SUPREME COURT COPY

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 OPENING BRIEF

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

HONORABLE S. ROBERT J. PERRY, TRIAL JUDGE

SUPREME COURT
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Frederick K. Ohlrich Clerk
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By appointment of the
California Supreme Court

DEATH PENALTY

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STATEMENT OF APPEALABILITY

This appeal is automatic following a judgment imposing death. (§ 1239, subd. (b).)[1]

OVERVIEW OF THE CASE

The capital charge arose out of a confrontation on May 12, 1995, that developed when Los Angeles Sheriff's deputies Stephen Blair and Robert Lyons drove up on Ernesto Avila and appellant Freddie Fuiava, who were walking down a sidewalk on Walnut Avenue in Lynwood. Lynwood is their hometown in South Central Los Angeles and is populated largely by minority races. Blair was a member of the Vikings, a gang of officers that had operated out of the old Lynwood Station and were known to impose vigilante justice in the neighborhood. Fuiava and Avila were members of Young Crowd, a street gang in the neighborhood.

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[1] All statutory references are to the Penal Code unless otherwise noted.

The deputies saw Avila toss an object — his firearm — into an adjoining yard. The deputies stopped and got out of their patrol car to detain Avila and Fuiava. Gunfire soon erupted. The defense contended that Blair initiated the gunfire by shooting in the direction of Avila, and then turned and fired towards Fuiava; Fuiava defended himself by pulling out a gun he was carrying and returning fire towards Blair. The prosecution contended that Fuiava shot first at Lyons but missed him, and then shot and killed Blair, who fired his weapon only in response to Fuiava's gunfire.

STATEMENT OF THE CASE

On May 25, 1995, the district attorney filed a complaint in the Municipal Court of Los Angeles Judicial District that charged Fuiava with crimes that included the capital murder of Blair. (CT 303-305.) Deputy district attorney Craig Richman appeared throughout the proceedings on behalf of the prosecution. The Public Defender appeared on behalf of Fuiava for arraignment on May 26, 1995, and the matter was put off until June 8, 1995. (CT 3-4.) On June 8, 1995, private attorney Edie Faal substituted in for the Public Defender for all proceedings in the municipal court. (CT 7.) Fuiava was arraigned and pleaded not guilty. (CT 7-8.) Preliminary hearing was set for June 26, 1995. (CT 8-9.)

In chambers following the June 8 proceeding, Faal advised the magistrate that Fuiava wanted the court to know that he had been placed on "suicide watch" and was being told that the Sheriff's Department "knew that he was going to commit suicide before this case comes to trial." (C.T. 11.) Fuiava had no intention of harming himself and had done nothing to so indicate, and believed that the "suicide watch" was a prelude to the murder of him by members of the Sheriff's Department, who would then

call it a suicide. (C.T. 11-14.) Fuiava's belief was reinforced by a series of assaults he suffered at the hands of a deputy in the days following his arrest. (C.T. 14.) The prosecutor confirmed that Fuiava was on suicide watch, but did not know the basis for that placement. (CT 11.) The chief bailiff advised the magistrate that his office had a "special handle card" for Fuiava, but that there was no indication he should be placed on suicide watch. (CT 12-13.) The bailiff then checked with the jail at the court's behest and was advised that "at this time there is no suicide watch on him." (CT 13-15.) Fuiava felt that putting this issue on the record provided him with "additional security." (CT 15.)

Upon conclusion of the preliminary hearing on September 18, 1995, the magistrate held Fuiava to answer on the charges. (CT 313.)

An information filed October 2, 1995, charged Fuiava with the murder of Blair in violation of section 187, subdivision (a) (count one); the attempted murder of Lyons in violation of sections 664 and 187, subdivision (a) (count two); and resisting arrest with attempt to remove a firearm from a peace officer with respect to Deputies Riggin and Corrigan in violation of section 148, subdivisions (a) and (d) (counts three and four, respectively). (CT 294.)

Two special circumstances were alleged to qualify Fuiava for the death penalty: 1) the offense was committed for the purpose of avoiding or preventing a lawful arrest (§ 190.2, subd. (a)(5)), and 2) Fuiava knew or reasonably should have known that Blair was a peace officer engaged in the performance of his duties (§ 190.2, subd. (a)(7)). (CT 294-295, 329.) It was further alleged that Fuiava personally used a firearm during the commission of counts one and two within the meaning of section 12022.5,

subdivision (a). (CT 295-296.) It was also alleged under section 664, subdivision (e) that the attempted murder was willful, deliberate, and premeditated, and was of a peace officer who Fuiava knew and reasonably should have known was engaged in the performance of duty. (CT 296.)

It was further alleged that Fuiava had been convicted of assault with a firearm (§ 245, subd. (a)(2)) both in 1989 and in 1992; that these convictions constituted violent or serious felonies within the meaning of section 667, subdivision (a)(1) and "strikes" within the meaning of sections 1170.12, subdivision (a)-(d), and 667, subdivision (b)-(i) (CT 297-298); and that he had served prison terms for each of those convictions within the meaning of section 667.5, subdivision (b).

The Public Defender was appointed to represent Fuiava after Faal made a special appearance to advise the court that he would not be representing Fuiava in superior court. (CT 325, 327; RT 1.)

On October 5, 1995, represented by the Public Defender, Fuiava was arraigned and denied all charges and allegations. (CT 327.)

On October 27, 1995, the Public Defender declared a conflict, as did the Alternate Public Defender. (CT 329; RT 11.) Consequently, the court appointed Steven Hauser of the private Bar panel to represent Fuiava. (CT 329; RT 11.)

At the next appearance on December 5, 1995, defense counsel advised that he "expect[ed] to be ready late spring or summer for trial." (CT 330; RT 16.) At the following appearance on February 22, 1996, counsel advised that "realistically, I am looking at middle of July to actually start trial," but then requested that the matter be continued to

April 19, 1986, with trial to be scheduled "within 60 days of that date." (RT 17.) It was so ordered. (CT 441; RT 18.)

On April 19, 1996, the court found that "[b]oth sides agree that we are not ready for trial [and that] discovery is still ongoing." (RT 19.) The parties expected to be ready for trial in early July. (RT 20.) The matter was continued to a date in May for pretrial issues. (CT 553; RT 19.)

On May 21, 1996, the court granted Fuiava's motion to dismiss the allegation that his 1992 conviction constituted a "strike" within the meaning of section 667, for Fuiava's plea to the charge of assault with a firearm specifically excluded any admission of personal use of that firearm. (CT 609; see also CT 577-589, RT 28.) On that date, the court also granted the prosecution's motion to present evidence in its case in chief that Fuiava had suffered two prior felony convictions for assault with a firearm, one of which was a "strike," and that at the time of the stop was on parole with a condition that he not possess any firearms. (CT 609.) (See Argument VIII, Section B, *post.*)

The parties next appeared on June 18, 1995, for a pretrial conference. (CT 612.) The court announced that it would not use a written questionnaire for jury voir dire. (CT 612.) Defense counsel stated that he was "still preparing for the case" and needed to conduct further investigation, but was "gearing up" for the trial date of July 8. (RT 43-44.)

The matter came on for trial on July 8, 1996. (CT 628.) The prosecution filed an amended information that deleted the allegation that the 1992 conviction constituted a strike, and dropped counts three and four because they did not take place within Los Angeles County. (CT 299, 628.) Fuiava again denied the charges and the allegations. (CT 628.)

Defense counsel moved for a short continuance because he was not yet prepared for trial, largely because he had been physically incapacitated in the preceding days. (CT 612, 628.) At the bench outside of the presence of the prosecutor, defense counsel disclosed that "the defense in this case is self-defense" and that "the issue in the case is who shot first." (RT 60.) He advised the court that Blair "was a member of a group called the Vikings which we allege is a police gang [and] had a tattoo on his ankle with a Viking with a roman numeral over it which we allege is the initiation number." (RT 60.) Trial counsel further informed the court that at the time of the shooting there was a civil rights suit about to go to trial in which Avila was a named plaintiff and Blair was a named defendant. (RT 60-61.) As counsel further advised the court:

> [A]s soon as Blair got out of the car, Blair threatened Ernie [and] started shooting at him. [Fuiava] turned around and yelled at Blair and then Blair shot at [Fuiava]. ... [Fuiava] was armed and went for his gun and shot and killed Blair.

(RT 61.) Trial counsel advised that he also still needed to conduct a "crucial bit of investigation" concerning a prior incident of violence involving Blair. (RT 61-62.) The court denied the request for a continuance. (See Argument VI, *post.*) (CT 628.)

The court proceeded to voir dire the jury. The court precluded defense counsel from conducting any of the voir dire himself, and the court's voir dire was so perfunctory that the jury was picked and sworn by the noon recess the following day, July 9th. (CT 631, RT 300-148.) (See Arguments VII and XV, *post.*)

The court reconvened in the afternoon out of the presence of the jury to discuss the scope of opening statements. The court ruled that the allegations of the prior convictions and prior prison terms would be tried with the trial of the substantive charges rather than bifurcated from them in light of its earlier ruling that the prosecutor could introduce evidence of those convictions to establish motive. (CT 631; RT 301.) The court precluded defense counsel from mentioning in his opening statement any evidence of the civil rights lawsuit or vigilantism by the Vikings. (CT 631; RT 313.)

The testimony commenced that afternoon following opening statements, and was completed seven court days later, in the morning session of July 18, 1996. (CT 631-636, 643-645; RT 2102.) The court permitted the prosecutor to present extensive evidence of Fuiava's criminal history and violent conduct and other prejudicial evidence, but excluded all the defense evidence about the lawsuit and most of the evidence regarding the Lynwood deputies' culture of misconduct. (See Arguments II, VIII, and IX, *post.*)

Before the beginning of the court session on July 19, 1996, when defense counsel was to resume his closing argument, the court received a phone call from juror No. 11, Miss J. (CT 647; RT 2208.) She reported that a migraine headache incapacitated her. (CT 647; RT 2209.) She further reported that she had been particularly stressed by the conduct of two women in the gallery who she believed were associated with Fuiava and were conferring together and pointing at various jurors. (RT 2209-2211.) This made her fearful and, in fact, "some of the jurors talked about" the conduct of these women and considered reporting it to the court. (RT

2209.) The court excused Miss J. and substituted in one of the alternates for her, but took no action to determine if the other jurors had been similarly tainted by the spectators' conduct. (RT 2213-2214; see also CT 647.) (See Argument V, *post.*)

Filling the gallery were numerous uniformed sheriff's deputies bearing silent witness to the proceedings and sporting Viking pins on their uniforms. (RT 2210, 2250.) The prosecutor, too, made a display of donning a Viking pin during his closing argument, which capped his pervasive misconduct. (RT 2250, 2488-2491; 2nd Supp. CT 20.) (See Argument XII, *post.*)

After closing arguments concluded, the court instructed the jury. (CT 647.) Among the instructions was one that permitted the jury to find Fuiava guilty based on evidence of his propensity for violence. (See Argument XI, *post.*) The jury began deliberations on July 19, 1996, at 2:10 p.m., and recessed that day at 4:00 p.m. (CT 647.) The jury resumed its deliberations at 10:00 a.m. on July 22, 1996, recessing again at 4:00 p.m. after submitting requests for readback of portions of the testimony of two witnesses. (CT 648-649.) The jury resumed deliberations the next day, July 23, at 9:20 a.m. while awaiting the requested readback of testimony. (CT 104.)

At 10:20 a.m., juror No. 8 and juror No. 10 sent the court notes requesting a hearing regarding conflict between juror No. 8 and other members of the jury, including juror no. 10. The dispute appeared to center around the proper assessment of the credibility of the witnesses, particularly defense witnesses that juror No. 8 credited. (CT 650-653.) Meanwhile, the readback to the jury began at 10:25 a.m. (CT 653.) At

10:55 a.m., the readback was interrupted to conduct a hearing on the deliberation problems among the jurors. (CT 653.) The court questioned juror No. 8, who advised that based on his "background" he may have a "bias" that "plays a role in which testimonies I will reject entirely" or partially credit. (RT 2354.) The court elicited a reiteration of Juror No. 8's confession of "bias," but refused to permit inquiry into whether the juror's purported bias was no more than the fact that his life experience informed his assessment of the credibility of the witnesses, and what exactly he understood his duties as a juror were with regard to determination of the credibility of a witness. (See CT 653; RT 2355-2357.) Instead, the court summarily discharged No. 8 from the jury. (See Argument III, *post.*) The court replaced him with an alternate juror. (CT 653; RT 2357.) The jury reconvened with instruction to begin its deliberations anew, and the readback was abandoned. (CT 653.) The jury deliberated that day again until 4:00 p.m. (CT 653.)

Before proceedings the next day, July 24, 1996, the new juror No. 8 called the court and asked to be excused, as she had become too distraught to continue deliberations. (CT 756; RT 2361-2362.) She was excused from service upon a finding of good cause by the court and with the stipulation of the parties. (CT 756; RT 2364-2365.) Another alternate replaced her and the jury was instructed once more to begin its deliberations anew. (CT 756.) After less than 2½ hours of deliberations, the jury returned guilty verdicts on both counts and found true all the allegations. (CT 756-757.) (See Argument IV, *post.*)

The penalty trial commenced the next day, July 25, 1996. (CT 759.) The prosecutor presented broad victim impact evidence from ten witnesses,

including Blair's family and fellow deputies. (See Argument XVI, *post.*) The prosecutor also presented evidence from one witness specifically concerning the Vikings to rebut lingering doubt (RT 2597), and the opinion of at least one deputy that the allegations in the civil lawsuit, references to which had crept into the trial incidentally, were frivolous. (RT 2493.) The prosecutor also presented evidence that he argued constituted admissions by Fuiava to two other shootings, though there was no independent evidence of a corpus delicti for either shooting, and no instructions requiring the jury — despite many indications that the evidence was unreliable — to find proof of a corpus delicti and to view the evidence of these oral admissions with caution. (See Argument XVII, *post.*) During this time the prosecutor continued to vouch for the Vikings by wearing its pin, taking it off only at the court's insistence. (See Argument XXIII, *post.*) The aggravation case lasted until the middle of the morning of the next court day, July 29, 1996. (CT 759, 762; RT 2623.)

The defense rested after the presentation of evidence for 2½ hours that day. During that presentation, the court barred Fuiava from expressing his sorrow to Blair's loved ones for their loss. (See Argument XIX, *post.*) The court also precluded evidence of the awful impact execution of Fuiava would have on his loved ones, evidence that the civil lawsuit was resolved with a multimillion dollar settlement to the plaintiffs, and evidence of the community's fear of the sheriff's deputies. (CT 762; RT 2685, 2712.) (See Arguments XX and XXI, *post.*)

The court concluded that day with instructions to the jury, refusing to instruct it that lingering doubt was a legitimate mitigation factor upon which to base a verdict of life. (CT 762.) (See Argument XXII, *post.*)

On July 30, 1996, counsel gave their closing statements, throughout which the prosecutor continued to play upon the passions of the jury. (See Argument XXIII, *post.*) The jury began deliberating at 11:45 a.m. (CT 763.) After recessing for lunch, it deliberated all afternoon, from 1:30 p.m. to 3:50 p.m. (CT 763.) The jury resumed deliberations at 9:05 a.m. the next day, July 31, 1996. At 9:20 a.m., it returned a verdict of death. (CT 786.)

On August 19, 1996, the court denied Fuiava's motions for new trial, to continue sentencing, and for modification of the sentence — rejecting defense assertions that Fuiava was innocent of capital murder, and that the guilt and penalty verdicts were a product of various court and prosecutorial error. (CT 790-799, 822-826, 827.) (See Argument I, *post.*) The court pronounced a judgment of death on count one. (CT 791, 827-831.) It enhanced that sentence by the upper term of ten years for the finding of firearm use. (CT 830.) The court further imposed a sentence of life with the possibility of parole on count two, to be served consecutively to count one, and enhanced that sentence by the upper term of ten years for firearm use. (CT 830.) The court imposed further enhancements of five years imprisonment pursuant to section 667, subdivision (a)(1) for the 1989 prior conviction, and stayed enhancement for the service of a prison term for that conviction. (CT 830-831.) The court additionally enhanced the sentence by one year in prison for the finding of a prior prison term for the 1992 conviction. (CT 831.) The court stayed all the prison terms pending Fuiava's execution. (CT 831.)

STATEMENT OF FACTS

A. Guilt Phase.

1. Backdrop: The Vikings and the Civil Lawsuit.

A longstanding practice of violence and other unlawful conduct perpetrated by sheriff's deputies operating out of the Lynwood Station against the residents of Lynwood led to a federal civil rights suit filed in 1990 against the Sheriff's Department and a number of its deputies, captioned *Thomas et al. v. County of Los Angeles et al.*, No. 90-5217 TJH. (RT 1416-1417.)[2] Avila was one of the plaintiffs. (RT 1141, 1456-1458.) Fuiava (also known as "Smokey") and Avila were members of Young Crowd, a neighborhood street gang. (RT 1590, 1878.) Blair was one of the defendants in the civil suit and a member of the Vikings, a core group of deputies at Lynwood Station. (RT 358, 367, 1591.) The plaintiffs, largely Hispanic residents of the community, alleged a range of police misconduct that included shootings, killings, beatings and other acts of terrorism. (RT 1416-1421, 1433-1436.) The unlawful shootings included cases where the police shot unarmed persons, including one who was running away. (RT 1436.) It also included the shooting death in the presence of Avila of Young Crowd member Lloyd "Stranger" Polk, who had been a plaintiff in the lawsuit when it was first filed and was also a good friend of Fuiava.

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[2] The court excluded from trial all evidence about the lawsuit, and generally excluded evidence of Viking and other police misconduct that did not involve Blair, Fuiava or Avila. (RT 1479, 1586.) (See generally Argument II, section A, *post.*) As later set forth in this Statement of Facts, there were incidental references to the litigation in the testimony of both Fuiava and Avila, but those references were left veiled by the court's ruling. This section of the Statement of Facts accordingly is largely taken from the evidence presented at the proceedings in which the defense sought to introduce these facts at trial.

(RT 1457-1459, 1716-1718, 1910.) The plaintiffs further alleged that the Vikings were a gang of vigilante deputies within Lynwood Station responsible for much of the excessive violence. (RT 1596-1597, 1652.) As to Blair in particular, they alleged that he participated in forcible entry into a residence that resulted in the unlawful beating of a Raul Gonzalez. (RT 1421-1424, 1433, 1435-1436.)

In 1991 the district court issued a preliminary injunction based on the evidence that supported the allegations. (RT 1427-1437, 1442-1443; see also *Thomas v. County of Los Angeles* (9th Cir. 1993) 978 F.2d 504, 511 [containing the district court's findings of fact and conclusions of law][3].) The district court made findings of fact that included the following:

> Since the date this case was filed, there have been many confrontations between deputy sheriffs and plaintiffs, in an apparent attempt by the deputies to convince plaintiffs to dismiss this action.
>
> The actions of many deputies working in the Lynwood sub-station are motivated by racial hostility; these deputies regularly disregard the civil rights of individuals they have sworn to protect. Many of the incidents which brought about this motion involved a group of Lynwood area deputies who are members of a neo-nazi, white supremacist gang — the Vikings....
>
> Deputies, who previously worked in the Lynwood sub-station, acknowledge that during the period they were assigned to Lynwood, it was clear that many of the deputies and sergeants in Lynwood were out to intimidate and ridicule Blacks and Hispanics.

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[3] Fuiava requests that this Court take judicial notice of this opinion pursuant to Evidence Code sections 451, subdivision (a) and 459, subdivision (a), which together obligate the Court upon request to take judicial notice of "[t]he decisional ... law ... of the United States...."

(*Thomas v. County of Los Angeles*, *supra*, 978 F.2d at pp. 510-511.)

The Ninth Circuit stayed and then vacated the injunction, finding it overbroad and based on too much conflicting evidence to support its issuance. (RT 1427; see also *Thomas v. County of Los Angeles*, *supra*, 978 F.2d 504.) The lawsuit was coming to a head at the time of the Walnut Avenue shooting, with trial of the lead incident in the lawsuit just weeks away. (RT 1424.)[4] The upcoming trial intensified the threats and intimidation that the deputy sheriffs directed at Young Crowd. (RT 643.)

Avila knew that Blair was a member of the Vikings. (RT 1603.) Indeed, it was stipulated that Blair had a tattoo of a Viking on his ankle with the letters "LXXI" above its head. (RT 2101.) Avila explained that the Vikings acted like a criminal street gang, and under color of authority threw gang signs and beat up and shot at people. (RT 1596-1597, 1602-1603, 1611.) During one of the several instances in which Blair had detained Avila, Blair said, "Fuck the Young Crowd, this is the Vikings." (RT 424, 522-524, 677-678, 1249, 1603.) Fuiava also knew the Vikings as a group of renegade deputies who acted like a gang, sported a signifying tattoo, flashed gang signs, and regularly harassed those in the neighborhood. (RT 1884, 1884-1885.)

Both Avila and Fuiava testified that the Lynwood deputies, including Vikings, had harassed and intimidated them. (RT 1596-1597, 1602-1603, 1880-1885.) Avila described one favorite Viking tactic as the

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[4] The eventual trial of this incident resulted in a verdict for the plaintiffs, and that verdict led to a settlement of the entire case that included an award of monetary damages in the millions to the aggrieved plaintiffs and injunctive relief. (RT 311-312, 1429-1430.)

administration of so-called "flashlight therapy" — beating a person with a police flashlight. (RT 1597.) Avila had received "flashlight therapy" from Vikings a number of times, including a couple times from Blair. (RT 1597, 1602.) Fuiava testified that in the weeks preceding the confrontation deputies had been threatening Young Crowd members, who consequently believed the deputies were out to get them. (RT 1880.) For example, in early April 1995 deputies impounded Fuiava's car, asking where his "homeys" were and if they all planned on coming to court. (RT 1881-1882.) Fuiava asked what they were talking about, and the deputies responded, "Your homeboys don't talk to you about the lawsuit that's going on?" (RT 1882.) A deputy then told Fuiava: "[T]alk to your homeboys. They know what I'm talking about.... The lawsuit's coming up, and, you know, you guys want things to be rough around here and shit, you know. You guys haven't seen nothing yet." (RT 1882.) Another deputy told Fuiava and his group, "You know, the Vikings are back." (RT 1883.) At the time of the fateful confrontation, Fuiava also was aware that in the prior month deputies had beaten up one Young Crowd member and shot another Young Crowd member. (RT 1880.)

Several weeks before the confrontation, friends of Young Crowd member Jose "Rascal" Nieves painted an abandoned truck that had been left on his property to look like a patrol car. (RT 1799-1801.) They painted it up with a police badge, wrote "sheriff" and "fuck the sheriff" on it, and put a number of punctures in the cab portion of the truck with a pick axe. (RT 1801.) Deputies discovered the mock patrol car on May 7, and raided Nieves's residence, during which they confiscated some firearms and shot him. (RT 1803.)

It was widely reported in the neighborhood that a sheriff's deputy had shot Nieves in the back when they raided his place, though he was unarmed and running away. (RT 1205-1206, 1318, 1334-1335, 1532, 1653, 1909.) For Fuiava, that shooting reminded him of the shooting death of his close friend Polk in 1990 perpetrated by sheriff's deputies. (RT 1910.) The wrongful shooting of Nieves ratcheted up the tension between the deputies and Young Crowd. (RT 1337, 1531-1532, 1654-1655.) On May 12, a number of Young Crowd associates were hanging out in the neighborhood when there was some discussion of whether the deputies had tried to kill Nieves as they had killed Polk. (RT 1909-1911.) According to Fuiava, one of the youngsters suggested they should just "blast" the sheriffs, but that suggestion was immediately dismissed by the rest of the group. (RT 1909, 1911.) Avila, who was present for this discussion, testified that there was no remark about killing a deputy; however, his parole officer testified that Avila had told her someone in the group had said that they should blast a deputy, but that it had been "just talk." (RT 1817.)

At that time, Los Angeles County had instituted gang enforcement teams that saturated areas of high gang activity and responded to gang-related incidents. (RT 355-356, 368.) The Sheriff's Department accumulated data on suspected gang-related incidents during the week and then decided which station's area would be saturated during the Friday evening patrol. (RT 357.) Team members, who were also assigned to various patrol stations in the county during the remainder of the week, would arrive at the designated station to receive briefing about the target area. (RT 357-361.)

On the evening of May 12, 1995, fifty deputies in twenty-five patrol units were assigned to the area patrolled by Century Station, which by then had replaced the Lynwood sub-station and covered a greater geographical area. (RT 358, 367.) At a pre-patrol briefing Sergeant Madden told Lyons, Blair and the other team members that Young Crowd was stealing from a 7-11 store; he also informed them that Young Crowd had fixed up a truck as a mock patrol car, complete with a sheriff's star symbol, and shot it up. (RT 371-372, 382-383.) The sergeant also reported that a search of a house associated with the truck turned up firearms, including semi-automatic weapons and an AK 47. (RT 408-410.) Madden displayed photographs of the truck, and Lyons couldn't believe "the type of fire power they had to do all the damage to that truck." (RT 381, 402.) (Trial testimony demonstrated that the truck actually had not been fired upon, and that there were no automatic weapons found in the house. (RT 1801).) The truck had graffiti on it that included "Fuck the Sheriff," "Kill Sheriff," and "The Crowd is going to get you." (RT 383.) Madden also told the deputies about a foot pursuit in Athens Park during which someone shot at a deputy. (RT 371, 527.)

At 5:00 p.m. on May 12, 1995, Lyons and Blair — who had partnered up three weeks earlier — began gang-enforcement team duty in the Lynwood area. (RT 354, 356-357, 360, 366, 454.) Each of the deputies was armed with the standard issue Baretta 92F, a nine millimeter firearm. (RT 489, 792.) Blair drove during patrol that evening because this was the first time that Lyons had worked the Lynwood area, while Blair was very familiar with it from his long service there. (RT 356, 389.) They left the station after the briefing at 6:20 p.m. (RT 392.) While on patrol, Blair

arranged to meet with four fellow Lynwood deputies at a Burger King. (RT 400.) There, they discussed the mock patrol car and weapons reportedly found at the Nieves residence; Blair remarked, "Young Crowd's at it again." (RT 401.) At about 7:45 p.m. Blair drove to the Young Crowd area of Martin Luther King Boulevard past the street where the mock patrol car had been found, which heightened the deputies' tension. (RT 404-408, 413-414.)

2. The Toss and Stop.

It was about 7:55 p.m., close to dark, when Blair made a left turn eastward onto Walnut Avenue, a residential street that dead-ends in Ham Park and a spot where Young Crowd was known to gather. (RT 414-415, 438-439, 672.) About 50 feet in front of them the deputies saw the backs of two men standing beside one another on the sidewalk across the street. (RT 419-423.) The shorter one was Avila (RT 1249) and the taller one was Fuiava (RT 424, 522-524, 677-678), but Lyons did not know them. (RT 424.) Lyons also saw a small child riding a bicycle in the direction of the two men. (RT 425-426.) The two men did not do anything to draw the attention of the deputies, but Lyons thought they were wearing gang clothes and watched them. (RT 427-428).

Avila had just left his home on Walnut to walk to Ham Park, a usual gathering place in the neighborhood. (RT 1590-1591.) Fuiava had just retrieved two guns (a nine millimeter and a .44 caliber) that he had stashed under Avila's house and was headed to Kito's house near the dead-end at Ham Park. The nine millimeter was Fuiava's gun; the .44 caliber he had taken from a youngster earlier that afternoon "because there was no need

for that little kid to be carrying the gun." (RT 1885-1887, 1964-1965.) When Fuiava happened past Avila, who was telling his daughter Melissa and her friend Charlotte that it was time to go inside, Avila told him that he would see him at the park. (RT 1591-1594, 1610, 1887.) Fuiava continued to walk towards Kito's residence. (RT 1610, 1887.)

Avila testified that he saw the patrol car suddenly come around the corner, shooed the kids toward the house, and started walking towards the park. (RT 1594-1595.) Avila — on parole at the time — looked back over his shoulder and saw the police car "coming pretty fast." (RT 1597.) Lyons observed Avila glance back at the patrol car and continue to walk at a normal pace in the direction of Ham Park; Lyons testified that he saw Fuiava do the same. (RT 429-430.)

Avila tossed a .45 caliber firearm that he had been carrying in his waistband as far from him as he could. (RT 1595-1597.) The patrol car was about twenty or thirty feet behind him at that point. (RT 439.) Lyons saw Avila maintain his pace and toss an object — which Lyons thought at the time was probably narcotics —in the manner of a basketball "sky hook" about fifteen or twenty feet into the front yard of a residence on Walnut Avenue. (RT 433-438.) The deputies commented on the toss, and Blair directed Lyons to handle the tosser and he would get the other guy. (RT 441.) Blair abruptly turned and parked across the street diagonal to the curb in the oncoming traffic lane, about five feet behind Avila and angled eastbound toward Ham Park. (RT 443, 1191; see also People's Exh. No. 4 [diagram].) Avila stopped walking when the patrol car pulled up behind him, while Fuiava continued on his way. (RT 442-446.) Avila turned

around and faced the patrol car with his hands visible at his sides. (RT 446, 1598.)

3. The Shooting.

a. Fuiava's Testimony.

As Fuiava walked down the street, he glanced back at the patrol car flashing its lights and swooping up on Avila. (RT 1887.) Fuiava continued walking toward Kito's house, but after a few steps — when he was about 9-10 feet past a tree in the grassy area between the sidewalk and the curb (see Exh. No. 4) — he heard a gunshot. (RT 1887) Fuiava ducked and turned around, and saw Lyons's back as Lyons was going down behind the patrol car. (RT 1888) Then he saw Blair with his gun pointed straight out in front of him toward the sidewalk. (RT 1888.) Avila was on the sidewalk in line with Blair's gun and looked as if he was coming up from the ground in a crouch, running low towards his home. (RT 1888.) Blair fired his weapon. (RT 1889.) While still watching Avila run, Fuiava took a step in their direction and yelled at Blair. (RT 1889.) Blair then made a movement toward Fuiava, who put his hands up, but Blair with "no hesitation" fired on him. (RT 1889-1890.) Fuiava heard the bullet pass close by his head, and fell up against an adjoining fence as more shots went by him. (RT 1890-1892.) As Fuiava did so, he pulled out the .44 caliber revolver; Blair hesitated a moment in apparent surprise. (RT 1892-1893.) Believing Blair was trying to kill him, Fuiava "let off the whole gun" — five rounds — towards Blair. (RT 1893.) Blair fell to the ground. (RT 1893.) When Fuiava saw Lyons pop his head up from behind the police car, Fuiava ran towards the park. (RT 1894.)

b. Lyons's Testimony.

Lyons got out of the patrol car as it was parked and focused on Avila. (RT 446-450, 453, 457-458.) Lyons had his gun holstered and took two steps that brought him to the right front tire of the vehicle. (RT 457.) Lyons kept his eye on Avila, who remained standing as he had been. (RT 452-453.) In his peripheral vision Lyons saw Blair begin to exit the vehicle, pulling himself up out of the car with his right hand atop the open driver door. (RT 452-458.) Blair was right-handed and holstered his gun on the right side. (RT 455; see also RT 767.) The car's windows were down, per standard operating procedure. (RT 463)

Gunfire stopped Lyons in his tracks. (RT 453, 457.) He heard five rapid gunshots in the space of one or two seconds, with the rounds whizzing by his left ear from the west behind him (i.e., from the general direction where Blair was located). (RT 453, 459-460, 465-466, 470, 483, 553.) Avila raised his arms a bit and displayed his palms, showing that he had nothing in his hands. (RT 460.) Lyons took his gun out of its holster and turned to look behind the patrol car because the shots sounded as if they had been fired from behind it; he knelt down for cover by the right front tire. (RT 462-463, 465, 467-469, 557-559, 571-572.) At the same time, Lyons saw Blair just clear of the driver's door reach for his weapon and then crouch down behind the driver's door in a combative stance; Lyons, however, did not actually see Blair bring his weapon back up. (RT 461-464, 467, 469.) Blair was looking towards the front of the car eastward in the direction where Fuiava had walked. (RT 468-469.) This was all happening very quickly. (RT 469.)

Lyons yelled to Blair and asked if he was okay. (RT 471.) There was no response. (RT 471.) Lyons could see by looking under the car that Blair was still crouched in the same position in which he had last seen Blair. (RT 473.) Lyons rose up and looked over the top of the car in the direction Blair was facing; he saw Fuiava 30-40 feet away running eastbound toward Ham Park. (RT 475-476.) Avila remained as he was. (RT 477.)

Lyons went around to the rear passenger side of the patrol car to contact Blair and saw Avila running westbound away from the park. (RT 483, 495.) A second set of approximately eight gunshots then erupted. (RT 483.) About five seconds elapsed between the two volleys of shots, though Lyons testified at the preliminary hearing the elapsed time was about 30 seconds. (RT 477, 568.) This latter volley proceeded more slowly than the first one and sounded as though it was fired from a different gun. (RT 483-484.) The volley also sounded like it came from the direction of the park rather than the opposite direction as in the first volley. (RT 483.) Lyons heard the second set of shots ping against a Mazda truck parked about five feet behind the patrol car. (RT 480-483, 560.) Lyons wanted to get away from the patrol car because he thought the shooter was shooting at them and he ran towards the Mazda truck. (RT 484-485.) After a couple of steps, however, he spied Blair face down on the ground and turned back to attend to him. (RT 487.) Blair was unresponsive, and had blood coming from his mouth and his firearm in his hand. (RT 487-490.) Lyons called for assistance over his portable radio. (RT 490.) Lyons never saw Blair fire his gun that night and did not know that he had — Lyons thought at the time that all the shots were coming at them. (RT 560-561.)

Lyon's testimony at the preliminary hearing about the shootout differed from his trial testimony in critical respects. 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, who remained stationary, 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.) Thus, Lyons never saw Blair reach for his weapon after the first shots were fired, as he testified at trial; rather, instantly after the first shots rang out, he saw Blair already armed and pointing his firearm in Fuiava's direction. No blood was on Blair at that point. (CT 163.)

On cross-examination at the preliminary hearing, Lyons added that when Blair called out for someone to stop, Blair was standing out of the vehicle at the end of the opened driver's door. (CT 160.) He also added that after the rounds went off, he immediately looked at Blair and saw that "his gun wasn't out yet" (CT 177), which contradicted his testimony on direct that Blair was pointing his gun in the direction of Fuiava when Lyons looked over at Blair immediately after the first shots. Finally, though at trial Lyons said he never actually saw Blair bring his gun up, he testified on

cross examination at the preliminary hearing as follows: "Q: Did you see him actually bring his gun up? A: Yes, I did." (CT 177.)

c. Avila's Testimony.

Blair flung his door open after the squad car pulled up to the curb, and came out of the vehicle with his gun already drawn. (RT 1604.) Avila put his hands up with his palms showing and said to Blair, whom he recognized, "What's up." (RT 1601.) Blair was about 15 feet from Avila, pointing the gun Avila's way as he moved beyond the car door, and the look on Blair's face caused Avila to think Blair was going to shoot him. (RT 1605, 1622.) Avila ducked and ran as he heard a couple shots go off and whiz by him. (RT 1606, 1621.) He heard someone yelling, "hey." (RT 1620.) He continued to hear gunfire, as if there was an exchange coming from two different guns, as he ran to his house. (RT 1607-1609, 1612.)

d. Other Eyewitness Testimony.

Doug Bristol, who was not a member of Young Crowd but lived on Walnut, was in Kito's yard with several others when their attention was directed to the patrol car coming around the corner in their direction. (RT 1098, 1734-1736, 1791.) The car then abruptly turned to the opposite curb and stopped. (RT 1739.) Blair jumped out of the vehicle with a gun in his hand, which was pointed toward Avila, and started firing just as he placed both hands on the gun and cleared the door. (RT 1739-1741, 1758, 1761.) Avila was up against the fence in front of the fourth house down and Fuiava was by the tree a little further down the street towards Bristol. (RT 1741, 1758.) Blair fired at least two rounds towards Avila. (RT 1741, 1758.) Lyons ducked behind the car. (RT 1763.) Fuiava was by the tree with his

arms out facing the police, yelling "hey, hey, hey," or "whoa, whoa, whoa." (RT 1743, 1754-1755, 1777.) Blair immediately turned in that direction "and that's when the rounds started going over our head." (RT 1741, 1750.) Bristol heard an exchange of gunfire "like ... two different guns going." (RT 1742.) The bullets were close and Bristol, who thought they were being fired upon in the yard, did a complete circle and then took a quick look and saw his niece Charlotte in front of a house in the area and Fuiava running. (RT 1746, 1752-1753.) In sum, Bristol saw Blair jump out of the car and begin shooting toward the fence, and then change his angle to shoot toward the tree area which was lined up directly in front of where Bristol was standing. (RT 1749.)

Sara Frausto and Renele Brooks were among those in the yard with Bristol and also heard the gunfire, which they described as five to ten gunshots. (RT 1095-1097, 1098-1099.) Frausto looked and saw Blair shooting in their direction from behind his car door. (RT 1100-1104.) Frausto, Brooks, and Bristol then ran into the house. (RT 1242.) Bristol told Nancy Pantoja, his girlfriend, that he thought Fuiava "did it." (RT 1735, 1771.)

Five-year-old Charlotte Bristol was by the curb when she saw Blair get out of the patrol car with both hands on his gun shooting in one direction, and then pointing or shooting it in another direction before he fell dead. (RT 1846-1857, 1869.)

e. The Earwitness Testimony.

An off-duty Long Beach Police Officer who was in Ham Park, Ismael Rubio, heard the gunfire. The first set of gunshots sounded to him like it came from a 9 millimeter (the same type Rubio — not to mention

Blair — carried while on duty (RT 962)); the second set sounded like a larger caliber, such as a .44 or .45 caliber (the same type Fuiava fired). (RT 726-729, 747.)

4. The Aftermath.

According to the prosecution's medical expert, Blair received two gunshot wounds, one of which penetrated his aorta and was fatal. (RT, 1046, 1053-1054.) Such a wound instantly cuts off the entire blood supply and typically causes the subject to fall dead immediately. (RT 1054, 1069.) Sometimes, however, the reserve oxygen and sugar supply may delay incapacitation for up to six seconds after infliction of the wound. (RT 1054, 1057.) The other wound was to the right shoulder and was potentially fatal. (RT 1052.) It was not possible to tell which bullet struck Blair first. (RT 1058.) Subsequent analysis showed that the two bullets retrieved from Blair were from the same .44 caliber gun. (RT 944-945, 969, 979-980, 1000.)

The responding deputies found Blair on the ground. (RT 773.) "His right arm was extended above his head. His duty weapon was in his hand with the hammer of the gun cocked," which showed that he had fired it. (RT 773, 794.) Five .9 mm shell casings were in his immediate area, and it was determined that he had fired five shots. (RT 774, 793, 944.) The gun was ready to be fired again with a bullet in its chamber. (RT 794.)

Sergeant Harris and Deputy Taylor responded to the scene to collect and evaluate the firearms evidence. (RT 786, 943.) They found what appeared to be two bullet impacts on the exterior stucco wall of a house at 5210 Walnut, across the street from and west of the patrol car. (RT 808-

810, 947; see also Exh. 4.) They could not say for sure they were bullet impacts, however, because they never found a bullet associated with either of them. (RT 807, 945-947.) The marks were measured at a height of 5'7" and 5'10" inches, respectively. Taylor determined that if bullets had been fired by a person near the tree and impacted where indicated, they would have traveled close by Lyons's head if he had then been standing by the front tire of the patrol car. (RT 814.) Harris said that when he went back to the scene another time, he found a single impact upon the exterior wall of the house across the street at 5219 Walnut. (RT 949-950; see also Exh. 4.) Although Taylor had initially testified that there were approximately four or five apparent bullet impacts found and he appeared to testify about two impacts at 5219, subsequently he testified that there were only three bullet impacts found in total. (RT 808-810; 814-815, 818.) Both Harris and Taylor testified that an impact was found near the top of that residence. (RT 817, 950.) Taylor did not believe it had been measured, but Harris testified that it measured 11½ feet from the ground. (RT 817, 950.) Taylor inexplicably testified after checking "the documents" that it measured 1½ inches from the ground. (RT 817-818.) In any event, though Avila was standing between 5219 Walnut and the parked patrol car when the shots rang out (see, e.g., Exhibit 4), no effort was made to show that line of fire. The .45 handgun that Avila had tossed was found in the grass between the residences of 5219 and 5215 Walnut; it was loaded. (RT 819-821, 859-860.)

5. The Investigation and Fuiava's Movements.

Brooks and Frausto were among those interviewed at the Century Station on the night of the shooting. (RT 1112, 1243.) Both were friends

with Young Crowd members and knew Fuiava. (RT 1083, 1204-1205, 1228, 1304.) Brooks and Frausto told the police that they had no information. (RT 1112-1114, 1211, 1243.)

The next day, May 13, 1995, Fuiava arrived at Brooks's home in Fontana. (RT 1118, 1248, 1898-1899.) Brooks testified that she heard Fuiava make the following statements then: He and Avila were walking along when a patrol car pulled up and a deputy asked them to show their hands (RT 1249-1250); he was concerned about being sent back to jail because he was carrying two guns and had two strikes; he told Avila to act naturally, so the police would not be suspicious, but Avila got nervous and threw his gun (RT 1250-1252); Fuiava shot at the deputies; he was upset that Avila did not shoot as well (RT 1252-1253); and Fuiava was not going to go to jail for "no bullshit." (R.T. 1306.) Brooks did not hear all the conversation, however, because she was in and out of the room during the course of the evening. (RT 1303, 1901.) Brooks did not provide this information to the police until June 1, 1995. (RT 1306.) By that time, the police had interrogated her three times; pulled her over and raided her house; told her that she was under surveillance; and threatened to prosecute her as an accessory to murder. (RT 1289-1291.)

Fuiava testified that he went to Brooks's house that day and there was talk then about the shooting, but nothing was said specifically about his involvement. (RT 1900-1901.) He denied saying that he had shot Blair to avoid a third-strike sentence, explaining that the three-strikes law was not anything he ever thought about then. (RT 1956-1957, 2006.) His sister was the only person in his family that he had told that he shot Blair only after Blair started shooting. (RT 1905.) Fuiava did so when he called his

sister from Brooks's home and assured her he was fine, but that a deputy had tried to kill him and his friend and that's why the deputy ended up getting killed. (RT 1905.)

Frausto was also interviewed at the station several times. (RT 1162, 1167, 1180.) The first two times she told the police that she had no information. (RT 1162, 1167.) On May 27, 1995, the police came to her home and took her to the station for a third time. (RT 1179-1180.) The police warned her that they had learned from Brooks that Frausto had information about the homicide, and she became concerned that she could be liable as an accessory to murder. (RT 1181-1183.) Frausto told them then that she was at Brooks's home when Fuiava showed up there on May 15, 1995, and maintained the same at trial. (RT 1121, 1246, 1248.) According to Frausto, she told Fuiava that she knew he had shot Blair. (RT 1123.) Fuiava was surprised and asked how she knew. (RT 1125.) Frausto replied that Bristol had said so and that she had seen Fuiava do it; in fact, however, she had not seen Fuiava during the shooting. (RT 1125.) Frausto testified that Fuiava told her that he shot Blair because he did not want to go back to jail. (RT 1127-1129.) Fuiava in his testimony denied any such conversation. (RT 2006.)

Brooks testified that she asked Fuiava what she should tell the police if they questioned her again. (RT 1275.) Fuiava told Brooks that she should continue to maintain that she did not know anything about the shooting. (RT 1270-1271.) Fuiava said if the police came looking for him, he would kill himself before they got him because he did not want to go back to jail. (RT 1164, 1270, 1273.)

Frausto testified that on May 17, 1995, she and Fuiava were watching the television news at Brooks's home when the news reported that police were looking for a Hispanic suspect in the Blair shooting. (RT 1160-1161.) Fuiava, who is Samoan, did not think the police would suspect he was the one who shot Blair. (RT 1161, 1269.)

On May 24, 1995, Avila was arrested in connection with the Blair shooting. (RT 1615.) Avila told deputies that he was in the shower during the shooting, a story he had already told his parole officer. (RT 1614, 1616, 1812-1813.) After the shooting Avila was repeatedly apprehended by deputies and threatened; the deputies told Avila "you killed one of ours and we are going to kill ten of yours." (RT 1616-1618.)

6. Fuiava's Arrest.

Just after midnight the morning of May 24th, 1995, Deputy Riggin and Deputy Corrigan, members of the L.A. County Sheriff's S.W.A.T. team, were dispatched to a house in Fontana under surveillance because it was believed Fuiava was there. (RT 868-870.) Riggin and Corrigan were assigned to perform a traffic stop on anyone who left the house. (RT 870.) The two deputies were in a marked police car; each was armed with a semi-automatic pistol and an automatic weapon. (RT 872-873, 880.)

At 8:45 a.m., Riggin and Corrigan were directed to stop an Isuzu Amigo truck. (RT 879.) They turned on their red light and the driver of the truck, who proved to be Fuiava, pulled over immediately. (RT 882, 886, 1911-1912.) Both deputies drew their weapons, and Fuiava complied with Riggin's order to get out of the truck. (RT 883-884.) Fuiava also complied with their order to lie on the ground. (RT 887, 1913-1914.) Fuiava testified that one of the deputies pulled down the collar of Fuiava's shirt to

see a tattoo on his chest, then exclaimed hysterically: "This is the mother fucker. Face the ground, mother fucker. Don't fucking look up or I'm going to blow your head off." (RT 1914.) Riggin put his knee on Fuiava's back and handcuffed his left hand. (RT 892.)

After realizing that the road was blocked off in front of and behind them, and that he was alone with the deputies, Fuiava became fearful that they were going to kill him. (RT 1915-1916.) He jumped up, pushed the barrel of one deputy's gun away from him and struggled with them, trying to stay on his feet until some passers-by approached. (RT 1914, 1916-1918.) When Fuiava stood up he lifted Riggin, who was caught on Fuiava's back. (RT 894, 932-933.) Fuiava and Corrigan moved towards each other. (RT 898, 900.) Riggin and Corrigan struggled with Fuiava. (RT 903, 908, 933.) Reinforcements arrived and five deputies assisted in subduing and handcuffing Fuiava. (RT 912, 935, 1918.) As the deputies wrestled with Fuiava, he yelled to the bystanders that the deputies were trying to kill him. (RT 1918.) The deputies tackled Fuiava and knocked him out with a blow to the head. (RT 912, 1918.) When he regained consciousness, he was handcuffed and lying on the ground. (RT 1918-1919.) Fuiava testified that he heard the deputies comment to another, "Damn, if there weren't so many witnesses." (RT 1919.) Fuiava told the deputies to go ahead and kill him. (RT 913-914, 935-936, 1919.) Fuiava testified that deputies at the Century Station subsequently threatened him with death. (RT 1920-1921.)

7. The Taped Jail Visit.

The prosecution obtained a court order permitting the taping of conversations between Fuiava and his personal visitors at the jail; Deputy

Sheriff Platis accordingly recorded Fuiava's visit with his mother and sister Sasa on June 3, 1995. (RT 1342, 1347; CT 3rd Supp. 1-2.) The conversation was in Samoan and the prosecution had it translated into English. (RT 1493-1496.) At trial, the prosecution was permitted to reenact the conversation from the translation: Two female deputy district attorneys impersonated Fuiava's mother and sister, and the prosecutor himself impersonated Fuiava. (RT 1498-1539.) Transcripts with the Samoan and English translation side by side were handed out to the jury for them to follow along. (RT 1499; 1st Supp. CT 72-115.)[5]

According to the translation, Fuiava learned from his mother that she had told the police he had been at the house during the day of the shooting, left about 7:00-7:45 p.m. that evening, and came back the next morning. (RT 1500-1501.) Fuiava complained, "I'm saying one thing to the lawyer, and you go tell the police something else." (RT 1501; see also 1516-1517.) Fuiava asked her not to talk to the police any further, but to tell his lawyer that he was at home all that night. (RT 1501.) Fuiava's mother told Fuiava to say that she did not know where Fuiava was because she went to sleep at 7:00 or 8:00 p.m. that night, and that's what she would say also. (RT 1501.)

Fuiava then spoke to his sister and worked with her on getting the story straight with everyone that he had not been at the shooting scene and

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[5] Upon motion of the prosecutor, the transcript and re-enactment of this conversation were redacted to exclude Fuiava's references to the civil rights case that at the time of the shooting was about to be tried. (RT 1392, 1499.) The transcript distributed to the jury showed that two pages were missing; the court advised the jury that this omission was due to a ruling it had made that they should not speculate about. (RT 1499.) (Compare CT 1st Supp 60-63 with 106-107.) (See also Argument II, section C.)

had been home that evening. (RT 1504-1508, 1516-1520.) Fuiava said no one had identified him but that "one person is saying that I told him [sic] that I did it" and that's "why I'm here." (RT 1505.) He referred again to "the only thing why I'm here," and gave a phone number for his sister to call. He told his sister to tell that person that to help him she should either go away until this was finished or tell his lawyer that the police threatened to take away her baby from her if she did not put the blame on Fuiava. (RT 1507-1509, 1514-1515.) Fuiava said again, "The only reason I'm here is because of her." (RT 1516.)

Fuiava then talked to his mother and explained that even if he could get the murder charge dropped, he would still have to deal with the charge of fighting with the deputies when they came to arrest him. (RT 1521.) He told his mother that when the deputies caught him, they wanted to kill him. They had him on the ground and had the traffic blocked off and one of them tried to give him his gun so that they could kill him. (RT 1522-1523..) As Fuiava explained: "That's why I jumped up and ... start[ed] fighting with them. [¶] I tried to take away the policeman's gun, the one we were fighting, and I tried to take away another gun." (RT 1523.)

When Fuiava's mother remonstrated with him to change his ways, he responded:

> What? ... I don't go out there looking for things to do.... [¶] I have my own gun. I don't want to end up like, ... Ric Rac. [¶] ... That's why wherever I go my gun is always with me. But what happened that night we got caught because of my friend. If he kept on walking, the police wouldn't come to us. But he got scared, man. He panicked. He threw his gun. That's why the police came to us.

> .....
>
> You know, I had two guns. If they found those, it's all over. I don't know what would [have] happened. They probably shoot me. You know, they just shot my friend, what, three days before that ....
>
> .....
>
> They shot my friend in the back while he was running. [¶] A lot of things were going on between Young Crowd and the police.

(RT 1531-1532; [omissions in dialogue at times].)

Fuiava also related that the guards were regularly beating him in the jail. (RT 1536-1538.) Fuiava expressed his belief that if he did get out from under his charges, the deputies would try and kill him on the streets. (RT 1538.)

Fuiava explained in his trial testimony that at first he began to prepare an alibi because he did not think that anyone would believe that he had shot at Blair in self-defense; he did not think that such a claim even constituted a defense. (RT 1896-1897.) Fuiava initially thought his only chance was "to lie my way out of it" because "nobody could place me at the scene ...." (RT 1923.) The person he referred to in the tape who could help him by going away or claiming that the police pressured her was his wife, Tina. (RT 2016.) He did not tell his mother what really happened to spare her the distress. (RT 1924.) In the end, he decided to tell the truth because there was so much misinformation about the shooting. He always knew in his heart that he did not do anything wrong, so he decided to speak the truth and take the consequences. (RT 1925-1926.)

8. Evidence of Blair's Character for Violence.

Defense counsel presented evidence of Blair's character for violence through the testimony of his ex-wife, Rebecca Blair. (RT 2079.) She had filed for divorce after finding out in 1990 that he was having an affair with a woman named Dana, whom he subsequently married. (RT 2080.) At that time she executed a declaration under penalty of perjury swearing that Blair had a very volatile temper, broke furniture, and physically attacked her. (RT 2078, 2099.) Other evidence established that she called the Cypress Police to their residence in one instance because of a physical altercation between them when Rebecca tried to get Blair to leave the house. (RT 2078, 2091-2093.)

9. Evidence of Fuiava's Character for Violence.

Fuiava had suffered one juvenile adjudication and two adult convictions of assault with a firearm — the first adult conviction in 1989 and the second in 1992. (RT 1038-1039, 1927-1936; CT 18-25.) Fuiava had admitted the juvenile allegation and pled guilty in each of the adult cases, but testified that in fact he had committed neither the juvenile assault nor the second of the two adult assaults. (RT 1875, 1927-1936.)[6] He was 14 years old at the time of the juvenile case (see CT 427) — he recalled he was "like 13 years old" (see RT 1929) — and explained that he had admitted the juvenile allegation to protect the actual perpetrator, an older friend. He had pled guilty [sic][see fn. 6] to the last charge because he had been wrongly identified as one of the culprits at a field identification and was

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[6] Although Fuiava testified under his own counsel's questioning that he pled guilty in the 1992 case, in fact he pled "No contest" — consistent with his trial testimony that he found it advisable to resolve the charge by plea, though he in fact was not guilty of it. (See CT 576-584.)

offered a three-year deal instead of a potential seventeen-year sentence. (RT 1927-1936.) As to the shooting he had actually committed, he shot at a man who had been "messing" with Fuiava's girlfriend. (RT 1932-1933.) Fuiava never intended to kill him, and did not hit him; rather, Fuiava was drunk and fired recklessly several times in the man's direction as the car Fuiava was in drove by the man's house. (RT 2038-2039.)

Fuiava committed that assault three or four months after paroling from his term in the Youth Authority that had been imposed for his juvenile adjudication. (1st Supp. CT 19, 21; RT 1039, 1932.) Fuiava was committed to prison for a term of four years for the 1989 shooting. (RT 1039-1040, 1934.) About four or five months after his parole from prison on that offense, the 1992 shooting occurred that led to Fuiava's second felony conviction and commitment to prison. (RT 1040, 1934-1935.) Fuiava paroled from that term in January 1994; he was still on parole when he killed Blair. (1st Supp. CT 24.)

B. Penalty Phase.

1. Aggravating Evidence.

The prosecution presented 14 witnesses: one was an eyewitness to the shooting in 1984 when Fuiava was a juvenile; two were sheriff's investigators who provided evidence relating to the 1984 and 1992 shootings; one was a deputy sheriff called "to dispel this notion that the Vikings are a rogue racist group of deputies" (RT 2587); and the remaining ten provided evidence of victim impact.

In 1984 Manuel Ramirez was in Lynwood traveling in a car with his sister, two brothers, and another woman. (RT 2394.) Someone at the corner of an intersection yelled out Ramirez's name. (RT 2396.) He heard

gunshots. (RT 2399.) The woman in the car was shot in the jaw. (RT 2399-2403.) According to Ramirez, she and her sons were "into gangs." (RT 2403.)

An investigating deputy sheriff testified that Fuiava admitted that shooting. (RT 2423.) This deputy further testified 1) that Fuiava admitted that he shot at another car within minutes of that shooting (RT 2432); 2) that he shot at both cars because he believed rival gang members were in them (RT 2428-2431); and 3) that Fuiava also admitted that, a week prior to those shootings, he shot into a car whose occupants he believed were rival gang members. (RT 2433, 2436.)

In 1992, Deputy Sheriff Matt Brady — a tattooed Viking — responded to a call that involved a shooting. (RT 2605, 2611.) A woman's head had been grazed by a bullet. (RT 2606.) Blair assisted on the call. (RT 2607.) They went to the Walnut Avenue area for a field identification of the suspect by the victim. (RT 2608.) She identified Fuiava as the assailant, and he was promptly arrested. (RT 2609.)

Lyons was called to reprise his testimony about being Blair's partner for the three weeks prior to the shooting. (RT 2405.) He added that their patrol down Walnut was a detour from their destination back to Lakewood Station, where Blair was going to drop Lyons off so that he could participate that evening in the annual "memorial run ... where all the deputies in Los Angeles County run ... to remember the deputies who have lost their lives in the line of duty." (RT 2408-2409.) Since the shooting, Lyons daily thought about Blair and about what Lyons could have done to change that night so that Blair would still be alive. (RT 2408-2409-2410, RT 2415.) Blair was a wonderful, beautiful person with children. (RT

2410.) Lyons loved working with Blair. (RT 2411.) They were best friends from the first and loved each other. (RT 2411.) Blair made Lyons a better deputy. (RT 2412.) Lyons "talks" to Blair daily and asks his forgiveness. (RT 2416.)

Deputy Sheriff Richard Westin met Blair in 1990 and they became instant companions and eventual best friends. (RT 2448-2450.) They shared intimacies, and talked daily. (RT 2450-2451.) They went through divorces at the same time. (RT 2451.)

Westin responded to the call when Blair was shot. (RT 2461.) He went "blind" when he learned the deputy lying in the gutter was Blair. (RT 2461.) He went up to Blair and promised "to get the son of a bitch that did this to you," and then left the scene to fetch Blair's wife and take her to the hospital. (RT 2461.) Westin had seen Blair earlier on the shift that evening and knew he had a miserable head cold, but "he was too dedicated to call in sick." (RT 2477.) Westin will never be able to replace Blair as his best friend and remains depressed by Blair's death. (RT 2457, 2463.) Westin loved Blair. (RT 2459.) Westin asks Blair to watch over him. (RT 2459.) Westin attempts to model his life after Blair. (RT 2453.)

Westin brought to court Blair's many commendations while a sheriff, "over ten." (RT 2467.) One extraordinary commendation marked as an exhibit was for arresting a murder suspect without using violence, although Blair justifiably could have used deadly force. (RT 2469-2470.) That commendation now hangs in the briefing room at Century Station along with a plaque that bears Blair's name as well as those of other deputy sheriffs at that station killed in the line of duty. (RT 2472.) The street leading to the station also has been renamed "Deputy Blair Way." (RT

2472.) The whole station of 350 people has grieved for Blair. (RT 2459.) Westin displayed a bracelet he was wearing that memorialized Blair and said that over a hundred similar ones were sold at his station alone, with the proceeds going to Blair's widow. (RT 2465.)

In Westin's estimation, Blair had no equal as a police officer. (RT 2453-2455.) There were countless times that Blair could have shot someone but did not, and Westin recounted several of them. (RT 2456-2457.) Blair "had a reverence for life and a degree of professionalism that was well beyond what would be expected of a deputy sheriff." (RT 2456.)

According to Westin, the only time in his career that Blair ever shot anybody was when he was backed up against the wall and about to be stabbed in his stomach with a spear. (RT 2455.) On cross-examination, Westin disclosed that Blair killed that person. (RT 2478.) Westin was not aware of the name of the victim of that shooting, which was Shelton, or of any allegations that it was wrongful. (RT 2478-2479.) Nor was he aware of any allegations that Blair had wrongfully beat someone with a baton, or had engaged in "flashlight therapy" — a term that Westin said was made up for use in a civil suit. (RT 2481.) Nor did Westin know about allegations of another beating by Blair. (RT 2482.) As Westin explained: "I just know that people are always complaining about the police and one common theme now, the day of lawsuits, is to claim they used force against him." (RT 2482.) As far as Westin knew, "there really wasn't a law suit over" the Shelton killing. (RT 2482.) Westin did know about a lawsuit filed against Blair for excessive force, but discounted it as "a lawsuit where [the lawyer] sued the entire station of Lynwood," so that "if you worked there, … you

were named in the suit." (RT 2482.) Westin believed the lawsuit was "frivolous" and was still pending in court. (RT 2493.)

Westin admitted that the Vikings consisted of a group of deputies that have tattoos, but protested that "it's not an organization." (RT 2484.) Indeed, Westin had a Viking tattoo with the Roman numeral for 73, which meant he was the 73rd member of the Vikings when he became one in 1992. (RT 2484-2485, 2488.) Westin explained that the Vikings consisted of a group of deputies with an allegiance to one another, "just as in any other organization[] that might have tattoos." (RT 2486.) He maintained that it was a "group of deputies of all races," and explained that the symbol of the Century Station was a Viking. (RT 2486.) "It's just like you go out and ask gang members how did you get your gang name and they don't even know." (RT 2487.) Westin described the pin that the prosecutor was wearing as symbolic of the area that the old Lynwood Station patrolled before it merged with another and became the Century Station. (RT 2489.) In the center of the pin was the station mascot, a Viking. (RT 2489.) The Vikings have since "been brought into a negative light." (RT 2490.)

When defense counsel on recross asked Westin to explain the lawsuit, the court interrupted and said: "I will take judicial notice that the lawsuit was filed in 1990, ladies and gentlemen. I have ruled it is remote. We're not going into it." (RT 2490.)

Bryan Hunt was an African-American who testified that he had been a deputy sheriff since 1989, assigned to the Lynwood Station before it merged with Century Station. (RT 2587-2588.) He is a member of the Vikings and has a tattoo that depicts a Viking. (RT 2588-2589.) He denied that the Vikings was "a racist, rogue band of vigilante deputies," explaining

that it was just a multi-racial group of deputies who hang out together with the symbol of a Viking as their mascot. (RT 2588.) He knew Blair was a Viking. (RT 2594.) Indeed, all the deputies in the courtroom — and there were seven or eight of them — were Vikings. (RT 2595-2596.) Hunt got the tattoo in the summer of 1993 because he was proud to be part of the Lynwood Station. (RT 2590.) His tattoo is different than those he has seen on the white deputies, and he does not know another black who is a Viking. (RT 2591-2593.)

Deputy Sheriff Jack Tarasuik met Blair in 1988. (RT 2494.) They were both trainees and Blair gave Tarasuik much-needed encouragement. (RT 2494-2498.) Blair helped Tarasuik with his paperwork after his shift. (RT 2499.) By the end of 1992 Tarasuik had become disillusioned with police work for various reasons, including bad press concerning the Lynwood Station and the Vikings. (RT 2503, 2517-1518.) He started working with Blair then, however, and Blair inspired him to stay in the profession. (RT 2503-2505.) They eventually became best friends. (RT 2500-2501.) When Blair died Tarasuik felt that part of him died too. (RT 2513.) Tarasuik has regularly visited Blair's grave to gain strength to go on. (RT 2513.) Knowing Blair made Tarasuik a more compassionate sheriff. (RT 2514.)

Both Tarasuik and Westin testified that Blair was known as "Mr. Lynwood" because of his dedication to working the Lynwood beat. (RT 2475, 2506.) Lynwood was the most challenging beat because of the level of criminal activity there, and Blair chose to work the 7:00 p.m. to 3:00 a.m. shift because that was the busiest time there. (RT 2475-2477, 2506.)

Tarasuik recited a poem written for Blair entitled "Mr. Lynwood." (RT 2514-2515.)

Blair's mother testified that he had wanted to be a sheriff since he was seven years old. (RT 2532.) He had volunteered at the sheriff's station after high school. (RT 2533.) She was taken to the hospital to see Blair the night of the shooting, and was informed upon her arrival that he was dead. (RT . (RT 2531, 2536-2537.) She prayed and told him that she loved him. (RT 2538.) She would like Blair's sons to grow up and be just like him. (RT 2539.)

Wayne, Blair's father, recollected that Blair had wanted to be a sheriff since high school. (RT 2615.) Wayne received a phone call late on the night of the shooting while in Tennessee that informed him that Blair had been killed. (RT 2616.) He felt shock, disbelief, pain, grief, and anger. (RT 2616.) He had spoken with Blair a couple of weeks earlier and they had told each other that they loved one another. (RT 2618.) He saw Blair at the funeral home and was devastated. (RT 2619.)

Becky, Blair's first wife, testified that she met him in 1980 when she was 16 years old. (RT 2540-2541.) He knew even then that he wanted to be a sheriff. (RT 2541.) They divorced in 1994. (RT 2543.) She spoke to him about the children before he went on patrol the night he died. (RT 2544.) He was sick and therefore did not think he should see the kids the next day. (RT 2544-2545.) A patrol car picked her up that night and took her to the hospital to see Blair. (RT 2546-2547.) The whole family was devastated. (RT 2549.) "Nothing will ever be the same again." (RT 2549.) It had been especially hard for the children. (RT 2549-2550.)

Michael, Blair's six-year-old son, expressed the belief that his dad was in heaven. (RT 2519-2521.) Joseph, Blair's eight-year-old son, said he missed his father all the time. (RT 2521-2523.) Stephen, Blair's twelve-year-old son, similarly said he missed his father. (RT 2524-2525.)

Dana, Blair's widow, met him in 1989 when she was a paramedic and he was a deputy sheriff. (RT 2554-2555.) They instantly became friends. (RT 2555.) They later became romantically involved and got married. (RT 2556.) They did everything together. (RT 2559.) On May 12, 1995, Dana was home studying for nursing finals. (RT 2559-2560.) Blair had a cold that day. (RT 2560.) She tried to talk him out of going to work because he was sick and he had had to work the day before, which was her birthday, but he loved his job. (RT 2561.) Dana dropped him off at work and told him that she loved him. (RT 2560.) That evening, Westin came over to the house, picked her up, and brought her to the hospital. (RT 2562.) He informed her along the way that Blair had been shot. (RT 2562.) Dana thought that she should have gone to work that night because maybe she could have helped him. (RT 2563.) He had told her he had a surprise for her birthday, but she never found out what it was. (RT 2564.) Blair's death had ripped her life away from her. (RT 2565.)

2. Mitigating Evidence.

Ten witnesses were called on behalf of Fuiava in a mitigation case that lasted only 2½ hours. (CT 762; RT 2685-2712.) They consisted of Fuiava himself, five members of his immediate family, his sister-in-law (RT 2662), and three longtime neighborhood or family friends (RT 2667, 2669-2670, 2687).

All of Fuiava's family members — his older sister Sasa (RT 2625), his younger sister Sopo (RT 2640-2641), his older brother Toetu (RT 2650), his much younger sister Melinda (RT 2682) and his mother (RT 2693) — testified to his goodness and expressed their great love for him. (RT 2653, 2696.) They are Samoan and were raised as a very close family unit and as Mormons active in the church. (RT 2626.) They testified about Fuiava's involvement in various constructive activities as a child — family functions, church activities, cub scouts, boy scouts, and sports. (RT 2626-2627, 2642, 2650-2651.), 2693-2694.) Throughout his life Fuiava proved himself a great brother to his seven siblings, a great uncle to his nieces, a great son to his parents, and a great father to his step-child Amanda. (RT 2630.) The death by cancer of Fuiava's father in December 1989 had affected him greatly because he especially cared for his father and was locked up at the time. (RT 2627, 2631.) Fuiava took over his father's responsibilities in helping his mother after his release from prison and was particularly close with the family then. (RT 2628, 2631, 2694-2695.)

Everyone also testified that Fuiava had a special affinity for children, and they responded in kind to him. (RT 2628-2629, 2643, 2651, 2664, 2667, 2671.) Fuiava spent considerable time with his wife's daughter, Amanda, whom he treated like his own daughter. (RT 2629-2630, 2638.) The neighborhood children referred to Fuiava as Uncle Freddie, and he was a father figure to his nieces. (RT 2628-2630, 2643-2644.)

Everyone found that Fuiava was loving, caring, and had a good heart. (RT 2630, 2651, 2664, 2670.) Fuiava was always protective of family and friends, even if it put him in harm's way or meant taking the rap for someone else. (RT 2630, 2652, 2672-2673.) He always extended

himself to others in their time of need, and provided "a strong shoulder." (RT 2652, 2667-2668, 2674-2675.) Fuiava's sister-in-law, an old family friend whose older brother was friends with Fuiava, testified that he showed his compassion when her brother was killed. (RT 2661-2662.) Many also loved and cared about Fuiava, and it would be hurtful to them if he were executed. (RT 2640-2641, 2644, 2652-2653, 2665, 2707.) His loved ones would feel the same loss as Blair's family felt about him if Fuiava were sentenced to death, and it would be like taking a piece of their heart away from them. (RT 2645, 2653, 2665, 2676.)

Fuiava's sisters testified that he did not deserve to die because he had not killed with malice. Sasa: "He protected his friend and himself. That's what happened." (RT 2632.) Sopo: "I truly believe that he did it to save his own life." (RT 2645.) If Blair had hit Fuiava rather than missed him, there would be no death penalty prosecution for him. (RT 2632, 2677.) Sopo heard that there was testimony the previous week that the deputies were out that night to protect them, which caused her to wonder, "who is out there to protect us from them?" (RT 2644-2645.)

Fuiava asked the jury to spare his life for his family and loved ones. (RT 2707-2709.) He asked the jury to take into consideration what those who knew him the best had to say about him. (RT 2707.) They knew that there was no way he would have killed Blair in cold blood as the prosecution argued. (RT 2707.)

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.

"[I]t is quite likely that an innocent man has been convicted of a capital crime," Fuiava's counsel aptly observed in his motion for a new trial or modification of the death verdict. (CT 792.) As counsel noted, the evidence exposed "the inherent weakness of the People's case." (CT 792.)

The record failed to show "'substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Accordingly, there was insufficient evidence to support the judgment. (*Ibid.*) A conviction based on such insufficient evidence violates the due process clause contained in the Fourteenth Amendment to the United States Constitution. (*Jackson v. Virginia* (1979) 443 U.S. 307 [61 L.Ed.2d 560, 99 S.Ct. 2781].)

Just as a reasonable trier of fact would harbor reasonable doubt as a matter of law, that trier of fact necessarily also would harbor lingering doubt as to Fuiava's guilt. Because the evidence established both lingering doubt and reasonable doubt as a matter of law, the judgment also violated the Constitution's guaranties of heightened reliability and assurance of fairness secured by the Eighth and Fourteenth Amendments to the United States Constitution. (See, e.g., *Monge v. California* (1998) 524 U.S. 721,

732 [118 S.Ct. 2246] [recognizing the "acute need for [the] reliability" of death judgments].)

First, there was insufficient evidence to overcome a reasonable doubt that Fuiava acted in self-defense. Lyons, the only eyewitness to the shootout the prosecution presented, testified that the first shots he heard sounded like they came from Blair's direction, not Fuiava's. The several eyewitnesses Fuiava presented uniformly testified that Blair shot first. Rubio, the off duty detective, testified that the first shots sounded like they came from a nine millimeter gun — Blair's gun. No physical evidence contradicted the eyewitness testimony that Blair, not Fuiava, shot first.

In the face of this evidence, the trial court's adherence to the view that "the evidence of guilt was overwhelming" (RT 2813) was untenable. According to the court, "the most compelling evidence came from [Fuiava's] own mouth in his admissions to his mother and his sister while he was incarcerated in the county jail." (RT 2812.) That view, however, required the court "to adopt the prosecutor's convoluted interpretation of the taped Samoan jail conversation," as defense counsel put it in the motion for new trial. (CT 792.) Only by negative implication, and thus indirectly, can that taped conversation be used even arguably to support 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. The fact that the court deemed it the most compelling evidence of Fuiava's guilt reveals not only the considerable doubt that inheres in the trial evidence, but also the bias of its view that the evidence of guilt was overwhelming. (See Argument XXIX, *post.*).

Far from overwhelming, "this was a close case" on the evidence, as trial counsel asserted. (RT 2811.) This assessment is borne out not only by objective consideration of the evidence, but also by the objective indications that the jury struggled greatly before reaching its verdicts of guilt. First, its deliberations consumed approximately two and a half days in a case where the evidence was presented in approximately seven days. Such prolonged deliberations provide "a graphic demonstration of the closeness of [a] case." (*People v. Cardenas* (1982) 31 Cal.3d 897, 908.) The jury's request for readback of portions of testimony of two witnesses was another indication that the case was close. (See, e.g., *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["Juror ... requests to have testimony reread are indications the deliberations are close. [Citations.]"].) In addition, there was divisiveness among the jury during deliberations that led to intervention into the deliberations by the court. That divisiveness was over the question of the credibility of the defense witnesses, upon which the case for self-defense depended. The jury's impasse on guilt was overcome only by the court's dismissal of the juror who credited the testimony of the witnesses who supported Fuiava's claim of self-defense. (See Argument III, *post.*) Evidence of jury impasse during deliberations is another indication of a close case. (*People v. Bennett* (1969) 276 Cal.App.2d 172, 176.)

There was also insufficient evidence of premeditation. As trial counsel argued, the evidence showed that "[t]he amount of time the defendant had to [act] was a matter of seconds or less." (CT 792.) Moreover, they were highly-charged seconds, where everything "happened very fast, in an instant," as counsel further argued. (RT 2814.) Lyons had

seen Fuiava moving away from the scene, with his back to the officers, when they initiated the stop. A mere few seconds later came the first burst of gunfire, and then the second. "Given the presumption that an unjustified killing of a human being constitutes murder of the second, rather than of the first, degree, and the clear legislative intention to differentiate between first and second degree murder, we must determine in any case of circumstantial evidence whether the proof is such as will furnish a *reasonable foundation* for an inference of premeditation and deliberation [citations], or whether it 'leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation.' [Citation.]" (*People v. Anderson* (1968) 70 Cal.2d 15, 25; italics in *Anderson*.) In *Anderson*, the Court described the considerable burden imposed upon the prosecution to prove "premeditation and deliberation":

> [I]n order for a killing with malice aforethought to be first rather than second degree murder, "the intent to kill must be formed upon a *pre-existing* reflection, and have been the subject of actual deliberation or *forethought*." [Citation.] We have therefore held that "a verdict of murder in the first degree on a theory of a willful, deliberate, and premeditated killing is proper only if the slayer killed "as a result of careful thought and weighing of considerations; as a *deliberate* judgment or plan; carried on cooly and steadily, especially according to a *preconceived design*." [Citations.]

(*People v. Anderson*, *supra,* 70 Cal.2d at p. 26; italics in *Anderson*; brackets and ellipses deleted.)

Given the explosiveness of events surrounding the shooting, not to mention 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] include[d] 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." (See CALJIC No. 8.20.) Most telling here was the complete absence of "what may be characterized as 'planning' activity" — i.e., "facts about how and what defendant did prior to the actual killing which show the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing." (*People v. Anderson*, *supra,* 70 Cal.2d at pp. 26-27) As the evidence made plain, Fuiava had no plan to kill Blair and was merely on his way down the street when the patrol car rounded the corner. Even then, Fuiava continued to mind his own business and proceeded in the direction he was heading, with his back to the officers. It was only the happenstance that Avila tossed his weapon that caused the fatal confrontation.

Planning evidence is the most persuasive evidence of premeditation and deliberation; where it is absent, a finding of premeditation and deliberation typically requires evidence that "the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for [the] 'reason'" established by the motive evidence. (*People v. Anderson, supra,* 70 Cal.2d at p. 27; see also *People v. Murtishaw* (1981) 29 Cal.3d 733, 749.) Here, the prosecutor presented evidence that Fuiava's motive was to avoid arrest, but that was not very persuasive evidence of premeditation, for any such motive arose in a flash. Making every inference from the evidence favorable to the prosecution, it showed that upon the abrupt materialization of the detention, Fuiava killed by shooting a

fusillade of bullets from the gun he kept at hand, with most of the bullets missing its target. Such a manner of killing is at best "highly ambiguous" on the question of premeditation and deliberation. (See *People v. Anderson, supra,* 70 Cal.2d at p. 31; see also *People v. Rowland* (1982) 134 Cal.App.3d 1, 9 [defendant's asserted motive to avoid discovery of his conduct "supports the conclusion that the murder was more of a spontaneous reaction than a premeditated and deliberated plan to end the victim's life"].) The evidence of motive and the evidence of the manner of killing each supports a conclusion that the killing was "hasty and impetuous" rather than coolly planned and calculated. (See *People v. Anderson, supra,* 70 Cal.2d at p. 31.)

