

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

JUN 18 2002

JAMES R. LARSEN, CLERK
DEPUTY
SPOKANE, WASHINGTON

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

9
10
11 Plaintiff,

12 v.

13 JOHN ASHCROFT, Attorney General;
14 ROBERT COLEMAN, District
15 Director, Seattle INS District
16 Office; and IMMIGRATION AND
17 NATURALIZATION SERVICE,

18
19 Defendants.

No. CS-02-0066-FVS

ORDER GRANTING MOTION TO
DISMISS

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

1 **BACKGROUND**

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

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

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

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

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

12 DISCUSSION

13 The government moves to dismiss under Fed. R. Civ. P. 12(b)(1)
14 for lack of subject matter jurisdiction¹ and Rule 12(b)(6) for
15 failure to state a claim upon which relief may be granted. The Court
16 dismisses the action under Rule 12(b)(6). The plaintiff's legal
17 position is contrary to Ninth Circuit precedent, which holds that
18 there is no right to appointed counsel in deportation proceedings.
19 The plaintiff has not distinguished his claim nor demonstrated that
20 his position is a natural progression of the law that should be
21 recognized despite its conflict with precedent. The motion for class
22

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

1 certification is denied as moot.

2 A. Motion To Dismiss or for Summary Judgment?

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

7 In support of its motion, the government filed several documents
8 that were not referred to in the complaint, and alleged a number of
9 facts not mentioned in the complaint. Documents not part of a
10 complaint "may be considered on a motion to dismiss only if their
11 authenticity is not contested and the plaintiff's complaint
12 necessarily relies on them." Wyatt v. Terhune, 280 F.3d 1238, 1246
13 (9th Cir. 2002) (summarizing Lee v. Los Angeles, 250 F.3d 668, 688
14 (9th Cir. 2001)). The Court may not convert the motion without
15 giving the plaintiff some opportunity to present evidence in
16 response. See Anderson v. Angelone, 86 F.3d 932, 934-35 (9th Cir.
17 1996); Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1532-33
18 (9th Cir. 1985).

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

1 judgment.

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

9 *B. Mootness*

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

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

1 However, "[t]he Supreme Court has held that, even in the absence
2 of prior class certification, the resolution of the named plaintiff's
3 substantive claim does not necessarily moot all other issues in the
4 case." Sze v. INS, 153 F.3d 1005, 1009 (9th Cir. 1998) (citing
5 United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402, 100 S.Ct.
6 1202 (1980)); Gerstein v. Pugh, 420 U.S. 103, 110 n.11, 95 S.Ct. 854,
7 861 n.11 (1975) (holding that even though named plaintiff's claims
8 were moot and plaintiff was not likely to suffer same deprivation
9 again, case could continue pending class certification). Mootness on
10 the part of the individual plaintiff's claim will not render the
11 whole case moot pending class certification if the class is
12 "inherently transitory." Sze, 153 F.3d at 1009 (quoting Geraghty,
13 445 U.S. at 397, 100 S.Ct. at 1209). "An inherently transitory claim
14 is one where there is a constantly changing putative class, and where
15 the trial court will not have even enough time to rule on a motion
16 for class certification before the proposed representative's
17 individual interest expires." Sze, 153 F.3d at 1009 (quoting
18 Geraghty, 445 U.S. at 399, 100 S.Ct. at 1209 and Wade v. Kirkland,
19 118 F.3d 667, 670 (9th Cir. 1997) (finding that class of prisoners
20 working on chain gang was inherently transitory)) (internal
21 punctuation omitted). However, it must also appear that a class of
22 persons with the same potential claim will continue to exist after
23 the expiration of the individual's claim. See Gerstein, 420 U.S. at
24 110 n.11, 95 S.Ct. at 861 n.11; Sze, 153 F.3d at 1009-10 (holding
25 mootness of class representative's claim fatal when class was
26 shrinking due to change in challenged INS procedures)

