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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

PEDRO TREJO,)	NO. CV 13-1354-JGB (E)
)	
Petitioner,)	
)	
v.)	REPORT AND RECOMMENDATION OF
)	
GREG LEWIS, Warden,)	UNITED STATES MAGISTRATE JUDGE
)	
Respondent.)	
_____)	

This Report and Recommendation is submitted to the Honorable Jesus G. Bernal, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed an unsigned "Petition for Writ of Habeas Corpus By a Person in State Custody" on February 25, 2013. The Petition contains the single claim that "the trial court erred in finding due diligence in violation of [Petitioner's] confrontation rights"

1 (Petition, p. 5).

2
3 The case initially was assigned to Magistrate Judge Jacqueline
4 Chooljian. On February 28, 2013, the Court issued an "Order Directing
5 Petitioner to File Signed/Verified Copy of Petition." Petitioner did
6 not file a timely signed and verified Petition. Therefore, on
7 March 29, 2013, the Court issued an Order to Show Cause, ordering
8 Petitioner to show cause why the Court should not dismiss the Petition
9 for failure to prosecute.

10
11 Petitioner did not file a timely response to the Order to Show
12 Cause. Therefore, on May 2, 2013, Judge Chooljian issued a Report and
13 Recommendation recommending dismissal of the Petition without
14 prejudice for failure to prosecute.

15
16 On May 17, 2013, Petitioner filed Objections to the Report and
17 Recommendation, together with a signed and verified copy of the
18 Petition. On May 21, 2013, Judge Chooljian issued a Minute Order
19 withdrawing the May 2, 2013 Report and Recommendation and discharging
20 the Order to Show Cause.

21
22 On June 7, 2013, Respondent filed a "Notice of Related Case,"
23 referencing the then-pending federal petition of Santos Aguilar, one
24 of Petitioner's co-defendants. See Aguilar v. Lewis, CV 13-1747-
25 JGB(E). On June 12, 2013, the present action was transferred to the
26 undersigned Magistrate Judge.

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1 On July 22, 2013, Respondent filed an Answer. Petitioner did not
2 file a Reply within the allotted time.

3
4 **BACKGROUND**

5
6 The State charged Petitioner and four co-defendants with the
7 murder of Ivan Perez and conspiracy to commit the murder, and alleged
8 various enhancements including firearm and gang enhancements (Clerk's
9 Transcript ["C.T."] 264-70). A jury found Petitioner guilty of
10 conspiracy to commit murder, and found true a gang enhancement and
11 various firearm enhancements (Reporter's Transcript ["R.T."] 2107-08;
12 C.T. 670). The jury found Petitioner not guilty of first degree
13 murder (R.T. 2106-07; C.T. 669). Petitioner received a sentence of
14 fifty years to life (C.T. 727-29; R.T. 2412).

15
16 The Court of Appeal affirmed the judgment (Respondent's Lodgments
17 6, 7; see People v. Trejo, 2012 WL 375441 (Cal. App. Feb. 2012, as
18 modified Feb. 23, 2012)). The California Supreme Court denied
19 Petitioner's petition for review summarily (Respondent's Lodgment 9).

20
21 **SUMMARY OF TRIAL EVIDENCE**

22
23 The following summary is taken from the opinion of the California
24 Court of Appeal in People v. Trejo, 2012 WL 375441 (Cal. App. Feb.
25 2012, as modified Feb. 23, 2012). See Runnigeagle v. Ryan, 686 F.3d
26 758, 763 n.1 (9th Cir. 2012), cert. denied, 133 S. Ct. 2766 (2013)
27 (presuming correct statement of facts drawn from state court
28 decision); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009)

1 (taking factual summary from state appellate decision).
2

3 On July 29, 2007, J.J., who was then ten years old, was
4 with his mother in a car on 58th Place in Los Angeles
5 County, when he heard two or three gunshots. He saw people
6 in a small car and the leg of a person who appeared to be
7 getting into the car. The car drove off, followed by a
8 light blue SUV. When the police arrived, they found Ivan
9 Perez lying in a gutter. Perez died from two bullet wounds
10 to his head, including one "close contact shot."
11

12 Homicide Detective Jonas Shipe of the Los Angeles
13 County Sheriff's Department investigated the shooting and
14 learned that Perez was a member of the Florencia 13 gang
15 with the moniker "Blackie." On June 21, 2007, about a month
16 before he was killed, Perez had been arrested along with
17 fellow gang member Javier Rangel. According to a statement
18 given to the police by Javier's sister Claudia Rangel, which
19 was recorded and played at trial and the preliminary
20 hearing, during that incident Perez had displayed a gun at a
21 car wash, someone fought with him, and Javier jumped into
22 the fight.¹
23

24 No one from the Rangel family testified at trial.
25 Testimony given at the preliminary hearing by Claudia and
26 her mother, Marta Moreno, was read at trial. Claudia
27

28 ¹ Because they have the same last name, we will refer to
the siblings by their first names.

