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SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

FREDDIE FUIAVA,
Defendant and Appellant.

No. S055652

APPELLANT'S SUPPLEMENTAL BRIEF

Appeal from the Judgment of the Superior Court
Los Angeles County, State of California
No. BA115681

HONORABLE S. ROBERT J. PERRY, TRIAL JUDGE

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FREDDIE FUIAVA, Defendant and Appellant.	No. S055652 (Superior Court No. BA115681 Los Angeles County)

APPELLANT'S SUPPLEMENTAL BRIEF

ARGUMENT

THE INTRODUCTION OF TESTIMONIAL HEARSAY EVIDENCE OF THE CIRCUMSTANCES OF THE 1994 SHOOTING IN AGGRAVATION OF THE PENALTY DEPRIVED FUIAVA OF HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AND TO A FAIR AND RELIABLE CAPITAL JUDGMENT AS PROTECTED BY STATE STATUTE AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Factual Background.

In his case in chief in aggravation of the penalty, the prosecutor relied on the evidence presented during the guilt phase that Fuiava had been convicted in 1992 for assault with a firearm in violation of Penal Code section 245 (a)(2), as relevant to the penalty factor of "[t]he presence or absence of any prior felony convictions" (Pen. Code, § 190.3 (c).) (See 1st Supp. CT 20 [Trial Exh. #28; 5 RT 1038; 7 RT 1548, 12 RT 2763].)

Though admitting his conviction pursuant to plea, Fuiava testified at the guilt phase that in fact he had not committed that assault. (8 RT 1934-1935.)

During his case in chief as to aggravation, the prosecutor presented the testimony of Viking deputy Matt Brady (12 RT 2604) as to the facts underlying that conviction, as relevant to the penalty factor of "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" (Pen. Code, § 190.3 (b).)

Brady testified that he contacted a man and a woman, Clifton Hill and Dee Dee Carr, respectively, and their two-year-old child in response to a report of an incident. (RT 2604-2605, 2611.) He testified that they described a shooting that had taken place involving them, and he brought them to the reported scene of the crime. (12 RT 2605.) Brady testified that Carr advised him that "she had been shot at and the bullet had passed right through ... her hair and actually took pieces of her hair out as it passed through the top of her skull or top of the head basically." (12 RT 2606.) While the bullet "didn't penetrate the skin ...[,] she said it was tender." (12 RT 2606.) Brady then transported Hill to where Fuiava and others were being detained for a field show-up where Hill identified Fuiava as the shooter. (12 RT 2608-2609.)

During cross-examination, Brady further volunteered that "Dee Dee Carr was too traumatized and frightened to get involved in a field show-up being as the bullet had just about killed her," and that "she didn't want to go over there and she was very shaky ...." (12 RT 2612-2613.)

The court subsequently instructed the jury that it could use in aggravation the presence of past violent criminal activity by Fuiava based on evidence that Fuiava had committed, among other things, an assault with a firearm in 1992 that involved the use of force or violence, if it found that the evidence showed such activity beyond a reasonable doubt. (12 RT 2730, 2733.)

B. Legal Analysis.

1. The Error.

All of Brady's testimony about the shooting was inadmissible on hearsay and other grounds, and violated Fuiava's federal constitutional rights to a fair trial, to confrontation of the evidence against him, and to a reliable death verdict.

The evidence of the statements about the shooting made to Brady in the course of his investigation of it is a paradigm of testimonial hearsay, admission of which was condemned in *Crawford v. Washington* (2004) 541 U.S. 36, 54-54, 124 S.Ct. 1354, 158 L.Ed.2d 17. The Court there found that admission of such hearsay violated a defendant's Sixth Amendment right to confront the witnesses against him where, as here, the declarant was not called to testify at trial and the defendant had no previous opportunity for cross-examination of the declarant.[1] In *Crawford*, the Court condemned such use of testimonial hearsay at trial "regardless of whether or not the statement falls within a state-law hearsay exception or bears indicia of reliability, overruling *Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531,

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[1] Although *Crawford* was decided after trial in this case, the decision is retroactive to cases pending direct review. (See, e.g., *People v. Cage* (2007) 40 Cal.4th 965, 974, fn. 4; *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400.)

