IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FREDDIE FUIAVA, Defendant and Appellant.	No. S055652

APPELLANT'S SUPPLEMENTAL BRIEF

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

HONORABLE S. ROBERT J. PERRY, TRIAL JUDGE

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By appointment of the
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Appellant FREDDIE FUIAVA files this brief in accordance with California Rules of Court, rule 8.520, subdivision (d) to address the significance of any decisional law published since briefing in his case that he wishes to rely on.

ARGUMENT

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.

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 constituted

reversible error. (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, particularly for a juror like Mr. T., whose rift with the other jurors appeared to stem from his view of the evidence favorable to the defense. Fuiava submitted 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 required 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 and that the difference of opinion between him and the other jurors had to do with his view of the merits, so that the denial of the motion was error that aggravated the constitutional violation. (AOB 130-131.)

Williams v. Cavazos (9th Cir. 2011) 646 F.3d 626, 644 confirms the merits of Fuiava's claim here. The Ninth Circuit there explained the federal constitutional issue as follows:

> [I]n deciding whether to discharge a juror middeliberation, the critical Sixth Amendment questions are whether, after an appropriately limited inquiry, it can be said that there is no reasonable possibility that the juror's discharge stems from his views of the merits, and whether the grounds on which the trial court relied are valid and constitutional. If the answer to either question is no, the

> removal of the juror violates the Sixth Amendment.

In *People v. Cleveland* (2001) 25 Cal.4th 466, this Court acknowledged the important interests surrounding the right to trial by jury that led some federal courts to utilize this standard for review of a court's discharge of a juror amid the jury's deliberations, especially when the juror is apparently holding out for the defense; in *Cleveland*, however, the Court declined to adopt this standard of review, stating:

> Rather, we adhere to established California law authorizing a trial court, if put on notice that a juror is not participating in deliberations, to conduct "whatever inquiry is reasonably necessary to determine" whether such grounds exist [citation], and to discharge the juror if it appears as a "demonstrable reality" that the juror is unable or unwilling to deliberate [citation].

(*People v. Cleveland*, 25 Cal.4th at pp. 483-484; see also *People v. Lomax* (2010) 49 Cal.4th 530, 590, fn. 17 [reiterating its choice of the *Cleveland* standard of review over the federal one].)

In *Williams v. Cavazos*, the Ninth Circuit described the trial court's decision in discharging the juror as follows:

> After the inquiry concluded, the court dismissed Juror No. 6 under California Penal Code section 1089, which provides for the discharge of jurors for good cause. The court ruled that its dismissal of Juror No. 6 was "not because he's not deliberating and not because he's not following the law." Instead, "he is

> dismissed without any question in my mind as a biased juror," because "his mind is bent ... against the prosecution," as evidenced by his statements concerning the government's burden of proof, his disagreement with the felony-murder rule, and his "dishonest[y]" in recounting whether anyone had discussed the severity of the charge or juror nullification. The court then concluded that Juror No. 6 "was lying in court" and "has no business being a juror in this matter," and so dismissed him.

(*Williams v. Cavazos*, 646 F.3d at p. 634.)

As the Ninth Circuit further recounted, this Court granted review for reconsideration in light of *Cleveland* after the Court of Appeal affirmed the conviction that ensued following substitution of the juror. (*Williams v. Cavazos*, 646 F.3d at p. 635.) "On remand, the Court of Appeal issued a slightly modified version of its prior opinion and again affirmed Williams's conviction. The Court of Appeal reiterated that the trial court 'discharged Juror No. 6 because he had shown himself to be biased, not because he was failing to deliberate or engaging in juror nullification.' ... The Supreme Court of California denied Williams's second petition for review without comment, over Justice Kennard's dissent." (*Id.* at p. 635.)

The Ninth Circuit emphasized the constitutional need for this Court to appropriately narrow a trial court's discretion both in investigation during deliberations of a juror's ability to serve and dismissal of that juror for an inability to serve:

> California does not appear to have considered ... how the federal constitution constrains a trial court's discretion to discharge a juror from deliberations .... *Cleveland* was not a constitutional decision; rather, the California Supreme Court defined the limits of a trial court's discretion to conduct evidentiary hearings into juror misconduct, and to dismiss jurors for good cause under section 1089, based on various "policy considerations" and its precedent interpreting section 1089. In so doing, the court expressly rejected the juror-discharge standard adopted by the Second, Ninth, and D.C. Circuits ... in favor of a more permissive standard[]. So it is entirely possible that a juror discharge under section 1089 that is permissible under *Cleveland* could nonetheless violate the Sixth Amendment. Indeed, Justice Werdegar wrote separately in *Cleveland* to raise the concern that a trial court might not abuse its discretion but nonetheless "trench upon a defendant's right to trial by jury" — a concern that the majority did not meet with any response. [Citation.]