1 testified at the preliminary hearing that on the day Perez
2 was killed several people came to her house three different
3 times to see Javier, including appellants and Perez. She
4 recognized some of the people as Florencia gang members, and
5 most were much older than Perez and Javier. She heard
6 appellant say that Perez or Javier had "snitched on the
7 gun." At some point, a man holding a gun in the backyard
8 said, "I'm going to shoot both of these fools right here."
9 He was told not to shoot anyone at the house because Claudia
10 and her baby were there. Claudia's other brother Jonathan
11 Rangel was also home at the time.

12
13 During the final visit to Claudia's house, appellant
14 Trejo took Perez and Javier to the backyard and told them to
15 fight, which they did for about four minutes. Appellants
16 and others then took Perez to a car where others were
17 waiting, and appellant Trejo placed Perez in the rear middle
18 seat. Several cars, including a light blue SUV, drove away.
19 Javier remained at the house. About 30 minutes later, Trejo
20 returned to the house and told Javier that Perez had been
21 killed, though he did not say who had done the killing.
22 Trejo told Javier to say that a rival gang had killed Perez
23 if anyone asked questions about his death.

24
25 Marta Moreno testified at the preliminary hearing that on
26 the day of the killing she returned home to find several people
27 she did not know, either in cars or leaving the back of her
28 house. Her children were at home with Perez, who left with the

1 others. Later that day, she saw Javier with a black eye or
2 injury to his face.

3
4 Detective Dean Camarillo of the Los Angeles County
5 Sheriff's Department testified as a gang expert. He was
6 familiar with the Florencia 13 gang, and first met Perez and
7 Javier in 2005 or 2006 when Perez was 12 or 13 years old.
8 Both boys told him they were members of Florencia. Perez
9 was killed in an area claimed by Florencia. Appellants were
10 also Florencia members and had tattoos indicating their gang
11 membership. Appellant Trejo had the gang monikers of
12 "Demon" and "Crash," and appellant Marquez had the monikers
13 of "Chuko" and "Necio." Detective Camarillo testified that
14 in Hispanic gangs, members who are perceived as snitches
15 will generally be killed, if the killing is authorized by
16 more senior members of the gang. Detective Camarillo
17 believed that the fight between Perez and Javier was
18 intended to settle the differences between them arising from
19 their accusing each other of having been the snitch. He
20 opined that the killing was committed for the benefit of, in
21 association with, and at the direction of the Florencia 13
22 gang.

23
24 (Respondent's Lodgment 6, pp. 2-4; see People v. Trejo, 2012 WL
25 375441, at *1-2).

26 ///

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28 ///

1 Under the "unreasonable application prong" of section 2254(d)(1),
2 a federal court may grant habeas relief "based on the application of a
3 governing legal principle to a set of facts different from those of
4 the case in which the principle was announced." Lockyer v. Andrade,
5 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537
6 U.S. at 24-26 (state court decision "involves an unreasonable
7 application" of clearly established federal law if it identifies the
8 correct governing Supreme Court law but unreasonably applies the law
9 to the facts). A state court's decision "involves an unreasonable
10 application of [Supreme Court] precedent if the state court either
11 unreasonably extends a legal principle from [Supreme Court] precedent
12 to a new context where it should not apply, or unreasonably refuses to
13 extend that principle to a new context where it should apply."
14 Williams v. Taylor, 529 U.S. at 407 (citation omitted).

