BEING DEPRIVED OF THE RIGHT TO EFFECTIVE COUNSEL IN REMOVAL PROCEEDINGS: WHY THE EIGHTH CIRCUIT'S DECISION IN *RAFIYEV* MUST BE OVERTURNED

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I. INTRODUCTION

Mr. Utoc Garcia,[1] a native and citizen of Guatemala, came to the United States in 1992, fleeing the brutal civil war that had been raging in his country for several decades.[2] He was from a minority ethnic Mayan group heavily targeted by the Guatemalan government for its suspected ties to the guerilla movement.[3] In fact, reports have shown that the Guatemalan government engaged in systematic human rights violations to a degree approximating genocide in some locations.[4] He fled Guatemala and sought refuge in the United States. After his arrival, he immediately brought himself to the attention of U.S. authorities by filing for asylum in 1992.

However, similar to many other Guatemalan asylum seekers, Mr. Utoc was not given his first interview before the branch of the government that adjudicates asylum applications until 2007, fifteen years after having filed for asylum.[5] The Asylum Corps was plagued with

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1. Although the facts of this case have been changed to preserve confidentiality, the material aspects described are unchanged and representative of several clients I have represented in Nebraska.

2. *See generally* COMMISSION FOR HISTORICAL CLARIFICATION: GUATEMALA MEMORY OF SILENCE: REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION CONCLUSIONS AND RECOMMENDATIONS (1994), *available at* http://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf [hereinafter GUATEMALA MEMORY OF SILENCE]; STEPHEN SCHLESINGER, BITTER FRUIT: THE STORY OF THE AMERICAN COUP IN GUATEMALA (4th ed. 2001).

3. GUATEMALA MEMORY OF SILENCE, *supra* note 2.

4. *Id.* at 38-41.

5. *See, e.g.*, Cuadra v. Gonzales, 417 F.3d 947, 948 (8th Cir. 2005) (delaying an asylum seeker's initial interview by twelve years); Molina Jerez v. Holder, 625 F.3d

backlogs during this time and devoted frightfully insufficient resources to adjudicating these claims.[6]

When Mr. Utoc appeared for his asylum interview, the United States Citizenship and Immigration Service ("USCIS") denied his request for asylum because the civil war in Guatemala had ended during the fifteen-year period in which he waited to present his claim.[7] Asylum law does not consider the fact that in the time he waited for an interview, he purchased a home, started a business, and established a family with minor children born in the United States who knew nothing of Guatemala. Notwithstanding these substantial ties to the United States, USCIS placed Mr. Utoc in removal proceedings a month later.[8]

Fearful of returning to a country he had not seen in a decade and a half, Mr. Utoc sought the assistance of counsel. However, as he would later discover, he entered into an agreement with a group that engages in the unauthorized practice of law. Mr. Utoc paid this group, located in rural Nebraska, $6,000 to represent him in his immigration matter. To Mr. Utoc, non-attorney Juan Valdez[9] appeared to be the primary person handling his case. It was not until Mr. Utoc obtained new counsel that he learned that Valdez was not actually an attorney.

Mr. Utoc was statutorily eligible to apply for cancellation of removal for certain nonpermanent residents because he had resided in the United States for more than ten years, had four United States-citizen children, and had absolutely no criminal record.[10] However, he was never informed of the requirements to be granted this form of relief. In particular, Mr. Utoc was never informed that the most important requirement to prevail on such a claim is to establish that his

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1058, 1061 (8th Cir. 2010) (failing to make a final asylum determination for nearly two decades); *see also* Hernandez v. Napolitano, No. 8:13CV113, 2013 WL 6662861, *2-3 (D. Neb. Dec. 17, 2013) (stating that the government "delayed implementation of the [ABC] settlement for years, and what were once strong asylum claims became stale as conditions improved in El Salvador and Guatemala").

6. *See* Memorandum, Joseph E. Langlois, Asylum Division, Making *ABC* Registration Determinations, *Chaly-Garcia v. U.S.*, 508 F.3d 1201 (9th Cir. 2007) (Aug. 5, 2008), *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/making_abc_registration_determinations_080508.pdf (developing procedure in 2008 to adjudicate hundreds of pending ABC asylum applications filed in or before 1991).

7. *Truth Commission: Guatemala*, UNITED STATES INSTITUTE OF PEACE (February 1, 1997), *available at* http://www.usip.org/publications/truth-commission-guatemala.

8. *See* INS v. Lopez, 468 U.S. 1032, 1038 (1984) (stating that removal proceedings, formally known as deportation proceedings, are civil proceedings to determine a noncitizen's eligibility to remain in the United States).

9. This is not the person's real name.

10. Immigration and Nationality Act § 240A(b), 8 U.S.C. § 1229b (2014); In re Gonzalez Recinas, 23 I. & N. Dec. 467, 468 (B.I.A. 2002).

United States-citizen children would suffer exceptional and extremely unusual hardship if he were deported back to Guatemala.[11]

While waiting for his final hearing, set for July of 2010, Mr. Utoc retrieved the documents Valdez instructed him to gather. Additionally, Mr. Utoc spoke with Valdez and informed him that his youngest son, Edward, suffered from developmental delays, significant language, learning, and psychological problems, and required speech therapy, psychiatric counseling, and special education. Mr. Utoc asked Valdez if this information should be included in his case. Valdez errantly told him that the information about his son's disabilities was not necessary to the case when in fact it likely would have made the difference between winning and losing.[12] Regretfully, Mr. Utoc relied on this bad advice from Valdez and did not bring it up again.

At the trial before the Omaha Immigration Court, an attorney who worked with Valdez represented Mr. Utoc. This attorney, Sue Jones,[13] had not been present at any of the meetings between Mr. Utoc and Valdez, and as far as he could tell, Jones was completely unprepared and knew nothing about his case. Jones did not speak Spanish and thus Mr. Utoc could not communicate with her. None of the information about Edward's disabilities was introduced at trial or considered by the Immigration Judge ("IJ").

At the conclusion of the hearing, the IJ denied Mr. Utoc's Application for Cancellation of Removal under section 240A(b) of the Immigration and Nationality Act ("INA") for the sole reason that he had failed to meet his burden of establishing exceptional and extremely unusual hardship.[14] Mr. Utoc, through Jones, filed a timely appeal of the IJ's decision to the Board of Immigration Appeals ("BIA" or "Board"); however, neither Jones nor Valdez included any information about Mr. Utoc's disabled son. Consequently, the Board denied the appeal for the same reasons given by the IJ.

Mr. Utoc retained new counsel[15] and discovered for the first time that Valdez was not even an attorney. He thus filed a complaint with

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11. *Gonzalez Recinas*, 23 I. & N. Dec. at 468.

12. *See, e.g.*, In re Monreal-Aguinaga, 23 I. &. N. Dec. 56, 63 (B.I.A. 2001) (noting that a "strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school.").

13. This is not the attorney's real name.

14. The IJ stated that there were "plenty of favorable discretionary factors" in the case. However, because the "sole hardship factor presented" related to Mr. Utoc's fourteen year old daughter who suffered from mild asthma, the IJ found that "the record [was] [in]sufficiently developed" to meet the hardship standard. Had the far more serious proof of hardship to Mr. Utoc's son been introduced, it is quite likely that Mr. Utoc's case would have been granted by the IJ.

15. The author of this Article.

the Nebraska Commission on the Unauthorized Practice of Law against Valdez. Likewise, Mr. Utoc filed a bar complaint with the Nebraska Counsel for Discipline against Jones for failing to introduce indispensable evidence relating to his son's disability. He also sought to reopen proceedings before the Board based upon the ineffective assistance of counsel he had received and the new evidence that had not been reviewed by the Board.[16]

Mr. Utoc's son, Edward, continued to suffer from his debilitating mental disability and required special education, weekly therapy, counseling, and psychiatric treatment. Although Edward was six years old, he remained largely unable to speak.

Edward's treating physician, Dr. Hong, indicated that Edward would not be able to receive the therapy he needed in Guatemala and numerous country conditions reports established that there was virtually no treatment for similarly disabled individuals in Guatemala.[17]

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16. *See* Ortiz-Puentes v. Holder, 662 F.3d 481, 485 n.2 (8th Cir. 2011) (explaining that the appropriate remedy is to reopen proceedings when there is a "reasonable probability that but for errors of counsel, the result in the case would have been different").

17. UNITED STATES BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES, GUATEMALA: THE SITUATION FACING THE DISABLED, PARTICULARLY PERSONS WITH SPEECH AND HEARING LOSS, (Jan. 25, 2000), *available at* http://www.refworld.org/docid/3ae6a6b53.html. A United States Bureau of Citizenship and Immigration Services ("USCIS") report indicated that "[i]n general, the Guatemalan State does not provide services for the disabled population [and] [a]s a result of this situation, it is common to witness persons with hearing and speech loss, . . . begging for money on the streets . . . ." *Id.* The report also indicated that "the potential for employment for the disabled is extremely limited" and those few jobs available for the disabled tend to be "at salaries below the established minimum wage." *Id.* Likewise, the "few social services that do exist in Guatemala" are very difficult to access "for the deaf-mute population" living outside of the capital. *Id.* Similarly, the report found that Guatemalan "health care is precarious" and that "even less can be expected for the special needs population." *Id.* In sum, because "resources available for those with physical disabilities are extremely scarce," most live in "a state of dependency" leaving them "vulnerable to discrimination and exploitation." *Id.* Another report found that "[m]ost children with disabilities in Guatemala do not attend school [and] fewer than 2% of adults with disabilities are" employed. EMERGE POVERTY FREE, *Who is helping people with disabilities in Guatemala?*, World Emergency Relief, November 11, 2010, http://emergepovertyfree.org/who-is-helping-people-with-disabilities-in-guatemala/ (last visited Feb. 1, 2015). A similar report found that because of the "lack of coordination between education and health-care systems to work with disabled children" in Guatemala, most "children with disabilities do not attend formal education." Jill Replogle, *Guatemala's disabled children face a lifetime of challenges*, THE LANCET, Vol. 365, Issue 9473 (May 2005), at p. 1757. In fact, one study indicated that "86% of students with disabilities in Guatemala are" receiving no education and "[t]here are virtually no special education programs." Need, Transitions Foundation of Guatemala, 2011. Of the disabled students who do complete high school, "51% are illiterate." *Id*. Indeed, the United States State Department's own Human Rights Report for Guatemala found that although the law states that persons with disabilities should not face discrimination, disabled people do "not enjoy these rights, and the government devoted few resources to addressing the problem." U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: GUATEMALA (2011), *available at* http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dlid=186518. The report

This evidence, along with proof regarding the ineffective assistance that Mr. Utoc received, was filed in a *Lozada* motion to reopen before the Board.[18] However, because the case arose in the jurisdiction of the United States Court of Appeals for the Eighth Circuit, the Board was required to apply the rule of that circuit.[19] Despite the truly compelling facts of this case, and Mr. Utoc's compliance with the requirements of a *Lozada* motion, a single member of the Board denied Mr. Utoc's action. Mr. Utoc appealed to the Eighth Circuit Court of Appeals, but settled his claim before a decision was rendered.

