IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent
Plaintiff and ~~Appellant~~,

v.

ARMANDO MONTER JACINTO,
Appellant
Defendant and ~~Respondent~~.

S164011

S_____

Court of Appeal
No. A117076

(Sonoma County
Superior Court
No. SCR487837)

PETITION FOR REVIEW

After Decision by the Court of Appeal
First Appellate District, Division Five
Filed April 23, 2008

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PETITION FOR REVIEW

TO: THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Respondent and petitioner respectfully petitions this Court to review the April 23, 2008, published opinion of the Court of Appeal (First Appellate District, Division Five) reversing the superior court's dismissal of the information based on a violation of respondent's Fifth, Sixth and Fourteenth Amendment rights to compulsory process and due process of law. The appellate court's opinion is attached to this petition pursuant to California Rules of Court, rule 8.504, subdivision (b)(4).

QUESTION PRESENTED FOR REVIEW

Whether a defendant's right 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 office, having been served with a defense subpoena for an in-custody alien exculpatory witness, notifies federal immigration authorities of the witness's presence and thereafter turns over the witness to federal immigration officials for deportation without prior notice to the superior court or the defense and the witness is immediately deported and therefore unavailable to testify.

STATEMENT OF THE CASE

Armando Jacinto was charged by complaint on May 23, 2006, with one count of attempted murder (Pen. Code, § 664/187), with related great bodily injury and personal use of a knife enhancements (Pen. Code, § 12022.7, 12022(b)(1)), and assault with a deadly weapon (Pen. Code, § 245), with a related great bodily injury enhancement. (CT 5.)[1] A preliminary hearing was held on May 30, 2006, and Jacinto was held to answer on both charges. (CT 12.) An information alleging the same charges and enhancements was filed on June 13, 2006. (CT 14.)

Jacinto refused to waive his rights to a speedy trial. (CT 17.) The

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[1] All record citations are to the appellate record in case A117076.

case continued on a no-time waiver basis until defense counsel filed a motion to continue trial based on the defense's inability to locate a percipient witness, Michelle Maestas, who was only available through the prosecution, as well as the failure of the Department of Justice crime lab to complete its forensic report, and the need to obtain further information from a possible percipient witness. (CT 67-68; see also RT 5.) Jacinto waived time until August 15, 2006, plus 60 days. (CT 69.) The defense filed a foreign subpoena affidavit and order for Maestas on September 21, 2006. (CT 72.) On October 18, 2006, the defense waived time to October 25, 2006, plus 60 days. (CT 75.) On October 25, 2006, the prosecution was ordered to supply discovery, and on November 17, 2006, it was ordered to turn over its witness list to the defense. (CT 76, 77.) On November 29, 2006, the case was confirmed for trial on December 1, 2006. (CT 78.)

On December 5, 2006, the defense alerted the court to its intent to file a motion to dismiss. (CT 81; RT 8.) The motion to dismiss was filed on December 12, 2006. (CT 82.) The prosecution filed a memorandum of law re: motion to dismiss, to which the defense replied. (CT 126, 133.) Hearings on the motion were held on January 9 and January 31, 2007. (CT 123, 141.) On February 2, 2007, the court granted the motion to dismiss. (CT 142.)

The prosecution filed a timely notice of appeal on March 13, 2007,

pursuant to Penal Code section 1238, subdivisions (a)(1) & (8). (CT 143.)

On April 23, 2008, the Court of Appeal for the First Appellate District, Division Five, in a published opinion, reversed the order dismissing the information. (App. A, *People v. Jacinto* (2008) 162 Cal.App.4th 373.) Petitioner Jacinto did not file a Petition for Rehearing with that court.

STATEMENT OF FACTS

Petitioner accepts the statement of facts as described by the Court of Appeal in its opinion. (Opn. 1-4.)

NECESSITY FOR REVIEW

This Court should grant review pursuant to California Rules of Court, rule 8.500(b) to settle an important question of law and secure uniformity of decision as to whether the county sheriff department's action in releasing a subpoenaed defense exculpatory witness to federal immigration authorities violated petitioner's Fifth, Sixth and Fourteenth Amendment rights under the Compulsory Process and Due Process Clauses of the United States Constitution.

