UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

MARCOS GONZALEZ MACHADO, by and through DAVID GROESBECK, the Proposed Guardian ad Litem, and all others similarly situated,

Plaintiff,

v.

JOHN ASHCROFT, Attorney General; ROBERT COLEMAN, District Director, Seattle INS District Office; and IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

No. CS-02-0066-FVS

ORDER GRANTING MOTION TO DISMISS

THIS MATTER came before the Court for a hearing on June 6, 2002, on the plaintiff's motion for class certification and the defendants' motion to dismiss. Rhonda Brownstein of the Southern Poverty Law Center argued the motions for the plaintiff. With her on the briefs were Rohit Nepal, also of the Southern Poverty Law Center, Matthew Adams of Northwest Immigrant Rights Project, and Nancy Isserlis, Atieno Odhiambro and Patricia Arthur, of Columbia Legal Services. Michelle E. Gorden, United States Department of Justice, Office of Immigration Litigation, argued the motions for the government. With her on the briefs were Papu Sandhu, also of the Office of Immigration Litigation, and Assistant United States Attorney William H. Beatty.

BACKGROUND

In this action the plaintiff seeks to establish a right under the Due Process Clause of the Fifth Amendment for detained, unaccompanied and indigent juvenile aliens in the Immigration and Naturalization Service ("INS") deportation process to be appointed counsel at government expense.

The plaintiff is a juvenile, 14 years old when this action began, and a citizen of Mexico. His father is deceased and his mother abandoned him when he was young. He does not speak English, and he is indigent. He was taken into Immigration and Naturalization Service ("INS") custody after being kidnaped in Seattle, Washington, where he had been living with his aunt and uncle. Mr. Gonzalez was transferred to Martin Hall, a state juvenile offender facility in the Eastern District of Washington that houses juvenile aliens under contract with the INS. During an initial proceeding before an Immigration Judge ("IJ"), Mr. Gonzalez agreed, without the advice of counsel, to accept "voluntary departure."

Mr. Gonzalez then filed this action for injunctive and declaratory relief and certification of a class of similarly situation persons. Mr. Gonzalez also sought a temporary restraining order and preliminary injunction halting his deportation proceedings and requiring the INS to appoint counsel to represent him at government expense. The government stipulated that it would not seek to physically remove the defendant from the United States while this action was pending. The Court further order a halt to proceedings involving the plaintiff, and ordered that if the government and the

plaintiff could not work out an agreement providing for the plaintiff to be released on bond, that specific counsel be appointed to represent the plaintiff in connection with his release status only, at government expense. The parties were unable to come to an agreement, and counsel was appointed, but could not secure the plaintiff's release. Mr. Gonzalez then asked the Court to dissolve its injunction and allow him to be deported in order to leave Martin Hall.

In lieu of a response the government filed the instant motion to dismiss, which was heard simultaneously with the motion for class certification.

DISCUSSION

The government moves to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction[1] and Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The Court dismisses the action under Rule 12(b)(6). The plaintiff's legal position is contrary to Ninth Circuit precedent, which holds that there is no right to appointed counsel in deportation proceedings. The plaintiff has not distinguished his claim nor demonstrated that his position is a natural progression of the law that should be recognized despite its conflict with precedent. The motion for class

---

[1] The government's jurisdiction arguments focus on mootness and administrative exhaustion. However, the government also asserts that the Court lacked jurisdiction to issue its prior injunction preventing the government from deporting the plaintiff or proceeding with deportation or removal hearings pending an Order from the Court. See Mem. in Support of Gov't Motion to Dismiss at 39. Because the Court has already dissolved the injunction on the plaintiff's motion, that issue is moot.

certification is denied as moot.

A. Motion To Dismiss or for Summary Judgment?

The Court must initially consider whether it would be appropriate to treat the government's motion as a motion to dismiss under Fed. R. Civ. P. 12 or convert the motion into a Rule 56 motion for summary judgment.

