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 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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ARGUMENT

I.

THE COURT ERRED WHEN IT DENIED FUIAVA'S MOTION FOR NEW TRIAL OR MODIFICATION OF THE VERDICT BECAUSE THE EVIDENCE SHOWS THAT HE IS INNOCENT.

A. The Insufficiency of the Evidence To Support the Judgment.

Fuiava has claimed that the evidence showed his innocence, so that the trial court committed state and federal constitutional error when it refused to invalidate the verdicts and instead sentenced him to death. (AOB 46-57.) The State asserts that "sufficient evidence supported the verdicts," so that the trial court properly condemned Fuiava to death. (RB 67.) The State is wrong.

There was a special risk of wrongful conviction of Fuiava because the killing of a police officer by a disfavored member of a minority (and admitted gang member) is just the kind of "flash point[] for the passions and prejudices of the citizenry" to be stirred into conviction and a death judgment "despite the evidence that established doubt throughout the proceedings." (AOB 57.) For example, Patrick Croy, an American Indian, was wrongly condemned to death for the shooting death of a police officer. (See *People v. Croy* (1985) 41 Cal.3d 1.) After this Court reversed his conviction, he was exonerated on retrial on the ground that he acted in self-defense. (See, e.g., Death Penalty Focus, Exonerations in California, p. 2 [http://www.deathpenalty.org/index.php?pid=Innocence] (as of 9/29/2004).) To be sure, there were more exonerations of defendants condemned to death this past year — 10 — than any other year since the death penalty was reinstated in this country more than a quarter century ago, and well more than 100 condemned have been exonerated across the nation since that reinstatement. (See http://www.deathpenaltyinfo.org/exoneration112.pdf.) Individuals on death row facing execution continue to be declared innocent and set free. For example, Illinois prisoner Gordon Steidl was set free in May 2004 as "the nation's 114th exonerated death row inmate." (See *Death Penalty Information Center*, Press Release dated May 28, 2004, Glaring Deficiencies in Death Penalty System Confirmed as Another Inmate is Freed [http://www.deathpenaltyinfo.org/article.php?scid=1&did=1017].) Just a few months later, Louisiana prisoner Ryan Mathews "became the nation's 115th death row inmate to be freed" when he was

exonerated by DNA evidence that identified the killer as "another man who is in prison in Louisiana for an unrelated killing that occurred just a few blocks from the murder in Mathews' case." (See *Death Penalty Information Center*, Press Release dated August 9, 2004, Ryan Mathews is 115th Death Row Inmate Freed [http://www.deathpenaltyinfo.org/article.php?scid=1&did=1103] (as of 9/29/2004).) As of September 29, 2004, 116 death row inmates have been exonerated, including 16 in the last 20 months. (See *Death Penalty Information Center*, Press Release dated September 15, 2004, DPIC Issues New Innocence Report: 116 Now Freed From Death Row in 25 States [http://www.deathpenaltyinfo.org/article.php?scid=1&did=1141] (as of 9/29/2004).)

California authorities maintain that California is different, but there have been anywhere from three to six exonerations of death row inmates since California re-instituted the death penalty, depending on the criteria used to establish such. (See, e.g., Death Penalty Focus, Exonerations in California [http://www.deathpenalty.org/index.php?pid=Innocence] (as of 9/29/2004) (six innocents); *Death Penalty Information Center*, Press Release dated December 9, 2003, Innocence and the Death Penalty, p. 2 [http://www.deathpenaltyinfo.org/article.php?did=412&scid=6] (as of 12/11/2003) (three innocents).) Indeed, a recent study found many of the same defects in this State that led to the miscarriages of justice that condemned innocent men and women to death in other states such as Illinois. (See *Sanger*, Comparison of the Illinois Commission

Report on Capital Punishment with the capital punishment system in California (2003) 44 Santa Clara L. Rev. 101-234.)

To buttress its claim of sufficient evidence here, the State invokes the general rule that "appellate courts review the entire record in the light most favorable to the judgment below." (RB 67.) "This rule, however, does not permit us to go beyond inference and into the realm of speculation in order to find support for a judgment. A finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed." (*People v. Rowland* (1982) 134 Cal.App.3d 1, 8.) There is simply too much doubt that runs through every level of this case to sustain the judgment of death.

1. Insufficient Evidence To Overcome Self-Defense as Justification for the Homicide.

First, there is reasonable doubt as a matter of law on the most fundamental question in this case: Who shot first? The record establishes:

- Lyons perceived two sets of shots coming from two different guns, the first set of shots coming from the direction opposite of Fuiava — that is, from Blair's direction — and the second set of shots coming from Fuiava's direction.
- The several eyewitnesses saw Blair shoot first, just as Fuiava testified.
- Rubio, the off-duty officer, concluded that the first set of gunfire sounded like it came from a .9 millimeter (Blair's

type of firearm) and the second set of gunfire sounded like it came from a .44 or .45 caliber (Fuiava's type of firearm).

- The forensic evidence established that Blair shot five times and likely died instantly from Fuiava's gunfire.

Reasonable doubt as to self-defense thus inhered in the evidence. (See generally AOB 47.) Relying on the rule that "appellate courts ... may not re-weigh the evidence, re-evaluate the credibility of witnesses, or resolve conflicts in the evidence" in assessing its sufficiency (RB 70), the State asserts that other evidence overcomes this showing that Blair shot first. (RB 70.) It does not.

The State asserts that Lyons testified that he "did not know where the [first] shots came from." (RB 11.) Lyons, however, knew very well where the second set of shots came from — Fuiava's direction, not Blair's. (RT 477-483.) Moreover, Lyons also testified that he perceived that the first gunfire came from west of him — and the undisputed evidence was that Blair was west of Lyons. (See AOB 21, citing RT 465; see also RT 557-558, 577-578.) Lyons turned to look westward behind the patrol car because he felt that the shots came from there. (AOB 21.) Moments later Lyons heard the second set of shots, which he was quite certain came from the opposite direction; that is, from the east, Fuiava's direction. (RT 477-483.) These shots sounded like they came from a different gun, and only after that second set of gunfire did Lyons see Blair fallen on the ground. (RT 484-486.)

By the time of trial, Lyons's testimony had been colored by his fellow officers, who had briefed him about the forensic evidence;

specifically, they had advised him that that evidence showed that Blair had fired his weapon (which Lyons had not realized). (See RB 11, fn. 2, citing RT 561-562; see also RT 576-577; see, finally, CT 165 ["I was told that the second burst of rounds that I heard at the rear of the vehicle were Deputy Blair's."].) Thus, to conform his testimony to that scenario concocted by his colleagues, Lyons had to testify that the first round of gunfire did not come from Blair. In this regard, the State asserts that Fuiava has overlooked Lyons's trial testimony that "when he heard the initial gunshots, Deputy Blair ... was getting out of the patrol car and had his right hand on the top of the driver's door [and] then brought his right hand from the top of the driver's door toward his holstered service handgun." (RT 69.) That trial testimony, however, is incredible in light of Lyons's testimony at the preliminary hearing, to wit:

> Lyons testified on direct at the preliminary hearing that as he exited the patrol vehicle and walked towards the front of it, he saw Blair "making a motion to put his foot up on the curb to get out of the car." (CT 139.) There was no mention about seeing Blair pulling himself up out of the car with his right hand atop the open driver door. Rather, Lyons said he focused on Avila ..., and then heard Blair call out, "Hey, stop." (CT 140.) Immediately after that Lyons heard gunfire — about five shots — whiz by the left side of his face from behind and he dropped down for cover, drawing his firearm. (CT 141, 161.) Simultaneously, he saw Blair in a squatting position slightly behind the door with both hands on his gun pointing it east, in the direction Lyons had seen Fuiava walking. (CT 145, 161-163, 166.) ... No blood was on Blair at that point. (CT 163.)

(See AOB 23.)

Officer Rubio's unvarnished opinion was that the first set of gunfire sounded like it came from a 9 millimeter and the second set sounded like it came from a .44 or .45; the State focuses on other testimony from Rubio that backtracked from that opinion, however, so that his testimony would not appear to favor an accused gang member over a fellow officer shot dead. (RB 14, 69.) That backtracking does not detract from the probative force of Rubio's opinion as to the type of guns he heard fire any more than does the testimony of Deputy Bruce Harris, an L.A. deputy sheriff like Lyons and Blair, that one cannot determine the caliber of a firearm by the sound of the gunshot. (RB 69.)

Finally, the State relies on the evidence that Fuiava "did not mention that Deputy Blair fired first when he spoke to his mother in a tape-recorded jail conversation [citation] or when he spoke to Renele Brooks and Sara Frausto." (RB 69.) Such evidence of negative implication, based not on what Fuiava said but on what he did not say, is "equivocal evidence, supportive as much of innocence as of guilt." (See AOB 47.)

2. Insufficient Evidence To Establish Premeditation and Deliberation.

The evidence also establishes reasonable doubt as a matter of law on the question whether Fuiava killed with premeditation and deliberation. As argued on his behalf: "Given the explosiveness of events surrounding the shooting [and] the peril provoked in Fuiava's mind by the Lynwood deputies' history of deadly misconduct, the

shooting was more an 'unconsidered and rash impulse that included an intent to kill' than a determination 'arrived at as a result of careful thought and weighing of considerations for and against the proposed course of action' or 'considered beforehand.'" (AOB 49-50, brackets and ellipses in quote deleted.) The State disagrees, noting that "cold calculated judgment may be arrived at quickly...." (RB 72, quoting *People v. Thomas* (1945) 25 Cal.2d 880, 900; ellipsis in quote.) The State's quotation of *Thomas* here is misleading, however, for its ellipsis omits the following completion of that quote:

> But the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides ... which are the result of mere unconsidered or rash impulse hastily executed. The word "deliberate" is an antonym of "Hasty, impetuous, rash, impulsive" (Webster's New Int. Dict. (2d ed.)) and no act or intent can truly be said to be "premeditated" unless it has been the subject of actual deliberation or forethought (*id.*).

(*People v. Thomas*, *supra*, 25 Cal.2d at pp. 900-901.) Events in Fuiava's case occurred within seconds and were too highly charged and rapidly unfolding to afford considered calculation or deliberated forethought; rather, the circumstances allowed for no more than a "rash impulse hastily executed."

The State's assertion that "there was sufficient evidence of motive, planning, and manner to support a finding of premeditation and deliberation" (RB 72) does not withstand analysis. To begin with, there was absolutely no evidence of planning, which is the most persuasive evidence of premeditation and deliberation. (See AOB

50.) Indeed, the State implicitly concedes the conspicuous absence of such evidence, for it proffers none that shows any planning. (See RB 72-73.) Moreover, the evidence of motive — that Fuiava killed to avoid apprehension — does not show premeditation and deliberation because any such motive arrived suddenly and was acted upon in an instant; thus, if anything, that alleged motive tends to show that the killing was not a product of reflection and deliberation, but rather an impulsive reaction to the moment. For example, in *Rowland* the prosecution asserted that the defendant killed the victim "to prevent any sound which would have betrayed the victim's presence" when he was about to be caught by his wife *in flagrante delicto*. (*People v. Rowland, supra*, 134 Cal.App.3d at p. 9.) That court responded that such evidence of motive "supports the conclusion that the murder was more of a spontaneous reaction than a premeditated and deliberated plan to end the victim's life." (*Ibid.*) Here, too, the evidence that Fuiava shot Blair to avoid apprehension when the deputies suddenly confronted him and Avila as they walked down the street "supports the conclusion that the murder was more of a spontaneous reaction than a premeditated and deliberated plan to end the victim's life." (See also AOB 51, citing and quoting *Rowland*; *People v. Dillon* (1984) 34 Cal.3d 441, 452 [no premeditation and deliberation where the defendant shot a fusillade of bullets from his firearm when suddenly confronted by owner during robbery].)

Lastly, the State argues that the manner of killing supports a finding of premeditation and deliberation, given the evidence that Fuiava "shot at Deputy Blair several times and struck him in the neck

and shoulder." (See RB 72.) That argument fails as well. *Rowland* is instructive here, too, for it found that use of an object or weapon at hand to accomplish the killing — there, a strangulation, which takes more time than the instant firing of a firearm as occurred here — "fails to show that defendant must have premeditated and deliberated the killing." (*People v. Rowland*, 134 Cal.App.3d at p. 9.) Here, Fuiava's firearm was on him and it took but an instant to fire its five bullets. The State argues that "the location of the gun shot wounds ... indicated that appellant aimed at Deputy Blair's head ..., intend[ing] to kill" rather than hurt or deter him. (RB 72.) The notion that the wound shows exactness of precision, however, is belied by the fact that most of the shots fired missed Blair. Moreover, the autopsy surgeon opined that the wound at the base of the neck was caused by a "tumbling bullet [that may have] hit the top of Deputy Blair's bullet-proof vest causing the bullet to flip around and enter Deputy Blair's neck backward." (See RB 18, fn. 4.)

The cases the State cites — *People v. Bolin* (1998) 18 Cal.4th 297, *People v. Boyd* (1985) 38 Cal.3d 762, and *People v. Pride* (1992) 3 Cal.4th 195 — do not establish otherwise. For example, in *Bolin*, the events leading to the killing occurred over the course of a "few minutes," rather than the few seconds here at issue. (*People v. Bolin*, *supra,* 18 Cal.4th at p. 332.) Moreover:

> What occurred within those few minutes ... is particularly telling with respect to [the defendant's] state of mind. According to both Wilson and Eloy Ramirez, defendant began arguing with Huffstuttler when Mincy and Wilson were shown the marijuana plants. Defendant continued berating Huffstuttler as

> the two walked back toward the cabin. Defendant went inside, retrieved a revolver, and shot Huffstuttler at close range. He proceeded back across the creek and confronted Wilson and Mincy. After apologizing that he had "nothing against" them, he opened fire. As a wounded Wilson fled the scene, he heard Mincy plead for his life. More shots were fired. Defendant returned to Huffstuttler and fired several rifle rounds into his motionless body. The autopsy report indicated at least three shots were inflicted before he died, although according to Ramirez he did not move after the first shot.... None of the victims were armed; nor did they engage in any provocative conduct.

(*Ibid.*)

The contrast between *Bolin* and the case at bar is striking on the question of premeditation and deliberation. So is the contrast between *Boyd* and this case. In *Boyd*:

> The only evidence of an argument and struggle between defendant and Edsill is that Edsill pushed the gun away when defendant pointed it at Edsill's head. Moreover, the deliberate manner in which defendant acted, especially in firing five additional shots at the fleeing and wounded victim, should be sufficient to justify an instruction on premeditation.

(*People v. Boyd*, *supra,* 38 Cal.3d at p. 770.) Moreover, the Court in *Boyd* never found that there was sufficient evidence to support a finding of premeditation and deliberation; rather, noting "that substantial evidence clearly supports an instruction on first degree felony murder," the Court found that "any error in instructing on premeditation could not have prejudiced defendant." (*Ibid.*)

The State relies on *Bolin* and *Boyd* to back up its broad assertion that "[m]ultiple gunshot wounds support a finding of premeditated murder" (RB 72), but those cases do not do so. Firing five additional shots at a fleeing victim after having first placed the gun at his head, as occurred in *Boyd*, is very different than the sudden exchange of gunfire that occurred here. Similarly, firing at different people between pauses in gunfire and then firing again at the same person already fallen from the first shooting, after having first retrieved a firearm to carry out the shootings, is very different from the explosive unfolding of events here and single fusillade of bullets that the evidence showed. The multiple firings under the evidence in *Bolin* and *Boyd* may have tended to show premeditation and deliberation when placed in the context of the other evidence in those cases, but the multiple firings by Fuiava showed no more than a panicked and impulsive shooting when placed in the context of the other evidence in the case. (See AOB 52, citing *People v. Dillon*, *supra*, 34 Cal.3d at p. 484 [12 shots fired reflexively at near-by victim, 9 of which found their mark, was product of panic and fear rather than premeditation and deliberation].)

Though "[a] violent and bloody death sustained as a result of multiple stab wounds can be consistent with a finding of premeditation" depending on the other evidence presented at trial (*People v. Pride*, 3 Cal.4th at p. 247[1]), a violent and bloody death

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[1] The Court found as follows in *People v. Pride*, *supra*, 3 Cal.4th at pp. 247-248:

sustained as a result of multiple stab wounds can also be consistent with a rash explosion of violence that negates premeditation and deliberation. (See, e.g., *People v. Anderson* (1968) 70 Cal.2d 15, 21 [evidence that "defendant had stabbed [the victim] repeatedly" did not indicate premeditation and deliberation]; see also *id.* at pp. 24-25, quoting earlier precedent ["If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations."].)

As *Anderson* explained, for the manner of killing to support a finding of premeditation, it must be "so particular and exacting" as to permit the jury to infer "that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life." (*Id.* at p. 27.) Against this standard, the evidence that two bullets struck Blair in the upper body, while the others entirely missed him, hardly shows such an exacting manner of killing that Fuiava must have deliberated and premeditated it. Rather, the evidence is strongly suggestive of a rash shooting, as *Dillon* confirms.

> The manner of killing also evidences reflection. The prosecution established that Kimele was stabbed 18 times; that all but 1 of the wounds were located in her torso; and that no defensive knife wounds were found. The location of bloodstains, semen and the Black pubic hair suggests the fatal attack occurred on the conference room floor, where the body was found. The jury could infer defendant pinned Kimele down or otherwise rendered her helpless before the stabbing began.

In contrast, no similar reflection is necessary to fire a fusillade of bullets at an advancing antagonist as occurred here.

The State asserts that the manner of killing indicated that Fuiava "did not merely want to injure Deputy Blair, but intended to kill him." (RB 72,) Not so, for it is equally consistent with the inference that Fuiava sought to stop Blair from shooting at Avila or him. Moreover, even assuming the fusillade of bullets showed that Fuiava intended to kill Blair, there must be more than evidence of an intent to kill to establish a premeditated and deliberate murder. Intent to kill establishes only second degree murder; evidence that the intent to kill was the product "of careful thought and weighing of the considerations" is required to show first degree murder. (See AOB 71, quoting *People v. Mayfield* (1997) 14 Cal.4th 668, 767.) This Court has "repeatedly pointed out that the legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill. [Citation.]" (*People v. Anderson*, *supra*, 70 Cal.2d at p. 26.) Thus, the Court of Appeal's response to a similar argument made by the Attorney General in another case is apropos here:

> A deliberate intent to kill ...is a means of establishing malice aforethought and is thus an element of second degree murder in the circumstances of this case. In order to support a finding of premeditation and deliberation the manner of killing must be, in the words of the *Anderson* court, "so particular and exacting" as to show that defendant must have "intentionally killed according to a 'preconceived design' ...." [Citation.]

(*People v. Rowland*, *supra*, 134 Cal.App.3d at p. 9.)

3. Insufficient Evidence To Support the Special Circumstances Findings.

Third, there was insufficient evidence to support the special circumstance findings because any reasonable juror would have had reasonable doubt that Blair was making a lawful arrest and that his conduct was lawful at the time of the homicide. (AOB 52-54.) Fuiava contended that there was no reasonable cause to detain him simply because "*Avila* reached into his jacket and tossed a large object over his shoulder into a yard." (RB 74; italics supplied.) Fuiava emphasized the need to connect him to the criminal activity being investigated, and asserted that his mere proximity to Avila was insufficient to connect Avila's toss to him. (AOB 53-54; see also *United States v. Cortez* (1981) 449 U.S. 411, 417-418 [101 S.Ct. 690, 66 L.Ed.2d 621] [an officer conducting an investigatory stop must articulate "a particularized and objective basis for suspecting the particular person stopped of criminal activity"].) To illustrate the point, Fuiava quoted from *Irwin v. Superior Court* (1969) 1 Cal.3d 423, 427-428, where this Court found no reasonable cause to detain Irwin at the airport baggage terminal when Cauwels was discovered transporting marijuana:

> Even assuming that it could be inferred that Irwin stood behind Cauwels in line and further inferred that Irwin knew Cauwels, the next inference that Irwin was involved in Cauwels' criminal activity is based on "nothing more substantial than inarticulate hunches."

(AOB 54, ellipsis deleted.)

The State asserts that this Court should reject this argument because "the portion of *Irwin* relied upon by appellant is *dictum* which has been disapproved." (RB 75, citing *People v. Souza* (1994) 9 Cal.4th 224, 233; *In re Tony C.* (1978) 21 Cal.3d 888, 893; italics in original.) The State is wrong, for this Court's holding in *Irwin*—as reflected in the language quoted above that there was no probable cause to detain the defendant merely due to either his acquaintance with or proximity to a suspect—stands to this day unimpeached. A person's mere propinquity in a public place to another independently suspected of criminal activity does not make it "reasonable for the officer to infer a common enterprise" sufficient to permit a search or seizure of the former. (*Maryland v. Pringle* (2003) 124 S.Ct. 795, 801 [157 L.Ed.2d 769].) Rather, the Fourth Amendment requires that the requisite suspicion to detain a person be "particularized with respect to that person." (*Ibid*, quoting *Ybarra v. Illinois* (1979) 444 U.S. 85, 91].)

In *People v. Souza*, *supra*, 9 Cal.4th at p. 233, the Court found other language in *Irwin* was dictum, language that Fuiava never relied upon in his opening brief. As the *Souza* Court stated:

> The Attorney General asserts that the possibility of an innocent explanation for a person's flight from a police officer does not mean that the flight is irrelevant in determining reasonable cause to detain. We agree. In *In re Tony C.*, *supra*, 21 Cal.3d 888, 893, we accepted this principle when we disapproved dictum in *Irwin v. Superior Court* (1969) 1 Cal.3d 423, 427, that if "events are as consistent with innocent activity as with criminal activity, a detention based on those events is

> unlawful." The *Irwin* dictum, we explained, "cannot be squared with the rule that a reasonable suspicion of involvement in criminal activity will justify a temporary stop or detention." Rather, when circumstances are "'consistent with criminal activity,' they permit — even demand — an investigation ...." (*In re Tony C., supra*, 21 Cal.3d at p. 894.)

In finding the errant language in *Irwin* dictum, the Court in *Tony C.* effectively reiterated the holding of *Irwin* that Fuiava here relies on. As the Court explained, the errant *Irwin* language "was not necessary to the decision therein: Irwin's detention was based totally on a hunch, and the record permitted no reasonable suspicion whatever of criminal activity on his part. [Citation.] His conduct was not merely 'as consistent with innocent activity as with criminal activity,' it was only consistent with innocent activity.' [Citation.]" (*In re Tony C., supra*, 21 Cal.3d at p. 894.)" The same must be said of Fuiava's conduct.

The State claims a reasonable suspicion that Fuiava was engaged in criminal activity "particularly" because before Avila's toss Fuiava "was side-by side with Avila, and ... *both* appellant and Avila began to walk away from the patrol car after they saw the deputies." (RB 74-75.) The State finds it especially suspicious "that immediately after appellant and Avila made eye contact with the deputies,[2] ... they both walked in the opposite direction" from the

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[2] The State's claim of "eye contact" overstates the evidence. According to Lyons, Fuiava and Avila "glance[d] back at the patrol car" (AOB 19, citing RT 429-430) "for 'a split' second.'" (RB 7, citing RT 416-431.) There was no evidence of any "eye contact."

advancing patrol car. (RB 75.) But Fuiava and Avila did nothing more than walk on the sidewalk in the direction in which they were headed, for the deputies approached them from behind. (See, e.g., RT 423-424.) While the State characterizes their movement as "flight"—"the opposite" of "'going about one's business'" (RB 75, quoting *Illinois v. Wardlow* (2000) 528 U.S. 119, 126 [120 S.Ct. 673, 145 L.Ed.2d 570]), merely walking on the sidewalk in the direction they were facing as the patrol car drove in the same direction constituted neither flight nor a basis for detention. "[A] person approached by police ... '*may go on his way.*'" (*People v. Souza,* 9 Cal.4th at p. 234, quoting *Florida v. Royer* (1983) 460 U.S. 491, 498 [75 L.Ed.2d 229, 236-237, 103 S.Ct. 1319]; see also *id.* at p. 232, fn. 2 ["the Attorney General explains that by the term 'flight' he means running in apparent response to the presence of a police officer"].) Indeed, "[a] detention occurs 'whenever a police officer accosts an individual and restrains his freedom to walk away,' [citation] ..."].) (*People v. Aldridge* (1984) 35 Cal.3d 473, 477.)[3]

Again, Lyons's testimony at the preliminary hearing is telling: When the patrol car turned the corner onto Walnut, Lyons saw Fuiava and Avila "walking approximately 50 feet in front of us" in the same eastbound direction as the officers were heading. (CT 130; see also CT 134 [Fuiava and Avila were walking in the same direction as the officers were driving when Lyons "first observed" them]; CT 136 ["When we came around the corner, we observed the two individuals

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[3] Significantly, at trial Lyons did not repeat his preliminary hearing testimony that Blair called out to Fuiava, "Hey, stop." (CT 140.)

walking away from us."] CT 158 [Lyons did not see Fuiava "do anything other than walking."].)

An "individual has a right to ignore the police and go about his business." (*Illinois v. Wardlow*, *supra*, 528 U.S. at p. 125 [120 S.Ct. at p. 676], explaining *Florida v. Royer*.) According to Lyons, Fuiava simply looked back at the patrol car and "continued to walk." (CT 135.) Fuiava and Avila were "separated from one another" when Avila made his toss. (CT 135.) "Fuiava ... was minding his own business and doing nothing more than walking down the street" when Blair sought to detain him. (AOB 53-54.) This was far from the "[h]eadlong flight" at issue in *Wardlow*, and did not approach even the milder "nervous, evasive behavior" that the Court there observed was "a pertinent factor in determining reasonable suspicion." (*Illinois v. Wardlow*, *supra*, 528 U.S. at p. 124 [120 S.Ct. at p. 676.) Simply noting and then ignoring the advancing presence of the deputies, as Fuiava did, is the very opposite of flight. Fuiava but continued the very same behavior in which he was engaged — walking eastbound — when he noted the deputy presence. (CT 139.) "[M]aking and then breaking eye contact with the officers, and then walking away from the officers ... do not furnish the basis for a valid *Terry* stop. Looking at a police officer and then looking away does not provide the officer with a 'particularized and objective basis for suspecting the person stopped of criminal activity' [Citations]." (*United States v. Davis* (10th Cir. 1996) 94 F.3d 1465, 1468.)

Indeed, even if Fuiava had registered some alarm or nervousness, it would not have been suspicious to the deputies

because they were aware of citizen apprehension over the ongoing use of force and violence by the deputies saturating the community. "Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the ... person ... with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence.... Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices." (*Illinois v. Wardlow*, 528 U.S. at p. 133 [120 S.Ct. 673] (dis. opn. of Stephens, J.).) Not coincidentally:

> [A] recent survey of 650 Los Angeles Police Department officers found that 25% felt that "'racial bias (prejudice) on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community.'" Report of the Independent Comm'n on the Los Angeles Police Department 69 (1991); see also 5 United States Comm'n on Civil Rights, Racial and Ethnic Tensions in American Communities: Poverty, Inequality and Discrimination, The Los Angeles Report 26 (June 1999).

(*Id.* at p. 135, fn. 9.)

Where "fear of the police is especially acute in a specific location or at a particular time," an individual's avoidance of the police is hardly suspicious. (*Id.* at p. 135, fn. 12.) Certainly this was the case here, for there was overwhelming evidence of fear and apprehension of police brutality in the minority community of

Lynwood. As Avila succinctly put it: "There was a big problem going on [because] all the cops were out to get us." (RT 1880.) In fact, the community was particularly apprehensive about unjustified searches and seizures and the excessive force the deputies used in carrying them out. As the Ninth Circuit described the civil rights lawsuit that resulted from such practices:

> The plaintiffs, predominately black and hispanic residents of the City of Lynwood, California, brought this section 1983 class action alleging that deputy sheriffs at the Lynwood station of the Los Angeles County Sheriff's Department were mistreating minority citizens. The complaint ... includes allegations of unlawful detentions and searches, beatings, shootings, terrorist activities, and destruction of property. Specifically, the plaintiffs charge that deputy sheriffs in Lynwood use excessive force in detaining minority citizens and employ unlawful procedures in searching residences occupied by minorities.

(*Thomas v. County of Los Angeles* (9th Cir. 1992) 978 F.2d 504, 505-506.) Determination of reasonable suspicion must be informed by "the experiences of many citizens of this country, particularly those who are minorities." (*Id.* at p. 129, citing *California v. Hodari D.* (1991) 499 U.S. 621, 630, fn. 4 [111 S.Ct. 1547, 113 L.Ed.2d 690] (dis. opn. of Stephens, J.).)

Moreover, the California Constitution extended additional protection to Fuiava and further constrained the conduct of Blair. (See *People v. Souza*, *supra*, 9 Cal.4th at pp. 232-233, explaining *People v. Aldridge*, *supra*, 35 Cal.3d at p. 478.) *Aldridge* noted that "furtive conduct" upon the appearance of the police, even at a locale

known for crime, is insufficient to justify a stop absent "some objective evidence of suspicious conduct" by the person detained. (*People v. Aldridge*, *supra*, 35 Cal.3d at p. 480.) As this Court noted in *Souza,* explaining *Aldridge*, the California Constitution grants citizens more protection from police intrusion than does the federal Constitution:

> *Aldridge* at page 478 phrased the issue this way: "It thus becomes necessary to test the police officer's actions against the requirements of article I, section 13, of the California Constitution." Because the *Aldridge* holding rested solely on California constitutional grounds, it is not pertinent authority for determining the propriety of the temporary detention in this post-Proposition 8 case; the issue, as we just explained, must be resolved under the federal Constitution.

(*People v. Souza*, *supra*, 9 Cal.4th at pp. 232-233 [brackets in quote deleted].) Here, the issue is not suppression of evidence, which is controlled by Proposition 8's "Truth in Evidence" provision that evidence may not be excluded on the basis that it was taken in violation of California law. Rather, the question is whether Blair's conduct was lawful and whether the arrest sought to be avoided was lawful, matters that must take into account the constraints on that conduct imposed by the California Constitution as well as the United States Constitution.

Aldredge makes clear that Blair's attempt to apprehend Fuiava was unlawful under the California Constitution. As there stated:

> From his more than two years' experience during which he made numerous arrests in Dr. J's parking

lot for narcotics, weapons and assault, it is obvious that Baldenegro entertained a subjective suspicion that defendant was involved in criminal activity.... However, the People suggest only three factors which they claim objectively justify a detention: it was nighttime; the incident took place "in an area of continuous drug transactions"; and defendant and his companions apparently sought to avoid the police.

Whether considered separately or together, these factors do not justify the detention. First, being in the area of a liquor store at 10:15 p.m., possibly carrying alcohol, is neither unusual nor suspicious. [Citation.] Next, ... persons may not be subjected to invasions of privacy merely because they are in or passing through a "high crime area." [Citations.] The People attempt to distinguish the present case by asserting that Dr. J's was not merely a "high crime area," but rather a specific locale in which a number of crimes had occurred. A history of past criminal activity in a locality does not justify suspension of the constitutional rights of everyone, or anyone, who may subsequently be in that locality.

Finally, the suggestion that an apparent effort to avoid a police officer may justify a detention has been refuted in numerous decisions of this court. [Citations.] ... The record reveals that defendant had previously been detained and interviewed by Baldenegro on Dr. J's lot, and it can safely be assumed that he knew what was in store for him if he were to remain. Defendant had every right to avoid such persistent harassment. [¶] ... "[T]he interest at stake is far from insignificant: it is the right of every person to enjoy the use of public streets, buildings, parks and other conveniences without unwarranted interference or harassment by agents of the law. [Citation.] 'A police officer may

> not use the authority of his uniform and badge to go around promiscuously bothering citizens." [Citation.] In this case, avoiding contact with the police was the only means by which the individuals on Dr. J's parking lot could protect their right of privacy. "To hold that police officers should in the proper discharge of their duties detain and question all persons in that location or all those who act nervous at the approach of officers would for practical purposes involve an abrogation of the rule requiring substantial circumstances to justify the detention and questioning of persons on the street." [Citation.]

Moreover, even if Blair could have lawfully detained an allegedly fleeing Fuiava after Avila's toss, Blair could not lawfully effect that detention by shooting at Fuiava or otherwise using deadly force, so that Blair's conduct was illegal for this reason as well. In the course of finding that a police shooting of a fleeing suspect violated the suspect's clearly-established constitutional rights, the Ninth Circuit had occasion not long ago to review the limits that the Constitution imposes on the conduct of police in the apprehension of a fleeing suspect. (See *Haugen v. Brosseau* (9th Cir. 2003) 339 F.3d 857.) As that court reviewed the law on the point:

> The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Supreme Court has held that the Fourth Amendment prohibits the use of excessive force by police in the course of apprehending suspected criminals. *See Graham v. Connor,* 490 U.S. 386, 394-95, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). In *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), the Supreme Court set forth the specific constitutional rule governing

> when police officers may use deadly force: The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

(*Haugen v. Brosseau, supra*, 339 F.3d at pp. 862-863.)

Haugen further reviewed the law as follows:

> Under *Garner,* deadly force cannot be justified based merely on a slight threat. An officer may not use deadly force "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3, 105 S.Ct. 1694.
>
> The application of *Garner* is clear in many cases. Where a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force. [Citations.] [¶] On the other hand, the mere fact that a suspect possesses a weapon does not justify deadly force. *See, e.g., Harris v. Roderick,* 126 F.3d 1189, 1202 (9th Cir. 1997) (holding, in the Ruby Ridge civil case, that the FBI's directive to kill any armed adult male was constitutionally unreasonable even though a United States Marshal had already been shot and killed by one of the males); *Curnow v. Ridgecrest Police,* 952 F.2d 321, 324-25 (9th Cir. 1991) (holding that deadly force was unreasonable where the suspect

> possessed a gun but was not pointing it at the officers and was not facing the officers when they shot); *Ting v. United States,* 927 F.2d 1504, 1508-11 (9th Cir. 1991) (holding that deadly force was unreasonable where a suspect had dropped his gun).

(*Haugen v. Brosseau, supra*, 339 F.3d at p. 863.)

Under these authorities, it is clear that Blair had no basis to shoot at Fuiava to stop his movement. The totality of the record, including not only the trial evidence but also the preliminary hearing evidence — in which Lyons heard Blair call out to Fuiava, "Hey, stop," and then saw Blair behind the patrol car door with his gun pointing in Fuiava's direction immediately after having heard shots ring out — establishes a reasonable doubt as to the lawfulness of Blair's conduct and attempted apprehension of Fuiava.

4. Insufficient Evidence To Support the Death Judgment.

Fourth and finally, the death judgment may not stand in the face of the doubt that resides and lingers at every level of this prosecution. "[T]he death penalty is unique in its severity and its finality," so that there is an "acute need for [the] reliability" of a death judgment. (*Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246].) That need also raises the constitutional bar for the certainty of the verdicts that underlie a death judgment. Unlike other punishments, execution cannot be called back once a mistake is discovered. Because of the irrevocable nature of the death penalty, an individual's guilt must be certain for the State to constitutionally execute him. While the risk of conviction of the innocent due to the fallibility of the criminal justice system may not alone render the death penalty

unconstitutional across the board (see *United States v. Quinones* (2nd Cir. 2002) 313 F.3d 49), the record here demonstrates that the chance that Fuiava is innocent of capital murder is too great to permit his execution consistent with the requirements of the Eighth and Fourteenth Amendments.

B. The Closeness of the Case.

Fuiava further argued that if the evidence was not insufficient as a matter of law, it certainly made it "a close case" for the jury on all the findings it was required to make to support its verdicts. (AOB 47-48.) The State claims that Fuiava's submission here "is mistaken." (RB 70.)

The State argues in an aside that "the test is not whether the evidence is 'close' or conflicting, but whether there is substantial evidence to support the verdict." (RB 70, citing *In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) That may be the test for determining the sufficiency of the evidence to support a judgment of guilt, which was at issue in *Gustavo M.*, but it is not necessarily the test for the sufficiency of the evidence to support a death judgment. As set forth above, there may be such lingering doubt about the evidence of guilt that a convicted defendant cannot fairly or constitutionally be put to death.

Moreover, whether the case is a close one on the evidence is precisely one of the tests for determining prejudice from error in the proceedings. (See, e.g., AOB 78-79, quoting *Gillette v. Greiner* (S.D.N.Y. 1999) 76 F.Supp.2d 363, 373 ["where 'the verdict is already of questionable validity, additional evidence of relatively

minor importance might be sufficient to create a reasonable doubt'"]; AOB 282, quoting *People v. Bolton* (1979) 23 Cal.3d 208, 215 ["A closer case, marred by the same misconduct, might well require reversal"]; also compare *People v. Allen* (1978) 77 Cal.App.3d 924, 935 [error found prejudicial where "the record reveals an extremely close case" with *People v. Rolon* (1967) 66 Cal.2d 690, 693-694 [similar error "is nonprejudicial 'in the light of a record which points convincingly to guilt'"].) To be sure, "the closeness of the issue ... is the single most important factor" in determining prejudice. (*United States v. Urbanik* (4th Cir. 1986) 801 F.2d 692, 699.)

A theme of the State's brief is that any and all errors that occurred in this case were harmless precisely because of the asserted "extremely strong evidence of appellant's guilt." (RB 107; see also RB 163 [error harmless because of asserted "overwhelming evidence of appellant's guilt"]; for similar assertions of harmlessness, see also RB 169, 195, 229, 263, 272, 319.) The State's refrain of "overwhelming evidence" rendering harmless any and all errors that occurred in Fuiava's case does not withstand analysis. According to the State: "[T]he evidence of appellant's guilt, especially the testimony of Deputy Lyons and the incriminating statements appellant made to Brooks and Frausto, as well as those he made to his mother and sister, overwhelmingly establish that appellant shot Deputy Blair, not in self-defense, but rather so that appellant would not return to prison for the rest of his life as a result of a third strike." (RB 70.) The State's submission fails, whether stated once or repeatedly.

It is "especially the testimony of Deputy Lyons" that makes this a close case. If anyone could be expected to produce devastating testimony against Fuiava, it would be Lyons, an eyewitness and partner of Blair. Lyons, nevertheless, provided testimony that was very favorable to Fuiava. Indeed, the prosecutor was reduced in his opening argument to distancing himself from Lyons's testimony, explaining it as a product of a "combat situation" (RT 2258), and arguing that the fact that Lyons's testimony so favored Fuiava indicated its truthfulness:

> Do you think if Deputy Lyons was lying, that he would have said, I don't know where the shots were coming from? Do you think he would have said that I covered my left ear? Do you think he would have said I thought the shots were coming from east of me.
>
> After talking to the detectives and all the other things that supposedly would have happened, Deputy Lyons would have got up here and said, no, the shots came from the tree and that's the guy who was shooting. Okay.
>
> If this is a conspiracy that counsel is trying to make it be, he would have laid him out.
>
> But he didn't.
>
> Now, we get to Sergeant Harris. We all know of echoes and things and stuff like that. But remember, this is a combat situation.
>
> People on this jury have been in combat. Now, do you always react with natural instincts or do the natural instincts sometime go out the door?

> Well, what was his natural instinct under the circumstances? He turned to the sound of where he thought the shots were coming from — which is what counsel argues is his natural instinct — and to Deputy Blair ....

(RT 2258.)

Tellingly, what the State points to as particularly establishing the overwhelming case for guilt — Lyons's testimony — exonerates more than incriminates Fuiava. The other evidence that the State advances as most persuasive of guilt is equally weak. To begin with, the asserted "incriminating statements ... he made to his mother and sister" (RB 70) are not incriminating. The "statements" that the State apparently refers to here is Fuiava's *lack of a statement* asserting that Blair shot first. (See RB 69, referring to the evidence which "showed that appellant did not mention that Deputy Blair fired first when he spoke to his mother in a tape-recorded jail conversation.") Evidence of what a defendant did *not* say, however, is merely circumstantial evidence from which the State infers guilt, and weak circumstantial evidence at that. It is far weaker than positive admissions by a defendant that constitute direct evidence of guilt. Fuiava demonstrated in his opening brief that his failure to claim self-defense in the taped jailhouse conversation is not convincing of his guilt:

> Fuiava never said on the tape that he shot first; indeed, there is no discussion of the shooting at all on the tape. The tape was equivocal evidence, supportive as much of innocence as of guilt.

(AOB 47.) This evidence is particularly unconvincing of guilt in light of other statements that Fuiava made during the taped

conversation revealing his apprehension that he would be shot and killed by the deputies. (See AOB 34, quoting RT 1531-1532.)

The only remaining evidence that the State particularly relies on to establish "overwhelming" evidence of guilt is the evidence of the assertedly "damning statements appellant made to Brooks, and Frausto" that he shot Blair to avoid arrest on a third strike charge. (RB 70.) While at least here the prosecution has reports of the kind of positive admissions that significantly are lacking in the evidence of Fuiava's recorded statements, these reports are not damning because there were so many bases to reject them as unreliable. First, the evidence purported to relate oral admissions — inherently questionable evidence, which is precisely why Fuiava's jury was instructed it "should view that evidence with caution." (RT 2297.) "The dangers inherent in the use of such evidence are well recognized by courts and text writers." (*People v. Bemis* (1949) 33 Cal.2d 395, 398.) The cautionary instruction "assist[s] the jury in determining if the statement was in fact made" because of the great risk that it never was made. (*People v. Beagle* (1972) 6 Cal.3d 441, 456; see also *People v. Stankewitz* (1990) 51 Cal.3d 72, 94.) Viewing the evidence as instructed, the jury could have rejected the reports by Brooks and Frausto of admissions by Fuiava on a variety of bases:

- Brooks and Frausto made numerous prior inconsistent statements to the police that they had no such information. (RT 1112-1114, 1167, 1180, 1211, 1243, 1283, 1290-1292, 1306.)

- Brooks may have misheard the statements because she was not always a party to the conversation in which they purportedly occurred, or even present in the same room. (RT 1302-1303, 1328, 1332, 1901.)
- No one corroborated the testimony of either Brooks or Frausto about the admissions made to each of them, though Brooks testified that at least three others heard the same statements by Fuiava that she heard. (RT 1249, 1301-1302.)
- Some of the reported statements, such as that the officers asked Fuiava and Avila to show them their hands, had no basis in any other evidence. (RT 1249-1250.)
- There was significant police pressure exerted on Brooks and Frausto that led to the evidence, including repeated interrogation, accusations of lying, detention, a house raid, surveillance, and threats of prosecution for accessory after the fact if there was no cooperation. (RT 1181-1183, 1289-1291, 1324-1326.)
- Brooks received favors from the prosecution, including the payment of $2800 to relocate. (RT 1297.)
- Fuiava denied ever making the statements. (RT 1900-1901, 1956-1957, 2006.)

Moreover, the State's assertion of overwhelming evidence of guilt ignores the evidence presented by the defense. Fuiava's testimony establishing self-defense and belief in the need to defend not only was consistent with much of Lyons's testimony about the

unfolding events, but was corroborated by all the eyewitness testimony. (See, e.g., *People v. Rolon*, *supra*, 66 Cal.2d at pp. 693 [characterizing as an "extremely close case" one where "the jury had to make its fact determination based upon the credibility of the appellant and his witnesses and the credibility of the prosecution's witnesses"].)

The State also largely ignores the abundant indications in the record that the jury experienced unusual difficulty in reaching its verdicts. Fuiava has argued that these comprise an objective showing that the case was close on the evidence. (See AOB 48; see also AOB 101.) Those objective indicators included the following:

- The jury's request for readbacks of testimony from two witnesses.
- Jury divisiveness during deliberations for which they sought and obtained court intervention.
- The unusual length of the jury's deliberations.

