

THE LIBERTY LEGEND

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PRESIDENT'S MESSAGE

Hello members and all fellow defenders.

This is the first edition of the Liberty Legend published under our new name ANational Association of Federal Defenders@ (NAFD). We have a new slate of officers and many new board and committee members. I want to thank all of this year's officers, board and committee members who have agreed to give their time and talent to NAFD.

NAFD is the whole and sum of its members. Perhaps the reason I believe so strongly in NAFD is because I believe so completely in its members and all the federal defenders across the country. When I say federal defenders, I mean Federal Defenders, Assistants, Paralegals, Investigators and Computer Systems Administrators. You are all a very special breed.

In a recent conversation with a dear friend and fellow defender, I expressed the feeling that lately I have been feeling a little uninspired and beaten down. My friend rightly took me to task and straightened me out. As she said, we have to stay inspired and fighting. The people sitting in that defendant's chair need us to stand up and fight for them. They have no one else.

That is also why we need to stay inspired and continue to build NAFD B Because there is no other organization committed solely to A improving the quality and administration of justice for those persons entitled to counsel in federal criminal or habeas corpus cases who are unable to afford counsel.@ NAFD's Mission Statement is not simply a string of words. It is what NAFD is all about, and it is who we all are individually.

This promises to be an exciting year with many new ideas on the horizon and projects to complete. At the meeting in Los Angeles, the member-

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ship discussed and approved new and meaningful projects. NAFD is exploring/creating a new Public Relations Committee, to respond to the media on various legal issues of local or national concern. We have a new group working on the Amicus Committee (with some welcome assistance from seasoned members) and anticipate an active amicus year. NAFD also voted to establish new award categories, so that all members will be eligible to receive awards and recognition whether they are a CSA, Paralegal, Writing Specialist, an Investigator or an Attorney. Two committees formerly operating separately have now been combined into the ASoPro@ Committee. This committee will be responsible for ordering and selling NAFD's promotional gear and

will also be responsible for planning NAFD social events at the various annual conferences (I predict this will be a popular committee). We are also exploring the notion of panel attorney membership in NAFD and are forming a committee to set the ball in motion. Troy Schnack and David Owen have taken over the website and wow, what a difference! (I can say that since I ADesigned@the previous site. More on the web site below).

As this year unfolds, look for status reports and articles about these and other NAFD projects in the Liberty Legend and on the web site. If you ever have any ideas or input you want to share, please do. I look forward to working with you all.

Nancy Graven

ASSOCIATION WEB SITE GETS NEW LOOK AND FEATURES

by David Owen

AFD, Western District of Missouri, Kansas City

For those of you who haven't visited the Association's web site lately there is a new look and a special section just for Association members. The "Members Only" section, once chosen, takes you to our site on the MSN communities. A login id and password are required and approval will be granted by either Association President Nancy Graven, Web site committee members David Owen or Troy Schnack (CSA, Western District of Missouri.)

The new benefits of the "Members Only" section include a photo album which any member can post photos about Association happenings. Also, there is the ability to initiate a private "chat room" where members can discuss live any topics or issues of concern. Documents of all sorts (memorandums, motions, briefs, etc.) can also be posted by Association members for the benefit of other members. There is also a public message board where members can post messages and replies.

In the "Links" area any member can display a link to other web sites which will benefit other Association members. (PLEASE, even if it is your favorite link DO NOT post a link to such sites as "rateyourrack.com" or other questionable areas.) All these benefits and abilities are available to each member and you do not have to be on the web site committee or a web programmer (computer geek) to utilize them.

When you request your "Passport" for access to the private Association community you will be requested to provide a user id and password. Please ensure your user ID is your full name rather than a "handle" or nickname. This will enable the authorizing persons to identify you as an Association member.

It is recommended you utilize Internet Explorer to view this web site. Netscape Navigator, AOL and other browsers can view the basic contents of the site, but Internet Explorer provides you

Class B Misdemeanors and Trials by Jury: When a Petty Offense Isn't so Petty

by Jack Schisler

AFD, Northern District of Oklahoma

It was an overcast day, but the air was very hot and heavy with humidity. Not the kind of day to be hanging around the Pawhuska Indian Village. The Feds call this particular patch of earth Indian Country. But my client will call him Bill Smith-Bwell, he just called it trouble. It's where his ex-wife lived and she had physical custody of their 15-year-old daughter. . .

The story began in the late spring of 2001. Bill, after determining that his ex-wife was not taking adequate care of his child, visited her to find out the particulars of the problem and to discuss a solution. There was an argument, an altercation, and subsequently, a Federal criminal charge: Assault on Indian Land in violation of 18 U.S.C. ' 113(a)(4). The offense is a Class B Misdemeanor, with a maximum sentence of 6 months in custody. The offense is also known as a petty offense, which means a defendant facing such a charge has no right to a trial by jury.

So far, none of the cases I've defended have qualified as the crime of the century. This one was no exception, however there was more to it than met the eye. Since Bill was being accused of battering an ex-spouse, a conviction on this charge would have made him a prohibited person under 18 U.S.C. ' 922(g)(9). As a result, upon conviction for the misdemeanor charge, he could no longer legally possess firearms and a violation of that statute can send a man away for a decade. The decision was made to seek a trial by jury. The theory: although this is technically a petty offense, the collateral consequences of a conviction make it serious under the law, and thus worthy of consideration by a jury.

A motion was made and the big guns were drawn, namely the Sixth Amendment to the United States Constitution and *Duncan v. Louisiana*, 391 U.S. 145 (1968). Amendment VI seems to say it all:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

Well, while you'd think the word *all* seems pretty clear, pretty unambiguous, it's obviously not what the Framers meant. That's where *Duncan* comes in. There the Court stated that the right to jury trial did not attach to the petty offense. But, sometimes, the Court reasoned, the barrier between the petty offense and something more deserving of a jury trial, a serious offense, is not too clear. In the absence of clarifying legislation on the issue, the Supreme Court left the ball in the trial judges' court:

Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts . . . it is necessary [for the courts] to draw a line in the spectrum of crime, separating petty from serious infractions.

Duncan at 160-161.

Assailed with this reasoning, the Magistrate Judge reasoned he had no choice but to allow for a jury trial. He also came up with his own authority, *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990), a habeas case dealing with third-time DWI offenders.

