IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. HENRY IVAN COGSWELL, Defendant and Appellant.	S158898

Fourth Appellate District, Division One, No. D049038
Superior Court of San Diego, No. SCN201693
Honorable John S. Einhorn, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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By Appointment of the
California Supreme Court

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ISSUE PRESENTED

Must a prosecutor request that an out-of-state sexual assault victim be taken into custody under the Uniform Act to Secure Attendance of Witnesses from without the State in Criminal Cases (Pen. Code, section 1334 et. seq.) in order to demonstrate the due diligence required to satisfy a finding of unavailability under Evidence Code section 240?

INTRODUCTION

This case arises from the failure of a complaining witness in a prosecution for sexual assault to personally appear for trial in California following the personal service to the witness of two judicial summons issued by the Denver County District Court of the State of Colorado, upon the certified requests of a California judge and the prosecuting attorney, to secure the attendance of the out-of-state witness pursuant to the Uniform Act to Secure Attendance of Witnesses [hereafter "Uniform Act"], Penal Code section 1334 and section 1334.3

Following the service of the first judicial summons, the witness, Lorene B., contacted a District Attorney investigator by telephone and explained through an interpreter that she did not want to return to California and deal with the case. Thereafter the Colorado District Court effected a second service of a judicial summons. The statutory option of securing the witness's attendance through custodial means was not requested or addressed. The witness ignored the second judicial summons altogether and failed to appear for trial as ordered.

Following a contested pretrial Evidence Code section 402 hearing, the trial court ruled the prosecution had exercised reasonable diligence in its attempts to produce the witness and further ruled the witness was unavailable pursuant to Evidence Code section 240. The witness's preliminary hearing testimony, the sole evidence of the charges, was read to the jury and criminal convictions were obtained.

Upon appeal, the Court of Appeal reversed the convictions, finding the prosecution failed to exercise due diligence when it neglected to request to secure the presence of the witness at trial through statutory custodial measures set forth in the Uniform Act upon clear indication that the witness

would not obey the second summons to appear. It held the trial court's finding that the witness was unavailable under the circumstances, and its admission of the witness's preliminary hearing testimony at trial constituted prejudicial error.

In the Opening Brief on the Merits (hereafter, "OBM"), respondent urges that Evidence Code section 240 does not require the prosecution to engage the custodial measures provided in the Uniform Act to ensure the appearance of the prosecution's most material witness (the alleged victim) in a sexual assault case in order to demonstrate due diligence for purposes of unavailability. Presenting the issue in the context of the witness's refusal to testify, respondent urges that to use such means is inconsistent with Code of Civil Procedure section 1219, subdivision (b), reasoning that the Legislature, in enacting that provision and others in kind, recognized the trauma of sexual crimes, and that incarceration is too extreme a sanction to impose upon a sexual assault victim for refusing to testify. Respondent finally urges that in the instant case, utilizing the custodial means authorized by the Uniform Act would have constituted "an empty formality" because the witness already refused to return to California and testify.

Appellant, Henry Ivan Cogswell, disagrees with respondent. As set forth below, appellant asserts that where a material witness is required for a criminal prosecution, where the prosecution is informed of the out-of-state location and current address of that witness for purposes of serving a subpoena or judicial summons, and where the witness has demonstrated an intention to ignore the court's process, the prosecution must request the engagement of the custodial measures necessary to transport the witness to the jurisdiction of the court in order to demonstrate due diligence for

purposes of unavailability.

Appellant asserts that the nature of the criminal offenses in an underlying trial is not a basis upon which to either allow a witness to disregard the court's process, or to lighten the obligation as to the exercise of due diligence in the procurement of a material witness to the court's jurisdiction. In this regard, appellant asserts that the limitation of sanctions available upon a finding of contempt for a sexual assault victim who refuses to testify, as set forth in Civil Code section 1219, subdivision (b), has no application to a sexual assault witness who willfully ignores a subpoena and fails to appear as ordered, and does not limit the means by which a prosecutor may obtain the witness's presence in court as summoned.

Finally, appellant asserts that in the instant case, respondent's reliance upon the out-of-court representations by the witness about attending the trial and testifying, to support a conclusion that fully utilizing the Uniform Act provisions here would have been futile, must be rejected. The statements were paraphrased hearsay, at best, and did not constitute competent evidence. While the conduct and comment of the witness demonstrated that the witness was likely to ignore the court's process and that further measures were necessary to demonstrate due diligence, neither can be relied upon for its alleged truth as it is proposed by respondent, that is, that "the witness refused to testify" in this case. For these reasons, as argued below, appellant requests this Court to affirm the decision of the Court of Appeal.

STATEMENT OF THE CASE

In a preliminary hearing held on November 17, 2004 Lorene B. testified that during the week of June 9, 2004 she was in California on vacation from Colorado. She visited friends who lived in Riverside, as well as her best friend, Crystal Ginther, who lived in San Diego. (4RT 208, 225-226.) Lorene knew that Ginther once had a relationship with appellant, that he was the father of her children, and that they were no longer romantically involved.[1] (4RT 205, 226.) Lorene had known appellant for two years. (4RT 272.) Appellant and Lorene are deaf and communicate by sign language. (4RT 210-211.)

On June 9, 2004 appellant was living with his sister, Henrietta, in San Diego county. (4RT 204, 226-227.) Late that afternoon, Lorene and her sister went to the apartment to visit Henrietta, and found appellant there alone. (4RT 202-203, 205-206, 226.) They spoke briefly and returned to Riverside. (4RT 203, 227.) Later that evening, Lorene began receiving "instant messages" from appellant begging her to return to his apartment that night to speak about his children. (4RT 203-205, 229.) Believing the matter was urgent, Lorene returned to the apartment alone at about midnight. (4RT 205-206, 231.)

When she arrived, she parked and exited the car. Upon seeing appellant walking toward her she flagged him over. (4RT 206-207.) He approached, kissed Lorene on the mouth, and pushed her against the car. (4RT 207-208, 231.) He told her he wanted to talk with her in private and

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[1] Appellant was convicted of raping Ginther in 1997. (5RT 317-318.) After the conviction, Ginther contacted the District Attorney and recanted. (5RT 320-321.) She testified about the incident at the instant trial, although she did not recall any details about it. (5RT 305-306.)

to get into the car. (4RT 208, 233.) Lorene entered the car on the driver's side and appellant took the front passenger seat. (4RT 209, 233-234.) Feeling uncomfortable, she opened the car door and asked appellant what he wanted to talk about. (4RT 209, 234.) Appellant jumped on Lorene, adjusting the car seat into a flat position. (4RT 209.) He put his hand down the front of her pants and tried to remove them, bit her breast, and kissed her face and neck. (4RT 210, 235-236.)

Appellant then removed his clothes, and told Lorene to do the same. (4RT 211-213.) Lorene was frightened and believed if she did as he asked, he would calm down." (4RT 212.) She removed her clothing and he pulled her on top of him and had sex with her. He also digitally penetrated her. (4RT 212-214.) Lorene moved to the back seat and told appellant she needed to use the bathroom. (4RT 214-215, 245.) Appellant told her to orally copulate him. (4RT 215.) As she complied, he fell asleep, but awakened when she gathered her clothing to leave. (4RT 216-217.) He pulled her on top of him and caused her to pass out as he had sex with her. (4RT 217-218.)

