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

RESPONDENT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

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

INTRODUCTION

Evidence Code section 240 allows the introduction of testimony given at a preliminary hearing if the prosecutor exercised due diligence but was unable to procure the attendance of the witness. The reasonable steps required by a prosecutor to demonstrate due diligence to establish witness unavailability do not require undertaking futile actions. In this case, the witness is a sexual assault victim and could not be placed in custody for refusing to testify once before the court. Since the witness had already indicated her refusal to testify, nothing in the Constitution or Evidence Code section 240 required the prosecution to arrest an out-of-state witness and bring her to California all to affirm a refusal to testify.

Appellant asserts that due diligence requires a prosecutor to request custody under the Uniform Act under certain circumstances. He maintains the nature of the charges and a witness's status as a sexual assault victim cannot be considered in making due diligence determinations. Appellant also argues that the evidence relied on to show the witness's refusal to testify in the instant case was incompetent hearsay. (ABOM 3-4.)

Respondent agrees that it is neither the status of the witness as a sexual assault victim nor the category of the underlying charges that dictate what

efforts must be made by the prosecution. Instead, it is the totality of the facts and circumstances surrounding each individual case which determines the efforts that are required to be made by the prosecution. One such factor that must be considered by the trial court is the existence of any legislation that may render efforts made by the prosecution to procure a witness's testimony for trial futile.

In this case, the California Legislature has limited a court's means of inducing a sexual assault victim to testify with the enactment of Code of Civil Procedure section 1219, subdivision (b). This statute forbids a court from placing a sexual assault victim into custody when found in contempt for refusing to testify. Thus, once a sexual assault victim is before the trial court and refuses to testify, he or she cannot be incarcerated. The court's inability to punish the witness for refusing to testify should be considered along with all other relevant factors and circumstances of the case when assessing due diligence. If it is apparent, as it was in this matter, that requesting an out-of-state sexual assault victim be taken into custody for the purpose of procuring her testimony would have been an act of futility, then custody under the Uniform Act should not have been required to demonstrate due diligence.

In addition, respondent disagrees with appellant's assertion that there was no competent evidence that Lorene was refusing to testify since the evidence adduced at the due diligence hearing was hearsay. Appellant's position ignores authority that recognizes due diligence may be demonstrated by hearsay since the evidence is being offered for the limited purpose of showing efforts taken by the prosecution. Thus, the record shows that Lorene was not going to testify against appellant at his trial in San Diego. Accordingly, the prosecution amply demonstrated due diligence and the trial court properly admitted her prior testimony.

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

A prosecutor should not be required to have an out-of-state sexual assault victim/witness who has indicated a refusal to testify arrested 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 due diligence for the purpose of showing unavailability in order to admit previous testimony under Evidence Code section 240.

A. A Trial Court Should Be Able To Consider Existing Statutory Law That May Impact The Prosecution's Ability To Compel A Witness To Testify When Making A Due Diligence Determination

Respondent and appellant agree that the confrontation clauses of 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; *Crawford v. Washington* (2004) 541 U.S. 36, 42 [124 S.Ct. 1354, 158 L.Ed.2d 177].) However, 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. (*Barber v. Page* (1968) 390 U.S. 719, 722 [88 S.Ct. 1318, 20 L.Ed.2d 255].) In California, this exception is codified in Evidence Code sections 240, 1290 and 1291. (*People v. Smith* (2003) 30 Cal.4th 581, 609; *People v. Ogen* (1985) 168 Cal.App.3d 611, 616; see OBM 9-12; ABOM 12-16.)

Under Evidence Code section 240, subdivision (a)(5), a witness may be unavailable if "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." A trial court considers the totality of efforts made by the proponent of the testimony to determine if due diligence has been met (*People v. Linder* (1971) 5 Cal.3d 342, 347), that is, whether, "the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial." (*People v. Cromer* (2001) 24 Cal.4th 889, 892.) Due diligence "depends upon the facts of the individual case," and "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." (*People v. Linder, supra,* 5 Cal.3d at p. 347.)

Existing case law holds that if a material witness is out-of-state and his or her whereabouts are known, then the Uniform Act must be utilized. (See *In re Terry* (1971) 4 Cal.3d 911, 931; *In re Montgomery* (1970) 2 Cal.3d 863, 867-868.) If the witness has indicated a refusal to obey his or her subpoena then the option exists for the prosecutor to request the custodial measures be used to secure the witness's presence. (Pen. Code, § 1334.3, subd. (a).) This additional step may go further to demonstrate due diligence on behalf of the prosecutor by showing an additional attempt to use the court's process; however, it should not be required in all cases.

