

An aerial photograph of Miami, Florida, showing a mix of modern high-rise buildings and older, white Art Deco-style structures. The turquoise ocean and white sandy beach are visible in the background under a blue sky with light clouds.

MULTI-TRACK FEDERAL CRIMINAL SEMINAR

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TRUMP INTERNATIONAL
BEACH RESORT
MIAMI, FL

Defending Against Charges of Alien
Smuggling, Alien Transportation, and
Alien Harboring

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DEFENDING ALIEN SMUGGLING¹ CASES

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Give me your tired, your poor...— Statue of Liberty

Representing those accused of smuggling illegal aliens presents some very unusual and unique considerations. This paper will discuss some of the more salient issues in defending alien smuggling cases (Title 8 U.S.C. §1324).

¹ The author refers to alien smuggling here as a catch-all for offenses found in Title 8 U.S.C. §1324 et. seq. The offenses found in this section are varied and the elements of proof are slightly different. However, for the most part, the paper covers issues that pervade all the various 1324 alien smuggling permutations.

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³ The presenter wishes to acknowledge Frank “Super-Star” Morales for letting her “adopt” his thought-provoking paper on alien smuggling cases, and insert – to what was already a thorough piece of work – additional sample motions and orders, and supplemental case law. She also wishes to acknowledge the work of Mike Gorman, Writing and Research Specialist in our El Paso, Texas office who authored the paper “Continuing Legal Education: Special Issues in Alien Smuggling Prosecutions (Jan. 2009) (*see* VI. Sample “E”, attached hereto.). This presenter used Gorman’s paper for her presentation at the CJA Panel Training on “Criminal Practice in Federal Court,” Feb. 22, 2009, El Paso, Tex.

I. MYRIAD OFFENSES.

A. Bringing in aliens at a place other than a port of entry.
8 U.S.C. §1324 (a)(1)(A)(i).

Anyone who knowingly brings an alien into the United States at a place other than a designated port of entry is guilty.

The penalties are as follows: 10 years maximum; 20 years maximum, if during and in relation to the offense the person causes serious bodily injury or puts in jeopardy the life of any person; death, if any death resulted.

B. Bringing in aliens in “any manner whatsoever.”
8 U.S.C. §1324 (a)(2)(A).

A person is guilty if he knows or acts in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the US and brings the alien to the US, regardless of later official action taken with respect to the alien.

The penalties are as follows: One year max.; 10 yr max, if first or second violation where alien is not immediately brought to port of entry upon arrival and presented to an immigration officer; 3 yrs minimum-10 year max, if bring-to was done for private financial gain or commercial advantage (first or second violation); 3 yrs minimum-10yrs maximum, if the offense was committed with intent or reason to believe alien would commit an offense against US or any state that is punishable by more than one year (first or second violation); 5 yr min.-15 yr max, for any other violation.

C. Transport/move aliens.
8 U.S.C. §1324(a)(1)(A)(ii).

A person knowing or in reckless disregard that an alien has come to, entered, or remained in the US in violation of law and thereafter transports or moves or attempts to move that alien within the US, *in any way*, in furtherance of that alien’s violation of law is guilty.

The penalties are as follows: 5 yrs max; 10 years max, if done for private financial gain or commercial advantage; 20 years maximum, if during and in relation to the offense the person causes serious bodily injury or puts in jeopardy the life of any person; death, if any death resulted.

D. Conceal/harbor/shield from detection aliens.
8 U.S.C. §1324(a)(1)(A)(iii)).

A person is guilty if they act in knowing or reckless disregard of the fact that an alien has come to, entered, or remained in the US in violation of law, and thereafter conceals, harbors, shields from detection or attempts to do any of the foregoing.

The penalties are the following: 5 yrs max; 10 yrs max, if done for private financial gain or commercial advantage; 20 years maximum, if during and in relation to the offense the person causes serious bodily injury or puts in jeopardy the life of any person; death, if any death resulted.

E. Encouraging/inducing aliens.
8 U.S.C. §1324(a)(1)(A)(iv).

A person who encourages or induces an alien to come to, enter, or reside in the US, knowing that such coming to, entry, or residence is in violation of law.

The penalties are as follows: 5 yrs max; 10 yrs max, if done or private financial gain or commercial advantage; 20 years maximum, if during and in relation to the offense the person causes serious bodily injury or puts in jeopardy the life of any person; death, if any death resulted.

LIMITED RELIGIOUS AFFIRMATIVE DEFENSE: Title 8 U.S.C. §1324(a)(1)(C) provides a limited defense against certain provisions of §1324. If you have a situation where a client is charged with transporting, concealing, or inducing an alien to reside in the US (once they have already arrived in the US)(i.e., Title 8 U.S.C. §1324(a)(1)(A)(ii), (iii), and (iv)⁴), there is a limited defense to prosecution where you can show:

- a. that your client was a religious denomination have a bonafide nonprofit, religious organization in the US, or the agents or officers thereof;
- b. who encourage/invite an alien already present in the US;
- c. to minister as a non-compensated volunteer, notwithstanding the provision of room, board, travel, medical, and other basic living expenses
- d. PROVIDED that the minister/missionary has been a member of the denomination for at least one year.

F. Conspiracy to do any of the above acts. 8 U.S.C. §1324(a)(1)(A)(v)(I).

10-year maximum punishment.

G. Aid/abet any of the above acts. 8 U.S.C. §1324(a)(1)(A)(v)(II).

5-year maximum punishment.

II. COMMON DEFENSES.

A. Knowledge.

Various of the sections in §1324 require a person to act in knowing or reckless disregard of certain facts. If your client presents a bonafide misunderstanding of the fact of the alien's illegal presence, that can act as a defense. Also, consider whether a person may have been

⁴ The defense is limited with respect to subsection (iv) and applies only to a person who encourages or induces an alien to reside in the United States. If your client encouraged or induced an alien to come to or enter the US illegally, the defense doesn't fit.

hoodwinked into thinking that his “cargo” is legal.

A non-exhaustive list of things to look for to discount knowledge of alienage requirement: Extent of furtiveness; extent of concealment; statements made of intention; extent to which client spoke aliens’ language; extent of previous encounters with alien(s); relationship with alien(s)

B. Intent to Further Illegal Alien’s Presence.

Some sections of §1324 require that a crime have as an element the intent to further the illegal presence of the alien.

Consider these defenses:

1. What is the *mental state and intent* of the mover? Was he acting out of some other purpose (i.e., humanitarianism, health, duress, etc.)?

2. Mere transportation, without more, is insufficient as a matter of law to convict. *United States v. Chavez-Palacios*, 30 F.3d 1290 (10th Cir. 1994);

3. Defendant must act with specific intent to further the illegal presence. *United States v. Rivera*, 879 F.2d 1247 (5th Cir. 1989), *cert. denied*, 493 U.S. 998, 110 S.Ct. 554, 107 L.ED.2d 550 (1989);

4. An attempt to secure legal status for an alien is not acting with requisite mental state. *United States v. Merkt*, 764 F.2d 266 (5th Cir. 1985). *But see United States v. Alvarado-Machado*, 867 F.2d 209 (5th Cir. 1989) (where Fifth Circuit said a paroled alien is equivalent to an alien who is

seeking admission at the border and a person who transports such an alien is in violation of the statute (1324) because aliens’ departure and re-entry into the US voids any such parole).

C. Alienage.

Each section of §1324 requires that the person transported, moved, brought to the US, concealed, etc. be an alien.

1. The Fifth Circuit Pattern Jury Instruction defines alien as any person who is not a natural-born or naturalized citizen, or a national of the United States. The term “national of the United States” includes a citizen and a person who, though not a citizen of the United States, owes permanent allegiance to the United States. Fifth Circuit Pattern Jury Charge, Criminal §2.03.

2. The introduction of previously issue immigration documents which attest to alienage is not sufficient proof beyond a reasonable doubt of alienage. *United States v. Alvarado-Machado*, 867 F.2d 209 (5th Cir. 1989).

3. Generally, either live testimony or testimony through depositions, as envisioned by Title 8 U.S.C. §1324(d) will suffice to show alienage. Whether in live testimony or in depositions, the key is getting good stuff out of the aliens that are kept as witnesses. These folks are called material witnesses.

III. HANDLING MATERIAL WITNESSES.

<p>BLESSED ARE THE MEEK: FOR THEY SHALL INHERIT THE EARTH</p> <p><i>MATTHEW 5:5</i></p>	<p>IT TAKES TWO TO LIE. ONE TO LIE AND ONE TO LISTEN.</p> <p><i>---HOMER J. SIMPSON</i></p>
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The government's use of material witnesses poses some interesting challenges to the criminal defense practitioner. On the one hand they might be putting the hurt on your client. On the other hand, their story (coming to America to work and make a better life) makes them an instant hero. How you treat these witnesses depends, of course, on what they are going to say. Therefore, prior to securing their status as a material witness, prior to deposing them, and definitely prior to putting them on the stand or conducting your cross-examination, know what they are going to say about your client.

