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5 SAM SAMPLE

6 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SOLANO

7
8 No. FCRXXXXXX

9 THE PEOPLE OF THE STATE
OF CALIFORNIA,

**Opposition to Prosecution's
Motion to Admit Statement of
Unavailable Witness.**

10 Plaintiff,

11
12 v.

13 SAM SAMPLE

Date: February 1, 2004
Time: 8:30 a.m.
Dept: 4

14 Defendant
15 _____ /

16
17 Defendant, SAM SAMPLE, objects to the admission of out-of-court hearsay
18 statements of his wife, SALLY SAMPLE, who is the alleged victim. The objection is
19 made on the following grounds: (1) SALLY SAMPLE's oral- unrecorded statements are
20 not trustworthy; (2) the prosecution has not satisfied the foundational requirements of
21 Evidence Code Sections 1370 and 240; and (3) admission of the statements will violate
22 the defendant's Sixth Amendment right under the United States Constitution, and the
23 California Constitution, to confront and cross examine SALLY SAMPLE.
24

25 STATEMENT OF CASE

26 Defendant is charged with violating Penal Code Section 273.5, corporal injury to
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1 spouse, on October 9, 2003. Defendant has pleaded not guilty to the charge. Defendant
2 waived preliminary hearing on November 13, 2003. The matter is set for jury trial on
3 February 1, 2004.
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5 STATEMENT OF FACTS

6 On October 9, 2003, Fairfield Police Officer COPP went to Sutter Solano
7 Hospital in Vallejo to investigate a report of a domestic disturbance that had occurred in
8 Fairfield. Officer COPP contacted SALLY SAMPLE, and obtained a brief oral
9 unrecorded statement. She alleged that SAM SAMPLE struck her one time with an open
10 hand, causing a red mark to the left side of her face. She made a similar statement to the
11 treating physician, DR. LOVE, who preliminarily diagnosed a torn ear drum, but referred
12 her to a specialist “for a definitive evaluation.”

13 On October 20, 2003, defense investigator EUGENE E. BORGHELLO
14 conducted a lengthy interview with SALLY SAMPLE. In the interview SALLY
15 SAMPLE gave a different story. She said that her injury was caused by Defendant acting
16 in self defense or by accident. See “Report of Investigation” attached and marked as
17 “Exhibit A.”
18

19 ARGUMENT

20
21 [Arguments 1. and 2. are deleted.]
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Even if Sally Sample's Is "Unavailable" Under Evidence Code § 240, The Admission Of Her Testimony Will Violate Defendant's Sixth Amendment And California Constitutional Right Of Confrontation.

Even if a witness is unavailable under California Evidence Code section 240, the admission of her statements may still violate a defendant's right to cross-examine and confront witnesses under the Sixth Amendment to the United States Constitution. This is illustrated by a case similar to the present one; *People v. Sandoval* (2001) 87 Cal.App.4th 1425 [105 Cal.Rptr.2d 504].

In *People v. Sandoval* the appellate court reversed the convictions of three defendants who had been convicted of murder and sentenced to life without the possibility of parole. The court held that the defendants' rights to confront a witness had been violated because the prosecution failed to use good faith efforts to secure the testimony of Zavala, a Mexican citizen who was in Mexico at the time of trial. (87 Cal.App.4th at p.1444.) Zavala had testified at the preliminary hearing, and the transcript of his testimony had been read to the jury at trial. While the court of appeal *agreed with the prosecution that Zavala was unavailable within the meaning of Evidence Code section 240, and agreed that the preliminary transcript was admissible under section 1391* (*Id.* at p. 1433, 1443), it held that the witness was not unavailable for *constitutional purposes.* (*Id.* at p. 1443.)

Evidence Code section 240 subdivision 4 states a witness is unavailable if "Absent from the hearing and the court is unable to compel his or her attendance by its process." The *Sandoval* court acknowledged that the trial court could not compel Zavala's attendance at trial because "the trial court had no power to compel his appearance in person in Sacramento County." (*Id.* at p. 1434.) But the *Sandoval* court held that to satisfy the Confrontation Clause the hearsay statement must be reliable, and

1 the witness must be unavailable using a *constitutional standard for unavailability*. (*Id.* at
2 pp. 1334-1335.) While the fact that a witness in another country is unavailable for
3 purposes of section 240, she is not necessarily unavailable for purposes of the
4 Confrontation Clause even though the trial court cannot compel the attendance of the
5 witness through its own process. (*Id.* at p. 1443.)

6 The *Sandoval* court said that Zavala's statement was reliable because he had been
7 cross-examined at the preliminary hearing. But the prosecution failed to show that the
8 *constitutional* standard of unavailability had been met. *Sandoval* relied on *Ohio v.*
9 *Roberts* (1989) 448 U.S. 56 which decided that a witness is not unavailable for
10 constitutional purposes unless the prosecution has made a good faith effort to secure his
11 presence at trial. (*Sandoval*, 87 Cal.App.4th at p. 1438.)

12 *Sandoval* held that the defendant's right to confrontation had been violated
13 because the prosecution did not make reasonable good-faith efforts to use the options
14 available to it to secure Zavala's testimony. (*Id.* at pp. 1443-1444.) While the evidence
15 suggested that the prosecution knew Zavala's location in Mexico, and Zavala appeared to
16 be willing to return to the United States voluntarily, the appellate court also relied on the
17 fact that the prosecution failed to utilize the Mutual Legal Assistance Treaty (MLAT)
18 between the United States and Mexico. The court specifically mentioned Article 7 of the
19 treaty which allows a prosecutor to request that a witness in Mexico be compelled by
20 Mexican authorities to appear and testify in Mexico. (*Id.* at p. 1439.) The court further
21 suggested that Article 7 might have been used so that Zavala could appear before the jury
22 by teleconferencing. (*Id.* at p. 1443.)

