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.	S164011 Court of Appeal No. A117076 Sonoma County Superior Court No. SCR487837

RESPONDENT'S REPLY BRIEF ON THE MERITS

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ARGUMENT

I.

THE SHERIFF DEPARTMENT'S NOTIFICATION AND RELEASE OF THE WITNESS TO ICE OFFICIALS CONSTITUTED STATE ACTION

A. Introduction

Appellant agrees that the Fourteenth Amendment protects against "such action as may fairly be said to be that of the States." (*Shelley v. Kraemer* (1948) 334 U.S. 1, 13; AAB 14.[1]) It offers discussion on

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[1]Appellant's Answer Brief on the Merits will be referenced as "AAB." Respondent's Opening Brief on the Merits will be referenced as "ROB."

numerous points in its attempt to deny responsibility for the violation of respondent's compulsory process and due process rights. It concludes that state action did not result in the unavailability of the witness because the sheriff's department, acting in its custodial capacity, cannot be considered a state actor for Fourteenth Amendment purposes. The entirety of appellant's analysis must be evaluated as to whether it supports its "no state action" position. Respondent offers the following reply disputing appellant's analysis and demonstrating the violation of his constitutional rights by state action.

B. The Sheriff's Department Took Affirmative Steps to Notify and Turn Over the Witness to ICE Officials Resulting in the Witness's Unavailability for Trial

Appellant argues that "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." (AAB 22.) Appellant ignores the sheriff department's affirmative acts which resulted in the transfer of the witness to ICE officials as action which "may fairly be said to be that of the States."

Appellant appears to argue that there was no evidence in the record

that the sheriff's department informed the ICE of the witness's status as a possible illegal alien subject to deportation. (See AAB 18-19 & fn. 9.) To the extent that it claims that the sheriff's department booking sheet notation "Refer to INS for review" does not establish that notification, the record speaks for itself and justifies a finding that the sheriff's department referred the witness to ICE for investigation into his immigration status. (See Req. for Judicial Notice, Ex. C, p. 2.) The transmission of the subsequent immigration detainer to the sheriff's department two months after the witness's initial booking also supports an inference that the ICE initiated deportation proceedings in response to notification received from the sheriff's department. (See Req. for Judicial Notice, Ex. D, p. 1.)

Despite this evidence, appellant argues that "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 . . ." (AAB 18.) It argues that "the mere transfer of legitimately obtained information" to ICE does not constitute "enforcement" of federal immigration statutes and did not "result in the witness's unavailability." (AAB 19.)

Appellant ignores authority establishing the sheriff's department as a state actor charged with the keeping of the county jails and the prisoners within them. (*People v. Thomas* (1959) 52 Cal.2d 521, 531-532; Gov. Code,

§ 26605; Pen. Code, § 4000.) Case law has confirmed that sheriff's departments are state actors when engaged in both official and unlawful activities. (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 839 [California sheriffs act as state officers while performing state law enforcement duties]; *County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1174 [sheriff acts as state officer performing state law enforcement duties in setting policies concerning the release of persons from county jail]; *Adickes v. S.H. Kress & Co.* (1970) 398 U.S. 144, 152; *Lugar v. Edmondson Oil Co.* (1983) 457 U.S. 922.) The notification to ICE was an act done by the sheriff's department while engaged in its official duty as keeper of the county jail and prisoners. The notification constituted state action.

Appellant, compelled by case authority, does not dispute that the sheriff's department was under no legal obligation to notify ICE of the witness's possible illegal alien status. (AAB 18-19; see also 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*).) Its citation to *Fonseca v. Fong* (2008) 167 Cal.App.4th 922[2] is curious, since that case discussed the continuing

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[2]Note that *Fonseca* was not yet final at the time this brief was filed.

validity of *LULAC I* and explicitly recognized that the provisions of Section 4 of Proposition 187 requiring notification, cooperation and reporting to federal authorities of a person's immigration status were not enforceable as preempted by federal law. (*Id.* at 934, fn. 11.)

