
POSTSCRIPT

THE NONCONSTITUTIONAL CHARACTER OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN IMMIGRATION PROCEEDINGS: A BRIEF COMMENT ON *AFANWI V. MUKASEY*

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On May 19, 2008, the United States Court of Appeals for the Fourth Circuit held that an alien was foreclosed from establishing that alleged ineffective assistance of counsel deprived him of his right to due process, as aliens do not possess any constitutional right to effective assistance of counsel in immigration proceedings, and thus any ineffectiveness of privately retained counsel cannot be imputed to the government for purposes of establishing a violation of the Fifth Amendment.¹ On its face, the holding of the Fourth Circuit regarding this issue seems spectacularly uninteresting—immigration proceedings have long been recognized to be civil in nature,² and thus the Sixth Amendment does not provide any right to counsel. Without a constitutional right to counsel, there can be no constitutional violation if privately retained counsel performs ineffectively, as there will be no nexus in those circumstances between the counsel’s ineffectiveness and the state action required for invoking the Constitution. Notwithstanding this seemingly straight-forward analysis, the Fourth Circuit joined just one other court, the Court of Appeals for the Seventh

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1. *Afanwi v. Mukasey*, 526 F.3d 788, 798 (4th Cir. 2008).
2. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

Circuit, in finding that ineffective assistance of counsel in immigration proceedings does not constitute a violation of an alien's right to due process.³ Every other court of appeals that addressed this issue has found that, although the Sixth Amendment does not guarantee a right to counsel in immigration proceedings, ineffective assistance of counsel may render the proceedings so fundamentally unfair and so impeding the presentation of an alien's case that the ineffectiveness could deprive an alien of his right to due process under the Fifth Amendment.⁴ These courts have reached this conclusion in a perfunctory fashion, without squarely reconciling Supreme Court precedent that seems to argue strongly against the possibility that the ineffective assistance of counsel may constitute a violation of due process in circumstances where the Constitution does not provide a right to counsel.⁵

The purpose of this brief essay is to elucidate the false foundations of this discovered constitutional right to effective assistance of counsel. In turn, the following will be addressed: (1) the invented relationship between an alien's statutory right to retain counsel and the Constitution's guarantee of due process; (2) a misapprehension of the relevant jurisprudence of the Board of Immigration Appeals ("BIA"); and (3) the belief that immigration proceedings are somehow *sui generis*. Following this, the decision of the Fourth Circuit may be weighed on its merits. First, however, it is necessary to understand when ineffective assistance of counsel may be imputed to the state, and thus, when that ineffectiveness may constitute a violation of due process.

As noted previously, the Supreme Court has consistently held that where there is no constitutional right to counsel, the ineffective assistance

3. See *Magala v. Gonzales*, 434 F.3d 523, 525–26 (7th Cir. 2005); *Stroe v. INS*, 256 F.3d 498, 499–501 (7th Cir. 2001). After the Fourth Circuit's decision in *Afanwi*, the Eighth Circuit also concluded that there is no constitutional right to effective assistance of counsel during removal proceedings. *Rafiyev v. Mukasey*, 536 F.3d 853, 859–61 (8th Cir. 2008). See also *Obleshchenko v. Ashcroft*, 392 F.3d 970, 971–72 (8th Cir. 2004) (questioning the existence of a Fifth Amendment right to effective counsel in immigration proceedings).

4. See *Zheng v. Gonzales*, 422 F.3d 98, 106 (3d Cir. 2005); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001); *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001); *Akinwunmi v. INS*, 194 F.3d 1340, 1341 n.2 (10th Cir. 1999); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999); *Saleh v. U.S. Dep't of Justice*, 962 F.2d 234, 241 (2d Cir. 1992); *Lozada v. INS*, 857 F.2d 10, 13–14 (1st Cir. 1988); *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985).

