NO. 22-_____

In The
Supreme Court of the United States

OCTOBER TERM, 2022

STEPHEN LUIS HARO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Writing for the majority in *Giles v. California,* 554 U.S. 353, 375 (2008), Justice Scalia wrote of his dissenting colleagues:

> The larger problem with the dissent's argument, however, is that the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider "fair." It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values.

In *Giles,* the Court reaffirmed the constitutional principle that admission at trial of *unconfronted*, out-of-court testimony from an unavailable witness, was not an exception to Sixth Amendment jurisprudence where the defendant had done nothing to cause the witness to be unavailable. Here, Haro did not make the material witness unavailable, it was the Government who did so, through multiple negligent actions. Therefore, the issue in this Petition is:

1. Whether the trial court deprived Haro of his Sixth Amendment right to confrontation when it admitted at trial the unconfronted, out-of-court testimony of a material witness, ignoring the mandate of Fed. R. Evid. 804(a)(5), where the Government's negligence had rendered the witness unavailable?

PARTIES TO THE PROCEEDING

Petitioner Stephen L. Haro was the defendant in the district court proceedings and appellant in the court of appeal proceedings. Respondent United State of America was the plaintiff in the district court proceedings and appellee in the court of appeal proceedings.

RELATED CASES

United States v. Stephen Luis Haro, Appeal No. 20-50354, Memorandum Opinion issued December 21, 2021, Docket 29-1, Ninth Circuit Court of Appeals.

United States v. Stephen Luis Haro, Appeal No. 20-50354, Order denying appellant's petition for rehearing, issued February 8, 2022, Docket 33, Ninth Circuit Court of Appeals.

United States v. Stephen Luis Haro, 19CR05229-CAB, United States District Court, Southern District of California, bench trial guilty verdict, Judgment & Commitment entered December 14, 2020, Docket 71.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Luis Stephen Haro, respectfully prays that a *Writ of Certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 8, 2022, denying rehearing.

OPINION BELOW

On December 21, 2021, the Court of Appeals for the Ninth Circuit issued its Memorandum opinion affirming the district court's judgment of conviction.

The Ninth Circuit concluded, in relevant part, that in admitting at trial the previously unexamined testimony of the Government's unavailable witness:

> The district court did not err in concluding that the government made good faith, reasonable efforts to locate [the unavailable witness] to testify at trial. During [the unavailable witness'] deposition, the government informed him that he was obligated to return to the United States, his travel expenses would be paid, and he would be given a parole letter to enter the United States.

Memorandum Opinion, App. 4.

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JURISDICTION

On December 21, 2021, the Ninth Circuit entered its Memorandum Opinion affirming the district court's judgment of conviction, denying Haro's constitutional confrontation challenge. Thereafter, on February 8, 2022, the Ninth Circuit issued its order denying Haro's timely petition for rehearing *en banc*. App. 6.

Jurisdiction of this Court is invoked under Title 28 U.S.C. §§ 1651(a) and 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Fifth Amendment:

"No person shall ... be deprived of life, liberty, or property without due process of law...."

United States Constitution, Sixth Amendment:

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

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INTRODUCTION AND STATEMENT OF THE CASE

Introduction.

This was a routine Title 8 USC § 1324 transportation of an undocumented migrant case in the Southern District of California. But the constitutional confrontation issue it raises is far from routine. Despite the Government's own actions having rendered the witness unavailable, the trial court nevertheless admitted the deposition testimony of the absent Government witness, despite Haro not having had a prior ability to properly cross-examine the witness. Haro's inability to fully confront the witness at the prior deposition was because, at the time, the witness had not committed the post release multiple acts of illegal reentry onto thew U.S., nor had he been deported multiple times by the Government. Illicit conduct and deportations unrevealed by the Government until the eve of trial.

The trial court's decision to admit the unconfronted testimony enabled the Government to prove the intent elements of 1324 and to meet its burden beyond a reasonable doubt. In doing so, the trial court violated Haro's compulsory right under the Sixth Amendment as interpreted in *Hemphill v. New York, 142 S.Ct. 681* (2022), *Giles v. California,* 554 U.S. 353 (2008), and *Crawford v. Washington,* 541 U.S. 36 (2004).

The court's decision to admit the unavailable witness' testimony also disregarded the foundational burden placed on the Government for admission of a previously unexamined, out-of-court statement, where the defendant did not contribute to the unavailability of the witness, required by Fed. R. Evid. 804(a)(5), its own precedent in *United States v. Rodriguez,* 880 F.3d 1151, 1166 (9th Cir. 2018), and the Fifth Amendment's due process clause.

Facts.

The underlying facts are simple.