Ignoring the divisiveness of the jury during deliberations and the jury's request for readbacks as evidence of the difficulty it had in reaching its verdicts, the State takes issue only with Fuiava's assertion that the unusual length of the jury's deliberations further demonstrated the closeness of the case. (RB 108.) The State claims that "the length of the deliberations could as easily be reconciled with the jury's conscientious performance of its civic duty, rather than its difficulty in reaching a decision." (RB 109, quoting *People v. Walker* (1995) 31 Cal.App.4th 432, 438.) In *Walker*, the court stated: "Here, there is no

evidence, absent defendant's speculation, that the jury, at any point during deliberations, was unable to reach a verdict." (*Ibid.*) In contrast, Fuiava's case indisputably discloses that the jury was unable to reach a verdict during points of its deliberations, for his jury required intervention of the court to resolve an impasse among them. Indeed, the *Walker* court "recognize[d] that in some cases our Supreme Court has inferred a close case from unduly lengthy deliberations," but found simply that it could not "do so under the facts of this case." (*Id.* at pp. 438-439.) In Fuiava's case, however, the Court may make such an inference for many reasons, including the fact that the length of deliberations here, 2 ½ days, was much longer than the 6 ½ hours at issue in *Walker*.

In sum, if the evidence is not insufficient as a matter of law to support the judgment, the evidence made the questions the jury had to decide so close and difficult that any substantial error mandates reversal. As detailed below and in the opening brief, there were many such errors that undermine the reliability of the judgment.

* * * * * *

II.

THE TRIAL COURT'S EXCLUSION OF EVIDENCE CRIPPLED FUIAVA'S DEFENSE, REQUIRING REVERSAL OF THE JUDGMENT.

A. Overview.

Fuiava has argued that the trial court excluded a range of evidence bolstering his defense that he shot Blair based upon an honest — and reasonable — fear that Blair was about to unlawfully kill or inflict great bodily injury on him or Avila. (AOB 58-102.) Fuiava described in his opening brief what he offered to prove:

> Fuiava proffered evidence of a culture of police misconduct by sheriff 's deputies directed at members of the Lynwood community and specifically the Young Crowd. This evidence included the existence within the Lynwood sheriff's station of a renegade clique of deputies called the Vikings that perpetrated vigilante justice in the community by lawless action under color of authority. The practice of such "justice" by the Vikings in particular and the sheriff's department generally — including wrongful detentions, searches, beatings, shootings, and killings — led to a major lawsuit by Lynwood neighbors, including Avila, against the Sheriff's department and a number of its deputies, including Blair. At the time of the Walnut Avenue confrontation, that litigation was coming to a head with a trial date only weeks away. Consequently, the deputy sheriffs had stepped up their intimidating police practices to cower the Lynwood neighborhood into silence. In addition, the deputies continued to administer their lawless justice in the neighborhood, wrongfully

> shooting a Young Crowd member in the back only days before the confrontation.

(AOB 58.) The court, however, "largely excluded this evidence." (AOB 59.)

The State asserts that "[t]he trial court properly excluded evidence of the alleged 'culture' of misconduct, civil lawsuits, and specific facts of two prior shootings of Young Crowd gang members ...." (RB 77.) The State further asserts that Fuiava waived the constitutional dimension of the court's error by not raising it in the trial court (RB 77, fn. 10; RB 100), and that any error was harmless (RB 78). The State's assertions all fail.

B. The State's Procedural Objection to the Constitutional Dimensions of Fuiava's Claim.

The State's procedural objection to consideration of the constitutional dimension of this assignment of error should be rejected on the ground that the constitutional analysis for error here is fully congruent with the statutory analysis. (See AOB 73-75.) Under such circumstances, a reviewing court will not find waiver or forfeiture of the federal issue, since it would not have affected the trial court's consideration of the issue. "[A]n objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. [Citations.] In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented. [Citations.]" (*People v. Scott* (1978) 21 Cal.3d 284, 290.) As stated in *United States v. Humphrey* (6th Cir. 2001) 287 F.3d 422, 445: "The preservation of a constitutional objection should not rest of magic words; it suffices that

the ... court be apprised of the objection and offered an opportunity to correct it."

The *Scott* rule and *Humphrey* admonition have even more force here, where the due process and Evidence Code section 352 issues were identical: Did the state's interest in avoiding undue 1) consumption of time, 2) prejudice, or 3) confusion of the issues substantially outweigh Fuiava's need to present this evidence to make his defense, so that the evidence could fairly be excluded? "A careful weighing of prejudice against probative value under [Evidence Code section 352] is essential to protect a defendant's due process right to a fundamentally fair trial." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1029; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334.) This Court has recognized as much, concluding that Evidence Code section 352 provides a realistic safeguard against due process violations. (*People v. Falsetta* (1999) 21 Cal.4th 903, 919-920.) The evaluation required by Evidence Code section 352 and by due process was virtually coextensive on the issue of admissibility of Fuiava's evidence. (See e.g. *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060.)

Since the issue the trial court had to decide was the same whether couched in the terms of Evidence Code section 352 or the federal Constitution, counsel's explicit invocation of the Constitution would not have affected the court's analysis. Hence, there was no need for trial counsel to specifically alert the court to the constitutional dimension of the state evidentiary issue. (See, e.g., *People v. Yeoman* (2003) 31 Cal.4th 93, 117 [no waiver on appeal of

federal dimension of issue posed in trial court only in terms of state law, where the federal and state standard is the same; rather, addressing the merits of the federal claim under those circumstances "is more consistent with fairness and good practice than to deny the claim as waived"].) As later explained in that case, this Court will address the merits of a constitutional claim asserted for the first time on appeal where it "merely invites us to draw an alternative legal conclusion ... from the same information he presented to the trial court." (*Id.* at p. 117, fn. 9.)

Moreover, "an appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party." (*People v. Williams* (1998) 17 Cal.4th 148, 168, fn. 6.) Rather, consideration of claims advanced for the first time on appeal is a matter of discretion, governed by no bright-line rule. Here, and throughout the State's brief when it asserts procedural default, it never articulates specific reasons why the Court should exercise its discretion in favor of forfeiture. There are good reasons here for the Court to exercise its discretion in favor of adjudication on the merits, the most important of which are that the demand for fundamental fairness of a death judgment contained in the due process clause of the Fourteenth Amendment and the demand for reliability of a death judgment contained in the cruel and unusual punishment clause of the Eighth Amendment counsel in favor of such adjudication. This Court's jurisprudence is in accord with these constitutional values. "This court has generally been reluctant to find that an accused forfeits his right to appellate review by failing to make a timely or

proper objection, if such a finding would result in substantial injustice." (*People v. Frank* (1985) 38 Cal.3d 711, 736 (conc. & dis. opn. of Bird, C.J.).) This is particularly so in a capital case: "The majority are correct in noting that this principle rings especially true in death penalty cases." (*Ibid*; accord, *United States v. McCullah* (10th Cir. 1996) 87 F.3d 1136, 1139 ["failure to say the 'magic words' should not result in the affirmance of a death sentence which might not otherwise have been imposed"].)

The cases cited by the State in a footnote (RB 77, fn. 10) are not to the contrary. In *People v. Williams* (1997) 16 Cal.4th 153, 250, the Court found waiver of the defendant's constitutional claims of wrongful admission of evidence where defendant at trial did not even raise an objection under Evidence Code section 352, which was not violated in any event, and the defendant's constitutional claims on appeal were "perfunctorily raised without argument" and lacked merit. Similarly, in *People v. Jackson* (1996) 13 Cal.4th 1164, 1231, fn. 17, the "defendant demonstrate[d] no constitutional error"; moreover, the claim concerned not the admission of evidence, but, rather, "the presence of a camera in the courtroom ...." The State's final authorities, *People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3, and *People v. Raley* (1992) 2 Cal.4th 870, 892, likewise both concerned constitutional claims that the Court found failed on their merits.

Moreover, in *People v. Sanders, supra*, 11 Cal.4th at p. 510, fn. 3, the appellant's "assertion that the trial court's ruling would not have been different had defense counsel expressly cited the constitutional

provisions [was] merely speculative." Fuiava's same assertion here, however, is demonstrable rather than speculative. As Fuiava noted in his opening brief, the same considerations that permit a court to exclude relevant defense evidence under Evidence Code section 352 permit a court to exclude such evidence under the Constitution. (See AOB 73, citing *Crane v. Kentucky* (1986) 476 U.S. 683, 689-690, 106 S.Ct. 2142, 2146.) At the same time, the constitutional imperative that requires a court to permit a defendant to present all relevant evidence of significant probative value to his defense informs a trial court's analysis of those statutory exclusionary considerations. (See AOB 74-75, citing *People v. Babbitt* (1988) 45 Cal.3d 660, 684.) "Both the federal and state analyses require a balancing of the extent to which the jury's determination could have been affected by the exculpatory evidence against the state's interest in avoiding undue consumption of time or jury confusion and prejudice." (AOB 77.) In addition, "[b]oth the weighing process [under Evidence Code section 352] and the due process violation for denial of the right to meaningfully present a defense are tied to the likelihood" that consideration of the evidence would result in a more favorable verdict to the defendant. (AOB 78.) Thus, there could never be a case where a trial court reasonably found that Evidence Code section 352 authorized the exclusion of evidence proffered by a defendant, but the Constitution prohibited that exclusion. Just as this Court recognized in *People v. Sanders*, *supra*, 11 Cal.4th at p. 510, fn. 3, the constitutional claims of error here "are premised on the assertion that the trial court erred [as a matter of state law] in excluding the ... testimony and that the error was prejudicial." (See also *People v. Cole* (2004) 33 Cal.4th

1158,1187, fn. 1 [Court addresses merits of federal claim where "[t]he predicate of defendant's claim of federal constitutional error is the existence of state law error"]; *id.* at p. 1193, fn. 5 [same]; *id.* at p. 1197, fn. 8 [Court addresses merits of constitutional dimension of evidentiary ruling raised "[f]or the first time on appeal" because constitutional claim premised on assertion of state law error preserved at trial; *id.* at p. 1198 fn. 10 [Court "[c]onsider[s] these constitutional claims on the merits despite defendant's procedural default" because they are premised on state error preserved at trial].)

These same considerations should cause this Court to eschew a finding of forfeiture of the constitutional grounds for relief raised here. Because the analyses of the state and federal claims of error here are the same, the policy reasons underlying the forfeiture rule would not be advanced by finding forfeiture of the constitutional aspects of this claim. No state interest is served by requiring the defendant to raise his federal ground for admission of the evidence in the trial court where he has made an objection to exclusion of the evidence under Evidence Code section 352. As the Court observed in *People v. Yeoman, supra,* 31 Cal.4th at p. 117:

> As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal.

Nor do the authorities that the State cites in the text on this point (RB 100) advance his procedural objection. *People v. Davis* (1995) 10 Cal.4th 463, 501, fn. 1 concerned exclusion of evidence pursuant to Evidence Code section 1101, not Evidence Code section 352. And *People v. Kipp* (2001) 26 Cal.4th 1100, 1122 concerned admission of evidence against a defendant, not exclusion of defense evidence. In neither case did the appellant show or even assert that the analysis of the state and federal dimension of the issue is the same, as was shown in *Yeoman* and is shown here. (See also AOB 96 [where there is a challenge to exclusion of defense evidence, "finding a violation of the [constitutional] right to present a defense is the equivalent of finding reversible error under Evidence Code section 352"].)

C. The Merits of Fuiava's Claim.

The State's argument on the merits is similarly insupportable. The State first emphasizes the broad discretion that resides in the trial court to determine when evidence may be excluded under Evidence Code section 352. (RB 90, citing *People v. Cox* (2003) 30 Cal.4th 916, 955; *People v. Waidla* (2000) 22 Cal.4th 690, 724.) This Court has recognized, however, that this discretion is constrained by a defendant's right to present evidence material to his defense. (See AOB 75, citing *People v. Babbitt, supra,* 45 Cal.3d at p. 684; *People v. Cooper* (1991) 53 Cal.3d 771, 816.) When a trial court exercises its discretion to exclude relevant defense evidence, that exercise must be reasonable and proportionate to the state's legitimate purposes and may not be arbitrary or capricious. (See AOB 76, quoting *People v.*

Cudjo (1993) 6 Cal.4th 585, 639 (dis. opn. of Kennard, J.).) The State admits as much, recognizing that an abuse of discretion is shown whenever discretion is "exercised in 'an arbitrary, capricious or patently absurd manner that result[s] in a manifest miscarriage of justice.'" (RB 90, quoting *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) That description well describes the court's rulings at issue here.

1. The Lawsuit Evidence.

a. The Error.

First, the State argues that the trial court could properly conclude that evidence of "the lawsuit had 'attenuated significance to the issues contested at trial.'" (RB 91, quoting *People v. Hart* (1999) 20 Cal.4th 546, 607.) Although *Hart* also concerned exclusion of evidence of a lawsuit, the contrast between that case and Fuiava's only highlights the trial court's error here. In *Hart*, the trial court excluded evidence that prosecution witness and victim Amy R. "filed a civil suit alleging that the Riverside County Sheriff's Department mistreated her and lied to her at the time she reported the murder of her friend, Diane." (*Id.* at p. 604.) The defendant had offered the evidence "as character evidence against sheriff's department officials" and because it "might be motivation for Amy to make a stronger statement for herself, and for the officers to make a protective statement for themselves." (*Id.* at pp. 604-605.) On appeal, he argued that it was relevant to Amy's credibility to show that she was suspected of involvement in the murder when she reported it. (*Id.* at p. 606.)

This Court rejected that claim as follows:

> Here, the trial court properly could conclude the circumstance that Amy filed a civil suit against the Riverside County Sheriff's Department was of attenuated significance to the issues contested at trial, particularly inasmuch as the observations of sheriff's deputies that were material to the present case were set forth to a great extent in reports prepared well before Amy filed her civil suit, and because the deputies' observations and recollections could be tested on cross-examination on the basis of those reports. Further, the trial court properly could determine that the admission of evidence of Amy's civil suit would have permitted the focus of the testimony to shift away from the events leading to and involving the charged offenses, to the conduct of law enforcement officers *after* those offenses had been committed. The trial court acted within its discretion in determining that such a shift presented a substantial risk of confusing or misleading the jury.

(*Id.* at pp. 606-607; italics in original.)

In contrast to the attenuated connection of the lawsuit evidence to the issues contested at the trial in *Hart*, here the evidence of the lawsuit had a direct connection to the most fundamental issue contested at trial — who shot first? The lawsuit evidence tended to show that Blair shot first because it gave him a motive to do so. (See AOB 78-86.) Just as the State puts it: Evidence of "[t]he lawsuit was offered to prove Deputy Blair's motive to shoot at Avila to protect the 'brotherhood' of Vikings, who allegedly wanted to intimidate witnesses or plaintiffs involved in that lawsuit." (RB 91.) Notably, the State does not dispute Fuiava's showing both that 1) who shot first

was a key issue at trial, and 2) a weak link in the defense was evidence of a motive for Blair to shoot first. (See AOB 83-85.)

The State's argument boils down to a claim that Fuiava's proffered evidence of motive simply was not persuasive. In this regard, the State notes that "Deputy Blair was named as a defendant in only two of the many cases consolidated" in the litigation, and that the lead case "scheduled to go to trial in June 1995" did not involve either of those cases, the Vikings, the Young Crowd, Avila, or Fuiava. (RB 91.) According to the State, the trial court could rely on these facts to "properly conclude[] that the pending lawsuit did not 'really provide ... any legitimate basis' for the defense allegation that Deputy Blair fired at Avila because" of the litigation. (RB 91, quoting the court; ellipsis in RB.) The court here simply overlooked the fact that the looming trial of the lead case could have prompted Blair to shoot first as a show of force, for the lead case was the pilot trial that would control the direction of the rest of the litigation. That imminent trial in fact did control the course of the litigation. "The trial on the first lawsuit in the Thomas case resulted in a verdict for plaintiffs and thereafter the remaining lawsuits in the Thomas case were settled out of court." (RB 84.)

The State's argument betrays the fact that the court's basis for exclusion went to the weight and power of the evidence, not its significance or relevance to the issues. The persuasiveness or power of the evidence to prove the defense's point, however, was for the jury to determine, not the court. The State's ellipsis is telling on this point, for the full quote of the court is that the lawsuit evidence "just doesn't

really provide *in the court's view* any legitimate basis for Blair to have shot at Fuiava...." (RT 1481, italics added.)

"Judicial exclusion of evidence that a jury may find relevant and helpful to the defendant's case just because the court does not find it particularly persuasive precludes the jury from considering such evidence in its determination of guilt or innocence, and thus serves to effectively substitute the court for the jury as the decisionmaker." (AOB 76, citing Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence* (1998) 86 Geo. L.J. 621, 637-642.) That is why this Court has instructed: "[I]f the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt." (See AOB 78, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834, in turn quoting 1A Wigmore, *Evidence* (Tillers rev. ed. 1980) § 139, p. 1724.) It is enough that Fuiava made a "plausible showing of how the testimony would have been both material and favorable to his defense." (AOB 78, quoting *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867 [102 S.Ct. 3440, 73 L.Ed.2d 1193]; brackets in AOB deleted.)

The State has no answer to Fuiava's demonstration that the court here wrongly arrogated to itself the determination of whether the evidence at issue provided a motive for Blair to shoot first, instead of permitting the jury to make that determination. Recent decisions of

the United States Supreme Court have emphasized the jury's central role in determining both the guilt and punishment of the defendant, and the unconstitutionality of a judge rather than a jury making any factual finding essential to determining either guilt or punishment. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 524 U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403].)

The State further argues that "the trial court properly determined that the probative value of the lawsuit [for establishing a motive for Blair to shoot first] was 'far outweighed' by the risk of confusion and undue consumption of time and its remoteness." (RB 92.) Not true, for that determination was an abuse of discretion.

The State argues that the trial court properly found that the evidence about the lawsuit would confuse the jury by distracting it from the facts of the shooting itself, likening the court's finding here to the one in *Hart* under purportedly "similar circumstances." (RB 92.) As discussed earlier, however, though the evidence at issue in *Hart* also concerned that of a civil lawsuit, the considerations there were very different than the ones here. Here, the evidence did not concern some after-the-fact lawsuit, as in *Hart*, that would have distracted the jury "from the events leading to and involving the charged offenses." (*People v. Hart, supra*, 20 Cal.4th at p. 607.) To the contrary, Fuiava's defense theory made the evidence of the lawsuit an integral part of the events leading to the charged offenses. Because the evidence of the lawsuit provided a context for the shooting, the jury's consideration of that evidence would not have distracted it from

the facts of the shooting; rather, it would have assisted the jury in determining those facts. The State has no answer to Fuiava's point that "[e]xclusion of the evidence ... distorted the truth by omitting the larger context in which the shooting occurred." (See AOB 87.)

Just as Fuiava has argued:

> Because there was such equipoise in the evidence of who shot first, the competing motives of the parties became crucial. The prosecution laid out its evidence of Fuiava's motive to initiate the gun battle — he wanted to avoid arrest for possession of the firearms and/or pay back the police for the shooting of Nieves. The defense, on the other hand, was precluded from laying out corresponding evidence of Blair's motive to initiate the gun battle — he was part of a cadre of deputies that made a practice of using force and firearms to police Lynwood and wanted to intimidate Avila and others who had sued Blair and his cadre for that practice.

(AOB 82.) The excluded "[e]vidence ... would not have 'confused the issue.' It would have further illuminated the situation the jury was required to evaluate." (See AOB 90, quoting *People v. Minifie* (1996) 13 Cal.4th 1055, 1070-1071.) Thus, exclusion of the evidence cannot be justified on the ground of any danger that the evidence would have distracted the jury from the facts pertinent to its decisionmaking.

The State's argument that evidence of the lawsuit would have involved an "undue consumption of time [because] the jury would have had to been informed about extensive ... facts about the lawsuits" (RB 92) is considerably overblown. The State lists certain "details" about the lawsuit that "would have [had] to be explained" (RB 92), but makes no effort to rebut Fuiava's showing that these

details could have been presented expeditiously because they were undisputed. (See AOB 87; see also *United States v. Crosby* (9th Cir. 1996) 75 F.3d 1343, 1348 ["minimal risk of delay" where excluded evidence in part "undisputed" ... so that so the trial would not have been delayed by disagreement on those facts," and the remainder "was a matter of public record and thus was easily ascertainable"].)

Finally, the State relies on the trial court's finding that "the lawsuit was remote" because it was filed back in "1990 or 1991 ... and the instant shooting took place in June 1995." (RB 92-93.) That reliance overlooks the arbitrariness of the court's finding. Fuiava's evidence concerned intimidation of the community based on the pendency of the litigation, not its filing, and particularly based on the looming trial of the lead case, which was only weeks away at the time. Fuiava sought to present evidence that the deputies stepped up their intimidation with the approach of that trial. (See AOB 62.) Thus, the finding that the evidence of the lawsuit and the deputy harassment of the community that accompanied it was remote illustrates the court's abuse of its discretion in exclusion of that evidence.

b. The Prejudice.

The State takes issue with Fuiava's claim of structural error here, on the basis that case law has found that wrongful exclusion of evidence is one of those errors the harm from which a reviewing court typically can gauge. (RB 104-105.) But in the unusual case where the exclusion concerns defense evidence that went to the heart of the defense and acts to deprive a defendant of his right to jury consideration of his guilt or innocence, there is inherent prejudice. In

such a case, "the wrong entity [has] judged the defendant guilty." (See *Rose v. Clark* (1986) 478 U.S. 570, 578 [92 L.Ed.2d 460, 106 S.Ct. 3101].) That kind of error constitutes a "structural defect affecting the framework within which the trial proceeds ...." (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 309.) The State is simply wrong in its assertion that "the cases cited by appellant in support of his contention of structural error do not involve the exclusion of evidence" (RB 105), for Fuiava argued in this regard as follows:

> Where the trial court has wrongly excluded evidence that went to the heart of the defense, reversal is required because the exclusion effectively deprives a defendant of his right to a jury determination of his innocence or guilt. (See *People v. Marsh* (1962) 58 Cal.2d 732, 741 ["the court quite effectively took from the jury the determination of the only real issue in the case" by its exclusion of evidence that "went to the very heart of the basic defense," so that there was necessarily a miscarriage of justice "in spite of the overwhelming nature of the evidence" otherwise] ....)

The argument over the standard for reversal here may simply be a question of semantics, for any exclusion of substantial critical evidence of innocence necessarily deprives a defendant of a fair determination of guilt and prejudices the defendant. In such a case the error is not only structural, but cannot be proved harmless by the usual federal and state measures of prejudice, for exclusion of evidence critical to the defense will require reversal no matter what standard is employed. As this Court has noted:

> As a general matter, the "application of the ordinary rules of evidence does not impermissibly infringe on

> a defendant's right to present a defense." [Citation.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, "the trial court's ruling was an error of law merely; there was no refusal to allow defendant to present a defense, but only a rejection of some evidence concerning the defense." [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243], and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824, 24 A.L.R.3d 1065]).

(*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103; brackets and ellipses omitted.)

The State claims that it is of no moment that the court excluded all the evidence of the lawsuit because in the end "the jury [became] aware that a lawsuit had been filed against the Sheriff's Department, and that deputies threatened appellant's gang after mentioning that lawsuit." (RB 105-106.) According to the State, this makes the case like *Fudge*, in which "this Court held the trial court's exclusion of defense evidence was harmless under the *Watson* standard where 'much of the evidence was ultimately placed before the jury.'" (RB 105, quoting *Fudge* at pp. 1103-1104,.) The State so asserts on the basis of a single reference to the lawsuit that Fuiava made in the course of his cross-examination. (See RB 105, citing RT 1881-1885.) There, Fuiava testified that a deputy mentioned to him about the fact

that "the lawsuit's coming up," and added: "You guys want things to be rough around here ... [but] you guys haven't seen nothing yet." (RT 1882.) The State ignores the fact that this incidental reference to the lawsuit was "left veiled by the court's ruling" excluding the rest of the evidence of the lawsuit. (AOB 12, fn. 2.) Without explanation or context, the jury must have been as mystified by it as Fuiava said that he was at the time. As he testified, "I didn't know what they were talking about. So I wasn't really paying attention." (RT 1882.) For the same reason, presumably the jury also did not attach any significance to the reference. Thus, the evidence about the lawsuit hardly "was ultimately presented to the jury," as the State claims. (RB 105.)

2. The Culture of Misconduct by Lynwood Deputies.

The State concedes that evidence about the Vikings "was relevant" because of other evidence that established that Blair was a Viking. (RB 93.) The State nevertheless justifies exclusion of "evidence regarding alleged specific bad acts by the Vikings ... because it was 'too far afield.'" (RB 93, quoting the trial court.)

The State submits that in light of the evidence that was admitted which indicated that the Vikings were a violent clique in the Sheriff's Department that made a show of force, and the further evidence of specific beatings of "Oso" and Avila that came in during cross-examination of Avila, the court properly precluded "additional evidence that the Vikings regularly used excessive force in policing Lynwood." (RB 94.) In making that submission, the State sidesteps

Fuiava's point that the additional evidence was needed to corroborate Avila, whose testimony the prosecutor urged the jury to reject as untrue. (See AOB 90-91.) This need was made plain during the examination of Juror T., who disclosed that the credibility of Young Crowd witnesses was in dispute. (See AOB 103.)

Along the same lines, the State submits that Fuiava forfeited his claim here when his counsel acknowledged upon the court's ruling outlining the limits of the evidence that he "did not intend 'to go any further.'" (RB 94, citing RT 1585-1587.) Counsel made that comment only after the court had effectively ruled, however, explaining that the court was permitting "the essence" of what he sought to present. (RT 1587.)

The State argues forfeiture here because Fuiava's counsel "not only failed to make a timely and specific objection, but also agreed with the trial court that additional evidence regarding specific bad acts by Vikings ... was inadmissible." (AOB 94-95.) The purpose of finding forfeiture absent an objection, however, is to give the trial court an opportunity to rule on the matter. (See, e.g., *People v. Scott*, *supra*, 21 Cal.3d at p. 290; see also *People v. Abbot* (1956) 47 Cal.2d 362, 372-373 [this Court treated the evidentiary issue as properly before it where "the court chose to pass upon the admissibility of all the evidence, whether objected to or not"].) While a defendant may not lie in the weeds at trial to ambush the verdict on appeal, counsel's conduct here does not render this Court's consideration of the evidentiary issue unfair to either the trial court or the prosecution. Given that "trial counsel presented evidence of other alleged

misconduct by the Vikings during the Evidence Code section 402 hearing" held to determine what evidence Fuiava could present on his behalf (RB 94), and that admission of that evidence at trial would have redounded significantly to Fuiava's benefit, counsel could not possibly have been satisfied with the court's ruling on this point. Any satisfaction with the ruling that he expressed could only have been designed to ingratiate himself with the court as a non-obstructionist counsel. "Where a court has made a ruling, counsel must not only submit thereto but it is his duty to accept, and he is not required to pursue the issue." (*People v. Diaz* (1951) 105 Cal.App.2d 690, 696.)

On the merits, the State misapprehends the full probative value of the evidence of a deputy practice of use of excessive force in the community. The State correctly notes that Fuiava contended that this evidence "was relevant on the issue of the reasonableness of appellant's belief in the need for self-defense or defense of Avila." (RB 95, citing AOB 89-90.) It was even more relevant, however, to Blair's state of mind — specifically, his intent when he shot at Avila and Fuiava — and to the ultimate showing that Blair shot first. The prosecution sought to explain Blair's shooting at Fuiava as conduct in defense of himself and Lyons, while Fuiava sought to explain his shooting of Blair as conduct in defense of himself and Avila. Thus, evidence that the Vikings had a practice of using excessive force and improperly shooting at those associated with Young Crowd while policing the community went directly to Blair's intent and motive when he shot. "[I]t is proper to introduce evidence which is even unpleasant or negative pertaining to an organization in issue which is

relevant on the issue of motive or the subject matter at trial." (*People v. Frausto* (1982) 135 Cal.App.3d 129, 140.). As *Frausto* explained at pp. 140-141:

> In *People v. Remiro* (1979) 89 Cal.App.3d 809, 841-844, it was proper to introduce evidence of various criminal acts of a terrorist group, the Symbionese Liberation Army, in order to show the nature of the conspiracy pertaining to a murder. In the same manner, in *People v. Manson* (1976) 61 Cal.App.3d 102, 131, 155-156, it was proper to introduce evidence of the social structure, religion, and criminal activities of an organization known as the "Family" because of its relevancy to the motivation and the nature of the conspiracy of the Tate-LaBianca murders. In *In re Darrell T.* (1979) 90 Cal.App.3d 325, 328-334, the court discussed evidence concerning the history and nature of various juvenile gangs as it pertained to the proof of the existence of a motive relative to the crime of murder. In *People v. Beyea* (1974) 38 Cal.App.3d 176, 194, evidence concerning a membership in the Hell's Angels was deemed to be properly introduced relative to the issue of motive. In *People v. McDaniels* (1980) 107 Cal. App.3d 898, 904-905 [166 Cal.Rptr. 12], a companion case to *In re Darrell T.*, the Court of Appeal upheld the use of gang experts "relating to the sociology and psychology of gangs."

Particularly because Fuiava was entitled to present evidence of Blair's propensity for violence to establish the claim of self-defense, the evidence of the violent propensities of the Vikings was especially relevant to show that Fuiava shot in response to Blair's shooting, not vice-versa.

Finally, the State claims that the evidence of the deputy culture of excessive force "constituted inadmissible hearsay" because it was offered in the form of "allegations in the lawsuit" and "declarations of persons" that constituted "out-of-court statements made by persons who were not witnesses at the instant trial." (RB 97.) There was no reason, however, that these declarants, who had submitted their statements under oath in the federal proceeding, could not be called as witnesses at Fuiava's trial to present similar testimony under oath at trial. The court's ruling after such testimony was proffered that its substance should be excluded under Evidence Code section 352 preempted any issue about the form of that testimony. Because evidence that Blair was part of a renegade cadre of deputies that made it a practice to use excessive force in their zeal to enforce the law in Lynwood was key to Fuiava's defense, he should have been permitted to develop and present it. As Fuiava has argued:

> The arguments of counsel made very clear that the critical evidence the defense needed to produce to make its case that Blair shot first without a legitimate law enforcement reason was evidence showing *why* he would do so. One reason why was because he was part of a vigilante clique of deputies called the Vikings that made it a practice to use excessive force in policing Lynwood.

(AOB 85-86.)

3. The Facts of the Shootings of Nieves and Polk.

Fuiava further argued that the trial court wrongly precluded him from presenting evidence about "the actual facts" of the shootings of Young Crowd members Jose "Rascal" Nieves and Lloyd "Stranger"

Polk. (See RB 98, citing AOB 59, 71-72, 92.) The sheriff's deputies had shot and killed Polk — a plaintiff in the lawsuit — in the presence of Avila, and that alleged wrongful death had become part of the lawsuit. (See AOB 12, 62.) The deputies allegedly had wantonly shot Nieves in the back as he ran from them during their raid of his residence after they discovered the mock patrol car on his property, just a week before the charged shootings. (See AOB 16.) Fuiava sought to prove these allegations of wrongful shootings, but the court excluded that evidence. (See AOB 71-72.)

The State characterizes the evidence about the actual facts as merely "details of those shootings." (RB 98.) According to the State, "the trial court properly found that the details regarding these two shootings were too remote, as those shootings did not involve Deputy Blair, and would involve unnecessary delay because the prosecution would then wish to present evidence to rebut defense witnesses's [sic] version of the details of the shootings." (RB 99.) The State's submission is not well taken.

The State first seeks to justify the exclusion of this evidence with the assertion that "[t]he trial court permitted multiple witnesses to testify that Nieves and Polk had been shot by deputies, including that Nieves had been shot in the back about a week prior to Deputy Blair's murder." (RB 98.) As the State's record citations indicate, however, the court allowed only Fuiava to testify about Polk's killing; moreover, his testimony was strictly limited to the fact that Fuiava had "heard about" the shooting death, and the court permitted that testimony not for its truth but only for the purpose of showing

Fuiava's "state of mind. (RT 1910.) Significantly, Avila, an eyewitness to the Polk shooting, was not permitted to testify about it at all. (See AOB 71, citing RT 1720.)

The State's record citations confirm that the evidence of the Nieves shooting was considered hearsay and admitted not for its truth but only for the purpose of establishing state of mind. (See RB 98.) Just as Fuiava has set forth in his opening brief about the shooting of Nieves: "The court ... allowed evidence only about what Young Crowd members and others on the street understood about that shooting, and excluded evidence of the actual facts of the shooting." (AOB 71.) The State makes no claim otherwise; rather, its argument illustrates Fuiava's point. As the State summarizes the evidence admitted "regarding shootings of Young Crowd gang members by deputies":

> Prosecution witness Brooks testified *she heard* that deputies shot "Rascal" and prosecution witness Frausto testified *she heard* that deputies shot a Young Crowd gang member. [Record Citation.] Appellant testified that his homeboy Rascal had been shot by sheriffs, and that his homeboy Stranger was shot and killed by sheriffs in December 1990. [Record Citations.]

(RB 106; italics added.)

The court's rationale for excluding this evidence does not stand up to scrutiny. That evidence supported Fuiava's defense theory in many ways: 1) The wrongful killing of Polk was one of the incidents that became part of the civil lawsuit; 2) Avila was a witness to that wrongful death and slated to testify about it when that incident came

to trial; 3) the deputy habit of using deadly excessive force in the community bore on Blair's intent when he shot at Fuiava and Blair's propensity to shoot first; and 4) the antecedent deputy violence further bore on Fuiava's honest belief in the need to shoot to defend himself and Avila, and the reasonableness of that belief. Given the value of this evidence to Fuiava's defense, the fact that it was disputed and subject to rebuttal does not establish that its presentation would cause "undue delay" justifying its exclusion. (See, e.g. *United States v. Crosby*, *supra*, 75 F.3d at p. 1348 ["delay reasonably necessary to allow a party to present key aspects of its case can never defeat admissibility"]; *People v. Taylor* (1980) 112 Cal.App.3d 348, 365 ["the right of a defendant to present evidence in his defense is so fundamental that consumption of time is irrelevant where the evidence is not cumulative"].)

Moreover, the fact that "those shootings did not involve Deputy Blair" is not particularly weighty, since they involved fellow officers that were associated with Blair. As the State acknowledges, "Where a defendant claims self-defense, prior threats by third parties whom the jury could infer that the defendant reasonably associated with the victim are admissible." (RB 95, citing *People v. Minifie*, *supra*, 13 Cal.4th at pp. 1064-1069; see also AOB 89-90.) The State also seeks to justify excluding the proffered evidence of deputy misconduct on the basis that the misconduct "occurred several years before" the charged offenses. (RB 96.) The proffered evidence of the wrongful shooting of Nieves, however, concerned the unjustified use of deadly force by an alleged Viking that occurred less than a week before the

charged shootings. (RT 1804.) Thus, the trial court could not reasonably conclude that the probative value of the evidence was substantially outweighed by the concerns identified in Evidence Code section 352 that permit exclusion of relevant evidence.

4. The Significance of the Fact that the Excluded Evidence Would Have Corroborated Fuiava's and Avila's Testimony.

The State asserts that all the evidence was properly excluded despite its "probative value supporting the credibility of defense witnesses ...." (RB 99; capitalization deleted.) This assertion is designed to meet Fuiava's contention that the excluded evidence "had probative value in that it bolstered the testimony of himself and Avila." (RB 99, citing AOB 90-92.)

In an odd argument, the State implies forfeiture of this claim because Fuiava assertedly "did not argue this [corroborative value] as a factor for the admission of evidence." (RB 99.) "Rather," according to the State, "appellant argued the evidence had probative value in proving Deputy Blair's motive to shot first, and as evidence of Deputy Blair's character for violence." (RB 99.) Tellingly, the State cites no authority to support its theory of forfeiture here. Moreover, its argument is illogical, for the excluded evidence would have supported Fuiava's testimony that Blair shot first precisely because it gave Blair a motive to shoot first and established his intent and propensity as a Viking deputy to resort to excessive force. Trial counsel explained that he wanted to show that Blair was part of a "group of renegades" that used excessive force and was exposed to

civil liability for such excessive use to give the jury reasons why Blair would shoot first. (RT 1582-1583.)

In another odd argument, the State points out that evidence such as polygraph results and hearsay is deemed incompetent even though it "bolsters a witness's credibility ...." (RB 101.) The evidence at issue here, however, was not such incompetent evidence. The State's assertion that evidence of "the lawsuit itself ... constituted inadmissible hearsay" (RB 100) is patently untrue. The fact of the lawsuit and its critical relation to Fuiava's defense to show Blair's motive and intent could easily have been presented through competent evidence, and exclusion of it was not grounded on its incompetence but on its purported irrelevance. Moreover, Fuiava sought to present evidence of the wrongful shootings of Polk and Nieves through eyewitness testimony precisely because the hearsay nature of the street talk about those shootings otherwise gave the jury an easy basis to reject that evidence as unreliable (assuming it could have considered that hearsay for its truth).

5. The Prejudice From the Exclusionary Rulings of the Court.

The State challenges Fuiava's claim that the court's evidentiary rulings here constituted structural error that requires reversal per se "because the exclusion effectively deprive[d] [Fuiava] of his right to a jury determination of his innocence or guilt" (AOB 93-94). (RB 104-105.) The State also disputes Fuiava's alternate claim that the violation of his constitutional right to compel witnesses to testify on his behalf worked by the court's exclusionary ruling required the State

to prove harmlessness beyond a reasonable doubt (AOB 93-94). (RB 103-104.) The State submits that the applicable standard for assessing prejudice is the state standard of whether "there is a reasonable probability that a result more favorable to appellant would have been reached" if the evidence at issue had been admitted because any error here did not implicate the Constitution. (RB 105.)

The State is wrong about the applicable standard for the prejudice analysis here, but Fuiava has shown that the error is prejudicial even under the more lenient standard that the State advances. Fuiava has submitted that "this Court ... may not reasonably" conclude that the exclusion of evidence "'was harmless because it is not reasonably probable that admission of the testimony would have affected the outcome.'" (AOB 97, quoting *People v. Cudjo*, *supra*, 6 Cal.4th at p. 612.)

To support its allegation that exclusion of the evidence was harmless under this standard, the State first asserts that "the jury was presented with much of the evidence appellant complains was improperly excluded ...." (RB 106.) Fuiava already has demonstrated the falsity of that assertion. None of the lawsuit evidence came before the jury, except a veiled reference by Fuiava during his cross-examination that could only have mystified the jury. (See *ante*, p. 52.) Nor did the facts about the wrongful shootings of Nieves or Polk come before the jury, except for hearsay references that the court admitted not for their truth but only to show state of mind. (See *ante*, pp. 57-58.) And, though "the jury was well aware of allegations of misconduct by the Vikings" through the testimony of

Fuiava and Avila (RB 106), the exclusion of the evidence of the deputies' actual misconduct and the community's consensus about that misconduct left Fuiava's and Avila's testimony on the matter bereft of corroboration and subject to rejection based on the prosecutor's considerable impeachment of their testimony. (See, e.g., AOB 90-91, including quotation of *People v. Carmichael* (1926) 98 Cal. 534, 548 [error not harmless based on "the admission of the testimony of the appellant himself [because] ... [i]t might be that the jury would hesitate to accept the uncorroborated evidence of the defendant in a case, when, if his testimony were supported by the evidence of a disinterested witness, they might take an entirely different attitude toward it"]; AOB 100, quoting *O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 576 [admission of excluded evidence "'might have easily made a difference, particularly' because it corroborated problematic evidence that otherwise 'may have been discounted in the jury's deliberations'"]; see also *United States v. Morales* (9th Cir. 1997) 108 F.3d 1031, 1040 [error prejudicial where defendant testified and "[t]he exclusion ... deprived [her] of the only corroborating evidence she had"].)

The State further relies on the fact that Fuiava presented other "evidence to support his theory that Deputy Blair fired first." (RB 107.) Here, the State points to the "evidence of Deputy Blair's character for violence, including his alleged prior beating of Avila with a flashlight [citations] and Deputy Blair's membership in the Vikings [citation]." (RB 107.) The State's argument is backwards, for the more plausible it was to the jury that Blair shot first from the

evidence before it, the greater the likelihood that the excluded evidence would have made the crucial difference in the jury accepting that fact. (See, e.g., *People v. Cudjo*, *supra*, 6 Cal.4th at p. 642 ["The determination of prejudice begins with an examination of the defense presented at trial"]; *United States v. Crosby*, *supra*, 75 F.3d at p. 1347 [where defendant presented evidence that a "sloppy investigation" caused his prosecution, exclusion of evidence that a third party committed the offense was prejudicial because it would have bolstered the "sloppy investigation theory"].)

Finally, the State claims there is no reasonable probability that admission of this evidence would have made a difference because assertedly the evidence of guilt "was truly overwhelming." (RB 107.) As Fuiava has set forth, however, in fact the evidence of guilt was marginal at best and rebutted by the defense case, which demonstrates the prejudice. (See, e.g., *United States v. Crosby*, *supra*, 75 F.3d at p. 1348 [exclusion of evidence prejudicial where "the government's case was hardly overwhelming"; *United States v. Morales*, *supra*, 108 F.3d at p. 1040 [exclusion of evidence prejudicial where "the government's incriminating evidence "was significant but not overwhelming"].)

In asserting overwhelming evidence of guilt, the State again relies on the evidence of Fuiava's "conversations with his mother, Brooks, and Frausto," in which he did not claim self-defense but assertedly "stated that he shot at the police officer because he did not want to go to jail for the rest of his life as a result of a third strike." (RB 107.) The State's representations here misleadingly mischaracterize the evidence. As explained previously, the topic of

why Fuiava shot at Blair never came up in his conversation with his mother. (See Argument I, Section B., *ante*, pp. 30-31.) Moreover, there were many bases for the jury to discredit the reports of both Brooks and Frausto on the subject. (See Argument I, Section B., *ante*, pp. 31-33.) The State further relies on "the manner of killing" as establishing guilt here, but the shooting "at Deputy Blair several times [in which two of the bullets] struck him in the neck and shoulder" (RB 108) is equally consistent with a shooting in self-defense in response to Blair's gunfire. (See Argument I, Section A. 2., *ante*, pp. 9-14.)

Finally, to establish "truly overwhelming evidence" that Fuiava shot first, the State points to Lyons's testimony "that based on his observations, he believed the initial gunshots were not fired by Deputy Blair." (RB 107-18.) But it is Lyons's eyewitness testimony that most starkly displays the weakness of the prosecution's case. Lyons testified that there were two series of gunfire, each series from a different gun, and he was quite certain that the second series was not fired by Blair but came from Fuiava's direction. (See Argument I, Section B., *ante*, pp. 29-30.) Indeed, Lyons at the time did not believe that Blair had fired either series, though the prosecution's evidence undeniably showed that Blair had fired five shots in the exchange of gunfire. (See Argument I, Section A., *ante*, pp. 5-6.) To be sure, Lyons believed at the time that the initial burst of gunfire came from Blair's direction (but beyond him), and "ultimately admitted [] he did not really know what happened that night. (RT 2418.)" (AOB 80.) Thus, the prosecution's evidence on its own terms left uncertain "what actually happened," increasing the probability that the excluded

evidence would have made a difference. (See *United States v. Crosby*, *supra*, 75 F.3d at p. 1347.)

