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**PRACTICE ADVISORY**

# Challenging the Constitutionality (or Legality) of Stipulated Removal Orders Issued Between 1997[1] and 2012 in Reinstatement and 8 U.S.C. §1326 Cases

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*with special thanks to Trina Realmuto[2]*

## *Stipulated Orders of Removal and the Illegal Scheme[3]*

> This is a situation in which one [redacted] unbeknownst to our program's leadership, was handling work in apparent violation of LSC regulations. The work involved: at most 20 minutes of advice and counsel per person assisted; no court appearances or advocacy on the person's behalf; and no opposition to the government's action to deport these individuals. Indeed, the federal government asked [redacted] to do the work and [redacted]work saved the government hundreds of thousands of dollars. The savings were so great that the INS actually investigated trying to replicate [redacted]work elsewhere.

In 1996, the Immigration and Nationality Act ("INA") was amended to include the authorization of stipulated orders of removal, directing the Attorney General to "provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the [noncitizen] (or the [noncitizen's] representative) and [ICE]," and states that a "stipulated

[1] We have not encountered any anecdotal evidence of pre-1997 cases yet. However, though stipulated orders of removal were created by statute in 1996, the scheme described in this Advisory could have started before then, albeit in slightly different form (e.g. via hearings as described in item number 2 under the "Illegal Orders" section below), so it is important to review pre-1997 removal orders, too.

[2] We want to think Trina Realmuto for her unwavering support in the pursuit of justice, and for her masterful editing skills. Ms. Realmuto is a fierce advocate for immigrant's rights and a widely known and recognized expert in the field of immigration law. She litigates before the federal courts on issues related to removal defense, government accountability, and the rights of noncitizens. With twenty years of experience, Ms. Realmuto has litigated and argued several precedent decisions on behalf of individuals and classes and amicus curiae, written numerous practice advisories, and is a frequent presenter on immigration issues. Ms. Realmuto earned her J.D. from Albany Law School and her B.A. from the University of North Carolina at Chapel Hill.

[3] The scheme as carried out in Kansas City is best described by Gregg Lombardi – then-Executive Director of Legal Aid of Western Missouri (LAWMo) in Kansas City – in his December 10, 2013 letter to Legal Services Corporation (LSC). LSC, which provides annual funding to LAWMo, began an investigation in 2012 into the involved LAWMo attorney's activities. While the scheme often included court appearances by the attorney, the mechanics of the scheme are otherwise correctly laid out in the paragraph highlighted above from Mr. Lombardi's Dec. 10, 2013 letter. The authors of this advisory obtained Mr. Lombardi's letter and other materials via a Freedom of Information Act (FOIA) request to LSC, and his full letter is included in the evidence we have compiled relating to this advisory, available here: https://drive.google.com/open?id=1YpS7H5eYGiHEekvZ2enY_YtuTjT9PrS6. (Some users may have to copy and paste the URL into their web browser; clicking on the link here may not work.)

order shall constitute a conclusive determination of the [noncitizen's] removability from the United States."[4]

Then, starting at least as early as 1997, as part of a mass scheme to remove individuals from the United States quickly and without due process protections, the federal government duped and coerced individuals into waiving their rights and agreeing to accept stipulated removal orders.[5] The program became even more robust in the mid-2000s, as "[b]efore 2003, a handful of stipulated orders were recorded. But by fiscal year 2008, approximately 30,000 removal orders – nearly one-fifth of all removal orders issued by [immigration judges] that year – were stipulated removal orders."[6] The consequences to the individuals removed under this scheme are profound and often permanent, and subject them to, *inter alia*, federal criminal prosecution if they attempt to reenter the U.S. without permission at any point after having been removed.[7]