The evidence of guilt cannot be isolated from the evidence of innocence to determine the sufficiency of the evidence to support a guilty verdict. As this Court has explained:

> Another first degree murder decision [citation] summarized as follows the principles of review for sufficiency of evidence to support the jury determination of the degree of the crime: "First, we must resolve the issue in light of the *whole record* — i.e., the entire picture of the defendant put before the jury — and may not limit our appraisal to isolated bits of evidence selected by the respondent. [Citation.] Second, we must judge whether the evidence of each of the essential elements constituting the higher degree of the crime is *substantial*; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in the light of other facts.' [Citation.]"

(*People v. Cruz* (1980) 26 Cal.3d 233, 244; italics in original.)

This Court's opinion in *People v. Dillon* (1984) 34 Cal.3d 441, 484 is instructive here. There, the defendant was found guilty of murder in the first degree based on a felony-murder theory. The defendant armed himself with a rifle and attempted to commit a robbery. "The shooting ... was a response to a suddenly developing situation that defendant perceived as putting his life in immediate danger" during the robbery attempt. (*Id.* at p. 488.) The defendant felt threatened and panicked and "acted reflexively." (*Id.* at p. 483, quoting testimony.) He fired twelve shots at his near-by victim, nine of which found their mark. (*Id.* at p. 452.) The trial court concluded that there was insufficient evidence to support a finding that the murder was deliberate and premeditated (*id.* at p. 484), as impliedly did this Court when it reduced the verdict from first degree murder to second degree to avoid cruel or unusual punishment. (See, e.g., *id.* at p. 489.) The evidence here was likewise insufficient to show premeditation and deliberation rather than a panicked shooting. As defense counsel described it: "[I]t was more like a reflex, a response, rather than a carefully planned-out thing." (RT 2814.)

There was also insufficient evidence to support the special circumstance findings here. The two special circumstances alleged were that 1) the offense was committed for the purpose of avoiding or preventing a lawful arrest (§ 190.2, subd. (a)(5)), and 2) Fuiava knew or reasonably should have known that Blair was a peace officer engaged in the performance of his duties (§ 190.2, subd. (a)(7)). (CT 294-295, 329.) By the terms of the first special circumstance alleged, the jury was required to determine that the arrest avoided was a lawful one. And, as the jury was instructed pursuant to CALJIC No. 8.81, a finding that the murder was of a

police officer in the performance of his duties within the meaning of the statute required the jury to conclude beyond a reasonable doubt that the peace officer was acting lawfully in the maintenance of the peace and security of the community. (See RT 2317.) As this Court has explained: "[T]he long-standing rule in California and other jurisdictions [is] that ... one ... cannot be convicted of an offense *against a peace officer* '*engaged in ... the performance of ... duties*' unless the *officer* was acting lawfully at the time. [Citations.]" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217; italics in original.) Specifically, and as the court instructed, Blair needed "reasonable cause to detain" Fuiava. (RT 2319.) As the jury was further instructed:

> In order for a peace officer to have a reasonable cause to detain,
>
> One, there must be a rational suspicion by the peace officer that some activity out of the ordinary has taken place, is occurring or is about to occur.
>
> Two, some indication must exist to connect the person under suspicion with that activity.
>
> And three, there must be some suggestion that the activity is related to a crime.

(RT 2319.)

While there may have been reasonable cause to detain Avila as a result of his toss, there was nothing that connected Fuiava to that activity. There was evidence that Fuiava and Avila were in close proximity, but that evidence alone gave the officers no cause to detain Fuiava for Avila's conduct. Avila's conduct simply did not implicate Fuiava, who was minding his own business and doing nothing more than walking down the

street. As stated in *Irwin v. Superior Court* (1969) 1 Cal.3d 423, 427-428, from which the language in the instruction quoted above was taken:

> 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, ..."

The same may be said here: No more than a rank hunch supported the detention of Fuiava. Hence, there was insufficient evidence to support the finding that Blair was engaged in the performance of his duties, especially when the pervasive pattern of police conduct is factored in, requiring that it be reversed.

The Constitution demands such reversal as well. A finding of a special circumstance without evidence upon which a jury reasonably could base its decision beyond a reasonable doubt violates a defendant's right to due process. (*Ring v. Arizona* (2002) 536 U.S. 584, __ [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, [120 S.Ct. 2348, 147 L.Ed.2d 435].) Because the function of a special circumstance is to distinguish those murders that qualify for the death penalty, such a finding on inadequate evidence also implicates the cruel and unusual punishment clause of the Eighth Amendment, which requires that a death sentence be a reliable one. (*See, e.g., Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, 587; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340) Thus, the finding must be reversed as a matter of both state and federal law.

The lack of reasonable cause to detain Fuiava also vitiates the legality of any ensuing arrest that Fuiava sought to avoid. An arrest that flows from an illegal detention is tainted by that illegality, for the police

may not exploit their own illegality to establish probable cause to arrest. (See, e.g., *People v. Leib* (1976) 16 Cal.3d 869, 877 [consent induced by an illegal detention is not voluntary]; *Wong Sun v. United States* (1963) 371 U.S. 471, 488 [9 L.Ed.2d 441, 455, 83 S.Ct. 407] [explicating doctrine of fruit of the poisonous tree].) Because neither special circumstance may stand in the face of the evidence, the jury's findings that they were true must fall. As they fall, so must the judgment of death, for it depends upon the truth of at least one of those allegations of special circumstances.

Finally, even if there was sufficient evidence to support the jury's findings otherwise in all the above regards, there remains such lingering doubt on all these levels that a finding that the penalty of death was appropriate is insupportable. "Because the death penalty is unique 'in both its severity and its finality'" (*Monge v. California*, *supra*, 524 U.S. at p. 732), the evolving standards of decency that mark the progress of a maturing society do not permit the execution of Fuiava in the face of such doubt. As the Supreme Court recently stated:

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [Citations.]

(*Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 2247, 153 L.Ed.2d 335].)

There is a growing awareness of the fallibility of the "machinery of death" established by our criminal justice system to identify those who merit the death penalty. (See, e.g., *Callins v. Collins* (1994) 510 U.S. 1141 [114 S.Ct. 1127, 1137-1138, 127 L.Ed.2d 435] [opn. of Blackmun, J.,

dissenting from denial of certiorari].) Moreover, there is a growing awareness of the fallibility of that machinery even in making the basic penalty identification of who is guilty of capital murder. (See, e.g., http://www.deathpenaltyinfo.org/DrowInfo.html#state (1/26/03), Innocence and the Death Penalty ["Since 1973, 103 people in 25 states have been released from death row with evidence of their innocence. (Latest release, Rudolph Holton, January 24, 2003)"]; see generally Death Penalty Information Center (July 1997) Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent.) Given the doubt that dwells in the very heart of this case and beats out in every direction, imposition of a sentence of death upon Fuiava is savage and barbaric.

As one court has found:

> [T]he best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence.

(*United States v. Quinones* (S.D.N.Y. 2002) 205 F.Supp.2d 256, 257, rev'd. on other grounds in *United States v. Quinones* (2nd Cir. 2002) 313 F.3d 49.) Fuiava may be added to the list of innocent people who have been condemned to death at a rate too alarming to be accepted in the 21st Century.

"The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of

death required by the Constitution." (*Callins v. Collins, supra*, 510 U.S. 1141 [114 S.Ct. at pp. 1137-1138] [opn. of Blackmun, J., dissenting from denial of certiorari].) Ironically, capital offenses carry the greatest risk of a miscarriage of justice because they typically tend to be flash points for the passions and prejudices of the citizenry. As will be set forth in later arguments, a number of errors stirred up the jury's passions against Fuiava and contributed to the miscarriage of justice that resulted in imposition of the death sentence upon him, despite the evidence that established doubt throughout the proceedings.

For all of these reasons, the trial court erred when it refused to correct "a terrible wrong done by the jury," as Fuiava requested in his motion for new trial or modification of the judgment. (CT 792.) The judgment accordingly must be reversed, and remanded for entry of a judgment of dismissal of the charges; alternatively, and in descending order, for acquittal of first degree murder; acquittal of the findings of special circumstances; and modification of the judgment by reduction of the sentence to life imprisonment. (See, e.g., *People v. Lucero* (1988) 44 Cal.3d 1006, 1034 (conc. opn. of Mosk, J.) ["to serve the ends of justice," the Court should exercise the appellate powers granted it by statute to reduce the death judgment to life imprisonment].)

II.

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

A. Overview.

Fuiava offered a range of evidence designed to bolster in various ways his claim that he shot in self-defense as a product of an honest — and reasonable — fear that Blair was about to unlawfully kill or inflict great bodily injury on him or Avila. 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.

This evidence would have bolstered the case for self-defense in several ways. First, the culture of Lynwood deputy misconduct directed at

the Young Crowd provided an acceptable explanation for why Blair would unlawfully shoot at Avila and Fuiava, behavior that otherwise ran counter to the likely intuition of the jury. Second, the looming civil trial gave Blair a particular motive to intimidate if not harm Avila by wrongfully shooting at him. Third, the evidence of actual deputy misconduct would have corroborated the evidence that the court did permit — namely, testimony by Fuiava and Avila of deputy mistreatment of them (including in Avila's case mistreatment by Blair) and their belief that the deputies wrongfully shot at others in the neighborhood and inflicted serious injury and death upon them. All this evidence thus would have supported Fuiava's claim that he honestly believed he was in imminent danger of death or bodily harm at the hands of Blair, supporting a finding of manslaughter, and that his belief in that danger was a reasonable one, supporting acquittal.

The trial court largely excluded this evidence. It only allowed the defense to introduce 1) evidence that Blair was a Viking, 2) evidence of misconduct either personally perpetrated by Blair or perpetrated by other deputies upon Avila or Fuiava, and 3) evidence of Fuiava's subjective beliefs that Lynwood deputies had acted wrongfully. Because the excluded evidence was crucial to the credibility of Fuiava's claim of self-defense, its exclusion requires reversal under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

B. Background Facts.

Dozens of Lynwood residents filed a civil rights lawsuit, *Thomas et al. v. County of Los Angeles et al.*, No. 90-5217 TJH, in September of 1990 naming the Los Angeles County Sheriff and many of the deputies at the Lynwood Station as defendants. (RT 642, 1140, 1416-1423.) The

plaintiffs included Avila, members of his family, and other members of the Young Crowd. The plaintiffs alleged deputy misconduct in more than a score of incidents, including wrongful beatings, shootings, and arrests; "slash and trash" searches; witness intimidation; falsification of evidence; and other forms of civil rights violations. (RT 1433, 1436.) There were also allegations that a core group of Lynwood deputies had formed a clique called the Vikings that engaged in lawless and vigilante behavior under color of authority. (RT 1426-1429.) The plaintiffs sought an injunction, money damages, and other relief. (RT 1425-1426.)

Blair was named as a defendant in the lawsuit, which alleged that he was a Viking and implicated him in two of the incidents. (RT 1420, 1425.) Specifically, Blair was named as one of the deputies who forced their way into the home of Raul Gonzales and battered him (RT 1420-1424, 1433-1434), and who responded to the fatal shooting of William Leonard by Lynwood deputies. (RT 1420, 1431.) Blair had been deposed as part of that suit. (RT 636.)

The lawsuit alleged that much of the misconduct was perpetrated by the Vikings and that the county was liable for the Vikings' actions because their activities were known and condoned by the Sheriff's Department. (RT 1429, 1466.) An attorney for the defendants in the civil case testified that the complaint alleged that the Vikings were a neo-nazi group in the sheriff's department engaged in vigilante justice. (RT 1429.) For example, one deputy testified in a deposition that the Vikings ran Lynwood Station, rewarding their own membership with prime positions and enforcing their own form of justice upon the community. (RT 1437.) As its name indicates, the Vikings historically was comprised of white deputies and was

considered racist by some; there was evidence, however, that in its war on crime it had evolved to include deputies of other races. (RT 1428, 1442-1443.) Mark Glasser, the attorney who represented Raul Gonzalez and several other plaintiffs in the lawsuit, testified that there were allegations against sheriff's deputies of unlawful shootings, unlawful arrests, house trashing, slash searches, and harassment; and that although some defendants had been dismissed from the case, Blair was not one of them. (RT 1433, 1436.) The discovery included photos of a substantial number of Lynwood deputies, at least twenty or twenty-five, who sported Viking tattoos. (RT 1439-1440.) While no photo had been taken of such a tattoo on Blair, Blair had admitted he had one. (RT 1445.) The testimony taken in the litigation shifted from defense assertions that there were no Vikings, to the assertions that the Vikings symbol was a mascot for the station adopted by all the deputies, to admissions that the Vikings constituted a particular band of deputies at the Lynwood station. (RT 1439-1441.) Glasser said the plaintiffs developed evidence, including testimony from at least one deputy in the Lynwood station, that "the Vikings were a group of deputies who formed together in a racist band of individuals who wanted to wreak their own form of law enforcement justice on the Lynwood community." (RT 1437, 1440-1442.) Glasser himself had personally seen Viking graffiti inside the lockups at the courthouse. (RT 1438.)

In support of a motion for preliminary injunction, the plaintiffs filed numerous declarations detailing abuses by deputies, including the Vikings; the defendants in their declarations denied or otherwise sought to explain the averments of abuse. According to an attorney for the defendants, the district court found in 1991 that the Vikings were a neo-nazi white

supremacist group within the Sheriff's department, and issued a preliminary injunction as requested. (RT 1427; see also *Thomas v. County of Los Angeles, supra*, 978 F.2d at p. 511, where the findings of the district court are appended to the opinion of the reviewing court.) Acting upon a defense petition for writ relief, the Ninth Circuit Court of Appeals stayed and then in 1992 reversed the district court's order on the ground that the evidence was too much in conflict to warrant the injunction. (RT 1426-1427; see generally *Thomas v. County of Los Angeles, supra*, 978 F.2d 504.) The district court then ruled that the individual incidents would have to be adjudicated before an injunction might issue. (RT 1428-1429.)

Fuiava's counsel made an offer of proof that during pendency of the lawsuit the Vikings threatened to get revenge for the lawsuit, and flashed hand signs and said they would take over. (RT 641-642.) As trial of the lawsuit approached, the intimidation of the Young Crowd increased; trial was but weeks away when the Walnut Avenue shooting occurred. (RT 640, 1424, 1479.)

Avila testified that he hade been told by the sheriffs to "leave the lawsuit alone." (RT 1457-1459.) Avila had been present when Lloyd "Stranger" Polk, a Young Crowd member, was shot and killed by a deputy; this was one of the incidents at issue in the lawsuit. (RT 1457-1459.) A deputy sheriff had warned Avila not to testify. (RT 1457-1459.) Avila had interpreted these warnings and admonitions as threats that he might "disappear" like Polk if he talked about the Vikings. (RT 1458.) There were also two incidents in which Avila was victimized, including one at his house, that were part of the lawsuit. (RT 1458.) Avila could identify Vikings by their conduct in the community; for example, they "threw" their

gang sign — an "L" and a "V" — or yelled "Vikings" as they patrolled the neighborhood. (RT 1454.) Blair specifically had flashed the Viking gang sign, harassed Avila, and said "f___ Young Crowd, this is Vikings." (RT 1455.) Avila considered the Vikings like a rival gang. (RT 1459.)

Fuiava's counsel proffered evidence that in the week before the shooting, deputies raided the residence of Young Crowd member Jose Nieves, in the course of which they wantonly shot him in the back, though he was unarmed and posed no threat. (RT 640-642.) Fuiava had heard about that shooting. (RT 640.) The prosecutor stipulated to the shooting, but offered to prove circumstances that justified it. (RT 641-642.)

Fuiava sought to admit the foregoing evidence, including 1) the pendency of the lawsuit; 2) the allegations of unlawful beatings and shootings; 3) the existence of the Vikings gang and Blair's membership in it; and 4) the alleged misconduct of the Vikings. (RT 1449.) Defense counsel argued that Blair's association with the Vikings and other deputies who patrolled Lynwood in the manner shown by this evidence supported an inference that Blair was primed to wrongfully shoot at Avila in solidarity with his Viking and Lynwood brothers; this evidence would have bolstered Fuiava's defense that Blair fired first and Fuiava was forced to shoot back at him in order to protect Avila and himself. (RT 310.) Defense counsel further explained that the evidence was relevant to show excessive use of force and false arrests, Blair's and Avila's recognition of each other, and Blair's motivation to shoot at Avila. (RT 310.) Counsel subsequently reiterated that evidence of the civil suit was admissible to show Blair's motivation to shoot first, even if it was not admissible for the truth of the allegations in the lawsuit. (RT 595.) As counsel also explained, the

evidence was relevant to show that there was a "form of a conspiracy that the brotherhood [of deputies] is threatened and they want to respond." (RT 1478.) Defense counsel further argued that all of this evidence went to Blair's state of mind at the time he came into contact with Avila and Fuiava. (RT 644.)

C. The Court's Rulings.

1. The Court's Preliminary Rulings.

When the matter was initially raised prior to opening statements, the court observed that the evidence concerning the Vikings could be relevant under Evidence Code section 1103, subdivision (a),[7] if it were shown that Blair's prior misconduct was relevant to the charges. (RT 588.) The court preliminarily ruled, however, that there would be no reference to the Vikings and that there would be no evidence pertaining to the civil lawsuit. (RT 646, 653, 654.) The court observed that if Blair when deposed had admitted violent acts, that evidence could be introduced to show his proclivity for violence. (RT 655.) The court advised the parties, however, that "[w]e are not going to litigate the civil law suit in this trial." (RT 653.)

2. The Court's Ultimate Ruling re the Civil Suit.

The court ultimately excluded all evidence concerning the civil lawsuit under Evidence Code section 352, finding its probative value was

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[7] Evidence Code, Section 1103, subdivision (a), provides: "In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible be Section 1101 if the evidence is: (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

far outweighed by the confusion and undue consumption of time that would be involved in its presentation. (RT 1478-1480.) In the court's view, the evidence had little if any relevance to Blair's motive for shooting toward Avila, since Avila's position as a plaintiff in the lawsuit was unrelated to Blair and Blair was a minor defendant in the lawsuit. (RT 312-322, 535-537, 546, 1478.)[8] The court deemed the evidence "remote" and determined that its admission would "unduly prolong the trial." (RT 1478.)

This decision was in line with the court's earlier ruling, upon motion of the prosecutor and over defense objection, to redact the transcript and the re-enactment of Fuiava's jailhouse conversation with his mother to exclude Fuiava's references to the civil rights action; he had made those references when he had been explaining to her that "a lot of things are happening between us and the police." (RT 1392, 1499; see also First Supp. CT 106.) The transcript given the jury was redacted to exclude the two pages where Fuiava discussed this litigation to put the fatal confrontation with the deputies in context for his mother; the court advised the jury that the gap in the transcript was due to a ruling it had made that they should not speculate about. (RT 1499.) In fact, in those pages Fuiava advised his mother that Blair was a defendant in that lawsuit, which was directed at police brutality; that it was coming up for trial soon; and that both Nieves and Avila were scheduled to be witnesses. (First Supp. CT 62-63.)

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[8] The court acknowledged at one point that the *Thomas* suit had relevance in that it showed bad blood between Young Crowd and the Sheriff's Department. (RT 1151.)

3. The Court's Ultimate Ruling on the Vikings.

The court proceeded to address the question whether evidence that Blair was a member of the Vikings could be introduced and, if so, what evidence concerning the Vikings could be introduced. (RT 1481.) The court observed that any evidence of Blair's propensity for violence would be admissible. (RT 1482.) The court expressed difficulty in seeing the relevance of the Vikings evidence, however, because "it's just not sufficiently supportive of Blair's propensity to violence." (RT 1483-1484.) Defense counsel had earlier asserted how the evidence was relevant both to Blair's motivation and his intent, and now explained that the Vikings were a gang or "a group that go around and abuse Young Crowd people, flash their signs, threaten them, give them flashlight therapy, shoot them." (RT 1484.) As trial counsel further explained, it was also relevant to explain Avila's and Fuiava's fear of the officers: "And ... really the key in the case is that Mr. Avila believed that the Vikings were responsible for the killing of Lloyd Polk a year earlier and the shooting of Jose Nieves a week before this incident and believ[ed] that Blair was a Viking ...." (RT 1484.) The court commented that Avila had not been specific as to what the Vikings did that would constitute bad acts other than Blair's specific abuse of Avila. (RT 1484-1485.) The court concluded that Blair's involvement with the Vikings did not itself show propensity to violence, as opposed to merely association. (RT 1485.) The court observed that the lawsuit's allegations concerning the Vikings were hearsay and did not qualify even as reputation evidence. (RT 1485.)

The trial court deferred its final ruling pending one more defense witness for the 402 hearing, Sergeant Stanley White. (RT 1485, 1550.)

White testified that he was assigned to the station in Lynwood through 1989 and was aware of a group of deputies there who later were identified as Vikings. (RT 1552-1554.) White supervised a number of these deputies at the time but never received complaints of excessive force or bad arrests pertaining to them. (RT 1554.) White was the victim of vandalism, including sliced tires and missing or destroyed property, that he suspected had been perpetrated by certain Lynwood sheriff's deputies; but the court precluded inquiry by counsel into whether the vandalism related to White's investigation of the Vikings. (RT 1555-1556.) White was never able to determine who was directly responsible for the vandalism. (RT 1556.)

At some point after White left the Lynwood Station he talked to a lawyer named Barham, who had been a sheriff's department member at one time and had achieved the rank of lieutenant. (RT 1557.) White claimed attorney-client privilege when defense counsel inquired whether he had told Barham that the Vikings created supervisorial problems. (RT 1558.) According to White, that conversation occurred when Barham was trying to persuade White to retain him regarding potential disciplinary charges that White faced. (RT 1558.) The trial court sustained the privilege. (RT 1558-1559.) White denied that Barham had told him he did not think that their conversation was protected by the attorney-client privilege. (RT 1558-1559.)

White denied having a discussion with a Deputy Clift about the Vikings being a baseball team, and denied having told Barham that the baseball team was a cover for the Vikings. (RT 1561.) White testified that at the time he left Lynwood in 1989 no one there ever talked about Vikings, although White had seen deputies wearing a Viking logo. (RT 1562-1563.)

It was not until a newspaper article about the Vikings came out in December of 1990 that White heard discussions about them. (RT 1563.) White was told indirectly that the department believed he had been the source of information given to the press about the Vikings, but he denied such. (RT 1563.) Because of the department's belief that White was a media source, he was transferred and spent three years back in patrol under the pretext that he needed more patrol time. (RT 1564.)

Following White's testimony, defense counsel requested that he be allowed to present testimony from Barham, first, to overcome White's invocation of attorney-client privilege, and, second, to establish what White had told Barham. (RT 1565-1566.) Counsel made an offer of proof based on a deposition of Barham in the civil suit in which Barham testified that White told him the following: a) the Vikings was a group of deputies formed at the Lynwood Station after Lynwood Deputy Hurtle was killed in the line of duty; b) the Vikings became a group of thugs who fancied themselves "above" suspects and set up their own standards of conduct; c) the Vikings were young deputies who felt ordinary controls and discipline exercised by management should not apply to them, creating supervisorial problems; d) they acted as individuals rather than a group, but were all deputies with Viking tattoos or affiliated with the Vikings; d) for a time they gave "pattern" justifications for shooting suspects, claiming that the suspect was reaching into his waist for a weapon in cases where the suspects in fact never had a weapon; e) when White expressed to under-sheriff Edmonds concerns that a shooting had been wrongful, Edmonds rebuffed White, telling him, "you have no problem, go outside, think about it and come back in and tell me about it again"; f) any story that the Vikings

were a softball team was a front or cover; g) the shooting of a Korean motorist by a deputy with a Viking tattoo resulted in the county having to pay nearly a million dollars in a lawsuit; h) Clift had a Viking tattoo; i) White's difficulties began when he refused to look the other way and began documenting cases where deputies were acting contrary to the established formal policy of the department; j) there followed complaints by deputies that White was exceeding his authority as a supervisor, acting improperly, and using profanity, which resulted in a formalized investigation that outraged White, who had worked throughout the department for twenty years with distinction and felt betrayed; and k) the supervisory problems generated by Vikings ranged from minor infractions of going out of their area to serious misconduct that included making stops or arrests on flimsy reasons and using unnecessary force. (RT 1566-1575.)

Barham and White had several conversations on these topics after Barham told White that Barham was representing plaintiffs who had been victimized by sheriff's deputies. Barham told White that he could not claim privilege as to their conversations because Barham was not representing White in litigation, that White's information to Barham was discoverable, and that Barham was concerned about White's career. White told Barham that White nevertheless was willing to testify and set the record straight on the Vikings. (RT 1566-1575.)

After hearing White and defense counsel's offer of proof regarding Barham, the trial court repeated that the lawsuit and incidents underlying it in 1989 and 1990 were too remote. The court found that White's testimony about events in 1989 and how he was treated in his job were issues that should be excluded under Evidence Code section 352. It also concluded

that White was not the person to "sponsor" the testimony the defense was seeking. (RT 1577-1581.) The court noted particular problems with the defense offer of proof in that White had told Barham the group of deputies who were Vikings or associated with Vikings did not act as a group but as individuals. (RT 1575-1576.)

Defense counsel again argued that the Vikings were analogous to the legal definition of a street gang (see § 186.22) and their conduct was analogous to the pattern of gang activity defined in that section. (RT 1582-1583.) Defense counsel argued that unless the jury heard this evidence, which would supply a motive for Blair to shoot first, Fuiava would not receive a fair trial. (RT 1584.) As he argued:

> [B]asically this case is a shoot-out. And it is a question of who shot first and why. And the jury, because of the court's limitation, the jury is going to hear evidence as to who shot first from the defense standpoint but they are not going to hear why.

(RT 1583.)

As to the Vikings, the court ruled it would permit evidence that Blair had a tattoo of a Viking or other evidence that he was a Viking. (RT 1584-1586.) The court also permitted Avila's testimony that there was a group of deputies that included Blair who flashed Viking signs at him and administered "flashlight therapy." (RT 1586.) "But nothing more than that. If we are going to get off into specific bad acts by members of the Vikings, I think that that is too far afield." (RT 1586.) The court thus precluded Fuiava from presenting evidence that the Vikings acted as a vigilante group or otherwise engaged in a pattern of violence and police misconduct. (RT 317, 1586.)

Subsequently, and also outside the presence of the jury, defense counsel sought to introduce evidence of the wrongful shooting death of Young Crowd member Lloyd "Stranger" Polk perpetrated by a deputy sheriff. (RT 1716.) Over the prosecutor's objection, the court stated that it would permit "very limited inquiry" into that area and permitted counsel to establish simply that "there[was] another shooting involving Young Crowd ... by a deputy sheriff." (RT 1719.) When Avila testified in front of the jury that the shooting death was in 1989 or 1990, however, the court struck the testimony about it and admonished the jury to "disregard" it. (RT 1720.)

4. The Court's Rulings on the Deputy Shooting of Nieves.

The court also ruled that it would permit testimony regarding the shooting of Nieves. (RT 1585) In the end, however, it 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.

Frausto testified that she had heard that about a week before the Blair shooting, a Young Crowd member named Rascal was shot by deputies. (RT 1205-1206.) Brooks also heard Young Crowd members talking about that, but not in any detail. (RT 1318, 1334-1335, 1337.) When Fuiava was taped in jail talking to his mother, he explained why he thought Blair and Lyons might shoot him that night: "[T]hey just shot my friend, what, three days before that, you know." (RT 1531-1532.) Fuiava repeated his concern: "My friend was shot there that week .... [T]hey shot my friend. They shot my friend in the back while he was running." (RT

1532.) Avila also testified to the fact that Young Crowd was upset with the deputies because one of them had shot a Young Crowd member in the back a few days before the Walnut Avenue shooting. (RT 1654-1655.)

When the defense called Nieves to testify about that shooting and other matters, however, the prosecutor objected to any evidence about the shooting. (RT 1797.) The court ruled that "[i]t was already in evidence" — though what was in evidence was only the street talk about it — and precluded testimony from Nieves about the actual facts of the shooting. The court stated: "[I]t doesn't relate directly to Blair, relates only indirectly. [¶] I am not going to have him testify to the details of that. It is going to open up this whole area." (RT 1798.)

5. The Motion for New Trial Based on the Court's Rulings.

Defense counsel moved for a new trial based on the court's preclusion of the evidence of the lawsuit. (CT 793-794.) He argued that this evidence was "crucial ... to explain why Blair might shoot at Avila and the defendant, consistent with the eye-witnesses' testimony." (CT 794.) Counsel further explained:

> Motive in this case was crucial in establishing who did what. Blair's membership in the Vikings, coupled with his having been named as a defendant in a pending lawsuit where members of Young Crowd were plaintiffs, was the only evidence to explain why Blair might shoot at two Young Crowd gang members who did not pose an immediate threat to him. ... [T]o deny it entirely was to deprive the defendant of a key element of his defense.

(RT 794.) The court nevertheless "[stood] by that ruling ..., having reconsidered the entire record of the trial." (RT 2813.)

D. Legal Analysis.

1. The Error.

Relevant evidence is generally admissible. (Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact ...." (*People v. Babbitt* (1988) 45 Cal.3d 660, 684, quoting Evid. Code, § 210.) In a criminal case, essentially "any evidence that tends to support ... the presumption of innocence is relevant." (*People v. Whitney* (1978) 76 Cal.App.3d 863, 869.)

The court concluded that the evidence Fuiava sought to present was but marginally relevant at best, and excluded it under the terms of Evidence Code section 352. That section provides in pertinent part that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of ... confusing the issues ...." Evidence Code section 352 is justified by "the policy in favor of an orderly trial on the merits." (*People v. Hall* (1986) 41 Cal.3d 826, 835.) That policy is reflected in the duty imposed upon the trial court in a criminal trial "to limit the introduction of evidence ... to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.) In accordance with that interest, "the Constitution leaves to the judges who must make these decisions [on admission of evidence] 'wide latitude' to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 689-690, 106 S.Ct. 2142, 2146.)

At the same time, however, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation] or in the Compulsory Process ... clause[] of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citations.] " (*Crane v. Kentucky, supra,* 476 U.S. at p. 690.) As *Crane* explained:

> That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence ... when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." [Citation.]

(*Id.* at pp. 690-691.)

The rights to compulsory process and due process are independently guaranteed by the California Constitution. (Art. I, § 15.) Thus, "[t]he defendant in a criminal cause has the right ... to compel attendance of witnesses in the defendant's behalf ," as well as to present material evidence in his defense. (*In re Martin* (1987) 44 Cal.3d 1, 29-30; see also *People v. Riser* (1957) 47 Cal.2d 566, 571.)

The right of a defendant to present evidence "relevant and material" or otherwise "critical" to the defense thus constrains the discretion of the trial court to exclude defense evidence under Evidence Code section 352 as too time-consuming or likely to confuse or prejudice the jury. (*People v. Babbitt, supra,* 45 Cal.3d at p. 684, quoting, respectively, *Washington v. Texas* (1967) 388 U.S. 14, 18-19 [18 L.Ed.2d 1019] and *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [18 L.Ed.2d 1019, 87 S.Ct. 1920.) In

sum, "Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense." (*People v. Babbitt, supra,* 45 Cal.3d at p. 684 [italics in quote deleted], quoting with approval *People v. Reeder* (1978) 82 Cal.App.3d 543, 553; see also *People v. Cooper* (1991) 53 Cal.3d 771, 816 ["This discretion [to exclude evidence under section 352] is not, however, unlimited, especially when its exercise hampers the ability of the defense to present evidence."].)

The exclusion of evidence that is significantly probative or material to the defense based merely on the court's estimation that its probative value did not justify the time it would take to present it or the jury confusion that might result from it also implicates the Sixth Amendment guarantee of the right to trial by jury and the Fourteenth Amendment guarantee to proof of guilt beyond a reasonable doubt contained in its due process clause. (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* [hereafter "Excluding Defense Evidence"] (1998) 86 Geo. L.J. 621, 635-642.) While exclusion of evidence as unduly prejudicial or confusing is generally premised on the goal of reducing inaccurate verdicts in either direction, the exclusion of evidence potentially favorable to a criminal defendant on these grounds is in tension with the value underlying *In re Winship*[9] that it is far worse to convict an innocent person than to let a guilty person go free. (See *id.* at 633-635.) "[W]hen viewed through the lens of the reasonable doubt

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[9] *In re Winship* (1970) 397 U.S. 358 (holding that guilt in a criminal case must be found beyond a reasonable doubt).

rule, to exclude defense evidence (and thereby increase the risk of an erroneous conviction) solely out of concern about the risk of an erroneous acquittal is flatly unacceptable." (*Id.* at 635.)

And the right to a *jury* determination of guilt beyond a reasonable doubt is based largely on the idea that a jury is more protective of the accused than a professional judge, in part because jurors are more likely to meaningfully consider an unusual or unexpected defense. (*Id.* at 636-639; Imwinkelried and Garland (1998 cum. supp.) *Exculpatory Evidence*, § 6-4.) 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. (*Excluding Defense Evidence, supra,* 86 Geo. L.J. at 637-642.) As exemplified by the prohibition of directed verdicts of guilt (see *Rose v. Clark* (1986) 478 U.S. 570, 578 [92 L.Ed.2d 460, 106 S.Ct. 3101]), a criminal defendant's right to a jury differs fundamentally from other trial rights "and thus lends support to the conclusion that the criminal defendant's right carries unique implications for evidence rules that allow courts to interfere with jury factfinding." (*Excluding Defense Evidence, supra,* at 642.)

"Restrictions on the right to present defense evidence are constitutionally permissible [only] if they 'accommodate other legitimate interests in the criminal trial process' and are not 'arbitrary or disproportionate to the purposes they are designed to serve.'" (*People v. Cudjo* (1993) 6 Cal.4th 585, 639 (dis. opn. of Kennard, J.), quoting *Rock v. Arkansas* (1987) 483 U.S. 44, 55-56 [97 L.Ed.2d 37, 47-48, 107 S.Ct.

2704] [inside quotation marks deleted].). Thus, the state may not invoke Evidence Code section 352 to deny a defendant the ability to present testimony that could well make a difference in the jury's verdict on the ground that the evidence would take too much time to present or unduly risk jury confusion. Such an unreasonable determination would constitute an arbitrary deprivation of the defendant's fundamental right to present a defense. It would also infringe upon a defendant's right to a reliable verdict secured by the Eighth and Fourteenth Amendments in a death penalty case. (*See, e.g., Johnson v. Mississippi*, *supra*, 486 U.S. at p. 585; *Caldwell v. Mississippi* , *supra*, 472 U.S. at p. 340.)

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. As this Court has described that balancing test:

> When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers "substantially outweigh" probative value, the objection must be overruled. [Citing *Babbitt* at p. 688.]

(*People v. Cudjo*, *supra*, 6 Cal.4th at p. 609.) Similarly, a state may constitutionally exclude exonerating evidence only if the state's interests in its exclusion outweighs its usefulness to the defendant's case. (*Michigan v. Lucas* (1991) 500 U.S. 145, 149 [114 L.Ed.2d 205]; see also *Richmond v. Embry* (1997) 122 F.3d 866, 872 [same].) Thus, to establish a violation of the constitutional right to present a witness, a defendant must make a

"plausible showing of how [the] testimony would have been both material and favorable to his defense" (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867 [102 S.Ct. 3440, 73 L.Ed.2d 1193]) and that there is no countervailing interest supporting its exclusion. (See, e.g., *Crane v. Kentucky,* 476 U.S. at pp. 689-90, 106 S.Ct. 2142 [court may exclude evidence that is repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion].) For example, in *Wallace v. Price* (W.D. Penn. 2002) __ F.3d __, 2002 WL 31180963, the court found that the exclusion of reliable evidence as inadmissible hearsay was error that violated the defendant's due process rights and required a new trial. And in *Noble v. Kelly* (2d Cir. 2001) 246 F.3d 93, 99-101, the court found that the exclusion of an alibi witness's testimony due to noncompliance with the state's rule mandating advance notice of intent to call such witnesses violated the compulsory process clause and required a new trial.

"When making [the balancing] determination, courts must focus on the actual degree of risk that the admission of relevant evidence may result in undue delay, prejudice, or confusion." (*People v. Hall, supra,* 41 Cal.3d at 834.) As this Court there said, quoting 1A Wigmore, *Evidence* (Tillers rev. ed. 1980) § 139, p. 1724: "[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." (*Ibid.*)

Both the weighing process and the due process violation for denial of the right to meaningfully present a defense are tied to the likelihood that the evidence would engender reasonable doubt in the context of all the

other evidence in the case, for only then can the evidence's probative value and significance be fairly calculated. As one court has explained:

> Whether the exclusion of evidence violates a defendant's "right to present a defense depends upon whether the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist. Thus, where 'the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.'" [Citations.]

(*Gillette v. Greiner* (S.D.N.Y. 1999) 76 F.Supp.2d 363, 373.)

Here, the probative value of the evidence was great and its admission vital to Fuiava's defense. This is so for three reasons: 1) the case was close on whether Blair or Fuiava unjustifiably initiated the shooting; 2) the excluded evidence established a credible motive for Blair to shoot first; and 3) Fuiava badly needed to establish a plausible motive for Blair to shoot first, both to overcome the jury's natural presumption that a deputy sheriff would not shoot unjustifiably and to counter-balance the evidence of Fuiava's motive to do so.

First, the evidence on which the case was submitted made the determination of who initiated the shooting a close and difficult one for the jury. No one saw Fuiava initiate the gunfire. While Lyons testified at trial that he heard gunfire before Blair reached for his gun, no witness corroborated that sequence of events. In addition, Lyons's focus was on Avila, not on either Blair or Fuiava. Lyons's further testimony that the first set of shots he heard sounded like they came from the direction of Blair, rather than Fuiava, supports the defense claim that Blair shot first and undermines Lyons's testimony implicating Fuiava. In addition, the stress

engendered by the "combat situation" (RT 601) in which Lyons suddenly found himself rendered his testimony about the shooting dazed and confused. The prosecution utilized Lyons's uncertainty as to how the shooting unfolded to characterize his testimony that the sudden shooting came from the direction of Blair as mistaken (see RT 1586-1587); Lyons's confusion and uncertainty can be utilized just as effectively, however, to characterize his testimony that Blair was unarmed when the shooting began as mistaken. Moreover, the very different story that Lyons first told in his direct testimony at the preliminary hearing simply cannot be ignored. Indeed, Lyons did not even realize at the time that Blair had fired his weapon during the flash of shooting. Finally, Lyons's institutional and personal biases in favor of Blair further weaken the credibility of his testimony that amid all his dazed confusion, he was certain that Blair did not have his weapon in hand when the gunfire erupted. As Lyons ultimately admitted, he did not really know what happened that night. (RT 2418.)

Other evidence further weakened the prosecution's scenario that Fuiava initiated the gunfire. The off-duty officer in nearby Ham Park testified that the first volley of shots he heard sounded like it came from a weapon like a .9 mm. (Blair's gun), and the second volley sounded like it came from a bigger gun such as a .44 (Fuiava's gun). The coroner testified that one of the two gunshot wounds that Blair suffered would have disabled him immediately in the usual case and in the unusual case between one and six seconds. If Fuiava shot first, this simply did not leave Blair enough time to pull his gun and fire it five times, as the evidence indisputably showed that he did. Moreover, there was a bullet impact in the house

behind Avila that placed him right in the line of fire from Blair, suggesting that Blair indeed shot in Avila's direction. Finally, there was the direct evidence from several eyewitnesses, including Fuiava, to the effect that Blair shot first without provocation.

Because the state of the foregoing evidence made such a weak case for the prosecution and such a strong one for the defense, the prosecution relied heavily on the evidence of Fuiava's jailhouse conversation with his mother to support its theory of guilt. In his opening argument, the prosecutor called this tape "the key piece of evidence" of guilt, such that "everything else can come out in the wash." (RT 2146) Accordingly, the prosecutor dwelled on that evidence both in his opening (RT 2146-2150) and his closing argument (RT 2271-2274). But only by negative implication, and thus indirectly, does the tape arguably support guilt. The prosecutor contended that Fuiava was guilty not because of what he said on the tape, but what he did not say. If Fuiava had said on the tape that he shot first, that would be one thing; but he never did so. In fact, there is no discussion of the actual shooting at all on the tape. Thus, what the prosecutor argued was his best evidence of guilt, the tape, was in fact equivocal evidence.

The closest Fuiava came to discussing the shooting is the portion of the tape that the prosecution pointed to most critically, where Fuiava stated:

> I don't know where [Avila] threw [his gun], but the police saw that and came to us. You know, I had two guns, if they found those, it's all over. I don't know what would happened [sic], they probably shoot me. You know, they just shot my friend, what, three days before that you know.

(First Supp. CT 61.) Following brief discussion of that shooting of Nieves, Fuiava then advised his mother that "a lot of things are happening between us and the police," and told her about the lawsuit. (First Supp. CT 61-63.) Thus, the court's redaction of the transcript to omit the discussion about the lawsuit, which followed on the heels of Fuiava's statement that the police could have killed him in that encounter, was particularly egregious because it distorted his statement. Fuiava sought admission of the evidence of the lawsuit contained in his conversation to offset this distortion. (RT 1389.) To be sure, this "doctrine of completeness," as the court called it (RT 1389), is reflected in Evidence Code section 356, which provides that when one party offers evidence of a conversation or statement, the other party may introduce evidence of other parts of that conversation or statement to give context and meaning to it. The court's exclusion of this portion of the transcript on hearsay and section 352 grounds was thus constitutional error for this reason as well.

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.

The opening statements and closing arguments illustrate the critical need of the defense to demonstrate to the jury why Blair would

unjustifiably shoot at Avila and Fuiava. In his opening statement, defense counsel advised the jury that this case concerned "a shooting by my client Freddie Fuiava in self-defense and only after Deputy Sheriff Stephen Blair decided that he had a right to shoot two known gang members." (RT 349.) As he encapsulated the defense later in his opening: "This is a case of self-defense by a scared gang member who was illegally threatened with death by an overzealous vigilante deputy sheriff." (RT 352-353.)

The prosecutor emphasized in his opening argument that the only question about whether Fuiava lawfully shot Blair was whether he acted in self-defense. (RT 2145-2146.) Defense counsel in his closing argument subscribed to that assertion and agreed "that the only issue is whether the killing was in self-defense." (RT 2181.) He explained that the "issue is like who drew first and who fired first" in this shootout. (RT 2242.) Counsel argued:

> We heard some fantastic evidence in this case ... about a police gang. [¶] Now, that sounds totally unbelievable but we heard about signs, Lynwood Vikings. We heard about a tattoo and that a group of deputies wear tattoos. That this group of deputies go around intimidating, harassing, at least Young Crowd, giving flashlight therapy, doing shootings. I mean, this is fantastic, unbelievable. [¶] The evidence in this case shows that it is true ....

(RT 2193-2194.)

Except for the fact that Blair had a Viking tattoo, however, the rulings of the court reduced the defense evidence of these "fantastic" allegations 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. To be sure, the prosecutor in his rebuttal argument

exploited these deficiencies when he argued that the defense had no credible evidence that Blair was an overzealous vigilante deputy:

> Mr. Avila's testimony ... has to lay the foundation for this Viking stuff, right. That is what he was called for. Mr. Hauser got up here and argued it to you.
>
> He and Freddie are the only two witnesses to say anything about the Vikings. And what does [Avila] say about the Vikings?
>
> Oh, you know, dah, dah, dah, dah, dah. There is this group of vigilante deputies. And you know, Deputy Blair, he did flashlight therapy on me ....
>
> .....
>
> An out-and-out lie because he has to make Deputy Blair look bad. He has to explain to you why a deputy sheriff, for no reason, whatsoever, would fire on an unarmed gang member.

(RT 2260-2261.)

Defense counsel had explained earlier in his closing:

> We've heard about the Vikings, sheriffs, tensions ... these things because there has to be some explanation why a deputy sheriff would in full uniform, would fire on an unarmed person. There has to be some explanation for that.
>
> Now, ... that's the situation that Freddie was facing when he was charged with this case. He knew he had to convince a jury that a police officer shot at his friend and at him before he fired his gun. [¶] Now, how is he going to convince anybody of that? Who would believe it?

(RT 2195-2196.)

Defense counsel argued later that "the evidence in this case suggests that Deputy Blair" was unable to police Lynwood "with reason, without undue emotion." (RT 2236.) As counsel elaborated:

> Deputy Blair had that tattoo. Deputy Blair had told Ernie he was a Viking, mentioned the Vikings, flashed these gang signs. There has to be some reason why a sworn police officer would fire at an unarmed gang member. This is the only explanation that appears evident in this case.
>
> .....
>
> Again, I said as a member of the Vikings Blair had a motive to want to shoot an unarmed Ernesto Avila.

(RT 2236.)

Early in his rebuttal, the prosecutor jumped on the inability of the defense to connect the fact that Blair was a Viking to the conclusion that this gave him a motive to shoot at Avila:

> Now, repeatedly the question has been asked, there has to be some reason for firing on an unarmed gang member. That assumes that an unarmed gang member was fired upon.
>
> Okay, we have heard testimony about the Vikings and that is the proper explanation for this happening, okay, or it didn't happen.... [¶] Either Deputy Blair fired on an unarmed gang member because he is a Viking or it didn't happen, which is obviously what the People's version of the case is.

(RT 2249.)

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. The court, however, precluded the defense from presenting any such evidence.

Another reason why Blair would unjustifiably shoot in Avila's direction was to intimidate him for his involvement in the lawsuit that sought redress for Viking misconduct. But here also, the court precluded evidence that the Lynwood deputies victimized Young Crowd members in retaliation for the civil rights prosecution, and that this retaliation and intimidation increased as the case approached trial. The prosecutor's denigration of Avila's and Fuiava's allegations of police brutality with the flip observation that "one man's harassment is another citizen's idea of community policing" (RT 2172) was effective because the jury was kept from learning that there were documented complaints from scores of Lynwood neighbors of excessive force by the deputies. The jury also never learned that the complaints had sufficient substance that the district court had granted preliminary relief (though subsequently reversed), and that the upcoming trial put the deputies in serious jeopardy of an injunction and substantial money damages. The court's denial of the motion for new trial based on preclusion of this evidence compounded its error, for the trial evidence and arguments of counsel made very clear how critical to the defense was this evidence of motive.

Because evidence of Blair's motive to initiate the gunfire was precisely the evidence that could have tipped a juror into finding reasonable doubt, the state's legitimate interest in exclusion of that evidence would have had to have been very great to support the court's ruling. The court

justified exclusion on the ground that the evidence's probative value was insubstantial compared to the time it would take to present it. Admission of the evidence, however, would not have sacrificed the state's interest in the expeditious ascertainment of the truth. Exclusion of the evidence in fact distorted the truth by omitting the larger context in which the shooting occurred. Moreover, presentation of the evidence would not have consumed an undue amount of time, particularly given the heightened process due a defendant whose life is at stake.

Certainly the evidence about the lawsuit would not have involved an undue amount of time. To the contrary, that evidence was undisputed and could have been presented in relatively abbreviated testimony that established the nature of the complaint's allegations, the procedural history and current posture of the litigation, and Blair's and Avila's status as named parties. Expenditure of the time necessary to present this evidence was especially warranted because it would have answered the critical question that Fuiava's defense begged — namely, what would possess Blair to shoot like that? This evidence well may have made the difference between acquittal and the death penalty. As the prosecutor marveled to the jury, the nine days of trial from jury selection to closing arguments on guilt made it a "pretty quick trial as things go for a case of this magnitude, [i.e.,] a police officer being killed and the death penalty being sought ...." (RT 2140.) A quick trial, indeed, at the expense of the defense case. As stated in *People v. Taylor* (1986) 180 Cal.App.3d 622, 633, regarding a similar wrongful exclusion of evidence under section 352: "The risk of undue consumption of time in a trial which took 10 days was minimal. The risk of confusing the jury was even smaller."

Presentation of the evidence necessary to establish the crucial context of the shooting on Walnut Avenue — namely, its occurrence within a police culture that made a practice of using excessive force in Lynwood — may have taken a day or two. The expenditure of this time was justified by the same considerations mentioned above: 1) Fuiava was fighting for his life; 2) it was the key evidence missing from his defense; and 3) the provision of it could well have been the tipping point for the jury. Indeed, given how crucial that evidence was for Fuiava, no expenditure of time for its presentation could reasonably be found excessive or involving a substantial danger of undue prejudice or confusion. As one court has observed, "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 [citation]." (*People v. Taylor* (1980) 112 Cal.App.3d 348, 365.) Exclusion under Evidence Code section 352 simply has no place when the evidence goes to the heart of the case and could establish the defendant's innocence. As stated in a case where the trial court excluded from evidence the admission of a third party where the defendant testified that that party committed the shooting:

> "[A] defendant's due process right to a fair trial requires that evidence, the probative value of which is *stronger* than the *slight- relevancy* category and which tends to establish a defendant's innocence, cannot be excluded on the theory that such evidence is prejudicial to the prosecution." (*People v. Reeder* (1978) 82 Cal.App.3d 543, 552 [147 Cal.Rptr. 275].) Here, [the] evidence ... was prejudicial only in the sense that it cast doubt on the prosecution's case against defendant.

(*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1679.) Finding that the issue of who committed the shooting "was the heart of the case," the court

found that "exclusion of [the admission] under section 352 to have been a serious abuse of discretion." (*Ibid.*)

Concerns about an undue consumption of time melt away where the evidence goes to the heart of the case. As noted by the court that reviewed the determination of the guardianship of the children of O.J. Simpson, this remains true even where the evidence may concern an issue as complicated as whether Simpson killed Nicole Simpson and Ronald Goldman:

> Given the overwhelming relevance of the issue, it is impossible to avoid the conclusion that the consumption of *time* as a reason to avoid it is simply untenable. A trial judge's discretionary authority in the management of evidence does *not* extend to arbitrarily refusing to consider the most salient issue in the case. (See *O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 575-576 [69 Cal.Rptr.2d 389] [abuse of discretion to exclude as more prejudicial than probative evidence which "is the very core of the case"].)

(*Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 936 [italics in original].)

This Court reached the same conclusion in a self-defense case where the trial court excluded evidence about "threats and the[] reputation for violence" of associates of the deceased. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070.) As the Court there stated:

> None of the considerations supporting the discretionary exclusion of relevant evidence substantially outweighed the probative value of the evidence at issue here. Presentation of evidence at the heart of the defense would not have represented an "undue" consumption of time. There was no risk of prejudice associated with the evidence. "The prejudice referred to in Evidence Code section 352 applies to evidence which uniquely tends to

> evoke an emotional bias against one party and which has very little effect on the issues." (*People v. Wright* (1985) 39 Cal.3d 576, 585 [217 Cal.Rptr. 212, 703 P.2d 1106] [internal quotation marks and ellipses omitted].) Evidence bearing on defendant's state of mind was highly probative, and had no "unique tendency" to evoke any emotional bias against the prosecution. Evidence that defendant might have had reason to fear for his life would not have "confused the issue." It would have further illuminated the situation the jury was required to evaluate.

(*Id.* at pp. 1070 -1071 [brackets in inside quotes deleted].)

As the Court there noted, "although the test is objective, reasonableness is determined from the point of view of a reasonable person in the defendant's position. The jury must consider all the facts and circumstances it might 'expect to operate on [defendant's] mind ....'" (*People v. Minifie, supra,* 13 Cal.4th at p. 1065, quoting *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083.) Here, the evidence of past violence of the deputies in Lynwood was "'relevant to interpreting the attacker's behavior' [and] 'illuminate[d] and reflect[ed] on the reasonableness of defendant's perception of both the imminence of danger and the need to resist with the degree of force applied.' [Citation.]" (*People v. Humphrey*, *supra*, 13 Cal.4th at p. 1094 (conc. opn. of Brown, J).)

Evidence that corroborates the testimony of the defendant or a defense witness on a central point, particularly where the witness has been impeached, is not cumulative but material. As the Court of Appeal has explained:

> Here the appropriate inquiry by the trial court was "whether this evidence could raise a reasonable doubt as to defendant's guilt and then whether section 352

> applied." (*People v. Hall, supra,* 41 Cal.3d at p. 833.) Hawkins's testimony, if found credible by the jury, would have been circumstantial evidence linking Tolbert to the shooting and would have corroborated defendant's testimony that he saw Tolbert commit the shooting. This testimony from a witness other than defendant was thus not excludable as being merely cumulative and its exclusion was a clear abuse of discretion.

(*People v. Jackson*, 235 Cal.App.3d at pp. 1680-1681.) This Court, too, has found that a "[d]efendant [is] entitled to bolster his claims by corroborating testimony in his attempt to influence the jurors to a more favorable finding." (*People v. Davis* (1965) 63 Cal.2d 648, 657.) There, the Court quoted with approval the following passage from *People v. Carmichael* (1926) 98 Cal. 534, 548:

> We cannot agree with respondent that this error was cured by the admission of the testimony of the appellant himself .... The appellant was entitled to prove [the fact] by disinterested witnesses, if he could .... It 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.

Here, the excluded evidence would have corroborated Fuiava's and Avila's testimony that Lynwood deputies had a practice of engaging in wrongful shootings and other types of excessive force, and had done so as recently as a few days before the Walnut Avenue shooting. Hence, the evidence would have supported Fuiava's defense that Blair in fact wrongfully shot at Avila and him and that in any event Fuiava honestly and reasonably believed that he needed to shoot Blair to protect against death or great bodily injury. (See, e.g., *United States v. James* (9th Cir. 1999) 169

F.3d 1210 [court abused its discretion in self-defense case when it excluded evidence of the victim's past violence, which would have corroborated the defendant's claim that the victim had told her about that violence and she honestly and reasonably feared that she and her daughter were in danger of grievous bodily harm or death from him when she killed him].) Indeed, even if the defendant is unaware of the past violence, he is entitled to present evidence of that violence to corroborate evidence of his belief in the need to defend himself. (See, e.g., *People v. Wright*, *supra*, 39 Cal.3d 576; *People v. Smith* (1967) 249 Cal.App.2d 395, 404.)

Thus, the evidence of wrongful shootings by Lynwood deputies, including evidence of the wrongful shooting of Young Crowd member Nieves just days before the Walnut Avenue shooting, and the earlier killing of Polk, also would have lent credibility to Fuiava's assertion that he shot only to ward off an unjustifiable shooting by Blair. Evidence "which lend[s] credibility to an asserted state of mind [is] relevant, competent evidence." (*People v. Duran* (1976) 16 Cal.3d 282, 295.) In sum, this evidence could have persuaded the jury to accept Fuiava's claim that he shot out of fear because it showed that his fear truly was well-founded.

2. The Prejudice.

The court's broad exclusion of crucial defense evidence prejudiced Fuiava on many different levels and under every applicable standard for determining harmless error.

First, the court's exclusion of critical defense evidence based on its own view that it provided only a speculative path to innocence deprived Fuiava of his right to a jury determination of his innocence or guilt. The Sixth Amendment of the United States Constitution guarantees a defendant

"the right to have a jury determine, beyond a reasonable doubt, his guilt ...." (*United States v. Gaudin* (1995) 515 U.S. 506, 522-523.) Preclusion of fair consideration by the jury of the defense is a structural error that defies analysis of harm and necessarily requires reversal. (See, e.g., *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1202 [the right to jury consideration of the defendant's theory of the case is one of those constitutional rights whose infraction can never be treated as harmless error].) Just as that court found that "[p]ermitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal" (*Escobar de Bright, supra*, 742 F.2d at pp. 1201-1202), informing a jury that a defense will entitle the defendant to a judgment of acquittal is of little value if the court excludes evidence that is vital to its establishment.

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]; see also *Rose v. Clark, supra,* 478 U.S. at p. 578 [harmless error analysis inapplicable where "the wrong entity judged the defendant guilty"].) In sum, evidence may not be excluded simply because the court finds it incredible or the inference from the evidence speculative; rather, "[s]uch a determination is properly

the province of the jury." (*People v. Hall*, *supra,* 41 Cal.3d 826 at p. 834.) Evidence may be "critical exculpatory evidence that the defendant is entitled to adduce" (*Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1177), " [e]ven if the defense theory is purely speculative," for "it is the role of the jury to consider the evidence and determine whether it presents legitimate alternative theories for how the crime occurred." (*United States v. Vallejo* (9th Cir. 2001) 237 F.3d 1008, 1023.)

Reversal is also required for violation of Fuiava's constitutional right to compulsory process under the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824]. *Chapman* requires reversal unless the state can prove beyond a reasonable doubt that the error was harmless. As Justice Kennard, joined by Justice Mosk, has noted:

> Because the right to compel witnesses to appear in court would be hollow and useless if the government was free to prevent those witnesses from testifying, the compulsory process guarantee encompasses a substantive right to have defense witnesses testify before the trial jury. [Citations.] The Sixth Amendment's right of compulsory process, which includes the right to have the testimony of defense witnesses received in evidence, is made applicable to state criminal trials by the due process clause of the Fourteenth Amendment to the federal Constitution. [Citations.]

(*People v. Cudjo*, *supra*, 6 Cal.4th at p. 638 (dis. opn. of Kennard, J.). It follows that violation of that right is subject to the constitutional rule for establishing prejudice:

> Once a reviewing court determines that exclusion of defense evidence has violated the defendant's right of compulsory process, the effect of the violation on the

> validity of the resulting conviction is determined by harmless error analysis [citation] using the "beyond a reasonable doubt" standard [citation]. Under this test, the appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, __ [124 L.Ed.2d 182, 189, 113 S.Ct. 2078, 2081], original italics.)

(*Id.* at pp. 641-642.)

"The determination of prejudice begins with an examination of the defense presented at trial ...." (*Id.* at p. 642.) Here, that defense was that Fuiava shot in response to Blair's wrongful shooting towards Avila and him. As Justice Kennard found in *Cudjo*, "[t]he success of this defense depended in large measure on providing the jury with sufficient reasons to credit defendant's explanation and to doubt the contrary version presented through [the prosecution's evidence]." (*Ibid.*) The trial court's erroneous exclusion of defense evidence "eviscerated this defense," just as Justice Kennard found that the evidence excluded in *Cudjo* did. (*Ibid.*) Here, as Justice Kennard claimed in *Cudjo*, "[t]he prosecution's case was far from compelling." (*Ibid.*) As in Justice Kennard's estimation of the value of the evidence excluded in *Cudjo*, the evidence here "would have filled a major gap in the defense case, and would have greatly increased the likelihood of the jury's entertaining a reasonable doubt of defendant's guilt." (*Id.* at p. 643.) Just as Justice Kennard there found that "[u]nder the circumstances, it is not possible to conclude that the guilty verdict in defendant's trial 'was surely unattributable to the error'" (*ibid.*), it similarly is not possible here to conclude that the exclusion of evidence was harmless beyond a reasonable doubt.

The *Cudjo* majority did not address whether exclusion of the evidence there was harmless beyond a reasonable doubt. As it recited the issue before it:

> Defendant urges that the trial court's exclusion of Culver's testimony usurped his federal due process and fair trial rights. In essence, defendant complains he was unconstitutionally deprived of the right to present a defense.

(*People v. Cudjo*, 6 Cal.4th at pp. 610-611.) Violation of the due process right to present a defense requires a showing that the excluded evidence was material to the jury's verdict; that is, that "there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." (*Taylor v. Singletary* (11th Cir. 1997) 122 F.3d 1390, 1394-1395.) This is the same standard as the standard of prejudice under state law when the court wrongly excludes evidence. In this sense the majority was correct in *Cudjo* when it found that "when a trial court misapplies Evidence Code section 352 to exclude defense evidence ...,the applicable standard of prejudice is that for state law error, as set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243] (error harmless if it does not appear reasonably probable verdict was affected)." (*People v. Cudjo*, *supra*, 6 Cal.4th at p. 611.) This is also why finding a violation of the right to present a defense is the equivalent of finding reversible error under Evidence Code section 352. Once it is determined that the testimony at issue "meets the materiality standard ..., there is no need for further harmless-error review of the trial court's error." (*Taylor v. Singletary, supra,* 122 F.3d at p. 1394.)

In *Cudjo*, the majority concluded that the wrongful exclusion of hearsay evidence of a confession to the crime by Gregory, a third party, "was harmless because it is not reasonably probable that admission of the testimony would have affected the outcome." (*People v. Cudjo*, *supra*, 6 Cal.4th at p. 612.) This Court, however, may not reasonably make such a conclusion in this case. In *Cudjo*, "the inference that defendant, not Gregory, was the murderer was extremely strong." (*Ibid.*) The evidence of guilt there included "a semen sample that included defendant but excluded all other known potential donors, including Gregory"; defendant's admission that he had sex with the victim at the crime scene on the morning of the murder; physical evidence that there had been only one visitor during that morning and eyewitness evidence of a single entry by the culprit. (*Id.* at p. 612.) "By contrast, defendant's uncorroborated effort to provide an innocent explanation for his presence in the victim's house was" filled with "implausibility." (*Id.* at p. 613.) "Finally, as the trial court surmised, both Culver's testimony and the hearsay confession it recounted had obvious indicia of unreliability. Though he knew the entire Cudjo family, Culver was a particular friend of defendant and thus had a motive to lie. Moreover, Gregory's purported jailhouse confession contravened both the physical evidence and all other accounts Gregory had given, including his testimony under oath at the preliminary hearing." (*Ibid.*) Other aspects of Culver's excluded testimony "strain[ed] common sense" as well. (*Ibid.*) "Moreover, after observing Culver's demeanor and hearing his testimony, the trial court concluded that Culver was a patently incredible witness." Not surprisingly, the Court concluded that "[u]nder all these circumstances, the chance that a competent jury would have given Culver's testimony substantial weight seems remote." (*Id.* at p. 614.)

Fuiava's case is in marked contrast. The inference from the rest of the evidence that Fuiava shot first was not particularly strong. Consider first the gaps and problems in the prosecution's case already discussed. Moreover, Fuiava's innocent explanation for his shooting was not only credible and convincing on its own, but consistent with the physical evidence and the eyewitness accounts. Nor did the excluded evidence have any indication of unreliability. The evidence concerning the lawsuit was undisputed, and the evidence of deputy misconduct was supported by numerous sworn declarations. In sum, there was a substantial rather than a remote chance that at least one member of the jury would have credited the evidence of Blair's motive and intent to shoot unjustifiably at Avila and Fuiava. The probability that this evidence would engender reasonable doubt was present, ready, and palpable.

Fuiava's case is analogous to that of *People v. Hernandez* (1977) 70 Cal.App.3d 271, 279, where the exclusion of evidence that "went to the heart of the defense" contributed to the need for reversal. The defendant there was charged with sale of heroin outside a methadone clinic where he was a patient, and where he had been observed on two occasions in an unusual number of interactions with other patients. (*Id.* at p. 276.) He presented evidence that the interchanges concerned a petition that on the first occasion he had circulated for signatures, but did not have with him when he was arrested on the second occasion. (*Id.* at p. 276.) The defendant sought to admit into evidence the substance of the petition, which concerned compensation for patient transportation to the clinic, but the court excluded that evidence. (*Id.* at pp. 276-277.) The reviewing court

found that the exclusion of this evidence was improper, and explained the damage it caused to the defense as follows:

> The suggestion of a petition circulating among methadone patients may have struck the jury as labored. Junkies are not supposed to be concerned citizens urging others to "Save Our Redwoods" or to "Stop Offshore Drilling." Information that the subject matter of the petition was a grievance of direct and exclusive concern to the patients at the methadone center would have had an inestimable effect on the credibility of the defense.

(*Id.* at p. 279.)

Similarly, Fuiava's claim that Blair wrongfully shot at Avila and him may have appeared labored to the jury, since sheriff's deputies are not supposed to be rogues roaming the streets and shooting citizens without reason — although since Fuiava's trial such police practices have been exposed with disturbing regularity, most notably in the Ramparts scandal. Admission of the evidence thus likewise "would have had an inestimable effect on the credibility of the defense." (*Ibid.*) Its exclusion prejudiced the defense accordingly.

Given that the prosecution's case for guilt was marginal and the excluded evidence would have provided the jury with a plausible answer to the critical question that arose from Fuiava's defense — namely, *why would Blair shoot first*? — the exclusion was an abuse of discretion under Evidence Code section 352 that deprived Fuiava of his constitutional right to present a complete defense and requires reversal. Moreover, "[t]he jury argument of the district attorney tips the scale in favor of finding prejudice," since the prosecution exploited the evidentiary gap in the defense created by the exclusion of this evidence. (See *People v. Minifie*,

supra, 13 Cal.4th at p. 1072; see also *People v. Taylor*, *supra*, 112 Cal.App.3d at pp. 365-366 [error requires reversal where "[t]he district attorney[']s argument to the jury ... would certainly not have been so telling if the proffered evidence had been admitted"].)

The competing arguments of the parties demonstrate that the excluded evidence was not minor, but critical to the jury's proper understanding of the case. (See, e.g., *People v. Humphrey, supra,* 13 Cal.4th at p. 1090 [wrongful preclusion of jury from considering evidence that "was not only relevant, but critical" to case for perfect self-defense prejudicial where the defendant "presented a plausible case for perfect self-defense"].) There simply is "no ground on which to base a conclusion that the trial court's error in not allowing the evidence was harmless": "It went to motive, which is the very core of the case." (*O'Mary v. Mitsubishi Electronics America, Inc., supra,* 59 Cal.App.4th at p. 576.) "Its admission thus might have easily made a difference, particularly" because it corroborated problematic evidence that otherwise "may have been discounted in the jury's deliberations." (*Ibid.*)

Moreover, where the trial court makes multiple evidentiary errors that bear on "the real issue in the case," "the court's errors ... have a synergistic effect." (*People v. Hernandez*, *supra*, 70 Cal.App.3d 271, 281.) Here, the trial court's exclusion of evidence concerning the civil rights litigation was compounded by exclusion of the evidence of the culture of police misconduct that underlay it. The court's preclusion of evidence that the deputies in fact had committed prior wrongful shootings against close associates of Fuiava fed the synergy of prejudice. These shootings included the death — murder — of Polk that Avila was prepared to testify about in

the much-anticipated civil rights trial about to begin. It also included the shooting of Nieves, another Young Crowd witness in the upcoming civil rights trial, that occurred just days before the Walnut Avenue shooting. The exclusion of this various evidence acted together both to artificially bolster the prosecution's version of events and to hide critical evidence supporting Fuiava's defense. "Thus, even if, taken in isolation, each error might be harmless, in combination [they] are clearly prejudicial." (*Ibid.*)

The conclusion that the excluded evidence was material is fortified by the jury deliberations, which were not easy ones. To the contrary, the many indications that the jury reached verdicts of guilt only with great difficulty confirm that the court's error harmed Fuiava. The jury's deliberations were extraordinarily prolonged — approximately two and a half days in a case where the evidence was presented in approximately seven days — which signify a close case. "This court has held that jury deliberations of almost six hours are an indication that the issue of guilt is not 'open and shut' and strongly suggest that errors in the admission of evidence are prejudicial. [Citation.] Here, the jury deliberated twice as long ..., a graphic demonstration of the closeness of this case." (*People v. Cardenas, supra,* 31 Cal.3d at pp. 907-908.) And, again, the jury's request for readbacks was another indication that the case was close. The divisiveness during deliberations over the credibility of the defense witnesses, leading to an impasse in deliberations, was a particularly telling indication of a close case, for it showed that at least one juror was inclined to find reasonable doubt even without consideration of the excluded evidence. (Cf. *People v. Bennett* (1969) 276 Cal.App.2d 172, 176 [finding that "[a]dmission of the rejected evidence could have raised a reasonable

doubt" in light of jury deadlock at one point in its deliberations].) The unusual difficulty of the jury in determining guilt confirms the likelihood that admission of the evidence that the court excluded would have made a difference.

For these reasons, the court erred in the exclusion of the proffered defense evidence and the error requires reversal.

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. Factual Background.

During the court's voir dire of the potential jurors, juror Albert T. appeared able to understand the voir dire proceedings. (RT 133-135, 300-12-13, 300-27.) He was also appropriately responsive to voir dire. (R.T. 300-27-289.) Among other things, he disclosed that he had graduated with a bachelor's degree in Economics from Colgate University in New York. (R.T. 300-27.) He had served as a juror on a civil case two years previously. (R.T. 300-27.) He had worked for eight years as an investment banker and currently worked as a volunteer at an elementary school. (R.T. 300-27.) He found the work meaningful and had just completed the examination to qualify to become a grammar school teacher. (RT 300-28.)

During the third day of deliberations on guilt, the court received a note from the foreperson of the jury that enclosed notes from two jurors. (CT 650.) One note was from juror no. 8, Mr. T., which he had typed the previous evening. (RT 2343.) The other note was from juror no. 10, Mrs.

P, and was written in response to Mr. T's note. (RT 2343.) The note from Mr. T read as follows:

> Dear Your Honor, as a juror of People vs. Fuiava, I have encountered potentially significant and disturbing legal issue during the course of deliberation which I believe can be addressed by the court and thus clarified to our fellow jurors.
>
> Juror number 10, Mrs. P., on behalf of several jurors has expressed and brought to my attention in explicit, no less certain terms, of their belief of reprehensible infraction for a juror to accentuate a testimony while discrediting another statement by the very same witness, based on the juror's personal bias.
>
> Meanwhile, more than one fellow juror have taken adamant stance to outright reject entire testimonies of some key witnesses, valid or not, based solely on the witness' age, alleged association with the defendant, or affiliation with the gang, the Young Crowd. Again, I must confess my disagreement with the treatment of witness credibility.
>
> I have rarely been accused of wrongdoing in my adult life and never involving a matter with such momentous implication as in this case of determining the future of another individual's life. However, if the court's interpretation is fully consistent and concurs with Mrs. P's "admonition" I will ask for permission for dismissal from the case at once as an unfit juror based on failure to comply with the court's instruction as stated.
>
> Thank you.

(CT 651 [grammatical errors left intact]; RT 2343-2345.)

Juror no. 10's note read:

> Your Honor, I read [No. 8's] letter to you and strongly feel that he has misinterpreted what I and others have said. I would like to speak to you in regards to the letter. Please know that the letter does not accurately

> reflect what I have said. [¶] Furthermore, I question [No. 8's] ability to follow the instructions of the law as you have instructed us to do. He is letting the death penalty and his emotions cloud the case. In addition, I question Albert's understanding of English.[10] If he feels he should be dismissed, I would support that request. Thank you.
>
> In closing, Your Honor, I am disturbed that [No. 8] thinks that I would discount a witness just because he/she is in Young Crowd or affiliated with Young Crowd.

(CT 652; RT 2345-2345.) This note also included references to certain jury instructions — CALJIC Nos. 2.06, 2.13, 2.20, 2.20.1, 2.21.2, 2.21.23, — concerning witness credibility and consciousness of guilt. (CT 652; RT 2345-2346.)

The court was "very troubled by the note from Mr. T., both because it was "not at all sure what it is he's saying" (RT 2347) and because though "certainly this is a serious case, ... 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 proposed to first question Mr. T., finding that this was not "an impermissible inquiry into how deliberations are proceeding," but "more ... a concern over what the law says and how the law should be understood" to "try to assist the jury." (RT 2348.) The prosecutor seconded the court's intention to question Mr. T as part of an inquiry to determine if any juror was "unwilling to follow the instructions as they were provided by the court ...." (RT 2349.) Defense counsel observed that the notes simply reflected "some disagreement" over interpretation of the

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[10] Mr. T.'s full name makes clear that he is of Japanese descent.

evidence leading to jurors "accus[ing] each other of not following the law." (RT 2349.) While counsel found that "Mr. ... T. apparently is sensitive" to that accusation, "the gist that I get is he is following the law as he understands it.... I think what he is asking for is a little help from the court to reassure him that he is entitled to interpret the evidence as he sees it ...." (RT 23249-2350.) The prosecutor responded that "it does appear that by his own words that he is considering penalty in his deliberations, and that would be inappropriate." (RT 2350.) The court agreed that that was a concern, as well as the reference to "accentuating the testimony while discrediting another statement by the very same witness based on the juror's personal bias." (RT 2350.)

The court proceeded to interrupt the readback the jury was then engaged in and brought Mr. T. into court for questioning. (RT 2350-2351.)

The following colloquy occurred:

> THE COURT: Is there a disagreement that you have with some of the other jurors as to what the law is?
>
> JUROR T.: Well, actually we had a discussion in the jury room this morning. I wrote that actually last night following our deliberation.
>
> I mean it came to my attention — I was not fully aware of your instructions at the time. But some of the jurors made it clear that — well, she used the term "legal"[11] to take account [of] some part of a witness['] testimony while disregarding another [portion of testimony] by the witness.

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[11] It is not clear whether the reporter accurately transcribed this word as "legal" rather than "illegal," since the latter is more consistent with Mr. T.'s letter relating that the female juror accused him of misconduct for crediting one portion of a witness's statement while discrediting another portion of it.

> And, also, that — yeah, it was made clear to me today, but I was not comfortable with the instruction that — to completely reject certain testimony from what I believe are key witnesses based on their age or some background. [¶] I would have liked to look at both, but I cannot — I have [a] problem with rejecting all the witness— all the testimony because of certain inconsistencies.

The court then advised the juror that it did not want him "to tell me about the deliberations or who is arguing what"; rather, it wanted "to know ... if there is a need to have better clarification on what the law says." (RT 2352.) The juror said that was not needed in light of the further deliberations that morning where the jury "examined the instruction book," and now he was "much more clear" on the law. (RT 2352-2353.)

The court nevertheless persisted, asking the juror if he was "able to follow the instruction and the law." The juror responded:

> ... I might not be fair to the prosecutors or the defense if my bias plays a role in which testimonies I will reject entirely while relying on other evidence or witness which to me was little bit less — well, more inconsequential. [¶] So to reject these testimonies based on certain background, it may not be — I might not be fair to the system as intended.

The court asked if Juror T. was "telling me that you believe that it is likely that you will not be able to follow the law in this case," to which he responded:

> As, yes, stated in the instruction book. Of course, not all, but perhaps certain — the details. I may fail to meet the standards that you come to expect from the jurors.

After advising the juror that the court expected the jurors to understand and apply the law, the court asked again if he was "saying that

you think that you are not going to be able to apply the law." (RT 2354.)

The following colloquy ensued:

> JUROR T.: Because of my — well, perhaps because of my bias.
>
> THE COURT: So you believe you have a bias that will make it difficult for you to comply with the instructions on the law as you understand the instructions? Is that what you are saying?
>
> JUROR T.: Yes, yes.
>
> THE COURT: Well, having said that, do you think that you should be excused from the case?
>
> JUROR T.: I —
>
> THE COURT: You know why I ask —
>
> JUROR T.: I think I should — I think I should be — I think I should be —
>
> THE COURT: Excused?
>
> JUROR T.: — Excused.
>
> THE COURT: And, you know, this is not a personal thing. You understand that?
>
> JUROR T.: Of course.
>
> THE COURT: It is just that you are saying if I understand you — and I want to make it clear that you believe having thought about the law that you cannot follow the — all the law's instructions; is that correct?
>
> JUROR T.: Yes, yes.