On November 27, 2019, Mr. Haro and his undocumented migrant passenger, Alejandro Vieyra-Manriquez (Material Witness), were pulled over by a Border Patrol Agent as they traveled westbound on interstate I-8 between the Imperial Valley and San Diego, California. During road-side interrogation, according to the Border Patrol Agent Davis:

> VIEYRA stated he was a citizen of Mexico without immigration documents to be in or remain in the United States legally. At approximately 3:20 PM, Agent Davis placed VIEYRA and HARO under arrest. This location is approximately 17 miles north of the United States/Mexico International Boundary and approximately three miles east of the Tecate, California Port of Entry.

Complaint, App. 7-9. After the Border Patrol Agent elicited these admissions from the Material Witness, he placed Haro under arrest and later charged that:

> On or about November 27, 2019, within the Southern District of California, defendant Luis Stephen HARO, with the intent to violate the immigration laws of the United States, knowing or in reckless disregard of the fact that certain aliens, namely, Alejandro VIEYRA-Manriquez, had come to, entered and remained in the United States in violation of law, did transport and move, said aliens within the United States in furtherance of such violation of law; in violation of Title 8, United States Code, Section 1324(a)(l)(A)(ii).

Id. at 7.

Relying on the statements about alienage and that Haro allegedly told the Material Witness to tell the Border Patrol Agent that he had a work permit, the Government filed a Complaint charging Haro with one violation of Title 8 USC Section 1324 (a)(1)(A)(ii) – transportation of one undocumented migrant. App. 7-9. A few days later, Haro was charged in an Information alleging the same alleged crime. Docket 13. The only Government's material witness for trial against Haro was, therefore, Alejandro Vieyra-Manriquez.

On January 29, 2020, the parties conducted a deposition of the Government's material witness. App. 10-11. At that time, the Government specifically asked the Material Witness, among other things, "And do you promise to return to the United States to testify at trial if needed?" The Witness answered "Yes." App. 11. Despite his assurances, the Material Witness would never return to testify.

The case was set for trial on August 21, 2020, and Haro filed a Rule 23(a)(1) Waiver of Trial by Jury, electing to proceed to trial by the court. App. 20-21.

Acting on new evidence five days before trial, on September 17, 2020, Haro filed his Objection to Admission of Video and Transcript of Deposition of Material Witness. App. 24- 26. Haro's objection was based upon his lack of a full opportunity to previously confront the Government witness at the prior deposition because of new impeachment discovery revealed by the Government. In his Objection, Haro informed the court that the Government had disclosed, for the first time, "discovery [reports] relative to three separate arrests of Alejandro Vieyra-Manriquez, the sole material witness in this case, by Calexico Border Patrol." App. 24. Haro's Objection noted that the disclosure by the Government was at the eve of trial.

In his Objection, Haro noted:

> These partial reports also establish that on each of the three separate times when the Material Witness was arrested in the company of other undocumented migrants, ***the Calexico Border Patrol agents released him and removed or deported him back to Mexico*** after they took six photographs each time and his fingerprints. Each of the three separate arrests, Calexico Border Patrol agents had the Material Witness's correct name and fingerprints from the first time he was arrested on the date of the offence in this case – November 27, 2019.

App. 25, emphasis added. The multiple arrests and releases of the Government's witness were made months after a suppression hearing and long after he had been deposed in the case. Haro noted that the Government argued in its *In Limine* Motion:

> The United States has taken and will continue to take significant steps to ensure the presence of the Material Witness at trial. Should he not return, the United States will request that this Court declare the Material Witness unavailable and admit his prior sworn deposition testimony into evidence. As the United States is continuing in its efforts to make the Material Witness available, this motion is not yet ripe for this Court's review.

Id. See also, United States' Motions *In Limine,* filed on September 3, 2020. App. 27-33.

The Government also countered in its Response that it had done its required good faith efforts required by Fed. R. Evid. 804(a)(5) and *United States v. Rodriguez,* 880 F.3d 1151, 1166 (9th Cir. 2018), to secure the witness's attendance but that the witness failed to maintain contact with this lawyer and was nowhere to be found. App 34-39. However, in Haro's Reply to the Government's Response to his Motion to Exclude, he emphasized the Government's multiple arrests for illegal re-entry into the US and several deportations of the Material Witness back to Mexico of the very witness the Government was then incorrectly arguing went rogue. App. 40-43.

In his Reply to the Government, Haro also provided the trial court specific background relative to his correspondence with the Government in his attempts to find out whether the material witness would be available. This correspondence was critical because it directly dispelled the Government's claim that it had done its required good faith efforts to ensure availability of its witness as required by Fed. R. Evid. 804(a)(5).

