IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

FREDDIE FUIAVA,

Defendant and Appellant.

Los Angeles County Superior Court No. BA115681
The Honorable Robert J. Perry, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Constitutional Provisions

TABLE OF AUTHORITIES (continued)

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RESPONDENT'S SUPPLEMENTAL BRIEF

ARGUMENT

Appellant contends that the introduction at the penalty phase of hearsay evidence regarding the circumstances of his 1992 conviction for assault with a firearm deprived him of his right to confront adverse witnesses and to a fair and reliable capital judgment, as protected by state statute and the United States Constitution. (Appellant's Supplemental Brief ["ASB"] 1-9.)[1/] The contention should be rejected.

A. Factual Backgrond

During the guilt phase, the prosecution presented evidence that appellant was on parole at the time he shot and killed Los Angeles County Deputy Sheriff Stephen Blair. Specifically, the prosecution presented evidence that appellant was on parole for two convictions of assault with a firearm in violation of Penal Code section 245, subdivision (a). Appellant incurred the first conviction on October 16, 1989, and the second on May 14, 1992. (5RT 1034-1040; 7RT

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1. Appellant refers to a "1994 shooting" and a "1994 assault." (ASB 1, 9.) As set forth below, the statements appellant contends are hearsay are all related to his 1992 conviction for assault with a firearm.

1548; Peo. Exh. 28 [abstract of judgment].) During cross-examination regarding the 1992 conviction, appellant admitted he had pled guilty to shooting a "lady." Appellant testified that he did not remember the charge, that he "just took the deal," that he did not know that anybody had been shot, but "thought she was grazed," explaining that "she got skinned in the head or something." (8RT 1934-1937.)

At the penalty phase, the prosecution presented the testimony of Deputy Matt J. Brady regarding the circumstances of appellant's 1992 conviction.[2/] On March 14, 1992, at about 1:15 a.m., Deputy Brady, in response to a radio call, encountered Dee Dee Carr, Clifton Hill and a two-year-old boy. Carr and Hill described a shooting. Deputy Brady saw five expended shell casings. Deputy Brady saw that Carr had a bullet wound on her head. It appeared that a bullet passed through her hair, along the top of her skull, and removed pieces of hair from her head. The bullet did not penetrate her skin. Carr and Hill described the vehicle involved in the shooting, and the perpetrator. (12RT 2603-2607, 2610-2611.)

About fifteen minutes later, Deputy Brady drove Hill to the 5200 block of Walnut Street in Lynwood. Deputy Brady saw a vehicle and individual that matched the description provided by Carr and Hill. Appellant was identified at the field show-up. There were five other persons in the field show-up. Appellant was arrested "as a result of all the evidence [Deputy Brady] had accumulated." (12RT 2607-2610.)

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2. The prosecution argued the 1992 conviction as an aggravating factor under section 190.3, factor (b), "[t]he presence or absence of criminal activity which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" and as an aggravating factor under section 190.3, factor (c), "[t]he presence or absence of any prior felony conviction." (12RT 2761-2763.)

Deputy Blair, the murder victim in the instant case, assisted Deputy Brady's investigation of the 1992 shooting. The trial court did not permit Deputy Brady to testify regarding Carr and Hill's description of the vehicle or the perpetrator. (12RT 2606-2608.)

On cross-examination, Deputy Brady showed his Viking tattoo at the request of appellant's trial counsel. Deputy Brady explained he was the 76th Viking. Deputy Brady could not recall whether he or his partner conducted a gunshot residue test of appellant's hands, or the results of that test. Carr was "too traumatized and frightened" to participate in the field show up. Hill did not have trouble identifying appellant; before Deputy Brady could stop the car, Hill, who appeared "very excited," stated, "That's him." Deputy Brady did not know who owned the car involved in the shooting. (12RT 2611-2614.)

B. Appellant Has Waived His Claims

As a preliminary matter, appellant has waived any claim that the admission of Brady's testimony regarding Carr and Hill's hearsay statements violated his right to confrontation and cross-examination under the Sixth Amendment, or constituted state law error. The record shows appellant did not make any objection that Hill and Carr's statements were inadmissible as hearsay, or that the admission of their statements violated his Sixth Amendment right to confrontation.[3/].

