SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

HONORIO MORENO HERRERA,

Defendant and Appellant.

S171895

Appellate District, Division Three
Case No. G039028
Orange County Superior Court Case No. 05CF3817
The Honorable Daniel J. Didier, Judge

PETITION FOR REVIEW

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

Respondent, the People of the State of California, respectfully petitions this Court to grant review in this matter pursuant to rule 8.500 of the California Rules of Court. In an unpublished 2-to-1 opinion filed on February 26, 2009, the Court of Appeal, Fourth Appellate District, Division Three, disagreed with the trial court's finding that a witness was unavailable, and reversed appellant's first degree murder conviction that resulted in a sentence of life without the possibility of parole. A copy of the opinion is attached to this Petition as Exhibit A.

ISSUE PRESENTED

Once the prosecution has established that an absent witness has been deported to a foreign country and cannot be extradited to the United States, is any further action required by the prosecution to demonstrate unavailability under Evidence Code section 240?

STATEMENT OF THE CASE AND FACTS

On Father's Day, 2005, appellant and two of his fellow Krazy Proud Criminals ("KPC") gang members drove into rival gang territory where they shot and killed Erick Peralta, a father of three with no gang ties, as Peralta walked with his cousin to a nearby convenience store. (1 RT 60, 66-68, 70-72, 199-202, 270; 2 CT 317-318.)

Three months later, Jose Portillo, a former KPC member, was arrested for evading a police officer. Appellant was in the car with Portillo at the time, and was also arrested as he attempted to flee. (1 RT 84, 89, 115, 120-121, 162-163.) A few days after his arrest, Portillo told police that appellant had admitted to him that he was the shooter who killed Peralta. (1 RT 87, 92, 135-136, 138) Appellant admitted to police that he was present at the murder scene but denied being the shooter. (1 RT 170-176.)

At the June 19, 2006, preliminary hearing, Portillo was the only person who identified appellant as the shooter. Portillo testified that in June 2005, appellant admitted to him that he was the shooter who had killed Peralta. (1 RT 87, 92, 135-136, 138).

Appellant's trial began on June 4, 2007. Prior to the start of trial, the court held a hearing on the prosecutor's motion to admit Portillo's preliminary hearing testimony. (1 RT 12, 38.) At the hearing, the prosecutor called his investigator, Ed Wood, to testify as to his efforts to locate Portillo before trial. (1 RT 12-25.) Wood testified that he began to look for Portillo on Friday, May 25, 2007, by running Portillo's name through law enforcement data bases and discovered that Portillo had two warrants for his arrest. Wood then contacted a Santa Ana gang detective and requested that he make a "wanted flyer" for Portillo to distribute to law enforcement throughout the state of California. (1 RT 13-14.) At the time of the hearing, the flyers had been disseminated throughout the state but there had been no leads from the flyers. (1 RT 14-15.) Wood also asked the Santa Ana gang detective to contact Portillo's friends and family members. (1 RT 16.) Wood then went to Portillo's last known address but was told by the resident there that she did not recognize Portillo. (1 RT 15.) Next, Wood called two phone numbers he found on Portillo's local arrest record, but he was unable to reach Portillo. (1 RT 16.) Wood then spoke with a special agent from Homeland Security who informed Wood that Portillo had been released from state custody on June 24, 2006, was placed into federal custody within a few days, and was then deported to El Salvador on September 11, 2006. (1 RT 16-18, 21.) Upon learning this information, Wood again contacted the gang detective in Santa Ana and told him about the deportation, but requested that he continue to distribute the wanted flyers "in case [Portillo] did come back" to California. (1 RT 18-19.) Wood then contacted an investigator in the foreign prosecution unit

of the district attorney's office and asked him to make any contacts he could in El Salvador to locate Portillo there. (1 RT 19.) Wood sent the information to Interpol in El Salvador. (1 RT 24.) Wood then learned that even if Portillo was located in El Salvador, he cold not be extradited to the United States for the trial. (1 RT 19-20.)

The trial court found the prosecution had exercised due diligence in attempting to locate Portillo for trial and agreed to allow Portillo's preliminary hearing testimony to be read to the jury. (1 RT 27-30, 80-161.) Appellant testified at his trial and admitted getting out of the car and being present during the shooting. However, appellant refused to identify the shooter. (1 RT 240-246.)

The jury convicted appellant of first degree murder and found true that appellant vicariously discharged a firearm causing death and that he committed the crime for the benefit of, at the direction of, or in association with a criminal street gang. The jury also found that the special circumstance of murder for a criminal street gang purpose existed and that appellant was guilty of street terrorism. (1 CT 294-296.)

The court sentenced appellant to prison for life without the possibility of parole. (2 RT 449-450.)

On appeal, appellant argued the trial court erred in finding due diligence by the prosecutor in seeking Portillo's presence and that the admission of Portillo's preliminary hearing testimony violated the confrontation clause under the Sixth Amendment to the United States Constitution.

In a 2-1 pinion filed on February 26, 2009, the Court of Appeal reversed the judgment on the ground that the trial court erred in finding that the prosecution acted with due diligence. The majority reached its conclusion, in part, by comparing the facts here to those in *People v. Cromer* (2001) 24 Cal.4th 889. (Exh. A at pp. 6-8.) Ignoring the futility of

further search efforts due to Portillo's deportation to a country that would not extradite him to the United States, the majority focused on the time the prosecution spent to investigate Portillo's whereabouts and concluded that "the prosecution did not give itself enough time to permit an adequate investigation." (Exh. A at pp. 7-8.) In determining the prosecution had not established due diligence under Evidence Code section 240, subdivision (a)(5), the majority reasoned the prosecution "apparently assumed that Portillo would not be available and went through a last-minute, perfunctory search in an attempt to make a showing of due diligence." (Exh. A at p. 9.)