ARGUMENT

PETITIONER WAS DENIED HIS RIGHTS TO COMPULSORY PROCESS AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WHERE A SUBPOENAED DEFENSE WITNESS WAS TURNED OVER TO IMMIGRATION AUTHORITIES BY THE COUNTY SHERIFF'S OFFICE FOR DEPORTATION PRIOR TO TRIAL

A. The Court of Appeal's Finding of No State Action was Erroneous as a Matter of Law and Must be Reversed

The trial court found that the applicable standard for determining whether dismissal was required because of a violation of a defendant's compulsory process and due process rights was set forth by the United States Supreme Court in *United States v. Valenzuela-Bernal* (1981) 458 U.S. 858, and the California case of *People v. Valencia* (1990) 218 Cal.App.3d 808. (See RT 79-85.) Under that standard, a defendant is entitled to a dismissal where he "makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." (*Valenzuela-Bernal*, at p. 873.) The trial court also found that the county sheriff's department was obligated to honor the defense subpoena, which the sheriff's department had logged into its computer system and of which it was therefore aware, and could not simply ignore the subpoena and turn over the witness to federal immigration

authorities without notifying the court. (RT 75-76.)

In reversing the trial court's dismissal order, the Court of Appeal held that petitioner Jacinto failed to establish "state action" resulting in a violation of petitioner's rights. (Opn. 1.) It also found that petitioner "has not shown any knowledge of the materiality of the witness's testimony by the jailers or any member of the prosecution team." (Opn. 1.)

The Court of Appeal's opinion fails to properly evaluate the effect of a validly-issued subpoena on the county sheriff department's obligation to notify the trial court or the defense, as the issuer of the subpoena, of its intent to turn over the subpoenaed witness to federal authorities for deportation prior to the release of the witness to federal authorities. The release of a subpoenaed defense witness to federal Immigration and Custom Enforcement agents ("ICE") by county jail officials for deportation was state action which denied petitioner his rights to compulsory process and due process of law. To the extent that the county sheriff department's knowledge of the materiality of the witness to the defense is relevant to the determination of whether state action has occurred, the existence of the subpoena was sufficient to place the sheriff's department on notice of the witness's materiality. Petitioner was denied his Fifth, Sixth and Fourteenth Amendment rights to compulsory process and due process of law, and the Court of Appeal's opinion must be reversed and the trial court's dismissal

order reinstated.

B. *Valenzuela-Bernal* is the Controlling Law Where the Defense Moves to Dismiss Based on the Deportation of Favorable Defense Witnesses Prior to Trial

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to "compulsory process for obtaining witnesses in his favor." This right has been recognized as fundamental:

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

(*Washington v. Texas* (1967) 388 U.S. 14, 19; see also *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 ["Few rights are more fundamental than that of an accused to present witnesses in his own defense"]; *Faretta v. California* (1975) 422 U.S. 806, 818 ["The rights to notice, confrontation, and compulsory process [are] basic to our adversary system of criminal justice"]; *People v. Ortiz* (1990) 51 Cal.3d 975, 982 ["The right of a criminal defendant to counsel and to present a defense are among the most sacred and sensitive of our constitutional rights"].) "The right of an accused to have compulsory process for obtaining witnesses in his favor, guaranteed in federal trials by the Sixth Amendment, is so fundamental and

essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment." (*Washington v. Texas, supra,* 388 U.S. at pp. 17-18.)

In *Valenzuela-Bernal*, the Court considered the appropriate test for determining whether the deportation of illegal alien witnesses violates a criminal defendant's rights to compulsory process under the Sixth Amendment, and due process of law under the Fifth Amendment. In *Valenzuela-Bernal*, the defendant, himself an illegal alien, was stopped after a high-speed chase near a Border Patrol checkpoint. The defendant and his five passengers fled on foot, but he and three of the passengers were eventually caught. The prosecution determined that the passengers possessed no evidence material to the prosecution or the defense, and had two of them deported. A third passenger was detained to provide evidence that the defendant had transported an illegal alien in violation of federal law. (*Valenzuela-Bernal*, *supra*, 458 U.S. at pp. 860-861.)

The Supreme Court considered the appropriate standard of prejudice to apply in determining whether the deportation of alien witnesses violates a defendant's Fifth and Sixth Amendment rights. The Court found that the "conceivable benefit" test used by the Ninth Circuit was "a virtual '*per se*' rule which requires little if any showing on the part of the accused defendant that the testimony of the absent witness would have been either

favorable or material." (*United States v. Valenzuela-Bernal, supra*, 458 U.S. at p. 866.) But prior decisions of the Court on the Sixth Amendment right to compulsory process "[suggested] that more than the mere absence of testimony is necessary to establish a violation of the right." (*Id.* at p. 867, citing *Washington v. Texas*, *supra*, 388 U.S. 14.)

