IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

HENRY IVAN COGSWELL,

Defendant and Appellant.

S158898

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

OPENING BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Must a prosecutor request that a sexual assault victim, who is out-of-state and does not wish to return to California and testify, be taken into custody under the Uniform Act to Secure Attendance of Witnesses from without the State in Criminal Cases (Pen. Code, § 1334 et seq.) in order to demonstrate the due diligence required to satisfy the finding of unavailability under Evidence Code section 240 that would permit the victim's preliminary hearing testimony to be admitted into evidence at trial?

INTRODUCTION

Cogswell was charged with multiple counts of rape. The victim testified at the preliminary hearing and then returned to her home in Colorado. The prosecutor subpoenaed the victim in Colorado through use of the Uniform Act, but the victim refused to return to San Diego and testify at Cogswell's trial. The prosecutor did not request the victim be taken into custody under the Uniform Act because Code of Civil Procedure section 1219, subdivision (b), forbids placing a sexual assault victim into custody for refusing to testify. The trial court found the prosecutor exercised due diligence in attempting to procure

the witness for trial and admitted her preliminary hearing testimony. The Court of Appeal reversed, finding the prosecutor had not demonstrated due diligence because she failed to request the victim be taken into custody under the Uniform Act.

Evidence Code section 240 allows the introduction of preliminary hearing testimony if the prosecutor exercised due diligence but could not procure a witness for trial. Due diligence requires a prosecutor to take reasonable steps to produce a witness for trial. A sexual assault victim's refusal to testify under Code of Civil Procedure section 1219, subdivision (b), renders the witness unavailable within the meaning of Evidence Code section 240. In enacting this provision, the Legislature recognized that sexual assault victims should not be further victimized by the legal system, and incarceration is too extreme a sanction to impose upon a sexual assault victim for refusing to testify.

Having a sexual assault victim incarcerated and brought to California would be an empty formality because she already refused to return to California and testify. A prosecutor should not be required to have an out-of-state sexual assault victim who has indicated a refusal to testify be taken into custody under the Uniform Act in order to demonstrate due diligence for the purpose of showing unavailability.

STATEMENT OF THE CASE

Sexual assault and related charges were filed against Cogswell. On November 17, 2004, Lorene, a deaf person, voluntarily flew to San Diego from Colorado and testified at Cogswell's preliminary hearing with the assistance of a sign language interpreter. (1 RT 41-42; 4 RT 210-211, 273.) Lorene testified that Cogswell, who is also deaf, lured her to his apartment complex in San Diego on the evening of June 9, 2004, by sending her instant messages pleading with her to meet him to discuss a very important matter regarding his children. (4 RT 202, 204-205.)

Lorene, who was a Colorado resident visiting her sister in Riverside, agreed to meet Cogswell. (4 RT 204, 225-226, 228.) Lorene's sister thought it must be urgent and important since Cogswell also sent her instant messages. (4 RT 205.) Lorene knew Cogswell through other members of the San Diego deaf community: Crystal G., the mother of Cogswell's children, and Cogswell's sister, Henrietta Cogswell. (4 RT 204-205, 208-211.)

Upon her arrival, Cogswell kissed Lorene on the mouth. (4 RT 205, 208.) She asked him why he kissed her and Cogswell pushed Lorene against the car. (4 RT 208, 232-233.) He then ordered Lorene to get into the car so they could talk in private. (4 RT 208.)

Once in the car, Cogswell climbed on top of Lorene, reclined the driver's seat, and forced his hands down the front of her pants. (4 RT 209-210.) Cogswell removed his clothes and ordered Lorene to remove her clothes. (4 RT 211.) Lorene was scared of Cogswell so she complied and removed her pants. (4 RT 212, 241.) Cogswell inserted both his fingers and penis into her vagina. Lorene struggled with Cogswell and told him to stop. (4 RT 214, 244.) She eventually managed to climb into the backseat. (4 RT 214.)

Cogswell followed Lorene into the backseat and forced her to orally copulate him. (4 RT 215-216, 245.) When it appeared Cogswell had fallen asleep, Lorene leaned forward to grab her clothes. (4 RT 216-217.) Cogswell grabbed Lorene and pinned her down, holding her arms above her head and making it difficult for her to breathe. (4 RT 217.) Cogswell raped Lorene and she passed out from his weight crushing her. (4 RT 217-218, 269.)

The next morning, Cogswell pushed Lorene down on the backseat and pried open her legs. (4 RT 253.) Cogswell raped Lorene and ejaculated on the backseat. (4 RT 224, 253.) He pulled up his pants, told her not to say anything, and signed, "I love you." (4 RT 224.) Lorene drove back to Riverside. (4 RT 255.) She reported the rape to police a few days later. (4 RT 260, 267-268.)

Cogswell was held to answer to the charges and a trial date was scheduled. The People had relied on prior communications with Lorene in which she indicated she would appear in court on the day of trial. On the last scheduled trial date, Lorene told the prosecutor she would not appear in court. The People were forced to dismiss the charges since they had not properly subpoenaed her in Colorado. (1 RT 5.)

On October 18, 2005, the San Diego County District Attorney refiled the complaint, which was deemed the information, charging Cogswell with three counts of forcible rape (counts 1, 4, & 5; Pen. Code, § 261, subd. (a)(2)), one count of rape by a foreign object (count 2; Pen. Code, § 289, subd. (a)(1)), and one count of forcible oral copulation (count 3; Pen. Code, § 288a, subd. (c)(2)). The information further alleged that Cogswell qualified as a habitual sex offender (Pen. Code, § 667.71, subd. (a)) because he was previously convicted of forcible rape (Pen. Code, §§ 261, subd. (a)(2) & 667.61, subd. (a)(c)(d)), and that Cogswell was on parole when he committed the current offenses (Pen. Code, § 1203.085, subd. (b)). The information also alleged Cogswell had a prison prior (Pen. Code, § 667.6, subd. (a)), a violent felony prison prior (Pen. Code, § 667.5, subd. (a)), a serious felony prior (Pen. Code, §§ 667, subd. (a), 668, & 1192.7, subd. (c)), and a strike prior (Pen. Code, §§ 667, subds. (b) through (i), 1170.12, & 668). (1 CT 1-7;2 CT 240.) At arraignment, the parties stipulated to a bindover and trial was scheduled for December 20, 2005. (2 CT 340.)