Although the facts of this case are unique, the situation for immigrants who have received frightfully defective assistance from their attorneys, or non-attorneys masquerading as attorneys, is all too common.[20] For the reasons discussed more fully below, immigrant victims are at particular risk in tribunals beneath the Eighth Circuit because of its aberrant precedent in the area of ineffective assistance of counsel in immigration proceedings.[21]

In this Article, I will first provide an overview of the procedure for making a claim for ineffective assistance of counsel in removal proceedings and give a brief history of this procedure as used since the Board's seminal decision in *Matter of Lozada*.[22] Second, I will discuss the Eighth Circuit's treatment of ineffective assistance of counsel in removal proceedings and how it compares with its sister circuits. Third, I will argue that the Eighth Circuit has erred in this area of the law and should join the vast majority of other circuits in the country by holding that there is a constitutional due process right to effective counsel in immigration proceedings. Finally, I will present a strategy that a future Eighth Circuit panel could use to overrule its previous decisions.

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also found that "[t]here were minimal educational resources for persons with special needs." *Id.*

18. *See* Matter of Lozada, 19 I. & N. Dec. 637, 638 (B.I.A. 1988) (explaining the administrative precedent relating to reopening a case to correct errors that result from the ineffective assistance of counsel).

19. In re Hector Ponce de Leon, 21 I. & N. Dec. 154, 159 (B.I.A. 1996).

20. *See* U.S. Dep't of Justice, *List of Currently Disciplined Practitioners*, http://www.justice.gov/eoir/list-of-currently-disciplined-practitioners, (last visited Jan. 5, 2015) (listing as of January 5, 2016, the 673 immigration practitioners who are suspended or disbarred by the BIA); *see generally* Anne E. Langford, *What's in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population,* 7 HARV. LATINO L. REV. 115 (2007).

21. *See generally* Rafiyev v. Mukasey, 536 F.3d 853 (8th Cir. 2008).

22. 19 I. & N. Dec. 637 (B.I.A. 1996).

II. LEGAL FRAMEWORK FOR MOTIONS TO REOPEN BASED UPON THE INEFFECTIVE ASSISTANCE OF COUNSEL IN REMOVAL PROCEEDINGS

A. Requirements for a *Matter of Lozada* Motion to Reopen

The Board in *Matter of Lozada*[23] recognized the need for a procedural mechanism to correct errors that resulted from counsel's ineffective assistance.[24] Although the underlying reasons for *Lozada* have come under attack in several cases,[25] its framework has been adopted by every circuit in the country as controlling on motions to reopen based upon ineffective assistance of counsel in removal proceedings.[26]

In order to comply with *Lozada*, a motion to reopen[27] based upon ineffective assistance of counsel must meet the following three requirements:

> [1] [It must be] supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts[,] . . . [2] [F]ormer counsel must be informed of the allegations and allowed the opportunity to respond[, and] . . . [3] 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.[28]

As to the first requirement, the Board has explained that the 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 and what counsel did or did not represent to the respondent in this regard.[29]

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23. 19 I. & N. Dec. 637 (B.I.A. 1996).

24. Matter of Lozada, 19 I. & N. Dec. 637, 639 (B.I.A. 1988); *see also* Ochoa v. Holder, 604 F.3d 546, 548 n.1 (8th Cir. 2010) (stating that the Eighth Circuit uses the Board's leading decision in *Matter of Lozada* as a "substantive and procedural compass" in evaluating these claims).

25. *See* In re Compean (*Compean I*), 24 I. & N. Dec. 710, 710 (Att'y Gen. 2009), *vacated by* 25 I. & N. Dec. 1 (Att'y Gen. 2009); Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008) (holding that noncitizens in removal proceedings have no constitutional right to effective counsel).

26. *See infra* note 109 and accompanying text; *see also* Ortiz-Puentes v. Holder, 662 F.3d 481, 485 (8th Cir. 2011) (stating, "When [a] motion [is] premised on claims of ineffective assistance of counsel, we use the Board's leading decision in [Lozada] as a 'substantive and procedural compass.'").

27. Motions to reopen based upon other considerations are beyond the scope of this Article.

28. *Lozada*, 19 I. & N. Dec. at 639.

29. *Id.*; *see also* In re Bozena Zmjewska, 24 I. & N. Dec. 87, 94-95 (B.I.A. 2007) (finding that the *Lozada* requirements may be likewise applied to non-attorney BIA accredited representatives); Hernandez-Moran v. Gonzales, 408 F.3d 496, 499 (8th Cir. 2005) (describing requirement for an affidavit detailing representation agreement).

The second two requirements are important to protect against meritless claims of ineffective assistance of counsel and they provide more information to the tribunal to evaluate the motion.[30]

One foundation for the procedures *Lozada* adopted is the "fifth amendment guarantee of due process."[31] The Board explained that "[i]neffective assistance of counsel in a deportation proceeding is a denial of due process" when it renders the "proceeding . . . so fundamentally unfair that the alien [is] prevented from reasonably presenting his case."[32] However, as discussed further below, this conclusion is not universally accepted.

B. The Requirement of Prejudice

In addition to complying with the three procedural requirements of *Matter of Lozada*[33] discussed in the previous section, one must also establish that such ineffective assistance resulted in prejudice.[34] To establish that former counsel's deficient performance resulted in prejudice, courts require the movant to make two showings: First, it must be shown that counsel failed to perform with sufficient competence.[35] Second, it must be shown that the client was prejudiced by his counsel's performance.[36] To do this, the noncitizen need only "show that he has *plausible* grounds for relief."[37] That is, the evidence submitted in a motion to reopen need not definitively prove eligibility for relief.[38]

The United States Court of Appeals for the Eighth Circuit has held that in order to establish "the requisite prejudice" for purposes of a motion to reopen based upon ineffective assistance of counsel, a peti-

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30. *See* In re Bassel Nabih Assaad, 23 I. & N. Dec. 553, 556 (B.I.A. 2003) (explaining that the policy reasons behind the complaint requirement is that it "increases our confidence in the validity of the particular claim, reduces the likelihood that an evidentiary hearing will be needed, and serves our long-term interests in monitoring the representation of aliens by the immigration bar.").

31. *Lozada*, 19 I. & N. Dec. at 638.

32. *Id.*

33. 19 I. & N. Dec. 637 (B.I.A. 1988).

34. Matter of Lozada, 19 I. & N. Dec. 637, 639 (B.I.A. 1988); Habchy v. Gonzales, 471 F.3d 858, 863-64 (8th Cir. 2006).

35. Mohammed v. Gonzales, 400 F.3d 785, 793 (9th Cir. 2005).

36. Ortiz-Puentes v. Holder, 662 F.3d 481, 485 (8th Cir. 2011).

37. Lin v. Ashcroft, 377 F.3d 1014, 1027 (9th Cir. 2004) (quoting United States v. Jimenez-Marmolejo, 104 F.3d 1083, 1086 (9th Cir. 1996)).

38. *See* Fadiga v. Attorney Gen., 488 F.3d 142, 157-63 (3d Cir. 2004) (reversing the BIA where the Board held that respondent had to prove a "clear probability" to reopen his case); *see also* Maravilla-Maravilla v. Ashcroft, 381 F.3d 855, 858-59 (9th Cir. 2004) (reversing the BIA denial of motion to reopen where the Board required Respondent show he would win his case, rather than that his claim may have been affected by counsel's ineffective assistance).

tioner must show that there is a "reasonable probability that but for errors of counsel, the result in the case would have been different."[39]

In other cases, the Eighth Circuit has explained "[a]ctual prejudice exists where defects in the deportation proceedings may well have resulted in a deportation that would not otherwise have occurred."[40] The United States Court of Appeals for the Ninth Circuit has defined "prejudice" as "an error that potentially . . . affects the outcome of the proceedings . . . ."[41]

Other circuits have made clear that the prejudice requirement does not mandate the movant to show that it is more likely than not that he would prevail if his case were reopened, but simply that there is a "reasonable probability" that the outcome would be different.[42]

In motions to reopen based upon new information, the Board has recognized that the evidence submitted need not definitively prove eligibility for relief; rather, it must only make out a *prima facie* case for eligibility.[43] In assessing whether a person has established prima facie eligibility in the asylum context, the Board has defined it as a "'realistic chance' that [the applicant] will be able to establish eligibility."[44]

In sum, if a movant complies with the procedural requirements of *Lozada* and establishes that the ineffective assistance of counsel resulted in prejudice to his case, the proceedings should be reopened.[45]

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39. *See Ortiz-Puentes*, 662 F.3d at 485 n.2 (citing Obleshchenko v. Ashcroft, 392 F.3d 970, 972 (8th Cir. 2004)).

40. Al Khouri v. Ashcroft, 362 F.3d 461, 466 (8th Cir. 2004) (citing United States v. Torres-Sanchez, 68 F.3d 227, 230 (8th Cir. 1995)).

41. *Al Khouri*, 362 F.3d at 466 (quoting Agyman v. INS, 296 F.3d 871, 884 (9th Cir. 2002)); Perez-Lastor v. INS, 208 F.3d 773, 780 (9th Cir. 2000); Ambati v. Reno, 233 F.3d 1054, 1061 (7th Cir. 2000) (quoting Kuciemba v. INS, 92 F.3d 496, 501 (7th Cir. 1996)).

42. *See Fadiga*, 488 F.3d at 157-63; *see also Maravilla-Maravilla*, 381 F.3d at 858-59.

43. *See* Matter of Coehlo, 20 I. & N. Dec. 464, 472 (B.I.A. 1992) (explaining a motion to reopen might be denied based on a failure to establish the prima facie case to reopen). Prima facie means "on the first appearance but subject to further evidence or information." *Prima facie*, BLACK'S LAW DICTIONARY (7th ed. 1999).

44. Matter of S-Y-G-, 24 I. & N. Dec. 247, 252 (B.I.A. 2007) (citing Poradisova v. Gonzales, 420 F.3d 70, 78 (2d Cir. 2005)).

45. The timing of a *Lozada* motion to reopen is another important consideration, but is beyond the scope of this Article. Additionally, while also beyond our scope here, it should be noted that United States Courts of Appeals always have jurisdiction to review the Board's denial of a motion to reopen based upon the ineffective assistance of counsel. The United States Supreme Court made that point clear during the last term. In *Mata v. Lynch,* 135 S. Ct. 2150 (2015), the Court, in an 8-1 decision, reversed the Fifth Circuit Court of Appeals' holding that it had no jurisdiction to review the Board's denial of an untimely motion to reopen removal proceedings based on a claim of ineffective assistance of counsel. The Court's decision in *Mata* held that "[w]henever the Board denies an alien's statutory motion to reopen a removal case, [circuit] courts have jurisdiction to review its decision." *Mata*, 135 S. Ct. at 2155. This decision implicitly overruled the Eighth Circuit's decisions in *Nativi-Gomez v. Ashcroft*, 344 F.3d 805, 809 (8th Cir.

