APPENDIX "A"

FILED

APR 20 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DRAWN IV, Petitioner-Appellant, v. ROBERT NEUSCHMID, Warden, Respondent-Appellee.	No. 19-17246 D.C. No. 3:19-cv-02150-SI Northern District of California, San Francisco ORDER

Before: GRABER and TALLMAN, Circuit Judges.

Appellant's motion for an extension of time to file a motion for reconsideration (Docket Entry No. 9) is granted.

Appellant's motion for reconsideration (Docket Entry No. 10) is deemed timely filed and is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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ROBERT DRAWN IV,	No. 19-17246
Petitioner-Appellant,	D.C. No. 3:19-cv-02150-SI Northern District of California, San Francisco
v.	
ROBERT NEUSCHMID, Warden,	ORDER
Respondent-Appellee.	

Before: GRABER and TALLMAN, Circuit Judges.

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No further filings will be entertained in this closed case.

Robert Drawn
DVI-Deul Vocational Institution
23500 Kasson Rd.
P.O. Box 400
Tracy CA 95378

UNITED STATES COURT OF APPEALS
FOR NINTH CIRCUIT

Robert Drawn,
Appellant
v.
Robert Neuschmid,
Respondent.

Case No. 19-17246

Request For Extension of Time

Appellant, Robert Drawn, hereby request of the Court for a 45 day extension, until May 3, 2021, to file a motion for reconsideration in the entitled matter. This motion has been made for reasons as follow:

1. On December 26, 2019, Appellant filed with the Court his opening brief for arguments for a certificate of appealability.
2. On March 5, 2021, the Court denied Appellant's request for a certificate of appealability.
3. Appellant is not a skilled practitioner of law.
4. Appellant is incarcerated.
5. Consequently, Appellant's access to legal materials and assistance is severely limited.
6. Appellate is currently working with another prisoner at another institution who is assisting him with the motion for reconsideration.

Wherefore, Appellant humbly request that requested relief be granted.

Robert Drawn R
Appellant, In Pro Se.

I, Robert Drawn IV, hereby do declare under penalty of perjury pursuant to the laws of the United States, the foregoing is true and correct.

Executed on this day 17 of March, 2021 at Tracy, California.

Robert Drawn R
Declarant/Robert Drawn IV

1 Robert Drawn R 3/17/2021

Robert Drawn
DVI-Deul Vocational Institution
23500 Kasson Rd.
P.O. Box 400
Tracy CA 95378

UNITED STATES COURT OF APPEALS
FOR NINTH CIRCUIT

Robert Drawn,
Appellant
v.
Robert Neuschmid,
Respondent.

Case No. 19-17246

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Wherefore, Appellant humbly request that requested relief be granted.

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Appellant, In Pro Se.

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Executed on this day 17 of March, 2021 at Tracy, California.

Robert Drawn IV
Declarant/Robert Drawn IV

Robert Drawn IV 3/17/2021

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DRAWN IV, Plaintiff-Appellant, v. ROBERT NEUSCHMID, Warden, Defendant-Appellee.	No. 19-17246 D.C. No. 3:19-cv-02150-SI Northern District of California, San Francisco ORDER

Before: CANBY and VANDYKE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

FILED

MAR 5 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DRAWN IV, Plaintiff-Appellant, v. ROBERT NEUSCHMID, Warden, Defendant-Appellee.	No. 19-17246 D.C. No. 3:19-cv-02150-SI Northern District of California, San Francisco ORDER

Before: CANBY and VANDYKE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX "B"

APPENDIX "B"

U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:19-cv-02150-SI

Drawn v. Nueschid
Assigned to: Judge Susan Illston
Referred to: PSLC CET
Case in other court: USCA#:19-17246
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 04/19/2019
Date Terminated: 10/15/2019
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Plaintiff

Robert Drawn, IV

represented by **Robert Drawn, IV**
AY7225
C.S.P. Solano State Prison
FA3-127
P.O. Box 4000
Vacaville, CA 95696-4000
PRO SE

V.

Defendant

Robert Nueschid

represented by **Gregory A. Ott**
California State Attorney General's Office
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
415-510-3838
Fax: 415-703-1234
Email: gregory.ott@doj.ca.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
04/22/2019	1	PETITION for Writ of Habeas Corpus (Filing fee DUE $ 5.00.). Filed byRobert Drawn, IV. (Attachments: # 1 Certificate/Proof of Service, # 2 Envelope)(amgS, COURT STAFF) (Filed on 4/22/2019) Modified on 4/22/2019 (amgS, COURT

		STAFF). (Entered: 04/22/2019)
04/22/2019	2	CLERK'S NOTICE re completion of In Forma Pauperis affidavit or payment of filing fee due within 28 days. IFP Form due by 5/30/2019. (amgS, COURT STAFF) (Filed on 4/22/2019) (Entered: 04/22/2019)
04/29/2019	3	**ORDER TO SHOW CAUSE (Illston, Susan) (Filed on 4/29/2019) (Additional attachment(s) added on 4/30/2019: # 1 Certificate/Proof of Service) (tfS, COURT STAFF). (Entered: 04/29/2019)**
05/07/2019	4	Receipt filing fee paid. (amgS, COURT STAFF) (Filed on 5/7/2019) (Entered: 05/07/2019)
06/28/2019	5	MOTION for Extension of Time to File Answer filed by Robert Nueschid. (Attachments: # 1 Declaration of Counsel in Support of Application for Enlargement of Time to File Answer, # 2 Proposed Order)(Ott, Gregory) (Filed on 6/28/2019) (Entered: 06/28/2019)
07/11/2019	6	Response to Order to Show Cause byRobert Nueschid. Traverse due by 8/20/2019. (Attachments: # 1 Memorandum of Points and Authorities in Support of Answer)(Ott, Gregory) (Filed on 7/11/2019) (Entered: 07/11/2019)
07/11/2019	7	NOTICE by Robert Nueschid re 6 Response to Order to Show Cause *of Lodging Exhibits with Court* (Attachments: # 1 Exhibit A, Part 1 of 2 (Part 1), # 2 Exhibit A, Part 1 of 2 (Part 2), # 3 Exhibit A, Part 2 of 2 (Part 1), # 4 Exhibit A, Part 2 of 2 (Part 2), # 5 Exhibit B, # 6 Exhibit C, Part 1 of 4 (Part 1), # 7 Exhibit C, Part 1 of 4 (Part 2), # 8 Exhibit C, Part 2 of 4 (Part 1), # 9 Exhibit C, Part 2 of 4 (Part 2), # 10 Exhibit C, Part 3 of 4, # 11 Exhibit C, Part 4 of 4, # 12 Exhibit D-H) (Ott, Gregory) (Filed on 7/11/2019) (Entered: 07/11/2019)
08/02/2019	8	MOTION for Extension of Time to File Traverse filed by Robert Drawn, IV. (Attachments: # 1 Certificate/Proof of Service, # 2 Envelope)(amgS, COURT STAFF) (Filed on 8/2/2019) (Entered: 08/02/2019)
08/08/2019	9	**DISREGARD ATTACHMENT - FILED IN ERROR. ORDER by Judge Susan Illston granting 5 Motion for Extension of Time to Answer ; granting 8 Motion for Extension of Time to File. Traverse due by 9/27/2019. (Attachments: # 1 Certificate/Proof of Service)(tfS, COURT STAFF) (Filed on 8/8/2019) Modified on 8/8/2019 (tfS, COURT STAFF). (Entered: 08/08/2019)**
08/08/2019	10	**ORDER EXTENDING DEADLINESRe: Dkt. Nos. 5, 8. Upon due consideration, both requests are GRANTED. Docket Nos. 5, 8. Respondents answer filed on July 11, 2019, is deemed to have been timely filed. Petitioner must file and serve his traverse no later than September 27, 2019.. Signed by Judge Susan Illston on 8/8/19. (Attachments: # 1 Certificate/Proof of Service)(tfS, COURT STAFF) (Filed on 8/8/2019) (Entered: 08/08/2019)**

