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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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BRUCE M. MOELLER,
Petitioner,

NO. CIV. S-01-2351 FCD JFM P

v.

MEMORANDUM AND ORDER

BILL LOCKYER, et al.,
Respondents.

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This matter is before the court on review of the findings and recommendations ("F&R") of the magistrate judge, filed February 20, 2009, addressing a petition for a writ of habeas corpus based upon claims relating to rights guaranteed by the Sixth Amendment and Fourteenth Amendment. Respondents filed objections to the magistrate judge's findings and recommendations. For the reasons set forth below, the court adopts in part and declines to adopt in part the findings and recommendations.

BACKGROUND

Based on information from a confidential informant, a search warrant was issued to search the home of [petitioner] Bruce

1 Moeller. (See F&R at 3.) Pursuant to the search warrant,
2 officers found approximately one-quarter pound of cocaine, two
3 pounds of methamphetamine, and over \$69,000 in cash. (See F&R at
4 4.) Petitioner moved in municipal court to unseal the warrant
5 and the supporting affidavit. (See id.) The court granted the
6 motion in part, and unsealed the search warrant itself, a portion
7 of the supporting affidavit, and the inventory of property
8 seized. (See id.) In order to keep the identity of the
9 informant confidential, much of the probable cause portion of the
10 affidavit remained sealed. (See id. at 3.)

11 Petitioner later moved in superior court to disclose the
12 identity of the confidential informant, to quash and traverse the
13 warrant, and to unseal the warrant's supporting affidavit. (See
14 id. at 4.) The superior court held an *in camera* hearing with the
15 prosecutor and the affiant's supervisor pursuant to People v.
16 Hobbs, 7 Cal. 4th 948 (1994). (See id. at 6.) Though petitioner
17 and his counsel were excluded from the hearing, the court
18 permitted petitioner's counsel to propound questions to be asked
19 *in camera*. (See id. at 5.)

20 Following the *in camera* hearing, all parties appeared before
21 the trial court for further proceedings on petitioner's motions.
22 (See id. at 5.) In response to defense counsel's complaint that
23 the Hobbs procedure violated petitioner's Fourteenth Amendment
24 due process rights and Sixth Amendment right to counsel, the
25 court noted the facts in the affidavit that led to a
26 determination of probable cause, and discussed its obligations
27 under Hobbs. (See id. at 6-7.) The court then denied
28 petitioner's motion to disclose the identity of the informant,

1 motion to traverse, and motion to quash the search warrant. (See
2 id. at 8.)

3 Petitioner appealed his conviction to the California Court
4 of Appeal, Third Appellate District. (See id.) In an
5 unpublished decision, relying on the California Supreme Court
6 decision in Hobbs, the court rejected petitioner's right to
7 counsel and due process claims on the merits. (See id.) The
8 California Supreme Court summarily denied petitioner's petition
9 for review. (See id.) Petitioner now proceeds through counsel
10 with an application for a writ of habeas corpus pursuant to 28
11 U.S.C. § 2254.¹

12 STANDARD

13 When timely objections to findings by magistrate judges are
14 filed, the district court must conduct a de novo determination of
15 the findings and recommendations as to issues of law. 28 U.S.C. §
16 636(b)(1). The district court may adopt, reject, or modify in
17 part or in full the findings and recommendations. 28 U.S.C. §
18 636(b)(1)(C).

19 ANALYSIS

20 Petitioner Moeller, through counsel, raises three claims in
21 his petition for a writ of habeas corpus, filed December 24,
22 2001, arising out of the trial court's use of an *in camera*
23 hearing on petitioner's motions to disclose the identity of the
24 informant, to quash or traverse the search warrant and to unseal
25 the affidavit in support of the search warrant: (1) he was
26 deprived of his Sixth Amendment right to counsel; (2) his

27 ¹ The facts are set forth in full in the F&R of the
28 magistrate judge at 1-8.

