UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID FERNANDEZ, Petitioner, v. LYDIA ROMERO, Acting warden, Respondent.	NO. CV 14-3529-PA(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Percy Anderson, 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 a "Petition for Writ of Habeas Corpus by a Person in State Custody" on May 7, 2014. Respondent filed an Answer on August 26, 2014. Petitioner filed a Reply on October 10, 2014.

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BACKGROUND

A jury found Petitioner guilty of the second degree murder of James Beikman (Reporter's Transcript ["R.T."] 1504; Clerk's Transcript ["C.T."] 99, 120). Petitioner admitted having suffered a prior robbery conviction which qualified as a strike under California's Three Strikes Law, California Penal Code sections 667(b) - (i) and 1170.12(a) - (d) (R.T. 1502-03; C.T. 120).[1] Petitioner received a sentence of thirty years to life (R.T. 1803-04; C.T. 140).

The California Court of Appeal affirmed the judgment and denied Petitioner's companion petition for writ of habeas corpus (Respondent's Lodgment 10 and Appendix A to Respondent's Lodgment 7; see People v. Fernandez, 2012 WL 2025616 (Cal. App. June 6, 2012)). The California Supreme Court denied Petitioner's petition for review summarily (Respondent's Lodgment 8).

Petitioner filed a habeas corpus petition in the Los Angeles County Superior Court, which that court denied on the grounds that Petitioner had failed to allege a fundamental jurisdictional or constitutional error, failed to alleged a prima facie case for relief, and raised issues that should have been raised on direct appeal

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[1] The Three Strikes Law consists of two nearly identical statutory schemes. The earlier provision, enacted by the Legislature, was passed as an urgency measure, and is codified as California Penal Code §§ 667(b) - (I) (eff. March 7, 1994). The later provision, an initiative statute, is embodied in California Penal Code § 1170.12 (eff. Nov. 9, 1994). See generally People v. Superior Court (Romero), 13 Cal. 4th 497, 504-05, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996). The State charged Petitioner under both versions (C.T. 40).

(Respondent's Lodgment 12). Petitioner filed a habeas corpus petition in the California Court of Appeal, which that court denied for failure to state facts sufficient to demonstrate an entitlement to relief (Respondent's Lodgment 14). Petitioner filed a habeas corpus petition in the California Supreme Court, which that court denied summarily (Respondent's Lodgment 16).

SUMMARY OF TRIAL EVIDENCE

The following summary is taken from the opinion of the California Court of Appeal in People v. Fernandez, 2012 WL 2025616 (Cal. App. June 6, 2012). See Runningeagle v. Ryan, 686 F.3d 758, 763 n.1 (9th Cir. 2012), cert. denied, 133 S. Ct. 2766 (2013) (presuming correct statement of facts drawn from state court decision); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009) (taking factual summary from state appellate decision).

A. *Prosecution Evidence*

> Anthonette Vidal was determined by the trial court to be unavailable as a witness, and portions of her preliminary hearing testimony were presented to the jury.[2] According to Vidal, prior to November 2006, she had known appellant for approximately a year. They lived on the streets of Lancaster and, for a period, were "together." She also knew James Beikman, who lived on the streets at a makeshift

[2] In this testimony, Vidal acknowledged that she had a conviction for a felony.

campsite that Vidal shared with appellant. Sometime before Beikman's death, appellant showed Vidal a distinctive knife he had acquired.

On November 17, 2006, while Vidal was in appellant's tent, appellant told her that she had "15 minutes to get everybody out of the desert. . . ." Appellant also said that she "didn't want to be a witness to what was gonna happen and pay for it later." As Vidal knew that appellant could act violently, she urged other people in the camp to "get out of the desert," and sounded an alert while riding a bicycle. As she did so, she saw appellant running after Beikman. According to Vidal, appellant was then wearing a T-shirt.

