No.

In the

Supreme Court of the United States

ROGER EVERETT SMITH, III, Petitioner

v.

UNITED STATES, Respondent

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

Petition for Writ of Certiorari

S. JONATHAN YOUNG
Post Office Box 42245
Tucson, Arizona 85733-2245
(520) 795-0525
jon@williamsonandyoung.com
Counsel of Record for Petitioner

Questions Presented For Review

I. Whether the mailing of form letters addressed to three material witnesses in three small villages in Mexico approximately two weeks before trial amounts to a "good-faith effort to procure witnesses" so as to comport with the Confrontation Clause to the Sixth Amendment before resorting to deposition testimony.

II. Whether there was sufficient evidence of alienage in this alien transporting case where the Government failed to ask all three material witnesses if they were United States citizens, asking instead if they were citizens of Mexico, as if the two things were mutually exclusive.

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United States v. Smith, 850 F. App'x 579 (9th Cir. June 17, 2021).

Statement of the Basis for Jurisdiction

The order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Appeal was entered on June 17, 2021. Petitioner's motion for rehearing was denied on July 22, 2021. This Petition for Writ of Certiorari is timely filed within 90 days of that date, pursuant to Supreme Court Rule 13. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). Service has been made on the United States Solicitor General.

Constitutional and Federal Provisions Involved

U.S. CONST. art. VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …"

8 U.S.C. § 1101 provides in pertinent part:

> "As used in this Act … [t]he term "alien" means any person not a citizen or national of the United States."

8 U.S.C. § 1324 provides in pertinent part:

> "(a)(1)(A)(ii) Any person who … knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien …"
>
> …
>
> "(d) Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence."

Fed. Rule Crim. Proc. 15(f) provides in pertinent part:

> "An order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence."

Federal Rule of Evidence 804(b) provides in pertinent part:

> "The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: … Testimony that: (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had – or, in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross-, or redirect examination."

Statement of the Case

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant was charged with a federal crime. The Ninth Circuit Court of Appeals had jurisdiction over the direct appeal pursuant to 28 U.S.C. § 1291 based on the entry of the final judgment by the district court on September 22, 2020.

ARGUMENT

I
Confrontation Requires Actual Good Faith Efforts, Not Just Sending Out Letters To Material Witnesses In Small Villages In Mexico Two Weeks Before Trial, Before The Government May Resort To Deposition Testimony

This decision of U.S. Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power.

Trial in this matter began February 4, 2020. (2-ER-42.) The Government had given the Federal Public Defender's Office letters addressed to the material witnesses in Mexico dated January 14, 2020, somewhere around that January 14 date. (2-ER-46.) The material witnesses lived in the Mexican towns of Chilpancingo, San Antonio La Portilla and

Tecamachalco. (3-ER-404, 417 and 428.) There is absolutely no reason to expect that a letter would make it to those small towns and back in the span of two weeks. That was not a serious effort to contact anybody. Any town as small as these will know the name of every resident, who their family members are and how to contact them. Finding these material witnesses was well within the realm of possibility. Mailing them two weeks before trial, however, was a meaningless lack of effort.

Before before the Government may use videotaped depositions of material witnesses at trial, Sixth Amendment confrontation requires that it make good-faith efforts prior to trial to locate and present the witnesses at trial.

> "Section 1324(d) authorizes use at trial of the videotaped deposition of a witness to a § 1324(a) violation 'who has been deported or otherwise expelled from the United States, or is otherwise unable to testify.' 8 U.S.C. § 1324(d). Nevertheless, 'good faith efforts to procure witnesses [are] still required' to comport with the Confrontation Clause to the Sixth Amendment. *United States v. Santos-Pinon*, 146 F.3d 734, 736 (9th Cir. 1998). The Sixth Amendment requires 'good-faith efforts undertaken prior to trial to locate and present th[e] witness.' *Jackson v. Brown*, 513 F.3d 1057, 1084 (9th Cir. 2008) (alterations in original) (quoting *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980))." (Emphasis added.)

