Office of the Attorney General

Washington, D.C. 20530

August 26, 2009

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Constitutionality of Certificates of the Non-Existence of Records, 8 U.S.C. 1360(d)

Dear Madam Speaker:

Pursuant to 28 U.S.C. 530D, I am writing to advise you that, in light of the Supreme Court's decision in Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (June 25, 2009), the Department of Justice has determined that the government will no longer defend the constitutionality of 8 U.S.C. 1360(d) as a means of admitting certificates of the nonexistence of a record, commonly known as "CNRs," at criminal trials. The Supreme Court's decision and analysis have made clear that the Confrontation Clause of the Sixth Amendment to the Constitution precludes reliance on CNRs to prove the truth of the matter asserted by the certificate in a criminal case, absent the defendant's having had an opportunity to cross-examine the declarant and proof that the declarant is unavailable. Section 1360(d) was enacted in the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, long before Melendez-Diaz, and it does not conform to that decision's requirements. Accordingly, absent a change in Supreme Court authority, the government can no longer rely on or defend Section 1360(d) as a means of admitting evidence in criminal cases.

Federal law prohibits previously removed aliens from reentering the United States without the express consent of the Secretary of Homeland Security. See 8 U.S.C. 1326(a)(2). At criminal trials involving charges under Section 1326, federal prosecutors must prove beyond a reasonable doubt that the alien has not obtained the appropriate consent. Before Melendez-Diaz, prosecutors routinely proved this element through the use of CNRs. The Department of Homeland Security maintains a centralized index system that records information on all aliens who have been admitted or denied admission to the United States. See 8 U.S.C. 1360(a). 8 U.S.C. 1360(d) provides for the admissibility of CNRs. It states:

> A written certification [by designated Homeland Security employees] that after diligent search no record or entry of a specified nature is found to exist in the records of the Service, shall be admissible as evidence in any proceeding as evidence that the records of the Service contain no such record or entry, and shall have the same effect as the testimony of a witness given in open court.

8 U.S.C. 1360(d). Accordingly, the statute permits an employee who has searched Department of Homeland Security records and determined that an alien had no permission to reenter to provide a written certification to the prosecutor for admission into evidence at trial, rather than requiring him or her to travel to court and testify in person.

In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause of the Sixth Amendment prohibits the admission in criminal trials of "testimonial" out-of-court statements unless either (1) the witness appears at trial, or (2) the witness is unavailable and the defendant had a prior opportunity for cross-examination. In Melendez-Diaz, the Court applied Crawford to hold that the Confrontation Clause precluded admission of a certificate of analysis from a state chemist who certified that a trial exhibit contained cocaine. "[a]bsent a showing that the analysts were unavailable to testify at trial and that [the defendant] had a prior opportunity to cross-examine them." 129 S. Ct. at 2532 (emphasis omitted).

The Court rejected the State's claim in Melendez-Diaz that its certificate of analysis was akin to a business or official record that could be admitted as not "testimonial." The Court stated that those traditional exceptions could not cover "cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statements would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched." 129 S. Ct. at 2539. The Court further held that documents "prepared specifically for use at petitioner's trial * * * were subject to confrontation under the Sixth Amendment" whether or not they qualified as business or official records exempt from the hearsay rules. Id. at 2540.

The procedures that the Supreme Court specifically disapproved in Melendez-Diaz are for all relevant purposes identical to those authorized for admission of a CNR under 8 U.S.C. 1360(d). In a CNR, a Department of Homeland Security records clerk attests to having searched various Department databases for any record that a defendant has been granted permission to reenter the country and states that no such record has been found. The document is used as substantive evidence to prove an element of the defendant's offense, just as the certificates in Melendez-Diaz were used to establish that the defendant there possessed an illegal drug. Finally, CNRs typically are prepared at the request of the prosecutor or investigating agent in anticipation of an upcoming criminal trial. Although the Department of Justice continued to defend the constitutionality of CNRs and of 8 U.S.C. 1360(d) in criminal cases after Crawford, the Court's ruling in Melendez-Diaz makes any such argument untenable under current doctrine.

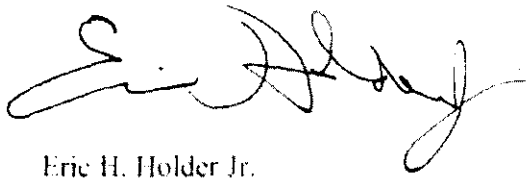
Accordingly, absent indications from the Supreme Court in the future that the Confrontation Clause would permit the admission of CNRs as provided by Section 1360(d), we have determined that we will concede that CNRs are inadmissible at criminal trials, absent the defendant's stipulation, the presence at trial of the CNR's preparer, or a showing that the

defendant had a prior opportunity for cross-examination of the preparer and that he or she is unavailable to testify at trial. CNRs may continue to be introduced consistent with Section 1360(d) in proceedings to which the Confrontation Clause does not apply, such as civil litigation and administrative proceedings.

We do not anticipate that this concession will have a significant practical effect in most illegal reentry prosecutions. The vast majority of defendants in these cases plead guilty. Furthermore, the Department of Homeland Security and the U.S. Attorney's Offices have taken steps since Crawford to reduce their reliance on CNRs and to use alternative methods to prove lack of consent for those defendants who take their cases to trial.

Please let me know if we can be of further assistance in this matter.

Sincerely,



Eric H. Holder Jr.
Attorney General