Lorene awoke after daylight. (4RT 218.) They drove to the bank and to buy gas, and then back to the apartment and parked. (4RT 220-221.) They got into the back seat where appellant pushed Lorene down and had intercourse with her, ejaculating on the car seat. (4RT 223-224, 253.) Appellant told her he loved her. (4RT 224.) She responded that she loved him too, and left. (4RT 224, 255.)

In a refiled information issued nearly one year later on October 18, 2005, appellant was charged with five counts committed against Lorene, including three counts of forcible rape, pursuant to Penal Code section 261, subdivision (a)(2), one count of forcible rape by use of a foreign object

within the meaning of section 289, subdivision (a)(1), and one count of oral copulation under section 288a, subdivision (c)(2). As to all counts, it was further charged that appellant suffered a prior conviction for rape pursuant to section 667.61, subdivisions (a), (c), and (d), and section 667.71, subdivision (a), and that appellant suffered a prior serious felony conviction and previously served a prison term pursuant to section 667, subdivisions (b) through (i), section 667, subdivision (a)(1), section 667.5, subdivision (a), and section 667.6, subdivision (a). (1CT 1-7; 2CT 340.) At the arraignment on that date, appellant pled not guilty and denied the allegations, and trial was calendared for December 20, 2005. (2CT 340.)

On November 2, 2005 the District Attorney filed a petition in the San Diego Superior Court requesting an order to secure the attendance of Lorene for trial on December 21, 2005 within the meaning of the Uniform Act. The petition was granted and a judicial certificate addressed to the Denver County District Court to hold proceedings and compel Lorene to appear in San Diego Superior Court was issued. (1CT 19-24.) Linda Ryder, a paralegal with the District Attorney's office prepared an interstate compact package which included the judicial certificate, as well as provision of airline fare, hotel accommodations, and per diem moneys for the duration of time of court appearances. (1RT 26-27, 33.) The package was overnighted to the Denver District Court, and its receipt was confirmed by Ryder. (1RT 28.) John Diaz, an investigator with the District Attorney's office was assigned to counsel and preserve contact with Lorene. (1RT 41.) Approximately one week before the December trial court date, Diaz contacted the Denver District Court regarding the summons served on her. (1RT 43.)

On December 15, 2005 the trial was continued to January 31, 2006.[2] (2CT 344.) On December 20, 2005 Diaz received a telephone call from a clerk at the Denver County courthouse informing him that Lorene was present there with an interpreter and wanted to speak with him about her "desires not to want to come to California." (1RT 44.) According to Diaz, Lorene told him she "wasn't coming." (1RT 49, 64.)

Thereafter, on December 23, 2005 the prosecutor submitted a second request to secure Lorene's attendance at trial on January 31, 2006 under the Uniform Act. (1CT 25-27.) The option for the engagement of custodial measures under the Uniform Act was not addressed in the petition. (1CT 25-27; 1RT 32-33.) The certificate was granted and paralegal Ryder prepared a second interstate compact package to forward to the Denver County District Court. (1CT 28-30; 1RT 33.) Ryder did not contact the Denver court after sending the package, but the prosecution received an original of an Affidavit of Service of Summons from the court indicating Lorene had been served with the second summons on January 20, 2006. (1CT 31-34; 1RT 28-30.)

Diaz stated he was specifically instructed not to contact the Denver District Court after the first service of summons because the court was "irate" over having to repeat the hearing and summons process. (1RT 48.) Diaz also did not make any efforts to contact Lorene after the December 20th phone call because he opined she would interpret his contact as "some type of intimidation." (1RT 48-49.) Moreover, Diaz did not contact Lorene about the second interstate compact because he believed she might

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[2] The record does not reflect that either Lorene or the Denver District Court was notified of the continuance.

evade service. (1RT 49.) After the second summons was served, he did not try to contact her through email or enlist the assistance of Denver law enforcement in reaching her. (1RT 60-61.) Diaz made no personal efforts to secure Lorene's attendance on the second trial date, and did not recommend that she be taken into custody and delivered to San Diego to secure her appearance. (1RT 64-65.)

Lorene did not contact anyone about the second summons and did not board the flight to San Diego or appear in court as ordered. (1RT 50-51.)

On February 1, 2006, the first day of trial, the prosecutor moved to admit the transcript of the preliminary hearing testimony elicited from Lorene asserting that she was unavailable as a witness. (1CT 55-56.) The prosecutor urged all statutory requirements for procuring her testimony were met, the prosecution had met its burden of demonstrating due diligence, and Lorene was unavailable to testify at trial within the meaning of Evidence Code section 240, subdivision (a)(4), Evidence Code section 1290, and Code of Civil Procedure section 1219, subdivision (b). (1CT 55-56.) The prosecutor represented that there was no further judicial avenue for obtaining Lorene's appearance, urging that Code of Civil Procedure section 1219 prohibited placing Lorene into custody to guarantee her presence because she was a victim of sexual assault. (1RT 6.)

Appellant vigorously opposed the prosecutor's motion and moved to exclude the preliminary hearing testimony. Appellant argued that the prosecution had not fully invoked the Uniform Act, as set forth in section 1334.3 to obtain Lorene's presence by custodial measures and thus, the due diligence requirement had not been satisfied. (1RT 71-72.) He also asserted that the failure to obey a subpoena for a court appearance was not

contemplated in Code of Civil Procedure section 1219, which concerns orders of contempt for failure to testify, and that the prosecutor's reliance upon that provision in allowing Lorene to ignore subpoenas requiring her presence in court was incorrect. (1RT 12.) Trial counsel further argued the prosecutor's and the investigator's representations regarding Lorene's statements constituted inadmissible hearsay which could not be considered for their truth. (1RT 12, 44-45.)

The trial court ruled the prosecutor met the requisite burden of due diligence and found the witness unavailable. It granted the prosecutor's motion to present the witness's previous preliminary hearing testimony during the People's case in chief. (2CT 348-349; 1RT 81.)

On February 15, 2006 the jury found appellant guilty on all counts. (1CT 195-199; 2CT 362–363.) Thereafter, the enhancement and "strike" allegations were found to be true. (2CT 202-204, 364-368.) Appellant was sentenced to a prison term of 105 years to life (2CT 374-375.) He filed a timely notice of appeal on July 14, 2006. (2CT 338.)

Appellant's Opening Brief was filed on February 20, 2007, raising three substantive issues. In a published decision issued on October 31, 2007, the Court of Appeal unanimously reversed appellant's convictions based upon prejudicial error by the trial court in finding the complaining witness unavailable within the meaning of Evidence Code section 240, and in admitting her preliminary hearing testimony at the trial. (Slip Opn. at pp. 7-21.)

