K

ORIGINAL

In the Supreme Court of the State of California

Court of Appeal Fourth District
FILED
SEP 1 2009
DEPUTY

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **HONORIO MORENO HERRERA,** **Defendant and Appellant.**	Case No. S171895

SUPREME COURT
FILED
SEP 18 2009
Frederick K. Ohlrich Clerk
DEPUTY

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

RESPONDENT'S OPENING BRIEF ON THE MERITS

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
KELLEY JOHNSON
Deputy Attorney General
State Bar No. 216387
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-3155
Fax: (619) 645-2581
Email: Kelley.Johnson@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

Question presented 1

Introduction 1

Statement of the case 3

Statement of facts 6

A. Prosecution evidence 6

B. Defense evidence 7

Argument 8

I. A foreign citizen witness is unavailable under Evidence Code section 240, subdivision (a)(4), if he is in a foreign country with which there is no treaty of cooperation; alternatively, the witness is also unavailable under section 240, subdivision (a)(5), if he has been deported and further action to procure his attendance would be futile 8

A. General legal principles 9

1. The Confrontation Clause And Hearsay 9

2. The California Evidence Code 14

B. Portillo was unavailable under Evidence Code section 240, subdivision (a)(4) 16

C. Portillo Was Unavailable Under Evidence Code Section 240, subdivision (a)(5) 27

Conclusion 40

TABLE OF AUTHORITIES

Page

CASES

Barber v. Page
(1968) 390 U.S. 719 [88 S.Ct. 1318, 20 L.Ed.2d 255] .... passim

Brown v. Kelly Broadcasting Co.
(1989) 48 Cal.3d 711 .... 17, 18

California v. Green
(1970) 399 U.S. 149 [90 S.Ct. 1930, 26 L.Ed.2d 489] 10, 11

Cervantes-Ascencio v. INS
(2nd Cir. 2003) 326 F.3d 83 30

Chong v. District Director INS
(3rd Cir. 2001) 264 F.3d 378 30

Commonwealth v. Wayne
(Pa. 1998) 720 A.2d 456 34

Cordovi v. State
(Md.Ct.Spec.App. 1985) 492 A.2d 1328 13

Crawford v. Washington
(2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed. 2d 177] 10, 11, 22

Government of the Virgin Islands v. Aquino
(3rd Cir. 1967) 378 F.2d 540 .... 22, 23, 24

Mancusi v. Stubbs
(1972) 408 U.S. 204 [92 S.Ct. 2308, 33 L.Ed.2d 293] .... passim

Maryland v. Craig
(1990) 497 U.S. 836 [110 S.Ct. 3157, 111 L.Ed.2d 666] 9

Morgan v. Commonwealth
(2007) 50 Va.App.369 38

Ohio v. Roberts
(1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597] .... passim

People v. Banks
(1966) 242 Cal.App.2d 373 38

People v. Benjamin
(1970) 3 Cal.App.3d 687 ....34, 35

People v. Benjamin
(1970) Cal.App.3d 696-697 ....34, 35

People v. Carter
(2005) 36 Cal.4th 1114 11

People v. Cavazos
(1944) 25 Cal.2d 198 35

People v. Cochran
(2002) 28 Cal.4th 396 ....17, 18

People v. Cromer
(2001) 24 Cal.4th 889 ....passim

People v. Cummings
(2003) 4 Cal.4th 1233 ....36, 37

People v. Denson
(1986) 178 Cal.App.3d 788 ....16, 20, 29

People v. Diaz
(2002) 95 Cal.App.4th 695 29

People v. Enriquez
(1977) 19 Cal.3d 221, 235 ....10, 11, 15, 16

People v. Garcia
(1999) 21 Cal.4th 1 18

People v. Gardeley
(1996) 14 Cal.4th 605 17

People v. Guiterrez
(1991) 232 Cal.App.3d 1624 38

People v. Horn
(1964) 225 Cal.App.2d 1 29

People v. Hovey
(1988) 44 Cal.3d 543 34

People v. Linder
(1971) 5 Cal.3d 342 ....29, 34, 35, 36

People v. Lopez
(1998) 64 Cal.App.4th 1122 ....35, 38

People v. Mendieta
(1986) 185 Cal.App.3d 1032 33

People v. Murphy,
(2001) 25 Cal.4th 136 18

People v. O'Shaughnessy
(1933) 135 Cal.App. 104 31

People v. Ogen
(1985) 168 Cal.App.3d 611 15

People v. Pieters
(1991) 52 Cal.3d 894 17

People v. Rodriguez
(1971) 18 Cal.App.3d 793 34

People v. Sandoval
(2001) 87 Cal.App.4th 1425 ....25, 26, 27

People v. Seijas
(2005) 36 Cal.4th 291 11

People v. Smith
(1971) 22 Cal.App.3d 25 34

People v. Smith
(2003) 30 Cal.4th 581 ....passim

People v. St. Germain
(1982) 138 Cal.App.3d 507 ....16, 17, 20

People v. Tewksbury
(1976) 15 Cal.3d 953 37

People v. Ware
(1978) 78 Cal.App.3d 822 ....16, 19, 20, 22

People v. Wilson
(2005) 36 Cal.4th 309 ....29, 37

People v. Wise
(1994) 25 Cal.App.4th 339 .... 36, 37

Pointer v. Texas
(1965) 380 U.S. 400 [85 S.Ct. 1065, 13 L.Ed.2d 923] 9

Rice v. Janovich
(Wash. 1987) 742 P.2d 1230 22

State v. Alvarez
(Wash. 1986) 726 P.2d 43 13

State v. Ford
(Kan. 1972) 502 P.2d 786 34

State v. Montano
(Ariz. 1993) 65 P.3d 61 13

State v. Nelson
(La. 1972) 259 So. 2d 46 34

United States v. Kehm
(7th Cir. 1986) 799 F.2d 354 38

STATUTES

8 U.S.C.
§ 1182(a) 30
§ 1182(a)(9)(A)(ii)(I) 30, 37
§ 1182(a)(9)(B)(i)(II) 30, 37
§ 1229a 30

28 U.S.C. § 1783 29
§ 2241(c)(5) 12

Evidence Code
§ 240 .... 1, 5, 6, 20
§ 240, subd. (a) 15
§ 240, subd. (a)(4) .... passim
§ 240, subd. (a)(5) .... passim
§ 405, subd. (a) 37
§ 451, subd. (a) 4
§ 452, subd. (c) 4
§ 459, subd. (a) 4
§ 1290 .... 2, 15
§ 1291 2

Pen. Code
§ 186.22, subd. (a) 5
§ 186.22, subd. (b) 5
§ 187 5
§ 190.2, subd. (a)(22) 5
§ 1334 20
§ 1334 .... 24, 29
§ 12022.53, subd. (d) 5
§ 12022.53, subd. (e)(1) 5

CONSTITUTIONAL PROVISIONS

United States Constitution
Sixth Amendment 5, 9, 17, 22
Fourteenth Amendment 9

California Constitution
art. I, § 15 9

COURT RULES

Federal Rules of Criminal Procedure
Rule 17(e) 24

OTHER AUTHORITIES

Treaty of Extradition arts. II, VIII, U.S. – El Sal., Apr. 18, 1911, 37 Stat. 1521 .... 4, 21

QUESTION 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?

INTRODUCTION

On Father's Day 2005, appellant and two fellow members of the Krazy Proud Criminals (KPC) gang drove into rival gang territory and shot and killed Erick Peralta, a father of three with no gang ties, as Peralta walked with his cousin to a convenience store. Three months later, Jose Portillo, a former KPC member, was arrested for evading police. Portillo told police that appellant had admitted to him that he had shot and killed Peralta.

At appellant's preliminary hearing, Portillo, who was the only person who identified appellant as the shooter, testified that in June 2005, appellant admitted to him that he was the shooter who had killed Peralta.

At a pretrial hearing on the prosecutor's motion to admit Portillo's preliminary hearing testimony, a district attorney investigator testified that while attempting to locate Portillo before trial, he discovered Portillo had been deported to El Salvador and could not be extradited to the United States for the trial. The trial court court found the prosecution had exercised due diligence under Evidence Code section 240 in attempting to locate Portillo and allowed the prosecution to read Portillo's preliminary hearing testimony to the jury. The jury convicted appellant of first degree murder and found true several enhancement allegations and a special circumstance allegation.