(RT 2354-2355.)

After the juror exited the courtroom, the court expressed its "satisf[action] that the juror has indicated an unwillingness to follow the

law" and its belief that "he should be removed at this time ...." (RT 2355-2356.) Defense counsel wanted further inquiry to learn "what bias [the juror] is talking about ...." The prosecutor considered such inquiry "inappropriate under the circumstances." The court found it "[un]necessary to explore ... further," explaining: "I am satisfied that he has said he will not follow the law. And that's all that I need I think to excuse him, and I think he should be excused." (RT 2356.)

Defense counsel objected further, arguing:

> My impression is that his interpretation in following the law is what the other jurors have told him. And he hesitated, and he didn't specifically say that he couldn't follow the law. He just felt that his own biases somehow prevented him from following the law. But my interpretation of what he was saying is that that's according to what the other jurors think. And I'd like to at least ask him that.

The court "disagree[d]," stating:

> "I think that it was very clear that he felt that he — after talking to the jurors, after reading the instruction that he had personal biases that would prevent him from following the law. And I am satisfied. I am going to go ahead and excuse him.

(RT 2356-2357.) The court proceeded to do just that. (RT 2357.)

One of the alternates was chosen to replace Mr. T., and after instruction from the court to begin deliberations anew, the new jury deliberated the rest of that day. (RT 2358-2360.) At the outset of deliberations the next day, however, the new juror asked to be excused, as she had become too distraught to continue deliberations. (RT 2361-2362.) With good cause the court so found, and that juror herself was replaced

with a second alternate. (RT 2364-2365.) That jury reached its verdicts on all the charges and allegations in less than three hours of deliberation. (CT 756; RT 2367-2368.)

Fuiava moved for a new trial on grounds that included the court's wrongful dismissal of juror T. (CT 793.) He sought a continuance of the time for pronouncement of judgment to give counsel an opportunity to interview that excused juror to perfect the motion. (RT 825-826.) Counsel's investigator in the end was able to interview that juror several days before sentencing, and counsel supplemented his motions with a declaration of the investigator about that interview. That declaration stated:

> On August 16, 1996, I spoke with [Mr. T.], a former juror in this case. He told me that the other jurors felt that he was not following the law because he did not want to totally disregard the testimony of gang members and witnesses associated with gang members. He said that he told the court that he was biased in his evaluation of evidence because he favored one side over the other, that of the defense witnesses. While he did not believe all of what was said by Ernesto Avila, Doug Bristol, Charlotte Bristol, and Freddie Fuiava, the four defense eye-witnesses, he did believe portions of their testimony enough to raise a reasonable doubt about the guilt of the defendant. [¶] After stating to the court that he felt he was biased, if 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. [¶] Mr. [T.] called me yesterday, August 18, 1996, and said that he would prefer not to sign a declaration, but was willing to come to court to explain things to the judge.

(CT 823.) The court found that the proffered evidence did not impeach its determination to excuse Mr. T. and did not otherwise suggest juror misconduct. (RT 2809.) It "note[d] also that Evidence Code [section] 1150 excludes evidence of a juror's subjective reasoning process from being explored in the interests of finality." (RT 2810.) It accordingly denied both the motion for continuance and the motion for new trial for wrongful discharge of the juror. (RT 2810, 2813.)

B. Legal Analysis.

1. The Improper Discharge of Juror T.

A defendant's right to trial by jury is guaranteed by both the United States Constitution and the California Constitution. As observed in *Duncan v. State of Louisiana* (1968) 391 U.S. 145, 149 [88 S.Ct. 1444, 1447, 20 L.Ed.2d 491: "[T]rial by jury in criminal cases is fundamental to the American scheme of justice, [so] that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee." The Court summed up the matter thusly: "The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States." (*Id.* at p. 156.) The California Constitution likewise provides that trial by jury is "an inviolate right and shall be secured to all" (Cal. Const., art. I, § 16), giving a criminal defendant a "state constitutional right to a unanimous jury verdict and to the independent and impartial decision of each juror ...." (*People v. Engelman* (2002) 28 Cal.4th 436, 444.)

These rights make it "constitutionally permissible" to discharge a member of the jury before it reaches a verdict only when there is good cause to do so. (See, e.g., *United States v. Tabaca* (9th Cir. 1991) 924 F.2d 906, 914-91519 [discharge of juror without good cause entitled defendant to reversal of judgment].) Particularly must the cause be manifest where the juror is discharged during deliberations, for the substitution of a juror after the jury has retired to deliberate runs a special danger of "trench[ing] upon a defendant's right to trial by jury." (*People v. Collins* (1976) 17 Cal.3d 687, 692.) For example, in *Miller v. Stagner* (9th Cir. 1985) 757 F.2d 988, 995, the habeas petitioner challenged his California conviction because a juror was discharged and an alternate substituted in during deliberations over the petitioner's objection. The court denied the petition because "[t]he California substitution procedure followed by the trial court preserved the 'essential feature' of the jury required by the Sixth and Fourteenth Amendments," noting that California Penal Code section 1089 required "good cause" for such substitution. (*Id.* at 995, fn. 2.)[12]

To preserve the sanctity of the jury's deliberative process, "[c]aution must be exercised in determining" whether there is good cause for discharge of a deliberating juror. (See *People v. Cleveland* (2001) 25 Cal.4th. 466, 475.) "The need to protect the sanctity of jury deliberations,

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[12] "Penal Code section 1089 provides, in pertinent part: 'If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.'" (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.)

however, does not preclude reasonable inquiry by the court" into a deliberating juror's fitness to serve. (*Id.* at p. 476.) Nevertheless, "[d]etermining whether to discharge a juror because of the juror's conduct during deliberations is a delicate matter ...." (*Id.* at p. 484.)

In *Cleveland*, this Court reviewed the lawfulness of a juror's discharge during deliberations pursuant to a finding by the trial court that the juror refused to deliberate. The Court there recognized the tension between the need to remove a juror for misconduct or bias to insure fair and impartial decisionmaking, and the need to leave the jury intact and without intrusion into its deliberations to insure the same. To resolve that tension, the Court reviewed not only California's relevant case law but also "three federal cases [that] have considered these issues in depth": *United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591; *United States v. Thomas* (2d Cir. 1997) 116 F.3d 606; and *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080. (*People v. Cleveland*, *supra*, 25 Cal.4th. at p. 480.) It then concluded as follows:

> We agree with the observations in *Brown*, *Thomas,* and *Symington* that a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence. And the court in *Brown* is correct in observing that often the reasons for a request by a juror to be discharged, or the basis for an allegation that a juror refuses or is unable to deliberate, initially will be unclear. We also agree ... that a court must take care in inquiring into the circumstances that give rise to a request that a juror be discharged, or an allegation that a juror is refusing to deliberate, lest the sanctity of jury deliberations too readily be undermined. But we do not adopt the standard promulgated in *Brown*, and refined in *Thomas* and *Symington*, that restricts a court's authority to inquire into whether a juror is unable or unwilling to

> deliberate and that precludes dismissal of such a juror whenever there is "any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case." [Citation.] 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.) This Court accordingly permitted a court to intervene in jury deliberations "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." (*Id.* at p. 478.) Moreover, under those circumstances "the decision whether (and how) to investigate rests within the sound discretion of the court." (*People v. Engelman*, *supra*, 28 Cal.4th at p. 442.)

In *Engelman*, the Court emphasized that a trial court's intrusion into the deliberative process, even following accusations of juror misconduct during deliberations, risks impairment of the integrity of the jury's eventual verdict.

> Courts must exercise care in responding to an allegation from a deliberating jury that one of their number is refusing to follow the court's instructions or is refusing to deliberate [citations], even though a juror's refusal to follow the court's instructions ... constitutes misconduct that could be a proper basis upon which to discharge the juror. As Justice Kennard stated in her concurring opinion in *People v. Williams* [2001] 25 Cal.4th 441, 464, even though refusal to follow the court's instructions on the law constitutes misconduct, a court's inquiry regarding a juror's motivations could

> "compromise the secrecy of the jury's deliberations." That opinion properly warned of the risk inherent in "permitting trial judges 'to conduct intrusive inquiries into ... the reasoning behind a juror's view of the case, or the particulars of a juror's (likely imperfect) understanding or interpretation of the law as stated by the judge' ...." [Citation.]

(*People v. Engelman*, *supra*, 28 Cal.4th at p. 445 [brackets in quote deleted].)

Applying these standards, the trial court here may have acted within its discretion when it interrupted the jury's deliberations for the ostensible purpose it announced: Not to inquire into how the jury's deliberations were proceeding, but to assist the jury in understanding the law. Such inquiry was warranted because the jurors' notes evidenced some disagreement among the jury as to whether all the jurors were following the law or understood the law.

The court abused its discretion, however, when it singled out juror no. 8 for inquiry outside the presence of the other jurors. By doing so, the court inevitably affected the deliberative process by spotlighting juror no. 8, for there was nothing to suggest that any inquiry of the dispute about the law and any juror's ability to follow it that arose during deliberations would taint the other jurors if conducted in their presence. On the contrary, subjecting Mr. T. to the isolated supervision of the court risked taint of the entire jury by encouraging speculation about that isolated inquiry and suggesting that the court found juror no. 8's behavior problematic. It also risked intimidation of Mr. T. as the single juror questioned, particularly given the sensitivity he had shown to the other jurors' accusations of misconduct. As this Court has cautioned:

> [W]hen inquiring into asserted misconduct of a member of a deliberating jury, the court should take care that any inquiry "minimize pressure on legitimate minority jurors" [citation] and the court should not conduct an inquiry that could "risk pressuring the dissenting juror to conform her vote to that of the majority." [Citation.]

(*People v. Engelman*, *supra*, 28 Cal.4th at p. 446 [brackets in quote deleted].)

Even if the court acted within its discretion in conducting an isolated inquiry of juror no. 8, the court abused its discretion by continuing that inquiry after the juror advised the court that the jury had resolved its differences and did not require further guidance from the court. "[T]he inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.) The court unreasonably intruded into the process by quizzing juror no. 8 about his ability to follow the law, rather than simply permitting the jury to resume its deliberations once the court had learned that the jury had resolved their differences about the law.

Assuming arguendo that inquiry of Mr. T about his ability to follow the law was proper, it was improper for the court to conduct the inquiry in the leading and intimidating manner that it did and then summarily cut off that one-sided inquiry. Mr. T. clearly was concerned that his integrity not be impugned and had expressed in his note his willingness to be excused if that was the price he needed to pay to maintain his integrity. The court arbitrarily cut off inquiry about Mr. T.'s ability to carry out his "solemn duties during trial and deliberations" (*People v. Engelman, supra,* 28

Cal.4th at p. 449) once it heard the juror's confession of bias, for it appeared 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. Because of that appearance, the court abused its discretion when it refused to conduct the further 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 simply based on his view of the evidence and misunderstanding of the instructions, rather than a true disqualifying prejudice or partiality. "It is difficult enough for a trial court to determine whether a juror actually is refusing to [follow the law] or instead simply disagrees with the majority view," even when it fully explores the matter. (*People v. Engelman, supra,* 28 Cal.4th at p. 446.) Given the leading and truncated questioning the trial court conducted to determine Mr. T.'s ability to follow the law, it was impossible for the trial court to fairly make that determination. As a result, the court failed to establish the requisite "demonstrable reality" that Mr. T. was biased or otherwise unable to deliberate.

As Justice Werdegar emphasized in her concurring opinion in *Cleveland*, the requisite "demonstrable reality" that a juror in fact was biased or otherwise unable to carry out his duties serves as a constitutional constraint upon a trial court's power to discharge a juror during deliberations.

> [D]ischarge of a juror who may be holding out in a defendant's favor raises the specter of the government coercing a guilty verdict by infringing on an accused's constitutional right to a unanimous jury decision. In light of this constitutional dimension to the problem, it

> is inappropriate to commit to the trial court — subject only to the deferential abuse-of-discretion standard of review on appeal — the important question of the substitution of jurors after deliberations have begun. 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. Because I read the majority opinion to be consistent with my understanding of the applicable standard of review, and because I agree the record does not show to a demonstrable reality that Juror No. 1 was refusing to deliberate with the other jurors, I concur.

(*People v. Cleveland*, *supra*, 25 Cal.4th at pp. 487-489 (conc. opn. of Werdegar, J.) (italics in quote).) As explained in *People v. Bowers* (2001) 87 Cal.App.4th 722, 729, a case which presaged *Cleveland* and which this Court cited with approval in *People v. Engelman*, *supra*, 28 Cal.4th at p. 446: "The trial court's discretion under this section is 'bridled to the extent' the juror's inability to perform his or her functions must appear in the record as a 'demonstrable reality,' and 'courts must not presume the worst' of a juror. [Citations.]" (Brackets in quote deleted.)

"Moreover, removal of the sole holdout for acquittal is an issue at the heart of the trial process and must be meticulously scrutinized." (*United States v. Hernandez* (2nd Cir. 1988) 862 F.2d 17, 23.) Thus, it is especially critical that the court make a full inquiry into the facts before it

determines that they constitute good cause for discharge of a juror that appears to favor the defense. (Cf. *People v. McNeil* (1979) 90 Cal.App.3d 830, 840 [court's failure to conduct a more extensive hearing before concluding that the deliberating juror *could* render an impartial and unbiased verdict entitled defendant to reversal].)

In Fuiava's case, the court's inquiry did not overcome the showing that the conflict between Mr. T. and the other jurors arose from the simple fact that the evidence did not convince Mr. T. of Fuiava's guilt, and that Mr. T. was not biased in any true sense of the word. The dispute between Mr. T. and the rest of the jurors apparently concerned assessment of the credibility of the witnesses, particularly the credibility of the defense witnesses. As Mr. T. related the dispute, juror assertion of a bias on his part was based on the fact that he credited some of the testimony of the witnesses while discrediting other portions of it. In turn, he expressed "disagreement with the treatment of witness credibility" by other jurors who apparently found the witnesses' credibility undermined by evidence of their age or association with the Young Crowd or Fuiava.

When the court examined Mr. T. about his letter, he began to reiterate that the point of contention between him and the rest of the jurors concerned whether he could credit some portion of a witness's testimony while rejecting other portions or whether he was obligated to reject all of a witness's testimony because that witness may have been untruthful in part of it. Instead of clarifying the law on this point — which, ironically, Mr. T. correctly understood —the court directed Mr. T. away from the conflict in the deliberations, and said it simply wanted to know if he was "able to follow the instruction and the law." This provoked Mr. T.'s expression of

concern about his fairness to each side in light of his "bias" or "background" that might "play a role" in which testimony he rejected entirely and which testimony he relied on. It was not at all clear that the juror's reference to bias in connection with his assessment of the evidence was anything more than his own subjective consideration of the evidence based on his life experience. "Individuals acquire different methods of processing information and decisionmaking based on their background and experiences. It is unrealistic to expect each person or each jury to deliberate and come to a conclusion in the same fashion." (*People v. Bowers*, 87 Cal.App.4th at p. 735) For this reason, "[t]he type of after-acquired information that potentially taints a jury verdict should be carefully distinguished from the general knowledge, opinions, feelings, and bias that every juror carries into the jury room. Voir dire questioning is the proper method of uncovering prejudicial character traits of potential jurors." (*Hard v. Burlington North R. Co.* (9th Cir. 1989) 870 F.2d 1454, 1460; see also *United States v. Symington*, *supra,* 195 F.3d at p. 1088 ["Voir dire is the primary mechanism" for a court to "ensure that the seated jurors are capable of participating effectively in deliberations."].)

Part of the glory of the right to trial by a jury of one's peers is that its collective wisdom arises out of the unique life experience that the common man or woman each brings to the deliberations. Thus, a juror's personal experience, as opposed to personal knowledge regarding the parties or the issues involved in the litigation, is a necessary and appropriate part of jury deliberations. "Jurors' views of the evidence ... are necessarily informed by their life experiences ...." (*People v. Steele* (2002) 27 Cal.4th 1230, 1265; see also *Crawford v. Head* (11th Cir. 2002) 311 F.3d 1288, 1332

["juries are supposed to examine the evidence in light of their own backgrounds and experiences, and by relying upon their collective backgrounds and experiences, arrive at a verdict that speaks the truth"].) As explained in *United States v. Navarro-Garcia* (9th Cir. 1991) 926 F.2d 818, 821-822:

> Inevitably, "jurors must rely on their past personal experiences when hearing a trial and deliberating on a verdict." [Citation.] Indeed, "50% of the jurors' time is spent discussing personal experiences." [Citation.] ....[¶] So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge the weight and force of that evidence by their own general knowledge of the subject of inquiry.

Indeed, the prosecutor recognized as much when he urged the jury as follows in his opening argument:

> You all have lived a certain number of years. And you know about certain things as a result of you living that number of years.
>
> You know how things work. You know what is reasonable and what is unreasonable. And the reason why we picked twelve of you with different life experiences and different wisdoms that you have acquired over the years is so that you can bring it in the jury room, talk among yourselves and say this is what we think the facts to be.

(RT 2142.) This is exactly what Mr. T. did during the deliberations. When the prosecutor learned that Mr. T's acquired wisdom from his years on this earth caused him to favor Fuiava, however, the prosecutor naturally wanted him discharged from the jury. But, as this Court made clear in *Cleveland*, intrusion into jury deliberations makes it difficult to distinguish between 1) the conscientious exercise of the duties of a juror who is at odds with the rest of his fellows, and 2) that juror's inability to carry out those duties. That distinction, as difficult as it is on its own terms, is only made more difficult when colored by the knowledge that the juror in question either stands in the way of jury consensus or favors the defendant, as was the case here.

"[T]he essential feature of a jury ... lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen ...." (*Williams v. Florida* (1970) 399 U.S. 78, 100 [26 L.Ed.2d 446, 460, 90 S.Ct. 1893.) "[T]he interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him" lies at the heart of the right to trial by jury. (See *Apodaca v. Oregon* (1972) 406 U.S. 404 [32 L.Ed.2d 184, 92 S.Ct. 1628.) The court's peremptory dismissal of Mr. T. here, whose "bias" appeared to be nothing more than the assessment of the credibility of certain witnesses based on his world view, both veered from the statute's requirement of good cause for discharge and deprived Fuiava of this essential feature of his right to a jury. Arbitrary deprivation of the right to a unanimous verdict guaranteed by California law similarly deprived Fuiava of his right to due process of law as guaranteed by the Fourteenth

Amendment. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343 [arbitrary deprivation of state guaranties constitutes a federal due process violation].)

The wrongful discharge here was like the one the trial court made in *Brown*. There, in the midst of deliberations "the trial court received a note from one of the jurors stating that he was 'not able to discharge my duties as a member of this jury.'" (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 480, quoting *United States v. Brown*, *supra*, 823 F.2d at p. 594.) The explanation the juror gave the court when it questioned him about the matter did not make clear whether his inability stemmed from his view of the evidence or his view of the law. "The court discharged the juror, because he indicated he could not follow the court's instructions. The court believed it could not question the juror any further, because additional inquiry would intrude on the secrecy of the jury's deliberations." (*People v. Cleveland, supra,* 25 Cal.4th at pp. 480-481, explaining *Brown*.) "The [reviewing] court in *Brown* reversed the judgment of conviction, concluding that the record 'indicates a substantial possibility that the juror requested to be discharged because he believed that the evidence offered at trial was inadequate to support the conviction.'" (*Id.* at p. 481, explaining and quoting *United States v. Brown, supra,* 823 F.2d at p. 596 [brackets in quote deleted].)

This Court in *Cleveland* implicitly agreed with the *Brown* judgment on appeal. Although it rejected *Brown's* "ultimate[] rule" that a trial court must simply deny the request to be discharged under such circumstances and may not inquire of the juror to clarify the ambiguity, and adopted a rule that permits inquiry to resolve the ambiguity (see *People v. Cleveland, supra,* 25 Cal.4th at p. 481), it did not disagree with the holding that

dismissal of the juror in the face of such ambiguity was error. Rather, this Court permitted such inquiry as necessary to "make the often difficult distinction between the juror who favors acquittal because he is purposefully disregarding the court's instructions on the law, and the juror who is simply unpersuaded by the Government's evidence." (*United States v. Thomas*, *supra*, 116 F.3d at p. 621.) As *Thomas* observed, "this distinction is a critical one, for to remove a juror because he is unpersuaded by the Government's case is to deny the defendant his right to a unanimous verdict." (*Ibid.*, citing *United States v. Brown, supra,* 823 F.2d at p. 596.) Thus, while this Court in *Cleveland* did not go so far as to tie the court's hands by precluding it from making any inquiry into the matter and obliging it to leave the questionable juror on the jury, it did not authorize trial courts to do what the trial court did in *Brown* and what the court did here. In each case, the court erred by dismissing a questionable juror after failure — out of concern for intrusion of the deliberative process — to make the kind of inquiry necessary to show as a demonstrable reality the inability of the juror to discharge his solemn duties.

The right to trial by the common sense of one's peers is a hallmark of fairness that the trial court sacrificed in pursuit of the phantom unfairness of trial by a biased juror. While Mr. T. said he was not comfortable with an instruction that required him to reject all of the testimony of a witness if he felt that some of it was false, this betrayed not an inability or unwillingness to follow the law, but a misunderstanding of the law. The court could have referred the jurors back to the instructions on the credibility of a witness or otherwise made clear to them that it is entirely up to each juror whether to credit any part of a witness's testimony, and that the instructions they were

given on witness credibility are merely guidelines to the jury in that assessment. (See, e.g., § 1127 ["The court shall inform the jury ... that the jurors are the exclusive judges ... of the credibility of the witnesses"].)

What the court could not do was precisely what it did do: immediately seize on Mr. T.'s conclusory confession of bias to summarily discharge him from the jury. The court was obligated to make manifest in the record — to show as a demonstrable reality — that Mr. T. was actually biased and to dispel the likelihood that his concern about his fairness was based on his misunderstanding of the law. The court could not accept Mr. T.'s reservations about his fairness when they were made in the same breath as his report that his background colored his assessment of the evidence. On this record, the court could not fairly accept Juror T.'s agreement with its suggestion that "you believe you have a bias that will make it difficult for you to comply with the instructions on the law as you understand the law" without testing his understanding of the law. The substantial possibility that Mr. T.'s difficulties during deliberations stemmed from his views on the merits of the case remained outstanding. Under federal case law, the court could not discharge him but was required to leave the jury intact. Under this Court's decision in *Cleveland*, the court was obligated to inquire further to establish the juror's bias as a demonstrable reality before it could discharge the juror.

"Jurors, of course, do not always know what constitutes misconduct." (*People v. Engelman*, *supra*, 28 Cal.4th at p. 446.) Nor do they always know what constitutes "bias" once their views have been shaped by the evidence and argument of the parties and they are engaged in deliberations. A juror, and it appears Mr. T. is a perfect example, may

mistake his subjective judgment based on all he has heard for a prejudice; but it is prejudgment that establishes bias, not judgment. Because the record fails to unmistakably show bias, Mr. T.'s inability to fulfill his duties as a juror was not demonstrated as a reality. The court's discharge of Mr. T. under these circumstances thus violated Fuiava's right to a full and fair trial by an impartial and unanimous jury as protected by the state and federal provisions cited above.

As in *Brown, Thomas*, and *Symington*, the trial court here dismissed a questionable juror in the face of a record that left open a reasonable "possibility that the juror's view on the *merits of the case*, rather than a purposeful interest to disregard the court's instructions, underlay the request that he be discharged ...." (*United States v. Thomas*, *supra*, 116 F.3d at p. 622, fn. 12.) "This evidentiary standard protects ... against the wrongful removal of jurors ...." (*Id.* at p. 622.) That standard also may be equated with this Court's requirement that the record show as a demonstrable reality a deliberating juror's unfitness to serve before such a juror may be discharged from service. "[A] lower evidentiary standard could lead to the removal of jurors on the basis of their view of the sufficiency of the prosecution's evidence." (*Id.* at p. 622.) Indeed, *Thomas* could have been talking about this case when it followed up that observation with this one:

> Consider a case where, for example, a strong majority of the jury favors conviction, but a small set of jurors — perhaps just one — disagrees. The group of jurors favoring conviction may well come to view the "holdout" or "holdouts" not only as unreasonable, but as unwilling to follow the court's instructions on the law. The evidentiary standard that we endorse today — that "if the record evidence discloses any possibility that" a

> complaint about a juror's conduct "stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request" — serves to protect these holdouts from fellow jurors who have come to the conclusion that the holdouts are acting lawlessly.

(*Ibid.*)[13]

Just as *Thomas* concluded, this Court, too, should conclude: "On this record, we cannot say that it is beyond doubt that Juror No. [8]'s position during deliberations was the result of his defiant unwillingness to apply the law, as opposed to his reservations about the sufficiency of the Government's case against the defendants." (*United States v. Thomas*, *supra*, 116 F.3d at p. 624.) As there, this Court is "required to vacate these judgments because the court dismissed Juror No. [8] largely on the ground that the juror was acting in purposeful disregard of the court's instructions on the law, when the record evidence raises a possibility that the juror was simply unpersuaded by the Government's case against the defendants." (*Ibid.*)[14] This Court also should conclude as did the court in *People v. Bowers*, *supra*, 87 Cal.App.4th at p. 730:

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[13] Again, *Cleveland* modified this holding by pointing out that the court "must deny the request" for discharge under these circumstances, but may make reasonable inquiry into the matter — indeed, must do so — to foreclose the reasonable possibility that a juror's view on the merits of the case, rather than a preconceived view regardless of the evidence, is the perceived impediment to his service as a juror.

[14] Fuiava, like the court did in *Symington*, adds the modifier "reasonable" possibility. His thesis is that if the record leaves open a reasonable possibility that the juror's views on the merits of the case motivate his behavior rather than an actual refusal or inability to follow the court's instructions, the juror's unfitness to serve does not appear in the record as a demonstrable reality. Here, there is not only a possibility, but a probability that the juror's purported bias or other inability to follow the law was based purely on his views of the merits of the case.

> [T]he record shows this [juror's] conduct was a manifestation, effectively communicated to the other jurors, that he did not agree with their evaluation of the evidence — specifically, their credibility determinations. There appears no demonstrable reality that Juror No. [8] was unable to perform his function and he did not engage in serious and willful misconduct. Accordingly, the record does not support the trial court's exercise of its bridled discretion to eliminate Juror No. [8]'s dissenting vote on the jury to obtain a verdict.

Moreover, this is hardly a case where the trial court "proceeded with painstaking care and caution throughout this trial, with a clear respect for the rights of the defendant[] to a fair trial," as did the trial court in *Thomas*. (*United States v. Thomas*, *supra*, 116 F.3d at p. 624.) Rather, the trial court here was preoccupied with rapid disposition of the case, making this case closer to one where "the record reveals an intention on the part of the court to remove Juror No. [8] as a means of achieving jury unanimity." (*Ibid.*) The court's dominating and one-sided questioning did nothing to clear up the apparent confusion of the juror regarding bias and his ability to render a fair verdict; it simply insulated the juror's confession of bias from exposure as misguided and mistaken.

In this regard, the court's dismissal of the juror served to defeat another central feature of the jury, for a jury provides an "inestimable safeguard ... against the compliant, biased, or eccentric judge." (*Duncan v. Louisiana*, *supra*, 391 U.S. at p. 156.) As *Thomas* admonished:

> [A trial] court may under no circumstances remove a juror in an effort to break a deadlock. *See United States v. Hernandez,* 862 F.2d 17, 23 (2d Cir. 1988), *cert. denied sub nom. Quinones v. United States,* 489 U.S. 1032, 109 S.Ct. 1170, 103 L.Ed.2d 228 (1989) (finding error in decision to dismiss juror where, *inter alia,* [t]he record ... seem[ed] to reflect that the cause of the

> removal was as much to avoid a mistrial because of a hung jury as to excuse an incompetent juror); *see also* [*United States v*]. *Wilson* [11th Cir. 1990] 894 F.2d [1245,] 1250 (noting that record lacked even "the slightest basis to believe that [the removed] juror was a holdout juror or that the jury had reached any sort of impasse in its deliberations"); [*United States v.*] *Stratton* [2d Cir. 1985] 779 F.2d [820,] 832 (finding that "the record [did] not present even the slightest basis to believe that [the dismissed juror] was excused on a pretext to remove an obstacle to reaching a unanimous verdict"). In fact, we subject a ... dismissal to "meticulous" scrutiny in any case where the removed juror was known to be the sole holdout for acquittal. [Citation.]

(*United States v. Thomas*, *supra*, 116 F.3d at pp. 624-625.)

Here, it appears that the trial court cut off questioning of Mr. T. once it had elicited his conclusory assertion that his bias prevented him from fairly following the law as a convenient means of promoting smooth jury deliberations rather than the protection of the parties' rights to trial by jury, which included Fuiava's right to the integrity of the jury sworn to try his case. As stated in *Crist v. Bretz* (1978) 437 U.S. 28, 35 [98 S.Ct. 2156, 2161, 57 L.Ed.2d 24]:

> [T]he interest of an accused in retaining a chosen jury [has been] described ... as a defendant's 'valued right to have his trial completed by a particular tribunal.' [Citation.] It is an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice. Throughout that history there ran a strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict

"The law provides, of course, that the court may not discharge a juror for failing to agree with the majority of other jurors or for persisting in

expressing doubts about the sufficiency of the evidence in support of the majority view ...." (*People v. Engelman*, *supra*, 28 Cal.4th at p. 446.) The court's wrongful discharge of Mr. T. thus infringed upon Fuiava's right to trial by jury and to proof to its satisfaction of guilt beyond a reasonable doubt.

The error necessarily prejudiced Fuiava because the right to a jury fairly constituted is part of the structure of a trial that the Constitution guarantees a criminal defendant. "[S]tructural defects in the constitution of the trial mechanism" require reversal without regard to the evidence. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309.) Trial by jury is one such structural guarantee, the denial of which necessarily deprives a defendant of a fundamentally fair trial. (*Rose v. Clark, supra,* 478 U.S. at pp. 578-579.) This Court has recognized that prejudice naturally flows from wrongful discharge of a juror during deliberations who appears to favor the defense, and requires no extended explication. (See, e.g., *People v. Cleveland*, *supra*, 25 Cal.4th. at 486 [finding such wrongful discharge prejudicial in a single conclusory sentence, citing *People v. Hamilton* (1963) 60 Cal.2d 105, 128.) As the Court held in *Hamilton* at the cited page:

> While it has been said repeatedly ... that a defendant is not entitled to be tried by a jury composed of any particular individuals, but only of a jury composed of qualified and impartial jurors, this does not mean that either side is entitled to have removed from the panel any qualified and acting juror who, by some act or remark made during the trial, has given the impression that he favors one side or the other. It is obvious that it would be error to discharge a juror for such reason, and that, if the record shows (as it does here), that, based on the evidence, that juror was inclined toward one side,

> the error in removing such a juror would be prejudicial to that side. If it were not, the court could "load" the jury one way or the other.

Not surprisingly, then, in every case in which a court has found wrongful discharge of a deliberating juror, it has found prejudice and ordered reversal of the judgment. (See, e.g., *United States v. Thomas*, *supra*, 116 F.3d at p. 625; *United States v. Symington*, *supra,* 195 F.3d at p. 1088; *United States v. Brown*, *supra*, 823 F.2d at p. 599; *People v. Castorena* (1996) 47 Cal.App.4th 1051, 1067 [trial court's removal of juror during deliberations without adequate inquiry required reversal]; *People v. Bowers*, 87 Cal.App.4th at pp. 735-736 [erroneous removal of juror during deliberations required reversal].)

2. The Improper Denial of the Motion for New Trial.

Fuiava need prove no more than inadequate inquiry prior to discharge of Mr. T., for "we cannot speculate about what facts might have been adduced if the inquiry had been conducted." (*People v. Castorena*, *supra*, 47 Cal.App.4th at p. 1067.) By conducting the inquiry of Mr. T. after trial that the court foreclosed during trial, however, Fuiava showed before imposition of judgment 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. It refused to do so. Hence, the need for reversal was confirmed by the investigation conducted by Fuiava after trial and proffered to the court in support of his motion for new trial. The trial court thus compounded its error and the violation of Fuiava's rights when it denied that motion for new trial and stood by its decision discharging Mr. T. in the face of this evidence.

3. The Error Entitles Fuiava to Dismissal of the Charges.

The error entitles Fuiava not only to reversal of the conviction, but to dismissal of the charges under state and federal constitutional principles that bar double jeopardy. (See U.S. Const., 5th Amend. ["nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"; Cal. Const., art. I, § 15 ["Persons may not twice be put in jeopardy for the same offense"].) The right not to be placed twice in jeopardy is as sacred as the right to jury trial. (*Larios v. Superior Court* (1979) 24 Cal.3d 324, 329.) Together, those rights protect the integrity of the jury pending return of its verdict. As the High Court has noted: "Regardless of its historic origin, ... the defendant's 'valued right to have his trial completed by a particular tribunal' is now within the protection of the constitutional guarantee against double jeopardy, since it is that 'right' that lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn." (*Crist v. Bretz, supra*, 437 U.S. at p. 35.) The Court went on to "explicitly hold [that] [t]he federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy," and hence applies to the

states through the Fourteenth Amendment of the United States Constitution. (*Id.* at p. 38.)

As this Court has explained:

> Article I, section 13, of the California Constitution declares that "No person shall be twice put in jeopardy for the same offense ...." Implementing this constitutional command, the decisions of this court have settled the now familiar rules that (1) jeopardy attaches when a defendant is placed on trial in a court of competent jurisdiction, on a valid accusatory pleading, before a jury duly impaneled and sworn, and (2) a discharge of that jury without a verdict is equivalent in law to an acquittal and bars a retrial, unless the defendant consented thereto or legal necessity required it. [Citations.]

(*Curry v. Superior Court* (1970) 2 Cal.3d 707, 712-713.) Jeopardy had attached here, for not only had the jury been duly impaneled and sworn, but the matter had been submitted to it for decision. Accordingly, the discharge of the juror broke up the integrity of the jury and was equivalent to an acquittal unless, in the words of *Curry*, "the defendant consented thereto or legal necessity required it." (See also *Crist v. Bretz, supra,* 437 U.S. at pp. 33-34, incl. fn. 10 ["a defendant, put to trial before a jury, may be subjected to the kind of 'jeopardy' that bars a second trial for the same offense even though his trial is discontinued without a verdict [but] a 'manifest necessity' for the discharge of the first jury" does not bar a second trial].)

Fuiava certainly did not consent to the discharge of the juror, nor did legal necessity require it, for it was never shown that the juror was unable to discharge his duties. Legal necessity exists in narrowly limited circumstances. (*Larios v. Superior Court, supra*, 24 Cal.3d at 330.) It typically arises from the inability of the jury to agree or perform its duties.

(*Curry v. Superior Court, supra*, 2 Cal.3d at 713-714.) A mere error of law or procedure does not constitute legal necessity. (*Ibid.*)

When a court without legal necessity or good cause alters the composition of the jury in the middle of trial in a way that favors the prosecution, jeopardy bars retrial. Here, a fair and impartial jury was selected, sworn, had the matter submitted to it for decision, was in the midst of deliberations, and stood ready to perform its duty. During deliberations the jurors actively disputed over Fuiava's guilt, leading to resort to the court to insure they were carrying out their duties. The court found that Mr. T. was unable to be impartial or otherwise follow the law, as was necessary to establish good cause for discharge under section 1089. The court's truncated questioning of the juror makes it just as likely that the juror was conscientiously carrying out his duty of fair consideration of the evidence through the prism of his own life experience just like the other jurors, but that the court wanted to replace a fully qualified juror in order to facilitate a verdict and avoid a hung jury and prolonged retrial. Were retrial permitted under these circumstances, the vital and fundamental right of every citizen to trial by a fair and impartial jury would be gravely undermined and the right to be free from double jeopardy would be rendered meaningless.

This Court thus should find that a violation of double jeopardy results when a jury is reconstituted without such necessity as section 1089 permits for good cause shown. (See, e.g., *People v. Collins, supra,* 17 Cal.3d at p. 692 [Court avoided "[d]efendant's contention that he was placed twice in jeopardy by the substitution of an alternate juror without legal necessity or his consent [because] ... [t]he discharge of the juror for good cause amounted to a legal necessity"]; accord, *In re Mendes* (1979) 23

Cal.3d 847, 853 ["'If the substitution of the alternate for one of the regular jurors is in accordance with the provisions of section 1089, no question of double jeopardy would arise.'"].) When there is wrongful substitution of a juror that apparently favors the defense, however, the implications of the double jeopardy bar are manifest. Indeed, the question of whether the double jeopardy clause bars retrial under such circumstances is pending in this Court. (See, e.g., *People v. Hernandez* (2002) 95 Cal.App.4th 1346, review granted May 15, 2002 (S10527) 120 Cal.Rptr.2d 429, 47 P.3d 222.)

By removing a juror who heard all the evidence and tended to harbor a reasonable doubt, the court tilted the jury toward guilt, facilitating Fuiava's conviction. The constitutional prohibition against double jeopardy, however, is intended to foreclose judicial attempts to garner advantage for the prosecution or afford it another more favorable opportunity to convict the accused. "Underlying this constitutional safeguard is the belief that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" (*United States v. Dinitz* (1964) 424 U.S. 600, 606, [47 L.Ed. 267, 96 S.Ct. 1075]; see also *Ohio v. Johnson* (1984) 467 U.S. 493, 498-499.) Thus, the bar against double jeopardy forecloses a new trial following the court's wrongful disruption of the integrity of the jury by discharge of the juror leaning in Fuiava's favor and reformulation of that jury.

IV.

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

The Sixth Amendment to the Constitution of the United States and article I, section 16 and article VI of the California Constitution guarantee an accused in a criminal prosecution the right to a trial by an impartial jury. (*People v. Price* (1991) 1 Cal.4th 324, 467.) Thus, a trial court must use "great care to avoid the impression that jurors should abandon their independent judgment 'in favor of considerations of compromise and expediency.'" (*People v. Price*, *supra*, 1 Cal.4th 324, 467, citing *People v. Carter* (1968) 68 Cal.2d 810, 817.)

The basic test of whether a verdict was coerced is whether the conduct of the court, viewed in the totality of the circumstances, operated to displace the independent judgment of the jury in favor of compromise and expediency. (*People v. Peters* (1982) 128 Cal.App.3d 75, 91; *People v. Ozene* (1972) 27 Cal.App.3d 905, 913, citing *People v. Carter*, *supra*, 68 Cal.2d 810, 817; see also *Jenkins v. United States* (1965) 388 U.S. 445 [85 S.Ct. 1059, 13 L.Ed.2d 957] [where the judge told the jury it was required to reach a verdict, the Supreme Court "conclude[d] that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it"].) The court's discharge of juror T. following his reported disagreement with the rest of the jurors concerning the credibility of the defense witnesses could not help but act as an endorsement of the position of those jurors who favored guilt. Accordingly, it operated to displace the jury's independent judgment and to coerce the verdict.

There are some circumstances where it is unrealistic to expect a jury to be able to begin its deliberations anew and to incorporate into those deliberations the perception, memory and viewpoints of the new juror. (See, e.g., *People v. Aikens* (1988) 207 Cal.App.3d 209, 219 (conc. & dis. opn. of Johnson, J.) [where jury reached a verdict on a related count prior to the substitution of a new juror, a verdict by a reconstituted jury cannot meet the requirement of unanimity]; *State v. Corsaro* (1987) 107 N.J. 330, [526 A.2d 1046] [once jurors have reached any verdicts, the panel cannot be reconstituted to deliberate and reach the remaining verdicts].) As *Corsaro* explained:

> [W]here the deliberative process has progressed for such a length of time or to such a degree that it is strongly inferable that the jury has made actual fact-findings or reached determinations of guilt or innocence, the new juror is likely to be confronted with closed or closing minds. In such a situation, it is unlikely that the new juror will have a fair opportunity to express his or her views and to persuade others. Similarly, the new juror may not have a realistic opportunity to understand and share completely in the deliberations that brought the other jurors to particular determinations, and may be forced to accept findings of fact upon which he or she has not fully deliberated.

(*State v. Corsaro*, *supra*, 526 A.2d at p. 1054.)

The court there accordingly concluded:

> The requirement that juries begin deliberations anew after a juror has been substituted would be rendered nugatory if the reconstituted jury is likely to accept, as conclusively established, facts that could underlie, if not necessarily establish, its verdict on the open charges. ... While the jury was not technically required to accept the facts underlying the partial verdict, the likelihood that deliberations would truly

> 'begin anew' was so remote, in our opinion, as to foreclose juror substitution.

(*Id.* at p. 1055.)

Similar circumstances attended Fuiava's case at the time of substitution. Deliberations had progressed to the point where only the views of Mr. T. may have stood between the fixed positions of the rest of the jurors and return of guilty verdicts. Moreover, the court implicitly endorsed the majority's position when it discharged Mr. T. Given the circumstances of his discharge, it was simply unrealistic to expect the reconstituted jury to be able to deliberate de novo and fully involve the new juror in such deliberations. There is a substantial "inherent coercive effect upon an alternate juror who joins a jury that has ... already agreed that the accused is guilty...." (*United States v. Lamb* (9th Cir. 1973) 529 F.2d 1153, 1156.) The coercive effect is particularly strong where the sole dissenter is removed by the court, which can only telegraph to the majority that its guilty position was approved by the court. (Cf. *Lowenfield v. Phelps* (1988) 484 U.S. 231, 239-241 [108 S.Ct. 546, 98 L.Ed.2d 568] [recognizing that court's conduct more likely to be interpreted as coercive where jury is aware that the court knows the numerical breakdown of the division between the jury].) The new juror no. 8 was under inordinate psychological pressure to go along with the group, whose one recalcitrant member the court had removed from its body after relatively lengthy deliberations.

The coercive effect became even stronger when that new juror was removed before the very next day of deliberations because those deliberations had troubled her so. That second discharge must have telegraphed to the rest of the jury that the court was inclined to remove any

juror who posed an impediment to quick consensus. Moreover, by that time the position of the remaining eleven jurors must have become so solid and cohesive as to make it impossible to follow the court's admonitions to begin their deliberations anew with yet another new juror. This mindset is 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. (See, e.g., *Jimenez v. Myers* (9th Cir. 1993) 40 F.3d 976, 981 [trial court coerced a verdict by its actions that "sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict, and the hold-out juror was to cooperate in the movement toward unanimity"].)

This Court has emphasized that the propriety of substitution of a juror during deliberations rests on the presumption that the new juror will participate fully in the jury's deliberation:

> It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations. The elements of number and unanimity combine to form an essential element of unity in the verdicts.

(*People v. Collins*, *supra,* 17 Cal.3d at p. 693.) The deliberations of Fuiava's jury were irretrievably skewed, however, when the court effectively gave its imprimatur to the majority by discharging the one juror

who took issue with its view during those deliberations. Under such circumstances, "[a] replacement juror, no matter how novel or persuasive her argument for [] acquittal may have been, would have been hard pressed to overcome the trial court's implied admonition to the original jurors to hold their ground and convict." (*Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1429 (dis. opn. of Nelson, J.).) And certainly the second replacement juror would have faced even more difficulty in opposing the apparent consensus the other eleven had already achieved. For these reasons, requiring redeliberation after the court removed Mr. T. as it did — even if such removal was proper and even with the explicit instruction to begin that deliberation anew —"risked the danger that it would coerce a verdict." (*People v. McIntyre* (1990) 222 Cal.App.3d 229, 232, fn. 1.) The danger was only increased when that juror, too, was replaced later in the deliberations. The trial court accordingly deprived Fuiava of his rights to an impartial jury, requiring reversal of the convictions. Because the coercion of the guilt verdicts rendered them unreliable, it also deprived Fuiava of his right to a reliable death judgment under the Eighth and Fourteenth Amendments to the United States Constitution. For all these reasons, the judgment should be reversed.

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. Factual Background.

Before the beginning of the trial day when the defense's closing argument was to resume, the court convened proceedings in chambers and reported to the parties a phone call it had received from juror No. 11, Miss J. (RT 2208.) "She was in tears. She was crying.... She was up all night. She has a migraine headache. She gets migraine headaches when she is under stress. She reported that she is nauseated, is basically incapacitated and unable to come to court today." (RT 2209.)

She further reported that "one of the reasons for this migraine" was that "as a juror, [she] was under a great deal of stress in this case and was particularly concerned about the activities of persons in the audience." (RT 2209.) "[I]n particular, she said there were two women ... who seemed to be pointing at jurors. And she believes these women are aligned with the defense in this case." (RT 2209.) The juror observed the two women talking together "and pointing at the jurors [] [a]nd she was concerned about that." (RT 2211.) Miss J. "did not say that she thought she alone was being pointed at [but] felt these people were talking among themselves and pointing at various jurors." (RT 2212.) While the juror did not expressly state that the gestures were threats, she expressed concern about them and they apparently made her fearful. (RT 2211-2212.) In response she added: "[i]n walking through the parking lot yesterday going home, ...

some of the jurors talked about this. And that Mr. A. [one of the jurors] even suggested that perhaps a note should be sent to the court." (RT 2209.) The court had not noticed any improper activity by anyone in the courtroom, though "it has been full of spectators, the vast majority [of whom] appear to the court to be deputy sheriffs or persons aligned with the People, including ... the widow Blair ... and others. But I do know that Mr. Fuiava has had a number of persons who have appeared for him, too." (RT 2210.)

The court stated that "at a minimum, I believe that Miss J. will have to be excused" and wondered "what, if anything, we should do to assuage any possible concerns that any of the jurors have." The court felt "it's not necessary to take any action" unless "other jurors tell us something." (RT 2210.) The prosecutor agreed with the court's proposal to replace Miss J. but otherwise "let it lay ...." (RT 2213.) The prosecutor further asked that the audience be admonished to be on their best behavior. (RT 2215.) Defense counsel suggested that any admonishment also advise that even innocent gestures might be misinterpreted. (RT 2215.) The court excused Miss J. from the jury and replaced her with an alternate juror chosen by lot. (RT 2213-2214.)

When proceedings convened in open court before the jury was called in, the court advised the audience that "there have been concerns raised that people may be making gestures or pointing at jurors or something along that nature," and admonished them in strong terms to refrain from any such conduct. (RT 2215-2216.) The court concluded its admonition by "ordering that no one make gestures of any kind or try to — or engage in

any conduct that could be interpreted as trying to influence anyone, including any juror in this case ...." (RT 2216.)

When the jury was called in, the court advised it that Miss. J. had been discharged because she had a migraine headache, as she occasionally did, and was too incapacitated to go forward. (RT 2216.) An alternate randomly selected then joined the jury. (RT 2217.)

B. Legal Analysis.

1. The Error.

Once more, a defendant accused of a crime has a constitutional right to trial by jury. (U.S. Const. 6th and 14th Amends; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 1642, 6 L.Ed.2d 751]; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) "The right of unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (*In re Hitchings*, *supra*, 6 Cal.4th at p. 110; see also *Marshall v. United States* (1959) 360 U.S. 310 [3 L.Ed.2d 1250, 79 S.Ct. 1171].) A defendant is "entitled to be tried by 12, not 11, impartial and unprejudiced jurors. 'Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' [Citations.]" (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) The rights to due process and to an impartial jury secured by the Sixth and Fourteenth Amendments guarantee a defendant a jury comprised of persons "capable and willing to decide the case solely on the evidence before it ...." (*Smith v. Phillips* (1982) 455 U.S. 209, 217 [102 S.Ct. 940, 946, 71 L.Ed.2d 78]; accord, *Dyer v.*

Calderon (9th Cir. 1997) 113 F.3d 927, 935; *Hughes v. Borg* (9th Cir. 1990) 898 F.2d 695, 700.)

A juror's receipt of information outside the evidence about a party or the case carries a presumption that it biased the juror. (*People v. Marshall* (1990) 50 Cal.3d 907, 949-951); *In re Carpenter* (1995) 9 Cal.4th 634, 650-655.) Even where the jury's exposure to the extrajudicial information was inadvertent, the presumption of partiality remains. (See, e.g., *People v. Zapien* (1993) 4 Cal.4th 929, 994; *People v. Lucas* (1995) 12 Cal.4th 415, 486-487; *People v. Cummings* (1993) 4 Cal.4th 1233, 1331.) "Although inadvertent exposure to out-of-court information is not blameworthy conduct, as might be suggested by the term 'misconduct,' it nevertheless gives rise to a presumption of prejudice, because it poses the risk that one or more jurors may be influenced by material that the defendant has had no opportunity to confront, cross-examine, or rebut." (*People v. Nesler* (1997) 16 Cal.4th 561, 579.)

The danger of juror partiality is greatest where the juror's extrajudicial exposure relates directly to attempts to influence the jury's deliberation process. (See, e.g., *People v. Hedgecock* (1990) 51 Cal.3d 395, 411, 416 [bailiff's remarks to sequestered jurors regarding expense of sequestration and necessity of reaching a quick verdict presumptively prejudicial and of a character likely to influence the verdict improperly].) Indeed, jury tampering is a "serious intrusion into the jury's process and poses an inherently greater risk to the integrity of the verdict [than other forms of juror misconduct]." (*United States v. Dutkel* (9th Cir. 1999) 192 F.3d 893, 895.) Tampering with the jury to obtain an advantage for a defendant is probably the most pernicious threat to the impartiality of a

juror. (See, e.g., *People v. Leach* (1985) 41 Cal.3d 92, 107 [juror properly discharged after a friend of defendant's approached her and asked her to hang the jury, despite her protestations that she was not influenced by the contact].) As the United States Supreme Court explained in a case where an unnamed person told a juror that he could profit by bringing in a verdict favorable to the defendant: "In a criminal case, any private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial ...." (*Remmer v. United States* (1954) 347 U.S. 227, 229; see also *United States v. Jackson* (9th Cir. 2000) 209 F.3d. 1103, 1110 [if juror who received a threatening phone call during trial considered the call an attempt to hang the jury, "the phone call threatened serious prejudice to" the defendant].)

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." Indeed, it was precisely that power the court exercised when it discharged Miss J. 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.) While the court satisfied that duty with regard to Miss J., it failed to inquire whether the other jurors were tainted by the conduct like Miss J. had been.

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.) "Such an inquiry is central to maintaining the integrity of the jury system, and therefore is central to the criminal defendant's right to a fair trial." (*People v. Kaurish* (1990) 52 Cal.3d 648, 694.) As the High Court has cautioned:

> The integrity of jury proceedings must not be jeopardized by unauthorized invasions. The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.

(*Remmer v. United States*, *supra*, 347 U.S. at pp. 229-230.)

The removal of Miss J. from the jury no more removed the taint than did the removal of the juror in *United States v. Angulo* (9th Cir. 1993) 4 F.3d 843, 847, who received a threatening phone call. In *Angulo*, the removal of the single juror was insufficient because other jurors had learned about the phone call. Here, the removal of Miss J. was insufficient because other jurors had seen the same spectator conduct; indeed, they had talked about it amongst themselves. "[T]he Supreme Court has stressed that the remedy for allegations of jury bias is a *hearing*, in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not it was prejudicial." (*Ibid*; italics in original.) "In determining whether a hearing must be held, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." (*Ibid.*) In *Angulo*, the court dismissed the juror who received the call, but failed to question the other jurors about what effect the threat to the removed juror had on them. (*Ibid.*) The *Angulo* court stated:

> Here, the potential for bias is so strong that the judge was obliged at a minimum to hold a hearing. In cases where a *bribe* or a *threat to a juror* was communicated to the other jurors, the trial judge must fully examine the effect of the threat on the remaining jurors....

(*Ibid.*; italics in original.)

The same potential for bias here mandated a hearing to fully examine the effect of the spectator conduct on the other jurors. The other jurors witnessed the same spectator conduct and apparently perceived it as a threat as well. In light of the considerable evidence that several prosecution witnesses feared for their safety, that perception may have especially

concerned them.[15] Indeed, the court knew that some of the other jurors were sufficiently disturbed by the perceived misconduct that they discussed it after the proceedings with Miss J., presumably observed the distress it caused her, and considered alerting the court to this interference with their consideration of the case. Yet, the court did nothing to determine how the spectator conduct may have influenced them. Compare the trial court's inaction here with the trial court's action in *United States v. Ivester* (9th Cir. 2003) 316 F.3d 955, 957, where the court learned that "jurors felt concerned for their safety because of the intimidating appearance of some of the spectators in the courtroom." That court conducted a hearing and "determined that the problem was principally a perceived lack of security in the courtroom." (*Id.* at p. 960.) After explaining the courtroom security to the jurors, the court then inquired:

> Having heard that, which you may not have known before, is there any juror who still has any concerns at all that you think might affect your ability to be fair in this case, to listen to the evidence, and to reach a verdict that is impartial to both sides? Anyone? If you have a concern, I want to address it.
>
> Are you sure? No one has any concerns?

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[15] Martha Godinez testified at the preliminary hearing that she became so afraid that she was going to be killed after she told the police that she saw Fuiava running by her car at Ham Park right after the shooting on May 12, 1995, that she shortly moved out of the neighborhood at police expense. (RT 1356-1358, 1367, 1373, 1386-1387.) Godinez was suspiciously — to the jurors — "not available" for trial. (RT 1355.) Brooks testified that she also was relocated at police expense because she felt that her cooperation with the prosecution endangered her. (RT 1297.) She remained fearful of Fuiava and his associates even as she testified. (RT 1299.) Frausto testified that she did not implicate Fuiava initially because she feared he would kill her if she did, and was later told that an associate of his was maintaining a list of the witnesses against him. (RT 1168-1169, 1177.)

Okay.

(*Id.* at p. 958 .) No like concern for the jurors' impartiality was displayed by the trial court in Fuiava's case.

2. The Prejudice.

As this Court has stated about the right to an impartial jury:

> Any deficiency that undermines the integrity of a trial ... introduces the taint of fundamental unfairness and calls for reversal without consideration of actual prejudice. [Citation.] Such a deficiency is threatened by juror misconduct. When the misconduct in question supports a finding that there is a substantial likelihood that at least one juror was impermissibly influenced to the defendant's detriment, we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial.

(*People v. Holloway*, *supra*, at p. 1110, quoting *People v. Marshall*, *supra*, 50 Cal.3d at p. 951; see also *People v. Diaz* (1984) 152 Cal.App.3d 926, 935, quoting *People v. Martinez* (1978) 82 Cal.App.3d 1, 22 ["'Convincing evidence of guilt does not deprive a defendant of the right to a fair trial [citation] since a fair trial includes among other things the right to an unbiased jury ....'"].)

United States v. Dutkel, *supra*, 192 F.3d at p. 895 reaffirmed the standard set out in *Remmer v. United States*, *supra,* 347 U.S. 227 that presumes prejudice once it is shown that a juror is exposed to an extraneous influence. That presumption of prejudice requires reversal unless the government overcomes it. In *Dutkel*, the court sought to determine whether tampering as to the defendant was present when henchmen for a co-defendant approached a juror seeking to influence his vote as to the co-

defendant and stated: "We don't care about Dutkel." (*Id.* at p. 896.) The court there stated:

> Because jury tampering cuts to the heart of the Sixth Amendment's promise of a fair trial, we treat jury tampering cases very differently from other cases of jury misconduct. Once tampering is established, we presume prejudice and put a heavy burden on the government to rebut the presumption. The Supreme Court has stated in categorical terms: [¶] "In a criminal case, any tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. The presumption is not conclusive, but the burden rests heavily upon the Government to establish that such contact with the juror was harmless to the defendant." [Citations.] If the government fails to meet this burden at an evidentiary hearing, the defendant is entitled to have the verdict set aside. [Citations.]

(*Id.* at pp. 894-895.)

Moreover, while jury tampering need not actually came from the defendant to be prejudicial (see, e.g., *United States v. Angulo, supra,* 4 F.3d 843), obviously the closer the perceived connection of the defendant to the tampering, the greater the prejudice. Miss J.'s association of the spectators with Fuiava and conclusion that their conduct portended danger to the jury reinforced the need to investigate whether the other jurors felt the same way. Precisely as the court observed, it simply "[didn't] know if Miss J. is just an overly sensitive person" or if the other jurors were similarly affected. (RT 2210.) The court's solution of burying its head in the sand in the hope any taint dissipated was hardly designed to find out if the other jurors, like Miss J., were no longer able to impartially judge the case because of perceived tampering by spectators aligned with Fuiava. The only way to find that out was to hold a hearing to determine what they had

observed, how they interpreted their observations, and how that might cloud their judgment.

The discussion by the other jurors of the spectators' conduct toward them and their failure to report that extraneous influence on them only made the need for inquiry more imperative. (Cf. *In re Hitchings*, *supra*, 6 Cal.4th 97 [juror concealment of facts causing potential bias of that juror is misconduct]; see also *Green v. White* (9th Cir. 2000) 232 F.3d 671 [juror concealment of ex-felon status contributed to finding of bias].) In addition, "[t]he Penal Code provides that jurors must not 'converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them' [Citation.] ... Violation of this duty is serious misconduct. [Citation.]" (*In re Hitchings*, *supra,* 6 Cal.4th at p. 118.) In this case, the court repeatedly admonished the jury not to discuss anything connected with the trial with anyone else prior to deliberations. (See, e.g., R.T. 79; see also C.T. 320-327.) As stated in *People v. Hernandez* (1988) 47 Cal.3d 315, 338, it is misconduct for a juror to fail to follow the court's instructions and admonitions.

Given the presumption of prejudice that attended both the jurors' exposure to the spectators' conduct and the jurors' discussion of it, the very fact that the court failed to hold a hearing left the prejudice outstanding. As explained in *People v. McNeal*, *supra*, 90 Cal.App.3d at p. 840, where the court similarly failed to inquire into the jury's impartiality when it was alerted to facts that put it in question, such error necessarily prejudices the defendant:

> An evaluation of whether the error was prejudicial must have as its foundation the defendant's right to a jury trial by a fair and impartial jury .... It is evident that a purpose of Penal Code sections 1089, 1120, and 1123 is to provide a vehicle for the dismissal of a sworn juror when facts are discovered from which it can reasonably be concluded that the juror, originally thought to be unbiased, actually cannot be fair and impartial. It necessarily follows that in such situations, as in the case at bench, where the fact of a sworn juror's impartiality comes into question ... during the course of the trial or the deliberations, the failure of the court to make at least a preliminary inquiry into the facts of such impartiality cannot be said to be error harmless beyond a reasonable doubt. We conclude, therefore, that the court's failure to make an appropriate inquiry into the facts in order to determine whether they constituted good cause for discharge of the juror constitutes reversible error.

(*People v. McNeal*, *supra*, 90 Cal.App.3d at p. 840.)

This Court agreed with *McNeal* in *Burgener*. It declined to reverse in *Burgener* only because defense counsel there actively opposed any inquiry of the jury and convinced the trial court not to conduct a hearing into the matter, as the court had proposed. (*People v. Burgener,* 41 Cal.3d at p. 517.) "Under the[se] particular circumstances," where the defendant's counsel invited the error by dissuading the trial court from conducting the requisite hearing, this Court "declined to reverse" for the error. (*Id.* at pp. 521-522.)

As it explained:

> [I]n this case, unlike *McNeal, supra*, this lack of a record is the result of defense counsel's preference that the court conduct no inquiry. In *McNeal*, defense counsel initiated the suggestion that the court conduct a full hearing .... Here, by contrast, the judge suggested such an inquiry but defense counsel expressed concern that questioning Juror M. would "destroy the jury" and

> intimated that other jurors might be conspiring to oust her because they did not get along with her. ... [D]efendant cannot be permitted to prevent an inquiry into the condition of a possibly intoxicated juror on the basis that such an inquiry would "destroy the jury" and subsequently challenge the verdict of that very jury on grounds that the court's failure to conduct an inquiry prejudiced his interests.

(*Id.* at p. 521.)

Fuiava's case is closer to *McNeal* than *Burgener*. Burgener's counsel actively remonstrated against the hearing the court proposed. In contrast, the court in Fuiava's case never proposed to conduct a hearing, and counsel never objected to a hearing or otherwise acted to prevent one. Because Fuiava's counsel did not cause the court to commit the error, the gap in the record must be ascribed to the court. Indeed, it is the very gap in the record the court caused by its error that makes the error as prejudicial as it was in *McNeal*. Moreover, here there was not even an admonishment to the jurors to disregard any spectator conduct. (Compare with *People v. Holloway*, *supra*, 50 Cal.3d at p. 1112 [where court made aware of misconduct, it may take appropriate "corrective steps to cure it through admonition or by other prophylactic measures"].)

There were clear indications that the jury suspected that associates of Fuiava had tampered with its members or were otherwise conspiring to take some sinister action against them. Such suspicions posed too great a likelihood of prejudice to leave uninvestigated. Rather, the court was required to take whatever steps were necessary to ensure that any perception of tampering did not infect the jury process. In line with the court's duty was the prosecution's obligation to rebut the presumption of prejudice that flowed from the extraneous influence by demonstrating that

it was harmless beyond a reasonable doubt. (See *United States v. Littlefield* (9th. Cir. 1985) 752 F.2d 1429, 1431-1432.) The presumption of prejudice thus controls here, for nothing could overcome it without a hearing on the matter.

"The jury is a cornerstone of our nation's judicial system. In California, the inviolate right to trial by jury is guaranteed by article I, section 16 of the California Constitution. As a matter of public policy, the integrity of our jury system must be carefully safeguarded." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 548.) To safeguard that right as well as the correlative federal constitutional right, the court should have inquired of the remaining jurors about any conduct they observed of the spectators that could have influenced their verdict. "We cannot be too strict in guarding trials by jury from improper influence." (*Wright v. Eastlick* (1899) 125 Cal. 517, 520.) Especially is such strictness required in a death penalty case, for the Eighth and Fourteenth Amendments demand that capital convictions be particularly reliable.

For these reasons, the court abused its discretion when it neglected to inquire into whether the jury was tainted by any perceived tampering of it, and the error requires reversal.

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. Factual Background.

On the Monday set for trial, defense counsel filed a written motion for a continuance because he needed more time to prepare for trial. (C.T. 624-625.) He explained that a toothache prevented him from working on the case over the weekend as he had intended to do. Moreover, his investigator was tied up in another case that was expected to end the next day, and counsel needed him to do some final investigation for trial. (CT 625.) Counsel represented that "three days should be sufficient to allow me to [be] fully ready for trial." (CT 625.)

On hearing the motion, the trial court advised counsel that it was "real negative toward this request for additional time." (RT 54.) The court recited that counsel was advised the previous Wednesday that trial would begin this day, and that it had taken "considerable effort" to arrange for the panel of 65 jurors that the court now had waiting for voir dire. (RT 54.)

Trial counsel informed the court that late the previous Thursday he had developed a toothache and had gone to the dentist the next day, Friday. (RT 54.) The dentist had advised him that he need a root canal. (RT 54.) The dentist had given counsel antibiotics and advised counsel the infection would clear up, which it did to the extent that as of the previous day counsel "was able to function rationally." (RT 55.) Trial counsel said he was not in constant pain and, though there was some discomfort, he "could function." (RT 55.) When the trial date was confirmed the previous

Wednesday, he had expected to be ready by devoting himself to preparing for trial from that time to this date; however, his tooth problems had prevented that preparation. (RT 55.) In addition, he had some final investigation he needed to accomplish, but his investigator required "a few more days" to accomplish those tasks. (RT 55.) As counsel explained:

> Really I was gearing up to go today. But I really don't feel that it is fair to Mr. Fuiava for me to have to go when I don't feel fully prepared. [¶] ... On a trial like this, I just want to feel adequately prepared. If the court makes me go, I will have to do it at night. [¶] If possible, I will try to have the root canal performed within the next three days so I won't have any problem because I don't think there is any guarantee that it won't recur. With a tooth like that I am just not able to function.

(RT 55-56.)

The court observed:

> This promises to be a rather short trial. I think my concern always is, that we have jurors here. They are ready to go. I would like very much to start the case today if we possibly could.

(RT 56.) The prosecutor took "no position concerning a continuance." (RT 57-58.) He advised that his scheduled second witness was flying in from out of state that afternoon and would be put up in a hotel until she was ready to testify, but that there was no particular inconvenience to the prosecution's case that the requested continuance would cause. (RT 58.) The court nevertheless found that it was "best to get the trial over"; counsel could then "seek whatever treatment" he needed, and meanwhile medicate himself with antibiotics. (RT 59.) As to the investigation needs, the court projected that "there will be periods of dead time probably between now

and certainly the defense case." (RT 59-60.) Accordingly, it denied the motion for continuance. (RT 60.) The court stood by its order after trial counsel laid out the investigation he still needed to pursue — namely, the location and interview of Blair's ex-wife concerning his violence, and confirmation that the attorney who deposed Blair in the civil suit was available to testify. (RT 61-65.)

B. Legal Analysis.

Denial of a continuance may deprive a defendant of the fundamental fairness guaranteed him by the Fourteenth Amendment:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. [Citation omitted]. *Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.* [Citation omitted]. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. [Citations omitted].

(*Ungar v. Sarafite* (1964) 376 U.S. 575, 589-590 [84 S.Ct. 841, 11 L.Ed. 2d 921] (emphasis supplied).)

A denial of a continuance may also intrude upon a defendant's Sixth and Fourteenth Amendment rights to be represented effectively by counsel. (See, e.g., *Morris v. Slappy* (1983) 461 U.S. 1, 11-12 [103 S.Ct. 1610, 1616, 75 L.Ed.2d 610] ["an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the

right to the assistance of counsel"].) "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." (*Kimmelman v. Morrison* (1986) 477 U.S. 365 [374, 106 S.Ct. 2574].) Indeed, "[w]ithout counsel the right to a fair trial itself would be of little consequence [citations], for it is through counsel that the accused secures his other rights." (*Id.* at p. 377.)

A "'reasonable opportunity to prepare for a trial is as fundamental as is the right to counsel.'" (*Jennings v. Superior Court* (1967) 66 Cal.2d 867, 876, quoting *People v. Sarazzawski* (1945) 27 Cal.2d 7, 17.) As our Supreme Court has admonished:

> [A] defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the claim spirit of regulated justice but to go forward with the haste of the mob.

(*Powell v. Alabama* (1932) 287 U.S. 45, 59, 53 S.Ct. 55, 60.) Consequently, the denial of a continuance that requires unprepared counsel to proceed to trial is a constructive denial of the right to counsel that inevitably invalidates the verdict. (*Hunt v. Mitchell* (6th Cir. 2001) 261 F.3d 575, 581; see also *Chambers v. Maroney* (1970) 399 U.S. 42, 59 (dis. opn. of Harlan, J.).) Particularly in a capital case, where the Eighth and Fourteenth Amendments require reliability and a heightened standard of care, a trial court errs when it disregards a manifest demonstration that the defense is unprepared. (See *Lankford v. Idaho* (1991) 500 U.S. 110, 120-126.)

The court's discretion to deny Fuiava's request for the continuance thus was constrained by a constellation of constitutional rights. Here, it

required the court to grant the motion, for "above all, whether substantial justice will be accomplished or defeated by granting the motion" is the guiding consideration for the trial court. (*People v. Laursen* (1972) 8 Cal.3d 192, 204.).

Counsel acted in good faith to prepare according to the court's schedule for trial. Indeed, 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. After all, this was a death penalty case involving the killing of a deputy sheriff who the defense alleged shot first as part of a pattern of wholesale police misconduct directed particularly at the defendant's racial-minority community. Still, counsel explained that it was only an unforeseen debilitating toothache, as well as the need to tie together some loose ends in the investigation, that caused him to be unprepared to proceed as expected. The court seemed piqued that trial counsel had reneged on the confirmation the previous week of his readiness for trial; however, counsel's assurance was made before his toothache disabled him from preparing as he had anticipated. Thus, the court's denial of the motion displayed an "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay.'" (*United States v. Mitchell* (9th Cir. 1984) 744 F.2d 701, 704.)

Moreover, there was every reason to believe that the short continuance requested would have met counsel's needs and caused no prejudice to the state. Counsel explained that he needed to make up for the time that he had been disabled by his medical condition, and to complete some unfinished investigation. A continuance would not have unduly inconvenienced the court or the prosecution. The prosecution frankly

advised the court that the requested continuance did not affect its interests. While the court may have troubled itself to secure a jury panel for that day, it would not have been terribly inconvenient to relieve that panel of jury duty that day and order it to return a few days hence. The trial court was obligated to granted a continuance precisely because the trial "promise[d] to be ... rather short," for counsel was unprepared for its intensity. The court's cavalier treatment of this capital case, which carried the gravest of consequences for Fuiava, boggles the mind.

Fuiava should not have been handicapped with counsel who had to scramble at trial, performing evening catch-up after long days of trial and preparing his guilt and penalty defenses at the same time the prosecution attacked with its case for guilt. As counsel candidly confessed, he was not yet prepared for the trial on guilt or innocence, never mind life or death. A court may not shrug off the need for a constitutional, reliable process when it comes to death in favor of single-minded adherence to a rigid trial schedule. Judicial inefficiency must bow to the need for a continuance when the substantial rights of a defendant are in the balance. (See, e.g., *People v. Gzikowski* (1982) 32 Cal.3d 580, 589 ["No prospect of possibly impairing efficient judicial administration appeared that was sufficient to overcome defendant's interest in obtaining counsel of his choice [so that] as a matter of law there was 'good cause' to grant continuance"]; see also *People v. Cruz* (1978) 83 Cal.App.3d 308, 326 [after finding wrongful denial of continuance, court admonished that "[t]he concern for orderly judicial administration must not be the means used to deny a defendant a full and fair trial"]; *People v. Mendez* (1966) 260 Cal.App.2d 302, 306 ["policy of prompt disposition of criminal cases and against unnecessary

continuances ... cannot transcend any of the basic elements of due process of law"].) Consequently, the court's denial of the continuance was error that violated the principle that a trial court is required to grant a motion for a continuance where denial would impair the fundamental rights of an accused. (See, e.g., *People v. Maddox* (1967) 67 Cal.2d 647, 653 [denial of continuance requires reversal because "a defendant may not be brought to trial ... without adequate opportunity for preparation of his defense"]; see also *People v. Fontana* (1982) 139 Cal.App.3d 326, 334 ["the trial court prejudicially abused its discretion in denying the motion to continue" and forcing unprepared counsel to proceed to trial].)

In sum, the denial of counsel's request for a continuance was an abuse of discretion that violated Fuiava's constitutional rights to due process of law, to the effective assistance of counsel, and to a reliable verdict under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The harm Fuiava suffered thereby requires reversal because it is impossible to assess from the record. The very composition of the record is affected by the denial of rights that occurred here, so that the harm is incalculable. Under those circumstances, prejudice is presumed and reversal required. As noted in *Rose v. Clark*, *supra*, 478 U.S. at p. 580, fn. 7, errors like the lack of counsel — or, in this case, prepared counsel — that "affect the composition of the record" are reversible per se because evaluation of prejudice otherwise would involve "difficult inquiries concerning matters that might have been, but were not, placed in evidence."

As explained by Justice Poche in a case in which the majority found that counsel was not unprepared, but he found otherwise:

> [A]nalysis of performance of counsel is relevant only to the question of counsel's competency. Instead what is challenged here is not that defendant was denied his Sixth Amendment right to competent counsel but that he was denied his Sixth Amendment right to adequately prepared counsel. Whether or not counsel performed well when viewed in hindsight is irrelevant when the reviewing court is faced with an admittedly unprepared counsel. Under such circumstance ... the only permissible course of conduct for the reviewing court is to reverse the judgment and remand the cause so that the defendant can be tried fairly with the aid of a prepared attorney. [Citation.]

(*People v. Abdoel-Malak* (1986) 186 Cal.App.3d 359, 372 (dis. opn. of Poche, J.).)

The unreasonableness of the trial court's insistence on proceeding despite defense counsel's admitted lack of preparation denied Fuiava his constitutional rights and inflicted incalculable harm to his case. The error affected the trial's framework, so that the prejudice need not be spread on the record: Structural error is prejudicial per se. The requisite prejudice is shown by the very fact that the denial of the motion deprived Fuiava of his substantive rights to a fair trial and the assistance of counsel as well as due process. (See, e.g., *People v. Gzikowski*, *supra*, 32 Cal.3d at 589 [denial of motion for continuance that deprived defendant of "right to defend with counsel of his choice, deprived him of due process and requires reversal regardless of whether in fact he had a fair trial"; see also *Hunt v. Mitchell*, *supra*, 261 F.3d at p. 581 ["prejudice must be presumed without inquiry into ... lawyer's actual performance at trial" when he is forced to go to trial without a reasonable opportunity to prepare for it]; *People v. Fontana,* *supra,* 139 Cal.App.3d at p. 334 [reversal required without need to show a reasonable probability of a more favorable outcome where denial of

continuance forced unprepared counsel to proceed].) As it happens, the haphazard representation that counsel provided Fuiava throughout the trial demonstrates the depth of his unpreparedness. Thus, denial of the motion for continuance requires reversal of the judgment.

VII.

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

A. Factual Background.

The court proposed to conduct the voir dire on its own without the participation of counsel, and to do so without a questionnaire. (RT 46.) The prosecutor argued that judicial voir dire "in a matter as serious as this one ... is inappropriate and would be inadequate to determine whether these jurors can be fair and impartial ...." (RT 46.) Trial counsel "expressed the opinion that the court will do a fine job and ... agree[d] with the court handling the voir dire"; moreover, he did not request a jury questionnaire. (RT 47.) Over the objection registered, the court found that it would be able to "do voir dire that will get the necessary information from the prospective panelists," but indicated that "after I did the judicial voir dire, I would allow counsel probably half an hour a piece [sic] to do their own voir dire of the jurors so that you will have a chance to talk to these people as well." (RT 48.) It further asked "that counsel [] provide to the court in writing questions you want me to ask and areas you want me to pursue so that I don't miss anything." (RT 48.)

Both the prosecution and the defense submitted questions for the voir dire. The prosecution submitted nine questions, the first eight of which

probed the venire on gangs and the last on testimony received through an interpreter. (CT 629-630.) The defense proposed five questions. (CT 626-627) The first one probed the venire's openness to a sentence of life imprisonment rather than death following any verdict of first degree murder of a police officer. The last four questions inquired about the venire's openness to the legal precept that permits a person to kill in defense of himself or another where life is illegally placed in peril by the person killed, particularly where the latter may be a peace officer and the imperiled life is that of a gang member. Indeed, trial counsel earlier had advised the court that "the defense in this case is self-defense," and that "the victim officer was a member of a group called the Vikings which we allege is a police gang ...." (RT 60.)

