A NEW APPROACH TO INEFFECTIVE ASSISTANCE OF COUNSEL IN REMOVAL PROCEEDINGS

*By Aliza B. Kaplan**

INTRODUCTION

> [I]t is difficult to imagine a layman more lacking in skill or more in need of the guiding hand of counsel, than an alien who often possesses the most minimal of educations and must frequently be heard not in the alien's own voice and native tongue, but rather through an interpreter.[1]

For more than twenty years, an alien wishing to assert a claim for ineffective assistance of counsel against his incompetent or fraudulent attorney had to follow *In re Lozada*[2] and its framework[3] set forth by the Board of Immigration Appeals ("BIA"). In January 2009, just two weeks before President Bush left office, former Attorney General Michael Mukasey issued a last minute administrative decision, *In re Compean* (*Compean I*),[4] which rejected the constitutional basis of *Lozada's* reasoning and changed both the procedural and substantive requirements an alien must meet in

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1. Hernandez-Gil v. Gonzalez, 476 F.3d 803, 807 (9th Cir. 2007).

2. 19 I. & N. Dec. 637, 638 (Dep't of Justice 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (holding that "[a]ny right a respondent in deportation proceedings may have to counsel is grounded in the fifth amendment guarantee of due process").

3. *Id.* at 639 (setting forth that a claim of ineffective assistance of counsel must be supported by an affidavit from the client detailing the agreement between attorney and client concerning representation, that counsel must be informed of the allegations against him or her and given an opportunity to respond, and that the motion must reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not); *see also In re* Bravo, 2008 WL 5537824 (Dep't of Justice Dec. 23, 2008).

4. 24 I. & N. Dec. 710 (Dep't of Justice Jan. 7, 2009); *see* discussion *infra* Part I.

order to succeed in an ineffective assistance of counsel claim.[5] Although just months later, in June 2009, the current Attorney General, Eric Holder, vacated Mukasey's *Compean I* decision in *In re Compean* (*Compean II*),[6] and directed the Executive Office for Immigration Review ("EOIR") to initiate procedures to evaluate the *Lozada* framework, these two *Compean* rulings have created an opportunity to reevaluate ineffective assistance of counsel claims in removal proceedings and perhaps change or modify the longstanding *Lozada* approach.

Removal hearings, the most common type of immigration proceeding, are "conducted to determine whether an alien is subject to removal from the [United States]."[7] When an alien loses a removal hearing, the result is deportation, an extremely serious outcome that may, as the Supreme Court has described, "result in the loss 'of all that makes life worth living.'"[8] These hearings are complex adversarial proceedings in which the alien's attorney, or the alien *pro se*, advocates against a lawyer from the Department of Homeland Security's ("DHS") Office of Chief Counsel. Such hearings can be fact-intensive and impose a high burden of proof and strict corroboration requirements including the provision of documentation to support the alien's claims.[9] In most cases, an alien, who is by definition not native and often not an English speaker, must be prepared to testify and his credibility is vital to his case.[10] A *pro se* applicant with no understanding of the complexities of the hybrid legal-administrative system is at a significant disadvantage and no match for the DHS attorney. Representation by a competent attorney therefore is especially important in removal hearings because "[t]he proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate."[11] The need for legal representation in removal proceedings has become even more necessary due to increased use of detention and changes in the law.[12] The EOIR's own reports indicate that the large number

5. Compean I, 24 I. & N. Dec. at 714.

6. 25 I. & N. Dec. 1 (Dep't of Justice June 3, 2009); *see* discussion *infra* Part I.

7. U.S. Dep't of Justice, Executive Office for Immigration Review, Types of Immigration Court Proceedings and Removal Process, http://www.usdoj.gov/eoir/press/04/ImmigrationProceedingsFactSheet2004.pdf (last visited Mar. 27, 2010).

8. Bridges v. Wixon, 326 U.S. 135, 147 (1945) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

9. *See, e.g.*, 8 U.S.C. § 1101(a)(42) (2006) (defining "refugee"); 8 C.F.R. § 1208.13(a) (2009) (providing that an alien has the burden of proof in asylum cases).

10. *See* 8 C.F.R. § 1208.13(a); *In re* Dass, 20 I. & N. Dec. 120, 124 (Dep't of Justice 1989).

11. Biwot v. Gonzalez, 403 F.3d 1094, 1098 (9th Cir. 2005).

12. *See* AM. BAR ASSOC. COMM'N ON IMMIGRATION, AMERICAN JUSTICE THROUGH IMMIGRANTS' EYES 53-72 (2004); 8 U.S.C. § 1778 (2006); Patriot Act of 2001, Pub. L.

of individuals appearing *pro se* is "[o]f great concern."[13]

Without government-funded counsel, an alien is left with few options. While nonprofit organizations, law firms, bar associations, law school clinics and religious groups offer pro bono representation to aliens in removal hearings, the demand for these free legal services exceeds the need numerous times over.[14] An alien is often left with no alternative but to put himself in the hands of the private bar, whose skills and knowledge of the removal process differ significantly from attorney to attorney. Due to financial constraints, language barriers, and a lack of understanding of the law, aliens are especially vulnerable to incompetent or fraudulent attorneys whose commitment to their clients, understanding of cultural differences, and experience in immigration court vary considerably. Sadly, immigration law practice includes too many attorneys who neglect or take advantage of their clients.[15] Without an appropriate and flexible remedy for ineffective assistance of counsel, deportation decisions are less likely to be based on an accurate review of the law and the facts in a particular case, and more likely to be based on the competence, or lack thereof, of a hired attorney.[16]

In this Article, I first present an overview of the law of ineffective assistance of counsel in the removal context. I describe the two recent *Compean* administrative rulings that resulted in Attorney General Holder directing the EOIR to evaluate the current *Lozada* framework, which could lead to an entirely new or modified framework for adjudicating ineffective assistance of counsel claims in removal proceedings. Next, I recommend that a new or modified framework recognize an alien's right to effective assistance of counsel in removal proceedings under both the Fifth Amendment and the Immigration and Nationality Act ("INA"). I propose that this framework use a flexible approach regarding the first two procedural

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No. 107-56 (codified as in scattered sections of 50 U.S.C.).

13. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2008 STATISTICAL YEAR BOOK G1 (2008) ("The percentage of represented aliens for FY 2004 to FY 2008 ranged from 35 percent to 45 percent."); *see also* Donald Kerwin, *Revisiting the Need for Appointed Counsel*, 2005 MIGRATION POL'Y INST. 4 (2005).

14. These organizations include, for example, Human Rights First, The Legal Aid Society, American Immigration Lawyers Association, Catholic Charities, American Bar Association, and City Bar Justice Center. *See* Judge Robert A. Katzmann, U.S. Court of Appeals for the Second Circuit, Address at the Orison S. Marden Lecture of the Association of the Bar of the City of New York: The Legal Profession and the Unmet Needs of the Immigrant Poor (Feb. 28, 2007) (discussing ongoing efforts to meet legal needs of immigrants).

15. *See, e.g.*, Dan Frosch, *Some Lawyers Said to Prey on Illegal Immigrants*, N.Y. TIMES, Aug. 14, 2009; Kirk Semple & Jenny Manrique, *Cuomo Widens Probe into Immigration Fraud*, N.Y. TIMES, May 28, 2009.

16. *See* Katzmann, *supra* note 14.

requirements introduced by *Lozada*, but eliminate *Lozada*'s third requirement of filing a bar complaint with state disciplinary authorities. Further, I propose the use of a uniform prejudice standard that allows an alien with a viable claim to have his case reassessed without having to prove everything the record would have shown if he had a competent attorney.[17] Lastly, in addition to making changes to how the courts should evaluate ineffective assistance of counsel claims, I suggest there are other ways to decrease the number of aliens receiving deficient representation. One of these ways would be to provide all aliens facing deportation with competent counsel. Unfortunately, because of political realities, this will most likely not occur in the near future. However, there are existing public/private partnership programs which, if expanded, could significantly increase the number of aliens receiving representation and improve the quality of that representation.

I. BACKGROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL IN REMOVAL PROCEEDINGS

After an alien has been ordered removed, he may file a motion to reopen if he is the victim of inadequate representation. He can seek to reopen his proceeding based on ineffective assistance of counsel.[18] An alien who can afford one may be represented by an attorney of his choice "[i]n any removal proceedings before an immigration judge and in any appeal proceeding before the Attorney General from any such removal proceeding."[19] Although there is no right to appointed counsel for those who cannot afford an attorney, an alien's right to effective assistance of counsel has long been recognized as part of the right to fundamental fairness, or due process, in removal proceedings.[20] The BIA has likewise recognized that ineffective

17. The United States immigration system is in need of comprehensive reform on every level, including its handling of legal representation for those facing removal which I believe should be guaranteed to all indigent aliens. Because large-scale reform in this area may not come soon, I make all of these recommendations in the context of our current system. This list of recommendations does not aspire to be exhaustive. Indeed, many practitioners have advocated for similar reforms. *See, e.g.*, The Am. Immigration Law Found., Ineffective Assistance of Counsel, http://www.ailf.org/lac/lac-ineffective.shtml (last visited Mar. 1, 2010); AM. BAR ASSOC., ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS (2008).

18. *See* 8 U.S.C. § 1229a(c)(6)(A)-(B), (7)(B) (2006) (explaining that an alien may file a motion to reopen removal proceedings that "state[s] the new facts that will be proven at a hearing to be held if the motion is granted"); 8 C.F.R. §§ 1003.2, 1003.23 (2009). An alien has a right to file one motion to reopen within ninety days of a final removal order. 8 C.F.R. § 1003.2(c)(2).

19. 8 U.S.C. § 1362 (2006); *see also* 8 U.S.C. § 1229a(c)(6)(A)-(B).

20. *See* Yamataya v. Fisher, 189 U.S. 86, 101 (1903); Aguilera-Enriquez v. I.N.S., 516 F.2d 565, 568-69 (6th Cir. 1975); Paul v. I.N.S., 521 F.2d 194, 198-99 (5th Cir. 1975).

assistance of counsel could infringe upon an alien's right to a full and fair hearing if it prevents the alien from "meaningfully presenting his or her case."[21] In 1988, the BIA ruled that ineffective assistance of counsel in immigration proceedings violates the Fifth Amendment Due Process Clause.[22]

Although the United States Constitution does not expressly provide for a "right to counsel," as the Sixth Amendment guarantees for accused criminal defendants, the BIA and federal courts have respected the right to effective assistance of counsel in removal proceedings for more than twenty years.[23] Specifically, in *Lozada*, the BIA stated that "[a]ny right a respondent in deportation proceedings may have to counsel is grounded in the fifth amendment guarantee of due process" and 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."[24] The BIA held that an alien in a removal proceeding may file a motion to reopen his case when his counsel was deficient.[25] In addition to demonstrating that he was prejudiced by his counsel's actions,[26] under *Lozada*, to prevail on a motion to reopen based upon a claim of ineffective assistance of counsel, an alien must: (1) support his motion with an affidavit that includes a statement "set[ting] forth in detail the agreement that was entered into with former counsel" and the representations counsel did or did not make to the alien in this regard; (2) show that he informed former counsel of the allegations of ineffective assistance and allowed the former counsel to respond; and (3) indicate in the

21. *In re* Assaad, 23 I. & N. Dec 553, 558 (Dep't of Justice 2003).

22. *In re* Lozada, 19 I. & N. Dec. 637, 638 (Dep't of Justice 1988). The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

23. *See Lozada*, 19 I. & N. Dec. at 637.

24. *Id.* at 638.