Moreover, the defense evidence, including testimony not only from Fuiava but from all the other eyewitnesses, established a reasonable basis to doubt the evidence of guilt. The forensic evidence — particularly the showing that Blair had fired five shots and in all likelihood had fallen dead immediately from Fuiava's gunfire (see AOB 26) — added to the reasonable doubt, already established by the eyewitnesses, concerning who initiated the shootout. Because the evidence on who fired first and self-defense was so close, the probative value of the excluded evidence was enhanced and increased the likelihood that at least one member of the jury would have been persuaded to reasonably doubt Fuiava's guilt.

Finally, the State's attempt to rebut Fuiava's claim that the long and difficult jury deliberations fortify the conclusion that the excluded evidence was material is unconvincing. (See RB 108.) Fuiava pointed to the objective indications that the jury had difficulty reaching a verdict, including the length of its deliberations, its request for readback, and its divisiveness leading to an impasse in deliberations. (See AOB 101-102.) The State cherry-picks only the duration of jury deliberations, citing an opinion from the Court of Appeal that discounted the significance of such. (RB 108, citing *People v. Walker* (1995) 31 Cal.App.4th 432, 438.) The *Walker* court, however, "recognize[d] that in some cases our Supreme Court has inferred a close case from unduly lengthy deliberations," and merely found that it "cannot do so under the facts of this case." (*Id.* at pp.

438-439.) In contrast, there can be no question that in Fuiava's case the jury struggled to reach its verdicts, ultimately requiring the intervention of the court to discharge a juror in order to do so. Significantly, the State offers no rebuttal to these other objective indications of a close case disclosed by the jury deliberations.

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III.

THE COURT'S DISCHARGE OF JUROR NUMBER 8, MR. T., DURING DELIBERATIONS AND ITS DENIAL OF FUIAVA'S MOTION FOR A NEW TRIAL DUE TO THAT DISCHARGE REQUIRE REVERSAL OF THE JUDGMENT.

A. Introduction.

Fuiava argued that the court's discharge during deliberations of Juror No. 8, Albert T., and its denial of Fuiava's motion for a new trial due to that discharge were contrary to state and federal law, and required reversal of the judgment and dismissal of the charges. (AOB 102-134.) Fuiava argued that both state law and the federal Constitution raise the bar for showing cause for removal during deliberations of a juror who appears to favor the defense, as did Mr. T., and that such cause was lacking here. (AOB 110-129.) Lacking the requisite demonstrable reality that Mr. T. was biased or otherwise incapable of carrying out his duties as a juror, the court's discharge of him deprived Fuiava of a fair trial by jury that necessarily requires reversal. (AOB 129-130.) The evidence produced in support of the motion for new trial confirmed that the court's discharge of Mr. T. lacked cause, so that the denial of the motion aggravated the constitutional violations. (AOB 130-131.) Finally, because the court's needless discharge of Juror T. dissolved the jury's integrity, the substitution of another juror placed Fuiava twice in jeopardy in violation of the Double Jeopardy Clause, which requires not only reversal of the judgment but also dismissal of the charges. (AOB 131-

134.) The State challenges Fuiava's assignments of error here at every level, but the challenge falls short.

B. The State's Procedural Objections.

To begin with, the State in a footnote interposes a procedural defense to consideration of the constitutional dimensions of the claim, asserting that those "claims have been waived and are the subject of procedural default since appellant did not raise those issues in the trial court." (RB 110, fn. 12.) The State's consignment of its objection to a footnote indicates the insubstantiality of the objection and its perfunctory nature, so that the Court may dismiss it out of hand. (See, e.g., *Lennane v. Franchise Tax Bd.* (1996) 51 Cal.App.4th 1180, 1186 [courts may deem issue inadequately presented when "set out not in the body of the briefs, but in a footnote"].).

In any event, the State's procedural point is baseless. There was no forfeiture of the claim, for Fuiava promptly and explicitly objected to discharge of Juror T., arguing that the record failed to show bias to justify his discharge as required by law, and requested an opportunity to inquire further of him on the point. (See AOB 108, citing RT 2356-2357; see also RB 116-117.) That objection was sufficient to preserve the constitutional dimensions of the assignment of error on appeal. An objection framed in factual rather than legal terms is sufficient to preserve the issue on appeal where the legal basis of the objection is "obvious from [the] context." (*People v. Kabonic* (1986) 177 Cal.App.3d 487, 496; see, e.g., *People v. Briggs* (1962) 58 Cal.2d 385, 409-410 [objection on ground that defendant not at scene of statement "amounted to objecting on the ground that the evidence

was hearsay, and that there had been no showing warranting an exception to the hearsay rule" as an adoptive admission]; *People v. La Fargue* (1983) 147 Cal.App.3d 878, 891 ["Appellant's objection to use of the prior conviction on the basis that 'it hasn't been substantiated, came solely from the mouth of Mr. LaFargue' and 'I don't believe that would be proper use' by the court as a factor in aggravation were sufficient to at least raise the question of its constitutional validity."].) Again:

> "[A]n objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. [Citations.] In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented. [Citations.]" (*People v. Scott* (1978) 21 Cal.3d 284, 290.)

(See Argument II, Section B., *ante*, p. 36.) There are no "magic words" that need be said to preserve an issue. (See Argument II, Section B., *ante*, pp. 36-37, quoting *United States v. Humphrey*, *supra*, 287 F.3d at p. 445; *United States v. McCullah*, *supra*, 87 F.3d at p. 1139.)

Here, where the question concerned whether there was cause to discharge for bias a deliberating juror who apparently favored the defense, even a first-year law student — never mind the trial court — would have realized the constitutional dimensions of Fuiava's objection to the discharge. Indeed, taking the State's procedural default argument to its logical conclusion, Fuiava would be defaulted from raising the assignment of error on any basis, state or federal, because he never specified any legal basis supporting his objection.

That is not the law: "Objections stated orally in the heat of trial cannot be analyzed with the legal acuity reserved for the interpretation of statutes and contracts." (*People v. Williams* (1970) 9 Cal.App.3d 565, 570.) To paraphrase *People v. Briggs*, *supra*, 58 Cal.2d at p. 410:

> Even if, contrary to the fact, the objection was not properly phrased, and even if it was not stated in the most precise terms, "we do not feel inclined to deprive defendant of his right[s] ... because of the oversight of his counsel in the midst of a difficult trial to remember that he should add the word, [Constitution], to the statement of his objection."

Moreover, the state standards for discharge of a juror are informed by federal constitutional principles, for this Court developed those standards conscious of the fact that "the substitution of a juror after the jury has retired to deliberate 'may trench upon a defendant's right to trial by jury. (U.S. Const., Amend. VI; Cal. Const., art. I, § 16.)'" (*People v. Cleveland* (2001) 25 Cal.4th. 466, 487, quoting *People v. Collins* (1976) 17 Cal.3d 687, 692.) Thus, invocation of a bar to consideration of the federal constitutional principles because trial counsel's objection failed to explicitly direct the trial court to them is particularly inappropriate. Again:

> As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal.

(See Argument II, Section B., *ante*, p. 41, quoting *People v. Yeoman*, *supra*, 31 Cal.4th at p. 117.)

The State's case authorities in its footnote are inapposite. For example, *People v. Hines* (1997) 15 Cal.4th 997, 1036 concerned state and federal rights that involved very different analyses. There, the Court concluded that "the trial court did not violate the confrontation clause when it permitted the prosecutor to ask questions from which the jury could infer that Roberts had identified defendant, and the error is one of state law only."

In *People v. Holt* (1997) 15 Cal.4th 619, 666, the Court found that the defendant had waived his assignment of error based on *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694], where he "failed to specify ... any *Miranda* claim [] in his written motion or at the hearing on his motion to exclude the statement on due process grounds for failure to tape-record the statement." There, the Court relied on Evidence Code section 353, which provides in pertinent part: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless ... [t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear *the specific ground of the objection or motion*; ..." (Italics in *Holt.*) The Court explained:

> The reason for the rule is clear — failure to identify the specific ground of objection denies the opposing party the opportunity to offer evidence to cure the asserted defect. [Citation.] "While no particular

> form of objection is required [citation], the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility." [Citation.]

The State's procedural claim here is based merely on form, for both the trial court and the State very obviously were on notice that the defense objection concerned whether Juror T. was biased or able to conscientiously perform his duties as a juror — the heart and substance of Fuiava's constitutional claims here. The State's final footnoted case, *People v. Alvarez* (1996) 14 Cal.4th 155, 186, similarly concerned an evidentiary issue controlled by the requirements of Evidence Code section 353, where the trial court was not fairly alerted to the constitutional basis for admission of the evidence that the defendant urged on appeal.

In any event, as one court stated in rejecting the State's assertion of forfeiture of a claim that a juror favorable to the defense was wrongly dismissed during deliberations:

> [T]he trial court had the duty to conduct a reasonable inquiry into juror misconduct consistent with defendant's right to a fair trial. [Citation.] Such constitutional issues may be reviewed on appeal even where the defendant did not raise them below.

(*People v. Barber* (2002) 102 Cal.App.4th 145, 150.)

C. The Merits of Fuiava's Claims.

On the merits, the State admits that a "dismissed juror's inability to perform his or her duties must appear in the record as a

'demonstrable reality'" for a reviewing court to uphold a trial court's dismissal of a sitting juror. (RB 119, quoting this Court's precedents on the point.) The State asserts that "the record shows that there was a demonstrable reality that Juror T. could not perform his duties as a juror." (RB 120.) According to the State, "Juror T. repeatedly stated that he could not follow the law and instructions, *as he understood them*." (RB 120; italics added.)

The italicized portion of the State's assertion is revealing, for it goes to the heart of the court's fundamental error here: insufficient inquiry of the juror before discharge of him. Fuiava's argument is that the record does not preclude the substantial likelihood "that the juror's bias' was based upon his consideration of the evidence *and misunderstanding of the instructions* rather than a prejudice or partiality that disqualified him from jury service." (AOB 116; italics added.) This was precisely the ambiguity in the record that Fuiava wanted explored before the juror was discharged. Without that exploration it is impossible for this Court to conclude that the record shows the requisite "demonstrable reality that Juror T. could not perform his duties as a juror." As trial counsel explained, further inquiry was needed to determine whether Juror T.'s purported inability to follow the law was based on a misinterpretation of the law gathered from the other jurors during deliberations and consequent misunderstanding of his duties as a juror, so that his confession of "bias" was no more than an honest evaluation of the evidence that differed from the evaluation of the other jurors. (See AOB 107-108.) The court, however, refused to make the inquiry that Fuiava sought to

foreclose the probability that the juror's self-proclaimed bias and professed inability to follow the court's instructions were based on his view of the evidence and misunderstanding of the instructions. The court thus left the record too cloudy and uncertain to establish a "demonstrable reality" that Juror T. was partial or otherwise unable to perform his duties as a juror. (See, e.g., RB 119, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 1029, quoting *People v. Espinoza* (1992) 3 Cal.4th 806, 821 ["The trial court must make '"whatever inquiry is reasonably" necessary' to determine if the juror should be dismissed."].) Rather, the record suggests that the juror was not biased, but confused. The court's minimal inquiry never clarified whether true cause existed — a genuine "bias" — for which the juror could properly be discharged.

It was not until after trial that the record established a demonstrable reality on the question whether or not Juror T. was biased — and that reality was that Juror T. was not biased or otherwise unable to perform his duties. Fuiava demonstrated that reality by conducting the inquiry after trial that the court should have conducted prior to its dismissal of Juror T. As set forth in the opening brief:

> Fuiava showed ... that the missing inquiry would have disproved Mr. T.'s confession of bias and established that his asserted bias was nothing more than the conscientious views of an honorable and impartial juror whom the other jurors had misled about the law. Indeed, Mr. T. was the epitome of a scrupulous juror because his confessed "bias" was based on his inability to totally disregard the portions of the testimony of defense witnesses that

> he credited, merely because these witnesses might have been untruthful in other portions of their testimony. In this regard, his instincts were congruent with the demands of the law. He simply had a mistaken view of the law that could have been cleared up if the court had queried him at all about his professed bias and inability to follow the law.

(AOB 130-131.)

The State asserts that the court properly denied the motion for new trial on this basis because Fuiava's showing was based on "double hearsay" — a declaration by the defense investigator relating statements that Juror T. made to him. (RB 126.) But the investigator's declaration itself noted that Juror T. preferred to come to court rather than sign a declaration, and counsel sought a hearing at which Juror T. could so testify "to supplement my argument that Mr. T. was not given a full opportunity to explain himself when he said he was biased." (RT 2809.) The prosecutor objected to a hearing, arguing that the court conducted "a full hearing" on the matter at the time of trial. (RT 2810.)

The prosecutor never challenged the truth of Juror T.'s statements related in the declaration or otherwise expressed concern about their hearsay nature. Rather, the prosecutor argued and the court agreed that substantively the declaration failed to establish a basis for a new trial; hence, the court found that there was no need for a hearing to procure Juror T.'s testimony on the subject, concluding that the substance of his statements to the investigator were insufficient to establish a basis for a new trial. (RT 2810.) The only reason for the hearsay nature of the evidence in the record is that —

consistent with the State's urgings below — the trial court denied a hearing on the issue, finding the proffer was substantively inadequate. (See, e.g., *People v. Steele* (2002) 27 Cal.4th 1230, 1267 ["A court may hold an evidentiary hearing ...in a new trial motion, but the court may also, in its discretion, conclude that a hearing is not necessary 'to resolve material, disputed issues of fact.'"].)

The State may not contrive to prevent a defendant from presenting evidence in the trial court and then rely on that lack of evidence on appeal as a reason to affirm the judgment. (Cf. *Paxton v. Ward* (10th Cir. 1999) 199 F.3d 1197, 1216 [State may not both successfully exclude evidence and later deceitfully take advantage of that lack of evidence].) Here, the State cannot turn around on appeal and take advantage of its own conduct in the trial court that limited the record to the hearsay. The State cannot urge the lack of an evidentiary hearing in the trial court as a basis to affirm the judgment when the State successfully opposed Fuiava's request for that hearing. The State's claim that the court properly denied the motion for new trial because of the hearsay nature of the evidence submitted misrepresents the record. The trial court never denied the motion on that basis. The State's claim also is untenable under the law, for fundamental fairness does not permit the kind of bait and switch tactic that the State here has engaged in.

The State ultimately must confront the substance of the declaration, for it invited the court to deny Fuiava a hearing at which he could call Juror T. to give his evidence under oath. To the degree that the statements attributed to Juror T. in the declaration submitted

to the court clinched Fuiava's claim of entitlement to a new trial because the court needlessly dismissed Juror T., the court erred in denying the motion for new trial. The court's own further error at the prosecutor's behest in denying Fuiava a hearing to provide admissible evidence on the point hardly rescues the trial court from its more fundamental error on the substance of Fuiava's claim.

The State, as did the trial court (see AOB 110), also invokes the law that "[e]vidence of what a juror 'felt,' or how he or she understood the court's instruction, is not admissible to impeach a verdict." (RB 127, citing *People v. Steele* (2002) 27 Cal.4th 1230, 1261; Evid. Code, § 1150.) This principle is irrelevant to the matters in dispute here. The law that a jury member's subjective reasoning process, including his or her understanding of the instructions, is not competent evidence to impeach the jury's verdict obviously concerns jurors who have reached that verdict. This principle has no application to evidence of Juror T.'s understanding of the court's instructions at the time that he was dismissed, which was before a different jury — one without him — reached its verdicts. This evidence went to impeachment of the court's ruling dismissing Juror T., not to impeachment of a verdict that Juror T. had nothing to do with. Thus, the trial court's invocation of Evidence Code section 1150 to ignore the evidence was error that contributed to the court's wrongful denial of the motion for new trial, rather than any basis upon which this Court may affirm the judgment.

Juror T.'s understanding of the court's instructions at the time of his dismissal was critical to the dismissal's legitimacy, for the court

excused Juror T. on the basis of his confession to a bias that rendered him unable to follow its instructions concerning determination of the credibility of the witnesses. Indeed, the cases are clear that inquiry into the state of mind of the jurors is permissible during deliberations when the question of juror bias is then at issue. (See *People v. Cleveland*, *supra*, 25 Cal.4th. at p. 485 ["the provisions of Evidence Code section 1150 apply only to the postverdict situation and not to an inquiry conducted during jury deliberations"]; see also *People v. Zapien* (1993) 4 Cal.4th 929, 996 [proscription against admission of evidence of juror's mental processes to impeach verdict does not preclude court from questioning juror prior to return of verdict on effect of improper influence]; *People v. Cooper* (1991) 53 Cal.3d 771, 838 [same]; *People v. Haskett* (1990) 52 Cal.3d 210, 240 [trial court permitted for good cause to inquire whether juror is following the court's instructions or using insanity plea as a mitigating factor at the penalty phase in contravention of the court's instructions to the contrary].) Here, the evidence at issue concerned the state of mind of a juror at the time he was dismissed from jury service, a juror who thus was not part of the deliberations that led to the verdict. The rule precluding impeachment of a verdict with evidence of the juror's mental process has no application to evidence of Juror T.'s bias or lack of same at the time that he was dismissed.

Finally, the State asserts that the dismissal was justified on the basis "the record shows that Juror T. was not obeying at least one instruction given by the court" — namely, not to consider penalty during deliberations on guilt. (RB 120.) Wrong on all counts. The

record did not show such a violation, the court did not find such a violation, and the court did not rely on any such violation in discharging Juror T. The State asserts that "Juror T. himself, and Juror No. 10, indicated that Juror T. was considering penalty during deliberations on ... guilt ...." (RB 120, citing CT 651-652.) Juror No. 10, in response to Juror T.'s complaint that she had admonished him that he was not properly assessing the evidence, responded with her own note questioning whether Juror T. was "letting the 'death penalty' and his emotions cloud the case." (CT 652.) The court, however, never pursued the matter with either Juror T. or Juror No. 10 to determine whether there was any basis to her expressed concern about Juror T.

Juror T. disputed the charge that Juror No. 10 leveled at him concerning his assertedly biased evaluation of credibility of the witnesses, stating: "I have rarely been accused of wrongdoing in my adult life, and never involving a matter with such momentous implications as in this case of determining the future of another individual's life." (CT 651.) This showed only that Juror T. appreciated the gravity of the case and thus was especially mindful of the need for impartiality and scrupulous adherence to the court's instructions. The instruction that the jury not consider the penalty or punishment when determining guilt is designed to protect against the danger that a juror's "consideration of guilt [is not] deflected by a dread of seeing the accused suffer the statutory punishment." (*People v. Shannon* (1956) 147 Cal.App.2d 300, 306.) Juror T.'s reference to the gravity of the case in connection with the questioning of his

integrity did not suggest that he had any such dread, let alone one that colored his consideration of Fuiava's guilt or innocence. Though the court observed that "we want him to judge the case on the evidence without concern for the consequences of the assessment of the evidence" (RT 2347-2348), the court never found that Juror T. disobeyed the court's instruction not to consider penalty in its deliberations on guilt. To the contrary, Juror T. was especially mindful of the court's instructions, as manifested by his appreciation that the need to carry out his duties as a juror with integrity was enhanced by the gravity of the case. His remarks indicated that he was scrupulously following the court's instructions, including the instruction that the prospective penalty should not affect his consideration of Fuiava's guilt.

The court thus abused its discretion when it dismissed Juror T. without conducting an inquiry sufficient to dispel the likelihood that Juror T. mistook his fair view of the evidence for "bias" due to a mistaken view of the law. The court easily could have cleared up Juror T.'s confusion, but instead peremptorily discharged him. The State quotes *People v. Halsey* (1993) 12 Cal.App.4th 885, 892 to the effect that while many courts have considered claims challenging the discretion of the court to dismiss a juror for cause, "[f]ew have found abuse." *Halsey's* observation is sadly out of date. (See, e.g., *People v. Cleveland, supra*, 25 Cal.4th. at p. 485 ["[W]e conclude that the trial court abused its discretion in excusing Juror No. 1, because the record before us does not establish 'as a demonstrable' reality' that Juror No. 1 refused to deliberate."]; *People v. Bowers* (2001) 87

Cal.App.4th 722, 735 [discharge of juror during deliberations abuse of discretion because "it is not possible to say ... that the record shows there is a 'demonstrable reality' that he was unable to perform as a juror"]; *People v. Barber*, 102 Cal.App.4th at p.151 ["Juror No. 5 was improperly dismissed [during deliberations] because the inquiry into misconduct was inadequate and fundamentally unfair"]; *People v. Karapetyan* (2003) 106 Cal.App.4th 609, 621 ["By removing Juror No. 12 at this point in the proceedings [i.e., during deliberations], the court committed reversible error."]; *Sanders v. Lamarque* (9th Cir. 2004) 357 F.3d 943, 944 [California "trial court's dismissal of the lone holdout juror" unreasonably applied clearly-established law and entitled the petitioner to habeas relief]; *People v. Hernandez* (2003) 30 Cal.4th 1, 4 ["the Court of Appeal found prejudicial error in discharging the juror [during deliberations], and for purposes of our review, we accept that determination"].) Indeed, from the several cases on which this Court granted review pending its decision in *Hernandez* on whether the double jeopardy clause barred retrial where the court abused its discretion in discharging a deliberating juror, this Court is well aware that there has been a veritable rash of such wrongful discharges in recent years. (See, e.g., *People v. Alas*, S109356, review granted Oct. 2, 2002, review. dism. May 14, 2003; *People v. Valot*, review. granted Feb. 25, 2003, review. dism. May 14, 2003 NO. S112450); *People v. Trotter*, review granted Nov 20, 2002, review dism. May 14, 2003) (NO. S1110380); *People v. Vinh Du*, (No. B110122), review granted Jun 19, 2002, review dism., cause remanded May 14, 2003.) In sum, the removal of Juror T. from the

deliberating jury was a grave error that went to the heart of Fuiava's trial, requiring reversal of the judgment.

As to the double jeopardy implications of trial by the reconstituted jury or trial by yet another jury convened following reversal, Fuiava recognizes the force of this Court's opinion in *Hernandez*, filed subsequent to the opening brief. (See RB 127, citing *People v. Hernandez*, *supra*, 30 Cal.4th at pp. 6-11.) The State submits that Fuiava's claim of double jeopardy should be rejected "[[f]or the same reasons set forth in *Hernandez*." (RB 127.) This Court should reconsider the double jeopardy question, however, because *Hernandez's* resolution of that question is not consistent with the prevailing federal authorities on the point. (See, e.g., *United States v. Jorn* (1971) 400 U.S 470, 484 [91 S.Ct. 547, 557, 27 L.Ed.2d 543] [Defendants "valued right to have his trial completed by a particular tribunal" places him twice in jeopardy when trial court declares mistrial without manifest necessity]; see also *United States v. Bonas* (9th Cir. 2003) 344 F.3d 945, 947-948 ["It is long established that 'criminal defendants have a right to have the jury first empaneled to try them reach a verdict.'"] (brackets in quote deleted).) Because double jeopardy principles bar retrial when that right is unnecessarily infringed, as it was here, those principles barred the trial court from unnecessarily reconstituting the jury here and bar any further trial by yet another jury.

For these reasons, the Court should reverse the judgment for the violation of Fuiava's constitutional and statutory rights caused by the dismissal of Juror T. It should further order dismissal of the charges

for violation of Fuiava's constitutional right not be placed twice in jeopardy.

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IV.

THE TWO SUBSTITUTIONS OF JURORS DURING DELIBERATIONS SERVED INEVITABLY TO COERCE THE VERDICTS, REQUIRING REVERSAL OF THE JUDGMENT.

Fuiava argued that the substitution of a new juror No. 8 for Juror T. together with the subsequent substitution of that new juror coerced the guilty verdicts, in violation of his state and federal rights. (AOB 135-139.) The State acknowledges that "[a] trial court may not ... exert undue pressure on jurors to reach a verdict." (RB 129, citing precedent of this Court.) The State asserts, however, that Fuiava's claim of coercion here is only "speculation." (RB 129.) According to the State, nothing in the record suggests that the jurors opposed to Juror T. considered his dismissal a judicial endorsement of their position or that "Juror T. was the sole recalcitrant dissenting juror ...." (RB 130.) Not so.

The record suggests that Juror T. was in the distinct minority of jurors that favored the defense, if not its only member who did so. In his letter to the court, Juror T. related that Juror No. 10 spoke on behalf of not only herself, but also "several jurors." (CT 651.) "[M]ore than one fellow juror," he reported, "disagree[d] with [his] treatment of witness credibility ...." (CT 651.) There was no suggestion that there were two opposing camps of jurors; rather, every indication from the record was that Juror T. stood alone. This was confirmed by Juror No. 10's letter, which alleged that Juror T. had

"misinterpreted what I and others have said." (CT 652.) She further advised that she "would support" his dismissal. (CT 652.)

Moreover, it was clear from the correspondence that Juror T. favored the defense, while his opposing jurors favored the prosecution. Juror T. criticized and expressly disagreed with the wholesale rejection by the other jurors of witnesses favorable to Fuiava, "based solely on the witness' age, alleged association with the defendant, or affiliation with the gang, The Young Crowd." (CT 651.) Juror No. 10 denied that she "would discount a witness just because he/she is in the Young Crowd or affiliated with YC." (CT 652, emphasis in original.) That emphasized adverb, however, confirmed that in fact she and the others were discounting witnesses favorable to Fuiava on that basis, albeit not solely on that basis. Thus, the record to that point made clear that Juror T., perhaps as part of a distinct minority of the jurors but more likely by himself, favored the defense.

The record of the subsequent deliberations suggested even more strongly that Juror T. was the bulwark against conviction. To begin with, after dismissal of Juror T., the court dismissed the new Juror No. 8 from the jury at the outset of the deliberations the very next day because the deliberations had so distressed her. (See AOB 108.) That only Juror No. 8, whether Juror T. or his successor, stood between the rest of the jury and conviction was borne out by "the incredibly swift — less than three hours — and untroubled return of the verdicts against Fuiava, despite the close questions of guilt posed by the evidence," following the selection of the third Juror No. 8. (AOB

138.) Many cases recognize that the quick return of a guilty verdict after the coercive act is evidence that the verdict was a product of that coercion. (See, e.g., *People v. Sellars* (1977) 76 Cal.App.3d 265, 271; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 251-252; *People v. Sanders* (1977) 75 Cal.App.3d 501, 512; *People v. Ozene* (1972) 27 Cal.App.3d 905, 914; *United States v. Petersen* (9th Cir. 1975) 513 F.2d 1133, 1136.) Thus, Fuiava's claim of coercion of the jury is well-founded in the record and far from speculative.

The State further asserts that the court's instructions at the time of the substitutions — that the substitutions were "for legal cause" and the jury should not "speculate" about them but rather "disregard their past deliberations and begin anew" — dispelled any potential for coercion. (RB 129-131.) But "[r]emoval of a holdout juror is the ultimate form of coercion." (*Sanders v. Lamarque, supra*, 357 F.3d at p. 944.) Thus, the coercion inherent in such removal could not be so easily dispelled by the instructions given here. Rather, *People v. Gainer* (1977) 19 Cal.3d 835, 842-843 teaches that instructions designed to offset coercive effects of a court's action may prove ineffectual in doing so. In *Gainer* the court instructed the jury that its verdict should be "the result of [each juror's] own convictions and not a mere acquiescence in the conclusion of his or her fellows." (*People v. Gainer, supra*, 19 Cal.3d 835, 841.) This Court held that this admonition to not succumb to such irrelevant factors as peer pressure in the determination of guilt did not overcome the coercive influence that inhered in the court's accompanying instruction that injected extraneous factors into the case. (*Ibid*; see also *People v. Talkington*

(1935) 8 Cal.App.2d 75, 86-87 [an instruction to the effect that the jury is the sole finder of fact that accompanied an instruction pressuring the jury did not neutralize the coercive effect of the erroneous instruction; *People v. Hinton* (2004) 121 Cal.App.4th 655, 660 ["That the judge also emphasized each juror must still reach his or her own decision did not repair the damage done by the instruction" that suggested the minority change its vote].) Likewise, the simple admonitions the court gave Fuiava's jury following the juror substitutions here did not purge those substitutions of the coercion that inhered in them. The swift return of the verdicts following the court's admonitions further belies the jury's ability to comply with them, for such quick action was inconsistent with the court's admonitions to begin deliberations anew and without regard to their past deliberations.

For all these reasons, the Court should reverse the judgment as a product of jury coercion.

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V.

THE COURT'S FAILURE TO DETERMINE WHETHER OTHER JURORS WERE TAINTED BY COURTROOM BEHAVIOR BY SUPPOSED ASSOCIATES OF FUIAVA THAT CAUSED AT LEAST ONE JUROR TO BECOME FEARFUL AND CONTRIBUTED TO HER DISCHARGE REQUIRES REVERSAL OF THE JUDGMENT.

A. Introduction.

Near the end of the trial, Juror J. (then Juror No. 11) reported to the court that two women spectators apparently associated with Fuiava directed gestures and looks at the jury that she found threatening and made her fearful. (AOB 140-142.) She further reported that other jurors had observed this spectator conduct as well and were so disturbed by it that they discussed it outside the courtroom, with one of those jurors suggesting that a note about it should be sent to the court. (AOB 140-141; see also RB 132-134.) The trial court dismissed Juror J. from the jury, but took no action to determine whether the impartiality of the other jurors was compromised by the spectator conduct they had seen and discussed. Nor did the trial court admonish the jury about any spectator misconduct or take other action to minimize or cure any prejudice resulting from it. (AOB141-142; see also RB 133-135.) Fuiava argued that the trial court's failure to hold a hearing or otherwise determine whether the spectator conduct affected the impartiality of the remaining jurors deprived him of his fundamental right to a fair trial by an impartial jury. (AOB 140-148.) The State characterizes

Fuiava's claim as "meritless." (RB 132.) The State is mistaken.

B. Procedural Issues.

The State first interposes in a footnote a procedural objection to any consideration of the constitutional dimensions of Fuiava's claim. (See RB 132, fn. 14.) This is substantially the same procedural objection, with the same authorities, that the State made to this Court's consideration of the constitutional dimensions of Fuiava's claim regarding improper dismissal of Juror T. in Argument III, *ante*. (Compare RB 110, fn. 12 with RB 132, fn 12.) The State's procedural objection here fails for many of the same reasons that its earlier procedural objections to this Court's consideration of the Constitution in determining the merits of Fuiava's claims failed. (See *ante*, Argument II, Section B., pp. 36-42, Argument III, section B., pp. 69-73.) Those reasons include:

- The objection's perfunctory footnoted nature.
- The trial court's sua sponte duty to conduct a reasonable inquiry once it has notice of any event casting doubt on juror impartiality.
- The congruency of the federal and state analyses of the issue.
- The trial court's notice and understanding of the constitutional issue presented.
- This Court's inherent power to consider a claim to avoid substantial injustice, and its particular disposition to do so in a death penalty case.

The State also makes a more sweeping procedural objection, asserting that "appellant has waived his claim" here entirely. (RB 136.) This is so, according to the State, because "after the trial court stated that it would excuse Juror J. and that it believed no further action was necessary unless the other jurors reported anything, appellant did not ask the trial court to examine the other jurors to determine whether they had been improperly influenced by the courtroom behavior." (RB 136, citing *People v. Burgener* (1986) 41 Cal.3d 505, 521.) The State's argument ignores Fuiava's showing that the court had a duty of inquiry independent of any request by counsel to examine the other jurors.

Fuiava observed in his opening brief:

> Penal Code section 1089 and Code of Civil Procedure section 233 vest trial courts with discretion to discharge a juror "found unable to perform his duty." ... Concomitant with the power those statutes grant the court to discharge a juror for good cause is a duty they impose upon the court to inquire about such cause when it learns of the possibility of juror partiality. "California cases construing these two statutes have established that, once a juror's competence is called into question, a hearing to determine the facts is clearly contemplated. [Citations.] Failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion...." (*People v. Burgener* (1986) 41 Cal.3d 505, 519-520.) Consequently, "once the court is put on notice of the possibility a juror is subject to improper influences, it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged; and failure to make this inquiry must be regarded as

> error." (*Id.* at p. 520, citing *People v. McNeal* (1979) 90 Cal.App.3d 830, 836.)

(AOB 144.) Indeed, Fuiava elaborated on this point, noting as follows:

> The court's duty is sua sponte. (See *People v. Burgener, supra,* 41 Cal.3d at pp. 518-519 [upon allegations that a deliberating juror was intoxicated, court's determination to simply admonish the jury not to use intoxicants rather than conduct an inquiry into whether the juror was too impaired to deliberate "was error" despite the fact that "[d]efense counsel agreed to this approach"].) Thus, "an inquiry sufficient to determine the facts is required whenever the court is put on notice that good cause to discharge a juror may exist." (*People v. Burgener, supra,* 41 Cal.3d at p. 519.)

(AOB 145.)

The State never seeks to reconcile these points with its reliance on *Burgener* to support the claim that Fuiava waived the issue by the acquiescence of his counsel. The State's assertion of forfeiture simply cannot be reconciled with *Burgener*. Indeed, the State's own quotation of *Burgener* makes the point that there counsel acted very differently than did counsel here: There, counsel "prevent[ed] an inquiry" by positively objecting to it. (See RB 137, quoting *People v. Burgener, supra,* 41 Cal.3d at p. 521.) Here, the State admits that "trial counsel did not actively refuse further inquiry" or take any action designed to head off inquiry by the court. (RB 140.) Mere inaction does not waive error that arises from failure of the court to carry out its sua sponte duties, for the nature of such a duty is that the court must act on its own. Just as the State admits: "[W]henever a

trial court is put on notice that ... improper or external influences are brought to bear on a juror, ... it must conduct an inquiry determining whether the juror is competent to serve." (RB 136, explaining *Burgener*.) There thus are no procedural obstacles to the Court's consideration of the merits of Fuiava's claims here.

C. The Merits of Fuiava's Claim.

1. The Error.

The State asserts that the court had no duty to inquire here because it was never "put on notice of good cause to believe that any of the other jurors were biased, improperly influenced, or intimidated by the behavior of two courtroom spectators." (RB 137.) Conceding that the court was informed that "some of the other jurors discussed the behavior of [the] two spectators," the State seeks to excuse the court's lack of inquiry on the ground that "Juror J did not say that the spectator's actual gestures were threatening." (RB 137.) But there was no question that Juror J. felt threatened by them, and that the other jurors were so unsettled by them that they discussed them among themselves and considered reporting them to the court. The very lack of clarity of the situation only added to the court's need to conduct an inquiry of the jurors to determine the effect of the gestures on their impartiality.

The State asserts that any inquiry of the other jurors may have been a cure worse than the disease, because of the possibility that such an inquiry would cause them to conclude that in fact there was "an attempt to intimidate them." (RB 135.) Perhaps a concern not to spread the taint would justify limiting the inquiry to those jurors who

had observed the conduct and discussed reporting it to the court, but that concern had no application to these jurors who had already been exposed to the taint. *People v. Leach* (1985) 41 Cal.3d 92, 107, the authority cited by the State to support its claim here, illustrates this point. There, a juror was excused after she had received several phone calls from an associate of the defendant seeking to tamper with her. (*Ibid.*) Because she "had not mentioned the calls to the other jury members," the court found no inquiry of them necessary. (*Ibid.*)

While the other jurors in *Leach* were blissfully ignorant of the attempted tampering of the discharged juror, the other members of Fuiava's jury had been exposed to the same spectator conduct that so distressed Juror J. Moreover, here it was not just the discharged juror who had been targeted; rather, "Juror J ... believed ... that the two women were pointing at various jurors." (RB 134.) Indeed, the other jurors themselves had been disturbed by the conduct enough to talk about it and consider reporting it to the court. Thus, inquiry under these circumstances would not have created "a danger that the other jurors would have misinterpreted innocent courtroom observer behavior to mean that spectators supposedly associated with the defense were attempting to intimidate them." (RB 138.) First, it is not clear that the courtroom behavior was innocent, though there was no suggestion that Fuiava had anything to do with it. Second, the danger that the other jurors suspected improper defense-related intimidation was already present. It is precisely because that danger was manifest that the court was obligated to address it.

The State excuses the trial court's inaction on the ground that the spectators' conduct was not "clearly threatening." (RB 138, contrasting *United States v. Angulo* (9th Cir. 1993) 4 F.3d 843, 846.) That answer does not address Fuiava's claim that the court's inaction left at large the "potential that these jurors perceived that behavior as a threat and thus were biased against appellant." (RB 138.) It may be "that the spectators' conduct was not intimidating" and that their "actual gestures were not threatening" (RB 138), but it may have been just the opposite — particularly in the minds of the other jurors. We will never know, precisely because the trial court failed to determine what the other jurors saw and what they thought about it. "When a trial court is aware of *possible* juror misconduct, the court 'must "make whatever inquiry is reasonably necessary"' to resolve the matter." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255.) Thus, the trial court erred because it never conducted an inquiry "sufficient to determine the facts" on the question whether there was good cause to discharge a juror due to improper or external influences brought upon that juror. (See *People v. Burgener, supra,* 41 Cal.3d at p. 518.)

"Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (*Smith v. Phillips* (1982) 455 U.S. 209, 217 [102 S.Ct. 940, 946, 71 L.Ed.2d 78]; see also *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 974-975 [a court "must undertake an investigation ... reasonably calculated to resolve the doubts raised about the juror's impartiality"].) Thus, the court here

was obligated at the very least to inquire of those jurors who had witnessed the spectator conduct and discussed reporting it to the court what they thought of the contact and whether it affected their impartiality. As this Court said long ago:

> Prejudice being a state of mind more frequently founded in passion than in reason, may exist with or without cause; and to ask a person whether he is prejudiced or not against a party, and, (if the answer is affirmative,) whether that prejudice is of such a character as would lead him to deny the party a fair trial, is not only the simplest method of ascertaining the state of his mind, but is, probably, the only sure method of fathoming his thoughts and feelings.

(*People v. Reyes* (1855) 5 Cal. 347, 350; see also *United States v. Rutherford* (2004) 371 F.3d 634, 645 ["In *United States v. Angulo,* 4 F.3d 843, 846 (9th Cir.1993), we recognized that in order to determine whether the jury might have been prejudiced, it may be necessary to inquire into the jurors' perceptions of the conduct and any effect the conduct may have had on their ability to remain impartial and unbiased."].) Indeed, if the court determined that the jurors in fact considered the spectator conduct an attempt to intimidate them, "the court may consider the likely consequence of actions that might cause jurors to feel intimidated regardless of whether the jurors admit such an effect." (*Id.* at p. 645.)

2. The Prejudice.

The State argues that "even if the trial court abused its discretion by failing to inquire, reversal is not required." (RB 139.) The State largely relies on *People v. Chavez* (1991) 231 Cal.App.3d

1471, 1482, to support its assertion of harmless error. (See RB 139-140.) *Chavez* concerned conversation between a prosecution witness and a juror about which the parties informally conducted their own inquiries and determined to their mutual satisfaction that there was no taint from that conversation, which did not concern the trial. (*Id.* at p. 1479.) *Chavez* held that the trial court's failure to further follow up on that contact was error, but the error did not entitle the appellant to reversal.

Chavez is not persuasive authority on the question of prejudice here for several reasons. First, it is a lower court opinion that has no authoritative weight with this Court. Second, it is not persuasive even on its own terms. To begin with, it is questionable whether the trial court erred when it failed to follow up the matter beyond the parties' own investigation and determination of the facts. As *Burgener* makes clear, a court need make inquiry only as necessary "to determine the facts" on any concern of jury partiality. In *Chavez* the court heard the undisputed facts from both counsel following their investigation of the conduct. That investigation established that the conversation between the juror and the witness was innocuous, which dispelled any question of partiality. Thus, the court there appears to have satisfied the *Burgener* requirement that the trial court conduct investigation "sufficient to determine the facts" necessary to making a determination of partiality. (See, e.g., *United States v. Saya* (9th Cir. 2001) 247 F.3d 929, 935 [no hearing need be held were the court already knows "the exact scope and nature" of the improper contact].

"[A] hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case. [Citations.]" (*People v. Ray* (1996) 13 Cal.4th 313, 343.) In *Chavez*, the parties had conducted an investigation and advised the court that the contact between the juror and the witness had been unrelated to the trial and provided no basis to doubt the juror's impartiality. Hence, no further inquiry was required. In *Chavez*, the facts showed that the juror-witness contact did not implicate the juror's impartiality. Moreover, *Chavez* is internally inconsistent because on the one hand it found that the court was obligated to investigate the contact further to determine if it was misconduct; but, on the other hand, it found that the contact between the juror and the witness was not misconduct because it was unrelated to the case. (See *People v. Chavez*, *supra*, 231 Cal.App.3d at p. 1482 ["no presumption of prejudice arose from the police officer/witness's conversation with a juror regarding matters unrelated to the cause being tried"].)

The *Chavez* court's finding that the failure to hold a hearing was harmless, based on the evidence before the trial court that the contact in fact had not implicated the juror's partiality, was more properly a finding that the court did not need to investigate the matter further. Here, in contrast, the evidence before the trial court was doubtful and ambiguous on both the spectator-juror contact and on how that contact affected the jurors. These questions demanded further inquiry from the court. In *Chavez*, the court had sufficient

information before it to make an informed determination of whether there was prejudice from the witness-juror contact. In contrast, the trial court here was not able to make an informed determination about either the contact itself or its effect upon the rest of the jurors. Precisely because the trial court's error left the impartiality of the rest of the jurors open to doubt, this Court has no basis to find the error harmless beyond a reasonable doubt.

In any event, this Court's decision in *In re Hamilton* (1999) 20 Cal.4th 273, 294 makes clear that *Chavez*'s harmless error analysis has no application here, where the contact concerned potential intimidation of the juror. As the State acknowledges, *Hamilton* found: 1) "An impartial jury is one in which no member has been improperly influenced and every member is capable and willing to decide the case solely on the evidence presented at trial" (RB 135, citing *Hamilton* at p. 294); and 2) "A sitting juror's involuntary exposure to out-of-court events, such as an outsider's attempt to tamper with the jurors by intimidation, may require examination for probable prejudice using the same standard which applies to situations involving where a juror directly commits misconduct by violating his or her oaths or duties as a juror." (RB 134-135, citing *Hamilton* at pp. 294-295; italics in RB deleted.) To quote *Hamilton* itself:

> A sitting juror's involuntary exposure to events outside the trial evidence, even if not "misconduct" in the pejorative sense, may require similar examination for probable prejudice. Such situations may include attempts by nonjurors to tamper with the jury, as by bribery or intimidation. (See, e.g., *Remmer v. United States* (1954) 347 U.S. 227, 229

> [74 S.Ct. 450, 451, 98 L.Ed. 654]; *People v. Cobb* (1955) 45 Cal.2d 158, 161 [287 P.2d 752] (*Cobb*); *People v. Federico* (1981) 127 Cal.App.3d 20, 38-39 [179 Cal.Rptr. 315] (*Federico*).)

(*In re Hamilton*, *supra*, 20 Cal.4th at pp. 294-295.) Specifically, "[m]isconduct by a juror, or a nonjuror's tampering contact or communication with a sitting juror, usually raises a rebuttable 'presumption' of prejudice." (*Id.* at p. 295; see also *Mattox v. United States* (1892) 146 U.S. 140, 150-151 [13 S.Ct. 50, 36 L.Ed. 917] ["Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."].)