In its written opinion, the Court of Appeal distinguished the circumstances which arise when a witness fails to obey a summons to appear in court, from those which occur when a witness appears as ordered, but refuses to testify. (Slip Opn. at pp. 14-20.) It held that in the latter

circumstance, when the witness is a victim of the sexual assault to be prosecuted, the witness may be held in contempt of court for refusing to testify against the defendant, but may not be incarcerated for purposes of punishment or to induce the witness into testifying, as set forth in Code of Civil Procedure section 1219, subdivision (b). (Slip Opn. at pp. 17-18.) As to the former circumstance it held that where, as here, the witness disregards the process of the court and fails to appear altogether, Code of Civil Procedure section 1219, subdivision (b) does not apply, and thus does not prohibit the engagement of custodial measures to secure the witness's presence in court as summoned. (Slip Opn. at pp. 18-20.)

The Court of Appeal concluded the prosecution's failure to fully utilize the Uniform Act in this case precluded a finding of due diligence and ultimately, precluded a finding that the witness was unavailable. (Slip Opn. at pp. 20-21.) Based upon the materiality of the witness, the Court of Appeal found prejudice to be manifest and reversed the judgment. (Slip Opn. at p. 21.)

On February 13, 2008, this Court granted respondent's petition for review.

ARGUMENT

FEDERAL AND STATE CONFRONTATION CLAUSES AND EVIDENCE CODE SECTION 240 REQUIRE A PROSECUTOR TO REQUEST THAT CUSTODIAL MEANS BE UNDERTAKEN TO SECURE THE PRESENCE IN COURT OF AN OUT-OF-STATE MATERIAL WITNESS, WHO HAS INDICATED AN INTENT TO IGNORE THE COURT'S PROCESS, IN ORDER TO DEMONSTRATE DUE DILIGENCE FOR PURPOSES OF PROVING THE WITNESS IS UNAVAILABLE, NOTWITHSTANDING THE WITNESS IS THE COMPLAINANT IN A PROSECUTION FOR SEXUAL ASSAULT.

A. State and Federal Confrontation Clauses Allow An Exception to the Requirement of Witness Presence at Trial Only in Circumstances of Necessity and Only Where A Good Faith and Reasonable Effort to Accomplish A Face-to-Face Meeting Has Taken Place.

The confrontation clauses of both the United States and the California Constitutions guarantee a criminal defendant the right to confront the witnesses against him. (*Crawford v. Washington* (2004) 541 U.S. 36, 42 [124 S.Ct. 1354, 158 L.Ed.2d 177]; *People v. Cromer* (2001) 24 Cal.4th 889, 892; U.S. Const., 6th Amend.; Cal. Const. art I, § 15.) The Sixth Amendment's Confrontation Clause provides that,"[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (*Crawford v. Washington, supra*, 541 U.S. at p. 42.) "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." (*Maryland v. Craig* (1990) 497 U.S. 836, 845 [110 S. Ct. 3157; 111 L. Ed.

2d 666].) "The right guaranteed by the Confrontation Clause includes not only a 'personal examination,' [citation] but also '(1) insures that the witness will give his statements under oath -- thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.'" (*Id.* at pp. 845-846, quoting *California v. Green* (1970) 399 U.S. 149, 158 [90 S. Ct. 1930, 26 L. Ed. 2d 489].) "The combined effect of these elements of confrontation -- physical presence, oath, cross-examination, and observation of demeanor by the trier of fact -- serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." (*Ibid.*)

The United States Supreme Court has held that a narrow exception to the Confrontation Clause may arise when a witness is unavailable for trial, but has been subject to cross-examination in a prior judicial proceeding. "It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." (*Barber v. Page* (1968) 390 U.S. 719, 722 [88 S. Ct. 1318; 20 L. Ed. 2d 255].) "This exception has been explained as arising from necessity and has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement."

(*Ibid.*) However, "[t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." (*Barber v. Page, supra,* 390 U.S. 719, 725.) Thus, "[a]lthough face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there is a '"case-specific finding of necessity."'[citations]." (*Maryland v. Craig, supra,* 497 U.S. at pp. 857-858.) In these exceptional circumstances, the previous testimony is admissible only if the prosecution has made a "good faith effort" to acquire the presence of the witness at the trial. (*Barber v. Page*, *supra*, 390 U.S. at pp. 724-725.)

Similarly in California, this Court has held "the 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. Cromer*, *supra*, 24 Cal. 4th at pp. 896-897, citing *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, 339, 39 L. Ed. 409].)

This Court has further recognized the narrow exception wherein the prior testimony of an unavailable witness may be admissible at trial in circumstances of necessity and only in "'the absence of any other means of utilizing the witness' knowledge.'" (*People v. Rojas* (1975) 15 Cal.3d 540,

549, quoting 5 Wigmore on Evidence (3rd ed.) § 1402, p. 148.) Thus, if a witness is unavailable for trial but has testified at a previous judicial hearing where the witness was subject to cross-examination, the prior testimony may be admitted at trial. (*People v. Smith* (2003) 30 Cal.4th 581, 609; *People v. Enriquez* (1977) 19 Cal.3d 221, 235, disapproved on other grounds in *People v. Cromer, supra,* 24 Cal.4th at p. 901, fn. 3.)

In this regard, the Court has adopted the federal standard for a finding of unavailability, holding the prosecution must engage in "a good faith effort" to secure the witness's presence at trial before the witness is deemed unavailable and the prior testimony may be heard. (*People v. Enriquez, supra,* at p. 235, quoting *Barber v. Page, supra,* 390 U.S. at p. 725.) The federal constitutional requirement of a "good faith effort" is paralleled in California as the requisite demonstration of "reasonable or due diligence" as set forth in Evidence Code section 240. (*People v. Smith, supra,* 30 Cal.4th at pp. 609-610.)

B. The California Legislature Has Codified the Principals of Unavailability and the Requirement of "Due Diligence" in Evidence Code sections 1291 and 240 and Numerous Cases Have Interpreted Their Application in Criminal Proceedings.

As explained above, a prerequisite to the introduction of the prior testimony under federal law is that the witness be legally unavailable and have undergone adequate cross-examination at the proceedings sought to be admitted. In California, this requirement is established by statute in the state Evidence Code. As relevant to the instant case, Evidence Code section 1291, subdivision (a)(2) provides that evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a

witness and the party against whom the evidence is offered had an opportunity to cross-examine the declarant with a similar motive and interest.

Evidence Code section 240, enacted in 1967, defines the term "unavailable as a witness" in relevant part, as follows:

> (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:
>
> 1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
>
> 2) Disqualified from testifying to the matter.
>
> 3) Dead or unable to attend or 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.

As pertinent here, Evidence Code section 240, subdivision (a)(5) sets forth two interrelated components for purposes of establishing unavailability: (1) the exercise of due diligence by the proponent of the evidence, in (2) the proponent's use of the court's process to secure the witness's presence.

As to the first requisite factor, this Court has held that although due diligence is "incapable of a mechanical definition," it "connotes persevering

application, untiring efforts in good earnest, efforts of a substantial character." (*People v. Cromer, supra*, 24 Cal.4th at p. 904, quoting *People v. Linder* (1971) 5 Cal.3d 342, 346-347; accord *People v. Wilson* (2005) 36 Cal.4th 309, 341.) The relevant considerations are whether the search was begun in a timely manner, the importance of the witness's testimony, and whether all leads have been competently explored. (*Ibid.*, citing *People v. Sanders* (1995) 11 Cal.4th 475, 523; *People v. Louis, supra,* 42 Cal.3d at p. 991; *People v. Enriquez, supra,* 19 Cal.3d at pp. 236-237; *People v. Wilson, supra*, at p. 341.)

