

7-1-2008

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Recommended Citation

Michael S. Vastine, *Is Your Client Prejudiced? Litigating Ineffective-Assistance-of-Counsel Claims in Immigration Matters Arising in the Eleventh Circuit*, 62 U. Miami L. Rev. 1063 (2008)
Available at: <https://repository.law.miami.edu/umlr/vol62/iss4/6>

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Is Your Client Prejudiced? Litigating Ineffective-Assistance-of-Counsel Claims in Immigration Matters Arising in the Eleventh Circuit

MICHAEL S. VASTINE*

Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

—Justice William O. Douglas¹

The process of adjudicating asylum claims in the United States entails a graduated system of hearings. The first opportunity to present a case is before an asylum officer—a civil official—who conducts an interview with minimal participation by the applicant’s attorney. If unsuccessful, the applicant renews the application defensively in removal proceedings before an immigration judge—an administrative official within the Department of Justice. The hearing is an adversarial setting where the attorney for the applicant advocates against an attorney from the Department of Homeland Security’s Office of Chief Counsel. Counsel is generally necessary to present an effective case before the immigration court and on any appeal to the Board of Immigration Appeals.

The U.S. system represents the necessary tension between the guiding principles of refugee law, known as nonrefoulement,² and the rigorous examination by officers, judges, and counsel striving to ensure that the applicants satisfy requirements of credibility, corroboration, and a sufficient legal theory that mandates relief.

It is axiomatic that an asylum applicant has no experience in navigating the complexities of this system.³ Consequently, the applicant is

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1. *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

2. This term is defined as “[a] refugee’s right not to be expelled from one state to another, esp. to one where his or her life or liberty would be threatened.” BLACK’S LAW DICTIONARY 1083 (8th ed. 2004).

3. See Judge Robert A. Katzmann, U.S. Court of Appeals for the Second Circuit, Address at

overmatched when litigating pro se against the trained counsel representing the United States. The immigration courts do not have the authority to designate pro bono counsel for noncitizen respondents in their administrative proceedings. The consequence is that the asylum-seeking community is highly dependent on a private bar that varies in skill level, familiarity with the asylum process, and commitment to its clients. Immigration case law requires applicants to meet strict standards of proof in corroborating their claims. A central problem is whether counsel for these respondents has an equally high burden of effective advocacy or, at a minimum, a burden of informing the clients of their evidentiary obligations.

This article will deal with the representation of clients in their claims of ineffective assistance of counsel and assess the role of the Board of Immigration Appeals and the U.S. courts of appeals in ensuring that immigrants are afforded a fair hearing in their removal proceedings. The Board of Immigration Appeals has a long-established, three-pronged approach for raising a claim of ineffective assistance of counsel under *Matter of Lozada*, requiring the applicant to enter a sworn affidavit alleging counsel's responsibilities and their failure to fulfill these obligations, inform the counsel of the charge and permit them to respond, and report any ethical or professional violation to the relevant state bar disciplinary panel. In order to win a new hearing, the immigrant must also show that the defective performance of counsel negatively influenced the outcome of the case.⁴

The Eleventh Circuit has favorably viewed this requirement of demonstrating prejudice. Thus, before the Eleventh Circuit, pursuant to *Dakane v. U.S. Attorney General*, the applicant must show that the performance of counsel was so inadequate that there is a reasonable possibility that, but for the attorney's error, the outcome of the proceedings would be different.⁵ *Dakane* itself involves an attorney that failed to file a required brief and thus deprived a Somali asylum applicant of his right to appeal. The Eleventh Circuit rejected the petition for review because the immigration judge had found *Dakane's* testimony not credible.⁶ The court reasoned that the attorney's failure on appeal did not prejudice

the Orison S. Marden Lecture of the Association of the Bar of the City of New York: The Legal Profession and the Unmet Needs of the Immigrant Poor 5 (Feb. 28, 2007), available at http://www.abanet.org/publicserv/immigration/katzmann_immigration_speech.pdf ("Numbers alone cannot capture the human drama on display in the immigration process. All immigrants, whether or not refugees or asylum seekers, are largely strangers to our language, our culture, our laws, certainly the complicated maze of immigration laws.")

4. See *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (B.I.A. 1988), *aff'd sub nom.* *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988).

5. 399 F.3d 1269, 1274 (11th Cir. 2005).

6. See *id.* at 1275.

Dakane, as his own testimony was his undoing.⁷ The court did not address the fact that with adequate performance of counsel, Dakane might have contested and possibly reversed the negative credibility finding; and that he was therefore likely subject to prejudice by his counsel's negligence.

The court presently uses *Dakane* as the standard for reviewing cases alleging ineffective assistance of counsel. As of May 2008, *Dakane* has been cited almost 100 times by federal courts of appeals, with most of the citations coming from the Eleventh Circuit.⁸ The Eleventh Circuit has yet to find prejudice under the *Dakane* standard.

Dakane was decided under the deferential "abuse of discretion" standard that federal courts apply in cases arising within an administrative agency's area of expertise.⁹ However, the Board of Immigration Appeals and the Department of Justice (the agency that is being questioned regarding its expertise), in issuing decisions in cases arising in the Eleventh Circuit, rely on *Dakane* to reject cases for failing to demonstrate the requirement of prejudice. The facts of these cases are often further complicated by multiple layers of ineffective assistance and the failure of counsel to preserve issues for appeal or to properly follow established precedent or procedure.

This article will examine the seemingly disastrous results of cases like *Dakane* in processing the cases of asylum seekers and other immigrants facing deportation. It will further explore bar complaints and *Lozada* claims before the Department of Justice. The goal is to reveal whether *Dakane* is itself problematic or if it is simply indicative of failures of advocates in representing asylum seekers and presenting other defensive cases in removal proceedings.

I. THE EVOLUTION OF THE RIGHT TO EFFECTIVE COUNSEL IN CRIMINAL DEFENSE

In removal proceedings, noncitizens may be represented by an attorney or representative of their own choosing at no cost to the government.¹⁰ This representation may be provided by attorneys, law students and law graduates serving pro bono and with attorney supervision, nonattorney-accredited representatives, and other reputable individu-

7. *Id.*

8. This number was calculated after conducting a Westlaw search. It will presumably increase by the time this article is published and thereafter.

9. *See id.*; *see also* *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (explaining that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").

10. *See* 8 C.F.R. § 1003.16(b) (2008).

als.¹¹ While lists of local, free, legal-service providers are given to all respondents, the noncitizens generally must secure private counsel or they must proceed pro se. In contrast, and as in the criminal trial, the U.S. government is always represented by attorneys, in this context by assistant chief counsel from the Department of Homeland Security.

In a well-known series of cases, the U.S. Supreme Court evolved its position regarding the necessity of counsel in criminal cases and the essential role of effective representation to protect the rights of the accused. While *Gideon v. Wainwright* is famously known for establishing the right to counsel in criminal matters, as early as 1932 the Supreme Court had declared that the right to the aid of counsel is of a fundamental character.¹²

In *Gideon*, the Court reversed its prior decision in *Betts v. Brady*¹³ and recognized that in the adversarial system of criminal justice, any person summoned into court who is too poor to hire a lawyer cannot be assured a fair trial without assistance of counsel.¹⁴ The Court reasoned as follows:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally,

11. See *id.* § 1292.1.

12. 372 U.S. 335, 342-43 (1963) (citing *Powell v. Alabama*, 287 U.S. 45, 68 (1932)).

13. 316 U.S. 455 (1942).

14. *Gideon*, 372 U.S. at 342-44.

of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”¹⁵

Clarence Earl Gideon had been accused of a felony for breaking and entering a poolroom with intent to commit a misdemeanor.¹⁶ Despite the possibility of facing a lengthy prison sentence, the trial court denied Gideon’s request to appoint counsel for him on the ground that under Florida law only a defendant charged with a capital offense was entitled to such an appointment.¹⁷ Gideon challenged his conviction on the ground that his federal constitutional rights were violated by the trial court’s refusal to appoint counsel.¹⁸

At the time of Gideon’s conviction, the controlling Supreme Court precedent was *Betts v. Brady*, and the *Gideon* Court interpreted *Betts* as acknowledging that in some noncapital cases, a defendant may be able to show “special circumstances” that would mandate court-appointed representation.¹⁹ However, the burden remained on the defendant to show “special circumstances” to potentially establish a denial of due process.²⁰ With Gideon’s victory, defendants became assured of court-appointed representation whenever they faced the possibility of a substantial prison sentence.

A. *Right to Effective Counsel: Strickland v. Washington*

With the right to counsel assured, later cases sought to establish when, and if, there is a minimum standard of performance required to support a finding that a defendant received effective representation by either court-appointed or privately retained attorneys. In *Strickland v. Washington*, the U.S. Supreme Court ruled that the Sixth Amendment right to counsel is the right to the *effective* assistance of counsel, and that the benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adver-

15. *Id.* at 344–45 (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

16. *Id.* at 336.

17. *Id.* at 337.

18. *Id.*

19. *See id.* at 350 (Harlan, J., concurring).

20. *Id.*

sarial process that the trial cannot be relied on as having produced a just result.²¹ *Strickland* established a two-part analysis for determining whether defendants are entitled to vacate their convictions.²² First, the defendant must show that counsel's performance was deficient.²³ Second, the defendant must show that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.²⁴

Regarding the first prong, the defendant must show a denial of "reasonably effective assistance," considering all the circumstances, meaning that the representation fell below an objective standard of reasonableness.²⁵ Judicial scrutiny of counsel's performance must be highly deferential, and the Supreme Court directs that "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."²⁶ Furthermore, courts will presume that "counsel's conduct falls within the wide range of reasonable professional assistance."²⁷

The crimes at the heart of *Strickland* were gruesome and several.²⁸

21. 466 U.S. 668, 686 (1984).

22. *Id.* at 687. The Court held:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id.

23. *Id.*

24. *Id.* In rejecting Strickland's claim of ineffective assistance, "the trial court concluded that respondent had not shown that counsel's assistance reflected any substantial and serious deficiency measurably below that of competent counsel that was likely to have affected the outcome of the sentencing proceeding." *Id.* at 677.

25. *Id.* at 687 (citing *Trapnell v. United States*, 725 F.2d 149, 151-52 (2d Cir. 1983)).

26. *Id.* at 669, 689.

27. *Id.* at 689.

28. *Id.* at 671-72. The Court described the crime spree:

During a 10-day period in September 1976, respondent planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnapping and murder and appointed an experienced criminal lawyer to represent him.

. . . [Counsel] cut his efforts short, however, and he experienced a sense of

Justice O'Connor's decision begins with a five-page account of the crimes and the defendant's subsequent decisions preceding and during his trial, including his confession to three murders. In sentencing Strickland, the trial judge found overwhelming aggravating factors and little to no mitigating issues.²⁹

The Court proceeded to detail its concept of "prejudice," issuing the current standard that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," given the totality of the evidence.³⁰ As a matter of procedure, a court does not need to assess both prongs of the analysis if it is possible to dispose of the case for failing to make the requisite showing of prejudice. The Court held that other reviewing courts are not bound to follow a particular order, but may first "determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," but "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice," then the courts are permitted to do so.³¹

The courts have determined that they must maintain a flexible approach in adjudicating a claim of actual ineffectiveness of counsel to make an adequate inquiry into the fundamental fairness of the proceeding, which is being challenged. "In every case the court should be concerned with whether, despite the strong presumption of reliability, the

hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnapping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

Id. at 671–72.

29. *See id.* at 675. The Court detailed the proceedings at trial:

The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain. All three murders were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and shooting the murder victim's sisters-in-law, who sustained severe—in one case, ultimately fatal—injuries.

Id. at 674.

30. *Id.* at 694.

31. *Id.* at 697.

result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."³²

The *Strickland* Court ruled that Strickland's counsel's conduct and strategy were not unreasonable and the result of the hearing, in light of the egregious facts, did not indicate that the proceedings were unfair.³³ This was despite counsel's failure to develop psychological and character evidence to present in the sentencing phase of the trial. The Court further concluded that even if his counsel had failed in some way, Strickland would be unable to demonstrate sufficient prejudice to warrant setting aside his death sentence.³⁴ Specifically, the Court found:

[A]s a matter of law, the record affirmatively demonstrates beyond any doubt that even if [counsel] had done each of the . . . things [that respondent alleged counsel had failed to do] at the time of sentencing, there is not even the remotest chance that the outcome would have been any different. The plain fact is that the aggravating circumstances proved in this case were completely *overwhelming*³⁵

32. *Id.* at 696.

33. *See id.* at 699.

34. *Id.* at 699–700. The Court went on at length:

The trial court dealt at greater length with the two other bases for the ineffectiveness claim. The court pointed out that a psychiatric examination of respondent was conducted by state order soon after respondent's initial arraignment. That report states that there was no indication of major mental illness at the time of the crimes. Moreover, both the reports submitted in the collateral proceeding state that, although respondent was "chronically frustrated and depressed because of his economic dilemma," he was not under the influence of extreme mental or emotional disturbance. All three reports thus directly undermine the contention made at the sentencing hearing that respondent was suffering from extreme mental or emotional disturbance during his crime spree. Accordingly, counsel could reasonably decide not to seek psychiatric reports; indeed, by relying solely on the plea colloquy to support the emotional disturbance contention, counsel denied the State an opportunity to rebut his claim with psychiatric testimony. In any event, the aggravating circumstances were so overwhelming that no substantial prejudice resulted from the absence at sentencing of the psychiatric evidence offered in the collateral attack.

The court rejected the challenge to counsel's failure to develop and to present character evidence for much the same reasons. The affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person who was worried about his family's financial problems. Respondent himself had already testified along those lines at the plea colloquy. Moreover, respondent's admission of a course of stealing rebutted many of the factual allegations in the affidavits. For those reasons, and because the sentencing judge had stated that the death sentence would be appropriate even if respondent had no significant prior criminal history, no substantial prejudice resulted from the absence at sentencing of the character evidence offered in the collateral attack.

Id. at 676–77.

35. *Id.* at 677–78 (alterations in original) (citations and internal quotation marks omitted).