23 In the present case the defense has informed the prosecution that SALLY
24 SAMPLE is in Czechoslovakia. There is an applicable MLAT; the Treaty With Czech
25 Republic On Mutual Legal Assistance In Criminal Matters, Senate Treaty Document
26

1 105-47.¹ Article 9 of the Czech MLAT is very similar to Article 7 of the Mexican
2 MLAT which is set out in footnote 5 of *Sandoval*. Article 9 subdivision 1 of the Czech
3 MLAT states in part: “A person in the Requested State from whom evidence is
4 requested pursuant to this Treaty shall be compelled, if necessary, to appear and either
5 testify or provide a statement, or produce items, including documents, records, and
6 articles of evidence.”

7 The *Sandoval* court noted Article 8 of the Mexican MLAT which provides for the
8 transportation of a person in custody in Mexico to the United States. (87 Cal.App.4th at
9 p. 1439.) The corresponding provision in the Czech MLAT is Article 12. *Sandoval*
10 noted Mexican MLAT, Article 9 which allows the prosecution to request Mexican
11 authorities to invite a witness in Mexico to come to California and testify. (87
12 Cal.App.4th at pp. 1439, 1442.) The corresponding article in the Czech MLAT is Article
13 11.

14 *Sandoval* is not distinguishable on the ground that the prosecution might have
15 known Zavala’s location, but the Solano County District Attorney does not know
16 SALLY SAMPLE’s location. Article 1 of the Czech MLAT states in part:

17 1. The Contracting States shall provide mutual assistance, in accordance
18 with the provisions of this Treaty, for criminal proceedings, including
19 *investigations* to verify the commission of offenses, to gather evidence of
20 offenses, and to prosecute offenses, the punishment of which, at the time of
21 the request for assistance, would fall within the jurisdiction of the judicial
22 authorities of the Requesting State. The Contracting States shall also
23 provide such assistance for forfeiture and other proceedings related to
24 criminal offenses.

25 2. Assistance shall include:

26 ¹The treaty was signed in Washington on February 4, 1998 and “entered into force” on May 7,
27 2000. (United States Department of State, *Treaties in Force: A List of Treaties and Other*
28 *International Agreements of the United States in Force on January 1, 2003* (June 2003) at p. 71.)

1 (a) *locating or identifying persons* or items;

2 (Emphasis added.) Thus the treaty could have been used to locate, or to attempt to locate
3 SALLY SAMPLE.

4 The California Supreme Court has held that for purposes of the Confrontation
5 Clause, “the prosecution must show reasonable or due diligence in locating the witness.”
6 (*People v. Cromer* (2001) 24 Cal.4th 889, 897 [103 Cal.Rptr.2d 23, 15 P.3d 243].) In
7 *Cromer* the trial date had been set several times. The California Supreme Court held that
8 the prosecution failed to use due diligence to locate the witness whose preliminary
9 hearing testimony had been read to the jury where the prosecution had issued subpoena’s
10 for the witness for two of the dates the case had been set for trial, but had not attempted
11 to serve them. (24 Cal.4th at p. 903.) The prosecution failed to subpoena the witness for
12 a third date. Investigators tried to locate the witness by going to her former house five or
13 six times where they were told that she no longer lived there. The *Cromer* prosecution
14 made other efforts that exceeded the efforts made by the Solano County District
15 Attorney’s office in the present case:
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17 On January 20, 1998, a man at Culpepper's former home told prosecution
18 investigators that Culpepper was living with her mother, Mildred
19 Culpepper, in San Bernardino. Despite the urgency of the situation,
20 prosecution investigators did nothing to follow up this information until
21 two days later, when an investigator obtained Culpepper's mother's address
22 (apparently from Department of Motor Vehicle records) and drove to her
23 San Bernardino home. A woman at the house said Culpepper's mother was
24 out but would return the next day. She said that Culpepper did not live
25 there, and that she had no idea where Culpepper was. The investigator left
26 a copy of a subpoena for Culpepper, but he did not return the next day, or
27 ever, to speak to Culpepper's mother, nor did he attempt to find other ways
28 to contact Culpepper's mother, such as at a work location or by telephone.
Apart from consulting computerized information systems, the county jail,
and the county hospital, the prosecution made no other efforts to locate
Culpepper.

(*Id.* at pp. 903-904.) But none of this amounted to due diligence. (*Id.* at p. 905.) In the

1 present case the prosecution was required to utilize the MLAT if necessary to attempt to
2 locate SALLY SAMPLE. The prosecution does not make a good faith effort when there
3 is a possibility of asking for help under the treaty. (See *Sandoval, supra*, 87 Cal.App.4th
4 at 1441-1442.)

5
6 CONCLUSION

7 For the foregoing reasons, the undersigned attorney respectfully requests that the
8 prosecution's motion to admit hearsay statements of SALLY SAMPLE be denied.

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10 Dated: January 15, 2004

Respectfully submitted,

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13 ROBERT G. SCOFIELD
14 Attorney for Defendant