1 Fourteenth Amendment due process rights were violated; and (3) he
2 was deprived of his Sixth Amendment right to public trial. (See
3 F&R at 1).

4 Federal habeas corpus relief is not available for any claim
5 decided on the merits in state court proceedings unless the state
6 court's adjudication of the claim: (1) resulted in a decision
7 that was contrary to, or involved an unreasonable application of,
8 clearly established federal law, as determined by the Supreme
9 Court of the United States; or (2) resulted in a decision that
10 was based on an unreasonable determination of the facts in light
11 of the evidence presented in the state court proceeding. 28
12 U.S.C. § 2254(d).²

13 Under section 2254(d)(1), a state court decision is
14 "contrary to" clearly established United States Supreme Court
15 precedent if it applies a rule that contradicts the governing law
16 set forth in Supreme Court cases, or if it confronts a set of
17 facts that are materially indistinguishable from a decision of
18 the Supreme Court and nevertheless arrives at a different result.
19 Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor,
20 529 U.S. 362, 405-06 (2000)).

21 Under the "unreasonable application" clause of section
22 2254(d)(1), a federal habeas court may grant the writ if the
23 state court identifies the correct governing legal principle from
24 the Supreme Court decisions, but unreasonably applies that
25 principle to the facts of the prisoner's case. Williams, 529
26 U.S. at 413. A federal habeas court "may not issue the writ

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28 ² This standard for a writ of habeas corpus is taken
in its entirety from the F&R at 9-10.

1 simply because that court concludes in its independent judgment
2 that the relevant state-court decision applied clearly
3 established federal law erroneously or incorrectly. Rather, that
4 application must also be unreasonable." Id. at 412; see also
5 Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 1175 (2003) (it
6 is "not enough that a federal habeas court, in its independent
7 review of the legal question, is left with a 'firm conviction'
8 that the state court was 'erroneous.'").

9 The court looks to the last reasoned state court decision as
10 the basis for the state court judgment. Avila v. Galaza, 297 F.3d
11 911, 918 (9th Cir. 2002). Where the state court reaches a
12 decision on the merits but provides no reasoning to support its
13 conclusion, a federal habeas court independently reviews the
14 record to determine whether habeas corpus relief is available
15 under section 2254(d). Delgado v. Lewis, 223 F.3d 976, 982 (9th
16 Cir. 2000).

17 In this case, the California Court of Appeals for the Third
18 District found that the superior court made appropriate inquiries
19 and findings pursuant to Hobbs, and that there was substantial
20 evidence to support those findings, and thus, it was not
21 reasonably probable that defendant could prevail on his motions
22 to traverse or quash the search warrant, unseal the search
23 warrant affidavit, or disclose the identity of the confidential
24 informant. People v. Moeller, No. SC063423A (Cal. Ct. App.,
25 filed Jul 31, 2000). The California Supreme Court summarily
26 denied petitioner's petition for review. People v. Moeller, 2000
27 Cal. LEXIS 8187 (Cal. 2000).

28 /////

1 **A. Sixth Amendment Right to Counsel**

2 Petitioner claims the trial court's use of the procedure
3 developed in People v. Hobbs, 7 Cal. 4th 948 (1994), deprived him
4 of his Sixth Amendment right to counsel because counsel was
5 "totally excluded" from the hearing on his motion to suppress
6 evidence.³ (Trav. for Writ at 1.)

7 The Sixth Amendment is violated whenever the accused is
8 denied counsel at a critical stage of his trial. United States
9 v. Cronin, 466 U.S. 648, 659 (1984). In Cronin, the Supreme
10 Court held that a Sixth Amendment violation may be found when
11 circumstances exist that are so likely to prejudice the accused
12 that the cost of litigating their effect in a particular case is
13 unjustified. Id. at 658. The Supreme Court's holding applies
14 when "the likelihood that any lawyer, even a fully competent one,
15 could provide effective assistance is so small that a presumption
16 of prejudice is appropriate without inquiry into the actual
17 conduct of the trial." Id. at 659-60. One circumstance
18 warranting a presumption of prejudice is the "complete denial of
19 counsel," which occurs when counsel is either totally absent, or
20 is prevented from assisting the accused during a critical stage
21 of the proceeding. Id. at 659.