25. *See id.*

26. *Id.*; *see also* Goonsuwan v. Ashcroft, 252 F.3d 383, 385 (5th Cir. 2001) (adopting a "substantial prejudice" standard); Huicochea-Gomez v. I.N.S., 237 F.3d 696, 699-700 (6th Cir. 2001) (finding that respondents must show that "but for [ineffective] legal advice, they would have been entitled to continue residing in the United States"); Castillo-Perez v. I.N.S., 212 F.3d 518, 527 n.12 (9th Cir. 2000) (quoting Ortiz v. I.N.S., 179 F.3d 1148, 1153 (9th Cir. 1999)) ("Prejudice is found when the performance of counsel was so inadequate that it may have affected the outcome of the proceedings."); Akinwunmi v. I.N.S., 194 F.3d 1340, 1341 n.2 (10th Cir. 1999) (finding that respondent "must show that his counsel's ineffective assistance so prejudiced him that the proceeding was fundamentally unfair"); United States v. Loasiga, 104 F.3d 484, 488 (1st Cir. 1997) ("[W]here a denial of counsel was so flagrant, and the difficulty of proving prejudice so great," it may be possible to presume harm); Esposito v. I.N.S., 987 F.2d 108, 111 (2d Cir. 1993) (holding that the prejudice requirement is that "the result would have been different").

motion whether a complaint was "filed with appropriate disciplinary authorities regarding such representation, and if not, why not."[27] This framework, which the BIA revisited and affirmed fifteen years after *Lozada*, was intended to "provide a basis for evaluating the many claims presented, to deter baseless allegations, and to notify attorneys of the standards for representing aliens in immigration proceedings."[28]

Courts have protected aliens by granting them new hearings when the aliens have proved ineffective assistance of counsel under *Lozada*.[29] For example, Garfield Aris arrived in the United States at age twelve.[30] He was ordered deported because his attorney failed to submit his application for discretionary relief on time.[31] In addition, on the day of his scheduled hearing, the attorney's paralegal wrongly informed Aris that he did not have an immigration hearing, causing him to miss his court date.[32] The lawyer nevertheless assured Aris that "he would take care of everything."[33] But, after an unsuccessful attempt to reopen the case, the lawyer never informed Aris that he lost the case; for the next ten years Aris mistakenly believed that his immigration problems were resolved until he was arrested and detained.[34] Aris' new attorney moved the BIA to reopen his case and rescind the deportation order, but the motion was denied.[35] On appeal to the Second Circuit, under *Lozada*, the court ruled that Aris's former attorneys provided ineffective assistance of counsel and remanded his case for a new hearing.[36]

A court also granted Fridoon Zalbeg Rawshan Nehad a new hearing after making a claim of ineffective assistance of counsel under *Lozada*. Nehad left his native Afghanistan for Germany at the age of sixteen to avoid military service.[37] Fourteen years later, he arrived in the United States to live with family members.[38] He applied for asylum because his father worked as a translator at Guantanamo Bay Prison and was concerned that this could lead the

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

28. *Assaad*, 23 I. & N. Dec. at 556.

29. *See, e.g.*, Aris v. Mukasey, 517 F.3d 595 (2d Cir. 2008); Nehad v. Mukasey, 535 F.3d 962 (9th Cir. 2008).

30. *Aris*, 517 F.3d at 597.

31. *Id.* at 598.

32. *See id.*

33. *Id.*

34. *Id.*

35. *Id.* at 598-99.

36. *Id.* at 600 n.8, 601.

37. *Nehad*, 535 F.3d at 965.

38. *Id.*

Taliban to view him as an enemy if he returned to Afghanistan.[39] His attorney misled him about the law and threatened to withdraw hours before his hearing if Nehad proceeded with his asylum application.[40] Because of his attorney's behavior, Nehad never filed his application, was forced to accept an offer of voluntary withdrawal, and was ordered deported.[41] In granting Nehad's motion to reopen under *Lozada*, the Ninth Circuit ruled that Nehad's counsel's misconduct may have affected the outcome of his case and that this prejudice violated Nehad's Fifth Amendment right to due process.[42]

Courts, however, differ in their willingness to reopen claims based on ineffective assistance of counsel especially when the alien does not meet all three *Lozada* factors.[43] Many circuits have explained that the *Lozada* procedural requirements should not be applied rigidly, but instead should serve merely as helpful factors a court should consider in evaluating ineffective assistance of counsel claims.[44] For example, the Ninth Circuit has held that full compliance with the factors is unnecessary when the record on its own sufficiently demonstrates ineffective assistance of counsel.[45] In one case, the Second Circuit went so far as to hold that mechanically applying the *Lozada* factors to bar an ineffective assistance of counsel claim was "arbitrary and an abuse of the [immigration judge's] discretion."[46]

After more than twenty years of applying *Lozada* to ineffective assistance of counsel claims, on January 7, 2009, two weeks before President George W. Bush left office, then Attorney General Mukasey issued the administrative decision *Compean I*,[47] which held that there is no constitutional or statutory right to effective assistance of counsel in immigration proceedings.[48] Specifically,

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39. *Id.* at 968.

40. *Id.* at 965-66.

41. *See id.*

42. *See id.* at 973.

43. *See* Gbaya v. United States Attorney Gen., 342 F.3d 1219, 1222 (11th Cir. 2003) (explaining how the circuits "disagree as to how strictly the BIA may enforce" the *Lozada* requirements).

44. *See infra* notes 133-36 and accompanying text.

45. *See* Rodriguez-Lariz v. I.N.S., 282 F.3d 1218, 1227 (9th Cir. 2002).

46. Twum v. I.N.S., 411 F.3d 54, 56 (2d Cir. 2005); *see also* Saakian v. I.N.S., 252 F.3d 21 (1st Cir. 2001).

47. 24 I. & N. Dec. 710, 710 (Dep't of Justice 2009).

48. *See id.* at 714 ("Although the Constitution does not *entitle* an alien to relief for his lawyer's mistakes, I conclude that the Department *may*, in its discretion, allow an alien to reopen removal proceedings based on the deficient performance of his lawyer . . . . In extraordinary cases, where a lawyer's deficient performance likely changed the outcome of an alien's removal proceedings, the Board may reopen those proceedings notwithstanding the absence of a constitutional right to such relief.") (emphasis in

Mukasey ruled that because removal proceedings are civil and not criminal in nature, aliens do not have a Fifth Amendment constitutional right to effective assistance of counsel in removal hearings[49] and that aliens have only a "statutory privilege" to retain counsel of their choosing.[50] *Compean I* overruled the BIA's longstanding *Lozada* precedent and directly contradicted the rulings of seven circuits. As a matter of "administrative grace,"[51] however, Mukasey noted that the court or BIA may still, in its discretion, reopen a case for consideration of "deficient performance of counsel claims."[52] To prevail on such a claim, the alien must submit an affidavit setting forth facts that prove three elements: (1) the "lawyer's failings were 'egregious';" however, Mukasey made clear that it is not enough to show that the lawyer "made an ordinary mistake,"[53] and that there is "a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance;'"[54] (2) if the motion to reopen is filed after the applicable time limit (usually ninety days from the removal order date), the court or BIA may "toll" the time period "but only if the alien affirmatively shows that he exercised due diligence in discovering and seeking to cure his lawyer's alleged deficient performance;"[55] and (3) the lawyer's errors were prejudicial, more specifically, that "but for the [lawyer's] deficient performance, it is more likely than not that the alien would have been entitled to the ultimate relief he was seeking."[56]

In addition to disclaiming a constitutional right and instead creating a "discretionary" remedy and raising the measure of proof required to make out a claim, *Compean I* also set forth a new, more restrictive set of procedural requirements for an alien attempting to demonstrate ineffective assistance. Under Mukasey's framework, an alien whose counsel is incompetent must comply with an onerous set of requirements to have an adverse ruling set aside and the proceedings reopened. The alien must submit: (1) a detailed affidavit

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original). It was well known that, through litigation, Attorney General Mukasey had been urging the BIA and federal courts to find that there was no constitutional right to effective assistance of counsel in removal proceedings. *See, e.g.*, Afanwi v. Mukasey, 526 F.3d 788 (4th Cir. 2008), *vacated*, Afanwi v. Holder, 78 U.S.L.W. 3169 (U.S. Oct. 5, 2009) (No. 08-906); *Assaad*, 23 I. & N. Dec. 553 (Dep't of Justice 2003).

49. Compean I, 24 I. & N. Dec. at 716 ("A removal proceeding is a civil action, not a criminal proceeding.").

50. *Id.* at 726.

51. *Id.* at 710, headnote 4.

52. *Id.* at 730-31.

53. *Id.* at 732.

54. *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).

55. *Id.*

56. *Id.* at 733-34.

setting forth the facts that form the basis of the deficient performance claim, or a copy of the retainer agreement with the attorney; (2) a copy of a letter to the former attorney specifying the attorney's deficient representation and a copy of the attorney's response; (3) a completed and signed complaint addressed, but not necessarily sent, to the state bar disciplinary board; (4) copies of documentary evidence or an affidavit of testimony that the attorney failed to submit in providing ineffective assistance; and (5) a signed statement by the alien's new attorney expressing an opinion as to why the previous attorney's representation was ineffective.[57] If any of these documents are missing from the filing, the alien must explain why in an affidavit.[58]

Mukasey's *Compean I* decision dismayed many in the immigration community because it arrived just days before President Bush left office, but more so because it fully eliminated an alien's constitutional due process right to bring an ineffective assistance claim against his deficient lawyer.[59] In early February 2009, the respondents in *Compean I* filed a motion to reconsider asking the new Attorney General, Eric Holder, to vacate former Attorney General Mukasey's decision. More than one hundred organizations, law firms, and individuals also submitted letters in support of the motion to reconsider asking Attorney General Holder to vacate Mukasey's ruling and urging him to issue a new decision affirming an alien's statutory and constitutional rights to counsel and a remedy for ineffective assistance of counsel.[60]

As many predicted, on June 3, 2009, Attorney General Holder rejected and vacated Mukasey's *Compean I* decision and its elaborate framework.[61] The new decision also directed the EOIR to initiate procedures to evaluate the *Lozada* framework, which could lead to new rules for ineffective assistance of counsel claims in removal proceedings.[62] While Holder's brief ruling did not specifically address

57. *Id.* at 735-39.

58. *Id.* at 735.

59. Daphne Eviatar, *Bush DOJ Rule Revokes Immigrants' Right to Counsel*, WASH. INDEP., Feb. 24, 2009, http://washingtonindependent.com/31090/immigration-advocates-rail-against-mukasey-rule. In addition, many in the immigration community believed that the *Compean I* decision was inappropriately "rushed through without input from many groups and individuals . . . who sought but were denied a meaningful extension of time to file briefs" in the case. *See* ACLU, Compean *Decision by Attorney General Mukasey Regarding Ineffective Assistance of Counsel in Immigration Proceedings* (2009), http://www.aclu.org/images/asset_upload_file558_38744.pdf; *see also* American Immigration Law Foundation, Ineffective Assistance of Counsel, http://www.ailf.org/lac/lac-ineffective.shtml (last visited Mar. 6, 2010).

60. *See* Eviatar, *supra* note 59.

61. Compean II, 25 I. & N. Dec. 1 (BIA 2009).

62. *Id.* at 2. "The integrity of immigration proceedings depends in part on the

an alien's constitutional right to effective assistance of counsel, it did reinstate the BIA's longstanding *Lozada* opinion for the time being.[63] These shifting *Compean* decisions create a much needed opportunity for the EOIR to examine the rights and procedures involved in ineffective assistance of counsel claims in removal proceedings and to create a new or modified framework for an alien bringing such a claim against his incompetent or fraudulent attorney.

II. RECOMMENDATIONS FOR A NEW FRAMEWORK FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN REMOVAL PROCEEDINGS

In creating a new or modified framework governing ineffective assistance of counsel claims in removal proceedings, the focus should not necessarily be on maintaining the *Lozada* status quo. Instead, the EOIR should learn from more than twenty years of applying *Lozada* and provide a framework that applies a more realistic approach which takes into account the lives and circumstances of the majority of aliens bringing these claims, who in addition to being betrayed by their counsel, are often dealing with language barriers, limited financial resources, and little understanding of the complex legal system in which they are involved. A new or modified framework should recognize an alien's right to effective assistance of counsel under both the Fifth Amendment and the INA. It should permit an alien's claim to be evaluated more easily on its merits and allow for a flexible approach regarding the procedural requirements introduced by *Lozada*. In particular, the framework should not require a bar complaint. Furthermore, a new or modified framework should use a uniform prejudice standard that truly allows an alien with a viable claim to have his case reassessed.