United States v. Rodriguez, 880 F.3d 1151, 1166 (9th Cir. 2018).

Confrontation is not just an opportunity for the defendant to ask questions of a witness. Confrontation is, even primarily, an opportunity to compel the witness to face the jury to whom they are testifying.

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. (Emphasis added.)

Mattox v. United States, 156 U.S. 237, 242-43 (1895). See also, *California v. Green*, 399 U.S. 149, 157 (1970).

Here the Government confirmed, on the record at the material witness depositions before trial, that Mr. Smith was declining its plea offer and was proceeding to trial. (EOR 402.) Then the Government immediately deported its own material witnesses. (CR 13, 14; EOR 47.) Approximately two weeks before trial the Government made the meaningless gesture of giving the FPD letters to forward to its former material witness clients in Mexico. (EOR 46.) This outsourcing of witness procurement to the FPD is far short of the Government's efforts in previous cases, which themselves have come up short of establishing good faith efforts to return the Government's own witnesses to court.

The Government knew before it deported the material witnesses that this case was proceeding to trial. It verified as much before the very first witness was seated for the material witness depositions. (EOR 402.)

The Government informed the FPD, prior to the material witness depositions, that it was not prosecuting the material witnesses. (EOR 443.) The last time that the FPD had any contact with the material witnesses was at the material witness depositions. (EOR 45-46.)

The Government has to work at least as hard to get a witness to trial as it would if it did not already have a deposition in its file with which it was already satisfied.

> "When the government seeks to rely on prior recorded statements of a witness on the ground that the witness is unavailable, it bears the burden of establishing that its unsuccessful efforts to procure the witness's appearance at trial were 'as vigorous as that which the government would undertake to secure a critical witness if it has no prior testimony to rely upon in the event of 'unavailability.'" (Emphasis added.)

United States v. Burden, 934 F.3d 675, 686 (D.C. 2019). If the Government deported the witness, it needs to try even harder. *United States v. Yida*, 498 F.3d 945, 955 (9th Cir. 2007) ("implicit in the duty to use reasonable means to procure the presence of an absent witness is the duty to use reasonable means to prevent a present witness from becoming absent"); *United States v. Burden*, 934 F.3d 675, 686 (D.C. 2019) ("Where the government itself bears

some responsibility for the difficulty of procuring the witness, such as by deporting the witness, the government will have to make greater exertions to satisfy the standard of good-faith and reasonable efforts than it would have if it had not played any role.")

The Government has tried far harder to produce material witnesses in other cases and still come up short of proving witness unavailability. In *Burden*, the Government sent a letter to material witness counsel with a subpoena and a promise to help him obtain a visa and pay his travel expenses, including round-trip airfare, transportation, room, board and a per diem witness fee and the Government sent the letter and subpoena directly to the witness's last known address and had DHS personnel in Thailand reach the witness by telephone, only to be informed that the witness "had no desire to travel to the United States to cooperate in any way." The Court there still determined that the Government had failed to demonstrate witness unavailability.

In *United States v. Yida*, 498 F.3d 945 (9th Cir. 2007), the court extensively cited the First Circuit case of *United States v. Mann*, 590 F.2d 361 (1st Cir. 1978):

> "Thus, '[e]ven where the absent witness is beyond the court's jurisdiction, the government must show diligent effort on its part to secure the (witness') voluntary return to testify.' *United States v. Mann*, 590 F.2d 361, 367 (1st Cir. 1978) (quoting *Aquino*, 378 F.2d at 551).

. . .

