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.

Supreme Court
Case No. S171895

COURT OF APPEAL, FOURTH DISTRICT, DIVISION THREE
Case No. G039028

APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT
OF CALIFORNIA, COUNTY OF ORANGE
Case No. 05CF3817
The Honorable Daniel J. Didier, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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

Defendant and appellant Honorio Moreno Herrera (hereafter defendant) respectfully submits his Answer Brief on the Merits.

ISSUE GRANTED REVIEW

"Did the trial court err in determining that a prosecution witness who had been deported and could not be extradited to the United States, was unavailable within the meaning of Evidence Code section 240, or was the prosecution required to show further due diligence to establish the unavailability of the witness before introducing the witness's prior testimony from the preliminary hearing?"

INTRODUCTION

The Court of Appeal correctly concluded the prosecution failed to act with due diligence in attempting to locate its key witness and that the trial court prejudicially erred in permitting the witness's preliminary hearing testimony to be read into evidence at defendant's trial. (Slip opn. at pp. 4-10.) Although the prosecution showed that eight months earlier the witness was deported to El Salvador and there is no applicable extradition treaty between the United States and El Salvador, such showing was not sufficient by itself to establish that the witness was unavailable for the purpose of the confrontation clauses of the United States and California Constitutions and Evidence Code section 240. Defendant's right of confrontation required the prosecution to establish that it made a reasonable, good faith effort to locate its crucial witness and obtain his attendance at defendant's trial. As concluded by the Court of Appeal, the prosecution failed. (Slip opn. at pp. 5-10.)

STATEMENT OF THE CASE

On June 20, 2006, after a preliminary hearing in which Jose Portillo testified that defendant had confessed to murdering Erick Peralta, defendant was bound over for trial and subsequently charged by information with one count of first degree murder with a gang special circumstance (Pen. Code, §§ 187, 190.2, subd. (a)(22) - count 1), a gang-benefit enhancement (Pen. Code, § 186.22, subd. (b)), a personal discharge of a firearm causing death enhancement (Pen. Code, § 12022.53, subds. (d), (e)), and one count of active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a) - count 2). (1 CT 23, 71, 212-213, 217-218, 219-220.) Defendant pleaded not guilty to the substantive charges and denied all allegations. (1 CT 222.) The prosecution decided not to seek the death penalty. (1 CT 223, 229.)

On May 25, 2007, both parties announced ready for trial. (1 CT 231.) The case was twice trailed to May 30, 2007. (1 CT 231-232.) On that date, the prosecutor filed a motion to admit Portillo's preliminary hearing testimony. (1 CT 233-236.) The motion stated that Portillo was unavailable and requested a hearing on the issue of due diligence. (1 CT 233-236.) The motion also stated that, at the time of the preliminary hearing, Portillo was in custody. Shortly thereafter, after having entered a plea, he was turned over to federal officials and deported to El Salvador. (1 CT 233-236.) After an evidentiary hearing, in which Ed Wood, an investigator for the Orange County District Attorney's Office, testified about his efforts to locate Portillo, the trial court granted the

motion. (1 CT 240.) The trial court ruled the prosecution acted with due diligence in attempting to insure Portillo's presence at trial and allowed Portillo's testimony from the preliminary hearing to be used at defendant's trial. (1 RT 25-27, 30.)

Jury trial began on May 31, 2007. (1 CT 243.) As part of the prosecution's case-in-chief, Portillo's preliminary hearing testimony was read to the jury. (1 CT 245-247.) On June 6, 2007, the jury convicted defendant of both charges and found all allegations true. (1 CT 294-296; 2 RT 436-438.) Defendant was sentenced to prison for life without the possibility of parole. (2 CT 383, 418-421; 2 RT 449-450.)

Defendant timely appealed his judgment of conviction. He argued on appeal that the trial court prejudicially erred in permitting Portillo's preliminary hearing testimony to be read into evidence at trial. In an unpublished 2-to-1 opinion, filed on February 26, 2009, the Court of Appeal, Fourth Appellate District, Division Three, reversed. (Slip opn. at p. 10.) The Court of Appeal concluded the prosecution failed to act with due diligence in attempting to locate Portillo and the trial court prejudicially erred in permitting Portillo's preliminary hearing testimony to be read into evidence at defendant's trial. (Slip opn. at pp. 4-10.)

STATEMENT OF FACTS

A. Prosecution's Case

About 10:30 p.m. on Father's Day 2005, Erick Peralta and his cousin Efren Enriquez were walking on Spurgeon Street in Santa Ana toward a local 7-Eleven store. (1 RT 66, 68, 70.) A blue four-door Toyota Corolla with three people in it passed them, stopped, and a man got out of the car and asked where were they from. (1 RT 70-71.) Enriquez responded by shrugging his shoulders, putting his hands up and saying "What's up?" as he and Peralta continued walking. (1 RT 270.) A second man got out of the car, pulled out a gun, and fired once. (1 RT 71.) The bullet hit Peralta's head, killing him. (1 RT 60, 72.) After someone yelled out "KPC," the gunman and other man reentered the car and drove off. (1 RT 72.)

Santa Ana Police Detective Richard Ashby, the lead detective investigating Peralta's homicide and a member of the gang detail, interviewed Enriquez shortly after the shooting. (1 RT 58-59, 162.) Enriquez was shown photographs of active KPC gang members, but he did not identify anyone as the suspects. (1 RT 72, 162.) At trial, Enriquez did not identify defendant as the shooter or second man on the street. (1 RT 64-75.)

The investigation into Peralta's homicide stalled and there was no break in the case until three months later when Jose Portillo, a former original gangster of the KPC (1 RT 85, 89, 96, 98-99, 100, 116-117, 220-221), was arrested for evading police on September 17-18, 2005.

(1 RT 115, 121, 162-163.) Defendant, a member of the KPC (1 RT 190, 199-200) was also arrested with Portillo after attempting to flee from Portillo's car.[1] (1 RT 84, 89, 120-121.) An unidentified man was also in the car during the high speed chase. (1 RT 84, 116-119, 201.) Portillo denied his evading police had anything to do with gang-banging; he evaded police because he knew defendant was on probation and Portillo did not want to go back to jail. (1 RT 146-150.)

