

I.

STATEMENT OF FACTS

Mr. CLIENT was admitted to lawful permanent residence in 1971, when he was two years old. On August 13, 1991, Mr. CLIENT was convicted, after trial, of Second Degree Murder in Florida. The Immigration and Naturalization Service (INS) initiated deportation proceedings against Mr. CLIENT on December 13, 1994. In its Order to Show Cause (OSC), the INS alleged that Mr. CLIENT was deportable by reason of having committed an aggravated felony. *See* Exhibit B. On May 30, 1995, Mr. CLIENT requested relief from deportation under section 212 (c) of the I.N.A. (repealed 1996). *See* Exhibit C. On October 31, 1995, the Immigration Judge (IJ) granted the requested relief. *See* Exhibit D. On November 3, 1995, the INS appealed to the Bureau of Immigration Appeals (BIA) alleging misuse of the IJ's discretion. *See* Exhibit E. The BIA held that Mr. CLIENT was statutorily ineligible for discretionary relief under AEDPA on March 12, 1997, this issue was never raised or briefed by the parties. *See* Exhibit F.

These motions follow.

II.

**THE COURT MUST DISMISS THE INDICTMENT BECAUSE
CLIENTNAME'S DUE PROCESS RIGHTS WERE VIOLATED
AT THE UNDERLYING REMOVAL PROCEEDINGS**

CLIENTNAME must be given the opportunity to collaterally attack his deportation. “A defendant charged with illegal reentry under 8 U.S.C. § 1326 has a Fifth Amendment right to collaterally attack his removal order because the removal order serves as a predicate element of his conviction.” United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1047 (9th Cir. 2004) (citing

InvalidDeport[2012]

United States v. Mendoza-Lopez, 481 U.S. 828, 837-38 (1987)).

To sustain a collateral attack under 8 U.S.C. § 1326(d), a defendant must demonstrate:

1) that he exhausted all administrative remedies available to appeal the removal order, 2) that the underlying removal proceedings at which the order was issued improperly deprived him of the opportunity for judicial review, and 3) that the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d). CLIENTNAME meets each of these requirements.

A. CLIENTNAME Is Exempt from the Exhaustion Requirement.

The exhaustion requirement of section 1326(d) cannot bar collateral review of a deportation proceeding when the waiver of the right to an administrative appeal did not comport with due process. Ubaldo-Figueroa, 364 F.3d at 1043 (citing United States v. Muro-Inclan, 249 F.3d 1180, 1189 (9th Cir. 2001)). A waiver does not comport with due process if it is not considered and intelligent. Id. An alien's waiver of his right to appeal his deportation order is not considered and intelligent where the record contains an inference that the petitioner is eligible for relief from deportation, but the IJ fails to advise the alien of the possibility. Id. at 1049.

B. CLIENTNAME Was Deprived of the Opportunity for Judicial Review.

CLIENTNAME was deprived of a meaningful opportunity to obtain judicial review because the IJ failed to inform him of his possible eligibility for relief from deportation. See Mendoza-Lopez, 481 U.S. at 840 (concluding that defendants were deprived of right to judicial review where IJ failed to advise them of eligibility for suspension of deportation); accord Ubaldo-Figueroa, 364 F.3d at 1050.

C. The Removal Order Was Fundamentally Unfair.

InvalidDeport[2012]

[Discussion of Particular Error at Deport Hearing]

D. CLIENT Was Prejudiced by the IJ's Error

[See Also Individual Motions for Prejudice Standards Pertinent to Those Claims]

CLIENT must also show that the proceedings were fundamentally unfair. An underlying removal order is fundamentally unfair if: (1) [a defendant's] due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects. Ubaldo-Figueroa, 364 F.3d at 1048. To establish prejudice CLIENT does not have to show that he would have been granted relief. Instead he must only show that he had a "plausible ground for relief from deportation." Id. at 1050 (citing United States v. Arrieta, 224 F.3d 1076, 1079 (9th Cir. 2000)).

First, CLIENT suffered prejudice because the government failed to prove that his convictions did not arise from a single scheme, and therefore, CLIENT was not deportable. However, should the Court reject CLIENT's first claim, the Court should still find that CLIENT suffered prejudice because his entire family resides in the United States and relied on him for economic and emotional support.

In Ubaldo-Figueroa, 364 F.3d at 1051, the Ninth Circuit held Ubaldo-Figueroa had a plausible legal challenge to his removal order, and thus, the IJ's unconstitutional failure to inform him that he was eligible for § 212(c) relief prejudiced him. In concluding that Mr. Ubaldo-Figueroa had a plausible legal claim for relief, the court noted that Mr. Ubaldo-Figueroa had been gainfully employed since he had come to the United States and he had substantial family ties in the United States, including a United States citizen wife and two United States citizen children.

InvalidDeport[2012]

Like Ubaldo-Figueroa, CLIENT has also been gainfully employed in the United States since he left school and also has substantial family ties in the United States, including two United States citizen siblings and a brother who is a legal permanent resident. Prior to 1996, CLIENT was a resident alien with proper documentation to live and work in the United States. He had lived in the United States almost all of his life, having first entered the United States in 1974 when he was only eight years old. Growing up, CLIENT lived in Los Angeles with his mother, MOTHERNAME, his siblings, SIBLINGS NAMES'ad Guadalupe. His two youngest siblings, Jose and Guadalupe, are United States citizens by birth. During his childhood and adolescence, CLIENTNAME attended Stevenson Junior High School in Los Angeles, see Exhibit C, and later Garfield High School, also in Los Angeles, California. Id. After high school Mr. Martinez joined the workforce. See Exhibit D. In 1987, CLIENTNAME obtained temporary resident status. See Exhibit A. Approximately two years later, he adjusted his status to that of a legal permanent resident. See Exhibit B. CLIENTNAME also met a woman and had two United States citizen children. The equities in CLIENTNAME's case, like the equities in Ubaldo-Figueroa, are significant. Therefore, CLIENTNAME had a plausible ground for relief and the IJ's failure to inform him that he was eligible for § 212(c) relief prejudiced him.