09/27/2019	11	Traverse byRobert Drawn, IV. (Attachments: # 1 Certificate/Proof of Service, # 2 Envelope)(amgS, COURT STAFF) (Filed on 9/27/2019) (Entered: 09/30/2019)
10/15/2019	12	**ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (Illston, Susan) (Filed on 10/15/2019) (Additional attachment(s) added on 10/16/2019: # 1 Certificate/Proof of Service) (tlS, COURT STAFF). (Entered: 10/15/2019)**
10/15/2019	13	**JUDGMENT (Illston, Susan) (Filed on 10/15/2019) (Additional attachment(s) added on 10/16/2019: # 1 Certificate/Proof of Service) (tlS, COURT STAFF). (Entered: 10/15/2019)**
11/01/2019	14	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Robert Drawn, IV. Appeal of Judgment 13 , Order 12 (Appeal fee FEE NOT PAID.) (Attachments: # 1 Certificate/Proof of Service, # 2 Envelope)(amgS, COURT STAFF) (Filed on 11/1/2019) (Entered: 11/04/2019)
11/05/2019	15	USCA Case Number 19-17246 for 14 Notice of Appeal filed by Robert Drawn, IV. (tnS, COURT STAFF) (Filed on 11/5/2019) (Entered: 11/05/2019)
03/05/2021	16	ORDER of USCA denying request (arkS, COURT STAFF) (Filed on 3/5/2021) (Entered: 03/05/2021)
04/20/2021	17	ORDER of USCA denying reconsideration (arkS, COURT STAFF) (Filed on 4/20/2021) (Entered: 04/21/2021)

PACER Service Center

Transaction Receipt

04/30/2021 18:20:26

PACER Login:	Saronya10:6373306:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	3:19-cv-02150-SI
Billable Pages:	2	**Cost:**	0.20

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT DRAWN,

Petitioner,

v.

ROBERT NUESCHID,

Respondent.

Case No. 19-cv-02150-SI

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Robert Drawn filed this *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254 to challenge his conviction in the Alameda County Superior Court. This Court issued an order to show cause why the writ should not be granted. Respondent has filed an answer and Drawn has filed a traverse. For the reasons discussed below, the petition will be DENIED.

BACKGROUND

Facts of the Case

The California Court of Appeal described the evidence relating to the crimes in which Waleed Wheatfall was killed and Kennith Robinson was wounded:

> The shootings occurred near the intersection of 57th Avenue and Foothill Boulevard in Oakland, where Drawn operated an auto detailing service out of a space he leased from a car wash. Drawn typically parked his blue van with large rims at the car wash or on the street nearby.
>
> On the day of the shootings the owner of the car wash saw Drawn conversing with Wheatfall. From their body language, "[i]t seemed like, you know, points were trying to be made." Later the owner heard gunshots, crossed the street and saw Robinson, in his car, shot.
>
> That afternoon M. LeClaire was sitting in his parked truck at the car wash when he noticed a "big African-American guy with a full beard" in a truck parked next to his. The man was "talking really loud" and apparently arguing

with someone. A few minutes later a blue van with big rims pulled in and parked in front of LeClaire's truck. Drawn got out of the van and the bearded man got out of his truck. Both were yelling and Drawn said "Come on. I'm gonna go knock this nigga's head off. Let's go knock this nigga's head off." The two crossed the street to the Safeland Market parking lot, where a man approached Drawn and extended his right arm as though to shake his hand. Drawn drew a gun, shot the man several times, then walked up to a parked car and "shot whoever was sitting there through the window." The bearded man ran back to his truck and drove away. Nobody returned to the blue van.

The next day police showed LeClaire a photo lineup. He recognized Drawn as the shooter, but did not want to get involved so he told police he did not recognize anyone. About six weeks later police showed LeClaire another photo lineup. This time he identified Drawn "[b]ecause I didn't feel I was so much under pressure like the first time," but said he was only 50 percent sure because he was afraid for his family's safety. He testified at trial that he lied to police about being uncertain and lied again at the preliminary hearing because he was afraid of repercussions from Drawn or his friends. LeClaire decided to do "the right thing" after the prosecutor promised to protect his family, and at trial testified he was certain Drawn was the shooter.

Robinson testified he was hanging out with Wheatfall at the Safeland Market the day of the shooting. He observed Wheatfall and Drawn having a conversation. Drawn left but returned 15 or 20 minutes later. Robinson thought he and Wheatfall were going to get jumped, so got into his car to put his phones away "[s]o I wouldn't break them if I get into a fight or something." Moments later he heard gunshots. Robinson was shot three times as he sat in his car.

Robinson called 911. A recording of his call was played for the jury. He said the shooter was "the guy at the detail shop across the street" and had a blue van. Five days later Robinson identified Drawn as the shooter from a six-pack photo lineup on which he circled and initialed Drawn's photograph.

At trial Robinson was a reluctant witness. He testified he never saw the shooter and did not remember being shown or making an identification from a photo lineup. But, he conceded that he recognized his handwriting and initials next to Drawn's photo. He later told police he did not know what he was doing when he identified the shooter because he was on medication. Robinson told the prosecutor that people who grow up in Oakland "are not supposed to come to court and testify . . . about what happened."

A. Williams and R. Lee drove to Safeland Market to see Wheatfall shortly before the shootings. Williams got out of the car and greeted Wheatfall. Then they heard gunshots. Lee looked around and saw a tall man in a hoodie and baseball cap shooting a gun toward the ground. She ducked and tried to drive away, but her car ran over "somebody or something" so she stopped and got out. Williams had run behind the market when he heard shots but came back to look for Wheatfall. Wheatfall was dead, his body pinned under Lee's car. The cause of death was multiple gunshot wounds. Neither Williams nor Lee was able to identify the shooter.

Drawn never returned to the car wash for his van and stopped visiting his children's mother not long after the shooting. He called her two or three times per month, but he blocked his phone number and would not disclose his whereabouts.

> Police found a blue baseball cap in the direction the shooter was seen fleeing from the crime scene. DNA on the cap was consistent with Drawn and could have come from him, but a statistical analysis was not possible due to the quality of the sample.
>
> Drawn was arrested in Southern California almost a year and a half later. A jury found him guilty of first degree murder and attempted murder, each enhanced for his use of a firearm, and three firearms offenses. Sentenced to 84 years to life in prison, Drawn filed this timely appeal.

