No. _______

IN THE

SUPREME COURT OF THE UNITED STATES

IGNACIO ARELLANO-BANUELOS,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-11490

United States Court of Appeals
Fifth Circuit
FILED
January 14, 2019
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

IGNACIO ARELLANO-BANUELOS,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before ELROD, HIGGINSON, and ENGELHARDT, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

Ignacio Arellano-Banuelos appeals his conviction by a jury for illegal reentry. He argues that the district court erred by denying his motion to suppress his confession, preventing him from presenting a statute of limitations defense, striking a prospective juror for cause, and admitting into evidence a certificate of non-existence of record. We remand for the district court to make additional findings as to whether Arellano-Banuelos was "in custody" within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966). We do not reach the other issues at this time.

I.

Arellano-Banuelos was born in Mexico in 1981 and entered the United States as a child. In 2001, he pleaded guilty to aggravated robbery and was sentenced to 10 years imprisonment. He was deported to Mexico in 2009, but later reentered the United States. On May 7, 2015, he was arrested by Texas law enforcement officers on an outstanding warrant. United States Immigration and Customs Enforcement (ICE) was notified of Arellano-Banuelos's arrest, and placed a detainer on him the next day.

In July 2015, Arellano-Banuelos pleaded guilty in state court to improper photography or visual recording and to attempted evading arrest. He was sentenced to 15 months imprisonment on each count. In August 2015, Arellano-Banuelos was interviewed in state prison by Norberto Cruz, an agent with ICE's Criminal Alien Program. The interview took place in an office within the prison, and Arellano-Banuelos was brought in by a prison guard. The prison guard remained present during the interview. According to Agent Cruz, he told Arellano-Banuelos that he had the right to refuse to answer questions. But it is undisputed that Agent Cruz did not provide Arellano-Banuelos complete *Miranda* warnings.

At the time of the interview, Agent Cruz was aware that Arellano-Banuelos had been previously removed from the United States and that he was subject to an ICE detainer. Agent Cruz asked Arellano-Banuelos a series of questions, including his country of citizenship, place of birth, whether he had ever been ordered deported, when he last entered the United States, and whether he ever applied to the Attorney General for permission to reenter the United States after he was deported. Agent Cruz recorded Arellano-Banuelos's answers to these questions on an affidavit form, and Arellano-Banuelos signed the affidavit.

Agent Cruz's supervisor later referred Arellano-Banuelos for criminal prosecution for illegal reentry. On May 4, 2016, Arellano-Banuelos was released from state prison into ICE custody. On May 25, 2016, he was indicted for illegal reentry.[1] Before trial, Arellano-Banuelos moved to suppress his August 2015 admissions to Agent Cruz, arguing that these statements were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The district court denied the motion after an evidentiary hearing, holding that the August 2015 interview "was not a custodial interrogation for *Miranda* purposes."

Arellano-Banuelos also filed a motion to dismiss the indictment on statute of limitations grounds, arguing that federal immigration authorities had reason to know of his presence in the United States more than five years before he was indicted. The district court denied the motion. Arellano-Banuelos later sought to introduce his income tax returns and his son's birth certificate into evidence to support a statute of limitations defense. The district court ruled that this evidence was inadmissible because it was legally irrelevant. The court later refused Arellano-Banuelos's request for a jury instruction on the statute of limitations, reasoning that there was no evidence in the record that ICE was aware of his presence in the United States more than five years before his indictment.

At trial, the government called Agent Cruz to testify about his interview with Arellano-Banuelos and introduced a copy of the August 2015 affidavit into evidence. The government argued to the jury that this affidavit demonstrated that Arellano-Banuelos admitted every element of the offense of illegal reentry. The government also introduced into evidence a certificate of non-existence of record (CNR) certifying that there was no record that Arellano-Banuelos received permission to reenter the United States after his prior removal.

[1] The grand jury returned a superseding indictment on April 4, 2017.

Priscilla Dobbins, an officer with United States Citizenship and Immigration Services (USCIS), testified that she signed the CNR and attested to the fact that a record search was conducted to attempt to locate an application for permission to reenter. Arellano-Banuelos did not object to the admission of the CNR or to Dobbins's testimony. After hearing this and other evidence, the jury found Arellano-Banuelos guilty of illegal reentry. He was sentenced to 66 months imprisonment.

II.

Arellano-Banuelos challenges the district court's denial of his motion to suppress his August 2015 affidavit and admissions to Agent Cruz. The Supreme Court held in *Miranda v. Arizona* that "the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination require[s] that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney." *Edwards v. Arizona*, 451 U.S. 477, 481–82 (1981). *Miranda* warnings are required only if an individual is both "in custody" and "subjected to interrogation." *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980).

