IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

VALENTIN VILLAVICENCIO-GARCIA,

Defendant.

REPORT AND RECOMMENDATION

06-CR-130-S

REPORT

The grand jury has charged defendant Valentin Villavicencio-Garcia with illegally re-entering the United States after having been deported and removed, in violation of 8 U.S.C. §1326. Before the court for report and recommendation is defendant's motion to dismiss the indictment. *See* Dkt. 9. For the reasons stated below I am recommending that this court deny the motion.

Defendant claims that it is a due process violation to prosecute him because the predicate deportation proceeding in 2002 was fundamentally unfair. In his opening brief, defendant claimed that he did not receive proper notice of the deportation hearing. The government responded by establishing the existence of a statutorily sufficient mailing, and arguing that defendant failed to exhaust his administrative remedies. This forced defendant to change tack in his reply: his argument now is that the government has not met its burden of proving a sufficient *attempted* mailing, *see* Def. Reply, Dkt. 16, at 2, and that the resulting

order was fundamentally unfair because he would have been eligible for relief from deportation had he actually received notice his hearing and had attended it. *id*. at 8.

The government had no opportunity to respond to defendant's claim that it has not established attempted delivery because that issue was not presented squarely in defendant's motion or initial brief. This alone could be grounds to deny defendant's motion. An argument raised for the first time in a reply brief is waived. *United States v. Alhalabi*, 443 F.3d 605, 611 (7th Cir. 2006). Here, defendant has offered a new argument which the government might have been able to counter more effectively had it been apprised that defendant was challenging its proof that defendant's hearing notice actually entered the mail stream. Given the imminent, firm trial date, there is no time to allow a surreply by the government, so what we have is sandbagging, intended or not. That's not cricket.[1]

At best, defendant is entitled to a plain error review of his new argument. *See United States v. Thornton*, ___ F.3d ___, ___ WL ____, Case No. 05-1465, slip op. At 11-12 (7th Cir. Sept. 12, 2006). To require relief, an error must be plain, affect substantial rights, and also seriously affect the fairness, integrity or public reputation of judicial proceedings. *Id.* It is anything but plain that the record lacks proof that the INS actually put defendant's hearing notice into the mail stream. To the contrary, the evidence in the record sufficiently establishes that an adequately mailing occurred.

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[1] Because defendant ought to lose on the merits, his attorney's failure to raise this argument in his opening brief could not have prejudiced defendant, so there is no serious *Strickland* concern here.

Defendant does not dispute that on July 16, 2001, an INS special agent personally served him with a Notice To Appear (Form I-862). The notice advised defendant where his hearing would be held, but it did not tell him when, stating that a hearing date was "to be set." *See* Exh. 1, Attached to Gov. Resp. (Dkt. 12). The form advised defendant that he was required to provide the INS, in writing, with his full mailing address and telephone number, and must notify the immigration court immediately if he were to change his address or telephone number while proceedings were pending.

Defendant advised the INS that he lived at 603 South Howard Street, Harvard, Illinois, which was his actual residence at that time. Defendant avers, however, that he never received any letter from the immigration court. *See* Affidavit of Villavicencio-Garcia, attached to Motion to Dismiss (Dkt 9). In his affidavit, defendant suggests that because he and his wife were having marital difficulties in July-August, 2001, and because she stayed at the Howard Street address while he left for Wisconsin to arrange new living arrangements, perhaps the hearing notice was lost as a result of his wife's indifference to whether defendant received any of his mail while he was gone. *Id*. at ¶¶ 7-8.[2]

The next document in defendant's immigration file is a written notice of hearing and removal proceedings. *See* Exh. 2, Attached to Dkt. 12. The notice states that it was mailed to Villavicencio-Garcia at 603 South Howard Street, Harvard, Illinois 60033. The notice

[2] Defendant prepared his affidavit before he decided to challenge whether the notice ever made it into the mail stream.

is dated July 31, 2001, and advises that Villavicencio's hearing is set for January 25, 2002 at 9:00 a.m. at the immigration court in Chicago. The bottom of the form is a "certificate of service" which indicates that the notice was served by regular mail to defendant on July 31, 2001 by "Court Staff **CSW** [?]." *See* Exh. 2, Dkt. 9. The "CSW" is handwritten on the form and is susceptible to differing decryptions. For what it's worth, the bottom left corner of the form has the letters "CSW" typed as the last entry.

