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.

Case No.
S171895

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

RESPONDENT'S REPLY BRIEF ON THE MERITS

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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

As explained in Respondent's Opening Brief on the Merits (RBOM), the trial court in this case correctly found Portillo unavailable under Evidence Code section 240[1] and admitted his former testimony at appellant's trial. A jury subsequently convicted appellant of first degree murder and found that appellant vicariously discharged a firearm causing death, and that he committed the crime for the benefit of a criminal street gang. The jury also found that the special circumstance of murder for a criminal street gang purpose existed and that appellant was guilty of street terrorism. The court sentenced appellant to prison for life without the possibility of parole. When appellant challenged his convictions, the Court of Appeal reversed the judgment after it concluded the trial court erred in finding the prosecution acted with due diligence.

Respondent and appellant agree that the right to confrontation is satisfied when a witness is found to be unavailable and there has been a previous opportunity to cross-examine the witness. (*Barber v. Page* (1968) 390 U.S. 719, 722 [88 S.Ct. 1318, 20 L.Ed.2d 255]; see also U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Crawford v. Washington* (2004) 541 U.S. 36, 42 [124 S.Ct. 1354, 158 L.Ed.2d 177].) Both parties also agree that in California, sections 240, 1290 and 1291 govern the admissibility of the former testimony of an unavailable witness. (*People v. Smith* (2003) 30

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

Cal.4th 581, 609; see RBOM 9-16; ABOM 17-21.) Appellant agrees with respondent that a party can establish unavailability under section 240, subdivision (a)(4) by showing the witness is "[a]bsent from the hearing and the court is unable to compel his or her attendance by its process," and a party is not required to show that it used reasonable diligence to attempt to secure the witness's attendance at trial. Appellant also agrees with respondent that under section 240, subdivision (a)(5), a party can demonstrate unavailability by showing the witness is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process."

Appellant disagrees with respondent's assertion that in this case, the prosecution established Portillo's unavailability under subdivision (a)(4) by showing Portillo was beyond the court's process. Appellant also disagrees that the prosecution used due diligence in its attempts to locate Portillo. In his answer brief on the merits (ABOM), appellant asserts that the Court of Appeal was correct to conclude that the prosecution failed to establish that Portillo was unavailable. According to appellant, the prosecution failed to prove Portillo was in El Salvador, and therefore unable to be reached by the court's process. Appellant further maintains that the prosecution failed to prove it used due diligence and good faith in attempting to obtain Portillo's presence at trial. Finally, appellant argues that the error in admitting Portillo's former testimony was prejudicial. (ABOM 9-36.)

As explained below, appellant's arguments are unavailing. The prosecution proved Portillo was unavailable under subdivision (a)(4) by presenting competent evidence which established by a preponderance of the evidence that he was in El Salvador, and therefore beyond the court's process. The prosecution also established that Portillo was not a United States citizen and there was no agreement between the United States and El

Salvador by which the court could compel his attendance. Pursuant to United States and California Supreme Court authority, this showing was sufficient to establish Portillo's unavailability under subdivision (a)(4). (See *Mancusi v. Stubs* (1972) 408 U.S. 204, 212 [92 S.Ct. 2308, 33 L.Ed.2d 293] (*Mancusi*); *People v. Smith*, *supra*, 30 Cal.4th at pp. 581, 609-611.)

In the alternative, the prosecution proved Portillo was unavailable under subdivision (a)(5) by showing it used reasonable diligence to search for Portillo, and when it discovered Portillo had been deported to El Salvador and had outstanding warrants in California, the prosecution had done enough because further efforts to produce Portillo at appellant's trial would have been futile. (*Ohio v. Roberts* (1980) 448 U.S. 56, 74 [100 S.Ct. 2531, 65 L.Ed.2d 597].) Appellant's arguments to the contrary ignore the totality of the prosecution's efforts. Because the evidence established Portillo was not in California, the prosecution's failure to produce Portillo at appellant's trial did not show a lack of good faith or reasonable diligence.

