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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN OLAGUES,  
                    Petitioner,  
  
vs.  
  
EDMUND G. BROWN JR.,  
                    Respondent.

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No. C 07-3918 JSW (PR)

**ORDER DENYING  
PETITION FOR WRIT OF  
HABEAS CORPUS AND  
CERTIFICATE OF  
APPEALABILITY**

**INTRODUCTION**

Petitioner filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254. In an order to show cause dated May 14, 2010, this Court found that the petition alleged a cognizable claim that Petitioner’s federal constitutional right to trial by a jury drawn from the vicinage of the crime was violated because the jury that convicted him was selected from a district in which no part of the crime occurred. Respondent filed an answer, memorandum and exhibits in support thereof. Petitioner filed a traverse. Petitioner also requests in the traverse that this Court impose sanctions under Rule 11(c) of the Federal Rules of Civil Procedure against Respondent’s attorney, which is now DENIED. For the reasons stated below, the petition is denied on the merits.

**PROCEDURAL BACKGROUND**

On November 5, 2005, Petitioner was convicted in the Marin County Superior Court for deprivation of custody of a child (Cal. Pen. Code § 278.5(a)). Petitioner was sentenced to three years probation, to be supervised in Louisiana.

1 Petitioner appealed, and the California Court of Appeal for the First District  
2 affirmed the judgment on May 30, 2007. Petitioner filed a petition for review in  
3 the California Supreme Court, which was denied on August 22, 2007. On June 12,  
4 2007, Petitioner filed a petition for habeas corpus in the Eastern District of  
5 Louisiana. The petition was transferred to this Court on July 31, 2007.

### 6 **FACTUAL BACKGROUND**

7 The facts underlying the charged offense, as found by the California Court  
8 of Appeal, are summarized in relevant part, as follows:

9 Appellant, an American citizen, married Charlotte Jensen, a  
10 Danish citizen, in California in 1993. Their two daughters were born  
11 in San Francisco in 1994 and 1995. The family moved to New  
12 Zealand in December 1995. In March 1999 appellant came back to  
13 the United States, where he stayed until November 2000, when he  
14 returned to New Zealand. The couple separated on his return. A  
15 December 21, 2000 interim order of the New Zealand Family Court  
16 prevented the children's removal from New Zealand.

17 In January 2001, the New Zealand court issued an interim  
18 custody order, whereby the girls lived with Jensen the majority of  
19 time. They stayed with appellant three weekends out of four, the  
20 Tuesday of the week they did not stay with him on the weekends,  
21 and half their school holidays. This visitation arrangement ended in  
22 May 2001 after appellant was deported from New Zealand for  
23 overstaying his three month visitor's permit. He moved to Louisiana,  
24 his home state. Jensen and the children were granted permanent  
25 resident status in New Zealand.

26 On September 30, 2002, the New Zealand Family Court  
27 issued an order regarding appellant's "access" to the children in the  
28 United States (the access order). New Zealand's Guardianship  
Amendment Act of 1991 defines "rights of access" as the right to  
visit a child, including the right to take a child for a limited period of  
time to a place other than the child's habitual residence. The access  
order allowed appellant access to the children for three weeks in  
December 2002 in California, two weeks in July 2003 in New  
Zealand or California, the travel time to be included in the school  
holiday period with the intent they not miss any school, and one  
week in September 2003 in New Zealand. Concerning the children's  
travel to the United States, the access order required that Jensen  
accompany them, that appellant pay the travel costs for her and the  
children, that appellant pick up and return the children in Los  
Angeles, that while the children were with appellant they could  
telephone Jensen once a day and she could telephone them three

1 times a week, and that a copy of the access order authorizing  
2 appellant to exercise access in California be registered in the  
3 appropriate California court at appellant's expense.

4 By consent order, the December 2002 visit took place in New  
5 Zealand instead of California.

6 On June 13, 2003, appellant had the access order registered  
7 with the Santa Clara County Superior Court, pursuant to Family  
8 Code section 3445. The registration document states that “[t]his  
9 [attached September 30, 2002 access] Order, inter alia, grants  
10 custody of the minor children to [Jensen], with specified access to  
11 [appellant].” It certifies that the access order was made in  
12 conformity with the jurisdictional provisions of the Uniform Child  
13 Custody Jurisdiction and Enforcement Act (Fam. Code, §§ 3421,  
14 3422, 3423). It requests that “the attached custody order” be made  
15 an order of the superior court, and it states that the parties waive any  
16 objection to registration of the order. Appellant and Jensen signed  
17 the registration document under penalty of perjury that the  
18 information therein was true. The superior court ordered the access  
19 order deemed registered and confirmed.

