NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JUAN GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

JOHN C. ARCECI
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

QUESTIONS PRESENTED

In *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), this Court recognized that the government's deportation of a material witness can violate a criminal defendant's Sixth Amendment compulsory process right. In the ensuing years, two questions have arisen in the circuits about how a defendant may establish a compulsory process violation. This case presents a good vehicle for addressing both questions, which are:

I. Whether a defendant must prove governmental bad faith to establish a compulsory process clause violation?

II. Whether, if a showing of governmental bad faith is required to establish a compulsory process clause violation, the cognizable showings are limited to either willful conduct designed to obtain a tactical advantage at trial or a departure from normal deportation procedures?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Juan Garcia, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on January 23, 2019.

OPINION BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Garcia*, ___ F. App'x ___ (10th Cir. 2019), is found in the Appendix at A1.

JURISDICTION

The United States District Court for the Northern District of Oklahoma had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on January 23, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISION INVOLVED

U.S. Const. amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

A. Mr. Garcia is arrested after the truck in which he was a passenger was pulled over during a drug trafficking investigation.

On January 26, 2017, local law enforcement was reaching the end of an investigation into a drug dealer in Oklahoma City named Antonio Martinez. (Vol. 1 at 197-98; 234, 463-65, 470, 716-17.)[1] As part of this investigation, they learned that a vehicle carrying approximately three pounds of methamphetamine would be traveling from Oklahoma City to Tulsa that day. (*Id.* at 416, 425, 718.)

Officers located the car, a Chevrolet Cruze, and surveilled it by helicopter and on the ground. (*Id.* at 416-25.) While in Oklahoma City, officers observed the Cruze stop at a gas station parking lot. The driver exited and walked over to a truck, a Chevrolet Silverado, briefly opened a passenger side door, and then returned to the Cruze. (422.) The Cruze then got on the highway and headed towards Tulsa. (422-23.) The Silverado followed, and officers observed it travel in tandem with the Cruze on the way to Tulsa. (*Id.*)

[1] Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page. The citations are provided for the Court's convenience in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

In Tulsa, the Silverado was pulled over for speeding. (*Id.* at 111-12, 719.) Roberto Dominguez, who owned the truck, was driving, (*Id.* at 199, 213, 460-62, 491), and petitioner, Juan Garcia, was riding in the passenger seat. (*Id.* at 749.)

Meanwhile, other officers simultaneously conducted a stop of the Cruze. (*Id.* at 423-24, 429-30.) Gustavo Flores, a cousin of Mr. Martinez, was driving, accompanied by a passenger, Joel Ulloa. (*Id.* at 543-45, 549.) After a drug dog alerted, a search of the Cruze turned up nearly three pounds of methamphetamine in a box on the backseat. (*Id.* at 431, 480.) Officers arrested Flores and Ulloa. (*Id.* at 458.) Both made statements indicating that they had received the methamphetamine from the Silverado, and that the truck was traveling with them to ensure that the contemplated deal went through. (*Id.* at 214-15, 546.)

Officers radioed back these developments to the officers at the Silverado stop, and Mr. Dominguez and Mr. Garcia were removed from the vehicle. (*Id.* at 134, 144-46, 495.) Although the same dog that alerted to the Cruze also alerted to the Silverado, no drugs were ever found in the truck or on its occupants. (*Id.* at 434, 492.) Nonetheless, both Mr. Dominguez and Mr. Garcia were arrested at the scene as well. (*Id.* at 495.)

In speaking with officers, Mr. Garcia explained that he was hitching a ride to Tulsa with Mr. Dominguez because he planned to purchase a Dodge Viper from a Craigslist seller there. (*Id.* at 214, 270, 488-89.) He was carrying approximately $20,000 in cash, money that he'd planned to use toward the purchase of that car. (*Id.* at 440, 448, 472, 756-58.) Officers attempted to speak with Mr. Dominguez but concluded that he did not speak or understand English; they did not contact a translator that day, or at any point thereafter make efforts to speak with Mr. Dominguez. (*Id.* at 213, 217-18, 240-43, 491, 494.)

Both the cash Mr. Garcia was carrying and the Silverado were seized by law enforcement, and eventually became the subject of civil asset forfeiture proceedings in state court. (*Id.* at 462, 473, 475.)

B. The government indicts but then deports Mr. Dominguez, the driver of the truck in which Mr. Garcia was a passenger; Mr. Garcia moves to dismiss the indictment based on that deportation.