> "In despite of court issuance of a subpoena and a request from the State Department, Shine refused to return to testify. *Id*. The trial court admitted Shine's deposition after receiving assurances from the government that it had offered to pay for her expenses and subsistence and that she had still refused to return. *Id*. at 364.
>
> "On appeal, the First Circuit stated that its inquiry into the government's efforts to produce the witness 'need not [be] limit[ed] . . . to that narrow time frame,' i.e. the time frame immediately before the trial but after the witness had left the United States. *Mann*, 590 F.2d at 368. Because '[I]mplicit . . . in the duty to use reasonable means to procure the presence of an absent witness is the duty to use reasonable means to prevent a present witness from becoming absent,' the court concluded that where the government had such means at its disposal -- i.e. retaining the witness's passport and plane tickets which it had seized -- and did not use them, '[t]he defendant should not suffer the injury from the government's choice.' *Id*. Therefore, the First Circuit held that the government had 'failed to demonstrate that the witness was unavailable,' when she refused to return from Australia to testify, and set aside the defendant's conviction because it was error for the trial court to admit the witness's prior deposition testimony under Rule 804(a)(5). *Id*."

United States v. Yida, 498 F.3d 945, 952-955 (9th Cir. 2007). The court in *Yida* went on to affirm the district court's determination that the Government had not established that the witness was unavailable despite far greater efforts than in the instant case:

> "After receiving assurances from both Reziniano and Pollock [Reziniano's attorney] that Reziniano would return to testify if asked, and receiving advance approval from DHS to have him paroled back into the United States, the government agreed to Reziniano's deportation. The government also agreed to pay for

Reziniano's airfare, hotel, food, and incidental expenses if it called upon him to testify at the retrial. After the government released Reziniano's material witness warrant, he was returned to DHS custody and deported to Israel.

"Pollock continued to communicate with Reziniano after his deportation in order to keep him apprised of developments in the Yida case. On June 12, 2006, Reziniano called Pollock and said that he would not return to the United States to testify because 'he needed to obtain medical treatment and . . . he had not been well since his return to Israel.' Pollock and another former attorney for Reziniano, Michael Stepanian, were unable to convince Reziniano to return to testify. They then notified Assistant United States Attorney Dana Wagner and gave him Reziniano's contact information.

"Both Wagner and Special Agent Miller called Reziniano and tried to convince him to fulfill his promise to return and testify. Reziniano told the government that he was having medical problems related to the conditions he had developed in custody, including a bleeding stomach that might require surgery, and that he was unwilling to leave Israel until these problems were resolved. He estimated that it would be months until he would be able to travel internationally. The government reiterated that it would pay all expenses related to Reziniano''s trip and suggested that he could obtain medical attention while in San Francisco. Reziniano, however, continued to refuse to come to the United States to testify at Yida's retrial.

. . .

"In support of its motion to admit Reziniano's former testimony, the government argued that it acted reasonably because: (1) Reziniano and his attorney made oral assurances that he would return; (2) he had cooperated with the government prior to the first trial; (3) the government was concerned about his Fifth Amendment due process rights (because it was keeping him imprisoned solely on the material witness warrant after he had completed his sentence); and (4) the government agreed to pay his expenses to return to testify.

. . .

> "Accordingly, we affirm the district court's exclusion of Reziniano"'s prior testimony in Yida's retrial because the government has not established that the witness is unavailable under Federal Rule of Evidence 804(a)."

United States v. Yida, 498 F.3d 945, 948-962 (9th Cir. 2007).

The Government's efforts in this case were nowhere near as extensive its efforts in *Yida* (inadequate), *Mann* (inadequate) and *Burden* (inadequate). Outsourcing witness availability to the Federal Public Defender's Office is exactly what the Government did in *Rodriguez* (also inadequate). If the Government did not already have witness depositions stored on its laptop, it certainly would have tried harder to locate its own witnesses. The FPD's incentive to spend its own very limited resources to find former clients that were never prosecuted in order to help the Government at trial in somebody else's case is limited at best.

The panel decision also faults undersigned counsel for not objecting to the Government releasing its own witnesses. But those were never Mr. Smith's witnesses and it was never undersigned counsel's job to stop the Government from shooting itself in its own foot. Undersigned counsel had read *Rodriguez* and well understood the expected good-faith efforts that were required of the Government before the Government could introduce its depositions at trial.