On November 2, 2005, the prosecutor filed a petition in the San Diego Superior Court, North County Division, requesting an order to secure the attendance of Lorene for trial on December 21, 2005, under the Uniform Act to Secure Attendance of Witnesses from without the State in Criminal Cases ("Uniform Act"; Pen. Code, § 1334 et seq.). (1 CT 19-21.) The prosecutor's petition was granted, and the San Diego Superior Court sent a certificate to the

Denver County District Court[1] requesting Lorene be summoned to appear for trial in San Diego. (1 CT 22-24.) Linda Ryder, a paralegal with the District Attorney's Office, spoke with Linda Shim[2] an employee of the District Court in Denver, and confirmed the Denver court had received the interstate compact request. (1 RT 28.) Included in the interstate compact request was an airline ticket to San Diego for travel on December 20, 2005, and per diem allowance for food and hotel accommodations. (1 RT 26-27.)

Investigator John Diaz of the District Attorney's Office had arranged for Lorene's travel and transportation to the preliminary hearing. He had also remained in contact with Lorene regarding her travel to San Diego and participation in the trial. (1 RT 42.) Investigator Diaz had contact with the Denver District Court about a week before the December 20, 2005, trial date. (1 RT 43.) On December 15, 2005, the trial was continued to January 31, 2006. (2 CT 344.)

On December 20, 2005, Investigator Diaz received a call from Shim informing him that Lorene was currently in her office and wanted to speak with him through an interpreter about the subpoena and her desire not to come to California. (1 RT 44.) Investigator Diaz spoke with Lorene who said she did not want to come to California and deal with the case. (1 RT 44, 49.)

On December 23, 2005, a second interstate compact request was prepared by the prosecutor and submitted to the San Diego Superior Court. (1 CT 25-27.) Upon its approval, the second interstate compact request was sent to the Denver District Court. (1 CT 28-30.) No one from the San Diego

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1. Although referred to as the "circuit" court at various points in the record, the Colorado trial court is the District Court.

2. Linda Shim's last name is spelled phonetically in the record as "Shim" and "Shram." (1 RT 28, 44.) For purpose of consistency, it will be reflected as "Shim."

District Attorney's Office contacted the Denver District Court about the second interstate compact request. (1 RT 29, 48.) Investigator Diaz explained that he was instructed not to contact the Denver court because that court "was irate a little bit, to say the least, over the first packet resulting in what it did and then being asked to do it again." (1 RT 48.)

Investigator Diaz also did not attempt to contact Lorene about the second interstate compact request because he did not want to provide her information that would allow her to evade service. (1 RT 48-49.) He was also concerned his contacting her could be interpreted as a form of intimidation. (1 RT 48-49.) Instead, Investigator Diaz waited for Lorene to contact him about her upcoming travel arrangements. (1 RT 49.)

On January 20, 2006, Lorene was summoned, appeared before a Denver District Court judge, who ordered her to appear in San Diego for trial on January 31, 2006. (1 CT 34.) Lorene did not contact Investigator Diaz or use her airline reservation on January 31, 2006. (1 RT 51.)

On February 1, 2006, the trial court held an Evidence Code section 402 hearing and heard argument as to whether Lorene's testimony should be admissible under Evidence Code sections 240, subdivision (a)(4), 1290, and 1291, subdivision (a)(2). (1 RT 4-7, 11-12, 23-82.) The prosecutor explained that due to Code of Civil Procedure section 1219, subdivision (b), she was precluded from putting Lorene in custody because Lorene is a sexual assault victim. Thus, the prosecution had done all it could to procure Lorene's attendance for trial. (1 RT 6.) Defense counsel argued the prosecutor did not exercise due diligence, and Code of Civil Procedure, section 1219 does not apply to the court's powers in a situation where a witness fails to obey a subpoena. (1 RT 12.) The trial court found the People had sustained their burden of showing due diligence to determine the unavailability of Lorene, and

permitted her preliminary hearing testimony to be presented in lieu of her live testimony. (1 RT 81.)

Lorene's preliminary hearing testimony was read to the jury. (4 RT 202-273.) Additional evidence presented by the prosecution included the following: Detective David Schaller of the San Marcos Sheriff's station, testified to interviewing Lorene about three days after the rape, and her small stature. (5 RT 356-357.) He also testified that he met with Cogswell the same day, and Cogswell had numerous bruises and scratches all over his body. (5 RT 358-362.) Crystal G. testified to having an abusive relationship with Cogswell since 1996. (5 RT 287-289.) In 1997, Cogswell raped Crystal G. four times over a two-day period. (5 RT 294-314.) Cogswell was arrested and convicted of raping Crystal G. (5 RT 315-318.)

On February 15, 2006, a San Diego County jury found Cogswell guilty of all charges. It also found the enhancements and prior allegations true. (8 RT 537-539; 9 RT 592-594.) On July 14, 2006, the trial court sentenced Cogswell to 105 years-to-life in prison. (2 CT 336, 374-375.)

Cogswell appealed his conviction, arguing in part that the prosecution did not exercise due diligence in attempting to secure Lorene's presence at trial because it failed to request she be taken into custody under the Uniform Act. The Court of Appeal agreed. The Court of Appeal reasoned that Code of Civil Procedure section 1219, subdivision (b), does not limit the power of a California court to utilize the custody and delivery provisions of the Uniform Act on a sexual assault victim because it only restricts a court from using incarceration through its contempt power as a means of securing testimony or punishing a contemptuous refusal to testify. (Slip Opn. at p. 16.) Since the prosecutor knew it was highly probable Lorene would not return to California even when ordered to do so by the Colorado court, the prosecutor would in all probability have had Lorene taken into custody under the Uniform Act if she

were aware that it was a viable option. (Slip Opn. at p. 21.) The Court of Appeal found the prosecutor did not use every reasonable means to secure Lorene's attendance, and therefore, did not exercise reasonable diligence. (Slip Opn. at p. 21.) The erroneous admission of Lorene's preliminary hearing testimony was prejudicial because it provided the only evidence that a sexual assault took place. (Slip Opn. at p. 21.)

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

ARGUMENT

I.

EVIDENCE CODE SECTION 240 DOES NOT REQUIRE A PROSECUTOR TO REQUEST AN OUT-OF-STATE SEXUAL ASSAULT VICTIM BE TAKEN INTO CUSTODY IN ORDER TO MEET THE REQUIRED SHOWING OF DUE DILIGENCE FOR THE PURPOSE OF PROVING UNAVAILABILITY

Evidence Code section 240 does not require a prosecutor to have an out-of-state sexual assault victim taken into custody under the Uniform Act in order to establish due diligence when the victim has already indicated that she will not testify. A witness will be found unavailable under Evidence Code section 240 if the prosecutor makes a good faith effort and takes reasonable steps, but is unable to produce the witness for trial. However, a sexual assault victim who appears in court and refuses to testify will be found unavailable for the purpose of Evidence Code section 240. Since legislation and public policy prohibits incarcerating sexual assault victims for refusing to testify, incarcerating an out-of-state sexual assault victim who has unequivocally indicated a refusal to testify should not be a necessary and reasonable prerequisite to demonstrating due diligence for the purpose of Evidence Code section 240.

