

SEP 14 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK A. RUST,)	No. 07-55413
)	
Petitioner – Appellant,)	D.C. No. CV-04-00529-PA
)	
v.)	MEMORANDUM*
)	
JAMES HALL,)	
)	
Respondent – Appellee.)	
_____)	
)	No. 07-55697
FRANK A. RUST,)	
)	
Petitioner – Appellant,)	D.C. No. CV-06-00576-PA
)	
v.)	
)	
DERRICK L. OLLISON,)	
)	
Respondent – Appellee.)	
_____)	

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted September 2, 2009

*This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

Pasadena, California

Before: FERNANDEZ and GOULD, Circuit Judges, and ENGLAND,**
District Judge.

Frank A. Rust appeals the district court's denial of one habeas corpus petition on the merits and the denial of another one as being second and successive. 28 U.S.C. §§ 2244(b), 2254. We affirm in part and reverse and remand in part.

(1) Rust asserts that pursuant to “clearly established Federal law, as determined by the Supreme Court”¹ his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution were violated.² We disagree. At the time that Rust's conviction became final on direct appeal, the principles set forth in Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L. Ed. 2d 597 (1980), controlled consideration of the admission of evidence. Now, the principles of Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369,

**The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.

¹28 U.S.C. § 2254(d)(1).

²At the outset, the state argues that Rust either failed to exhaust or has procedurally defaulted his claims. However, in the district court the state expressly waived the exhaustion claim. See 28 U.S.C. § 2254(b)(3). Moreover, it did not raise the procedural-default claim. See Vang v. Nevada, 329 F.3d 1069, 1073 (9th Cir. 2003); Franklin v. Johnson, 290 F.3d 1223, 1232–33 (9th Cir. 2002). Thus, we will proceed to the merits.

158 L. Ed. 2d 177 (2004), control. While Crawford cannot be applied retroactively at the behest of a petitioner,³ it can be applied retroactively at the behest of the state.⁴ In any event, the result would be the same under either Roberts or Crawford.

In the first place, the state court's determination that the witnesses in question — Rita Keith and Andre Thomas Barnett — were not available and that due diligence had been used by the prosecution in an attempt to make them available was not unreasonable. See 28 U.S.C. § 2254(d); Cal. Evid. Code § 240(a)(5); see also Barber v. Page, 390 U.S. 719, 725, 88 S. Ct. 1318, 1322, 20 L. Ed. 2d 255 (1968); People v. Cromer, 24 Cal. 4th 889, 892, 15 P.3d 243, 244, 103 Cal. Rptr. 2d 23, 24 (2001).

Secondly, as far as Keith's preliminary hearing testimony is concerned, there is no claim that it was not subject to cross-examination; thus, it was admissible under either Crawford or Roberts. Similarly, her statements to a police officer, whether testimonial or not, were essentially the same as those at her preliminary

³See Whorton v. Bockting, 549 U.S. 406, 421, 127 S. Ct. 1173, 1183–84, 167 L. Ed. 2d 1 (2007).

⁴See Danforth v. Minnesota, ___ U.S. ___, ___, 128 S. Ct. 1029, 1032–33, 169 L. Ed. 2d 859 (2008); Delgadillo v. Woodford, 527 F.3d 919, 926–28 (9th Cir. 2008).

hearing, and, therefore, their substance was subject to cross-examination; at worst, any error in their admission was harmless. See Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S. Ct. 1710, 1714, 123 L. Ed. 2d 353 (1993). Moreover, her statement to a lay person shortly after she was bludgeoned with a baseball bat was not testimonial under Crawford, and, therefore, did not present a Confrontation Clause issue at all under that approach. See Whorton, 549 U.S. at 420, 127 S. Ct. at 1183; Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 2273, 165 L. Ed. 2d 224 (2006); Delgadillo, 527 F.3d at 924. Under Roberts, 448 U.S. at 66, 100 S. Ct. at 2539, it was based on a firmly rooted hearsay exception. See Cal. Evid. Code § 1240 (spontaneous statements).

Thirdly, we agree that admission of Barnett's statements was more problematic. However, they were essentially cumulative to Keith's statements, and the jury did not find Rust guilty for the attack on Barnett. Any error was harmless. See Brecht, 507 U.S. at 623, 113 S. Ct. at 1714.

(2) The instruction given to the jury regarding Rust's prior domestic-violence offense (rape) did not undermine the requirement that he be found guilty beyond a reasonable doubt of every element of the offense at hand. See Mendez v. Knowles, 556 F.3d 757, 768 (9th Cir. 2009). We note that the instruction was

quite different from one that we have found unconstitutionally defective,⁵ and to the extent that some residual ambiguity remained, it did not render the instruction so defective that it violated due process.⁶

(3) While Rust's first petition was still under submission, he filed a wholly new petition with the district court. The district court dismissed the new petition as second and successive. See 28 U.S.C. § 2244(b). In so doing, the district court erred because we have held that when a pro se petitioner (like Rust) files a new petition before the first one is decided, the district court must treat the new one as a motion to amend rather than as a second and successive petition. See Woods v. Carey, 525 F.3d 886, 890 (9th Cir. 2008). Thus, we must reverse in this respect.⁷

AFFIRMED as to No. 07-55413; REVERSED and REMANDED as to No. 07-55697.

⁵Gibson v. Ortiz, 387 F.3d 812, 818–19 (9th Cir. 2004), overruled on other grounds by Byrd v. Lewis, 566 F.3d 855, 865–66 (9th Cir. 2009).

⁶See Hedgpeth v. Pulido, ___ U.S. ___, ___, 129 S. Ct. 530, 532, 172 L. Ed. 2d 388 (2008) (per curiam); Middleton v. McNeil, 541 U.S. 433, 437, 124 S. Ct. 1830, 1832, 158 L. Ed. 2d 701 (2004) (per curiam).

⁷We leave to the district court in the first instance the state's assertions that the new petition violated a scheduling order, as well as that it was late and could not relate back. See Mayle v. Felix, 545 U.S. 644, 650, 125 S. Ct. 2562, 2566, 162 L. Ed. 2d 582 (2005); King v. Ryan, 564 F.3d 1133, 1141 (9th Cir. 2009).