C. Criticism of *Lozada*

Since the Board's decision in *Matter of Lozada*,[46] every circuit court in the country has adopted and used the case as a guidepost for analyzing ineffective assistance of counsel claims.[47] However, the underlying reasons for *Lozada* have been called into question by several tribunals and the extent to which the decision rests on constitutional footing has been the subject of some debate.

The most significant attack on *Lozada* and its progeny occurred in the 2008 decision *In re Compean* (*Compean I*)[48] when the Attorney General of the United States ("AG"), Michael Mukasey, overruled *Lozada*.[49] In his decision, the AG threw out *Lozada*'s well-established framework and laid in its place a structure designed to make this already difficult remedy even more unattainable for victims of unscrupulous attorneys.[50]

In overruling *Lozada* and creating a new substantive and procedural framework, the AG in *Compean I* stated that only in exceptional circumstances did the BIA retain the discretion to reopen removal proceedings based upon the ineffective assistance of counsel.[51] The new standard also clearly made the process of reopening proceedings more cumbersome for noncitizens negatively affected by defective counsel.[52]

Known as the "deficient performance of counsel" test, it required the noncitizen first establish that his or her retained counsel's errors were "egregious," not just that that counsel failed to perform with sufficient competence.[53] Additionally, the noncitizen had to show that he was prejudiced by his former attorney's error under a heightened

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2004), *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008), and *Jamieson v. Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005).

46. 19 I. & N. Dec. 637 (B.I.A. 1988).

47. *See infra* notes 109-116 and accompanying text.

48. 24 I. & N. Dec. 710 (Att'y Gen. 2009).

49. In re Compean (*Compean I*), 24 I. & N. Dec. 710, 712 (Att'y Gen. 2009), *vacated by* 25 I. & N. Dec. 1 (Att'y Gen. 2009).

50. *See Compean I*, 24 I. & N. Dec. at 726 (concluding there is no constitutional right to effective assistance of counsel in removal proceedings); *see also* American Immigration Council page regarding Ineffective Assistance of Counsel, *available at* http://www.legalactioncenter.org/litigation/ineffective-assistance-counsel.

51. *Compean I*, 24 I. & N. Dec. at 714.

52. *See id*. (stating that the AG created a new administrative framework for the Board to comply with in reopening removal proceedings).

53. *Id*. at 732; *compare id.* (stating that an "alien must show that his lawyer's failings were 'egregious'"), *with* Matter of Lozada, 19 I. & N. Dec. 637, 638 (B.I.A. 1988) (stating that the noncitizen must show he was prejudiced by counsel's deficient performance), *and* Matter of Assaad, 23 I. & N. Dec. 553, 556 (B.I.A. 2003) (reiterating *Lozada*'s standard); *see also* Mohammed v. Gonzales, 400 F.3d 785, 793-94 (9th Cir. 2005) (explaining that an alien does not have to establish counsel's deficient performance changed the outcome of the proceeding, but merely must show prejudice due to counsel's performance).

standard of prejudice.[54] Indeed, the AG explained that to establish prejudice under the new test, one had to show that "but for the deficient performance, it is *more likely than not* that the alien would have been entitled to the ultimate relief he was seeking[,]" a clear repudiation of the *reasonable probability* standard previously adopted by the BIA and several circuit courts.[55]

Most troubling perhaps is *Compean I*'s conclusion that a noncitizen's constitutional right to due process does not encompass a right to effective counsel in removal proceedings.[56] Rather, the AG explicitly held that "the Constitution [does not entitle] an alien who has been harmed by his lawyer's deficient performance in removal proceedings to redo those proceedings."[57]

The AG reasoned that "there is no constitutional right to effective assistance of counsel under the Due Process Clause . . . in . . . civil proceedings . . . [where] there is no constitutional right to counsel."[58] While the AG acknowledged "the Fifth Amendment's Due Process Clause applies in removal proceedings," he stated that "that Clause does not entitle an alien to effective assistance of counsel."[59]

The AG gave two reasons for his conclusion that there is no constitutional right to counsel in removal proceedings.[60] First, he relied on the Supreme Court's conclusions that removal proceedings are

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54. *Compean I*, 24 I. & N. Dec. at 732.

55. *Compare id.* at 733-34 (establishing the deficient performance test) (emphasis added), *with* Ortiz-Puentes v. Holder, 662 F.3d 481, 485 n.2 (8th Cir. 2011) (applying the reasonable probability test) (citing Obleshchenko v. Ashcroft, 392 F.3d 970, 972 (8th Cir. 2004)); *see also* Agyeman v. INS, 296 F.3d 871, 884 (9th Cir. 2000) (stating that prejudice occurs when the violation "*potentially* . . . affects the outcome of the proceedings"); Ambati v. Reno, 233 F.3d 1054, 1061 (7th Cir. 2000) (requiring the alien to show that the due process violation had potential to affect the outcome); Kuciemba v. INS, 92 F.3d 496, 501 (7th Cir. 1996) (stating that the petitioner must produce evidence showing a procedural violation had the *potential* to affect the deportation proceeding's outcome).

56. *Compean I*, 24 I. & N. Dec. at 714.

57. *Id.* at 712.

58. *Id.* at 714.

59. *Id.* The AG explains that "[u]nlike the Sixth Amendment, the Due Process Clause of the Fifth Amendment, which provides that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law,' applies to civil" proceedings. *Id.* at 717. The AG also recognizes that due process applies to "all 'persons' within the United States, including aliens," and that "it is well established that the Fifth Amendment entitles all aliens who have entered the United States to due process of law in removal proceedings." *Id.* (citing Reno v. Flores, 507 U.S. 292, 306 (1993) and Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953)); *see also Shaughnessy*, 345 U.S. at 212 (declaring, "[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (noting that the Due Process Clause of the Fifth Amendment "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

60. *Compean I*, 24 I. & N. Dec. at 716.

civil—and not criminal—in nature;[61] therefore, the Sixth Amendment's right to counsel does not apply.[62] Second, he reasoned that the "Fifth Amendment's due process guarantee . . . applies only against the Government"[63] and thus "the actions of a private party, including a privately retained lawyer," cannot deprive a noncitizen his due process rights[64] unless there is a "'sufficiently close nexus' between the Federal Government . . . and the private party."[65]

It is significant that the AG precisely applied the Eighth Circuit's reasoning in *Rafiyev v. Mukasey*,[66] to *Compean I*.[67] We will come back to this point in the next section.

Less than a year after *Compean I* was decided, the newly appointed Attorney General Eric Holder vacated the decision in its entirety and reinstated the *Lozada* framework by issuing a new decision, *Matter of Compean*[68] ("*Compean II*").[69] In *Compean II*, Attorney General Holder laments *Compean I*'s impetuous decision to implement a "new, complex framework in place of a well-established and long-

61. *Id.* (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) and Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952)); *see also Lopez-Mendoza*, 468 U.S. at 1038 (stating, "[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry."); *Shaughnessy*, 342 U.S. at 594 (declaring, "[d]eportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.").

62. *Compean I*, 24 I. & N. Dec. at 716 (citing Abel v. United States, 362 U.S. 217, 237 (1960), Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003), United States v. Loaisiga, 104 F.3d 484, 485 (1st Cir. 1997), Delgado-Corea v. INS, 804 F.2d 261, 262 (4th Cir. 1986), and United States v. Cerda-Pena, 799 F.2d 1374, 1376 n.2 (9th Cir. 1986)); *see also Abel*, 362 U.S. at 237 (noting, "deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions").

63. *Compean I*, 24 I. & N. Dec. at 717 (citing Mathews v. Eldridge, 424 U.S. 319, 332 (1976)); *see also Mathews*, 424 U.S. at 332 ("stating that the Due Process Clause applies only to 'governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment'") (emphasis added).

64. *Compean I*, 24 I. & N. Dec. at 717 (citing S. F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 542-43 (1987)); *accord S.F. Arts & Athletics*, 483 U.S. at 542-43 ("stating that where a plaintiff alleges a violation of the Fifth Amendment, '[t]he fundamental inquiry is whether the [defendant] is a governmental actor to whom the prohibitions of the Constitution apply.'").

65. *Compean I*, 24 I. & N. Dec. at 720 (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)); *accord* Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982) ("stating that 'constitutional standards' may be invoked to challenge private action 'only when it can be said that the [Government] is responsible for the specific conduct of which the plaintiff complains'"); Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) ("emphasizing that the Due Process Clause applies to a private actor only if he may 'fairly be said to be a state actor.'").

66. 536 F.3d 853 (8th Cir. 2008).

67. *Compean I*, 24 I. & N. Dec. at 720-21 (citing Rafiyev v. Mukasey, 536 F.3d 853, 860-61 (8th Cir. 2008)).

68. 25 I. & N. Dec. 1 (B.I.A. 2009).

69. Matter of Compean (*Compean II*), 25 I. & N. Dec. 1, 1 (B.I.A. 2009).

standing practice that had been reaffirmed by the Board in 2003 after careful consideration."[70]

Today *Lozada* remains the seminal case used by every circuit court across the U.S. to analyze motions to reopen based upon ineffective assistance of counsel.[71] But, as we will see below, the constitutional foundation of *Lozada* has continued to come under attack.

III. THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT'S REJECTION OF A DUE PROCESS RIGHT TO EFFECTIVE COUNSEL IN REMOVAL PROCEEDINGS

A. An Assumed Right

The first case where the United States Court of Appeals for the Eighth Circuit addressed the question of ineffective assistance of counsel in the context of a *Lozada* motion to reopen is *Nativi-Gomez v. Ashcroft*,[72] in 2003.[73] There, the court recognized that noncitizens are "entitle[d] . . . to due process of law in deportation proceedings,"[74] and the court also indicated that "some courts have explained that the ineffective assistance of counsel can serve as the basis for a due process violation."[75] However, in a footnote, the court stated that "[o]ur Circuit has yet to recognize the validity of a due-process claim in a deportation proceeding based on the ineffective assistance of counsel."[76]

Obleshchenko v. Ashcroft,[77] was the next case to take up the issue. In *Obleshchenko*, the court again recognized that other circuits had found a due process right to effective assistance of counsel in removal proceedings[78] and "assume[d] without deciding" that the movant "had a right to have [his] counsel effectively represent" him.[79]

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70. *Compean II*, 25 I. & N. Dec. at 2.
71. *See infra* notes 109-116 and accompanying text.
72. 344 F.3d 805 (8th Cir. 2004).
73. Nativi-Gomez v. Ashcroft, 344 F.3d 805, 807 (8th Cir. 2004).
74. Reno v. Flores, 507 U.S. 292, 306 (1993).
75. *Nativi-Gomez*, 344 F.3d at 807 (citing Iavorski v. INS, 232 F.3d 124, 128 (2d Cir. 2000) and Henry v. INS, 8 F.3d 426, 440 (7th Cir. 1993)); *see also Iavorski*, 232 F.3d at 128 (expressing that the "statutory right to be represented by counsel [at one's] own expense . . . is 'an integral part of the procedural due process to which the alien is entitled.'").
76. *Nativi-Gomez*, 344 F.3d at 809 n.1. Instead, the court resolved the appeal on other grounds and concluded that when a noncitizen is seeking discretionary relief, he has no constitutionally protected liberty interest. *Id.* at 808. Thus, the court explained that adjustment of status, suspension of deportation, and motions to reopen, all of which are discretionary forms of relief, are too "speculative" to constitute a "constitutionally protected liberty interest." *Id.*
77. 392 F.3d 970 (8th Cir. 2004).
78. *See* Xu Yong Lu v. Ashcroft, 259 F.3d 127, 132 (3d Cir. 2001); Lozada v. INS, 857 F.2d 10, 13–14 (1st Cir. 1988).
79. Obleshchenko v. Ashcroft, 392 F.3d 970, 972 (8th Cir. 2004).