A. Material Witness Investigation.

1. REMEMBER: MATERIAL WITNESSES ARE REPRESENTED.

Always secure counsel's permission before discussing case with witness.

2. Plan ahead for multiple interviews. It never fails that the more times a person tells a story the more grandiose the facts get.

3. Photo array (any line-up problems?)

a. Photo line-up tricks: Get a multiple photo spread.

b. When presenting the spread (which includes a photo of your client), pay particular attention to hesitation in the identification process. "I think this is him" or "Maybe it's..." or "I am not sure" or "I don't know," together with pauses, silence, and constant looking.

c. Or you can do a spread without your client's photo. See if the person gives a false positive regarding some other person in the lineup.

4. Lying History. Adults are liars. But, how do you get adults to admit that they are liars? Anybody ever heard of Santa Claus, the Easter Bunny, the Tooth Fairy, the stork, etc. Start with the little, harmless, *white* lies and then make it explode. Try to see under what circumstance they'd stray from the little white lie to the big nasty one.

5. Criminal history inquiry. Get into everything (arrests, convictions, etc.) whether in their country or in the US.

6. Dastardly deeds. Have you ever done anything that you are not proud of?

7. Familiarity with the system (tit-for-tat). Are they aware of what they are

getting for agreeing to testify for the government? Or is the government foregoing something because they are getting the person's testimony?

8. Border Patrol treatment/promises/coercion. Are they preoccupied by anything the BP told them or did to them or anything else they may have witnessed?

9. Gathering negative information about a material witness can be difficult. The witness may or may not be onto what you are trying to achieve. But, how do you elicit all of this horrible information from someone not really willing to talk to you in the first place? You must build the trust between you and the witness. *How do you do that?*

- a. Appear interested in their story. They just want someone to "feel their pain." Mirror their emotion.
- b. Close in on them physically, lessening the space between you and them.
- c. Note-taking. Does it distract from the connection that you are trying to make with the witness?
- d. Tape- or other type of recording. Does this create a barrier to the trust-building that you are trying to accomplish?
- e. Dress. Do the clothes you wear have an impact on the interview and whether it'll

make the witness more or less forthcoming?

- f. Use of language, tone, pace, and accent.

10. Motion to suppress help.

Oftentimes, whether the material witnesses hurt or help you in the long run, they can help you in the context of a motion to suppress. These are the ultimate bystanders with nothing to gain.

Take the agent's report relating to reasonable suspicion or probable cause for the stop and ask the alien material witness if that fact existed. For example, if a BP agent testifies that they saw heads bobbing up and down, the mats can refute that. If the BP says that he saw the vehicle riding low, a material witness can help refute that. This is powerful stuff. On the one hand, if they help the government in its case-in-chief, but on suppression, the government is forced into the position of not refuting the testimony (which lends instant credibility to the suppression testimony) or challenging the credibility of the witness (which might call into question their testimony at later hearings, trial, etc.). To that end, get the judge to make a finding as to the credibility of the material witness. Either way, it will help you. If for nothing else, this might help get you some plea bargain leverage.

B. Material Witness Depositions.

The government is able to sift through all of the witnesses in search of their favorite two. Why do they choose to keep certain aliens and not others? What are they hiding? Is it possible that they have allowed all of your favorable witnesses to go

about their business in Mexico and kept only those that could really put the hurt on your client? The government wouldn't do that, would they? What do you do if the government sends home a favorable material witness?

1. Valenzuela-Bernal Motion to Dismiss the Indictment.

Supreme Court decision holding that the government had duty to make a good faith determination that any illegal alien witnesses possess no favorable evidence to the defense *prior* to its their deportation. *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). If the defendant can make a plausible showing that the testimony of the deported alien would have been material and favorable to the defense, the indictment should be dismissed. *Id.* at 873. The Court should dismiss the indictment if the testimony could have affected the judgment of the trier of fact. *Id.* at 873.

Some circuits have adopted an additional requirement of a showing of bad faith on the part of the government. *United States v. Chaparro-Alcantara*, 226 F.3d 616, 624 (7th Cir. 2000); *United States v. Pena-Gutierrez*, 223 F.3d 1080, 1085 (9th Cir. 2000); *United States v. Iribe-Perez*, 129 F.3d 1167, 1173 (10th Cir. 1997); But See *United States v. Gonzalez*, 463 F.3d 560 (5th Cir. 2006)(where 5th Circuit applies, but does not express adopt the requirement). Examples of bad faith include government departures from normal deportation procedures, or deporting a witness to gain an unfair tactical advantage.

2. Evidence to Gather and How.

a. Proceed by oath or affirmation of

defendant or counsel attesting to facts favorable to the defendant.

b. Cross-examine material witnesses about the lack of proper interrogation of all witnesses.

c. Use material witnesses to develop those facts that are favorable to the defendant that *would have been* testified to or potentially addressed by missing alien witness. Did the missing witness have the best opportunity to observe critical facts? Did the missing witness have knowledge of the encounter not known by all? Was there some insight that could only be provided by that witness?

d. Surprisingly, sometimes BP reports contain synopses of statements given by everybody. They are oft times contained in I-213's or in other reports such as the G-166 (Report of Investigation) or the I-831 (Continuation Page for Form G-166F).

e. Contact the deported material witness to see what story they gave to BP. I know you're sitting there thinking, "Yeah, if I had a cape and red suit I might could do that." But, remember, your point is that the government acted improperly by trying to limit the universe of information eventually available to the trier of fact. In the case of certain aliens, their deportation may be pending, but not yet executed (ie, El Salvadorans, Hondurans, Guatemalans, etc.) so it would be easier for you to track them down and speak to them.

D. Moving to Depose Favorable Witnesses Prior to their Deportation.

Sometimes you will run into a

witness who is saying favorable things about your client and who unwittingly aides the hell out of your defense. What do you do? Under Federal Rule of Criminal Procedure 15 and 18 U.S.C. §3144, you can move for the arrest and detention of a material witness, together with a motion to depose the witness. Attach an affidavit describing the need for the testimony (they possess material information and are in the course of deportation). Also, if you'd rather have the witness available for live testimony, you can slap him/her with a subpoena and ask for the setting of reasonable bail in your motion, pursuant to Title 18 U.S.C. §3142 (Bail Reform Act).

If you don't slap the witness with a subpoena and attempt to secure his presence at your trial, and he doesn't want to come to court to testify, your chances of postponement are nil. Best course of action is to serve the subpoena on him to appear at ever hearing so that, at very least, you can serve him with his next subpoena or to give further instructions.

Know what they are going to say ahead of time through investigation requests; i.e., photo array (any line-up problems?); motion to suppress information; reckless endangerment issues; criminal history inquiry; lying history (anything and everything); dastardly deeds; familiarity with the system (How can I help myself?); and/or border patrol treatment/promises/coercion

E. The Deposition.

Often heard through criminal defense circles is the comment, "Man, I wish we had the rules that they have in civil cases, because if I did..." Depositions,

although being conducted for and used in criminal cases, are largely governed by the Federal Rules of Civil Procedure. The "technicalities" that we often look for often hold the key to our client's freedom.

Consider these "technicalities": ***Before the deposition even starts*** (and you don't want depositions) object to the following *in writing*:

1. There has been no factual foundation of exceptional circumstances to take the depositions of these witnesses, in lieu of their live testimony before the trier of fact;

2. If you received no notice as to the time, place, manner of the deposition...object.

3. If you are being forced to conduct depositions prior to the passing of a discovery deadline, object that you cannot meaningfully cross-examine because the government has not disclosed any information for you to be able to properly cross-examine. As such, your objection is that your client is denied effective assistance of counsel, right to counsel, due process, and a fair trial.

4. If you are forced to depositions within 30 days of your client's first appearance through counsel⁵, object that you

⁵ Generally this first appearance references the arraignment of the defendant following indictment. Therefore, the passing of this thirty-day time limit for which the court requires a defendant's consent prior to proceeding to trial often, if not always, occurs long after the date set for

have not given consent to proceed to trial within that 30 day time frame. Only you can consent to that proceeding to trial that early and since these depositions are *for use at trial*, they are tantamount to trial testimony for which your consent must be first secured. See Title 18 U.S.C. §3161.

5. Make Sixth Amendment confrontation objection, stating that depositions are not the equivalent of testimony before the trier of fact since the trier of fact cannot gauge the witness's demeanor in a court setting.