The trial court correctly found Portillo was unavailable and his former testimony therefore admissible. Evidence Code section 240, subdivision

(a)(4), allows the introduction of former testimony when competent evidence suggests the witness is out of the country and there is no procedure in place to compel his attendance at a trial in this country, i.e., the witness is unavailable if the prosecution establishes the witness cannot be procured by the court's process. Equally, Evidence Code section 240, subdivision (a)(5), allows the introduction of former testimony if the prosecutor exercises due diligence but cannot procure the absent witness for trial.

Despite the applicability of these two subdivisions under the facts of the present case, the Court of Appeal reversed the judgment in a 2-1 opinion. The appellate court concluded the trial court erred in finding the prosecution acted with due diligence, and therefore that Portillo was unavailable to testify. However, in reaching this conclusion, the Court of Appeal failed to consider the unambiguous and controlling language of Evidence Code section 240, subdivision (a)(4). In addition, by concluding the prosecution did not exercise due diligence under Evidence Code section 240, subdivision (a)(5), the appellate court focused on the timeliness of the prosecutor's actions and failed to consider the totality of the prosecution's search efforts. Finally, the Court of Appeal failed to appreciate that the law does not require the prosecution to undertake futile acts.

The Court of Appeal's reversal of the judgment is based on an untenable interpretation of the requirements for establishing unavailability. If not reversed, the appellate court's decision in this case would undermine the intent of the Legislature to provide for six separate but equally necessary means of allowing the proponent of former testimony to show the unavailability of a witness so as to permit the introduction of the former testimony under Evidence Code sections 1290 and 1291, and would increase the expense and difficulty of criminal prosecutions by requiring actions not reasonably likely to protect a defendant's right to confrontation.

STATEMENT OF THE CASE

Appellant shot and killed Erick Peralta in June 2005. (1 RT 60, 65-67, 70-71.) At the June 19, 2006, preliminary hearing, Jose Portillo, a former KPC gang member, testified that in June 2005, appellant admitted to him that he was the shooter who had killed Peralta. (1 RT 84-87, 92, 135-136, 138.)

At a pretrial hearing on May 30, 2007, the court considered the prosecution's motion to admit Portillo's preliminary hearing testimony. (1 CT 233; 1 RT 12, 38.) The prosecutor called District Attorney Investigator Ed Wood to testify to the prosecution's 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. Wood discovered that Portillo had two "no bail" warrants for his arrest. Wood then contacted Santa Ana Gang Detective Rick Ashby to request that Ashby distribute a "wanted flyer" for Portillo 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 had garnered no leads. (1 RT 14-15.)

Wood continued his search by going to Portillo's last known address in Santa Ana. When a woman answered the door, Wood showed her a photograph of Portillo but she did not recognize him. Wood also attempted to make contact with Portillo's family and friends in the Santa Ana area by calling two telephone numbers he found on Portillo's arrest record. When Wood was unable to contact Portillo's relatives or friends, he asked Detective Ashby to continue the search. (1 RT 15-16.) When none of these efforts proved successful, Wood spoke with a special agent from Homeland Security who informed him that Portillo had been released from state custody on June 24, 2006, was placed into federal custody within a few days, and was deported to El Salvador on September 11, 2006. (1 RT 16-

18, 21.) Wood requested that local authorities attempt to locate Portillo in El Salvador. He also sent the information to Interpol in El Salvador. (1 RT 24.) Wood learned, however, that even if Portillo was located in El Salvador, he could not be extradited to the United States for the trial.[1] (1 RT 19-20.)

The trial court accepted the prosecution's offer of proof that in April 2007, the Orange County Probation Department issued a warrant for Portillo's arrest for failing to report to probation upon his release from custody. (1 RT 22-23, 25-26.) The trial court explained that Portillo was in custody during the preliminary hearing and,

> it would have been presumably difficult to keep the gentleman in protective custody for almost a year to this trial. [¶] There certainly appears to be due diligence on behalf of the People in attempting to have his presence here today. I don't know what further efforts could be done . . . to secure his appearance here.

(1 RT 27.)

The court noted that Portillo "certainly was deported," and explained,

> I think it would likely 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 . . . with regard to the relationship between El Salvador and this country with regard to extradition.

(1 RT 27.)

---

[1] In a motion being filed concurrently with this brief, Respondent respectfully requests this Court to take judicial notice of the extradition treaty between the United States and El Salvador that existed at the time of appellant's trial. (Evid. Code, §§ 451, subd. (a); 452, subd. (c); 459, subd. (a).) Pursuant to the U.S. – El Salvador treaty, El Salvador would not extradite Portillo to the United States. (Treaty of Extradition arts. II, VIII, U.S. – El Sal., Apr. 18, 1911, 37 Stat. 1521.) Although the treaty has subsequently been amended, the amendments do not affect this case.

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.)

Trial began on June 4, 2007. (1 RT 38.) Portillo's former testimony was read to the jury. (1 RT 80-161.) On June 6, 2007, an Orange County jury convicted appellant of the first degree murder of Erick Peralta. (Pen. Code, § 187.) The jury found that appellant vicariously discharged a firearm causing death (Pen. Code, § 12022.53, subds. (d), (e)(1)), and that he committed the crime for the benefit of, at the direction of, or in association with a criminal street gang (Pen. Code, § 186.22, subd. (b)). The jury also convicted appellant of street terrorism (Pen. Code, § 186.22, subd. (a)), and found true the special circumstance allegation of murder for criminal street gang purposes (Pen. Code, § 190.2, subd. (a)(22)). (1 CT 294-296; 2 CT 306-307.) Appellant was sentenced to prison for life without the possibility of parole. (2 RT 449-450.)

On appeal, appellant claimed the trial court prejudicially erred in finding the prosecution had exercised due diligence in seeking Portillo's presence under Evidence Code[2] section 240, 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 opinion, the Court of Appeal agreed with appellant and reversed the judgment on the ground that the trial court erred in finding that the prosecution exercised due diligence. (Slip opn. at 4-10.) According to the appellate court, the prosecution failed to engage in "persevering application, untiring efforts in good earnest, efforts of a substantial character." (Slip opn. at 7, citing *People v. Cromer* (2001) 24 Cal.4th 889.)

---

[2] Unless otherwise indicated, all further statutory references are to the Evidence Code.

The Court of Appeal recounted that Portillo had been deported to El Salvador in September 2006 but characterized Portillo's deportation as "presumably a not unexpected event." (Slip opn. at 8.) The Court of Appeal stated that the prosecution did not do "enough" to secure Portillo's presence and concluded that 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." (Slip opn. at 9.)

This Court granted the People's petition for review to decide the following issue: 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 FACTS

A. Prosecution Evidence

On June 18, 2005, Santa Ana Police Officers contacted appellant, a member of the criminal street gang known as "Krazy Proud Criminals" (KPC), at a park in Santa Ana. Appellant was with five other documented KPC gang members. (1 RT 199-201, 231.)

The next day, Father's Day 2005, appellant and two fellow KPC gang members drove into rival gang territory. They saw Erick Peralta and Efren Enriquez walking to a 7-Eleven store. The car appellant was in stopped near the two men; one man got out of the car and asked Peralta and Enriquez where they were from. Enriquez shrugged his shoulders, said "What's up?" and continued walking with Peralta. A second man then got out of the car and shot and killed Peralta as someone yelled "KPC." The assailants returned to the car and left. (1 RT 60, 66-68, 70-72, 202, 270.)

The night of the shooting, Santa Ana Police Detective Richard Ashby showed Enriquez photographs of active KPC gang members, but Enriquez

could not identify anyone from the photographs. At trial, Enriquez did not identify appellant as the shooter, nor did he identify appellant as the other man who exited the car that day. (1 RT 64-75, 162.)

On September 17 or 18, 2005, Jose Portillo was arrested for evading a police officer. (1 RT 115, 121, 162-163.) Appellant was in the car with Portillo at the time of the arrest. (1 RT 84, 89, 120-121.) On September 19, 2005, Portillo told police that in June 2005, appellant approached him on the street and began bragging about his role in the murder of a rival gang member. (1 RT 87, 92, 135-136, 138.)

On November 19, 2005, Detective Ashby interviewed appellant. (1 RT 166-169.) At first, appellant denied any involvement in the murder. Appellant eventually admitted to being present at the murder; however, he denied being the shooter. (1 RT 170-176.)

A gang expert testified the murder was committed for the benefit of the KPC gang. (1 RT 202-203.)