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25 ³ The state court's explanation of the Hobbs procedure is
26 set forth in full in the F&R at 10-11. In short, the Hobbs
27 procedure determines whether sufficient ground exists for keeping
28 the informant's identity confidential. If the trial court decides
in the affirmative, the court determines whether the entire
search warrant affidavit, or any major portion of it, must remain
sealed to avoid revealing that identity.

1. Critical Stage of the Proceeding

2 Critical stages of the prosecution include all parts of the
3 prosecution implicating substantial rights of the accused.
4 United States v. Bohn, 890 F.2d 1079, 1080 (9th Cir. 1989). The
5 Ninth Circuit has identified three factors that the Supreme Court
6 has found useful in determining whether an event constitutes a
7 critical stage of the prosecution: (1) whether failure to pursue
8 strategies or remedies results in a loss of significant rights;
9 (2) whether skilled counsel would be useful in helping the
10 accused understand the legal confrontation; and (3) whether the
11 proceeding tests the merits of the accused's case. Id. at 1080-
12 81 (citing Menefield v. Borg, 881 F.2d 696 (9th Cir. 1989)).

13 In Bohn, the court held that defendant was denied his right
14 to counsel during a critical stage of the proceedings in
15 violation of the Sixth Amendment when he was excluded from an *in*
16 *camera* hearing to determine the validity of his Fifth Amendment
17 claims. Id. at 1082. Addressing the second of the "critical
18 stage" factors, the court pointed out the intricacies involved in
19 a Fifth Amendment claim, where the accused must show that answers
20 to questions might incriminate him but need not actually confess
21 to the crime, and concluded that this was plainly a situation in
22 which counsel would be useful in helping the accused understand
23 the legal confrontation. Id. at 1081. Furthermore, because the
24 district court's decision on the validity of the Fifth Amendment
25 privilege would determine whether a criminal conviction was
26 possible, this decision invoked the third factor by testing the
27 merits of the case. Id. Accordingly, the court held that the *in*
28 *camera* proceeding was a critical stage of the prosecution, and

1 that therefore defendant had a right to have counsel present at
2 the hearing. Id.; see also Hovey v. Ayers, 458 F.3d 892, 902
3 (9th Cir. 2006) (equating the first of the three factors, or the
4 "loss of significant rights," with "permanent depriv[ation] of
5 any rights," and holding that although defendant might have
6 enjoyed benefits from having unconflicted counsel present at a
7 pre-trial hearing, the absence of counsel did not permanently
8 deprive him of any rights and therefore the hearing was not a
9 critical stage).

10 However, in the unpublished opinion of United States v.
11 Johnson, the Ninth Circuit held that defendant's right to counsel
12 was not violated when the court excluded counsel from two pre-
13 trial *in camera* hearings relating to the disclosure of a
14 confidential informant. Johnson, No. 99-15467, 65 Fed. Appx.
15 628, 629-30 (9th Cir., filed May 28, 2003). Relying on the Bohn
16 factors to determine whether the hearings were a critical stage,
17 the court noted that defendant's counsel was allowed to submit a
18 list of questions for the district court to ask, the court asked
19 the questions, defendant's counsel forcefully objected to the *in*
20 *camera* proceedings, and his counsel was knowledgeable about the
21 nature of the proceedings. Johnson, 65 Fed. Appx. at 630. The
22 court further noted that the record intimated no suggestion that
23 counsel was not useful in helping Johnson understand what was
24 going on. Id.