Indeed, as Mr. Richter got his jury trial, so did Bill. And through a combination of good facts, good luck and a good jury, Bill walked out of the courtroom that day, yes, a free man. I steer clear of Indian Country, I said as we parted company on the courthouse steps. You know it, was Bill's reply.

I hope he means that, I thought to myself as I cracked open another case file and wondered again why my John Grisham-like book deal has

DEFENDING A § 1326 CHARGE: “But, I Meant To Ask Permission When I Came In...”*by Juan Matos**AFD, District of Puerto Rico*

On May 19, 1999, Placido Cabral arrived at the Puerto Rico International Airport from the Dominican Republic. He was detained and referred to secondary inspection. When queried by pertinent authorities he provided his correct name, his Resident Alien card, which is valid until March 5, 2002, and his Dominican Republic passport. He identified his deportee status, and indicated that it was his intention, then and there, to request the pertinent permit to enter the United States. The duty A.U.S.A., authorized the filing of charges of re-entering after deportation, and Mr. Cabral was duly indicted.

All of the above is pretty much your standard, garden variety re-entry case. However, the manner of entering made this case different. The defendant did not come into the U.S. surreptitiously, for example in a yawl. Rather, Mr. Cabral entered through the airport, and presented his still valid alien registration card and his Dominican passport. After being sent to secondary inspection for interviewing, the following exchange occurred:

Q: If you were deported, did you know of your responsibility to request a permit from the Attorney General of the United States before requesting admission?

A: My understanding was that when I arrived to the country, to request permission from Washington. I knew that I had to request a permit. The Judge told me what I had to do .. To request a pardon from Washington.

Q: If you were deported from the United States, did you request permission from the Attorney General of the United States?

A: No sir, I was going to do it now

As luck would have it, he was not far off the mark. To the amazement of many, including one Se-

nior INS Inspector, it turns out that you can.

In order to legally re-enter the United States, a previously deported alien, such as Mr. Cabral, must request permission from the Attorney General to do so. The U.S. Court of Appeals for the First Circuit has determined that to obtain a conviction for an attempt to illegally re-enter the United States, the government must prove that the defendant (1) was an alien at time of the alleged offense; (2) had previously been deported; (3) attempted to enter the United States; and (4) had not received the express consent of the Attorney General of the United States to apply for re-admission to the United States since the time of his previous arrest and deportation.

The statute itself gives no direction regarding how to obtain such permission from the Attorney General. See *U.S. v. Morales-Tovar*, 37 F.Supp.2d 846 (W.D. Tex. 1999). The procedures to obtain the permission are found at 8 C.F.R. § 212.2. According to the same, the permission can be obtained in only two manners. First, the alien may request permission prior to entering by filing Form I-212, *Application for Permission to Reapply for Admission into the United States After Deportation or Removal*, at the U.S. Consulate in his or her country. See 8 C.F.R. § 212.2(b)(1). As a second method, the alien may also file an application at a valid port of entry, by submitting upon arrival a Form I-212. In that scenario the request is handled by the District Director. 8 C.F.R. § 212.2(f).

The mechanics of the procedures differ, depending on which method is used. If the Form I-212 is filed with a consular officer outside of the United States, that officer has discretion to not accept it. However, if the request is filed at the port of entry, the C.F.R. does not provide the same discretion to the District Director. In the latter situation, the District Director is required to accept and process the application. Additionally, when a request filed at the port of entry is granted, it will be made retroactive to

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the date on which the alien embarked or re-embarked at a place outside the United States. 8 C.F.R. § 212.2(I)(1)(I). Although the granting of such an approval is a function usually reserved to the Attorney General, the same is delegated to the Commissioner of the Immigration and Naturalization Service. 8 C.F.R. § 2.1.

As it turns out, this section of the C.F.R. is so obscure that even INS Inspectors, which are the first line of officers tasked to enforce it, do not know it exists. They are only aware of the procedure to request the permission from outside the United States. One senior inspector recently testified at trial that his office does not keep the form at the airport, and that if a such a request had been made, he would not have accepted it.

This somewhat anomalous situation was addressed in *U.S. v. Morales-Tovar, Id.* The defendant in that case had previously been deported from the United States after committing an aggravated felony, specifically a drug offense. He was served with notice that in order to apply for readmission to the United States within twenty years of committing the felony offense, he was required to obtain permission from the Attorney General. Approximately four years after his conviction, he went to the port of entry at Del Rio, Texas, with his Mexican birth certificate and labor union card. He then proceeded to a “secondary inspection” point, and asked an immigration inspector to replace his resident alien card. After the inspector asked the defendant for identification, a computer check revealed that he had been previously deported, whereupon the defendant was arrested and charged with attempt to re-enter under 8 U.S.C. § 1326. In a sworn statement the defendant admitted his desire to re-enter the country to be united with his family.

The court in *Morales-Tovar* held that there was insufficient evidence to convict the defendant despite the fact that he had entered the port-of-entry inspection post. While it was undisputed that the defendant never received the express consent of the Attorney General to apply for readmission to the United States, the Court ruled that the port of entry itself has the authority to then and there grant such a

waiver pursuant to 8 C.F.R. § 2.1. Likewise, the Court determined that 8 C.F.R. § 212.2 grants a person previously deported or removed from the United States the right to apply for permission to be admitted at a port of entry. The court determined that the different alternatives granted under the C.F.R. were plausible explanations for the defendant’s conduct.

Back in Puerto Rico, Mr. Cabral arrived at a designated port of entry on a regular flight and presented his documents. He was aware of his need to request permission to enter, and it was his intention to do so there. He stated this intention specifically in his sworn statement. In this case, as in *Morales-Tovar*, when the defendant informed the authorities that he wanted to apply for permission to enter, he was never given a Form I-212, nor informed of its existence. He was at a valid port of entry to request permission to enter, but the authorities by their actions denied him that opportunity and instead arrested and charged him with illegal entry after deportation. They essentially created the illegal re-entry by fiat.