Fonseca's holding that Health and Safety Code section 11369 is not an impermissible state regulation of immigration, and thus not preempted by federal law, does not support a finding of no state action in this case. Rather, both *Fonseca* and *Gates v. Superior Court* (1987) 193 Cal.App.3d 205 support a finding of state action where local law enforcement voluntarily choose to supply information to the ICE regarding a person's possible status as an illegal alien. *Fonseca* noted that the *Gates* holding relied on the 1984 opinion of the California Attorney General concluding that local law enforcement were under no legally enforceable duty to report information to ICE, but were permitted to do so "'as a matter of comity and good citizenship'[Citation]." (*Fonseca*, *supra*, 167 Cal.App.4th at 938, fn. 16.) Appellant's claim that the sheriff department's notification to ICE "did not result in the witness's unavailability" (AAB 19) rings hollow when it was that very notification that resulted in the subsequent detainer and deportation. (*Gates*, *supra*, 193 Cal.App.3d at 219 [acknowledging that "absent the arrest and notification, the INS would not have been able to deport or exclude the alien"].)

Appellant agrees that the sheriff's department was not holding the witness for a violation of federal immigration law. (AAB 19.) Appellant also agrees that the department was not the governmental agency responsible for "'enforcement' of federal immigration statutes." (*Ibid*) The relevant point, however, is that the sheriff department's actions in notifying ICE and turning the witness over to federal officials constituted affirmative acts by a state actor in the performance of its official duty. Its actions constitute state action. (*People v. Mejia* (1976) 57 Cal.App.3d 574, 581-582; *People v. Jenkins* (1987) 190 Cal.App.3d 200, 204; *Cordova v. Superior Court* (1983) 148 Cal.App.3d 177, 186.)

C. The Sheriff's Department was a State Actor Whose Notification to the ICE is Subject to Redress Under the Fourteenth Amendment

Appellant appears to argue that because the sheriff's department was not the district attorney's office, and *United States v. Valenzuela-Bernal* (1981) 458 U.S. 858 involved a federal prosecution in which an Assistant United States Attorney ordered the release of two witnesses to immigration officials, the sheriff department's acts in this case cannot be deemed "state action." (See AAB 15-16.) There is no authority limiting a *Valenzuela-Bernal* challenge to federal prosecutions, or to acts of federal and state prosecutors, and appellant offers none. It is axiomatic that the Fifth and Sixth Amendments are applicable to the States via the Fourteenth

Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149; *Washington v. Texas* (1967) 388 U.S. 14, 19.) The actions of local law enforcement officers in delivering illegal aliens to federal immigration authorities without prior notice to the defense and without further arrangements to prevent or delay deportation has been deemed state action. (See *Jenkins*, *supra*, 190 Cal.App.3d at 204.)

Appellant argues that the "prosecution team" was not responsible for actions taken by the sheriff's department, and, drawing on the Court of Appeal's opinion, acts of the sheriff's department "may not be attributable to the prosecution." (AAB 22-23, Slip Opn. at 6.) It argues that case law addressing due process violations distinguish between actions of the "prosecution team" from actions of other officials, and thus the district attorney's office cannot be held "responsible" for the sheriff department's actions in this case. (AAB 22-23.)

There is a significant difference between holding that a prosecutor does not have a statutory or constitutional obligation to obtain or disclose information not in the possession of the "prosecution team," and holding that the denial of a defendant's compulsory process and due process rights is not subject to redress where occasioned by a county sheriff rather than a prosecutor. *People v. Zambrano* (2007) 41 Cal.4th 1082 did not "squarely reject a claim that the prosecution must be held accountable for actions of a

jailer whenever those actions implicate the defendant's due process rights." (AAB 26.) *Zambrano* held that a letter to a "deputy sheriff was not within the prosecution's constitutional or statutory disclosure requirements." (*Id.* at 1134.) Similarly, *Barrett* did not reject a defendant's right of discovery and compulsory process for materials held by corrections officials, it held that the district attorney's office was not responsible for obtaining and providing records held by the Department of Corrections acting in its custodial capacity. (See *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1317-1318; see also *In re Steele* (2004) 32 Cal.4th 682, 693-697 [capital habeas petitioner entitled under § 1054.9 to discovery of materials in possession of prosecution or law enforcement authorities, but not to materials held by governmental agencies not involved in investigation or prosecution of the case].) These cases did not address and do not support a finding that the concept of the "prosecution team" as it is applied to discovery issues also applies to compulsory process and due process violations committed in the first instance by the sheriff's department.