A. A New Framework Should Recognize a Fifth Amendment Constitutional Right to Effective Assistance of Counsel in Removal Proceedings

Although Attorney General Holder did not affirm an alien's constitutional right to effective assistance of counsel in his recent

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ability to assert claims of ineffective assistance of counsel, and the Department of Justice's rulemaking in this area will be fair, it will be transparent, and it will be guided by our commitment to the rule of law . . . ." Press Release, U.S. Dep't of Justice, *Attorney General Vacates* Compean *Order, Initiates New Rulemaking to Govern Immigration Removal Proceedings* (June 3, 2009), http://www.justice.gov/opa/pr/2009/June/09-ag-547.html.

63. Compean II, 25 I. & N. Dec. at 2-3 (finding it "not necessary [to decide on the constitutional issue] either to decide these cases under *pre-Compean* standards or to initiate a rulemaking process" and thus, it should be vacated along with the decision's "new procedural framework").

decision vacating *Compean I*,[64] during his confirmation hearings, while discussing *Compean I*, he stated that "[t]he Constitution guarantees due process of law to those who are the subjects of deportation proceeding [sic]. I understand Attorney General Mukasey's desire to expedite immigration court proceedings, but the Constitution requires that those proceedings be fundamentally fair."[65] Following the majority of circuit courts which have already addressed the issue, a new or modified framework for ineffective assistance of counsel claims in removal proceedings should recognize that the Constitution provides an alien with a due process right to effective assistance of counsel under the Fifth Amendment.[66]

The Sixth Amendment to the United States Constitution guarantees the right to counsel in criminal proceedings,[67] and the Supreme Court has interpreted this right to effective assistance of counsel as "critical to the ability of the adversarial system to produce just results"[68] and necessary "to ensure that the trial is fair."[69] However, the Sixth Amendment right to counsel extends only to criminal cases and as removal proceedings are civil in nature, an alien is not entitled to this Sixth Amendment right.[70] In many civil contexts, Fifth Amendment due process requires fundamental fairness, and effective assistance of counsel has been found to be an essential part of a fundamentally fair proceeding when the government seeks to deprive individuals of their liberty interests.[71]

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64. *See id.*

65. *Executive Nomination: Hearing on the Nomination of Eric H. Holder, Jr. to be Attorney General of the United States Before the S. Comm. on the Judiciary to Sen. Hatch*, 111th Cong. 27 (2009) (response of Eric H. Holder, Jr., Att'y Gen. nominee), http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Holder-QFRs.pdf.

66. Over the last year, two petitions for certiorari on the issue were filed. *See* Jezierski v. Mukasey, 543 F.3d 886, 888-90 (7th Cir. 2008), *cert. denied*, 77 U.S.L.W. 3528 (U.S. Mar. 23, 2009) (No. 08-656); Afanwi v. Mukasey, 526 F.3d 788, 798–99 (4th Cir. 2008), *vacated*, Afanwi v. Holder, 78 U.S.L.W. 3169 (U.S. Oct. 5, 2009) (No. 08-906) (vacating and remanding for further consideration under *Compean II*).

67. Strickland v. Washington, 466 U.S. 668, 684-85 (1984).

68. *Id.* at 685.

69. *Id.*

70. *See id* at 684-85.

71. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (holding that whether an indigent mother is entitled to appointed counsel before terminating her parental rights should be evaluated on a case-by-case basis and applied when fundamental fairness requires); Vitek v. Jones, 445 U.S. 480 (1980) (finding that transferring a convicted felon from a state prison to a mental hospital without adequate notice and an opportunity for a hearing was a violation of appellee's due process rights); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (concluding that a case-by-case approach should be used to decide whether an indigent probationer should be provided counsel at revocation hearings to avoid due process violations); *In re* Gault, 387 U.S. 1 (1967) (holding that in juvenile delinquency hearings, due process requires *inter alia* adequate notice and

The Supreme Court has extended such a right in numerous decisions holding that Fifth Amendment due process includes a right to counsel in civil hearings where individuals face deprivations of their rights.[72] For example, in *In re Gault*,[73] the Court held that even though the proceeding was "civil" not "criminal," due process required that juveniles in delinquency proceedings have a right to be represented by counsel because such proceedings could "result in commitment to an institution in which the juvenile's freedom is curtailed."[74] In *Gagnon v. Scarpelli*,[75] the Court held that representation in adult probation revocation hearings was appropriate when the parolee or probationer alleged that "he ha[d] not committed the alleged violation of the conditions upon which he is at liberty" or where the reasons for the alleged violation "are complex."[76] Similarly, in *Vitek v. Jones*,[77] the Court held that an indigent prisoner was entitled to due process prior to being transferred and committed to a state mental hospital, because of his liberty interest.[78] And in *Lassiter v. Department of Social Services*,[79] the Court expanded on its reasoning in *Gault* and held that there is a right to counsel in certain parental termination cases where the state seeks to terminate a person's parental rights because of the "complexity of the proceeding and the incapacity of the uncounseled parent."[80] The due process right involved in all of these civil cases is "barely distinguishable from criminal condemnation in view of the magnitude and permanence of the loss [the party] faces."[81] Like the individuals in these civil proceedings, according to the Supreme Court, an alien in removal proceedings faces the same loss of his protected liberty interest as "[t]hough technically not criminal, it practically may be[,] [and] [t]he penalty is so severe that we have extended to the resident alien the protection of due process."[82] Moreover, "the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in

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assistance of counsel).

72. *See* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 332-35 (1985).

73. 387 U.S. 1 (1967).

74. *Id.* at 17, 41.

75. 411 U.S. 778 (1973).

76. *Id.* at 790.

77. 445 U.S. 480 (1980).

78. *Id.* at 495-97.

79. 452 U.S. 18 (1981).

80. *Id.* at 31.

81. M.L.B. v. S.L.J., 519 U.S. 102, 119 (1996).

82. Boutilier v. I.N.S., 387 U.S. 118, 132 (1967) (Douglas, J., dissenting); *see also* Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

deportation proceedings especially important."[83]

The BIA initially introduced, but did not elaborate upon, the constitutional right to effective assistance of counsel in removal proceedings in *Lozada* where the court stated that "[a]ny right a respondent in deportation proceedings may have to counsel is grounded in the [F]ifth [A]mendment guarantee of due process."[84] Circuit courts, however, have taken different stances to *Lozada*'s assertion that this Constitutional right exists. Seven of the federal appellate courts (First, Second, Third, Sixth, Ninth, Tenth, and Eleventh Circuits) have specifically grounded an alien's due process right to effective assistance of counsel in the Fifth Amendment.[85] The Fourth and Eighth Circuits have rejected an alien's right to effective assistance of counsel in removal proceedings under the Fifth Amendment.[86] The Fifth Circuit has declined to decide the issue, and both the Fifth and the Eighth Circuits have recognized the BIA's creation of a regulatory right to effective assistance in deportation proceedings separate from the Fifth Amendment right to such effective assistance.[87] The Seventh Circuit has issued opinions with opposing views.[88] (It is worth noting that even the circuits that have

83. Ardestani v. I.N.S., 502 U.S. 129, 138 (1991).

84. Lozada v. I.N.S., 19 I. & N. Dec. 637, 638 (Dep't of Justice 1988).

85. Aris v. Mukasey, 517 F.3d 595, 600-01 (2d Cir. 2008); Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008); Fadiga v. U.S. Attorney Gen., 488 F.3d 142, 155 (3d Cir. 2007); Dakane v. U.S. Attorney Gen., 399 F.3d 1269, 1273 (11th Cir. 2005); Osei v. I.N.S., 305 F.3d 1205, 1208 (10th Cir. 2002); Huicochea-Gomez v. I.N.S., 237 F.3d 696, 699 (6th Cir. 2001); Lozada v. I.N.S., 857 F.2d 10, 13 (1st Cir. 1988).

86. Afanwi v. Mukasey, 526 F.3d 788, 798–99 (4th Cir. 2008), *vacated sub nom.*, Afanwi v. Holder, 130 S. Ct. 350 (2009) (vacating and remanding in light of *Compean II* – holding "it is quite clear that aliens enjoy a Fifth Amendment right to due process" but "retained counsel's ineffectiveness in a removal proceeding cannot deprive an alien of his Fifth Amendment right to a fundamentally fair hearing"); Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008) (holding that "there is no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding").

87. *See, e.g.*, Mai v. Gonzales, 473 F.3d 162, 165 (5th Cir. 2006) ("BIA itself has determined that ineffective assistance of counsel is a valid ground for reopening a deportation case."); Etchu-Njang v. Gonzales, 403 F.3d 577, 585 (8th Cir. 2005) ("The BIA has developed procedures to consider motions to reopen based on claims of ineffective assistance of counsel, and it retains discretion to reopen proceedings at any time.") (citing 8 C.F.R. § 1003.2(a) (2009)) (internal citation omitted).

88. *Compare* Castaneda-Suarez v. I.N.S., 993 F.2d 142, 144 (7th Cir. 1993) (quoting Magallanes-Damian v. I.N.S., 783 F.2d 931, 933 (9th Cir. 1986)) ("[C]ourts have consistently held that counsel at a deportation hearing may be so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause."), *and* Sanchez v. Keisler, 505 F.3d 641, 647 (7th Cir. 2007) (holding that there is a right to effective assistance of counsel "derived from the immigration statutes and regulations and ultimately the Fifth Amendment's due process clause"), *with* Magala v. Gonzales, 434 F.3d 523, 526 (7th Cir. 2005) (denying the existence of a constitutional right to effective assistance of counsel, but recognizing that the BIA "may grant relief as a matter of sound discretion").

not specifically recognized the constitutional right to effective assistance of counsel have all applied the *Lozada* procedural and substantive framework but have chosen to ground the right elsewhere.)

Notwithstanding that the majority of circuits accept that an alien has a Fifth Amendment due process right to effective assistance of counsel, some argue against this right because, they believe, the government is under no obligation to provide an alien with legal representation. According to this argument, an alien's privately retained lawyer is not a state actor[89] and thus, any alleged ineffectiveness by the lawyer can only be considered private action.[90] Therefore, they contend that without further connection to the government, the alien's hired counsel's actions cannot implicate the Fifth Amendment, and the counsel's alleged ineffectiveness cannot deprive the alien of due process.[91]

However, in the criminal context, the Supreme Court has found that despite the fact that retained defense attorneys are not state actors,[92] their ineffectiveness has still been found to violate the Constitution.[93] Moreover, removal proceedings, just like criminal trials, are commenced and conducted by the government under the Constitution.[94] The right to effective assistance of counsel stems from the "guarantee[] [of] a fair trial through the Due Process Clauses," not from the state providing an attorney.[95] "[A] proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment."[96] Therefore, "the State's conduct of a criminal trial itself implicates the State in

89. *See Afanwi*, 526 F.3d at 798 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)) ("The standard for finding federal government action under the Fifth Amendment is the same as that for finding state action under the Fourteenth Amendment, namely 'whether there is a sufficiently close nexus between the [federal government] and the challenged action of the [private actor] so that the action of the latter may be fairly treated as that of the [federal government].'").

90. *See id.*

91. *See id.*

92. *See* Georgia v. McCollum, 505 U.S. 42, 53 (1992) (finding "that a public defender does not qualify as a state actor when engaged in his general representation of a criminal defendant").

93. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335, 343 (1980) (determining that a trial is a state-initiated proceeding and a criminal conviction "unconstitutionally deprives the Defendant of his liberty").

94. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 306-08 (1993) (concluding that the deportation procedures for removal are constitutional because the "alien juveniles [have] the right to a hearing" even though it is not automatic).

95. Strickland v. Washington, 466 U.S. 668, 684-85 (1984) (finding that an attorney's assistance "whether retained or appointed . . . plays the role necessary to ensure that the trial is fair").