All of these arguments were presented to the district court, which determined that it would rule upon the motion at trial, based on the testimony presented. For all practical purposes it was converted to a Rule 29 argument. Unfortunately, Mr. Cabral was convicted, after trial by peers, of attempted re-entry after deportation. The First Circuit took up the issue in *U.S. v. Cabral*, 252 F.3d 520 (1st Cir. 2001). The Court appears to have accepted the defense, without specifically so stating. However, using the nemesis of attorneys everywhere, it determined that the facts of the case did not support the defense raised. Specifically, it observed that Mr. Cabral tried to enter by subterfuge, claiming initially to be a resident alien by presenting a no longer valid resident alien card, and that he denied, during the initial interview, his prior deportation. Only after everything failed did he request the waiver at the port of entry.

The defense is available, albeit probably limited to port of entry situations. It’s just a matter of finding the right client, who said, “*But officer, I meant to ask permission when I came in.*” And if

OUTSTANDING ASSISTANT FEDERAL DEFENDERS RECOGNIZED AT LOS ANGELES SEMINAR

At the recent national seminar for federal defenders in Los Angeles, the NAFD gave Outstanding Assistant Federal Defender awards to the following superb and deserving colleagues:

DEBRA M. HUGHES Northern District of Ohio

Debra has been with the Ohio office since 1989, and has served as its First Assistant for a substantial portion of that time. Although only seven lawyers work in the office, including Debra and Federal Defender Michael Dane, the office has markedly influenced criminal defense practice throughout the state and beyond. Much of that influence is because of Debra. CJA and private attorneys statewide, some of whom are quite prominent in the area, call the office regularly with questions about some aspect of criminal defense practice, and Debra is always in the middle of formulating a response. She graciously and patiently wades through similar problems with her own work col-



leagues, affecting our level of practice and raising the bar like no one else can. Debra also exerts influence on judicial thinking, in that she is so highly regarded by the bench in her district that judges frequently seek her views on issues to get the benefit of her thinking. Through her competence and professionalism, Debra displays a nique sense of humanity and humility in her work. She treats clients with the utmost respect and compassion, and makes profound first impressions on many of them, giving them strength and confidence in their representation. In sum, the local bar and bench are indebted to Debra Hughes for her many contributions. She is richly deserving of this award.

MICHAEL KENNEDY

District of Nevada

Michael, who has been in the federal defender system since 1992, is admired and beloved by his clients, colleagues and peers. A gifted lawyer who approaches all cases with creativity and innovation, he excels in the most hopeless and complex ones. His ability to think outside of the box and assert new issues in defense of his clients is awe inspiring. For exam-



ple, in preparing an Indian country murder case, Michael discovered that a third of the counties in the District of Nevada were systematically excluded from the petit jury rolls. In those counties are many of the Indian reservations from which Indian Major Crime prosecutions arise. Michael challenged the com-

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position of the jury pool on a novel theory, arguing that “Indianness” as required under the Major Crimes Act is a political, not a racial, designation, and that the systematic exclusion of several counties and Indian tribal members from the jury pool was a constitutional violation. The case and this issue are pending before the Ninth Circuit. In another hopeless case, an alien reentry case in which his client faced the dreaded 77-96 month range upon conviction, he made the date and place his client was “found” in the United States factual issues which the government could not prove beyond a reasonable doubt. His client was acquitted!

In every case that Michael tries, the issues are well briefed and preserved. Lawyers and support staff line up to volunteer for his trial team,

reflecting his rapport with all levels of office personnel and the benefits they get from close exposure to his energy and talents. He is always available to answer questions uncritically, and freely gives of his time not just to office colleagues but to numerous CJA attorneys and private counsel seeking his input. Michael frequently teaches in-house and to the CJA panel, and is also an instructor at the National Criminal Defense College. Finally, Michael can often be found at the jail on nights and weekends, making sure his clients understand the status of their cases and get help with other issues affecting their lives. He frequently remarks that we are a full service law firm!@ Michael Kennedy is a ready-to-go-to-war public defender, an inspiration to everyone around him, and wholly deserving of

this award. Congratulations for your outstanding work!

JON SANDS

District of Arizona (Phoenix)

Jon has worked in the Phoenix office since 1987, and has been supervisor in charge of that office for the past six years. He is deeply committed to indigent defense and to educating the criminal defense bar, and he is one of the most active and prolific lawyers in our national defender community. He teaches extensively in training programs nationwide, and is an Adjunct Professor of Law at the Arizona State University College of Law. He is co-author of four book chapters in treatises, co-author of two law review articles, and author or co-author of 22 articles in professional journals. Jon is Chair of the Defender Services Committee on the Sentencing Guidelines, and has testified before the U.S. Sentencing Commission on four occasions, arguing for more rational guidelines. He served as the FPD



representative on the USSC’s legal staff as special counsel and is a member of the Defender Services Advisory Panel on Training. Jon is also president of the Arizona Attorneys for Criminal Justice, past president of the National Association of Federal Defenders, past chair of the Arizona State Bar Criminal Jury Instruction Committee, past chair of the Arizona State Bar Criminal Justice Section, and on the board of directors of the Phoenix Chapter of the Federal Bar Association and the Advisory Editorial Board of *The Champion*. Jon has been profiled in the *National Law Weekly* on his defense of a native American client using a diminished capacity defense arising from environmental toxins, and was profiled in the *American Lawyer* and the book *Triple Jeopardy* concerning his defense in the several times tried John Henry

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Knapp capital case. Mr. Knapp was many years on death row and several times within days of execution. Today he is a free man.

In addition to Jon's supervisory duties, he consistently maintains the largest case list in the Phoenix office. He specializes in homicide and

other violent crimes and has been lead and co-counsel in three capital cases in the FPD office. He is always approachable to colleagues and support staff, and is enormously respected by lawyers and judges in Arizona and throughout the country. One's mind grows exhausted when thinking of all that Jon has accomplished and aspires to accom-

plish. He has surely earned this award from our association!

GREGORY A. WALDRON

Eastern District of Texas

Greg has been with the Texas Eastern office since it was created in 1993. He has devoted his entire legal career to defending indigent clients. He possesses excellent analytical and legal research skills, and regularly assists his colleagues with complex and novel legal issues. He communicates effectively with court personnel, clients and prosecutors, and all of the office support staff find it a pleasure to work with him. Greg's knowledge of the federal sentencing guidelines is so outstanding that U.S. Probation Officers routinely contact him for advice and recommendations. He is a true professional who accepts all assignments willingly, works extremely hard on behalf of all of his clients, and treats even the most difficult and demanding clients with patience and respect.

