No. 10-937

In the
Supreme Court of the United States

FAYEZ DAMRA, aka Alex Damra,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982), five Justices of this Court joined a decision holding that, in a case involving deportation of a prospective defense witness, a violation of the Compulsory Process Clause of the Sixth Amendment "requires some showing that the evidence lost would be both material and favorable to the defense." The decision did not require that the defendant demonstrate that the government acted in bad faith, a requirement imposed by the court of appeals in this case. The federal courts of appeals and state courts have reached conflicting decisions regarding whether a showing of bad faith is required. Accordingly, this case presents the following questions:

1. Whether a defendant who establishes the loss of material and favorable evidence when the government deports a prospective defense witness prior to trial must demonstrate that the government acted in bad faith in order to establish a violation of the Sixth Amendment's Compulsory Process Clause?

2. Whether a defendant asserting a violation of the Sixth Amendment's Compulsory Process Clause may establish, through the defendant's trial testimony alone, that a prospective defense witness deported by the government prior to trial would have provided material and favorable evidence?

PARTIES TO THE PROCEEDING

The cover page names all of the parties to the proceedings in the court of appeals below.

Petitioner's brother, Fawaz Damra, who was deported prior to trial, was a defendant in the district court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Blank Page

PETITION FOR A WRIT OF CERTIORARI

Fayez Damra, aka Alex Damra, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND JUDGMENT BELOW

The decision of the court of appeals is reported at *United States v. Damra*, 621 F.3d 474 (6th Cir. 2010) and is reproduced in the Appendix at 1a-77a. The amended judgment of the U.S. District Court for the Northern District of Ohio is reproduced in the Appendix at 78a-86a.

JURISDICTION

The court of appeals issued its judgment on September 15, 2010. Pet. App. 1a. The court of appeals denied petitioner's timely petition for rehearing and rehearing en banc on October 26, 2010. Pet. App. 87a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the U.S. Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, ...

STATEMENT OF THE CASE

On July 25, 2006, petitioner Fayez Damra, known as Alex Damra (hereinafter, "Mr. Damra"), was indicted on two counts, conspiracy to defraud the United States pursuant to 18 U.S.C. §371 (Count 1) and attempted tax evasion pursuant to 26 U.S.C. §7201 (Count 2). Mr. Damra's brother, Fawaz Damra (hereinafter, "Fawaz"), who was deported prior to trial, was indicted in the same indictment on the same conspiracy count and an additional count of aiding and abetting the preparation of a fraudulent tax return. Mr. Damra has degrees in computer engineering, mathematics, and aeronautical and astronomical engineering from Purdue University, and owned and operated a company, Applied Innovation Management, which provided web-based services for several Fortune 500 companies and governmental entities.

The principal transaction between the brothers, which transaction was the subject of Count 2 of the indictment, was a payment of $100,000 from Applied Innovation Management to Fawaz and his wife in 1999. Count 2 alleged that Mr. Damra caused Fawaz to file a false tax return for 1999 by causing Fawaz to report the payment as consulting income, when in fact it was a gift. The government's theory was that Mr. Damra had advised Fawaz how to report the income on Fawaz's personal return, a theory Fawaz could have rebutted at trial had he not been deported.

Fawaz had previously been found guilty in a separate case of procuring his citizenship unlawfully, and his citizenship had been revoked. *United States v. Damrah*, 412 F.3d 618 (6th Cir. 2005). Fawaz had been in the United States since 1984 and had been a citizen

since 1994. *Id.* at 620. At the time of the indictment, Fawaz was in the custody of the government at a facility in Monroe, Michigan, and remained in custody until his sudden deportation in January, 2007 prior to trial.

When the indictment was filed in this case, the government requested that no bond be set for Fawaz, who remained in custody pursuant to his prior conviction. This set the stage for the government's deportation of Fawaz in January 2007, without any notice to the district court or his co-defendant, Mr. Damra.

During pretrial proceedings and at trial, Mr. Damra proceeded *pro se*. At a pretrial conference on September 14, 2006, Fawaz's attorney represented to the district court and Mr. Damra that "he'll [Fawaz] be here for trial or for whatever proceedings the Court deems necessary." The prosecutor confirmed to the district court that "Your Honor, if I may, just to inform the Court, that what [Fawaz's counsel] says is accurate." Accordingly, Mr. Damra had reason to believe that his brother, Fawaz, would be at trial and available as a witness.