On September 19, 2005, Portillo fingered defendant as the shooter who killed Peralta based on defendant's alleged bragging confession to him. (1 RT 89, 163-164.) According to Portillo, in June 2005, after he had been released from jail, defendant approached him on the street and inquired why he was not "coming around" and accused Portillo of not being a "homey." (1 RT 85, 97, 127, 131-132.) Portillo told defendant he was getting a job, taking care of his child, and "I don't need to hang around. It's just not me." (1 RT 129,131.) Defendant replied, "You're missing out. Stop being a coward and hang out because we are going at it with Logan," a rival gang. (1 RT 87, 92, 135-136.) Defendant then told Portillo he was "putting work" on Logan when he got out of a car on Spurgeon and shot a person who identified himself as a Logan gang member. (1 RT 87, 92, 135-138.) Defendant said two people, a guy from "Clown Town" and another "youngster" whom he did not name, were with him at the time of the shooting. (1 RT 87, 92, 137.)

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[1] On the night before Peralta's homicide, defendant was contacted by Santa Ana police at a park. (1 RT 199-201.) With him were five documented members of the KPC. (1 RT 199.)

Portillo also described the car used in the shooting as a dark purple Chevy Beretta. (1 RT 164.) Portillo had previously seen defendant driving this car and he had seen defendant in the company of Estudillo and De La Cruz, the other two suspects. (1 RT 123, 164.)

Now that defendant was a suspect and there was a suspect vehicle, Detective Ashby re-interviewed Enriquez in October 2005. (1 RT 164-165.) After Enriquez was shown a photographic lineup containing defendant's photograph, he was unable to identify defendant as the shooter or second suspect. (1 RT 164-165.) When shown photographs of a car that looked like Estudillo's car, Enriquez stated it looked similar to the suspect vehicle, but he insisted the car he had seen was a dark blue four-door Toyota. (1 RT 164-165.)

On November 19, 2005, after defendant's arrest, defendant gave a statement to Detective Ashby after waiving his rights to an attorney and to remain silent. (1 RT 166-169.) During the first half hour of the two-hour interview defendant denied knowing anything about the shooting, but then he admitted witnessing it. (1 RT 170-171.) He denied being the shooter. (1 RT 171-175.) While he named "Striker," an Anaheim "Clown Town" gang member, as the driver, he refused to name the shooter. (1 RT 175-176.)

The prosecution's gang expert opined the shooting of Peralta was committed for the KPC criminal street gang. (RT 202-203.)

B. Defense Case

Defendant testified that he was "stoned" on marijuana on the night of the shooting. (1 RT 240-241, 243.) He admitted getting out of the car and being present on the street at the time of the shooting, but he denied being the shooter. (1 RT240-242.) Defendant further identified "Striker" as the driver (1 RT 242), but he refused to name the gunman (1 RT 243-246). Defendant knew the gunman from the neighborhood, but he was afraid to name him because something could happen to defendant and his family. (1 RT 274-275.)

Defendant explained he initially lied about the shooting to police and was uncooperative because he was scared. (1 RT 245.) He was scared because "anything could happen to me," especially if he gave out names. (1 RT 273.)

Defendant denied being a KPC gang member (1 RT 233) and he denied confessing to Portillo, who was a KPC gang-banger (1 RT 234, 236-237, 247).

ARGUMENT

THE COURT OF APPEAL CORRECTLY CONCLUDED THAT THE TRIAL COURT PREJUDICIALLY ERRED IN PERMITTING JOSE PORTILLO'S PRELIMINARY HEARING TESTIMONY TO BE READ INTO EVIDENCE AT DEFENDANT'S TRIAL BECAUSE THE PROSECUTION FAILED TO ESTABLISH PORTILLO'S "UNAVAILABILITY" AND FAILED TO ESTABLISH THAT IT ACTED WITH DUE DILIGENCE AND IN GOOD FAITH IN ATTEMPTING TO LOCATE PORTILLO, ITS KEY WITNESS.

The trial court prejudicially erred in determining that Jose Portillo, a key prosecution witness who had been deported to El Salvador and could not be extradited to the United States pursuant to a treaty, was "unavailable" for the purpose of introducing Portillo's prior testimony from the preliminary hearing and erred in finding the prosecution exercised due diligence and made a good faith effort to locate Portillo.

A. Pertinent Facts

Defendant, Luis Estudillo, and Paul Barrera were jointly charged with the murder of Erick Peralta, and a joint preliminary hearing was held on Monday, June 19, 2006. (1 CT 23.) Prosecutor Mark Geller knew that Jose Portillo, the star prosecution witness linking defendant to Peralta's murder by claiming defendant confessed to him, would be

released from custody "on Friday" (1 CT 72-73, 77-78, 80, 84, 85-86), pursuant to a plea bargain agreement Geller and Portillo had entered into prior to the preliminary hearing (Aug.CT 6).

On Saturday, June 24, 2006, Portillo was released from custody. (1 RT 17, 24.) The record does not reveal what happened to Portillo upon his release.

On July 5, 2006, defendant was arraigned on the information. (1 CT 222.) A pre-trial setting conference was set for July 21, 2006. (1 CT 222.)

On July 21, 2006, Geller announced the People would not be seeking the death penalty against defendant, and a trial setting conference was set for July 28, 2006. (1 CT 223.)

On July 28, 2006, trial was set for November 27, 2006. (1 CT 224.)

On September 11, 2006, Portillo was deported to El Salvador, his country of origin. (1 RT 17-18, 22.)

On November 27, 2006, defendant's counsel, Glenn Osajima, waived defendant's statutory time for jury trial. (1 CT 225; Aug.RT [11/27/06] 1-2.) By stipulation, trial was continued to March 5, 2007, and a pre-trial conference was set for February 9, 2007. (1 CT 225; Aug.RT [11/27/06] 2-3.)

On February 9, 2007, the case was placed off calendar and "no action taken." (1 CT 226.) During this hearing, it was agreed there would be separate trials and co-defendant Barrera would be tried first. (Aug.RT [02/09/07] 4.) Trial remained set for March 5, 2007 (1 CT

226), with prosecutor Geller stating, "And I anticipate being ready also" (Aug.RT [02/09/07] 4).

