IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	UNDER SEAL
	)	
v.	)	Crim No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

INTRODUCTION

Fortunately, due process does not require the utterly unprecedented steps the defense seeks. Rather, where the Government has two competing duties and fulfilling one may make a potential witness unavailable for a defendant, the principles that govern are settled. As courts applying the seminal decision in United States v. Valenzuela-Bernal, 458 U.S. 858 (1982), have made clear, a defendant cannot establish any violation of his constitutional rights in such a case absent a showing of both bad-faith conduct and specific prejudice from the loss of material evidence that will result in a fundamentally unfair trial. The defense cannot satisfy either burden.

As for the motions for attendance at trial, which would implicate rights under the Compulsory Process Clause, the Government respectfully submits that at this stage—six months

before trial—they are premature. Definitively resolving the scope of defendant's rights under the Compulsory Process Clause could potentially involve questions that need not be decided to deny the claims for pretrial interviews. There is no need for the Court to wade into such issues at this early date, particularly given that, as trial preparations continue, it may become clearer (even to the defense) that the detainees here would provide no value to defendant as witnesses.

Background

ARGUMENT

I

Defendant's claim for pretrial access to the detainees falls into what the Supreme Court has said "might loosely be called the area of constitutionally guaranteed access to evidence." Valenzuela-Bernal, 458 U.S. at 867. Such a claim rests upon the Due Process Clause, see

generally Brady v. Maryland, 373 U.S. 83 (1963),[1] and as the Court explained in Valenzuela-Bernal, the ultimate touchstone for such claims is fundamental fairness:

> Due process guarantees that a criminal defendant will be treated with "that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

458 U.S. at 872 (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)). Due process does not require, of course, that a defendant be permitted access to any evidence or witnesses he claims might be helpful. Rather, in evaluating claims under this standard, it is essential to bear in mind the well-settled rule that "[t]here is no general constitutional right to discovery in a criminal case." Weatherford v. Bursey, 429 U.S. 545, 559 (1977). See also Wardius v. Oregon, 412 U.S. 470, 474 (1973) ("[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.").

More specifically, in Valenzuela-Bernal, the Court addressed the proper analysis in precisely the situation where government action to fulfill one governmental duty—there, enforcing the immigration laws through deportation of several illegal aliens—makes potential witnesses unavailable for a criminal defendant. The Court made clear that analysis must focus

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[1]See also Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987) ("[T]he applicability of the Sixth Amendment to [pre-trial access to evidence claims] is unsettled, and because our Fourteenth Amendment precedents addressing the fundamental fairness of trials establish a clear framework for review, we adopt a due process analysis for purposes of this case."); id. at 56 (noting that the Court "has never squarely held that the Compulsory Process Clause guarantees the right to discover the identity of witnesses, or to require the government to produce exculpatory evidence.").

on both the good faith of the government conduct and a demonstration that the inaccessible witness would have provided material evidence favorable to the defense. Valenzuela-Bernal, 458 U.S. at 863-67. As lower courts applying Valenzuela-Bernal have clarified, the Supreme Court's analysis mandates "a two-pronged test of bad faith and prejudice," each of which is necessary for demonstrating a violation of due process. United States v. Dring, 930 F.2d 687, 693 (9th Cir. 1991). Defendant here cannot meet either part of that test.

Second, defendant cannot show that the lack of pretrial access to these detainees would cause him prejudice amounting to denial of a fundamentally fair trial. Under Valenzuela-Bernal, the defendant must demonstrate at the threshold that witnesses whom he seeks would provide evidence that would be "material and favorable to the defense." 458 U.S. at 873. In evaluating any purported need for pretrial access, moreover, the Court must also consider the Government's legitimate countervailing interests in precluding access. That is, the Court must "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense." Roviaro v. United States, 353 U.S. 53, 62 (1957). Cf. Valenzuela-Bernal, 458 U.S. at 870 (describing Rovario as the "closest case in point"). Thus, contrary to the defense's suggestions (Standby Counsel Reply 11/27/02 at 8), it is settled that "a defendant's constitutional right to information held by the prosecutor—more specifically, a defendant's right to pre-trial

access to a potential witness—is not unlimited." United States v. Oliver, 908 F.2d 260, 262 (8th Cir. 1990).