Trial was set for October 23, 2006. On October 6, 2006, the district court granted the government's motion to continue the trial and reset the trial for December 5, 2006. A week before trial, the district court advised the parties that the trial would not proceed on December 5 as scheduled. A hearing was set for January 8, 2007. The government did not advise the district court or Mr. Damra that it planned to deport Fawaz prior to the January 8, 2007 hearing.

On January 2, 2007, the government, without notice to the district court or Mr. Damra, deported Fawaz Damra.

Mr. Damra objected to the government's deportation of Fawaz and advised the district court that he needed Fawaz as a witness for his defense because Fawaz would confirm that there was no conspiracy between Fawaz and Mr. Damra and that the two brothers had never discussed taxes.

Shortly thereafter, the government, having deported Fawaz and made him unavailable as a witness, moved to admit, through the co-conspirator exception, statements allegedly made by Fawaz to his tax preparer Mir Ali. Tax preparer Ali testified in broken English that Fawaz had told him that Mr. Damra had asked Fawaz to report the $100,000 payment as income to Fawaz because Mr. Damra was in a higher tax bracket. The district court admitted Fawaz's statements through tax preparer Ali despite Mr. Damra's argument that admission of the evidence violated his Sixth Amendment rights and that the government, knowing when Fawaz would be deported, should have advised Mr. Damra and the district court so that an examination of Fawaz could have been conducted before Fawaz was deported. Accordingly, although Fawaz had been deported, Fawaz, in effect, testified against Mr. Damra through the tax preparer's testimony about conversations between Fawaz and Mr. Damra, which the tax preparer claimed Fawaz had related to him.[1]

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[1] The court of appeals found that the district court erred in permitting an IRS agent, who was the government's trial

Fawaz's deportation ensured that there would be no rebuttal to the testimony elicited from Fawaz's tax preparer about Fawaz's alleged conversations with Mr. Damra. Left without a witness to rebut the hearsay testimony provided by the tax preparer, Mr. Damra took the witness stand and testified at trial that he never discussed taxes with Fawaz. Pet. App. 12a.

Mr. Damra was convicted on both counts. The court of appeals affirmed. The court of appeals determined that the leading Sixth Circuit case relating to compulsory process, *United States v. McLernon*, 746 F.2d 1098 (6th Cir. 1984), incorrectly interpreted this Court's decision in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), and that this Court's decision in *Arizona v. Youngblood*, 488 U.S. 51 (1988) required that a defendant alleging a violation of the Compulsory Process Clause demonstrate that the government acted in bad faith. Pet. App. 22a, 24a. Since the court of appeals adopted this standard for the first time in this case, Mr. Damra had no notice that this was the applicable legal standard and no opportunity to present argument or evidence on the issue. The court of appeals concluded that Mr. Damra had failed to establish that the government acted in bad faith. Pet. App. 19a. The court of appeals discounted entirely the representations from both Fawaz's counsel and the prosecutor that Fawaz would be present at trial. Pet. App. 19a.

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representative, to translate for the jury Ali's English testimony which could not be understood by the court reporter, the district court, and the other trial participants, but that such error was not plain error. Pet. App. 42a, 43a.

The court of appeals also found that the defendant must "make some plausible showing that the testimony of the deported witness would have been both material and favorable to his defense." Pet. App. 25a. To meet this standard, Mr. Damra testified that he and Fawaz had never discussed Fawaz's taxes. Pet. App. 12a. The court of appeals found that Mr. Damra's testimony alone was insufficient because "he can offer nothing apart from his unsupported (and implausible) claim that Fawaz Damra 'could have' testified that Fawaz never spoke to Damra regarding Fawaz's filing of his 1999 tax return." Pet. App. 27a. The court also found that Mr. Damra failed to meet his burden because, had Fawaz not been deported, Fawaz "would likely have invoked his Fifth Amendment right not to testify." Pet. App. 30a.[2]

Mr. Damra now respectfully petitions a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because, pursuant to Supreme Court Rule 10, the decision below conflicts with decisions of one or more federal courts of appeals and state courts of last resort on important issues of constitutional law and the court below decided important federal constitutional questions in a way that conflicts with this Court's decision in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982).

