

In the

ORIGINAL

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

RICARDO VALENZUELA-BERNAL

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No. 81-450

Washington, D. C.

Tuesday, April 20, 1982

Pages 1 - 71

ALDERSON



REPORTING

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1 IN THE SUPREME COURT OF THE UNITED STATES

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4 Petitioner, :

5 v. : No. 81-450

6 RICARDO VALENZUELA-BERNAL :

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8 Washington, D. C.

9 Tuesday, April 20, 1982

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 10:05 o'clock a.m.

13 APPEARANCES:

14 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf
15 of the Petitioner.

16 EUGENE G. IREDALE, ESQ., San Diego, Cal.; on behalf of
17 the Respondent.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
CARTER G. PHILLIPS, ESQ.,	
on behalf of the Petitioner	3
EUGENE G. IREDALE, ESQ.,	
on behalf of the Respondent	32
CARTER G. PHILLIPS, ESQ.,	
on behalf of the Petitioner - rebuttal	63

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in United States against
4 Valenzuela-Bernal.

5 Mr. Phillips, you may proceed whenever you're
6 ready..

7 ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.,
8 ON BEHALF OF THE PETITIONER

9 MR. LACOVARA: Thank you. Mr. Chief Justice,
10 and may it please the Court:

11 This case is here on a writ of certiorari to
12 the United States Court of Appeals for the Ninth
13 Circuit. There are three questions presented:

14 First, whether the United States violates a
15 criminal defendant's Fifth Amendment due process or
16 Sixth Amendment compulsory process rights when it
17 deports an illegal alien after making a reasonable
18 investigation and concluding that the illegal alien has
19 no material exculpatory evidence to make available to
20 the Defendant;

21 Second, assuming that the Government acts at
22 its peril in deporting illegal aliens, whether the
23 Defendant in order to state a constitutional violation
24 still must demonstrate that the loss of the illegal
25 alien has caused him a concrete loss of material

1 exculpatory evidence;

2 Finally, assuming that the Court of Appeals is
3 correct that the Respondent's constitutional rights are
4 violated when the Defendant is deprived of no more than
5 the loss of a conceivable benefit, whether the proper
6 remedy for that technical constitutional violation is
7 dismissal of the indictment against the Respondent.

8 On March 29th, 1980, Respondent was captured
9 in the process of transporting five illegal aliens from
10 Escondido, California, to Los Angeles. The
11 circumstances surrounding Respondent's arrest were
12 explained by Respondent in his own post-arrest statement
13 volunteered to Border Patrol agents.

14 Respondent is an illegal alien from Mexico.
15 He entered this country approximately six days prior to
16 his arrest with the assistance of an illegal alien
17 smuggler. He had been kept in a house in Escondido up
18 to the day of his arrest.

19 On the day he was arrested he agreed with the
20 illegal alien smuggler to transport five additional
21 illegal aliens to Los Angeles in return for the price of
22 his illegal entry into this country. Respondent had
23 been told that the Border Patrol agents at the Temecula
24 checkpoint were not actually checking for illegal
25 aliens. Unfortunately for Respondent, he was

1 misinformed and was pulled over to the side or at least
2 was motioned over to the side.

3 He slowed the car down and then drove away at
4 a very high rate of speed. Border Patrol agents chased
5 him, two agents in a single car. Respondent stopped his
6 car approximately a mile away from the checkpoint and
7 fled on foot along with other five illegal aliens.
8 Respondent and three illegal aliens were captured by the
9 Border Patrol agents. Two other illegal aliens,
10 however, escaped.

11 The Border Patrol agents then returned
12 Respondent back to the Border Patrol checkpoint and
13 informed Respondent of his right to remain silent. He,
14 however, waived the right and agreed to make a statement
15 under oath, and the recorded statement explained his
16 decision to flee from the Border Patrol checkpoint on
17 the basis, "I already knew that I had had it, too late,
18 it was done." Later he told the agents, "I acknowledge
19 the charge of driving."

20 The agents also interviewed the other illegal
21 aliens and they all admitted that they were in the
22 country illegally and that Respondent had been the
23 driver of the car.

24 The * agent at that point or soon thereafter
25 called the Assistant United States Attorney in the

1 Southern District of California for advice as to how to
2 proceed in the case. The Assistant U.S. Attorney, based
3 on the information regarding Respondent's apparent
4 confession, the cumulative nature of the statements made
5 by the three additional illegal aliens, and the general
6 circumstances surrounding the arrest, the flight, et
7 cetera, decided that no useful purpose would be served
8 either for the Government or for the Defendant in
9 requiring two otherwise not prosecutable, in our
10 discretion, however, but not prosecutable illegal aliens
11 to remain in custody, and therefore authorized the
12 release of those two illegal aliens back to Mexico.

13 QUESTION: Were statements taken from them
14 before they were released?

15 MR. PHILLIPS: Yes, sir, there were.

16 QUESTION: What happened to them?

17 MR. PHILLIPS: Well, unfortunately the tape
18 recorder malfunctioned. Originally it was thought that
19 the tape recording of Respondent's statement had
20 malfunctioned and there was no statement from him. But
21 it turned out that the malfunction occurred during the
22 time that the statements --

23 QUESTION: So in fact there is no written or
24 recorded statement from those released?

25 MR. PHILLIPS: No, not a specific written or

1 recorded statement, although I think typically there
2 would be. Moreover, we do of course have the statement
3 from the remaining illegal alien, Romero Morales, and
4 the statements from the * agents that all the statements
5 by all the illegal aliens are essentially the same.

6 QUESTION: And when did they get the statement
7 from Morales? Same time?

8 MR. PHILLIPS: Subsequently, when he testified
9 at the hearing, they obtained that statement. And
10 there's nothing to indicate that his statement at the
11 hearing on the motion to dismiss was different from his
12 statement given to the * agents at the time of his
13 arrest.

14 The Assistant United States Attorney
15 authorized the release of two of the three illegal
16 aliens, chosen at random, and they were released on
17 March 30th.

18 QUESTION: Mr. Phillips, I assume the
19 Government could have prosecuted the witnesses who were
20 deported --

21 MR. PHILLIPS: Yes, ma'am.

22 QUESTION: -- for a criminal offense?

23 MR. PHILLIPS: Yes, ma'am. We could have
24 prosecuted them for illegal entry into this country.

25 QUESTION: But it is the general practice not

1 to do that and to simply deport them?

2 MR. PHILLIPS: It is significantly easier on
3 our resources to do that, yes, ma'am.

4 QUESTION: There's no claim, I take it, here
5 that the Respondent himself transported the illegal
6 aliens across the border?

7 MR. PHILLIPS: No.

8 QUESTION: Just that he transported them after
9 they were in the country and they hadn't been here three
10 years.

11 MR. PHILLIPS: That's correct, that's correct,
12 Your Honor.

13 The two illegal aliens were returned on March
14 30, concededly prior to the time the Respondent's
15 counsel had any opportunity to interview them.

16 Respondent was indicated on one count, transporting --

17 QUESTION: Was Respondent represented and did
18 the prosecutor know that at the time they were
19 released?

20 MR. PHILLIPS: No, Respondent was not
21 represented by counsel, no, Your Honor.

22 QUESTION: Ultimately, was he represented by
23 retained or appointed counsel?

24 MR. PHILLIPS: I believe it was appointed
25 counsel.

1 Respondent was indicated on one count of
2 transporting an illegal alien, Romero Morales, within
3 this country in violation of 8 U.S.C. Section
4 1324(a)(2). Soon thereafter he filed a motion to
5 dismiss the indictment on the ground that the
6 deportation of the two illegal aliens had deprived --
7 had violated his Fifth and Sixth Amendment rights.

8 The district court held a hearing on the
9 motion --

10 QUESTION: Did he make any proffer of what
11 testimony would be given had these people been kept in
12 the country?

13 MR. PHILLIPS: Not specifically. The closest
14 thing to a proffer I suppose would be, he did offer the
15 testimony of Romero Morales at the hearing. Romero
16 Morales was at least putatively a defense witness at the
17 hearing on the motion to dismiss, although I submit that
18 his statements were rather strongly inculpatory of
19 Respondent rather than exculpatory.

20 QUESTION: Mr. Phillips, before you go on,
21 could I get the time sequence in my mind?

22 MR. PHILLIPS: Yes, sir.

23 QUESTION: The man was arrested on the 29th of
24 March, was it?

25 MR. PHILLIPS: Yes, sir.

1 QUESTION: And the other occupants of the
2 vehicle were sent back on the 30th.

3 MR. PHILLIPS: Yes, Your Honor.

4 QUESTION: And he was arraigned on the 31st,
5 was it, the next day?

6 MR. PHILLIPS: Yes, I think so.

7 QUESTION: Now, when -- was counsel appointed
8 for him on the 31st?

9 MR. PHILLIPS: I assume that --

10 QUESTION: So it would have been a question of
11 whether to hold them for one day to give the counsel an
12 opportunity to interview them, is that what we're
13 fighting about?

14 MR. PHILLIPS: In this specific case it would
15 have been. But there was no way, I don't think, of
16 knowing that at the time necessarily.

17 QUESTION: Isn't there a procedure whereby
18 these things are processed in this manner normally?
19 Wouldn't you normally expect the complaint to be filed
20 rather promptly?