25 As an initial matter, it is unclear whether the *in camera*
26 hearing on petitioner's motion to suppress evidence is a
27 "critical stage" of the proceedings. Like Johnson, petitioner's
28 counsel was allowed to submit a list of questions for the court

1 to ask, the court asked the questions, petitioner's counsel was
2 knowledgeable about and forcefully objected to the *in camera*
3 proceeding, and there is no suggestion in the record that counsel
4 was not useful in helping petitioner understand what was going
5 on. Furthermore, the *in camera* hearings involved the preliminary
6 evidentiary question of probable cause, not the merits of the
7 charges. See United States v. Anderson, 509 F.2d 724, 729 (9th
8 Cir. 1974) (citing McCray v. Illinois, 386 U.S. 300 (1967), for
9 the proposition that the question of probable cause is a
10 preliminary one, where guilt or innocence is not at stake).
11 Because none of the three factors were clearly implicated by
12 petitioner's exclusion from the *in camera* hearing, it is unclear
13 whether the hearing took place during a critical stage of the
14 criminal proceedings.

15 2. Complete Denial of Counsel

16 However, assuming *arguendo* that the *in camera* hearings are a
17 critical stage of the criminal proceedings, the court is not
18 persuaded that petitioner's lack of counsel amounted to "complete
19 denial of counsel." Wright v. Van Patten, 552 U.S. 120; 128
20 S.Ct. 743 (2008). The Supreme Court has held that the Cronic
21 standard of "complete denial of counsel" must be on par with
22 total absence. Id. at 746. In Wright, the Court held that
23 counsel's participation by speaker phone was not a complete
24 denial of counsel under the Cronic standard. Id. at 743. The
25 Court found that although a physically present lawyer will likely
26 perform better than one participating by phone, it did not
27 necessarily follow that mere telephone contact amounted to total
28 absence or "prevented [counsel] from assisting the accused,"

1 thereby requiring application of Cronic. Id. at 746. The Court
2 clarified that the Cronic test did not inquire whether counsel
3 performed less well in the relevant circumstances than he
4 otherwise would, but whether the circumstances were likely to
5 result in such poor performance that an inquiry into its effects
6 would not be worth the time. Id. Accordingly, the Court found
7 that because no case law clearly established that Cronic should
8 be applied in this novel factual context, it could not be said
9 that the state court unreasonably applied clearly established
10 federal law. Id. at 746-47.⁴

11 The New York Court of Appeal has found that *in camera*
12 hearings relating to probable cause do not deprive a defendant of
13 effective assistance of counsel. New York v. Castillo, 80 N.Y.2d
14 578, 585 (1992). In Castillo, the court noted that although a
15 defendant lacking access to the information purporting to
16 establish probable cause will be unable to suggest reasons why
17 probable cause was lacking, this fact does not deprive the
18 defendant of his constitutional right to counsel. Id. Indeed,
19 the court noted that in a suppression hearing, the importance of
20 a defendant's input is limited, because the reviewing court does
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22 ⁴ Notably, the concurring opinion also recognized the
23 difficulty in reaching the Cronic standard of complete lack of
24 counsel, stating that even the substandard quality of
25 representation by telephone was not enough to qualify as
26 "complete denial of counsel." Wright, 552 U.S. at 748 (Stevens,
27 J., concurring). In so concluding, Stevens noted that
28 representation by telephone meant defendant could not turn to his
lawyer for private legal advice, clear up misunderstandings, seek
reassurance, or discuss any last minute misgivings, and counsel
could not detect and respond to cues from his client's demeanor
that might have indicated he didn't understand certain aspects of
the proceeding, or that he was changing his mind. Id.