(*Williams v. Cavazos*, 646 F.3d at pp. 640-641.)

In this regard, Justice Werdegar's concurring opinion in *Cleveland* was prescient, for it emphasized the constraints on a court's discretion when it intrudes into a jury's deliberations and acts to discharge a juror, and the teeth that this Court must give to its standard in *Cleveland* of a "demonstrable reality" that the discharge of a juror was unrelated to that juror's views on the merits:

> Recognizing the need for additional protection of an accused's constitutional rights, we more

> accurately have explained that, to affirm a trial court's decision to discharge a sitting juror, "the juror's inability to perform as a juror must 'appear in the record as a demonstrable reality.'" [Citations.] Such language indicates that a stronger evidentiary showing than mere substantial evidence is required to support a trial court's decision to discharge a sitting juror. In this context, then, a trial court would abuse its discretion if it discharged a sitting juror in the absence of evidence showing to a demonstrable reality that the juror failed or was unable to deliberate.

(*People v. Cleveland*, 25 Cal.4th at p. 488 (conc. opn. of Werdegar, J.).)

Indeed, this Court has since acknowledged that " 'a somewhat stronger showing' than is typical for abuse of discretion review must be made to support such decisions on appeal." (*People v. Lomax*, *supra*, 49 Cal.4th at p. 590, quoting *People v. Wilson* (2008) 44 Cal.4th 758, 821.[1]) *Lomax*, quoting

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[1] *Wilson* stated:

> Although we have previously indicated that a trial court's decision to remove a juror pursuant to section 1089 is reviewed on appeal for abuse of discretion [citation], we have since clarified that a somewhat stronger showing than what is ordinarily implied by that standard of review is required. Thus, a juror's inability to perform as a juror must be shown as a "demonstrable reality" (*People v. Cleveland* (2001) 25 Cal.4th 466, 474), which requires a "stronger evidentiary showing than mere substantial evidence" (*id.* at p. 488 (conc. opn. of Werdegar, J.)). As we recently explained in *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052: "To dispel any lingering uncertainty, we explicitly hold

People v. Barnwell (2007) 41 Cal.4th 1038, 1052, further explained with regard to the need for a "demonstrable reality" of juror disqualification:

> This standard involves "a more comprehensive and less deferential review" than simply determining whether any substantial evidence in the record supports the trial court's decision. [Citation.] It must appear "that the court as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion that bias was established." [Citation] However, in applying the demonstrable reality test, we do not reweigh the evidence. [Citation.] The inquiry is whether "the trial court's conclusion is manifestly supported by evidence on which the court actually relied." [Citation.]

(*People v. Lomax*, 49 Cal.4th at pp., 589-590; see also *People v. Barnwell, supra*, 41 Cal.4th at p. 1052 ["Under the demonstrable reality standard, ... the reviewing court must be confident that the manifestly supported by evidence on which the court actually relied"); cf. *People v. Nelson* (Ill. 2009) 922 N.E.2d 1056, 1089 [reviewing court gave "intense scrutiny" with "less deference than usual" to trial court's discharge of holdout

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> that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury.

(*People v. Wilson, supra*, 44 Cal.4th at p. 821.)

juror during penalty deliberations, finding abuse of discretion requiring reversal].)

The violation of Fuiava's right to trial by jury is clear under *Williams*, for at least in *Williams* the trial court was authorized to make inquiry into the juror's ability to serve, given that the jury noted "that we have one juror who: 1) has expressed an intention to disregard the law and 2) has expressed concern relative to the severity of the charge (1st degree murder)." (*Williams v. Cavazos*, 646 F.3d at pp. 631-632 (ellipsis in quote deleted).) Obviously, a report that a juror has expressly stated his intention to disregard the law provides cause for inquiry, for it establishes an unwillingness or inability to follow the court's instructions, which require the jury to follow the law in all respects. In contrast, the two notes from the jury here disclosed only, to quote the precipitating note from Juror No. 8, "disagreement with the treatment of witness credibility" under the court's instructions. (See AOB 103-104.)