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

10 Therefore, it appears that the class of persons that Mr.
11 Gonzalez seeks to represent is "constantly changing" and is
12 "inherently transitory." Sze, 153 F.3d at 1009. Also, "the constant
13 existence of a class of persons suffering the deprivation is
14 certain," Gerstein, 420 U.S. at 110 n.11, 95 S.Ct. at 661 n.11,
15 because there is no indication that the INS has changed or will
16 change its past practice with regard to detention and deportation of
17 juveniles. Thus, even if Mr. Gonzalez' individual claim is moot,
18 this exception to the general justiciability requirement of Article
19 III applies in this case. The government's motion to dismiss for
20 mootness is denied.

21 *C. Procedural Exhaustion*

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

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

1 lacks merit.

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

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

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

26 The government moves to dismiss this action on the basis that

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

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

17 "On a motion to dismiss we are required to read the complaint
18 charitably, to take all well-pleaded facts as true, and to assume
19

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

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

7 The claim that due process requires the appointment of counsel
8 at government expense for aliens has been rejected by the Ninth
9 Circuit on many occasions in cases that did not distinguish between
10 adult and juvenile aliens. See, e.g., United States v. Cerda-Pena,
11 799 F.2d 1374, 1376 n. 2 (9th Cir. 1986). Therefore, despite this
12 precedent, the plaintiff's specific due process claim is not
13 necessarily defeated because it is limited to indigent,
14 unaccompanied, juvenile aliens in INS detention. "Dismissal is
15 proper only where there is no cognizable legal theory or an absence
16 of sufficient facts alleged to support a cognizable legal theory."
17 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001); Balistreri v.
18 Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). "Rule
19 12(b)(6) dismissals are especially disfavored in cases where the
20 complaint sets forth a novel legal theory that can best be assessed
21 after factual development." Baker v. Cuomo, 58 F.3d 814, 818-19 (2d
22 Cir. 1995). However, when a plaintiff proceeding on a novel theory
23 is faced with a Rule 12(b)(6) motion, "[t]he plaintiff has to show
24 that while her claim has no basis in existing law, or at least the
25 law's current pigeonholes, it lies in the natural line of the law's
26 development and should now be recognized as part of the law."

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

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

7 1. Statutory Right to Counsel

8 Under current statutory law, aliens have a right to counsel, at
9 their own expense, at deportation and removal hearings. See 8 U.S.C.
10 § 1252(b). The government argues that Congress' policy decision on
11 this issue is dispositive. However, it is axiomatic that Congress is
12 not the arbiter of what process is due under the Constitution. The
13 Ninth Circuit has shown little hesitation in considering whether to
14 strike down portions of the immigration laws or the INS' policies and
15 procedures as violative of Constitutional rights. See Kim v. Ziglar,
16 276 F.3d 523, 528 (9th Cir. 2002) (questioning whether portion of INA
17 permitting no-bail detention of certain classes of aliens is facially
18 unconstitutional); Vargas-Garcia v. INS, 287 F.3d 882, 886 (9th Cir.
19 2002) (holding that BIA notice of appeal form "is so misleading that
20 it can result in a denial of due process to the alien."); see also
21 Jankowski-Burczyk v. INS, No. 01-2353, slip op. at 5 (2d Cir. May 29,
22 2002) (portion of INA treating permanent legal resident aliens
23 ("PLRs") and non-PLRs differently did not violate equal protection).

24 Thus, the fact that Congress has conferred upon aliens the
25 "privilege" of retaining counsel, Acewicz v. I.N.S., 984 F.2d 1056,
26 1062 (9th Cir. 1993), is not dispositive of the Constitutional issue

1 argued by the plaintiff.