A. Portillo was unavailable under Evidence Code section 240, subdivision (a)(4), because he was not a United States citizen and the evidence suggested he was in a foreign country with which the United States did not have a treaty of cooperation

In its opening brief, respondent explained that an absent witness is unavailable pursuant to section 240, subdivision (a)(4), if "the court is unable to compel his or her attendance by its process." (RBOM 16-18.) 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.) The prosecution need not show that it used reasonable diligence to secure the witness's presence to

establish unavailability under this subdivision. (*People v. Denson*, *supra*, 178 Cal.App.3d at p. 793; *People v. Ware*, *supra,* 78 Cal.App.3d at pp. 829-838; *People v. St. Germain*, *supra*, 138 Cal.App.3d at pp. 517-518; see also *People v. Smith*, *supra*, 30 Cal.4th at p. 610.)

Appellant does not dispute that subdivision (a)(4) does not contain a due diligence requirement. (See ABOM 22-26.) Instead, appellant claims the prosecution failed to prove that Portillo was in El Salvador at the time of appellant's trial, and therefore, that the court was unable to compel his attendance by its process. (ABOM 22-26.) Contrary to appellant's claim, 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.) First, the prosecution presented competent evidence which established that Portillo had been deported to El Salvador after the preliminary hearing (1 RT 16-21), and defense counsel did not challenge this evidence. (Cf. *People v. Smith*, *supra*, 30 Cal.4th at p. 610.) In addition, the prosecution presented competent evidence which established that even if it had located Portillo in El Salvador, El Salvador would not allow for Portillo's extradition to the United States to testify at appellant'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. (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.) Appellant has never suggested any treaty or agreement which would have permitted a contrary result. Since there was no process by which the court could compel Portillo's attendance, the prosecutor established that Portillo was unavailable under subdivision (a)(4).

Nevertheless, appellant claims that no evidence was presented to establish that after Portillo was deported to El Salvador in September 2006, he remained there "or outside the United States eight to nine months later." However, appellant never challenged the prosecution's evidence suggesting Portillo was still in El Salvador at the time of the trial. The prosecution presented evidence which showed that on June 24, 2006, the United States deported Portillo to El Salvador, and the United States and El Salvador did not have an agreement that would provide for Portillo's extradition to the United States. (1 RT 16-20.) Moreover, the prosecution proved that Portillo remained out of this country by presenting evidence concerning Portillo's arrest warrants, including one warrant that was for a violation of probation. (1 RT 22-23, 25-26.) 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, presumably 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]; § 405, subd. (a).)

As the trial court explained when ruling on the prosecution's motion to admit Portillo's preliminary hearing testimony,

> 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 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.)

By noting that Portillo "certainly was deported," and that it would be speculative to come up with further efforts that could . . . obtain[] his presence . . . given the relationship between El Salvador and this country"

(1 RT 27), the trial court implicitly found that Portillo was in El Salvador at the time of appellant's trial. Appellant never challenged this finding. The present case is in sharp contrast to *People v. Smith, supra,* 30 Cal.4th 581, in which defense counsel made a hearsay objection to evidence the prosecution presented to show it had located the witness in Japan. (*Id.* at p. 610 [court acknowledged that "trying to prove a person is, in fact, outside the country case raise substantial practical difficulties because of the hearsay rule"].)

Contrary to appellant's claim, the prosecution was not required to establish that Portillo was "a nonresident of the United States." (See ABOM 22, comparing *People v. St. Germain, supra,* 138 Cal.App.3d at pp. 516, 518; *People v. Ware, supra,* 78 Cal.App.3d at pp. 827, 837; *Mancusi, supra,* 408 U.S. at p. 209.) To establish Portillo's unavailability under subdivision (a)(4), the prosecution merely had to show Portillo was out of the country and that he was not able to be reached through the court's process or through established procedures depending on the voluntary assistance of El Salvador. (See *Mancusi, supra,* 408 U.S. at p. 212; see also *People v. Smith, supra*, 30 Cal.4th at pp. 609-611; *People v. Denson, supra*, 178 Cal.App.3d at p. 793; *People v. St. Germain, supra*, 138 Cal.App.3d at pp. 517-518.)

