No. 10-1463

In the Supreme Court of the United States

ANTONIO VILLANUEVA-DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
VIJAY SHANKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner was deprived of his Fifth Amendment right to due process by his privately retained counsel's failure to inform him of the Board of Immigration Appeals' decision affirming his removal order.

2. Whether, assuming petitioner's privately retained counsel rendered ineffective assistance, petitioner demonstrated prejudice.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 634 F.3d 844.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2011. The petition for a writ of certiorari was filed on May 31, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of unlawfully reentering the United States after being removed, in violation of 8 U.S.C. 1326. Pet. App. 1, 5. He was sentenced to time

served, to be followed by one year of supervised release. *Id.* at 6. The court of appeals affirmed. *Id.* at 1-16.

1. In September 1975, petitioner, a native and citizen of Mexico, was admitted into the United States as a lawful permanent resident. Pet. App. 2. In April 1997, he pleaded guilty in a Texas state court to a felony—his third felony offense of driving while intoxicated (DWI)—and received a nine-year suspended sentence. *Ibid.* In September 1997, he pleaded true to the allegation that he had violated the terms of his supervision, and the nine-year term of imprisonment was enforced. *Ibid.*

In June 1998, removal proceedings were instituted against petitioner under the theory that his DWI conviction qualified as an "aggravated felony" under 8 U.S.C. 1227(a)(2)(A)(iii) and 1101(a)(43)(F) because it was a "crime of violence" under 18 U.S.C. 16.[1] Pet. App. 2. The Immigration Judge (IJ) ordered petitioner removed to Mexico on that basis and denied his application for cancellation of removal. *Id.* at 3. On November 4, 1999, the Board of Immigration Appeals (BIA) affirmed the

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[1] Section 1227(a)(2)(A)(iii) provides that an "alien who is convicted of an aggravated felony at any time after admission is deportable." Section 1101(a)(43) defines "aggravated felony" by specifying various particular offenses and including the following residual definition in Subsection (F): "a crime of violence (as defined in [18 U.S.C. 16], but not including a purely political offense) for which the term of imprisonment [is] at least one year." Section 16, in turn, defines "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

IJ's decision. *Id.* at 3, 26-28. The BIA relied on the Fifth Circuit's then-binding decision in *Camacho-Marroquin* v. *INS*, 188 F.3d 649, 652 (1999), withdrawn, 222 F.3d 1040 (2000), in which the court held that a Texas felony DWI offense was a crime of violence that qualified as an aggravated felony and rendered an alien convicted of that offense removable. Pet. App. 3, 27. Petitioner did not petition for review of the BIA's decision. See *id.* at 20. On November 2, 2000, petitioner was removed from the United States. *Id.* at 3.

On July 11, 2000, the Fifth Circuit withdrew its decision in *Camacho-Marroquin* at the alien's request. 222 F.3d at 1040; see Pet. App. 2-3. On March 1, 2001, the Fifth Circuit held in *United States* v. *Chapa-Garza*, 243 F.3d 921, 927 (2001), that a Texas felony DWI offense is not a crime of violence under 18 U.S.C. 16(b) and therefore does not constitute an aggravated felony for purposes of Section 1101(a)(43)(F) and United States Sentencing Guidelines § 2L1.2, which employs the Section 1101(a)(43) definition. See Pet. App. 3-4.

2. In July 2009, petitioner was found in a county jail in Texas. Pet. App. 4. He was charged with being unlawfully present in the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b). Pet. App. 4. Petitioner filed a motion to dismiss the indictment, arguing that he had been denied due process in his removal proceedings because he did not receive notice of the BIA's decision either from his attorney or directly from the BIA. *Ibid.* Petitioner claimed that he would have filed a petition for review of the BIA's decision if he had known of it. *Ibid.* If he had done so, petitioner argued, he could have benefitted from the Fifth Circuit's decision in *Chapa-Garza*, which would have had the effect of restoring his legal-resident status and pre-

venting his removal. *Ibid.* Petitioner further noted that the attorney who represented him in his proceedings before the BIA had subsequently resigned from the Texas Bar in lieu of disciplinary action stemming from his representation of several other clients. *Id.* at 4, 38-62.

In support of his motion, petitioner filed a declaration stating that his lawyer had informed him "that he was going to appeal the decision" of the IJ ordering petitioner's removal. Pet. App. 37. Petitioner claimed that he "never heard from the lawyer again" and "never learned what happened to [his] appeal." *Ibid.* He alleged that he was told by immigration agents that he had lost his appeal when they arrived on November 2, 2000, at the jail where he was housed and deported him to Mexico. *Ibid.* Petitioner further stated that, "[i]f [he] had known that [he] could appeal [his] deportation order, [he] would have asked [his] family to continue the appeal." *Ibid.*

The immigration record revealed that petitioner's counsel unsuccessfully appealed the IJ's ruling to the BIA and that notice of the BIA's decision was sent to the counsel. Pet. App. 5, 26-28. Petitioner's counsel did not petition for review by the Fifth Circuit or forward the decision to petitioner. *Id.* at 5.