2 2. The Plaintiff's Due Process Claim

3 The Ninth Circuit has held that in addition to being a statutory
4 right, an alien's right to counsel is required by the Due Process
5 Clause of the Fifth Amendment. Castro-Cortez v. INS, 239 F.3d 1037,
6 1049 (9th Cir. 2001) ("Fundamental to due process is the right to
7 counsel, and we have previously held that, in deportation hearings,
8 aliens have the 'right to obtain counsel of their choice at their own
9 expense.'" (quoting Orantes-Hernandez v. Thornburgh, 919 F.2d 549,
10 554 (9th Cir. 1990)); United States v. Lara-Aceves, 183 F.3d 1007,
11 1011 (9th Cir. 1999), cert. denied, 528 U.S. 1095, 120 S.Ct. 836
12 (2000), overruled on other grounds by United States v.
13 Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001) (en banc); Acewicz, 984
14 F.2d at 1062. The Court of Appeals has characterized an alien's
15 right to counsel as "fundamental." Orantes-Hernandez, 919 F.2d at
16 554.

17 However, the law in this Circuit is clear that aliens have no
18 right to appointed counsel. "[C]ourts have uniformly held in this
19 circuit and elsewhere that in light of the non-criminal nature of
20 both the proceedings and the order which may be a result, that
21 respondents are not entitled to have counsel appointed at government
22 expense." United States v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir.
23 1975) (abrogated on other grounds, United States v. Mendoza-Lopez,
24 481 U.S. 828, 834, 107 S.Ct. 2148, 2153 (1987) (quoted in United
25 States v. Cerda-Pena, 799 F.2d 1374, 1376 n. 2 (9th Cir. 1986)); see
26 Lara-Aceves, 183 F.3d at 1010; Martin-Mendoza v. INS, 499 F.2d 918,

1 922 (9th Cir. 1974); Burr v INS, 350 F.2d 87 (9th Cir.), cert.
2 denied, 383 U.S. 915, 86 S. Ct. 905 (1965); Perez-Funez v. INS, 611
3 F. Supp. 990, 1004 (C.D. Cal. 1984) (in suit alleging that INS
4 coerced minors into accepting voluntary removal, granting partial
5 injunction keeping alien minors from being deported and certifying
6 class but denying request to appoint counsel for minors).⁴

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

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

19
20 ⁴ The law of other Circuits is in accord. See, e.g.,
21 Burquez v INS, 513 F.2d 751 (10th Cir. 1975); Tupacyupanqui-Marin
22 v. INS, 447 F.2d 603 (7th Cir. 1971). Only one Court of Appeals
23 has ever ruled to the contrary. See Aguilera-Enriquez v. INS,
24 516 F.2d 565, 568 (6th Cir. 1975) (holding that if "fundamental
25 fairness" requires, appointment of counsel for indigent alien may
26 be required by due process despite statutory bar).

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

1 Gasca-Kraft, 522 F.2d at 152. It is true, as the plaintiff points
2 out, that this distinction has not held up as a bar to extension of
3 Sixth Amendment-type rights in certain other contexts. See, e.g.,
4 Lassiter v. Dept. Social Servs., 452 U.S. 18, 21, 101 S.Ct. 2153,
5 2157 (1981) (holding that parental-rights termination proceeding,
6 although civil, may require appointment of counsel in an individual
7 case if indigent person's interests overcome "presumption that there
8 is no right to appointed counsel in the absence of at least a
9 potential deprivation of physical liberty."); Vitek v. Jones, 445
10 U.S. 480, 500, 100 S.Ct. 1254, 1267 (1980) (holding indigent prisoner
11 entitled to appointed counsel in civil mental health commitment
12 proceeding); In re Gault, 387 U.S. 1, 41, 87 S.Ct. 1428, 1451 (1967)
13 (concluding that delinquency proceedings, although considered civil,
14 nevertheless require appointed counsel because of the possibility
15 that juvenile's liberty may be curtailed as a result).