A. The Confrontation Clause And Evidence Code Section 240 Require That A Prosecutor Act In Good Faith And Take Reasonable Steps To Secure A Witness's Presence

The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15.) "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* (2004) 541 U.S. 36, 42 [124 S.Ct. 1354, 158 L.Ed. 2d 177].) However, as clarified in *Maryland v. Craig* (1990) 497 U.S. 836, 844 [110 S.Ct. 3157, 111 L.Ed.2d 666], "We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." (Original italics.) "[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important *public policy* and only where the reliability of the testimony is otherwise assured." (*Id.* at pp. 850, 857, italics added [testimony of child abuse victim witnesses by closed circuit television "necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate"].)

"[T]he confrontation clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose . . . infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony."" (*Delaware v. Fensterer* (1985) 474 U.S. 15, 22 [106 S.Ct. 292, 88 L.Ed.2d 15]; see *California v. Green* (1970) 399 U.S. 149, 165–168 [90 S.Ct. 1930, 26 L.Ed.2d 489] [the

confrontation clause is not violated by admitting a declarant's preliminary hearing testimony, as long as the declarant is testifying as a witness and subject to full and effective cross-examination].)

Both the United States Supreme Court and this Court have recognized that the right to confrontation is not absolute when a witness is found to be unavailable and there has been a previous opportunity to cross-examine the witness. "[T]here has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." (*Barber v. Page* (1968) 390 U.S. 719, 722 [88 S.Ct. 1318, 20 L.Ed.2d 255]; *People v. Enriquez* (1977) 19 Cal.3d 221, 235, overruled on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889.)

"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." (*Barber v. Page, supra,* 390 U.S. at p. 722; see also *People v. Rojas* (1975) 15 Cal.3d 540, 549, quoting 5 Wigmore on Evidence (Chadbourn ed. 1970) § 1402, p. 148 ("The general principle upon which depositions and former testimony should be resorted to is the simple principle of necessity . . . .").)

A witness is not unavailable "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." (*Barber v. Page, supra,* 390 U.S. at pp. 724-725; *People v. Enriquez, supra*, 19 Cal.3d at p. 235.) "The lengths to which the prosecution must go to produce a witness before it may offer evidence of an extra-judicial declaration is a question of reasonableness." (*California v. Green* (1970) 399 U.S. 149, 189, n. 22 [90 S. Ct. 1930, 26 L.Ed.2d 489] (Harlan concurring opinion, citing *Barber v. Page, supra*, 390 U.S. 719).

In California, this exception is codified in Evidence Code sections 1290 and 1291. (*People v. Ogen* (1985) 168 Cal.App.3d 611, 616.) Evidence Code sections 1290 and 1291 render former testimony given under oath not inadmissible under the hearsay rule provided the declarant is unavailable and the party against whom the former testimony is offered had the right and opportunity to cross-examine the declarant. California Evidence Code section 240, defining when a witness is unavailable, is "in harmony" with the constitutional requirements. (*People v. Smith* (2003) 30 Cal.4th 581, 609; *People v. Enriquez, supra*, 19 Cal. 3d at p. 235.)

Before the enactment of Evidence Code sections 240, 1290, and 1291, Penal Code section 686 codified the unavailability exception to the confrontation clause. Penal Code section 686 formerly read, in relevant part,

> In a criminal action the defendant is entitled: . . . 3. . . . to be confronted with the witnesses against him . . . except that where the charge has been preliminarily examined before a committing magistrate and the . . . defendant . . . has . . . had an opportunity to cross-examine the witness; . . . the deposition of such witness may be read, upon its being satisfactorily shown to the court that he . . . cannot with due diligence *be found within the state*. . . .

(Italics added; see also *People v. Crumbley* (1962) 204 Cal.App.2d 591, 595-596.) Notably, prior to the enactment of Evidence Code section 240, a witness was considered unavailable if absent from the state of California.

Operative January 1, 1967, the California Legislature enacted the Evidence Code in an effort to consolidate and revise the law relating to evidence. "This code establishes the law of this State respecting the subject to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice." (Evid. Code, § 2.)

Included, was the enactment of Evidence Code section 240, subdivision (a), which currently reads:

> (a) *Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:*
>
> (1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
>
> (2) Disqualified from testifying to the matter.
>
> (3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.
>
> (4) Absent from the hearing and the court is unable to compel his or her attendance by its process.
>
> (5) *Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.*

(Evid. Code, § 240, subd. (a), italics added.)

The first opinion by this Court addressing the requirements for demonstrating reasonable diligence was *People v. Linder* (1971) 5 Cal.3d 342. In *Linder,* this Court acknowledged, "[w]hat constitutes due diligence to secure the presence of a witness depends upon the facts of the individual case." (*Id.* at p. 347.) Due diligence "is incapable of a mechanical definition . . . the word 'diligence' connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citation.] The totality of efforts of the proponent to achieve presence of the witness must be considered by the court." (*Ibid.*) This Court recognized factors bearing upon a party's ability to show due diligence, in addition to its affirmative efforts, include "whether he reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena him when he was available [citation], whether the search was

timely begun, and whether the witness would have been produced if reasonable diligence had been exercised [citation]." (*People v. Linder, supra*, 5 Cal.3d at p. 347.)

Recently, this Court abandoned deferential review for de novo review of a trial court's due diligence determination. (*People v. Cromer, supra,* 24 Cal.4th at pp. 892-893, 901, fn. 3.) When evaluating a trial court's due diligence determination, "appellate courts should independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial." (*Id.* at p. 892.)

The *Cromer* decision also reaffirmed the notion that "due diligence" is "incapable of a mechanical definition," and restated the relevant factual considerations applicable to assessing due diligence previously recited in *Linder.* (*People v. Cromer, supra,* 24 Cal.4th at 904; accord *People v. Wilson* (2005) 36 Cal.4th 309, 341.) Additional considerations have included the importance of the witness's testimony (*People v. Louis* (1986) 42 Cal.3d 969, 991) and whether leads were competently explored (*People v. Enriquez, supra,*19 Cal.3d at pp. 236-237). (*People v. Wilson, supra*, 36 Cal.4th at p. 341.) "[T]he measure of due diligence is not the difficulties imposed by a search for a witness, but rather the diligence exercised in surmounting those difficulties." (*People v. Enriquez, supra,* 19 Cal.3d at p. 236.) "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; *People v. Price* (1991) 1 Cal.4th 324, 424.)