5. See *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007) (finding that mistake by petitioner's counsel is insufficient basis for tolling one-year statute of limitations for seeking federal habeas relief because "prisoners have no constitutional right to counsel" in postconviction context); *Coleman v. Thompson*, 501 U.S. 722, 752–57 (1991) (finding the same in state habeas proceedings); *Wainwright v. Torna*, 455 U.S. 586, 586–88 (1982) (per curiam) (finding the same in discretionary state appeals).

of retained counsel is not a constitutional violation.⁶ For instance, in *Wainwright v. Torna*, the Court was confronted with a claim of constitutional ineffectiveness based on the respondent's attorney's failure to file a timely application for a writ of certiorari with the Florida Supreme Court.⁷ Review in the Florida Supreme Court would have been pursuant to a discretionary grant of jurisdiction, as respondent's case did not fall within the class of cases subject to that court's mandatory jurisdiction.⁸ In such circumstances—that is, those seeking further discretionary review—the respondent did not possess any constitutional right to counsel, and thus any alleged ineffectiveness connected with that counsel's failure to timely file the application with the Florida Supreme Court could not be deemed a constitutional violation.⁹ The Court also noted, however, that, even assuming the failure to timely file the application implicated a due process interest, such failure “was caused by [respondent's] counsel, and not by the State.”¹⁰

Justice Marshall dissented, writing an opinion that would be adopted by many courts of appeals in the immigration context, despite the fact that the reasoning and logic of that dissent has never become constitutional law in any context. Marshall argued that “[a]lthough respondent's Sixth Amendment right to effective assistance of counsel may not have been infringed, he was denied his right to due process.”¹¹ This is the exact logic utilized by those courts of appeals that have found a constitutional violation in the ineffective assistance of counsel in immigration cases. While foreswearing any reliance on the Sixth Amendment, which even more fully forecloses relief in the immigration context than it does in state or federal discretionary proceedings, the courts instead turn to the open-ended precepts of the Fifth Amendment's guarantee of due process.

More recently, in *Coleman v. Thompson*,¹² the Court reiterated the fundamental basis for finding a constitutional violation in the ineffective assistance of counsel. The focus must lie with the fact that counsel is constitutionally mandated. Absent a constitutional right to counsel in any

6. *Wainwright*, 455 U.S. at 587–88.

7. *Id.* at 586–87.

8. *Id.* at 587.

9. *Id.* at 587–88.

10. *Id.* at 588 n.4.

11. *Id.* at 589 (Marshall, J., dissenting). Justice Marshall also found sufficient state action to invoke the Constitution, contending that “a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment.” *Id.* at 590.

12. *Coleman v. Thompson*, 501 U.S. 722 (1991).

given class of proceedings, ineffectiveness in the representation during those proceedings cannot rise to a constitutional violation.¹³ If there is a constitutional right to counsel, then the foundation of the ensuing “constitutional violation” lies with the fact that the errors of counsel are imputable to the state, which in the first instance had the constitutional obligation to provide counsel, and effective counsel at that. As more fully explained by Justice O’Connor:

Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails. A different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel. As between the State and the petitioner, it is the petitioner who must bear the burden of a failure to follow state procedural rules.¹⁴

Thus, as *Coleman* makes clear, for ineffective assistance of counsel to rise to the level of a constitutional violation, there must be a constitutional obligation on the state to provide effective counsel such that it would be fair to impute any ineffectiveness to the state. Without this state obligation, any failures in a counsel’s representation cannot be fairly imputed to the state for constitutional purposes.

On this logic, then, how could a court discern a constitutional violation in the representation of privately retained counsel in a civil immigration proceeding, where the Constitution does not itself guarantee a right to be represented by counsel? Courts have looked to an imagined relationship between the statutory right to retain counsel in immigration proceedings and the due process clause. First, it has long been held that the Constitution guarantees aliens the right to due process, whether they are present in the United States legally or illegally, and that this constitutional right extends to aliens in removal proceedings.¹⁵ The problem arises when this due process right is weighed in conjunction with the nonconstitutional right to retain counsel guaranteed by the Immigration and Nationality Act (“INA”). The INA guarantees aliens the right to be represented by counsel of their choosing in the course of their proceedings, at no expense to the

13. *Id.* at 752 (citing *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Wainwright*, 455 U.S. 586).

14. *Id.* at 754.

