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ATTY. ROBERT REEVES & NANCY MILLER

Right to effective assistance of counsel returns

(Compean 1). After paying lip-service to the fact that the Lozada framework had stood the test of time, former Attorney General Mukasey rejected its reasoning and ordered the Board not to rely upon it, even in the exercise of direction. In so doing, he determined that there was no constitutional right to effective assistance of counsel in the immigration court context. Under Compean 1, claims of ineffective assistance of counsel were to be decided as an exercise of the Attorney General's administrative discretion. In addition, the new formulation needed to show

overruled. The Attorney General also took this opportunity to resolve a long-standing question of whether the BIA has the authority to reopen removal proceedings based on ineffective assistance of counsel conduct that occurred after a final order of removal had been entered. The Attorney General determined that the BIA did have the authority to consider such claims and to reopen those cases. He declined to define the scope of the BIA's discretion and left it to the BIA to make that determination.

In addition to overruling Compean 1 and reinstating Lozada, the Attorney General directed the Acting Director of the Executive Office for Immigration Review to initiate rule-making procedures as soon as practicable to evaluate the Lozada framework and to determine what modifications should be proposed for public consideration. Following solicitation of information and public comment by publication of a proposed rule in the Federal Register, a new or modified framework for reviewing claims of ineffective assistance of counsel in immigration proceedings may be instituted. In the meantime, the standard that has existed for over twenty years is back.

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On June 3, 2009, the current Attorney General, Eric H. Holder, Jr., vacated the Compean 1. In what we will call Compean 2, Attorney General Holder instructed the BIA to follow the pre-Compean 1 standards to all pending and future motions to reopen based upon ineffective assistance of counsel, regardless of when such motions were filed. In other words, Attorney General Holder told the BIA to go back to the Lozada standard even for motions that were filed during the time the decision was

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