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

PETITIONER'S REPLY BRIEF

RICHARD L. STOPER, JR.
Counsel of Record
ROTATORI BENDER CO., L.P.A.
BY: J. TIMOTHY BENDER (#0007522)
RICHARD L. STOPER (#0015208)
800 LEADER BUILDING
526 SUPERIOR AVENUE EAST
CLEVELAND, OHIO 44114
(216) 928-1010
rstoper@rotatori.com

Attorneys for Petitioner Alex Damra

May 4, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Blank Page

TABLE OF CONTENTS

Blank Page

TABLE OF AUTHORITIES

Cases

Blank Page

REPLY BRIEF FOR PETITIONER

The government has re-phrased the "Questions Presented" in the Petition for Certiorari in an attempt to characterize the issues placed before this Court by Mr. Damra as "fact-bound" claims that do not warrant this Court's review. To the contrary, the "Questions Presented" by the Petition are purely legal issues. The "Questions Presented" allow this Court to determine whether the court of appeals, contrary to the precedents of this Court, improperly adopted new standards for assessment of compulsory process claims arising from the deportation of a defense witness with material and favorable evidence.

The court of appeals, without precedent for doing so, imported a bad faith requirement from this Court's decision in *Arizona v. Youngblood*, 488 U.S. 51 (1988) into the standard applicable to review of violations of the Compulsory Process Clause based on the government's deportation of a witness with testimony "material and favorable to the defense." Likewise, the decision of the court of appeals directly contradicts this Court's holding in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) that a defendant's testimony is sufficient to establish that the testimony of a deported witness is "material and favorable to the defense." The government would have this Court permit the court of appeals decision to stand even though such decision altered the standards adopted by this Court in *Valenzuela-Bernal* and materially modified the rules applicable to exculpatory evidence articulated in this Court's decision in *Brady v. Maryland,* 373 U.S. 83 (1963). For the reasons set forth in the petition and below, the decision of the court of appeals should be reviewed by this Court.

I. The "Material and Favorable to the Defense" Standard Applied by This Court in *Valenzuela-Bernal* is Identical to the "Evidence Favorable to An Accused" Standard of *Brady v. Maryland*.

As demonstrated in Mr. Damra's petition, the "material and favorable to the defense" standard enunciated by this Court in *Valenzuela-Bernal* is identical to the "evidence favorable to an accused" standard set forth in *Brady v. Maryland*. Pet. 12-14. In light of the fact that the evidence in issue, whether the testimony of a deported witness or evidence withheld by a prosecutor, meets the same standard of exculpatory value, there is no rationale for providing relief to a defendant from whom the government has withheld *Brady* material, "irrespective of the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87, while denying relief to a defendant whom the government has deprived of the "material and favorable" testimony of a deported witness because such a defendant cannot demonstrate that the government acted in bad faith. There is no constitutional distinction between the evidence at issue in *Brady* and the evidence at issue in a Compulsory Process Clause case such as this one that would warrant the conflicting standards articulated by the court of appeals.

The government admits that the court of appeals altered the standards set forth by this Court in *Valenzuela-Bernal* by presuming that this Court itself had, through its decision in *Arizona v. Youngblood*, *sub silentio* "modifi[ed] or clarifi[ed]" the standard it had set forth in *Valenzuela-Bernal*. Opp. 7. The government and court of appeals reach this conclusion

despite the fact that *Youngblood* did not involve the government's deportation of a defense witness, nor did this Court expressly find that the standards set forth in *Youngblood* relating to "potentially useful evidence" applied to material exculpatory evidence of the kind at issue in *Brady* and *Valenzuela-Bernal*.

The government contends that a comparison between the "evidence favorable to an accused" withheld in *Brady* and the "material and favorable" testimony of a deported witness is misplaced. Opp. 10. To the contrary, the lost testimony of the deported witness in this case is more analogous to the material exculpatory evidence in *Brady* than the untested semen samples in *Arizona v. Youngblood*. Mr. Damra, by testifying that there were no discussions about taxes between himself and his brother, Fawaz Damra, established that Fawaz Damra's testimony was "material and favorable to the defense."

Fawaz Damra's prospective testimony was not the equivalent of the untested semen samples in *Youngblood*, as to which no more could be said than that they "could have been subjected to tests." *Youngblood*, 488 U.S. at 57. Fawaz Damra's testimony was not merely "potentially useful" as characterized by the government, but was "material and favorable" evidence because Mr. Damra, the sole witness to the conversations with his brother, testified under oath, as required by *Valenzuela-Bernal*, that the two brothers had no discussions regarding taxes. *See Valenzuela-Bernal*, 458 U.S. at 873 (alleged testimony of deported witness should be "verified by oath or affirmation of either the defendant or his attorney"). Fawaz Damra's prospective testimony was known to be "material and favorable" as Mr. Damra's testimony established.

