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 REPLY 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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By appointment of the
California Supreme Court

TOPICAL INDEX

TABLE OF AUTHORITIES

California Statutes

Other Authorities

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

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ARGUMENT

THE INTRODUCTION OF TESTIMONIAL HEARSAY EVIDENCE OF THE CIRCUMSTANCES OF FUIAVA'S 1992 CONVICTION OF ASSAULT WITH A FIREARM[1] DEPRIVED HIM 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. Introduction.

In his supplemental opening brief, Fuiava contended that the introduction at the penalty phase of hearsay evidence of the underlying details and circumstances of his conviction in 1992 for assault with a firearm in violation of Penal Code section 245 (a)(2) deprived him of his state and federal rights that precluded the state from relying on testimonial hearsay to condemn him. Most centrally, Fuiava asserted that the evidence from Viking deputy Matt Brady relating the statements of Clifton Hill and Dee Dee Carr to Brady when he responded to the reported scene of the crime, and Hill's subsequent identification of Fuiava as the shooter, was "a paradigm of testimonial hearsay, admission of which was condemned in *Crawford*

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[1] In the opening of his supplemental AOB, Fuiava correctly referred to the conviction at issue as a "convict[ion] in 1992 for assault with a firearm in violation of Penal Code section 245 (a)(2)." (Supp. AOB 1.) As respondent pointed out, Fuiava elsewhere in his brief referred to the conviction as a 1994 assault or shooting. (See Supp. RB 1, fn. 1.) Appellant concurs in Respondent's clarification that "the statements appellant contends are hearsay are all related to his 1992 conviction for assault with a firearm." (See Supp. RB 1, fn. 1.)

v. Washington (2004) 541 U.S. 36, 54-54, 124 S.Ct. 1354, 158 L.Ed.2d 17" as violative of a defendant's Sixth Amendment right to confrontation. (Supp. AOB at 3.)

Respondent concedes some state law error here in admission of hearsay evidence. (E.g., Supp. RB 19 "[It does appear ... evidence that the prosecution presented on direct examination of Deputy Brady regarding Hill's actions at the field show-up constituted hearsay."].) Overall, however, respondent makes three submissions in opposition to Fuiava's claim of wrongful introduction of the challenged evidence of the circumstances underlying the 1992 conviction: 1) Fuiava waived or forfeited the claim in the trial court by failing to object to its introduction; 2) the introduction of the evidence violated none of Fuiava's rights; and 3) in any event, any error in introduction of any of the evidence was harmless. As set forth below, respondent is wrong on all three counts.

B. Argument.

1. Fuiava Did Not Waive or Forfeit His Claim.

Respondent first asserts that because Fuiava failed to object to admission of this evidence, he procedurally defaulted or "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." (Supp RB 3.)[2] In so arguing, respondent ignores the law that

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[2] Respondent's further assertion, bereft of authority, that "the record also shows that appellant affirmatively waived this claim" when Fuiava waived

excuses Fuiava's lack of objection on the basis of *Crawford*, since his trial pre-dated issuance of that decision.

"Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703.) The courts have recognized that the rule announced in *Crawford* was such an unforeseeable change in the law, and hence have excused lack of objection in cases where trial occurred before issuance of that decision. (See, e.g., *People v. Song* (2004) 124 Cal.App.4th 973, 982; *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400; *People v. Johnson* (2004) 121 Cal.App.4th. 1409.) As stated in *Sisavath*: "*Crawford* announced a new rule regarding the effect of the confrontation clause on the admission of hearsay statements in criminal prosecutions." (*Sisavath, supra,* 118 Cal.App.4th at p. 1400 [brackets and ellipsis in quote deleted].) Thus, the cases that respondent cites for the proposition that failure to raise a Sixth Amendment objection on appeal forfeits an appellate claim of wrongful admission of evidence are inapposite, for those cases did not concern the kind of unforeseeable change in Sixth Amendment law that *Crawford* represented.

In addition, for the further reasons set forth in Fuiava's reply brief as to why the Court should overlook another arguable default precluding consideration of an issue on appeal, it should do so here.

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his trial rights at the time he pleaded guilty to the offense (AOB 3-4) is frivolous and does not warrant further response.

Those reasons include: 1) the discretionary nature of a finding of forfeiture or waiver of the issue on appeal (ARB 38)[3]; 2) the substantial injustice that would result if the Court did not review the claim on its merits (ARB 38-39); and 3) the capital nature of the judgment on appeal (ARB 39).