In one particular jurisdiction – Kansas City, Missouri – immigration officials, with the assistance of one nonprofit attorney from Legal Aid, engaged in a scheme to help DHS obtain thousands of removal orders with "no advocacy…[and]…no opposition to the government's action to deport these individuals."[8] The way the scheme usually appeared to work was that the nonprofit attorney, Suzanne Gladney, would meet with recently detained individuals at the ICE ERO office in Kansas City, would (usually incorrectly) advise them that they had no relief from removal, would tell them they could not obtain a timely review of their bond, and would encourage them to sign a stipulated order of removal.[9] Under this scheme, "the federal government asked [Ms. Gladney] to do the work and [her] work saved the government hundreds of thousands of dollars. The savings were so great that the INS [and eventually DHS] actually investigated trying to replicate [her] work elsewhere."[10] We know this scheme in Kansas City spanned from at least as early as 1997 – if not before – until late 2012 or early 2013.

In fact, this Kansas City scheme was so successful that from 2004 to 2010[11], Ms. Gladney alone was responsible for 40% of all of the stipulated orders of removal ***in the***

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[4] INA §240(d), 8 U.S.C. §1229a(d) (added to the INA by sec. 304 of div. C, title III of P.L. 104-208 (09/30/1996)); *see also* 8 C.F.R. §1003.25(b) (implementing regulation).

[5] For a discussion of the general due process concerns associated with stipulated removal orders, *see* Jennifer L. Koh, Jayashri Shrikanthiah, Karen Tumlin, *Deportation Without Due Process,* Sept. 2011, available at *https://www.nilc.org/news/special-reports/deportation-without-due-process/*.

[6] Jennifer L. Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475 (2013), available at http://scholarship.law.unc.edu/nclr/vol91/iss2/3.

[7] *See* Immigration and Nationality Act ("INA") §276, 8 U.S.C. §1326.

[8] Dec. 10, 2013 letter from Greg Lombardi, then-Executive Director of Legal Aid of Western Missouri, to LSC (hereinafter "12/10/13 Lombardi letter") *available at* https://drive.google.com/open?id=1YpS7H5eYGiHEekvZ2enY_YtuTjT9PrS6.

[9] *See, e.g.*, Affidavit of J. Gutierrez (provided unredacted with his permission) and redacted Affidavit of C-O-, Affidavit of G-O-, and Motion to Rescind Stipulated Order + Reopen for J-M- (includes affidavit by J-M-), *available at* https://drive.google.com/open?id=1YpS7H5eYGiHEekvZ2enY_YtuTjT9PrS6

[10] 12/10/13 Lombardi letter, *available at* https://drive.google.com/open?id=1YpS7H5eYGiHEekvZ2enY_YtuTjT9PrS6

[11] *See* September 17, 2012 Letter from Mark Fleming, National Litigation Coordinator of the National Immigrant Justice Center (addressing results of a FOIA request regarding stipulated removal orders from

***entire United States***. In just those 6 years, she signed approximately 4,224 stipulated orders of removal as the attorney of record for the respective deportee, far outpacing every other attorney in the country. Based on the number of years this activity went on, and on the volume of resulting stipulated removal orders, the total number of victims is believed to be in the tens of thousands.

### *The Illegal Orders*

Under the Kansas City scheme, immigration officials provided Ms. Gladney with private and exclusive access to the deportation and removal processing area in the guise of her giving "Know Your Rights" presentations.[12] Evidence obtained implies that no such Know Your Rights presentations were occurring in any meaningful way, however.[13] Subsequent to these orchestrated meetings between recently detained individuals and Ms. Gladney, she would typically advise the individuals that they had no relief from removal and also often told them either (1) if they wanted a bond hearing, it would be several weeks before they could see the judge and so they should just agree to be deported, or (2) that they were ineligible for bond (often incorrectly), or even (3) without advising them they could request a bond redetermination hearing, that, if ICE set a bond that they could not afford, they should just agree to be deported.[14] At that point, the cases would take one of two paths to an order of removal:

1. Ms. Gladney or an ICE officer would complete either a "Respondent's Request for Issuance of a Final Order of Removal and Waiver of Hearing"[15] or a "Stipulation" form[16] (or as Ms. Gladney referred to it "the Stipulation of Removal/Deportation form."[17]) The document was usually pre-filled out, on the computer, and often contained incorrect information about the respective respondent. Ms. Gladney would sign the document as the person's attorney and tell the individual to sign it, too, without reading through it with the respondent.[18] Then ICE would submit this paperwork to an immigration judge at the Immigration Court for a judge to review it, approve it, and issue a removal order. In these cases, there was no

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2004-2010), *available at* https://drive.google.com/open?id=1YpS7H5eYGiHEekvZ2enY_YtuTjT9PrS6. The LSC OIG investigation revealed that this attorney was helping ICE obtain stipulated orders of removal from before 2004 and until at least late 2012 or early 2013, but the FOIA results obtained from NIJC only cover the 2004-2010 period.

[12] *See* Dec. 10, 2013 Affidavit of Suzanne Gladney (hereinafter "12/10/2013 Gladney Affidavit"), *available at* https://drive.google.com/open?id=1YpS7H5eYGiHEekvZ2enY_YtuTjT9PrS6, submitted to LSC along with the 12/10/13 Lombardi letter (see supra note 3) during the LSC investigation of LAWMo.

[13] *See*, e.g., *supra* note 9, Affidavit of J. Gutierrez (unredacted with his permission) + Affidavits of C-O-, G-O-, and J-M-.

[14] *See, e.g.*, *supra* note 9, Affidavits of J. Gutierrez, of C-O-, of G-O-, and Motion to Rescind Stipulated Order + Reopen for J-M- (includes affidavit by J-M-).

[15] *See, e.g.*, redacted Request for Issuance of a Final Order of Removal and Waiver of Hearing, obtained from LSC FOIA, *available at* https://drive.google.com/open?id=1YpS7H5eYGiHEekvZ2enY_YtuTjT9PrS6

[16] *See, e.g.*, C-O- stip + order and J-M- stip + order, available at https://drive.google.com/open?id=1YpS7H5eYGiHEekvZ2enY_YtuTjT9PrS6

[17] 12/10/2013 Gladney Affidavit, *supra* note 12.

[18] *See, e.g.*, *supra* note 9, redacted Affidavits of C-O-, G-O-, + Motion to Rescind Stipulated Order + Reopen for J-M- (includes affidavit by J-M-).

court appearance and no hearing – the judge could simply issue an order of removal based on the written submissions.[19] Following issuance of such an order, the person was promptly removed from the United States.

The evidence reveals that the attorney considered the act of completing these forms as "ministerial acts" rather than requiring a detailed or individualized assessment of the individual's case.[20] She did not meaningfully discuss with the individuals the consequences of waiving the right to a hearing before an immigration judge under INA §240(d), 8 USC §1229a – and thus the right to due process – or that such waiver meant they were waiving the right to apply for any relief from removal.[21] Therefore, any such waiver of rights cannot be considered knowing, intelligent or voluntary. Unfortunately, the implementing regulation appears to presume that, where a person is represented by an attorney on the request for a stipulated order of removal, such waiver will be entered into knowingly, intelligently and voluntarily, without a judge even having to ask the noncitizen whether this is true.[22] Moreover, the deprivation of a hearing in front of an immigration judge with due process protections[23] prevented the noncitizen from learning from an immigration judge whether he or she was eligible for immigration relief or protection, and likewise prevented the noncitizen from submitting any application for such relief or protection. As at least one court has recognized, this is a violation of the noncitizen's due process rights.[24]

2. The other method through which stipulated removal orders were obtained involved Ms. Gladney appearing for a telephonic (and in some cases an in-person) immigration hearing. Usually, several noncitizens would appear at the same time, with Ms. Gladney representing all of them, and Ms. Gladney would make a blanket admission as to the factual allegations and the charge(s) in all of the charging documents (known as Notices to Appear), for all of the noncitizens, all at one time. She did not request any relief from removal on their behalf, she did not request time to investigate her clients' eligibility for any such relief, and the court did not ask the noncitizens any questions other than how to spell their names. There were also no findings made by the court other than to enter an order of removal.[25]