Arellano-Banuelos moved to suppress his admissions on the grounds that he was questioned while in custody without the benefit of *Miranda* warnings. After an evidentiary hearing, the district found that Arellano-Banuelos was not subjected to a custodial interrogation and denied the motion.[2] When considering the denial of a motion to suppress, "this Court

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[2] Over a month after oral argument, the government submitted a letter to the court arguing for the first time that any *Miranda* error was "invited error" because Arellano-Banuelos introduced a copy of the affidavit into evidence. Arellano-Banuelos, referring to other portions of the record and citing caselaw, contends that he did not waive his challenge to the suppression ruling. The government previously described the *Miranda* issue in initial briefing as a "preserved issue with de novo review." Even had the government not explicitly asserted that the *Miranda* issue was preserved, "we generally do *not* consider contentions raised for the first time at oral argument." *Martinez v. Mukasey*, 519 F.3d 532, 545 (5th Cir.

reviews factual findings for clear error and the ultimate constitutionality of law enforcement action de novo." *United States v. Robinson*, 741 F.3d 588, 594 (5th Cir. 2014).

A.

We first consider whether Agent Cruz's August 2015 interview with Arellano-Banuelos was an interrogation for purposes of *Miranda*. The government argued before the district court that Cruz's questioning was not an interrogation because it was intended only to verify information for an administrative deportation, not to elicit incriminating statements. In response, Arellano-Banuelos asserted that an investigating officer's subjective intent is not determinative and that *Miranda* warnings are required whenever the officer is aware that the information sought is potentially incriminating.

In its oral denial of the motion to suppress, the district court concluded that *Miranda* warnings were not required because Agent "Cruz's subjective motivation was purely administrative" and "generally the purpose of the screening interview is administrative." The district court also found that "[w]hether or not there is any decision made to prosecute criminally is not made by the people in the screening function" and "at the time of the interview there was no investigation into the defendant's criminality."

2008). We are even more reluctant to consider arguments raised after oral argument is complete and the case has been submitted for decision. The proper time to closely examine the record and develop legal defenses is *before* the completion of briefing, not in the months after oral argument. The issue presented in the government's letter is based on the trial record and could easily have been addressed in the initial briefing. *See United States v. Guillen-Cruz*, 853 F.3d 768, 777 (5th Cir. 2017) (declining to consider an argument not raised in the appellee brief when "the facts supporting the Government's argument . . . were readily available prior to briefing"). The government acknowledges that this issue was not raised in briefing or at argument, but points to no "exceptional circumstances," *Silber v. United States*, 370 U.S. 717, 718 (1962), or "substantial public interests," *Guillen-Cruz*, 853 F.3d at 777, warranting consideration of its late-raised argument. We therefore decline to consider the government's new theory.

As the Supreme Court has explained, "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police *should know* are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 301 (emphasis added); *see also Gladden v. Roach*, 864 F.2d 1196, 1198 (5th Cir. 1989) ("Interrogation is defined as words or actions that the police should know are reasonably likely to elicit an incriminating response from the suspect."). This inquiry is "focuse[d] primarily upon the perceptions of the suspect, rather than the intent of the police." *Innis*, 446 U.S. at 301. Although an officer's subjective intent may be relevant to what an officer *should* know, proof of subjective intent is not required to establish that an interrogation occurred. *Id.* at 301, 301 n.7.

That the initial purpose of an investigation is civil rather than criminal does not render *Miranda* inapplicable. In *Mathis v. United States*, 391 U.S. 1 (1968), the Supreme Court held that *Miranda* warnings were required when a government revenue agent questioned an inmate as part of a tax investigation. The Court acknowledged that "a 'routine tax investigation' may be initiated for the purpose of a civil action rather than criminal prosecution." *Id.* at 4. But it "reject[ed] the contention that tax investigations are immune from" *Miranda*, noting that "tax investigations frequently lead to criminal prosecutions, just as the one here did." *Id.* The Court observed that "the investigating revenue agent was compelled to admit" that "there was always the possibility during his investigation that his work would end up in a criminal prosecution." *Id.*

In this case, Agent Cruz's own testimony makes clear that he should have known that his questioning of Arellano-Banuelos was likely to elicit incriminating responses. Agent Cruz testified that he reviewed Arellano-Banuelos's file before the interview, and he was aware of Arellano-Banuelos's

prior removal from the United States. He also testified that, as part of his work as an ICE deportation officer, he was aware of the offense of illegal reentry. Like the investigating revenue officer in *Mathis*, Agent Cruz acknowledged that he was aware that someone he interviewed could later be referred for prosecution. *Id.*

Notably, Agent Cruz began the August 2015 interview by telling Arellano-Banuelos that he already had his file and had "identified him as somebody that had been removed before." Cruz's questioning then elicited a confession to every element of the crime of illegal reentry. Specifically, Arellano-Banuelos admitted that (1) he was an alien; (2) he was previously deported; (3) he never applied to the Attorney General for permission to reenter the United States after being deported; and (4) he reentered the United States. *See* 8 U.S.C. § 1326(a); *United States v. Martinez-Rios*, 595 F.3d 581, 583 (5th Cir. 2010). At trial, the government relied on the August 2015 affidavit, among other evidence, to argue to the jury that Arellano-Banuelos had admitted his guilt to every element of the offense.