The court did, however, express "serious doubts" that any such constitutional right would exist in "civil [removal] proceedings."[80]

A year later, in *Etchu-Njang v. Gonzales*,[81] the court stated again that it had "yet to recognize the validity of a due-process claim in a deportation proceeding based upon the ineffective assistance of counsel," but resolved the case on other grounds and thus declined to reach the issue.[82]

By 2006, the court in *Habchy v. Gonzales*[83] moved further. The Eighth Circuit stated that it had squarely rejected "an absolute constitutional right to effective assistance of counsel with respect to asylum claims" while continuing to maintain that "the Fifth Amendment's due process clause mandates that removal hearings be fundamentally fair."[84] The court characterized *Obleshchenko* as standing for that proposition; however, in reality, *Obleshchenko* clearly stated that it assumed the right without deciding.[85] Aside from mischaracterizing *Obleshchenko*'s holding,[86] the court in *Habchy* did not offer any explanation for why it believed there was no constitutional right to effective assistance of counsel in removal proceedings.

Rather, it was not until 2008, in the case of *Rafiyev v. Mukasey*,[87] that the court finally offered an explanation for why it rejected the existence of a constitutional right to effective counsel in removal proceedings in *Habchy*.[88]

B. *Rafiyev* – The Court Rejects its Earlier Assumption

In *Rafiyev v. Mukasey*,[89] the court began by declaring that the United States Court of Appeals for the Eighth Circuit "has never rec-

80. Rafiyev v. Mukasey, 536 F.3d 853, 860 (8th Cir. 2008) ("[I]n *Obleshchenko v. Ashcroft,* 392 F.3d 970 (8th Cir. 2004), we expressed 'serious doubts . . . that a fifth amendment right to counsel exists in civil deportation proceedings,' because '[c]onstitutional rights are rights against the government,' and we found it 'difficult to see how an individual, such as [an alien's] attorney, who is not a state actor, can deprive anyone of due process rights.'").

81. 403 F.3d 577 (8th Cir. 2005).

82. Etchu-Njang v. Gonzales, 403 F.3d 577, 581-85 (8th Cir. 2005) (citing *Nativi-Gomez*, 344 F.3d at 808 n.1).

83. 471 F.3d 858 (8th Cir. 2006).

84. Habchy v. Gonzales, 471 F.3d 858, 866 (8th Cir. 2006) (citing Al Khouri v. Ashcroft, 362 F.3d 461, 464 (8th Cir. 2004)).

85. *Habchy*, 471 F.3d at 866.

86. It should be apparent that *Habchy*, decided in 2006, clearly misconstrued the holding of *Obleshchenko*, decided in 2004. The court recognized in 2005 that the Eighth Circuit "has yet to decide the issue" of whether there is a "Fifth Amendment Due Process" right in removal proceedings that includes a right to effective counsel. Jamieson v. Gonzales, 424 F.3d 765, 768 (8th Cir. 2005).

87. 536 F.3d 853 (8th Cir. 2008).

88. *Rafiyev*, 536 F.3d at 860; *Obleshchenko*, 392 F.3d at 972.

89. 536 F.3d 853 (8th Cir. 2008).

ognized a constitutional right to effective counsel in a removal proceedings."[90] The court relied upon the same two reasons that formed the basis of the Attorney General's decision in *Compean I*—the state actor doctrine and the criminal/civil distinction—to conclude that there is no constitutional right to effective counsel in removal proceedings.[91]

First, the Eighth Circuit reasoned that because constitutional rights are only rights against the government and a noncitizen's attorney is "not a state actor," he or she cannot "deprive anyone of due process rights."[92] Second, the court believed that the civil/criminal distinction militated against finding a constitutional right to counsel in removal proceedings, which have consistently been styled as civil proceedings.[93]

To the first point, the court so concluded because it did not feel that there was "a sufficient nexus between the federal government and counsel's ineffectiveness such that the latter may fairly be treated as a governmental action."[94] The court relied heavily upon its understanding of the United States Supreme Court's holding in *Coleman v. Thompson*[95] in reaching its conclusion.[96]

In *Coleman*, the Supreme Court determined that where there is no constitutional right to counsel in criminal proceedings, there can be no constitutional violation for ineffective assistance of counsel even if the attorney's error would have otherwise failed the *Strickland v. Washington*[97] test.[98] The *Coleman* court reasoned therefore that a criminal defendant must "bear the risk of attorney error" where there is no constitutional right to an attorney because it is the existence of a right to counsel that permits errors of counsel to be "imputed to the State."[99] In applying *Coleman*'s reasoning to immigration proceedings, the Eighth Circuit held that errors of "[a noncitizen's] attorney,

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90. Rafiyev v. Mukasey, 536 F.3d 853, 860 (8th Cir. 2008).

91. *See Rafiyev*, 536 F.3d at 860-61; *see also supra* notes 60-65 and accompanying text.

92. *Rafiyev*, 536 F.3d at 860; *Obleshchenko*, 392 F.3d at 972.

93. *Rafiyev*, 536 F.3d at 860-61 (citing Paul v. INS, 521 F.2d 194 (5th Cir. 1975), Goonsuwan v. Ashcroft, 252 F.3d 383, 385 n.2 (5th Cir. 2001), and Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986)).

94. *Id.* (citing Alfanwi v. Mukasey, 526 F.3d 788, 799 (4th Cir. 2008)).

95. 501 U.S. 722 (1991).

96. *See Rafiyev*, 536 F.3d at 861 (citing Coleman v. Thompson, 501 U.S. 722, 752 (1991)).

97. 466 U.S. 668 (1984).

98. *Coleman*, 501 U.S. at 752-53.

99. *Id.* at 753-54. While the Supreme Court has subsequently moved away from its holding in *Coleman*, it does so for reasons that do not necessarily relate to our argument here. *See generally* Martinez v. Ryan, 132 S. Ct. 1309 (2012).

who is not a state actor," likewise cannot deprive that noncitizen of his due process rights.[100]

The second reason underlying the Eighth Circuit's decision in *Rafiyev* is the longstanding distinction made between criminal and civil proceedings.[101] As removal proceedings are not considered criminal proceedings, the Sixth Amendment right to counsel does not apply in that setting.[102] Accordingly, the court in *Rafiyev* rejected any Fifth Amendment right to effective counsel, and because it ruled out any Sixth Amendment right to counsel in non-criminal proceedings, it thus concluded that no constitutional right to counsel exists at all in civil immigration proceedings.

Once the court had concluded that "there is no constitutional right to an attorney" in removal proceedings, it then held that a noncitizen in those proceedings cannot claim "constitutionally ineffective assistance of counsel."[103] In other words, the Eighth Circuit clearly believed that a constitutional right to effective counsel rested squarely on the more basic question of whether the constitution provides a right to counsel at all in removal proceedings.

In deciding that no such right exists, the Eighth Circuit, like the Supreme Court in *Coleman*, held that "[t]o the extent [a noncitizen's] counsel [is] ineffective, the federal government [is] not accountable for [the] substandard performance;" rather such error must be "imputed to the [noncitizen]" in immigration proceedings.[104]

While the court refused to recognize a constitutional right to effective assistance of counsel in removal proceedings, it did find that under *Matter of Lozada*,[105] Rafiyev could raise a non-constitutional administrative claim that the BIA should exercise its discretionary authority to reopen his case.[106] However, as discussed further below, this administrative claim to reopen proceedings has proved to be of very little value for noncitizens aggrieved by defective counsel in the Eighth Circuit, as the court has only twice granted, in the last fifteen years, a petition for review raising the issue.[107]

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100. *Rafiyev*, 536 F.3d at 860-61.

101. *Id.*

102. *Id.*

103. *Id.* at 861 (citing *Coleman*, 501 U.S. at 752 and Wainright v. Torna, 455 U.S. 586, 587-588 (1982)).

104. *Rafiyev*, 536 F.3d at 861.

105. 19 I. & N. Dec. 637 (B.I.A. 1988).

106. *Rafiyev*, 536 F.3d at 861.

107. *See infra* note 166 and accompanying text. Indeed, the court in *Ochoa* went so far as to determine that it was without jurisdiction to even review the Board's denial of a motion to reopen removal proceedings based upon the ineffective assistance of counsel. Ochoa v. Holder, 604 F.3d 546, 548-50 (8th Cir. 2008) (citing Tamenut v. Mukasey, 521 F.3d 1000, 1005 (8th Cir. 2008)). *Ochoa* is no longer good law following the Supreme Court's decision in *Mata v. Lynch*, 135 S. Ct. 2150 (2015); however, *Ochoa* illus-

C. The United States Court of Appeals for the Eighth Circuit Stands Alone in its Conclusion

The United States Court of Appeals for the Eighth Circuit's holding in *Rafiyev v. Mukasey*[108]—that there is no constitutional right to effective counsel in removal proceedings—stands in stark contrast to nearly every other circuit in the country to have addressed this issue.[109] Indeed, the United States Courts of Appeals for the First, Second, Third, Sixth, Ninth, Tenth, and Eleventh Circuits have explicitly stated that because respondents in removal proceedings have a constitutional right to due process, which includes a fundamentally fair hearing, they necessarily have a constitutionally protected right to effective counsel insofar as it relates to the fairness of the proceedings.[110] The United States Court of Appeals for the Fifth Circuit has assumed that to be the case without specifically deciding it.[111] Similarly, the United States Court of Appeals for the Seventh Circuit has indicated that being denied effective counsel could implicate a respon-

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trates how far the Eighth Circuit has been willing to go to deny any review to noncitizens deprived of a fair hearing as a result of defective counsel.

108. 536 F.3d 853 (8th Cir. 2008).