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[19] *See* 8 C.F.R. §1003.25(b) ("The immigration judge may enter…an order [of removal stipulated to by the noncitizen] without a hearing and in the absence of the parties based on a review of the charging document, the written stipulation, and supporting documents, if any….A stipulated order shall constitute a conclusive determination of the [noncitizen's] deportability or removability from the United States.").
[20] 12/10/13 Gladney Affidavit, *supra* note 12.
[21] *See, e.g.*, *supra* note 9 - redacted Affidavits of C-O-, G-O-, + Motion to Rescind Stipulated Order + Reopen for J-M- (includes affidavit by J-M-).
[22] The regulation requires that, "[i]f the [noncitizen] is unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing and intelligent," but it does not require the judge to ascertain this where the noncitizen has an attorney. 8 C.F.R. §1003.25(b).
[23] It is "well-settled" that noncitizens are "entitled to the Fifth Amendment's guarantee of due process of law in deportation proceedings." *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004) (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)).
[24] *See United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050 (9th Cir. 2003).
[25] The recording and transcript of one such hearing in April 1998 is provided in the materials found at https://drive.google.com/drive/folders/1YpS7H5eYGiHEekvZ2enY_YtuTjT9PrS6?usp=sharing

The evidence reveals that in at least two cases where the noncitizens "appeared" telephonically – from the Kansas City ICE ERO office – for a hearing with a judge in Chicago,[26] the order of removal in the alien file was not even signed by the immigration judge; instead, the judge's signature appears to have been forged by government counsel, who was in the room at the ICE office with the noncitizen and Ms. Gladney during the telephonic "hearing."[27] In both cases, it appears that a separate copy of the order was later actually signed by the judge.[28] Thus, the signature on the orders in the immigration court's files is different – though purportedly made by the same judge – than the signature on the same orders contained in the government-maintained alien file.

We have just learned that, at least as recently as 2017, ICE has continued to use the same pre-filled stipulation forms that Ms. Gladney was using in later years – even where the detainee does not have an attorney. In these cases, ICE is pre-filling the forms by computer, just like they were doing with Ms. Gladney, and are telling noncitizens to sign the form without them understanding what is included on the form or what rights they are giving up. In these cases, practitioners should check whether the immigration judge held a hearing at which the judge asked the noncitizen questions and determined that the noncitizen's waiver of rights was made knowingly, voluntarily, and intelligently.[29] If not, then the immigration judge violated the applicable regulations, and thus, has violated the noncitizen's right to due process.[30]

In any of these circumstances, the consequences to the individual and his or her family are devastating. Two scenarios in which these illegally-obtained orders may come back to further harm the individual are: (1) where the individual has re-entered the U.S. illegally after deportation, is caught, and ICE reinstates the old order of removal in order to deport them again; and/or (2) where an individual who re-entered illegally after a deportation is caught and prosecuted under 8 U.S.C. §1326 for illegal reentry after removal. Each of these scenarios and tips for practitioners are discussed below.

### *Reinstatement cases*

Immigration law provides for another summary removal process known as reinstatement of removal.[31] Under this provision, DHS may issue an order of removal to an

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[26] The individuals in those cases were ordered removed in 1997 and 1998, but the immigration court in Kansas City did not open until 2009. Prior to 2009, cases originating in the Kansas City region were under the jurisdiction of the Chicago Immigration Court.

[27] This is based on a visual comparison of other orders actually signed by that same Judge. This new twist was only recently discovered after Suzanne Gladney's file was obtained in a recent case, and her file contained both versions of the order. It was subsequently discovered that the same thing occurred in another former client's case in an almost identical scenario.