As with tax inquiries, immigration investigations into previously removed aliens "frequently lead to criminal prosecutions, just as the one here did." *Mathis*, 391 U.S. at 4. Agent Cruz was aware of the possibility that Arellano-Banuelos could be referred for prosecution, and he should have known that his questions were highly likely to elicit incriminating responses. Under these circumstances, it is immaterial that Cruz's supervisor—rather than Cruz himself—made the decision to refer Arellano-Banuelos for prosecution. Nor is it determinative that no criminal investigation was underway at the time of the interview. *See id.* (noting that the criminal investigation began eight days after the last interview).

The government offers no persuasive basis to distinguish *Mathis* from the facts of this case. It relies primarily on *United States v. Rodriguez*, 356 F.3d

254, 258–60 (2d Cir. 2004), and *United States v. Salgado*, 292 F.3d 1169 (9th Cir. 2002), to argue that immigration screening interviews do not constitute interrogation. But these cases involved interviews with immigration officers that took place *before* the defendant illegally reentered the United States. The Second and Ninth Circuits therefore concluded that immigration officials had no reason to believe that the information they were gathering would incriminate the defendants in a later prosecution for illegal reentry. *See Rodriguez*, 356 F.3d at 260 (distinguishing *Mathis* because there was "no basis in the record to conclude that Agent Smith knew or should have known that the results of his interview would be used to support criminal charges resulting from conduct of Rodriguez—conduct that would not take place until three years thereafter"); *Salgado*, 292 F.3d at 1172–73 (explaining that the immigration officer "had no reason to believe" that Salgado would later reenter the United States illegally and be subject to prosecution for illegal reentry). Here, by contrast, Agent Cruz was aware at the time of the interview that Arellano-Banuelos had a prior removal and could be prosecuted for illegal reentry.

Although we have recognized a "routine booking exception" to *Miranda*, *United States v. Virgen-Moreno*, 265 F.3d 276, 293 (5th Cir. 2001), the exception does not apply here. *Miranda* warnings are not required when an officer asks only "routine booking question[s] . . . to secure the biographical data necessary to complete booking or pretrial services." *Pennsylvania v. Munoz*, 496 U.S. 582, 601 (1990) (plurality opinion) (internal quotation omitted). "The permissible booking questions include data such as a suspect's name, address, height, weight, eye color, date of birth, and current age." *Presley v. City of Benbrook*, 4 F.3d 405, 408 (5th Cir. 1993); *see also Virgen-Moreno*, 265 F.3d at 293. "[Q]uestions designed to elicit incriminatory admissions are not covered under the routine booking question exception." *Virgen-Moreno*, 265 F.3d at 293–94.

Arellano-Banuelos was booked into state prison several months before his interview with Agent Cruz, and the government has not argued that the August 2015 ICE interview was a "booking" interview. Even if we were to assume that the interview resembled a booking, Agent Cruz's questions to Arellano-Banuelos exceeded the scope of the routine booking exception. Cruz's questioning went beyond basic biographical information to include inquiries into whether Arellano-Banuelos had been previously deported and whether he had received permission from the Attorney General to reenter the United States. We are aware of no authority suggesting that such questions can be considered routine booking questions.

In light of Agent Cruz's knowledge of Arellano-Banuelos's prior removal from the United States and the incriminating nature of his questions, we hold that the August 2015 interview was an interrogation under *Miranda*.

B.

Even in the context of an interrogation, *Miranda* warnings are not required unless an individual is "in custody for the purposes of *Miranda*." *United States v. Wright*, 777 F.3d 769, 777 (5th Cir. 2015). Custody is a term of art, and prison inmates are not automatically considered "in custody" within the meaning of *Miranda* caselaw. *See Maryland v. Shatzer*, 559 U.S. 98, 114 (2010). "When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation" to determine whether the circumstances of the interview "are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave." *Howes v. Fields*, 565 U.S. 499, 514–15 (2012) (internal quotation omitted). In the prison context, a prisoner is considered free to leave if he is free to "return[] to his normal life" within the prison. *Shatzer*, 559 U.S. at 114.