15. *See, e.g., Reno v. Flores*, 507 U.S. 292, 306 (1993).

government.¹⁶ Yet this statutory right to be represented is not, by definition, constitutional in character, nor does it place any burden on the government to provide counsel. Rather, the INA simply guarantees aliens representation of their choosing and at their own cost, if the aliens so desire. The error occurs in absorbing this statutory right to counsel into the broader right to due process. For instance, the Ninth Circuit has consistently asserted that the “right to counsel” in immigration proceedings stems from the alien’s right to due process in those proceedings.¹⁷ These assertions are always perfunctory, however, and there has never been an explanation for why a statutory right to retain counsel, existing wholly outside the bounds of any constitutional prescription, could be deemed a constitutional right, especially in light of Supreme Court precedent clearly drawing a line of constitutional demarcation between those circumstances when the state is and is not obligated to provide counsel, and thus, where the actions of counsel can and cannot be imputed to the state for constitutional purposes.

A second level of confusion stems from a reciprocal legitimation of jurisprudence between the BIA and those courts of appeals that have found a constitutional violation in the ineffective assistance of counsel. In 1988, the BIA decided the case of *In re Lozada*.¹⁸ Citing precedent decisions in the Fifth and Ninth Circuits, the BIA noted that *if* there was any right to counsel in immigration proceedings, that right would have to be a function of the Fifth Amendment.¹⁹ The BIA did not, however, address the issue on its own terms and *find* such a right. Citing to previous circuit court decisions, the BIA assumed that such a right did exist.²⁰ It then established certain requirements that claimants would have to meet in order to demonstrate such ineffectiveness that would justify the granting of relief.²¹

These *Lozada* requirements became nearly sacrosanct in the courts of appeals, entrenching the very principle which the BIA had simply assumed based on its review of circuit court precedent. The former Immigration and Naturalization Service attempted to rectify this false conception, but was rebuffed by the BIA in 2003.²² In *In re Assaad*, while recognizing the

16. 8 U.S.C. §§ 1229a(b)(4)(A), 1362 (2006). *See also* 8 C.F.R. § 1003.16(b) (2008).

17. *Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985).

18. *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988).

19. *Id.* at 638.

20. *Id.*

21. *Id.* at 638–39.

22. *In re Assaad*, 23 I. & N. Dec. 553, 556–58 (B.I.A. 2003) (en banc).

seemingly contrary precedents of the Supreme Court, the BIA determined that, as the courts of appeals had moved with near unanimity toward a jurisprudence recognizing ineffective assistance of counsel as a violation of due process, it would be bound by that line of cases.²³ Dodging the more thorny issue of whether these circuit courts were correctly applying Supreme Court precedent, the BIA noted:

[A]ccepting the Service's interpretation of Supreme Court law in this case would amount to a decree by the Board that the circuit courts that have analyzed the issue in the immigration context, and who are clearly able to consider the Supreme Court's authority, have reached an incorrect result. We are unwilling to so hold, as it is beyond our limited authority as an administrative decision-making body.²⁴

The course of legitimation is worth noting. The BIA presumed that ineffective assistance of counsel could constitute a due process violation based on conclusory circuit court precedent. The courts of appeals then noted the BIA's decision assuming this and took it as validation for their initial holding, which was affirmed by the BIA when asked to reconsider this rule because the courts of appeals had almost unanimously followed the principle it merely adopted without reasoning, on the basis that the BIA had found such a right. Despite the appearance of firm entrenchment, this "constitutional" right has passed into the canon with nary a sentence of actual justification and no engagement with the relevant Supreme Court precedent. And it is, of course, again worth noting that even in *In re Assaad*, the BIA did not itself determine that there was a right to effective assistance of counsel; it simply acknowledged that the mass of circuit court precedent recognized such a right and that it was bound to observe the precedent decisions of the courts of appeals.

Finally, some argue that immigration proceedings are neither entirely civil nor entirely criminal in nature, and are thus, in a sense, *sui generis*. Accordingly, the traditional bright-line rule regarding constitutionally mandated counsel cannot be as clearly applied as some believe. Judge Diane Wood of the Seventh Circuit voiced such a sentiment in her concurrence in *Stroe v. INS*, noting that "[t]he labels 'civil' and 'criminal' for cases are imprecise . . . [T]here are many areas of federal law where this distinction becomes blurred. Habeas corpus is one, civil forfeitures in

23. *Id.* at 558–60 (citing *In re Anselmo*, 20 I. & N. Dec. 25, 31–32 (B.I.A. 1989)).

