IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

ARMANDO MONTER JACINTO,

Defendant and Respondent.

S164011

First Appellate District, Division Five, No. A117076
Sonoma County Superior Court No. SCR487837
Hon. Lawrence G. Antolini, Judge

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, **v.** **ARMANDO MONTER JACINTO,** Defendant and Respondent.	S164011

ISSUE PRESENTED

"Whether a defendant's rights to compulsory process and due process of law under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution are violated when the county sheriff's department, having been served with a defense subpoena for an in-custody alien exculpatory witness, turns over the witness to federal immigration officials for deportation without prior notice to the superior court or the defense, thereby rendering the witness unavailable to testify?" (Petn. at p. 2.)

INTRODUCTION

Defendant Armando Jacinto was awaiting trial on violent felony charges arising from a public brawl when he met a fellow jail inmate, Nicolas Esparza. Esparza, a citizen of Mexico illegally in the United States, was serving a 180-day sentence in an unconnected case in which he had been represented by the public defender. Esparza voluntarily spoke to a Spanish-speaking public defender's investigator assigned to represent Jacinto. He told the defense investigator that he was an exonerating eyewitness but that he had given no statement to law enforcement as his employer had instructed him to leave the scene before the authorities arrived. The investigator served on the jail and, after a discussion with his supervisor, on Esparza personally, a witness

subpoena for Esparza's appearance at Jacinto's trial for a date after Esparza's sentence would expire. Although the investigator confirmed that Esparza was an illegal alien subject to deportation, the defense neither alerted the prosecutor's office or the trial court about the problem nor requested their assistance in producing Esparza or preserving his testimony.

Esparza was released upon the completion of his sentence to federal immigration officers who promptly deported him. The defense investigator later confirmed the deportation without seeking information respecting Esparza's current whereabouts. The public defender then revealed his account of Esparza and his exculpatory statements in a motion to dismiss the charges against Jacinto. The prosecution was unable to locate Esparza. Granting the motion to dismiss, the trial court ruled that the jailer's release of Esparza to federal officers was attributable to the prosecution and that Jacinto consequently had been deprived of material exculpatory testimony aiding his defense.

On appeal by the People, the Court of Appeal held that the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were not violated. It found that the transfer of Esparza into federal custody was not state action attributable to the prosecution, and that no evidence showed the prosecution or the sheriff's department employees knew the materiality of Esparza's testimony.

On review, Jacinto claims that an accused's federal constitutional rights to compulsory process and to due process forbid the state from surrendering a county jail inmate under defense subpoena to immigration officials for deportation on expiration of the inmate's sentence absent prior notice to the trial court or the defendant. (Respondent's Opening Br. on the Merits (ROBM) 2.)

Jacinto, however, was deprived of no federal constitutional rights by the sheriff's department employees or the prosecution. In any event, dismissal of the charges was an inappropriate sanction under the circumstances.

STATEMENT OF THE CASE AND FACTS

Preliminary Examination

On May 12, 2006, around 6:30 p.m., Eric Garcia and Victor Retana went to a restaurant where the other patrons included Jacinto and a woman. Garcia tried to use the jukebox, but it did not work properly. (CT 22-23, 28, 36.) After about 30 minutes, Garcia and Retana decided to leave. Garcia asked the restaurant owner for a refund of the money he had put in the jukebox. (CT 23, 28-30.) Jacinto told the owner not to refund any money, but the owner refunded $10 anyway. (CT 23-24, 27, 28-29.)

Garcia left by the front door, then saw Retana behind him near the door arguing with Jacinto, the woman, the owner, and an older man over the money. Garcia drew within two or three feet of Retana, but did not see what happened very well because the other persons began pushing Retana. (CT 25-27, 31, 38.) Jacinto reached into his pocket and moved his hand toward Retana; then Retana jumped back, holding his side and bleeding profusely. (CT 25-26, 30-31, 33, 38.) Garcia saw no knife. But he did see that the woman, the owner, and the older man were about four feet away from Retana—and only Jacinto had made a stabbing motion toward him. (CT 30, 33-35, 38-39.) Garcia heard Retana ask the owner if "he had seen what he had done," and was told by Retana that it was the people drinking at the table right beside them, "the man sitting at that table," who stabbed him. (CT 26, 34-35, 37.) Before the woman left with Jacinto, Garcia heard her deny she stabbed Retana. (CT 27-28, 36.) At the preliminary hearing, Garcia identified Jacinto as the assailant. (CT 24.)

Sheriff's Detective Carlos Basurto interviewed Victor Retana on May 22 and 25, 2006, at Santa Rosa Memorial Hospital.[1/] (CT 40-41.) Retana said that

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1. The stab wound had collapsed Retana's right lung, and also struck his diaphragm and liver, nearly causing him to bleed to death. At the time of the preliminary hearing, he had undergone at least two surgeries, was still in

Garcia argued with an older man at the restaurant.[2/] Jacinto intervened and began arguing with Garcia, then they stepped outside the door of the restaurant a few feet and began pushing and hitting each other. Retana tried to pull Jacinto away from Garcia. Jacinto pushed Retana, Retana pushed him back, and then Jacinto stabbed Retana with a knife. (CT 42-43, 52-56, 59-60.) Retana identified Jacinto from a photographic lineup as the assailant. (CT 43, 55-56.) Retana said that no one else was involved and that a woman did not stab him. (CT 60.)

Jacinto was charged in an information filed in June 2006 by the Sonoma County District Attorney with two violent felonies: attempted murder enhanced by personal infliction of great bodily injury and personal use of a deadly and dangerous weapon; and assault with a deadly weapon enhanced by personal infliction of great bodily injury. (CT 14-16.)

The Defense Investigation and Motion to Dismiss

In July 2006, defense investigator Carlos Escobedo received an e-mail indicating that the public defender's office had learned that either Jacinto or a member of his family had located a possible eyewitness. (RT Jan. 9, 2007 37, 48-49.) Escobedo subsequently conducted two interviews of inmate Nicolas Esparza at the Sonoma County Jail. (CT 87; RT Jan. 9, 2007 34-35.) Esparza was serving a 180-day sentence for misdemeanor domestic violence, which had been imposed on July 3, 2006. (Appellant's Request for Judicial Notice, Exhibit B.)[3/] Esparza, like Jacinto, had been represented by the county public defender's office. (RT Jan. 9, 2007 34-35, 37.)

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intensive care, and likely would require more surgery. (CT 44-46.)

2. Retana did not mention a problem with the jukebox. (CT 48, 50.)

3. The Court of Appeal granted appellant's request for judicial notice. (Ct. of App. Order (Case No. A117076), Aug. 13, 2007.)

In a tape-recorded interview on July 19, 2006, Esparza told Escobedo that he was working in a lunch truck outside the restaurant the day of the crime. (CT 88.) When Esparza's shift ended, he went with his coworkers and his employer inside the restaurant where a customer complained to the owner that he had lost money in the jukebox. (CT 88-89.) Esparza went outside where a man (the victim) and a woman were arguing in front of the restaurant. (CT 90, 98.) The two struggled over the woman's purse. (CT 92.) Esparza saw the woman remove a blade from her purse (CT 92)[4] and "hit[] [the man] with her hand and hit[] him with a blade" (CT 90; see also CT 99). Esparza saw the man bleeding. (CT 93.) He also saw two men fighting. (CT 94.) He did not see a man stab anyone, "just a woman towards a man." (CT 99.)[5] Esparza told his employer that people were fighting outside. (CT 91, 93.) Esparza's employer directed Esparza to leave, so he went home and did not speak to law enforcement. (CT 91-93, 100.) Esparza indicated that he learned Jacinto was charged with the stabbing when he encountered Jacinto in jail. Esparza said that this caused him to give a statement to the defense investigator "because I know the person, that he is not . . . guilty . . . ." (CT 100-101; see also RT Jan. 9, 2007 48-50.)

On August 1, 2006, defense counsel moved for a continuance of Jacinto's trial. (CT 65.) Defense counsel's declaration stated that "we have located another possible percipient witness and are attempting to obtain more information concerning his particular observations," without identifying the witness or any particulars of his information. (CT 67.) The defense motion to continue was granted and trial was set for October 20, 2006. (CT 69, 71.)

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4. Esparza said later that he did not actually see the blade. (CT 94.)

5. Esparza was the only witness who identified the perpetrator as female. (RT Jan. 9, 2007 51, 57-58, 63-64.)

About August 19, 2006, United States Immigration and Customs Enforcement (ICE)[6] served the county jail with a notice of an immigration detainer for Esparza. (Appellant's Request for Judicial Notice, Exhibit D.)

On October 6, 2006, Escobedo served jail personnel with a subpoena for Esparza's appearance in court on October 26, 2006. (CT 103.) After Escobedo and his supervisor discussed the importance of Esparza's testimony, Escobedo, returned to the jail on October 16, 2006 and personally served Esparza with the subpoena. (CT 103-106; RT Jan. 9, 2007 39, 44-45.) Escobedo spoke again with Esparza, whom he knew was in this country illegally, and Esparza confirmed a belief that he would be deported. Escobedo immediately conveyed this information to his supervisor and to Jacinto's attorney. (RT Jan. 9, 2007 38-39, 43-45, 55-56.) The same day, an employee in the jail confirmed to Escobedo that the jail's computer database listed Esparza as a subpoenaed witness. (RT Jan. 9, 2007 44.) The sheriff's department employee also told Escobedo that she believed Esparza was going to be deported. (RT Jan. 9, 2007 45.) Escobedo did not state his concern to sheriff's personnel that Esparza not be deported because he was needed as a defense witness in the case. (RT Jan. 9, 2007 45.) Nor did he inform anyone in the district attorney's office that Esparza was a potential witness. (RT Jan. 9, 2007 48.)

The following day, October 17, 2006, Esparza completed his jail sentence and was released into ICE custody. (Appellant's Request for Judicial Notice, Exhibit C.)[7] Esparza was deported to Mexico on October 18, 2006. (CT 83,

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6. Formerly known as the Immigration and Naturalization Service, the agency is now called Immigration and Customs Enforcement, or "ICE."

7. Between the sentence date of July 3, 2006, and October 17, 2006, Esparza served 107 days of actual custody. Under Penal Code section 4019, Esparza was entitled to 52 days of credit for good time/work time served in county jail. (See *People v. Culp* (2002) 100 Cal.App.4th 1278, 1283 [the proper method of calculating presentence custody credits is to divide by four the

127; RT Jan. 9, 2007 12, 23, 28, 46, 65; Appellant's Request for Judicial Notice, Exhibit D.) Escobedo subsequently confirmed Esparza's deportation by contacting ICE agent Ken Todd, but the investigator neither asked Todd for an address where Esparza could be located, nor attempted to locate Esparza. (RT Jan. 9, 2007 45-47, 65.)