After conducting a hearing, the district court denied petitioner's motion to dismiss. See Pet. App. 17-25. The court found that any neglect on the part of petitioner's counsel in failing either to forward the BIA decision to petitioner or to file a petition for review on his behalf could not be attributed to the government. *Id.* at 20. Accordingly, the district court concluded that it was "left with no choice but on legal grounds to deny the motion to dismiss the indictment." *Id.* at 5, 20.

Petitioner then entered a conditional guilty plea to the sole count of the indictment, preserving his right to appeal the denial of his motion to dismiss. Pet. App. 5-6, 22. The district court sentenced him to time served, to be followed by one year of supervised release. *Id.* at 6, 23.

3. The court of appeals affirmed. Pet. App. 1-16. First, the court ruled that the expiration of petitioner's term of supervised release had not rendered his appeal moot because petitioner challenged his conviction (not just his sentence), which subjected him to collateral consequences. *Id.* at 7-8. Second, the court held that petitioner had exhausted his administrative remedies under 8 U.S.C. 1326(d)(1). Pet. App. 8-9. The court rejected the argument that exhaustion would have required petitioner to file a motion with the BIA to reopen his case. *Ibid.* The court reasoned that petitioner became aware of the facts giving rise to his collateral challenge only while he was being removed from the United States and that the BIA would have refused to take jurisdiction of his motion to reopen after he was removed. *Ibid.*

The court of appeals went on to consider and reject petitioner's argument that the immigration proceedings against him had been fundamentally unfair because he did not receive personal notice of the BIA's decision. Pet. App. 9-14. The court noted that petitioner had "vociferously disclaimed" at oral argument "any argument that the Fifth Amendment imports a freestanding right to effective assistance of counsel in a civil case." *Id.* at 10. The court therefore expressly declined to decide both whether such a right was afforded under the Fifth Amendment and whether "there can ever be a circumstance where an attorney's neglect is such that his cli-

ent's due process rights are violated in a civil case." *Ibid.*

In considering the arguments actually advanced by petitioner, the court of appeals noted that petitioner did "not attack the fairness of any of the fora which were available to him: the original immigration court, the BIA, or th[e] court" of appeals." Pet. App. 11. Instead, the court explained, petitioner claimed "that he personally failed to receive[] notice of the BIA's decision because of his attorney's neglect, and that this failure on his attorney's part rendered the proceedings against him 'fundamentally unfair.'" *Ibid.* The court rejected that argument, pointing to the BIA's compliance with the federal regulations requiring it to send its decision to petitioner's counsel. *Id.* at 12 (citing 8 C.F.R. 292.5(a), 1292.5(a)). Not only is such a rule not fundamentally unfair, the court held, it also comports with the "well[-]established" rule in American jurisprudence that contact with a represented party should be through his lawyer. *Id.* at 12-13. The court of appeals stated that, "[s]imply put, the process provided for [petitioner] outlined a course of action—notice to counsel for a represented party of a BIA decision—which is fair and which was followed. [Petitioner] received the process he was due from the Government." *Id.* at 13.

Any unfairness petitioner may have suffered, the court of appeals noted, was attributable to petitioner's retained counsel. Pet. App. 13-14. The court reasoned, however, that absent a constitutional right to effective assistance of counsel—which petitioner did not argue existed in his civil immigration case—petitioner's counsel's error could not be attributed to the government to render the proceedings against him fundamentally un-

fair. *Id.* at 13-14 (citing *Coleman* v. *Thompson*, 501 U.S. 722, 753-754 (1991)).

Finally, the court of appeals held in the alternative that, even assuming arguendo that petitioner's counsel's failure to notify him of the BIA decision could support a claim of fundamental unfairness, petitioner could not establish prejudice because he could not demonstrate "a reasonable likelihood that but for the errors complained of [he] would not have been deported." Pet. App. 14-15 (quoting *United States* v. *Benitez-Villafuerte*, 186 F.3d 651, 658 (5th Cir. 1999), cert. denied, 528 U.S. 1097 (2000)). The court concluded that it was "exceedingly speculative" to imagine what would have happened if counsel had told petitioner of the BIA decision. *Id.* at 15. The court reasoned that, if petitioner's counsel had informed petitioner of the BIA's decision, he presumably also would have informed petitioner that his argument about whether his felony DWI offense constituted a crime of violence was foreclosed at that time by Fifth Circuit precedent. *Ibid.* Although petitioner could have opted to file an appeal *pro se*, his claim was at the time "wholly foreclosed" and any advice from his counsel not to pursue an appeal, "judged at the time of the BIA decision, * * * would not have been a wholesale deprivation of due process." *Ibid.*

ARGUMENT

Petitioner asks (Pet. 12-21) this Court to resolve the division among the courts of appeals about whether an alien is deprived of due process under the Fifth Amendment when his privately retained counsel renders ineffective assistance in removal proceedings. Review of that question is not warranted in this case, however, because petitioner "vociferously disclaimed" reliance on

that argument in the court of appeals, Pet. App. 10, and the court of appeals consequently did not pass on it.