California law places the sheriff's department squarely within the law enforcement function, and "the sheriff operates the jail pursuant to the sheriff's constitutional and statutory law enforcement powers." (*County of Los Angeles v. Superior Court, supra,* 68 Cal.App.4th at 1177; see also Cal. Const., art. V, § 13 ["The Attorney General shall have direct supervision

over every district attorney and sheriff"], Gov. Code, § 12560 ["The Attorney General has direct supervision over the sheriffs of the several counties of the State . . ."].) The sheriff has a statutory obligation to keep the county jails and the prisoners with them. (Gov. Code, § 26605, Pen. Code, § 4000, subd. (1) & (4).) The sheriff department's actions in this case were state action within the meaning of the Fourteenth Amendment, fully attributable to the prosecution.

Appellant asserts that *Michigan v. Jackson* (1986) 475 U.S. 625, 634, is not on point despite its finding that "Sixth Amendment principles require that we impute the State's knowledge from one state actor to another . . . [f]or the Sixth Amendment concerns the confrontation between the State and the individual." (AAB 27.) It argues that the finding of "state action" on the part of the police in that case cannot be extended to compulsory process violations because *Jackson* concerns the Sixth Amendment's right to counsel guarantee, and not the right to compulsory process. (*Ibid.*) It relies on language in *Taylor v. Illinois* (1988) 484 U.S. 400, 410, that there "is a significant difference between the Compulsory Process Clause weapon and other rights that are protected by the Sixth Amendment . . . ."

Appellant's assertion that the Compulsory Process Clause does not carry with it the full protection of the Sixth Amendment such that actions

by one set of state actors cannot be imputed to another set of state actors is directly rejected by *Taylor*: "The right of the defendant to present evidence 'stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States.' [Citation.]." (*Id.* at 409.)

McNeil v. Wisconsin (1991) 501 U.S. 171, 178-179, does not rebut this principle. (See AAB 28.) *McNeil* explored the difference between the Sixth Amendment and Fifth Amendment rights to counsel and their relationship to police interrogation of suspects. It explained that the attachment of the Sixth Amendment right to counsel at the initiation of criminal proceedings precluded a subsequent waiver of that right during a police-initiated custodial interview as to that offense. (*Id.* at 175-176; see also *Michigan v. Jackson*, *supra*, 475 U.S. at 629-633.) That "offense specific" right to counsel was in contrast to the Fifth Amendment's right to counsel, which precludes police questioning as to *any* offense once a defendant exercises his or her right under *Miranda* to have counsel present during questioning. (*Id.* at 176-177; see also *Edwards v. Arizona* (1981) 451 U.S. 477, *Arizona v. Roberson* (1988) 486 U.S. 675.)

McNeil refused to establish a new rule holding that an invocation of the Sixth Amendment right to counsel in one case would also automatically trigger the Fifth Amendment's right against any subsequent police questioning as to any other cases in the absence of counsel, finding it

contrary to public policy. (*McNeil*, *supra*, 501 U.S. at 180-182, and fn. 3.) *McNeil* did not address, let alone reject, *Michigan v. Jackson*'s earlier statements regarding the imputation of state action from one state actor to another. The sheriffs department's actions in this case constitute state action attributable to the prosecution.