If there is only one plausible line of defense, counsel is required to conduct a “reasonably substantial investigation” into that line of defense because there can be no strategic choice that renders such an investigation unnecessary.³⁶ This same duty exists if counsel relies at trial on only one line of defense even though other defenses are available.³⁷ If counsel conducts such “substantial investigations,” into possible defenses, the strategic choices that counsel may make as a result “will seldom if ever” be found wanting.³⁸ In the end, the adversary system requires deference to counsel’s informed decisions, and such strategic choices must be respected in these circumstances as long as they are based on professional judgment.³⁹

Focusing on efficiency, the Court noted a concern of a possible proliferation of ineffectiveness challenges if the process was not deferential to reasoned judgment by trial counsel.⁴⁰ The Court feared that a less deferential system would lead to losing defendants increasingly following their actual trials with second trials—now focused on the ineffective nature of counsel’s defense.⁴¹ Counsel’s performance and even counsel’s willingness to serve could be adversely affected if subjected to this continuing analysis. “Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.”⁴²

Thus, any court deciding an ineffectiveness claim is restricted to the specific facts and chronology of the particular case when it determines the reasonableness of counsel’s challenged conduct.⁴³ This means that a convicted defendant making an ineffective-assistance claim must identify those acts or omissions of counsel that were *not* the result of reasonable professional judgment.⁴⁴ “The court must then determine

36. *See id.* at 680.

37. *Id.*

38. *Id.* at 681.

39. *Id.*

40. *Id.* at 690, 697. The Court explained:

The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Id. at 697.

41. *Id.* at 690 (“Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel’s unsuccessful defense.”).

42. *Id.*

43. *Id.*

44. *Id.*

whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."⁴⁵ In making that determination, *Strickland* advises that "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case."⁴⁶

The topic has rightly been highly contested since the *Strickland* decision was issued, with some prosecutors seeing the ineffective claim as a mechanism likely to be abused by the convicted.⁴⁷ In fact, the prejudice requirement is so rarely satisfied that some find that it stands more for forbidding only the most egregiously ineffective behavior, rather than requiring effectiveness.⁴⁸

B. *The Successful Ineffective-Assistance Challenge: Wiggins v. Smith*

In 2003 the U.S. Supreme Court did find ineffective assistance in

45. *Id.*

46. *Id.*

47. See James Podgers, *The Blame Game: Criminal Defendants Try To Reverse Convictions by Claiming Ineffective Counsel*, A.B.A. J., Sept. 1995, at 44.

Prosecutors, however, tend to view claims of ineffective representation more as another element in the repertoire of tactics available to defendants seeking to overturn convictions rather than a symptom of a crumbling network of effective defense services.

"We hear so much about indigent representation falling below par, but I do not believe that to be the case," asserts Michael P. Barnes, prosecuting attorney for St. Joseph's County, Indiana.

Id.; see also Gary Hengstler, *Attorneys for the Damned*, A.B.A. J., Jan. 1, 1987, at 56.

"Before I got involved with this, I used to think the death penalty was fairly imposed," said Ronald Tabak, special counsel at Skadden, Arps, Slate, Meagher and Flom in New York. "After all, everything I had read suggested that it was the death row inmates who were abusing the system through repeated frivolous appeals."

Id. This is also a common complaint among the assistant chief counsel who prosecute immigration matters, some of whom remark that an immigration case is never over until the immigrant wins.

48. See Douglas McCollam, *The Ghost of Gideon*, AM. LAW., Mar. 2003, at 64.

"*Gideon* is of immense symbolic importance," says Abe Krash, an Arnold & Porter partner who worked with [future Supreme Court Justice Abe] Fortas on the case, "but in practice there's a great gap between the promise and how it's been realized." In part that's because courts have proven amazingly tolerant of shoddy lawyering, like the 72-year-old lawyer in Texas who slept through much of his client's capital murder case. Or the lawyer in California arrested for drunk driving on the way to pick a jury in his client's murder trial. Or the lawyer in Georgia who didn't make a single objection during his client's capital murder trial. . . . Yet in none of the cases cited above was the lawyer's conduct deemed sufficiently bad to require a reversal on appeal. "If *Gideon* just means having a warm body in court sitting next to the defendant, we might as well not call it a constitutional guarantee," says Kathryn Jones of the National Association of Criminal Defense Lawyers.

Id.

Wiggins v. Smith, a challenge to a capital-sentencing case in which the counsel was found to have deviated from practice standards during pre-sentence investigation.⁴⁹ Challenging the adequacy of his representation at sentencing, Wiggins argued that his attorneys had rendered constitutionally defective assistance because they failed to investigate and present mitigating evidence of his dysfunctional background. To support his claim, he presented testimony by a licensed social worker who was certified as an expert by the court.⁵⁰ The social worker's testimony was exclusively for the sake of the appeal to show the available defense not presented by Wiggins's counsel. The expert testified concerning an elaborate social-history report he had prepared containing evidence of the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents.⁵¹ Relying on state social services, medical and school records, as well as interviews with Wiggins and numerous family members, the expert chronicled Wiggins's horrific life history.⁵²

The Court found trial counsel's failing efforts in presenting the case to reflect ineffectiveness, more than unsuccessful strategic choices. It applied its discussion from *Strickland*:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be

49. 539 U.S. 510, 533–34 (2003).

50. *Id.* at 516.

51. *Id.* at 516–17.

52. *See id.* The Court relayed the expert's testimony:

According to [the] report, petitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner—an incident that led to petitioner's hospitalization. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically[] and, as petitioner explained to [the expert], the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor.

Id. (citations omitted).

directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.⁵³

The record showed that Wiggins's counsel's diligence was below the standard level of practice, which at the time of Wiggins's trial included the preparation of a social-history report:

Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report. Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as "guides to determining what is reasonable." The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.⁵⁴

With "ineffectiveness" established by counsel's break from accepted professional norms, Wiggins still needed to show prejudice. Unlike in *Strickland*—where the Court gave much attention to the scope of the defendant's crimes and found their numerosity and aggravating factors so overwhelming that it was unlikely that mitigating factors could have helped Mr. Strickland avoid the death sentence—the *Wiggins* Court focused on the compelling personal story of the defendant: "Wiggins' sentencing jury heard only one significant mitigating factor—that Wiggins had no prior convictions. Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."⁵⁵ Since a single juror could have saved Wiggins from the death penalty, it was deemed that prejudice was shown, as the outcome would have been different if the evidence had been properly developed and presented by effective counsel.

Although Wiggins was successful, the case represents the exception, rather than the norm, in challenges based on ineffective assistance, as evidenced by the fact that *Wiggins* was only the second death-penalty reversal by the Supreme Court after *Strickland*, with the first reversal, *Williams v. Taylor*,⁵⁶ being decided in 2000, sixteen years after *Strick-*

53. *Id.* at 521–22 (quoting *Strickland*, 466 U.S. at 690–91) (alteration in original) (internal quotation marks omitted).

54. *Id.* at 524 (citations omitted).

55. *Id.* at 537.

56. 529 U.S. 362 (2000).

land. *Strickland's* two-pronged approach is extremely limiting, such that one must question what substantive protections result from the noble intentions of *Gideon*.⁵⁷ In fact, despite surveys showing that the federal bench found the defense bar to be grossly inadequate, a survey of cases from the first four years after *Strickland* was decided revealed that in all federal courts, cause for reversal under the two-pronged approach was found in only 4% of cases.⁵⁸

II. DUE-PROCESS CONCERNS AND RIGHT TO COUNSEL IN IMMIGRATION PROCEEDINGS

As discussed above, there is no right to appointed counsel in immigration proceedings. Arguments have been made for providing representation to all immigrants, but at the present those without means to

57. See Martin C. Calhoun, Note, *How To Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 455–56 (1988).

Replacing the amorphous and virtually insurmountable *Strickland* standard with [a] predictable and objective categorical approach will provide defense counsel, lower courts, and defendants much-needed guidance on how to vindicate the sixth amendment right to effective assistance of counsel. *Strickland's* prejudice prong is in large measure responsible for transforming a standard meant to protect the basic constitutional right to effective assistance of counsel into the proverbial “eye of the needle” through which few defendants are able to pass. 43.3% of all the unsuccessful ineffective assistance claims brought under *Strickland* have been rejected solely for lack of prejudice. Rather than repeatedly paying cynical lip service to the fundamental constitutional importance of the right to effective assistance of counsel, the Supreme Court should abolish the prejudice requirement for most cases.

Id. (citations omitted).

58. *Id.* at 430–31.

Three different kinds of information indicate that the overall quality of defense counsel performance is inadequate and that *Strickland* was built on a shaky foundation. First, [a survey of] all ineffective assistance claims reviewed by federal circuit courts between the time of the *Strickland* decision and May 1988, shows that the circuit courts explicitly found that counsel's performance did not fall outside of the wide range of reasonable professional conduct in only 54.3% of all ineffective assistance claims. Conversely, only 4.3% of all ineffectiveness claims resulted in reversals. Of the remaining claims resolved only by a finding of no prejudice, the court indicated that defense counsel's performance was inadequate in 5.3% of the total claims even though the conviction was affirmed. Thus, even when evaluated under *Strickland's* excessively deferential performance prong—with the “easy way out” provided by the prejudice prong—counsel's performance was unreasonable at least 4.3% of the time, and upon closer scrutiny of the courts' opinions that figure approaches ten percent. If *Strickland* were not so deferential to defense counsel's performance and did not encourage lower courts to avoid the question of inadequate representation by making solely a prejudice determination, courts undoubtedly would have found unreasonable performance far in excess of ten percent of the claims.

Id. (citations omitted).

retain private counsel must either proceed pro se or, in some fortunate circumstances, with the aid of an attorney, with a nonprofit organization, or law-school clinic providing services free of charge.⁵⁹ Unfortunately, immigrants, particularly asylum seekers, are frequently poor, and their access to quality representation is correspondingly minimized. Although there are many quality attorneys specializing in immigration-defense work, there is ample anecdotal and empirical evidence that a great deal of inadequate, if not illegal, representation is carried out by attorneys and nonattorneys throughout the country.⁶⁰ Concerns over quality of representation led the Department of Justice, Executive Office for Immigration Review to issue its own rules for disciplining practitioners:

While most practitioners adequately represent their clients in immigration matters, a small minority of practitioners do not meet the minimum standards set forth in this rule and an even smaller minority may take unfair advantage of the very clients they have promised to help. Others have engaged in conduct that has rendered them unfit to practice law, as determined by the state courts which originally licensed them to practice. The practitioners who should not, and in fact cannot, be permitted to continue to practice before EOIR and the Service are the practitioners who will primarily be affected by this

59. See Katzmann, *supra* note 3, at 7–13. Katzmann notes:

In 1999, Senator Daniel Patrick Moynihan proposed a mandated counsel pilot project in three Immigration and Naturalization Service districts, arguing that asylum seekers should have the right to representation in removal provisions and that such provisions would be cost effective by obviating the need for frequent continuances for asylum seekers who search for pro bono legal support. Senator Diane Feinstein proposed legislation mandating legal representation for unaccompanied children in immigration proceedings, reasoning that youngsters should not be expected to navigate the immigration process.

Id. (citation omitted).

60. *Id.* at 4–6. Katzman states:

I might also say, from sitting on an appellate court, that the quality of representation varies widely. There are, of course, many lawyers in the immigration bar who serve their clients well, who submit briefs which reflect considerable thinking; they deserve our praise and appreciation. But too many of the briefs which I see are barely competent, often boilerplate submissions. John Palmer, a superb staff attorney with the Second Circuit, undertook a study with coauthors Stephen Yale-Loehr and Elizabeth Cronin, and determined that ten law offices (most with just one attorney) had 34.87 of the petitions for review pending in the Second Circuit on April 21, 2005, and that the total for top 20 offices was 46.54. What is particularly striking is that several of these solo practitioners each had more than 100 cases pending for review. From my vantage point, one cannot help but feel that at some point the quality of representation suffers under the volume of cases.

Id. at 6.

rule.⁶¹

A critical procedural safeguard, the right to effective counsel ensures that our advocacy system will achieve its “ultimate goal of affording people a fair trial, and allowing the truth to surface.”⁶² But unscrupulous attorneys may clog the legal system and cause problems by coaching their clients to lie, filing false claims on their behalf, and filing frivolous appeals.⁶³

Quality representation is essential to succeed in immigration cases. The difference in the approval rates in asylum cases is astounding—those represented by counsel are much more likely to prevail than those who appear *pro se*.⁶⁴ Immigration cases tend to be very fact-intensive.⁶⁵ In the asylum context, respondents are charged with a high burden of proof and strict corroboration requirements.⁶⁶ They are expected to provide any and all documentation to support central and collateral elements of their claims, or alternatively argue its reasonable unavailability.⁶⁷ In the context of defensive waivers of criminal grounds of removal, case law has established a framework of factors that the applicants must satisfy, with direct documentation of their life in the United States and the prospective effects of their removal on their families and communities.⁶⁸ In both contexts, immigrants must be thor-

61. Professional Conduct for Practitioners—Rules and Procedures, 65 Fed. Reg. 39,513, 39,514–15 (June 27, 2000) (to be codified at 8 C.F.R. pts. 3, 292).

62. The Honorable Carlos T. Bea, U.S. Court of Appeals for the Ninth Circuit, Address to the Board of Immigration Appeals and Immigration Judges (Aug. 10, 2007), in 12 BENDER'S IMMIGR. BULL. 1357, 1361 (2007).

63. *Id.*

64. TRAC Immigration, Immigration Judges, <http://trac.syr.edu/immigration/reports/160> (last visited June 5, 2008) (“The data indicate that an important determining factor in the decision process is the presence or absence of legal representation. While having a lawyer by no means ensures success—64% of these requests are denied—the denial rate for those without it is far higher, 93%.”) [hereinafter TRAC, Immigration Judges].

65. Katzmann, *supra* note 3, at 6. Katzmann observes:

Proceedings before the immigration judge are fact-intensive. An immigrant often has limited fluency with the English language, and the immigration judge must work with a translator in the effort to understand the immigrant's case; frequently, because of the language difficulty, the judge must ask the immigrant the same question repeatedly in order to be secure about his or her complete answer. An immigrant who appears *pro se* or does not have the benefit of adequate counsel will be at a disadvantage in such proceedings.

Id.

66. See *In re S-M-J*, 21 I. & N. Dec. 722, 724 (B.I.A. 1997) (noting that while a respondent may be able, in some cases, to establish their claim through credible testimony alone, available supporting documentation must be submitted or its absence explained).