Moreover, the record also shows that appellant affirmatively waived this claim. The Reporter's Transcript of the May 14, 1992, proceedings in which appellant pled no contest to one count of assault with a firearm (the incident

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3. The defense made only one objection during Deputy Brady's testimony. The prosecutor asked Deputy Brady why he went to the 5200 block of Walnut Street. Deputy Brady testified that Deputies Blair and Gittisarn had found out the description of the shooting suspect. The defense objected before Deputy Brady could finish his response. The trial court sustained the objection, noting the question called for hearsay.

with Carr and Hill as the victims) shows that appellant was informed of, and expressly waived, his right to confront and cross-examine witnesses. (2CT 580-581.) Thus, the claim should be deemed waived. (*People v. Tafoya* (2007) 42 Cal.4th 147, 166 [defendant forfeited confrontation clause claim by failing to raise it at trial]; *People v Lewis & Oliver* (2006) 39 Cal.4th 970, 1052 [same].) In any event, the claim should be rejected.

C. General Sixth Amendment Principles

The Sixth Amendment provides that a criminal defendant has the right to confront adverse witnesses. (U.S. Const., 6th Amend.; see Cal.Const., art. I, § 15.) The Sixth Amendment's Confrontation Clause precludes the admission of "testimonial" hearsay statements unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant regarding those statements. (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54, 68 [124 S.Ct. 1354, 158 L.Ed.2d 177]; *Davis v. Washington* (2006) 547 U.S. 813, 822 [126 S.Ct. 2266, 165 L.Ed.2d 224].)

D. This Court Should Hold that The Sixth Amendment Right to Confrontation Does Not Apply In Capital Sentencing Proceedings

There is "a great deal of disagreement" as to the issue of whether *Crawford* and/or the Sixth Amendment right to confrontation applies to capital sentencing proceedings. (*United States v. Mills* (C.D. Cal. 2006) 446 F.Supp.2d 1115, 1128; *Taylor v. State* (Utah 2007) 156 P.3d 739, 766, fn. 4 [in capital case, noting *Crawford* has "triggered some debate as to whether confrontation rights apply to sentencing" and citing cases, but declining to address issue].)

Some courts have held that *Crawford* does not bar the admission of testimonial hearsay at capital sentencing proceedings. (*United States v. Fields*

(5th Cir. 2007) 483 F.3d 313, 325-326, 332; *Summers v. State* (Nev. 2006) 148 P.3d 778, 781-783; *State v. McGill* (Ariz. 2006) 140 P.3d 930, 942.) Similarly, prior to *Crawford*, several courts, citing *Williams*, have held that the Sixth Amendment Confrontation Clause does not apply in capital sentencing proceedings. (*Szabo v. Walls* (7th Cir. 2002) 313 F.3d 392, 398; *Del Vecchio v. Ill. Dep't of Corr.* (7th Cir. 1994) (en banc) 31 F.3d 1363, 1388; *Bassette v. Thompson* (4th Cir. 1990) 915 F.2d 932, 939.) On the other hand, some courts have held that *Crawford* and the Sixth Amendment right to confrontation do apply to capital sentencing proceedings. (*United States v. Mills, supra*, 446 F.Supp.2d at p. 1129; *Rodgers v. State* (Fla. 2006) 948 So.2d 655, 663; *State v. Smith* (Ariz. 2007) 215 Ariz. 221, 227, fn. 6; *Proffitt v. Wainwright* (11th Cir. 1982) 685 F.2d 1227, 1254-1255.)

This Court should follow the line of cases holding that the Sixth Amendment right to Confrontation, and *Crawford*, do not apply to capital sentencing proceedings. In *Fields*, *Summers*, and *McGill*, the courts relied upon *Williams v. New York* (1949) 337 U.S. 241 [69 S.Ct. 1079, 93 L.Ed. 1337] in holding that there is no Sixth Amendment right to confrontation in capital sentencing proceedings. (*United States v. Fields, supra,* 483 F.3d at pp. 325-326, 332; *Summers v. State, supra,*148 P.3d at pp. 781-783; *State v. McGill, supra*, 213 Ariz. at pp. 941-942.)