6. Object to the absence of a judicial officer or qualified person to administer the oath to the witness. Fed. R. Civ. Proc. 30

Once the depositions start you are to object in the same fashion as if the case was actual in trial mode.

1. Objections under Federal Rules of Evidence not made are waived. Federal Rule of Criminal Procedure 15(g)

2. Object to proceeding through the deposition with your client in jail garb.

3. Object to the identification of your client during the deposition as improper, especially if the prosecutor or other person has previously identified the defendant prior to the material witness identification.

4. Object and advise that the material witness be made aware (again) of his Fifth Amendment privilege to remain

material witness depositions.

silent.⁶

5. Make sure that the Rule of Sequestration of Witnesses is invoked and adhered to.

6. Object to any time that the videographer moves the camera from recording the witness to recording other things. Re-urge objection to not having witness testify live; then object that the very limited opportunity for the jury to see the witness's demeanor is being wasted when the videographer scans away from the witness.

7. Similarly, any time a videographer pans the camera to get a gut-reaction from the parties (positive or negative) to the testimony given, although it might make "good tv" it has the effect of bolstering the testimony of the witness.

Once the videotaped deposition has concluded, there are a couple of interesting objections/requests you can make that might get you some leverage.

1. At the conclusion of each

⁶ This one is tricky. The author once made this objection during a deposition and counsel for the material witness got testy. After advising the author that he had already advised his client about the privilege, he told the author that he knew what he was doing. The author had no doubt counsel for the material witness knew what he was doing; rather, the author just wanted a videotaped reaction from the lawyer and/or client about the privilege. Since that altercation, that lawyer chose to no longer represent material witnesses.

deposition, an individual request should be made for the deponent to review the transcript or recording.

2. Once the playback is commenced, sit back and wait for the end of the playback. Once the playback is done, interrogate the videographer about the lack of interpretation given to the deponent as they reviewed the transcript/tape. The purpose of the playback is to provide the deponent with the opportunity to make changes to their testimony. If they are not provided with the interpretation of the english that is purportedly what their answer is, how can they make corrections?

3. In a similar vein, if the deponent is not made aware of the purpose of the playback, how can they make any changes?

4. Object to the absence, if any, of certification of the record.

F. Technical Pitfalls for both Prosecutor and Defender.

The deposition can be an interesting experience for both defense counsel and the prosecutor. The deposition can trip up both parties. The idea here is to try to be tripped up the least.

1. Prosecutor pitfalls

Nine times out of ten, deposition testimony not as harmful as in-court testimony because:

1. The prosecutor has absolutely no rapport with the material witness. In fact, only the arresting agent has any rapport with the witness...and that rapport isn't so good.

2. No victimization potential. A deposition doesn't give the prosecutor the same soapbox to pontificate over victimization issues. The thunder is somehow lost.

3. Not as talkative (video). Whether because of the amazement of the electronics or the augustness of the setting, generally, material witnesses are less talkative during depositions than during trial.

2. Defense pitfalls

One of the things that defense counsel often forgets is that cross-examination is substantially different when you are dealing with an interpreter and a non-English-speaking witness. Cross-examination is a skill based in large part on timing. That timing is hurt when the examiner's searing cross is elongated into undecipherable mush by the translator.

Consider this exchange in which the defense attorney is trying to get the witness to admit that he has been in the US before (based on a true story)

Defense: You've been here before?

Witness: (No Answer)

Defense: Answer please.

Witness: Answer what?

Defense: The question.

Witness: Which question?

Defense: That you've been here before.

Witness: This is my first time here.

Defense: This is your first time here in the US?

Witness: No, this is my third time in the US. It is my first time in this building.

Now, add the time it takes for translation and your one question *coup de grace* cross has just been shredded by a guy that didn't even finish grade school. It feels an awful lot like the confusion that is created by the "Who's on First?" comedy routine performed by Abbott and Costello.⁷ Now, no one is trying to mess up your cross. There is no malice on the part of the witness. It's just that typical cross, that Larry Posner-Terrence McCarthy stuff, doesn't work too well with anyone who needs translation. So here are some tips for conducting good cross on material witnesses who require translation:

Conducting good cross-examination of a material witness who requires translation. This list is by no means exhaustive, but they present good starting tips.

1. Know the answers to your questions ahead of time!

2. Keep your questions ultra-short. Don't overload the translator with compound questions or a question that drags on. If he gets tripped up by your question, you will likely not get the answer you are

looking for from the witness and/or the witness will ask you to repeat the question.

3. Slow down. This is #2's big sister. Same rationale.

4. If the answer you want is a "yes," nod while you ask the question.

5. Make eye contact with the translator and the witness. By making eye contact with the translator and the material witness, you can gauge the proper pace of

⁷ *Who's on First?*, Bud Abbott and Lou Costello, Copyright 1956.

your examination.

6. If needed, break a question into 2 digestible parts for the translator, and the material witness. This allows you and the translator to further synchronize the cross.

7. If you are referring to things, objects, or people, have them there at the deposition to point to as you cross. If, for example, you are talking about a location, photograph it, give a copy to the government and mark and introduce it in evidence. If you want to implicate an agent in wrongdoing, subpoena the agent and have him there to be identified by the witness.

G. Other Good Stuff to Bring Out.

If the material witness did not feel threatened or endangered by your client, bring it out. But, if he felt threatened or endangered by the agents, bring it out. That might provide an excellent opportunity to suggest, ever so coyly, that the government's hovering coerciveness colored the testimony of the witness. Beef up your motion to suppress with facts the government would rather not have aired out (ie, facts that contradict the agents...i.e., the truth).

H. Unavailability Requirement.

The requirement of unavailability (Compare 8 U.S.C. §1324(d) and Federal Rule of Evidence 804(a) and (b)(1)[Hearsay Exception, Former Testimony].

1. If the deposed promises to return if subpoenaed, there is a hurdle for a showing of unavailability. So, in your

questioning, bolster the witness's agreement to be present at the trial to testify.⁸

2. If the government fails to subpoena prior to his return to Mexico, there is a hurdle for a showing of unavailability.

3. If the government does nothing to secure his presence for court to testify, there is a hurdle for a showing of unavailability (i.e., lack of due diligence). *See United States v. Tirado-Tirado*, 563 F.3d 117 (5th Cir. 2009)(Held: (1) Government did not make "good faith" effort to obtain alien's [material witness's] presence at trial, such that alien could not be deemed "unavailable" for Confrontation Clause purposes.)

4. If the witness somehow gets to stay in the United States, no unavailability.

5. Question the witness about whether, if released on bond, he would return to testify in trial. If he answers no, make offers that the government might not. For example, the material witness answers "No." Then say, "Now, if the government

⁸ Now, obviously you'd rather the witness not be present to put the hurt on your client. And, you'd also like the videotaped depositions to be lost somehow. So, this line of questioning is quite tongue-in-cheek. In cases where material witnesses have been released on bond, sometimes they don't show up for hearings. The author would rather take his chances on a material witness who has "a little rabbit in him" than with a judge granting my ever-so-thoughtful objections. The reference "a little rabbit in him" comes from the movie *Cool Hand Luke*, Copyright 1967.

offers to allow you to stay in the country and work, would you stay?” Y’all know what the answer is. This extra question is helpful on two fronts: First, it destroys unavailability. Second, it sets up the reward-for-testimony angle. It essentially puts the government in a nasty Catch-22⁹. If it releases the witness to cure the unavailability issue, it opens up the paid testimony angle. If it does nothing, it creates a problem with unavailability.

6. Never, never, never agree to deport the material witnesses. Instead, object to the release of the material witness, and cite some favorable testimony that they would provide. The exception to this doctrine, of course, is when you have no other alternative than to enter of a plea of guilty.

IV. MOTIONS TO SUPPRESS.

First, how was the discovery of aliens made? Was it a roving Border Patrol who was testing his reasonable suspicion calculus? Was it a legitimate traffic stop that uncovered the aliens? Was it an informant’s tip? Was it an anonymous tip? Was it the result of an execution of a search warrant? There are two distinct areas of seizures seem to pervade alien smuggling cases.

A. Roving Border Patrol Stops.

A Border Patrol agent, to support a stop of legal traffic, must be “aware of specific, articulable facts that reasonably

⁹ *Catch-22*, Joseph Heller, Copyright 1970.

warrant suspicion ‘to believe that criminal activity may be afoot.’” *United States v. Arvizu*, 122 S.Ct. 744, 750 (2002). Often cited as important in the reasonable suspicion calculus are what are referred to as the *Brignoni-Ponce* factors. *United States v. Brignoni-Ponce*, 95 S.Ct. 2574 (1975). Those factors include, but are not limited to: Known characteristics of a particular area; previous experience of the arresting agents with criminal activity; proximity of the area to the border; usual traffic patterns of that road; information about recent illegal trafficking in aliens or drugs; behavior of the vehicle’s driver; appearance of the vehicle; number, appearance, and behavior of the passengers in the vehicle.