Moreover, since the United States would not deport one of its own citizens, the fact that this country deported Portillo shows he was not a citizen of the United States. Thus, contrary to appellant's assertion, the prosecution was not required to prove Portillo had purchased a house in El Salvador in order to show he was not a citizen of the United States. (See ABOM 22.) It was sufficient that the prosecution presented evidence that showed the United States had deported Portillo to El Salvador, which was his country of origin. (1 RT 16-18, 21.)

Appellant further contends the prosecution failed to introduce any evidence concerning illegal immigration from El Salvador and whether it would have been difficult or easy to return to the United States. (ABOM 23.) As noted above, the prosecution met its burden of establishing Portillo's unavailability under this subdivision by presenting competent evidence which established Portillo had been deported to El Salvador after the preliminary hearing. Nothing more was required, especially since defense counsel did not challenge this evidence. (Cf. *People v. Smith, supra*, 30 Cal.4th at p. 610.)

Relying on *People v. Sandoval* (2001) 87 Cal.App.4th 1425, appellant claims "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" and "is merely one factor to consider in determining whether such effort would be futile and therefore need not be undertaken." Thus, appellant argues that the lack of an applicable extradition treaty between the United States and El Salvador did not render any effort in locating Portillo futile because the prosecution could have requested that Portillo voluntarily attend the trial if it had located him in El Salvador. (ABOM 23-24, citing *People v. Sandoval, supra,* 87 Cal.App.4th at pp. 1440-1441.) Appellant ignores respondent's discussion of *Sandoval* in the opening brief and fails to refute respondent's assertion that *Sandoval* is inapplicable to the instant case. (See RBOM 25-27.)

Moreover, because subdivision (a)(4) pertains to the court's ability to *compel* a witness's attendance by its process, a witness's willingness to voluntarily return for a trial would not render him unavailable as a matter of statutory or constitutional law. (See *Mancusi, supra*, 408 U.S. at pp. 212-213.) As respondent pointed out in its opening brief, 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. (RBOM

12-13, 21-25, 27.) The *Mancusi* court found that Holm, a trial witness, who, by the time of the defendant's trial, had left the United States and moved to Sweden, was unavailable because the witness was out of the country and beyond the compulsory processes of the court. (*Mancusi, supra*, 408 U.S. at pp. 209, 212-213.) As the court explained,

> Upon discovering that Holm resided in a foreign nation, the State of Tennessee . . . 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, *Mancusi* held the use of the prior testimony of a witness who is in another country did not violate the confrontation clause. By doing so, the focus in *Mancusi* was on the court's ability to *compel* attendance by its process, not the prosecution's ability to show it used diligence in attempting to locate the witness. (See *Mancusi, supra,* 408 U.S. at pp. 212-213.)

Appellant does not dispute this holding and does not challenge respondent's assertion that if Portillo was beyond the court's process, he would be unavailable pursuant to subdivision (a)(4). Instead, appellant makes a more limited attack on the evidence, claiming there was no proof that Portillo was beyond the court's process. However, as explained above, the prosecution proved Portillo was beyond the court's process and, therefore, appellant's claims fail.[2]

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[2] Appellant challenges respondent's suggestion that it would have been futile to continue searching for Portillo in El Salvador since he was inadmissible under Title 8 United States Code section 1182(a)(9)(A)(ii)(I) and (a)(9)(B)(i)(II). (See ABOM 25.) However, because this point goes to the futility of further search efforts, respondent addresses it below, in relation to subdivision (a)(5). In any event, even if Portillo was somehow able to reenter the United States voluntarily, this would not assist

(continued...)

Appellant's citation to *United States v. Bourdet* (D.D.C. 2007) 477 F. Supp.2d 164, 177, does nothing to assist his argument. (See ABOM 24.) In *Bourdet*, the defendants were arrested in El Salvador by El Salvadorian authorities for alleged drug trafficking. (*Id.* at pp. 169-170.) United States Drug Enforcement Agents (DEA) met the El Salvadorian authorities at an airport and flew the handcuffed and waist-chained defendants to the United States on a DEA airplane. (*Id.* at p. 170.) On appeal, the defendants argued their abduction violated the treaty between the United States and El Salvador. The government conceded the defendants were not extradited from El Salvador and noted their "presence was acquired outside the terms of the treaty." (*Ibid.*) The appellate court subsequently determined that the government's method of rendition did not violate the treaty. (*Id.* at pp. 178-179.) Nothing in *Bourdet* suggests the prosecution could have obtained Portillo's voluntary attendance at trial, and accordingly, appellant's reliance on that case is misplaced.