67. See *id.*

68. See *Matter of Marin*, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978); As another court explained:

[F]avorable considerations include such factors as family ties within the United States, residence of long duration in this country . . . , evidence of hardship to the

oughly prepared to present their testimony, as their credibility is central to their claims.⁶⁹

Recently, the dramatic inconsistency in asylum-grant rates between immigration judges has sparked controversy.⁷⁰ For example, within the Miami Immigration Court, immigration judges' denial rates of asylum claims range from 22.3% to 96.7%.⁷¹ In New York, two judges denied asylum requests less than 11% of the time and four denied requests more than 90% of the time.⁷²

Nationally, the judge-to-judge differences in asylum rates for applicants from single countries is remarkable. Chinese applicants range from a denial rate of 7% up to a denial rate of 95%.⁷³ Even within a single court there is dramatic variation. The denial rate of asylum cases for judges in Los Angeles varied from 27% to 87%.⁷⁴ Nationally, judge-to-judge denial rates for Haitians ranged between 16% and 99%.⁷⁵ Judge-to-judge asylum denial rates for Colombians were as low as 2% and as high as 96%, including a Miami range of denial rates from 16%

respondent and his family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value or service to the community, proof of genuine rehabilitation if a criminal record exists and other evidence attesting to a respondent's good character. Among the factors deemed adverse to an alien are the nature and underlying circumstances of the grounds of exclusion or deportation (now removal) that are at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, . . . other evidence indicative of a respondent's bad character or undesirability

In re C-V-T, 22 I. & N. Dec. 7, 10 (B.I.A. 1998) (citing *Matter of Marin*, 16 I. & N. Dec at 584-85).

69. Katzmann, *supra* note 3, at 4. Katzmann expounds:

Thus, quality legal representation in gathering and presenting evidence in a hearing context and the skill in advocacy as to any legal issues and their preservation for appeal can make all the difference between the right to remain here and being deported. It also means that getting effective counseling BEFORE, not after, petitioning for relief or getting immersed in proceedings provides the best chance for fleshing out the merits of the case, avoiding false or prejudicial filings, and securing lawful status or appropriate relief.

Id.

70. The Transactional Records Access Clearinghouse ("TRAC") has compiled and maintained exhaustive data on this subject. See TRAC, Immigration Judges, *supra* note 64; see also Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 302 (2007).

71. See TRAC, Immigration Judges, *supra* note 64 (referring to charts included in figure 4 listing percentages of denials for different judges and asylum seekers of different nationalities).

72. *Id.*

73. TRAC Immigration, Asylum Disparities Persist, Regardless of Court Location and Nationality, <http://trac.syr.edu/immigration/reports/183> (last visited June 5, 2008).

74. *Id.*

75. *Id.*

to 97%.⁷⁶ The conclusion of TRAC was that the wide range of disparities in how asylum matters are decided—regardless of the perspective from which they are examined—points strongly to a “dysfunctional system where the law is not the law.”⁷⁷

In any legal context, lawyers and their clients must strive to develop a complete record before the initial fact finder. In the immigration context, this is of paramount importance, not only to secure victory at the onset of the case, but to prepare for inevitable appeals. What is filed and what is said have enduring effects. Immigration judges will often make findings of adverse credibility based on the disparity between the two.

Despite (or perhaps because of) the vulnerability of many immigration clients, there are many instances of attorneys who accept and litigate cases without taking the necessary time to fully develop the factual, cultural, and legal issues present. This practice style dooms the immigrant both at the trial and appellate levels.⁷⁸

What record is made by the immigrant, therefore, and what legal points are preserved for review in the record are critical to the outcome, especially where the alien has the burden of coming forward with evidence and the burden of proof of entitlement to status or relief. Even if a[n] [appellate] judge would have ruled differently in the first instance, he or she has no authority to do so.⁷⁹

As Judge Katzmann described:

Especially for those fleeing from persecution, however, their first encounters with immigration authorities may be difficult. Experience has led them to be distrustful and fearful of government. Having lived life in the shadows in their native lands, they enter this country afraid and often are easy prey for unscrupulous parties. Not knowing where to turn, anecdotal evidence suggests that they often depend on notarios and travel agents—persons who generally share the language and culture—for advice as to how to secure legal entry. And anecdotal evidence suggests that not all notarios and travel agents are com-

76. TRAC Immigration, Court-by-Court Disparity in Asylum Decisions, http://trac.syr.edu/immigration/reports/183/include/2_citydisparity.html (last visited June 5, 2008).

77. *Id.*

78. Katzmann, *supra* note 3, at 5. Katzmann expounds:

Often times, the reviewing appellate judge, who is constrained at the time the case comes before her, is left with the feeling that if only the immigrant had secured adequate representation at the outset, the outcome might have been different. For the immigrant who is ultimately deported, the consequences of faulty representation are devastating. Unlike a person in the U.S. who can sue a lawyer for malpractice, or file a bar complaint, a deported immigrant for financial, geographic or other reasons, is unlikely to pursue such recourse.

Id.

79. *Id.* at 4.

petent or honest; travel agents often refer the immigrants to persons with whom they have relationships, but who are not licensed to practice law. These unauthorized practitioners, sometimes known, misleadingly as “notarios,” charge immigrants for their services in filing documents and preparing applicants for relief and benefits, but often lead the immigrants astray with incorrect information and terrible advice with lasting, damaging consequences that can fatally prejudice what otherwise would be a proper claim to entry. The immigrants are also referred to licensed lawyers, too many of whom render inadequate and incompetent service. These attorneys do not even meet with their clients to flush out all the relevant facts and supporting evidence or prepare them for their hearings; these are “stall” lawyers who hover around the immigrant community, taking dollars from vulnerable people with meager resources. They undermine trust in the American legal system, with damaging consequences for the immigrants’ lives.⁸⁰

Judge Bea is a bit more blunt:

Although the immigration bar certainly has some of the best and most dedicated attorneys, it is also an area that attracts some of the worst. First, the clients tend to be uninformed about how the American justice system operates. They have few connections with business and community leaders who can inform them. They unquestioningly accept whatever the attorney tells them. Second, if malpractice is committed, the likely result is the client is removed and no malpractice suit is ever filed.

Therefore, we must be especially vigilant about policing the immigration bar.⁸¹

III. DISCIPLINE WITHIN THE STATE BARS AND THE ELEVENTH CIRCUIT

The primary purpose of the disciplinary process is to protect the public. Lawyers who have engaged in serious misconduct, such as theft of client funds or certain crimes, may be suspended or disbarred. Other types of misconduct, such as not communicating with clients or failing to pursue a case diligently, may result in an admonishment or reprimand, or the attorney being placed in a diversion or probation program.⁸² Lack of competence and lack of diligence may result in punishment ranging from an admonishment to disbarment, depending on the severity of the

80. *Id.* at 5.

81. The Honorable Carlos T. Bea, *supra* note 62, at 1361.

82. See generally The Florida Bar, Consumer Pamphlet: Inquiry Concerning a Florida Lawyer, <http://www.floridabar.org/tfb/TFBConsum.nsf/48e76203493b82ad852567090070c9b9/c5b7d247a0c9c45a85256b2f006c6186?OpenDocument> (last visited May 6, 2008).

infraction.⁸³

For example, in 2006 there were 72,695 attorneys with active licenses to practice in Florida.⁸⁴ Of the 9063 complaints of lawyer misconduct that were filed, only 557 lawyers were charged.⁸⁵ In Georgia, during 2005 there were 28,689 attorneys.⁸⁶ There were 2500 complaints filed against the attorneys.⁸⁷ Of these complaints, 356 were investigated and 112 were dismissed, resulting in 123 different attorneys charged for the remaining 244 proven allegations.⁸⁸ Two-thousand-thirty-nine were dismissed for lack of jurisdiction.⁸⁹

One example of Florida attorney discipline for conduct in the immigration context, *Florida Bar v. Alvarez*, involved a lawyer who handled a high volume of matters before the immigration court.⁹⁰ Alvarez worked in conjunction with a religious organization that referred him cases that he represented at “reduced fee[s].”⁹¹ In the ten complaints consolidated into a legal action against him, it was apparent that he was only able to maintain the pace of his high-volume practice by failing to prepare adequately each case or meet with the clients in advance of hearings. As found by the referee making findings on behalf of the Florida Supreme Court:

- 4) Respondent’s first contact with the [clients] occurred on October 19, 1999, prior to their Master Calendar Hearing.
- 5) Respondent agreed to appear with the [clients] at their Master Calendar Hearing and received a fee from [them] for this appearance.
- 6) On October 19, 1999, Respondent appeared with [them] at the Master Calendar Hearing during which the Individual Hearing on [their] asylum applications was scheduled for January 10, 2000.
-
- 8) Respondent’s next contact with the [clients] occurred on January

83. See A.B.A. JOINT COM. OF PROF’L SANCTIONS, STANDARDS FOR IMPOSING LAWYER SANCTIONS §§ 4.4, 4.5 (1992).

84. ABA CTR. FOR PROF’L RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS (2006), available at <http://www.abanet.org/cpr/discipline/sold/06-ch1.pdf>. The Florida Bar does not maintain data on the nature of the practices of the disciplined attorneys so it is not possible to know the number of complaints or orders of discipline issued to immigration practitioners.

85. *Id.*

86. ABA CTR. FOR PROF’L RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS (2005), available at <http://www.abanet.org/cpr/discipline/sold/05-ch1.pdf>.

87. *Id.*

88. *Id.*

89. *Id.*

90. No. SC06-940, 2007 Fla. LEXIS 1217 (Fla. June 21, 2007). The details of the case are laid out in more depth in the referee’s report. See Fla. Bar v. Alvarez, Case No. SC06-940 (Fla. June 21, 2007) (Rep. of Ref.), available at www.floridasupremecourt.org/clerk/briefs/2006/801-1000/06-940_ROR.pdf.

91. See *Alvarez*, Case No. SC06-940, at *3.

10, 2000. On that date Respondent met with [them], prior to their Individual Hearing, and then proceeded to represent [them] at their Individual Hearing.

9) The [clients'] request for asylum was denied during the Individual Hearing; Respondent acknowledges that the [clients] believe asylum was denied due to inadequate preparation by Respondent.⁹²

The referee made further findings that, in other matters, Alvarez contributed to the failure of his clients' cases because he missed appeal deadlines by filing incorrect addresses with the court, caused clients to miss hearings by sending notices to incorrect addresses, failed to communicate with his clients to properly develop their cases, caused a client to abandon a possible form of relief by not filing an application in a timely manner, and failed to submit necessary corroborating documentation in accordance with an established court deadline.⁹³ Despite this extreme negligence, Alvarez received just a ninety-day suspension and a fine of \$2,251.90.⁹⁴

State bars are not alone in instituting discipline. On occasion, a federal court sees fit to sanction members of its bar. For example, an immigration practitioner received a sixty-day suspension after the U.S. Court of Appeals for the Eleventh Circuit referred his conduct to the Florida Bar.⁹⁵ The referee in the matter found the following:

[O]f 85 petitions filed by Mr. Jean-Joseph after 1 January 2001, 43 were dismissed for want of prosecution or failure to file timely notices of appeal. Mr. Jean-Joseph filed 26 motions to reinstate, of which 16 were granted and 10 were denied. The Eleventh Circuit's Final Disciplinary Order further found that the Respondent failed to appropriately supervise the activities of his associates who actually prepared the briefs, but were not admitted to practice before the Court. The Order sanctioned the Respondent as follows:

- A. Respondent [was] suspended from the practice of law in the immigration courts for 3 months;
- B. Respondent [was] publicly reprimanded and admonished;
- C. Respondent [was required] to comply with The Florida Bar's Law Office Management course;

92. *Id.* at *4.

93. *See id.* at *6–16.

94. *Alvarez*, 2007 Fla. LEXIS 1217, at *1, *2. Alvarez was also ordered to attend and successfully complete ethics school. *Id.* at *1.

95. *See Fla. Bar v. Jean-Joseph*, 952 So. 2d 1192 (Fla. 2007). Again, the details of the case, including information about the Eleventh Circuit's order, are laid out in more depth in the referee's report. *See Fla. Bar v. Jean-Joseph*, Case No. SC06-1649 (Fla. Feb. 15, 2007) (Rep. of Ref.), available at www.floridasupremecourt.org/clerk/briefs/2006/1601-1800/06-1649_ROR.pdf.

D. Respondent [was] required to attend 2004 Immigration Conference; and

E. Respondent [was] required to pay costs of disciplinary proceedings.⁹⁶

In each of the examples above, the conduct of the attorneys was detrimental to the development of the clients' cases at trial or to the presentation of issues on appeal. In some cases, the clients were both prevented from building an adequate record and from appealing the legal findings for their removal due to negligence of the same attorney. This phenomenon seems to highlight Justice Marshall's concerns about properly identifying cases when ineffective assistance attaches to a case, particularly at the appellate level, because that it is impossible to identify if flaws in a record are the result of a weak case or if it simply reflects the inadequacy of the attorney who was ineffective in developing the case.⁹⁷

IV. INEFFECTIVENESS IN IMMIGRATION LITIGATION

A. *Board of Immigration Appeals: Lozada and its Application*

The primary controlling case from the Board of Immigration Appeals is *Matter of Lozada*.⁹⁸ *Lozada* largely parallels the principles from *Strickland* and *Wiggins* regarding the necessity of demonstrating both ineffective assistance and prejudice for the immigrant-respondent to prevail in seeking a rehearing of the case.⁹⁹ But *Lozada* also went a step further than these other cases by creating additional procedural requirements, specific to the immigration context, for establishing an ineffective case prior to presenting the matter to the courts for review.¹⁰⁰

Lozada concerned a resident alien who was subject to deportation proceedings because he had been convicted of a crime involving moral

96. *Jean-Joseph*, Case No. SC06-1649, at 3 (internal quotation marks omitted).

97. *Strickland v. Washington*, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting).

On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel. In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.

Id. (citation omitted).

98. 19 I. & N. Dec. 637 (B.I.A. 1988), *aff'd sub nom.* *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988).

99. *See Matter of Lozada*, 19 I. & N. Dec. at 638.