The Court found that a defendant "must at least make some plausible showing of how [the witness's] testimony would have been both material and favorable to his defense" in order to establish a violation of the right to compulsory process. (*United States v. Valenzuela-Bernal, supra*, at p. 867.) Other cases concerning "what might loosely be called the area of constitutionally guaranteed access to evidence" supported the Court's imposition of a materiality requirement. (*Id.* at pp. 867-871.) The Court concluded that a defendant "can establish no Sixth Amendment violation without making some plausible explanation of the assistance he would have received from the testimony of the deported witnesses." (*Id.* at p. 871.) The Court also held that "the same materiality requirement obtains with respect to a [Fifth Amendment] due process claim." (*Id.* at p. 872.)

The Court was mindful of the difficulty a defendant would have in establishing materiality where the eyewitnesses have been deported prior to being interviewed by the defense. (*United States v. Valenzuela-Bernal, supra*, at p. 873.) But it found that a defendant could "advance additional

facts, either consistent with facts already known to the court or accompanied by a reasonable explanation for their inconsistency with such facts, with a view to persuading the court that the testimony of a deported witness would have been material and favorable to his defense." (*Ibid.*) Because such a proffer is "testimonial in nature and constitutes evidence of the prejudice incurred as a result of the deportation, it should be verified by oath or affirmation of either the defendant or his attorney." (*Ibid.*)

Because the defendant in *Valenzuela-Bernal* "made no effort to explain what material, favorable evidence the departed passengers would have provided for his defense," the Court found he had failed to establish a constitutional violation and reversed. (*Id.* at p. 874.) The Court ruled that for other cases, sanctions for the deportation of alien witnesses are warranted where there is a reasonable likelihood their testimony could have affected the judgment of the fact-finder. (*Id.* at pp. 873-874.)

The parties below did not contest the trial court's finding that the transcript of witness Esparza's statement to the defense investigator demonstrated that his testimony was material, not cumulative, and favorable to the defense. (See RT 66.) As found by the trial court, Esparza's statement that the woman stabbed the victim would be exculpatory if believed by a jury. (RT 66; see also CT 92-93, 98-99.) It was also not cumulative because Esparza was the only witness known to either party to

say that a woman had committed the stabbing. (RT 66.) The defense proffered Esparza's statement through the testimony of its investigator, given under oath at the hearing on the motion to dismiss. (RT 34.) The court also found that the sheriff's department knew that Esparza was under subpoena. (RT 67-68; see also RT 44, 65.)

The trial court's ruling that the defense had satisfied *Valenzuela-Bernal*'s materiality standard was correct and supported by the evidence produced at the hearing. Because there was a reasonable likelihood that Esparza's testimony could have affected the judgment of the fact-finder, petitioner was entitled to sanctions, and the trial court's order dismissing the case was correct under the controlling law. (*Valenzuela-Bernal*, at pp. 873-874.)

C. The County Sheriff Department's Turning Over a Subpoenaed Defense Witness to Immigration Authorities Constituted State Action Which Violated Petitioner's Rights To Compulsory Process and Due Process of Law and the Right to Present a Defense

The Compulsory Process and Due Process Clauses of the Fifth, Sixth and Fourteenth Amendments, as well as a defendant's right to present a defense under those same amendments, demand that a defense subpoena of an in-custody witness be honored by the state. *Valenzuela-Bernal* recognized the government's obligation to enforce the immigration laws passed by Congress. (*United States v. Valenzuela-Bernal*, *supra*, 458 U.S. at

pp. 864-866.) It was that responsibility that caused the Court to find that deportation alone would not establish a constitutional violation, but that a defendant had to show that the lost testimony "would be both material and favorable to the defense." (*Id.* at pp. 872-873.)

Even so, Justice O'Connor noted that the government's executive authority to enforce the immigration laws did not "lessen the importance of affording the defendant the 'fundamental fairness' inherent in due process. [Citation.]." (*United States v. Valenzuela-Bernal*, *supra*, 458 U.S. at p. 876, O'Connor, J., concurring.) Justice O'Connor opined that "[a] governmental policy of deliberately putting potential defense witnesses beyond the reach of compulsory process is not easily reconciled with the spirit of the Compulsory Process Clause." (*Ibid.*)

Compulsory process gives criminal defendants "the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.) "A judicial system with power to compel attendance of witnesses is essential to effective protection of the inalienable rights guaranteed by [article I, section I of the California Constitution]." (*Vannier v. Superior Court* (1982) 32 Cal.3d 163, 171.)