A short time later, in the late afternoon, Vidal was riding her bicycle close to a Valero gas station near Avenue J and Division Street when appellant ran up to her from behind a dairy in the area. Appellant was shirtless, had blood stains on his chest, and carried his knife. He asked Vidal whether she could see the knife and blood, to which she answered affirmatively. Appellant then said, "I had to kill an innocent man." He explained that he had performed the killing to gain the trust of a man called "Loco," whom appellant viewed as controlling a local street gang. Appellant also said that he intended to kill Loco "if [he] went to sleep." Afterward, Vidal found a place of safety away from appellant, and learned that Beikman had been

stabbed.

Los Angeles County Sheriff's Department Deputy Sheriff Paul Fernandez testified that on November 17, 2006, he patrolled an area encompassing a Valero gas station and Young's Bar. At approximately 5:30 p.m., he saw a shirtless man talking to a woman seated on a bicycle. Later, Fernandez identified the pair as appellant and Vidal in photographic lineups; in addition, at trial he identified appellant as the shirtless man.

On the date Beikman was killed, Charleen Heasley was working as a bartender in Young's Bar, located on the corner of Trevor Avenue near Avenue J. According to Heasley, her shift ran from 10:00 a.m. until 6:00 p.m. Late in her shift, she heard a commotion outside the bar. She left the bar through its front door and saw an argument between two men, one of whom was shirtless. She recognized neither man and noticed no weapon. As she re-entered the bar, someone said that there had been a fatal stabbing near the bar. At trial, Heasley denied having identified the two men as appellant and Beau Vitagliano to investigating officers. Heasley also denied that she recognized appellant in the courtroom.

At approximately 5:00 p.m., Los Angeles County deputy sheriffs discovered Beikman in the area of Young's Bar, in a planter behind a wall along Trevor Avenue. He had died from

a fatal stab wound to the chest. The deputy sheriffs found a knife approximately 75 to 100 yards away in an alley adjoining Trevor Avenue. Later, Vidal identified it as appellant's knife.

Around 10:00 p.m., Ted Hamm, a dog scent consultant, arrived at the crime scene with Joe D'Allura, a dog handler, and a "trailing" dog trained to follow scents. Using a vacuum device, Hamm created two "scent pads" from the knife; in addition, he created "scent strips" to preserve the scent evidence. After exposure to the crime scene and a scent pad, the dog followed a course that went past the dairy and Valero gas station near Division and J, and ended inconclusively near an apartment building.

On November 26, 2006, appellant was arrested on an unrelated matter at his campsite. Upon arresting appellant, deputy sheriffs obtained two bags containing his personal belongings. From these belongings, Los Angeles County Sheriff's Department Detective Alexander MacArthur created a scent pad. MacArthur and D'Allura then conducted a dog scent identification lineup. After MacArthur arranged the scent pad and three unrelated scent pads in a diamond pattern, D'Allura exposed his trailing dog to a scent pad taken from the knife, and then permitted the dog to sniff each of the scent pads in the pattern. The dog responded to the scent pad taken from appellant's belongings.

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On December 28, 2006, when Los Angeles County Sheriff's detectives interviewed Heasley, she said that she had seen two men arguing outside the bar; from photographic lineups she identified the men as appellant and Beau Vitagliano. According to Detective MacArthur, Heasley also said that appellant was shirtless and was holding a knife while arguing with Vitagliano.

The knife found near Beikman disclosed DNA from a major contributor and at least two minor contributors. Detective MacArthur testified that the major contributor was identified as an individual residing in the Antelope Valley who had no connection with Beikman's death. Cheryl Andersen, the criminalist who conducted the DNA analysis, testified that she had included appellant as a potential minority contributor, but that his inclusion was statistically weak.

B. *Defense Evidence*

Appellant presented no evidence.

(Respondent's Lodgment 6, pp. 2-5; Respondent's Lodgment 7, attachment, pp. 2-5; see People v. Fernandez, 2012 WL 2025616, at *1-2) (footnote in original).