B. Defense Evidence

Appellant testified and admitted getting out of the car and standing on the street during the shooting. Appellant denied being the shooter and refused to provide the name of the actual gunman. (1 RT 227, 240-246.) Appellant denied that he was a member of the KPC gang, and that he confessed to Jose Portillo, who was a KPC gang member. (1 RT 231-233, 234-237.) Appellant claimed he had smoked marijuana on the day of the murder, and was "stoned" at the time of the shooting. (1 RT 240-241.)

Appellant's father testified that appellant was a straight "A" student and that he did not belong to a gang. (2 RT 296, 298-300, 304.)

ARGUMENT

I. A FOREIGN CITIZEN WITNESS IS UNAVAILABLE UNDER EVIDENCE CODE SECTION 240, SUBDIVISION (A)(4), IF HE IS IN A FOREIGN COUNTRY WITH WHICH THERE IS NO TREATY OF COOPERATION; ALTERNATIVELY, THE WITNESS IS ALSO UNAVAILABLE UNDER SECTION 240, SUBDIVISION (A)(5), IF HE HAS BEEN DEPORTED AND FURTHER ACTION TO PROCURE HIS ATTENDANCE WOULD BE FUTILE

In this case, the prosecution established Portillo's unavailability under both subdivisions (a)(4) and (a)(5). First, the prosecution demonstrated Portillo was unavailable under section 240, subdivision (a)(4), by showing that Portillo was in El Salvador and no process existed by which the court could compel his attendance. Pursuant to subdivision (a)(4), once the prosecution shows a witness is out of the country and beyond the reach of the court's process, the prosecution has established that the witness is unavailable and the witness's prior testimony may be admitted; the prosecution need not show more. This is consistent with the plain language of subdivision (a)(4), which reveals that in contrast to subdivision (a)(5), subdivision (a)(4) does not contain a reasonable diligence requirement. This reading of subdivision (a)(4) is also consistent with the United States Supreme Court's decision in *Mancusi v. Stubbs* (1972) 408 U.S. 204 [92 S.Ct. 2308, 33 L.Ed.2d 293] (*Mancusi*), and satisfies the historical practice of the confrontation clause. Moreover, this interpretation of subdivision (a)(4) provides a historical basis for drawing a bright-line rule for prosecutors when attempting to establish the unavailability of a witness.

Alternatively, the prosecution also demonstrated Portillo's unavailability under section 240, subdivision (a)(5), by presenting evidence which showed that by exercising reasonable diligence, the prosecution discovered Portillo had been deported to El Salvador. Once the prosecution learned there was no treaty or agreement by which the court could compel

Portillo's attendance at trial, the prosecution was not required to undertake further efforts to locate Portillo because they would have been futile. By concluding that the trial court erred in finding Portillo unavailable under section 240, subdivision (a)(5), the Court of Appeal erroneously relied on *Cromer* to conclude that under the circumstances of the present case, the prosecution did not give itself enough time to conduct an adequate investigation. Furthermore, the Court of Appeal failed to consider the totality of the prosecution's search efforts and erroneously focused instead, on the timeliness of the search. Finally, the appellate court failed to appreciate that further efforts to locate and produce Portillo would have been futile and therefore were not required.

A. General Legal Principles

A review of the constitutional and statutory law indicates that the Court of Appeal erroneously engrafted a due diligence requirement into subdivision (a)(4) and misapplied subdivision (a)(5) by concluding that the prosecution failed to exercise due diligence under the facts of this case.

1. The Confrontation Clause And Hearsay

The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15.)[3] However, the Supreme Court has never held that the confrontation clause "guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial." (*Maryland v. Craig* (1990) 497 U.S. 836, 844 [110 S.Ct. 3157, 111 L.Ed.2d 666].)

---

[3] The Sixth Amendment applies to the States through the Fourteenth Amendment. (*Pointer v. Texas* (1965) 380 U.S. 400, 403 [85 S.Ct. 1065, 13 L.Ed.2d 923].)

As explained by the Supreme Court in *Barber v. Page* (1968) 390 U.S. 719 [88 S.Ct. 1318, 20 L.Ed.2d 255](*Barber*):

> [T]here has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant.

(*Id.* at p. 722; *People v. Enriquez* (1977) 19 Cal.3d 221, 235, overruled on other grounds in *People v. Cromer*, *supra*, 24 Cal.4th at p. 889; see also *California v. Green* (1970) 399 U.S. 149, 165–168 [90 S.Ct. 1930, 26 L.Ed.2d 489] [the confrontation clause is not violated by admitting a declarant's preliminary hearing testimony, as long as the declarant is testifying as a witness and subject to full and effective cross examination].)

In *Crawford v. Washington* (2004) 541 U.S. 36, 42 [124 S.Ct. 1354, 158 L.Ed. 2d 177] (*Crawford*), the high court stated that a prior opportunity to cross-examine a witness was a necessary requirement to establish the admissibility of his testimonial statements, "and not merely one of several ways to establish reliability." (*Crawford*, *supra*, 541 U.S. at pp. 55-56.) Indeed, *Crawford* made clear that reliability is not part of the inquiry under the confrontation clause:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

(*Crawford*, *supra*, 541 U.S. at p. 61.)

Courts have routinely allowed admission of the preliminary hearing testimony of an unavailable witness, and although the United States Supreme Court's decision in *Crawford* changed the law of confrontation in

some respects, it left these principles in tact. (*People v. Seijas* (2005) 36 Cal.4th 291, 303; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1173-1174.)

> The lengths to which the prosecution must go to produce a witness before it may offer evidence of an extra-judicial declaration is a question of reasonableness.

(*California v. Green*, *supra*, 399 U.S. at p. 189, fn.22 (Harlan, J., concurring, citing *Barber*, *supra*, 390 U.S. at p. 719). Accordingly, it has been said that for purposes of the exception to the confrontation requirement, a witness is not unavailable "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." (*Barber*, *supra*, 390 U.S. at pp. 724-725, citing *Ohio v. Roberts* (1980) 448 U.S. 56, 74 [100 S.Ct. 2531, 65 L.Ed.2d 597], overruled on other grounds by *Crawford*, *supra*, 541 U.S. at p. 60; accord *Mancusi*, *supra*, 408 U.S. at p. 204; see also *People v. Enriquez*, *supra*, 19 Cal.3d at p. 235.) The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. (*Ohio v. Roberts*, *supra*, 448 U.S. at p. 74.)

In *Barber*, *supra*, 390 U.S. at page 719, an Oklahoma prosecutor made absolutely no effort to obtain the presence of a witness known to be incarcerated in a federal prison in Texas. The United States Supreme Court recounted that

> various courts and commentators have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation on the theory that 'it is impossible to compel his attendance, because the process of the trial Court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless.'

(*Id*. at p. 723.)

However, the *Barber* Court then quashed that notion and explained that "increased cooperation between the States" and "between the States

and the Federal Government has largely deprived it of any continuing validity in the criminal law." (*Barber*, *supra*, 390 U.S. at p. 723.) As the *Barber* court pointed out, title 28 of United States Code Section 2241(c)(5), gives federal courts the power to issue writs of habeas corpus ad testificandum at the request of state prosecutorial authorities and the United States Bureau of Prisons would permit federal prisoners to testify in the state criminal proceedings pursuant to writs of habeas corpus ad testificandum issued out of state courts. (*Id.* at 724.) The *Barber* court explained that a witness is not "unavailable" for purposes of the exception to the confrontation requirement "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." (*Id.* at pp. 724-725.) Because a federal statute empowered federal courts to issue appropriate writs at the request of state authorities and federal prison policy supported the procedure, the *Barber* court concluded that the state failed to meet its good faith obligation of establishing unavailability. (*Id.* at pp. 723-725.)

Four years later, in *Mancusi*, *supra*, 408 U.S. at page 204, the United States Supreme Court addressed the issue of unavailability as it pertained to an out-of-the-country witness. In *Mancusi*, the defendant sought federal habeas corpus review of his 1964 murder conviction nine years after his state court trial. By that time, Holm, a trial witness, had left the United States and moved to Sweden. (*Id.* at p. 209.) Prior to a hearing on the habeas petition, the prosecutor attempted to subpoena Holm at his last known address. The Court found that Holm was unavailable because the State of Tennessee was powerless to compel his attendance: the witness was out of the country and beyond the compulsory processes of the court. (*Id.* at pp. 212-213.)