As an example of his outstanding work, Greg handled a recent complex arson case. It was a potential federal death penalty case in which his

client had confessed in writing to the crime. His first victory was persuading the Department of Justice not to authorize death. His next was the "Not guilty" verdict, delivered after a lengthy trial and coming as a tremendous shock to the government. So impressed was the trial judge at Greg's skills, talent, and courtroom demeanor that he wrote a letter to Federal Defender Patrick Black, which says it all: "[I]n addition to the jury verdict, which speaks for itself, might I add that Mr. Waldron's performance was quite outstanding. As we all know, it is not every day you get an acquittal in the face of your client's confession. Mr. Waldron was as well prepared and with the sure knowledge of his case as any lawyer I have seen during



the years of my practice. His style and demeanor and appeal to the jury was close to perfect. He does credit to your office...@ And he does credit to all of us! The court's kind letter went on to compliment the entire defender office "for the day in, day out service they supply to indigent defendants. I think you probably have one of the best criminal defense

Collaterally Attacking The Prior Deportation Order: A Defense To Prosecutions Under 8 U.S.C. § 1326

by John Ostermann

E. Barrett Prettyman Fellow - Criminal Justice
Georgetown Law Center, Washington, D.C.

Part I: Introduction

In *United States v. Mendoza-Lopez*,¹ the United States Supreme Court held that due process considerations required that where defects in the (deportation proceeding) foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense.² Thus, immigrants facing prosecution under 8 U.S.C. § 1326 retain the right to collaterally attack the prior deportation order in the criminal proceeding,³ providing a potentially powerful avenue of defense.

In this article, I explore the scope of due process rights afforded immigrants in deportation proceedings, as articulated by the Ninth Circuit. I also examine the procedures by which immigrants who subsequently reenter the United States may collaterally attack the deportation order. Because this area of intersection between immigration and criminal law remains unsettled, however, significant questions remain to be litigated. Hopefully, this article will be helpful to criminal defense lawyers seeking to defend the due process rights of immigrants against an increasingly punitive political climate.

Part II: Due Process Rights in the Deportation Hearing

A. Notice and Presence at the Hearing

Due process requires that notice be served in a manner reasonably calculated to advise the respondent of the proceedings.⁴ The notice sent to the immigrant must inform him or her of the consequences resulting from a deportation order.⁵ The immigrant cannot be held to have waived an in-person hearing simply by failing affirmatively to request one.⁶

The notice sent to the respondent must be adequate. In a case involving charges of document fraud, the Ninth Circuit held that the notice documents failed to inform the immigrants adequately of the drastic consequences regarding deportation from waiver of a hearing on the document fraud charge.⁷ The lesson is clear. Where no deportation hearing was held, defense lawyers should examine carefully whether the circumstances underlying the alleged waiver of a hearing show a voluntary, knowing, and intelligent waiver.⁸

B. Right to Counsel⁹

The right to counsel at a deportation proceeding derives from the Immigration and Nationality Act¹⁰ and the Fifth Amendment right to due process.¹¹ There is no right to counsel provided at government expense, however.¹²

At the initial deportation hearing, the immigration judge must advise the respondent of his right to representation,¹³ including the availability of *pro bono* legal services.¹³ Each respondent at a removal hearing has the automatic right

to one continuance in order to obtain counsel,¹⁴ with further continuances available upon a showing of good cause.¹⁵ For example, the Ninth Circuit reversed a deportation order, for denial of the statutory right to counsel, where the immigration judge proceeded with the deportation hearing without clarifying whether the immigrant had consented to being represented by the lawyer present in court.¹⁶

The right to counsel includes the right to effective assistance of counsel.¹⁷ The Ninth Circuit has held that ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.¹⁸ The Bureau of Immigration Appeals has required specific procedures for appeals of deportation orders based on ineffective assistance of counsel.¹⁹ It appears, however, that if counsel's ineffectiveness constructively precluded an appeal to the B.I.A., due process concerns in a subsequent criminal proceeding would vitiate those requirements.²⁰

A fundamental due process issue concerns whether or not the immigrant validly waived his or her right to appeal the deportation order.²¹ Invalid waivers can be strong grounds for later claims of ineffective assistance of counsel.²² If the immigrant's lawyer had his or her client waive the right to appeal without a full explanation of the rights the immigrant gave up by waiving, defense counsel in a subsequent criminal proceeding should raise this error in terms of ineffective assistance of counsel.²³ In another case, a lawyer purported to make a collective waiver of appeal for his four clients.²⁴ Although the court of appeals decided the case on the ground that the immigrant had not actually waived his right to appeal, it appears that in the criminal proceeding the immigrant also could have raised a valid claim of ineffective assistance of counsel.²⁵ Finally, independent of statutory changes limiting the authority of courts of appeals to review the decisions of immigration judges or the Bureau of Immigration Appeals,²⁶ the federal courts retain jurisdiction to consider claims of ineffective assistance of counsel from deportation proceedings.²⁷

C. Right to Certain Procedures at the Deportation Hearing

1. Translation

Due process requires that respondents in deportation hearings enjoy the assistance of translation of the proceedings in a language the respondents understand.²⁸ The Ninth Circuit has held that evidence of incompetent translation includes direct evidence of incorrectly translated words, unresponsive answers by the witness, and a witness's expression of difficulty understanding what is said to him.²⁹

2. Duties of the Immigration Judge

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KUDOS KORNER

Great work by **AFD Robert Kinney**, and **Shari Allison**, **Research and Writing Specialist**, from the **District of New Mexico (Las Cruces)**, for their recent win in the Tenth Circuit

Court of Appeals. In *USA v. Gordon K.*, 257 F.3d 1158 (10th Cir. 2001), after accepting the Rule 11(e)(1)(C) plea agreement in a juvenile case, and sentencing the client accordingly, the judge spoke *ex parte* to the victim's family who convinced her that restitution was in order. The judge thereafter amended the sentence to include restitution. The Court of Appeals reversed, holding that the district court had no jurisdiction to reopen the sentence. The Court did not buy the government's argument that Rule 35(c) does not apply to juvenile proceedings because it was "inconsistent" with the Federal Juvenile Delinquency Act. The Court observed that the government could not point to a single provision of the Act that was in conflict with Rule 35(c), especially no provision that allowed what Rule 35(c) forbids in most cases--modification of a sentence after it has been imposed. The Court also rejected the idea that imposing finality on juvenile sentences interferes with the flexibility and informality of juvenile proceedings. Finally, it confirmed that Rule 35(c) does not allow judges to modify sentences simply because they have changed their minds or received new information.