Docket No. 7-12 at 89-92.

B. Procedural History

At a jury trial in Alameda County Superior Court in December 2015, Drawn was convicted of first-degree murder, attempted murder, unlawful transportation of an assault weapon, and two counts of possession of a firearm by a felon, with enhancements on the murder and attempted murder counts for personal use of a firearm. Docket No. 1 at 1–2. Drawn was sentenced to 84 years to life. Drawn's conviction was upheld on appeal to the California Court of Appeal. Docket No. 7-12 at 89. The California Supreme Court denied Drawn's petition for review. *Id.* at 133. Drawn twice filed unsuccessful habeas petitions in the California Court of Appeal and twice filed unsuccessful habeas petitions in the California Supreme Court. *See id.* at 138-215.

On April 22, 2019, Drawn filed this action seeking federal habeas relief on both a Confrontation Clause claim under the Sixth Amendment to the United States Constitution and an Equal Protection Clause claim under the Fourteenth Amendment. Docket No. 1. This Court then ordered respondent to show cause why the petition should not be granted. Respondent filed an answer. Drawn then filed his traverse. The case is now ready for review on the merits.

JURISDICTION AND VENUE

This court has subject matter jurisdiction over this action for a writ of habeas corpus under 28 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the petition concerns the conviction and sentence of a person convicted in Alameda County, California, which is within this judicial district. 28 U.S.C. §§ 84, 2241(d).

EXHAUSTION

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are required first to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. 28 U.S.C. § 2254(b), (c). State judicial remedies have been exhausted for the claims presented in the petition.

B. Procedural History

LEGAL STANDARD

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") amended § 2254 to impose new restrictions on federal habeas review. A petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). When there are no Supreme Court cases that answer questions raised in a federal habeas petition "it cannot be said that the state court unreasonably applied clearly established Federal law." *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (quoting *Carey v. Musladin*, 549 U.S. 70, 77 (2006)).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decided a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13 (2000).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions

but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. "A federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was 'objectively unreasonable.'" *Id.* at 409.

The state-court decision to which § 2254(d) applies is the "last reasoned decision" of the state court. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991). When confronted with an unexplained decision from the last state court to have been presented with the issue, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

Section 2254(d) generally applies to unexplained as well as reasoned decisions. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). When the state court has denied a federal constitutional claim on the merits without explanation, the federal habeas court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the U.S. Supreme] Court." *Id.* at 102.

DISCUSSION

A. The Confrontation Clause Claim

1. State Court Proceedings

Drawn contended on appeal, as he does here, that the admission of witness testimony concerning statements made in an anonymous 911 call violated his rights under the Sixth Amendment's Confrontation Clause. In the call, the anonymous caller told the 911 operator that

the suspect ran south from the crime scene and dropped his blue baseball cap, describing where the police could find the cap. Before trial, the prosecution moved *in limine* to introduce a recording of this anonymous 911 call. Docket No. 7-12 at 92. The court decided that the recording was not a spontaneous utterance and therefore was only admissible at trial for purposes other than showing the truth of the matter asserted. *Id.* at 92–93.

At trial, two witnesses for the prosecution described information gained from the anonymous 911 call, although neither witness directly referenced the call. First, Technician Boyle testified that she placed a placard next to a baseball cap found near the shootings because she "*was advised* that the suspect fled southbound on foot." Docket No. 7-9 at 12 (emphasis added). The court overruled a hearsay objection and explained to the jury that the testimony "would be hearsay if offered to prove that, in fact, the suspect fled that direction" but that the testimony was being offered to explain "why she placed the placard [next to the baseball cap]" and that explained her conduct, regardless of whether it was true that the suspect fled in that direction. *Id.* Second, Detective Rosin testified that he ordered the baseball cap to be tested for DNA because he "*had information* that the suspect in this crime had ran from the crime scene on foot in a southern direction which would cover [the area where the cap was located]." Docket No. 7-10 at 81 (emphasis added). Again, the court admonished the jury that Detective Rosin's testimony was admissible only to explain why Detective Rosin ordered the baseball cap to be tested for DNA, not to prove that the suspect actually ran south from the crime scene. *Id.* at 82.

The California Court of Appeal did not discuss the Sixth Amendment Confrontation Clause claim and instead focused on the related state law inadmissible hearsay claim. Docket No. 7-12 at 92–95. The state appellate court concluded that the evidence regarding the 911 call was properly admitted for a nonhearsay purpose. *Id.* at 92. The court explained how evidence—which otherwise would be hearsay—cannot be admitted simply because a nonhearsay purpose is identified. *Id.* at 94–95. For the evidence to be properly admitted, this nonhearsay purpose must also be relevant to a disputed fact. *Id.* The state appellate court ruled that, because Drawn had argued the police had conducted a "sloppy and biased investigation," evidence tending to show a nonbiased motive to test the baseball cap for DNA rebutted Drawn's argument. *Id.* Therefore, the California Court of Appeal

concluded that the evidence relating to the 911 call was properly admitted because it was admitted for a nonhearsay purpose that was relevant to a disputed fact. *Id.* at 95.

When, as here, the state court has denied a federal constitutional claim on the merits without explanation, the federal habeas court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the U.S. Supreme] Court." *Harrington*, 562 U.S. at 102.

2. Analysis

The Confrontation Clause of the Sixth Amendment provides that in criminal cases the accused has the right to "be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause applies to all "testimonial" statements. *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). However, "[t]he clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9.

Confrontation Clause errors are subject to harmless error analysis. *United States v. Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004) (post-*Crawford* case); *see also United States v. Allen*, 425 F.3d 1231, 1235 (9th Cir. 2005). For purposes of federal habeas corpus review, the harmless standard applicable to violations of the Confrontation Clause is whether the improperly admitted evidence had "'substantial and injurious effect or influence in determining the jury's verdict.'" *Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir. 2002) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

a. The Evidence Was Testimonial

As the Confrontation Clause only applies to testimonial statements, the first question is whether evidence of the anonymous 911 phone call was testimonial. The "primary purpose" test establishes the boundaries of testimonial evidence. *Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015). Under this test, statements are testimonial: (1) "when they result from questioning, 'the primary purpose of [which was] to establish or prove past events potentially relevant to later criminal

prosecution,'" and (2) "when written statements are 'functionally identical to live, in-court testimony,' 'made for the purpose of establishing or proving some fact' at trial.'" *Lucero v. Holland*, 902 F.3d 979, 989 (9th Cir. 2018) (quoting *Davis*, 547 U.S. at 822, and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009)).

Emergency 911 calls are sometimes considered testimonial but sometimes are not. *See Davis*, 547 U.S. at 822. When the primary purpose of the police questioning over the phone is to respond to an ongoing emergency, the 911 call is not testimonial. *Id.* On the other hand, when the circumstances show that there was no on-going emergency and that the primary purpose of the interrogation over the phone was to "establish or prove past events potentially relevant to later criminal prosecution," the 911 call is testimonial. *Id.* The following circumstances all indicate that the 911 call is less likely to be testimonial: if the caller is in imminent danger while on the 911 call; if the caller is relating events that are actually happening as opposed to past events; and if the interrogation is less formal and the caller seems more frantic. *See id.* at 827.