The majority then found that the erroneous admission of Portillo's preliminary hearing testimony was prejudicial, because, according to the court, appellant's decision to testify and admit his presence at the shooting "may well have been motivated by his need to contradict Portillo's testimony that he had confessed to being the shooter." Further, the majority found the error to be prejudicial because Portillo's preliminary hearing testimony provided the only evidence indentifying appellant as the shooter. (Exh. A at pp. 9-10.)

Dissenting Justice Aronson concluded the trial court did not err in admitting Portillo's preliminary hearing testimony. (Exh. A, dis. opn. at pp. 1-2.) In doing so, Justice Aronson reiterated that the evidence showed Portillo had been deported to El Salvador and the prosecution lacked the means to compel his attendance because of the extradition treaty between the United States and El Salvador. Justice Aronson also noted that contrary to the majority's assumption that deported felons may return to the United States, the assumption was not supported here because Portillo faced several outstanding warrants for his arrest and therefore had a strong motive to avoid this jurisdiction. Justice Aronson explained that once begun, the prosecution took reasonable steps to locate Portillo, and any "additional efforts" to locate Portillo, as suggested by the majority, were

not likely to succeed given Portillo's incentive to stay away from a jurisdiction seeking to incarcerate him. Emphasizing this Court's decision in *People v. Smith* (2003) 30 Cal.4th 581, 611 (*Smith*), Justice Aronson concluded the trial court did not err in admitting Portillo's preliminary hearing testimony because the prosecution is not required to engage in futile acts to locate an absent witness who is likely beyond the court's jurisdiction. (Exh. A, dis. opn. at pp. 1-2.)

REASONS FOR REVIEW

I. REVIEW IS NECESSARY TO RESOLVE THE CONFLICT BETWEEN THE COURT OF APPEAL'S INTERPRETATION OF EVIDENCE CODE SECTION 240, SUBDIVISION (A)(4) WITH THIS COURT'S DECISION IN *SMITH*, AND ALSO TO DETERMINE WHETHER A SHOWING OF DUE DILIGENCE UNDER SUBDIVISION (A)(5) REQUIRES A PROSECUTOR TO DO MORE TO PROCURE AN ABSENT WITNESS FOR TRIAL ONCE THE PROSECUTOR HAS LEARNED THE WITNESS HAS BEEN DEPORTED TO HIS COUNTRY OF ORIGIN AND CANNOT BE EXTRADITED TO THE UNITED STATES

A. Introduction

Review is necessary to settle an important question regarding whether any further action is required in order for the proponent of an absent witness to establish unavailability under Evidence Code[1] section 240 when the proponent discovers the witness has been deported to a foreign country and cannot be extradited to the United States. In this case, the prosecutor learned that after Portillo testified at appellant's preliminary hearing, he was deported to his country of origin, El Salvador. Despite the prosecutor's efforts, he had not located Portillo in El Salvador by the time the court held the due diligence hearing. However, the prosecutor knew he would be

[1] All further statutory references are to the Evidence Code, unless otherwise indicated.

unable to procure Portillo's attendance at the trial because El Salvador would not allow for Portillo's extradition to the United States. Nevertheless, in reversing the judgment, the majority concluded the prosecution failed to establish due diligence because it did not give itself enough time to permit an adequate investigation and the search was "at best, perfunctory." (Exh. A at pp. 7-9.) The majority's decision in this case would allow appellant – a gang member who, on Father's Day, murdered a father of three with no gang ties – to avoid responsibility for this callous crime notwithstanding the fact that the prosecution could do nothing more to secure Portillo's presence at trial. Petitioner contends that such a rule cannot be accepted for the following reasons.

First, the evidence presented at the due diligence hearing was sufficient to establish Portillo's unavailability under section 240, subdivision (a)(4) [witness is "absent from the hearing and the court is unable to compel his or her attendance by its process]. However, the majority's holding here is in direct conflict with this court's decision in *People v. Smith, supra*, 30 Cal.4th at page 610, in which this Court noted that if it was shown that the witness was in Japan, unavailability would be established under section 240, subdivision (a)(4), because the court would be "unable to compel his . . . attendance by its process." Here, the majority's decision would require the prosecution to show additional due diligence notwithstanding the lack of subpoena power over the witness and this conclusion conflicts with this Court's decision in *Smith*, as well as the unambiguous language of subdivision (a)(4). Accordingly, this Court must grant review to prevent erosion of its decision in *Smith*.