On December 12, 2006, the public defender filed a nonstatutory motion to dismiss the information on the ground that the sheriff's release of Esparza, a material witness under defense subpoena, to the federal officers for deportation, denied Jacinto's constitutional rights to compulsory process and a fair trial. (CT 82-107.) Investigator Escobedo testified to his contacts with Esparza, as summarized above. (CT 123.) Both parties filed extensive briefs (CT 108-114 [People's opposition]; CT 115-122 [Defendant's reply]; CT 126-132 [People's supplemental opposition]; CT 133-139 [Defendant's supplemental reply]). Independent efforts by the prosecution to locate Esparza failed. (RT Jan. 31, 2007 85-86; RT Feb. 2, 2007 88-89.)

The superior court ruled that Esparza was a material exculpatory witness, that Jacinto was deprived of the witness's testimony by the jailer's release of the witness to immigration authorities, and that no showing of bad faith by the prosecution was required. The court ordered the charges dismissed. (CT 142; RT Feb. 2, 2007 89.)

Appellate Court Proceedings

The Court of Appeal reversed unanimously. (Slip Opn. at p. 8.) The appellate court, like the People, took no issue with the finding that Esparza was a material favorable witness to the defense. (Slip Opn. at p. 5.) The Court of Appeal, however, held that the transfer of Esparza into federal custody by the

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number of actual presentence days in custody, discount any remainder, and then multiply that number by two].) The 52 days of custody credits, plus 107 actual days credit, plus 21 days presentence credits, totals 180 days.

sheriff's department or county jail personnel was not "state action" attributable to the prosecution. (Slip Opn. at pp. 1 & 6, citing, inter alia, *People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1317 (*Barrett*)). Under the supremacy clause in article VI, section 2, of the United States Constitution, the court noted, the sheriff's department's role as custodian of the witness was constrained by the federal detainer, which deprived the jailer of power to interfere with the deportation proceeding. (Slip Opn. at pp. 6-7, citing *Tarble's Case* (1871) 80 U.S. 397, 410, and *Gates v. Municipal Court* (1992) 9 Cal.App.4th 45, 53.) The appellate court also recognized that Jacinto could have brought his need for the witness to the attention of the prosecutor and could have sought the witness's testimony under both federal regulations and state statute. (Slip Opn. at p. 7, citing 8 C.F.R. §§ 215.2(a), 215.3(g); *ibid*, at fn. 7, citing Code Civ. Proc., §§ 1995-1997.)

Additionally, the Court of Appeal held that service of the subpoena on a sheriff's department or jail employee was not "sufficient to inform the department or the prosecution that a witness has evidence that is 'material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses.'" (Slip Opn. at p. 7, quoting *United States v. Valuenzuela-Bernal* (1982) 458 U.S. 858, 873.) It noted that knowledge by jail personnel from a subpoena of the desire of a defendant for the testimony of a witness "does not establish knowledge of the *materiality* of [the witness's] testimony." (Slip Opn. at p. 7.) "[I]t is unreasonable to impose a duty on the jailers to make an inquiry into the materiality of the testimony a witness may offer every time jail personnel are served with a subpoena requiring a deportable witness to appear at trial. The jailers acted in accord with their normal practice of releasing an inmate at the completion of his sentence and should not be required to seek a court determination of whether the subpoena served by [the investigator] required them to continue to hold [the witness]," i.e., beyond the

expired term of the witness's state custody. (Slip Opn. at pp. 7-8.) Based on these holdings, the Court of Appeal found it unnecessary to consider the People's further argument that the trial court erroneously found federal constitutional error without requiring Jacinto to show prosecutorial bad faith. (Slip Opn. at pp. 4-5, fns. 4 & 5). The Court of Appeal ordered the charges reinstated. (Slip Opn. at p. 8.)

This Court granted Jacinto's petition for review.

SUMMARY OF ARGUMENT

The due process and confrontation clauses of the federal Constitution do not entitle a defendant to dismissal of criminal charges simply because he is unable to produce a witness material to his defense. Rather, the defendant must show that the state has wrongfully deprived him of the opportunity to secure the presence of the witness.

Although the Supreme Court in *United States v. Valenzuela-Bernal, supra,* 458 U.S. 858, held that a defendant's constitutional rights to compulsory process and due process may be implicated where a federal prosecutor arranges for the deportation of a witness by federal authorities, it has never held that state or local officials may violate the defendant's rights when they simply comply with a federal detainer order and hand over custody of a prisoner at the end of his sentence. Even if such conduct were deemed to implicate the defendant's rights, subsequent decisions indicate that a violation might occur only if all of the following facts are present: (1) the testimony of the witness is both material and favorable to the defense; (2) the prosecutor knows of the material and exculpatory nature of the testimony when the witness is deported; (3) the prosecutor turns the witness over for deportation without informing the defense of the witness's identity or affording an opportunity for the defense to interview the witness; and (4) the prosecutor seeks to deport the witness in order to gain

an unfair tactical advantage over the accused.

Only the first condition is present in this case. Moreover, unlike *Valenzuela-Bernal*, the prosecution here had nothing to do with the witness's deportation. Neither the federal government's deportation action nor the jailer's transfer of the witness's custody to ICE officers can be attributed to the prosecutor. The United States Supreme Court has long rejected the notion that the actions of one government official must be attributed to all government officials, particularly where, as here, the power to regulate immigration is exclusively a federal power. It is entirely unsatisfactory to hold the prosecutor strictly liable for the acts of the federal government in deporting a witness simply because a county jailer, not acting as a member of the prosecution team, was compelled by a federal detainer to hand over the witness to federal officials at the completion of his sentence. State action requires more than simple compliance with federal mandate.

This Court's compulsory process cases militate against sanctions in the absence of prosecutorial misconduct that is entirely unnecessary to the performance of the prosecutor's proper duties and is a substantial cause of the accused's inability to present the material favorable testimony of his witnesses. (*People v. Lucas* (1995) 12 Cal.4th 415, 456-457; *In re Williams* (1994) 7 Cal.4th 572, 603.) In dismissing the charges here, the trial court ignored these principles as well as practical and legal imperatives governing the transfer of jail inmates to federal custody. The compulsion on the jailer of a federal detainer and the compelling interest of the federal government in implementing immigration law free of state interference are not trifles. Service of a defense subpoena on an incarcerated witness neither tolls a federal detainer for the individual, nor triggers sanctions, if the jailer lawfully complies by transferring the inmate without delay whenever the federal government elects to take custody. Sanctions for the defense's loss of an inmate's testimony in such cases

would require, at minimum, that the accused made the appropriate prosecutorial authorities aware that the inmate's deportation will deprive the defense of material favorable testimony; that the accused sought timely judicial intervention to prevent the loss of the testimony; and that, despite the accused's diligent pursuit of these matters, the state withheld assistance to gain an unfair tactical advantage. Here, none of these conditions were met. The prosecutor and the sheriff's employees did not know of the materiality of the inmate's testimony, bore no responsibility to acquire such knowledge, and did not act in bad faith in complying with a federal immigration detainer for Esparza.

The sheriff's department did what the supremacy clause of the United States Constitution and state statute required: it transferred Esparza on expiration of his sentence into the custody of the federal government pursuant to its immigration detainer. The sheriff's employees acted in their administrative capacity as custodians, not as prosecution team investigators, in receiving service of a subpoena for Esparza's appearance at Jacinto's trial. Moreover, the subpoena for a date *after* Esparza's scheduled release from custody was in any event a deficient mechanism to compel the jail to produce the witness.

Although the defense received from Esparza and from jail personnel actual notice of Esparza's anticipated deportation, and had the means of determining his release date, the defense did nothing with that information. The defense failed to inform the prosecutor or the court that Esparza had material exculpatory testimony. Nor did the defense seek an inmate removal order, a witness deposition order, a material witness bond, or even informal contact with immigration officers. And no prosecutorial bad faith had been shown. Misconduct was not a cause of the witness's loss, let alone a substantial cause of the loss.

Sheriffs and jail personnel have no obligation to provide inmate defendants, their attorneys and/or the courts in which they are charged a "notice" before

releasing other subpoenaed inmates into federal custody. No constitutional authority imposes that obligation. Such a requirement would be administratively burdensome, have little practical value, impact inmate privacy adversely, and create institutional security concerns. Resistance by state custodial officers to federal detainers is not incorporated in the right to compulsory process.

Even if a violation of the federal Constitution were present, dismissal of the charges would remain inappropriate in this case. The admission at trial of the tape-recorded hearsay statements of Esparza to the defense investigator is a satisfactory remedy and results in a fair trial for both parties.

ARGUMENT

I.

THE STATE WAS NOT SUBJECT TO SANCTIONS FOR THE FEDERAL GOVERNMENT'S DEPORTATION OF THE DEFENSE WITNESS SINCE HIS TRANSFER TO FEDERAL CUSTODY WAS COMPELLED BY FEDERAL LAW AND WAS NOT ATTRIBUTABLE TO THE PROSECUTION; NEITHER THE PROSECUTION NOR THE SHERIFF'S EMPLOYEES KNEW THE MATERIALITY OF HIS TESTIMONY; AND THE PROSECUTION UNDERTOOK NO ACTION TO GAIN AN UNFAIR TACTICAL ADVANTAGE OVER THE ACCUSED

Jacinto contends that the sheriff's employees' acts of providing information to ICE about Esparza and surrendering Esparza into ICE custody without prior notice to the court or to him of Esparza's release unconstitutionally deprived him of Esparza's material exonerating testimony. (ROBM 15.) Evidently arguing from an unspoken premise that benign neglect by the state toward federal immigration law is the default preference of the Sixth and Fourteenth Amendments, he deems it established that the sheriff notified the federal government of the witness's undocumented alien status while under "no compulsion" to provide such information. (ROBM 17.) He views the subpoena for Esparza placed into the jail records as legal notice to the state of the witness's materiality. (ROBM 22, 29.) He attributes to the prosecution the sheriff's department employees' cooperation with ICE, though he admits those employees were "not serving in an investigative or 'prosecutorial team' capacity" (ROBM 25) and the defense had not disclosed its witness to the prosecution (or, we add, to the trial court) (ROBM 22). Despite finding no decision that attributes to the state the federal deportation of a subpoenaed defense witness in a similar context (ROBM 25), Jacinto insists the compulsory and due process clauses should be interpreted to mean that a defense subpoena

for a noncitizen inmate obliges a state custodian to notify a defendant or the court prior to transfer of the witness, "so that the defense can utilize available mechanisms for insuring that witness's presence or preserving his testimony for trial" (ROBM 26). The custodian's notice obligation (i.e., to alert third-party defendants or the courts in which they are charged that ICE is picking up an inmate) apparently would be triggered by service on a jailer of any defense subpoena that names an inmate subject to a federal detainer. For these purposes, it is irrelevant, Jacinto argues, whether the state is ignorant of the materiality of the inmate's information (ROBM 32-33) or whether the state acts in bad faith (ROBM 51-52). Jacinto misreads the Constitution.

A. The Sheriff's Department's Release of Esparza into ICE Custody Did Not Render Esparza's Deportation State Action

1. There can be no due process violation without state action

Under the Fourteenth Amendment, no "state [shall] deprive any person of life, liberty, or property without due process of law." The clause "incorporates many of the specific protections defined in the Bill of Rights." (*Zinermon v. Burch* (1990) 494 U.S. 113, 125.) Among these is the Sixth Amendment right to compulsory process for obtaining witnesses in the defendant's favor (*Washington v. Texas* (1967) 388 U.S. 14, 17-19.)