21 MR. PHILLIPS: Well, we would assume that,
22 although of course it's not really accurate, altogether
23 accurate, to say that it's only holding them for a
24 single day. I mean, other than the fact that he would
25 have had counsel appointed at that point, there still

1 presumably would have been a period of time that counsel
2 would have required in order to investigate the matter
3 and to pursue it.

4 Typically the practice is to keep the illegal
5 aliens for ten days, even after counsel is appointed.

6 QUESTION: The practice is to keep them for
7 ten days?

8 MR. PHILLIPS: Yes, Your Honor.

9 QUESTION: I see. Is that the -- I don't
10 understand. I'm a little puzzled. What is the source
11 of the ten-day practice?

12 MR. PHILLIPS: It's just -- it's a common law
13 practice. I think it's developed primarily by the
14 magistrates in the Southern District of California,
15 although it is also adopted in other districts.

16 QUESTION: Then why wasn't it followed in this
17 case?

18 MR. PHILLIPS: Well, because the case wasn't
19 submitted -- the illegal aliens were already gone prior
20 to the time that it went to the magistrate.

21 QUESTION: Well, in order to avoid the ten-day
22 rule you must ship them back before the magistrate's
23 complaint is filed, is that right?

24 MR. PHILLIPS: Well, in a sense, yes, Your
25 Honor, because the problem is that, given the state of

1 the law in the Ninth Circuit, the magistrate is simply
2 not in a position to release the illegal aliens. Unless
3 we can modify the Ninth Circuit's very strict ruling,
4 it's very difficult to have a magistrate agree to
5 release the illegal aliens, even though there is no
6 likelihood --

7 QUESTION: Would the Government's problem be
8 solved if the Ninth Circuit rule were modified to
9 require them to be kept, say for 24 hours? It seems to
10 me that the dispute may be narrower than it appears to
11 be. The other side seems to be just asking for an
12 opportunity to interview, and I can see your objection
13 to the ten-day rule, but I wonder if it necessarily
14 would apply to say a 24-hour rule.

15 MR. PHILLIPS: Well, I suspect that -- I mean,
16 obviously the Government's position would be materially
17 advanced by a 24-hour rule. But I'm not sure that the
18 decision as to how much time is one that is of -- it's
19 not an easy judgment to make, and certainly I wouldn't
20 -- it's a close legislative judgment.

21 QUESTION: Well, apart from that, Mr.
22 Phillips, I gather -- or perhaps I better put it as a
23 question. Do you think they could have been released
24 had counsel in fact been appointed before they were
25 released?

1 MR. PHILLIPS: Well, it might have been -- it
2 would have been significantly more difficult. I mean,
3 it would have certainly -- without consulting counsel,
4 you mean?

5 QUESTION: Yes. Would the Government's case
6 be in any trouble if you did that?

7 MR. PHILLIPS: No, I don't think so, because
8 it's still -- our submission is that there was no
9 prejudice whatsoever. And even if there were some claim
10 that we violated his right to counsel, you would still
11 have to have a demonstration of prejudice.

12 QUESTION: You mean there's no Massiah
13 overtones after counsel is appointed as to whether or
14 not you may release?

15 MR. PHILLIPS: Well, you don't have -- I mean,
16 no, I don't think, no, sir. No, Your Honor.

17 At the hearing on the motion to dismiss,
18 testimony was offered by the two arresting * agents, the
19 detained illegal alien, Romero Morales, and the
20 Assistant United States Attorney who approved the
21 release of the two illegal aliens. Based largely on the
22 post-arrest admissions by the Respondent, the district
23 court held that the loss of the missing illegal aliens
24 could not possibly, or at least with no substantial
25 possibility, have prejudiced Defendant's, Respondent's,

1 case, and therefore he denied the motion to dismiss.

2 QUESTION: When did the Respondent know that
3 the witnesses were being sent away?

4 MR. PHILLIPS: When did he learn that the
5 witnesses had been sent away?

6 QUESTION: Uh-hmm.

7 MR. PHILLIPS: I suspect probably on the --

8 QUESTION: You suspect? You don't know?

9 MR. PHILLIPS: Well, I don't know exactly when
10 he was informed.

11 QUESTION: But if he'd had a lawyer you would
12 know, wouldn't you?

13 MR. PHILLIPS: Well, I assume his attorney was
14 probably informed on the 31st.

15 QUESTION: The attorney on the 31st. So
16 neither the Respondent or his lawyer to be appointed had
17 any opportunity to oppose the removal of the witnesses?

18 MR. PHILLIPS: That's absolutely correct, Your
19 Honor.

20 QUESTION: What has happened to this third
21 witness in the meantime?

22 MR. PHILLIPS: He is being detained. He was
23 detained in custody as a material witness for the
24 Government, and also for the Defendant as it turns out
25 -- I mean, excuse me, for the Respondent. As it turns

1 out, he did testify on behalf of the Respondent.

2 QUESTION: Did he testify?

3 MR. PHILLIPS: Yes, sir.

4 QUESTION: He was called by --

5 MR. PHILLIPS: He was called by the
6 Respondent.

7 QUESTION: -- the Respondent.

8 MR. PHILLIPS: And his statement was that he
9 was an illegal alien, that he had been in this country
10 for less than two days at the time that Respondent
11 transported him, that Respondent was the driver of the
12 car. So that while he was nominally a witness on behalf
13 of the Respondent, in reality I submit that his
14 testimony was rather inculpatory.

15 QUESTION: Let me go back to my former
16 question about whether there was a proffer. Was there
17 any suggestion, whether proffered testimony or
18 otherwise, that the two who had gone back to Mexico,
19 been deported, would have testified to any factors which
20 were not available from the witness who was detained?

21 MR. PHILLIPS: No, Your Honor, none
22 whatsoever.

23 QUESTION: Well, how would anybody have made
24 that proffer if he couldn't ever have -- if there was no
25 opportunity to chat with those witnesses?

1 MR. PHILLIPS: Well, the circumstances -- I
2 mean, Respondent had ample opportunity to chat with
3 those witnesses, Your Honor. He was at the house at the
4 time prior to the transportation. He was in the car the
5 whole time during the transportation. And he was there
6 at the time of the arrest.

7 QUESTION: Well, maybe he was, but his lawyer
8 never had a chance to talk with them, did he?

9 MR. PHILLIPS: No, but his lawyer certainly
10 had access to the Respondent and to any information that
11 the Respondent has.

12 QUESTION: Well, that may be so, but the
13 Respondent probably didn't know what he was -- that, A,
14 he was going to be charged, or B, what he was going to
15 be charged with, or what the elements of the crime
16 were.

17 MR. PHILLIPS: Well, even if Respondent
18 couldn't make an immediate judgment as to how to proceed
19 in this matter, certainly some time between the period,
20 the time when he was arrested, and the post-arrest
21 period, all the way up until the time of the trial,
22 Respondent had ample opportunity to explain to his
23 attorney what possible defenses might be available. And
24 even to this day we still have nothing.

25 QUESTION: That's hardly equivalent to --

1 that's hardly equivalent to knowing what the witnesses
2 would have said in response to questions from the
3 lawyer.

4 MR. PHILLIPS: Well, concededly it is somewhat
5 different, although it is not significant -- I mean,
6 this case has never had any trouble in the Roviario
7 context --

8 QUESTION: Don't you -- your first submission,
9 as I understand it, is that the Government should be
10 relied on to decide whether a witness has anything
11 relevant that might help the Defendant. That's a very
12 strange submission, isn't it? I thought Defendants
13 usually decide what --

14 MR. PHILLIPS: Well, it's not that we're
15 really -- I mean, we're actually not. I mean, if we
16 were to take -- if we were to reason by analogy from
17 United States versus Lovasco, it would seem to us that
18 the rule ought to be that the United States simply, in
19 pursuing its policy with regard to immigration, should
20 simply deport the illegal aliens.

21 All we do in this context is attempt to
22 provide a certain amount of protection for the
23 Respondent. By virtue of the fact that we provide him a
24 certain amount of protection, I don't think that should
25 give rise to any inherent problems. I mean, otherwise

1 we would just simply deport him, as the Court held in
2 United States versus Rhodes in the First Circuit
3 decision.

4 QUESTION: Well, would you say that if you
5 interviewed them and you thought there was something
6 helpful to the Defendant you could nevertheless deport
7 them?

8 MR. PHILLIPS: Well, our assumption would be
9 no, that if there was reason to suspect --

10 QUESTION: Why? Why? Why? You've got a
11 power to deport. Just deport them.

12 MR. PHILLIPS: Concededly, we have the power
13 to deport them.

14 QUESTION: Deport them without talking to
15 them.

16 MR. PHILLIPS: Well, that's exactly what the
17 court sanctioned in United States versus Rhodes. But
18 we're not asking this Court to adopt that view, although
19 as I said it would certainly further our immigration
20 policies if the Court were to adopt that view. But
21 we're prepared to give the Respondent perhaps more
22 protection than he otherwise might require.

23 QUESTION: Well, you want to talk to them
24 because you want to get a witness for yourself.

25 MR. PHILLIPS: I'm sorry?

1 QUESTION: You interview the people because
2 you need witnesses yourself.

3 MR. PHILLIPS: Admittedly, we do. But we
4 also, in the process of interviewing a witness in order
5 to determine whether there's any inculpatory evidence,
6 we necessarily discover whether there is any exculpatory
7 evidence.