20 Jensen was reluctant to bring the children to California for the  
21 July 2003 visit because she feared appellant would not return them to  
22 her. He had not returned them on previous occasions, he objected to  
23 the children residing in New Zealand, and he had threatened that he  
24 would not return the children once they were out of New Zealand  
25 and that she would have to visit them in New Orleans, where, as she  
26 quoted appellant, “they belonged.” Her fears were compounded  
27 by the fact that in the month prior to the July visit, appellant had  
28 made comments to the children about taking them to Louisiana, he  
had asked his travel agent about airfares to Louisiana, and he would  
not agree to any specific plans for his visit with the children. At her  
request appellant signed a letter on June 17, 2003, swearing that he  
would not take the children out of California without her written  
permission.

Before Jensen and the children left New Zealand for the July  
2003 visit, she and appellant agreed that he would pick them up in  
San Francisco or Marin County rather than Los Angeles because  
they both had family or friend ties to the area that would make the  
exchange easier in these locales. Appellant and Jensen agreed that  
he would pick them up at a specified Tiburon parking lot on July 2  
and return them at 1:00 p.m., July 18, at a specified Tiburon  
restaurant. Although the access order allowed appellant a two-week  
visit in July 2003, which included travel time, Jensen agreed to a  
16-day visit to allow him more time with the children. Appellant  
knew the children and Jensen had nonrefundable, nonchangeable  
tickets to fly back to New Zealand on July 22.

1           On July 2, Jensen turned the children over to appellant at the  
2 specified Tiburon shopping center parking lot. During his visit to  
3 New Zealand the previous December, appellant had promised to take  
4 the children to Disneyland during their summer visit to the United  
5 States to celebrate the older child's July 12 birthday. However, on  
6 July 6 or 7 Jensen learned that appellant and the children would be  
7 going to Disneyland on July 7 instead, which she thought odd  
8 because it was not the child's actual birthday.

9           On July 7, the children telephoned Jensen from a car driven by  
10 appellant. They said they had only been at Disneyland for six or  
11 seven hours and were on "State Highway 5" on their way to New  
12 Orleans. When Jensen asked them where they were, they asked  
13 appellant, who told them to get off the telephone. Jensen was unable  
14 to make telephone contact with them for the next three days. She  
15 had a cell phone contact number for them, but all her calls went to an  
16 answer machine.

17           On July 10, the children telephoned her to say they were just  
18 inside the Louisiana border. She asked to speak to appellant, but he  
19 did not come to the phone. She spoke to them several times each day  
20 thereafter when they "sneak[ed] away into the bedroom" to call her.

21           Appellant refused to speak to her until the morning of July 18,  
22 when he told her he was keeping the children, they were not coming  
23 back at all, and he would "fight [her] all the way to the Supreme  
24 Court" if she took action to get them back.

25           Jensen went to the arranged pickup site in Tiburon at 1:00  
26 p.m., July 18. Appellant did not appear with the children. During a  
27 July 21 recorded telephone call made from the Marin County District  
28 Attorney's office, appellant told Jensen it was unfair that the children  
were with her 95 percent of the time during the previous two years,  
and that it was in their best interest to spend substantial time with  
their father and for him to have joint custody. He also admitted that  
he had turned off his cell phone for the three days he and the children  
were traveling from California to Louisiana, and that he broke the  
promise he made in his June 18 letter not to leave California with the  
children.

          On July 23, 2003, appellant was arrested in Louisiana and the  
children were recovered.

*People v. Olagues*, No. A112016, 2007 WL 1556662 (Cal. Ct. App. May 30,  
2007), at \*1-3 (footnotes omitted).