24. *Id.* at 560 (citing *In re Martin*, 23 I. & N. Dec. 491, 492 (B.I.A. 2002)). In response to this argument, Board Member Lauri Steven Filppu noted that "[i]f *Coleman* and *Wainwright* are not distinguishable, it does not matter how many lower court cases, oblivious to Supreme Court law, exist." *Id.* at 564 (Filppu, Board Member, concurring).

conjunction with criminal prosecutions is another, and immigration cases may well be a third.”²⁵ In the immigration context, the argument rests on the obviously significant fact that the alien may be removed from the United States based on the outcome of the proceeding and that “[d]eportation is [d]ifferent” in kind from a normal civil proceeding.²⁶ Leaving aside the fact that deportation and removal proceedings have never been construed as criminal proceedings, there is no weight to the “deportation is different” argument. There is no constitutional right to counsel in habeas corpus proceedings or other discretionary review proceedings, even when capital in nature, which surely involve a greater deprivation of life or liberty than removal.²⁷ Although removal is certainly a more significant deprivation than many outcomes in civil proceedings—say, a fine—it is not dramatically different from that broad class of cases in which the Supreme Court has consistently held there is no constitutional right to effective counsel, and thus no constitutional remedy for ineffective assistance of counsel.

None of the professed bases for finding a constitutional violation in the ineffective assistance of counsel is compelling, and so we find ourselves where we began: in the Fourth Circuit, where the first court of appeals to engage the relevant Supreme Court holdings found that, as there is no constitutional right to counsel in immigration proceedings, there can be no violation of due process if retained counsel performs ineffectively.

Joseph Afanwi applied for asylum, withholding of removal, and protection under the regulations implementing the Convention Against Torture, but he was found not credible by an immigration judge after the referral of that application to the immigration court by an asylum officer.²⁸ Although Afanwi appealed this decision to the BIA, it dismissed his appeal on November 29, 2005.²⁹ A copy of the BIA’s decision was mailed to the address Afanwi’s counsel provided to the BIA, but in the interim between the proceedings before the BIA and the BIA’s decision, counsel had moved to a new location.³⁰ Thus, it was only after the thirty-day deadline for filing

25. *Stroe v. INS*, 256 F.3d 498, 505 (7th Cir. 2001) (Wood, J., concurring).

26. Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544, 1558–61 (2007). See also Robert S. Catz & Nancy Lee Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARV. C.R.-C.L. L. REV. 397, 437–38 (1984) (discussing the significance of deportation proceedings).

27. See *Murray v. Giarratano*, 492 U.S. 1, 7–8 (1989).

28. *Afanwi v. Mukasey*, 526 F.3d 788, 791 (4th Cir. 2008).

29. *Id.*

30. *Id.*

a petition for review with the Fourth Circuit had passed that Afanwi became aware of the BIA's dismissal.³¹ Alleging ineffective assistance of counsel, Afanwi filed a motion to reopen with the BIA, but this motion was denied on May 12, 2006.³²

In addressing Afanwi's ineffective assistance of counsel claim, the court first reiterated that, as immigration proceedings are civil in nature, the Sixth Amendment does not extend to aliens in removal proceedings.³³ Nonetheless, aliens do possess a statutory right to retain counsel and a constitutional right to due process,³⁴ both mentioned earlier. The sole issue becomes whether the Fifth Amendment's guarantee of due process can be construed in such a way as to support a constitutional right to effective assistance of counsel. Noting the mass of decisions by the other courts of appeals finding a due process violation in the ineffective assistance of counsel, the Fourth Circuit ruled to the contrary, holding that "retained counsel's ineffectiveness in a removal proceeding cannot deprive an alien of his Fifth Amendment right to a fundamentally fair hearing."³⁵

Having found only a right to retain counsel, the remaining question in the chain of reasoning is whether there is a sufficient nexus between the actions of privately retained counsel, who the government has no obligation to provide, and the state.³⁶ If there is no significant nexus between the state and private counsel, then there can be no constitutional violation, as the Fifth Amendment applies solely against the government.³⁷ Applying these traditional principles to the alien's claim of ineffective assistance of counsel, the court held that privately retained counsel acting in an immigration proceeding is not a "state actor," nor is there a sufficient nexus between such counsel and the government to justify imputing counsel's actions to the government for constitutional purposes. As the court summed up:

Afanwi's counsel was privately retained pursuant to 8 U.S.C. § 1362,

31. *Id.* See 8 U.S.C. § 1252(b)(1) (2006) (setting a thirty-day deadline for review of orders of removal).