The due process clause inhibits only "such action as may fairly be said to be that of the states." (*Shelley v. Kraemer* (1948) 334 U.S. 1, 13; accord, *San Francisco Arts and Athletics, Inc., v. United States Olympic Committee* (1987) 483 U.S. 522, 543, fn. 21.) "Generally, an accused is not entitled to a dismissal simply because he is unable to produce witnesses assertedly necessary to his defense. [Citation.] The rule is otherwise, however, where it is shown that the prosecution has wrongfully deprived an accused of the opportunity to secure the presence of a material witness." (*Bellizzi v. Superior Court* (1974) 12 Cal.3d

33, 36 (*Bellizzi*).) Thus, a due process claim requires the accused to show that "state action has deprived [him] of the opportunity to present the testimony of a person who would be a material witness on the issue of guilt or innocence." (*People v. Jenkins* (1987) 190 Cal.App.3d 200, 204.)

"State action" familiarly delineates government action from private conduct, which, however wrongful, is not unconstitutional. (*Shelley v. Kraemer, supra,* 334 U.S. at p. 13; *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 358.) It also delineates, in its dual sovereignty aspect, acts of the state government from those of the federal government. "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." (*McCulloch v. Maryland* (1819) 17 U.S. (4 Wheat.) 316, 410, 4 L.Ed. 579, accord, *Heath v. Alabama* (1985) 474 U.S. 82, 92.) Axiomatically, not all government actors are "state" actors under the Fourteenth Amendment with respect to state proceedings. (See *San Francisco Arts and Athletics, Inc., v. United States Olympic Committee, supra,* 483 U.S. at p. 543, fn. 21 [the Fourteenth Amendment applies only to actions by a state; it does not apply to the federal government].) It is in this respect that the Court of Appeal found Esparza's deportation by the federal government not attributable to "state action."

United States v. Valenzuela-Bernal, supra, 458 U.S. 858 (*Valenzuela-Bernal*), recognized that a witness's deportation is federal governmental action that may violate an accused's constitutional rights. Border patrol agents there arrested the defendant and three companions for smuggling undocumented immigrants. (*Id.* at pp. 860-861.) An Assistant United States Attorney detained one of the latter to testify for the government and, finding no other material testimony, had the other two deported. (*Ibid.*) Defendant's claim of a violation of the rights to compulsory process and to a fair trial was denied (*ibid.*) and a

conviction followed (*id.* at p. 862). Upholding the judgment, the Supreme Court said: "The mere fact that the Government deports [a potential defense witness] is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense." (*Valenzuela-Bernal, supra*, 458 U.S. at pp. 872-873.) "As in other cases concerning the loss of material evidence, sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." (*Id.* at pp. 873-874.)

Jacinto faced state prosecution, not federal prosecution, when his witness was deported. Neither the Sonoma County District Attorney nor the sheriff's department employees could have decided if Esparza was a material, let alone a favorable, witness for the defense. That is because his testimony was unknown, except to the public defender's office (and possibly Jacinto himself). *Valenzuela-Bernal* makes clear the compulsory process right of the defendant is implicated when the *prosecutor* deports a witness on a decision that the witness "possessed no evidence material to the prosecution or defense . . . for transporting illegal aliens." (458 U.S. at p. 861.) That did not occur.

2. The power to regulate immigration lies exclusively with the federal government; jail officials' compliance with the federal detainer did not transform Esparza's federal deportation into "state action"

"The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government." (*Valenzuela-Bernal, supra*, 458 U.S. at p. 864.) Under the federal Constitution's supremacy clause (U.S.

Const., art. VI, cl. 2), once a

> State judge or court [is] judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he had committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress.

(*Tarble's Case, supra,* 80 U.S. at p. 410; accord, *Ableman v. Booth* (1858) 62 U.S. 506, 516, 526; *Gates v. Municipal Court, supra,* 9 Cal.App.4th at p. 53 [no state court, agency, or officer has authority to affect a federal court order].)

The Sonoma County Sheriff's Department detained and released Esparza in its capacity as custodian "of persons sentenced to imprisonment [in the jail] upon a conviction for crime." (Pen. Code, § 4000, subd. (4); *People v. Thomas* (1959) 52 Cal.2d 521, 532 ["the sheriff is . . . the executive officer who executes the jail sentence [citation.]"].) Esparza was serving a misdemeanor sentence when he and county jail personnel received a subpoena for Esparza's personal appearance on October 26, 2006. But nine days before that event, his sentence expired. (Appellant's Request for Judicial Notice, Exh. C at p. 3.)

Pursuant to the federal immigration detainer served on the Sonoma County Jail in August 2006, county jail officials released Esparza into ICE custody. (Appellant's Request for Judicial Notice, Exhibit D.) The jail employees had no authority to extend Esparza's detention. (See *Zadvydas v. Davis* (2001) 533 U.S. 678, 690 ["Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects"]; *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 714-722 [defendant could bring cause of action for false imprisonment against the county where the sheriff failed to release the

defendant after all charges against him had been dismissed].) Nor did they have authority to ignore a federal detainer or to interfere, either directly or indirectly, with a federal deportation. (See *Valenzuela-Bernal, supra*, 458 U.S. at p. 864 ["[t]he power to regulate immigration . . . has been entrusted by the Constitution to the political branches of the Federal Government"]; see also Pen. Code, § 1389.2 ["[a]ll courts, departments, agencies, officers, and employees of this State and its political subdivisions are hereby directed to enforce the agreement on detainer and to co-operate with one another and with other states in enforcing the agreement and effectuating its purpose"].) A third-party defense subpoena is not a warrant to the sheriff or to employees of a county jail to disclose and thereby to subvert the execution of federal detainers.

The only "state action" taken against Esparza was his conviction and incarceration on a misdemeanor charge. The fact that ICE learned of Esparza's whereabouts and detained him upon his release from state custody did not transform federal deportation proceedings into state action in Jacinto's case. Jacinto's insistence that the sheriff's department was not free to ignore his subpoena ignores the fact that the Sixth Amendment affords a right to compulsory process "only where it is within the power of the . . . government to provide it." (*United States v. Greco* (2d Cir. 1962) 298 F.2d 247, 251.) Jacinto's issuance of a subpoena for Esparza's appearance at trial did not authorize the jail to detain Esparza past his release date or prohibit the federal government from filing the detainer or taking custody of the witness at any time.

Citing Esparza's booking record, Jacinto argues that the sheriff voluntarily undertook the act of "refer[ing Esparza] to INS for review." (Appellant's Request for Judicial Notice, Exhibit C, p. 2.) He claims this transforms deportation into "state action." He asserts that the sheriff's department was under no legal compulsion to notify ICE regarding the possible illegal status of

the witness. (ROBM 17, citing 84 Ops. Cal.Atty. Gen. 189 (2001); *League of United Latin American Citizens v. Wilson* (C.D. Cal. 1995) 908 F.Supp. 755, 769-770 (*LULAC*) [holding that Pen. Code, § 834b which compels local authorities to verify an arrestee's legal status and notify INS of illegal aliens, is preempted by federal law].)[8]

Jacinto reads too much into the cryptic notation in the booking record.[9] It does not establish the sheriff's department's responsibility for Esparza's deportation. Esparza was not arrested and held in state custody for a violation of federal immigration law. (Cf. *Gonzales v. City of Peoria* (9th Cir. 1983) 722 F.2d 468, 475, overruled on another ground in *Hodgers-Durgin v. de la Vina* (9th Cir. 1999) 199 F.3d 1037, 1040, fn. 1; 8 U.S.C., § 1252c.) The mere transfer of legitimately obtained information from state officials to ICE does not constitute "enforcement" of federal immigration statutes. (*Gates v. Superior Court* (1987) 193 Cal.App.3d 205, 219.) "[N]otification . . . is a far cry from processing such individuals through a state court system with neither mandate for, nor experience in, the application of federal laws." (*City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 380.)

The sheriff department's notice, in any event, did not result in the witness's unavailability. The notice remained subject to the federal government's actual

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8. But see *Fonseca v. Fong* (2008) 167 Cal.App.4th 922 (not final) [distinguishing *LULAC* and holding that Health & Saf. Code, § 11369's requirement that local law enforcement notify federal officials of suspected illegal aliens convicted of certain drug offenses is not preempted by federal law].)

9. The notation "Refer to INS for review" appears to be a "tickler" of a matter requiring future action, with no date of completion recorded. (Appellant's Request for Judicial Notice, Exhibit C, p. 2.) Notably, any referral by the sheriff's department to ICE necessarily had to predate the defense subpoena for Esparza, since the ICE detainer preceded the subpoena by over one month.

decision to deport, and any remedial steps available to the defense that might have delayed deportation.

3. The subpoena could not have triggered the protections of the compulsory process clause, since the subpoena itself was deficient

Jacinto insists that his issuance of a defense subpoena triggered the protections of the compulsory process clause and imposed on the sheriff's department, as custodian of the witness, a duty to facilitate the subpoena. (ROBM 27, 30.) He overlooks that a defendant may not subpoena the appearance of a county prisoner in court, but instead must seek a court order authorizing the transport of the prisoner upon a showing of good cause. (Pen. Code, § 4004; Code Civ. Proc. § 1995.) "[A] prisoner in the county jail has to be produced in court to testify so long as he is confined in the county (Code Civ. Proc. [§] 1997), but the party desiring his testimony must move the court to order his appearance, and further he must make an affidavit showing the necessity and materiality of the prisoner's testimony (Code Civ. Proc. [§] 1996; *People v. Townsend* [(1915)] 28 Cal.App. 204. 205)." (28 Ops.Cal.Atty.Gen. 59, 61 (1956).)

Addressing the statutory provision for securing a state prisoner's attendance as a witness at a criminal trial, *People v. Garcia* (2008) 160 Cal.App.4th 124, observed that "a witness incarcerated in state prison is brought to a criminal court to testify by means of a removal order issued pursuant to Penal Code section 2621 or 1567." (*Id.* at p. 126.) "In the case of prisoner witnesses, *who can appear only after a removal order is issued* to the warden and executed by the sheriff, personal service on the witness would result in unnecessary bureaucratic activity and additional costs and delays *which serve no purpose.*" (*Id.* at p. 132, emphasis added.) As a subpoena serves no purpose under such circumstances, the court cannot require one as a condition of issuing a removal

order. (*Ibid.*)

Furthermore, Jacinto's subpoena specified a return date after Esparza's scheduled release from custody. The subpoena could not authorize Esparza's incarceration past his release date. Still less could it trigger a duty on the sheriff to keep tabs on a former prisoner to produce him in court at some later time. A defense subpoena is not an arrest warrant.

Penal Code section 1332 provides that, in limited circumstances, a party to a criminal action may seek to have a material witness post bond or, if he is unable to do so, be taken into custody, upon a showing of a risk of nonappearance. (Pen. Code, § 1332; *In re Francisco M.* (2001) 86 Cal.App.4th 1061.) The jailer may detain persons so committed "in order to secure their attendance as witness in criminal cases" (Pen. Code, § 4000, subd. (1).) Jacinto never sought such an order, however.