Specifically, in his reply, Haro noted, in part:

> As background, Mr. Haro provides the Court with an email correspondence that Mr. Haro initiated on March 18, 2020 with the Government and ended on July 27, 2020. In an email dated July 27, 2020 at 11:25 AM, through counsel's paralegal, Mr. Haro noted and asked:
>
> > Good morning, AUSA Thomas:
> > It is my understanding that Mr. Vieyra [the material witness] has not shown up to court for any hearings. Mr. Cortez has asked me to coordinate any matters relating to the material witness if we proceed to trial in this case. For this purpose, we just need to know if Mr. Vieyra has been in contact with you or your office?
> > Thank you,
> > Mayra A.
>
> Before this July 27, 2020, email, Mr. Haro had already contacted the Government in March 2020 about concerns regarding the whereabouts of the material witness. At that time, the undersigned had been deliberating whether to subpoena the material witness to testify at the suppression hearing; he was, undeniably, an eyewitness to the *Terry* stop.

App. 40-42.

In his Reply, Haro added:

> The Government replied to Haro's July 27, 2020, email on August 19, 2020, in relevant part saying: Good Morning Mayra – Seeing your email about ... reminded me that I had not yet responded to this. I apologize. I confirmed with Ciro [mat wit lawyer] last week that he has been in contact with Mr. Vieyra's wife recently and that Mr. Vieyra's wife confirmed that Mr. Vieyra can be contacted through her. I have not had any direct with Mr. Vieyra, but I will work closely with Ciro to make sure Mr. Vieyra has the information he needs about upcoming court dates where his attendance is required.
>
> But as early as March 2020, Mr. Haro's counsel had placed the Government on notice that the material witness could have gone missing. On March 18, 2020, before the Material Witness went rogue and was arrested each of three times with three sperate groups of undocumented migrants, counsel's paralegal expressed concern:
>
> We need to verify that Mr. Vieyra will be present at the next hearing. Mr. Cortez did not see him in court on March 6th despite the subpoena; has Mr. Vieyra checked in with anyone about the upcoming evidentiary hearing?
> Thank you.

App. 42-43.

Despite Haro's evidence showing that the Government had not, as it claimed, exercised good faith efforts, the court granted the Government's Motion to Admit the video and the transcript of the material witness' deposition. Trial Transcript App. 44-47.

The bench trial proceeded as scheduled on September 22, 2020. The record shows that, after hearing from the Government's ifficial witnesses, the court explicitly considered the unconfronted testimony from the unavailable material witness on the critical trial issues of 1) alienage, 2) unlawful presence in the US, and 3) defendant "knew or acted in reckless disregard of whether the alien was not lawfully in the United States and whether he was transporting him in order to help him remain in the United States." App. 45. The court specifically noted of one of the critical elements "The only testimony we have on that subject comes from the material witness himself." App. 46, lines 10-11. The court found Haro guilty as to the one-count Information. App. 47.

On December 11, 2020, the court sentenced Haro to 46 months custody and 3 years of supervised release. App. 48-52. Haro filed his notice of appeal the very same day – December 11, 2020. App. 53, Docket 69.

In its memorandum Opinion affirming Haro's conviction, the appellate court concluded that: 1) the Government's arrest of the material witness for illegal re-entry multiple times after he had been released from custody pending trial; 2) deporting that material witness back to Mexico each time *without* notifying the court or counsel for Mr. Haro; and 3) placing the witness outside the jurisdiction of the court, thereby making him unavailable, were factors that were simply irrelevant to the analysis

under its own precedent - *Rodriguez*. The appellate court plainly overlooked the record showing that it was *only* after Haro's counsel asked about the whereabouts of that witness, did the Government belatedly, and unsuccessfully, made any "good faith efforts", at the eve of trial, to try to secure the witness's presence. App. 4-5.

The appellate court similarly concluded that the Government's prompted, belated efforts to secure the material witness for trial constituted the kind of "good faith efforts" required by the Sixth Amendment and *Rodriguez*. App. 4. This Government-indulgent interpretation of "good faith efforts" plainly injected inconsistency in its own binding precedent to the contrary as established in *Rodriguez* at 1166-68, and *Jackson v. Brown*, 513 F.3d 1057, 1084 (9th Cir. 2008).

The appellate court's entire analysis of the confrontation issue consisted of one paragraph in the Memorandum Opinion, wherein the panel quite mistakenly wrote:

> ***About a month before trial***, the government provided Vieyra-Manriquez's attorney ***with a parole letter and travel information after counsel stated that he could contact Vieyra- Manriquez***. Then, when the government learned that Vieyra-Manriquez was not in contact with his attorney, it ran records checks, placed investigative alerts, searched social media, contacted the Mexican government, and asked Vieyra-Manriquez's counsel for contact information for Vieyra-Manriquez or his wife.