Once the court determined upon inquiry of Juror No. 8 that this disagreement from the day before had been resolved through further jury deliberations, including review of "the instruction book" (see AOB 106), the court was obliged to terminate its investigation of the juror's ability to serve. (See, e.g., *People v. Russell* (2010) 50 Cal.4th 1228, 1252 ["The court intruded as minimally as possible to satisfy its dual goals of investigating allegations of misconduct while preserving the secrecy of the deliberative process."]) Here, however, the court

continued its probe, eventually eliciting the juror's concern that he "might not be fair to the prosecutors or the defense if my bias plays a role in which testimonies I will reject entirely [or not]," and abruptly excused him from jury service. (AOB 106.) Denying defense counsel's request for further inquiry on "what bias" the juror could possibly have been talking about in terms of his consideration of the testimony from either side and the instructions of the court, the court pronounced itself "satisfied that the juror has indicated an unwillingness to follow the law" based on his "personal biases." (AOB 106.)

As in *Williams*, the court here "was not justified in acting upon that cause because there was a 'reasonable possibility' that the request for removal was directly connected to the juror's views on the merits." (*Williams v. Cavazos*, 646 F.3d at p. 647.) Indeed, there was much more than a reasonable possibility of such here, for the record failed to demonstrate the reality of Juror No. 8's inability to serve. Rather, the record admitted to a substantial likelihood that the juror's reference to "personal biases" affecting his ability to follow the court's instructions on witness credibility was nothing more than a statement that his life experiences informed his evaluation of the evidence, and reflected a misunderstanding of the pertinent instruction on witness credibility rather than an inability to follow it. This Court has stressed that removal of a juror during deliberations is a "serious matter" that requires the court to exercise its judgment with "great care." (*People v. Barnwell, supra*, 41

Cal.4th at p. 1052.) Unfortunately, the trial court did not have the benefit of this Court's admonition in this regard, and excused Juror No. 8 without exhibiting such care.

The evidence presented in the new trial motion confirmed that the reality was the dismissed juror was more than capable of conscientiously applying the law, and that his reference to bias indeed was based on a misunderstanding both of that concept in the context of deliberations and the instruction on witness credibility: As the evidence disclosed after trial: "[I]f asked by the court what his bias was, he would have answered it was because he favored part of the defense testimony and was not willing to totally disregard all of their testimony like the other jurors told him he had to do. The other jurors told him he was not following the law, and that is why he told the court that he was biased and could not follow the law." (See AOB 109.) Thus, the court's discharge of Juror No. 8 here on the ground of a disqualifying bias was even more egregious than the trial court's discharge of the juror for a disqualifying bias in *Williams*.

Finally, *Williams* also exposes the fallacy of the State's argument that the dismissal was justified on the basis that "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.) According to the State, "Juror T. himself, and Juror Number Ten, indicated that Juror T. was considering penalty during deliberations on

the guilt phase of appellant's trial, in violation of the instruction ... that the jurors were not to do so." (RB 120, citing CT 651-652, the notes of those jurors to the court.) *Williams* makes clear, however, that at most Juror T. was considering the gravity of the charges rather than the penalty. Juror T.'s note simply averred: "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 individuals life." (3 C.T. 651.) It was Juror No. 10 who offered her impression that Juror No. 8 was "letting the 'death penalty' and his emotions cloud the case" (3 C.T. 652), but she never suggested that he had invoked the death penalty during deliberations.

Williams rejected "the ... trial court findings related to Juror No. 6's 'concern' with the 'severity of the charge,'" as establishing good cause for dismissal. (*Williams v. Cavazos*, 646 F.3d at p. 649.) The Ninth Circuit found that the trial court "erroneously took [that concern] to mean that the juror was applying a higher-than-allowed burden of proof." (*Ibid.*) It meant no such thing, as the Ninth Circuit explained in language equally apt here:

> [I]t is hardly "bias" to acknowledge the relative "importance" of a murder trial and to "pay particular attention" to whether the evidence satisfies the required burden of proof. Rather, it is a realistic description of what all dedicated citizens who perform the public duty of serving on juries do: deliberate

> more intensively and consider the facts and law more thoroughly in the most serious of cases. Indeed, in *Adams* the Supreme Court expressly disapproved a voir dire inquiry that "excluded jurors who stated that they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally." [Citation.] So long as the jury actually applies the requisite burden of proof — which is the same for all crimes — in the end, it has acted appropriately, even if it undertook its task more deliberately and devoted more time to its deliberations before reaching its decision.
>
> What resulted from the court's intrusive inquiry into the juror's reasoning was a suggestion that Juror No. 6 was paying "particular attention to what evidence was presented at the trial," was taking more time than others, and was not yet sure whether the government had satisfied its burden of proof. That he was not convinced was not something that showed his bias, but rather a reflection of his current thinking regarding the issues in the case, a thought process to which the trial court should not even have been exposed.