On March 5, 2007, prosecutor Geller answered "ready" for trial, but the defense answered "not ready." (1 CT 227.) Trial was trailed to March 7. (1 CT 226-227.)

On March 6, 2007, attorney Sherry A. Garrels filed a continuance motion, explaining in part she had "just been retained for trial and I need to prepare for trial." (Aug.CT 1.) Garrels requested a continuance to May 21 or 29, 2007. (Aug.CT 1.)

On March 7, 2007, prosecutor Geller now announced he was "not ready" because there needed to be three separate trials, Garrels replaced Osajima as defendant's counsel, and she announced "not ready." (1 CT 228; Aug.RT [03/07/07] 5-6.) Because co-defendant Barrera was going to be tried first, trial for defendant was continued to May 21, 2007. (1 CT 228; Aug.RT [03/07/07] 6-7.) Co-defendant Estudillo's trial was set for June 4, 2007. (Aug RT [03/07/07] 6.) Co-defendant Barrera's trial was set for March 12, 2007. (Aug.RT [03/07/07] 6.)

In March 2007, co-defendant Barrera pleaded guilty to first degree murder and received a prison term of 25 years to life. (2 CT 308; 1 RT 213-214.)

On an unknown date in April 2007, some 9 to 10 months after Portillo was released from jail (June 24, 2006; 1 RT 17, 24) and some 7 months after his deportation (September 11, 2006; 1 RT 17, 22-23), the probation department obtained a warrant for Portillo's arrest for failing to report to probation upon his release (1 CT 234; 1 RT 23). The

record does not reveal what prompted the probation department to obtain the warrant.

The arrest warrant for Portillo was placed in the system and, according to prosecutor Geller, has been there since April 2007. (1 RT 23.)

On May 21, 2007, Monday, Ebrahim Baytieh appeared for prosecutor Geller and announced ready for trial on Friday, May 25, 2007. (1 CT 230; Aug.RT [05/21/07] 8-9.) Defense counsel stated she needed a continuance because in April her investigator moved into a new office. (Aug.RT [05/21/07] 9.) The court trailed the case to May 25, 2007, and set a trial date of July 16, 2007, for co-defendant Estudillo. (Aug.RT [05/21/07] 9.)

On Friday, May 25, 2007, defense counsel withdrew the request for continuance and announced ready for trial. (1 CT 231; Aug.RT [05/25/07] 10.) Prosecutor Geller announced, "The People are still ready." (Aug.RT [05/25/07] 10.) The case was then trailed. (Aug.RT [05/25/07] 11.)

That same day, Investigator Wood first began looking for Portillo. (1 RT 13.) Wood ran Portillo's name through the law enforcement database and discovered there were two outstanding "no bail" warrants for Portillo's arrest. (1 RT 13-14.) Wood then contacted Santa Ana Police Detective Rick Ashby and asked him to "make out a bolo or a wanted flyer" for Portillo, so a flyer could be disseminated throughout the entire state of California. (1 RT 14.)

Further, that same day around 2:00 p.m., Wood and two other

investigators went to Portillo's last known address. (1 RT 15.) Laura Castro, who lived at the apartment with her father and daughter, did not recognize Portillo when shown his photograph. (1 RT 15.)

Wood also obtained a "Local Arrest Record" printout and obtained two telephone numbers, but those numbers had been disconnected or changed. (1 RT 16.) According to Wood, "that's really all I had," as far as looking back to see what Portillo might have as far as contacts. (1 RT 16.)

Because Wood's investigation was at a dead end, he contacted Detective Ashby and asked him to try to contact Portillo's friends and family, just in case Ashby had some information that was not in the database. (1 RT 16.)

That same Friday afternoon, around 3:00-3:30 p.m., Wood contacted Special Agent Mark Johnson of the Department of Homeland Security. (1 RT 16-17.) Twenty minutes later Johnson notified Wood that Portillo had been deported to El Salvador on September 11, 2006. (1 RT 17.) Wood never discovered when Portillo was first placed in federal custody. (1 RT 18.) He assumed Portillo went into "ICE or INS custody" as soon as he was released on June 24, 2006. (1 RT 21-22.)

After learning about the deportation, Wood called Detective Ashby and told him that Portillo had been deported on September 11, 2006. (1 RT 18.) Wood also told the detective to "still send out the wanted flyer, bolo" on Portillo. (1 RT 19.)

That same day, the Portillo "wanted flyer" was disseminated "throughout law enforcement, at least regionally." (1 RT 14.) However,

Wood never heard back from Detective Ashby about trying to locate Portillo's friends or family. (1 RT 16.)

Wood did not do any further investigation in trying to locate Portillo until Tuesday, May 29, 2007, because there was a three-day holiday weekend. (1 RT 19-20.)

On May 29, 2007, at 8:30 a.m., Wood contacted Art Zorilla, a District Attorney investigator who worked in the foreign prosecution unit, and asked him if he could contact El Salvador in an attempt to locate Portillo in that country. (1 RT 19.) Zorilla contacted INTERPOL, the agency in El Salvador that would do a database search and send out officers (1 RT 24), but El Salvador had "nothing" about Portillo (1 RT 19-20).

On Wednesday, May 30, 2007, the day of trial, the prosecutor filed a motion to introduce Portillo's preliminary hearing testimony. (1 CT 233-236.) A hearing on the motion was held, with Wood being the sole witness. (1 CT 239; 1 RT 13-20.)

After testifying about his attempts to locate Portillo on May 25 and May 29 (1 RT 13-20), Wood testified he had been in contact with Investigator Zorilla that day, May 30, and, as of 1:00 p.m., there was still "nothing" from El Salvador about Portillo. (1 RT 19-20.) Wood further testified that Zorilla told him that there was no extradition treaty with El Salvador, even if Portillo had been located in El Salvador. (1 RT 20.)

