SUPREME COURT COPY

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

GRAYLAND WINBUSH,

Defendant and Appellant./

CAPITAL CASE

No. S117489

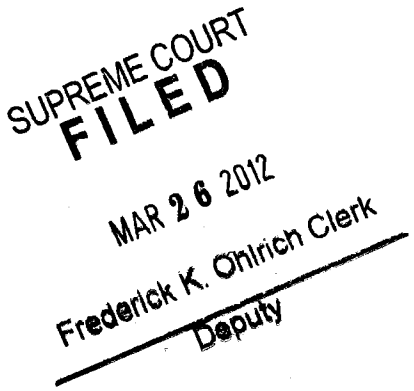
Alameda County Superior Court
No. 128408B

On Appeal From Judgment Of The Superior Court Of California

Alameda County

Honorable Jeffrey W. Horner, Trial Judge

APPELLANT'S OPENING BRIEF



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Supreme Court

DEATH PENALTY

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OVERVIEW OF APPELLANT'S OPENING BRIEF

Racism, subliminally and explicitly, infected and permeated Grayland Winbush's trial from the time of the District Attorney's charging decision to the death verdict, and best explains why this mundane felony murder – far from the worst of the worst -- resulted in a death sentence. The prosecution manipulated the jury selection to eliminate any jurors of Winbush's race, and then manipulated the evidence at trial to exploit racial biases in the jury. (See *Furman v. Georgia* (1972) 408 U.S. 238, 242 [Douglas, J. concurring] ["It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices"].)

Winbush, a 19-year old, African-American teenager, killed Erika Beeson, a 20-year-old white woman. Although Beeson was killed in a robbery, and no sexual assault was involved, the court permitted the prosecutor to exploit the fearful stereotype about black men raping and killing white women. Killing a white woman is why Winbush sits on death

row. If Winbush had not been black, or if he had killed a black man or black woman or, even a white man, or if all blacks had not been removed from his jury, he probably would not have been condemned to death.

First, in most jurisdictions, the unplanned strangulation and stabbing of a young woman during a robbery that netted less than an ounce of marijuana, approximately $300 in cash, a shotgun and a graphic equalizer, would not be charged as a capital case. This felony murder was no more horrible than the average felony murder; to suggest otherwise is to denigrate truly horrific murders. Winbush did not kill more than one person; he did not kill a child, an elderly person, a police officer, or a witness; he did not sexually assault anyone; and he did not torture anyone. Nor, despite a troubled past of juvenile misconduct, had he committed any prior homicide. This felony murder (or possibly intentional murder with minimal premeditation) during the course of a robbery simply did not warrant capital prosecution and probably would not have been so charged in the absence of racism.

Second, the prosecutor challenged all the African-American jurors, using 30 percent of his challenges, resulting in a jury without any blacks. (104-RT 6669-6673.) Based on the 2000 U.S. Census, taken just two years before jury selection, the racial composition of Alameda County was: 41 percent white; 21 percent Asian; 16 percent Latino; and 15 percent black.[1] (Alejandra Lopez, *Racial/Ethnic Diversity and Residential Segregation in the San Francisco Bay Area*, No. 1, September 2001, Center for Comparative Studies in Race and Ethnicity, Stanford University,

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1. Winbush requests this court to take judicial notice of the results of the 2000 federal census. (*People v. Howard* (1992) 1 Cal.4th 1132, 1160, fn. 6.)

at 2.) Thus, on a jury of twelve, where race was not an issue, one would have expected five white jurors, three Asian jurors, two Latinos, and two blacks. The jurors who actually served included eight whites, two Asians, two Latinos and no blacks. On a jury of 18 people, including alternates, one would have expected seven or eight white jurors, four or five Asians, three Latinos, and three blacks. Instead, there were 11 Caucasians, three Hispanics, two Asians, and no blacks. (105-RT 6841-6842.) It was not fair to have Winbush sentenced to death by a jury without any blacks.

The prosecutor's subliminal racist suggestions and explicit arguments had greater impact and were more likely to be persuasive to a jury without African-Americans. There is no evidence that Hispanics and Asians are more likely to be colorblind than white jurors when it comes to judging a young black man killing a white woman, and thus, Winbush was convicted not by a jury of his peers, representative of his community, but a death-primed, white-washed, hanging jury.

Third, even though there was no evidence of sexual assault and the victim was fully clothed when her dead body was found, the court permitted the prosecutor to introduce nude photos of Beeson's dead body. Thus, despite instruction that this murder had nothing to do with a sexual assault -- medical personnel had stripped Beeson while trying to resuscitate her -- the jury was subliminally tainted by these nude photographs suggesting a sexual aspect to the white woman's murder by a black teenager. To further erroneously suggest this case involved a sexual aspect and Winbush preyed on white women, the court permitted the prosecutor at penalty phase to introduce evidence of Winbush's alleged sexual assault on a white woman, Julia Phillips, even though the evidence was weak, in part because she did not report this alleged sexual

assault to the police until many years later, despite talking to the police several times in the interim.

Studies show that jurors are most likely to impose a death sentence when the victim is a non-Latino, white person. (See, e.g., Pierce & Radelet, *"The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99"* (2005) 46 Santa Clara L. Rev. 1; Baldus & Woodworth, "*Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*" (2003) 39 Criminal Law Bulletin 194–226.) Moreover, black defendants are disproportionately sentenced to death when the victim is a white woman and the evidence suggests she was raped. (See, e.g., Crocker, "*Is the Death Penalty Good for Women*" (2001) 4 Buff. Crim. L. Rev. 917, and "*Crossing the Line: Rape-Murder and the Death Penalty*" (2000) 26 Ohio N. U. L. Rev. 689.) Showing jurors in the penalty phase 18 minutes of images of the innocent white girl who was killed by the black defendant seated at the defense table was more than sufficient for subconscious racial and gender stereotypes to surface. Dozens of photographs were of Beeson as a young girl and young lady, and included one nude photograph of her dead body, thus subliminally suggesting Winbush, a black man, had killed and sexually assaulted a young white girl, not a 20-year-old white woman.

The penalty phase was also marred by the court permitting the prosecutor to use the defense expert in the field of learning disabilities, Dr. Candelaria-Greene [hereafter Dr. Greene], to venture opinions beyond her expertise about whether Winbush fit the criteria for antisocial personality disorder. The court also permitted the prosecutor to cross-examine Dr. Greene about the fact that "at age 8, Winbush and a copartner attempted

to set fire to a neighbor's home." The court also permitted the prosecutor to use Winbush's attempted carjacking and attempted robbery of a woman at gunpoint -- at the age of 12 -- to help the jury decide whether he should be executed. It violates due process to sentence Winbush to death because he committed crimes at ages 8 and 12, and was a troubled teenager who routinely committed violent acts or threatened to do so while in the state's custody for nearly all his teenage years, when he could not have been executed if he had murdered someone during his youth.

The only reason such acts of juvenile violence were introduced at the penalty phase was to give the jury further reason to condemn Winbush to death. For an act of violence or the threat of violence by a *child* – to be used as a reason to execute him as an adult -- ignores the undisputed fact that the younger a child, the less morally responsible he is for his actions. The evidence of juvenile misconduct was simply too prejudicial to be admitted or considered in any manner as a reason to execute Winbush. Because Winbush could not be executed for a murder done under the age of 18, he should not be executed for lesser crimes he committed under the age of 18, particularly ones at age 8 or 12.

Finally, the entire trial was marred by the fact that Winbush's two lawyers were incapable of defending him against five lawyers: the two rabid prosecutors who unfairly characterized this case as one of the worst of the worst and sanitized the jury of any blacks; the two energetic defense counsel for Winbush's codefendant, Norman Patterson, who successfully saved their client's life at the expense of Winbush; and the judge who sided with the prosecution on virtually every issue of substance. Everyone knows that five against two is not a fair fight; Winbush's case is no exception.

STATEMENT OF APPEALABILITY

This automatic appeal from a final judgment of conviction and imposition of a sentence of death is authorized by Penal Code section 1239, subdivision (b).

STATEMENT OF THE CASE

On October 9, 1996, the Alameda County District Attorney filed an information charging appellant, Grayland Winbush, along with co-defendant, Norman Patterson, with one count (count 1) of murder in violation of Penal Code section 187(a),[2] and with respect to Winbush alone, alleged the special circumstance allegation that Winbush was engaged in the commission of robbery within the meaning of section 190.2(a)(17)(A); and alleged Winbush used a deadly weapon within the meaning of section 12022(b). The information charged Patterson alone with a separate count of robbery (count 2), in violation of section 211, and alleged a firearm use as to the robbery count within the meaning of section 12022.5(a). (2-CT 436.)

On July 8, 1999, the Alameda County District Attorney filed an amended information to add the special circumstance allegation that Winbush and Patterson were both engaged in the commission of robbery within the meaning of section 190.2(a)(17)(A). (3-CT 534.) On November 14, 2002, the Alameda County District Attorney filed a second-amended information, alleging both Winbush and Patterson used a deadly weapon within the meaning of section 12022(b). (9-CT 2430.)

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[2] All further statutory references are to the Penal Code unless otherwise indicated. For easier reading, appellant generally will not use the word "subdivision" or the abbreviation "subd." in statutory citations that include a reference to a subdivision

On June 28, 2002, jury trial commenced with *in limine* motions, including *Pitchess* [*Pitchess v. Superior Court* (1974) 11 Cal.3d 531] motions on various dates extending into September, 2002.[3] (See, e.g., 5-CT 1136, 1221, 6-CT 1527, 1560; see e.g., 9-CT 2407.)

On November 14, 2002, jury selection began. (9-CT 2429.) During November and December, 2002, and early January, 2003, jury panels were called, hardships were considered, and individual jurors were scheduled for *Hovey* [*Hovey v. Superior Court* (1980) 28 Cal.3d 1] voir dire, to commence on January 15, 2003. (9-CT 2429, 2448-2491.)

On March 3 and 4, 2003, the court heard and denied Winbush's *Batson-Wheeler* [*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258] motions. (10-CT 2564, 2567.)

On March 11, 2003, the prosecutor began to present his case.[4] (10-CT 2575.) On April 15, 2003, Winbush began to present his case.

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3. The court ruled that Winbush and Patterson were deemed to have joined in each other's objections during trial unless they said they did not, though they were required to state the specific grounds. (5-RT 217-219.) The court's in limine rulings were binding throughout trial. (26-RT 1734-1735.)

4. The prosecution proceeded on both first-degree, premeditated murder and felony-murder theories, and the jurors were instructed that they did not have to agree on the theory. (11-CT 2779; 166-RT 13099; CALJIC No. 8.21.) The verdicts did not indicate whether the jurors believed both theories or just one. (11-CT 2815-2816.) The evidence of premeditation was weak, as Winbush did not bring a weapon to the robbery or discuss killing beforehand, but the evidence of felony murder was strong, as the jury found the felony-murder special circumstance to be true. (11-CT 2816.) The special circumstance finding did not require the jury to find that Winbush "intended to kill," as long as the jury found that he "actually killed" someone in the commission of robbery. (11-CT 2787; 166-RT 13102; CALJIC No. 8.80.1.) The fact that the jury found that Winbush personally used a deadly weapon suggests that it found that he "actually killed." (11-CT 2815.)

(10-CT 2664.) On April 23, 2003, Patterson began to present his case. (10-CT 2682.) On April 29, 2003, the prosecutor presented rebuttal. (10-CT 2693.) On May 8, 2003, the court instructed the jury, which began its approximately nine hours of deliberations over three days. (11-CT 2716-2722.) On May 12, 2003, the jury found Winbush guilty of first degree murder, the robbery special circumstance, and the special allegations, and Patterson guilty of both murder and robbery, the robbery special circumstance, and the special allegations. (11-CT 2722, 2812-2816.)

On May 15, 2003, the penalty phase of trial began with the prosecution presenting its penalty phase evidence. (11-CT 2825.) On June 2, 2003, Patterson presented his penalty phase evidence. (11-CT 2869.) On June 2, 3, and 4, Winbush presented his penalty phase evidence. (11-CT 2869-2875.) On June 4, 5, and 10, the parties presented argument and the court instructed the jury. (11-CT 2875-2881.)

On June 16, 2003, after about 13 hours of deliberation over four days, the jury returned a verdict of death for Winbush and a verdict of life-without-possibility-of-parole for Patterson.[5] (11-CT 2881-2892.)

On July 11, 2003, the court denied Winbush's motion for modification of the death sentence, and pronounced judgment, sentencing Winbush to death for special-circumstances murder; the court stayed a one-year term for the knife enhancement, imposed a $10,000 restitution fine, and ordered $19,100.37 of direct restitution jointly and severally with Patterson. (11-CT 2958-2969.) Winbush's appeal from his death sentence is automatic. (Pen. Code § 1239(b).)

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5. On July 11, 2003, the court sentenced Patterson to life without possibility of parole. (11-CT 2957, 2960.) On October 21, 2005, the court of appeal affirmed Patterson's conviction. (See Unpublished Slip Op., No. A103263.)

INTRODUCTION TO FACTUAL SUMMARY

Mario Botello was a black marijuana dealer who lived in an apartment on Claremont Avenue in Oakland, with his 20-year-old white girlfriend, Erika Beeson. On Friday, December 22, 1995, Beeson's body was found in the apartment. Less than an ounce of marijuana, approximately $300 in cash, a shotgun, and a graphic equalizer were missing from the apartment.

On April 30, 1996, a lone gunman robbed a Shell station on Park Boulevard in Oakland. A passerby noted the license plate of the man's car; and the license number led police to Norman Patterson's girlfriend. Patterson was arrested; and a search of his and his mother's house uncovered the shotgun stolen from Botello's apartment.

On May 1, 1996, Patterson gave statements admitting involvement in both the robbery of the Shell station and the robbery-murder of Beeson. Later that day, Winbush also gave statements admitting involvement. Both defendants testified at trial, denying responsibility and arguing that their "confessions" had been coerced by coercive police interrogation techniques. This dispute framed the factual issues at trial.

With that backdrop, Winbush turns to the evidence presented at trial. He will focus first on the homicide, second on his statements and testimony, and that of Patterson, and then on the penalty phase evidence.

STATEMENT OF THE FACTS

The People's Case

A. The Discovery Of The Homicide

Mario Botello and his girlfriend, Erika Beeson, lived in an apartment building at 5412 Claremont Avenue near the Claremont off ramp from Highway 24. (108-RT 7050; 119-RT 8063; 122-RT 9129.) There was a security gate downstairs. (109-RT 7194.)

Jennifer Onweller was one of Beeson's best friends. (111-RT 7355.) Onweller testified that Beeson and Botello kept marijuana and money in their bedroom. (113-RT 7443-7444.) They also kept cocaine in the apartment, but "just for fun." (113-RT 7457.)

Grace Sumisaki had gone to school with Beeson, and she bought marijuana from Botello. (111-RT 7335, 7348.) On December 22, 1995, Sumisaki picked up Botello at 4:00 p.m. to go shopping, and she dropped him off at his apartment at around 10:00 p.m. (111-RT 7336-7338, 7341-7343.)

Andre Williams was Botello's uncle. (111-RT 7276.) At about 7:30 p.m. on December 22nd, Williams called Botello on his cell phone, and Botello said that he was Christmas shopping and that Williams should go to his apartment and wait for him. (111-RT 7277-7278.) Williams called Beeson at about 7:35 p.m., and she told him to come over. (111-RT 7278-7280.) When Williams arrived between 7:45 and 8:00 p.m., the security gate was shut, and someone he knew from high school was at the gate buzzing Botello's apartment, but there was no answer. (111-RT 7281.) Williams left, and when he called the apartment repeatedly over the next several hours, the line was always busy. (112-RT 7283-7285.)

On Friday, December 22, 1995, after trying without success to contact Beeson by phone, Onweller called the telephone company and learned the phone was off the hook. (110-RT 7263-7363.) She went to Beeson's apartment to leave a note, and she met Botello coming up the stairs. (111-RT 7364, 7427.) Botello did not have a key, so he removed the window screen, and entered to find Beeson's body. (113-RT 7428-7430.) While Onweller was calling 911 around 9:53 p.m., Botello opened the bedroom door, and their two dogs ran out. (113-RT 7430, 7435.)

When police arrived at 9:58 p.m., they found Botello on the second floor landing, with an aggressive dog. (108-RT 7034, 7051-7053, 7064-7065.) Inside Apartment 19, Beeson lay dead on the floor "fully dressed," near the entertainment system. (108-RT 7054, 7084.) There was no evidence Beeson had been bound. (109-RT 7165.) Beeson was stripped by the medical technicians in an attempt to revive her. (108-RT 7085-7086.)

The doorknob appeared to have a bloody fingerprint. (119-RT 8006.) A broken rope chain necklace, which appeared to have been cut, was found under Beeson. (119-RT 8011, 8024-8025.) Marijuana paraphernalia was found, but no marijuana. (109-RT 7113, 119-RT 8025-8026.) No bloody knife or stabbing instrument was found. (109-RT 7108, 119-RT 8027.) There were blood drops on the ground between the apartment and the street. (108-RT 7102.)

The bedroom was very messy, with drawers open and clothing on the floor. (108-RT 7097, 119-RT 8027.) Within days, Botello provided police with a description and serial number of a shotgun that had been stolen. (109-RT 7135-7136.)

Beeson had sustained nine stab wounds to the head and neck -- one on the side of her face by her left ear, seven on the back side of her neck, and a very small one on the left front side of the neck – caused by a knife no wider than one and one-eighth inches. (138-RT 10672-10681.) She had blunt force injuries to her head, arms, legs, and back, abrasions to her neck consistent with ligature strangulation, and a circular injury on her nose consistent in size with the diameter of Botello's shotgun. (138-RT 10641-10650, 10654-10671.) The cause of death was asphyxiation due to strangulation and multiple stab wounds. (138-RT 10634.) There was no indication of sexual assault. (138-RT 10640-10641; 140-RT 10848.)

B. The Testimony of Mario Botello

Botello was 28 years old when he testified at the defendants' trial. (122-RT 9130.) Beeson had been his girlfriend for about two years. (122-RT 9129.) He had known Maceo Smith, Patterson, and Winbush for many years. (122-RT 9130-9132.) In December 1995, Botello and Beeson lived at 5412 Claremont Avenue, Apartment 19, on the second floor. (122-RT 9134.) Botello's income came from selling small amounts of marijuana.[6] (109-RT 7114, 122-RT 9143.)

Patterson brought Winbush, who had just been released from the California Youth Authority (CYA), to Botello's apartment the Tuesday or Wednesday before the murder on Friday.[7] (122-RT 9147-9148, 9164.)

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6. By the time of trial, Botello had been convicted of illegal possession of a gun and domestic violence and had lied to the police in 2001. (124-RT 9377-9379, 9383-9394.)

7. Colin Gaffey was a marijuana dealer, and Botello was a regular weekly customer. (115-RT 7629-7630, 7640.) A couple of days before the homicide, Gaffey had gone to Botello's apartment to

Beeson was home, and the four of them talked and smoked. (122-RT 9165.) Botello gave Winbush $40 because he had just gotten out of prison. (122-RT 9166.) He and Winbush went into the bedroom, where Winbush admired Botello's shotgun and asked if he had more guns because Winbush wanted to rob somebody. (122-RT 9168.) Winbush asked Botello for his phone number. (122-RT 9173.) Botello had Winbush's pager number, 5150, which meant crazy person. (127-RT 9638-9639.) This number was commonly used by the police and in jail to refer to the commitment of psychotic persons. (127-RT 9639.)

Winbush called Botello five or six times inquiring about a gun, saying that he wanted to rob "some Mexicans" in Hayward. (122-RT 9181-9182; 124-RT 9343-44.) Winbush called several times on Thursday, December 21st, the day before the murder. (122-RT 9189.)

On December 22nd, Winbush called to discuss a gun, saying he was coming by with Smith. (122-RT 9195-9196, 124-RT 9336-9337.) Botello wanted to avoid them, so he left. (123-RT 9212-9213.) Botello was concerned Winbush was dangerous because he had been in jail for so long, but thought Beeson was safe because Smith was with Winbush. (124-RT 9342.) Only after Smith and Winbush had come and gone did Botello return home. (123-RT 9215.)

On December 22nd, Botello went shopping with Grace Sumisaki from 3:45 p.m. until 10:00 or 10:15 p.m. (122-RT 9190-9191, 123-RT 9216-9220.) When he got home, Onweller and another girl were at the door. (123-RT 9222-9223.) Botello did not have a key so he slid the

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deliver marijuana, finding Winbush and Patterson on the couch. (115-RT 7632-7633.) Botello had seemed "edgy." (115-RT 7636.)

window open, reached in, opened the door, and entered to find Beeson on the floor. (123-RT 9225-9228.)

The phone was off the hook, under the couch. (123-RT 9234.) His dogs were locked in the bedroom, and about a half an ounce to an ounce of marijuana, approximately $300 hidden in his bedroom, a shotgun and a Zapco graphic equalizer were missing from his apartment. (109-RT 7114, 122-RT 9153, 9160-9164.)

Botello testified on defense cross-examination that the next day he told Sergeant Sharon Banks that Beeson had told him that Mosely told her that Smith said that Winbush wanted to kill innocent bystanders. (127-RT 9661-9662, 9683.) Botello called Smith and told him he thought Winbush had done it, but Smith said, "That can't be true because I was with Grayland all day and all night." (123-RT 9255-9259.) Within a week, Botello talked with Smith again. (123-RT 9265.) According to Smith, after their visit to Botello's apartment, Winbush had suggested robbing Botello when he was not home. (123-RT 9267-9268.)

Botello identified the shotgun found in Patterson's home as his. (122-RT 9158, 125-RT 9450-9452.) He also identified his Zapco graphic equalizer, which had also been found in Patterson's home, by a missing knob. (122-RT 9160, 124-RT 9339-9341, 126-RT 9539.)

Botello went out several times looking for Winbush and Patterson to kill them, but never did so. (124-RT 9359-62, 9379-83.) Botello testified further that he had been in a barbershop after Beeson's death when Patterson entered. When Botello asked why he had come to his house and "done it," Patterson responded that Winbush had forced him to come. Patterson told him that Winbush had done "everything" while Patterson was looking out the window. (156-RT 12236-12237.)

C. Other Witnesses Who Suggested That Winbush And/Or Patterson May Have Been Involved

1. Maceo Smith's Testimony

Smith was 28 years old when he testified at the defendants' trial. (113-RT 7465.) He testified that he had grown up in Berkeley with Botello, Patterson, and Winbush. (113-RT 7462-7463.) In December 1995, Smith and Iva Mosley lived together, and had been with each other for more than 10 years and had three children. (113-RT 7465.) Beeson was Mosley's best friend. (113-RT 7464, 7466.)

Smith saw Winbush, who was on parole from the CYA, the day before the murder. (113-RT 7464, 7469.) On the day of the murder, Smith and Winbush were "hanging out" together. (113-RT 7471.) They had been discussing a robbery. (112-RT 7483.) That afternoon, they went to Botello's apartment, expecting to find him there. (113-RT 7485.) Smith expected to get money or "something that Botello did not want to give."[8] (113-RT 7486.) Beeson answered the door and said Botello was not home. (113-RT 7488.) Winbush was angry because Botello was not there and because Beeson would not let them enter, and Winbush called her a bitch. (113-RT 7487-7489, 7491.)

Later that day, between 6:00 and 10:00 p.m., Smith was with Mosley at the movies. (113-RT 7472.) Upon returning home, he found Winbush and Patterson there. (113-RT 7473.) Smith did not see anything out of the ordinary, and there were no signs of blood, bandages, scratches, or marks on Winbush or Patterson. (114-RT 7539-7541.)

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8. In impeachment of Smith, Andre Williams was called to testify that Smith said about a year after the murder that Winbush had asked him to rob Botello, and that Smith had refused. (115-RT 7652-7653.)

The three of them picked up Michael Hilliard and drove to a liquor store in Berkeley. (114-RT 7542-7543.) From there, they went to a park. (114-RT 7543.) Winbush and Patterson were laughing and joking and were in a good mood. (114-RT 7544.)

2. Statements Attributed to Smith

Steven Benczik testified that he had talked to Smith the day after the murder. Benczik could not recall details of that discussion, but what he had told Sergeant Banks and Lieutenant David Kozicki on December 24, 1995, had been correct. (117-RT 7859-7861; 127-RT 9639-9640.) In that interview, Benczik said that Smith had phoned him the day before and said that Winbush had killed Beeson; that Winbush was spending money after the murder; and that Mosley and Smith were afraid to go home because they were afraid of Winbush. (117-RT 7886, 127-RT 9639-9640.)

Lieutenant Kozicki testified that Benczik told him that Winbush was asking Mr. Smith how he could get a gun, and that Smith had gone to Botello's apartment with Winbush between 4:00 and 6:00 p.m. on the day of the murder. (117-RT 7879; 118-RT 7905-08.) Beeson told them Botello was not there and shut the door. (117-RT 7880.) Winbush was angry because Beeson would not let him in the apartment. (117-RT 7880.) Smith dropped Winbush off where he was living in Berkeley. (117-RT 7882.) Smith went to the movies at 7:00 p.m. and had not talked to Winbush again until about 10:00 p.m. (117-RT 7882.) Smith and Winbush went out about 10:00 p.m. in a red car, and at this time, Winbush had money. (117-RT 7884.)

Kozicki testified that Mosley told him that Smith told her that Winbush was "sick and crazy and wanted to kill people," and he had talked about robbing or killing Botello. (118-RT 7902, 7908-09.)

3. Iva Mosley's Testimony

Iva Mosley testified that she and Beeson were very close. (115-RT 7676.) Smith was the father of her children. (115-RT 7672.) Winbush had called her house several times before the homicide, but Smith was trying to avoid him. (116-RT 7781-7782; 118-RT 7899-7902.) Mosley had never met Patterson before the homicide, and she had seen Winbush only once, when Smith brought him to their house around midday on the day of the murder. (115-RT 7677-7678.)

On December 22nd, Smith told Mosley that he and Winbush were going to Botello's house. (115-RT 7680.) Mosley called Beeson and said they were on their way, and she heard Botello in the background, saying, "They are on their way here?" (115-RT 7680-7681, 116-RT 7792.) The two women were still on the phone when the men arrived, and Beeson told them Botello was not there. (116-RT 7728, 7734, 7737.) Mosley saw Winbush at her house when she and Smith returned from the movies. (116-RT 7725-7727.)

Sergeant Banks testified without objection that on March 11, 1996, Beeson's mother, Melitta Beeson, told her that Winbush had threatened Mosely on the Saturday and Sunday after the murder. (127-RT 9642-9643; 119-RT 8076 [Mrs. Beeson testified earlier about Mosely feeling threatened by Winbush].)

In a taped interview with the police, Mosley said that she was uncomfortable with Mr. Winbush, because he came onto her sexually.

(120-RT 8925-8926, 8945.) Mosley said that a defense investigator tried to get Smith to give Winbush a false alibi, and Smith became upset and did not want to talk to him. (120-RT 8927-8928.)

4. Tyrone Freeman's Prior Testimony

On May 15, 1996, police received a phone call from an anonymous woman who said an inmate in the county jail named Tyrone Freeman had information about Winbush and his murder case. (130-RT 9951.) The jail log for May 7th indicated Freeman and Winbush had been together in a holding cell. (130-RT 9954.)

A transcript of Freeman's preliminary examination testimony was read at trial. In that prior testimony, Freeman stated that he and Winbush had been in custody together on May 8th. Winbush told Freeman that he pleaded guilty to armed robbery, receiving a two-year sentence. Winbush had also talked about a murder case. (156-RT 12201.)

Winbush said that a white woman had been stabbed and choked with a belt. (156-RT 12203-12205.) When they had knocked on the door, the woman admitted them, and Winbush pulled a gun from his waistband. When the girl did not cooperate, he "pistol-whipped" her. He removed his belt and started choking her. When she tried to get a knife from the counter, he grabbed the knife and stabbed her in the back. (156-RT 12207-12210.) He and "Nate" had taken a chrome-plated, pistol-grip shotgun, a digital scale, and money found in a back bedroom. (156-RT 12205-12206.)

5. Winbush's Youth Authority Parole Monitor

According to CYA Agent Mike Mapes, Winbush was supposed to be wearing a monitoring device on his ankle, with a unit that plugged into

a wall outlet and telephone line. (109-RT 7138-7139, 7144.) When the individual left the range of the monitor, it recorded the time of departure and time of return. (118-RT 7924.)

The monitoring records for December 22nd showed that Winbush had gone out at 11:58 a.m. and returned at 12:07 p.m. He went out again with permission at 12:11 p.m. and returned at 5:18 p.m. (109-RT 7141; 118-RT 7945.) There was a "failure" on Winbush's monitor at 7:04 p.m., and the phone line was not sending or receiving calls. (109-RT 7141; 118-RT 7933.) The monitor did not transmit again until December 25th at 11:21 a.m.[9] (109-RT 7141; 118-RT 7934.)

On January 26, 1996, Winbush was taken to Highland Hospital having sustained a gunshot wound to the leg; Winbush was not wearing his monitoring device. (119-RT 8046-8047.) On March 2, 1996, Winbush was again at Highland Hospital, having been shot in the foot; again, he was not wearing his monitoring bracelet. (119-RT 8048.)

6. The Gas Station Robbery by Patterson

At 6:45 p.m. on April 30, 1996, a car arrived at a Shell station on Park Boulevard near Interstate 580. As the driver got out, he stuffed a pistol into his pants pocket. (122-RT 9102.) While videotapes recorded the events,[10] an armed man entered, and Henrietta Taylor, the cashier,

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9. The monitor had a backup battery system that functioned for about 12 hours. To prevent transmission, the monitor had to be unplugged from both the power and phone lines. (118-RT 7935-7936.)

10. An audiovisual technician used the original videotape to create five versions, based on the five video cameras. (124-RT 9322-9323, 9326-9327, 9330, 9332.)

surrendered approximately $45 in tens, fives, and ones. (122-RT 9113-9116, 9121.) Taylor could not identify anyone in court. (122-RT 9124.)

A pedestrian noted the license plate and called 911. (122-RT 9101-9102, 9105.) The police traced the car's license to a woman in Berkeley, who said that her daughter had daily use of the car and that her daughter's boyfriend was Patterson. (125-RT 9438.) Police received a prom night photograph of the daughter and Patterson, and the police compared the videotape to the photograph.[11] (125-RT 9439, 9441.)

7. Patterson's Arrest and the Search

Patterson lived with his mother at 2913 Mabel Street in Berkeley. (125-RT 9443.) Sergeant Campbell testified that while watching Patterson's house for several hours from an unmarked van, he saw Patterson arrive home at about 3:00 a.m. on May 1, 1996. (125-RT 9486, 9488, 9490.) At about 6:30 a.m., the police announced their presence with a bullhorn, and banged on the door. (125-RT 9446-9447.) After 15 to 20 minutes, Patterson answered the door and the police arrested him. (125-RT 9446-9447.)

Patterson was placed in the back of a police car, and Sergeant Campbell got in back with him. (125-RT 9499-9500.) Sergeant Campbell told Patterson, "I can't believe you didn't see me." Patterson replied, "I pulled right up next to you? Huh, shit." (125-RT 9501, 9504.)

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11. Lillian Roberts was the woman in the photograph, and she testified that Patterson had her car on April 30, 1996. (126-RT 9544-9545.) When Roberts viewed the videotape of the robbery, she was 75% certain the person was Patterson, although he looked heavier and did not have dreadlocks as did the man in the videotape. (126-RT 9546-9547.)

Patterson asked questions about the scope and laser range finder on Campbell's assault rifle. (125-RT 9504.) When Patterson asked, "You all didn't come get me about a murder," Campbell replied, "Not unless you want to talk to me about one." Patterson laughed, saying, "Naw, I don't think so." (125-RT 9505.) Patterson then asked why the police were there, and he was told the investigator would tell him when he got downtown. (125-RT 9506.)

The police searched Patterson's bedroom and found a pistol, a "Zapco" equalizer, clothing, $66 in currency (including 45 $1 bills), a Winchester 12-gauge pistol-grip shotgun, and a Berkeley High School English paper, which was very negative about women, the police, and the law, and on which a teacher had written, "This is sick." (125-RT 9450-9452, 9459-9460; 126-RT 9525-9526, 9539.)

8. Patterson's Statements to Police with Regard to the Gas Station Robbery

On May 1, 1996, Oakland police interviewed Patterson about the robbery at the Shell station on April 30, 1996. (128-RT 9718-9719.) At first, Patterson said he had been with friends at the time of the robbery and had not been driving the car. (128-RT 9724-9725.) His second version of events was that he had loaned the car to "Joe Moe," knowing that Moe intended to use it in a robbery. (128-RT 9727-9733.) The initial conversations with Patterson were not tape recorded. (128-RT 9744-9760.)

In his final version, which was tape-recorded, Patterson admitted doing the robbery, so he could repay his girlfriend money she had loaned him. (128-RT 9735.) A tape of Patterson's final version was played at trial. (130-RT 9937; Exhibit 69 & 69A.) Patterson had been laid off from

Lucky's, but had a job with the City of Oakland as a basketball coach. (1-Supp.CT 93.) He had taken his girlfriend to school and visited a friend's house in Oakland. He was desperate for money because his girlfriend was pregnant and had loaned him $500, which was all the money she had. When he happened to drive by the station, he parked around the corner, put on a wig, and took a gun inside. The clerk gave him a 20-dollar bill, a ten-dollar bill and a five-dollar bill. (1-Supp.CT 88-89.)

D. Patterson's Statements To Police, And His Trial Testimony, With Respect To The Homicide

Also on May 1, 1996, Oakland police learned that the serial number of the shotgun seized at Patterson's house matched that of the shotgun taken from Botello's apartment. (128-RT 9703-9704.) For these reasons, Patterson was moved to the homicide section, where he was questioned for many hours about the murder. (128-RT 9740, 10186.)

1. The Initial Denial of Involvement

After several conversations with Patterson which were not tape recorded, on May 1, 1996, Patterson gave a taped-recorded statement at 5:23 p.m., and that tape was played at trial. (128-RT 9760-9762; 133-RT 10199; Exhibit 70 & 70A.)

Patterson stated that Winbush, whom he called his "brother-in-law," had phoned him in December 1995, after Winbush got out of jail. Winbush wanted to go see Smith. They all went out in Smith's car, drinking and smoking. (1-Supp.CT 96-99.) Patterson admitted knowing Botello, who lived with a white girl on Claremont Avenue in apartment 19. (1-Supp.CT 100.) As for the shotgun found at his house, Patterson stated that he had gotten it from a "dope fiend" he knew as "Gichi Dan." (1-Supp.CT 102.)

2. Patterson's Admission of Involvement

On May 1, 1996, Patterson gave another taped statement at 11:16 p.m., and that tape was also played at trial. (132-RT 10088, 134-RT10236; Exhibit 71 & 71A.) In that statement, Patterson told police that after Winbush was released from the CYA, Winbush was trying to plan a robbery (a "lick"), because he needed money to buy Christmas presents. (1-Supp.CT 107.)

A few days before the homicide, Patterson and Winbush had gone by Botello's house where Botello had shown Winbush his shotgun. (1-Supp.CT 107.) A couple of days afterward, Winbush called and said he wanted to go to Botello's to "get his weed and his money." Patterson made "excuses," but Winbush called Patterson a "punk" and said he would "take [him] off the map," which meant to kill him. (1-Supp.CT 108.)

Between 8:00 and 9:00 p.m. on the day of the homicide, Patterson drove Winbush to Botello's apartment, where Patterson told Beeson he wanted to buy marijuana. After they had been there for a while, Winbush told Beeson to take the dogs into the bedroom. When the dogs escaped from the bedroom, Winbush told Patterson to put the dogs back. When Patterson returned to the living room, he found Beeson on the ground with Winbush on top of her with a belt around her neck. (1-Supp.CT 108-110.)

Winbush ordered Patterson to get the gun, which Patterson retrieved and placed on the couch. Winbush ordered Patterson to get the marijuana from the top of the stereo counter, which he did. Winbush then went into the bedroom and came out with cash. (1-Supp.CT 111-112.) While Patterson was watching at the door, Winbush got a knife from the kitchen and started "pumping" Beeson "about four times." (1-Supp.CT 113.) Patterson then stated that Winbush told him to get the knife from

the counter, which he did. (1-Supp.CT 118.) After Winbush stopped strangling Beeson, he picked up the shotgun and jammed her in the head with it. Winbush told Patterson to take the shotgun when they left, and Winbush took the knife wrapped in a T-shirt. (1-Supp.CT 114-115.)

Winbush told Patterson to drive to Aquatic Park, where Patterson threw the knife in "the river." They stopped briefly at Patterson's house, and then went to Winbush's house where Winbush changed clothes. (1-Supp.CT 115-116.) Winbush left the shotgun at his house, and they went to Smith's house. Using Smith's car, the three men picked up Michael Hilliard and went to a liquor store. (1-Supp.CT 116-117.) Later, when they saw a sobriety checkpoint, they all got out of the car. Patterson, Winbush, and Hilliard took the bus back to Smith's house, picking up Patterson's car. Patterson dropped off Hilliard and Winbush before going home. (1-Supp.CT 117.) The following morning, Winbush left the shotgun at Patterson's house, because Winbush was on "house arrest." Winbush said he had cut off his monitoring bracelet and left it by the monitor so authorities would think he was still at home. (1-Supp.CT 117.) Patterson said that Winbush "going around bragging" that he had stabbed and killed Beeson.[12] (1-Supp.CT 118.)

E. Patterson's Trial Testimony

After Winbush testified, Patterson testified that during the day on December 22, 1995, when he was 19 years old, he went to Botello's

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12. Sergeant Enoch Olivas testified that he talked to witnesses who indicated that Winbush had bragged to them about having committed the murder, including Latanya Wilson; her sister, Vicki Fortenberry; Winbush's cousin, Lakeisha Lovely; Julia Phillips; and a jail inmate. (133-RT 10155-56.)

apartment. (149-RT 11676-11678.) He said he had not participated in killing Beeson, and he never went to Aquatic Park. (149-RT 11678.)

That night at 10:15 or 10:30 p.m., Patterson picked up Winbush. (149-RT 11678-11679.) They went to Smith's house, and Smith drove them to pick up Hilliard. (149-RT 11679.) They spent the rest of the evening together, drinking and smoking marijuana. (149-RT 11680.)

As for the shotgun at his house, he had gotten it from an addict named "Gichi Dan." He had bought the Zapco equalizer at California Music Store on 63rd. (149-RT 11680-11681.) While in a police car with a S.W.A.T. Team officer after his arrest, Patterson had said to the officer: "You all act like you came and got me for a murder." (150-RT 11750-51.)

Patterson explained that in his "confession," he had told police a story based on what he had heard on the street, which was that Winbush had done it. Patterson had falsely admitted involvement because the police assaulted him and threatened him with the death penalty. (149-RT 11683; 151-RT 11813-11814, 11868.) At first Patterson told police that he had gotten the gun from "Gichi Dan," and then that he had gotten the gun from Smith and Winbush. In response, one officer punched him, squeezed his jaw and throat, and forced his head back.[13] The officer was talking in a low tone about Patterson being stupid for not telling him who killed Beeson. (149-RT 11682-11683, 151-RT 11814-11815.) The

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13. A nurse at the Oakland City Jail testified that jail records included the following: "Inmate was seen by A.M. nurse at approximately 10:10, 5/4/96." "Inmate has possible abrasion with no drainage to his left lower inner lip area." "Inmate states altercation with OPD officers after his arrest, apparently up in the interrogation room. He states he was hit with fists and choked in an effort to get him to make a statement." (155-RT 12133, 12138.)

officer stated further that he did not believe Patterson about "Gichi Dan" and that, if Patterson admitted responsibility, someone at the District Attorney's office would show leniency and arrange for Patterson to be released on bail.[14] (151-RT 11817, 11883.)

F. Winbush's Statements To Police, And His Trial Testimony, With Respect To The Homicide

1. Winbush's Statement in April 1996

On April 5, 1996, Sergeant Banks, the secondary investigator of Beeson's murder, had information that Winbush was involved with Beeson's murder, so she decided to speak with him about it while he was in custody.[15] (127-RT 9634-9643.) Winbush admitted that he went to Botello's house on the afternoon of December 22, 1998, expecting Botello to be there. Beeson answered the door and said Botello was not there, so Winbush left and never returned. (127-RT 9643-9644, 9651-9652.)

2. Winbush's Initial Statement in May 1996

On May 3, 1996, at 10:15 a.m., the Oakland police transferred Winbush from the North Alameda County Jail to an interview room in the police department. (128-RT 9777-9785.) At 11:07 a.m., Sergeant Olivas and Inspector Don Lopes interviewed Winbush, after he waived his *Miranda* rights, but they did not tape-record this first interview. (128-RT 9785-9790; 140-RT 10937.) The subsequent interviews lasted about 14

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14. After Patterson gave his statement incriminating Winbush, he was permitted to post bail on July 11th, 1997, because the Alameda County District Attorney's Office did not seek the death penalty against him until he attacked Phillips in September 1998. (See 142-RT 11060-11087; 148-RT 11674.)

15. At trial, Winbush testified he was arrested on April 4, 1996, for robbing a Chevron station, and he confessed to the robbery that day. (144-RT 11267-11268.) He apparently remained in custody.

hours, until after midnight. (128-RT 9789-9790.) According to both Olivas and Lopes, Winbush appeared coherent and in good physical condition, with no injuries. (128-RT 9791-9793; 140-RT 10937-38.) The police never threatened Winbush or made promises. (128-RT 9789-9791.) The police described Winbush as being very confident to the point of being arrogant, as well as cooperative, and not arrogant or rude. (128-RT 9794; 141-RT 10991.) Lopes never forced Winbush to say anything or prevented him from saying anything, nor did he edit him; and Winbush never said he had given a false confession. (128-RT 9789-9791; 141-RT 10992-93.)

Winbush's first interview lasted until about noon. (129-RT 9830.) During this initial non-recorded statement, Winbush said that he had been at Botello's apartment earlier on the day of the murder, but had no involvement in the murder. (128-RT 9805, 9830-9832.) Winbush said that he and Patterson had once smoked "weed" with Botello, who lived with "this broad, who is white." (128-RT 9796-9798.) Winbush admitted having gone to the apartment on December 22, 1995, after calling and speaking with Botello, but when he got there only the woman was there. (128-RT 9801-9803.) That was the last time Winbush was at the apartment or saw either of the occupants. (128-RT 9803.) He had been "club hopping" with Smith and Patterson that night. (129-RT 9833-9834.)

3. The Confrontation and Revised Statement

After an hour break in the interrogation, the police interviewed Winbush from 12:54 to 2:09 p.m., took a break, and resumed from 2:47 to 3:55 p.m., took a break, and resumed from 4:40 to 6:15 p.m. (129-RT 9841, 9849-9853.) Winbush used the bathroom and ate lunch. (129-RT

9853.) These interviews were not recorded. (129-RT 9861-9863.) The police showed Winbush photographs of Patterson, and told Winbush that Patterson was in custody. (129-RT 9856-9857.) The police played a four or five minute portion of Patterson's taped statement relating to Beeson's killing, after which Winbush lowered his head and said, "That motherfucker." (129-RT 9859-9861.) Aside from this portion of Patterson's taped statement, the police did not tell Winbush any details of Beeson's murder. (129-RT 9886, 9889, 9895.)

Thereafter, at about 5:50 p.m., Winbush stated that he and Patterson had gone to see Botello, who was not there. (129-RT 9863-9864.) Within minutes of arriving, Winbush decided to do a robbery, but Beeson had a bad attitude about being robbed. (129-RT 9865.) Winbush said, "I didn't plan this the way it happened. She didn't take the robbery seriously." (129-RT 9865.)

The police took another break at 6:25 p.m. and resumed the interrogation at 7:20 p.m., still not tape-recorded. (129-RT 9866-9867.)

Winbush stated further: "I admit that I was there. If I get the death penalty, I get it." "Once I got there, it all went sour." "I have to play it out. I'm fucked." (129-RT 9867-9869.) The police took another break from interrogating Winbush from 7:20 to 8:58 p.m. (129-RT 9871.)

4. The Recorded Statements and Telephone Call

The first of five tape-recorded statements was taken from Winbush at 9:12 p.m. on May 3, 1996, until 9:42 p.m. and all five tapes were played at trial. (129-RT 9871-9872; 130-RT 9919-9920.) According to Sergeant Olivas' testimony at trial, Winbush, who "showed a lot of sophistication and street smarts," was "one of the toughest guys" he had ever

interviewed.[16] (129-RT 9878.) When Winbush began to make admissions, Sergeant Olivas decided to begin to secretly tape him, because he feared that Winbush might stop speaking if he knew he was being tape-recorded. (129-RT 9878-9882.) Normal procedure was not to tape-record questioning, but instead take notes, until the police knew what pertinent information the suspect had to offer. (129-RT 9882.)