The court said it would inquire generally about both the Young Crowd and the Vikings. (RT 67-69.) It also said it "will be covering the death penalty in some detail in my voir dire." (RT 69.)[16] As to self-defense and defense of others, the court did not adopt trial counsel's proposed inquiry into the subject vis-à-vis gang members defending themselves against peace officers. Rather, it stated that it was "inclined to give [only] some brief comment ... that they should not necessarily adhere to their own feelings of what constitutes self-defense. That they must follow the court's instruction." (RT 69.) It added: "I view gangs as the more critical issue in terms of voir dire. But I think some mention of self-defense is not inappropriate." (RT 69-70.)

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[16] The court failed to voir dire the jury in any detail on the question of penalty. (See Argument *XV*, *post*.)

The court conducted group voir dire rather than individually sequestered questioning. (RT 75.) It announced at the beginning to the jury venire that "we are going to hopefully select a jury today and start with the trial." (RT 80.) It did not take the court much longer than it had hoped to complete voir dire: It went from hardships, through pretrial exposure to the case, through death penalty attitudes and general voir dire in little more than one day and in less than three hundred pages of transcript. (RT 79-330/45.)

After it completed voir dire, the court inquired of counsel whether they had "any follow up questions or challenges for cause ...." (RT 300/45.) When defense counsel reminded the court it had promised to give the attorneys a chance to personally voir dire the prospective jurors, the court responded: "Well, if you want, I can give you a little time. I feel I have done a pretty thorough job." (RT 300-45.) The prosecutor, meanwhile, advised that he had no supplemental voir dire. (RT 300-46.) In the end, when trial counsel outlined his follow-up questions, the court refused to permit counsel to ask them and instead conducted additional voir dire itself. (RT 300/45-47.)

When defense counsel learned that the court did not intend to conduct any voir dire beyond these follow-up questions, he requested that the court "at least touch on self-defense." (RT 300/49.) Indeed, the court's voir dire had failed to probe the juror's attitudes at all about self-defense or defense of others, let alone of a gang member against a deputy sheriff. The court then stated to the jury panel:

> [I]t is very important — I think we all have ideas of when the idea of self-defense is appropriate and when it isn't. I want to make sure that the jurors understand that

> if you are instructed on what the law says is appropriate for self-defense, that you follow my instructions on the law.
>
> Anybody have any question about that? [¶] Let me make sure of this.
>
> .....
>
> You may have in your own mind when you came in here an idea of when self-defense is appropriate. [¶] But you understand that if I instruct you — I am not saying I will — but if I instruct you on the law of self-defense, you must follow my instructions?

(RT 300/53.)

The court solicited individual assents to its question from three jurors chosen at random. (RT 300/53.) No further voir dire was conducted on self-defense.

B. Legal Analysis.

Yet again, "[t]he right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (*People v. Galloway* (1927) 202 Cal. 81, 92; see also *United States v. Brooklier* (9th Cir. 1982) 685 F.2d 1162, 1162, 1167 ["The meticulous care devoted to securing a fair and impartial jury exemplifies the search for even-handed justice characteristic of our system of criminal justice."].) "*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (*People v. Bolden* (2002) 29 Cal.4th 515, 538, quoting *Rosales-Lopez v. United*

States (1981) 451 U.S. 182, 188 [101 S.Ct. 1629, 1634, 68 L.Ed.2d 22].) "'Voir dire examination serves to protect [a criminal defendant's right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges.'" (*In re Hitchings supra*, 6 Cal.4th at pp. 110-111, quoting *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554 (plur. opn.).) Thus, the ability of a defendant to adequately examine the prospective jurors during voir dire is crucial to securing his right to an impartial jury. (*In re Hitchings*, *supra*, 6 Cal.4th at p. 110.)

The essential demands of fairness require a voir dire which is "sufficient to test the jury for bias or partiality." (*United States v. Baldwin* (9th Cir. 1979) 607 F.2d 1295, 1297; accord, *People v. Chapman* (1993) 15 Cal.App.4th 136, 141.) There must be a "reasonable assurance that prejudice would be discovered if present." (*United States v. Quiroz-Hernandez* (5th Cir. 1995) 48 F.3d 858, 869.) It follows that restriction on voir dire that renders it ineffective to ferret out bias and prejudice in prospective jurors violates the guarantees to jury trial and to due process secured by the Sixth and Fourteenth Amendments, and in a death penalty case, the Eighth Amendment's guarantee of a reliable verdict. Such restriction also violates the correlative provisions of the California Constitution. (See Cal. Const., art. I, §§ 15, 16 & 24.)

This Court gives considerable deference to the trial court's determination of the scope of voir dire necessary to ferret out any prejudices. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 990; see also

People v. Ashmus (1991) 54 Cal.3d 932, 959 [restriction on voir dire reviewed under abuse of discretion standard].) At the same time, the Court has recognized that the Constitution imposes substantive limits on that discretion: "If [the constitutional right to an impartial jury] is not to be an empty one, the defendants must, upon request, be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges." (*People v. Williams* (1981) 29 Cal.3d 392, 405, quoting *United States v. Dellinger* (7th Cir. 1972) 472 F.2d 340, 368 [brackets in original]; see also *People v. Chapman*, *supra,* 15 Cal.App.4th at p. 141 ["Abuse of discretion is found if the questioning is not reasonably sufficient to test the jury for bias or partiality."].) This is because "[l]imitations on *voir dire* examination that create unreasonable risks of biases or prejudice violate due process." (*Turner v. Murray* (1986) 476 U.S. 28, 37 [90 L.Ed.2d 27, 106 S.Ct. 1683].)

Specifically, counsel must be allowed to inquire into "matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact." (*People v. Williams, supra,* 29 Cal.3d at p. 408, quoting *United States v. Robinson* (D.C. Cir. 1973) 475 F.2d 376, 381.) As one court has noted:

> ... [B]ias is seldom overt and admitted. More often, it lies hidden and beneath the surface. An individual juror "may have an interest in concealing his own bias or may be unaware of it." [Citation.] To paraphrase an earlier statement by this court, made in the context of attorney voir dire, "because racial, religious or ethnic prejudice or bias is a thief which steals reason and makes unavailing intelligence — and sometimes even good

> faith efforts to be objective — trial judges must, where appropriate, be willing to ask prospective jurors relevant questions which are substantially likely to reveal such juror bias or prejudice, whether consciously or unconsciously held." [Citation.]

(*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1312-1313, brackets in original omitted.)

Here, the excluded questions concerning the venire's openness to the defense of self-defense in the homicide of a peace officer by a reputed gang member were "reasonably designed to assist in the intelligent exercise of peremptory challenges ...." (*People v. Williams*, *supra*, 29 Cal.3d at p. 408.) Because "the court must reach the concerns highlighted in the accused's proposed questions to ensure revealing any latent prejudice" (*United States v. Quiroz-Hernandez, supra*, 48 F.3d at p. 869), it had a duty to ascertain whether the jurors harbored any biases that might prevent them from impartially entertaining a claim that a gang member's killing of a peace officer was justified by the need to defend one's self or a fellow gang member and from evaluating the evidence of such a defense. The court's voir dire failed to do so. All it did was secure an abstract promise from several potential jurors that they would follow the court's instructions on self-defense. Where a juror's answer to a general question whether he will follow the law given him by the court "is merely a predictable promise that cannot be expected to reveal some substantial overtly held bias against particular doctrines[,] ... a reasonable question about the potential juror's willingness to apply a particular doctrine of law should be permitted when from the nature of the case the judge is satisfied that the doctrine is likely to be relevant at trial." (*People v. Williams*, *supra*, 29 Cal.3d at p. 410.)

The doctrine of self-defense was the central issue at trial. While the jurors agreed in the abstract to follow the law regarding self-defense upon which they might be instructed, the court utterly failed to probe the jurors' ability to fairly consider the defense under the controversial circumstances where it would be asserted by a reputed gang member against a peace officer on patrol. As the United States Supreme Court has commented, general questions like those asked by the trial court here may allow potential jurors to attest "in all truth and candor" to their "fairness and impartiality" even though they harbor a bias inconsistent with impartial judgment, because "the specific concern" which is the root of the bias was left "unprobed." (*Morgan v. Illinois* (1992) 504 U.S. 719 [119 L.Ed.2d 492, 112 S.Ct. 2222, 2233].)

"A challenge ... may be based on the juror's response when informed of facts or circumstances likely to be present in the case being tried. [Citation.]" (*People v. Cash* (2002) 28 Cal.4th 703, 720.) This Court there again "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 ...." (*Id.* at pp. 720-721.) The court in Fuiava's case refused to probe the prospective jurors about their views on self-defense as they might be pertinent to this case. Instead, it obtained only their abstract commitment to follow any instruction on the law of self-defense that it might give. The court thus abused its discretion, for it failed to test the jury for bias or partiality on the very point that was controversial and most likely to evoke bias.

To be sure, the chief concern of the defense was that the jury would not fairly consider a claim of self-defense asserted by a gang member against an officer on patrol. As defense counsel later advised the jury in closing argument as a prelude to his assertion that "[t]his case is about self-defense" (RT 2180):

> Standing up defending someone in a case where people's prejudices can run wild, people's favoritism for police officers can run rampant and people's violence against street gangs can be overwhelming. And I have to tell you that I am very concerned that those kinds of issues will come into play in your decision in this case. [¶] But I am asking you to please make your decision based on the evidence. Let's look at the evidence in this case and let's look at it impartially and fairly.

(RT 2179.)

Trial counsel had good cause to be worried about whether the jury could impartially consider the defense of self-defense asserted by Fuiava, for the court's voir dire was hopelessly abbreviated on that question, and ignored entirely the controversial aspects of it. As the prosecutor advised the jury in his opening statement:

> It used to be up until a few years ago that in order to do a death qualifying jury, to pick a jury such as yourself who may at some point in time be asked to impose the death penalty, it use to take months, literally months. And then the system was changed somewhat and they were streamlined and then only took maybe a week or two. [¶] So for a day and a half [of voir dire] you should feel pretty lucky that it only took that long.

(RT 333.) The fact that the voir dire was so short is even more telling in view of the absence of a questionnaire preliminary to the voir dire, which typically complements voir dire in a death penalty case. (See, e.g., *People*

v. Bolden, 29 Cal.4th at p. 538 [rejecting claim of inadequate voir dire in light of "the questionnaires that all prospective jurors completed" prior to voir dire and the fact that the court "did not prohibit the parties from asking any … questions"].)

The inadequacy of the voir dire is further illustrated by the court's failure to query the jury at all about the obvious racial aspects of the case. (See, e.g., *Rosales-Lopez v. United States*, *supra*, 451 U.S. at p. 192 [noting that "[i]n *Aldridge*[17], which *Ristaino*[18] embraced, the Court held that it was reversible error for a federal trial court to fail to inquire into racial prejudice in a case involving a black defendant accused of murdering a white policeman" and that "[t]he circumstances of both cases indicated that there was a 'reasonable possibility' that racial prejudice would influence the jury"].) For this reason as well, the voir dire the court conducted was inadequate to ferret out bias and prejudice within the jury venire. (But see *People v. Bolden*, *supra*, 29 Cal.4th at p. 538 and *Rosales-Lopez v. United States*, *supra*, 451 U.S. at p. 192 [requiring request from defense counsel to trigger court's obligation to inquire into racial prejudice].)

A voir dire that is inadequate to reveal juror bias and permit the intelligent exercise of challenges requires reversal without regard to the weight of the evidence, for denial of an impartial jury is a structural defect that necessarily renders a trial fundamentally unfair. (*United States v. Baldwin, supra*, 607 F.2d at p. 1298; accord, *United States v. Quiroz-*

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[17] *Aldridge v. United States* (1931) 283 U.S. 308 [51 S.Ct. 470, 75 L.Ed. 1054].

[18] *Ristaino v. Ross* (1976) 424 U.S. 589, 595 [96 S.Ct. 1017, 1020, 47 L.Ed.2d 258].)

Hernandez, supra, 48 F.3d at p. 868; see also *People v. Wilborn* (1999) 70 Cal.App.4th 339, 347, citing *People v. Holt* (1997) 15 Cal.4th 619, 661.) As this Court has stated, reversal is required if the area on which defendant wanted to voir dire is actually relevant and the excluded questions are "found substantially likely to expose strong attitudes antithetical to defendant's cause." (*People v. Williams*, *supra*, 29 Cal.3d at p. 410; see also *People v. Bittaker* (1989) 48 Cal.3d 1046, 1086, [reversal required where judicial limitations on voir dire affected the defendant's right to a fair and impartial jury].) As explained by another court:

> The conduct of voir dire is left to the broad discretion of the trial judge. The exercise of that discretion, however, is limited by "the essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 310, 51 S. Ct. 470, 471, 75 L. Ed. 1054 (1931); *United States v. Apodaca*, 666 F.2d 89, 94 (5th Cir.), cert. denied, 459 U.S. 823, 74 L. Ed. 2d 58, 103 S.Ct. 53 (1982). A voir dire procedure that effectively impairs the defendant's ability to exercise his challenges intelligently is ground for reversal, irrespective of prejudice. [Citation.]

(*Knox v. Collins* (5th Cir. 1991) 928 F.2d 657, 661.)

For these reasons, the restrictions the trial court placed on voir dire of the prospective jurors and its own inadequate voir dire require reversal.

VIII.

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

A. Introduction.

Relevant evidence is evidence must have some "tendency in reason to prove or disprove [a] disputed fact that is of consequence to the

determination of the action." (Evid. Code, § 210.) "No evidence is admissible except relevant evidence." (Evid. Code, § 350.) The court should have excluded testimony on a number of subjects under these sections. The trial court also abused its discretion in admitting other evidence because its probative value was marginal and substantially outweighed by its prejudice. (See Evid. Code, § 352.)

The constitutional guarantee to due process is violated when evidence is admitted that is so prejudicial it infects the trial with unfairness. (See, e.g., *Duncan v. Henry* (1995) 513 U.S. 364, 366; *Romano v. Oklahoma* (1994) 512 U.S. 1, 12-13; *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [116 L.Ed.2d 385, 112 S.Ct. 475].) It is also violated by arbitrary deprivation of the protections afforded by Evidence Code. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. 343 [arbitrary deprivation of state right constitutes a federal due process violation].) Finally, wrongful admission of unduly prejudicial information also undermines the reliability of the guilt verdict demanded by the Eighth and Fourteenth Amendments in a capital case. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625 [65 L.Ed.2d 392, 100 S.Ct. 2382] [constitutional demand for reliability of guilt verdict in capital case requires instruction on lesser included offenses].) Due to the prosecutor's zeal in offering prejudicial evidence and the trial court's erroneous evidentiary rulings allowing such evidence, Fuiava was deprived of his federal constitutional rights and corollary state rights in these respects.

B. Evidence of Fuiava's Criminal History.

1. Factual Background.

The prosecution introduced a plethora of evidence concerning Fuiava's prior criminal record, including convictions, incarcerations, juvenile commitments, paroles, and criminal conduct to prove his guilt. The ostensible rationale for this evidence included: a) proof of the allegations of prior serious felony convictions and prison terms alleged in the information; b) establishment of Fuiava's motive under Evidence Code section 1101(b); and, ultimately, c) establishment of Fuiava's character for violence in response to the defense's presentation of evidence of Blair's character for violence, pursuant to Evidence Code sections 1101 and 1103.

Before trial the prosecutor filed a "Motion to Admit Prior Uncharged Acts." The prosecutor proffered evidence that Fuiava had suffered two prior convictions for assault with a firearm, served a term of imprisonment in the state penitentiary for each, and was on parole at the time of the Blair shooting with a condition of no firearm possession. The prosecutor argued that he should be allowed to present this evidence to show motive under Evidence Code section 1101, subdivision (b), and to corroborate evidence that Fuiava said he shot Blair because Fuiava was not going back to jail for the rest of his life on a third strike. (CT 544, 547-548.) The defense filed an opposition, arguing that the prejudice from this evidence outweighed its probative value and in any event the evidence did not tend to show premeditation. (CT 585-588.) As defense counsel argued, the two prior convictions had "nothing to do with police." (CT 586.) Moreover, the evidence hardly corroborated the prosecution's third strike theory of

motive, since it established that only one of those convictions was a strike. (CT 586.)

At the hearing on the motion, the trial court ruled 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. (RT 31-32.) The court further ruled the prior convictions would not be sanitized because that would "invite[] speculation" by the jury that, in the court's estimation, would prejudice Fuiava even more. (RT 30-31.) The court additionally ruled the jury would be informed that one of the prior convictions was a strike and the other was not. (RT 28-35.) The court also ruled that evidence of Fuiava's parole status and condition of no guns was admissible because it "provides additional impetus and motive for the shooting." (RT 35.) In light of these rulings permitting this evidence of Fuiava's criminal history, the court declined to use the recognized procedure of bifurcating trial of the allegations of prior convictions and prison terms from trial of the charges. (RT 301.) Such bifurcation, which permits trial of the allegations to follow any guilty finding on the charges, avoids the substantial prejudice from proving the allegations at the trial of the charges. (See, e.g., *People v. Calderon* (1994) 9 Cal.4th 69.)

When the prosecutor later expressed his intention to call Fuiava's parole officer to testify to Fuiava's "parole conditions and [] prior convictions" at the time of the charge, defense counsel again objected to admission of evidence about Fuiava's parole conditions. (RT 971.) The court ruled that it would permit evidence that one of Fuiava's parole

conditions was that he not possess a gun. (RT 971.) The prosecutor sought to broaden the parole officer's testimony to include evidence that a further condition of Fuiava's parole was that he not associate with any Young Crowd members, purportedly because evidence of violation of that condition gave him further motivation to avoid apprehension. (RT 971.) Trial counsel argued that the prosecutor's theory of admission was "a stretch" and more prejudicial than probative. (RT 971.) The court confirmed that it would permit the prosecution to introduce Fuiava's parolee status to establish motive. (RT 972.) Counsel argued again that "to go into it with more detail [was] prejudicial and unnecessary." (RT 972.) The court found that the evidence of Fuiava's parole conditions had "significant probative value that outweighs its prejudicial impact" and permitted the prosecutor to introduce it. (RT 972.)

Ivan Boling, Fuiava's parole agent, testified that Fuiava had signed a document that contained his parole conditions and informed him that he would go back to custody if he violated them. (RT 1018-1020.) Fuiava's conditions of parole included not carrying weapons or associating with Young Crowd members. (RT 1020.) Boling noted that by moving to San Bernardino Fuiava had violated another condition that precluded him from changing his residence or being 50 miles away from his reported residence. (RT 1033-1034.) Over defense objection Boling was allowed to testify that he had discussed certain of the parole conditions with Fuiava. (RT 1020, 1030-1037) Boling testified that because Fuiava had twice previously been convicted of felonies involving firearms, Bolling emphasized to Fuiava that he could not carry firearms or possess ammunition. (RT 1034-1036.) The prosecutor took this occasion to introduce into evidence the abstracts of

judgment of Fuiava's prior felony convictions, which included evidence that 1) the convictions were both for assault with a firearm; 2) Fuiava had been committed to prison for four years on the first conviction and three years on the other; and 3) Fuiava was also serving a term for violation of parole at the time of sentence on the second conviction. (RT 1038-1040; Supp CT 20-21.)

At the outset of trial there were also discussions outside the presence of the jury regarding evidence the defense intended to offer and what areas such defense evidence would open up to the prosecution. Defense counsel revealed that he intended to present evidence of the civil rights lawsuit and Viking threats and violence directed at the Young Crowd. (RT 313-317.) The prosecutor asserted that he could then use evidence of Young Crowd's violent acts or threats against the deputies, and questioned whether the court realized the breadth of what it was opening up. (RT 318-321.) Defense counsel also indicated he might present evidence of a previous domestic violence incident involving Blair; the prosecutor countered that he would then be able to present evidence of Fuiava's propensity for violence under Evidence Code sections 1101 and 1103. (RT 322-324.) As the prosecutor described it, he would be moving his penalty phase evidence into guilt phase rebuttal. (RT 322.) The trial court agreed and referred to its previous ruling that the jury would be told of Fuiava's prior convictions. (RT 323.)

2. Legal Analysis.

The trial court concluded 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. That ruling was error. Just as defense

counsel had argued, the fact that the two prior convictions did not both constitute strikes detracted considerably from the probative force of this evidence to support the prosecution's theory that this was a killing to avoid arrest for a third strike.

> Even if evidence of other crimes is relevant under a theory of admissibility that does not rely on proving disposition, it can be highly prejudicial. "Regardless of its probative value, evidence of other crimes always involves the risk of serious prejudice...." [Citation.] Therefore, the law places other restrictions on its admissibility. ... [U]nder Evidence Code section 352, the probative value of this evidence must outweigh its prejudicial effect. [Citation.] "Since substantial prejudicial effect is inherent in evidence [of other crimes],' uncharged offenses are admissible only if they have *substantial* probative value. If there is any doubt, the evidence should be excluded." [Citation.]

(*People v. Thompson* (1980) 27 Cal.3d 303, 318.)

These considerations should have caused the court to exclude this evidence. Even if the probative value of the evidence of the convictions justified its admission in some form, the court's failure to sanitize the convictions to avoid disclosure that they concerned shootings constituted error because the prejudice of that evidence was devastating to Fuiava and overwhelmed its probative value. It also facilitated the prosecutor's misconduct in portraying Fuiava as a chronic "shooter" who should be found guilty on that basis. (See Argument *XII, post.*) At the very least, then, the court should have sanitized and limited admission of this evidence by allowing the prosecutor to do no more than present evidence that Fuiava had two unspecified prior felony convictions, one of which was a strike. This limited evidence would have fully satisfied the probative purposes for

which the prosecutor proffered the evidence while avoiding the tremendous prejudice to Fuiava that the trial court's erroneous ruling occasioned. Fuiava has shown elsewhere in this brief how terribly prejudicial to him was the admission of evidence that he had engaged in other shootings. (See Argument XI, *post*, quoting this Court's observation in *People v. Fries* (1979) 24 Cal.3d 222, 230 that "the risk of undue prejudice is far greater when the prior conviction is similar or identical to the crime charged." (Ellipsis in quote deleted.); see also *Old Chief v. United States* (1997) 519 U.S. 172, 185 [117 S.Ct. 644, 652] ["Where a prior conviction was for ... one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious"].)

Sanitization of prior convictions is regularly accomplished by trial courts to reduce the prejudice suffered by a defendant where evidence of the fact of the defendant's prior conviction of a felony is relevant. (See, e.g., *People v. Foreman* (1985) 174 Cal.App.3d 175; *People v. Massey* (1987) 192 Cal.App.3d 819; see also *Old Chief v. United States*, *supra*, 519 U.S. at p. 191 [where class of conviction is the probative point rather than the specific conviction in question, evidence of the specific conviction results in unfair prejudice when "the prior conviction is for an offense likely to support conviction on some improper ground"].) The trial court, however, arbitrarily rejected that measure to reduce prejudice, finding that jury speculation about the priors would harm Fuiava more than naming his offenses as assaults with a firearm. That finding not only was at odds with the commonplace practice of sanitation, but was capricious in view of the fact that both charges concerned assaults with a firearm.

In light of the prosecution's theory that Fuiava shot Blair because he was facing life in prison for a third strike arrest, admission of evidence that Fuiava was on parole and the several parole conditions he arguably violated constituted error because the evidence was irrelevant, and cumulative at best. The evidence was substantially more prejudicial than probative, for any motive to avoid a third strike completely overshadowed any motive to avoid a parole sanction. The admission of the parole evidence, during which the prosecutor again emphasized that the prior convictions involved shootings, painted Fuiava from yet another angle as an incorrigible criminal who broke every rule and law that applied to him. It also reinforced the suggestion to the jury that society's efforts to control Fuiava were unavailing, and thus he should be found guilty on the charged offense to corral that incorrigibility. Finally, the prosecutor exploited the admission of this evidence to suggest that Fuiava was at fault despite his justification for the homicide because "none of this would have happened" if he had not been on Walnut Avenue in violation of his parole conditions. (RT 1939.)

Admission of evidence of Fuiava's prior prison terms was substantially probative only of the allegations of such. Because the evidence was fraught with unnecessary prejudice to Fuiava as to his guilt, the court should have bifurcated those allegations from the charges to preserve a fair trial on the charges. The prosecutor ably used the evidence to sway the jury on the charges by emphasizing the extent of Fuiava's criminality despite the amount of time he had spent in prison. (See Argument XII, Section H, *post.*) Evidence of the prior prison terms thus had very little probative value, but caused great prejudice to Fuiava.

This prejudice was aggravated by the way that the prosecutor used Penal Code section 969b to prove the allegations. That section provides that prima facie evidence of the fact of a prior felony conviction or prior prison term can be supplied by the introduction into evidence at trial of certified copies of records from the relevant institution that show such. The 969b packet that the prosecutor entered into evidence (RT 1038, People's 28) contained a two-page document entitled "California Department of Corrections Chronological History." (Supp. CT 24-25.) Included in that document were entries showing that after Fuiava paroled on January 20, 1994, his parole was suspended on May 19, 1995, and reinstated on June 14, 1995. (Supp. CT 24.) A further entry indicates "Arrested/Reinstated." (*Ibid.*) Numerous other entries refer to "WCL," shorthand for "work credit losses" that result from prison rules violations. (See 15 CCR § 3315 et seq.). (CT 25.) Again, that document should have been sanitized to exclude all notations except those denoting that Fuiava was received on a certain date and was paroled on a certain date. The notations regarding arrest and reinstatement were particularly prejudicial, for the jury may have inferred from them that Fuiava was arrested for the offense for which he was being tried but that he was continued on parole. The references to prison rule violations likewise were prejudicial, as to both guilt and penalty. Because proof of the allegations necessarily focused on the sanctions used to punish Fuiava for his past criminal conduct, this evidence suggested that the criminal justice system had been too lenient on Fuiava in the past and was ineffectual to insure public safety. Hence, it added to the likelihood that the jury was influenced to resolve doubt of Fuiava's guilt with conviction to insure that he was removed from society.

The court's admission of this evidence over defense opposition also changed the course of the trial to Fuiava's detriment. (See, e.g., *Alvarado v. Hickman* (9th Cir. 2002) 316 F.3d 841, 857 [noting that "the strategic decision about whether or not" to present defense evidence "may have been strongly influenced by the" error in admitting evidence during the prosecution's case]; accord, *People v. McClary* (1977) 20 Cal.3d 218, 231; *People v. Spencer* (1967) 66 Cal.2d 158, 165-166.)

Fuiava presented a defense of self-defense. Once the trial court ruled that unsanitized evidence of Fuiava's prior convictions and prior prison terms, as well as his parole status and conditions at the time of the offense were admissible — and the Viking evidence was mostly precluded —, defense counsel was forced to rely on evidence of Blair's prior violence to countervail the prosecution's evidence of Fuiava's violence. Counsel accordingly presented evidence of an act of domestic violence by Blair to bolster the evidence that Blair fired first and that Fuiava was returning fire to defend himself and Avila. The evidence of Blair's domestic violence then opened the door for the prosecutor to expand on the evidence of Fuiava's prior violent acts under Evidence Code sections 1101 and 1103. (See Argument XI, *post.*)

Admission of all this evidence resulted in a conviction and death sentence based not on what happened when Blair was shot, but on the jury's perception of Fuiava's character and his criminal past. The trial court's erroneous evidentiary rulings opened the floodgates of prejudice, and resulted in a fundamentally unfair trial that deprived Fuiava of due process and a reliable verdict in violation of the Eighth and Fourteenth Amendments.

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

During Lyons's direct examination, he testified that earlier on the evening of May 12, he and Blair had made contact with a group of about 15 Compton gang members who were standing outside their car drinking and playing loud music. (RT 394-396.) Blair appeared to know a couple of them. He looked over their car for weapons, and told the group to turn down the music and dump their beer. (RT 394-397.) According to Lyons, however, there was no tension between Blair and the group, and he chit-chatted with them for several minutes. (RT 395, 397.) Neither Blair nor Lyons had his weapon out. (RT 396.) The gang members then got in their cars and drove away. (RT 403.) The following colloquy then occurred:

> Q. You didn't jack them around and say get in your car and then watch them drive away and then stop them for driving under the influence?
>
> A. No, no.
>
> Q. You sort of laughed when I asked you that question. Why is that?
>
> A. That's just not — we just didn't do that. We weren't — I'm not that type of deputy and Deputy Blair was not that type of deputy.
>
> Mr. Hauser: Objection, nonresponsive.
>
> The Court: Overruled, I will allow it.

(RT 403.)

The court erred in overruling Fuiava's objection that Lyons's answer was non-responsive, and failing to strike that answer. Not only was Lyons's answer nonresponsive, the prosecutor's inquiry in this area called for irrelevant evidence as well. The question asked Lyons to relate a fact

that was not in issue. While the questions themselves were objectionable, Lyons's manner of answering the latter question went well beyond the scope of the question. Lyons gave a gratuitous opinion of what kind of officer Blair had been, which had little foundation in light of the evidence that Lyons had had minimal contact with Blair. Finally, this baseless surmisal was prejudicial to Fuiava, whose defense was that Blair had wrongfully shot at Avila and him as part of a pattern of misconduct by the deputies in Lynwood. The erroneous admission of Lyons's unsupported opinion testimony improperly allowed the jury to conclude that Blair was an upstanding officer who had good relations with gang members in the community. This opinion, from an obviously sympathetic but uninformed witness, likely resonated with the jury. Moreover, it added to the gross distortion of the truth engendered by the court's exclusion of evidence of the civil rights lawsuit and culture of deputy misconduct that prompted that suit.

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

Bruce Harris, a sergeant for the Los Angeles County Sheriff's Department, testified as a ballistics expert for the prosecution. (RT 940-943, 993.) He had been a firearms examiner for the department for three years and involved in the handling of firearms for over thirty years. (RT (RT 941-942.) He discussed the activities of a firearm examiner, none of which concerned assessing the accuracy of perceptions by others as to the direction of a bullet. (RT 941.) He went to the scene of the shooting at Walnut the evening it occurred to evaluate the firearms evidence. (RT 943.)

The prosecutor hypothesized that an individual from the area of the tree at the scene shot a .44 caliber weapon in the direction of the patrol car, and asked Harris if that action was consistent with an individual standing near the front passenger tire of the patrol vehicle saying that he heard the shots on the left side of his head. (RT 1006.) The defense objected on the ground that the question sought evidence beyond the expertise of Harris. (RT 1006.) The prosecutor offered that Harris would opine that such a mis-perception would be consistent, based primarily on the fact that Harris "has read that people in combat situations who are scared are not necessarily able to accurately determine the direction that the gunfire is coming from." (RT 1007.) Defense counsel argued that the offer of proof provided an insufficient foundation, but the court found otherwise and permitted the question. (RT 1007.) Harris opined that "under times of stress, determining where a shot came from often is not possible." (RT 1008.) Thus, Lyons's perception that the first set of bullets whizzed by the left side of his head from behind him was consistent, according to the sheriff's officer, with the shot actually coming from the opposite direction. (RT 1008-1009.) As Harris explained the basis of his opinion:

> I draw from my experience when I was working at the training academy investigating ... officer involved shootings in the actual training of deputies under stress conditions, that once we put people under stress and shots are being fired, the determination of where a shot came from, even though we know the shot came from the right, the person might say it came from the left or vice versa.

(RT 1008.)

This foundation was too vague and skimpy to support the officer's opinion. Particularly because Harris had no training or credentials in the

science of acoustics or auditory perceptions, which was the subject of his testimony, his opinion was no better than a guess. Yet, that opinion under the guise of his expertise in ballistics naturally would have impressed the jury.

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. Thus, the wrongful admission of this opinion likely contributed to the verdict, making it prejudicial under state law, and deprived Fuiava of a fair trial and reliable verdict, violating his constitutional rights to due process and a reliable death sentence.

E. Photograph of Simulated Shotgun in Mock Patrol Vehicle.

Lyons on direct examination testified that as part of the briefing before going on patrol the night of May 12, 1995, Sergeant Madden showed the deputies some photographs of a pick-up truck that had been painted to simulate a patrol car. (RT 380.) People's Exhibit 1 was a poster board that contained six photographs of the truck. (RT 381.) Madden had displayed three of them — A, B, and C —during the briefing. (RT 381-382.) Even though the prosecutor advised the court out of the presence of the jury that he was offering the evidence regarding the briefing not for its truth, but to show its effect upon the listeners (RT 374-375), the prosecutor nevertheless

questioned Lyons about photograph E, which Lyons said he had not seen. (RT 383.) The questioning was as follows:

> Q. Do you see the object that is in the pickup truck?
>
> A. Yes, I do.
>
> Q. As you are an experienced deputy sheriff, does that object trigger something in your mind. What does it look like?
>
> A. It simulates a shotgun.
>
> Q. But it is not a shotgun.
>
> A. No, it's not.
>
> Q. You did not see that picture so you don't know if that object was in the truck. But that object looks to you like a shotgun.
>
> A. Yes, it does.

(RT 384.) In addition, the entirety of People's Exhibit No. 1 was admitted into evidence. (RT 1548.)

Since the ostensible reason the prosecutor offered the evidence about the mock patrol vehicle was for its effect upon Lyons and Blair in the briefing, anything about the truck that was not disclosed at the briefing was obviously irrelevant. Nor was there any foundation for the prosecutor's insinuation that the simulated shotgun was part of the mock patrol vehicle discovered by the deputies, for the prosecutor never presented competent evidence to that effect. However irrelevant and foundationless photograph E and the evidence concerning it may have been, its prejudice was central: The evidence of the simulated shotgun facilitated the prosecutor's promotion of the truck as signifying a deadly threat to the deputies.

At both the guilt phase and the penalty phase, the prosecutor exploited the evidence of the mock patrol vehicle and ascribed its menacing intent to Fuiava. In arguing Fuiava's guilt, the prosecutor stated:

> Remember, this truck is found at the shooting that happened the week earlier. This wasn't a truck that was found the day before. This is an anger that Young Crowd has for the deputy sheriffs that has been existing for a significant period of time. But one [of] their homies just got killed or shot, Jose Nieves, by a deputy sheriff and they're angry, angrier than they were when they did what they did to that pickup truck.

(RT 2265.) Then, at penalty the prosecutor argued as follows:

> Another factor that has to be considered by you in deciding the appropriate punishment is this truck, People's 1 in evidence during the guilt phase of this trial. [¶] Take this truck if you need to, if you don't remember it, back into the deliberation room with you and take a look at it. [¶] These are people that have an anger and a hatred for the sheriff's department, for society.
>
> This truck was found a week before deputy Blair was killed. A week before.

(RT 2745-2756.) The inclusion of the mock shotgun among the photos that the jury may have looked at to decide penalty, as the prosecutor urged it to do, could only have fueled misdirected indignation during its deliberations both on guilt and on penalty. Thus, it is likely that this evidence contributed to each verdict, and in the process violated Fuiava's rights to a fundamentally fair trial and to a reliable verdict.

F. Photograph of a Mannequin Dressed in Blair's Bloody Shirt.

During the prosecutor's examination of the ballistics expert, photographs of a mannequin wearing Blair's bloody shirt were shown to the witness and the jury. (RT 1063, People's Exhibit 30.) According to the witness, although sheriff's detectives had dressed the mannequin in the shirt to model the wounds, he did not find it necessary to use the model. (RT 1061.) Nevertheless, over several pages of testimony (RT 1063 et seq.), the prosecutor referred to and elicited testimony regarding the mannequin photos.

By the witness's own testimony, the dressing of the mannequin in Blair's bloody shirt was not necessary for his purposes. Accordingly, the photo was irrelevant evidence at trial and should not have been admitted. The pathos of presenting Blair's bloody shirt on a mannequin to the jury prejudiced Fuiava, and the reference to the sheriff's investigators having set the mannequin up when not necessary again reinforced to the jury the solidarity of the sheriff's department and its officers against Fuiava.

G. Conclusion.

While each wrongful admission of evidence discussed above eroded Fuiava's right to a fair trial, the admission of all this evidence was particularly harmful in the aggregate. The evidence largely worked in concert to fill in the picture the prosecutor sought to create of Fuiava as a threatening and violent individual who shot at the officers in conformity with his lawless character. While such evidence would produce unfair prejudice in almost any case, it was particularly unfair and prejudicial here because Fuiava testified in his own behalf and presented a defense of self-

defense. At the same time, this picture of Fuiava was contrasted with the dutiful picture of Blair that wrongful admission of Lyons's opinion facilitated, unimpeached by the Viking and other evidence excluded by the court. Together, the court's errors in admitting prosecution evidence fed into its case that Fuiava rather than Blair shot first, which was fortified by the baseless departmental opinion that Lyons's perception that the first shots came from Blair's direction was insignificant. For these reasons, the admission of the totality of this evidence skewed the jury's decision and impermissibly lightened the prosecution's burden of proof beyond a reasonable doubt. (See *In re Winship* (1970) 397 U.S. 358, 363 [25 L.Ed.2d 368, 90 S.Ct. 1068].)

The jury was permitted to reach its verdict by improperly considering the evidence of Fuiava's prior convictions and violence as bad-character and propensity evidence. A jury tainted by such evidence could not objectively evaluate the prosecution's case that Fuiava had wrongfully shot at the deputies. Instead the jury was improperly biased toward conviction. Trial by such a jury was thus in violation of the Sixth, Eighth and Fourteenth Amendments. (See *Zant v. Stephens* (1983) 462 U.S. 862, [77 L.Ed.2d 235, 103 S.Ct. 2733].) In addition, because the trial court arbitrarily deprived Fuiava of protections under California law, it violated Fuiava's liberty interests protected by the Fourteenth Amendment. (*Hicks v. Oklahoma, supra*, 447 U.S. 343; *Ford v. Wainwright* (1986) 477 U.S. 399, 428 (conc. opn. of O'Connor, J.); see also *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.) The errors also infringed upon Fuiava's rights to a fair trial and reliable verdict under the Eighth and Fourteenth

Amendments. For these reasons, the errors require reversal as a matter of both state and federal law.

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.

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.

A trial judge may not impose stricter standards for admission of defense evidence than it has established for admission of prosecution evidence. "It is elementary that if the prosecution can introduce evidence of a required specific intent, the defendant must be given the equal privilege of showing the lack of such intent." (*People v. Marsh*, *supra*, 58 Cal.2d at p. 736.) This rule emanates from core constitutional guarantees of the Sixth and Fourteenth Amendments to the United States Constitution that secure

the rights of a criminal defendant to present a defense and to fundamental fairness, and the guarantee of the Eighth and Fourteenth Amendments to a reliable penalty judgment. (See, e.g., *In re Oliver* (1948) 333 U.S. 257, 273 [68 S.Ct. 499, 92 L.Ed. 682] [a defendant's "right to his day in court" is "basic in our system of jurisprudence" and includes " a right to ... offer testimony"]; see also *Crane v. Kentucky, supra*, 476 U.S. at pp. 687, 690 [right to present a defense]; *Taylor v. Illinois* (1988) 484 U.S. 400, 408 [108 S.Ct. 646, 98 L.Ed.2d 798] [right to present witnesses]; *Washington v. Texas, supra*, 388 U.S. at pp. 17-19 [formally incorporating the Compulsory Process Clause of the Sixth Amendment into the Due Process Clause of the Fourteenth Amendment].) *Washington* stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

(*Id.* at p. 19.)

A court violates a defendant's right to present a defense and witnesses supporting it when it applies evidentiary standards in an arbitrary or uneven way. In *Washington,* for example, the Supreme Court held that a Texas rule preventing an accomplice from testifying on a defendant's behalf arbitrarily denied the defendant his right to offer the testimony of a witness. (*Washington v. Texas, supra*, 388 U.S. at p. 23.) The Supreme Court has found especially pernicious the unjustified and uneven application of

evidentiary standards in a way that favors the prosecution over defendants. In *Green v. Georgia* (1979) 442 U.S. 95, 97 [99 S.Ct. 2150, 60 L.Ed.2d 738] (per curiam), the Supreme Court reversed a death sentence because the trial court had excluded testimony offered by the defense under Georgia's hearsay rules. While Georgia's hearsay rules did not allow Green to introduce the evidence in question in mitigation at his sentencing hearing, the state's rules allowed the government to introduce the same evidence in his co-defendant's trial. The Supreme Court held that the exclusion of the evidence at sentencing was reversible error for several reasons. The Court concluded: "Perhaps most important the State considered the testimony sufficiently reliable to use it against [Green's co-defendant], and to base a sentence of death upon it." (*Id.*)

Other cases also recognize that imposition of a greater evidentiary burden on a defendant without justification violates due process. In *Webb v. Texas* (1972) 409 U.S. 95, 98 [93 S.Ct. 351, 34 L.Ed.2d 330], for example, the trial judge admonished the defendant's witness at length to testify truthfully, but did not give similar warnings to the state's witnesses. The trial judge's lecture caused the defendant's witness to refuse to testify. The Supreme Court ruled that the "trial judge gratuitously singled out this one witness," and held that the witness' subsequent refusal to testify deprived the defendant of due process. (*Id.* at pp. 97-98.) Similarly, in *Washington*, the Supreme Court objected to a Texas rule that applied unequal standards to the defense and the prosecution. Under the Texas rule, an accomplice could testify for the state but not for the defendant. The Court ruled that this distinction was not rational. (*Washington v. Texas*, *supra*, 388 U.S. at p. 22.) Justice Harlan, in concurrence, emphasized the

arbitrariness and unevenness of this distinction. He stated that the different rules violated the Due Process Clause because a state may not recognize as relevant and competent the testimony of a certain category of witness, but arbitrarily bar use of testimony by that same kind of witness by the defendant. (*Id.* at pp. 24-25; see also *Chambers v. Mississippi,* 410 U.S. at pp. 295-98 [unconstitutional to bar defendant from impeaching his own witness where the government was free to impeach that witness]; *Cool v. United States* (1972) 409 U.S. 100, 103, fn. 4 [93 S.Ct. 354, 34 L.Ed.2d 335] [jury instruction telling the jury that it could convict solely on the basis of accomplice testimony but not that it could acquit on this basis constituted grounds for reversal].)

In sum, a court violates a defendant's right to present a defense and witnesses by applying evidentiary standards in an arbitrary or uneven way. The court did so here with its uneven application of Evidence Code section 352, allowing the prosecution to present the evidence it needed to establish its case but precluding the defense from presenting the evidence it needed to establish its case. As defense counsel argued in support of his motion for new trial:

> Motive in this case was crucial in establishing who did what.... The defendant's priors were allowed to show a possible motive for shooting; Blair's motive for shooting first was prohibited .... A new trial should be granted on this ground alone.

(CT 794.)

Because the Constitution forbids the unjustified application of evidentiary standards that favor the prosecution over the defendant, the court's imposition of a greater evidentiary burden on Fuiava than it

required for the prosecution violated due process. "We should not have one rule [of evidence] for the prosecution and another rule for the defense." (*United States v. James*, *supra*, 169 F.3d at p. 1214.)

There is not only a reasonable possibility, but a reasonable probability, that the court's disparate treatment of the prosecution and the defense contributed to the verdict. The combination of excluding Fuiava's evidence of Blair's motivation and intent to unlawfully shoot at Avila and Fuiava and admitting the evidence of Fuiava's motivation and intent to unlawfully shoot at Blair imposed a double whammy on Fuiava at trial. Such a double whammy prejudiced Fuiava exponentially, for evidence of motive was key to determining guilt. Accordingly, 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 requires reversal of the judgments of conviction as a matter both of statutory and constitutional law.

X.

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

A. Background Facts.

Martha Godinez testified at the preliminary hearing in Fuiava's case that she was parked by Ham Park on the evening of May 12, 1995. She heard several shots and saw Fuiava come running into the park with another person. (RT 1356-1367; CT 22 et seq.) A friend, Conejo, who was standing nearby jumped into her car. (RT 1369.)

The prosecution could not find Godinez for trial and offered her preliminary hearing testimony as the former testimony of an unavailable witness. (See Evid. Code, § 1291.) Defense counsel objected. He contended in a hearing outside the presence of the jury that the prosecution did not use due diligence in attempting to locate Godinez for trial, which made her preliminary hearing testimony inadmissible. (RT 1131a-1138.) At that hearing, the prosecution's investigator testified that he knew Godinez had been living at a motel during the preliminary hearing. He took no action to secure her appearance at trial, however, until the end of June or beginning of July. He discovered then that she was no longer at the motel. He went by a former residence of hers but it was vacant. (RT 1133-1134.) He put the word out to the Century Station police to be on the look out for her and regularly checked emergency rooms and hospitals. (RT 1134.) He attempted unsuccessfully to locate a brother of hers. (RT 1135.) He also talked with some neighbors who had previously lived with her, one of whom thought Godinez might have gone to Mexico. (RT 1138.) He did not check the post office for a forwarding address. (RT 1136.)

Trial counsel argued that these efforts to locate Godinez following a failure to keep better tabs on her, given her apparent transience, showed lack of due diligence. (RT 1138.) The trial court disagreed and found that Godinez's preliminary hearing testimony was admissible under Evidence Code section 1291. (RT 1138.) Her testimony was introduced by re-enactment with a woman deputy district attorney playing Godinez, and the prosecutor asking all the examination questions. (RT 1354-1355, 1366.) The trial court advised the jury that the evidence was in this form because

Godinez was unavailable, but gave the jury no further information or admonition about her absence. (RT 1351.)

During cross examination Godinez testified she had moved shortly after she gave her information to the police, with help and monetary assistance from them. (RT 1372-1373.) Godinez moved because she was fearful, although no one had threatened her. (RT 1373-1378.) Godinez explained that she moved because she was afraid after she told the police the truth. (RT 1384-1385.) Although she testified she never varied in her statements to the police identifying Fuiava as running into the park after the shots, she had lied initially to the police about her activities that night at Conejo's request to protect him. (RT 1381-1384) She testified: "Everybody out there said that I was going to be killed [] [¶] for what I had said ...." (RT 1384-1385.) Her own family and brother told her she could be killed. (RT 1385-1386.) They told her she could be killed because she had lied to the police to protect her friend, Conejo, and then she had gone back to tell the truth. The lies had nothing to do with Fuiava. (RT 1386.)

B. Legal Analysis.

Evidence Code section 1291 provides that former testimony may be offered against a party to the former proceeding if the witness is unavailable and the party against whom the former testimony is offered was a party to the action or proceedings in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing. (Evid. Code, § 1291, subd. (a)(2).)

Evidence Code section 240 provides in part as follows:

> "Unavailable as a witness" means that the declarant is ... [a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

The burden of establishing due diligence is on the proponent of the evidence — here, the prosecutor; whether reasonable diligence has been shown is a factual question to be determined according to the circumstances of each case. (*People v. Enriquez* (1977) 19 Cal.3d 221, 235; *People v. Cromer* (2001) 24 Cal.4th 889.) The prosecution "must make a good faith effort and exercise reasonable diligence to procure the witness's appearance." (*People v. Hovey* (1988) 44 Cal.3d 543, 562.) That effort must be considerable to justify admission of former testimony, in light of a defendant's federal and state constitutional rights to confront and cross-examine witnesses. (See U.S. Const., Amend. VI; Cal. Const. art. I, §15; *Barber v. Page* (1968) 30 U.S. 719; *Pointer v. Texas* (1965) 380 U.S. 400.)

> We have said that the term "due diligence" is "incapable of a mechanical definition," but it "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." [Citations.] Relevant considerations include "'whether the search was timely begun'" [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation].

(*People v. Cromer*, *supra*, 24 Cal.4th at p. 904.) "A determination of the reasonableness of efforts to procure attendance of a witness at trial cannot be assessed by reference to rigid rules of law; it depends upon analysis of practical human experience and contemporary community standards." (*People v. McElroy* (1989) 208 Cal.App.3d 1415, 1426-1427, fn. 7.)

When evaluating a trial court's due diligence determination, a reviewing court applies the independent de novo standard of review. (*People v. Cromer*, *supra*, 24 Cal.4th at pp. 901-902; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1296-1297.) Applying that standard, the prosecution did not show due diligence in its efforts to bring Godinez to trial.

The prosecution knew from the outset that Godinez was a reluctant witness who had moved with the help of law enforcement because she believed her cooperation with the investigation endangered her. The evidence of her fear coupled with her disappearance before trial made it likely that the jury speculated that she came to harm or was in hiding to avoid harm. In this respect, the reading of her preliminary hearing testimony due to her purported unavailability constituted more powerful and prejudicial evidence against Fuiava than had she given the same testimony in person at trial, where the jury could have seen that she had come to no harm. No attempt was made by the prosecution to keep tabs on Godinez after the preliminary hearing, despite the apparent likelihood that she might flee or go into hiding. Significantly, there was "an even more powerful incentive [for the witness] not to appear despite the threat of either arrest or loss of assets — the threat to one's safety." (*People v. Watson* (1989) 213 Cal.App.3d 446, 454.) The prosecution was on notice that Godinez was fearful and thus might hide or flee. The prosecution's failure to stay in touch or maintain surveillance of a witness known to be a flight risk is a crucial factor in determining due diligence. (*People v. Louis* (1986) 42 Cal.3d 969, 992.) Following the preliminary hearing, the

prosecution should have maintained contact with Godinez to assure her presence at trial.

Despite Godinez's reluctance and purported importance to its case, the prosecution not only failed to stay in touch with her but also delayed in attempting to find her until shortly before trial. The attempt was not only delayed but desultory. Apparently no officer who had helped her move was ever contacted. Nor had there been any attempts to locate anyone she knew, besides her brother and the neighbors of her vacated house. Although neighbors who were contacted told the investigator Godinez might have gone to Mexico, no effort was made to try and locate Godinez in Mexico and secure her attendance if she was located there. Due diligence is required to secure the appearance of a witness residing in a foreign country. (See *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433-1437, 1444.)

In sum, the prosecution considered Godinez's testimony important enough for trial that it successfully obtained admission of her preliminary hearing testimony; yet, its efforts to locate her were untimely, unfocussed, incomplete, and off the mark. The prosecution should have kept tabs on Godinez after the preliminary hearing as set forth above, thus effectively beginning the process of securing her as a witness for trial in a timely fashion. The preliminary hearing occurred approximately one year before trial and before the prosecution's efforts to locate Godinez for trial began. Thus, the trial court's finding of due diligence under the circumstances was error.

This was error of federal constitutional dimension that violated Fuiava's rights to due process, to a reliable verdict and sentence, and to

confrontation of the evidence against him, and rendered his trial fundamentally unfair. The error thereby violated Fuiava's Sixth, Eighth and Fourteenth Amendment rights, requiring application of the higher standard of prejudice under *Chapman v. California, supra,* 386 U.S. at p. 24. (See, e.g., *People v. Sandoval*, *supra*, 87 Cal.App.4th at 1444.)

Fuiava was particularly prejudiced by admission of Godinez's testimony because it 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. The court failed to admonish the jury to reduce this danger. It did not tell the jury not to consider why Godinez was not available; or that it was due to the prosecution's failure to keep track of her. Admission of this evidence suggesting threats and violence stemming from Fuiava resulted in a fundamentally unfair trial that contravened the Fourteenth Amendment's guaranty of due process of law. (See, e.g., *Estelle v. McGuire, supra,* 502 U.S. 62 [state law evidentiary error that renders a trial fundamentally unfair violates the Due Process Clause]; *People v. Millum* (1954) 42 Cal.2d 524, 527 [wrongful admission of evidence may deprive a defendant of constitutional right to due process of law].) Wrongful admission of this evidence also violated Fuiava's Sixth Amendment right to confront the witnesses against him and his Eighth Amendment right to a reliable verdict and death sentence in a capital case. Even though Godinez was cross-examined by counsel for Fuiava at the preliminary hearing, he obviously was not allowed to cross-examine her at trial to elicit that there had been no

retaliation against her by Fuiava or any Young Crowd member. In fact her very absence signaled to the jury the opposite.

XI.

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

A. Factual Background.

As previously set forth, the prosecution presented evidence in its case in chief that tended to show that Fuiava had a violent character. This included evidence of Fuiava's two prior felony convictions for assault with a firearm and the fact he was on parole at the time of the charged offense. (See Statement of Facts, Section A.10, and Argument VIII, Section B, *ante*.) The prosecutor offered this evidence ostensibly to show not Fuiava's propensity for violence, but his motivation, and to prove the enhancement allegations concerning his prior convictions. (See, e.g., RT 302-303, 322-323, 1037.)

Fuiava presented evidence of Blair's domestic violence to show that he had a violent character, which tended to demonstrate that Fuiava's shooting of him was a reasonable response to Blair's gunfire. (See Statement of Facts, Section A.9, *ante*.) The prosecution then elicited further evidence that Fuiava had a violent character, including the facts surrounding a juvenile adjudication of assault with a firearm as well as the two adult convictions of assault with a firearm. That evidence showed that all three assaults were shootings. (See generally Statement of Facts, Section A.10., *ante*.)

The court expressly permitted the jury to use the evidence of Fuiava's past violence to find that he had a propensity or disposition to commit the crimes charged and to convict him accordingly. The court did so by instructing the jury as follows:

> A person's character for violence may be shown by evidence of reputation, opinion, or specific acts of violence. Evidence of a person's character for violence may tend to show the person acted in conformity with such character.
>
> Whether a person had a character for violence and whether he acted in conformity with such character are matters for the jury to decide.

(RT 2294-2295.)

B. Legal Analysis.

Evidence Code section 1103, subdivision (b), provides in relevant part:

> In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 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 tending to show violence has been adduced by the defendant ....

Admission of evidence under this section to show that Fuiava had a disposition or propensity to commit the charged crime, together with the instruction explicitly advising the jury that it could utilize propensity evidence to find him guilty, was fundamentally unfair in violation of his rights to a fair jury trial, due process, and to be protected from cruel and

unusual punishment, as protected by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

This Court touched on the constitutionality of basing a verdict of guilt on evidence of propensity when it determined the constitutionality of Evidence Code section 1108, which provides for "the admissibility of disposition or propensity evidence in sex offense cases." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) As this Court there noted:

> In the due process context, defendant must show that [the challenged practice] offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (See *Montana v. Egelhoff* (1996) 518 U.S. 37, 43-44 [116 S.Ct. 2013, 2017, 135 L.Ed.2d 361] [courts examine "historical practice" in evaluating due process claims]; *Medina v. California* (1992) 505 U.S. 437, 445 [112 S.Ct. 2572, 2577, 120 L.Ed.2d 353]; *Dowling v. United States* (1990) 493 U.S. 342, 353 [110 S.Ct. 668, 674, 107 L.Ed.2d 708] [fundamental principles of justice are those """which lie at the base of our civil and political institutions'" [citation] and which define "the community's sense of fair play and decency"""]; *Patterson v. New York* (1977) 432 U.S. 197, 201-202 [97 S.Ct. 2319, 2322, 53 L.Ed.2d 281]....

(*Id.* at p. 913.) The Court further noted that the admission even of relevant evidence violates due process when "the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*Id.*, citing *Estelle v. McGuire, supra,* 502 U.S. at p. 70; *Spencer v. Texas* (1967) 385 U.S. 554, 562-564 [87 S.Ct. 648, 653-654, 17 L.Ed.2d 606].)

The considerations that caused the Court in *Falsetta* to find that use of evidence of past sex offenses to establish a propensity of the defendant to commit the charged sex offense passed constitutional muster do not

apply here. There, the Legislature had found special "policy considerations" that favored admission of such evidence in sex cases. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 911.) These considerations included "the serious and secretive nature of sex crimes and the often resulting credibility contest at trial," and the fact "that the willingness to commit a sexual offense is not common to most individuals ... [so that] evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness." (*Id.* at pp. 911-912.). In addition, other jurisdictions, including the federal one, permitted similar evidence in sex cases. (*Id.* at p. 912.) Finally, acknowledging that "[f]rom the standpoint of historical practice, unquestionably the general rule against admitting [propensity] evidence is one of long-standing application" (*ibid.*), the Court found significant the fact "that courts have been considerably more 'ambivalent' about prohibiting admission of defendants' other sex crimes in sex offense cases." (*Id.* at p. 914.) Thus, the Court found "it unclear whether the rule against 'propensity' evidence *in sex offense cases* should be deemed a fundamental historical principle of justice." (*Ibid.*; italics in original.) Moreover, *Falsetta* "involve[d] the admission only of *convictions* for rapes as to which defendant *pleaded guilty*" and did not deny. (*Id.* at p. 925 (conc. opn. of Mosk, J.) (italics in original).) As Justice Mosk noted, the prejudice may be very different if — as here — "a defendant pleaded not guilty to the previous offenses [] [or] pleaded guilty, or nolo contendere, but now alleges that he was not, in fact, the perpetrator ...." (*Ibid.*)

In *People v. Blanco* (1992) 10 Cal.App.4th 1167, an appellate court rejected the defendant's contention "that the 1991 amendment to Evidence

Code section 1103, subdivision (b) — which allows the introduction of evidence of a defendant's violent acts and reputation for violence, if a defendant presents evidence as to the bad acts or reputation of the victim of a crime — violates the due process rights of a criminal defendant and is, therefore, unconstitutional." (*Id.* at p. 1169.) Significantly, however, that court's "own research disclose[d] that the new California rule enacted in 1991 is a distinctly minority view in common law jurisdictions ...." (*Id.* at p. 1173.) It found that "most American jurisdictions, under the influence of the general rule that the bad character of the defendant should not be admissible by prosecution evidence unless the accused first tenders the issue, have barred this evidence." (*Id.* at p. 1174.) Noting that California's then-new law "adopted the view originally espoused by Wigmore" in self-defense cases, it further noted that "the reviser of Wigmore's treatise criticizes Wigmore's rule on a miscellany of grounds ...." (*Ibid.*) As it quoted that reviser:

> "There is little authority, except in England, to support Wigmore's view. Furthermore, the theory is crude, implying tit for tat. Moreover, there are special reasons not to allow the use of character evidence against an accused .... It should not be forgotten that the accused is on trial, whereas in a criminal prosecution the victim, except in a metaphorical and symbolic sense, is not." (1A Wigmore, Evidence, [Tillers ed. 1983] § 63, p. 1379, fn. 7.)

(*Ibid.*)

In *Blanco*, the court found that "any arguable constitutional error on the facts of this particular case would have to be considered harmless. (See *Chapman v. California* (1967) 386 U.S. 18, 22-24 [17 L.Ed.2d 705, 709-710, 87 S.Ct. 824, 24 A.L.R.3d 1065].)" (*People v. Blanco*, *supra*, 10

Cal.App.4th at p. 1176.) Fuiava's case is very different, for the guilt and innocence determination here was a close and difficult one for the jury, where "grave doubt of appellant's guilt existed." (*Ibid.*)

The claim in *Blanco* that the defendant "shot the victim without warning, in the back, from some distance away, in self-defense as part of a struggle 'would have strained the credulity of the most gullible jury.'" (*People v. Blanco*, *supra*, 10 Cal.App.4th at p. 1176.) In contrast, Fuiava's claim that he shot Blair only in response to Blair's shooting was backed by powerful corroborating evidence. First, Lyons stated that the first volley of shots sounded like it came from the opposite direction of Fuiava and from a direction consistent with Blair's location, and that the second volley came from Fuiava's direction. Second, the testimony from the off-duty officer in Ham Park about the sound of the gunfire corroborated the defense claim. Third, there was eyewitness testimony from multiple sources that Blair initiated the shooting. Fourth, the deputies were on hyper-alert from the inflammatory briefing they received, which could have caused Blair to shoot first and ask questions later. Finally, Blair's Viking membership gave him a motive to shoot first out of anger or malice.

Given the equipoise of the evidence concerning who shot first, Fuiava was especially prejudiced by the propensity evidence and instruction that permitted the jury to convict him not because he was truly guilty, but because he was the type to offend as charged. After all, "prior decisions of this court indicat[e] that 'propensity' evidence is per se unduly prejudicial to the defense." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 911.) As this Court noted in another capital murder case, if the jury used evidence of an uncharged killing to show propensity to kill, "the

prosecution's burden of proof as to the central issue in the case ... arguably was lightened, thus raising the possibility that defendant's constitutional right to due process of law was impaired." (*People v. Garceau* (1993) 6 Cal.4th 140, 186.) Indeed, in that very case, the Ninth Circuit found that the defendant's due process right was impaired by admission of evidence of another murder in that case. (*Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 776 [finding that instruction "where the jury was expressly invited to draw the additional inference of criminal propensity" from the evidence of other crimes violated due process][19].)

The United States Supreme Court has recognized that the common law decidedly bars use of character evidence to demonstrate disposition. As it stated in *Michelson v. United States* (1948) 335 U.S. 469, 475-476 [69 S.Ct. 213, 93 L.Ed. 168]:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, [citation], but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a

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[19] On October 1, 2002, the Supreme Court granted certiorari of the Ninth Circuit's opinion in *Garceau* on the question of what is the correct triggering event for application of AEDPA in capital cases. (*Woodford v. Garceau* (2002) __ U.S.__ [123 S.Ct. 32, 153 L.Ed.2d 893].)

> bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Indeed, long ago then-Chief Justice Warren noted that the Court's decisions "suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." (*Spencer v. Texas, supra,* 385 U.S. at pp. 572-574 (conc. and dis. opn. of Warren, C.J.).) That notion reinforced the suggestion in *Brinegar v. United States* (194) 336 U.S. 160 [93 L.Ed. 1879, 69 S.Ct. 1302] that the rule against propensity evidence is an essential component of due process. In *Brinegar*, the defendant was prosecuted for illegal importation of liquor and the Court found that evidence of his arrest for the same offense several months earlier was not admissible at trial. The Court reasoned:

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty, and property.

(*Id.* at p. 174.)

Other federal courts are in accord. (See, e.g., *United States v. Daniels* (D.C. Cir. 1985) 770 F.2d 1111, 1118 ["The exclusion of other crimes evidence ... reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence."]; *United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044 [rule against propensity

evidence is a "concomitant of the presumption of innocence"]; *Lovely v. United States* (4th Cir. 1948) 169 F.2d 186 [admission of evidence of rape committed within weeks of the charged rape and at the same location violated rule against propensity evidence, which "arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence"); *United States v. Burkhart* (10th Cir. 1972) 458 F.2d 201, 205 [admission of propensity evidence "goes to the fundamental fairness and justice of the trial itself"].)

A Seventh Circuit opinion, *United States v. Dow* (7th Cir. 1972) 457 F.2d 246, is also instructive. There, the court reviewed a murder conviction in which the prosecutor cross-examined the defendant concerning the underlying facts of his prior felony convictions, as did the prosecutor here. In reversing, the court stated:

> As can be seen from the line of questions pursued by the prosecutor, with its excessive concentration on the prior criminal acts of the defendant, an attempt was made to destroy the character of the accused and not merely to impeach him as a witness .... Questions of this nature, since their effect is to show criminal propensities, unfairly prejudice the defendant as to his guilt or innocence of the specific crime charged. Guilt must be predicated upon evidence relevant to the offense charged and not founded upon past crimes. [Citation.]

(*Id.* at p. 250.) As Justice Cardozo observed, "[t]he law is not blind to ... the peril to the innocent if character is accepted as probative of guilt," making the propensity rule one of "fundamental importance for the protection of the innocent." (*People v. Zackowitz* (N.Y. 1930) 172 N.E. 466, 468.) As stated in *People v. Molineux* (N.Y. 1901) 61 N.E. 286, 293-294.

> This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of the Magna Charta. It is the product of that same human and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt.

The Ninth Circuit has found that use of evidence of past offenses to convict a defendant based upon his disposition to commit the charged offense offends our "fundamental conception of justice," which "is part of our community's sense of fair play that people are convicted because of what they have done, not who they are." (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384, 1386.) *McKinney* further explained the point thusly:

> The use of "other acts" evidence as character evidence is ... contrary to firmly established principles of Anglo-American jurisprudence. In 1684, Justice Withins recalled a prior case in which the court excluded evidence of any forgeries, except the one for which the defendant was standing trial. [Citation.] Similarly, in *Harrison's Trial*, the Lord Chief Justice excluded evidence of a prior wrongful act of a defendant who was on trial for murder .... [Citation.] "Early American courts retained the rule against using 'other acts' evidence as character evidence to show action in conformity therewith. [Citations.]
>
> "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition ... has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property" [¶] The rule

> against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence. It has persisted since at least 1684 to the present ...."

(*Id.* at pp. 1380-1381.)

As the Ninth Circuit recounted in *Garceau v. Woodford*, *supra*, 275 F.3d at p. 775:

> Specifically, in *McKinney,* we held that the admission of other crimes evidence violated due process where: (1) the balance of the prosecution's case against the defendant was "solely circumstantial"; (2) the other crimes evidence ... was similar to the [offense] for which he was on trial; (3) the prosecutor relied on the other crimes evidence at several points during the trial; and (4) the other crimes evidence was "emotionally charged."

Garceau found that "[a]pplication of the *McKinney* factors to this case similarly leads to the conclusion that the other crimes jury instruction violated due process." (*Garceau v. Woodford, supra*, 275 F.3d at p. 775.) The same may be said here.

First, the balance of the evidence in Fuiava's case was close and conflicting on the question of guilt. Indeed, not only was the prosecution's evidence of guilt solely circumstantial, but Fuiava presented substantial direct evidence of his innocence. This Court also has recognized that disposition evidence is most likely to influence the jury's determination of guilt when the other evidence makes the prosecution's case for guilt "a close one" rather than "a strong one." (See *People v. Antick* (1975) 15 Cal.3d 79, 98-99.) In *Antick*, this Court found that the wrongful admission of evidence of prior misconduct by the defendant required reversal of his burglary conviction. Significantly, the evidence in that case was admitted

only for limited purposes and the jury was expressly instructed that "[s]uch evidence was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes." (See *id.* at p. 93, fn. 13].) The likelihood that evidence of a defendant's other criminal conduct has contributed to the verdict is even greater, of course, where the jury is expressly permitted to rely on the evidence to find that the defendant is disposed to criminal conduct and hence conclude that because the defendant previously broke the law he did so on the charged occasion as well.

Moreover, the evidence of violence principally concerned unlawful shootings by Fuiava, as was the charge here. Thus, the similarity of the propensity evidence to the charge made it that much more likely that the jury used it to break through the deadlock the other evidence was so likely to create. The jury must have been sorely tempted to take the easy way out and rely on the evidence that Fuiava had engaged in like conduct before to overcome the doubt of guilt that the remainder of the evidence created: "The risk of undue prejudice is ... far greater when the prior conviction is similar or identical to the crime charged." (*People v. Fries, supra,* 24 Cal.3d at p. 230.)

Moreover, the evidence of these other shootings was emotionally charged. They started when Fuiava was only 13 or 14 and were interrupted only by periods of confinement for them. (RT 1927-1933.).) Multiple rounds were fired in at least one of them, which was a drive-by shooting of a person in front of his residence. (RT 1933-1934.) Moreover, the victims in the two other shootings were women, one of whom was hit by the gunfire and the other grazed by it. (RT 1928-35.) Thus, the evidence was

even more inflammatory than the evidence of knife possession that the court in *McKinney v. Rees*, *supra*, 993 F.2d at p. 1385 found was "emotionally charged" because it "help[ed] paint a picture of a young man with a fascination with knives and with a commando lifestyle." Like the evidence in *Garceau v. Woodford*, *supra*, 275 F.3d at p. 776, the evidence of Fuiava's other shootings "very likely emotionally affected the jury."

Finally, the prosecutor exploited the evidence of the other shootings to incite the jury to convict Fuiava. The prosecutor asserted in his opening argument: "He is a shooter. That's what he does for a living." (RT 2160.) The prosecutor reprised the evidence that Fuiava had been convicted of shooting three people and then linked that evidence to Fuiava's nickname of "Smokey," asserting that it was derived from his habit of "smoking" or shooting at people. (RT 2160-2161.) The prosecutor further argued: "Fuiava had no problem shooting. He is a professional assassin who shoots people in the back." (RT 2165.) In his rebuttal argument, the prosecutor continued this theme: "This guy is a shooter. He is a professional shooter, that's all he does." (RT 2274.)

By the close of that argument, the prosecutor's reliance on the evidence of Fuiava's propensity toward violence to move the jury to a guilt finding reached fever pitch:

> When we allow punks like this to roam the street terrible things happen. Three of them get shot. Now a fourth, a deputy sheriff gets killed. Respect for the law. [¶] Deputy Blair gets out there with a badge on. His full uniform. Do you think this punk had any respect for the law? If he had respect for the law, do you think that three times in prison might have told him that he shouldn't be hanging around there? [¶] Do you think

> three times in prison might have said, you probably shouldn't be carrying two guns?
>
> .....
>
> He has no respect for the law. He never had any respect for the law. [¶] ... [W]e're supposed to believe him about his two prior convictions? [¶] Well, I only shot one of the three. I pled guilty to the other two but I only shot that guy who I happened to shoot in the back.

(RT 2279-2280.) Indeed, the last words the jury heard in argument, before it was instructed with the propensity and other instructions and retired to deliberate, were these from the prosecutor:

> Let's take this guy out of our society. We tried three times before. He didn't learn his lesson. And Deputy Blair suffered the ultimate example of why three strikes was enacted. We need to get these guys off the street. He had no respect for the law. And now, the law is dead. [¶] I will look forward to talking to you again when we begin the penalty phase, thank you.

(RT 2280.)

All of these factors made it too likely that the jury's verdict of guilt was founded more upon Fuiava's past crimes than upon the evidence concerning what exactly happened on Walnut Avenue that fateful night. Add to that the evidence that Fuiava habitually carried a firearm, and the natural pull on the jury to resolve the question of guilt based on the evidence of Fuiava's violent disposition must have been especially strong. Just as defense counsel argued to the court in support of his motion for a new trial: "I think that the jury found premeditation and they found first-degree murder because of — more of who Freddie Fuiava is, as a gang member, than based on what happened in this case." (RT 2814.) For all of these reasons, it was fundamentally unfair to permit exposure of the jury to

evidence of Fuiava's disposition or propensity to commit the charged offense and to expressly permit the jury to base its finding of guilt on such evidence. This Court should reverse the judgment accordingly.

XII.

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

A. Introduction.

Prosecutorial misconduct pervaded the trial and showed the prosecutor's intent to convict Fuiava regardless of how reprehensible the means used to do so. Defense counsel objected to a goodly amount of this misconduct, and enough objections were sustained or admonitions given the prosecutor by the court to show that the prosecutor was heedless of these warnings and not to be deterred from his misconduct. The end result was a jury primed to convict Fuiava based on passion and prejudice, in obeisance to the prosecutor's baseless theme that Fuiava should be convicted because he was "a professional assassin" who had to be "taken off the street." Thus, as more fully detailed below, the prosecutor's extraordinary misconduct produced guilt verdicts that were the product of fundamental unfairness in violation of state and federal constitutional guaranties of due process and a reliable death judgment.

B. Overview of Law on Prosecutorial Misconduct.

The role of the prosecutor is not "simply a specialized version of the duty of any attorney not to overstep the bounds of permissible advocacy." (*People v. Superior Court* (*Greer*) (1977) 19 Cal.3d 255, 266.) Rather, a prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function the prosecutor performs in representing the

interests and in exercising the sovereign power of the State. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) The prosecutor's interest "in a criminal prosecution is not that he shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314].)

Prosecutorial misconduct violates due process when it has been so egregious that it rendered the trial fundamentally unfair. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [91 L.Ed.2d 144, 106 S.Ct. 2464].) This occurs when the prosecutor's misconduct has "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Id.,* quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [40 L.Ed.2d 431, 94 S.Ct. 1868]). Here, the prosecution's zeal for conviction led to repeated misconduct that worked a fundamental injustice, for the practice and pattern of that misconduct was "'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.' [Citations.]" (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1215.) Misconduct by a prosecutor may also violate a defendant's right to a reliable determination of penalty under the Eighth Amendment. (*Darden v. Wainwright, supra,* 477 U.S. at pp. 178-179.)

"'In general, a prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury. [Citations.]' The defendant generally need not show that the prosecutor acted in bad faith or with appreciation of the wrongfulness of his or her conduct, because the prosecutor's conduct is evaluated in accordance with an objective standard." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333.) Even if such conduct is caused by ignorance or otherwise is in good faith, it

remains misconduct because it is no less prejudicial to the defendant. (*People v. Johnson* (1964) 229 Cal.App.2d 162, 169-170.) "What is crucial to a claim of prosecutorial misconduct is not the good faith vel non of the prosecutor, but the potential injury to the defendant. [Citation.]" (*People v. Benson* (1990) 52 Cal.3d 754, 793.)

The prosecution's misconduct here was various and wide-ranging, occurring throughout the proceedings. The prosecution's underhanded tactics prejudiced Fuiava and violated his rights to due process, to a reliable verdict and sentence, to present a defense, to confrontation of the evidence against him, and to freedom of speech and association. The prosecutor's misconduct thereby deprived Fuiava of fundamental fairness and violated his First, Sixth, Eighth and Fourteenth Amendment rights.

While generally a defendant may not complain of prosecutorial misconduct on appeal "unless in a timely fashion — and on the same ground — the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841, citing *People v. Berryman* (1993) 6 Cal.4th 1048, 1072), that general rule has its exceptions. For example, a defendant is excused from the necessity of a timely objection if such would be futile. (*People v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Noguera* (1992) 4 Cal.4th 599, 638.) Lack of objection is also excused if "an admonition would not have cured the harm caused by the misconduct." (*People v. Price* (1991) 1 Cal.4th 324, 447; see also *Caldwell v. Mississippi, supra,* 472 U.S. at p. 339 ["Some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect"].) The absence of a request for a curative admonition also does not

forfeit the issue for appeal if "the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request." (*People v. Hill* (1998) 17 Cal.4th 800, 820, citing *People v. Green* (1980) 27 Cal.3d 1, 35, fn. 19.)

Each of those bases where pertinent serves to preserve the issue here for appeal. First, objection in many instances would have been futile, given the trial court's rulings on other similar objections. Second, in many instances objection would have served only to emphasize the content of the misconduct and thereby have increased its harm. Third, constant objection to the persistent misconduct would have disrupted the proceedings and alienated the jury. Indeed, the failure of counsel to do more to restrict the flood of misconduct is entirely excused by the fact that the misconduct was so sustained: Objection is not required "where improper comments and assertions are interspersed throughout the trial and/or closing argument, [and] repeated objections might well serve to impress upon the jury the damaging force of the misconduct. [Citation.] In such a situation, a series of admonitions will not generally cure the harmful effect of such misconduct." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 692.) This Court will not let pass a miscarriage of justice caused by the "constant clang" of prosecutorial misconduct that mars the proceeding simply because that misconduct was not always objected to at trial. (See, e.g., *People v. Hill, supra*, 17 Cal.4th, at pp. 821, 846.)

In addition, repeated instances of prosecutorial misconduct, even if potentially harmless independently, may "rise by accretion to the level of reversible and prejudicial error." (*People v. Hill, supra*, 17 Cal.4th at p. 844.) Thus, misconduct is especially likely to result in an unfair trial that

denies due process where it "comprised a pattern...." (*People v. Gionis*, *supra,* 9 Cal.4th at p. 1214; see, e.g., *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381; *People v. Herring* (1992) 20 Cal.App.4th 1066, 1075-1077 [cumulative prejudicial effect of the prosecutor's improper statements in closing argument required reversal].) Because the misconduct here was so varied and occurred throughout the course of the trial, it infected the trial with unfairness and deprived Fuiava of due process. For the same reasons, it is '"reasonably probable that a result more favorable to the defendant would have occurred'" absent misconduct, requiring reversal under state law as well. (See *People v. Bolton* (1979) 23 Cal.3d 208, 214.)