## STANDARD OF REVIEW

1  
2 This Court may entertain a petition for a Writ of Habeas Corpus “pursuant to  
3 the judgment of a state court only on the ground that he is in custody in violation  
4 of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).  
5 The petition may not be granted with respect to any claim that was adjudicated on  
6 the merits in state court unless the state court’s adjudication of the claim: “(1)  
7 resulted in a decision that was contrary to, or involved an unreasonable application  
8 of, clearly established Federal law, as determined by the Supreme Court of the  
9 United States; or (2) resulted in a decision that was based on an unreasonable  
10 determination of the facts in light of the evidence presented in the State court  
11 proceeding.” 28 U.S.C. § 2254(d).

12 Under the “contrary to” clause, a federal habeas court may grant the writ if  
13 the state court arrives at a conclusion opposite to that reached by the Supreme  
14 Court on a question of law or if the state court decides a case differently than the  
15 Supreme Court has on a set of materially indistinguishable facts. *Williams v.*  
16 *Taylor*, 529 U.S. 362, 412-13 (2000).

17 Under the “unreasonable application” clause, a federal habeas court may  
18 grant the writ if the state court identifies the correct governing legal principle from  
19 the Supreme Court’s decision but unreasonably applies that principle to the facts of  
20 the prisoner’s case. *Williams*, 529 U.S. at 413. As summarized by the Ninth  
21 Circuit: “A state court’s decision can involve an ‘unreasonable application’ of  
22 federal law if it either 1) correctly identifies the governing rule but then applies it  
23 to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails  
24 to extend a clearly established legal principle to a new context in a way that is  
25 objectively unreasonable.” *Van Tran v. Lindsey*, 212 F.3d 1143, 1150 (9th Cir.  
26 2000) (citing *Williams*, 529 U.S. at 405-07), *overruled in part on other grounds by*  
27 *Lockyer v. Andrade*, 538 U.S. 63 (2003).

28 “[A] federal habeas court may not issue the writ simply because that court

1 concludes in its independent judgment that the relevant state court decision applied  
2 clearly established federal law erroneously or incorrectly. Rather, that application  
3 must also be unreasonable.” *Williams*, 529 U.S. at 411; *accord Middleton v.*  
4 *McNeil*, 541 U.S. 433, 436 (2004) (per curiam) (challenge to state court’s  
5 application of governing federal law must be not only erroneous, but objectively  
6 unreasonable); *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam)  
7 (“unreasonable” application of law is not equivalent to “incorrect” application of  
8 law).

9 In deciding whether the state court’s decision is contrary to, or an  
10 unreasonable application of clearly established federal law, a federal court looks to  
11 the decision of the highest state court to address the merits of a petitioner’s claim  
12 in a reasoned decision. *LaJoie v. Thompson*, 217 F.3d 663, 669 n.7 (9th Cir.  
13 2000). If the state court, relying on state law, correctly identified the governing  
14 federal legal rules, the federal court must ask whether the state court applied them  
15 unreasonably to the facts. *Lockhart v. Terhune*, 250 F.3d 1223, 1232 (9th Cir.  
16 2001).

17 A habeas petitioner is not entitled to relief unless the trial error “had  
18 substantial and injurious effect or influence in determining the jury’s verdict.”  
19 *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United*  
20 *States*, 328 U.S. 750, 776 (1946)). The habeas petitioner must prove that the trial  
21 error resulted in “actual injury” to obtain relief. *Id.* The *Brecht* standard applies in  
22 all federal habeas corpus cases challenging criminal convictions under section  
23 2254. *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007). The proper question in  
24 assessing harm in a habeas case is, “‘Do I, the judge, think that the error  
25 substantially influenced the jury’s decision?’” *O’Neal v. McAninch*, 513 U.S. 432,  
26 436 (1995). If the court is convinced that the error did not influence the jury, or  
27 had but very slight effect, the verdict and the judgment should stand. *Id.* at 437.  
28

1 **DISCUSSION**

2 Petitioner alleges that the Vicinage Clause of the Sixth Amendment was  
3 violated because the jury that convicted him was composed solely of residents of  
4 Marin County, a county in which Petitioner alleges no part of the crime occurred.  
5 Petitioner’s argument fails under the applicable standard of review.