96. *Cuyler*, 446 U.S. at 343.

the defendant's conviction."[97] And when such a conviction occurs in a trial tainted by ineffective assistance of counsel, "it is the state that unconstitutionally deprives the defendant of his liberty," even when the defendant chooses his own lawyer.[98] Similarly, in a removal proceeding, it is the government's conduct of seeking to remove the alien that implicates the Fifth Amendment in the alien's deportation hearing, not whether the alien's attorney has been provided by the government.

Relying on Supreme Court cases *Wainwright v. Torna*[99] and *Coleman v. Thompson*,[100] critics of finding a constitutional due process right to effective assistance of counsel in removal proceedings argue that because there is no constitutional right to the appointment of counsel at government expense, there is no constitutional basis for a claim of ineffective assistance of counsel.[101] However, unlike the proceedings in *Wainwright* and *Coleman*, where the Court rejected ineffective assistance of counsel claims of criminal defendants because they were outside the context of the initial trial, removal hearings are the initial proceedings for aliens seeking relief from removal. Reliance on *Wainwright* and *Coleman* therefore overlooks important differences between contexts in which the government is seeking to deprive a person of his liberty and those in which a person has already been deprived of his liberty and is bringing a collateral attack[102] or a discretionary appeal[103] on the judgment.

In *Wainwright*, the Court considered whether an already

97. *Id.* at 344.

98. *Id.* at 343, 345.

99. 455 U.S. 586 (1982).

100. 501 U.S. 722 (1991).

101. *See, e.g.*, Afanwi v. Mukasey, 526 F.3d 788, 799 (4th Cir. 2008), *vacated sub nom*, Afanwi v. Holder, 130 S. Ct. 350 (2009) ("[C]ounsel's alleged ineffectiveness did not deprive Afanwi of due process."); Compean I, 24 I. & N. Dec. 710, 714 (Dep't of Justice 2009), *vacated*, 25 I. & N. Dec. 1 (Dep't of Justice 2009) ("[T]here is no constitutional right to counsel, including Government-appointed counsel, in the first place."); Assaad, 23 I. & N. Dec. 553, 560 (Dep't of Justice 2003) (rejecting the government's argument that *Coleman* and *Wainwright* should be applied in immigration proceedings); Patrick J. Glen, *The Nonconstitutional Character of Ineffective Assistance of Counsel Claims in Immigration Proceedings: A Brief Comment on* Afanwi v. Mukasey, 82 S. CAL. L. REV. POSTSCRIPT 1 (2008), http://weblaw.usc.edu/why/students/orgs/lawreview/documents/Glen_Patrick_82_PS1.pdf.

102. *See Coleman*, 501 U.S. at 756 ("[S]tate discretionary appeals where defendants already had one appeal as of right" is one example.).

103. *See Wainwright*, 455 U.S. at 586-87; *see also* Halbert v. Michigan, 545 U.S. 605, 611 (2005) (quoting Douglas v. California, 372 U.S. 353, 357 (1963)) (explaining how an appeal of right that involves an error-correction "entails an adjudication on the 'merits'" but a discretionary review does not).

convicted felon could challenge his attorney's failure to file a timely discretionary appeal to the state supreme court.[104] The Court held that there was no right to effective assistance of counsel in discretionary state proceedings and that whether the Florida Supreme Court was willing to accept petitioner's appeal was entirely within its discretion.[105] In *Coleman*, an already convicted and sentenced-to-death prisoner's attorney filed a state habeas petition raising several federal constitutional claims but filed his state appeal late, resulting in a procedural default.[106] Coleman filed for federal habeas review and argued that his lawyer's mistakes should not bar review of his claims.[107] Coleman had fully exhausted all of his opportunities for a direct appeal of right and his counsel's ineffectiveness did not arise until after his state habeas corpus hearing, a collateral hearing.[108] Rejecting Coleman's argument, the Supreme Court held that because Coleman had no constitutional right to an attorney in a state post-conviction proceeding, he did not have an ineffective assistance claim in such proceeding.[109] Specifically, the Court held that due process does not require effective assistance when a defendant collaterally attacks his criminal sentence because unlike in a criminal trial and a direct appeal of right, the government is no longer affirmatively trying to deprive him of his liberty.[110] Thus, the Court ruled that fundamental fairness does not require effective counsel when an incarcerated habeas prisoner is trying to have an already affirmed conviction reversed.[111]

Denying the right to effective assistance of counsel in collateral habeas proceedings and discretionary appeals is not the same as denying the right in removal proceedings; the contexts are completely different. A removal proceeding, like a criminal trial (and a civil deprivation hearing), is the government's attempt to deprive a party of his liberty interests and is hence, not a collateral attack on, or a discretionary appeal of, an already completed deprivation. Removal proceedings take place in front of an immigration judge ("IJ") or in

104. 455 U.S. at 587-88.

105. *Id.*

106. 501 U.S. at 726-28, 735.

107. *Id.* at 755.

108. *Id.* at 756.

109. *Id.* at 757.

110. *Id.* at 756-57. In fact, the Supreme Court specifically distinguished the situation where the ineffective assistance of counsel occurs during the actual proceeding for which the petitioner has a claim of right. The Court explained that there may be an exception to the rule that there is no right to counsel in state collateral proceedings, "where state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.* at 755.

111. *Id.* at 756-57.

the BIA, not in post-appeal collateral proceedings. Proceedings before an IJ are trials and an alien is entitled to full hearings.[112] An alien has an appeal of right from the IJ's decision on ineffective assistance claims; the BIA must rule, and has no discretion whether to rule, on the appeal; and the BIA reviews these claims *de novo*.[113] Furthermore, in rejecting arguments based on *Coleman* and *Wainwright*, the BIA has pointed out that many of the decisions by the courts of appeals regarding effective assistance of counsel in removal hearings,

> were rendered in the decade after the Supreme Court decided *Coleman v. Thompson* . . . strongly suggest[ing] that the courts of appeals have not viewed the Supreme Court's pronouncements in the criminal context as requiring a reexamination of the due process underpinnings of ineffective assistance of counsel claims in the immigration context.[114]

Accordingly, the majority of courts of appeals who have found a Fifth Amendment due process right to effective assistance of counsel in removal proceedings got it right. For example, the Third Circuit has held that "[a]liens in removal proceedings have a Fifth Amendment right to due process, which entails a right to be represented by counsel. Ineffective assistance of counsel may 'constitute a denial of due process if the alien was prevented from reasonably presenting his case.'"[115] The Tenth Circuit has explained that "[w]hile an alien does not have a right to appointed counsel, he does have a Fifth Amendment right to a fundamentally fair proceeding. . . . Accordingly, [an alien] '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.'"[116] And the Ninth Circuit has ruled 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 alien was prevented from reasonably presenting his case."[117] Consequently, a new or modified framework for an alien trying to

112. 8 U.S.C. § 1229a(a)-(b) (2006).

113. 8 C.F.R. § 1003.1(b) (2009).

114. Assaad, 23 I. & N. Dec. 553, 559 (Dep't of Justice 2003).

115. Zheng v. Gonzalez, 422 F.3d 98, 106 (3d Cir. 2005) (quoting Xu Yong Lu v. Ashcroft, 259 F.3d 127, 131 (3d Cir. 2001)) (internal quotation omitted); *see also* Fadiga v. Attorney Gen., 488 F.3d 142, 155 (3d Cir. 2007) ("A claim of ineffective assistance of counsel in removal proceedings is cognizable under the Fifth Amendment – i.e., as a violation of that amendment's guarantee of due process.").

116. Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003) (quoting Osei v. I.N.S., 305 F.3d 1205, 1208 (10th Cir. 2002)).

117. Ortiz v. I.N.S., 179 F.3d 1148, 1153 (9th Cir. 1999) (quoting Lopez v. I.N.S., 775 F.2d 1015, 1017 (9th Cir. 1985)); *see also* Lozada v. I.N.S., 857 F.2d 10, 13 (1st Cir. 1988).

prove ineffective assistance of counsel should follow the majority of the courts of appeals and recognize that an alien's right to effective assistance of counsel originates in the Fifth Amendment.[118]

B. A New Framework Should Recognize a Statutory Right to Effective Assistance of Counsel in Removal Proceedings

In *Compean I*, in addition to declaring that an alien has no right to effective assistance of counsel under the Constitution, Attorney General Mukasey also rejected, with virtually no explanation, that an alien has a statutory right to effective assistance of counsel in removal proceedings.[119] Irrespective of the constitutional issue, and although *Compean I* has been vacated, it is important that a new or modified framework makes clear that the INA, 8 U.S.C. sections 1362[120] and 1229a(b)(4)(A),[121] and their regulations, on their own, provide an alien with a statutory right to effective assistance counsel.

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118. *See* Zeru v. Gonzales, 503 F.3d 59, 72 (1st Cir. 2007) (quoting *Lozada*, 857 F.2d at 13) (finding that ineffective assistance of counsel "is a denial of due process . . . if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case"); United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003) (quoting Saleh v. U. S. Dep't of Justice, 962 F.2d 234, 241 (2d Cir. 1992)) (holding that an alien may "prevail on a claim of ineffective assistance of counsel . . . [if] 'counsel's performance was so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause'"); Sene v. Gonzales, 453 F.3d 383, 386 (6th Cir. 2006) (citing Denko v. I.N.S., 351 F.3d 717, 724 (6th Cir. 2003)); ("Petitioner has received ineffective assistance of counsel in violation of the Due Process Clause of the Fifth Amendment because counsel's errors result in a proceeding that is so fundamentally unfair that Petitioner was prevented from reasonably presenting her case."); Dakane v. U.S. Attorney Gen., 399 F.3d 1269, 1273 (11th Cir. 2005) (citing Gbayav. U.S. Attorney Gen., 342 F.3d 1219, 1221 (11th Cir. 2003)) ("[A]n alien in civil proceedings . . . has the constitutional right under the Fifth Amendment Due Process Clause right to a fundamentally fair hearing to *effective* assistance of counsel where counsel has been obtained.") (emphasis in original); Figeroa v. I.N.S., 886 F.2d 76, 78 (4th Cir. 1989) (finding a Fifth Amendment due process right to effective assistance of counsel and stating that "[w]hether the alleged ineffective assistance of counsel rises to the level of a due process violation presents a mixed question of law and fact").

119. Compean I, 24 I. & N. Dec. 710, 727 (Dep't of Justice 2009), *vacated*, 25 I. & N. Dec. 1 (Dep't of Justice 2009) (ruling in two sentences that neither the "immigration statutes or departmental regulations—entitle an alien to reopen his removal proceedings based on his lawyer's deficient performance").

120. 8 U.S.C. § 1362 states:

> In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

121. 8 U.S.C. § 1229a(b)(4)(A) states that "the alien shall have the privilege of being represented, at no expense to the government, by counsel of the alien's choosing who is authorized to practice in such proceedings."

"In fact, Congress has long recognized the importance of counsel in immigration proceedings,"[122] which is clear from the INA and its regulations—a detailed scheme which provides an alien with a right to counsel and a fair hearing.[123] As the Seventh Circuit has explained, "aliens have a statutory right [under the INA] to retain counsel, and that adequacy of representation is an important factor in assuring that the statutory right to a fundamentally fair proceeding is respected."[124] The title of Section 1362, "Right to Counsel," itself, identifies this right.[125] When commencing removal proceedings, IJs provide an alien with notice of his right to counsel and a list of pro bono attorneys.[126] After advising an alien of his or her right to counsel, IJs must allow a reasonable amount of time for the alien to secure counsel.[127] The regulations[128] further explain that the right to counsel is warranted in all proceedings where an "examination" is held, which include master calendar and individual merits hearings.[129] An alien's statutory and regulatory guarantees of a fair hearing include the right to present evidence on his behalf, the right to examine the evidence, the right to cross-examine witnesses, the right to an administrative appeal, and the right to seek judicial review.[130] Without effective counsel, an alien would not have these rights.[131]

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122. Xu Yong Lu v. Ashcroft, 259 F.3d 127, 132 (3d Cir. 2001).