In support of its motion, the government filed several documents that were not referred to in the complaint, and alleged a number of facts not mentioned in the complaint. Documents not part of a complaint "may be considered on a motion to dismiss only if their authenticity is not contested and the plaintiff's complaint necessarily relies on them." Wyatt v. Terhune, 280 F.3d 1238, 1246 (9th Cir. 2002) (summarizing Lee v. Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)). The Court may not convert the motion without giving the plaintiff some opportunity to present evidence in response. See Anderson v. Angelone, 86 F.3d 932, 934-35 (9th Cir. 1996); Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1532-33 (9th Cir. 1985).

Consideration of all of the materials and facts in the government's briefing would not convert the Rule 12(b)(1) portions of the motion into a motion for summary judgment. See Ass'n of Am. Med. Colls. v. United States, 217 F.3d 770, 778 (9th Cir. 2000) (holding that courts may consider extra-pleading material in evaluating a motion to dismiss for lack of subject matter jurisdiction). However, considering these facts in the context of the Rule 12(b)(6) portion of the motion would convert that portion into a motion for summary

judgment.

The outside information presented by the government includes evidence about Mr. Gonzalez' prior criminal activity, statistics related to juvenile aliens in the INS system, and the like. Because the Court does not need to rely on any of this information in order to rule in the government's favor on the Rule 12(b)(6) portion of the motion to dismiss, the Court ignores all of this information in that context.

B. Mootness

The government argues that the action should be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) because Mr. Gonzalez' due process claim is moot. The government asserts that Mr. Gonzalez' deportation proceedings are over, ending his need for appointed counsel to represent him.

Mr. Gonzalez' claim may be moot as a result of his departure from the United States, although it was not moot when this action was filed. Mr. Gonzalez accepted voluntary departure during his first hearing but filed a motion to reopen his case and for reconsideration. Therefore, at the time this case was filed Mr. Gonzalez still faced potential proceedings before the INS in which counsel would be of assistance. However, following unsuccessful attempts to bond him out of INS detention, Mr. Gonzalez asked the Court to lift the stay preventing his removal, accepted voluntary deportation, and was removed from the United States. This may have ended the possibility of reopening or appealing his case, and mooted the issue of representation by counsel.

However, "[t]he Supreme Court has held that, even in the absence of prior class certification, the resolution of the named plaintiff's substantive claim does not necessarily moot all other issues in the case." Sze v. INS, 153 F.3d 1005, 1009 (9th Cir. 1998) (citing United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402, 100 S.Ct. 1202 (1980)); Gerstein v. Pugh, 420 U.S. 103, 110 n.11, 95 S.Ct. 854, 861 n.11 (1975) (holding that even though named plaintiff's claims were moot and plaintiff was not likely to suffer same deprivation again, case could continue pending class certification). Mootness on the part of the individual plaintiff's claim will not render the whole case moot pending class certification if the class is "inherently transitory." Sze, 153 F.3d at 1009 (quoting Geraghty, 445 U.S. at 397, 100 S.Ct. at 1209). "An inherently transitory claim is one where there is a constantly changing putative class, and where the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." Sze, 153 F.3d at 1009 (quoting Geraghty, 445 U.S. at 399, 100 S.Ct. at 1209 and Wade v. Kirkland, 118 F.3d 667, 670 (9th Cir. 1997) (finding that class of prisoners working on chain gang was inherently transitory))(internal punctuation omitted). However, it must also appear that a class of persons with the same potential claim will continue to exist after the expiration of the individual's claim. See Gerstein, 420 U.S. at 110 n.11, 95 S.Ct. at 861 n.11; Sze, 153 F.3d at 1009-10 (holding mootness of class representative's claim fatal when class was shrinking due to change in challenged INS procedures)

As the government itself points out, most juvenile aliens who are taken into custody are released relatively quickly, and adjudication of most juveniles' deportation status is usually accomplished quickly as well.[2] The government's statistics indicate that the pace of immigration proceedings is much more rapid in most cases than the pace of District Court proceedings. As a result, this Court did not (and likely would not if this case were to be repeated) have time to rule on a motion for class certification before the plaintiff's due process claim became moot.

Therefore, it appears that the class of persons that Mr. Gonzalez seeks to represent is "constantly changing" and is "inherently transitory." Sze, 153 F.3d at 1009. Also, "the constant existence of a class of persons suffering the deprivation is certain," Gerstein, 420 U.S. at 110 n.11, 95 S.Ct. at 861 n.11, because there is no indication that the INS has changed or will change its past practice with regard to detention and deportation of juveniles. Thus, even if Mr. Gonzalez' individual claim is moot, this exception to the general justiciability requirement of Article III applies in this case. The government's motion to dismiss for mootness is denied.