This Court has stated that "the prosecution may not deprive an

accused of the opportunity to present material evidence which might prove his innocence. Even if the prosecution's motives are praiseworthy, they cannot prevail when they inevitably result, intentionally or unintentionally, in depriving the defendant of a fair trial." (*Bellizzi v. Superior Court* (1974) 12 Cal.3d 33, 36-37 [internal punctuation omitted].) This Court has further found that "[a] defendant's constitutional right to compulsory process is violated when the government interferes with the exercise of his right to present witnesses on his own behalf." (*People v. Martin* (1987) 44 Cal.3d 1, 30.)

In overturning the trial court's dismissal, the Court of Appeal held that the county sheriff department's act of releasing the witness to federal officials did not constitute state action, and thus did not violate petitioner's rights to compulsory process and due process of law. (Opn. 5-6.) It found that the county sheriff's department, as custodian of the subpoenaed witness, was not part of the prosecutorial team, and thus its action in releasing the witness to ICE officials was not attributable to the prosecution. (Opn. 6.) It incorrectly asserted that *Valenzuela-Bernal* found no state action "in circumstances where the federal executive branch was both jailer and actor assessing the materiality of the deported witnesses' prospective testimony." (Opn. 6.) It ignored the fact that the county sheriff's office took affirmative steps to inform the ICE of its custody of the witness and to turn

the witness over to ICE officials while under no obligation to do so. (Opn. 7.) And it disagreed that the service of the defense subpoena on the county sheriff's department was sufficient to inform that office of the materiality of the witness's testimony. (Opn. 7.)

In this case, the defense investigator confirmed that the county jail listed the witness as having been subpoenaed in its computer database, and then went back to personally serve the witness in order to insure that he would be compelled to appear in court. (RT 44-45, 65.) Service of a subpoena is the preferred method for obtaining a witness' attendance at trial. (*In re Francisco M.* (2001) 86 Cal.App.4th 1061, 1074.) The defense did all that it could to insure the witness's presence, and without notice from county jail officials that the witness was to be turned over to ICE agents, the defense was precluded from taking further steps to insure his presence.

Where a defendant has identified a material witness and subpoenaed that person to testify, the defense has identified and declared that witness to be both central to the defense and materially exculpatory. The government has no role to play in determining the materiality of a witness where the defense has already deemed that witness necessary, taken steps to insure the witness's presence at trial, and by those steps, i.e., the service of the subpoena, placed both the sheriff's department and the witness on notice

that his presence was required.

The Court of Appeal found that pursuant to the Supremacy Clause, the sheriff's department was powerless to interfere with federal deportation proceedings. (Opn. 7; U.S. Const., art. VI, § 2.) But of course the witness was not in federal custody prior to the issuance of the subpoena or the county jail officials' actions. And there was no affirmative obligation on the part of the county sheriff's office to notify the ICE of Esparza's immigration status. (See 84 Ops.Cal.Atty.Gen. 189 (2001); 67 Ops.Cal.Atty.Gen. 331 (1984); *League of United Latin American Citizens v. Wilson* (C.D.Cal.1995) 908 F.Supp. 755, 786-787 (*LULAC I*); *League of United Latin American Citizens v. Wilson* (C.D.Cal.1997) 997 F.Supp. 1244, 1261 (*LULAC II*); Brady et al., Cal. Crim. Law and Immigration (The Immigrant Legal Resource Center 2002) State Enforcement of Immigration Law, Immigration Holds and Detainers, and Detention of Juvenile Aliens, chapter 12, §§ 12.1–12.3.)

The county jail's actions in "[referring] to INS for review" at the time of booking (Req. for Judicial Notice, Ex. C., p. 2) and turning over the witness to ICE officials at the end of his county jail term were unquestionably affirmative acts resulting in the loss of the witness. The Court of Appeal's finding of "no state action" has been soundly rejected by other courts: the state is responsible for the loss of a material witness where

it turns over that witness to federal authorities with knowledge that the witness would be deported. (*People v. Mejia* (1976) 57 Cal.App.3d 574, 581-5829 ["no question" that state action was responsible for deportation of alien witnesses by federal government where state authorities made no effort to notify the defense of imminent deportation so they could take actions necessary to make witnesses available at trial]; *Cardova v. Superior Court* (1983) 148 Cal.App.3d 177, 185-187 [failure to give notice to defense of impending release and deportation of alien witness violates due process and required dismissal]; *United States v. Hernandez* (2004) 347 F.Supp.2d 375, 382 [in some circumstances the government must give defense counsel reasonable notice before it unilaterally deports a potential alien witness].)