16 However, the Supreme Court and the Ninth Circuit continue to
17 rely on the civil/criminal distinction in the immigration context to
18 limit the process that is due in deportation and removal hearings.
19 "A deportation proceeding is a purely civil action to determine
20 eligibility to remain in this country, not to punish an unlawful
21 entry." INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39, 104 S.Ct.
22 3479, 3483 (1984) (holding that exclusionary rule does not apply to
23 deportation proceedings); Lara-Aceves, 183 F.3d at 1010 ("Given the
24 civil nature of deportation proceedings, it is well established that
25 aliens in such proceedings have no constitutional right to counsel
26 under the Sixth Amendment."); United States v. Yacoubian, 24 F.3d 1,

1 10 (9th Cir. 1994) (holding that ex post facto and double jeopardy
2 protections do not apply to deportation proceedings); Urbina-Mauricio
3 v. INS, 989 F.2d 1085, 1089 n. 7 (9th Cir. 1993) (concluding that
4 double jeopardy does not apply; "deportation is a civil action, not a
5 criminal punishment."); El Rescate Legal Servs., 959 F.2d at 751
6 (finding INS interpretation of statute not to require full
7 translation of proceedings did not violate due process; deportation
8 "is a civil proceeding in which many of the protections afforded in
9 the criminal context do not apply."); United States v. Garay-Burgos,
10 961 F. Supp. 1321, 1322-23 (D. Ariz. 1997) (holding that double
11 jeopardy does not apply to deportation proceedings; rejecting
12 argument that United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892
13 (1989), transformed deportation into punishment); see also Zadvydas
14 v. Davis, 533 U.S. 678, 690, 121 S.Ct. 2491, 2499 (2001) (finding
15 that although proceedings to detain aliens who had been ordered
16 removed, but whose deportations could not be effectuated, "are civil,
17 not criminal, and we assume that they are nonpunitive in nature,"
18 interpreting statute to permit indefinite detention would violate due
19 process); Reno v. Amer.-Arab Anti-Discrimination Comm., 525 U.S. 471,
20 491, 119 S.Ct. 936 (1999) (concluding that removal is not
21 punishment); Ardestani v. INS, 502 U.S. 129, 137, 112 S.Ct. 515, 521
22 (1991) (determining that deportation proceedings are not "adversary
23 proceedings" covered by Administrative Procedure Act and thus
24 attorney's fees not reimbursable under Equal Access to Justice Act);
25 Briseno v. INS, 192 F.3d 1320, 1323 (9th Cir. 1999) (holding that
26 deportation is not punishment).

1 The plaintiff also appears to argue that recent case law has
2 expanded aliens' right to counsel to such a point that the
3 unfavorable precedent is simply anachronistic, and that declaring a
4 right to appointed counsel is the next logical step in the outward
5 expansion of due process protections for aliens. It is true that the
6 Ninth Circuit has taken a hard line on actions that interfere with an
7 alien's right to counsel. The court has gone so far as to question
8 the INS' regulations and written policies, see, e.g., Castro-Cortez,
9 239 F.3d at 1048 (holding that right to private counsel should apply
10 to aliens subject to reinstatement of deportation as well as other
11 aliens); Orantes-Hernandez, 919 F.2d at 566 (concluding that district
12 court's injunction regarding access to counsel was supported by
13 factual findings that INS practices "severely impeded class members
14 from communicating with counsel."), along with criticizing individual
15 applications of INS policies. See Singh v. Waters, 87 F.3d 346, 349
16 (9th Cir. 1996) (finding that INS "effectively scuttled the right to
17 counsel guaranteed to Singh by statute" when it failed to inform his
18 counsel that it had found Singh's INS file); Castro-O'Ryan v. INS,
19 847 F.2d 1307, 1313 (9th Cir. 1988) (holding that immigration judge's
20 failure to rule on alien's request for representation by counsel
21 "effectively denied" right to private counsel); Baires v. INS, 856
22 F.2d 89, 92 (9th Cir. 1988) (finding that immigration judge abused
23 discretion by denying continuance necessary for counsel to travel to
24 hearing); Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985)
25 (concluding that immigration judge abused discretion and denied right
26 to counsel by not granting continuances to allow alien time to secure