1 not reevaluate the accuracy of the underlying information. Id.
2 Rather, it does "no more than insure that there was a substantial
3 basis for the magistrate's conclusion that probable cause
4 existed." Id. Furthermore, in approving the *in camera* procedure
5 used by the trial court, the Castillo court noted that the task
6 of deciding whether, based on the warrant application and
7 supporting affidavit along with informant's oral testimony, the
8 issuing judge reasonably could have concluded that probable cause
9 existed was precisely the type of inquiry that can be resolved
10 accurately on an *ex parte*, *in camera* basis. Id. at 585.
11 Accordingly, the Castillo court determined that the trial court
12 properly exercised its discretion to conduct an *in camera* inquiry
13 into the reliability of the evidence of probable cause. Id. at
14 587.

15 In this case, the court cannot find that the state court's
16 determination that petitioner was not denied counsel is an
17 unreasonable application of Supreme Court precedent. That
18 petitioner's counsel did not meet the Cronic standard of
19 "complete denial of counsel" on par with total absence is
20 evidenced by the Wright decision. Though the petitioner's
21 counsel arguably could have "perform[ed] better" with access to
22 the *in camera* hearings than without, this absence did not
23 "preven[t] [counsel] from assisting the accused" so as to evoke
24 application of Cronic. See Wright, 552 U.S. at 746. Rather,
25 because petitioner enjoyed the advice and understanding of his
26 counsel even during their exclusion from the *in camera* hearings,
27 this exclusion never amounted to denial of counsel on par with
28 total absence. See id. Counsel vigorously objected to the in

1 camera proceedings on behalf of petitioner and was allowed to
2 submit questions to be asked during the hearing. Following the
3 *in camera* hearing, the court held an open hearing in which the
4 court's use of the Hobbs procedure and conclusions regarding
5 probable cause were explained. These factors all weigh against
6 petitioner's claim that he was denied his Sixth Amendment right
7 to counsel by the court's use of an *in camera* hearing. See also
8 Castillo, 80 N.Y.2d 578 (holding that *in camera* hearings relating
9 to probable cause do not deprive a defendant of effective
10 assistance of counsel).⁵

11 The Ninth Circuit's decision in Bradley v. Henry is
12 distinguishable from the facts presented in this case. Bradley
13 v. Henry, 510 F.3d 1093 (9th Cir. 2007). In Bradley, the court
14 held that the petitioner was denied her right to the assistance
15 of counsel when she was excluded from an *in camera* hearing held
16 while petitioner's lawyer-client relationship with her current
17 counsel had broken down into an adversarial relationship, and she
18 was not yet represented by new counsel. Id. at 1098. Because
19 this situation effectively rendered petitioner without any
20 assistance of counsel, the court found that petitioner's
21 exclusion was harmful. Id. at 1098-99. In contrast, in this
22 case, petitioner was never without assistance of counsel in the
23 same sense. Petitioner's counsel was allowed to submit questions
24 to the witness during the *in camera* hearings, advised petitioner
25 as to the hearings, strenuously objected to the hearings, and
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27 ⁵ For these reasons, the court also finds that any error
28 would be harmless under Brecht v. Abrahamson, 507 U.S. 619
(1993).

1 generally was able to ensure that petitioner understood what was
2 going on. (See F&R at 15.) Because petitioner was at no point
3 without the help and advice of his attorney, the holding and
4 rationale in Bradley are inapplicable.

5 For a writ of habeas corpus relief to be granted, the state
6 court's decision must be an unreasonable application of United
7 States Supreme Court precedent. The court finds that
8 petitioner's claim that he was denied his right to counsel under
9 the Sixth Amendment does not meet the standard of "complete
10 denial of counsel" required under Cronic. Accordingly, the state
11 court's adjudication of petitioner's claim was not an
12 unreasonable application of United States Supreme Court
13 precedent, and petitioner's claim does not merit habeas relief
14 under 28 U.S.C. § 2254(d).

15 **B. Due Process Rights**

16 Petitioner urges as an alternative ground for issuance of
17 the writ that the Hobbs procedure used in the trial court
18 violated his right to due process. (Traverse in Supp. of Writ at
19 7).