Second, established authority on unavailability indicates that although the prosecution must take reasonable steps to locate an absent witness, the prosecution is not required to pursue further efforts to locate the witness when the evidence suggests that no possibility of procuring the witness

exists because the law does not require the doing of a "futile act." (*Ohio v. Roberts* (1980) 448 U.S. 56, 74 [100 S.Ct. 2531, 65 L.Ed.2d 597]; *People v. Smith, supra*, 30 Cal.4th at p. 611.) In other words, if there is a "great improbability that such efforts would have resulted in locating the witness," reasonableness does not require the prosecutor to do other things to try to find the witness. (*Ohio v. Roberts, supra*, 448 U.S. at p. 76.) In determining the prosecution here failed to establish due diligence because it could have done more, the majority ignored the above established authority. As Justice Aronson emphasized in the dissent, "further efforts to locate the witness would have been futile" and "the prosecution need not engage in futile acts to locate an absent witness likely beyond the court's jurisdiction." (Exh. A, dis. opn. at pp. 1-2, citing *People v. Smith, supra*, 30 Cal.4th 581, 611.) The dissent in this case demonstrates that reasonable minds are not in accord on this important issue. Accordingly, this Court must settle this recurring issue to provide necessary guidance of what is required to establish unavailability under section 240, subdivision (a)(5).

Alternatively, this case presents the other shoe waiting to drop in *Smith*: whether, in order to establish due diligence under section 240, subdivision (a)(5), the prosecution was required to request that Portillo come voluntarily to testify. (See *People v. Smith, supra*, 30 Cal.4th at p. 611, fn. 6.)

The Court of Appeal's reversal of appellant's sentence of life without the possibility of parole was based on an untenable interpretation of the requirements for establishing unavailability under section 240. For these reasons, review is necessary not only to clarify the existing law, but also to rectify the erroneous reversal in this case.

B. Discussion

Pursuant to section 1291, subdivision (a)(2), former testimony is admissible as an exception to the hearsay rule if the witness "is

unavailable" and the "party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." In turn, section 240 defines "unavailable." As relevant here, a witness is unavailable if he or she is "[a]bsent from the hearing and the court is unable to compel his or her attendance by its process" (§240, subd. (a)(4)) or "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process" (§ 240, subd. (a)(5)).

Section 240, subdivision (a)(4) comes into play where there is no applicable "court process," for example, where the witness is a foreign citizen not in the United States, and there is no treaty or compact provisions through which the witness's presence can be compelled. (*People v. Denson* (1986) 178 Cal.App.3d 788, 793, citing Pen. Code, § 1334, et seq.) In contrast, subdivision (a)(5) applies where there is a "court process" in existence which would compel the witness to appear, and comes into play where the witness is in another state or is a United States national or resident in another country. (*Ibid.*, citing 28 U.S.C. § 1783; see also *People v. St. Germain* (1982) 138 Cal.App.3d 507, 517.)

1. The Applicability of Evidence Code Section 240, Subdivision (a)(4)

Although the trial court's ruling in this case was based on its determination that the prosecutor had exercised due diligence in attempting to obtain Portillo's presence pursuant to section 240, subdivision (a)(5), the court's findings were sufficient to establish unavailability under subdivision (a)(4), as well. (*People v. Smith, supra*, 30 Cal.4th at p. 610.)

As the trial court explained,

> I don't know what further efforts could be done . . . to secure [Portillo's] appearance here. [¶] He certainly was deported. . . . And I think it would likely to be futile to continue this matter or it would be speculative to come up with further efforts that could be fruitful in obtaining his presence, especially given the testimony we heard with regard to the relationship between El Salvador and this country with regard to extradition, et cetera.

(1 RT 27.)

However, in concluding that the trial court erred by admitting Portillo's preliminary hearing testimony, the majority's decision here is in direct conflict with this Court's decision in *People v. Smith, supra*, 30 Cal.4th 581, 609-610, in which this Court noted that if it was shown that the witness was in Japan, unavailability would be established under section 240, subdivision (a)(4) because the court would be "unable to compel his…attendance by its process." In *Smith*, the prosecutor sought to admit the former testimony of a Japanese national (Fukumoto) who had returned to Japan shortly after he testified at Smith's preliminary hearing. (*Id.* at pp. 609-611.) In ruling that the witness was unavailable, the trial court's ultimate finding was that Fukumoto "is a resident of the country of Japan and therefore is not subject to the process of this court to compel his attendance" pursuant to section 240, subdivision (a)(4). (*Id.* at p. 610.) On appeal, the defendant in *Smith* did not dispute that if Fukumoto were in Japan he would have been unavailable but claimed that because the prosecution showed Fukumoto was in Japan by using hearsay evidence, there was no competent evidence to establish Fukumoto's unavailability. (*Id.* at p. 609.) This Court explained that pursuant to section 240, the prosecutor could have shown Fukumoto was unavailable by showing either "that Fukumoto was absent 'and the court is unable to compel his . . . attendance by its process,' i.e., that he was in Japan, or that he was absent and it 'has exercised reasonable diligence but has been unable to procure

his . . . attendance by the court's process.'" (*People v. Smith, supra*, 30 Cal.4th at p. 610, citing § 240, subd. (a)(4), (5).)