In *Williams*, the Supreme Court rejected the contention that a death sentence based on information from witnesses whom the defendant had not been permitted to confront violated the Due Process Clause of the Fourteenth Amendment. (*Williams v. New York, supra,* 337 U.S. at pp. 245, 251-252.) The *Williams* Court noted there was a historical basis for having different evidentiary rules applicable at trial and at sentencing, and further noted there were practical reasons for having that distinction.

> In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant-if not essential-to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

(*Williams v. New York, supra*, 337 U.S. at pp. 246-247, footnote omitted.)

This Court, relying upon *Williams*, has already found the Sixth Amendment right to confrontation inapplicable to *non-capital* sentencing proceedings,[4/] noting that different evidentiary rules apply in trial and

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4. Many other courts have held that *Crawford* and the Confrontation Clause do not apply in *non-capital* sentencing proceedings. (*United States v.*

sentencing proceedings . In *People v. Arbuckle* (1978) 22 Cal.3d 749, 753-754, a non-capital case, this Court rejected the defendant's contention that he had a constitutional right at sentencing to cross-examine and confront a Department of Corrections employee who prepared a probation report. In so holding, this Court first found there was "no statutory support for the asserted right to confront and cross examine" witnesses in sentencing proceedings. (*Id.* at p. 754.) The *Arbuckle* Court also found there was no such right based on the state or federal Constitutions, stating as follows:

> Neither does the purported right of confrontation in these circumstances derive from the Sixth and Fourteenth Amendments to the federal Constitution or article I, section 15, of the California Constitution. In *Williams v. New York* (1949) 337 U.S. 241, 251 [93 L.Ed. 1337, 1344, 69 S.Ct. 1079], the United States Supreme Court concluded that the federal due process clause does not extend the same evidentiary protections at sentencing proceedings as exist at the trial. A sentencing judge ''may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and

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Luciano (1st Cir. 2005) 414 F.3d 174, 179 [First Circuit's view, and "majority view" among federal appellate courts is that Sixth Amendment confrontation right does not apply to non-capital sentencing]; *Summers v. State, supra*, 148 P.3d at p. 782, fn. 16 ["weight of authority is that *Crawford* does not apply to a noncapital sentencing proceeding"]; *United States v. Littlesun* (9th Cir. 2006) 444 F.3d 1196, 1198-1200; *United States v. Stone* (6th Cir. 2005) 432 F.3d 651, 654; *United States v. Brown* (8th Cir. 2005) 430 F.3d 942, 943-944; *United States v. Chau* (11th Cir. 2005) 426 F.3d 1318, 1323; *United States v. Roche* (7th Cir. 2005) 415 F.3d 614, 618; *United States v. Martinez* (2d. Cir. 2005) 413 F.3d 239, 242-243; see *United States v. Navarro* (5th Cir. 1999) 169 F.3d 228, 236; *United States v. Kikumura* (3d Cir. 1990) 918 F.3d 1084, 1101-1103 & fn. 21.)

to the convicted person's life and characteristics." (*Williams* v. *Oklahoma* (1958) 358 U.S. 576, 584 [3 L.Ed.2d 516, 521-522, 79 S.Ct. 421].)

(*People v. Arbuckle, supra*, 22 Cal.3d at p.754.)

The *Arbuckle* Court also noted that "several courts have held the Sixth Amendment right of confrontation inapplicable at the sentencing stage of a criminal prosecution." (*Ibid.*; see *People v. Cain* (2000) 82 Cal.App.4th 81, 86 ["California courts have repeatedly held that the defendant does not have a Sixth Amendment right of confrontation at the sentencing stage of a criminal prosecution."]; *People v. Lamb* (1999) 76 Cal.App.4th 664, 683.)

This Court has also noted, similar to *Williams*, that the ultimate issues involved in a trial (determining guilt) and in sentencing (selecting an appropriate sentence) are distinctly different, and that the goal in sentencing is to place as much information as possible before the judge or jury making the sentencing decision. (See *People v. Morgan* (2008) 42 Cal.4th 593, 624; *People v. Balderas* (1985) 41 Cal.3d 144, 205, fn. 32 ["The penalty phase is unique, intended to place before the sentencer all evidence properly bearing on its decision under the Constitution and statutes."]; see *Williams v. New York, supra*, 337 U.S. at pp. 246-247.) These considerations noted in *Morgan, Williams* and *Arbuckle* apply equally to a non-capital and capital sentencing proceedings; indeed, *Williams* was a capital case. (*Williams v. New York, supra*, 337 U.S. at pp. 242.)