15
16 "In order for a federal court to find a state court's application
17 of [Supreme Court] precedent 'unreasonable,' the state court's
18 decision must have been more than incorrect or erroneous." Wiggins v.
19 Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state
20 court's application must have been 'objectively unreasonable.'" Id.
21 at 520-21 (citation omitted); see also Waddington v. Sarausad, 555
22 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th
23 Cir. 2004), cert. dismiss'd, 545 U.S. 1165 (2005). "Under § 2254(d), a
24 habeas court must determine what arguments or theories supported,
25 . . . or could have supported, the state court's decision; and then it
26 must ask whether it is possible fairminded jurists could disagree that
27 those arguments or theories are inconsistent with the holding in a
28 prior decision of this Court." Harrington v. Richter, 131 S. Ct. 770,

1 786 (2011). This is "the only question that matters under §
2 2254(d)(1)." Id. (citation and internal quotations omitted). Habeas
3 relief may not issue unless "there is no possibility fairminded
4 jurists could disagree that the state court's decision conflicts with
5 [the United States Supreme Court's] precedents." Id. at 786-87 ("As a
6 condition for obtaining habeas corpus from a federal court, a state
7 prisoner must show that the state court's ruling on the claim being
8 presented in federal court was so lacking in justification that there
9 was an error well understood and comprehended in existing law beyond
10 any possibility for fairminded disagreement.").

11
12 In applying these standards, the Court looks to the last reasoned
13 state court decision, here the decision of the California Court of
14 Appeal. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir.
15 2008).

16 17 **DISCUSSION**

18
19 Although the Confrontation Clause claim asserted in the Petition
20 is somewhat unclear, the claim is clarified by Petitioner's brief on
21 appeal and petition for review to the California Supreme Court. In
22 these documents, Petitioner argued that the introduction of the
23 preliminary hearing testimony of Claudia Rangel ("Claudia") and Marta
24 Moreno ("Marta") violated the Confrontation Clause because the
25 prosecution assertedly failed to show the requisite diligence in
26 attempting to locate these witnesses to testify at trial (see
27 Respondent's Lodgments 3, 8).

28 ///

1 **I. Background**

2
3 California's hearsay rule permits the admission of former
4 testimony if: (1) the witness is unavailable; and (2) the party
5 against whom the former testimony is offered was a party to the prior
6 proceeding and had the right and opportunity to cross-examine the
7 witness with an interest and motive similar to that which that party
8 has at the present hearing. See Cal. Evid. Code § 1291(a)(2).
9 California Evidence Code section 240 defines the term "unavailable as
10 a witness" to include a situation in which the proponent of the absent
11 witness' statement "has exercised due diligence but has been unable to
12 procure his or her attendance by the court's process." Cal. Evid.
13 Code § 240(a)(5).
14

15 Claudia testified at Petitioner's preliminary hearing on
16 July 29-31, 2008, and Petitioner's counsel cross-examined her at that
17 time (C.T. 7-59). Marta also testified for the prosecution, although
18 Petitioner's counsel elected not to cross-examine her (C.T. 117-32).
19 In December 2008, the prosecutor filed a motion seeking an order
20 requiring Claudia to post bail to assure her appearance at trial (C.T.
21 253-57). The motion indicated that Claudia reportedly had evinced an
22 unwillingness to testify, had made no effort to stay in contact with
23 detectives, and did not answer or return phone calls (C.T. 256-57).
24 Detectives allegedly had not heard from Claudia since late October
25 2008 (C.T. 257). The motion also stated that, during the last week of
26 November 2008, Claudia had told the owner of the place where Claudia
27 then resided that the family intended to move to Mexico (C.T. 257).
28 The court granted the motion and issued a body attachment (C.T. 258-

1 59).

2
3 On July 9, 2010, the trial court set a trial date of
4 September 21, 2010 (C.T. 328). On August 25, 2010, the prosecution
5 filed a motion to permit the reading at trial of the preliminary
6 hearing testimony of Claudia and Marta (C.T. 337-43). Petitioner's
7 counsel filed a written opposition (C.T. 349-52). After a hearing,
8 the court granted the motion (C.T. 371-72, 375-76, 493-94). Claudia's
9 preliminary hearing testimony and portions of her taped interview to
10 police were read to the jury (R.T. 1206-1328). Marta's preliminary
11 hearing testimony also was read to the jury (R.T. 1329-41).