After Wood testified, the trial court gave a "tentative" ruling on the question of due diligence favorable to the People. The trial court

found "Mr. Portillo in fact likely did not report to probation, since he was deported" and "[t]here 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, unless you have some ideas, Ms. Garrels, to secure his appearance here." (1 RT 25-27.) "He certainly was deported. He has apparently a history of – well, his charge was evading. And 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 we heard with regard to the relationship between El Salvador and this country with regard to extradition, et cetera." (1 RT 27.)[2]

Defense counsel responded, "I have never had a witness vaporize before. What happens – and I'm not the resident expert on El Salvador either. I didn't know this witness was missing until today, so I didn't have a chance to look up the code or do anything." (1 RT 28.) When defense counsel raised the subject of "[h]ow do we deal with . . . the felony arrest from an officer or any moral turpitude crimes that we would usually use to impeach [Portillo] at the time" (1 RT 28), prosecutor Geller disclosed to the trial court that Portillo "entered into an agreement" before testifying at the preliminary hearing, and he would

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[2] In its ruling, the trial court did not take judicial notice of the 1911 treaty between the United States and El Salvador for mutual extradition of fugitives. (See Treaty between the United States and Salvador for the Mutual Extradition of Fugitives from Justice, Apr. 18, 1911, 37 Stat. 1516.) The Attorney General has requested this Court to take judicial notice of the treaty.

be willing to stipulate into evidence this agreement and any moral turpitude prior conviction that would have been available to the defense "if Mr. Portillo was seated in this courtroom testifying in this case." (1 RT 28-29.)[3]

The trial court made its tentative due diligence ruling final: "I will find due diligence and allow the testimony of the unavailable witness through the presentation of his prelim transcript which, of course, he was subject to cross-examination." (1 RT 30.)

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[3] The agreement referred to by Geller stated, in relevant part: "In consideration of the mutual promises . . . 1. Jose Portillo shall give a complete and truthful account of the participation of all persons in the criminal actions of June 19, 2005, that resulted in the murder of Erick Peralta. In fulfilling this promise, Jose Portillo *shall give as many complete and truthful interviews as* representatives of the Santa Ana Police Department and the Orange County District Attorney's office feel *are necessary*, if any. 2. Jose Portillo *shall also give complete and truthful testimony at any and all court proceedings pertaining to the murder of Erick Peralta (including any retrials, if necessary).* (Aug.CT 6, emphasis added.) The agreement further provided: "In the event a dispute arises as to whether or not Jose Portillo has testified truthfully and completely in *all criminal proceedings* arising out of the above referenced murder, Jose Portillo and the Orange County District Attorney's Office agree that a Judge of the Superior Court appointed by the Presiding Judge . . . shall determine whether Joe Portillo testified truthfully and completely and whether this agreement shall stand. The *trial judge* in the case where defendant Jose Portillo is a witness will not be called upon to determine whether Jose Portillo has testified truthfully." (Aug CT 7.) Finally, "In the event that Jose Portillo **refuses to testify or testifies untruthfully** at *any and all court proceedings*, including preliminary hearings and *any trials* wherein any person is charged in the murder of Erick Peralta, it is agreed that this agreement shall be null and void." (Aug.CT 7, original bolding, italics added.)

B. General Principles of The Confrontation Clause and Hearsay Law

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.; *Pointer v. Texas* (1965) 380 U.S. 400, 406 [85 S.Ct. 1065; 13 L.Ed.2d 923] [holding this federal constitutional right enforceable in state court proceedings]; Cal. Const., art. I, § 15; see also Pen. Code, § 686.) This confrontation right 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.'" (*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].) To deny or significantly diminish this right deprives a defendant of the essential means of testing the credibility of the prosecution's witnesses, thus calling "into question the ultimate '"integrity of the fact-finding process."'" (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [93 S.Ct. 1038; 35 L.Ed.2d 297].)

However, an exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. (*People v. Smith* (2003) 30 Cal.4th 581, 609.) "Where testimonial evidence is at issue,

. . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Crawford v. Washington* (2004) 541 U.S. 36, 68 [124 S.Ct. 1354; 158 L.Ed.2d 177].) A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or the witness is unavailable and the defendant had a prior opportunity for cross-examination. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S.__ [129 S.Ct. 2527, 2531; 174 L.Ed.2d 314, 320]; *Crawford v. Washington*, *supra*, 541 U.S. 36, 54.)

Under state law, hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay is not admissible unless it qualifies under some exception to the hearsay rule. (*People v. Lewis* (2008) 43 Cal.4th 415, 497; Evid. Code, § 1200, subd. (b).) Pursuant to Evidence Code section 1291, under various circumstances prior testimony by an unavailable witness is admissible despite the general rule excluding hearsay evidence. (*People v. Williams* (2008) 43 Cal.4th 584, 610; Evid. Code, § 1291.) Subdivision (a) of section 1291 allows the use of former testimony if the witness is unavailable and the party against whom the former testimony is offered was a party to the proceeding in which the former testimony was given and had the right to confront and cross-examine the witness. (Evid. Code, § 1291, subd. (a).)[4]

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[4] Evidence Code section 1291, subdivision (a) provides in (continued...)

C. General Principles Governing "Unavailability"

The proponent of the evidence has the burden of showing that the witness is unavailable. (*People v. Price* (1991) 1 Cal.4th 324, 424.) This showing must be made by "competent evidence." (*Ibid.*)[5]

On appeal, the reviewing court "independently review[s] 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." (*People v. Cromer* (2001) 24 Cal.4th 889, 901.)

The constitutional right to confront witnesses 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 v. Page* (1968) 390 U.S. 719, 725 [88 S.Ct. 1318; 20 L.Ed.2d 255]; *People v. Smith*, *supra*, 30 Cal.4th 581, 609.) In *Ohio v. Roberts* (1980) 448 U.S. 56, 74 [100 S.Ct. 2531; 65 L.Ed.2d 597], overruled on another ground

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[4](...continued)
pertinent part: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] ... [¶] (2) 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."

[5] "Competent evidence" in this context "means that the exclusionary rules such as hearsay, best evidence and opinion rules apply to the evidence offered at a hearing to determine this issue of declarant's unavailability as a witness." (*People v. Williams* (1979) 93 Cal.App.3d 40, 51; *People v. Green* (1963) 215 Cal.App.2d 169, 171.)

by *Crawford v. Washington*, *supra*, 541 U.S. 36, the Supreme Court reaffirmed *Barber v. Page*, *supra*, 390 U.S. 719:

> [C]ertain general propositions safely emerge. The 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. But 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." *California v. Green*, 399 U.S. at 189, n. 22 (concurring opinion, citing *Barber v. Page*, *supra*). The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present the witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate.
>
> (*Ohio v. Roberts*, *supra*, 448 U.S. 56, 74-75; see also *People v. Cromer*, *supra*, 24 Cal.4th 889, 892 [reasonable diligence standard under state Constitution].)