65 L.Ed.2d 597." (*People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1401 (citing *Crawford, supra,* 124 S.Ct. at pp. 1369-1372).)[2]

As the High Court later explained:

> When we said in *Crawford, supra,* at 53, 124 S.Ct. 1354, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford,* " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " 541 U.S., at 51, 124 S.Ct. 1354.

(*Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266, 2276].)

Under *Crawford* and *Davis*, the statements at issue were testimonial hearsay. As this Court explained *Davis*:

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[2] The *Crawford* issue does not even need to be reached if the statements were not "otherwise admissible under the state hearsay law ...." (*People v. Cage* (2007) 40 Cal.4th 965, 975.) Here, the evidence in question was inadmissible hearsay both as a matter of state law (see Evid. Code, § 1200) and constitutional law. While Evidence Code section 1238 provides an exception to the hearsay rule of exclusion for prior identifications if certain foundational requirements are met, that exception does not apply here because at least one of those foundational requirements was not met – namely, the evidence was not "offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time." (Evid. Code, § 1238, subd. (c).) Moreover, the statements were inadmissible even under *Roberts*, for there "the court held that the hearsay statement of a declarant not present for cross-examination at trial was admissible under the confrontation clause only if ... the declarant was truly unavailable to testify ...." (*People v. Cage*, 40 Cal.4th at p. 975.)

> The court succinctly distinguished testimonial from nontestimonial statements as necessary to decide the matters before it. "Statements are nontestimonial," the court said, "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis, supra,* --- U.S. ----, ----, ----, 126 S.Ct. 2266, 2273-2274.)

(*People v. Cage* (2007) 40 Cal.4th 965, 982.)

Because the entire purpose of Brady's interrogation was to establish the facts of a past crime from the witnesses in order to identify, arrest, and prosecute the perpetrator, the statements he related in his testimony were quintessentially testimonial hearsay. Therefore, admission of them violated Fuiava's constitutional right to confront the witnesses against him, and to a fair and reliable death judgment. (See, e.g., *Proffitt v. Wainwright* (11th Cir. 1982) 685 F.2d 1227, 1254-1255 ["the constitutional right to cross-examine witnesses applies to capital sentencing hearings"]; *United States v. Mills* (C.D. Cal. 2006) 446 F.Supp.2d 1115, 1135 [*Crawford's* Confrontation Clause "protections apply to any proof of any aggravating factor during the penalty phase of a capital proceeding"].)

2. The Prejudice.

Because of the constitutional dimension of the error, the prosecution must prove harmlessness beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. (See, e.g., *People v. Cage*, 40 Cal.4th at p. 991 [applying the Chapman standard of prejudice to *Crawford* error].) Under this standard, the prosecution must

show "not [that], in a trial that occurred without the error, a guilty verdict would surely have been rendered, but [that] the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, __ [124 L.Ed.2d 182, 189, 113 S.Ct. 2078, 2081] (italics in original).)

The prosecution cannot do so here, since it substantially relied on the testimonial hearsay to persuade the jury to return a death judgment. The prosecution found it necessary not only to smuggle in this evidence to make its case for death, but also to exploit that evidence in its closing argument for death. The prosecutor argued:

> You have heard during the course of the testimony here testimony concerning five separate shootings that the defendant was involved in before he killed Deputy Blair. Five separate shootings.
>
> ....
>
> And then we hear about Dee Dee Carr who has a crease in her head, another woman, a bullet crease in her head.
>
> Can you imagine what we're talking about here, how many inches and she would be another victim to this killing machine?
>
> This killing machine has never from the time that he was 13 years old displayed anything but a blatant disregard for human life.... [¶] All he does is shoot people. That's all he ever has done.

(12 RT 2761-2762.)

The prosecutor further argued:

> This killing machine has never ... displayed anything but a blatant disregard for human life. And I emphasize human. And just people in our society....

....

> Now he is 25, and we know that he has hit three people. We know that.

(RT 2763.)

The only way "we know" that he hit Dee Dee Carr – indeed, in the words of Brady, "nearly killed her" -- is through the testimonial hearsay the prosecutor snuck into the trial. The prosecutor did so, and then exploited that evidence in his argument to the jury, precisely because he knew the power of such evidence to persuade for death. In *People v. Robertson* (1982) 33 Cal.3d 21, 54, this Court recognized "the overriding importance of 'other crimes' evidence to the jury's life-or-death determination." Certainly the prosecutor gave overriding importance to this evidence to foster the image of Fuiava as "a killing machine."