The *Mancusi* court distinguished its facts from those in *Barber* by explaining,

> The Uniform Act to secure the attendance of witnesses from without a State, the availability of federal writs of habeas corpus ad testificandum, and the established practice of the United States Bureau of Prisons to honor state writs of habeas corpus ad testificandum, all supported the court's conclusion in *Barber* that the State had not met its obligations to make a good-faith effort to obtain the presence of the witness merely by showing that he was beyond the boundaries of the prosecuting state. There have been, however, no corresponding developments between this country and foreign nations. Upon discovering that Holm resided in a foreign nation, the State of Tennessee, so far as this record shows, was powerless to compel his attendance at the second trial, either through its own process or through established procedures depending on the voluntary assistance of another government.

(*Mancusi, supra*, 408 U.S. at p. 212.)

Thus, the *Mancusi* court held that because the predicate of unavailability was sufficiently stronger than that in *Barber*, the federal habeas court was not warranted in upsetting the state trial court's determination that Holm was unavailable. (*Mancusi, supra*, 408 U.S. at pp. 212-213.) Accordingly, *Mancusi* held the use of the prior testimony of a witness who is in another country did not violate the confrontation clause.

Cases from sister states have relied on *Mancusi* and held likewise. (See, i.e., *State v. Montano* (Ariz. 1993) 65 P.3d 61, 68-69 [witness in Mexico; adequate opportunity to cross-examine provided at preliminary hearing, thus preliminary hearing testimony properly admitted]; *State v. Alvarez* (Wash. 1986) 726 P.2d 43, 47 [former testimony properly admitted because witness in Mexico at time of trial and therefore unavailable "in constitutional sense"]; *Cordovi v. State* (Md.Ct.Spec.App. 1985) 492 A.2d 1328, 1331-1332 [preliminary hearing testimony properly admitted because "efforts to pinpoint" whereabouts of witness in Columbia at time of trial "would have been futile and hence unnecessary"].)

In *Ohio v. Roberts, supra*, 448 U.S. at page 56, the Supreme Court reiterated that a witness is not unavailable for purposes of the exception to the confrontation requirement "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." (*Id.* at p. 74, citing *Barber, supra*, 390 U.S. at pp. 724-725.) The court acknowledged that "although . . . the Court's prior cases provide no further refinement of this statement of the rule, certain general propositions safely emerge." (*Ohio v. Roberts, supra*, 448 U.S. at p. 74.) Among these propositions is the rule that the law "does not require the doing of a futile act." (*Ibid.*) As the court explained,

> if no possibility of procuring the witness exists (as, for example, the witness' intervening death), 'good faith' demands nothing of the prosecution.

(*Ibid.*)

The court emphasized, however:

> if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. 'The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.'

(*Ohio v. Roberts, supra*, 448 U.S. at p. 94.)

As the *Roberts* Court explained, the "ultimate question" is whether the witness is unavailable "despite good-faith efforts undertaken prior to trial to locate and present that witness." (*Ibid.*)

2. The California Evidence Code

Operative January 1, 1967, the California Legislature enacted the Evidence Code in an effort to consolidate and revise the law relating to evidence.

> This code establishes the law of this state respecting the subject to which it relates, and its provisions are to be liberally

construed with a view to effecting its objects and promoting justice.

(§ 2.)

Pursuant to California Evidence Code sections 1290 and 1291, former testimony given under oath is not inadmissible under the hearsay rule as long as the declarant is unavailable and the party against whom the former testimony is offered had the right and opportunity to cross-examine the declarant. (*People v. Ogen* (1985) 168 Cal.App.3d 611, 616.) The proponent of the evidence has the burden of proof of unavailability and the showing must be made by competent evidence. (*People v. Smith* (2003) 30 Cal.4th 581, 609; *People v. Enriquez*, *supra*, 19 Cal.3d at p. 235.)

Section 240, subdivision (a), which defines when a witness is unavailable, currently reads as follows:

> (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:
>
> (1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
>
> (2) Disqualified from testifying to the matter.
>
> (3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.
>
> (4) Absent from the hearing and the court is unable to compel his or her attendance by its process.
>
> (5) 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.
>
> (6) The declarant is present at the hearing and refuses to testify concerning the subject matter of the declarant's statement despite an order from the court to do so.

(Evid. Code, § 240, subd. (a).)

As noted above, the Constitution mandates that before a witness can be found unavailable, the prosecution must "have made a good-faith effort to obtain his presence at trial." (*Barber*, *supra*, 390 U.S. at p. 725.) Section 240 contains a similar requirement and therefore, "the constitutional and statutory requirements are 'in harmony.'" (*People v. Smith*, *supra*, 30 Cal.4th at p. 609; *People v. Enriquez*, *supra*, 19 Cal.3d at p. 235)

Applicable here are subdivisions (a)(4) and (a)(5), which provide "two closely related but slightly different ways in which a person may be shown to be unavailable." (*People v. Smith*, *supra*, 30 Cal.4th at p. 610.)

B. Portillo Was Unavailable Under Evidence Code Section 240, Subdivision (a)(4)

Pursuant to section 240, subdivision (a)(4), an absent witness is unavailable if "the court is unable to compel his or her attendance by its process." This subdivision is applicable 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; *People v. St. Germain* (1982) 138 Cal.App.3d 507, 517-518; see also *People v. Smith*, *supra*, 30 Cal.4th at p. 610; *People v. Ware* (1978) 78 Cal.App.3d 822, 833-834.)

Under subdivision (a)(4), the prosecution need not show that it used reasonable diligence to secure the witness's presence. (*People v. Denson*, *supra*, 178 Cal.App.3d at p. 793; *People v. Ware*, *supra,* 78 Cal.App.3d at pp. 829-838; see also *People v. Smith*, *supra*, 30 Cal.4th at p. 610.) For example, in *People v. St. Germain*, *supra*, 138 Cal.App.3d at p. 507, the court held the trial court properly admitted the preliminary hearing testimony of Kowsoleea, who was one of the defendant's victims and was a resident of Holland. (*Id.* at p. 517.) When the prosecutor contacted Kowsoleea about returning to testify, he refused and claimed it would be a

hardship for him to do so. (*People v. St. Germain*, *supra*, 138 Cal.App.3d at p. 516.) The Court of Appeal determined that subdivision (a)(5) had "no application to" Kowsoleea because "there was no 'court process' which could compel the attendance of a nonresident." (*People v. St. Germain*, *supra*, 138 Cal.App.3d at p. 517.) Instead, subdivision (a)(4) was applicable because that subdivision defined unavailability as "the declarant is: [absent] from the hearing and the court is unable to compel his attendance by its process." (*Id.* at pp. 517-518.) The *St. Germain* court concluded that by showing Kowsoleea was a nonresident of the United States, a citizen of another country and that there were no treaty provisions nor any compact with the foreign country, the prosecutor met his burden and "[n]othing more was required either by the Evidence Code or the Sixth Amendment." (*Id.* at p. 518, citing *Mancusi*, *supra*, 408 U.S. at pp. 211-212; *People v. Ware*, *supra*, 78 Cal.App.3d at p. 833.)

The plain language of subdivision (a)(4) also indicates that the Legislature did not intend to include a reasonable diligence requirement in that subdivision. As this Court has observed, "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law." (*People v. Pieters* (1991) 52 Cal.3d 894, 898; see also *People v. Gardeley* (1996) 14 Cal.4th 605, 621.) In approaching this task, a court "must first look at the plain and common sense meaning of the statute because it is generally the most reliable indicator of legislative intent and purpose." (*People v. Cochran* (2002) 28 Cal.4th 396, 400; see also *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724, 727-728 [in adopting legislation, the Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing on them].)

If there is "no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said," and it is not necessary "to resort to legislative history to determine the statute's true meaning." (*People v. Cochran*, *supra*, 28 Cal.4th at pp. 400-401.) The words must be considered "'in context, keeping in mind the nature and obvious purpose of the statute.'" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) A court must take the language of a statute

> as it was passed into law, and must, if possible without doing violence to the language and spirit of the law, interpret it so as to harmonize and give effect to all its provisions.

(*People v. Garcia* (1999) 21 Cal.4th 1, 14.)

By its clear language, subdivision (a)(4) does not require reasonable diligence because that subdivision contains no reference to such a requirement. In contrast, the plain language of subdivision (a)(5) expressly requires reasonable diligence. Had the Legislature intended to impose a reasonable diligence requirement in subdivision (a)(4), it could have easily done so as evidenced by its inclusion in subdivision (a)(5). (See *Brown v. Kelly Broadcasting Co.*, *supra*, 48 Cal.3d at p. 725.) Thus, nothing in the plain language of subdivision (a)(4) indicates the Legislature intended to include a reasonable diligence requirement in that subdivision.