In this secretly tape-recorded statement, Winbush said that Botello had told them to come over. (1-Supp.CT 3-4; Exhibits 1 and 1A.) It was getting dark when he and Patterson arrived, and Beeson, who had nothing against Winbush, said Botello was not there.[17] (1-Supp.CT 2-4.) Patterson told Beeson he wanted to buy "some weed," and they entered. (1-Supp.CT 4.) They did not plan a murder or robbery, but when they saw the marijuana they decided to steal it. (1-Supp.CT 4-6.) Patterson took the dogs into the bedroom, and when he returned, he had a shotgun. (1-Supp.CT 7.) Winbush went into the bedroom and found approximately $300. (1-Supp.CT 8-9.)

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16. Olivas believed Winbush was sophisticated with the criminal justice system in part because he had heard that Winbush had bragged to at least six people about having murdered Beeson, but had never heard Winbush was claiming he had made a false confession. (133-RT 10155-57.)

17. The other evidence in the case, suggested that Beeson was murdered between 7:35 and 9:00 p.m., not as it was getting dark in late December around 5:00 p.m. (148-RT 11675.) Andre Williams, Botello's uncle, spoke with Beeson at about 7:35 p.m., and she told him to come over. (111-RT 7276-7280.) When Williams arrived between 7:45 and 8:00 p.m., the security gate was shut, and there was no answer to buzzing the apartment. (111-RT 7281; 112-RT 7283-7285; see also 1-Supp.CT 108-110 [Patterson's taped statement indicated they arrived between 8:00 and 9:00 p.m.].)

Winbush returned to the living room and picked up the marijuana, and Patterson "poked" the woman with the shotgun. (1-Supp.CT 10.) Winbush gave Patterson his belt, telling him to choke Beeson with the belt: "Here, man, put her to sleep, man." (1-Supp.CT 11.) Because Patterson was not doing it "right," Winbush took one end of the belt and they both pulled on the belt for about two minutes. (1-Supp.CT 12-13.) They were not trying to kill her. (1-Supp.CT 13.) Winbush then got a kitchen knife from the kitchen and gave it to Patterson who did nothing with it. Winbush grabbed the knife from Patterson and barely sliced Beeson's neck and then stabbed her "at least" three times in the shoulder blade area, first the shoulder and then in the back of the neck. (1-Supp.CT 13-16.) When the men left, they took the shotgun, cash, marijuana, and the knife, disposing of the knife at Aquatic Park in Berkeley. (1-Supp.CT 17-18.) Patterson dropped Winbush at his grandmother's house. (1-Supp.CT 17-18.) Winbush had a "strong feeling" that Beeson was either dead or dying. (1-Supp.CT 19.) Winbush wanted to "get this off my chest." (1-Supp.CT 19.)

From 10:00 to 10:28 p.m. on May 3, 1996, Winbush knowingly gave a tape-recorded statement, which was played at trial. (130-RT 9923-29; Exhibit 2, 2A.) During that statement, Winbush first admitted that he had waived his rights in writing; he then waived them again, and reiterated his previous statement. (1-Supp.CT 21-33.) Winbush tried to slice or scratch Beeson once with the butcher knife, about eight inches long including the handle, and an inch and a half wide, to let her know he was serious, but the knife stuck her twice in the shoulder area behind the neck. (1-Supp. CT 25-29.) After Winbush realized he had inflicted a serious knife wound by accident -- when he had intended only to make a small incision wound

-- he was real sorry he had stabbed her, but stabbed her again because he did not want Beeson to suffer. (1-Supp.CT 25-26, 28-30.) Winbush stated that he had no knowledge of Patterson taking "an equalizer" or "some kind of little box." (1-Supp. CT 27.) Winbush stated further that Patterson had kept the shotgun when he dropped off Winbush that night. (1-Supp.CT 27.)

At about 10:30 p.m., Winbush asked to make a call to his mother and Sergeant Olivas advised him that all calls were taped. (130-RT 9930, 9932.) The call was recorded and the recording was played at trial. (130-RT 9932-9934; Exhibits 3 & 3A.) Winbush stated during that call: "We did it, mama;" "Norman already said he did it and then he put me in it;" "I ain't gettin' out;" and "I'm gonna get life." (1-Supp.CT 35-37.) Winbush also answered, "Yeah," when his mother asked: "You killed somebody?" (1-Supp.CT 37) and when she asked: "You told 'em the truth, you all both killed her?" (1-Supp.CT 39.)

A team from the District Attorney's office took another statement from Winbush at 1:05 to 1:40 a.m. on May 4, 1996, which was tape-recorded, and that tape was played at trial. (130-RT 9930-9931, 140-RT 10934-36, 141-RT 10977; Exhibit 4 & 4A; 1-Supp.CT 41-56.)

In this statement Winbush said that when he went to Beeson's apartment, he was feeling high after drinking a 40-ounce beer and smoking some marijuana. (1-Supp.CT 41-43.) When they went to Beeson's place, Patterson had $10 to buy some marijuana. (1-Supp.CT 46.) Winbush decided to steal the marijuana and he also found $300 to steal. (1-Supp.CT 47-48.) Winbush told Patterson to knock out Beeson or put her sleep so they could leave, but he had no intention of hurting her. (1-Supp.CT 48.) When Beeson struggled, Winbush took a knife intending

just to scratch her and draw blood to indicate they were not playing. (1-Supp.CT 50.) Winbush was so nervous with his adrenaline pumping that he panicked and twice swung his knife hard behind Beeson's right shoulder. (1-Supp.CT 51-52.) Once Winbush realized he had inflicted a serious knife wound he was real sorry he had stabbed her, but stabbed her a third time, because he did not want Beeson to suffer. (1-Supp.CT 52-53.) Winbush did not want the knife that was used to kill Beeson, so he threw the knife out by Aquatic Park. (1-Supp.CT 54-56.) Winbush kept the $300 and most of the marijuana. (1-Supp.CT 56.)

After a break of a couple of minutes, another tape-recorded statement was taken from Winbush from about 1:45 to 2:00 a.m. on May 4, 1996, and that tape was played at trial. (140-RT 10934-37, 141-RT 10977-79; 1-Supp.CT 58-69; Exhibit 5 & 5A.) Winbush reiterated his account of Beeson's killing. (1-Supp.CT 58-69.) Winbush said he swung the kitchen knife with a six or seven-inch blade used to cut meat, at Beeson's face "to shed some blood to make her get scared, to make her be quiet." (1-Supp.CT 63.) Winbush decided to stab Beeson again to put her out of her misery, rather than call a doctor, because he was in shock. (1-Supp.CT 64.) Winbush threw the knife wrapped in a T-shirt out of the car when they got off the freeway in Berkeley. (1-Supp.CT 65.)

G. Winbush's Trial Testimony

Winbush testified in his defense that he was born in Berkeley, California on October 5, 1976, and grew up in the area. (144-RT 11246-47.) When Winbush was in elementary school, other children thought he was handicapped, because he was dyslexic, and never learned to read until he was a teenager. The children made fun of him, and sometimes

had fights with him. (144-RT 11248-11249.) Winbush was about 10 or 11 years old when he started having trouble with the police and came in contact with the juvenile court system, and was sent to a group home. (144-RT 11249-11250.) Winbush was arrested for an attempted robbery in 1989 at age 12, along with a 17 or 18-year old companion. (144-RT 11250.) In 1991, when he was about 14, Winbush was arrested for stealing a car after a high-speed chase, in which he had an unloaded gun, and was sent to the CYA where he learned to read. (144-RT 11250-51.) When released from the CYA, at age 19, on December 11 or 12, 1995, he went to live with his grandmother in Berkeley, though he was required to wear an ankle bracelet. (144-RT 11252.)

On December 20, 1995, Patterson took Winbush to Botello's apartment, where he met Beeson for the first time. (144-RT 11245-55.) Botello showed him a shotgun and gave him 30 or 40 dollars. (144-RT 11254-55.) Thereafter, he and Botello talked several times by phone about a gun and a job. (144-RT 11256.)

On the afternoon of December 22nd, Winbush went to Smith's house, and met Iva Mosley for the first time. (144-RT 11257.) From there, they went to Botello's, where Beeson answered the door and said Botello was not there. (144-RT 11257-11258.) After looking around for Botello, they returned to Smith's house for a while, and Smith took him to his grandmother's shortly after 5:00 p.m. when it was starting to get dark. (144-RT 11256-11259.)

A little after 7:00 p.m., Winbush left his grandmother's house, in violation of his parole. (144-RT 11259-11260.) He took the bus to his "auntie's" house in south Berkeley, where he stayed until Patterson called at 9:30 or 10:00 p.m. (144-RT 11259-11260.) When Patterson picked

him up sometime after 9:30 or 10:00 p.m., they drove to Smith's house, and they picked up Mike Hilliard. (144-RT 11260.) They used marijuana and alcohol, after which Winbush returned home by bus. (144-RT 11260-11261.)

On December 26, 1995, CYA agent Mike Mapes and Officer Kozicki took Winbush from his grandmother's house and brought him to the Oakland Police Department where they questioned him. (144-RT 11262-11263.) They asked Winbush if he took off his bracelet, and where he was on December 22nd. (144-RT 11262.) Winbush said he was with Smith, and later that night, Hilliard and Patterson joined them. Winbush said he had been to Botello's house once on the 20th, and once on the 22nd when he went there in the afternoon with Smith, when he saw Botello and Beeson. (144-RT 11263.) After the interview, Officer Mapes took Winbush to the CYA building, checked and adjusted his ankle bracelet, and then dropped him off at Winbush's grandmother's house. (144-RT 11263-11264.)

Winbush heard rumors that Botello accused him of killing Beeson. (144-RT 11264.) Winbush removed his ankle bracelet in January, and was shot on his ankle by an unknown person on January 26th at his auntie's house, in South Berkeley on Mabel Street. (144-RT 11264-11267.) When Winbush went to Highland Hospital, he initially gave the police a false name, but then his real name, and lied about other aspects of this shooting. (144-RT 11267; 145-RT 11374-80.) Winbush was shot again in March of 1996, again by an unknown assailant. (144-RT 11267.)

Winbush was arrested on April 4, 1996, for robbing a Chevron station; he confessed to the robbery that day and pleaded guilty about a week later. (144-RT 11267-11269.) Winbush admitted to telling the gas

station attendant: "Bitch give me all the money." (145-RT 11327.) Winbush refused to talk about his partner, Michael Boddie, because he did not want retaliation. (145-RT 11329, 11334.) Upon his arrest, Winbush gave the police two false names: Carl Newman and Carl Young. (144-RT 11268.)

On April 5, 1996, Sergeant Banks interviewed Winbush about Beeson's murder. (144-RT 11269.) Winbush described where he was on December 22nd in the same manner as before. He went to Botello and Beeson's apartment on Claremont once before Beeson died and once with Smith on the day that she died, when Botello was not there and Beeson answered the door. (144-RT 11269.)

On May 3, 1996, Winbush was brought to North County Jail, where the Oakland police discussed Beeson's murder. (144-RT 11270-11272.) Police showed Winbush photographs of Beeson, Patterson, and a shotgun, saying it had been stolen from Botello's house and bore his fingerprints. (144-RT 11275.) Winbush admitted he was aware of his *Miranda* rights, as he had been read the *Miranda* warning about 10 or 15 times, but he did not know he had a right to stop talking after he signed the *Miranda* waivers. (145-RT 11355-74, 11389; 146-RT 11444-46, 11476; 148-RT 11666; Exhs. 114-116.)

The police threatened Winbush with the death penalty, but did not use physical intimidation. (144-RT 11276; 146-RT 11454-55.) If Winbush admitted to the murder, the police said it could clear him of the death penalty and he would not get the death penalty. (144-RT 11279-80.) Winbush believed Sergeant John McKenna when he told him he did not want to have Winbush killed. (144-RT 11281.) The police told Winbush that Smith and Botello were going to testify against him and with the

fingerprints on the gun, no jury would believe him. (144-RT 11279.) Winbush had felt trapped because Patterson was lying on the taped statement, which the police played for him twice. (144-RT 11278; 146-RT 11497.) The police also told him facts about the case. (144-RT 11281-82; 146-RT 11457.) The police said they would assume the worst unless Winbush admitted his part, and he had been trying to save his life when he made false statements. (144-RT 11278-83; 146-RT 11454-55.) After the long hours of interrogation and threats, Winbush felt scared, helpless, deserted, and terrified. (144-RT 11288; 145-RT 11381.)

Winbush simply told Sergeants Olivas and McKenna what he would have been thinking and doing if he had been involved. (148-RT 11595.) Winbush thought he had made a deal with the police about no death penalty and that the police were allowed to make such a deal and to threaten him with the death penalty. (144-RT 11283; 148-RT 11671-72.) He was real excited, nervous and scared, so he made up a story consistent with what Patterson had said, which the police officers appeared to believe, to try to convince the police that his involvement was unintentional and he was not in his right mind, so he would not to get the death penalty. (148-RT 11595-98, 11617-21, 11625.) That explained why some of his statements about the killing were not in Patterson's taped statement. (148-RT 11601-09, 11612-18, 11621-32.) Winbush was not repeating what Patterson had said; he was shifting blame to him as he was angry at him. (147-RT 11538-39.) Winbush did not kill Beeson. (148-RT 11671-72.) Winbush said that Beeson was stabbed in the shoulder because one of the police officers pointed to his shoulder (even though she was stabbed in the arm). (144-RT 11282.) After Winbush

confessed, the police became nice and offered him food and phone calls. (144-RT 11283.)

Winbush asked to call his mother and the police told him the conversation would be taped. (144-RT 11283-84.) Winbush lied to his mother about killing Beeson because he wanted to appease and calm her, and he did not want to jeopardize his deal about no death penalty. (144-RT 11285, 146-RT 11460-64.) He also went along with what the police wanted, because Patterson was accusing him of murder and Winbush did not want to die. (146-RT 11460-64, 11474-75, 11485-87, 11491-92.)

Winbush never talked to Tyrone Freeman, the jailhouse informant who claimed appellant had confessed to him. (148-RT 11653-55; 156-RT 12203-10.)

Winbush had threatened or assaulted police officers and guards, but had never threatened to kill anyone. (148-RT 11655-58.)

H. Julia Phillips' 1996 Anonymous Phone Call And Patterson's 1998 Assault Of Phillips

1. The Anonymous Call Of Julia Phillips[18]

On April 5, 1996, Berkeley police received and taped an anonymous call from a woman – later identified as Phillips -- who said that she had information about a "young Caucasian girl" being robbed and stabbed in Berkeley on the day after Christmas. (1-Supp.CT 79-81; 130-RT 9946-9948.) The woman said she had overheard Winbush, who was

18. This evidence was admitted only against Patterson. (127-RT 9697-9700.) The alleged probative value of this tape-recording was that Patterson had listened to it, and it arguably motivated his assault on Phillips, thus tending to prove his consciousness of guilt. (139-RT 10755.) It was unrealistic to believe that the jury would not consider this damaging evidence against Winbush. It was also admitted at the penalty phase. (170-RT 13359-60; 171-RT 13447.)

"sick in the head," say that he had robbed and stabbed to death a white woman in Oakland, and that someone else said he had to break his bracelet off his leg. (1-Supp.CT 81-82.) The caller thought Winbush was arrested the night before and in jail. (1-Supp.CT 81.) The tape of that call was played at trial. (127-RT 9694-9698; 1-Supp.CT 79-85; Exhibit 65.)

2. Patterson's 1998 Assault of Julia Phillips

On September 25, 1998, after midnight, an Asian man and his five fraternity brothers responded to Phillip's screams and confronted a large, black man who was trying to lift her against her will into his car. (139-RT 10788-10797, 10822-27.) The man said, "That's my new wife, and she's acting crazy or kind of crazy." (139-RT 10795-97, 10824-26.) The black man got in his car and drove away, leaving behind the woman, naked from the waist up, who was crying and bloody. (139-RT 10788-98, 10824-30.) When the police responded, Phillips stated that Patterson had attacked her, and lived on Mabel Street in Berkeley. (140-RT 10909-10.) When the police searched Patterson's car, they found a tooth on the front passenger seat and observed fresh blood and possible semen. (140-RT 10897, 10900-01, 10904, 143-RT 11062.)

3. Julia Phillips's Testimony

Phillips testified that on the night of the assault, Patterson drove her to a park, where they sat on benches. (142-RT 11060, 11063, 11065.) Patterson asked her if she had called police, and she said it had not been her, but "Keisha." (142-RT 11065-69.) When they returned to the car, he told her to give him "some head." He said, "I'm trying to have some fun and get all the sex I can because I might have to do some time." (142-RT 11070-72.) When she refused, he hit and choked her. (142-RT 11072-75,

11077.) He told her: "I'm going to do you like I did that bitch." (142-RT 11075.) When someone ran up, Patterson said, "This is my girlfriend. We're just having a fight." He then drove away. (142-RT 11086-87.)

4. Patterson's Trial Testimony with Regard to this Incident

Patterson testified that he had given Phillips $5300 to buy a pound of marijuana from her brother. She had been "dodging" him, but on that Friday, Phillips paged Patterson, telling him that if he picked her up after work, they would pick up his "stuff." (155-RT 12068-69.) They went to a playground, where they took Ecstasy and drank Champagne, and, after he moved the car, she orally copulated him. (155-RT 12069-70.)

When her brother did not arrive, Phillips suggested that "we can just do this another day," but Patterson responded, "No, we're going to do this today." Under the influence of Ecstasy, he went into a "rage" over the loss of his money, and he punched her." (155-RT 12070-71.)

PENALTY PHASE: The Prosecution's Aggravating Evidence

I. Victim Impact Testimony

Mellita Beeson testified that her daughter Erika was a very loyal-type person and a very good friend. Erika had a very strong sense of right and wrong. She was a bit of a rebel, and somewhat fearless. (177-RT 14048-49.) As a teenager, Erika drank a lot and ran around with a crazy crowd for a while and would not come home at night. (177-RT 14049.) Even though Erika was in a private school, she had academic problems, and a learning disability with which she was born. (177-RT 14056-57.) The family gave Erika a lot of love and attention, and tried to help her with her reading and her learning disability. (177-RT 14058-59.) Even though

Erika had learning disabilities, she was very intelligent. (177-RT 14053.) Erika loved crew and art. She was an enthusiastic participant in holidays, birthdays, and family occasions. (177-RT 14050.) Since her death in 1995, the family no longer celebrated Christmas. (177-RT 14052.)

What Mrs. Beeson missed most about Erika was her laughter and great sense of humor and wit; they always joked and laughed. They had little games they played. Erika was like her little buddy. (177-RT 14053.)

Mrs. Beeson's best memory of her daughter was the time they decorated the Christmas tree just before her death. Usually the whole family would help, but since Lisa, Erika's elder sister, was away and Fred, Erika's father, had to work that weekend, they picked up and decorated the tree themselves, drank Bailey's, which Erika loved, and played Jingle Bell Rock, which was Erika's favorite. (177-RT 14053.)

Erika had matured considerably by the time she was 18 and a half. Mrs. Beeson noticed that Erika was much more relaxed and happy and had a sense of well-being. She was making plans to do something more with her life, maybe go back to cooking school. (177-RT 14053.) She wanted to have children, to travel, see the world, and have a family. (177-RT 14054, 14066.) She liked to paint, dance, and liked music and art. (177-RT 14066.) The jury viewed Erika's notebook, letters, last Christmas list, and family photos of her at all ages. (177-RT 14054-55; Exh. 138.)

Erika and her father, Fred, were very close. (177-RT 14051.) "We were all so horrified within our own pain that we didn't share very much. It was like zombies all over the house coming and going all day, when you seen [sic] someone cry . . . He used to play the guitar, and . . . would spend hours at it practicing, but he . . . never picked up that guitar again." (177-RT 14052.) Fred appeared "totally devastated;" "the life just kind of

went out of him" after Erika's death. (177-RT 14052.) Fred died six months after Erika. (177-RT 14051.)

Lisa Beeson testified that she and Erika, her younger sister, were very close. They had a lot of fun together growing up. They took trips together. The age difference -- just under five years -- was less important as they grew up. (177-RT 14060.)

When Lisa returned home from a friend's wedding in Bolivia immediately after Erika's death, her mother was totally incapacitated and her father obsessed with figuring out what happened. (177-RT 14060-62.)

Erika's memorial service, which many people attended, was nice, but the burial was disappointing. (177-RT 14063-65.) Lisa selected the musical passages and readings for the memorial service, and gave the eulogy. (177-RT 14063-64.)

Lisa felt guilty she was not there for Erika; she wished she could have held Erika's hand as she died. (177-RT 14066.) Lisa took flowers to Erika's and Fred's grave. (177-RT 14066.) Before each visit, Lisa would "have to buy the flowers myself in bunches, and make identical bouquets, always pretty much a single flower, always a rose, [rather than buy prearranged bouquets]. The two cups are different depths, so I have to cut them differently so they stand evenly together, and I tie them together with a ribbon." (177-RT 14066.)

A week or ten days later, after Erika was cremated, Lisa and Fred rode in the funeral director's car with a gold cement box with Erika's ashes on the seat next to Fred, but Mrs. Beeson was too upset to go. (177-RT 14064-65.) There was a really cheap label with Erika's name on it stuck to the box, and Fred had his hand on it, and he just kept stroking the top of the box. (177-RT 14065-66.) The cheap label made Lisa very angry,

because she thought the funeral home could have handled it better. (177-RT 14065.)

Erika's murder caused Lisa a lot of anger and pain, which had not gone away. (177-RT 14066-67.) Lisa dropped out of Tulane law school during her third year, but graduated a year later after attending Hastings law school as a visiting student. (177-RT 14061, 14063.) Lisa had a lot of trouble focusing since Erika's murder. (177-RT 14068.) Lisa passed the bar and was licensed to practice law, but quit practicing after a short time. (177-RT 14067.) It was extremely hard to get her legal career going and stay with it. (177-RT 14068.) Lisa was now doing a bit of real estate. (177-RT 14068.) Lisa planned to leave the country and live elsewhere after the trial. (177-RT 14068.) Erika's murder "destroyed" their family and ruined Lisa's life; they were not a family anymore and did not celebrate holidays or birthdays. (177-RT 14065, 14068.) Since 1995, the family no longer celebrated Christmas. (177-RT 14052.)

J. Winbush's Prior Criminal Acts

1. Age 12: March 6, 1989: Dejuana Logwood

On March 6, 1989, at about 1:30 a.m., Dejuana Logwood drove home with her boyfriend, Otis Hornsby, and parked her 1968 van in front of her house on Alcatraz Street in Berkeley. (172-RT 13520-21.)

Winbush and a taller man approached them, looking angry. (172-RT 13522-25.) The taller man pulled a gun and pointed it at Hornsby. (172-RT 13523-25.) Hornsby ran away and Logwood slammed the door and tried to find her keys in her purse to start the van. (172-RT 13525-26.)

Winbush said, "Open the door bitch. Let me in." (172-RT 13527-28.) The boys said, "Give us your money or we're going to kill you." (172-

RT 13527.) Winbush used a pole to hit and crack the stained glass windows covering the porthole of the van. (172-RT 13529.)

Winbush gave her "the most evil look," "just a cold stare with no compassion." (172-RT 13530.) After Winbush pointed the gun at her and said he would count to 10 and shoot her, Logwood said she would give them a ride. (172-RT 13531-32.) Logwood, however, started up the van and drove away without them, swerving after she heard gunshots. (172-RT 13531-32.)

The incident was the worst thing that ever happened in her life, so she remembered it. (172-RT 13522.) In court, Winbush gave Logwood a very cold, threatening and intimidating look. (172-RT 13533.)

2. Age 13: September 22, 1990: Officer Robert Seib and Sergeant Randall

On September 22, 1990, about 5:30 p.m., Berkeley Police Officer Robert Seib and Sergeant Randall were working a drug detail when Officer Seib stopped and searched Winbush and found rock cocaine wrapped in a dollar bill in Winbush's sock. (176-RT 13953-57.) Winbush tried to run away and Officer Seib grabbed him and Sergeant Randall helped and they all fell to the ground. (176-RT 13956.)

3. Age 14: May 21, 1991: Officer Peter Bjedlanes

On May 21, 1991, at about 2:30 a.m., Berkeley Police Officer Peter Bjedlanes engaged in a high speed chase up to 70 to 90 miles an hour with Winbush for 34 minutes through the streets of Berkeley and Oakland. (172-RT 13586-99.) As Officer Woods approached Winbush's car from the other direction and pulled to the curb, Winbush turned off his blinker signaling a left turn at the intersection, accelerated to about 40 m.p.h., and drove straight at Officer Woods' car, taking off the rear bumper. (172-RT

13595-97.) The chase included an area in Berkeley where, a few hours later, there was a report that a .357 magnum unloaded revolver had been found. (172-RT 13611-12, 13615.)

When 14-year-old Winbush stopped the car, he submitted to arrest without resistance. (172-RT 13600.) After being *Mirandized*, Winbush, said, "Fuck that." (172-RT 13604-05.) Later, Winbush initiated a conversation asking Officer Bjedlanes why he had stopped him. (172-RT 13607.) Officer Bjedlanes answered, "Your taillight was smashed." (172-RT 13607.)

Winbush said: "I shouldn't have run. I should have got out of my car and started shooting at you. What kind of gun do you carry anyway?" Officer Bjedlanes answered: "I carry a Glock .9-millimeter." Winbush said, "That ain't shit. You should have seen what I had." Officer Bjedlanes answered, "Yeah, what was that?" Winbush said, "I had a .357 magnum revolver. Isn't that why you stopped me in the first place, because you heard me shooting it off?" (172-RT 13607.) Officer Bjedlanes said, "No," and asked whether the gun was one of those big black ones. Winbush said, "Hell yeah. That is what it was. I should have shot your ass dead." Officer Bjedlanes asked him, "What did you do, throw it out during the chase?" (172-RT 13608.)

Winbush said: "Hell, mother fucking yeah I did. Along with some other shit too. You will never find it, though. That shit is gone. Some tweaker is going to be happy as hell when he finds that shit." Officer Bjedlanes asked, "So, why did you throw all that stuff out?" (172-RT 13608.)

Winbush said: "Because I ain't going to get caught with no gun or "d" [drugs] on me." Winbush said: "The chump ass charges you got me

on now ain't shit. I will be out tomorrow." Officer Bjedlanes asked: "So how much money did you lose by dumping all of that stuff?" (172-RT 13608-09.)

Winbush said: "It wasn't shit. Only about 50 rocks, and there is a lot more guns where that came from." Officer Bjedlanes asked: "So why don't you tell me where the gun is so nobody hurts themselves with it." Winbush said, "Hell mother fucking no. I will never tell you that. Nobody will hurt themselves with the gun anyway because it wasn't loaded. You will never find it, so don't even try. Some tweaker is going to be really happy." (172-RT 13608-09.)

Officer Woods came in and said, "You almost killed me, my friend." Winbush said, "Oh, you are the punk asshole I rammed. I should have run straight into you and then jumped out and started shooting." Officer Woods said, "You mean you tried to hit me?" (172-RT 13610.)

Winbush said, "Hell mother fucking yeah, I did. I was trying to fuck you up. I ain't scared of no punk ass Berkeley police. I would have had a bigger car, I would have taken out hell of cars [sic]. Let me be in a fifty [a mustang] next time and see who wins." (172-RT 13610.)

4. Age 16: July 16, 19, and August 3, 1993: Juanita Ream

Juanita Ream, a teacher at the CYA, had Winbush in her class on July 16th and 19th, and August 3rd, 1993, when she wrote him up. (175-RT 13919-23.) Winbush was threatening and disrespectful, calling her a coward and a bald-headed bitch, which led her to call security to have him removed from the classroom. (175-RT 13921-23.) Many wards chose not to participate in class, instead choosing to maintain their criminal life style. (175-RT 13929.)

5. Age 16: July 16, 1993: Mrs. McEwen and Officer Kerry Spinks

On July 16, 1993, about 11:00 a.m., at the CYA in Paso Robles, Winbush refused to follow instructions during a search. Winbush was removed from the classroom at the teacher's aide's request. Winbush was verbally abusive toward his teacher, Mrs. McEwen, while leaving the class, calling her a bitch and a coward. Winbush cooperated with Officer Kerry Spinks until the search reached his shoes. Winbush refused to hand Spinks his shoes. After Winbush was handcuffed, he became verbally abusive to Spinks. Winbush called Spinks a coward numerous times. He also challenged Spinks to settle things one-on-one. Winbush was escorted from school. Senior youth counselor Daniel Bittick tried to speak with Winbush, but met with the same results. Winbush repeated his threats and challenges and his inflammatory remarks to Bittick. While waiting for transportation, Winbush became so agitated that Bittick placed him in a restraint hold. Spinks believed that Winbush's actions and attitude were a danger to those around him. (174-RT 13815-16.)

While Winbush was searched, the officers told him to comply, but he refused and began yelling "fuck you" and other epithets. After searching Winbush, Spinks and Bittick were escorting him outside, while he was still yelling and struggling. Bittick put Winbush on his knees, but Winbush kept trying to get up. When security staff got there, Winbush was trying to break away and had to be physically picked up and put into the van. (174-RT 13824-25.) During the two years Bittick was assigned to school control for about 950 inmates, there were only about a dozen similar incidents, where the guards had to physically restrain the wards, in contrast to routine fights. (174-RT 13829-13832.)

6. Age 17: February 11, 1994: Officer Jeffrey Germond

On February 11, 1994, around 7:30 p.m. Officer Jeffrey Germond, a guard at Pismo CYA, heard Winbush tell his roommate Juan Trevino, "You are going to be my pussy; you are going to give it to me; I'll make you submit." (174-RT 13790-95.)

Officer Germond immediately ran to Winbush's cell where he found Winbush leaning on Trevino. Trevino was on his back on the bottom bunk and Winbush was standing, leaning on him with his left hand on Trevino's chest. Winbush's right hand was clenched and held an "ice pick," fashioned out of a toothbrush with the bristle end broken off. Winbush was pointing the sharp end of the pick at Trevino's throat and chest area. Both boys were completely bathed in sweat and breathing deep and rapidly. As Germond removed Winbush, Winbush repeatedly instructed Trevino to say that they were horse playing. It looked like the onset of a sexual assault to Officer Germond, not horse play. (174-RT 13805.)

After Germond removed Winbush from his room and handcuffed him, he became physically resistive and had to be placed in a finger-lock. (174-RT 13796.) Winbush began threatening bodily harm to Officer Germond and was written up as a level "b" offense. (174-RT 13797.) Winbush stated, "Kiss your ass" repeatedly, and, "Wait till I get back from temporary detention." (174-RT 13800.)

7. Age 17: July 15, 1994: Officer Valerie Godfrey

On July 15, 1994, about 8:00 p.m., while at the CYA in Pablo Robles, Winbush assaulted a smaller youth, Daryl Onie, and when Onie ran, Winbush ran after him. (175-RT 13892-94.) Initially both Onie and Winbush were fighting. (175-RT 13914.) Officer Valerie Godfrey, a youth counselor, and others, maced Winbush twice before they were able to

control him. (175-RT 13892-95.) Winbush said: "If I'm going to catch some time, why should I stop"? (175-RT 13895-97.)

8. Age 18: November 10, 1994: Officer Dwight Smith

Officer Dwight Smith, who was retired from the CYA, testified that on November 10, 1994, about 10:00 p.m., Winbush, who was in the maximum security unit, complained that he had not received a fair portion of the evening meal. (172-RT 13537-44; 175-RT 13898-99.) Winbush became highly agitated, hostile, and verbally abusive, and was screaming, kicking and banging on the door of his cell for a couple hours. (172-RT 13544-45; 175-RT 13899.) Winbush was inciting the other wards to cause trouble as well. (175-RT 13899.) When Winbush refused to stop, Officer Smith told Winbush to roll up his mattress, but he refused. (172-RT 13545-47; 175-RT 13900-01.)

Officer Smith, with help from Officer Barkas, sprayed mace in the room, and Winbush ran at the door, covered by a blanket to ward off the mace, and threw close-fisted punches at them, hitting Smith's head and upper body and Barkas. (172-RT 13548-51; 175-RT 13901-03.) Smith's glasses and hat were knocked off and his shoulder was slammed into the steel door in the process of trying contain Winbush. (172-RT 13552-53; 175-RT 13903.) Officer Godfrey tried to help get Winbush under control, which was difficult because Winbush had covered himself in oil to make him slippery and hard to grab. (175-RT 13904-05.) The two guards and Winbush sustained bloody injuries. (175-RT 13906-07.) The guards, including Big Ed, did not stage fights among the CYA inmates. (172-RT 13579-83.)

9. Age 18: 1995: Officer Craig Jackson

Officer Craig Jackson was a senior youth correctional counselor at the CYA in Stockton, known as Chaderjain or Chad. (176-RT 13960.) In 1995, Winbush was on his caseload. (176-RT 13963.) Officer Jackson recommended parole, because Winbush had no serious "b" offenses and he did his assigned work, and took classes on anger management, victim awareness, and accepted full responsibility for his crimes. (176-RT 13965-69.) Winbush did a very good program during that year at Chad. (176-RT 13970.)

Officer Jackson stated that Winbush taught himself how to read while he was in the CYA, which caught his attention. They talked about his maturity level, how he was young when he first came in, unlike most adolescents who came to the CYA. When Winbush was at Chad, his maturity level grew and he was able to function around other individuals. (176-RT 13969.) Winbush admitted to Officer Jackson that he often reacted aggressively in order to gain stature among his peers and to make himself feel good. (176-RT 13969-70.)

While at Chad, Winbush was attacked from behind by white gang members of the Supreme White Powers gang, and was hospitalized with severe head injuries. (176-RT 13971-75.) Officer Jackson did not see the medical records of this attack. (176-RT 13972.) Winbush was not the aggressor and he had no trouble after the incident. (176-RT 13973-74.)

Officer Jackson's concluded that Winbush was ready to be paroled and that Winbush would not pose a significant danger to the community if he were released on parole. (176-RT 13970.)

10. Age 18: April 1996: Julia Phillips[19]

On April 5, 1996, Julia Phillips made an anonymous phone call accusing Winbush of killing Beeson. (170-RT 13359-60; 171-RT 13447-48.) Phillips called the police about Winbush, because she was very afraid of him and she did not want him to get out of jail. (170-RT 13383.)

Phillips wrote Winbush when he was in the CYA. (171-RT 13464.) Phillips kept going back to the houses where Winbush's sister, cousin and aunt lived, even though Winbush was often there. (171-RT 13467.) Winbush would call her and tell her if she did not come over to Lakeisha's house, he would "beat [her] ass." (171-RT 13475.) Winbush never beat her or hit her, however. (171-RT 13467, 13476.) One day Winbush entered the house as two men were leaving, and Winbush said: "I could have robbed them." (171-RT 13472, 13469.) Phillips had seen Winbush with a small silver gun in a dark bathroom. (171-RT 13476-77.) Winbush told her if he got arrested again he would shoot the police and would rather die than go back to jail. (171-RT 13477.)

Phillips was afraid for her life because Winbush kept harassing her and she did not know what he was capable of. (171-RT 13475.) Winbush sexually harassed and assaulted her for three months after Beeson's murder until she finally submitted to his advances. (170-RT 13360-71, 13386.) Winbush grabbed Phillips by the neck and headed upstairs with her. (171-RT 13472.) Winbush asked her, "Why do you act like I'm raping you?" (170-RT 13371.) Phillips told Lakeisha she let Winbush have sex with her, "just to get it over with." (170-RT 13371.) Phillips was afraid of Winbush and thought he was "very violent." (170-RT 13368.)

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19. Patterson attacked Phillips in September 1998. (See AOB, Statement of Facts at 37-39; 142-RT 11060-11087.)

Phillips never told the police about Winbush's sexual assault at the time or in her anonymous phone call about Winbush on April 5, 1996. (171-RT 13447-48.) On May 9, when she had a long conversation about Winbush with Sergeants Olivas and Swisher, she did not mention Winbush's sexual assault. (171-RT 13448-49.) Not until her taped interview with Sergeant Page two years later on September 26, 1998, when she complained about Patterson's assault that day, did she mention Winbush had harassed her, but she still did not mention that he had sexually assaulted her. (171-RT 13449-55.) Phillips first told the police about Winbush's alleged sexual assault in 1996 more than six years later in November 2002. (171-RT 13455-56.) Phillips was angry with Winbush and wanted him in prison for life. (171-RT 13455.)

In her taped interview with Sergeant Page on September 26, 1998, Phillips said a man named Charles, the same man whom Winbush said he could rob, told Lakeisha, "Your cousin's crazy for killing that white girl." (171-RT 13469-72.) Phillips asked Lakeisha why did Winbush kill Botello's girlfriend, and she said, "They were trying to rob her, and she wouldn't cooperate so they killed her."[20] (171-RT 13472.)

11. Age 20: March 1, 1997: Officer David Lannon

On March 1, 1997, the inmates at the Santa Rita jail were told that showers would go off at 2:20 p.m. and they would be locked down at 2:30 p.m. (173-RT 13678, 13705.) Just as the jail was locking down, and after Officer Francis Huber had turned off the showers at about 2:20 or 2:25 p.m., Winbush asked for more time to finish his shower. (173-RT 13678,

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20. This evidence was erroneously admitted allegedly with respect to Phillips' ability to recall that day, not for the truth. (171-RT 13470-72; see AOB, Arg. IX, D.)

13682-83, 13705-07.) Officer Lannon told Winbush and another inmate they had two minutes to wash the soap off, and Winbush went back to the showers. (173-RT 13707-08, 13684.)

Winbush rang the intercom after the showers were turned off again and said he had not had time to wash off the soap. (173-RT 13684.) Lannon told Winbush to lock down and to rinse himself off in his cell, and that he had had enough time to shower -- about five minutes. (173-RT 13685, 13696-97.) Winbush refused to lock down, angrily saying he needed more time to wash the soap off, and called him a bitch. (173-RT 13685-86, 13705-07.)

Lannon told Winbush he had to lock down, because it was time for count. Winbush said, "Fuck you. I'm not going to lock down." (173-RT 13687, 13708-09.) Winbush refused to go to the isolation room and demanded to see a sergeant. (173-RT 13687-88.) Lannon said a sergeant was not going to talk to Winbush about a shower and that he needed to lock down. Winbush did not say anything; he just doubled up his fists and put them up in front of his face, taking a fighting stance. (173-RT 13688.) Lannon sprayed Winbush in the face with pepper spray when Winbush put his fists up. (173-RT 13688-89, 13699.) In response, Winbush charged Lannon and punched him about two or three times in the face, fracturing his nose and causing bleeding. (173-RT 13689-91, 13712-14, 13717.) Lannon hit Winbush with his baton, and Winbush used a chair as a weapon and to ward off blows from the baton until Officer Wysock grabbed another chair and used that chair to knock the chair out of Winbush's hands. (173-RT 13689-90, 13699.)

12. Age 21: February 6, 1998: Officer Dale Dailey

On February 6, 1998, Officer Dailey, a transportation officer at the Santa Rita jail put Winbush and Juan Merced in the bus, both of them in restraints. (172-RT 13502-07.) Winbush attacked Merced, and pushed him against the wall, and said, "That is what you get for calling me PC [protective custody]." (172-RT 13507-15.) Officer Dailey stepped between them. (172-RT 13507-15.) Winbush had slipped his hand restraints off, which allowed him to use his restraint chain as a weapon. (172-RT 13509-11.) No one was injured. (172-RT 13518.)

13. Age 22: July 28, 1999: Officer Dino Belluomini and Deputy Wyatt

On July 28, 1999, at the North County jail in Oakland, Officer Belluomini advised Winbush of the disciplinary process and how it worked. Winbush said that he understood. Winbush waived his right to a hearing and told him the following. (176-RT 13982.)

Winbush said that inmates had been passing hot water to each other through the cell doors on that floor for a very long time. Because they were allowed outside for only one hour per day, pouring hot water to each other allowed them to eat their commissary throughout the day. Winbush became very upset and said that he would starve in his cell without access to hot water. (176-RT 13982-83.)

Winbush believed that he was not properly admonished about the no-passing rule, and should have gotten a verbal warning from the deputy, not a write-up. He further related that if he wanted to get a write-up, he could get one for a much more serious incident. Winbush stated that he would assault any guards who came into his cell, but then said he was "not threatening anybody." (176-RT 13982-83, 13988-89.)

Winbush also believed that the recommended punishment was too severe, and was upset and argumentative. Once the interview was over, and Winbush's waist restraints were removed, Winbush turned to Deputy Wyatt and told her that she better not come up to his cell. Winbush was told to step into e-pod a few times, and finally complied. (176-RT 13988-89.) Winbush was still upset with Wyatt from a previous disciplinary report she had written about him. In that incident, Winbush had pushed his food tray back, and Wyatt caught the tray and prevented Winbush from hitting her with it. (176-RT 13992-93.)

14. Age 23: February 1, 2000: Officer William Humphries

On February 1, 2000, Officer William Humphries was working at an Administrative Segregation Unit at the Alameda jail, where Winbush was housed. (170-RT 13295-97.) The Administrative Segregation Unit is for violent inmates or for protection of inmates. (173-RT 13655.) The jail can take away privileges from inmates or put them on a disciplinary diet for breaking the rules. (173-RT 13656-58.) Inmates get more privileges if they are in the general population. (173-RT 13660-62.)

At 1:55 p.m., Officer Humphries told Winbush to get off the phone and return to his cell. (170-RT 13298.) Winbush told him to hold on. (170-RT 13298-13300.) Winbush said: "You better check your attitude. You came in here with attitude today. You don't know who you are dealing with. I'll be here every day, Humphries." (170-RT 13301.) Winbush further said, "I don't care if you are writing me up. I have been here a long time. I have been in every pod. I don't care where I get sent. You need to check your stuff. You still have to come in my room." (170-RT 13303.) Humphries took this as a threat. (170-RT 13303, 13315.)

Humphries wrote Winbush up for infractions, but not for making a veiled threat, because Winbush already had a lot of charges pending. (170-RT 13305-06.) There was a disciplinary hearing. (170-RT 13307.) Three days later, Winbush told Humphries that he was sorry about what had happened and he was stressed out. Humphries continued to be extra careful around him despite Winbush's apology. (170-RT 13308.) He had no further contact or incidents with Winbush. (170-RT 13312, 13321.)

15. Age 24: July 4, 2001: Officers Donn Bradley and Kyle Upchurch

On July 4, 2001, about 10:45 p.m., Officers Bradley and Upchurch were guards at the Administrative Segregation Unit – high security -- of the North County Alameda jail. (173-RT 13638, 13650-51.) They told Winbush to sit on his bed, but he refused. (173-RT 13640-41, 13652.)

When they entered Winbush's cell, Winbush took a fighting stance and, taking Officer Bradley by surprise, hit him on the jaw with his fist and knocked his glasses off. (173-RT 13642-43, 13652.) The punch caused pain, but Bradley was not injured. (173-RT 13648.) Bradley and three other guards grabbed Winbush and fell to the concrete floor and fought Winbush for about 45 seconds. (173-RT 13644-46, 13653-54.) Officer Upchurch did not see any of them hit Winbush. (173-RT 13653.) Upchurch had no problems with Winbush since the incident, though he saw him daily. (173-RT 13660.)

Winbush got the worst of the fight and was checked by a nurse. (173-RT 13648, 13667-68.) Winbush told Officer Keir Abrams: "The prosecutor is not going to charge this case. I don't have any marks on my hands. No deputies have any injuries or marks." (173-RT 13670.)

Winbush had some swelling, abrasions, and bruises to his shoulder, chest, legs and face, but none on his hands. (173-RT 13675.)

16. Age 25: July 9, 2002: Inmate Razo and Officer Lack

On July 9, 2002, about 9:00 a.m., the guards were bringing inmate Razo, a small man in his 40's, back to his cell from the medical clinic. (173-RT 13717-18; 175-RT 13877-78; 177-RT 14036-39.) Razo had thrown feces at numerous inmates' cells. (174-RT 13842.) As they passed Winbush, Officer Geoffrey Lack yelled, "'Watch out," as Winbush swung his fists at Razo and Officer Higgins stepped between them, and the guards struggled with Winbush. (173-RT 13721-23; 175-RT 13880-81; 177-RT 14036-39.) Officer Lack grabbed the back of Razo's chains, because Razo was defenseless, and pushed him up the stairs. (177-RT 14036-39, 14047.) Razo escaped up the stairs without being hit, while Winbush was still swinging. (175-RT 13881.)

Officer Patrick Higgins tried to control Winbush, who was struggling. (177-RT 14040-41.) Officer Lack told Winbush to stop fighting. (175-RT 13882.) Winbush refused to stop resisting and they fell to the floor. (173-RT 13723-24, 177-RT 14041.) Higgins grabbed Winbush and they fell on Lack's legs. (175-RT 13882.) When they fell, Lack felt a tearing pain in his left knee and ankle. (177-RT 14042.) Lack's injuries (sprained left knee and ankle and contusions to his right knuckle) prevented him from working for about a week and he still had problems with his right hand. (177-RT 14046.) Fearing they were in danger, Lack punched Winbush in the head area about five or ten times, causing him to bleed, and told him to stop resisting. (177-RT 14042-45.) Winbush, the

only one bloodied, was able to walk to the isolation cell. (174-RT 13848; 175-RT 13883-84, 13888; Exh. W.)