6 **I. Legal Standard**

7 The Vicinage Clause of the Sixth Amendment guarantees a person accused  
8 of a crime “the right to a . . . jury of the State and district wherein the crime shall  
9 have been committed, which district shall have been previously ascertained by  
10 law.” U.S. Const. amend. XI. In *Stevenson v. Lewis*, the Ninth Circuit affirmed a  
11 district court’s decision to deny habeas relief on Vicinage Clause grounds to a  
12 petitioner that alleged that he was tried in a county different from the county in  
13 which the crime occurred. The court reasoned that the United States Supreme  
14 Court has not decided whether the Vicinage Clause of the Sixth Amendment  
15 applies to the states through the Fourteenth Amendment. 384 F.3d 1069, 1071-72  
16 (9th Cir. 2004). Accordingly, in *Stevenson*, the state court’s decision could not  
17 have been “contrary to, or an unreasonable application of, clearly established  
18 federal law.” *Id.*

19 **2. Analysis**

20 The California Court of Appeal for the First Appellate District rejected  
21 Petitioner’s related claims that he was tried in an improper venue and that his  
22 rights under the Sixth Amendment’s Vicinage Clause were violated. In rejecting  
23 Petitioner’s claim that he was tried in an improper venue, the state court first  
24 analyzed the claim under California law and denied the claim based on the  
25 California Supreme Court’s holding in *People v. Betts*. 2007 WL 1556662 at \*7  
26 (citing 34 Cal. 4th 1039, 1057 (2005)). In *Betts*, a truck driver had committed sex  
27 offenses during the course of three trucking trips, thus committing the felony in  
28 several different counties and states. 34 Cal. 4th at 1044-45. The California

1 Supreme Court concluded that venue was proper in the trial county under  
2 California Penal Code section 781 which allows for jurisdiction in either county  
3 when “acts or effects thereof constituting or requisite to the consummation of the  
4 offense occur in two or more counties.” *Id.* at 1057. In *Betts*, the California  
5 Supreme Court held that section 781 should be liberally construed to achieve its  
6 underlying purpose of expanding venue beyond the county in which the crime was  
7 committed. *Id.* The court noted that proper venue was expanded under section  
8 781 to include a county where preparatory acts, including telephone calls to the  
9 county, for the commitment offense occurred. *Id.* Facts establishing venue must  
10 be proved by a preponderance of the evidence rather than beyond a reasonable  
11 doubt. *Id.* (citing *People v. Posey*, 32 Cal. 4th 137, 219 (2004); *People v.*  
12 *Cavanaugh*, 43 Cal.2d 252, 262.)

14 Relying primarily on *Betts*, the state court found that venue in Marin County  
15 was proper under section 781 because Petitioner committed some aspects of the  
16 crime, including preparatory acts, there. 2007 WL 1556662 at \*7. Specifically,  
17 the court found that Petitioner removed the children from Marin County with  
18 intent not to return the children. *Id.* Further, Petitioner actually failed to return the  
19 children to their lawful custodian in Marin County on the agreed date. *Id.* The  
20 state court found that these facts were proven by a preponderance of the evidence.  
21 *Id.*

22 In addition to concluding that Petitioner was tried in the proper venue under  
23 section 781, the state court also rejected Petitioner’s argument that his Sixth  
24 Amendment Vicinage Clause right was violated. 2007 WL 1556662 at \*8. In  
25 making his Vicinage Clause argument, Petitioner relied on the holding in *United*  
26 *States v. Johnson*, 323 U.S. 273, 275 (1944). *Id.* In *Johnson*, the Supreme Court  
27 discussed the importance of the Vicinage Clause stating, “[q]uestions of venue in  
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1 criminal cases . . . are not merely matters of formal legal procedure.” *Johnson*,  
2 323 U.S. at 275-76. Relying on *Price v. Superior Court*, the state court rejected  
3 Petitioner’s argument and concluded that *Johnson* is not dispositive in this case  
4 because the Sixth Amendment has not been incorporated by the Fourteenth  
5 Amendment’s due process clause for operation against the states. 2007 WL  
6 1556662 at \*8 (citing 25 Cal. 4th 1046, 1056 (2001)). As a result, the state court  
7 determined that Petitioner’s Sixth Amendment vicinage right was not violated as  
8 that right does not apply to state proceedings. *Id.*

9  
10 As the United States Supreme Court has not decided whether federal  
11 constitutional vicinage rights extend to the states, the California Court of Appeal’s  
12 holding cannot be “contrary to, or an unreasonable application of, clearly  
13 established federal law,” as those terms are used in 28 U.S.C. § 2254(d)(1).  
14 *Stevenson v. Lewis*, 384 F.3d at 1072. In *Stevenson v. Lewis*, the Ninth Circuit  
15 denied a habeas petition because there is no Supreme Court precedent that  
16 incorporates the Vicinage Clause for application to state court proceedings. *Id.*  
17 Petitioner’s habeas claim fails on this ground.

