Office of the Attorney General
Washington, D. C. 20530

November 15, 2011

The Honorable Charles Grassley
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: United States v. Luis Mario Barajas-Alvarado, No. 10-50134 (9th Cir.)

Dear Senator Grassley:

Consistent with 28 U.S.C. 530D, I write to advise you that on October 27, 2011, the Department of Justice determined not to seek further review of the decision of the court of appeals in the above-referenced case, a copy of which is enclosed. The court of appeals held that, under what it understood as controlling Supreme Court authority, an alien facing criminal prosecution has a due process right to bring a collateral challenge to a expedited-removal order that is used to establish an element of his offense. The court thus found invalid a statute that it read to preclude such collateral review. But the court of appeals went on to reject the alien's collateral challenge on the merits, finding that the alien could not establish any prejudice. Because the government prevailed in the case; because the reasoning of the court of appeals makes clear that such collateral challenges will generally fail; and because the court's decision will not impede effective enforcement of immigration and criminal law, the government has determined not to seek certiorari in this instance.

Several times between 2002 and 2005, defendant Luis Mario Barajas-Alvarado was removed from the United States to Mexico via expedited removal proceedings, pursuant to 8 U.S.C. 1225. Such proceedings provide a streamlined process for the removal of aliens who attempt to gain entry to the United States but who are not admissible and who have not indicated either an intent to apply for asylum or a fear of persecution. See 8 U.S.C. 1225(b)(1)(A)(I). In order to streamline the process, the statute provides limited administrative and judicial review of expedited removal proceedings. See United States v. Barajas-Alvarado, No. 10-50134, 2011 WL 3689244, at *3 (9th Cir. Aug. 24, 2011) (listing the provisions of the Immigration and Nationality Act (INA) that limit review).

In January 2009, Barajas-Alvarado was arrested when he applied for admission into the United States using a fraudulent permanent resident alien card. He pleaded guilty to one count of attempted reentry after deportation, in violation of 8 U.S.C. 1326, but he reserved his right to appeal the government's use of the earlier expedited removal orders to show that he had previously been deported. On appeal, Barajas-Alvarado relied on United States v. Mendoza-Lopez, 481 U.S. 828 (1987), which holds that "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there

must be some meaningful review of the administrative proceeding." Id. at 837-838 (emphasis in original). Barajas-Alvarado argued that the INA precludes any meaningful review of an expedited removal order. See, e.g., 8 U.S.C. 1225(b)(1)(D) (providing that in any criminal prosecution against an alien for illegal entry, "the court shall not have jurisdiction to hear any claim attacking the validity" of an expedited removal order). Barajas-Alvarado thus argued that expedited removal orders could not be used as predicates in criminal prosecutions under Section 1326.

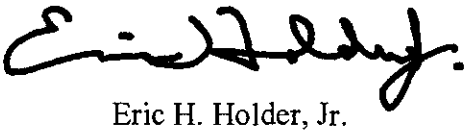
The government defended the constitutionality of Section 1326 in the court of appeals, but the court held that the INA precludes any meaningful judicial review of an expedited removal order in a Section 1326 prosecution, contrary to the Supreme Court's decision in Mendoza-Lopez. See Barajas-Alvarado, 2011 WL 3689244, at *3-*6. The court of appeals nevertheless rejected Barajas-Alvarado's argument "that expedited removal orders can never be used as predicates in [Section] 1326 prosecutions." Id. at *7. Rather, the court reasoned that the correct inquiry is whether "the proceeding that resulted in the expedited removal order was fundamentally unfair in that the deportation process violated the alien's due process rights and the alien suffered prejudice as a result." Ibid. (internal quotation marks omitted). Applying that standard to this case, and "assuming that but for the alleged procedural violations in his hearing Barajas-Alvarado would have requested the right to withdraw his application for admission," the court held that "Barajas-Alvarado failed to establish that it was plausible such relief would be granted." Id. at *11. The court therefore concluded that Barajas-Alvarado had "failed to establish any prejudice resulting from the alleged procedural violations."

Despite the court of appeals' constitutional ruling concerning Section 1224(b)(1)(D), the Department has determined that a petition for a writ of certiorari is not warranted. The court of appeals held that, under what it understood as the controlling Supreme Court decision in United States v. Mendoza-Lopez, due process entitles an alien to collateral review of expedited removal orders in Section 1326 prosecutions, notwithstanding the statutory preclusion of such review. But the court also correctly determined that the alien here was not entitled to relief, because he could not show any prejudice from the alleged procedural violations in his earlier removal proceedings. The court's discussion makes clear that aliens generally will not be able to show prejudice, because they will not be able to show that they would have received discretionary relief in the earlier removal proceeding at issue. See Barajas-Alvarado, 2011 WL 3689244, at *10 (relying on the INS's Field Manual for the six factors that govern whether to grant withdrawal relief); ibid. ("When we consider the factors listed in the Field Manual, it is clear they all weigh against Barajas-Alvarado's request for withdrawal."). The government does not expect to encounter difficulties in successfully and effectively prosecuting Section 1326 cases based on expedited-removal orders in the future; indeed, the court's ruling is helpful to the government in that it rejected the defendant's argument that such orders may not be used to support Section 1326 prosecutions. Finally, the court's decision has no effect on the use of expedited removal in the civil immigration context. See id. at *3-5, 10.

Because the government prevailed under the court of appeals's standard in this case, because it is likely to prevail under that standard in other cases, and because the court's decision will not impede law enforcement activities, further review is not warranted in this case. A petition for a writ of certiorari would be due on November 22, 2011.

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

Sincerely,



Eric H. Holder, Jr.
Attorney General

Enclosure