Officer Higgins did not see Winbush hit anyone, just swing his arm. (175-RT 13886-87.) Officer Garrett Dagneau saw Winbush strike Officer Lack with his fists. (174-RT 13835-37.) Dagneau jumped on Winbush and restrained him, but did not hit him. (174-RT 13837-38.) Dagneau saw Lack hit Winbush three or four times when he was resisting. (174-RT 13838.) Winbush was bleeding, but no one hit him once he was restrained. (174-RT 13839.) Officer Huber saw Winbush hitting Officer Lannon before he used pepper spray. (173-RT 13724-30.) Other inmates are not supposed to be out in the pod at the same time. (173-RT 13730.)

17. Age 26: January 14, 2003: Officer Judith D. Miller-Thrower and Deputy Jeglum

On January 14, 2003, Officer Miller-Thrower moved Winbush and other inmates from Santa Rita county jail to court. (175-RT 13930-34.) After Officer Miller-Thrower alerted Deputy Jeglum about Winbush having a sheet, Deputy Jeglum ordered Winbush – who denied it -- to turn around so he could be searched. (175-RT 13935-36.) Winbush started to comply and then angrily said: "Don't put your fucking hands on me. I don't have a sheet." (175-RT 13937.)

When Winbush refused to comply and took a fighting stance, Jeglum pushed Winbush against the wall, while Winbush resisted and tried to get out of Jeglum's hold. (175-RT 13938-39.) Winbush lunged at Jeglum and he pushed Winbush into an elevator. (175-RT 13939-40.)

Deputy Jeglum did not find a sheet when he searched Winbush. (175-RT 13939.) They searched the cell where Winbush had been and found a sheet under newspapers. (175-RT 13940.)

Officer Charles Foster had known Winbush for years and never had any problems with him. (174-RT 13776.) Officer Foster testified that Winbush had a reputation in the Sheriff's Department – based on accounts of many deputies over many years -- as being an excessively violent inmate toward staff. (174-RT 13776, 13788.) Anytime Winbush, who was housed in Administrative Segregation, was moved within the jail, he was in chains and restraints for the safety of the staff and other inmates. (175-RT 13941.)

Winbush's Penalty Case

K. The Defense's Mitigation Evidence Concerning The Shower Melee On March 1, 1997

Dennis Burke, Winbush's private investigator, interviewed Patrick Freeney on July 3, 1997, at Solano State prison in Vacaville, after Freeney signed a statement on March 2, 1997, that was consistent with what he told Burke. (183-RT 14401-02.) Freeney had been convicted of several felonies and other crimes, including assault on a police officer and burglary. (183-RT 14418-21; Exh. 159.)

Freeney stated he witnessed the shower incident at the Alameda County jail on March 1, 1997, involving Winbush and the guards. (183-RT 14402-07; see AOB, Statement of Facts at 51-52.) Freeney stated that they had been locked down the day before, and all night, and this was the first time they had to exercise. (183-RT 14402-07.)

It was about 10 minutes before lock-down, and Freeney hit the button to talk with the technician. When the water was turned off by the technician, Winbush was wet, had soap all over him, and was shivering. Winbush pushed the button, and stated, "I just want to rinse off, it wasn't time." The technician "went off" and told Winbush to get away from the buzzer and that she was going to write him up if he hit the button again. (183-RT 14402-07.)

Deputy Lannon came down to the pod area; told Winbush that he was going to the cold tank; grabbed Winbush with his left hand, and with his right hand swung and struck Winbush in the neck and head area. Everyone had been locked down but Winbush at the time of the incident. Then Winbush hit the officer with his fist. Four to five officers responded to the pod and handcuffed Winbush. They sprayed Winbush with mace after he was handcuffed by a deputy. (183-RT 14402-07.)

Winbush was not resisting. He was hollering, "You see this; I just wanted to get the soap off me." Winbush was kicked in the face, on purpose, by one of the deputies, then sprayed with "tear gas" again. The deputy may have dropped his" "spray bottle" when hit, and the deputy fell down, but then jumped up. (183-RT 14402-05.) Winbush was not combative, but was simply pleading with the deputies to allow him to shower off the soap, until they grabbed him. Winbush's facial expression indicated: "Oh, no, not the cold room," and he was shivering. (183-RT 14402-07.)

Deputy Wysock grabbed a chair and Winbush grabbed a chair and said, "I don't want to fight you all. All I'm doing is trying to get the soap off." At that time other officers were running in and everybody in the pod told Winbush to lie down. When Winbush laid down, the officers got all

over him and an officer ran up and kicked Winbush in the face, which caused him to bleed. (183-RT 14406-07.)

Defense investigator Burke interviewed James Belcher on June 20, 1997, at the Alameda County jail in Santa Rita, after Belcher signed a statement on March 1, 1997, that was consistent with what he told Burke. (183-RT 14407-13.) Belcher had been convicted of dozens of crimes, including murder in 1994. (183-RT 14414-18; Exh. 158.)

Belcher stated he witnessed the shower incident at the Alameda County jail on March 1, 1997, involving Winbush and the guards. Belcher stated that they had been locked down for two or three days due to a lack of staffing. (183-RT 14407-13.) According to Belcher, at about 2:20 p.m., the showers were cut off, the doors opened for lock-down at 2:25 p.m., and everybody but Winbush locked down. Winbush came out of the shower, pushed the call button, and asked the lady tech, "Can I rinse off?" Winbush was not hostile, and asked again, "Will you allow me to rinse off?" The technician said that she was not going to turn on the showers again. Some of the technicians will allow a couple of minutes before shutting off the water. (183-RT 14408.)

Winbush then asked to speak to a sergeant. The officer said, "No," and Deputy Lannon came down. Winbush was naked at first, but then got a towel. He had soap on his face and shampoo on his hair. Lannon entered the pod area standing directly in front of the door. Winbush and his cellmate asked if they could just rinse off. The deputy refused and told Winbush to rinse off in his cell. Winbush asked to speak to a sergeant and was refused. Lannon told Winbush that if he was not going to lock-down, that he was going to the cold room. Winbush again asked to speak to a sergeant. (183-RT 14408-09.) Lannon said, "No," reached for the

keys, opened the door, and put his right hand on Winbush. He had his left hand on the mace spray and the fight began. When Lannon said, "Let's go," while reaching out to Winbush, Winbush stated, "Don't put your hands on me. All I want is to rinse off." (183-RT 14409-10.)

Winbush hit Lannon three to four times in the face with his fists. Other deputies entered the pod. Lannon was dazed; he took out his billy club and struck Winbush. One of the deputies grabbed a loose chair and Winbush grabbed a chair. Four or five other deputies entered and wrestled Winbush to the floor and handcuffed him. One of the guards kicked Winbush in the face when he was handcuffed. (183-RT 14409-10.) Belcher said that in the past, the guards had denied the inmates water and toilet paper, and he had seen guards hit other inmates. (183-RT 14410.)

L. The Defense's Mitigation Evidence Concerning Winbush's Disabilities And Psychological Evaluations

Dr. Jamie Candelaria-Greene earned a doctorate in Special Education in 1996. (184-RT 14449-50.) The court qualified her as an expert in the field of learning disabilities and special education. (184-RT 14452.) The defense retained Dr. Greene in 2003, who was paid $110 an hour. (184-RT 14506, 14564.) Dr. Greene did not interview Winbush, because his lawyers did not request her to do so. (187-RT 14624.) Instead, Winbush's lawyers provided her with Winbush's school records, probation records, CYA records, and medical records, all of which predated the date of the crime, but not the crime reports. (184-RT 14453, 14474.) Winbush's lawyers did not invite her to view Winbush's testimony at trial or read the transcripts of it. (184-RT 14507-08.)

Winbush was born prematurely on October 5, 1976, in Berkeley. (184-RT 14454; 144-RT 11246.). His mother had high blood pressure,

hypertension, and suffered from eclampsia. (184-RT 14454.) With the exception of toilet training, Winbush's developmental milestones were within normal limits. (186-RT 14581; Exhibit 167.) Winbush refused to wear glasses despite having been told he needed them, which was not uncommon among various individuals, especially self-conscious teenagers who are very aware of their appearance. (186-RT 14575; 187-RT 14618.)

It was well documented that Winbush had a number of learning disabilities throughout his life and still had them. (184-RT 14455-56, 14474-75.) Winbush had attention deficit disorder with hyperactivity affects (ADHD), because he met the criteria listed for ADHD in the *Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition (DSM-IV).[21] (184-RT 14455-58.) None of the reports about Winbush's behavior changed Dr. Greene's diagnosis of ADHD. (187-RT 14632.) Between three to seven percent of the American general population has ADHD. (187-RT 14614.) Winbush also has dyslexia. (184-RT 14459-60.) An estimate of Winbush's intellectual function was difficult to assess due to his uncooperativeness in testing. (186-RT 14574.) Winbush's lack of academic progress was very likely due to his inconsistent school attendance, his refusal to wear glasses, and his defensiveness about admitting to having difficulties or deficits in his education. (186-RT 14575.)

A report prepared by the Oakland School District, Psychological Services, in late 1983 or early 1984, when Winbush was seven years old, indicated that on visual-motor functioning, Winbush scored at four years,

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21. The DSM-IV is used for diagnosis of mental illness and statistics. (184-RT 14466-67.)

nine months age-level equivalency. His Bender drawings were equivalent to four years, six months. Both written tasks of the VADS test were unable to be scored. Digits were written in reverse order and digits themselves were written in reverse. (187-RT 14642-43; Exh. 161.)

The prosecutor's cross-examination revealed that at age 8, Winbush twice played with matches, and once where "he and a copartner attempted to set fire to a neighbor's home." (187-RT 14613; Exh. 167.)

A clinical psychologist interviewed Winbush when he was nine years, ten months old in the summer of 1986. (187-RT 14644; Exh. 164.) In his report, the doctor found that on Axis II, Winbush suffered from a developmental language disorder, receptive type. This diagnosis reflected Winbush's difficulty associating written symbols with sounds. Second, Winbush suffered from an atypical specific developmental disorder to reflect his difficulty in spelling.

The doctor recommended individual psychotherapy at least once weekly, and a day treatment program with an on-site school program. (187-RT 14645; Exh. 164.) Winbush refused to participate in psychotherapy. (187-RT 14618.) Winbush's mother may not have been in favor of giving him psychotropic medication. (187-RT 14619.)

Winbush had qualified for speech and language services as a youth. (186-RT 14589; Exh. 168.) In the 1980s, special services were available under federal law to Winbush as a student with learning disabilities and having scored in low percentiles. (187-RT 14650.) Psychologist Rita Marcella of the Alameda County Mental Health Service wrote: Winbush "received no specialized counseling services because the intensive services required to meet his needs could not be provided at the school site." (187-RT 14649-50.)

Winbush was frequently assaultive in school. Information from Mrs. Winbush as well as from Gloria Roberts, resource specialist with the juvenile court school, indicated that Winbush had not been in school for 15 months, since the beginning of 1988. (186-RT 14570.) Winbush refused to attend a day treatment program at Seneca for one month. (186-RT 14570.)

Dr. Greene did not review all the reports showing many acts of violence by Winbush between the ages of 10 and 13 years old, or the crime reports of robberies with guns and assaults or auto thefts or the reports documenting his violence in juvenile hall. (187-RT 14620.)

From 1989, at age 12, Winbush was housed at the Alameda County juvenile mental health facility called the youth guidance center. (186-RT 14568-69; Exh. 167.) Winbush refused to attend school, associated with older youth, stayed out all night, and was gone for up to two weeks at a time. He frequently became angry and broke things; he was assaultive towards counselors and his siblings. A counselor was intimidated by his aggressiveness. Winbush said he was not assaultive towards his grandmother because she did not try to set limits for him. (186-RT 14569-70.)

In July of 1989, Winbush received a psycho-educational evaluation from Alameda County juvenile court school. Winbush's ability was estimated in the overall average range. (186-RT 14590; Exh. 165.) Winbush received a cognitive functioning testing where he had scores from very low to very high. (186-RT 14591.)

There were six different violent incidents at the St. John's School for boys between February 19th and April 26th of 1990 at age 13. (187-RT 14621; Exh. 175.) One involved smoking marijuana in his room, when

Winbush either verbally threatened the officer of the day or was involved in a physical altercation with a peer; three were fist fights with peers; two threats to staff; and one incident where he got upset and started throwing chairs and ashtrays before he threatened staff. (187-RT 14621; Exh. 175.) There were other violent incidents in school for which he was suspended, and there were reports of violence against his mother and his sister. (187-RT 14622.) One report described an attempted rape by force of Winbush's cellmate. (187-RT 14630; Exh. 147.)

In a psychological evaluation at age 13, on March 5, 1990, Winbush scored high second grade level in reading; low first grade level in spelling; and high second grade level, ages seven to nine, in arithmetic. (187-RT 14643-44; Exh. 163.)

At age 15, a speech-language diagnosis from the CYA on August 13, 1992, indicated that Winbush qualified as language handicapped because he scored in or below the 7th percentile on six subtests: 1) Oral directions: the first percentile. 2) Word classes: the first percentile. 3) Semantic relationships [word usage and vocabulary]: the second percentile. 4) Formulated sentences: the first percentile. 5) Recalling sentences: the 16th percentile. 6) Sentence assembly: the second percentile. (187-RT 14646-48; Exh. 168.) In the Ross Information Processing Assessment, Winbush was below normal on all 10 subparts, but on problem solving and abstract reasoning, which means being able to figure out new problem-solving challenges on the spot that an individual is continually exposed to in their day-to-day lives, Winbush scored at the 10th percentile. (187-RT 14648-49.)

Winbush's high school transcript from the Chaderjain High School at the CYA showed that Winbush generally earned A's, B's, and C's and

completed 161.5 units of the required 200 credits; but was behind on elective credits. (186-RT 14593-14600; Exh. 160.)

Winbush met seven of the nine criteria in section A1 for Attention-Deficit/Hyperactivity Disorder from the DSM-IV. (187-RT 14633-36; Exh. FF.) Winbush met eight of the nine criteria in section A2. (187-RT 14636-38.) Winbush met the criteria for section B: "Some hyperactive-impulsive or inattentive symptoms that cause impairment were present before age seven years." Winbush met the criteria for section C: "Some impairment from the symptoms is present in two or more settings (for example, at school or work and at home)." (187-RT 14638-39.) Winbush met the criteria for section D: "There must be clear evidence of clinically significant impairment in social, academic or occupational functioning." Winbush met the criteria for section E: "The symptoms do not occur exclusively during the course of a pervasive developmental disorder, schizophrenia, or other psychotic disorders and are not better accounted for by another mental disorders (for example, mood disorder, anxiety disorder, dissociative disorder, or a personal disorder." (187-RT 14639.)

There is no correlation between having ADHD and being a murderer. The incidence of conduct disorder and ADHD and learning disabilities is much higher in prisons and in the prison population. (187-RT 14615.)

Nothing in the records that Dr. Greene reviewed showed that Winbush as a youngster was referred to a medical doctor because of suspected ADHD. When the criteria for both conduct disorder and ADHD appear to be met, both diagnoses can be given. According to the DSM, learning disabilities lead to behavioral problems. It is well known that there is a higher risk of behavioral problems for people with learning

disabilities and/or ADHD, simply due to the constant level of frustration and stress that they are under. Children do not choose to have ADHD or learning difficulties. There is a strong genetic factor with both of these conditions. (187-RT 14641.)

The recidivism rate was much lower ("from 50 to 60 percent way down to 10 percent") among parolees who had classic ADHD who were involved in at least a six-month program of prescribed medication, such as Ritalin, and appropriate counseling, because they had fewer instances of violence and they were better able to concentrate on some vocational and other skills. There was "a greater degree of safety" associated with prisoners sentenced to life, because [they were] better able . . . to control impulses." (184-RT 14463-64; 187-RT 14616.)

Dr. Greene testified that Winbush's records showed from a very early age that when he trusted the person who was doing the assessment, he performed much like someone with learning disabilities and ADHD. (186-RT 14573.)

During an interview, Winbush spoke in a rapid fashion with poor enunciation. He was able to speak in clear organized sentences, but when he wanted to avoid giving specific answers to questions, his responses were confusing, and he contradicted himself. Winbush was alert and well oriented. There were no indications of formal thought disorder or major affective disorder. (186-RT 14575.)

Children with learning disabilities and ADHD have very low tolerance for frustration. As soon as they feel a little bit of failure, their performance is negatively affected. (186-RT 14564.) Winbush had a history of truancy from school. He had been involved in special education

throughout his educational career. He had a history of refusing to cooperate. (186-RT 14567; Exh. 163.)

When psychological testing with Winbush was not completed due to his refusal to cooperate, this refusal appeared to be part of an established pattern in that he had refused to participate in an earlier evaluation with a guidance clinic, and he had a long history of noncompliance in school and in the home. Dr. Greene stated that several reports indicated that Winbush was unwilling to cooperate with testing, especially as he got older. (186-RT 14560.) Winbush had extreme difficulty with authority figures and with any limits that were set on his behavior. (186-RT 14576.)

In 1983, at age seven, Winbush submitted to testing. (186-RT 14560; Exh. 161.) Winbush handled difficulty by leaving the table and insisting he return to his class. Because of his low frustration level in the classroom, Winbush was permitted to have a shorter day. (186-RT 14561.)

On September 23, 1985, at age eight, Winbush again submitted to testing. (186-RT 14561-62.) His mood was quite variable during the time spent in testing. His tolerance for frustration was low, and he asked to go home when he encountered his first challenge. At one point, he resisted and refused to respond to questions. Subsequently, he spontaneously admitted that he could answer the questions and proceeded to cooperate and respond to questions. (186-RT 14562-63.)

Dr. Greene concluded from this testing that Winbush was uncooperative to some degree, but believed that all of these behaviors were very consistent with both untreated learning disabilities and untreated ADHD. There was a great deal of frustration and a lot of

impulsivity. By this time, Winbush would have been in the school system for at least three years with constant failure, and still functioning way below his peers. So these kinds of behaviors should have been expected given little or no psychological or emotional counseling, and very little appropriate educational treatment or remediation. (186-RT 14563.)

Winbush's oppositional attitude may have regressed his testing scores. (186-RT 14567; Exh. 165.) Winbush refused to do the reading test, but he was responsive to encouragement, reframing, and behavior modification. Overall, Winbush appeared to make a genuine effort on the tests. (186-RT 14568.)

If someone engaged in a pervasive pattern of disregard for and violation of the rights of others occurring most of their life, and they are violent and they do not have any fear of authority figures, and they do not want to listen to anybody, and they get violent if they are told to comply with rules – which meets the criteria for antisocial personality disorder or some kind of conduct disorder -- and they refuse to cooperate with testing, that would affect somebody's ability to accurately assess their learning disability. (186-RT 14573.)

During an interview, Winbush presented as a hostile, guarded, and extremely oppositional youth with very low tolerance for frustration. His maximum ability for behaving cooperatively lasted one to three minutes, after which he would complain profusely about being asked questions or having to engage in a task followed by a complete refusal to cooperate further. It was not possible to perform a thorough assessment of Winbush due to his negative attitude and his refusal to cooperate. Winbush was notably suspicious of the purpose of the evaluation and was unable to establish any level of trust or rapport with the examiner. (186-RT 14571.)

Winbush's anger escalated quickly. He was likely under-socialized. For example, he got into fights with peers and adults; did not express guilt or remorse for his actions; did not consider how his behavior affects others, and denied responsibility for his misbehaviors. In addition, Winbush denied that he had any problems, did not appear motivated to make any changes in his behavior, and repeatedly stated that he was just doing his time. (186-RT 14576-77.)

Winbush was probably not a good candidate for psychotherapy because he denied that he had any problems and appeared to have significant difficulty in establishing positive interpersonal relationships. It was doubtful that he would establish the trust and rapport necessary to benefit from treatment. (186-RT 14577.)

Winbush became frustrated and did not seem to put forth his best effort. Therefore most of the items missed on the tests were at the end and evaluation of these results should be guarded. Winbush, however, was responding at a level which was indicative of his true speech and language skills. (186-RT 14577-78; Exh. 168.)

Winbush made threats against Judge Sweeney at juvenile hall. (186-RT 14578; 187-RT 14620; Exh. 173.) Winbush refused to go to school at juvenile hall. (186-RT 14578; Exh. 173.) Winbush had no fear of authority and/or consequences, and also attempted to control the interview. (186-RT 14579.) Winbush ran away from school and stayed out of custody until he was arrested for selling rock cocaine. (186-RT 14579.)

Dr. Greene opined that based on these records, Winbush was making choices not to cooperate, which is quite common for individuals

with untreated ADHD and learning disability, especially if they also have conduct disorder. (186-RT 14579.)

Winbush was able to express himself adequately and his expression and his language expression were adequate. (186-RT 14580-81; Exh. 163.)

In one interview, he was interested in being cooperative, trying to avoid being sent to the CYA. (186-RT 14581; Exh. 166.) Winbush appeared to be an engaging, likeable young man of average height and build for his age. He was cooperative throughout the interview and appeared anxious to impress the examiner with his "soft side." (186-RT 14582.) Although Winbush appeared to have little sense of the reckless nature of his life, nor knew what he would do to be successful in the community upon release, he indicated that the threat of commitment to the youth authority would be a likely means of deterring his acting out behavior. (186-RT 14582.)

There was no indication of hallucinatory or delusional material, and his thought process appeared to be within normal limits. His eye contact was good, but his motor behavior was remarkable due to his incessant fidgeting and indications of attention deficit. His expressive speech was notable by his markedly limited vocabulary. (186-RT 14583; Exh. 166.) The fact Winbush rode bicycles, fought others, and murdered a person, showed he had adequate motor skills. (186-RT 14583-86; Exh. 169.)

Dr. Greene's assessment of Winbush showed areas of strengths and weaknesses, but she focused on his learning disability. (186-RT 14586-89; Exh. 168.) She did not see any indications that Winbush refused medical help. Winbush agreed to do things when he felt that he could trust the individual and when it made sense to him. (187-RT 14618.)

Dr. Greene agreed with the prosecutor that the best predictor of future dangerousness is past violence, if everything in the environment stays the same and there is no treatment. (187-RT 14619-20; 14630; Exh. 147.) Dr. Greene agreed that Winbush's potential for future violence was high, given his past behavior, if nothing was changed. (187-RT 14631.) Other people who had met with Winbush indicated that his potential for future violence was high. (187-RT 14623.) One psychiatrist who interviewed Winbush believed that psychoactive medications were not indicated, but his aggressive potential was above average. (187-RT 14623-24; Exh. 162.)

One psychiatrist believed Winbush had sadistic personality tendencies; he was likely to run away under stress; he was very untrusting of others; he would use other people as objects; and he was likely to relate on superficial levels. (187-RT 14624-25; Exh. 163.)

Two reports agreed about Winbush's explosiveness and destructiveness. Winbush experienced very intense emotions, particularly rage and depression, which he had trouble containing. He had trouble getting along with peers. If he could not be top dog he resorted to verbal and physical attacks. (187-RT 14625; Exh. 164.) At age 14, Winbush's extensive involvement in the juvenile justice system and significant placement failures placed him at high-risk for an incomplete rehabilitation. (187-RT 14626; Exh. 166.)

Winbush's long history of aggressiveness at school, in the home, and in the community indicated that his potential for violence was high. Mrs. Winbush, by her own report, was not able to control her son and at times had felt intimidated by and fearful of his angry outbursts. (187-RT 14626-27; Exh. 167.) Winbush would not stabilize his behavior in juvenile

hall. He had no fear of authority figures; had his primary needs met by juvenile hall staff until recently; and had stated that he would "run" from any program. (187-RT 14627-28; Exh. 173.)

The report indicated that Winbush remained resistant and evasive concerning any meaningful discussion of his personal history. Winbush was not on any psychotropic medication at age 14, and his mother was reportedly opposed to any psychotropic medication. Winbush was extremely defensive, guarded, and under-socialized, did not express guilt or remorse for his actions, denied responsibility for his misbehavior, and had a high potential for violence. (187-RT 14629.)

One of the situations in which Winbush did the worst was when people were trying to get him to comply with rules. If he went to prison for life, where people were constantly trying to get him to comply with rules, he could become angry and violent. (187-RT 14631.)

M. The Prosecutor Forced Dr. Candelaria-Greene To Suggest Winbush Fit The Criteria For Antisocial Personality Disorder (ASPD), Even Though She Was Not A Psychologist And Protested It Was Outside Her Range Of Experience And Expertise

Dr. Greene was not familiar with ASPD, as she was not a psychologist, so it was outside her range of experience and expertise. (184-RT 14486.) According to the DSM, ASPD is a more modern term than psychopath or sociopath. (184-RT 14503.) Dr. Greene relied on the DSM when she was obtaining information about attention deficit disorder with hyperactivity and conduct disorder. She was not familiar with the entire DSM manual as she was not a psychologist and could not say if a person with ASPD was also referred to as a psychopath or sociopath. (184-RT 14488, 14503.)

The prosecutor showed Dr. Greene a copy of the elements of ASPD in the DSM-IV and led her through the 15 elements of conduct disorder (precursor to ASPD), and she agreed that Winbush appeared to have a lot of them. (184-RT 14486-14502; Exhs. 176, 177. 177A.) The doctor did not focus on conduct disorders, but on learning disabilities, and focused on ADHD because that was her area of expertise. About 50 percent of those with ADHD also have conduct disorder, although up to two-thirds of those with ADHD also have some kind of psychiatric disorder. (187-RT 14639-40.)

It was not surprising to Dr. Greene that Winbush would have these types of behaviors. But as a learning specialist primarily, not a psychologist, Dr. Greene believed it was appropriate to focus on those things in which she had expertise. (186-RT 14572.) Despite her lack of expertise, the prosecutor led Dr. Greene through the seven elements of ASPD, three of which must be met for a diagnosis. (184-RT 14504.)

Winbush appeared to qualify under factor 1: Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest. (184-RT 14504-06.) Winbush was arrested more than 25 times in his life, according to the prosecutor. (184-RT 14504.)

Dr. Greene said there were indications of Factor No. 2: Deceitfulness as indicated by repeated lying, use of aliases or conning others for personal profit or pleasure. The prosecutor pointed out that Winbush used aliases and lies, and presented a "hypothetical" that would support factor No. 2 if Winbush had told a lot of lies to the police about the murder that he had been convicted of and then he came to the courtroom and testified for a number of days and lied to the jury. (184-RT 14508-09.)

Dr. Greene definitely believed Winbush met Factor No. 3: Impulsivity or failure to plan ahead. Winbush had very low impulse control. (184-RT 14517.) When people tried to tell him to follow the rules or confront him he became angry at times. Winbush could make plans; however, the degree of the planning was very short-sighted and ineffective. (184-RT 14508-09.) Winbush had some executive functioning ability, but it was poor. From what she has seen, Winbush was capable of premeditating a murder. (186-RT 14517, 14552.)

The prosecutor asked a hypothetical about Winbush getting mad for being short-changed for dinner while in the CYA and assaulting guards after oiling his body. (184-RT 14509-11.) Dr. Greene responded that individuals with classic ADHD can plan ahead in certain circumstances, but do not plan it through to the end. (184-RT 14511.)

With respect to a hypothetical about Winbush's role in Beeson's murder (184-RT 14511-16), Dr. Greene responded:

> It shows all of those things that we would ordinarily associate with executive functioning, however, during the incidents that you described, he would have an artificial form of psycho stimulants pulsing through his body. In other words, the adrenalin (or anger) that he would be experiencing during times of criminal activity or when he was under stress would most likely imitate the effects of psycho stimulants (which help ADHD). (184-RT 14516-17.)

If, hypothetically, Winbush engaged in a pattern of threatening witnesses to dissuade them from contacting the police and prevent them from coming to court to testify, Dr. Greene agreed that was planning behavior that foresaw at least suspected consequences to his actions. (186-RT 14551.) If, hypothetically, Winbush made efforts to get a witness to give a false alibi, then Dr. Greene agreed that was behavior that would

indicate some realization of a connection between the action and consequence. (186-RT 14551.)

Dr. Greene agreed that Winbush met Factor No. 4: Irritability and aggressiveness as indicated by repeated physical fights or assaults. (186-RT 14552.) Dr. Greene agreed that Winbush met Factor No. 5: Reckless disregard for the safety of self or others, but particularly focusing on reckless disregard for the safety of others. (186-RT 14552-53.) Because Winbush had been locked up so much of his life, she could not evaluate Factor No. 6: Consistent irresponsibility as indicated by repeated failure to sustain consistent work behavior or honor financial obligations. (186-RT 14553.)

Dr. Greene agreed that Winbush probably met Factor No. 7: Lack of remorse as indicated by being indifferent to or rationalizing, having hurt, mistreated or stolen from another. (186-RT 14553-54.) Dr. Greene had seen many indications that Winbush did not show guilt or remorse for the things that he had done, and he did not show apparent caring or consideration for his actions on others, based on the reports of violence towards others. (186-RT 14554.)

Dr. Smith, who had not conducted any psychological or educational assessment of Winbush, reported: "Grayland appears under-socialized, because 1) he has no peer group ties; 2) he does not sustain himself; 3) he does not appear to feel guilt; 4) his verbal attacks suggest he blames others; and 5) there is no evidence he feels concern about the welfare of others. (186-RT 14555-57.)

Dr. Greene concluded that Winbush met at least five out of seven of the above factors to diagnose ASPD. (186-RT 14557.) In addition, Winbush met Factor No. B, because he was over 18 years old, and he

met Factor No. C because he was previously diagnosed with conduct disorder. (186-RT 14557.) She did not know if Winbush met Factor No. D, because there was no indication that he suffered from schizophrenia or manic episodes, but she was not a psychologist. The doctor did not recall seeing any indication that Winbush was suffering from schizophrenia or manic episodes. (186-RT 14557-59.) From her limited awareness, she could not make a definite diagnosis. (*Ibid.*)

INTRODUCTION TO ARGUMENT

The argument is divided into three sections. The first section deals with jury selection and pretrial issues. The second section deals with guilt phase issues. The third section deals with penalty phase issues.

The errors in this close case were prejudicial, where the jury deliberated about nine hours over three days before returning guilty verdicts and deliberated about 13 hours over four days before returning a verdict of death as to Winbush and an LWOPP verdict as to Patterson. (11-CT 2716-2722, 2881-2892; see *In re Martin* (1987) 44 Cal.3d 1, 51 [lengthy deliberations]; *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1140-1141 [three days of deliberations].)

ARGUMENT

SECTION 1 – PRETRIAL ISSUES

I. WINBUSH REQUESTS THIS COURT TO REVIEW THE TRIAL COURT'S RULINGS ON HIS *PITCHESS* MOTIONS TO DETERMINE WHETHER THE RULINGS DENYING ACCESS TO RELEVANT RECORDS DENIED HIM HIS CONSTITUTIONAL DUE PROCESS RIGHT TO PRESENT A DEFENSE AND CROSS-EXAMINE WITNESSES

A. The Relevant Facts

On July 18, 1996, Winbush filed his first motion for discovery under Evidence Code section 1043 for the Penal Code section 832.5 personnel records of Sergeants Olivas and J. Madarang. (1-CT 111-115.) On August 14, 1996, the court deferred ruling, because there were no files. (1-CT 118, 122.)

On April 10, 2000, Winbush filed a motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), to discover any citizen complaints against Sergeants Olivas and McKenna concerning dishonesty, use of excessive force, and improper interrogation techniques, such as promises of leniency and threats. (3-CT 654-667.)

On May 26, 2000, the court reviewed the files in camera only for "promises of leniency or improper interrogation tactics, not acts of dishonesty under *People v. Wheeler* (1992) 4 Cal.4th 284, and found no discoverable information. (3-CT 695-696; 1-Supp. RT 65-71 [confidential].)

On August 15, 2000, the court reviewed the files in camera on Patterson's motion, and found no discoverable information about the named officers for coercive or otherwise inappropriate interview techniques. (3-CT 707-709.) On December 3, 2000, the court, after an in

camera hearing, turned over some discoverable information to the defense. (1-CT 108, 68-106; 2-RT 17-18.)

On June 28, 2002, Winbush filed motions under *Pitchess* to discover CYA officers' histories and Alameda County Sheriff officers' histories. (5-CT 1155-1175; 1176-1188; 2-RT 18, 28-37, 41-45; 3-RT 57.)

On July 12, 2002, the court found Winbush had failed to make a showing of a specific factual scenario establishing a plausible foundation and denied without prejudice Winbush's request for an in camera hearing. (5-CT 1221; 3-RT 58-63, 79-86.) On July 24, 2002, Winbush refiled his two *Pitchess* motion with newly-expanded affidavits. (6-CT 1287-1311, 1312-1328; 4-RT 110-122.) On August 29, 2002, the Attorney General filed opposition. (6-CT 1429-1447.) On August 30, 2002, the court again found insufficient allegations. (6-CT 1448; 4-RT 129-133.)

Under *People v. Memro* (1985) 38 Cal.3d 658, 687-689, the court found Winbush had provided a plausible factual foundation for Officers Smith and Barkas with respect to aggression and perjury which trumped *Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, 158 and *Arcelona v. Municipal Court* (1980) 113 Cal.App.3d 523, 531, but found no foundation to provide records for Officers Godfrey and Marquez. (4-RT 161-171.) The court was not inclined to turn over verbatim reports, but only the names of persons who had filed complaints (4-RT 172.)

The court stated it would preserve all the personnel files for appellate review and correctly held an in camera hearing under *People v. Mooc* (2001) 26 Cal.4th 1216 after finding "good cause" under Evidence Code section 1043. (4-RT 178-180; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 82-84.)

On August 29, 2002, the CYA filed points and authorities opposing Winbush's *Pitchess* motion. (6-CT 1429.)

On September 3, 2002, Winbush filed another *Pitchess* motion seeking the training records of Olivas and McKenna. (6-CT 1452; 5-RT 185.) During the in camera hearing on Winbush's *Pitchess* motion held on September 3, 2002, the court stated that it would place under seal for appellate review all the records it reviewed. (6-RT 238-239, 252.) The Alameda County Sheriff argued that Winbush had not shown good cause for the records of certain deputies. (6-RT 247-249.) Winbush stated he sought *Brady* material concerning any reports of lying or fabrication by any officers. (6-RT 260.) Winbush contended that denying him the time to wash off soap on his body in the shower was aggressive behavior. (6-RT 265.) The Sheriff disagreed, citing *California Highway Patrol v. Superior Court (Luna)* (2000) 84 Cal.App.4th 1010, and *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1. (6-RT 268.)

The court ruled that Winbush had established a plausible factual foundation warranting in camera review of all the documents for all the guards except Officers Huber and Mullin, because the fact that Officer Huber would not turn the shower back on was not sufficient, and Deputy Mullin arrived after Winbush was secured and had nothing to do with the fight. (6-RT 269-274.)

On September 4, and 5, 2002, the court reviewed the CYA officers' files in camera under *Pitchess*. (6-CT 1516, 1527; 7-RT 327-381; 8-RT 382-418 [sealed].) The court stated it had reviewed and paginated 254 pages of records. (8-RT 421-422.) The court agreed to give the documents to defense counsel for discovery, without ruling on their admissibility. (8-RT 435, 465.) The court stated it was giving the defense

access to nearly all the documents, including verbatim reports. (8-RT 438-447, 454.) The court issued a limited protective order with respect to this material. (8-RT 459-461.)

On September 11, 12, 18, 2002, the court reviewed the Alameda County Sheriff officers' files in camera under *Pitchess.* (6-CT 1520-1527; 9-RT 466 through 11-RT 666.) On September 20, 2002, the court gave Winbush access to some redacted documents about Officer Dwight Smith under a protective order, while preserving the original file in the court file, and ordered discovery about numerous other incidents (6-CT 1520-1527; 12-RT 667-670.)

The court relied on *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84, to deny Winbush's request for the inmates' grievances concerning what they wrote down and would reveal only the name, address, phone number of the inmates, and the dates of their complaints. (12-RT 682-683.) Winbush requested the current addresses under *Pitchess.* The court disagreed:

> "In this context, the courts have generally limited the criminal defendant to the names, addresses and telephone numbers of the prior complainants/witnesses unless the defendant shows he or she has been unsuccessful in obtaining the relevant information. (See *People v. Matos* (1979) 92 Cal.App.3d 862, 868." (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1090.) (12-RT 684.)

The court issued protective orders with respect to the files on Officers Lannon, Bradley and Eggers. (6-CT 1555-1557; 12-RT 687-688.)

The court reviewed the files in camera, listing them, and found no other discoverable information. (12-RT 695-696, 704.)

B. The Relevant Law

The issue before this Court is whether the trial court released all information to which Winbush was entitled under Evidence Code section 1045(b), which requires the trial court to determine whether the privileged information contains any material relevant to the defense. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220.) A trial court's decision on the discoverability of material in police personnel files is reviewable under an abuse of discretion standard. (*Id.* at 1220-1221.) Therefore, Winbush requests this Court to review the sealed record of the in camera proceedings to determine whether the trial court abused its discretion in not releasing "all relevant and reasonably accessible information." (*Ibid.*; *People v. Mooc* (2001) 26 Cal.4th 1216, 1225-1232; *Pitchess v. Superior Court, supra*, 11 Cal.3d at 535.)

If the trial court denied Winbush relevant information, then it denied him his constitutional rights to present a defense and confront, cross-examine, and impeach witnesses, and his conviction must be reversed because the error was not harmless beyond a reasonable doubt. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691; *Delaware v. Van Arsdall* (1986) 475 U.S. 673 684.) As in *People v. Memro* (1985) 38 Cal.3d 658, 684-685, the error is prejudicial, because it deprived Winbush of the possibility of presenting relevant evidence concerning the witnesses against him. Because Winbush does not have access to the in camera hearings, Winbush must rely on this Court's review of the reporter's transcript of the hearings and the materials reviewed by the trial court. Winbush cannot argue prejudice further without access to the material the court declined to release to Winbush.

II. THE COURT VIOLATED WINBUSH'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS AND HIS RIGHT TO AN IMPARTIAL, REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY, AND A RELIABLE DETERMINATION OF PENALTY, BY DENYING HIS *WHEELER/BATSON* MOTIONS AFTER THE PROSECUTOR PEREMPTORILY EXCUSED ALL THREE AFRICAN-AMERICANS FROM THE JURY

A. The Relevant Facts

Winbush, who is African-American, made three *Wheeler/Batson* motions, after the prosecutor used his second peremptory challenge against African-American Prospective Juror, E.T.; his sixth challenge against African-American Prospective Juror, B.C.; and his tenth and last challenge against African-American Prospective Juror, T.W., thereby eliminating all African-Americans jurors from sitting on Winbush's jury. (104-RT 6630, 6632, 6636-6637, 6666-6670, 6673.) Thus, the prosecutor exercised ten peremptory challenges, and used three of them, or 30 percent, to excuse 100 percent of the prospective African-Americans jurors who were chosen for the jury. (104-RT 6669-6673.)

There were only four black jurors in the jury pool of about 68, but the fourth black, a Mr. Vernon, was number 66, who never would have been reached because the defense had used five challenges. (104-RT 6671-6672.)

The prosecutor first excused R.C. (104-RT 6629.) In his jury questionnaire, R.C., a 50-year-old engineer and Republican, stated he was moderately in favor of the death penalty, but was not sure how he would feel if he had to decide that fate for someone. (73-CT 20693-94, 20703, 20726.) During voir dire, he explained that he could return a death

verdict, but would consider all factors, especially in light of the death penalty cases recently overturned in Illinois due to coerced pleas or DNA exonerations. (79-RT 4758-4761.)

The prosecutor used his second peremptory challenge to excuse E.T., an African-American woman. (104-RT 6630.) Winbush made his first *Wheeler/Batson* motion. (104-RT 6630.) The court deferred a ruling until the end of the jury selection process. (104-RT 6630.)

The prosecutor used his third peremptory challenge to excuse P.S. (104-RT 6631.) In her jury questionnaire, P.S., a 55-year-old nurse, stated she was moderately in favor of the death penalty, which is a "necessary avenue." (157-CT 44600.) During voir dire, P.S said that, while she is Catholic, the church's position on the death penalty would not interfere with her ability to return a death verdict. (96-RT 6026-6027.)

The prosecutor used his fourth peremptory challenge to excuse S.H. (104-RT 6631.) In his jury questionnaire, S.H. , a 37-year-old post-doctoral molecular biologist, stated he was neutral with respect to the death penalty, but felt it could be considered for premeditated murder if strong evidence was provided, and in extreme cases. (174-CT 49648-49, 49680-81.) In voir dire, he stated he was not close-minded and could impose the death penalty or not, depending upon the evidence. (100-RT 6300-6303.)

The prosecutor used his fifth peremptory challenge to excuse C.I. (104-RT 6631.) In his jury questionnaire, C.I., a 26-year-old, Samoan, Fed-Ex worker from Guam, stated that he was moderately in favor of the death penalty, and that "if an individual voluntarily kills another, that individual should suffer the same consequence." (73-CT 17861-62, 17894; 80-RT 4795.) He did not think the felony murder rule was fair if the

felon had no intention to physically harm or kill another. (73-CT 17882-83.) He would always vote for death if he thought that "the killing was intentional for the purpose of robbery." (73-CT 17896.) In voir dire, he clarified that he would wait to determine the appropriate penalty until he heard all the penalty phase evidence. (80-RT 4783-4785.) He said he would most likely not vote for death if only one person had been killed who had not been raped or mutilated; whereas he would be more inclined to apply the "eye for an eye," maxim if it involved a child. (80-RT 4786-4788.) He would keep an open mind. (80-RT 4794.)

The prosecutor used his sixth peremptory challenge to excuse a second African-American, B.C. (104-RT 6628-6632.) Winbush then made his second *Wheeler/Batson* motion. (104-RT 6632.) The court again deferred a ruling until the end of the jury selection process. (104-RT 6632.)

The prosecutor used his seventh peremptory challenge to excuse P.B. (104-RT 6633.) In her jury questionnaire, P.B., a 47-year-old elementary school teacher, stated the criminal justice system was "effective for the most part, but mistakes about guilt or innocence have been made," and that poverty may play a role in the system, making her unsure if it was fair to minorities. (147-CT 41688-89, 41707.) She was moderately against the death penalty, though not opposed in all circumstances, but would find it difficult to vote to put someone to death, and would prefer to vote for life without possibility of parole (LWOPP). (147-CT 41721-23.) In voir dire, she clarified that she was not opposed to the death penalty in all cases, but the "aggravating circumstances would have to really clearly show to me the death penalty was appropriate." (91-RT 5702-5704.) She also stated that despite her concerns about innocent

people on death row in Illinois, she could give serious consideration to the death penalty, even without DNA evidence, if the aggravating circumstances were sufficient. (91-RT 5706-5710.) The prosecutor asked her if she "could live with their blood on [her] hands," to which the court sustained a defense objection. (91-RT 5710.) The court denied the prosecutor's challenge for cause. (91-RT 5711-5716.)

The prosecutor used his eighth peremptory challenge to excuse K.H. (104-RT 6634.) In her jury questionnaire, K.H., a 48-year-old UPS driver, stated she was moderately for the death penalty, which was a fair sentence in some cases, though she would not always vote to put someone to death. (16-CT 4330-4331, 4363-4365.) In voir dire, she clarified that as a juror on a murder case the jury reached a verdict on an aggravating assault on a child, but failed to reach a verdict on the murder charge. (71-RT 4128.) The court denied the prosecutor's request to reopen voir dire so that he could question K.H. about the hung jury, the vote, and whether she was with the majority or minority. (91-RT 4135.)

The prosecutor used his ninth peremptory challenge to excuse C.R. (104-RT 6635.) In his jury questionnaire, C.R., a 35-year-old director of research for a medical company, stated that he was moderately in favor of the death penalty, and supported it for "sufficiently heinous crimes." (107-CT 30285-86, 30318-20.) In voir dire, he said that he would not "tend to favor the death penalty in a case where a woman was stabbed and strangled during a robbery, but was not raped or "cut up into pieces and spread all over Kansas." (87-RT 5437-5438.)

Finally, the prosecutor used his tenth peremptory challenge to excuse a third African-American, T.W., as soon as he was seated. (104-RT 6636.) Winbush made his third *Wheeler/Batson* motion. (104-RT

6636.) The court again deferred a ruling until the end of the jury selection process. (104-RT 6636.) After the defense peremptorily excused another juror, and now that there were no blacks on the jury for the first time, the prosecutor accepted the jury, and so did the defense. (104-RT 6636-6637.)

According to the 2000 U.S. Census, the racial composition of Alameda County two years before jury selection was 41 percent white; 21 percent Asian; 16 percent Latino; and 15 percent black. (Lopez, *Racial/Ethnic Diversity and Residential Segregation in the San Francisco Bay Area, supra,* at 2.)