123. 8 U.S.C. §§ 1362, 1229a(b)(4)(A) (2006).

124. Sanchez v. Keisler, 505 F.3d 641, 648 (7th Cir. 2007) (ruling that because of her attorney's incompetence, Sanchez did not receive a fair hearing to which she is entitled under the INA); *see also* Zeru v. Gonzales, 503 F.3d 59, 72 (1st Cir. 2007) ("[A]liens in deportation proceedings have a statutory right to be represented by counsel at their own expense."); Borges v. Gonzales, 402 F.3d 398, 408 (3d Cir. 2005) (citing 8 U.S.C. § 1362) ("[A]liens have a statutory right to counsel.").

125. 8 U.S.C. § 1362 (2006).

126. *See* 8 U.S.C. §§ 1229(a)(1)(E), (b)(1)-(2) (2006); *see also* 8 C.F.R. § 1240.10(e) (2009) (requiring the IJ to advise alien of his right to counsel after additional charges have been lodged); Snajder v. I.N.S., 29 F.3d 1203, 1206-07 (7th Cir. 1994) (finding a violation of right to counsel where alien was not re-advised of right to counsel after the I.N.S. issued new charges against him).

127. *See* 8 U.S.C. § 1229(b)(1) (2006).

128. 8 C.F.R. § 1240.10 (2009).

129. 8 C.F.R. § 292.5(b) (2006).

130. 8 U.S.C. § 1229a(b)(4)(B) (2006); 8 U.S.C. § 1101(a)(47)(B) (2006); 8 U.S.C. § 1252(a) (2009).

131. *See* Borges v. Gonzales, 402 F.3d 398, 408 (3d Cir. 2005) ("Implicit in the right to counsel is the requirement that the assistance rendered not be ineffective."); Batanic v. I.N.S., 12 F.3d 662, 667 (7th Cir. 1993) (quoting Castaneda-Delgado v. I.N.S., 525 F.2d 1295, 1302 (7th Cir. 1975)) (explaining that the statutory right to counsel is "an integral part of the procedural due process to which the alien is entitled").

C. A New Framework Should Apply Lozada's First Two Procedural Requirements Flexibly and Eliminate the Third

Procedurally, a new or modified framework for ineffective assistance of counsel claims in the removal context does not need to completely abolish the *Lozada* procedural approach. Instead, it should use the *Lozada* framework by preserving its first two requirements and applying them flexibly, but eliminating its third requirement, which has been proven unnecessary. These changes will help to ensure that valid ineffective assistance claims are properly reviewed and not dismissed on procedural grounds alone.

Under the current three-step *Lozada* procedural framework, an alien is required to support his ineffective assistance of counsel claim by filing (1) a detailed affidavit setting forth all the relevant facts including a description of the agreement entered into and the services the attorney failed to provide; (2) proof that former counsel "whose integrity or competence is being impugned" has been advised of the allegations brought against him and was provided an opportunity to respond; and (3) proof "a complaint has been filed with appropriate disciplinary authorities regarding [counsel's performance], and if not, why not."[132] In general, the *Lozada* requirements are often administered too mechanically, especially by the BIA,[133] and with little understanding for what aliens face in showing that their previous counsel was deficient and that they have been harmed. Because of this, while all the circuit courts have adopted the BIA's *Lozada* procedural requirements, several circuits do not require strict compliance to them and instead, have used a flexible *Lozada* approach while still ensuring that the ineffective claims are legitimate.[134] Numerous courts have expressed reluctance to require the alien to meet all of *Lozada*'s requirements.[135] For instance, in the Eleventh Circuit, "exact" compliance with *Lozada* is unnecessary to find ineffective assistance of counsel,[136] and in the

132. 19 I. & N. Dec. 637, 639 (Dep't of Justice 1988).

133. *See* Saakian v. I.N.S., 252 F.3d 21, 26 (1st Cir. 2001); Ontiveros-Lopez v. I.N.S., 213 F.3d 1121, 1124-25 (9th Cir. 2000); Rivera-Claros, 21 I. & N. Dec. 599 (Dep't of Justice 1996). The federal courts have criticized the BIA for applying the *Lozada* requirements mechanically. *See, e.g.*, Castillo-Perez v. I.N.S., 212 F.3d 518, 526 (9th Cir. 2000). This can also be seen by the number of BIA decisions that are appealed to the federal courts, which has increased from five percent to twenty-five percent. AM. BAR ASS'N., *supra* note 17.

134. *See, e.g.*, *Castillo-Perez*, 212 F.3d at 525-26 (finding no need to comply with *Lozada* strictly where ineffectiveness is obvious).

135. *See, e.g.*, Fadiga v. Attorney Gen., 488 F.3d 142, 155-57 (3d Cir. 2007); Lo v. Ashcroft, 341 F.3d 934, 937-38 (9th Cir. 2003); Figeroa v. I.N.S., 99 F.3d 1153 (11th Cir. 1996); Esposito v. I.N.S., 987 F.2d 108, 111 (2d Cir. 1993).

136. Dakane v. U.S. Attorney Gen., 399 F.3d 1269, 1274 (11th Cir. 2005).

Fourth Circuit, "strict compliance with Lozada is not always required."[137] These types of flexible approaches should be adopted in a new or modified procedural framework.

The First Circuit has ruled that the *Lozada* factors should not be applied arbitrarily.[138] In *Saakian*,an asylum case, Saakian's lawyer advised him not to appear at his hearing since he had filed a motion to change venue.[139] However, because he did not appear, the IJ ordered him deported in absentia.[140] In response, Saakian filed a motion to reopen which was denied for failure to comply with the *Lozada* requirements.[141] On appeal to the BIA, Saakian submitted additional documentation but the BIA still dismissed his appeal because he did not meet all three *Lozada* requirements.[142] Saakian petitioned the First Circuit for review and argued that "due process require[s] that he be afforded the opportunity to satisfy the *Lozada* requirements and have his ineffective assistance [of counsel] claim heard on the merits."[143] The court agreed and noted that both the IJ and the BIA "[e]levat[ed] form over substance" by refusing to analyze Saakian's ineffective assistance of counsel claim simply because it was procedurally deficient.[144] The court found that the BIA's decision constituted an arbitrary application of *Lozada* and remanded the case.[145] Rather than deny Saakian an opportunity for his claim to be fully examined, the court properly held that even if he failed to comply with *Lozada*'s procedural requirements, his claim was entitled to a full review on its merits.[146]

The Ninth Circuit takes the most flexible approach to the *Lozada* requirements and has "not hesitated to address ineffective assistance of counsel claims even when an alien fails to comply strictly with *Lozada*."[147] It has explained that the *Lozada* requirements are unnecessary "when the record shows a clear and obvious case of ineffective assistance."[148]

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137. Barry v. Gonzales, 445 F.3d 741, 746 (4th Cir. 2006) (explaining that "[t]here are inherent dangers" in applying *Lozada* strictly) (quoting Xu Yong Lu v. Ashcroft, 259 F.3d 127, 133 (3d Cir. 2001)).

138. *Saakian*, 252 F.3d at 26.

139. *Id.* at 23.

140. *Id.*

141. *Id.*

142. *Id.* at 24.

143. *Id.*

144. *Id.* at 26.

145. *Id.* at 26-27.

146. *See id.* at 27.

147. Ray v. Gonzales, 439 F.3d 582, 588 (9th Cir. 2006).

148. Rodriguez-Lariz v. I.N.S., 282 F.3d. 1218, 1227 (9th Cir. 2002) (citing Castillo-Perez v. I.N.S., 212 F.3d 518, 526 (9th Cir. 2000)).

For example, in *Ray v. Gonzales*,[149] Ray's asylum application was denied and he was ordered removed.[150] On appeal, the BIA summarily affirmed the IJ's decision because Ray's attorney failed to file a brief.[151] Ray subsequently retained another attorney and arranged for the representation just four days after he learned that the BIA had dismissed his appeal, which was well in advance of all deadlines to file motions for reconsideration or to reopen; nevertheless, this new attorney did nothing.[152] Ray filed two motions to reopen his case with the BIA, which were both denied on procedural grounds.[153] Ray first claimed that the BIA "abused its discretion in denying his first motion to reopen because [his second lawyer] provided him with ineffective assistance of counsel"[154] and that he was "denied due process in his original appeal because of the ineffective assistance" of the first lawyer.[155] Ray's second motion to reopen presented evidence of the ineffective assistance of a third attorney which Ray submitted evidence that he paid $10,000 and received no legal assistance at all.[156] Ray, appearing *pro se*, petitioned the Ninth Circuit for review of the BIA's decision denying his second motion to reopen.[157] The court explained that although the circuit has approved applying the *Lozada* procedural requirements and that they "serve important policy goals–such as ensuring that a legitimate claim actually exists and developing an adequate factual basis for the BIA to adjudicate the claim,"[158] it has also cautioned that these "requirements 'are not sacrosanct.'"[159] In reversing the BIA, the court stated that:

> There is no question that these two attorneys have provided assistance so poor that Ray has been "prevented from reasonably presenting his case." The former dallied for several months before missing filing deadlines, neglecting filing requirements, and ultimately costing Ray the opportunity to have his first motion to reopen heard on the merits. The latter took from Ray $10,000 in fees, and the record indicates that he provided no substantive legal assistance whatsoever; in doing nothing, he condemned to failure Ray's second motion to reopen. Indeed, these attorneys have

149. 439 F.3d at 582.

150. *Id.* at 583.

151. *Id.* at 584.

152. *Id.*

153. *Id.* at 584-86.

154. *Id.* at 585.

155. *Id.*

156. *Id.* at 586 (noting that Ray's third attorney had been disciplined by the California State Bar three times).

157. *Id.*

158. *Id.* at 588 (citing Castillo-Perez v. I.N.S., 212 F.3d 518, 526 (9th Cir. 2000)).

159. *Id.* (quoting *Castillo-Perez*, 212 F.3d at 525).

> prevented Ray not only from "reasonably presenting his case," but from presenting his case *at all*.[160]

When a court is too strict in its adherence to fulfilling *Lozada*'s procedural requirements (as the BIA was in *Saakian* and in *Ray*), it can leave an alien, who has a compelling ineffective assistance of counsel claim, with no remedy under the law.[161] Thus, it follows that in addition to the record from the actual removal hearing (if one exists), a detailed affidavit from the alien explaining the relevant facts about his case and experience with his deficient counsel, including a description of his relationship with his former counsel (the first *Lozada* requirement), if examined flexibly, creates further evidence for the court to review and is appropriate in almost all circumstances.[162] Moreover, requiring that former counsel be informed of the allegations against him and provided with an opportunity to respond (the second *Lozada* requirement), if applied flexibly, is important to put the accused on notice of the charges alleged, provides a chance to counter them, and works to discourage unfounded claims.[163] These first two *Lozada* requirements, if not applied too mechanically, are appropriate and sufficient on their own to fulfill the BIA's aims of providing a useful evidentiary guide to evaluate ineffective assistance of counsel claims, deter baseless allegations and notify attorneys of the standards for representing aliens in immigration proceedings.[164]

While the first two *Lozada* requirements are helpful to making out an ineffective assistance of counsel claim, a new or modified framework should eliminate the requirement of filing a bar complaint against the alien's former attorney (the third *Lozada* requirement) because it has been proven to be unnecessary to meet the BIA's declared purposes. According to the BIA, the purpose of the bar complaint requirement is to "increase[] our confidence in the validity of the particular claim, reduce[] the likelihood that an evidentiary hearing will be needed, and serve[] our long-term interests in monitoring the representation of aliens by the

160. *Id.* (quoting Rodriguez-Lariz v. I.N.S., 282 F.3d 1218, 1226 (9th cir. 2002).

161. *See, e.g.*, Tao Lin v. U.S. Attorney Gen., 220 F.App'x 914, 916 (11th Cir. 2007) (holding that mailing notice of hearing to defendant at last known address is sufficient notice); *see also Rodriguez-Lariz*, 282 F.3d at 1227.