B. Traffic Stops.

In determining whether to attack evidence obtained as a result of a traffic stop, counsel should consult whatever statute was cited as being violated. This will involve consulting state transportation codes and regulations, together with state court decisions regarding proper interpretation of those statutes.

Consider, for example, the case of Sonia Luz Lopez-Valdez. *United States v. Lopez-Valdez*, 178 F.3d 292 (5th Cir. 1999). Valdez was stopped by a State Trooper/ Border Patrol agent dynamic duo. Valdez was officially stopped for having a crack in her rear taillight. Unfortunately for the government, although the Trooper believed it was a crime to have a taillight that emitted both white and red light, it was well-settled law in Texas that police lack the authority to make a stop simply because some white light is emitted from the taillight. Further, the Trooper’s good faith belief in his stop of the vehicle did not cure the illegality of the

stop of Valdez.

V. REASONABLE, OR NOT SO REASONABLE, PLEA BARGAIN OFFERS.

In any case where you might want to suggest a plea bargain, in lieu of whipping up on the prosecutor in a motion to suppress or other pretrial motion, consider making an offer immediately after filing your dispositive motion. The following are suggestions for plea offers.

1. Aiding and abetting the illegal entry of an alien. Title 8 U.S.C. §1325 & Title 18 U.S.C. §2. Max penalty: 6 months per alien charged in criminal complaint;

2. Accessory after the fact to the illegal entry of an alien. Title 8 U.S.C. §1325 & Title 18 U.S.C. §3. Max penalty: 3 months per alien charged in criminal complaint;

3. Superseding the indictment to read a misprision of the underlying offense pursuant to Title 18 U.S.C. §4. This provides for a nine-level reduction in the sentencing scheme and caps the prison time to 3 years;

4. Superseding the indictment to allege an accessory after the fact to the underlying offense pursuant to Title 18 U.S.C. §3. This will provide for a six-level reduction in the sentencing scheme and cuts in half all of the maximums provided by statute for the offense.

VI. SAMPLE MOTIONS AND SPECIAL ISSUES IN ALIEN SMUGGLING CASES

- A. Motion To Suppress (Warrantless Search, Lack of Probable Cause and/or Reasonable Suspicion to Make Investigative Detention).
- B. Motion To Suppress Deposition.
- C. Motion To Suppress Pretrial Identification of Defendant's Automobile Based on the Use of Suggestive Lineup Procedures.
- D. Motion To Dismiss Indictment Based on Violation of Defendant's Fifth Amendment Right to Due Process and Sixth Amendment Right to Compulsory Process Clause.
- E. Special Issues in Defending Alien Smuggling Cases.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA

§

V.

§

CAUSE NO. xxxWWJ

§

XXXXXXXXXX

§

§

“A”

DEFENDANT’S MOTION TO SUPPRESS
(Warrantless Search, Lack of Probable Cause and/or Reasonable Suspicion to Make
Investigative Detention)

TO THE HONORABLE WILLIAM WAYNE JUSTICE, SENIOR UNITED STATES
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS:

COMES NOW, the Defendant XXXXXXXX (“Xxxx” or “Defendant”), by and through his attorney of record, Assistant Federal Public Defender Frank Morales, and under the authority of the Fourth Amendment of the United States Constitution and files this Motion to Suppress and would show this Honorable Court the following:

I.

Statement of the Facts¹⁰

On May 19, 2005, at approximately 5:45 P.M., Defendant was stopped on FM 2644 by agents with the United States Border Patrol. The stop effectuated by the agents was without a warrant, lacked probable cause, and lacked reasonable suspicion to believe that a crime was being committed. During that stop, agents approached the vehicle. During the approach of the

¹⁰ This recitation of facts are gleaned from information provided through discovery. Their recitation in this portion of this motion is not meant as a stipulation of facts, but merely a recitation of facts as alleged by the Government.

vehicle, the agents determined that there were passengers in the vehicle that were present in the United States in violation of law.

It appears from discovery that no questioning was conducted of Defendant during the stop except for his citizenship, right to be present in the United States, and whether he had crossed with the others in the truck's bed. However, Border Patrol agents peered into the bed of the truck and asked the passengers their citizenship. In answer to these questions, the passengers related that they were citizens of Mexico in the United States illegally. At this point, the Defendant was arrested, advised of his *Miranda* rights, and he and the aliens were transported to the border patrol station for further investigation and processing. From discovery, it does not appear as though Defendant made any statements prior to his arrest, other than to state his citizenship and/or immigration status, and whether he had crossed with the group of aliens. Additionally, it does not appear as though Defendant made any incriminating statements relating to the passengers found in the vehicle he was driving.

Defendant moves to suppress the fruits of his stop on the grounds that:

1. The stop was without a warrant, and lacked probable cause and/or reasonable suspicion to make an investigative detention.

II.

Based on the foregoing illegality, Defendant moves to suppress the following:

1. Any evidence acquired as a result of the stop. This includes, among other things, the material witnesses themselves. Additionally, the Border Patrol Agents were able to ask questions of the individuals in the vehicle as to their citizenship, to which all of the individuals stated that they were in the United States illegally. Additionally, and as a direct result of the

stop, the agents were able to question the material witnesses and extract statements from the material witnesses. The contents of those statements can be found in the Government's discovery at Forms G-166F and I-831.

2. Any fruits of any observation or search of the interior or of the cargo area of the truck, together with any observation made of the bed of the truck. In this case, the agents noticed that two individuals, among others, were in the vehicle with the Defendant and that they did not have proper documentation to be in the United States.

3. Any post-detention statements of Defendant. Specifically, these statements can be found in the Government's discovery and is known as Form G-166, in addition to the answers to questions posed on the Form I-213.

4. Any identification of Defendant by any witness as a result of the illegal stop. This identification is a direct result and a direct fruit of the illegal stop. But for the illegal stop, the material witnesses would not have provided Border Patrol with an identification of the Defendant.

5. Any other evidence arrived at directly or indirectly by exploitation of the evidence directly acquired. Specifically, this provision includes any evidence which becomes known to the defense at the hearing of this motion.

Legal Argument

III.

The Fourth Amendment to the United States Constitution applies to seizures of the person as well as seizures of property, including investigatory stops of a vehicle, such as the stop of the vehicle operated by Defendant in this case. *See United States v. Cortez*, 449 U.S. 411,

417, 101 S.Ct. 690, 694-95 (1981); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574 (1975); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968); *United States v. Glass*, 741 F.2d 83, 85 (5th Cir. 1984). An investigatory stop must be justified by some objective manifestation that criminal activity is afoot. *United States v. Cortez*, 449 U.S. at 417, 101 S.Ct. at 695; *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 2640 (1979). Specifically, the officer making the stop must have a “particularized and objective basis for suspecting the particular person stopped of criminal activity”. *United States v. Cortez*, 449 U.S. at 417-418, 101 S.Ct. at 695.

Border Patrol agents on roving patrol may not stop vehicles randomly to check the immigration status of the vehicles’ occupants or because they have information which does not rise to the level of reasonable suspicion to believe that illegal activity is afoot. Only when they have a reasonable suspicion of wrongdoing, based on particularized and articulable facts, may roving agents detain a vehicle. *United States v. Inocencio*, 40 F.3d 716, 721 (5th Cir. 1994), citing *United States v. Cardona*, 955 F.2d 976, 977 (5th Cir. 1992). Defendant believes the Government will not be able to show such facts in this case.

IV.

A roving Border Patrol agent may temporarily detain a vehicle for investigation only if he is aware of specific articulable facts, together with rational inferences from those facts, that reasonably support suspicion that the vehicle is involved in illegal activities. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975); *United States v. Moreno-Chaparro*, No. 97-50641 (5th Cir. Sept. 30, 1998); *United States v. Jones*, 149 F.3d 364, 366 (1998); *United States v. Inocencio*, 40 F.3d 716, 722 (5th Cir. 1994); *United States v. Chavez-Villarreal*, 3 F.3d 124, 126-

27 (5th Cir. 1993) (based on the totality of the circumstances, the detaining officers must have a particularized and objective basis for suspecting the persons stopped of criminal activity).

In assessing the objective reasonableness of a stop, the Court must consider the “whole picture.” *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). The Court must examine several factors in order to evaluate the whole picture. *United States v. Brignoni-Ponce*, 422 U.S. at 884-85. *See also United States v. Frisbee*, 550 F.2d 335 (5th Cir. 1977), *United States v. Melendez-Gonzalez*, 727 F.2d 407 (5th Cir. 1984). In order for Border Patrol agents to legally stop a vehicle there must be a reasonable and articulable suspicion that the persons seized are engaged in criminal activity.