In *People v. Linder, supra*, 5 Cal. 3d at p. 347, this Court held that "the totality of efforts of the proponent to achieve presence of the witness must be considered by the court." The Court opined that factors to consider include "not only the character of the proponent's affirmative efforts but such matters as whether he reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena him when he was available, whether the search was timely begun, and whether the witness would have been produced if reasonable diligence had been exercised." (*Ibid.*, citations omitted.)

More recently, this Court held that while Evidence Code section 240 defines the term "unavailable as a witness" in a manner that applies to all hearsay exceptions that require declarant unavailability, it should not be interpreted so strictly as to "preclude unlisted variants of unavailability." (*People v. Reed* (1996) 13 Cal.4th 217, 226.) "Rather, courts have given the statutes a realistic construction consistent with their purpose, i.e., to ensure that certain types of hearsay, including former testimony, are admitted only when no preferable version of the evidence, in the form of live testimony, is legally and physically available." (*Id.* at pp. 226-227.)

This Court has recently held that appellate courts will apply independent, de novo review over trial court determinations of due diligence. (*People v. Cromer, supra,* 24 Cal.4th at p. 901.) The court stated, "[A]ppellate courts should independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial. (*Ibid.*)

This Court has confirmed, as well, that the prosecution bears the burden of proving, by competent evidence, that a hearsay declarant is unavailable as a witness. (*People v. Smith, supra,* 30 Cal.4th at p. 609, citing *People v. Price* (1991) 1 Cal. 4th 32, 424; *People v. Enriquez, supra,* 19 Cal.3d at p. 235.) The proof must be made by competent evidence, applying the exclusionary rules such as hearsay, best evidence and opinion to the evidence offered in making the determination. (*Ibid.*; *People v. Williams* (1979) 93 Cal.App.3d 40, 51, citing *People v. Green* (1963) 215 Cal.App.2d 169, 171.)

The second component of Evidence Code section 240, subdivision (a)(5) is the proponent's use of the court's process to compel attendance. As is relevant to the instant case, the "court's process" includes interstate process under the Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases (Uniform Act), as embodied in California in section 1334, et. seq.. (*People v. Blackwood* (1983) 138 Cal.App.3d 939, 946.)

C. California Courts and Courts of Other Jurisdictions Have Recognized that "The Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases" Provides An Interstate Court Process Procedure for Securing the Presence of a Witness From Another State Which Must Be Utilized To Establish the Requisite Due Diligence For A Finding of Unavailability.

In criminal cases, a witness's presence in another state does not place him beyond the reach of the court's process within the meaning of Evidence Code section 240. The Uniform Act, enacted in 1937 and held to be constitutional in *New York v. O'Neill* (1959) 359 U.S. 1, 11 [79 S. Ct. 564, 3 L. Ed. 2d 585], provides an interstate procedure for securing the attendance of a witness who is in another state. The purpose of the Uniform Act is to make uniform law throughout the states for procurement of witnesses beyond state borders. (Cal. Pen. Code § 1334.6.) The procedures set forth in the Uniform Act have been adopted in all states and territories. (*People v. Superior Court (Jans)* (1990) 224 Cal.App.3d 1405, 1408-1412; *State v. Breeden* (Md. 1993) 333 Md. 212, 222.) As relevant to the instant case, the Uniform Act was in effect in the State of Colorado at the time of trial. (Colo. Rev. Stats section 16-9-202, subd. (1)-(4), enacted 1963.)

Where the witness resides out of the state of California, it is the prosecutor's duty to invoke the Uniform Act. (*People v. Blackwood, supra,* 138 Cal.App.3d at p. 947.) When the prosecution knows of the witness's location, and procedures exist to secure the witness's presence in court, Evidence Code section 240 requires those procedures be utilized. (*Ibid.*) Thus, when the prosecution knows of the witness's location, and fails to attempt to secure process under the Uniform Act, the witness is not unavailable. (*Id.* at pp. 945-947; *In re Terry* (1971) 4 Cal.3d 911, 931.) To

show reasonable diligence, a good faith effort to find the witness, and the use of the Uniform Act to secure the attendance of the witness, must be demonstrated. (*People v. Masters* (1982) 134 Cal.App.3d 509, 520-528.) In order for the Uniform Act to apply to the proceeding, the person whose attendance is required must be a material witness in the case. (Cal. Pen. Code §§ 1334.2, 1334.3; *People v. Cavanaugh* (1968) 69 Cal.2d 262, 266.)

Where, as here, the witness resides in Colorado, the prosecution must apply to the judge in the court where the action is proceeding, to request the presence of the out-of-state witness, with a motion containing all facts demonstrating that the witness is material to the proceeding. (*People v. Cavanaugh, supra*, at pp. 266-267; Cal. Pen. Code § 1334.3.) Upon such a showing, the judge then issues a certificate for the out-of-state court, avering that the witness is material, and specifying the period of time for which the witness will be required. (Cal. Pen. Code §§ 1334.2, 1334.3;; Colo. Rev. Stats. § 16-9-202, subd. (1).) The certificate may either request that a subpoena be issued to procure the attendance of the witness, or that the witness be taken into custody and delivered to an officer of the state where the trial is pending. (*Ibid.*; Colo. Rev. Stats. § 16-9-202, subd. (2)-(3).)

If only a subpoena to the witness is requested, the out-of-state judge may simply issue a summons. If, however, the certificate recommends, by facts which constitute prima facie proof for the need of custody and delivery, that the witness should be taken into custody and delivered to an officer of the state in which the trial is pending in order to secure that witness's attendance, the out-of-state court may order that the witness be brought before it to determine whether the witness should be taken into custody and delivered to the requesting state. (Cal. Pen. Code § 1334.3;

Colo. Rev. Stats. § 16-9-202, subd. (2).) If that court is satisfied that custody is necessary, then it may order the witness be so detained and delivered to an officer of the requesting state. (Cal. Pen. Code § 1334.3; Colo. Rev. Stats. § 16-9-202, subd. (3).)

If a witness appears solely upon the basis of the issuance of a subpoena by the out-of-state court, then he or she may be paid for the costs of the appearance. If the witness fails without good cause to appear and testify as directed in the subpoena, the witness may be punished in accordance with those who disobey subpoenas within the state. (Cal. Pen. Code § 1334.3; Colo. Rev. Stats. § 16-9-202, subd. (4).)