The State suggests there was no prejudice here because "none of the other jurors reported to the court any concern about the spectators' behavior." (RB 137; see also RB 140 ["none of the other jurors reported any note expressing any concern about spectator behavior"].) That fact provides no assurance that they were immune from the exposure that so tainted Juror J. The lack of an actual report to the court was not enough to dispel the specter of prejudice from the contact with the spectators these other jurors had, for these jurors had expressed concern among themselves about the spectator conduct and had further discussed the need to report that conduct to the court. To the contrary, the presumption of prejudice was reinforced by the information before the court, which also included the fact that one of the group of jurors who observed the spectator gestures reported her intimidation by them and confessed to its prejudicial effect.

(Compare *In re Hamilton*, 20 Cal.4th at p. 306 [presumption of prejudice from "an[y] improper attempt to intimidate Gholston by silent menace" overcome by facts, among others, that 1) she "mentioned no ... threatening gestures"; 2) "[b]y Gholston's own account, 'it never occurred to her' to report the incident to the trial court"; and 3) she "never discussed the incident with other jurors"].)

The State also disputes Fuiava's invocation of a presumption of prejudice from the jury-spectator contact here. (RB 140.) The State relies on concurring opinions by Judge O'Scannlain in two decisions in which he pointed out that three federal circuits "have found that the presumption of prejudice in alleged jury tampering cases established by *Remmer v. United States* (1954) 347 U.S. 227 [74 S.Ct. 450, 98 L.Ed. 654 has since been modified by the Supreme Court in *Smith v. Phillips* (1982) 455 U.S. 209, 215 [102 S.Ct. 940], where the Court held the remedy for allegations of juror bias is a hearing, and *United States v. Olano* (1993) 507 U.S. 725 [113 S.Ct. 1770, 123 L.Ed.2d 508], where the Court de-emphasized the importance of presumptions of prejudice." (RB 141.) Of course, here Fuiava's complaint is that the trial court failed to conduct a hearing to inquire into jury tampering where bias could have been determined and remedied prior to the jury's verdict, so that *Smith v. Phillips* illustrates the merit of Fuiava's claim. As to *Olano*, the Ninth Circuit has exposed how specious the State's reliance upon it is under circumstances like those here:

> Despite the government's contention, the Supreme Court's decision in *United States v. Olano* ... did not signal a retreat from *Mattox's* well-settled rule.

> The Court in *Olano* merely commented that whether or not a rebuttable or conclusive presumption of prejudice applies in a case involving an intrusion upon a jury, a reviewing court is required to evaluate the actual extent of prejudice. [Citation.]

(*Caliendo v. Warden* (9th Cir. 2004) 365 F.3d 691, 697, fn. 3.) Moreover, as discussed above, *Hamilton* completely undermines the State's claim that the presumption of prejudice does not apply here.

Finally, the State argues that at most the presumption of prejudice applies only where there is "egregious tampering or third party communication which directly injects itself into the jury process" (RB 142, quoting *United States v. Boylan* (1st Cir. 1990) 898 F.2d 230, 261), and that Fuiava's is not such a case. But *Boylan* itself recognized that any "significant *ex parte* contacts with sitting jurors" would meet that standard. (*Ibid.*) The State attempts to downplay the contact here by asserting that the spectator conduct was not "inherently intimidating" (RB 142) and that "had the court questioned the other jurors, there was a danger that the other jurors would have misinterpreted innocent courtroom observer behavior to mean that spectators supposedly associated with the defense were attempting to intimidate them." (RB 138.) This argument makes no sense, since the very reason that the court was obligated to conduct a hearing was because of the evidence that the jurors construed the spectator conduct as intimidation of them. The likelihood that the jury was intimidated by the spectator conduct, whether innocent or not, cannot be discounted in light of the evidence that Juror J. considered the conduct a direct and threatening communication to the jury that contributed to her inability to fulfill her duties as a juror. Moreover, the central

question was not how objectively intimidating the conduct was, but how subjectively intimidated the jurors were by it.

The Ninth Circuit considered a case where during a trial on charges of tax evasion, IRS agents sat in the spectator section of the courtroom and "[a]t least one juror alleged that a number of the agents regularly glared at her and her fellow jurors." (*United States v. Rutherford*, *supra*, 371 F.3d at p. 643.) The court concluded that the presumption of prejudice applied, explaining:

> [T]he district court erred in concluding that the defendant must prove that the individuals involved *intended* to influence or prejudice the jurors in order for the presumption of prejudice to apply. The appropriate inquiry is whether the unauthorized conduct "raises a risk of influencing the verdict," [citation], or "had an adverse effect on the deliberations," [citation].

(*Id.* at p. 644.) The court in part elaborated upon its holding as follows:

> [I]n *United States v. Elias,* 269 F.3d 1003 (9th Cir. 2001), in determining whether the presumption of prejudice should apply, we again looked not to the intent of the individual alleged to have tampered with the jury, but rather to the jurors' perceptions of the conduct at issue. ... [T]he inquiry in *Elias* was centered not on whether the defendant had intended to bribe the jurors — the defendant was not called to testify about his intent in making the comments— but on the jurors' perception of the defendant's conduct, i.e. whether they believed he was joking or serious and whether the defendant's conduct had scared or distracted them. *Id.* at 1020. Thus, it is clear from our precedent that when considering possible incidents of jury tampering or intimidation,

> "we are ultimately not so concerned with their nature as with the prejudice they may have worked on the fairness of the defendant's trial." *United States v. Armstrong,* 654 F.2d 1328, 1332 (9th Cir. 1981). Accordingly, in cases in which the circumstances suggest that the improper communication or contact is sufficiently serious that it might prejudice the jurors we have afforded the presumption of prejudice; in the case of other more "prosaic kinds of jury misconduct" we have not. [Citations.]

(*Id.* at pp. 642-643.) Given that this Court generally accords the presumption of prejudice to any juror misconduct, the presumption obviously applies to the juror contact with the spectators in Fuiava's trial. (See, e.g., *United States v. Betner* (5th Cir.1974) 489 F.2d 116, 117-119 [reversing judgment on appeal because the trial court aborted a hearing on the contact during a recess between the prosecutor and the jury panel once the court learned that the case was not mentioned during the contact]; *Caliendo v. Warden*, *supra*, 365 F.3d at p. 692 [granting habeas relief where three deliberating jurors chatted amiably and at length with the critical prosecution witness, a police officer, in an uncontrolled setting].)

In sum, the court's failure to conduct any kind of inquiry to determine whether the other jurors who were exposed to the spectators' conduct and discussed that conduct were affected in the way Juror J. confessed she was constituted error that requires reversal.

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VI.

THE COURT'S DENIAL OF DEFENSE COUNSEL'S MOTION TO CONTINUE TRIAL FOR THREE DAYS BECAUSE HE NEEDED THAT TIME TO ADEQUATELY PREPARE REQUIRES REVERSAL OF THE JUDGMENT.

A. Introduction.

Fuiava alleged that the court committed reversible error when it denied trial counsel's motion to continue the trial for a short time because he was not yet prepared to defend against the capital charge. (AOB 154-162.) Fuiava argued that the court's denial of the continuance was particularly abusive because "it was rather remarkable, if not impractical, to expect that a case this complex and consequential could be readied for trial in the eight months since counsel's appointment." (AOB 158.) Fuiava argued that such error affects "the trial framework so that the prejudice need not be spread on the record" (AOB 161), though, "[a]s it happens, the haphazard representation that counsel provided Fuiava throughout the trial demonstrates the depth of [counsel's] unpreparedness." (AOB 162.) The State submits that the trial court properly denied the motion to continue the trial. (RB 143.) That submission fails.

B. The State's Procedural Objection.

At the threshold, the State interposes a procedural objection to the Court's consideration of the claim that the denial of the motion for continuance deprived him of his right to a fair trial and reliable verdict in violation of the Eighth and Fourteenth Amendments of the United States Constitution. (See RB 143, fn. 15.) This is substantially the

same procedural objection, with the same authorities, that the State made to this Court's consideration of the constitutional dimensions of Fuiava's claim regarding exclusion of defense evidence in Argument II, *ante*. (Compare RB 77, fn. 10 with RB 143, fn. 15.) The procedural objection here fails for many of the same reasons that the State's earlier procedural objection failed. (See *ante*, Argument II, Section B., pp. 36-42.) Those reasons include:

- The objection's perfunctory footnoted nature.
- The congruency of the analysis of this constitutional issue with the analysis of the other state and constitutional issues that the State implicitly concedes were properly raised by the motion for continuance.
- The trial court's notice and understanding of the issue presented.
- This Court's inherent power to consider a claim to avoid substantial injustice, and its particular disposition to do so in a death penalty case.

C. The Merits of Fuiava's Claim.

1. The Error.

On the merits, the State first asserts that the trial court properly exercised its discretion to deny the motion because "trial counsel did not comply with section 1050, subdivision (b), which requires that written notice of a motion for a continuance be filed and served at least two court days before the hearing." (RB 146.) As the State recognizes, however, the trial court may not deny a motion for failure

to meet this notice requirement where "good cause is shown for the failure to comply." (RB 146.) In addition, the opposing party may waive the notice requirement. (§ 1050, subd. (a).) Here, the State waived the notice requirement because it never opposed the motion on the ground that defense counsel failed to give notice two court days in advance. Moreover, the trial court did not deny the motion on the basis of any lack of the specified notice. Rather, the court proceeded to hear the motion on its merits, implicitly finding that there was good cause for the failure to provide the notice of two court days.

To be sure, the motion was largely based on the fact that trial counsel had been incapacitated since the last court day. (See CT 625; RT 53.) Thus, good cause for failure to give the notice of two court days inhered in the motion, for it was based on developments since then. It is ludicrous under these circumstances for the State to assert on appeal that trial counsel's failure to provide notice of two court days justified the court's denial of the motion.

The State asserts that "[i]n similar circumstances [showing lack of two-day notice], this Court has held trial courts have not abused their discretion in denying motions for a continuance." (RB 146-147, citing *People v. Smithey* (1999) 20 Cal.4th 936, 1012; *People v. Jones* (1998) 17 Cal.4th 279, 318.) Contrary to the State's representation, neither of those cases presented "similar circumstances." Most significantly, in neither case was the continuance based on events that had occurred in the time intervening since two court days earlier. Moreover, in *Smithey* "[t]he prosecutor opposed a continuance, noting among other things that defendant had not requested a continuance

pursuant to section 1050, which requires at least two days' written notice." (*People v. Smithey*, *supra*, 20 Cal.4th at p. 1011.) Further, on appeal in that case "[d]efendant ma[de] no serious attempt to establish good cause for his failure to comply with the notice requirements of section 1050, subdivision (b)." (*Id.* at p. 1012.) Not surprisingly, then, this Court found in *Smithey* that "[i]n the absence of any justification in the record for the failure to prepare a timely motion for a continuance or for new trial, we determine that the trial court did not abuse its discretion in denying a continuance." (*Ibid.*) In contrast, Fuiava's record on appeal indisputably shows good cause for counsel's failure to earlier prepare his motion for continuance, for the basis for his motion had arisen since the previous court day. The State's conclusory assertion here that "trial [counsel] did not establish any 'good cause' for his failure to comply with this notice requirement" (RB 146) simply ignores that fact.

The State next asserts that the court acted within its discretion in finding that any benefit to the defense from grant of the motion was outweighed by the burden on other parties, particularly the court, which had called in a panel of prospective jurors for the trial that day, and to the jury panel who had been obliged to report that day. (RB 147.) That burden was no more than a minor inconvenience when compared to the potential harm to Fuiava from proceeding with unprepared counsel. Particularly when compared to the burden the court's ruling imposed on Fuiava by forcing him to begin a trial where his life hung in the balance with counsel who was admittedly unprepared to defend against the charges, the court's ruling cannot be

reconciled with the constitutional constraints that controlled its consideration of counsel's motion. "[A] trial court may not exercise its discretion over continuances so as to deprive the defendant or his attorneys of a reasonable opportunity to prepare. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 70.)

2. The Prejudice.

The State finally argues that any abuse of discretion by the court in denying the motion for continuance does not require reversal because Fuiava has not shown prejudice from the denial. The State's argument here fails, first, because it ignores Fuiava's point that any abuse of discretion here necessarily requires reversal because the error subverts a structural component of a fair trial; namely, prepared counsel. (See, e.g., AOB 160-161.) It also ignores Fuiava's point that an appellant need not show prejudice for errors like this one, which affect the composition of the record. Unlike other errors from which the harm can be calculated from the record, an outcome-determinative evaluation of prejudice here would involve "difficult inquiries concerning matters that might have been, but were not, placed in evidence." (See AOB 160, quoting *Rose v. Clark, supra,* 478 U.S. at p. 580, fn. 7.) Prejudice under such circumstances is thus presumed. (*Ibid.*)

The State asserts that "[a]ppellant's claim that trial counsel was unprepared (AOB 156-162) is based on his speculation." (RB 148.) It is not. That claim is based on counsel's own confession to the court that he was not prepared to proceed that day, for he required at least several more days to devote to the case to be adequately prepared.

The State retorts that because counsel requested only a short period of time for that preparation, "he was essentially prepared for trial." (RB 148.) In fact, however, the very shortness of the delay requested was a factor that favored the grant of the continuance. The State claims that because counsel "had approximately eight months to prepare for trial" he "had adequate time to prepare." (RB 148.) Eight months, however, was an incredibly short time for preparation of a capital case that was as obviously complex as this one, so that the expiration of only eight months from counsel's appointment to the date set for trial was another factor that favored grant of the continuance requested.

Finally, the State argues that "appellant cites nothing from the record to support his assertion that 'the haphazard representation that counsel provided appellant demonstrates the depth of his unpreparedness.'" (RB 148, citing AOB 162; brackets deleted].) Counsel's lack of adequate preparation, however, is stamped on every page of the record, and includes the following:

- On July 8, the day after denial of the motion for continuance, counsel gave an opening statement in which he promised the jurors he would present "expert testimony that [Blair's] nine millimeter handgun makes a higher pitch sound when fired than Freddie's .44, proving that Blair shot first." (RT 351.) Counsel, however, failed to deliver on that promise.
- On July 10, when the prosecutor sought to play to the jury the tape of Lyons's radio call for assistance after the

shooting, counsel confessed that he had yet to listen to it or review a transcript of it. (RT 511.)

- On July 11, counsel still did not have a copy of the civil rights lawsuit, the admissibility of which was contested by the prosecution. (RT 631.)
- On that same day, counsel had yet to determine whether he wanted the tape of the jail visit played to the jury. (RT 650.)
- At the outset of the penalty phase presentation on July 25, counsel either had not yet reviewed the penalty phase discovery report of an interview with Fuiava where he allegedly made admissions regarding prior shootings or counsel simply was not familiar with that report. (RT 2425.)
- As the penalty phase was about to close, counsel still had not decided whether or not to call Fuiava as a witness. (RT 2703.)

The record discloses these and other examples of counsel's inability to prepare for trial in the time granted him. "Matters that might have been, but were not, placed in evidence," however, are what the record cannot show, but which form the heart of prejudice in a case where counsel is not prepared. Thus, under any standard of prejudice, the court's refusal to continue the trial in the face of counsel's confessed lack of preparation was error that resulted in an unfair trial and requires reversal of the judgment.

VII.

THE TRIAL COURT'S VOIR DIRE OF THE JURY WAS INADEQUATE, REQUIRING REVERSAL OF THE JUDGMENT.

A. Introduction.

Fuiava has assigned as reversible error on appeal the trial court's voir dire of the jury because that voir dire was inadequate to uncover prejudice. (AOB 162-172.) Although the voir dire overall was superficial and inadequate, the court particularly abused its discretion when it refused to permit defense counsel to personally conduct any voir dire, excluded his proposed questions that were designed to probe the jury's ability to fairly consider claims of self-defense or defense of others made by a gang member against a deputy sheriff, and did not itself meaningfully cover that issue in its voir dire. (AOB 169-170.) The State asserts that "this claim should be rejected." (RB 150.) The State is wrong.

B. The State's Procedural Claims.

The State preliminarily asserts that Fuiava "failed to preserve his claim ...." (AOB 157.) The State asserts forfeiture, first, because "trial counsel did not ask the trial court to ask any questions regarding racial bias." (RB 157.) Fuiava pointed out in his opening brief that some courts have required a request from counsel to trigger a court's obligation to inquire into racial prejudice. (See AOB 171, citing *People v. Bolden* (2002) 29 Cal.4th 515, 538 and *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 192.) As Fuiava argued, however, "the obvious racial aspects of the case" imposed upon the court a duty

to inquire into them even absent a specific request from counsel. (See AOB 171.) A court's failure to inquire about racial prejudice during voir dire in a case where the potential for racial bias is obvious is just as unfair, and just as likely to result in a biased jury, as those cases in which the court refuses counsel's request to inquire on the point. (See, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 660-661 [adequate inquiry into possible racial bias is essential in a case with an African-American defendant charged with a capital crime against a White victim][4]; *People v. Hope* (Ill. 1998) 702 N.E.2d 1282 [trial court's refusal to question venirepersons on the issue of racial bias required reversal of the death sentence where the defendant had requested that the jurors be asked, "Would you automatically vote for the death penalty with respect to [defendant] because he is a Black man who has admittedly killed a White police officer?"]; *People v. Wilborn* (1999)

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[4] In *People v. Holt, supra,* 15 Cal.4th at p. 661, the Court stated:

> Trial court judges should closely follow the language and formulae for voir dire recommended by the Judicial Council in the Standards to ensure that all appropriate areas of inquiry are covered in an appropriate manner. Failure to use the recommended language may be a factor to be considered in determining whether a voir dire was adequate, but the entire voir dire must be considered in making that judgment.

Section 8.5 (b)(18) of the California Standards of Judicial Administration (23 pt. 2 West's. Cal. Codes Ann. Rules (1996 ed.) Appen., p. 663) suggests the following inquiry, when appropriate:

> It may appear that one or more of the parties, attorneys or witnesses come from a particular national, racial or religious group (or may have a life style different than your own). Would this in any way affect your judgment or the weight and credibility you would give to their testimony?

70 Cal.App.4th 339, 343 & 348 ["The trial court's refusal to ask any questions regarding racial bias" deprived defendant of his right to a fair and impartial jury "where the defense by an African-American defendant rested entirely on a credibility challenge to the White police officers"].)

The State also asserts that Fuiava forfeited his claim of inadequate voir dire on the subject of self-defense by a gang member against a law enforcement officer. (RB 157.) The State acknowledges, however, that "trial counsel ... asked the trial court to ask the potential jurors whether they could apply the doctrine of self-defense where one's life, or that of a street gang member, was 'illegally placed in peril' by another person or a uniformed police officer." (RB 157.) This acknowledgment defeats the State's forfeiture contention. Moreover, the State also concedes that when it became clear to counsel that the court had no intention to ask the questions he had submitted or, indeed, any other questions, counsel beseeched the court to "at least touch on self-defense." (RB 157.) This sequence confirms that there was no forfeiture of Fuiava's claim of inadequate voir dire.

Counsel adequately preserved the issue here: 1) He submitted specific questions on the topic for the court to ask; 2) when the court neglected to ask the questions, he asked to question the jury himself; and 3) rebuffed in those efforts, he asked the court to at least make some inquiry on the issue. The fact that thereafter "trial counsel ... did not object or request further inquiry" (RB 157) hardly forfeits this claim on appeal. Rather, "[a]ppellant carefully preserved this issue,

first by written motion requesting specific questions, and then by asking the court whether it would inquire into [the subject]." (*People v. Wilborn*, *supra*, 70 Cal.App.4th at p. 347; compare with *People v. Stewart* (2004) 33 Cal.4th 425, 458 ["Trial counsel for defendant was given an opportunity to submit or ask additional voir questions of the prospective jurors who had not been excused for cause over objection, and yet declined to do so."].)

The sole authority the State cites to support its contention of forfeiture, *People v. Sanchez* (1995) 12 Cal.4th 1, 61-62 (see RB 157), is not on point. There, the defendant complained on appeal that the trial court had failed to voir dire the jury venire about any knowledge its members may have had about the pending disbarment of one of his counsel. Counsel for the defendant, however, had never asked the court to question the jury on that issue; moreover, counsel had also personally voir dired the prospective jurors without questioning any of them on the disbarment issue. (*Id.* at p. 61, incl. fn. 6.)

Sanchez's analysis on the procedural point confirms its distinction from Fuiava's case. That analysis consisted of the following single sentence: "First, it is evident from the record that defendant failed to preserve his claim of improper voir dire by objecting to the court's questioning during trial. (*People v. Viscotti* (1992) 2 Cal.4th 1, 48.)" (*Id.* at pp. 61-62.) The asserted error in *Viscotti* concerned questions that the court permitted the prosecutor to ask during voir dire, a very different error than the one here. (See *People v. Viscotti*, *supra*, 2 Cal.4th at p. 46.) The need for an objection to preserve such asserted error does not establish a need for

Fuiava's counsel to "object" to the court's refusal to ask the questions he submitted or to permit him to personally probe the jury on this topic. The court's very refusals are sufficient to preserve the issue, and "objections" to such rulings are not required. (See, e.g., *People v. Scott* (1978) 21 Cal.3d 284, 291 [requests or objections "need not be repetitiously renewed" to preserve issue for appeal].) Moreover, even in *Sanchez* this Court brushed aside any procedural irregularity and addressed the claim "[o]n the merits." (*People v. Sanchez, supra*, 12 Cal.4th at p. 62.) So should the Court here.

C. The Merits of Fuiava's Claim.

1. The Error.

The State further asserts that the claim, if preserved, "nevertheless lacks merit." (RB 157.) The State faults Fuiava for "relying upon *People v. Williams* (1981) 29 Cal.3d 392, 408, 410" to argue that the trial court was obliged "to ask the jurors the proposed voir dire questions submitted by trial counsel regarding their 'openness to the defense of self-defense in the homicide of a peace officer by a reputed gang member.'" (RB 158, quoting AOB 168-169.) According to the State, "*Williams* has little, if any precedential value" in light of "the subsequent enactment of [P]roposition 115 ...." Not so.

As this Court has explained the change wrought by Proposition 115 in this regard:

> Before the passage of Proposition 115 in the June 5, 1990, Primary Election, the permissible scope of voir dire included examination directed towards the

> exercise of peremptory challenges. Proposition 115 changed the scope of legitimate inquiry on voir dire by requiring that the examination of prospective jurors be conducted only in aid of the exercise of challenges for cause. [Citation.]

(*People v. Mendoza* (2000) 24 Cal.4th 130, 168, fn. 5.)

Thus, under both *Williams* and Proposition 115, a party must be permitted to pose questions that are "directly relevant to whether a juror would be subject to a challenge for cause." (See *People v. Noguera* (1992) 4 Cal.4th 599, 646.) Just as the State notes: "Under *Williams*, a court should permit questions about relevant, controversial legal doctrines that jurors are likely to resist applying." (RB 160.)

A juror's resistance to a legal doctrine that is controversial within the factual context of the case at hand can provide a basis to excuse that juror for cause when that resistance disables the juror from fairly applying that doctrine. (See AOB 169, quoting *People v. Cash* (2002) 28 Cal.4th 703, 720-721, which "affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction" on the law.) While a court after Proposition 115 is not required to examine prospective jurors about matters that are relevant only to a peremptory challenge, both Proposition 115 and the state and federal constitutional rights to an impartial jury obligate the court upon request to test the prospective jurors for bias based on their strong feelings on controversial issues that might impair their ability to fairly decide the case before them.

As the State acknowledges: "Voir dire provides a 'critical function' in protecting a defendant's Sixth Amendment right to a trial by an impartial jury," for its "main purpose ... is to 'ferret out bias and prejudice on the part of prospective juror.'" (RB 157-158; inside quotes and brackets in quote deleted.) Here, the trial court's voir dire was inadequate to test whether any prospective juror's strong views concerning gang members and the police would impair that juror's ability to follow the law permitting gang members to kill an officer on duty in self-defense or defense of one another. This Court recently has confirmed that a court abuses its discretion and denies a defendant a fair trial where its voir dire "'questioning is not reasonably sufficient to test the jury for bias or partiality.'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 737, quoting *People v. Box* (2000) 23 Cal.4th 1153, 1179.)

The State next argues that Fuiava's claim fails under *Williams* even if that case "has some remaining vitality." (RB 160.) According to the State, this is so because *Williams* requires voir dire "about relevant, controversial legal doctrines that jurors are likely to resist applying " (RB 160), whereas "the doctrines of self-defense and self-defense of another [sic] are not controversial, but rather are generally accepted by most, if not all, jurisdictions." (RB 161.) As the State asserts in another way: "Even under the rule set forth in *Williams*, appellant's claim lacks merit because the average juror would not disagree with the proposition that one has the right to self-defense or defense of a third person." (RB 161.)

As set forth above, however, a legal doctrine may be noncontroversial in the abstract but controversial when it is applied in the context of the case at hand. It is for precisely this reason that voir dire on the controversial point is necessary when requested. Fuiava's case perfectly illustrates this principle: While the doctrine of self-defense or defense of others is non-controversial in the abstract, a juror could well resist or reject the doctrine when asked to apply it to a gang member who kills a patrolling officer. Indeed, *Williams* itself concerned voir dire of the jury concerning its willingness to apply the law of self-defense, which was the central issue at trial. There, the defendant asserted that he had been entitled to use force to defend himself, his grandson and his home against the decedent. The decedent had come to the defendant's home, challenged the defendant, struggled with defendant, and then had then been shot by the defendant. (*People v. Williams*, *supra,* 29 Cal.3d at pp. 397-398.) During voir dire, defense counsel was permitted to ask the prospective jurors generally whether they would follow self-defense instructions even if they disagreed with the law, but prohibited from probing the prospective jurors on "whether they would willingly follow an instruction to the effect that a person has a right to resist an aggressor by using necessary force and has no duty to retreat." (*Id.* at p. 398.)

The Court in *Williams* found that it was not enough simply to query the jury about the law of self-defense generally, when it was the particular context of that law which generated the controversy and potential bias of the prospective jurors: The question was whether an individual may stand his ground in his house and use deadly force

when there was an open avenue of retreat. (*People v. Williams*, *supra*, 29 Cal.3d at p. 411.) "A statement of general willingness to apply unspecified self-defense principles is not a sufficient guarantee of impartial application of a rule so important to the case and so likely to encounter opposition." (*Ibid.*) Here, too, given the disfavored status of a minority gang member and the favored status of a police officer, Fuiava should have been granted the opportunity to test the jurors on the question whether they could fairly apply the law of self-defense in a case where such a gang member invoked it against a deputy sheriff. "Because the inquiry foreclosed by the court bore a substantial likelihood of uncovering jury bias, the court abused its discretion by refusing to allow the proposed question." (*Id.* at p. 412.)

The State justifies the court's refusal to utilize the questions submitted by counsel on the basis that the "[t]he proposed voir dire questions ... were not neutral and nonargumentative ...." (RB 161.) First, they were not argumentative, for they were phrased in terms of hypotheticals rather than assertions or argument concerning the evidence. Moreover, any inartfulness in the phrasing of the questions did not relieve the court of its duty to probe the jury on the controversial points highlighted by those questions. While the court may require that questions "be phrased in neutral, nonargumentative form," it may not refuse to conduct an inquiry that is "proper in scope ...." (*People v. Williams*, 29 Cal.3d at p. 408.) Thus, consistent with its duty to adequately voir dire the jury to uncover bias, the court had a duty to rephrase any inartful question designed to uncover bias. For example, as part of its duty to give correct instructions on the law, a

court has a duty to correct defects in an instruction proffered by the defendant to pinpoint his defense. (See, e.g., *People v. Malone* (1988) 47 Cal.3d 1, 49; *People v. Whitehorn* (1963) 60 Cal.2d 256, 265.)

Particularly in a capital case, "[a] trial court must be careful not to permit its proper concern with the expeditious conduct of the trial to lead to an improper acceleration of the proceedings." (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 998.) The trial court here failed to show such care.

2. The Prejudice.

Finally, the State argues that any inadequacy of voir dire "was harmless" because "there was overwhelming evidence of appellant's guilt" and the jury was generally instructed to be fair and to follow the court's instructions. (RB 163.) There are many reasons for the Court to reject this argument.

First, the State submits that the analysis is controlled by the state law standards for determining prejudice, not the stricter constitutional standard. (RB 162, citing *People v. Leung* (1992) 5 Cal.App.4th 482, 483, and asserting that it "not[ed] [the] *Williams* court applied [the] *Watson* standard.") In fact, however, the Court in *Williams* ruled that the missing voir dire was required in order to secure the peremptory challenge as a critical "safeguard of the right to a fair trial before an impartial jury" (*People v. Williams*, *supra*, 29 Cal.3d at p. 405, citing *Swain* v. *Alabama* (1965) 380 U.S. 202, 219-221 [13 L.Ed.2d 759, 771-773, 85 S.Ct. 824]; *Pointer v. United States* (1894) 151 U.S. 396, 408 [38 L.Ed. 208, 213-214, 14 S.Ct. 410].) Thus, the Court based its ruling on the right to an impartial jury under

not only the state Constitution, but also the federal Constitution. Moreover, whether a state constitutional right or a federal constitutional right, the structural nature of the right to an impartial jury renders the test for harmlessness under either constitutional standard a particularly strict one. As *Williams* found:

> Although in many contexts a procedure depriving defendant of the right to secure an impartial jury necessarily dictates reversal [citations], that standard should not apply if the potential for bias relates only to a particular doctrine of law. When antipathy to a legal rule is the issue, its potential effect is limited by the significance of the rule to the case's outcome. If in light of the evidence no reasonable, impartial juror would apply the rule, or if the judge determines the rule to be irrelevant as a matter of law, or if the verdict is consistent with an application of the rule favorable to defendant, any bias would obviously be harmless.

(*Id.* at p. 412.) Under that standard, refusal to instruct on a particular doctrine of law will rarely be harmless. Indeed the Court in *Williams* found prejudice on the following basis:

> Here ... the jury was instructed to excuse defendant's failure to retreat if it found certain facts, for which there was substantial evidentiary support. Moreover, the jury's finding of guilt was inconsistent with application to defendant of the retreat doctrine. Therefore, the error in excluding questions regarding that doctrine was prejudicial.

(*People v. Williams*, *supra*, 29 Cal.3d at p. 412.)

Likewise, here the jury was instructed to acquit Fuiava if it found that he killed Blair in defense of himself or his fellow Young

Crowd member Avila, and Blair's life-threatening actions were not "lawfully in the maintenance of the peace and security of the community." (RT 2317.) There was substantial evidentiary support for such a finding. And, finally, the jury's finding of guilt was inconsistent with application of that law. Hence, the error was prejudicial.

The State's argument that the error was harmless because of "overwhelming evidence of guilt" fails both as a matter of law and a matter of fact. As a matter of law, even overwhelming evidence of guilt does not excuse trial by a jury harboring bias on a central issue. The *Williams* court prejudice analysis exemplifies this point, for its analysis did not include consideration of the weight of the prosecution's evidence. Denial of an impartial jury is structural error that is always prejudicial, and the State does not even purport to cite authority to support its claim otherwise.

As a matter of fact, the State's argument ignores the substantial evidence that Fuiava shot to defend himself and Avila at a time when Blair had exceeded his police authority. Devoid of legal authority, the State's argument on this point consists of a single sentence, viz.: "[G]iven appellant's statements that he killed Deputy Blair, not in self defense, but rather because he did not want to return to prison for the rest of his life as the result of a third strike, any error in the voir dire questioning regarding self defense must be deemed non-prejudicial." (RB 163.) In those statements, however, Fuiava never disclaimed that he shot in defense of himself and Avila. More fundamentally, there was substantial dispute at trial over whether Fuiava ever made those

statements. Finally, Fuiava not only testified that he shot in defense of himself and Avila, but there was abundant evidence that corroborated his testimony. Given that the proposed inquiry went to the heart of the case and the evidence particularly vied on the question whether Fuiava had a right to shoot Blair in defense of himself and Avila because Blair's abuse of his police power endangered their lives, the trial court's refusal to voir dire the jury on the subject carried a grave potential for harm that made it prejudicial under any standard. Certainly the State cites no authority to support its assertion that the concluding instructions to the jury to be fair and to follow the court's instructions on the law — general instructions given in every case — somehow served to fill the gap from the omitted inquiry on voir dire. Thus, the court's restrictive voir dire of the jury requires reversal of the judgment.

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VIII.

THE COURT'S ADMISSION OF IRRELEVANT AND PREJUDICIAL EVIDENCE REQUIRES REVERSAL OF THE JUDGMENT.

A. Introduction.

Fuiava assigned as error requiring reversal the rulings of the court that admitted evidence against him that was either irrelevant or unduly prejudicial. (AOB 172-173.) The State asserts that none of the evidence Fuiava identified in this argument was wrongly admitted. (RB 164.) The State is wrong. As set forth below, the evidence was not only wrongfully admitted but prejudicial, entitling Fuiava to reversal of the judgment

B. Evidence of Fuiava's Criminal History.

The court permitted the prosecution to introduce evidence of Fuiava's two prior convictions for assault with a firearm, as well as evidence that at the time of the charged offense he was on parole with a condition that he not possess firearms. (AOB 174-175; RB 165-166.) The court allowed this evidence on the basis that it helped establish Fuiava's motive to shoot in order to avoid arrest and return to prison. (AOB 175-177; RB 165-166.) Despite the fact that one of the prior convictions was not a strike, the court found the evidence admissible also to corroborate other testimony that Fuiava said that he had shot Blair to avoid arrest on a third strike that would send him back to prison for the rest of his life. (AOB 175; RB 165-166.)

The State asserts that the evidence of the prior convictions was probative of Fuiava's motive to avoid arrest for a third strike, despite the fact "[t]hat the convictions were not actually strikes," because of the asserted "likely possibility" that Fuiava believed that they were. (RB 167.) The State's argument betrays the extremely limited probative value of the evidence, if not its utter lack of relevance, for it is conjectural Thus, this evidence should not have been admitted.[5]

The court added to the prejudice from admission of this evidence when it refused to sanitize the evidence to avoid the jury learning that the convictions were for assaults with a firearm, offenses similar to the shooting crimes charged here. (AOB 175.) The State

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[5] Evidence Code section 1101, subdivision (b), permits evidence of a defendant's other misconduct when relevant to certain issues, including motive. Though the admissibility of the evidence under this code section was joined at trial and the court explicitly found it admissible under that section (see AOB 174-175), the State asserts that Fuiava has forfeited *on appeal* any claim that the evidence was improperly admitted under Evidence Code section 1101. (RB 166, fn. 16.) Not so. Fuiava flatly asserted on appeal that the court's finding "that evidence of the prior convictions and parole status and conditions was probative of Fuiava's motive to shoot Blair to avoid return to prison ... was error." (AOB 177; see also AOB 180 ["admission of evidence that Fuiava was on parole and the several parole conditions he arguably violated constituted error because the evidence was irrelevant"]; *ibid.* ["Admission of evidence of Fuiava's prior prison terms was substantially probative only of the allegations of such."].) Indeed, Fuiava specifically assigned as error "the trial court rul[ing] that evidence of the prior convictions could be admitted under Evidence Code section 1101, subdivision (b) as corroboration of the other evidence the prosecutor intended to present to prove that Fuiava killed Blair because he believed his detention would lead to a third-strike conviction and life imprisonment." (AOB 175.) Thus, there is no forfeiture on appeal of the claim that the trial court erred when it admitted this evidence as relevant under Evidence Code section 1101, subdivision (b). If there is any question on that point, Fuiava unequivocally makes that claim now.

protests that "the trial court did not act arbitrarily or unreasonably in refusing to sanitize appellant's prior convictions" (RB 168), arguing that the court correctly reasoned that "the jury would have speculated as to the nature of his prior offenses, possibly concluding they were crimes more heinous or violent than shootings." (RB 168.) An admonition not to speculate about the nature of the convictions, however, would have protected against that concern. The much more obvious concern was that the jury's certain knowledge of the prior offenses would over-persuade them towards guilt on a propensity theory because of their similarity to the charged crime. (See AOB 178-179.) The State simply ignores the obvious prejudice to a defendant when the jury learns that he has been previously convicted of an offense similar to the charged one. Thus, the court's refusal to sanitize the evidence on the ground that such sanitization would have prejudiced Fuiava was arbitrary and capricious, for it was the Court's very refusal that caused him undue prejudice.

The State asserts that the evidence of Fuiava's parole violation was relevant because it gave Fuiava an additional motive to avoid arrest, and "e[]vidence does not become irrelevant solely because it is cumulative of other evidence." (RB 168.) There was no foundation for the submission that Fuiava shot Blair to avoid service of a parole violation term, however, for no evidence suggested that theory. Thus, the evidence of the parole violation was irrelevant. The State is also incorrect in characterizing the evidence as properly admitted despite its cumulative nature. Because any motive to avoid a prison term for a parole violation paled by comparison to a motive to avoid a Three-

Strike sentence, admission of the evidence of parole violation was substantially more prejudicial than probative. In this regard, the cumulative nature of the evidence is in fact an important consideration. (See, e.g., *People v. Gibson* (1976) 56 Cal.App.3d 119, 135 [where exhibits "represented cumulative evidence of slight relevancy," their "probative value was substantially outweighed by the danger of undue prejudice"].)

Next, the State asserts that Fuiava forfeited the claim that admission of the evidence used to prove the allegations of his prior convictions was error because he "did not object when those prison documents ... were admitted into evidence at trial." (RB 168.) But the court had already overruled Fuiava's objection to admission of any evidence of his prior convictions and parole violation, and the court had elected on that basis to try the allegations with the charges rather than bifurcate them. (See AOB 175.) Thus, Fuiava has not waived his claim here.

Finally, the State claims that any error in admission of "evidence of appellant's criminal history and parole status" was "harmless." (RB 169.) The State so argues, first, on the basis that the jury nevertheless would have heard evidence of other crimes of Fuiava. In this regard, the State points to the testimony of Frausto and Brooks that Fuiava believed he had two strikes, and Fuiava's own testimony that "he was involved in 'some criminal acts'" *after* he shot Blair. (RB 169.) The prejudice from the evidence that Fuiava engaged in some nonviolent criminality after the shooting is light years away from the magnitude of prejudice that Fuiava suffered from

the evidence that he had twice previously been convicted of assaults with a firearm — the same kind of conduct that comprised the charges of murder and attempted murder in this case. Similarly, the prejudice from the evidence that Fuiava believed that he had two strikes also did not compare to the prejudice from the evidence of his prior convictions. The jury could have harbored reasonable doubt as to the evidence of Fuiava's statements of belief because the witnesses who provided that evidence were not very credible. In contrast, his guilt of the prior convictions was proven by court documents. Moreover, the documents reflected conduct substantially the same as that charged, while worries about a third strike did not.

The State claims harmless error, secondly, on the basis that "the prosecution presented overwhelming evidence ... that appellant fired first at Deputy Blair." (RB 169.) Fuiava has already argued that just the opposite is true: There was substantial evidence that Blair shot first and that Fuiava responded with gunfire only in response to the apparent danger posed by Blair's gunfire. (See *ante*, Argument I, section B., The Closeness of the Case, pp. 27-34.)

C. Lyons's Irrelevant and Baseless Opinion of Blair's Police Work.

The State further disputes Fuiava's claim that the court wrongfully permitted Lyons's opinion evidence that Blair was not the kind of officer who would harass gang members. (Compare RB 170 with AOB 183-184.) The State's assertion that "Lyons' testimony was relevant as it had a tendency in reason to show that Deputy Blair was not a violent person, or the type of deputy that would harass gang

members" (RB 170), overlooks Fuiava's claim that there was no foundation for that opinion because "Lyons had had minimal contact with Blair." (AOB 184.) Moreover, even if relevant, Lyons's gratuitous testimony on the point was nonresponsive, so that the court wrongly overruled Fuiava's objection to the testimony on that basis. (See AOB 183.) Finally, the State's emphasis in its assertion that the evidence carried no "*undue* prejudicial impact" (RB 170) confuses the legal issues here with one under Evidence Code section 352, where the analysis depends upon a consideration of undue prejudicial impact.

D. Expert Opinion on Reliability of Lyons's Perception of Direction of Gunfire.

Fuiava also challenged the admission of expert testimony from Sgt. Harris that police officers subject to gunfire are not able to determine the direction of that gunfire, so that their determination of the direction of the gunfire is unreliable. (AOB 184-185.) Fuiava asserted that the court erred when it overruled his objection at trial to admission of this evidence as lacking foundation and beyond the witness's expertise. (AOB 185-186.) The State asserts that Fuiava's objection goes to the weight of the evidence (RB 172), but Fuiava demonstrated in his opening brief why the foundation for the officer's expertise was "too vague and skimpy ...." (AOB 172.) An expert's qualifications "must be related to the particular subject upon which he is giving expert testimony. Qualifications on related subject matter are insufficient. [Citations.]" (*People v. Hogan* (1982) 31 Cal.3d 815, 832.)

The State further asserts that Fuiava "has not demonstrated that the probative value of this evidence was substantially outweighed by its prejudicial impact" such that it should have been excluded under Evidence Code section 352. (RB 172.) Fuiava explained in his opening brief, however, that even if there was some foundation for Harris's opinion, permitting admission of "that opinion under the guise of his expertise in ballistics naturally would have impressed the jury" beyond the actual worth of his opinion. (AOB 186.) The State's conclusory argument that Harris's opinion here had "little impact on the issues" (RB 172) should be rejected out of hand in light of Fuiava's showing otherwise:

> The opinion prejudiced Fuiava, for it invited the jury to disregard Lyons's testimony and statements that the first set of shots he heard came not from Fuiava's direction, which was to Lyons's front and right, but from Blair's direction, which was to Lyons's back and left. Lyons's testimony was extremely powerful evidence of Fuiava's innocence and compelling corroboration of his claim of self-defense. Consequently, the error in permitting Harris's unfounded opinion testimony that Lyons's perception of direction meant nothing under the circumstances greatly harmed Fuiava's cause.

(AOB 186.)

E. Photograph of Simulated Shotgun in Mock Patrol Vehicle.

Fuiava asserted that the evidence of a simulated shotgun in the mock patrol car should have been excluded because the prosecutor offered the evidence of the mock patrol car only for its effect upon Lyons and Blair, and neither Lyons nor Blair had seen or heard of a

simulated shotgun in that car. (AOB 186.) The State asserts that "the claim is meritless." (RB 173.) The State, however, never explains how the photo or presence of the simulated gun in the car was relevant. The evidence regarding the patrol car was offered only to show its effect upon Lyons, and Lyons had never seen the photo with the simulated shotgun or heard about it as part of the mock-up. Thus, the fact that Lyons was able to "explain[]" to the jury that the "object in the truck appeared to be" a simulated shotgun when he was shown the photo at trial did not give his testimony "some probative value," as the State asserts. (RB 173.) A trial court "has no discretion to admit irrelevant evidence." (*People v. Turner* (1984) 37 Cal.3d 302, 321.)

The State further asserts that there was no prejudice because other evidence established "that Young Crowd gang members hated deputy sheriffs and used firearms," and the evidence of the mock patrol car established that point even without consideration of the simulated firearm. (RB 173-174.) The wrongful admission of this evidence, however, added to the cumulative prejudice from the wrongful admission of all the other evidence that Fuiava has identified in this argument. (See, e.g., AOB 189 ["the admission of all this evidence was particularly harmful in the aggregate"].) It also added to the prejudice Fuiava suffered from the court's uneven application of evidentiary rules to permit evidence that established a motive for Fuiava to shoot first while barring evidence that established a motive for Blair to shoot first. (See Argument IX, *post.*)

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IX.