8 QUESTION: Counsel, what is the Government's
9 main concern, saving the cost involved in maintaining
10 these witnesses in jail over a long period of time or
11 what?

12 MR. PHILLIPS: Well, certainly the cost is a
13 significant factor. But I think the idea of having
14 illegal aliens languishing in jail for a period of time
15 when no one has any intention of calling them as
16 witnesses, either the Government or the Defendant, and
17 no one has -- you know, and they're not going to serve
18 any useful function to anybody, I think that's the
19 primary interest of the Federal Government in these
20 cases.

21 And to go back to the statistics that we cited
22 in our brief, there is something wrong with a rule of
23 law that requires the Federal Government to detain 5,000
24 illegal aliens as material witnesses in a district in
25 which there are 36 trials on Title VIII offenses.

1 There's something just fundamentally wrong with that.

2 QUESTION: What about the various alternatives
3 suggested by the Respondents that might alleviate the
4 problem?

5 MR. PHILLIPS: Well, our submission is that
6 none of those -- that none of those alternatives are
7 very useful. Specifically, they suggest the use of work
8 farms. The United States, the Southern District of
9 California at least, does not have work farms --

10 QUESTION: Well, how about an early interview
11 at which defense counsel has an opportunity to be
12 present, before release?

13 MR. PHILLIPS: Well, the difficulty with that,
14 with the idea of an early interview, is, one, it's
15 difficult just to get counsel appointed. I mean, a lot
16 of these, a lot of captures, are not in locations where
17 counsel is close by. So there's certainly a period of
18 time lost in that process.

19 Second of all, it's not altogether clear what
20 an early interview will accomplish. Testimony by the
21 Assistant United States Attorney at the hearing on the
22 motion to dismiss was to the effect that oftentimes
23 defense counsel prefers to be able to try to retain
24 illegal alien material witnesses, even without any
25 expectation of having them testify, simply as leverage

1 against the Government for a plea bargaining
2 arrangement.

3 So that I'm not sure that we're going to gain
4 anything by virtue of having counsel there earlier.

5 QUESTION: What does he mean, as leverage for
6 a plea bargain?

7 MR. PHILLIPS: Well, it is absolutely true
8 that the Government can only hold so many material
9 witnesses. As it stands now, we are renting out space
10 in the state jails. And when we get to the point where
11 we can hold no more illegal aliens, we simply either
12 have to release the defendants or release the illegal
13 aliens and thereby end up losing our ability to
14 prosecute.

15 QUESTION: Under the rule of the Ninth
16 Circuit.

17 MR. PHILLIPS: Under the rule of the Ninth
18 Circuit, Your Honor.

19 QUESTION: Mr. Phillips, on the proffer point
20 that was raised by the Chief Justice, what is this
21 stipulation on page 22 of the Joint Appendix?

22 MR. PHILLIPS: That was a stipulation offered
23 by the Assistant United States Attorney, Your Honor,
24 that we were willing to stipulate that the illegal
25 aliens --

1 QUESTION: This wasn't agreed to?

2 MR. PHILLIPS: No, Your Honor. At least if it
3 was, there was nothing in the record to suggest that
4 anybody responded to it.

5 But it was our stipulation that we were
6 willing to say that none of the illegal aliens had told
7 --

8 QUESTION: But it says: "It is hereby ordered
9 that the substance of paragraphs 1 through" --

10 MR. PHILLIPS: Oh, I'm sorry. The stipulation
11 with regard to the oral -- with regard to the trial on
12 the basis of the record that was produced at the oral
13 hearing. I'm sorry, Your Honor, at the hearing on the
14 motion to dismiss, that stipulation.

15 QUESTION: But that --

16 MR. PHILLIPS: That was agreed to, yes.
17 That's why there wasn't a trial in this case.

18 QUESTION: Well, does this excuse the proffer
19 or not?

20 MR. PHILLIPS: No, Your Honor. All that does
21 is explain why there wasn't a specific trial in the
22 case.

23 QUESTION: That's what I wanted.

24 QUESTION: What were you referring to?

25 MR. PHILLIPS: I was referring to the offer to

1 stipulate on the part of the Government that the illegal
2 aliens who had been deported would not testify, would
3 not have testified that they had told the Respondent
4 that they were illegal aliens that had been in this
5 country for more than three years. Basically, we were
6 willing to agree to Romero Morales' testimony, which was
7 that they never said anything at all in that
8 automobile. And so in order to prove Respondent's
9 knowledge we were going to have to use the
10 circumstances.

11 QUESTION: There was no response, no
12 counteroffer, will you please stipulate that if they
13 were called they would testify as follows?

14 MR. PHILLIPS: No, nothing at all was said at
15 all on that point, Your Honor.

16 QUESTION: It's awful difficult for me to
17 imagine how a lawyer who never talked to the people
18 could proffer anything.

19 MR. PHILLIPS: Well, Your Honor, he still has
20 access to the Respondent. This is not a case of
21 mistaken identity. This individual was there at all
22 relevant times. As the Fifth Circuit said, you can
23 typically tell in these cases what exactly happened.
24 And so Respondent was in the presence of the missing
25 witnesses at all times. He presumably can suggest

1 something --

2 QUESTION: I'm not talking about Respondent.
3 I'm talking about the lawyer.

4 MR. PHILLIPS: Well, the lawyer has access to
5 the Respondent. There's no reason to assume the
6 Respondent --

7 QUESTION: Respondent might not know what is
8 the important point. That's why he has a lawyer.

9 MR. PHILLIPS: Certainly, Your Honor, and
10 that's why his attorney --

11 QUESTION: I get back to the point, why
12 couldn't they have waited around one day?

13 MR. PHILLIPS: Well, because one day wouldn't
14 have gained us anything, Your Honor.

15 QUESTION: So the lawyer could have talked to
16 them.

17 MR. PHILLIPS: One day would not have gained
18 us anything in most instances.

19 QUESTION: It would have allowed the lawyer to
20 talk to them. It wouldn't have gained you anything.

21 MR. PHILLIPS: No, and it wouldn't have gained
22 anybody anything in the facts of this case.

23 QUESTION: It would allow the lawyer to talk
24 to the witnesses.

25 MR. PHILLIPS: I mean, well, it wouldn't have

1 allowed the lawyer to make any kind of a reasonable
2 conversation with the witnesses, because he had no
3 opportunity to investigate the matter.

4 QUESTION: My question was, could -- it
5 would. I don't even have to ask a question. It's
6 obvious that in one day the lawyer could have talked to
7 the witnesses. You can either admit it or let it go;
8 it's all right with me.

9 MR. PHILLIPS: Well, he could have talked to
10 them, but I'm not sure that anything meaningful would
11 have come from that conversation, Your Honor.

12 QUESTION: Well, you never are. But couldn't
13 he have asked them a few questions, like when did you
14 come into the country, and what was your arrangement,
15 take a ten-minute interview? Facts that maybe his
16 client would not have known, because I think you
17 indicated the driver of the vehicle didn't necessarily
18 talk to all the passengers.

19 Isn't it possible the lawyer could have found
20 out something by direct conversation that he could not
21 have found out through his client?

22 MR. PHILLIPS: You mean as to their illegal
23 alien status?

24 QUESTION: Yes.

25 MR. PHILLIPS: The only person whose illegal

1 alien status is relevant to this prosecution, however,
2 is Romero Morales and Romero Morales is available to
3 talk with the attorney.

4 QUESTION: Could the Government have deported
5 him under your view of the law?

6 MR. PHILLIPS: You mean aside from Fifth and
7 Sixth Amendment problems?

8 QUESTION: No. Under your view of this case,
9 would it have been permissible for the Government to
10 deport him as well as all the other passengers?

11 MR. PHILLIPS: Well, it would have been -- the
12 problem that that would have created is that we would
13 have lacked a non-hearsay basis for proving some of the
14 elements, perhaps creating a confrontation clause
15 problem.

16 QUESTION: Assume you had a statement that was
17 sufficient from the driver himself, plus the testimony
18 of the two agents who arrested him, that might have made
19 out a sufficient case. I think that's possible. Then I
20 suppose under your view you could also have deported the
21 man who was actually the charge was based on, under your
22 view of the law?

23 MR. PHILLIPS: Yes, Your Honor, I suspect that
24 we might well have been able to do that, although --

25 QUESTION: And the question we have to decide,

1 would that have been consistent with the Constitution.

2 That's really the issue.

3 MR. PHILLIPS: Sure. But still, you have to
4 analyze it on two different grounds: One, on the basis
5 of the reasonableness of our decision to release him,
6 which is probably questionable in those circumstances,
7 since one, detention of one illegal alien, versus three
8 is perhaps not all that onerous a burden on us.

9 Second of all, you still would have to show
10 that he was a material witness in any sense. I mean,
11 typically -- in some ways it's unfortunate in this case
12 that the tape recorder broke, because typically we would
13 have an oral statement from everyone that we could then
14 examine, and that would presumably serve as at least
15 some basis for counsel to inquire as to what possible
16 grounds.

17 QUESTION: Well, it wouldn't hurt you much if
18 you lost this case.

19 MR. PHILLIPS: I'm sorry, Your Honor?

20 QUESTION: It wouldn't hurt you much, then, if
21 you lost this case, in the sense that the next case,
22 with a tape recorded statement, would be different.