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[2] "[A] court should not assume that a potential witness will invoke the Fifth Amendment." *United States v. Moussaoui*, 382 F.3d 453, 472 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

The decision below changes the standard for evaluating violations of the Compulsory Process Clause, as set forth in this Court's decision in *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982), in federal criminal cases in which witnesses with testimony material and favorable to the defense have been deported with the knowledge and assistance of the government. The court of appeals acknowledged that its decision modified this Court's decision in *Valenzuela-Bernal*, stating that "*Youngblood*, then, can be read as modifying or clarifying *Valenzuela-Bernal*." Pet. App. 24a. The decision below alters the *Valenzuela-Bernal* standard by imposing a requirement that a defendant demonstrate that the government acted in bad faith by deporting the witness. The decision below is not only contrary to this Court's decision in *Valenzuela-Bernal*, but also undermines this Court's decision in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (cited by the Court in *Valenzuela-Bernal*), which affirmatively found a constitutional violation "irrespective of the good faith or bad faith of the prosecution."

As demonstrated below, the federal courts of appeals, as well as state courts, are split on whether bad faith by the government is required to establish a violation of the Sixth Amendment's Compulsory Process Clause when the government deports a witness with evidence material and favorable to the defense. The courts of appeals have themselves recognized that there is no uniformity among them regarding whether a showing of bad faith is required. *United States v. Gonzales*, 436 F.3d 560, 578 (5th Cir.), *cert. denied*, 547 U.S. 1139 (2006) ("The Seventh, Ninth, and Tenth Circuits recognize a second prong: the defendant must establish that the government

acted in bad faith."). Other courts have affirmatively stated that this Court's decision in *Valenzuela-Bernal* does not require that a defendant show that the government acted in bad faith. *United States v. Neb. Beef, Inc.*, 194 F. Supp. 2d 949, 957 (D. Neb. 2002) (bad faith not explicitly required by *Valenzuela-Bernal*); *State v. Reeves*, 444 So. 2d 20, 23 (Fla. Dist. Ct. App. 2d Dist. 1983) ("*Valenzuela-Bernal* did not involve an allegation of bad faith on the government's part").

The decision of the court of appeals is also contrary to this Court's decision in *Valenzuela-Bernal* in regard to whether a defendant can establish, through his own testimony, that the deported witness's testimony is material and favorable to the accused. The decision in *Valenzuela-Bernal*, relying on this Court's prior decisions in *Roviaro v. United States*, 353 U.S. 53 (1957) and *Washington v. Texas*, 388 U.S. 14 (1967), suggested that such evidence is sufficient.

Uniformity on these issues is important because there is a national interest in uniform enforcement of the immigration laws, the criminal code, and the compulsory process guarantee of the U.S. Constitution. Witnesses may often be deported from jurisdictions which are different from the ones in which the criminal case is pending. Further, witnesses who are being held by the government are subject to transfer throughout the United States prior to deportation. These witnesses may have information and testimony material and favorable to defendants in multiple jurisdictions. Accordingly, it is highly desirable that uniform standards be established to assess whether the government's deportation of a witness with material and favorable testimony is a violation of the Compulsory Process Clause.

I. This Court's Decision in *Valenzuela-Bernal* Did Not Require That a Defendant Asserting a Violation of His Right to Compulsory Process Based on Deportation of a Material and Favorable Witness Demonstrate That the Government Acted in Bad Faith.

This Court's decision in *Valenzuela-Bernal* arose from cases recognizing the defendant's right to present a defense. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment . . . ." *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes, v. South Carolina*, 547 U.S. 319, 324 (2006) *quoting Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

In *Valenzuela-Bernal*, five Justices of this Court, in a case involving the government's deportation of a prospective defense witness, held that a violation of the Compulsory Process Clause of the Sixth Amendment "requires some showing that the evidence lost would be both material and favorable to the defense." *Valenzuela-Bernal*, 458 U.S. at 873. This Court borrowed from *Brady v. Maryland,* 373 U.S. 83 (1963) and "other cases in what might loosely be called the area of constitutionally guaranteed access to evidence" the requirement that the lost testimony be material. *Valenzuela-Bernal*, 458 U.S. at 867.