32. *Afanwi*, 526 F.3d at 791. The procedural and jurisdictional questions posed by this case are significantly more complicated than the foregoing would seem to indicate, but, as interesting as those issues may be, they are outside the bounds of the instant essay.

33. *Id.* at 796.

34. *Id.* at 796–97.

35. *Id.* at 798.

36. *Id.* (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974)).

37. *Id.* See also *Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008) ("To the extent Rafiyev's counsel was ineffective, the federal government was not accountable for her substandard performance; it is imputed to the client.").

and his alleged ineffectiveness—namely his failure to check his mailbox regularly and to file a timely appeal—was a purely private act. The federal government was under *no obligation to provide Afanwi with legal representation, and there was no connection between the federal government and counsel's failure to check his mail. Thus, Afanwi's counsel's actions do not implicate the Fifth Amendment, and accordingly counsel's alleged ineffectiveness did not deprive Afanwi of due process.* That Afanwi was denied an opportunity to petition this court for review . . . may be unfortunate, but it is not a constitutional violation, and it is only the latter that we may redress.³⁸

Although not specifically cited by the court in reaching this holding, the underlying rationale of the decision—that is, where there is no constitutional right to counsel and no obligation on the part of the government to provide counsel, there cannot be a constitutional violation if privately retained counsel performs ineffectively—is commensurate with the Supreme Court's decisions in *Coleman* and *Wainwright*.³⁹ It is also the only holding that the circumstances and the legal status of the relevant actors in immigration proceedings may legitimately bear.

Yet a definitive, circuit-wide revision of the relevant case law is exceedingly unlikely outside an explicit holding by the Supreme Court on the Fifth Amendment issue in the immigration context.⁴⁰ Unfortunately, this hesitation will largely be premised on the circumstances which led many courts to subsume the right to effective assistance of counsel within the more general right to due process in the first place: astounding incompetence and dismal representation by not insignificant segments of the immigration bar.⁴¹ Nonetheless, despite this very real problem, it is profoundly disingenuous to somehow arrive at a constitutional remedy to a

38. *Afanwi*, 526 F.3d at 799 (emphasis added) (footnotes omitted).

39. In *Rafiyev*, however, the Eighth Circuit explicitly cited to both *Coleman* and *Wainwright* in support of its holding that where there is no constitutional right to counsel, there can be no constitutional claim based on ineffective assistance of counsel. *Rafiyev*, 536 F.3d at 861.

40. On August 7, 2008, Attorney General Michael B. Mukasey directed that the BIA refer to him for review three unpublished BIA decisions raising the issue of whether there is a constitutional right to effective assistance of counsel during administrative immigration proceedings. See Office of the Attorney Gen., Order Nos. 2990-2008 (*In re: Matter of J-E-C-M- (A79-506-797/798/799/800)*), 2991-2008 (*In re: Matter of Bangaly (A78-555-848)*), 2992-2008 (*In re: Matter of Compean (A78-566-977)*), available at <http://www.bibdaily.com/pdfs/AGOs.pdf>. See also 8 C.F.R. § 1003.1(h)(1) (2008) (governing referral of cases by the Board to the Attorney General).

41. See generally Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. REV. 1449 (2006) (highlighting instances of neglect in immigration cases); Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3 (2008) (discussing the challenges in providing immigrants legal representation).

problem that itself has no constitutional dimension. As the Fourth Circuit quite sensibly concluded, the ineffectiveness in *Afanwi*'s case may well be unfortunate, but it is not a violation of constitutional significance.⁴² Reaching that conclusion in these circumstances may well be difficult, as deportation and removal from the United States are not garden-variety civil penalties, yet it is the only result that our long constitutional heritage permits.

42. *Afanwi*, 526 F.3d at 799.