109. *See* Zeru v. Gonzalez, 503 F.3d 59, 72 (1st Cir. 2007) (stating that "[i]neffective assistance of counsel in a deportation proceeding is a denial of due process . . . [where] the proceeding was so *fundamentally unfair* that the alien was prevented from reasonably presenting his case.") (emphasis added); United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003) (explaining that "an alien [can] prevail on a claim of ineffective assistance of counsel, [if] he . . . show[s] that his counsel's performance was so ineffective as to have impinged upon the *fundamental fairness* of the hearing in violation of . . . due process.") (emphasis added); Contreras v. Att'y Gen., 665 F.3d 578, 584 (3d Cir. 2012) (recognizing that "[a] claim of ineffective assistance of counsel in removal proceedings is cognizable under the Fifth Amendment . . . , as a violation of . . . due process" where it "undermine[s] the *fundamental fairness* of . . . proceedings.") (emphasis added); Denko v. INS, 351 F.3d 717, 723 (6th Cir. 2003) (stating that ineffective assistance of counsel in deportation proceedings violates due process if "the proceeding was so *fundamentally unfair* that the alien was prevented from reasonably presenting his case.") (emphasis added); Nehad v. Mukasey, 535 F.3d 962, 967-71 (9th Cir. 2008) (explaining that it is "particularly important in removal proceedings" that an alien's "due process right 'includes a right to competent representation"); Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003) (stating that "[t]his court has recognized that the Fifth Amendment guarantees aliens subject to deportation the right to a *fundamentally fair* deportation proceeding" and that one can "state a Fifth Amendment violation if he proves that retained counsel was ineffective and, as a result, [he] was denied a fundamentally fair proceeding.") (emphasis added); Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1273 (11th Cir. 2004) (explaining that "[an alien] . . . has the constitutional right under the Fifth Amendment . . . to a *fundamentally fair* hearing and to *effective* assistance of counsel") (emphasis added).

110. *See supra* note 109 and accompanying text (listing illustrative cases of circuit courts positions on a noncitizen's right to counsel in immigration proceedings).

111. *See* Mai v. Gonzalez, 473 F.3d 162, 165 (5th Cir. 2005) (noting that "this court has repeatedly assumed without deciding that an alien's claim of ineffective assistance may implicate due process concerns . . . .").

dent's right to due process, though in other cases it has expressed some doubts.[112]

Other than the Eighth Circuit, only the United States Court of Appeals for the Fourth Circuit has explicitly held that there is no constitutional right to effective counsel in removal proceedings.[113] The court did so in *Alfanwi v. Mukasey*,[114] for the same two reasons given by the Eighth Circuit.[115] However, *Alfanwi* was vacated[116] by the United States Supreme Court and thus the Eighth Circuit now stands alone in declaring that there is no constitutional right to effective counsel for immigrants in removal proceedings.

It is difficult to overstate the breathtaking implications of the court's holding in *Rafiyev*. The court believes that an attorney in civil removal proceedings can never be a state actor, and therefore, no matter how deficient the assistance, and no matter how damaging the result, it can never deprive a noncitizen in removal proceedings of his Fifth Amendment right to due process.

Thus, even if an attorney were to commit an egregious error that directly and unequivocally resulted in an unlawful deportation that caused the death of a client, the court would have to conclude that no constitutional deprivation occurred.[117] To put it another way, in the Eighth Circuit, a noncitizen in removal proceedings does not even have the constitutional right to not be killed as a result of his counsel's defective service. In an area of law, such as asylum, which so often deals with matters of life and death, the hypothetical is not a chimera.

IV. THE ARGUMENT THAT A CONSTITUTIONAL DUE PROCESS RIGHT TO FUNDAMENTAL FAIRNESS IN REMOVAL PROCEEDINGS NECESSITATES A RIGHT TO EFFECTIVE COUNSEL

The underlying reason for the availability to seek redress for counsel's errors in removal proceedings through a motion to reopen is imbedded in the Constitution. The Supreme Court has explained that

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112. *See* Jezierski v. Mukasey, 543 F.3d 886, 890 (7th Cir. 2008) (stating that "[t]he complexity of the issues . . . in a particular removal proceeding might be so great that forcing the alien to proceed without the assistance of a competent lawyer would deny him due process of law . . . ."); *but see* Magala v. Gonzales, 434 F.3d 523, 525-26 (7th Cir. 2005) (explaining in dicta that because immigration proceedings are civil, there is no "constitutional ineffective-assistance" claim and thus the remedy is "damages for malpractice.") (citing Stroe v. INS, 256 F.3d 498 (7th Cir. 2001)).

113. Alfanwi v. Mukasey, 526 F.3d 788, 798 (4th Cir. 2008), *vacated*, 558 U.S. 801 (2009).

114. 526 F.3d 788 (4th Cir. 2008).

115. *Alfanwi*, 526 F.3d at 799.

116. Alfanwi v. Holder, 558 U.S. 801, 801 (2009).

117. *See supra* notes 103-104 and accompanying text.

"[i]t is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings."[118] Nearly every circuit court in the country has held that this right to due process in removal proceedings includes a right to effective counsel.[119] And the Board has also held that "[i]neffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the [noncitizen] was prevented from reasonably presenting his case."[120] Indeed, the right to a fundamentally fair hearing is virtually worthless if confined to a legal framework in which the fairness of the proceedings can never be affected by prejudicial errors of defective counsel.[121]

A. The Meaninglessness of a Right to a Fair Hearing That Does Not Encompass a Right to Effective Counsel

The Fifth Amendment of the United States Constitution provides that "[n]o *person* shall be . . . deprived of life, liberty, or property, without due process of law."[122] The United States Supreme Court has long maintained that the Fifth Amendment's due process clause applies to aliens in removal proceedings.[123] The Court has also held that the "touchstone" of due process is the requirement that proceedings be fundamentally fair, which includes the right to be heard.[124]

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118. Reno v. Flores, 507 U.S. 292, 306 (1993); Demore v. Kim, 538 U.S. 510, 523 (2003) (quoting *Flores*, 507 U.S. at 306); *see also* Mata v. Lynch, 135 S. Ct. 2150, 2153-54 (2015) (determining that the circuit court had jurisdiction over an appeal of the denial of an alien's otherwise untimely motion to reopen removal proceedings, when the motions untimeliness is due to the ineffective assistance of council).

119. *See supra* notes 109-117 and accompanying text.

120. Ortiz v. INS, 179 F.3d 1148, 1153 (9th Cir. 1999); *see also* Matter of Lozada, 19 I. & N. Dec. 637, 638 (B.I.A. 1988) (stating that "[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."); Matter of M-A-M-, 25 I. & N. Dec. 474, 479 (B.I.A. 2011) (stating that "[a] removal hearing must be conducted in a manner that satisfies principles of fundamental fairness.").

121. Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008).

122. U.S. Const. amend. V (emphasis added); *see also* Plyler v. Doe 457 U.S. 202, 210 (1982) (stating that, "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

123. Reno v. Flores, 507 U.S. 292, 306 (1993); Landon v. Plascenia, 459 U.S. 21, 32-33 (1982); Wing Wing v. United States, 163 U.S. 228, 238 (1896); *see also* Shaughnessey v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (stating that immigration proceedings must conform to traditional standards of fairness encompassed in due process).

124. Gangon v. Scarpelli, 411 U.S. 778, 790 (1973); *see also* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (discussing the due process right to be heard); Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (explaining in the context of deportation proceedings that "no person shall be deprived of his liberty without opportunity, at some time, to be heard").

In *Gideon v. Wainwright*,[125] the Supreme Court explained that the due process "right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel."[126] Although the court in *Gideon* addressed the right to be heard in criminal proceedings, the Supreme Court has held that a right to counsel can be required by the due process clause in civil proceedings as well.[127]

As explained above, nearly every circuit court in the country to address this issue has likewise concluded that the due process right to fundamental fairness in removal proceedings includes a right to be heard by counsel and is infringed when the ineffective assistance of counsel undermines the fairness of proceedings.[128]

That conclusion is aptly supported by *Matthews v. Eldridge*,[129] the Supreme Court's seminal procedural due process decision. There, the court articulated a three-prong test to determine the parameters of procedural due process.[130] One must weigh (1) the private interests affected by the official action, (2) the "risk of an erroneous deprivation of such interest through the procedures used," and (3) the government interests affected, including fiscal and administrative burdens that would result if the procedure were required.[131]

These factors, when weighed and balanced against each other, clearly tip in favor of holding that there is a constitutional right to effective counsel in removal proceedings under the due process clause.[132] It is my position that this conclusion constitutionally requires a procedure for reopening proceedings when ineffective counsel has rendered those proceedings fundamentally unfair.

To the first prong in *Matthews*, in removal proceedings there is an elevated private liberty interest at stake for the individual facing deportation. Justice Brandeis observed many years ago that "[deportation] may result also in loss [of] . . . all that makes life worth living."[133]

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125. 372 U.S. 335 (1963).

126. Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (citing Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

127. *See* Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 25-26 (1981) (stating that, "it is [an] . . . interest in personal freedom, and not simply the Sixth . . . Amendment[ ] right to counsel in criminal cases, which triggers the right to appointed counsel . . . even though proceedings may be styled 'civil' and not 'criminal.'") (citing In re Gault, 387 U.S. 1, 41 (1967)); *Gault*, 387 U.S. at 41 (concluding there is a right to counsel in certain civil delinquency proceedings); Vitek v. Jones, 445 U.S. 480, 483-84, 497 (1980) (stating a plurality held that the due process clause could in some circumstances require a right to counsel in civil proceedings).

128. *See supra* notes 109-112 and accompanying text.

129. 424 U.S. 319 (1976).

130. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

131. *Mathews*, 424 U.S. at 334-35.

132. *Id.*

133. Ho v. White, 259 U.S. 276, 284 (1922).

And, the Court has indicated that deportation is a drastic measure, and at times "the equivalent of banishment or exile."[134] Indeed, the Court in *Padilla v. Kentucky*[135] stated that "[w]e have long recognized that deportation is a particularly severe 'penalty . . . .'"[136] As far back as 1903, the Court acknowledged that a noncitizen has a liberty interest in his "right to be and remain in the United States."[137] The private interest affected is, at a minimum, the ability to live and work in the United States, the ability to not be separated from home and family, and the ability to not be detained and ultimately exiled to a foreign land.

To the second prong in *Matthews*, the risk of an erroneous deprivation of these private liberty interests is high when a noncitizen in removal proceedings is deprived of effective counsel. It is now axiomatic that persons facing deprivation of a liberty interest are guaranteed a fundamentally fair hearing under the due process clause.[138] Yet when counsel is so deficient as to render those proceedings fundamentally unfair, a refusal to reopen removal proceedings would unquestionably result in "an erroneous deprivation" of the liberty interests referenced above.[139] As such, protection against an erroneous deprivation in removal proceedings necessitates a right to effective counsel that includes the ability to reopen proceedings when they have been rendered unfair by deficient counsel.

Comprehensive studies have shown that the single most important factor in one's chance at success in their immigration case is the presence or absence of counsel.[140] As such, it is inconceivable to assert that a hearing can be fair when a person has lost the ability to remain in the United States as a result of counsel's errors.[141] For ex-

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134. Padilla v. Kentucky, 559 U.S. 356, 373 (2010).

135. 559 U.S. 356 (2010).

136. *Padilla*, 559 U.S. at 365 (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

137. Yamataya v. Fisher 189 U.S. 86, 101 (1903); *see also* Bridges v. Wixon, 326 U.S. 135, 150-54 (1945) (explaining that the "rules are designed to protect the interest of the alien and afford him due process of law . . . safeguards against essentially unfair procedures . . . . Here the liberty of an individual is at stake").