Here, as Drawn argues in his traverse, the evidence about the substance of the 911 call was testimonial because it was to establish past events that were potentially relevant to a later prosecution rather than to respond to an ongoing emergency. *See* Docket No. 11 at 2. As the California Court of Appeal also noted, the call was made shortly after the shooting occurred, not during the shooting. Docket No. 6-1 at 14. The questions asked by the 911 operator concerned the location of the dropped baseball cap, the color of the suspect's car, the color of the cap, and the description of the suspects. *Id.* at 15. These questions were all related to past events that had already occurred. Also, the anonymous caller did not seem particularly frantic or frightened because of some imminent danger. *Id.* at 15. Though the caller did seem concerned about the police inadvertently revealing his identity, he did not face an imminent threat of harm. *Id.* Therefore, evidence about the substance of the anonymous 911 call is testimonial evidence.

b. The Testimonial Evidence Was Properly Admitted for a Purpose Other Than the Truth of the Matter Asserted

There is one important exception to the general rule that the Confrontation Clause applies to testimonial statements: the Confrontation Clause does not bar the use of testimonial statements for

purposes other than establishing the truth of the matter asserted. *Crawford*, 541 U.S. at 59 n.9; *see* *Moses v. Payne*, 555 F.3d 742, 761 (9th Cir. 2009) (finding state court properly admitted son's out-of-court statement to social worker that his father had kicked his mother; statement was introduced to show why social worker contacted Child Protective Services, not to prove defendant had kicked the victim).

Here, the evidence was introduced for the purpose of explaining the conduct of police technician Boyle and Detective Rosin, regardless of whether it was true that the suspect ran south from the crime scene. The information from the anonymous 911 phone call tended to prove the motive of both Technician Boyle and Detective Rosin in searching for the blue baseball cap, marking the cap, and testing it for DNA. *See* Docket No. 7-12 at 95. Without the evidence of the phone call, Technician Boyle and Detective Rosin's behavior may have been challenging to explain. With the evidence, the jury was able to understand what made these persons behave the way they did. Therefore, the exception to the general rule from *Crawford* applies and evidence relating to the anonymous 911 phone call is admissible.

c. Harmless Error

Drawn argues that the nonhearsay purpose for the evidence—to show why the police marked and tested the baseball cap—was not relevant. Docket Nos. 1 at 22, 11 at 4. This Court disagrees. A main defense theory was that the police had decided that Drawn was the shooter and had disregarded any evidence that might have pointed to someone else. Defense counsel urged this theory in her opening statement to the jury: "This is a case where the police focus their investigation immediately on Mr. Drawn and ignored evidence of other possibilities. The police had tunnel vision. They had a theory about who did the shooting, and they did everything they could to support that theory." Docket No. 7-7 at 22.[1] Regardless of whether the information was correct that the

[1] Defense counsel returned to this theme in her closing argument, as she hammered on the tunnel-vision theory repeatedly. Docket No. 7-11 at 40-42, 63; *see, e.g., id.* at 40 ("I did mention tunnel vision, and that's because the police in this case had tunnel vision. The police were focused from the very beginning on Mr. Drawn as a suspect in the case, and they focused their investigation on that theory."); *id.* at 41 ("The police started with their conclusion – they started with the conclusion that Mr. Drawn committed these crimes, and they worked backwards to support that conclusion, and that is not the way an unbiased investigation works."); *id.* at 42 ("Police in this investigation looked for what they wanted to hear. If it didn't fit their theory, then they disregard it as lies and fears with no basis to support that.").The prosecutor also mentioned that defense counsel had begun the trial with an argument that the "police had tunnel vision" and the prosecutor tried to

suspect dropped the baseball cap, by showing that a technician marked the baseball cap as evidence and the lead investigator ordered the baseball cap tested for DNA evidence when neither knew whether Drawn was connected to the baseball cap, the prosecution was able to show that the police were doing a normal investigation rather than an investigation focused solely on proving that Drawn was the shooter. The evidence showed an unbiased investigation rather than a biased one.

The California Court of Appeal reasonably could have used the above line of reasoning to conclude the admission of the information from the anonymous 911 phone caller was not a violation of Drawn's Sixth Amendment right to confrontation. This reasoning is not inconsistent with prior holdings by the United States Supreme Court because *Crawford* explicitly permits the admission of testimonial statements that are introduced for a purpose other than proving the truth of the matter asserted. Therefore, the state court's conclusion that there was not a Confrontation Clause violation does not warrant federal habeas relief.

c. <u>Harmless Error</u>

Even if there was a Confrontation Clause violation, the Court concludes that any such error would be harmless. An error is harmless unless it "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). In general, this inquiry is guided by several factors: "the importance of the testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony, the extent of cross-examination permitted, and the overall strength of the prosecution's case." *Whelchel v. Washington*, 232 F.3d 1197, 1206 (9th Cir. 2000) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)); *accord Slovik v. Yates*, 556 F.3d 747, 755 (9th Cir. 2009). A proper limiting instruction makes an error more likely to be harmless. *United States v. Lane*, 474 U.S. 438, 450, 106 S. Ct. 725, 732 (1986). Also, a longer jury deliberation relative to the length of the trial can indicate the error was not

show in his closing argument that was not true. Docket No. 7-11 at 16; *see also id.* at 17, 28, 39. He again chipped away at the tunnel-vision theory in his rebuttal argument. Docket No. 7-11 at 68, 69, 77, 79.

United States District Court
Northern District of California

harmless while a short deliberation can indicate otherwise. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001); *see also United States v. Lopez*, 500 F.3d 840, 846 (9th Cir. 2007).

The prosecution introduced substantial evidence that corroborated the statements made by the anonymous 911 phone caller, who provided the information that the suspect fled in the direction where the baseball cap was found. Most notably, a video showed the suspect fleeing south from the crime scene wearing a baseball cap. Docket No. 7-12 at 95. In addition, the baseball cap contained DNA that was consistent with Drawn's DNA, though it could not be confirmed because of the quality of the sample. Docket No. 7-9 at 88–91. The prosecution also introduced eyewitness testimony from one witness (LeClaire) who saw Drawn shoot one victim (Wheatfall) and then shoot another victim (Robinson) in a car nearby. Though LeClaire initially did not recognize Drawn in a photo lineup, six weeks later LeClaire identified Drawn in a photo lineup but said he was only "50 percent sure." Docket No. 7-7 at 109. Finally at trial, LeClaire stated that he initially lied to the police about his certainty because was afraid for his life and for his family. *Id* at 109–10. Once the prosecution promised to protect his family, LeClaire testified at trial that he was certain Drawn was the shooter. *Id* at 113–14. The victim Robinson also testified that he saw Drawn with Wheatfall right before the shooting, heard gunshots, and then was shot while sitting in his car. Robinson identified Drawn from a photo lineup five days after the shooting but was a reluctant witness at trial, telling the prosecutor that people who grow up in Oakland are not supposed to come to court and testify about what happened. *Id.* at 28. There also was evidence that Drawn fled the Oakland area where the shooting occurred—leaving behind his van, his family, and his business—and remained away until he eventually was arrested a year and a half later in Southern California.