In *People v. Smith*, *supra*, 30 Cal.4th at pages 609-610, this Court specifically distinguished between subdivisions (a)(4) and (a)(5) in this regard. In *Smith*, the prosecutor sought to admit the former testimony of Fukumoto, a Japanese national who had returned to Japan shortly after he testified at *Smith's* preliminary hearing. (*Id.* at pp. 609-611.) The trial court had found that because Fukumoto was "a resident of the country of Japan," he was "not subject to the process of this court to compel his attendance" pursuant to section 240, subdivision (a)(4). (*People v. Smith*,

supra, 30 Cal.4th at p. 610.) This Court explained that the prosecution could have established Fukumoto's unavailability 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, subds. (a)(4) & (5); italics added.)

The defendant in *Smith* did not dispute that if Fukumoto was in Japan he would have been unavailable. Instead, the defendant claimed that because the prosecution used hearsay evidence to show that Fukumoto was in Japan, there was no competent evidence to establish Fukumoto's unavailability. (*Id.* at p. 609.) 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." (*Id.* at p. 610.) Thus, this Court analyzed Fukumoto's unavailability under subdivision (a)(5), and explained that subdivision (a)(5) provided 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.*) By making this distinction in *Smith*, this Court implicitly reiterated that once the evidence reasonably indicates the witness is beyond the court's process, the proponent of the absent witness's testimony is not required to demonstrate further diligence under subdivision (a)(4).

Other California appellate court decisions also support the conclusion that subdivision (a)(4) does not require the prosecution to demonstrate due diligence when seeking to introduce the former testimony of a witness who is beyond the process of the court. For example, in *People v. Ware*, *supra*, 78 Cal.App.3d at p. 822, a sexual assault victim testified at the defendant's preliminary hearing but then returned to her home in Spain. (*Id.* at p. 827.)

The prosecution made no attempt to have the witness return to the United States to testify at trial, even though the prosecutor had the witness's telephone number and address in Spain. (*People v. Smith*, *supra*, 30 Cal.4th at p. 829.) Noting that subdivision (a)(4) contained no due diligence requirement, the *Ware* court compared its factual situation to that in *Mancusi* and concluded the trial court was correct to find the witness unavailable under subdivision (a)(4) "since there were no available means to compel" the absent witness's attendance. (*People v. Ware*, *supra*, 78 Cal.App.at pp. 837-838.)

Similarly, in *People v. Denson*, *supra*, 178 Cal.App.3d at page 788, the witness returned to England after she provided video-taped testimony at the defendant's preliminary hearing. (*Id.* at pp. 790-791.) In concluding that the trial court correctly found the witness unavailable under section 240, the appellate court distinguished subdivision (a)(4) from subdivision (a)(5). The court 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's presence can be compelled. (*Id.* at p. 793, citing *People v. St. Germain*, *supra*, 138 Cal.App.3d at pp. 517-518.)

In the instant case, the prosecution met its "burden of showing by competent evidence that the witness [was] unavailable" pursuant to subdivision (a)(4). (*People v. Smith*, *supra*, 30 Cal.4th at pp. 609-610.) As noted above, the prosecution presented competent evidence which established that Portillo had been deported to El Salvador after the preliminary hearing and defense counsel did not challenge this evidence. (Cf. *People v. Smith*, *supra*, 30 Cal.4th at p. 610.) Moreover, El Salvador would not allow for Portillo's extradition to the United States to testify at Herrera's trial. (1 RT 13-24.) Unlike agreements among the states (Pen.

Code, § 1334, et seq.) or agreements between a state and the federal government (see *Barber, supra*, 390 U.S. at pp. 724-725), 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 *Mancusi, supra*, 408 U.S. at p. 212; see also Treaty of Extradition arts. II, VIII, U.S. – El Sal., Apr. 18, 1911, 37 Stat. 1521.) 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.

(1 RT 27.)

Since there was no process by which Portillo's attendance could be compelled, the prosecutor established Portillo's unavailability under subdivision (a)(4).

The Court of Appeal noted the distinction between section 240, subdivisions (a)(4) and (a)(5) but stated that,

> [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.

(Slip Opn. at 5.)

Thus, although the majority recognized that the two subdivisions are different, the majority collapsed the two subdivisions by reading a due diligence requirement into subdivision (a)(4), and essentially treated subdivision (a)(4) the same as (a)(5) by requiring a prosecutor to undertake additional acts to establish unavailability. The Court of Appeal erred by reading a due diligence requirement into subdivision (a)(4).

Cases from other jurisdictions have suggested that a prosecutor offering an out-of-court statement of a witness beyond the legal reach of a subpoena must show that he or she made an effort to secure the voluntary attendance of the witness at trial. (See *Rice v. Janovich* (Wash. 1987) 742 P.2d 1230, 1236; *Government of the Virgin Islands v. Aquino* (3rd Cir. 1967) 378 F.2d 540, 550-551.) In a footnote in *Smith*, this Court mentioned the possibility of such a requirement when it stated:

> Defendant has never argued that, and hence we do not decide whether, assuming Fukumoto was in Japan, the prosecution was required to do more to procure his attendance, such as request that he come voluntarily to testify. (Cf. *People v. Sandoval* [*supra*,] 87 Cal.App.4th [at pp.] 1440-1441.)

(*People v. Smith*, *supra*, 30 Cal.4th at pp. 581, 611, fn. 6.)

However, as will be discussed below, the constitutional good-faith requirement does not require the prosecution to request and assist an absent witness's voluntary return to this country. This is consistent with the historical basis in interpreting the constitutional right to confrontation. As exemplified by the United States Supreme Court in *Crawford*, the right to confrontation is steeped in historical practice. Indeed, in *Crawford*, the Court looked to history as an aid to interpreting the confrontation clause. (*Crawford*, *supra*, 541 U.S. at pp. 43-59.) The Court began with a discussion of English common law, including the treason trial of Sir Walter Raleigh, then charted the background of the Sixth Amendment's inclusion in the Constitution and discussed the early cases interpreting the Amendment. (*Crawford*, *supra*, 54 U.S. at pp. 43-59.)

Early cases interpreting unavailability for purposes of the confrontation clause focused on the court's ability to compel a witness's attendance at trial. For instance, prior to the high court's decision in *Barber*, absence from the state was sufficient to establish unavailability. (*Barber*, *supra*, 390 U.S. at p. 723; see also *People v. Ware*, *supra*, 78

Cal.App.3d at pp. 830-833.) This changed, as explained in *Barber*, only because increased cooperation between the states and the federal government undermined the basis for dispensing with confrontation as a result of mere absence from the jurisdiction. (*Barber*, *supra*, 390 U.S. at pp. 723-724.) Because the *Barber* court's conclusion was predicated on the presence of alternatives, such as agreements between the states to secure the presence of an absent witness at the trial, the *Barber* court created an exception to the law: where a party has the ability to obtain an absent witness's presence at trial by relying on agreements between the states or within the federal government, the party must avail itself of the agreement and attempt to obtain the witness.

The instant case presents circumstances more akin to those in *Mancusi*. As previously discussed, *Mancusi* held that where the witness is not a United States citizen and is in a country with which there is no treaty, the foreign witness's absence from this country is enough to establish unavailability under subdivision (a)(4). This rule comports with the traditional rule that had long been in place prior to *Barber*. Accordingly, there is no further duty to request the witness's voluntary attendance at trial once the witness is outside the court's jurisdiction. Cases that have suggested a contrary result are unpersuasive.

For example, in *Government of the Virgin Islands v. Aquino*, *supra*, 378 F.2d at page 540, the United States Court of Appeals for the Third Circuit reversed the defendant's rape conviction on the ground that the police violated his right to counsel by continuing to interrogate him regarding the rape charge and awarded the defendant a new trial. (*Government of the Virgin Islands v. Aquino*, *supra*, 378 F.2d at pp. 546-547.) In contemplation of the new trial, the Third Circuit Court discussed the district court's admission of the complainant's testimony from the

preliminary hearing. (*Government of the Virgin Islands v. Aquino*, *supra*, 378 F.2d at p. 547.) The court pondered, in dictum, whether it would be

> enough . . . to prove that the witness is beyond the reach of subpoena, without showing any effort to secure his voluntary return and without any indication that if he had been asked he would have refused to do so?