The California Evidence Code contains a similar requirement. (*People v. Smith*, *supra*, 30 Cal.4th 581, 609.) As relevant, it provides that to establish unavailability, the proponent of the evidence must establish that the witness is absent from the hearing and either that "the court is unable to compel his or her attendance by its process" (Evid. Code, § 240, subd. (a)(4)) or that the proponent "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)).[6] (*People v. Smith*, *supra*, 30 Cal.4th 581, 609.)

Here, the trial court's finding of Portillo's unavailability failed to satisfy the above requirements of both Constitutions and of section 240 of the Evidence Code.

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[6] Evidence Code section 240 provides: "(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. [¶] (b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying. [¶] (c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010. [¶] The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

D. The Prosecution Failed to Prove That Portillo Was In El Salvador And Thus "Unavailable"

The prosecution failed to establish that Portillo was in El Salvador and that the trial court was therefore unable by its process to compel Portillo's attendance at defendant's trial. While the prosecution established that Portillo was deported to El Salvador on September 11, 2006, no evidence whatsoever was presented that Portillo was still in El Salvador or outside the United States eight to nine months later at the time of defendant's trial. Portillo could have been on United States soil, either in California or another state at the time of trial. It is well-known the southern border of the United States is extremely porous and that many deportees quickly return back to the United States.

The prosecution failed to establish Portillo was "a nonresident of the United States" – absence of being in an El Salvador police database does not establish residence – or that he remained in El Salvador and did not return to California. (Compare with *People v. St. Germain* (1982) 138 Cal.App.3d 507, 516, 518 [the prosecution established the witness was a nonresident of the United States by showing the witness returned to Holland and purchased a house in Amsterdam]; *People v. Ware* (1978) 78 Cal.App.3d 822, 827, 837 [no dispute that the witness was residing in Spain]; *Mancusi v. Stubbs* (1972) 408 U.S. 204, 209 [92 S.Ct. 2308; 33 L.Ed.2d 293] [the witness permanently resided in Sweden at the time of defendant's retrial].) No effort was made by the prosecution to contact the consulate or embassy of El Salvador to confirm Portillo's presence and/or residence in El Salvador. The

armchair investigations, including the so-called El Salvador investigation by INTERPOL that did not include any "in-field" investigation based on the record, did not establish that Portillo stayed in El Salvador after his deportation. There is no evidence Portillo was a resident of El Salvador and had any connection with that country before deportation, and nothing suggests he considered himself a resident of El Salvador after deportation.

The prosecution also failed to introduce any evidence concerning illegal immigration from El Salvador, whether difficult or easy. It did not attempt to establish that it would have been impossible or unlikely for Portillo to return to the California or how quickly he could have returned to California to be with his family (child, mother and sister) who lived in Santa Ana. (1 CT 77, 89-90, 96-97, 99, 114, 116-117.)

Accordingly, contrary to the Attorney General's claim (ABOM at pp. 8, 20-21), the prosecution did not establish that Portillo was in El Salvador at the time of defendant's trial.

The Attorney General also claims the prosecution was not required to establish "due diligence" in locating Portillo because any attempt to compel his attendance at defendant's trial would have been futile inasmuch as there is no applicable extradition treaty between the United States and El Salvador. (ABOM at pp. 8-9, 20-21, 37.) The fact there is no applicable extradition treaty between the two countries does not render any effort in locating Portillo futile, because "the court's power to compel attendance [is not] the sine qua non of the requirement to make a good faith effort to obtain the attendance of a witness.

Instead, power to compel is merely one factor to consider in determining whether such effort would be futile and therefore need not be undertaken." (*People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1440-1441.) Although there is no applicable treaty between the two countries, a witness in another country may always voluntarily agree to appear for trial (see *id.* at 1441-1444), especially when he grew up in the United States and continues to have close family ties to this country. (1 CT 71, 77, 89-90, 96-97, 99, 114, 116-117.) Had the prosecution located Portillo in El Salvador, it could have secured his presence in the United States outside the terms of any treaty. (See *United States v. Bourdet* (D.D.C. 2007) 477 F.Supp.2d 164, 177 [the defendants' "presence in the United States was acquired outside the terms of the treaty between the United States and El Salvador"]; *People v. Sandoval*, *supra*, 87 Cal.App.4th 1425, 1442 [the prosecution could have assisted a witness residing in Mexico without reference or resort to the treaty]; compare with *People v. Martinez* (2007) 154 Cal.App.4th 314, 323-332 [witness, an asylum seeker in Canada, refused to attend the defendant's trial in California based on the risk that he would not be allowed to return to Canada].)

Equally misguided is the Attorney General's claim that it would have been futile for the prosecution to try to secure Portillo's attendance at defendant's trial because of Portillo's "inadmissibility" under Section 1182(a)(9) of Title 8 of the United States Code (8 U.S.C. § 1182, subds.

(a)(9)(A)(ii)(I), (a)(9)(B)(i)(II)).[7] (ABOM at pp. 30, 37.) The fact Portillo may be considered "inadmissible" under federal law does not necessarily prevent his admission to attend defendant's trial, inasmuch as federal statutory law provides for a waiver of inadmissibility upon the consent of the Attorney General of the United States. (See 8 U.S.C. § 1182, subd. (a)(9)(A)(iii) ["Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission."]; *Yepes-Prado v. INS* (9th Cir. 1993) 10 F.3d 1363, 1965 [it is the Attorney General, not courts, that is charged with making decision whether to grant relief from deportation or exclusion]; *Kleindienst v. Mandel* (1972) 408 U.S. 753, 770 [92 S.Ct. 2576; 33 L.Ed.2d 683] [the Congress granted the Attorney General the right to grant or deny a waiver to an alien seeking a visa to enter the United States].) Federal statutory law also provides for a temporary admission or "parole" of nonimmigrants in the discretion of the Attorney General of the United States or when the Attorney General considers it to be in the national interest to do so. (See 8 U.S.C. § 1182, subds. (d)(1), (d)(3)(A), (d)(5)(A); *Flammia v. United States* (5th Cir. 1984) 739 F.2d 202, 204 [INS has broad statutory discretion to parole into the United States foreign nationals even when they might otherwise be excludable]; *Chin Ming Mow v. Dulles* (D.C. N.Y. 1953) 117 F.Supp

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[7] The Attorney General asked this Court to take judicial notice of 8 U.S.C. section 1182.