For all these reasons, Fuiava did not waive or forfeit this claim for relief on appeal.

2. Admission of the Evidence Violated Fuiava's Constitutional Rights.

a. The Sixth Amendment Right to Confrontation and Cross-Examination Applies to the Penalty Phase.

Respondent first submits that admission of this evidence did not violate Fuiava's constitutional rights because "the Sixth Amendment right to Confrontation, and *Crawford*, do not apply to capital sentencing proceedings." (Supp. ARB at 4-5.) Respondent cites the decisions of some courts that have so found. (Supp. 4-5.) Respondent further concedes, however, that "some courts have held that *Crawford* and the Sixth Amendment right to confrontation do apply to capital sentencing proceedings." (Supp. RB 5.)

Respondent urges this Court to follow those cases that have found that the Sixth Amendment does not apply to capital proceedings. (Supp. RB 4-13.) To the contrary, this Court should

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[3] As stated in *People v. Johnson*, *supra*, 121 Cal.App.4th at p. 1411, citing *People v. Mattson* (1990) 50 Cal.3d 826, 854, and *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173: "Johnson's arguments raise only questions of law, and we exercise our discretion to address the *Crawford* issue."

reject those cases as unpersuasive. (See, e.g., *United States v. Fields* (5th Cir. 2007) 483 F.3d 313, 362-376 (dis. opn. of Benavides, J.).) This Court should not distinguish between the guilt and penalty phases for purposes of applying the fundamental protection of the Sixth Amendment right to confrontation; rather, it should side with those cases that find that this right applies to the penalty phase of a capital trial every bit as much as it applies to the guilt phase of such a trial.

Respondent argues that the Court should make a distinction between the guilt phase and penalty phase here because at the penalty phase "the goal ... is to place as much information as possible before" the decisionmaker. (RB 8.) Not so. In fact, our statute restricts what evidence the prosecution may present in the way of aggravating evidence that favors a death sentence. (See, e.g., *People v. Boyd* (1985) 38 Cal.3d 762, 774-776 [prosecution is limited to introducing evidence in its case-in-chief that is relevant to factors (a)-(j) set forth in Penal Code section 190.3].) For example, so called "factor k" evidence, a factor that encompasses only extenuating circumstances and offered as a basis for a sentence less than death, may not be used by the prosecution to introduce aggravating evidence regarding the defendant's character or background that does not qualify as aggravating evidence under another factor. (*Ibid.*; see also *People v. Edelbacher* (1989) 47 Cal.3d 983, 1033.)

In particular, the hearsay rules that are generally applicable to criminal cases and serve to vindicate a defendant's right to confrontation and cross-examination are applicable to evidence that is

introduced by the prosecution at the penalty phase. (See, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795 [upholding use of preliminary hearing testimony in aggravation under the former testimony exception of Evidence Code section 1291].) As the Court said recently:

> [D]efendant argues that laxer rules for the admission of evidence apply at penalty phase proceedings. Not so. The death penalty statute does not adopt any new rules of evidence peculiar to itself, but simply allows the generally applicable rules of evidence to govern. Defendant confuses the broader range of evidence deemed relevant at the penalty phase--victim impact evidence, for example--with the technical rules of evidence that remain in effect during those proceedings. One such rule is embodied in Evidence Code section 351.1, and it has equal application to noncapital and capital trials and to both the guilt and penalty phases of the latter. There is no less of an imperative to prevent unreliable evidence from being admitted at the penalty phase than the guilt phase of a capital trial.

(*People v. Richardson* (2008) 43 Cal.4th 959, 1033.)

The rules of evidence are rules of limitation; that is, they restrict the quality of evidence that a proponent may introduce. (See James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law, p. 364 (Little, Brown, and Company 1898) ["This excluding function is the characteristic ones in our law of evidence."].) "These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." (*Brinegar v. United States* (1949) 338 U.S. 160, 174.) Again, as this Court noted in the quote

excerpted above, these rules of preclusion apply equally to the guilt and penalty phases of a capital trial.

Indeed, the constitutional imperative that a death penalty verdict be distinctively reliable mandates that at the very least the constitutional standards that apply to ensure fair and accurate guilt verdicts apply equally to ensure fair and accurate death judgments. "Cross-examination is the greatest engine for the development of truth ever devised ...." (*People v. Robinson* (1961) 196 Cal.App.2d 384, 390; see also 6 Wigmore, Evidence (3d ed. 1940) § 1838, p. 463 [extolling cross-examination as "one of the greatest engines ever invented for the detection of liars"].) "Death is different" in its need for greater protections at the penalty phase, not lesser protections. Thus, the United States Supreme Court repeatedly has struck down procedures that create an unnecessary risk of factual error in the decision to inflict death as punishment. (See, e.g., *Lankford v. Idaho* (1991) 500 U.S. 110; *Gardner v. Florida* (1977) 430 U.S. 349; see also *Ford v. Wainwright* (1986) 477 U.S. 399, 411 ["In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability."].)