THE COURT'S RULINGS PERMITTING THE PROSECUTION TO PRESENT EVIDENCE SUPPORTING FUIAVA'S MOTIVE TO SHOOT BUT EXCLUDING LIKE EVIDENCE OF BLAIR'S MOTIVE TO SHOOT WORKED A PARTICULAR UNFAIRNESS THAT REQUIRES REVERSAL OF THE JUDGMENT.

Fuiava assigned as constitutional error "the court's uneven application of Evidence Code section 352 in connection with the evidence of competing motives of Blair and Fuiava to shoot first ...." (AOB 195.) The State asserts that "[t]here is nothing in the record, and appellant provides no factual support, that shows the trial court imposed a greater evidentiary burden on him than on the prosecution." (RB 176.) The court's rulings, however, speak for themselves, and Fuiava has identified them on appeal. As he stated:

> The court admitted various evidence freighted with prejudice to aid the prosecution's effort to establish motive and intent for Fuiava to unlawfully shoot Blair. This included evidence concerning Fuiava's prior felony convictions and shootings, his association with Young Crowd and its mock representation of a shot-up sheriff's patrol car, and his parolee status and violation of parole conditions. But the court did not extend like consideration to Fuiava, for it excluded corollary defense evidence of Blair's motive and intent to unlawfully shoot at Avila and Fuiava. Such defense evidence included information about the civil rights lawsuit in which Blair and Avila were both parties that was being readied for trial, and the Lynwood deputies' culture of misconduct.

(AOB 191.)

The State implicitly concedes that the law does not permit a trial court to impose stricter standards for admission of defense evidence than it has imposed for admission of prosecution evidence. (See AOB 191-194.) The State also implicitly concedes the prejudice of "a double whammy" if the trial court granted the State more leeway to establish a motive for Fuiava to shoot first than it granted Fuiava to establish a motive for Blair to shoot first. (See AOB 195.) The State claims only that the trial court's evidentiary rulings at issue were "balanced." (RB 176.) They were not. For these reasons, the court's uneven application of evidentiary rules to Fuiava's detriment requires reversal of the judgment.

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X.

THE ADMISSION OVER OBJECTION OF THE PRELIMINARY HEARING TESTIMONY OF MARTHA GODINEZ REQUIRES REVERSAL OF THE JUDGMENT.

A. Introduction.

Fuiava assigned as error the court's admission at trial of Martha Godinez's testimony from his preliminary hearing. (AOB 195-202.) He argued, as he had argued below when he objected to admission of that evidence, that the prosecution had failed to show that it had diligently tried to produce Godinez for trial. (AOB 196.) He argued that such a showing of due diligence was required under both Evidence Code section 1291 and the Confrontation Clause of the United States Constitution to establish her unavailability and permit admission of her former testimony. (AOB 197-201.)

B. The State's Procedural Objection to the Constitutional Dimension of the Claim.

In a footnote consisting of a single sentence, the State first asserts that Fuiava's claims of constitutional error "are waived since appellant did not present such a claim to the trial court." (RB 177, citing *People v. Williams*, *supra*, 16 Cal.4th at p. 250; *People v. Jackson*, *supra*, 13 Cal.4th at p. 1231, fn. 17; *People v. Raley, supra,* 2 Cal.4th at p. 892.) The State is wrong, for compliance with both the state statute and the constitutional provisions depended upon the same question — whether the prosecution could show that Godinez was unavailable. The parties were fully aware that admission of the

evidence depended upon whether Godinez was unavailable, and never distinguished between Evidence Code section 1291 and the Confrontation Clause in this regard. (See, e.g., RT 967 [prosecutor acknowledged need to show "due diligence" in producing Godinez for trial]; RT 1073, 1131 [court schedules "due diligence hearing" on question of admission of Godinez testimony].)

Where the court's determination of an issue is dispositive of both the state right and the constitutional right and that issue is fully litigated, there is no forfeiture of the constitutional claim. (See, e.g., *People v. Yeoman*, *supra*, 31 Cal.4th at p. 117 [no waiver on appeal of federal dimension of issue posed in trial court only in terms of state law, where the federal and state standard is the same].) The cases cited by the State in its footnote are inapposite, for they did not find waiver under such circumstances. In *People v. Williams, supra,* 16 Cal.4th at p. 250, the Court found waiver of the defendant's constitutional claims of wrongful admission of evidence where the objection was based simply on relevancy grounds, which does not necessarily implicate the United States Constitution. Similarly, in *People v. Jackson, supra,* 13 Cal.4th at p. 1231, fn. 17, the claim concerned "the presence of a camera in the courtroom" in violation of California Rules of Court, rule 980, which again does not necessarily implicate the United States Constitution. Finally, *People v. Raley, supra,* 2 Cal.4th at p. 892 concerned an objection to admission of a statement as a spontaneous declaration where there was no showing attempted or made that the objection implicated the Confrontation

Clause, and the court in any event rejected the constitutional claim "on the merits."

In contrast, Fuiava's objection here implicated the Constitution. As the State itself notes:

> A criminal defendant has the right under the state and federal Constitutions to confront adverse witnesses. [Citations.] The primary interest protected by the right to confrontation is the right to cross-examination at trial, which permits the testing of the credibility of the prosecution's witnesses by giving the factfinder an opportunity to evaluate a witness's demeanor on the stand. [Citations.] ... There is no violation of a defendant's right to confrontation where there is a showing that a hearsay declarant is unavailable and the declarant's statement has "adequate indicia of reliability." [Citations.] [¶] ... [S]tatements which have been cross-examined at a preliminary hearing are "generally immune from subsequent confrontation attack ... [when the witness is unavailable for trial] ... because the cross-examination itself provides the requisite assurance of reliability.

(RB 178-179.) Thus, it is clear that the state right and the confrontation right devolved to the same inquiry, to wit: Did the State show that Godinez was unavailable?

Crawford v. Washington (2004) __ U.S. __ [124 S.Ct. 1354], a case issued by the United States Supreme Court after the filing of the State's brief, confirms this point. There, the Court found as follows:

> The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was

> unavailable to testify, and the defendant had had a prior opportunity for cross-examination.... [T]he "right ... to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. [Citations.] As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country.

(*Id.* at pp. 1365-1366.) Thus, whether there was state error or constitutional error depended here on the very inquiry that the court conducted — i.e., did the State show due diligence in attempting to secure Godinez's trial testimony? As explained above, there is no waiver of the constitutional claim under these circumstances. For these reasons, Fuiava's constitutional claims are not forfeited.

C. The Merits of Fuiava's Claim.

1. The Error.

Fuiava and the State agree on the law that controls whether the State showed that Godinez was unavailable. (Compare AOB 198-200 with RB 180-182.) They simply disagree on the conclusion that should be reached following application of the law to the facts. Accordingly Fuiava rests on the points made in his opening brief that favor a finding by this Court that the prosecution failed to show the unavailability of Godinez at trial.

2. The Prejudice.

The State further argues that any error in admission of the preliminary hearing testimony of Godinez was harmless. (RB 182.) The State here correctly utilizes the constitutional standard of prejudice, requiring the State to prove harmlessness beyond a reasonable doubt. (See RB 182.) The State's application of that doctrine is flawed, however, because it takes into consideration the fact that Godinez's testimony was subjected to cross-examination at the preliminary hearing. The error caused the jury to hear Godinez's testimony from that hearing without any means to gauge her demeanor. Thus, the fact that Godinez's testimony was subject to cross-examination at the preliminary hearing is irrelevant to the prejudice analysis.

The State further asserts that admission of the evidence was not prejudicial because Godinez's testimony tended to establish no more than Fuiava's identity as the shooter, a fact never contested at trial. (RB 182.) But, as Fuiava has argued:

> Godinez's testimony ... carried with it the specter of threats and menaces to her because of her cooperation with the investigation of the shooting. That testimony, coupled with her absence at trial, suggested that Godinez had come to some harm, presumably at Fuiava's hands.

(AOB 201.) Ignoring Godinez's testimony concerning threats and menaces to her because of her cooperation with the prosecution in this case, the State rejoins only that "the prosecutor did not argue that Godinez was not available at trial because she had been harmed by appellant's compatriots." (RB 183.) Such argument was not

necessary, however, to cause prejudice from the evidence. The jury was well able on its own to draw that harmful inference from the evidence and Godinez's conspicuous absence from the trial. As recently stated in a case where the reviewing court reversed for wrongly admitted evidence of the defendant's poverty that in a robbery case "provided her with a motive to steal": "Although the prosecutor did not expressly argue this point, she didn't have to [because] ... the notion was virtually inescapable." (*People v. Carrillo* (2004) 119 Cal.4th 94, 104.) Thus, the prosecution has not borne its burden of showing beyond a reasonable doubt that the error in admission at trial of Godinez's preliminary hearing testimony was harmless.

* * * * * *

XI.

THE INSTRUCTION PERMITTING THE JURY TO FIND GUILT BASED ON FUIAVA'S PROPENSITY FOR VIOLENCE REQUIRES REVERSAL OF THE JUDGMENT.

A. Introduction.

Just as the State puts it, Fuiava "contends the trial court violated his federal constitutional rights ... by admitting evidence of his prior violent acts ... and instructing the jury that his prior acts of violence could be used to show he acted in conformity with his violent character." (RB 184.)

B. The State's Procedural Objection to Consideration of Fuiava's Claim.

The State first claims that Fuiava "has waived his federal constitutional challenges to the trial court's instruction and the admission of the evidence to prove propensity." (RB 186.) The State is wrong.

The State claims forfeiture because Fuiava's trial counsel never asserted "that the evidence of his prior bad acts was inadmissible to prove propensity" or registered "any objection to the instruction regarding the use of evidence of character for violence" to find guilt. (RB 186.) The State's argument on the merits, however, illustrates why there was no forfeiture, for any objection to the evidence would have been futile. The State notes that Evidence Code section 1103, subdivision (b) specifically authorizes the admission of "evidence of the defendant's character for violence or trait of character for violence

... if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character to show violence has been adduced by the defendant under subdivision (a)." (RB 186-187, quoting Evid. Code, § 1103, subd. (b) (ellipsis in quote deleted).) Further: "Evidence Code section 1103, subdivision (b), has been held constitutional by state appellate courts." (RB 187, citing *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173-1176, *People v. Walton* (1996) 42 Cal.App.4th 1004, 1015.) Trial courts are bound to follow the law laid down by the appellate courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, it would have been futile for trial counsel to object to admission of the evidence of Fuiava's violent character or consideration of that evidence to show propensity as the instruction fashioned by the court to implement Evidence Code section 1103 provided. As this Court has explained: "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations.]" (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.)

Moreover, no objection was necessary to assign as error on appeal the instruction that permitted consideration of the evidence to find guilt based on Fuiava's propensity towards violence. "[T]he general rule is settled that even in the absence of an objection the accused has a right to appellate review of any instruction that affects his or her substantial rights. (Pen. Code, § 1259; *People v. Brown*

(2003) 31 Cal.4th 518, 539, fn. 7.)" (*People v. Johnson* (2004) 119 Cal.App.4th 976, 984.) *Johnson* further observed that when "the inference arises that an objection to the instructions would have been futile, ... the general rule barring appellate review does not apply." (*Ibid.*, citing *People v. Hill* (1998) 17 Cal.4th 800, 822.) *Johnson's* further observation is on point here as well:

> "The fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an *appellate court* is precluded from considering the issue. 'An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party .... Whether or not it should do so is entrusted to its discretion.' " (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497, quoting *People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6, 69 Cal. Rptr.2d 917, 948 P.2d 429; see *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061 [appellate court has discretion to adjudicate important question of constitutional law despite party's forfeiture of right to appellate review].)

(*Id.* at pp. 984-985.) Hence, as did *Johnson*, this Court should "reject the Attorney General's forfeiture argument." (*Id.* at p. 985; see also *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5 [citing other cases in which no objection was required due to futility].)

C. The Merits of Fuiava's Claim.

On the merits, the State relies largely on *People v. Falsetta* (1999) 21 Cal.4th 903, 911 for the proposition that a state statute that permits consideration of propensity evidence to find guilt does not offend the Constitution. (See RB 187-189.) Fuiava addressed

Falsetta on this point, however, and explained why it had no application here. (See AOB 204-205.))

The State also relies on *Blanco*. (See RB 190-193.) But again, Fuiava addressed *Blanco* and explained why this Court should disapprove it on this point. (See AOB 206-207.)

The State dismisses the several federal court decisions Fuiava cited in his opening brief that are supportive of his argument that the use of propensity evidence in this case was unconstitutional, noting that "the decisions of lower federal courts are not binding on state courts" and "the Supreme Court expressly declined to answer this question." (RB 193-194.) These federal court decisions certainly carry more weight, however, than Federal Rules of Evidence, rule 404, which is the final authority on which the State relies. (See RB 191-192.) Federal rules of evidence are subordinate to the federal Constitution.

The State finally claims that any error in admitting the evidence of his prior shootings to permit the jury to find him guilty based on his character for violence "was harmless beyond a reasonable doubt." (RB 195.) The State argues that evidence of Fuiava's convictions was otherwise admissible to prove his motive. The evil, though, was in permission for the jury to find guilt on the basis that Fuiava was disposed to criminal violence. Instead of entitlement to an instruction such as CALJIC No. 2.50 that would have specially admonished the jury that the evidence of Fuiava's prior crimes that came in to establish motive "may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to

commit crimes," the jury was expressly advised that it could use that evidence for just that purpose. As the State notes elsewhere in its brief, "It is presumed the jury understood and followed [the court's] instruction." (RB 129.)

The State further finds no prejudice because the instruction "applied equally to past acts of, or reputation for, violence of both appellant and Deputy Blair." (RB 185.) There was no evidence that Blair had been involved in any prior criminal shootings, however, so that the propensity instruction was particularly harmful to Fuiava. Moreover, Fuiava was the one on trial, not Blair, so only Fuiava was liable to be convicted based on his violent disposition.

Finally, the State returns again to its refrain that "evidence of appellant's guilt was overwhelming." (RB 196.) Fuiava already has explained that the evidence was to the contrary, making the question of his guilt a close and difficult one for the jury. Thus, the Court cannot foreclose the possibility that the jury resolved that difficult question by concluding that Fuiava had been the one who had initiated the shooting because he was disposed to such criminality.

* * * * * *

XII.

PROSECUTORIAL MISCONDUCT DURING THE GUILT PHASE REQUIRES REVERSAL OF THE JUDGMENT.

A. General.

Fuiava assigned a range of misconduct by the prosecutor in the guilt phase as error that required reversal of the judgment. (AOB 264-285.) As to all that misconduct, the State asserts — again in its rote footnote —, that Fuiava has waived the constitutional dimension of his claim because he "never relied upon the federal Constitution in any of the objections he made to the prosecutor's alleged misconduct." (RB 197, fn. 19, citing *People v. Williams, supra,* 16 Cal.4th at p. 250; *People v. Jackson*, *supra*, 13 Cal.4th at p. 1231, fn. 17; *People v. Raley, supra,* 2 Cal.4th at p. 892.) None of those cases, however, concerned prosecutorial misconduct. Rather, both *Williams* and *Raley* concerned defense objections to admission of evidence, where Evidence Code section 353 provides in pertinent part that no judgment shall be reversed "by reason of the erroneous admission of evidence unless ... [t]here appears of record an objection to or a motion to exclude or strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion ...." *People v. Jackson*, *supra*, 13 Cal.4th at p. 1231, fn. 17, concerned "the presence of a camera in the courtroom" in violation of California Rules of Court, rule 980. The State's authorities simply are not relevant to a claim of prosecutorial misconduct.

There is no need to particularly specify the Constitution when objecting to prosecutorial misconduct, and no authority holds otherwise. Nothing would be added to the objection by including a reference to the Constitution, since the threshold for showing prosecutorial misconduct under state law is lower than under the federal Constitution. Just as the State has explained:

> Under the federal Constitution, a prosecutor commits misconduct only when his or her behavior "comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." [Citation.] Under state law, a prosecutor commits misconduct by using deceptive or reprehensible methods to persuade either the court or the jury, even if such actions did not render the trial fundamentally unfair. [Citation.]

(RB 198.) Thus, if the court overruled the objection to prosecutorial misconduct under state law, it would necessarily overrule the objection under the Constitution. Because the federal objection is superfluous once the state objection is made and bound to be futile if the state objection is overruled, a requirement of an objection separately based on the federal Constitution serves none of the purposes that underlie the forfeiture doctrine. For these reasons, specification of the Constitution as a basis for an objection to prosecutorial misconduct is not necessary in order to preserve the federal due process claim that the misconduct deprived the defendant of a fair trial.

B. Opening Statement.

The State claims that Fuiava "waived any prosecutorial misconduct claim" to the prosecutor's conduct in his opening statement, which told the jury that the shooting was an "unintended but not unanticipated side effect result of the three strikes law," and that "[w]e knew that these three strike candidates are going to kill police officers rather than go to jail" for 25 years to life. (RB 199; see also AOB 224.) As Fuiava argued on appeal, these comments were objectionable as improper argument, improper introduction of incompetent evidence, and prosecutorial vouching. (AOB 224.)

The State notes that Fuiava "objected to the prosecutor's statement regarding Three Strike candidates, but did not seek an admonition for that statement ...." (RB 199.) The State argues forfeiture on the ground that a defendant must "both make an objection *and* seek a request for an admonition." (RB 199 (italics in original), citing *People v. Gurule* (2002) 28 Cal.4th 557, 651; *People v. Cunningham, supra*, 25 Cal.4th at pp. 1000-1001.) The court overruled the objection, however, so that any request for admonition was superfluous and futile. Only if the court finds the conduct objectionable is there a basis for the court to cure the damage from the misconduct by appropriate admonition. (See, e.g., *People v. Green* (1980) 27 Cal.3d 1, 35, fn. 19 [failure to request admonition does not forfeit claim where court overruled objection].) In *Gurule* for example, the defendant waived his claim of prosecutorial misconduct because he "did not object to any of these comments *or* request a curative instruction ...." (*People v. Gurule, supra*, 28 Cal.4th at p.

651.) Likewise, the defendant did not object to the alleged misconduct in *People v. Cunningham*, *supra*, 25 Cal. 4th at p. 1000.) As observed in *People v. Hall* (2000) 82 Cal.App.4th 813, 817:

> The State counters that any error has been waived by the failure of trial counsel to seek a curative admonition. The State does not explain how the court might have been persuaded to give a curative admonition since it found the objection meritless. The inherent impossibility of obtaining a curative admonition in such a situation has led to the rule that the failure to request the admonition does not forfeit the error. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

On the merits, the State asserts that "there was no prosecutorial misconduct," since "[t]he purpose of an opening statement is to inform the jury of expected evidence and the manner in which the evidence and reasonable inferences related to the prosecution's theory of the case." (RB 199.) This is precisely why Fuiava's objection to the prosecutor's misconduct was well taken. The assertion that "we" — law enforcement — "knew that these three strike candidates are going to kill police officers rather than go to jail" was not "expected evidence"; rather, it was a blatant example of the prosecutor testifying to a fact that was not competent evidence. It also showed prosecutorial vouching from the outset, for the prosecutor aligned himself with law enforcement and suggested special knowledge from that status that third strikers would kill rather than submit to arrest. The notion that law enforcement "anticipated" that third strikers would shoot officers rather than submit to arrest was again another fact not in evidence and one that wrongly served to persuade the jury

that Fuiava shot for that purpose — when the actual evidence offered at trial was in hot dispute and in conflict precisely on that critical point.

Moreover, it was the very closeness of the evidence and conflict of that key dispute at trial that puts the lie to the State's final assertion here that the misconduct "was harmless because the jury was instructed that the attorney's statements were not evidence ...." (RB 200.) As one knowledgeable litigator has advised:

> The opening statement ... is extremely critical to developing themes. Even though jurors will be instructed that the lawyers' comments are not evidence, studies show that jurors form opinions after opening statement that nine times out of ten will not change. Jurors form opinions based on the opening statement as to what happened, who was right, and who was wrong — and use those opinions to filter all evidence presented.... A juror who has made a preliminary determination of the merits of the controversy after opening statements will place greater emphasis on the facts supporting that opinion and discount the evidence inconsistent with it.

(Callahan, *Expert Advice: Jury Practice*, California Lawyer (Sept. 2004) p. 20, at p. 21.)

The State's further point that Fuiava "had an opportunity to confront all witnesses and challenge and rebut the prosecution's evidence" (RB 200) misses the essence of the misconduct. The prosecutor testified during opening statement that three strike candidates kill rather than submit to arrest and that law enforcement knew that they would do so. He, however, presented no evidence to

that effect. The harm from the prosecutor's wrongful testimony in opening statement lies precisely in the fact that Fuiava was not able to confront or cross-examine the prosecutor on his assertions. (See, e.g., *People v. Blackington* (1985) 167 Cal.App.3d 1216, 1222 [prosecutor's attempt to put inadmissible evidence before the jury violated defendant's right to cross-examine and confront witnesses]; see also AOB 253, citing for the same proposition *People v. Bolton* (1979) 23 Cal.3d 208, 213; *People v. Johnson* (1981) 121 Cal.App.3d 94, 104.) It is for this reason, exacerbated by the fact that the unsworn testimony comes from a source the jury is likely to credit, that "a prosecutor may not ... under the guise of argument, assert as facts matters not in evidence ...." (*People v. Love* (1961) 56 Cal.2d 720, 730.) Even less may that prosecutor assert facts as evidence under the guise of an opening statement.

C. Cross-Examination of Witnesses.

1. Examination of Avila.

Fuiava assigned as misconduct the prosecutor's suggestion in questioning Avila, after having established that "smoking" was a street term for "killing," that Fuiava had earned his nickname "Smokey" by killing people. (AOB 2226-228.) The State asserts that there was no misconduct here "because the prosecutor, in framing the question, was drawing an inference from the evidence, which he was permitted to do." (RB 201, citing *People v. Smith* (2003) 30 Cal.4th 581, 617.) Hardly, for the prosecutor had absolutely no basis to suggest that Fuiava's common nickname was linked to murderous behavior. The prosecutor's elicitation of the irrelevant fact of an

earlier nickname of Fuiava — "Devil" — only added to the misconduct by reinforcing the prejudice wrung from the evidence of Fuiava's innocent nickname, making transparent that the prosecutor was smearing Fuiava to evoke undue prejudice. (See AOB 226-227.)

The State asserts that Fuiava "has waived this claim by failing to raise any objection or seek an admonition." (RB 201, citing RT 1641-1642.) The State here simply ignores counsel's objections on the cited pages to the questions about Fuiava's prior nickname and to the street meaning of "smoke," objections which were decisively overruled. (See AOB 226-227.)

The State's argument on the merits also falls short. *Smith* is not apposite, for there was adequate foundation for the prosecutor's question in that case. There, the Court found no misconduct where the prosecutor questioned the defendant in cross-examination about whether the victim had been orally copulating him when she died. The evidence in *Smith* afforded the jury a reasonable basis to so conclude, for it showed that the victim had been kneeling at the time of her death and the jury found that the defendant had kidnapped her to rape her and had raped her; moreover, there was substantial evidence that he had sodomized her, though the jury acquitted him on that count and the accompanying special circumstance allegation. (*People v. Smith*, *supra*, 30 Cal.4th at p. 594.) In addition, "[t]he record contain[ed] no evidence that the prosecutor asked the questions in bad faith." (*Id.* at p. 617.) In contrast, the inference that Fuiava derived his nickname from a practice of killing people came not from any evidentiary foundation but from the prosecutor's own fantasy.

Significantly, the prosecutor made no attempt to show that the fantasy he promulgated had any basis in reality, which shows that his insinuations were in bad faith.

The State's attempt to justify the prosecutor's series of questions designed to show that Young Crowd members typically were armed is strained at best and betrays the fact that there was no legitimate purpose to the prosecutor's conduct. For example, the State asserts this evidence was relevant to corroborate Lyons's testimony "that he saw Avila toss something over his shoulder which was later discovered to be a gun." (RB 202.) But, as the State itself concedes, "Avila testified on direct examination that [he was] armed" and had tossed his firearm just as Lyons testified. (RB 202.) Thus, the State's claim that evidence of a general practice of Young Crowd members to corroborate Lyons's testimony on this point was necessary is hogwash. Similarly specious is the claim that the prosecutor properly asked this question to "test Avila's credibility" that he ran toward his house, rather than in the opposite direction toward Fuiava, when the shooting started. (RB 202.) Any evidence of Young Crowd weaponry hardly yields a "tendency in reason" to doubt that Avila ran westbound toward the safety of his home, as the State asserts. (RB 202.) Indeed, the State elsewhere notes that Lyons himself testified that Avila ran westbound, which was towards his house and away from Ham Park. (See RB 10; see also AOB 22.)

Finally, the State claims that any error was harmless in light of the evidence that both Fuiava and Avila were armed at the time. (RB 202.) The misconduct was nevertheless prejudicial, however, for it

went well beyond evidence of any single incident " to paint Fuiava and his associates as an armed and roving band of criminals and thereby inspire fear and antipathy in the jurors." (AOB 228.)

The State's assertions of relevancy to whitewash the prosecution's elicitation of evidence of Avila's prior criminality are equally strained. That evidence hardly served "to test his testimony that he was afraid when he saw Deputies Blair and Lyons arrive in a patrol car." (RB 203.) Moreover, the State's submission that any such misconduct was harmless because the court obviated the prejudice by sustaining counsel's objections to the misconduct (RB 203-204) is at odds with its submission that Fuiava "waived his claims" concerning the prosecutor's examination of Avila in this area. (RB 203.) Even when objections to misconduct are sustained, "thereby diminishing the prejudice flowing from that particular misconduct," the misconduct nevertheless may contribute to a finding of prejudice based on the cumulative harm from an "onslaught of ... misconduct." (*People v. Hill, supra*, 17 Cal.4th at p. 845.)

The State's attempts to find relevance to the other questions the prosecutor posed to Avila that are challenged fail as fully as its earlier ones. For example, the extent of Avila's knowledge of Fuiava's prior incarcerations for shootings or other criminal behavior did not in any way "test Avila's testimony that he and appellant never discussed not wanting to go to jail." (RB 204.)

The State resurrects its forfeiture assertion concerning the prosecutor's false testimony that Avila had changed his testimony about Viking administration of "flashlight therapy," arguing that

Fuiava "fail[ed] to seek any admonitions." (RB 205.) But as previously explained, where the defendant's objections are overruled — as they were here (see AOB 231) — the issue is preserved without need to make the superfluous and futile request for a curative admonition.

On the merits, the State concedes that "[t]he prosecutor ... asked Avila a line of questions suggesting that he had changed his testimony regarding the number of flashlight therapy incidents from one to two." (RB 205.) In fact, the prosecutor did more than just suggest such; he testified to such a change in his questioning — twice narrating to the jury his version of Avila's testimony outside of its presence, and then asking Avila what caused him to change his testimony. (See AOB 231.) Try as it might, the State cannot avoid the conclusion that the prosecution's representation that Avila had changed his testimony in front of the jury on the critical question of Blair's past brutality towards him simply was not true. (Compare RB 206 with AOB 232-233.) The State relies on the fact that Avila was available to testify to deflect Fuiava's assertion that the prosecutor's misconduct violated his right to confrontation and cross-examination, but the constitutional objection is to the fact that the prosecutor was not a witness subject to confrontation and cross-examination to test the accuracy of his statements.

The State finally claims that any misconduct here was harmless, again on the basis that the jury was generally instructed that the attorneys' statements and questions were not evidence. (RB 206.) That instruction, however, does not give a prosecutor license to

fabricate evidence against the defendant and then turn around and claim "no harm, no foul." (See, e.g., *People v. Hill*, 17 Cal.4th at p. 845 [finding prosecutorial misconduct prejudicial, though the "instructions included the admonition that the arguments of counsel are not evidence"].) Particularly when the misconduct bears on critical issues in the case — here, both Avila's credibility and Blair's lawlessness towards Avila and his Young Crowd associates —, the misconduct cannot be so easily excused. As this Court once stated when it found that the prosecutor's misconduct in insinuating facts during cross-examination of a witness prejudiced the defendant:

> We note in passing that the trial court admonished the jurors "not to draw any inference or make any speculation as to what the answer to questions asked by the prosecutor to which objections were sustained might have been. A question is not evidence[,] so just take the position that you never heard it." Subsequently, the jurors were given a form instruction which stated that "You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer." We conclude, however, that neither the admonition or the form instruction were sufficient to cure the prejudicial effect of the prosecutor's repeated insinuations ... during his cross-examination.

(*People v. Wagner* (1975) 13 Cal.3d 612, 621, brackets and ellipsis in quote deleted.)

The State challenges Fuiava's assertion of misconduct where the prosecutor asked Avila whether his parole agent was lying in her testimony, claiming that this Court should reject the line of federal

authority concluding that such questioning is misconduct. (RB 207-208.) "The State submits that this Court should follow those decisions [two decisions in other states] which hold that a prosecutor's 'were they lying' questions is not misconduct ... [because] such questions merely emphasize the conflict in the evidence." (RB 208.) That submission, however, shows that such questions are objectionable if for no other reason than that they are argumentative. The State's final submission of harmless error (RB 208) also should be rejected, for the misconduct went to the credibility of Avila, a key witness for the defense.

The State next seeks to justify the prosecutor's elicitation of details of Avila's prior criminality on the ground that it "directly contradicted Avila's testimony that he was in jail for 'tickets.'" (RB 209.) What Avila was in jail for was irrelevant, however, so at most this was impermissible impeachment on a collateral matter. Moreover, by the time that the prosecutor elicited the evidence that Avila had been committed to prison for possession of a firearm (and the further evidence that the firearm was a .45 that, in the prosecutor's words, was his "gun of choice"), Avila had already conceded that he had not been imprisoned for "tickets." (See AOB 236.) Again, it is clear that the motive of the prosecutor was not to impeach Avila, but to smear him and, by association, Fuiava.

The State's further arguments about the prosecutor's misconduct in the examination of Avila are similarly unavailing. For example, in response to Fuiava's assertion "that the prosecutor falsely suggested that Avila had testified that appellant had almost reached

Kito's house prior to the shooting" (RB 211), the State was reduced to the claim that the misconduct was "harmless, as the trial court sustained objections and stated in open court that the prosecutor was misstating the evidence ...." That misconduct did harm Fuiava, for it was part and parcel of "[t]he prosecution's underhanded tactics [that] prejudiced Fuiava ...." (AOB 218.) As the Court has said about the harm from a similar program of misconduct:

> "It has been truly said: 'You can't unring a bell.' " [Citation.] Here, the jury heard not just a bell, but a constant clang of erroneous law and fact.

(*People v. Hill*, *supra*, 17 Cal.4th at pp. 845-846.)

2. Examination of Fuiava.

The State justifies the prosecutor's examination of Fuiava about "his shooting of Christina Anthony" on the ground that "the questions were relevant to challenge the credibility of appellant's testimony that he did not really shoot Anthony." (RB 211.) But the relevancy objection went only to the prosecutor's initial question asking Fuiava who Anthony was; the follow-up questions were objectionable precisely for the reasons set forth: The prosecutor used his questioning to "testify" to Fuiava's guilt and provide details of the shooting through questions that assumed facts not in evidence. (Compare AOB 241 with RB 211.)

The State submits that other misconduct by the prosecutor that was checked by the court's sustaining of objections to it was harmless in light of that check. (RB 211-212.) That submission fails because that misconduct was part of the prosecutor's campaign "to bring about

Fuiava's conviction through inflammatory evidence of his criminal past" (AOB 241) — a campaign that prejudiced Fuiava in the extreme.

The State next claims that the prosecutor's detailing of the dispositions of the juvenile court that followed its adjudication of the Anthony shooting was "entirely appropriate in light of appellant's initial response that he had only been sent to juvenile camp as a result of that shooting." (RB 212.) But that series of questions started with the question: "And you went to the Youth Authority for that — right? — eventually?" (RT 1932.) That question was improper because it was irrelevant, so that the prosecutor cannot justify his follow-up questions to clarify Fuiava's answer to it as proper.

While the State makes some arguments either suggesting that Fuiava forfeited his claim by failing to object to several instances of misconduct or justifying the prosecutor's conduct, it largely relies on the fact that the court sustained many of the objections made to the prosecutor's examination of Fuiava. (See RB 212-213.) Again, the State's ready claim of harmless misconduct on this basis overlooks the sheer mass and persistence of the prosecutor's misconduct, causing the prejudice to remain despite attempts to check the misconduct. "[W]e may not escape the fact defendant was forced to suffer constant and outrageous misconduct" when assessing the impact of any curative measures. (*People v. Hill*, *supra*, 17 Cal.4th at p. 845.) Here, the checked misconduct was "part and parcel of the prosecution's elaborate effort to paint Fuiava as a chronic offender." (AOB 242.)

For that reason, the misconduct remained harmful despite the court's attempts to mitigate that harm.

3. Examination of Lyons.

As to the misconduct Fuiava ascribed to the prosecutor in his examination of Lyons, the State seeks to justify only the prosecutor's questions characterizing Fuiava's actions as "taking cover" — impliedly to shoot. (RB 252.) The State asserts that here "the prosecutor was properly drawing inferences from the record in asking Deputy Lyons these questions." (RB 215.) The State's assertion is belied, however, by its recognition that "the trial court sustained objections to the line of questions regarding taking cover ...." (RB 215.)

The State largely relies on the argument that the assigned misconduct "was harmless" because either "the trial court sustained the objection" at issue (RB 214-214) or "the jury was instructed that they were not to be influenced by sympathy, prejudice, or passion." (RB 214.) The effect of a prosecutor's misconduct cannot be so easily obviated by objections, however, when the misconduct is as insistent as it was here. (See, e.g., AOB 219, citing *People v. Hill, supra,* 17 Cal.4th at pp. 821 & 846; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692.) Nor can the general instruction not to be influenced by emotion overcome prosecutorial conduct that "pandered to emotion" and was specifically designed to inflame jury passion, such as when the prosecutor here drew attention to the fact that Lyons was testifying in the bloodied uniform he had worn at the time of the shooting and to his reasons for wearing it. (See AOB 250-252.)

4. Examination of Nieves.

Fuiava assigned as misconduct "[t]he prosecutor's insistent, repetitive challenge of Nieves's denial that the deputies recovered an AK 47 from his house [that] baldly insinuated to the jury that there was such a recovery." (AOB 253-254.) Although the prosecutor never presented any evidence to disprove Nieves's denial, the State asserts that "the prosecutor's questions were properly based on evidence which had already been admitted at trial, specifically Deputy Lyons's' testimony that, during a briefing, he had been told that an AK-47 was found at the house where the mock patrol car had been found." (RB 216.) That hearsay testimony did not come in for its truth, however, and in fact was a reckless untruth that only whipped up Blair and Lyons and contributed to their readiness to shoot. Thus, the prosecutor's bad faith in insinuating that the police briefing on this point was true and that Nieves was lying on the point remains. Finally, the State concedes by its silence that the prosecutor's conduct had all the effects conducive to guilty verdicts that Fuiava pointed out in his opening brief. (See AOB 254-255.)

5. Examination of Brooks and Frausto.

Fuiava claimed the prosecutor vouched for the truth of Brooks's testimony during his redirect examination, particularly when he suggested to her that she brought her lawyer when she went to the sheriff's station for questioning "to make sure that everything was legal that was going on." (AOB 255.) The State asserts that Fuiava "has waived this claim" because he "did not object on grounds of prosecutorial vouching ...." (RB 216.) Fuiava's counsel did object to

such questioning, however, which the court interrupted with its own objection that it sustained; the court further admonished the jury to disregard the answer. (See RT 1330-1331.) Since the purpose of requiring an objection and admonition is to obviate prejudice from the misconduct, Fuiava was relieved of any further need to object when the court interrupted his objection to find on its own that the prosecutor's question was objectionable and admonished the jury accordingly. Indeed, the State asserts that the prosecutorial misconduct assigned here was "harmless in light of the fact that the trial court sustained an objection to that question and ordered the jury to disregard it." (RB 216.) The State's reliance on forfeiture to avoid Fuiava's claim of prosecutorial misconduct under these circumstances attains new heights of trumping substantial unfairness with strained readings and formal technicalities. "Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." (*Hormel v. Helverling* (1941) 312 U.S. 552, 557.) The prosecutor's misconduct worked a substantial injustice because the court's actions could not erase the prejudicial effects of the prosecutor's vouching of this key — but impeached — witness. (See AOB 255.)

The State asserts forfeiture once again concerning the prosecutor's misconduct in his questioning of Brooks about what Fuiava meant when he said — according to her — that he was not going to go down for "no bullshit." (RB 216.) That assertion also exalts form over substance, given that the prosecutor's line of questioning on this point was interspersed with objections and motions to strike that the court consistently overruled and denied.

(See AOB 256-257.) Nor is the State's argument on the merits any more substantial, for the fact remains that "the prosecutor twisted Brooks's testimony about Fuiava's statement from its obvious sense and the sense she understood it — that any criminal charge arising out of that shooting would be groundless — into a claim that his possession of the guns was 'bullshit' for which he did not intend to go to jail." (See AOB 257.)

The State next implicitly concedes misconduct in the prosecutor's reference to "gang members" while questioning Brooks. The State claims only that the misconduct "was harmless because the trial court sustained an objection to it and noted that the manner in which the prosecutor phrased the question was argumentative." (RB 217.) When a prosecutor persists in misconduct despite repeated correction and admonishment, however, the repetitiveness of the prosecutor's misconduct overwhelms the curative measures designed to blunt it. (See AOB 258.)

Fuiava also assigned as misconduct the prosecutor's repeated references to "Doug's statement" in his examination of Frausto after the court had ruled that the statement was inadmissible hearsay. (See AOB 259-260.) The State claims that those references were proper because they never went into the substance of Doug's statement. (RB 217-218.) But the questions had no relevance without consideration of the substance of that statement — which the prosecutor had wrongly exposed to the jury immediately before those references. (See AOB 259.)

6. Examination of Bristol.

Fuiava assigned as error the misconduct during the course of the prosecution's cross-examination of Bristol where the prosecutor argued with the witness by stating to him: "All right, I have a right to ask questions, too, do you understand that?" (See AOB 260.) The State points out that this followed questioning about Fuiava, not Blair. (RB 214.) The State is correct on that point, but does not otherwise attempt to respond to or justify the misconduct at issue. The State's attempts to justify the other misconduct assigned by Fuiava in the course of the prosecutor's examination of Bristol are similarly unavailing. (Compare AOB 261 with RB 214.))

7. Examination of Jackson.

Fuiava and the State put differing slants on the prosecutor's questioning of Jackson that Fuiava assigned as misconduct. (Compare AOB 261-262 with RB 218-219.) Fuiava reiterates the argument in his AOB.

D. The Prosecutor Tried To Deter Avila From Testifying In The Defense Case.

The State asserts that the prosecutor did not try to deter Avila from testifying when he raised the specter of a Three Strikes prosecution if Avila testified "as indicated" for the defense (RT 632), because the prosecutor discussed this possible prosecution out of the presence of Avila. (RB 220.) But the prosecutor raised the club of a Three Strikes prosecution if Avila testified precisely to preempt that testimony, for he stated that Avila needed independent counsel in light of the potential for prosecution. (RT 623.) The prosecutor's ulterior

motive to request appointment of independent counsel for Avila was betrayed by his own observations:

> I can't for the life of me imagine that a lawyer is going to allow Mr. Avila to testify .... [¶] I would venture to guess that once a lawyer has the opportunity to speak with Mr. Avila about the incriminating nature of this testimony, that Mr. Avila will not take the witness stand in this trial.

(RT 633-634.) It is telling that the prosecutor never previously even hinted at the prospect of charging Avila with possession of a firearm, though the prosecutor clearly had all the evidence he needed to do so well before Avila was about to testify for the defense. It is even more telling that the prosecutor's threat of prosecution was only a bluff to keep Avila off the stand, for he never pursued prosecution after Avila's testimony either.

The State's further assertion that Fuiava's claim is meritless here "because Avila testified at trial" (RB 262) simply overlooks Fuiava's argument of the significance of and prejudice from this misconduct. (See AOB, 264, discussing *People v. Hill, supra*, 17 Cal.4th at p. 835, where this Court found similar misconduct and prejudice though the witness "found the courage to testify for defendant, risking a threatened ... prosecution.")

E. The Prosecution's Closing Arguments Were Rife with Misconduct.

1. Vouching for the Vikings by Donning a Viking Pin.

One of the more outrageous and prejudicial acts of misconduct by the prosecutor occurred when he announced during closing

argument that he was "going to become a Viking," displayed a Viking pin to the jury, and affixed it to himself. By this conduct the prosecutor identified himself both with Blair and with the gallery of deputies that also sported the pin in apparent solidarity with Blair and against Fuiava. (AOB 265-272.) Acknowledging that Fuiava claims on appeal that this vouching "constituted 'testimony' regarding facts not presented at trial that were based on a personal belief and improperly suggested the Vikings were a group of high integrity and character" (RB 222), the State first asserts that Fuiava "waived these claims." (RB 223.) The State asserts forfeiture because trial counsel's "only objection was that there was no evidence presented at trial regarding the pin or the significance of it," so that his objection was not "specific" enough and was not accompanied by a request for an admonition. (RB 223.) The State's readiness to exalt form over substance and to sacrifice fundamental fairness for a hypertechnical insistence on procedural rules reaches another level of absurdity here.

Counsel's objection to the prosecutor's introduction of evidence during his closing argument was sufficiently on point to give the court notice of the legal issue at hand and a basis for ruling on it. Again: "Objections stated orally in the heat of trial cannot be analyzed with the legal acuity reserved for the interpretation of statutes and contracts." (*People v. Williams*, *supra*, 9 Cal.App.3d at p. 570.) Moreover, after the objection, "[t]he prosecutor continued speaking, describing the pin as "a triangle and a Viking." (RB 222.) At any rate, the court understood the significance of the objection and held a sidebar conference at the bench, where the court entertained argument

about the propriety of the prosecutor talking about the pin and donning it. The court ruled that the prosecutor could not testify about the pin, but specifically permitted him to wear it for the rest of his closing argument. (RT 2251.) Given the court's express permission to the prosecutor to sport the pin during the rest of his argument, Fuiava was excused from requesting an admonition about the prosecutor's misconduct, for any such admonition would only have called further attention to the pin and reinforced the prosecutor's solidarity with the gallery of officers and the Vikings. (See, e.g., RB 197, citing *People v. Hill*, *supra*, 17 Cal.4th at pp. 820-821, for the rule that a request for an admonition is not necessary "if an admonition would not have cured the harm caused by the misconduct.")

The State's assertions on the merits fare no better. The State claims that due to the interruption of the prosecutor's misconduct by counsel's objection, "[t]here is no reasonable likelihood the jury understood" the prosecutor's conduct as vouching for the integrity of the Vikings with the prestige of his office. (RB 223.) The record belies that claim, particularly because the court permitted the prosecutor to continue to wear the Viking pin as a badge of honor for the rest of his argument.

The State also asserts that the record shows that "the prosecutor did not state that the court had authorized him to wear the pin." (RB 223.) Even if the prosecutor had not so stated, the court's authorization of the prosecutor's adornment became very obvious to the jury thereafter. Moreover, the State does not dispute Fuiava's

assertion that as the prosecutor donned the Viking pin signifying that he was now "going to become a Viking," he further advised the jury that "I actually asked permission before doing this." (See AOB 266, citing RT 2250.)