Notably, in *Linder*, this Court rejected the trial court's finding that insufficient efforts were made to locate a witness because the trial court relied solely on the fact defense counsel had not served the relative papers for the

subpoena weeks earlier, rather than considering the cumulative efforts made to locate the witness. (*People v. Linder, supra,* 5 Cal. 3d at pp. 346-347.) The *Linder* court also took notice of the fact that serving the subpoena at an old address where the witness could not reasonably be expected to be found, albeit an effort to demonstrate reasonable diligence by utilizing the court's process, "could play only a minor role in the overall assessment of what constitutes reasonable diligence." (*Id.* at p. 347, fn. 1.)

While recognizing the requirement of due diligence "is a stringent one for the prosecution" (*People v. Salas* (1976) 58 Cal.App.3d 460, 469),

> California courts have not interpreted Evidence Code sections 240 and 1291 so strictly as to preclude unlisted variants of unavailability. 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.

(*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 79-80, quoting *People v. Reed* (1996) 13 Cal.4th 217, 226-227.) For instance, in *People v. Rojas* (1975) 15 Cal.3d 540, a witness's "refusal to testify on the grounds of fear for the safety of his person and that of his family rendered . . . him 'unavailable as a witness' within the meaning of section 240, subdivision (a)(3)." (*Id.* at p. 552.)

In sum, the United States Supreme Court and this Court have both indicated that while a prosecutor must make substantial efforts, there is no indispensable or categorical requirement to establishing due diligence. Rather, the facts of each case will dictate what precise steps are expected to demonstrate due diligence. These steps should be taken in good faith and need not surpass notions of reasonableness.

B. The Uniform Act To Secure The Attendance Of Witnesses From Without The State In Criminal Cases Provides A Permissive Option Of Requesting The Witness Be Placed Into Custody

In 1937, California enacted the Uniform Act, which it codified in Penal Code sections 1334 through 1334.6. The Uniform Act "provides that a person shall be required to appear at a hearing upon receipt of a certificate of a court of another state, which has similar legislation, asserting that the person is a material witness in a criminal prosecution or grand jury investigation." (*Vannier v. Superior Court* (1982) 32 Cal.3d 163, 169; see Pen. Code, § 1334.2.) The Uniform Act also includes the conditional requirement that the certificate may also recommend "that the witness be taken into immediate custody and delivered to an officer of this state to assure his or her attendance in this state. . . ." (Pen. Code, § 1334.3.)

> If the judge at the hearing is satisfied of the desirability of the custody and delivery, for which determination the certificate shall be prima facie proof of this desirability, he or she may, in lieu of issuing a subpoena, order that the witness be forthwith taken into custody and delivered to an officer of this state.

(*Ibid.*)[3]

"The essence of the Uniform Act is to create a community of jurisdictions which will honor the request of fellow members for the appearance of witnesses at criminal proceedings under the conditions specified in the Act." (*People v. Superior Court (Jans)* (1990) 224 Cal.App.3d 1405, 1410; *Vannier*

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3. It is clear by the terms of the Uniform Act that placing a witness in custody is not mandated simply because it is "recommended" by the requesting state. Rather, the statute provides the foreign court "may" direct that the witness be taken into custody. The word "may" carries the distinct notion of discretion. (See eg., *Commonwealth v. Griffin* (Pa.Sup.Ct. 1976) 243 Pa.Super. 115, 118 [California court exercises its discretion and quashes subpoena under the Uniform Act, finding that further testimony would be detrimental to the health of the witness].)

v. Superior Court, supra, 32 Cal.3d at p. 172.) To date, the Uniform Act, or some variation of it, has been adopted by every state in the Union, the District of Columbia, Puerto Rico, and the Virgin Islands. (*State v. Breeden* (Md.Ct.App. 1993) 333 Md. 212, 222-223.)

The United States Supreme Court has upheld the validity of the Uniform Act against challenges based on the privileges and immunities and due process clauses of the federal Constitution. (*New York v. O'Neill* (1959) 359 U.S. 1 [79 S.Ct. 564, 3 L.Ed.2d 585].) The constitutionality and validity of the Uniform Act was likewise recognized by this Court in *People v. Cavanaugh* (1968) 69 Cal.2d 262, 266, footnote 3.

Prior to the enactment of Evidence Code section 240, the consensus was an individual was considered "unavailable" and due diligence was inapplicable if the witness was located outside the state. (*People v. Carswell* (1959) 51 Cal.2d 602, 605.) In *Barber v. Page, supra,* 390 U.S. 719, the United States Supreme Court recognized that with the inception of the Uniform Act the process of the trial court was no longer limited to the respective state. (*Barber v. Page, supra,* 390 U.S. at p. 723, fn. 4.). California has since held the court process referred to in Evidence Code section 240, subdivision (a)(5), "includes the interstate processes made available by the uniform act to states which are parties to the compact." (*People v. Masters* (1982) 134 Cal.App.3d 509, 523, citing *People v. Joines* (1970) 11 Cal.App.3d 259, 266; *People v. Nieto* (1968) 268 Cal.App.2d 231, 235-241.)

This Court has not extensively considered the Uniform Act's implications on Evidence Code section 240. In *In re Montgomery* (1970) 2 Cal.3d 863, this Court held *Barber v. Page, supra,* 390 U.S. 719 applied retroactively, resulting in a finding that no efforts to secure an out-of-state witness for trial rendered the introduction of preliminary hearing testimony unconstitutional. (*In re Montgomery, supra,* 2 Cal.3d at pp. 865, 867-868.)

The failure to utilize the Uniform Act was revisited by this Court in *In re Terry* (1971) 4 Cal.3d 911. In *Terry*, "the prosecuting authorities obtained subpoenas, wrote letters to the children [witness victims], talked to the father, and made telephone inquiries of him as to the children's whereabouts and whether they would attend the trial . . . ." (*Id.* at p. 931.) However, the failure to make "any attempt to use the Uniform Act or to persuade the father to bring the children to California to testify" forbade the use of the children's preliminary hearing testimony at trial. (*Ibid.*) This Court has since addressed the Uniform Act on one other occasion, finding the California Constitution does not include a witness's right to refuse to be a witness in judicial proceedings within the state. (*Vannier v. Superior Court, supra*, 32 Cal. 3d at p.171.)