In sum, the prosecution established Portillo's unavailability under section 240, subdivision (a)(4).

(...continued)
appellant's argument because it has nothing to do with the court's process, which is the focus of subdivision (a)(4).

B. Portillo Was Unavailable Under Evidence Code section 240, subdivision (a)(5), because the prosecution's search efforts revealed that Portillo had been deported and that further efforts to procure his attendance at trial would have been futile

As respondent explained in its opening brief, a witness is unavailable pursuant to subdivision (a)(5) 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." (RBOM 28-29.) Although subdivision (a)(5) refers to "reasonable diligence," this Court has often described the evaluation as one involving "due diligence." (*People v. Cromer* (2001) 24 Cal.4th 889, 898.) This subdivision 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 the present case, the prosecution established Portillo's unavailability under subdivision (a)(5) by presenting evidence which showed the prosecutor exercised reasonable diligence in attempting to locate Portillo. As described in more detail in respondent's opening brief, Wood testified that in addition to checking Portillo's last known addresses, he also tried to contact Portillo's friends and family. (1 RT 16.) Wood contacted Detective Ashby with the Santa Ana District Attorney's Office and requested that he make a wanted flyer for Portillo. (1 RT 14-17.) Wood testified that he personally distributed the flyer throughout southern California and he requested that Detective Ashby continue to disseminate the flyer in California. (1 RT 14-15, 19.) Wood also requested Detective Ashby to continue to search for Portillo's friends and family. (1 RT 15-16.)

Once Wood discovered the Portillo had been deported, Wood contacted the authorities in El Salvador. (1 RT 16-20.) Wood also called Investigator Art Zorilla with the Foreign Prosecution Unit at the Orange County District Attorney's Office and asked him to "make any contacts he could in El Salvador" in an attempt to locate Portillo there. (1 RT 19.) These efforts were sufficient to establish that the prosecution acted with reasonable diligence.

In addition, the prosecution established that additional efforts would have been futile (and were therefore not required) because there was no treaty which would bring Portillo within the court's process. (1 RT 20; see also *Ohio v. Roberts*, *supra*, 448 U.S. at p. 74 ["[t]he law does not require the doing of a futile act"].) 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"].) Nevertheless, appellant claims the prosecution failed to prove "due diligence" and a "good faith" effort to obtain Portillo's presence at trial. (ABOM 26-33.) In support of this claim, appellant first argues that because Portillo was a key prosecution witness, the prosecutor should have made an effort to delay Portillo's deportation to allow him to testify at appellant's trial. (ABOM 28.) As noted in respondent's opening brief, this is not a case in which the prosecution had reason to believe shortly after the preliminary hearing that Portillo would be deported. (See RBOM 35.) Instead, the record is devoid of any indication that the prosecutor was aware that Portillo would be deported or even that he was in this country illegally.

Furthermore, appellant points to nothing to indicate that Portillo would have been able to testify if the prosecution had been aware of his alien status and taken more than the numerous steps it already had to locate Portillo and secure his presence at appellant's trial. (See *People v. Lopez* (1998) 64 Cal.App.4th 1122, 1128 [noting prosecution is "not required to do everything possible" to procure witness's attendance, and is only "required to use reasonable diligence"].) To suggest, as appellant does here, that the prosecution had an affirmative duty to verify Portillo's immigration status and take affirmative steps with federal authorities to ensure that his status did not change between the preliminary hearing and trial, "imposes too great a burden on the prosecution." (*People v. Martinez* (2007) 154 Cal.App.4th 314, 329.)

Next, appellant claims the fact that the prosecution began its search for Portillo on the date set for trial indicates, in and of itself, that the prosecution failed to act with due diligence. (ABOM 28-29, citing Aug. RT [5/21/07] 9; Aug. RT [5/27/07] 10-11; 1 RT 13.) Appellant's argument ignores the totality of the prosecution's efforts. As respondent explained in its opening brief, in *People v. Linder* (1971) 5 Cal.3d 342, 347, this Court held that the lower court erred by excluding the 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 instead on the lack of timeliness of the service of the subpoena. (RBOM 35-36.)