V.

In the instant case the officer's observations did not constitute a “particularized and objective basis” for suspecting that any crime was being committed. The discovery disclosed to date reflects a set of facts when taken together do not rise to the level of reasonable suspicion.

Interestingly, agents with the United States Border Patrol made a couple of observations of the vehicle which led to the development of reasonable suspicion in this case. This observation, in particular, was that defendant’s vehicle appeared to be riding in tandem with another vehicle. Before defendant’s vehicle was stopped, the other suspected tandem vehicle was stopped and its involvement with and familiarity of defendant’s truck was dispelled. That having been the case, a major aspect of the agents’ suspicion was resolved against the development of reasonable suspicion or probable cause. The set of facts relied upon by the agents, even when considered under the totality of the circumstances, does not give rise to reasonable suspicion for effectuating a stop.

In order for a stop of a vehicle to occur, under circumstances of reasonable suspicion to believe that a crime is being committed, the suspicion must be reasonable. In this case, with these facts, the compilation of facts does not give rise to a reasonable suspicion, only a mere hunch.

Further, the registration check of the truck driven by defendant came back to San Antonio, Texas. All the observations made about the truck, its location, registration, its manner of operation and all other observations did not lead the agents to stop that vehicle. Instead, the agents opted to stop the Blazer. Only after they dispelled the Blazer's involvement did they set their eyes on defendant's truck. To put it more bluntly, the agents' observations of the truck did not even lead them to believe that the truck was involved in any wrongdoing. In choosing to stop the Blazer and focus on it, it appears as though their belief of ongoing illegal activity did not rest with the defendant's vehicle; instead, their focus rested on the Blazer. This is significant because all of the observations made of defendant's truck still did not lead agents to stop it.

VI.

An illegal detention requires suppression of later-discovered contraband. Under the "fruit of the poisonous tree" doctrine, all evidence derived from the exploitation of an illegal search or seizure must be suppressed, unless the Government shows that there was a break in the chain of events sufficient to refute the inference that the evidence was a product of the Fourth Amendment violation. *Brown v. Illinois*, 422 U.S. 590, 602–04 (1975); *Wong Sun v. United States*, 371 U.S. 471, 484–88 (1963). To determine whether the Government has demonstrated that evidence is not a product of the Fourth Amendment violation, the Court must examine the totality of the circumstances surrounding the discovery of the evidence, giving special attention

to three factors: (1) the temporal proximity of the detention and the discovery of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the initial misconduct. *Brown*, 422 U.S. at 603–04. Because the initial stop of Defendant's vehicle was unreasonable under the Fourth Amendment, all fruits of the stop, direct and indirect, must be suppressed. *United States v. Cruz*, 581 F.2d 535 (5th Cir. 1978) (en banc).

PRAYER

WHEREFORE, premises considered, Defendant prays that this Honorable Court will set this motion down for pretrial evidentiary hearing and thereafter order suppression of evidence.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA §
 §
 §
VS. § CAUSE NO. Xxxx
 §
 §
xxxx §

**“B”
DEFENDANT’S SECOND MOTION TO SUPPRESS DEPOSITION**

TO THE HONORABLE WILLIAM WAYNE JUSTICE, SENIOR UNITED STATES
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS:

COMES NOW the Defendant xxxx or “Defendant”), in the above-styled and numbered
cause and by and through his attorney of record Assistant Federal Public Defender Frank
Morales, pursuant to Federal Rule of Criminal Procedure 15, Title 18 U.S.C. §3503, and Federal
Rules of Civil Procedure 30, 32 and hereby files this SECOND MOTION TO SUPPRESS
DEPOSITION and in support thereof would show the following:

I.

**THERE EXISTS NO STIPULATION BY AND BETWEEN THE
PARTIES TO WAIVE REVIEW OF THE DEPOSITIONS BY
THE DEONENTS.**

On December 2, 1999, defense counsel received copies of depositions of the material
witnesses in the above-numbered and styled cause. Defense counsel objects to the use of both
depositions until such time as the material witnesses can examine the deposition and affix his
signature. Page three, lines thirteen through sixteen of the deposition of Miguel Mendez Soto
and page three, lines fourteen through seventeen of the deposition of Jose Hernandez-Miranda

contain a certification that the deposition transcript was not submitted to the witness for examination and signature, “examination and signature having been waived by the witness and all parties present.” Additionally, the cover letter which accompanies both depositions states that all parties have waived the reading, examination, and signing by the deponents.

This waiver plainly did not occur. Defense counsel remembers that no one ever asked him, counsel for the Government, or the witness if they desired to have the examination and signature waived. Defense counsel comes to this conclusion because he was present at the deposition and recalls that, during the time he was present, neither the parties nor the witness consented to a waiver of the examination of the deposition and signature of the deposition. In a conversation with the Assistant United States Attorney who conducted the deposition, he also recalls no such stipulation.

II.

TITLE 18 U.S.C. §3503 AND FEDERAL RULE OF CIVIL PROCEDURE 30 REQUIRE THAT THE DEPOSITION BE GIVEN TO THE DEPONENT FOR EXAMINATION, CHANGES, AND SIGNATURE.

Depositions in criminal cases shall be taken and filed in the manner provided in civil actions. Title 18 U.S.C. §3503(d). When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read by the witness. Federal Rule of Civil Procedure 30(e). To the best knowledge of the defense, neither the deposition of Jose Hernandez-Miranda nor Miguel Mendez-Soto have been delivered to each respective deponent for an examination, changes, and signing. Until that has been accomplished, the defense would move to suppress both depositions as noncompliant with Title 18 U.S.C. §3503 and Federal Rule of Civil Procedure 30(e).

III.

SUPPRESSION IS ENVISIONED AS A PROPER REMEDY FOR FAILURE TO COMPLY WITH EXAMINATION, CHANGES, AND SIGNATURE OF THE DEPOSITION.

Errors in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained. Federal Rule of Civil Procedure 32(d)(4). The error relating to the deponent's examination, changes, and signature of the deposition was discovered on December 2, 1999, when the deposition was received by defense counsel.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the depositions of Jose Hernandez-Miranda and Miguel Mendez-Soto held on November 2, 1999 be suppressed until such time as the Officer has complied with the requirements of Federal Rule of Civil Procedure 30.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA §
 §
VS. § CAUSE NO. Xxx
 §
xxx §

“C”
**MOTION TO SUPPRESS PRETRIAL IDENTIFICATION OF DEFENDANT’S
AUTOMOBILE BASED ON THE USE OF SUGGESTIVE LINEUP PROCEDURES**

TO THE HONORABLE WILLIAM WAYNE JUSTICE, SENIOR UNITED STATES
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS:

COMES NOW the Defendant, xxx or “Defendant”), in the above-styled and numbered cause and by and through her attorney of record, Assistant Federal Public Defender Frank Morales, and under the authority of the Fifth and Sixth Amendments to the United States Constitution and respectfully requests that this Court grant this Motion to Suppress Pretrial Identification of Defendant’s Automobile Based on the Use of Suggestive Lineup Procedures for the following good reasons:

I.

An arraignment waiver was filed in this case on December 9, 1998. Discovery was received from Assistant United States Attorney Tracy Spoor on December 15, 1998. A discombobulated set of discovery was reviewed, corrected, and re-distributed to the Defense on December 29, 1998.

II.

From the limited discovery received thus far, Xxxx anticipates that the Government will attempt to introduce evidence of a set of pretrial identifications of Xxxx's automobile made by the material witnesses in this case.

III.

The use of said identifications would violate Xxxx's constitutional due process protection against the use of certain suggestive pretrial identification procedures.

IV.

Argument

Under some circumstances, a lineup or other procedure that so strongly suggests to a witness who should be identified as the perpetrator renders that person's in-court testimony on that identification a violation of the accused's due process guarantees. *See Stovall v. Denno*, 388 U.S. 293, 302 (1967); *Foster v. California*, 394 U.S. 440, 442 (1969). A claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances. *Stovall*, 388 U.S. at 302. Moreover, and often quoted, is language which suggests that "showing suspects singly to persons for the purpose of identification and not as part of a lineup, has been widely condemned." *Id.* The admissibility of eyewitness identification at trial following a pretrial identification from a photo lineup is governed by a two-step analysis. *United States v. Hickman*, 151 F.3d 446, 459 (5th Cir. 1998). First, we ask whether the lineup was impermissibly suggestive; second, if it was so suggestive, we consider whether the lineup led to a substantial likelihood of a misidentification. *Id.*

V.