Shortly thereafter, on March 6, 2017, Mr. Martinez (the initial target of the investigation), Mr. Dominguez (the driver of the Silverado), Mr. Garcia (the passenger of the Silverado), and Mr. Ulloa (the passenger of the Cruze) were all charged federally with drug conspiracy in the Northern District of Oklahoma. (Mr. Flores was not charged at the time.) (Vol. 1 at 15.)

Just two weeks later, on March 20, 2017, the government moved to dismiss the indictment against Mr. Dominguez. (Vol. 1 at 270; *see also* N.D. Okla. case no. 4:17-cr-00021, Doc. No. 42.) The court granted the motion the following day, and Mr. Dominguez was transferred to the custody of Immigration and Customs Enforcement (ICE). (Vol. 1 at 227-229, 270-71.) He was deported approximately three weeks later, on April 13, 2017, after stipulating to removal. (*Id.* at 226, 230.)

Mr. Ulloa and Mr. Martinez reached favorable plea deals that summer, leaving Mr. Garcia as the only remaining defendant. (*Id.* at 270-71.) Thereafter, the government obtained a superseding indictment against Mr. Garcia, charging him with a broader drug conspiracy extending from November 2016 up until the January 26, 2017 traffic stop. (Vol. 1 at 59, 270-71.)

Mr. Garcia moved to dismiss the superseding indictment because the government's deportation of Mr. Dominguez violated the Sixth Amendment's guarantee of "compulsory process for obtaining witnesses in his favor." (Vol. 1 at 34, 294.) To prevail on such a claim in the Tenth Circuit, he had to show two things: (1) governmental bad faith, and (2) the deprivation of materially favorable testimony. *United States v. Iribe-Perez*, 129 F.3d 1167, 1173 (10th Cir. 1997).

This petition concerns the legal requirements of the first prong of the Tenth Circuit's test, about which Mr. Garcia made two arguments pertinent here. [2]

First, he challenged (for preservation purposes) whether a showing of bad faith was in fact even required under this Court's decision in *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982).

Second, he alleged that Mr. Dominguez's deportation was in bad faith because it was, at least in part, calculated to ensure that the Silverado would be forfeited in a state civil asset forfeiture proceeding. (*Id.*) In support of this assertion, he noted that one of the arresting officers on January 26th had been recorded by a police dash-cam video remarking about how nice the truck was, and further discussing a potential dispute between federal and state authorities about which jurisdiction would take possession of what evidence and other valuable property seized that day.

[2] Mr. Garcia also argued that Mr. Dominguez's absence deprived him of the meaningful and material testimony of an eyewitness to the events leading up to his arrest. (Vol. 1 at 35-36.) The district court rejected that argument as well, concluding that because Mr. Dominguez was deported before it could be determined what testimony he could provide, Mr. Garcia was unable to show the existence of materially favorable testimony. (*Id.* at 274-75.) The court's ruling on this separate "materiality" prong of Mr. Garcia's compulsory process claim is not directly implicated in the questions presented here.

(*Id.*) Mr. Garcia sought to develop additional evidence about this motivation at an evidentiary hearing. (*Id.* at 35, 203-06.)

The government responded that bad faith must be proven and that it must relate to law enforcement's actual knowledge of the exculpatory value of the testimony at issue and be willful conduct designed to deprive the defense of that evidence thereby obtaining a tactical advantage. (Vol. 1 at 43-44.) And, it contended, none of these showings were present here. (*Id.*)

The district court rejected both of Mr. Garcia's arguments.

Consistent with circuit precedent, it held that bad faith must be shown. (*Id.* at 271-72.) And as to that bad faith showing, the district court concluded (relying on an unpublished decision of the Tenth Circuit) that bad faith with respect to the deportation of a material witness includes only "willful conduct designed to obtain a tactical advantage'" over the defense at trial or "a departure from . . . normal deportation procedures." (Vol. 1 at 208-11, 272 (citing *United States v. Gonzales-Peres*, 573 F. App'x 771, 776 (10th Cir. 2014) (unpublished)). It categorically does not include, the court held, any bad faith that may exist with respect to collateral matters like civil asset forfeiture. (*Id.*)

Accordingly, the court went on to explain, that even if Mr. Garcia *could* prove that the government deported Mr. Dominguez in order to "get their hands on that truck," that evidence would be irrelevant to the bad faith analysis. (*Id.* at 210-11.) In so ruling, the court repeatedly suggested that this "may well be an issue for the circuit." (*Id.* at 207, 209, 211, 723.)