Also supporting the conclusion that any error was harmless is the fact that the trial court gave limiting instructions. The trial court also admonished the jury to not use the evidence relating to the 911 call to decide the truth of the matter asserted. On the two occasions the evidence was presented, the trial court told the jury that the evidence relating to the 911 call could only be used to explain Technician Boyle's and Detective Rosin's conduct. Docket No. 7-9 at 12; Docket No. 7-10 at 82. The trial court also gave the jury a limiting instruction with regard to the same evidence at

the end of trial. Docket No. 7-11 at 91. Drawn has not provided any reason to depart from the normal presumption that jurors follow the court's instructions. *See Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985).

The relatively brief jury deliberation support a finding of harmlessness of any Confrontation Clause error. After a seven-day trial, the jury apparently took less than half a day to deliberate. The jury only took two hours to deliberate on the day of closing arguments and returned a verdict the following morning. Docket No. 7-4 at 39–41. This short jury deliberation relative to the length of the trial indicates that the jury did not have difficulty in coming to a consensus. Therefore, any error that may have occurred is less likely to have actually changed the outcome of the verdict. "'Longer jury deliberations weigh against a finding of harmless error because lengthy deliberations suggest a difficult case.'" *United States v. Lopez*, 500 F.3d at 846 (quoting *United States v. Velarde-Gomez*, 269 F.3d at 1036); *see, e.g., id.* (2.5-hour jury deliberations in illegal reentry case suggested any error in allowing testimony or commentary on defendant's post-arrest silence was harmless); *Velarde-Gomez*, 269 F.3d at 1036 (4-day jury deliberations in a two-count drug case supported inference that impermissible evidence affected deliberations). The half-day jury deliberations suggest the jury did not struggle with this case and weigh in favor of finding that any error in admitting the 911 caller's statements was harmless.

Based on the strength of the prosecution's case, the corroboration of the anonymous phone call by the video, the witnesses' identification of Drawn as the shooter, the trial court's proper limiting instructions, and the length of jury deliberations, the court concludes that any error with respect to the admission of evidence of the anonymous 911 phone call was harmless under the standard in *Brecht*. Therefore, even if an error occurred, Drawn is not entitled to habeas relief on his Confrontation Clause claim.

B. The Equal Protection Clause Claim

Drawn contends that his Fourteenth Amendment right to equal protection was violated when the trial court refused to resentence him under a later-enacted law that provided sentencing discretion with regard to a sentence enhancement for use of a firearm. The trial court lacked that

discretion when it originally sentenced him.

1. Background

When Drawn was sentenced in December 2015, he received two sentence enhancements of 25 years to life under California Penal Code § 12022.53(d) based on findings that he had used a firearm in both the murder and the attempted murder. *See* Docket No. 7-4 at 81–84 (abstract of judgment). Sentence enhancements under California Penal Code §§ 12022.5(a)(1), 12022.53(b), and 12022.53(c) were stayed. *See* Docket No. 7-4 at 81–84. At the time of Drawn's sentencing, California courts did not have the discretion to strike or dismiss a sentence enhancement allegation or finding regarding use of a firearm.

On October 11, 2017, the Governor of California signed Senate Bill 620 (SB 620), a law that ended the statutory prohibition on a court's discretion to strike or dismiss a firearm enhancement allegation or finding. SB 620 amended California Penal Code sections 12022.5(c) and 12022.53(h) to provide that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." These will be referred to as the "SB 620 amendments."

The SB 620 amendments went into effect on January 1, 2018. Subsequent California cases have held that the SB 620 amendments do "not apply retroactively to cases that [have become] final." *People v. Hernandez*, 34 Cal. App. 5th 323, 326 (2019) (citing *People v. Johnson*, 32 Cal.App.5th 938 (2019)). This created two classes of persons: those whose convictions became final before January 1, 2018, and those whose convictions became final on or after January 1, 2018.

After Drawn's conviction became final on November 7, 2017, he sought resentencing when the statutory amendments brought about by SB 620 became law. He contended that denying the Drawn argued in state court (as he does here) that his conviction had not yet become final when SB 620 was enacted. The Alameda County Superior Court rejected his argument, finding that the conviction became final 90 days after the California Supreme Court denied review on August 9, 2017, i.e., the conviction became final on November 7, 2017, before the SB 620 amendments took effect on January 1, 2018. The Alameda County Superior Court also explained that the California courts had "unanimously" concluded that the SB 620 amendments' grant of discretion to strike firearm enhancements applied only to "nonfinal convictions," which Drawn's was not. Docket No. 7-12 at 212. The Alameda County Superior Court's decision is a state law determination that this

superior court the discretion to strike or dismiss a firearm enhancement allegation or finding in his case amounted to a difference in treatment that violated his rights under the Equal Protection Clause. The superior court rejected his argument. The superior court determined that Drawn's conviction became final before SB 620 became effective and that the failure to apply the SB 620 amendments retroactively to his case did not violate Drawn's right to equal protection. Docket No. 7-12 at 212.

> [Drawn,] who was convicted and sentenced before the enactment of SB 620, is not similarly situated, for purposes of the law, to someone [whose] case was not yet final when SB 620 was enacted. "'[T]he Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.'"

Docket No. 7-12 at 213 (quoting *People v. Floyd*, 31 Cal. 4th 179, 181 (Cal. 2003) (quoting *Sperry & Hutchinson Co. v. Rhodes*, 220 U.S. 502, 505 (1911))).[3]

Drawn raised his Equal Protection Clause claim again in petitions for writ of habeas corpus in the California Court of Appeal and the California Supreme Court. Both of those courts summarily denied his claim.

When, as here, the most recent state opinion on the merits provides no explanation, the federal court can presume that the "unexplained decision adopted the same reasoning" as the reasoned decision from a lower state court. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). This court thus considers whether the Alameda County Superior Court's rejection of the equal protection claim was contrary to, or an unreasonable application of, clearly established federal law as set forth by the U.S. Supreme Court.

court does not revisit. *Hicks v. Feiock*, 485 U.S. 624, 629 (1988) (court is not free to review state court's determination of state law); *see id.* at 630 n.3 (quoting *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237-38 (1940) (determination of state law made by an intermediate appellate court must be followed and may not be "'disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise'"); *cf. Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (federal habeas relief does not lie for errors of state law). In other words, this court's analysis of the federal habeas claim accepts that (a) Drawn's conviction became final on November 7, 2017, and (b) under California law, the SB 620 amendments did not apply to cases, such as Drawn's, that had become final before SB 620 took effect on January 1, 2018.

[3] The superior court referred to the date the law was "enacted," but the context shows that the court meant the date the law became effective.

2. Analysis

The Fourteenth Amendment's Equal Protection Clause provides that no state shall deny to any person "the equal protection of the laws." U.S. Const. amend. XIV. The Equal Protection Clause ensures that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). When state action "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution," that action must be analyzed under strict judicial scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). When neither a suspect class nor a fundamental right is implicated, the appropriate standard of analysis is rational basis review, which requires only that disparate treatment be "rationally related to legitimate government interests." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). The rational basis standard presents a significant obstacle to an equal protection claim, as "legislative solutions must be respected if the 'distinctions drawn have some basis in practical experience.'" *McGinnis v. Royster*, 410 U.S. 263, 276 (1973) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966)).