The State offers no explanation for the prosecutor's meaning here that suggests the prosecutor was referring to permission from some authority other than the court. The only other possible explanation was that the prosecutor asked permission of the Vikings to wear the pin in solidarity with them. If so, that was equally prejudicial, for it bestowed special honor upon the Vikings. Indeed, that interpretation makes the prosecutor's misconduct even more prejudicial, for he was able to thereby convey both that the Vikings consented to his becoming one of them (and they had such prestige that he needed to obtain their permission to become one of them) and, returning from the bench conference sporting the pin, that the court had also consented to his becoming a Viking. Thus, there was solidarity all the way around in favor of Blair and against Fuiava. Entirely unconvincing is the State's ipse dixit that any prejudice from the prosecutor's stunt was obviated by the general admonition to the jury to decide the case on the facts presented at trial. (See RB 223.)

2. Argument Regarding the Prosecutor's Inability To Call Fuiava's Spouse as a Witness Against Him.

Fuiava assigned as misconduct the prosecutor's "testimony" in his closing argument that he had not called Fuiava's wife to provide incriminating testimony because spousal privilege precluded him from

calling her as a witness. (AOB 272-275.) This was one of the more transparent introductions of fact by the prosecutor that lay outside the record, and Fuiava cited a legion of law that condemns that precise misconduct. (See AOB 273-274.) The prosecutor further advised the jury that Fuiava, on the other hand, could have called his wife to testify, and "bet that if she had anything to offer that would help the defendant, she would have been up on this witness stand testifying." (See RB 224, quoting this portion of the argument.) Ignoring the body of law against it, the State refuses to confess misconduct. (RB 224-225.)

The State first contends that Fuiava "waived the claim by failing to object and failing to request an admonition." (RB 224.) This assertion fails on many levels.

First, the forfeiture claim is unsupported and purely conclusory. (See, e.g., *People v. Beltran* (2000) 82 Cal.App.4th 693, 698, fn. 5 [finding that "waiver issue waived" where the State's contention of forfeiture is "without discussion, citation to authority or citation to the record"].) Second, the forfeiture claim disregards the exception to the requirement of objection and admonition when the misconduct could not be cured by such. As the State acknowledged earlier in its brief: "An exception [to default] lies where a timely objection and/or ... admonition would not have cured the harm caused by the misconduct." (RB 197, citing *People v. Hill*, *supra*, 17 Cal.4th at pp. 820-821.) Once the jury knew that the prosecutor wanted to call Fuiava's wife to provide evidence against Fuiava but that exercise of the spousal privilege precluded the prosecution from doing so, there

was little chance that any admonition to disregard the prosecutor's comments could realistically be followed. It is too much to expect the jury to be able to dispel from its mind the implication that testimony from Fuiava's wife would have incriminated him. Given the closeness of the case and the apparently unimpeachable source of this evidence of guilt, this "testimony" from the prosecutor stood no better chance of being disregarded than would a sore thumb. Thus, the issue is preserved because the bell could not be unrung.

In any event, the prosecutor's misconduct struck too close to the heart of the trial to be overlooked on the basis of a claimed procedural irregularity. An appellate court has a duty "to insure justice was done in the trial court" rather than "to choose which lawyer did the best job." (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1032 (dis. opn. of Johnson, J.).) Nowhere is this duty more paramount than in a capital appeal. (See, e.g., *People v. Bob* (1946) 29 Cal.2d 321, 325-326.) Thus, a court will forgive a procedural failing like that claimed here when there is "plain error." As explained in *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, a claim of error where there was no objection at the time of trial "is subject to review under the 'plain error' standard. [Citation.]" "To secure reversal under this standard, [the defendant] must prove that: (1) there was 'error'; (2) the error was 'plain'; and (3) that the error affected 'substantial rights.'" (*Ibid*; see also *People v. Arias* (1996) 13 Cal.4th 92, 159 [recognizing but rejecting the defendant's "'plain error' argument" regarding prosecutorial misconduct].) The prosecutor's egregious "testimony" about the spousal privilege here

and his urging that the jury use Fuiava's exercise of that privilege as evidence against him easily meets these three criteria, so that there was "plain error" entitling Fuiava to relief from the judgment.

Finally, the Court has the discretion in any event to overlook a procedural default in the interests of justice. (See, e.g., *People v. Williams*, *supra*, 17 Cal.4th at p. 161, fn. 6 ["an appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party"].) The Court is particularly disposed to overlook such a default when necessary to insure the substantial fairness of so consequential a criminal judgment as a death judgment. (See, e.g., *People v. Frank* , *supra*, 38 Cal.3d at p. 736 (conc. & dis. opn. of Bird, C.J.).) Reaching the misconduct here is especially appropriate, for it is fundamentally unfair for the State on review of a capital judgment to evade its responsibility for the reprehensible conduct of its representative simply because that representative got away with that conduct in the trial court.

As the authorities cited in the opening brief make clear, the prosecutor injected fundamental unfairness into the proceedings when he advised the jury that exercise of the spousal privilege precluded him from presenting incriminating evidence from Fuiava's wife. The State skirts the unfairness by never acknowledging this conduct. Unable to justify these comments of the prosecutor, the State instead focuses on other comments by the prosecutor — namely, comments that Fuiava could have called his wife as his witness but did not do so. In this regard, the State points to law that permits a prosecutor to "comment on a defendant's failure to present a logical witness,

including ... defendant's spouse." (RB 225, citing *People v. Wash* (1993) 6 Cal.4th 215, 263; *People v. Coleman* (1969) 71 Cal.2d 1159, 1167.)

First, this Court should reconsider the rule that permits a prosecutor to comment on the failure of a defendant to call a witness. That rule is in tension with one of the most fundamental principles of criminal law — the prosecutor's burden to prove the defendant guilty beyond a reasonable doubt, guaranteed him by the federal due process clause. (See, e.g., *Mullaney v. Wilbur* (1975) 421 U.S. 684, 684-685.) An essential corollary of this principle is that the defendant may rely on the State's burden and has no obligation to take any action to prove he is not guilty. Thus, prosecutorial comment on the defendant's failure to call a witness infringes on his constitutional right to rely on the evidence and demand proof beyond a reasonable doubt. Prosecutorial argument "that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence" is "improper." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340-1341.) Comment on a defendant's failure to produce a witness treads too close to this impropriety to permit it.

Such comment violates due process for an additional reason: it invites conjecture based on facts outside the evidence to establish guilt. First, it presumes that the absent witness was subject to process, when the witness well may not have been. (See, e.g., *People v. Frohner* (1976) 65 Cal.App.3d 94 [misconduct where prosecutor commented on defendant's failure to call police informant whom prosecutor knew was unavailable as a witness].) Second, there are

many reasons why the defense may not call a witness that do not bear on whether the witness has incriminating, exonerating, or no information on the defendant's guilt. Thus, it is irrelevant that the defense has not called a witness, for it cannot reasonably be inferred therefrom that the absent witness had no information helpful to the defense or, worse, information helpful to the prosecution. (See, e.g., *People v. Smith* (1898) 121 Cal. 355, 361 [misconduct for prosecutor to argue that inference from failure of defense to call a witness is that the witness's "testimony would have been adverse to the defense"].) There simply is no relevance to a defendant's failure to call a witness. Since the witness's testimony is not in evidence, argument about the defendant's failure to call the witness assumes a fact not in evidence — namely, the putative substance of the witness's testimony.

In any event, reference to that rule of law does not assist the State here. Rather, as stated in *People v. Gaines* (1997) 54 Cal.App.4th 821, 825: "Although 'a prosecutor may argue to a jury that a defendant has not brought forth evidence to corroborate an essential part of his defense story' [citation], the comments here were not so limited." "[A] prosecutor commits misconduct when he purports to tell the jury why a defense witness did not testify" (*id.* at p. 823), which is exactly what Fuiava's prosecutor did. A prosecutor commits even further misconduct when he tells the jury that that witness would have supported the prosecution's case rather than the defense case. "When this tactic is achieved in the guise of closing argument, the defendant is denied Sixth Amendment rights to confrontation and cross-examination. [Citations.]" (*Id.* at p. 825.)

The State's brief simply does not speak to the prosecutor's misconduct in telling the jury why the prosecution did not call Fuiava's spouse. In *Wash*, the Court found that there was no prosecutorial misconduct to the extent of argument "that defendant had failed to adduce expert psychiatric testimony to support the claim that he was depressed and suicidal when he confessed to the crimes," pointing to its precedent holding that "prosecutorial comment upon a defendant's failure 'to introduce material evidence or to call logical witnesses' is not improper." (*People v. Wash*, *supra*, 6 Cal.4th at pp. 262-263.)

In *Coleman*, this Court found that a defendant's failure to call his wife when the evidence showed she was a material and important witness "could be considered by the jury and commented upon by the prosecuting attorney." (*People v. Coleman*, *supra*, 71 Cal.2d at p. 1167.) The Court there explained: "Under the provisions of the Evidence Code, ... a defendant's spouse has no privilege not to testify *for* the defendant, and the defendant has no privilege to prevent his spouse from testifying for or against him. (Evid. Code, §§ 911, 970, 971.)" Thus, the Court found that prosecutorial "[c]omment on a wife's failure to testify for her defendant husband does not ... constitute comment on the exercise of a privilege that defendant has (see Evid. Code, § 913) or on his failure to call a witness that he cannot compel to testify on his behalf." (*Ibid.*)

The prosecutor here, in contrast, did "comment on the exercise of a privilege" — namely, that invoked by Fuiava's wife not to be compelled to testify against him. (See Evid. Code, §§ 970 & 971.)

As Evidence Code section 970 makes plain: "[A] married person has a privilege not to testify against his spouse in any proceeding." The law rightly condemns as misconduct prosecutorial revelation to the jury that he could not call the defendant's wife as a witness and the urging of it to draw an inference of guilt from exercise of the privilege, for such misconduct "destroy[s] the privilege." (See AOB 274, quoting *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1222-1223.)

The Legislature's recognition of the prejudice from exposing the jury to the fact of exercise of the marital privilege is illustrated by Evidence Code section 971, which implements the privilege by providing that the spouse has a right not to be called as a witness without her consent. As explained in the Law Revision Commission's Comment to that section, this right is necessary to avoid the prejudicial effect to the party that would result if his spouse invoked her privilege not to testify against him in front of the jury:

> The privilege of a married person not to be called as a witness against his spouse is somewhat similar to the privilege given the defendant in a criminal case not to be called as a witness (Section 930). This privilege is necessary to avoid the prejudicial effect ... [f]or example, of the prosecution's calling the defendant's wife as a witness, thus forcing her to object before the jury.

In Fuiava's case, the prosecutor's misconduct not only resulted in the prejudice that this statute is designed to avoid, but imported even greater prejudice. The prosecutor's comments suggested to the jury that the marital privilege was one that Fuiava had invoked, rather

than his wife. As *Coleman* teaches, however, "the defendant has no privilege to prevent his spouse from testifying ... against him." (*People v. Coleman, supra*, 71 Cal.2d at p. 1167.) Thus, the prosecutor's "testimony" was doubly prejudicial for Fuiava, for it not only introduced as fact matters outside the record but misled the jury as to those matters.

Significantly, the State makes no effort to show that this misconduct was harmless. Rather, it concedes by its silence Fuiava's showing that "[t]he harm from this misconduct was incalculable ...." (See AOB 275; see also *People v. Gaines, supra*, 54 Cal.App.4th at p. 825 [reversal required where "we cannot declare an abiding conviction that the prosecutor's misconduct was utterly irrelevant to the jury's verdict"].)

3. Argument that Fuiava's Nickname "Smokey" Came From a Habit of Killing People.

The prosecutor insinuated in his questioning of witnesses that Fuiava had derived his nickname, "Smokey," from a practice of shooting at or killing people, but the prosecutor never produced any evidence to prove this insinuation. (See *ante*, pp. 151-152.) The lack of such evidence, however, did not deter the prosecutor from spreading that baseless vilification before the jury in closing argument. Just as trial counsel charged: "That is an unfair smear." (RT 2189.) Fuiava charged the same in his opening brief. (AOB 275-276.)

The State asserts that Fuiava "waived this claim by failing to object to the statements ...." (RB 225.) For all the reasons set forth

in the previous section, this Court should reject the State's summary claim of forfeiture.

The State asserts on the merits that the prosecutor's comments were "based on the evidence presented at trial" that Fuiava's nickname was "Smokey," "and that he had three convictions for assault with a firearm." (RB 225.) While a prosecutor may argue inferences that are reasonably drawn from the evidence, this evidence provided no reasonable basis for the prosecutor to argue that Fuiava earned his nickname by "smoking" people. Fuiava's nickname no more denotes violence than do the nicknames of Smokey the Bear or Smokey Robinson, and the prosecutor must have known this. Permissible argument requires conclusions fairly drawn from the evidence, not conclusions drawn out of thin air that the jury nevertheless may credit precisely because "of the special regard the jury has for the prosecutor," who also has more information about the case than they do. (See, e.g., *People v. Hill*, *supra*, 17 Cal.4th at p. 827.) The prosecutor's argument here was wildly unfair by any measure.

4. Other "Testimony" During Argument and Appeals to Passion and Prejudice.

The prosecutor engaged in a miscellany of other misconduct in his closing argument that Fuiava pointed out in his opening brief brimmed with unfairness. (See AOB 276-282.) The State's attempts to avoid the consequences of that misconduct by invoking waiver and forfeiture wherever it can should be rejected in the face of the persistence of that misconduct. (See, e.g., *People v. Pitts*, *supra*, 223

Cal.App.3d at p. 692 [no forfeiture for lack of objection "where improper comments and assertions are interspersed throughout the trial and/or closing argument"].)

Nor are any of the arguments that the State makes on the merits credible. For example, the State avers that there was no harm in referring to Fuiava as "Frito Bandido" "because appellant was Samoan, not Hispanic." (RB 226.) Putting aside the evidence that the Young Crowd was largely Hispanic and that an eyewitness described Fuiava as Hispanic, the State's argument is beside the point. The jury certainly understood that this racist slur was aimed at Fuiava.

The State's attempts to justify the prosecutor's introduction of facts outside the evidence in his closing argument also fail. For example, the State fobs off the prosecutor's self-congratulatory advice to the jury that "[r]arely do you catch people in what is called a judicial admission of lying" as "a matter of common knowledge." (RB 227.) Similarly, the State defends the prosecutor's baseless claim that Fuiava's counsel urged him to admit that he lied in his earlier testimony as "a proper inference or conclusion based on occurrences at trial"; yet, there was in fact neither evidence nor "trial occurrences" to support the prosecutor's scenario. (RB 237.)

Finally, in response to Fuiava's contention that "the prosecutor improperly argued that appellant dragged Deputy Blair's reputation in the mud by putting his 'widow' on the stand," the State argues no prejudice "because the trial court sustained appellant's objection that the defense presented the testimony of Blair's ex-wife rather than his widow and the prosecutor acknowledged that ...." (RB 228.) The

State's argument overlooks the more substantive evil of the prosecutor's misconduct here as pointed out in the opening brief: "[H]e attached a penalty to Fuiava's exercise of his constitutional right to present witnesses and a defense. (See, e.g., *Marshall v. Hendricks* (3d Cir. 2002) 307 F.3d 36, 77-78 [misconduct for prosecutor to comment that it was obscene for defendant accused of killing his wife to have their sons testify ....].)" (AOB 278-279.)

F. The Individual and Cumulative Prejudice From the Misconduct.

Fuiava detailed at some length how the prosecutor's misconduct deprived him of a fair trial. (AOB 282-285.) The misconduct prejudiced him by its nature, for it was "blatant and repeated" (AOB 282), "multifarious" (AOB 283), and "went to central features of the defense ...." (AOB 283.) The misconduct prejudiced him in context as well, for the weight of the evidence made Fuiava's guilt or innocence a close and competing question, as demonstrated both by subjective assessment of the incriminating and exonerating evidence and the objective signposts of the jury's long and troubled deliberations. (AOB 282-284.)

The State devotes a single paragraph to the question of prejudice, dismissing Fuiava's assertion of harm as "meritless" and largely relying on assertions of forfeiture and denials of misconduct. (RB 229.) The State also claims that "the instructions to the jury (particularly that the comments of the attorneys did not constitute evidence)" effectively neutralized all the misconduct. (RB 229, citing *People v. Burgener* (2003) 29 Cal.4th 833, 876.) *Burgener*, however,

did not concern the standard instructions that the jury receives before deliberations like those that the State here relies on to prove harmlessness. Rather, *Burgener* concerned strong admonitions that were given on the spot. As set forth there:

> [O]nly a few of the prosecutor's actions may be characterized as misconduct, and those few improper questions were not serious enough, even in the aggregate, to have prejudiced defendant in the face of the court's unequivocal admonition on each occasion to disregard the improper evidence. [Citation.] At defendant's request, the court even highlighted its admonitions in the course of instructing the jury: the court informed the jury it could be "certain" nothing that would help them fairly decide the case had been excluded, warned the jury not to mention or consider the improper remarks for any purpose, and explained that a verdict based on such matters would result in a mistrial. Defendant offers no reason to think these sharply worded warnings did not "counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks."

(*Ibid.*)

In contrast, this Court has never found the harm from misconduct as serious as that shown here to be purged by general, standard jury instructions given at the close of trial. The State in particular ignores this Court's longstanding law that while statements by the prosecutor that amount to "unsworn testimony" may be "worthless as a matter of law, [they] can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." (See, e.g., AOB,

quoting *People v. Hill*, *supra*, 17 Cal.4th at p. 823, in turn quoting *People v. Bolton*, *supra*, 23 Cal.3d at p. 213.) In *Bolton*, where the defendant raised a claim of self-defense , the prosecutor "implied that there was additional evidence about the appellant's past known to him but unavailable to the jury." (*Id.* at p. 213.) Though the jury was specifically instructed to disregard the prosecutor's statements (*id.* at p. 212), the Court found that of no consequence in assessing prejudice from the misconduct. Rather, it found the misconduct harmless only because the defendant's own testimony "torpedoed" his claim of self-defense as a matter of law, making it "certain that any reasonable jury would have reached the same verdict even in the absence of the prosecutor's remarks." (*Id.* at pp. 214-215.) The Court cautioned, however, that "[a] closer case, marred by the same misconduct, might well require reversal." (*Id.* at p. 215.) This is such a case.

This Court drew a line in the sand long ago on this point, requiring reversal for introduction of facts not in evidence by the prosecutor whenever those facts could bear on the verdict. Under such circumstances, the Court explained that it was unrealistic to expect a jury to be able to simply put those facts out of its mind during deliberations:

> The learned judge of the court below did everything in his power to dislodge from the minds of the jurors any impression which the statements referred to may have made, but we do not think the error committed against appellants was thereby removed from the case....
>
> A person accused of crime is entitled, under the constitution, to a trial by jury, conducted according

to the established principles of law, not the least important of which is, that the verdict shall be founded only upon relevant and competent facts produced before the jury under the rules prescribed for the admission of evidence; and it was held by the supreme court of New Hampshire, in the leading and well-considered case of *Tucker v. Henniker,* 41 N. H. 317, that this right is violated "if counsel are permitted to state facts, and comment upon them in argument against the adverse party, which are not before the jury by proofs regularly submitted." It is true that the attorney for the prosecution in this case was not permitted by the court to comment at any length upon the facts which he himself imported into the case; but while this was to the credit of the court, it does not change the fact that a matter not in evidence, and of a nature clearly prejudicial to the appellants, was laid before the jury for the purpose of affecting their verdict, and it is no answer to this to say that the jury may have disregarded it. As was said in the case just cited: "When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied. It may be said, in answer to these views, that the statements of counsel are not evidence, that the court is bound to so instruct the jury, and that they are sworn to render their verdict only according to evidence. All this is true; yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they, in the slightest degree, influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to make them. It is unreasonable to believe the jury will entirely disregard them. They may struggle to disregard them; they may think they have done so, and still be

> led involuntarily to shape their verdict under their influence."
>
> It follows that the only safe and just rule to apply in such cases is to make it impossible for a party to derive any advantage from such misconduct of counsel by promptly granting a new trial to the adverse party, unless it is clear that the verdict was not affected thereby.

(*People v. Ah Len* (1891) 92 Cal. 282, 283-285.) It is far from clear that the jury's verdict in Fuiava's case was not affected by the prosecutor's misconduct. To the contrary, there is every reason to believe that "the purity and impartiality of the trial" was sullied by that misconduct.

The State next, and finally, asserts harmlessness "in light of the very strong evidence of appellant's guilt, including appellant's incriminating statements." (RB 229.) That assertion ignores the substantial evidence that Fuiava never made the admissions to which the prosecution witnesses testified, and the equivocal nature of his statements that the authorities recorded. It also ignores all the other evidence that favored the defense and cast doubt on the prosecution's evidence of guilt. Finally, the State's assertion also ignores the several objective indications that the jury struggled to its verdict of guilt. (See Argument I, Section B., *ante*, pp. 33-34.)

For all of these reasons, the prosecutor's misconduct prejudiced Fuiava. It deprived him of the fundamentally fair trial guaranteed by due process of law. Consequently, the misconduct requires reversal of the judgment.

G. The Trial Court's Failure To Curb the Prosecutor's Misconduct.

Fuiava further assigned as error the trial court's failure to curb the misconduct of the prosecutor. (AOB 285-286.) The State concedes that "[t]rial courts have a duty to curb misconduct by prosecutors." (RB 230.) The State asserts that the court "complied with its duty to curb misconduct" because "any misconduct was isolated and infrequent" and the court "sustain[ed] objections where appropriate." (RB 230.) As the preceding argument concerning the prosecutor's misconduct demonstrates, however, the prosecutor's misconduct was persistent and pervasive rather than isolated and infrequent. Moreover, the court "overruled various objections by defense counsel to the misconduct ...." (AOB 285.)

The State asserts that "[t]he only specific instance of the trial court's alleged failure to comply with this duty that appellant raises is that the trial court permitted the prosecutor to wear a Viking pin." (RB 285.) Fuiava, however, identified that as the "most striking[]" example of the court's facilitation of that misconduct. (AOB 285.) The State argues that Fuiava "has not demonstrated that the wearing of the pin by the prosecutor constituted misconduct" (RB 230), but the State's defense of that conduct is unavailing. The State desperately protests that this Court is not bound to follow either *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828, 829, where the court held that "the presence of spectators wearing buttons inscribed with the words 'Women Against Rape' at Robert Lee Norris's trial for kidnapping and sexual intercourse without consent deprived him of a fair trial," or *Woods v. Dugger* (11th Cir. 1991) 923 F.2d 1454, 1459-1460, where

the court found that the substantial presence of uniformed prison guards in the gallery in a capital trial where the defendant was charged with the murder of a prison guard deprived the defendant of a fair trial. (RB 230.) Its attempts to distinguish these cases are even more desperate.

Any difference between *Norris* and this case only highlights the egregiousness of the misconduct here. For example, here it was the prosecutor, using the prestige of his office, who wore the pin, not a spectator. Moreover, expressing opposition to rape is hardly a controversial message, and did not speak to the evidence at trial. In contrast, while "[h]ere ... the pin itself expressly communicated no message regarding the offenses charged in the case" (RB 231), it spoke volumes about what was perhaps the most controversial evidence in the case — the status of the Vikings as a lawful social group or a renegade band of deputies. That evidence was not only the most controversial, but it went to the heart of Fuiava's defense. Fuiava's defense depended upon showing that Blair's conduct at the Walnut St. shooting was that of an out-of-control Viking.

The prosecutor's "outrageous stunt" (AOB 272) in pinning himself with the Viking symbol was the ultimate in prosecutorial vouching. "The prosecutor's transformation of himself into the living embodiment of a Viking personally vouched for his case in the most striking way possible." (AOB 271.) By representing himself as a Viking, the prosecutor aligned himself with Blair; he aligned himself with the gallery of deputies who "were all wearing it on the uniform" (see AOB 266) in solidarity against Fuiava; and he aligned himself

with the court, which the jury fully knew was complicit in the prosecutor's parading of the pin in front of it. Indeed, "[t]he effrontery of the prosecutor's mask of honor" (AOB 271) and consequent prejudice to Fuiava finally moved the court — at the penalty trial — "to suggest to [the prosecutor] that it is improper for you to wear that Viking badge or pin." (See AOB 363.) When the prosecutor failed to heed that suggestion, the court finally ordered him — too late — to take it off. (*Ibid.*) For the State to continue to insist on appeal that it was proper for its representative to so conduct himself at trial dishonors the prosecutorial function.

The State's attempt to distinguish *Woods* fares no better. There, as explained by respondent, the court "found that the presence of numerous uniformed prison guards in the audience at a trial of a defendant charged with the murder of a prison guard deprived the defendant of a fair trial." (RB 231.) The State seeks to avoid the force of that case by noting that "the United States Supreme Court and this Court have held that the presence of uniformed guards at trial does not deprive a defendant of the right to a fair trial." (RB 231, citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 568-569 [106 S.Ct. 1340, 89 L.Ed.2d 525]; *People v. Jenkins* (2000) 22 Cal.4th 900, 995-996.) Those cases do not implicate *Woods*, however, for they concerned "deployment of security personnel in a courtroom during trial ...." (*Holbrook v. Flynn*, *supra*, 475 U.S. at p. 568, 106 S.Ct. at p. 1345.) In *Holbrook*, the Court found that a defendant charged with robbery was not "denied his constitutional right to a fair trial when, at his trial with five codefendants, the customary courtroom security

force was supplemented by four uniformed state troopers sitting in the first row of the spectator's section." (*Id.* at p. 562 [106 S.Ct. at p. 1342].) Indeed, *Woods* relied on the "dictum from the Supreme Court in *Holbrook v. Flynn* ... [that] 'we do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial.'" (*Woods v. Dugger*, *supra*, 923 F.2d at p. 1456.)

Jenkins is like *Holbrook*. There, this Court rejected a challenge to a "security measure[]" (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 995) consisting of "the appearance of three additional bailiffs in the courtroom during the in limine testimony of [a witness]." (*Id.* at p. 998.)

In contrast, *Woods* concerned a gallery of officers who, like the gallery here, "were not part of the courtroom security." (*Woods v. Dugger*, *supra*, 923 F.2d at p. 1460.) Rather:

> The officers in this case were there for one reason: they hoped to show solidarity with the killed [fellow] officer. In part, it appears that they wanted to communicate a message to the jury. The message of the officers is clear .... The officers wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message.

(*Id.* at pp. 1459-1460.)

Again, certain differences between *Woods* and Fuiava's case only highlight the unfairness of the latter. The officers here wore the Viking symbol, which served to comment on the evidence and further reinforce their solidarity with their fallen comrade Viking and against

Fuiava. Moreover, the prosecutor aligned himself with that show of solidarity by donning the pin himself, which reinforced the message from the gallery. In sum, while "[t]he Sixth Amendment imposes an obligation upon trial courts to minimize any risk of 'unacceptable factors' affecting the accused's right to have a fair trial" (*id.* at p. 1460), here the court enlarged the risk by permitting the prosecutor to don the Viking pin in solidarity with the gallery of Vikings sending their message of guilt to the jury. As in *Woods*, there was an inherent unfairness in such a trial atmosphere that requires reversal of the judgment independent of the evidence. (*Ibid.*) But here there was actual prejudice as well because the misconduct permitted by the court went to the very core of the trial. Certainly there was prejudice, actual and inherent, that was not obviated — as the State claims without citation to authority — by the general instruction to the jury to base its verdict on the evidence rather than "mere sentiment." (See RB 231.) Reversal is required for this and all the other misconduct of the prosecutor that the court permitted.

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XIII.

THE COURT'S DENIAL OF FUIAVA'S MOTION FOR DISCOVERY OF DOCUMENTS FROM POLICE PERSONNEL FILES HELPFUL TO THE DEFENSE REQUIRES REVERSAL OF THE JUDGMENT.

Fuiava assigned as error in two ways the trial court's denial of his motion for discovery from police personnel files of documents helpful to the defense. First, the court erred when it failed to require the custodian of the records to place on the trial record the extent of his review of those records. Second, the court erred when it failed to disclose the one document that the custodian proffered as potentially discoverable, since in fact it was discoverable. (AOB 287.) Ignoring the first aspect of Fuiava's assignment of error, the State concedes that this Court appropriately "may independently review the documents and determine whether the trial court abused its discretion in denying appellant's discovery motion." (RB 232.) This Court should conduct that review accordingly. That review should lead to reversal for the errors in the discovery process identified above.

* * * * * *

XIV.

CUMULATIVE PREJUDICE REQUIRES REVERSAL OF THE GUILT JUDGMENTS.

Fuiava argued that due to the various errors that occurred in his case, "prejudice from all directions converged to deprive [him] of a fair trial." (AOB 290.) He further argued that "these errors had a synergistic effect," making the cumulative prejudice greater than its parts. (AOB 292.)

Implicitly conceding that an accumulation of harm from individual errors may deprive a defendant of a fair trial even when the harm from each error considered in isolation may not, the State asserts "that no error occurred at the guilt phase," so that there "cannot be any cumulative error." (RB 235. It further asserts that it has demonstrated "that appellant did not suffer any prejudice" from any error, referring back to its arguments on individual prejudice. (RB 235.) Not only were the State's assertions of "harmless error" meritless, but those assertions never spoke to the claim of cumulative harm. Thus, this Court should reverse the judgment for the cumulative prejudice that Fuiava laid out in his opening brief. (See AOB 290-292.)

* * * * * *

XV.

THE COURT'S VOIR DIRE OF THE VENIREPERSONS CONCERNING THEIR ABILITY TO MAKE A FAIR PENALTY DECISION, AND ITS EXCUSAL OF VENIREPERSONS WHOSE VIEWS FAVORING A LIFE SENTENCE DID NOT SUBSTANTIALLY INTERFERE WITH THEIR ABILITY TO RENDER A FAIR PENALTY DETERMINATION, ORGANIZED THE JURY TO RETURN A VERDICT OF DEATH AND THUS REQUIRES REVERSAL OF THE JUDGMENT.

Fuiava has assigned as error on appeal the trial court's organization of the jury during voir dire and selection to return a death judgment. (AOB 293-297.) "The State submits the trial court properly voir dired the prospective jurors regarding their view on the death penalty and properly excused for cause prospective jurors C. and L." (RB 237.) It did neither.

The State first asserts that Fuiava forfeited his claim of slanted voir dire on penalty because he never objected to the voir dire on this ground. (RB 252.) The fairness of the selection of the jury for a capital case is so basic and essential to our constitutional democracy and criminal justice system that the Court should consider Fuiava's claim on its merits even if there was no objection. A court has many sua sponte duties to ensure a fundamentally fair trial at trial, and one of its most basic duties is to ensure the impartiality of the jury. Thus, when a court undertakes to itself voir dire the jury, it must make sure it does so fairly. Fuiava has emphasized in this brief that procedural default is a discretionary doctrine that this Court readily dispenses

with in the interests of justice. No context could call for relaxing that rule more than the one that attends this claim. This Court should never refuse to rule on the merits of a claim that the court organized the jury to return a verdict of death, for that claim goes to the heart of the trial structure.

The State finds no significance to the "numerical disparity" that 19 of the 20 prospective jurors excused for their views on penalty favored life. (RB 253.) But that disparity gives substance to Fuiava's claim that the court encouraged jurors favoring life to answer in a way that would suggest cause for disqualification and discouraged jurors favoring death from doing so, and then wrongly found cause for disqualification of jurors favoring life when there was none.

On that latter aspect of the claim, which alleged wrongful discharge of prospective jurors Lang and Chaiveera, the State first claims as to Chaiveera that Fuiava "effectively waived the issue for appeal." (RB 255.) Accordingly to the State, counsel but "initially indicated some hesitation in the excusal of prospective juror C. and asked the trial court to ask her additional questions." (RB 244, citing RT 249.) The record, however, supports Fuiava's assertion that "[w]hen the court announced its intention to excuse Chaiveera, defense counsel objected on the basis that she had said no more than that 'it was highly unlikely she would vote for death.'" (AOB 244, citing RT 248-249.)

The full colloquy among counsel and the court regarding Chaiveera and Lang following the court's expression of its

expectation that they were among the prospective jurors that it could excuse without "discussion or objection" (RT 248) was as follows:

> Mr. Hauser: Your Honor, my feeling is, I don't think we have enough information on Chaiveera [to excuse her for cause]. She said it was highly unlikely to vote for death. That seems to be a similar answer as Ms. Lang.
>
> The Court: Well, I understood her to be putting herself in that third category where she felt she would never herself vote for death.
>
> Mr. Hauser: She didn't really say that. I feel –
>
> The Court: I will ask a few more questions of her.

(RT 249.)

After argument concerning the prospective jurors for whom the court had anticipated objection and the court's reiteration of its presumption that there was "no objection to the others being excused" (RT 250), the following colloquy occurred:

> Mr. Hauser: ... I did want to reiterate my feeling about Ms. Lang. [¶] I don't think we have enough information [to show cause for discharge]. She is in a similar category.
>
> The Court: Oh, I felt she was real strong.
>
> Mr. Hauser: I think she said she had a problem voting for death. I think anybody would.
>
> The Court: When she says very unlikely, persuades me they would substantially compromise their ability to perform as a juror. And that would be my thought.

> So I am going to go ahead and excuse Lang over objection. I will talk some more to these other three [including Chaiveera].

(RT 251.)

The State has misread the record. Rather than "indicating some hesitation" in the excusal of Chaiveera and Lang, counsel's submission that the record of the voir dire did not support discharge of either of them for cause was *an objection* to such discharge. There was no request by counsel for further questioning to rehabilitate a prospective juror for whom the record at that point supported a finding of cause. Rather, defense counsel's position was that the record of voir dire did not support discharge of either juror for cause. Certainly the court understood that difference, for it expressly "[excuse]d Lang over objection." (RT 251.) The court interrupted counsel's objection to discharge of Chaiveera on the same basis by determining on its own to "ask a few more questions of her." (RT 249.)

The State recognizes that "[a]ppellant presented a timely objection ... to the excusal of prospective juror L." (RB 244.) The State must conclude the same as to Chaiveera, for counsel made the same objection at the same time as to her. Indeed, the State's true claim of forfeiture here is based on the fact that "[a]fter the trial court asked additional questions of prospective juror C. (RT 251-252), appellant did not object when the trial court subsequently excused her for cause (see RT 254)." (RB 244.) Indeed, the State reveals as much in its argument, where it asserts that Fuiava forfeited his claim concerning Chaiveera because he "failed to renew his objection

following the additional questions ...." (RT 255.) Significantly, the State cites no authority to support that claim of forfeiture.

The authority, in fact, supports the conclusion that Fuiava adequately preserved the issue of wrongful discharge for review by this Court when he once objected to Chaiveera's excusal for lack of cause, and he was not required to repeat that objection when the court thereafter discharged her. Penal Code section 1259 expressly provides that in a criminal appeal "the appellate court may, *without exception having been taken in the trial court*, review any question of law involved in any ruling ... or thing ... done at the trial ..., which thing was said or done *after objection made in and considered by the lower court,* and which affected the substantial rights of the defendant." (Italics added.) Here, Fuiava challenges on appeal the court's excusal for cause of prospective juror Chaiveera after he made an objection to her excusal and the trial court considered that objection. The fact that the trial court in its consideration asked the prospective juror a few more questions before discharging her does not change the analysis, for Penal Code section 1259 expressly relieves the defendant of any need to take exception to the trial court ruling after lodging an objection to it.

This Court has explained the reasons for the rule of objection as follows:

> In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and calling the judge's attention to any

> infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.

(*People v. Saunders* (1993) 5 Cal.4th 580, 590, quoting with approval *Sommer v. Martin* (1921) 55 Cal. App. 603, 610.) Fuiava's objection served the purpose of this rule, for it called to the court's attention that discharge of Chaiveera would infringe his right to an impartial jury and gave the court the opportunity to avoid that infringement, which it failed to do.

Following the objection, the court instead questioned Chaiveera further, along with two other prospective jurors to which Fuiava had objected. (RT 251-254.) After that questioning the court immediately proceeded to make its rulings, obviously treating the objections as still standing. (RT 254.) It denied the prosecutor's challenges for cause of the other two prospective jurors that it had re-questioned,[6] and went "ahead and excuse[d] Ms. Chaiveera" as well as the other jurors, including Lang, for whom it found cause. (RT 254.) Counsel was not obliged at that point to lodge an exception to that ruling, for his previous objection stood. (See, e.g., *People v. Stewart*, *supra*, 33 Cal.4th at p. 452 [rejecting state's claim of forfeiture where defense counsel objected to the excusals at issue on the ground that the record "did not afford sufficient grounds for excusal under the standard set out in" *Wainwright v. Witt* (1985) 469 U.S. 412, 424].)

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[6] The court confusingly treated the prosecutor's challenges as objections to finding these other prospective jurors qualified to serve, and ruled "the objections to those two are denied." (RT 254.)

Two of this Court's opinions filed since Fuiava's submission of his opening brief illustrate that the State's argument on the merits concerning dismissal of Chaiveera and Lang fares no better than its forfeiture argument concerning Chaiveera. In the first decision, *People v. Heard* (2003) 31 Cal.4th 946, the Court concluded "that there is not substantial evidence to support a determination that H. harbored views that would prevent or substantially impair the performance of his duties so as to support his excusal for cause." (*Id.* at p. 965.) *Heard* was filed prior to submission of the State's brief, and the State seeks to distinguish it on the ground that the prospective jurors in Fuiava's case "gave equivocal and conflicting answers on their ability to impose the death penalty ... [and] made statements indicating that they could not vote for death," while the prospective juror in *Heard* "unequivocally indicated 'that he would not vote "automatically"' for life" and "'indicated he was prepared to follow the law and had no predisposition'" on penalty. (RB 258.)

Neither of Fuiava's prospective jurors suggested that she would vote "automatically" for death, so that they are like the prospective juror in *Heard* in that regard. As to Lang, the State elsewhere in its brief admitted that "she did not indicate she could never vote for the death penalty ...." (RB 257.) In fact, Lang specifically denied that she "would never ever vote for death." (RT 247.) The State's further assertion that Fuiava's prospective jurors "made statements indicating that they could not vote for death" (RB 258, citing RT 230-231, 251-252) distorts the record. To begin with, the cited pages concern only Chaiveera. In them, she stated it would be "difficult" for her to vote

for death and "highly unlikely" she would so vote. She also assented to the court's characterization that she believed it "highly unlikely that [she] would ever vote for the death penalty," and its suggestion that she saw herself "as kinda in that third category of people, the people that say, ... I believe that the death penalty is okay, but I really couldn't do it." The purportedly "equivocal or conflicting" answers of Lang that the State points to were her statements that she would "have a real problem" voting for the death penalty and that it was "very unlikely" that she would do so. (See RB 257.) These statements neither equivocated about any substantial impairment to return a death verdict if called for by the court's instructions nor conflicted with any statements of such impairment. "To the extent [the prospective juror's] responses were less than definitive, such vagueness reasonably must be viewed as a product of the trial court's own unclear inquiries." (*People v. Heard*, *supra*, 31 Cal.4th at p. 967.)

This Court's second decision on dismissal of death-scrupled jurors since filing of the opening brief, *People v. Stewart*, *supra*, 33 Cal.4th at p. 445, was published after submission of the State's brief, and illustrates the lack of cause for excusal of Fuiava's prospective jurors. The Court admonished in *Stewart*: "Before granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would prevent or substantially impair the performance of his or her duties (as defined

by the court's instructions and the juror's oath) in the case before the juror." (Inside quotes and citations deleted.) The State acknowledges that Lang's "voir dire was brief" (RB 257), and Chaiveera's voir dire was hardly less abbreviated. As Fuiava argued in his opening brief: "The incredibly brief voir dire of this venireperson [Lang] on her views was simply inadequate to establish an intractable bias, given that her answers never confessed to any inability to fairly consider death as a penalty option." (AOB 301.) The same may be said about the voir dire of Chaiveera.

This Court in *Stewart* emphasized its language in *People v. Kaurish* (1990) 52 Cal.3d 648, 699: "*A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict.*" (*Id.* at pp. 446-446 (italics in *Stewart*); also quoted at AOB 301.) The Court explained that language thusly:

> *Kaurish* ... recognizes that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty. Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions

> or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt, supra,* 469 U.S. 412, 105 S.Ct. 844.

(*Id.* at p. 447.) "A juror might find it very difficult to vote to impose *the death penalty,* and yet such a juror's performance still would not be substantially impaired under *Witt,* unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*Ibid.*)

The trial court never established with either prospective juror here at issue that she was unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law. This gap is seen mostly clearly with Lang, who stated no more than that that it was very unlikely she would vote for the death penalty — while specifically disavowing that she would never vote for the death penalty. In the face of *Stewart,* the State falls short in its submission that "[s]uch answers ... provide sufficient and ample evidence to support the conclusion L.'s views on the death penalty would prevent or substantially impair the performance of her duties as a juror in accordance with oath." (RB 257, brackets and quotation marks in quote deleted.) These "answers of the prospective juror[] simply were not 'unequivocally disqualifying.'" (*People v. Stewart,* 33 Cal.4th at p.450.) Even given the deference accorded a trial court when its finding of cause is "based

upon voir dire responses and prospective jurors' demeanor" rather than review of answers to a written questionnaire such as occurred in *Stewart* (*id.* at p. 451; see also *People v. Griffin* (2004) 33 Cal.4th 536, 559 ["substantial evidence supports the trial court's findings" of substantial impairment]), the court's finding of cause here lacked substantial evidence.

The State's silence on the issue of prejudice effectively ratifies Fuiava's contention that any wrongful organization of the jury to return a death verdict or wrongful excusal of either Chaiveera or Lang requires reversal of the judgment. (See AOB 303.) Both *Heard* and *Stewart* confirm this conclusion. (See, e.g., *People v. Heard*, *supra*, 31 Cal.4th at p. 968 [noting "the per se standard of reversal" for such error]; *People v. Stewart*, *supra*, 33 Cal.4th at p. 454 ["this error requires reversal of defendant's death sentence, without inquiry into prejudice"].) Bemoaning the waste of reversal, not to mention the injustice of conviction, the Court emphasized "the need for our trial courts to redouble their efforts to proceed with great care, clarity, and patience in the examination of potential jurors, especially in capital cases." (*People v. Heard*, *supra*, 31 Cal.4th at p. 968.) The characteristics of "great care, clarity, and patience" in voir dire of the jury panel on its ability to determine penalty decidedly were lacking here, so that reversal is required.

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XVI.

THE ADMISSION OF A RANGE OF IMPROPER EVIDENCE UNDER THE GUISE OF VICTIM IMPACT EVIDENCE REQUIRES REVERSAL OF THE JUDGMENT.

Fuiava has assigned as error the trial court's admission of a range of evidence under the guise of victim impact evidence that deprived him of a fair trial and required reversal of the judgment. (AOB 303-318; see also *People v. Pollock* (2004) 32 Cal.4th 1153, 1180 ["victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case"].) The State asserts that Fuiava "has waived most of these claims." (RB 259.) Fuiava's arguments throughout this brief that this Court may and should exercise its discretion to consider his claims on their merits have special force here, however, because "unchecked admission of [victim impact] evidence r[uns] special risks of interference with the Constitution's demand for fair and reliable decisionmaking when imposing a death sentence." (See AOB 308-309.)

The State further asserts that Fuiava's "claims are meritless." (RB 259.) Fuiava rests on the points and authorities set forth in his opening brief that demonstrate the merits of his claims here.