A remarkable 38 percent of the jurors on Winbush's Alameda County jury were from the relatively small community of Livermore with a population of 73,345 or about 5 percent of the population of Alameda County. (pop. 1,443,741). (*Id.* at 2, 13.) The chance that a person living in Livermore would have a black neighbor was extremely unlikely, as its population was 74 percent white and only 1.49 percent black. (*Ibid.*)

Equally remarkable, the prosecutor peremptorily excused both of the black prospective jurors from Oakland, leaving one white, 64-year-old woman from Oakland on the jury. (184-CT 52313-14; 105-RT 6845.) Oakland has a population of 399,484 or about 27.7 percent of Alameda County -- with more than five times as many residents as Livermore. In sharp contrast to Livermore, Oakland is predominantly black (35.08 percent black and 23.52 percent white). (Lopez, *Racial/Ethnic Diversity and Residential Segregation in the San Francisco Bay Area*, *supra,* at 2, 13.)

The twelve jurors who actually served on Winbush's jury included eight whites, two Asians, two Latinos, no blacks, four jurors from

Livermore and one juror from Oakland. (105-RT 6841-6842.) On a jury of twelve, if race were not an issue, however, one would have expected five white jurors, three Asian jurors, two Latinos, two blacks, and no more than one juror from Livermore and three jurors from Oakland.

On a jury of 18 people, including alternates, one would have expected seven or eight white jurors, four or five Asians, three Latinos, three blacks, one juror from Livermore and four jurors from Oakland. Instead, Winbush's jury consisted of 13 jurors who described themselves as Caucasians, three Hispanics, two Asians, and no blacks; *seven* jurors were from Livermore and one juror from Oakland. (105-RT 6841-6842.) Of the three jurors who identified as Hispanics, Juror No. 3 described herself as Spanish; Juror No. 5 identified himself as Puerto Rican; and Juror No. 14 identified himself as Hispanic. (105-RT 6842.) Juror No. 12 identified himself as Filipino and Juror No. 15 described himself as Asian. (105-RT 6842.)

Obviously, the prosecutor exercised his peremptory challenges to exclude all African-Americans, and all but one juror who lived in the predominately black city of Oakland, and loaded the jury with non-black jurors from one of the most lily-white towns in Alameda County: Livermore.

B. The Parties' Arguments

When the court heard Winbush's *Batson/Wheeler* motions after jury selection was completed, his attorneys argued that the prosecutor's questioning of black jurors "was quite different than it was for the white jurors." (104-RT 6673.) The prosecutor asked the black jurors about something from their questionnaires, which was unusual. (104-RT 6673-6674.) Two of the excused blacks were neutral on the death penalty

and one was pro-death penalty. (104-RT 6674.) Of the 12 jurors who were chosen for Winbush's jury, one was strongly pro-death, six moderately pro-death, and five were neutral. (104-RT 6674.) Winbush argued that the characteristics of the challenged jurors were essentially the same as the non-challenged jurors. (104-RT 6675.)

After Winbush had stated his objections, the court found a prima facie case, and asked the prosecutor for his non-racial reasons for excusing the three African-Americans jurors. (104-RT 6682-6683.) The prosecutor gave remarkably well-prepared, lengthy explanations for each of the three jurors: E.T. (104-RT 6684-6693), B.C. (104 RT 6693-6708), and T.W.. (104-RT 6708-6718.)

Winbush strenuously disputed the prosecutor's argument that a race-neutral explanation can include the fact that the defense did not ask any questions of a juror, which inferentially meant the defense found him or her favorable. (104-RT 6723-6725, 6738-6739.) Winbush had argued that attorney voir dire under current statutes is limited and counsel may have nothing to ask a juror after thorough voir dire by the court. (104-RT 6723-6725.)

C. The Court's Ruling

The court denied Winbush's *Batson/Wheeler* motion, finding that the prosecutor's "stated reasons are, in fact, supported by the record and they are inherently plausible," and "the truth." (104-RT 6763-6764, 6776, 6799-6800.) Any one of the reasons articulated by the prosecutor "would have been a valid and race-neutral reason . . . supported by the record, and plausible to justify excusing the juror." (104-RT 6778-7679.) The court found the prosecutor used exactly the same pattern of questioning

all of the jurors, and did not show a "preconceived and predetermined decision by him that he was going to excuse them regardless of what they say." (104-RT 6765-6766.)

The court found there were dramatic differences in approach by counsel to each individual juror. Defense counsel asked very few questions of several jurors, including two of the three jurors that were the subject of this motion. (104-RT 6767.) Under *People v. Ervin* (2000) 22 Cal.4th 48, 75, that can be an appropriate reason for excusing the juror, because it would draw the prosecutor's apparently justified suspicions regarding the juror's neutrality. (104-RT 6773-6775.)

With respect to Prospective Juror E.T, the court found she had mixed feelings about the death penalty, where she stated only God can take a life: "Who are we to take a life? Such remarks were "startling and dramatic statements of a reservation regarding the application of the death penalty based on what appear to be strongly held religious beliefs." (104-RT 6768-6769; see *People v. Catlin* (2001) 26 Cal.4th 81, 115-119.) The court found that this alone would justify the prosecutor excusing this juror. (104-RT 6770.)

The court found that another reason to excuse E.T. was her attitude towards law enforcement, as reflected in a police report about the juror's arrest on August 30, 1986 for "substantial unlawful conduct," which she tried to minimize. (Exhibit 98.) E.T. physically interfered with the activities of an officer in such a way that a person who had a no bail felony arrest warrant was successful in escaping. (104-RT 6771-6772; see *People v. Sanders* (1990) 51 Cal.3d 471, 500 [juror was arrested for violation of section 148 of the Penal Code but was never charged].)

With respect to B.C., she had participated on a jury that was unable to reach a verdict on the most serious charge, where she was the foreperson and instrumental in encouraging the jury to take the easy way out. (104-RT 6777; *People v. McCaskey* (1989) 207 Cal.App.3d 248, 255; *People v. Turner* (1994) 8 Cal.4th 137, 168-172; *People v. Rodriguez* (1999) 76 Cal.App.4th 1093, 1099-1100.)

The court found that B.C. expressed repeatedly in her questionnaire and in the courtroom that a defendant who could afford a private attorney would have a better chance in court, and an indigent defendant would be suffering a significant and subtle disadvantage in the system. (104-RT 6780.) Moreover, B.C. left the courtroom with the impression that the attorneys in this case were working for free, which could lead to feelings of sympathy for the defendants because they were not being adequately represented because they could not afford to pay their lawyers, and thus the prosecutor had "every reason to fear that that juror was forever poisoned . . . by the representations that were made." (104-RT 6781-6783; *People v. Pride* (1992) 3 Cal.4th 195, 230.)

The court found that B.C.'s concerns regarding the rape of her daughter, and the fact the District Attorney's Office had not charged the case was another reason to excuse her, despite her denials that it had unset her. (104-RT 6783-6784.)

B.C. had an affirmative, immediate and unequivocal response to defense attorney Krech when he asked whether it was possible that a person can falsely confess to a crime that he did not commit, unlike many other jurors who had reservations and hesitations; the court stated that this could reasonably lead to a concern about whether B.C. could be fair in

the case where the issue of a false confession was the heart of Winbush's defense. (104-RT 6785-86.)

T.W. was the subject of a challenge for cause which the court denied, but those reasons were sufficient for the prosecutor to use a peremptory challenge. (104-RT 6788; see *People v. Johnson* (1989) 47 Cal.3d 1194, 1216-1219; *People v. Pride* (1992) 3 Cal.4th 195, 230; *People v. Jones* (1998) 17 Cal.4th 279, 294; *People v. Mayfield* (1997) 14 Cal.4th 668, 724-725.)

The court also found that T.W. had stated that innocent people are going to jail and the system was unfair to blacks. T.W. was concerned about the number of blacks on death row. And it was unlikely he could return the death penalty for two defendants where there was but one victim. (104-RT 6790-6795.) The court found that the prosecutor was well within his rights to conclude that T.W. could not be fair to him or the People, and to excuse him for cause. (104-RT 6795-6796.)

The court found it was legitimate for the prosecutor to have some concern that T.W. was not totally candid about his criminal past. (*People v. Box* (2000) 23 Cal.4th 1153, 1186.) T.W. indicated that he had a very low opinion of the Oakland Police Department in the past, and a preconception that whites would not fairly evaluate the case. (104-RT 6795-6799.) The court found that these reasons were not sham excuses belatedly created to excuse impermissible conduct. (104-RT 6795-6799.)

D. This Court Should Conduct A Comparison Of The Three Excused African-American Jurors With The Jurors Who Served, To Determine That Winbush Proved Racial Discrimination

This court should conduct a comparison of the three excused African-American jurors with the 18 trial jurors and alternates – the 13

white jurors, the Hispanic juror, the Puerto Rican juror, the "Spanish" juror, the Filipino juror, and the Asian juror -- to determine that Winbush proved racial discrimination. While Winbush presents the facts showing a discriminatory intent with respect to all three African-Americans jurors, *Batson* error may be found if only one juror was impermissibly excused, while considering all peremptory challenges.

In *Snyder v. Louisiana* (2008) 552 U.S. 472, 478, the Supreme Court held that because "the trial court committed clear error in overruling petitioner's *Batson* objection with respect to Mr. Brooks, we have no need to consider petitioner's claim regarding Ms. Scott . . . [I]f there were persisting doubts as to the outcome, a court would be required to consider the strike of Ms. Scott for the bearing it might have upon the strike of Mr. Brooks." (*Ibid.*) The Court then proceeded to do an in-depth comparative juror analysis at the third stage, finding, in one instance, that the "implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks." (*Snyder v. Louisiana*, *supra,* 552 U.S. at 478-485.)

There is no requirement that jurors be identically situated in order for meaningful comparison to take place. (*See Miller-El v. Dretke* (2005) 545 U.S. 231, 247, fn.6 [*Miller-El II*].) "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination." (*Id.* at 241.)

In *People v. Lenix* (2008) 44 Cal.4th 602, 620-622, fns. 14 & 15, this court approved of comparative juror analysis for the third stage, citing *Miller-El, II, supra,* 545 U.S. 231. Winbush explicitly engaged in

comparative juror analysis in attempting to meet his burden of showing racial discrimination. When the jurors who sat on Winbush's jury are compared with the three African-Americans whom the prosecutor excused, it is clear that Winbush had met his burden of showing that one or more of the black jurors were excused based on race discrimination.

In *People v. Snow* (1987) 44 Cal.3d 216, 225, and *People v. Huggins* (2006) 38 Cal.4th 175, 236, which involved an Alameda County jury, the prosecutor had accepted two or three black jurors, which this Court found to be "an indication of the prosecution's good faith in exercising his peremptories." In contrast to those cases, Winbush's prosecutor challenged all the African-American jurors. (104-RT 6669-6670, 6673.) It is also relevant that Winbush was a member of the excluded group, and "especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong." (*People v. Kelly* (2007) 42 Cal.4th 763, 779-780, citing *Wheeler, supra*, 22 Cal.3d at 280-281.)

This is further evidence that suggests that this court should reconsider its rejection of a declaration of former Alameda County Deputy District Attorney John R. Quatman, dated May 29, 2003, that it was standard practice for Alameda County prosecutors to exclude Jewish jurors and African-American women from capital juries. (*In re Freeman* (2006) 38 Cal.4th 630, 633.)

Because Winbush's jury consisted of 13 Caucasian jurors, three Hispanic jurors, two Asians, and a remarkable seven of the 18 jurors were from the relatively small community of Livermore, with a population 74 percent white and 1.49 percent black, this Court should conduct a comparison of the three African-American prospective jurors, whom the

prosecutor peremptorily excused, with the twelve jurors and the six alternate jurors the prosecutor allowed to sit on Winbush's jury. (105-RT 6841-6842.)

1. The Prosecutor's Peremptorily Challenged E.T., An African-American Juror

When the prosecutor excused E.T. with his second challenge, Winbush made his first *Wheeler/Batson* motion in response. (104-RT 6630.) E.T. was a 55-year-old married black woman from Oakland, who had worked as a credit manager. (58-CT 16426-27.) She had once been charged with impeding or obstructing justice. (58-CT 16440.) About nine years earlier, her husband retired from the INS, where he had been a special agent. (58-CT 16444.) In her juror questionnaire, she stated she thought the criminal justice system "has proven to be fair." (58-CT 16445.) She thought minorities were treated fairly by the criminal justice system. (58-CT 16445.) She agreed with the felony murder rule and aiding and abetting. (58-CT 16447-48.)

She described herself as neutral with respect to the death penalty, but actually appeared to be in favor of it, explaining that "If you take a life be prepared to give up your life." (58-CT 16459.) During voir dire, she explained that she could consider life in prison. (79-RT 4721-4722.) Although she was not against capital punishment, she did not "believe that somebody should just be able to take somebody else's life, either." (79-RT 4726.) She could vote for death under the circumstances of Winbush's case. (79-RT 4726-4748.) She could still vote for death, although she believed that, according to the Bible, "only God is supposed to be able to really take somebody's life." (79-RT 4728.) She explained that she and a police officer had a verbal altercation, after which she was

arrested, but then not charged. (79-RT 4724-25.) Defense counsel asked several questions. (79-RT 4729-30.)

The prosecutor disagreed with Winbush's view that E.T. was fully candid about her arrest for resisting arrest. He argued that she did not mention in her voir dire that she refused to identify herself to the police officer; she did not mention that she blocked the path of the officer while he was trying to arrest a felon; and she did not mention that she was so successful in blocking his path that the felon escaped.[22] Those were significant points that left the prosecutor "with a very uneasy feeling about her." The prosecutor protested that the reasons he gave for excusing this juror were race-neutral, and that he had supported them with case law. He stated that those reasons were true and sincere and were the actual reasons why he exercised a peremptory challenge for this juror and the other jurors. (104-RT 6754.)

2. The Prosecutor's Peremptorily Challenged B.C., An African-American Juror

When the prosecutor excused B.C. with his sixth challenge, Winbush made his second *Wheeler/Batson* motion in response. (104-RT 6630-6632.)

B.C. was a 54-year-old married black woman from Union City, who worked as a receptionist at the Safeway corporate office. (CT-87 24546-47.) In her juror questionnaire, she said she had been on two juries and

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22. It appears the prosecution may have singled out this black juror for investigation, going as far as obtaining the police report of the incident, something that the prosecution appeared to do for only a few jurors, including T.W., another peremptorily-excused African-American, who failed to mention a 20-year-old arrest for public intoxication until voir dire. (102-RT 6459, 6497-6503, 6510-6512; Exh. 97.)

was the foreperson on a criminal trial. (CT-87 24559-60.) She had a "good feeling" about police officers, having worked with them at her last job. (CT-87 24561.) Her daughter was raped by a high profile person two years earlier, but he was not charged or convicted. (CT-87 24562.) She explained that she wanted the criminal justice system to be stronger and that victims "don't seem to get the justice they deserve because of loopholes for the accused." (CT-87 24565.) She did not think minorities were treated fairly by the criminal justice system, given that they usually could not afford to pay a lawyer, in contrast to whites. (CT-87 24565.) She agreed with the felony murder rule and aiding and abetting liability. (CT-87 24567-68.) She thought drug dealers "should be stopped." (CT-87 24570.) She was moderately in favor of the death penalty, and would vote for the death penalty, which is needed under the right circumstances, and "some crimes warrant it." (CT-87 24579-80.)

During voir dire, B.C. explained that her daughter had been drugged and date-raped by a professional basketball player for the Warriors, but that Alameda County did not bring charges after an investigation. (86-RT 5292-5294.) She did not resent the police. (86-RT 5294.) She could return either a death or life verdict. (86-RT 5295-5296.) She could vote for death under the circumstances of Winbush's case. (86-RT 5296-5298.) It would be more difficult to reach a death verdict than a life verdict. (86-RT 5300.) With respect to the criminal case on which she served as foreperson, the jury found the defendant guilty of attempted robbery and possessing a concealed weapon, but could not agree on an attempted murder charge. (86-RT 5299.) B.C. was in the majority of a 9-3 vote. (86-RT 5299-5300.)

She thought it was wonderful that Winbush and Patterson had two lawyers each. (86-RT 5301.) She thought defendants have a better chance with a private lawyer than the Public Defender. (86-RT 5302.) Whether Winbush and Patterson could afford lawyers and whether the lawyers were court appointed would not affect her ability to listen to the evidence. (86-RT 5302-5303.) Counsel for Patterson told B.C. that there are private lawyers who participate in the system, "kind of like at Highland [Hospital] where you have doctors that donate time there? They are private, but they donate." (86-RT 5303.)

The prosecutor explained that he "certainly didn't find [B.C.] to be an insincere person." He was concerned, however, with her daughter's "rape situation" where a professional basketball player was able to get away with raping her daughter without charges being brought, even though she was not angry at the prosecutor's office for not charging her daughter's assailant. He also found relevant her concerns about wealthy defendants being able to buy their way out, in contrast to indigent defendants.

The prosecutor protested that the reasons he gave for excusing this juror were race-neutral, and that he had supported them with case law citations. He stated that those reasons were true and sincere and were the actual reasons why he exercised a peremptory challenge on this juror and the other jurors. (104-RT 6754.)

3. The Prosecutor's Peremptorily Challenged T.W., An African-American Juror

When the prosecutor excused T.W. with his tenth challenge, Winbush made his third *Wheeler/Batson* motion in response. (104-RT 6636.)

T.W. was a 57-year-old married black man from Oakland, who worked as a maintenance supervisor for 13 government buildings. (181-CT 51616-17.) His dealings with the police – reporting drug dealing – were positive. (181-CT 51631.) An innocent person going to jail was particularly upsetting to him, rather than any particular types of crimes. (181-CT 51632.) He thought the criminal justice system "is unfair to Blacks." (181-CT 51635.) He did not believe minorities were treated fairly; the "history of slavery" went "deep in this country." (181-CT 51635.) He agreed with the felony murder rule and aiding and abetting liability. (181-CT 51636-37.) He felt "very bad," about drug users, which he described as "scum." (181-CT 51640.) He was neutral with respect to the death penalty, and thought it "appropriate in some cases." (181-CT 51649.) His view about the death penalty had changed, "because of the number of black[s] on death row." (181-CT 51649.)

During voir dire, T.W. stated he believed that some white people had preconceived negative beliefs about black people, but explained that his views would not affect this case. (102-RT 6488-6490.) He attributed the disproportionate number of blacks on death row to poverty, poor education, and not having equal opportunities to achieve. (102-RT 6490.) He could still vote for death, even though the defendants were black, though it would be a "very difficult decision to make." (102-RT 6491-6492.) He thought the Oakland police department still needed improvement, but was "pretty good right now." (102-RT 6492.) He thought it was unlikely he could vote for death for two co-defendants when there was only one murder. (102-RT 6495.) To impose the death sentence, it would have to be a "pretty heinous, ugly kind of act." (102-RT 6495.) About 20 years earlier, he was arrested and jailed for having a

dispute with a taxi cab, after he had been drinking. (102-RT 6497.) He felt he was treated fairly. (102-RT 6497.) He did not mention this arrest for public intoxication until voir dire. (102-RT 6459, 6497-6503; Exh. 97.) Neither Winbush nor Patterson asked T.W. any questions. (102-RT 6497.)

The prosecutor asked for T.W. to be excused for cause for his previous arrest, which he did not disclose in his questionnaire, and his views about how blacks are mistreated in the criminal justice system. (102-RT 6500-6503.) The court denied the request. (102-RT 6518.)

4. The 12 Sitting Jurors and The Six Alternates

Juror No. 1 (149) was a white, married, 61-year old man from Livermore. (182-CT 51821.) He had been in the Marine Corps for four years. (95-RT 5948.) During voir dire, he stated: "A life is a life." He could vote for death. (95-RT 5946.) In fact, he stated that he would "automatically" vote for death after a murder verdict, "if no evidence changed it." (95-RT 5951.) On his juror questionnaire, he stated that he was moderately in favor of the death penalty, which was sometimes warranted. (182-CT 51854.) The court qualified him. (95-RT 5952-5953.)

Juror No. 2 (142) was a white, 41-year old woman from Hayward with a domestic partner who had pleaded guilty to a crime. (182-CT 51862, 51876.) On her juror questionnaire, she stated that the death penalty, which she was neutral towards, was used when necessary by the courts; that the death penalty was the right penalty in some cases, and she would vote based on the facts in the individual case. (182-CT 51895-97.) The court qualified her. (75-RT 4454-65.)

Juror No. 3 (69) was a Spanish, 50-year-old, married woman from Hayward, who worked on the staff of Pacific Bell. (182-CT 51903-04.) She stated she was strongly in favor of the death penalty, and in favor of the death penalty if circumstances warranted. (182-CT 51936.) The court qualified her. (85-RT 5250-62.)

Juror No. 4 was a white, semi-retired, 59-year-old divorced man from Emeryville. (182-CT 51944-45.) He had been convicted of drunk driving in 1984; and thought alcohol abuse was not a good thing. (182-CT 51967-68.) He was moderately in favor of the death penalty and believed it should be used in some cases. (182-CT 51977.) The court qualified him. (92-RT 5777-90.)

Juror No. 5 was a Puerto Rican, 37-year-old married man from Hayward. (182-CT 51985.) He believed that "empirical data has proven" that minorities are not treated fairly by the criminal justice system. (182-CT 52004.) In his juror questionnaire, he stated that "we need to be sure of all the facts (DNA) before we impose stiff death penalty." (182-CT 52012.) He believed that the death penalty was "appropriate when needed;" and that certain crimes need the death penalty, while professing he was neutral towards the death penalty. (182-CT 52018-19.) Prior to the start of trial, the court excused Juror No. 5 for serious family health issues. (105-RT 6845, 6878.) The court substituted the first alternate: Juror No. 13, a white woman, for Juror No. 5. (105-RT 6845-48.)

Juror No. 6 was a white, 40-year-old married woman and registered nurse from Livermore. (182-CT 52026-27; 76-RT 4519-31.) Her husband's 13-year-old niece had been killed by a serial killer in 1999. (182-CT 52042.) She believed that minorities were usually treated fairly by the criminal justice system, but not always. (182-CT 52045.) She

believed that the felony murder rule was fair: one should be completely responsible for one's actions. (182-CT 52048.) She was not opposed – neutral -- towards the death penalty "if the requirements by law are met," even though it was not "really activate[d]" in this state. (182-CT 52059.) She believed that previous contact with the criminal justice system should not be a factor in deciding who lives or dies. (182-CT 52061.)

Juror No. 7 was a white, 39-year-old married woman and customer services representative from Albany. (182-CT 52067.) She would like to see "possibly fewer rights for convicted felons." (183-CT 52087.) She believed the death penalty is a "just verdict for some cases," and said she was neutral on the death penalty. (183-CT 52100.) The court qualified her. (76-RT 4551-67.)

Juror No. 8 was a white, 69-year-old white woman from San Leandro. (183-CT 52108.) She wrote that it seems like money speaks, as in the O.J. and Ted Kennedy cases. (183-CT 52128.) She was moderately in favor of the death penalty, and favored the death penalty if facts "lead to no possibility of doubt." (183-CT 52141.) She described herself as "very religious, but felt that "one should pay penalty for wrong." (183-CT 52142.) The court qualified her. (75-RT 4431-51.)

Juror No. 9 was a white, 24-year-old married woman from Livermore. (183-CT 52149.) She believed that the felony murder rule was fair, whether or not the killers took a life on purpose. (183-CT 52171.) She was moderately in favor of the death penalty, because "if they did something bad they deserve the consequences for their actions." (183-CT 52182.) She was in favor of the death penalty because there were too many murderers in prison who could still kill. (183-CT 52183.) She thought that other crimes should not determine whether the death penalty

was appropriate in this case. (183-CT 52184.) Because she worked with Oakland Officer Marty Ziebarth's wife at Home Depot, she believed it would put a strain on her fellow employees for her to be a juror. (183-CT 52186.)

During voir dire, she explained that "bloody crimes are more upsetting and it would be a "little more" difficult to be objective, being in her 20's. (80-RT 4833.) She thought it would "probably not" be an appropriate case for her to be a juror because the victim was a young woman about her age who was strangled and stabbed in her home. (80-RT 4834.) She said: "It [probably] wouldn't really be fair" to the defendants for her "to be a juror in this case." (80-RT 4834.) She said she would try to forget "that part of it" [age and blood] "but it is hard not to relate it to yourself." (80-RT 4835.) It would make her feel "uneasy," but not unfair. (80-RT 4836.) Winbush challenged her for cause. (80-RT 4838.) Winbush argued that she would identify with the victim, being the same age, sex and hair color, and she could not promise that those similarities would not influence her. (80-RT 4841-4842.) The court found that the fact the prospective juror was 24 years old and a white female (and in the court's opinion did not resemble the victim) was not sufficient to exclude her. (80-RT 4842-4845.)

Juror No. 10 was a white, 52-year-old married woman from Castro Valley. (183-CT 52190.) Her ex-husband tried to strangle her while under the influence. (183-CT 52205; 76-RT 4541.) She thought the justice system was "very effective if you have plenty of *money* and an *excellent* attorney." (183-CT 52209 [emphasis in original].) She would narrow the appeals on death penalty cases, and she thought there was no need for appeals for the obviously guilty. (183-CT 52210; 76-RT 4546.) She

thought felony murder was fair, because "a person killed *period*." (183-CT 52212 [emphasis in original].) DNA evidence would be wise, but "not necessary if there is absolutely no doubts." (183-CT 52217.) She said she was neutral on the death penalty, which depended upon the individual case. (183-CT 52223.) The court qualified her.[23] (76-RT 4533-49.)

Juror No. 11 was a white, 42-year-old married man from Castro Valley. (183-CT 52231.) He thought ethnicity was an issue in the criminal justice system; but held no strong personal opinions. (183-CT 52250.) He stated that he was moderately in favor of the death penalty (after much soul searching), but as an "option in extreme cases only." (183-CT 52264.) He thought the death penalty was appropriate only for extreme acts for which there was no remorse, and it would be appropriate only if "compelled by evidence." (183-CT 52266.)

Juror No. 12 was a 58-year-old married Filipino man from Newark. (183-CT 52272.) He had once been convicted of petty theft and possessing alcohol at age 18. (183-CT 52286.) He was moderately in favor of the death penalty, and believed that a killer should sometimes get the death penalty; and sometimes LWOPP was better. (183-CT 52305, 52307.) During voir dire, he said he wanted to hear everything before making up his mind. (95-RT 5968.) But he also said that if someone strangled a woman, the only fair punishment would be death. (95-RT

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23. The court excused Juror No. 10, a white woman, by stipulation after she realized she was related to a witness. (112-RT 7404-7406; 113-RT 7413-7422.) The court substituted the second alternate by stipulation: Juror No. 14, an Hispanic woman. (*Ibid.*; 105-RT 6845-48; 184-CT 52354.)

5971.) The court denied Winbush's challenge for cause, because the juror said he wanted to hear everything. (95-RT 5972, 5975-78.)

Juror No. 13, who was substituted for excused Juror No.5, was a white, 64-year-old woman who was a substitute teacher and lived with a domestic partner in Oakland. (184-CT 52313-14; 105-RT 6845.) In her juror questionnaire, she stated she believed that the criminal justice worked, but slowly, and was fair to minorities. (184-CT 52332.) She believed that people must be responsible for their actions. (184-CT 52334-35.) She was moderately in favor of the death penalty "for crimes that meet the criteria for death penalty." (184-CT 52346.) The court qualified her. (81-RT 4912-23.)

Alternate Juror No. 14 was an Hispanic, 40-year-old married woman from Livermore. (184-CT 52354.) This juror replaced Juror No.10 by stipulation. (112-RT 7404-06; 113-RT 7413-22.) She wrote in her questionnaire that murder and people making stupid choices were particularly upsetting. (184-CT 52370.) She was moderately in favor of death penalty, but needed to hear the facts about the killing. (184-CT 52387.) Depending on the circumstances, the death penalty might not be appropriate. (184-CT 52389.) The court qualified her. (81-RT 4879-92.)

Alternate Juror No. 15 was a 49-year-old married Asian man from Livermore. (184-CT 52395.) He believed that the felony murder rule was fair. (184-CT 52417.) He said he was neutral about the death penalty, which was a "legitimate and viable means of punishment but must be exercised judiciously." (184-CT 52428.) He said he must see the evidence and hear the facts before deciding. (184-CT 52430.) He stated he could still vote for death when only one person had been killed and it was not a sex or mutilation murder. (72-RT 4211.) He agreed that some

people are sociopaths and are dangerous even in prison. (72-RT 4214.) The court qualified him. (72-RT 4217.)

Alternate Juror No. 16 was a white 49-year-old, married woman from Livermore. (184-CT 52436.) She believed that minorities are treated fairly for the most part, though some may unfairly be judged on their race. (184-CT 52455.) She favored speeding up the judicial system and fewer appeals. (184-CT 52456.) She approved of the felony murder rule. (184-CT 52458.) She was moderately in favor of the death penalty and believed that there were some situations where the death penalty fit the crime, such as crimes that are violent and inhuman. (184-CT 52469.) She agreed that she must hear all the evidence before deciding between the death penalty and LWOPP. (184-CT 52471.) She believed that death would be more difficult to impose than LWOPP. (76-RT 4597-4610, 4603.)

Alternate Juror No. 17 was a white, 38-year-old married woman from Livermore. (184-CT 52477.) She believed that the justice system was slow, but fair to everyone. (184-CT 52496.) She favored speeding the system up and fewer appeals. (184-CT 52497.) She believed the felony murder rule was fair because if one commits an act leading to a killing, "you should pay for it." (184-CT 52499.) She believed that most psychological testimony is a "crock of crap" used to "get off." "You either did it or you didn't." (184-CT 52503.) She was strongly in favor of the death penalty and had no problems with it. (184-CT 52510.) She agreed that the death penalty depends on circumstances, such as the viciousness of the crime. (184-CT 52512.)

The court denied Winbush's challenge for cause because she was biased in favor of the police and believed that LWOPP was a horrendous

burden on taxpayers. (87-RT 5400-5428.) The court believed she could be fair under *People v. Cunningham* (2001) 25 Cal.4th 926, 977. (87-RT 5428-5431.) Winbush also challenged her because she knew a witness to Winbush's actions, but the prosecutor said he would not call that witness. (87-RT 5398-5400.)

Alternate Juror No. 18 was a white, 46-year-old married man from Alameda. (184-CT 52518.) He believed the justice process should move faster and that minorities are treated fairly. (184-CT 52537.) He favored reducing frivolous appeals. (184-CT 52538.) He believed the felony murder rule was fair. (184-CT 52540.) He was moderately in favor of the death penalty, but wanted to be certain you have the right person. (184-CT 52551.) If the culprit were "honestly remorseful," and there was no way he or she would ever be released from prison, he "might consider life." (184-CT 52553.) The court qualified him. (88-RT 5504-22.)

To repeat, Winbush's jury consisted of 13 Caucasian jurors, three Hispanic jurors, two Asians, and a remarkable seven of the 18 jurors were from the relatively small community of Livermore, with a population 74 percent white and 1.49 percent black. (105-RT 6841-6842.)

E. The Prosecutors' Explanation For His Exclusion Of All Three African-Americans While Not Excusing Jurors With Similar Beliefs

Defense counsel protested that some of the prosecutor's excuses for excusing the black jurors were equally applicable to jurors the prosecutor accepted. (104-RT 6740-6741.) The prosecutor stated that the reasons he gave for excusing the black jurors were race-neutral, and that he had supported them with case law. He stated that those reasons were true and sincere and were the actual reasons why he exercised

peremptory challenges. (104-RT 6754-6755.) The prosecutor explained that the jurors he kept were much more favorable to him than the black jurors he dismissed. (104-RT 6748-6755.)

The prosecutor's elaborate excuses cannot be taken seriously, as there can be no excuse for Winbush's death verdict by an all-white jury in Alameda County. "'The prosecution's proffer of [one] pretextual explanation naturally gives rise to an inference of discriminatory intent,' even where other, potentially valid explanations are offered." (*Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1192, quoting *Snyder v. Louisiana, supra,* 552 U.S. at 484.)

For example, Juror No. 5 stated that it was empirically proven that minorities are treated unfairly, like one of the black prospective jurors, but the prosecutor stated he was otherwise a conservative juror likely to return a death sentence:

> I was favorably impressed by his answers on my series of death penalty questions. And perhaps most importantly for me, when I asked him which penalty would be harder to impose, he said they would be the same. Now, when I hear a juror say that there's no difference to him in terms of the difficulty of imposing a death or life sentence, that's a juror that I find to be very favorably disposed towards imposing the death penalty. (104-RT 6748.)

The prosecutor explained that he also liked Juror No. 6, despite the fact that she said that minorities were not always treated fairly:

> [She] was a woman whose husband's niece was murdered by a serial killer in Texas in 1999. . . She expressed perhaps the most articulate recitation of a variety of kinds of reasons for voting for the death penalty as any juror I've ever come across. She also discussed the importance of the symbolism of . . . a jury returning a verdict of death, even where it's probably not going to be carried out, that sends a message to the community, and

> it sends a message about the case. I find her to be a remarkably strong juror in this panel. (104-RT 6749-6750.)

The prosecutor acknowledged that Juror No. 8 stated that the O.J. Simpson trial was an example where money made a difference in the defense, like one of the black prospective jurors:

> But she was also a juror who indicated that she had been in a prior jury situation where she and another juror, the foreperson, felt that the defendant was guilty of murder, and the other ten jurors felt that there was reasonable doubt. And after some good amount of agony, because she wanted to reach a unanimous verdict, and this is a juror who made great strides to reach a unanimous verdict, which is important to me, since I have to get all 12, so she stated that she finally managed to find a way to talk herself into voting not guilty in that way, only to find out after the fact that the guy was really guilty of murder, okay, and that she had made a mistake. [If] she has an opportunity to redo her jury service here . . . I don't think she's going to make the same mistake again. (104-RT 6750-6751.)

With respect to Juror No. 10, who said the criminal justice system is effective if you have money and an excellent attorney, the prosecutor excused the fact that he used that same reason to dismiss black jurors because the juror was a woman who was a supervisor at Safeway, and he "always liked supervisors because they have to make decisions, oftentimes hard decisions."

> She is a meat cutter, a butcher, so I feel confident that she's not going to be overwhelmed by gory pictures or specific evidence about how this woman was murdered. She has somewhat of a background with drugs, drug abuse, which I think in this particular case, given my victim's lifestyle and some of the witnesses' lifestyles, I don't find that to be negative. When she and her husband had some sort of argument, he strangled her, and my victim in this case was murdered in part by strangulation.
>
> She lists herself as death penalty neutral, okay, but when asked what type of changes she'd like to see to the

> criminal justice system, she'd like death penalty appeals to be shortened. I think she's probably a pretty strong juror. (104-RT 6751.)

The prosecutor justified not challenging Juror No. 11, even though he said that ethnicity is, in fact, an issue in criminal justice, like one of the black prospective jurors because he had no strong opinion about that. (104-RT 6751-6752, 6740.)

> He's a captain in a fire department. [He] was very focused on the issue of remorse. Before he could really feel like he could consider the death penalty or find it to be appropriate, he would want to know if the defendants showed remorse after the murder. And I personally think that based on my evaluation of the evidence in this case, that if we get to a penalty phase, I'm probably going to do pretty well on that . . . specific issue. (104-RT 6751-52.)

With respect to alternate Juror No. 16, who believed that some minorities may unfairly be judged on their race (184-CT 52455), the prosecutor stated that he did not excuse her because "she is strongly in favor of the death penalty." (104-RT 6752.) Not so. Alternate Juror No. 16 stated she was "moderately in favor of the death penalty," and believed that there were only some situations where the death penalty fit the crime, such as crimes that are violent and inhuman. (184-CT 52469.)

F. The Prosecutors' Exclusion Of All Three African-Americans Jurors Established Purposeful Racial Discrimination

Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial or other cognizable group. (*People v. Box* (2000) 23 Cal.4th 1153, 1187; *Wheeler, supra,* 22 Cal.3d at 276-277 [using "peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to a

representative cross-section of the community under article I, section 16, of the California Constitution"]; *Batson v. Kentucky, supra*, 476 U.S. at 89, 96-97 [the State's purposeful or deliberate exclusion of individuals from participation as jurors on account of race violates the Equal Protection Clause]; *Powers v. Ohio* (1991) 499 U.S. 400, 409 ["racial discrimination in the jury selection process cannot be tolerated"].)

African-Americans are a cognizable group under *Wheeler* and *Batson*. (*Ibid.; People v. Cleveland* (2004) 32 Cal.4th 704, 734; *People v. Clair* (1992) 2 Cal.4th 629, 652.) Here, the prosecutor excused all three African-Americans. (See *People v. Kelly* (2007) 42 Cal.4th 763, 779-780 ["the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention"]; *People v. Taylor* (2010) 48 Cal. 4th 574, 643 [fact that the defendant and the excused jurors were African-American, while the victim and a majority of the seated jurors were white is some evidence permitting an inference of discriminatory excusal].) The "Constitution forbids striking even a single prospective juror for a discriminatory purpose." (*United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902.)

"Although *Wheeler* motions may be made seriatim, each *Wheeler* motion is itself separate and discrete and is resolved definitively and independently of each other." (*People v. Irvin* (1996) 46 Cal.App.4th 1340, 1351.) Winbush made three such motions.

Batson sets forth a three-step process to determine whether a peremptory challenge is race-based in violation of the Constitution.

(*Batson, supra,* 476 U.S. at 96-97.) First, the defendant must make a prima facie showing that the prosecution has exercised a peremptory challenge on the basis of race. (That is, the defendant must demonstrate that the facts and circumstances of the case "raise an inference" that the prosecution has excluded venire members from the petit jury on account of their race.) (*Id.* at 96.) If a defendant makes this showing, the burden then shifts to the prosecution to provide a race-neutral explanation for its challenge. (*Id.* at 97.) To meet its burden, the government need only disclose its (nondiscriminatory) purpose for striking the potential juror. The ultimate burden then returns to the defendant at step three, and the defendant must persuade the court that the government's (nondiscriminatory) reason is pre-textual. (*Ibid.*) The trial court then has the duty to determine whether the defendant has established purposeful racial discrimination by the prosecution. (*Id.* at 98; *Snyder v. Louisiana, supra,* 552 U.S. at 477.)

An analysis both of the disproportionate number of blacks struck by the prosecutor, coupled with an examination of the backgrounds of the jurors whom he struck, demonstrated that the defense established racial discrimination. The jurors who were impermissibly challenged by the prosecutor lived in economic circumstances that were as diverse as a jury venire in the Alameda area can produce, and had varying lifestyles, personal experiences, and employment histories and situations. (See section B., *supra.*) They were the type of "heterogeneous" prospective jurors that this Court referred to *Wheeler*, *supra*, 22 Cal.3d at 281.)

No African-Americans served on Winbush's jury. Clearly, the prosecutor's strikes eliminating all the blacks constituted "a disproportionate number." (See *Snyder v. Louisiana, supra,* 552 U.S. at

475-476 [prosecution had 12 peremptory challenges and used five of those to eliminate all of the African-American prospective jurors from the panel].) Thirty percent of the prosecutor's challenges in Winbush's case went to the black jurors, all of whom he peremptorily excused. The percentage of peremptory challenges used against African-Americans -- 30 percent -- is more than the 25 percent in *Johnson v. California* (2005) 545 U.S. 162, 170 [prima facie showing]; 104-RT 6672-6673.)

Moreover, about six percent (four out of 68) of the venire were African-American, but the prosecutor used a significantly higher percentage of his peremptory challenges – 30 percent -- against African-Americans. Thus, two different statistics -- the percentage of available African-Americans challenged – 100 percent, and the percentage of peremptory challenges used against a venire only six percent African-American – 30 percent -- provide support for an inference of discrimination. (*Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 813 [approximately 30 percent of the venire persons who appeared before the court for voir dire were African-American. Yet the government used a significantly higher percentage of its peremptory challenges - 56 percent - against African-Americans]; *United States v. Johnson* (8th Cir. 1989) 873 F.2d 1137, 1140 [considering the disproportionate rate of strikes against blacks to be relevant evidence of discrimination]; *United States v. Alvarado* (2d Cir. 1991) 923 F.2d 253, 255-256; *McGahee v. Alabama Department Of Corrections* (11th Cir. 2009) 560 F.3d 1252, 1259-1270 [court finds intentional discrimination, in part because the prosecutor struck all the blacks, an "astonishing pattern," "leaving an all-white jury in a county which was fifty-five percent African-American"].)

In another death penalty case from Alameda County, the fact that six African-Americans ultimately served on the jury, was held to be strong evidence of no racial bias in jury selection. (*People v. Blacksher* (2011) 52 Cal.4th 769, 801-802; see also *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [concluding a challenge raised no inference of bias, "particularly in view of the circumstance that the other African-American juror had been passed repeatedly by the prosecutor from the beginning of voir dire and ultimately served on the jury"]; *People v. Turner* (1994) 8 Cal.4th 137, 168 ["While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection."].) In *People v. Bell* (2007) 40 Cal.4th 582, 599, the prosecutor did not exercise peremptory challenges against most or all panel members who were African-American men; three of them served on the jury.

In *People v. Lancaster* (2007) 41 Cal.4th 50, 73-77, & fn. 10, this court rejected a claim that the prosecutor had peremptorily challenged three female African-American prospective jurors for discriminatory reasons, in part because three of the four African-American women who remained on the panel at the time of his *Wheeler* motion ultimately served on the jury, and the jury was quite diverse. Thus, the *Lancaster* court distinguished *Johnson*, "where a 'suspicious' appearance was created by the prosecutor's removal of all prospective jurors in a cognizable group." (*Id.* at 76, citing *Johnson, supra*, 545 U.S. at 173 and *People v. Johnson, supra*, 30 Cal.4th at 1326.) Moreover, in *Lancaster*, "the views or family experiences disclosed by [the challenged] women were more than

sufficient to overcome any inference of improper discrimination." (*People v. Lancaster*, *supra,* 41 Cal.4th at 76-78.)

The *Bell* Court explained another relevant fact as follows:

> Defendant does not contend Gwendolyn J. and Lisa J.-S. shared only the characteristic of being African-American women and were otherwise "as heterogeneous as the community as a whole." (*People v. Bell, supra,* 40 Cal.4th at 598, citing *Wheeler*, at 280.)

In contrast, Winbush does contend and did contend that the excused African-American women and African-American man shared only the characteristic of being African-American and were otherwise similar to the non-challenged sitting jurors, as explained above. (See *Batson v. Kentucky*, *supra,* 476 U.S. at 106 [Marshall, J., concurring] ["[a] prosecutor's own conscious or unconscious racism may lead him easily to [a] conclusion" regarding an African-American juror "that would not have come to his mind if a white juror had acted identically"].)

Where group discrimination is a motivating factor for a governmental decision -- even if it is not the only motivation -- the Constitution has been violated. (*Miller-El II, supra*, 545 U.S. at 265 ["The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny"]; *People v. Alvarez* (1996) 14 Cal.3d 155, 197; *Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 959, quoting *Cook v. LaMarque* (9th Cir. 2010) 593 F.3d 810, 815 ["peremptory strike was 'motivated in substantial part' by race"].)

Arlington Heights v. Metropolitan Housing Development (1977) 429 U.S. 252, 264, could not have been clearer on motivation:

> "[Establishing an equal protection violation] does not require [proof] that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a . . . decision [was] motivated by a single concern or even that a particular purpose was the 'dominant' or 'primary' one. . . . When there is proof that a discriminatory purpose has been a motivating factor in the [governmental] decision, [that is enough]." (*Id.* at 264.)

The Supreme Court's equal protection cases should have particular applicability in the *Batson* context, since *Batson* was an equal protection case. (See *Batson v. Kentucky*, *supra,* 476 U.S. 79.) In applying Title VII of the Civil Rights Act of 1964 (which bars discrimination in employment), the Supreme Court has also made clear that where unlawful discrimination is a motivating factor in an employment decision, that decision is unlawful. (See, e.g., *Desert Palace v. Costa* (2003) 539 U.S. 90, 98-101; *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 258.) Thus, a prosecutor cannot legitimately strike a juror because of his or her race, even if the prosecutor has other reasons as well.

G. The Prosecutors' Discriminatory Exclusion Of All Three African-Americans Jurors Is Reversible Per Se

Whether or not this Court does a comparative juror analysis, Winbush carried his burden to show discriminatory intent, and the conviction must be reversed because he was denied his rights to equal protection, a jury chosen from a fair and representative cross-section of society, a reliable determination of penalty, and due process. (United States Constitution Amends. V, VI, VIII, XIV.)

The *Wheeler/Batson* errors committed by the trial court compel reversal of the charges and the judgment of death. (*People v. Wheeler*, *supra*, 22 Cal.3d at 283 [error "prejudicial per se"]; *People v. Snow* (1987)

44 Cal.3d 216, 226-227 ["reversible per se"]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282 [structural error requires per se reversal].)

In *Snyder v. Louisiana, supra,* 552 U.S. at 485-486, the United States Supreme Court simply reversed, without a remand, for third-stage *Batson* error, given that there was nothing "in the record showing that the trial judge credited the claim that Mr. Brooks was nervous," and thus there was no "realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date, more than a decade after petitioner's trial."