108 [the Attorney General has discretion to parole excluded aliens for emergent reasons or reasons deemed in public interest].) "'[T]he possibility of a refusal is not the equivalent of asking and receiving a rebuff.'" (*Barber v. Page*, *supra*, 390 U.S. 719, 724.)

Accordingly, the showing that Portillo was deported to El Salvador on September 11, 2006 and that there is no applicable extradition treaty between the United States and El Salvador was insufficient by itself to establish that Portillo was "unavailable" for the purpose of the confrontation clauses of the United States and state Constitutions and Evidence Code section 240, based on the trial court's alleged inability to compel his attendance by its process.

E. The Prosecution Failed to Prove "Due Diligence" And A "Good-Faith" Effort To Obtain Portillo's Presence At Trial

The prosecution also failed to establish that it has exercised "due diligence" in locating Portillo and "good faith" in securing his attendance at defendant's trial.

"Whether 'due diligence' was shown depends upon the circumstances of each case" (*People v. Kuranoff* (1950) 100 Cal.App.2d 673, 677) and upon the totality of efforts used to locate the witness. (*People v. Sanders* (1995) 11 Cal.4th 475, 523.) "Due diligence" is not susceptible to a mechanical definition, but "'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.'" (*People v. Valencia* (2008) 43 Cal.4th 268, 292; *People v. Wilson* (2005) 36 Cal.4th 309, 341.) 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. Valencia*, *supra*, 43 Cal.4th 268, 292-293; *People v. Wilson*, *supra*, 36 Cal.4th 309, 341.)

The first requirement of "due diligence" is a timely attempt to secure the attendance of the witness. (*People v. Collins* (1925) 195 Cal. 325, 332-333 [although a subpoena has issued, if no effort to secure the testimony has been made within a reasonable time there is no "sufficient showing of diligence"]; *People v. McDonald* (1944) 66 Cal.App.2d 504, 508 [process server's receipt of subpoena in the latter part of October when the case was set for trial on December 2 was deemed "leisurely activity" and "not 'due diligence'"]; see also *People v. Dozier* (1965) 236 Cal.App.2d 94, 105.) Not only must the search for the witness be timely, "[t]he word 'diligence' connotes persevering application, untiring efforts in good earnest. There must be evidence of a substantial character to support the conclusion of due diligence." (*People v. Redston* (1956) 139 Cal.App.2d 485, 494.)

"[T]he term 'reasonable diligence' denotes a thorough, systematic investigation and inquiry conducted in good faith." (*In re Megan P.* (2002) 102 Cal.App.4th 480, 489; *In re Arlyne A.* (2000) 85 Cal.App.4th 591, 598-600.) There must be "a thorough, painstaking and systematic

effort to locate the witness." (*People v. Redston*, *supra*, 139 Cal.App.2d 485, 495; *People v. Andrade* (1950) 101 Cal.App.2d 509, 511 [requirement of "exertion of diligent effort"].) "To say that a witness has not been found is not the same as saying that he cannot, with due diligence, be found within the state." (*People v. Redston*, *supra*, 139 Cal.App.2d 485, 494.)

Here, as concluded by the Court of Appeal (slip opn. at pp. 4-10), the record fails to establish that the prosecution conducted a "due diligent" search for Portillo.

First, it must be noted that Portillo was a key prosecution witness against defendant. (*People v. Valencia*, *supra*, 43 Cal.4th 268, 293.) Portillo's testimony was the only evidence that defendant was the shooter.[8] Under these circumstances, the prosecution should not have waited until the last minute to locate its star witness. In fact, the prosecution should have made an effort to delay Portillo's deportation to allow him to testify at defendant's trial, which at the time of Portillo's deportation on September 11, 2006, was scheduled for November 27, 2006. (1 CT 224.)

Second, the search for Portillo was not timely begun. Based on Investigator Wood's testimony, the search literally began on the date set for trial. (Aug.RT [05/21/07] 9; Aug.RT [05/25/07] 10-11; 1 RT 13.)

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[8] Defendant's statements to police do not establish that he was the shooter. His statements merely establish that he was present at the scene when another person shot the victim. It is well-established that mere presence at the scene of a crime does not establish criminal liability. (*People v. Durham* (1969) 70 Cal.2d 171, 181.)

The mere fact the prosecution realizes its star witness has not yet been contacted or served a subpoena for trial and asks an investigator to try to locate the witness as quickly as possible is untimely and not "due diligence." This is particularly true given that the prosecutor was apparently ready for co-defendant Barrera's trial and defendant was being tried second.[9] (1 CT 228; Aug.RT [03/07/07] 6-7.)

Third, the character of the prosecution's efforts to locate Portillo demonstrates lack of "due diligence." The entire "search" for Portillo amounted to an armchair search, except for Investigator Wood going to Portillo's last known address. (1 RT 15-16.) Searches that are "perfunctory," "incomplete and desultory," or "indifferent" are insufficient. (*People v. Ballard* (1905) 1 Cal.App. 222, 224; *People v. McDonald*, *supra*, 66 Cal.App.2d 504, 508-509; *People v. Kuranoff*, *supra*, 100 Cal.App.2d 673, 677.) Acts amounting to attempts to serve a subpoena are not sufficient. (*People v. Redd* (1969) 273 Cal.App.2d 345, 350.) Here the investigator's sole in-field act amounted to even less than an attempt to serve a subpoena, because the investigator possessed no subpoena. (1 RT 15.) This is insufficient to establish "due diligence."