Numerous decisions of the California Court of Appeals have addressed the use of the Uniform Act in assessing a witness's unavailability under Evidence Code section 240. They are all in accordance with the requirement that an effort to utilize the Uniform Act must be made in order to establish due diligence in securing the attendance of an out-of-state witness. (See *People v. Blackwood* (1983) 138 Cal.App.3d 939, 947 (error finding witness unavailable when no attempt made to use Uniform Act); *People v. Masters, supra,* 134 Cal.App.3d 509, 528 (witness's earlier promise to appear did not excuse using the Uniform Act); *People v. Joines, supra,* 11 Cal.App.3d 259, 268 (no attempt to use Uniform Act); *People v, Fortman* (1970) 4 Cal.App.3d 495, 502 (no attempt to use Uniform Act); *People v. Bailey* (1969) 273 Cal.App.2d 99, 106 (same); *People v. Nieto, supra,* 268 Cal.App.2d 231, 239-240 (same); *People v. Woods* (1968) 265 Cal.App.2d 712, 715 (same).)

No California court prior to the Court of Appeal's decision in the present matter had considered the extent to which the coercive features of the Uniform Act must be utilized to demonstrate due diligence. Other states that have considered this issue generally agree custody is not a necessary requirement to

demonstrate due diligence. Similar to California precedent, these decisions also considered additional factors such as the cooperativeness of the witness or guardians and the importance of the testimony.

In *Gray v. Commonwealth* (Va. Ct.App. 1993) 16 Va.App. 513, the defendant subpoenaed two out-of-state witnesses in New York pursuant to the Uniform Act on September 27th. (*Id.* at p. 515.) His counsel had spoken to the witnesses the day before trial, who represented that they were on their way to Virginia and had a place to stay. Defense counsel also spoke with a New York public defender who had spoken to the witnesses and assured defense counsel they would be present. Based on these assurances, defense counsel did not request the witnesses be taken into custody under the Uniform Act. (*Ibid.*) When the witnesses failed to appear for trial on October 9th, the defendant moved for a continuance. (*Id.* at pp. 514-515.) The trial court denied the continuance and found the defendant failed to exercise due diligence based on the "delayed" use of the Uniform Act, and "the fact that the witnesses 'knew about the trial date, and they voluntarily pledged that they would be here and they're not here.'" (*Id.* at p. 516.) The Virginia Court of Appeal found the trial court abused its discretion in denying the continuance because the defendant "did all that was possible to secure material out-of-state witnesses, thereby exercising due diligence." (*Id.* at p. 514.) With respect to the custody option, the Virginia court held "the permissive language . . . allowing that a certificate from a Virginia court . . . include a recommendation that the witness be taken into immediate custody . . . 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." (*Id.* at pp. 518-519.)

In *People v. Thorin* (Mich.Ct.App. 1983) 126 Mich.App. 293, the defendant was convicted of third degree criminal sexual misconduct. (*Id.* at

p. 296.) On appeal, he claimed the trial court erred in impliedly finding the prosecutor had exercised due diligence in attempting to produce a certain witness. (*People v. Thorin*, *supra*, 126 Mich.App. at pp. 303-304.) The Michigan Court of Appeal rejected the claim finding the prosecutor used due diligence in the attempt to produce the witness for trial. (*Id.* at p. 304.) Specifically, the witness had been subpoenaed through the Uniform Act, and arrangements were made for him to fly to Michigan and testify. (*Ibid.*) In addition, both the prosecutor and defense counsel were in contact with the witness and his attorney, "[a]lthough the prosecutor admitted that [the witness's] attorney was never certain whether [the witness] would appear at trial. . . ." (*Ibid.*) The *Thorin* court acknowledged that the prosecutor took all possible steps "short of requesting [the witness] be taken into custody by the police in the state where he was located." (*Ibid.*) The *Thorin* court felt such "extreme steps" were not warranted given the limited exposure the witness had to the abduction. (*Ibid.*)

In *Bussard v. State* (1989) 300 Ark. 174, the defendant and cohorts shot one victim twice, and shot and killed a second victim while burglarizing a motel in Arkansas. (*Id.* at pp. 177-178.) The next day, the defendant who had a gunshot wound showed up at his sister Dorothy Hudson's home in Missouri. (*Id.* at p. 178.) Hudson took the defendant to the hospital where the bullet was removed and it was determined to have been fired from the victim's gun. (*Ibid.*) Hudson testified at the defendant's first trial for the prosecution. (*Id.* at p. 179.) The conviction was reversed, and the prosecution wanted Hudson to testify at a second trial. (*Id.* at pp. 177, 179.)

The prosecution subpoenaed Hudson through the Uniform Act. (*Bussard v. State*, *supra,* 300 Ark. at p. 179.) Two hearings were held in Missouri; Hudson appeared at the first, and her attorney at the second hearing. The Missouri court ordered Hudson to appear in Arkansas for trial. (*Ibid.*)

However, Hudson failed to appear voluntarily after being ordered to do so by the Missouri court and her testimony from an earlier trial was read into evidence. (*Bussard v. State, supra,* 300 Ark. at pp. 179-180.) Notwithstanding the failure to place Hudson in custody, the Arkansas Supreme Court found the prosecution had established the unavailability of the witness by subpoenaing her in Missouri through the Uniform Act. (*Id.* at p. 180.)

In Colorado, the Court of Appeal found an out-of-state six-year-old victim/witness unavailable even though the prosecutor had not even employed the Uniform Act. (*People v. Arguello* (Col.Ct.App. 1987) 737 P.2d 436, 439.) In *Arguello*, the minor had appeared voluntarily and testified at two earlier trials against the defendant. Shortly before the third trial, the prosecutor notified the court that the victim's custodians refused to bring her from Texas to testify a third time. (*Id.* at p. 437.) The reviewing court disagreed with the defendant's assertion that the prosecutor was required to use the Uniform Act before the victim could be found unavailable. (*Id.* at p. 438.) The *Arguello* court acknowledged the prosecution must make a showing of good fath, but this "may not require the exhaustion of *every* possible means of securing the witness's presence, especially if the means appear to be futile, the witness may be in a position to frustrate efforts to compel her attendance, or insufficient time before trial prevents the use of the Uniform Act." (*Id.* at pp. 438-439, original italics.) In that case, the Court of Appeal agreed with the trial court's finding that resorting to the Uniform Act would be a "useless act" without the custodian's cooperation. (*Id.* at p. 439.)