Further, *Williams* is still good law and has not been overruled. *Crawford* addressed whether testimonial hearsay introduced at trial violated the Confrontation Clause. (*Crawford v. Washington, supra*, 541 U.S. at p. 68.) *Crawford* did not overrule *Williams* or address whether the Sixth Amendment right to confrontation applies to sentencing proceedings, capital or non-capital. (*United States. v. Katzopoulos* (6th Cir. 2006) 437 F.3d 569, 574; *United States*

v. Luciano, supra, 414 F.3d at p. 179 ["By its own terms, *Crawford* does not address whether the Sixth Amendment right to confront witnesses applies at sentencing."]; *State v. Summers, supra*, 148 P.3d at p. 782 ["The Court in *Crawford* indicated no intent or basis to extend the Sixth Amendment to capital penalty hearings."]; see *United States v. Fields, supra*, 483 F.3d at p. 329 [Supreme Court in *Gardner v. Florida* (1997) 430 U.S. 349, 356 [97 S.Ct. 1197, 51 L.Ed.2d 393] "explicitly declined to overrule *Williams*."].)

Further, even though *Williams* was decided under the Fifth Amendment, that case nevertheless applies to the instant claim, which involves the Sixth Amendment. *Williams*, which involved a capital sentence imposed by a state court, was decided under due process principles rather than the Sixth Amendment, since the Sixth Amendment was not applicable to the states until *Pointer v. Texas* (1965) 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. Though *Williams* was a due process case, it is nevertheless applicable to the issue of whether the Sixth Amendment right to confrontation applies in capital sentencing proceedings:

> *Williams* is a due process, rather than Sixth Amendment, case and therefore does not dictate the result of Fields's Confrontation Clause challenge. We conclude, however, that *Williams*'s distinction between guilt and sentencing proceedings and its emphasis on the sentencing authority's access to a wide body of information in the interest of individualized punishment is relevant to our Confrontation Clause inquiry. Included in the notion that information influencing a sentencing decision need not be introduced in open court is the idea that defendants have no confrontation right at that phase and therefore that testimonial hearsay is not *per se* inadmissible. Indeed, the [*Williams*] Court referred to the rights to confront and cross-examine as "salutary

> and time-tested protections" included within the due process guarantee but available only "where the question for consideration is the guilt of the defendant." *Id.* at 245, 69 S.Ct. 1079.

(*United States v. Fields, supra*, 483 F.3d at p. 327; see also *State v. McGill, supra,* 213 Ariz. at p. 941 [*Williams* is the only case in which the United States Supreme Court "directly addressed a defendant's right to confront witnesses during sentencing"].)

Additionally, the cases which hold that the Sixth Amendment right to confrontation does apply in capital proceedings are not persuasive. Some of those cases simply assume the Sixth Amendment right to confrontation applies in sentencing proceedings, without engaging in any analysis or even acknowledging courts are divided on the issue. (See *Rodgers v. State, supra,* 948 So.2d at p. 663 ["We start with the uncontroverted proposition that the Sixth Amendment right of confrontation applies to all three phases of the capital trial."); *State v. Smith, supra,* 215 Ariz. at p. 227, fn. 6 [state conceded the issue].) Those cases have little, if any, persuasive value.

Respondent notes that appellant has cited *United States v. Mills, supra*, 446 F.Supp.2d at p. 1135, and *Proffitt v. Wainwright, supra,* 685 F.2d at pp. 1254-1255 for the proposition that *Crawford* and the Confrontation Clause apply to capital sentencing proceedings. (ASB at 5.) Those cases are not binding, and are similarly not persuasive.