No authority requires a jailer or a prosecutor to initiate a hearing under Penal Code section 1332, in the first instance, to compel the appearance of a subpoenaed defense witness. *In re Jesus B.* (1977) 75 Cal.App.3d 444, held that "because of the draconian nature of this procedure, . . . the police or prosecution do not have to invoke it in order to avoid the dismissal of an action for failure to make a witness available at trial." (*Id.* at p. 452 [discussing provisions for detaining a material witness under Pen. Code §§ 879, 881 & 882].) Nor could prosecutors or jail officials have made the required showing under Penal Code section 1332, because they were not privy to information regarding Esparza's materiality to the defense.

Accordingly, when Esparza completed his sentence, the jail lost authority to retain him in custody. Any duty it otherwise might have had to produce Esparza at trial as the witness's custodian expired too.

Even if the subpoena had been procedurally proper and its return date within the term of the sentence being served by the witness, its authority

remained subordinate to the federal government's sovereign power to deport the witness. "The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government." (*Valenzuela-Bernal, supra*, 458 U.S. at p. 864.) Even a valid state subpoena cannot compel the federal government to produce a witness or evidence in a state court proceeding. (See *United States ex. rel. Touhy v. Ragen* (1951) 340 U.S. 462, 469; *Swett v. Schenk* (9th Cir. 1986) 792 F.2d 1447, 1451; *Boron Oil Co. v. Downie* (4th Cir. 1989) 873 F.2d 67, 69-71 [the limitations on a state court's subpoena and contempt powers stem from the sovereign immunity of the United States and from the Supremacy Clause].)

Accordingly, the sheriff's department was not responsible for ensuring Esparza's appearance at the October 26, 2006 court proceedings. It had no court order for production of the witness, and no longer had physical custody of him. It likewise was not responsible for the federal government's decision to deport Esparza in its sovereign capacity to regulate immigration. The sheriff's department did nothing affirmative to make Esparza unavailable; it simply complied with its mandatory administrative duty to release Esparza at the end of his state sentence. That he was released into federal custody pursuant to a valid federal detainer did not transform the deportation proceedings into a form of "state action" under the Fourteenth Amendment's due process clause.

B. The Prosecution Team Was Not Responsible for Actions Taken by the Sheriff's Department in Its Administrative Capacity as Custodian of the Witness

It is undisputed that the Sonoma County District Attorney's Office had no knowledge of the subpoena for Esparza, or Esparza's status as a material defense witness. (Slip Opn. at p. 5.) Jacinto's theory of state action rests not

upon the prosecution but upon the sheriff's department which released Esparza despite the existence of a defense subpoena. In finding no constitutional violation, the Court of Appeal properly distinguished these two county departments: "The sheriff's department was no more than the custodian of witness Esparza. In this case, it was not a part of the prosecutorial investigative team. We agree with the People that the action of the sheriff's department or county jail personnel may not be attributed to the prosecution." (Slip Opn. at p. 6, citing *Barrett, supra*, 80 Cal.App.4th at p. 1317.)[10/]

Jacinto asserts that the goal of ensuring a fair trial requires that the actions of one state actor be attributed to all state actors. Case authority is against him. For purposes of assessing due process claims, courts distinguish actions of the "prosecution team" from actions of other officials. Under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), the prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant that is both favorable to the defendant and material on the issues of guilt or punishment. (*Id.* at pp. 86-87.) This includes favorable evidence "known to the others acting on the government's behalf in the case, including the police." (*Kyles v. Whitley* (1995) 514 U.S. 419, 437.) "But the prosecution cannot reasonably be held responsible for evidence in the possession of *all* governmental agencies, including those not involved in the investigation or prosecution of the case. 'Conversely, a prosecutor does not have a duty to disclose exculpatory evidence or information to a defendant unless the prosecution team actually or constructively possesses that evidence or information. Thus, information possessed by an agency that has no connection

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10. Although a detective from the Sonoma County Sheriff's Department conducted the interview of the victim (CT 40), no member of the Sheriff's Department interviewed defense witness Esparza. He was held in custody by the sheriff solely in its administrative capacity as custodian of a person sentenced to imprisonment upon conviction for a crime. (See Arg.I.A.2, *ante*.)

to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such material.'" (*In re Steele* (2004) 32 Cal.4th 682, 697 (*Steele*), quoting *Barrett, supra*, 80 Cal.App.4th at p. 1315; accord, *United States v. Hall* (1st Cir. 2006) 434 F.3d 42, 55 [*Brady* duty of disclosure "does not extend to information possessed by government agents not working with the prosecution"]; *Lovitt v. True* (4th Cir. 2005) 403 F.3d 171, 185-186 [*Brady* duty to learn of favorable evidence known to others acting on the government's behalf does not cross jurisdictional lines]; *United States v. Morris* (7th Cir. 1996) 80 F.3d 1151, 1169 [*Brady* duty of disclosure does not extend to information possessed by other government agencies, such as the SEC, the OTS and the IRS, not involved in the prosecution]; *United States v. Locascio* (2d Cir. 1993) 6 F.3d 924, 949 [*Brady* duty of disclosure did not extend to reports prepared by other government agents who were "uninvolved in the investigation or trial of the defendants-appellants"].)

In *Barrett*, the defendant was charged with murdering his cellmate in a state prison facility. The California Department of Corrections and Rehabilitation (CDCR) investigated the murder. At trial, the defendant moved for a discovery order compelling the prosecution to produce 17 categories of CDCR records mostly relating to management of the state prison. After the trial court ordered discovery, the Court of Appeal issued a writ of mandate vacating the trial court's order. The appellate court found CDCR was part of the prosecution team in investigating the charged offense. The court, however, drew a distinction between CDCR's investigative function and its custodial function. CDCR "first and foremost supervises, manages and controls the state prisons . . . in connection with its administrative and security responsibilities in housing California felons while they serve their sentences, CDC[R] is not part of the prosecution team. Thus, for our purposes, CDC[R] has a hybrid status: part

investigatory agency, and part third party." (80 Cal.App.4th at p. 1317.) Accordingly, the Court of Appeal found that the prosecution team was not in possession of CDCR records relating to its separate and distinction prison administration function, and that the defendant had to utilize traditional third-party discovery tools, such as a subpoena duces tecum, to obtain those records. (*Id.* at p. 1318, cited with approval in *In re Steele, supra*, 32 Cal.4th at p. 697 [holding that the discovery obligation under Pen. Code, § 1054.9 does not extend to all law enforcement authorities but only those who were involved in the investigation or prosecution of the case].)

Jacinto argues that *Barrett* is limited to compliance with statutory discovery and does not preclude attributing to the prosecution the custodial activities of jail officials which infringe a defendant's constitutional right to present a defense. (ROBM at p. 24.) He also argues that *Barrett* did not concern the defendant's right to compulsory process, since the court there acknowledged the defendant's "right to discovery of the CDC[R] records by subpoena duces tecum upon a showing of good cause." (ROBM at p. 24.) Both of these arguments have been rejected by the courts.

People v. Zambrano (2007) 41 Cal.4th 1082 extended the rationale in *Barrett* and *Steele* to a claimed due process violation arising from a failure to disclose material exculpatory evidence. There, the defendant's sister sent a letter to a deputy sheriff at the jail where the defendant was housed pending trial. The letter, which discussed defendant's history of mental problems, was unknown to the prosecutor and not disclosed during the People's case in chief. (*Id.* at p. 1131.) On appeal, the defendant argued that the prosecutor's failure to disclose the letter was prejudicial misconduct in violation of *Brady* obligations to disclose materially favorable evidence to the defense. This Court rejected the claim and recognized the distinction between the prosecution team and the jailer with respect to the loss of defense evidence: "It is clear the

prosecutor committed no lapse, constitutional or statutory, with respect to Terri's letter to the deputy sheriff. The prosecutor represented, without contradiction, that his office did not possess that letter and that he was unaware of its existence elsewhere. . . . [¶] Moreover, the record does not show the sheriff's office was an agency subject to the statutory or constitutional duty of disclosure. So far as appears, the sheriff was only defendant's jailer, and was not involved in the investigation or prosecution of the charges against him. [¶] Under *Brady*, the prosecutor's duty extends to evidence 'known to the others acting on the government's behalf' [citation], '[b]ut the prosecution cannot reasonably be held responsible for evidence in the possession of *all* government agencies, including those not involved in the investigation or prosecution of the case. . . .'" (41 Cal.4th at p. 1133, quoting *Kyles v. Whitley, supra,* 514 U.S. at p. 437 and *In re Steele, supra*, 32 Cal.4th at p. 697.) Thus, *Zambrano* squarely rejected a claim that the prosecution must be held accountable for actions of a jailer whenever those actions implicate the defendant's due process rights.

The result is no different because Jacinto asserts both his Sixth Amendment right to compulsory process, as well as his Fourteenth Amendment right to due process. As noted previously, the issuance of a defense subpoena in this context did not trigger a constitutional obligation by the jailer to produce Esparza at trial. (Arg.I.A.3., *ante*.) Moreover, *Valenzuela-Bernal* treated the defendant's compulsory process and due process claims equivalently in assessing an alleged constitutional violation based upon the federal government's deportation of a defense witness in a federal prosecution. (*Valenzuela-Bernal, supra*, 458 U.S. at p. 872 ["Having borrowed much of our reasoning with respect to the Compulsory Process Clause of the Sixth Amendment from cases involving the Due Process Clause of the Fifth Amendment, we have little difficulty holding that at least the same materiality requirement obtains with respect to a due process claim"].) The high court

looked to *Brady* cases to define the parameters of the defendant's claimed compulsory process violation based on the loss of a potential defense witness. (*Id.* at pp. 867-868.) Jacinto cites no authority that defines the "prosecution team" more broadly for purposes of Sixth Amendment compulsory process than the definition employed for purposes of Fourteenth Amendment due process. As shown, the latter provision does not incorporate county jailers acting in the capacity of a custodian of a defense witness in that definition. (*People v. Zambrano, supra,* 41 Cal.4th at p. 1133.)

Jacinto's reliance on *Michigan v. Jackson* (1986) 475 U.S. 625 is likewise misplaced. There, the Supreme Court held that, if a defendant invokes the Sixth Amendment right to counsel at the arraignment, law enforcement officers may not thereafter interrogate him without counsel present unless the defendant initiates the exchange and waives his right to counsel. (*Id.* at p. 636.) In that context, the Court rejected an argument that the police may be ignorant of the defendant's in-court invocation of the right to counsel. "Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)." (*Id* at p. 634, fn. omitted.)

Jacinto cites no authority extending *Jackson's* right to counsel rule to compulsory process and due process cases. This is understandable because there are none. The Supreme Court has emphasized that "[t]here is a significant difference between the Compulsory Process Clause weapon and other rights that are protected by the Sixth Amendment . . . ." (*Taylor v. Illinios* (1988) 484 U.S. 400, 410.)