23 MR. PHILLIPS: Well, if you were prepared --
24 if the Court were to hold that it is abundantly clear
25 that if we have that statement in hand we can go ahead

1 and deport the illegal aliens, that may well be true.

2 But what we're looking for -- I mean, this specific case
3 is not what's terribly important. This is not a case
4 about two illegal aliens and one criminal defendant.

5 This is a case literally about thousands of
6 illegal aliens. The United States captures -- has
7 captured in each of the last three years one million
8 illegal aliens. Each of those -- not every one of those
9 illegal aliens, of course, necessarily raises a
10 Mendez-Rodriguez problem. But if you consider that most
11 of them probably had some assistance coming into this
12 country, probably had some assistance in trying to
13 conceal themselves from the authorities, and probably
14 because of where they ended up having to stay in this
15 country came across criminal activity of another nature,
16 the chances of a Mendez-Rodriguez problem with regard to
17 all one million of those illegal aliens is fairly good.

18 And it cannot be that the Government is
19 responsible to keep all those illegal aliens.

20 QUESTION: Mr. Phillips, suppose it were
21 perfectly clear that counsel would always be appointed,
22 in the vast majority of instances, within 24 hours after
23 arrest or 48 hours after arrest, and the rule was that
24 you should give counsel one day and then you can deport
25 witnesses. Now you would have to hold all these people

1 for three days.

2 MR. PHILLIPS: Well, that's not altogether
3 clear, Your Honor. I mean, the question is, does that
4 mean after they interview them and regardless of what
5 they say we then have the right to go ahead and deport
6 them?

7 Or what if they interpose an objection, is the
8 problem. Then they interpose an objection, we go to a
9 magistrate under the Ninth Circuit's regimen.

10 QUESTION: Well, you would be in the position,
11 and you would be, if somehow this alien, this defendant,
12 had a lawyer with him in the room when he was arrested,
13 and he went around and he subpoenaed all these
14 witnesses. What would you do with them then, deport
15 them?

16 MR. PHILLIPS: Well, if he asked -- well, no.
17 Obviously if he had a subpoena in hand we wouldn't. We
18 might try to quash the subpoena.

19 QUESTION: Well, that's just one of those
20 problems about what the Government does --

21 QUESTION: Well, does the subpoena prevent you
22 from deporting them?

23 MR. PHILLIPS: Well, I think -- I guess the
24 subpoena doesn't actually act against the Government.
25 It acts against the illegal alien.

1 QUESTION: You might -- consequences might
2 attach to your deportation of him, but I wouldn't think
3 that --

4 MR. PHILLIPS: No, that's true. It wouldn't
5 directly prohibit us from deporting him.

6 QUESTION: But you wouldn't deport them, I
7 don't suppose, would you?

8 MR. PHILLIPS: I suspect we would not, no.

9 QUESTION: I don't understand why under a
10 24-hour rule you would be precluded from deporting them
11 after they'd been interviewed, because the burden would
12 remain on the defendant to make a showing that their
13 testimony would have been material, I would suppose.

14 MR. PHILLIPS: I'm sorry, Your Honor. I
15 missed that.

16 QUESTION: You seem to assume that if there
17 were a 24-hour rule where you just somehow or other get
18 your counsel appointed immediately, then they interview
19 you, you seem to be assuming you could not then
20 immediately deport if you're satisfied they have nothing
21 material to present, because then I would suppose if you
22 did deport the lawyer, having interviewed the person,
23 would be in a position to make a showing, if he could,
24 that there was some material testimony.

25 MR. PHILLIPS: I guess our response to that is

1 that I don't see that there's any significant difference
2 between what we've done here, because I don't think that
3 the appointment of counsel in this situation would have
4 materially altered the ultimate findings of the district
5 court, that should have been upheld by the Court of
6 Appeals.

7 QUESTION: Well, that's if you assume that the
8 prosecutor should be the one who does the investigating
9 for defense counsel on the facts. That's the basic
10 assumption.

11 MR. PHILLIPS: Well, it's only that the
12 Government makes the initial determination.

13 QUESTION: Well, I know, but it's a
14 determination that totally forecloses the opportunity
15 for the defense counsel to investigate.

16 MR. PHILLIPS: But I mean -- I guess our
17 response to that is that it's just not simply realistic
18 to say that they cannot know. I mean, I don't see how
19 this case is distinguishable from Roviato, where you're
20 denied access to the confidential informant unless you
21 can make a showing that he has some materiality. You
22 don't -- you've never talked to him.

23 The assumption is because you were present at
24 the crime that you can take action, and therefore -- and
25 this Court has consistently upheld the right of the

1 Government to deny you access to the confidential
2 informant in those circumstances. We submit that the
3 Government's interest in this case is every bit as great
4 as in that case.

5 QUESTION: You mean that on the day of the
6 hearing they couldn't have talked to these witnesses if
7 they were there?

8 MR. PHILLIPS: No, of course they could have
9 talked to them if they had been there, Your Honor.

10 QUESTION: I thought you meant --

11 MR. PHILLIPS: I will reserve the rest of my
12 time for rebuttal.

13 CHIEF JUSTICE BURGER: Mr. Iredale.

14 ORAL ARGUMENT OF EUGENE G. IREDALE, ESQ.

15 ON BEHALF OF RESPONDENT

16 MR. IREDALE: Mr. Chief Justice and may it
17 please the Court:

18 I'd like to address four of the issues in this
19 case. The first is the issue of what the statute with
20 which Mr. Valenzuela was charged required for proof of
21 conviction and what the defense in the case was;
22 secondly, the way in which the Government's action in
23 this case violated the Sixth Amendment right to
24 compulsory process; third, what the actual procedure is
25 in the Southern District of California in implementing

1 the Ninth Circuit decision in Mendez-Rodriguez, a
2 decision that has been adopted by the circuits, three
3 other circuits, the Fifth, the Seventh, and recently in
4 Armijo-Martinez the Sixth.

5 QUESTION: Well, the Fifth is a little
6 different, isn't it?

7 Mr. Justice Blackmun, as we talk about that in
8 the brief, the original decision was Avila-Dominguez,
9 and in that case the Court of Appeals for the Fifth
10 Circuit held that deportation of the witnesses before an
11 interview is a violation of due process, the sanction
12 for which is dismissal. However, they said, we reject
13 the automatic dismissal rule.

14 The Ninth Circuit, of course, does not have an
15 automatic dismissal rule, and in a subsequent case,
16 Henao, the Fifth Circuit said that the standard is that
17 the defense in order to obtain relief must show either a
18 plausible theory or some slight suggestion concerning
19 which the witnesses could have helped.

20 QUESTION: That strikes me as out of line with
21 the Ninth Circuit's approach.

22 MR. IREDALE: Well, whether you call it --

23 QUESTION: I'm just objecting to your saying
24 that the Fifth Circuit has followed the Ninth.

25 MR. IREDALE: I should say that with the

1 exception -- to our mind, the difference between the
2 terms "plausible theory" or "some slight suggestion" and
3 the Ninth Circuit formulation of "conceivable benefit"
4 is a matter of semantics. But I think you're correct
5 that there is some difference in the formulation of the
6 test, although the Fifth has held that deportation in
7 this context violates compulsory process.

8 Finally, I'd like to discuss the Government's
9 proposal and why it would strike at the heart of the
10 adversary process, which is the basis for our criminal
11 justice system.

12 The Respondent was charged in this case with a
13 violation --

14 QUESTION: Mr. Iredale, before you go on to
15 that section, am I correct in thinking that the Ninth
16 Circuit did not require the Defendant to make any sort
17 of a showing here before it dismissed the indictment?

18 MR. IREDALE: No, Your Honor. The Ninth
19 Circuit requires that the Defendant show some
20 conceivable benefit could have been gained from the
21 testimony of these witnesses.

22 QUESTION: What did the Defendant show here?

23 MR. IREDALE: In the district court, the
24 Defendant submitted an exhibit. We actually tried to
25 subpoena the witnesses. We obtained the addresses in

1 Mexico, mailed them subpoenas, although of course the
2 subpoenas have no force outside the geographical limits
3 of the United States except with respect to United
4 States citizens.

5 We also mailed a parole letter which was
6 countersigned by the U.S. Attorney authorizing the
7 witness, should the witness choose to attend court, to
8 enter into the United States. The parole is the permit
9 to let him in.

10 And finally, we sent a letter to each of the
11 witnesses in these cases, which was submitted as an
12 exhibit on the hearing on the motion to dismiss. In
13 each of the letters, the counsel in the case wrote to
14 the witness: "Your testimony regarding any
15 conversations that occurred between Mr. Valenzuela,
16 yourself, and other occupants of the vehicle is
17 important in the case of Mr. Valenzuela. Further, your
18 physical appearance on the date of the arrest and any
19 information you provided or did not provide to Mr.
20 Valenzuela concerning your illegal status and time and
21 place of illegal entry in the United States is important
22 to the issues of guilt or innocence."

23 QUESTION: Could you have taken their
24 testimony by deposition?

25 MR. IREDALE: Yes, Your Honor, had they been

1 held.