Moreover, and as noted above, there was nothing in the record in this case to affirmatively place the prosecution on notice of Portillo's unavailability. In contrast, in *People v. Mendieta* (1986) 185 Cal.App.3d 1032, 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.* (*Id.* at p. 1036; emphasis

added.) Here, the prosecution was never placed on such notice. (See also *People v. Benjamin* (1970) Cal.App.3d 696-697 [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].) In addition, 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. 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].)

Appellant claims "the character of the prosecution's efforts to locate Portillo demonstrates a lack of 'due diligence.'" (ABOM 29.) According to appellant, the entire search for Portillo amounted to "an armchair search, except for Investigator Wood going to Portillo's last known address" and involved even less than an attempt to serve a subpoena, since the investigator did not possess a subpoena. (ABOM 29, citing 1 RT 15.) Appellant ignores the evidence described above that showed that Wood used reasonable efforts in his attempts to locate Portillo. (See 1 RT 14-20; see also RBOM 3-5.)

Notwithstanding the evidence showing the prosecution exercised due diligence in its attempts to locate Portillo, appellant argues the following information provided "leads" the prosecution should have explored: Portillo grew up on Durant Street in Santa Ana and had lived in the area for 10 or 11 years (1 CT 71, 89); Portillo 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 lived in Santa Ana (1 CT 77,

90, 96-97, 99, 114, 116-117); Portillo had been employed (1 CT 79); and, Portillo had gone to school or taken classes to get his high school diploma (1 CT 117). (ABOM 30.) As explained above, the prosecution did attempt to contact Portillo's family and friends but that proved unsuccessful. (See 1 RT 15-16.) Appellant fails to explain how the other "leads" discussed above would have produced information on Portillo's whereabouts. For example, although appellant faults the prosecution for failing to look into information that Portillo had gone to school or taken classes to get a diploma, appellant does not suggests how such information would have helped produce Portillo at appellant's trial. 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 [his] production at trial, neutralizes any intimation that a concept of reasonableness required their execution." (*Ohio v. Roberts*, *supra*, 448 U.S. at pp. 75-76.)

Appellant faults the prosecution for failing to contact Portillo's attorney. (ABOM 30-31.) According to appellant, "[i]t 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." Thus, appellant speculates that "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 and see his family." (ABOM 31.) Although the prosecution apparently did not contact Portillo's attorney, it is speculative to conclude that successful contact with that attorney would have resulted in success in obtaining Portillo's attendance at appellant's trial. Indeed, appellant cites no reason to believe Portillo's prior criminal attorney would have been involved in the deportation proceedings or would have kept in touch with Portillo after

Portillo was placed on probation. (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"].)

Appellant asserts that the prosecution failed to act with due diligence while searching for Portillo in El Salvador because there is no evidence the prosecution contacted the consulate or embassy of El Salvador. (ABOM 32.) There is no basis in the record to support an inference that, assuming arguendo the People successfully contacted the consulate or embassy in El Salvador, this would have led to locating Portillo in El Salvador or more importantly, to producing him at appellant's trial in the United States. Reasonable diligence does not require such actions. (*People v. Lopez*, *supra*, 64 Cal.App.4th at p. 1128; see also *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"].)

Appellant rejects respondent's suggestion that it would have been futile to continue searching for Portillo in El Salvador since he would have been unable to enter this country under Title 8 United States Code section 1182. (ABOM 24-25.) According to appellant, pursuant to section 1182(a)(9)(A)(iii), the United States Attorney General may consent to an alien's reapplication for admission prior to the alien's attempt to be admitted to the United States from a foreign contiguous territory. (ABOM 25.) However, it hardly seems "reasonable" for the prosecution to request that the United States Attorney General consent to depart from federal statutory law and allow Portillo, a gang-banging felon with a criminal history of evading authorities, leave the country the United States removed him to, so that he could return to this country to testify at appellant's trial.