(*Williams v. Cavazos*, 646 F.3d at p 650-651.)

In any event, in dismissing Juror No. 8, the court — unlike the court in *Williams* — never purported to rely upon any evidence that he was considering the penalty in contravention of the court's instructions in order to justify his dismissal. As set forth above, consistent with the higher level of scrutiny required

for review of a trial court discharge of a juror amid deliberations, "the trial court's conclusion [must be] manifestly supported by evidence on which the court actually relied." (See discussion *ante* of *People v. Lomax*, 49 Cal.4th at pp. 589-590.)[2]

For all of these reasons, the case law since the briefing was concluded in this case reinforces Fuiava's claim that the trial court committed error in its examination of Juror No. 8, in its discharge of him from the jury, and in its denial of Fuiava's motion for new trial based on that wrongful discharge.

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 who she

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[2] The same is true with regard to Juror No. 10's questioning of whether Juror No. 8 had a sufficient command of English to serve as a juror: in investigating Juror No. 8's ability to serve and ultimately discharging him for an inability to perform his duties as a juror, the court neither took up that issue nor relied on any evidence related to it.

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 also had observed this spectator conduct directed at them 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 what 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. (AOB 141-142; 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, particularly of the other two with whom Juror J. had discussed the conduct, deprived him of his right to a fair trial by an impartial jury. (AOB 140-148.)

The State first asserted procedural default 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.) Fuiava disputed that assertion in his reply brief. (ARB 91-93.)

This Court has since rejected a similar assertion as follows:

> The Attorney General asserts defendant forfeited his claim by failing to request additional inquiry. We disagree. The duty to conduct an investigation when the court possesses information that might constitute good cause to remove a juror rests with the trial court whether or not the defense requests an inquiry, and indeed exists even if the defendant objects to such an inquiry.

(*People v. Cowan* (2010) 50 Cal.4th 401, 506.) *Cowan* thus confirms the lack of merit to the State's assertion of procedural default here.

On the merits, the Court has reiterated that "[i]f the trial court has good cause to doubt a juror's ability to perform his duties, the court's failure to conduct a hearing may constitute an abuse of discretion on review." (*People v. Lomax, supra*, 49 Cal.4th at p. 588.) There was just such an abuse here. The trial court had good cause to doubt the impartiality of any juror who had observed the spectator conduct, for such observation had disabled Juror J. from performance of her duties. There was particularly good cause for inquiry of the jurors who had apparently been disturbed by it along with Juror J., for she had advised the court that indeed other jurors had discussed with her the spectator conduct after trial the previous day and had considered reporting that extraneous influence upon them. Thus, it was imperative that the court determine whether that influence had also caused any of those jurors to lose their impartiality. (See, e.g., *People v. Martinez* (2010) 47 Cal.4th

911, 942, fn. 5 ["Given that the police report stated Juror No. 6 believed the call was intimidating and related to the instant case, this was clearly the kind of matter that would affect a juror's impartiality, and 'once a juror's competence is called into question, a hearing to determine the facts is clearly contemplated.' [Citation.]"].)

XII.

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

Fuiava assigned misconduct by the prosecutor throughout the guilt phase, from opening statement, through examination of witnesses, to closing argument, as error that required reversal of the judgment. (AOB 264-285.) Fuiava argued that the breadth and nature of that misconduct required reversal, particularly because the misconduct touch live nerves of the defense in a trial that presented a close contest on guilt.

Cases published in our courts of appeal since the briefing in this case illustrate the merit of Fuiava's claim here. For example, in one murder case, the court "conclude[d] that the prosecutor's misconduct tipped a very delicate balance—and thus qualifies as prejudicial." (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1202.) Here, the case was close on every point of decision the jury had to make to reach guilt of capital

murder: whether Blair was engaged in the lawful performance of his duties at the time Fuiava shot him; whether Fuiava premeditated the shooting; whether Fuiava had malice or acted in the honest belief that he needed to shoot; and whether any such honest belief was reasonable. Thus, *Vance's* observations about that case apply equally here: "The prosecution's evidence was hardly overwhelming in pointing to defendant's guilt for first degree murder. None of the prosecution's evidence directly and unambiguously pointed to the mental state required for first degree murder. Even giving the prosecution's evidence its maximum effectiveness, the two sides were in equipoise. With the case teetering on a knife edge, it would not take much to tilt the balance." (*Id.* at p. 1206.)