Further, the officers who interviewed Jackson were part of the prosecution team investigating the charged offense. (475 U.S. at p. 627.) Since *Jackson*,

the Supreme Court has clarified that invocation of the right to counsel is offense specific, and does not restrict the actions of officers who are investigating unrelated charges. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 178-179 [rejecting bright-line rule that there can be no police-initiated questioning of any person in custody who has requested counsel to assist him in defense or in interrogation as not contained within the Sixth Amendment's right to counsel].) *McNeil* thus rebuts Jacinto's expansive reading of the "state actor" language in *Jackson.*

C. In any Event, State Officials Are Not Responsible for the Federal Government's Deportation of a Defense Witness Absent the Prosecution's Cooperation in Deporting a Witness with Known Material Exonerating Testimony as an Attempt to Gain an Unfair Tactical Advantage over the Accused

The responsibility of state prosecutors for the federal government's deportation of a defense witness can accrue, if at all, only on terms that independently establish a federal constitutional violation in the defendant's case. (*People v. Valencia* (1990) 218 Cal.App.3d 808, 818-820 (*Valencia*) [under Proposition 8 the federal standard contained in *Valenzuela-Bernal* controls a claim of loss of a material witness due to deportation].)

In this case, the Court of Appeal held that such responsibility by state actors requires, at minimum, their knowledge of the witness's materiality at the time he was released into federal custody. (Slip Opn. at p. 1.) Finding no such knowledge by either the prosecution or the sheriff's department, the Court of Appeal did not consider whether a showing of bad faith on the part of state officials was also required. (Slip Opn. at p. 6, fn. 5.)

In *Valenzuela-Bernal*, the United States Attorney's Office knew of the existence of the passengers who had been arrested with the defendant. That office had conducted interviews with the passengers and had determined in good faith that they did not possess evidence material to the prosecution or the

defense before it released the passengers for deportation. (458 U.S. at p. 861.) In outlining the government's duty not to interfere with the defendant's right to due process and compulsory process, the high court implicitly recognized that the prosecution's knowledge, or lack thereof, of the witness's materiality was critical to a determination of the alleged constitutional violation: "Congress' immigration policy and the practical considerations discussed above demonstrate that the Government had good reason to deport respondent's passengers *once it concluded that they possessed no evidence relevant to the prosecution or the defense of respondent's criminal charge.*" (*Id.* at p. 866, emphasis added.) "[T]he responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses upon the Executive's *good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution.*" (*Id.* at p. 872, emphasis added.)

Relying on this language, federal circuit courts interpret *Valenzuela-Bernal* to require a showing that (1) the lost evidence was both material and favorable to the defense, and (2) the government acted in bad faith in deporting a known material witness. (See, e.g., *Buie v. Sullivan* (2d Cir. 1990) 923 F.2d 10, 11-12; *United States v. Chaparro-Alcantara* (7th Cir. 2000) 226 F.3d 616, 623-624; *United States v. Pena-Gutierrez* (9th Cir. 2000) 222 F.3d 1080, 1085; *United States v. Dring* (9th Cir. 1991) 930 F.2d 687, 693; *United States v. Iribe-Perez* (10th Cir. 1997) 129 F.3d 1167, 1173.) "'The presence or absence of bad faith by the police [in deporting a witness] . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.'" (*United States v. Chaparro-Alcantara, supra*, 226 F.3d at p. 624, quoting *Arizona v. Youngblood* (1988) 488 U.S. 51, 56, fn. *.) "Our focus, then, must be on the Government's knowledge when, exercising its deportation authority, it arranged for the departure of the witness, not on any of its

subsequent conduct." (*United States v. Chaparro-Alcantara, supra*, at p. 624.) The defendant bears the burden of demonstrating that the government deported the witness in bad faith. (*United States v. Dring, supra,* 930 F.2d 687, 694.) Such burden is met where the government deports a witness to gain an unfair tactical advantage over the accused (*Pena-Gutierrez, supra,* 222 F.3d at p. 1085), or in a conscious effort to suppress exculpatory evidence (*Chaparro-Alcantara, supra,* 226 F.3d at p. 624).

Jacinto insists that *Valenzuela-Bernal* requires sanctions for deportation of a material defense witness regardless of whether the government actors knew of the witness's materiality. (ROBM 32-33.) He reasons that a knowledge inquiry would convert compulsory process claims into *Brady* due process claims, thus rendering *Valenzuela-Bernal* superfluous. (ROBM 33.) He further argues that, once knowledge is shown, suppression of evidence favorable to the accused violates due process irrespective of the good faith or bad faith of the prosecution. (ROBM 48.) He therefore criticizes federal circuit authority for engrafting a bad-faith requirement onto the *Valenzuela-Bernal* holding. (ROBM 45-50.) Contrary to Jacinto's claims, the knowledge and bad faith requirements (1) are consistent with Supreme Court jurisprudence governing the destruction or suppression of material evidence; (2) balance the need to preserve material witness testimony and the government's compelling interest in regulating immigration; and (3) preserve the distinction between state actors and the sovereign federal government by requiring state complicity as a substantial cause of the deportation before finding a constitutional violation.

First, construing *Valenzuela-Bernal* to include a knowledge requirement achieves parity with Supreme Court jurisprudence concerning the destruction and suppression of material evidence. *Brady, supra,* 373 U.S. 83, cited by analogy in *Valenzuela-Bernal* (458 U.S. at p. 868), imposes on the prosecutor a "responsibility for failing to disclose *known*, favorable evidence rising to a

material level of importance" to the defense. (*Kyles v. Whitley, supra,* 514 U.S. at p. 433, emphasis added.) *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*), imposes a duty on police to preserve evidence only where the evidence "possess[es] an exculpatory value that was *apparent before the evidence was destroyed*, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Id.* at p. 489, emphasis added; accord, *Arizona v. Youngblood, supra*, 488 U.S. at p. 56, fn. 1 ["we made it clear in *Trombetta* that the exculpatory value of the evidence must be apparent '*before* the evidence was destroyed'"].) Where the exculpatory nature of the evidence is not apparent at the time the evidence was destroyed, the defendant must show that the prosecution destroyed the evidence in "bad faith." (*Arizona v. Youngblood, supra*, 488 U.S. at pp. 57-58 [discussing destruction of "potentially useful" evidence].) And, in cases of preaccusation delay, the defendant must show both that the delay resulted in prejudice to the defense and that the government "intentionally delayed to gain some tactical advantage" over the accused. (*United States v. Marion* (1971) 404 U.S. 307, 325; accord, *United States v. Lovasco* (1977) 431 U.S. 783, 790; *People v. Nelson* (2008) 43 Cal.4th 1242, 1251-1254 [summarizing United States Supreme Court authority].) No Supreme Court case imposes strict liability for lost exculpatory evidence based solely on the fact that the loss is attributable to governmental action.

Jacinto offers no rationale for a more stringent strict-liability standard respecting lost material defense testimony than is provided for the government's destruction or non-disclosure of material evidence. A review of this body of case law reflects that "the United States Supreme Court in *Valenzuela-Bernal* did not intend to state a different standard of materiality from that required in other cases concerning the loss of material evidence," namely that the exculpatory nature of the testimony be apparent prior to the loss

of the witness. (*People v. Lopez* (1988) 198 Cal.App.3d 135, 145-146; accord, *United States v. Barajas-Chavez* (10th Cir. 2004) 358 F.3d 1263, 1267 [citing to both *Valenzuela-Bernal* and *Youngblood* in considering whether there has been a constitutional violation for deporting a witness]; *United States v. Chaparro-Alcantara, supra,* 226 F.3d at pp. 623-624 [same]; *United States v. Iribe-Perez, supra,* 129 F.3d at p. 1173 [same]; *United States v. Dring, supra,* 930 F.2d at pp. 693-694 [same].)[11/]

This conclusion of the federal courts has not rendered *Valenzuela-Bernal* superfluous. Like *Trombetta* and *Youngblood*, *Valenzuela-Bernal* deals with evidence (in the form of witness testimony) that is unavailable, whereas *Brady* deals with evidence in the prosecutor's possession. "'The Supreme Court's jurisprudence divides cases involving nondisclosure of evidence into two distinct universes. *Brady* and its progeny address exculpatory evidence that is still in the government's possession. *Youngblood* and *Trombetta* govern cases in which the government no longer possesses the disputed evidence.' [Citation.] [¶] Thus, while the state of mind of the prosecutor is irrelevant to the question under *Brady* of whether the prosecution failed to disclose material exculpatory evidence, 'the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results

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11. Disagreeing with *Lopez*, *People v. Valencia, supra,* 218 Cal.App.3d 808, held that "*Trombetta* and *Valenzuela-Bernal* address two different aspects of the state's duty to preserve exculpatory evidence" and that "the appropriate federal standard of materiality to apply in witness deportation cases is *Valenzuela-Bernal*." (*Id.* at pp. 824-825.) *Valencia*, however, does not support Jacinto's argument for imposing a higher standard of liability on prosecutors for loss of a material witness. On the contrary, *Valencia* was "mindful that the government's good or bad faith in making deportation decisions may have a bearing on application of the federal standard of materiality under *Valenzuela-Bernal* . . . ." (*Id.* at p. 826.) In this sense, it is consistent with the federal circuit authorities cited above.

of which might have exonerated the defendant.' [Citation.]" (*Smith v. Secretary of New Mexico Dept. of Corrections* (10th Cir. 1995) 50 F.3d 801, 824, fn. 34; see also *United States v. Velarde-Gavarrete* (9th Cir. 1992) 975 F.2d 672, 675 [distinguishing *Valenzuela-Bernal* and *Brady* on this basis].)

Second, requiring the defendant to show knowledge of the witness's materiality *and* bad faith on the part of the prosecution in deporting him is consistent with *Valenzuela-Bernal*'s recognition of the government's compelling interest in the area of deportation. As *Valenzuela-Bernal* observed, the government is "charged with a dual responsibility" to prosecute persons charged with crimes, and to deport other persons who may be potential witnesses to such crimes in order to carry out the immigration policies that Congress has enacted. (458 U.S. at p. 864.) "[I]ts 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." (*Id.* at p. 866.) Under *Brady*, by contrast, the government has no legitimate, countervailing interest for failing to disclose exculpatory evidence in the government's possession. Accordingly, suppression of such material evidence known to the government but not to the defense violates due process irrespective of the good or bad faith of the prosecution. (*Brady v. Maryland, supra*, 373 U.S. at p. 87.)

By emphasizing the prosecutor's good-faith determination that the witness was not material to the prosecution or the defense, *Valenzuela-Bernal* implicitly held that the bad faith, *vel non,* of the prosecutor was a component of the analysis. (*United States v. Dring, supra,* 930 F.2d at p. 694.) The court subsequently recognized as much in *Youngblood*, where it cited *Valenzuela-Bernal* as one of the "decisions in related areas [that] have stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the

Government." (488 U.S. at p. 57.) While Jacinto questions the validity of the circuit courts' interpretation of *Valenzuela-Bernal*, he has failed to cite a single federal case to disapprove of the bad-faith requirement. Notably, *United States v. Gonzales* (5th Cir. 2006) 436 F.3d 560, did not take such a position, but rather declined to decide the issue. (*Id.* at p. 579.)