Because the defendant in *Smith* had objected to the prosecution's hearsay evidence, this Court explained that "trying to prove a person is, in fact, outside the country can raise substantial practical difficulties because of the hearsay rule." (*People v. Smith, supra*, 30 Cal.4th at p. 610.) The Court then distinguished section 240, subdivision (a)(4) from subdivision (a)(5) and explained that subdivision (a)(5) provides a separate basis supporting a finding of unavailability when the proponent of the evidence is able to establish it made reasonable efforts to obtain the witness. (*Ibid.*)

In the instant case, the prosecution's evidence indicated Portillo was from El Salvador, and after the preliminary hearing, he had been deported to El Salvador. Additionally, there was no evidence to suggest Portillo had returned to California since his deportation, and El Salvador would not allow for Portillo's extradition to the United States to testify at Herrera's trial. (1 RT 13-24.) Defense counsel never objected to any of the prosecutor's evidence and the trial court found that Portillo "certainly was deported" and that "further efforts" would not result in Portillo's presence at trial due to the fact that El Salvador would not extradite him. (1 RT 27.) Although it did not expressly state its ruling in the language of subdivision (a)(4), the trial court essentially ruled that Portillo was unavailable pursuant to subdivision (a)(4) because he was in El Salvador and therefore, "the court is unable to compel his . . . attendance by its process." (See 1 RT 27.) The prosecution met its "burden of showing by competent evidence that the witness is unavailable," and therefore, the prosecutor established that Portillo was unavailable pursuant to subdivision (a)(4). (*People v. Smith, supra,* 30 Cal.4th at pp. 609-610.) Unlike agreements among the states (Pen. Code, § 1334, et seq.) or agreements between a state and the federal government (see *Barber v. Page* (1968) 390 U.S. 719, 724-725 [88 S.Ct.

1318, 20 L.Ed.2d 255]), no facilities exist for compelling the attendance in California of a witness located in El Salvador, and appellant has never suggested any treaty or agreement which would have permitted a contrary result. (See *Mancussi v. Stubbs* (1972) 408 U.S. 204, 212 [92 S.Ct. 2308; 33 L.Ed.2d 293].) Consequently, no further action was required.

Indeed, this conclusion comports with other appellate court decisions. For instance, in *People v. Denson, supra*, 178 Cal.App.3d 788, the witness had returned to England after she provided video-taped testimony at the defendant's preliminary hearing. (*Id.* at pp. 790-791.) In concluding the trial court correctly found the witness was unavailable under section 240, the Court of Appeal distinguished subdivision (a)(4) from subdivision (a)(5) and explained that pursuant to subdivision (a)(4), the prosecution is *not* required to show it used due diligence in securing the witness's presence if the witness is a foreign citizen who is outside of the United States and there is no treaty or compact provisions through which the witness' presence can be compelled. (*Id.* at p. 793, citing *People v. St. Germain, supra*, 138 Cal.App.3d at pp. 517-518.)

In contrast to *Smith* and *Denson*, the majority cited section 240, subdivisions (a)(4) and (a)(5) and concluded, "[a]lthough these exceptions are stated in the alternative, constitutional provisions require that, in a criminal case, the prosecution show due diligence in its attempts to secure the attendance of the witness before prior testimony may be admitted." (Exh. A at p. 5.) Thus, although the majority recognized that the two subdivisions are different, by reading a due diligence requirement into subdivision (a)(4), the majority collapsed the two subdivisions, and essentially treated subdivision (a)(4) the same as (a)(5) by requiring a prosecutor to undertake additional acts to establish unavailability. This is contrary to what this Court did in *Smith*, in which this Court distinguished the two subdivisions and concluded that unlike subdivision (a)(5),

subdivision (a)(4) did not require prosecutorial due diligence. (*People v. Smith, supra,* 30 Cal.4th at p. 610.) Furthermore, the text of subdivision (a)(4) does not include a due diligence requirement, in contrast to subdivision (a)(5). Because the majority's treatment of the two subdivisions here is at odds with the language of the subdivisions and conflicts with this Court's decision in *Smith* and the Court of Appeal's decision in *Denson*, this Court must grant this petition to protect the legislative intent as evidenced by the language of subdivisions (a)(4) and (a)(5).

2. The Applicability of Evidence Code Section 240, Subdivision (a)(5)

As noted above, pursuant to section 240, subdivision (a)(5), a witness is unavailable if he or she is "absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." Although section 240, subdivision (a)(5), refers to "reasonable diligence," this Court has often described the evaluation as one involving "due diligence." (See *People v. Cromer*, *supra,* 24 Cal.4th 889, 898.) What constitutes due diligence to secure the presence of a witness depends on the facts of the individual case. (*People v. Sanders* (1995) 11 Cal.4th 475, 523.) Relevant considerations include the character of the prosecution's efforts; whether the search was timely begun; the importance of the witness's testimony; whether leads were competently explored; whether the proponent of the evidence reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena the witness when he or she was available; and whether the witness would have been produced if reasonable diligence had been exercised. (*People v. Cromer, supra*, 24 Cal.4th at p. 904; *People v. Sanders, supra*, 11 Cal.4th at p. 523; see also *People v. Wilson* (2005) 36 Cal.4th 309, 341.)

In *Ohio v. Roberts, supra*, 448 U.S. 56, the United States Supreme Court explained that in the context of unavailability for purposes of the Confrontation Clause, a "witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial." (*Id.* at p. 74, citing *Barber v. Page, supra*, 390 U.S. at pp. 724-725; accord *Mancusi v. Stubbs, supra,* 408 U.S. 204.) The court explained that "[t]he law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), 'good faith' demands nothing of the prosecution." (*Ohio v. Roberts, supra*, 448 U.S. at p. 74.) The court noted that "one . . . may always think of other things" or other steps that could have been taken in an effort to find the witness, but explained that "the great improbability that such efforts would have resulted in locating the witness, and would have led to her production at trial, neutralizes any intimation that a concept of reasonableness required their execution." (*Id.* at pp. 75-76.)