100. *See id.* at 639.

turpitude within five years of his admission to the United States.¹⁰¹ The judge rejected Lozada's application for a discretionary waiver of his deportation under former Section 212(c) of the Immigration and Nationality Act ("INA").¹⁰² The judge also rejected Lozada's request for voluntary departure after determining that he was statutorily ineligible for this limited benefit because of the same conviction.¹⁰³ Lozada filed a timely notice of appeal with the Board of Immigration Appeals and asserted that he would file a subsequent legal brief.¹⁰⁴ Lozada failed to file any such brief and his appeal was denied for having "had in no meaningful manner identified the claimed error in the immigration judge's comprehensive decision."¹⁰⁵ He subsequently sought to reopen his deportation proceedings by claiming ineffective assistance of counsel in that his counsel had failed to file a brief or statement explaining the basis for appeal on his behalf.¹⁰⁶

The board held that "[a]ny right a respondent in deportation proceedings may have to counsel is grounded in the Fifth Amendment guarantee of due process," but "[i]neffective assistance of counsel in a deportation proceeding is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case."¹⁰⁷ Therefore to prevail in a motion to reopen, an alien must show not just ineffective assistance of counsel, but assistance that was so ineffective that it impinged upon the fundamental fairness of the hearing in violation of the Fifth Amendment Due Process Clause. The board held, "[o]ne must show, moreover, that he was prejudiced by his representative's performance."¹⁰⁸

The board expressed concern for efficiency and also sought to avoid the possibility that an alien respondent could, by missing an appointed briefing deadline, "circumvent at will the appeals process, with its regulatory time restraints," and then proceed at his or her later

101. See *id.* at 637–38, 640 (explaining how Lozada was convicted of obtaining money under false pretenses).

102. See *id.* at 640. Former Section 212(c) was repealed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, but it remains codified at 8 C.F.R. § 212.3 (2008). In its most common form, it requires that an applicant establish eligibility by having been a legal resident in the United States for seven years, having pleaded guilty to a ground for removal prior to April 24, 1996, and not having served more than a five-year sentence for the deportable offense. *Id.* § 212.3 (f)(2), (f)(4), (g).

103. See *Matter of Lozada*, 19 I. & N. Dec. at 640.

104. *Id.* at 638.

105. *Id.*; see also *Matter of Valencia*, 19 I. & N. Dec. 354, 355 (B.I.A. 1986) (holding that failure to specify reasons for an appeal is grounds for summary dismissal under 8 C.F.R. § 3.1(d)).

106. *Matter of Lozada*, 19 I. & N. Dec. at 638.

107. *Id.*

108. *Id.* (citing *Mohsseni Behbahani v. INS*, 796 F.2d 249 (9th Cir. 1986)).

convenience by “then claiming ineffective assistance of counsel.”¹⁰⁹ The board’s concern for efficiency also led it to pronounce a procedure for properly advancing a claim of ineffective assistance. Under the new standard:

A motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts. In the case before us, that affidavit should include a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken on appeal and what counsel did or did not represent to the respondent in this regard. Furthermore, before allegations of ineffective assistance of former counsel are presented to the Board, former counsel must be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel, or report of counsel’s failure or refusal to respond, should be submitted with the motion. Finally, if it is asserted that prior counsel’s handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.¹¹⁰

The board determined that these procedural requirements were necessary for efficiency, accuracy of adjudications, and to curb any potential for abuse, given the substantial number of claims of ineffective assistance of counsel that come before it. Lozada’s claim was denied for failure to comply with any of these requirements.¹¹¹

The safeguards of *Lozada* contrast with the de novo review that the board was previously forced to undertake based on the record before it.¹¹² Additionally, under *Lozada*, respondents have notice that they must establish prejudice in the underlying proceeding that resulted from

109. *Id.* at 639; *see also* *Anin v. Reno*, 188 F.3d 1273, 1278, 1279 (11th Cir. 1999). *Anin* held that an ineffective-assistance claim was appropriately denied where the applicant filed a motion to reopen a case based on his exceptional circumstances almost two years after an in absentia deportation order was issued even when the attorney had not advised the client of the hearing date (only the attorney—not the client—received notice of the hearing). The court noted that filing deadlines are necessarily arbitrary and harsh and apply even if the client is without fault.

110. *Id.*

111. *Id.* at 639–40.

112. *See* *Matter of Matelot* 18 I. & N. Dec. 334, 336 (B.I.A. 1982). Appealing the denial of his asylum application, the Haitian applicant in *Matelot* alleged that

he was denied effective assistance of counsel because his present counsel was not competent to handle [his] case, having no prior experience in immigration law. After reviewing the proceedings and the brief on appeal, we are unpersuaded that the applicant has sustained his burden of establishing that he was denied effective assistance of counsel.

Id.

the ineffective representation. In Lozada's case, the board found that he had, in fact,

received a full and fair hearing at which he was given every opportunity to present his case. . . . The immigration judge considered and properly evaluated all the evidence presented, and his conclusions that [Lozada] did not merit a grant of . . . relief as a matter of discretion . . . are supported by the record.¹¹³

In other words, Lozada could not show that, had he filed a proper appellate brief, there was any significant error in the underlying decision. Therefore, he could not claim any meaningful denial of his due process rights simply because his direct appeal was summarily dismissed, as the appeal itself was unlikely to prevail. Thus, the board found no prejudice in any alleged failing by Lozada's appellate counsel.

B. *Evolution of Lozada: Subsequent Cases from the Board of Immigration Appeals*

The *Lozada* procedure and prejudice requirements have been further elucidated in subsequent cases. In *In re Grijalva*, the board issued a decision addressing the potential culpability of attorneys in cases where the respondent was ordered deported in absentia.¹¹⁴ *Grijalva* concerned a respondent who had been a permanent resident for approximately thirty years at the time that he missed his court appearance. He was deportable for a controlled-substance violation but was eligible and had applied for relief from deportation.¹¹⁵

Grijalva alleged that "his failure to appear [at his hearing] was due to the misdirection of his counsel, who was unable to attend the hearing."¹¹⁶ When Grijalva filed to reopen his case before the immigration judge, his motion was denied in part because the court believed that his "counsel had engaged in tactics of delay which could only be characterized as contumacious."¹¹⁷ Grijalva appealed the denial of his motion to reopen based on ineffective assistance of counsel:

According to the respondent, on the morning of the scheduled hearing, an employee of his prior attorney called to inform him that there had been a continuance and that he should not appear at the Immigration Court. The respondent later learned that the hearing had been conducted in absentia, that his application for relief had been deemed abandoned, and that he had been ordered deported. In support of his

113. *Matter of Lozada*, 19 I. & N. Dec. at 640.

114. 21 I. & N. Dec. 472 (B.I.A. 1996).

115. *See id.* at 472, 474.

116. *Id.* at 473.

117. *Id.* (internal quotation marks omitted). "Contumacious" is defined as "stubbornly disobedient." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 272 (11th ed. 2003).

appeal, the respondent has submitted evidence that he filed a complaint against his former counsel with the State Bar of Arizona, and that he informed counsel of the allegations made against him. The respondent also has included an affidavit from his former counsel which corroborates the respondent's account of events.¹¹⁸

Upon review of the record, the board found that the respondent had established ineffective assistance by his former counsel. The board further found that he had complied with the three steps as required in *Lozada* in providing a detailed complaint to his prior counsel, allowing counsel to respond, and subsequently filing his complaint with the disciplinary arm of his counsel's bar.¹¹⁹

The board concluded:

[T]he respondent has made a convincing claim of ineffective assistance by his former counsel.

Furthermore, the level of incompetence involved in this case establishes that the respondent's absence was the result of exceptional circumstances within the meaning of section 242B(f)(2) of the Act. . . .

[T]he respondent, who had no reason not to rely on his counsel at this juncture, was blatantly misled regarding his need to appear at the scheduled hearing. Counsel's inappropriate behavior was recognized by the Immigration Judge in his decision. We consider also that the respondent is a longtime resident of the United States who had a pending application for relief before the Immigration Judge. This suggests that he would have appeared but for the misrepresentations by his former counsel.¹²⁰

In an analogous case, *In re Rivera-Claros*, the motion to reopen was denied where the failure to appear at a hearing was attributed to a breakdown in attorney-client communication, but the respondent was unwilling to file a complaint with the attorney's bar association.¹²¹ The board further commented on the complaint-filing requirement with the impugned attorney's governing bar association as established by *Lozada*, noting that this requirement "serves to protect against collusion between alien and counsel in which 'ineffective' assistance is tolerated, and goes unchallenged by an alien before disciplinary authorities, because it results in a benefit to the alien in that delay can be a desired end, in itself, in immigration proceedings."¹²²

The board reviewed the procedural history of the deportation hearing and expressed distrust of the respondent's motives. The respondent,

118. *In re Grijalva*, 21 I. & N. Dec. at 473.

119. *See id.* at 474.

120. *Id.*

121. 21 I. & N. Dec. 599, 600-01 (B.I.A. 1996).

122. *Id.* at 604.

Rivera-Claros, had changed venue and the impugned counsel was to represent her at the new immigration court.¹²³ The attorney never filed to withdraw his appearance with the court, but failed to appear at the hearing after allegedly attempting to notify the respondent that he would not be appearing at the hearing on the respondent's behalf due to his heavy caseload.¹²⁴ Notice of the hearing had been properly served on counsel of record, who failed to notify the respondent of the date and their inability to represent the respondent.¹²⁵ Despite this failure of communication and the resulting order of deportation against the respondent, she still was unwilling to file a complaint against counsel.¹²⁶

The board acknowledged that client communication is an essential element of competent representation and thus is a basis for a complaint, but reasserted that efficiency mandates filing a bar complaint or adequately explaining the reasons for failure to file so that the board is not the sole reviewer of attorney conduct:

The governing regulations allow any attorney who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia to practice before Immigration Judges and the Board. Regulations do exist for the disciplining of attorneys appearing before Immigration Judges. But those regulations, in their current form, are not intended to be a comprehensive set of rules governing the practice of law in the immigration field and, indeed, are not as broad as the American Bar Association's Model Rules of Professional Conduct (1995), for example. Moreover, there is no expeditious way for this Board to deal with the more routine attorney-related problems that periodically arise. Instead, for attorneys who may practice before us simply by virtue of their admission into a state bar or the bar of another recognized jurisdiction, we rely on the disciplinary process of the relevant jurisdiction's bar as the first, and ordinarily the fastest, means of identifying and correcting possible misconduct.

In this way, this Board's interest in having a method of monitoring those attorneys who practice before us is addressed. However owever [sic], this process, as set out in *Matter of Lozada* . . . , also necessitates the cooperation of the party alleging ineffective assistance of counsel. As we stated in *Matter of Lozada*, this process not only serves to deter meritless claims of ineffective assistance of counsel but also highlights the standards which should be expected of attorneys who represent aliens in immigration proceedings.¹²⁷

123. *Id.* at 599–600.

124. *Id.* at 600–01.

125. *See id.* at 599–600.

126. *See id.* at 602.

127. *Id.* at 603–04 (citations omitted).

The board found that filing of a bar complaint serves several purposes:

First, it increases our confidence in the validity of the particular claim. Second, it reduces the likelihood that an evidentiary hearing will be needed. Third, it serves our long-term interests in policing the immigration bar. And, fourth the requirement of filing a complaint, or adequately explaining why such a complaint has not been filed, protects against possible collusion between counsel and the alien client. Moreover, we consider the filing of such a complaint, or reasonably explaining why such was not done, to be a relatively small inconvenience for an alien who asks that he or she be given a new hearing in a system that is already stretched in terms of its adjudicatory resources.¹²⁸

The majority in *Rivera-Claros*, while overtly concerned with the possibility of collusion to stall the immigration-court process, disregarded the objective fact that the respondent did *not* achieve lengthy delay in her case. In fact, she had complied with the strict time limitations for filing to reopen an immigration case conducted in absentia within 180 days of the entry of an order against her.¹²⁹ Any delay in her proceedings would have had minimal advantage in terms of extending her stay in the United States.¹³⁰

The dissenting view questioned “the wisdom and the fairness of making the respondent in this case bear the major brunt of enforcing professional practice standards before EOIR,” particularly given that the attorney had provided an affidavit describing that “[t]he breakdown in attorney-client communications . . . was on the side of the attorney.”¹³¹ Unfortunately for *Rivera-Claros*, the majority found that her failure to fully comply with *Lozada* by not filing a bar complaint was sufficient cause to deny her motion to reopen.

In contrast to *Rivera-Claros*, nearly identical facts did constitute ineffective assistance of counsel in the case of *In re N-K- & V-S*.¹³² But *N-K- & V-S* is distinguishable in that the respondents perfected their *Lozada* motion, including filing a complaint with their counsel’s bar association, even though, like the respondent in *Rivera-Claros*, their harm only extended to a failure of their attorney to properly notify them of their hearing date.¹³³ The board found that “the record supports their

128. *Id.* at 605.

129. *See id.* at 607 n.5.

130. One potential advantage might be her ability to be employed under a continued work-authorization card, but even this benefit was terminated with the order of removal.

131. *Id.* at 609 (Schmidt, Chairman, dissenting).

132. 21 I. & N. Dec. 879, 879–81 (B.I.A. 1997).

133. *See id.* at 881. The board went on to explain:

The applicants in this case have met the “high standard” we announced in *Lozada*. First, the female applicant provided a detailed declaration supporting her claim of

contention that they were prejudiced by the actions of their former counsel and were prevented from presenting their case.”¹³⁴

The board again addressed the conduct of an attorney who missed an appellate deadline in the case of *In re Assaad*.¹³⁵ Mr. Assaad had acquired temporary residency through his marriage to a U.S. citizen but was placed in removal proceedings and sought to have the conditions eliminated so that he could become a permanent resident. The board found that his trial counsel had performed competently, but his second attorney failed to file his appeal on time, resulting in its dismissal. Assaad’s case before the immigration court went poorly, as the judge found that “limited evidence was submitted to assess the qualifying marriage and that the respondent knew little about his wife.”¹³⁶

Assaad’s appellate attorney filed his appeal one week late, and it was dismissed for being untimely.¹³⁷ The attorney never informed Assaad of the dismissal of the appeal. Assaad later filed a properly developed *Lozada* motion alleging ineffective assistance of his appellate counsel. Included in his motion and supporting materials was “a letter from the State Bar of Texas to his current counsel, stating that the Investigatory Panel of the District Grievance Committee determined, based on the respondent’s complaint, that there was just cause to believe that former counsel committed professional misconduct.”¹³⁸ However, even with discipline imposed upon counsel, the Board of Immigration Appeals found that Assaad was not prejudiced because “ineffective

ineffective assistance of counsel. This declaration states that the applicants never received notice of the hearing from former counsel or anyone else. It also states their understanding that the attorney was retained for the limited purpose of arranging their release from custody and that there was no agreement that he would represent them at any future proceeding.