In addition to the constitutional imperative of a reliable sentence, "[t]ext, history, structure and precedent favor applying the Confrontation Clause with full force to capital sentencing." (*United States v. Fields*, *supra*, 483 F.3d 313, 376 (dis. opn. of Benavides, J.); see generally *id.* at pp. 362-376.)

b. The Evidence Was Testimonial Hearsay Whose Admission was Precluded by the Sixth Amendment Right to Confrontation.

Respondent next argues that even if the Sixth Amendment Right to Confrontation applies to the penalty phase, it was not implicated here because the evidence did not constitute testimonial hearsay. (Supp. RB 13.) Respondent claims this is so because, first, "[m]uch of Deputy Brady's testimony was about his own observations about the shooting." (Supp. RB 13.) But those observations have no context without the testimonial hearsay Brady related that gives them meaning. For example, respondent asserts that "Deputy Brady testified as to his observations of Carr's bullet wound ...." (Supp. RB 13.) But the deputy identified his observation as a bullet wound only because Carr had *told* him a bullet had gone right past her head. For example, he prefaced his description of the wound with the statement, "she had been shot at." (12 RT 2606.) In fact, he did not see any actual blood or wound, but "[s]he said it was tender." (12 RT 2606.) What he described seeing was a crease in her hair. (12 RT 2606.)

Among Brady's further "observations" that respondent asserts did not constitute testimonial hearsay was his testimony "that he saw appellant identified at a field show-up after taking Hill to that show-up." (Supp. RB 13.) But respondent's concession that Evidence Code section 225 provides that a "'statement' as used in the hearsay rules includes 'nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression'" (Supp. RB 17) defeats the attempt to take this observation out of the ambit of

testimonial hearsay. Indeed, respondent's admission that "the clear inference was that Hill identified appellant at the show-up" was an effective concession that the crucial fact that Hill "said" Fuiava was the culprit was testimonial hearsay. (Supp. RB 15-16.)[4]

Respondent's attempt to portray the evidence from Brady beyond that of identification as outside the ambit of testimonial hearsay is similarly unavailing. For example, respondent asserts that Brady's testimony of Carr's and Hill's statements to him in which "they described a shooting, and described the vehicle involved in the shooting and the perpetrator" were not testimonial because "the statements were made *before* appellant had been apprehended." (RB 16; italics in original.) But respondent's thesis proves too much: a statement of a witness taken in the course of investigation of a crime does not fall outside the definition of "testimonial hearsay" simply because it may occur prior to the arrest of a suspect. Brady was not responding to an "ongoing" or "contemporaneous" emergency for which he needed the information. Rather, he was responding to a report of a crime, an event that had fully concluded before his arrival and discussion with the witnesses. The primary if not the only purpose of Brady's interrogation was to investigate the crime, a past event, so that authorities could apprehend and prosecute the culprit.

For example, the Supreme Court in *Davis v. Washington* (2006) 547 U.S. 813 contrasted the hearsay statements in that case, which

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[4] Again, respondent admits elsewhere that the crucial evidence that gives the rest of Brady's testimony relevance, namely, the identification of Fuiava as the culprit, was inadmissible hearsay even under state law. (RB 19.)

occurred during a 911 call about events then happening, with the hearsay statements in the companion case of *Hammon v. Indiana*, which were made "to police officers who were investigating a domestic disturbance that had already run its course by the time the officers arrived on the scene." (*Id.*, at pp. 829-830.) The Court found the latter statements testimonial because they were derived from an investigation aimed at finding out "'what happened,'" as opposed to "'what is happening.'" (*Id.*, at p. 830.)

This case is not like *People v. Brenn* (2007) 152 Cal.App.4th 166, relied on by respondent in support of the claim that Brady's primary purpose was to deal with a contemporaneous emergency. (RB 16.) *Brenn*, like *Davis*, concerned 911 and other statements about a contemporaneous event, and *Brenn* specifically distinguished the *Hammon* circumstances in *Davis* that concerned investigation of past events. (*Id.*, at p. 176.) Certainly by the time of the identification "about 15 minutes or so" after the statements to Brady at the scene (12 RT 2607), Brady was not dealing with a contemporaneous or ongoing emergency, but with a formal attempt to apprehend and prosecute the suspect for a past crime. Thus, the statements at issue fell well within the mainstream of testimonial hearsay as described in *Davis* and interpreted in *People v. Cage* (2007) 40 Cal.4th 965, 984.)