On the other hand, the Arizona Court of Appeal held a prosecutor had failed to meet the good faith requirement of establishing unavailability in part for not taking the witness into custody under the Uniform Act. (*State v. Archie* (Ariz.Ct.App. 1992) 171 Ariz. 415, 418.) In *Archie,* the defendant was indicted for kidnapping, sexual assault, and sexual abuse. (*Id.* at p. 415.) The victim

testified at the first trial, but a mistrial was declared because of a deadlocked jury. (*State v. Archie, supra*, 171 Ariz. at p. 415.) Before the second trial commenced, the victim moved to Indiana. (*Ibid.*) The state filed a motion to use the victim's testimony from the first trial because of an inability to locate the victim in Indiana, "although the state claimed the receipt from a certified letter sent to her in Indiana had been returned. The state also claimed that because the victim was still under subpoena for a previous trial date, it was not required to employ an out-of-state subpoena server." (*Id.* at pp. 415-416.) The trial court denied the motion, and granted a continuance suggesting the state utilize the Uniform Act. (*Id.* at p. 416.) Two weeks later, and less than three weeks before trial was to begin, the state filed a request to have the victim subpoenaed in Indiana under the Uniform Act. (*Ibid.*)

> The day before trial was to begin,
>
> [t]he prosecutor avowed, without any documentary support, that the victim had been served, had been provided with a plane ticket and witness fee, had not taken the scheduled flight and had not contacted the state with any excuse for her absence, and it appeared that she did not 'wish in any way shape or form [to] participate for a second time in this.'

(*State v. Archie, supra,* 171 Ariz. at p. 416.) The defendant argued the state should have used the Uniform Act to have the victim arrested. (*Ibid.*) "The trial court ruled 'it is contrary to the Court's belief that the State was required to actually take [the victim] into physical custody and hold her in custody.'" (*Ibid.*) The victim's former testimony was read to the jury. (*Ibid.*)

The *Archie* court recognized that a witness will not be found unavailable unless the prosecutorial authorities have made a good faith effort to produce the witness, and have proven the good faith effort by competent evidence. (*State v. Archie, supra,* 171 Ariz. at p. 417.) The Arizona Court of Appeal found the good faith requirement had not been met for two reasons. (*Id.* at p. 418.) First, because there was "no competent evidence in the record of any action taken by

the Indiana authorities pursuant to the signed certificate . . . the trial court lacked any evidence from which to conclude that the victim, *in fact*, could not be produced." (*State v. Archie, supra,* 171 Ariz. at p. 418, original italics.) Also, the court held the "state could have done more to secure the victim's presence" and requested her be taken into custody under the Uniform Act. (*Ibid.*) Recommending custody would not have been futile, and "likely would have resulted in her presence at trial." (*Ibid.*)

As for the reasonableness of any specific act performed by the proponent of testimony to show due diligence, the consensus is that having a witness taken into custody is dependent on the surrounding circumstances of each individual case. The decision to request a witness be taken into custody under the Uniform Act is a matter of reasonableness.

C. Code Of Civil Procedure Section 1219, Subdivision (b), And Similar Legislation Demonstrate Placing A Sexual Assault Victim Into Custody To Compel Testimony Is Not Reasonable

The California Legislature has made pioneering efforts in enacting legislation geared towards protecting the rights and interests of sexual assault victims subject to the criminal justice system. This legislation, and in particular Code of Civil Procedure section 1219, demonstrates that arresting a sexual assault victim to compel testimony is not reasonably required.

In 1984, Code of Civil Procedure, section 1219 was amended in part by adding the following language:

> (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 the contempt consists of refusing to testify concerning that sexual assault.

This bill was proposed for the purpose of "protecting victims of sexual assault from the further victimization resulting from imprisonment or threats of imprisonment by our judicial system . . . [and] to begin to create a supportive

environment in which more victims might come forward to report and prosecute assailants of sexual assault." (Senator McCorquodale's Senate Floor Statement on SB 1678.)[4/]

In enacting the legislation, the Legislature announced its intent not to cause sexual assault victims further harm through the legal process: "It is the intent of the Legislature that a victim of a sexual assault shall be accorded special consideration because of the severity of the emotional harm resulting from this type of crime. It is the further intent of the Legislature that this act shall not be interpreted to excuse any person other than a victim of a sexual assault from the prescribed penalties for contempt." (Stats. 1984, ch. 1644, § 3.)

By enacting Code of Civil Procedure section 1219, subdivision (b), the Legislature acknowledged the unique situation in which sexual assault victims are placed. Victims of sexual assault are particularly vulnerable because they have been subjected to the most humiliating of crimes and are often forced to expose their most personal and intimate details:

> The emotional trauma experienced by sexual assault victims is so great that many victims are at risk of further psychological damage when confronted with publicly testifying about their assault. Effects of imprisonment or threats of imprisonment by a court or district attorney can indefinitely extend the very painful recovery process a victim experiences.

(Senator McCorquodale's May 1, 1984, Statement on SB 1678 to the Senate Committee on Judiciary.)

At the same time, the Legislature recognized the need to facilitate sexual assault victims cooperation with law enforcement in order to better prosecute their assailants. In addition, it was felt that incarceration was too extreme a

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4. Respondent has requested by separate motion that this Court take judicial notice of various portions of the legislative history of Code of Civil Procedure section 1219.

sanction to impose upon victims for refusing to discuss and relive the trauma of sexual assault: "A sexual assault victim who is unable to muster the courage necessary to testify should not be further punished and victimized through imprisonment by our legal system." (Senator McCorquodale's May 1, 1984, Statement on SB 1678 to the Senate Committee on Judiciary.)

On one hand, it is imperative that a defendant be provided a reasonable opportunity to confront and cross-examine witnesses against him. At the same time, in order to encourage victims to report sex offenses and facilitate their prosecution, legislation holds discretion must be given to the courts to enable the ascertainment of truth while protecting victims from emotional trauma. The California Legislature's enactment of various laws demonstrates the high priority placed on protecting sexual assault victims from further and unnecessary victimization in the court processes. This legislative intent should likewise be supported and furthered by the courts when interpreting these laws.

The California Legislature's actions demonstrate that the pursuit of justice often involves the balancing of competing social interests. For instance,

> [a]cknowledging the reality that rape victims were often victimized a second time by the criminal justice system, the Legislature enacted one of the nation's first 'rape shield' laws, limiting the admissibility of evidence of a complainant's sexual history except under narrowly defined conditions and prohibiting an instruction that an 'unchaste woman' is more likely to have consented to sexual intercourse.