On January 25, 2002, the removal hearing was held as scheduled, with Immigration Judge Samuel Der-Yeghiayan presiding.[3] Judge Der-Yeghiayan filled in a preprinted form, which stated, among other things, that

> Notice that this removal hearing was to be conducted on this date was given to the parties. The respondent had a reasonable opportunity to be present but did not appear. No reasonable cause has been advanced as to why the respondent was absent. This hearing was, therefore, conducted in absentia pursuant to Sec. 240(b) of the Immigration and Nationality Act.

Exhibit 3 to Dkt. 12.

Judge Der-Yeghiayan signed and dated this order.

Villavicencio was located and deported. Although the statutes provide a remedy for an alien who has been ordered deported at a hearing held in absentia and who claims that he did not receive proper notice of the removal proceeding, defendant did not avail himself of this process and made no attempt to challenge the removal order.

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[3] On July 15, 2003, Judge Der-Yeghiayan became a United States District Judge in the Northern District of Illinois.

Title 8, U.S.C. § 1326(d) provides that in a criminal proceeding charging illegal re-entry, the defendant alien may not challenge the validity of underlying deportation order unless he demonstrates that:

> (1) He exhausted any administrative remedies available to seek relief against the order;
>
> (2) The deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) The entry of the order was fundamentally unfair.

As defendant acknowledges, the Fourth and Second Circuits have held that an alien must meet all three criteria to obtain relief, *see United States v. Wilson*, 316 F.3d 506, 509 (4th Cir. 2003) and *United States v. Fernandez-Antonia*, 278 F.3d 150, 157 (2nd Cir. 2002), while the Ninth Circuit has held more obliquely that §1326(d) cannot bar collateral review when the alien's waiver of the right to an administrative appeal did not comport with due process, *see United States v. Muro-Inclan*, 249 F.3d 1180, 1183 (9th Cir. 2001). The Seventh Circuit has implied that there is no real difference between the circuits' tests, *see United States v. Roque-Espinoza*, 338 F.3d 724, 728 (7th Cir. 2003), and later seemed to indicate that an alien must meet all three prongs of the statute, *see United States v. Santiago-Ochoa*, 447 F.3d 1015, 1019 (7th Cir. 2006).

As the government notes in its response, defendant never attempted to obtain a rescission order pursuant to 8 U.S.C. § 1229a(5)(C)(ii). That statute permits a motion to

reopen "*at any time* if the alien demonstrates that the alien did not receive notice in accordance with [8 U.S.C. § 1229(a)(1) or (2)]." (Emphasis added). Defendant concedes that he still has the right to mount a challenge to his removal in immigration court. Def. Reply, dkt. 16 at 2. Even so, defendant contends that this does not affect his ability to raise a due process challenge to the indictment in this case. This contention depends on this court accepting the view, propounded by the Ninth Circuit, that proof of a due process violation trumps the three-part test of §1326(d). I'm not sure if this contention is correct, but this court would be hard-pressed to allow the government to proceed with a felony case against defendant in the face of a proven due process violation. In this case, it's just as efficient to determine whether, in fact, defendant suffered a due process violation.

Defendant claims that he was denied due process because of the lack of proof of the *attempted* delivery of his hearing notice. How did defendant arrive at this juncture? In *Joshi v. Ashcroft*, 389 F.3d 732 (7th Cir. 2004), the court held that proof of attempted delivery to an alien's last known address was sufficient to prove sufficient service by mail and notice. *Id.* at 736, citing 8 U.S.C. § 1229[c). This leaves only one avenue open for defendant: attack the proof that delivery actually was attempted.

Here, we have a finding by the presiding judge that "Notice that this removal hearing was to be conducted on this date was given to the parties. The respondent had a reasonable opportunity to be present but did not appear." True, this is boilerplate on a form order, but

Judge Der-Yeghiayan filled in the rest of the form and signed it as the court's order. This court has no reason to doubt the accuracy of this finding.

This is particularly true where there is corroboration by way of the certificate of service at the bottom of the hearing notice. Defendant claims that this court should disregard this notice because the initials of the signer are not legible, and because there is no proof that anyone actually put stamps on the envelope or addressed it to defendant's residence.

Dealing with the second claim first, I suppose this certification would have been clearer, and therefore less vulnerable to sniping, if it had included a phrase like "with proper postage affixed and properly directed." We all have seen certifications that include words to this effect. But to conclude from the absence of such language that the government has failed to prove attempted delivery, which in turn should be viewed as a violation of defendant's constitutional right to due process, would be to flirt with absurdity. When someone certifies that "this document was served by mail," the clear implication–and the only logical inference–is that proper postage was affixed and the mail-clerk sent it to the address listed above the certification. Nothing else would constitute actual "service by mail."