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[9] Although Portillo could not testify at Barrera's trial about defendant's alleged "confession" to Portillo, he could testify about his meeting defendant in 2004 (1 CT 90-91) and defendant living in the KPC neighborhood (1 CT 71-72), his seeing defendant with Estudillo, a co-defendant (1 CT 94), the KPC gang and its origins (1 RT 98-100), and the conflict between the KPC and Logan gangs, with him being chased by Logan gang members shortly after the Father's Day shooting (1 RT 110, 114-115).

Fourth, potential leads were not competently explored. Indeed, Investigator Wood's request for Detective Ashby to search for Portillo's friends and family was ignored, based on the record, and went unanswered. (1 RT 16.) This does not constitute "due diligence." (*People v. McDonald*, 66 Cal.App.2d 504, 508-509 [process server asking police officer as to whereabouts of a witness amounts to "an incomplete and desultory search].) "Due diligence" requires inquiry and search of "obvious places" where the witness may be found, and "[u]ntil such inquiry was made, reasonable diligence was not shown." (*People v. Redd*, *supra*, 273 Cal.App.2d 345, 352; *People v. Ballard*, *supra*, 1 Cal.App. 222, 224.) There must be inquiry into the witness' known associations or organizations. (*People v. Redd*, *supra*, 273 Cal.App.2d 345, 350 [Bartenders' Union].)

Portillo, as established by his own preliminary hearing testimony, grew up on Durant Street in Santa Ana and had lived in the area for 10 or 11 years. (1 CT 71, 89.) He was a longtime member of the KPC gang (1 CT 89), and had lived with his mother on Baker Street (1 CT 96, 113). Portillo had a daughter and sister (who was married and had two children) who lived in Santa Ana. (1 CT 77, 90, 96-97, 99, 114, 116, 117.) He had been employed (1 CT 79), and had gone to school or taken classes to get his high school diploma (1 CT 117). None of these leads were explored. Also, there is no evidence that traditional methods of obtaining change of address or telephone information were used.

More importantly, there was no attempt to contact Portillo's attorney, who was named during Portillo's preliminary hearing

testimony (1 CT 74) and in Portillo's cooperation agreement with prosecutor Geller (Aug.CT 7). There was no evidence that Wood spoke to Geller about suggested "contacts" to find Portillo. One would think that if there is an existing formal agreement for a witness to testify, which was negotiated by the witness's attorney, that the first person the district attorney investigator would contact would be the witness's attorney. Based on this record, Portillo's attorney may have known of his client's whereabouts or knew how to contact him, whether he was in California, another state, or in El Salvador.

Further, Portillo's attorney may have had contact with Portillo before the deportation. It is reasonable that a key prosecution witness may attempt to avoid deportation by contacting his attorney to arrange to stay in California, especially when his child, mother, and sister resided in Santa Ana. But even if Portillo did not want to contest his deportation, he may have voluntarily returned to El Salvador with the expectation that he would be able to return to Santa Ana to testify so that he could see his family. Nothing in the record suggests Portillo was "hiding" from the prosecutor or did not intend to keep his promises contained in the written agreement – promises that would keep him out of prison. Portillo could have called his attorney, told him he was being deported, and asked his attorney to call him in El Salvador when the prosecution wanted his appearance so that he could return to Santa Ana to testify and see his family.

For the above reasons, there was no "thorough, painstaking and systematic effort to locate [Portillo]." (*People v. Redston*, *supra*, 139

Cal.App.2d 485, 495.) It appears Investigator Wood and Detective Ashby just threw up their hands and did not take any reasonably available steps to locate Portillo. (See *People v. Sandoval*, *supra*, 87 Cal.App.4th 1425, 1443.)

While Investigator Wood had Detective Ashby prepare a "wanted flyer" and it was sent out on the date Wood began his search for Portillo, the evidence is insufficient to establish the flyer was distributed statewide or nationwide. Wood could only testify the "wanted flyer" went out "regionally." There was no evidence the "wanted flyer" was sent to the FBI or to any jurisdiction outside California. The prosecution did not carry its burden of demonstrating that Portillo was outside of the court's process. (*People v. St. Germain*, *supra*, 138 Cal.App.3d 507, 516-518; *People v. Green*, *supra*, 215 Cal.App.2d 169, 171; see also *People v. Sandoval*, 87 Cal.App.4th 1425, 1432-1444.) At a minimum, it is reasonable to require that "'*some* effort must be made to locate the witness in the state at large unless there is evidence . . . such a search would be unavailing.'" (*People v. Kuranoff*, *supra*, 100 Cal.App.2d 673, 676-677.)

Nor did the prosecution conduct a "due diligent" search for Portillo in El Salvador, the country where he was deported eight to nine months before defendant's trial. Indeed, there is no evidence the prosecution contacted the consulate or embassy of El Salvador. Moreover, to the extent the prosecution "presumed" Portillo remained in El Salvador as a result of his deportation, the prosecution failed to use "due diligent" efforts to return him to California for trial.

For the same reasons, the search for Portillo was not made in "good-faith," as required by *Barber v. Page*, *supra*, 390 U.S. 719, and its progeny.

Any exception to the face-to-face confrontation requirement arises because of necessity (*Barber v. Page*, *supra*, 390 U.S. 719, 722), not for the convenience of the prosecution. (*People v. Sandoval*, *supra*, 87 Cal.App.4th 1425, 1441.) If a reasonable effort could have resulted in the witness's attendance at trial, then the prosecution must make such an effort or forgo use of the witness's testimony because the use of the former testimony is not shown to be necessary. (*Ibid.*)

F. The Error is Prejudicial under the Federal *Chapman* Test and California *Watson* Test

The Court of Appeal correctly found the error prejudicial and reversed defendant's convictions. (Slip. opn. at pp. 9-10.) The erroneous admission of Portillo's preliminary hearing testimony was not harmless under the federal *Chapman* test (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824; 17 L.Ed.2d 705]) or the state *Watson* test (*People v. Watson* (1956) 46 Cal.2d 818, 836) for determining prejudice. (See *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140 [119 S.Ct. 1887; 144 L.Ed.2d 117] [*Chapman* test applies to Confrontation Clause violation].)