In *People v. Smith, supra*, 30 Cal.4th 581, 611, this Court weighed in on the futility aspect addressed by the United States Supreme Court in *Ohio v. Roberts, supra*, and explained, "The prosecution must take reasonable steps to locate an absent witness, but need not do 'a futile act.'" Notwithstanding this established authority, the majority here concluded the prosecution failed to establish Portillo's unavailability because it did not give itself enough time to permit and adequate investigation and the search was, "at best, perfunctory." (Exh. A at pp. 7-9.) For example, the majority complained that no effort was made to determine if Portillo's attorney had information about his whereabouts, and that no "real search was made for friends and family." (Exh. A at p. 9.) The majority also explained that a "lack of seriousness in the search efforts" was illustrated by the prosecution's failure to explore other potential leads based on the prosecutor's knowledge that (1) Portillo was a member of the KPC gang;

(2) Portillo had lived with his mother on Baker Street; (3) Portillo had a daughter and a sister who lived in Santa Ana; (4) Portillo had been employed; and, (5) he had gone to school or taken classes to get his high school diploma. (Exh. A at p. 9.)

While it is true that the prosecutor could have pursued additional avenues of investigation, there is no reason to believe these efforts would have been fruitful. In any event, and most importantly, the contention that the prosecutor should have done more is irrelevant to this analysis. Indeed, as this Court has explained, "[t]hat additional efforts might have been made or other lines of inquiry pursued does not affect [a finding of due diligence] . . . It is enough that the People used reasonable efforts to locate the witness." (*People v. Wilson, supra,* 36 Cal.4th 309, 342, citing *People v. Cummings* (1993) 4 Cal.4th 1233, 1298.)

In reaching its conclusion that the prosecution did not give itself enough time to permit an adequate investigation of Portillo's whereabouts, the majority noted that "it is not unheard of that a deported felon returns to the United States." (Exh. A at p. 8.) However, under the facts of this case, it is extremely unlikely that Portillo would have returned to the United States. The prosecutor was aware of this because in attempting to locate Portillo before trial, the prosecutor learned that Portillo had outstanding warrants for his arrest. (1 RT 13-14.) Thus, it was not reasonably likely that Portillo would have voluntary returned to the United States because he faced arrest. (See *People v. Banks* (1966) 242 Cal.App.2d 373 [one factor to be considered in determining the sufficiency of the proponent's efforts is whether the witness has purposefully sought to conceal himself].) As Justice Aronson explained in the dissent, the additional efforts suggested by the majority were not likely to succeed, given Portillo's incentive to stay away from a jurisdiction seeking to incarcerate him because he faced several outstanding warrants for his arrest. (Exh. A, dis. Opn at p. 1-2.)

Further, because at least one of the outstanding warrants was for a probation violation (1 RT 23), the prosecutor could have reasonably determined that if Portillo had returned to California, the probation department would have already located and arrested him for the violation.

Nevertheless, under the majority's reasoning, a prosecutor faced with knowledge that a witness has been deported would be required to ignore that information as well as the fact that the witness cannot be compelled to come to the United States, and continue to search for the witness in the area he lived *before* he was deported. The majority's opinion would also require the prosecution to ignore the effect of Portillo's outstanding arrest warrants on any possibility that he would voluntarily return to this country and testify in a trial where he would be the main witness implicating a fellow-gang member in a horrific murder. (Exh. A at pp. 8-9.)

People v. Cromer, supra, 24 Cal.4th 889, on which the majority relied to conclude the prosecutor here failed to exercise due diligence, is distinguishable. In *Cromer*, the prosecution was on notice of the disappearance of a crucial witness less than two weeks after the preliminary hearing. Although a subpoena was issued for the witness to attend the trial, the prosecution made no effort to serve the subpoena. Nor did the prosecution make any effort to serve a subsequently issued subpoena when the trial date was rescheduled. The prosecutor never made any serious efforts to locate the witness during the time the trial was continued. Two days before the trial was scheduled to begin, the prosecutor learned the witness was living with her mother in San Bernardino. However, the prosecutor waited two days "to check out this information" and obtain the address. During jury selection, the prosecutor's investigator went to the witness's mother's home and learned the mother would return the next day. Nevertheless, the investigator never returned to speak to the mother, who

was the single person most likely to know where the witness was located. (*People v. Cromer, supra*, 24 Cal.4th at pp. 893, 903-904.)

Unlike in *Cromer*, there was no report shortly after Portillo's preliminary hearing testimony that Portillo had been deported. Therefore, the prosecution had no reason to believe that Portillo had left the jurisdiction or would be unavailable at trial. In addition, there was no evidence to suggest the witness in *Cromer* had left the country, as Portillo had done here. Finally, there was no evidence in *Cromer* to suggest that if the witness had been located, the prosecution would not be able to procure his attendance by the court's process. In contrast, in the instant case, the prosecutor discovered that El Salvador would not allow for Portillo's extradition to the United States.