Custody determinations under *Miranda* present "a mixed question of law and fact." *Thompson v. Keohane*, 516 U.S. 99, 102 (1995). "Relevant factors include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." *Fields*, 565 U.S. at 509 (citations omitted). The interview in this case took place in an office within the prison. Agent Cruz and another ICE agent conducted interviews in the same room simultaneously. Arellano-Banuelos was not in handcuffs, although a prison guard was present during the interview. The length of the interview is not apparent from the record. Agent Cruz testified that he told Arellano-Banuelos that he had the right to refuse to answer questions. But we perceive no evidence in the record as to whether Arellano-Banuelos was told that he was free to leave the interview.

In summarizing its reasons for denying the motion to suppress, the district court stated that, "although certainly as a factual matter the defendant was in custody, meaning he couldn't get up and walk out, he was not required to cooperate or to speak with Agent Cruz, and therefore I find that this was not a custodial interrogation for *Miranda* purposes." The district court made no further findings on the custody issue. From this record, it is unclear whether the district court made a custody determination; and if so, whether the district court's custody determination was based on an analysis of all the circumstances of the interrogation or solely on Arellano-Banuelos's status as a prisoner.

Because the district court's factual findings provide an inadequate basis for appellate review, we remand for the district court to enter a supplemental

order on the custody issue.[3] *United States v. Cole*, 444 F.3d 688, 690 (5th Cir. 2006); *United States v. Runyan*, 275 F.3d 449, 468 (5th Cir. 2001). The district court may reopen the suppression hearing to take additional evidence. *United States v. Chavis*, 48 F.3d 871, 873 (5th Cir. 1995). Once the record has been supplemented, the case shall be returned to this court for further proceedings. *See Runyan*, 275 F.3d at 468. We do not reach the other issues raised in this appeal at this time.

III.

We REMAND to the district court with instructions that, within sixty days after the entry of this remand, it provide a supplemental order setting forth its findings as to whether Arellano-Banuelos was in custody under *Miranda v. Arizona.* We retain jurisdiction over this appeal.

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[3] We note that *Miranda* violations are subject to harmless error analysis. *See Harryman v. Estelle*, 616 F.2d 870, 875 (5th Cir. 1980). But it is the government's burden to establish that a constitutional error is harmless beyond a reasonable doubt. *See United States v. Jackson*, 636 F.3d 687, 697 (5th Cir. 2011); *United States v. Akpan*, 407 F.3d 360, 377 (5th Cir. 2005). Here, the government has offered no argument that the denial of the motion to suppress was harmless.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-11490

United States Court of Appeals
Fifth Circuit
FILED
June 17, 2019
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

IGNACIO ARELLANO-BANUELOS,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before ELROD, HIGGINSON, and ENGELHARDT, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

Ignacio Arellano-Banuelos was convicted by a jury of illegal reentry. On appeal, he argues that his confession was admitted in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), he was denied the opportunity to present a statute of limitations defense, the district court erred in striking a prospective juror for cause, and the admission of a certificate of non-existence of record violated his rights under the Confrontation Clause.

In an earlier opinion, we remanded this case to the district court for additional findings as to whether Arellano-Banuelos was "in custody" for purposes of *Miranda*. *See United States v. Arellano-Banuelos*, 912 F.3d 862 (5th Cir. 2019). Our prior opinion recounts the pertinent factual background.

See id. at 864–65. After considering the district court's findings and the parties' supplemental briefs, we now affirm.

I.

A.

Under *Miranda*, an individual subjected to "in-custody interrogation" must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444–45. These safeguards are required "[b]ecause custodial police interrogation, by its very nature, isolates and pressures the individual," and "heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment not to be compelled to incriminate himself." *Dickerson v. United States*, 530 U.S. 428, 435 (2000) (cleaned up).

Arellano-Banuelos's *Miranda* claim arises out of an August 2015 interview with Norberto Cruz, a U.S. Immigration and Customs Enforcement (ICE) agent. At the time of the interview, Arellano-Banuelos was serving a sentence of 15 months' imprisonment on unrelated state offenses. Cruz and two other ICE agents traveled to the state prison to interview 23 inmates, including Arellano-Banuelos. The inmates were escorted to the office in groups of five. A prison guard stood at the door of the office, which remained open. Cruz and another ICE agent conducted simultaneous interviews at separate tables, and a third agent photographed and fingerprinted the inmates after the conclusion of their interviews. These interviews ordinarily lasted between ten and thirty minutes, although the parties agree that Arellano-Banuelos's interview took about ten to fifteen minutes.

Cruz interviewed Arellano-Banuelos about his immigration status and past deportation without providing complete *Miranda* warnings. Over the course of this interview, Arellano-Banuelos acknowledged his alienage, his

prior removal, and his lack of permission from the Attorney General to reenter the United States. Arellano-Banuelos was later charged with illegal reentry, and he moved to suppress his admissions to Cruz. The district court denied the motion after finding that the August 2015 interview "was not a custodial interrogation for *Miranda* purposes."