D. The Subpoena was the Appropriate Mechanism for Securing the Witness's Testimony

The critical difference between this case and all of the state and federal cases dealing with the deportation of alien witnesses is the service of the defense subpoena on the sheriff's department and on the witness himself. (See ROB 25-26.) Where a defendant puts the sheriff's department on notice of the need for that prisoner to testify via the issuance of a subpoena, and the sheriff's department confirms receipt and entry of the subpoena in its database, due process and compulsory process require the department to notify the defense or the court prior to the actual transfer or release of the witness so that the defense can utilize available mechanisms for insuring that witness's presence or preserving his testimony for trial. The failure of the sheriff's department to provide that notice resulted in the constitutional violation in this case.

Appellant insists that the subpoena was a deficient mechanism for securing the witness's attendance in court, and instead argues that a removal

order was required. (AAB 20.) The authority that it cites does not support its contention. The Penal Code section 1326 subpoena power does not exempt incarcerated witnesses. (*People v. Garcia* (2008) 160 Cal.App.4th 124, 131.) *Garcia* did not state that a subpoena is not the proper vehicle by which to secure the presence of a county jail inmate, it found that service of a subpoena cannot be made a prerequisite for the issuance of a removal order for a witness confined in state prison. (*Id.* at 132.) Since the state prisoner in that case could only be brought to court pursuant to a removal order, requiring the service of a subpoena before the issuance of such an order would result in unnecessary bureaucratic activity and cost. (*Ibid.*; see § 2621 [prisoners in state prisons]; § 1567 [state prisoners and out-of-county jail inmates].) That sections 2621 and 1567 governing removal orders do not specifically address in-county prisoners also counsels against a finding that a subpoena is not a proper mechanism for securing the presence of such a witness. "The expression of one thing in a statute ordinarily implies the exclusion of other things. [Citation.]" (*In re J.W.* (2002) 29 Cal.4th 200, 209.)

Neither section 4004 nor Code of Civil Procedure section 1995 require a removal order in order to obtain the presence of a county jail inmate. Section 4004 expressly recognizes that a county jail inmate may be permitted to leave the jail "by virtue of a legal order or process . . ." Code of

Civil Procedure section 1995 speaks in permissive language: "temporary removal and production [of a prisoner] before a court or officer may be made as follows . . ."

There is no indication that the legislature intended to limit the manner in which an in-county jail inmate may be brought to court where these statutes speak in permissive terms. (See *People v. Ledesma* (1997) 16 Cal.4th 90, 95 [noting "shall/may" dichotomy]; 2A Sutherland, Statutory Construction (4th ed.) § 57.03, p. 643 [form of the verb used, i.e., something 'may,' 'shall' or 'must' be done, is single most important textual consideration determining whether statute mandatory or directory"].) Service of a subpoena is the preferred method for obtaining a witness's attendance at trial. (*In re Francisco M.* (2001) 86 Cal.App.4th 1061, 1074.) Where section 1326 does not exclude incarcerated inmates, sections 2621 and 1567 do not include in-county jail inmates, and section 4004 speaks in terms of "legal order or process," there is no basis upon which to find that a subpoena was not an appropriate mechanism for securing the witness's presence at trial in this case.

Appellant offers no explanation as to why a removal order would have put the sheriff's department on notice of the need for the witness, while a subpoena did not. It offers no reasoned basis for finding that a removal order would have "triggered the protections of the compulsory

process clause," while a subpoena was "deficient." (AAB 20.) Both are valid legal orders. (Pen. Code, §§ 1326, 1331; *Ex parte Cohen* (1894) 104 Cal. 524, 526-527 [right of the legislature to compel the attendance of witnesses cannot be disputed]; *United States v. Bryan* (1950) 339 U.S. 323, 331 [subpoena compels testimony and individuals properly served are "bound to perform" as matter of civic duty].) The district attorney below never argued that a removal order, rather than a subpoena, was necessary in order to bring the witness to court from the county jail. (See RT 74-76.) As a matter of local custom and practice it may have taken no more than a phone call from the court's bailiff, let alone a subpoena, to obtain a county jail inmate's presence. Certainly the judge found that the subpoena was a proper mechanism to place the sheriff's department on notice of the need for the witness, and as triggering an obligation on the part of the sheriff's department to consult with the court before releasing the witness to ICE custody. (RT 75-76.)[3]