The starting point is to determine the appropriate level of review for this case. Although Drawn was treated differently than persons whose convictions became final on or after January 1, 2018, that fact does not make him a member of a suspect class. *See Frontiero v. Richardson*, 411 U.S. 667, 682 (1973) (describing classifications based on sex, race, alienage, and national origin as "inherently suspect"). And, although liberty is affected when a defendant is sentenced following a conviction, this alone does not mean that different sentences impinge on a fundamental right. *Cf. United States v. Harding*, 971 F.2d 410, 412 (9th Cir. 1992) (holding that a longer sentence for an offense involving crack cocaine rather than powder cocaine does not implicate a fundamental or quasi fundamental right); *McQueary v. Blodgett*, 924 F.2d 829, 834 (9th Cir. 1991) ("Legislators do not likely intend to create liberty interests when they draft guidelines to govern the imprisonment of state convicts."). Because Drawn is neither a member of a suspect class nor being denied a fundamental right, rational basis review properly applies to his claim and requires only that the disparate treatment be rationally related to a legitimate state interest. *See Foster v. Washington State Board of Prison Terms and Paroles*, 878 F.2d 1233, 1235 (9th Cir. 1989); *McQueary*, 924 F.3d at

834–35.

Improvement of sentencing laws is a legitimate government interest. *See Foster*, 878 F.2d at 1235 (denying an equal protection challenge to prospective-only application of a new sentencing law under the rational basis standard); *McQueary*, 924 F.2d at 834–35 (citing *Foster* with approval). In order to make a statutory change to give judges discretion over sentence enhancements for firearms, California chose a starting point for its new sentencing scheme. Setting a starting date and applying statutory changes prospectively is not inherently unconstitutional. *See Sperry & Hutchinson Co. v. Rhodes*, 220 U.S. 502, 505 (1911) ("[T]he Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between rights of an earlier and later time."). In the context of sentencing, the Ninth Circuit has held that "'[t]here is nothing unconstitutional in a legislature's conferring a benefit on prisoners only prospectively.'" *Jones v. Cupp*, 452 F.2d 1091, 1093 (9th Cir. 1971) (quoting *Comerford v. Commonwealth*, 233 F.2d 294, 295 (1st Cir. 1956)) (denying an equal protection challenge to the failure to apply retroactively a statutory reduction in the maximum sentence for second-degree murder).

The starting point is to determine the appropriate level of review for this case. The Alameda County Superior Court cited to *People v. Floyd*, 31 Cal. 4th 179 (Cal. 2003), in support of its conclusion that the sentencing improvements brought about by the SB 620 amendments could be limited to prospective application. *Floyd* predated SB 620 and concerned another change to California's sentencing laws, Proposition 36's reduction of punishments for certain nonviolent drug offenses. *Floyd* determined that there was no equal protection violation in applying the Proposition 36 sentencing changes only to convictions occurring after the effective date of the new law. *See id.* at 188-91 (finding that Proposition 36, which generally provided for probation rather than imprisonment for nonviolent drug possession offenses, applied prospectively and did not violate equal protection principles in doing so). *Floyd* identified several reasons that provided a rational basis for California to apply the new sentencing law prospectively only: "'assur[ing] that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written'"; preventing numerous resentencing hearings of defendants who had already been sentenced under the former law; discouraging sentencing delays and other manipulation of the law; and deterring defendants from filing meritless appeals simply to delay the

time of finality. *Id.* at 190-91. Those same reasons would provide a rational basis for California to apply the SB 620 amendments prospectively only.

Although it may seem harsh to a person, such as Drawn, who ends up on the wrong side of the dividing line for the application of a new law, a state is allowed to legislate prospectively or retroactively without running afoul of the Equal Protection Clause. California's decision to make the SB 620 amendments prospective in operation is rationally related to the legitimate government interest in improving the state's sentencing scheme. The Alameda County Superior Court's rejection of Drawn's equal protection claim thus was not contrary to, or an unreasonable application, of clearly established federal law as set forth by the U.S. Supreme Court. *Accord Peters v. Sherman*, No. EDCV 19-1016-PA (GJS), 2019 U.S. Dist. LEXIS 98142, at *10 (C.D. Cal. June 11, 2019) (rejecting equal protection challenge to the SB 620 amendments because there is no clearly established federal law recognizing a Fourteenth Amendment violation when a new law or amendment is applied prospectively). Drawn is not entitled to habeas relief on this claim.

C. No Certificate of Appealability

A certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). This is not a case in which "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a certificate of appealability is DENIED.

CONCLUSION

The petition for writ of habeas corpus is DENIED. The clerk shall close the file.

IT IS SO ORDERED.

Dated: October 15, 2019

SUSAN ILLSTON
United States District Judge

time of finality. *Id.* at 190-91. Those same reasons would provide a rational basis for California to apply the SB 620 amendments prospectively only.

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CONCLUSION

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IT IS SO ORDERED.

Dated: October 15, 2019

SUSAN ILLSTON
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT DRAWN,

Plaintiffs,

v.

ROBERT NUESCHID,

Defendants.

Case No.: 19-cv-02150-SI

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that:

(1) I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California; and

(2) On 10/16/2019, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an interoffice delivery receptacle located in the Clerk's office.

Robert Drawn ID: AY7225
C.S.P. Solano State Prison FA3-127
P.O. Box 4000
Vacaville, CA 95696-4000

Dated: 10/16/2019

Susan Y. Soong
Clerk, United States District Court

By: Tracy Geiger
Tracy Geiger, Deputy

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT DRAWN, Plaintiffs, v. ROBERT NUESCHID, Defendants.	Case No. [illegible] **CERTIFICATE OF SERVICE**

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(1) I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California; and

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Robert Drawn ID: AY7225
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P.O. Box 4000
Vacaville, CA 95696-4000

Dated: 10/16/2019

Susan Y. Soong
Clerk, United States District Court

By: [illegible]
Tracy Geiger, Deputy

APPENDIX "C"

APPENDIX "C"

S252676

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ROBERT DRAWN IV on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX "D"

APPENDIX "D"

Filed 5/30/17 P. v. Drawn CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT DRAWN IV, Defendant and Appellant.	A147250 (Alameda County Super. Ct. No. C173278)

Robert Drawn IV was convicted of the first degree murder of Waleed Wheatfall, the attempted murder of K. Robinson and related firearms charges. His defense at trial was that he was not the shooter. Drawn contends it was error to admit hearsay evidence that police had information about the direction the shooter fled, and that the error was prejudicial because it tied the shooter to a hat that contained DNA consistent with his own. Not so. The testimony was properly admitted for a relevant nonhearsay purpose and, in any event, it was not prejudicial, so we affirm. But we correct two sentencing errors properly conceded by the People.

BACKGROUND

The shootings occurred near the intersection of 57th Avenue and Foothill Boulevard in Oakland, where Drawn operated an auto detailing service out of a

space he leased from a car wash. Drawn typically parked his blue van with large rims at the car wash or on the street nearby.