2 QUESTION: No, in Mexico.

3 MR. IREDALE: In Mexico?

4 QUESTION: What would prevent you from taking
5 that, except the dollars?

6 MR. IREDALE: Dollars and the logistical
7 difficulty. Otherwise, I believe --

8 QUESTION: In terms of distance from where you
9 were operating, how far were these witnesses away?

10 MR. IREDALE: I may be wrong, but I think that
11 Helisco is about 800 to 1,000 miles away, and the other
12 witness was in another province.

13 QUESTION: That would put them pretty far down
14 in southern Mexico.

15 MR. IREDALE: Yes, Your Honor. In other
16 words, unless the deposition could be taken before the
17 release of the witnesses --

18 QUESTION: Is that in the record? Is their
19 location in the record?

20 MR. IREDALE: It is, because the exhibit was
21 introduced as an exhibit. It's in the record before the
22 Court of Appeals, albeit not in the Joint Appendix
23 before this Court. But their address, La Huerta,
24 Helisco, for one of the witnesses, and the other address
25 in another state in Mexico, is in the record.

1 QUESTION: Mr. Iredale, as I understand your
2 statements as to what the Defendant showed here, it was
3 simply letters to the missing witnesses saying that it
4 would be very desirable to interview them on certain
5 points. Was there nothing more than that?

6 MR. IREDALE: Your Honor, there was also a
7 statement in argument by counsel that we wanted the
8 witnesses because we felt that they could possibly
9 testify in such a way as he might be found not guilty of
10 the crime of knowingly transporting aliens, and then
11 this followed a colloquy when the Assistant U.S.
12 Attorney was on the stand in which the questions were
13 asked which set forth the defense in this case, the
14 defense which the Ninth Circuit recognized in its
15 opinion.

16 One of the elements of illegal transportation
17 of aliens is that a person has to have reasonable
18 grounds knowing that the people came into the United
19 States within the last three years. The prosecutor
20 answered, "That's correct." The Ninth Circuit
21 recognized that that was the basis or conceivable
22 benefit.

23 In other words, we showed both in the district
24 court and to the Ninth Circuit that these witnesses
25 could have proffered evidence that would have been

1 relevant to the defense. What was that defense?

2 QUESTION: Relevant one way or the other, it
3 would have helped the Government or it would have helped
4 you.

5 MR. IREDALE: Yes. And because we didn't have
6 the witnesses we'll never be able to know for sure.

7 QUESTION: Well, couldn't the Defendant
8 himself have made some sort of an affidavit or proffer
9 if in fact he hadn't talked to any of the deported
10 witnesses in the car?

11 MR. IREDALE: Well, there are several reasons
12 why that would not be, I would suggest, an appropriate
13 procedure. First of all is the fact that, as a general
14 matter, the Defendant may not have himself knowledge of
15 the relevant evidence that can be given by the
16 witnesses.

17 QUESTION: Well, but after -- I mean, you're
18 now at the hearing stage. He's talked to his lawyer and
19 presumably has a much better idea from his lawyer than
20 he would have had on his own.

21 MR. IREDALE: He has a Fifth Amendment right
22 not to testify.

23 QUESTION: Well, sure, and he has other kinds
24 of rights that if he doesn't testify he may not help
25 himself.

1 MR. IREDALE: I understand that, Your Honor.
2 But the point is I think that, in the absence of some
3 immunity in the Simmons context, the Defendant could get
4 up on the stand or submit an affidavit which could later
5 be used, parts of which could later be used at the trial
6 in the case in chief to convict him, and that would be
7 an inappropriate showing.

8 QUESTION: Well, presumably if he swears to
9 something and says, I didn't talk to these witnesses
10 while they were in the car, the only need -- the only
11 fear he need have is that the witnesses will actually
12 come back and say, yes, he did talk to me a lot in the
13 car. I don't see that that's unduly penalizing if he
14 swears to something under oath.

15 MR. IREDALE: Well, Your Honor, the Ninth
16 Circuit and none of the other circuits have ever made a
17 requirement that the Defendant himself make a showing
18 --

19 QUESTION: Well, we're reviewing the Ninth
20 Circuit here.

21 MR. IREDALE: Yes, I understand. I think the
22 appropriate test would be not to require the Defendant
23 to come forth and make any showing, but to allow his
24 counsel by statement or by some indication as to the
25 possible defense to show how these witnesses could have

1 helped were they here. And that's what was done in this
2 case.

3 QUESTION: But all counsel could do is tell
4 what the elements of the offense are. He can't say that
5 what the -- the Defendant will know much more about it
6 than counsel as to the factual basis.

7 MR. IREDALE: He may or may not, depending on
8 the facts of the case, Your Honor.

9 QUESTION: Mr. Iredale, could the Defendant
10 not testify for purposes of the hearing only and
11 preserve his right not to testify at trial and not have
12 it used against him, much as we would have have happen
13 at other pretrial hearings?

14 MR. IREDALE: Yes, that's my point, Justice
15 O'Connor. It's not clear whether there would be a
16 Simmons protection, in other words whether that could
17 not be used by the prosecution.

18 QUESTION: That has not been tested, to your
19 knowledge?

20 MR. IREDALE: It has never been raised and so,
21 because there was no such requirement in this case,
22 counsel would have in effect been risking, allowing his
23 client to get on the stand --

24 QUESTION: But certainly that would be one
25 possibility, would it not?

1 MR. IREDALE: As to the showing, as to the
2 showing.

3 QUESTION: The showing of possible prejudice;
4 wouldn't that be a possibility?

5 MR. IREDALE: It could be, except that it
6 would trench on the Defendant's Fifth Amendment right to
7 remain silent. I think the rule which we have is an
8 appropriate one, which is counsel must show, given the
9 facts and the law and the statute involved, that these
10 witnesses could conceivably, because we'll never know
11 for sure what they would have, they could have given
12 evidence that would have helped his case.

13 Now, let me just address this, because the
14 Government seems to say this Defendant was so guilty it
15 doesn't matter. Well, certainly there was no question
16 that he transported the persons, that one of them in
17 fact was an alien, and given all of the evidence in the
18 light most favorable to the Government possibly even
19 that he knew of his illegal status.

20 But 8 U.S.C. 1324(a)(2), the statute employed
21 in this case, requires that the Defendant know that the
22 alien had entered illegally within the last three years
23 before the transportation.

24 QUESTION: What was the testimony of the one
25 witness who did remain?

1 MR. IREDALE: The testimony in that regard,
2 Your Honor, was that he did not enter with Mr.

3 Valenzuela, that he met Mr. Valenzuela at a house in
4 Escondido, which is some 50 miles north of the border.

5 QUESTION: Did he testify how long he had been
6 in the country?

7 MR. IREDALE: Yes. The witness -- Mr.
8 Valenzuela, the indication was from his statement, had
9 been in the country six years. The witness had been in
10 the country between a day and a half and possibly as
11 little as 12 hours when he arrived at the house in
12 Escondido.

13 QUESTION: What did he testify to as to
14 communicating that information to this Respondent?

15 MR. IREDALE: He denied any communication
16 whatsoever, one way or the other. And the point of
17 course is that, although he was the one witness that the
18 Government chose to charge, the other witnesses were
19 apparently in his company and it is conceivable that
20 these witnesses would have said something to Mr.
21 Valenzuela, such as for instance one saying to the other
22 in his presence, you remember when we were up in the
23 Imperial Valley three years ago picking those grapes,
24 which would indicate to Valenzuela that, albeit without
25 legal status, they had not in fact illegally entered the

1 country within the last three years.

2 Because as this Court recognized, I think in
3 Brignone-Ponci, the Hispanic population of southern
4 California is large and in fact there are large numbers
5 of people illegally there who have been there for many,
6 many years.

7 QUESTION: Well, what was the Defendant
8 charged with, transporting whom?

9 MR. IREDALE: He was charged with transporting
10 Romero-Morales, the one witness who remained.

11 QUESTION: And so whether he knew anything
12 about Morales, Morales was available to testify.

13 MR. IREDALE: That was my point, Justice
14 White. The point is that these witnesses apparently got
15 in the car with Romero as a group, and so the relevant
16 issue is not in fact what the case is, but what
17 Valenzuela's state of mind is.

18 QUESTION: Let's suppose the Defendant knew
19 what -- about this particular witness.

20 MR. IREDALE: Yes.

21 QUESTION: That he was not only an alien, but
22 that he had just been in the country two days. If he
23 had known that it's the end of the case, I take it.

24 MR. IREDALE: Correct.

25 QUESTION: No matter what the other witnesses

1 might have said about them.

2 MR. IREDALE: About their own particular
3 status.

4 QUESTION: Yes.

5 MR. IREDALE: That's correct. But the issue
6 is, the factual setting is such that, anything any one
7 of the witnesses could have said to the other,
8 Valenzuela could have perceived that they were there
9 together, that they were friends, that they were in the
10 same status, and what was true as to one was true as to
11 the other.

12 QUESTION: And the witness who was there said
13 he didn't say anything to the Defendant, is that right?

14 MR. IREDALE: Correct.

15 QUESTION: As to how long he had been there?

16 MR. IREDALE: Yes. And as to that particular
17 element of the offense, the Government's proof was
18 deficient.

19 QUESTION: Did he say anything?

20 MR. IREDALE: He did not.

21 QUESTION: Did he quote either of the two who
22 had been deported?

23 MR. IREDALE: No, sir, he did not.

24 QUESTION: Was he asked any questions about
25 that?

1 MR. IREDALE: I'm not sure. I think the
2 question that was put to him was, did you have any
3 conversations with him, and the answer was no. But of
4 course, in order to cross-check, to see if that was a
5 correct statement --

6 QUESTION: Was there any question, well, did
7 you -- did the driver have any conversation with the two
8 deported aliens?