that this action had violated the defendant's rights, the Court emphasized that analysis must include an inquiry into the Government's good faith. See id. at 864-66. Indeed, in subsequent cases addressing what the Supreme Court has treated as parallel claims of "constitutionally mandated access to evidence," the Court has relied on Valenzuela-Bernal to derive a clear requirement that, absent a showing of bad faith, there can be no constitutional violation. See, e.g., Arizona v. Youngblood, 488 U.S. 51, 57 (1988) (citing Valenzuela-Bernal to support requirement of bad faith in cases involving government's loss of physical evidence).[2]

In keeping with this approach, lower courts applying Valenzuela-Bernal have made it clear that a showing of bad faith is the threshold requirement in cases involving claims that government action has unconstitutionally denied a defendant access to a potential witness by rendering him unavailable. See, e.g., United States v. Chaparro-Alcantara, 226 F.3d 616, 623-24 (7th Cir.), cert. denied, 531 U.S. 1026 (2000); United States v. Pena-Gutierrez, 222 F.3d 1080, 1085 (9th Cir. 2000), cert. denied, 531 US 1057 (2000); United States v. Iribe-Perez, 129 F.3d 1167, 1173 (10th Cir. 1997); United States v. Armenta, 69 F.3d 304, 308 (9th Cir. 1995); United States v. Dring, 930 F.2d 687, 694 (9th Cir. 1991); Buie v. Sullivan, 923 F.2d 10, 11-12 (2d Cir. 1990); cf. United States v. Rivera, 859 F.2d 1204, 1207-08 (4th Cir. 1988) (discussing facts

showing that prosecutor acted in good faith in executing his competing duties without expressly applying threshold good faith test). It is settled, moreover, that "[i]t is the criminal defendant who bears the burden of proving that the Government acted in bad faith." Dring, 930 F.2d at 694.

In fact, even before Valenzuela-Bernal, the Fourth Circuit recognized that the Government's good faith was critical in evaluating a claim that government action in fulfilling a governmental duty violated a criminal defendant's rights by rendering a witness unavailable. In United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980), a State Department request to recall the Vietnamese ambassador had rendered him unavailable as a witness in an espionage trial, even though he was an unindicted co-conspirator. The Fourth Circuit explained that, given the Ambassador's suspected involvement in espionage, the Government had a compelling obligation to take action removing him from the country. See id. at 929 ("When a foreign diplomat becomes engaged in outrageous and perhaps sinister conduct . . . the United States government cannot decline to act."). And in holding that there had been no violation of the defendants' rights, the Fourth Circuit noted that it was an important part of its analysis that there was no evidence that the Government acted in "bad faith" and "no proof that the State Department made the recall request merely to deny the defense a favorable witness." Id. at 929 n.25 (emphasis added).

A parallel form of good-faith analysis, moreover, is applied in the analogous situation where the Government has the ability to make a witness's testimony available by granting him immunity, but refuses to do so. In such a case, unlike a case involving a deported witness, the

witness is not simply gone. The Government still has it fully within its power to make the witness's testimony available by granting immunity, but to pursue a competing governmental obligation—prosecuting the prospective witness for his crimes—the Government refuses to do so. It is settled that there can be no constitutional violation in such government action, however, unless the defendant "makes a decisive showing of prosecutorial misconduct." United States v. Gravely, 840 F.2d 1156, 1160 (4th Cir. 1988). See also United States v. Tindle, 808 F.2d 319, 325-26 (4th Cir. 1986). Courts apply this good-faith standard, moreover, precisely in recognition of the need to preserve the Executive's ability to determine how best to pursue its obligations in multiple prosecutions. See Autry v. Estelle, 706 F.2d 1394, 1401 (5th Cir. 1983) ("At least when there is no governmental abuse, we held that the immunity decision requires a balancing of public interests which should be left to the executive branch.") (citation and internal quotation marks omitted).

In all the cases described above, the requirement of bad faith reflects a critical recognition of "the varied nature of the duties assigned to the Executive Branch." Valenzuela-Bernal, 458 U.S. at 863. The Government has multiple constitutional responsibilities, for example, in enforcing our Nation's laws, both civil and criminal, and in securing the national defense. In a particular case, these varying duties may impose conflicting obligations. The Valenzuela-Bernal Court recognized that the Government's "exercise of these manifold responsibilities is not to be judged by standards which might be appropriate if the Government's only responsibility were to prosecute criminal offenses." 458 U.S. at 866. Accordingly, Valenzuela-Bernal and its progeny instruct that, even if government action results in placing or keeping a potential witness outside

the defendant's reach, where the Executive acts in the good faith fulfillment of other lawful obligations, such as enforcement of the immigration laws, its actions cannot be deemed a violation of the defendant's constitutional rights. (See also Gov't Response 10/1/02 at 12).

