IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 85,451

THE FLORIDA BAR FILE NO. 94-50, 161(17C) and 95-50,151(17C)

097

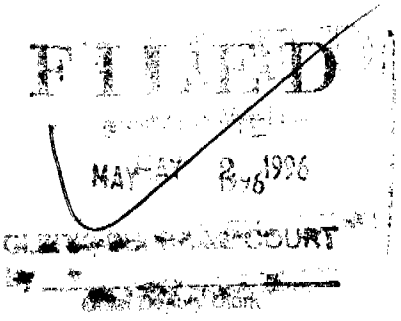
DAVID SMITH NUNES

Petitioner,

v.

THE FLORIDA BAR

Respondent.



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PETITIONER'S BRIEF
IN SUPPORT OF PETITION FOR REVIEW
OF REPORT OF REFEREE

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PETITIONER'S REPLY BRIEF

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INTRODUCTION

The Petitioner, DAVID NUNES (hereinafter "NUNES" or the "ATTORNEY"), was the Respondent below and the Respondent, THE FLORIDA BAR (hereinafter "TFB") was the Complainant below. References to the Transcript of the proceedings before the Honorable Howard C. Berman below are designated by the symbol "T", and references to the Petitioner's Appendix shall be designated by the symbol "A".

STATEMENT OF THE FACTS

There are some corrections required in the factual presentation by TFB.

On pages 4-5 of the Answer Brief, TFB stated that NUNES should have checked a "yes" in response to question 33(b) of the Application for Immigrant Visa and Alien Registration, but that he insisted on answering with a "no".

Although the Referee did find this "fact", the transcript upon which both the Referee and TFB relied (T. 168, line 25), indicates as the form shows that question 33(b) was answered with a "yes" and a "no".

Moreover, there is a clear distinction between having committed an "excludable" offense under 8 U.S.C. § 1182(a)(2)(A)(I)(II), and a supposed law that one can "never ever enter the U.S." (T. 174.) Mrs. Burton testified that she was told that her son had been told that he could never enter the United States. To this, NUNES stated that he had never heard of such a law.

It is incorrect for TFB to suggest that he denied knowledge of 8 U.S.C. §

1182(a)(2)(A)(I)(II), which was not the absolute bar that Mrs. Burton had described.

Of greater importance, TFB asserts that the record fails to indicate that NUNES intended to attempt to reopen the original deportation. This is simply not so.

The "Burton Young Story" included in the Petitioner's Response to Notice of Intent to Revoke (A. 8-11) attempts to have the waived INA 212(c) waiver applied to the original deportation proceeding.

Furthermore, NUNES testified that he could have challenged Mark Burton's exclusion under Section 212(c), as the U.S. Consulate had suggested, by filing a motion to reopen the original 1988 case. (T. 203, l. 20 - 21; 204, l. 12 - 205, l. 7.)

As to the Dennis Whynes matter, TFB is not incorrect in their assertions that Mr. Whynes' father and Jeffrey Brauwerman testified that Dennis Whynes had been deported. There is no question that he had been. The question is not whether or not he had been deported, but rather <u>why</u> he was deported.

As TFB stated, NUNES testified that Dennis Whynes had voluntarily departed because he did not wish to spend any more time incarcerated. Voluntarily departing after there has been an order of deportation for which an application to reopen was pending, was tantamount to being deported.

NUNES' point, which was not refuted was that Mr. Whynes was not deported due to NUNES' failure, but by Mr. Whynes' own volition. The testimony on Mr. Whynes' father and TFB's expert did not refute this.

SUMMARY OF ARGUMENT

In TFB's Summary of Argument, TFB raised the issue of a "radical" approach that was taken by NUNES.

Although NUNES did use the words "radical approach" in his Initial Brief, the words are taken out of context.

NUNES stated that he took a "**more** radical approach" (Initial Brief page 13-14) than that of attorneys who "will sit on their hands while they sing 'Too bad. So sad.', and offer no relief". He did this by challenging the five year old deportation decision. This was not the kind of "radical" lawyering for which he had an obligation to warn his client of such.

Yet, in the Summary of the Argument and in the Argument, TFB asks for an increased penalty for not advising the client that NUNES was taking a "radical approach."

This is clearly an unfair misuse of words taken out of context.

ARGUMENT

I. THE REFEREE ERRED BY FINDING, AS A MATTER OF LAW, THAT "AN ALIEN WHO HAS BEEN DEPORTED AS A RESULT OF A COCAINE CONVICTION" CANNOT OBTAIN RELIEF UNDER THE "WAIVER" PROVISIONS CONTAINED IN § 212(a) AND § 212(c) OF THE U.S. IMMIGRATION AND NATIONALITY ACT

TFB almost completely failed to address NUNES' primary argument.

The only refutation of the argument is **1)** that the issue of reopening the original deportation hearing was not raised below, and **2)** that there is no authority for the proposition that a deportation proceeding can be reopened.

In regard to the allegation that the issue of reopening the original deportation hearing was never raised before the Referee, NUNES did testify as to reopening the

original deportation proceeding. (T. 203, l. 20 - 21; 204, l. 12 - 205, l. 7.)