It was a perversion of Winbush's constitutional right to a representative jury -- a true cross section of the community acting as the conscience of the community – for the trial court to permit the prosecutor to exclude all three African-American jurors – at least one of whom was excused based on his or her race. (See *Batson v. Kentucky*, *supra,* 476 U.S. at 106 [Marshall, J., concurring] ["[a] judge's own conscious or unconscious racism may lead him to accept [a prosecutor's racially tinged] explanation as well supported"].)

Thus, the death judgment must be set aside, because "the exclusion of even a single juror based on race is unconstitutional and requires reversal." (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

III. THE COURT VIOLATED WINBUSH'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY DENYING HIS CHALLENGES TO EXCUSE TWO JURORS FOR CAUSE WHO SERVED ON THE JURY, WHILE ERRONEOUSLY EXCUSING PROSPECTIVE JUROR E. I. FOR CAUSE WITHOUT PERMITTING ADEQUATE VOIR DIRE AND BECAUSE HER VIEWS CONCERNING THE DEATH PENALTY WOULD NOT HAVE SUBSTANTIALLY IMPAIRED THE PERFORMANCE OF HER DUTIES

A. The Relevant Facts

The court erred by denying Winbush's challenges for cause to excuse two jurors – Jurors No. 12 and No. 9 -- who served on the jury – a claim which is not forfeited for the reasons explained in section E. The court also erroneously excused Prospective Juror E.I. for cause without permitting adequate voir dire and because her views concerning the death penalty would not have substantially impaired the performance of her duties, and by applying a different standard than for Jurors No. 12 and 9.

1. Juror No. 12 Would Automatically Vote For The Death Penalty

Juror No. 12 was a 58-year-old married Filipino man from Newark. (183-CT 52272.) His juror questionnaire revealed that he was moderately in favor of the death penalty, and believed that a killer should sometimes get the death penalty; and sometimes LWOPP was better. (183-CT 52305, 52307.)

During voir dire, he said he wanted to hear everything before making up his mind. (95-RT 5968.) But he then said that if someone strangled and stabbed a woman during a plan to rob her, the only fair punishment would be death. (95-RT 5971.) Winbush asked him the following question: "So do you believe in a case like that where a 20-year-

old woman is in her apartment, two men go in, stab her repeatedly, and strangle her, and she dies because of what they did while they're robbing her, they went to her apartment to rob her. If you believe that that's what happened and all the other 12 jurors, you all believe beyond a reasonable doubt that that's what happened, is that the kind of case where the only really fair punishment is the death penalty in your opinion? Juror No. 12 simply answered: "Yes." (95-RT 5971.)

The prosecutor argued that the court should deny Winbush's challenge for cause, because the prospective juror also said he wanted to "weigh" everything. (95-RT 5972-5974.) The court agreed with the prosecutor, and because the juror answered question No. 8 on page 37: "No, sometimes the alternative is better," in response to the following question: "If you find that either or both of these defendants intentionally killed the victim for the purpose of robbery, and you find either or both previously had substantial contact with the criminal justice system, would you always vote for death instead of the alternative of life imprisonment without the possibility of parole?" (183-CT 52307; 95-RT 5975-5976.)

That written statement is not determinative of the juror's attitude towards the death penalty in Winbush's case. When the additional facts of Beeson's murder were added, the juror unequivocally stating that if someone strangled and stabbed a 20-year-old woman in her apartment during the course of a robbery, the only fair punishment would be death. It is this disqualifying answer that clearly demonstrated an inability to perform his duties as a juror. Moreover, the court did not evenhandedly rule that written answers on the juror questionnaire trumped a juror's voir dire answers with respect to Prospective Juror E.I. (See sections C & D, *infra*.)

2. Juror No. 9 Herself Stated "It [Probably] Wouldn't Really Be Fair" To The Defendants For Her "To Be A Juror In This Case"

Juror No. 9 was a white, 24-year-old married woman from Livermore. (183-CT 52149.) She believed that the felony murder rule was fair, whether or not the killers took a life on purpose. (183-CT 52171.) She was moderately in favor of the death penalty, because "if they did something bad they deserve the consequences for their actions." (183-CT 52182.) She was in favor of the death penalty because there were too many murderers in prison who could still kill. (183-CT 52183.)

During voir dire, she explained that "bloody crimes are more upsetting and it would be a "little more" difficult to be objective, being in her twenties. (80-RT 4833.) She thought it would "probably not" be an appropriate case for her to be a juror because the victim was a young woman about her age who was strangled and stabbed in her home. (80-RT 4834.) She said: "It [probably] wouldn't really be fair" to the defendants for her "to be a juror in this case." (80-RT 4834.) She said she would try to forget "that part of it" [age and blood] "but it is hard not to relate it to yourself." (80-RT 4835.) It would make her feel "uneasy," but not unfair. (80-RT 4836.) Winbush challenged her for cause. (80-RT 4834, 4838.) Winbush argued that she would identify with victim, being the same age and sex and with the same hair color and she could not promise that similarity would not influence her. (80-RT 4841-4842.)

The court found that the fact she was 24 years old and a white female (and, in the court's opinion, did not resemble victim) was not sufficient cause to excuse her. (80-RT 4842-4845.) The court noted that the juror responded that she would try to forget "that part of it" [age and blood] "but it is hard not to relate it to yourself." (80-RT 4835.) The court

stated that she said the crime would make her feel "uneasy," but not unfair. (80-RT 4836.)

Winbush disagrees this juror could be impartial. She said: "It [probably] wouldn't really be fair" to the defendants for her "to be a juror in this case." (80-RT 4834.) Simply because the juror also said she would not be unfair, even though she would feel "uneasy," did not negate her previous statements that it would probably not be fair for her to be a juror on the case.[24] (80-RT 4834.)

3. Prospective Juror E.I. Would Not Automatically Vote For Life, But Was Excused Anyway

In her jury questionnaire, Prospective Juror E.I., a 59-year-old woman, wrote she was "moderately in favor" of the death penalty, which her other responses confirmed. (102-CT 28973, 29006.) E.I. believed death was an "acceptable punishment for certain crimes, but it is a heavy responsibility to take a life so he/she better be guilty and the jury had better be sure." (102-CT 29006.) She explained that "for a while in college I was opposed to it but as I saw more horrific crimes I became for it." (102-CT 29006.) She would vote for the death penalty because "some crimes are so serious that there are no second chances for the person who committed them. Why spend huge amounts of money on imprisoning these people." (102-CT 29007.) She stated she would *always vote for death* if the crime was "intentional," but clarified that she did not mean "always." (102-CT 29008.)

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24. Inexplicably, counsel did not also challenge Juror No. 1, who stated: "A life is a life." He could vote for death." (95-RT 5946.) In fact, he stated that he would "automatically" vote for death after a murder verdict, "if no evidence changed it." (95-RT 5951.)

Voir dire allowed the parties to clarify Prospective Juror E.I.'s position. E.I. explained she could consider death, though it was difficult to do so in the abstract:

> Well, they are both possible, however, it would have to be really, really aggravating circumstances for me to choose the death penalty over life in prison, because that is the most serious thing you can do . . . I can think of cases where I think I would have voted for the death penalty, but this is all abstract because I'm not sitting there to do it. And I can think of cases that has [sic] already happened where I would have done that. . . Serial killers like Ted Bundy. The guy in the park, the Yosemite killer . . . was incredibly violent, took her head off or something. That kind of thing. I mean, I think I would have voted for the death penalty for that. (86-RT 5318.)

The court asked the following question:

> Do you think this case here, this courtroom with one victim, no sexual assault, no mutilation and none of the things that you have described is present as the Yosemite case and the Ted Bundy case, is our case a case where the death penalty is not a realistic option for you? Only life would be. (86-RT 5319.)

Prospective Juror E.I. answered: "It doesn't seem to be the kind of case where I would vote for the death penalty." (86-RT 5319.)

The court stated it was "inclined to this excuse this juror." (86-RT 5319.)

The prosecutor, like the court, minimized the crime and aggravating circumstances with this mild description of the facts:

> The victim was involved in marijuana dealing at the time of this offense. Kind of a drug deal gone bad. Okay? And she ends up strangled and stabbed and robbed. That is the basic scenario. You will also learn through the course of it that both defendants were 19 years old at the time. Is what you are telling us is that in this kind of a situation in the absence of a child murder or the absence of something horrible like what Jeffrey Dahmer did, raped and cut up people and stuffed them in the refrigerator.

> And you mentioned the fellow in Yosemite cutting one woman's head off and burned the bodies of the others and all that. In the absence of that kind of stuff . . . am I understanding correctly that what you are saying is under our scenario the death penalty is not a realistic possibility here? Is that what you are saying?" (86-RT 5320-5321.)

Prospective Juror E.I. answered:

> "I don't see a reason why it would be a possibility from what I'm hearing. I would have to hear something really different to make the people so incredibly dangerous and deranged that it would have to be death as opposed to life in prison." (86-RT 5321.)

The prosecutor challenged Prospective Juror E.I. for cause after she answered yes to the following question:

> "So, if the degree of violence is more in, for lack of a better term, a normal range and simply causes death, that doesn't get up to that level for you; is that what you are saying? In the absence of something like a series of murders, and Ted Bundy had a series of murders. Am I understanding you correctly? (86-RT 5321-5322.)

Patterson tried to rehabilitate Prospective Juror E.I. by giving her a better idea of some of the facts involved:

> This is terribly unfair to you because we're asking you to answer these questions in a vacuum. You know of necessity very little about the case. What you do know or what we can tell you is that it is a 20-year-old woman who was in her apartment when it is alleged that these two men came in with the intent to rob her. That they robbed her in the course of a robbery. Stabbed her repeatedly. Choked her with a belt and killed her. There is no question that it was an intentional murder. (86-RT 5322.)

E.I. explained her answer on the jury questionnaire that she would *always vote for death* if the murder was intentional by stating that if it were intentional, that sort of made [the death penalty] more of a possibility . . . But I "said that obviously always doesn't cut it. I mean, that is a really serious thing and I'm sitting here sweating and you are asking me to make

a decision on somebody's life. That is a really serious thing, it really is. . . . *I do believe in the death penalty in most cases*, but for the most part, life in prison will handle it." (86-RT 5323-5324 [emphasis added].)

E.I. again clarified that she would not automatically vote for death if she found an intentional killing and would not automatically vote for life without possibility of parole for anything less than a serial killing, mass killing, or something of that nature. (86-RT 5324.) She said:

> I mean, it is really hard for me to hypothesize on this. I have never been in a situation like this so I can't say that I absolutely wouldn't, wouldn't vote for the death penalty. But, you know . . . It would definitely have to really be some reason for me to do that. (86-RT 5324.)

The prosecutor objected to Patterson informing E.I. that "the prosecution is allowed to bring in in aggravation . . . [a]ny prior felony record that these defendants have." (86-RT 5324-5325.) In chambers, the court sustained the prosecutor's objection finding that Patterson's lawyer was "in essence . . . going to ask the juror for a prejudgment of specific evidence at the penalty trial." (86-RT 5330-5331.)

Winbush finally explained the process to E.I. as follows:

> In order to be eligible for the death penalty under California law you have to be convicted of first-degree murder and a special circumstance. As the judge explained, the special circumstance we're talking about is that the murder happened in the course of a robbery. . . . So, we will never get to the issue of penalty unless and until you find that they intentionally killed somebody during the course of a robbery. . . . Having found that, then there is a second trial. And in the second trial the district attorney is entitled to put in things that he thinks are aggravating. Things that he thinks make the situation worse than what I have just described to you. And, incidentally, we're entitled to put in things that are mitigating. Things that make the situation in our judgment better. It won't change the conviction. . . . An inquiry in the background of these gentlemen and an inquiry, to a lesser

> extent, into the background of the victim. Now, I'm not going to ask you if you could promise that you will come back with the death penalty, because I'm going to argue it is not an appropriate penalty. All I'm asking you, would you wait and listen to the evidence in the second phase, and can you conceive that depending on what the aggravation is that you might return a verdict of death? (86-RT 5326-5327.)

Prospective Juror E.I. answered: "I don't want to send anybody to death." (86-RT 5327.)

Winbush asked: "You are saying you wouldn't vote for death?

Prospective Juror E.I. answered: "I'm beginning to think more and more -- as I'm more and more on the spot, I don't want to live with my conscience." (*Ibid.*)

Winbush explained that he was "not trying to ask [E.I.] to do that. I agree, I couldn't either," but asked E.I.: "are you telling me that you would not want to return a verdict of death?" E.I. answered, "no." (*Ibid.*)

The parties submitted the matter, and the court granted the prosecutor's challenge for cause. (86-RT 5327-5328; *People v. Collins* (2010) 49 Cal.4th 175, 226-227 [issue not forfeited when defense counsel submitted the matter after the colloquy between court and counsel].

The court ruled that Prospective Juror E.I. should be excused for cause, because it had formed "the definite impression from the views she stated principally here in this courtroom, that her views on capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath." (86-RT 5328-5329.) The court cited *People v. Hill* (1992) 3 Cal.4th 959, 1003; *People v. Visciotti* (1992) 2 Cal.4th 1, 45. (86-RT 5328.) The court ruled:

> [S]he made it very clear at the beginning the parameters of the case necessarily which she was willing to return a verdict of death and they did not include the

> facts before us. (86-RT 5329.) She was very knowledgeable about cases before other courts, such as Ted Bundy, the serial killer, the Yosemite case involving multiple killings and decapitation and other mutilation. Clearly those aren't our case." (86-RT 5329.) In her last answer, she said: "more and more I think I don't want to send anyone to death." So, clearly at the end her views became crystalized that she could never return a verdict of death, so based on her last answer alone she was clearly excusable. Even short of that, though, I think her answers were clear that she should be excused. (86-RT 5329.)

B. The Court Violated Winbush's Constitutional Rights By Denying His Challenges To Excuse Two Jurors For Cause Who Served On The Jury

"The due process clause of the Fourteenth Amendment requires the sentencing jury in a capital case to be impartial to the same extent required at the guilt phase." (*People v. Blair* (2005) 36 Cal.4th 686, 741.) In a capital case, a prospective juror who "would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances," is not impartial and must be excused for cause. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.)

A prospective juror in a capital case may not be excused for cause on the basis of moral or ethical opposition to the death penalty unless that juror's views would prevent him or her from judging guilt or innocence or would cause the juror to reject the death penalty regardless of the evidence. (*Witherspoon, supra*, 391 U.S. at 522.) The *Witherspoon* standard was refined in *Witt, supra,* 469 U.S. at 424, to permit the state to excuse a prospective juror based on the juror's opposition to the death penalty only where 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." (*Witt, supra*, 469 U.S. at 424; *People v. Stewart* (2004) 33 Cal.4th 425, 441 & fn. 3 (*Stewart*); *People v. Heard* (2003) 31 Cal.4th 946, 958 (*Heard*).) A juror may properly be discharged if they are unwilling to temporarily set aside their beliefs about capital punishment and follow the law. (*Witt, supra*, 469 U.S. at 422.) A prospective juror's conscientious objection to the death penalty is not a sufficient basis for excusing that person from the jury. (*Witherspoon, supra*, 391 U.S. at 522; *Witt, supra*, 469 U.S. at 424; *Lockhart v. McCree* (1986) 476 U.S. 162, 176.) Even people who "firmly believe that the death penalty is unjust" can serve as jurors if they are willing to temporarily set aside their own beliefs in deference to the rule of law. (*Ibid.*)

It is undisputed that a "juror who will automatically vote for the death penalty in every case [or] will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do," is subject to being excused by a challenge for cause. (*Morgan v. Illinois* (1992) 504 U.S. 719, 728; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.)

Obviously, Juror No. 12's views would "prevent or substantially impair" his ability to be fair to Winbush. Neither the court nor the prosecutor were able to rehabilitate him after he stated in voir dire that if someone stabbed and strangled a woman during a robbery, the only fair punishment would be death. (95-RT 5971.) Similarly, Juror No. 9, herself, declared: "It [probably] wouldn't really be fair" to the defendants for her "to be a juror in this case." (80-RT 4834.)

In *People v. Boyette* (2002) 29 Cal.4th 381, 416-418, this court held that the trial court erred in denying the defendant's challenge for cause against a juror no more biased than Jurors No. 12 and No. 9. In that case,

the court found that the juror, who was "strongly in favor of the death penalty," did not give "equivocal answers," despite these remarks:

> When the court asked whether he could return "a verdict of life imprisonment without [the] possibility of parole if you thought it appropriate," he replied, "I would probably have to be convinced." He did not similarly qualify his answer when asked whether he could impose the death penalty. He explained he believed the death penalty was "effective" and that, given an "honest choice" between the two penalties, he "would be more inclined to go with the death penalty." He equivocated when asked whether he would exclude consideration of a life term, saying, "Never having been in that situation, I have no idea." When asked whether he could impose a life term if he thought it appropriate, he replied: "Yeah, if there was enough to make it seem appropriate, yes, I could." (*Id.* at 417-418.)

The remarks of Juror No. 12 were no more equivocal than the remarks of the biased juror in *Boyette*, and thus the court erred in denying Winbush's challenge for cause against Juror No. 12.

With respect to Juror No. 9's assertion that it [probably] wouldn't really be fair" to the defendants for her "to be a juror in this case," courts have held similar statements are sufficient to show someone is not qualified to be a juror. (*People v. Jimenez* (1992) 11 Cal.App.4th 1611, 1620-1622 [good cause found when the juror admitted, among other things: "I don't feel that I would be unfair . . . but I feel there would be prejudice in leniency"]; *People v. Cleveland* (2004) 32 Cal.4th 704, 735-736 [former police officer excused by stipulation after he said: "To be perfectly honest, your honor, I think it would be unfair to the defense based on my knowledge of how these trials are conducted"].) Thus, the court also erred in denying Winbush's challenge for cause against Juror No. 12.

C. The Court Violated Winbush's Constitutional Rights By Erroneously Excusing Prospective Juror E.I. For Cause Without Permitting Adequate Voir Dire, Or By Applying A Different Standard Than For Jurors No. 12 And No. 9

"A criminal defendant is entitled to a trial by jurors who are impartial and unbiased. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.)" (*People v. Roldan* (2005) 35 Cal.4th 646, 689.) To assure that impartiality, 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." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.)

Trial courts must of course "be evenhanded in their questions to prospective jurors . . . and should inquire into the jurors' attitudes both for and against the death penalty to determine whether these views will impair their ability to serve as jurors." (*People v. Mills* (2010) 48 Cal.4th 158, 189, citing *People v. Champion* (1995) 9 Cal.4th 879, 908-909.) Here, the trial court did not evenly apply *Witherspoon-Witt* when it refused to excuse Jurors No. 12 and No. 9 for cause, while excusing Prospective Juror E.I. for cause. With respect to Juror No. 12, the court indicated that the juror's answers in his questionnaire trumped his answers during voir dire with respect to whether he could consider both a life and death sentence. (183-CT 52307; 95-RT 5975-5976, 5971.) With respect to Prospective Juror E.I., however, the court ignored her answers in her questionnaire which strongly and unequivocally indicated she could consider death, and based its ruling solely on one or two allegedly ambiguous voir dire answers. (102-CT 29006-09; 86-RT 5318-5328.)

To make matters worse, the court improperly restricted voir dire, by refusing to allow counsel to inform Prospective Juror E.I. of the most basic aggravating factors, like Winbush's substantial criminal history, but instead allowed the prosecutor to sugarcoat and understate the circumstances of the crime without mention of any of the aggravating factors. (86-RT 5320-5321 [murder was essentially "a drug deal gone bad . . . And she ends up strangled and stabbed and robbed."].) In contrast, if the prosecutor had told the jury about Winbush's many prior violent acts and crimes, and portrayed Beeson's murder with the kind of hyperbole to which he subjected the jurors in his closing argument, then there is a reasonable probability that E.I. would have said she would be able to return a death verdict. In closing argument the prosecutor told the jury what he really believed about the circumstances of this unexceptional felony murder:

> They are telling you this is not a bad murder. This poor woman suffered enough for a hundred murders. She suffered more than the 167 victims than the Oklahoma City bombing victims did because they all died instantly. . . [Erika] suffered more than a hundred victims suffered in a bomb blast because they all went out immediately. And she slowly is being strangled. Think about how terrorized she must have been. Think about how frightening that was. But they are telling you this is not a bad heinous murder. . . This is a serious murder. This is a bad murder. This is the worst type of murder. (189-RT 14794-96; see AOB, Arg. XIII, C.)

If Prospective Juror E.I. had been presented with a picture of the facts as imagined by the prosecutor, then it is highly probable she would have again clarified -- for at least the sixth time -- that she could impose the death penalty under the circumstances presented in Winbush's case, in contrast to Juror No. 12, who unequivocally stated that death would be

his only verdict for the crime against Beeson. (95-RT 5971; 102-CT 29006-08; 86-RT 5318-5327.)

With respect to voir dire, this Court has explained:

> [T]rial courts must give advocates the opportunity to inquire of panelists and make their record. If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions. Undue limitations on jury selection also can deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition. (*People v. Lenix* (2008) 44 Cal.4th 602, 625, citing *Miller-El II, supra*, 545 U.S. at 252.)

"The *Witherspoon-Witt* . . . voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract . . . . The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1120.)

> "Death-qualification voir dire must avoid two extremes . . . it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. In deciding where to strike the balance in a particular case, trial courts have considerable discretion." (*Id.* at 1120-1121, citing *People v. Cash* (2002) 28 Cal.4th 703, 721-722.)

In *Cash*, this Court reversed the death penalty judgment for the trial court's failure to allow sufficient inquiry into jurors' death penalty attitudes about particular facts -- the court had refused to allow defense counsel to ask prospective jurors about the fact that defendant had previously murdered his grandparents which was "a general fact or circumstance . . .

that could cause some jurors invariably to vote for the death penalty," and was "likely to be of great significance to prospective jurors, regardless of the strength of the mitigating circumstances." (*People v. Cash, supra*, 28 Cal.4th at 721; see also *People v. Zambrano*, *supra*, 41 Cal.4th at 1200-1202 [conc. & dis. opn. of Kennard, J.] [murder victim's dismemberment was "a general fact or circumstance" likely to elicit a strong emotional response from the jurors]; *People v. Jenkins* (2000) 22 Cal.4th 900, 990.)

Here, the trial court's limitations on describing Beeson's murder in any but the most antiseptic terms and without asking whether Winbush's prior criminality would affect the juror's ability to return a death verdict, directly contradicted *Cash*, and was an abuse of discretion. Moreover, the trial court used two different standards in refusing to dismiss Jurors No. 12 and No. 9 for cause, while excusing Prospective Juror E.I.

D. The Court Violated Winbush's Constitutional Rights By Erroneously Excusing Prospective Juror E.I. For Cause Because Her Views Concerning The Death Penalty Would Not Have Substantially Impaired The Performance Of Her Duties

"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.' (*Witt, supra*, 469 U.S. at 423.) 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 "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." (*Gray v. Mississippi* (1987) 481 U.S. 648, 658-659, citing *Witherspoon, supra,* 391 U.S. at 523.)

A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. The party seeking to have a prospective juror excused for cause -- the prosecution with respect to E.I. -- bears the burden of demonstrating that a challenged juror is unfit to serve on the jury. (*People v. Stewart* (2004) 33 Cal.4th 425, 445-447.)

Moreover, in order to determine whether a prospective juror is fit to serve in a capital case, the trial court must analyze the prospective juror's questionnaire and voir dire as a whole, rather than simply focus on an isolated statement. (*People v. Mason* (1991) 52 Cal.3d 909, 953.) Here, the trial court essentially ignored Prospective Juror E.I.'s answers in her juror questionnaire which strongly and unequivocally indicated she could consider death, and based its ruling solely on a couple of allegedly ambiguous voir dire answers in response to misleading questions. (102-CT 29006-09; 86-RT 5318-5329.)

Prospective jurors must not be excused if their comments as a whole indicate that their views on capital punishment would not prevent or substantially impair the performance of their duties. (*Ibid.*) In *Mason*, the defendant was charged with capital murder. During the initial questioning in voir dire, a prospective juror informed the court that she would "'always vote for capital punishment.'" (*Ibid.*) After the judge and counsel explained a juror's obligation to hear and consider mitigating evidence, the prospective juror answered that certain evidence could persuade her to vote against the death penalty. The prospective juror further explained that she "would try to leave [her] mind open and listen to everything" and that she could "really" and "realistically" see herself voting for life imprisonment instead of death. (*Id.* at 953-954.) Defense counsel's

motion to excuse the prospective juror for cause was rejected by the trial court. On appeal, this Court refused to focus on the prospective juror's single statement that she would categorically vote for death in every case. Instead, the Court reviewed the prospective juror's "entire voir dire" and found that, given her other comments after being informed by the court of a juror's obligations, the prospective juror's views on capital punishment would not have "prevented or substantially impaired the performance of her duties." (*Ibid.*)

The fact E.I. expressed difficulty voting for the death penalty is far from being a disqualifying fact. (86-RT 5323-5324.) This Court reversed a death sentence where the trial court excused five jurors based on affirmative answers to whether opposition to the death penalty would prevent or make it very difficult to vote for death. (*People v. Stewart, supra*, 33 Cal.4th at 442-443.) This Court noted in *Stewart* that in light of the gravity of a sentence of death, for many people their personal and conscientious views concerning the death penalty would make it "very difficult"' ever to vote for the death penalty. But a prospective juror who simply would find it "very difficult" ever to impose the death penalty, is both entitled and duty bound to sit on a capital jury unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror. (*Id.* at 446.) Moreover, E.I.'s belief, expressed in her juror questionnaire, that a death verdict is a heavy responsibility and the jury had better be sure," is not in itself disqualifying. (*Id.* at 449; 102-CT 29006.)

The *Witt* court emphasized that, as in other situations involving juror bias, a capital juror's bias based on opposition to the death penalty "involves credibility findings whose basis cannot be easily discerned from

an appellate record," and therefore requires considerable deference to the trial court's determination. (*Witt, supra*, 469 U.S. at 429; *People v. Roldan* (2005) 35 Cal.4th 646, 696-697.) If the voir dire is unequivocal, however, the trial court's ruling will be upheld only if it is "fairly supported by the substantial evidence in the record." (*Id.* at 434; *People v. Holt* (1997) 15 Cal.4th 619, 651; *People v. Heard, supra*, 31 Cal.4th at 958.)

The United States Supreme Court stated the applicable principles as follows:

> First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. . . Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes . . . . Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. . . Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9 [citations omitted]; *People v. Pearson* (2012) 53 Cal.4th 306, 328.)

In Winbush's case, the evidence was either unequivocal or it was not based on credibility findings. Even giving deference to the trial court, there is not substantial evidence in the record to support a finding that the views of E.I. would have prevented or substantially impaired the performance of her duties as a juror. First, E.I. unequivocally and repeatedly stated she could impose the death penalty in her juror questionnaire. (102-CT 29006-08.) Then, during voir dire, she so stated another five or six times. (86-RT 5318 ["they are both possible"]; (86-RT

5320-5321 ["I would have to hear something really different to make the people so incredibly dangerous and deranged that it would have to be death as opposed to life in prison"]; 86-RT 5321-5322 [if the degree of violence was in a "normal range and simply causes death," she would not vote for death]; 86-RT 5323-5324 ["I do believe in the death penalty in most cases, but for the most part, life in prison will handle it"]; 86-RT 5324 ["I can't say that I absolutely wouldn't . . . vote for the death penalty. But . . . it would definitely have to really be some reason for me to do that"]; 86-RT 5327 [she was *not* saying that she "would not want to return a verdict of death"].)

In the face of all this strong evidence that it was possible for E.I. to impose the death penalty in Winbush's case, the only evidence suggesting an inability to consider death came in response to the court's terse and misleading summary of the case as one "with one victim, no sexual assault, no mutilation and none of the things that you have described is present as the Yosemite case and the Ted Bundy case," which elicited this response from E.I.: "It doesn't seem to be the kind of case where I would vote for the death penalty." (86-RT 5319.) Of course, when a case is described so blandly, only the most rabid pro-death jurors would answer yes. Moreover, the juror did not say that only the most horrific crime would deserve the ultimate penalty, thus her statements do not constitute equivocal evidence, and they do not show an inability to follow the law.

The second instance of alleged ambiguity was after Winbush's questioning, when Prospective Juror E.I. stated: "I don't want to send anybody to death." (86-RT 5327.) To clarify, Winbush asked: "You are saying you wouldn't vote for death? E.I. answered: "I'm beginning to think more and more -- as I'm more and more on the spot, I don't want to live

with my conscience." (86-RT 5327.) Again asked to clarify, E.I. explained that she was *not* saying that she "would not want to return a verdict of death." (86-RT 5327.) Again, this is not evidence sufficient to disqualify this juror.

The present case is similar to *People v. Heard, supra*, 31 Cal.4th at 966, in which this Court found that the granting of the prosecution's challenge for cause was erroneous. In *Heard*, the prospective juror stated in his questionnaire that imprisonment for life without the possibility of parole to him represented a "worse" punishment than death. (*Id.*, at 964.) Later, however, during voir dire, the trial court explained to the prospective juror that California law considered death the more serious punishment and that the death penalty could be imposed under California law only if the aggravating circumstances outweighed the mitigating circumstances. (*Ibid.*) After being informed of the correct law, the prospective juror "did not provide any indication that his views regarding the death penalty would prevent or significantly impair him from following the controlling California law." (*Ibid.*) Thus, this Court concluded that the "earlier juror questionnaire response, given without the benefit of the trial court's explanation of the governing legal principles, does not provide an adequate basis to support [the] excusal for cause." (*Ibid.*)

Similarly, E.I. clearly indicated she would not automatically vote for death if she found an intentional killing and would not automatically vote for life without possibility of parole for anything less than a serial killing, mass killing, or something similar. (86-RT 5324.) Furthermore, it was not disqualifying that Prospective Juror E.I. stated she "would definitely have to really be some reason for her to vote for death," or that she did not "want to send anybody to death." (86-RT 5324, 5327.) Under California

law, a juror is "free to assign whatever moral or sympathetic value [he or she] deem[s] appropriate to each and all of the various" mitigating and aggravating factors. (CALJIC No. 8.88; *People v. Boyde* (1988) 46 Cal.3d 212, 253-254.) Similarly, a juror has the discretion not to vote for the death penalty unless the juror is satisfied that there is no doubt about the defendant's guilt. This Court has repeatedly stated that in determining penalty, "the jurors may consider any lingering doubts they may have concerning the defendant's guilt." (*People v. Medina* (1995) 11 Cal.4th 694, 743; *People v. Zapien* (1993) 4 Cal.4th 929, 989; *People v. Kaurish* (1990) 52 Cal.3d 648, 706.) Lingering doubt is considered a factor in mitigation under Penal Code section 190.3, factor (a) (circumstances of the crime), and factor (k) (any other circumstance that extenuates the crime or any sympathetic aspect of the defendant's character or record). (*People v. Hines* (1997) 15 Cal.4th 997, 1068; *People v. Sanchez* (1996) 12 Cal.4th 1, 77-78.) Thus, E.I.'s view that she did not "want" to impose the death penalty did not prevent or substantially impair the performance of her duties as a juror, because she affirmed time and time again that she could vote for death if she were certain of guilt and there were aggravating circumstances. (95-RT 5971; 102-CT 29006-08; 86-RT 5318-5327.)

As this Court explained:

> 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. (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.)

Such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*Ibid*; see *People v. Stewart* (2004) 33 Cal.4th 425, 447 [a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty].)

In a fairly recent case involving the same trial judge as in Winbush's case, the Honorable Jeffrey W. Horner, this Court upheld the trial court's decision to excuse two questionable jurors under *Witt*. (*People v. Martinez* (2009) 47 Cal.4th 399, 424-438.) Justice Moreno, however, had the better of the argument, and illustrates Judge Horner's inclination to excuse jurors who simply express difficulty with condemning a murderer to death. (*Id.* at 456-467 [conc. & dis. opn. of Moreno, J.].)

In *Martinez*, Prospective Juror E.H. affirmed that she could vote in favor of the death penalty if the "crime was really, really awful," for example, in situations "in which a lot of people were killed, or in which torture." (*Id.* at 461.) Justice Moreno explained, however:

> She never indicated that these were the sole sets of circumstances that would warrant her vote in favor of the death penalty. When the prosecutor pointed out that neither was involved in the present case, and that the special circumstance at issue was a murder connected with lewd and lascivious acts on a child under the age of 14, she indicated that she "might" be able to impose the death penalty, and that she would have to hear the facts of the case. (*Id.* at 461.)

E.H. denied having any "hidden agenda" and stated that "realistically, if I had to put a number on it, it would be like, say, 10 percent possibility I could vote for the death penalty." (*Id.* at 462.) Justice Moreno found:

> At most, the record supports the conclusion that E.H.'s moderate opposition to the death penalty would "make it very difficult for [her] ever to impose the death penalty . . . . But as we have held, that difficulty is not to be equated with substantial impairment of a juror's duties. (*Id.* at 464, quoting *Stewart, supra*, 33 Cal.4th at 447.)

For the same reasons, the trial court improperly excused E.I. even though she could have returned a verdict of death and never indicated that the facts present in the Yosemite case and the Ted Bundy case, were the sole sets of circumstances that would warrant her vote in favor of the death penalty. (86-RT 5319.)

Just this year, this Court unanimously reversed a death sentence due to the trial court's improper excusal of a prospective juror because of her views on capital punishment. (*People v. Pearson*, *supra*, 53 Cal.4th at 333.) The facts of *Pearson* are remarkably similar to the facts in Winbush's case and compel the same result. First, the *Pearson* court rejected the trial court's finding that the excused juror (C.O.) had given "equivocal" and "conflicting" responses about capital punishment, "and, therefore, she would not be an appropriate juror in this particular case." (*Id.* at 330-331.) This Court refused to take a handful of statements out of context and characterize them as equivocal or ambiguous about her ability to perform her duties as a capital juror. (*Id.* at 331-332.) Question No. 188 of the questionnaire stated: "Some people say they support the death penalty; yet could not personally vote to impose it. Do you feel the same way?" C.O. checked "no" and wrote in explanation: "I'm not sure where I

stand but if I strongly felt strong about something, I would stand behind it." (*Id.* at 328.) When the prosecutor questioned C.O. about this answer, she answered, "All I can say to that is that I can vote for it." (*Id.* at 330.) In her juror questionnaire, C.O. also wrote: "I don't think that [the death penalty] is cruel and unusual punishment. But I'm uncertain if I approve or disapprove w/ death sentence." (*Id.* at 329.) Asked what she meant by this answer, C.O. said, "I think with that answer, because I'm uncertain of how I really feel about the death penalty, unless I had everything presented in front of me, so I don't know what I really meant on that one." (*Id.* at 329.)

This Court held:

> Contrary to the trial court's impression, C.O. made no conflicting or equivocal statements about her ability to vote for a death penalty in a factually appropriate case. In the absence of such contradictions or equivocation, the trial court's ruling is reviewed for substantial evidence . . . of which we find none. (*People v. Pearson*, *supra*, 53 Cal.4th at 330, citing *People v. Horning* (2004) 34 Cal.4th 871, 896-897.)

The *Pearson* Court further explained that *People v. Guzman* (1988) 45 Cal.3d 915, on which the trial court relied:

> does not stand for the idea that a person is substantially impaired for jury service in a capital case because his or her ideas about the death penalty are indefinite, complicated or subject to qualifications, and we do not embrace such a rule. As the high court recently reminded us, "a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 9.) Personal opposition to the death penalty is not itself disqualifying, since "[a] prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law." (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.) It follows the mere *absence* of strong, definite views about the death

> penalty is not itself disqualifying, since a person without strong general views may also be capable of following his or her oath and the law.
>
> To the extent the trial court excused C.O. because of what the court characterized as "equivocal" views on the merits of the death penalty itself, the court rested its ruling on an erroneous view of the law. C.O.'s possession of such views (more accurately described as vague, indefinite or unformed) did not itself disqualify her from service in this case, so long as she could follow her oath to conscientiously consider the death penalty. As explained above, her responses on that point were unequivocally affirmative. (*People v. Pearson*, *supra*, 53 Cal.4th at 331.) [¶]
>
> To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process. So long as a juror's views on the death penalty do not prevent or substantially impair the juror from "conscientiously consider[ing] all of the sentencing alternatives, including the death penalty where appropriate" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146), the juror is not disqualified by his or her failure to enthusiastically support capital punishment. (*People v. Pearson*, *supra*, 53 Cal.4th at 332.)

Here, E.I. repeatedly said she could conscientiously consider the death penalty and impose it under appropriate circumstances. Simply because she could not promise to sentence Winbush to death when she was not told of the aggravated circumstances in the case did not make her incapable of following her oath and the law.

E. The Court's Refusal To Excuse Either Jurors No. 12 Or No. 9, Who Both Served On Winbush's Jury, Or The Court's Erroneous Excusing Of Prospective Juror E. I. For Cause Requires Reversal Of The Death Judgment

The erroneous excusal of Prospective Juror E.I. for cause violated Winbush's right to an impartial jury, and his rights under the Fifth, Sixth and Fourteenth Amendments. (*Witherspoon v. Illinois, supra*, 391 U.S. at

522-523.) This violation requires automatic reversal of the death judgment. (*Gray v. Mississippi* (1987) 481 U.S. 648, 666-668; *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *People v. Heard, supra*, 31 Cal.4th at 966-968; *People v. Pearson, supra*, 53 Cal.4th at 333.)

The constitution does not require automatic reversal of a conviction, however, for the trial court's good-faith error in denying the defendant's peremptory challenge to a juror, provided that all jurors seated in a criminal case are qualified and unbiased. (*Rivera v. Illinois* (2009) 556 U.S. 148, 129 S.Ct. 1446, 1450, 1453, 173 L.Ed.2d 320.) Similarly, a trial court's erroneous refusal to strike a juror for cause does not violate a defendant's Fifth Amendment right to due process by impairing his right to the full complement of peremptory challenges to which state law entitled him, because a defendant is not "forced" to use a challenge. (*United States v. Martinez-Salazar* (2000) 528 U.S. 304, 314-317.) Instead, the defendant may let the juror sit on the jury and pursue a Sixth Amendment challenge on appeal. (*Id.* at 315.) Here, Winbush took this risky approach and left Jurors No. 12 and No. 9 on the jury, apparently in the hope and expectation that the appellate courts would uphold his Sixth Amendment challenge.

In *People v. Yeoman* (2003) 31 Cal.4th 93, 114, and *People v. Hillhouse* (2002) 27 Cal.4th 469, 487, this Court reiterated that the loss of a peremptory challenge is reversible error only if the defendant exhausts all challenges and an incompetent juror is forced on him. Winbush, however, is not complaining about the loss of a peremptory challenge, and thus this error should not be considered to be waived by counsel's failure to use all his peremptory challenges. It is illogical and unfair to equate the non-use of peremptory challenges with the absence of prejudice to a

defendant resulting from the trial court's error in failing to grant a challenge for cause to excuse jurors. Defense counsel, faced with even less sympathetic jurors, should not be required to risk seating jurors even more biased than the jurors the court refused to exclude. Thus, counsel's failure to exhaust his peremptory challenges must not be used to insulate the trial court's erroneous rulings from this Court's review, because the right to an impartial adjudicator is essential to a fair trial. (*Gray v. Mississippi, supra*, 481 U.S. at 668; see *Gomez v. United States* (1989) 490 U.S. 858, 876 ["Among those basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury"].)

In *Boyette,* the error was found to be harmless where the defendant removed the biased juror from the jury using a peremptory challenge. (*People v. Boyette, supra,* 29 Cal.4th at 418-419.) In contrast, two biased jurors both sat on Winbush's jury, after the court refused to excuse them, and Winbush decided to let them sit on the jury and pursue a Sixth Amendment challenge on appeal. (*United States v. Martinez-Salazar, supra,* 528 U.S. at 315.) This error skewed the jury selection process, rendering it unfair, unreliable, unrepresentative, and unconstitutional. (*Lockhart v. McCree*, *supra,* 476 U.S. at 182; *Taylor v. Louisiana* (1975) 419 U.S. 522, 528-530.)

IV. THE COURT VIOLATED WINBUSH'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY ADMITTING WINBUSH'S COERCED STATEMENTS

A. The Relevant Facts

On August 21, 2002, Winbush filed a motion to exclude his statements because they were coerced during eight separate interviews over more than 16 hours. (6-CT 1384-1402.) Winbush argued that his last confession to Deputy District Attorney McLaughlin, who was an Alameda superior court judge at the time of the motion, was tainted by his initial illegally-coerced confessions. (6-CT 1396.)

At the 402 hearing on Winbush's motion, Sergeant Olivas stated that on May 3, 1996, the detectives decided to interview Winbush, who was in custody in the Alameda County jail on unrelated charges. (14-RT 808, 812.) At 9:15 a.m., the police transported Winbush from the North County Jail to the Oakland Police Department. (14-RT 810.) Winbush sat in the interview room until Olivas and McKenna began their first interview at 11:07 a.m. (14-RT 812.) Winbush, who appeared mentally competent and sober, waived his *Miranda* rights and initialed the waiver form. (14-RT 815-820.) There was no physical force, no physical injuries, no threats of any kind, including the death penalty, and no promises. (14-RT 819-820.)

Sergeant Olivas told Winbush that they had "some pretty good evidence" implicating him in the murder of Beeson.[25] (14-RT 825.) Olivas did not tell Winbush that he had interviewed Patterson. (14-RT 825.) Winbush denied any involvement. (14-RT 825.)

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25. At trial, Winbush testified that the police told him Botello's stolen shotgun bore his fingerprints and that Smith and Botello were going to testify against him. (144-RT 11275.)

After about an hour, the first interview stopped at noon. (14-RT 822.) The second interview began at 12:54 p.m. and ended at 2:09 p.m. (14-RT 823-826.) During that break and the break over the noon hour, Winbush was alone in the interview room. (14-RT 827.) The first bathroom break was at 2:39 p.m. Prior to that, Winbush had not asked to use the bathroom or anything else. (14-RT 831-832.) The detectives resumed a third time at 2.47 p.m. and questioned Winbush until 3:55 p.m. (14-RT 826, 829.) Winbush was given food at 4:10 p.m., and was alone in the room for 45 minutes. (14-RT 830-831.) The interview resumed a fourth time at 4:40 p.m. when Winbush made a positive identification of Patterson from photos. (14-RT 832-833.) Sergeant Olivas then played the first four to five minutes of Patterson's third taped interview taken around 11:16 p.m., where Patterson admitted involvement in the murder and mentioned Winbush by name.[26] (14-RT 833-836.) Olivas did not provide Winbush with Patterson's version of the murder or any details of the murder. (14-RT 834-835.)

Before hearing this portion of the tape, Winbush had been laughing and smirking. Afterwards, his attitude changed and he became somber, sat back in his chair, and lowered his head. (14-RT 836-837.) Olivas was able to read Winbush's lips and hear him say: "That motherfucker." (14-RT 837.) With his head still lowered, Winbush said: "The streets made me bitter." (14-RT 837.) This portion of the interview ended at 6:15 p.m. (14-RT 837.)

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25. According to Dr. Ofshe who listened to Patterson's taped statement of how the crime occurred for exactly five and six minutes, there was no description of the robbery or the murder during this time. (21-RT 1354-1357; Exhibit 3A at 3-4.)

Olivas wrote down quotations of Winbush, including: "I went there to do the robbery." (14-RT 838.) "I didn't plan the way it happened." (14-RT 839.) "She didn't take the robbery seriously." (14-RT 839.) "I admit I was there." "If I get the death penalty, I get it." (14-RT 840.) "Once I got there, it all went sour." (14-RT 840-841.) "I have to play it out." "I'm fucked. Right." (14-RT 841.)

Winbush was the first to mention "death penalty." (14-RT 841.) Sergeants Olivas and McKenna did not respond to Winbush mentioning the death penalty. (14-RT 842.) Olivas never mentioned the death penalty. (14-RT 842.) No threats were made about the death penalty at any time. (14-RT 842-843.) To his knowledge, no police officer discussed penalty with Winbush. (14-RT 842.) Olivas did not give Winbush any information that day about the penalties for murder. (15-RT 872.)

Winbush came off as "kind of bright," and as someone who was very experienced in the criminal justice setting. (14-RT 846.) Olivas believed Winbush's statement was voluntary. (14-RT 842.)

A break was taken from 6:15 p.m. until 6:25 p.m. (14-RT 839.) At 6:25 p.m. the interview resumed for the fifth time. (14-RT 839-840.) The next break was taken from 7:20 p.m. to 8:58 p.m., and at 8:00 p.m., Olivas again took Winbush to the bathroom. (14-RT 839-840, 843.) Olivas returned to the interview room after 9:00 p.m. and surreptitiously-recorded his sixth interview with Winbush. (14-RT 848-854; Exhibits 4, 4A, 4B.) McKenna showed photographs to Winbush. (14-RT 849.) During this interview, Winbush made another voluntary statement: "I'm going to get what I'm going to get." (14-RT 848.) In the secret tape recordings, Winbush described how he stabbed and choked Beeson, what he took in

the robbery, and how the knife was disposed of. (15-RT 861-862.) That was the first time Olivas heard those details from Winbush. (15-RT 862.)