Next, undoubtedly aware that no showing of bad faith can plausibly be made here, standby counsel assert that the requirement of bad faith simply does not apply. Standby counsel contend that defendant need not establish bad faith because their request for access "is being made well in advance of trial so the Court has the ability to weigh this request." (Standby Counsel Reply 11/27/02 at 14). The claim appears to be that the Government's good or bad faith is irrelevant when a defendant seeks a ruling upon access to a potential witness before trial; rather, it is relevant solely when a court must determine in hindsight, after a conviction, whether a defendant's due process rights have been violated. But that claim is both illogical and unsupported by precedent. In the paradigmatic case where the Government has deported potential witnesses, the defendant typically raises his claim that the Government has violated his rights before he goes to trial. There is no basis, however, for claiming that the Government's good faith should suddenly be deemed irrelevant to the constitutional analysis because of the

timing of defendant's pleading.[6] Nor can standby counsel point to any case holding that the timing of a request for access to a witness eliminates one part of the constitutional analysis. To the contrary, the Supreme Court has expressly recognized that the same due process analysis applies, including a determination whether the Government acted in bad faith, even when a court initially reviews a defendant's claim prior to trial. See Valenzuela-Bernal, 458 U.S. at 874. See also United States v. Hsin-Yung, 97 F. Supp. 2d 24, 30 (D.D.C. 2000) (requiring defendant to demonstrate that the Government had deported witnesses in bad faith on pre-trial motion to dismiss). Thus, the standard to be used here is the same as it would be if the Court deferred ruling on these motions until the close of evidence at trial.

[6]Indeed, it seems likely that in most cases, the claim of a due process violation is raised before trial (or at least at the commencement of trial), because otherwise it would likely be deemed waived on appeal. See, e.g., United States v. Rouse, 111 F.3d 561, 566 (8th Cir. 1997); United States v. Scarborough, 43 F.3d 1021, 1025 (6th Cir. 1994).

justified.[17] See also United States v. Soape, 169 F.3d 257, 269 (5th Cir. 1999); United States v. Edwards, 47 F.3d 841, 843-44 (7th Cir. 1995); United States v. Pepe, 747 F.2d 632, 655 (11th Cir. 1984); United States v. Large, 729 F.2d 636, 640 (8th Cir. 1984); Salemme v. Ristaino, 587 F.2d 81, 87 (1st Cir. 1978); United States v. Murray, 492 F.2d 178, 194-95 (9th Cir. 1973).

In addition to finding that the protection of witnesses' personal safety suffices to bar pretrial access to witnesses, courts have also concluded that threats to the Government's ability to root out conventional criminal activity merit denying the defendant the disclosure of the identity of an informant. For example, in United States v. Brinkman, 739 F.2d 977, 981 (4th Cir. 1984), the Fourth Circuit concluded that the "crippl[ing]" effect that disclosure of the informant's identity would have on ongoing criminal investigations weighed heavily against disclosure of that identity. See also United States v. Polowichak, 783 F.2d 410, 414 (4th Cir. 1986) (concluding that co-conspirator's identity should be withheld from the defendant based in part on the need to protect the Government's interest in apprehending the fugitive co-conspirator).

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[17]Standby counsel assert that Tipton held "that access to the witnesses in capital cases is specifically assured." (Standby Counsel Reply 11/27/02 at 3). As text makes clear above, this assertion is completely erroneous.

Turning to the other side of the balance, in cases involving requests for access to potential witnesses, "this circuit has made clear that the onus is on the defendant" to establish that the witnesses have material, exculpatory, non-cumulative evidence that is not otherwise available. United States v. Blevins, 960 F.2d 1252, 1259 (4th Cir. 1992). To meet this burden, the defendant must make "at least some plausible showing" of how the witnesses' testimony would be "relevant and material, and . . . vital to the defense." Valenzuela-Bernal, 458 U.S. at 867 (quoting Washington v. Texas, 388 U.S. 14, 16 (1967)). That standard requires that the defendant "must come forward with something more than mere speculation as to the usefulness of disclosure." United States v. Smith, 780 F.2d 1102, 1108 (4th Cir. 1985); see also United States v. Agurs, 427 U.S. 97, 110 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish 'materiality' in the constitutional sense."); Iribe-Perez, 129 F.3d at 1173 ("Valenzuela-Bernal, however, requires more than the mere potential for favorable testimony . . . ."). And it most certainly does not permit the "presumption" that a witness has material and exculpatory evidence, as standby counsel suggests. (Standby Counsel Reply 11/27/02 at 23, 24).