That "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" does not change the analysis, as respondent contends. (Supp. RB 16.) That restriction meant little in light of the fact that the court permitted Brady to testify that at the show-up he saw "an

individual that matched the description"[5] and "a vehicle that matched the description" the witnesses had given him. (12 RT 2608.)

3. The Wrongful Admission of the Evidence Prejudiced Fuiava.

Assuming constitutional error and acknowledging state law error, respondent argues that any error was harmlessness beyond a reasonable doubt and that there was no reasonable possibility of a more favorable verdict absent the error.[6] (RB 17-19.) Respondent, however, has failed to meet his burden of showing harmlessness.

Respondent asserts harmlessness, first, on the ground that the evidence that Fuiava "almost killed" someone was a product of Brady's observation rather than testimonial hearsay, and that Fuiava admitted as much in his cross-examination. As to the first point, as stated earlier, Brady's observation only had meaning in the context of the testimonial hearsay. As to the second point, this was but another example of prosecutorial misconduct, for the cross-examination producing this answer constituted introduction by the prosecutor of facts outside the record and obviously called for hearsay. (See 8 RT 1935, where over objection the prosecutor was allowed to ask Fuiava, "Did you understand that you hit another lady in the head?"; see also AOB 243, pointing out this questioning as part of the prosecutor's misconduct in his cross-examination of Fuiava.) A prosecutor "may

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[5] Specifically, the individual that matched the description was the same one that Hill identified and the police took into custody. Brady identified that individual at trial as Fuiava. (12 RT 2609.)

[6] As respondent correctly notes, these formulations of federal constitutional error and state penalty-phase error, respectively, are equivalent. (Supp. 19.)

not assume or state facts not in evidence ...." (*People v. Valdez* (2004) 32 Cal.4th 73, 133.)

The first wrong does not neutralize the prejudice of the second; rather, the two wrongs double the prejudice. That the prosecutor may have wrongly elicited this incompetent evidence more than once does not lessen the error in each case; to the contrary, the wrongful repetition of the evidence only added to the error, for it served to remind the jury of the evidence. The prosecutor in his closing argument then drummed this evidence into the jury's consciousness. (See Supp. AOB 6.)

Finally, respondent argues that in light of the other aggravating evidence, there was no reasonable possibility that the verdict would have been other than death had this evidence not been presented. (Supp. RB 18.) But that is belied by the prosecutor's artful smuggling of this testimonial hearsay into evidence, and his exploitation of it in closing argument. "[A]fter injecting [evidence] into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless." (*People v. Glass* (1910) 158 Cal. 650, 659.) Rather, "[t]here is no reason why [this Court] should treat this evidence as any less crucial than the prosecutor — and presumably the jury — treated it." (*People v. Cruz* (1964) 61 Cal.2d 861, 868.)

"[A]n abridgment of a federal constitutional right is not lightly to be declared without prejudicial consequence ...." (*People v. Leach* (1975) 15 Cal.3d 419, 448.) This is particularly so when it puts a thumb on the scale favoring death. Respondent has not overcome the

showing of prejudice from this error that Fuiava has made. (See Supp. AOB 5-8.) This is especially evident when the prejudice is seen in conjunction with the other errors that occurred at the penalty phase, for the harm is cumulative from these errors and demonstrates that that there is at least a reasonable probability of a more favorable penalty verdict had Fuiava been accorded a trial free of these constitutional taints. (See generally AOB, Arg. XXVII, pp. 441-442.)

CONCLUSION

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

Dated: July 14, 2008

Respectfully submitted,

MICHAEL SATRIS
DIANA SAMUELSON

By: 

MICHAEL SATRIS
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANT'S SUPPLEMENTAL REPLY BRIEF uses a 14 point Times New Roman font and contains 3,296 words.

Dated: July 14, 2008

Respectfully submitted,

MICHAEL SATRIS
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By: _____
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California Supreme Court No. S055652
Los Angeles County Court No. BA115681
People v. Freddie Fuiava

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 July 14, 2008, I served the within **APPELLANT'S SUPPLEMENTAL REPLY 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 in Bolinas, California, on July 14, 2008.

Sabine Jordan