More to the point, the Government was working from a flawed script at the material witness depositions and had neglected to establish alienage (lack of U.S. citizenship) of any of the material witnesses, establishing only that they were citizens of Mexico, but leaving open the possibility of U.S. citizenship for all of them. If undersigned counsel had rushed to fill that gap by asking a question-he-did-not-know-the-answer-to, that would have violated a universal law school lesson with real-world applicability – a lesson that undersigned counsel has relearned enough times already. And, if undersigned counsel had objected during the material witness depositions that the Government had not finished proving its case, his client would have wondered for whom undersigned counsel was working – already a regular topic of conversation with clients as the court rather than the client pays counsel's CJA bill. Proving its own case is the Government's responsibility and having its own witnesses at trial or, failing that, at least making a good-faith effort to have the Government's own witnesses at trial is also a well-understood responsibility of the Government.

II
Proving Mexican Citizenship Does Not Disprove American Citizenship – It Just Proves Mexican Citizenship – The Government Failed to Prove Alienage In This Alien Transporting Case

8 U.S.C. § 1101(a)(3) defines an alien as "not a citizen."

> "The term "alien" means any person not a citizen or national of the United States."

8 USCS § 1101. Multiple citizenships are increasingly common as the world shrinks and as travel becomes ever easier. Asking a material witness whether they are a citizen of the United States does not seem to much to ask, since that is what the material witness depositions were for. Asking whether they are a citizen of Mexico establishes that they are a citizen of Mexico. But it does not establish whether they are a citizen of the United States.

Instead of asking the material witnesses if they were United States citizens, the Government asked them everything but. The government asked if they were Mexican citizens, if they were born in Mexico, if their parents were born in Mexico. The Government asked if they had obtained documentation to enter the United States. But it did not ask if they were entitled to documents. (EOR 400-442.)

Obtaining documents, even if they are entitled to them, for instance an N-600 Certificate of Citizenship, is a lengthy and expensive process. There is a $1,170.00 non-refundable application fee for an N-600. https://www.uscis.gov/feecalculator. There is, according to USCIS, a case processing time of 7.5 to 18.5 months, for N-600 applications processed in Tucson, assuming that the application is properly completed, assuming that no further supporting documents are required and assuming that no

interview is necessary. https://egov.uscis.gov/processing-times/. There are tax ramifications for United States citizens who are recognized as such. There are plenty of reasons for skipping USCIS bureaucratic queue. If citizenship were an affirmative defense, rather than alienage being an element, that might have been something for defense counsel to explore at the material witness depositions. But alienage is part of the Government's case.

It has long been established that, "Mexican appearing, spoke Spanish and did not produce immigration papers" does not support an alien transporting conviction.

> "The only evidence that bears on the issue was the testimony of Agent Ainscoe that all of the people in the truck were 'Mexican appearing,' spoke Spanish, and did not produce immigration papers on request. The description fits thousands of American citizens. The failure to prove alienage defeated the Government's case on the three substantive counts."

United States v. Camacho-Davalos, 468 F.2d 1382, 1383 (9th Cir. 1972).

The border between the United States and Mexico is porous and people walk across it with a high degree of frequency. *In re Approval of the Judicial Emergency Declared in the Dist. of Ariz*., 2011 U.S. App. LEXIS 4491, at 209, Tab I (9th Cir. Mar. 2, 2011) ("Our region is the nation's largest and most porous sector of the U.S.-Mexico border."); *United States v. Maldonado*, 242 F.3d 1, 4 (1st Cir. 2001) ("American borders remain fairly

porous.”). The fact that the material witnesses walked across a porous border does not prove that they are not citizens of this or any other particular country. They have simply not traveled to a port-of-entry, not stood in line at a port-of-entry and not subjected themselves to inspection.

Dated August 9, 2021.

s/S. Jonathan Young
S. JONATHAN YOUNG
Post Office Box 42245
Tucson, Arizona 85733-2245
(520) 795-0525
jon@williamsonandyoung.com
Counsel of Record for Petitioner