Third, where a state prosecution is involved, a showing that state officials acted with knowledge of the witness's materiality and in bad faith in allowing the witness to be deported by the federal government is necessary to establish "state action" under the due process clause. Such requirements recognize the divisions between sovereign governments and hold state officials responsible for the actions of the federal government only on such terms as would independently establish a constitutional violation. Because state officials have no power to ignore a detainer from the federal government or to interfere with federal deportation proceedings (*Valenzuela-Bernal, supra*, 458 U.S. at p. 864; Pen. Code, § 1389.2), they must do more than simply comply with federal mandate before they are held responsible for a witness's unavailability. At a minimum, the defendant must show that the state prosecutor (1) actively sought to deport a defense witness or refused to provide assistance necessary to secure the witness's presence, (2) with knowledge of that witness's materiality and (3) in order to gain an unfair tactical advantage over the accused. Anything less would impose a harsher penalty on the state government than is set forth in *Valenzuela-Bernal*, and would hold the state strictly liable for sovereign acts of the federal government without its actual complicity in the act that deprives the accused of the evidence. It is not the release of the witness from the jail but the deportation which has that result. Absent a showing of knowledge and bad faith on the part of state officials, the act of deportation cannot "fairly be said to be that of the State[]." (*Shelley v. Kraemer, supra*, 334 U.S. at p. 13.)

People v. Parham (1963) 60 Cal.2d 378, drew a similar distinction between state and federal actors in assessing a claim of constitutional error based on failure to comply with a defense subpoena duces tecum. The defendant was charged in a state prosecution with three counts of robbery. Prior to trial, witnesses to the robberies gave signed statements to the FBI. A state investigator observed the interviews and provided his notes of the interviews to the defense. However, the FBI refused to comply with a defense subpoena duces tecum to produce the actual statements. The defendant unsuccessfully moved to excluded the witness's testimony at trial on the ground that failure to produce their prior statements violated his constitutional rights to a fair trial and due process. On appeal, this Court found no constitutional violation by state prosecutors:

> Had the witnesses' statements been in the possession of the prosecution an order to produce would have been proper. . . . It does not follow, however, that the use of the witnesses' testimony even though their prior statements were unavailable deprived defendant of a fair trial. The prosecution did not withhold the statements, but on the contrary made every effort to obtain them from the F.B.I. The prosecution cannot be penalized because those efforts failed. The prosecution is not penalized if, through no fault of state officials, a material witness for the defense is unavailable at trial. [Citations.] It does not appear that the statements were unavailable because of any improper activity by state officials.

(*Id.* at pp. 381-382; see also *In re Pratt* (1980) 112 Cal.App.3d 795, 853, 856-859 [defendant was not deprived of his constitutional right to counsel in state proceeding where, unbeknownst to local prosecutors, a federal informant sat in on confidential communications between defendant and his attorney].)

People v. Mejia (1976) 57 Cal.App.3d 574 (*Mejia*),[12/] cited by Jacinto, does not compel a different result. There, county officials investigating a crime arrested the defendant and six other people in the defendant's residence,

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12. Superseded by statute on other grounds as noted in *People v. Valencia, supra*, 218 Cal.App.3d at pp. 811-812.

including two illegal aliens. The state later decided not to press charges against any of the arrestees except defendant and his wife. Without notice to the defense, the state turned over the two illegal aliens to the United States Immigration Services which deported them. (*Id.* at p. 577.)

The appellate court found those individuals were deported as a result of state action. "There can be no question but that state action initiated and was at least partially responsible for the fact Velasquez and Arce became unavailable as witnesses. They were apprehended and arrested by state authorities for violation of state law. . . . For reasons that do not appear, state authorities determined not to press charges against them. State authorities turned them over to federal immigration officials, knowing they would be deported . . . . State authorities failed to notify the defendant of the action taken so that he had no opportunity either to interview the witnesses or subpoena them in the criminal proceedings pending against him." (57 Cal.App.3d at p. 581.) While recognizing the state had to cooperate in the surrender of the two individuals to federal authorities, the court observed that "cooperation involves participation, and participation generally results in responsibility." (*Ibid*; see also *People v. Jenkins, supra,* 190 Cal.App.3d 200, 204 [citing *Mejia* with approval]; *Cordova v. Superior Court* (1983) 148 Cal.App.3d 177, 185, fn. 2.)

Mejia does not support the rule of strict liability urged by Jacinto. In finding state action, *Mejia* emphasized that state authorities, "[k]nowing that material witnesses about to be released would be deported," had not informed the defendant of the action taken and thereby deprived him of an opportunity to interview the witnesses. (*Id.* at p. 582.) Such facts independently satisfied the knowledge and bad faith requirements discussed previously.

To the extent *Mejia* can be read to hold that the state's compliance with a valid federal detainer, standing alone, transforms federal deportation proceedings into "state action," it is erroneous. The state does not initiate and

indeed has no control of, federal deportation proceedings. As *Mejia* recognized, the state would not be responsible for the loss of the witness if the witness was detained by ICE officials "unilaterally and without the knowledge and aid of state authorities . . . ." (57 Cal.App.3d at p. 581.) The result is no different when federal immigration officials seize the witness from the jail pursuant to a detainer. In either event, state officials have neither the power nor the discretion to prevent the seizure. Absent a showing that state officials actively colluded with the federal government to deport a defense witness with knowledge of the witness's materiality and in bad faith thereby sought to gain a tactical advantage over the accused, no federal due process violation exists due to the sovereign actions of the federal government.

In sum, Jacinto is correct that *Valenzuela-Bernal* sets forth the federal test for loss of material witnesses due to deportation. (*People v. Valencia, supra,* 218 Cal.App.3d 808, 819.) But he incorrectly construes that test to apply uniformly to all government officials without regard to concepts of federal sovereignty or state action. And he incorrectly construes the test as one which omits knowledge and bad faith requirements. Such requirements are implicit in the rationale of *Valenzuela-Bernal* and the subsequent federal cases construing it. Such requirements also expressly appear in decisions both predating and postdating *Valenzuela-Bernal*, which address the prosecution's loss or suppression of material favorable defense evidence. A review of this jurisprudence makes clear that "the United States Supreme Court in *Valenzuela-Bernal* did not intend to state a different standard of materiality from that required in other cases concerning the loss of material evidence," namely that the exculpatory nature of the testimony be apparent prior to the loss of the witness. (*People v. Lopez, supra,* 198 Cal.App.3d at pp. 145-146; accord, *United States v. Barajas-Chavez, supra,* 358 F.3d at p. 1267 [citing to both *Valenzuela-Bernal* and *Youngblood* in considering whether there has been a

constitutional violation for deporting a witness]; *United States v. Chaparro-Alcantara, supra,* 226 F.3d at pp. 623-624 [same]; *United States v. Iribe-Perez, supra,* 129 F.3d at p. 1173 [same]; *United States v. Dring, supra,* 930 F.2d at pp. 693-694 [same].)

The appellate court found that Jacinto had not shown any knowledge of the materiality of Esparza's testimony by the jailers or any member of the prosecution team.[13/] Jacinto counters that his act of subpoenaing Jacinto for trial, and serving a copy of the subpoena on county jail officials, put the state on notice of the materiality of the witness's testimony and demonstrated that the witness was released to federal agents in bad faith. Even assuming the prosecution is responsible for actions of the sheriff's department as a custodian of the witness (but see Arg.I.B, *ante*), the facts cited by Jacinto do not satisfy the knowledge and bad faith requirements of *Valenzuela-Bernal.*

The existence of a subpoena, without more, did not place jail officials on notice that Esparza was a material witness. A party may subpoena any witness who can offer relevant testimony on his behalf. (See *In re Finn* (1960) 54 Cal.2d 807, 813 [defendant is entitled to subpoena a witness who can offer relevant testimony on his behalf].) Relevance, however, is a far cry from the materiality required to establish a due process violation. As *Valenzuela-Bernal* made clear, a defendant must demonstrate more than that the deported alien was a witness to the crime, or that his testimony would be of "conceivable benefit" to the defense. (458 U.S. at pp. 861, 866.) He must make a "plausible showing that the testimony of the deported witness would have been material

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13. It was undisputed that the District Attorney's office had no knowledge of the service of a subpoena on witness Esparza, or that Esparza was a material defense witness. (Slip Opn. at p. 5.) The trial court concluded, however, that neither knowledge of the witness's materiality nor bad faith on the part of state officials was required under *Valenzuela-Bernal* and *People v. Valencia, supra,* 218 Cal.App.3d 808. (RT Jan. 9, 2007 15-17, 21-22, 67; RT Jan. 31, 2007 79, 83.)

and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." (*Id.* at p. 873.) In *Valenzuela-Bernal*, members of the prosecution team interviewed the potential witness prior to deporting them and were able to assess their relevance to the case. Here, by contrast, the defense subpoena did not inform jail officials of the *content* of Esparza's anticipated testimony, namely that he claimed to have witnessed the crime and had identified someone other than Jacinto as the stabber. Accordingly, at the time he was released to federal officials, no one in the jail had notice that Esparza's testimony was both material and favorable to the defense, and that it was not cumulative to other evidence.

Nor did county sheriff's employees act in bad faith by releasing Esparza into federal custody. As discussed *ante*, jail officials had no authority to hold Esparza in custody once his sentence expired. They likewise had no authority to ignore a valid federal detainer or to interfere with federal deportation proceedings. Jacinto presented no evidence that county jail officials released Esparza into federal custody in order to gain a tactical advantage over him at trial (*United States v. Dring, supra*, 930 F.2d at p. 695), or in a conscious effort to suppress exculpatory evidence (*Chaparro-Alcantara, supra,* 226 F.3d at p. 624).

As to the subpoena, it did not impose upon the jailer an affirmative obligation to inquire as to Esparza's materiality or to determine whether his appearance as a witness would be frustrated by the federal government's deportation proceedings. (See *United States v. Dring, supra*, 930 F.2d at p. 694 [rejecting defendant's argument that *Valenzuela-Bernal* allows the government to deport aliens *if and only if* it first questions them, or otherwise makes a good faith determination that they are not material and favorable eyewitnesses].) Under similar circumstances, *Illinois v. Fisher* (2004) 540 U.S. 544, 548 held that the existence of a pending discovery request by the defense does not

establish bad faith per se in the destruction of evidence. There, the police destroyed cocaine samples 10 years after the offense in accordance with normal procedure even though there was a pending discovery request by the defense. In finding no evidence of bad faith, the Court observed, "[w]e have never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of police." (*Id.* at p. 548.) Likewise, here, Esparza's release into federal custody at the termination of his state sentence in accordance with normal administrative procedure did not establish bad faith on the part of the sheriff's department. While Jacinto would have this Court impose a duty on jailers to notify defendants in advance of a subpoenaed witness's release (a point which will be discussed in further detail below), the failure to notify Jacinto in this case does not establish bad faith. No such duty was recognized by statute or case law at the time of Esparza's release.