Appellant claims that any duty that the sheriff's department may have had to produce the witness at trial expired upon the expiration of the

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[3] ". . . [the witness] was under subpoena that was presented to the jail that they accepted. And so lawfully under the State of California he was to remain here pending the order of the Superior Court. You can't just ignore the order of the court and say well, he's been subpoenaed, we are the federal government, we are going to ignore the subpoena." (RT 76.)

witness's county jail sentence. (AAB 21.) Appellant ignores both the state and federal mechanisms for securing the presence of a witness at trial, including the material witness statutes and federal regulations providing for the retention of alien witnesses prior to their deportation. (Pen. Code, §§ 1332, 878-883; 8 C.F.R. § 215.2(a), 215.3(g); 18 U.S.C. §§ 3144, 3149.) The violation occurred not in the sheriff department's failure to move to detain the witness under these authorities (see AAB 21), it occurred in the transfer of the witness to ICE custody without notice to the court or the defense despite its knowledge of the subpoena. The subpoena was a valid order commanding the witness's presence. (Pen. Code, §§ 1326, 1331.) Had the sheriff's department notified the court or the defense prior to the witness's transfer to ICE, such mechanisms could have been utilized.

E. Knowledge of the Materiality of the Witness is Not Relevant to the Determination of Whether State Action Occurred and in Any Event was Satisfied by the Service of the Subpoena on the Sheriff's Department

Appellant asserts that "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." (AAB 34.) It argues that because state officials have no power to ignore or interfere with federal deportation proceedings, state officials must do more "than simply comply

with federal mandate before they are held responsible for a witness's unavailability." (AAB 34.) Anything less "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." (AAB 34.)

Appellant concedes *Mejia*'s finding that "cooperation involves participation, and participation generally results in responsibility." (AAB 36, citing *Mejia*, *supra*, 57 Cal.App.3d at 581.) It also notes California case authority uniformly finding state action in cases raising *Valenzuela-Bernal* error. (*Jenkins*, *supra*, 190 Cal.App.3d at 204; *Cordova*, *supra*, 148 Cal.App.3d at 186 [act of turning over witnesses to immigration authorities the "efficient cause" of their unavailability].) *People v. Lopez* (1988) 198 Cal.App.3d 135, a case upon which appellant heavily relies for its dicta regarding the applicable materiality standard (see AAB 31-32), failed to even address state action, so apparently settled was that point.

It was not the federal government's act of deportation that justified a finding of state action in these cases (see AAB 34), it was the state officials' cooperation and transfer of the illegal alien witnesses that was the "efficient cause" of their unavailability and which could "fairly be said to be that of the [state]." (*Shelley v. Kraemer*, *supra*, 334 U.S. at 13.) In this case, the sheriff department's notification to ICE and cooperation in transferring the witness to federal immigration custody upon the completion of his county

jail term were the affirmative acts that justify a finding of state action.

Appellant's attempt to engraft knowledge and bad faith elements to the determination of whether state action has occurred confuses the inquiry. The concept of "state action" was developed to distinguish between acts undertaken by the government versus acts undertaken by private individuals. "Individual invasion of individual rights is not the subject-matter of the [Fourteenth Amendment]. It has a deeper and broader scope. It nullifies and makes void . . . state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law . . . ." (*Civil Rights Cases* (1883) 109 U.S. 3, 11.) "But private action, however hurtful, is not unconstitutional." (*Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 358.)

In alien deportation cases, it is unquestionably the actions of the state, be it the federal government or local state officials, that ultimately result in the loss of the witness. Whether a constitutional violation has occurred based on those acts is a separate inquiry, but that inquiry proceeds from the actions of governmental officials. Knowledge and bad faith do not speak to whether the loss of the witness was due to either private or governmental acts, and thus should play no role in the determination of whether state action has occurred. Appellant's attempt to engraft such

elements to the concept of state action is not well-taken.