The Court found support for the materiality requirement in this Court's prior Compulsory Process Clause decision in *Washington v. Texas*, 388 U.S. 14 (1967), which had found a violation of the Clause "when the defendant was arbitrarily deprived of 'testimony [that] would have been *relevant* and *material*, and . . . *vital* to the defense.'" *Valenzuela-Bernal*, 458 U.S. at 867 (citation omitted) (emphasis in original). Justice Rehnquist, writing for the Court in *Valenzuela-Bernal*, found "*Washington's* intimation of a materiality requirement more than borne out" by cases such as *Brady v. Maryland*, 373 U.S. 83 (1963) which the Court found "held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, ***irrespective of the good faith or bad faith of the prosecution***.'" *Id.* at 868 (citation omitted) (emphasis added).

This Court in *Valenzuela-Bernal* did not require that the defendant establish that the government acted in bad faith in order to establish a violation of the Compulsory Process Clause. There is no basis in *Brady*, or the other cases cited by this Court in *Valenzuela-Bernal*, for requiring that the defendant demonstrate that the government acted in bad faith, and this Court has never overruled *Brady*'s holding that the prosecutor's good faith or bad faith is irrelevant to whether due process is violated by suppression of evidence favorable to the accused.

The decision of the court of appeals in this case, which did require that a defendant asserting a Compulsory Process Clause claim demonstrate that

the government acted in bad faith, conflicts with the decision in *Valenzuela-Bernal*.[3]

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[3] In subsequent cases in which this Court or its Justices have cited *Valenzuela-Bernal*, this Court has not suggested that a showing of bad faith was required to establish a violation of the Compulsory Process Clause. *See Strickler v. Greene*, 527 U.S. 263, 299-300 (1999) (Souter, J., dissenting) (characterizing *Valenzuela-Bernal* as holding "that sanctions against the Government for deportation of a potential defense witness were appropriate only if there was a 'reasonable likelihood' that the lost testimony 'could have affected the judgment of the trier of fact'"); *Boyde v. California*, 494 U.S. 370, 380 n.4 (1990) (citing *Valenzuela-Bernal* for the proposition that "[d]eportation of potential defense witnesses does not violate due process unless 'there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact.'"); *United States v. Bagley*, 473 U.S. 667, 681-682 (1985) (characterizing *Valenzuela-Bernal* as "the Court held that due process is violated when testimony is made unavailable to the defense by Government deportation of witnesses 'only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact.'"); *California v. Trombetta*, 467 U.S. 479, 486 (1984) (citing *Valenzuela-Bernal* for the proposition that "the Government could offend the Due Process Clause of the Fifth Amendment if, by deporting potential witnesses, it diminished a defendant's opportunity to put on an effective defense").

Likewise, in a case remanded by this Court for further consideration in light of *Valenzuela-Bernal*, the court did not interpret *Valenzuela-Bernal* as requiring a showing that the government had acted in bad faith. *See United States v. Marquez-Amaya*, 686 F.2d 747, 748 (9th Cir. 1982) ("We have carefully reviewed the record on appeal and find our affirmance was in error. Appellant made no 'plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses.'").

II. This Court's Decision in *Arizona v. Youngblood*, Which Addressed the Obligations of the Police in Cases Involving "Potentially" Useful Evidence, Does Not Require That a Defendant Asserting a Violation of the Compulsory Process Clause Based on the Deportation of a Witness with Material and Favorable Evidence Demonstrate That the Government Acted in Bad Faith by Deporting the Witness.

The decision of the court of appeals in this case confused a violation of the right to compulsory process based on loss of a material and favorable witness with a violation of due process based on destruction of potentially useful evidence.

Arizona v. Youngblood, 488 U.S. 51 (1988), relied upon by the court of appeals, did not involve evidence material and favorable to the defense pursuant to the standards set forth in *Brady* and *Valenzuela-Bernal*. The evidence at issue in *Youngblood* was improperly preserved semen samples, which, unlike the evidence in *Brady* and this case, were not known to be material and favorable to the defense. The samples were characterized by this Court as only "potentially" useful. *Id.* at 58. This Court found that the case before it in *Youngblood* was distinguishable from *Brady* and the line of cases following *Brady* because the evidence in the *Brady* line of cases was material exculpatory evidence, while the evidence in *Youngblood* could not be so characterized.

Since the semen samples were only "potentially" useful, this Court, in an opinion joined by five Justices of this Court, found that a defendant could not

establish a violation of due process without demonstrating that the government acted in bad faith.

> The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.

Id. at 57. The Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58.