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PETITIONER'S CONTENTIONS

Petitioner contends:

1. The introduction of Vidal's preliminary hearing testimony allegedly violated the Confrontation Clause (Ground One);

2. Petitioner's trial counsel allegedly rendered ineffective assistance, by assertedly failing to preserve properly Petitioner's constitutional rights to cross-examination and due process (Ground Two); and

3. Petitioner's appellate counsel allegedly rendered ineffective assistance, by assertedly: (a) failing to raise on appeal Petitioner's constitutional rights to cross-examination and due process; and (b) failing to raise on appeal an argument that the DNA evidence and other evidence in the case purportedly showed that Petitioner was innocent (Grounds Three and Four).

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme

Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 132 S. Ct. 38, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

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"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 786 (2011). This is "the only question that matters under § 2254(d)(1)." Id. (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. at 786-87 ("As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.").

In applying these standards, the Court looks to the last reasoned state court decision. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Where no reasoned decision exists, as where the state court summarily denies a claim, "[a] habeas court must determine

what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011) (citation, quotations and brackets omitted).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

DISCUSSION

I. Petitioner's Confrontation Clause Claim Does Not Merit Habeas Relief.

Petitioner claims that the admission at trial of Vidal's preliminary hearing testimony violated the Confrontation Clause because the prosecution assertedly failed to exercise due diligence to secure Vidal's presence at trial. Petitioner raised this claim in his Superior Court habeas petition, which that court denied in a brief order stating that Petitioner had not alleged a cognizable or prima facie ground for habeas relief (Respondent's Lodgments 11, 12). The California Court of Appeal rejected this claim for failure to state

facts sufficient to demonstrate entitlement to the relief requested, and the California Supreme Court rejected the claim summarily (see Respondent's Lodgments 13, 14, 15, 16).

A. Background

1. Introduction

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

At the preliminary hearing on September 13, 2007, Vidal testified that: (1) on the day of the killing, Vidal saw Petitioner with a knife; (2) on the day of the killing, Petitioner told Vidal that she had fifteen minutes to get everybody out of the desert; (3) Vidal later saw Petitioner running after the victim; (4) still later that day, Vidal saw Petitioner with blood on his chest and on the knife, and Petitioner told Vidal that Petitioner had had to kill an innocent man; and (5) Petitioner said he killed a man to obtain Loco's trust so

that Petitioner could stab Loco while Loco was asleep (C.T. 7-14). Petitioner's counsel cross-examined Vidal at length, eliciting her testimony that, among other things: (1) Vidal recently had suffered a felony drug conviction; (2) Vidal had used methamphetamine for approximately a year and had ingested methamphetamine earlier that week; and (3) Vidal did not report the incident to police until police contacted her for another reason several days later (C.T. 18-19, 22-23).

Trial commenced on March 9, 2011 (C.T. 88).[3] On Monday, March 14, 2011, the court held a hearing, out of the presence of the jury, on the prosecution's motion to admit Vidal's preliminary hearing testimony on the ground that Vidal assertedly was "unavailable" within the meaning of Evidence Code section 1291 (R.T. 601-22).

2. Summary of Evidence at the March 14, 2011 Evidentiary Hearing

At the evidentiary hearing, Detective Alexander MacArthur testified as follows:

> MacArthur interviewed Vidal prior to the preliminary hearing (R.T. 603). At that time, Vidal was homeless and addicted to drugs (R.T. 604). Vidal was placed in temporary, county-funded housing prior to the preliminary

[3] Numerous continuances, occasioned in part by the death of one of Petitioner's attorneys, delayed the commencement of trial (see C.T. 59-60, 62-67, 69-71, 73-85; R.T. 621).

hearing (R.T. 604, 614). MacArthur gave Vidal his contact information (R.T. 604). MacArthur had contact with Vidal once a week until the preliminary hearing (R.T. 612).

The preliminary hearing occurred on September 13, 2007 (R.T. 614). After the preliminary hearing, Vidal's county-funded housing was no longer available to her (R.T. 604). MacArthur heard nothing from Vidal after the preliminary hearing (R.T. 604-05).