The Court of Appeal held that "we do not believe that the service of a subpoena on a sheriff's department or jail personnel is 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." [Citation.] Further, we conclude it 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 accordance 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." (Opn. 7-8.)

The right to compel a witness to testify is a fundamental right pursuant to the Compulsory Process Clause, and as such takes precedence over the enforcement of the immigration laws. (*Washington v. Texas*, *supra*, 388 U.S. at p. 19; *Pennsylvania v. Ritchie*, *supra*, 480 U.S. at p. 56.) Had county jail officials alerted the court or the defense, as the issuer of the subpoena, of Esparza's pending release and transfer to federal authorities, steps could have been taken to secure his presence at trial. The material witness statutes exist for just such a purpose. (See Pen. Code, §§ 1332, 878-883; *In re Francisco M.*, *supra*, 86 Cal.App.4th at p. 1064.) The witness could have been detained under a court order pursuant to Penal Code section 1332. Alternatively, the defense could have preserved his testimony via a conditional examination. (See Pen. Code, § 1335, et. seq.) The Court of Appeal found that Jacinto's remedy was to have "sought the assistance of the District Attorney's office in securing the witness's appearance at trial in the face of the immigration detainer." (Opn. 7.) But without notice of the witness's impending release and transfer to federal officials, the defense justifiably relied on the service of the subpoenas as the appropriate means of securing the witness's presence at trial.

While there is no due process violation where the prosecution "take [such] steps as appear reasonably calculated under the circumstances to assure [the material witness's] presence" (*In re Jesus B.* (1977) 75 Cal.App.3d 444, 450), the converse is also true: the prosecution 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 and due process rights. "[P]rocedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." (*Giglio v. United States* (1972) 405 U.S. 150, 154.)

It was incumbent on county jail officials to alert the defense, as the issuer of the subpoena, and/or the trial court, of their intent to turn over the witness to ICE officials before releasing the witness to federal custody. Failure to do so is directly attributable to the prosecution, regardless of whether the district attorney's office had notice of the witness's existence, and regardless of whether either the prosecution or the county sheriff's office had knowledge of the witness's materiality to the defense. The prosecution, regardless of whether an individual prosecutor or county sheriff official acts in good or bad faith, ultimately bears responsibility for the failure to disclose known, material evidence. (*Kyles v. Whitley* (1995)

514 U.S. 419, 437-438.) The service of the subpoena on county jail officials gave notice of the witness's materiality to the prosecution. The prosecution is ultimately responsible for the loss of the witness here.

The Court of Appeal concluded by stating that "without knowledge of the materiality of the deported witness's testimony, there was no violation of Jacinto's rights to compulsory or due process, and the trial court erred in granting the motion to dismiss." (Opn. 8.) To the extent that knowledge of the witness's materiality to the defense determines whether state action has occurred, the service of the subpoena on county jail officials satisfied that notice requirement. Once state action has occurred, any further inquiry into the county sheriff's or prosecution's knowledge of the materiality of the witness is not the proper test for determining whether a violation of the petitioner's compulsory process and due process rights has occurred. (See *Valenzuela-Bernal*, at p. 873.) The Court of Appeal declined to reach the issue of whether petitioner satisfied the *Valenzuela-Bernal* test in light of its finding of no state action. Petitioner asks this Court to grant review to determine whether the county sheriffs department action in releasing the witness to ICE officials denied petitioner his rights to compulsory process and due process of law.

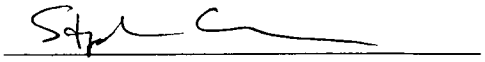
CONCLUSION

Appellant respectfully requests that this Court grant review to determine whether the county sheriff department's action in releasing a subpoenaed defense exculpatory witness to federal immigration authorities violated petitioner's Fifth, Sixth and Fourteenth Amendment rights under the Compulsory Process and Due Process Clauses of the United States Constitution.

DATED: May 28, 2008

Respectfully submitted,

MATTHEW ZWERLING
Executive Director



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CERTIFICATE OF WORD COUNT

Counsel for Armando Jacinto hereby certifies that this brief consists of **4400** words (excluding tables, proof of service, and this certificate), according to the word count of the computer word-processing program. (California Rules of Court, rule 8.504(d)(1).)

DATED: May 28, 2008

STEPHANIE CLARKE

Filed 4/23/08

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Appellant,

v.

ARMANDO MONTER JACINTO,

Defendant and Respondent.