18 Additionally, Petitioner fails to demonstrate that the state appellate court  
19 decision was an “unreasonable determination of the facts in light of the evidence  
20 presented in the State court proceeding,” within the meaning of 28 U.S.C. §  
21 2254(d)(2). In *Stevenson*, the Ninth Circuit determined that there was a “sufficient  
22 nexus” to try the petitioner in Orange County because he left his Orange County  
23 home with a gun, robbed a woman at gunpoint in Los Angeles County, returned to  
24 Orange County after the crime, and abandoned the victim’s purse in Orange  
25 County. 384 F.3d at 1072. A similar nexus exists in Petitioner’s case. Petitioner  
26 was arrested in Louisiana for the charged crimes, but Petitioner drove his two  
27 children to Louisiana after picking them up from Tiburon, California, within Marin  
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1 County. 2007 WL 1556662 at \*1-3. Further, the state court found that Petitioner  
2 withheld the children “from their lawful custodian in the county in which the  
3 lawful custodian was to resume physical custody” by failing to return the kids to  
4 their mother on the date that Petitioner had agreed to do so in Marin County. *Id.*  
5 Unless the petitioner rebuts with clear and convincing evidence to the contrary, a  
6 determination of a factual issue made by a state court is presumed correct under 28  
7 U.S.C. § 2254(e)(1). Because the Petitioner did not rebut the state court’s facts  
8 with clear and convincing evidence, this court finds that the California Court of  
9 Appeal did not make an unreasonable determination of the facts in light of the  
10 evidence presented. Therefore, Petitioner’s claim is DENIED.

11  
12 **CERTIFICATE OF APPEALABILITY**

13 The federal rules governing habeas cases have been amended to require a  
14 district court that denies a habeas petition to grant or deny a certificate of  
15 appealability in the ruling. See Rule 11(a), Rules Governing § 2254 Cases, 28  
16 U.S.C. foll. § 2254 (effective December 1, 2009). A petitioner may not appeal a  
17 final order in a federal habeas corpus proceeding without first obtaining a  
18 certificate of appealability (formerly known as a certificate of probable cause to  
19 appeal). See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

20 A judge shall grant a certificate of appealability “only if the applicant has  
21 made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §  
22 2253(c)(2). The certificate must indicate which issues satisfy this standard. *See*  
23 *id.* § 2253(c)(3). “Where a district court has rejected the constitutional claims on  
24 the merits, the showing required to satisfy § 2253(c) is straightforward: the  
25 petitioner must demonstrate that reasonable jurists would find the district court’s  
26 assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*,  
27 120 S.Ct. 1595, 1604 (2000). For the reasons set out in the discussion of the  
28


1 merits, above, jurists of reason would not find the result debatable. A certificate of  
2 appealability is DENIED.

3 **CONCLUSION**

4 After a careful review of the record and pertinent law, the petition for writ of  
5 habeas corpus is denied. The Clerk shall enter judgment in favor of Respondent  
6 and close the file.

7 IT IS SO ORDERED.

8 DATED: September 23, 2010

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11 JEFFREY S. WHITE  
12 United States District Judge  
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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA  
4

5  
6 JOHN OLAGUES,

7 Plaintiff,

8 v.

9 EDMUND G. BROWN, JR., et al,

10 Defendant.  
11 \_\_\_\_\_/

Case Number: CV07-03918 JSW

**CERTIFICATE OF SERVICE**

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
13 Court, Northern District of California.

14 That on September 23, 2010, I SERVED a true and correct copy(ies) of the attached, by placing  
15 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
16 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office  
17 delivery receptacle located in the Clerk's office.

18 John Olagues  
19 413 Sauve Road  
20 River Ridge, LA 70123

21 Dated: September 23, 2010



22 Richard W. Wieking, Clerk  
23 By: Jennifer Ottolini, Deputy Clerk  
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