C. Procedural Exhaustion

Second, the government argues that the Court lacks jurisdiction because Mr. Gonzalez failed to administratively exhaust his claim before the Board of Immigration Appeals ("BIA"). This assertion

---

[2] As noted above, referring to these facts in the context of a Rule 12(b)(1) motion based on jurisdiction does not convert the motion into a motion for summary judgment.

lacks merit.

In the immigration context exhaustion is only required for "procedural errors, constitutional or otherwise, that are correctable by the [BIA]." Liu v. Waters, 55 F.3d 421, 426 (9th Cir. 1995). Exhaustion is not required where administrative review of the claim would be futile. See McCarthy v. Madigan, 503 U.S. 140, 144, 112 S.Ct. 1091 (1992). Statutory exhaustion requirements do not apply to allegations that the INS' practices and procedures are themselves unconstitutional. El Rescate Legal Servs. Inc. v. Exec. Office of Immigration Review, 959 F.2d 742, 746 (9th Cir. 1991); Detroit Free Press v. Ashcroft, 195 F. Supp.2d 948, -- (E. D. Mich. 2002)(holding exhaustion not required on alien's due process challenge to INS directive to close certain post-9/11 immigration hearings).

Here, the BIA clearly lacked any authority to correct the due process violation that Mr. Gonzalez alleges, because the statute under which the INS operates specifies that aliens only have a right to counsel at their own expense. See 8 U.S.C. § 1252(b). Moreover, the BIA itself has declared that it lacks jurisdiction to hear the specific due process claim that Mr. Gonzalez advances. See Matter of Gutierrez, 16 I. & N. Dec. 226, 229 (1977) (declining to consider argument that due process requires appointed counsel; "we are precluded from entertaining constitutional challenges to the Act itself."). Therefore, the defendants' Rule 12(b)(1) motion based on lack of administrative exhaustion fails.

D. Failure to State a Claim Upon Which Relief Can Be Granted

The government moves to dismiss this action on the basis that

Mr. Gonzalez has failed to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). The government argues that Mr. Gonzalez has failed to state a claim because Congress has determined that aliens only have a right to counsel at their own expense; courts have already determined that due process does not require that counsel be appointed in deportation proceedings; and the statutory rights conferred by Congress adequately protect juvenile aliens and satisfy due process.

Mr. Gonzalez responds that Congress' determination that aliens have a right to counsel at their own expense is irrelevant to the question whether due process requires more, and that due process requires that indigent juvenile aliens in INS detention have counsel appointed for them at government expense. Specifically, the plaintiff argues that the Court should apply the test established in Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976), for determining what due process requires.[3]

"On a motion to dismiss we are required to read the complaint charitably, to take all well-pleaded facts as true, and to assume

---

[3] The Matthews factors are: (1) the private interests of the person subject to the government proceeding; (2) the government's interests; and (3) the risk that the procedure, if carried out without the requested accommodation to the individual, will result in an erroneous result. Matthews, 424 U.S. at 335, 96 S.Ct. at 903. The plaintiff further argues that, if the Court concludes that due process requires the appointment of counsel, the Court should not leave the issue to a case-by-case determination, but should declare the right to be automatic. Cf. Lassiter v. Dept. Social Servs., 452 U.S. 18, 31, 101 S.Ct. 2153, 2162 (1981) (due process only requires that counsel be appointed to represent parents in parental-rights-termination proceedings if trial court so determines on facts of particular case).

that all general allegations embrace whatever specific facts might be necessary to support them." Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994); Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 984 (9th Cir. 2000) ("[T]he court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party.").

