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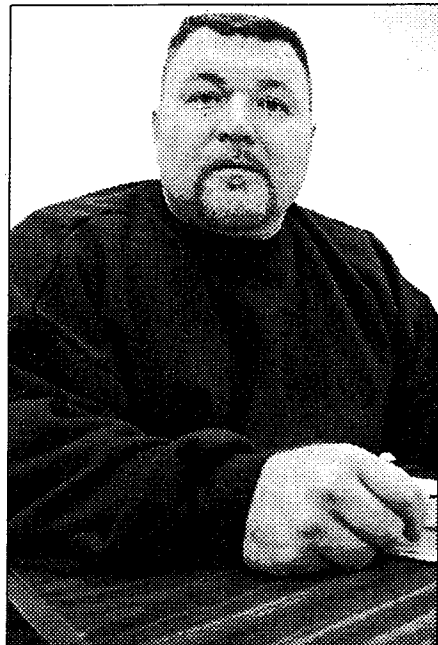
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ROBERT LEVINS / Daily Journal
WAITS AND WORRIES — "If it were just me, I'd be long gone. I'm fighting for the right to stay here for my boys. I made a promise to my wife," Joe Fernandez, who may be deported, said in his holding cell at Terminal Island INS prison.

New INS Deportation Laws Postpone Widower's Release

By Susan McRae
Daily Journal Staff Writer

After a long struggle, Joe Fernandez thought his years of bad luck, heroin addiction, prison and family tragedy were almost over.

A federal judge believed he paid his debt.

So did his lawyer, several local representatives, a U.S. senator and a county social worker.

Only the legal machinery of the Immigration and Naturalization Service has stood in his way.

Three months ago, U.S. District Judge Christine Snyder, clearly moved by the plight of the 45-year-old widower of two children, reduced Fernandez's illegal re-entry charges and sentenced him to time served.

In granting Fernandez his freedom, Snyder said, "I expect you to be the father I think you can be."

Yet, Fernandez remains locked up in the Terminal Island INS prison.

The immigration agency persists in

trying to deport him.

Despite an appellate court ruling that says it can't do so, the INS insists that a harsh new immigration law should be applied to Fernandez — retroactively.

When Congress passed the amendments to the Immigration and Nationality Act in 1996, Fernandez was awaiting parole having served more than two years in state prison.

Under the laws in effect at the time he pleaded guilty to second-degree burglary, Fernandez could have asked an immigration court to use its discretion to waive deportation.

With the new laws, Congress stripped immigration courts of the power to give discretionary waivers of deportation to noncitizens convicted of aggravated felonies.

So instead of restoring his residency status, the INS, citing the new laws, took Fernandez into custody after he served his time and prepared to deport him to El Salvador, a country he left when he was 6.

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Widower Continues to Fight For His Freedom and Family

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While Fernandez was locked up fighting his deportation, his American-born wife unexpectedly died of cancer. His younger son, who has learning disabilities, ended up in foster care. His older son was cared for by relatives and friends.

During the ensuing years, Fernandez was deported, returned illegally, found work, reunited his family and supported them — until the INS once again caught up with him.

Now, after getting his federal illegal re-entry charges dropped in August, Fernandez is back where he started.

And things are deteriorating fast.

His sons, whom he calls every day, are refusing to obey his elderly mother. Both are failing school. Jonathan, 12, is disruptive. Christopher, 15, is cutting class and in danger of being expelled.

His mother, who lives and cares for his sons in the house Fernandez bought just before his arrest, said she can no longer cope. She wants to sell the house and put both children in foster care.

Fernandez's mounting worries and frustration are heightened by the INS's refusal to grant bail or even reply to his requests.

"If it were just me, I'd be long gone," Fernandez, in navy prison sweats, said during an interview in the windowless, one-room holding cell at Terminal Island. "I'm fighting for the right to stay here for my boys. I made a promise to my wife."

Two weeks ago, the INS, without warning or explanation, brought Fernandez in handcuffs to the basement lockup at the downtown Los Angeles federal building, where the agency has offices. Only then did he learn that the INS had met with members of the Salvadoran consulate to arrange for his deportation.

Fernandez called his attorney, Federal Deputy Public Defender Michael Proctor, who immediately arranged for a stay of deportation pending consideration of his appeal.

Proctor has been representing Fernandez since he landed in federal court last year on illegal re-entry charges.

While trying to get the charges reduced, Proctor managed to get Fernandez bail from federal detention.

That's when the INS took over and transported Fernandez to Terminal Island.

Proctor's frustration in dealing with the agency equals that of Fernandez.

"They are like the Sphinx," Proctor said of his repeated requests for bail. "No information is coming out."

INS officials have declined comment on Fernandez case.

Proctor has been trying since August to get Fernandez released from INS detention, while working to get his permanent residency status restored.

If the agency doesn't respond soon, or turns him down, Proctor plans to file a

writ of habeas corpus with the federal court.

Meanwhile, an immigration judge has refused to rehear Fernandez's case, and Proctor has filed an appeal with the Board of Immigration Appeals in Falls Church, Va.

In his brief, due in two weeks, Proctor will argue that a federal court has ruled that Fernandez's prior deportation was unconstitutional, violated due process and was in error.

Additionally, Proctor will cite precedents to show that the 1996 law cannot be applied retroactively, *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999).

Quoting from the opinion, Proctor said, Fernandez's case presents one of the rare circumstances contemplated by the 9th Circuit, which stated that an alien may be able to establish that relief is available to him "under a specific factual showing that a plea was entered in reliance on the availability of a discretionary waiver under [the old law]."

To qualify for this relief, according to the 9th Circuit ruling, an alien must meet three conditions: His prior conviction must predate the 1996 law; his conviction must stem from a guilty plea; and his plea must have been entered into on the advice of counsel, including advice on the immigration consequences.

Fernandez meets all three conditions, Proctor said.

Proctor's argument also is supported by opinions in the 1st and 4th Circuits. However, the 3rd, 5th and 10th Circuits have ruled against aliens in similar cases. In the 10th Circuit case, the U.S. Supreme Court denied certiorari.

While Proctor works on getting Fernandez released, his client waits — and worries.

"There comes a time in someone's life when you have to change," Fernandez said. "Prison really woke me up."

While locked up after his burglary arrest in the early '90s, he kicked heroin, the root of his criminal behavior, and made a vow to turn his life around.

"But the slap in the face was immigration," Fernandez continued. "It humbled me. Trying to get someone to listen to you in immigration is like being between a rock and a hard place."

His old boss has told Fernandez he's holding his job.

But Fernandez doesn't know how much longer his mother can hang on. His children need the firm guidance of their father.

"They're walking all over grandma," Fernandez said of his children. "That house was an opportunity for them to have a home. We lived in a one-bedroom apartment before. I wanted them to grow up the American way, in a house with a dog and a cat."

"I'm hoping immigration gives me a bond so I can take care of things," he added, as the hour interview drew to a close. "That's all I want to do."