In a prior opinion, we held that this interview was an "interrogation" under *Miranda* because Cruz should have known that his questioning was "reasonably likely to elicit an incriminating response from the suspect." *Arellano-Banuelos*, 912 F.3d at 866 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). We remanded to the district court for additional findings on the issue of Arellano-Banuelos's custodial status. *Id.* at 869. After hearing further testimony and argument, the district court concluded that Arellano-Banuelos was not in custody under *Miranda* during the August 2015 interview.

We review the district court's "factual findings for clear error and the ultimate constitutionality of law enforcement action de novo." *United States v. Robinson*, 741 F.3d 588, 594 (5th Cir. 2014). "The clearly erroneous standard is particularly deferential where denial of the suppression motion is based on live oral testimony because the judge had the opportunity to observe the demeanor of the witnesses." *United States v. Ortiz*, 781 F.3d 221, 226 (5th Cir. 2015) (cleaned up). Further, we consider "the evidence in the light most favorable to the prevailing party, which in this case is the government." *United States v. Wright*, 777 F.3d 769, 773 (5th Cir. 2015) (quoting *United States v. Santiago*, 410 F.3d 193, 197 (5th Cir. 2005)).

B.

Custody for purposes of *Miranda* "is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Howes v. Fields*, 565 U.S. 499, 508–09 (2012). This inquiry "is an objective one—the subjective intent of the questioners and the subjective fear

of the questioned person are irrelevant." *United States v. Melancon*, 662 F.3d 708, 711 (5th Cir. 2011). We first consider whether "'there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010) (quoting *New York v. Quarles*, 467 U.S. 649, 655 (1984)). The Supreme Court has observed that "[t]his test, no doubt, is satisfied by all forms of incarceration." *Id*. Yet, "the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." *Id.* Courts also consider "the additional question [of] whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Fields*, 565 U.S. at 509.

Although Arellano-Banuelos was incarcerated at the time of the August 2015 interview, the Supreme Court has instructed that "imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*." *Id.* at 511. The Supreme Court drew this conclusion in part because of the differences in circumstances between a prisoner serving a lawful sentence and a suspect who "is arrested in his home or on the street and whisked to a police station for questioning." *Id.* "[T]he ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar and thus do not involve the same 'inherently compelling pressures' that are often present when a suspect is yanked from familiar surroundings in the outside world and subjected to interrogation in a police station." *Id.* (quoting *Shatzer*, 559 U.S. at 103). Moreover, "[s]entenced prisoners, in contrast to the *Miranda* paradigm, are not isolated with their accusers," and their imprisonment "is relatively disconnected from their prior unwillingness to cooperate in an investigation." *Shatzer*, 559 U.S. at 113.

Of course, prisoners sometimes *are* in custody for *Miranda* purposes. "An inmate who is removed from the general prison population for questioning and

is thereafter subjected to treatment in connection with the interrogation that renders him 'in custody' for practical purposes will be entitled to the full panoply of protections prescribed by *Miranda*." *Fields*, 565 U.S. at 514 (cleaned up); *see also Melancon*, 662 F.3d at 711 (explaining that a "prison inmate is not automatically always 'in custody' within the meaning of *Miranda*, although the prison setting may increase the likelihood that an inmate is in 'custody' for *Miranda* purposes") (cleaned up). The custody determination must "focus on all of the features of the interrogation," including "the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted." *Fields*, 565 U.S. at 514.

In *Fields*, the Supreme Court held that a prisoner was not in custody under *Miranda* when he was interviewed by two sheriff's deputies regarding allegations of sexual abuse of a child. *Id.* at 502–03, 514. The Court acknowledged several factors that could support a finding of custody, including that Fields "was not advised that he was free to decline to speak with the deputies," the "interview lasted for between five and seven hours," the deputies were armed, and one of the deputies "used a very sharp tone" and once used profanity. *Id.* at 515. Other offsetting circumstances, however, led the Court to determine that Fields was not in custody. *Id.* "Most important, [Fields] was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted." *Id.* Additionally, Fields "was not physically restrained or threatened," he "was interviewed in a well-lit, average-sized conference room," "the door to the conference room was sometimes left open," and he "was offered food and water." *Id.* The Court concluded that "these objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave." *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664–65 (2004)).

C.

In critical respects, Arellano-Banuelos's August 2015 ICE interview had fewer hallmarks of *Miranda* custody than the interview at issue in *Fields*.[1] The interview was much shorter—lasting ten to fifteen minutes rather than five to seven hours. *See id.* at 515. Multiple people were present in the interview room, including another prisoner, and Arellano-Banuelos was not isolated with Cruz. *Cf. Miranda*, 384 U.S. at 476 (emphasizing the "compelling influence" of "lengthy interrogation or incommunicado incarceration"). The ICE agents were not armed, and the prison guard did not have a firearm. *Cf. Fields*, 565 U.S. at 515. Although Cruz stated that he knew Arellano-Banuelos had been previously removed, he did not raise his voice during the interview, use a sharp tone of voice, or use profanity. *Cf. id.* at 503, 515.