Justices of this Court have recently noted the differing standards applied in *Arizona v. Youngblood* and *Brady v. Maryland* to "potentially useful evidence" versus "material exculpatory evidence." *Connick v. Thompson*, __ U.S. __, 131 S.Ct. 1350, 179 L.Ed.2d 417, 437 (2011) (Scalia, J., concurring). Accordingly, the petition should be granted so that this Court can itself determine whether the bad faith requirement applied in *Youngblood* to "potentially useful" evidence should be extended to compulsory process claims involving "material and favorable" evidence with the same exculpatory value as evidence in cases involving *Brady* claims.

The government contends that it did not act in bad faith by deporting Fawaz Damra prior to trial. Opp. 13 n. 4. However, application of the bad faith standard to compulsory process claims was first announced by the court of appeals in this case. Therefore, the parties never litigated whether the government acted in bad faith and Mr. Damra had no opportunity to address the issue.

Although the government contends that Mr. Damra and the district court could not be notified of the planned deportation of Fawaz Damra on January 2, 2007 due to national security concerns, the government never explains why the prosecutor, just four months earlier, had confirmed to the district court and Mr. Damra that defendant Fawaz Damra would be present at the trial. Pet.App. 26a-27a. The government's contention that Mr. Damra first asked to call Fawaz Damra as a witness on February 13, 2007, after Fawaz had been deported, rings hollow in light of the prosecutor's prior assurance that Fawaz would be present at trial.

II. This Court's Decision in *Valenzuela-Bernal* Determined That A Defendant's Testimony Is Sufficient to Establish That The Testimony of a Deported Witness is "Material and Favorable."

The second question presented by Mr. Damra's petition is the purely legal question of whether, as this Court held in *Valenzuela-Bernal*, the testimony of the defendant alone is sufficient to establish that the testimony of a deported defense witness would have been "material and favorable." The government attempts to characterize this inquiry as a "fact-bound claim," despite the fact that this Court's prior cases clearly establish that the testimony of a deported or unavailable witness is "material and favorable" where that witness, as in this case, is the only other witness to the conversations in issue and where the defendant, like Mr. Damra, testifies that the missing witness's testimony would be "material and favorable."

The government admits that this Court held in *Valenzuela-Bernal* that a "defendant could establish through his own sworn testimony that testimony of a deported witness would have been material and favorable." Opp. 14. That is exactly what happened in this case. This Court reached this conclusion after noting that the defendant in *Valenzuela-Bernal*, like defendants in other similar cases decided by this Court, was the sole witness to his interaction with the deported or unavailable witness. *See Valenzuela-Bernal*, 458 U.S. at 871 ("[n]o one knows better than he what the deported witnesses actually said to him"); *Washington v. Texas*, 388 U.S. 14, 16 (1967) ("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"); *Roviaro v. United States*, 353 U.S. 53, 64 (1957) ("[t]he informer was the only witness in a position to amplify or contradict the testimony of government witnesses").

In these cases, as in this case, because the defendant was the only person with knowledge regarding the testimony of the deported or unavailable witness, such knowledge, as long as it was "verified by oath or affirmation of either the defendant or his attorney," was found by this Court to meet the defendant's burden to establish that the testimony of the unavailable witness was "material and favorable." *Valenzuela-Bernal*, 458 U.S. at 873. As this Court held in *Roviaro*, the defendant was entitled to the testimony of the missing witness to "contradict the testimony of government witnesses." *Roviaro*, 353 U.S. at 64.

The government's response asserts that, contrary to *Roviaro*, *Valenzuela-Bernal*, and *Washington v. Texas*, the testimony of a single government witness (Mir Ali, in this case), with no first-hand knowledge of the conversations between Mr. Damra and his deported brother, may be used to establish that the testimony of the deported witness would not be "material and favorable," despite the fact that the testimony of Mr. Damra, the only witness to the conversations in issue, established that the testimony of Fawaz Damra was "material and favorable." Opp. 15. In light of the fact that Mr. Damra was the sole witness to conversations between himself and his brother, there is nothing else Mr. Damra needed to do, or could do, to establish that Fawaz Damra's testimony was "material and favorable."

The decision of the court of appeals, supported by the government, effectively overrules this Court's holding in *Valenzuela-Bernal* that a defendant can establish through his own sworn testimony that the testimony of a deported witness is "material and favorable." If the government's position prevails, no defendant with exclusive knowledge of the testimony of a deported witness will be able to establish that the witness's testimony is "material and favorable." Such a drastic re-writing by the court of appeals of the applicable standard as set forth in this Court's decision in *Valenzuela-Bernal* should not be permitted without the benefit of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard L. Stoper, Jr.
Counsel of Record
ROTATORI BENDER CO., L.P.A.
By: J. Timothy Bender (#0007522)
Richard L. Stoper (#0015208)
800 Leader Building
526 Superior Avenue, N.E.
Cleveland, Ohio 44114
(216) 928-1010
rstoper@rotatori.com

Attorneys for Petitioner Alex Damra

Blank Page