They took a break at 9:42 p.m. and resumed at 10:00 p.m. (15-RT 863.) During that break, Olivas prepared to do the first openly- taped interview with a tape-recorder was on the table. (15-RT 863-867.) The seventh interview began at 10:00 p.m., and Sergeants Olivas and McKenna completed their interviews with Winbush at 10:28 p.m. (14-RT 822; 15-RT 864-867; Exhibits 5, 5A.) After these interviews, Olivas called the D.A. homicide team. (14-RT 821.)

Winbush asked to make a telephone call to his mother. Olivas told him he could, and that all phone calls are monitored. (15-RT 867-868.) Winbush was permitted to use a phone in the homicide section of the jail and his conversation with his mother was tape-recorded. (15-RT 868, 870-871; Exhibit 6.)

Inspector Lopes and Deputy District Attorney McLaughlin entered the interview room at 1:05 a.m., and left at 2:00 a.m. (18-RT 1107-1109; Exhibit 21.) They took two taped statements. (18-RT 1108-1111; Exhibit 19A, Exhibit 20.) The first tape ended at about 1:42 a.m. McLaughlin told Winbush that they were going to make another tape-recording and that he was not to mention Patterson. (18-RT 1112, 1117.) The second tape began at 1:45 a.m. (18-RT 1112.) Other than the two or three minutes between the tapes, the entirety of their discussion with Winbush was tape-recorded. (18-RT 1113-1114.)

In the final tape, Winbush appeared to be trying to cooperate by not mentioning Patterson. (18-RT 1117.) Winbush appeared coherent. (18-RT 1113.) No one in Lopes' presence told Winbush to lie. (18-RT 1119.) The police did not make threats or promises, or apply physical force or

violence. (18-RT 1113.) This final and eighth interview ended about 2:00 a.m. and Winbush was taken back to North County jail at 2:00 or 2:15 a.m., arriving about 3:00 a.m. (14-RT 821-822; 18-RT 1118.)

Olivas had attended training programs by the Oakland Police regarding interrogation. Those courses were taught by Sergeant Chenault and Lieutenant Voznik. (15-RT 904.) He also attended an FBI training program on interrogation techniques. (15-RT 904.) The training manual used in that course discussed how to interview a person who is a suspect in a crime; how to establish dominance and control over a suspect in interrogation; and how to raise the anxiety of the person being interrogated. (15-RT 906, 920-921, Exhibit 13.) Sergeant McKenna was a veteran officer and very gruff. (15-RT 921.) Olivas knew that Winbush had been interrogated about Beeson's murder shortly after it occurred, on or about December 26, 1995. (15-RT 907.) He believed that Winbush was also interviewed by Oakland police on April 5, 1996. (15-RT 908.) Nothing in Kozicki or Banks' logs indicated anything inappropriate during these interviews. (15-RT 909.)

Dr. Richard Ofshe, a professor in the Department of Sociology at the University of California at Berkeley, who was a forensic consultant on issues involving extreme forms of influence with respect to decision making, testified on Winbush's behalf. (21-RT 1297-1301, 1326; Exhibit 22 [curriculum vitae].) His current research focused on police interrogation, influence, and confession. (21-RT 1302.) He had testified 61 times as an expert witness in California on the subject of influence and police interrogation. (21-RT 1302.) He had never testified whether a confession was true or false. He testified only about the conditions under

which confessions were given. (21-RT 1304.) The court qualified Dr. Ofshe as an expert in influence and police interrogation. (21-RT 1326.)

Until the 1930s, the principal method by which police elicited confessions was the "third degree." (21-RT 1327.) Since then, the Supreme Court issued opinions that led to the rise of "psychological interrogation." (21-RT 1327.) By 1966, psychological interrogation methods were ubiquitous in the United States. (21-RT 1328.) Police interrogation is organized around the use of influence. (21-RT 1328.)

Modern interrogation involves the pre-admission phase and the post-admission phase, where the person confesses and indicates or realizes he or she is giving up. (21-RT 1330.) The post-admission phase is important because, if done properly, it will link the person to the crime in a way he or she will never be able to repudiate. (21-RT 1330-1331.) A skilled interrogator will attempt to elicit information to demonstrate actual knowledge, even on mundane details. (21-RT 1331.)

If one can demonstrate uncontaminated knowledge, the confession should be given great weight. (21-RT 1332.) Some interrogations do not go into a post-admission narrative. If an "I-did-it" statement is in dispute, then the interrogator has failed to provide sufficient information to resolve the dispute. (21-RT 1332.)

Both the innocent and the guilty are usually confident that they can get through an interrogation. (21-RT 1333.) The question is how to influence someone who is sure that all they have to say is "I did not do it." (21-RT 1333.) There are two things that contribute to influence. Interrogations tend to take place in secure areas where the power of the interrogator to control the person's life is manifest. The playing field is set up to maximize the influence power of the interrogator. (21-RT 1334.)

Dr. Ofshe identified three elements of interrogation techniques: evidence ploys, a motivator (threat of maximum harm), and offering benefits of confessing, including using an accident version. (21-RT 1349.)

The interrogator must do two things: (1) diminish the person's confidence by convincing him or her that the police have so much evidence that they do not need a confession; and (2) heighten the suspect's motivation to say "I did it." The principal way in which modern interrogation reduces a person's confidence is with "evidence ploys," which does not require actual evidence. (21-RT 1334-1335.) Someone who knows that they have committed the crime is more vulnerable to evidence ploys. (21-RT 1336.) Evidence ploys are not particularly dangerous. (22-RT 1417.)

Once the suspect's confidence level is reduced, then a motivator is introduced. Low-end motivators could be statements such as we know you did it, you will look better in my eyes, or show that you have courage. (21-RT 1337.) If low-end motivators do not work, the interrogators are liable to go up the power scale and start talking about how the system works. The tactic is to get the person thinking about the criminal justice system. They will make statements such as "now is the time for you to show remorse." (21-RT 1338.) The interrogator should avoid setting up obvious connections: confess and get minimum punishment, continue to deny and get maximum punishment. (21-RT 1338.) If this is done, the only thing left for the suspect to choose is which level of punishment they would rather have. (21-RT 1340.)

The formatting technique attempts to redefine the crime in a way that makes it appears legally less significant. The classic technique is to suggest self-defense justified the homicide. (21-RT 1341.) Offering to

believe a self-defense account is also designed to communicate an offer of leniency. (22-RT 1380.) Another way to coerce a confession is to suggest that while the suspect was committing the robbery, his only intention was to get some money, or everyone could understand that it was just an accident. (21-RT 1341-1342.) Whether someone committed the crime or not, it can be rational for an individual to choose to confess. (21-RT 1342.) That is the danger of psychologically-coercive interrogation techniques. (21-RT 1343.)

In an unrecorded interrogation, things can be said and done that would be foolish to tape-record. (21-RT 1344.) What occurs while the interrogation is not being taped can be very significant. (21-RT 1358.)

Dr. Ofshe reviewed the tapes and transcripts of all eight of Winbush's interviews, and the taped telephone call with Mrs. Winbush; the tape and transcript of Patterson's recorded statement; the City of Oakland Intermediate Investigator's course manual; and Winbush's CYA Report, and then the doctor tape-recorded his interview with Winbush. (21-RT 1346, 1348.) Dr. Ofshe's normally requests that the defendant prepare a history of the events of the interrogation. (21-RT 1347.)

Dr. Ofshe knew from two sources that Winbush claimed he was threatened with the death penalty: (1) Winbush wrote and spoke to him about it; and (2) the recorded telephone call with his mother. (21-RT 1349.) During the surreptitiously-recorded conversation with Winbush's mother, he spoke about the crime and about why he chose to confess. (21-RT 1350.) Winbush was taped reporting the deal: "I get the death penalty if I didn't say nothing." (21-RT 1350.) "They were gonna go for the death penalty on me. So I just tell them the truth." (21-RT 1351-1352.) Dr. Ofshe believed that Winbush was telling his mother that he was told

that there would be a prosecution seeking death. (21-RT 1352.) The fact Winbush talked about the death penalty indicated that the death penalty was a subject that came up during the interrogation. (21-RT 1353.)

Contamination means introducing information about the crime which reduces the ability to demonstrate that a particular person has knowledge of the crime. (21-RT 1353.) Dr. Ofshe was aware that Winbush claimed that the police provided him with facts of the crimes and that Sergeant Olivas denied that. (21-RT 1354.) Dr. Ofshe listened to Patterson's taped statement of how the crime occurred for exactly five and six minutes.[27] (21-RT 1354-1357; Exhibit 3A at 3-4.) After five and six minutes, there was no description of the robbery or the murder. (21-RT 1354-1357; Exhibit 3A at 3-4.) Dr. Ofshe was unable to distinguish between Patterson's account and Winbush's account. (22-RT 1384.) Making Winbush mad at Patterson, however, would not be considered a psychologically-coercive tactic. (22-RT 1411.)

Dr. Ofshe believed that Winbush's phone call with his mother corroborated Winbush's statements about how coercive techniques led him to confess falsely. (22-RT 1395.) In Winbush's conversation with his mother, he talked about Patterson's role and what he had learned. (21-RT 1355.) "They played the tape, and he was saying all this stuff on tape, Mamma. So right there I had to decide there's only two ways how it go."

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26. Sergeant Olivas testified that he played only the first four or five minutes of the Patterson's third taped interview where Patterson admitted involvement in the murder and mentioned Winbush by name. (14-RT 833-836.) Olivas stated that he did not provide Winbush with Patterson's version of the murder or any details of the murder. (14-RT 834-835; see also 129-RT 9859-9861, 9886, 9889, 9895.)

(21-RT 1356.) "He [Patterson] was trying to defend his self, trying to put all the blame on me." (21-RT 1356.)

The fact that Winbush also gave a statement not mentioning Patterson suggested that he wanted to keep his interrogators happy to preserve his deal. (21-RT 1358-1359.) Dr. Ofshe concluded that psychologically-coercive tactics were used, and that they were a motivating factor for Winbush. (21-RT 1359.) In addition to threats and promises about sentencing, Dr. Ofshe took into consideration the "accident story," which carried with it an expectation of lesser punishment (22-RT 1412, 1420-1421.) Dr. Ofshe concluded that Winbush framed the killing as an accident, which would be consistent with being exposed to the "accident scenario technique." (21-RT 1359-1360.)

Over Winbush's objection to the prosecutor's question whether Winbush's confession was false, Dr. Ofshe stated that the account given by Winbush about how the killing occurred was probably not true because Winbush framed the killing as an accident – which was unbelievable -- and there were suggestions of leniency. (22-RT 1378-1381.) The doctor did not conclude it was a false confession. (22-RT 1398.) Dr. Ofshe had never testified about whether a confession was true or false and did not reach conclusions as to whether a confession was reliable or unreliable. (22-RT 1436.) It is possible to coerce a true as well as a false statement, so coercive tactics can produce an accurate statement. (22-RT 1399.) The tactics might also produce a factually-inaccurate statement by somebody who committed a crime, or they might produce a false statement from someone who had nothing to do with the crime. (22-RT 1400.)

Either Sergeant Olivas or Winbush was telling the truth about what happened. (22-RT 1414.) Winbush's story of coercion was corroborated by the phone call to his mother and his accident story. (22-RT 1414.)

B. The Parties' Arguments

Winbush argued that whether he was coerced depended upon who was telling the truth and the prosecutor agreed. (31-RT 2006, 2043.) Sergeant Olivas did not tape the entire interrogation, which would have obviated the need to guess. (31-RT 2008.) There were inconsistencies between Sergeant Olivas' and McKenna's notes. (31-RT 2009.) Sergeant Olivas recanted testimony that he did not give Winbush a cigarette. (31-RT 2010-2011.)

When Winbush told the story omitting any mention of Patterson, that was strong evidence Winbush thought he had a deal to save his life. (31-RT 2015.) Every fact stated by Winbush had been stated by Patterson. (31-RT 2015.)

Winbush would never have made the statement to his mother about Patterson putting the blame on him unless he had heard more than the first four or five minutes of Patterson's tape, which showed Sergeant Olivas was lying. (31-RT 2015.) The taped phone call to his mother was the strongest evidence that Olivas was not being truthful about what information he had provided to Winbush about the crimes and what psychologically-coercive pressures were brought to bear. (31-RT 2017.) The taped phone call to Winbush's mother showed he believed he had a deal to get a life sentence, not death. (31-RT 2018.) The tape revealed Winbush stating: "They played the tape, and he was saying all this stuff on

tape, Mamma. . . . He [Patterson] was trying to defend his self, trying to put all the blame on me." (21-RT 1356.)

The prosecutor argued that Sergeants Olivas and McKenna were open and honest. (31-RT 2043-47.) In contrast, Dr. Ofshe was not credible and presented "junk science," and "garbage testimony." (31-RT 2053, 2047-55.) Winbush is a "bright fellow, articulate, not easily intimidated with experience in dealing with the police." (31-RT 2056; 32-RT 2102.) In Winbush's statement prepared for Dr. Ofshe, Winbush said he had invoked his right to counsel. (32-RT 2096-98; Exhibit 49.) There were no challenges to *Miranda* waivers, however. (31-RT 2058.)

C. The Court's Rulings

On October 17, 2002, the court concluded that Sergeants Olivas and McKenna told the truth regarding the circumstances of their interviews of Winbush. (33-RT 2155-2156, 2161.) Winbush was interviewed for more than 16 hours, but approximately half the time he was waiting to be interviewed. (33-RT 2158.) His personal needs were attended to; he was given food and taken to the bathroom. (33-RT 2158.)

Nothing that Winbush told police or the manner in which he told them suggested that what he said was involuntary or coerced. (33-RT 2159.) Winbush's taped voice was not the voice of a terrified man; it was not the voice of man speaking under duress; it was not the voice of an exhausted man. (33-RT 2159.) Nowhere in the taped statements does Winbush say one word that would indicate his will had been broken. (33-RT 2162.)

The court concluded that the subject of sentencing or the death penalty or life in prison was never raised by the officers. (33-RT 2161.)

Winbush's statements regarding the death penalty or life in prison did not indicate that the police had made threats or offered a deal for life. (33-RT 2163.) The court considered that Winbush confessed to the Oakland police about the Chevron gas station robbery. (33-RT 2167-2168.) The court disregarded the "unreasonable" testimony of Dr. Ofshe, whose apparent mission in life is to educate juries how to identify unreliable and false statements. (33-RT 2178, 2169.) The court found beyond a reasonable doubt that all statements by Patterson and Winbush were admissible; they were not the product of coercion and they were not involuntary. (33-RT 2178-2179; 34-RT 2180-2183.)

D. Winbush's Admissions Were Involuntary

In *People v. Neal* (2003) 31 Cal.4th 63, 79, this Court explained the relevant law on coerced confessions:

> It long has been held that the due process clause of the Fourteenth Amendment to the United States Constitution makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion. A statement is involuntary when, among other circumstances, it "was ' "extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight . . . ." ' " Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the "totality of [the] circumstances." (*Ibid.* [citations omitted.])

The voluntariness of a confession is reviewed de novo, as is the presence of coercive police activity. (*Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 415 [en banc]; see *Derrick v. Peterson* (9th Cir. 1990) 924 F.2d 813, 818.) Under the Fourteenth Amendment, a confession is involuntary only if the police use coercive means to undermine the suspect's ability to exercise his free will. (See *Colorado v. Connelly* (1986) 479 U.S. 157, 167; *Derrick v. Peterson, supra*, 924 F.2d at 818.) Voluntariness depends

on such factors as the surrounding circumstances and the combined effect of the entire course of the officers' conduct upon the defendant. (See *United States v. Polanco* (9th Cir. 1996) 93 F.3d 555, 560.) The test of voluntariness is well established: "Is the confession the product of an essentially free and unconstrained choice by its maker? . . . The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession." (*Collazo v. Estelle, supra*, 940 F.2d at 416, quoting *Culombe v. Connecticut* (1961) 367 U.S. 568, 602.)

The United States Supreme Court has held that, under the Due Process Clause, "'certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.'" (*Colorado v. Connelly, supra,* 479 U.S. at 163, quoting *Miller v. Fenton* (1985) 474 U.S. 104, 109.) Accordingly, analysis of whether admission of a confession into evidence violates the Fifth or Fourteenth Amendment does not turn solely on the "voluntariness" of the confession. "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" (*Colorado v. Connelly*, *supra,* 479 U.S. at 167 [analyzing voluntariness under Fourteenth Amendment].)

A court must conduct a "totality of circumstances" examination of a confession to determine whether the interrogators exploited the defendant's disabilities and deficiencies in such a way that his "will was overborne." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 288; *Withrow v. Williams* (1993) 507 U.S. 680, 689 [quoting *Haynes v. Washington* (1963) 373 U.S. 503, 513 (internal citation and quotation marks omitted)].) "'[T]he totality of circumstances [includes] both the characteristics of the accused

and the details of the interrogation." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226.)

Under the totality of circumstances test, courts must consider such external factors as the duration of the interrogation, the persistence of the officers, police trickery, absence of family and counsel, and threats and promises made to the defendant by the officers. (See *Davis v. North Carolina* (1966) 384 U.S. 737, 746-747, 752 [duration, treatment]; *Haynes v. Washington* (1963) 373 U.S. 503, 514-515 [threats, promises, absence of family and counsel]; *Rogers v. Richmond* (1961) 365 U.S. 534, 535 [threats]; *Spano v. New York* (1959) 360 U.S. 315, 323 [police trickery]; *Leyra v. Denno* (1954) 347 U.S. 556, 559-561 [suspect repeatedly complained "about how tired and how sleepy he is and how he cannot think"]; *Harris v. South Carolina* (1949) 338 U.S. 68, 71 [duration and persistence].)

"As interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus." (*Colorado v. Connelly, supra,* 479 U.S. at 164.) Thus, under the totality of circumstances analysis, courts must also consider such factors as the defendant's mental health, mental deficiency, emotional instability, education, age, and familiarity with the judicial system. (See *Clewis v. Texas* (1967) 386 U.S. 707, 712 [education]; *Culombe v. Connecticut* (1961) 367 U.S. 568, 602-603 [mental deficiency]; *Spano v. New York, supra*, 360 U.S. at 322 [emotional instability]; *Fikes v. Alabama* (1957) 352 U.S. 191, 193 [mental health].)

In *Robinson v. Smith* (W.D. N.Y. 1978) 451 F.Supp. 1278, one factor supporting a finding that the defendant's confession was involuntary

was his limited educational background, consisting of only a fifth grade education. Here, Winbush had a limited educational background, even though this information was not fully presented until penalty phase. (See 187-RT 14646-49 [Winbush, at age 15, was language handicapped because he scored in or below the 7th percentile on six subtests and was below normal on all 10 subparts of the Ross Information Processing Assessment, and scored at the 10th percentile on problem solving and abstract reasoning].)

In order to introduce a defendant's statement into evidence, the prosecution must prove by a preponderance of the evidence that the statement was voluntary. (*People v. Markham* (1989) 49 Cal.3d 63, 71.) In Winbush's case, the prosecution failed to carry its burden. Reviewing the interrogation in light of the totality of circumstances, Winbush's confession was induced by police coercion and was involuntary. Winbush's taped phone call to his mother was the strongest evidence that Sergeant Olivas was not being truthful about what information he had provided to Winbush about the crimes and what psychologically coercive pressures were brought to bear. (31-RT 2017.)

Dr. Ofshe concluded that psychologically-coercive tactics were used, and that they were a motivating factor for Winbush. (21-RT 1359.) Dr. Ofshe stated that the account given by Winbush about how the killing occurred was probably not true because Winbush framed the killing as an accident and there were suggestions of leniency. (22-RT 1378-1380.)

"It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied." (*People v. Cahill* (1994) 22 Cal.App.4th 296, 311-315 [confession found to be involuntary where the implicit promise that a first

degree murder charge might be avoided if there were a confession showing no premeditation and repeated assertions that the officer was present to help defendant and repeated remarks about showing remorse and the implication that the officer would testify favorably about remorse if defendant would talk]; *People v. Jimenez* (1978) 21 Cal.3d 595, 610-612 [mention that the defendant was subject to the death penalty and statement that defendant might get leniency from the jury if he gave a statement to the police officers is a promise of leniency]; *People v. Boyde* (1988) 46 Cal.3d 212, 238 ["[W]here a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law"].) Since threats of harsh penalty often contain an implicit promise of more lenient treatment, they are treated as promises of leniency. (See *People v. McClary* (1977) 20 Cal.3d 218, 229; *People v. Thompson* (1990) 50 Cal.3d 134, 169 [a threat of the death penalty, whether express or implied, is so highly coercive, that it can, all by itself, render a confession involuntary]; *People v. Avena* (1996) 13 Cal.4th 394, 420 ["confession induced by the threats of prosecution for a capital crime have been held inadmissible]; see *People v. Williams* (2010) 49 Cal.4th 405, 442-446 [potentially coercive techniques that the interrogators used in a series of four relatively short interrogations over four days did not cause the suspect to confess, in part because he "did not incriminate himself as a result of the officers' remarks"]; see also *People v. Holloway* (2004) 33 Cal.4th 96, 116.) There is no question that Winbush incriminated himself during the eight separate interrogations over more than 16 hours.

In *People v. Neal*, *supra*, 31 Cal.4th at 82, this Court overturned a murder conviction, based in part on involuntary confessions obtained after a detective "intentionally continu[ed] to interrogate defendant in deliberate violation of *Miranda*," and "branded" defendant a "liar" and used "deception" in implying that he possessed more incriminating evidence than he actually did. (*Ibid.* [citations omitted].)

In *Neal,* this Court also relied on the fact that the defendant, like Winbush, "as far as he could tell, was confined incommunicado." (*Id.* at 84.) The detectives in *Neal,* "did not offer defendant an opportunity to speak with an attorney. Although defendant's situation might not have reflected 'physical punishment' in the strictest sense of the phrase, its harshness cannot be ignored. Put simply, defendant's situation 'could only have increased his feelings of helplessness.'" (*People v. Neal, supra,* 31 Cal.4th at 84 [citations omitted].)

The *Neal* court also held that the "third circumstance that additionally weighs heavily against the voluntariness of defendant's initiation of the second interview, and against the voluntariness of his two subsequent confessions as well, arises from Detective Martin's promise and threat to defendant at the first interview. Promises and threats traditionally have been recognized as corrosive of voluntariness." (*Ibid.* [citations omitted].)

In *Taylor v. Maddox* (9th Cir. 2004) 366 F.3d 992, 1008, the Ninth Circuit granted habeas corpus relief to a state prisoner because the police had coerced the confession of a 16-year-old boy who had signed a written waiver of his *Miranda* rights and the trial court's findings to the contrary defied "rational understanding." The court held that "the slippery and illegal tactics of the detectives overcame [the defendant's] will and that he

continued his confession only as a result of police deception," including the promise that his statements would not be used against him. (*Ibid.* ["[F]ailure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness]; see also *Alverez v. Gomez* (9th Cir. 1999) 185 F.3d 995.) Similarly, in *People v. Bey* (1993) 21 Cal.App.4th 1623, 1628, the court found the defendant's statement was coerced and involuntary, due to deliberate police deception and violation of *Miranda.*

Chief among the many problems with such duplicity is that it may lead wrongly accused suspects "to see themselves as either being set up or railroaded." (Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action* (1997) 74 Denv. U. L. Rev. 979, 1044.) Such a suspect may well determine that "continued resistance is futile" because the police have evidence that will convict him despite his innocence. (Welsh S. White, *What is an Involuntary Confession Now?* (1998) 50 Rutgers L. Rev. 2001, 2053.) Such a suspect may also conclude that, given the futility of resistance, it is most prudent to cooperate and even confess falsely in order to get leniency.

A suspect may also be more likely to confess when faced with assertions that the State has evidence of fingerprints, palm prints, ballistic evidence and the like, implicating him because "[b]oth the guilty and the innocent have a harder time explaining away evidence that is allegedly derived from scientific technologies." (Ofshe & Leo, *The Decision to Confess Falsely*, at 1023.) In this case, it is clear that Winbush became convinced that the police had "some pretty good evidence" implicating him in the murder of Beeson, including the lie that Botello's stolen shotgun bore his fingerprints. (14-RT 825; 144-RT 11275.) Similarly, the duplicity

used by the officers interrogating Winbush created a grave risk of a false confession, thus requiring Winbush's involuntary statement to be excluded from his trial.

In Winbush's case, the lengthy and repeated interrogations and the period of isolation for over 16 hours "[a]ll were simply parts of one continuous process." (*Leyra v. Denno*, *supra,* 347 U.S. at 561; 33-RT 2158.)

Full consideration of all the factors discussed above compels a determination that Winbush's confession was involuntary because his will was overborne by the suggestive and coercive techniques used by the interrogators, which exploited his vulnerabilities. (See *Colorado v. Connelly*, *supra,* 479 U.S. at 164-165 [a confession may be suppressed where a police officer knows of a suspect's mental illness or deficiencies at the time of the interrogation and effectively exploits those weaknesses to obtain a confession, citing *Blackburn v. Alabama* (1960) 361 U.S. 199, 207-208;

Here, there is no evidence sufficient to dissipate the taint of the initial illegal conduct during the numerous unrecorded interrogations. Thus, all subsequent conversations are the inadmissible fruit of the unrecorded unlawful interrogations. (*People v. Beardslee* (1991) 53 Cal.3d 68, 108; *People v. Montano* (1991) 226 Cal.App.3d 914.)

E. The Introduction of Winbush's Involuntary Statements Was Not Harmless Beyond A Reasonable Doubt

The erroneous admission of a confession is reversible error unless the prosecution can prove that the introduction of the inadmissible evidence was harmless beyond a reasonable doubt. (*Arizona* v. *Fulminante*, *supra,* 499 U.S. 279; *People* v. *Cahill* (1993) 5 Cal.4th 478,

510.) Under that rule, constitutional error is excused if the state "has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Collazo v. Estelle*, *supra,* 940 F.2d at 423-424, quoting *Chapman v. California*, *supra*, 386 U.S at 24.) The admission of Winbush's confessions cannot be said to be "unimportant" in relation to everything else the jury considered. (*Ibid.*)

The state must show that the evidence that remains after the unlawful confessions are excluded not only is sufficient to support the verdict, but overwhelmingly establishes the defendant's guilt beyond a reasonable doubt. (*Brown v. United States* (1973) 411 U.S. 223, 230-232; *Milton v. Wainwright* (1972) 407 U.S. 371, 372-373, 377-378.) Because confessions carry "extreme probative weight," the admission of an unlawfully obtained confession rarely is "harmless error," and their admission is harmless only in limited instances. (Cf. *Felder v. McCotter* (5th Cir.1985) 765 F.2d 1245, 1250-1251 [use of unlawful confession not harmless even though there was a second, less detailed, admission in evidence]; see also *Satterwhite v. Texas* (1988) 486 U.S. 249.)

Because Winbush's confessions were a significant part of the evidence against him, their improper admission cannot be considered harmless beyond a reasonable doubt. (See *People* v. *Johnson* (1990) 220 Cal.App.3d 742, 751.) The jury did not find Patterson credible, and, in the absence of Winbush's own confessions, was likely to reject Patterson's efforts to blame Winbush both pretrial and at trial, given that Patterson was permitted to post bail for 14 months and not charged with a capital crime as a reward for blaming Winbush for the murder. (See 142-RT 11060-11087; 148-RT 11674.) The circumstantial evidence suggesting Winbush's involvement, consisting of hearsay and

contradictions, was not alone sufficient to convict him of a capital crime in the absence of his confessions. Moreover, a full confession, unlike statements concerning only isolated aspects of a crime, "'may tempt the jury to rely upon that evidence alone in reaching its decision.'" (*Arizona v. Fulminante, supra,* 499 U.S. at 296.)

The introduction of these wrongfully-obtained statements was also not harmless error with respect to the imposition of the death penalty. During his penalty phase closing argument, the prosecutor relied upon Winbush's statements to portray Winbush as a heartless murderer, and argued repeatedly that the Winbush should be sentenced to death because his statements established that he was not deserving of life. (188-RT 14687-88; 189-RT 14776-78.)

Given the prosecution's reliance on Winbush's statements at the penalty phase, it certainly cannot be said that the admission of Winbush's statements in contravention of his constitutional rights was harmless beyond a reasonable doubt. "There is no reason why [this Court, should treat this evidence as any less 'crucial' than the prosecutor -- and so presumably the jury -- treated it." (*People v. Powell* (1967) 67 Cal.2d 32, 56-57, quoting *People v. Cruz* (1964) 61 Cal.2d 861, 868.) Winbush's videotaped confessions and his other statements cannot be considered to be harmless beyond a reasonable doubt either at the guilt or penalty phases of his trial.

V. THE COURT DENIED WINBUSH HIS DUE PROCESS RIGHT TO A FAIR AND RELIABLE PENALTY DETERMINATION BY REFUSING TO SEVER HIS CASE FROM HIS CODEFENDANT

A. The Relevant Facts

Pretrial, Winbush moved for severance of his case from Patterson's case. (36-RT 2227; 9-CT 2268, 2298; see 3-8-2002-RT 24-41.) The court and defense counsel debated how much of Winbush's defense they must reveal to show that antagonistic defenses by the codefendant warranted severance. (36-RT 2230-56; 38-RT 2406.) Winbush argued it was sufficient that he denied being there or committing the murder. (36-RT 2242; 38-RT 2406; 9-CT 2344.) Patterson and the prosecutor argued that antagonistic defenses, no matter how severe, would alone not justify severance under *Zafiro v. United States* (1993) 506 U.S. 534. (38-RT 2402; 9-CT 2336.) The court agreed, denying severance. (38-RT 2480; 3-8-2002-RT 36, 41.)

During trial, Winbush renewed his severance motion on the ground of antagonistic defenses and the fact Patterson's lawyer acted as a second prosecutor in cross-examining Mosley, who implicated only Winbush, and because the court limited Winbush's cross-examination of Botello about why he wanted to shoot Patterson. (117-RT 7809; 124-RT 9369-9373; 139-RT 10758; 10-CT 2657; 10-CT 2608, 2650-2657.) The court denied the motion for same reasons as before. (117-RT 7811; 124-RT 9369; 10-CT 2657.) Winbush again renewed his severance motion on the ground of antagonistic defenses due to the testimony of Julia Phillips. (139-RT 10740-58.)

1. The Anonymous Call Of Julia Phillips

On April 5, 1996, Berkeley police received and taped an anonymous call from a woman -- later identified as Julia Phillips -- who said that she had information about a "young Caucasian girl" being robbed and stabbed in Berkeley on the day after Christmas. (1-Supp.CT 79-81; 130-RT 9946-9948.) Phillips said she had overheard Winbush, who was "sick in the head," say that he had robbed and stabbed to death a white woman in Oakland, and that someone else said he had to break his bracelet off his leg. (1-Supp.CT 81-82.) The caller thought Winbush was arrested the night before and was in jail. (1-Supp.CT 81.) The tape of that call was played at trial. (127-RT 9694-9696, 9698; 1-Supp.CT 79-85; Exhibit 65 & 65A.)

The court admitted the above testimony only against Patterson, not Winbush. (127-RT 9697-9700.) The alleged probative value of this tape-recording was that Patterson listened to it and it arguably formed the motive for the assault on, and attempted murder of, Julia Phillips, thus tended to prove Patterson's consciousness of guilt. (139-RT 10755.) It was unrealistic to believe that the jury would not consider this evidence against Winbush. This testimony would not have been admitted at a separate trial.

Winbush renewed his severance motion in conjunction with a mistrial motion made after the prosecutor cross-examined Winbush about gratuitous prior bad acts in the guise of establishing that Winbush had been *Mirandized* before. (145-RT 11400.) Winbush also complained that antagonistic defenses created a situation where there were "two prosecutors" against him. (146-RT 11409-10; 10-CT 2679.) The court noted that it had refused to permit Patterson's counsel to cross-examine

Winbush about alleged sexual assaults against Julia Phillips, and denied Winbush's motions for mistrial and severance. (146-RT 11425-26; see 138-RT 10723.)

2. The Jailhouse Testimony Of Tyrone Freeman

Mid-trial, Patterson abandoned his defense of innocence in favor of a defense of less culpability, by offering the preliminary hearing testimony of an unavailable witness, Tyrone Freeman. Freeman had testified that Winbush told him that he and his brother-in-law "Nate" did the murder. (156 RT 12164-88; 10-CT 2693.) Winbush's alleged confession arguably also implicated Patterson as an accomplice, because Patterson admitted he was Winbush's brother in law, although he denied that he was called "Nate." (155 RT 12083-85.) The prosecutor had earlier stated that he was not intending to call Freeman as a witness, because he was an unreliable jail-house informant. (18-RT 1084, 1094.)

Neither Patterson's incriminating taped statements nor his trial testimony blaming Winbush, would have been admissible at Winbush's separate trial, because Patterson would have had no reason to testify at it, and without his testimony, his taped statements would have been inadmissible under *Aranda-Bruton*. (See *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 [a nontestifying codefendant's extrajudicial statement that incriminates both himself or herself and the other defendant is inadmissible].)

Winbush objected and renewed his severance motion, citing *People v. Diggs* (1986) 177 Cal.App.3d 958, and *People v. Davis* (1989) 48 Cal.2d 241, for the proposition that for one co-defendant to abandon his only viable defense to the detriment of the co-defendant violates the

co-defendant's right to a fair trial and due process. (156 RT 12164-88.) The court denied Winbush's severance motion and permitted Patterson to present Freeman's testimony. (156 RT 12164-88.)

Winbush was prejudiced by the denial of severance in other ways, as well. In rebuttal to the defense case, the prosecution called Botello, who testified that he had been in a barber shop after Beeson's murder when Patterson entered. When Botello asked why he had come to his house and "done it," Patterson responded that Winbush had forced him to come. Winbush had done "everything" while Patterson was looking out the window.[28] (156-RT 12236-37.)

During the closing arguments at the guilt phase, Winbush again moved for severance under the antagonistic defense theory, because Patterson acted as a second prosecutor when he argued that Winbush lived in a world of liars. (161-RT 12699; 11-CT 2707.)

The court denied Winbush's renewed motion for mistrial after Patterson's attorney's guilt phase argument, when he argued that Winbush was the actual killer and more culpable. Winbush complained again that antagonistic defenses made Patterson a second prosecutor. (163 RT 12837-41; 11-CT 2710.)

During the penalty phase, the court again denied Winbush's renewed motion for mistrial after Patterson's attorney cross-examined a jail guard who had testified about an incident with Winbush, and elicited a statement that anytime Winbush, who was housed in Administrative Segregation, was moved within the jail he was placed in chains and restraints for the safety of the staff and other inmates. (175-RT 13941.)

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27. This hearsay was admitted as a prior inconsistent statement of Patterson.

Winbush renewed his motions for severance or mistrial because Patterson's counsel's cross-examination was prejudicial to Winbush. (175-RT 13943-44.) The court incorporated all of its earlier rulings and denied the motions. (175-RT 13945; 11-CT 2854-2856.) The court also denied one final severance motion at the close of penalty arguments because the arguments made by Patterson's attorneys, blaming Winbush for the murder, were unfairly prejudicial to Winbush. (190-RT 14881; 11-CT 2879-2881.)

Patterson's attorneys strenuously and successfully argued to the jury that Patterson should be spared the death penalty, because Winbush was largely responsible and incorrigible:

> Grayland Winbush is the cause of this crime. Grayland Winbush is the motivating factor. It was Grayland who wanted to go rob. It was Grayland who wanted the gun. He was the spark plug. If there were no Grayland, there would have been no . . . murder. (189-RT 14739-40.) . . .
>
> I'm definitely not advocating the death penalty for Grayland Winbush. But however you look at Norman Patterson, his aggravation, his potential for dangerousness in prison, his entire personality is far less deserving of the death penalty than Grayland. . . .
>
> [B]ut some men just can't adjust to confinement and others do just fine. You have heard the evidence about Grayland behind bars, how he fights with guards, fights with other inmates. Attempt to rape another boy. Threats. Not just in the Youth Authority as recently as this year when he knew it could be brought forward to you because you had already been impaneled. He knew that when he did it, it was going to affect this case, but still violence in custody.
>
> Deputy Foster told you his reputation in the Alameda County jail is for being excessively violent to staff. I thought that word "excessively" was interesting. It implied that there is a degree of violence that is acceptable. That Grayland goes even beyond that. (189-RT 14757-58.)

> Without Grayland Winbush, this trial would not have happened. This crime would not have happened. (190-RT 14820.)
>
> Everything that Jacobson has told you and shown you about Grayland Winbush tells you that this was his crime. Minor events set him off. He's got a hair trigger. He blows things out of proportion. He gets short-changed on his enchiladas, he goes crazy on the guards. Berkeley Police officers want to give him a ticket, turns into a wild chase through the streets of Berkeley and North Oakland; rams a police officer, tries to kill him. It's all consistent. That was Jacobson's theory; it's all consistent with Grayland Winbush's temper. Hair trigger. Beeson disrespects him, a simple robbery turns into a murder. (190-RT 14822.)
>
> Remember the evidence. Grayland took off his belt. Grayland decided to turn this robbery into a murder. Grayland is the one who talks about putting her down like a dog, putting her to sleep. Not Norman. (190-RT 14823.)

B. The Relevant Federal Law

The trial court's failure to grant Winbush's motions for severance rendered the joint proceeding fundamentally unfair so as to violate due process. (See *Johnson v. Dugger* (11th Cir. 1987) 817 F.2d 726; *Manning v. Warden Louisiana State Penitentiary* (5th Cir. 1986) 786 F.2d 710; cf. *Robinson v. Wyrick* (8th Cir. 1984) 735 F.2d 1091 [to obtain federal habeas relief for failure to sever offenses, the joinder must render the trial fundamentally unfair]; *Tifford v. Wainwright* (5th Cir. 1979) 588 F.2d 954, 957 [denial of motion to sever one codefendant's trial from that of other codefendants, under facts of the case, made trial "fundamentally unfair"]; *Byrd v. Wainwright* (5th Cir. 1970) 428 F.2d 1017, 1019-1022 [same].)

Severance may be warranted when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States* (1993) 506 U.S. 534, 539 [addressing severance under Fed. Rules Crim. Proc., rule 14, 18 U.S.C.]; see *United*

States v. Lane (1986) 474 U.S. 438, 446, fn. 8, 449 [misjoinder would violate federal due process were the prejudice sufficiently great].) These case are not constitutionally based and apply only to federal trials, not state trials. (*Collins v. Runnels* (9th Cir. 2010) 603 F.3d 1127.)

Winbush clearly demonstrated substantial, undue, and compelling prejudice from the joinder of his trial with Patterson's. In *People v. Box* (2000) 23 Cal.4th 1153, 1195-1197, this Court explained federal law as follows:

> There is a preference in the federal system for joint trials of defendants who are indicted together." (*Zafiro v. United States* (1993) 506 U.S. 534, 537.) Consequently, a motion for severance is committed to the sound discretion of the district judge. (See *United States v. McCoy* (6th Cir.1988) 848 F.2d 743, 744.) A defendant seeking severance at trial from co-defendants bears a strong burden and must demonstrate substantial, undue, or compelling prejudice. (See *United States v. Warner* (6th Cir.1992) 971 F.2d 1189, 1196.)

In Winbush's case, counsel for Patterson successfully placed the blame on Winbush, while deflecting blame from himself. (156-RT 12236-37.) In addition, the court permitted Patterson to present Freeman's testimony about Winbush's alleged confession, which the prosecutor had declined to introduce because Freeman was a jailhouse informant. (156 RT 12164-88; 18-RT 1084, 1094; 10-CT 2693.)

In a capital case, the prejudicial effects of joinder also implicate the right to individualized sentencing. (See, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 604-605; see *Zant v. Stephens* (1983) 462 U.S. 862, 885.) In *Woodson v. North Carolina* (1976) 428 U.S. 280, 304, the Court recognized that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record

of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the death penalty." In this case, the penalty phase process was distorted because Patterson blamed Winbush and unfavorably contrasted him to Patterson, thus prejudicing Winbush's right to individualized sentencing in his death penalty case. (*Stringer v. Black* (1992) 503 U.S. 222, 230.)

C. The Relevant State Law

Penal Code section 1098 states a statutory preference for a joint trial of jointly-charged defendants. (*People v. Pinholster* (1992) 1 Cal.4th 865, 932-934.) It also specifies that a trial court is vested with discretion to grant or deny separate trials for persons jointly accused. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 343; *People v. Boyde* (1988) 46 Cal.3d 212, 231 [an order denying severance is reviewed for abuse of discretion].)

The joinder laws, in "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 448, 451-452; see *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 938-939.) "The court should separate the trial of codefendants 'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.'" (*People v. Turner* (1984) 37 Cal.3d 302, 312, quoting *People v. Massie* (1967) 66 Cal.2d 899, 917.)

In *People v. Massie* (1967) 66 Cal.2d 899, 916-917, & fns. 18-22, this Court recognized that a trial court should order separate trials for

codefendants where: (1) An extrajudicial statement is made by one defendant which incriminates another defendant and which cannot adequately be edited to excise the portions incriminating the latter; (2) there may be prejudicial association with codefendants; (3) there may be likely confusion from evidence on multiple counts; (4) there may be conflicting defenses; or (5) there is a possibility that in a separate trial the codefendant may give exonerating testimony.

Applying these factors, severance was required because Winbush was severely prejudiced by the prejudicial association with Patterson and they had conflicting defenses, which resulted in highly prejudicial testimony that otherwise would not have been admitted at Winbush's trial. The prosecutor had decided that he was not intending to call Freeman as a witness, because he was an unreliable jail-house informant. (18-RT 1084, 1094.) Patterson, however, introduced Freeman's testimony that Winbush told him that he and his brother-in-law "Nate" did the murder. (156 RT 12164-88; 10-CT 2693.) Patterson inexplicably introduced this testimony about Winbush's alleged confession even though it implicated Patterson, because Patterson admitted he was Winbush's brother in law, although he denied that he was called "Nate." (155 RT 12083-85.)

In *People v. Cummings* (1993) 4 Cal.4th 1233, 1286-1287, the court approved of the impaneling of separate juries for the defendants to minimize any impact the defendants' respective trial strategies might have on the other defendant. The jury trying each defendant was fully aware that the other was attempting to avoid his own responsibility by shifting blame. Unlike Winbush's case, however, each jury in *Cummings* heard only the closing argument of the defendant whose guilt it was to decide, and each was able to determine guilt solely on the basis of the evidence

relevant to that defendant. In contrast, the jury heard the arguments of Patterson's counsel blaming Winbush for the murder, and distancing Patterson from Winbush.

D. The Error Requires Reversal

The failure to grant severance is reversible error if it is determined that "because of the consolidation, a gross unfairness has occurred such as to deprive defendant of a fair trial or due process of law." (*People v. Turner* (1984) 37 Cal.3d 302, 312.) Even if the trial court had not abused its discretion in denying separate trials at the time, the ruling may still form the basis for reversal after trial if the reviewing court determines that, "because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*Id.* at 313; see also *People v. Ervin* (2000) 22 Cal.4th 48, 69.)

In Winbush's case, the consolidation of the codefendants led to a distortion of the evidence suggesting Winbush was far more culpable than Patterson, who blamed Winbush, and which unfairly bolstered the prosecution's case against Winbush. Without the joinder, the jury would not have heard Patterson's incriminating taped statements nor his trial testimony blaming Winbush, because Patterson would have had no reason to testify at Winbush's separate trial, and, thus, his testimony at a separate trial and his taped statements would have been inadmissible under *Aranda-Bruton*.

In *People v. Ervin* (2000) 22 Cal.4th 48, 78-79, 95-96, this Court held that it was unnecessary to sever the penalty phase trials of codefendants, because the record failed to "show that the jurors in this joint trial were unable or unwilling to assess independently the respective culpability of each codefendant or were confused by the limiting

instructions. Indeed, their verdicts (imposing death for McDonald and defendant, but life without parole for Robinson) indicate the contrary was true." (See also *People v. Taylor* (2001) 26 Cal.4th 1155, 1173 ["nothing in the record indicating defendant's jurors failed to assess independently the appropriateness of the death penalty for defendant or DeWitt, or engaged in improper comparative evaluations of these men"].) But the error in joinder in Winbush's case was not limited to penalty, but also the guilt phase, given all the incriminating evidence from Freeman and Patterson that would not have been admitted at a separate trial.

In Winbush's case, Patterson's defense successfully pinned most of the blame on Winbush at penalty, even though it was Winbush alone who had spent most of his childhood in state confinement. (See *Boyde v. California* (1990) 494 U.S. 370, 382 [there is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse"].) Simply because the jury found Winbush killed Beeson and had a troubled childhood mainly in state custody is not enough by itself to condemn him to a death sentence that his cohort escaped.

In *Foster v. Commonwealth* (Ky. 1991) 827 S.W.2d 670, 681-683, the court held that the trial court erred in refusing to sever the penalty phase of the trial, when acts of his misconduct were introduced in support of his codefendant's mitigation case:

> The respective evidence in mitigation offered by the appellants to the jury was antagonistic to each other. The penalty phase as to Foster was unfairly tainted by the appearance of Powell's counsel acting as a second prosecutor. (*Id.* at 683.)