12
13 Claudia implicated Petitioner in the crime, testifying that:
14 (1) she and "Demon" (identified in other evidence as Petitioner) were
15 present in the back yard of the house when "Demon" ordered Perez and
16 Javier to fight; (2) one member of the group had a gun; (3) after the
17 fight the group left in a car with "Blackie"; and (4) some time
18 thereafter "Demon" returned and said they had "killed Blackie" (R.T.
19 1225-31, 1234-35, 1285, 1292, 1293, 1309-10, 1665). Claudia admitted
20 telling detectives, truthfully, that after the fight between Javier
21 and "Blackie," a co-defendant had walked "Blackie" to a car where
22 "Demon" and another person, "Tony," were waiting (R.T. 1240-41, 1247,
23 1268, 1275-76). Claudia said "Demon" exited the car and put "Blackie"
24 in the middle seat (R.T. 1241, 1326-27). Claudia said "Demon" got in
25 the car with "Blackie" and "Tony" (R.T. 1288, 1327). Claudia said
26 that later, after "Demon" returned, Claudia heard "Demon" tell her
27 brother that if the police asked what had happened to Ivan, he should
28 say "that it was the 38th Street," referring to a rival gang (R.T.

1 1233) .

2
3 Marta did not inculcate Petitioner directly and said she did not
4 recall much about the incident. She testified she did not know any of
5 the "cholos" who came to her house, but later said she recognized co-
6 defendant Valdez as one of the men (R.T. 1331-32, 1338-39). She
7 admitted telling a detective that the "cholos" left and took "Blackie"
8 with them (R.T. 1334). She denied seeing any man with a gun (R.T.
9 1336-37). Marta said Claudia told Marta they had to move "because we
10 were all going to be killed" (R.T. 1315).

11
12 **II. Summary of Evidence Presented at the Evidentiary Hearing in**
13 **Superior Court**

14
15 **A. Testimony of Detective Jonas Shipe**

16
17 Detective Jonas Shipe testified as follows:

18
19 At the time of the preliminary hearing, Claudia and Maria were in
20 custody as material witnesses (R.T. 6). Claudia had expressed fear
21 and was "semi uncooperative" (R.T. 16). After the preliminary hearing
22 the two were released and relocated (R.T. 6-7, 16-17). Shipe did not
23 oppose Claudia's release, and the prosecutor did not then request a
24 bond to secure her presence for later proceedings, because the family
25 was relocated immediately after the preliminary hearing and "appeared
26 cooperative at that time" (R.T. 16-17, 29-30). The family, consisting
27 of Claudia, her baby, Marta, Marta's boyfriend and Claudia's two
28 brothers, was relocated to Oxnard, where they resided for

1 approximately three months (R.T. 6-7, 31, 303). Officers were in
2 contact with the family on a regular basis in order to pay the rent
3 and to give them money for utilities, food and other items (R.T. 33-
4 34). Because the family appeared cooperative and "comforted" by the
5 relocation, investigators believed they would be able to find the
6 witnesses later to subpoena them for trial (R.T. 17, 30-31). Shipe
7 last saw Claudia at the Oxnard location on August 13, 2008, although
8 there was phone contact with her after that date (R.T. 19-21, 32-33).

9
10 Investigators lost contact with the family in December of 2008
11 (R.T. 7, 22). The owner of the apartment complex where the family
12 lived told police that the family packed up and fled in the middle of
13 the night (R.T. 7-8, 36). The owner said the family was going to go
14 to Mexico, but did not provide an address in Mexico or even identify
15 the state in Mexico to which the family purportedly had fled (R.T. 14-
16 15). Investigators went to the home of Marta's boyfriend, but no one
17 was home, and thereafter investigators were unable to locate the
18 boyfriend (R.T. 307-09).

19
20 Shipe and another detective, Detective Ferguson, contacted the
21 confidential informant who had provided the original information
22 linking the two women to the case, but that contact did not help the
23 detectives find the family (R.T. 9). In 2008, investigators checked
24 various law enforcement resources including the California Warrant
25 System, "RAPS," "CCHRS," "Calgangs," the Los Angeles County Booking
26 System, inmate locators for surrounding agencies, the Department of
27 Motor Vehicles and the Department of Children's Services (R.T. 9-10,
28 42-43).

1 In January of 2009, Shipe and Ferguson assigned the job of
2 locating the witnesses to the "major crimes surveillance team" tasked
3 with the duty of tracking down witnesses, comprised of six
4 investigators under the direction of Detective Juan Alvarado (R.T. 10,
5 36, 49-50). The team distributed to law enforcement agencies,
6 including the Border Patrol, a "special bulletin" flyer bearing the
7 photographs of Claudia, Marta, Javier and Jonathan (R.T. 11-12, 314-
8 15). The surveillance team unsuccessfully investigated four
9 addresses, which were also included on the flyer (R.T. 12-13). A
10 different surveillance team rechecked the addresses unsuccessfully in
11 2010 (R.T. 13-14).