The fact that county jail officials released Esparza into ICE custody after his state sentence expired, without knowledge of the materiality of his testimony, and without acting in bad faith, does not establish a violation of the compulsory process or due process clauses. The Court of Appeal correctly found that Jacinto was not deprived of any constitutional rights through state action.

II.

UNDER THE COMPULSORY AND DUE PROCESS CLAUSES THE ACCUSED MUST SEEK TIMELY JUDICIAL INTERVENTION TO AVOID THE PENDING RELEASE OF HIS OWN SUBPOENAED INMATE WITNESS; IT IS NOT A JAILER'S OBLIGATION TO GIVE "NOTICE" TO DEFENDANTS OF FEDERAL DETAINERS OR OF THE TRANSFER OF CUSTODY OF SUCH INMATES

Jacinto maintains that principles of due process and compulsory process required the sheriff's department to notify him or the court of Esparza's imminent release into federal custody. He argues that he "did all that [he] could reasonably be expected to do" to ensure his witness's availability by serving a subpoena on the jail and on Esparza personally for his appearance at trial. (ROBM 29.) With an eye to the present record, he draws a distinction between having been (1) aware that a "witness was subject to deportation" and (2) "aware of the witness's *imminent* transfer to ICE authorities." (ROBM 29, emphasis added.) He claims "the state cannot sit back and do nothing in the face of a validly issued subpoena for an in-custody witness and then claim that it had no role in the denial of the defendant's compulsory process and due process rights." (ROBM 30.) But Jacinto was aware of the risk that his witness would be deported by the federal government. His investigator had interviewed the witness and knew he was slated for deportation. Jacinto's responsibility was to take all necessary steps to ensure his witness's presence at trial. (*Bellizzi v. Superior Court, supra*, 12 Cal.3d at p. 36; accord, *United States v. Castillo* (9th Cir. 1980) 615 F.2d 878, 881-882 [no due process violation where defendant had adequate time to interview witness prior to witness's deportation].) His argument incorrectly assumes a conclusion that the accused may serve a subpoena then sit back and do nothing under the Sixth Amendment.

"There is a significant difference between the Compulsory Process Clause weapon and other rights that are protected by the Sixth Amendment—its availability is dependent entirely on the defendant's initiative. Most other Sixth Amendment rights arise automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case. While those rights shield the defendant from potential prosecutorial abuses, the right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant. *The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct.*" (*Taylor v. Illinois, supra,* 484 U.S. at p. 410, fn. omitted, emphasis added.)

"Generally, it is not the duty of the prosecution to produce or to keep track of witnesses the defendant may later wish to have testify. An exception has been made in the case of police informants whose exact identity and whereabouts the police keep confidential until disclosure is required. (*Bellizzi v. Superior Court* [*supra,*] 12 Cal.3d 33, 36-37.) But this rule does not apply to other types of witnesses. (*Id.*, at p. 37; *People v. Hernandez* (1978) 84 Cal.App.3d 408, 411; *People v. Flores* (1976) 62 Cal.App.3d Supp. 19, 23.) In these other cases, only some impropriety on the People's part which makes the witness unavailable may result in dismissal if the defendant would otherwise be deprived of a fair trial. (See *People v. Hernandez, supra*, 84 Cal.App.3d 408; *People v. Mejia* [*supra,*] 57 Cal.App.3d 574, 579-580; *In re Jesus B.* [*supra,*] 75 Cal.App.3d 444, 449-450.)" (*People v. Rance* (1980) 106 Cal.App.3d 245, 253-254 (*Rance*), parallel citations omitted.)

A similar limitation applies to the prosecutor's duty to provide exculpatory evidence under the due process clause. "Although the prosecution may not withhold favorable and material evidence from the defense, neither does it have

the duty to conduct the defendant's investigation for him. [Citation.] If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial . . . . Accordingly, evidence is not suppressed unless the defendant was actually unaware of it and could not have discovered it '"by the exercise of reasonable diligence."' [Citations.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1048-1049.)

State cases repeatedly have recognized that a defendant may not neglect his duty to keep track of a defense witness and then hold the prosecutor responsible for the witness's unavailability. In *Bellizzi*, the defendant interviewed a witness, Evans, a friend of the defendant's who agreed to testify in his defense. When charges against the defendant were dismissed, Evans left the state. Thereafter a second complaint was filed, but Evans could not be located. (12 Cal.3d at p. 36.) This Court held that the People were not accountable for the loss of the witness. The Court observed that, where only the prosecution could realistically assure a witness's presence at trial, fairness required that the People, rather than the defendant, bear the responsibility for maintaining the witness's availability. (*Id.* at p. 37.) The case is otherwise, however, where the defendant has equal access to the witness. Thus, in *Bellizzi*, the defendant was a friend of the witness, knew of his relevance, and had ample opportunity to ascertain the witness's plans so that he could reach him in the event that the charges were refiled. "Since Evans' unavailability as a defense witness cannot be said to be the 'inevitable' result of the People's action or omission, it would be unreasonable to hold the People accountable therefore." (*Ibid.*)

In *Rance*, an officer who responded to the victim's apartment immediately after the crime moved out of state before the trial. The officer's name and report had been provided to the defense in discovery, but the officer was not

included in the prosecutor's list of trial witnesses. On appeal, the defendant argued that the officer was a material witness whose testimony may have been favorable to him, and that the prosecutor's failure to keep track of the witness warranted a dismissal. Defendant argued the prosecution had a duty to learn of the officer's intended move and to take steps to ensure his availability, or at least to notify the defense immediately after learning of the officer's absence, and to provide the defense with his new address if possible. (106 Cal.App.3d at p. 253.) The appellate court disagreed, noting that "it is not the duty of the prosecution to produce or keep track of witnesses the defendant may later wish to have testify." (*Ibid.*) "Officer Zerbe was not a confidential informant nor did the People in any way bring about his absence. His identity and (business) address were apparent to the defense from compliance with the original discovery request. From that time until the time of trial the defense was just as capable as the prosecution of keeping track of his whereabouts." (*Id.* at p. 254.)

In *Hernandez*, officers witnessed the defendants beat and rob the victim, Jan Callahan. Defendants were arrested, as was Callahan for being drunk in public. Callahan was transported to a hospital for treatment, then released without any efforts made to ascertain how to contact him in the future. By the time of the preliminary hearing, Callahan could not be found. The trial court dismissed the information because the police did not exercise reasonable diligence to maintain contact with Callahan, who may have been a material witness for the defense. (*People v. Hernandez* (1978) 84 Cal.App.3d 408, 410-411.) The appellate court reversed. Unlike a police informant, who is "in contact with, and under the control of, the prosecution" an "ordinary witness has not made himself part of the police mechanism by becoming an agent of law enforcement." (*Id.* at p. 411.) Accordingly, a motion to dismiss lies only "if the record supports the inference that the police did something to make Callahan unavailable." The release of a material witness from custody is not such an act. (*Id.* at p. 412.)

Likewise, the sheriff's department here had no affirmative duty to track Esparza's whereabouts or to notify defendant or the court of his imminent release to federal officials for deportation. Esparza was a cooperative defense witness who gave an interview to a defense investigator on July 19, three months prior to being deported. Defendant's investigator learned from Esparza on October 16, that he faced possible deportation and confirmed that fact with a jail staff member. (RT Jan. 9, 2007 38-39, 43-45, 55-56.) Jacinto's public defender attorney was capable of calculating Esparza's release date based upon court records that were available to his office, which was the same office that represented Esparza. (RT Jan. 9, 2007 37.) That he did so can be readily inferred from the fact that, despite having already served the county jail with a subpoena for Esparza's appearance, the defense investigator returned to jail and personally served Esparza with a subpoena one day before he was released. (RT Jan. 9, 2007 45.)

Despite having this information at his disposal, Jacinto apparently made no arrangements with Esparza to voluntarily return to the United States to testify. He did not disclose Esparza's identity or the substance of his testimony to the prosecution. He did not seek assistance from local prosecutors or ICE officials to delay Esparza's deportation. (See 8 C.F.R. §§ 215.2(a) & 215.3(g).) Nor did he seek a court order for Esparza's deposition (Code Civ. Proc., §§ 1995-1997), or to set bond upon risk of Esparza's nonappearance (Pen. Code, § 1332).

Jacinto asserts that he was not legally obligated to disclose Esparza's identity to the prosecution under applicable rules of discovery. This comment rings hollow where the issue is Jacinto's silence and inaction in the face of the known risk that his material witness would become unavailable when his sentence expired.

It is true that "criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial."

(*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.) However, an accused cannot conceal the identity and materiality of his witness from the prosecution, then blame the state for failing to ensure his availability. Jacinto's service of a subpoena on Esparza and local jail officials, without more, was not reasonably calculated to ensure Esparza's presence. As noted above, a subpoena could not compel county jail officials to hold Esparza past his scheduled release date and was utterly ineffective against the federal government's deportation power. Although federal immigration officials are authorized to detain in the United States any alien who is needed as a witness in a criminal case (8 CFR §§ 215.2(a) & 215.3(g)), Jacinto failed to notify the prosecutor, the superior court, or ICE officials of the subpoena, or seek their cooperation to make Esparza available at trial.

Jacinto cites no authority that compels a sheriff, as a matter of constitutional mandate, to act as a legal secretary, alerting the accused, the federal officers, or the trial court of the imminent release of a subpoenaed defense witness. As the Court of Appeal held, it would be "unreasonable to impose a duty on the jailers to make an inquiry into the materiality of the testimony a witness may offer every time jail personnel are served with a subpoena requiring a deportable witness to appear at trial. The jailers acted in accord with their normal practice of releasing an inmate at the completion of his sentence, and should not be required to seek a court determination of whether the subpoena served by Escobedo required them to continue to hold Esparza." (Slip Opn. at pp. 7-8.)

This Court made a similar observation in assessing a witness's unavailability for purposes of admitting prior testimony under oath: "we could not properly impose upon the People an obligation to keep 'periodic tabs' on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive." (*People v. Hovey* (1988) 44 Cal.3d 543, 564.) Given that Jacinto was aware of Esparza's materiality, and that his presence

might be lost due to the valid deportation proceedings by the federal government, it was his responsibility to do everything lawfully permitted to ensure Esparza's availability. The prosecution is not responsible for preparing the defendant's case. Defendant cannot complain where he failed to use the resources at his disposal.

The Court of Appeal reached a similar conclusion in *People v. Valencia* (1987) 191 Cal.App.3d 1483. The defendant was arrested with two other men for possession of narcotics for sale. After several court appearances over a two-month period, the codefendants pleaded guilty and were sentenced to jail. They completed their sentences five months later and were deported to Mexico. Relying on *People v. Mejia, supra*, 57 Cal.App.3d 574, the defendant argued that he was deprived of material witnesses for his defense due to state action. The Court of Appeal disagreed.