20 The Supreme Court has held that a defendant's due process
21 right to discover exculpatory evidence does not require that the
22 defense be granted full access to confidential material and may
23 be satisfied by an in-chambers review of the records by the trial
24 court to determine whether they contain evidence that was likely
25 to have changed the outcome of the trial. Penn. v. Ritchie, 480
26 U.S. 39, 59-61 (1987); see also McCray v. Illinois, 386 U.S. 300,
27 312 (1967) (noting that the Supreme Court has "consistently
28 declined to hold that an informer's identity need always be

1 disclosed in a federal criminal trial, let alone in a preliminary
2 hearing to determine probable cause for an arrest or search.").

3 In Ritchie, the Court examined the issue of whether defense
4 counsel must be allowed to examine all confidential information
5 in search of exculpatory evidence and present arguments in favor
6 of disclosure. Id. at 59. In deciding this question in the
7 negative, the Court stated that a defendant's interest in
8 ensuring a fair trial can be protected fully by requiring that
9 files be submitted only to the trial court for *in camera* review.

10 Id. The Court noted that although this rule denies defendants
11 the benefits of an "advocate's eye," the trial court does not
12 have unbridled discretion, as it is still bound to release
13 unprivileged information. Id. Further, the Ritchie Court stated
14 that to hold otherwise would unnecessarily sacrifice the
15 competing interest to protect confidential information. Id.

16 The Ninth Circuit has also held that if a trial judge is
17 satisfied that an *in camera* hearing in which neither the
18 defendant nor his attorney participates is adequate to explore
19 the foundations of the informant's information, no disclosure is
20 necessary. United States v. Anderson, 509 F.2d 724, 730 (9th
21 Cir. 1974); see also United States v. Rawlinson, 487 F.2d 5 (9th
22 Cir. 1973) (holding that an *in camera* hearing was an appropriate
23 means for determining whether the informant's identity and
24 testimony would be relevant and helpful to the defense). In
25 Anderson, petitioner challenged the propriety of the court's use
26 of *in camera* hearings to determine the bases for the confidential
27 informant's knowledge that provided the probable cause for
28 petitioner's arrest. Id. at 727. In upholding the trial judge's

1 discretion to balance the interests between disclosure of an
2 informant's identity and maintaining confidentiality, the court
3 relied upon Supreme Court precedent that employed a similar
4 balancing test. Id. at 728 (citing Roviaro v. United States, 353
5 U.S. 53, 58-62 (1957) (employing a balancing test between the
6 public interest in protecting the flow of information against the
7 defendant's right to prepare his defense)). The court also noted
8 that the Supreme Court had implicitly approved of federal
9 procedures in which the trial judge has discretion to require or
10 deny disclosure. Id. at 729 (citing McCray, 386 U.S. at 312-13
11 (holding that disclosure of the identity of an informer who
12 provided information constituting probable cause for a
13 warrantless search was not constitutionally required)). As such,
14 the Anderson court concluded that the trial court's use of an *in*
15 *camera* hearing closed to the defendant and his attorney did not
16 infringe defendant's Fifth and Sixth Amendment rights. Id. at
17 730.

18 The New York Court of Appeal has also determined that *in*
19 *camera* hearings relating to the disclosure of confidential
20 informants who furnished probable cause do not necessarily
21 deprive the defendant of due process of law. New York v.
22 Castillo, 80 N.Y.2d 578, 587 (1992). In Castillo, the court
23 examined the issue of whether a defendant has an absolute right
24 to take part in an *in camera* suppression hearing. Id. at 582.
25 According to the court, this determination called for the
26 sensitive balancing of a defendant's right to participate in the
27 defense and society's need to encourage citizens to participate
28 in law enforcement by granting them anonymity when necessary.