The State has argued that "if there was misconduct, in light of the instructions to the jury (particularly that the comments of the attorneys did not constitute evidence), any error was harmless. (RB 229.) In another case finding prejudicial misconduct, the court rejected a similar argument by the Attorney General, stating: "Although the prejudicial effect of mild misconduct during argument may be dissipated by an instruction that the statements of the attorneys are not evidence [citation], an instruction is not a magical incantation that erases from jurors' minds a prosecutor's erroneous representations ...." (*People v. Woods* (2006) 146 Cal.App.4th 106, 118.) Certainly the same may be said here.

That court explicated the standard for determining prejudice as follows:

> Because some of [counsel's] improper arguments were of federal constitutional magnitude, we assess the cumulative effect of the misconduct under the standard applicable to federal constitutional errors that are not reversible per se. Respondent has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict.

(*People v. Woods*, 146 Cal.App.4th at p. 117.) Here, likewise, some of counsel's misconduct, such as insinuating facts not in evidence and "testifying" that he was precluded from calling Fuiava's wife as a witness but that Fuiava was not so precluded, trenched upon Fuiava's constitutional rights. Accordingly, the strict constitutional standard for determining prejudice applies here. Thus, as in *Woods*:

> Indeed, it is entirely reasonable to conclude that [counsel's] misconduct may have played a role in appellant's conviction. Credibility was the crux of this case. Therefore, vouching for prosecution witnesses, implicitly asserting that other uncalled witnesses would have corroborated the officers who testified, [and other misconduct] were grievous errors that may well have played a substantial role in the verdict.

(*Id.* at pp. 118-119.)

Federal cases decided since the briefing in this case illustrate by contrast the prejudice that Fuiava here suffered from the prosecutor's misconduct. For example, under the more

demanding standard a defendant must meet on federal habeas corpus, the Sixth Circuit found that the prosecutor's misconduct was harmless because his "improper comments were made in the context of a strong evidentiary case against [the defendant], were almost all minimally prejudicial, were not extensive, and were not repeated." (*Slagle v. Bagley* (6th Cir. 2006) 457 F.3d 501, 514.) In contrast, the prosecutor's misconduct in Fuiava's case occurred in the context of strong evidence of innocence, touched the live nerves of the defense, and was repeated and persistent.

Moreover, the presence of these circumstances in the instant case added to the court's sua sponte duty to control the prosecutor's misconduct, discussed in the AOB in subsection G of this claim, pp. 285-286. (See, e.g., *People v. Vance, supra*, 188 Cal.App.4th at p. 1207 ["The trial court's reactions and inactions to the misconduct only aggravated the situation by removing the one restraint that might have operated on the jury."]; *Mitchell v. State* (Okla. Crim. App. 2006) 136 P.3d 671, 711 ["The total failure to constrain this prosecutor, combined with the obvious annoyance displayed by the court that defense counsel was 'interrupting the flow' of the State's argument, suggests that the trial judge may have forgotten, at least momentarily, where she was sitting and what she was wearing."].)

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 argued that the trial court's voir dire of and selection process for the jury had organized that body to return a death judgment. In this regard, he first asserted that the court was not evenhanded in its conduct of voir dire with pro-life and pro-death jurors and with its rulings on respective challenges to their qualifications. (AOB 293-297.). In response, the State claimed Fuiava forfeited this issue for appeal because he never objected to the court's voir dire as slanted. (RB 252-253.) Fuiava replied that this Court should not find a procedural default on that basis, and instead should decide that claim on its merits. (ARB 191-192.) *People v. Clark* (2011) 52 Cal.4th 856 provides explicit support for Fuiava's position here. There, this Court stated:

> Respondent asserts that we should reject as forfeited defendant's contention that the trial court engaged in a discriminatory pattern of ruling on challenges for cause because he failed to raise a claim of judicial bias below. We have reached the merits of similar claims

> in other decisions [citations], and shall do so again here.

(*Id.* at p. 902, fn. 10.)

In *Clark*, this Court reiterated that "trial courts should be evenhanded in their questions to prospective jurors during the 'death-qualification' portion of the voir dire, and should inquire into the jurors' attitudes both for and against the death penalty to determine whether these views will impair their ability to serve as jurors." (*Id.* at pp. 902-903, quoting *People v. Champion* (1995) 9 Cal.4th 879, 908-909; see also *Mitchell v. State* (Okla. Crim. App. 2006) 136 P.2d 671, 689 ["This Court is particularly concerned by the inconsistent approach that the trial court adopted toward jurors who indicated a predisposition toward a particular penalty."].)