On the day of the shootings the owner of the car wash saw Drawn conversing with Wheatfall. From their body language, "[i]t seemed like, you know, points were trying to be made." Later the owner heard gunshots, crossed the street and saw Robinson, in his car, shot.

That afternoon M. LeClaire was sitting in his parked truck at the car wash when he noticed a "big African-American guy with a full beard" in a truck parked next to his. The man was "talking really loud" and apparently arguing with someone. A few minutes later a blue van with big rims pulled in and parked in front of LeClaire's truck. Drawn got out of the van and the bearded man got out of his truck. Both were yelling and Drawn said "Come on. I'm gonna go knock this nigga's head off. Let's go knock this nigga's head off." The two crossed the street to the Safeland Market parking lot, where a man approached Drawn and extended his right arm as though to shake his hand. Drawn drew a gun, shot the man several times, then walked up to a parked car and "shot whoever was sitting there through the window." The bearded man ran back to his truck and drove away. Nobody returned to the blue van.

The next day police showed LeClaire a photo lineup. He recognized Drawn as the shooter, but did not want to get involved so he told police he did not recognize anyone. About six weeks later police showed LeClaire another photo lineup. This time he identified Drawn "[b]ecause I didn't feel I was so much under pressure like the first time," but said he was only 50 percent sure because he was afraid for his family's safety. He testified at trial that he lied to police about being uncertain and lied again at the preliminary hearing because he was afraid of repercussions from Drawn or his friends. LeClaire decided to do "the right thing"

after the prosecutor promised to protect his family, and at trial testified he was certain Drawn was the shooter.

Robinson testified he was hanging out with Wheatfall at the Safeland Market the day of the shooting. He observed Wheatfall and Drawn having a conversation. Drawn left but returned 15 or 20 minutes later. Robinson thought he and Wheatfall were going to get jumped, so got into his car to put his phones away "[s]o I wouldn't break them if I get into a fight or something." Moments later he heard gunshots. Robinson was shot three times as he sat in his car.

Robinson called 911. A recording of his call was played for the jury. He said the shooter was "the guy at the detail shop across the street" and had a blue van. Five days later Robinson identified Drawn as the shooter from a six-pack photo lineup on which he circled and initialed Drawn's photograph.

At trial Robinson was a reluctant witness. He testified he never saw the shooter and did not remember being shown or making an identification from a photo lineup. But, he conceded that he recognized his handwriting and initials next to Drawn's photo. He later told police he did not know what he was doing when he identified the shooter because he was on medication. Robinson told the prosecutor that people who grow up in Oakland "are not supposed to come to court and testify . . . about what happened."

A. Williams and R. Lee drove to Safeland Market to see Wheatfall shortly before the shootings. Williams got out of the car and greeted Wheatfall. Then they heard gunshots. Lee looked around and saw a tall man in a hoodie and baseball cap shooting a gun toward the ground. She ducked and tried to drive away, but her car ran over "somebody or something" so she stopped and got out. Williams had run behind the market when he heard shots but came back to look for Wheatfall. Wheatfall was dead, his body pinned under Lee's car. The cause of

death was multiple gunshot wounds. Neither Williams nor Lee was able to identify the shooter.

Drawn never returned to the car wash for his van and stopped visiting his children's mother not long after the shooting. He called her two or three times per month, but he blocked his phone number and would not disclose his whereabouts.

Police found a blue baseball cap in the direction the shooter was seen fleeing from the crime scene. DNA on the cap was consistent with Drawn and could have come from him, but a statistical analysis was not possible due to the quality of the sample.

Drawn was arrested in Southern California almost a year and a half later. A jury found him guilty of first degree murder and attempted murder, each enhanced for his use of a firearm, and three firearms offenses. Sentenced to 84 years to life in prison, Drawn filed this timely appeal.

DISCUSSION

I. Hearsay

Drawn contends his convictions for murder and attempted murder must be reversed because a police sergeant and an evidence technician were permitted to testify that the blue baseball cap was collected and tested for DNA due to information the suspect fled in the direction where it was found. Drawn argues this was inadmissible hearsay and that the error was prejudicial because the testimony "struck directly at the heart of appellant's defense that he was not the shooter" and the prosecution's case was "not overwhelming." We disagree.

Background

The prosecutor moved in limine to introduce a recording of an anonymous 911 call made shortly after the shooting. The caller reported that one of the suspects dropped a dark blue hat as he fled and described the location where police could find it. The court ruled the recording was not admissible as a spontaneous

utterance, "[s]o it may be admissible for non-hearsay purpose[s], but it's not admissible for the truth asserted in the statement."

At trial, the prosecutor asked questions of two witnesses that elicited information drawn from the recording. Over a defense objection, evidence technician Patricia Boyle testified that she placed a placard next to a baseball cap found not far from the shootings because she "was advised that the suspect fled southbound on foot." The court admonished the jury. "[T]echnician Boyle just testified that she was advised that the suspect fled this direction. Now, that would be hearsay if it was being offered to prove that, in fact, the suspect fled that direction. However, there's a non-hearsay purpose which is information that was imparted to Technician Boyle that the suspect fled that way. Whether it's true or not, based on that information that's why she placed the placard there and that explains her conduct. That's a non-hearsay purpose for why the evidence is offered."

Lead police investigator Sergeant Rosin testified over objection that he had the cap tested for DNA "because I had information that the suspect in this crime had ran from the crime scene on foot in a southern direction which would cover this area . . . ." The court admonished the jury: "Again, ladies and gentlemen, the statement that Detective Rosin just related about the suspect running on that street is offered only as giving information to this detective which caused him to have the hat tested for DNA not as truth of the fact that the suspect, in fact, ran south on that street." At the conclusion of trial, the court instructed the jury pursuant to CALJIC No. 2.09 that "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted, you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

Analysis

"An out-of-court statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute. (*People v. Armendariz* (1984) 37 Cal.3d 573, 585 . . . ; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1204–1205 . . . ; see *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 . . . [' "one important category of nonhearsay evidence—evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement." '].) (*People v. Turner* (1994) 8 Cal.4th 137, 189, overruled on another point in *People v. Griffin* (2004) 33 Cal.4th 536, 555 fn. 5.) We review the court's relevance determination for abuse of discretion. (See *People v. Rowland* (1992) 4 Cal.4th 238, 264.)

Drawn contends the court erred when it concluded the challenged testimony was admissible to explain why police collected and tested the hat for DNA because "the officers' conduct and the legality of their actions in collecting this evidence was not a disputed issue." Therefore, he maintains, the testimony was not relevant for any nonhearsay purpose and should have been excluded. Not so

"A hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute." (*People v. Armendariz*, *supra*, 37 Cal.3d at p. 585; *People v. Lucero* (1998) 64 Cal.App.4th 1107, 1109–1110.) Here, the officers' reason for treating the baseball cap as potential evidence, i.e., information that the suspect fled in that direction, contradicted a main theme of Drawn's defense: that the police conducted a sloppy

and biased investigation, pursuing only evidence they knew would implicate Drawn while ignoring other avenues of investigation. Defense counsel told the jury in her opening statement that "the police focus[ed] their investigation immediately on Mr. Drawn and ignored evidence of other possibilities. The police had tunnel vision. They had a theory about who did the shooting, and they did everything they could to support that theory." Repeating the theme in closing, she argued the police "started with the conclusion that Mr. Drawn committed these crimes, and they worked backwards to support that conclusion, and that is not the way an unbiased investigation works. Instead, we see the bias. We see the bias—we see the bias in the steps that they took in this investigation. We see the bias in the steps that they did not take in this investigation." So the police "looked for what they wanted to hear. If it didn't fit their theory, then they disregard it as lies and fears with no basis to support that." In this context, police retrieval and testing of the hat for DNA was directly relevant. There is nothing in the record to show that police had any reason to believe the hat belonged to Drawn at the time it was taken from the scene. These circumstances were relevant to refute his theory that he was targeted by police. The court's ruling was well within its discretion.