(*Id.* at p. 550.)

The *Aquino* court explained that the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (Pen. Code, § 1334 et seq.), and Rule 17(e) of the Federal Rules of Criminal Procedure

> indicate the modern recognition of the desirability of securing the attendance of witnesses who are outside the jurisdiction where the trial is held and the fairness of requiring the payment of the travel and per diem subsistence of the witness by the party who calls him.

(*Government of the Virgin Islands v. Aquino*, *supra*, 378 F.2d at p. 551.)

The court then explained that if the prosecution located the witness before the retrial, the prosecution "would be required to reimburse her for her expenses of travel and subsistence if . . . necessary . . . to secure her voluntary appearance." (*Government of the Virgin Islands v. Aquino*, *supra*, 378 F.2d at p. 552.)

Notwithstanding the above, neither the Constitution nor subdivision (a)(4) requires a prosecutor to show that he or she made an effort to secure the voluntary attendance of the witness at trial. Indeed, no decision from the United States Supreme Court or this Court has ever held that the confrontation clause imposes a duty on the prosecutor to request the voluntary attendance of a witness in a foreign country with which there is no treaty of cooperation. The *Mancusi* Court was presumably aware of *Aquino* since it predated *Mancusi*, and could have adopted the position set forth by the Third Circuit in that case. It chose not to. Moreover, in

Mancusi, the Court never stated that the witness had declined to return to the United States. This is evidence that the United States Supreme Court did not consider this to be a requirement. As the present case exemplifies, prosecutors need a black letter rule because without practical guidance as to what is required to establish unavailability, a prosecutor will second guess his or her efforts to locate an absent witness from the time of conviction until the appeal is final.

In any event, it is clear that in the instant case, the prosecutor had no duty to request Portillo's voluntary attendance at appellant's trial because Portillo had not been located.

Finally, the circumstances attendant in *People v. Sandoval* (2001) 87 Cal.App.4th 1425, are completely different from those in the present case since the witness in *Sandoval* had been located in Mexico – a country with which the United States has a treaty of cooperation. In *Sandoval*, the prosecutor knew the address of a witness who lived in Mexico and was willing to return to the United States to testify. However, the prosecutor refused to provide $100 to allow the witness to travel to the consulate to obtain a visa. (*Id.* at p. 1432.) The trial court found the witness unavailable under subdivision (a)(4) because he was in Mexico and was a Mexican citizen. (*Id.* at pp. 1432-1433.)

On appeal, the *Sandoval* court determined that the prosecutor failed to establish the witness's unavailability. The court held that the witness was not per se unavailable simply because he had gone to Mexico. As the appellate court explained, the Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance changed the circumstances so that a Mexican national residing in Mexico may no longer be considered per se unavailable. (*People v. Sandoval*, *supra*, 87 Cal.App.4th at pp. 1440-1441.) Since the witness had expressed a willingness to attend the trial and had been located in Mexico

(with which the United States has a treaty that specifically provided for mutual assistance in obtaining witnesses for trial in criminal matters), the *Sandoval* court noted that the prosecution had several reasonable alternatives it could have pursued to obtain the witness's live testimony at trial. However, the appellate court found that instead of making a good faith effort to obtain live testimony, the prosecution "threw up its hands" and asserted the witness was unavailable simply because he was a foreign citizen residing outside of the United States. (*People v. Sandoval*, *supra*, 87 Cal.App.4th at p. 1443.)

Although the trial court in *Sandoval* had found the witness unavailable pursuant to subdivision (a)(4) since the witness was in Mexico and was a Mexican citizen, the appellate court concluded that the prosecutor failed to establish the witness's unavailability and that the confrontation clause requires reasonable efforts by the prosecution to secure the attendance of such witnesses when those efforts could result in their attendance at trial. (*Id.* at p. 1441.) As the court explained, the witness

> was statutorily unavailable because the trial court could not utilize its own process to compel [his] attendance at trial. The Supreme Court has made clear, however, that to satisfy the confrontation clause must make a reasonable, good faith effort to obtain the witness's presence at the trial. [Citation.] Consideration of the options available to the prosecution and the extent to which the prosecution attempted to use these alternatives to obtain [the witness's] presence establishes that the prosecution did not make a reasonable, good-faith effort. [Citation.] It did not exercise due diligence. [Citation]. Therefore, use of [the witness's] former testimony violated the defendant's right to confrontation.

(*People v. Sandoval*, *supra*, 87 Cal.App.4th at pp. 1443-1444.)

S*andoval* presents a unique situation because of the existence of the treaty between Mexico and the United States. But here, there is no agreement between El Salvador and the United States and therefore, this

Court need not address the issue presented in *Sandoval* (i.e., whether the prosecution is required to request the witness's voluntary attendance when the witness is in a country with which the United States does have a treaty or legally recognized alternative which could be used to produce the witness at trial).

The *Sandoval* decision was more in keeping with the exception to the rule as set forth in *Barber*, rather than that in *Mancusi*. In contrast, there have been no changes in the manner that witnesses in a foreign country may be compelled to attend trial that would require this Court to create a new exception to that rule. As noted above, *Barber* created a limited exception to the historical approach by holding that when there is a legally recognized alternative that would enable the witness's attendance (i.e., an agreement between states), the proponent of the statement must use that alternative to attempt to procure the witness's attendance. Here, there is no agreement between El Salvador and the United States, and therefore, the present case squarely falls within the rule of *Mancusi*. (See *Mancusi, supra*, 408 U.S. at pp. 212-213.)

This reading of (a)(4) is consistent with the United States Supreme Court's decision in *Mancusi* and satisfies the historical practice of the confrontation clause. In other words, once the prosecution shows the absent witness is in a country with which there is no treaty of cooperation, the prosecution has satisfied the requisite due diligence and is not required to show more. In addition, this historical interpretation of the confrontation clause provides a basis for drawing a bright-line rule for prosecutors when attempting to establish the unavailability of a witness.

C. Portillo Was Unavailable Under Evidence Code Section 240, Subdivision (a)(5)

Alternatively, Portillo was also unavailable under section 240, subdivision (a)(5). Pursuant to that subdivision, 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 subdivision (a)(5) refers to "reasonable diligence," this Court has often described the evaluation as one involving "due diligence." (*Cromer*, *supra*, 24 Cal.4th at p. 898.)

When evaluating a trial court's due diligence determination,

> 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. 892.)

The court must conduct "a twofold inquiry" in determining whether the prosecution exercised due diligence to locate a missing witness. (*Id.* at p. 900.) As explained in *Cromer*,

> the first inquiry is a matter of determining the historical facts – a detailed account of the prosecution's failed efforts to locate the absent witness. Those facts will rarely be in dispute. When they are, a reviewing court must . . . apply a deferential standard of review to the trial court's factual findings.

(*Ibid.*)

The second inquiry is "whether these historical facts amount to due diligence by the prosecution," and requires application of an objective, constitutionally-based legal test to the historical facts. (*Cromer*, *supra*, 24 Cal.4th at p. 900.)

Subdivision (a)(5) applies where there exists a "court process" which could "compel the witness to appear." (*People v. Denson*, *supra*, 178 Cal.App.3d at p. 793.) Thus, subdivision (a)(5) is applicable where the witness is in another state (see Pen. Code, § 1334 et seq.), or when the witness is a United States national or resident in another country (see 28 U.S.C. § 1783). (*People v. Denson*, *supra*, 178 Cal.App.3d at p. 793.)

In *People v. Linder* (1971) 5 Cal.3d 342, this Court explained that "[w]hat constitutes due diligence to secure the presence of a witness depends on the facts of the individual case." (*People v. Linder*, *supra*, 5 Cal.3d at p. 346.) Although the term "due diligence" is "incapable of a mechanical definition," it suggests "persevering application, untiring efforts in good earnest, efforts of a substantial character." (*Id.* at p. 347, citing *People v. Horn* (1964) 225 Cal.App.2d 1, 5.) This Court stated that courts must consider the "totality of efforts of the proponent to achieve presence of the witness," and noted that prior decisions also considered:

> whether [the proponent] reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena him when he was available (*People v. Banks* (1966) 242 Cal.App.2d 373, 377 []), whether the search was timely begun, and whether the witness would have been produced if reasonable diligence had been exercised (*People v. Benjamin* (1970) 3 Cal.App.3d 687, 696-697).