Moreover, when the misconduct implicates specific federal constitutional rights, the burden shifts to the state "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra,* 386 U.S. at p. 24; see, e.g., *People v. Harris* (1989) 47 Cal.3d 1047, 1083 ["If a prosecutor's argument refers to extrajudicial statements not admitted at trial, the defendant may be denied his right under the Sixth Amendment to confrontation and cross-examination, thus requiring reversal of the judgment unless the court is satisfied beyond a reasonable doubt that the misconduct did not affect the verdict."].) Likewise, the assessment of a mix of misconduct, some of which implicated specific constitutional rights of the defendant, is assessed by the stricter *Chapman* standard. (See, e.g., *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59) [where state error is combined with federal error, the *Chapman* standard applies in determining the cumulative effect of the errors].)

Finally, the Court should consider the matter notwithstanding certain individual absences of objection because the trial court was obligated to intervene to curb and cure the misconduct to insure that Fuiava received a fair trial. Certainly the court had the power to do so. Section 1044 directs a trial judge to "control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters ...." Moreover, Evidence Code section 765, subdivision (a) provides that "[t]he court shall exercise reasonable control over the mode of interrogation of a witness ...." (See also *People v. Hill*, 17 Cal.4th at p. 831, fn. 3 [court's failure to take control of courtroom when egregious misconduct occurs facilitates atmosphere "destructive to a fair trial"].) In fact, the trial court here on occasion did intervene to curb the prosecutor's misconduct, but with little overall effect. A trial court is remiss when it fails to curb excessive prosecutorial misconduct: "We think the trial judge should have stopped the discourse without waiting for an objection." (*Viereck v. United States* (1943) 318 U.S. 236, 248 [63 S.Ct. 561, 87 L.Ed.2d 734].)

This Court also has stressed the trial court's duty to intervene where the prosecutor's "course of conduct was so improper and so offensive to the requirement that the question of guilt or innocence shall be determined by an orderly legal procedure." (*People v. Perez* (1962) 58 Cal.2d 229, 250.) The Court since has rejected the force of *Perez* because "its legal underpinnings (i.e., the 'close case' exception)" to the need to object were rejected in *People v. Green* (1980) 27 Cal.3d 1, 27-34. (See *People v. Poggi* (1988) 45 Cal.3d 306, 335-336; see also *People v. Adcox* (1988) 47 Cal.3d 207, 261.) In disavowing *Perez*, however, the Court failed to

consider *Viereck v. United States, supra*, 318 U.S. at pp. 247-248 and its implication that the trial court's duty to curb prosecutorial misconduct inimical to a fair trial springs from a defendant's right to due process of law as guaranteed by the United States Constitution. Federal courts have admonished in no uncertain terms: "A trial judge should be alert to deviations from proper argument. Because such comments have the clear potential for affecting adversely the defendant's right to a fair trial, the judge should take prompt corrective action as appropriate in each case." (*United States v. Roberts* (9th Cir. 1980) 618 F.2d 530, 534.)

C. Misconduct in the Prosecutor's Opening Statement and Examination of Witnesses.

1. Introduction.

The prosecutor strove to transform the trial from one determining guilt of the charges at hand into a spectacle that put Fuiava on trial for an alleged history of violence — a proceeding incompatible with due process and the presumption of innocence. The prosecutor introduced inflammatory evidence of prior acts of violence by Fuiava, as well as irrelevant and prejudicial evidence of Fuiava's criminal history that could only have confused the jury and diverted its attention from the charges. The criminal history evidence concerned such details as commitment to juvenile camp, violation of juvenile probation, commitment to the Youth Authority, service of jail terms, and timing of offenses. While some of this evidence ostensibly was admitted for various proper purposes, the prosecutor commented and embellished on the evidence in such an intentionally sarcastic, repetitive and prejudicial manner that it constituted misconduct and a denial of Fuiava's right to confrontation of the evidence

against him. (See, e.g., Evid. Code § 352; *People v. Castro* (1985) 38 Cal.3d 301.) The prosecutor's obvious tactic was to inflame the jury by depicting Fuiava as a chronic gunman who should be "put away" based more on evidence of a violent history and character than on evidence of guilt in the Blair shooting. "[E]vidence of other crimes always involves the risk of serious prejudice ...." (*People v. Thompson*, *supra*, 27 Cal.3d 303 at p. 318.) Here, the prosecutor capitalized on admission of this evidence to realize just the risk of serious prejudice that this Court there worried over.

Before trial was underway, the prosecutor made clear the inspiration for his reprehensible tactics. He said that he felt the "burden of the entire sheriff's department weighing heavily on my back to make sure that justice is achieved in this particular case" — "justice" in that context, of course, code for conviction and a death sentence. (RT 46-47.) The prosecutor's image was almost literal, for the gallery was full of deputy sheriffs throughout the trial. (See, e.g., RT 2210 [court noted that the courtroom "has been full of spectators, the vast majority [of whom] appear to the court to be deputy sheriffs"].) The prosecutor no doubt felt extraordinary pressure from law enforcement to obtain a conviction and capital sentence in this case, and unfortunately succumbed to this pressure by using a variety of improper means to achieve this goal.

Beginning in his opening statement, the prosecutor depicted Fuiava as an unreconstructed violent criminal and murderer hardly entitled to the presumption of innocence, a corrosive theme he developed throughout the trial. At the beginning of the prosecutor's opening statement, in his first specific reference to the charges, he told the jury that the shooting was an "unintended but not unanticipated side effect result of the three strikes

law": "We knew that these three strike candidates are going to kill police officers rather than go to jail" for 25 years to life, implying that Fuiava was such a candidate with this motive. (RT 336.) Defense counsel objected as improper "argument" — not to mention also improper introduction of incompetent evidence that included prosecutorial vouching — but the court overruled the objection. (RT 336.)[20] Shortly thereafter the prosecutor asserted that Fuiava feared arrest for a third strike under the three strikes law if Blair stopped him, although in fact Fuiava did not then have two prior strikes due to a "subtle nuance" in that law. (RT 338.) Again, the prosecutor referred to a third strike as Fuiava's reason for shooting at Blair; Fuiava's possession of two guns at the time; and his parole officer's admonition to him not to carry guns. (RT 343-344.) The prosecutor concluded his statement by again telling the jury that Fuiava shot Blair because Fuiava had guns and was afraid of being arrested for a third strike. (RT 348.)[21]

The prosecutor repeatedly raised the fact of Fuiava's prior convictions for assault with a firearm to unfairly prejudice Fuiava. For example, during direct examination of Fuiava's parole agent, the prosecutor asked: "Is there a reason why you amplified the 'no possession of firearms'

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[20] In his opening statement, the prosecutor also misled the jury by asserting that Blair did not clear his patrol car door before he was shot in the throat. (RT 338.)

[21] The trial court had ruled the evidence of Fuiava's prior convictions and his ostensible belief he faced a third strike should he be convicted of another felony were admissible as motive evidence. (See Argument VIII, Section B, *ante*.) Capitalizing on that ruling, the prosecutor's remarks in opening statement set the stage for his outrageous misconduct later leading to his ultimate argument without factual basis that Fuiava was nothing less than a hit man or professional killer.

condition" of Fuiava's parole. (RT 1035-1038.) Defense counsel's objection to the question was overruled, and the parole agent responded that it was because Fuiava was on parole for assault with a firearm. The prosecutor then asked, "and he has a prior conviction before that conviction, right?," to which the parole agent answered, "yes, for assault with firearm." (RT 1035-1038.) The trial court admonished the jury at that point that the evidence of the prior convictions was admissible at that point only for two purposes: 1) to determine whether Fuiava in fact did "have prior convictions as alleged" and 2) "for possible motive." (RT 1037.) The admonition not only disproved the relevance of the prosecutor's line of inquiry here, but became empty of protection in light of the prosecutor's reprise of this evidence throughout the trial and the court's eventual instruction that permitted the jury to use the evidence to conclude that Fuiava was disposed to commit the charged crimes. (See Argument XI, *ante*.)

In fact, the whole of the parole agent's testimony was irrelevant, for Blair had no basis or authority to arrest Fuiava for violation of parole, but only for a violation of the criminal law. Fuiava's parolee status had nothing to do with his liability for arrest as a convicted felon in possession of a gun. Moreover, given that parole violation subjected Fuiava to reimprisonment for a year at maximum (see § 3057, subd. (a)), any motive to avoid confinement pursuant to a parole violation paled by comparison to the purported motive to avoid life imprisonment as a third striker. Thus, Fuiava's parole status was marginally probative of any alleged motive at best. The prior convictions themselves were provable by the simple means

of introduction of Fuiava's prison records as provided by section 969b,[22] which the prosecutor did here. (See RT 1038, where these documents were admitted into evidence as Exh. 28; see also 1st Supp. CT 18-25.) The prosecutor, however, used every opportunity to make certain the fact of Fuiava's priors was hammered into the jury as many times and in as many ways as possible, knowing well their potential to set the jury against Fuiava.

2. Examination of Avila.

Building momentum in his unfounded depiction of Fuiava as a career killer, the prosecutor elicited evidence from Avila that Fuiava's nickname was "Smokey."[23] (RT 1641.) The following interchange then occurred:

> Q. What used to be his nickname?
>
> .....
>
> Mr. Hauser: Objection, irrelevant.
>
> The Court: Overruled.
>
> Q. By Mr. Richman: What use to be his nickname?
>
> A. I've always known him as Smokey. We call him Freddy.
>
> Q. Ever known him as Devil.

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[22] Section 969b provides that prima facie evidence of the fact of a prior felony conviction or prior prison term can be supplied by the introduction into evidence at trial of certified copies of records so showing from the relevant institution.

[23] The reporter's transcripts spell the nickname as "Smoky," when it is actually "Smokey." (See, e.g., 1st Supp. CT 22.) Fuiava accordingly uses the correct spelling throughout this brief.

A. That was — I never called him Devil, no.

Q. Did you know him as Devil?

A. Yes.

(RT 1641.)

The prosecutor then returned to the nickname "Smokey," asking whether "smoke" has a particular meaning on the street. (RT 1641.) Defense counsel again objected as irrelevant, but that objection was again overruled. (RT 1642.) The prosecutor then asked Avila what it meant to say, "I'm going to smoke somebody?" (RT 1642.) Avila responded, "That means that you're going to kill somebody." The prosecutor persisted: "Smokey, that is the defendant's name, isn't it?" Avila again confirmed that fact. (RT 1642.) At that point the trial court admonished the prosecutor, who apparently had raised his voice to emphasize the unfounded implication that Fuiava earned his nickname from "smoking" or "killing" people, to keep his voice down. (RT 1642.) Then, the prosecutor suggested in bad faith that Fuiava had earned his nickname by a practice of killing people: "[Fuiava's] nickname has a street vernacular meaning killing people, isn't that right?" (RT 1642.) When Avila's answer suggested otherwise, the prosecutor nevertheless persisted with his outrageous and unfounded submission. (RT 1642-1643.)

A prosecutor must have a good faith basis for questions he asks of a witness, particularly when those questions suggest that the defendant committed other offenses. (See generally *Michelson v. United States, supra,* 335 U.S. at pp. 472-481; see also *United States v. Lamarr* (4th Cir. 1996) 75 F.3d 964, 971 [attorney "must have a 'good faith factual basis' for

questions about a defendant's prior acts"]; *United States v. Glass* (11th Cir. 1983) 709 F.2d 669, 673 [trial court's discretion in admitting inquiries as to a defendant's prior misconduct is subject to limitation that "the prosecutor asking the questions must have a good faith factual basis for the incidents inquired about"]; *United States v. Wells* (5th Cir. 1976) 525 F.2d 974, 976 [same]; *People v. LoCigno* (1961) 193 Cal.App.2d 360, 388 [improper for prosecutor to ask questions which clearly suggest the existence of facts harmful to defendant "in the absence of a good faith belief by the prosecutor that the questions would be answered in the affirmative, or with a belief on his part that the facts could be proved, and a purpose to prove them, if their existence should be denied"]; *People v. Perez* (1962) 58 Cal.2d 229, 238 [approving *LoCigno* standard], disapproved on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 32; *People v. Warren* (1988) 45 Cal.3d 471, 480 [same]; ABA Model Rules of Professional Conduct, Model Rule 3.4(e) ["[a] lawyer shall not ... in trial, allude to any matter ... that will not be supported by admissible evidence ...."].)

The prosecutor launched into a series of questions to show that Young Crowd members, including Fuiava, typically were armed. (RT 1643.) The inquiry was largely objectionable, for it was interspersed with defense objections that were sustained and the court's own objections. (RT 1643-1644.) The prosecutor's persistence in his objectionable questioning was transparent misconduct. (See *People v. Sawyer* (1967) 256 Cal.App.2d 66, 77 [misconduct for prosecutor to ignore court's ruling and question defendant repeatedly in violation thereof].) The prosecutor's obvious purpose was to paint Fuiava and his associates as an armed and roving band of criminals and thereby inspire fear and antipathy in the jurors. These

questions of Avila to elicit detailed gang information brought forth irrelevant and prejudicial facts whose effect — if not also purpose — was to inspire fear and revulsion in the jurors. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 193 ["even where gang membership is relevant ... it may have a highly inflammatory impact on the jury"]; *People v. Cox* (1991) 53 Cal.3d 618, 660 [gang evidence has highly inflammatory impact]; see also *People v. Luparello* (1986) 187 Cal.App.3d 410, 426 [gang membership evidence tends to suggest that a defendant is the type of person predisposed to commit violent acts of the type engaged in by the gang to which he belongs].)

The prosecutor persisted in this manner, smearing both Fuiava and Avila. For example, the prosecutor elicited evidence that Avila had seen the mock patrol car in the back yard of a fellow Young Crowd Member (RT 1645); had been released on parole just a month prior to the Walnut Avenue shooting (RT 1646); and was a "hardened street gang" member (defense counsel's belated objection as "vague" was overruled on the ground that Avila had "adopted it"). (RT 1658.) The prosecutor then asked how many gunfights Avila had been in; when defense counsel's relevance objection was sustained, the prosecutor reformulated another objectionable question. (RT 1651-1652.) The trial court finally cut off the prosecutor with the observation, "we are getting off the point." (RT 1659.) Again, the prosecutor's blatant disregard of the court's ruling not only constituted misconduct (see *People v. Sawyer*, *supra*, 256 Cal.App.2d at 77), but demonstrated his intention to emphasize group violence to incite the jurors against Fuiava and the defense witnesses. None of the evidence concerning the past criminal acts of Avila and other Young Crowd members was

admissible, and its introduction served only to bolster by association the prosecutor's depiction of Fuiava as a dangerous career criminal.

Generally, "evidence of common gang membership is ... arguably of limited probative value while creating a significant danger of unnecessary prejudice." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 450.) Here, the prosecutor elicited wide-ranging details about alleged Young Crowd shootings, possession of weapons, and other criminal behavior that was unrelated to Fuiava and remote from any material issue.

Switching back to his "Smokey" theme, the prosecutor continued with questions that were irrelevant but designed to reinforce the notion that Fuiava was a chronic criminal. The prosecutor asked Avila, "You knew that Smokey had been to jail at least two other times for shooting at someone, right?" Avila answered that he did not know. (RT 1660.) The prosecutor then asked how many times "Smokey" had gone to jail, and Avila answered he did not know. (RT 1660.)

The prosecutor questioned Avila at length about Avila's habit of being armed while on the streets, and suggested that he had participated in a number of shoot-outs in the past. (RT 1638-1645.) Later, the prosecutor engaged Avila about his various incarcerations, and elicited evidence that he had been released from prison just thirty days before the Walnut Avenue shooting. (RT 1646-1647.) Avila revealed that he had been in prison for eleven months, having been arrested June 4 of 1994, but this was not admissible evidence. (See, e.g., Evid. Code, § 788.) The prosecutor's misconduct painted Avila as a dangerous person whose testimony should be disbelieved for that reason, and further smeared Fuiava by association.

Avila testified on direct examination that he had received "flashlight therapy" from the Vikings three or four times, and from Blair more than once. (RT 1597, 1602.) After the prosecutor elicited evidence that outside the presence of the jury that morning Avila had testified that Blair administered flashlight therapy on him, the prosecutor falsely "testified" that Avila had changed his testimony in front of the jury: "This morning you said it was one incident. This afternoon you said it was two." (RT 1648.) He then asked, "What changed." (RT 1648.) The court overruled defense counsel's objection that the question assumed a fact not in evidence (i.e. that Avila had testified to only one occasion in his morning testimony). (RT 1648.) When Avila said that he did not know what the prosecutor meant when he asked what changed, the prosecutor again falsely testified: "Well, this morning it was only one time. This afternoon in front of the jury it's more than once." (RT 1648.) He then asked, "What helped you remember the other times that Deputy Blair was supposed to have administered this flashlight therapy to you?" (RT 1648.) The court overruled defense counsel's objection that the question was argumentative. (RT 1648.) The prosecutor then further repeated his false testimony, and aggravated that misconduct with compound questioning: "Why did it change to [sic] once to more that once. Do you think it sounded better?" Avila responded, "No." (RT 1648.) The prosecutor continued his false testimony: "Then why did you change?" Avila protested, "I would have swore I said ... he gave me ... flashlight therapy a few times earlier." (RT 1649.) The prosecutor responded, "We have a transcript and we'll look at it later," implying that the transcript would back him up and expose Avila as a liar. (RT 1649.)

The prosecutor then accused Avila of having previously testified that the single incident of "flashlight therapy" occurred in June or July, and he was now testifying he was in jail at the time. (RT 1649-1651.) During this questioning the prosecutor sarcastically asked if Blair had come to the Lynwood Jail or Avenal Prison to administer "flashlight therapy" in Avila's cell. (RT 1650-1651.) Avila recalled that he had not given a specific date when Blair beat him because he was unsure of exactly when that had been. (RT 1649.) Later, the prosecutor lodged his accusation again: "You said that Blair gave you flashlight therapy in June or July, and we know it didn't happen then." (RT 1687.) Defense counsel objected as asked and answered, and the trial court sustained the objection. (RT 1687.)

In fact, the prosecutor's assertion that Avila had changed his testimony was smoke and mirrors: Avila simply had not testified at the hearing held outside the presence of the jury that morning in the manner that the prosecutor represented that he had. Avila's responses to the prosecutor's false accusations in front of the jury reflected his testimony at the morning hearing. At that hearing, Avila testified on direct that Blair administered flashlight therapy on him "a few times." (RT 1460.) On cross-examination, Avila said he had "three or four " contacts with Blair. (RT 1461.) The best time frame that Avila could give for those contacts was "around '93, '94." (RT 1461-1462.) When Avila said on cross-examination that Blair was one of the deputies who administered flashlight therapy, it was the prosecutor who transposed Avila's testimony to a single incident:

> Q. So is this the same incident where Blair flashed the gang sign ..., or is this a different incident?

A. No, a different incident.

Q. So when did this incident where Blair gave you flashlight therapy take place? When?

A. About '94.

Q. When in '94.

A. About June or July.

(RT 1466-1467.)

Thus, the prosecutor blatantly misstated the facts in front of the jury to improperly attack Avila as the dishonest one. If the prosecutor "checked the transcripts" on Avila's morning testimony as he had promised to, he would have discovered that he misrepresented the facts of Avila's morning testimony. (RT 1649.) The prosecutor, however, never advised either the court or the jury that he had been mistaken in his accusations about Avila's testimony. He either knowingly let his false representations remain in the jury's mind, or he made his editorial comment that he would check the transcripts just for effect. Either way, he falsely impugned Avila's credibility on a key issue in the case — Blair's violence, particularly directed at Avila. The harm thus was grievous. By going beyond the trial evidence, the prosecutor denied Fuiava his Sixth Amendment right to confrontation of the witnesses against him. (*People v. Bolton*, *supra*, 23 Cal.3d at p. 213.) The prosecutor magnified the constitutional harm by lying about the facts that were beyond the trial evidence. (See, e.g., *Mooney v. Holohan* (1935) 294 U.S. 103 [79 L.Ed. 791, 55 S.Ct. 340 [conviction based on evidence that the prosecution knew or should have known was false violates a defendant's right to due process]; *Miller v. Pate*

(1967) 386 U.S. 1, 6 [87 S.Ct. 785] [defendant denied due process where "[t]he prosecution deliberately misrepresented the truth" at trial].)

The record of the morning hearing also demonstrates that defense counsel's objection that the prosecutor's accusatory questioning assumed a fact not in evidence was well-taken, so that the trial court erred in overruling it. Even when the trial court sustained defense counsel's objections to the prosecutor's cross-examination of Avila, the trial court had to rebuke the prosecutor for continuing to ask improper questions. (See, e.g., RT 1650-1651.) The prosecutor capitalized on his misconduct in closing argument, emphasizing these "lies" of Avila that in fact the prosecutor had manufactured. (RT 2260-2261.)

A prosecutor's "vigorous" presentation of the facts favorable to his side "does not excuse either deliberate or mistaken misstatements of fact." (*People v. Purvis* (1963) 60 Cal.2d 323, 343.) "Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal." (*People v. Hill* (1998) 17 Cal.4th at 828, quoting 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Trial, § 2901, p. 3550.) That the misstatements were deliberate is demonstrated by their baldness, the prosecutor's failure to correct them after he made a show in front of the jury that the transcript of that hearing would prove him right, and the fact that these misstatements were not isolated. For example, the prosecutor also misrepresented Avila's testimony about where Fuiava was when the patrol car pulled up, which the court corrected. (RT 1637.)

This was not the end of the prosecutor's misconduct during the cross-examination of Avila. The prosecutor also asked Avila: "Did you tell Claretha Jackson [Avila's parole agent] that very day, May 12, 1994

[sic: 1995], you guys were talking about killing the first deputy that came down the street?" Avila responded, "No." (RT 1655.) The prosecutor then got Avila to agree that Jackson would be lying if she came to court and testified to that statement. (RT 1655.) It was misconduct for the prosecutor to ask Avila to comment on the truth or falsity of the testimony of another witness. As the Ninth Circuit has said in a case where it reversed for plain error due to similar questions by a prosecutor:

> These questions were improper because they compelled [defense witnesses] to offer opinions regarding the veracity of the government witnesses. *Sanchez,* 176 F.3d at 1220; *United States v. Richter,* 826 F.2d 206, 208 (2d Cir. 1987) (holding that a prosecutor is guilty of misconduct when the defendant is forced to testify that an FBI agent was either mistaken or lying); *United States v. Sullivan,* 85 F.3d 743, 749-50 (1st Cir. 1996) ("[C]ounsel should not ask one witness to comment on the veracity of the testimony of another witness"); *United States v. Boyd,* 54 F.3d 868, 871 (D.C. Cir. 1995) ("[i]t is therefore error for a prosecutor to induce a witness to testify that another witness, and in particular a government agent, has lied on the stand") (citation omitted). [¶] We have held that it is reversible error for a witness to testify over objection whether a previous witness was telling the truth. *United States v. Sanchez-Lima,* 161 F.3d 545, 548 (9th Cir. 1998).

(*United States v. Geston* (9th Cir. 2002) 299 F.3d 1130, 1136.)

The prosecutor quizzed Avila about Fuiava's criminal history, asserting that "Smokey had been to jail at least two other times for shooting at someone, right?" (RT 1660.) This led to an interchange where Avila responded, "I'm always in jail when he goes to jail." (RT 1660.) The prosecutor seized upon this answer, asking what Avila is "always in jail for?" Avila responded, "Tickets." (RT 1660.) The trial court asked for a

repetition of the answer when defense counsel lodged a relevance objection; instead of waiting for a ruling, the prosecutor continued: "They don't send you to prison for tickets, do they?" (RT 1660.) When Avila answered, "No," the prosecutor asked, "What did they send you to prison for?" When Avila answered "having possession of a firearm," the prosecutor said, "Is that a .45 on that occasion, too?" (RT 1661.) Avila answered "Yes," and the prosecutor commented, "That's your gun of choice, right?" (RT 1661.) Avila answered, "Yes." (RT 1661.)

Again, the prosecutor's manner of impeaching Avila here was improper. The prosecutor did not ask him if he had been convicted of a felony or a crime involving moral turpitude as permitted by Evidence Code section 788. Instead, he improperly asked Avila for details of instances of his conduct, including the fact he had been to prison and other times that he carried a gun. Such conduct is forbidden by Evidence Code section 787. The elicitation of all of these facts biased the jury against Fuiava and a key defense witness.

The following exchange occurred after the prosecutor asked Avila a long series of questions about where Blair was in relation to his door when he got out of the patrol car and pointed the gun at Avila: Prosecutor: "Deputy Blair knows you, right?"; Avila: "Yes, he does"; Prosecutor: "He has arrested you, right?"; Avila: "No, he hasn't." "He has administered flashlight therapy on you before, right?"; Avila: "Yes."; Prosecutor: "You are an armed felon, right?"; Avila: "Pardon me?"; "You are an armed felon, you are known to be armed all the time by your own admission?" (RT 1667.) Defense counsel objected to this last improper

questioning, and the court sustained it, finding the question irrelevant and assuming facts not in evidence. (RT 1667.)

These questions were not only improper but prejudicial, for they sought to label Avila as a criminal and, equally importantly, Fuiava as well. The prosecutor elicited as much inflammatory detail and suggestion of Avila's criminal past as he could. By testifying through his questioning to Avila's asserted involvement in acts of violence, the prosecution successfully circumvented the rules of evidence governing the proper method of impeachment and prohibiting character evidence, and deprived Fuiava of his right to confront the evidence against him.

The prosecutor also asked Avila: "By the way, your dad lied about where you were that night, didn't he?" Avila answered that his dad had been drunk. (RT 1701.) The prosecutor then asked: "Did he say you were in the shower?" Avila responded that he did not know what his father had said. (RT 1701.) The prosecutor here smuggled in hearsay evidence about Avila's father covering for him. This not only was misconduct, but deprived Fuiava again of his right to confrontation of the evidence guaranteed by the Sixth and Fourteenth Amendments. Moreover, what Avila's father said about Avila was irrelevant. The prosecutor here did not attempt to show, for example, that Avila had put his father up to lying for him.

The prosecutor also asked Avila whether a Young Crowd member would come to the aid of another member who was being harassed by deputies if that first member had been armed like Fuiava was that night. (RT 1714-1715.) Defense counsel's objection as calling for speculation was overruled by the trial court "based upon his understanding of gang

affiliations and associations," but it remained irrelevant even so. (RT 1714.) Avila responded that some will and some won't. (RT 1715.) The prosecutor asked whether that would be Avila's decision, and Avila responded, "No." (RT 1715.) The court intervened with the observation that what Avila's decision would be was irrelevant. (RT 1715.) The prosecutor nevertheless persisted in his misconduct:

> Q. By Mr. Richman: You wouldn't go to a cop, would you?
>
> A. No.
>
> Q. And based upon your experience with the sheriff's department and the Vikings and all this stuff, you're not going to actively throw yourself into a situation where you could get flashlight therapy and/or shot, are you?
>
> A. No.
>
> .....
>
> Q. You're not going to throw yourself into a situation where you can get flashlight therapy or worse, are you?
>
> A. No.

(RT 1715.)

A prosecutor violates ethical standards and Evidence Code section 765, subdivision (a) by using the examination process to disclose irrelevant but prejudicial facts or implying the existence of prejudicial facts that cannot be proved. (Cal. RPC 5-320; ABA Standard 3-5.7(a); ABA EC 7-25; ABA DR 6-106; NDAA-NPS 2d No. 77.1.) A prosecutor may not ask a question that implies a factual predicate which the prosecutor does not support with evidence. (ABA Standards 3-5.7(c), 3-5.7(d).) As this Court stated in *People v. Wagner* (1975) 13 Cal.3d 612, 619: "The rule is well

established that the prosecuting attorney may not interrogate witnesses solely for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers that might be given." As the trial court ruled, there was no relevance to these questions.

The court recognized that the prosecutor's questioning regarding what Avila would do if he were armed and his "homie" were being harassed by the police was irrelevant to whether Fuiava had come to Avila's aid — and his own — and shot in self-defense. The only purpose in eliciting evidence that Avila might not throw himself into a situation where he risked being beaten or shot by deputies was to make Fuiava look that much worse, suggesting that Fuiava shot simply to kill a deputy.

The prosecutor was consistently argumentative and inflammatory while cross-examining Avila, which also constitutes misconduct. (See, e.g., *Volkmor v. United States* (6th Cir. 1926) 13 F.2d 594, 595.) For example, he asked how it could be determined that Avila was not in the shower during the shooting. The trial court intervened, finding the question argumentative. (RT 1628.) While questioning Avila about why he did not simply take his children in the house when the patrol car pulled up to avoid drawing the officers' attention, the prosecutor implied that Avila was an unfit parent. (RT 1674-1675.) Shortly thereafter, characterizing Avila's testimony of how he ran when the bullets started flying by his head, the prosecutor suddenly said, "Are the little girls still there?" (RT 1676.) Avila responded that he had seen them jump in the car. (RT 1676.) The prosecutor repeatedly asked Avila if he saw them in the car, when the court said to the prosecutor: "Don't interrupt him [Avila] and keep your voice

down." (RT 1677.) The prosecutor continued to badger Avila about where his girls were and their safety as the shots were fired, suggesting that Avila disregarded the safety of the children. (RT 1677-1679.) Finally the trial court again had to intervene of its own accord, telling the prosecutor: "You are arguing with him [Avila]." (RT 1678.)

The prosecutor persisted in falsely suggesting that Avila's testimony had been that Fuiava was almost at Kito's house the last time Avila had seen him before the shooting, while Avila persisted in answering he had not said that. (RT 1696-1698.) Finally, defense counsel objected: "He has never said that. Counsel has asked that at least six times." (RT 1698.) The trial court sustained the objection, telling the prosecutor: "I think you are misstating the evidence." (RT 1698.) Indeed he was. Later, the prosecutor again misstated the same evidence and was admonished by the court: "I think that is a misstatement of the evidence. I think [Avila testified Fuiava] was in the direction of, not down at the house. That is the problem, Mr. Richman." (RT 1710.) Again, a prosecutor's "vigorous" presentation of the facts favorable to his side "does not excuse either deliberate or mistaken misstatements of fact." (*People v. Purvis*, *supra*, 60 Cal.2d 323, 343.)

Avila was "best friends" (RT 1700) with Fuiava and a central defense witness. The prosecutor's cross-examination of Avila created an atmosphere of prejudice and hostility toward him. The prosecutor's misconduct further fomented an atmosphere of prejudice toward Fuiava based on irrelevant evidence of his group affiliation. (See *Dawson v. Delaware* (1992) 503 U.S. 159.) In addition, the prosecutor's argumentative questioning throughout the proceedings — particularly with

the defense witnesses — contributed to a trial so infused with passion and prejudice that a fair trial was impossible.

3. Examination of Fuiava.

When Fuiava took the stand in his own defense, the prosecutor outdid himself in his efforts to bring about Fuiava's conviction through inflammatory evidence of his criminal past. The prosecutor's first question on cross-examination of Fuiava was an irrelevancy: the name of the victim in the shooting that occurred when he was a juvenile. The prosecutor asked, "Who's Christina Anthony?" (RT 1927.) When Fuiava responded that he did not know, the prosecutor retorted: "You shot her. You don't know who she is?" (RT 1927.) The prosecutor's misconduct here in testifying during his question caused Fuiava to respond: "You seen me shoot her?" (RT 1927.) The prosecutor then stated that Fuiava had confessed to shooting her, but Fuiava disputed the truth of that confession. (RT 1927.) There were then questions and answers whose purpose was to identify which of Fuiava's past incidents involved Christina Anthony, suggesting to the jury through this confusing exchange a number of incidents for which Fuiava was committed to custody, including to the Youth Authority for a probation violation. (RT 1927.) The prosecutor then assumed a number of facts not in evidence when he asked Fuiava if he remembered shooting Anthony in the jaw as he had confessed. (RT 1928.) Fuiava repeated that the confession did not mean he shot her. The prosecutor continued to press Fuiava as to why he shot Anthony, and the court overruled defense counsel's objection that the question had been "asked and answered." (RT 1929.)

When Fuiava explained that he did not shoot her, but pled to it because he was "like 13 years old" while the other suspects were 17 and 18 (RT 1929), the prosecutor seized on his age as an aggravating factor: "Were you 13 years old." (RT 1929.) When Fuiava confirmed that, the prosecutor continued: "So you were shooting people when you were 13 years old?" The court sustained an argumentative objection. (RT 1930.) Fuiava explained that the shooting was gang-related and he had simply been present at it. (RT 1931-1932.) The prosecutor's persistent questioning of Fuiava on the subject elicited an objection from defense counsel on the grounds that "we have been over this about four times." (RT 1930-1931.) In response, the court admonished the prosecutor with an understatement: "I think you have exhausted it." (RT 1931.)

The prosecutor further elicited from Fuiava evidence that he had gone to a juvenile camp for that shooting, been released, and then violated probation; the violation caused him to be committed to the Youth Authority. (RT 1932.) None of this evidence was relevant or otherwise admissible. This was not evidence tending to prove any of the crimes of which Fuiava was charged; instead, it was part and parcel of the prosecution's elaborate effort to paint Fuiava as a chronic offender. A prosecutor may not, "under the guise of 'artful cross-examination,' [] tell the jury the substance of inadmissible evidence." (*United States v. Hall* (4th Cir. 1993) 989 F.2d 711, 716; see also *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1221 [misconduct where the prosecutor elicited inadmissible evidence during cross-examination]; *Goldsmith v. Witkowski* (4th Cir. 1992) 981 F.2d 697, 704 [prosecutor prohibited from presenting evidence through the "back door"]; *United States v. Check* (2d Cir. 1978)

582 F.2d 668, 683 [prosecutor may not introduce inadmissible hearsay through "artful" cross-examination].)

The prosecutor also elicited from Fuiava evidence that he had been out of the Youth Authority for three or four months "before you shot at the guy that you admit shooting at." (RT 1932.) The prosecutor insisted: "You admit that one; right?" (RT 1932.) Fuiava assented that he "went back to jail for that." (RT 1932.) The prosecutor elicited evidence that Fuiava shot at the man because he had been "messing with [his] girl" and other irrelevant details of that offense. (RT 1933.) Fuiava ultimately testified that he drove by the man's house in Watts and shot three or four rounds in his direction as he headed up the walkway to his house. (RT 1933-1934.) Fuiava was committed to prison for four years for that shooting. (RT 1932-1934.)

The prosecutor further elicited that Fuiava thereafter had been out of prison four or five months "when you pled guilty to shooting this other lady."[24] (RT 1934.) Over defense counsel's objection, which the court overruled, Fuiava explained how he had again confessed to a shooting he had not committed, in which the victim was grazed by a bullet. (RT 1935.) After Fuiava explained that he "took the deal" after he was wrongly identified as a product of a suggestive identification, the prosecutor sarcastically commented: "You just have the darndest luck, don't you?" The court sustained an argumentative objection to that question and instructed the jury to disregard it. (RT 1936.) At defense counsel's request that the prosecutor be admonished, the court merely directed the prosecutor

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[24] Again, the prosecutor knew that Fuiava had pleaded no contest, rather than not guilty, in that case. (See CT 576-584.)

to "[k]eep it on an upward plane." (RT 1936.) This mild advisement proved ineffectual to stem the prosecutorial tide of misconduct.

After eliciting evidence that Fuiava had served his entire term on the Anthony shooting, the prosecutor asked if he had served his entire term on the other shooting. Defense counsel's objection of relevancy was initially sustained by the court; however, when the prosecutor argued it was relevant to the allegations of the prior convictions, the court reversed itself and overruled the objection. (RT 1937.) When the prosecutor then asked how much of Fuiava's 25-year life he had "spent in prison for shooting people," defense counsel objected as argumentative; the court disagreed, but sustained the objection on relevancy grounds. (RT 1937.)

Over further defense objections, the prosecutor emphasized yet again that Fuiava was on parole the day of the Blair shooting, and that the conditions of his parole prohibited him from being in the Young Crowd neighborhood and carrying firearms. (RT 1937-1938.) When the prosecutor asked, "Why were you there in the first place?," Fuiava responded, "What do you mean why?" The prosecutor retorted, "Which part don't you understand?" Defense counsel objected, and the court sustained the objection with the comment, "I think it is improper." (RT 1938.)

The court intervened and elicited evidence that Fuiava knew he was not supposed to be in the neighborhood. The prosecutor then asked: "If you weren't there, none of this would have happened, would it?" Defense counsel objected as Fuiava answered, "[Avila] would have been dead." (RT 1939.) The trial court admonished the prosecutor that his questions were argumentative and speculative. Nevertheless, the prosecutor

continued by asking, "If you did not have a gun there —." (RT 1939.) The trial court interrupted the question with its own objection that the question was argumentative. (RT 1939.)

Remaining undeterred, the prosecutor asked Fuiava where he got the gun he was carrying. Fuiava answered: "From a little youngster." (RT 1964.) In response to the question where Fuiava was taking the gun, he answered: "[B]ack down the street to the homeys .... [¶] Whoever was willing to pack it when I got down there." (RT 1964.) The prosecutor again relied on sarcasm and ridicule, asking Fuiava: "How does that work? I don't understand. [¶] Does someone say I want to carry the .44 tonight, and you go, here, it's your turn? [¶] Someone says, please, Smokey, can I carry the .44 tonight?" (RT 1964.)

Section 5.2 of the ABA Standards of Criminal Justice provides in relevant part in subsection (a): "The prosecutor should ... strict[ly] adhere [] to the rules of decorum and ... manifest[] an attitude of professional respect toward the judge, opposing counsel, witnesses, defendants, jurors and others in the courtroom." "Prosecutors who engage in rude or intemperate behavior ... greatly demean the office they hold and the People in whose name they serve." (*People v. Espinoza* (1992) 3 Cal. 4th 806, 820.) "A prosecutor is held to higher standards than imposed on other attorneys because he exercises the sovereign powers of the state." (*People v. Hill, supra*, 17 Cal.4th at 819.) Thus, it is misconduct for the prosecutor to demean a defendant by insult. (*Volkmor v. United States, supra,* 13 F.2d at p. 595.)

In the course of examining Fuiava about his jailhouse conversation with his mother, the prosecutor asserted: "I mean your Mom is now

grasping onto every one of your words, isn't she." (RT 1953.) The court sustained defense counsel's objection, finding the question "argumentative." (RT 1953.) The prosecutor nevertheless continued in the same vein and defense counsel objected; the court overruled the objection this time, but explained the distinction Fuiava was attempting to make to the prosecutor and implied the prosecution should move on. (RT 1953.) The prosecutor elicited an acknowledgment from Fuiava that he had told his mother that after Avila threw his weapon, "the police came to us." (RT 1952.) The prosecutor then editorialized: "Came to us as in Ernie and I, not just Ernie. Ernie and I." Counsel's objection as argumentative was overruled, requiring Fuiava to answer the prosecutor's editorialization. (RT 1953.)

Shortly thereafter, the prosecutor asked Fuiava what he meant when he told his mother in the jail conversation that it would have been "all over" if the officers had found the guns on Fuiava. Fuiava responded that he did not recall what he meant, but his meaning was "obvious." (RT 1954.) The prosecutor then stated: "Well, I think it is ... [but] what is it obvious of to you?" The court, recognizing the prosecutor's misconduct, admonished the jury to disregard the prosecutor's comment that he found the meaning of "it's all over" obvious. (RT 1954.) Fuiava explained that "it's all over" meant that the deputies would kill him, because that was all the excuse they needed to "blast" him. As the examination continued, the court was compelled to admonish the prosecutor to keep his voice down. (RT 1954.)

The court overruled objections when the prosecutor testified — again, not even in the form of a question — "That's what you told your Mom, 'If they found [the guns], it's all over." (RT 1955.) The court did so

though the "question" was obviously argumentative and, as counsel noted, "that's the third time" the prosecutor had sought to bring out that evidence. (RT 1955.)

The prosecutor then sought to elicit evidence that Fuiava thought he was a third striker at the time of the confrontation and would go back to jail for the rest of his life — though Fuiava in fact was not a third striker. (RT 1956.) Fuiava said he did not think he was a third striker, and the prosecutor said, "you had been to prison twice, right?" (RT 1956.) Several questions later the prosecutor asked, "You shot at two people, right?" The trial court sua sponte admonished the prosecutor that he was misstating the evidence, which was that Fuiava had been convicted of such. (RT 1956.) Continuing his badgering of Fuiava, the prosecutor asked another series of questions leading up to, "You didn't want the cops to find the guns, did you?" Trial counsel objected, "that's the fifth time he's asked that." (RT 1959.) The trial court sustained the objection, noting that the prosecutor had already "gone over it." (RT 1959.)

This Court has long recognized the tremendous potential for prejudice from other crimes evidence, so that such evidence may be received only with great caution and after careful scrutiny. (*People v. Banks* (1970) 2 Cal.3d 127, 137; *People v. Thompson*, *supra,* 27 Cal.3d 303.) The natural and inevitable tendency of the jury is to give excessive weight to prior crimes evidence and either allow it to bear too strongly on the present charge or take its proof as justifying condemnation irrespective of the guilt of the present charge. (*People v. Guerrero* (1976) 16 Cal.3d 719, 724; see also *McKinney v. Rees, supra,* 993 F.2d 1378.) The courts in general recognize that a guilty verdict inevitably will be tainted by a jury's

wrongful exposure to evidence that the defendant has previously been imprisoned. (See, e.g., *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342 [reversal required where defendant called an "ex-con"]; *People v. Figuierado* (1955) 130 Cal.App.2d 498, 505-506 [reversal required where witness stated defendant "did time" in San Quentin].) Furthermore, admonitions regarding such evidence are generally ineffectual. (See, e.g., *People v. Ozuna*, *supra*, 213 Cal.App.2d at p. 342 ["we cannot say that the admonition [to disregard the evidence] probably accomplished that purpose"].)

Although the trial court had found that evidence of Fuiava's prior felony convictions and prior prison incarcerations for assault with a firearm was admissible for limited purposes, the repetitive and derisive fashion in which the prosecutor brought forth this evidence and hammered the jury with it was improper, inflammatory, and deprived Fuiava of a fair trial. The prosecutor went well beyond permissible limits in order to prejudice the jury against Fuiava. The prosecutor was also consistently rude, sarcastic, argumentative, and demeaning in questioning that baited Fuiava, all of which was misconduct. (See, e.g., *Volkmor v. United States*, *supra*, 13 F.2d at p. 595; see also *Boyle v. Million* (6th Cir. 2000) 201 F.3d 711, 717 [badgering, interrupting, and name-calling constitute "deplorable" misconduct].) For example, in introducing the evidence of the translation of the jailhouse recording of Fuiava talking to his mother and sister, the prosecutor had that translation read into evidence and portrayed Fuiava in the reading of it. At one point in that reading, defense counsel objected to the prosecutor's dramatic interpretation of that reading. (RT 1501.) The court admonished the prosecutor: "I think it is best that you not read with

inflection. Just read without inflection." (RT 1501.) (Cf. *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 712 -713 [misconduct for prosecutor to impersonate the victim during closing argument because "[b]y doing so, the Prosecutor inappropriately obscured the fact that his role is to vindicate the public's interest in punishing crime ... [and] ... the prosecutor also risked improperly inflaming the passions of the jury"].)

By spreading and re-spreading this evidence as he did, the prosecutor created a portrait of Fuiava as an armed and dangerous assassin since the age of 13, who had failed numerous opportunities for reform through various incarcerations dating back to juvenile commitments. The prosecutor's purpose, made plain later in his closing argument, was to mislead the jury into concluding that it was Fuiava's lifelong habit to roam the streets armed and coldly shoot people. In short, the manner in which the prosecutor introduced and dwelled on this evidence was improper and constituted a transparent attempt to obtain a verdict through character assassination. Due process is violated where the record strongly suggests that the contested evidence was intended to prejudice the defendant rather than address its proffered purpose. (*Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 972.)

4. Examination of Lyons.

The prosecutor elicited from Lyons the fact that the uniform he was then wearing was the same one he had worn the night of the Walnut Avenue shooting. (RT 497-498.) The prosecutor drew the jury's attention to the fact that it was still stained with Blair's blood. (RT 497; see also CT 842 [Lyons never had removed from his uniform the stain from Blair's blood].) Lyons testified that he wore the blood-stained uniform in homage

to Blair. (RT 497-498.) Lyons concluded this evidence by breaking down in tears. (RT 497-498.)

As one court critiqued introduction of evidence of photographs that "showed the victim's blood": "Blood was not relevant to any issue in the case. The only conceivable reason for placing [the photographs of the blood] in evidence was to inflame the jury against [the defendant]." (*Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548.) Here, too, the ploy of having Lyons wear the uniform stained with Blair's blood was purely to infuse the testimony with an emotional wallop.

In closing argument the prosecutor capitalized on the passion wrung from this evidence, harkening back to it as follows: "Deputy Lyons ... got on the witness stand and he recalled the events as best he could. He stood up here and he bared his soul to you. There was no holding back. [¶] Do you think he wanted to cry up here? Do you think it made him feel good in front of his fellow co-workers?" (RT 2257.) Yet, introduction of victim impact evidence is improper at the guilt phase. (*People v. Gurule* (2000) 28 Cal.4th 557.)

During redirect of Lyons, the prosecutor educed the evidence that Lyons employed his training as best he could at the time Blair was shot, that no amount of training could prepare Lyons for what happened at that time, and that Lyons hoped he never had to go through such an experience again. (RT 588.) Defense counsel's objection that the first question was leading was overruled. (RT 601-602.) The court sustained defense counsel's relevance objection when the prosecutor ended this round with the question whether Lyons thought that incident affected his ability to be a deputy sheriff. (RT 588.)

This evidence was introduced to evoke sympathy for Blair and Lyons, and to inflame the jury against Fuiava. It is misconduct for the prosecutor to appeal to passion, prejudice, and sympathy for the victims. (*People v. Rodgers* (1979) 90 Cal.App.3d 358, 371.) "A prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. [Citations.] If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement. [Citation.]" (*People v. Warren* (1988) 45 Cal.3d 471, 481-482.) In *People v. Blackington* (1985) 167 Cal.App.3d 1216, 1222, that court noted that such conduct is also inconsistent with standards of professional responsibility established for the legal profession based on Rule 3.4(e) of the American Bar Association Model Rules of Professional Conduct, which provided that a lawyer shall not allude to any matter that will not be supported by admissible evidence. Here, the prosecutor, obviously in cahoots with Lyons, purposefully brought forth the bloody uniform evidence to charge the jury with emotion. He then argued Lyons's tears in closing to the jury, reminding it of Lyons's vulnerability soon before it went out to deliberate. The prosecutor further played the sympathy card by suggesting without evidence that Lyons was mortified by having cried in front of the jurors and his fellow deputies.

This misconduct likely had a strong impact on the jurors adverse to Fuiava, since Lyons was the prosecution's lead witness. They were met by the sight of Lyons, provoked to tears by the prosecutor, dramatically wearing the uniform bloodied by Blair in homage to him. They were urged to recall Lyons's anguish in believing at the time Blair could be saved, and it was suggested that Lyons suffered feelings of guilt for not saving Blair.

They heard how much Blair's loss meant to Lyons. Finally, the prosecutor insinuated that the experience had left Lyons incapable of doing his job as a police officer. The prosecutor emphasized all of this material laden with emotion in his argument to the jury. Elicitation and exploitation of this victim impact evidence at the guilt phase pandered to emotion and deprived Fuiava of a fair trial.

The prosecutor persisted in being argumentative, sarcastic, raising his voice, and making gratuitous and improper comments. During his redirect of Lyons, the prosecutor said: "You don't need detectives or a degree in rocket science to show that [Blair did not shoot the first set of rounds], do you?" (RT 603-604.) Defense counsel lodged an argumentative objection, which the trial court sustained. In fact, there was ample evidence from witnesses at trial — including some from Lyons — that Blair had fired first, such that the *prosecutor* found it necessary to call a ballistics expert to attempt to undercut some of that evidence. (See Argument VIII, Section C.) The prosecutor's sarcastic insinuation that the central issue in dispute could be simply decided was contrary to his own presentation and part of his pattern to mislead the jury.

Then in questioning Avila, the prosecutor more than once asserted that Fuiava was "taking cover" — the implication being so that he could better take aim and fire at Blair — behind the tree near Avila. The prosecutor made this assertion even after admonishment from the court that such phrasing was conclusory and beyond the evidence. (RT 450, 466, 502.) Then, during his examination of Lyons, the prosecutor asked whether Lyons knew where his "assailant" was, which assumed the fact that Lyons was being assaulted. (RT 468.) In addition, of course, there were all the

other ways already described in which the prosecutor sought to lead the jury away from the trial evidence in favor of the evidence he created to persuade the jury.

The prosecutor's misconduct here denied Fuiava his right to confront the evidence against him guaranteed him by the Sixth and Fourteenth Amendments to the United States Constitution. As this Court has observed, prosecutorial argument "'which goes beyond the evidence admitted may be violative of the Sixth Amendment which provides that every accused has the right to be confronted by the witnesses against him.' [Citation omitted.]" (*People v. Bolton, supra,* 23 Cal.3d at p. 213; see also *People v. Johnson* (1981) 121 Cal.App.3d 94, 104 [where a prosecutor serves as his own unsworn witness through argument, violation of a defendant's Sixth Amendment rights occurs].)

5. Examination of Nieves.

Jose Nieves testified for the defense about the pickup truck dummied up to look like a sheriff's vehicle. (RT 1798-1810.) He stated on direct that the vehicle was a shell without an engine, and that some of his Young Crowd friends had decorated it as a mock patrol car. (RT 1801.) They made holes in it with a pick axe, not with bullets. (RT 1801.) Nieves's home was raided when the deputies discovered the truck; though the deputies found some guns there, none of them was an AK47, rifle, or a shotgun. (RT 1801-1802.)

The prosecutor challenged Nieves's testimony that no AK-47 was found in his house with extended cross-examination on the point. (RT 1808-1809.) The prosecutor's insistent, repetitive challenge of Nieves's denial that the deputies recovered an AK 47 from his house baldly

insinuated to the jury that there was such a recovery. This insinuation demonstrably was false and in bad faith, for the prosecutor never presented any evidence that an AK 47 was found there, and must have known that no such gun was found there. A prosecutor commits misconduct by asking questions which "'impl[y] the existence of facts which the People... had no reason to believe could be proved,'" even when the questions elicit a negative response. (*People v. Blackington*, *supra*, 167 Cal.App.3d at 1221, citing *People v. LoCigno* (1961) 193 Cal.App.2d 360, 388, approved in *People v. Perez* (1962) 58 Cal.2d 229, disapproved on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 32; see also *People v. Wagner* (1975) 13 Cal.3d 612, 619.) "By their very nature the questions suggest[] to the jurors that the prosecutor ha[s] a source of information unknown to them which corroborate[s] the truth of the matters in question." (*People v. Wagner, supra,* 13 Cal.3d at 619; see also *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, 968-975 [court reversed where the prosecutor falsely implied evidence that the defendant's alibi was concocted]; *United States v. Sanchez, supra,* 176 F.3d at p. 1223 ["No attempt was made by the prosecutor to show that he acted in good faith because he had witnesses available to prove the facts insinuated in the question."].)

This misconduct prejudiced Fuiava in a variety of ways. First, it undercut Nieves' credibility. Second, it deflated the defense showing that a reckless briefing had whipped up Blair and contributed to his readiness to shoot. Third, it deflected the defense effort to show that the Young Crowd was not the deadly threat to the deputies that the prosecutor claimed. Fourth, it reinforced the general credibility of the deputies. Fifth and

finally, it added to the prosecutor's misleading tactic of painting Fuiava as guilty by association with the Young Crowd and the mock patrol car.

6. Examination of Brooks and Frausto.

The prosecutor questioned Brooks about the fact that she originally failed to tell the police what she knew about the Blair shooting, but then finally talked to them "truthfully" in June. (RT 1329.) Brooks responded "No" to the prosecutor's question whether she would have volunteered the information she gave in June had the police not called her. Defense counsel objected, the court sustained the objection and said "disregard." Defense counsel moved to strike, but the court did not respond. (RT 1330.) The prosecutor then said, "When they [the police] called you, if I understand your testimony — correct me if I am wrong — you went down to sheriff's homicide, you brought your lawyer with you?" Brooks: "Yes, I did." Prosecutor: "Because you wanted to make sure that everything was legal that was going on?" Defense counsel objected, the trial court sustained the objection and directed the jury to disregard the answer. (RT 1330-1331.)

A prosecutor may not vouch for the credibility of his witnesses or insert his opinions or beliefs in argument; instead he may argue only what the evidence shows or implies. (*People v. Bain* (1971) 5 Cal.3d 839, 848-849; *United States v. Morris* (5th Cir. 1978) 568 F.2d 396, 401.) Here, by characterizing Brooks' statement in June as "truthful" and commenting on the fact she brought her attorney with her "to make everything legal," the prosecutor improperly bolstered Brooks's testimony. Furthermore, by stating that Brooks's purpose was to be "legal," the prosecutor neatly swept from jury view the coercion law enforcement exerted upon her to implicate Fuiava in order to avoid her own prosecution as an accessory to a crime.

On cross-examination by the defense, Brooks testified that she had overheard Fuiava talking about staying at the Border Brothers' house after the shooting and that he had said that he "wasn't going to jail for no ... bullshit." (RT 1306.) Fuiava did not explain further what the "bullshit" was. (RT 1306.) On re-direct, the questioning on this point went as follows:

> Q. By Mr. Richman: Now, I am trying to understand this statement to the effect of "I'm not going down because of this bullshit." What was the defendant's statement in that regard?
>
> A. He said that he wasn't going to jail for any bullshit, meaning that —
>
> Mr. Hauser: Objection.
>
> The Court: Overruled, he can explore it.
>
> Mr. Hauser: Speculation.
>
> The Court: What did she understand?
>
> Q. By Mr. Richman: What did he say concerning what the bullshit was?
>
> A. Shooting police, them coming around and asking him to show his hands and feeling the way he did, that he felt that shooting the police was just bullshit.
>
> Mr. Hauser: Objection, move to strike, speculation.
>
> The Court: Overruled, her understanding.
>
> Q. By Mr. Richman: That is what he said?
>
> A. No, that's what I took what he said as.
>
> Q. But did he say that he wasn't going back to jail for the rest of his life because of three strikes?
>
> A. Yes.

Q. Did he say that because that because [sic] the reason why he shot the deputy?

Mr. Hauser: Objection, leading.

The Court: Overruled.

Mr. Hauser: It's been gone over and non — it's beyond the scope.

The Court: Overruled.

The Witness: He said that because he had two strikes already and he had two guns on him and that would lead to a third strike which would have him going to jail for the rest of his life.

Q. He wasn't going to jail for that bullshit?

A. Yes.

Q. Did he talk about ... weighing the two alternatives?

A. Basically it wasn't — it was just that he wasn't going to jail.

(RT 1332-1334.)

Here, the prosecutor continued his tactic of dwelling on and repeating inflammatory remarks attributed to Fuiava for its effect upon the jury, as evidenced by the number of times "bullshit" was invoked in this exchange. Worse, 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. Thus, exonerating evidence became incriminating evidence through the prosecutor's deceptive mixing of the evidence.

Shortly thereafter, over objection, the prosecutor elicited from Brooks evidence that in the days before the Blair shooting she had heard — in the prosecutor's words — "the Young Crowd gang members ... talking about their fellow gang member who got shot." (RT 1334.) The prosecutor then asked, "What do you hear in [sic] these gang members talking about?" The court sustained defense counsel objection to the prosecutor's "over-emphasizing" the gang aspect in his questioning, stating: "Yes. I agree with that. I think it is argument the way you have asked it. You can ask it — " (RT 1334.) The prosecutor interrupted the court's ruling with yet another improper question to the witness. (RT 1334-1335.) The court sustained counsel's hearsay objection to that question. (RT 1335.) The prosecutor nevertheless persisted in his questions about the content of that conversation, suggesting that they "talk[ed] about getting revenge on the sheriff's department." Brooks demurred to that suggestion of the prosecutor as well as another one the prosecutor offered, finally testifying that all she remembered was a reference to the fact that one of their group had been shot. (RT 1335.)

The prosecutor's lacing of his questions with comments like "these gang members" was a transparent part of the prosecutor's scheme to inflame the jury that remained undeterred by both defense counsel's and the court's efforts to control. Not only was that scheme improper (see, e.g., *People v. Rodgers*, *supra,* 90 Cal.App.3d at 371; *People v. Warren*, *supra*, 45 Cal.3d at 481-482), but the prosecutor aggravated his misconduct by persist in asking questions to which defense objections were sustained. (See, e.g., *People v. Sawyer*, *supra*, 256 Cal.App.2d at 77.)

The prosecutor elicited further hearsay from Sara Frausto, asking if she heard anyone say anything concerning the shooting of Blair as it was taking place. (RT 1105.) When Frausto answered "yes," the prosecutor asked, "Who said something?" (RT 1105.) As Frausto answered, "Doug was telling Nancy Freddie did it[]," defense counsel objected as hearsay and moved to strike. The court sustained the objection and admonished the jury to disregard the answer. (RT 1105.) The prosecutor argued outside of the jury's presence that Doug's statement was admissible as an excited utterance for which he would like to lay the foundation, or as a statement made not for the truth of the matter "but to explain [Frausto's] subsequent conduct when confronting the defendant." (RT 1106.) The trial court ruled against the prosecutor. (RT 1106.)

Back before the jury, the prosecutor nevertheless immediately reminded the jury of the stricken answer by referencing "the statement ... made by Doug" in his next question. (RT 1107.) Though unable to establish a foundation for admission of the evidence as an excited utterance when Frausto testified that Doug was calm and whispered when he made the statement (RT 1108), the prosecutor persisted in referencing the statement, eliciting evidence that Frausto's fear of Fuiava and Young Crowd caused her to keep that statement to herself when she spoke with the deputies. (RT 1112-1113.) The prosecutor sought at length to obtain elaboration from Frausto about her fear. (RT 1113-1115.) Finally, the trial court intervened, telling the prosecutor "that is an unfair question at this point." (RT 1115.) The prosecutor returned to the stricken evidence of Bristol's statement, eliciting Frausto's testimony that she had told Brooks what she had heard Bristol say. (RT 1117.) Again, it was misconduct for

the prosecutor to continue to ask the same questions to which the trial court has just sustained an objection and to remind the jury of the stricken answer. (See *People v. Sawyer, supra,* 256 Cal.App.2d 66 at 77.)

The trial court then overruled defense counsel's hearsay objection to the prosecutor's renewed question, "What did Doug say?" The court advised the jury that the evidence of Bristol's statement was not being offered for its truth, but to explain Frausto's state of mind when she thereafter spoke to Fuiava. (RT 1123.) The prosecutor made certain that the evidence that Bristol said Fuiava "did it" was impressed upon the jury by repeating that evidence in a variety of ways. (See RT 1156.) Although there was no question at trial that Fuiava shot Blair, the prosecutor's mantric repetition of the statement that Fuiava "did it" carried an aura of criminal liability and undermined the defense of self-defense. The prosecutor's extensive efforts to place this evidence before the jury indicate the importance the prosecutor attached to them, and his emphasis and repetition of the evidence must have made it impossible for the jury to cabin it within the limited purpose for which it was received.

7. Examination of Bristol.

The court again had to intervene during the prosecutor's cross-examination of defense witness Doug Bristol, who provided evidence that Blair fired first. The prosecutor asked: "You saw his [Blair's] fingers extended, right? [¶] To grip a gun, you can't extend the fingers, right? [¶] I am just asking you what you saw?" Bristol: "Yes." Prosecutor: "All right, I have a right to ask questions, too, do you understand that?" Bristol: "I am answering it." (RT 1756.) At this point the court interjected: "He is answering it. Ask your next question." (RT 1756.) Shortly thereafter the

prosecutor was not getting the answers he wanted, and defense counsel objected that the prosecutor was testifying. (RT 1757.) The court commented: "Let's slow it down. Tone it down." (RT 1757.) The prosecutor continued with his questions and still was not getting the answers he wanted, when the court again intervened and said to the prosecutor: "He [Bristol] is correcting it...." (RT 1757-1760.) After that the prosecutor accused Bristol of previously demonstrating that Blair turned to his left, when Bristol was now saying Blair turned to his right. (RT 1760.) Defense counsel objected, Bristol denied saying that, and the trial court observed that the prosecutor was misstating the testimony, the witness was explaining himself, and to leave it at that. (RT 1761.) The prosecutor protested, generating a stern, "Mr. Richman, no. Don't pursue this point any further." (RT 1761.)

8. Examination of Jackson.

The prosecutor examined Claretha Jackson, Avila's parole agent, who testified about the conversation that Avila and other Young Crowd members had earlier the day of the shooting. (RT 1817.) Jackson testified in pertinent part: "He told me ...they were talking about how the sheriff had been harassing them and that they had a lawsuit against them because of the Viking gang. [] ... He said it was just talk ... — they was [sic] going to shoot one of them or do something or blast one of them or do something to that effect. He said it was all just talk ...." (RT 1817.) The following exchange then occurred where the prosecutor hammered in this evidence:

> [Prosecutor]: And he told that they were talking about killing a deputy?

[Jackson]: Yeah, because of harassment.

[Prosecutor]: The day of the shooting before the shooting happened, they are at Kito's house talking about killing a deputy?

[Jackson]: Yes, he did say that to me.

[Prosecutor]: And you have no doubt about that.

[Jackson]: No doubt whatsoever.

The prosecutor here committed misconduct in leading the witness to repeat and translate her testimony into words the prosecutor chose, grossly distorting it in the process. This manipulation of the evidence obviously served to create a dramatic backdrop to the shooting that played into the prosecutor's tactic to obtain a verdict of guilt by association.

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

Outside the presence of the jury on July 11, 1996, defense counsel made an offer of proof of testimony Avila would give in Fuiava's defense pertaining both to the Vikings and what happened when Blair was shot. (See RT 626 et seq.) At the time of this offer of proof Avila was in custody on a parole violation and had not been charged with any crime arising out of the Walnut Avenue confrontation. (RT 634.) After the offer of proof was made, the prosecutor "was compelled" to raise a side issue about Avila: Avila's testimony would incriminate him in a third strike offense with a 25-to-life penalty. (RT 632-633.) Defense counsel interjected that Avila was not a third strike candidate, but the prosecutor repeated that he was. (RT 633.) The offense in which Avila would ostensibly incriminate himself was ex-felon in possession of a firearm. (See § 12021, subd. (a).) Though the prosecution had long had Lyons's eyewitness testimony and the

gun in question to prosecute Avila for that crime, the prosecutor raised the club of prosecution only when it appeared that Avila would appear as a defense witness.

Notably, the prosecutor had tried to secure a statement from Avila at the jail, but Avila indicated to the investigator that he would let his lawyer (meaning Fuiava's lawyer) speak for him. (RT 633.) The prosecutor and the court agreed that defense counsel did not represent Avila's interests (RT 633), and the prosecutor asserted that any lawyer for Avila would advise him to exercise his right not to incriminate himself. (RT 633-634.) Defense counsel then said that he had advised Avila of his constitutional rights and his possible exposure to additional charges should he testify, and Avila had advised defense counsel he did want independent counsel. (RT 634-635.) Shortly thereafter Avila was brought into court, advised of his right against self-incrimination and his right to independent counsel by the trial court, and Avila accepted the appointment of his own counsel. (RT 636-638.)

"A defendant's constitutional right to compulsory process is violated when the government interferes with the exercise of his right to present witnesses on his own behalf." (*In re Martin, supra,* 44 Cal.3d at p. 30, and authorities cited there; see also *United States v. Golding* (4th Cir. 1999) 168 F.3d 700, 703.) Such "prosecutorial misconduct ... include[s] ... statements to defense witnesses to the effect that they would be prosecuted for any crimes they reveal ... in the course of their testimony. (*Ibid.*) The prosecutor's "warning" that Avila's testimony could incriminate him in a third strike plainly was designed to prevent Avila from testifying. For fourteen months the prosecutor had compelling evidence at hand with

which to charge Avila for the ostensible "third strike" of being an ex-felon in possession of a firearm, had the prosecutor wished to do so. It was only the prospect that Avila would testify in Fuiava's defense as a key witness to the shooting, Blair's previous unlawful use of force against Avila, and the intimidation that the Vikings used to police the neighborhood that prompted the prosecutor to raise the specter of prosecution of Avila.

Though Avila eventually testified, this misconduct demonstrates that the prosecutor was intent on obtaining a conviction in this case regardless of Fuiava's constitutional rights, including his right to a fair trial. Moreover, the specter of prosecution surely chilled Avila and shaded his testimony to curry favor with the prosecution, thereby affecting both the composition of the record and the jury's evaluation of his crucial testimony. This Court's statement in a case where a prosecutor from the same district attorney's office as here also wrongly threatened a key defense witness with prosecution applies directly to Fuiava's case:

> [A]lthough Berry found the courage to testify for defendant, risking a threatened perjury prosecution, it is possible the added stress engendered by [the prosecutor] threat of prosecution affected Berry's emotional state and his demeanor on the stand, evidencing a hesitancy that [the prosecutor] exploited in closing argument. This, then, comprises just one more example of [the prosecutor's] misconduct during defendant's trial.

(*People v. Hill, supra,* 17 Cal.4th at p. 835.)

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

"A prosecutor's closing argument is an especially critical period of trial. (*People v. Alverson* (1964) 60 Cal.2d 803, 805.) Since it comes from an official representative of the People, it carries great weight and must

therefore be reasonably objective. [Citation.]" (*People v. Pitts, supra,* 223 Cal.App.3d at p. 694.) The prosecutor's argument was the antithesis of reasonable and objective.

Here, defense counsel was particularly excused from lodging repeated objections to the persistent misconduct of the prosecutor in closing argument. Both this Court and the United States Supreme Court have noted that objections during the argument of opposing counsel are extremely problematical. "[I]nterruptions of arguments, either by an opposing counsel or the presiding judge, are matters to be approached cautiously." (*United States v. Young* (1985) 470 U.S. 1, 13 [105 S.Ct. 1038, 84 L.Ed.2d 1].) Such interruptions by a party may be perceived as a tactic designed to disrupt the opposing party's train of thought and therefore "involve the risk of antagonizing the jurors." (*People v. Bain, supra,* 5 Cal.3d at 849, fn. 1; see also *People v. Arias* (1994) 13 Cal.4th 92, 159 ["repeated objections to argument are tactically unwise"].) Thus, this Court has found that a defendant must request a curative admonition to misconduct in argument only "if practicable." (*People v. Hill, supra,* at p. 820, citing *People v. Noguera* (1992) 4 Cal.4th 599, 638.)

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

During his rebuttal argument, the prosecutor summed up the basic dispute between the two sides as follows: "Either Deputy Blair fired on an unarmed gang member because he is a Viking or it didn't happen, which is obviously what the People's version of the case is." (RT 2249.) The prosecutor then continued: "Now, it doesn't mean the men and the women that are in court today and out there on the street protecting the lives of the

people in Lynwood, if I am worthy enough — I actually asked permission before doing this — I am going to become a Viking. [¶] You see what this is? It's just a pin." (RT 2250.) At this point defense counsel objected, but the prosecutor continued: "A triangle and a Viking." (RT 2250.) The court called counsel to sidebar and asked the prosecutor to show the court the item. The prosecutor responded: "Just a pin. They [the deputies in the courtroom] are all wearing it on the uniform. It is a symbol of the station." (RT 2250.) Defense counsel argued that there had been no testimony on it, and the prosecutor responded that he could wear it nonetheless. The court iterated that the prosecutor could wear the pin but could not testify as to its significance. (RT 2251.)

The prosecutor's misconduct here was particularly outrageous, for he not only testified to facts not in evidence but effectively used the pin to vouch for the Vikings. In light of the court's exclusion of evidence concerning Viking misconduct and the resulting civil rights lawsuit, defense counsel in closing argument perforce relied largely on the evidence that Blair was a Viking to explain why he had shot at Avila and then Fuiava. (See Argument II, Section D.1, quoting passages of the defense closing from RT 2193-2196 and 2236.) As the prosecutor himself acknowledged elsewhere in his argument, the defense's best evidence that Blair had shot wrongfully was "this Viking stuff." (RT 2260.) Indeed, in the prosecutor's introduction to the display of the Viking pin, he asserted that the defense case stood or fell on the Viking evidence. The prosecutor's theatrics in donning the pin in front of the jury thus dramatically touched not only "a live nerve" of the defense case, but struck at the heart of that defense. (See *People v. Modesto* (1967) 66 Cal.2d 695, 714 [prosecutorial

misconduct in closing argument prejudicial where it either "serve[s] to fill an evidentiary gap in the prosecution's case" or "touch[es] a live nerve in the defense"].)

A prosecutor may not vouch for the credibility of his witnesses or insert his opinions or beliefs in argument; instead he may argue only what the evidence shows or implies. (*People v. Bain*, *supra,* 5 Cal.3d at pp. 848-849; *United States v. Morris*, *supra,* 568 F.2d at p. 401.) It is misconduct for the prosecutor's argument to amount to unsworn testimony or vouching for his case. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1224-1225.) Such argument is also tantamount to the prosecutor testifying as a witness, not subject to cross-examination, in violation of a defendant's right under the Sixth and Fourteenth Amendments to confrontation of the evidence against him. (See *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 722.)

By personally becoming a Viking if "worthy" enough, the prosecutor undermined the defense's evidence that the Vikings were an outlaw mob of deputies and smuggled in evidence that ennobled the Vikings by lending the prestige of his office to them. As the representative of the state, he sent a clear but false message that the Vikings were a group of the highest integrity and character. In fact, by rhetorically wondering if he were worthy enough to wear the pin, the prosecutor elevated the Vikings above the prestige of his own high station. But a prosecutor may not take advantage of the prestige of his office "to express a personal belief in the merits of a case, rather than a belief based upon the evidence at trial." (*People v. Johnson*, *supra*, 121 Cal.App.3d at p. 102, citing *People v. Bain* (1971) 5 Cal.3d 839, 848; see also *People v. Alverson* (1964) 60 Cal.2d 803, 808; *People v. Kirkes* (1952) 39 Cal.2d 719, 723.)

A prosecutor may not invite the jury to convict a defendant on the basis of facts outside the record. (*United States v. Meeker* (7th Cir 1977) 558 F.2d 387, 390.) As set forth in *People v. Johnson, supra,* 121 Cal.App.3d at p. 102, quoting Witkin, Cal. Criminal Procedure (1963) § 450, pp. 453-454:

> Statements of supposed facts not in evidence, either because never offered, or offered and excluded or stricken, or admitted for a limited purpose outside the scope of the comment, are a highly prejudicial form of misconduct, and a frequent basis for reversal. The effect of such remarks is to lead the jury to believe that the district attorney, a sworn officer of the court, has information which the defendant insists on withholding; or that they may consider matters which could not properly be introduced in evidence. [Citations.]

The prosecutor's improper vouching here was especially powerful, for it was backed by the vouching of the spectator deputies, who all were similarly sporting the same Viking pin in alliance with the prosecutor and their fallen comrade. The prosecutor's open embrace of this united front against Fuiava added exponentially to the egregiousness of the prosecutor's misconduct. As stated in *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 necessarily deprived the defendant of the rights to an impartial jury and fair trial that the Sixth and Fourteenth Amendments guaranteed him:

> The officers in this case were there for one reason: they hoped to show solidarity with the killed correctional officer. In part, it appears that they wanted to communicate a message to the jury. The message of the officers is clear in light of the extensive pretrial

> publicity. The officers wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message.

The prosecutor ensured that the jury could not help but receive the same message from the gallery of uniformed officers at Fuiava's trial. He did so by explicitly drawing the jury's attention to them, as they sat there all displaying the same Viking pin that he was. (See also *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828, 829 ["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"].) As the Ninth Circuit there explained:

> Because the buttons, which were donned before any evidence was introduced, conveyed an implied message encouraging the jury to find Norris guilty, and because the buttons were not subject to the constitutional safeguards of confrontation and cross-examination, they are clearly the sort of "impermissible factors" that courts must ensure receive no weight. Thus, we must decide whether the risk that the buttons did "come into play" was an unacceptable one. To decide whether that risk was unacceptable we specifically look at the relationship of exposure to the buttons to two facets of the right to a fair trial: the presumption of innocence and the right of confrontation and cross-examination.

(*Id.* at pp. 830-831.) The same reasons that compelled the court there to find inherent prejudice, including the fact that there "the duel of credibility was all-important" (*id.* at p. 833), apply here. Indeed, the case for reversal is even more compelling here, for the prosecutor joined forces with the "extrajudicial participation by trial attendees" against Fuiava in a manner that was "not only antithetical to notions of due process but also risk[ed] converting the 'courtroom proceedings into little more than a hollow formality." (*Id.* at p. 833; brackets in quote deleted.)

Worse, the prosecutor went to pains to explain that the court specifically authorized him to wear the pin, magnifying the vouching effect of his theatrics. In *United States v. Frederick, supra,* 78 F.3d at p. 1380-1381, the court pointed out how a prosecutor, by improperly linking himself to the court, both bolstered the credibility of the government and implied that the court was satisfied with the prosecutor's presentation of the particular witness or witnesses. The prosecutor's alliance of himself with the court suggested that both the government and the court had one view of the evidence, while the defendant's lawyer had another. By doing so, the prosecutor implied that the defense was on a "different team" from the government and the judge. The potential effect on the jury of a prosecutor's implication that the government and the court are allied in opposition to the defendant and his lawyer is serious indeed, and all the more troubling where the trial court fails to correct this misimpression. (*Ibid*; see also *United States v. Smith* (9th Cir. 1992) 962 F.2d 923, 933 [egregious misconduct requiring reversal where "the prosecutor vouched not only on behalf of the government in general but also on behalf of the court specifically"].)

> Just as the prosecutor may not take advantage of his special role as representative of the sovereign to imply that the government's investigatory apparatus is satisfied of the defendant's guilt, even more so may he not abuse his position and his obligation to see justice done by imputing such satisfaction to the court.

(*United States v. Smith, supra,* 962 F.2d at p. 934.) Here, the prosecutor surely did so with the acquiescence of the trial court, similarly requiring reversal.

The prosecutor here not only introduced facts not in evidence that shamelessly vouched for the Vikings, but exploited the evidentiary gap created by the court's rulings granting his motions to preclude evidence of Viking misconduct. The prosecutor's impropriety thus doubly distorted the truth to his great advantage. It is fundamentally unfair for the prosecutor to take advantage and argue the absence of defense evidence when he was instrumental in precluding its introduction. (*People v. Varona* (1983) 143 Cal.3d 566, *People v. Dagget* (1990) 225 Cal.App.3d 751, *People v. Gaines* (1997) 54 Cal.App.4th 821, 825.) Here, the prosecutor successfully erected legal barricades to defense evidence about Vikings misconduct, then argued to the jury with a Viking badge of honor — indeed, with a host of Viking badges — sanctioned by the court. The effrontery of the prosecutor's mask of honor and his appeal to the ignorance of the jury were incompatible with the constitutional demands for the reliability of the verdict required by the Constitution. The prosecutor's transformation of himself into the living embodiment of a Viking personally vouched for his case in the most striking way possible.