Approximately two months before trial, the prosecutor asked MacArthur to attempt to locate Vidal (R.T. 605). MacArthur checked all databases available to him and to personnel in his office, including: (1) Lexis Nexis; (2) Choice Point/Auto Trak; (3) the Department of Motor Vehicles; (4) the Reverse Directory; (5) telephone information or "4-1-1"; (6) Los Angeles City Schools and School Police; (7) the Los Angeles District Attorney case information database; (8) a rap sheet database (the "JDIC" "RAPS" database); (9) the DMV photograph database ("Cal Photo"); (10) the Los Angeles Regional Crime Information System; (11) the Los Angeles County Probation office; (12) a "wants and warrant" database; (13) the Los Angeles Sheriff's Department booking information database; (14) Los Angeles Police Department records; (15) the Los Angeles County voter registration database; (16) the United States Post Office; (17) the California Department of Corrections statewide locator; (18) the vital records database of the Los Angeles

County Registrar/Recorder's Office; (19) the Los Angeles Superior Court divorce index and civil index; (20) the United States military locator; (21) the "utility research" database of the Los Angeles District Attorney's Office Operations Section; (22) the licensing database of the California Department of Consumer Affairs; (23) the Los Angeles County Coroner's Office; (24) the Los Angeles City Fire Department; (25) the Los Angeles County dog license department; (26) the Los Angeles County Tax Assessor/Tax Collector; (27) the Los Angeles County fictitious business database; (28) the federal prison locator; (29) the victim witness advocate; (30) the DMV occupational licensing database; (31) the Los Angeles Police Department jail release records; (32) the Union Rescue Mission; (33) the Los Angeles City Housing Authority; (34) the Los Angeles Mission; (35) the Midnight Mission; (36) the Salvation Army; (37) "LA Clear"; (38) the Los Angeles County Medical Center patient information database; (39) the state parole database; (40) the California state disability database; (41) the Los Angeles Traffic Court; and (42) the "Cop Link" database (R.T. 606-09). MacArthur checked the databases most recently on the Saturday and Sunday before the Monday hearing (R.T. 606, 611).[4] The last record of Vidal MacArthur found was a domestic violence incident in Lancaster, but there was no arrest and no reports taken (R.T. 610).

[4] MacArthur's records of his investigation comprised "60 pages of paperwork" (R.T. 610).

MacArthur had the names of some relatives of Vidal (R.T. 614). MacArthur spoke with Vidal's ex-husband before the preliminary hearing, but had not spoken with him since then (R.T. 614). On March 8, 2011, MacArthur checked "the surrounding area, neighborhoods and last known addresses" (R.T. 607). Additionally, MacArthur drove through the homeless camp where Vidal previously resided by herself in a field in a makeshift structure constructed of a covered dugout,[5] checked some of the hotels where Vidal had resided temporarily after the murder, and checked a shelter near the crime scene (R.T. 610, 613).

3. Subsequent Proceedings

The court found that Vidal was unavailable and that her preliminary hearing testimony was admissible at trial (R.T. 622). The court commented that, because Vidal was subject to cross-examination at the preliminary hearing, there was "no Crawford issue" (R.T. 622).

A reader later took the witness stand (R.T. 681-82). The prosecutor read the questions asked of Vidal at the preliminary hearing and the reader read Vidal's responses at the preliminary hearing, including the cross-examination (R.T. 681-712).

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[5] MacArthur never saw Vidal in the field in anyone else's company (R.T. 613).