(*People v. Linder*, *supra*, 5 Cal.3d at p. 347.)

The fact that the proponent of the evidence could have taken some further or additional step does not render his or her efforts unreasonable; reasonable diligence is all that is required. (*People v. Wilson* (2005) 36 Cal.4th 309, 342; *People v. Diaz* (2002) 95 Cal.App.4th 695, 706.)

In the present case, the prosecution established Portillo's unavailability under subdivision (a)(5), because the evidence showed the prosecutor exercised reasonable diligence in attempting to locate Portillo and that additional efforts would have been futile because there was no

treaty which would bring Portillo within the court's process. (See *Ohio v. Roberts*, *supra*, 448 U.S. at p. 74 ["[t]he law does not require the doing of a futile act"].) One may always think of other things or other steps that could have been taken in an effort to find the witness but, "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.)

Moreover, even if the prosecution had located Portillo in El Salvador, he would have been unable to attend a trial in the United States pursuant to the relevant provisions of Title 8 of United States Code section 1182(a). For example, pursuant to section 1182(a)(9)(A)(ii)(I), an alien who "has been ordered removed under section 240 [8 U.S.C. § 1229a] or any other provision of law . . . and who seeks admission within 10 years of the date of such alien's departure or removal . . . is inadmissible." Since Portillo was deported in September 2006 (1 RT 17), he was ineligible to be admitted to the United States and would remain so until 2016. (See also *Chong v. District Director INS* (3rd Cir. 2001) 264 F.3d 378, 385.) In addition, it appears that Portillo was also subject to a ten-year bar on reentering this country pursuant to section 1182(a)(9)(B)(i)(II), which provides that any alien "who has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States" is ineligible to be admitted to the United States. (See *Cervantes-Ascencio v. INS* (2nd Cir. 2003) 326 F.3d 83, 86 [8 U.S.C. § 1182(a)(9)(B)(i)(II)

imposes a ten-year bar on readmission of all "long term" aliens, "irrespective of how or when" the alien departs].)[4]

Thus, although other steps could have been taken in an effort to find Portillo, "'good faith' demands nothing of the prosecution" if there is no possibility of procuring the witness. (*Ohio v. Roberts, supra*, 448 U.S. at p. 74; see *People v. O'Shaughnessy* (1933) 135 Cal.App. 104, 110 ["no good can be accomplished by requiring that an officer make a pretense of looking for the witness in a number of places where he could not reasonably be expected to be found"].) Accordingly, the prosecutor established that Portillo was unavailable pursuant to section 240, subdivision (a)(5).

Notwithstanding the above, the Court of Appeal in this case reversed the judgment on the ground that the trial court erred in finding that the prosecution exercised due diligence. (Slip opn. at 4-10.) In doing so, the appellate court quoted "extensively" from this Court's decision in *Cromer* and compared the facts of this case to those in *Cromer*. (Slip opn. at 6-7.) The Court of Appeal noted that the *Cromer* court found a lack of due diligence where the prosecutor waited two weeks before the scheduled trial date before attempting to locate a missing witness. The Court of Appeal stated that in the instant case,

> the prosecutor 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).

(Slip opn. at 7-8.)

---

[4] Portillo's testimony at the preliminary hearing suggests he was in the United States for at least 10 years before he was deported in September 2006. (1 CT 88-89.)

The distinctions between the facts in *Cromer* and those in the instant case reveal that the Court of Appeal's reliance on *Cromer* was misplaced. In *Cromer*, the Los Angeles County District Attorney's primary witness testified at the preliminary hearing and appeared cooperative. (*Id.* at pp. 889, 903.) Two weeks later, however, patrolling officers reported that the witness had disappeared from the neighborhood where she lived. Despite this information which put the prosecution on notice of the disappearance of a crucial witness less than two weeks after the preliminary hearing, the prosecution made no attempt to contact the witness for almost six months. (*Id.* at p. 903.) Two days before the trial was scheduled to begin, the prosecutor learned the witness was living with her mother in San Bernardino. However, the prosecution waited two days to look into this information and obtain an 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. The investigator, however, never returned to speak to the mother, who was the single person most likely to know where the witness was located. (*Cromer*, *supra*, 24 Cal.4th at pp. 893, 903-904.) No further efforts were made to locate the witness. (*Id.* at p. 904.)

Unlike in *Cromer*, in the instant case, there was no report shortly after Portillo's preliminary hearing testimony that he had been deported. Therefore, the prosecution had no reason to suspect that Portillo had left the jurisdiction or would be unavailable at trial. *Cromer* can be further distinguished because in that case, the witness was still in the state of California and therefore, this Court did not address a situation like that in the present case, where the witness is out of the country and beyond the reach of the court's process. (See *People v. Cromer*, *supra*, 24 Cal.4th at pp. 903-904.) Of equal importance, in *Cromer* there was no evidence to suggest the witness had left the country, as Portillo had done here. Thus, unlike this case, in *Cromer* there was evidence to suggest that if the witness

had been located, the prosecution would have been able to procure her attendance by the court's process. In this case, however, even if Portillo had been located, he would not have been able to attend the trial because of the absence of a cooperation treaty between the United States and El Salvador.

Further, in contrast to the situation in *Cromer*, the prosecutor here did not simply sit on his hands after discovering Portillo had disappeared. Once the prosecution discovered that Portillo had been deported and that El Salvador would not allow for his extradition, the prosecution continued its attempts to locate Portillo in El Salvador and in California. (1 RT 14-16, 19-24.) Because *Cromer* is factually distinct from the instant case, the Court of Appeal erred by relying on *Cromer* to find a lack of prosecutorial diligence.

The Court of Appeal also erred by concluding that the prosecution did not give itself enough time to permit an adequate investigation. The appellate court questioned the probability that the "wanted" flyer that had been disseminated "one day before the trial was scheduled to start" would have resulted in Portillo's arrest in time for him to testify. (Slip opn. at 8.) According to the Court of Appeal, "even during the single day the prosecution allowed itself to try to find Portillo, the search was, at best, perfunctory." (Slip opn. at 8.) Contrary to the appellate court's conclusion, the fact that the prosecutor's search was made close to the time of trial did not show a lack of due diligence under the circumstances present in this case because the prosecutor had no reason to believe Portillo might disappear. For example, in *People v. Mendieta* (1986) 185 Cal.App.3d 1032, 1036, the court held that due diligence was not established when an attempt to serve the subpoena was delayed until close to trial because the witness had advised the chief investigating officer at time of the

preliminary hearing that he would be leaving the state. Here, the prosecution was never placed on such notice.

Furthermore, numerous courts have upheld a finding of reasonable diligence when the proponent began the search for the witness shortly before or even during trial. (See, e.g., *People v. Hovey* (1988) 44 Cal.3d 543, 562 [reasonable diligence finding upheld where search for witness began after trial commenced]; *People v. Linder, supra*, 5 Cal.3d at p. 345 [court's finding of reasonable diligence upheld where search for witness began one day before trial]; *People v. Smith* (1971) 22 Cal.App.3d 25, 31-32 [reasonable diligence finding upheld where search efforts began one week prior to trial]; *People v. Rodriguez* (1971) 18 Cal.App.3d 793, 796 [court's finding of reasonable diligence upheld where investigator began trying to locate witness six days before trial].)[5]

Equally important, where there is no reason to believe the prosecution required additional time to conduct its search, the question of when the prosecution initiated its search becomes largely irrelevant. (See *People v. Benjamin* (1970) Cal.App.3d 696-697.) In *Benjamin*, the unavailable witness was a Marine who had been deployed to Vietnam and who had never been subpoenaed. (*Id.* at p. 696.) The court upheld the finding that the witness was unavailable due to his deployment and that due diligence had been exercised even though the search "was slight" and began four

---

[5] Courts from other states have also found a witness unavailable when the prosecution's efforts to secure a key witness began only a few days before trial. (See *Commonwealth v. Wayne* (Pa. 1998) 720 A.2d 456 [commencing efforts to secure witness four days before a capital murder trial]; *State v. Ford* (Kan. 1972) 502 P.2d 786, 789-790 [Kansas Supreme Court found due diligence when efforts to secure witness began the morning of trial]; *State v. Nelson* (La. 1972) 259 So. 2d 46, 50 [upholding as sufficient a search of the witness's last known address over the weekend before a murder trial].)

days before trial because prior cooperation by the witness justified the prosecutor's assumption that if he had not been deployed then he would have been available at trial. (*Id.* at pp. 696-698; see also *People v. Cavazos* (1944) 25 Cal.2d 198, 201 [witnesses in the military who had been deployed were outside the jurisdiction of the court and "it would have been an idle act to require further inquiry or search in this state"].)