The prosecutor transparently appealed to the passions and prejudices of the jury. He highlighted to the jury the silent witnesses in the law enforcement gallery, all wearing the Viking pin in police espirit dé corps when not otherwise "out there on the street protecting the lives of the people in Lynwood." The emotional pitch directed precisely at the fears of the jury replaced evidence with irrationality, and reason with prejudice. The prosecutor promoted the deputy presence in the form of a troop honoring their fallen comrade and highlighted it to the jury. Most egregious was the utter falseness of the underlying passions and sympathies

generated. The truth about the Lynwood Vikings was barred by the prosecutor's legal maneuverings during the taking of evidence and then covered by the false façade he smuggled into the trial after the close of evidence. This outrageous stunt alone requires reversal of Fuiava's conviction.

2. Argument Regarding Fuiava's Spouse.

The prosecutor introduced facts outside the evidence when he argued: "I can't call [Tina Fuiava] as a witness. I can't call someone's spouse as a witness. But they [the defense] can." (RT 2151.) The prosecutor then argued that Fuiava had told Sasa to tell his wife to leave or lie, and that Fuiava would not have so instructed had his wife been able to help him. The prosecutor flatly stated that "if she [Tina Fuiava] could help, she would have been up there." (RT 2151.)

"[W]ell-settled is the rule that statements of fact not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct. [Citations.]" (*People v. Kirkes* (1952) 39 Cal.2d 719, 724.) Thus, a prosecutor may not use summation to relate "facts not in evidence or to invite the jury to speculate as to unsupported inferences." (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747.) "[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.) "Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal." (*People v. Hill, supra*, 17 Cal.4th at 828, quoting 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Trial, § 2901, p. 3550; see also *Tankleff v. Senkowski* (2nd Cir. 1998) 135 F.3d 235, 251-252 [implication of facts not in evidence constitutes prosecutorial misconduct].)

The prosecutor's introduction of facts not in evidence denied Fuiava his right to confront the evidence against him guaranteed him by the Sixth and Fourteenth Amendments to the United States Constitution. (See *People v. Bolton, supra*, 23 Cal.3d at 213; see also *People v. Johnson, supra,* 121 Cal.App.3d at 104.) This misconduct also deprived Fuiava of the right to be presumed innocent and to require proof of guilt beyond a reasonable doubt, guaranteed by the Fourteenth Amendment. (See, e.g., *United States v. Roberts* (1st Cir. 1997) 119 F.3d 1006, 1011; *Ross v. State* (Nev. 1990) 803 P.2d 1104.) Fuiava had no obligation to produce any witness to testify on his behalf, and had a right under the Fifth and Fourteenth Amendments to stand on the evidence and require the prosecution to prove its case. Accordingly, the prosecutor infringed that right when he urged the jury to infer from the fact that he could not call Fuiava's wife as a witness but that Fuiava could have that her testimony would have been incriminating.

The prosecutor's "testimony" about Fuiava's exercise of the marital privilege was especially egregious, for the cases that prohibit such argument are legion. As the Ninth Circuit has noted:

> We have previously observed that "there is general agreement that it is improper to comment adversely on a defendant's exercise of the marital privilege, or to permit the jury to draw adverse inferences." [Citation]. *See also United States v. Tapia-Lopez,* 521 F.2d 582, 584 (9th Cir. 1975) (improper for prosecutor to suggest that defendant's husband's testimony would be favorable for the government where defendant held marital privilege to keep husband from testifying) .... Other circuits are in accord. *See United States v. Golding,* 168 F.3d 700, 1999 WL 74558, *4 (4th Cir. 1999) (improper for prosecutor to comment about wife not testifying when she has a privilege not to testify); ... *United States v.*

> *Chapman,* 866 F.2d 1326, 1334 (11th Cir. 1989) (improper for prosecutor to comment on a spouse's assertion of the marital privilege); *United States v. Smith,* 591 F.2d 1105, 1111 (5th Cir. 1979) (improper for prosecutor to argue that defendant's failure to produce his wife as witness created inference that her testimony would be unfavorable). *See also* 8 Wigmore, Evidence § 2243; McCormick, Evidence § 66 at 255 (4th ed. 1992).
>
> The Fourth Circuit ... analyzed this issue as follows: "[S]ince the marital privilege is recognized, the privilege should not be undermined by permitting the prosecution to gain an advantage with the jury by inferring that if the spouse's testimony were in fact exculpatory, the defendant would not be asserting the privilege." [Citation.] The court continued, "to permit such an inference would destroy the privilege." [Citation.] The Fourth Circuit also opined that "given that the marital privilege is one that remains vital in modern jurisprudence and has been sanctioned by Congress and the Supreme Court, it is apparent that we should guard against turning the privilege into an empty promise." [Citation]; *cf. Trammel v. United States,* 445 U.S. 40, 48, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) (recognizing the important policy concerns surrounding the marital privilege and stating that "the long history of the privilege suggests that it ought not to be casually set aside"). Allowing the prosecutor to reveal in the presence of the jury that Sanchez's wife could not be made to testify against Sanchez improperly suggested to the jurors that they could legitimately infer that her testimony would be adverse to his defense. The prosecutor committed misconduct in revealing to the jury that he could not make Mrs. Sanchez testify as a witness for the prosecution.

(*United States v. Sanchez, supra*, 176 F.3d at pp. 1222-1223; see also *People v. Johnson* (1981) 121 Cal.App.3d 94, 103 [improper "to lead the jury to believe that the district attorney, a sworn officer of the court, has information which the defendant insists on withholding"].)

The harm from this misconduct was incalculable in light of the evidence that at the time Fuiava was considering an alibi defense he was concerned that she would incriminate him. The suggestion from that evidence was that she had information that would identify Fuiava as the shooter. The prosecutor's misconduct went well beyond that, suggesting that she had information to which he was privy that her testimony would show not just that Fuiava was the shooter, but that he had not shot in self-defense. There was no basis to that intimation in the record. The prosecutor's testimony that Fuiava's own wife held the key to this evidence against him, but that Fuiava had precluded the prosecutor from using it to open a vault of incriminating evidence, was thus outrageous in every way.

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

Capitalizing on his earlier misconduct in which he had baselessly asserted that Fuiava's nickname "Smokey" was given him because he shot and killed people, the prosecutor emphasized that nickname during closing argument. The prosecutor explicitly stressed what he had implied in his examination of witnesses: That Fuiava's nickname "Smokey" came from killing people. (RT 2160-2161.) The prosecutor did this after arguing that Fuiava shot Blair in the head because he was a "shooter" and that was what he did for a living. (RT 2160.) He further argued that one doesn't become a gang honcho unless he is the "baddest of the bad." (RT 2160-2161.) This forced defense counsel to respond that there was no evidence that Fuiava was given the nickname "Smokey" because he killed people, further emphasizing this improper reference. (RT 2189.) Continuing this theme, the prosecutor asked the jury to remember the statements that we will kill the next cop who is harassing us, and "tell Mrs. Blair it wasn't a big deal."

(RT 2164.) He continued: "Fuiava had no problem shooting. He is a professional assassin who shoots people in the back." (RT 2165.) This was more outrageous prosecutorial misconduct, smuggling into evidence further untruths and exaggerating the evidence beyond hyperbole.

Following further references to "Smokey," the prosecutor again baldly lied when he asserted: "Fuiava is a professional shooter. That's all he does." (RT 2274.) After making certain the jurors would not forget the unfounded submission that Fuiava was given the nickname "Smokey" because he kills people, the prosecutor thereafter repeatedly referred to Fuiava as "Smokey." (See, e.g., RT 2251-2252, 2266, 2268-2269, 2274.)

The prosecutor's theme that Fuiava was an assassin or hit man constituted misconduct for any number of reasons, not the least of which was that it was untrue. There was no evidence that Fuiava had ever killed anyone before. He denied committing two of the prior shootings and as to the other gave an explanation that had nothing to do with being a hit man. It is beneath the good office of a prosecutor to use epithets or derogatory comments; when they are not supported by the evidence, the misconduct is that much more egregious. (See, e.g., *People v. Duvernay* (1941) 43 Cal.App.2d 832, 828; *People v. Vienne* (1956) 142 Cal.App.2d 172 ["professional gunman" not warranted by the evidence].) Again, the prosecutor persisted throughout in his effort to see that Fuiava was convicted of capital murder based on the prosecutor's improper depiction of who Fuiava was rather than how the Walnut Avenue shooting unfolded.

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

During closing argument the prosecutor told the jury:

> They pick the baddest dude with the biggest gun, two guns, like the Frito Bandito with his bandoliers and stuff like that. One gun isn't enough for this guy. He has got to have two guns.

(RT 2161.) As a Samoan with brown skin, Fuiava looked Hispanic, for the shooter was even described by one eyewitness as Hispanic. (RT 851, 1161.) The prosecutor's reference here to "Frito Bandito" had decidedly racist overtones. Even if brief, use of race as a factor in closing argument obviously is improper (*United States ex rel. Haynes v. McKendrick* (2d Cir. 1973) 481 F.2d 152), and filled with prejudice. (*Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1413.) The racist caricature also ridiculed Fuiava. It was ugly for the prosecutor to so dehumanize Fuiava, further undermining the reliability of the verdict required by the Eighth and Fourteenth Amendments.

The prosecutor argued that Fuiava had admitted that he had lied in earlier cross-examination. In making that point perhaps to a nonplussed jury, the prosecutor congratulated himself: "Rarely do you catch people in what is called a judicial admission of lying, okay." (RT 2269.) The prosecutor again was testifying here by arguing facts outside the evidence. The effect of this misconduct on the credibility of Fuiava was incalculable, for acquittal depended upon the jury believing his account of the shooting.

Continuing his misconduct, the prosecutor observed that Fuiava had admitted he had lied on this point when he returned to the stand the following morning, and then argued: "Do you think that [Fuiava] did that on his own accord? Or do you think that maybe Mr. Hauser and his investigator went back and said, hey, you better come clean on this because Richman is going to drive that down your throat." (RT 2270.) Here, the

prosecutor's personalization of the case matched his penchant to make up evidence. The prosecutor told the jury that it might have noticed that the morning Fuiava retook the stand, the prosecutor "had papers lined up all the way over here." (RT 2270.) He gloated: "I was ready to run that [lie] down his throat. He [Fuiava] tried to diffuse it, oh, yeah, I remember now, it was my wife that I just happened to forget." (RT 2270.) The prosecution's suggestion of "defense dirty tricks" aggravated the misconduct. (See, e.g., *Berger v. United States, supra,* 295 U.S. at p. 88]; *People v. McGreen* (1980) 107 Cal.App.3d 504.)

The prosecutor continued to argue facts not in evidence:

> Now, here's this poor pitiful person who is being persecuted by the sheriff's department in jail and he is so confused he doesn't know what happens. And he can't be responsible for his acts — ..... Give me a break. [¶] And this is after — I mean, he [defense counsel] brings up these charts and they are all nice and neat. If you are impressed by the bigger charts the better, I don't apologize. I don't have the facilities to make such neat charts. We're on a budget.

(RT 2272.)

The prosecutor castigated Fuiava for dragging "the deputies' reputation into the mud." The prosecutor argued that the only way the defense could try and establish "what they're making up, this nonsense, about [Blair] killing an unarmed gang member" was to bring in the widow to talk about domestic violence. (RT 2271.) Defense counsel objected, noting that it was the ex-wife with whom Blair had been violent. (RT 2271.) The prosecutor committed misconduct here not only because he misstated the evidence to further fan the flames of prejudice, but because he 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 and that there is a place in hell for such people].)

Finally, in his last words to the jury, the prosecutor railed:

> Take this one to the bank, ladies and gentleman. [¶] It's all right here out of Smokey the Bear's mouth. End of story. [¶] You talk about respect for the law, the laws of the country when the law erodes [sic] — excuse me — terrible things happen. When we allow punks like this — [25] [¶] When we allow punks like this to roam the street terrible things happen. Three of them get shot. Now a fourth, a deputy sheriff gets killed. Respect for the law. [¶] Deputy Blair gets out there with a badge on. His full uniform. Do you think this punk had any respect for the law? If he had respect for the law, do you think that three times in prison might have told him that he shouldn't be hanging around there? [¶] Do you think three times in prison might have said, you probably shouldn't be carrying two guns? [¶] He has no respect for the law. He never had any respect for the law.
>
> By the way, one of the points that I missed. This person [Fuiava] who has lied to you twice on the stand, okay, about Tina and where he spent the night, we're supposed to believe him about his two prior convictions? [¶] Well, I only shot one of the three. I pled guilty to the other two but I only shot that guy who I happened to shoot in the back.]¶] You have got to believe me on this other stuff. Because that's his only shot. But the problem is, that he told his mom what happened. When they painted that pickup truck to look like that sheriff's car, did they have respect for the law? [¶] Would you do that? Would you allow your kids to

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[25] Defense counsel objected to the prosecutor's misconduct here, but the trial court overruled it. (RT 2278)

> do that? Is that showing respect for the law? [¶] When you have no respect for the law, terrible things happen, Mr. Hauser. Police officers get killed. And that's exactly what happened here. There was no respect for the law. Smokey and his homeboys were out there armed to the teeth, angry, because another of their homeboys just got killed by a deputy sheriff. And they're saying we're going to smoke the next deputy sheriff who comes down the street. And two hours later, coincidentally — can you imagine the mathematics involved in that coincidence? [¶] ... Two hours later, you know, of all the planets and all the stars and everything else, two hours after this conversation takes place deputy Blair is lying dead in his own blood on the pavement. Gee, what a coincidence. What a coincidence, Smokey. When respect for the law erodes, terrible things happen.
>
> Let's take this guy out of our society. We tried three times before. He didn't learn his lesson. And Deputy Blair suffered the ultimate example of why three strikes was enacted. We need to get these guys off the street. He had no respect for the law. And now, the law is dead. [¶] I will look forward to talking to you again when we begin the penalty phase, thank you.

(RT 2277-2280.)

This final passage of argument brimmed with misconduct. The "Smokey the Bear" comment not only ridiculed Fuiava, but played upon the prosecutor's earlier misconduct equating Fuiava's nickname of "Smokey" with "Killer." The repeated characterization of Fuiava as a "punk" further heaped invective upon Fuiava. The prosecutor's serial embellishment of the evidence was unconscionable. Three people did not "get shot" by Fuiava before Blair. Fuiava had never shot anyone in the back. Fuiava had nothing to do with the mock patrol car. No "homeboy" had "just got killed" by a deputy sheriff. Fuiava had not served three

prison terms.[26] "Smokey and his homeboys" had not been "armed to the teeth" when someone piped up with a reference to blasting a deputy. And the comment wasn't that "we're going to smoke the next deputy sheriff who comes down the street." These were no inadvertent misstatements of the evidence; rather, they were persistent and purposeful attempts to mislead the jury.

It was also misconduct for the prosecutor to argue that the jury should convict Fuiava to remove him from society. (See, e.g., *Viereck v. United States, supra*, 318 U.S. at p. 247; *Taglianetti v. United States* (1st Cir. 1968) 398 F.2d 558; *People v. Mendoza* (1974) 37 Cal.App.3d 717, 726-727.) It was doubly misconduct to urge conviction so we can get "these guys off the street," for it painted Fuiava as guilty by association and evoked a war against gangs. As one court has explained:

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

(United States v. Monaghan (D.C. Cir 1984) 741 F.2d 1434, 1441.) The prosecution's reference to "looking forward" to the penalty phase was further misconduct because it mixed the issues of guilt and punishment.

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[26] Defense counsel objected to the falsity of the prosecutor's argument that Fuiava had been in prison three times, but the trial court overruled the objection. (RT 2278.)

(See *People v. Mendoza* (1974) 37 Cal.App.3d 717, 726; *People v. Morse* (1964) 60 Cal 2d 631, 636.)

Like argument condemned by the Supreme Court, "[t]he prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." (*Berger v. United States*, *supra*, 295 U.S. at p. 85.) The argument was a patent appeal to the fears and prejudices of the jury at the most base level.

F. The Individual and Cumulative Prejudice From the Misconduct.

The need for reversal for prosecutorial misconduct in California "focuses on how prejudicial the wrongful conduct is and the weight of the evidence adduced at trial." (*People v. Parsons* (1984) 156 Cal.App.3d 1165, 1171; see also *People v. Bolton*, *supra*, 23 Cal.3d at p. 215 ["A closer case, marred by the same misconduct, might well require reversal"].) Similar considerations apply for determining when federal protections against prosecutorial misconduct have been violated and require reversal:

> The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger ... we think may properly be characterized as weak .... In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt "overwhelming," a different conclusion might be reached.

(*Berger v. United States*, *supra*, 295 U.S. at pp. 88-89.)

Here, not only was the misconduct blatant and repeated, but the weight of the evidence adduced at trial was not particularly persuasive of

guilt. Each of the prosecution's foundations for establishing guilt was less than compelling. The prosecution's witnesses could not establish that Fuiava fired first. The defense eyewitnesses were quite sure who shot first — Blair. Blair's zeal and membership in the Lynwood Vikings gave him a motive to shoot first. Finally, Fuiava's statements on the tape that the prosecution considered critical to its case were equivocal. Thus, because the evidence did "not point unerringly to guilt, ... the type of misconduct involved here could reasonably have tipped the scales." (*People v. Pitts*, *supra*, 223 Cal.App.3d at p. 816.)

In addition, the misconduct that included prosecution of Fuiava for his past conduct rather than for the charge at hand carried great potential for harm. Moreover, other misconduct trenched on individual constitutional rights of Fuiava, so that the prosecution must prove beyond a reasonable doubt that the misconduct did not contribute to the verdict. Here, the range and frequency of the misconduct increased the probability that it influenced the verdict. Finally, misconduct such as the Viking vouching went to central features of the defense, making it even more likely that the misconduct contributed to the jury's verdict. (See, e.g., *People v. Gallows* (1979) 100 Cal.App.3d 551, 560-561, citing *People v. Sedeno* (1967) 66 Cal.2d 695, 714 [factor indicating prejudice is that error goes to "live nerve" of defense case].)

This was a close case. The defense presented direct evidence that Blair fired first, that of two eyewitnesses and Fuiava himself. The prosecutor's main eyewitness, Lyons, testified to facts which also supported an inference that Blair fired first. The prosecution presented no direct evidence that Fuiava fired first. The defense presented — to the

extent the court permitted it to do so — evidence of motive, intent, and state of mind that supported the inference that Blair fired first. The defense additionally presented evidence of Blair's character for violence. Thus, the repeated and outrageous prosecutorial misconduct may well have tipped the scales against Fuiava, establishing prejudice. (See, e.g., *People v. Washington* (1958) 163 Cal.App.2d 833, 846 [in case dependent on credibility determinations where jury requested reread of testimony and refused to convict the defendant on second count, court "satisfied that in a close case of this nature the error ... may well have tipped the scales in the balance and hence was in fact prejudicial"]

In *United States v. Sanchez*, *supra*, 176 F.3d at p. 1225, the court found that "[t]he cumulative effect of [the prosecutorial misconduct], when viewed in the context of the entire trial, compels a reversal in this case." The same is true here. In *Sanchez*, "To obtain a conviction, the Government had the burden of persuading the jury that Sanchez did not tell the truth when he testified ...." There, "the prosecutor ... disclosed to the jury that Mrs. Sanchez had exercised her privilege not to testify against her husband as a prosecution witness." (*Ibid.*) There, "[t]he prosecutor also improperly vouched for his witnesses in his argument to the jury ...." (*Ibid.*) The prosecutor there committed other misconduct that aggravated the harm, as did the prosecutor here — except here the prosecutor's misconduct was more extreme and far-ranging.

Further, the closeness of the case was objectively shown here, increasing the probability that the prosecutor's misconduct materially influenced the verdicts. The jury's difficulty in reaching its verdicts was extreme, as demonstrated by its long deliberations, its requested readback

of testimony, its expression of impasse and conflict in consideration of the evidence; the discharge of a juror during deliberations who favored acquittal, and the discharge of another juror during deliberations. (See, e.g., *People v. Cribas* (1991) 231 Cal.App.3d 596, 607-608 [prejudice found where"[a]pparently, the jury did not view its decision as clear cut" in light of its comparatively lengthy deliberations and request for readback].)

In sum, the prosecutor's misconduct trenched upon a number of individual rights that the Constitution guaranteed Fuiava as well as his general due process right to a fair trial. For all of these reasons, then, the misconduct must be deemed to have infected the jury's verdict. It also infected the jury's verdict on penalty, for the prejudice that Fuiava suffered from the multifarious misconduct carried over into the penalty phase.

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

As set forth in the introductory portion of this argument, regardless of defense counsel's failures to object to certain instances of misconduct, the trial court had a duty to curb it to protect Fuiava's federal due process right to a fair trial. The court at times fulfilled its duty, because it did in some instances step in to admonish the prosecutor for his behavior even when defense counsel did not object. (See, , e.g., 1643, 1931, 1939, 1954, 1956.) For the most part, however, not only did the court generally fail to step in to control the prosecutor at times when defense counsel failed to object; but the court facilitated the misconduct. It did so when it overruled various objections by defense counsel to the misconduct, and, most strikingly, when it expressly authorized the prosecutor to don the Viking pin during his closing argument.

For the reasons already set forth, the prosecutor's egregious misconduct rendered Fuiava's fundamentally trial unfair in violation of a range of his federal and state constitutional rights, so that the trial court's failure to prevent that unfairness requires reversal.

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 moved for discovery of any evidence of excessive use of force and related misconduct by deputies Blair, Corrigan and Riggin contained in their police files. (CT 554-569.) As this Court recently recounted concerning such motions:

> In *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 [113 Cal.Rptr. 897, 522 P.2d 305] (*Pitchess*), we recognized that a criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting law enforcement officer's personnel file that is relevant to the defendant's ability to defend against a criminal charge. "In 1978, the California Legislature codified the privileges and procedures surrounding what had come to be known as '*Pitchess* motions' through the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045." [Citation.]

(*People v. Mooc* (2001) 26 Cal.4th 1216, 1219-1220.)

Implicitly finding that Fuiava showed good cause for discovery of such documents (see *People v. Mooc*, *supra*, 26 Cal.4th at p. 1222), the court held an in camera hearing in which only the attorney for the Sheriff, who was the custodian of the records, was present. (CT 608-609, RT 22-27.) Counsel for the sheriff proffered a single document as potentially

discoverable under the motion. (CT 608; RT 22-23.) The court found it was not discoverable, but made it part of the sealed record. (CT 608, 866-878, RT 25;.)

The court erred in its handling of this motion. First, in view of the fact that the charge here was the murder of a deputy sheriff and the obvious bias that created in the custodian here to cooperate with this motion, the court should not have simply accepted the representations of the sheriff's representative at face value. As this Court has observed: "The custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion." (*People v. Mooc*, *supra*, 26 Cal.4th at p. 1229.) The court did not require the custodian to so show here. The custodian's production of only one document in response to the *Pitchess* motion is particularly suspect given the impeachment material utilized by defense counsel in the penalty phase involving several major allegations of misconduct lodged against Blair. (See, e.g., RT 2479.)

Second, the court should have disclosed the one document that the custodian did proffer to the court as potentially discoverable, for it in fact was discoverable. The error was also prejudicial. (See *People v. Memro*, (1985) 38 Cal.3d 658, 680-684.) The Court's order of February 11, 2003, precludes counsel for Fuiava to elaborate further in argument both on the error and the resultant prejudice, for it provided counsel no avenue to present the confidential information that demonstrates both the error and the prejudice from it. Hence, Fuiava here can do no more than request that

the Court review the record and make its own assessment of the error and the prejudice without benefit of counsel's argument on the point. (See, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 827.) As Fuiava noted in his motion for leave to use the confidential information inadvertently released to him: "[T]o hamstring counsel from utilizing that information would impact Fuiava's right to the effective assistance of counsel on appeal, protected by the Sixth and Fourteenth Amendments to the United States [Constitution], and to a reliable judgment, protected by the Eighth and Fourteenth Amendments to that same constitution." (Motion, p. 10.)

The denial of discovery of information helpful to the defense, particularly where the information is in the hands of the state, implicates a defendant's due process right to secure a fair trial. (See, e.g., *Brady v. Maryland* (1963) 373 U.S. 83, 87 [government has constitutional obligation to disclose material evidence favorable to defendant]; *Pitchess v. Superior Court, supra*, 11 Cal.3d at p. 535 [court's exercise of power to permit discovery like here requested consistent with "the fundamental proposition that [the accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information"]; *People v. Mooc*, 26 Cal.4th at p. 1227 ["*Pitchess*, *supra*, 11 Cal.3d 531, and its statutory progeny are based on the premise that evidence contained in a law enforcement officer's personnel file may be relevant to an accused's criminal defense and that to withhold such relevant evidence from the defendant would violate the accused's due process right to a fair trial."].)

To protect "the criminal defendant's ... compelling interest in all information pertinent to his defense," the "good cause" standard is "relatively relaxed," resulting in a "relatively low threshold for discovery"

that "insure[s] the production for inspection of all potentially relevant documents." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 82-84.) Thus, to meet the "threshold showing of 'materiality'" required by the statute and *Pitchess,* "a defendant need only show that the information sought is material 'to the subject matter involved in the pending litigation.'" (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 10.) Because this was a capital case, the denial of discovery here also implicated defendant's right to a reliable verdict as required by the Eighth and Fourteenth Amendments to the United States Constitution. In sum, the court's refusal to turn over material useful to prepare Fuiava's defense implicated his constitutional rights to present a complete defense, to a the jury determination based on consideration of all material evidence, and to standards of justice required for a fair and reliable verdict. Thus, the State must show that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) It cannot do so.

"It is settled that an accused must demonstrate that prejudice resulted from a trial court's error in denying discovery. [Citations.]" (*People v. Memro, supra*, 38 Cal.3d at p. 684.) *Memro* demonstrates that the showing is relaxed where the defendant wrongfully was denied discovery, however, for denial of the opportunity to present evidence that could have made a difference to the ultimate finding necessarily undermines the reliability of that finding.

In *Memro*, the defendant was pursuing a motion to suppress a confession coerced from him, and sought pre-trial discovery of records of complaints of excessive force by the four officers who interrogated him. The trial court denied both the discovery request and suppression motion,

and the defendant was convicted. This Court reversed, stating that "[s]ince the denial of discovery deprived appellant of the possibility of presenting evidence on th[e] issue [of a coerced confession], the trial court did not make as informed a determination as it might have if discovery had been granted." (*Id.* at p. 684.) The Court further stated: "Obviously, the trial court's failure to afford appellant an opportunity to discover evidence of coercion precluded him from presenting any such evidence as to whether the confession should have been believed...." (*Id.* at p. 684, fn. 28.) It further explained:

> The two courts which have found error on appeal in denying an accused *Pitchess* discovery have deemed reversal the appropriate remedy. (*People v. Matos* (1979) 92 Cal.App.3d 862, 869; *In re Valerie E.* [1975], *supra*, 50 Cal.App.3d [213] at p. 220.) Therefore, to simply remand for a renewed determination of appellant's discovery motion and the effect, if any, of discovered evidence on the admissibility and weight of the confession would be improper.

(*Id.* at p. 685.) The same analysis applies here. For these reasons, the judgment must be reversed in favor of a new trial.

XIV.

CUMULATIVE PREJUDICE REQUIRES REVERSAL OF THE GUILT JUDGMENTS.

Prejudice from all directions converged to deprive Fuiava of a fair trial. To begin with, the court precluded access to police records that Fuiava's counsel could have used to develop his defense. Then the court forced counsel to trial before he was ready to defend against the charges. The court further emasculated Fuiava's defense by excluding key evidence

establishing Blair's motive and intent to shoot unlawfully at Avila and Fuiava. At the same time, it permitted the prosecution to introduce extremely prejudicial evidence of Fuiava's violence purportedly to establish Fuiava's motive and intent to shoot Blair unlawfully. It also allowed irrelevant and unreliable evidence that further undermined Fuiava's defense while bolstering the prosecution's case. It then told the jury that it could convict Fuiava on the basis of his disposition to commit the charged crimes.

In addition to crippling Fuiava's defense and aiding the prosecution's cause in these ways, the court's voir dire of the jury was entirely inadequate to insure fair consideration of Fuiava's defense. Then the court failed to conduct any investigation after it was alerted to jury members' exposure to an extraneous influence that presumably prejudiced them. Then during deliberations it unjustifiably discharged a juror who in his good judgment favored Fuiava's defense. That discharge along with a second one pushed the jury further into a partial and biased verdict against Fuiava. All the while, the prosecutor engaged in a variety of misconduct that promoted a false view of Fuiava and the shooting.

"Where, as here, there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. [Citation.]" (*United States v. Frederick, supra,* 78 F.3d at p. 1381.) Because each error reinforced and added to the harm of the others, the cumulative prejudice of all the errors requires reversal even if the harm from each of those errors considered by itself was insufficiently prejudicial to require reversal. (See, e.g., *Taylor v. Kentucky* (1978) 438 U.S. 478; *People v. Cardenas, supra,* 31 Cal.3d at p. 907].)

Moreover, these errors had a synergistic effect, making the sum of their prejudice greater than their individual parts. "In other words, a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts." (*United States v. Sepulveda* (1st Cir. 1993) 15 F.3d 1161, 1196.) Thus, the harm from the accumulated error deprived Fuiava of a fair trial and a reliable verdict that entitles him to reversal as a matter of federal constitutional law as well as state law. (See, e.g., *In re Gay* (1998) 19 Cal.4th 771, 826; *People v. Holt* (1984) 37 Cal.3d 436, 449, 459; *United States v. Castro* (9th Cir. 1989) 887 F.2d 988, 998.)

Most of the court's and the prosecutor's errors touched upon critical issues in the case and necessary underpinnings of a constitutionally acceptable trial. In addition, where state error is combined with constitutional error, the stricter constitutional test for prejudice set forth in *Chapman v. California*, *supra*, 386 U.S. 18 applies in determining the cumulative effect of the errors. (*People v. Williams, supra,* 22 Cal.App.3d at pp. 58-59.) Here, there was a mix of both types of error that rendered Fuiava's trial fundamentally unfair, so that the cumulative effect of the errors requires reversal of the judgments of conviction.

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.

A. Factual Background.

As previously noted, the court conducted voir dire itself, and did so without benefit of a questionnaire. (See Argument VII, *ante*.) Moreover, like its voir dire on guilt issues, the court's voir dire on the ability of the venirepersons to fairly consider a life sentence was too perfunctory to ferret out those jurors whose views on penalty biased them against Fuiava. In addition, in asking the prospective jurors to determine whether they could impose the death penalty, the court emphasized that its inquiry was not concerned only with notorious murderers. (RT 124.) Finally, the court emphasized that jurors should single themselves out for exclusion if they had scruples regarding a death verdict, saying it did not want jurors who discovered only after they were selected that the death penalty aspect of the case proved "too much" for them. The court admonished, "I just implore you to not bite off more than you think you can chew, so to speak." (RT 220; see also RT 126-127.)

The voir dire of the first panel is illustrative of the way the court selected a jury that was prone to impose the death penalty. After questioning of the panel that covers less than sixty pages of transcript (RT 117-175), the court excused eleven jurors on the basis that their views

favoring a life sentence rendered them unable to fairly determine the penalty, yet excused only a single juror on the basis that his views favoring a death sentence rendered him unable to fairly determine the penalty. (RT 176.) Indeed, the court retained one juror on the panel who so favored death that he said he would automatically vote for death "if I think the evidence is there." (RT 150.) The limited follow-up to that answer suggested even further that the prospective juror would automatically vote for death if he found that the evidence was sufficient to establish guilt:

> THE COURT: Okay, if you think the evidence is there. [¶] If the evidence isn't there, you would vote not guilty — I mean —
>
> PROSPECTIVE JUROR FARFAN: Not guilty or life, whatever.
>
> THE COURT: If the evidence is insufficient to support guilt you would vote not guilty?
>
> PROSPECTIVE JUROR FARFAN: Yes.
>
> THE COURT: All right, that is fine. Let's move on then ....

(RT 150-151.) The court found no cause to excuse this juror.

In contrast, the court's suggestive and leading questioning of jurors who expressed any reservation concerning a death sentence was designed to remove them from the panel. Its questioning of Ms. Chaiveera of the second panel exemplified this design. She was not one of those who had raised a hand when the court asked the panel if there was anyone who felt that they "would never ever vote for the death penalty ...." (RT 222, 230.) After she said she was "really nervous" about the penalty decision, the court asked: "Okay, does that mean we should send you out of here, kick

you off this jury, what do you think?" (RT 228.) When she said she "would like to be on the panel but probably not on a murder case," the court suggested: "This is too much for you, you think?" (RT 228.) After Chaiveera acknowledged that she was "very sensitive" and tended to "cry over" such things as the "homeless on the street," the court seized the opportunity by emphasizing that the juror would "be hearing about somebody who died" and that there would probably be "pictures of a dead body." (RT 229.) Then the court suggested that the trial "is going to be rough, don't you think, for you?" (RT 229.) When she demurred to that suggestion, the court raised the specter of a movie where two hundred people were killed. (RT 229.) After she admitted that she did not "like violence," the court suggested: "I sense from you a serious reservation about ever voting for the death penalty," and asked if the court was "correct" that "it would be very difficult for you to vote for death?" (RT 230.) The prospective juror acknowledged that it would be, and explained that she had not earlier raised her hand because "[a]t first I was thinking maybe I haven't heard the evidence ...." (RT 230.) After she said, "it would be very difficult," the court attempted to lead her further: "Would you say impossible?" (RT 230.) Chaiveera explained that she could not say that because the case was about the killing of a police officer and she had a "very high regard for police officers." (RT 230.) The court commented and paraphrased, "You have a very high regard for police officers, but are a very sympathetic person." (RT 230.) After acknowledging this trait, she accepted the court's suggestion that she was" very emotional and it is gong to be difficult for you to make a decision in this case ...." (RT 230.) Finally, the court suggested that Chaiveera's real beliefs were such that it was "highly unlikely" that she "would ever vote for

death regardless of the evidence" (RT 230-231). When Chaiveera affirmed this notion, the court concluded: "Let me move on, then." (RT 231.)

When 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." (RT 248-249.) The court then completed the record with another very suggestive and compound "question." After establishing that Chaiveera had said it was highly unlikely that she would vote for the death penalty in this case, the court remarked:

> And so that means that — well, I don't know how else to say that. You see yourself, pardon me, as in that third category of people [the court had previously enumerated], the people that say, you know, I believe that the death penalty is okay, but I really couldn't do it; is that right?

(RT 252.) The court terminated its voir dire of Chaiveera when she acceded to that characterization. (RT 252.) It then excused her for cause. (RT 252, 254.)

The court also expressed its intention to excuse prospective juror Lang, following a voir dire that consisted of no more than the following:

> THE COURT: And Ms. Lang.
>
> PROSPECTIVE JUROR LANG: I don't have a problem weighing the evidence to determine innocence or guilt but I do have a problem voting for the death penalty.
>
> THE COURT: Are you telling me that you would never ever vote for death?
>
> PROSPECTIVE JUROR LANG: No, I'm just saying I have a real problem."

> THE COURT: I have got to explore that with you. [¶] You would have a real problem. [¶] Are you saying that it is very unlikely that you would ever vote for death?
>
> PROSPECTIVE JUROR LANG: Yes.

(RT 257-247.) Defense counsel objected to excusing Lang, arguing that there was not enough information developed to establish cause for her discharge. (RT 251.) The court disagreed, finding that "she was real strong" about her inability to fairly consider death. (RT 251.) The mere fact that she stated it was "very unlikely" that she would vote for death persuaded the court that her scruples "substantially compromise [her] ability to perform as a juror." (RT 251.) Accordingly, the court indicated that it would "go ahead and excuse Lang over objection," and proceeded to do so. (RT 251, 254.) Indeed, the court excused eight jurors on the second panel after finding that their views favoring a life sentence rendered them unable to fairly determine the penalty, but did not find a single case where the views of a juror favoring death established cause for discharge.

In sum, the court voir dired two panels of prospective jurors concerning their ability to fairly determine the penalty. Its manner of questioning and rulings resulted in the discharge for cause of only a single panel member because of views favoring the death penalty, but of nineteen members because of their views favoring life. The discharge over defense objection of prospective jurors Lang and Chaiveera on the basis that they could not fairly determine the penalty especially stacked the jury against Fuiava.

B. Legal Analysis.

The Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corollary provisions of article I, sections 15, 16 and

17 in the California Constitution, entitled Fuiava to a fair selection of an unbiased jury and to a reliable decision on the question of penalty. (See, e.g., *Wainwright v. Witt* (1985) 469 U.S. 424 [enunciating Sixth Amendment and Fourteenth Amendment constraints on discharge of death-scrupled prospective juror]; *Gardner v. Florida* (1977) 430 U.S. 349 [97 S.Ct. 1197] [due process and Eighth Amendment entitle defendant to reliable death sentence].) The manner in which the trial court voir dired the venirepersons concerning their impartiality on penalty and its excusal of prospective jurors whose views favoring life did not substantially impair their ability to fairly determine the penalty violated these fundamental guarantees.

Most blatantly, the court's excusal of prospective juror Lang contravened the constitutional limits for discharge of death-scrupled jurors established in *Witherspoon v. Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt*, *supra*, 469 U.S. 412. As the Supreme Court explained the force of these cases:

> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Wainwright v. Witt,* 469 U.S. at 423, 105 S.Ct., at 851. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stacks the deck against the petitioner. To execute such a death sentence would deprive him of his life without due process of law." *Witherspoon v. Illinois,* 391 U.S., at 523, 88 S.Ct., at 1778.

(*Gray v. Mississippi* (1987) 481 U.S. 648, 658-659 [107 S.Ct. 2045] (brackets in quotes deleted).) The Court further explained those cases thusly:

> In *Witherspoon,* this Court held that a capital defendant's right, under the Sixth and Fourteenth Amendments, to an impartial jury prohibited the exclusion of venire members "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." [Citation.] It reasoned that the exclusion of venire members must be limited to those who were "irrevocably committed ... to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," and to those whose views would prevent them from making an impartial decision on the question of guilt. [Citation.] We have reexamined the *Witherspoon* rule on several occasions, one of them being *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), where we clarified the standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment. We there held that the relevant inquiry is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " [Citation.]

(*Id.* at pp. 657-658.)

This Court has adopted the *Witt* standards as its own. (See, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 821-822.) The Court there stated:

> [T]he standard governing our review of such a claim is whether exclusion was necessary because the juror's views concerning capital punishment would "prevent or substantially impair the performance of his or her duties as a juror." [Quoting *Wainwright,* 469 U.S. at p. 424.] When a juror's views are conflicting or ambiguous, the

> trial court's determination as to his or her state of mind generally is binding on a reviewing court. When there is no inconsistency, but simply a question whether the juror's responses demonstrated a bias for or against the death penalty, the trial court's judgment will not be set aside if supported by substantial evidence. [Citations.]

(*Ibid.* [ellipsis and brackets in quote omitted]; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1115 [finding "no basis for rejecting the constitutional standard set by the United States Supreme Court" in *Witt*].)

The trial court erred in excusing prospective juror Lang under these standards because there was not substantial evidence that her views concerning capital punishment would prevent or substantially impair the performance of her duties as a juror. First, Lang stated only that she would have a problem voting for death, but expressly denied that her views were such that she would never vote for death. All that the trial court established with its next leading question was that it was "very unlikely" that she would impose a death sentence, and it was solely on that basis that the court found that her views about the death penalty would substantially impair her duties to fairly consider that penalty. The *Witt-Witherspoon* standard requires a greater showing than that to authorize the excusal of a prospective juror.

There was nothing conflicting, equivocal, or ambiguous about Lang's responses such that the trial court's determination to excuse her is binding on this Court; rather, there is simply a gap from her acknowledgment that it was very unlikely that she would impose a death sentence to the court's conclusion that her views substantially impaired her ability to fairly and conscientiously follow the court's instructions in consideration of the death penalty. More than an inclination to vote for life

must be established before a court may conclude that a prospective juror's views on capital punishment disqualify her from service. As this Court stated in *People v. Kaurish, supra,* 52 Cal.3d at p. 699:

> Neither *Witherspoon* nor *Witt*, nor any of our cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty. The real question is whether the juror's attitude will "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" [Citation.] A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law. 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.

There was no showing here that Lang's predilection or predisposition to return a life verdict would have precluded her from conscientiously considering and returning a death verdict as the appropriate punishment pursuant to her oath and the instructions of the court. The incredibly brief voir dire of this venireperson 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. "[T]he Supreme Court has expressly warned against oversimplifying the inquiry as to whether jurors can perform their duty notwithstanding their views on the death penalty.... Moreover, because the jurors are vested with greater discretion in capital cases, the examination of prospective jurors must be more careful than in non-capital cases." (*United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1269.) The federal appeals

court granted habeas relief there because "none of the questions which [the prospective juror] answered articulated the proper legal standard under *Witt* ... [and] ... [n]othing in [the prospective juror's] responses on the record indicate an intention to disregard or circumvent the law or the court's instructions." (*Id.* at p. 1272.) Here, the only question the court asked of Lang that articulated the proper standard under *Witt* — whether she was saying that she would never vote for death — she answered, "No." Her other answers — that she found return of a death verdict problematical and it was very unlikely in the abstract that she would find for death — failed to demonstrate an inability to fairly consider a death verdict in accordance with the evidence and the court's instructions. (See, e.g., *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 331 [trial court's decision to excuse a prospective juror due to his views on the death penalty violated *Witherspoon* and *Witt* because the record failed to show that his discomfort with the death penalty substantially impaired the performance of his duties as a juror].)

"[A] jury can speak only for a distinct and dwindling minority" when it is "[c]ulled of all who harbor doubts about the wisdom of capital punishment — of all who would be reluctant to pronounce the extreme penalty ...." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 520.) The court's exclusion of prospective jurors such as Lang and Chaiveera accomplished just such a culling. Indeed, Chaiveera, who considered the murder of a police officer a particularly egregious crime but who was likely to be responsive to mitigation evidence, was precisely the kind of thoughtful juror poised to determine penalty by balancing the evidence in aggravation against that in mitigation. "In its quest for a jury capable of

imposing the death penalty, the [court] produced a jury uncommonly willing to condemn a man to die" when it disqualified her from service. (*Id.* at p. 521.) Indeed, the whole of the court's voir dire led to "a tribunal organized to return a verdict or death." (*Ibid.*) "No defendant can constitutionally be put to death at the hands of a tribunal so selected." (*Id.* at pp. 522-523.)

The death judgment should be reversed accordingly. Indeed, *Witt-Witherspoon* error mandates reversal in every case, for it affects the very structure of the trial. (See, e.g., *Gray v. Mississippi*, *supra*, 481 U.S. 648.) As explained there: "Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury [citation], and because the impartiality of the adjudicator goes to the very integrity of the legal system," wrongful application of that standard can never be found harmless. (*Id.* at p. 668; see also *In re Anderson* (1968) 69 Cal.2d 613, 619, cited with approval in *Gray* at p. 660 ["reversal is automatically required if a venireman was improperly excused for cause on the basis of his opposition to the death penalty"].)

XVI.

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

A. Factual Background.

The prosecutor pulled out all the stops to obtain a passionate verdict for death. (See generally Argument XXIII, *post.*) His first step in doing so was to obtain admission of as much evidence under the aegis of victim

impact[27] as he could to inflame the jury to return a verdict of death. To this end, the prosecutor sought to present testimony from each of Blair's three young sons, his ex-wife, his widow, both of his parents, his fellow officer Lyons (again), two other deputies, and a "number of individuals necessary to prove up Deputy Blair's commendations while he was performing his duties as a deputy sheriff." (RT 2379.) Over objection at least to the presentation of Lyons's testimony, the court permitted all the testimony that the prosecutor proposed. (RT 23782385.) The court specifically found that testimony from the children and about Blair's commendations was admissible. (RT 2382-2383.) The court nevertheless cautioned the prosecutor: "If I feel it is getting out-of-hand, I will limit it." (RT 2378-2385.).

The prosecutor further proposed to present a video of Blair at work that coincidentally had been in the process of being produced for television, and was completed after the shooting. (RT 2379.) The prosecutor also sought to present a "finished video tape of Deputy Blair's funeral" as well as what he referred to as "a roll call tape" (RT 2379), which he described as follows:

> It is an audio tape that was made on the day of Deputy Blair's funeral. It is a roll call of the patrol deputies that were on duty that day. It is over the radio. It is an actual recording of the radio transmission taking place where the radio dispatcher asked each car in order to send their final regards to Deputy Blair over the air waves and it talks about the fact that Deputy Blair's unit was permanently retired as a result of this incident ....

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[27] "Victim impact evidence" is described in *Payne v. Tennessee* (1991) 501 U.S. 808, 827, and *People v. Edwards* (1991) 54 Cal.3d 787, 835-836.

(RT 2380.) The court excluded this testimony pursuant to objection of defense counsel, finding "that the funeral and the roll call [tape] would have as their primary purpose, to inflame the passions of the jury ...." (RT 2380; see also RT 2381.) Also following defense objection, the court excluded the evidence of the tape "showing ... Deputy Blair in action," concluding that it "would be likely to misdirect the proper focus of the jury." (RT 2383.)

Apparently sensing where the prosecutor was headed, the court stated: "Again, I must caution you, Mr. Richman, that we'll not appeal to the passions and prejudices of the jury and try to taint them with the victim impact testimony." (RT 2386.) Citing *People v. Edwards* (1991) 54 Cal.3d 787, the trial court said that this Court there "caution[ed] that we cannot have emotion reign over reason," and that while a trial court "should allow evidence and argument on emotional though relevant subject that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction[,] [o]n the other hand, irrelevant information or inflammatory rhetoric which diverts the jury's attention from its proper role or invites an irrational purely subjective response should be curtailed." (RT 2387.) Despite those admonishments, the prosecutor positively advised the jury in his opening statement that the penalty phase was the venue to let its passions rule: The prosecutor contrasted the admonitory instruction at guilt phase that "sympathy, pity and passion should not play a role in your decision making process," and advised the jury that "in this portion of the trial it does." (RT 2392.) The prosecutor explicitly urged the jury to be moved by sympathy and pity for Blair and those affected by his death, and to condemn Fuiava to death out of passion. "[U]se your emotion," the

prosecutor beseeched, "in making a decision on what penalty to impose in this case." (RT 2392.) "[I]f you have a kleenex, keep it handy," he told the jury as the final introduction to his evidence. (RT 23292.

The prosecutor then wrung as many tears as he could from the evidence to favor Blair and rile the jury against Fuiava. Over objection, the prosecutor was allowed to introduce a photograph of Blair in his uniform, though his effort to introduce a photograph of Blair's bloody badge was rebuffed. (RT 2574-2575.) As the prosecutor advised the jury:

> You will hear about the victims that the defendant terrorized. You will hear about the havoc that he wreaked. You will hear about the lives that he shattered. [¶] And you will hear about the dreams and the hopes that he has caused to be unrealized.
>
> And you are going to hear ... about Deputy Blair. It is not going to be that Deputy Stephen Blair, who they tried to bring his reputation down into the same gutter that he died in .... It is going to be Deputy Stephen Blair, highly respected, highly commended Deputy Sheriff. [¶] You will hear about his commendations. You will hear from people who worked with him, that he was a highly respected lawman, friend, son, husband, father hero.

(RT 2392.)

As set forth in the Statement of Facts, Section B.1, the jury did hear from friends and colleagues of Blair as well as from his family, all of whom spoke of him in glowing terms. They recounted various poignant anecdotes and stories about him from the time of his youth to the day of his death. Each of the deputies seemed to be Blair's best friend and expressed their great love for him. Through the testimony of Westin, the prosecutor highlighted the numerous commendations that had been awarded Blair, and

the various memorials dedicated to his memory. As it turned out, many of those awards were given to Blair posthumously in recognition of his death, so that the court subsequently excluded them and further testimony about them from evidence. (RT 2577-2578.) Nevertheless, through insinuation of evidence that there was a memorial run for all such deputies who had been slain in the line of duty scheduled the night of the shooting in which Lyons had planned to participate, the prosecutor evoked the spirit of all such fallen deputies.

Blair's career as a police officer was highlighted throughout the prosecutor's case. Each of his young boys was called to the witness stand purely for the emotional impact their appearance would carry for the jury, for they testified only to the obvious: They missed their father. The penalty phase was transformed by all the victim impact evidence into more of a homage to Blair in celebration of his life and mourning of his death than an inquiry into the person of Fuiava to determine whether he should live or die. (See generally RT 2405-2569.)

Fuiava's counsel moved for a new trial based on this transformation of the trial, arguing that "the evidence turned into a contest as to how much sympathy and emotion each witness could get from the jurors, and the trial went from being about law and justice to being about how much the prosecutor could 'whip up' the jury for a quick death verdict." (RT 794-795.) The court denied the motion. (CT 827.)

B. Legal Analysis.

Historically, victim impact evidence was not admissible in California. For instance, in *People v. Gordon* (1990) 50 Cal.3d 1223, this Court held that factor (a) of section 190.3 — authorizing consideration of

the circumstances of the capital murder — did not permit consideration of victim impact evidence: "In *People v. Boyd* [(1985)] 38 Cal.3d 762, 772-776, we made it plain that the only circumstances material to the determination of penalty are those defined in Penal Code section 190.3 .... In the general case — and certainly here — the effect of the crime on the victim's family is not relevant to any material circumstance. Nor is sympathy for the victim. Obviously, evidence on these matters is inadmissible." (*Id.* at pp. 1266-1267.) As the United States Supreme Court found in 1987, admission of such evidence "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." (*Booth v. Maryland* (1987) 482 U.S. 496, 505, 107 S.Ct. 2529, 2534; see also *South Carolina v. Gathers* (1989) 490 U.S. 805 [prohibiting prosecution argument on the subject of victim impact].)

In *Payne v. Tennessee* (1991) 501 U.S. 808, the United States Supreme Court overruled *Booth* and *Gathers*, finding that the Eighth Amendment erects no per se bar to admission of victim impact evidence, including evidence of the personal characteristics of the victim and the impact of the crime on the victim's family. (*Id.* at p. 827.) According to the Supreme Court, these matters demonstrate "the specific harm" caused by the defendant's capital crime. (*Id.* at p. 825.) Thus, a state may authorize such victim impact evidence "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness ...." (*Ibid.*) At the same time, however, the Supreme Court recognized that while admission of victim impact evidence would not always lead to an arbitrary penalty verdict, its unchecked admission of such evidence ran special risks of interference with the Constitution's demand for fair and reliable

decisionmaking when imposing a death sentence. It accordingly noted: "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) Moreover, a defendant has a right under the Eighth and Fourteenth Amendment to a reliable determination that death was the appropriate punishment (*see, e.g., Johnson v. Mississippi*, *supra*, 486 U.S. at p. 587; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 340), which provides an additional basis for limiting the admission of victim impact evidence.

On the heels of *Payne*, this Court issued its decision in *People v. Edwards, supra,* 54 Cal.3d 787, which held that its theretofore restrictive interpretation of factor (a) had been informed by the constitutional concerns about such evidence expressed in *Booth* and *Gathers*. (*Id.* at p. 835.) Accordingly, this Court there determined that the prosecution may present victim impact evidence under section 190.3, subdivision (a)'s "circumstance of the crime" provision. (*Id.* at pp. 835-836.) Nevertheless, the Court recognized that the mere statutory authorization for the jury to consider the "circumstances of the crime" does not necessarily permit broad categories of victim impact evidence. As it stated:

> We thus hold that factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. This holding only encompasses evidence that logically shows the harm caused by the defendant. We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by

> *Payne, supra,* 501 U.S. ___ [115 L.Ed.2d 720, 111 S.Ct. 2597].

(*Id.* at p. 835-836.) As it hastened to add:

> Our holding also does not mean there are no limits on emotional evidence and argument. In *People v. Haskett* [1982], *supra,* 30 Cal.3d [841] at page 864, we cautioned, "Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (See also the cautionary language in *Payne, supra,* 501 U.S. at p. ___ [115 L.Ed.2d 735, 111 S.Ct. at p. 2608], quoted previously.)

(*Id.* at p. 836.)

Here, the extensive presentation of victim impact evidence violated Fuiava's constitutional rights to due process, a fair trial, and a reliable verdict as protected by the Eighth and Fourteenth Amendments to the United States Constitution, correlative rights of the state Constitution (Cal. Const., art. I, §§ 15 & 24), and Evidence Code section 352. The trial court permitted an excessive amount of such evidence. The evidence was far-reaching, heart-rending and emotionally charged, yet largely irrelevant to and distracting from the grave moral question facing the jury: Whether Fuiava should live or die.

First, the court erroneously admitted extraneous victim impact evidence that had nothing to do with the circumstances of the crime. Second, it erroneously admitted excessive amounts of unduly prejudicial victim impact evidence so tinged with emotion that it could have only appealed to the passions of the jurors and distracted them from rendering a fair and reliable verdict. Third, it admitted testimony about Blair and the impact of his death on others that Fuiava obviously did not know and about which he could not have known. (See *People v. Fierro* (1991) 1 Cal.4th 173, 264 (conc. and dis. opn. of Kennard, J. ["As used in section 190.3, 'circumstances of the crime' should be understood to mean those facts or circumstance either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated in the guilt phase"].) As Justice Kennard further noted, the Supreme Court in *Payne* did not retreat from its previous holding in *South Carolina v. Gathers*, *supra*, 490 U.S. at pp. 811-812, "that the term 'circumstances of the crime' did not include personal characteristics of the victim that were unknown to the defendant at the time of the crime." (*Id.* at p. 260.) The Tennessee Supreme Court, too, has recognized subsequent to *Payne* that there is only minimal probative value to victim impact evidence where the defendant lacked knowledge about the victim. (*State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872.)

This Court still has not explored the limits of victim impact evidence. In *People v. Taylor* (2002) 26 Cal.4th 1155, for example, it simply found that "[v]ictim impact evidence... directed toward showing the impact of the defendant's acts on the family of his victims [] is admissible at the penalty phase of capital trials." (*Id.* at pp. 1171-1172, citing *Payne*.)

There, the Court's "review of the record indicate[d] the evidence was relevant and not so voluminous or inflammatory as to divert the jury's attention from its proper role or invite an irrational response." (*Id.* at p. 1172.) It contrasted that case with *People v. Love* (1960) 53 Cal.2d 843, 854-857, where the Court reversed the judgment because of "unduly prejudicial victim impact evidence, including tape-record groans of [the] dying victim." (*Taylor* at p. 1172, explaining *Love*.) As this Court there suggested, the Constitution places inherent limits on the receipt of such evidence. To be sure, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S. 153, 189 [96 S.Ct. 2909, 49 L.Ed.2d 859 (plur. opn.).) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida, supra,* 430 U.S. at p. 358.)

The limits other states have placed on such evidence to comply with these constitutional dictates are instructive and demonstrate the error here. For example, Texas, like California, allows victim impact evidence under the rubric of consideration of the circumstances of the capital crime. Texas, however, limits such evidence to the impact of the crime on those members of the decedent's family who were personally present during or in its immediate aftermath — precisely the evidence at issue in *Payne*. (Compare *Smith v. State* (Tex. 1996) 919 S.W.2d 96, 102, with *Ford v. State* (Tex.

1996) 919 S.W.2d 107, 1150116.) Here, the evidence both from Blair's colleagues and his family members went far beyond such a limited scope.

The quantity of victim impact evidence must be limited as well. As the New Jersey Supreme Court has observed: "The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant." (*New Jersey v. Muhammad* (1996) 145 N.J. 23, 54 [678 A.2d 164, 180].) The court accordingly found that in the usual case "the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness." (*Ibid.*; see also *People v. Hope* (Ill. 1998) 702 N.E.2d 1282 [Illinois Supreme Court interpreted its law to limit victim impact testimony to "a single representative who may be the spouse, parent, child or sibling" of the victim]; *New Mexico v. Clark* (1999) 128 N.M. 119, 136 [990 P.2d 793, 810 ["Victim impact testimony admissible when "brief in nature and narrow in scope and purpose"].) The New Jersey Supreme Court also found that "minors should not be permitted to present victim impact evidence except under circumstances where there are no suitable adult survivors and thus the child is the closest living relative." (*New Jersey v. Muhammad, supra*, 145 N.J. at p. 54 [678 A.2d at p. 180].) The court further cautioned that "[t]he testimony should be factual, not emotional ...." (*Id.* at p. 55.) The victim impact evidence the court admitted here hardly met these limits.

The Mississippi Supreme Court also has expressed concern that victim impact evidence should be limited to protect against its wrongful

use, finding such evidence proper only when it "could not serve in any way to incite the jury." (*Berry v. State* (Miss. 1997) 703 So.2d 269, 275.) Commentators overwhelmingly concur that admission of victim impact evidence at the penalty phase of a capital trial should be strictly limited, if not precluded. (See, e.g., Bartolo, *Payne v. Tennessee: The Future Role of Victim Statements of Opinion in Capital Sentencing Proceedings* (1992) 77 Iowa L. Rev. 1217 [urging that admission of victim impact evidence not be extended beyond the limits of *Payne*]; Oberlander, *The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings* (1992) 45 Van. L. Rev. 1621 [arguing victim impact evidence should not be admitted at capital sentencing]; Note, *Victim Impact Evidence and Capital Sentencing—A Casenote on Payne v. Tennessee* (1992) 52 La. L. Rev. 1299 [recommending that states preclude victim impact evidence in capital cases].)

Here, the evidence presented was designed precisely for its emotional impact on the jury to evoke sympathy for Blair and his loved ones and to set the jury against Fuiava. Displaying the picture of Blair that showed him "wearing his uniform next to the flag that we have in our courtroom that is a symbol of our society," the prosecutor argued that Fuiava "killed a hero." (RT 2746.) The prosecutor argued at length about Blair's heroics as a policeman (RT 2746-2750), noting that he was "Mr. Lynwood." (RT 2750.) As the prosecutor further argued:

> [Y]ou can consider the impact that Deputy Blair has on his friends and his family.
>
> You saw Mrs. Blair testify, his father, his mother, his children, his ex-wife.

> You can see the impact. You don't need a hammer to hit you in the head to know what kind of loss that it had to him and his fellow deputies who were his friends.
>
> ... [Y]ou heard deputies who were his friends that came in here and testified to what a good deputy sheriff he was, what a highly respected individual he was, and all the accolades that they could give him.
>
> You saw his commendation here that is hanging in the roll call room at Century Station.
>
> So I am not really going to address the victims' impact as far as family and friends are concerned because you saw it and you felt it.

(RT 2751-2752.)

In determining prejudice, "the stricter reasonable possibility standard applies even to errors of state law at the penalty phase." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 844, fn. 14.) That same standard, of course, applies to constitutional error as well where improper admission of victim impact evidence is measured for harm. (See, e.g., *Willingham v. Mullim* (10th Cir. 2002) 296 F.3d 917, 931, [specifically invoking "the 'harmless beyond a reasonable doubt' standard of *Chapman v. California*, *supra*, 386 U.S. at 24" for determining prejudice from such error on direct appeal].) For several reasons, there is a reasonable possibility that this evidence influenced the determination of death for Fuiava.

First, the evidence constituted the majority of the penalty phase. (Compare *Allen v. Holder* (8th Cir. 2001) 247 F.3d 741, 779 [no due process violation for admission of victim impact evidence were, among other things, the testimony "took up only eighty-eight pages of transcript," while "the entire penalty phase transcript takes up over seventeen hundred pages, and the testimony from Allen's penalty phase witnesses took up over

nine hundred pages"]; *Louisiana v. Miller* (La. 2000) 776 So.2d 396, 412 [admission of victim impact evidence not fundamentally unfair where, among other things the "testimony totaled less than fifteen pages in the transcript"].) The disproportionate use of victim impact evidence highlights one of the evils of using such evidence as a benchmark for the appropriate sentence under the rationale that it is a "circumstance of the offense," as explained by one justice: "[R]ather than orienting punishment to the perpetrator, punishment is oriented toward the victim." (*Tennessee v. Smith* (Tenn. 1999) 993 S.W.2d 6, 24. (dis. opn. of Birch, J.); see also *New Jersey v. Muhammad*, *supra*, 145 N.J. at p. 88 (dis. opn. of Handler, J.) ["victim-impact evidence turns the focus from the defendant's blameworthiness to the victim's worthiness"].)

Second, the impact evidence in this case carried considerable emotional power. (See, e.g., *New Jersey v. Muhammad*, *supra*, 145 N.J. at p. 55 [recognizing "the potential for prejudice and improper influence that is inherent in the presentation of victim impact evidence"]; *id.* at p. 88 (dis. opn. of Handler, J.) ["The prejudicial effect of victim-impact evidence cannot be minimized; it will be extremely difficult for jurors to escape its influence."].) As the Chief Justice stated in his concurring opinion in that case: "Victim impact evidence has no place in a rationally conducted sentencing proceeding. It is a throwback, at least potentially, to the days when the death penalty could be imposed arbitrarily, without reason, much like being struck by lighting." (*Id.* at p. 60 (conc. opn. of Wilentz, C.J.).) Another justice in that case found that "victim-impact evidence cannot be tolerated because of its powerful and corrosive potential for invidious discrimination." (*Id.* at p. 71 (dis. opn. of Handler, J.).) The highly

evocative victim impact evidence admitted in Fuiava's case, which concerned the killing of a mainstream police officer by a member of a minority race, maximized the danger of an arbitrary penalty verdict.

Third, in both his opening statement and closing argument, the prosecutor exploited the evidence to inflame a passionate response. Indeed, the jury was specifically permitted and encouraged by the prosecutor to let its passion and emotions evoked by the victim impact evidence carry the day, and the prosecutor frankly admitted that because that evidence was so laden with power he hardly needed to argue it. (Compare *Williams v. Chrans* (7th. Cir. 1991) 945 F.2d 926, 946-947 [affirming admission of victim impact evidence where it was comparatively brief and the court instructed the jury to avoid passion and sympathy in determining the penalty]; *United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166, 1221 [noting "the government's self-restraint" in the presentation of its victim impact evidence in the Oklahoma bombing case as one factor in finding admission of that evidence fair]; *United States v. Bernard* (5th Cir. 2002) 299 F.3d 467, 481 ["any prejudice that did result from the statements was mitigated by the district court's instructions to the jurors not to be swayed by passion, prejudice or sympathy"].)

The case for death was otherwise close. There was a powerful case for lingering doubt as to whether the shooting was justified or excusable. Moreover, even if the jury had rejected self-defense and provocation as defenses to murder here, the evidence that a reign of terror in the community imposed by the Lynwood deputies substantially contributed to the murder was powerful mitigation in its own right. Furthermore, indisputably the shooting was unplanned and the product of rapidly

evolving events that lent themselves to confusion and uncertainty, so that at most there was but marginal premeditation and deliberation that also reduced Fuiava's culpability. Finally, Fuiava presented a sincere — albeit narrow — case in mitigation, using his family background to argue that death was not the appropriate penalty under all the circumstances that attended the jury's decision. Thus, the possibility that the victim impact evidence, laden as it was with emotion and prejudice, contributed to the jury's determination to impose death is a reasonable one. Indeed, it would be unreasonable to conclude that there was no chance that it contributed to the jury's decision, given the visceral power of the evidence to skew the proceedings toward a death verdict.

For all of these reasons, the admission of all this evidence under the guise of victim impact requires reversal of the judgment.

XVII.

THE COURT'S ADMISSION OF EVIDENCE THAT FUIAVA CONFESSED TO COMMITTING TWO SHOOTINGS, THOUGH THERE WAS NO INDEPENDENT EVIDENCE OF ANY SUCH SHOOTINGS AND THERE WERE MANY REASONS TO SUSPECT HE DID NOT SO CONFESS, REQUIRES REVERSAL OF THE JUDGMENT — PARTICULARLY BECAUSE THE COURT'S EVIDENTIARY RULING WAS AGGRAVATED BY RELATED INSTRUCTIONAL ERROR.

A. Factual Background.

Section 190.3 provides that a jury shall take into account as an aggravating factor "[t]he presence ... of criminal activity by the defendant which involved the use or attempted use of force or violence ...." In the course of presenting evidence about the September 1984 shooting that was

the subject of a juvenile adjudication, the prosecutor elicited evidence that Fuiava had admitted committing two other shootings around that time. (RT 2424.) The court overruled defense counsel's objection to the evidence and denied his request for instruction to the jury to disregard it. (RT 2424.) When defense counsel protested that he had received no notice that evidence of these two additional shootings would be introduced, the court conducted a side bar conference. (RT 2424.) The prosecutor advised that these admissions were "all part of the original statement." (RT 2425.) Defense counsel further objected, "We don't have a corpus to the other shootings." (RT 2426.) The court overruled the objections and allowed the prosecutor to introduce the evidence, advising counsel that he could argue the lack of a corpus "to the jury as to weight." (RT 2426.) The prosecutor then fully developed this evidence of admissions to two additional shootings. (RT 2426-2438.)

The court subsequently instructed the jury that it could use in aggravation the presence of past criminal violence by Fuiava. (RT 2730.) The court further instructed as follows: "Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts, assault with a firearm in 1984, 1990, and 1992, which involved the use of force or violence." (RT 2733.) The court also instructed that "testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact." (RT 2730.) It did not instruct the jury either that it needed to find evidence of a corpus delicti independent of any asserted confession in order to find that Fuiava committed any crime of violence, or that it should view any evidence of an extrajudicial oral confession with caution.

In closing argument, the prosecutor asserted that the evidence showed that Fuiava had committed five prior shootings — three in 1984, and one each in 1990 and 1992. (RT 2761.) He further argued:

> You have heard during the course of the testimony here testimony concerning five separate shootings that the defendant was involved in before he killed Deputy Blair. Five separate shootings.
>
> You heard about the three shootings that he confessed to ... Sergeant Kaono, who came in here and testified ....
>
> [Argument regarding the adjudicated juvenile shooting of Anthony.]
>
> And then he talks to Deputy Kaono about two other shootings, one immediately before shooting Christina Anthony and then another one where he went out looking for Segundo gang members and was shooting at them.
>
> .....
>
> This killing machine has never from the time that he was 13 years old displayed anything but a blatant disregard for human life.... [¶] All he does is shoot people. That's all he ever has done.

(RT 2763; see also RT 2764 [That's all he knows how to do."].)

B. Legal Analysis.

1. The Error.

"In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself — i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or

admissions of the defendant." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169, italics in original; see also *People v. Jones* (1998) 17 Cal.4th 279, 301 ["'In any criminal prosecution, the corpus delicti must be established by the prosecution independently from the extrajudicial statements, confessions, or admission of the defendant.' [Citations.]"].)

"This rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*People v. Alvarez*, 27 Cal.4th at p. 1169; see also *People v. Jones*, *supra*, 17 Cal.4th at p. 301 [the corpus delicti rule "assure[s] that 'the accused is not admitting to a crime that never occurred.' [Citation.]"].) "The rule arose because of the law's unease with inflicting punishment when 'a confession may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given ....'" (*Id.* at p. 319 (conc. opn. of Mosk, J.).) "The corpus delicti rule is a prophylactic remedy, protecting ... against the ... inclination of jurors to believe a confession without conducting a close factual analysis of its trustworthiness." (*People v. Culton* (1992) 11 Cal.App.4th 363, 374 (conc. opn. of Timlin, J.).) "Today's judicial retention of the rule reflects the continued fear that confessions may be the result of either improper police activity or the mental instability of the accused, and the recognition that juries are likely to accept confessions uncritically." (*Jones v. Superior Court* (1979) 96 Cal.App.3d 390, 397.)

The corpus delicti rule applies to evidence of other violent crimes the prosecution introduces at the penalty phase of a capital trial in support of its case for death. For example, in *People v. Hamilton*, *supra*, 60 Cal.2d at p. 129, as here, "over defense objections the trial court allowed the

prosecution to introduce the testimony of police officers ... relating to claimed extrajudicial admissions allegedly made by appellant, confessing the commission of or participation in prior crimes as to which no other evidence was produced." As here, "[e]ach constituted evidence that appellant had made such an extrajudicial admission concerning a crime as to which no corpus delicti was proved." (*Ibid.*) 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." (*Ibid.*; accord, *People v. Robertson* (1982) 33 Cal.3d 21, 42.) The error here in overruling defense counsel's objection to introduction of evidence that Fuiava confessed to these two other shootings thus is patent.

It is equally clear that the court erred when it failed to instruct the jury that it could not find that Fuiava committed any such shooting without "some proof of each element of the crime independent of any [extrajudicial] confession," and that it should view "with caution" any evidence of an oral confession. (See *People v. Beagle* (1972) 6 Cal.3d 441, 455 [court must instruct sua sponte regarding criminal charges that "evidence of an oral admission should be viewed with caution" and that "the corpus delicti must be proved independently of admissions"].) "The failure of a trial court to give such instruction on its own motion where it is warranted by the evidence is error." (*People v. Romo* (1975) 14 Cal.3d 189, 194.)

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. Similarly, the same considerations that require instruction that charges the jury to view evidence of an oral confession of a charged crime with caution apply at the penalty phase to alleged violent offenses. "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.) As the Court there explained:

> "It is a familiar rule that verbal admissions should be received with *caution* and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself." [Citation.] It was undoubtedly such considerations that led the Legislature to make the admitting of extrajudicial admissions into evidence conditional on the giving of a cautionary instruction. [Citation.])

(*Id.* at p. 399; italics in original.) The unreliability of evidence of oral confessions does not vary with whether the evidence is offered to support charged crimes at the guilt phase or alleged other crimes of violence at the penalty phase, so that the obligation for the court to give the cautionary instruction applies equally at the penalty phase. (See, e.g., *People v. Pensinger* (1991) 52 Cal.3d 1210, 1268 -1270 ["The Attorney General concedes the error" where court failed to give cautionary instruction to jury concerning evidence at the penalty phase of defendant's oral admissions to violent crimes]; compare with *People v. Livaditis* (1992) 2 Cal.4th 759, 782-784 [where defendant pleaded guilty and the evidence of his oral

admissions to the capital offense at penalty could be deemed mitigation, court either not obliged to give cautionary instruction or any such error was harmless].)

The court was obligated to give the cautionary instruction here, for the prosecutor introduced and relied on the evidence of the oral confession to establish the commission of violent crimes as aggravation supporting a sentence of death. Moreover, all the dangers that impel such instruction applied here, for the evidence was extremely unreliable. To begin with, the witness purported to recall statements that had been made to him more than a decade earlier. The fallibility of memory was thus especially great here. Moreover, the evidence was confused on whether there was truly any admission to two additional shootings; indeed, to the degree that the witness relied on refreshing his recollection with the notes of his interview with Fuiava, it appears that there was at most one shooting that was confessed to in addition to the adjudicated one. (See CT 513-514.) Finally, the witness had a great opportunity and temptation out of solidarity with his fellow officers to shade the truth or otherwise revise history — whether consciously or unconsciously — to secure the death penalty. In sum, there was a great danger here that the evidence "convey[ed] a false impression."

2. The Prejudice.

Equally patent as the errors is the fact that the introduction of this unreliable evidence and the prosecutor's exploitation of it require reversal. In *People v. Robertson*, *supra*, 33 Cal.3d at p. 54, this Court recognized "the overriding importance of 'other crimes' evidence to the jury's life-or-death determination." Certainly the prosecutor here gave overriding importance to the evidence of Fuiava's past shootings — including the

evidence of his admissions to the two shootings here in question — in seeking a verdict of death. As set forth above, the prosecutor made full use of the evidence of extrajudicial confessions to these two additional shootings and the court's instructions permitting their consideration as aggravation to foster the image of Fuiava as "a killing machine," as was the prosecutor's hyperbolic refrain. (See, e.g., RT 2762.)

Notably, this Court in *Robertson* found prejudicial the jury's wrongful exposure to evidence that defendant admitted two other murders for which there was no corpus delicti, despite the fact that "the prosecutor did not discuss this [evidence] in his closing argument at the penalty phase." (*People v. Robertson*, *supra*, 33 Cal.3d at p. 55.) The Court so found there because of 1) the similarity of those crimes to the capital offense; 2) instruction that one witness was sufficient to prove any fact; and 3) "the difficulty in ascertaining 'the precise point which prompts the death penalty in the mind of any one juror.' [Citation]." (*Id.* at p. 54; brackets in quote deleted) All of these considerations apply here, as does the final consideration noted by the Court in *Robertson*: "[T]he potential for prejudice was particularly serious because the error in question significantly affected the jury's consideration of 'other crimes' evidence, a type of evidence which this court long ago recognized 'may have a particularly damaging impact on the jury's determination whether the defendant should be executed.'" (*Id.* at p. 54.) As in *Robertson*, "we cannot gamble a life on the possibility that the evidence concerning the two previous [shootings] did not sway a single juror toward the death penalty." (*Id.* at p. 55.)

Moreover, the instructional errors magnified the prejudice. First, they permitted a finding of commission of other crimes solely on the basis of the evidence of Fuiava's confession. Second, they so permitted without even insuring that the jury give its considered attention to whether the confession truly was made as the witness testified it was. The purpose of the cautionary instruction — "to assist the jury in determining if the statement was in fact made" — must be kept in mind. (*People v. Beagle*, *supra*, 6 Cal. 3d at p. 456; see also *People v. Stankewitz* (1990) 51 Cal.3d 72, 94.) Here the lack of the cautionary instruction was especially harmful because there were so many indications that the officer's testimony was as divorced from reality as the final statement of the game of "telephone" typically is from the statement that starts the game.

The evidentiary and instructional errors also had implications under the United States Constitution that require reversal of the judgment. The corpus delicti rule springs from deeply embedded notions of fundamental justice reflected in the Due Process Clause of the Fourteenth Amendment, which mandates proof beyond a reasonable doubt. (See *Opper v. United States* (1954) 348 U.S. 84, 89; see also *Wong Sun v. United States, supra,* 371 U.S. at pp. 488-89.) As explained in *Opper*, at pp. 89-90:

> In the United States our concept of justice that finds no man guilty until proven has led our state and federal courts generally to refuse conviction on testimony concerning confessions of the accused not made by him at the trial of his case. [Citations.] ... In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession.

Accordingly, there is a constitutional "need for corroboration" of a defendant's extrajudicial confession." (*Ibid.*; see also *People v. Alvarez*, 27 Cal.4th at p. 1169 ["Virtually all American jurisdictions have some form of rule against convictions for criminal conduct not proven except by the uncorroborated extrajudicial statements of the accused."].)