Second, prior counsel was informed by letter of the allegations against him, and his reply indicates that he believed that his role as attorney was “limited to handling the exclusion matter up to the release from INS custody, and did not extend to asylum or any other subsequent work.” Finally, the record reflects that the female applicant filed a complaint against former counsel with the State Bar of California.

Id. (citations omitted). The board went on:

The attorney’s stated belief that he only represented the applicants for a certain phase of their case does not explain why he appeared at their hearing without them and presented himself as their representative. Nor does it reflect an understanding of the well-settled principle that there is no “limited” appearance of counsel in an immigration proceeding. However, it does support a finding that the assistance the applicants received from him was ineffective.

Id. at 881 n.2 (citation omitted).

134. *Id.* at 881.

135. 23 I & N. Dec. 553, 554 (B.I.A. 2003).

136. *Id.* at 555.

137. *See id.*

138. *Id.* at 556.

assistance of counsel is a denial of due process only if the proceedings were so fundamentally unfair that the alien was prevented from reasonably presenting his or her case."¹³⁹

Assaad argued that the failure of his counsel to file a brief denied him the chance for meaningful appellate review of his case, which was necessarily prejudicial.¹⁴⁰ But the board found the following:

[R]eview of the record indicates that the respondent received a fair and complete hearing before the Immigration Judge. He was well represented by counsel throughout the hearing before the Immigration Judge and was provided every opportunity to present his case for a waiver under section 216(c)(4)(B) of the Act. In a careful decision, the Immigration Judge determined that the respondent had failed to meet his burden of showing that he had contracted a valid marriage, which is necessary for a waiver under section 216(c)(4)(B). In addition, the respondent has made no showing in his motion alleging ineffective assistance of counsel that he is eligible for any relief from removal, or that there was error in the Immigration Judge's decision. Accordingly, we find that the respondent has not shown that he was prejudiced from prior counsel's conduct, and we will dismiss the appeal.¹⁴¹

Thus, with the line of cases culminating in *Assaad*, the board established a two-part process for evaluating claims of ineffective assistance of counsel in immigration matters. First, respondents must comply with *Lozada* by providing counsel with notice and filing a bar complaint. Second, respondents must allege and prove significant prejudice—that there is a reasonable possibility that the ineffective representation violated their due-process rights of reasonably presenting their cases. *Assaad* demonstrates the complexity of the matters, where he seems to have had two, possibly three, ineffective attorneys. His third attorney failed to properly allege prejudice, so they lost the *Lozada* motion against appellate counsel. Appellate counsel was per se ineffective for depriving Assaad of his appeal and was disciplined for this action. His first attorney may or may not have been effective, but was unsuccessful at building a trial record that convinced a judge of the bona fides of Assaad's marriage. Then again, the judge, despite making a "careful decision" may have been in error. The case, even in hindsight, presents such uncertainty that one must question if his case represented due process, despite the involvement of three attorneys.¹⁴²

139. *Id.* at 558.

140. *See id.* at 561.

141. *Id.* at 562 (citations omitted).

142. Justice Marshall's dissent in *Strickland* also touched on this point about due process: "Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful

V. ELEVENTH CIRCUIT INEFFECTIVE CASES BEFORE *DAKANE*

The U.S. Court of Appeals for the Eleventh Circuit, along with the other federal circuits, has seen a dramatic rise in immigration litigation in recent years.¹⁴³ As a result, the court has a well-developed record of its application of the standards of effectiveness and prejudice. The circuit's view regarding prejudice was pronounced in *Mejia Rodriguez v. Reno*, which was adjudicated under the court's highly deferential standard of review in which the court will only reverse a decision of the Board of Immigration Appeals if it finds that the board has *abused its discretion* in denying the motion to reopen.¹⁴⁴

Mejia Rodriguez was an alien who sought to reopen his immigration proceedings so that he might apply for suspension of deportation.¹⁴⁵ Suspension of deportation was a discretionary form of relief that was available to certain alien respondents if they could demonstrate (1) presence in the United States for ten years; (2) good moral character; and (3) that their removal would cause exceptional and extremely unusual hardship to themselves or their spouse, parent, or child if these relatives were U.S. citizens.¹⁴⁶ *Mejia Rodriguez* was ineligible for suspension of deportation because he was convicted of a crime involving a controlled substance. This conviction, although sealed by the state criminal court, was a bar to showing the requisite good moral character for suspension of deportation. He initially appealed the issue of his statutory eligibility to the BIA but lost this appeal in 1994. He subsequently unsuccessfully sought to reopen his deportation proceedings in 1997 after being taken into immigration custody by the Immigration and Naturalization Service for his imminent deportation. The motion was denied as untimely.¹⁴⁷

In his motion to reopen, *Mejia Rodriguez* alleged that he had received ineffective representation by his counsel in immigration pro-

assistance in meeting the forces of the State does not, in my opinion, constitute due process." *Strickland v. Washington*, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting).

143. Final Grant Guidelines for 2008, 72 Fed. Reg. 68,619, 68,621 (Dec. 5, 2007).

144. 178 F.3d 1139, 1145 (11th Cir. 1999).

145. *See id.* at 1141. *Mejia Rodriguez* had been subject to removal proceedings from 1990 to 1994, when his order of deportation became final. *See id.* at 1140-41. He entered the United States in 1980, overstayed his student visa, and in 1986 pleaded no contest to one count of trafficking in cocaine. *See id.* The court withheld adjudication and sentenced him as a youthful offender. *See id.* at 1141. The trial court and his criminal counsel wrongly advised him that his conviction would not trigger any adverse immigration consequences. *See id.* In 1997 he successfully sought to reopen the criminal case by demonstrating that he had received ineffective assistance of counsel in the criminal matter because of the erroneous advice regarding the consequences of his plea. *See id.* at 1142. The trial court vacated the conviction and the State Attorney's office elected not to prosecute the case. *See id.* at 1142-43. As a result, *Mejia* has no criminal history.

146. *See* 8 U.S.C. § 1254(a)(2) (1994) (repealed in 1996).

147. *See Mejia Rodriguez*, 178 F.3d at 1142-43.

ceedings.¹⁴⁸ His immigration defense counsel had also represented him in his criminal matters and had erroneously advised him of the immigration consequences of his plea and conviction.¹⁴⁹ By proving their wrongful advice, he had successfully vacated and reversed the criminal conviction, asserting that he had been denied his constitutional right to effective assistance of counsel.¹⁵⁰ Additionally, as a collateral consequence of their wrongful advice in his criminal matters, he had been barred from establishing eligibility for cancellation of removal before the immigration court.¹⁵¹ The court found the following:

Mejia's ineffective-assistance contentions necessarily focus on only his argument that, except for the cocaine conviction, he would have been eligible for suspension of deportation. As suspension of deportation is an extraordinary remedy over which the Attorney General possesses broad discretion, Mejia does not, and cannot, argue that he would have *received* suspension, and thus would not be facing deportation, if he had received effective assistance from his counsel during his initial deportation proceedings.¹⁵²

Thus, the issue becomes whether deficient representation by counsel in deportation proceedings that renders an alien ineligible for suspension of deportation inflicts a constitutional injury.

Under *Mejia Rodriguez*,

to establish the ineffective assistance of counsel in the context of a deportation hearing, an alien must establish that his or her counsel's performance was deficient to the point that it impinged the "fundamental fairness" of the hearing. . . . [T]o establish the lack of fundamental fairness in a deportation proceeding, the alien must establish deficient representation and "prejudice" or "substantial prejudice" arising from this deficient representation.¹⁵³

However, the court found that there is no "liberty interest" implicated in the quest for discretionary relief, since such relief is an "act of grace" rather than an entitlement.¹⁵⁴ Consequently, under the court's logic

148. *See id.* at 1143.

149. *See id.* at 1146-47 & n.6.

150. *See id.* at 1142.

151. *See id.* at 1148.

152. *Id.* at 1146 (emphasis added).

153. *Id.* (citation omitted).

154. *See id.* at 1147. The court went on:

Indeed, the Supreme Court recently reaffirmed the analogy between suspension of deportation and an executive pardon by stating:

We have described the Attorney General's suspension of deportation under a related and similarly phrased provision of the INA as "an act of grace" which is accorded pursuant to her "unfettered discretion" and have quoted approvingly Judge Learned Hand's likening of that provision to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict."

there is no “prejudice” if counsel’s actions “merely” cause an applicant’s ineligibility to apply for the relief.¹⁵⁵

Interestingly, the court never mentioned *Matter of Lozada* by name even though *Lozada* was the controlling agency precedent since 1988. However, the court did reference the prejudice required after a showing of ineffective assistance:

[A]n alien must make a prima facie showing of eligibility for waiver of deportation and demonstrate a “strong showing” in support of the application for discretionary relief. Similarly, . . . the alien must establish “substantial prejudice” arising from the deficient performance, which requires that the alien make a prima facie showing of eligibility and demonstrate that he or she would receive the relief sought.

In this case, to be eligible for suspension, Mejia would have had to demonstrate “exceptional and extremely unusual hardship” if he is returned to Honduras. Mejia has not made a “strong showing” of an “exceptional . . . hardship” and thus has not shown “prejudice”—let alone “substantial prejudice”—arising from his attorneys’ deficient performance.

In this case, assuming Mejia’s representation during his initial deportation proceedings was deficient, this deficient representation did not deprive Mejia of due process. The only consequence of his counsel’s deficient representation that Mejia alleges is that he is ineligible for suspension. As mentioned above, Mejia does not, and cannot, establish that, but for his counsel’s deficient representation, he would not have been ordered deported. Moreover, Mejia has not even made a strong showing that he would have been able to demonstrate an extreme hardship arising from his return to Honduras. Therefore, Mejia has not demonstrated that the alleged ineffectiveness of his counsel caused any actual “prejudice” or “substantial prejudice”, because Mejia has not, and could not, argue that he would have received the extraordinary relief of suspension were it not for his counsel’s deficient performance.¹⁵⁶

The irony is that the decisions of Mejia Rodriguez’s counsel had barred the client from applying for the relief, because counsel’s own ineffective, faulty advice had rendered Mejia Rodriguez statutorily ineligible for the waiver he sought from the immigration judge.¹⁵⁷ Because he was ruled ineligible, his application was pretermitted and Mejia was denied the opportunity to develop a record of the hardship he would face if deported. Finally, the Eleventh Circuit based its decision of a finding of

Id. (quoting *INS v. Yeuh-Shaio Yang*, 519 U.S. 26, 29 (1996)).

155. *See id.* at 1148.

156. *Id.* at 1148–49 & n.8 (citation omitted).

157. *See id.* at 1147–48.

no “prejudice” on the absence of proof of any potential hardship in the inadequately developed record, despite the fact that this empty record was the work and result of the ineffective attorneys.¹⁵⁸

VI. DAKANE

The current Eleventh Circuit case most commonly cited regarding claims of ineffective assistance of counsel is *Dakane v. U.S. Attorney General*.¹⁵⁹ *Dakane* was an asylum applicant who claimed to have been from Somalia, but had attempted to enter the United States using his valid Kenyan passport.¹⁶⁰ The immigration judge denied his application for asylum after having determined that *Dakane*’s testimony was not credible regarding both his asserted claim of Somali nationality and his claim of past persecution in Somalia.¹⁶¹ The court further found that, even if *Dakane* had been from Somalia, the record showed that he had resettled in Kenya and therefore was ineligible for asylum in the United States.¹⁶²

The immigration judge ordered removal, and *Dakane* appealed the ruling to the Board of Immigration Appeals. After the BIA granted *Dakane*’s counsel multiple extensions of time, the attorney failed to ever file a brief, and the BIA ordered removal. Through new counsel, *Dakane* asserted a *Lozada* claim of ineffective assistance of counsel because of his former counsel’s failure to comply with the briefing deadline, thus depriving *Dakane* of any right to appeal the denial of his asylum application.¹⁶³

In *Dakane*, the court made a straight-forward application of *Lozada* and determined that despite substantial compliance with the attorney-complaint process mandated by *Lozada*, the Eleventh Circuit was, in this and future cases, requiring that a petitioner demonstrate that the ineffective assistance of counsel prejudiced the removal proceedings.¹⁶⁴

158. *See id.* at 1148–49.

159. 399 F.3d 1269 (11th Cir. 2005).

160. *Id.* at 1271.

161. *See id.* at 1271–72.

162. *See id.* The court quotes 8 C.F.R. § 208.15 (2008):

An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement

Id. at 1271 n.1.

163. *See id.* at 1272.

164. *See id.* at 1274.

This Court has previously determined that the BIA may require aliens to satisfy the three part *Lozada* test. However, it is not disputed by the parties that *Dakane* substantially complied with the procedural requirements of *Lozada*. The issue here is whether we should agree with the BIA’s further requirement in *Lozada* that an

Dakane referenced the right to effective representation:

It is well established in this Circuit that an alien in civil deportation proceedings, while not entitled to a Sixth Amendment right to counsel, has the constitutional right under the Fifth Amendment Due Process Clause right to a fundamentally fair hearing to *effective* assistance of counsel where counsel has been obtained. In order to establish the ineffective assistance of counsel in the context of a deportation hearing, an alien must establish that his or her counsel's performance was deficient to the point that it impinged upon the fundamental fairness of the hearing such that the alien was unable to reasonably present his or her case.¹⁶⁵

Just as in *Lozada*, *Dakane*'s sole claim of prejudice was in the failure of his counsel to file an appeal.¹⁶⁶

Prejudice exists when the performance of counsel is so inadequate that there is a reasonable probability that but for the attorney's error, the outcome of the proceedings would have been different. Where counsel fails to file any appeals brief in the context of an immigration proceeding, effectively depriving an alien of an appellate proceeding entirely, there is a rebuttable presumption of prejudice.¹⁶⁷

However, *Dakane* had failed to conclusively show that the attorney's error negatively affected the outcome of the case.¹⁶⁸

Dakane failed because the trial record rebutted the presumption of prejudice created by counsel's failure to file a brief. *Dakane* was deemed not to be credible, and therefore he was ineligible to meet his burden of proof as it pertained to past persecution. Without credible testimony or any new evidence to support a different decision, *Dakane* could not show how a lack of appeal had prejudiced him, as he could not show that absent the error there was a "reasonable probability" that the outcome would have been different.¹⁶⁹

VII. SURVEYING THE CASES FOLLOWING *DAKANE*

Since issuing its decision in *Dakane* on May 25, 2004, the Eleventh Circuit has cited the case in almost one hundred subsequent decisions.¹⁷⁰ Of these, more than a dozen cases were petitions for review in which the

alien such as *Dakane* must also prove that his counsel's deficient representation resulted in prejudice to him.