The standard of materiality, moreover, is demanding. Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. Materiality in the constitutional sense means that "there is a reasonable probability that the suppressed evidence

would have produced a different verdict." Strickler v. Greene, 527 U.S. 263, 281 (1999); see also Basden v. Lee, 290 F.3d 602, 608-09 (4th Cir. 2002), cert. denied, 123 S. Ct. 446 (2002). Thus, as the Fourth Circuit has set the materiality standard in the CIPA context, "[a] district court may order disclosure only when the information is at least essential to the defense, necessary to his defense, and neither merely cumulative nor corroborative." Smith, 780 F.2d at 1110 (internal citations and quotation marks omitted) (emphasis added).[19]

[19]It is, therefore, singularly insufficient for the defense to claim that a detainee may provide "more evidence" on a particular point that would "square nicely with other evidence" the defense already has on the same point. (Standby Counsel Reply 11/27/02 at 26).

in light of all the evidence, including any stipulations about other participants in the plot. Once the roles of others have been presented to the jury (either by stipulation or through other evidence), it will be up to the jury to weigh the significance of defendant's role.

The pending motions thus could be resolved on an analysis that is broader and logically antecedent to the reasoning in Part I above. Nevertheless, the Government respectfully submits that the Court need not, and should not, address this novel constitutional question when it is not necessary to do so.[44] The well-settled analysis outlined above in Part I provides an ample basis for denying the defense motions.

[44] See, e.g., Strawser v. Atkins, 290 F.3d 720, 730 (4th Cir. 2002), cert. denied, 123 S.Ct. 618 (2002) (applying the "venerable principle that a court will not decide a constitutional question, particularly a complicated constitutional question, if another ground adequately disposes of the controversy"); Eisenberg v. Montgomery County Pub. Schs., 197 F.3d 123, 131 n.20 (4th Cir. 1999) (declining to decide constitutional question "because it is not absolutely necessary to our decision").

That, in fact, is exactly the approach that Judge Ellis of this District employed in United States v. Lindh, Crim. No. 02-37-A. There, Judge Ellis faced requests by the defense for pretrial and trial access to enemy combatants held at the U.S. Naval Base at Guantanamo Bay, Cuba.

With a trial date set for August 2002, Judge Ellis determined to resolve the requests for pretrial interviews with more than 20 detainees at a hearing on May 6 (just three months before trial), but decided that questions of trial attendance should not be addressed until later. As Judge Ellis recognized, as trial preparations continued to develop, it was entirely possible that there would be no need to address the question of bringing any of the detainees to testify at trial. See Order of May 2, 2002, at 2 n.1 ("Procedures to be used in the event any detainees are called to testify at trial or other hearings will be addressed and resolved by the Court, if and when it becomes necessary to do so.").

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Government's Memorandum of Law dated October 1, 2002, the defense motions should be denied.

Respectfully Submitted,

Paul J. McNulty
United States Attorney

By: /s/
Robert A. Spencer
Kenneth M. Karas
David J. Novak
Assistant United States Attorneys

Of Counsel:

Michael Chertoff
Assistant Attorney General
Criminal Division
Department of Justice

CERTIFICATE OF SERVICE

I certify that on January 13, 2003, a copy of the foregoing Government's Response (without a copy of the *ex parte* submissions) was provided to the Court Security Officer for service upon:

Frank Dunham, Jr., Esq.
Office of the Federal Public Defender
1650 King Street
Suite 500
Alexandria, Virginia 22314
Facsimile: (703) 600-0880

Alan H. Yamamoto, Esq.
108 N. Alfred St., 1st Floor
Alexandria, Va. 22314-3032
Facsimile: (703) 684-9700

Edward B. MacMahon, Jr., Esq.
107 East Washington Street
Middleburg, VA 20118

/s/
Kenneth M. Karas
Assistant U.S. Attorney