In his argument on this point, Fuiava particularly assigned as error requiring reversal the excusal of prospective jurors Chaiveera[3] and Lang on the ground that their scruples

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[3] The State interposed a claim of procedural default here as well, arguing that Fuiava's "fail[ure to renew his objection following the additional questions ... effectively waived the issue for appeal regarding the propriety of the excusal of prospective juror C. for cause." (RB 255.) Fuiava argued otherwise in his reply brief. (See ARB 192-195.) This Court has since made clear that Fuiava did not need to object at all to the excusals at issue here to preserve his claim of error on appeal. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 643 ["In any capital case tried after the finality of this decision, counsel (or defendant, if proceeding pro se) must make either a timely objection, or the functional equivalent of an objection, such as a statement of opposition or disagreement, to the excusal stating specific grounds under *Witherspoon/Witt* in order to preserve the issue for appeal. Nevertheless, ... because at the time of this trial we

about the death penalty would prevent or substantially impair their ability to fairly consider death as an appropriate penalty in the case. (AOB 293-297.) Fuiava argued that the record showed only that in the abstract they would have difficulty imposing the death penalty and were unlikely to do so, not that they would be impaired in their performance of their duty as a juror to fairly consider the penalty of death and impose that penalty in an appropriate case. (See, e.g., ARB 197-198, citing *People v. Heard* (2003) 31 Cal.4th 946 and *People v. Stewart* (2004) 33 Cal.4th 425.)

United States v. Quintanilla (N-M.C.C.A. 2005) 60 M.J. 852, 860[4] illustrates the validity of Fuiava's submission that the record did not support the court's finding that the scruples of these prospective jurors about the death penalty would prevent or substantially impair the performance of their duties as jurors. As *Quintanilla* emphasized:

> The military judge found that [the prospective panel member] would have "difficulty in considering the entire range of punishments in this case." [Citation.]. That is not the correct test. We expect that many, if not most, conscientious members in a capital case would have some difficulty in voting to condemn a

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had not expressly held that an objection is necessary to preserve *Witherspoon/Witt* excusal error on appeal, we do not apply this rule here."].)

[4] In *United States v. Quintanilla* (C.A.A.F. 2006) 63 M.J. 29, 37, the reviewing court "reverse[d] the lower court's decision to the extent that it set aside the findings [of guilt] as a remedy for the military judge's erroneous grant for the prosecution's challenge for cause."

> fellow Marine to die. Rather, the test is "whether the member's views would 'prevent or substantially impair the performance of his duties as a [member] in accordance with his instructions and his oath.'" [Citation.]

(*Id.* at p. 860 (brackets in quote deleted).)

The Supreme Court decision in *Uttecht v. Brown* (2007) 551 U.S. 1 further supports Fuiava's claim here, if only by contrast. There, the Court stated:

> The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment. But where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful voir dire, the trial court has broad discretion. The record does not show the trial court exceeded this discretion in excusing Juror Z; indeed the transcript shows considerable confusion on the part of the juror, amounting to substantial impairment.

(*Id.* at p. 20.) In addition:

> Before individual oral examination, the trial court distributed a questionnaire asking jurors to explain their attitudes toward the death penalty. ... After the questionnaires were filled out, the jurors were provided with handbooks that explained the trial process and the sentencing phase in greater depth. Small groups of potential jurors were then brought in to be questioned.

(*Id.* at pp. 12-13.)

In contrast, there was no written questionnaire in Fuiava's case, nor questioning in small groups. Moreover, the actual voir dire was extensive in *Uttecht*. As the Court described that process:

> [A]pplying the principles of *Witherspoon* and *Witt*, it is instructive to consider the entire voir dire in Brown's case. Spanning more than two weeks, the process entailed an examination of numerous prospective jurors. ... [¶]Eleven days of the voir dire were devoted to determining whether the potential jurors were death qualified. During that phase alone, the defense challenged 18 members of the venire for cause. Despite objections from the State, 11 of those prospective jurors were excused. As for the State, it made 12 challenges for cause; defense counsel objected seven times; and only twice was the juror excused following an objection from the defense. Before deciding a contested challenge, the trial court gave each side a chance to explain its position and recall the potential juror for additional questioning. When issuing its decisions the court gave careful and measured explanations. to excuse Juror X despite an objection from defense).