Moreover, TFB was incorrect in its reading of *Matter of Ng*, 171 I & N Dec. 63 (BIA 1979). *Matter of Ng* states that an immigration judge or the Board of Immigration Appeals has the power in either exclusion or deportation proceedings to grant nunc pro tunc permission to reapply for admission following deportation when the granting of that relief will effect a complete disposition of the case.

In the Burton matter, Mr. Burton needed to have an adjustment of status, meaning that he required the reissuance of his green card. This would have been considered at the same time as the reopening of his deportation proceeding and he is eligible for the relief which continues to be pending.

Also, TFB failed to address the cases provided that permit an alien to attack a final order of exclusion or deportation in a subsequent proceeding when he can show a gross miscarriage of justice.

Instead of dealing with the clear cut issues raised in the Initial Brief, without ascertaining the facts, TFB makes a brazen allegation that Mrs. Burton did not authorize any further action by NUNES, and it seeks additional penalties based on that assertion. In fact, Mrs. Burton did request that NUNES continue with his efforts. TFB apparently relied on an assumption.

II. THE REFEREE ERRED BY FINDING THAT THE PETITIONER WAS INCOMPETENT FOR FILING THE FORMS THAT HE FILED FOR DENNIS WHYNES

As for the Whynes matter, there is no clear and convincing evidence either way that shows why Mr. Whynes was deported. Whether it was consensual of because of NUNES'

supposed failing is not clearly demonstrated.

The onus is not on NUNES to prove why Mr. Whynes was ultimately deported when he was. He can only presume, just as TFB has presumed.

As for the bar charges, the onus is upon TFB to prove its case. It cannot succeed on the basis of the guess work of experts who have no knowledge as to why Mr. Whynes was deported. No one at the hearing knew if it was voluntary or not.

Certainly, on the type of evidence submitted, NUNES could not be found guilty when he filed certain papers and Mr. Whynes was taken off of the plane and returned to custody.

Perhaps the case of *Matter of Gabryelsky,* 20 I&N Interim Dec. 3213 shows best what NUNES was trying to do with Mr. Whynes' case. *Gabryelsky* shows that a conviction for the commission of a crime with the use of weapons is a deportable offense, and since there is no corresponding ground for exclusion, an Alien who has been so convicted (and who automatically loses his status or his green card) must file an Application for Adjustment of his illegal status to the status of a permanent resident.

This is completely different than the type of case that necessarily goes to the District Director, where the authority to adjust the status of an Alien is pursuant to § 245(a) of the INA. In criminal immigration, however, the Alien already had a green card which is the equivalent to permanent resident status. In that type of situation, the Immigration Judge has jurisdiction over the green card holder, the District Director has none.

In the Whynes case, an Application for Adjustment of Status had been filed because Mr. Whynes had been convicted of a weapons offense. When Mr. Whynes left Louisiana for the airport, he was under a Final Order of Deportation. When NUNES, then, filed his

Motion to Reopen it made the immigration judge's decision into a non-final order. At least, that is the way that the INS handled it. That is why Mr. Whynes was not put on a plane.

The case against NUNES was never proven, as it could not have been, because he was actually successful.

The evidence of the speculation that Mr. Whynes' Deportation was not delayed by NUNES, but rather for some other unknown reason, by witnesses who had no part in the underlying case or in NUNES' efforts, was not sufficient competent evidence to support a finding against NUNES.

This is especially true when no efforts other than NUNES' efforts were made and no other explanation was offered as to why Mr. Whynes was turned around.

In the recent decision in the Burke case, NUNES had similar results to the success that he had in the Whynes case, using the same procedure that worked for Mr. Whynes. The difference is that Mr. Burke did not chose to leave the country and the immigration judge, not the District Director, ultimately granted NUNES' motions regarding adjustment of status and § 212(c) relief.

There can be no question that NUNES did an awful job in defending himself. He was obviously emotionally involved and clearly fell into the category of a client that represents himself.

Ultimately, and hopefully, in time, NUNES did retain counsel who, also hopefully, has had the ability to objectively explain why NUNES did act competently and does have the ability to obtain results.

NUNES' legal strategy and the law involved in immigration is complex and the Referee failed to understand that which NUNES subjectively and emotionally thought was

basic, notwithstanding his patience and good faith attempt. Before the Referee, NUNES failed to explain himself (though he tried and had raised sufficient points to preserve his right to raise them more succinctly here). As a result, the Referee erred as a matter of law. The basic facts were always admitted.

Now that NUNES has additional materials which were unavailable at the time of the hearing, which should be persuasive to the Referee, NUNES, the Referee, and our system, which aims for a fair determination of disciplinary decisions, should be given the opportunity to make a legally correct decision.

CONCLUSION

For all of the foregoing reasons, NUNES asks that this Honorable Court reverse the Findings of the Referee, or in the alternative, that this matter be referred back to the Referee to consider the additional evidence that has come into existence after the hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this **29th day of April, 1996**, to **RONNA FRIEDMAN YOUNG, ESQUIRE,** The Florida Bar, 5900 N. Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309; and **JOHN A. BOGGS**, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

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