Also in **Las Cruces**, **AFD Steve Sosa** has had a streak of successes with derivative citizenship in reentry after deportation cases. He's had one case dismissed before the preliminary hearing, one case dismissed on the eve of trial, and one other case dismissed somewhere in-between. He is working on a fourth case through INS. Luckily for the fourth client, his U.S. citizen father has spent most of his life incarcerated in the United States. Once Steve submits all the certified documents as proof to the INS, with the help of **Investigator Garfield Salas**, that case should be a winner as well. Congratulations, Steve! **AFD Yasmin Irrizary** won a dismissal of her client's drug case after persuading the government of a mere presence defense. Her client had the misfortune of dating a man who took her with him to several problematic meetings, and also when the drugs were actually delivered. The client passed a polygraph and met with the prosecutor in person, and the government finally did the right thing! Great advocacy!

The office in **Albuquerque (District of New Mexico)** is doing it too! Kudos to **AFD Susan Dunleavy**, for a jury acquittal! This was another aggravated assault on Indian Country, but with a vehicle. The client and his pregnant fiancé were beaten by several females. He ran over them, unwittingly, as he and his girlfriend were escaping. The photos showed severe injuries, but it became apparent that the "victims" were not particularly forthcoming about how their injuries occurred. **AFD Michael Keefe's** client went to trial in a fraud/check kiting scheme. The judge granted a motion for directed verdict on the ground that the government had not proved intent to defraud. Client had deposited and used a check which was later found to be counterfeit. What a great win! Great work by **AFD Roger Finzel**, whose client was charged with a shooting on the Reservation. Discovery was delayed, and critical, helpful information was "discovered" by the government just 2 days before trial. The alleged victim was a gang banger who claimed to have been 85 yards from client when shot. The victim's father indicated that they were much closer (this was the newly discovered evidence), which corroborated the client's story that the victim and his armed buddies were attacking him at time of shooting. The five day trial resulted in an acquittal! Roger doesn't stop there. He and **Research & Writing Specialist Scott Davidson** earned a big suppression victory! The judge found the deputy sheriffs involved in the car stop to be incredible and suppressed a gun and statements made about it. The client and his friend were parked in a pickup truck at a bike park. The officer pulled



KUDOSKORNER

behind them and immediately questioned them about why they were there, etc. After 10 minutes, the client asked if he was free to leave, was ignored, and asked several more times. He was ordered out of the vehicle and told to kneel on ground. The officer looked in the passenger side and allegedly saw the butt of a shotgun and determined that it was illegal. He asked what it was and who owned it and client responded in an inculpatory manner. Both were arrested and ATF and other officers came to scene to inspect gun and determine if the barrel's length was too short (it was). The court found that the stop was not justified, that the client had standing to challenge his illegal detention and its fruits, and found no intervening facts to dissipate the taint of the illegal detention regarding the statements made, including one to the ATF after *Miranda* warnings. And a big hand for **AFD Judy Rosenstein** and **Senior Litigator Dick Winterbottom**, who won a suppression motion and got their client's case dismissed! Client was a 70-ish gentleman napping in the front passenger seat of his car when it was stopped by a NM state trooper because his unlicensed companion - the driver - was speeding in client's car. Both individuals (elderly black men) were separately questioned about their destination, route, and other irrelevant issues and gave somewhat contradictory information. Client had a valid driver's license, registration and proof of insurance. The driver was ticketed and asked to consent to a search, but replied that client should be asked since it was his vehicle. Client indicated he did not have a choice and had to consent. After a dog alerted, client and driver were arrested and cuffed, and the car was towed to the station and torn apart (the vehicle had very sophisticated hidden compartments). Found were a handgun, a kilo of crack, two kilos of powder cocaine and about 5 kilos of marijuana (which was not indicted). The court found that the questioning exceeded the purpose of the stop and that the consent was involuntary. The government did not appeal and the motion to dismiss was granted.

They've had a string of recent successes in **Philadelphia's Capital Habeas Unit** in the **Eastern District of Pennsylvania**. Kudos to **AFDs Michael Wiseman, Rob Dunham** and **Jay Nickerson**, along with **Investigator Beth Muhlhauser** and **Paralegal Alice Meehan**, for winning a new trial for their death sentenced client! In *Hardcastle v. Horn*, 2001 WL 722781 (E.D.Pa., June 2001), the court reversed the client's conviction and sentence after finding that the prosecutor exercised his peremptory challenges in a racially discriminatory manner in violation of *Batson v. Kentucky*. **AFDs David Wycoff, Matthew Lawry**, and **Billy Nolas**, assisted by **Investigator Cindy Rowe** and **Paralegal Dana Thomas**, secured a new capital sentencing in *Holloway v. Horn*, 2001 WL 1006710 (E.D.Pa., August 27, 2001)! The judge found that trial counsel rendered ineffective assistance at the penalty phase for failing to investigate, develop and present the available evidence of the client's traumatic childhood and impaired mental health. **AFDs Christina Swarns** and **Billy Nolas**, working with **Investigator Gary Hendrix** and **Paralegal Beth Green**, won big in *Laird v. Horn*, 2001 WL 1013580 (E.D.Pa., September 5, 2001). The court granted this death sentenced client a new trial and a new capital sentencing on five separate grounds: the client was improperly visibly shackled during capital sentencing; the trial judge improperly instructed the jury regarding the need for unanimity in the finding of mitigating circumstances; the trial judge improperly instructed the jury regarding the finding of specific intent to kill as an element of first degree murder for accomplices; trial counsel rendered ineffective assistance for failing to investigate, develop and present evidence of the client's traumatic childhood and impaired mental health; and the prosecutor improperly commented on the client's exercise of his Fifth Amendment right to remain silent during his penalty phase closing argument. **AFDs Victor Abreu** and **Jim Moreno**, together with **Paralegal Alice Meehan** and **Investigator Beth Muhlhauser**, won a new trial for Dennis Countermand. In August 2001, the

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trial court determined that the prosecution improperly withheld exculpatory evidence of Mr. Counterman's innocence in violation of *Brady v. Maryland*. Congratulations! And finally, kudos to **AFDs Christina Swarns** and **Kica Matos, Investigator Pam Tucker**, and **Paralegal Beth Green**, for securing a new capital sentencing for Angel Reyes. In June 2001, the court determined that trial counsel was ineffective for failing to investigate, develop and present evidence of the client's poor, abusive and neglectful childhood and impaired mental health. Congratulations to all for the consistently fine work and the excellent results!