Finally, the State claims that "any error in the admission of excessive victim impact evidence was harmless." (RB 263.) Not so,

for the State admits that "[t]he prosecutor emphasized victim impact evidence" in his closing argument to the jury. (RB 262.) Prejudice is particularly likely where "the prosecutor exploited the erroneously admitted [evidence] during final arguments ...." (*People v. Woodard* (1979) 23 Cal.3d 329, 341.) The State asserts harmlessness on the ground of "the very strong evidence of aggravating factors" (RB 263), but whether death was the appropriate verdict was doubtful. What made the penalty determination particularly troubling was all the uncertainty that surrounded the shooting and which suggested life rather than death was the appropriate verdict. Accordingly, the Court should reverse the judgment because admission of such a range of victim impact evidence likely had a substantial impact upon the jury's determination.

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XVII.

THE JURY'S CONSIDERATION OF THE EVIDENCE THAT FUIAVA CONFESSED TO COMMITTING TWO SHOOTINGS FOR WHICH THERE WAS NO INDEPENDENT EVIDENCE VIOLATED THE CORPUS DELICTI RULE AND REQUIRES REVERSAL OF THE JUDGMENT.

Fuiava here reformulates his assignment of error concerning violation of the corpus delicti rule in the jury's consideration of evidence of admissions he made to two shootings for which there was no independent evidence. In his opening brief, Fuiava submitted that the court erred in admission of this evidence and in "related instructional error" that permitted the jury to use in aggravation any finding that he had committed those alleged shootings. (AOB 318.) The State argues that there was no evidentiary error because following "adoption of Proposition 8 adding section 28, subdivision (d) to Article I of the California Constitution, the corpus delicti rule no longer bars the admissibility of a defendant's out-of-court statements on the ground that independent proof of a crime is lacking." (RB 267, citing *People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169.) The State's argument on the evidentiary ruling is well-taken, for *Alvarez* indeed found as much.

At the same time, however, *Alvarez* reiterated and confirmed the law on which Fuiava's claims of related instructional error and insufficient evidence to establish those crimes are based. *Alvarez* affirmed the force of the corpus delicti rule for all purposes other than

determining the admissibility of evidence of a defendant's confession without a showing of independent evidence of the offense, stating:

> [S]ection 28(d) did not eliminate the independent-proof rule insofar as that rule prohibits *conviction* where the only evidence that the crime was committed is the defendant's own statements outside of court. Thus, section 28(d) did not affect the rule to the extent it (1) requires an instruction to the jury that no person may be convicted absent evidence of the crime independent of his or her out-of-court statements or (2) allows the defendant, on appeal, directly to attack the sufficiency of the prosecution's independent showing.

(*People v. Alvarez*, *supra*, 27 Cal.4th at pp. 1180-1181.)

As Fuiava explained in the opening brief, this Court has already applied the corpus delicti rule to "other violent crimes the prosecution introduces at the penalty phase of a capital trial in support of its case for death." (AOB 321, citing *People v. Hamilton* (1963) 60 Cal.2d 105, 129.) "This Court there found that prior crimes at the penalty phase could not 'be proved by the introduction of evidence of an extrajudicial admission without proof *aliunde* that such a crime had been committed.'" (AOB 322, quoting *Hamilton*.) The Court applied the corpus delicti rule again to other crimes of violence that the prosecutor relied upon in its case for death in *People v. Robertson* (1982) 33 Cal.3d 21, 42. As Fuiava argued: "Given *Robertson's* recognition that the requirement of independent evidence of a corpus delicti in order to find a defendant guilty of a charged crime applies equally to jury findings of a violent crime alleged in aggravation, it necessarily follows that the jury must be instructed on that

requirement for violent crimes alleged at the penalty phase." (AOB 322.) And, when as here there is no evidence of the corpus delicti outside the defendant's confession, it follows that a jury may not rely on the evidence of the defendant's confession to return a verdict of death. Especially is this so where the alleged confession is a supposedly oral one made at the station house by a 14-year-old in the glare of deputy interrogators, as was the case here.

Fuiava further pointed out that the error also "had implications under the United States Constitution that require reversal of the judgment [since] [t]he corpus delicti rule springs from deeply embedded notions of fundamental justice reflected in the Due Process Clause of the Fourteenth Amendment ...." (AOB 326.) He further noted that "[t]he assurance of reliability that the corpus delicti rule brings to any finding that the defendant has committed an offense that he once claimed he committed is also a constitutional demand under the Eighth and Fourteenth Amendments when that finding is used to support a judgment of death." (AOB 327.)

"[R]espondent submits that the corpus delicti rule should not apply to conduct admitted as aggravating evidence under section 190.3, factor (b) at the penalty phase of a capital trial." (RB 268.) The State critiques the rule as "inefficient, unnecessary," and subject to "abuse," citing law review articles to that effect. (RB 268.) This Court, however, has definitively determined that the rule should apply to crimes admitted as aggravation to support a death judgment. Indeed, the rule is especially apt as a protection against the execution of an individual for an act that he never committed. The State's

assertion that "the reasoning in *Hamilton* no longer applies in light of this Court's decision in *Alvarez*" (RB 270) ignores the fact that this Court confirmed in *Alvarez* the vitality of the corpus delicti rule and its constraints upon jury findings of criminal conduct. Those constraints only take on more prominence when the jury's findings of violent criminal conduct lead it to a death verdict.

The State's attempt to avoid the force of *Robertson* is equally unavailing. First, the State acknowledges that *Robertson* found that the corpus delicti rule precluded the jury from considering the evidence of the defendant's confession to other crimes in the penalty phase because "no independent evidence of the corpus delicti of the other crimes was ever introduced." (RB 271.) The State insists that *Robertson*, however, "*did not* decide the issue based on the corpus delicti rule, but rather held the evidence should have been excluded pursuant to Evidence Code section 352." (RB 271, citing *Robertson* at p. 42 (italics in original).) Not so.

The issue in *Robertson* was whether counsel was ineffective for failing to lodge an objection to the evidence of the defendant's admissions to the other crimes. (*Id.* at p. 41.) The Court found that in light of the fact that the corpus delicti rule applied to other crimes introduced at the penalty phase, "trial counsel is simply wrong in maintaining that there was no basis on which to object to the testimony in question." (*Ibid.*) In response to the further argument of the Attorney General that the evidence "was not introduced to prove that defendant had committed other murders" but to show its effect upon the listener (*ibid.*), the Court found that in that case the evidence

was subject to exclusion upon objection pursuant to Evidence Code section 352. (*Id.* at p. 42.) Thus, the State's assertion that the Court did not decide this assignment of error on the basis of the corpus delicti rule is meritless.

The State's submission that "[t]his Court's recent opinion in [*People v. Sapp* (2003) 31 Cal.4th 240] is not inconsistent with the State's position" (RB 269) does not survive a close reading of *Sapp*. The Court in *Sapp* acknowledged that it had held in *Alvarez* that "section 28(d) did not abrogate the corpus delicti rule insofar as it provides that every conviction must be supported by some proof of the corpus delicti aside from or in addition to a defendant's incriminating statements, and that the jury must be so instructed." (*Id.* at p. 304, quoting *Alvarez* at p. 1165 [brackets in quote deleted].) In light of both *Hamilton's* and *Robertson's* application of that rule to other crimes introduced at the penalty phase to support a verdict of death, *Sapp* properly "[a]ssum[ed] that the corpus delicti rule applies to unadjudicated crimes admitted as aggravating evidence (§ 190.3, factor (b)) at the penalty phase of a capital trial ...." (*People v. Sapp*, *supra*, 31 Cal.4th at p. 303.) In *Sapp*, the Court found that evidence independent of the defendant's confession established the corpus delicti. (*Id.* at p. 304.) Here, in contrast, there was no independent evidence of the crimes at issue, and the State makes no claim that there was. Thus, the trial court violated the corpus delicti rule in permitting the jury to find that he had committed two shootings solely on the basis of evidence that Fuiava said so, when there was no other evidence that such shootings had ever occurred.

The State finally claims that even if "the trial court should have given the jury a cautionary instruction regarding the use of appellant's statements, any such error was nonprejudicial ...." (RB 271.) The State's claim of harmless error here fails as well. The State asserts that there is no reasonable possibility that a jury finding that Fuiava committed these two shootings contributed to its death verdict because "[t]he jury already knew from the guilt phase that appellant was an 'outlaw' who had no respect for human life and/or the laws of society." (RB 271.) While this characterization of the evidence at the guilt phase supports Fuiava's earlier argument that the guilt verdict was based on improper propensity evidence (see Argument VIII, *ante*), the jury's finding of guilt signified no more than a finding that Fuiava shot at the deputies with a premeditated intent to kill and without excuse or justification. According to the State, "the circumstances of Deputy Blair's murder ... demonstrate the height of appellant's lawlessness." (RB 271.) But the evidence concerning that shooting was too ambiguous on provocation, motive, and other circumstances to excluded the possibility that findings by the jury that Fuiava also committed the two additional shootings here at issue bore on its death determination. As earlier set forth, the circumstances of the capital crime themselves gave the jury a basis to return a sentence of life rather than death. Thus, the State's proposition that the capital crime itself was so aggravated that the consideration of these two purported shootings could not have made a difference in the verdict is untenable.

Nor did the evidence of Fuiava's other prior criminal conduct make a finding that Fuiava committed these two shootings "nothing more than icing on a very rich cake," as the State argues. (RB 272, quoting *People v. McDaniels* (1980) 107 Cal.App.3d 898, 905.) *McDaniels* was a case concerning guilt or innocence, not life or death. The question of guilt is subject to an objective evaluation of the evidence, while "the determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts." (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044.) The judgment of life or death is a subjective and ultimately immeasurable determination "entrusted to a jury because it is a uniquely moral decision in which bright line rules have a limited place." (*Ibid.*) Because the death determination involves a moral, normative judgment, this Court has recognized that there is great "difficulty in ascertaining 'the precise point which prompts the death penalty in the mind of any one juror'" (See AOB 325, quoting *People v. Robertson, supra*, 33 Cal.3d at p. 54.) Indeed, the State has no answer to the points Fuiava made in his brief demonstrating that this case presents an even stronger one than *Robertson* for reversal based on violation of the corpus delicti rule. (See AOB 325.)

The difficulty of knowing at what point the jury might be prompted to find death presumably is why the prosecutor felt it important to present this evidence over objection and argue for death based on it. As this Court has recognized, "[g]enerally, the potential for prejudice from [error concerning violent conduct beyond the capital offense] ... is serious because 'other crimes' evidence may

have a particularly damaging impact on the jury's determination whether to impose the death penalty." (*People v. Heishman* (1988) 45 Cal.3d 147, 181.) The prosecutor angled for the jury's consideration of these shootings precisely because he determined that jury findings of them held a reasonable potential to persuade it to return a verdict of death. That settles the question of prejudice. This Court has previously disapproved of the kind of disingenuous distancing on appeal that the State here displays in claiming harmless error. (See *People v. Cruz* (1964) 61 Cal.2d 861, 868.) As the Court there stated:

> "[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.) There is no reason why [the court] should treat this evidence as any less crucial than the prosecutor — and presumably the jury — treated it.

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XVIII.

LIMITING TO FIVE MINUTES COUNSEL'S CONSULTATION WITH FUIAVA CONCERNING HIS PROPOSED TESTIMONY AT THE PENALTY PHASE REQUIRES REVERSAL OF THE JUDGMENT.

Fuiava assigned as error on appeal the court's limitation to "five minutes" of his consultation with counsel to determine whether Fuiava would be called to testify on his own behalf. The court so limited their consultation because it "want[ed] to try to finish ... this case today." (AOB 328-332.) The State's various efforts to avoid the consequences of that unreasonable limitation are unavailing.

The State first claims that the record does not support Fuiava's claim because the record does not show "the actual length of the recess." (RB 275.) There is no reason to suspect that the court took any action other than what it ruled — i.e., limitation of the recess to five minutes in an effort to wrap up the case the same day. The State cites no authority to support its claim that under these circumstances the record fails to support the very limitation that the court set.

The State next claims waiver on the basis that Fuiava never "objected or requested additional time from the trial court." (RB 276.) There was no waiver because the trial court had ruled already that counsel would be granted no more than five minutes for consulting with Fuiava about testifying. Counsel has a duty to submit to the rulings of the court and need not challenge them post-hoc to preserve an issue on appeal. (See, e.g., *People v. Diaz* (1951) 105 Cal.App.2d 690, 696 ["Where a court has made a ruling, counsel must

not only submit thereto but it is his duty to accept it, and he is not required to pursue the issue."].) A defendant is not obliged to incur the displeasure of the court in order to preserve an issue on appeal. (See, e.g., *Douglas v. Alabama* (1965) 380 U.S. 415, 422 [failure to object excused where "objection might well affront the court"].)

In addition, given the importance of the determination whether to testify or not, an appellate court may address the merits of a claim of trial court infringement upon that determination notwithstanding any alleged procedural default. In sum, for all the reasons previously set forth demonstrating that it is particularly inappropriate to invoke procedural default on appeal when the fundamental constitutionality of a death judgment is at stake, this Court should exercise its discretion to overlook any default here in the interests of justice. (See, e.g., *People v. Williams*, *supra*, 17 Cal.4th at p. 161, fn. 6 [an appellate court has discretion to reach the merits of an issue "that has not been preserved for review by a party"].)

Finally, the State asserts that because Fuiava's "direct testimony was very brief and consisted of an 11-line response to the sole question of 'Why should this jury spare your life[,]' ... it seems clear defense counsel had adequate time to consult with appellant before he testified." (RB 277.) To the contrary, such ineffectual examination of Fuiava evidences the prejudice from the court's limitation on Fuiava's access to his counsel on the critical issue of whether he should testify at penalty.

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XIX.

THE COURT'S REFUSAL TO PERMIT FUIAVA TO EXPRESS HIS SORROW FOR THE SUFFERING BLAIR'S DEATH CAUSED HIS FAMILY AND LIMITATION OF FUIAVA'S TESTIMONY TO "WHAT THE SENTENCE SHOULD BE" REQUIRE REVERSAL OF THE JUDGMENT.

The narrowness of Fuiava's direct examination set forth in the preceding argument followed efforts by counsel to pose a question that would permit Fuiava to express his sorrow for the suffering that Blair's death had caused his family. The court blocked those efforts by sustaining the prosecutor's objection to a question designed to elicit Fuiava's direct expression of condolence and sorrow to the Blair family, and directing counsel in his examination of Fuiava to "confine yourself to the issue of whether or not he should be — what the sentence should be." Fuiava assigned these restrictions on his examination as error on appeal. (AOB 333-338.)

The State acknowledges that Fuiava had a right to express his remorse in testimony at the penalty phase. (See RB 280 ["A defendant's statements of remorse is [sic] a relevant mitigating factor."].) The State argues that the court "did not in any manner" infringe that right. (RB 280-281.) This is so, according to the State, because the court did not "bar appellant from expressing any remorse or sympathy *for* Deputy Blair's family," but only "*to* Deputy Blair's family." (RB 280-281; latter italics in RB.) The State here offers a distinction that makes no difference to Fuiava's claim.

To begin with, Fuiava was entitled in his testimony "to make a public apology" — as the trial court put it when it barred such testimony (see AOB 333) — to express and show the sorrow and remorse he had for the harm that resulted from his shooting of Blair. The State concedes that the court barred such. Thus, the State's contention that Fuiava "could have expressed his remorse in his testimony to the penalty jury [but] chose not to" (RB 281) misrepresents the record and the harmful consequences of the trial court's ruling. Since counsel's lead question was designed to elicit such an expression and counsel was prepared to rest when the court rebuffed that effort (see AOB 333), empathy apparently was the one thing Fuiava clearly communicated to his counsel during their hurried consultation that he wanted to an express through his testimony.

The State fails in its attempt to fit the court's ruling into one only on the form of the question (or Fuiava's answer), rather than the substance of it. The State claims that "[t]he prosecutor objected on the grounds the question, as phrased, was 'inappropriate'" (RB 278) and that "the trial court ruled that the phrasing of the question posed to appellant, whether he had anything to say *to* Deputy Blair's family, was inappropriate ...." (RB 280.) This extrapolates too much from the record. The prosecutor did not specify anything about the phrasing of the question. The prosecutor's objection to the question whether Fuiava had anything that he wanted to say to the Blair family was: "Your Honor, I object. That is inappropriate." (RT 2706.) The court agreed, and directed counsel away from any expression by Fuiava of sorrow for Blair's family by instructing counsel to confine

himself "to the issue of ... what the sentence should be." (See AOB 333.) The court's ruling carried a declaration that any expression by Fuiava of sorrow for the capital offense was outside the scope of the question whether he should live or die. Counsel very obviously understood that the court so ruled. Counsel's subsequent examination showed that understanding, for his sole question posed to Fuiava asked why the jury should spare Fuiava's life. Counsel limited his question in order to comply with the court's directive. He subsequently moved for a new trial on the ground that the court's directive precluded him from introducing evidence of remorse. (See AOB 334.) Fuiava similarly understood the court's ruling. He honored it by not adverting to his sorrow for the Blair family when he answered counsel's question. Fuiava's respect for the court's ruling should not be twisted into a "choice" by him not to express his sorrow for Blair's death.

The State claims that "any error was harmless" because Fuiava "failed to make a record" of what his excluded mitigation evidence would have been. (RB 281.) Quite to the contrary. Very evidently, Fuiava wanted to express his remorse for Blair's death. Fuiava wanted to acknowledge the harm that he had inflicted upon Blair's family and express his sympathy for them. To be sure, the court understood that Fuiava's testimony would have served as such a public apology to the family, for that is precisely how the court phrased it. Thus, this Court can make an informed assessment of whether there is a reasonable possibility that the absence of an expression of remorse by Fuiava affected the penalty verdict.

The State implicitly concedes that possibility, for it fails to allege that there is no reasonable possibility that such a public apology or other expression of remorse by Fuiava would have affected the jury's penalty verdict. Indeed, the State's emphasis elsewhere in its brief that Fuiava's asserted lack of remorse was one of the significant bases for the return of a death sentence by his jury proves the prejudice here. (See, e.g. RB 272 [asserting harmlessness of penalty error "[g]iven appellant's violent history, coupled with appellant's penalty phase testimony where he refused to express any remorse for his conduct"].) Courts similarly have emphasized a defendant's failure to express remorse for his crime as an important factor informing a jury's determination that death was the appropriate penalty. (See, e.g., *Allen v. Woodford* (9th Cir. 2004) 366 F.3d 823, 853 [particularly noting the fact that the defendant had "expressed no remorse for the crimes that he committed" when explaining why the aggravation so outweighed the mitigation in that case].) Thus, the court's error in taking away from Fuiava the ability to base a plea for his life on his sorrow and remorse for the tragic consequences of his conduct, and to show his humanity by making a public apology to the family of Blair, cannot be deemed harmless.

The State's exclusive reliance on the procedural allegation that Fuiava failed to make a sufficient record of what his testimony would have been falls short. The cases cited by the State, *People v. Whitt* (1990) 51 Cal.3d 620, 648-650 and *People v. Anderson* (2001) 25 Cal.4th 543, 580-581, fail to support its claim of harmless error on the ground that the content of the excluded evidence was not known here.

Rather, those cases demonstrate by contrast the lack of merit to the State's claim. Those cases explain that rejection of a claim of harmless error on the basis that the substance of the excluded testimony was not set forth on the record is an application of the rule of Evidence Code section 354, subdivision (a). As observed in *Whitt*:

> Evidence Code section 354 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error ... is of the opinion that [it] resulted in a miscarriage of justice and ... [¶] ... [t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means ....

(*People v. Whitt*, *supra*, 51 Cal.3d at p. 648, fn. 18; see also *People v. Anderson*, *supra*, 25 Cal.4th at p. 580.) Thus, *Whitt* explained that "even where the *question* is relevant on its face, the *appellate court* must know the 'substance' or content of the *answer* in order to assess prejudice." (*People v. Whitt*, *supra*, 51 Cal.3d at p. 648; see also *People v. Anderson*, *supra*, 25 Cal.4th at p. 580 ["This rule is necessary because, among other things, the reviewing court must know the substance of the excluded evidence in order to assess prejudice."].)

In both *Anderson* and *Whitt* , this Court did not know enough about the excluded evidence to make an informed assessment of the potential prejudice from its exclusion. In *Anderson* "counsel explained *why* Bruce might be called, i.e., to impeach Deborah concerning her interview with defense investigators, but counsel did

not offer to show *what* material impeachment Bruce might provide." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 581; italics in *Anderson*.) Moreover, there "prejudice appear[ed] unlikely, because Francis Leaman and Charles Small, the defense investigators who interviewed Deborah in Bruce's presence, both testified about the interview at the hearing concerning Deborah's competence, and Leaman gave testimony on that subject before the jury." (*Ibid.*) In *Whitt*, the court sustained objections to such general questions posed to the defendant that they gave no indication of their answers.[7] *Whitt* illustrated its holding in discussing one of those questions:

> In this case, though the question "Why do you deserve to live?" *might* produce a significant answer, the phraseology is so inherently broad, and the range of conceivable answers so vast, that we cannot know whether defendant's actual response might have influenced the penalty determination. of the content of the answers.

(*People v. Whitt*, *supra*, 51 Cal.3d at p. 648.)

In contrast, the question posed to Fuiava, particularly with the colloquy that ensued from the objection, made clear that the question was designed to elicit specific evidence. No more and no less was sought than Fuiava's expression of remorse and sorrow for the consequences of his shooting and apology for it. The State on appeal makes no claim otherwise, but asserts only that "appellant and trial

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[7] The court sustained the prosecutor's objections to three questions posed to the defendant: 1) "[W]hat do you have to say about those stakes [of life or death]?; 2) [D]o you want to live?; and 3) Why do you deserve to live? (*People v. Whitt*, *supra*, 51 Cal.3d at p. 646.)

counsel did not inform the trial court about what appellant would have testified to regarding remorse or sympathy for Deputy Blair's family." (RB 281.) The details of Fuiava's expression of remorse about and concern for the harm he inflicted on Blair's family are not essential to this Court's determination of whether there is a reasonable possibility that exclusion of this expression of remorse and sympathy affected the verdict. The statutory "requirement is met ... where the wording or context of the question makes the expected answer clear." (*People v. Whitt*, *supra*, 51 Cal.3d at p. 648.) As set forth in *People v. McGee* (1947) 31 Cal.2d 229, 242, one of the cases cited in *Whitt* to support this point:

> Defendant made no formal offer of proof, but such offer was not necessary because the questions themselves, together with colloquies with the trial judge, ... clearly disclose their purpose, and since they were directed to defendant's own witness they indicate that the answers were expected to be favorable to defendant.

Fuiava's case is much more akin to *McGee* than to *Whitt*, "where the conceivable range of answers is unlimited, and the nature of the excluded testimony is known only to the defendant and lies within his exclusive control." (*People v. Whitt*, *supra*, 51 Cal.3d at p. 649.) *Whitt's* holding should be limited to the extreme circumstances there delineated, for the dissenting opinions of both Justice Mosk and Justice Kennard in *Whitt* persuasively show that the majority's rationale for finding the error harmless is in great tension with the test for determining prejudice from constitutional error.

* * * * * *

XX.

THE EXCLUSION OF EVIDENCE IN THE PENALTY PHASE CONCERNING THE FEAR AND LOATHING THAT THE SHERIFF'S DEPARTMENT CREATED IN FUIAVA'S COMMUNITY AND THE CIVIL RIGHTS LAWSUIT THAT RESULTED FROM SUCH, AGGRAVATED BY ADMONITIONS TO THE JURY THAT THIS EVIDENCE WAS REMOTE AND IRRELEVANT AND SHOULD BE DISREGARDED, REQUIRES REVERSAL OF THE JUDGMENT.

Fuiava assigned as error the trial court's exclusion of evidence at the penalty phase about the history of excessive force perpetrated in Lynwood, the resultant fear it engendered in the community, and the civil rights lawsuit that was filed to redress those grievances. (AOB 339-344.) First, the court precluded impeachment of Deputy Westin's testimony during cross-examination that the lawsuit was frivolous, its depiction of Vikings as rogue officers fabricated, and its inclusion of Blair as a defendant baseless. (AOB 339.) The court exacerbated its error when it further advised the jury that it had already found the evidence about the lawsuit remote because it had been filed in 1990. (AOB 339.) The court did so in the face of counsel's protest that in view of the deputy's denigration of the lawsuit he "want[ed] the jury to understand that this little lawsuit settled for seven and a half million dollars." (AOB 339.)

Worse, the court on its own motion interrupted the testimony of Terri Clark, one of Fuiava's neighbors who was bearing witness to the fear of the deputies that resided in the community at the time of the shooting and the seven million dollar verdict that resulted from their

excessive use of force, and asserted that she did not "understand." (AOB 340.) The court thereupon struck her entire answer, advising the jury to disregard it and that it was "not relevant and ... gets us off into areas that I have ruled are not appropriate for this jury to consider." (AOB 340.)

The State admits that "a capital defendant has a federal constitutional right to present relevant mitigating evidence." (RB 285.) The State, however, asserts that the evidence excluded was either irrelevant or its probative value substantially outweighed by the probability that it would confuse the issues or mislead the jury. (RB 286.) Neither is true.

Putting aside the question whether this evidence was relevant to the jury's consideration of lingering doubt (compare AOB 341-342 with RB 286), it can hardly be gainsaid that evidence of the fear and loathing that the deputies engendered in the community was evidence that extenuated the offense. (See AOB 342.) Nevertheless, the State asserts that this claim "is meritless." (RB 287.) The State asserts that because "[t]he trial court already had permitted appellant ... to introduce evidence that a civil lawsuit had been filed against deputies" that included "complaints filed by persons alleging Deputy Blair used excessive force" (RB 287, citing RT 2481-2483), the "details" of that lawsuit — including its settlement for millions of dollars — "had little, if any, probative value ...." (RB 287-288.) The record pages to which the State cites, however, concern the cross-examination of Deputy Westin in which he testified that the allegations against Blair were baseless and the lawsuit meritless. As the State recognizes

elsewhere in its argument, Fuiava's complaint is that "he was not able to ask Deputy Westin regarding his characterization of the lawsuit ...." (RB 282.) Fuiava wanted to impeach Westin's testimony about the lawsuit, so that the State's argument here is perversely circular. The State's claim of harmless error based on this same evidence from Westin (RB 288) suffers from the same illogic.

As to the preclusion of Clark's testimony about the fear that the deputies' lawless conduct generated in Fuiava and the rest of the community, the State argues that "[t]he most reasonable reading of the record shows the trial court ruled that Clark's testimony regarding the lawsuit was inadmissible." (RB, citing RT 2691-2692.) The State never explains how it reaches this insupportable conclusion. The last portion of Clark's answer included the following:

> He [Fuiava] is afraid of them. He is not the only one that is afraid of them. They do their own activity, crimes.
>
> Once again, I am not here to put them down or to judge them but these are supposed to be men that supposed to be a trade of tradition to serve us but yet they are doing their own activity, crimes.
>
> ... If I am wrong, then why did we win over ... 7 million –

(RT 2691.) It was at that point that the court interrupted her answer and stated it was "going to stop you now." (RT 2691.) The prosecutor seized the moment and "move[d] to strike *all* of her answer." (RT 2691; italics added.) The court granted the motion, and instructed the jury in relevant part: "Ladies and gentlemen, you must

not consider *anything* she said in response to the last question." (RB 2692, italics added.) The only reasonable reading of the record is that the trial court barred Clark from testifying that Fuiava's conduct was extenuated by the fear generated by the lawless conduct of the deputies against the citizenry.

The State claims that any error in excluding Clark's testimony regarding the community fear of the deputies due to their alleged misconduct was harmless because the evidence presented at the guilt phase made "the jury ... well aware that an 'extenuating' circumstance of the crime was the alleged misconduct by deputies which caused appellant and other people in his community to be afraid." (RB 289.) Not true. To begin with, the court substantially precluded evidence of the deputies' history of misconduct in the community during the guilt phase. (See Argument II, *ante*.) As Fuiava stated in his opening brief:

> Except for the fact that Blair had a Viking tattoo ... the rulings of the court reduced the defense evidence of these "fantastic" allegations [of deputy misconduct] to the testimony of Avila and Fuiava, the latter largely based on his information and belief. Both Avila and Fuiava, however, had obvious credibility problems.

(AOB 83.) In contrast, Clark's testimony was unimpeached. Her testimony about the deputies' terrorization of the community thus was invaluable. For these reasons, there is a reasonable possibility that had the jury been permitted to consider her testimony on that point as well as the other testimony she was prepared to give about the significance of the lawsuit, it would have mitigated Fuiava's

punishment by returning a verdict of life without the possibility of parole rather than death.

* * * * * *

XXI.

THE EXCLUSION OF EVIDENCE OF THE DELETERIOUS IMPACT FUIAVA'S DEATH WOULD HAVE ON OTHERS WAS ERROR THAT REQUIRES REVERSAL OF THE JUDGMENT.

The State asserts that Fuiava's claim that the court wrongly excluded evidence of the deleterious impact that his execution would have on his family and friends "lacks merit." (RB 290.) The concessions that the State makes in the course of its argument, however, prove the error. The State concedes:

- The trial court sustained the prosecution's objection to the question posed to Fuiava's sister that inquired into "how it would affect her if appellant was executed ...." (RB 290.)
- "'Family members may offer testimony of the impact of an execution on them,'" for such illuminates positive qualities about the defendant. (RB 291, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 456.)

The State also implicitly concedes that "the evidence [was] admissible as indirect evidence of [Fuiava's] character," for it asserts only that Fuiava forfeited this claim "by failing to press the trial court to explain its ruling below." (RB 291.) Notably, the State cites no authority to support its forfeiture claim, which raises to another pinnacle its exaltation of form over substance. The law simply does not require a party to "press the trial court to explain its ruling"

sustaining an objection to the admission of evidence in order to challenge that ruling on appeal.

The State asserts that the court's ruling "was proper to the extent it was ruling that such evidence was inadmissible solely to prove sympathy for appellant's family." (RB 291.) The court, however, never specified such as the basis for its ruling, nor did the prosecutor object on that basis. Just as the State recites:

> The prosecutor objected that the question called for inappropriate penalty phase evidence. The trial court agreed, stating that "I don't think that is appropriate technically."

(RB 290.) The State on appeal concedes that evidence of the impact of the defendant's execution on others is appropriate mitigation evidence, and that there is nothing "technically" inadmissible about it. The vagueness of the prosecutor's objection imposed no duty on Fuiava to "press the court" to explain its ruling sustaining the objection. Rather, it is up to the prosecutor to specify the ground for an objection and the court to "explain" its ruling as it deems necessary. Again: "Where a court has made a ruling, counsel must not only submit thereto but it is his duty to accept, and he is not required to pursue the issue." (*People v. Diaz*, *supra*, 105 Cal.App.2d at p. 696.)

The State also asserts that any error in precluding the testimony of Fuiava's sister Sasa on the impact his execution would have on her was harmless because she testified "regarding her love for appellant ... and why she did not want a death verdict," and other family members testified about the impact Fuiava's execution would have on

them. (RB 291-292.) Sasa's brief testimony, however, lacked a compelling emotional dimension because she was not able to render her mitigating evidence in the context of how Fuiava's execution would hurt her. The State makes no reply to the point made by the Oregon Supreme Court that "it is the rare case in which this court can determine that evidence [of the impact of execution on family and friends] could not have affected the jury's 'reasoned moral response' in determining whether defendant should have received a death sentence." (AOB 348, quoting *State v. Stevens* (Or. 1994) 879 P.2d 162, 168; brackets, bracketed material and ellipsis in brief deleted.) Finally, the State's point that several family members were able to testify about the impact Fuiava's death would have on them overlooks another aspect of prejudice from this error: "The harm Fuiava suffered due to exclusion of this evidence was magnified by the imbalance created by admission of the slew of evidence about the impact that Blair's death had upon his loved ones." (AOB 348.)

In sum, the State has conceded the error here, and has failed to carry its burden to prove beyond a reasonable doubt that the error was harmless. The Court should reverse accordingly.

* * * * * *

XXII.

THE COURT'S REFUSAL TO INSTRUCT ON LINGERING DOUBT AS A RELEVANT CONSIDERATION REQUIRES REVERSAL OF THE JUDGMENT.

Fuiava assigned as error the trial court's refusal to instruct the jury that it could factor into its penalty determination any lingering doubt it might harbor as to Fuiava's guilt. (AOB 349-358.) "Respondent submits the trial court properly refused to give appellant's requested instructions on lingering doubt." (RB 293.)

According to the State, Fuiava's claim of entitlement to a lingering-doubt instruction on request "was squarely rejected by this Court in *People v. Hines* (1997) 15 Cal.4th 997, 1068." In *Hines*, this Court found such an instruction "unnecessary" in light of the instruction on factor (a) concerning "the circumstances of the crime" and the catchall mitigation instruction on factor (k), which together "sufficiently encompassed the concept of lingering doubt" and relieved the jury of any "duty to give a more specific instruction." (*Ibid.*)

Hines does not dispose of Fuiava's claim, which is based not only on the Constitution but also Penal Code sections 1093, subdivision (f) and 1127. (See AOB 354-356.) As Fuiava set forth in his opening brief, this Court has explained that these statutes require the court upon request to charge a jury on any point of law pertinent to the issue, so that a trial court "may be required to give a properly formulated lingering doubt instruction when warranted by the

evidence." (See AOB 354, quoting *People v. Fauber* (1992) 2 Cal.4th 792, 864-865, in turn quoting *People v. Cox* (1991) 53 Cal.3d 618, 678, fn. 20.)

The instruction Fuiava proffered on lingering doubt was a classic "pinpoint" instruction — that is, "an instruction that pinpoints a legal theory of the defense." (See AOB 355.) For example, a court at the guilt phase upon request must give an instruction that "'pinpoint[s]' the crux of a defendant's case, such as mistaken identification or alibi." (*People v. Adrian* (1982) 135 Cal.App.3d 335, 337.) This is so even though the general instructions "sufficiently encompass" those theories of defense to relieve the court of any duty to instruct sua sponte on them. (See, e.g., *People v. Freeman* (1978) 22 Cal.3d 434, 438 [no sua sponte duty for the court to instruct on alibi, which would have been "redundant" since "the jury was instructed to acquit defendant if the prosecution failed to establish his guilt beyond a reasonable doubt"].)

A defendant's pinpoint instruction at the penalty phase is proper where "the instruction ... assist[s] the jury in comprehending the legal 'crux' of defendant's case [by] illuminating the legal standards at issue." (*People v. Howard* (1988) 44 Cal.3d 375, 442.) Here, the proffered instruction would have illuminated the legal standard for the penalty decision by providing straightforward advice that the jury could properly factor lingering doubt — the crux of Fuiava's mitigation case—into its penalty determination.

The instruction would have assisted the jury precisely because consideration of lingering doubt was such a gray area under the

general instructions that were given here. As Fuiava observed in his opening brief, no less an august legal body than the United States Supreme Court has explicitly found that "lingering doubts over the defendant's guilt do not relate to 'the circumstances of the offense,'" and that "lingering doubts over the defendant's guilt do not relate to his 'character' or 'record.'" (AOB 352, quoting *Franklin v. Lynaugh* (1988) 487 U.S. 164, 175.) If so, it is not clear how instruction on factors (a) and (k) apply to a defense theory of lingering doubt. Fuiava further pointed out in his brief that confusion over how lingering doubt may factor into the penalty determination was heightened by the prosecutor's argument that lingering doubt did not come into play under factor (a) or factor (k), but under factor (f) ["a reasonable belief in moral justification or extenuation"], and should be rejected under that factor in Fuiava's case. (See AOB 352-353.) The State ignores this confusion, which is precisely why "trial courts regularly have instructed upon lingering doubt upon request of the defendant to do so." (AOB 353.) Indeed, this Court itself has stated that "doubt as to the defendant's guilt is not relevant to the circumstances of the offense or the defendant's character and record." (*In re Gay* (1998) 19 Cal.4th 771, 814.)

The State does not argue that Fuiava's proffered instructions on lingering doubt were improperly formulated. In *Fauber*, the Court assumed no irregularity with the proffered instruction and implicitly recognized that the court's refusal to give it was error. It found only that there was no prejudice in that case from the error because "[t]rial counsel did not argue that the jury should base its decision on any

residual doubt as to defendant's guilt." (See AOB 355, quoting *People v. Fauber*, *supra*, 2 Cal.4th at p. 865; ellipsis in brief deleted.)

Ironically, the State here relies on the fact that "defense counsel effectively argued 'lingering doubt' to the jury" to support its claim of no reversible error. (See RB 298.) The mere fact that counsel was able to argue the point does not show that the lack of instruction giving that argument legal credence was harmless. (See, e.g., *People v. Wilson* (1929) 100 Cal. App. 428, cited with approval in *People v. Wright* (1988) 45 Cal.3d 1126, 1137 [refusal to give an instruction pinpointing alibi defense required reversal]; *People v. West* (1983) 139 Cal.App.3d 606, 610 [refusal to give instruction pinpointing misidentification defense required reversal]; *People v. Coates* (1984) 152 Cal.App.3d 665, 670-671 [same]; *People v. Pena* (1984) 151 Cal.App.3d 462, 474-475 [refusal to instruct on the legal significance of the evidence of antecedent threats in a self-defense case required reversal because a "[d]efendant's fate ...should not rest on abstract generalizations"].) In each of those cases, defense counsel was able to freely argue the evidence and law at issue, but that did not establish harmlessness. Rather, critically missing from those cases, and missing here as well, was explicit instruction that would have backed counsel's argument with judicial force and clarity on the crux of the defense case.

The State makes no answer to Fuiava's point that there is a reasonable possibility that such judicial force and clarity on the pertinence and legitimacy of consideration of lingering doubt would have persuaded at least one juror to vote for life, given both the power

that lingering doubt has to persuade a juror against death and the substantial evidence of such doubt in his case. (See AOB 356-357.) Thus, Fuiava's claim of prejudice stands unimpaired.

Finally, the State asserts that there is no constitutional dimension to the claim because assertedly "[t]he United States Supreme Court has held that capital defendants have no federal constitutional right to such an instruction." (RB 298, citing *Franklin v. Lynaugh* , *supra*, 487 U.S. at pp. 174-175.) As Fuiava set forth in his opening brief, however, "*Franklin v. Lynaugh* did not dispositively reject the assertion that a defendant has a 'constitutional right to seek jury consideration of "residual doubts" about his guilt during his sentencing hearing.'" (AOB 350-351, quoting *Franklin v. Lynaugh*, *supra*, 487 U.S. at p. 175.) Moreover, since California permits the jury to consider lingering or residual doubts about guilt at the time of penalty, the refusal to give the requested instruction deprived Fuiava of his right to a reliable, non-arbitrary, and individualized sentencing determination guaranteed by the federal constitutional clauses barring cruel and unusual punishment and securing due process and equal protection. (See, e.g., *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318 [106 L.Ed.2d 256; 109 S.Ct. 2934]; *Clemons v. Mississippi* (1990) 494 U.S. 738 [108 L.Ed.2d 725; 110 S.Ct. 1441].)

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XXIII.

PROSECUTORIAL MISCONDUCT IN THE PENALTY PHASE REQUIRES REVERSAL OF THE JUDGMENT.

A. Introduction.

The prosecutor's misconduct did not abate in the penalty phase. Rather, the prosecutor continued to engage in significant misconduct during the evidentiary portion of the penalty phase. (see AOB 361-364.) "[T]he prosecutor's misconduct reached its zenith in his closing argument" at the penalty phase. (AOB 364.) On appeal, Fuiava separately assigned the prosecutor's penalty-phase misconduct as reversible error. (See AOB 358.)

B. The State's Procedural Objection.

The State claims at the outset that Fuiava "waived most of his specific claims alleging prosecutorial misconduct by failing to object and seek an admonition." (RB 300.) As Fuiava set forth in his opening brief, however, the pervasiveness and insistence of the prosecutor's misconduct throughout the proceedings made "any attempt by defense counsel to object to the misconduct ... futile. Accordingly, the claims of penalty phase misconduct are properly before this court." (AOB 359, quoting *People v. Hill*, *supra*, 17 Cal.4th at p. 836 [brackets and ellipsis in quote deleted].)

The futility, if not counter-productiveness, of further attempts by counsel for Fuiava to control the prosecutor's misconduct relieved counsel of the need to object and seek admonishment for each and every improper action of the prosecutor. For example, the State

asserts that counsel "did not object to the 'Devil' testimony" at the penalty phase. (RB 301-302.) This overlooks the fact that counsel did object during the guilt phase to inquiry about this old nickname of Fuiava, and that objection was overruled. (See AOB 226-227, quoting RT 164.) Similarly, the State's assertion that Fuiava's counsel "made no objection regarding the prosecutor's wearing of the [Viking] pin" at the penalty phase (RB 303) overlooks the fact that the court specifically authorized the prosecutor to wear the pin when the issue first came up at the guilt phase. (See AOB 266, citing RT 2250-2251.)

The inability of objections and admonitions to curb the prosecutor's misconduct and minimize the harm resulting from it may best be exemplified by the prosecutor's exploitation at the penalty phase of his wrongful comments about the marital privilege during his closing argument at the guilt phase. At the penalty phase the prosecutor built upon that misconduct when he recklessly asserted to the jury that he would have elicited evidence from Fuiava's wife that would have destroyed any remaining doubt as to Fuiava's guilt if she had then appeared as a witness. When the prosecutor first began to argue against lingering doubt by noting the absence of Fuiava's wife as a witness at the penalty phase, counsel promptly objected. "The court overruled defense counsel's objection to such argument (RT 2767), which encouraged the prosecutor to enlarge upon that misconduct[.]" (AOB 368.) Counsel objected again when the prosecutor continued his misconduct by suggesting that Fuiava's wife was not called as a witness on his behalf "because they are afraid that

they couldn't argue lingering doubt when I asked her what he told her." (RT 2768.) "Although the court sustained defense counsel's reiteration of his objection at this point and further told the prosecutor, 'I think you are going too far now, Mr. Richman,' the prosecutor nevertheless resumed his argument as follows: 'Think about that when he gets up here and asks you about lingering doubt or explains lingering doubt to you.' (RT 2768.)" (AOB 368-369.) The promiscuity of the prosecutor's flagrant misbehavior throughout the proceedings, which he continued heedless of the court's rulings, excused counsel from taking additional measures to control its "constant clang" at the penalty phase. (See AOB 219, citing *People v. Hill, supra*, 17 Cal.4th, at pp. 821& 846.)

C. The Merits of Fuiava's Claim.

The State also takes issue with the merits of Fuiava's claim, asserting that the prosecutor at all times acted with rectitude and propriety. (See RB 301-320.) Questions concerning whether the prosecutor committed misconduct in each of the instances identified by Fuiava are fairly joined by each party's brief, and do not warrant extensive reply here. Reference to just a few of the prosecutor's more egregious improprieties, however, puts the lie to the State's claim of no misconduct.

For example, the State continues to assert that the prosecutor's wearing of the Viking pin during the penalty phase was not "deceptive, reprehensible, or egregious." (RB 304.) In the very next sentence, however, the State acknowledged that "the trial court ordered the prosecutor to take the pin off ...." (RB 304, citing RT

2507.) The court did so because the prosecutor's misconduct in vouching for the Vikings through his wearing of the pin had become so blatant and egregious that the court felt compelled on its own to reverse its earlier decision on that point. The State protests that Fuiava "has not even demonstrated that Deputy Westin's testimony regarding the pin was inadmissible." (RT 304.) But the prosecutor's vouching for the Vikings through wearing of the pin only became more outrageous once Westin testified about the symbolic importance of the very pin that the prosecutor was wearing, and tied it to the positive description of the Vikings that the prosecutor elicited from Westin. (See AOB 40.) The prosecutor's abuse of his power and prestige in sporting the Viking pin both before and after eliciting testimony about it was misconduct that went to one of the most controverted matters at trial. Thus, the State's assertion that Fuiava "has not demonstrated that this conduct by the prosecutor was reprehensible, or deceptive, or that it was so egregious that it resulted in a denial of due process" (RB 303) is empty rhetoric, as is the State's claim of no harm (RB 304).