162. The record of the proceedings, on its own, can at times adequately prove ineffectiveness, such that the claim is valid without a strict compliance of the *Lozada* requirements. *See, e.g., Castillo-Perez*, 212 F.3d at 525.

163. *But see* Apolinar v. Mukasey, 514 F.3d 893, 897 (9th Cir. 2008) (holding that complying with *Lozada's* second requirement was unnecessary because the attorney had already been suspended).

164. *See In re* Rivera, 21 I. & N. Dec. 599, 604 (Dep't of Justice 1996). These *Lozada* requirements have "stood the test of time." Compean I, 24 I. & N. Dec. 710, 731 (Dep't of Justice 2009).

immigration bar," and to protect against "collusion between counsel and client."[165] These goals are not automatically met by filing a bar complaint and, in fact, can be met without a bar complaint at all.[166] Furthermore, an alien's detailed affidavit is sufficient to establish that his former counsel did not properly represent him; that the former counsel committed errors, was incompetent or failed to file the appropriate document or motion in a timely manner.[167]

A recent Third Circuit case addressed the bar complaint requirement and ruled that it is possible, without filing a bar complaint or providing a decent explanation for not filing it, to have an ineffective assistance of counsel case reopened.[168] In *Rranci v. Mukasey*,[169] Rranci paid a smuggling organization to bring him to the United States from Albania.[170] He became a material witness in a criminal case against a smuggler of illegal immigrants and an alleged leader in Albanian organized crime, who eventually pled guilty after Rranci agreed to testify.[171] Once the case against the

165. *In re* Assaad, 23 I. & N. Dec. 553, 556 (Dep't of Justice 2003) (citing *Rivera*, 21 I. & N. Dec. at 605).

166. *See, e.g.*, Rranci v. I.N.S., 540 F.3d 165, 173-74 (3d Cir. 2008). Under *Lozada*, an alien is allowed, instead of filing a bar complaint, to explain why such a complaint has not been filed; however, doing this has proved unsuccessful. *See, e.g.*, Stroe v. I.N.S., 256 F.3d 498, 502-03 (7th Cir. 2001) (finding the alien's explanation that he failed to file a bar complaint against his "ineffective" attorney for failing to file an appellate brief on time because he "did prepare and file a brief in [their] case, albeit several months past the deadline" insufficient to meet *Lozada*'s third requirement) (internal quotation marks omitted); Lara v. Trominski, 216 F.3d 487, 498 (5th Cir. 2000) (finding the alien's explanation that her attorney's failure to inform her of the BIA's decision denying her appeal "inadvertent," not reasonable enough to excuse her failure to file a bar complaint).

167. *Stroe*, 256 F.3d at 501. Interestingly, there is no bar complaint requirement for establishing ineffective assistance of counsel in the criminal context. Under *Strickland v. Washington*, for a criminal defendant to make out an ineffective assistance of counsel claim against his attorney, he must prove that his attorney's performance fell below an objective standard of reasonableness and that it prejudiced the defense. 466 U.S. 668, 694-95 (1984). Pursuant to the BIA's goals behind filing a bar complaint as set forth in *Lozada*, it is difficult to understand how the filing of a bar complaint is mandatory in the removal context but not needed in a criminal case. A criminal defense attorney's deficient performance could lead to a death sentence or long prison term for his client, yet he is not subjected to the bar complaint. Even the risk of collusion between the attorney and client in the criminal context is higher than in removal proceedings. In a criminal case, an affidavit from the ineffective attorney explaining that he had made a mistake in his representation of the client can be critical in proving that the attorney's actions were not strategic decisions. *See id.* at 681.

168. *Rranci*, 540 F.3d at 170-71.

169. *Id.*

170. *Id.* at 169.

171. *Id.*

smuggler was no longer pending, Rranci applied for asylum.[172]

After being poorly advised by his attorney to voluntarily depart from the United States to Albania before his removal hearing even began,[173] he obtained new counsel and moved to reopen his case on the ground that his prior counsel had provided ineffective assistance.[174] His motion to reopen was denied for failure to meet the *Lozada* requirements.[175] On appeal to the Third Circuit, although Rranci conceded that he failed to file a bar complaint, the court held that "[w]here a petitioner succeeds on the first two prongs of *Lozada* but does not file a disciplinary complaint or provide an explanation, we have held that the third prong does not necessarily sink a petitioner's ineffective-assistance-of-counsel claim."[176] The court explained that because Rranci provided enough evidence in his motion to reopen to meet the general "policies underlying *Lozada*'s third prong" he satisfied the *Lozada* requirement, and the court remanded the case to the BIA to consider the substantive aspects of error and prejudice.[177] Understanding that a bar complaint was unnecessary for Rranci to make out a legitimate ineffective assistance of counsel claim, the court ensured that his claim was not prematurely dismissed.

As *Rranci* demonstrates, the validity of an alien's ineffective assistance of counsel claim can be clear from the first two *Lozada* requirements. Filing a bar complaint under such circumstances does nothing extra to strengthen the court's confidence in the claim.[178] Nor does it reduce the need for an evidentiary hearing. Unless there is a real reason to question the legitimacy of the claim, it would be pointless to conduct a hearing to test the reliability of the alien's story.[179] It is also unfair to require the alien victim who should not "bear the major brunt of enforcing professional practice standards" to file a bar complaint for the purpose of policing the immigration bar.[180] It is gratuitous as there are other mechanisms in place that

172. *Id.*

173. *Id.* at 170 (explaining in his affidavit: "The lawyer also told me that I could be arrested if I did not say I wanted to leave. I was afraid.").

174. *Id.*

175. *Id.* at 173.

176. *Id.* at 174.

177. *Id.*

178. *See id.* at 174-75.

179. *See* Figeroa v. I.N.S., 886 F.2d 76, 79 (4th Cir. 1989) (rejecting the need for a bar complaint and stating that "it is not as though Figeroa's story itself is inherently incredible. Indeed, in view of the facts, attorney negligence or incompetence appears to be the only plausible explanation for Figeroa's failure to timely file an asylum application.").

180. *Rivera-Claros*, 21 I. & N. Dec. at 609 (Schmidt, J., dissenting) (questioning "the wisdom and fairness" of the bar complaint requirement).

exist for disciplining attorneys appearing before immigration judges.[181] Specifically, the BIA has the authority to sanction attorneys who violate the EOIR's standards of conduct for attorneys who practice immigration law, including conduct the IJ or BIA determines to be ineffective assistance of counsel,[182] and it uses this power.[183] Furthermore, the EOIR's expanded authority to investigate and discipline immigration lawyers makes it even more unnecessary to rely on state bar disciplinary procedures in the immigration context.[184] In fact, in many states, in order to be disciplined by the state bar, an attorney must have acted willfully in his misconduct; negligent behavior is not enough.[185] The bar complaint also does little to protect against collusion between counsel and client in immigration proceedings,[186] and even if it did, the EOIR's authority to regulate and discipline the immigration bar makes it unwarranted.

Even under Attorney General Mukasey's recent *Compean I* decision, he admitted that requiring an alien to file a bar complaint as a prerequisite to seeking an ineffective assistance of counsel claim may have "contributed to the filing of many unfounded or even frivolous complaints."[187] He further explained that the filing of these *Lozada* bar complaints ends up imposing unnecessary costs on competent attorneys and makes it difficult for the state bars to actually identify meritorious claims of deficient attorneys and impose

181. *See* 8 C.F.R. § 292.3(a)(1) (2009).

182. *Id.*; *see also id.* §§ 1003.102(k); 1003.101(a).

183. *See, e.g.*, *In re* Quinones, D2005-057 (Sept. 16, 2005) (finding ineffective assistance of counsel), *available at* http://www.usdoj.gov/eoir/profcond/FinalOrders/QuinonesJose_FinalOrder.pdf; *see also* Dep't of Justice, Executive Office for Immigration Review, *List of Currently Disciplined Practitioners*, http://usdoj.gov/eoir/profcond/chart.htm (last visited Mar. 6, 2010).

184. Upon receipt of a complaint or on its own initiative, the EOIR may do a preliminary inquiry of an attorney. 8 C.F.R. § 1003.104(b) (2009). There is a procedure for investigating, charging and adjudicating disciplinary charges against an attorney. 8 C.F.R. § 1003.101-.109 (2009).

185. *See, e.g.*, N.Y. RULES OF PROF'L CONDUCT R. 1.1(c)(2) (2009) ("[The] lawyer shall not intentionally prejudice or damage the client during the course of the representation."); CAL. RULES OF PROF'L CONDUCT R. 3-110A (2005) ("A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.").

186. The BIA's desire to protect against collusion between counsel and client in ineffective assistance of counsel claim is unsubstantiated. In fact, in *Rivera-Claros*, the BIA failed to explain or provide factual support about why it thought collusion is a problem in such claims. *See* 21 I. & N. Dec. at 604 (citing three cases that do not discuss ineffective assistance of counsel).

187. 24 I. & N. Dec. at 737 (citing ASS'N OF THE BAR OF NEW, COMMENT FILED BY THE COMMITTEE ON IMMIGRATION & NATIONALITY LAW (2008), in response to the Proposed Rule for Professional Conduct for Practitioners – Rules and Procedures, and Representation and Appearances, 73 Fed. Reg. 44, 178 (July 30, 2008)).

sanctions on them.[188]

In order to avoid defeating valid claims for ineffective assistance of counsel before they have had an opportunity to be heard, a new or modified framework should use a flexible, not mechanical, application of the first two *Lozada* procedural requirements, and completely do away with the *Lozada* bar complaint requirement. A new or modified framework must employ practical and flexible requirements that permit the judge's or court's "discretion to grant a motion to reopen when the circumstances and fairness require[] it."[189]

D. A New Framework Should Use a Uniform Prejudice Standard

Under *Lozada*, in addition to meeting procedural requirements, an alien who brings an ineffective assistance of counsel claim must also show that he was prejudiced by his attorney's deficient performance.[190] However, there is disagreement in the courts as to the character of the prejudice that must be shown.[191] As prejudice may be difficult for an alien to prove precisely because his attorney was ineffective, a new or modified framework for ineffective assistance of counsel claims should use a uniform moderate prejudice standard that allows a case to be reopened when the attorney "was so inadequate that it *may* have affected the outcome of the proceedings."[192] This standard would ensure that a legitimate claim is not denied simply because an alien is limited to the inadequate record (or lack of a record at all) created by his deficient attorney.

In the Fifth and Sixth Circuits, the prejudice standard requires an alien to prove that "but for the alleged ineffective assistance of

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188. *Id.* at 737-38.

189. *Rivera-Claros*, 21 I. & N. Dec. at 609 (Schmidt, J., dissenting).

190. 19 I. & N. Dec. at 638 (explaining that an alien must prove "that he was prejudiced by his representative's performance") In *Lozada*, the BIA did not define prejudice. *See id.*

191. *See, e.g.*, Esposito v. I.N.S., 987 F.2d 108, 111 (2d Cir. 1993) (explaining that prejudice exists when the end result of the removal hearing would have been different had the prior attorney been effective); *see also* Fadiga v. Attorney Gen., 488 F.3d 142, 159 (3d Cir. 2007) (applying the "reasonable likelihood standard" that the result would have been different if the errors had not occurred); Sako v. Gonzales, 434 F.3d 857, 864 (6th Cir. 2006) ("[B]ut for the ineffective assistance of counsel, he would have been entitled to continue residing in the United States."); Ambati v. Reno, 233 F.3d 1054, 1061 (7th Cir. 2000) ("[A] petitioner must produce concrete evidence indicating . . . [that] had the potential for affecting the outcome of the hearing.") (quoting Kuciemba v. I.N.S., 92 F.3d 496, 501 (7th Cir.1996)); Miranda-Lores v. I.N.S., 17 F.3d 84, 85 (5th Cir. 1994) (holding that an alien must "allege ... facts that would have merited the grant of relief").