Likewise in **Philadelphia**, Kudos **AFDs Edson Bostic** and **Joyce Eubanks**, along with **Christy Unger, Research and Writing Specialist**, and **Martha Swan, Paralegal**, for their outstanding win in the case against their "Hawaiian Princess" client. For three long years, they relentlessly defended the client against the government's charge that she committed mail fraud and money laundering by falsely claiming to be a descendent of a Hawaiian royal family whose status entitled her to certain monies held in trust, as well as to IRS refund checks. The case required experts in genealogy and psychology, as well as extensive research into the lineage of the royal family. At trial, a Rule 29 motion was granted as to the money laundering counts, and the client was ultimately acquitted of all of the remaining counts, *not* because she was who she claimed, but because her delusions as to her identity rendered her unable to form the specific intent necessary to commit the crimes. A well-deserved win after a long-fought battle!

It doesn't get much better than this: TWO LIVES SAVED!! That's right, **AFD Randy A. Bauman, Capital Habeas Unit, Western District of Oklahoma**, has done it again with big saves in just two month's time. In *Spears v. Gibson*, No. CIV-96-1862-M (W.D. Okla. Jun. 1, 2001) relief was achieved for Brian Spears based on the fact that "evidence introduced in support of the heinous, atrocious or cruel aggravating factor violated the Eighth and Fourteenth Amendments to the Constitution and therefore Petitioner's sentence of death cannot stand." *Id.* at 105. In *Mitchell v. Gibson*, No. 99-6364, 2001 WL 909212 (10th Cir. Aug. 13, 2001), the Tenth Circuit Court of Appeals issued a scathing opinion which strongly criticized the purposefully misleading testimony of forensic chemist Joyce Gilchrist. With equally strong language the Court criticized the use of Ms. Gilchrist's testimony by the prosecution in support of an argument in favor of the death penalty. It would be difficult to recount accurately the vigor with which the Court attacks the misdeeds of Ms. Gilchrist and her prosecutor colleagues. Finally, **AFD Vicki Werneke**, attended recently the Airlie Death Penalty Conference and accepted for Oklahoma the cherished **Rubber Chicken Award**. The **RCA** is bestowed each year upon a state that has had either a difficult year in fighting the death penalty or a successful year. This year Oklahoma merited the **RCA** for noteworthy activity in both categories.

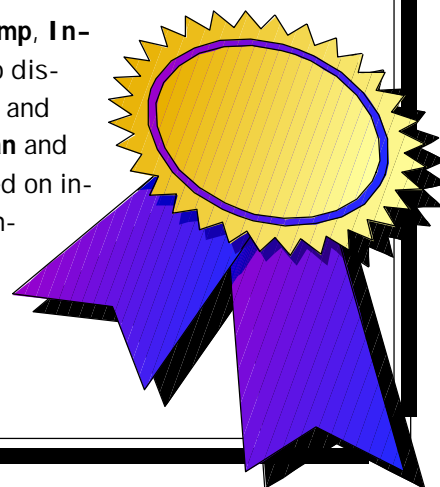
Multi-wins and dismissals in the **District of Arizona (Tucson)**! **AFD Andrea Noriega** had a two-day trial in an alien transportation case where the co-defendant pled. The defense to transporting aliens was that the client was being a Good Samaritan. Problem was, he ran when stopped (because he had a traffic failure to appear). After six hours of deliberation, the case ended with a hung jury! **AFD Rosemarie Valdez's** client was an Legal Permanent Resident taxi driver charged with alien smuggling while driving his taxi - a very weak case. He risked losing his livelihood and his residency with an aggravated felony conviction (said alien smuggling). After Rosemarie took it to video depositions, the case got better and the government offered misprision of a felony. Rosemarie argued, "No factual basis - dismiss instead." The client then thought Rosemarie wasn't doing enough for him and retained her ex-husband to

represent him. Just before the substitution was signed, the AUSA filed the Motion to Dismiss!! **AFD Chris Kilburn** was able to get an illegal entry case dismissed, with proof that his client has derivative citizenship! And after **AFD Roxanne Johnson's** teenaged client, who likes to jump the International Boundary Fence for kicks, was arrested and charged with illegal entry, Roxanne got the case dismissed by locating her client's birth certificate. The Border Patrol had not believed the client was a U.S. citizen!

Great results from the **District of Alaska!** **AFD Kevin McCoy** not only kept out all expert testimony regarding his client's handwriting under Daubert, in a case involving 66 pounds of opium, but he went on to win an acquittal at trial! Judge Holland's decision to exclude the handwriting testimony is expected to be published soon, so look for *U.S. v. Chan Ian Saelee*, No.A01-0084-CR(HRH), Dist.Ct.Ak., 8/24/01, if you've got that challenge in your case. And kudos to **FD Rich Curtner** and **Investigators Ed Denman** and **Frank Wake** for their superior efforts in the first "white slavery" prosecution in the United States under 18 U.S.C. Sec. 1589. It was a high publicity case involving a Russian dance troupe director and 7 women dancers who went to Alaska on cultural visas. The women ended up doing all of their dancing in a strip club, and when arrested by the INS, the women claimed (falsely) that they had been tricked/kidnapped into going to Alaska, and coerced into nude dancing for money. The investigative trip to Russia disclosed that the women went voluntarily to Alaska intending to dance nude for money, which resulted in a dismissal of the kidnapping and forced labor charges! The dance troupe director ended up with a conviction for visa fraud only!