A117076

(Sonoma County Super. Ct. No. SCR487837)

In this case, a defense witness, incarcerated in county jail and facing deportation, was served with a subpoena requiring his personal appearance at trial. Upon completion of his sentence, the witness was immediately deported. Asserting a deprivation of constitutional rights under the Fifth, Sixth, and Fourteenth Amendments, defendant Armando Monter Jacinto (Jacinto) moved the trial court to dismiss an information charging him with attempted murder and assault with a deadly weapon. The trial court granted the motion and the People appeal from the dismissal order.

The People contend the trial court erred in ordering dismissal because there was no state action. Alternatively, the People urge, "accepting that the state cooperated with federal authorities to deport the witness, [Jacinto] failed to demonstrate that state officials [acted with] knowledge of the materiality of the witness's testimony . . . ." and in bad faith. We agree with the former contention and conclude Jacinto failed to establish "state action." He has not shown any knowledge of the materiality of the witness's testimony by the jailers or any member of the prosecutorial team. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

The facts relating to the charged offenses are taken from the preliminary hearing. Eric Garcia and Victor Retana went to a restaurant at about 6:30 p.m. on May 12, 2006. Others, including Jacinto and a woman, were also at the restaurant. Garcia testified that he lost some money in a jukebox and asked the restaurant owner for a refund. Jacinto told the owner not to give a refund, but the owner gave Garcia his money back. As Garcia was leaving the restaurant, he saw Retana standing near Jacinto, the woman, the owner, and an older man. Retana and Jacinto pushed each other, then Jacinto "moved his hand" and Retana "jumped back." Retana held his side and started to bleed profusely.[1] Garcia did not see anyone with a knife and did not see the incident clearly because Jacinto, the woman, the owner and the older man were all "pushing at the time of the stabbing[.]" Garcia heard the woman deny she had stabbed Retana.

A detective who interviewed Retana testified that according to Retana, Garcia got into an argument with an older man, and Jacinto intervened and began arguing with Garcia. Retana stepped in to help Garcia and Jacinto pushed Retana. When Retana pushed back, Jacinto stabbed him. Retana identified Jacinto from a photographic lineup as the person who had stabbed him. Retana confirmed it was Jacinto, and not a woman, who stabbed him.

On June 13, 2006, an information was filed charging Jacinto with attempted murder (§§ 664/187, subd. (a)) (count I) with enhancements for infliction of great bodily injury (§ 12022.7, subd. (a)) and personal use of a knife (§ 12022, subd. (b)(1)), and assault with a deadly weapon (§ 245, subd. (a)(1)) (count II) with an enhancement for infliction of great bodily injury.

In July 2006, defense investigator Carlos Escobedo interviewed Sonoma County Jail inmate Nicolas Esparza on two separate occasions.[2] Esparza stated he was at the restaurant on the day of the stabbing and that he heard a customer complaining to the

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[1] Retana suffered serious injuries from the stab wound and was in intensive care at a hospital at the time of the preliminary hearing.

[2] At the time of the interviews, Esparza was serving a 180-day sentence for misdemeanor domestic violence.

owner that the jukebox was "eating . . . the bills." Approximately 20 minutes later, Esparza went outside and saw a man and a woman, and two other men, arguing in front of the restaurant. Esparza saw the woman remove a blade from her purse and stab the man. Esparza was 99 percent sure it was a woman, and not a man, who stabbed the victim. Esparza left the restaurant and did not speak to the police. Esparza later encountered Jacinto in jail and learned that Jacinto had been charged with the stabbing. Esparza stated he did not receive anything in exchange for providing a statement, and said he agreed to be interviewed "because I know . . . that he is not [] guilty . . . ."

Escobedo testified that of all of the witnesses he had interviewed, one witness suspected that the woman stabbed Retana, but Esparza was the only one who stated he saw the woman stab Retana. A waitress Escobedo interviewed told him that she saw Esparza at the restaurant on the night of the stabbing.

On October 6, 2006, Escobedo served the Sonoma County Sheriff's Department with a subpoena for Esparza's appearance at trial on October 26, 2006. After discussing with his supervisor the importance of Esparza's testimony, Escobedo returned to jail on October 16, 2006, and personally served Esparza. At that time, Esparza mentioned that he was going to be deported. While Escobedo was at the jail to personally serve Esparza, a sheriff's department employee conducted a computer search and confirmed that Esparza was listed as a subpoenaed witness. The employee also stated she thought Esparza was going to be deported. Escobedo did not inform that employee or anyone at the jail that Esparza was needed as a witness for the defense or raise any concern about the witness's deportation. On October 17, 2006, Esparza completed his sentence and the sheriff's department released him to the immigration authorities. Esparza was deported the following day.