But based on this legal ruling, the court prevented Mr. Garcia from developing a factual record related to the law enforcement motivations for seizing the Silverado. (*Id.* at 208-11, 222.) The court further noted though, "for the record, that's a nice truck," and that whichever "government agency that gets to forfeit it is going to make some money." (*Id.* at 210-11.)

The court concluded, however, that it was "not unsympathetic to Mr. Garcia's plight," remarking:

> Caselaw does seem to incentivize snap deportation of potentially exculpatory witnesses before anyone can learn what, if any, information they have. In such circumstances, defendants may struggle to make the required bad faith or materiality showing necessary to prevail on a compulsory process claim. But the proper remedy is not dismissal of the indictment. Rather, it is the use of cross-examination to highlight an absent witness's importance, the government's role in deportation, and its failure to identify the information a witness possesses. Before a jury, that should be remedy enough.

(*Id.* at 276-77.)

Mr. Garcia was convicted after a trial at which Mr. Flores and Mr. Martinez testified against him. (Vol. 1 at 551-52, 625-28; Vol. 2 at 21.) Both disclaimed knowing who Mr. Dominguez was. (Vol. 1 at 551-52, 625; *see also id.* at 234-35.)

D. The Tenth Circuit affirms the district court's denial of Mr. Garcia's motion to dismiss.

On appeal, the Tenth Circuit affirmed the district court's denial of Mr. Garcia's motion to dismiss the indictment. (Appendix at A3-A4.) Given circuit precedent requiring a showing of bad faith, the panel of course did not reach Mr. Garcia's challenge to whether that showing was in fact required. (*Id.* at A1-A4.) As to the scope of that showing, the court noted that "this circuit has not yet decided what the standard is for determining when the government's deportation of a witness is in bad faith . . . ." (*Id.* at A3 & n.1.) But it decided that it didn't need to reach that question because, in effect, any error would have been harmless. That is, it agreed with the district court that Mr. Garcia had not established the requisite materiality showing (i.e., that Mr. Dominguez's deportation deprived him of testimonial evidence that would have been material and favorable to the defense). (*Id.*)

This petition follows.

REASONS FOR GRANTING THE WRIT

This Court's intervention is necessary to impose a clear and consistent rule as to whether a showing of governmental bad faith is a necessary part of a compulsory process claim, and, if so, what constitutes bad faith in this context.

The Sixth Amendment guarantees a criminal defendant "compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. Nearly forty years ago, this Court held that this right may be violated by the government's deportation of a material witness, warranting dismissal of the indictment. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982). In the years since, the circuits have taken varying approaches to applying *Valenzuela-Bernal*.

Consistent with the holding of that case, there's no disagreement that a compulsory process claim requires a "plausible showing that the testimony of the deported witness[] would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." *Id.* at 873. But some circuits have further held that a defendant also must establish governmental bad faith, while others have declined to reach the question. And even among those circuits that employ a bad faith requirement, there is a divergence of views as to what constitutes bad faith in this arena. This case presents a good vehicle to resolve these outstanding questions.

A. Not all circuits have held that a defendant must establish governmental bad faith to prevail on a compulsory process claim.

In the Tenth Circuit, "bad faith" is an element that a defendant must show to establish a compulsory process claim. *See United States v. Iribe-Perez*, 129 F.3d 1167, 1173 (10th Cir. 1997). Some circuits agree with this approach. *See United States v. Damra*, 621 F.3d 474, 489-90 (6th Cir. 2010); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 624 (7th Cir. 2000); *Buie v. Sullivan*, 923 F.2d 10, 12 (2d Cir. 1990); *United States v. Leal-Del Carmen*, 697 F.3d 964, 970 (9th Cir. 2012).

Others, however, have declined to answer this question. *See, e.g.*, *United States v. Kaixiang Zhu*, 854 F.3d 247, 255 (4th Cir. 2017) (deciding that "[w]e need not reach the issue of whether bad faith is an element of a compulsory process claim"); *United States v. Gonzalez*, 436 F.3d 560, 578-79 (5th Cir. 2006), *abrogated on other grounds by United States v. Vargas-Ocampo*, 747 F.3d 299, 300 (5th Cir. 2014) (en banc) (deciding same under plain error review of compulsory process claim); *United States v. Bresil*, 767 F.3d 124, 130-31 (1st Cir. 2014) (declining to decide whether absence of bad faith can defeat a defendant's claim because bad-faith presumed under facts of case).