Similarly in *Lafevers v. State* (Okl.Cr. 1991) 819 P.2d 1362, 1367-1368, the court overturned a death sentence because of the trial court's failure to sever the codefendant's penalty phase, because of "the inherent problems involved when two co-defendants with mutually antagonistic defenses are put on trial together result[ing] in fundamental unfairness." In Winbush's case, severance of both the guilt and penalty phases would have been necessary because the jury had been tainted by the guilt phase evidence, which they could consider in penalty under factor (a).

Similarly in *McDaniel v. State* (Ark. 1983) 648 S.W.2d 57, 59-61, the court held that the trial court abused its discretion in denying severance of defendants in a capital case because their defenses were antagonistic to each other and "the overriding duty of the trial judge is to determine that defendants can be tried together without substantial injustice." (*Id.* at 59.)

Here, there was an evident strategy by the prosecution to permit Winbush and Patterson to try each other which, in the end, tainted the result in Winbush's case. Over Winbush's objection, Patterson argued in closing that "without Grayland Winbush, this trial [and] this crime would not have happened." (190-RT 14820, 14881; 11-CT 2879-2881.) Given the closeness of the penalty determination, in light of jury deliberations of about 13 hours over four days (11-CT 2881-2892); it is both reasonably possible (*Chapman v. California, supra*, 386 U.S. at 24) and reasonably probable (*Strickland v. Washington, supra*, 466 U.S. at 693-695) that the jury would not have imposed the death penalty if Winbush had not been tried at the same time with Patterson. It certainly cannot be found that the errors had "no effect" on the penalty verdict. (*Caldwell v. Mississippi, supra*, 472 U.S. at 341.)

SECTION 2 - GUILT PHASE ISSUES

VI. THE COURT ADMITTED IRRELEVANT AND PREJUDICIAL PHOTOGRAPHIC EVIDENCE IN THE GUILT PHASE IN VIOLATION OF EVIDENCE CODE SECTIONS 350-352 AND WINBUSH'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND A VERDICT BASED ON REASON AND NOT PASSION AND PREJUDICE

A. The Relevant Facts

Winbush moved to exclude nude photographs of Beeson that erroneously suggested sexual assault, at least subliminally, and other inflammatory, gruesome, irrelevant, and cumulative photographs under Evidence Code section 352. (24-RT 1552; 6-CT 1339.) The prosecutor argued he was entitled to use numerous photographs and autopsy photos. (6-CT 1543.) The court largely denied Winbush's motion, admitting virtually all photos. (9-CT 2244, 2249; People's Exhibits 25-41.)

The prosecutor argued that the bloody nude photos related to clothing and the amount of blood, and the fact Winbush said in his statement that he did not notice any blood.[29] (24-RT 1539-1540.) The prosecutor also claimed multiple stab wounds were very strong evidence of a first degree, premeditated, deliberate murder. (24-RT 1583-1584.) The prosecutor also claimed these photos corroborated the crime scene technician, homicide detectives, and the boyfriend who found the victim, and were circumstantial evidence of the state of the mind of the killers. (25-RT 1600-1601.)

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29. The prosecutor never introduced any evidence that the blood on Beeson's nude body -- who was "fully dressed" when found -- could have been seen by her assailants. (108-RT 7054, 7084.) Beeson was stripped by the medical technicians in an attempt to revive her. (108-RT 7085-7086.)

Winbush argued that the nude photos of Beeson did not show the crime scene as people observed it when they discovered her body; but that Beeson's body had been undressed and moved by the paramedics before the crime scene technician arrived. (25-RT 1601, 1626-1627.) Winbush argued that there were other photographs of the crime scene without the nude body, and the medical intervention by the emergency personnel, which required removing Beeson's clothes, was not relevant. (25-RT 1603; see 108-RT 7054, 7084-7086.) The prosecutor argued that while there were other crime scene photos, the semi-nude photographs were the only crime scene photos with the victim's body. (25-RT 1604.) Winbush emphasized that nude photos are particularly inflammatory and prejudicial when there was no allegation of a sexual attack, and other photos adequately showed the scene and wounds. (25-RT 1615-1617, 1626.)

Ignoring the visceral and subliminal revulsion and sexual connotations of a bloody, nude, dead young woman sprawled on the floor, the court found that nothing about an unclothed body made this so inflammatory or so prejudicial that it inherently outweighed their significant probative value. (25-RT 1633, 1661-1644.) Winbush renewed his objections to the nude photographs at trial. (138-RT 10636.)

B. The Relevant State Law

In *People v. Scheid* (1997) 16 Cal.4th 1, 13-21, this Court reviewed the standards for the admissibility of photographs of a murder victim. Evidence must be excluded under Evidence Code sections 350-352 if either 1) it is not relevant to a material issue, or 2) the evidence creates a substantial danger of undue prejudice that substantially outweighs its

probative value. (*People v. Turner* (1984) 37 Cal.3d 302, 320-321.) Because of the discretion normally accorded to the trial judge's decision, a "refusal to exclude [evidence] under section 352 will not be disturbed on appeal unless the prejudicial effect clearly outweighs the . . . probative value." (*People v. Allen* (1986) 42 Cal.3d 1222, 1256.)

A prosecutor may not use photographs of victims where they are "relevant only on what . . . is a nonissue," or they "are . . . largely cumulative of expert and lay testimony regarding the cause of death," or they "are . . . unduly gruesome." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1137.) Admission of the photographs challenged in this case violated all of these principles. They shed absolutely no light on any disputed issues; they added nothing to the testimony of the autopsy surgeon; they were and are disturbing and nauseating to look at; and they falsely suggested a sexual component to the killing when there was none.

Permitting the prosecution to introduce evidence of no probative value and enormous prejudicial impact thus violated state law. (Evid. Code §§ 350, 352, 1101(a); see generally, *People v. Cummings* (1993) 4 Cal.4th 1233, 1295; *People v. Williams* (1988) 44 Cal.3d 883, 909.) Weighing the probative and prejudicial value of proffered evidence requires a court to consider several factors. The probative value of evidence is assessed by considering whether the evidence is cumulative, relates to an uncontested issue, or is necessary to support or illustrate the government's case. (*People v. Allen, supra*, 42 Cal.3d at 1257; *People v. Marsh* (1985) 175 Cal.App.3d 987, 998.) To determine the extent of undue prejudice, the court should assess the inflammatory nature of the evidence and the prosecution's use and presentation of it. (*People v. Marsh, supra*, 175 Cal.App.3d at 996-999; *People v. Smith* (1973) 33

Cal.App.3d 51, 69.) In *People v. Blue* (Ill. 2000) 724 N.E.2d 920, 931-934, the court reversed a murder conviction, in part because the court erroneously permitted the introduction into evidence of the bloodied uniform of the police officer victim.

The explicit nude photographs of Beeson's dead body at the scene of the murder were not only irrelevant to any material issue in the guilt phase, but also misleading, as Beeson was found fully clothed. (108-RT 7054, 7084.) Her clothes were removed by the emergency personnel. (108-RT 7085-7086.) Because the nude photos of a young, white woman were far more prejudicial than probative of any relevant issue, they should have been excluded. (Evid. Code §§ 350-352; *People v. Turner, supra*, 37 Cal.3d at 320-321; *People v. Hendricks* (1987) 43 Cal.3d 584, 594.) In addition, some of the graphic autopsy photographs of Beeson should have been excluded because they were also far more prejudicial than probative. (*Ibid.*) The photos were largely cumulative of the extensive, and essentially uncontested, expert testimony by the pathologist regarding the precise nature of Beeson's injuries and the possible causes of death. This testimony needed no further illustration or clarification. There was no dispute that Beeson was stabbed and strangled; the only disputed issue was the identity of the culprit or culprits.

The prejudicial nature of the evidence, however, was substantial. The photographs of Beeson's nude body, at a minimum, were misleading as Beeson was found fully clothed, and they subliminally suggested a sexual component to the murder, when there was no evidence of such. The prosecutor's use of autopsy photos repeatedly highlighted the injuries, thereby exacerbating the inflammatory impact inherent in such evidence. (Cf. *People v. Hendricks, supra*, 43 Cal.3d at 594 [crime scene photos of

victims "are always unpleasant"].) The photographs "supplied no more than a blatant appeal to the jury's emotions," a form of undue prejudice that in this case clearly outweighed the probative value of the evidence. (*People v. Smith, supra*, 33 Cal.App.3d at 69.)

The substantial prejudice caused by the photographs is unquestionable. Seeing a nude photograph of Beeson's dead body was certainly incredibly painful for the family members, and watching that pain must have had an impact on the emotions of the jury. The resulting prejudice heavily outweighed any probative value of the identification.

The photos were also entirely cumulative. (See *People v. Smith* (1973) 33 Cal.App.3d 51, 69 [finding photographs cumulative to "autopsy testimony regarding the precise location and nature of the wounds, which needed no clarification or amplification"].) "If evidence is 'merely cumulative with respect to other evidence which the People may use to prove the same issue,' it is excluded under a rule of necessity." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1137, quoting *People v. Thompson* (1981) 27 Cal.3d 303, 318.) "'[T]he prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant.'" (*People v. Cardenas* (1982) 31 Cal.3d 897, 905, quoting *People v. De La Plane* (1979) 88 Cal.App.3d 223, 242.)

These are exactly the kinds of photographs which can bias or otherwise "inflame the passions" of the jury. (See *People v. Burns* (1952) 109 Cal.App.2d 524, 535-538 [reversal based on gruesome autopsy photos]; accord, *People v. Scheid* (1997) 16 Cal.4th 1, 20 [recognizing that portrait photos displaying contorted facial expressions of crime victims could conceivably inflame a jury].)

Under Evidence Code section 352, the trial court's discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. (*People v. Scheid, supra*, 16 Cal.4th at 18.) The prejudice referred to in section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. (*People v. Karis* (1988) 46 Cal.3d 612, 638.) A photograph of a naked, young white woman is the kind that tends to evoke an emotional bias against a defendant, particularly a young black man. That is the true reason why the prosecutor showed these photographs to the jury, and that is the reason this Court should find the trial court's admission of it erroneous. The prejudicial effect of the photograph clearly outweighed any probative value. (*People v. Scheid, supra*, 16 Cal.4th at 18.)

C. The Admission Of This Evidence Violated Winbush's Due Process Rights And His Eighth Amendment Right To A Reliable Verdict Based On Relevant Factors

Not only was the admission of the photographs a violation of state law, the court's ruling deprived Winbush of his federal constitutional rights to due process and to a reliable penalty determination. (U.S. Const., 5th, 8th and 14th Amends.; see *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548-549 [irrelevant photographs of blood spattered crime scene could render trial fundamentally unfair].) To the extent the error was solely one of state law, it nevertheless violated Winbush's right to due process by depriving him of a state-created liberty interest. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Hewitt v. Helms* (1983) 459 U.S. 460, 466.)

Federal due process is violated if the state trial is conducted "in such a manner as amounts to a disregard of that fundamental fairness

essential to the very concept of justice." (*Chavez v. Dickson* (9th Cir. 1960) 280 F.2d 727, 735; *Osborne v. Wainwright* (11th Cir. 1983) 720 F.2d 1237, 1238-1239 [remanding for habeas hearing to determine whether admission of gruesome photographs constituted fundamental unfairness violating due process].) In addition, a death verdict based on irrelevant factors is constitutionally unreliable, in violation of the Eighth Amendment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.) The array of irrelevant, misleading, and inflammatory photographs violated these federal standards.

Erroneously admitted evidence deprives a defendant of fundamental fairness only if it was a " 'crucial, critical, highly significant factor' in the [defendant's] conviction." (*Williams v. Kemp* (11th Cir.1988) 846 F.2d 1276, 1281.) The introduction of graphic photographic evidence rarely renders a proceeding fundamentally unfair. (*Futch v. Dugger* (11th Cir. 1989) 874 F.2d 1487 [photograph of victim, nude, showing wounds made by gunshot]; *Evans v. Thigpen* (5th Cir. 1987) 809 F.2d 239, 242 [nine color slides of homicide victim]; *Jacobs v. Singletary* (11th Cir. 1992) 952 F.2d 1282 [because the photographs served a minor role in the state's case, their admission if erroneous did not deprive Jacobs of her right to a fair trial].) In Winbush's case, however, the graphic and nude photographs played a major role in Winbush's conviction and sentence of death.

D. The Admission Of The Prejudicial Evidence Was Not Harmless Beyond A Reasonable Doubt

The prosecutor was allowed to focus the jury's attention on nude and bloody photographs to generate sympathy for Beeson and improperly impugn Winbush, suggesting a sexual aspect to the crime, thereby increasing the likelihood that the jury would convict Winbush. (See *People*

v. Hendricks, supra, 43 Cal.3d at 694-696; see also *People v. Scheid, supra*, 16 Cal.4th at 20 [suggesting impropriety of "unduly belaboring' issue by using potentially inflammatory photographs extensively during witness examination].) Under either the *Chapman or Watson* standard of prejudice, the errors must be seen as prejudicial, whether considered by themselves or in conjunction with the other errors in this case. (See *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

Admission of the photographs was especially wrong because this was a capital trial. Both the Eighth Amendment and the due process clauses of the Fifth and Fourteenth Amendments require greater reliability in all the stages of a capital trial than is required in non-capital trials. (*Beck v. Alabama, supra*, 447 U.S. at 637.) Courts must take extra precautions to ensure that a juror's decisions are not influenced by "irrelevant" considerations (*Zant v. Stephens, supra*, 462 U.S. at 885) or are the product of "an unguided emotional response" to evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328). Admission of the misleading nude photographs and the gross autopsy photos created a significant risk of such undue influence. The revulsion caused by the photographs rendered the trial fundamentally unfair (*McKinney v. Rees, supra*, 993 F.2d at 1386) and the guilt verdicts unreliable within the meaning of the Eighth Amendment. (*Beck v. Alabama, supra*, 447 U.S. at 637).

VII. THE COURT VIOLATED MR. WINBUSH'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY HAVING A COURTROOM DEPUTY ACCOMPANY MR. WINBUSH TO THE STAND AND STATIONING HIM RIGHT NEXT TO HIM

A. The Relevant Facts

At the start of a pretrial hearing, defense counsel stated that "should Mr. Winbush testify before the jury, I have a serious objection to suddenly having somebody going up there with him, which is nothing but a nonverbal communication to the jury that this man is more dangerous than the other witnesses." (28-RT 1802.)

The court responded: "It is my practice -- and I think the practice of most judges in the building -- that the defendants with the charges we have before us, defendants will be accompanied by a bailiff. . . . who is seated next to Mr. Winbush . . . is seated no closer to him than the bailiffs are seated on everyday proceedings throughout this trial . . . within, say, three feet of him, and that is where the bailiff is seated now. So, there is really no difference. I don't perceive any difference in what you described as nonverbal communication with the bailiff seated behind him at counsel table or next to him on the witness stand." (28-RT 1802-1803.) The court ruled that "will be my practice," including Mr. Patterson and any other in-custody witnesses. (28-RT 1804-1805.)

Defense counsel reiterated his objection:

> The difference [is] all the other witnesses go up there without a bailiff. . . .I have tried a substantial number of murder cases in Alameda County, including just a capital case -- including one we just finished, and the bailiff did not sit up with our clients. (28-RT 1803.) . . .
>
> [I]t appears that the deputy's knee is about less than two feet from Mr. Winbush's chair. And the chairs where

> the deputy sit are about three feet from the defendant's chair. I would also say that our objection is based on the federal constitution and due process and equal protection clause, as made applicable to the states by the 14th amendment. (28-RT 1805.) . . .
>
> What bothers me is he is a witness who will be displayed to the jury differently than other witnesses. I think jurors expect that there will be bailiffs in criminal court. I don't find that very shocking. And they have to sit somewhere. And the fact they sit near the defendants is not a problem. But once he goes up here, what we are telling the jury, this man is so dangerous that the bailiffs down here might not be able to get to him in time. We need a bailiff up there with him. And that, I think absent some evidence of his misbehavior in court – and there is none. He has been a perfect gentleman as the court itself has noted -- is to me offensive. (28-RT 1806.)

The court stuck by its ruling, not based on the facts of the case or Mr. Winbush's misconduct or threat, but because of his general practice: "I will continue this practice with Mr. Winbush, with Mr. Patterson, and any in-custody witness called by whatever side that intends to call him or her." (28-RT 1806.)

B. The Relevant Law

In *People v. Stevens* (2009) 47 Cal.4th 625, 643, this court held: "Although the stationing of a security officer at the witness stand during an accused's testimony is not an inherently prejudicial practice, the trial court must exercise its own discretion in ordering such a procedure and may not simply defer to a generic policy." Factors justifying extraordinary security measures, include "evidence establishing that a defendant poses a safety risk, a flight risk, or is likely to disrupt the proceedings or otherwise engage in nonconforming behavior." (*People v. Gamache* (2010) 48 Cal.4th 347, 367.) There was no such evidence in Mr. Winbush's case; thus the trial court violated even this minimal stricture by simply deferring to his general

practice and the alleged generic policy of the Alameda County Superior Court. (28-RT 1802-1805.) Because the trial court did not dispute that Mr. Winbush was a "perfect gentleman" in court, and because there was no such evidence, and because the trial court was simply implementing a "generic policy," *Stevens* does not justify this security measure. (28-RT 1806; *People v. Stevens*, *supra,* 47 Cal.4th at 633 ["the record must show the court based its determination on facts, not rumor and innuendo"]; see also *People v. Lomax* (2010) 49 Cal.4th 530, 559; *People v. Hernandez* (2011) 51 Cal.4th 733, 742-744 [the court erred in elevating a standard policy above individualized concerns and basing its decision on the generic policy].)

In *People v. Hernandez*, *supra,* 51 Cal.4th at 744, this court held: "Where it is clear that a heightened security measure was ordered based on a standing practice, the order constitutes an abuse of discretion, and an appellate court will not examine the record in search of valid, case-specific reasons to support the order." The *Hernandez* court held that the error was one of state law subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 837, and held the error was harmless. (*People v. Hernandez*, *supra,* 51 Cal.4th at 745-748; but see *id.* at 748-750 [dis. opn. of Moreno, J.].)

Mr. Winbush disagrees and urges this court to reconsider its position and adopt the dissenting opinion of Justice Moreno, joined by Justice Kennard, which relied on well-established law to conclude that the federal constitutional error must be reviewed under *Chapman v. California* (1967) 386 U.S. 18, 24:

> As with the use of physical restraints (*Deck v. Missouri* (2005) 544 U.S. 622 (*Deck*)) or prison attire (*Estelle v. Williams* (1976) 425 U.S. 501 (*Estelle*)) in front of a jury,

> the stationing of a uniformed officer next to a defendant as he or she testifies is the kind of government action that constitutes an "unmistakable indication[] of the need to separate a defendant from the community at large" (*Holbrook v. Flynn* (1986) 475 U.S. 560, 569 (*Holbrook*)) and "is likely to lead the jurors to infer that [a defendant] is a violent person disposed to commit crimes of the type alleged. [Citations.]" (*People v. Duran* (1976) 16 Cal.3d 282, 290 (*Duran*).) Consequently, I would hold that such an unmistakably defendant-focused security arrangement is inherently prejudicial and permissible only if the trial court first identifies an essential case-specific state interest justifying its use. (*People v. Stevens*, *supra,* 47 Cal.4th at 644-645 [dis. opn. of Moreno, J.)
>
> Thus, I conclude that, like physical restraints or prison clothing, the security arrangement in this case was inherently prejudicial and posed a serious risk to the presumption of innocence and to the right to a fair trial. As such, while the measure might be justified under certain circumstances, the trial court should have first found a manifest need to justify permitting the arrangement. No manifest need, such as defendant posing a flight or safety risk, was identified by the trial court in support of the use of a uniformed escort. Rather, the trial court justified its decision by concluding that the arrangement was no more prejudicial than having a guard sit behind defendant at the defense table and that the Sheriff's Department justification for its blanket policy of accompanying all in-custody defendants was reasonable, and by relating an anecdote about a previous juror being uncomfortable with an armed police officer sitting at the witness stand. None of these reasons suffice. (*People v. Stevens*, *supra,* 47 Cal.4th at 650-651 [dis. opn. of Moreno, J.] [footnote omitted].)

Because this is federal constitutional error, the state must prove beyond a reasonable doubt that this error did not contribute to the guilt and death verdicts. It cannot. Justice Moreno's explanation applies equally as well to Mr. Winbush, because Mr. Winbush need not demonstrate actual prejudice to prove a due process violation. Whether Mr. Winbush was found guilty and condemned to death depended to a

significant degree on how he came across to the jury on the stand and his credibility – including his claim that his confessions were coerced. Being tailed by the bailiff, even as he sat in the witness chair -- as if he might jump on a juror unless closely watched -- cannot help but have prejudiced him. As Justice Moreno explained:

> Reversal is required unless the state can prove the error was harmless "beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24.) In applying the *Chapman* standard to the erroneous use of physical restraints, the *Deck* court explained that the use of restraints "will often have negative effects, but -- like 'the consequences of compelling a defendant to wear prison clothing' or of forcing him to stand trial while medicated -- those effects 'cannot be shown from a trial transcript.' [Citation.]" (*Deck, supra*, 535 U.S. at p. 635.) "Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the . . . error complained of did not contribute to the verdict obtained. [Citation.]" (Ibid.) The same is true of the error in this case. (*People v. Stevens*, *supra,* 47 Cal.4th at 651 [dis. opn. of Moreno, J.].)

For the same reasons, reversal is required here, because the state cannot prove the error harmless beyond a reasonable doubt at either the guilt or penalty phase. Moreover, it is reasonably probable Winbush would have obtained a more favorable result under *Watson* without the deputy stationed at the witness stand.

SECTION 3 - PENALTY PHASE ISSUES

VIII. THE COURT'S ADMISSION OF IRRELEVANT AND HIGHLY PREJUDICIAL "VICTIM IMPACT EVIDENCE," INCLUDING PERMITTING THE PROSECUTOR TO USE A VIDEOTAPE OF THIS EVIDENCE IN CLOSING ARGUMENT, DEPRIVED WINBUSH OF A FAIR TRIAL AND A RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. The Relevant Facts

The prosecution introduced substantial victim impact evidence, which Winbush will not repeat at length here. (AOB, Statement of Facts at 39-42.)

Evidence included Mrs. Beeson's testimony that her daughter Erika wanted to have children, to travel, see the world, and have a family. (177-RT 14054, 14066.) Erika liked to paint, dance, and liked music and art. (177-RT 14066.) Beeson's father appeared "totally devastated;" "the life just kind of went out of him" after Erika's death; and he died six months after Erika died. (177-RT 14051-52.)

Lisa Beeson testified that it was extremely hard to get her legal career going and stay with it, and she planned to leave the country and live elsewhere after the trial. (177-RT 14068.) Erika's murder "destroyed" their family and ruined her life; they were not a family anymore and did not celebrate holidays or birthdays. (177-RT 14065, 14068, 14052.)

Early in the guilt phase of trial, both Winbush and Patterson objected to permitting the Beeson family members to be present in the courtroom. Winbush's attorney argued that it would be "extremely

prejudicial to permit Beeson's family to attend the trial," citing *Payne v. Tennessee* (1991) 501 U.S. 808 (*Payne*). (104-RT 6825.)

During the prosecutor's opening statement in guilt phase, in which he regaled the jury with a graphic description of how Beeson was killed, counsel for both defendants renewed their motion to exclude witnesses after seeing Mrs. Beeson crying in the courtroom and learning that both Mrs. Beeson and Lisa Beeson had been seen crying in court before the recess. (106-RT 6894-6895.) The court overruled the objection, stating that it did not see anything prejudicial, and there had been no outbursts. (106-RT 6897-98.)

Later in the trial, Winbush again alleged that Mrs. Beeson was "visibly crying in courtroom," and renewed his motion to exclude witnesses. (148-RT 11611.) The court skirted the issue, ruling that it had seen "nothing distracting to the jurors or in violation of court order." (148-RT 11611.)

Pretrial, Winbush objected to the admission of irrelevant, unforeseeable or inflammatory victim impact evidence at the penalty phase. (40-RT 2501-2591; 43-RT 2682; 5-CT 1266-1278.) He argued that victim impact evidence should be limited to the impact upon family members at the scene or immediately afterwards, as in civil cases under *Thing v. La Chusa* (1989) 48 Cal.3d 644, 646-647. (5-CT 1267-1270.) Winbush argued that it should be limited to a single representative citing *People v. Hope* (Ill. 1998) 702 N.E.2d 282. (5-CT 1278.) He strongly objected to evidence that Beeson's father died of a broken heart because there was no medical evidence that it was true. (6-CT 1332; 45-RT 2806-2812, 2827-2831.) The prosecutor promised he would not argue Winbush and Patterson were responsible for Mr. Beeson's death. (45-RT 2810-

2811.) The court stated that such testimony was admissible. (45-RT 2813-2815; 48-RT 2985-2999.)

Winbush argued further that only a "brief glimpse" of a victim's life is admissible under *Payne*. (41-RT 2590-2591.) He argued that evidence of harm caused by a killing which is not foreseeable to the killer is inadmissible, citing *People v. Fiero* (1991) 1 Cal.4th 173, 260-261 [conc. & dis. opn. of Kennard, J.]. (41-RT 2584-2585.)

The court overruled Winbush's objection that *Payne* does not authorize testimony of the impact on the family, but only a brief glimpse into the life that was taken. (179-RT 14134-35.) The court overruled Winbush's constitutional and non-constitutional objections in large part, while excluding two witnesses as duplicative. (42-RT 2595-2617; 43-RT 2682.) The court approved the admission of all of Mrs. Beeson's three-page declaration/interview with inspector Jay Patel, except paragraph 6, and all of Lisa Beeson's five-page interview with inspector Jay Patel, overruling defense objections on numerous statutory and federal constitutional grounds, including that the testimony was overly emotional.[30] (42-RT 2618-2637; 43-RT 2650-2709; 44-RT 2716-2724, 2724-2779; 45-RT 2795-2838; Exhibits 1 & 2.) The court stated that it would give a limiting instruction before the victim impact testimony, that certain evidence was not admitted for the truth, but for the witnesses' state of mind. (42-RT 2628-2629; 45-RT 2798-2799.)

In the prosecutor's opening statement before penalty phase, he stated that the victim impact was horrible. (170-RT 13240-41.)

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30. Mr. Winbush will explore some of these issues below.

Before the prosecutor's closing argument, he stated his intention to accompany his argument with an 18-minute video presentation that included a nude photo of Beeson's dead body, autopsy photos, and photos of Winbush and Patterson, during which portions of Patterson's and Winbush's confessions would be played. Winbush's counsel objected, noting, among other problems, that the voices on the tape were not only difficult to understand, but did not clearly identify the speakers, and that the photographs of Winbush or Patterson, when exhibited, did not always correlate with the taped confessions of either Winbush or Patterson. (176-RT 14000-32; Court Exhibit 105A.) Winbush reiterated his objection to the nude photograph of Beeson's body because the body had been moved and undressed by medical personnel before the photos were taken. (183-RT 14434-35.) For the same reasons the nude photos of Beeson's dead body and autopsy photos violated Winbush's due process rights in the guilt phase, he argued, they violated his due process rights in the penalty phase. (See AOB, Arg. VI.)

The prosecutor argued that the 18-minute videotape was admissible under *People v. Wash* (1993) 6 Cal.4th 215, 256-257. (183-RT 14398-99, 14427.) The prosecutor argued that the photographs and the audio portions of the videotape video were fair and used only admitted evidence and were "strung together" in a way which told an 18-minute version of the murder, as opposed to playing hours of tape and showing all the photos that had been admitted. (183-RT 14429, 14435-38.) The court overruled the defense objections to the videotape.

During closing argument, the prosecutor used that evidence as follows:

I'm going to play a videotape now. This videotape has . . . some of the pictures from the book, Exhibit 138. It has some pictures from the crime scene. A few pictures from the autopsy. It has a soundtrack that is spliced pieces from evidence that you have before you. The start of it, some of it difficult to hear as the tape rolls. We heard 'em in court. There's a piece of tape from an interview with Iva Mosley. And then there's some back and forth between the confessions of Norman Patterson and those of Grayland Winbush. And you'll hear that there are very clear demarcation points in the tape. The tape stops abruptly so that you can tell there are pieces, they're simply segments, okay, that are taken from various places. Okay. And they're strung together to tell you the story of this . . .

The purpose of this tape is to keep your focus for why we're here, because Erika Beeson was murdered so brutally. You'll note some different things in this tape. One of the things that you'll note in this tape, you know, all of us as we are here in this moment in life, we have with us our childhood, and who that is. Now, I suppose the younger you are, the closer you are to your childhood, but we all carry our childhood with us, and you'll see in one of the photos here of Erika Beeson from about seven or eight years old, that there's a photo of her holding some Cabbage Patch Dolls, and you'll also see in the murder scene in the apartment she saved her dolls and stuffed animals. And it's an indication that you have that she was a wonderful person, you know. (Videotape played.) She was a good person to her friends. Good person to her family. And it's not fair. It's just not fair. This murder of Erika Beeson that Norman Patterson and Grayland Winbush did is absolutely evil. (188-RT 14705-06.)

The prosecutor explicitly asked the jury to compare Winbush with Beeson:

He's a very seasoned criminal in terms of violence, drug dealing, robberies, sexual assaults, all kinds of assaults. Highly, highly sophisticated, experienced criminal at the time of the murder. And again, I invite you, if you want, to consider the age factor, to compare him, his background, his sophistication, to Erika Beeson who was about the same age. (188-RT 14692.)

> And if you hear arguments about whether or not these guys are the worst of the worst, I encourage you to think about this from Erika Beeson's point of view during the last half hour of her life. Think about whether Grayland Winbush was the worst of the worst for Erika Beeson. (188-RT 14704-05)

The prosecutor also emphasized the impact of the crime on the family and the fact that Winbush was provided with a lawyer to mount a defense:

> Her family has been destroyed. They have some good memories; they have these few photos and some cards. They have some murderously bad memories. Her father, Fred, his last six months, a horrible six months. Lisa's left with the memory of Fred in the back seat of that car stroking a box of Erika's ashes. It's not fair that they get a lenient sentence of life. They've gotten lawyers, they've gotten preliminary hearings, they've gotten evidence, they've gotten months of motions. They've gotten a jury. Erika got executed. They decided. They decided together. It's not fair. (188-RT 14704.)

Citing *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, 335-336, Winbush objected to the prosecutor using this videotape of photographs and tape recordings during closing argument. (176-RT 14000-32.) Winbush also objected that the 53 photographs of Beeson, and greeting cards from Beeson that the prosecutor introduced at penalty phase were "absolutely unnecessary," cumulative, and irrelevant, appealed only to passion and emotions, and were extremely poignant and emotional to a degree that would prejudicially affect the jury. (46-RT 2889-2896, 2906-2907; 176-RT 14023; Exhibit 38.) Patterson complained that the prosecutor's editing of the videotape changed its meaning; that Winbush and Patterson's voices were not identified; and the photos often did not match the statements, so the video was confusing and misleading. (183-RT 14430-32.)

Winbush objected on "both the state constitution and the federal constitution" that the use of the sound video was overly theatrical and not how the evidence was presented to the jury, and the juxtaposition of the sound and the pictures that were not necessarily related was misleading: "By the combining of snippets of sound where portions of photographs [it] does make a different whole than the sum of the parts." (183-RT 14433-35.) Winbush explained that the problem was that the voiceover and the photos sometimes bore no relationship to each other and created a totally different image that had no logical basis, such as showing pictures of Beeson when there was something totally different being discussed on the tape. (183-RT 14434-35.)

The court reiterated its previous rulings, finding that an average of two-and-a-half photographs for every year Beeson "lived on this earth" was admissible and that the probative value substantially outweighed any prejudicial effect, because "all that remains of Erika Beeson are in these photographs and these few accompanying documents." (176-RT 14003, 14027-30; 183-RT 14427-44; 11-CT 2946.) The court found that everything in the videotape had been admitted into evidence and that having a photograph depicting one thing and a soundtrack depicting another was approved in *People v. Wash* (1993) 6 Cal.4th 215, 256-257. (188-RT 183-RT 14438-44.)

The court believed that "the voices . . . make it clear who is speaking. Beyond that, the context of what the speaker is saying I think make it clear who is speaking. I don't see think any ambiguity [or] anything unclear. It is cleared up either by the distinctive voices themselves or by the context of

what the speaker has said.[31] Or, . . . the tape recordings themselves have been played before this jury a number of times, and of course can be played again." (183-RT 14442-43.)

B. The Court Violated Winbush's Due Process Right To A Fair Trial By Permitting Beeson's Mother And Sister To Watch The Trial, Despite The Fact They Were Victim-Impact Witnesses And Crying

Over Winbush's objection, the court permitted Beeson's mother and sister to watch the trial, despite the fact they were crying and were victim-impact witnesses. (106-RT 6894-6898; 148-RT 11611.) This ruling denied Winbush his state and federal constitutional rights to a fair penalty determination. (See *People v. Valdez* (1986) 177 Cal.App.3d 680, 692-695 [the trial court properly required appellant to elect between keeping his defense expert in the courtroom to assist his counsel in cross-examining the prosecution's expert witness and calling the defense expert as a witness. By electing to keep the defense expert in the courtroom in the face of the exclusion order, appellant waived his right to call the expert as part of the defense case].) Here, the court should have required the prosecutor to choose: either allow Beeson's mother and sister to watch the trial, which would convey their emotions about Beeson, or testify, but not both.

Allowing witnesses to watch the trial constituted reversible error because it "led to a penalty verdict based on vengeance and sympathy as opposed to reasoned application of rules of law to facts." (*Fuselier v State* (Miss. 1985) 468 So.2d 45, 52-53 [allowing the victim's daughter to sit in

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31. This is simply not true. Appellant requests this court to review this videotape, which is confusing, hard to hear, and extremely prejudicial. (Court Exhibit 105A; 183-RT 14427.) The parties agreed not to admit a transcript. (183-RT 14423-26.)

close proximity to the prosecutor throughout the trial prejudiced defendant's right to a fair guilt and penalty trial because it "presented the jury with the image of a prosecution acting on behalf of [the victim's daughter"]; cf. *Mask v. State* (Ark. 1993) 314 Ark. 25, 869 S.W.2d 1, 3-4 [reversible error to allow robbery victim to sit at the prosecution table following her testimony, as she "was not a party to this case. The prosecuting party was the State of Arkansas"]; *Walker v. State* (Ga. 1974) 32 Ga.App. 476, 208 S.E.2d 350 [mother of the victim sitting at the prosecution table "surely must have had an impact on the jury and we cannot say it was not harmful and prejudicial to the defendant's right to have a fair trial"].)

C. The Racially-Tinged And Extensive Victim Impact Evidence Based On An Invidious Comparison Between The Societal Worth Of The Deceased And The Societal Worth Of The Defendant Violated Winbush's Due Process Right To A Fair Trial

The victim impact evidence in this case crossed the line between an appropriate request for a death verdict based on the impact of the killing and the improper request for a death verdict based significantly on an invidious comparison between the societal worth of the deceased and the societal worth of the defendant. That is, the prosecution was allowed to beatify Beeson as not only someone special to her family but someone with hopes and dreams. By contrast, the prosecution asserted that Winbush had little social worth and preyed on others. Underlying this overt presentation was yet another message, a not-so-subtle appeal to race. The prosecution's penalty phase theme was primal: a young, hopeful, white woman's life was snuffed out by a black defendant of little

social value. Indeed, that theme permeated the entire penalty phase presentation. For these reasons the death verdict must be set aside.

In *Booth v. Maryland* (1987) 482 U.S. 496, 504-505, and *South Carolina v. Gathers* (1989) 490 U.S. 806, 811-812, the United States Supreme Court forbade evidence or argument regarding the victim's characteristics or the impact of the murder on the victim's family members. The Court concluded that such evidence was not only irrelevant but that its use in a capital trial violated the Eighth Amendment ban on cruel and unusual punishment. In *Payne v. Tennessee* (1991) 501 U.S. 808, 827, however, the high court held "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." The victim impact evidence in this case went wildly beyond anything contemplated by *Payne*. "It is a hallmark of a fair and civilized justice system that death verdicts be based on reason, not emotion, revenge, or even sympathy." (*Le v. Mullin* (10th Cir. 2002) 311 F.3d 1002, 1015.) Evidence that improperly encourages the jury to impose a sentence of death based on considerations of sympathy for the victims may constitute due process error. (*Ibid.*)

Under *Payne*, if such evidence is admitted at all, it must be attended by appropriate safeguards to minimize its prejudicial effect and confine its influence to the provision of information that is legitimately relevant to the capital sentencing decision. "If, in a particular case, a witness' [victim impact] testimony . . . so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." (*Payne, supra,* 501 U.S. at 825, 831-832 [conc. opn. of O'Connor, J.].)

"Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case." (*Payne, supra,* 501 U.S. at 836-837 [conc. opn. of Souter, J.] [citations omitted].)

The *Payne* decision left intact the constitutional restrictions announced in *Booth v. Maryland* (1987) 482 U.S. 496, that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." (*People v. Robinson* (2005) 37 Cal.4th 592, 656 [conc. opn. of Moreno, J..] There is a definite line between proper victim impact testimony and improper characterization and opinion by the victim's family. (*Ibid.*)

To be consistent with the facts and holding of *Payne,* the admission of victim impact evidence, if such evidence is admitted at all, should be limited to testimony from a single witness, like the testimony from the grandmother in *Payne.* This limitation is imposed by judicial decision in New Jersey *(State* v. *Muhammad* (N.J. 1996) 678 A.2d 164, 180) and by statute in Illinois (Illinois Rights of Victims and Witnesses Act, 725 ILCS 12013(a)(3); see *People* v. *Richardson* (Ill. 2001) 751 N.E.2d 1104, 1106-1107).

The Supreme Court of New Jersey explained the reason for this limitation:

> 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. Thus, absent special circumstances, we expect that 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. (*State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180.)

Here, however, both Beeson's mother and sister testified at length about the life and character of Beeson and the impact of her death on them and Beeson's father.

Second, victim impact evidence should be limited to testimony which describes the effect of the murder on a family member who was present at the scene during or immediately after the crime. Neither Beeson's mother or sister were present at the scene or immediately thereafter.

Third, victim impact evidence should be limited to those effects which were known or reasonably apparent to the defendant at the time he committed the crime or were properly introduced to prove the charges at the guilt phase of the trial. These limitations are necessary to make the admission of victim impact evidence consistent with the plain language of California's death penalty statutes and to avoid expanding the aggravating circumstances to the point that they become unconstitutionally vague.

In California, aggravating evidence is only admissible when it is relevant to one of the statutory factors *(People v. Boyd* (1985) 38 Cal.3d 762, 775-776), and victim impact evidence is admitted on the theory that it is relevant to factor (a) of Penal Code section 190.3, which permits consideration of the "circumstances of the offense." (*People v. Edwards*

(1991) 54 Cal.3d 787, 835). To be relevant to the circumstances of the offense, the evidence must show the circumstances that "materially, morally, or logically" surround the crime. (*Id.* at 833-836.) The only victim impact evidence which meets this standard is evidence of "the immediate injurious impact of the capital murder" (*People v. Montiel* (1993) 5 Cal.4th 877, 935), and evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes and the facts of the crime which were disclosed by the evidence properly received during the guilt phase." (*People v. Fierro, supra,* 1 Cal.4th at 264-265 [conc. & dis. opn. of Kennard, J.].)

Finally, evidence concerning events that occurred many years before or after the victim's death does not fall within any reasonable commonsense definition of the phrase "circumstances of the crime." (Pen. Code, § 190.3, factor (a).) Hence, if the victim impact evidence in this case was in fact admissible as "circumstances of the crime," then section 190.3, factor (a), is unconstitutionally overbroad and vague. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17; see *Lewis v. Jeffers* (1990) 497 U.S. 764, 774-776 [the jury should be given clear and objective standards providing specific and detailed guidance]; but see, *People v. Boyette* (2002) 29 Cal.4th 381, 445 [rejecting a similar argument where substantial, but much less extensive, victim impact testimony was presented].) Sentencing factors must have a common-sense core of meaning that juries are capable of understanding. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

Here, however, the prosecution wildly exceeded these common sense limitations. Besides the testimony of victim impact witnesses who were not present at the scene at the time of the homicide, the victim

impact evidence included numerous details of Beeson's activities and achievements, beginning in her childhood, none of which Winbush could possibly have known anything about, such as her relationship with her family or that she struggled in school. Additionally, Beeson's mother and sister described events and their own emotional anguish months and years after her death.

A significant portion of the prosecution's penalty phase evidentiary presentation was devoted solely to victim impact evidence. Beeson's mother and sister testified and the prosecution presented a videotape, numerous photographs, notebook, letters, Beeson's last Christmas list, and other prejudicial material. Beeson's virtues were explored at length. The evidence also included an account of her complete life history, from birth to death. The testimony about these activities was buttressed by 53 photographs contained in prosecution exhibits, plus the videotape, accompanied by excerpts of Winbush's and Patterson's confessions, contained in court exhibit 105. (176-RT 14029-30.) The evidence about Beeson's character far exceeded the "quick glimpse" of the decedent's life approved in *Payne, supra,* 501 U.S. at 822-823.

In *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, 335-336, for example, the court, in a unanimous decision, held that both the visual and audio portions of a 17-minute video montage of about 140 still photographs of the deceased, including the decedent as an infant and toddler, had been improperly admitted because they were far more prejudicial -- because of its sheer volume -- than probative. The court noted that a "'glimpse' into the victim's life and background is not an invitation to an instant replay." (*Id.* at 336-337; see also *People v. Robinson* (2005) 37 Cal.4th 592, 644-652.) While *Salazar* was a non-

capital case, the court applied the principles that govern the admission of victim impact testimony in capital cases. (See *id.* at 335 & fn.5.) The victim impact evidence in Winbush's case was very similar to that in the *Salazar* case in that it included numerous childhood photos displayed in a video montage.

The need for restraint in the admission of victim character evidence was also emphasized by the Louisiana Supreme Court. Although it held that the prosecutor could "introduce a limited amount of general evidence providing identity to the victim," it also warned that special caution should be used in the "introduction of detailed descriptions of the good qualities of the victim" because such descriptions create a danger" of the influence of arbitrary factors on the jury's sentencing decision." (*State v. Bernard* (1992) 608 So.2d 966, 971.) The Supreme Court of New Mexico likewise held that "victim impact evidence, *brief and narrowly presented,* is admissible" in capital cases. (*State v. Clark* (N.M. 1999) 990 P.2d 793,808, emphasis added.)

The presentation of extensive evidence about the virtues of a homicide victim also created the risk that the death sentence was improperly imposed based on a comparison between the victim and the defendant. (See, e.g., *Burns* v. *State* (Fla. 1992) 609 So.2d 600, 610; see also *State* v. *Koskovich* (N.J. 2001) 776 A.2d 144, 182 ["Common experience informs us that comparing convicted murderers with their victims is inherently prejudicial because defendants in that setting invariably will appear more reprehensible in the eyes of jurors . . . . We are convinced that the court's instruction infringed on the integrity of the penalty phase and impermissibly increased the risk that the death

sentence would be arbitrarily imposed"]; *State v. Storey* (Mo. 1995) 901 S.W.2d 886, 902.)

The presentation of extensive evidence concerning the outstanding character of the homicide victim creates the risk that arbitrary and irrelevant comparisons will influence the sentencing decision. (*Booth v. Maryland, supra,* 496 U.S. at 506 & fn. 8; *State v. Carter* (Utah 1995) 888 P.2d 629, 652; *Alvarado v. State* (Tex.Crim.App.1995) 912 S.W.2d 199,222 [conc. opn. of Baird, J.].) It is wrong to allow "such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." (*Booth v. Maryland, supra,* 496 U.S. at 506.)

Whether the comparison is placed as a comparison between victims or a comparison between the defendant and the victim, the effect is exactly the same, and the result is a death sentence that is not only arbitrary and unfair (*Booth v. Maryland, supra,* 496 U.S. at 506), but also a violation of the equal protection of the laws. *(Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564; U.S. Const., Amends. 8 and 14; Cal. Const., art. I, §§ 15 and 17.)

The most obvious discrimination is unique to the capital punishment context; the danger that defendants whose victims are perceived as assets to society will be more likely to receive the death penalty than equally culpable defendants whose victims are perceived as less worthy. (*Booth v. Maryland, supra,* 496 U.S. at 506.) A more familiar form of discrimination is lurking as well -- discrimination based on race. "[I]n many cases, expansive [victim impact evidence] will inevitably make way for racial discrimination to operate in the capital sentencing jury's life or death

decision." (Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases* (2003) 88 Cornell L. Rev. 257, 280 [Blume].)

"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* (1986) 476 U.S. 28, 35.) That danger is particularly acute in cross-racial crimes like this one, where the victim and her surviving relatives are white and middle class and the defendant is black and poor. Neither the race of the victim nor the race of the defendant is a constitutionally permissible factor in capital sentencing. (*McCleskey v. Kemp, supra,* 481 U.S. 279 [race of victim]; *Zant v. Stephens, supra,* 462 U.S. at 885 [race of defendant].)