12
13 During 2009 and 2010, investigators checked law enforcement
14 resources on a monthly basis (R.T. 10-11, 14). Investigators
15 performed property searches using Lexis-Nexis and checked hospitals
16 and coroner's offices (R.T. 43-44, 54). Investigators checked the
17 welfare system and determined that Claudia had used a credit card
18 until the card was "tapped out" (R.T. 44-45, 53). Claudia had stopped
19 using this card in 2008 or 2009, so this lead "dried up" (R.T. 45).
20 Investigators attempted to locate the father of Claudia's child, but
21 Claudia had only given the authorities the father's gang name (R.T.
22 321). Investigators checked with Jonathan Rangel's probation officer
23 (R.T. 323). Authorities had interviewed Jonathan Rangel on
24 October 20, 2008, their last contact with him (R.T. 46-47). Shipe did
25 not contact Mexican authorities because the investigators did not know
26 whether the family was in Mexico and had no leads concerning in which
27 Mexican state the family might be found (R.T. 46).

28 ///

1 In March of 2009, investigators received a report that someone
2 had seen Claudia at a Fontana mall, and that Claudia probably was
3 living with her aunt in Fontana (R.T. 36-37, 39). Alvarado informed
4 Shipe that Alvarado would "hook up" with Claudia when there was "time
5 to go snatch these folks" (R.T. 38). Shipe did not call the aunt
6 himself and did not recall if Alvarado called her (R.T. 40). Shipe
7 did not investigate this lead himself, but the surveillance team log
8 showed that someone went to Fontana in May of 2009 (R.T. 38-39).
9 Shipe did not call Claudia's aunt, although he had her phone number,
10 but he provided the number to Alvarado, who spoke Spanish (R.T. 40).
11 Shipe did not recall if Alvarado called the aunt (R.T. 40).

12
13 In May of 2010, a new surveillance team rechecked the addresses
14 and other law enforcement resources, without success (R.T. 13-14).
15 Also in May of 2010, an officer contacted immigration authorities,
16 without success (R.T. 54-55).

17
18 Shipe admitted he did not investigate Claudia's cell phone
19 records, saying "it was probably something we should have done" (R.T.
20 311-12). Shipe denied that he failed to search "hard" for Claudia so
21 that her preliminary hearing testimony could be read at trial, saying
22 he preferred to have witnesses testify at trial (R.T. 45-46).

23
24 **B. Testimony of District Attorney Investigator Gilbert Roldan**

25
26 Gilbert Roldan, an investigator with the Los Angeles County
27 District Attorney's Office, testified as follows:

28 ///

1 Following a request received on September 10, 2010, Roldan began
2 a search on September 16, 2010 (R.T. 332). Roldan checked the Justice
3 Data Interface Communication system, the Lexis database, the
4 Prosecution Information Management System, Los Angeles County booking
5 records, and a warrant database (R.T. 327-29). Roldan checked
6 hospitals in Los Angeles and San Bernardino Counties, the postal
7 service, the Employment Development Department, the Los Angeles and
8 San Bernardino County coroner's offices, and approximately four
9 homeless shelters (R.T. 329-30, 335-36).

10
11 **C. The Superior Court's Ruling**

12
13 In granting the prosecution's motion, the Superior Court ruled
14 that, because it had taken eight months to "get to the preliminary
15 hearing," it was "understandable" that the witnesses had been released
16 from material witness custody after the preliminary hearing (R.T.
17 610). The court said that it had taken two years to get to trial and
18 that the defendants had consented to all of the delay and had not
19 objected to the witnesses' release (R.T. 610). The court said it knew
20 of no judge who would keep a witness in custody for years awaiting a
21 trial (R.T. 610).

22
23 The court further ruled that the relocation to Oxnard was
24 reasonable and a "great way to keep an eye on [the witnesses] (R.T.
25 610-11). The court deemed diligent the searches performed after the
26 family disappeared (R.T. 611).