138. *See* Reno v. Flores, 507 U.S. 292, 306-07 (1993) (examining the INS procedures for deportation); *see supra* notes 123-128 and accompanying text; *see generally* Ellison, *Extending Due Process Protection to Unadmitted Aliens Within the U.S. Through the Functional Approach of Boumediene*, 3 the crit: Critical Stud. J. 1 (2010).

139. *Mathews*, 424 U.S at 335.

140. *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz, Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (Nov. 2007) (stating "[r]epresented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel. The regression analyses confirmed that, with all other variables in the study held constant, represented asylum seekers were substantially more likely to win their case than those without representation.").

141. Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008).

ample, there have been instances in which a noncitizen's lawyer has failed to even file a brief on appeal, resulting in the automatic loss of the case.[142] When such clients have a meritorious claim to remain in the United States and are denied that right due to ineffective counsel, they unequivocally experience an erroneous deprivation of that right if denied the ability to reopen their proceedings.

The Supreme Court has explained that "recent changes in . . . immigration law" have "dramatically raised the stakes of a noncitizen's criminal conviction" such that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants . . . ."[143] Numerous courts have recognized the importance of competent counsel to avoid an erroneous deprivation of that high personal interest at stake.[144]

In contrast, when considering the final prong of the *Matthews* analysis, the government's interests and burdens in this analysis are minimal. In the circuits that have held that there is a constitutional right to effective counsel in removal proceedings, which includes a right to file a motion to reopen, the government is not being forced to appoint counsel in immigration proceedings.[145]

Likewise, such motions to reopen do not subject the government to any financial or administrative burdens outside of having to rehear certain cases that were found to be fundamentally unfair due to counsel's errors. The Board of Immigration Appeals and the majority of circuit courts across the country already impose this rule on the government.[146] That the right has existed for nearly thirty years, and in so many circuits, establishes that the fiscal and administrative burdens are slight, particularly when weighed against the substantial liberty interest at stake.[147]

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142. *See, e.g.*, Correa-Rivera v. Holder, 706 F.3d 1128, 1133 (9th Cir. 2013); Xu Yong Lu v. Ashcroft, 259 F.3d 127, 129-30 (3d Cir. 2001); Iturribarria v. INS, 321 F.3d 889, 901 (9th Cir. 2003).

143. *Padilla*, 559 U.S. at 364-66.

144. *See id*. at 364; *see also Nehad*, 535 F.3d at 967 (explaining that "[r]epresentation by competent counsel is particularly important in removal proceedings because '[t]he proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate.'"); *see also supra* note 109 and accompanying text.

145. Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003). This fact also distinguishes the instant case from *Murray v. Giarratano*, 492 U.S. 1, 109 (1989), which addresses the right to appointed counsel when seeking post-conviction relief.

146. Matter of Assaad, 23 I. & N. Dec. 553, 556-58 (2003); *see supra* notes 109-113 and accompanying text.

147. The Attorney General ("AG") has also recognized its interest in regulating who may practice before the BIA and Immigration Courts for the purpose of "the protection of the public, the preservation of the integrity of the immigration courts, and the maintenance of high professional standards." *Professional Conduct for Practitioners – Rules and Procedures*, 65 FR 39513-01, 39514 (June 27, 2000). The AG stated that these goals

In sum, the conclusion that a noncitizen in immigration proceedings has a Fifth Amendment due process right to effective counsel, which includes a procedure to correct errors of counsel, is well supported in the law and follows necessarily from the axiomatic conclusion that removal proceedings must be fundamentally fair. It borders on the absurd to say one has a right to a fair hearing, but that right does not extend to correcting prejudicial errors of defective counsel. Where a lawyer misses a deadline and permanently destroys all chances of prevailing in a case,[148] for one with a meritorious claim to relief, the right to a fundamentally fair hearing would be of no value at all if it does not encompass a right to correct prejudicial errors of defective counsel.[149] In such situations, the two rights are synonymous, coextensive, and meaningless if separated from one another.

B. THE CONGRUENCE OF A DUE PROCESS RIGHT TO EFFECTIVE COUNSEL IN REMOVAL PROCEEDINGS WITH THE STATE ACTOR DOCTRINE

As explained above, the Attorney General ("AG") in *Matter of Compean*[150] ("*Compean I*") and the United States Court of Appeals for the Eighth Circuit in *Rafiyev v. Mukasey*,[151] both held that because only state actors can deprive individuals of their constitutional rights, and because counsel in immigration proceedings is never a state actor, one can never claim a constitutional deprivation, even when the attorney commits egregious errors that result in manifest injustice.[152]

However, it is my opinion that the AG and the Eighth Circuit erred in *Rafiyev* and *Compean I* by circularly misapplying the state actor doctrine.[153] The United States Supreme Court has explained numerous times that where there is a constitutional right to counsel and an individual has been prejudiced by the ineffective assistance of even a privately retained, non-appointed attorney, the error is imputed to the state.[154]

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are "important public interest objectives." *Id.*; *see also* 8 C.F.R. § 292.1(a); 8 C.F.R. § 3.102(k) (providing that practitioners who engage in ineffective assistance can be sanctioned).

148. Iowa Supreme Court Attorney Disciplinary Bd. v. Said, 869 N.W.2d 185, 189 (Iowa 2015); Iowa Supreme Court Attorney Disciplinary Bd. v. Mendez, 855 N.W.2d 156, 162 (Iowa 2014).

149. *Nehad*, 535 F.3d at 967.

150. 24 I. & N. Dec. 710 (Att'y Gen. 2009).

151. 536 F.3d 853 (8th Cir. 2008).

152. Rafiyev v. Mukasey, 536 F.3d 853, 860 (8th Cir. 2008); Obleshchenko v. Ashcroft, 392 F.3d 970, 972 (8th Cir. 2004).

153. *See infra* notes 154-160 and accompanying text.

154. *See* Coleman v. Thompson, 501 U.S. 722, 753-54 (1991) (determining that when an attorney's error "constitutes a violation of petitioner's right to counsel, . . . the error must be seen as [being] imputed to the State.") (citing Evitts v. Lucey, 469 U.S. 387, 396

Indeed, the Supreme Court in *Cuyler v. Sullivan*[155] explained that a retained attorney whose error, of which state officials neither knew nor had reason to know, could provide inadequate representation such that would "render a trial so fundamentally unfair as to violate the Fourteenth Amendment['s]" due process clause.[156] In fact, the Court explicitly rejected the argument that there could be no constitutional violation because there was no state action.[157] Rather, the Court reasoned that where "proceedings [are] initiated and conducted by the State," and an unjust result is obtained by the State because of inadequate assistance of counsel, "it is the State that unconstitutionally deprives the defendant of his liberty."[158]

This reasoning, in the context of criminal proceedings, is equally applicable to civil removal proceedings. Indeed, the Court has never limited its holding regarding the right to counsel simply to criminal proceedings involving the Sixth Amendment.[159] Rather, the Supreme Court has held on several occasions that the right to even appointed counsel can be required by the due process clause in civil proceedings.[160]

Accordingly, there is no principled reason for finding state action where there has been a violation of one's right to counsel in criminal proceedings, while refusing to find state action where there has been a violation of a one's right to counsel in civil proceedings. The Supreme Court's reasoning regarding the right to counsel and state action is equally applicable in both contexts.

C. Practical Implications to Finding a Due Process Right to Effective Counsel in the Eighth Circuit

There are two practical implications at stake if the United States Court of Appeals for the Eighth Circuit reverses *Rafiyev v.*

(1985)); *see also Evitts*, 469 U.S. at 396 (declaring, "[t]he constitutional mandate guaranteeing effective assistance of counsel is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law."); Murray v. Carrier, 477 U.S. 478, 488 (1986) (stating that "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default is imputed to the State.") (citing Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)).

155. 446 U.S. 335 (1980).

156. *Cuyler*, 446 U.S. at 343-44.

157. *See id.* at 344-45 (stating "we see no basis for drawing a distinction between retained and appointed counsel.").

158. *Id.*

159. *See supra* note 127 and accompanying text.

160. *See* Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C., 452 U.S. 18, 33 (1981) (applying the Sixth Amendment right to counsel to proceedings outside the criminal context); In re Gault, 387 U.S. 1, 41 (1967); Vitek v. Jones, 445 U.S. 480, 483, 493 (1980) (concluding by plurality that the due process clause could require a right to counsel in civil proceedings).

Mukasey,[161] and finds there is a constitutional right to effective counsel in removal proceedings. First, a reversal should result in obtaining a better standard of review of denials by the BIA of motions to reopen based upon ineffective assistance of counsel. Second, it would represent an important preventative measure against future attempts to eliminate the BIA's *Lozada*[162] decision.

Because constitutional claims are given a *de novo* standard of review by a reviewing court,[163] if the Eighth Circuit were to explicitly hold that an alien has a due process right to effective counsel in removal proceedings, it should result in obtaining *de novo* review of the BIA's denials of motions to reopen on this basis, rather than the extraordinarily deferential level of review presently given to such decisions.[164] Indeed, at present, the court's deferential "abuse of discretion" standard is currently used to review such decisions.[165]

It should come as no surprise then that in the last fifteen years, the Eighth Circuit has only twice granted a petition for review of a denial by the BIA of a motion to reopen for ineffective assistance of counsel, out of twenty-five published decisions on the issue.[166]

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161. 536 F.3d 853 (8th Cir. 2008).

162. 19 I. & N. Dec. 637 (B.I.A. 1996).

163. Njorge v. Holder, 753 F.3d 809, 811 (8th Cir. 2014). In the context of reviewing a claim for denial of access to counsel, the court has stated that it "review[s] due process challenges de novo." *Njorge*, 755 F.3d at 811.

164. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 493 (1991); Habchy v. Gonzales, 471 F.3d 858, 862 (8th Cir. 2006) (quoting Shoaira v. Ashcroft, 377 F.3d 837, 842 (8th Cir. 2004)); Contreras v. Att'y Gen. of U.S., 665 F.3d 578, 583 (3d Cir. 2012); Sing v. Lynch, 803 F.3d 988, 991 (8th Cir. 2015); *see also infra* note 165 and accompanying text.

165. Rafiyev v. Mukasey, 536 F.3d 853, 856-58 (8th Cir. 2008) (stating "[t]he BIA's discretionary decision . . . is conclusive unless 'manifestly contrary to the law and an abuse of discretion.'"); Ortiz-Puentes v. Holder, 662 F.3d 481, 484 (8th Cir. 2011) (noting that the Eighth Circuit "review[s] the BIA's decision to deny a timely motion to reopen under a deferential abuse-of-discretion standard."). Under the substantial evidence standard, factual findings are treated as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Singh*, 803 F.3d at 991 (citing Sandoval–Loffredo v. Gonzales, 414 F.3d 892, 895 (8th Cir. 2005)).