Congratulations to **AFD Nancy Graven, Western District of Missouri**, for her recent win in the Eighth Circuit Court of Appeals. In *United States v. Hutton*, 252 F.3d 1013 (8th Cir. 2001), a case of first impression in this Circuit, the Eighth Circuit **reversed** the district court's three-level enhancement under 2B3.1(b)(2)(E). The district court found that Mr. Hutton's possession during a bank robbery of a non-operable handgun replica warranted a three-level enhancement under that subsection for "brandishing, displaying or possessing a dangerous weapon." The district court followed the Eleventh Circuit in *United States v. Shores*, 966 F.2d 1383, and found that the commentary requires an enhancement if the object "appears" to be a dangerous weapon, whether or not it appeared during the robbery. The twist here is that Mr. Hutton did not display, brandish or in any way refer to the replica handgun. The agreed upon facts were that no witnesses or victims were even aware Mr. Hutton possessed the replica. Mr. Hutton obligingly informed agents when he was arrested that he possessed the replica, which was seized upon his arrest, during the robbery. Rejecting the reasoning of the Eleventh Circuit in *Shores* and the Seventh Circuit in *United States v. Robinson*, 20 F.3d 270, the Eighth Circuit reversed the district court and declared the enhancement inappropriate in that it never "appeared" during the robbery.

Working together, **Middle District of Tennessee AFD Sumter Camp, Investigator Richard Moore**, and **CSA Jim Engelmann** got the government to dismiss bank robbery charges against their client, after the case went to trial and ended a mistrial due to a deadlocked jury. Kudos also to **AFD Jude Lenahan** and **Research and Writing Specialist Gretchen Swift**, who won an appeal based on insufficient evidence, overturning their client's conviction and 352 month sentence for various drugs and gun charges.



(Continued from page 9)

Particularly because there is no constitutional right to have counsel provided in deportation proceedings, the responsibility of the immigration judge to safeguard the immigrant's rights is key. Most of the published cases where the courts of appeals reversed deportation orders have involved due process violations by immigration judges.

To begin with, if the evidence in a case raises a possibility that (the immigrant) may be eligible for relief, the (immigration judge) must advise the alien of this possibility and give him the opportunity to develop the issue.³⁰ Thus, the immigration judge is charged with an affirmative duty to inform immigrants of the relief that a basic review of their situations suggests they may be eligible for.³¹

Immigration judges must ensure that the immigrant in a deportation proceeding is afforded the opportunity to present evidence on his or her behalf.³² When deciding a case on the merits, the immigration judge must have a legitimate articulable basis to question (the immigrant's) credibility, and must offer a specific, cogent reason for any stated disbelief.³³

Perhaps most important, the immigration judge has a duty to ensure that any waivers of rights by the immigrant are made knowingly, intelligently, and intentionally.³⁴ In a case involving the right to appeal the deportation order, the Ninth Circuit held that the immigration judge improperly presumed a waiver of appeal in the absence of an affirmative act by the immigrant.³⁵

The I.N.S. must show that the immigrant received sufficient information regarding the charges and procedures of the deportation process before a waiver of rights may be considered knowing and intelligent.³⁶ Likewise, the Ninth Circuit has held that a waiver of appeal was invalid because the immigration judge failed to inform the respondent of potential grounds of relief for which he might have been eligible.³⁷

Part III: Exhaustion

Generally, a defendant may not collaterally attack a prior deportation order unless he or she previously exhausted his or her administrative remedies by appealing the order to the Board of Immigration Appeals (B.I.A.).³⁸ The most likely ground for evading the exhaustion requirement is for the defendant to show that his or her waiver of appeal to the B.I.A. was invalid.³⁹

Defense counsel should examine the B.I.A.'s review of the prior deportation order. To comport with due process, the B.I.A. may not affirm an order on grounds other than those relied upon by the immigration judge unless it provides the immigrant with an opportunity to address the new grounds and present evidence in that regard.⁴⁰ For example, the B.I.A. violated immigrants' due process rights when it denied their appeal on credibility grounds despite never having given the immigrants notice that their credibility was in issue.⁴¹

Even where the recent Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) precludes an immigrant from appealing to the federal courts a deportation order based on an aggravated felony conviction,⁴² the immigrant retains the right to collaterally attack in a subsequent criminal proceeding.⁴³

Part IV: The Prejudice Requirement

To prevail, a defendant seeking to collaterally attack the validity of a prior deportation order must demonstrate that he or she was prejudiced by the due process violations in the deportation proceeding.⁴⁴ The Ninth Circuit requires a showing of plausible grounds for relief from deportation absent the due process violation,⁴⁵ although the defendant does not have to show that he actually would have been granted relief.⁴⁶ Other circuits appear to require a somewhat greater showing of prejudice to support a collateral attack.⁴⁷

In *United States v. Proa-Tovar*, the Ninth Circuit noted that there may well be times when the administrative proceedings were so flawed that effective judicial review will be foreclosed, making a showing of prejudice unnecessary.⁴⁸ In one case a defendant argued that prejudice should be presumed because his deportation hearing was conducted by an I.N.S. officer who, the defendant claimed, was institutionally biased against him.⁴⁹ The Ninth Circuit held that the defendant still needed to demonstrate that he was prejudiced in order to prevail in his collateral attack.⁵⁰

Finally, the Ninth Circuit has held that the appropriate remedy for an immigrant whose due process rights were violated in the deportation hearing was for the case to be remanded for another hearing, with instructions to apply the law as it existed at the time of the original hearing.⁵¹

Part V: Conclusion

Collaterally attacking the prior deportation order can be a powerful tool for defending against prosecutions under 8 U.S.C. § 1326. Because the scope of due process rights afforded to immigrants in the deportation context remains unsettled, defense counsel should be creative and aggressive when raising these claims.

1. *United States v. Mendoza-Lopez*, 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987).

2. *Id.* at 838.

3. A collateral attack is usually made through a motion to dismiss the indictment. See *United States v. Medina*, 236 F.3d 1028 (9th Cir. 2000).

4. See *Farhoud v. I.N.S.*, 122 F.3d 794, 796 (9th Cir. 1997).

5. See *Walters v. Reno*, 145 F.3d 1032, 1042-3 (9th Cir. 1998).

6. *United States v. Contreras*, 63 F.3d 852, 856 (9th Cir. 1995).

7. *Walters*, 145 F.3d at 1042-3.

8. See *id.* at 1037.

9. For a highly detailed discussion of the scope of the right to counsel in deportation, see NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE at Chapter 7 (West 2000).