[28] A copy of both orders (forged and un-forged) and the audio recording + transcript from one of the cases has been provided with the consent of the subject of that order. The orders and audio can be found here: https://drive.google.com/open?id=1YpS7H5eYGiHEekvZ2enY_YtuTjT9PrS6. Redacted copies of both orders (forged and authentic) from the second case are also provided at this link.

[29] *See* 8 C.F.R. §1003.25(b).

[30] *See, e.g.*, *Accardi v. Shaughnessy*, 347 U.S. 260, 265, 268 (1954).

[31] *See* INA §241(a)(5), 8 U.S.C. § 1231(a)(5); *see also* 8 C.F.R. § 241.8.

individual who has entered the United States unlawfully after having a prior removal order. DHS can issue and execute the order without providing the noncitizen with a hearing, and with few exceptions, without allowing the noncitizen to apply for any form of relief from removal.[32] The reinstatement statute also purports to prevent review or reopening of the predicate underlying order.

The reinstatement provision indicates:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, *the prior order of removal* is reinstated from its original date and *is not subject to being reopened or reviewed*, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.[33]

This purported bar against review of prior orders can be devastating. However, there are limited exceptions under which challenges to an underlying order may be sought so as to prevent the person from being deported again on that same invalid order. For example, the Board of Immigration Appeals has historically frowned upon orders of removal obtained in violation of law,[34] and thus, in this context, practitioners should move the Immigration Court or Board of Immigration Appeals to rescind or reconsider the underlying order as invalid. Likely, the government will argue that the noncitizen is barred under the statute from seeking review. However, attorneys should argue that the courts have set limitations on this bar, and ineffective assistance of counsel should be one of those limitations.[35]

Likewise, attorneys should argue that the ineffective assistance of counsel and the unconstitutional governmental scheme are so shocking that they satisfy extraordinary standards and constitute a "gross miscarriage of justice."[36]

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[32] *Id*.

[33] *Id.* (emphasis added).

[34] *See, e.g.*, *Matter of Farinas*, 12 I&N Dec. 467, 472 (BIA 1967) (finding that a prior deportation order "can and must" be examined upon a showing of a gross miscarriage of justice); *Matter of Malone*, 11 I&N Dec. 730 (BIA 1966) (same).

[35] Ineffective assistance of counsel has widely been recognized as an extraordinary circumstance for purposes of allowing equitable tolling of certain deadlines. *See, e.g.*, *Iavorski v. US INS*, 232 F.3d 124 (2d Cir. 2000); *Mahmood v. Gonzales*, 427 F.3d 248 (3d Cir. 2005); *Davies v. US INS*, 10 Fed. Appx. 223 (4th Cir. 2001) (per curiam); *Gordillo v. Holder*, 640 F.3d 700, 704 (6th Cir. 2011); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Valencia v. Holder*, 657 F.3d 745 (8th Cir. 2011); *Socop-Gonzales v. INS*, 272 F.3d 1176, 1195 (9th Cir. 2001) (en banc); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); *Ruiz-Turcios v. US Atty. Gen*., 717 F.3d 847 (11th Cir. 2013).

[36] Some Circuits have permitted federal court review of legal and constitutional challenges to a prior order of removal where there has been a gross miscarriage of justice. *See, e.g.*, *Debeato v. AG*, 505 F.3d 231, 234-35, 237 (3d Cir. 2007); *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 513-15 (5th Cir. 2006); *Villegas de la Paz v. Holder*, 614 F.3d 605, 610 (6th Cir. 2010); *de Rincon v. Mukasey*, 539 F.3d 1133, 1138-39 (9th Cir. 2008). Other Circuits have assumed without discussion or held that there is no federal court jurisdiction to review an underlying order. *See Garcia-Villeda v. Mukasey*, 531 F.3d 141, 150 (2d Cir. 2008); *Torres-Tristan v. Holder*,

In situations where the person who signed a stipulation was not represented by counsel, if the immigration judge did not have a hearing with the noncitizen to ascertain whether the noncitizen made the wavier knowingly, voluntarily, and intelligently, attorneys should argue that failure to follow the applicable regulation[37] means the order was obtained in violation of due process[38] and must be rescinded.