1. Petitioner is correct (Pet. 12-16) that the courts of appeals have disagreed about whether aliens in immigration proceedings have a Due Process Clause entitlement to effective performance by their privately retained counsel. The Fourth, Seventh, and Eighth Circuits have held there is no such constitutional right. See *Afanwi* v. *Mukasey*, 526 F.3d 788, 798-799 (4th Cir. 2008), vacated on other grounds, 130 S. Ct. 350 (2009); *Magala* v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005);[2] *Rafiyev* v. *Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008). By contrast, a number of other circuits have suggested or held that the Due Process Clause creates a right to assistance by counsel that is sufficiently effective to prevent removal proceedings from being fundamentally unfair. See *Zeru* v. *Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Aris* v. *Mukasey*, 517 F.3d 595, 600-601 (2d Cir. 2008); *Fadiga* v. *Attorney Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Denko* v. *INS*, 351 F.3d 717, 723-724 (6th Cir. 2003); *Nehad* v. *Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Tang* v. *Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); *Dakane* v. *United States Att'y Gen.*, 399 F.3d 1269, 1273-1274 (11th Cir. 2005).

If this Court were inclined to resolve that disagreement, it should do so in a case in which that question was actually decided by the court of appeals. In this case, in contrast, petitioner "vociferously disclaimed" at oral

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[2] Earlier Seventh Circuit decisions do contemplate that counsel in immigration proceedings "may be so ineffective as to have impinged upon the fundamental fairness of the proceeding in violation of the fifth amendment due process clause." *Mojsilovic* v. *INS*, 156 F.3d 743, 748 (1998) (quoting *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 144 (7th Cir. 1993)).

argument "any argument that the Fifth Amendment imports a freestanding right to effective assistance of counsel in a civil case." Pet. App. 10. The court of appeals therefore expressly declined to reach both that question and the question whether "there can ever be a circumstance where an attorney's neglect is such that his client's due process rights are violated in a civil case." *Ibid.* The court of appeals addressed a narrower question, *i.e.*, whether the lack of personal notice to petitioner of the BIA's decision rendered the proceedings against him "fundamentally unfair." *Ibid.* The court correctly concluded that it did not because petitioner received all the process he was due: the BIA complied with its own procedures for notice to counsel, and those procedures are consistent with "well[-]established" practice in American jurisprudence. *Id.* at 13-14.

There are, moreover, independent reasons that counsel against this Court's resolving constitutional questions concerning the right to effective assistance of counsel at this time. The relatively recent decisions of the Fourth and Eighth Circuits demonstrate that jurisprudence on the issue is still developing in the courts of appeals. Indeed, this Court recently denied a petition for a writ of certiorari raising this question. See *Massis* v. *Holder*, 130 S. Ct. 736 (2009). In addition, the Court should not resolve the broad constitutional issue petitioner attempts to insert into his case at this late date because, although it is not constitutionally required, the BIA already provides a framework for an administrative remedy that can give an alien relief for ineffective assistance of counsel. The Attorney General has clarified that such a remedy is available even if when, as here, the claim pertains to retained counsel's failure to file a petition for review in a court of appeals. See *In re*

Compean, 25 I. & N. Dec. 1, 3 (A.G. 2009) (BIA does have discretion to consider claims of ineffective assistance pertaining to the post-final order conduct of counsel); *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988). The Attorney General has also recently directed that the Department of Justice initiate rulemaking to consider whether the "*Lozada* factors," which have governed the BIA's administrative resolution of claims of ineffective assistance for 20 years, should be revised. Because that process is still ongoing, review by this Court of the constitutional question would be premature.

2. Even if the question petitioner asks this Court to resolve were properly presented and ripe for consideration by this Court, petitioner would not prevail because the Fifth Amendment does not confer a right to effective assistance by privately retained counsel in immigration proceedings. The court of appeals' conclusion, see Pet. App. 14, that counsel's failure to forward the BIA decision to petitioner did not render the proceedings fundamentally unfair because the failure could not be imputed to the government was a straightforward application of this Court's decision in *Coleman* v. *Thompson*, 501 U.S. 722 (1991). In *Coleman*, the Court explained that, when the government is not constitutionally required to furnish counsel in the relevant proceedings, the errors of privately retained counsel are not imputed to the government. See *id.* at 752-754. When "[t]here is no constitutional right to an attorney" furnished by the government in a particular kind of proceeding, a client "cannot claim constitutionally ineffective assistance of counsel in such proceedings"; in that situation, the attorney performs in a private capacity as the client's agent, not a state actor, and the client therefore must "'bear the risk of attorney error.'" *Id.* at 752-753 (quoting *Murray* v.