B. Discussion

The Confrontation Clause prohibits the admission of an out-of-court testimonial statement at a criminal trial unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 59 (2004) ("Crawford"). Neither party disputes that Vidal's preliminary hearing testimony was "testimonial" hearsay within the meaning of Crawford or that Petitioner's counsel had an opportunity to (and did) cross-examine Vidal at the preliminary hearing.[6]

"The constitutional requirement that a witness be 'unavailable' stands on separate footing that is independent of and in addition to the requirement of a prior opportunity for cross-examination." United States v. Yida, 498 F.3d 945, 950 (9th Cir. 2007) (citations omitted). A witness is not "unavailable" for purposes of the hearsay exception for former testimony "'unless the prosecutorial authorities have made a good-faith effort to obtain [the witness'] presence at trial.'" Hardy v. Cross, 132 S. Ct. 490, 493 (2011) (quoting Barber v. Page, 390 U.S. 719, 724-25 (1968)); Windham v. Merkle, 163 F.3d 1092, 1102 (9th Cir. 1998); People v. Smith, 30 Cal. 4th 581, 609, 134 Cal. Rptr. 2d 1, 68 P.3d 302 (2003), cert. denied, 540 U.S. 1163 (2004) (noting good faith requirement of Barber v. Page is "similar" to due diligence requirement of California Evidence Code section 240(a)(5)). However,

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[6] Petitioner appears to assert that the jury did not hear Vidal's testimony that she had suffered a prior felony conviction and had been using methamphetamine for "about a year" (see Traverse, p. 17). The record belies any such assertion (see R.T. 702-04).

"the law does not require the doing of a futile act, and the extent of the effort the prosecutor must make is a question of reasonableness." United States v. Olafson, 213 F.3d 435, 441 (9th Cir.), cert. denied, 531 U.S. 914 (2000) (citation, quotations and brackets omitted).

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

The United States Supreme Court also addressed the issue of diligence in locating a witness in Hardy v. Cross, supra. In that case, a kidnap and sexual assault victim testified at the petitioner's first trial prior to the grant of a motion for a mistrial. Hardy v. Cross, 132 S. Ct. at 491. Nine days prior to the retrial, the prosecutor informed the court that the witness could not be located. Id. at 492. The day before the retrial, the prosecutor moved to have the witness declared unavailable and to introduce her prior testimony. Id. The prosecutor told the court that after the first trial the witness, although "extremely frightened," had indicated her willingness to testify at the retrial, and that the prosecution had

remained in "constant contact" with the witness and her mother. Id. However, approximately three weeks before the retrial, the witness disappeared. Id. The witness' mother, father and brother told investigators they did not know the witness' whereabouts. Id. Investigators made personal visits to the witness' home and that of her father, and contacted the witness' parents and other family members. Id. Investigators also contacted the county medical examiner, the witness' school, the family of the witness' old boyfriend, the office of the state secretary of state, the welfare department, the morgue, the public health department, the jail, the post office, and immigration authorities. Id. at 492-93. The day before the retrial, the witness' mother told a detective that the witness had called two weeks previously, saying she did not want to testify and would not return to the area. Id. at 493.

The trial court admitted the prior testimony and the state court of appeals affirmed, ruling the prosecution's efforts met the constitutional diligence standard. Id. On habeas review, the United States Court of Appeals for the Seventh Circuit disagreed, noting that investigators had not contacted the victim's current boyfriend and a school at which the victim once had been enrolled. Id. at 494. In an unanimous summary per curiam disposition, the Supreme Court reversed. Id. at 494-95. The Supreme Court held that, under the deferential AEDPA standard of review, the Seventh Circuit erred in deeming the state court of appeals' determination unreasonable. Id. The Supreme Court stated that the constitution did not "require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." Id. The Court continued: "And, more to the point, the deferential standard of

review set out in 28 U.S.C. § 2254(d) does not permit a federal court to overturn a state court's decision on the question of unavailability merely because the federal court identifies additional steps that might have been taken." Id. at 495.

Similarly here, this Court cannot deem unreasonable the state court's diligence determination. MacArthur performed an exhaustive database search and also physically searched the locations Vidal previously had frequented. Given the numerous continuances of the trial date and Vidal's apparent transient status, it was not necessarily unreasonable for MacArthur to delay searching for Vidal until approximately two months before the trial date. Although Petitioner points to other avenues of inquiry that purportedly could have been pursued in an attempt to locate Vidal, the efforts that MacArthur did undertake were not unreasonable. See Hardy v. Cross, 132 S. Ct. at 494-95.