(*Mary M. v. City of L.A* (1991) 54 Cal.3d 202, 222.)

In addition to Code of Civil Procedure section 1219, subdivision (b) and the rape shield laws (Evid. Code, §§ 782 & 1103), legislation sensitive to the trauma associated with testifying to sex crimes include: minor, developmentally disabled, and spousal victim testimony should be preserved on videotape for use if later found unavailable as witnesses (Pen. Code, §§ 1346 & 1346.1); minors and persons with disabilities who have been victims of sex crimes may

testify under closed-circuit television under certain circumstances (Pen. Code, §§ 1347 & 1347.5); and hearsay statements of minor children that are victims of sexual abuse may be admitted to establish the elements of the crime in order to prove a defendant's confession (Evid. Code, § 1228).

This Court has recognized that in light of Code of Civil Procedure section 1219, subdivision (b)'s restriction on incarceration, a sexual assault victim and witness who refuses to testify does not preclude a finding of unavailability under Evidence Code section 240, *even when the witness is present in the courtroom.* (*People v. Smith, supra,* 30 Cal.4th at p. 624, italics added.)

In *Smith*, the defendant was found guilty of kidnapping, raping, and murdering a 16-year-old foreign exchange student. (*People v. Smith, supra,* 30 Cal. 4th at p. 595.) A prior rape victim of the defendant refused to testify at the penalty phase because she was not allowed to express her views opposing the death penalty. (*Id.* at p. 621.) The victim was questioned by the trial court, and indicated she could not "in good conscience testify," and any potential contempt sanctions "would not cause her to testify." (*Ibid.*) The trial court found the victim unavailable as a witness and her preliminary hearing testimony was read to the jury. (*Id.* at pp. 621-622.)

This Court held "Evidence Code section 240 . . . does not 'state the exclusive or exact circumstances under which a witness may be deemed legally unavailable for purposes of Evidence Code section 1291.'" (*People v. Smith, supra,* 30 Cal. 4th at p. 624, quoting *People v. Reed* (1996) 13 Cal.4th 217, 228.) *Smith* recognized that

> Courts have admitted 'former testimony of a witness who is physically available but who refuses to testify (without making a claim of privilege) if the court makes a finding of unavailability only after taking reasonable steps to induce the witness to testify unless it is obvious that such steps would be unavailing.'

(*People v. Smith, supra,* 30 Cal.4th at p. 624, quoting *People v. Sul* (1981) 122 Cal.App.3d 355, 364-365 (plur. opn.), citing *Mason v. United States* (10th Cir. 1969) 408 F.2d 903; accord, *People v. Francis* (1988) 200 Cal.App.3d 579, 584; *People v. Walker* (1983) 145 Cal.App.3d 886, 894.)

In *Smith*, this Court found

> the court's efforts to induce [the witness] to testify were reasonable under the unusual circumstances of this case. The court questioned her under oath and asked whether additional time or prosecution for criminal contempt would change her mind. It had no power to incarcerate this victim of a sexual assault for refusing to testify concerning that assault. (Code Civ. Proc., §§ 1219, subd. (b).)

(*People v. Smith, supra,* 30 Cal. 4th at p. 624.) The *Smith* court also noted that "[t]rial courts 'do not have to take extreme actions before making a finding of unavailability.'" (*Ibid.*, quoting *People v. Sul, supra*, 122 Cal. App. 3d at p. 369 (conc. opn. of Zenovich, Acting P. J.).)

D. In Order To Establish Due Diligence, A Prosecutor Need Not Request A Sexual Assault Victim Be Placed Into Custody When The Witness Has Already Refused To Testify

The good faith and reasonableness requirements of the unavailability doctrine do not require that a prosecutor request that a sexual assault victim be taken into custody in order to establish due diligence. Once an out-of-state sexual assault victim has been subpoenaed through use of the Uniform Act and clearly announced a refusal to return to the state to testify, the prosecutor has acted in good faith and all reasonable steps have been taken to establish due diligence.

As this Court stated in *People v. Smith, supra,* 30 Cal.4th 581, "the due diligence requirement . . . focuses on what the proponent of the evidence . . . did, that is, whether it made *reasonable efforts* to obtain the witness." (*Id.* at p.610, italics added.) However, a witness who is physically present and refuses

to testify "does not preclude a finding of unavailability" if the court takes "reasonable steps to induce the witness to testify unless it is obvious that such steps would be unavailing." (*People v. Smith, supra,* 30 Cal.4th at pp. 623-624.) In *Smith,* since the witness was a sexual assault victim, Code of Civil Procedure section 1219, subdivision (b), forbade the court from incarcerating the witness. Thus, the court questioned the witness under oath and asked if additional time or prosecution for contempt would change her mind. (*Id.* at p. 624.) These steps were found reasonable under the circumstances of the case, and fining the witness for contempt was considered an unnecessary and "extreme action." (*Ibid.*)

E. The Prosecutor Was Not Required To Request Lorene Be Taken Into Custody In Order To Demonstrate Due Diligence

The process Lorene was subjected to was sufficient to make a finding of unavailability, as any further efforts would have been unavailing. Lorene first indicated her refusal to come to San Diego to testify when she rescinded her earlier indications of appearing voluntarily, and failed to appear for the first trial date. (1 RT 5.) Lorene appeared before the Colorado court and was instructed to testify in San Diego. After receiving this order, she called the District Attorney's Office from the Colorado courthouse and told Investigator Diaz, with the assistance of an interpreter, that she was refusing to testify in San Diego. (1 RT 44, 49.) Lorene's conduct made it clear that she was refusing to testify in San Diego.

Despite Lorene's protestations, she was subpoenaed a second time through the Uniform Act. When considering the efforts and intricacies involved in having the Denver District Attorney's Office locate and serve the witness, and then have the witness brought before the Denver court to be ordered to appear in San Diego, understandably the Denver court was "irate" with having to repeat this process. (1 RT 48.) Once again, Lorene

demonstrated that she was adamant about not testifying in San Diego when she did not board her flight. (1 RT 51.) Given the circumstances, it is highly unlikely the Colorado court would have placed Lorene in custody even had the prosecutor requested it.

Lorene's refusal to come to San Diego meant only one thing, she was saying "No" to testifying at trial. She had already ended her earlier cooperation, had been subpoenaed and appeared before a Colorado court twice, and told the prosecution she was refusing to testify. Her conduct made her intent and decision not to testify unequivocal. At that point, placing her in custody and dragging her to San Diego in chains would have been an unreasonable and unavailing step to compel her testimony. Once in San Diego, Lorene would have refused to testify, she could not be incarcerated, and she would have been found "unavailable."