In order to see if a client has a stipulated removal order that may have been issued pursuant to the illegal scheme discussed in this Advisory, practitioners should try to obtain client records and information quickly. The following steps should be considered:

- □ Obtain copies of the alien file ("A-File") and the immigration court file to determine whether (1) the order involves a stipulated removal order or a removal order issued while the client appeared telephonically from the ICE office for a cursory immigration hearing, and the individual was represented by Suzanne Gladney; *or* (2) the order involves a stipulated removal order that was filled out by computer and the individual was unrepresented.

- □ Obtain a recording of the hearing (if one occurred) if possible by either asking the immigration court where the hearing was held to provide you a recording, or, if the file is old, by filing a FOIA request with the Executive Office for Immigration Review ("EOIR").[39]

- □ Contact Ms. Gladney to obtain a copy of her file on the client[40] at:
  P.O. Box 413223
  Kansas City, MO 64141

- □ Challenge the reinstatement by submitting evidence to ICE ERO to show the underlying order was obtained in violation of law and a product of ineffective assistance of counsel or, if the individual was not represented and did not have a hearing with an immigration judge, was obtained in violation of 8 C.F.R. §1003.25(b) and thus was a violation of due process. Among other things, you will need an affidavit from your client describing the circumstances leading to the order of removal. We suggest reviewing the redacted affidavits provided with these materials.[41]

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656 F.3d 653, 656 (7th Cir. 2011); *Cordova-Soto v. Holder*, 659 F.3d 1029, 1032 (10th Cir. 2011); *Avila v. United States AG*, 560 F.3d 1281, 1284 (11th Cir. 2009). *Miller v. Sessions*, 889 F.3d 998 (9th Cir. 2018).

[37] 8 C.F.R. §1003.25(b) (If the alien is unrepresented, the Immigration Judge **must** determine that the alien's waiver is voluntary, knowing, and intelligent.);

[38] *See, e.g.*, *Accardi v. Shaughnessy*, 347 U.S. 260, 265, 268 (1954).

[39] *See* https://www.justice.gov/eoir/foia-facts for instructions.

[40] Though Ms. Gladney was allowed to resign from her employment at LAWMo in 2013, she somehow continues to have access to client files. It is for this reason that an initial demand for the file should be made to her directly.

[41] *See* Affidavits of J. Gutierrez, of C-O-, of G-O-, and of J-M-, *supra* note 9.

- □ File a Petition for Review[42] with the relevant federal Circuit Court of Appeals challenging the reinstatement order by collaterally attacking the predicate (stipulated removal) order[43].

- □ File a Motion to Rescind or Reconsider the Stipulated Removal Order with the immigration court based on ineffective assistance of counsel (or based on the court's violation of 8 C.F.R. §1003.25(b) where individual was *pro se*) within 30 days of discovering the unlawful stipulated removal order, and/or, in the alternative, request *sua sponte* reopening of the case based on a due process violation resulting in a gross miscarriage of justice. Among other things, you will need an affidavit from your client describing the circumstances leading to the order of removal. We suggest reviewing the redacted affidavits provided with these materials.[44]

### *8 U.S.C. §1326 Cases*

In a criminal prosecution under 8 U.S.C. §1326 for illegal reentry after removal, the validity of the underlying, original order of removal is an element of the crime.[45] The invalid order can thus be challenged in a motion to dismiss the indictment. Moreover, the U.S. Supreme Court has indicated that as a matter of due process, "a defendant must be permitted to bring a collateral challenge to a prior deportation that underlies a criminal charge, where the prior deportation proceeding effectively eliminated the right of the alien to obtain judicial review."[46] Thus, it can and should be argued that where the conduct of the government and ineffective counsel has led to a fundamental violation of due process and an involuntary and uninformed waiver of rights, such actions effectively eliminated the right of the individual to obtain judicial review.