Nor were the prosecutor's various attempts to stir up passion and prejudice in his closing argument either proper or without impact on the verdict. To begin with, the prosecutor engaged in those attempts for the very purpose of swaying the jurors, so that the State's argument that there was no likelihood that any of them was so swayed rings hollow. Moreover, the State's reliance on the numerous instances where the court sustained objections to the prosecutor's conduct and/or admonished the jury to disregard the prosecutor's

comments to establish harmlessness (see, e.g., RB 302, 303, 308, 317) undermines its claims that the prosecutor engaged in no misconduct.

The prosecutor's appeal to passion and prejudice was especially transparent in his urging that the jury "sentence appellant to death to 'back up' the police and send a message that the killing of an officer would not be tolerated" (RB 309), his "quotation of the Biblical passage indicating that those who shed blood should have their blood shed" (RB 316), and his urgings that the jurors make their penalty determination not based on their "morals and ... values" but by "acting as society's consciousness" (RB 316). The State admits that the prosecutor's various comments urging the jury to impose death on Fuiava to back up the police in the war on gangs that they were losing, to send a message to the community, and to avenge the death of Blair were "potentially inflammatory ...." (RB 309.) The State nevertheless asserts that these comments were not misconduct because they were "isolated, brief references" that did "not form the principal basis for advocation of the death penalty." (RB 309, citing *People v. Davenport* (1995) 11 Cal.4th 1171, 1222; *People v. Wash*, *supra*, 6 Cal.4th at p. 262; *People v. Ghent* (1987) 43 Cal.3d 739, 771.)

Fuiava's case, however, is not like those cited by the State. *Davenport*, for example, concerned a single reference to "retribution." (See *People v. Davenport*, *supra*, 11 Cal.4th at pp. 1221-1222.) Similarly, in *Wash* the prosecutor made only several brief problematical comments within a minor part of his argument. (See *People v. Wash*, *supra*, 6 Cal.4th at pp. 261-262.) Finally, in *Ghent*, the prosecutor made what the appellant there described as "occasional

references to 'retribution' and 'community outrage'" and what the Court described as merely "[i]solated [and] brief references." (*People v. Ghent*, *supra*, 43 Cal.3d at p. 771.) In contrast, the offensive comments by the prosecutor in Fuiava's case along these lines were not mild, not isolated, and not brief. Rather, they were part of a theme that the prosecutor promulgated for pages of transcript and used to cap his conclusion. (See, e.g., AOB 365-366, citing RT 2750-2758; AOB 372-373, citing RT 2780-2781.) Thus, those comments constituted a principal basis of the prosecutor's argument in favor of the death penalty. True, "the prosecutor argued other grounds for imposition of the death penalty" (RB 310), but no court has ever held that improper comments must form the exclusive basis of a prosecutor's argument for death to constitute misconduct. Rather, the many cases cited by Fuiava on this point in his opening brief (see AOB 375 & 385) — authority that the State ignores in its brief — demonstrate the opposite. In addition, much of the remainder of the prosecutor's argument was improper on other bases, which only magnified the prejudicial effect when all the improper comments are taken together, as they must be to assess their prejudice. (See AOB 364-373.)

The prosecutor's outrageous assertion that he would have elicited evidence of admissions that Fuiava made to his wife that would have sealed the case for guilt had she appeared as a witness on his behalf belies the State's claim that the prosecutor here "simply argued that the appellant failed to present a logical witness in his case in mitigation." (RB 312.) What the prosecutor did here was argue facts not in evidence, transparently suggesting to the jury that he had

information not before it that Fuiava had made damning statements to his spouse that would have removed any last vestige of doubt as to his guilt. "[P]rosecutorial vouching, which consists of suggesting that information not presented to the jury supports the witnesses' testimony, is improper." (*United States v. Matthews* (9th Cir. 2000) 240 F.3d 806, 818, quoting *United States v. Molina* (9th Cir.1991) 934 F.2d 1440, 1445; ellipsis deleted.)

While that vouching in itself was gross prosecutorial misconduct, its building upon other facts outside the evidence that the prosecutor had disclosed to the jury to vouch for his case made his misconduct even worse. The prosecutor had already wrongly informed the jury in the guilt phase that Fuiava's exercise of the spousal privilege blocked the prosecution from introducing this alleged evidence. The prosecutor's repeated, deliberate and sophisticated abuse of his position made his misconduct particularly reprehensible. While the prosecutor in his argument at penalty did not "refer to appellant's exercise of the marital privilege to keep his wife from testifying" (RB 312), the prosecutor did not need to: He had already fully explained to the jury during the guilt phase that the marital privilege precluded him from calling Fuiava's wife as a witness. Then, at the penalty phase, the prosecutor assured the jury that the defense "couldn't argue lingering doubt when I asked her what he told her" (See RB 312.) The prosecutor thus told the jurors that Fuiava had made statements to his wife that constituted conclusive evidence of guilt and would have erased any doubt of such that lingered with any of them — if only the rules of evidence had not

precluded the prosecutor from producing that evidence. It is fundamentally unfair for a prosecutor to smuggle evidence into closing argument that he was precluded from presenting at trial, but it was doubly unfair here because it insulated the evidence from impeachment and made true what was not true. "[W]hen a jury considers facts that have not been introduced in evidence, a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to jury consideration of the extraneous evidence." (*Gibson v. Clanon* (9th Cir. 1980) 633 F.2d 851, 854.)

The State finally claims that any prosecutorial misconduct was harmless because "it is not reasonably possible" that it contributed to the verdict. (RB 320.) The State bases that conclusion on the purported "overwhelming aggravating evidence, the instructions to the jury, and the length of the jury deliberations ...." (RB 320.) The State's prejudice analysis is faulty on each of these points.

The State's first assertion, that there was "overwhelming aggravating evidence" that made any misconduct inconsequential (RB 320), fails as a matter of fact. The State's case for death was far from overwhelming. The prosecutor naturally emphasized and dwelled upon the circumstances of the capital offense, including its impact, as the most aggravating evidence in the case. (See, e.g., RT 2743-2761.) Indeed, after the prosecution led off his argument with a discussion of that aggravating factor, he advised the jury that his coverage of the other factors will "go faster now." (RT 2761.) Even in his much shorter discussion of the two other aggravating factors of prior felony

convictions and prior violence, the prosecutor ultimately returned to his fundamental reliance on the commitment offense to justify a death sentence. (See RT 2764 ["He killed Deputy Blair [] and we are just going to send him back to prison again?"].) The prosecutor again relied upon the circumstances of the offense to rebut the presence of significant mitigating factors in this case, including whether there were circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct (RT 2766-2767), or circumstances that extenuated the gravity of the crime or about the defendant that supported a sentence less than death (RT 2711-2772, 2774-2776, 2781). Moreover, at the beginning of argument the prosecutor evoked the memory of Blair through display of a large photograph of him in uniform, and urged the jury to let it color its deliberations "when you sit here and evaluate and weigh the aggravating factors versus the mitigating factors ...." (RT 2744.) To support its claim of overwhelming evidence in aggravation of sentence, the State quotes the trial court's finding that the offense was an "unjustified, unprovoked shooting at sworn law enforcement officers attempting to discharge their duties, which is the height of lawlessness ...." (RB 319, quoting RT 2817-2818; brackets in quote deleted.)

Yet, the evidence about the circumstances of the offense permitted a reasonable juror to conclude that they justified a sentence of life rather than death. The mitigating evidence about Fuiava and the offense is precisely what made the life-or-death decision here a particularly troubling one for the jury, for much of the evidence tilted

toward a life verdict. Fuiava was a first-generation Samoan with cultural traditions that did not transplant easily to the world of an inner city ghetto marked by daily violence. Instead of providing for law and order in that world, the police presence degenerated into another front in the war zone. The fatal confrontation between Fuiava and Blair occurred at a time when each side considered any confrontation with the other potentially life-threatening.

The circumstances of the crime included all the provocation, violence and fear that accompanied interactions between the deputies (particularly the Vikings), and community members (particularly Young Crowd). These circumstances included as well the evidence that abuse of the police power by the deputies contributed greatly to the community fear and resentment and resultant violence that culminated in the death of Blair. Thus, the circumstances of the offense permitted a reasonable juror to conclude that the killing was the very opposite of an "unprovoked shooting," and that the context of the shooting amid the rising tension in the community from the deputies' continued use of excessive force mitigated the offense. Fuiava's counsel so argued in explaining why the "real" circumstances of the crime called for the jury to spare Fuiava's life. (See RT 2783-2784, 2786-2788.)

The circumstances of the crime further established a substantial basis for return of a life sentence based on lingering doubt, given the conflicting evidence and uncertainty about how the shooting occurred. Either Blair or Fuiava shot preemptively, but it was never conclusively shown that it was Fuiava who did so. The evidence

showed (or would have, if the court had permitted it) that it had been the deputies who had most recently resorted to unnecessary deadly force, — specifically, "a deputy sheriff believed to be a Viking." (See RB 81.) Moreover, the police briefing that evening about the mock patrol car no doubt further inflamed the deputies. Blair and Lyons were primed for action as part of the deputy saturation of the neighborhood that evening. Counsel for Fuiava substantially relied on lingering doubt as well in his argument for life, and the prosecutor's concern that the jury might base a verdict on that consideration was evident. (Compare RT 2766-2768 with RT 2784-2786, 2792.) Thus, the case for life or death at its most fundamental level was close and contested.

With the penalty question as close and contested on these points as it was, the prosecutor's misconduct was especially likely to affect the verdict because it impacted precisely upon these points. (See AOB 266-267, quoting *People v. Modesto* (1967) 66 Cal.2d 695, 714, brackets in quote deleted ["prosecutorial misconduct in closing argument prejudicial where it either 'serves to fill an evidentiary gap in the prosecution's case' or 'touches a live nerve in the defense'"]. The misconduct both shored up the State's case for death where it was most vulnerable to defeat and undermined the strongest features of Fuiava's case for life.

For example, the evidence permitted a reasonable juror to conclude that excessive use of force and other deputy misconduct, particularly by the Vikings, was one of the base ingredients of the stew that sparked the shooting. This evidence thus had enormous

potential for mitigation. The prosecutor's adornment of himself with a Viking pin throughout the penalty phase considerably blunted that evidence, however, for it vouched in the most personal and vivid way for the deputy averments that the Vikings were an upstanding group of deputies filled with integrity as symbolized by that pin. In like manner, the doubt that lingered over whether Blair shot first in the course of his attempt to intimidate or apprehend Fuiava and Avila was another powerful basis to reject a sentence of death. (See, e.g., AOB 357-358 quoting *Tarver v. Hopper* (11th Cir. 1999) 169 F.3d 710, 715-716 for the proposition that lingering or residual doubt about guilt is the one factor that more than any other is likely to persuade a juror to opt for a life sentence.) Here, too, however, the prosecutor's misconduct bore directly on that basis for a life sentence, for his comments about the absence of Fuiava's wife from the penalty phase wrongly assured the jury that he had evidence it had never heard that would erase any doubt that lingered about Fuiava's guilt. At its most basic, the Constitution demands that a death verdict be based on trial evidence subject to all the protections that a trial affords. The Constitution does not permit execution based on prosecutorial assertions of what is beyond the evidence, nor on mere indictment by the prosecutor, nor on unsworn promises to the jury by the prosecutor.

Moreover, the prosecutor's overall appeal to passion and prejudice throughout his argument was precisely the kind of misconduct likely to inflame and infiltrate the jury's deliberations on the appropriate penalty for Fuiava. The jury faced a profoundly difficult question of whether Fuiava should live or die, given the

evidence that vied with and locked against each other so strongly on that question. The prosecutor exhorted the jury to resolve that thorny question by passion rather than reason. (See generally AOB 374-375, 385.) Thus, the likelihood was substantial that the passion engendered by the prosecution was the tipping point in the jury's deliberations. Yet, a death judgment must "be and appear to be based on reason rather than caprice or emotion." (*Gardner v. Florida,* (1977) 430 U.S. 349, 358 [97 S.Ct. 1197].) Nor may a death judgment be "imposed out of whim, passion, prejudice, or mistake." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 [71 L.Ed.2d 1, 102 S.Ct. 869] (conc. opn. of O'Connor, J.).)

The State's second assertion, that the general instructions to the jury that statements of the attorneys were not evidence and that it was to decide the case based on the evidence rather than bias or prejudice purged any taint, fails as a matter of law. No authority supports the State's claim that such general concluding instructions negate the possibility of taint from misconduct of the kind that occurred in Fuiava's case. This Court as far back as 1891 established that such instructions, and indeed even more pointed admonitions, cannot overcome prejudice from the prosecutor's wrongful insinuation of material facts that are not in evidence. (See *ante*, Argument XII, Section F., pp. 181-183, quoting *People v. Ah Len*, *supra*, 92 Cal. at pp. 283-285.) The Court has adhered to that ruling ever since. For example, in *People v. Wagner*, *supra*, 13 Cal.3d at p. 619, the prosecutor insinuated past misconduct of the defendant during his questions. The Court found that this misconduct was "not cured by

the fact that his questions elicited negative answers ... [because] the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question." (*Ibid.*) Rather, the jury was irreparably tainted once the prosecutor suggested information in his possession that it did not have:

> We note in passing that the trial court admonished the jurors "not to draw any inference or make any speculation as to what the answer to questions asked by the prosecutor to which objections were sustained might have been. A question is not evidence so just take the position that you never heard it." Subsequently, the jurors were given a form instruction which stated that "You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer." We conclude, however, that neither the admonition nor the form instruction were sufficient to cure the prejudicial effect of the prosecutor's repeated insinuations ....

(*Id.* at p. 621, ellipsis and brackets in quote deleted; see also *People* v. *Evans* (1952) 39 Cal.2d 242, 248-249 [finding irreparable prejudice from similar insinuation of facts not in evidence].) The single authority that the State cites, *People v. Cunningham, supra*, 25 Cal.4th at p. 1019, does not detract from this rule of law, for there the Court found no misconduct.

The State's last assertion, that the fact that "the jury deliberated less than one full day before reaching its penalty verdict" demonstrates the harmlessness of the prosecutor's misconduct (RB

319, citing RT 2799-2802), fails both as a matter of fact and as a matter of law. In fact, the cited pages show that the jury deliberated approximately one full day before reaching its verdict after only two days of hearing evidence. It began its deliberations in the morning after argument of counsel and concluding instructions that together comprised less than 60 pages of transcript, and deliberated for the rest of the day, with noon and evening recesses. (See also RT 2741-2798.) The jury then reconvened the next morning, and announced that it had reached its verdict after approximately 90 more minutes of deliberations. (RT 2801-2802.) The State cites no authority for the proposition that deliberations that last less than one full day indicate the case was not close, let alone authority that deliberations that last as long as a full day indicate such. To the contrary, this Court has found that deliberations of approximately six hours are lengthy ones that indicate that the case *was* close, increasing the likelihood of prejudice from the error. (See, e.g., *People v. Woodard* (1979) 23 Cal.3d 329, 341.) This is especially so where the evidence portion of the trial was relatively brief.

Moreover, any perceived brevity of the jury's deliberations is not probative on the question of jury taint, for that brevity may well be due to that taint. Thus, it is futile for the State to base a claim that the jury was not tainted by the prosecutor's misconduct on the fact that the jury deliberations were not particularly lengthy. Any brevity in deliberations tends to prove prejudice rather than negate it where an objective view of the evidence shows that the case was — or would have been, absent the error — a close and difficult one for the jury.

Nor can the cumulative impact of the prosecutor's misconduct be overlooked, as the State did in its brief. As set forth in the opening brief, the prosecutor's misconduct at penalty phase not only was broad and multi-faceted in itself, but continued and enlarged upon misconduct in the guilt phase that also must be considered in determining its impact on the penalty verdict. (See AOB 381-382 & 442.) As further set forth in that brief, authority from both this Court and the United States Supreme Court establishes that when a prosecutor's "misconduct was pronounced and persistent [the] probable cumulative effect upon the jury ... cannot be disregarded as inconsequential." (AOB 381, quoting *Berger v. United States* (1935) 295 U.S. 78, 89 [55 S.Ct. 629, 79 L.Ed. 1314]; see also AOB 381, citing *People v. Hill, supra*, 17 Cal.4th at p. 847 as an example where "[t]his Court, too, has recognized that prejudice is likely when there is a series of prosecutorial improprieties, for in aggregation they may together rise to the level of reversible and prejudicial error, even if each instance independently is harmless"].)

In sum, given both the quantity and the quality of the prosecutor's misconduct, as well as the subjective nature of the penalty decision, the High Court's conclusion in *Chapman v. California* (1967) 386 U.S. 18, 25-26 is apt here:

> [This is] a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in [life] verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the

prosecutor's comments [and other misconduct] ... did not contribute to petitioners' [judgment].

* * * * * *

XXIV.

THE FAILURE OF CALIFORNIA'S DEATH PENALTY LAW TO MEANINGFULLY DISTINGUISH THOSE MURDERS IN WHICH THE DEATH PENALTY IS IMPOSED FROM THOSE IN WHICH IT IS NOT REQUIRES REVERSAL OF THE JUDGMENT.

The State characterizes as "meritless" Fuiava's claim that California's death penalty law "is impermissibly broad and fails adequately to narrow the class of person eligible for the death penalty." (RB 321.) According to the State, "[t]he United States Supreme Court has found that California's requirement of a special circumstance finding adequately 'limits the death sentence to a small subclass of capital-eligible cases.'" (RB 321, quoting *Pulley v. Harris* (1984) 465 U.S. 37, 53.) But Fuiava dealt with *Pulley v. Harris* in his opening brief:

> In *Harris*, the issue before the Supreme Court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the High Court itself contrasted the 1977 law with the 1978 law under which Fuiava was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley v. Harris*, 465 U.S. at p. 52, fn. 14.)

(AOB 321.) In addition, Fuiava traced the steady expansion of California's death penalty net since its 1970's laws, to the point where "the statute now outlines twenty-two categories of murder for which

the death penalty may be imposed, many of which are extremely inclusive of murders." (AOB 389.) Fuiava also pointed to studies since *Pulley* that either have "presented empirical evidence demonstrating in two respects that California's law fails to perform the constitutionally mandated narrowing function" (AOB 391) or "shown that wrongful death judgments are much more likely in jurisdictions like California, which provide a broad range of qualifying murders" (AOB 390). The State makes no response to these points, nor to the showings that Fuiava made in his opening brief demonstrating California's "broad and random use" of the death penalty. (See AOB 398.) Accordingly, this Court should strike down California's death penalty scheme for its failure to distinguish the few cases in which the death penalty may legitimately be imposed from the many cases in which it may not be. Such an indiscriminate and overbroad program of capital punishment violates " the Eighth Amendment's proscription against cruel and unusual punishment ... [and] the Fourteenth Amendment's proscription against arbitrary and capricious administration of the death penalty." (See AOB 386 and authorities cited therein.)

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XXV.

THE JUDGMENT MUST BE REVERSED BECAUSE IT WAS NOT PREMISED ON FINDINGS BY A UNANIMOUS JURY BEYOND A REASONABLE DOUBT OF THE PRESENCE OF ONE OR MORE AGGRAVATING FACTORS THAT OUTWEIGHED MITIGATING FACTORS.

Fuiava assigned as error on appeal the lack of any requirement that the jury unanimously find beyond a reasonable doubt the presence of any aggravating factor supportive of its death judgment and of its ultimate determination that death was the appropriate verdict. (AOB 398-410.) Recognizing that this Court has rejected similar arguments in the past, Fuiava argued that the recent High Court decision in *Ring v. Arizona* (2002) 536 U.S. 584, __ [122 S.Ct. 2428, 153 L.Ed.2d 556], which built on *Apprendi v. New Jersey* (2000) 530 U.S. 466, [120 S.Ct. 2348, 147 L.Ed.2d 435], changed the analysis. (AOB 399.) The State argues otherwise, citing decisions of this Court that have been filed since Fuiava's opening brief that have rejected this argument. (See RB 325, chiefly citing *People v. Prieto* (2003) 30 Cal.4th 226, 262-263 & 271-272.) A careful look at California's death penalty procedures, however, shows that essential steps in the death-eligibility process take place during the penalty phase of a capital trial that are subject to the mandates of *Ring*.

California utilizes a bifurcated process in which the jury first determines guilt or innocence of first-degree murder and whether or not alleged "special circumstances" are true. If a defendant is found guilty and at least one special circumstance is found to be true, a

penalty phase proceeding is held, where evidence may be presented by the prosecution and defense to establish the presence or absence of specified "aggravating circumstances" and "mitigating circumstances." The jurors are instructed that they are to weigh aggravation against mitigation and may impose death only if they find that the former substantially outweighs the latter. If aggravating circumstances do not substantially outweigh mitigating circumstances, the jury must impose life without possibility of parole (LWOP). Even if aggravating circumstances do substantially outweigh mitigating circumstances, the jury has the discretion to exercise mercy and impose LWOP instead of death. (See §§ 190-190.9; CALJIC Nos. 8.84-8.88; *People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown* (1985) 40 Cal.3d 512, 541.)

In California, the penalty for first-degree murder is 25 years to life unless at least one of the statutorily enumerated list of "special circumstances" is found. This finding is made during the guilt phase by the jury, unanimously and beyond reasonable doubt. Prior to *Ring*, this Court held that "there is no right under the Sixth or Eighth Amendments to the United States Constitution to have a jury determine the existence of all of the elements of a special circumstance." (*People v. Odle* (1988) 45 Cal.3d 286, 311.) However, the Court later acknowledged the error of that holding. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 256.) The trial may proceed to a penalty phase, where the jury hears additional evidence and argument from the prosecution and defense and determines whether

the penalty will be LWOP or death, only if the jury has first found that a special circumstance allegation is true.

California's scheme in the eligibility phase directly parallels the Arizona scheme described in *Ring*. (Compare Ariz. Rev. Stat. Ann. § 13-703(E) & (F) to Cal. Pen. Code §§ 190.2 & 190.3.) The Arizona statute, like section 190.3, lists the specific circumstances which can be considered as aggravating or mitigating the offense. (Ariz. Rev. Stat. Ann. § 13-703(F).) Some of these are similar to some of the special circumstances found in California's section 190.2 (compare § 190.2(3) with Ariz. Rev. Stat. Ann. § 13-703(F)(8); and § 190.2(2) with Ariz. Rev. Stat. Ann. § 13-703(F)(1); and § 190.2(7) with Ariz. Rev. Stat. Ann. § 13-703(F)(10); others, however, are equivalent to section 190.3's aggravating circumstances. (Compare § 190.3, subds. (c), (a), (i), (h), (g), & (k), with Ariz. Rev. Stat. Ann. §§ 13-703(F)(2), (F)(6),(9)&(3), (F)(5)&(9), (G)(1), (2), and 13-703(G), respectively.)

Like a first-degree murder conviction under the Arizona statutory scheme invalidated by the Court in *Ring*, a jury verdict of guilt with a finding of a special circumstance in California "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 536 U.S. at pp. 602-605.) In California, death is the maximum penalty for *all* murder convictions. (See § 190.1, subds. (a), (b) & (c).) Section 190, subdivision (a) provides that the punishment for first-degree murder is 25 years to life, life without the possibility of parole, or death. The penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5" (*Ibid.*)

Section 190.3 requires the jury to impose LWOP unless the jury finds aggravating factors outweigh factors in mitigation. According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), an aggravating factor is "any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88.) In the context of a California capital murder conviction, the "elements of the crime" can only be interpreted to mean the elements necessary to prove both the first degree murder and whatever special circumstance or circumstances may have been found during the guilt phase. Only then is the defendant truly "eligible" for death. The jury then engages in the final, purely normative stage of determining whether a particular defendant should be sentenced to death. Even if the jury concludes that aggravation outweighs mitigation, as noted, it may still impose LWOP.

To summarize, then, there are four steps to determining whether the sentence in a California capital case will be death or LWOP: (1) the defendant must be found guilty of first-degree murder with a "special circumstance" enumerated in section 190.2; (2) at least one of a *different* list of "aggravating factors" from section 190.3 must be found; (3) aggravating factors must be found to outweigh any mitigating factors present; and (4) if and only if aggravating factors are found to substantially outweigh mitigating factors, the jury must choose between death and LWOP.

Of these four steps, only the first occurs during the guilt phase of the trial, attended by the Sixth Amendment's protections of unanimity and proof beyond reasonable doubt. In contrast, steps 2, 3, and 4 occur during the penalty phase, unprotected by these constitutional constraints. Although occurring in the penalty phase, steps 2 and 3 are part of the *eligibility* determination as described by this Court in *People v. Tuilaepa* (1992) 4 Cal.4th 569, rather than the *selection* determination. Like the Arizona defendant in *Ring* convicted of first-degree murder, a person convicted of first-degree murder with a special circumstance finding in California is eligible for the death penalty in a "formal sense" only. (*Ring, supra,* 536 U.S. at pp. 602-605.) In substance; a defendant is not eligible for the death penalty unless and until he passes through the further gates of steps 2 and 3.

It is here that California's scheme runs afoul of *Ring*, for steps 2 and 3 do not require either juror unanimity or findings beyond reasonable doubt. Yet, they do involve factual determinations above and beyond those made in the guilt phase of the trial necessary for the imposition of death. Therefore, under *Ring*, these factual determinations must be made unanimously and beyond a reasonable doubt. A special circumstance finding pursuant to section 190.2 is not the same as an aggravating factor; it can even serve as a mitigating factor. (See e.g., *People v. Hernandez* (2003) 30 Cal.4th 835 [financial gain special circumstance of section 190.2, subd. (a)(1) can be argued as mitigation if murder was committed by an addict to feed addiction].)

In effect, the California Legislature has extended steps of the eligibility phase into the penalty phase of the trial. The selection phase does not begin until step 4, where the jury considers all of the circumstances of the case and defendant, and determines whether to impose death.

The highest courts of Colorado, Missouri, Nevada, Connecticut, Arizona, and Maryland have concluded that steps wholly analogous to step 2 of California's process involve factual determinations and are therefore subject to the requirements of *Ring*, and all but Maryland have further concluded that steps analogous to step 3 of California's process — the determination of whether aggravation outweighs mitigation — is also a factual determination that must be made beyond a reasonable doubt. (See *Woldt v. People* (Colo. 2003) 64 P.3d 256, 263-267; *State v. Whitfield* (Mo. 2003) 107 S.W.3d 259; *Johnson v. State* (Nev. 2002) 59 P.3d 450, 460; *State v. Rizzo* (Conn. 2003) 833 A.2d 363, 406-407; *State v. Ring* (Ariz. 2003) 65 P.3d 915, 942-943; *Oken v. State* (Md. 2003) 835 A.2d 1105, 1122.) California stands alone among the states in holding that the determination of whether aggravating factors are present need not be made by the jury unanimously and beyond reasonable doubt. And in *Prieto*, this Court stated that the high court's reasoning in *Ring* does not apply to the penalty-phase determination in California. (See also *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32, also cited by the State at RB 325.) In *Prieto*, this Court recognized that a California sentencing jury is charged with a duty to find facts in the penalty phase: "While each juror must believe that the aggravating circumstances substantially

outweigh the mitigating circumstances, he or she need not agree on the existence of any one aggravating factor. This is true *even though the jury must make certain factual findings* in order to consider certain circumstances as aggravating factors." (*People v. Prieto*, *supra*, 30 Cal.4th 226 at p. 263, emphasis added.)

Thus, California's statutory law, jury instructions, and this Court's previous decisions leave no doubt that facts must be found, and fact-finding must occur, before the death penalty may be considered. Yet, this Court has attempted to avoid the mandates of *Ring* by characterizing facts found during the penalty phase as "facts which bear upon but do not necessarily determine which of these two alternative penalties is appropriate." (See *People v. Snow, supra*; see also *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn. 14.) This is a meaningless distinction. There are no facts in either Arizona's or California's scheme that are necessarily determinative of a sentence; in both states the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. The jury's role in the penalty phase of a California capital trial requires that it make factual findings regarding aggravating factors that are a prerequisite to a sentence of death. *Ring* thus applies. California's statute, as written, applied, and interpreted by this Court, is unconstitutional and must fall.

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XXVI.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND AS APPLIED TO FUIAVA, VIOLATES THE UNITED STATES CONSTITUTION, REQUIRING REVERSAL OF THE JUDGMENT.

Fuiava has challenged the constitutionality of California's death penalty scheme based on a number of features of that law that in theory and in practice promote arbitrary and unreliable death judgments. (AOB 410-440.) Fuiava acknowledged that these "arguments ... largely have already been rejected by this Court in other cases ... [but] retain their constitutional vitality ... because they have not necessarily been rejected by the United States Supreme Court." (AOB 410.) In response, the State primarily relies on this Court's prevailing law sanctioning the various features of the death penalty law that Fuiava has challenged. (RB 326-340.) Fuiava accordingly largely submits his challenge to the constitutionality of California's death penalty practice without further argument.

The State's response to Fuiava's "complaint with regard to the appeal process" (RB 337), however, calls for reply. The State critiques that complaint as no more than a "conclusionary statement that this Court's 'manner of review on direct appeal' has 'increasingly rendered state post-conviction remedies ineffectual to protect against unreliable judgments of death, and thereby aggravated the unreliability of California's death judgments.'" (RB 337, quoting AOB 434.) The State then asserts that Fuiava has been accorded

elaborate process on appeal. (RB 337.) On that basis, the State asserts that Fuiava's claim "overlooks the reality of what occurs in this state ...." (RB 337.)

To the contrary, Fuiava's claim is based exactly on the reality of what occurs in a capital appeal in this state, for whatever procedural due process is accorded on appeal, substantive due process is missing. The reality is that this Court's review provides an inadequate check on unconstitutional and unreliable death judgments. The reality is that the State would have unconstitutionally executed scores of individuals whose condemnation to death was approved by this Court were it not for the federal writ of habeas corpus — a writ that has been substantially narrowed for Fuiava due to increased "procedural barriers to obtaining federal habeas corpus relief under AEDPA." (RB 336, referring to AOB 433-434.)

Fuiava is not "in the wrong forum" (RB 336) when he emphasizes the finality that attends this Court's denial of post-conviction relief. The reality is that the path to overcoming that finality in federal habeas proceedings is ever narrowing. Just as the State notes: "This is, after all, an *appeal* from a judgment of death which seeks to ensure appellant received a fair trial and that the death verdict is reliable." (RB 337; italics in original.) Fuiava here appeals from the judgment of death precisely because California's capital post-conviction process demonstrably fails "to ensure ... that the death verdict is reliable."

The most dramatic evidence of the unconstitutionality of California's death penalty law, as legislated, administered, and

supervised finally by this Court, is the fact that the courts have overwhelmingly found California's death judgments unconstitutional. A distressing number of those findings have been by federal courts after those judgments have passed this Court's gateway to the execution chamber. California has imposed over 700 death judgments since 1978. (See California Department of Corrections (CDC), Death Sentence Status, 1978 to Present [http://www.corr.ca.gov/CommunicationsOffice/CapitalPunishment/death_sentence (as of 11/19/2004].) To date, only eight of those judgments have been found upon final federal review to meet the constitutional demand of reliability that permits California to carry out its intention to execute the individual, for two of the ten prisoners that California has executed in that time (David Edwin Mason and Robert Lee Massie) were "volunteers" who waived federal court review of their judgments. (See DPIC, Number of Executions by State and Region Since 1976 [http://www.deathpenaltyinfo.org/article.php?scid=8&did-186 (as of 11/19/2004)]; DPIC, Execution Database [http://www.deathpenaltyinfo.org/getexecdata.php (as of 11/19/2004)]; CDC, [http://www.corr.ca.gov/CommunicationsOffice/CapitalPunishment/executed_inmate (as of 11/19/2004]; CDC, [http://www.corr.ca.gov/CommunicationsOffice/CapitalPunishment/inmates executed (as of 11/19/2004)].)

Meanwhile, at least 60 death judgments in that time have been found infirm and unreliable in the courts, including this one. (See CDC, [http://www.corr.ca.gov/CommunicationsOffice/CapitalPunishment/death_sentence (as of 11/19/2004)] (60 sentences

overturned); 4/16/02 San Jose Mercury News OP1, 2002 WL 18706800 [72 reversals].) In short, the frightening fact is that California's death judgments are constitutionally unreliable 8 or 9 times out of 10.

Almost as frightening is the fact that this Court's review of death judgments cannot be counted on to protect against the unconstitutional practice of imposing death in California. Knowledgeable observers have found that this Court is "unusually tolerant of error." (Liebman, et al. (2002) *A Broken System, Part II: Why There Is So Much Error in Capital Cases, And What Can Be Done About It* [*Broken System II*], p. 65.) The Liebman study showed that this Court has an "atypically low reversal rate[]." (*Ibid.*) Another study showed that this Court's "10 percent reversal rate is among the nation's lowest." (See 4/16/02 San Jose Mercury News OP1, 2002 WL 18706800; see also 4/15/02 San Jose Mercury News 1, 2002 WL 18706650 ["[I]t is the California Supreme Court that has moved further from the national norm in ruling on these life-and-death cases, affirming nine of every 10 it reviews."]).) "Studies show that the California Supreme Court is less likely to overturn a death sentence than just about any of the 38 state high courts that review capital appeals." (4/15/02 San Jose Mercury News 1, 2002 WL 18706650 at *2.)

This Court's low reversal rate, unfortunately, is not a product of the reliability of death verdicts in California. Rather, it is a contributing factor to the rampant unconstitutionality of the death penalty in California, for California has an "especially high federal

reversal rate[]." (See Liebman et al., *Broken System II*, *supra*, at p. 65.) In fact, "federal courts ... are overturning a higher percentage of capital cases [from California] than from any other state." (4/15/02 San Jose Mercury News 1, 2002 WL 18706650.) As of April 15, 2002, "federal judges [had] overturned 36 ... cases in the state ... since California restored capital punishment in 1978." (*Id.* at *3.) Since then, the Ninth Circuit has overturned several more death judgments for lacking constitutional reliability. (See, e.g., *Sanders v. Woodford* (9th Cir. 2004) 373 F.3d 1054; *Belmontes v. Woodford* (9th Cir. 2003) 350 F.3d 861; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862.) The shameful fact is that to date final decisions by the federal courts have shown that this Court has failed in 80% of those cases to protect condemned defendants from wrongful execution by the state. The undeniable fact is that this Court's tolerance of flawed death verdicts has contributed to the unusual unreliability of death verdicts rendered in California and consequent unconstitutionality of California's capital punishment scheme.

These statistics show how far California is from minimum benchmarks of constitutionality. California has promised "thoughtful and effective appellate review" to guarantee the fairness and reliability of death judgments. (See *Pulley v. Harris*, 465 U.S. 37 at p. 53 [104 S.Ct. at pp. 880-881], quoting *People v. Frierson* (1979) 25 Cal.3d 142, 179.) "[B]ecause human error is inevitable, and because our criminal justice system is less than perfect, searching appellate review of death sentences and their underlying convictions is a prerequisite to a constitutional death penalty scheme." (*Callins v.*

Collins (1994) 510 U.S. 1141 [114 S.Ct. 1127, 1129] (Blackmun, J., dissenting from denial of certiorari).) Such searching review is missing in California.

The Chief Justice of this Court repeatedly has suggested that the disparity between affirmance rates by it and reversal rates by the federal courts may be explained by the fact that "we have different standards on prejudicial error than the federal courts." (4/15/02 San Jose Mercury News 1, 2002 WL 18706650 at *2.) The Constitution requires that this Court apply a strict prejudice standard for constitutional errors, however, requiring the State to prove beyond a reasonable doubt that any such error was harmless. (See, e.g., AOB 94, citing *Chapman v. California*, *supra*, 386 U.S. at p. 24.) This is a much stricter standard for prejudice than the federal courts apply on habeas corpus. On federal habeas, an error is considered harmless unless it has had a substantial and injurious effect upon the verdict. (See *Brecht v. Abrahamson* (1993) 507 U.S. 619, 623 [113 S.Ct. 1710, 1722].) Thus, these different standards for prejudice should make the incidence of reversal higher in state court than in federal court, for the latter harmless error standard is informed by respect for the finality of state court judgments. This Court's unusually high rate of affirmance of death judgments, followed by an unusual high rate of federal court overturning of death sentences, can be explained only by this Court's unwillingness to reverse death judgments even in the face of constitutional error that demonstrates their unreliability.

California's inability to protect against arbitrary and capricious execution of its own subjects is scandalous. "[T]he machinery of

death" (*Callins v. Collins*, *supra*, 114 S.Ct. at p. 1130 (Blackmun, J., dissenting from denial of certiorari)) is broken, at least in California. This Court may tinker with it from time to time with the odd reversal, but justice is so regularly miscarried beyond this Court that California's machinery of death is beyond repair. As did Justice Blackmun, this Court should conclude on behalf of California "that the death penalty experiment has failed" (*ibid.*), and accordingly reverse Fuiava's death judgment.

* * * * * *

XXVII.

IMPERMISSIBLE RACE FACTORS CONTRIBUTED TO THE JUDGMENT, REQUIRING REVERSAL.

Fuiava argued that impermissible race factors permeated his prosecution and contributed to the judgment of death imposed upon him. (AOB 435-440.) He laid out how "racial prejudice was the genesis of this case" (AOB 440) and "played an improper role ... from the initial charging decision to the penalty sentencing." (AOB 436.) The State "submits [] there is no record support for" this claim. (RB 339.) Fuiava rests on the showing he made in his opening brief, which included the highly-charged divide between the white-majority Vikings and the ethnic-minority Young Crowd as well as a racial slur directed at Fuiava by the prosecutor. The State's protest that no racial animus tinged this case ignores not only this record, but the larger social context in which this prosecution proceeded — indeed, in which the shooting occurred.

"Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death ...." (*Callins v. Collins, supra*, 510 U.S. at p. 1153 [114 S.Ct. 1127, 1135, 127 L.Ed.2d 435] (Blackmun, J., dissenting from denial of cert.).) This view has been seconded by another well-respected jurist:

> Adding to the arbitrariness inherent in the system is our society's deeply-rooted problem of racial bias.

> Studies have shown that persons who kill white victims are sentenced to death more often than persons who kill black victims and that, in some jurisdictions, black defendants receive the death penalty more often than do white defendants. Systematic racial discrimination in capital sentencing is one of the reasons cited by the American Bar Association in support of its recent resolution calling for a moratorium on carrying out death sentences in any state until such time as adequate safeguards are in place to ensure fair and impartial administration and the risk of killing innocent persons can be minimized. [Citation.]

(*Singleton v. Norris* (8th Cir. 1997) 108 F.3d 872, 875 (conc. opn. of Heaney, J.).) Recent studies confirm that race has a pernicious effect upon imposition of the death penalty. (See, e.g., *Death Penalty Information Center*, Facts About the Death Penalty (p. 2), September 22, 2004, Recent Studies on Race, [http://www.deathpenaltyinfo.org/FactSheet.pdf] (as of 9/29/2004).) This Court should accordingly reverse the judgment of death imposed upon Fuiava.

* * * * * *

XXVIII.

CUMULATIVE PREJUDICE REQUIRES REVERSAL OF THE DEATH JUDGMENT.

Fuiava asserted that the cumulative prejudice from the errors at the penalty phase, especially when also combined with the errors at the guilt phase, "converged to miscarry justice" and undermine the reliability of the death judgment. (AOB 441-442; see also *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1208.) ["consideration of petitioner's claim of error at the penalty phase may be cumulated with guilt-phase error, so long as the prejudicial effect of the latter influenced the jury's determination of sentence"].) The State merely argues that "there was no error at the penalty phase." (RB 341.) Fuiava has made an overwhelming showing otherwise.

The State further asserts that in any event "appellant has failed to demonstrate prejudice" (RB 341), but the State here has it backwards. It is the State that bears the burden of demonstrating that any error at the penalty phase was harmless beyond a reasonable doubt, whether the error was one of state or constitutional law. (See, e.g., *Chapman v. California*, *supra*, 386 U.S. at p. 24 ["beneficiary of a constitutional error" must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"; *People v. Edwards* (1991) 54 Cal.3d 787, 844, fn. 14 ["the stricter reasonable possibility standard applies even to errors of state law at the penalty phase"].) "Our state *reasonable possibility* standard is the same, in substance and effect, as the *harmless beyond a reasonable doubt*

standard of *Chapman*...." (*People v. Jones* (2003) 29 Cal.4th 1229,1265, fn. 11.) As *Chapman* noted, placement of the burden on the State to prove harmlessness is in accord with "the original common-law harmless-error rule [that] put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." (*Chapman v. California*, *supra*, 386 U.S. at p. 24, citing 1 Wigmore, Evidence (3d ed. 1940) § 21; see also *O'Neal v. McAninch* (1995) 513 U.S. 432, 436, 115 S.Ct. 992, 995 [while eschewing harmless-error analysis "in terms of 'burden of proof,'" Court concludes that doubt as to harm on habeas should be resolved in favor of the petitioner].)

The State makes no attempt to overcome Fuiava's demonstration that "[t]he errors ...combined ... to make their sum greater than their parts" when assessing cumulative prejudice. (See AOB 441.) Certainly invocation of the old saw that a "defendant is only entitled to a fair trial, not a perfect one" (RB 341) fails to serve as meaningful rebuttal to Fuiava's showing that "when all the errors are considered together, the fundamental injustice of the death penalty is manifest." (AOB 442.) Just as this Court found in another case:

> The sheer number of the instances of prosecutorial misconduct, together with the other trial errors, is profoundly troubling. Considered together, we conclude they created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors. Considering the cumulative impact of [the prosecutor's] misconduct, at both the guilt and penalty phases of the trial, together with ... the other errors throughout the trial, we conclude

> defendant was deprived of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial. Defendant is thus entitled to a reversal of the judgment and a retrial free of these defects.

(*People v. Hill*, *supra*, 17 Cal.4th at p. 847.)

* * * * * *

XXIX.

FUIAVA WAS DENIED AN IMPARTIAL DECISIONMAKER, REQUIRING REVERSAL.

Fuiava has asserted his entitlement to reversal on the ground that the trial court pre-judged his case. (AOB 443-446.) The State acknowledges that Fuiava was "entitled to an impartial trial judge." (RB 342.) It claims only that he "has failed to demonstrate that the trial judge was partial toward the prosecution and 'jaded' toward the defense in its rulings." (RB 342.) Though the State denigrates Fuiava's claim as nothing more than "a restatement of the previous 28 issues discussed" in his brief (RB 342), the fact that the record is so marked with abuse of trial court discretion is powerful evidence in support of his claim that he was deprived of an impartial decisionmaker. And, as Fuiava set forth in his opening brief, denial of an impartial decisionmaker is a structural error that "necessarily renders a trial fundamentally unfair" and requires reversal. (AOB 446, quoting *Rose v. Clark*, *supra*, 478 U.S. at p. 577; brackets in brief deleted.)

* * * * * *

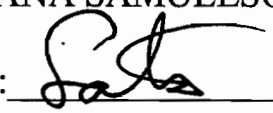
CONCLUSION

For these reasons and for those stated in the opening brief, the Court should reverse the judgment.

Dated: November 22, 2004

Respectfully submitted,

MICHAEL SATRIS
DIANA SAMUELSON

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 November 24, 2004, I served the within **APPELLANT'S 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 on November 24, 2004.

Sabine Jordan