In *United States v. Mills,* the District Court cited recent United States Supreme Court precedent regarding factfinding in sentencing proceedings and found those cases supported its holding that a defendant's Sixth Amendment trial rights, including the right to confrontation, extend to sentencing proceedings. (*United States v. Mills, supra*, 446 F.Supp.2d at pp. 1125-1136.) The *Mills* Court specifically relied upon *United States v. Booker* (2005) 543

U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Apprendi v. New Jersey* (2003) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428. 153 L.Ed.2d 556]. (*Ibid.*)

However, this Court has found *Booker, Blakely*, *Apprendi*, and *Ring* inapplicable to capital sentencing. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1067-1068; *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Ward* (2005) 36 Cal.4th 186, 221.) Other courts have rejected the argument that *Booker, Blakely, Apprendi, and Ring* have extended the Sixth Amendment right to confrontation to capital sentencing proceedings. (*United States v. Fields, supra*, 483 F.3d at pp. 331-332; *United States v. Katzopoulos, supra*, 437 F.3d at p. 576 [rejecting claim that *Crawford* combines with *Booker* to change prior law]; *Summers v. State, supra*, 148 P.l3d at p. 783.) Further, as set forth above, the United States Supreme Court has not overruled *Williams*. The Supreme Court, in *Booker, Blakely, Apprendi* and *Ring*, did not overrule *Williams*.

In *Proffitt v. Wainwright, supra*, 685 F.2d at pp. 1252-1253, the Eleventh Circuit noted that the Supreme Court had declined to extend Sixth Amendment procedural rights, including the right to confrontation and cross examination, to sentencing proceedings. The *Proffitt* Court, relying primarily upon *Gardner v. Florida, supra,* 430 U.S. 349, found:

> The Supreme Court's emphasis in *Gardner* and other capital sentencing cases on the reliability of the factfinding underlying the decision whether to impose the death penalty convinces us that the right to cross-examine adverse witnesses applies to capital sentencing hearings.

(*Id.* at p. 1254.)

This Court should not follow *Proffitt*. The *Proffitt* Court's reasoning is not sound. Cross-examination is not the only effective means of ensuring reliability of factfinding at capital sentencing proceedings. (See *United States v. Fields, supra*, 483 F.3d at p. 330, fn. 12 ["cross examination of a hearsay declarant in particular should not be deemed the only effective means of denying or explaining adverse information at sentencing"].) For example, a defendant is free to introduce his own evidence at sentencing, and this Court expressly permits records of prior convictions to be introduced at capital sentencing proceedings. (See section 190.3, factor (c).)

Moreover, in *United States v. Fields*, the Fifth Circuit analyzed two cases relied upon by the *Proffitt* court, *Gardner* and *Smith v. Estelle* (5th Cir. 1979) 602 F.2d 694. (*United States v. Fields, supra*, 483 F.3d at pp. 328-330.) The *Fields* court stated:

> [W]e find wholly unpersuasive the Eleventh Circuit's [decision in *Proffitt*] extension (in reliance on *Gardner* and *Smith*) of the Sixth Amendment confrontation right through the entirety of the capital sentencing process, and note that that circuit is the only one to have taken that step.

(*United States v. Fields, supra*, 483 F.3d at p. 330; see also *Bassette v. Thompson, supra,* 915 F.2d at p. 939 [finding *Proffitt*'s reasoning unpersuasive]; *People v. Simms* (Ill. 1995) 168 Ill.2d 176, 191 [rejecting *Proffitt*'s reasoning].) In particular, the *Fields* court noted that *Gardner* decision "made no mention of a right of confrontation," that the *Gardner* court "explicitly declined to overrule *Williams*," and "*Gardner* nowhere suggests that cross-examination of hearsay declarants in particular is necessary to satisfy due process." (*United States v. Fields, supra*, 483 F.3d at pp. 328-329.)

Also, as set forth above, despite subsequent Supreme Court decisions emphasizing reliability in factfinding in capital sentencing, *Williams*'s holding

that, as a matter of due process, cross-examination is not required at capital sentencing hearings has not been overruled, and its reasoning applies in a Sixth Amendment context.

In sum, this Court should follow the reasoning of those courts which have relied upon *Williams* and hold that the Sixth Amendment right to confrontation, and *Crawford*, do not apply in capital sentencing proceedings.

E. There Was No Confrontation Clause Violation

Even assuming the Sixth Amendment right to confrontation applies in capital sentencing proceedings, appellant's claim should nevertheless be rejected.