The claim that due process requires the appointment of counsel at government expense for aliens has been rejected by the Ninth Circuit on many occasions in cases that did not distinguish between adult and juvenile aliens. See, e.g., United States v. Cerda-Pena, 799 F.2d 1374, 1376 n. 2 (9th Cir. 1986). Therefore, despite this precedent, the plaintiff's specific due process claim is not necessarily defeated because it is limited to indigent, unaccompanied, juvenile aliens in INS detention. "Dismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001); Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). "Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development." Baker v. Cuomo, 58 F.3d 814, 818-19 (2d Cir. 1995). However, when a plaintiff proceeding on a novel theory is faced with a Rule 12(b)(6) motion, "[t]he plaintiff has to show that while her claim has no basis in *existing* law, or at least the law's current pigeonholes, it lies in the natural line of the law's development and should now be recognized as part of the law."

Kirksey v. R.J. Reynolds Tobacco Co., 168 F.3d 1039, 1041-42 (7th. Cir. 1999) (emphasis in original).

Therefore, this action may be maintained if the plaintiff can distinguish his legal position from unfavorable precedent on the basis that the reasoning of those case has been eroded by subsequent developments or is inapplicable to juvenile aliens.

1. Statutory Right to Counsel

Under current statutory law, aliens have a right to counsel, at their own expense, at deportation and removal hearings. See 8 U.S.C. § 1252(b). The government argues that Congress' policy decision on this issue is dispositive. However, it is axiomatic that Congress is not the arbiter of what process is due under the Constitution. The Ninth Circuit has shown little hesitation in considering whether to strike down portions of the immigration laws or the INS' policies and procedures as violative of Constitutional rights. See Kim v. Ziglar, 276 F.3d 523, 528 (9th Cir. 2002) (questioning whether portion of INA permitting no-bail detention of certain classes of aliens is facially unconstitutional); Vargas-Garcia v. INS, 287 F.3d 882, 886 (9th Cir. 2002) (holding that BIA notice of appeal form "is so misleading that it can result in a denial of due process to the alien."); see also Jankowski-Burczyk v. INS, No. 01-2353, slip op. at 5 (2d Cir. May 29, 2002) (portion of INA treating permanent legal resident aliens ("PLRs") and non-PLRs differently did not violate equal protection).

Thus, the fact that Congress has conferred upon aliens the "privilege" of retaining counsel, Acewicz v. I.N.S., 984 F.2d 1056, 1062 (9th Cir. 1993), is not dispositive of the Constitutional issue

argued by the plaintiff.

2. The Plaintiff's Due Process Claim

The Ninth Circuit has held that in addition to being a statutory right, an alien's right to counsel is required by the Due Process Clause of the Fifth Amendment. Castro-Cortez v. INS, 239 F.3d 1037, 1049 (9th Cir. 2001) ("Fundamental to due process is the right to counsel, and we have previously held that, in deportation hearings, aliens have the 'right to obtain counsel of their choice at their own expense.'") (quoting Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 554 (9th Cir. 1990)); United States v. Lara-Aceves, 183 F.3d 1007, 1011 (9th Cir. 1999), cert. denied, 528 U.S. 1095, 120 S.Ct. 836 (2000), overruled on other grounds by United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001) (en banc); Acewicz, 984 F.2d at 1062. The Court of Appeals has characterized an alien's right to counsel as "fundamental." Orantes-Hernandez, 919 F.2d at 554.

However, the law in this Circuit is clear that aliens have no right to appointed counsel. "[C]ourts have uniformly held in this circuit and elsewhere that in light of the non-criminal nature of both the proceedings and the order which may be a result, that respondents are not entitled to have counsel appointed at government expense." United States v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir. 1975) (abrogated on other grounds, United States v. Mendoza-Lopez, 481 U.S. 828, 834, 107 S.Ct. 2148, 2153 (1987) (quoted in United States v. Cerda-Pena, 799 F.2d 1374, 1376 n. 2 (9th Cir. 1986)); see Lara-Aceves, 183 F.3d at 1010; Martin-Mendoza v. INS, 499 F.2d 918,

922 (9th Cir. 1974); Burr v INS, 350 F.2d 87 (9th Cir.), cert. denied, 383 U.S. 915, 86 S. Ct. 905 (1965); Perez-Funez v. INS, 611 F. Supp. 990, 1004 (C.D. Cal. 1984) (in suit alleging that INS coerced minors into accepting voluntary removal, granting partial injunction keeping alien minors from being deported and certifying class but denying request to appoint counsel for minors).[4]

As discussed above, the plaintiff's task is to distinguish this unfavorable precedent through either of two modes of attack: demonstrating that the case law is not "good law," or demonstrating that the unique features of the sub-set of aliens that he represents require a different result.