Here, as in *Benjamin*, Portillo was a cooperative witness. In fact, prior to Portillo testifying at the preliminary hearing, he and the prosecutor entered into an agreement by which Portillo promised to testify at appellant's trial in exchange for a grant of probation. (Supp. CT 6-7.) Because of this agreement, the prosecutor had no reason to suspect that Portillo would disappear before appellant's trial. Moreover, nothing in the record suggests the prosecutor was aware that Portillo would be deported or even that he was in this country illegally. Thus, Portillo's unavailability in this matter was caused by his deportation and not by any failure of the prosecution. Additionally, there is nothing in the record to indicate that Portillo would have been able to testify if the prosecution had been aware of Portillo's alien status and taken more than the numerous steps it already had to locate Portillo and secure his attendance at the upcoming trial. (See *People v. Lopez* (1998) 64 Cal.App.4th 1122, 1128.)

The Court of Appeal further erred by failing to consider the totality of the prosecution's efforts in the instant case. (*People v. Linder*, *supra*, 5 Cal.3d at p. 347.) Instead of examining each step the prosecutor undertook to locate Portillo, the majority focused on the timeliness of the efforts and concluded that the prosecutor "apparently assumed" Portillo would be unavailable "and went through a last-minute, perfunctory search in an attempt to make a showing of due diligence." (Slip opn. at 9.)

In *People v. Linder*, *supra*, 5 Cal.3d at page 342, however, this Court held that the lower court erred by excluding former testimony of an absent

witness because the court did not consider the cumulative efforts made by the party to locate the witness and focused only on the timeliness (or lack thereof) of the service of the subpoena. (*Id.* at p. 347.) Because "the lengths to which the prosecution must go to produce a witness is a question of reasonableness" (*Ohio v. Roberts*, *supra*, 448 U.S. at p. 74), a reviewing court must consider the totality of the efforts before it can make a determination as to whether the proponent's efforts were reasonable. (See *People v. Cummings* (2003) 4 Cal.4th 1233, 1297-1298 [court found due diligence under totality of circumstances which included search for witness at new and former addresses and contact with witness's mother, neighbors, employers and apartment manager]; *People v. Wise* (1994) 25 Cal.App.4th 339, 344 [totality of circumstances showed prosecution exercised due diligence by making several attempts to serve witness at residence and searching for witness at last known address, post office, jail, hospital, and coroner].)

Finally, the Court of Appeal was wrong to conclude the prosecution's failure to pursue other avenues rendered inadequate the search efforts that were made. (See slip opn. at 7-9.) According to the appellate court, "[n]o real search was made for friends and family" and the prosecution "failed to explore several other potential leads." (Slip opn. at 9.) The Court of Appeal noted that the prosecution was aware that Portillo was a longtime member of the KPC gang; that he had lived with his mother on Baker Street; that he had a daughter and sister who lived in Santa Ana; that he had been employed; and that he had gone to school or taken classes to get his high school diploma. The appellate court determined that the fact that the prosecution did not follow up on these leads "illustrates the lack of seriousness in the search efforts." (Slip opn. at 9.)

However, none of these "leads" would have made any difference because once it was discovered that Portillo had been deported, the

prosecution had no reason to continue to search for Portillo in California. In fact, the prosecution proved that Portillo remained out of this country by presenting evidence concerning arrest warrants, including one warrant that was for a violation of probation. This evidence was sufficient to prove by a preponderance of the evidence that Portillo was not in the United States, because if Portillo had returned to this country, he would have been picked up by authorities. (See *People v. Tewksbury* (1976) 15 Cal.3d 953, 966 [the court is required to find the existence or nonexistence of a preliminary fact by proof by a preponderance of the evidence]; Evid. Code, § 405, subd. (a).)

Nevertheless, the Court of Appeal's suggestion that other steps that could have been taken shows the court's failure to appreciate that further efforts to locate Portillo would have been futile and were therefore not required. (*Ohio v. Roberts*, *supra*, 448 U.S. at p. 74.) 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]." (*People v. Wilson, supra,* 36 Cal.4th at p. 342, citing *People v. Cummings, supra,* 4 Cal.4th at p. 1298; see also *People v. Wise, supra,* 25 Cal.App.4th at p. 344.) Once the prosecution discovered Portillo had been deported to El Salvador and there was no treaty which could be used to compel his attendance, the prosecution was not required to take further action to locate Portillo because to do so would have been futile. Moreover, as previously noted, even if Portillo had been located in El Salvador, the prosecution could not have obtained his presence at appellant's trial because Portillo would have been precluded from entering the United States. (See 8 U.S.C. § 1182(a)(9)(A)(ii)(I) [indicating Portillo could not be readmitted to the United States because he had been deported less than ten years before]; § 1182(a)(9)(B)(i)(II) [Portillo's illegal residence in the United States would subject him to a ten-year bar on reentry].)

The Constitution does not require "the prosecutor to butt his head against a wall just to see how much it hurts." (*United States v. Kehm* (7th Cir. 1986) 799 F.2d 354, 360.) Accordingly, the prosecution was "not required to do everything possible to procure [Portillo's] attendance; it was only required to use reasonable diligence." (*People v. Lopez*, *supra*, 64 Cal.App.4th at pp. 1122, 1128.) The prosecution did so here. (See *Morgan v. Commonwealth* (2007) 50 Va.App.369, 375 [due diligence "requires only a good faith, reasonable effort; it does not require that every possibility, no matter how remote, be exhausted"].)

Furthermore, as Justice Aronson explained in his 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. (Slip opn., dis. opn at p. 1-2, citing *People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1640 [witness had strong motive to avoid jurisdiction because of an outstanding warrant].) Moreover, because at least one outstanding warrant 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. (See *People v. Guiterrez*, *supra*, 232 Cal.App.3d at p. 1641, fn.10 [existence of outstanding warrant for probation violation supported assumption that probation department would have arranged for absent witness's arrest if it had more accurate information concerning witness's whereabouts]; *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].)

Reasonable diligence does not require the result reached by the majority in this case -- that 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. Moreover, the majority here failed to consider the totality of the prosecutor's efforts and focused instead on the timeliness of the search efforts, while ignoring the futility of undertaking further efforts to locate Portillo. Independently reviewing the steps taken by the prosecutor to find and procure Portillo's presence for trial, the evidence established the prosecution exercised reasonable diligence under Evidence Code section 240, subdivision (a)(5) to allow for the admission of Portillo's preliminary hearing testimony.

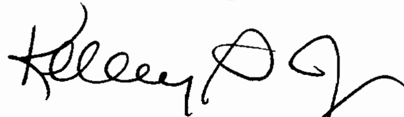
CONCLUSION

On the present facts, Portillo, who had been deported to El Salvador after he testified at appellant's preliminary hearing, was unavailable within the meaning of section 240, subdivisions (a)(4) *and* (a)(5). As a result, the introduction of his former testimony did not deny appellant the right of confrontation. Based on the foregoing, respondent respectfully requests that this Court reverse the Court of Appeal's decision and reinstate the judgment of conviction against appellant.

Dated: September 17, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General



KELLEY JOHNSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

KJ:gnn
SD2009701890
80386197.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains **11,701** words.

Dated: September 17, 2009

EDMUND G. BROWN JR.
Attorney General of California

KELLEY JOHNSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Honorio Moreno Herrera** Case No.: **S171895**

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 September 18, 2009, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Waldemar D. Halka Attorney at Law P.O. Box 99965 San Diego, CA 92169 *Attorney for Appellant* *Honorio M. Herrera* (two copies)	Court of Appeal Fourth Appellate District, Division Three 925 North Spurgeon St. Santa Ana, CA 92701
Hon. Daniel J. Didier Orange County Superior Court Central Justice Center 700 Civic Center Drive West Santa Ana, CA 92701	Tony Rackauckas, District Attorney Orange County District Attorney's Office 401 Civic Center Drive West Santa Ana, CA 92701
Appellate Defenders, Inc. 555 West Beech Street, Suite 300 San Diego, CA 92101	

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 September 18, 2009, at San Diego, California.

G. Nolan

Declarant Signature

SD2009701890