Knowledge and bad faith on the part of the sheriff's department existed in this case where a subpoena was served, accepted and logged into the department's computerized data bank prior to the transfer of the witness to federal custody. (See ROB 25-34.) Respondent fundamentally disagrees with appellant's position that "[t]he existence of a subpoena, without more, did not place jail officials on notice that Esparza was a material witness." (AAB 38.) It was not incumbent on the defense to inform the sheriff's department, or the district attorney, that the witness would provide testimony that "was both material and favorable to the defense, and that it was not cumulative to other evidence." (AAB 39.) The defense was not required to make a *Valenzuela-Bernal* materiality showing to the sheriff's department in order to have its subpoena be given effect.

Contrary to the Court of Appeal's and appellant's position (Slip Opn. at 7-8; AAB 39, 41), the existence of the subpoena was sufficient to require the sheriff's department to notify either the trial court or the defense of its intent to transfer the witness to federal custody. "It would not be imposing a significant burden upon the prosecution to require the prosecutor to give reasonable notice to defense counsel of the impending release from jail of a material alien witness in order that defense counsel could take such action as he may deem necessary to interview the witness and make him or his

testimony available for trial." (*Cordova, supra*, 148 Cal.App.3d at 186; *Giglio v. United States* (1972) 405 U.S. 150, 154.)

So too a sheriff's department which has accepted and logged a subpoena for an in-custody prisoner in its computerized data bank. The subpoena was a legal order which put the sheriff's department on notice of the need for the witness. Acceptance of that subpoena by the sheriff's department implied that it would make the witness available to the court. Its failure to notify the court or the defense prior to its transfer of the witness to ICE custody was state action directly attributable to the prosecution. Respondent is entitled to seek redress for the sheriff department's actions which resulted in the denial of respondent's rights to compulsory process and due process of law.

II

VALENZUELA-BERNAL DOES NOT REQUIRE A SHOWING OF BAD FAITH IN ORDER TO ESTABLISH A CONSTITUTIONAL VIOLATION RESULTING FROM THE DEPORTATION OF A DEFENSE WITNESS

Appellant concedes that there is no bad faith component to the *Valenzuela-Bernal* test. Had *Valenzuela-Bernal* stated such a requirement, there would be no need to "construe" *Valenzuela-Bernal* to include such an element (AAB 30), nor to argue that "*Valenzuela-Bernal* implicitly held that the bad faith, *vel non*, of the prosecutor was a component of the

analysis. [Citation.]." (AAB 33.)

Appellant's reliance on *Youngblood* to support a bad faith requirement in *Valenzuela-Bernal* cases (AAB 33-4) is misplaced, since *Youngblood* does not impose a bad faith requirement in the "related area" of alien deportation cases, it only repeats the oft-quoted language in *Valenzuela-Bernal* that the prompt deportation of the witnesses "was justified 'upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution.'" (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57, quoting *Valenzuela-Bernal*, *supra*, 458 U.S. at 872.) *Youngblood* did not go on to require bad faith in all cases concerning lost evidence, and distinguished between cases involving material exculpatory evidence and "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Youngblood*, *supra*, 488 U.S. at 57.) In his dissent, Justice Blackmun specifically referred to *Valenzuela-Bernal*, *Trombetta*, *Brady* and *Agurs* as cases which "in no way require that government actions that deny a defendant access to material evidence be taken in bad faith in order to violate due process." (*Youngblood*, *supra*, 488 U.S. at 62-63 (dis. opn. of Blackmun, J.).)

The Court has stated different tests for constitutional violations based on the different types of evidence at issue, and has cautioned lower

courts against rejecting binding precedent. (*Agostini v. Felton* (1997) 521 U.S. 203, 237; accord, *Tenet v. Doe* (2005) 544 U.S. 1, 10-11.) Appellant's attempts to have this Court add a bad faith requirement to the materiality test set forth in *Valenzuela-Bernal* should be rejected.