Portillo's inadmissible preliminary hearing testimony "was critical to the prosecution's case." (*People v. Enriquez* (1977) 19 Cal.3d 221, 237.) Indeed, his testimony was the only evidence identifying defendant

as the shooter. (*People v. Kons* (2003) 108 Cal.App.4th 514, 517-518, 520, 525-526.) In absence of Portillo's testimony "it is doubtful the prosecution could have obtained guilty verdicts from the jury." (*People v. Sandoval*, *supra*, 87 Cal.App.4th 1425, 1445.)

As noted by the Court of Appeal (slip. opn. at p. 9), it cannot be assumed that defendant would have testified had Portillo's preliminary testimony been excluded. Defendant's decision to take the stand may well have been motivated by his need to contradict Portillo's preliminary hearing testimony that defendant had confessed to him to being the shooter. In any event, defendant's trial testimony and his statements to police do not establish that he was in any way involved in the shooting. His testimony and statements merely establish that he was present at the scene when another person shot the victim. Mere presence at the scene of a crime does not establish criminal liability. (*People v. Durham*, *supra*, 70 Cal.2d 171, 181.) There was no evidence that defendant was the driver or that he in any way aided and abetted the homicide.

It cannot reasonably be concluded that the jury would have reached the same guilty verdicts without Portillo's preliminary hearing testimony. Indeed, with Portillo's prior testimony before the jury, it never had to decide whether the prosecution proved beyond a reasonable doubt that defendant aided and abetted the homicide. It would be sheer speculation to affirm a first degree murder conviction and life without possibility of parole sentence based on an aiding and abetting theory which the jury never needed to decide.

For these reasons, it cannot be concluded beyond a reasonable doubt that the error "did not contribute to the verdict obtained" or that "the guilty verdict actually rendered in [the] trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [113 S.Ct. 2078; 124 L.Ed.2d 182]; *People v. Flood* (1998) 18 Cal.4th 470, 504-507.) "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question . . . ." (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [111 S.Ct. 1884; 114 L.Ed.2d 432], overruled in part on other grounds by *Estelle v. McGuire* (1991) 502 U.S. 62, 72 fn.4 [112 S.Ct. 475; 116 L.Ed.2d 385].)

For the same reasons the error was prejudicial under the *Watson* test. Under *Watson*, a miscarriage of justice occurs when "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error." (*People v. Breverman* (1998) 19 Cal.4th 142, 149.) The "reasonable probability" test imparts a meaning less than "more likely than not." (*People v. Bonin* (1988) 46 Cal.3d 659, 673.) A "reasonable probability" in this context is "merely a reasonable chance" that the outcome would have been more favorable to the appealing party. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) "There is a reasonable probability of a more favorable result within the meaning of *Watson* when there exists 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.'" (*People v. Mower* (2002) 28 Cal.4th 457, 484.)

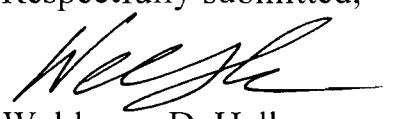
Accordingly, for the above reasons, the Court of Appeal correctly reversed defendant's convictions based on its conclusion that the trial court prejudicially erred in determining that Portillo was unavailable. The showing that Portillo had been deported and could not be extradited to the United States was insufficient by itself to establish Portillo's unavailability within the meaning of the confrontation clauses of the United States and California Constitutions and section 240 of the Evidence Code. Before introducing Portillo's prior testimony from the preliminary hearing the prosecution was required to show good-faith and due diligence in locating Portillo and attempting to secure his attendance at defendant's trial.

CONCLUSION

The Court of Appeal correctly concluded the prosecution failed to act with due diligence in attempting to locate Portillo and that the trial court prejudicially erred in permitting Portillo's preliminary hearing testimony to be read into evidence at defendant's trial. For the reasons stated in this brief, this Court should affirm the Court of Appeal's decision.

Dated: November 12, 2009

Respectfully submitted,



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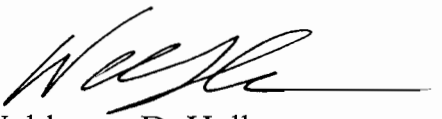
Attorney for Defendant and
Appellant Honorio Herrera

CERTIFICATE OF LENGTH

I, Waldemar D. Halka, counsel for appellant, certify pursuant to rule 8.520(c)(1) of the California Rules of Court, that the word count for this Answer Brief on the Merits is 9,013 words, excluding the tables, this certificate, and any attachment permitted under the rules. This document was prepared in WordPerfect 11, and this is the word count generated by the program for this document. The brief uses a 14 point Times New Roman font.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Diego, California, on November 12, 2009.



Waldemar D. Halka
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Appellant Honorio Herrera

DECLARATION OF SERVICE

I, Waldemar D. Halka, declare under penalty of perjury I am over 18 years of age; I am not a party to the action herein; my business address is P.O. Box 99965, San Diego, California 92169. I caused to be served a copy of the following document to each of the parties listed below:

APPELLANT'S ANSWER BRIEF ON THE MERITS
***People v. Herrera* - S171895**

Clerk of Court of Appeal Fourth Appellate District, Division Three P.O. Box 22055 Santa Ana, CA 92702	**Appellate Court**
Hon. Daniel J. Didier, Judge c/o Clerk of Orange County Superior Court Room K100 700 W. Civic Center Drive Santa Ana, CA 92702	**Trial Court**
Office of the Attorney General 110 West "A" Street, Suite 1100 P.O. Box 85266 San Diego, CA 92186-5266	**Appellate Counsel for Plaintiff and Respondent**
Orange County District Attorney 401 Civic Center Drive, West P.O. Box 808 Santa Ana, CA 92701	**Trial Counsel for Plaintiff and Respondent**
Sherry Garrels, Esq. 4952 Warner Ave., Ste. 106 Huntington Beach, CA 92649	**Trial Counsel for Defendant and Appellant**
Honorio Moreno Herrera (CDC # F-85214) Kern Valley State Prison P.O. Box 5101 Delano, CA 93216-5101	**Defendant and Appellant**
Appellate Defenders, Inc. 555 West Beech Street, Ste 300 San Diego, CA 92101	**Appellate Program**

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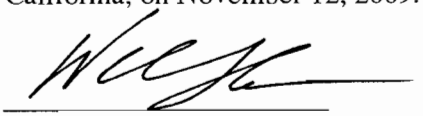

Waldemar D. Halka