1. Deputy Brady's Observations

Appellant claims that all of Deputy Brady's testimony about the 1992 shooting was inadmissible hearsay that violated his right to confrontation. (ASB at 3.) Not so. Much of Deputy Brady's testimony was about his own observations about the shooting. Specifically, Deputy Brady testified as to his observations of Carr's bullet wound, of bullet casings at the crime scene, and that he saw appellant identified at a field show-up after taking Hill to that show-up.` (12RT 2603-2611.) Because Deputy Brady testified at the penalty phase and was subjected to cross-examination, there is no Confrontation Clause violation as to his observations. (See *Crawford v. Washington, supra,* 541 U.S. at p. 59, fn. 9 ["when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements"].)

2. Carr and Hill's Statements

The *Crawford* Court declined to provide a comprehensive definition of "testimonial." (*Crawford v. Washington, supra*, 541 U.S. at p.

68.) Instead, the *Crawford* Court listed "[v]arious formulations" of the class of testimonial statements:

> "[E]x parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," [citation]; "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," [citation]; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," [citation].

(*Crawford v. Washington, supra*, 541 U.S. at pp. 51-52.)

Subsequently, in *Davis v. Washington*, the Supreme Court explained:

> Without attempting to produce an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation-as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial 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 v. Washington, supra,* 547 U.S. at p. 822, fn. omitted.)

> This Court has noted it derived the following principles from *Davis*: First, as noted above, the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony-to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined " objectively," considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial

(*People v. Cage* (2007) 40 Cal.4th 965, 984, fns. omitted, italics in original.)

This Court added that

> *Davis* now confirms that the proper focus is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial. Instead, we are concerned with

statements, made with some formality, which, *viewed objectively,* are for the *primary purpose* of establishing or proving facts for possible use in a criminal trial.

(*People v. Cage, supra,* 40 Cal.4th at p. 984, fn. 14.)

Here, Deputy Brady testified that when he initially encountered Carr and Hill, they described a shooting, and described the vehicle involved in the shooting and the perpetrator. (12RT 2603-2607, 2610-2611.) It does not appear that these statements were testimonial. First, the statements were made *before* appellant had been apprehended. In this regard, Deputy Brady testified that about 15 minutes after he spoke with Carr and Hill, he then drove Hill to the field show-up. (12RT 2607-2608.) It thus appears the statements were made for the primary purpose of dealing with an ongoing emergency, and were not out-of-court analogs of witness testimony at trial, as there was little, if any, formality or solemnity about the circumstances in which those statements were made. Moreover, the trial court did not permit Deputy Brady to testify as to the substance of Carr and Hill's statements describing the vehicle and perpetrator. (12RT 2606-2608.) Accordingly, this Court should hold the statements were not testimonial. (See *People v. Brenn* (2007) 152 Cal.App.4th 166, 176-177 [statements to 911 operator and subsequent statements to police officer, including description of the suspect, found non-testimonial under *Davis* and *Cage*] .)

Deputy Brady also testified that he drove Hill to a field show-up, and that appellant was identified at that show-up. Deputy Brady did not testify, on direct examination, as to any statements Hill made during the field show-up. (12RT 2607-2610.)[5/] Even though the prosecution did not present any express statements by Hill on direct examination of Deputy Brady, the clear inference

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5. On cross-examination by the defense, Deputy Brady testified Hill had no trouble identifying appellant, and said, "That's him." (12RT 2611-2614.)

was that Hill identified appellant at the show-up. (See Evid. Code, § 225 [term "statement" as used in hearsay rule includes "nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression"].)

In any event, even if Hill and Carr's initial statements were testimonial, and Hill's subsequent actions at the field show up constituted a statement that was testimonial, any error in the admission of those statements at the penalty phase was harmless beyond a reasonable doubt. (*People v. Cage, supra,* 40 Cal.4th at pp. 991-994 [applying harmless beyond a reasonable doubt standard where testimonial hearsay was erroneously admitted].)

Appellant, citing the prosecutor's closing argument, contends that the admission of Carr and Hill's statements was prejudicial because those statements were the only evidence presented to the jury that appellant "almost killed" Carr, and those statements rebutted his testimony that he was not the shooter. (ASB 7-8.) The claims are meritless.

