

JAN 26 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FOSTER SHANE GAINES,

Petitioner - Appellant,

v.

A. K. SCRIBNER,

Respondent - Appellee.

No. 07-17279

D.C. No. CV-03-01268-PJH

MEMORANDUM\*

Appeal from the United States District Court  
for the Northern District of California  
Phyllis J. Hamilton, District Judge, Presiding

Submitted January 11, 2010\*\*

Before: BEEZER, TROTT, and BYBEE, Circuit Judges.

California state prisoner Foster Shane Gaines appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

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

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Gaines contends that the district court erred by determining that the California Court of Appeal did not unreasonably apply clearly established federal law in rejecting his Confrontation Clause claim. He argues that the trial court erroneously applied *Ohio v. Roberts*, 448 U.S. 56, 74, (1980), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004), when it determined that the State was diligent in attempting to locate a witness and admitting the preliminary hearing testimony of the witness in her absence.

The district court properly rejected this claim because the testimony of the witness was cumulative of other testimony in the record. *See Welchel v. Washington*, 232 F.3d 1197, 1211 (9th Cir. 2000). Thus, any error did not have a “substantial and injurious effect” on the jury’s verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993); *see also Fry v. Pliler*, 551 U.S. 112 (2007).

**AFFIRMED.**