With regard to the first option, the plaintiff has not shown that his claim may survive because the basis for the unfavorable precedent is not "good law" in that it has been eroded or has become anachronistic. The Ninth Circuit's rulings that there is no right to appointed counsel in these circumstances is based in large part on the importance of the distinction between deportation as a civil, and not a criminal, proceeding.[5] See Lara-Aceves, 183 F.3d at 1010;

---

[4] The law of other Circuits is in accord. See, e.g., Burquez v INS, 513 F.2d 751 (10th Cir. 1975); Tupacyupanqui-Marin v. INS, 447 F.2d 603 (7th Cir. 1971). Only one Court of Appeals has ever ruled to the contrary. See Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975) (holding that if "fundamental fairness" requires, appointment of counsel for indigent alien may be required by due process despite statutory bar).

[5] For an overview of the civil/criminal distinction as applied to immigration law, see Robert Pauw, A New Look At Deportation As Punishment: Why At Least Some of the Constitution's Criminal Procedure Protections Must Apply, 52 Admin. L. Rev. 305 (2000).

Gasca-Kraft, 522 F.2d at 152. It is true, as the plaintiff points out, that this distinction has not held up as a bar to extension of Sixth Amendment-type rights in certain other contexts. See, e.g., Lassiter v. Dept. Social Servs., 452 U.S. 18, 21, 101 S.Ct. 2153, 2157 (1981) (holding that parental-rights termination proceeding, although civil, may require appointment of counsel in an individual case if indigent person's interests overcome "presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty."); Vitek v. Jones, 445 U.S. 480, 500, 100 S.Ct. 1254, 1267 (1980) (holding indigent prisoner entitled to appointed counsel in civil mental health commitment proceeding); In re Gault, 387 U.S. 1, 41, 87 S.Ct. 1428, 1451 (1967) (concluding that delinquency proceedings, although considered civil, nevertheless require appointed counsel because of the possibility that juvenile's liberty may be curtailed as a result).

However, the Supreme Court and the Ninth Circuit continue to rely on the civil/criminal distinction in the immigration context to limit the process that is due in deportation and removal hearings. "A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry." INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39, 104 S.Ct. 3479, 3483 (1984) (holding that exclusionary rule does not apply to deportation proceedings); Lara-Aceves, 183 F.3d at 1010 ("Given the civil nature of deportation proceedings, it is well established that aliens in such proceedings have no constitutional right to counsel under the Sixth Amendment."); United States v. Yacoubian, 24 F.3d 1,

10 (9th Cir. 1994) (holding that ex post facto and double jeopardy protections do not apply to deportation proceedings); Urbina-Mauricio v. INS, 989 F.2d 1085, 1089 n. 7 (9th Cir. 1993) (concluding that double jeopardy does not apply; "deportation is a civil action, not a criminal punishment."); El Rescate Legal Servs., 959 F.2d at 751 (finding INS interpretation of statute not to require full translation of proceedings did not violate due process; deportation "is a civil proceeding in which many of the protections afforded in the criminal context do not apply."); United States v. Garay-Burgos, 961 F. Supp. 1321, 1322-23 (D. Ariz. 1997) (holding that double jeopardy does not apply to deportation proceedings; rejecting argument that United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989), transformed deportation into punishment); see also Zadvydas v. Davis, 533 U.S. 678, 690, 121 S.Ct. 2491, 2499 (2001) (finding that although proceedings to detain aliens who had been ordered removed, but whose deportations could not be effectuated, "are civil, not criminal, and we assume that they are nonpunitive in nature," interpreting statute to permit indefinite detention would violate due process); Reno v. Amer.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491, 119 S.Ct. 936 (1999) (concluding that removal is not punishment); Ardestani v. INS, 502 U.S. 129, 137, 112 S.Ct. 515, 521 (1991) (determining that deportation proceedings are not "adversary proceedings" covered by Administrative Procedure Act and thus attorney's fees not reimbursable under Equal Access to Justice Act); Briseno v. INS, 192 F.3d 1320, 1323 (9th Cir. 1999) (holding that deportation is not punishment).