To "succeed on collateral attack under 8 U.S.C. § 1326(d)" – challenging the validity of an underlying removal order – a defendant charged with illegal reentry into United States "must demonstrate:

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[42] It recommended to do both the PFR to circuit court AND Motion to Rescind to immigration court be filed simultaneously. It is also advised that a motion to hold in abeyance be filed with the Circuit Court, asking the Court to hold the matter until the Motion to Rescind has been ruled on and if needed appealed. If that appeal is denied, a second PFR should then be filed and the case should consolidate the entire matter into one PFR. if a Motion to Rescind is filed with the Immigration Court simultaneously.

[43] Every circuit court has held they have jurisdiction over petitions for review of reinstated orders. *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 144 (2d Cir. 2008); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 110 (3d Cir. 2003); *Velasquez Gabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002); *Warner v. Ashcroft*, 381 F.3d 534, 536 (6th Cir. 2004); *Gomez-Chavez v. INS*, 308 F.3d 796, 800 (7th Cir. 2002); *Briseno-Sanchez v. Heinauer*, 319 F.3d 324, 326 (8th Cir. 2003); *Chay Ixcot v. Holder*, 646 F.3d 1202, 1206 (9th Cir. 2011); *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162 n.3 (10th Cir. 2003); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277, 1278 (11th Cir. 2004).

[44] *See* Affidavits of J. Gutierrez, of C-O-, of G-O-, and of J-M-, *supra* note 9.

[45] *See United States v. Mendoza-Lopez*, 481 U.S. 828, 838-39 (1987).

[46] *United States v. Arias-Ordonez*, 597 F.3d 972 (9th Cir. 2010) (citing *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987)).

(1) that he exhausted all administrative remedies available to him to appeal his removal order,

(2) that the underlying removal proceedings at which the order was issued improperly deprived [defendant] of the opportunity for judicial review, and

(3) that the entry of order was fundamentally unfair."[47]

Furthermore, an underlying removal order is fundamentally unfair, as regards a defendant charged with illegal reentry into United States, if:

(1) the defendant's due process rights were violated by defects in the underlying deportation proceeding, and

(2) the defendant suffered prejudice as a result of those defects.[48]

Given the absolute lack of advocacy or advisals provided to individuals, coupled with – in some cases – a sham hearing which may have resulted in a forged order, it should be argued that issuing the removal order was plain error.[49] Additionally, where the government engaged the assistance of a nonprofit attorney to remove individuals en masse by affirmatively misleading them about the relief available to them, the plain error was also a clear due process violation.[50] Put another way, the removal is not legally sound and cannot be used to support a conviction for illegal reentry. This is true of the original, underlying order of removal, as well as of any reinstatements of such order.[51]

The following steps should be considered in defending section 1326 cases:

- □ Obtain copies of the alien file ("A-File") and the immigration court file to determine whether (1) the order involves a stipulated removal order or a removal order issued while the client appeared telephonically from the ICE office for a cursory immigration hearing, and the individual was represented by Suzanne Gladney; *or* (2) the order involves a stipulated removal order that was filled out by computer and the individual was unrepresented.

- □ If possible, obtain a recording of the hearing (if one occurred) by either asking the immigration court where the hearing was held to provide you with the

[47] *United States v. Melendez-Castro*, 671 F.3d 950, 953 (9th Cir. 2012) (internal citations omitted); *see also* INA §276(d), 8 U.S.C. §1326(d).
[48] *United States v. Melendez-Castro*, 671 F.3d at 953.
[49] *See* Fed. R. Crim. Pro. 52(b) ("Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").
[50] *See Walters v. Reno*, 145 F.3d 1032, 1043 (9th Cir. 1998).
[51] *See United States v. Arias-Ordonez*, 597 F.3d 972, 976 (9th Cir. 2010) ("[W]hen a due process violation has occurred, 'you can't take a reinstatement and launder the original deportation' because the reinstatement 'bears the same taint as the original deportation.'").

recording, or, if the file is old, by filing a FOIA request with the Executive Office for Immigration Review ("EOIR").[52]

□ Contact Ms. Gladney to obtain a copy of her file[53] on the client at:
P.O. Box 413223
Kansas City, MO 64141

□ File a Motion to Dismiss the illegal reentry charge based on 8 U.S.C. § 1326(d).