Other circumstances are similar to the facts presented in *Fields*. Arellano-Banuelos was not restrained during the interview, but he was escorted to the interview by a prison guard and required to pass through locked doors. *See id.* at 502–03; *see also id.* at 513 (noting that a prisoner may be "taken, under close guard, to the room where the interview is to be held" but "such procedures are an ordinary and familiar attribute of life behind bars"). Arellano-Banuelos was not told in advance that he could decline the interview, and the district court found that a reasonable person in his position would have believed he was required to attend the interview. *See id.* at 515 (noting that Fields "did not invite the interview or consent to it in advance, and he was not advised that he was free to decline to speak with the deputies").

Arellano-Banuelos points to several factors that he asserts distinguishes his situation from the interrogation at issue in *Fields*. First, and most

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[1] We base our analysis on the district court's factual findings as to what occurred during the interview. Neither party argues that those findings are clearly erroneous, and we perceive no clear error.

significantly, he emphasizes that he was never explicitly told he was free to leave the interview room. In *Fields*, by contrast, the Supreme Court underscored that the "[m]ost important" factor in its custody determination was that the prisoner "was told that he was free to end the questioning and to return to his cell." *Id.* at 515–17. This type of straightforward advisement would certainly have strengthened the government's case. *See Wright*, 777 F.3d at 776 (holding that a suspect was not in custody under *Miranda* in part because of the "crucial" fact that he was repeatedly told "that he was 'free to leave' and that he 'wasn't under arrest'"); *see also Ortiz*, 781 F.3d at 231 (explaining that statements that a suspect "was not under arrest . . . would suggest to a reasonable person that he was free to leave, but they are less clear than the statements in *Wright*, which answered the question directly"). Yet the absence of an explicit statement that an interviewee is free to leave does not compel a finding of *Miranda* custody. Other statements and circumstances may similarly suggest to a reasonable person that he can choose to end the questioning and leave. *See Ortiz*, 781 F.3d at 231–33.

Here, Cruz told Arellano-Banuelos that his statement had to be voluntary and that the interview would terminate if he chose not to speak with Cruz. Cruz also reviewed a form with Arellano-Banuelos advising him that his "statement must be freely and voluntarily given" and that any statement "may be used against [him] in any administrative or criminal proceeding."[2] Arellano-Banuelos contends that such warnings are inadequate because *Miranda*'s protections apply even absent proof that a statement was in fact involuntary.

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[2] Although Arellano-Banuelos presented a different account of Cruz's statements at the suppression hearing, he does not dispute on appeal the district court's findings as to what was said during the interview. We note that the district court made no adverse credibility determinations, and we therefore do not rely on the government's suggestion that we should disbelieve Arellano-Banuelos's testimony because he has in the past received disciplinary infractions.

We agree that telling an interviewee that his statement must be voluntary is insufficient, alone, to satisfy the concerns underlying *Miranda*. *See, e.g., Dickerson*, 530 U.S. at 442 (holding that a multi-factor test focused on "determining the voluntariness of a suspect's confession" is not an "adequate substitute for the warnings required by *Miranda*"). Such advisories are nonetheless relevant factors in assessing the interview environment.

Moreover, Cruz did more than advise Arellano-Banuelos that his statement must be voluntary and that any statements he made could be used against him. Cruz testified that he tells inmates that they do not have to speak with him and that, if they do not want to talk to him, the interview will end. The district court found that Cruz explained this to Arellano-Banuelos. Given the circumstances of the August 2015 ICE visit, with multiple inmates being interviewed and processed on a tight time frame, the clear implication of ending the interview is that Arellano-Banuelos could then leave and return to his ordinary life in the prison.[3] A reasonable inmate would not expect to be required to stay in the office after the termination of the interview. Indeed, two other inmates did refuse to answer Cruz's questions on the day of Arellano-Banuelos's interview, and their interviews terminated. In this context, we believe that the objective circumstances of the interview were "consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave." *Fields*, 565 U.S. at 515 (quotation omitted).

Arellano-Banuelos highlights other aspects of the interview that he contends created an unacceptable risk of coercion. He notes that he was placed in a holding cell prior to the interview, he was required to stand in the hallway

[3] We emphasize that officer statements must be interpreted in context. In a different interrogation environment, the statement that someone is free to terminate an interview may not signify that he is free to leave.

before the interview without leaning on anything, and he was not given a chance to use the restroom. Arellano-Banuelos also emphasizes, and the district court found, that the administrative building where the interviews were held experienced electrical problems that caused the lights to flicker and interfered with the air conditioning system. Cruz testified that the office was very hot and he wanted to get through the interviews as quickly as possible. These facts indicate that the interview process was uncomfortable, and provide some support for Arellano-Banuelos's custody argument. *Cf. id.* at 515 (noting that Fields "was 'not uncomfortable'" in the interview room). Critically, however, these conditions were not tied to Arellano-Banuelos's cooperation with Cruz. As discussed above, a reasonable inmate in Arellano-Banuelos's position would have believed he could terminate the interview and leave the office. This exit option substantially reduces the coercive pressures of an unpleasant interview environment.