Jacinto filed a nonstatutory motion to dismiss the information on the ground that the sheriff's department's act of releasing Esparza, a material witness under subpoena, to the federal government for deportation deprived him of his constitutional right to compulsory process and a fair trial. The trial court provided the prosecution with time to locate Esparza, but the prosecution was unable to find him. The trial court found Esparza's

testimony was material and favorable to the defense, and that the sheriff's office knew Esparza was under subpoena when it released him to the immigration authorities. The trial court ruled that bad faith on the part of the prosecution was not required to establish a constitutional violation, and granted Jacinto's motion to dismiss the information. The People filed a timely notice of appeal.

DISCUSSION

The Sixth Amendment guarantees a criminal defendant "compulsory process for obtaining witnesses in his favor." (U.S. Const., 6th Amend.) Principles of due process also provide the defendant with the right to offer testimony that is material and favorable to him. (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867, 872-873 (*Valenzuela*).) "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." (*Washington v. Texas* (1967) 388 U.S. 14, 19.)

Valenzuela, *supra*, 458 U.S. at pages 872-873, addressed whether the government's act of deporting a witness violated the defendant's right to compulsory process and a fair trial. There, border patrol agents stopped the defendant's car near a checkpoint and arrested him and three passengers. (*Id.* at pp. 860-861.) An Assistant United States Attorney determined that two of the passengers had no material evidence relating to whether the defendant had committed the crime of transporting illegal aliens, and had them deported. (*Ibid.*) A third passenger was detained to provide testimony for the prosecution. (*Ibid.*) The defendant moved to dismiss the indictment, claiming the government's deportation of the two passengers violated his right to due process and compulsory process. (*Ibid.*) The trial court denied the defendant's motion, and after a bench trial, found him guilty as charged. (*Id.* at p. 862.)

The Ninth Circuit reversed, holding that the government violates a defendant's right to compulsory process and due process when it deports alien witnesses before allowing defense counsel an opportunity to interview them. The United States Supreme Court upheld the conviction. (*Valenzuela*, *supra*, 458 U.S. at p. 873.) Emphasizing that a defendant has a constitutional right to obtain only *witnesses in his favor*, the court held a defendant cannot establish a Sixth Amendment violation "without making some plausible explanation of the assistance he would have received from the testimony of the deported witnesses." (*Id.* at p. 871, fn. omitted.) The court held that sanctions were warranted only if the defendant could show that the deported witnesses would have provided evidence that is both "material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." (*Id.* at p. 873.) It is settled that this federal standard of materiality is applicable to a defendant's due process claims based on lost evidence due to deportation of a witness. (*People v. Valencia* (1990) 218 Cal.App.3d 808, 811-812.)

The People do not dispute that Esparza was a material witness whose testimony would have been favorable to Jacinto. Jacinto does not dispute that the District Attorney's office had no knowledge of the service of a subpoena on witness Esparza,[3] or that Esparza was a material defense witness. Rather, as a threshold matter, the People assert that dismissal was improper because the release of witness Esparza by county jail personnel does not establish state action. Moreover, the People urge, the trial court should have required Jacinto to make a showing that the state acted with "knowledge of [the] materiality or in bad faith."[4] As we explain, we agree the trial court erred when it

[3] It is undisputed that the subpoena was not served on the prosecution.

[4] At various places in the People's opening brief, the People assert Jacinto must establish both knowledge of materiality and bad faith, while urging elsewhere that Jacinto must establish state knowledge of materiality *or* bad faith. Because we conclude there was no knowledge of materiality and no state action, we need not resolve whether "bad faith" is a separate and distinct concept that the moving defendant must prove in addition to showing the state's knowledge of "materiality."

concluded that the sheriff's department's act of releasing Esparza to federal custody was state action.[5]

Notably, in *Valenzuela*, the federal government was prosecuting the defendant, and the federal government's Assistant United States Attorney made the determination that two passenger witnesses "possessed no evidence material to the prosecution or defense . . . for transporting illegal aliens," and had the witnesses deported. (*Valenzuela, supra*, 458 U.S. at p. 861.) The case before us presents a significantly different factual predicate. 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. (See *People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1317 [California Department of Corrections, which houses felons while they serve their sentences, is a distinct and separate governmental entity from the District Attorney], cf. *U.S. v. Santiago* (9th Cir. 1995) 46 F.3d 885, 894 [Bureau of Prisons files were within the possession and control of the United States Attorney for discovery purposes because Bureau of Prisons and the United States Attorney's Offices are both branches of the Department of Justice and federal prosecutors therefore have access to prison files]).[6]

Moreover, the sheriff's department's role and duty as the custodian of witness Esparza was constrained by the service of a notice of immigration detainer for Esparza on the sheriff's department by the federal Immigration and Customs Enforcement agency. In finding an absence of state action in circumstances where the federal executive branch was both jailer and the actor assessing the materiality of the deported witnesses' prospective

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[5] Accordingly, we do not reach the question of whether a showing of bad faith on the part of the prosecution was required.