The option of placing a witness in custody under the Uniform Act, like any other step taken by the proponent of the evidence, should be required only if it is reasonable under the circumstances and can be accomplished in good faith. Most importantly, as demonstrated by the holdings of sister states, custody is not a requisite to reasonableness. (*Gray v. Commonwealth, supra,* 16 Va.App. at pp. 518-519.)

Placing an innocent victim witness into custody is an extreme measure to take as it imposes a significant infringement on the victim's personal rights. Further, as the facts here demonstrate, it would have been futile as the witness would ultimately refuse to testify once in California. It is of no surprise that the custody option under the Uniform Act has been termed an "extreme step." (*People v. Thorin, supra,* 126 Mich.App. at p. 304.) Likewise, the *Thorin* court found requesting custody was not warranted given the witness's limited exposure to the crime. (*Ibid.*) It also explains why the *Bussard* court found issuing a subpoena through the Uniform Act was sufficient to establish due

diligence despite the witness's refusal to appear for trial. (*Bussard v. State, supra,* 300 Ark. at p. 180.)

Here, placing Lorene in custody was also an unwarranted and extreme measure to require of the prosecution. She had already repeatedly indicated her refusal to testify and could not be compelled to testify under threat of incarceration once before the court. Also, placing her in custody would be particularly traumatizing and difficult considering the communication barrier presented by her being deaf.

Moreover, requesting custody should not be required if the result would be the same, i.e., the witness would refuse to testify once before the trial court. (*People v. Arguello, supra,* 737 P.2d at p. 439.) Just as the *Arguello* court acknowledged that using the Uniform Act on a child witness would be useless without the guardian's cooperation (*ibid.*), arresting Lorene and bringing her to California in custody would also be useless since she had already made it clear that she was not going to testify and could not be compelled to do so once before the court in San Diego.

The Arizona Court of Appeal opinion in *State v. Archie, supra,* 171 Ariz. at p. 415, is distinguishable form this case in many respects and should not be followed by this Court. One glaring difference is that in *Archie* the prosecution's attempts to procure the witness were insincere from the very beginning. The prosecution requested to use earlier testimony based on questionable factual assertions before even resorting to the Uniform Act. (*Id.* at pp. 415-416.) It then waited another two weeks, a mere three weeks before trial, before having the witness subpoenaed. (*Id.* at p. 416.) The prosecution's inaction and procrastination lacked the good faith effort required to demonstrate due diligence.

Notably, the *Archie* court focused its holding on the fact the prosecution did not provide any competent evidence to show its efforts were fruitless.

(*State v. Archie, supra,* 171 Ariz. at p. 418.) Not only were the prosecution's efforts questionable, but they could not even be proven by competent evidence. (*Ibid.*) Thus, this case is distinguishable because the prosecution made sincere efforts to produce Lorene, which have been memorialized in the record through the testimony of employees of the District Attorney's Office and certificates submitted to the Colorado courts.

The *Archie* court also found that in addition to the complete lack of evidence supporting the use of the Uniform Act, the prosecution failed to request taking the victim into custody, recognizing this option could have produced the witness. (*State v. Archie, supra,* 171 Ariz. at p. 418.) There is no doubt that had the prosecution requested to have Lorene placed in custody, the odds would have increased that Lorene B would have been present for trial. However, it would have been to no avail in light of Code of Civil Procedure section 1219, subdivision (b)'s restriction on placing her into custody to compel her testimony. Respondent has been unable to locate any Arizona statute comparable to that of Code of Civil Procedure, section 1219, subdivision (b), that would have been applicable in the Arizona court. Absent a similar restriction on compelling testimony, the scenario set forth in *Archie* is distinguishable because the witness's mere presence would have a purpose. Where, as here, Lorene could not be compelled to testify, her arrest and transportation in custody would have been a cruel and useless formality.

Notions of good faith and reasonableness are perverted when the prosecutor must have a sexual assault victim, who has repeatedly indicated a refusal to testify, arrested and brought to court in custody in order for the prosecution to prove efforts were made to produce the witness for trial. Legislative policy, as evidenced in Code of Civil Procedure section 1219, subdivision (b), shows an extreme measure such as custody is not a reasonable

requirement when the witness may not be incarcerated for refusing to testify once in the California court.

Respondent acknowledges the Court of Appeal's decision distinguished the custody option presented by the Uniform Act from the custody restriction in Code of Civil Procedure section 1219, subdivision (b). (Slip Opn. at p. 16.) While Code of Civil Procedure section 1219, subdivision (b), does not forbid placing a sexual assault victim into custody under the Uniform Act, the policy behind the legislation renders requiring custody under the Uniform Act unreasonable under the circumstances of this case. It defies reason to require that a prosecutor have a sexual assault victim arrested and brought to court knowing the victim has already refused to testify and cannot be compelled to do so once present before the court. Furthermore, such efforts cannot be considered to be made in good faith, knowing the revictimization the witness will be subjected to in the process, all for the sake of mere formality.

Witness detention is a delicate and controversial issue as it requires a balancing of the witness's rights with those of a defendant. However, when additional policy considerations come into play, such as that expressed in Code of Civil procedure section 1219, subdivision (b), that undermine the purpose and ultimate benefit of detaining the witness, required custody should be cautiously imposed. The arrest of a sexual assault victim cannot be considered reasonable if there is no practical benefit to either party. Accordingly, as with any other possible step to be taken by the proponent of evidence, the surrounding circumstances should be carefully considered before finding the requirement a necessary component of reasonableness. In this case, arresting Lorene would have been a mere formality and thus not a reasonable and necessary step to demonstrate due diligence.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal and reinstate the judgment of conviction against Cogswell.

Dated: April 11, 2008

Respectfully submitted,

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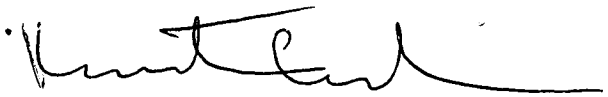

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPENING BRIEF ON MERITS** uses a 13 point Times New Roman font and contains 9739 words.

Dated: April 11, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
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Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Henry Ivan Cogswell** No.: **S158898**

I declare:

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

On April 11, 2008, I served the attached **OPENING 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:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 11, 2008, at San Diego, California.

Maria G. Stawarz
Declarant

Signature

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