Id. (citation omitted).

165. *Id.* at 1273–74 (citations and internal quotation marks omitted).

166. *Id.* at 1274.

167. *Id.* at 1274–75 (citations omitted).

168. *See id.* at 1275.

169. *See id.* at 1274.

170. *See supra* note 8 and accompanying text.

court made rulings on allegations of ineffective assistance of counsel.¹⁷¹ Under the logic of *Dakane*, the court has never found both ineffective assistance and prejudice. Thus, the Eleventh Circuit has never reversed the Board of Immigration Appeals on this issue. In each case the court has found at least one of four reasons for dispensing with the case: (1) failure to comply with *Lozada*, (2) failure to demonstrate prejudice, (3) failure to show prima facie eligibility for the underlying relief sought, or (4) failure to comply with any procedural element. Furthermore, none of the cases have been published.

A. Cases Failing To Comply with *Lozada*

The Eleventh Circuit applied *Dakane* in *Rama v. U.S. Attorney General*, which concerned an Albanian asylum applicant whose case was denied after being deemed not credible.¹⁷² His attorney failed to file a brief on his behalf when his case was on appeal with the Board of Immigration Appeals, and as a result he was unable to challenge the adverse credibility finding.¹⁷³ Rama further failed to gather and submit available documentary evidence to support his claim, and he provided no supporting testimony of his family members, so he had failed to meet

171. As of March 6, 2008, there were twelve cases exactly. Again, this number is subject to change by the time this article is published.

172. 147 F. App'x 905, 913 (11th Cir. 2005).

173. See *id.* at 909–12. In more detail, the court went on to explain the reasons for its adverse-credibility finding, listing the following:

(1) Rama testified that he received threatening phone calls at home, while he told the INS inspector on his entry into the United States that he had no phone at home in Albania; (2) Rama testified that these phone calls had included threats involving his family, while he also testified that his family had left Albania by the time that these calls were made; and (3) Rama testified that he worked in a brick factory, while he told the INS inspector that he was a private driver and he included in his asylum application that his only job during the previous five years had been selling groceries.

Furthermore, the record reflects that, although Rama included in his asylum application, and testified during the asylum hearing, that he received threatening anonymous phone calls at home immediately before he left Albania in July 2001, he informed the INS inspector on his arrival into the United States that he had no phone in Albania. When Rama was asked to verify what location he meant by "home," he stated "Elbasan L. Aqife Pasha, No. 42," which was the same home address that he had listed in his asylum application and provided to the INS inspector. Although Rama stated that this inconsistency was due to the fact that he "didn't exactly understand" the interpreter during his interview with the INS inspector because she spoke with a different Albanian dialect, the IJ reasonably concluded that Rama's explanation was belied by his concession that the translator accurately translated all of his other answers during this inspection. In addition, although Rama testified that these phone calls included threats involving his family members, he also testified that his mother, two brothers, and sister-in-law entered the United States prior to his arrival in July 2001.

Id. at 912–13.

his burden of proof. The BIA entered a summary affirmance of the decision of the immigration judge.¹⁷⁴

In cases where a single board member renders a summary affirmance of an appeal, the circuit court must review the immigration judge's decision, which is accepted by the BIA as the final order in the case.¹⁷⁵ While legal issues are reviewed *de novo*, credibility determinations are reviewed under the more deferential "substantial evidence" test.¹⁷⁶ In Rama's case, he had not provided any factual, available evidence to help buttress his testimony. He naturally failed to demonstrate that the evidence, in the form of his inconsistent testimony, did not support the lower court's adverse-credibility determination.

Rama argued that his attorney had been ineffective in not only failing to present documentary evidence but also neglecting to call family members as witnesses even though some of his family members had been granted asylum.¹⁷⁷ Unfortunately for Rama, he failed to comply with the requirements of *Lozada* and *Dakane*. Rama failed to develop a record that he had submitted an affidavit to the BIA, informed his counsel of the allegations, or that he had filed a complaint with the Florida bar.¹⁷⁸ The court further found that even if Rama had complied with *Lozada*, he would not have been able to demonstrate prejudice, as he had not argued how any other evidence submitted would have possibly changed the outcome of the proceedings.¹⁷⁹

Similarly, in a brief decision in *Pitam v. U.S. Attorney General*, the Eleventh Circuit dismissed a petition for review for a Guyanese asylum applicant who alleged that his trial counsel had committed ineffective assistance only by failing to notify the client when he lost his appeal at the BIA, thereby depriving him of his right to petition for appellate review.¹⁸⁰ *Pitam* had filed, and the BIA denied, a motion to reopen, alleging ineffective assistance of counsel because *Pitam* had failed to comply with any of the *Lozada* requirements and made no further demonstration of prejudice.¹⁸¹

174. *See id.* at 907, 909.

175. *Id.* at 911

176. *Id.* ("[The court] must affirm the [IJ's] decision if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole.") (quoting *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1283–84 (11th Cir. 2001)) (internal quotation marks omitted).

177. *See id.* at 914–15.

178. *Id.* at 915.

179. *See id.* at 916.

180. 252 F. App'x 263, 263–64 & n.1 (11th Cir. 2007).

181. *See id.* at 264.

The BIA denied the motion to reopen on September 8, 2006. It rejected the ineffective assistance claim because Petitioner failed to comply with the procedural requirements for presenting such a claim as spelled out in *Matter of Lozada*.

A more developed case is that of *Hyacinthe v. U.S. Attorney General*.¹⁸² Hyacinthe, a citizen of Haiti, entered the United States in 2000 and pleaded guilty to three counts of bank fraud in 2003.¹⁸³ He was detained and removal proceedings ensued without the possibility of bond as he was subject to mandatory detention under INA § 236(c).¹⁸⁴ His attorney conceded that his crimes did not arise from a single scheme of conduct, thus making him deportable for having committed multiple crimes involving moral turpitude, but avoided a possible charge of having been convicted of an “aggravated felony,” which may have been the case had the total loss occurred in one scheme.¹⁸⁵ Hyacinthe applied for asylum but later withdrew the application after a detailed examination by the judge ensuring that the withdrawal was voluntary and knowing.¹⁸⁶ Hyacinthe then requested and received voluntary departure, a limited privilege that avoided the entry of an order of deportation. Despite his acquiescence to his departure:

On November 23, 2004, Hyacinthe filed a *pro se* notice of appeal with the BIA, in which he contended that he had acquired “new evidence” that [his attorney] Mr. Landy was “ineffective, malicious, and [perhaps] even . . . psychologically unfit to practice law.” Thereafter, Hyacinthe filed a *pro se* “Motion to Invalidate Waiver of Appeal” with the BIA, as well as a merits appeal brief arguing that his due process rights had been violated. The essence of Hyacinthe’s filings before the BIA was that Mr. Landy conspired with the IJ to trick Hyacinthe into withdrawing his asylum application, and that Hyacinthe’s underlying bank fraud convictions were part of a single scheme, making deportation under § 1227(a)(2)(A)(ii) inappropriate.¹⁸⁷

The BIA adopted and affirmed the IJ’s decision, “addressed Hyacinthe’s claim of ineffective assistance of counsel, and concluded that Hyacinthe failed to satisfy any of the requirements of *Lozada*.”¹⁸⁸

Interestingly, Hyacinthe retained appellate counsel who filed a

Specifically, Petitioner failed to accompany his motion with a copy of his representation agreement with his attorney, failed adequately to notify the attorney of her alleged deficiencies, and failed to provide adequate proof that he had filed a bar complaint against her.

Id. (citation omitted).

182. 215 F. App’x 856 (11th Cir. 2007).

183. *See id.* at 858.

184. *See id.* at 859 n.3.

185. *See id.* at 858 (noting that an aggravated-felony charge would have statutorily barred Hyacinthe from applying for asylum).

186. *See id.* at 859.

187. *Id.* (second alteration in original). In a footnote, the court also noted that “[o]n October 27, 2004, Hyacinthe filed a complaint against Mr. Landy with the police.” *Id.* at 859 n.4.

188. *Id.* at 859–60.

motion to reconsider on the issue of ineffective assistance. This counsel neglected to guide Hyacinthe to properly comply with the requirements of *Lozada*, so the motion to reconsider naturally failed, as did the petition for review with the Eleventh Circuit.¹⁸⁹

The petitioners in *Rama*, *Pitam*, and *Hyacinthe* are linked in that they were represented by counsel on appeal and before the Eleventh Circuit and despite retaining attorneys, they were unable to comply with the clearly defined prerequisites for successfully filing an ineffective-assistance claim under *Lozada* and *Dakane*. This raises more troubling issues regarding the possible ethical duties of appellate counsel. It appears that in each case, the respondent was doomed for obvious and avoidable technical issues, as counsel was obligated to comply with the three-step *Lozada* process. It would appear that counsel in these three matters had a duty to either: (1) comply with controlling precedent and adequately represent the client, or (2) acknowledge that they were advancing a claim with no legal merit and refrain from doing so. *Lozada* itself was concerned that requiring substantial steps on the part of an aggrieved respondent would prevent collusion with counsel and prevent dilatory tactics, which the BIA perceived as having some advantage for certain respondents. However, there is no possible nefarious motive to filing a petition for review in the federal courts of appeal, as review at this level does not provide any automatic stay of removal while the case is pending. Additionally, as respondents must retain their own private counsel for advancing their claims in the immigration context, it is likely that the respondents in *Rama*, *Pitam*, and *Hyacinthe* each compensated their appellate counsel for work that was fundamentally flawed.

B. *Cases Failing To Demonstrate Prejudice*

The Eleventh Circuit has issued nine unpublished decisions applying *Dakane* where the central issue was whether the petitioner had shown the requisite prejudice to justify a motion to reopen based on ineffective assistance of counsel in the course of removal proceedings. As mentioned above, the court has not yet found prejudice in any case.¹⁹⁰

In *Sales Luis v. U.S. Attorney General*, the court addressed an asylum case where, after numerous continuances, the respondent's attorney failed to appear for the individual hearing.¹⁹¹ The respondent proceeded without counsel, and his case was denied:

189. *See id.* at 860–63.

190. *See supra* text accompanying note 8.

191. 152 F. App'x 864, 866–67 (11th Cir. 2005).

[O]n June 24, 2003, Sales-Luis appeared without [his attorney,] Phillips. Earlier that morning, the court had received an emergency motion from Phillips, asking to continue the hearing because he suffered from chronic sleep disorder, anxiety, and depression. The IJ noted the letter from Phillips' doctor submitted in support of his motion was dated June 11, 2003, and, consequently, denied Phillips' motion as untimely. The IJ further stated that, according to Phillips' motion, Phillips had suffered from his medical condition since childhood, but failed to bring this information to the court's attention in the "close to a year and a half" he represented Petitioners. After the IJ informed Sales-Luis that Phillips had filed a motion indicating he could not represent Sales-Luis due to his health, Sales-Luis stated it was "fine because that's what [Phillips had] been using in order to cancel all his appointments with [Sales-Luis] and then saying that he would see [Sales-Luis] in two or three months down the road."¹⁹²

The respondent wished to be considered for voluntary departure, but was ineligible for post-hearing voluntary departure because neither he nor his minor child (who was also in removal proceedings) had requested this relief at a master calendar hearing.¹⁹³ Had the respondent wished to be considered for pre-hearing voluntary departure, he would have had to abandon his asylum claim. However, Sales Luis had not elected to do so, likely in part because he made this decision without the assistance of counsel, because his counsel had not appeared at the individual hearing.

The Eleventh Circuit did not address any efforts by Sales Luis to comply with *Lozada*, but rather made its decision in reliance on *Dakane*, based on the lack of any prejudice shown by Sales Luis:

Petitioners have failed to demonstrate what prejudice they suffered on account of Phillips' ineffective assistance of counsel. Aside from speculating as to how a competent attorney might have conducted himself at the hearing, Petitioners fail to set forth how their proceedings would have been different had their counsel been present, including what, if any, additional (1) *evidence would have been presented*, (2) *testimony would have been offered*, and (3) *witnesses would have testified*. Moreover, Petitioners fail to explain how any such evidence would have changed the outcome of the proceedings. Consequently, Petitioners failed to establish their proceedings would have differed but for their counsel's deficient performance. Their ineffective assistance of counsel claim therefore fails¹⁹⁴

In *Toska v. U.S. Attorney General*, the Eleventh Circuit made a similar finding of lack of prejudice, but the trial counsel was not por-

192. *Id.* at 866–67 (third, fourth, and fifth alteration in original).

193. *Id.* at 869.