Therefore, the state courts' rejection of Petitioner's Confrontation Clause claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United State Supreme Court. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770 (2011). Petitioner is not entitled to relief on Ground One of the Petition.

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II. Petitioner's Claim of Ineffective Assistance of Trial Counsel Does Not Merit Habeas Relief.

Petitioner contends his trial counsel ineffectively failed to preserve Petitioner's Confrontation Clause claim (Petition, p. 5). Petitioner raised this claim in his Superior Court habeas petition, which that court denied in a brief order stating that Petitioner had not alleged a cognizable or prima facie ground for habeas relief (Respondent's Lodgments 11, 12). The California Court of Appeal rejected this claim for failure to state facts sufficient to demonstrate entitlement to the relief requested, and the California Supreme Court rejected Petitioner's claim of ineffective assistance of trial counsel summarily (see Respondent's Lodgments 13, 14, 15, 16).

A. Governing Legal Standards

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984) ("Strickland"). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Id. at 697; see Gentry v. Sinclair, 705 F.3d 884, 889 (9th Cir.), cert. denied, 134 S. Ct. 102 (2013) ("[f]ailure to meet either [Strickland] prong is fatal to a claim"); Rios v. Rocha, 299

F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted).

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight. . . ." Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009), cert. denied, 558 U.S. 1154 (2010) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Petitioner bears the burden to show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Harrington v. Richter, 131 S. Ct. at 787 (citation and internal quotations omitted); see Strickland, 466 U.S. at 689 (petitioner bears burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy") (citation and quotations omitted).

A state court's decision rejecting a Strickland claim is entitled to "a deference and latitude that are not in operation when the case

involves review under the Strickland standard itself." Harrington v. Richter, 131 S. Ct. at 785. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. at 788.

"In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." Id. at 791-92 (citations omitted). Rather, the issue is whether, in the absence of counsel's alleged error, it is "'reasonably likely'" that the result would have been different. Id. at 792 (quoting Strickland, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." Id.

B. Discussion

Contrary to Petitioner's apparent contention, counsel did not fail to challenge the admission of Vidal's preliminary hearing testimony. Counsel opposed the prosecution's motion to admit this testimony. At the evidentiary hearing concerning the issue of witness unavailability, counsel reasonably cross-examined Detective MacArthur (R.T. 611-15). Counsel also argued that, given the alleged facts that at the time of the preliminary hearing Vidal had been homeless and was in temporary housing, authorities should have obtained Vidal's contact information and information concerning her relatives while the authorities were still in contact with Vidal (R.T. 617-20). Counsel

argued that the authorities assertedly had not made a sufficient effort to stay in touch with Vidal after the preliminary hearing (R.T. 619-20). The fact that counsel's arguments were unsuccessful does not show counsel's ineffectiveness. See United States v. Layton, 855 F.2d 1388, 1420 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989), overruled on other grounds, People of the Territory of Guam v. Ignacio, 10 F.3d 608, 612 n.2 (9th Cir. 1993) ("Lack of success, however, does not prove ineffective assistance of counsel"). Although Petitioner appears to assert counsel failed to elicit Vidal's testimony that Vidal was a transient who took drugs (see Traverse, p. 28), the record belies any such assertion (see R.T. 703-04). Petitioner does not allege what other questions counsel could have asked that would have yielded any reasonable probability of a different outcome. See Bible v. Ryan, 571 F.3d 860, 871 (9th Cir. 2009), cert. denied, 559 U.S. 995 (2010) (speculation insufficient to show Strickland prejudice); Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995), cert. denied, 517 U.S. 1143 (1996) (conclusory allegations unsupported by a statement of specific facts do not warrant habeas relief). In sum, Petitioner has shown neither counsel's unreasonableness nor any resulting prejudice.