10. See I.N.A. § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A).

11. *United States v. Lara-Aceves*, 183 F.3d 1007, 1012 (9th Cir. 1999).

12. *Id.*

13. 8 C.F.R. § 240.10(a).

14. 8 C.F.R. § 3.29.

15. 8 C.F.R. § 240.6.

16. *Escobar-Grijalva v. I.N.S.*, 206 F.3d 1331, 1335 (9th Cir. 2000).

17. *Ortiz v. I.N.S.*, 179 F.3d 1148, 1153 (9th Cir. 1999). See also *Ontiveros-Lopez v. I.N.S.*, 213 F.3d 1121 (9th Cir. 2000).

18. *Ortiz*, 179 F.3d at 1153 (quoting *Lopez v. I.N.S.*, 775 F.2d 1015, 1017).

19. *Matter of Lozada*, 19 I.&N. Dec. 637, 1988 WL 235454 (BIA),

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- affirmed sub nom. Lozada v. I.N.S.*, 857 F.2d 10 (1st Cir. 1988).
20. *See Dearinger, ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000), holding that where an alien is prevented from filing an appeal in an immigration proceeding due to counsel's error, the error deprives the alien of the appellate proceeding entirely, mandating a presumption of prejudice because the adversary process itself has been rendered presumptively unreliable. *Id.* (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 1038 (2000) (internal citations omitted)). Indeed, the logical argument is that to require that the immigrant always have exhausted his or her administrative appeals beforehand would necessarily violate *Mendoza-Lopez*.
21. For an example from a criminal case, *see United States v. Leon-Leon*, 35 F.3d 1428 (9th Cir. 1994).
22. *See Leon-Leon*, 35 F.3d 1428.
23. *See Leon-Leon*, 35 F.3d 1428.
24. *United States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1085 (9th Cir. 1996).
25. *Jimenez-Marmolejo*, 104 F.3d at 1085. The court apparently held that the petitioner failed to demonstrate ineffective counsel, although the court offered no reasons for its decision.
26. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) purported to limit substantially the jurisdiction of the courts of appeals to review discretionary decisions by immigration judges and the Bureau of Immigration Appeals. *See Castillo-Perez v. I.N.S.*, 212 F.3d 518, 523 (9th Cir. 2000).
27. *Castillo-Perez*, 212 F.3d at 523-4. Ineffective assistance of counsel was held not to be an area of discretion for immigration judges and the B.I.A.; thus, the courts of appeals were not deprived of jurisdiction over such claims. *Id.* at 524. Indeed, in a recent case, the Ninth Circuit seemed to suggest that constitutional challenges to deportation proceedings were always justiciable by the courts of appeals. *See Dearinger, ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000).
28. *Hartooni v. I.N.S.*, 21 F.3d 336, 340 (9th Cir. 1994).
29. *Perez-Lastor v. I.N.S.*, 208 F.3d 773, 778 (9th Cir. 2000).
30. *Moran-Enriquez v. I.N.S.*, 884 F.2d 420, 423 (9th Cir. 1989) (emphasis added).
31. *See* 8 C.F.R. ' 242.17. *See also United States v. Arce-Hernandez*, 163 F.3d 559, 563 (9th Cir. 1998); *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000).
32. *Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000); *Campos-Sanchez v. I.N.S.*, 164 F.3d 448, 450 (9th Cir. 1999).
33. *Hartooni*, 21 F.3d at 342. *See also Osorio v. I.N.S.*, 99 F.3d 928, 931 (9th Cir. 1996).
34. *See United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998).
35. *Zarate-Martinez*, 133 F.3d at 1198.

36. *See Walters*, 145 F.3d at 1038.
37. *Arrieta*, 224 F.3d at 1079.
38. I.N.A. ' 276(d)(1), 8 U.S.C. ' 1326(d)(1). *See also United States v. Estrada-Torres*, 179 F.3d 776, 778 n.3 (9th Cir. 1999). To meet the requirement of exhaustion, the courts of appeals appear to require only that the immigrant have appealed to the Board of Immigration Appeals. *See Estrada-Torres*, 179 F.3d at 778 n.3. Nevertheless, another recent case appears to suggest the immigrant must appeal a B.I.A. ruling to the court of appeals in order to fulfill the exhaustion requirement. *See United States v. Hinojosa-Perez*, 206 F.3d 832, 836 (9th Cir. 2000). This seems unlikely, however, because requiring that the immigrant appeal the adverse B.I.A. ruling to the court of appeals effectively vitiates the right to collaterally attack in the criminal proceeding since any subsequent due process claim would be res judicata.
39. Among other things, defense counsel should examine carefully whether or not the immigrant was fully informed of his or right to appeal the deportation order before waiving that right. *See Zarate-Martinez*, 133 F.3d at 1197.
40. *Campos-Sanchez*, 164 F.3d at 450.
41. *Abovian v. I.N.S.*, 219 F.3d 972, 978, amended 228 F.3d 1127 (9th Cir. 2000).
42. *See* I.N.A. ' 242(a)(2)(C), 8 U.S.C. ' 1252(a)(2)(C), *eff.* April 1, 1997.
43. *United States v. Herrera-Blanco*, 232 F.3d 715 (9th Cir. 2000).
44. *United States v. Proa-Tovar*, 975 F.2d 592 (9th Cir. 1992).
45. *United States v. Esparza-Ponce*, 193 F.3d 1133, 1136 (9th Cir. 1999).
46. *Arrieta*, 224 F.3d at 1079.
47. *See e.g. United States v. Benitez-Villafuerte*, 186 F.3d 651, 659 (5th Cir. 1999) (prejudice means there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported); *United States v. Perez-Ponce*, 62 F.3d 1120, 1122 (8th Cir. 1995) (same standard as *Benitez-Villafuerte*).
48. *Proa-Tovar*, 975 F.2d at 595.
49. *United States v. Garcia-Martinez*, 228 F.3d 956, 960 (9th Cir. 2000).
50. *Garcia-Martinez*, 228 F.3d at 964.
51. *Castillo-Perez*, 212 F.3d at 528.

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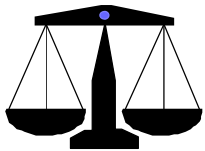
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