This Court has addressed the requirement of due diligence in the context of the Uniform Act on a very few occasions. In *In re Montgomery* (1970) 2 Cal.3d 863, this Court reversed the petitioner's convictions upon finding the prosecution failed to exercise a good faith effort to secure the presence of a witness, who was located in the state of New York, pursuant to the Uniform Act. This Court observed that "[t]he ability of the fact finder to evaluate a witness' credibility is severely hampered when such witness is absent and when his prior testimony is read into evidence. [Citation.] Only if the necessity, due to the witness' unavailability, is clearly demonstrated may the defendant's right of confrontation be overcome, for this right is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the trier of fact to weigh the credibility of the witness." (*Id.* at p. 867.) Finding that the witness's testimony was the only evidence against the petitioner as to one of the counts, and was critical to the judgment of the other count, the court held the prejudicial nature of the error was manifest and reversal was required. (*Id.* at p. 868.)

The following year, in *In re Terry, supra,* 4 Cal.3d 911, this Court

reversed the petitioner's convictions upon finding the prosecution failed to either utilize the Uniform Act, or make any attempt to persuade the father of two minor children to travel from Virginia to California, in order to procure the presence at trial of the children who were critical witnesses to the prosecution's case against him, and whose preliminary hearing testimony had been read into evidence over defense objection. (*Id.* at pp. 928-931.) In *Terry*, the children resided with their father in the State of Virginia, but were traveling with him in California two days before the scheduled date of trial, October 23rd. (*Id.* at p. 929.) The father, who was there served with two subpoenas for the pending trial date, complained to the District Attorney about having to remain in California for an extended period of time. (*Ibid.*) The District Attorney suggested the case might be resolved without a trial, but if the case did proceed and the father would did not want to bring the children, he could write a letter with his reasons. (*Ibid.*) The children did not appear as subpoenaed on October 23rd, and the trial was continued to December 4th. (*Ibid.*) In November, the prosecutor obtained subpoenas for the trial, but did not serve them upon the children at their home in Virginia. Instead, the prosecutor called the father on December 3rd to ask if the boys would be in court. The father explained he would not bring the children out at any time because of the embarrassment they suffered and due to their low school grades. (*Id.* at pp. 929-930.) The trial was again continued to January 28th. (*Id.* at p. 930.) Again, the prosecutor obtained subpoenas for the children, but did not serve them in Virginia and instead, telephoned the father on the date of trial. (*Ibid.*) The father stated the boys were in school in Virginia. (*Ibid.*)

This Court noted that had the prosecution utilized the Uniform Act, a summons would have been issued by a Virginia court only if at the hearing

there the judge determined it would not have caused undue hardship to the witnesses to be compelled to testify. (*In re Terry, supra,* 4 Cal.3d at pp. 930-931.) While acknowledging the father's position and considering reports issued by the boys' psychologists as to their psychological problems, this Court opined those matters did not prevent the children from testifying at the preliminary hearing or from traveling to California in connection with another case, and it could not conclusively find that a Virginia court would have necessarily found the existence of hardship. (*Id.* at p. 931.) Although this Court recognized the efforts that were made by the prosecution in the case, it found the failure to use the Uniform Act, and its failure to attempt to persuade the father to bring the children to California, required reversal of the convictions. (*Id.* at p. 931.)

As noted by respondent, California Courts of Appeal have consistently held that the provisions set forth in the Uniform Act must be exercised in order to establish due diligence in procuring the attendance of out of state witnesses. For example, in *People v. Masters*, *supra*, 134 Cal.App.3d 509, the victim and sole witness to the robbery charged against appellant moved from California to Arkansas during the course of several trial continuances. (*Id.* at pp. 520-521.) An investigator for the prosecution located the witness, who was residing with her parents and looking for work in Arkansas. (*Id.* at p. 521.) The investigator left several messages for the witness, requesting that she return his call collect, but she did not respond. (*Id.*) The investigator then caused a subpoena to be personally served on the witness, who thereafter called the investigator and reluctantly agreed to return to California and testify upon learning her expenses would be paid. (*Id.* at p. 522.)

The case was thereafter continued three times, and when the

investigator tried to reach the witness by telephone to confirm the final new trial date, her mother told him she moved to another city and that she did not want to return to California to testify. (*People v. Masters, supra,* 134 Cal.App.3d at p. 522.) The following day, the witness personally contacted the investigator and informed him that she had just started a new job, that her health was too poor to make the trip, and that she "would not come by any mode of transportation despite efforts to convince her otherwise." (*Ibid.*) She further refused to provide him with her address. (*Ibid.*)

The court in *Masters* reviewed the previous appellate decisions which had considered the issue of unavailability in the context of good faith and the Uniform Act, noting that the cases finding prejudicial error involved a failure to utilize the Uniform Act in effect between California and the other state, or otherwise involved the absence of, or minimal, efforts limited to establishing contact with the witness out of state. (*People v. Masters, supra*, 134 Cal.App3d. at pp. 524-525, citing *People v. Nieto* (1968) 268 Cal.App.2d. 231 [address known but telephone contact only], *People v. Casarez* (1968) 263 Cal.App.2d 130 [telephone contact], *People v. Bailey* (1969) 273 Cal.App.2d 99 [telegrams sent], *People v. Fortman* (1970) 4 Cal.App.3d 495 [no effort], *People v. Joines* (1970) 11 Cal.App.3d 259 [no effort].) Recognizing the efforts made by the investigator in the case before it, the *Masters* court opined that when the witness first reluctantly agreed to travel to California, she was amenable to the Uniform Act and that an adequate showing was not otherwise made to excuse the failure to utilize its provisions for process at that time. (*Id.* at p. 528.) Finding that the testimony of the witness was the sole evidence of the robbery count, the court concluded it was prejudicial error to find her unavailable and admit her preliminary hearing testimony. (*Id.*)

Although, until the instant matter, courts of this state have not been called upon to decide the issue of the use of custodial measures as set forth in the Uniform Act, it is significant that in each instance where the Uniform Act has been considered, courts have held the exercise of its provisions in procuring out of state material witnesses is necessary to satisfy the due process and confrontation rights of the accused. Notably, where, as here, the testimony of the out of state witness is the primary, or sole evidence against the defendant, this Court and the appellate courts have found the provisions of the Uniform Act indispensable, notwithstanding witness claims of psychological harm, poor grades, poor health, financial stress, or new employment.

Cases arising from other states which have considered the question of custodial measures, as set forth by respondent, instruct that such measures must be utilized where the testimony of the out of state witness is primary to the prosecution's case and where there is good cause to invoke such means in order to secure the presence of an out of state witness. (See OBM at pp. 18-22.)

First, in *Grey v. Commonwealth* (Va. Ct.App. 1993) 16 Va.App. 513, the defendant, Grey, served subpoenas upon two witnesses who were material to the defense, and who resided in New York, pursuant to the Uniform Act. The subpoenas were served the week prior to the trial, upon the defense learning of new prosecution witnesses which caused the witnesses' testimony to be vital to the defense. The witnesses appeared in the New York court to accept summons, and there informed a public defender of that state that they would appear at the Virginia trial. (*Grey v. Commonwealth, supra,* at p. 515.) As well, on the day before the trial, the witnesses assured Grey they would be present at the trial, indicated they

were already en route to Virginia, and that they had arranged for accommodations there. (*Ibid.*) On the first day of trial, however, the witnesses failed to appear in court and Grey moved for a continuance. (*Ibid.*) Grey explained to the trial court that although the Uniform Act had been utilized, the custodial measures provided in the Act had not been requested since the witnesses had assured they would appear to testify. (*Ibid.*) Grey advised that he knew how to locate the witnesses and secure them. (*Id.* at p. 519.) The trial court denied the continuance, noting the delayed manner in which the defense secured the certificate for the out of state witnesses, and the fact that the witnesses knew about the trial date, said they would appear, and then did not. (*Id.* at p. 516.)