194. *Id.* at 868 (emphasis added).

trayed in any negative light.¹⁹⁵ *Toska* involved a family's application for asylum that was denied because the lead respondent was deemed not credible.¹⁹⁶ *Toska* argued that "the BIA erred in denying her motion to remand based on ineffective assistance of counsel because the IJ would not have found her lacking in credibility if her attorney had familiarized himself with the facts of her case and properly prepared her for her first asylum hearing."¹⁹⁷ The court analyzed the case to determine if *Toska* had shown "that counsel's performance was so deficient that it may have affected the outcome of the proceedings," but found that "*Toska* did not establish that her attorney's performance resulted in prejudice because she failed to demonstrate that the IJ would have found her credible but for her attorney's errors."¹⁹⁸

The petitioner in *Wenas v. U.S. Attorney General* challenged the effectiveness of his attorney when the attorney failed to file corroborating documentation of country conditions demonstrating persecution of Chinese Christians in his native Indonesia.¹⁹⁹ From the appeal, it appears that *Wenas* had failed to provide documentation of claims of past or future persecution in Indonesia, however the immigration judge did consider:

the 2002 Department of State Country Report on Human Rights Practices for Indonesia and the 2003 Department of State International Religious Freedom Report for Indonesia ("the Reports"), both of which adequately conveyed Indonesia's history of religious violence against Chinese Christians. The additional materials *Wenas* filed with his motion to reopen predate the Reports and are largely generalized accounts of religious violence in Indonesia. These additional materials do not demonstrate a reasonable probability of a different outcome in *Wenas's* proceedings. Therefore, because the IJ adequately considered Indonesia's history of religious violence, the BIA did not abuse its discretion in concluding that *Wenas's attorney's failure to file supporting documentation did not prejudice Wenas.*²⁰⁰

Mora Lancheros v. U.S. Attorney General addressed alleged ineffectiveness of counsel at an individual hearing on the petitioner's application for asylum based on her past persecution in Venezuela.²⁰¹ *Mora Lancheros* was found not credible because of "notable discrepancies between *Mora's* written statement and testimony."²⁰² Her testimony

195. 194 F. App'x 767, 769 (11th Cir. 2006).

196. *See id.* at 768–69.

197. *Id.*

198. *Id.* at 769.

199. 201 F. App'x 668, 669 (11th Cir. 2006).

200. *Id.* at 670–71 (emphasis added).

201. 236 F. App'x 555, 557 (11th Cir. 2007).

202. *Id.* at 558. *Mora* failed to mention the following in her application:

was much more detailed than her asylum application, leading the immigration judge to conclude that Mora was embellishing her story.²⁰³

[Mora claimed] that her counsel was ineffective for failing to properly examine her, investigate her claim, and present evidence to the IJ that she had been stabbed with a screwdriver on January 31, 2003 during her encounter with the two Bolivarian Circle members. Mora asserts that, had her counsel more fully investigated and developed her claim, there was a reasonable probability that the outcome of her hearing would have been different.²⁰⁴

Mora never mentioned the stabbing in her testimony, and if she had, this would have been an additional inconsistency with her asylum application. However, in her motion to reopen based on ineffective assistance of counsel, she attached medical documentation of the stab wound. One may speculate that had this documentation been included in the record, Mora's other "embellishments" may have been viewed more charitably by the immigration judge.

The court ruled that Mora could not demonstrate that her counsel's conduct prejudiced her case because she conceded that she had never informed him of the stabbing in advance of the trial.²⁰⁵ Additionally, despite her allegation that this was part of the claim that counsel failed to discover through his lack of diligence, she asserted in her filings that her counsel "did not violate his ethical or legal responsibilities."²⁰⁶ Effective client communication and diligence in developing the claim would have been among these duties and responsibilities. Since he was not accused of failing in his duties, the evidence of the stabbing could be deemed reasonably available at the time of the hearing, thereby not constituting "previously unavailable" evidence or evidence not submitted through the failure of counsel.²⁰⁷

The four remaining cases are more discrete applications of the prejudice standard. In *Pavlova v. U.S. Attorney General*, the petitioner challenged a denial of a motion to reopen when, through counsel, she had withdrawn her application for asylum and accepted voluntary depart-

(1) that she was approached and threatened by members of the Bolivarian Circles on January 31, 2003; (2) that she had been collecting signatures to recall the Venezuelan president and that the activity resulted in threats to her safety; and (3) that she had received pamphlet threats warning her to stop her political activity. Mora does not contest the BIA's findings that she omitted the above-mentioned incidents from her written application.

Id. at 560.

203. *Id.*

204. *Id.*

205. *Id.* at 561.

206. *Id.* (internal quotation marks omitted).

207. *Id.* at 561-62.

ture.²⁰⁸ Pavlova failed to comply with *Lozada*, but the BIA rejected her motion for her failure to show prejudice.²⁰⁹ The court found she had not suffered any prejudice or “even suggest[ed] that she would not have been ordered removed but for her counsel’s alleged misrepresentation [regarding the limited benefit of voluntary departure].”²¹⁰

Portillo-Sierra v. U.S. Attorney General rejected a Colombian asylum seeker’s ineffective-assistance claim because the petitioner raised the claim for the first time before the Eleventh Circuit and therefore was procedurally barred.²¹¹ Additionally, the petitioner failed to show that he was prejudiced by his attorney’s unusual decision to bypass his direct testimony, despite the immigration judge finding him not to be credible because his story was contradicted by other evidence in the record.²¹²

Diop v. U.S. Attorney General also rejected an argument that a Senegalese asylum seeker was prejudiced by his appellate counsel’s performance, when the petitioner had lost his asylum case for failure to file the application within the permitted one-year period after his arrival in the United States.²¹³ Among other reasons for losing in the Eleventh Circuit, “Diop fail[ed] to establish that his appellate counsel’s failure to argue that the IJ erred in his assessment of Diop’s alleged extraordinary circumstances [for filing beyond the one-year deadline] was so deficient that it may have affected the proceedings’ outcome,”²¹⁴ particularly given that the record showed improving conditions in Senegal that the petitioner also had not rebutted.²¹⁵

Finally, in *Chahin v. U.S. Attorney General*, the Eleventh Circuit rejected a claim of ineffective assistance where the respondent was

208. 242 F. App’x 656, 657 (11th Cir. 2007).

209. *Id.* at 660.

210. *Id.* Pavlova alleged that her former counsel had rendered ineffective assistance by because counsel had failed to fully apprise her of the removal process, failed to sufficiently prepare for the hearing, and provided incorrect information regarding voluntary departure. She alleged that the benefit to her of voluntary departure was completely illusory since in her opinion the suggestion that she could still secure a visa was “fatally flawed” because there was “virtually no chance” she would receive another visa in light of her fraud in acquiring her current visa. Additionally, Pavlova’s motion did not state that her attorney had been informed of her allegations and had been given an opportunity to respond, or that a complaint had been filed against him with a disciplinary authority. *Id.* at 657–58.

211. 200 F. App’x 925, 928 (11th Cir. 2006).

212. *Id.* at 927–28.

213. 159 F. App’x 103, 104–05 (11th Cir. 2005) (“An alien may not apply for asylum unless he demonstrates by clear and convincing evidence that the application has been filed within one year of his arrival in the United States.”) (citing Immigration and Nationality Act of 1952, § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2000)). The primary dispute on Diop’s direct appeal to the BIA was whether the immigration judge erred in denying Diop an additional continuance to seek counsel. *Id.* at 104. (Diop proceeded pro se.)

214. *Id.* at 105.

215. *Id.* at 106–07.

deported in absentia, and his motion to reopen was denied.²¹⁶ Whereas the record reflected that the respondent may have had a claim of extraordinary circumstances to justify his absence from court, the petitioner proceeded instead with a claim of ineffective assistance before the Eleventh Circuit.²¹⁷ The claim was based on the history of representation in which the attorney “always had provided [Chahin] with prior notice of his immigration hearings, so he expected to hear from his attorney regarding the hearing that he missed.”²¹⁸ However, because the petitioner had moved, the attorney could not contact him.²¹⁹ The court did not address compliance with *Lozada*, but dismissed the case for a failure to demonstrate prejudice.²²⁰

VIII. COMPARISON WITH SELECTED DECISIONS BY COURTS IN OTHER CIRCUITS

The Eastern District of New York has incorporated the same standard and had occasion, in *United States v. Manragh*, to address the issue of ineffective assistance in a case where the respondent’s counsel failed to file a brief on appeal.²²¹ The court held that this failure was manifestly ineffective, but could not find “prejudice” given Manragh’s absence of specificity as to what appellate counsel might have argued to the BIA in an effort to overturn the immigration judge’s determination.²²² Manragh had originally sought discretionary relief under INA § 212(c) but was denied this relief in the exercise of discretion.²²³

216. 190 F. App’x 921, 922–23 (11th Cir. 2006) (per curiam).

217. *See id.*

218. *Id.* at 922.

219. *Id.*

220. *Id.* at 923.

221. 428 F. Supp. 2d 130, 133 (E.D.N.Y. 2006). The case arose in federal district court because Manragh was criminally charged with reentry after deportation. *See id.* at 132. His defense relied in part on attacking the underlying removal order. *See id.*

222. *See id.* at 137–38.

223. *Id.* at 133. Discretionary relief such as 212(c) requires an immigration judge to balance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appear[ed to be] in the best interests of this country. *Adverse factors* include: (1) the nature and circumstances of the exclusion ground at issue; (2) other immigration law violations; (3) the alien’s criminal record; and (4) evidence indicative of an alien’s undesirability as a permanent resident. *Favorable factors* include: (1) family ties to the United States; (2) many years of residency in the United States; (3) hardship to the alien and his family upon deportation; (4) United States military service; (5) employment history; (6) community service; (7) property or business ties; (8) evidence attesting to good character; and, in the case of a convicted criminal, (9) proof of genuine rehabilitation.

Id. at 135 (quoting *United States v. Scott*, 394 F.3d 111, 119–20 (2d Cir. 2005)) (alterations in original) (citations and internal quotation marks omitted).

Manragh's "extensive criminal record compiled over a relatively short period of time" could not be overcome by his family ties, health problems, and employment history, given that the history was sporadic and interrupted by periods of incarceration.²²⁴

The district court found that Manragh's unfavorable criminal history and other negative factors left appellate counsel with "scant, if any, ammunition" to fashion a viable position for the Board of Immigration Appeal's consideration—despite Manragh's contention that his immigration counsel failed to properly present the full spectrum of his medical problems and their impact on his capacity to work.²²⁵ Manragh ultimately could not demonstrate that "there is a *reasonable probability*

224. See *id.* at 137–38. The court described his criminal record and immigration history as follows:

In 1979, defendant pled guilty to Criminal Sale of a Controlled Substance in the Fourth Degree He was sentenced to a conditional discharge and a \$600 fine.

A year and a half later, i.e. in November of 1980, defendant was charged with Assault in the First Degree and Criminal Possession of a Weapon in the Second Degree Those charges arose from an incident during which defendant shot another person who, according to defendant, had attempted to steal his marijuana after he offered to sell that person and his companion "a couple of bags." After bail was apparently posted by his mother, defendant failed to appear for a scheduled court date on December 9, 1980. As a result, another State charge was leveled against defendant, Bail Jumping in the First Degree

. . . .
 . . . [D]efendant was sentenced to an indeterminate sentence of imprisonment of 3 1/3 to 10 years incarceration on the convictions for assault and weapons possession, and 1 1/3 to 4 years on the Bail Jumping in the Second Degree conviction, with all sentences to run concurrently. Defendant was released from jail on May 27, 1988.

. . . .
 A warrant of deportation was issued on January 24, 1991. In approximately March 1991, [defendant] was removed from the United States to Jamaica.

. . . .
 At some point between March 1991 and August 1992, defendant illegally returned to the United States and was thereafter charged by a Suffolk County New York grand jury with three felony counts of Criminal Possession of a Controlled Substance in the Third Degree and three felony counts of Criminal Sale of a Controlled Substance in the Third Degree. On August 5, 1993, defendant entered a guilty plea to one count of Attempted Criminal Sale of a Controlled substance in the Third Degree, a class C Felony and on November 24, 1993, was sentenced as a second felony offender to serve four to eight years in prison. Defendant served his state prison sentence on that conviction and on or about March 21, 1997, was again removed to Jamaica.

Between March 27, 1997 and 2003, defendant again returned illegally to the United States. On or about June 10, 2003, defendant was found in the custody of the Suffolk County New York Sheriff at the Suffolk County jail awaiting trial on a felony charge of Criminal Possession of Marijuana in the Second Degree.

Id. at 132–34 (citations and internal quotation marks omitted).

225. *Id.* at 138.

that, but for counsel's unprofessional errors, the result of the proceeding would have been different."²²⁶

United States v. Scott is a primary controlling Second Circuit case on the subject.²²⁷ It is interesting because the court did find prejudice—this time in the case of a resident who, like Manragh, was eligible for a discretionary waiver of removal under former INA §212(c).²²⁸ The prejudice attached when Scott's counsel failed to file the necessary application for Scott, despite instruction to do so by the immigration judge. The attorney then failed to notify Scott of a hearing date and did not appear himself, resulting in Scott being ordered deported in absentia and abandoning his claim for relief from removal.²²⁹ The Second Circuit found that this performance was ineffective and that prejudice could be shown, since Scott could show a reasonable possibility that he could have prevailed in his hearing, resulting in a different outcome but for his attorney's failings:

Several factors would have weighed in favor of granting § 212(c) relief to Scott in 1996—fifteen years of residence in New York, strong family ties to New York, young age of lawful arrival in United States, and employment and education in New York. According to Scott, his mother would also have testified that he is a “good father and a good husband,” a “nice caring person” who is “willing to help and very considerate,” and that he was physically abused as a child.

. . . Scott makes a legitimate claim under any reasonable standard that he could have persuaded an IJ in 1996 that he was rehabilitated

. . . .

. . . However, an alien's strong family ties to the United States in addition to his extensive educational and employment histories in the United States have, on occasion, been held to outweigh a single conviction of third degree drug possession, a crime more serious than any of Scott's. Therefore, we are persuaded that Scott's multiple convictions for lesser crimes would not have outweighed his strong ties to the United States.

We also find noteworthy that, between 1989 and 1995, more than one-half of the applications filed for § 212(c) relief were granted.

Based on these factors, we conclude that Scott had a “reasonable

226. *Id.* at 135 (quoting *United States v. Copeland*, 376 F.3d 61, 73 (2d Cir. 2004)).

227. 394 F.3d 111 (2d Cir. 2005).

228. *Id.* at 119.

229. *Id.* at 114.

probability” of receiving § 212(c) relief in 1996. Thus, the failure of Scott’s counsel to seek § 212(c) relief was prejudicial and rendered entry of the deportation order “fundamentally unfair”²³⁰

Thus, given that Scott had been completely barred from presenting his case by his counsel’s failings, he could show ineffectiveness. He also built a record to show what facts he could have proven to earn a positive exercise of discretion. Given this evidence and the very good odds for success, he was able to show that he was prejudiced in that he reasonably could have achieved a different outcome in his case.