9 MR. IREDALE: I'm not sure if that question
10 was put or not.

11 QUESTION: Well, how about on
12 cross-examination of that witness? He testified for the
13 Defendant.

14 MR. IREDALE: We called him as a witness at
15 the motion to dismiss.

16 QUESTION: Well, if you'd have wanted to see
17 if -- if you had have asked him, did the other witnesses
18 or the other aliens, or whoever, however you might want
19 to call them, did the other aliens have any
20 conversations with the driver, they'd have said yes, you
21 might have --

22 MR. IREDALE: Yes, we would have said, what
23 was that conversation.

24 QUESTION: Then you could have said, well,
25 what was the conversation.

1 MR. IREDALE: Yes. But the point is that --

2 QUESTION: So you didn't even take this
3 opportunity to demonstrate that there might have been
4 some help from the testimony of these other witnesses.
5 Because if he'd have said no, they didn't say a word to
6 the driver, you might -- there isn't much use those
7 witnesses would have been to you.

8 MR. IREDALE: Well, they could have been of
9 help in another way. For instance, if in fact these
10 witnesses -- Romero-Morales was not necessarily telling
11 the truth. One of more of those witnesses could have
12 been in the United States, could have been involved in
13 smuggling Romero, or could have in fact been legally
14 within the United States. We don't know, absent talking
15 to those witnesses.

16 QUESTION: Well, I know, but the question is
17 about Romero, not them.

18 MR. IREDALE: The question is whether those
19 witnesses could help with respect to the charge --

20 QUESTION: Well, I gather what you said
21 earlier, Mr. Iredale, was that one of them might have
22 said in the hearing and presence of the driver and this
23 chap who stayed --

24 MR. IREDALE: Romero.

25 QUESTION: -- might have said, up in the grape

1 country three years ago; and even though he denied that
2 they had said anything, they might have come and
3 testified that they did indeed say something, and that's
4 what was said. And your point is that this would have a
5 bearing on the knowledge of the Defendant.

6 MR. IREDALE: Absolutely.

7 QUESTION: But they would have had to have
8 been saying something about Romero, not about them.

9 MR. IREDALE: Or something that the Defendant
10 could have inferred related to Romero or to the group of
11 them, because --

12 QUESTION: If he had said, if any one of them
13 had said any of those things to the Respondent in this
14 case, the Respondent could have told his lawyer and his
15 lawyer could have made a proffer that this witness would
16 say that, I talked about up in the grape country. And
17 that's not here.

18 So what inference do you draw from that?

19 MR. IREDALE: Given the rule of law as it
20 exists and the fact that any such requirement may well
21 trench on the Defendant's Fifth Amendment right to
22 remain silent, I would submit --

23 QUESTION: A proffer would? This is not the
24 Defendant testifying. This is the lawyer testifying.

25 MR. IREDALE: A proffer through counsel, and

1 such a proffer was made. The proffer was made that
2 these witnesses --

3 QUESTION: A proffer was made about picking
4 the grapes?

5 MR. IREDALE: No, no, sir. The proffer was
6 made --

7 QUESTION: I'm talking about something
8 specific that you are now talking about.

9 MR. IREDALE: No. The issue was raised --

10 QUESTION: If these witnesses had said
11 anything in that car that would have helped him, he
12 could have told the lawyer and the lawyer could have
13 made a proffer. That's true, isn't it?

14 MR. IREDALE: Well, Your Honor, assuming that
15 Valenzuela remembered accurately what happened and
16 assuming that he trusted his lawyer enough --

17 QUESTION: Well, I would assume that a man
18 who's on trial for his liberty remembers, and if he
19 doesn't remember God help him.

20 MR. IREDALE: And if the witnesses aren't
21 there to help him, God help him.

22 QUESTION: No, but I mean, what are these
23 witnesses going to testify to? As of right now, what
24 are they going to testify? Tell me, what are they going
25 to testify?

1 MR. IREDALE: That's the problem. I can't
2 tell you, Justice Marshall, what they would testify to
3 --

4 QUESTION: What did your client tell you?

5 MR. IREDALE: -- because they weren't there.
6 I wasn't the lawyer in the court below.

7 QUESTION: Well, what did the client tell his
8 lawyer?

9 MR. IREDALE: I don't know, Justice Marshall.

10 QUESTION: So how can we do any business?
11 Nobody knows anything around here.

12 MR. IREDALE: Because the witnesses aren't
13 there. All the Government would have had to have done
14 would have been to hold them for a reasonable period of
15 time.

16 QUESTION: All you did was to write these two
17 Mexicans letters in English. I don't even know whether
18 they can read English.

19 MR. IREDALE: They were translated into
20 Spanish, Justice Marshall, and the Spanish was sent to
21 --

22 QUESTION: Good Spanish?

23 MR. IREDALE: Yes. And both letters came back
24 marked "No esta que"; this person is not here.

25 We couldn't subpoena the witnesses.

1 QUESTION: So you think that discharges all
2 your responsibilities?

3 QUESTION: I must confess that I still find
4 some difficulty in understanding what their testimony
5 could have done to help the particular case. Even if
6 they had said they'd been in the grape vineyards four
7 years ago, there's no presumption they've been in the
8 United States continuously since then. And they took
9 off. There was flight here. The route was such it
10 tended to corroborate the Government's case. There are
11 a lot of physical facts.

12 MR. IREDALE: I agree. But the issue is not
13 what, in the light most favorable to the Government, the
14 evidence would --

15 QUESTION: I think in the light most favorable
16 to the Defendant, I don't don't really know what these
17 other passengers could have done that would have belied
18 the testimony of the one man who was -- admittedly just
19 had entered the day before.

20 MR. IREDALE: Well, what Valenzuela could have
21 argued through his counsel to a jury is, sure, he knew
22 they were illegally here, he knew he was illegally here,
23 but there was no basis for him knowing --

24 QUESTION: He thought they'd been hiding in
25 this place for four years, is that the idea? I mean,

1 the whole circumstances certainly are not consistent
2 with over three years before they suddenly chase by the
3 checkpoint.

4 MR. IREDALE: Well, many of the people who are
5 illegally in California go from southern California
6 where they work up to the north, and they have to get
7 through the checkpoint, and then they come back south
8 and work in the south, and then they go back up north,
9 without necessarily entering back into Mexico. And he
10 could have inferred that or believed that that was the
11 situation here.

12 Even though admittedly he knew they were
13 without status, he could have inferred that they were
14 coming not from Mexico, but from the Imperial Valley up
15 to the Central Valley to pick crops there.

16 QUESTION: Mr. Iredale, suppose the Respondent
17 here had been driving a van with 30 aliens and 29 of
18 them are released, and there's evidence to support a
19 conclusion, a reasonable conclusion by a jury, that one
20 of them was knowingly transported. Does it make any
21 difference that 29 of them have disappeared?

22 MR. IREDALE: I would say it would depend on
23 the facts of the particular case.

24 QUESTION: Well, let me read you his
25 testimony. When they asked him why he fled at the

1 checkpoint, "Why didn't you stop?", his answer was,
2 "Well, I did stop, but since I was bringing in the
3 people I already knew that I had, it was too late. It
4 was done."

5 What do you make of that testimony?

6 MR. IREDALE: That he -- it could be argued,
7 first of all, that he had some knowledge of their
8 illegal status in the United States.

9 QUESTION: You say it could be argued?

10 MR. IREDALE: It was argued by the
11 Government.

12 QUESTION: And could a reasonable jury
13 conclude --

14 MR. IREDALE: That they were illegal, that he
15 knew that they were illegally in the United States?
16 Yes.

17 QUESTION: But that would not --

18 MR. IREDALE: But that doesn't go to the
19 three-year element.

20 QUESTION: Well, even if -- if you lose this
21 case, I take it the conviction still would have to be
22 reviewed in the Ninth Circuit.

23 MR. IREDALE: No, Your Honor.

24 QUESTION: Why?

25 QUESTION: There isn't a trial.

1 QUESTION: Oh, that's right.

2 MR. IREDALE: No. He was convicted in the
3 court below.

4 QUESTION: Yes.

5 MR. IREDALE: He was convicted in the court
6 below. The Ninth Circuit reversed the conviction, and
7 this Court would --

8 QUESTION: Yes, but they reversed the
9 conviction on the ground that you won on.

10 MR. IREDALE: That's correct.

11 QUESTION: But if we set that aside, I take it
12 your appeal would be reinstated in the Court of
13 Appeals. They would still have to review the evidence.

14 MR. IREDALE: There was no issue raised as to
15 that. The only issue, the single issue in this case --

16 QUESTION: Well, you've been telling us the
17 Government's proof was absolutely deficient on the
18 knowledge with respect to the three years.

19 MR. IREDALE: That was not argued in the Court
20 of Appeals. We relied on Mendez-Rodriguez solely.

21 QUESTION: Well, once again, let me come back
22 to, what do you say he -- what's your version of what he
23 meant when he said, "I already knew that I had had it."
24 What do you think he meant?