The Virginia appellate court held the trial court erred in finding Grey had not exercised due diligence and in denying the request for a continuance. (*Grey v. Commonwealth, supra,* at p. 518.) Noting that the implementation of custodial measures are not mandatory under the Uniform Act in every instance, the court stated the permissive language of the provision "does not require that a party always request a recommendation to take the witness into custody, especially where, as here, the witnesses have assured numerous officials that they would be present. There was no indication that the witnesses would not be present; in such a situation a party is not required to request that friendly, cooperative out-of-state witnesses be taken into custody as a matter of course." (*Id.* at pp. 518-519.)

In *People v. Thorin* (Mich.Ct.App. 1983) 126 Mich.App. 293, witness Herbert Okinen was subpoenaed pursuant to the Uniform Act to testify in defendant's trial on sexual assault charges. Both the prosecutor and defense counsel were in contact with Okinen and his attorney, and airline transportation arrangements were made for the witness's travel to

Michigan. (*Id.* at p. 304.) Apparently, Okinen's attorney was not certain whether Okinen would appear at trial and he did not. Finding the prosecutor had exercised due diligence, the court in *Thorin* held that "given the limited exposure which Okinen had to the initial abduction" the extreme step of taking Okinen into custody under the Uniform Act was not warranted. (*Ibid.*)

In *Bussard v. State of Arkansas* (1989) 300 Ark. 174 the defendant Bussard was convicted of capital murder arising from a robbery and murder at a motel in Arkansas. Defendant's sister, Hudson, testified for the prosecution at his first trial, stating that she had taken Bussard into her home following the incident and that she had assisted him in obtaining medical treatment for a gunshot wound which was later determined to have been caused by a bullet from the murder victim's firearm. (*Id.* at pp. 177-178.) When Bussard's first conviction was reversed, Hudson, who resided in Missouri, was subpoenaed twice by the prosecution pursuant to the Uniform Act to testify at his second trial. (*Id.* at p. 179.) Hudson appeared personally at the first summons hearing and moved to quash the subpoena. (*Id.* at pp. 179-180.) The trial was continued and Hudson's motion to quash was denied. Thereafter, a second subpoena was issued to the state of Missouri, and Hudson's attorney appeared at the hearing at which she was ordered to appear for trial in Arkansas. (*Id.* at p. 179.) Hudson apparently did not appear at trial. (*Ibid.*) The *Bussard* court upheld the trial court's finding that the prosecution exercised due diligence. (*Id.* at p. 180.) It is noteworthy that the *Bussard* court did not reference the use of custodial means and it is unclear whether the issue was before the appellate or the trial court in the case.

In *People v. Arguello* (1987) 737 P.2d 436, a Colorado case, the

defendant was charged with the sexual assault of a minor child. The defendant's first trial ended in a mistrial on the charge and a new trial motion was granted after his second trial. (*Id.* at p. 437.) The minor testified at both trials. (*Ibid.*) At the time of the third trial, the minor was seven years old and living with her mother and stepfather in Texas. (*Ibid.*) The prosecutor represented to the court that the minor's parents "absolutely refused" to bring her back to testify for a third time. Asserting the minor was unavailable to testify, the prosecutor moved to admit the minor's testimony from the second trial. (*Id.* at pp. 437-438.) The trial court agreed the minor was unavailable and admitted her testimony from direct and cross examination. (*Id.* at p. 438.)

The court in *Arguello* held that the due diligence requirement had been met. (*People v. Arguello*, *supra*, 737 P.2d at pp. 438-439.) It noted that the prosecution had secured the minor's appearance from another state through enforceable subpoenas issued pursuant to the Uniform Act for the first two trials. (*Id.* at p. 439.) At the time of the third trial, the prosecutor contacted the custodial parents in Texas and attempted to secure the child's attendance through voluntary means, as well as unsuccessfully attempting to serve Colorado subpoenas. (*Ibid.*) Two days before the third trial, the parents formally notified the prosecution of their refusal to return the child for a third trial, noting she was "just recovering from nightmares and other detrimental effects of her two previous experiences in testifying in this matter," and they would not allow it to happen again. (*Ibid.*) Due to the late date, the prosecution declined to use the Uniform Act to compel the child's attendance, particularly without any assurance the Texas court would have issued a summons to compel the child's testimony under the circumstances. (*Ibid.*) The court in *Arguello* found the trial court's

characterization of further attempts at subpoenaing the child to be a "useless act," and in finding the child unavailable, was not an abuse of discretion. (*Ibid.*) It further noted the child had been thoroughly examined at both trials. (*Ibid.*)

Finally, in *State of Arizona v. Archie* (Ariz.Ct.App. 1992) 171 Ariz. 415, an appeal from a conviction of a sexual assault, the court held the good faith requirement for a finding of unavailability had not been met because the prosecution had not produced any evidence demonstrating its avowed efforts to secure the sexual assault victim's presence at trial, and because the state could have done more to assure the victim's presence by recommending the victim be taken into custody under the Uniform Act. (*Id.* at pp. 415, 417-418.) In *Archie*, the complaining witness moved out of state to Indiana prior to the defendant's second trial. (*Id.* at p. 415.) The prosecutor first moved to admit her former testimony in the second trial, asserting the witness could not be located in Indiana. The trial judge denied the motion and continued the trial date, finding a likelihood the prosecution would be able to secure the witness's presence by using an out of state subpoena. (*Id.* at p. 416.) Three weeks before the trial, the prosecutor filed a request for the attendance of the out-of-state witness, and the trial court signed the certificate. (*Ibid.*) On the day prior to the trial, however, the prosecutor represented that the witness had been served and provided with airfare and monetary provisions, but that the witness had not contacted the state with any excuse for her absence. (*Ibid.*) The defense argued that the witness could be secured by custodial means under the Uniform Act, but the trial court ruled it did not believe the State was required to take the witness into physical custody. (*Ibid.*) The trial court found the witness to be unavailable, finding the prosecution had made a good-faith effort to obtain

her presence at trial. (*Ibid.*)

The court in *Archie* held there was no competent evidence in the record of any action taken by the Indiana authorities pursuant to the judicial certificate. (*State of Arizona v. Archie, supra,* 171 Ariz. At p. 417.) Thus, there was no evidence the witness could not be produced. (*Ibid.*) Moreover, the court held if the certificate would have recommended the witness be placed in custody to ensure her attendance, it was more likely she would have appeared. The court stated:

> "Here, the state knew the victim's address, and according to the prosecutor, his legal assistant had spoken to the victim at least twice since she moved to Indiana. Therefore, because the witness had been located, it would not have been futile to recommend that she be taken into custody, as it likely would have resulted in her presence at trial."

