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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAVIER ZAMORA,

Petitioner - Appellee,

v.

DARREL G. ADAMS, Warden,

Respondent - Appellant.

No. 03-57074

D.C. No. CV-02-03002-CAS

MEMORANDUM*

ON REMAND FROM THE UNITED STATES
SUPREME COURT

Before: REINHARDT, O'SCANNLAIN, and CLIFTON, Circuit Judges.

Javier Zamora was convicted in California Superior Court of the attempted murder of Hugo Cruz and related offenses. On direct appeal, the California Court of Appeal affirmed all counts, and the California Supreme Court denied Zamora's petition for review.

I

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Zamora then petitioned for a writ of habeas corpus in federal district court, claiming, among other things, that his Sixth Amendment right to confront Cruz had been violated and that he had been denied the effective assistance of counsel because his attorney had failed to object to the admission of Cruz's out-of-court statements on Confrontation Clause grounds. The magistrate judge recommended that the petition be granted on both grounds. The district court adopted the magistrate judge's report and recommendation and ordered a new trial. The State filed a timely notice of appeal and a motion to stay the decision pending appeal, which was granted.

In *Bockting v. Bayer*, 399 F.3d 1010, 1012-13 (9th Cir. 2005), we held that the Confrontation Clause rule announced by the U.S. Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), applies retroactively under *Teague v. Lane*, 489 U.S. 288 (1989). Relying on *Bockting*, we affirmed the grant of Zamora's habeas petition. *Zamora v. Adams*, 150 Fed. Appx. 583 (9th Cir. 2005). In *Whorton v. Bockting*, 127 S. Ct. 1173 (2007), the United States Supreme Court held that *Crawford* has no retroactive application to cases on collateral review. The Court therefore vacated our prior judgment remanded this case for further consideration in light of *Whorton*. *Adams v. Zamora*, 127 S. Ct. 1482 (2007).

Zamora contends that, by deeming Cruz unavailable to testify, the state trial court denied him an opportunity to confront Cruz in violation of the Sixth Amendment. However, Zamora failed to object to Cruz's unavailability despite having been provided a clear opportunity to do so by the state court. Accordingly, Zamora's Sixth Amendment claim pertaining to Cruz's unavailability is procedurally barred. *See Windham v. Merkle*, 163 F.3d 1092, 1100 (9th Cir. 1998).

III

In reviewing Zamora's claim that the admission of Cruz's statements violated the Sixth Amendment, we are obligated to accord deference to the state court's factual findings and legal determinations. *See* 28 U.S.C. §§ 2254(d), (e)(1); *Uttecht v. Brown*, 127 S. Ct. 2218, 2225 (2007). In light of that deferential standard of review, we hold that the state court's conclusion that Cruz's out-of-court statements were admissible under the then-governing test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), was not unreasonable.

IV

The district court held that Zamora was denied effective assistance of counsel in violation of the Sixth Amendment, due to his attorney's failure to object to the admission of Cruz's statements. However, the state trial court rejected

multiple objections to the admission of those statements on the ground that they were unreliable under California Evidence Code § 1370. The attorney's failure to raise an identical objection under the Confrontation Clause was not objectively unreasonable. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Moreover, the state court reasonably concluded that the failure to object to Cruz's unavailability was not objectively unreasonable. Accordingly, Zamora's counsel did not render ineffective assistance.

V

For the foregoing reasons, the district court's decision is **REVERSED** and this case **REMANDED** with instructions that Zamora's petition for writ of habeas corpus be dismissed.