Finally, this case presents the other shoe that did not fall in *Smith*, where this Court left open the question of whether, assuming the witness there was in Japan, "the prosecution was required to do more to procure his attendance, such as request that he come voluntarily to testify." (*People v. Smith, supra*, 30 Cal.4th at p. 611, fn. 6.) Even if the prosecutor had contacted Portillo in El Salvador and requested that he voluntarily return to the United States to testify at appellant's trial, it is unlikely that Portillo would have agreed to return due to the fact that he would be arrested for his outstanding warrants. [2]

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[2] Respondent notes that this Court has recently granted review in *People v. Cogswell* (Feb. 13, 2008, S158898). The issue in *Cogswell* is whether a prosecutor must request that a sexual assault victim, who is out-of-state and does not wish to return to California to testify, be taken into custody under the Uniform Act to Secure Attendance of Witnesses from without the State in Criminal Cases (Pen. Code, § 1334, et seq.) in order to demonstrate the due diligence required to satisfy the finding of unavailability under section 240 that would permit the victim's preliminary hearing testimony to be admitted into evidence at trial. For the same

(continued...)

CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court grant the petition for review.

Dated: April 7, 2009

Respectfully submitted,

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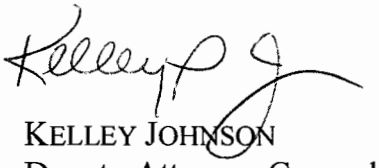

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(...continued)
reasons that a prosecutor need not take the extraordinary action of arresting an out-of-state victim, so too should a prosecutor not be required to ignore information that a witness has been deported and cannot be compelled to return to the trial and continue to search for the witness in the area he occupied *before* he was deported to his country of origin.

CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 5083words.

Dated: April 7, 2009

EDMUND G. BROWN JR.
Attorney General of California

KELLEY JOHNSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

EXHIBIT A

COPY

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G039028
v.	(Super. Ct. No. 05CF3817)
HONORIO MORENO HERRERA,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Daniel J. Didier, Judge. Reversed and remanded.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lynne G. McGinnis and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

EXHIBIT "A"

A jury convicted defendant Honorio Moreno Herrrera of first degree murder (Pen. Code, § 187; all further statutory references are to this code unless otherwise indicated), and found true that defendant vicariously discharged a firearm causing death (§ 12022.53, subds. (d) and (e)(1)), and committed the crime for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b). The jury also found that the special circumstance of murder for criminal street gang purpose (§ 190.2, subd. (a)(22)) existed and that defendant was guilty of street terrorism (§ 186.22, subd. (a)). The court sentenced him to prison for life without possibility of parole.

Defendant's appeal asserts that the court erred in permitting a witness's preliminary hearing testimony to be read into evidence after the witness could not be found. For reasons stated below, we agree the prosecution failed to exercise due diligence and the court erred in permitting this testimony to be read. We therefore reverse the judgment. Defendant also raises a number of instances of alleged ineffective assistance of counsel; these issues are moot or should be raised, if at all, in a petition for habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.

FACTS

1. The Murder

Defendant, a member of the criminal street gang "Krazy Proud Criminals" or "KPC," and two of his fellow gang members drove into rival gang territory. There they saw Eric Peralta and Efren Enriquez. One of the car's occupants got out of the car and asked the two where they were from. The two continued to walk towards a 7-Eleven store. Then a second person came out of the car and started shooting. Peralta fell down. The assailants stated "KPC" and left the scene. Peralta died.

Months later, the police arrested Jose Portillo, a former KPC member, for evading a police officer. They also arrested defendant, who attempted to flee. Portillo subsequently told the police defendant had admitted to him that he was the shooter who had killed Peralta.

After he was arrested, defendant acknowledged his presence at the murder scene in a police interview, but he denied being the shooter. Defendant also testified during his trial and, again, admitted getting out of the car and being present during the shooting. But he refused to identify the shooter.

2. Admission of Former Testimony

Trial was originally scheduled for March 7, 2007. On that date it was continued to May 21, then trailed to May 25, again to May 29, and then again to May 30. On that day, the prosecution filed a "motion to admit preliminary hearing testimony of Jose Portillo and request for hearing." (Capitalization omitted.) The motion stated that Portillo was unavailable and requested "a hearing on the issue of due diligence." It also stated that, at the time of the preliminary hearing in this case, Portillo was in custody. Shortly thereafter, after having entered a plea, he was turned over to federal officials and deported to El Salvador.

District attorney investigator Ed Wood testified during the hearing on the motion regarding efforts to locate Portillo. He stated that he began looking for Portillo the previous Friday, May 25. (This was Friday before a three-day holiday weekend, with the trial scheduled to start on the following Tuesday.) Wood determined there were warrants for Portillo's arrest and contacted the Santa Ana police asking them to make out a "wanted flyer" for the witness. The flyer was disseminated to regional law enforcement agencies. No leads developed.

That same day, Wood, accompanied by another investigator, went to an apartment on Civic Center Drive; the occupant was unable to identify Portillo. Wood

called two phone numbers associated with Portillo but both had been changed. Still on the same day, Wood contacted a Mark Johnson, a special agent at Homeland Security, who told him that Portillo had been deported to El Salvador in September 2006. Wood then talked to Art Zorilla, another district attorney investigator in the foreign prosecution unit, requesting that Zorilla attempt to locate Portillo in El Salvador. Zorilla exchanged e-mails with his contacts in that country but Portillo was not located. Zorillo also advised Wood there is no treaty between the United States and El Salvador that would enable them to have Portillo extradited, even if he were found.

The trial court ruled the prosecution acted with due diligence in attempting to insure Portillo's presence and allowed Portillo's testimony from the preliminary hearing to be used.