Other states have found there are limitations to when the extreme step of witness custody should be employed. (See *Gray v. Commonwealth* (Va.Ct.App. 1993) 16 Va.App. 513, 518-519 [431 S.E.2d 86] [Uniform Act custody option not required when witnesses indicated they would appear voluntarily]; *People v. Thorin* (Mich.Ct.App. 1983) 126 Mich.App. 293, 304 [336 N.W.2d 913] [Uniform Act custody option unnecessary when witness was not "material"]; *People v. Arguello* (Colo.Ct.App. 1987) 737 P.2d 436, 438-439

[Uniform Act did not have to be used to compel minor's presence because it would have been useless without custodian's cooperation]; but see *State v. Archie* (Ariz.Ct.App. 1992) 171 Ariz. 415, 418 [831 P.2d 414] [due diligence required prosecutor to request custody under Uniform Act].) However, the extent to which the Uniform Act must be employed to show due diligence should be evaluated on a case by case basis, taking into consideration all relevant factors and circumstances. (*People v. Linder, supra,* 5 Cal.3d at p. 347.)

One such factor to be considered is Code of Civil Procedure section 1219, subdivision (b), which forbids a trial court from arresting a sexual assault victim who refuses to testify. That is, a sexual assault victim who has indicated a refusal to testify, in all practicality, cannot be compelled to testify once present in the trial court. (See *People v. Smith, supra,* 30 Cal.4th at pp. 623-624.) This should be a factor considered by a trial court in making a due diligence determination.

Appellant asserts that to show due diligence a prosecutor must always request custody under the Uniform Act when a witness is material, the whereabouts are known, and the witness will not obey the court's process. (ABOM 3-4.) He also asserts that the nature of the offense and the witness's status as a sexual assault victim do not allow the witness to ignore the court's process or lighten the burden of due diligence. (ABOM 4.)

Respondent agrees that it is not the status of the witness as a sexual assault victim or the category of the underlying charges that dictate *vel non* what efforts must be made by the prosecution. Instead, it is the totality of the facts and circumstances surrounding each individual case which determine the efforts that are required to be made by the prosecution. One such factor that should be considered by the trial court is the existence of any legislation that may render such efforts futile.

Although the Constitution does not provide for special treatment of sexual assault victims as witnesses, California legislation does place restrictions on a court's ability to punish them for refusing to testify. These limitations impact the measure of due diligence. Even though the nature of the charges and a witness's status as a sexual assault victim should not determine whether the custody option must be requested under the Uniform Act, the existence of California Code of Civil Procedure section 1219, subdivision (b), cannot be ignored. A trial court assesses due diligence based on all relevant circumstances and facts of each individual case. (*People v. Linder, supra,* 5 Cal.3d at p. 347.) Conducting a totality of the circumstances analysis necessarily includes consideration of Code of Civil Procedure section 1219.

A trial court should be able to consider the futility that could result if a prosecutor has an out-of-state sexual assault victim arrested using the Uniform Act and brought to California to testify. Specifically, if the witness is arrested, brought to California and refuses to testify, further incarceration cannot be used to compel the witness's testimony. Thus, having the out-of-state witness arrested under the Uniform Act would be an act of futility. Due diligence does not require a prosecutor to take futile steps in order to procure a witness's testimony.

The California Legislature has gone to great lengths to protect victims of sexual assault and encourage their testimony in order to prosecute such offenses, as shown by the enactment of Code of Civil Procedure section 1219 and similar legislation. (OBOM 22-25.) Such legislation does not absolve sexual assault victims from obeying the court's process. Nor does it restrict a prosecutor from requesting a sexual assault victim to be taken into custody under the Uniform Act. However, the limitations of Code of Civil Procedure section 1219 bear upon the futility of a prosecutor's attempts to procure a

witness and should be considered by the trial court in its assessment of due diligence.

Where there are practical and real limitations on the prosecution's and the court's ability to compel testimony of a witness because of existing legislation, the efforts that must be taken by the prosecution to procure a witness cannot be as apparent as appellant suggests. Rather, the court's inability to punish a witness for refusing to testify should be considered as a relevant factor when determining whether requesting custody of an out-of-state witness under the Uniform Act is necessary to show due diligence.

B. The Prosecutor Should Not Have Been Required To Request Custody Since Lorene Made It Apparent She Was Refusing To Testify

As respondent pointed out in its Brief on the Merits, if the prosecutor had requested Lorene be taken into custody under the Uniform Act, this effort would have been unavailing since Lorene indicated she was refusing to testify. (OBOM 27-31.) Appellant responds that the evidence before the trial court and this Court does not establish Lorene was refusing to testify in San Diego against him because it was incompetent at best and paraphrased hearsay. (ABOM 4.) He is mistaken. Appellant's application of *People v. Smith, supra,* 30 Cal.4th at p. 609, is flawed. (ABOM 37.) In the context of a due diligence hearing, hearsay evidence is admissible to show the prosecution's efforts and may be sufficient to show due diligence. Lorene's statements at the preliminary hearing, her refusal to obey subpoenas, and statements she made to Investigator Diaz establish that she would not testify if brought to San Diego.