In the present case, Neil Marley, arresting and special agent, along with Senior Patrol Agent Benjamin Ponce de Leon, “drove [the aliens] to Batesville *to identify* the pickup. Upon arrival in Batesville, we drive [sic] down Old Loma Vista Rd. to the mobile homes. The pickup was parked across the street from the mobile homes. Both aliens affirmed that the pickup was the one which was utilized to take them from the house on Rios St. to the mobile homes where they were concealed.” 1 Memorandum of Investigation at 2 (emphasis added).

The agents’ transportation of the alien-material witnesses to the location where they were initially found and later detained for the purpose of identifying a vehicle that was the alleged vehicle of transport violates Xxxx’s due process protection against unnecessarily suggestive lineup procedures. Additionally, testimony about that identification would deprive Xxxx of her constitutional right to a fair trial.

This “lineup” exercise runs afoul of a widespread court dictate. While this procedure was with respect to the identification of the supposed vehicle of transport, the procedure adversely affects Ms. Xxxx because that procedure singled out *her* vehicle that was parked near *her* home. This procedure unnecessarily suggested this vehicle to the material witnesses as the vehicle in question. While the showing of suspects singly to persons for the purpose of identification and not as part of a lineup has been widely condemned, by analogy, so too should the showing of a defendant’s vehicle for purposes of identification where that identification is evidence of the alleged commission of a crime. This exercise isolated only one vehicle as the possible subject vehicle. It did not offer an alternative or other option. In addition, the vehicle was very near the location of the aliens’ arrest. There were no independent recollections or descriptions given by the aliens in this case. Because this “lineup” was unnecessarily suggestive, leaving the aliens

with only one option and placing that option at the locus in quo and no mention is made of independent sketches, composites, descriptions, etc., the possibility of a misidentification is substantial.

The factors which the court looks at to determine whether a suggestive identification procedure could have led to a substantial likelihood of misidentification are: 1) the opportunity of the witness to view the criminal; 2) the witness's degree of attention; 3) the accuracy of the pre-identification description; 4) the witness's level of certainty; 5) the elapsed time between the crime and the identification; and 6) the corrupting influence of the suggestive identification.

Hickman, 151 F.3d at 459. Here, the misidentification analysis must analogize to the identification of the vehicle and whether that identification could have possibly misidentified the subject vehicle.

First, no mention is made of the material witness's opportunity to view the vehicle while the offense was being committed. Second, and again, no mention is made of any detail provided by the material witnesses of the appearance, color, make, model, capacity, wheels, size, et cetera of any vehicle. Third and fourth, no mention is made of the pre-identification description's accuracy. Presumably, there was no pre-identification description made. In addition, no mention is made of the level of certainty of the pre-identification description. Fifth, the lapse of time between the alleged commission of the offense and the identification of the vehicle was relatively short. However, it should be noted that said identification was orchestrated, pre-ordained, and virtually guaranteed because of the corrupting effect of the suggestive identification procedure, the sixth factor in determining whether a misidentification is possible.

Therefore, because the nature and conduct of this “lineup” was overly suggestive and that suggestiveness corrupted the witness’s ability to effectively and independently identify Defendant’s vehicle as the subject vehicle, this procedure violated Xxx’s due process guarantees under the United States Constitution.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant prays that any evidence of eyewitness identification of her vehicle as a vehicle involved in the transport of aliens be in all respects suppressed.

Additionally, Defendant prays that the any and all fruits of this illegally suggestive lineup procedure be suppressed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA)
)
v.) CAUSE NO. EP-xx-CR-xxx
)
Xxx Xxx-Xxx)

“D”
DEFENDANT’S MOTION TO DISMISS INDICTMENT
AND SUPPORTING MEMORANDUM OF LAW
(Violation of Defendant’s Fifth Amendment Right to Due Process and
Sixth Amendment Right to Compulsory Process Clause.)

Defendant Xxx Xxx-Xxx, charged with knowingly or recklessly transporting undocumented aliens, respectfully moves the Court to dismiss the indictment due to the Government’s deportation of the alien witness whose testimony would be exculpatory and who would have formed the core of his defense. Of the three aliens allegedly transported, the Government immediately deported the one whose statement was helpful to Mr. Defendant, and held as material witnesses and deposed the two whose statements were helpful to the Government. This violated his rights under the Due Process Clause of the Fifth Amendment and Compulsory Process Clause of the Sixth Amendment, and the prejudice it has caused his defense cannot be alleviated by any relief short of dismissal.

FACTS

Mr. Defendant’s vehicle was stopped for speeding near the Fort Bliss golf course. Along with him in the car were his wife and three other persons. The Military Police called the Border Patrol due to a suspicion that the passengers might be undocumented, and upon inquiry by the agents, it was determined that they were in fact in the United States illegally. All three aliens and

Mr. Defendant and his wife gave a consistent account regarding the aliens showing up at their house in the middle of the night and asking for some food because they were hungry. Mr. Defendant and his wife admitted them to the house and fed them.

The accounts diverged from that point. Mr. Defendant, his wife, and one of the aliens (Mat Wit 1) advised that they were only helping the three aliens return to Mexico. Two of the aliens (Mat Wit 2 and Mat Wit 3), however, claimed that Mr. Defendant had agreed to take them to an area where they could hop a northbound freight train for a fee of \$60. Mat Wit 3 explained the divergence in his story from that he initially gave the MPs (he had initially told them that the three were in fact being given a ride back to Mexico) by claiming that Mr. Defendant had told them to give this story when he saw the MP vehicle behind them.

The Border Patrol agents interviewed all three aliens, but only took a sworn statement from Mat Wit 2 and Mat Wit 3. The two were held as material witnesses and given information on victim-witness assistance benefits. By contrast, after the agents heard what Mat Wit 1 had to say, he was promptly processed for an expedited removal and was deported the very next day. Of course, Mat Wit 1 is now outside the subpoena power of the United States and Mr. Defendant does not even know where to locate him. There was no compelling reason why the Government needed to deport Mat Wit 1 rather than one of the other aliens, and it was aware at the time that it did so that he was an important exculpatory witness for Mr. Defendant.

ARGUMENT AND AUTHORITIES

- A. Mr. Defendant's Sixth Amendment right to Compulsory Process and Fifth Amendment right to Due Process were violated by the Government's deportation of a material witness knowing that he would provide exculpatory testimony***

The Government's act of deporting a potential witness when it had actual knowledge that the person can provide material exculpatory evidence was in violation of Mr. Defendant's due process rights. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982). In order to prevail on a *Valenzuela-Bernal* claim, Mr. Defendant must show that the Government deported an individual knowing that he would be able to give exculpatory testimony, and that the Government's conduct resulted in prejudice to his case. *Valenzuela-Bernal*, 458 U.S. at 873; *United States v. Gonzales*, 436 F.3d 560, 578 (5th Cir. 2006)¹¹. It must be shown that the Government knew of this at the time of the deportation. *Id.*

In this case, the Government knew immediately after the arrest that Mat Wit 1 gave an account of events which was entirely consistent with what Mr. Defendant and his wife had told the agents. Their response was to immediately deport him while paroling the other two aliens into the country and providing them with information on victim/witness assistance benefits. The agents deliberately did not ask Mat Wit 1 to even provide a sworn statement. Instead, they deported him and detained the witnesses who would best help the Government's case to testify. It is quite obvious that making sure that Mr. Defendant would have a fair trial was not at the forefront of the Border Patrol's mind when selecting which witnesses to detain.

To establish "prejudice," Mr. Defendant must at least make "a plausible showing that the testimony of the deported witness would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." *Id.* It is clear, based on the

¹¹ The Fifth Circuit has never expressly held that this is a requirement but it appears likely that it will be so held based on the rules in other circuits. *Gonzalez* held merely that the defendant had not made the necessary showing for plain error because the witness had been deported before *Gonzalez* was even arrested or charged.

reports of the Border Patrol agents, that Mat Wit 1's testimony would be extremely helpful to Mr. Defendant's defense. A jury presented with the testimony of a disinterested witness which was so contrary to the testimony the Government relied upon would have a reasonable likelihood of finding that there was a reasonable doubt as to Mr. Defendant's guilt¹². Indeed, were such a witness still within the U.S. and available, it would be something akin to ineffective assistance of counsel for Mr. Defendant's attorney not to seek to call him. It obviously would not be cumulative of the other aliens' testimony when it would be contrary to what they claimed. As such, Mr. Defendant has made a sufficient showing of prejudice based on the Government's bad faith conduct in deporting the one witness who had exculpatory and material testimony regarding his role in the offense charged.