The 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. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 586 ["allowing petitioner's death sentence to stand although based in part on a reversed conviction violates" the Eighth Amendment's demand for the reliability of a death judgment].) In *Johnson*, the Court found that "[i]t is apparent that the New York conviction provided no legitimate support for the death sentence imposed on petitioner," where the conviction was later overturned. (*Johnson v. Mississippi*, *supra*, 486 U.S. at p. 586.) Here, too, it is apparent that evidence of Fuiava's admissions to shootings that were never shown by any other evidence provided no legitimate support for the death sentence imposed upon him.

The High Court's analysis of prejudice from the error in *Johnson* reinforces the conclusion that Fuiava was prejudiced by the court's error in permitting the evidence of Fuiava's admissions. In *Johnson*, the Supreme Court found prejudice as follows:

> It is equally apparent that the use of that conviction in the sentencing hearing was prejudicial. The prosecutor repeatedly urged the jury to give it weight in connection with its assigned task of balancing aggravating and

> mitigating circumstances "one against the other." [Citations.] Even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be "decisive" in the "choice between a life sentence and a death sentence." [Citation.]

(*Johnson v. Mississippi*, *supra*, 486 U.S. at p. 586.)

The same reasoning applies here, for the prosecutor expressly urged the jury to give the evidence of these two shootings great weight in balancing the aggravating and mitigating circumstances in reaching its verdict. Moreover, this unsupported evidence gave force to the prosecutor's repeated references to Fuiava as a career killer and assassin, enlarging the possibility that the jury's belief that Fuiava committed these shootings was decisive in its choice of a death sentence.

For these reasons, the court's ruling permitting evidence of Fuiava's uncorroborated admissions of two shootings and related instructional lapses constituted state and federal error that requires reversal.

XVIII.

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

As the defense case in mitigation was concluding, the following colloquy occurred at the bench:

> Mr. Hauser: Your Honor, I haven't had a chance to talk to my client about testifying — I mean, I talked to him before but not today. And he is telling me now that he wanted to testify so I need a chance to talk to him.

> The Court: I will give you five minutes. I want to try to finish ... this case today.
>
> Mr. Hauser: I understand.

(RT 2704.) The court then recessed the proceedings for five minutes. Following the recess, defense counsel called Fuiava to testify on his own behalf. (RT 2705.)

By limiting consultation between Fuiava and his counsel to five minutes on the critical question of calling Fuiava as a witness on his own behalf as to the life-or-death decision, the court abused its discretion and deprived Fuiava of his constitutional right to counsel and to testify on his own behalf, as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution as well as the correlative rights secured by the California Constitution.

"[T]he right to testify in one's own behalf is of ... fundamental importance ...." (*People v. Robles* (1970) 2 Cal.3d 205, 215; see also *United States v. Martinez* (9th Cir. 1989) 883 F.2d 750, 756, vacated on other grounds, *United States v. Martinez* (9th Cir. 1991) 928 F.2d 1470 ["The right to testify is a constitutional right of fundamental dimensions."]; see generally *Wright v. Estelle* (5th Cir. 1978) 572 F.2d 1070, 1077-1080 (en banc) (dis. opn. of Godbold, J.) for a full discussion of the several constitutional bases of the right.) Indeed, "[e]xperienced litigators such as Anthony Amsterdam and Edward Bennett Williams have noted that the decision whether or not to testify can be the single most important factor in the criminal case. *See* Amsterdam, *Trial Manual for the Defense of Criminal Cases* § 390 (3d ed. 1974); Williams, *The Trial of a Criminal*

Case, 29 N.Y.St.B.A.Bull. 36, 42 (1957)." (*United States v. Martinez*, *supra*, 883 F.2d at p. 764 (dis. opn. of Reinhardt, J.).)

Equally fundamental to a fair trial is the right to counsel. (See *Gideon v. Wainright* (1963) 372 U.S. 335.) Though "a defendant ... has no constitutional right to consult with his lawyer while he is testifying [,] [he] has an absolute right to such consultation *before* he begins to testify ...." (*Perry v. Leeke* (1989) 488 U.S. 272, 281 [109 S.Ct. 594, 600]; italics in original.) Where the right concerns a defendant's testimony at the penalty phase, there is even greater constitutional imperative for the court to scrupulously honor that right. (See, e.g., *People v. Horton* (1995) 11 Cal.4th 1068, 1135-1136 [penalty reversal where death verdict relied on prior conviction tainted by deprivation of right to counsel].) Here, the token five minutes granted counsel to consult with Fuiava regarding the question whether he should testify and the scope of that testimony deprived him of meaningful exercise of that right. Counsel appeared to be taken by surprise by Fuiava's figurative tug at the sleeve about testifying. Counsel accordingly expressed a "need [for] a chance to talk to him." The court, once again showing more concern for the speedy conduct of the trial than the protection of Fuiava's rights to a full and fair trial, gave counsel but five minutes because the court wanted to conclude the trial by the end of the day. The court's effort to save time at the expense of Fuiava proved useless, for it abandoned that effort later in the day when it threatened to infringe the prosecutor's interests. Though at the conclusion of Fuiava's testimony the court remained intent on finishing the trial that day, the session in fact concluded early — before argument to the jury — at the prosecutor's request. (RT 2711-2712, 2739.) At the prospect that the court

might recess at the end of the day before the defense concluded its argument, the prosecutor complained that "it would be unfair to me ... [if] "Mr. Hauser would have the night to think about my argument." (RT 2711-2712.) What truly was unfair, however, was the court's allotment of no more than five minutes for Fuiava and his counsel to determine whether Fuiava would testify and what he would testify about.

The record shows that the hurried consultation failed to provide for adequate preparation for that testimony. After the court sustained the prosecutor's objection to counsel's first question to Fuiava and directed counsel to confine his questioning to "what the sentence should be" (RT 2706), counsel approached the bench and offered to "withdraw the question and have my client sit down" if the prosecutor agreed not to argue lack of remorse. (RT 2706.) When the prosecutor stated that he had no intention of arguing that point, counsel said: "Well, wait a minute. I am sorry. I should clear it with my client. He does have a right to testify." (RT 2707.) The court did not call a further recess for this purpose, but only permitted counsel to confer with Fuiava while he was on the witness stand in front of everyone, including the jury. (RT 2707.) Fuiava apparently advised his counsel that he still wished to testify, for counsel continued with direct examination. (RT 2707.) Obviously unprepared, counsel asked Fuiava a single broad question: "[W]hy should this jury spare your life?" (RT 2707-2708.) Fuiava answered that question in eleven lines of transcript. (RT 2707-2708.) The prosecutor followed with three pages of cross-examination (RT 2708-2711), and defense counsel had no re-direct of Fuiava. (RT 2711.)

When a court's limitation on attorney client communications during trial deprives a defendant of meaningful exercise of his right to counsel, the deprivation requires reversal. (See, e.g., *Moore v. Punkett* (8th Cir. 2001) 275 F.3d 685, 689 [trial court's prohibition of oral communication during court sessions infringed right to counsel and required reversal "without a showing of prejudice].) Specifically, abridgment of the right to consult with counsel in connection with a defendant's testimony on his own behalf is a structural error that requires reversal per se. (See *Perry v. Leeke*, 488 U.S. at pp. 278-279.) The Court there explained that such automatic reversal is "consistent with the view we have often expressed concerning the fundamental importance of the criminal defendant's constitutional right to be represented by counsel." (*Id.* at p. 279.) Thus, "'actual or constructive denial of the assistance of counsel altogether' [citation] is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." (*Id.* at p. 280.)

For these reasons, the trial court's impractical limitation on the time counsel and Fuiava could to consult on the all-important question of whether and to what extent Fuiava should testify as part of the effort to save his life deprived him of his rights under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the corollary provisions of the California Constitution.

XIX.

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

A. Factual Background.

Defense counsel opened his examination of Fuiava by asking whether he had anything that he wanted to say to Blair's family. (RT 2706.) The prosecutor objected on the ground that the question was "inappropriate." (RT 2706.) The court sustained the objection and directed counsel to "confine yourself to the issue of whether or not he should be — what the sentence should be." (RT 2706.) Counsel made clear that his question was designed to permit Fuiava to express his remorse for the death of Blair, as demonstrated by the colloquy at the bench following the court's ruling:

> Mr. Hauser: Your Honor, if the prosecutor is going to be prevented from arguing remorse, then I will withdraw the question and have my client sit down.
>
> The Court: Are you planning to argue remorse?
>
> Mr. Richman: No.
>
> The Court: All right.
>
> Mr. Hauser: Well, wait a minute. I am sorry. I should clear it with my client. He does have a right to testify.
>
> The Court: He has a right to testify. He has a right to plead for his life. At this point it would be inappropriate given the position that the people are taking that they are not going to argue the issue of remorse that he should make a public apology, for

> instance, to the Blair family. I don't think that that would be appropriate. And that what I think is —
>
> Mr. Richman: Absolutely, Your Honor.

(RT 2707.)

After conferring with Fuiava and learning that he still wanted to testify, counsel proceeded with examination of Fuiava. Consistent with the court's ruling that Fuiava could not publicly apologize or express his sorrow for Blair's death and could only speak to why he should not be put to death, counsel posed a single question: "Mr. Fuiava, why should this jury spare your life?" (RT 2707.)

Fuiava's counsel assigned this ruling as error entitling him to a new penalty trial in the motion for new trial, arguing as follows:

> The defendant tried to introduce evidence of remorse. This was objected to and sustained by the court. ...[T]he ruling prohibiting the jury from hearing the remorse of the defendant had the effect of denying the defendant a crucial and highly significant factor in the penalty phase of the case. Remorse of the defendant is usually something that jurors look for in deciding to vote for life or death. The court's ruling denied the defendant this important aspect of his defense.

(CT 794.) The court denied the motion based on this ground, finding that its ruling went to the form of the question rather than its substance. (RT 2813

B. Legal Analysis.

The court erred when it refused to allow testimony about Fuiava's sorrow and remorse for the harm resulting from his shooting of Blair. Even if the prosecutor was not inclined to argue that Fuiava's lack of remorse made death appropriate, Fuiava was entitled to display his sorrow and

remorse for the suffering that the death of Blair caused his loved ones.[28] This evidence would have mitigated the offense and provide the jury with a basis for sparing Fuiava's life. This Court has always recognized that evidence of remorse or lack of it is very relevant to the jury's determination of whether a defendant should live or die. (See, e.g., *People v. Coleman* (1969) 71 Cal.2d 1159, 1168 ["The jury may properly consider the defendant's remorse or lack thereof in fixing the penalty"]; see also *People v. Ochoa* (2001) 26 Cal.4th 398; *People v. Champion* (1995) 9 Cal.4th 786; *People v. Wharton* (1991) 53 Cal.3d 522; *People v. Taylor* (1990) 52 Cal.3d 719.)

A capital defendant has a right to present competent evidence of remorse as part of "his federal constitutional right to have the sentencer consider all 'relevant mitigating evidence.' (*Payne v. Tennessee* (1991) 501 U.S. ___, ___ [115 L.Ed.2d 720, 733, 111 S.Ct. 2597, 2606]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4, 6 [90 L.Ed.2d 1, 6, 106 S.Ct. 1669].)" (*People v. Livaditis* (1992) 2 Cal.4th 759, 780; inside quotation marks deleted.) This Court noted the persuasive power of evidence of remorse when it observed in another case that an expert witness "provided considerable favorable testimony regarding factors in mitigation, including the only testimony presented to the jury that defendant showed remorse for the murder ...." (*People v. Davis* (1995) 10 Cal.4th 463, 529.) The direct expression of remorse that Fuiava would have displayed carried even

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[28] The entitlement proved even more crucial when the prosecutor effectively did argue lack of remorse by arguing for a death verdict because Fuiava was a killing machine who, if given a life sentence, would bask in the lionization that his fellow prisoners would give him for killing a cop. (See, e.g., RT 2757, 2775-2776.)

greater power to sway the jury. Thus, what this Court said in another case where the court wrongly excluded mitigating evidence applies here:

> The court's error in sustaining the prosecutor's objections ... goes beyond questions of California evidentiary rules. The United States Supreme Court has expressly held that the sentencer must be permitted to consider "'any aspect of a defendant's character ... that the defendant proffers as a basis for a sentence less than death.'" (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [71 L.Ed.2d 1, 8, 102 S.Ct. 869]; quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [57 L.Ed.2d 973, 990, 98 S.Ct. 2954].)

(*People v. Lucero* (1988) 44 Cal.3d 1006, 1026-1027.)

Fuiava's capacity to empathize with Blair's family and regret the harm his actions had caused them would have demonstrated an aspect of Fuiava's humanity and character that he was entitled to proffer as a basis for a sentence less than death. Just as the Court stated in *Lucero*, where certain character evidence was wrongly excluded: "Defendant was entitled to establish this point as an important consideration in mitigation." (*People v. Lucero*, *supra*, 44 Cal.3d at p. 1028.)

The court sought after the fact to insulate the verdict from this ruling, claiming that its ruling only went to the form of counsel's question and not to the substance of it. The record, however, belies that construction. Counsel made plain his desire to elicit evidence of remorse through the question the court precluded Fuiava from answering and further made clear that he was seeking to present evidence of remorse. The court never advised counsel that its ruling concerned only the form in which counsel sought to elicit Fuiava's expression of sorrow for the homicide.

Counsel obviously took the ruling at its face value — precluding evidence of Fuiava's sorrow and remorse.

Indeed, the court exacerbated its error excluding this evidence when in its very next breath it greatly restricted the scope of direct examination of Fuiava. It permitted questioning of Fuiava only on the question of the appropriate sentence. In context, that limitation permitted only Fuiava's opinion on what he believed the appropriate sentence, and did not permit elicitation of aspects of the case or his character that might provide the jury with a basis to mitigate the penalty. Consequently, Fuiava testified only about why he believed the sentence should be life rather than death.

Because wrongful exclusion of relevant mitigating evidence violates fundamental constitutional guarantees, the prosecution must prove beyond a reasonable doubt that the error was harmless. (*People v. Lucero, supra,* 44 Cal.3d at p. 1032, citing *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24].) This demanding test of prejudice is like the state test for harmlessness for state law error at the penalty phase, which requires reversal unless there was no reasonable possibility that the error affected the verdict. (See *People v. Wright* (1990) 52 Cal.3d 367, 422, fn. 19 ["the applicable test for prejudice ... for assessing the effect of state-law error at the penalty phase of a capital trial [is] the 'reasonable-possibility test.'"].) The State cannot meet this standard, for Fuiava's case was far from one in which a death sentence was inevitable, and the mitigation evidence precluded bore directly on the jury's moral, normative penalty decision.

As in *Lucero*, which concerned the killing of two innocent little girls for which the defendant offered no excuse, "[t]his case is one in which the

jury might have found the death penalty inappropriate" had it been permitted to hear the missing mitigation evidence. (*People v. Lucero, supra,* 44 Cal.3d at p. 1032.) Particularly given the prosecutor's extensive presentation in his case for death of evidence dwelling on the suffering that Blair's death had caused his circle of friends and family, an affecting and heartfelt expression from Fuiava of his sorrow for that suffering could have gone a long way to both blunt that aggravation and establish a basis for a life verdict. (See, e.g., *Ullery v. State* (Okla. Crim. App. 1999) 988 P.2d 332 [reviewing court modified sentence to life imprisonment due to evidence of substantial mitigation, including the fact that the defendant testified on his own behalf and apologized to the victim's family].) Indeed, a recent survey of capital jurors showed that their perceptions of remorse in a defendant generally influenced their verdict, and that there was an inverse relationship between the juror's finding of remorse and their view of how cold-blooded the crime was. (See Eisenberg, et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing* (1998) 83 Cornell L. Rev. 1599.)

For these reasons, the court's rulings precluding Fuiava from eliciting expressions of remorse and sorrow and otherwise confining the scope of his testimony deprived his jury of evidence of an aspect of his character that would have provided a strong basis, along with other mitigation, for a sentence less than death. The error improperly tipped the balance toward death and hence requires reversal.

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.

A. Factual Background.

During the examination of the deputies who eulogized Blair, they were permitted to denigrate the civil rights lawsuit in which Blair was a defendant. For example, Westin was allowed to opine that he considered the lawsuit frivolous, and that Blair had been sued for use of excessive force only because the plaintiff's attorney had sued the entire station of Lynwood. (RT 2483.) On re-direct, Westin likewise claimed that there was nothing "sinister or sadistic or evil" about the Vikings, which he said was a multi-ethnic organization of deputies who had adopted the station logo of a Viking as a mascot. (RT 2488-2489.) The Viking symbol, according to him, "was not made infamous until this lawsuit where the plaintiffs of the lawsuit created this sinister motivation behind getting a tattoo." (RT 2489.)

The court immediately broke in on the recross-examination of Westin when defense counsel began to inquire about the civil rights lawsuit. (RT 2490.) Invoking Evidence Code section 352, the court prohibited testimony about the lawsuit, and advised the jury: "I will take judicial notice that the lawsuit was filed in 1990, ladies and gentlemen. I have ruled it is remote. We're not going to get into it." (RT 2490.)

At the bench then, defense counsel argued as follows:

> Your Honor, the witness characterized it as plaintiff[s'] little lawsuit. I want the jury to understand that this little lawsuit settled for seven and a half million dollars. He has mischaracterized it. He did that intentionally.

(RT 2491.) The court nevertheless stood by its ruling. (RT 2491-2492.)

During the mitigation case, defense counsel asked Terri Clark, a longtime neighborhood friend of Fuiava, why the jury should spare his life. (RT 2690.) She responded in part:

> I am not here to put the sheriffs down because I wish it could stop. You cannot win [sic: beat] them.
>
> I feel that Freddie ... [was] afraid of them. He is not the only one that is afraid of them. They do their own activity, crimes. [¶] ... [T]hese are supposed to be men that ...[have a] 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.) The court interrupted, stating, "No, you don't understand," to which she interjected, "I do understand." (RT 2691.)

The court then said it was going to stop her because "[t]his is not appropriate in this proceeding." The court granted the prosecutor's motion to strike the entirety of her answer, and advised the jury as follows:

> Ladies and gentlemen, you must not consider anything she said in response to the last question. It is not relevant here and it gets us off into areas that I have ruled are not appropriate for this jury to consider.
>
> So don't speculate as to what motivation the witness might have had or what she said or why she said what

> she said. [¶] But it was inappropriate. And I want you to disregard it.

(RT 2692.)

B. Legal Analysis.

Under the Eighth Amendment's guaranty of a reliable verdict and the Fourteenth Amendment's guaranty of due process, a capital defendant has a "federal constitutional right to have the sentencer consider all relevant mitigating evidence." (*People v. Whitt* (1990) 51 Cal.3d 620, 647, citing *Skipper v. South Carolina, supra,* 476 U.S. at p. 4; *Eddings v. Oklahoma, supra,* 455 U.S. at p. 110; *Lockett v. Ohio, supra,* 438 U.S. at p. 604 (plur. opn.); and *People v. Easley* (1983) 34 Cal.3d 858, 877-878 & fn. 10.) In short, "a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death. [Citations.] ...." (*Payne v. Tennessee, supra,* 501 U.S. at p. 822.) In addition, "the range of constitutionally pertinent mitigation is ... broad" (*Whitt* at p. 647), for it is "desirable for the jury to have as much information before it as possible when it makes the sentencing decision." (*Gregg v. Georgia, supra,* 428 U.S. at pp. 203-204.)

At a minimum, then, mitigation includes any evidence about the crime that might reduce Fuiava's culpability. (See, e.g., *Green v. Georgia* , *supra*, 442 U.S. at p. 97 [exclusion of evidence at the penalty phase of co-defendant's admission that he committed the killing after he sent defendant on an errand was unconstitutional because it "was highly relevant to a critical issue in the punishment phase of the trial"].) Moreover, this Court has long recognized the propriety of jury consideration of lingering doubt of guilt in its capital determination (see, e.g., *People v. Terry* (1964) 61

Cal.2d 137, 145-146; *People v. Farmer* (1989) 47 Cal.3d 888, 921 fn. 5), so that any evidence relevant thereto would similarly be admissible. (See, e.g., *People v. Alcala* (1992) 4 Cal.4th 742, 807 [recognizing defendant's right at penalty phase to present "relevant evidence regarding the circumstances of [the capital crime], in an attempt to create a lingering doubt"]; *People v. Cox*, *supra*, 53 Cal.3d at p. 677 ["a defendant may not be precluded from offering such evidence"]; but see *People v. Zapien* (1993) 4 Cal.4th 929, 989 ["the defendant may [not necessarily] introduce evidence, not otherwise admissible at the penalty phase, for the purpose of creating a doubt as to the defendant's guilt"].) Even if Fuiava could not introduce evidence of the lawsuit strictly for purposes of fostering lingering doubt, he should have been permitted to present evidence about the lawsuit and his own and the community's fear of the deputies due to their history of transgressions as evidence that extenuated the offense. This is especially so because the prosecutor was able to use the flip side of this evidence to argue that Fuiava shot first out of hostility toward the deputies due to his perception that they had previously perpetrated wrongful shootings.

"Exclusion of this mitigating evidence thus violate[d] the constitutional requirement that a capital defendant must be allowed to present all relevant evidence to demonstrate he deserves a sentence of life rather than death. [Citations.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1117.) While "[e]xclusion of such evidence ... does not automatically require reversal," it is subject to the next level of stringency: "the standard of review announced in *Chapman v. California*, *supra*, 386 U.S. 18, that is, the error is reversible unless it is harmless beyond a reasonable doubt. [Citations.]" (*Id.* at pp. 1117-1118.) This standard, requiring that the

prosecution prove beyond a reasonable doubt that the error was harmless, is like the state test for harmlessness for state law error at the penalty phase: no reasonable possibility that the error affected the verdict. (See *People v. Wright, supra,* 52 Cal.3d at p. 422 fn. 19 ["the applicable test for prejudice ... for assessing the effect of state-law error at the penalty phase of a capital trial [is] the 'reasonable-possibility test.'"].)

The exclusion of evidence showing the community's fear of the deputies founded upon their history of misconduct, the lawsuit that resulted from that misconduct, and its substantial merit was prejudicial under these standards. While that evidence may not have justified the homicide, it would have gone a long way toward explaining it. It would also have belied the prosecution's depiction of the homicide as an unfeeling and cold-blooded, conscienceless act. Finally, evidence that Blair was identified in the lawsuit as one of the Lynwood deputies who oppressed rather than protected Fuiava's community also would have blunted the prosecution's version of Blair as a heroic defender of law and order in Lynwood. Particularly given the prosecutor's voluminous evidence at the penalty phase that accorded golden status to Blair and his colleagues as a force for law and order in the community, exclusion of evidence that colored Blair and his colleagues in a very different way devastated the case for life. The prosecution's case for death made it all the more important for the jury to learn that Blair and his fellow deputies were stained by a pattern of misconduct so egregious that it led to a settlement for millions of dollars. The reality check of this evidence was particularly valuable and necessary mitigation evidence. Consequently, its exclusion rendered the death penalty constitutionally unreliable, requiring reversal.

The court's admonishment to disregard the entirety of Clark's answer, in which she testified to the fear that the deputies engendered in the community and their history and reputation for use of excessive force, exacerbated the error of exclusion of that evidence and compounded the unfairness to Fuiava. It not only reinforced the view that this evidence did not bear on the jury's penalty decision, but communicated the court's disapproval of it as well. Thus, the admonishment served to disparage and render worthless the evidence of misconduct by the deputies and resultant fear in the community that had crept into the trial. It negated the powerful extenuating evidence that the long history of deputy misconduct was integral to the commission of the offense, and stripped the shooting of its contextual mitigation.

The court's advisement to the jury indicated that any evidence of the lawsuit had nothing to do with the penalty determination because the lawsuit had been filed in 1990. Dubbing this evidence "remote" was terribly harmful to Fuiava's cause. First, it gave the impression that the court itself agreed with the deputy witnesses who opined that the lawsuit was inconsequential. More fundamentally, the admonition perverted the truth. The truth was that both Blair and Avila were parties to that lawsuit, trial was but weeks away at the time of the shooting, and the trial's approaching date had percolated the deputies' deep resentment of and animosity toward the plaintiffs. Thus, far from remote because filed in 1990, the lawsuit was the immediate backdrop to the confrontation. The court's comments directed the jury away from mitigation that was central to the penalty determination. It also acted to dispel lingering doubt, since the lawsuit's approaching trial date gave Blair a reason to shoot unlawfully at

Avila and Fuiava, and gave Fuiava, in turn, good reason to anticipate and fear violence at the hands of Blair and his fellow deputies — especially in light of Nieves's shooting just days before.

In sum, the court's preclusion of evidence about the community's fear of the deputies based on their history of misconduct, and its characterization of the lawsuit as old news that had nothing to do with the penalty determination, was grave error that skewed the jury's deliberations toward death. The Court can have no confidence in a verdict where the trial court discredited mitigation that was central to the penalty decision. (See, e.g., *McDowell v. Calderon* (9th Cir. 1977) 130 F.3d 833 [habeas relief granted where court's instructions may have caused the jury to discard crucial mitigation].) For these reasons, the trial court's preclusion of jury consideration of relevant and reliable evidence in mitigation violated Fuiava's rights under state law and the Sixth, Eighth, and Fourteenth Amendments, and mandates reversal. (See, e.g., *Skipper v. South Carolina*, *supra*, 476 U.S. 1; *Green v. Georgia*, *supra*, 442 U.S. 95.)

XXI.

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

Fuiava's sister, Sasa, was the first mitigation witness at the penalty trial. (RT 2625.) Defense counsel asked how it would affect her if the jury returned a sentence of death and Fuiava was executed. (RT 2631.) The court sustained the prosecutor's objection to the question, agreeing with the prosecutor's assertion that any impact of Fuiava's execution on others was

not "appropriate penalty phase evidence." (RT 2631.) Counsel accordingly refrained from soliciting evidence from the rest of the witnesses who testified in mitigation. Some evidence on the point, however, was incidentally received on the subject. Another sister, Sopo, testified that his execution would be painful for her. (RT 2644-2645.) Fuiava's brother, Toetu, testified that Fuiava would be missed. (RT 2652.) Fuiava's sister-in-law testified that a big part of his family's life would be taken away by his execution. (RT 2665.)

The court's ruling precluding counsel from eliciting evidence of how Fuiava's execution would impact his family and friends was error. As previously set forth, the Eighth and the Fourteenth Amendments grant a defendant the right to introduce all relevant mitigating evidence; that is, any evidence about the crime or the defendant that he seeks to proffer to the jury as a basis for a sentence less than death. (See generally, Arguments XVIII and XX, citing *Payne v. Tennessee*, *supra*, 501 U.S. at p. 822; *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 110; *Lockett v. Ohio*, *supra,* 438 U.S. at p. 604; *People v. Lucero*, *supra,* 44 Cal.3d at pp. 1026-1027.). The suffering that a defendant's family would experience if he were executed reflects upon his character, for it stands to reason that it is the defendant's character and the relationship he has developed with his family members that would cause them to suffer were he executed.

This Court has recognized as much. "In *People v. Cooper* (1991) 53 Cal.3d 771, 844, we surmised that 'defendant may have a constitutional right to present evidence of the effect of a death verdict on his family.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 455.) In *Ochoa*, the Court found

that there was a right under both state and federal law to present such evidence. As it explained there:

> State law requires the jury to take into account matters relevant to the penalty determination. Section 190.3 provides that, with narrow exceptions, "evidence may be presented by both the people and the defendant as to *any* matter relevant to aggravation, mitigation, *and sentence* including, but not limited to ... defendant's character, background, history, mental condition and physical condition."

(*Id.* at p. 455; italics in *Ochoa*; inside quote, brackets, and ellipsis deleted.) "[T]his evidence [of impact of execution] is relevant because it constitutes indirect evidence of the defendant's character." (*Id.* at p. 456.) "[T]he law ... requires an individualized assessment of the defendant's background, record, and character, and the nature of the crimes committed, both as a matter of state law [citations] and as a federal constitutional requirement [citations]." (*Ibid.*) "In summary, we hold ... that family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character." (*Ibid.*; see also *State v. Stevens* (Or. 1994) 879 P.2d 162, 165 [court's refusal to allow "evidence of the potential effect of [defendant's] execution on his daughter" required reversal of death judgment].)

"[D]efendant family impact evidence will humanize the defendant so that the jury will have a more balanced understanding of the impact of its decision to impose death." (King & Norgard, *What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings* (1999) 26 Fla. Stat. U. L. Rev. 1119, 1126 [hereafter "*What About Our Families?*"].) The exclusion of this humanizing evidence harmed Fuiava. Although some

incidental references were made by some of the mitigation witnesses about the negative effects that Fuiava's execution would have, counsel was precluded from eliciting and developing that evidence in any meaningful way. Hence, the jury received but faint hints on this aspect of mitigation instead of the kind of full development that could have affected its reasoned moral response to the question whether the death penalty was appropriate for Fuiava.

As already set out, whether Fuiava deserved to die for his capital offense presented an extremely complex moral question for the jury. Accordingly, there is a reasonable possibility that admission of this evidence, which could have impressed upon the jury the strength of Fuiava's redeeming qualities, would have caused at least one juror to vote for life. As the Oregon Supreme Court explained why exclusion of similar evidence required reversal: "[I]t is the rare case in which this court can determine ... that [such] evidence could not have affected the jury's 'reasoned moral response' in determining whether defendant should have received a death sentence." (*State v. Stevens, supra,* 879 P.2d at p. 168.) Moreover, the exclusion of this evidence prevented the jury from understanding the full impact of any potential death verdict it may render, causing improper diminution of the awesome responsibility the penalty decision vested in it. (C.f. *Caldwell v. Mississippi, supra,* 472 U.S. at pp. 328-330.)

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. As stated in *What About Our Families?, supra,* 26 Fla. Stat. U. L. Rev. at p. 1124:

> To balance the influence of victim impact statements, we propose the use of defendants' family impact statements during the sentencing phases of capital trials.... Juries should hear about the impact an execution will have on ... the defendant's spouse, mother, brother, grandchildren, and other loved ones .... The system should realize that the innocent family members of the defendant are also victimized by the process and that the impact of their loved one's death sentence on their lives is significant.

The due process error in the court's uneven application of evidentiary rules during the guilt phase (see Argument IX, *ante*) thus continued into the penalty phase and undermines confidence in the reliability of the death verdict. This imbalance doubled the harm from the court's wrongful exclusion of evidence about the impact of Fuiava's execution, for it tilted the jury's penalty determination towards death not once but twice.

For these reasons, respondent cannot establish beyond a reasonable doubt that this error, which narrowed and distorted the jury's consideration of penalty, had no possible effect on its penalty verdict. Accordingly, the court's exclusion of this evidence requires reversal.

XXII.

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

A. Factual Background.

The defense proffered two instructions that advised the jury it could act on any residual or lingering doubt that it may harbor about Fuiava's guilt in determining whether death was the appropriate verdict. (CT 745-746.) One instruction advised in part that a "juror may consider as a

mitigating factor residual or lingering doubt" that the defendant was guilty of first degree murder, while the other advised that the jurors could "demand a greater degree of certainty for the imposition of the death penalty" than proof beyond a reasonable doubt. (CT 745-746.) The court refused to give any part of either of these instructions and refused further to instruct on lingering doubt in any fashion. (RT 2714.) It found that Fuiava had "no federal or state constitutional right to have the penalty phase jury instructed to consider any residual doubt about the defendant's guilt," citing *Franklin v. Lynaugh* (1988) 487 U.S. 164, 173, *People v. Johnson* (1992) 3 Cal.4th 1183, 1252, *People v. Cox*, *supra*, 53 Cal.3d 618, 667, and *People v. Medina* (1995) 11 Cal.4th 694, 743.

B. Legal Analysis.

The court's refusal to give a lingering doubt instruction upon defense request violated Fuiava's rights to due process of law, to protection against cruel and unusual punishment, to freedom from a death sentence that is arbitrarily and unreliably imposed, and to trial by a fair and impartial jury. (See U.S. Const., 6th, 8th & 14th Amends.) Besides these violations of the federal Constitution, the refusal also arbitrarily violated state law that obligates the court to give an instruction requested by the defense that pinpoints a basis for the jury to return a verdict that favors the defendant. Lingering doubt was key mitigation for Fuiava, so that the lack of clear instruction authorizing the jury to consider such prejudiced him, requiring reversal.

Contrary to the court's ruling, *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 ...." (*Franklin v. Lynaugh*, *supra*, 487 U.S. at p. 175.) It simply found that such a right was a "questionable proposition." (*Ibid.*) Moreover, this Court's rejection of constitutional entitlement to an instruction on lingering doubt is in tension with its recognition that California law obliges the court to give such an instruction upon request.

In the cases cited by the trial court, this Court rejected claims that a defendant is constitutionally entitled to instruction at the penalty phase on lingering doubt as to guilt. Such rejection has been founded on the conclusion that the instruction pursuant to CALJIC No. 8.85 on what factors the jury may consider for purposes of penalty, in the words of another case, "adequately alerted the jury that it could consider lingering doubt in reaching its decision." (*People v. Osband* (1996) 13 Cal.4th 622, 716.) In these cases, the Court relied on the instruction's reference to factor (a), the circumstances of the offense, and factor (k), any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death. (See RT 2729-2732, where the jury was so instructed in this case.)

But it is reasonably likely that the jury did not understand from these factors that lingering doubt of guilt was a basis to mitigate the penalty. An instruction is unconstitutional if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 380 [110 S.Ct. 1190, 1198, 108 L.Ed.2d 316]; see also *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72 ["in reviewing an

ambiguous instruction ..., we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution"]; *People v. Clair* (192) 2 Cal.4th 629, 662-663 ["reasonable likelihood" standard applies when reviewing claims of ambiguous instructions].)

Considering the circumstances of the capital crime under factor (a) is a very different matter than considering whether the defendant is innocent of the crime; to be sure, the former assumes guilt and the latter questions it. Moreover, the Supreme Court found in *Lynaugh* that "lingering doubts over the defendant's guilt do not relate ... to 'the circumstances of the offense,' which the sentencer must be given a chance to consider in mitigation of that crime.... " (*Franklin v. Lynaugh, supra*, 487 U.S. at p. 175.) If the Supreme Court has reached that conclusion, presumably even a learned juror might reasonably do the same. Likewise, it is probable that the jury did not understand that abstract factor (k), circumstances that extenuate the gravity of the crime or relate to an aspect of the defendant's character offered as a basis for a sentence less than death, included lingering doubt. Again, the Supreme Court found in *Lynaugh* that "lingering doubts over the defendant's guilt do not relate to his 'character' or 'record.....'" (*Ibid.*) Indeed, this Court's indecision concerning which factor covers lingering doubt exemplifies the confusion over the role of lingering doubt in the penalty phase.

That confusion is further illustrated by the prosecutor's argument that lingering doubt had nothing to do with factor (a), which was only an aggravating factor. (RT 2765.) Nor did he concede that lingering doubt was relevant under factor (k). He argued that "a concept called lingering

doubt comes in" to play under factor (f). (RT 2766.) Reciting the key words of that factor, "a reasonable belief in moral justification or extenuation," the prosecutor confusedly argued, "[i]t has to be reasonable." (RT 2766.) He went on to argue:

> He [defense counsel] is going to get up here, and he is going to say, well, you know, you can think that you need more evidence than beyond a reasonable doubt. You might have to get close to beyond all possible doubt.
>
> .....
>
> Don't let him change your mind. You are not supposed to relitigate guilt. That's not what you are supposed to do.

(RT 2767.)

Thus, the record here demonstrates that Fuiava had a special need to foreclose any conclusion by a juror that the standard instructions on the life-or-death decision do not comprehend consideration of any lingering or residual doubt the juror may have as to guilt. Explicit instruction on lingering doubt invades no legitimate interest of the prosecution, and Fuiava's request for it forces the conclusion that there was a possibility that it would have made the difference in his quest for a life sentence. Fuiava required the jury's awareness of its power to take lingering doubt into consideration as mitigation to insure a fair and reliable verdict.

Precisely because the standard instructions do not make clear that lingering doubt is a proper basis for mitigation of the punishment, trial courts regularly have instructed upon lingering doubt upon request of the defendant to do so. (See, e.g., *People v. Cain* (1995) 10 Cal.4th 1 66, fn. 23 ["the jury was instructed on lingering doubt as a mitigating circumstance"];

People v. Morris (1991) 53 Cal.3d 152, 218-219 (brackets in quote deleted) ["The jury was informed that 'the adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered.' This straightforward instruction allowed the jury to consider any remaining uncertainty as to defendant's guilt."]; *People v. Kaurish* (1990) 52 Cal.3d 648, 705-706 ["The court instructed the jury that it could consider lingering doubt of defendant's guilt to be a factor in mitigation."].)

Independent of constitutional requirements, California law requires the court to give such a pinpoint instruction when appropriate upon request. (See *People v. Fauber* (1992) 2 Cal.4th 792, 864-865.) In *Fauber*, the trial court refused to give the following instruction that the defendant proposed: "Possible innocence is a mitigating factor which you may consider in determining the appropriate penalty in this case. You are permitted to demand a greater degree of certainty of guilt for the imposition of the death penalty. Therefore, any lingering doubt you may have concerning the guilt of the Defendant may be considered by you as a mitigating factor upon which to base a sentence less than death." (*People v. Fauber,. supra*, 2 Cal.4th at pp. 863-864.) On review, the Court stated:

> In *People v. Cox* (1991) 53 Cal.3d 618, we observe[d] that "[a]s a matter of statutory mandate, the court must charge the jury 'on any points of law pertinent to the issue, if requested' [citations]; thus, it may be required to give a properly formulated lingering doubt instruction when warranted by the evidence." (*People v. Cox, supra,* 53 Cal.3d at p. 678, fn. 20.) We rejected the defendant's proffered instruction in *Cox* because it

> erroneously prescribed that the jury evaluate lingering doubt in a particular manner. (*Ibid.*) Assuming for the sake of argument that defendant's proffered instruction suffered no similar infirmity, we are still unable to conclude that the court's refusal to give the proffered instruction caused prejudice. Trial counsel did not argue that the jury should base its decision on any residual doubt as to defendant's guilt ....

(*Id.* at pp. 864-865.)

The statutory mandate the court cited was the mandate in section 1093, subdivision (f), which provides that a court must "charge the jury ...on any points of law pertinent to the issue, if requested." (*People v. Cox*, *supra*, 53 Cal.3d at p. 679.) The Court further cited section 1127, which states in pertinent part: "Either party may present to the court any written charge on the law ... and request that it be given. If the court thinks it correct and pertinent, it must be given ...." (*Ibid.*)

Under sections 1093, subdivision (f) and 1127, a defendant has a right to an instruction that pinpoints a legal theory of the defense. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137; *People v. Mincey* (1992) 2 Cal.4th 408.) In a proper instruction, "What is pinpointed is not specific evidence as such, but the theory of the defendant's case." (*People v. Adrian* (1982) 135 Cal.App.3d 335, 338.) A defendant also may "offer[] 'pinpoint' instructions intended to supplement or amplify more general instructions." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 257, cited with approval in *People v. Cox*, *supra*, 53 Cal.3d at p. 679.) The trial court's refusal to give Fuiava's requested instruction pinpointing lingering doubt as an authorized type of mitigation thus was error. The error arbitrarily deprived Fuiava of the right California granted him to specific instruction on lingering doubt and hence separately violated the Constitution for this

reason as well. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346 [due process violation when state fails to follow its own law in imposition of capital punishment].)

Fuiava was much prejudiced by the absence of the pinpoint instruction here. Unlike the parties in *Cox*, both sides here treated doubt as very much at issue at the penalty phase. The prosecutor successfully pressed for admission of evidence in the penalty phase to meet lingering doubt based on the Viking evidence. (See Statement of Facts, Section B.1, *ante*, citing RT 2587.) Fuiava, too — albeit with considerably less success — pressed to present Viking and other evidence of the culture of police misconduct directed at doubt in the penalty phase. (See, e.g., Argument XVIII, *ante*.)

As already discussed, the prosecutor worried much about lingering doubt, addressing it at some length in closing. He was also "sure that Mr. Hauser will spend a significant amount of time on lingering doubt." (RT 2766.) Indeed, Mr. Hauser did, introducing his argument on the point as follows:

> He predicted that I was going to talk to you about lingering doubt. Sure. That's because he sees it. He know that it's in this case because he doesn't have concrete, solid absolute 100 percent proof of what happened in this case.

(RT 2792.) Because the evidence left such great doubt about Fuiava's guilt despite the jury's verdicts, lingering doubt was a critical plank in Fuiava's case for life. Defense counsel naturally dwelled on lingering doubt, because the evidence begged that question. (See RT 2784-2787.)

The prosecutor's vehement protest against any jury relitigation of guilt, however, suggested that consideration of lingering doubt was improper. This made the need for instruction on the legitimacy of considering lingering doubt all the more imperative. From the prosecutor's repeated admonition that the jury should not reconsider guilt, it may well have been persuaded that lingering doubt was not an authorized basis for mitigation of the punishment. Especially is this so in light of the conspicuous absence of such authorization in the court's instructions, which further advised the jury that "[y]ou must accept and follow the law that I shall state to you." (RT 2725.) "In death cases doubts [as to whether the jury properly understood the instructions] should be resolved in favor of the accused." (*Andres v. U.S.* (1948) 333 U.S. 740, 752 [68 S.Ct. 880].)

For all of these reasons, there was a reasonable possibility that the jury would have returned a verdict of life rather than death if the court had explicitly and authoritatively instructed it that any lingering doubt it may have as to guilt was a legitimate basis upon which to conclude that death was not the appropriate verdict. (See *People v. Wright*, *supra*, 52 Cal.3d at p. 422 fn. 19 [reversal required for state error in the penalty phase if there was a reasonable possibility of a more favorable verdict absent the error].) That possibility was reasonable not only because of the likelihood that the evidence caused at least one juror nagging doubt, but also because of the great power of lingering doubt to move a juror to find death inappropriate. As noted in *Tarver v. Hopper* (11th Cir. 1999) 169 F.3d 710, 715-716:

> Creating lingering doubt has been recognized as an effective strategy for avoiding the death penalty. We have written about it. [Citation.] In addition, a comprehensive study on the opinions of jurors in capital cases concluded: "Residual doubt" over the defendant's

> guilt is the most powerful "mitigating" fact. The study suggests that the best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?,* 98 Colum. L. Rev. 1538, 1563 (1998) (footnotes omitted); *see* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases,* 15 Am. J.Crim. L. 1, 28 (1988) ("[t]he existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied."); *see also* Jennifer Treadway, Note, "*Residual Doubt" in Capital Sentencing: No Doubt it is an Appropriate Mitigating Factor,* 43 Case W. Res. L. Rev. 215 (1992). Furthermore, the American Law Institute, in a proposed model penal code, similarly recognized the importance of residual doubt in sentencing by including residual doubt as a mitigating circumstance.

The prejudice Fuiava suffered by the court's refusal to instruct on lingering doubt is even more patent when the harm is measured by the Eighth Amendment's reliability standard and the Fourteenth Amendment's due process considerations. Thus, the court's refusal to plainly instruct as requested that a juror could weigh lingering doubt in its penalty calculus was state and federal error that requires reversal of the judgment.

XXIII.

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

A. Introduction.

"Unfortunately, [the prosecutor's] misconduct was not limited to the guilt phase." (*People v. Hill, supra*, 17 Cal.4th at p. 836.) To the contrary,

it permeated the penalty phase as well. "As in the guilt phase, ... given the pervasive nature of [the prosecutor's misconduct], any attempt by [defense counsel] to object to [the] misconduct would have been futile. Accordingly, ... the claims of penalty phase misconduct are properly before this court." (*Id.* at p. 836.)

We have already discussed how the prosecutor exploited the opportunity to introduce extensive evidence of victim impact to evoke as much passion from the jury as he could, and explicitly urged the jury to return a verdict based on emotion. (See Argument XVI, *ante.*) The prosecutor also revealed his design to charge the jury with passion and emotion in an exchange with the court. When the court precluded the prosecutor from introducing certain evidence after finding that its introduction was "designed to evoke emotion and sentiment and outrage by the jury," the prosecutor protested that at the penalty phase "emotion and sentiment and outrage are appropriate feelings to have for the jury." (RT 2576.)

This was a blatantly improper strategy, for the United States Supreme Court long ago admonished that it "is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida, supra*, 430 U.S. at p. 358.) Indeed, ["b]ecause of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices." (*Lesko v. Lehman* (3rd. Cir. 1991) 925 F.2d 1527, 1541.) The prosecutor here failed time and again to meet this duty. Indeed, the prosecutor's misconduct culminated in

his closing argument. But "if there is any distinction between guilt and penalty phase arguments, it would seem that there should be a more searching review of the penalty phase as the Eighth Amendment is implicated." (*Copeland v. Washington* (8th Cir. 2000) 232 F.3d 969, 974, fn. 2.)

The same authorities that favored review of the prosecutor's misconduct at the guilt phase also favor such review here. Moreover, as already suggested, the constitutional demand that death judgments be particularly reliable requires consideration of the merits of a claim of prosecutorial misconduct at the penalty phase where such misconduct plainly has rendered the judgment unreliable. Under the Eighth Amendment, "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination" (*California v. Ramos* (1983) 463 U.S. 992, 998-999), including scrutiny of the prosecutor's conduct at the penalty phase (*Caldwell v. Mississippi, supra*, 472 U.S. at pp. 328-334, 337-341). As observed in *Flowers v. State* (Miss. 2000) 773 So.2d 309, 326, because "heightened scrutiny applies in death penalty cases [] [p]lain error applies to the issues" of prosecutorial misconduct if there was no objection to it. (Accord, *People v. Wash* (1993) 6 Cal.4th 215, 276-277 (conc. & dis. opn. of Mosk, J.).) As set forth below, there was persistent and plain misconduct that neither the numerous objections of counsel nor the several admonitions of the court could hold in check. Consequently, the prosecutor violated appellant's federal constitutional rights to a fair trial, due process, confrontation of the evidence against him, assistance of counsel, freedom of association, separation of church and state, and a reliable penalty

determination as secured by the First, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the parallel provisions of the California Constitution. (See *Berger v. United States*, *supra,* 295 U.S. 78; *Caldwell v. Mississippi*, *supra*, 472 U.S. 320.)

B. Factual Background.

The prosecutor persisted in misconduct that he initiated during the guilt phase. For example, he repeated and reinforced any evidence that lent itself to inflaming the jury against Fuiava. In the course of Detective Kaono's testimony about the 1984 shooting, the prosecutor took the opportunity again to elicit evidence that a nickname for Fuiava was "Devil." (RT 2422.) Then, after the detective testified that Fuiava said he shot into the car because he believed its passengers were "faggot Segundo gang members" (RT 2428-2429), the prosecutor was allowed to repeatedly spread the inflammatory "faggot" reference before the jury over the repeated objection of defense counsel:

> Q: By Mr. Richman: They didn't do anything to him or say anything or do anything just because he believed that they were faggot —
>
> Mr. Hauser: Objection, leading Your Honor.
>
> The Court: Overruled, its clarification —
>
> Q. By Mr. Richman: Faggot Segundo gang members, that's why he fired into the car?
>
> A. That's correct.
>
> Mr. Hauser: I am going to object, that mischaracterizes what the witness said.
>
> The Court: You will have a chance on cross-examination to clarify.

> Q. By Mr. Richman: Did he give you any other justification or excuse for firing into that car?
>
> A. Just that he believed them to be rival gang members.
>
> Q. Faggot Segundo gang members?

(RT 2429-2430; see also later at RT 2430 [prosecutor's reference again to "these faggot Segundo gang members"].)

In elaborating on evidence that Fuiava had admitted he fired at another car that evening, the detective stated: "And like any other conversations I have had with him, he appeared to have similarly the same excuse or the same reasoning that if he believed someone was a gang member or a rival to his gang, then he shot at them." (RT 2428.) The prosecutor did not pass quickly on to another matter or take other action to minimize the baseless impression from this nonresponsive answer that Fuiava had regularly shot at rival gang members; instead, the prosecutor sought to embellish the prejudice from that answer by asking the detective how many contacts he had had with Fuiava. (RT 2438.) Over several objections, the detective was permitted to respond, "at least ten interviews." (RT 2438.) The prosecutor subsequently explained to the court that he elicited this latter evidence to tie it up with the detective's earlier testimony that Fuiava admitted shooting rival gang members in every conversation they had. (RT 2439.) At that point, the court sustained the objection to this line of inquiry, but the damage had been done. (RT 2440.)

The prosecutor's overreaching was further illustrated by the fact that the court needed to admonish him to keep his voice down when questioning Fuiava's mother. (RT 2701.) The prosecutor also persisted in

argumentative questions in his very short cross-examination of Fuiava. (See RT 2709 [argumentative objection sustained]; 2710 [same].)

In perhaps his most shocking display of misconduct, the prosecutor allied himself as a representative of the Vikings throughout the penalty phase. He sported the Viking pin on his lapel that he first had donned for closing argument at the guilt phase. (2nd Supp. CT 20.) In his questioning of Deputy Westin, the prosecutor flaunted his pin by asking the deputy to identify and describe it. (RT 2488.) Defense counsel objected, but the court overruled the objection. (RT 2489.) Westin explained that deputies from the old Lynwood Station typically wore the pin on their uniforms. (RT 2489.) The pin had a Viking in the center of it and the station logo of a triangle that signified the three areas it patrolled, one of which was Lynwood. (RT 2489.) At a bench conference called for another reason later in the questioning of the deputy, the court said to the prosecutor: "I am going to suggest to you that it is improper for you to wear that Viking badge or pin. I think you can mark it as an exhibit and let's just put [it] into evidence." (RT 2491.) Ignoring the court's direction, the prosecutor continued to represent the Vikings by wearing their pin. Accordingly, at the end of that court session outside the presence of the jury, the court repeated its observation that it was inappropriate for the prosecutor to wear the pin and pointedly instructed him to take it off. (RT 2507.)

The prosecutor's vouching for the Vikings by adorning himself with the Viking pin at the penalty phase outdid the outrageousness of his similar vouching for the Vikings at the guilt phase simply by its insistence. As the prosecutor recognized, the legitimacy of the Vikings was key to the question of lingering doubt at the penalty phase. Moreover, the evidence

about the Vikings had become even more distorted at the penalty phase by the court's evidentiary rulings, which permitted evidence that tended to show that the Vikings were law-abiding deputies and excluded evidence that tended to show they were an outlaw band of deputies. The prosecutor's identification with the Vikings exacerbated that distortion of the evidence and further served to whitewash the Vikings. The prosecutor's literal personification of a Viking was well beyond the pale and bound to impress the jury.

As in the guilt phase, the prosecutor's misconduct reached its zenith in his closing argument. Over objection, he pandered to the jury's sympathies by displaying the photograph of Deputy Blair. (RT 2743-2744.) The prosecutor called parole "a privilege" that Fuiava abused in this case (RT 2744), when in fact it is not a privilege at all; it is simply an additional measure of control the state imposes following imprisonment. Then the prosecutor asked rhetorically, "Society gave him that privilege how many times?" (RT 2745.) Doubling the improper appeal to the jury's passion, the prosecutor then asserted: "And this is what we have to show for the privileges that society has given him, a picture and a grieving widow." (RT 2745.)

The prosecutor proceeded to inappropriate use of the photo of the truck that other Young Crowd members had painted into a mock patrol car in his argument for death by association:

> Another factor that has to be considered by you in deciding the appropriate punishment is this truck, people's 1 in evidence during the guilt phase of this trial. [¶] Take this truck if you need to, if you remember it, back into the deliberation room with you. Take a look at it.

> These are people that have an anger and hatred for the sheriff's department, for society. [¶] This truck was found a week before Deputy Blair was killed. A week before.

(RT 2745-2746.)

Then, capitalizing on his earlier guilt phase misconduct that misstated the testimony of Avila's parole agent, the prosecutor twisted it further:

> And you remember the testimony.... [¶] They are going to kill the very next deputy that harasses us or comes down the street or whatever it was.

The prosecutor then returned to the photo of Blair. (RT 2746.) Not long thereafter, he switched back to the photo of the truck to establish the danger that faced the deputies. (RT 2748.) Capitalizing on still other misconduct from the guilt phase, the prosecutor then referenced the "AK-47's and shotgun," asserting that "these guys [Young Crowd members] are as armed, if not more heavily armed" than the deputies. (RT 2748.) The prosecutor railed on, calling Blair "a hero" who "[n]ot only ... risk[ed] his life, but he risk[ed] his family's life." (RT 2748-2749.) The prosecutor argued that Blair "saw that truck that day" and then harkened back to the memorial run scheduled for that evening. (RT 2750.)

In a flight of fancy, the prosecutor told the jury that Blair turned off the freeway to cruise Walnut Avenue that evening to "just show the police presence here ... because there are good people on this street. There are good people that live on that street that are terrorized by Smokey and his homeboys, that are victimized by Smokey and his homeboys. They are afraid to go out at 8:00 that night." (RT 2750.) The court sustained defense counsel's objection to this argument on the ground that "there's no

evidence" to support it, and admonished the prosecutor to "[s]tick with the evidence." (RT 2751.) Disregarding that admonition, the prosecutor continued his appeal to the jurors' fear of gangs. (RT 2751.) The prosecutor asserted that such fear was increasing because "[w]e're losing ... to him [Fuiava] and his homeboys." (RT 2752.) Moreover, the prosecutor's reference here and throughout his argument to Fuiava as "Smokey" exacerbated the prejudice from his earlier equation of that name with "Murderer." (See, e.g., the prosecutor's further references to Fuiava as "Smokey" at RT 2744, 2745, 2749, 2755, 2766, 2768, 2771, 2773, 2774, 2778.)

Further veering from the evidence, the prosecutor argued the "impact to law enforcement that you need to consider and may not be aware of." (RT 2752.) According to the prosecutor, the killing of a deputy causes the other deputies to become frightened and hesitant in the performance of their duties, and to wonder whether "[s]ociety is going to back us up." (RT 2753-2754.) The prosecutor challenged the jury: "Are you going to back them up? Because if you're not, it's going to affect their willingness and their ability to perform their job." (RT 2754.) The prosecutor dwelled on this point. (RT 2754-2755.) Indeed, the prosecutor ascribed any increase in the crime rates to the police loss of verve for enforcement of the law due to being "sued, allegations." (RT 2754.) "You know, they look at you cross-eyed, not you, but them, and all of a sudden they slap a lawsuit on them ...." (RT 2755.) Then another rhetorical challenge from the prosecutor: "Are you going to back them up and say we are not going to tolerate people like Smokey killing heroes." (RT 2755.)

Moving further afield from the evidence, the prosecutor invoked the bombing in Olympic Park that had then just occurred and caused injury and death to scores of people, inquiring: "Did you bother to see how many of those people were policemen?" (RT 2755-2756.) According to the prosecutor, six Georgia policemen were injured as well as a federal agent. (RT 2756.) The prosecutor asserted that Fuiava should be put to death "because society needs to back them up." (RT 2756.)

The prosecutor argued again without evidentiary support that Blair saved lives every day, and that Fuiava should be put to death because of all the lives that Blair now would be unable to save. (RT 2757.) The prosecutor asked the jury to conjecture about "[h]ow many other people would this animal have killed along the way." (RT 2757. The sustaining of defense counsel's objection to reference to Fuiava as "an animal" (RT 2757) hardly deterred the prosecutor, who proceeded to dub Fuiava a "predator" and "a killing machine." (RT 2757.) The prosecutor urged the jury to find for death because of all the crime that would occur without Blair to prevent it. (RT 2757-2758.) According to the prosecutor, "Society is a major victim in this crime." (RT 2758.)

Over objection, the prosecutor contended that the jury's guilt verdicts meant that it had already found that Fuiava killed following "a deliberate and calculated decision" to avoid return to prison "for the rest of his life." (RT 2758.) Over further objections, the prosecutor argued that a life sentence for Fuiava would make his murder of Blair "inconsequential," since Fuiava already expected to be put back in prison for the rest of his life for possession of the guns. (RT 2759-2761.) Vengeance for Blair, he implied, would be served only by the death penalty.

In arguing that Fuiava's criminal history supported a death verdict, the prosecutor asserted that the evidence showed "five separate shootings" before the shooting of Blair. (RT 2761.) The prosecutor again invoked the "faggot Segundo gang members" phrase to rile the jury. (RT 2762.) The prosecutor repeatedly employed the hyperbole that Fuiava was "a killing machine," asserting that "[a]ll he does is shoot people." (RT 2762-2763.) The prosecutor then invited the jury to imagine other shootings by Fuiava despite the lack of evidence of such: "[W]e know that he has hit three people. We know that. [¶] How many others are there?" (RT 2763.)

The prosecutor repeated his earlier misconduct by commenting once more on the exercise of Fuiava's marital privilege: "If you still have lingering doubt, where's Tina? Where's Tina Fuiava, his wife." The court overruled defense counsel's objection to such argument (RT 2767), which encouraged the prosecutor to enlarge upon that misconduct:

> How many witnesses did I ask yesterday, you know where Tina is; right? She's just a phone call away, right? Where's Tina? Remember Tina is the woman in the tape that he is trying to get rid of. "She's the only one that they got on me. Tell her to get out of here or tell her that the police threatened her."
>
> Where's Tina? Where's his wife to come in and plead for his life? Please save my husband Smokey's life. His wife. Where is she? Is it because she couldn't plead for his life? Maybe.[29]

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[29] The prosecutor knew full well that Tina's absence from the penalty phase was not due to any inability to provide mitigation evidence or unwillingness to testify in favor of Fuiava's life. To the contrary, it was due entirely to the prosecutor's success in deterring such testimony by obtaining a ruling from the court permitting him to invade the marital privilege if she testified at penalty, even if her testimony did not concern the capital offense. (RT 2578-2581.) "[I]t is decidedly improper for the

> Is it 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.)

The prosecutor also took significant liberty with the evidence when he argued that Fuiava's "parole officer talked to him and said you can't carry a gun because you have been shooting all these people your whole life ...." (RT 2769.) The prosecutor invoked the Bible when he argued: "There is a message that I took out of the Bible. I'm not really a religious

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government to propound inferences that it knows to be false ...." (*United States v. Blueford*, *supra*, 312 F.3d at p. 968.) As in *Paxton v. Ward* (10th Cir.1999) 199 F.3d 1197, 1218, "the misconduct which undisputedly occurred here was an integral part of the deprivation of [defendant's] constitutional rights to present mitigating evidence," for it capitalized on the trial court's ruling that wrongfully led to exclusion of Tina Fuiava's mitigation evidence. The prosecutor here continued his guilt phase misconduct of exploiting the absence of defense evidence that he was instrumental in precluding. (See Argument XII, *ante*, citing *People v. Varona*, *supra*, 143 Cal.3d 566, *People v. Dagget*, *supra*, 225 Cal.App.3d 751, *People v. Gaines*, *supra*, 54 Cal.App.4th at p. 825; see also *United States v. Golding, supra,* 168 F.3d at p. 703 ["the prosecutrix further abused her power by using the very situation she had created against the defendant in closing argument"].) As the court spoke in *Golding*:

> Not only was the argument in violation of the testimonial privilege of the wife, the suggestion that the prosecutrix did not know the reason for the absence of [defendant's wife] as a witness was at least highly improper.

(*Id.* at p. 703.)

person, but this sort of played in: 'Blessed are the merciful for they shall obtain mercy.'" (RT 2771.) The prosecutor then stated that the law specifically asked the jury "to apply their religious standards ... to Smokey." (RT 2771.) The prosecutor made further religious references, quoting the Bible again on the point, and concluded that the jury should show no mercy to Fuiava because he had shown none. (RT 2772.) The prosecutor urged the jury to forego its morals, values, sympathy and compassion in favor of Fuiava's in determining his fate. (RT 2772.) Once more: "He is a killing machine. That's all he knows." (RT 2773.)

The prosecutor then returned to his untrue and vengeful theme that punishment of life without possibility of parole would not "give [Fuiava] one more day" of punishment, since he was already liable for return to prison for life. (RT 2774.) The prosecutor then groundlessly claimed that Fuiava would be a danger in prison because "he's going to get affiliated with some homeboys there." (RT 2774.) Defense counsel's objection to such baseless argument was overruled (RT 2774), encouraging the prosecutor to speculate further:

> And he is going to get into little problems with other homeboys that aren't his homeboys, other Segundo faggots, but their names will be different and their gang members will be different .... .

(RT 2774.) The prosecutor then asked the jury to "imagine" the threat Fuiava would pose to prison staff (RT 2774-2775), asserting: "And you saw him get angry how many times in guilt phase and in the penalty phase?" (RT 2775.) The prosecutor concluded: "He is a killing machine on a path of destruction, and he can kill again." (RT 2775.)

To counter any inclination of the jury to return a verdict of life imprisonment, the prosecutor fabricated the outlandish notion that Fuiava "enjoys prison." (RT 2764.) The prosecutor continued to introduce facts not in evidence by claiming that imposition of a judgment of life in prison for Fuiava would permit him to watch "movies on the VCR, ... go to the gym and work out ...." The court overruled defense counsel's objection to arguing untrue facts (RT 2775), which encouraged the prosecutor to enlarge upon his misconduct by arguing: "Does he deserve to have conjugal visits?" (RT 2775.) This time, defense counsel's objection to argument outside the evidence was sustained, and the trial court instructed the jury to disregard the prosecutor's argument regarding conjugal visits.[30] Nonetheless, the prosecutor continued to introduce facts outside the record, claiming that Fuiava would be considered "a hero" in the prison for killing an officer. (RT 2776.) The prosecutor then challenged the jury: "Are you going to give him that opportunity? Are you going to make him a hero?" (RT 2776.) After denigrating the mitigation evidence, the prosecutor then displayed the picture of Blair and urged the jury to "[f]eel compassion, feel sympathy for him." (RT 2778.)

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[30] The prosecutor's assertion that the jury's return of a verdict of life without possibility of parole would permit Fuiava to enjoy conjugal visits not only introduced facts outside the record, but was patently untrue. The Department of Corrections enacted a regulation in May 1995 that provided that "Family [conjugal] visits shall not be permitted for inmates who are ... sentenced to life without the possibility of parole ...." (See *Pro-Family Advocates v. Gomez* (1996) 46 Cal.App.4th 1674, 1679, fn. 4.) *Pro-Family* was published a month prior to the prosecutor's closing argument and reversed a trial court order that had preliminarily enjoined enforcement of this regulation.

The prosecutor again invoked "[t]he jury's own religious concerns for imposing the death penalty," and asserted that Fuiava "doesn't have religious concerns." The court overruled defense counsel's objection to this line of argument. (RT 2779.) The court's ruling encouraged the prosecutor to expand as follows upon his religious theme:

> But some of you may have religious concerns. So what I did was I looked in the Bible a little bit and in Genesis. "Who so shedeth man's blood shall by his blood be shed. For in the image of God made he man."

(RT 2779-2780.) Defense counsel reiterated his objection to this line of argument, and this time the court sustained it, striking "that last argument" and stating: "We are not going to be referring to the Bible." (RT 2880.) Having just been cut off in his efforts to utilize religious principles to secure a death verdict, the prosecutor then urged the jury not to "let your religious convictions save his life." (RT 2880.)

The prosecutor again returned to his untrue theme that a sentence of life without the possibility of parole would diminish the death of Blair because Fuiava "would have gotten the rest of his life in prison if he had given up that day." (RT 2780.) The prosecutor urged the jury to return the death penalty not only "to send him a message" but also "to send them [the deputies in the gallery] a message." (RT 2780.) The prosecutor asserted that "we are losing the war" and as the conscience of the community the jury was obliged to return a death verdict to show that the killing of an officer will not be tolerated. (RT 2880.) The prosecutor continued to introduce facts outside the record, advising the jury that the newspaper article about the guilt verdict in this case "was right under the article where the Chippie got shot, the highway patrol officer." (RT 2781.) The court

sustained defense counsel's objection to that argument as both "misleading" and introducing facts "not in evidence," and advised the jury to disregard it. (RT 2781.) The prosecutor then concluded his argument as follows:

> You all know how many policemen are getting shot and killed everyday. Everyday. [¶] You have to tell them, the criminals[,] and them, the police officers, that we will not tolerate it and the only way you can do that is by imposing the death penalty.

(RT 2781.)

Following return of the death verdict, defense counsel moved for a new penalty trial because of prosecutorial misconduct. (CT 794-796.) Counsel complained that the prosecutor exceeded the proper limits of victim impact evidence to "'whip up' the jury for a quick death verdict." (CT 795.) Counsel further complained that "[d]uring penalty argument, the prosecutor made a number of errors that had to have had a prejudicial effect on the jury." (CT 795.) Counsel noted that the prosecutor more than once used argument to introduce "false evidence" — including argument "that giving life to the defendant [] meant giving him a 'free ride,' because he was looking at life anyway for carrying the gun." (CT 795.) Counsel further noted the biblical references, the references to Fuiava as a "killing machine" and "animal," and the prosecutor's overall "design[] to 'whip up' the jury's emotions" to overcome its reason and rationality. (CT 795.) He argued that the misconduct in the aggregate was particularly prejudicial "[b]ecause of the uncertainty of the evidence in proving exactly what did happen on the evening of May 12, 1995, [that established] lingering doubt in this case." (CT 795-796.) The court denied the motion, finding that the

prosecutor's conduct "was in its totality acceptable and did not unduly inflame the jury to bring in the verdict they brought in." (RT 2813.)

C. Legal Analysis.

1. The Misconduct.

"[C]ounsel may not use arguments calculated to mislead the jury [citations] or that appeal primarily to passion or prejudice. [Citations.]" (*People v. Love, supra,* 56 Cal.2d at p. 731; see also *People v. Fosselman* (1983) 33 Cal.3d 572, 580-581; ABA Standards of Criminal Justice, section 5.8 (c) ["The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury."].) As one court put it simply: "With a man's life at stake, a prosecutor should not play on the passions of the jury." (*Hance v. Zant* (11th Cir. 1983) 696 F.2d 940, 951 (limited by *Brooks v. Kemp* (11th Cir. 1985) (en banc) 762 F.2d 1383, *vacated,* (1986) 478 U.S. 1016 [106 S.Ct. 3325, 92 L.Ed.2d 732], *reinstated on remand* (11th Cir.) (en banc) (per curiam), 809 F.2d 700 *cert. denied,* (1987) 483 U.S. 1010 [107 S.Ct. 3240, 97 L.Ed.2d 744]).) Much of the prosecutor's conduct during the penalty phase and almost all of his closing argument was in violation of this injunction. Consequently, "the prosecutor's fervent appeal to the fears and emotions of an already aroused jury was error of constitutional dimension." (*Ibid.*) "[E]motion must not 'reign over reason' at the penalty phase." (*People v. Carpenter* (1997) 15 Cal.4th 312, 401, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864, 180 Cal.Rptr. 640, 640 P.2d 776.)

"[A]t the penalty phase [the prosecutor] continued [his] practice, begun during the guilt phase of the trial, of both asserting facts before the jury that were not in the record and mischaracterizing facts that did appear

in the record." (*People v. Hill*, *supra*, 17 Cal.4th at p. 837.) Moreover, the prosecutor's reference to Fuiava as a killing machine and baseless assertion that he had committed other shootings that remained undetected "grossly mischaracterized defendant's record and thereby [constituted] misconduct." (*Id.* at p. 838.) Additionally, the prosecutor's description of "conditions of life in prison" outside the evidence "contributed to the overall unfairness of the trial." (*Ibid.*) Those descriptions were that much more unfair here, for they were demonstrably untrue. (See, e.g., *Davis v. Zant* (11th Cir. 1994) 36 F.3d 1538, 1548 ["Little time and no discussion is necessary to conclude that it is improper for a prosecutor to use misstatements and falsehoods."]; see also *Simmons v. South Carolina* (1994) 512 U.S. 154, [114 S.Ct. 2187, 129 L.Ed.2d 133].)

Conjecture in closing argument about the possibility that the defendant would kill his prison guards was condemned in *Hance v. Zant*, *supra*, 696 F.2d at p. 952. That court similarly condemned the prosecutor's argument "exhorting [the jury] to join in the war against crime" by returning a death verdict. (*Ibid*; accord, *Brooks v. Kemp*, *supra*, 762 F.2d at p. 1413 [prosecutor's "'war on crime' argument was improper" in certain respects].) As *Hance* concluded: "[D]ramatic appeal to gut emotion has no place in the courtroom, especially in a case involving the penalty of death." (*Hance v. Zant*, *supra*, 696 F.2d at pp. 952-953; see also *United States v. Moreno* (1st Cir. 1993) 991 F.2d 943, 947 -948 ["The argument, playing upon the jury's emotional reaction to neighborhood violence, was outside the bounds of legitimate argument and cannot be condoned"]; *United States v. Johnson* (1st Cir. 1991) 952 F.2d 565, 574 [admonishing "prosecutorial commentary serving no purpose other than to inflame the passions and

prejudices of the jury, and to interject issues broader than" that before the jury]; *Peterkin v. Horn* (E.D.Pa. 2001) 176 F.Supp.2d 342, 371 ["It is improper for a prosecutor [in closing argument at the penalty phase] to suggest to a jury that it has a 'duty to even the score,' to direct his comments to passion and prejudice rather than to an understanding of the facts and of the law or to appeal to the jury to act as the conscience of the community."]; cf. *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 179-180 [prosecutorial comments in closing argument in guilt phase of capital trial that, among other things, "implied that the death penalty would be the only guarantee against a future similar act" and called the defendant an "animal" "undoubtedly were improper"].)

The prosecutor's persistent introduction of facts not in evidence was plain misconduct: "[I]t would obviously be improper for the prosecutor to make argument [for death] using facts not introduced in evidence before the jury." (*Brooks v. Kemp*, *supra*, 762 F.2d at p. 1408; see also *People v. Hill*, *supra*, 17 Cal.4th at p. 823 ["A prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.' [Citation.]"].) As this Court elaborated on the point in *Hill*:

> [S]uch practice is "clearly ... misconduct" [citation] because such statements "tend to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations.]" [Citations.] "Statements of supposed facts not in evidence ... are a highly prejudicial form of

misconduct, and a frequent basis for reversal."
[Citations.]

(*Id.* at p. 828.) Here, the prosecutor's unsworn testimony that Blair's death had a deleterious effect on law enforcement and the war on crime was dynamite that only became more explosive when combined with the prosecutor's testimony about the terrorist bombing at the Olympics that injured so many officers, the juxtaposition of the reports of Fuiava's conviction and the killing of a highway patrol officer, the purportedly soft life and lofty position that Fuiava would enjoy in prison, and the many other facts to which the prosecutor testified in his closing.

The prosecutor's urging of the jury to forego its values in favor of the supposed bloodthirstiness that Fuiava displayed in killing Blair was further argument that has long been disapproved. As stated in *Lesko v. Lehman*, *supra*, 925 F.2d at pp. 1541-1544, the prosecutor's argument that jurors should make their decision about whether the defendant should receive the death penalty in the "cruel and malevolent manner shown by the defendant when [he] tortured and drowned [the victims] ... incite[d] an unreasonable and retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence." The Eighth Amendment requires that a verdict of death be a "reasoned moral response to the defendant's background, character, and crime," not "an unguided emotional response." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328.) The prosecutor's argument here, however, was "'directed to passion and prejudice rather than to an understanding of the facts and of the law.'" (*Lesko v. Lehman*, *supra*, 925 F.2d at pp. 1541.)

The Supreme Court of Tennessee followed *Lesko* in *State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, 812: "The prosecutor strayed beyond the

bounds of acceptable argument by making a thinly veiled appeal to vengeance, reminding the jury that there had been no one there to ask for mercy for the victims of the killings ..., and encouraging the jury to give the defendant the same consideration that he had given his victims." The Tennessee Court held that this was an improper argument that "encouraged the jury to make a retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence." (*Ibid.*) The same may be said here.

This entire line of argument was a blatant attempt to appeal to the jury's emotions and to incite them to vengeance on Fuiava rather than to apply the law in a dispassionate and thoughtful way. Such tactics have been repeatedly condemned in capital cases not only in the jurisdictions set forth above, but wherever they have manifested themselves. For example, in *Urbin v. State* (Fla. 1998) 714 So.2d 411, the Florida Supreme Court found "blatantly impermissible" a prosecutor's argument that "[i]f you are tempted to show this defendant mercy, if you are tempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed [during the capital crime], and that was none." (*Id.* at p. 421.) The same court also condemned a prosecutor asking the jury to show the defendant "as much pity as he showed his victim." (*Richardson v. State* (Fla. 1992) 604 So.2d 1107, 1109.) A similar argument was also condemned in *Rhodes v. State* (Fla. 1989) 547 S.2d 1201, 1206.)

Particularly egregious was the prosecutor's argument which appealed to the Bible and was otherwise tinged with religion. "Penalty determinations are to be based on the evidence presented by the parties and

the legal instructions given by the court. Reference by either party to religious doctrine, commandments or biblical passages tending to undermine that principle is improper." (*People v. Sandoval* (1992) 4 Cal.4th 155, 194; see also *People v. Roybal* (1998) 19 Cal.4th 481, 520.) It "cannot [be] emphasize[d] too strongly that to ask the jury to consider biblical teachings when deliberating is patent misconduct." (*People v. Hill*, *supra*, 17 Cal.4th at p. 836, fn. 6.) As the Court elaborated there on this point:

> By relying on the Bible ..., [the prosecutor] committed misconduct. As we have explained repeatedly, an appeal to religious authority in support of the death penalty is improper because it tends to diminish the jury's personal sense of responsibility for the verdict. [Citations].) Such argument also carries the potential the jury will believe a higher law should be applied and ignore the trial court's instructions. [Citation]. Significantly, [the prosecutor] was not responding to a defense argument invoking religious authority. [Citation.]

(*Id.* at pp. 836-837.)

The prosecutor's assertions regarding the danger Fuiava would pose in prison, unsupported as it was by any evidence, was also improper. While a prosecutor may argue future dangerousness where an inference of such is rooted in the evidence (*People v. Bradford* (1997) 15 Cal.4th 1229, 1379-1380), a prosecutor may not engage in speculation or argue beyond a reasonable inference. (*People v. Kirkes* (1952) 39 Cal.2d 719, 724.) Moreover, a prosecutor certainly cannot argue such speculation or inference based on the defendant's demeanor in the courtroom. As stated in *Gomez v. Ahitow* (7th Cir. 1994) 29 F.3d 1128, 1136-1137:

> There is caselaw authority that holds that a defendant's nontestimonial courtroom behavior is not evidence subject to comment. [Citation.] In such a case, the defendant has not had a fair opportunity to introduce evidence supporting an inference to the contrary to the one being supported by the prosecutor, and the jury is being asked to accept the word of the prosecutor about conduct to which its attention was not called during trial. Moreover, the defendant's Sixth Amendment right to confront adverse witnesses is violated in such a case because there has been no opportunity for the defendant to cross-examine the prosecutor. [Citations.]