Appellant cites *Smith* for the proposition that "[t]he 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, citing *People v. Price* (1991) 1 Cal.4th 324, 424; ABOM 37.) In *Smith*, the defendant argued

the prosecution had not sustained its burden of demonstrating the witness was unavailable because the offer of proof that the witness was in Japan was based on hearsay. (*People v. Smith, supra,* 30 Cal.4th at p. 609.) However, appellant fails to acknowledge or address the subsequent analysis of *Smith* that held due diligence could be demonstrated by hearsay evidence since the issue was the efforts taken by the prosecution. (*Id.* at p. 610.)

In *Smith* this Court declined to address the admissibility of statements in support of proving that the witness was actually in Japan because the prosecution only had to prove it exercised due diligence to obtain the witness's presence at trial. (*People v. Smith, supra,* 30 Cal.4th at p. 610.) This Court recognized that "trying to prove a person is, in fact, outside the country can raise substantial practical difficulties because of the hearsay rule. But the due diligence requirement . . . focuses on [whether] the proponent of the evidence . . . made reasonable efforts to obtain the witness." (*Ibid.*)

The *Smith* court found the prosecution exercised due diligence based on the following facts:

> (1) Fukumoto testified at the preliminary hearing that he was a Japanese national and intended to leave the country several months before the trial occurred, (2) Fukumoto's host parent told the district attorney that Fukumoto had left the country, and (3) the district attorney's investigator had called the telephone number in Japan that the records showed was Fukumoto's number and heard a voice at the other end say he was Fukumoto.

(*People v. Smith, supra,* 30 Cal.4th at pp. 610-611.) Acknowledging that this "information may have been legally incompetent, due to the hearsay rule, to show that Fukumoto was actually in Japan," this Court found it sufficient "to show that the prosecution made reasonable efforts to locate him and that further efforts to procure his attendance would be futile." (*Id.* at p. 611.)

Similar to *Smith*, here, evidence presented at the due diligence hearing was admitted for the limited purpose of demonstrating the prosecution's efforts

to procure Lorene's attendance for trial. (1 RT 43.) However, this evidence was sufficient to establish that incarcerating Lorene would be a futile act since she already indicated her refusal to testify in San Diego.

Evidence in the record supports the conclusion that Lorene would ultimately refuse to return to court and testify against appellant at his trial. Lorene testified at the preliminary hearing that she wanted to work something out with appellant and her friend Crystal because she did not want appellant to go to jail for raping her. (4 RT 256.) Lorene even made an attempt to do so by communicating online with appellant and Crystal about the incident. (4 RT 268.) However, after speaking about the incident, Lorene decided she should report it to the police. (4 RT 260.) Lorene's nine-year friendship with Crystal ended a few weeks later. (4 RT 260, 272-273.)

Lorene's refusal to testify is further apparent by her failure to appear at the initial trial date. The prosecutor testified to Lorene's failure to appear, which forced the prosecution to dismiss and refile the charges. (1 RT 5.) Subsequent steps to procure Lorene's attendance were explained by the prosecutor and other employees of the District Attorney's Office. The prosecutor went to the lengths of having Lorene subpoenaed by use of the Uniform Act with the permission of the San Diego Court and assistance of the Denver District Court.

Investigator Diaz testified under oath about his efforts to bring Lorene to San Diego and his contact with her. (1 RT 41.) The most critical piece of evidence demonstrating Lorene's refusal to testify is her statement made through an interpreter to Investigator Diaz. Investigator Diaz testified that on December 20, 2005, he received a call from Linda Shim, the clerk from the Denver District Court informing him that Lorene was at their office and wanted to speak with him through an interpreter "[a]bout the subpena [*sic*] on the case and her desires not to want to come to California." (1 RT 44.) Investigator

Diaz spoke with Lorene who told him through the interpreter that she did not want to come to California and deal with the case, and indicated she would not be there. (1 RT 43-44, 49.) Investigator Diaz testified that Lorene did not show up and a second interstate compact was issued. (1 RT 49.) During the second attempt, Investigator Diaz did not contact Lorene for fear she might evade service or interpret the contact as a means of intimidation. (1 RT 48-49.)

Similar to the hearsay issues which arose in *Smith* because the witness was located in Japan, here issues arose in light of the witness being located in Denver and also deaf. Also, Lorene's hesitation to report the events and testify, common amongst sexual assault victims of acquaintances, is apparent by her preliminary hearing testimony. In any event, Lorene's repeated refusal to obey her subpoenas and appear in San Diego, coupled with her statements to Investigator Diaz and Linda Shim, demonstrate Lorene was not going to testify if brought to San Diego.

CONCLUSION

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

Dated: July 3, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF** uses a 13 point Times New Roman font and contains 2944 words.

Dated: July 3, 2008

Respectfully submitted,

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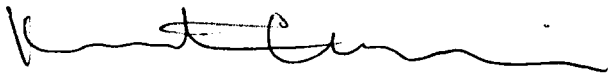

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DECLARATION OF SERVICE BY U.S. MAIL

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 July 3, 2008, I served the attached **RESPONDENT'S REPLY BRIEF** 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 July 3, 2008, at San Diego, California.

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