Accordingly, the state courts' rejection of Petitioner's claim of ineffective assistance of trial counsel was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United State Supreme Court. See 28 U.S.C. § 2254(d); Harrington v. Richter, 131 S. Ct. at 770. Petitioner is not entitled to relief on Ground Two of the Petition.

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III. Petitioner's Claims of Ineffective Assistance of Appellate Counsel Do Not Merit Habeas Relief.

A. Governing Legal Standards

The standards set forth in Strickland govern claims of ineffective assistance of appellate counsel. See Smith v. Robbins, 528 U.S. 259, 285-86 (2000); Bailey v. Newland, 263 F.3d 1022, 1028 (9th Cir. 2001), cert. denied, 535 U.S. 995 (2002). Appellate counsel has no constitutional obligation to raise all non-frivolous issues on appeal. Pollard v. White, 119 F.3d 1430, 1435 (9th Cir. 1997). "A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court." Id.

B. Appellate Counsel's Failure to Raise Confrontation Clause Claim on Appeal

Petitioner contends appellate counsel ineffectively failed to raise Petitioner's Confrontation Clause claim on appeal (Petition, pp. 5-6). The California Court of Appeal and the California Supreme Court rejected this claim (see Respondent's Lodgments 13, 14, 15, 16). As suggested by the discussion in Section I above, Petitioner has not shown a reasonable likelihood that any appellate challenge to the admission of Vidal's preliminary hearing testimony would have been successful. Strickland does not require appellate counsel to raise a meritless argument. See Moormann v. Ryan, 628 F.3d 1102, 1109 (9th

Cir. 2010), cert. denied, 132 S. Ct. 346 (2011) (failure to raise a meritless issue on appeal is not unreasonable); Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001) (appellate counsel's failure to raise an issue on direct appeal cannot constitute ineffective assistance when "the appeal would not have provided grounds for reversal.") (citation omitted). Therefore, the state courts' rejection of this claim of ineffective assistance of appellate counsel was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d); Harrington v. Richter, 131 S. Ct. at 770. Petitioner is not entitled to relief on this claim.

C. Appellate Counsel's Failure to Argue that the DNA Evidence Purportedly Showed Petitioner's Innocence

Petitioner contends counsel should have argued on appeal that the DNA evidence purportedly "exonerated" Petitioner and that the DNA evidence, along with other evidence including evidence that Petitioner assertedly "was not identified in the photo lineup," supposedly showed Petitioner's innocence (Petition, p. 6). This claim lacks merit for several reasons.

The California Supreme Court has "long recognized the viability of an actual innocence habeas corpus claim, at least insofar as the claim is based on newly discovered evidence or proof false evidence was introduced at trial." In re Lawley, 42 Cal. 4th 1231, 1238, 74 Cal. Rptr. 3d 92, 179 P.3d 891 (2008) (citations omitted). A petitioner may attack a criminal judgment on the ground of newly

discovered evidence if such evidence casts "fundamental doubt on the accuracy and reliability of the proceedings." Id. at 1239 (citations and internal quotations omitted). "At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability." Id. (citations and internal quotations omitted). "If a reasonable jury could have rejected the evidence presented, a petitioner has not satisfied his burden." Id. (citation omitted).

Petitioner does not argue that appellate counsel should have submitted any alleged "newly discovered evidence" on appeal or in a companion habeas corpus petition, much less show that any new evidence "point[ed] unerringly to innocence." Rather, the gist of Petitioner's argument is that the evidence admitted at trial, including the DNA evidence, assertedly did not support his conviction. Petitioner essentially contends appellate counsel should have challenged the sufficiency of the evidence on appeal.

Counsel reasonably could have decided not to make such a challenge. In considering a challenge to the sufficiency of the evidence, a California court must view the evidence "in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." People v. Elder, 227 Cal. App. 4th 411, 417, 174 Cal. Rptr. 3d 192 (2014) (citing, inter alia, Jackson v. Virginia, 443 U.S. 307, 319, (1979)). The court may not reweigh the evidence, resolve conflicts in the evidence, or

reevaluate the credibility of witnesses. Id. (citations omitted). "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." Id. (citation and internal quotations omitted).