(*Uttecht v. Brown*, *supra*, 551 U.S. at pp. 10-11.) In contrast, the court here arrogated to itself the entire conduct of voir dire, which it completed in little more than a day. (See e.g. 3 C.T. 628 & 629; 1 R.T. 70-330/148.)

In sum, the court's determinations of the challenges for cause here are entitled to little or no deference, given the

remarkably abbreviated process of voir dire. Indeed, Fuiava has assigned as separate error the inadequacy of the court's voir dire. (See Argument VII.) Thus, Fuiava has sustained his claim that the court erred in excusing these two prospective jurors due to their views on the death penalty, which requires reversal of the judgment of death. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 643 ["the erroneous excusal of a prospective juror under *Witherspoon/Witt* requires reversal of a death penalty judgment"].)

XVI.

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

Fuiava 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.) The State asserted that Fuiava "has waived most of these claims" due to lack of objection (RB 259.) Fuiava replied that this Court should exercise its discretion to consider his claims on their merits notwithstanding any lack of objection because "unchecked admission of victim impact evidence runs special risks of interference with the Constitution's demand for fair and reliable decisionmaking when imposing a death sentence." (ARB 202 [brackets in quote deleted].)

At least one other state supreme court has found the need to address the merits of such a claim where the defendant similarly had failed to object to specific evidence of victim impact. (See *Wheeler v. State* (Fla. 2009) 4 So.3d 599, 606-607 ["[W]e recognize that evidence that places undue focus on victim impact, even if not objected to, can in some cases constitute a due process violation.... Thus, we must determine if fundamental error or a violation of due process occurred in the admission of the victim impact evidence in this case."]).) This Court likewise should address the merits of Fuiava's claim to determine whether the admission of the victim-impact evidence complained of on appeal rendered Fuiava's trial fundamentally unfair in violation of due process.

XXIII.

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

Fuiava separately assigned the prosecutor's penalty-phase misconduct as reversible error (see AOB 358), and noted in this regard that "the prosecutor's misconduct reached its zenith in his closing argument" at the penalty phase. (AOB 364.)

One of the ways the prosecutor overreached in his summation was his assertion that Fuiava would "enjoy[] prison," with the prosecutor depicting a life of leisure for him

behind bars. (See generally AOB 371.) One court has castigated similar argument as a "version of the infamous, but ever-popular, 'three hots and a cot' argument" that should have no place in the "prosecutorial repertoire of ... death-seeking, closing argument incantations." (*Malone v. State* (Okla. Crim. App. 2007) 168 P.3d 185, 232.) That argument was particularly reprehensible here, for the prosecutor's depiction of the easy life in prison that Fuiava would enjoy was fabricated in every respect. (See AIB 371.)

On the merits, another Sixth Circuit federal habeas corpus case, where the standard for obtaining relief is greater than on direct appeal as here, again provides a ready analogy. (See *Bates v. Bell* (6th Cir. Tenn. 2005) 402 F.3d 635.) In *Bates*, as here, "[t]he closing argument of the prosecution was riddled with wildly inappropriate and inflammatory remarks in violation of ... 'the cardinal rule that a prosecutor cannot make statements "calculated to incite the passions and prejudices of the jurors."'" (*Id.* at p. 642.) Such appeals to passion and other misconduct of the prosecutor akin to that here, such as vouching, caused that court to find that misconduct was prejudicial. It based that finding on the four considerations noted *ante* concerning prosecutorial misconduct in the guilt phase:

> Having determined that the prosecutor's conduct was improper, we must consider whether the misconduct was so flagrant as to warrant reversal. Flagrancy is determined by

> an examination of four factors: (1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; 3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against the defendant. [Citations.]

(*Id.* at p. 647.)

Those considerations warrant a finding of prejudice when applied to Fuiava's case. Here, too, the prosecutor's "appeal to fear and emotion clearly poisoned the hearing." (*Bates v. Bell*, 402 F.3d 635 at p. 648.) Here, too, the prejudice was aggravated "by the prosecut[or's] attempt[] to place the government's thumb on the scales" (*id.* at p. 648) – here, by his personal endorsement of the Vikings. Here, too, "the improper conduct was not isolated to one comment [or] one section of the argument ... and most regrettably, the misconduct was plainly deliberate." (*Ibid.*)

Another federal court habeas case that illustrates the prejudice that Fuiava suffered is *Weaver v. Bowersox* (8th Cir. Mo. 2006) 438 F.3d 832, 841. There, the court affirmed a judgment granting relief from a death judgment due to prosecutorial misconduct that included comments similar to those in Fuiava's trial, where the prosecutor 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, all of which the