The plaintiff also appears to argue that recent case law has expanded aliens' right to counsel to such a point that the unfavorable precedent is simply anachronistic, and that declaring a right to appointed counsel is the next logical step in the outward expansion of due process protections for aliens. It is true that the Ninth Circuit has taken a hard line on actions that interfere with an alien's right to counsel. The court has gone so far as to question the INS' regulations and written policies, see, e.g., Castro-Cortez, 239 F.3d at 1048 (holding that right to private counsel should apply to aliens subject to reinstatement of deportation as well as other aliens); Orantes-Hernandez, 919 F.2d at 566 (concluding that district court's injunction regarding access to counsel was supported by factual findings that INS practices "severely impeded class members from communicating with counsel."), along with criticizing individual applications of INS policies. See Singh v. Waters, 87 F.3d 346, 349 (9th Cir. 1996) (finding that INS "effectively scuttled the right to counsel guaranteed to Singh by statute" when it failed to inform his counsel that it had found Singh's INS file); Castro-O'Ryan v. INS, 847 F.2d 1307, 1313 (9th Cir. 1988) (holding that immigration judge's failure to rule on alien's request for representation by counsel "effectively denied" right to private counsel); Baires v. INS, 856 F.2d 89, 92 (9th Cir. 1988) (finding that immigration judge abused discretion by denying continuance necessary for counsel to travel to hearing); Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985) (concluding that immigration judge abused discretion and denied right to counsel by not granting continuances to allow alien time to secure

counsel, despite INS regulation allowing only one continuance for that purpose).

Case law does not demonstrate, however, that the right to counsel is on an inevitable path of outward expansion. The Court of Appeals has been clear that the right to counsel is not absolute. Thus, for example, a deportation order may be overturned on a showing that the right to counsel was interfered with only if the alien can show some degree of prejudice. See Acewicz, 984 F.2d at 1062 (holding right to counsel not violated when aliens could not demonstrate that "counsel might have obtained a different result."); United States v. Villa-Fabela, 882 F.2d 434, 438 (9th Cir. 1989) ("Infringements of the right to counsel are prejudicial [when counsel] could have better marshaled specific facts or arguments in presenting the petitioner's case."); but see Cerda-Pena, 799 F.2d at 1337 n. 3 (holding that "failure to adequately apprise an alien of his or her right to representation" requires showing prejudice but that "an outright refusal to allow an alien the opportunity to obtain representation may be such an egregious violation of due process so as not to require any further showing of prejudice."); Garcia-Guzman v. Reno, 65 F. Supp.2d 1077, 1089 (N.D. Cal. 1999) (finding that Ninth Circuit precedent on "whether prejudice must be shown where the right to counsel is involved... points in both directions."); see also Huicochea-Gomez v. INS, 237 F.3d 696, 699 (6th Cir. 2001) ("The alien carries the burden of establishing that ineffective assistance of counsel prejudiced him or denied him fundamental fairness in order to prove that he has suffered a denial of due process.").

With regard to the second method of attack, the plaintiff does not succeed at distinguishing precedent by providing a sufficient legal basis for finding that due process requires more procedural protection for juvenile aliens than adults.[6] The plaintiff points out that children have been granted the right to appointed counsel in proceedings that are themselves civil because of their special vulnerabilities. See In re Gault, 387 U.S. 1, 36-37, 87 S.Ct. 1428 (1967) (holding that needs of children require representation by counsel in juvenile adjudications that can result in confinement); Kent v. United States, 383 U.S. 541, 557- 62, 86 S.Ct. 1045 (1966) (finding a right to appointed counsel in proceedings to waive juvenile court jurisdiction); see also Haley v. Ohio, 332 U.S. 596, 600, 68 S.Ct. 302, 92 L.Ed. 224 (1948) (stressing a minor's need for "counsel and support if he is not to become the victim first of fear, then of panic" during interrogation).[7]

---

[6] For academic treatments of this issue see Note, Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children, 17 N.Y.L. Sch. J. Hum. Rts. 1105 (2001) and Beth J. Werlin, Renewing the Call: Immigrants's Right to Appointed Counsel in Deportation Proceedings, 20 B.C. Third World L. J. 393 (2000).