> In the instant case, it cannot be said that by the deportation of Barron and Ceja the prosecution deprived appellant of the opportunity to present material evidence which might have proven his innocence. First of all, it is apparent that appellant in this instance had plenty of opportunity to make use of the subject witnesses in the preparation of his case prior to their deportation, had he chosen to do so. Ceja and Barron were arrested along with appellant on May 14, 1984. The three were all present at the preliminary hearing on May 30, 1984. They appeared together for arraignment in superior court on June 14, 1984. Appellant was present when the two codefendants pled guilty on July 26, 1984. From the time Ceja and Barron were sentenced on August 28, 1984, to the time they were deported at the completion of their sentence, January 10, 1985, appellant had five months to make contact with these witnesses. He did not. . . .
>
> Nor can appellant excuse his inaction by claiming lack of notice. The record indicates that both he and his counsel were present when Barron and Ceja entered their pleas. They were thus aware that sentencing and service of sentence were imminent for the pair. Additionally, as found by the trial court, the sentencing order for the two clearly indicates that they were to be turned over to immigration authorities upon completion of their sentence. Thus, appellant and his counsel had notice of the impending deportation.

(191 Cal.App.3d at p. 1493.)

United States v. Filippi (1st Cir. 1990) 918 F.2d 244, provides an apt comparison. There, the defendant sought to call an Ecuadorian citizen to testify regarding the circumstances in which the defendant came into possession of luggage which contained contraband. Although the witness was cooperative, he was unable to secure a visa to enter the country. The defendant informed the United States Attorney of the relevance of the witness, and sought her assistance in procuring the visa. The defendant also sought assistance from the district court judge, who wrote a letter to the Consul informing it that the witness was urgently needed for trial. When the Consul failed to respond, the defendant contacted the INS for assistance, which informed him that the United States Attorney would need to intervene on his behalf. Upon the defendant's request, the court ordered the United States Attorney to cooperate with the INS. The United States Attorney contested the procedure and ultimately refused to cooperate. (*Id.* at pp. 245-246.)

The federal circuit court held that the actions of the United States Attorney had deprived the defendant of his right to compulsory process and due process of law. The court acknowledged that the government had no power to compel the presence of a foreign national residing outside of the United States. However, the witness was willing to testify, and his presence could not be secured without the cooperation of the United States Attorney. "This it failed to do, *despite several requests for assistance from both the defendant and the judge*." (918 F.2d at p. 247, emphasis added.) Under such circumstances, "[s]uch a deliberate omission to act, where action was required, by the United States Attorney constitutes a violation of the Sixth Amendment right to compulsory process and, derivatively, the right to due process protected by the Fifth Amendment." (*Ibid.*)

This is not a situation where only the People or the sheriff's department could realistically produce Esparza in court. Defense counsel had full knowledge of the witness. The public defender was as capable as any of these, if not more so, of ascertaining the witness's release date, seeking assistance from ICE to delay deportation, or seeking a court order to detain Esparza as a material witness. Despite knowledge that Esparza could be deported, counsel failed to notify ICE or to request assistance from either the court or the prosecutor to ensure Esparza's presence at trial. The record compels the conclusion that the defense withheld from the prosecutor and the court both the existence of the subpoena and the nature of Esparza's anticipated testimony.

It was not the duty of sheriff's employees to solicit from Jacinto's public defender or anyone else process to retain Esparza in custody. Nor was it their duty to delay or to defer execution of the federal detainer. Simply put, jail personnel have no responsibility to provide third-party defendants with tickler alerts before subpoenaed inmates are transferred to federal custody. A requirement of advance notice of inmate transfers to ICE would pose burdensome, perhaps insuperable, administrative issues, would impinge the privacy rights of inmates concerning their immigration status, and would create grave institutional security issues for both inmates and federal officers at the jail. As reflected by the facts in this case, any benefit of such notice is a matter of pure speculation. Ultimately, it was Jacinto's burden, not that of the jail or the prosecution team, to keep track of his witness's whereabouts and to ensure his presence at trial. (*Bellizzi v. Superior Court, supra*, 12 Cal.3d at p. 36.)

III.

EVEN IF THERE WERE A CONSTITUTIONAL VIOLATION, DISMISSAL OF THIS VIOLENT FELONY CASE IS INAPPROPRIATE SINCE A LESSER SANCTION ADEQUATELY PROTECTS JACINTO'S RIGHT TO A FAIR TRIAL

Even assuming a constitutional violation was shown in this case, the trial court's dismissal of charges as a remedy for the violation was an abuse of discretion. "A trial court has discretion to fashion a remedy when the prosecutor's conduct has resulted in a loss of evidence favorable to the defense." (*People v. Conrad* (2006) 145 Cal.App.4th 1175, 1185.) The court abuses its discretion when it dismisses charges despite an "intermediate remedy" which "adequately addresses the loss of relevant evidence in a manner that affords defendant due process and a fair trial while allowing the prosecution to go forward." (*Id.* at p. 1186.) Here, Esparza's recorded statement was an adequate substitution for live testimony that would allow Jacinto to present his defense at trial despite Esparza's unavailability.

In *Conrad,* defendant moved from his registered residence and was charged with the failure to register as a sex offender. Defendant denied changing his residence, claiming that he only stayed with family members while resolving a dispute with his ex-wife. The defense was supported by a brother, Willis Conrad, who died before trial after telling a parole officer that defendant stayed with him during a relevant period of time. (*Id.* at pp. 1179-1181.) The Court of Appeal held that preaccusation delay deprived defendant of this material exonerating testimony, but that the trial court abused its discretion in dismissing charges: "[T]he appropriate remedy is for the trial court to instruct the jury that defendant stayed with his brother for a few days between January 10, 2004, and January 23, 2004. The instruction should also inform the jury that defendant's brother was unavailable to testify concerning that fact because he died during

the time the prosecution unjustifiably delayed in filing a complaint against the defendant. [¶] This is not a perfect solution to the problem of lost evidence; however, it adequately addresses the loss of relevant evidence in a manner that affords defendant due process and a fair trial while allowing the prosecution to go forward. [Citation.] Because prejudice could have been substantially mitigated in this way, thereby affording defendant due process and a fair trial, dismissal of the action was an abuse of discretion. [Citation.]" (145 Cal.App.4th at p. 1186.)

People v. Woods (2004) 120 Cal.App.4th 929 reaches a similar result with direct application here. Misconduct by the *Woods* prosecutor caused a defense witness to invoke his Fifth Amendment privilege not to testify, but the trial court "relax[ed]" the hearsay rules and allowed defendant to introduce the witness's out-of-court statements for their truth. (*Id.* at pp. 935-936.) Defendant nevertheless was convicted. The Court of Appeal rejected defendant's claim that prosecutorial interference resulting in the witness's unavailability to testify required reversal. Citing decisions applying *Valenzuela-Bernal* standards, it found that "courts have rejected Sixth Amendment/due process claims when the defendant is given the opportunity to present statements of an unavailable witness through other witnesses." (*Id.* at p. 937.) So long as the defendant is permitted to present his version of the defense through comparable evidence, the court held, the loss of a material witness does not irreparably compromise the rights to a fair trial and to compulsory process. (*Id.* at p. 938.)

Similarly, the prosecutor here proposed that Jacinto introduce the hearsay statements of Esparza. (RT Jan. 9, 2007 30-32.) The trial court evidently accepted defense counsel's argument that a hearsay statement is an unsatisfactory substitute for live testimony. (RT Jan. 9, 2007 31-32.) Its ruling impermissibly deprecates the remedy afforded in *Woods*. That remedy would

be viable even if, by assumption, the accused could only offer "less satisfactory secondary evidence." (*People v. Gonzales* (1986) 179 Cal.App.3d 566, 575, citing *Trombetta, supra,* 467 U.S. at p. 490.) But the *Woods* remedy here allows Jacinto the use of exonerating statements by Esparza on better terms than he could obtain were the witness available to testify. Testimonial hearsay is categorically excluded under the confrontation clause because it evades cross-examination of adverse witnesses by the accused, but the compulsory process clause compels no similar categorical exclusion because the accused has no interest in cross-examination of exonerating statements by his witnesses. A mere assumption that Esparza might have testified in terms materially more favorable to Jacinto's defense than is otherwise reproducible in court cannot shape the appropriate remedy under the compulsory process decisions discussed above. Otherwise, dismissal would be automatic in all such cases. It is true that this remedy means Jacinto will lack the opportunity "to examine [the witness] on the witness stand and use his 'live testimony' to undermine the prosecution's case. But '[t]he right to present a defense and its concomitant right to compulsory process, are not unqualified. . . .' [Citation.]" (*People v. Woods, supra*, 120 Cal.App.4th at p. 938.)

Jacinto scarcely can complain that his defense would be presented at trial through an exonerating hearsay declarant whose statement is immune to cross-examination, whose information was procured by a trained defense investigator rather than the authorities, and whose unknown whereabouts makes it unlikely the prosecution ever will acquire inconsistent statements. It bears emphasis that Jacinto's investigator conducted a comprehensive, tape-recorded interview with Esparza. As Jacinto indicates in his brief (ROBM 7, fn. 2), no question exists about whether Esparza made the exonerating statements ascribed to him. Esparza clearly said he saw a woman, not a man, stab the victim. He discussed the circumstances leading up to the stabbing, and his vantage point during the

crime. He said he was not intoxicated at the time, and he said he was 99-percent certain that a woman had done the stabbing. (CT 87-102.)

Esparza's statement, whether admitted in verbatim or summarized form, is a more than adequate substitute for live testimony. It would allow the fact finder to weigh Esparza's eyewitness observations against the other eyewitness accounts identifying Jacinto as the stabber. Accordingly, Jacinto is not entitled to dismissal due to Esparza's deportation because he has obtained "comparable evidence by other reasonably available means." (*Trombetta, supra*, 467 U.S. at p. 489.) Because the trial court abused its discretion in dismissing the charges, this matter should be remanded so that Jacinto may present his defense to the factfinder.

CONCLUSION

Accordingly, the judgment of the Court of Appeal should be affirmed.

Dated: November 19, 2008

Respectfully submitted,

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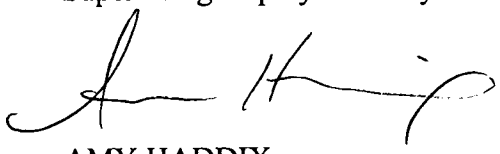

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CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 16561 words.

Dated: November 19, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
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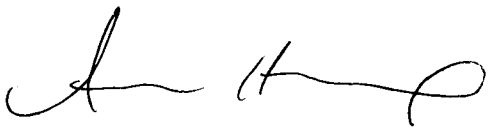

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Amando Monter Jacinto**

No.: **S164011**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 19, 2008, I served the attached **APPELLANT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 19, 2008, at San Francisco, California.

Pearl Lim
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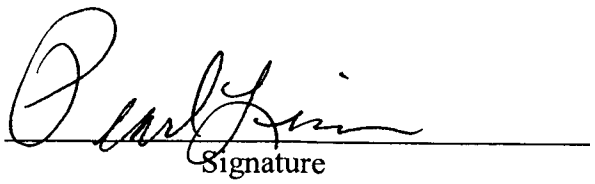
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