1 Id. The court noted that a defendant's right to participate in
2 his trial is different for pretrial hearings, and that
3 accordingly, the defendant's interest in utilizing the
4 exclusionary rule may be subordinated to safety precautions
5 necessary to encourage citizens to participate in law
6 enforcement. Id. at 583. The court found that the decision of
7 whether probable cause exists, based upon the warrant
8 application, supporting affidavit, and informant's oral
9 testimony, is "precisely the type of inquiry which can be
10 resolved accurately on an ex parte, in camera basis." Id. at
11 585. Accordingly, the court stated that although a defendant who
12 does not have access to the information purporting to establish
13 probable cause will be unable to suggest reasons why probable
14 cause was lacking, this fact alone does not deprive the defendant
15 of due process. Id.

16 In this case, the state court's conclusion regarding
17 petitioner and his counsel's exclusion from the *in camera*
18 hearings pertaining to petitioner's various motions was not
19 contrary to nor an unreasonable application of United States
20 Supreme Court precedent pursuant to 28 U.S.C. 2254(d).
21 Petitioner bases his due process claim on the assertion that the
22 Hobbs procedure wrongly deprived him of the right to subject the
23 prosecution case to adversarial testing. (See F&R at 22.)
24 However, the denial to petitioner of the benefits of an
25 "advocate's eye" does not necessarily deprive him of due process
26 of law. See Ritchie, 480 U.S. at 59. The Hobbs procedure used
27 to conduct the *in camera* review of petitioner's motions seeks to
28 balance the tension between the public need to protect

1 confidential informants' identities and the criminal defendant's
2 right to access information when challenging a search warrant.
3 (See Object. to F&R at 10). Because the Supreme Court has found
4 that *in camera* review does not necessarily deprive a defendant of
5 due process of law and has weighed the competing interests of
6 disclosure and maintaining confidentiality in a manner similar to
7 the balancing test utilized by the Hobbs procedure, the state
8 court's determination that the Hobbs procedure was
9 constitutionally applied in this case is not contrary to, nor an
10 unreasonable application of, United States Supreme Court
11 precedent. See Anderson, 509 F.2d 724; Castillo, 80 N.Y.2d 578.

12 Accordingly, because the state court's adjudication of
13 petitioner's claim was not contrary to nor an unreasonable
14 application of United States Supreme Court precedent,
15 petitioner's claim does not merit habeas relief under 28 U.S.C. §
16 2254(d).

17 **C. Sixth Amendment Right to Public Trial**

18 Petitioner also claims that the Hobbs procedure used in the
19 trial court violated his right to a public trial guaranteed under
20 the Sixth Amendment. The court adopts the magistrate judge's
21 findings that petitioner's claims are procedurally barred, and
22 that petitioner failed to demonstrate that there was cause for
23 his procedural default or that a miscarriage of justice would
24 result absent review.⁶ (See F&R at 31.)

25
26 ⁶ The court notes that in People v. Theilen, the
27 California Court of Appeal stated that the Hobbs procedure
28 conflicts with U.S. Supreme Court precedent under Waller v.
Georgia. People v. Theilen, F026190 (Cal. Ct. App., filed May
29, 1998). In Waller, the Court held that the Sixth and
Fourteenth Amendment right to a public trial applies to a hearing

CONCLUSION

For the foregoing reasons, the court adopts in part and declines to adopt in part the magistrate judge's recommendation. Petitioner's request for a writ of habeas corpus is DENIED.

IT IS SO ORDERED.

DATED: June 23, 2009



FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

on a motion to suppress evidence. Waller v. Georgia, 467 U.S. 39 (1984). The Court authorized the use of *in camera* proceedings during suppression hearings, provided certain safeguards were met. Id. at 48. However, because petitioner's claim that he lacked the Sixth Amendment right to public trial was procedurally defaulted, the court does not reach the merits of this argument or take any position regarding whether the Hobbs procedure conflicts with Supreme Court precedent with respect to the Sixth Amendment right to public trial.