CONCLUSION

The facts of this case clearly demonstrate that the witness the Government deported would have been a favorable witness to the defense and not merely cumulative. Thus, the deportation of a witness with favorable and material evidence was done with knowledge that he would likely be Mr. Defendant's best witness and has prejudiced Mr. Defendant's defense to the charges against him. The Government has removed from the Court's jurisdiction a key witness to the events charged in the indictment and has thus effectively foreclosed Mr. Defendant from presenting that witness. An adversarial system of justice where the Government is allowed to deport and thus prevent the defense from presenting any witness whose testimony the Government finds

¹² This is particularly true when the deported witness' testimony is consistent with what the Government's witnesses told the officer who initially stopped them.

problematic or inconvenient is no adversary system at all. Dismissal is the only sanction which will vindicate Mr. Defendant's rights.

WHEREFORE, premises considered, Mr. Defendant requests that this Court dismiss the indictment with prejudice.

“E”
**Continuing Legal Education:
Special Issues in Alien Smuggling Prosecutions**

I. INTRODUCTION

In criminal proceedings in alien smuggling prosecutions, a number of common issues may arise. This paper addresses three such issues: (1) governmental issues in the handling of defense witnesses; (2) federal procedure governing the conduct of foreign depositions; and (3) the use of deposition testimony.

II. GOVERNMENT MISCONDUCT

Whether characterized as the right to compulsory process or the more generic right to present a defense, any governmental interference with a defendant’s right to present witnesses in his or her defense raises potential Sixth Amendment violations.

A. Deportation of Defense Witness

If the government deports a witness prior to affording defense counsel an opportunity to interview that witness, such an action may violate the Sixth Amendment’s Compulsory Process Clause. This Clause guarantees a defendant’s right “to have compulsory process for obtaining witnesses in his favor.” A violation of this right is established only if the testimony of the missing witness is shown to be (1) favorable and (2) material. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982). The mere act of deporting a witness will not in and of itself establish a violation. *Id.* at 872-73. Nor may the potential be cumulative of testimony offered through available witnesses. *Id.* at 873.

The standard for proving a violation is “some showing of materiality” or “a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense.” *Id.* The Court recommends this be accomplished through agreed facts or a statement of facts supporting the claim verified by oath or affirmation by the defendant or counsel. *Id.* The Fifth Circuit has interpreted this language as a demonstration of prejudice from the deportation of the witness. *United States v. Gonzales*, 436 F.3d 560, 578 (5th Cir. 2006). The Court, while declining to specify whether a defendant must also prove bad faith by government officials, holds that proof that the officials acted in good faith will defeat the claim. *Id.*

Sanctions are appropriate if there is a “reasonable likelihood that the testimony could have affected the judgment of the trier of fact.” *Valenzuela-Bernal*, 458 U.S. at 874.

B. Threatening/Intimidation of Defense Witness

“Substantial government interference with a defense witness's free and unhampered choice to testify violates due process rights of the defendant.” *United States v. Fricke*, 684 F.2d 1126, 1130 (5th Cir. 1982). The Supreme Court has defined this right as follows:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Webb v. Texas, 409 U.S. 95, 98 (internal quotation marks omitted)(holding forceful court admonishment of defense witness on penalty for perjury resulting in refusal of witness to testify violated due process).

Substantial interference may arise in a case in the form of a prosecutor's notification of a witness that he or she will be prosecuted for an unrelated drug offense if testimony is provided at trial, *United States v. Whittington*, 783 F.2d 1210, 1219 (5th Cir. 1986)(citing as example of violation prosecutor's notification of defense witness that trial testimony may result in perjury and drug prosecution), threats from prison guards intimidating a defense witness, *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980), suggestion that testimony would result in conviction in witnesses' state criminal case, *United States v. Hammond*, 598 F.2d 1008, 1012 (5th Cir. 1979), *on reh'g*, 605 F.2d 862 (5th Cir. 1979)(finding due process violation when FBI agent told defense witness he would have “nothing but trouble” in pending state case if he testified), or a plea agreement expressly providing that witness' testimony would render the agreement void, *United States v. Henricksen*, 564 F.2d 197, 198 (5th Cir. 1977)(finding substantial interference due to plea agreement that became void if witness presented testimony that tended to exonerate co-defendant). The aforementioned cases establish that government interference includes the court, the prosecutor, agents or guards.

If a case involves threats, the Fifth Circuit adopted a per se rule of reversal. “Threats against witnesses are intolerable. Substantial government interference with a defense witness' free and unhampered choice to testify violates due process rights of the defendant. . . . If such a due process violation occurs, the court must reverse without regard to prejudice to the defendants.” *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980).

C. Remedies

The aforementioned cases involve post-judgment review, indicating that prejudice is not potential but actual and realized. Nevertheless, the decisions suggest a number of proactive responses.

Dismissal of a case may be sought as a remedy. This remedy is considered extreme and appropriate “where it has been shown that governmental misconduct or gross negligence in prosecuting the case has actually prejudiced the defendant.” *United States v. Fulmer*, 722 F.2d 1192, 1195 (5th Cir. 1983). As a demonstration of prejudice is required to establish the violation, this remedy would be an option.

To the extent dismissal is not an alternative, and as will be discussed subsequently, a foreign deposition could be taken pursuant to Federal Rule of Criminal Procedure 15.

If the witness could return for trial but the issue is assertion of a witness’ Fifth Amendment rights, counsel could move for an in camera hearing specific to the witness’ testimony to determine if the privilege applies to the specific area for which the privilege is asserted. *Goodwin*, 625 F.2d at 701.

If ongoing harassment by law enforcement personnel of defense witnesses is reported, a motion could be filed with the court to enjoin future conduct.

Finally, as mentioned in *Whittington*, counsel could seek use immunity to eliminate Fifth Amendment concerns applicable to a particular witness, although it should be noted that the availability of use immunity has not been established.

D. Practice Pointers

1. Use Immunity

With regard to the issue of use immunity, such a request should be considered a remedy of last resort. It is well established in this Circuit that trial courts lack broad authority to grant judicial use immunity. *United States v. Follin*, 979 F.2d 369, 374 (5th Cir. 1992). A grant of immunity may, however, issue to stem governmental abuse. *Id.* The seminal case addressing the availability of judicial use immunity in the Fifth Circuit is *United States v. Thevis*, 665 F.2d 616, 638-41 (5th Cir.1982). In *Thevis*, the Court first noted the absence of statutory authority on which to grant immunity. *Id.* at 638-39. The Court then proceeded to analyze the Third Circuit Court of Appeals standard, which assessed the following considerations in determining the availability of judicial use immunity: (1) immunity properly was sought in the district court; (2) the witness is available to testify; (3) the testimony is both essential and clearly exculpatory; and (4) no strong governmental interests weigh against a grant of immunity. *Id.* at 639 n.24. Ultimately, the Court declined to sanction the authority of a trial court to “grant immunity to defense witnesses simply because that witness has essential exculpatory information unavailable from other sources.” *Id.* Stated otherwise, the Court rejected a rule that “where a witness has essential exculpatory evidence, a defendant is entitled to his immunized testimony by judicially conferred immunity unless outweighed by strong government interests.” *Autry v. Estelle*, 706 F.2d 1394, 1401 (5th Cir. 1983).

Recitation of the rejection of this rule appears in numerous decisions in this Circuit. *United States v. Chagra*, 669 F.2d 241, 258-61 (5th Cir. 1982)(discussing absence of authority under a variety of constitutional theories); *United States v. Heffington*, 682 F.2d 1075, 1081(5th Cir. 1982); *Mattheson v. King*, 751 F.2d 1432, 1443 (5th Cir. 1985); *United States v. Ramirez*, 996 F.2d 307, 307 (5th Cir. 1993); *United States v. Bustamante*, 45 F.3d 933, 943 (5th Cir. 1995). It is important to note that the Court of Appeals “has not completely foreclosed the opportunity for a district court to grant use immunity.” *United States v. Woods*, 992 F.2d 324, 324 (5th Cir.1993)(unpublished decision). As such, a grant of judicial use immunity is available as necessary to stem governmental abuse that otherwise would detrimentally effect a defendant’s right to a fair trial.

2. *Government Response to Request for Second Deposition for Deported Material Witness*

In response to a motion to conduct a foreign deposition, counsel may see a response that the granting of such a motion would undermine the beneficial purpose of Local Rule 15B. Local Rule of Criminal Procedure 15B provides procedures for deposition and release of material witnesses in custody. In response to a motion to conduct a foreign deposition the Government responded that a subsequent deposition of a witness previously deposed pursuant to this provision would undo the beneficial purpose of this rule. Federal Rule of Criminal Procedure 15(a)(2) and 18 U.S.C. § 3144 provide for the release of any material witness provided the testimony can be adequately preserved by deposition. Under these provisions the witness need only make the request. The Local Rule (1) imposes specific requirements for those depositions and (2) obviates the need for a material witness to request a deposition prior to one being granted. No additional rights are given to material witnesses under the Local Rule that did not previously exist.