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

3 Case law does not demonstrate, however, that the right to
4 counsel is on an inevitable path of outward expansion. The Court of
5 Appeals has been clear that the right to counsel is not absolute.
6 Thus, for example, a deportation order may be overturned on a showing
7 that the right to counsel was interfered with only if the alien can
8 show some degree of prejudice. See Acewicz, 984 F.2d at 1062
9 (holding right to counsel not violated when aliens could not
10 demonstrate that "counsel might have obtained a different result.");
11 United States v. Villa-Fabela, 882 F.2d 434, 438 (9th Cir. 1989)
12 ("Infringements of the right to counsel are prejudicial [when
13 counsel] could have better marshaled specific facts or arguments in
14 presenting the petitioner's case."); but see Cerda-Pena, 799 F.2d at
15 1337 n. 3 (holding that "failure to adequately apprise an alien of
16 his or her right to representation" requires showing prejudice but
17 that "an outright refusal to allow an alien the opportunity to obtain
18 representation may be such an egregious violation of due process so
19 as not to require any further showing of prejudice."); Garcia-Guzman
20 v. Reno, 65 F. Supp.2d 1077, 1089 (N.D. Cal. 1999) (finding that
21 Ninth Circuit precedent on "whether prejudice must be shown where the
22 right to counsel is involved... points in both directions."); see
23 also Huicochea-Gomez v. INS, 237 F.3d 696, 699 (6th Cir. 2001) ("The
24 alien carries the burden of establishing that ineffective assistance
25 of counsel prejudiced him or denied him fundamental fairness in order
26 to prove that he has suffered a denial of due process.").

1 With regard to the second method of attack, the plaintiff does
2 not succeed at distinguishing precedent by providing a sufficient
3 legal basis for finding that due process requires more procedural
4 protection for juvenile aliens than adults.⁶ The plaintiff points
5 out that children have been granted the right to appointed counsel in
6 proceedings that are themselves civil because of their special
7 vulnerabilities. See In re Gault, 387 U.S. 1, 36-37, 87 S.Ct. 1428
8 (1967) (holding that needs of children require representation by
9 counsel in juvenile adjudications that can result in confinement);
10 Kent v. United States, 383 U.S. 541, 557- 62, 86 S.Ct. 1045 (1966)
11 (finding a right to appointed counsel in proceedings to waive
12 juvenile court jurisdiction); see also Haley v. Ohio, 332 U.S. 596,
13 600, 68 S.Ct. 302, 92 L.Ed. 224 (1948) (stressing a minor's need for
14 "counsel and support if he is not to become the victim first of fear,
15 then of panic" during interrogation).⁷

16
17 ⁶ For academic treatments of this issue see Note, Voice of
18 Justice: Promoting Fairness Through Appointed Counsel for
19 Immigrant Children, 17 N.Y.L. Sch. J. Hum. Rts. 1105 (2001) and
20 Beth J. Werlin, Renewing the Call: Immigrants's Right to
Appointed Counsel in Deportation Proceedings, 20 B.C. Third World
L. J. 393 (2000).

21 ⁷ Congress has also created a right to representation for
22 children in some non-criminal proceedings. See Catherine J.
23 Ross, From Vulnerability to Voice: Appointing Counsel for
24 Children in Civil Litigation, 64 Fordham L. Rev. 1571, 1575
25 (1600) (noting that the Child Abuse Prevention and Treatment Act,
26 42 U.S.C. §§ 5101-5118, "requir[es] appointment of a guardian ad
litem for abused or neglected children in judicial
proceedings."). "In addition, some states have created statutory
rights to counsel for children in certain substantive categories
of civil litigation, such as custody proceedings." Id. Federal
law also provides for the appointment of counsel by the court for
indigent civil litigants (usually prisoners) if certain criteria