166. *Singh*, 803 F.3d at 994 (Denied); Lee v. Holder, 765 F.3d 851, 855 (8th Cir. 2014) (Denied); Salman v. Holder, 687 F.3d 991, 993 (8th Cir. 2012) (Denied); *Ortiz-Puentes*, 662 F.3d at 485 (Denied); Valencia v. Holder, 657 F.3d 745, 749 (8th Cir. 2011) (Denied); Ortega-Marroquin v. Holder, 640 F.3d 814, 820-21 (8th Cir. 2011) (Granted); Pafe v. Holder, 615 F.3d 967, 970 (8th Cir. 2010) (Denied); Ochoa v. Holder, 604 F.3d 546, 547 (8th Cir. 2010) (Denied); Ezeagwu v. Mukasey, 537 F.3d 836, 837 (8th Cir. 2008) (Denied); *Rafiyev*, 536 F.3d at 861 (Granted); Tamenut v. Mukasey, 521 F.3d 1000, 1005 (8th Cir. 2008) (Denied); Guled v. Mukasey 515 F.3d 872, 883 (8th Cir. 2008) (Denied); Lubale v. Gonzales, 484 F.3d 1078, 1081 (8th Cir. 2007) (Denied); *Habchy*, 471 F.3d at 868 (Denied); Haider v. Gonzales, 438 F.3d 902, 910 (8th Cir. 2006) (Denied); Dominguez-Capistran v. Gonzales, 413 F.3d 808 (8th Cir. 2005) (Denied) *rev'd en banc,* 438 F.3d 876 (8th Cir. 2006); Hernandez-Moran v. Gonzales, 408 F.3d 496, 500 (8th Cir. 2005) (Denied); Kanyi v. Gonzales, 406 F.3d 1087, 1091 (8th Cir. 2005) (Denied); Etchu-Njang v. Gonzales, 403 F.3d 577, 585 (8th Cir. 2005) (Denied); Guerra-Soto v. Ashcroft, 397 F.3d 637 (8th Cir. 2005) (Denied); Jamieson v. Gonzales, 424 F.3d 765, 768 (8th Cir. 2005) (Denied); Obleshchenko v. Ashcroft, 392 F.3d 970, 973 (8th Cir. 2004) (Denied); Al

And it has done so only once since the court issued its decision in *Rafiev.*[167]

If the Eighth Circuit abandons *Rafiev* and adopts its fellow circuit courts' holding that effective assistance of counsel is a constitutional right under the Fifth Amendment, the court should begin reviewing the Board's denials of such ineffective assistance of counsel claims *de novo.*[168] Such a move would give aggrieved noncitizens a much better chance at success before the Eighth Circuit.

Second, as shown above, *Lozada* is not immune from attack and may be reversed by the United States Attorney General. Just like AG Mukasey, a future AG has the authority to eradicate or alter the administrative structure of *Lozada* to make it dramatically more difficult for aliens negatively affected by deficient counsel to prevail in their motions to reopen.[169]

In the Eighth Circuit, the only reason such motions are presently reviewed is because it is the framework currently used by the Board.[170] Were the Board to cease accepting such motions (or dramatically limit them as occurred in *Compean I*[171]) in circuits where the right has been founded upon the due process clause, noncitizens would be able to continue to make such motions before the Board and seek review of any denials before the courts of appeals.[172] However, absent a constitutional basis for motions to reopen based upon ineffective assistance of counsel, were the AG to overrule *Lozada*, noncitizens would be without recourse in circuits such as the Eighth Circuit.

For these reasons, *Rafiyev*'s reversal represents an important safeguard and needed change for noncitizens suffering from deficient assistance of counsel in the Eighth Circuit, both now and into the future.

Khouri v. Ashcroft, 362 F.3d 466, 467 (8th Cir. 2004) (Granted); Nativi-Gomez v. Ashcroft, 344 F.3d 805, 809 (8th Cir. 2003) (Denied); Ismailov v. Reno, 263 F.3d 851, 855 (8th Cir. 2001) (Denied).

167. *See supra* note 166 and accompanying text.

168. *McNary*, 498 U.S. at 493; *Contreras*, 665 F. 3d at 583.

169. *See supra* notes 48-70 and accompanying text; *see also* Matter of Compean (*Compean I*), 24 I. & N. Dec. 710, 712 (Att'y Gen. 2009), *vacated by*, 25 I. & N. Dec. 1 (Att'y Gen. 2009); Matter of Compean (*Compean II*), 25 I. & N. Dec. 1, 1-2 (Att'y Gen. 2009).

170. Notwithstanding the Eighth Circuit's holding in *Ochoa*, the Supreme Court has held that the United States Courts of Appeals have the jurisdiction to review decisions by the Board's decision on this matter. Mata v. Lynch, 135 S.Ct. 2150, 2156-57 (2015); *cf.* Ochoa v. Holder, 604 F.3d 546, 548-50 (8th Cir. 2008).

171. 24 I. & N. Dec. 710 (Att'y Gen. 2009).

172. *See* In re Hector Ponce de Leon, 21 I. & N. Dec. 154, 159 (B.I.A. 1996) (stating that the Board is obligated to follow circuit law). However, courts afford agencies no deference in interpreting the Constitution. *See* U.S. W., Inc. v. FCC, 182 F.3d 1224, 1231 (10th Cir.1999) (citing Rust v. Sullivan, 500 U.S. 173, 190–91 (1991)).

V. STRATEGIES FOR ARGUING FOR THE REVERSAL OF *RAFIYEV* IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The United States Court of Appeals for the Eighth Circuit has already declared that it is bound by prior precedent on this issue in *Singh v. Lynch*;[173] however, it is not clear what arguments, if any, were placed before the court to reverse course in *Singh*. While one possible option for combating *Rafiyev v. Mukasey*[174] would be to seek review before the United States Supreme Court, in this section I present several possible strategies for requesting a future panel of the Eighth Circuit, or the full court sitting en banc, to reverse *Rafiyev*.[175]

The Eighth Circuit has explained that "it is well settled that a panel may depart from circuit precedent" if there is "an intervening opinion of the Supreme Court that undermines" or casts doubt on the prior panel's decision.[176] The panel reviewing the prior precedent in light of an intervening Supreme Court opinion is required to "explicitly identify the error or changed circumstances and explain why a different result is justified."[177] An error or changed circumstance includes cases in which the reasoning of the intervening Supreme Court opinion is inconsistent with the reasoning of past panel precedent.[178]

A. The Inconsistency Between the Supreme Court's Reasoning in *Padilla* and the Bright Line Rule Used by the Eight Circuit in *Rafiyev*

The reasoning behind the United States Court of Appeals for the Eighth Circuit's decision in *Rafiyev v. Mukasey*[179] rests squarely upon the outmoded distinction between criminal and civil proceedings to hold that "there is no constitutional right to an attorney" in removal proceedings, which are "civil."[180] However, the United States Su-

173. Singh v. Lynch, 803 F.3d 988, 993 (8th Cir. 2015) (rejecting Singh's request for the court to depart from *Rafiyev* and find a Fifth Amendment right to effective counsel in removal proceedings) (citing Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc)).

174. 536 F.3d 853 (8th Cir. 2008).

175. Fed. R. App. P. 35 (2015).

176. Northport Health Serv. of Ark., LLC v. Rutherford, 605 F.3d 483, 489 (8th Cir. 2010) (citing Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A., 551 F.3d 812, 821 (8th Cir. 2009)); *see also* United States v. Williams, 537 F.3d 969, 975 (8th Cir. 2008) (discussing review of prior circuit decisions) (citing Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 838 (8th Cir. 1997)).

177. *Williams*, 537 F.3d at 975 (citing Jacobs v. Lockhart, 9 F.3d 36, 38 (8th Cir. 1993)).

178. *Id.*

179. 536 F.3d 853 (8th Cir. 2008).

180. Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008).

preme Court's decision in *Padilla v Kentucky*[181] has significantly eroded this distinction. While noting that the "particularly severe 'penalty'" of deportation "is not, in a strict sense, a criminal sanction," the Court "find[s] it 'most difficult' to divorce the penalty from the conviction in the deportation context."[182]

In recognizing that the weighty liberty interest in "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence," the court holds that the Sixth Amendment and *Strickland v. Washington*[183] require competent counsel to advise noncitizens accused of crimes "whether his plea carries a risk of deportation."[184]

Although the context of *Padilla* is distinguishable from the issue at hand, as our discussion in this Article is confined to the right in removal proceedings, its reasoning is applicable. The punitive nature of deportation sets removal proceedings apart from other purely civil proceedings such that the ineffective assistance of counsel resulting in deportation can no longer be brushed aside as a purely civil consequence.[185]

In these respects, the Supreme Court's holding in *Padilla* "undermines" the Eighth Circuit's decision in *Rafiyev* insofar as the Eighth Circuit relies upon a strict distinction between civil and criminal proceedings.[186] Inconsistency between circuit law and Supreme Court precedent has been established in the Eighth Circuit as a justification for a current panel to depart from reliance on past panel precedent.[187] Therefore, the court should at least reexamine its holding in *Rafiyev* based upon the intervening Supreme Court precedent touching upon this issue.

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181. 559 U.S. 356 (2010).

182. Padilla v. Kentucky, 559 U.S. 356, 365-66 (2010).

183. 466 U.S. 668 (1984).

184. *Padilla*, 559 U.S. at 374.

185. *See id*. at 373-74 (discussing the severity in consequence of deportation proceedings). As Justice Alito points out in his concurring opinion, "criminal convictions can carry a wide variety of consequences . . . including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and the loss of business or professional licenses." *Id.* at 376 (Alito, J., concurring). However, he explains that although "those consequences are 'serious,' . . . this Court has never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about such matters." *Id*.

186. *Northport Health Serv.*, 605 F.3d at 489.

187. *Williams*, 537 F.3d at 975.

B. *RAFIYEV*'S MISAPPLICATION OF THE STATE ACTOR DOCTRINE

Additionally, the United States Court of Appeals for the Eighth Circuit's reasoning in *Rafiyev v. Mukasey*[188] regarding the state actor doctrine is terribly flawed. As explained above, the court held that because counsel in immigration proceedings are not state actors and only state actors can deprive constitutional rights, a noncitizen in removal proceedings can never have his due process right infringed by defective counsel, irrespective of how catastrophic the damage.[189]

However, the court's reasoning in *Rafiyev* is utterly circular when the doctrine of state action is viewed in its proper light.[190] As explained above, the United States Supreme Court has long held that where there is a constitutional right to counsel and an individual has been prejudiced by defective counsel, the error is imputed to the state as a matter of law.[191]

Because it is the conclusion that one has a right to counsel that requires counsel's errors be imputed to the state,[192] it is circular to use the state action doctrine to resolve the question of whether there is a right to counsel. The Eighth Circuit's reasoning is incoherent to the extent that it bases its conclusion that there is no right to counsel on its earlier conclusion that private immigration attorneys are not state actors,[193] when the issue of state action in this context turns upon the more fundamental question of whether there is any right to counsel. In short, because the Eighth Circuit assumes there is no right to counsel, it finds there is no state action. However, given that the presence or absence of state action rests upon the more basic conclusion of whether there is a right to counsel,[194] it is nonsense to seek to use the state actor doctrine to resolve whether there is a right to counsel.

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188. 536 F.3d 853 (8th Cir. 2008).