192. Mohammed v. Gonzales, 400 F.3d 785, 793-94 (9th Cir. 2005) (quoting Ortiz v. I.N.S., 179 F.3d 1148, 1153 (9th Cir. 1999)) (emphasis added).

counsel" he would have been allowed to stay in the United States.[193] Under this standard, prejudice is unfairly difficult to prove; in fact, often the alien must prove the impossible—everything the record would have shown if he had a competent attorney. For example, in *Sene v. Gonzales*,[194] an alien from Senegal sought asylum on the basis of her race and political opinion. On review to the Sixth Circuit, she argued that her former attorney's failure to obtain medical reports documenting her female genital mutilation and to submit them to the IJ at her merits hearing constituted ineffective assistance of counsel.[195] Although Sene's motion to reopen was supported by a medical report confirming she had been circumcised, the court, affirming the BIA's ruling, held that petitioner "failed to sufficiently establish that her former counsel's actions resulted in prejudice to her case."[196] It further explained that although her attorney failed to submit the medical report confirming she had suffered female genital mutilation, that "[g]iven the limited nature of [the] report, it is far from clear that this information would have changed the outcome of Sene's asylum proceedings."[197]

The *Sene* court's ruling illustrates that in the Fifth and Sixth Circuits, fully proving the outcome of the underlying claim is the only way to be successful in the ineffective assistance of counsel analysis. Yet, as was the case in *Sene*, for an alien to prove his underlying claim on a motion to reopen without a developed record below and without a meaningful proceeding in which he has both had a full opportunity to be heard and to subject the government's case to some type of "meaningful adversarial testing,"[198] is often unachievable. In fact, at Sene's hearing, the IJ explained that "[t]his case could be pretty simple if a doctor confirmed what she said [about the extent of her injuries and female genital mutilation]."[199] Yet, Sene's lawyer submitted no medical evidence and recommended that she obtain medical documentation of her female genital mutilation only *after* the IJ had denied her asylum application on the merits.[200] Even after Sene submitted corroborating medical documentation confirming

193. *Sako*, 434 F.3d at 863; *see also Miranda-Lores*, 17 F.3d at 85. *But see* Mai v. Gonzales, 473 F.3d 162, 167 (5th Cir. 2006) (finding that Mai may have been prejudiced by his attorney's admissions because it "ensured that he was deprived of all possibility for relief from deportation").

194. 180 Fed. App'x 551, 552 (6th Cir. 2006).

195. *Id.*

196. *Id.* at 553.

197. *Id.* at 554.

198. United States v. Cronic, 466 U.S. 648, 656 (1984) (discussing the *Strickland v. Washington* prejudice requirement used for criminal cases).

199. *Sene*, 180 Fed. App'x at 559 (Clay, J., dissenting) (quoting the IJ from petitioner's hearing).

200. *See id.*

that she suffered female genital mutilation, the court concluded that it was still insufficient to prove her former attorney prejudiced her.[201] Requiring an alien to fully prove that he is entitled to stay in the United States at the motion to reopen stage creates significant challenges to proving what would have (or might) have happened if the alien's attorney's incompetence had not interfered with the course of his removal proceeding. In *Sene*, even with the IJ's comment at Sene's hearing and a medical report documenting her female genital mutilation, it was still too difficult for her to prove what would have occurred at the hearing or what further evidence an effective attorney would have presented; thus, according to the Sixth Circuit, she could not show that but for her attorney's advice, she was entitled to asylum and to continue residing in the United States.

The prejudice standard in the Second Circuit is: whether "the result would have been different."[202] And the First, Third and Eleventh Circuits use a "reasonable probability" or "reasonable likelihood" that "but for the attorney's error, the outcome of the proceeding would have been different" standard.[203] These standards are like the one applied in the criminal context under *Strickland v. Washington*.[204] While these standards may be appropriate in some circumstances,[205] in others, it may still be quite difficult for an alien to predict how a competent attorney would have acted or what record would have been developed but for the attorney's errors.[206] The record may show the result of the attorney's actual performance and choices but will offer no hint as to what would have occurred if he had called different witnesses, submitted different evidence, or filed a

201. *Id.* at 555 (majority opinion) ("[I]f the information in Dr. Dyson's report had been coupled with the psychological evaluation and the asylum application of her mother, both of which corroborated her claims, there is a strong likelihood that the outcome of the proceedings would have been different.").

202. Esposito v. I.N.S., 987 F.2d 108, 111 (2d Cir. 1993).

203. *See, e.g.*, Dakane v. U.S. Attorney Gen., 399 F.3d 1269, 1274 (11th Cir. 2005) ("Prejudice exists when the performance of counsel is so inadequate that there is a reasonable probability that but for the attorney's error, the outcome of the proceeding would have been different.").

204. Strickland v. Washington, 466 U.S. 668, 694 (1984) ("[D]efendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

205. *See* United States v. Scott, 394 F.3d 111, 120 (2d Cir. 2005) (finding prejudice because there was a reasonable probability that Scott would have been successful in persuading the IJ that he had been rehabilitated if not for his attorney's error).

206. *See Strickland*, 466 U.S. at 710 (Marshall, J., dissenting) ("[I]t may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer," and that the "evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.").

brief.

For example, in *Dakane v. United States Attorney General*,[207] Dakane entered the United States with the use of a Kenyan passport but told immigration officials that he was a citizen of Somalia and his Kenyan passport was a false document that he purchased in Somalia.[208] Dakane's application for asylum was denied and the IJ ordered him removed because he found Dakane's testimony, with respect to the persecution he suffered in Somalia and to his Somali origins, not credible.[209] Dakane's lawyer filed a notice of appeal with the BIA and numerous extensions of time, but never filed a brief on appeal.[210] With new counsel, on appeal, the BIA affirmed the IJ's conclusions and ordered Dakane removed.[211] Dakane then filed a motion to reconsider against his first attorney,[212] but the BIA denied Dakane's motion for "fail[ure] to establish how he was prejudiced by his former attorney's failure to file a brief in support of his appeal."[213]

On appeal, the Eleventh Circuit ruled that Dakane failed to show how an appellate brief could have changed the outcome of his proceeding when the IJ based its decision on an adverse credibility finding.[214] Dakane lost his appeal and his removal order was affirmed because the record from his hearing before the IJ (in which he had a deficient attorney) rebutted the presumption of prejudice created by the failure of his attorney to file an appellate brief.[215] Without credible testimony below or a completely new set of facts or evidence to support his claim for asylum, it was impossible for Dakane to prove how not having an appeal had prejudiced him; thus, he could not show that there was a reasonable probability that the outcome of his case would have been different.[216]

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207. 399 F.3d 1269 (11th Cir. 2005).

208. *Id.* at 1271.

209. *Id.* (explaining that the IJ "rejected Dakane's testimony to support his claim that he is a Somali national as well as the unauthenticated document he submitted as a Somali birth certificate").

210. *Id.* at 1272.

211. *Id.*

212. *Id.* ("[T]he BIA construed [this motion] as a motion to reopen removal proceedings.").

213. *Id.*

214. *Id.* at 1275.

215. *Id.*

216. Note that since *Strickland v. Washington* was decided, there has been significant criticism of the opinion and the enormously difficult burden of proof placed on defendants challenging their counsel's representation. *See, e.g.*, Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L. J. 413 (1988); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433 (1999) (detailing the downsides of the test articulated in *Strickland*).

Other circuits apply more suitable prejudice standards. For example, the Seventh Circuit requires an alien to produce evidence indicating "the potential for affecting the outcome of the hearing."[217] In *Sanchez v. Keisler*,[218] an alien who alleged that she was the victim of domestic violence petitioned the Seventh Circuit for review of a BIA ruling denying her motion to reopen her removal proceedings, claiming her lawyer was ineffective.[219] The court found that the BIA erred when it rejected Sanchez's effort to invoke the longer time period for filing motions to reopen under the Violence Against Women Act ("VAWA").[220] It concluded that her lawyer prejudiced her and was ineffective because he failed to pursue a claim under the VAWA.[221] In ruling that Sanchez did not receive a fair hearing because her lawyer was deficient, the court explained that it is impossible to know how the IJ would have ruled if he had all the proper facts before him and thus, the BIA's decision "rests on the flawed record that was prepared before the IJ."[222]

Likewise, in the Ninth Circuit, a removal proceeding will be reopened if the alien proves that his counsel's performance "was so inadequate that it *may* have affected the outcome of the proceeding[]."[223] For example, in *Mohammed v. Gonzales*,[224] after finding a Somali woman not credible, the IJ denied her application for asylum.[225] The BIA affirmed the IJ's adverse credibility ruling.[226]

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217. Ambati v. Reno, 233 F.3d 1054, 1061 (7th Cir. 2000) (quoting Kuciemba v. I.N.S., 92 F.3d 496, 501 (7th Cir. 1996)).

218. 505 F.3d 641 (7th Cir. 2007).

219. *Id.* at 642-43.

220. *Id.* at 648 ("From her standpoint, the pursuit of VAWA cancellation could only have helped.").

221. *Id.* ("We also see no way to avoid the conclusion that this decision seriously prejudiced Sanchez.").

222. *Id.* at 649 ("We do not know whether, with all the facts properly before him and the backdrop of VAWA cancellation as the legal basis for the claim, [how] the IJ would once again weigh all the evidence . . . ."). Other circuits have issued similar rulings when errors prevent an alien from fully developing the record. *See* Al Khouri v. Ashcroft, 362 F.3d 461, 467 (8th Cir. 2004) (ruling that an alien "cannot produce a record that does not exist"); Cano-Merida v. I.N.S., 311 F.3d 960, 965 (9th Cir. 2002) (quoting Perez-Lastor v. I.N.S., 208 F.3d 773, 782 (9th Cir. 2000)) (finding that the errors put the alien in "the impossible position of having to 'produce a record that does not exist'").

223. Munoz v. Ashcroft, 339 F.3d 950, 955 (9th Cir. 2003) (emphasis added) (quoting Ortiz v. I.N.S., 179 F.3d 1148, 1153 (9th Cir. 1999)); *see* Hernandez-Mendoza v. Gonzales, 537 F.3d 976, 979 (9th Cir. 2007) (stating that the alien "need not demonstrate *prima facie* eligibility for the relief sought [], nor that but for his attorney's error the outcome of his proceedings would have been different").

224. 400 F.3d 785 (9th Cir. 2005).

225. *Id.* at 789.

226. *Id.*

Mohammed hired a new attorney who filed a motion to reconsider the BIA's ruling on the ground that her previous attorney failed to raise the issue of female genital mutilation at her hearing before the IJ or on appeal, which was denied.[227] Mohammed filed a second motion, a motion to reopen, again alleging that her prior counsel was ineffective for failing to raise the female genital mutilation issue at her hearing.[228] That second motion was barred by the BIA who, regarding its previous ruling, stated that Mohammed "did not demonstrate any prejudice resulting from her prior counsel's representation such as would affect the outcome of her case."[229] On appeal, the Ninth Circuit ruled that Mohammed sufficiently demonstrated that her attorney's failure to introduce evidence of her past female genital mutilation was sufficient to show she was prejudiced by her former attorney because such evidence at a minimum "may have affected the outcome of the [asylum] proceedings."[230] Applying this standard, which does not require that an alien "show that the counsel's ineffectiveness definitively changed the outcome"[231] of the case, allows a court to "consider the underlying merits of the case to come to a tentative conclusion as to whether [the] claim, if properly presented [by a competent attorney], would be viable."[232]

The Ninth Circuit's prejudice standard (or a similar one) should be adopted under a new or modified framework for ineffective assistance of counsel claims in removal proceedings; it is the most fair standard because it is adaptable to the numerous types of "real" situations that occur when an alien has a deficient lawyer and it does not require that the alien prove he would have been successful in his claim without a meaningful proceeding and/or based upon a limited record or no record.[233] In return, the court need not decide whether the alien would win or lose his claim; instead, the court is only required to find that the claim should be given further consideration or that the alien's former counsel failed to present possible claims for relief.[234]

In addition to following the Ninth Circuit's prejudice standard, a new or modified framework for ineffective assistance of counsel

227. *Id.* at 789-90.

228. *Id.* at 791.

229. *Id.* (quoting the BIA).