The prosecutor's theme that the punishment of life imprisonment without possibility of parole was the equivalent of no punishment for Fuiava because he would have been committed to prison for life had he surrendered his gun rather than shot it also misstated the evidence in a way antithetical to a reasoned penalty determination. As stated in *Davis v. Zant, supra,* 36 F.3d at p. 1549, where the court found the prosecutor's misconduct worked a fundamental unfairness, "the prosecutor intentionally painted for the jury a distorted picture of the realities of this case."

2. The Prejudice.

Because the penalty decision rests so broadly in the jury's discretion and that discretion is based on intangible moral factors, jury deliberations on penalty are peculiarly likely to be compromised by prosecutorial misconduct. Thus, prosecutorial misconduct "tending to affect the jury's attitude in fixing the penalty 'implicitly invites reversal in every case. Only under extraordinary circumstances can the constitutional provision [art. VI, § 4 1/2] save the verdict." (*People v. Love*, *supra*, 56 Cal.2d at p. 733; brackets in original.) Additionally, due to the high regard that the ordinary citizen typically accords the office of the prosecutor, his "improper

suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." (*Berger v. United States*, *supra*, 295 U.S. at p. 88.) In a close case rather than an overwhelming one, "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence" when there is such misconduct. (*Id.* at pp. 88-89.) "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." (*Id.* at p. 89.)

This 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. (See, e.g., *People v. Hill*, *supra*, 17 Cal.4th at p. 847 [cumulative impact of prosecutorial misconduct deprived defendant of a fair trial].) Especially given the subjective nature of the penalty decision, the evidence here did "not point unerringly to" death as the only reasonable verdict; thus, "the type of misconduct involved here could reasonably have tipped the scales." (*People v. Pitts*, *supra*, 223 Cal.App.3d at p. 816.) Given the difficulty of quantifying the prejudice from prosecutorial misconduct in the penalty phase, this Court cannot discount a reasonable probability "that a result more favorable to the defendant would have occurred" absent the misconduct. (*People v. Bolton*, *supra*, 23 Cal.3d at p. 214.) For the same reasons, the misconduct "comprised a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to

make the [death verdict] a denial of due process' [citation]." (See *People v. Gionis*, *supra,* 9 Cal.4th at p. 1214.)

"[A]wareness that the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct" must inform any determination of prejudice. (*Brooks v. Kemp*, *supra*, 762 F.2d at p. 1399.) This is one reason why prosecutorial vouching is an especially pernicious form of misconduct. The prosecutor's adoption of the Viking emblem and transformation of himself into a Viking were "not accidental but calculated to ... 'strike at the jugular' of the defendant's story." (*Bruno v. Rushen* (9th Cir. 1983) 721 F.2d 1193, 1195 (per curiam).) By unfairly attaching the prestige of his office to a Viking symbol, the prosecutor effectively deflated Fuiava's claim that he shot in retaliation for Blair's Viking misconduct. As previously noted, lingering doubt as to guilt was powerful mitigation for Fuiava. Hence, "[t]he prejudicial effect in this case is enhanced because the prosecutor's [errors] were designed to undermine the core of the defense." (*Davis v. Zant*, 36 F.3d at pp. 1549-1550.)

Another reason why prosecutorial vouching is so pernicious is because it trenches upon the defendant's right to confront the evidence against him and other trial rights. As this Court observed in *People v. Bolton, supra* 23 Cal.3d at p. 215, fn. 4: "The prosecutor, serving as his own unsworn witness, is beyond the reach of cross- examination." The prosecutor's repeated introduction of facts not in evidence allowed the jury to receive evidence without any of the trial protections that assure its competence and reliability. Thus, the conclusion of prejudice is fortified by the fact that "misconduct of constitutional dimensions occurred" here. (See *Bruno v. Rushen*, *supra*, 721 F.2d at p. 1195.) In such cases, a reviewing

court "need only determine ... whether [the misconduct] was harmless beyond a reasonable doubt." (*Ibid.*) As there, here "[t]he cumulative effect of the prejudice can reasonably be regarded as possibly affecting the verdict and thereby denying the defendant a fundamentally fair trial." (*Ibid.*; compare with *Darden v. Wainwright*, *supra*, 477 U.S. at p. 182 ["prosecutors' argument [not unconstitutional because it] did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused"].)

The use of the Bible to justify a judgment of death, particularly in conjunction with the prosecutor's assertion that Fuiava lacked religious principles, was also likely to affect the jury's penalty decision. In finding prejudice in a case where this Court found none for improper reliance on God's law, the Ninth Circuit explained why such misconduct is so contrary to constitutional protections:

> In a capital case like this one, the prosecution's invocation of higher law or extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict. [Citation.]. The Biblical concepts of vengeance invoked by the prosecution here do not recognize such a refined approach. [Citations]
>
> Argument involving religious authority also undercuts the jury's own sense of responsibility for imposing the death penalty. The Supreme Court has disapproved of an argument tending to transfer the jury's sense of sentencing responsibility to a higher court. [Citation.] A fortiori, delegation of the ultimate responsibility for imposing a sentence to divine authority undermines the jury's role in the sentencing process. [¶] For these reasons, religious arguments have been condemned by

> virtually every federal and state court to consider their challenge. [Citations.]

(*Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 776-777.) The constitutional harm was exacerbated by the prosecutor's urging of death because Fuiava purportedly was irreligious and associated with Young Crowd. (See, e.g., *Dawson v. Delaware, supra,* 503 U.S. 159 [admission of evidence at penalty phase that defendant was a member of the Aryan Brotherhood prison gang infringed his rights under the First and Fourteenth Amendments].)

The prosecutor's invasion of the marital privilege was further outrageous misconduct, and its prejudice was double-edged. After having frustrated the efforts of Fuiava's wife to testify, the prosecutor planted the false evidence that Fuiava was so bereft of redeeming qualities that even his wife had nothing to contribute that might mitigate the penalty. Worse, the prosecutor imparted special knowledge of the case when he argued that the testimony of his wife would erase all lingering doubt — though that was never shown to be the case. Because lingering doubt was such a stronghold of mitigation in this case, this misconduct was particularly damning. (See, e.g., *Hutchins v. Wainwright* (11th Cir. 1983) 715 F.2d 512, 515-516 [habeas relief granted where prosecutor in closing argument implied that an individual who did not testify made an extrajudicial statement that implicated the defendant].) The prosecutor's misconduct was even worse here, for the record does not show that Tina's testimony in fact would have undermined Fuiava's claim of self-defense, as the missing witness's statement in *Hutchins* indisputably undermined the defense there.

As the United States Supreme Court has noted, courts have reversed "based upon a concept of prosecutorial misconduct, when the Government

makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege." (*Namet v. United States* (1963) 373 U.S. 179, 186.) "A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." (*Id.* at p. 187.) Either theory requires reversal here.

The breadth of the prosecutor's misconduct in this case undermines confidence in the reliability of the verdict. In an analogous case, a federal court found clear error that infected the reliability of the verdict where "the prosecutor referred to facts not in evidence (the other murders in all of Missouri's history); drew a comparison to violent drug gangs, evoking the jury's fear of crime; and made references to his son and the defense attorney's son." (*Copeland v. Washington, supra*, 232 F.3d at p. 975.) As here, "This was the sort of argument that would result in 'mob justice' rather than result in a reasoned deliberation." (*Ibid.*) Courts in sister states have also condemned these ploys. (See, e.g., *People v. Blue* (2000) 189 Ill.2d 99, 724 N.E.2d 920; *People v. Williams* (1994) 161 Ill.2d 1, 641 N.E.2d 296; *Commonwealth v. LaCava* (1995) 542 Pa. 160, 666 A.2d 221.)

"[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (*California v. Ramos* , *supra*, 463 U.S. at pp. 998-999.) Hence, "the Court ... [has] applied a stricter standard in assessing the validity of closing argument in death cases ...." (*Depew v. Anderson* (6th Cir. 2002) 311 F.3d 742, 751, citing *Caldwell v. Mississippi, supra,* 472 U.S. at p. 329.) As one state's highest court has characterized

that level of review: It is a "standard ... of 'heightened scrutiny' in which all bona fide doubts are resolved in favor of the accused .... [W]hat may be harmless error in a case with less at stake becomes reversible error when the penalty is death." (*Flowers v. State*, *supra*, 773 So.2d at p. 317.) Certainly this Court "cannot say that [the prosecutorial misconduct] had no effect on the sentencing decision"; where a reviewing court cannot say so, "that decision does not meet the standard of reliability that the Eighth Amendment requires." (*Caldwell v. Mississippi, supra,* 472 U.S. at p. 341.) As in *Caldwell*, "The sentence of death must therefore be vacated." (*Ibid.*)

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.

"To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.' (*Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 2764, 33 L.Ed.2d 346] (conc. opn. of White, J.; accord, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427 [100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (plur. opn.).)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) Such narrowing of the bases to impose the death penalty is also necessary to avoid the Fourteenth Amendment's proscription against arbitrary and capricious administration of the death penalty. (See, e.g., *California v. Brown* (1987) 479 U.S. 538, 541 [93 L.Ed.2d 934, 107 S.Ct. 837] [a state's death penalty scheme must be "structured so as to prevent

the penalty from being administered in an arbitrary and unpredictable fashion"]; *McGautha v. California* (1971) 402 U.S. 183, 305, 307 [dis. opn. of Brennan, J.) [random or arbitrary imposition of the death penalty denies due process].)

California has sought to comply with these constitutional mandates by establishing "special circumstances" that separate those murders for which the ultimate penalty may be imposed from those for which it may not. (See § 190.2.) Such "circumstances play a constitutionally necessary function at the state of legislative definition: they circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens*, *supra*, 462 U.S. at p. 878.) As this Court noted in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 468: "Under our death penalty law, ... section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (See also *Tuilaepa v. California* (1994) 512 U.S. 967, 975-976 [distinguishing role of California's aggravating circumstances from the narrowing function of its special circumstances].)

California's set of special circumstances, however, is so all-encompassing of first-degree murders that it fails to meaningfully separate those few deserving of death from the many that are not. There are very few first-degree murders committed in California that do not also include a special circumstance that qualifies the murder as a capital one. Indeed, instead of a death penalty law that separates the many murders that do not qualify for the death penalty from the "most grievous ... affronts to humanity" that do (see *Zant v. Stephens, supra,* 462 U.S. at p. 877, fn. 15),

California has a law that perversely separates only a few murders from the universe of first-degree murders that California otherwise designates as deserving of death.

To be sure, the legislative history of California's death penalty law makes clear that it was designed to apply to virtually all murderers. The 1978 Death Penalty Law was enacted by passage of Proposition 7. In the voter's pamphlet for that election, the proponents of Proposition 7 criticized the existing law "because the Legislature's weak death penalty law does not apply to every murderer." They promised: "Proposition 7 would." (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") Justice Blackmun noted with respect to California's 1978 law that it "creates an extraordinarily large death pool ...." (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 994 (dis. opn. of Blackmun, J.).) "Because petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing." (*Ibid.*)

The constitutional violation has become even more discernible since Justice Blackmun's observation, for California has steadily expanded that law over the years to insure full coverage of any murder in the first degree. For example, in 1990 Proposition 114 added certain law enforcement personnel to section 190.2, subd. (a) (7), concerning murder of a peace office engaged in official duties. Thereafter, Proposition 115 added the felony of rape with a foreign instrument to qualifying felonies under section 190.2, subd. (a) (17). The death penalty law was expanded still further thereafter. For example, an amendment in 1995 added carjacking to the list of special circumstance felonies, added jurors to the list of victims

qualifying for the death penalty, and added discharging of a firearm to the means of intentional killing which qualify for the death penalty. (Stats. 1995, ch. 478, amending § 190.2, amending subdivision (a) (19) (B) and adding subds. (a) (20) and (a) (21), ratified by Proposition 196, effective March 26, 1996.) Amendments to section 190.2 in 2000 yet further enlarged the scope of the death penalty to include an intentional killing that was gang-related, and the special circumstance felonies of kidnapping and arson even when those felonies were committed only to facilitate the murder. (Stats. 1998, ch. 629, § 2, approved by voters [Prop. 18, § 2, effective March 7, 2000].)

Consequently, 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. (§ 190.2, subd. (a).) For example, almost all first-degree felony-murders now qualify for death, whether committed by the defendant or another, and whether accidental, unforeseeable, or the product of panic or mental illness. (See, e.g., *People v. Dillon* (1984) 34 Cal.3d 441.) Moreover, this Court's construction of the lying-in-wait special circumstance makes it applicable to virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal. 4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-58, 575.) These broad categories are joined by so many other categories of special circumstance murder that the statute comes very close to achieving its goal of making every first-degree murderer eligible for death. (Compare § 189 with § 190.2; see also Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1324-1326 (hereafter "*The California Death Penalty Scheme*").) Rather than performing the

constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, section 190 culls out a small subset of murders for which the death penalty is not available.

The all-encompassing nature of California's death penalty statute makes it unconstitutional in other respects as well. Recent studies have shown that wrongful death judgments are much more likely in jurisdictions like California, which provide a broad range of qualifying murders. (See, e.g., Liebman, et al. (2000) *A Broken System: Error Rates in Capital Cases*; 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.*) Such a state of affairs obviously increases the risk as well of imposition of the death judgment upon innocent persons. As one court has found:

> In brief, the Court found that the best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence. It follows that implementation of the Federal Death Penalty Act not only deprives innocent people of a significant opportunity to prove their innocence, and thereby violates procedural due process, but also creates an undue risk of executing innocent people, and thereby violates substantive due process.

(*United States v. Quinones* (2002) 205 F.Supp.2d 256, 257). Although the reviewing court reversed this holding in *United States v. Quinones* (2d Cir.

2002) 313 F.3d 49, it took no issue with the lower court's finding that innocent people are being condemned to death at an alarming rate.

This Court routinely rejects challenges to the statute's lack of meaningful narrowing, and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court had rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. 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.)

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the Legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to result in the arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution as well as the correlative provisions of the California Constitution.

The California Death Penalty Scheme presented empirical evidence demonstrating in two respects that California's law fails to perform the constitutionally mandated narrowing function. First, the data demonstrate

that 84% of convicted first degree murders are statutorily death-eligible under the 1978 statute. (*The California Death Penalty Scheme, supra*, 72 N.Y.U. L.Rev. at p. 1332.) Such inclusion does not "allow for a principled distinction between the subset of murders for which the sentence of death may be imposed and the majority of murders which are not subject to the death penalty." (*Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319.) California's "subset of murders for which the sentence of death may be imposed" hardly distinguishes those murders from "the majority of murders"; to the contrary, that subset includes the majority of murders. Yet, "under contemporary standards of decency death is viewed as inappropriate punishment for a substantial portion of convicted first-degree murderers." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 295 (plur. opn.).) Not surprisingly, the all-encompassing nature of the special circumstances has led to an overabundance of murderers sentenced to death in California; for example, over 600 prisoners condemned to death now languish on its Death Row, far and away the most condemned prisoners in any jurisdiction in the country. (See Death Row Inmates by State, at http://www.deathpenaltyinfo.org/DrowInfo.html#state (1/26/03).)

In sum, while "the Court conspicuously has avoided defining in numerical terms how narrow the class of death-eligible murders must be relative to all murders" (Acker & Lanier, *Aggravating Circumstances and Capital Punishment: Rhetoric or Real Reforms*? (1993) 29 Crim. L. Bull. 467, 475), a death penalty scheme that includes 85% of all first-degree murders does not meaningfully narrow the class of death-eligible murders. (See, e.g., *Tuilaepa v. California, supra,* 512 U.S. at p. 972 [the narrowing circumstances "must apply only to a subclass of defendants convicted of

murder"]; *Maynard v. Cartwright* (1988) 486 U.S. 356, 364 [108 S.Ct. 1853, 100 L.Ed.2d 372] [the class of death-eligible murderers must be "demonstrably smaller and more blameworthy" than the class of all murderers].) As Justice Thomas has observed: "[O]ur capital jurisprudence has held that routine murder does not qualify [for capital punishment], but only a more narrowly circumscribed class of crimes such as those that 'reflect a consciousness materially more "depraved" than that of any person guilty of murder.' [Citation.]" (*Kelly v. South Carolina* (2002) 534 U.S. 246 [122 S. Ct. 726; 737, 151 L. Ed. 2d 670 (dis. opn. of Thomas, J.).)

Second, the data show that only 11.4% of the statutorily death-eligible class of first degree murders are sentenced to death. (*The California Death Penalty Scheme, supra,* 72 N.Y.U. L.Rev. at p. 1332.) A major factor in the Court's conclusion in *Furman* that the state's death penalty scheme permitted an unacceptable risk of arbitrary death sentences was because a handful of murders were arbitrarily singled out for death from the much larger class of murderers who were death-eligible. (See *Furman v. Georgia, supra,* 408 U.S. at pp. 309-310 (conc. opn. of Stewart, J.) and 311-313 (conc. opn. of White, J.). In *Gregg v. Georgia, supra,* 428 U.S. at pp. 188-189, the plurality understood the Stewart and White view to be the "holding" of *Furman,* and in *Maynard v. Cartwright, supra,* 486 U.S. 356, a unanimous Court cited to the Stewart and White opinions as embodying the holding of *Furman* (*id.* at p. 362), which is now a cornerstone of death penalty jurisprudence. The operative understanding in *Furman* was that only 15-20% of death-eligible murderers were sentenced to death. (See *Furman, supra,* 408 U.S. at pp. 309, 386, fn. 11; and 435, fn.

19.) As the plurality in *Gregg* wrote: "It has been estimated that before *Furman* less than 20% of those convicted of murder were sentenced to death in those states that authorized capital punishment." (*Gregg v. Georgia, supra,* 428 U.S. at p. 182, fn. 26.) Although the Supreme Court has not quantified precisely what death sentence ratio — in terms of actual death sentences out of convicted death-eligible murders — would satisfy the requirements of *Furman*, very clearly a capital sentencing scheme so overbroad that little more than 10% of statutorily death-eligible defendants are sentenced to death does not do so. "In the context of capital punishment, the Court has recognized that the eighth amendment requires regularity in the imposition of the death penalty." (*Gray v. Lucas* (5th Cir. 1982) 677 F.2d 1086, 1103.) The absence of such regularity in California reveals the over-inclusiveness of its death penalty statute. The essential Eighth Amendment problem here is that too few murderers are selected for death from too large a pool of those eligible for death, so that inevitably those executed reflect, in the words of Justice Stewart in *Furman*, "a capriciously selected random handful." (See *California Death Penalty Scheme, supra,* 72 N.Y.U. L.Rev. at pp. 1285-1286.)

"Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra,* 408 U.S. at p. 420 [dis. opn. of Powell, J.) Hence, one technique for determining whether a state's statute imposes cruel and unusual punishment is to compare it to

the law in other jurisdictions to determine if it is out of the mainstream. As the High Court recently has stated:

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [Citations.] ... [R]eview under those evolving standards should be informed by "objective factors to the maximum possible extent," [citations]. We have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." [Citations.]

(*Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 2247]; see also *Solem v. Helm* (1983) 463 U.S. 277, 290-292 [77 L.Ed.2d 637]; *In re Lynch* (1972) 8 Cal.3d 410, 478.) By that measure, California's death penalty dragnet is an aberration. To begin with, many states do not even have a death penalty. Among the states that do, California stands at the lead in the breadth of its death net. As has been reported, "California now has one of the broadest death penalty schemes in the country." (*California Death Penalty Scheme, supra,* 72 N.Y.U. L.Rev. at pp. 1306-1307.) It thus is not surprising that no other Death Row in the country comes close to having the number of prisoners that California has on its Death Row.

California's readiness to impose death for practically any first degree murder is even more shameful when compared to the world at large, whose nations overwhelmingly have dispensed with the death penalty altogether. "The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment .... The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa as one of the few nations which has executed large numbers of persons. ...

Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom*: *Use of the Death Penalty and International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366[31]; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].)

Abandonment of the death penalty, or its limitation to "exceptional crimes such as treason" — as opposed to its routine use— is particularly uniform on the continent of Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International (Dec. 18, 1999) "The Death Penalty: List of Abolitionist and Retentionist Countries," at www.amnesty.org.)[32]

This is especially important since our Founding Fathers looked to the nations of Western Europe for the "law of nations," as models on which the laws of civilized nations were founded, and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's

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[31] That number was reduced to nine in 1995,when South Africa post-*apartheid* renounced its former reliance on the death penalty.

[32] These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

Commentaries 1, quoted in *Miller v. United States* (1870) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227 [40 L.Ed. 95]; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; *Martin v. Waddells' Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].) Thus, for example, Congress's power to prosecute war, as a matter of constitutional law, was limited by the power recognized by the law of nations; and what civilized nations of Europe forbade, such as poison weapons or slavery or wartime prisoners, was constitutionally forbidden here. (*Miller v. United States, supra,* 78 U.S. at pp. 315-316, fn. 57 [dis. opn. of Field, J.]; see also *Atkins v. Virginia, supra,* 122 S.Ct. at p. 2249, fn. 21 [considering the practice of "the world community" in finding that imposition of the death penalty for crimes committed by mentally retarded offenders was cruel and unusual punishment].)

In short, "cruel and unusual punishment," as defined by the Constitution, is not limited solely to what violated the standards of decency in the 18th century. Rather, this prohibition encompasses violation of our current standards of decency. If the standards of decency of the civilized nations of Europe to which our Framers looked as models have themselves evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of punishment shunned by the civilized nations of Europe and used by only a handful of countries throughout the world, including totalitarian regimes whose "standards of decency" we like to believe are less advanced than ours.

Thus, assuming arguendo capital punishment itself is not contrary to existing norms of human decency, California's arbitrary use of it for

ordinary murders decidedly is. Nations in the Western world and virtually every other state in the Union have long since abandoned such a broad and random use of it. The Eighth Amendment does not permit California to lag so far behind other jurisdictions. Furthermore, inasmuch as the laws of nations now overwhelmingly recognize the impropriety of capital punishment as regular punishment, it is unconstitutional in California inasmuch as international law is a part of our federal law. (*Hilton v. Guyot, supra*; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

For these reasons, California's death penalty practice is unconstitutional and requires reversal of Fuiava's death judgment.

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.

A. Introduction.

The United States Constitution guaranteed Fuiava that any death judgment would be based upon a jury determination beyond a reasonable doubt of all the elements essential to its imposition. It did so through the Sixth Amendment guaranty of a right to a jury, the Fourteenth Amendment's due process guaranty of proof beyond a reasonable doubt, and the Eighth Amendment's guaranty of a fair and reliable penalty decision. These constitutional rights were violated because Fuiava's jury was not told that it had to find the presence of any of the aggravating

factors specified by section 190.3 beyond a reasonable doubt, or find beyond a reasonable doubt that those factors outweighed the mitigation. Nor was the jury told that it needed any agreement on these findings, let alone unanimity, before determining whether or not to impose a death sentence. Furthermore, it was not required to specify in any way how it arrived at its death decision.

The High Court's decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490, [hereafter *Apprendi*], and *Ring v. Arizona*, *supra*, 536 U.S. 584, 122 S.Ct. 1428 [hereafter *Ring*] make plain the consequent constitutional deficiencies in the judgment. While this Court has held that *Apprendi* has no application to findings of fact made by the jury in the penalty phase of California trials, it based such holdings on *Walton v. Arizona* (1990) 497 U.S. 639, a case specifically overruled by *Ring*.

The prosecution's penalty presentation was based on a raft of evidence that only questionably supported a death judgment. It is not at all clear which of the aggravating factors were relied on by the jury, nor is it clear which foundational factors were accepted by the jury, or if any of them were accepted by all the jury as true beyond a reasonable doubt. This proceeding thus violated the constitutional mandates recognized in *Ring*.

B. Burden of Proof.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[33] Only

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[33] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 17-10-30(c) (Harrison

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require that the jury base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[34] A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt. (*State v. Wood* (Utah 1982) 648 P.2d 71, 83-84.)

1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. § 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, § 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-890; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2) (a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (C) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4(C) (Michie 1990); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

[34] See Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State v. Goodman* (1979) 257 S.E.2d 569, 577.

California does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior violent conduct relied upon as an aggravating circumstance — and even in that context, the required finding need not be unanimous. This Court has reasoned that penalty phase determinations are "moral and ... not factual" functions, and they are therefore not "susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) California, however, does require fact-finding before the decision to impose death or a lesser sentence is finally made.

Section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that any such aggravating factors outweigh any and all mitigating factors, as a prerequisite to the imposition of the death penalty. 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.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors. These determinations are essential elements of a death-worthy crime, but not of a death-eligible crime; the finding of one of the special circumstances enumerated in section 190.2 suffices for the latter.

The fact that under the Eighth Amendment "death is different" cannot justify relaxation of procedural protections provided by the Sixth and Fourteenth Amendments when proving an aggravating factor necessary to a capital sentence. (*Ring, supra*, 122 S.Ct. at p. 1443.) To the contrary, "death is different" because no greater interest is ever at stake than in the penalty phase of a capital case, so that more procedural protections are demanded. (See *Monge v. California, supra,* 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].)

In deciding *In re Winship, supra,* 397 U.S. at pp. 363-364, the Court explained why the standard of proof beyond a reasonable doubt applies to the guilt determination:

> [It] is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence — that bedrock 'axiomatic and elementary' principle whose "enforcement lies at the foundation of the administration of our criminal law." ... "Due process commands that no man shall lose his liberty unless the Government has borne the burden of ... convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.

As the Supreme Court further explained in *Santosky v. Kramer* (1982) 455 U.S. 745, 755 [internal citations omitted]: "When the State brings a criminal action to deny a defendant liberty or life, ... the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." In *Monge*, the Supreme Court foreshadowed *Ring*

and expressly found the *Santosky* statement of the rationale for the requirement of proof beyond a reasonable doubt applicable to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant are of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California, supra*, 524 U.S. at p. 732.)

In *Apprendi*, the High Court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt, unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 478.) This decision confirmed that as a matter of due process under the Fourteenth Amendment, the standard of proof beyond a reasonable doubt must apply to all of the findings the sentencing jury makes as a prerequisite to its determination that death is the appropriate punishment.

In *Ring*, the High Court held that the Sixth and Fourteenth Amendment's guarantees of a jury trial mean that such determinations must be made by a jury, and must be made beyond a reasonable doubt. Before *Ring* was decided, this Court rejected the application of *Apprendi* to the penalty phase of a capital trial. In so doing, it relied on *Walton v. Arizona, supra,* 497 U.S. 639 and its conclusion that there is no constitutional right to a jury determination of facts that would subject defendants to a penalty of death. (See *People v. Ochoa*, *supra,* 26 Cal.4th at p. 453 [*Walton* "compels rejection of defendant's instant claim [that the defendant was

entitled to a finding beyond a reasonable doubt of the applicability of a particular section 190.3 sentencing factor]".)

In *Ochoa*, the Court found that the finding of first degree murder in Arizona at issue in *Walton* was the "functional equivalent" of a finding of first degree murder with a section 190.2 special circumstance in California:

> [B]oth events narrowed the possible range of sentences to death or life imprisonment.... [A] death sentence is not a statutorily permissible sentence until the jury has found the requisite facts true beyond a reasonable doubt. In Arizona, the requisite fact is the defendant's commission of first degree murder; in California, it is the defendant's commission of first degree murder with a special circumstance. Once the jury has so found, however, there is no further *Apprendi* bar to a death sentence.

(*People v. Ochoa, supra*, 26 Cal.4th at p. 454.)

This reasoning was specifically rejected by the High Court in *Ring*. *Ring* (1) overruled *Walton* to the extent *Walton* allowed a sentencing judge to make factual findings necessary for imposition of a death sentence, and (2) held *Apprendi* fully applicable to all such findings whether labeled "sentencing factors" or "elements" and whether made at the guilt or penalty phases of trial. As *Ring* stated: "Arizona's enumerated aggravating factors operate as `the functional equivalent of an element of a greater offense'...." (*Ring*, 122 S.Ct. at p. 2443, quoting *Apprendi*, *supra*, 530 U.S. at p. 494, fn. 19.)

In light of *Ring*, this Court's previous holdings made in reliance on *Walton* should be reconsidered. California's statute requires that the "trier of fact" find one or more aggravating factors, and that these factors substantially outweigh mitigating factors, before it can decide to impose

death. It is these critical findings that ostensibly made Fuiava worthy of a death judgment in the eyes of the jury and the law, and warranted the death judgment for which the special circumstances findings by themselves only made him eligible.

> Capital defendants, no less than non-capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment....The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

(*Ring*, 122 S. Ct. at p. 1443.)

C. Jury Agreement & Unanimity.

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor*, *supra*, 52 Cal.3d 719, 749; accord, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given here requiring jury agreement on any particular aggravating factor, let alone agreement that any particular combination of aggravating factors warranted the sentence of death. Indeed, the instructions effectually authorized each of the 12 jurors to vote for a death sentence based on a finding of what was aggravating enough to warrant a death penalty that the other eleven rejected. Thus, each juror could have relied on a factor in aggravation that was different from the factors relied on by the other jurors, so that there was no actual agreement on why Fuiava should be condemned.

A death verdict would not satisfy the Eighth and Fourteenth Amendments if it were based on (i) each juror finding a different set of aggravating circumstances, (ii) the jury voting separately on whether each juror's individual set of aggravating circumstances warranted death, and (iii) each such vote coming out 1-11 against that being an appropriate basis for death (for example, because other jurors were not convinced that all of those circumstances actually existed, and were not convinced that the subset of those circumstances which they found to exist actually warranted death). Nothing in this record precludes such a possibility. The result here is thus akin to the chaotic and unconstitutional result suggested in *Schad v. Arizona* (1991) 501 U.S. 624, 633 (plur. opn.), undermining the fairness and reliability of the judgment.

Nothing shows that the jury imposed a death sentence based on any agreement on reasons therefor — including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth and Fourteenth Amendments And it violates those same amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty.

The United State Supreme Court decision in *Apprendi* confirms that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantees of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (*Apprendi v. New Jersey, supra,* 530 U.S. at 478.) Under *Ring*, the finding of one or more aggravating factors, and the

finding that such factors outweigh mitigating factors, are critical elements of California's sentencing scheme and a prerequisite to the eventual normative penalty determination. Such determinations must be made by a jury, and certainly cannot be attended with fewer procedural protections than decisions of much less consequence. In his concurrence with the majority opinion in *Ring*, Justice Scalia confirmed that the court was articulating a right to a factual determination that "a unanimous jury must find beyond a reasonable doubt." (*Ring v. Arizona, supra*, 122 S.Ct. at p. 2444.)

The Supreme Court also has held in a non-capital case that the verdict of a six-person jury must be unanimous in order to "assure ... [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra*, 524 U.S. at p. 732; the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., §§ 1158, 1158a.) Capital defendants are entitled to no less protection than that afforded to non-capital defendants. (*Ring, supra*, 122 S.Ct. at p. 1443.) Indeed, capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Monge v. California, supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.Ct. 2680, 115 L.Ed.2d 836].) Moreover, providing more protection to a non-capital defendant than a capital defendant violates the equal protection clause of

the Fourteenth Amendment. (See generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 421.) For all of these reasons, unanimity with regard to the presence of one or more aggravating factors, and a finding that these factors outweigh mitigating factors, is constitutionally required.[35]

Jury unanimity was deemed an integral part of criminal jurisprudence by the Framers of the California Constitution. As they provided: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (Cal. Const., art. I, § 16; see also *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].) To apply the requirement to findings carrying a maximum punishment of one year in the county jail — but not to factual findings that have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) — would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial" on guilt or innocence." (*Monge v. California, supra*,

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[35] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C., § 848, subd. (k).)

524 U.S. at p. 726; *Strickland v. Washington* (1984) 466 U.S. 668, 686-687 [80 L.Ed.2d 674, 104 S.Ct. 2052]; *Bullington v. Missouri* (1981) 451 U.S. 430, 439 [101 S.Ct. 1852, 68 L.Ed.2d 270].) While the unadjudicated violent offenses are not the only offenses the defendant is being "tried for," that trial-within-a-trial may play a dispositive role in determining whether death is imposed. That likelihood is particularly great here, where the prosecutor relied on the evidence of Fuiava's history of violence as a reason to return a death sentence.

This Court has also rejected the need for unanimity on the ground that "generally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding." (*People v. Miranda* (1987) 44 Cal.3d 57, 99.) But unanimity is not limited to final verdicts. For example, it is not enough that California jurors unanimously find that the defendant violated a particular criminal statute; where the evidence shows several possible acts which could underlie the conviction, the jurors must be told that to convict, they must unanimously agree on at least one such act. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281-282.)

Where jurors are charged with the most serious task with which any jury is ever confronted — determining whether the aggravating circumstances are so substantial in comparison to the mitigating as to warrant death —, unanimity as to the existence of the particular aggravating factor supporting that decision and the conclusion that such factors outweigh the mitigating factors, should be required. *Ring* makes clear that these "foundational factors" of the sentencing decision are precisely the

types of factual determinations for which a capital defendant is entitled to unanimous jury verdicts beyond a reasonable doubt.

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.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Some of them, such as the law's overbreadth and its failure to require the jury to make required findings unanimously and beyond a reasonable doubt, have already been highlighted in this brief with their own separate assignments of error. (See Arguments XXIV and XXV, *ante*.) The remainder listed in this argument exacerbate the unconstitutional effect of the constitutional defects already detailed by permitting the imposition of the death penalty in truly wanton and freakish ways that randomly choose among the thousands of murderers in California a few to be victims of the ultimate sanction. The lack of safeguards to ensure reliable, fair determinations by the jury and reviewing courts means that a random element in selecting who the state will kill is impermissibly dominant throughout the process of applying the penalty of death.

Here Fuiava challenges features of the law as violative of his rights under the Sixth, Eighth, and Fourteenth Amendments in arguments that largely have already been rejected by this Court in other cases. Those arguments retain their constitutional vitality, however, because they have not necessarily been rejected by the United States Supreme Court. To

avoid prolix argument, Fuiava presents these challenges to the law and it application to him in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional bases,. (See, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 464-465 [Court summarily rejected the defendant's constitutional challenges to California's death penalty statute made admittedly only to preserve them for potential review in federal court, but "liste[d] the defendant's claims ... to ensure a future court will consider them fully exhausted"].) Individually and collectively, these various constitutional defects require that Fuiava's sentence be set aside under the Eighth and Fourteenth Amendments to the United States Constitution.

The jury was instructed with CALJIC No. 8.85, the "principal sentencing instruction" at the penalty phase. (*People v. Farnam, supra,* 28 Cal.4th at p. 177.) This instruction concerns the factors in aggravation and mitigation that the jury may consider in determining whether a sentence of death or life without the possibility of parole should be imposed. As given in this case, the instruction read as follows:

> In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> A, The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> B, The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings which involve the use or attempted use of force or

violence or the express or implied threat to use force or violence.

C, The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceeding.

D, Whether or not the offense was mitigated [sic: committed] while the defendant was under the influence of extreme mental or emotional disturbance.

E, Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

F, ... Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

G, Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

H, ... Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

I, The age of the defendant at the time of the crime.

J, Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

K, any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

> You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(RT 2730-2732; see also CT 773-774.)

The foregoing instruction violated Fuiava's federal constitutional rights in a number of respects beyond those he has already identified in this brief. Whether read as a whole or in its individual component parts, the instruction was impermissibly vague, overbroad and misleading to the jury on the question of life or death. The instruction and attendant law therefore violated the Sixth, Eighth and Fourteenth Amendments. Consequently, as discussed below with regard to each specific deficiency, the Court should reverse the death judgment.

A. Fuiava's Death Penalty Is Invalid Because Section 190.3(a) as Applied Is Impermissibly Vague Under The Sixth, Eighth And Fourteenth Amendments To The United States Constitution.

Section 190.3(a) violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution in two respects. First, it permits artificial inflation by double-counting a fact related to the crime that also constitutes a special circumstance. Second, it has been applied in such a wanton and freakish manner that every feature of any murder, even features exactly at odds with those of other murders, may be and have been found to be "aggravating" within the statute's meaning. Fuiava will address each of these constitutional deficiencies in turn.

1. Double Counting.

In California, a trial court must instruct the jury upon request not to double count the same facts as both circumstances of the crime and as special circumstances. (*People v. Melton* (1988) 44 Cal.3d 713, 768; see

also *People v. Morris* (1991) 53 Cal.3d 152, 224.) In *Melton,* referring to Penal Code section 190.3, subdivision (a), this Court acknowledged the need for clarification when the same conduct constitutes both a circumstance of the crime and a special circumstance, as the killing of Blair here did:

> The literal language of subdivision (a) presents a theoretical problem in this respect, since it tells the penalty jury to consider the "circumstances" of the capital crime *and* any attendant statutory "special circumstances." Since the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any "circumstances" which were also "special circumstances." On defendant's request, the trial court should admonish the jury not to do so.

(*People v. Melton*, *supra*, 44 Cal.3d at p. 768; emphasis in original.)

In *Morris,* this Court reiterated this holding, stating that "the trial court should, on request, admonish the jury not to consider multiple special circumstances '*more than once* for exactly the same purpose' in the penalty determination because it might otherwise double-count any 'circumstances' of the capital crime which are also 'special circumstances.'" (*People v. Morris*, *supra*, 53 Cal.3d at p. 224.) It explained there that "the manifest purpose of factor (a) [is] to inform jurors that they should consider, *as one factor, the totality of the circumstances* involved in the criminal episode that is on trial." (*Ibid.*, emphasis added.)

This Court has stated that a trial court need give no "double counting" instruction sua sponte. (*People v. Cain* (1995) 10 Cal.4th 1, 68; *People v. Welch* (1999) 20 Cal.4th 701, 769.) Fuiava urges this Court to nevertheless to find error for lack of an instruction prohibiting double-

counting in this case, where Fuiava's offense could have been aggravated three times by the same evidence — as an aggravating circumstance of the crime, the special circumstance of the murder of a peace officer, and the special circumstance of murder to avoid arrest — all for his single act of killing Blair. Trial courts have a duty to give correct instructions regarding principles of law essential to the determination of the case. "It is settled that in a criminal case, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issue raised by the evidence. [Citation.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) In this case, the jury needed to be told that the single fact of the murder could not be tripled in aggravation. Consequently, *St. Martin* and its progeny required that the jury be explicitly advised that it could not use a fact more than once in aggravation.

Such a sua sponte instruction was also required to protect the due process and equal protection rights of Fuiava, as well as his right to be free of cruel and unusual punishment. Indeed, the same likelihood of double-counting that prompted this Court to require a no-double-use instruction on request requires such instruction sua sponte to pass constitutional muster. This is because an instruction is unconstitutional if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Boyde v. California*, *supra*, 494 U.S. at p. 380; *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72 ["[I]n reviewing an ambiguous instruction ..., we inquire 'whether

there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution"].) The lack of any limitation on the use of both special circumstances and the circumstances of the crime to triple the aggravation for the single act of murdering Blair created a reasonable likelihood that the jury repeatedly considered the same fact, thus artificially transposing the murder into one worthy of a death sentence. This deprived Fuiava of his due process right to a fair penalty determination, violated equal protection principles by subjecting him to a far greater risk of a death judgment than other first degree murderers, and deprived him of his right to a reliable death penalty judgment. Accordingly, reversal of the death judgment is required.

2. Arbitrary Application.

Second, the instruction as applied here permitted imposition of the death penalty in an arbitrary and capricious manner. Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor. Instead, the Court has allowed extraordinary expansions of this factor, approving reliance on the "circumstance of the crime" aggravating factor because defendant had a "hatred of religion"[36]; sought to conceal evidence three weeks after the crime[37]; threatened witnesses after his arrest[38]; or disposed of the victim's

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[36] *People v. Nicolaus*, (1991) 54 Cal.3d 551, 581-82, 817 P.2d 893, 908-09, *cert. den.*, 112 S. Ct. 3040 (1992).

[37] *People v. Walker*, (1988) 47 Cal.3d 605, 639 n.10, 765 P.2d 70, 90 n.10, *cert. den.*, 494 U.S. 1038 (1990).

body in a manner that precluded its recovery.[39] As previously set forth, the Court now has expanded the meaning of that aggravating factor further to include victim-impact evidence. Moreover, it has done so without placing any substantive limits on the contours of such victim impact evidence, exacerbating the vagueness and reach of this aggravating factor.

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California, supra,* 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate the federal guaranty of due process of law.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. For example, the prosecutor argued here that Fuiava should be put to death because he killed Blair to avoid arrest, but prosecutors have also argued that a defendant should be put to death because he killed without any motive at all.[40] Similarly, the prosecutor argued here that death was appropriate because Fuiava shot and killed Blair coldly and without warning, but other prosecutors have argued that death was appropriate

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[38] *People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S. Ct. 498.

[39] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110 n.35, 774 P.2d 659, 697 n.35, *cert. den.*, 496 U.S. 931 (1990).

[40] See, e.g., *People v. Edwards*, No. S004755, RT 10,544; *People v. Osband*, No. S005233, RT 3650; *People v. Hawkins*, No. S014199, RT 6801.)

because the defendant struck many blows and inflicted multiple wounds,[41] killed in a savage frenzy,[42] or made the victim endure the terror of anticipating a violent death.[43] Similarly, the prosecutor utilized the fact that Blair had three children to support a judgment of death, but other prosecutors have argued that a defendant should be executed because the victim had not yet had a chance to have children.[44] The vagueness of the factor allows a prosecutor always to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale. For example, prosecutors have argued that the circumstances of the offense support a finding of death in diametrically opposed circumstances, including the following:

a. Because the defendant engaged in a cover-up to conceal his crime,[45] or because the defendant did not engage in a cover-up and so must have been proud of it.[46]

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[41] See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[42] See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[43] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[44] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[45] See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[46] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-31

b. Because the victim struggled prior to death,[47] or because the victim did not struggle.[48]

c. Because the defendant had a prior relationship with the victim,[49] or because the victim was a complete stranger to the defendant.[50]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, this factor in every case can be slanted to weigh in favor of death. Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim.

Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[51]

(same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[47] See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[48] See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[49] See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d at 717, 802 P.2d at 316 (same).

[50] See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

[51] See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims

b. The method of killing.

Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[52]

c. The motive of the killing.

Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[53]

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were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips* (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[52] See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[53] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

d. The time of the killing.

Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[54]

e. The location of the killing.

Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[55]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any logic or limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn mutually exclusive facts — or facts that are inevitable variations of every homicide — into aggravating factors that the jury is urged to weigh on death's side of the scale. This potential for arbitrary bases to impose death has only been exacerbated by the boundless inclusion of victim-impact evidence under this factor. Fuiava's case is a model of the abuse of factor (a).

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[54] See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[55] See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

In practice, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, ... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright, supra,* 486 U.S. at p. 363.)

B. The Failure To Delete Inapplicable Factors From CALJIC No. 8.85 Violated Fuiava's Federal And Constitutional Rights.

Although some of the factors listed in CALJIC No. 8.85 were applicable to the facts of this case, many were not. Specifically, the inapplicable factors included: factor (e) ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"); factor (g) ("Whether or not the defendant acted under extreme duress or under the substantial domination of another person"); factor (h) ("Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law as impaired as a result of mental disease or defect or the effects of intoxication"); and factor (j) ("Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor").

In spite of their inapplicability, the trial court did not delete these factors from the instruction. Their inclusion in the list introduced confusion, capriciousness, and unreliability into the capital decision-making process in violation of Fuiava's rights under the Sixth, Eighth, and Fourteenth Amendments. Fuiava recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Carpenter* (1999) 21

Cal.4th 1016, 1064), but requests reconsideration for the reasons given below.

The inclusion of inapplicable factors harmed the defense case in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation.[56] However, the "whether or not" formulation of the inapplicable factors cited above suggested that the jury could consider them either for or against Fuiava. Moreover, it is improper to instruct the jury on irrelevant matters because instructions dilute the jury's focus, distract its attention from the difficult task at hand, and introduce confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of factors which have no application to the case. These two dangers are heightened by the court's failure to clearly explain which factors were aggravating and which were mitigating. Finally, the failure to delete unsupported factors for which there was no evidence at all had the inevitable effect of denigrating the mitigation evidence that was actually presented. The jury was effectively invited to engage in a quantitative analysis and sentence Fuiava to death because there was evidence in mitigation for "only" one or two factors, whereas there was either evidence in aggravation or no evidence at all with respect to all the rest.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has stated that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first

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[56] Factor (i), the age of the defendant, may be considered either in aggravation or mitigation. (*People v. Osband*, *supra*, 13 Cal.4th at p. 709.)

place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an ad hoc determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors deprived Fuiava of his right to an individualized sentencing determination based on permissible factors relating to him and the crime. In addition, this error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (See, e.g., *Ford v. Wainwright, supra,* 477 U.S. at pp. 411, 414; *Beck v. Alabama, supra,* 447 U.S. at p. 637.)

C. The Court's Failure To Designate Aggravating And Mitigating Factors Deprived Fuiava Of State And Federal Constitutional Rights.

CALJIC No. 8.85 presents the jury with a list of factors to guide the jury's decision, but does not indicate which factors are aggravating and which are mitigating. This Court has held that factors (d), (e), (f), (g), (h), and (k) may be given only mitigating weight and may not be used in aggravation. (*People v. Hardy* (1992) 2 Cal.4th 86, 207; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-290.)

The failure of the instruction to identify which factors are aggravating and which are mitigating deprived Fuiava of state and federal constitutional rights to due process, an impartial jury, equal protection, and a reliable determination of penalty in violation of the Sixth, Eighth, and Fourteenth Amendments. To begin with, there was nothing to stop the jury

from using mitigating factors in aggravation. This error undermined Fuiava's right to a fair trial and a reliable penalty determination. In addition, the failure to designate aggravating and mitigating factors violated Fuiava's right to equal protection because aggravating and mitigating factors are separately designated in noncapital sentencing. (See Cal. Rules of Court, rules 4.421 and 4.423.)

D. The Use of Adjectives and Adverbs in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Fuiava's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)), and "substantial" (see factor (g)), and such adverbs as "reasonably" (see factor (f)) acted as barriers to the consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments. (See *Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.) Here, the limitations were particularly likely to have influenced the verdict, for the prosecutor exploited them in urging the jury to find no mitigation. For example, with regard to the factor whether the defendant believed there was moral justification or extenuation for his conduct, the prosecutor emphasized: "It has to be reasonable." (RT 2766.)

E. Inadequacy Of Instructions As To Penalties.

The jury was instructed that the alternative to a sentence of death was a commitment to prison for life without the possibility of parole (LWOP). (CALJIC Nos. 8.84 and 8.88, given at RT 2725 and 2736, respectively.) These instructions were insufficient to guard against the possibility that the jurors believed that life without the possibility of parole did not actually mean "without the possibility of parole."

This is no mere technicality, since a national study has found only 11% of people believe a sentence of life without the possibility of parole means exactly that. (Ramos, Bronson & Pond, *Fatal Misconception: Convincing Capital Jurors That LWOP Means Forever* (1994) 21 CACJ Forum (No. 2), p. 43 [hereafter *Fatal Misconception*].) To summarize, "The public widely believes that LWOP is the same as straight life ...." (*Id.*, p. 44, fn. 16.) Another study based on actual juror interviews draws similar conclusions. (Eisenberg and Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell Law Rev. 1.) With so substantial a possibility jurors will misunderstand the LWOP instructions, a trial court fails in its responsibility of ensuring that jurors understand the central issues in the penalty case if the court fails to provide an adequate explanation of what LWOP really means.

The lapse was particularly telling because whether jurors believe LWOP really means LWOP is central in shaping their attitudes toward a life-and-death decision. (*Fatal Misconception, supra,* 21 CACJ Forum (No. 2) at pp. 44-45.) The Sixth, Eighth and Fourteenth Amendments require "provision of accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." (*Gregg v. Georgia, supra,* 428 U.S. at p. 190 [opn. of Stewart, J.].) Incomplete sentencing information with a high likelihood of misunderstanding is insufficient for such a reasoned determination. Moreover, due to the unique nature of the death penalty, "there is a corresponding need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) Heightened reliability hardly exists when there

is a likelihood that the jurors misunderstood the critical choice it had to make.

Instructions are not required as to terms that lay jurors will understand, but they are required for terms as to which there is a substantial likelihood of misunderstanding or confusion. (See, e.g., *People v. Shoals* (1992) 8 Cal.App.4th 475, 489-491.) The strong evidence that the public suffers from severe misapprehensions over the true nature of an LWOP sentence renders the instructions given here as constitutionally deficient as instructions that did not mention parole ineligibility at all, or that otherwise raised a substantial likelihood of misunderstanding in a material fashion. (Cf. *Maynard v. Cartwright, supra,* 486 U.S. 356 [jury instruction containing vague aggravating circumstance renders sentence unconstitutional].)

Where the consequences of jury misunderstanding may mean the difference between life and death, it is essential that the alternative punishments be defined with clarity. The Supreme Court so held in *Simmons v. South Carolina, supra*, 512 U.S. at pp. 170-171, a case that resonates here. *Simmons* shows that if there is a reasonable probability a penalty jury is operating under a false idea of parole ineligibility, the judgment cannot survive constitutional scrutiny. (See also *Kelly v. South Carolina, supra,* 534 U.S. 246 [122 S.Ct. 726; 151 L.Ed.2d 670,] [where future dangerousness at issue, jury must be instructed on parole ineligibility]. Accordingly, the penalty judgment should be reversed.

F. Failure To Instruct On The Presumption Of Life Was Unconstitutional.

In non-capital cases, the presumption of innocence acts as a core constitutional and adjudicative value to protect the accused, and is a basic component of a fair trial. (*Estelle v. Williams* (1976) 425 U.S. 501, 503 [96 S.Ct. 1691, 48 L.Ed.2d 126].) Paradoxically, at the penalty phase of a capital trial, where the stakes are life or death, the jury is not instructed as to the presumption of life, the penalty phase correlate of the presumption of innocence. (Note, *The Presumption of Life: A Starting Point For A Due Process Analysis Of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272 [113 S.Ct. 1222, 122 L.Ed.2d 620].)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that such a presumption is not necessary when a person's life is at stake, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit" so long as the state's law properly limits death eligibility. (*Id.* at p. 190.) As Fuiava has argued in this brief, however, California's law does not properly limit death eligibility.

Fuiava respectfully requests that the Court reconsider *Arias* and hold that the presumption of life is a constitutional necessity at the penalty phase of a capital trial. (U.S. Const., Amends VI, VIII, XIV; Cal. Const., Art. I, §§ 7, 15; see also Wash. Rev. Code, § 10.95.060 [life sentence presumed unless jury finds beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency].) The failure to so instruct Fuiava's jury requires reversal of the judgment of death.

G. The Trial Court's Failure To Instruct The Jury on Any Penalty Phase Burden of Proof Violated Fuiava's Constitutional Rights.

Fuiava's death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution because it was imposed pursuant to a statutory scheme that does not establish a burden of proof. Fuiava has already argued that the Constitution requires application of the standard of proof beyond a reasonable doubt. (See Argument XXV, *ante*.) If that argument is rejected, this Court should conclude that the jury must find by clear and convicting evidence or at least by a preponderance of evidence that aggravating circumstances so substantially outweigh mitigating circumstances that death is the appropriate sentence.

Even if not constitutionally necessary to place the usual criminal burden of persuasion on the prosecution, some burden of proof must be articulated to ensure that juries faced with similar evidence will return similar verdicts and that the death penalty is evenhandedly applied, and capital defendants treated equally from case to case. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) The trial court's failure to instruct on any penalty phase burden of proof deprived Fuiava of his rights to due process, equal protection, and freedom from cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

H. California Law Violates The Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require That The Jury Base Any Death Sentence On Written Findings Regarding Aggravating Factors.

The importance of explicit findings to reasoned decision-making has long been recognized — and emphatically so — by this Court. (*See, e.g., People v. Martin* (1986) 42 Cal.3d 437, 449.) Thus, in a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, § 1170, subd. (c).) Since under the Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (*see Harmelin v. Michigan, supra,* 501 U.S. at p. 994) — and, since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst, supra,* 897 F.2d 421) — it follows that the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating and mitigating circumstances found and rejected.

Explicit findings in the penalty phase of a capital case are especially critical because of two factors: (1) the magnitude of what is at stake (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305); and (2) the possibility of error. In *Mills v. Maryland, supra,* 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id.* at p. 383, fn. 15.)

Given all that is at stake, the enormous benefit it would bring, and the minimal burden it would create, a requirement of explicit findings is essential to ensure the "high [degree] of reliability" in death-sentencing that is demanded by both the due process clause and the Eighth Amendment. (*Mills v. Maryland, supra*, 486 U.S. at pp. 383-384.) In several cases, accordingly, in the course of explaining why the state death statutes at issue were constitutional, the United States Supreme Court has pointed to the fact that the statutory schemes required on-the-record findings by the sentencer, thus enabling meaningful appellant review. (See, e.g., *Gregg v. Georgia, supra,* 428 U.S. at pp. 195, 198 [plur. opn.], 211-212, 222-223 [conc. opn. of White, J.]; *Proffitt v. Florida* (1976) 428 U.S. 242, 250-251, 253, 259-260.)

In rejecting the claim advanced here, this Court has most often relied on *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-778, which, in turn, relied on the analysis of the 1977 law in *People v. Frierson* (1979) 25 Cal.3d 142, 179 and *People v. Jackson* (1980) 28 Cal.3d 264, 317. The latter cases, however, equated the requirement in Penal Code section 190.4 — requiring a statement of reasons from the trial court on the automatic motion for modification — with the statement of reasons from the actual sentencer in the federal cases. The equation fails. It is the reasons of the entity that actually made the decision that are the crucial ones. (Cf. *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 124 L.Ed.2d 182].) For these reasons, this Court's precedent on the issue does not control.

I. The Absence of Inter-Case Proportionality Review In California's Death Penalty Statute Guarantees Arbitrary, Discriminatory, and Disproportionate Impositions Of The Death Penalty.

The overwhelming majority of states that sanction capital punishment require comparative, or "inter-case," appellate sentence review. The United States Supreme Court has noted that such a provision guards "... further against a situation comparable to that presented in *Furman* [*v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726]...." (*Gregg v. Georgia, supra,* 428 U.S. at p. 198.)

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it; the prohibition on the consideration of any evidence showing that death sentences are not being charged by California prosecutors or imposed on similarly situated defendants by California juries is strictly the product of this Court.

Furman raised the question of whether, within a category of crimes for the death penalty that is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. The California capital case review system contains the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra,* 428 U.S. at p. 192, citing *Furman v. Georgia, supra,* 408 U.S. at p. 313 (conc. opn. of White, J).) This failure also violates the Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a

constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

J. Insufficiency Of Available Postconviction Relief In Federal And State Courts.

Post-conviction relief in both this Court and in the federal courts was much more readily available in 1976, when *Gregg v. Georgia* was decided, than it is now. While the availability of such relief at that time may have been adequate to guard against arbitrary and capricious imposition of the ultimate sentence in violation of federal constitutional law, the severe compression of its availability since then renders California's death penalty practices too unreliable now to pass constitutional muster. Justice Blackmun made this point in his concurrence in *Sawyer v. Whitley* (1992) 505 U.S. 333, 357-360 [112 S.Ct. 2514, 120 L.Ed.2d 269], in which he grappled with the likely reality that the ever-increasing procedural barriers to meaningful federal habeas review "undermine[] the very legitimacy of capital punishment itself." (See generally *Sawyer v. Whitley, supra,* 505 U.S. at pp. 357-360 [conc. opn. of Blackmun, J.]; see also *Callins v. Collins, supra,* 510 U.S. 1141 [114 S.Ct. 1127, 1137-1138, 127 L.Ed.2d 435] [opn. of Blackmun, J., dissenting from denial of certiorari].); *People v. Bull, supra,* 185 Ill.2d at p. 227 [dis. opn. of Harrison, J.]; *Singleton v. Norris* (8th Cir. 1997) 108 F.3d 872, 876 [conc. opn. of Heaney, J.].)

Justice Blackmun's discussion of the point in *Sawyer* has even more force now, since the procedural barriers to obtaining post-conviction relief have continued to mount since then. (See, e.g., The Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, effective April 24, 1996.) That enactment established numerous strict limits on the availability

of federal habeas corpus cases, particularly for death judgments. As the Supreme Court has described that Act

> Title I of the Act stands more or less independent of the Act's other titles in providing for the revision of federal habeas practice and does two main things. First, in §§ 101-106, it amends § 2244 and §§ 2253-2255 of chapter 153 of Title 28 of the United States Code, governing all habeas corpus proceedings in the federal courts. [Citation.] Then, for habeas proceedings against a State in capital cases, § 107 creates an entirely new chapter 154 with special rules favorable to the state party ....

(*Lindh v. Murphy* (1997) 521 U.S. 320, 326-327 [117 S.Ct. 2059].)

The constrictions that have been placed on post-conviction review in state court and this Court's manner of review on direct appeal and collateral attack have also increasingly rendered state post-conviction remedies ineffectual to protect against unreliable judgments of death, and thereby aggravated the unreliability of California's death judgments. (See, e.g., *In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16; *In re Robbins* (1998) 18 Cal.4th 770, 780, 787; *In re Gallego* (1998) 18 Cal.4th 825.) California's imposition of the death penalty thus violates the Sixth, Eighth and Fourteenth Amendments because it lacks meaningful post-conviction review.

K. Miscellaneous Other Constitutional Defects.

California's death penalty scheme and the instructions implementing it further violate the constitutional provisions identified earlier in this argument for the following reasons:

- The principal instruction's use of the words and phrases "so substantial" and "warrants" is vague and misleading.

- It permits the consideration of nonstatutory aggravating factors.
- It fails to inform the jury it need not be unanimous in relying on a mitigating circumstance.
- The law gives prosecutors unbounded discretion in deciding when to charge a murder case as a capital case.

(See generally *People v. Boyette*, *supra*, 29 Cal.4th at pp. 464-465.)

L. California's Procedures and Practices Make Arbitrary and Unreliable Imposition of the Death Penalty Unavoidable.

Fuiava relies on the analysis in and adopts by reference Justice Blackmun's opinion in *Callins v. Collins*, *supra*, 510 U.S. 1141 [114 S.Ct. 1127, 127 L.Ed.2d 435] [opn. of Blackmun, J., dissenting from denial of certiorari].) The opinion is complete, and there is no need to add to it, except to say the limitations cited therein apply to California postconviction proceedings as well as federal ones.

On the same subject, Fuiava also relies on the analyses in and incorporates Justice Harrison's dissent in *People v. Bull, supra,* 185 Ill.2d at pp. 225-228, and Judge Heaney's concurrence in *Singleton v. Norris*, *supra*, 108 F.3d at pp. 874-876.) The imposition of the death penalty, once again, violates the Sixth, Eighth, and Fourteenth Amendments.

XXVII.

IMPERMISSIBLE RACE FACTORS CONTRIBUTED TO THE JUDGMENT, REQUIRING REVERSAL.

Prosecution that is "deliberately based upon an unjustifiable standard," such as race or religion, deprives the accused of his Fourteenth Amendment right to equal protection. (*Murgia v. Municipal Court* (1975)

15 Cal.3d 286, 300; *Oyler v. Boles* (1962) 368 U.S. 448, 456.) In addition, invidious discrimination in the imposition of the death penalty has long been condemned as violative of the Eighth and Fourteenth Amendments. (*Furman v. Georgia, supra,* 408 U.S. 238.) Just as the race of the accused may not be used as a factor in capital punishment, application of the capital sentencing statute may not be based on racial considerations concerning the victim. (See, e.g., *Booth v. Maryland, supra,* 482 U.S. at p. 506, fn. 8 ["our system of justice does not tolerate ... distinctions" based on the perceived status of the victim].)

The record supports the inference that race played an improper role in Fuiava's case from the initial charging decision to the penalty sentencing. Fuiava was a member of a minority community which had long been victimized by a predominantly white force of deputy sheriffs. The victim Blair was also a member of this predominantly white police force. The prosecutor acknowledged early on that the deputies exerted a great deal of pressure on him to obtain the maximum sentence for Blair's death. (See Arg. VIII, *ante.*) Surely much of this pressure sprung from the war on crime which the deputies waged in the neighborhood, fueled by a history of racial animosity. Racial polarization was the subtext of the entire prosecution. "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." (*Turner v. Murray, supra,* 476 U.S. at p. 35.) Such was the case here.

As the trial progressed, additional opportunities were provided for decision-making based on racial bias. Despite the clear indications that race would be a strong factor in the case, no voir dire concerning this issue

was conducted. (See, e.g., *People v. Hope*, 702 N.E.2d 1282 (Ill. 1998).) In that case, the reviewing court reversed the death sentence because the trial court refused to question venirepersons on the issue of interracial crime bias was reversible error as to death sentence. 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?" (*Id.* at p. 1284.)

The prosecution's focus on highly emotional victim impact evidence in the penalty phase further facilitated the exercise of racial bias, and the broad instructions gave the jury freedom to act on such. Because the weighing procedures did not "`focus [jurors' consideration] on the particularized circumstances of the crime'" that constitute constitutionally permissible aggravating factors, jurors were permitted to draw their own inferences. (See *McCleskey v. Kemp* (1987) 481 U.S. 279, 307, quoting *Gregg v. Georgia, supra,* 428 U.S. at p. 199.) These inferences likely included conclusions drawn on the basis of racial bias. In fact, the vagueness of the instructions allowed "those to discriminate who [were] of a mind to discriminate." (*Avery v. Georgia* (1953) 345 U.S. 559, 562.)

Factor (a), referring generally to the circumstances of the crime, may not be so vague as to violate on its face the Eighth Amendment's cruel and unusual punishment clause. (See *Tuilaepa v. California, supra,* 512 U.S. 967.) However, the elasticity of the meaning of factor (a) — illustrated, for example, by this Court's interpretation that it also encompasses the impact of the offense on others — so lends itself to a penalty determination based on racial grounds that the resulting death sentence here was unconstitutional.

Racial prejudice need not have been conscious or overt to have affected the jury's sentence. Indeed, "race prejudice stems from various causes and may manifest itself in different forms." (*Powers v. Ohio* (1991) 499 U.S. 400, 416; see also *Hernandez v. New York* (1991) 500 U.S. 352.) In a society where racial discrimination was the legally-sanctioned norm until this generation, it sadly "still remain[s] a fact of life." (*Vasquez v. Hillery* (1986) 474 U.S. 254, 264.) Jurors' sentencing decisions, in particular, remain swayed by negative stereotypes about racial groups and their individual members. These negative racial stereotypes "produce a 'reverse halo effect': members of negatively stereotyped groups are assumed to possess negative traits, and positive information about them is devalued." (King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63, 77 (1993).)[57] Especially vulnerable to such stereotypes are those

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[57] Public opinion polls confirm the widespread acknowledgment that racial discrimination persists in the criminal justice system. See R. Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, The Washington Post, May 12, 1992, p. A4; *Black and White: A Newsweek Poll*, Newsweek, March 7, 1988, at 23. Such discrimination has been noted in racial disparities in non-capital sentencing rates, see *Developments in the Law: Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1603, fn. 35 (1988) (reviewing literature); racial disparities in the charging, sentencing and imposition of the death penalty after the *Gregg* decision, see U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (February 1990), reprinted in 136 Cong. Rec. S6889-90 (daily ed. May 24, 1990); and the propensity of prosecutors to exercise peremptory challenges based on group biases, see *Batson v. Kentucky* (1986) 476 U.S. 79, 103-104 (Marshall, J., concurring) (reviewing data from various jurisdictions). The American Bar Association not long ago called for a moratorium on the death penalty in part to eliminate discrimination in capital sentencing on the basis of the race of either victim or the defendant. (Recommendation approved by the ABA House of Delegates February 3, 1997.)

defendants whom prosecutors demonize by association, i.e., alleged members of street gangs comprised of racial minorities.

Nobody denies that the dangers associated with negative racial stereotypes are magnified in the context of capital sentencing. A juror who believes stereotypical assumptions that members of a certain cognizable group are "violence prone or morally inferior might well be influenced by that belief" in deciding to impose the sentence of death. (*Turner v. Murray*, *supra*, 476 U.S. at p. 35.) In addition, such a juror may be "less favorably inclined" toward a capital defendant's mitigating evidence. (*Ibid.*) The High Court also has acknowledged that fear of members of a cognizable group "could easily be stirred up by the violent facts of [a capital crime]" and could influence a juror's decision to impose death. (*Ibid.*) The prosecutor here took full advantage of such attitudes in his inflammatory presentation of his case for death, whipping up passion against minority street gangs generally and the Young Crowd in particular. (See Arguments XII and XXVII, *ante*.) His reference to Fuiava as Frito Bandito was a particularly inexcusable exploitation of negative racial stereotypes.

Defendants are more likely to receive the death penalty if the victims are white rather than minority members,[58] and minorities tend to receive the

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[58] See Tabak, *Is Racism Relevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racal Discrimination in Capital Sentencing?* (1990-91) 18 N.Y.U. Rev. L. Soc. Change 777, 780-83 (summarizing various studies). This law review article is an adaptation of the ABA's testimony in support of the proposed Racial Justice Act, U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES A PATTERN OF RACIAL DISPARTIES (Feb. 1990), reprinted in 136 CONG. REC. S6889-90 (daily ed., May 24, 1990); L. Ekstrand and H. Ganson, in panel discussion on Race and the Death Penalty, in The Death Penalty in the

death penalty more often than Caucasians. (See, e.g., David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (1990) p. 399, as cited in the ABA Report as approved by the ABA House of Delegates February 3, 1997.) Here, Blair was associated with the white majority and ruling class. As Illinois Governor Ryan observed on January 11, 2003, when he granted blanket clemency to those on Illinois's Death Row:

> [T]he most glaring weakness is that no matter how efficient and fair the death penalty may seem in theory, in actual practice it is primarily inflicted upon the weak, the poor, the ignorant and against racial minorities. That was a quote from former California Governor Pat Brown ... [made] nearly 50 years ago; nothing has changed in nearly 50 years.

In summary, the opportunity for prejudice inherent in California's death penalty law was realized in this case. Indeed, it is not too much to say that racial prejudice was the genesis of this case, for the confrontation on Walnut Avenue was the culmination of a history of police oppression against the minority citizens of Lynwood. The presence of polarizing racial issues in the trial made that prejudice manifest, and deprived Fuiava of his federal constitutional rights to equal protection and due process under the Fourteenth Amendment, to a fair trial under the Sixth and Fourteenth Amendments, and to a reliable verdict under the Eighth and Fourteenth Amendments. Such a grievously tainted sentence cannot stand.

Twenty-First Century, 45 Amer. UL. Rev. 239, 320-23, 341, 345, 347, 348 (1995). See also Samuel R. Gross & Robert Mauro, *Death and Discrimination; Racial Disparities in Capital Sentencing* (1989).

XXVIII.

CUMULATIVE PREJUDICE REQUIRES REVERSAL OF THE DEATH JUDGMENT.

The errors at the penalty phase converged to miscarry justice and to deprive Fuiava of the fundamentally fair and reliable capital verdict to which the Eighth and Fourteenth Amendment rights to the United States Constitution entitled him, even if each individual error considered separately did not do so. (See generally authorities cited in Argument XIV, *ante*, regarding cumulative error at the guilt phase.)

The errors at the penalty phase combined in various way to make their sum greater than their parts. For example, the court's exclusion of evidence of the community's fear of excessive force by the sheriff's deputies and advice to the jury that evidence of the resultant lawsuit was remote and irrelevant acted together with its refusal to instruct that lingering doubt was a mitigating factor to deprive Fuiava of full and fair consideration of the existence of doubt as to his guilt when the jury determined the penalty. These errors acted in concert with the court's exclusion of other mitigating evidence, such as the negative impact Fuiava's death would have on his loved ones, the court's bar on Fuiava's expression of sorrow for the suffering of Blair's family, and the court's limitation on consultation between counsel and Fuiava prior to his testimony, to deprive the jury of full and fair consideration of the case for mitigation. On the other hand, the extensive victim impact evidence and the admission of prosecution evidence about the Vikings and the lawsuit together acted to tilt the proceedings even further towards a death verdict. The prosecutor's misconduct overlay these errors, for it exploited them to

inject passion and prejudice into the proceedings. Moreover, the various deficiencies in California's death penalty law facilitated this unconstitutional result, starting with the breadth of its death net and ending with its inadequate post-conviction review process for remedying unconstitutional death judgments.

Not only did the penalty phase error accumulate to deprive Fuiava of a reliable penalty verdict, but it aggregated with the guilt phase errors to do so. A number of the penalty phase errors built upon the defects in the guilt phase and enlarged upon their prejudice to render the penalty verdict unreliable. For example, the exclusion of the Viking and lawsuit evidence that occurred in the guilt phase was continued and broadened in the penalty phase. In addition, the court continued to sacrifice Fuiava's rights in favor of expedited penalty proceedings. The prosecutor likewise built upon the guilt phase errors and his own misconduct during that phase and enlarged upon the harm they caused as well. For example, he continued to sport the Vikings pin, comment on exercise of the marital privilege, disparage Fuiava, and otherwise exploit the passion and prejudice facilitated by the court's errors.

Finally, many of the guilt phase errors, such as forcing unprepared counsel to trial and the several errors undermining the jury's impartiality, affected the penalty phase as much as they did the guilt phase. Thus, when all the errors are considered together, the fundamental injustice of the death penalty is manifest.

XXIX.

FUIAVA WAS DENIED AN IMPARTIAL DECISIONMAKER, REQUIRING REVERSAL.

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." (*In re Murchison* (1955) 349 U.S. 133, 136 [75 S.Ct. 623].) Thus, "a judge [must] hold the balance nice, clear, and true between the state and the accused"; otherwise, the judge "denies the latter due process of law." (*Tumey v. State of Ohio* (1927) 273 U.S. 510, 532 [47 S.Ct. 437].) "[A] defendant may assert on appeal a claim of denial of the due process right to an impartial judge." (*People v. Mayfield* (1997) 14 Cal.4th 668, 811.) Where a jaded judge does not hold the balance true but rushes to impose a death judgment, the Eighth and Fourteenth Amendments' requirement for reliability in death sentences is also implicated.

We have already pointed out how the trial court's evidentiary rulings were not applied equally to the prosecution and the defense, but favored the former. The prosecution was allowed to present its evidence of motive for Fuiava to shoot first, but Fuiava was not allowed to present his evidence of Blair's motive to shoot first. This disparate application of evidentiary rules appeared to be a function of the fact that the court simply did not credit Fuiava's evidence and theory of motive. The Constitution, however, did not permit the court to substitute its personal view of that evidence for the jury's by suppressing it. Nor was the court, when some evidence of the civil rights lawsuit incidentally came before the jury, empowered to advise the jury of its view that the evidence was remote and irrelevant because the lawsuit had been filed some five years before the confrontation. The bias

of that view is made plain by the fact that trial of the lawsuit was anything but remote — it was only weeks away at the time of the confrontation, and other evidence the court excluded showed that the deputies stepped up their intimidation in Lynwood as the trial approached. Thus, the time period between the confrontation and the trial of that lawsuit, not between the filing of the lawsuit and the confrontation, was what mattered in any neutral and objective consideration of that evidence.

The court's same subjective view of the evidence allowed deputy opinion that the lawsuit was frivolous, but excluded the evidence that the Sheriff's Department lost the lead trial and thereafter settled the case for millions of dollars. Similarly, the court permitted evidence of the mock patrol vehicle to establish Young Crowd symbolic violence toward the Lynwood deputies, but excluded the evidence of the deputies's actual wrongful shootings in Lynwood that inflicted bodily and death and incited that symbolism. It also permitted Fuiava to be found guilty by ascribing such Young Crowd aggression to him, but excluded evidence of Viking aggression that could have been ascribed to Blair.

The trial court's roughshod riding over Fuiava's rights throughout the proceedings can be explained only by the fact that it assumed there was no question of his guilt — as it so found after trial when it denied the motions for new trial and modification of the verdict —, so that its predominant concern was with completion of the trial. Hence, the court denied Fuiava's counsel the short time he needed to prepare for that trial; it conducted a perfunctory voir dire of the venirepersons that slighted Fuiava's interests both in fair consideration of his claim of self-defense and in fair consideration of penalty; it denied Fuiava the time he needed to

present his evidence; it ignored the danger that the jury might be prejudiced against him due to gallery conduct; it summarily excused a juror during deliberations who impeded return of guilt verdicts because he credited defense testimony; it permitted outrageous prosecutorial misconduct; it refused to grant Fuiava and his counsel more than five minutes to discuss Fuiava's penalty testimony because it might then take another day to submit the case to the jury, but then called an early close to that day's session out of concern for fairness to the prosecutor; it admitted extensive victim impact evidence, but then restricted the mitigation evidence; and it made all the other rulings that Fuiava has assigned on appeal as errors that deprived him of a fair trial. A series of rulings adverse to a party may evidence unconstitutional judicial bias. (See, e.g., *Taylor v. Hayes* (1974) 418 U.S. 488, 502 [94 S.Ct. 2697].) Especially may that be the case when those rulings are beyond the discretion of the court and violate the fundamental rights of the defendant.

The need for fair and impartial decisionmaking is at its greatest in a death penalty case that is especially controversial and incites strong feelings on both sides. "It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." (*Reid v. Covert* (1957) 354 U.S. 1, 45-46 [77 S.Ct. 1222, 1 L.Ed.2d 1148] (conc. opn. of Frankfurter, J.).) Because of the "intense political pressures" generated in such a case, particularly "in a system that requires elected judges, subject to the prevailing political winds, to preside over capital cases," the courts must be "especially vigilant in enforcing the procedural rights accorded the accused

by the Bill of Rights." (*Depew v. Anderson, supra,* 311 F.3d at p. 753.) The trial court here was not.

"The State of course must provide a trial before an impartial judge"; if it does not, the deprivation "necessarily render[s] a trial fundamentally unfair." (*Rose v. Clark*, *supra*, 478 U.S. at p. 577.) This is true "[n]o matter what the evidence was against" the defendant. (*Tumey v. State of Ohio* (1927) 273 U.S. 510, 535 [47 S.Ct. 437].) How much more true is it when the evidence — all the evidence — casts such long shadows of doubt on the correctness of the jury verdicts and the ultimate judgment of death that the court imposed upon Fuiava.

* * * * * *

CONCLUSION

Trial counsel argued to the court that an "[in]justice was done here" because the jury "convicted an innocent man, and they condemned him to death." (RT 2811-2812.) He urged "the court to make it right." (RT 2812.) The trial court refused to do so, and pronounced a judgment of death. That judgment made the injustice even more grave, for the trial court committed many errors that in concert with the prosecutor's errors contributed to the verdict of death. "The quintessential miscarriage of justice is the execution of a person who is entirely innocent" of the capital charge. (*Schlup v. Delo* (1995) 513 U.S. 298, 324-325.) Fuiava accordingly now asks this Court to correct the ultimate miscarriage of justice that his judgment of death reflects.

For these reasons, the Court should reverse the judgment.

Dated: March 19, 2003

Respectfully submitted,
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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 March 21, 2003, I served the within **APPELLANT'S OPENING BRIEF** on the interested parties in said action causing to be placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States Post Office box addressed to the parties as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 21, 2003.

Sabine Jordan