Other circuits have shown a more flexible application of the prejudice and *Lozada* requirements. The First Circuit has upheld application of the *Lozada* requirements, so long as they are not applied arbitrarily, and it has even overturned the Board of Immigration Appeals for rejecting a *Lozada* claim where the applicant initially failed to fully comply with *Lozada*, but later perfected the complaint procedure.²³¹ The Ninth Circuit has also held that the *Lozada* requirements should not be applied rigidly, such as when counsel has already been disciplined or when the record is clear regarding ineffectiveness.²³²

230. *Id.* at 120–21 (citations omitted).

231. *See* Saakian v. INS, 252 F.3d 21 (1st Cir. 2001). *But see* Tai v. Gonzales, 423 F.3d 1 (1st Cir. 2005) (holding the BIA not obligated to inform applicant of *Lozada* defects and permit to cure incomplete filing).

232. *See* Ray v. Gonzales, 439 F.3d 582, 588 (9th Cir. 2006) (discussing how multiple *Lozada* motions may be permitted even when untimely); Granados-Oseguera v. Gonzales, 464 F.3d 993, 998, 1002 (9th Cir. 2006) (noting that *Lozada* requirements are not sacrosanct, and noncompliance is forgiven where counsel failed to file an appeal and failed to pursue available relief); Rodriguez-Lariz v. INS, 282 F.3d 1218 (9th Cir. 2002).

In this case, we face multiple claims of ineffective assistance. Like a set of nested Russian dolls, the case reveals one layer of allegedly incompetent representation after another. Ray asserts that his first attorney, Jang Im, denied him due process by failing to file his brief on appeal. Ray asserts that his second attorney, Anthony Egbase, denied him due process by failing to file his first motion to reopen in a timely fashion. Ray asserts that his third attorney, Martin Guajardo, denied him due process by failing to contest the BIA’s decision to deny his first motion to reopen (or, for that matter, to do anything else).

We find that Ray has been denied due process because of the failure of his last two attorneys, Mr. Egbase and Mr. Guajardo, to litigate his case in a timely fashion. There is no question that these two attorneys have provided assistance so poor that Ray has been “prevented from reasonably presenting his case.” The former dallied for several months before missing filing deadlines, neglecting filing requirements, and ultimately costing Ray the opportunity to have his first motion to reopen heard on the merits. The latter took from Ray \$10,000 in fees, and the record indicates that he provided no substantive legal assistance whatsoever; in doing nothing, he condemned to failure Ray’s second motion to reopen. Indeed, these attorneys have prevented Ray not only from “reasonably presenting his case,” but from presenting his case *at all*. Their performance unquestionably constitutes ineffective assistance.

IX. STRATEGIC CONCERNS

Litigants in the Eleventh Circuit are left to wonder what might constitute prejudice and seek guidance in the unpublished decisions discussing what is *not*. One may deduce that the Eleventh Circuit is not sympathetic to these types of cases, but the author suggests that the failings of the post-*Dakane* cases are not necessarily representative of any sort of process failure. As discussed above, despite some clear instances of ineffectiveness, the cases following *Dakane* all seem to share weaknesses. A common flaw was failing to exhaust administrative remedies and properly preserve arguments for appeal by neglecting to fully comply with *Lozada* before the Board of Immigration Appeals, since unlike some other circuits, the Eleventh Circuit has not explicitly excused the *Lozada* complaint process.²³³ However, the primary issue in most cases was failing to build a thorough record, in conjunction with the ineffective-assistance claim, to demonstrate that a court could have found a reasonable possibility of a different outcome if the original claim was properly litigated. In other words, if the applicant is going to embark on “a second trial . . . of counsel’s unsuccessful defense,”²³⁴ the applicant must be prepared to fully document every possible aspect of the claim that the original counsel had neglected to pursue.

An additional possible benefit of properly building the alternate record of evidence in a *Lozada* or *Dakane* action is that the aggrieved immigrant with a strong case may benefit from a motion to remand by counsel from the U.S. Department of Justice, Office of Immigration Litigation (“OIL”). OIL is charged with defending the decisions of the Executive Office for Immigration Review (“EOIR”) in Petitions for Review with the U.S. courts of appeal. In cases where the petitioner properly complied with *Lozada*, and especially when a complaint leads to punishment by the former counsel’s state bar, OIL attorneys are then in the potentially difficult position where they must argue that the EOIR decision was correct and that the disciplined counsels’ actions were not prejudicial. To a certain extent, in defending EOIR, OIL must argue that disciplined counsel’s defense was sufficient. When confronted with a developed record demonstrating available evidence, witnesses and testimony not discovered by negligent former counsel, OIL may be willing

233. See *Esposito v. INS*, 987 F.2d 108, 111 (2d Cir. 1993) (“Esposito did not file a complaint with any disciplinary authority, but provided a reasonable explanation in his affidavit (a belief that [his counsel] had already been suspended from the practice of law) for not doing so.”); *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000) (“While the requirements of *Lozada* are generally reasonable, they need not be rigidly enforced where their purpose is fully served by other means.”). The attorney in *Castillo-Perez* had failed to file applications by a court-appointment deadline, thus causing applicant to abandon forms of relief.

234. *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

to agree to remand the case for further proceedings with EOIR, particularly in the Eleventh Circuit, where there is no favorable decision in any *Lozada* actions after *Dakane* and ostensibly, OIL's litigation position is strengthened by the absence of any favorable case providing a scheme for other post-*Dakane* claims.

When offered a chance at a motion to remand, the petitioning immigrant has two choices: agree to the remand or proceed with the case before the court of appeals. On principle, petitioners may wish to have their day in court, including a court judgment on the issue of ineffectiveness, but as a practical matter, the offer of remand, as initiated by the attorneys charged with defending EOIR's judgment is generally an attractive position that will be accepted by petitioners. Attorneys advising their clients may feel that the clients have a reasonable chance of establishing favorable post-*Dakane* precedent, but ultimately, the clients' assurances of a second hearing, and likely a grant of relief from removal, will prevail over any larger policy concerns of the attorneys.

Litigants for asylum in the Eleventh Circuit have additional concerns caused by negative decisions such as *Silva v. U.S. Attorney General*, which affirm a highly deferential standard of review to findings of fact by immigration judges.²³⁵ *Silva* pertained to a Colombian asylum seeker who had received a series of threats related to the political activities of Silva and her family.²³⁶ However, since persecution is an "extreme concept," she could not show that the threats were persecution.²³⁷ A few days after receiving threats, she was attacked while driving her car, but she could not identify her attackers, so the immigration judge found that she had failed to distinguish that this act was persecution on account of her political opinion rather than a random act of violence.²³⁸ Despite the proximity of the incidents, the immigration judge's decision was upheld by the Board of Immigration Appeals.²³⁹ The Eleventh Circuit also upheld the decision because of the deference owed to the agency fact-finder:

This Court reviews administrative fact findings under the highly def-

235. 448 F.3d 1229, 1236 (11th Cir. 2006).

236. *Id.* at 1233-34.

Although Silva first speculated that the FARC was responsible for the shooting, Silva later admitted that she did not know who fired the shots or made the phone call or why the shots were fired. Silva testified that the last time she participated in politics was a few days before the October 9, 1999, shooting. Silva testified that she had no further threats, calls, or other problems after October 9, 1999, until she came to the United States in November 1999.

Id. at 1234.

237. *Id.* at 1237 (citing *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005)).

238. *Id.* at 1242.

239. *Id.* at 1235.

erential substantial evidence test. We must affirm the decision of the Immigration Judge if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole. Thus, we do not engage in a *de novo* review of factual findings by the Immigration Judge.

Findings of fact made by . . . the [Immigration Judge] may be reversed by this Court only when the record compels a reversal; the mere fact that the record may support a contrary conclusion is not enough to justify a reversal of the administrative findings. We view the record evidence in the light most favorable to the agency's decision and draw all reasonable inferences in favor of that decision. Under this highly deferential standard of review, we may not reweigh the evidence from scratch.²⁴⁰

Silva, taken literally, would doom many, if not most, asylum cases because applicants will not know the exact identity of their persecutors.

240. *Id.* at 1236 (alterations in original) (citations and internal quotation marks omitted). The dissent found these findings highly unsatisfactory:

The only reasonable conclusion from the facts established by Silva's application statements and testimony, which were credited by the immigration judge, is that the reason she was threatened, shot at, and threatened again is her political activities. The evidence compels that conclusion. It is no answer to say to Silva, as the immigration judge did, that "I don't see that you are in any worse position than anybody else in that country." I doubt that all forty-three million people in Colombia are being persecuted by FARC—the evidence establishes that at least four of them, Silva's non-political brothers, are not. In any event, the widespread nature of violence in a country is not a legitimate reason for denying asylum to a petitioner who establishes that she has been persecuted within the meaning of § 101(a)(42)(A) of the Immigration and Nationality Act. There is no numerosity exception in the asylum laws.

And indeed under the majority's decision, no one from Colombia will be entitled to asylum. Since "[t]he majority of the violence in Colombia is not related to protected activity," since the "awful is ordinary," and since only "four out of every ten murders are on account of a protected ground," it will always be reasonable to find that violence was not on account of a protected ground—even where, as here, a terrorist group threatens a political activist with death because of her politics, she receives a barrage of threatening phone calls connected in time to that threat and to her political activities, and soon thereafter someone attempts to kill her. This is not a good decision but there is, I suppose, a bright side. What the Court holds today will make it easier to handle our caseload. In the future we can simply stamp any petition for review of a Colombian's asylum denial: "Affirmed. See the *Silva* decision."

Today's decision also has implications beyond cases involving Colombian applicants. The majority opinion refers to the often-mentioned, but never sighted, "rare case" in which the facts are so compelling that we will reverse an immigration judge's finding that a petitioner has failed to prove persecution on a protected ground. No published opinion of this Court has ever found that rare case, and today's decision indicates that such a case, like the fabled unicorn, exists only in our imagination.

Id. at 1248–49 (Carnes, C.J., dissenting) (alterations in original) (citation omitted).

However, one must remember that it applies only to the standard of review at the Eleventh Circuit, where deference will be given to the agency decision unless the evidence compels an alternate outcome. *Silva* is important in the context of claims of ineffective assistance of counsel because it highlights the potential of failure in all appeals if the applicant does not build a compelling trial record to support a grant of asylum.

X. CONCLUSION

The author embarked on this project expecting to find that there was possible injustice and neglect on the part of the Eleventh Circuit in the context of ineffective-assistance cases and *Lozada* actions. Part of this assumption was based on discouraging decisions such as *Silva* and by the discovery that there were no favorable cases granting remand subsequent to *Dakane*.

However, the ultimate conclusion must be that, within the Eleventh Circuit, litigants must strictly comply with *Lozada*, because unlike other circuits, the Eleventh Circuit has never explicitly excused noncompliance. Furthermore, litigants bear a heavy burden of demonstrating prejudice, even if their counsel commits obvious misconduct. Both the immigrant and counsel must build a significant record that demonstrates that they had a reasonable possibility of prevailing on the underlying claim for relief, but for previous counsel's failure to perform as a reasonable attorney would in representing the claim. This record must be presented to the Board of Immigration Appeals in conjunction with proof of the bar complaint, so that the final agency decision, even if negative, is made inclusive of the immigrant's complete record documenting how the attorney did harm.

It is remarkable that in so many cases, attorneys alleging ineffective assistance are themselves ineffective and improperly file a *Lozada* claim. It is further tragic that some litigants do not find adequate counsel until after their agency proceedings are concluded, so they are precluded from building a proper *Lozada* claim and presenting evidence of the resulting prejudice before litigating the matter before the U.S. courts of appeals.

It is also interesting that, because of the prejudice requirement, there is no direct correlation between victimization by attorney malpractice and winning a second day in court. In the disciplinary cases cited herein, it may be assumed that none prevailed in a decision at the Eleventh Circuit, since there is no positive case from the court. Perhaps some of the victims were successful in actions with the Board of Immigration Appeals or benefited from an OIL motion to remand but the

implication is that some of the cases were not permitted to be relitigated despite receiving such unprofessional representation that it led to sanction of the attorney.

As discussed above, *Dakane* itself illustrates a possible negative result. The immigrant lost, in part, because he was deemed not credible, and he never was able to directly challenge that credibility finding because his attorney failed to file an appeal. The tremendous disparity in asylum-grant rates by immigration judges permits skepticism into the legitimacy of the original decision, but *Dakane* was denied any direct review of his case, including the problematic credibility finding. The Eleventh Circuit based its negative decision on his inability to show prejudice because his lack of credibility was fatal to his asylum application.

As discussed by Judges Katzmann and Bea, there is ample reason for concern that immigrants fall victim to malpractice by attorneys and nonattorneys. The misdeeds of counsel frequently involve a failure of communication with clients, failure to investigate and understand clients' claims, and failure to prepare adequate testimony and supporting documentary records. As documented above, in some instances, trial counsel fail to meet with their clients at all, which means the lawyers lack the familiarity with the case to elicit and rehabilitate testimony or effectively argue factual and legal issues. This lack of diligence results in a poor trial record that cannot provide the foundation for a reasonable appeal.

Similar to the criminal context, it is very difficult to establish a claim of ineffective assistance of counsel, because the prejudice requirement is so onerous and difficult to prove, given the fact that the trial record being attacked is itself necessarily the product of the negligent attorney. There is a degree of arbitrariness in the assessment of prejudice as demonstrated by the different outcomes in *Strickland* and *Wiggins*. Despite similarities in crimes, counsels' noncompliance with professional norms and mitigating factors not presented in sentencing hearings, in *Wiggins* the court thought one juror might be swayed, but in *Strickland* the court decided that all twelve jurors would be indifferent. I would argue that Justice Marshall was right in his *Strickland* dissent, that given the "impediments to a fair evaluation of the [probable] . . . outcome of a trial . . . affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice."²⁴¹

The life of the aggrieved immigrant clearly is prejudiced by the

241. *Strickland v. Washington*, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting).

actions of negligent counsel. The problem for subsequent counsel is to show that such immigrants are legally “prejudiced” to such an extent that they may overcome the shortcomings of the initial attorney. Legal problems are compounded at each stage of appeal, so it is imperative for the bar to reach a higher level of effectiveness earlier in the appellate stage and spare no effort to build a record of the harm done. Otherwise, the prejudice will only be felt by the immigrant and never recognized outside of their own view of disenfranchisement.