189. Rafiyev v. Mukasey, 536 F.3d 853, 860 (8th Cir. 2008); Obleshchenko v. Ashcroft, 392 F.3d 970, 972 (8th Cir. 2004).

190. *See supra* notes 154-160 and accompanying text.

191. *See* Coleman v. Thompson, 501 U.S. 722, 755 (1991) (stating that when an attorney's error "constitutes a violation of petitioner's right to counsel, . . . the error must be seen as [being] imputed to the State.") (citing Evitts v. Lucey, 469 U.S. 387, 396 (1985) and Murray v. Carrier, 477 U.S. 478, 488 (1986)); *see also Evitts*, 469 U.S. at 396 (expressing that "[t]he constitutional mandate [guaranteeing effective assistance of counsel] is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law."); *Murray*, 477 U.S. at 488 (explaining that "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State.") (citing Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)).

192. *See Cuyler*, 446 U.S. at 343-45.

193. *Rafiyev*, 536 F.3d at 860.

194. *See Cuyler*, 446 U.S. at 343-45.

Instead, in order for the court to continue to find that there is no right to effective counsel in removal proceedings, it must be able to meaningfully explain how it is possible for a noncitizen to enjoy his right to a fundamentally fair hearing when defective counsel renders those proceedings unfair. If noncitizens are constitutionally without recourse in such cases, how could their proceedings possibly be fair? It is my position that the court has not and cannot answer that question.

C. The Eight Circuit's Decision in *Rafiyev* is at Odds with its Reasoning in Several Other Precedent Decisions

In addition to the errors in *Rafiyev v. Mukasey*'s[195] reasoning laid out above, the court's holding in *Rafiyev* is also inconsistent with prior and subsequent United States Court of Appeals for the Eight Circuit precedent. In *United States v. Torres-Sanchez*,[196] the Eighth Circuit recognized in 1995 that an alien has both a statutory and a constitutional right to counsel.[197] In *Torres-Sanchez*, the court held that "depriving an alien of the right to counsel" could constitute "a due process violation."[198] More recently, in 2004, the court in *Al Khouri v. Ashcroft*[199] reaffirmed a due process right to counsel in removal proceedings.[200] Indeed, the court explained that:

> It is well-settled that, while there is no Sixth Amendment right to counsel[,] . . . aliens have a statutory right to counsel at their own expense[,] . . . and are entitled to the Fifth Amendment's guarantee of due process of law in deportation proceedings. In certain circumstances, depriving an alien of the right to counsel may rise to the level of a due process violation.[201]

Thus, the court's claim in *Rafiyev*—that the Eighth Circuit has never held that a noncitizen in removal proceedings has a due process right to counsel—is not entirely true.

Likewise, the court's holding in *Rafiyev*—that an alien has no constitutional right to an attorney—conflicts with *Njorge v. Holder;*[202]

195. 536 F.3d 583 (8th. Cir. 2008).
196. 68 F.3d 227 (8th Cir. 1995).
197. United States v. Torres-Sanchez, 68 F.3d 227, 230 (8th Cir. 1995).
198. *Torres-Sanchez*, 68 F.3d at 230-231 (citing United States v. Campos-Asencio, 822 F.2d 506, 509 (5th Cir. 1987)); *accord Campos-Asencio*, 822 F.2d at 509 (stating "an alien has a right to counsel if the absence of counsel would violate due process under the fifth amendment . . . . Aliens also have a statutory right to counsel, although not at Government expense.").
199. 362 F.3d 461 (8th Cir. 2004).
200. Al Khouri v. Ashcroft, 362 F.3d 461, 462 (8th Cir. 2004) (citing *Torres–Sanchez*, 68 F.3d at 230).
201. *Al Khouri*, 362 F.3d at 462 (citing 8 U.S.C. § 1229a(b)(4)(A) (2006); Reno v. Flores, 507 U.S. 292, 306 (1993); *Torres-Sanchez*, 68 F.3d at 230).
202. 753 F.3d 809 (8th Cir. 2014).

the court's own and more recent holding.[203] In 2014, the court in *Njorge* acknowledged that the right to counsel exists in removal proceedings to the extent that an alien is entitled to the Fifth Amendment's guarantee of due process of law.[204]

While the panels in *United States v. Torres-Sanchez*,[205] *Njorge*, and *Al Khouri* were not addressing the issue of ineffective assistance of counsel, but rather the right to have counsel at one's hearing, the reasoning in those decisions is irreconcilable with the court's reasoning in *Rafiyev*. Indeed, it makes no sense to say one has a constitutional right to have counsel present at removal proceedings, while asserting elsewhere that there is no right to effective counsel.[206]

Rather, it seems that in some circumstances—such as in the case of a missed filing deadline—having defective counsel may actually be worse than having no counsel at all. For this reason, it is my view that the court's holdings in *Torres-Sanchez*, *Al Khouri*, and *Njorge* could be used to lay the legal groundwork to overrule *Rafiyev*.

Contrary to *Rafiyev*'s holding, *Torres-Sanchez*, *Al Khouri*, and *Njorge* make it clear that a noncitizen has a constitutional right to counsel in circumstances when the absence of counsel would violate his Fifth Amendment due process rights.[207] Therefore, it follows that if a noncitizen has a recognized constitutional right to counsel in circumstances when having no counsel would be a violation of that right, then a noncitizen must also at least have a right to effective counsel whenever ineffective counsel would be as bad as having no counsel at all.

In sum, there are substantial legal errors related to the Eighth Circuit's state actor doctrine and heavy reliance upon a strict criminal/civil distinction in immigration matters, a dichotomy significantly eroded by the Supreme Court in *Padilla*. Additionally, there is inconsistency within the Eighth Circuit's jurisprudence on the issue of a due process right to counsel in removal proceedings. Moreover, it logically follows that if there is a right to a fair hearing in removal proceedings, that right is of little value if divorced from a right to effective counsel. Consequently, it is time for the court to revisit its decision in

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203. Njorge v. Holder, 753 F.3d 809, 811 (8th Cir. 2014).

204. *Njorge*, 753 F.3d at 811 (citing Uspango v. Ashcroft, 289 F.3d 226, 231 (3d Cir. 2002); *Flores*, 507 U.S. at 306; *Torres-Sanchez*, 68 F.3d at 230).

205. 68 F.3d 227 (8th Cir. 1995).

206. Indeed, even the court in *Rafiyev* appears to accept the conclusion that the right to counsel and the right to effective counsel are inextricably entwined. Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008).

207. *See Rafiyev*, 536 F.3d at 861 (denying that the Fifth Amendment grants the right to effective counsel in removal proceedings); *see also Torres-Sanchez,* 68 F.3d at 230 (stating that "in some circumstances, depriving an alien of the right to counsel may rise to a due process violation.").

Rafiyev and choose to adopt the rule shared by the vast majority of its sister circuits that there is a constitutional right to effective counsel in immigration proceedings under the Fifth Amendment.[208]

VI. CONCLUSION

The story of Mr. Utoc Garcia, with which we began this Article, is one all too common in the practice of immigration law.[209] Unscrupulous lawyers, and those masquerading as lawyers, too often take advantage of immigrants seeking to traverse the U.S. immigration system, one that has been aptly described as a "labyrinth that only a lawyer could navigate."[210] Indeed, cultural and linguistic barriers, unfamiliarity with our legal processes, and the timidity often accompanying an uncertain immigration status work together to prevent many noncitizens from knowing their rights, let alone seeking to enforce them.[211]

Indeed, one of the significant reasons immigration lawyers have some of the lowest malpractice insurance rates among all practice areas[212] is because when errors occur, it often results in the removal of the client from the country.[213] This outcome makes it exceedingly difficult for the client to seek redress in the form of a subsequent malpractice suit.

Moreover, while clients can and do occasionally win malpractice suits against former deficient counsel, the remedy is limited to monetary damages. This does not allow for the aggrieved and wrongfully deported client to return to his home or property in the United States. It cannot give him the ability to live and work in the United States.

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208. Contreras v. Att'y Gen., 665 F.3d 578, 584 (3d Cir. 2012); Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008); Zeru v. Gonzalez, 503 F.3d 59, 72-73 (1st Cir. 2007); Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1273 (11th Cir. 2004); United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003); Denko v. INS, 351 F.3d 717, 723-24 (6th Cir. 2003); Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003).

209. *See supra* note 20 and accompanying text; *see also Court Suspends Des Moines Immigration Lawyers License*, DES MOINES REGISTER, September 8, 2016, *available at* http://www.desmoinesregister.com/story/news/crime-and-courts/2015/09/08/court-suspends-des-moines-immigration-lawyers-license/71882090/?from=global&sessionKey=&autologin=.

210. *Nehad*, 535 F.3d at 967 (explaining that "[r]epresentation by competent counsel is particularly important in removal proceedings because '[t]he proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate.'").

211. Aguilera-Cota v. INS, 914 F.2d 1375, 1382 (9th Cir. 1990) (noting that immigration forms "are frequently filled out by poor, illiterate people who do not speak English and are unable to retain counsel.").

212. Andrew Lavoott, *The Rare Immigration Legal Malpractice Case*, April 14, 2010, *available at* http://blog.bluestonelawfirm.com/2010/04/legal-malpractice-news/the-rare-immigration-legal-malpractice-case/.

213. *Id.*

And it cannot end the separation he experiences with his friends and family that remain in the United States. Indeed, it cannot make him whole after a loss of "all that makes life worth living."[214] This fact alone should silence those who would assert that the only remedy for noncitizens denied justice in removal proceedings is a malpractice suit against the deficient attorney.

The extreme penalty of deportation is what distinguishes civil immigration proceedings from other civil proceedings. Wherein most civil proceedings are simply about the allocation of monetary damages, immigration removal proceedings are about one's weighty liberty interests in being able to remain free from detention in one's home with one's family and friends. Thus, while in ordinary civil proceedings, a malpractice suit against one's former counsel can indeed make one whole in most instances; in removal proceedings, monetary damages cannot even come close. Thus, as alluded to by the Supreme Court in *Padilla v Kentucky*,[215] it is time to end the absurd legal fiction that immigration proceedings are purely civil proceedings.

In the nation that so eloquently declares at the foot of its monument to liberty, "[g]ive me your tired, your poor, [y]our huddled masses yearning to breathe free,"[216] it is a most perverse hypocrisy for us to deny those huddled masses justice in our courts as a result of the errors of defective counsel. The law in the Eighth Circuit is on the wrong side of justice and must be set right.

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214. Ho v. White, 259 U.S. 276, 284 (1922).

215. 559 U.S. 356 (2010).

216. Poet Emma Lazarus penned these words that now adorn the pedestal on which the Statute of Liberty stands. Her full poem reads as follows:

> Not like the brazen giant of Greek fame, With conquering limbs astride from land to land; Here at our sea-washed, sunset gates shall stand, A mighty woman with a torch, whose flame, Is the imprisoned lightning, and her name, Mother of Exiles. From her beacon-hand, Glows world-wide welcome; her mild eyes command, The air-bridged harbor that twin cities frame. "Keep ancient lands, your storied pomp!" cries she, With silent lips. "Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!"