The court of appeals in this case improperly changed the standard applicable to compulsory process claims involving evidence material and favorable to the defense by adding the requirement that the defendant demonstrate that the government acted in bad faith. Pet. App. 24a. The court of appeals held that the bad faith requirement applied by this Court in *Youngblood* to "potentially" useful evidence that is withheld or destroyed by the government "applies equally to the metaphorical 'destruction' of potentially useful deported-witness testimony not known by the government to be exculpatory." Pet. App. 24a.

Because a defendant asserting a compulsory process claim is already required to demonstrate that the testimony of the deported witness is "both material

and favorable to the defense," he should not be required to demonstrate that the government acted in bad faith by deporting a defense witness. Evidence "material and favorable to the defense" is equivalent to the "evidence favorable to the accused" standard of *Brady* which gives rise to a constitutional violation "irrespective of the good faith or bad faith of the prosecution," *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and is distinguishable from the "evidentiary material [in *Youngblood*] of which no more can be said than that it could have been subjected to tests, ..." *Youngblood*, 488 U.S. at 57.

The decision of the court of appeals conflicts with this Court's decisions in *Valenzuela-Bernal* and *Brady v. Maryland* by requiring that a defendant asserting a compulsory process claim demonstrate that the government acted in bad faith.

III. The Courts of Appeals and State Courts Are Split in Regard to Whether a Defendant Asserting a Violation of His Right to Compulsory Process Based on the Deportation of a Witness With Material and Favorable Evidence Is Required to Establish That the Government Acted in Bad Faith.

The federal courts of appeals and state courts are split in regard to whether a showing of bad faith is required.

A. Four Courts of Appeals Have Not Required That a Defendant Demonstrate That the Government Acted in Bad Faith in Order to Establish a Violation of the Compulsory Process Clause.

Several courts of appeals have ***not*** required that a defendant asserting a violation of the Compulsory Process Clause demonstrate that the government acted in bad faith.

- The D.C. Circuit has not cited bad faith as an element of a Compulsory Process Clause claim. *See United States v. Dean*, 55 F.3d 640, 662 (D.C. Cir. 1995).

- The First Circuit, in *United States v. Filippi*, 918 F.2d 244 (1st Cir. 1990), found that the defendant's right to compulsory process was violated by the government's refusal to permit a witness to travel from Ecuador to the United States to testify. The court found that the defendant had "made the preliminary showings of materiality and favorability required by *Valenzuela-Bernal*" and did not require evidence that the government acted in bad faith in order to establish a violation of the Sixth Amendment. *Id.* at 248. The court granted no relief on grounds of waiver. Other First Circuit cases also do not require bad faith. *See United States v. Hoffman*, 832 F.2d 1299, 1303 (1st Cir. 1987) ("There can be no violation of the defense's right to present evidence, we think, unless some contested act or omission (1) can be attributed to the sovereign and (2) causes the loss or erosion of testimony which is both (3) material to the case and (4) favorable to the accused.").

- The Fourth Circuit, in assessing a claim that the government's failure to provide the defendant access to witnesses who were enemy combatants violated the Compulsory Process Clause, did not require the defendant to demonstrate that the government acted in bad faith by refusing to make the witnesses available to the defendant. *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005). *See United States v. Soriano-Jarquin*, 492 F.3d 495, 504 (4th Cir. 2007), *cert. denied*, 552 U.S. 1189 (2008) (no compulsory clause violation where testimony in issue "was wholly peripheral to the defendant's case," with no inquiry regarding the government's bad faith); *United States v. Rivera*, 859 F.2d 1204 (4th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) (applying *Valenzuela-Bernal* without reference to any requirement that the defendant demonstrate bad faith by the government).

- In *United States v. One 1982 Chevrolet Crew-Cab Truck*, 810 F.2d 178, 183 (8th Cir. 1987), a forfeiture case, the Eighth Circuit held that a criminal defendant must make a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, without reference to any requirement that the defendant demonstrate that the government acted in bad faith. *But see United States v. Neb. Beef, Inc.*, 194 F. Supp. 2d 949, 957 (D. Neb. 2002) ("While not explicitly required by *Valenzuela-Bernal*, some circuits have required that defendants also prove that the government's removal action was a result of 'bad faith.'").

B. Two Courts of Appeals Have Issued Conflicting Decisions or Have Not Determined Whether a Defendant Is Required to Demonstrate That the Government Acted in Bad Faith in Order to Establish a Violation of the Compulsory Process Clause.

Other courts of appeals have issued conflicting decisions regarding whether evidence of bad faith by the government is required.