27 ///

28 ///

1 **D. The Court of Appeal's Ruling**

2
3 The Court of Appeal agreed, deeming the search for the witnesses
4 sufficiently diligent under the standards set forth in cases including
5 Barber v. Page, 390 U.S. 719 (1968) (Respondent's Lodgment 6, pp. 8-
6 12; see People v. Trejo, 2012 WL 375441, at *4-7). The Court of
7 Appeal ruled that, after the family's relocation, it was not
8 unreasonable for the prosecution to assume there was no need to take
9 "drastic measures" to assure the witnesses' future attendance at trial
10 (Respondent's Lodgment 6, p. 11; People v. Trejo, 2012 WL 375441 at
11 *6). The Court of Appeal also reasoned that, although investigators
12 possibly could have done more, "the fact that 'additional efforts
13 might have been made or other lines of inquiry pursued'" did not
14 indicate a lack of diligence (Respondent's Lodgment 6, p. 12; People
15 v. Trejo, 2012 WL 375441, at *6 (citation omitted)).
16

17 **III. Discussion**

18
19 The Confrontation Clause prohibits the admission of an out-of-
20 court testimonial statement at a criminal trial unless the witness is
21 unavailable to testify and the defendant had a prior opportunity for
22 cross-examination. Crawford v. Washington, 541 U.S. 36, 59 (2004)
23 ("Crawford"). Neither party disputes that the witnesses' prior
24 testimony was "testimonial" within the meaning of Crawford.
25

26 "The constitutional requirement that a witness be 'unavailable'
27 stands on separate footing that is independent of and in addition to
28 the requirement of a prior opportunity for cross-examination." United

1 States v. Yida, 498 F.3d 945, 950 (9th Cir. 2007) (citations omitted).
2 A witness is not "unavailable" for purposes of the hearsay exception
3 for former testimony "unless the prosecutorial authorities have made
4 a good-faith effort to obtain [the witness'] presence at trial.'" Hardy v. Cross, 132 S. Ct. 490, 493 (2011) (quoting Barber v. Page,
5 390 U.S. at 724-25); Windham v. Merkle, 163 F.3d 1092, 1102 (9th Cir.
6 1998); People v. Smith, 30 Cal. 4th 581, 609, 134 Cal. Rptr. 2d 1, 68
7 P.3d 302 (2003), cert. denied, 540 U.S. 1163 (2004) (the good faith
8 requirement of Barber v. Page is "similar" to due diligence
9 requirement of California Evidence Code section 240(a)(5)). However,
10 "the law does not require the doing of a futile act, and the extent of
11 the effort the prosecutor must make is a question of reasonableness."
12 United States v. Olafson, 213 F.3d 435, 441 (9th Cir.), cert. denied,
13 531 U.S. 914 (2000) (citation, quotations and brackets omitted).
14
15

16 In Ohio v. Roberts, 448 U.S. 56 (1980), abrogated on other
17 grounds, Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court
18 held that the prosecution had made a good faith effort to locate the
19 unavailable witness, despite the prosecution's failure to contact a
20 social worker who might have been able to assist in finding the
21 witness. Id. at 75-76. The Court held that, although "[one], in
22 hindsight, may always think of other things," the "great improbability
23 that such efforts would have resulted in locating the witness, and
24 would have led to her production at trial, neutralized any intimation
25 that a concept of reasonableness required their execution." Id. at
26 76.

27 ///

28 ///

1 The United States Supreme Court recently addressed the
2 unavailability issue in a case somewhat similar to the present case.
3 See Hardy v. Cross, supra. In that case, a kidnap and sexual assault
4 victim testified at the petitioner's first trial prior to the grant of
5 a motion for a mistrial. Hardy v. Cross, 132 S. Ct. at 491. Nine
6 days before the commencement of the retrial, the prosecutor informed
7 the court that the witness could not be located. Id. at 492. The day
8 before the trial was to begin, the prosecutor moved to have the
9 witness declared unavailable and to introduce her prior testimony at
10 the retrial. Id. The prosecutor told the court that the witness,
11 although "extremely frightened," had indicated after the first trial
12 her supposed willingness to testify at the retrial, and that the
13 prosecution had remained in "constant contact" with the witness and
14 her mother. Id. Approximately three weeks before the retrial,
15 however, the witness disappeared. Id. The witness' mother, father
16 and brother told investigators they did not know the witness'
17 whereabouts. Id. Investigators made personal visits to the witness'
18 home and that of her father, and contacted the witness' parents and
19 other family members. Id. Investigators also contacted the county
20 medical examiner, the witness' school, the family of the witness' old
21 boyfriend, the office of the state secretary of state, the welfare
22 department, the morgue, the public health department, the jail, the
23 post office, and immigration authorities. Id. at 492-93. On the day
24 before trial, the witness' mother told a detective that the witness
25 had called two weeks previously, saying she did not want to testify
26 and would not return to the area. Id. at 493.