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All removal orders where Ms. Gladney was involved – particularly those issued between 1997 and 2013 – should be carefully reviewed and scrutinized for validity. Likewise, any orders obtained by ICE where the noncitizen was not represented should also be scrutinized, and practitioners should check whether an immigration court hearing was held and that the judge asked the person questions to ensure the waiver of rights was knowing, voluntary and intelligent. At first glance, it is easy to overlook the inherent violations hidden within them, but these horcrux orders must be found and each must be nullified in order to restore the integrity of the immigration court system. It is only then that the scheme, under which thousands of individuals and their families were victimized, can be finally and fully dismantled.

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[i] *Rekha Sharma-Crawford* is a founding partner of Sharma-Crawford Attorneys at Law in Kansas City, MO. Known for aggressive and creative litigation strategies, she devotes her practice to representing clients in complex immigration matters including appeals and federal litigation. In recognition of her courage in the face of adversity, she was awarded the Kansas Bar Association's 2018 Courageous Attorney Award. She was also named as one of the 2018 Best of the Bar by the Kansas City Business Journal. Ms. Sharma-Crawford is active with the American Immigration Lawyers Association (AILA), and served as Chair of the AILA Midyear Conference – Removal Track in 2016, as Vice Chair of the Federal Litigation Steering Committee from 2015-2017, and served twice on the AILA National Conference planning committee, including Chair of the Due Process/Removal track. She also serves as a mentor through AILA's attorney mentoring program. Ms. Sharma-Crawford is a contributing author in AILA's The Waivers Book and has been a repeat instructor at the AIC Litigation Institute. She is also the Editor in Chief of the AILA Litigation Toolbox, 5th Ed. (2016). In 2012, she and her law partner/husband, recognizing the enormous gap in competent, indigent legal representation, opened the first nonprofit legal clinic dedicated solely to providing low-fee and pro bono representation for those in removal proceedings in the Kansas City Immigration Court. Prior to founding Sharma-Crawford Attorneys at Law in 2003, Ms. Sharma-Crawford spent several years working as an assistant district attorney in Sedgwick County, Kansas and Douglas County, Kansas.

[ii] *Genevra Alberti* is the sole full-time attorney at The Clinic at Sharma-Crawford Attorneys at Law, which is a nonprofit removal defense organization in Kansas City, Missouri, and is currently the only nonprofit west of St. Louis providing representation to those facing removal proceedings in the Kansas City Immigration Court. Ms. Alberti has represented close to 600 indigent noncitizens in removal proceedings – detained and not detained – since The Clinic opened in January 2012. She has also often provided Know Your Rights presentations to detained noncitizens in Kansas and Missouri. Ms. Alberti was also a founding member, and serves on the steering committee, of the Deportation Defense Legal Network (DDLN) in Kansas City, a group

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[52] *See* https://www.justice.gov/eoir/foia-facts for instructions.

[53] Again, though Ms. Gladney was allowed to resign from her employment at LAWMo in 2013, she somehow continues to have access to client files. It is for this reason that the initial demand for the file should be made to her directly.

dedicated to training local attorneys to handle immigration bond hearings and then pairing those attorneys with detained, indigent noncitizens to provide them pro bono representation for their bond hearings. Ms. Alberti has also presented on a variety of immigration-related topics at multiple national and local conferences and is a contributing author to the AILA Litigation Toolbox, 5th Ed. (2016). Prior to The Clinic's inception, Ms. Alberti practiced removal defense at Sharma-Crawford Attorneys at Law. She received her B.A. with honors from the University of North Carolina at Chapel Hill, and graduated *cum laude* from Washington University in St. Louis School of Law.