

Remedies for Ineffective Immigration Counsel



By Michael J. Wildes, Esq.

The Sixth Amendment to the U.S. Constitution guarantees that, in all criminal prosecutions, the accused shall "have the assistance of counsel for his defense." Nearly 200 years later, the Supreme Court decided in a landmark decision, *Strickland v. Washington*, that the right guaranteed by this amendment is the right to effective assistance of counsel. Inasmuch as immigration proceedings are civil in nature, rather than criminal, this 6th Amendment guarantee does not apply to lawyers providing immigration defense. However, appellate courts agree that if the legal services provided in an immigration case are unreasonably deficient, so much so that they are determined to be "fundamentally unfair," the lawyer may be in violation of the Constitution, and the noncitizen in the matter may be entitled to recourse against him. In other words, if an immigration lawyer commits a serious error in the representation of a client in a manner that harms the case, the client may appeal the decision based on ineffective assistance of counsel.

Matter of Lozada is the case that establishes the requirements one must meet in order to establish ineffective assistance

of counsel. First, the claim must be supported by an affidavit that sets forth in detail the agreement that was entered into with counsel with respect to the actions to be taken, and what representations counsel did or did not make to his client in this regard; second, the former counsel whose competence is being impugned must be informed of the allegations leveled against him and be given an opportunity to respond; and third, the appeal or motion must reflect whether a complaint has been filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. In addition, the applicant for relief must show also prejudice as a result of his attorney's inadequate representation. In New York, "prejudice" requires a showing that but for the attorney's ineffectiveness, the result of the case would have been different.

A claim of ineffective assistance may be made by a motion to the immigration court by an individual in removal proceedings, or by an appeal of a denial of a visa petition. A common example of ineffective assistance occurs when a lawyer fails to file a timely appeal, or submits a Notice of Appeal to the court indicating that he will follow up with a written statement in support of the appeal, but fails to do so. It should be noted that a claim of ineffective assistance of counsel is only valid when it applies to the conduct of a licensed lawyer, an accred-

ited representative, or to a non-lawyer who the claimant reasonably but mistakenly believes is a licensed attorney.

Protection for Noncitizen Criminal Defendants

A few years ago, the Supreme Court diverged from the established, century-old view that "deportation is not punishment" in the famous decision *Padilla v. Kentucky*. Jose Padilla was a Vietnam veteran and legal permanent resident, who had been in this country for over 40 years when he was found with a large amount of marijuana in his truck. On the word of his attorney, who told him he did not have to worry about deportation because he had been in this country so long, Padilla pled guilty to drug charges, which in fact made deportation virtually inevitable. The Supreme Court of Kentucky held that counsel was not required to inform a defendant of potential immigration consequences, and therefore the fact that Padilla's attorney misadvised him entitled Padilla to no basis for relief.


In a radical break from the traditional thinking that deportation is "collateral" to a criminal conviction and thus counsel was not required to advise clients of its possibility, the United States Supreme Court recognized that deportation is a "particularly severe penalty" that is inextricably intertwined with the criminal process. Acknowledging the devastating

effects that deportation has on individuals and families living in the U.S., the court held that a criminal defendant could validly claim ineffective assistance of counsel if his defense attorney failed to advise him of the potential immigration consequences of a guilty plea. Even when the ramifications of a particular guilty plea are unclear, counsel is required to offer advice to any defendant who is not a citizen that a plea may potentially result in adverse immigration consequences, mainly deportation. However, if the consequences are clear, counsel has an affirmative duty to correctly inform the client what they are.


Persons who believe that they may have been inadequately represented by counsel are advised to consult an experienced immigration attorney who can advise how to mitigate any damage done, as well as offer advice as to options to move forward.

* This article is based on information available as of its publication and is not intended to be all-inclusive or to furnish advice in a particular case. We are not responsible for any changes in regulations that may occur subsequent to publication. Please feel free to contact our office for further information and advice.

Michael J. Wildes, is the Managing Partner of Wildes and Weinberg, P.C. To contact Michael Wildes please email him at michael@wildeslaw.com and visit the firm's website at www.wildeslaw.com.



HELLO VIDEO & PHOTO STUDIO



hellovideo.com 212.203.4393
home appointments available 718.494.2998



Garb Consulting Group LLC
Let's talk about IT

Full IT Networking Services



Networks, Web Development, Google Apps Migration, Hardware Sales

Let's talk about I.T.

Fully Insured

1415 Queen Anne Road, Suite 210Teaneck, NJ 07666 **201-379-9234** | www.garbcg.com

ALMONITOR

THE PULSE OF THE MIDDLE EAST



Al-Monitor features unmatched reporting and analysis by prominent journalists and experts from the Middle East, including through its Egypt, Iran, Iraq, Israel, Lebanon, Palestine, Syria and Turkey Pulses.

www.al-monitor.com  @almonitor