25 MR. IREDALE: He knew he was going to be

1 arrested. He knew there were people illegally in the
2 country who were in --

3 QUESTION: In his car.

4 MR. IREDALE: -- his car. But his --

5 QUESTION: Doesn't that go to his knowledge
6 that these were --

7 MR. IREDALE: Yes.

8 QUESTION: -- at least one illegal alien?

9 MR. IREDALE: But the statute has two mens rea
10 requirements. One is that he knew they're illegally
11 here. The second is that he knows they entered within
12 three years. And I think that statement goes to the
13 first. The Government can argue it goes to the second,
14 but that's the issue in dispute in the case.

15 QUESTION: Well then, why, as Justice White
16 just asked you, why isn't that open for review when the
17 Ninth Circuit never reached that issue, never considered
18 it?

19 MR. IREDALE: It was never raised because we
20 felt the Mendez-Rodriguez issue was absolutely in our
21 favor and we wanted to raise that issue only.

22 QUESTION: Do you think you're foreclosed on
23 remand if you lose this case?

24 MR. IREDALE: I would hope not. I would hope
25 we would not lose the case, given the fact that we feel

1 that the procedure here followed by the Government was
2 completely unreasonable, especially in light of the
3 practices in the Southern District of California. These
4 were testified to in the record and I'd like to explain
5 them, because they're a very reasonable effort to
6 balance all of the interests of all of the parties.

7 When a defendant is arrested and charged with
8 an offense involving felony illegal alien smuggling,
9 he's brought into court, almost always within 24 hours
10 of the arrest. At the Rule 5 arraignment, counsel is
11 appointed for him. Counsel is also at that point
12 appointed for the witnesses.

13 A date is set for a preliminary examination,
14 which is nearly always within ten days of the date of
15 the initial appearance in court. Mr. Justice Stevens,
16 there's nothing magical about the ten-day figure and
17 it's not common law. The reason why it's ten days is
18 because the Government wants ten days to be able to
19 indict the case. Defense counsel, frankly, could
20 conduct his investigation in much less time.

21 It is the practice in the Southern District of
22 California that the Government provides discovery, the
23 reports, to defense counsel on an informal basis, and
24 the witnesses are all interviewed before that initial
25 appearance. And at that appearance, after the interview

1 of the witnesses has taken place, counsel appears with
2 the defendant.

3 The Government is required at that time to
4 make a showing as to which witnesses they want. Defense
5 counsel is required to make a showing as to which, if
6 any, witnesses he wants. In one magistrate's court it
7 must be done by an affidavit under oath and --

8 QUESTION: Well, what kind of a showing must
9 he make? What if he says, for example, all of these
10 people were in the vehicle and I'd like to hold them all
11 because they might conceivably benefit the defense. Is
12 that enough?

13 MR. IREDALE: That's insufficient. You see,
14 the standard of conceivable benefit does not apply at
15 these hearings, because --

16 QUESTION: Well, what is the standard at that
17 hearing?

18 MR. IREDALE: The standard -- the defendant
19 must be able to show that the witness could offer
20 relevant, material and exculpatory evidence that would
21 not otherwise be obtainable from the witnesses that the
22 Government is keeping. In other words, counsel is held
23 at that hearing to a very specific standard. The reason
24 is he has been able to interview these witnesses.

25 QUESTION: And does he say at that hearing

1 what the exculpatory evidence would be?

2 MR. IREDALE: Yes, Your Honor. He's required
3 to, because absent such a showing the magistrate will
4 order the discharge of the witness immediately. And as
5 a matter of fact, at this hearing probably 50 to 60
6 percent of the witnesses are discharged.

7 In every case, the Government keeps material
8 witnesses in custody. Even if this Court adhered to the
9 Government's position, the number of material witnesses
10 retained in the Southern District of California would
11 not decrease.

12 QUESTION: What if the defendant objects,
13 though, to an action of the magistrate in discharging a
14 particular witness or group of witnesses? I take it he
15 can preserve that point and object at trial and
16 conceivably either have the indictment thrown out or the
17 Court of Appeals reverse it?

18 MR. IREDALE: Justice Rehnquist, that's
19 correct. In other words, a verbatim record is kept of
20 the magistrate's proceedings and defense makes his
21 proffer, the Government may oppose it. The magistrate
22 has ruled and then it would be presented to the district
23 court for his resolution of the issue.

24 But the point is at this material witness
25 hearing the defense can properly be held to the high

1 standard that they are held to. We're not allowed to
2 come in and say, oh well, maybe he could help, we don't
3 know exactly. Because we've had the chance to
4 interview, the defense is required to show at that
5 hearing to show specifically.

6 QUESTION: But there's nothing final about the
7 magistrate's decision, either. I take it the defendant,
8 anyway, can pursue the question into the district court
9 or the Court of Appeals if he wanted to.

10 MR. IREDALE: That's absolutely correct. But
11 the witness is ordered released at that time if the
12 magistrate so holds.

13 QUESTION: May I ask you, suppose that a day
14 after arrest the witnesses are all available and the
15 defense counsel interviews them. He's been appointed
16 and he interviews them. And then the ten days goes by
17 and at the hearing it turns out that the Government two
18 days after the arrest had deported all but the witnesses
19 they wanted to retain.

20 And then the defense counsel says, well, I
21 want those witnesses that were deported. What would the
22 judge say to him then? Wouldn't he make you show --

23 MR. IREDALE: That's exactly right, and that
24 would properly be held. In other words, Mr. Justice
25 White, if I understand correctly, what you're saying is,

1 given the interview, then the defense would have to make
2 a specific particularized definite concrete exculpatory
3 showing.

4 QUESTION: So if the Government -- if the
5 Government made the witnesses available to a defense
6 counsel, even for a day, and if he actually interviewed
7 them, the Government, if it was confident enough, could
8 just deport them if they were sure you couldn't make the
9 showing?

10 MR. IREDALE: Let me just say, I hesitate at
11 the formulation of a day, because depending on the facts
12 of the case a reasonable time might be necessary. You
13 might need to see -- for instance, in order to interview
14 intelligently you need to know what the Government's
15 going to charge.

16 QUESTION: I'll just say -- I'll say, okay, a
17 reasonable time.

18 MR. IREDALE: A reasonable time. Given a
19 reasonable time and adequate opportunity to know what
20 the Government's going to charge.

21 QUESTION: Actually, my example was that you
22 actually had interviewed.

23 MR. IREDALE: Yes.

24 QUESTION: If you had actually interviewed and
25 then the Government took the risk of deporting them, you

1 would have to then make the showing, the strict showing,
2 at the hearing?

3 MR. IREDALE: Assuming a reasonable
4 opportunity for investigation --

5 QUESTION: Well, I said you actually
6 interviewed.

7 MR. IREDALE: Absolutely. Then it would be
8 appropriate, because then you would be in a position to
9 say --

10 QUESTION: All right. You hadn't interviewed,
11 but you had had a reasonable time to interview.

12 MR. IREDALE: Yes.

13 QUESTION: Suppose you hadn't interviewed but
14 you had had a reasonable time to do so and had neglected
15 it.

16 MR. IREDALE: Then it's waiver. Then it's
17 waiver.

18 QUESTION: You suggested that there's no
19 reason why the Government shouldn't keep all these
20 witnesses in the country. Now, it's not unusual that
21 there would be 29 or 30 in one batch. We've seen such
22 cases. But now go back to my hypothetical, 30 of them
23 stashed around a van, concealed. Are you suggesting
24 that all 30 of these people have got to be retained in
25 the country to prove that the driver knowingly brought

1 them over?

2 MR. IREDALE: Either -- for a brief period of
3 time, yes. For a reasonable period of time, three,
4 four, five days.

5 QUESTION: All 30 of them?

6 MR. IREDALE: Yes, for a reasonable period of
7 time and only to allow an interview. It could be a
8 summary interview.

9 QUESTION: Then you're suggesting it isn't
10 enough if the Government stands the verdict of proof and
11 assumes it sustains a reasonable burden of proof that
12 one of them was there illegally?

13 MR. IREDALE: In Washington versus Texas this
14 Court held that the Government violates compulsory
15 process when it makes unavailable to the defense or
16 prevents from testifying a witness who is an eyewitness
17 to an event and who is physically and mentally able to
18 testify about events which he personally witnessed which
19 are relevant to the defense.

20 QUESTION: But the only issue is the knowing
21 aspect, isn't it? So there's nothing to witness in the
22 traditional sense of seeing, is there?

23 MR. IREDALE: Mr. Justice Burger, this case is
24 an atypical case. The Government chose this case as its
25 so-called test case, so they chose the facts they felt

1 would be most favorable to them. In most of these cases
2 the issue is not knowledge, but in many cases alibi,
3 mistaken identity, and in fact who is doing what, with
4 whom and to whom.

5 QUESTION: Oh, it would have been a better
6 case if Morales or whatever his name was, when he was
7 put on the stand had said, yes, I told the Defendant
8 that I had been -- that I was an illegal alien and that
9 I had been here for only two days.

10 MR. IREDALE: From the Government's point of
11 view it would have been a very good case.

12 QUESTION: But suppose he had testified that
13 way. Would you still be here then?

14 MR. IREDALE: Yes, because those other
15 witnesses could have testified that Morales --

16 QUESTION: That Morales really didn't know
17 what he was talking about?

18 MR. IREDALE: No, that he was lying, that
19 Morales was the man who was the smuggler, which is what
20 happens sometimes in these cases. It's hard to tell the
21 smuggler sometimes from the witnesses, which is why
22 counsel is appointed for them.