Carrier, 477 U.S. 478, 488 (1986)); see *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962) (noting fairness of civil litigant's having to bear consequences of attorney's actions because, in "our system of representative litigation * * * each party is deemed bound by the acts of his lawyer-agent").

Aliens have no constitutional right to appointed counsel in immigration proceedings. See, *e.g.*, *Romero* v. *INS*, 399 F.3d 109, 112 (2d Cir. 2005); *Al Khouri* v. *Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004). Rather, Congress has provided as a statutory matter that an alien shall have the "privilege" of being represented by the counsel of his choice "at no expense to the Government." 8 U.S.C. 1229a(b)(4)(A), 1362; cf. 28 U.S.C. 1654 (parallel provision providing that a party may appear through counsel in any court of the United States). Accordingly, when an alien invokes that privilege and retains a lawyer to represent him in removal proceedings or in filing a petition for review, counsel's actions are attributed to the client, not the government. See *Afanwi*, 526 F.3d at 799 ("Simply put, Afanwi's counsel was not a state actor, nor is there a sufficient nexus between the federal government and counsel's ineffectiveness such that the latter may fairly be treated as a governmental action. To the contrary, Afanwi's counsel was privately retained pursuant to 8 U.S.C. § 1362, and his alleged ineffectiveness—namely his failure to check his mailbox regularly and to file a timely appeal—was a purely private act.").

3. Finally, even if petitioner were correct that the Fifth Amendment affords him a right to effective assistance of counsel in his immigration proceedings, and that the performance of his counsel fell below a constitutional floor, he would still not be entitled to relief from his conviction for illegal reentry following removal be-

cause the court of appeals correctly concluded that he could not establish prejudice as a result of his counsel's inaction. Pet. App. 14-16. As the court of appeals held, it is sheer speculation whether petitioner would have proceeded with an appeal if his attorney had informed him that the BIA rejected his claim and that the BIA's decision was dictated by then-binding Fifth Circuit precedent. *Ibid.* Cf. *Roe* v. *Flores-Ortega*, 528 U.S. 470, 484-486 (2000) (defendant claiming ineffective assistance from attorney's failure to consult about an appeal must show a "reasonable probability" that, if counsel had not performed deficiently, he would have appealed).

Petitioner argues (Pet. 17-18) that the court of appeals here evaluated prejudice under a different standard than that employed by the Ninth Circuit in *Rojas-Garcia* v. *Ashcroft*, 339 F.3d 814, 826 (2003), and the Eleventh Circuit in *Dakane*, *supra*.[3] But petitioner is incorrect. All three courts of appeals find prejudice when it appears that counsel's inadequate performance may have affected the outcome of the proceedings. Pet. App. 14; *Dakane*, 399 F.3d at 1274; *Rojas-Garcia*, 339 F.3d at 826.

Petitioner argues (Pet. 17) that the decision in his case conflicts with those in *Rojas-Garcia* and *Dakane* in that those courts applied a rebuttable presumption of prejudice because counsels' error deprived the aliens of appellate proceedings entirely. But those cases concern failure to file a brief after having filed a notice of appeal; they did not apply a presumption of prejudice on the

[3] *Rojas-Garcia* and *Dakane* are also distinguishable because each involved a situation in which counsel's alleged error deprived the alien of the right to appeal an IJ's decision to the BIA. Petitioner argues, in contrast, that his counsel's alleged error prevented him from filing a petition for review of the BIA's decision in the court of appeals.

antecedent question whether the alien, but for the deficient consultation of counsel, would have appealed at all. The Ninth Circuit does apply a rebuttable presumption of prejudice when counsel's error deprives an alien of review in the court of appeals of a BIA decision if the alien can demonstrate a reasonable probability that, but for the error, he would have appealed. See *Dearinger ex rel. Volkova* v. *Reno*, 232 F.3d 1042, 1045 (2000); but see *Hernandez* v. *Reno*, 238 F.3d 50, 57 (1st Cir. 2001) (rejecting such a presumption). But even if the Fifth Circuit employed such a rebuttable presumption, it would have been rebutted in this case because petitioner's argument that his felony DWI offense is not a crime of violence was foreclosed by circuit precedent at the time petitioner would have made the decision whether to appeal, rendering speculative at best that petitioner would have opted to appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
VIJAY SHANKER
Attorney

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