[6] *People v. Mejia* (1976) 57 Cal.App.3d 574, on which Jacinto relies in asserting there was state action, is also distinguishable. In concluding there was state action, *Mejia* noted that the state authorities, "[k]nowing that material witnesses about to be released would be deported," did not inform the defendant of the action taken and thereby deprived him of an opportunity to interview the witnesses. (*Id.* at p. 582, superseded by statute on other grounds as noted in *People v. Valencia, supra*, 218 Cal.App.3d at pp. 811-812.) In contrast, here, state authorities were not aware of the materiality of Esparza's testimony and did not deprive Jacinto of the opportunity to interview Esparza.

testimony, *Valenzuela* made clear the obligation of the federal executive branch "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." (*Valenzuela*, *supra*, 458 U.S. at p. 872.) Pursuant to the Supremacy Clause, U.S. Constitution, article VI, section 2, the sheriff's department operating the county jail had no power to interfere with the federal deportation proceedings. (*Tarble's Case* (1871) 80 U.S. 397, 410; see *Gates v. Municipal* Court (1992) 9 Cal.App.4th 45, 53.) This is not to say Jacinto was without a remedy. Jacinto could have brought to the attention of the prosecutor his desire to produce Esparza's evidence, or sought the assistance of the District Attorney's office in securing the witness's appearance at trial in the face of the immigration detainer. (See 8 C.F.R. §§ 215.2(a), 215.3(g) [federal immigration regulations prohibit departure from the United States by an alien who is needed as a witness in a criminal case unless the prosecuting authority consents].)[7]

Finally, the record discloses no information given to the sheriff's department concerning the nature of the witness's testimony or role in the events at issue, nor any basis to have knowledge of the materiality of the witness's testimony. Jail personnel knew no more than that the witness's testimony was wanted by the defense. This does not establish knowledge of the *materiality* of Esparza's testimony. We do not believe that the service of a subpoena on a sheriff's department or jail personnel is 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." (See *Valenzuela*, *supra*, 458 U.S. at p. 873.) Further, we conclude it 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

[7] Jacinto might also have sought a court order to require the taking of a deposition or the production of witness Esparza pursuant to Code of Civil Procedure sections 1995 and 1997, in which case the materiality of the prisoner's testimony would have to be established under Code of Civil Procedure section 1996.

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.

Esparza told Escobedo on October 16, 2006, that he was going to be deported. The sheriff's department employee who confirmed that Esparza was identified in jail records as a subpoenaed witness also said she thought Esparza was going to be deported. Nevertheless, there is no evidence that Escobedo advised the employee or anyone else at the jail that Esparza was a necessary or favorable witness for the defense, or that the sheriff's department released Esparza to gain a tactical advantage over defendant Jacinto at trial. Without knowledge of the materiality of the deported witness's testimony, there was no violation of Jacinto's rights to compulsory or due process, and the trial court erred in granting the motion to dismiss.[8]

DISPOSITION

The order dismissing the information is reversed.

[8] In light of our decision that dismissal was improper, we will not address the People's argument that the trial court also abused its discretion in dismissing the information.

Jones, P.J.

We concur:

Needham, J.

Stevens, J.*

*Retired Associate Justice of the Court of Appeal, First Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

A117076

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DECLARATION OF SERVICE BY MAIL

Re: *People v. Armando M. Jacinto* **Case No. : A117076**

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business address is 730 Harrison Street, Suite 201, San Francisco, CA 94107. On May 30, 2008 I have caused to be served a true copy of the attached **Petition for Review** on each of the following, by placing same in an envelope(s) addressed as follows:

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Armando Jacinto
(Respondent)

Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in San Francisco, California, on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 30, 2008, at San Francisco, California.

Bonnie Palmer
Declarant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. ARMANDO MONTER JACINTO, Defendant and Respondent.	S_____ Court of Appeal No. A117076 (Sonoma County Superior Court No. SCR487837)

PETITION FOR REVIEW

After Decision by the Court of Appeal
First Appellate District, Division Five
Filed April 23, 2008

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