Panels of the Third Circuit have issued conflicting decisions regarding whether bad faith is an element of a claimed violation of the right to compulsory process. *Compare Government of Virgin Islands v. Mills*, 956 F.2d 443, 446 (3d Cir. 1992) ("to establish that he was convicted in violation of his Sixth Amendment right to compulsory process, he must show: First, that he was deprived of the opportunity to present evidence in his favor; second, that the excluded testimony would have been material and favorable to his defense; and third, that the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose.") *with United States v. Santtini*, 963 F.2d 585, 596-597 (3d Cir. 1992) ("As a general matter, even when actions by the prosecution appear to deprive a criminal defendant of his constitutional right to present a defense, no remedy will lie for such infringement absent a showing that the government has caused the unavailability of material evidence and has done so in bad faith.").

In *United States v. Gonzales*, 436 F.3d 560, 578 (5th Cir.), *cert. denied*, 547 U.S. 1180 (2006), in which a defendant asserted that the government's deportation

of witnesses violated his compulsory process rights, the Fifth Circuit noted that "[t]his circuit has not yet fully defined the contours of a claim under *Valenzuela-Bernal*." The court of appeals noted that all courts have required that the defendant demonstrate that the lost testimony was material and favorable to the defense. "The Seventh, Ninth, and Tenth Circuits recognize a second prong: the defendant must establish that the government acted in bad faith." *Id.* The court declined to address whether bad faith was required, finding a lack of plain error. "Whether this court ever adopts the second prong, requiring a showing of bad faith by government officials, remains an open question that we do not decide today." *Id.* at 579.

C. Five Courts of Appeals Have Required That a Defendant Demonstrate That the Government Acted in Bad Faith in Order to Establish a Violation of the Compulsory Process Clause.

Other courts of appeals have required a showing of bad faith as an element of a claimed violation of compulsory process in connection with deportation of a witness with testimony material and favorable to the accused. *See Buie v. Sullivan*, 923 F.2d 10 (2d Cir. 1990); *United States v. Chaparro-Alcantara*, 226 F.3d 616 (7th Cir.), *cert. denied*, 531 U.S. 1026 (2000); *United States v. Medina-Villa*, 567 F.3d 507, 517 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 1545 (2010); *United States v. Dring*, 930 F.2d 687 (9th Cir. 1991), *cert. denied*, 506 U.S. 836 (1992); *United States v. Iribe-Perez*, 129 F.3d 1167 (10th Cir. 1997); *United States v. De La Cruz Suarez*, 601 F.3d 1202 (11th Cir.), *cert. denied*, 130 S.Ct. 3532 (2010).

D. State Courts Are Split on Whether a Defendant Is Required to Demonstrate That the Government Acted in Bad Faith in Order to Establish a Violation of the Compulsory Process Clause.

State courts have likewise split on whether bad faith is required to establish a violation of the Compulsory Process Clause in cases involving deportation of witnesses. *Compare People v. Jacinto*, 231 P.3d 341, 345 (Cal. 2010) (prosecutorial misconduct required); *State v. Estrella*, 893 A.2d 348, 366 (Conn. 2006) (bad faith required); *State v. Serna*, 787 P.2d 1056, 1060 (Ariz. 1990) (bad faith required) *with Ramirez v. State*, 842 S.W.2d 796, 799 (Tex. App. El Paso 1992) (evaluation of compulsory process claim in context of deported witness without reference to requirement of bad faith); *People v. Garcia*, 735 P.2d 897, 899 (Colo. Ct. App. 1986) (evaluation of compulsory process claim in context of deported witness without reference to requirement of bad faith); *State v. Vargas*, 704 P.2d 125, 129 (Or. Ct. App. 1985) (evaluation of compulsory process claim in context of deported witness without reference to requirement of bad faith); *State v. Reeves*, 444 So. 2d 20, 23 (Fla. Dist. Ct. App. 2d Dist. 1983) ("*Valenzuela-Bernal* did not involve an allegation of bad faith on the government's part").

IV. A Defendant Asserting a Violation of the Sixth Amendment's Compulsory Process Clause May Establish Through the Defendant's Own Trial Testimony That the Witness Deported By the Government Would Have Provided Material and Favorable Testimony.

This Court in *Valenzuela-Bernal* held that a claimed violation of the Compulsory Process Clause "requires some showing that the evidence lost would be both material and favorable to the defense." *Valenzuela-Bernal*, 458 U.S. at 873.