In any case, admission of the evidence was also nonprejudicial. Drawn complains the hearsay information that the shooter fled southward tied the cap (with arguably his DNA) to the shooter, but the jury saw a video depicting the shooter, wearing a baseball cap, fleeing in that direction. That police possessed information the shooter fled south thus had little if any independent significance. Moreover, the jury was admonished not to consider the challenged testimony as proof the suspect fled south, and the prosecution evidence, including Robinson's identification of Drawn from a photo lineup and LeClaire's in-court identification, was compelling. We are satisfied the challenged testimony could not have affected the verdict under any standard.

II. Sentencing Issues

Drawn was charged in count three with unlawfully transporting an assault weapon and in counts four and five with being a felon in possession of a firearm. Counts three and four were based on his possession of an assault weapon found in the blue van, while count five was based on his possession of the handgun used to shoot Wheatfall and Robinson.

The court imposed a two-year concurrent term for count four and imposed and stayed a two-year term for count five pursuant to Penal Code section 654. Drawn and the People correctly observe that this was error. Both counts three and four were based on possession of the assault weapon, so the court should have stayed count four. (See *People v. Jones* (2012) 54 Cal.4th 350, 353, 357 [single possession or carrying of a single firearm on a single occasion may be punished only once under section 654].) On the other hand, count five was based on possession of the handgun, so section 654 did not apply. (See *People v. Correa* (2012) 54 Cal.4th 331, 334, 342–343.) We therefore order the sentence modified to stay execution of sentence on count four and impose the concurrent term on count five, consistent with section 654 and the intent apparent from the court's sentencing decision.

Both parties also correctly agree that the abstract of judgment fails to reflect the trial court's award of 1,010 days of presentence credit for actual time served. We modify the judgment accordingly and remand for the trial court to determine whether Drawn is entitled to good conduct credits not shown on the abstract of judgment.

DISPOSITION

The case is remanded for a determination of whether Drawn is entitled to good conduct credits not reflected on the abstract of judgment. The sentence is modified to stay the two-year concurrent term imposed on count four and impose

the two-year concurrent term imposed and stayed on count five. The trial court shall modify the abstract of judgment to show this change and to reflect Drawn's presentence custody credits and, if applicable, any good conduct credits to which he is entitled. The judgment is affirmed in all other respects.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.

Docket (Register of Actions)
The People v. Drawn
Division 3
Case Number A147250
Date Description Notes
01/13/2016 Notice of appeal lodged/received (criminal).
03/22/2016 Counsel appointment order filed. Eric R. Larson (independent/40)
04/18/2016 Record on appeal filed. CT-2, RT-4
Sealed: PO Report
05/25/2016 Record omission letter received. Dated 5/12/16.
CT - Several written motions in limine. Minute order from the trial proceedings on 9/22/15. Transcript of two audio recordings played for the jury during trial.
RT - Marsden hearing on 11/24/15.
05/25/2016 Requested - extension of time. 30 days to 6/30
05/26/2016 Granted - extension of time.
06/17/2016 Filed augmented record pursuant to rule 8.340. 1 CT, 1 RT - Marsden hearing on 11/24/15.
06/29/2016 Requested - extension of time. 30 days to 8/1
06/30/2016 Granted - extension of time.
08/02/2016 Default sent to court appointed counsel. Defendant and Appellant: Robert Drawn, IV
Attorney: Eric R. Larson
08/02/2016 Record omission letter received. CT of written jury instructions.
08/25/2016 Appellant's opening brief. Defendant and Appellant: Robert Drawn, IV
Attorney: Eric R. Larson Two extensions granted for a total of 62 days:
05/25/2016 Requested - extension of time. Requested for 06/30/2016 By 30 Day(s)
05/26/2016 Granted - extension of time. Due on 06/30/2016 By 30 Day(s)
06/29/2016 Requested - extension of time. Requested for 08/01/2016 By 32 Day(s)
06/30/2016 Granted - extension of time. Due on 08/01/2016 By 32 Day(s)
08/26/2016 Filed augmented record pursuant to rule 8.340. c-1
09/26/2016 Requested - extension of time. to 10/26
09/26/2016 Granted - extension of time.
10/24/2016 Requested - extension of time. 33 days
10/28/2016 Granted - extension of time.
11/28/2016 Requested - extension of time. to 12/28/16
12/08/2016 Granted - extension of time.
12/30/2016 Respondent notified re failure to file respondent's brief. Plaintiff and Respondent: The People
Attorney: Office of the Attorney General
01/30/2017 Respondent's brief. Plaintiff and Respondent: The People
Attorney: Office of the Attorney General Three extensions granted for a total of 93 days:
09/26/2016 Requested - extension of time. Requested for 10/26/2016 By 30 Day(s)
09/26/2016 Granted - extension of time. Due on 10/26/2016 By 30 Day(s)
10/24/2016 Requested - extension of time. Requested for 11/28/2016 By 33 Day(s)
10/28/2016 Granted - extension of time. Due on 11/28/2016 By 33 Day(s)
11/28/2016 Requested - extension of time. Requested for 12/28/2016 By 30 Day(s)
12/08/2016 Granted - extension of time. Due on 12/28/2016 By 30 Day(s)
02/21/2017 Appellant's reply brief. Defendant and Appellant: Robert Drawn, IV
Attorney: Eric R. Larson
02/21/2017 Case fully briefed.
03/06/2017 Case on conference list. 17-3
03/06/2017 Oral argument waiver notice sent.
03/08/2017 Record to court for review.
03/17/2017 Argument waived by: (no response - 10 day notice)
05/30/2017 Opinion filed. (Signed Unpublished) The case is remanded for a determination of whether Drawn is entitled to good conduct credits not reflected on the abstract of judgment. The sentence is modified to stay the two-year concurrent term imposed on count four and impose the two-year concurrent term imposed and stayed on count five. The trial court shall modify the abstract of judgment to show this change and to reflect Drawn's presentence custody credits and, if applicable, any good conduct credits to which he is entitled. The judgment is affirmed in all other respects.
07/03/2017 Service copy of petition for review received.
07/11/2017 Record transmitted to Supreme Court.
08/09/2017 Petition for review denied in Supreme Court.
08/16/2017 Remittitur issued.
08/16/2017 Case complete.
08/23/2017 Record returned from Supreme Court.
03/07/2018 Shipped to state retention center, box # / list #: L369

Additional material from this filing is available in the Clerk's Office.