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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

GEORGE PAUL HICKER,  <div style="text-align: center;">Petitioner,</div> <div style="text-align: center;">vs.</div> SAN DIEGO SUPERIOR COURT,  <div style="text-align: center;">Respondent.</div>		CASE NO. 13CV2957-WQH (JMA)  ORDER
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HAYES, Judge:

The matter before the Court is the review of the Report and Recommendation (ECF No. 9) issued by United States Magistrate Judge Jan M. Adler, recommending that this Court deny the Motion to Dismiss (ECF No. 6) filed by Respondent..

**I. Background**

On August 28, 2008, Petitioner George Paul Hicker was arrested for driving under the influence of alcohol. (ECF No. 1 at 11). Petitioner was charged with the misdemeanor offenses of driving under the influence of alcohol and driving with a blood alcohol level of 0.08% or higher, in violation of sections 23152(a) and 23152(b) of the California Vehicle Code, respectively. *Id.* At trial, one of the witnesses called to testify was Jorge Peña. *Id.* Peña testified that the blood alcohol tests performed on Petitioner’s blood sample were accurate and showed a blood alcohol level of .142%. *Id.* at 11-12. Peña was not present during the analysis of Petitioner’s blood sample and did not supervise the analysis of Petitioner’s blood sample. *Id.* at 11. Petitioner’s counsel objected to the testimony on Sixth Amendment grounds, contending that it

1 violated petitioner's right to confrontation. *Id.* at 12. The San Diego County Superior  
2 Court overruled the objection. *Id.* Petitioner was convicted of driving with a blood  
3 alcohol level of 0.08% or higher, but found not guilty of driving under the influence.  
4 *Id.* at 12-13.

5 Petitioner appealed his conviction to the Appellate Division of the Superior Court  
6 of the County of San Diego, contending that Peña's testimony violated his rights under  
7 the Confrontation Clause. *Id.* at 13. On February 21, 2013, the Appellate Division  
8 affirmed his conviction, relying primarily on *People v. Lopez*, 55 Cal. 4th 569 (2012),  
9 dealing with confrontation. (Respondent's Lodgement 2, ECF No. 6-2 at 7).

10 Following the Appellate Division's decision, Petitioner filed in the Appellate  
11 Division an application for certification for transfer to the California Court of Appeal.  
12 (ECF No. 1 at 17). On March 25, 2013, the Appellate Division denied the application.  
13 *Id.* at 4. Petitioner then filed a petition for transfer in the California Court of Appeal,  
14 Fourth Appellate District, Division One. *Id.* On April 16, 2013, the Court of Appeal  
15 denied the petition. (Respondent's Lodgment 3, ECF No. 6-2 at 10). Petitioner did not  
16 seek direct review or habeas relief from the California Supreme Court. (ECF No. 1 at  
17 16-18). On July 11, 2013, Petitioner filed a petition for a writ of certiorari in the United  
18 States Supreme Court. *Id.* at 4. On October 7, 2013, the United States Supreme Court  
19 denied the petition for a writ of certiorari. (Respondent's Lodgment 4, EC No. 6-2 at  
20 12).

21 On December 9, 2013, Petitioner filed a Petition for Writ of Habeas Corpus.  
22 (ECF No. 1). Petitioner alleges that his Sixth Amendment right to confrontation was  
23 violated by Peña's testimony at trial. *Id.* at 18-20. On January 21, 2014, Respondent  
24 filed the Motion to Dismiss, contending that Petitioner failed to exhaust his state court  
25 remedies. (ECF No. 6). On February 10, 2014, Petitioner filed an opposition. (ECF  
26 No. 7).

27 On July 18, 2014, United States Magistrate Judge Jan M. Adler issued the Report  
28 and Recommendation, recommending that the Motion to Dismiss be denied. (ECF No.

1 9). The Magistrate Judge stated that “[t]he exhaustion requirement may be satisfied  
2 notwithstanding a failure to present a claim to the state supreme court if it is clear that  
3 (the habeas petitioner’s) claims are now procedurally barred under (state) law.” *Id.* at  
4 6 (citing *Gray v. Netherland*, 518 U.S. 152 (1996); *Engle v. Isaac*, 456 U.S. 107 (1982);  
5 and *Valerio v. Crawford*, 306 F.3d 742, 770 (9th Cir. 2002)). The Magistrate Judge  
6 found that Petitioner was procedurally barred from directly appealing his conviction to  
7 the California Supreme Court pursuant to California Rule of Court 8.500(a)(1), *id.* at  
8 6-7, which provides:

9 A party may file a petition in the Supreme Court for review of any  
10 decision of the Court of Appeal, including any interlocutory order, except  
11 the denial of a transfer of a case within the appellate jurisdiction of the  
12 superior court.

11 Cal. Rules Ct. 8.500(a)(1). The Magistrate Judge further found that had petitioner  
12 instead filed a petition for a writ of habeas corpus with the California Supreme Court,  
13 “such petition would have served as Petitioner’s ‘second appeal’” pursuant to *In re*  
14 *Reno*, 55 Cal. 4th 428 (2012), which is “impermissible under California law.” (ECF  
15 No. 9 at 8). The Magistrate Judge concluded that Petitioner’s claims were exhausted,  
16 notwithstanding the fact that “Petitioner did not present his claim to the California  
17 Supreme Court.” *Id.* at 8.

18 The docket reflects that neither party filed objections to the Report and  
19 Recommendation.

## 20 **II. Review of the Report and Recommendation**

21 The duties of the district court in connection with a report and recommendation  
22 of a magistrate judge are set forth in Federal Rule of Civil Procedure 72(b) and 28  
23 U.S.C. § 636(b)(1). When a party objects to a report and recommendation, “[a] judge  
24 of the [district] court shall make a de novo determination of those portions of the [report  
25 and recommendation] to which objection is made.” 28 U.S.C. § 636(b)(1). When no  
26 objections are filed, the district court need not review the report and recommendation  
27 de novo. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003) (en  
28 banc). A district court may “accept, reject, or modify, in whole or in part, the findings


1 or recommendations made by the magistrate judge.” Fed. R. Civ. P. 72(b); *see also* 28  
2 U.S.C. § 636(b)(1).

3 Neither party objected to the Report and Recommendation, and the Court has  
4 reviewed the Report and Recommendation in its entirety. Respondent has failed to  
5 demonstrate that the Petition must be dismissed for a failure to exhaust state remedies.  
6 The Court adopts the Report and Recommendation in its entirety.

7 **III. Conclusion**

8 IT IS HEREBY ORDERED that the Report and Recommendation is ADOPTED  
9 in its entirety. (ECF No. 9). IT IS FURTHER ORDERED that the Motion to Dismiss  
10 (ECF No. 6) is DENIED.

11 DATED: August 26, 2014

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13 **WILLIAM Q. HAYES**  
14 United States District Judge

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