State has conceded were "potentially inflammatory." (See RB 309.) Contrary to the State's refrain of harmlessness, however, *Weaver* illustrates the prejudice that Fuiava suffered from those comment. As it explained:

> The argument that a signal must be sent from one case to affect other cases puts an improper burden on the defendant because it prevents an individual determination of the appropriateness of capital punishment. [Citation.] Further, invoking a jury's general fear of crime to encourage the application of the death penalty in a particular case is unfairly inflammatory. [Citation.] Using the conscience of the community as a guiding principle for punishment puts too significant of a burden on a single defendant. [Citation.] There is little doubt that the prosecutor's statements are such that we would certainly grant relief without applying AEDPA.

(*Id.* at p. 841; see also *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142) [reversal required in "a comparatively close case that boiled down to a battle over credibility" (*id* at p. 1152)]; *State v. Northcutt* (S.C. Supr.Ct. 2007) 641 S.E.2d 873, 881[reversal of death judgment required for any one of several acts of misconduct in the prosecutor's closing argument, including his assertion that it would be "open season on babies" in the county if the jury returned a life verdict].)

This is not a case like *People v. Gonzales* (2011) 51 Cal.4th 894, 952, where the Court found no reasonable possibility that the prosecutor's improper penalty argument, which included "purely emotional appeals [that] invited a subjective response

from the jurors and tended to divert them from their proper role of rational deliberation on the statutory factors governing the penalty determination," had any effect on the verdict. The Court found no prejudice there because "[f]irst, the prosecutor's improper remarks were not central to the case he presented in closing argument [but rather] "were rhetorical flourishes" to his otherwise substantive argument. (*Id.* at p. 953.) Not so here. "Second, the circumstances of this murder were almost unimaginably horrible" in that case. (*Ibid.*) Not so here. "Third, the defense at the penalty phase was hobbled by the fact that the adult family members asking the jury to spare defendant's life were themselves complicit in [the child] endangerment." (*Id.* at p. 954.) Not so here; rather, what hobbled the defense at penalty were the trial court's erroneous rulings related to Fuiava's defense. (See Arguments XVII-XVII.) Thus, none of the three considerations on which the Court relied in *Gonzalez* to "hold that there is no 'reasonable (i.e., realistic) possibility' that the jury was diverted from returning a life sentence by the improper arguments" of the prosecutor (*ibid.*) applies here.

Though the Court's holding of harmless error is inapposite in *Gonzalez*, the remarks in the concurring and dissenting opinion in that case are directly on point. There, Justice Wiseman stated:

> I fear that holding that the prosecutor's improper argument was harmless in this case establishes a new low bar for harmless error on the issue of appealing to passion in penalty

> phase closing arguments. The law intends to make it relatively difficult for the prosecution to show harmless error when the prosecutor improperly appeals to emotion in the penalty phase of a capital trial. This is why the legal standard of review requires a mere reasonable possibility of prejudice in order to reverse a verdict of death. It is, in my opinion, essential for the court to ensure that the rule has some teeth and will be enforced. Otherwise, overly zealous prosecutors may be incentivized to push the limits without serious fear of reversal.

(*People v. Gonzales*, 51 Cal.4th at p. 964 (conc. & dis. opn. of Wiseman, J.).)

CONCLUSION

For the reasons stated above and in Fuiava's prior briefing, the Court should reverse the judgments of conviction and death.

Dated: October 27, 2011

Respectfully submitted,

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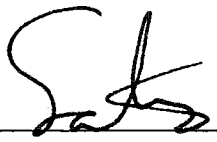
CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204 (c) of the California Rules of Court

I, Michael Satris, appointed counsel for appellant Freddie Fuiava, hereby certify, pursuant to rule 8.520 (d)(2) of the California Rules of Court, that I prepared the foregoing Supplemental Brief on behalf of my client, and that the word count for this brief, including footnotes, is 7,320 words. This supplemental brief therefore **does not** comply with the rule, which limits a supplemental brief to 2,800 words. I certify that I prepared this document in Microsoft Word 2002, and that this is the word count Microsoft Word generated for this document. Accordingly, we are submitting with the supplemental brief a motion for leave to file the brief in excess of the word limit.

Dated: October 28, 2011



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PROOF OF SERVICE BY MAIL

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

On October 28, 2011, I served the within **FUIAVA'S SUPPLEMENTAL BRIEF** on the interested parties in said action causing to be placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States Post Office box addressed to the parties as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 28, 2011, at Bolinas, California 94924.

Sabine Jordan