III. FOREIGN DEPOSITIONS OF WITNESSES

In general, counsel should note that foreign depositions in criminal cases, unlike their civil counterpart, are not considered discovery depositions but rather are mechanisms to preserve evidence.

Federal Rule of Criminal Procedure 15 is provided in its entirety at the conclusion of this paper. Rule 15(a)(1), governing motions to conduct depositions, provides “[t]he court may grant the motion because of exceptional circumstances and in the interest of justice.” The Eleventh Circuit adopted a test used to determine whether a court should grant a Rule 15 motion that should serve as a useful guide for such motions comprised of the following elements: (1) the witness is likely to be unavailable at trial; (2) injustice will otherwise result without the material testimony that the deposition could provide; and (3) countervailing factors would make the deposition unjust to the nonmoving party. *United States v. Ramos*, 45 F.3d 1519, 1522-23 (11th Cir. 1995). While no court has limited “exceptional circumstances” to unavailability, the Fifth Circuit has suggested materiality of testimony and unavailability of witnesses as grounds for

granting such motions. See *United States v. Dillman*, 15 F.3d 384, 388 (5th Cir. 1994); *United States v. Farfan-Carreon*, 935 F.2d 678, 680 (5th Cir.1991).

Rule 15 does not set a deadline for filing deposition requests, but counsel should file the request as soon as the need is apparent. *Farfan-Carreon*, addressing a motion filed on the day of trial in which timeliness was not an issue, makes clear that court is well within its rights to reject such a motion as untimely even when exceptional circumstances would otherwise justify a court's granting the motion.

Rule 15(b) governs notice of depositions, providing specific details required including the deposition date and location and the name and address of each deponent. The notice must be in writing and served a reasonable time before the conduct of the deposition. It is recommended counsel simply adopt the general notice of deposition format used in civil cases.

A defendant has a right to be present at a deposition, but that right is without limitation. Rule 15(c) addresses that concern, with specific provisions addressed to a defendant in custody and not in custody.

Rule 15(e) indicates that, unless modified by court rule or order, a deposition will be taken in the same manner as a civil deposition. This consideration is likely the most time intensive aspect of foreign depositions as it will either require liaison with a United States embassy or foreign courts.

Federal Rule of Civil Procedure 28(b) delineates the relevant procedures for the taking of a foreign deposition. Rule 28(b) prescribes 4 measures to conduct a foreign deposition:

- (1) through an applicable treaty or convention;
- (2) through a letter of request, sometimes referred to as a "letter rogatory";
- (3) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or
- (4) before a person commissioned by the court to administer any necessary oath and take testimony.

The first two possibilities refer to procedures seeking the cooperation of the foreign government in which the deposition is to be taken. The latter two possibilities refer to the use of United States officials and facilities in the foreign country, specifically a United States embassy.

Discussion of treaties is beyond the scope of this brief review. As a matter of experience, it is recommended counsel touch base with the local embassy and attempt to arrange foreign depositions using United States officials if possible. The Secretary of State has a Web page, http://travel.state.gov/law/law_1734.html, detailing contact information, treaty information and assistance information that should prove invaluable in arranging foreign depositions. If counsel is required to resort to requests for assistance to a foreign government, assume the logistics of arranging the deposition will become significantly more complex.

Counsel attempting to arrange a foreign deposition should consider consulting Linda F. Ramirez, *Federal Law Issues in Obtaining Evidence Abroad, Champion* (June 2007)(available at <http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/e2680a3811a075e385257321005f04f5?OpenDocument&Highlight=0,forensic,forensics,evidence>), and Part 2 of that article published the second month. In her articles, Ms. Ramirez provides a more detailed review of foreign deposition considerations.

There are other civil rules applicable to the conduct of the foreign deposition, albeit rules of lesser importance than Rule 28. Federal Rules of Civil Procedure 30, providing procedures in the conduct of a deposition, should be followed as limited by Federal Rule of Criminal Procedure 15(e). While other civil rules, for example Rule 26 governing discovery and protective orders, and civil subpoena rules have conceivable application to a Rule 15 deposition, the requirements of Rule 15 make the need for these civil rules less apparent.

Practice Pointers

The taking of foreign depositions should not be considered a trivial procedure. As an alternative, consider bringing the witness to the United States. One option would be the Visa Waiver Program applicable to certain member countries (http://www.cbp.gov/xp/cgov/travel/id_visa/business_pleasure/vwp/vwp.xml). A past option has been the Special Interest Parole. *See United States v. Theresius Filippi*, 918 F.2d 244, 247 Cir. 1990) (failure of Government to request special interest parole violation of the Sixth Amendment right to compulsory process and, derivatively, the right to due process protected by the Fifth Amendment).

The Government will know certain details of the witness by virtue of Rule 15 procedures, thus much of the element of surprise will be lost. The use of procedures undertaken to bring the witness to the United States, assuming the witness does not have unresolved criminal issues pending, involves the Government in facilitating the testimony and bolsters the credibility of a Rule 15 requests if the Government refuses to assist or obstructs attempts to bring the witness for purposes of live testimony.

IV. USE OF DEPOSITIONS OF GOVERNMENT WITNESSES WHO HAVE NOT BEEN PROVEN TO BE UNAVAILABLE FOR TRIAL

Rule 15 has been the subject of some confusion in the use of deposition testimony at trial. In previous versions of Rule 15, specific uses of the deposition were explicitly provided. The current version of Rule 15, Rule 15(f) provides only “A party may use all or part of a deposition as provided by the Federal Rules of Evidence.” As such, the admissibility of deposition testimony is purely an evidentiary question and should not otherwise viewed as an exceptional evidentiary issue. There is one caveat to this rule, Rule 15(g), which provides “A party objecting to deposition testimony or evidence must state the grounds for the objection *during the deposition.*” It is anticipated the parties will conduct a complete examination, and the natural

import of Rule 15(g) is a failure to object at the time of questioning bars subsequent objections to the recorded testimony at trial.

From the basic premise that Rule 15, with the one exception described above, has no bearing on the admissibility of the testimony contained in a written document or recording of the transcript at trial, counsel may resort to any evidentiary objection available traditionally for prior testimony. Even an ominous provision like 8 U.S.C. § 1324(d), providing

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) of this section who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

must be read “in conjunction with other rules governing the admission of deposition testimony in a criminal proceeding.” *United States v. Aguilar-Tamayo*, 300 F.3d 562, 565 (5th Cir. 2002). The Fifth Circuit has interpreted this provision as invoking Federal Rule of Evidence 804's definition of unavailability, and otherwise requiring government compliance with Confrontation Clause requirements. *Id.*

As a matter of unavailability, whether for purposes of Rule 15 or Federal Rule of Evidence 804, it is worth recounting the definition of unavailability set forth in Rule of Evidence 804(a). A witness is “unavailable” when he or she

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

The aforementioned circumstances should be considered a general guidepost for unavailability and not an exhaustive list. The burden for establishing unavailability falls on the proponent of the evidence, requiring a preliminary fact-finding by the court. If the Government offers the deposition testimony as evidence at trial, it must “produce, or *demonstrate the unavailability of*, the declarant whose statement it wishes to use against the defendant.” *United States v. Martinez-Perez*, 916 F.2d 1020, 1023 (5th Cir. 1990)(emphasis added); *see also Crawford v.*

Washington, 541 U.S. 36, 57 (2004)(noting in case summary “we excluded the [prior] testimony where the government had not established unavailability of the witness”).

Rule 804(a) expressly excludes from its definition of unavailable a witness whose “exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.” In the absence of evidence of wrongdoing, the lengths to which the Government must go to produce a witness at trial “is a question of reasonableness.” *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). “The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.” *Id.*

The relevant Rules of Evidence for admitting deposition testimony are Rule 804(b)(1), providing for the admission of hearsay testimony if the declarant is unavailable, and Rule 801(d)(1), characterizing as non-hearsay prior statements of a testifying witnesses if (1) inconsistent with the declarant's testimony and given in the course of a deposition, (2) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (3) one of identification of a person made after perceiving the person.

In considering potential uses of hearsay testimony in the form of a deposition transcript, one should consider the definition of hearsay provided in Rule 801(c), “a statement, other than one made by the declarant while testifying at the trial or hearing, *offered in evidence to prove the truth of the matter asserted*,” and consider Government attempts to admit such testimony for a purpose other than the truth of the matter asserted. *See United States v. Holmes*, 406 F.3d 337, 349 (5th Cir. 2005)(analyzing civil deposition offered by government under *Crawford v. Washington*, 541 U.S. 36 (2004), and alluding to this concern).