The evidence in the present case, taken in the light most favorable to the judgment, showed that: (1) the day before the killing Petitioner showed Vidal, for the first time, a knife with a light; (2) on the day of the killing, Petitioner told Vidal to get everybody out of the desert because Vidal would not want to be a witness to what was going to happen; (3) Vidal knew Petitioner was violent; (4) Vidal saw Petitioner running after the victim; (5) when Vidal encountered Petitioner later, Petitioner, who had blood on his chest, showed Vidal blood on the knife and told Vidal "I had to kill an innocent man"; (6) Petitioner told Vidal he had to kill the victim to engender trust in a gang member so that Petitioner could kill that gang member; (7) a detective found the knife, with the light still on, lying on the ground approximately a block from the victim's body; (8) Vidal identified the knife police found at the scene as the knife Petitioner showed her the day before the killing; and (9) at a dog scent lineup on November 30, 2006, a trained dog first sniffed a scent pad made from the knife and then alerted at a box containing a scent pad taken from Petitioner's clothing (R.T. 669-73, 687-96, 977-78, 1002-06).

A DNA expert testified that: (1) DNA on the knife blade assertedly matched that of the victim; (2) DNA on the knife handle

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assertedly was a mixture from at least three contributors;[5] and (3) although Petitioner assertedly was a "weak" inclusion for the DNA on the knife handle, (based on a statistical analysis reportedly showing one out of every 136 people had Petitioner's DNA profile), Petitioner allegedly could not be excluded as a contributor (R.T. 944-60).

A reasonable trier of fact crediting this evidence could have found Petitioner guilty beyond a reasonable doubt. The DNA evidence did not "exonerate" Petitioner, and did not even exclude him as a contributor. Petitioner argues Heasley purportedly did not identify Petitioner in a "six-pack" photo lineup (Petition, p. 6). Although Heasley testified at trial that she did not identify Petitioner in the photo lineup, she did authenticate her signature on the photo lineup form which reflected an identification of Petitioner (R.T. 652-53, 656-58). Furthermore, Detective MacArthur testified that Heasley identified Petitioner from the photo lineup as a person she knew from prior contacts at the bar and as the person whom she saw outside the bar holding a knife just prior to the murder (R.T. 988-91). Appellate counsel reasonably could have determined that, despite any evidence assertedly favoring Petitioner, the jury's credibility determinations would be unassailable on appeal. See People v. Elder, 227 Cal. App. 4th at 417 (in reviewing the sufficiency of the evidence, an appellate

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[5] An investigation revealed that the major contributor to the DNA on the knife handle was a white male, 18 to 19 years old, approximately six feet, two inches tall and 140 pounds (R.T. 1006-07). Detective MacArthur excluded this person as a possible suspect because the description did not match that of anyone involved in the case and "anyone could have handled the knife prior to the murder" (R.T. 1007).

court may not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses). Hence, appellate counsel reasonably could have determined that a challenge to the sufficiency of the evidence would have been fruitless. See Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996), cert. denied, 519 U.S. 1142 (1997) ("the failure to take a futile action can never be deficient performance"); Shah v. United States, 878 F.2d 1156, 1162 (9th Cir.), cert. denied, 493 U.S. 869 (1989) ("[T]he failure to raise a meritless legal argument does not constitute ineffective assistance of counsel"; citation and internal quotations omitted).

In sum, Petitioner has not shown appellate counsel acted unreasonably in failing to assert Petitioner's "innocence" on appeal. For the same reasons, Petitioner has not shown that any claim of innocence or any challenge to the sufficiency of the evidence on appeal would have been successful, and hence has not shown Strickland prejudice.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting and adopting this Report and

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Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: October 23, 2014.

_____/S/_____
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

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

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