Memorandum Opinion, App. 4-5, emphasis added. The "facts" created by the lower court in its reasoning to save the Government, ignored the very conduct by the Government causing the unavailability of its own witness.

V.
REASON TO ALLOW THE WRIT

The appellate court sanctioned a departure by the trial court that was so far from the accepted and usual course of judicial proceedings, as to require this Court to exercise its supervisory power. The Ninth Circuit created a conflict with *Crawford V. Washington*, 541 U.S. 36 (2004) and *Giles v. California,* 554 U.S. 353, 374 (2008) when it ignored the showing required of the Government by Fed. R. Evid. 804(a)(5) for admission of previously unconfronted testimony from an unavailable witness. In doing this, the appellate court sanctioned a denial of Petitioner's confrontation and fair trial rights when it admitted the material witness' previously unconfronted out-of-court testimony affecting "the ability of courts to protect the integrity of their proceedings". *Giles,* at 374, quoting *Davis v. Washington,* 547 U.S. 813, 834 (2006).

In its own precedent in *Rodriguez,* the Ninth Circuit itself noted that in *Jackson v. Brown* at 1166-67:

> [A] case involving a state prisoner's petition for federal *habeas corpus* relief pursuant to 28 U.S.C. § 2254, an investigator employed by the state of California to locate two witnesses ***did nothing to locate one of the witnesses until several weeks into the defendant's trial and, instead,***

> ***relied exclusively on a Los Angeles police officer who had been in contact with the witness and had volunteered to contact him again***. 513 F.3d at 1084. We held that the investigator's involvement with other matters ***was no excuse for the government's failure to engage in good-faith efforts to find the witness***, and the reasonableness of the investigator's reliance on the police officer ***was irrelevant, because the investigator and the police officer were both state agents responsible for performing good-faith efforts to find the witness***. *Id.*

Emphasis added. The appellate court failed to consider that here also the Government similarly "did nothing to locate one of the witnesses until" until the eve of trial; and only then because it was prompted to do so by Mr. Haro. Haro respectfully submits that the facts at bar are analogous to those in *Jackson* and are equally compelling.

In *Jackson*, the "Los Angeles police officer...who had volunteered to contact [the witness] again", was in the same position here as the Witness's lawyer. While the investigator in *Jackson* "employed by the state of California to locate two witnesses" who "did nothing to locate one of the witnesses until several weeks into the defendant's trial" would be Border Patrol Agent here. And the prosecutor in *Jackson who* "failed to take good-faith, available measures to locate Mr. Martinez-Arguelles" would be akin to the Government here, who did not have its left hand communicate with its right when the Witness was arrested not once, not twice, but

three consecutive times. And then the Government deported the Material Witness each time without alerting the district court or defense counsel for Mr. Haro.

Here, the Government in a laissez faire approach relied entirely upon the Material Witness's lawyer to keep in contact with his rogue client. No different than in *Jackson,* the prosecutor delegated its duty to conduct reasonable, good faith efforts to ensure that the Material Witness here was available for trial. And then the Government deported the material witness, thereby risking that he would for sure not be available for trial because he could be, presumably, too afraid of prosecution. And as in *Jackson,* "Thus, admission of Mr. Martinez-Arguelles's videotaped deposition violated Rodriguez's Confrontation Clause rights." *Jackson* at 1167.

The district court also failed to properly construe the foundational requirements of Rule 804(A)(5) to undisputed facts when it decided to allow the Government to introduce at trial the inadmissible deposition transcript. In *Rodriguez,* the court addressed unavailability in an analogous case involving a violation of the Confrontation Clause. There, the court specifically noted:

> 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)). We review de novo whether the Confrontation Clause was complied with. *United States v. Macias*, 789 F.3d 1011, 1017 (9th Cir. 2015).

Id., at 1166, emphasis added. Despite its own binding precedent, the appellate court indulged the Government and sanctioned a violation of Haro's confrontation and due process rights contrary to this Court's binding precedent in *Crawford* and *Giles*.

Despite the mandate in *Rodriguez,* the Government failed to exercise good faith efforts to maintain contact with its sole witness. The Government also failed to reveal those three multiple arrests and releases of the witness, to the parties – the court, the material witness' own lawyer, and most definitely not Mr. Haro's counsel. The Government's failure to timely reveal such impeachment material was also a classic *Brady* violation because such material would have been critical to Haro in his cross-examination of the agents at the suppression hearing and to fashion a different defense at trial.

For these reasons, this Court must grant review.

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CONCLUSION

For the foregoing reasons, Stephen L. Haro respectfully requests this Court issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

Dated: May 5, 2022

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