To be fair to defendant, there is a tax refund case in which the court held that

> The government is entitled to a rebuttable presumption of delivery upon presentation of evidence of proper mailing. To invoke the presumption of delivery, the government could either present evidence of actual mailing such as an affidavit from the employee who mailed the check, or present proof of procedures

> followed in the regular course of operations which give rise to a strong inference that the [item] was properly addressed and mailed.

Godfrey v. United States, 997 F.2d 335, 338 (7th Cir. 1993)

In *Godfrey*, the IRS did not dispute that the plaintiffs were entitled to a $279,323 refund check, but disputed the plaintiffs' claim that the check had not been timely mailed. The only evidence that the IRS had to corroborate its claim that a check had been issued and mailed was an entry on the plaintiffs' account that read "REFUND OF OVERPAYMENT." The court held that this statement, without any other proof of mailing, was insufficient to establish that any mailing actually had occurred:

> in the absence of any reliable submission to the court relating to the check mailing process or other proof such as an accompanying cover letter or records of IRS mailings, we conclude that the government has failed to prove that the original refund check was ever mailed, and consequently it is not entitled to a presumption that the check was delivered.

Id. at 339.

In the instance case, the evidence of mailing is less detailed than that suggested by the court in *Godfrey* but significantly more robust than that actually presented by the IRS in support of its assertion that a check had been mailed. A certification by an INS employee, which the hearing judge accepted and adopted, is a sufficiently reliable submission relating to the mailing process for this court to conclude that the INS did in fact attempt delivery.

Not so fast, counters defendant: because it is not clear whose initials actually appear within the certification, the government has not provided sufficient information to prove attempted delivery. In support of this position defendant cites *Adeyemo v. Ashcroft*, 383 F.3d 558 (7th Cir. 2004), but the case is distinguishable because it involved a certified letter.

In *Adeyemo*, the issue was whether the government had sufficiently established that the petitioner had received an order to show cause sent to him by the INS via certified mail. The use of certified mail was important to the outcome because the agency's own administrative rulings required that a certified mail receipt must be signed by the respondent or a responsible person at the respondent's address and returned in order to constitute personal service. *Id.* at 559-60. "Absent such a requirement, there is no meaningful distinction between service by certified mail and service by regular mail." *Id.* at 561, quoting *Matter of Huete*, 20 I.&N. Dec. 250, 253 (BIA 1991). The petitioner presented credible evidence that the illegible signature on the certified mail receipt was not his or his wife's; this was enough to rebut the presumption of receipt attendant to the Agency's certified mail rules, which did not apply to the use of ordinary mail to send notices of hearings. *Id.* at 561-62.

So, defendant is correct that there are circumstances in which the legibility of a signature is important, but those circumstances surround certified mail and they focus on the recipient, not the sender. Of course, defendant takes issue with this, arguing that *knowing* the actually initials of the certifier is important to due process (although defendant does not

contend that the government is obliged to submit that person's affidavit). *See* dkt. 16 at 7. I am not persuaded that there is a problem here. The immigration judge presiding over defendant's removal hearing, who was familiar with the INS's personnel and procedures, was satisfied with the adequacy of the certification. Whether this court now can discern the initials of the person who certified service is not as important as knowing that *someone* in INS, whoever s/he is, certified service.

In sum, the record before this court proves attempted delivery sufficiently to comply with § 1229[c). Defendant has suffered no due process violation. This conclusion also disposes of defendant's third argument, that because he was challenging the effectiveness of service, he could not avail himself of § 1229a(b)(5)[C)'s rescission process. From this court's perspective at least, there is no bar to defendant seeking rescission.

This leaves defendant's final due process argument: that he was eligible for relief at the removal hearing. The Seventh Circuit has noted that "it would be hard to show that the loss of a chance at wholly discretionary relief from removal is the kind of deprivation of liberty or property that the due process clause is designed to protect." *United States v. Roque-Espinoza*, 338 F.3d 724, 729 (7th Cir. 2003); even so the court also noted that maybe an alien has some right to a hearing, even if he does not have any right to a particular outcome. *Id.* at 730. But in the instant case, defendant has not lost his chance at discretionary relief: as just noted, he still may seek rescission of the removal decision. This failure to exhaust available remedies "dooms his case no matter what." *Id*.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Valentin Villavicencio-Garcia's motion to dismiss the indictment.

Entered this 22nd day of September, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

September 22, 2006

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Re: United States v. Valentin Villavicencio-Garcia
Case No. 06-CR-130-S

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before October 2, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by October 2, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable John C. Shabaz, District Judge