(*Ibid.*)

Based upon the foregoing California and foreign authorities, appellant submits that a finding of due diligence may require the Uniform Act to compel the attendance of out of state witnesses to be fully utilized, including the use of custodial measures, where the location and address of the witness is known, where the testimony of the witness is the primary, or the sole evidence of the charges against the defendant, where the witness may intentionally fail to appear despite the issuance of a properly executed interstate summons, and where the efforts to secure the witness would not be utterly futile due to time constraints or potential for the witness to frustrate efforts to compel attendance. (See *People v. Arguello, supra,* 737 P.2d at p. 439.) Applying this analysis to the instant case, appellant submits it was necessary for the prosecution to fully utilize the Uniform Act, specifically exercising the option of custodial means, to secure the

attendance of Lorene B. in this case. Here, the prosecution was informed of Lorene B.'s address in Colorado. Further, it cannot be disputed that Lorene B.'s testimony was the sole evidence that the sexual assaults took place in this case. Clearly, Lorene B. demonstrated by conduct, if not by declaration, that she would not appear in court despite the service of two properly executed interstate subpoenas and summons. The record does not reflect any evidence that using custodial means to compel Lorene B.'s presence at trial would have been futile, that she would have frustrated efforts to compel her attendance, or that time constraints prevented a request for custodial intervention at the time of the issuance of the second certificate in this case. Moreover, unlike the witnesses in *Bussard* and *Arguello*, who had testified not only at the defendants' preliminary hearing, but also in at least one jury trial, Lorene B.'s testimony here arose only from a preliminary hearing proceeding.

D. Code of Civil Procedure section 1219, Subdivision (b) Does Not Apply to The Uniform Act Or To Witnesses Who Refuse To Appear in Obedience of A Subpoena.

Code of Civil Procedure section 1219 provides in pertinent part:

> "(a) Except as provided in subdivision (b) and (c), when the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it, and that case the act shall be specified in the warrant of commitment.
>
> (b) Notwithstanding any other law, no court may imprison or otherwise confine or place in custody the victim of a sexual assault for contempt *when that contempt consists of refusing to testify* concerning that sexual assault.

(Italics added.)

As noted in the opinion of the Court of Appeal, by its express terms, Code of Civil Procedure section 1219, subdivision (b) addresses the court's contempt power and forbids the court's use of its power to place in custody a sexual assault victim who refuses to testify. (Slip Opn. at p. 16.) The Uniform Act, and specifically its provision for taking a witness into custody to secure their appearance in court is not an exercise of the court's contempt power. (Slip Opn. at p. 16.) The language of Civil Code of Procedure section 1219, subdivision (b) does not preclude the use of the Uniform Act to secure the presence of sexual assault victims.

As set forth in the opinion of the Court of Appeal, Code of Civil Procedure section 1219, subdivision (b) was enacted in 1984 in response to the detention of a minor child who refused to testify against her stepfather who was accused of sexually molesting her. (Stats. 1984, ch. 1644, § 2; Slip Opn. at p. 17, citing Sen. Bill No. 1678 (1983-1984 Reg. Sess.) § 2.) Proponents argued that too many sexual assault victims were testifying as a result of threats of contempt and imprisonment, and that the threats were increasing the level of trauma experienced by the victims. (Slip Opn. at p. 17, citing Assem. Com. on Crim Law and Public Safety, analysis of Sen. Bill No. 1678 (1983-1984 Reg. Sess.), as amended June 18, 1984, p. 2; Assem. Off. of Research, 3d reading analysis of Sen. Bill No. 1678 (1983-1984 Reg. Sess.), as amended June 18, 1984; Sen. Republican Caucus, analysis of Sen. Bill No. 1678 (1983-1984 Reg. Sess.), p. 2; Sen. Com. on Judiciary, report on Sen. Bill No. 1678 (1983-1984 Reg. Sess.), as amended Apr. 26, 1984, p.2.) The amendment did not affect a trial court's power to find a sexual assault victim in contempt for refusing to testify, and it left in place the court's power to impose sanctions other than imprisonment if a

sexual assault victim refused to testify. As noted by the Court of Appeal, Code of Civil Procedure section 128, subdivision (d) was enacted at the same time as section 1219, subdivision (b), staying for three days the imposition of any contempt sanction imposed upon a sexual assault victim for refusing to testify. (Slip Opn. at pp. 17-18.)

Disobedience of a judicial summons to appear is not the same as refusing to testify. As noted by the Court of Appeal, the decision to ignore the court's process is a more serious affront to the court than is a refusal to testify. (Slip Opn. at p. 19.) Moreover, the law provides that a witness who disobeys a subpoena may be taken into custody and brought before the court. (Slip Opn. at p. 19, citing Penal Code § 881, subdivisions (b), (c); Penal Code §§ 1331, 1332; Code of Civil Procedure § 1993.) Likewise, the Uniform Act is a means to secure the attendance of a witness at trial, and is not intended to punish or coerce a witness who refuses to testify.

Respondent relies on *People v. Smith, supra*, 30 Cal.4th 581 to demonstrate that a sexual assault victim who refuses to testify may be found unavailable under Evidence Code section 240 even if the witness is present in the courtroom. (OBM at pp. 25-26.) In *Smith*, this Court held that former testimony of a witness who is physically available, but who refuses to testify, may be found unavailable by the court only after taking reasonable steps to induce the witness to testify unless it is obvious that such steps would be unavailing. (*Id.* at p. 624, citing *People v. Sul* (1981) 122 Cal.App.3rd 355; accord, *People v. Francis* (1988) 200 Cal. App. 3d 579, 584; *People v. Walker* (1983) 145 Cal. App. 3d 886, 894 .)

In *Smith*, the witness Mary G., one of the defendant's rape victims, was to testify as to mitigation factors in the death penalty phase of his trial. As a condition of her testimony, Ms. G. wished to address the jury as to her

general beliefs in opposition to the death penalty. (*People v. Smith, supra*, 30 Cal.4th at p. 623.) Since Ms. G.'s views on the death penalty were not relevant nor related to her feelings about the defendant, the court advised her she could not express her views as to the correct punishment. (*Id.* at pp. 623-624.) Based upon this ruling, Ms. G. refused to testify. (*Ibid.*) The trial court questioned Ms. G. under oath, offering her more time, or alternatively suggesting she could be prosecuted for criminal contempt. (*Ibid.*) Since she was a sexual assault victim, the court had no authority to incarcerate her. (Code of Civil Pro. § 1219, subd. (b).) The Court held that the trial court's efforts to induce Ms. G. to testify were reasonable. (*Ibid.*) It further held that a trial court need not "take extreme actions before making a finding of unavailability." (*Id.* at p. 624.) It is noteworthy, however, that in *Smith*, the Court stated that a "witness who is under subpoena and present in court [has] a duty to testify in accordance with the rules of evidence, a duty trial courts have the power to enforce." (*Ibid.*)

Appellant acknowledges that the California Legislature has enacted laws which aim to reduce the trauma for sexual assault victims in the context of the criminal judicial process and the courtroom, as cited by respondent. (OBM at pp. 24-25, citing Penal Code, §§ 702, 1103, 1346, 1346.1, 1347, 1347.5.) The legislation, however, does not either expressly or impliedly provide that sexual assault victims are not obligated to obey subpoenas or judicial summons in the first instance. It cannot be the intent of the Legislature that sexual assault victims are outside of the subpoena process, either as applied by the Uniform Act or by the laws of the county and state of jurisdiction.