In *Robertson* the court found prejudicial the jury's wrongful exposure to evidence of other crimes of violence despite the fact that "the prosecutor did not discuss this [evidence] in his closing argument at the penalty phase." (*People v. Robertson*, *supra*, 33 Cal.3d at p. 55.) The Court so found based on several considerations, including the similarity of those crimes to the capital offense and "the difficulty in ascertaining 'the precise point which prompts the death penalty in the mind of any one juror.' [Citation]." (*Id.* at p. 54; brackets in quote deleted) These considerations apply here, as does the final consideration noted by the Court in *Robertson*: "[T]he potential for prejudice was particularly serious because the error in question significantly affected the jury's consideration of 'other crimes' evidence, a type of evidence which this court long ago recognized 'may have a particularly damaging impact on the jury's

determination whether the defendant should be executed.'" (*Id.* at p. 54.) As in *Robertson*, "we cannot gamble a life on the possibility that the evidence … did not sway a single juror toward the death penalty." (*Id.* at p. 55.)

Reliability of a death judgment is a constitutional demand under the Eighth and Fourteenth Amendments. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 586. ["allowing petitioner's death sentence to stand although based in part on a reversed conviction violates" the Eighth Amendment's demand for the reliability of a death judgment].) In *Johnson*, the Court found the illegitimate evidence prejudicial in part because "[t]he prosecutor repeatedly urged the jury to give it weight in connection with its assigned task of valancing aggravating and mitigating evidence 'one against the other." (*Ibid.*) As the Court emphasized, even putting aside the prosecutor's reliance on the evidence in closing argument, where there is "a possibility" that wrongfully admitted evidence was "'decisive' in the 'choice between a life sentence and a death sentence' [citation]," a death judgment may not stand. (*Ibid.*.)

There was such a reasonable possibility here, for the prosecutor expressly urged the jury to give this evidence substantial weight and find that death was the appropriate punishment in light of it. Moreover, the testimonial hearsay not only rebutted Fuiava's testimony that he had not been the shooter, but showed that he had literally come within a hair of killing another person. Thus, it gave force to the prosecutor's repeated references to Fuiava as a career killer, enlarging the possibility that the evidence proved decisive in the jury's choice of death over life.

For these reasons, the admission of the hearsay evidence describing the circumstances of the 1994 assault and identifying Fuiava as the shooter constituted state and federal error that requires reversal. Particularly when this error is considered in conjunction with all the other errors that occurred in this case, the prejudice Fuaiva suffered requires reversal. (See AOB. Arg. XXVIII.)

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of death.

Dated: February 29, 2008

Respectfully submitted,

MICHAEL SATRIS
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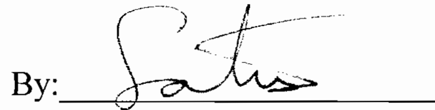
By: 

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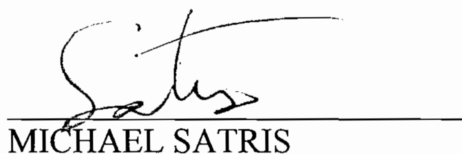
CERTIFICATE OF APPELLATE COUNSEL

Pursuant to rule 8.520 (d)(2) of the California Rules of Court

I, Michael Satris, appointed counsel for Appellant Freddie Fuiava, hereby certify, pursuant to rule 8.520 (d)(2) of the California Rules of Court, that I prepared the foregoing Appellant's Supplemental Brief on behalf of my client, and that the word count for this petition, including footnotes, is 2,261 words. This petition therefore complies with the rule, which limits a supplemental brief to 2,800 words. I certify that I prepared this document in Microsoft Word 2000, and that this is the word count Microsoft Word generated for this document.

Dated: March 1, 2008



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California Supreme Court No. S055652
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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of Marin County. I am over the age of eighteen years and not a party to the within above entitled action. My business address is P.O. Box 337, Bolinas CA.

On March 3, 2008, I served the within **APPELLANT'S SUPPLEMENTAL BRIEF** on the interested parties in said action causing to be placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States Post Office box addressed to the parties as follows:

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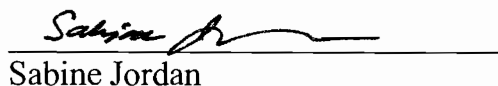
I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 3, 2008.



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