[7] Congress has also created a right to representation for children in some non-criminal proceedings. See Catherine J. Ross, From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation, 64 Fordham L. Rev. 1571, 1575 (1600) (noting that the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5118, "requir[es] appointment of a guardian ad litem for abused or neglected children in judicial proceedings."). "In addition, some states have created statutory rights to counsel for children in certain substantive categories of civil litigation, such as custody proceedings." Id. Federal law also provides for the appointment of counsel by the court for indigent civil litigants (usually prisoners) if certain criteria

The Court assumes that the needs of juvenile aliens are greater than those of alien adults. The plaintiff has made a very convincing argument that that is true.[8] However, that is not the key issue here. The Ninth Circuit precedent referred to above rejecting a due process right to appointed counsel is based not on the concept that adult aliens can effectively participate in INS proceedings without the assistance of counsel, but on the civil nature of the INS proceedings themselves. See, e.g., Lara-Aceves, 183 F.3d at 1010. Interrelated with the "civil" characterization of the proceedings is the observation that the interest implicated is not the deprivation of physical liberty.[9] See Gasca-Kraft, 522 F.2d at 152 (finding no

---

are met. See 28 U.S.C. § 1915(d); United States v. $292,888.04 in U.S. Currency, 54 F.3d 564, 569 (9th Cir. 1995).

[8] The Court notes, however, that the Supreme Court in Reno v. Flores, 507 U.S. 292, 308-09, 113 S.Ct. 1439, 1450-51 (1993), specifically rejected an argument that the vulnerabilities of juvenile aliens require a special degree of procedural protection. In Flores the Court denied the plaintiff's claim that as a matter of procedural due process that an immigration judge automatically review the INS' initial custody determination. Id. The Court held that simply giving juvenile aliens the right to request such a review, and to revoke their waiver of the right, was sufficient; "It has not been shown that all of them are too young or too ignorant to exercise that right when the form asking them to assert or waive it is presented." Flores, 507 U.S. at 309, 113 S.Ct. at 1451 (noting that the Court has upheld juvenile waivers of the Fifth-Amendment right to counsel in criminal proceedings).

[9] Of course, a portion of the interest-deprivation that the plaintiff alleges is the physical liberty of those indigent juveniles who cannot secure their release on bond without the expertise of an attorney. This aspect of an alien's interest has been recognized as Constitutionally significant despite the "civil" nature of the confinement. See Zadvydas, 533 U.S. at 696, 121 S.Ct. at 2502 (aliens' liberty interest "is, at the least, strong enough" to raise question about whether indefinite

right to appointed counsel because of the non-criminal nature of proceedings and "the order which may be a result."). Therefore, the case law cited by the plaintiff is unhelpful; all of these cases involved a proceeding that was a first step in potentially depriving a juvenile of physical liberty for an extended period. Faced with unfavorable precedent, the key question here is not whether the needs of juvenile aliens are different than those of adults, but whether the interests of juvenile aliens in their deportation proceedings are different.

Although the Supreme Court has never precisely described the nature of an alien's interest in deportation proceedings, the Court has implied that it is not of great Constitutional significance in cases that found the interest insufficiently compelling when balanced against the government's interests. See, e.g., Arab-Amer. Comm., 525 U.S at 491, 119 S.Ct. at 947 (holding aliens' interests insufficient to warrant a right of action against government for selective prosecution; "deportation is necessary in order to bring to an end an ongoing violation of United States law."); Lopez-Mendoza, 468 U.S. at 1049-50, 104 S.Ct. at 3488-89 (alien's interest did not outweigh government's interest in expedited proceedings to justify application of exclusionary rule). The plaintiff has not pointed to any case that has held that a juvenile alien's interests are different from those of an adult. Indeed, if the Court were to undertake an analysis of whether a juvenile's "liberty" interest in not being

---

detention would violate Fourth Amendment). However, the plaintiff claims a much broader interest, and the Court addresses the plaintiff's claim in that context.

erroneously deported is different than that of an adult, it is unclear what the result would be. The plaintiff has referred the Court to only one case finding a right to appointed counsel in proceedings that did not in substance implicate physical liberty. See Lassiter, 452 U.S. at 26-27, 101 S.Ct. at 2158-59 (finding right to appointed counsel in parental-rights-termination proceedings). Using that Supreme Court precedent as a yard-stick, the interest of a unaccompanied juvenile like the plaintiff in an accurate proceeding is potentially of less Constitutional significance than those of an adult alien who, in many cases, is faced with being separated from his or her children. See Lassiter, 452 U.S. at 27, 101 S.Ct. at 2159-60 (parents' interest in retaining "companionship, care, custody, and management of his or her children" is "a commanding one.").