23 The point I think is that the Government
24 cannot accurately or fairly determine --

25 QUESTION: Because he might be lying because

1 he's getting a break from the Government?

2 MR. IREDALE: All of these witnesses are
3 subject to prosecution, and all of them are interviewed
4 initially by the Border Patrol.

5 CHIEF JUSTICE BURGER: Very well.

6 MR. IREDALE: I thank the Court.

7 CHIEF JUSTICE BURGER: Do you have anything
8 further, Mr. Phillips?

9 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.,

10 ON BEHALF OF PETITIONER

11 MR. PHILLIPS: Just a few remarks, Mr. Chief
12 Justice.

13 Initially I point out from the record that
14 Romero-Morales was asked whether he had heard any
15 testimony -- or any statements made to the driver by any
16 of the illegal aliens who had been deported. That's on
17 page 44 of the Joint Appendix.

18 QUESTION: How did he answer?

19 MR. PHILLIPS: No, both in terms of the car
20 and at the house prior.

21 QUESTION: Well, he didn't hear them. Does
22 that mean that there weren't any?

23 MR. PHILLIPS: It just said he didn't hear any
24 statements made. But he was in the presence and if
25 you're inside a car and they were together in the same

1 room of a house --

2 QUESTION: You said that was page 44?

3 MR. PHILLIPS: Yes, Your Honor, at the
4 bottom.

5 With regard to the reasonableness of the
6 practice in the Southern District of California, it
7 sounds good when you talk about individualized cases and
8 the step by step determination, but it seems to me that
9 the aggregate effect of the rule in the Southern
10 District of California is best demonstrated by the
11 statistics: 5,000 illegal aliens held in custody in
12 order for 36 trials, and we don't even know, of those 36
13 trials, how many if any illegal aliens ever testified on
14 behalf of a defendant.

15 QUESTION: On that point, Mr. Phillips, at
16 page 30 of the red brief they give some figures about
17 the number of cases and they say there were only 11
18 Mendez-Rodriguez motions filed in a total of 239 cases,
19 and only one motion was granted. Is that accurate?

20 MR. PHILLIPS: We did not independently
21 evaluate that, although we wouldn't be terribly
22 surprised if there aren't a lot of Mendez-Rodriguez
23 cases in light of the fact that the Government's
24 practice is typically to detain all illegal aliens
25 and/or to dismiss the charges. So you wouldn't expect

1 that there'd be very many cases. It doesn't come up
2 because --

3 QUESTION: So in other words, this case really
4 is an atypical case, then? The Government deviated from
5 its normal practice?

6 MR. PHILLIPS: In this case the Government
7 tested the theory of how much prejudice has to be
8 demonstrated, yes, Your Honor.

9 QUESTION: I see.

10 MR. PHILLIPS: With regard to a couple points
11 --

12 QUESTION: May I ask one other question. The
13 5,000 that have been detained, for how long?

14 MR. PHILLIPS: Well, it varies from one day to
15 120 days, Your Honor.

16 QUESTION: But we don't know? We don't have
17 any notion of what the average period is?

18 MR. PHILLIPS: Well, the average according to
19 the marshal is something in excess of five days per
20 person.

21 QUESTION: I believe, counsel, that counsel
22 for the Respondent indicated that even if the Government
23 won this decision it wouldn't alter the number of
24 witnesses retained.

25 MR. PHILLIPS: I don't know where -- I don't

1 understand how Respondent can make that claim. It seems
2 to me inconceivable in light of cases like Tsutagawa,
3 where the Government has to detain 39 material witnesses
4 for in excess of two weeks because of a decision
5 expressly on those facts by the Ninth Circuit, how it
6 could be that if the Government altered its position the
7 number of illegal aliens wouldn't be reduced.

8 QUESTION: How about the suggestion that the
9 witnesses be retained for simply long enough to let
10 defense counsel interview them and then let the
11 Government deport at its peril?

12 MR. PHILLIPS: That sounds good in theory,
13 Your Honor. But the reality is that we simply can't get
14 defense counsel there and ready to go, contrary to what
15 Respondent suggests.

16 QUESTION: Well, but if an opportunity were
17 provided and they didn't take advantage of it, I suppose
18 that's too bad.

19 MR. PHILLIPS: That may well -- yes, Your
20 Honor, I think that's probably true, although we don't
21 -- I mean, you'd have to set specific deadlines. The
22 Ninth Circuit at this point has been disinclined to say
23 anything less than ten days.

24 QUESTION: All right. But let's suppose there
25 are -- I mean, what's the matter with that, then, with

1 the shorter time, and then you could deport at your
2 peril, I suppose?

3 MR. PHILLIPS: Well, if we thought it would
4 work and that we could in fact deport at our peril given
5 two days. I just think we're going to have trouble
6 having that enforced in the Ninth Circuit.

7 QUESTION: Well, you're certainly acting at
8 your peril now. You don't say that you can just --
9 well, I guess you do. Your submission really is that if
10 you -- once you've interview them and the Government
11 makes a decision that they would have no exculpatory
12 evidence, that you can deport them, and as long as you
13 act in good faith that's the end of the matter, no
14 matter what the showing is on the other side. That's
15 your first submission.

16 MR. PHILLIPS: Yes, Your Honor. I mean, we
17 have to make that kind of a determination with regard to
18 each of the one million illegal aliens who are
19 captured.

20 QUESTION: Have you ever had a court agree
21 with you on that, that first position?

22 MR. PHILLIPS: Yes.

23 QUESTION: Who?

24 MR. PHILLIPS: The Ninth Circuit holds that if
25 we make a determination that there is no connection in

1 time or space between the illegal alien and a criminal
2 defendant, then we can --

3 QUESTION: Well, you say on the facts of this
4 case if you make a good faith judgment that, even though
5 they were present on the spot, that they would have no
6 exculpatory evidence, that's the end of the matter no
7 matter what kind of a showing the other side makes.

8 MR. PHILLIPS: Sure, but all we're suggesting,
9 though, is that there's not a demonstrable difference
10 --

11 QUESTION: Well, isn't that your submission?

12 MR. PHILLIPS: Yes, that is our submission.
13 But that's not demonstrably different from the judgment
14 we'd make otherwise.

15 QUESTION: Well then, suppose we rejected
16 that. What's your next fallback?

17 MR. PHILLIPS: Is that Respondent under any
18 circumstances must demonstrate with some concreteness
19 the materiality of the witnesses who were lost, which
20 they cannot do in this case.

21 QUESTION: And is that rule extant in any
22 circuit that you know of

23 MR. PHILLIPS: Yes, Your Honor, I believe the
24 Fifth Circuit adopts a rule --

25 QUESTION: You think that's the rule of the

1 Fifth Circuit?

2 MR. PHILLIPS: I think so, Your Honor, because
3 in the Avila-Dominguez case those witnesses were
4 witnesses to the crime at the time they were arrested,
5 and the court held that they could be -- that they could
6 be sent away.

7 QUESTION: So you -- so you would be acting at
8 your peril in deporting witnesses under the Fifth
9 Circuit rule?

10 MR. PHILLIPS: Certainly, to the extent that
11 there is review. But I mean, we don't -- we don't, you
12 know, wither from the notion that there'll be judicial
13 review of our determination. I think we'll be right.

14 QUESTION: Do you regularly take that risk in
15 the Fifth Circuit now or do you hold everybody?

16 MR. PHILLIPS: No, we regularly take that
17 risk, Your Honor.

18 QUESTION: Under the Fifth Circuit rule?

19 MR. PHILLIPS: Yes. We make an evaluation and
20 if we think there is no material exculpatory evidence we
21 will deport. You know, we won't keep more than
22 several.

23 QUESTION: Because the rule is not that
24 different from the Ninth Circuit rule, you don't think
25 it's so strict that you can't take that risk?

1 MR. PHILLIPS: Well, I mean, it's not my
2 decision to take that risk.

3 QUESTION: Well, it's somebody's decision.

4 MR. PHILLIPS: That's true. The Border Patrol
5 agents in the Fifth Circuit have on occasion released
6 illegal aliens, especially in circumstances essentially
7 like the Tsutagawa position, situation, where you have a
8 large number of illegal aliens, all of whom seem to say
9 the same thing. We don't detain all 39 of them in the
10 Fifth Circuit.

11 QUESTION: My question, my question really is
12 that if you don't -- if we do not agree with your first
13 submission, would the Government regularly -- and
14 suppose you had to operate under the Fifth Circuit
15 rule. Would the Government regularly release a lot of
16 witnesses that it would not release under the Ninth
17 Circuit rule?

18 MR. PHILLIPS: Well, there will certainly be
19 some. In instances where is clear inculpatory
20 statements made by the defendant at the time of his
21 arrest and where all other statements that are sworn by
22 the illegal aliens are cumulative, we will almost
23 assuredly release some illegal aliens.

24 CHIEF JUSTICE BURGER: Thank you, gentlemen.
25 The case is submitted.

1 (Whereupon, at 11:09 o'clock a.m., the case in
2 the above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

United States, Petitioner, v. Ricardo Valenzuela-Bernal No. 81-450

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BY Reene Hammond

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