Finally, Arellano-Banuelos contends that his situation is different from that of Fields because Cruz had "the authority to affect the duration of his sentence." *See id.* at 512. Specifically, Arellano-Banuelos was told that if he cooperated, this would reduce the amount of time he might spend in ICE detention before his removal from the United States. This offer may have given Arellano-Banuelos some "reason to think that the listeners ha[d] official power over him." *Id.* at 512 (quoting *Illinois v. Perkins*, 496 U.S. 292, 297 (1990)). There is no suggestion in the record, however, that Cruz had any authority to influence the length of Arellano-Banuelos's state prison sentence. Unlike a suspect who "may be pressured to speak by the hope that, after doing so, he will be allowed to leave and go home," the only benefit that Cruz could offer was a speedier deportation once Arellano-Banuelos completed his state sentence. *Id.* at 511. In light of other factors pointing to an absence of custody,

such an offer does not create the "inherently coercive" interview environment contemplated by *Miranda*. *Id.* at 509.

Considering all the circumstances of the August 2015 interview, and viewing the evidence in the light most favorable to the government, we hold that Arellano-Banuelos was not in custody for purposes of *Miranda.* We therefore affirm the district court's denial of the motion to suppress.

II.

Arellano-Banuelos next contends that the district court erroneously prevented him from presenting a statute of limitations defense to the jury. The statute of limitations for illegal reentry is five years. 18 U.S.C. § 3282(a). The limitations period "begins to run at the time the alien is 'found,' barring circumstances that suggest that the INS should have known of his presence earlier." *United States v. Santana-Castellano*, 74 F.3d 593, 597 (5th Cir. 1996). Arellano-Banuelos was indicted in May 2016. Thus, the relevant question is whether Arellano-Banuelos was "found" in the United States before May 2011.

For an alien to be "found" in the United States, the "alien's physical presence must be discovered and noted *by immigration authorities* and the illegality of the alien's presence must be reasonably attributable *to immigration authorities* through the exercise of typical law enforcement diligence." *United States v. Compian-Torres*, 712 F.3d 203, 207 (5th Cir. 2013); *see also Santana-Castellano*, 74 F.3d at 597 (explaining that immigration authorities should know of an alien's presence if, for example, "he reentered the United States through an official border checkpoint in the good faith belief that his entry was legal"). Arellano-Banuelos sought to present a statute of limitations defense through evidence that he filed income tax returns and that he put his name on his son's birth certificate.

The district court's decision to admit or exclude evidence is reviewed for abuse of discretion.[4] *See United States v. Walker*, 410 F.3d 754, 757 (5th Cir. 2005). Here, the district court properly excluded Arellano-Banuelos's proposed evidence as legally irrelevant. We held in *Compian-Torres* that knowledge of an alien's presence by other government officials, including state or federal authorities, is not imputed to immigration authorities. *See* 712 F.3d at 207–08. Arellano-Banuelos attempts to distinguish *Compian-Torres* as a case about the sufficiency of the evidence rather than the exclusion of evidence. But the court in *Compian-Torres* characterized the issue presented as "a pure question of law," and proceeded to resolve the legal question of what it means for an immigrant to be "found" in the United States. *Id.* at 207. Under this caselaw, the district court correctly concluded that Arellano-Banuelos's tax returns and his son's birth certificate are not probative of when he was found in the United States by immigration authorities.

For the same reasons, the district court did not abuse its discretion in refusing to instruct the jury on a statute of limitations defense. *See United States v. Dailey*, 868 F.3d 322, 327 (5th Cir. 2017) (noting the district court's "substantial latitude in formulating jury instructions"). There was no evidence in the trial record that immigration authorities had actual or constructive knowledge of Arellano-Banuelos's presence in the United States before May 2011. *See United States v. Branch*, 91 F.3d 699, 712 (5th Cir. 1996) (explaining that the district court may "refuse to give a requested instructor that lacks sufficient foundation in the evidence"). We perceive no error in the district court's rulings on the statute of limitations.

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[4] The government asserts that Arellano-Banuelos may have forfeited his challenge to the district court's exclusion of evidence because he did not attempt to introduce the evidence at trial. Because we find no error in the district court's ruling under any standard of review, we need not address the forfeiture issue.

III.