Based on the discussion above, the Court determines that the plaintiff has not distinguished the interests of juveniles from those of adults generally so as to demonstrate that the Ninth Circuit's holding that aliens have no right to appointed counsel should not bar his claim.

The task of establishing a due process right for juveniles in proceedings that do not at their core threaten personal liberty is difficult, and is made more difficult here by the way that courts have consistently characterized immigration proceedings, and unfavorable precedent. If this issue had not already been addressed in a general sense by a higher court, the plaintiff's argument that the special needs and dilemmas faced by juvenile aliens require more

procedural protection than is now provided would have great force. However, this Court is not free to ignore or overrule Ninth Circuit precedent. Mr. Gonzalez has not demonstrated that the fundamental civil/criminal dichotomy that forms the basis for Ninth Circuit case law on this issue is no longer a valid analytical model or that the interests of juvenile aliens undermines the reasoning of those prior opinions when applied to children.

CONCLUSION

Although the plaintiff's claim is not moot, and the plaintiff need not procedurally exhaust his claim, the plaintiff has failed to demonstrate that his legal position, contrary to precedent as it is, "lies in the natural line of the law's development." Kirksey, 168 F.3d at 1041-42. The Court determines that even taking all of the complaint's factual allegations as true and drawing all reasonable inferences in his favor the plaintiff has not set forth a cognizable legal claim, and can prove no set of facts that would warrant relief, and thus has failed to state a claim on which relief can be granted. Therefore, the government's Rule 12(b)(6) motion to dismiss is granted.

LEAVE TO AMEND

The "key question" in determining whether leave to amend should be granted after a successful Rule 12(b)(6) motion "is whether [the plaintiff] could [] save[] his complaint through further amendment." Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th Cir. 2001); Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986) (plaintiff should be denied

opportunity to amend only if "allegations or other facts consistent with the challenged pleading could not possibly cure the defect.").

Here, it is clear that amendment would be futile because the plaintiff could prove no set of facts that would save his claim. The Court has assumed throughout that the plaintiff is, as the complaint describes, the most sympathetic kind of plaintiff for this claim. That is, the Court has taken as true the complaint's allegations that he speaks and understands no English; is unfamiliar with the criminal legal system, the immigration system and legal procedures generally; is not unusually mature for his age; has been detained at Martin Hall with (and treated as) a juvenile criminal offender; and that he did not understand what was happening when he agreed to voluntary departure or attempted to secure his release on bond pending his deportation.

If the Court had concluded that it was appropriate to examine whether due process required that counsel be appointed under the factors elucidated in Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976) and In re Gault, 387 U.S. 1, 36 -37, 87 S.Ct. 1428 (1967), these features may have proven determinative. However, the Court does not reach that analysis. The Court is bound by the Ninth Circuit's precedent on this issue, and the plaintiff has failed to demonstrate that this precedent should be ignored even under the most compelling of facts. Therefore, leave to amend is denied, and the dismissal will be with prejudice.

IT IS HEREBY ORDERED THAT:

1. The defendant's motion to dismiss **(Ct. Rec. 47)** is **GRANTED**.

This action is **DISMISSED WITH PREJUDICE.**

2. The plaintiff's motion for class certification (**Ct. Rec. 4**) is **DENIED AS MOOT.**

3. The "house-keeping" motions discussed at the hearing (**Ct. Recs. 14, 18, 19, 45, and 60**) are **GRANTED.**

4. The defendant's motion to vacate (**Ct. Rec. 47**) is **DENIED AS MOOT.**

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order, furnish copies to counsel, and close the file.

DATED this 17th day of June, 2002.

Fred Van Sickle
Chief United States District Judge