Good faith was assumed in *Valenzuela-Bernal* because had the government knowingly deported a material defense witness, that would have been a *Brady* violation and there would have been no need for the establishment of the *Valenzuela-Bernal* materiality test. (ROB 47-50; cf. *McNeil*, *supra*, 501 U.S. at 179-180 [finding no need for new rule announced in *Michigan v. Jackson* if 6th Amend. right to counsel was the equivalent of 5th Amend. right to counsel under *Edwards v. Arizona* (1981) 451 U.S. 477].) *Valenzuela-Bernal* assumes governmental good faith, but in no way requires governmental bad faith in order to establish a constitutional violation in witness deportation cases.

Appellant is incorrect that "[n]o Supreme Court case imposes strict liability for lost exculpatory evidence based solely on the fact that the loss is attributable to governmental action." (AAB 31.) *Valenzuela-Bernal* explained that a defendant must show the materiality of the lost witness's testimony in order to establish a compulsory process violation based on the loss of the evidence. (*Valenzuela-Bernal*, *supra*, 458 U.S. at 867-872.) Thus there is no "strict liability" for the lost evidence – a defendant "must at

least make some plausible showing of how [a deported witness's] testimony would have been both material and favorable to his defense . . . " (*Id.* at 867.) Once appellant makes that showing, however, the government is liable for the loss of the witness's testimony due to governmental action and the court is free to impose sanctions. (*Id.* at 873-874.) Bad faith is not required.

There is no evidence in the record to support appellant's assertion that respondent's attorney knew of the witness's discharge date from his county jail sentence and thus was either negligent or complicit in the release of the witness to ICE. (AAB 45.) Such an assertion cannot be "readily inferred," and the issue in this case is not respondent's "silence and inaction in the face of the known risk that his material witness would become unavailable when his sentence expired." (AAB 45.)

The defense response to being told informally that the witness was subject to deportation was to confirm the logging of the subpoena with sheriff's department officials, and to personally serve the witness as well. (RT 43-45, 65.) The defense justifiably relied on the subpoena as invoking respondent's compulsory process rights. Other courts have disagreed with appellant's and the Court of Appeal's position that it is unreasonable to impose a duty on the sheriff's department to inquire whether they were obligated to hold the witness in light of the subpoena. (See AAB 46, Slip

Opn. at 7-8; but see *Cordova, supra*, 148 Cal.App.3d at 186; *Giglio, supra*, 405 U.S. at 154.) As a practical matter, the subpoena issued in this case was accepted and logged into the sheriff department's computerized data base, and it would have been just as easy to alert the court or defense counsel of the witness's pending release as it was to communicate with and facilitate the transfer of the witness to ICE custody. The trial court so found. (RT 16-17.) There is no evidence to suggest that such communication from the sheriff's department to the court or the defense would be administratively burdensome, impugn inmates' privacy rights, or create security risks (AAB 49), and respondent asks this Court to reject appellant's hyperbole to the contrary.

Bellizzi v. Superior Court (1974) 12 Cal.3d 33 supports respondent's claim, not appellant's. It is not respondent's responsibility to "take all necessary steps to ensure his witness's presence at trial" (AAB 41) when his witness is in the actual custody and control of the sheriff's department. It is the prosecution's duty to "refrain from conduct which makes the noninformant material witness unavailable [Citations.]." *People v. Hernandez* (1978) 84 Cal.App.3d 408, 411.) Here, where the defense served subpoenas on both the sheriff's department and the witness himself, it did all that it could reasonably be expected to do to secure the witness's presence at trial in the absence of notification that the witness was about to

be turned over to ICE for deportation.

There is no basis in this record to support appellant's assertion that "the defense withheld from the prosecutor and the court both the existence of the subpoena and the nature of Esparza's anticipated testimony." (AAB 49.) There is no basis in the record or as a matter of effective criminal practice to believe the defense willfully colluded in the deportation of its star witness so that it could then raise a *Valenzuela-Bernal* challenge. It is true that the defense had not yet turned over the witness's name to the district attorney's office prior to the date of his deportation. (RT 16-17.) But that was not because the defense was engaged in gamesmanship, it was because the case was still in pre-trial status and no formal discovery had yet taken place. (See RT 30 [district attorney states case not yet at stage where formal discovery request necessary to obtain information]; RT 60-61 [parties agree mutual discovery obligation starts 30 days prior to trial]; CT 76 [DA to supply discovery by 10-26-06]; CT 77 [DA to supply witness list by 11-20-06].)