27 ///

28 ///

1 The trial court admitted the prior testimony and the state court
2 of appeals affirmed, ruling that the prosecution's efforts met the
3 constitutional diligence standard. Id. On habeas review, the United
4 States Court of Appeals for the Seventh Circuit disagreed, emphasizing
5 that investigators had not contacted the victim's current boyfriend or
6 a school at which the victim once had been enrolled. Id. at 494. The
7 Supreme Court reversed the Seventh Circuit in a unanimous summary per
8 curiam disposition. Id. The Supreme Court held that, under the
9 deferential AEDPA of review, the Seventh Circuit had erred in ruling
10 that the state court of appeals' determination had been unreasonable.
11 Id. at 494-95. The Supreme Court stated that the Constitution did not
12 "require the prosecution to exhaust every avenue of inquiry, no matter
13 how unpromising." Id. at 495. The Supreme Court continued: "And,
14 more to the point, the deferential standard of review set out in 28
15 U.S.C. § 2254(d) does not permit a federal court to overturn a state
16 court's decision on the question of unavailability merely because the
17 federal court identifies additional steps that might have been taken."
18 Id.

19
20 Similarly here, this Court cannot deem unreasonable the state
21 courts' diligence determination. The efforts to locate Claudia and
22 Marta resemble those described in Hardy v. Cross and far exceed the
23 efforts deemed deficient in Barber v. Page, 390 U.S. at 723 ("the
24 State made absolutely no effort to obtain the presence of [the
25 witness] at trial other than to ascertain that he was in federal
26 prison outside Oklahoma"). Although Petitioner appears to contend
27 that the authorities should have kept Claudia and Marta in custody
28 following the preliminary hearing, neither the prosecution nor the

1 state court acted unreasonably in deciding that the relocation of the
2 family would resolve any issues regarding Claudia's and Marta's
3 alleged fear of testifying. Although Petitioner may argue that
4 investigators should have undertaken further investigation,² the
5 efforts that the detectives and investigators did undertake, over a
6 period of years, were reasonable. The depth and breadth of the
7 efforts utilized to locate Claudia and Marta belie any unsupported and
8 speculative allegation that the prosecution did not really want to
9 find them. Furthermore, no "clearly established" Supreme Court law
10 requires the prosecution to attempt to subpoena a witness who has gone
11 into hiding. See Hardy v. Cross, 132 S. Ct. at 494-95 ("the issuance
12 of a subpoena may do little good if a sexual assault victim is so
13 fearful of an assailant that she is willing to risk his acquittal by
14 failing to testify at trial").

15
16 Therefore, the Court of Appeal's rejection of Petitioner's
17 Confrontation Clause claim was not contrary to, or an objectively
18 unreasonable application of, any clearly established Federal law as
19 determined by the United State Supreme Court. See 28 U.S.C. §
20 2254(d). Petitioner is not entitled to habeas relief.

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25 ² In his California Supreme Court petition for review,
26 for example, Petitioner argued that Shipe should have done more
27 investigation himself rather than relying on the surveillance
28 team, and in particular should have followed up more promptly on
the suggestion that Claudia was staying with her aunt in Fontana
(Respondent's Lodgment 8, pp. 6-8).

1 **NOTICE**

2 Reports and Recommendations are not appealable to the Court of
3 Appeals, but may be subject to the right of any party to file
4 objections as provided in the Local Rules Governing the Duties of
5 Magistrate Judges and review by the District Judge whose initials
6 appear in the docket number. No notice of appeal pursuant to the
7 Federal Rules of Appellate Procedure should be filed until entry of
8 the judgment of the District Court.

9 If the District Judge enters judgment adverse to Petitioner, the
10 District Judge will, at the same time, issue or deny a certificate of
11 appealability. Within twenty (20) days of the filing of this Report
12 and Recommendation, the parties may file written arguments regarding
13 whether a certificate of appealability should issue.

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