The fact that whether governmental bad faith is a requisite showing remains an open question in some circuits forty years after *Valenzuela-Bernal* counsels in favor of this court's intervention here.

B. Even among the circuits imposing a bad faith requirement, there is some divergence about what constitutes bad faith.

While noting that the Tenth Circuit had not decided what standard to apply to the bad faith inquiry, the panel decision below also noted, as the district court had, that in an unpublished decision the court had found only two plausible showings of bad faith in this context. That is, that "[t]here must be (1) willful conduct motivated by a desire to obtain a tactical advantage over the defense or (2) a departure from the government's normal deportation procedures." (Appendix at A3 n.1 (quoting *United States v. Gonzales-Peres*, 573 F. App'x 771, 776 (10th Cir. 2014) (unpublished).)

On fact value, that's consistent with the articulation of bad faith in the Ninth Circuit. *See, e.g.*, *United States v. Pena-Gutierrez*, 222 F.3d 1080, 1085 (9th Cir. 2000) (explaining same two-factor analysis). But in practice, the Ninth Circuit appears to impose a fairly low threshold, imposing strict limitations on the government's ability to initiate removal proceedings simply "[o]nce the government is aware that an alien

has potentially exculpatory evidence." *United States v. Leal-Del Carmen*, 697 F.3d 964, 970 (9th Cir. 2012).

The Seventh Circuit, in contrast, has required a defendant to show "official animus," or "a conscious effort to suppress exculpatory evidence." *United States v. Chaparro-Alcantara*, 226 F.3d 616, 624 (7th Cir. 2000) (citation omitted).

Again, the fact that the circuits have not settled on a standard for what constitutes a sufficient showing of bad faith in this context further counsels in favor of this court's intervention here.

C. Bad faith should not be required, but, even if it is, it should not be construed as narrowly as contemplated by the district and circuit courts below.

The seeds of this bad faith requirement appear to grow from two places, but neither are so compelling that they should take root here.

First, there is a statement in *Valenzuela-Bernal* that "the 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." 458 U.S. at 872 (emphasis added). The court immediately went on, however, to explain the scope of when a constitutional violation actually occurs, and noted that "[t]he mere fact that the Government deports such witnesses

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." *Id.* at 872-73. Indeed, materiality is the current that runs through *Valenzuela-Bernal*; in fact, earlier in the opinion, the Court emphasized that it was a "materiality requirement" that it was considering. *Id.* at 872 (discussing requirements of compulsory process claim and due process claim related to the deportation witness). Accordingly, because *Valenzuela-Bernal* did not expressly evaluate governmental bad faith as a showing, it should not be said to answer the question presented here. *Cf. Webster v. Fall*, 266 U.S. 507, 511 (1925) (noting that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

Second, courts imposing a bad faith requirement also have looked to this Court's decision in *Arizona v. Youngblood*, issued six years after *Valenzuela-Bernal*. In *Youngblood*, this Court considered whether police violated a defendant's due process rights by destroying potentially useful DNA evidence that had not yet been tested and so was not known by the police to be exculpatory. 488 U.S. 51, 58 (1988). The

Court held that unless the defendant can show bad faith on the part of the government, the "failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.*

Youngblood thus arose in a different context than that presented here (dealing with the *due process* implications of a failure to test physical evidence). And while there is of course significant overlap between the analyses of the Due Process Clause and the Compulsory Process Clause, *Valenzuela-Bernal*, 458 U.S. at 872, they are not necessarily coterminous. Moreover, in other evidentiary arenas, no bad faith requirement exists. *See, e.g.*, *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (noting that in *Brady,* this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution*.") (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (emphasis added). Accordingly, *Youngblood* itself shouldn't be said to compel the conclusion that a showing of bad faith also is required to make out a compulsory process claim when the government deports a potential defense witness.

But even if bad faith is required, there is no reason to conscribe it as narrowly as the district and circuit courts below contemplated. The bad faith Mr. Garcia sought to prove below provides a compelling example of why this is so.

Recall that Mr. Garcia argued, and sought leave to develop evidence about, whether Mr. Dominguez was deported, at least in part, to ease in the civil forfeiture of his "nice truck."