There is no basis upon which to believe the defense would play "hide the ball" with an exonerating witness in the face of the witness's imminent deportation. Without notice of the witness's imminent transfer to ICE authorities, the defense was precluded from seeking the assistance of the court or the district attorney's office of maintaining the witness in local

custody. The defense instead attempted to secure respondent's compulsory process and due process rights to the testimony of an exonerating witness via the service of the subpoena. The sheriff department's failure to notify the defense or the court prior to the transfer of the witness to ICE custody in the face of that subpoena constituted state action which resulted in the violation of his constitutional rights.

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE CASE WHERE THE DENIAL OF RESPONDENT'S COMPULSORY PROCESS AND DUE PROCESS RIGHTS RESULTED IN THE LOSS OF AN EXONERATING WITNESS

Appellant concedes that a trial court has discretion to fashion an appropriate remedy where the government has denied a defendant the right to compulsory process and due process. (AAB 50.) *Valenzuela-Bernal* specifically provides for sanctions based on the deportation of material witnesses. (*Valenzuela-Bernal*, *supra*, 458 U.S. at 873.) The trial court below, while stating it was "loathed [sic] to have something short of trial on a case" (RT 85), nonetheless ordered the case dismissed after fully considering whether admission of the recorded statement would be an adequate substitute for his live testimony. (RT 31-32.)

Appellant relies on *People v. Woods* (2004) 120 Cal.App.4th 929, 937 for its assertion that the trial court abused its discretion in dismissing

the charges, stating 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." (AAB 51.) But where the government's conduct has resulted in the destruction of evidence, this Court's decisions reflect that "the severity of the remedy depends on the materiality of the evidence lost to the defense." (*People v. Conrad* (2006) 145 Cal.App.4th 1175, 1185, interpreting *People v. Zamora* (1980) 28 Cal.3d 88, 99-100.)

The trial court's dismissal order recognized that the lost evidence was unquestionably material because of both its substance in exonerating respondent of criminal responsibility for the charges, and its form in the presence of a live witness. The order recognized and gave effect to the fundamental role that live testimony, subject to confrontation and cross-examination, plays in a criminal trial. (See *Crawford v. Washington* (2004) 541 U.S. 36.) It also recognized the fundamental nature of the Compulsory Process Clause and its role in securing a defendant's right to present the testimony of witnesses in his favor. The trial court's dismissal order was not an abuse of discretion where it found that the in-court testimony of a live witness could not be adequately replaced by a tape recorded statement from the witness. While other remedies may have been available, no abuse of discretion occurred under the specific facts of this case.

CONCLUSION

The sheriff's department's actions of notifying and facilitating the transfer of the witness to ICE was state action subject to redress under the Fourteenth Amendment. The trial court's finding that the defense had established a constitutional violation under the materiality standard of *Valenzuela-Bernal* was legally correct, and its dismissal of the case was not an abuse of discretion. The Court of Appeal's reversal of the dismissal order must be overturned, and the trial court's order reinstated.

Dated: December 9, 2008

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel for Armando Monter Jacinto hereby certifies that this brief consists of **5980** 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 8.520(c)(1).)

Dated: December 9, 2008

STEPHANIE CLARKE

DECLARATION OF SERVICE BY MAIL

Re: *People v. Armando M. Jacinto* **Case No. : S164011**

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 December 9, 2008, I have caused to be served a true copy of the attached **Respondent's Reply Brief on the Merits** on each of the following, by placing same in an envelope(s) addressed as follows:

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Armando Jacinto
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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.

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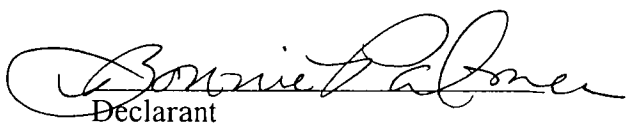

Declarant