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

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

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

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

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

10 Although the Supreme Court has never precisely described the
11 nature of an alien's interest in deportation proceedings, the Court
12 has implied that it is not of great Constitutional significance in
13 cases that found the interest insufficiently compelling when balanced
14 against the government's interests. See, e.g., Arab-Amer. Comm., 525
15 U.S. at 491, 119 S.Ct. at 947 (holding aliens' interests insufficient
16 to warrant a right of action against government for selective
17 prosecution; "deportation is necessary in order to bring to an end an
18 ongoing violation of United States law."); Lopez-Mendoza, 468 U.S. at
19 1049-50, 104 S.Ct. at 3488-89 (alien's interest did not outweigh
20 government's interest in expedited proceedings to justify application
21 of exclusionary rule). The plaintiff has not pointed to any case
22 that has held that a juvenile alien's interests are different from
23 those of an adult. Indeed, if the Court were to undertake an
24 analysis of whether a juvenile's "liberty" interest in not being
25

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

1 erroneously deported is different than that of an adult, it is
2 unclear what the result would be. The plaintiff has referred the
3 Court to only one case finding a right to appointed counsel in
4 proceedings that did not in substance implicate physical liberty.
5 See Lassiter, 452 U.S. at 26-27, 101 S.Ct. at 2158-59 (finding right
6 to appointed counsel in parental-rights-termination proceedings).
7 Using that Supreme Court precedent as a yard-stick, the interest of a
8 unaccompanied juvenile like the plaintiff in an accurate proceeding
9 is potentially of less Constitutional significance than those of an
10 adult alien who, in many cases, is faced with being separated from
11 his or her children. See Lassiter, 452 U.S. at 27, 101 S.Ct. at
12 2159-60 (parents' interest in retaining "companionship, care,
13 custody, and management of his or her children" is "a commanding
14 one.").

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

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

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

8 CONCLUSION

9 Although the plaintiff's claim is not moot, and the plaintiff
10 need not procedurally exhaust his claim, the plaintiff has failed to
11 demonstrate that his legal position, contrary to precedent as it is,
12 "lies in the natural line of the law's development." Kirksey, 168
13 F.3d at 1041-42. The Court determines that even taking all of the
14 complaint's factual allegations as true and drawing all reasonable
15 inferences in his favor the plaintiff has not set forth a cognizable
16 legal claim, and can prove no set of facts that would warrant relief,
17 and thus has failed to state a claim on which relief can be granted.
18 Therefore, the government's Rule 12(b)(5) motion to dismiss is
19 granted.

20 LEAVE TO AMEND

21 The "key question" in determining whether leave to amend should
22 be granted after a successful Rule 12(b)(6) motion "is whether [the
23 plaintiff] could [] save[] his complaint through further amendment."
24 Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th Cir.
25 2001); Schreiber Distributing Co. v. Serv-Well Furniture Co., 806
26 F.2d 1393, 1401 (9th Cir. 1986) (plaintiff should be denied

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

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

15 If the Court had concluded that it was appropriate to examine
16 whether due process required that counsel be appointed under the
17 factors elucidated in Matthews v. Eldridge, 424 U.S. 319, 335, 96
18 S.Ct. 893, 903 (1976) and In re Gault, 387 U.S. 1, 36 -37, 87 S.Ct.
19 1428 (1967), these features may have proven determinative. However,
20 the Court does not reach that analysis. The Court is bound by the
21 Ninth Circuit's precedent on this issue, and the plaintiff has failed
22 to demonstrate that this precedent should be ignored even under the
23 most compelling of facts. Therefore, leave to amend is denied, and
24 the dismissal will be with prejudice.

25 **IT IS HEREBY ORDERED THAT:**

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

1 This action is DISMISSED WITH PREJUDICE.

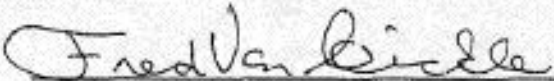
2 2. The plaintiff's motion for class certification (Ct. Rec.
3 4) is DENIED AS MOOT.

4 3. The "house-keeping" motions discussed at the hearing (Ct.
5 Recs. 14, 18, 19, 45, and 50) are GRANTED.

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

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

11 DATED this ^{CA} 17 day of June, 2002.

12 
13 Fred Van Sickle
14 Chief United States District Judge