E. The Prosecutor Was Required to Request the Implementation of Custodial Measures Provided by the Uniform Act in Order to Establish Due Diligence in this Case.

Respondent urges that the process utilized by the prosecution in this case was sufficient to demonstrate unavailability because any further efforts to secure her presence in court would have been futile. Respondent urges that Lorene B. made it clear that she was refusing to testify and that securing her attendance before the court in San Diego by custodial means would have been unwarranted, extreme, and useless. (OBM at p. 27-29.) Appellant disagrees.

Respondent acknowledges that Lorene was an uncooperative witness. (OBM at p. 28.) Respondent also acknowledges she was summoned on two occasions to the Colorado District Court and ordered to appear in San Diego. (OBM at p. 28.) There is no dispute that Lorene was the sole witness who could provide evidence that appellant committed the offenses he was charged with. There is no dispute that the prosecution had Lorene's address in Colorado. There is further no dispute that Lorene ignored both the first and the second judicial summons instructing her to attend court in San Diego and that she failed to appear for trial as ordered. In fact, it cannot be disputed that after Lorene failed to appear for trial following the first summons, the prosecution was clearly noticed that it was highly probable that without more, Lorene would fail to appear following the second judicial summons as well. Based upon the above authority and the undisputed facts, the custodial measures of the Uniform Act were warranted and necessary for a finding of due diligence in this case.

It is noteworthy that the prosecution here not only failed to fully utilize the custodial measures of the Uniform Act in securing Lorene's

attendance in court, but also failed to make any efforts to persuade Lorene to appear as ordered. Investigator Diaz conceded that he never tried to contact Lorene, either by email or telephone, after she first failed to appear and contacted him by telephone on December 20, 2005. (1RT 44, 48-49, 60-61, 64-65.) The record reflects that in fact, once Lorene failed to appear following the first summons, the prosecution did not contact her at all, but instead, effected a second service of summons for which it must have known, that without more, would likely have the same result. The totality of the effort in this case cannot be characterized as the "persevering application, untiring efforts in good earnest, efforts of a substantial character" as expressly required by this Court to demonstrate due diligence. (*People v. Cromer, supra,* 24 Cal.4th at p. 904; *People v. Wilson, supra,* 36 Cal.4th at p. 341; *People v. Linder, supra*, 5 Cal.3d at pp. 346-347.)

Respondent urges that even if Lorene had appeared in the trial court it is a foregone conclusion that she would have refused to testify. (OBM at p. 29.) Appellant disagrees. Respondent cannot know what the outcome of her appearance would have been. It is the within the purview of the trial court to determine whether a witness refuses to testify, and such determination is made only after efforts to induce the testimony of a reluctant witness have been exhausted, or after the court, in its examination of the witness, concludes efforts to induce testimony are futile. (*People v. Smith, supra*, 30 Cal.4th at p. 624.) Due diligence demands that the prosecutor take all reasonable steps to secure the attendance of its material witnesses at trial. The trial court, and this Court, have no competent evidence as to whether Lorene would have testified if she had appeared in court, must less evidence of a good cause to fail to appear in court when summoned to do so.

Moreover, it is not a foregone conclusion that Lorene would have been found to be "unavailable" if she had appeared as ordered, and then refused to testify. The proper steps to reach that determination never took place. In this case, once again, Lorene simply ignored the subpoena and did not appear. No good cause or reason was provided. The trial court did not have an opportunity to determine whether Lorene would testify, or make a finding on that issue after taking "reasonable steps" to induce her to testify. Examples of reasonable steps endorsed by the courts to induce an available yet unwilling sexual assault witness to testify have been to appoint an attorney to correctly advise the witness of the consequences, to prosecute the witness for criminal contempt, impose financial sanctions, or otherwise attempt to solve the problem before the trial begins. (*People v. Francis, supra*, 200 Cal.App.3d at p. 585; see *People v. Walker, supra*, 145 Cal. App. 3d at p. 893-894 [court used reasonable steps and found them unavailing when witness refused to testify when offered immunity and threatened with contempt.) Defense counsel, likewise, was not given a meaningful opportunity to participate in the "availability" proceedings.

Finally, respondent's repeated premise that Lorene "refused to testify" is flawed. (See OBM at pp. 26-31.) The record does not reflect competent evidence that Lorene "refused to testify" in this case. As noted above, the proponent of the evidence has the burden of showing by competent evidence that the witness is unavailable. (*People v. Smith, supra,* 30 Cal.4th at p. 609.) Lorene's signed statements to an interpreter, paraphrased by Investigator Diaz, that she did not want to "deal with this case," and that she "wasn't coming" were hearsay and cannot be considered for their truth. Even if the comments are taken at their truth, to urge that Lorene "repeatedly indicated a refusal to testify" and therefore, her

appearance in court would be a "mere formality" (OBM at p. 31.) reflects an overstated characterization of the evidence.

In sum, appellant submits the prosecution was required to fully utilize the Uniform Act in securing Lorene's appearance in the trial court. This is not only the appropriate outcome for this case, but a contrary finding would have sweeping effects for future cases. If this Court should find that sexual assault victims may ignore the court's process and fail to appear when properly summoned, the constitutional rights of the accused will be violated, the criminal justice system will be compromised, and the court's powers of process will be diminished. The custodial measures of the Uniform Act do not punish a witness for refusing to testify. It assures the orderly conduct of the criminal justice system and ensures the constitutional rights of the accused are respected.

CONCLUSION

For the foregoing reasons, appellant requests this Court to affirm the decision of the Court of Appeal.

Dated: June 13, 2008

Respectfully submitted,

PATRICIA A. SCOTT
Attorney for Appellant
Henry Ivan Cogswell

CERTIFICATE OF COMPLIANCE

I, Patricia A. Scott, certify that the attached APPELLANT'S ANSWER BRIEF ON THE MERITS contains 10,943 words as calculated by Word Perfect Version 12.0.

Dated: June 13, 2008

PATRICIA A. SCOTT
Attorney for Appellant
Henry Ivan Cogswell

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SUPREME COURT CASE NUMBER: S158898
People v. Henry Ivan Cogswell

DECLARATION OF SERVICE

I, undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of Yavapai, in the State of Arizona, in which county the within-mentioned delivery occurred, and not a party to the subject cause. I served:

APPELLANT'S ANSWER BRIEF ON THE MERITS

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

OFFICE OF THE ATTORNEY GENERAL
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For: Hon. John S. Einhorn, Judge

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Each envelope was then sealed and with the postage thereon fully prepaid, deposited in the United States mail by me at Prescott, Arizona, on June 13, 2008.

I declare under penalty of perjury under the laws of the State of Californiathat the foregoing is true and correct. Executed on June 13, 2008, at Prescott, Arizona.

Patricia A. Scott