DISCUSSION

Defendant raises two issues with respect to Portillo's transcribed testimony; the trial court erred in finding due diligence by the prosecutor in seeking Portillo's presence and admission of Portillo's recorded testimony violates the confrontation clause of the Sixth Amendment to the United States Constitution.

1. The prosecution failed to act with due diligence.

Evidence Code section 1291, subdivision (a)(2) provides that former testimony is admissible as an exception to the hearsay rule, if the witness is unavailable and "[t]he party against whom the former testimony is offered was a party to the action . . . in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." Section 240 defines "unavailable." It includes in the definition a witness who is "[a]bsent from the hearing and the court is unable to compel his or her attendance by

its process" (Evid. Code, § 240, subd. (a)(4)) or "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) Although these exceptions are stated in the alternative, constitutional provisions require that, in a criminal case, the prosecution show due diligence in its attempts to secure the attendance of the witness before prior testimony may be admitted.

Both the United States and the California Constitutions entitle a criminal defendant to confront adverse witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) The right to confrontation seeks "to ensure that the defendant is able to conduct a 'personal examination and cross-examination of the witness, in which [the defendant] has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' [Citations.]" (*People v. Louis* (1986) 42 Cal.3d 969, 982, quoting *Mattox v. United States* (1895) 156 U.S. 237, 242-243 [15 S.Ct. 337, 39 L.Ed 409].)

As noted by the parties, our Supreme Court dealt with the issue in the context of unavailable witnesses in *People v. Cromer* (2001) 24 Cal.4th 889 (*Cromer*). There, the court stated, "Generally, a witness is not unavailable for purposes of the right of confrontation 'unless the prosecutorial authorities have made a good-faith effort to obtain [the witness's] presence at trial.' [Citations.] (As we mentioned at the outset, and as we explain in detail later, under California law the prosecution must show reasonable or due diligence in locating the witness.)" (*Id.* at p. 897, fn. omitted.)

Cromer also held "that appellate courts should independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial." (*Cromer, supra,* 24 Cal.4th at p. 901, fn. omitted.) Employing

such independent review, we must disagree with the trial court and conclude that the prosecution failed to use due diligence in attempting to locate Portillo. We reach this conclusion, in part, by comparing the facts in this case with those in *Cromer*, which likewise found lack of due diligence in attempting to locate a missing witness. In order to do so, we must quote rather extensively from that case.

"At the preliminary hearing on June 13, 1997, Culpepper testified under subpoena and appeared to be a cooperative witness. About two weeks later, however, officers patrolling the neighborhood where she lived noticed and reported that Culpepper was no longer there.

"Trial was originally set for September 9, 1997, and was then rescheduled for November 20, 1997, December 11, 1997, and January 12, 1998. Subpoenas issued for Culpepper to attend trial on September 9 and December 11, but the prosecution made no effort to serve them. No subpoena issued for Culpepper to attend trial on November 20.

"Despite Culpepper's June 1997 disappearance from her neighborhood, it was not until December 1997, with the January 12, 1998, trial date looming ahead, that the prosecution made any serious effort to locate her. Two investigators went to Culpepper's former residence five or six times, only to be informed by a woman at that address that Culpepper no longer lived there.

"Trial was continued to January 14, 1998, and then to January 20, 1998, when both sides announced ready for trial. The matter was put over to January 22, 1998, the last permissible day on which to bring defendant to trial.

"On January 20, 1998, a man at Culpepper's former home told prosecution investigators that Culpepper was living with her mother, Mildred Culpepper, in San Bernardino. Despite the urgency of the situation, prosecution investigators did nothing to follow up this information until two days later, when an investigator obtained Culpepper's mother's address (apparently from Department of Motor Vehicle records)

and drove to her San Bernardino home. A woman at the house said Culpepper's mother was out but would return the next day. She said that Culpepper did not live there, and that she had no idea where Culpepper was. The investigator left a copy of a subpoena for Culpepper, but he did not return the next day, or ever, to speak to Culpepper's mother, nor did he attempt to find other ways to contact Culpepper's mother, such as at a work location or by telephone. Apart from consulting computerized information systems, the county jail, and the county hospital, the prosecution made no other efforts to locate Culpepper.

"On January 27, 1998, after a hearing at which the prosecution presented evidence of these facts, the trial court determined that the prosecution had exercised due diligence in attempting to locate Culpepper, and it ruled that the prosecution could use her former testimony in evidence against defendant." (*Cromer, supra,* 24 Cal.4th at pp. 903-904.)

Cromer concluded this factual recital by stating: '"We have said that the term 'due diligence' is 'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citations.] Relevant considerations include"' whether the search was timely begun '"[citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation]." (*Cromer, supra,* 24 Cal.4th at pp. 903-904.) *Cromer* concluded that the preliminary testimony of the witness was improperly admitted because the prosecution failed to demonstrate due diligence in attempting to locate the witness. (*Id.* at p. 904.)

We cannot conclude that the prosecution in this case engaged in "persevering application, untiring efforts in good earnest, efforts of a substantial character." In *Cromer*, the prosecution waited until two weeks or more before the then scheduled January 12 trial date before attempting to locate the missing witness. This was not enough. Here the prosecution made no effort until the last business day before the

trial was scheduled to start. Nothing was done until the Friday before a three-day weekend, with the trial then scheduled to start the following Tuesday (although it was trailed to Wednesday May 30, 2007).