In this case, "[a]t trial, under oath, [Mr.] Damra testified that he never spoke with Fawaz about Fawaz's taxes." Pet. App. 30a. The court of appeals found that this was insufficient to establish that Fawaz's testimony would be favorable and material because "the defendant's unsupported word alone is not sufficient where the defendant maintains only that the potential witness 'could explain' or 'might have testified' in some favorable fashion." Pet. App. 26a.

This holding of the court of appeals undermines this Court's decision in *Valenzuela-Bernal* which held that "the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality." *Valenzuela-Bernal*, 458 U.S. at 871. Since Mr. Damra and Fawaz were the only parties to their conversations, there is nothing more that Mr. Damra could provide to "support" his claim regarding Fawaz's missing testimony other than his own sworn testimony. This Court recognized as much in *Valenzuela-Bernal*, noting that "respondent was

present throughout the commission of this crime. No one knows better than he what the deported witnesses actually said to him, or in his presence, that might bear upon whether he knew that Romero-Morales was an illegal alien who had entered the country within the past three years." *Valenzuela-Bernal*, 458 U.S. at 871. This Court held: .

> In some cases, such a showing may be based upon agreed facts, and will be in the nature of a legal argument rather than a submission of additional facts. In other cases the criminal defendant may advance additional facts, either consistent with the facts already known to the court or accompanied by a reasonable explanation for their inconsistency with such facts, with a view to persuading the court that the testimony of deported witness would have been material and favorable to his defense. Because in the latter situation the explanation of materiality is testimonial in nature, and constitutes evidence of the prejudice incurred as a result of the deportation, it should be verified by oath or affirmation of either the defendant or his attorney.

Id. at 873 (footnote omitted).

That Mr. Damra's sworn testimony is sufficient evidence of materiality is confirmed by the prior decisions of this Court relied upon in *Valenzuela-Bernal* -- *Roviaro v. United States*, 353 U.S. 53 (1957) and *Washington v. Texas*, 388 U.S. 14 (1967). In *Roviaro*, this Court held that the defendant's right to put on a defense was violated by the government's refusal to disclose the identity of an informer to whom

the defendant was alleged to have sold drugs. The informer, John Doe, was the only other witness to the transaction in issue. This Court held that this fact alone made the informer's testimony material.

> The circumstances of this case demonstrate that John Doe's possible testimony was highly relevant and might have been helpful to the defense. So far as petitioner knew, he and John Doe were alone and unobserved during the crucial occurrence for which he was indicted. Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness. Petitioner's opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he "transported" from the tree to John Doe's car.

Roviaro, 353 U.S. at 63-64. This Court noted that "[t]his is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses." *Id.* at 64.

Likewise, in *Washington v. Texas*, 388 U.S. 14 (1967), this Court held that the accused's Sixth Amendment right to compulsory process was violated when, pursuant to a state statute, he was denied the opportunity to present the testimony of an alleged accomplice, similar to Fawaz Damra in this case. This Court found that "Fuller was the only person other than petitioner who knew exactly who had fired the shot-gun and whether petitioner had at the last minute attempted to prevent the shooting." *Id.* at 16. The Court held that Washington "was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Id.* at 23.

Valenzuela-Bernal, and the cases underlying that decision, establish that the testimony of the defendant is a sufficient basis to establish that the testimony of a deported witness is material and favorable. The decision of the court of appeals that Mr. Damra's testimony alone is insufficient is contrary to *Valenzuela-Bernal.*[4]

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[4] The court of appeals found that even after Fawaz was deported and beyond the compulsory process of the district court, Fawaz could have volunteered to be deposed and Mr. Damra could have traveled to the Palestinian Authority to take Fawaz's deposition there. Pet. App. 28a. However, it is undisputed that once Fawaz was deported to Israel for the sole and limited purpose of travel to the West Bank, the district court lacked subpoena power to compel his appearance for trial or deposition. *See United States v. Moussaoui*, 382 F.3d 453, 463-464 (4th Cir. 2004), *cert. denied*, 544

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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U.S. 931 (2005) ("the process power of the district court does not extend to foreign nationals abroad"). Likewise, no international treaties or conventions exist between the United States and the Palestinian Authority which would have permitted Mr. Damra to obtain Fawaz's testimony by deposition.