Arellano-Banuelos's challenge to jury selection is similarly unavailing. The district court struck a prospective juror for cause after the juror stated that he would have difficulty being fair and impartial because he believed that the immigration laws were too harsh. "We review the district court's ruling as to juror impartiality only for manifest abuse of discretion." *United States v. Munoz*, 15 F.3d 395, 397 (5th Cir. 1994). Moreover, "[i]n noncapital cases, removal of a venire member generally is not grounds for reversal unless 'the jurors who actually sat were not impartial within the meaning of the Sixth Amendment.'" *United States v. Parker*, 133 F.3d 322, 327 (5th Cir. 1998) (quoting *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1222 (5th Cir. 1994)). Arellano-Banuelos has not shown that the district court manifestly abused its discretion in striking the prospective juror, nor has he offered any basis to question the impartiality of the jury empaneled in his case.

IV.

For the first time on appeal, Arellano-Banuelos argues that the admission of a certificate of non-existence of record (CNR) violated his rights under the Confrontation Clause. The CNR certified that there is no record that Arellano-Banuelos received permission to return to the United States following his prior deportation. Because Arellano-Banuelos did not object to the admission of the CNR, our review is for plain error. *See United States v. Martinez-Rios*, 595 F.3d 581, 584 (5th Cir. 2010). We will find plain error only if, among other factors, the district court made a "clear or obvious" error. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (2018).

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to cross-examine witnesses who provide testimonial statements, unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *See Crawford v. Washington*,

541 U.S. 36, 68 (2004). We have held that a CNR qualifies as a testimonial statement. *See Martinez-Rios*, 595 F.3d at 586. Arellano-Banuelos therefore had the right "to be confronted with the analyst who made the certification." *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011); *see also Martinez-Rios*, 595 F.3d at 586 (finding constitutional error because the person who "prepared the CNR" did not testify at trial).

Priscilla Dobbins, an officer with U.S. Citizenship and Immigration Services (USCIS), authored and signed the CNR in this case. She certified that she had the authority "to ascertain whether there are particular documents in" an alien's file. She further attested that USCIS systems were searched to ensure that no application for permission to reenter the United States after removal existed in Arellano-Banuelos's file. Dobbins testified at trial and Arellano-Banuelos had the chance to cross-examine her, but he chose not to do so. Arellano-Banuelos argues that the admission of the CNR nonetheless violated his rights under the Confrontation Clause because Dobbins did not personally check all the systems that led to the certification. Instead, a staff member ran the initial checks and created printouts.

Arellano-Banuelos does not offer legal authority for the proposition that every individual involved in the preparation of a document such as a CNR must testify at trial. *Cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009) (explaining that "it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case"). Because Arellano-Banuelos had an opportunity to cross-examine the individual who prepared and signed the CNR, he cannot show a "clear or obvious" Confrontation Clause error.

V.

The judgment of the district court is AFFIRMED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-11490

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

IGNACIO ARELLANO-BANUELOS,

Defendant - Appellant

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

Before ELROD, HIGGINSON, and ENGELHARDT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA	§	**JUDGMENT IN A CRIMINAL CASE**
	§	
v.	§	
	§	Case Number: **3:16-CR-00213-N(1)**
IGNACIO ARELLANO-BANUELOS	§	USM Number: **14279-479**
	§	**Erin Leigh Brennan**
	§	Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☒ pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court. **Count 1s of the Superseding Indictment filed April 4, 2017.**

☐ pleaded nolo contendere to count(s) which was accepted by the court

☐ was found guilty on count(s) after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
8:1326(A) and (B)(2) Illegal Reentry After Removal From The United States	05/08/2015	1s

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) Count 1 of the Original Indictment ☒ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

DECEMBER 4, 2017
Date of Imposition of Judgment

Signature of Judge

DAVID C. GODBEY, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

DECEMBER 15, 2017
Date

DEFENDANT: IGNACIO ARELLANO-BANUELOS
CASE NUMBER: 3:16-CR-00213-N(1)

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

66 (Sixty-Six) months as to count 1s.

☒ The court makes the following recommendations to the Bureau of Prisons:
That the defendant be designated to a facility in Texas, if possible.

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ____________________________ to

at ________________________________, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By

____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: IGNACIO ARELLANO-BANUELOS
CASE NUMBER: 3:16-CR-00213-N(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **No Term of Supervised Release Imposed.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☐ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: IGNACIO ARELLANO-BANUELOS
CASE NUMBER: 3:16-CR-00213-N(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$100.00	$.00	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: IGNACIO ARELLANO-BANUELOS
CASE NUMBER: 3:16-CR-00213-N(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payments of $ ________________ due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal __________ *(e.g., weekly, monthly, quarterly)* installments of $ ____________ over a period of ______________ *(e.g., months or years)*, to commence ________ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ ____________ over a period of ______________ *(e.g., months or years)*, to commence ________ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within __________ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $100.00 for Count 1s which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.
.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.