Portillo was deported to El Salvador in September 2006, presumably a not unexpected event. But even if he had not been deported, what was the likelihood he would still live in the same Civic Center Drive apartment he occupied a year earlier? What was the probability that the flyer disseminated one business day before the trial was scheduled to start would have resulted in Portillo's arrest in time for him to testify at the trial? It took Wood less than a day to learn that Portillo had been deported. Had this been discovered a few weeks before the trial, efforts could have been made to obtain his return to this country and, if such efforts proved unsuccessful, the diligence requirement might have been satisfied. Furthermore, it is not unheard of that a deported felon returns to the United States. Again, the prosecution did not give itself enough time to permit an adequate investigation of his whereabouts.

And, although Portillo was subjected to fairly extensive cross-examination during the preliminary hearing, the type of cross-examination during such a proceeding does not necessarily encompass the same scope of cross-examination in which counsel would engage during a jury trial.

The Attorney General argues that, although Wood testified he did not start looking for Portillo until Friday May 25, "there is no evidence with regard to when the prosecutor actually began to look for Portillo." But the burden is on the prosecution to present evidence substantiating due diligence. (*People v. Smith* (2003) 30 Cal.4th 581, 610.) It there was such evidence, it should have been presented and we cannot now speculate that such evidence existed. And the only Court of Appeal cases cited by the Attorney General holding that a search began shortly before or during the trial is sufficient to satisfy the diligence requirement were all decided before *Cromer*. Further,

even during the single day the prosecution allowed itself to try to find Portillo, the search was, at best, perfunctory.

As pointed out by defendant, no effort was made to determine if Portillo's attorney had information about his whereabouts. No real search was made for friends and family. As defendant further notes: "The District Attorney's office also failed to explore several other potential leads. Indeed, the District Attorney's office had information that Portillo grew up on Durant Street and had lived in the area for 10 or 11 years. [Citations.] The [District Attorney's] office also knew that: (1) Portillo was a longtime member of the KPC gang; [citation] (2) he had lived with his mother on Baker Street; [citations] (3) he had a daughter and sister (who was married and had two children) who lived in Santa Ana; [citations] (4) he had been employed; [citation] and (5) he had gone to school or taken classes to get his high school diploma [citation]. None of these leads were explored." Even if not each of these leads constitute the kind of "obvious places" where inquiry would be required, the fact that none of these was tried illustrates the lack of seriousness in the search efforts. The prosecution apparently assumed that Portillo would not be available and went through a last-minute, perfunctory search in an attempt to make a showing of due diligence. This was not enough.

2. The error was not harmless.

The Attorney General contends that the error in permitting admission of the hearsay evidence was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 LEd.2d 705]. In support of this contention, the Attorney General relies in part on defendant's own testimony. But the fact that defendant decided to take the stand may well have been motivated by his need to contradict Portillo's testimony that he had confessed to being the shooter. We cannot speculate that he would have testified without Portillo's recorded testimony. And, absent the statement defendant told the witness that, after identifying the victim as being from a competing

gang, "he got off the car and shot them once or twice, and that was it[,]" defendant may well have decided not to take the stand. Portillo also characterized defendant's attitude after the murder as "he was just celebrating that fact that he's - - he's doing a lot for the - - so-called neighborhood."

We cannot conclude that the recorded testimony, the only evidence identifying defendant as the shooter, was harmless beyond a reasonable doubt. Although, as the Attorney General points out, defendant could have been found guilty under an aider and abettor theory, even if he was not the shooter, we are not persuaded beyond a reasonable doubt that this is what the jury would necessarily have concluded.

DISPOSITION

The judgment is reversed and the case is remanded to the trial court for a new trial or such other proceedings as the court deems appropriate.

RYLAARSDAM, ACTING P. J.

I CONCUR:

MOORE, J.

ARONSON, J., Dissenting.

I respectfully dissent. The evidence shows federal authorities deported Portillo to El Salvador in September 2006. Efforts to locate the witness in El Salvador proved fruitless, but even if authorities had located him, the prosecution lacked the means to compel his attendance because no extradition treaty exists between El Salvador and the United States. I agree with the majority deported felons may return to the United States, but the facts here do not support this assumption because the witness faced several outstanding warrants for his arrest. (*People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1640, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [witness had strong motive to avoid jurisdiction because of an outstanding warrant].)

I do not quarrel with the majority's conclusion the prosecution waited too long to begin its efforts to locate the witness. But once begun, the prosecution took reasonable steps to locate the witness by checking the witness's last known address and trying to locate the witness's family and friends. The prosecution's investigator also contacted law enforcement to learn if any leads existed that would assist the prosecution's search. True, as the majority points out, the investigator could have done more, such as contact Portillo's former attorney. But these additional efforts were not likely to succeed given Portillo's incentive to stay away from a jurisdiction seeking to incarcerate him. Simply put, further efforts to locate the witness would have been futile. As our Supreme Court has observed, the prosecution need not engage in futile acts to locate an absent witness likely beyond the court's jurisdiction. (*People v. Smith* (2003) 30 Cal.4th 581, 611 [further efforts to procure witness's attendance would have been futile because

witness returned to Japan].) Consequently, I conclude the trial court did not err in admitting Portillo's preliminary hearing testimony.

ARONSON, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Honorio Moreno Herrera**

No.: **S** _____

I declare:

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

On April 7, 2009, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 7, 2009, at San Diego, California.

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Declarant

Signature