First, Deputy Brady did not testify that Hill or Carr had told him that the bullet had almost struck Carr. Rather, Deputy Brady testified as to his own observations of Carr's bullet wound, indicating the bullet had grazed her head. (12RT 2603-2607, 2610-2611.) In any event, appellant himself testified at the guilt phase that he was aware that some "lady" had been "grazed," explaining that "she got skinned in the head or something." (8RT 1934-1937.) Thus, even if Hill and Carr's statements had been excluded, the jury would have been aware that appellant "almost killed" Carr.

Second, as to appellant's claim that Hill and Carr's statements and Deputy Brady's testimony about the field show-up were prejudicial because they rebutted appellant's claim that he did not commit the shooting, that claim is meritless because there was ample evidence of appellant's culpability for that crime. Appellant had admitted he pled guilty to the conviction. (8RT 1936.)

The abstract of judgment reflecting that conviction was admitted into evidence. (5RT 1038; 7RT 1548.)

Moreover, even without evidence of the 1992 conviction, the prosecution presented substantial and significant evidence supporting the criminal activity and prior felony conviction aggravating circumstances. In addition to appellant's convictions for the 1992 and 1989 shootings, the prosecution presented evidence that appellant was involved in two shootings September 9, 1984 (11RT 2394-2404, 2419-2432, 2441-2443) and another shooting about one month prior to September 9, 1984 (11RT 2423-2424, 2430-2438).

Further, the prosecution presented extensive victim impact evidence from Deputy Blair's family members and coworkers. (See Respondent's Brief at pp. 46-51.)

Also, the circumstances of the instant crimes, in which appellant, a gang member on parole armed with two handguns who did not want to return to prison for the rest of his life as a third-striker, shot and killed Deputy Blair, clearly was an aggravating factor warranting capital punishment.

Under these circumstances and in light of the entirety of the evidence admitted in aggravation at the penalty phase, any error in the admission of Carr and Hill's statements was harmless beyond a reasonable doubt.

F. No State Law Error

Appellant contends that Deputy Brady's testimony was inadmissible hearsay, specifically contending that "the evidence in question" was inadmissible under Evidence Code section 1200. (ASB 4, fn. 2.) The claim does not warrant appellate relief.

Evidence Code section 1200 defines "hearsay evidence" as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted. Deputy

Brady testified that Hill and Carr made statements during his initial encounter with them, specifically that they described a shooting, a vehicle and a perpetrator. (12RT 2603-2607.) It appears Hill and Carr's statements during may not have been hearsay, because it does not appear those statements were offered to prove the truth of the matter asserted (that Hill and Carr described a shooting, a vehicle, and a perpetrator), but rather to show Deputy Brady's conduct and observations. Moreover, the trial court did not permit Deputy Brady to testify as to the substance of these statements. (12RT 2606-2608.) It does appear, however, evidence that the prosecution presented on direct examination of Deputy Brady regarding Hill's actions at the field show-up constituted hearsay.

In any event, any state law error was harmless. This Court evaluates state law errors at the penalty phase under the reasonable possibility standard (whether there is a reasonable possibility the error affected the verdict), which effectively the same standard for reviewing federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], that is, whether the error is harmless beyond a reasonable doubt.. (*People v. Wilson* (2008) 43 Cal. 1, ____ [73 Cal.Rptr.3d 620, 646]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 960-961; *People v. Jones* (2003) 29 Cal.4th 1229, 1264.) Any error under state law was harmless for the reasons set forth above.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Dated: May 9, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

THOMAS C. HSIEH
Deputy Attorney General

Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 5,419 words.

Dated: May 9, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

THOMAS C. HSIEH
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: ***In re: Freddie Fuiava*** ***No. S055652***

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 9, 2008, I placed the attached

RESPONDENT'S SUPPLEMENTAL BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Michael Satris
Attorney at Law
P. O. Box 337
Bolinas, CA 94924

Diana Samuelson
Attorney at Law
506 Broadway
San Francisco, CA 94133

In addition I placed one (1) copy in this Office's internal mail collection system, to be mailed to California Appellate Project (CAP) in San Francisco addressed as follows:

California Appellate Project
Attention: Michael Millman
101 Second St., Suite 600
San Francisco, CA 94105

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on May 9, 2008 at Los Angeles, California.

Rina B. Genson

Rina B. Genson
Signature

TCH:rbg
LA2008500955