(*People v. Wilson* (2005) 36 Cal.4th 309, 342 [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].)

Moreover, appellant fails to address 8 United States Code 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.) There is no exception to the 10-year bar on Portillo's reentry into the United States.

Nevertheless, appellant claims that federal statutory law 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. (ABOM 25, citing 8 U.S.C. § 1182(d)(1), (d)(3)(A), (d)(5)(A).) Appellant does not explain how it would be within the "national interest" for the United States Attorney General to consent to Portillo's temporary admission under the circumstances here. In addition, such action was not required because 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.)

In sum, the prosecution established Portillo's unavailability under section 240, subdivision (a)(5).

C. Even if the trial court erred by admitting Portillo's former testimony, the error was harmless

Appellant claims that without Portillo's testimony, "it is doubtful the prosecution could have obtained guilty verdicts from the jury." (ABOM

33-34.) Indeed, the Court of Appeal found the admission of Portillo's preliminary hearing testimony to be prejudicial. According to the court, it could not speculate that appellant would have testified without Portillo's former testimony because appellant's decision to testify and admit his presence at the shooting "may well have been motivated by his need to contradict Portillo's testimony that he had confessed to being the shooter." (Slip opn. at 9.) The Court of Appeal also found the admission of Portillo's testimony to be prejudicial because it was "the only evidence identifying [appellant] as the shooter." (Slip opn. at 10.) However, as explained below, the Court of Appeal was wrong to reverse the judgment on this ground because the jury could have based their verdicts on the theory that appellant aided and abetted the crimes. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

When jurors are presented the option of relying on a factually inadequate theory, the error is harmless if there existed alternate grounds for which the evidence was sufficient. (*People v. Guiton, supra*, 4 Cal.4th at pp. 1125-1126.) "[I]f the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*Id.* at p. 1129.) Here, without Portillo's testimony, the alleged inadequacy was factual, not legal. The prosecution's theory was that appellant was the shooter but, even if appellant did not pull the trigger, he was guilty of murder and street terrorism under an aiding and abetting theory. (2 RT 399.) Detective Ashby testified that appellant admitted he was present during the shooting but denied pulling the trigger. (1 RT 170-176.) Other evidence indicated appellant was standing outside of the car when he or one of his fellow gang members shot Erick Peralta in the head, killing him. At least one gang member then yelled "KPC," the men returned to the car, and

they drove away. (1 RT 60, 66-68, 70-72, 270.) This evidence was sufficient to support appellant's convictions under a theory that he aided and abetted the crimes, and there is no affirmative indication in the record supporting a finding that the jury's verdicts were based on the theory that appellant was the direct perpetrator. (*People v. Guiton, supra*, 4 Cal.4th at pp. 1125-1126.) Since a valid ground for the verdicts remain, reversal is not required. (*Ibid.*)

Appellant rejects the notion that his guilt could have been premised on an aiding and abetting theory because he claims that with Portillo's former testimony before the jury, the jury "never had to decide whether the prosecution proved beyond a reasonable doubt that [appellant] aided and abetted the homicide." Thus, according to appellant, "it would be sheer speculation" to affirm a first degree murder conviction based on an aiding and abetting theory which the jury never needed to decide. (ABOM 34.) However, as explained above, there is no affirmative indication in the record that the jury's verdict was based on an inadequate ground. Accordingly, appellant's contention must be rejected and reversal is not required. (*People v. Guiton, supra*, 4 Cal.4th at pp. 1125-1126.)

CONCLUSION

For the foregoing reasons and those stated in Respondent's Opening Brief on the Merits, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal.

Dated: December 2, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains **5425** words.

Dated: December 2, 2009

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DECLARATION OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE

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 Decmber 2, 2009, I served the attached **RESPONDENT'S REPLY 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 PO Box 22055 Santa Ana, CA 92702
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

and furthermore declare, I electronically served a copy of the above-listed document from the electronic notification address (ADIEService@doj.ca.gov) on December 2, 2009, to the following entity's electronic notification address: APPELLATE DEFENDERS INC, eservice-criminal@adi-sandiego.com.

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 December 2, 2009, at San Diego, California.

G. Nolan
Declarant

Signature