Earlier this term, in *Timbs v. Indiana*, this Court considered a state civil asset forfeiture that arose in the context of a criminal case. 139 S. Ct. 682 (2019). The Court's holding in *Timbs*, of course, was limited to concluding that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause against the states. *Id.* at 689-90. But in so holding, the Court also reaffirmed that such "civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive." *Id.* at 690. In this sense then, such forfeitures are, in a real way, still related to the criminal proceedings, even if not directly related to the guilt-phase of trial. Put another way, the bad faith Mr. Garcia sought to prove was far closer, both conceptually and practically, to the criminal case in the Northern District of Oklahoma than the district court below credited.

Moreover, as the district court recognized below, holding to a narrow view of bad faith risks "incentiviz[ing] snap deportations of potentially exculpatory witnesses before anyone can learn what, if any, information they have." (Vol. 1 at 274.) That perverse incentive is hard to write off as wholly remediated (as the district court suggested) by the availability of cross examination at trial. Not only is it unclear how effective that would be, but many defendants, of course, would opt against going to trial without individuals whom they believe to be exculpatory witnesses. One way to guard against that concern, of course, is what Mr. Garcia proposed below—a broader view of what can constitute governmental bad faith.

D. Harmless error review presents no obstacle to review because the circuit erred in concluding that any error would have been harmless.

The Tenth Circuit declined to reach the contours of bad faith because, it concluded, Mr. Garcia could not meet the second prong of its compulsory process claim test: materiality. In other words, any error as to bad faith would have been harmless. (Appendix at A3-A4.) This conclusion was wrong.

As this Court recognized in *Valenzuela-Bernal*, the required materiality showing is not that high of a standard. The Court described it as making "some showing," or a "plausible showing that the testimony of the deported witness[] would have been material and favorable to his defense, in ways not merely cumulative to the

testimony of available witnesses." 458 U.S. at 873. That makes sense, since, as the Court observed, the government's very removal of the witness deprives the defendant of the opportunity to determine what the testimony would have been. *Id.*

Here, Mr. Garcia made that plausible showing because the unique circumstances of the arrests suggest that Mr. Dominguez may have had materially favorable testimony. Importantly, Mr. Dominguez was the driver of the vehicle that met with and then followed the Cruze, and the only other person beyond Mr. Garcia himself with personal knowledge of the purpose and intent of the drive to Tulsa that day. Under the circumstances, and given Mr. Garcia's testimony and explanation for the trip, it is certainly plausible that Mr. Dominguez could have corroborated Mr. Garcia's testimony and/or provided additional material and helpful information to the defense.

It is not dispositive that other witnesses testified differently, as the district court suggested. That's particularly true where, as here, the government's key witnesses were themselves admitted participants in drug trafficking who had entered into very favorable plea bargains, and about whom the district court instructed the jury that they "should receive this type of testimony with caution and weigh it with great care." (Vol. 1 at 339.)

Nor is the circuit's determination that the weight of the evidence overshadowed any possible materiality showing a compelling argument for harmlessness.

At the end of the day, the government's case amounted to the word of two admitted drug traffickers, who each received extremely favorable plea deals, fingering Mr. Garcia as their supplier. (Vol. 1 at 551-52, 625-28.) Their purported link to Mr. Garcia was demonstrated by calls and texts to a phone found in the center console of Mr. Dominguez's truck when he and Mr. Garcia were stopped, a phone that contained no personal information linking it to Mr. Garcia. (Vol. 1 at 45-47, 523-29, 539, 561-62, 581-82, 631-32, 758-59.) And the "corroborat[ion]" of Mr. Flores's testimony about the events of January 26th, in fact concerned only the movement of *vehicles*; the police helicopter's surveillance captured *nothing* about the interactions or actions of Mr. Dominguez or Mr. Garcia *individually*. (Vol. 1 at 409, 420-24.)

Simply put, it was the word of Mr. Flores and Mr. Martinez against that of Mr. Garcia. Under those circumstances, favorable testimony from Mr. Dominguez would have been extremely meaningful both in countering the testimony of these two alleged accomplices and in bolstering Mr. Garcia's own account of traveling to Tulsa to purchase a Dodge Viper, which account was itself corroborated by text messages from his own phone. (Vol. 1 at 753-58, 767-70, 791.)

* * *

All told, the legal questions presented here about bad faith in the context of a compulsory process claim were raised and preserved below, and are squarely addressed in this petition. This case is a good vehicle to bring certainty to this area of law, which remains unsettled nearly forty years after *Valenzuela-Bernal*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ John C. Arceci
JOHN C. ARCECI
Assistant Federal Public Defender
Counsel of Record
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

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