230. *Id.* at 794 (quoting Ortiz v. I.N.S., 179 F.3d 1148, 1153 (9th Cir. 1999)).

231. *Id.* at 793.

232. *Id.* at 794 (quoting Lin v. Ashcroft, 337 F.3d 1014, 1027 (9th Cir. 2004)).

233. *See* Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting) (explaining that it is "senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice").

234. *See* Mohammed v. Gonzalez, 400 F.3d 785, 794 (9th Cir. 2005).

claims should adopt its presumed prejudice approach in claims where an alien's counsel's incompetence prevents him from filing his appeal or a required application. In these types of cases, prejudice can only be overcome when the alien presents "*plausible* grounds for relief."[235] For example, in *Hernandez-Mendoza v. Gonzales*,[236] an alien petitioned the Ninth Circuit for review of a BIA order for his removal.[237] He argued that he received ineffective assistance of counsel under *Lozada* during his removal proceeding.[238] In granting the alien's petition, the court ruled that the alien was prejudiced by his lawyer's errors in failing to file a waiver application for cancellation of removal and declining the IJ's offer to extend time to file the waiver.[239] The court explained that because the alien was statutorily eligible for a waiver and with that waiver may have been eligible for cancellation of removal, his attorney's failure to file or to follow the IJ's instructions constituted ineffective assistance of counsel.[240]

Prejudice should also be presumed in situations where counsel fails to appear in court to represent the alien, or when the lawyer's misconduct prevents the alien himself from appearing. The attorney's error or lack of advice to his client should excuse the alien's failure to appear, and his ineffective assistance of counsel claim should be granted because it is difficult for the alien to later demonstrate what a competent lawyer would have done or what the record would have shown if he or his attorney were present at the hearing. In *Grijalva-Barrera*, after being found deportable in absentia, the respondent appealed the denial of his motion to reopen arguing that his counsel was ineffective.[241] The alien's former counsel's office phoned him on the morning of the scheduled hearing and informed him that there was a continuance in his case and he did not have to appear in court.[242] The BIA properly rescinded the deportation order after the alien sufficiently proved ineffective assistance of counsel because he was "blatantly misled regarding his need to appear at the scheduled hearing."[243]

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235. *Id.*

236. 537 F.3d 976 (9th Cir. 2007).

237. *Id.* at 978-79.

238. *Id.*

239. *Id.* at 980.

240. *Id.*; *see also* Ray v. Gonzales, 439 F.3d 582, 589 (9th Cir. 2006) (holding that there was a presumption of prejudice when attorneys failed to file necessary documents).

241. Grijalva-Barrera, 21 I. & N. Dec. 472 (Dep't of Justice 1996).

242. *Id.* at 473.

243. *Id.* at 474; *see also* Galvez-Vergara v. Gonzales, 484 F.3d 798, 801-02 (5th Cir. 2007); Lo v. Ashcroft, 341 F.3d 934, 937-38 (9th Cir. 2003).

A new or modified framework for ineffective assistance of counsel claims in removal proceedings should adopt a prejudice standard like the one employed in the Ninth Circuit which does not require proof of how the proceeding would have been different if counsel had been competent. Instead, it recognizes the challenges of establishing harm and focuses on whether the alien's claim merits further consideration.

III. THERE IS A NEED TO IMPROVE THE QUALITY OF REPRESENTATION THAT ALIENS IN REMOVAL PROCEEDINGS RECEIVE

Not only are there a number of significant ways to improve how ineffective assistance of counsel claims are evaluated, more needs to be done to increase the number of aliens receiving representation in removal proceedings and to improve the quality of that representation. The most useful way to do this would be to provide all indigent aliens with competent counsel.[244] If this is not possible, more needs to be done to educate and empower aliens and to connect them with competent representation. For example, the EOIR should expand its efforts to educate and provide information to aliens about their rights in removal proceedings and should participate more actively in promoting pro bono representation by recruiting and training *pro bono* lawyers through its programs such as the Legal Orientation Program ("LOP") and the BIA Pro Bono Project ("BIA Project").

Pursuant to the INA, as discussed above, an alien in removal proceedings has a right to counsel but at "no expense to the government."[245] Thus, he must find and hire an attorney on his own or he must find pro bono representation. This "no expense" requirement, however, does not prevent the government from funding programs and providing materials that educate and facilitate representation.[246] In 2003, the government funded and created the LOP,[247] a public/private partnership program administered by EOIR

244. *See, e.g.*, Nina Bernstein, *Immigrant Finds Path Out of Maze of Detention*, N.Y. TIMES, Sept. 11, 2009.

245. 8 U.S.C. § 1362 (2006). A person appearing for removal proceedings enjoys "the privilege of being represented" by a qualified attorney, albeit at his own expense. *Id.*

246. *See* EOIR, U.S. Dep't of Justice, *EOIR Legal Orientation and Pro Bono Program*, http://www.usdoj.gov/eoir/probono/MajorInitiatives.htm (last visited Mar. 13, 2010).

247. *Id.* Congress appropriated $1 million in fiscal year 2002 to develop the LOP by expanding the pilot project model to detention facilities. VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM, EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II 7 (2008). The Vera Institute of Justice is one of the nonprofit organizations who contracts with the EOIR to provide services through the LOP. *Id.* at iii.

in twenty-five detention centers around the country, which provides aliens detained by the United States Immigration and Customs Enforcement ("ICE") with legal information prior to their court hearings.[248] The LOP is offered by nonprofit organizations, under contract with the EOIR, whose attorneys, accredited representatives, paralegals, and law students, meet individually and in small and large groups with detained aliens and conduct presentations for them that explain immigration law and the removal process.[249] Once an alien understands his case in the context of the law and process, he can properly decide whether he has a valid claim for relief.[250] Those with little chance of winning in court often agree to removal while those with viable claims are referred to pro bono counsel.[251] Since its establishment, the LOP has served more than 100,000 detainees.[252] In addition, according to the Department of Justice, the LOP saves the government money by expediting cases and leads to aliens spending less time in detention.[253] Although Congress increased the amount of funding for LOPs in 2008 to $3.7 million (up from $1 million), and expanded its reach from thirteen detention centers to twenty-five,[254] more needs to be done. Specifically, Congress needs to secure more funding for LOPs so the program can be expanded to serve all aliens (detained and nondetained) in removal proceedings.

Moreover, more steps need to be taken and more funding is needed to recruit and train pro bono lawyers to aid alien litigants by expanding the BIA Project. The BIA Project, another public/private

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248. *See* EOIR, *supra* note 246.

249. *Id.* ("Through the LOP, representatives from nonprofit organizations provide comprehensive explanations about immigration court procedures along with other basic legal information to large groups of detained individuals. The orientations are normally comprised of three components: 1) the interactive group orientation, which is open to general questions; 2) the individual orientation, where non-represented individuals can briefly discuss their cases with experienced counselors; and 3) the referral/self-help component, where those with potential relief, or those who wish to voluntarily depart the country or request removal are referred to pro bono counsel, or given self-help legal materials and basic training through group workshops, where appropriate.").

250. *See id.*

251. *See id.*

252. VERA INST. OF JUSTICE, *supra* note 247, at 27.

253. EOIR, *supra* note 246; News Release, EOIR, U.S. Dep't of Justice, *EOIR Adds 12 New Legal Orientation Program Sites* (Oct. 15, 2008), http://www.ilw.com/immigdaily/news/2008,1021-EOIR.pdf [hereinafter EIOR News Release] (citing VERA INST. OF JUSTICE, *supra* note 247); ANNA HINKEN, U.S. DEP'T OF JUSTICE, EVALUATION OF THE RIGHTS PRESENTATION 6-11 (Jan. 2000), http://www.usdoj.gov/eoir/statspub/rtspresrpt.pdf; Luis F. Perez, *Immigrants Facing Deportation Learn They Have the Right to Stay*, S. FLA. SUN-SENTINEL, Nov. 10, 2008.

254. *See* EOIR News Release, *supra* note 253; *see also* VERA INST. OF JUSTICE, *supra* note 247, at 7.

partnership, was created by the EOIR and several nonprofit organizations in 2001 "to increase pro bono representation initially for individuals detained . . . with immigration cases under appeal."[255] In 2003, the BIA Project was expanded to include case appeals by some non-detained aliens.[256] According to the EOIR, since its inception, the BIA Project has secured pro bono counsel for over 450 aliens on appeal.[257] In addition to expanding this program to assist as many aliens as possible, it (or a similar program) should also be expanded beyond appeals and should help connect aliens entering the immigration system to pro bono lawyers who can guide them through our complex legal system beginning at the alien's first court appearance. This would not only increase the number of aliens represented by competent counsel and decrease the number of aliens with deficient or incompetent lawyers; it would also lessen the number of appeals at the BIA and in the circuit courts.

The government's efforts, in cooperation with private organizations, in educating aliens about their legal rights and assisting them in finding competent pro bono representation has already proven both time and cost effective; it has also resulted in empowering aliens to make better decisions about their legal representation and cases. When aliens make good decisions about their representation, there will be fewer incompetent attorneys involved, more legitimate claims being heard, and less time being wasted by our already-overburdened immigration and circuit courts. Accordingly, the EOIR should take a larger role in making sure that aliens facing deportation are educated about the law and competently represented by pro bono attorneys.

CONCLUSION

As Attorney General Eric Holder recently stated: "The integrity of immigration proceedings depends in part on the ability [of aliens]

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255. EOIR, *supra* note 246.

256. *See* BIA, U.S. DEP'T OF JUSTICE, THE BIA PRO BONO PROJECT IS SUCCESSFUL 4 (Oct. 2004), http://www.usdoj.gov/eoir/reports/BIAProBonoProjectEvaluation.pdf. Specifically, the BIA Project now assists aliens in five categories:

> 1) Detained case appeals filed by the DHS or by minors, and detained cases involving a certification of the appeal by the Immigration Judge; 2) Non-detained case appeals filed by the DHS or by minors, and non-detained cases involving an Immigration Judge certification; 3) Detained case appeals filed by asylum seekers (non-criminal charge); 4) Non-detained case appeals filed by asylum seekers (non-criminal charge), and; 5) Detained case appeals filed by individuals, with criminal convictions, seeking protection under the Convention Against Torture (CAT) and other claims for relief.

Id.

257. EOIR, *supra* note 246.

to assert claims of ineffective assistance of counsel."[258] Aliens come to this country with hopes for a better and safer life; they often have little means and are unfamiliar with our language, culture, and legal system. As a result, they are especially vulnerable to harm at the hands of incompetent or fraudulent attorneys. These lawyers "undermine trust in the American legal system . . . [and] the consequences of faulty representation are devastating."[259] Thus, there is a need for an appropriate and flexible remedy for ineffective assistance of counsel. While the *Lozada* framework has been useful for more than twenty years, there is now an opportunity to reevaluate it and to create a new or modified framework that takes into account the circumstances of the majority of aliens bringing these claims. This new or modified framework should affirm an alien's right to effective assistance of counsel under the Fifth Amendment and the INA. It should allow an alien's claim to be evaluated on its merits by using a flexible approach to the first two *Lozada* procedural requirements. And it should use a uniform prejudice standard that enables an alien whose deficient lawyer "may have affected the outcome of the proceeding" with an opportunity to have his case reassessed. Lastly, in order to increase the quality of competent representation for aliens in removal proceedings, the EOIR should expand its efforts to educate aliens about their rights in removal proceedings and should participate more actively in promoting pro bono representation. It is now time to launch a "process for reforming the *Lozada* framework."[260] There is hope that a new or modified approach will ensure that deportation decisions are based on an accurate assessment of each case, and not on the competence—or lack thereof—of an alien's hired attorney.

258. Press Release, U.S. Dep't of Justice, *Attorney General Vacates Compean Order, Initiates New Rulemaking to Govern Immigration Removal Proceedings* (June 3, 2009), http://www.justice.gov/opa/pr/2009/June/09-ag-547.html.

259. Katzmann, *supra* note 14, at 5.

260. Compean II, 25 I. & N. Dec. 1, 2 (Dep't of Justice 2009).

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