Nevertheless, "virtually every statistical study, including one commissioned by the federal government, indicates that although the death penalty is rarely sought in black-victim cases, it is sought (and obtained) in a disproportionate share of cases involving black defendants and white victims." (Blume, *supra,* at 280, fn. omitted.) The sad reality is that "prosecutors and jurors tend to place a premium on the value of white lives and a discount on the value of black ones." (Garvey, *The Emotional Economy of Capital Sentencing* (2000) 75 N.Y.U. L. Rev. 26, 44, fn. omitted.)

Therefore, while it may be impossible to eliminate the pernicious effect of race from capital sentencing altogether, the courts should engage "in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system," and disapprove any procedures which create an unnecessary 'risk that racial prejudice will come into play. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 308-314; *Batson v. Kentucky* (1986) 476 U.S. 79, 99.) A death sentence is unconstitutional "if it discriminates against [the

defendant] by reason of his race, .. ,*or if it is imposed under a procedure that gives room for the play of such prejudices." (Furman v. Georgia* (1972) 408 U.S. 238, 242 [conc. opn. of Douglas, J.].)

Starting with the fact the prosecutor sanitized the jury of any African-Americans and loaded it with jurors from the white middle-class suburbs of Alameda County, and continuing through the other racist aspects of this trial, racism, subliminally and explicitly, infected and permeated Winbush's trial. Evidence which glorified the homicide victim and emphasized her virtues exacerbated this disparity. In *Moore v. Kemp* (11th Cir. 1987) 809 F.2d 702, 747-749, the victim character evidence was much less extensive than it was in this case, and the prosecutor's comparison argument was much less explicit. Neither mentioned race expressly. (*Id.* at 747-748 & fn. 12.) Even so, Judge Johnson readily concluded that "it could not but help inflame the prejudices and emotions of the jury to be confronted with a father's testimony of the virtuous life of his white daughter violated and then mercilessly snuffed out by this black defendant." (*Id.* at 749 [conc. & dis. opn. of Johnson, J.].)

Overt prejudice is not the only danger. There are many subtle ways in which conscious or unconscious racism can color the jurors' perception of the defendant, their evaluation of his defenses, and their assessment of the seriousness of his crime. (*Turner* v. *Murray, supra,* 476 U.S. at 35.) Evidence which focuses the jury's attention on the character of the victim gives these improper influences free rein, causing white jurors to view the crime as especially serious because they empathize and identify with the white victim.[32] (See Berger, *Payne and Suffering – A*

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32. There is a disquieting similarity between the underlying problems of Winbush and Beeson. Both suffered from learning

Personal Reflection and a Victim-Centered Critique (1992) 20 Fla. St. U. L. Rev. 21, 25, 48.)

"Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." *(United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323.) Here, the prosecutor's request to compare the value of lives was explicit. He told the jury: "And again, I invite you, if you want, to consider the age factor, to compare him, his background, his sophistication, to Erika Beeson who was about the same age." (188-RT 14692.) If that were not enough, only a few pages later, the prosecutor compared the concern of Beeson's family with the no-show of Winbush's family: "Where are the family members? They're here in the community; they're local; they're around. Where are they? Why didn't they come in here and tell you something?" (188-RT 14695.) This rhetoric was an overt and an inflammatory emotional appeal that Winbush's life was not worth saving because he had been abandoned by his family and community, in contrast to Beeson whose family loved her and missed her.

In the jury's calculus on the momentous question of whether Winbush should live or die, it should not have been relevant that Beeson was more sympathetic than Winbush. This evidence had another purpose entirely. This instance of blatant appeal to the jury's darkest emotions should compel reversal of Winbush's death sentence all by itself. (Cf.

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disabilities that disrupted their academic performance and socialization. (Beeson was, after all, living with a drug dealer at the time of her death.) The effects of her disabilities were cushioned by educated and involved parents and, in all likelihood, some monetary resources. Winbush, in contrast, was thrown by his impoverished and overwhelmed family onto an equally overwhelmed school system and from there into state institutions that socialized him by forced choices between violence and victimization.

People v. Marsh (1985) 175 Cal.App.3d 987, 997 [unnecessary admission of gruesome photograph can deprive a defendant of a fundamentally fair trial and require reversal]; see also, *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548-549 [large photos showing victim's blood at the scene were inflammatory].)

D. An Exhaustive Account of Beeson's Life History -- Amounting To A Memorial Service -- And Emotionally-Charged Evidence About the Impact of the Crime on the Victim's Survivors Was Improperly Presented to the Penalty Jury

The victim impact evidence in this case was not limited to an exhaustive recital of the virtues and achievements of Beeson herself. Her mother and sister also testified at length regarding the grief, pain, and enduring sense of loss they suffered as a result of her death. (AOB, Statement of Facts at 39-42.) The victim impact testimony in this case was voluminous, detailed, and emotionally-charged. "[V]ictim impact and character evidence may become unfairly prejudicial through sheer volume," and here both the sheer volume of the evidence and the heart-rending details of the specific incidents recounted made unfair prejudice inevitable. (*Moseley v. State* (Tex.Crim.App. 1998) 983 S.W.2d 249, 263.)

In addition to a history of the victim's entire life, there were poignant anecdotes illustrating the devastation caused by Beeson's death, including the death of her father six months after her death. Moreover, the prejudicial effect of the testimony was magnified by the numerous photographs, videos and letters which accompanied it, including such irrelevant but inflammatory items as photographs of Beeson as a child and young adult, and the video of her life. The photographs of Beeson as a young girl were purposely designed to tug at the jurors' heartstrings in an

effort to get them to vote for death. "The Chinese proverb of old states it well: 'One picture is worth more than a thousand words.'" (*People* v. *Kelly* (1990) 51 Cal.3d 931, 963.)

In *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829-830, where similar life history evidence was introduced through the testimony of a single witness, the court noted that "portraying [the victim] as a cute child at age four in no way provides insight into the contemporaneous and prospective circumstances surrounding his death," and found that the probative value of the life history evidence was substantially outweighed by its prejudicial effect.

The presentation resembled a memorial service more than a capital penalty trial. "[T]he punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." (*Salazar v. State*, *supra,* 90 S.W.3d at 335-336.) The *Salazar* court was particularly critical of the 17-minute memorial service video's "undue emphasis on the adult victim's halcyon childhood," noting that the defendant had "murdered an adult, not a child," a fact which the video tended to obscure, and that the video was "barely probative of the victim's life at the time of his death." (*Salazar v. State*, *supra,* 90 S.W.3d at 337-338).

A considerable portion of the penalty phase of the trial was converted into what amounted to a testimonial or memorial service for Beeson, far exceeding the "quick glimpse" of the victim's life approved in *Payne*. It did not merely humanize the victim; it glorified her; as the prosecutor sought "'not merely to let the jury know who the victim was, but rather to urge the jury to return a sentence of death *because of* who the

victim was,'" rendering the penalty trial unconstitutionally unreliable and unfair. (*Moore v. Kemp* (11th Cir. 1987) 809 F.2d 702, 749 [emphasis in original] [conc. and dis. opn. of Johnson, J.].)

This court initially cautioned against the admission of evidence about the victim's character, and generally approved evidence that was brief, factual, and non-inflammatory. (See, e.g., *People v. Wash* (1993) 6 Cal.4th 215, 267 [evidence of the victim's plan to enlist in the Army at time of her death]; *People v. Montiel, supra,* 5 Cal.4th 877, 934-935 [evidence that victim was in excellent health at time of his death, that he needed to use a walker to get around, and that he could still enjoy life]; *People v. Edwards, supra,* 54 Cal.3d at p. 832 [photographs of the victims shortly before their deaths].)

Here, Beeson's virtues were explored at length, and the evidence also included an exhaustive account of her complete life history. (See Exhibit 38, Court Exhibit 105.) There was no way defense counsel could counter the highly emotional effect this evidence undoubtedly had on Winbush's jury and its penalty determination, effects which were skillfully exploited by the prosecutor in his penalty phase closing argument.

E. The Trial Court Erred in Admitting Evidence Concerning Erika's Funeral and Visits to Her Grave

In the present case, the erroneously admitted victim-impact evidence included:

1) Lisa's testimony that she took flowers to Erika's and her father's grave, and would "have to buy the flowers myself in bunches, and make identical bouquets, and tie them together with a ribbon." (177-RT 14066.)

2) Many people came to Erika's memorial service. Lisa selected the musical passages and readings for that memorial service, and gave the eulogy. (177-RT 14063-64.)

3) A week or ten days later, after Erika was cremated, Lisa testified, she and Fred rode in the funeral director's car with a gold cement box with Erika's ashes on the seat next to Fred; Mrs. Beeson was too upset to go. (177-RT 14064-65.) There was a really cheap label with Erika's name on it stuck to the box, and Fred had his hand on it, and he just kept stroking the top of the box. (177-RT 14065-66.) That make Lisa very angry, because she thought the funeral home could have handled it better. (177-RT 14065.)

The evidence concerning Beeson's funeral and visits to Beeson's grave by her sister Lisa was particularly prejudicial both because it exceeded "a quick glimpse of the life' which [Winbush] 'chose to extinguish'" (*Payne*, *supra*, 501 U.S. at 827), and because it inappropriately drew the jury into the mourning process. (See *Welch v. State* (Okla. Crim. App. 2000) 2 P.3d 356, 373 [error to admit evidence that the victim's son put flowers on his mother's grave and brushed the dirt away because that evidence "had little probative value of the impact of [the victim's] death on her family and was more prejudicial than probative"]; *State v. Storey* (Mo. 2001) 40 S.W.3d 898, 909 [a photograph of the victim's tombstone was not relevant to show the impact of the victim's death, "and it inappropriately drew the jury into the mourning process"]; *Salazar v. State, supra*, 90 S.W.3d at 335-336 ["the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial].)

The evidence offered in the present case concerning Beeson's burial far exceeded the brief testimony in *Welch* and the single photograph in *Storey*. It is true that this Court has held that brief views of the victims' grave markers did not constitute error. (*People v. Zamudio* (2008) 43 Cal.4th 327, 367-368 [three photographs of grave markers at the end of video photo montage].) *Kelly, supra*, 42 Cal.4th at 797 [video ends with brief view of the victim's grave marker], and *People v. Harris* (2005) 37 Cal.4th 310, 328, 352 [single photograph of victim's gravesite]. In contrast, the evidence offered in Winbush's case was excessive when compared to the very brief funeral-related evidence found in *Zamudio*, *Kelly,* and *Harris*, and particularly prejudicial because, unlike *Zamudio, Kelly, and Harris*, the evidence offered in Winbush's case inappropriately drew Winbush's penalty jury into the mourning process. To admit evidence of Beeson's funeral and her family's visits to her grave, including putting flowers on the graves long after Beeson's death, as a "circumstance of the crime," would be unconstitutionally overbroad and vague. (See AOB, Arg. VIII, C.)

F. The Admission Of The Misleading Eighteen-Minute Videotape Denied Winbush Due Process

The admission of videotapes or video montages of a crime victim has been disapproved by a number of courts, as well as several U.S. Supreme Court justices. (See *Salazar v. State, supra*, 90 S.W.3d at 333-335, & fn. 5 [introduction of a video montage covering the victim's entire life, and where almost half of the photographs depicted the victim's infancy and early childhood was reversible error; prejudicial effect of videotape showing 20-year old victim as a child was "enormous because the implicit suggestion is that appellant murdered this angelic infant; he killed this

laughing, light-hearted child; he snuffed out the life of a first-grade soccer player and of the young boy hugging his blond puppy dog"]; *United States v. Sampson* (D. Mass. 2004) 335 F.Supp.2d 166, 191-193 [victim impact evidence, in the form of a 27-minute video on the victim's life, which included 200 still pictures and was accompanied by "evocative contemporary music," was inadmissible at the penalty phase of defendant's capital murder trial because it prejudicially provided more than the allowable "glimpse" of the victim's life]; cf. *United States v. McVeigh* (10th Cir. 1999) 153 F.3d 1166, 1221 and fn. 47 [court noted that the prejudicial impact of the victim impact evidence had been minimized by the exclusion of wedding photographs and home videos].)

Justice Stevens' statement respecting the denial of the petitions for writs of certiorari in *Kelly v. California* and *Zamudio v. California* (2008) 555 U.S. 1020, 1025, aptly explained the distortion of the sentencing process which such evidence can create:

> Victim impact evidence is powerful in any form. But in each of these cases, the evidence was especially prejudicial. Although the video shown to each jury was emotionally evocative, it was not probative of the culpability or character of the offender or the circumstances of the offense. Nor was the evidence particularly probative of the impact of the crimes on the victims' family members: The pictures and video footage shown to the juries portrayed events that occurred long before the respective crimes were committed and that bore no direct relation to the effect of the crime on the victims' family members.
>
> Equally troubling is the form in which the evidence was presented. As these cases demonstrate, when victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming. While the video tributes at issue in these cases contained moving portrayals of the lives of the victims, their primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors'

> antipathy for the capital defendants. The videos added nothing relevant to the jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment. (*Kelly v. California* and *Zamudio v. California, supra*, 555 U.S. at 1025 [fn. omitted]; see also *id.* at 1020 [Justice Souter's vote to grant cert. in *Kelly*].)

Justice Breyer, dissenting from the denial of the petitions for writs of certiorari in *Kelly v. California* and *Zamudio v. California* (2008) 555 U.S. 1026, similarly explained:

> The question here is whether admission at a death penalty proceeding of a particular film about the victim's life goes beyond due process bounds. . . . The film, in my view, is poignant, tasteful, artistic, and, above all, moving.
>
> On the other hand, the film's personal, emotional, and artistic attributes themselves create the legal problem. They render the film's purely emotional impact strong, perhaps unusually so. . . .
>
> This Court has made clear that "any decision to impose the death sentence" must "be, and appear to be, based on reason rather than caprice or emotion." . . . [T]he due process problem of disproportionately powerful emotion is a serious one. Cf. *United States v. Johnson,* 362 F.Supp.2d 1043, 1107 (N.D. Iowa 2005) (describing "juror's sobbing" that "still rings" in judge's "ears"). (*Kelly v. California; Zamudio v. California, supra*, 555 U.S. at 1026-1027.)

In *People v. Zamudio*, *supra*, 43 Cal.4th at 365-368, this court held that the admission at the penalty phase of appellant's trial of a 14-minute videotape prepared and narrated by one of the victims' two daughters, consisting of a montage of 118 still photographs which depicted the victims' lives from their infancy to the time of their deaths some 60 years later, closing with photographs of their graves, was not error.

In *People v. Bramit* (2009) 46 Cal.4th 1221, 1239-1241, this court again upheld the admission of a videotape shown by the prosecution: a montage of fewer than 20 still photographs of the victim at all ages,

rejecting the defendant's argument that it "played unfairly to the jury's emotions, and was clearly prejudicial:"

> "Trial courts must be very cautious about admitting [victim impact] videotape evidence." (*People v. Kelly* (2007) 42 Cal.4th 763, 798 (*Kelly*).) In particular, we have cautioned against the admission of "lengthy" videotapes. (*People v. Prince* (2007) 40 Cal.4th 1179, 1289 (*Prince*).) However, the videotape here was less than three minutes long. By contrast, we have upheld the admission of much longer videotapes. (See, e.g., *People v. Zamudio* (2008) 43 Cal.4th 327, 363-368 [14 minutes]; *Kelly, supra*, 42 Cal.4th at 793-799 [20 minutes]; *Prince, supra,* 40 Cal.4th at 1286-1291 [25 minutes].)
>
> Considering Evidence Code section 352, the trial court held that any potentially prejudicial impact did not outweigh the tape's probative value. The court noted that the videotape was simply "a repackaging of the evidence." Defendant had not objected to the admission of the still photographs themselves.
>
> The trial court did not abuse its discretion. The videotape was not unduly emotional. It merely presented admitted evidence in a different medium, unenhanced by any soundtrack or commentary. The few grainy family photographs simply "humanized" the victim, "as victim impact evidence is designed to do." (*Kelly, supra,* 42 Cal.4th at 797.)

Here, the victim impact videotape was presented by the prosecution at the penalty phase to eulogize Beeson's life, and, in that effort, it exceeded every limitation that this court unanimously set forth in *People v. Prince* (2007) 40 Cal.4th 1179, 1286-1287. (*Kelly, supra*, 42 Cal.4th at 802-806 [conc. and dis. opn. of Moreno, J.]; see also *id.* at 801-802 [conc. opn. of Werdegar, J.].)

The admission of the victim impact videotape cannot be justified on the ground that without it the jury would have been deprived of information about Beeson's "'uniqueness as an individual human being.'" (*Payne, supra,* 501 U.S. at 823.) As Justice Souter noted in *Payne*: "Just as

defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles." (*Id.* at 838 [conc. opn. of Souter, J.].)

The use of victim impact videos, such as the one in Winbush's case, injected excessive emotionalism into the capital sentencing process, because the very point of using a victim impact video is to manipulate the emotions of the viewer. (Leighton, *The Boob Tube: Making Videotaped Evidence Interesting* (2001) 2 Ann. 2001 American Trial Lawyers-CLE 1519, at 2.) A victim impact videotape like the one presented in Winbush's case is editorialized evidence. It is, by definition, "staged and contrived" to achieve dramatic effect, and, as in all film, cinematic techniques, such as the ones used to create the video in Winbush's case, are used to manipulate the viewer's emotions toward a particular perspective. (*People v. Kelly*, *supra*, 42 Cal.4th at 798.) The emotional impact of evocative images on the viewer is well documented. (See, e.g., Ed S. Tan, *Emotions and the Structure of Narrative Film: Film as an Emotion Machine* (Lawrence Erlbaum Associates, 1996); *Passionate Views: Thinking About Film and Emotion* (Gregory Smith and Carl Plantinga eds. 1998), Johns Hopkins University Press). Studies have shown that visual presentations account for the vast majority of the information retained by jurors. (David Hennes, *Comment, Manufacturing Evidence for Trial: The Prejudicial Implications of Videotaped Crime Scene Reenactments* (1994) 142 U. Pa. L. Rev. 2125, 2173 & fn. 292.) "A television videotape, much more than other forms of demonstrative visual evidence, leaves a lasting impression on jurors' mental processes, since its vividness dictates that it will be readily available for cognitive recall." (*Id.* at 2180; see also *People v. Dabb* (1948) 32 Cal.2d 491, 498

[recognizing "the forceful impression made upon the minds of the jurors" by motion pictures].)

These are some of the reasons why this type of victim impact evidence, if used at all at the penalty phase of a capital trial, must be used very sparingly. Having said this, however, it is Winbush's position that such victim-impact videotape evidence should never be admitted at the penalty phase of a capital trial.

This Court's prohibition only of victim-impact videos that are "unduly emotional" (*People v. Kelly*, *supra*, 42 Cal.4th at 798; *People v. Prince*, *supra*, 40 Cal.4th at 1286-1287) is insufficient to satisfy the Eighth Amendment's dictate that "the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion." (*California v. Brown* (1987) 479 U.S. 538, 545 [conc. opn. of O'Connor, J.].)

Winbush's case is readily distinguishable from *Kelly* in many important respects. First, the victim impact video in Winbush's case is far more prejudicial and inflammatory than the video tape admitted in *Kelly*. (Compare *People v. Kelly*, *supra,* 42 Cal.4th at 796-797 [this Court's summary of the contents of the *Kelly* videotape] to Court Exh. 105A [the videotape admitted in Winbush's case].)

Second, unlike *Kelly*, where the evidence in aggravation was substantial, and no evidence was offered in mitigation, the evidence in mitigation in Winbush's case was substantial, consisting of testimony from a medical expert that Winbush suffers from extremely serious and untreated ADHD, his mother's inadequacy in getting him the treatment he needed, the failure of public institutions to help him, and the fact that he spent his adolescence trying to survive in the snake pit of the Youth

Authority. The evidence in aggravation consisted of the circumstances of the offense and his admittedly troubled and violent youth.

Third, in *Kelly*, the jury returned its death verdict fairly quickly and without any apparent difficulty, while Winbush's penalty jury deliberated about 13 hours over four days before returning a verdict of death as to Winbush. (11-CT 2716-2722, 2881-2892.)

Fourth, the photo montage videotape in Winbush's case was accompanied by the taped confessions of Winbush and Patterson, which was confusing as the audio did not correspond with the photos, and did not identify the speaker.

In short, the differences between the facts and circumstances in Winbush's case and in *Kelly* are such that it cannot be fairly said, as it was in *Kelly*, that the erroneous admission of the victim impact videotape in Winbush's case was harmless beyond a reasonable doubt. In the present case, the video montage played unfairly to the emotions of Winbush's jury and was clearly prejudicial. (See *Gardner v. Florida* (1977) 430 U.S. 349, 358 ["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."].)

G. The Victim Impact Evidence And Videotape Were Prejudicial

The improperly admitted victim impact evidence violated Winbush's right to a trial before a fair and impartial jury, a reliable capital sentencing hearing, the effective assistance of counsel, and due process of law under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution by making the penalty trial fundamentally unfair. (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, §§ 7, 15, and 17; *Payne,*

supra, 501 U.S. at 823, 825, 830-831, fn. 2 [conc. opn. of O'Connor, J.]; *Booth v. Maryland, supra,* 482 U.S. 496.)

In view of the nature and extent of the evidence and the prosecutors' exploitation of it during closing arguments, there is simply no way that the state can prove beyond a reasonable doubt that the trial court's several errors in admitting the victim impact evidence in this case was harmless. (See *Burns v. State* (Fla. 1992) 609 So.2d 600, 610 ["Reverting to our earlier finding that it was error to admit the background evidence of the deceased, we cannot with the same certainty determine it to be harmless in the penalty phase. The testimony was extensive and it was frequently referred to by the prosecutor. The prosecutor described the defendant as an evil supplier of drugs and contrasted him with the deceased. These emotional issues may have improperly influenced the jury in their recommendation"].)

Here, the victim impact evidence was extensive, and included overt disparaging comparisons between Beeson and Winbush, and improper appeals to the jury's emotions. These included subtle (and not-so-subtle) appeals to racial bias as well. Additionally, the extensive life history of Beeson from birth to death and even after her death was emotionally devastating evidence, which overwhelmed any realistic chance that the jury could rationally deliberate Winbush's fate and far exceeded anything contemplated in *Payne.* Instead, it opened the emotional floodgates so clearly condemned in *Booth v. Maryland* and *South Carolina v. Gathers.*

Thus, the error of admitting this victim-impact evidence and the prosecutor's argument was not harmless beyond a reasonable doubt. (*Payne v. Tennessee, supra,* 501 U.S. at 823, 825, 830-831, fn. 2 [conc. opn. of O'Connor, J.]; see also *Greer v. Miller* (1987) 483 U.S. 756, 765;

People v. Edwards, supra, 54 Cal.3d at 836; *Chapman v. California, supra*, 386 U.S. at 24.) The violations of state law during the penalty phase require reversal because there is a reasonable possibility that the errors affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.)

IX. THE COURT DEPRIVED WINBUSH OF HIS DUE PROCESS RIGHT TO A FAIR PENALTY HEARING AND HIS RIGHT TO CONFRONTATION WHEN IT ADMITTED THE TESTIMONY OF JULIA PHILLIPS THAT WINBUSH HARRASSED AND "ASSAULTED" HER UNTIL SHE AGREED TO HAVE SEX; AND REFUSED TO ALLOW WINBUSH TO CROSS-EXAMINE HER ABOUT A FALSE COMPLAINT OF RAPE; AND PERMITTED INFLAMMATORY EVIDENCE PURPORTEDLY TO SUPPORT PHILLIPS' ABILITY TO RECALL, NOT FOR THE TRUTH OF THE MATTER

A. The Relevant Facts

On April 5, 1996, Julia Phillips made an anonymous phone call reporting that Winbush had killed Beeson. (170-RT 13359-60; 171-RT 13447-48.) Phillips testified that she called the police about Winbush, because she was very afraid of him and did not want him to get out of jail. (170-RT 13383.)

Phillips had written Winbush when he was in the CYA. (171-RT 13464.) Phillips kept going back to the houses where Winbush's sister, cousin and aunt lived, even though Winbush was often there. (171-RT 13467.) She claimed that Winbush would call her and threaten to "beat [her] ass" if she did not come over to Lakeisha's house. (171-RT 13475.) Winbush never beat her or hit her, however. (171-RT 13467, 13476.) One day, Winbush entered the house as two men named Charles and

Reggie were leaving, and Winbush said: "I could have robbed them." (171-RT 13472, 13469.) Phillips had seen Winbush with a small silver gun in a dark bathroom. (171-RT 13476-77.) Winbush told her if he got arrested again he would shoot the police and would rather die than go back to jail. (171-RT 13477.)

Phillips was afraid for her life because Winbush kept harassing her and she did not know what he was capable of. (171-RT 13475.) In early 1996, Winbush sexually harassed and assaulted her for three months after Beeson's murder until she finally submitted to his advances. (170-RT 13360-71, 13386.) Once, Winbush grabbed Phillips by the neck and headed upstairs with her. (171-RT 13472.) Winbush asked her, "Why do you act like I'm raping you?" (170-RT 13371.) Phillips told Lakeisha she let Winbush have sex with her, "just to get it over with." (170-RT 13371.) Phillips was afraid of Winbush and thought he was "very violent." (170-RT 13368.)

Phillips never told the police about Winbush's alleged sexual assault at the time or in her anonymous phone call about Winbush on April 5, 1996. (171-RT 13447-48.) On May 9, 1996, when she had a long conversation about Winbush with Sergeants Olivas and Swisher, she did not mention Winbush's sexual assault. (171-RT 13448-49.) On September 26, 1998, in her taped interview with Sergeant Page, she complained about Patterson's assault on her that day and mentioned Winbush had harassed her, but she still did not accuse him of sexually assaulting her. (171-RT 13449-55.) It was not until November 2002, more than six years after Winbush's alleged sexual assault, did Phillips tell

the police.[33] (171-RT 13455-56.) Phillips was angry with Winbush and wanted him in prison for life. (171-RT 13455.)

In her taped interview with Sergeant Page on September 26, 1998, Phillips said a man named Charles, the same man whom Winbush said he could rob, told Lakeisha, "Your cousin's crazy for killing that white girl." (171-RT 13469-72.) Phillips asked Lakeisha why Winbush killed Botello's girlfriend, and she said, "They were trying to rob her, and she wouldn't cooperate so they killed her." (171-RT 13472.) This evidence was admitted solely with respect to Phillips' ability to recall that day, not for the truth. (171-RT 13470-72.)

B. There Was Insufficient Evidence That Winbush Used Force Or Violence When Phillips Testified That He Harassed Her And "Assaulted" Her Until She Agreed To Have Sex

"Criminal activity" involving the "use or attempted use of force or violence or the express or implied threat to use force or violence" is admissible under section 190.3, factor (b). Phillips's testimony, which was ambiguous, inconsistent, and without foundation (e.g. she thought Winbush was "very violent"), did not satisfy the "crime" and/or "violence" requirement of factor (b), and was therefore irrelevant to any statutory aggravating factor. (*People v. Boyd* (1985) 38 Cal.3d 762, 772-778; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 587-588.)

As explained above, Phillips testified about being scared of Winbush, who she said sexually harassed and assaulted her for three months after Beeson's murder, until she finally submitted to his advances,

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33. The court admitted this evidence as past recollection recorded under Evidence Code section 1237.

though she admitted that he never beat her or hit her. (170-RT 13360-76, 13386.)

This was not substantial evidence from which a jury could conclude beyond a reasonable doubt that violent criminal activity occurred or was threatened. (*People v. Boyd, supra*, 38 Cal.3d at 778; see *People v. Bramit* (2009) 46 Cal.4th 1221, 1239 [bringing BB guns onto school grounds when the defendant was 12 years old was not criminal and did not involve "the express or implied threat to use force or violence" within the meaning of section 190.3, factor (b)].)

C. The Court Deprived Winbush Of His Due Process Right To A Fair Penalty Hearing And His Right To Confrontation When It Refused To Allow Winbush To Cross-Examine Phillips About A False Complaint Of Rape

Winbush sought to cross-examine Phillips about a false accusation she made to Nicole New that a man named Pie had raped her. (170-RT 13391-403; 171-RT 13434-41.) The court correctly overruled the prosecutor's objection under Evidence Code section 782, which provides a procedure by which a defendant may attempt to attack the credibility of a complaining witness by introducing evidence of the complaining witness's sexual conduct. (See *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1454-1456 [Section 782 was inapplicable because it was the complaining witness's allegedly false complaints that the defense sought to use as impeachment evidence, not her prior sexual conduct]; *People v. Franklin* (1994) 25 Cal.App.4th 328, 335.) The court, however, improperly sustained the prosecutor's objection under Evidence Code section 352. (170-RT 13391-99.) Winbush objected on Sixth Amendment confrontation

grounds. (170-RT 13399; 171-RT 13440-41.) The court requested a more specific offer of proof. (170-RT 13404-05.)

Winbush argued he had a right to impeach Phillips with a prior false report of rape. (171-RT 13406-32; see *People v. Bittaker* (1989) 48 Cal.3d 1046, 1097 [court did not err in excluding evidence of prior false accusations under Evid. Code § 352]; *People v. Wall* (1979) 95 Cal.App.3d 978, 984-989 [the defense was allowed to introduce collateral evidence consisting of the victim's ex-boyfriend's testimony that she had previously threatened to accuse him of rape under Evidence Code section 1103, subdivision (a), as a specific instance of nonsexual conduct tending to disprove the truthfulness of the complainant's testimony]; *People v. Randle* (1982) 130 Cal.App.3d 286, 295-296 [the trial court erred in a prosecution for forcible oral copulation by excluding testimony that on two prior occasions, at the same bar, the complainant had falsely complained of being a victim of purse snatch and having been kidnapped].)

"A prior false rape complaint is relevant on the issue of the complaining witness's credibility. (*People v. Adams* (1988) 198 Cal.App.3d 10, 18.) Prior rape complaints would have no bearing on her credibility, unless it was also established that those prior complaints were false. (See *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599-600 [error to exclude evidence that the victim had previously made false accusation of rape, but error was harmless under the circumstances]; *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1457-1458.)

The court ruled that because Phillips denied making a false allegation about Pie, Winbush could not cross-examine her about it until he produced either Nicole New or Pie as a witness at a 402 hearing. (171-RT

13434-37.) The court then denied Winbush's request for a continuance to cross-examine Phillips to comply with the court's ruling. (171-RT 13444.)

Winbush also wanted to ask Phillips if she had sex with a man named Zeke (which she had told people) which was also a lie, and which was similar to her false allegations about having sex with Winbush. (171-RT 13438-41.) The court held that Winbush must comply with the notice provisions of Evidence Code section 782 (a)(1) thru (4), and if so, the court would hold a hearing. (171-RT 13441-43; *People v. Rioz* (1984) 161 Cal.App.3d 905, 916.) The court then denied Winbush's request for a continuance to comply with the court's order. (171-RT 13444.)

The court erred. Winbush was entitled to cross-examine Phillips about making false allegations about Pie or Zeke, or at least to be granted a continuance to find supporting evidence to comply with the court's rulings. (171-RT 13434-44.) "The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1105-1106.) Entitlement to a midtrial continuance requires the defendant "show he exercised due diligence in preparing for trial." (*People v. Danielson* (1992) 3 Cal.4th 691, 705.) Here, Winbush had shown due diligence sufficient to warrant a continuance to find the witnesses the court insisted were required to question Phillips about her lies concerning sexual conduct with other men. Winbush has also shown the court abused its discretion to his prejudice, first ruling that the defense would have to present witnesses at a

foundational hearing in order to cross examine Phillips, and then refusing to continue the trial to allow the hearing to be held. (*People v. Zapien* (1993) 4 Cal.4th 929, 972 [a denial of his motion for a continuance cannot result in a reversal of a judgment of conviction unless the court abused its discretion].)

D. The Court Deprived Winbush Of His Due Process Right To A Fair Penalty Hearing When It Permitted Highly Inflammatory Evidence Purportedly To Support Phillips' Ability To Recall, Not For The Truth Of The Matter; And The Limiting Instruction Was Ineffective

In her taped interview with Sergeant Page on September 26, 1998, Phillips said a man named Charles, the same man whom Winbush said he could rob, told Lakeisha, "Your cousin's crazy for killing that white girl." (171-RT 13469-72.) Phillips asked Lakeisha why did Winbush kill Botello's girlfriend, and she said, "They were trying to rob her, and she wouldn't cooperate so they killed her." (171-RT 13472.)

Winbush objected to this testimony as hearsay.[34] (171-RT 13470-72, 13496-97.) The court gave a limiting instruction that the jury was not to consider this testimony for the truth, but solely for whatever bearing it had on Phillips' ability to recall that day. (171-RT 13470-72.) The prosecutor also argued that the testimony gave context to Winbush's questions about why Phillips did not tell the police she went upstairs with Winbush. (171-RT 13470-72.)

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34. No unfairness to the parties or the court results from considering a due process claim which is inextricably entwined with the evidentiary problems presented by hearsay. (*People v. Gomez* (2010) 181 Cal.App.4th 1028, 1033; *People v. Partida* (2005) 37 Cal.4th 428, 436.)

The marginal probative value of this testimony paled in comparison to the highly prejudicial hearsay testimony that several people believed that Winbush killed Beeson. (See *People v. Thompson* (1988) 45 Cal.3d 86, 103 [before admitting hearsay the court initially looks to whether the victim's state of mind was really in dispute and whether it was relevant to an issue in the case].) Here, Phillips' ability to recall that day or why she did not tell the police she went upstairs with Winbush was not seriously in dispute. Resolving some imagined uncertainty about Phillips's memory could in no way justify presenting to the jury the extremely tangential and highly prejudicial hearsay statements by Charles, that Winbush was "crazy for killing that white girl," and Lakeisha's hearsay upon hearsay statement about Winbush that "They were trying to rob her, and she wouldn't cooperate so they killed her." (171-RT 13469-72.) [35]

In *People v. Bell* (2007) 40 Cal.4th 582, 608, this court upheld a trial court's ruling that a limiting instruction would be insufficient to prevent the jury from considering defendant's statements about the crimes themselves, as evidence of the truth of the events, effectively permitting

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35. Similarly, in the guilt phase, the court displayed the same kind of bias against Winbush by admitting copious and questionable hearsay, double hearsay, and even triple hearsay about Winbush's alleged bad acts or admissions of guilt, as inconsistent statements or some other implausible excuse. (117-RT 7878-7886; 118-RT 7902-7909; 119-RT 8072-8077; 124-RT 9389-9390, 9407-9410; 127-RT 9639-9643, 9661-9662, 9683; 133-RT 10152-57.) The court also ruled that limiting instructions obviated any prejudice to admitting such hearsay evidence, including evidence supporting the witnesses' alleged fear of Winbush under *People v. Burgener* (2003) 29 Cal.4th 833, 869. (119-RT 8077, 120-RT 8916, 121-RT 8991-8994, 126-RT 9602-9605; 127-RT 9697-9700; 133-RT 10153, 10182-83; 139-RT 10755.) The court overruled Winbush's objection to CALJIC No. 2.04, based on the admission of inconsistent statements concerning Winbush's threats. (158-RT 12393-95.)

defendant to testify to his version of events without being subject to cross-examination. For an analogous reason, the trial court erred in admitting this highly prejudicial hearsay evidence about Winbush's guilt, which permitted the prosecutor to place before the jury inadmissible and un-cross-examined witness statements that went to the core of his theory of guilt, knowing the jurors would be unable to ignore their content. (See *People v. Song* (2004) 124 Cal.App.4th 973, 982-983, [a limiting instruction does not cure *Aranda-Bruton* error because courts have repudiated the premise that it is reasonably possible for a jury to follow an instruction to disregard evidence that expressly incriminates the defendant].) "A limiting instruction is not a substitute for defendant's constitutional right of cross-examination." (*Ibid.*)

Even if such evidence was relevant, the trial court must engage in a careful weighing of its probative value against the danger of undue prejudicial effect on the jury. (*People v. Coleman* (1985) 38 Cal.3d 69, 92-93.) In *Coleman*, this court found it was prejudicial error to admit several letters written by the dead victim and used by defense experts to formulate an opinion about the defendant's mental state and his relationship with the victim, and the use of a limiting instruction that matters on which an expert based his opinion are admitted only to show the basis for the opinion and not for the truth of the matter did not cure any hearsay problem involved, because it was an "aggravated" situation. (*Id.* at 92; see also *People v. Bracamonte* (1981) 119 Cal.App.3d 644, 650-651 [limiting instructions insufficient to overcome prejudicial effects of trying issue of guilt with truth of prior conviction allegations].)

In *People v. Ervine* (2009) 47 Cal.4th 745, 775-776, this court approved of out-of-court hearsay statements of the defendant's wife

concerning a domestic violence complaint introduced through police officers' testimony where the jury was instructed at length that these out-of-court statements were not offered for their truth and they were essential to proving that the officers were performing their lawful duties when they approached defendant's home. (See also *People v. Mayfield* (1997) 14 Cal.4th 668, 751 [witness's out-of-court statement to officer that the defendant possessed a gun "was not admissible to prove that defendant in fact possessed a gun" but "was admissible for the nonhearsay purpose of establishing [the officer's] state of mind and the appropriateness of his ensuing conduct" to rebut a charge of excessive force]; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 204-205.)

In *In re Spencer* (1965) 63 Cal.2d 400, 403, this court explained that if a defendant "specifically places his mental condition into issue, the psychiatrist's testimony is admissible, provided that the court renders a limiting instruction that the jury should not regard the testimony as evidence of the truth of defendant's statements so related by the psychiatrist." (See *People v. Modesto* (1963) 59 Cal.2d 722, 732-733 [exclusion of tape recording of defense psychiatrist's hypnotic interview with defendant would have been a proper exercise of discretion]; *People v. Reyes* (1974) 12 Cal.3d 486, 503-504 [trial court properly ruled that 20-year-old medical report about the psychiatric diagnosis of the victim was an extraneous issue which should not be the subject of questioning where it played only an insignificant role in medical experts' conclusion that defendant suffered from diminished capacity]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 837 [the limiting instruction was inherently insufficient].)

Here there was no evidence of unavailability of Charles or Lakeisha, and Winbush had no opportunity to cross-examine these

witnesses. Under the *Chapman* test, the admission of this hearsay testimony indicating Winbush had killed Beeson was not harmless beyond a reasonable doubt. (*Yates v. Evatt* (1991) 500 U.S. 391, 403.)

X. THE COURT DEPRIVED WINBUSH OF HIS DUE PROCESS RIGHT TO A FAIR PENALTY HEARING WHEN IT OVERRULED WINBUSH'S DUE PROCESS OBJECTIONS TO INTRODUCING ACTS OF VIOLENCE OR THREATS OF VIOLENCE WHEN WINBUSH WAS A JUVENILE UNDER THE AGE OF 16 AND WHILE IN THE CUSTODY OF THE STATE AND UNDER THE AGE OF 18; AND THE LIMITING INSTRUCTIONS WERE INEFFECTUAL AND PRETEXTUAL

A. The Relevant Facts

Over Winbush's due process objection, the court admitted many incidents of misconduct when Winbush was under the age of 16, in part "only to show the basis of the doctor's opinion and not . . . for the truth of the matter," and many other incidents when he was in the custody of the state as a juvenile under section 190.3, factor (b). (19-RT 1179-1187; 186-RT 14549-50.) The prosecutor "wondered" at what point "does the defense cut this off at, age 16, at age 14? I mean I think we go back as far as the evidence shows." (19-RT 1183-1184.) The court agreed, finding that neither remoteness nor age was a reason to exclude the evidence under *People v. Karis* (1988) 46 Cal.3d 612, 641, & fn. 21, which held that the trial court does not have discretion under Evidence Code section 352 to exclude at the penalty phase any evidence of a capital defendant's commission or attempted commission of a prior violent felony. (19-RT 1187, 1183; see *People v. Anderson* (2001) 25 Cal.4th 543, 586.) Under the circumstances, any further defense objection to crimes

committed by Winbush as a child would have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-821, 845-846.) For the same reasons explained in the previous argument, the limiting instructions were ineffectual and pretextual. (See AOB, Arg. IX, D.)

1. Age 8: Attempted Arson and Age 10 to 13: Fights and Misconduct at Juvenile Hall

The prosecutor's cross-examination of Dr. Greene about Mr. Winbush's alleged future dangerousness revealed that Dr. Greene had seen a report that "at age 8, Winbush and a copartner attempted to set fire to a neighbor's home." (187-RT 14613; Exh.167.) This cross-examination also revealed that Dr. Greene had not reviewed all the reports showing many acts of violence by Winbush between the ages of 10 and 13 years old, including reports showing robberies with guns and assaults or auto thefts, or reports documenting his violence in juvenile hall. (187-RT 14620.) Dr. Greene had seen a report that Winbush was involved in six different violent incidents from February 19th to April 26th of 1990 at age 13 at the St. John School for boys, including once or twice where he verbally threatened the officer of the day, and three times where he was involved in a physical altercation or fight with a peer. (187-RT 14621; Exh. 175.) Winbush was involved in one incident where he threatened staff and got upset and started throwing chairs and ashtrays. (187-RT 14621.) There were other violent incidents in school for which he was suspended, and there were reports of violence against his mother and his sister. (187-RT 14622.)

This evidence was introduced allegedly to support Dr. Greene's opinion, also revealed during the prosecutor's cross-examination, that

Winbush's potential for future violence was high, given his past behavior, if nothing was changed.[36] (187-RT 14631.)

The court gave a meaningless limiting instruction the day before this testimony to the effect that the reports of juvenile bad acts were "admitted only to show the basis of the doctor's opinion and not . . . for the truth of the matter." (186-RT 14549-50; see AOB, Arg. IX, D.) No juror could be expected to understand this ridiculous distinction: either the jury could consider evidence that Mr. Winbush was an arsonist at age 8 or it could not.

The way the prosecutor referred to these crimes as fact in closing argument also shows that no juror could possibly understand these facts any differently, even though the prosecutor reminded the jury to use these facts only to evaluate Dr. Greene's opinion that Mr. Winbush would be dangerous in the future (an opinion with which the prosecutor agreed):

> This evidence that we talked about yesterday with the expert, and I don't know, was it 50 new incidents we brought out? Something like that. Maybe it was 40; maybe it was 55. I didn't count it. It was a large number of incidents. I know there were at least seven incidents, notice of suspension involving stabbing and whatnot. There was setting fires, there was all kinds of things. There were six or seven things at a group home, over a three-month period involving incidents of assaultive behavior. So all that stuff from the expert, you don't consider that as aggravation evidence. Okay. You consider that in terms of what your evaluation of her opinion. Okay?
>
> Did he have a learning disability? I don't think there's any dispute about the fact that he did. Okay? But the other opinion she offered, he will be dangerous in the future if he's sent to prison on a life sentence. Okay. And

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36. The court erred in allowing the prosecutor to cross-examine on this topic allegedly to impeach Dr. Greene's statement that a study had revealed that medication and therapy could reduce the violence of an imprisoned person suffering from ADHD. (See AOB, Arg. XII, C.)

> the information that you evaluate when you look at that opinion is all the violent stuff we talked about, he beat his mother, he beat his sister. He was a fire setter. He was assaultive in school. He tried to stab another student in school. He tried to stab a teacher. He assaulted the school secretary. All of that stuff that her opinion's based on, all the people who actually took the time with him face-to-face and evaluated him, even though she might have said they didn't evaluate him enough times, but each of those people evaluated him times that they did, but all those people who concluded -- I think there were eight or nine different spots I pulled out of records where someone wrote down on a piece of paper that his potential for future violence is high. (188-RT 14694-95.)

Thus, the jury had every reason to ignore the court's limiting instruction given the day before -- just as the prosecutor did -- that these juvenile bad acts were "admitted only to show the basis of the doctor's opinion and not . . . for the truth of the matter." (186-RT 14549-50.) The declaratory sentences: "He was a fire setter," or "He tried to stab a teacher," cannot be construed as anything but statements of fact.

2. Age 12: March 6, 1989: Dejuana Logwood

This incident is described in section J of the Statement of Facts and will not be repeated here. (AOB, Statement of Facts at 42-43.)

3. Age 13: September 22, 1990: Officer Robert Seib and Sergeant Randall

This incident is described in section J of the Statement of Facts and will not be repeated here. (AOB, Statement of Facts at 43.)

4. Age 14: May 21, 1991: Officer Peter Bjedlanes

This incident is described in section J of the Statement of Facts and will not be repeated here. (AOB, Statement of Facts at 43-45.)

5. Age 16: July 16, 19, and August 3, 1993: Juanita Ream

This incident is described in section J of the Statement of Facts and will not be repeated here. (AOB, Statement of Facts at 45.)

6. Age 16: July 16, 1993: Mrs. McEwen and Officer Kerry Spinks

This incident is described in section J of the Statement of Facts and will not be repeated here. (AOB, Statement of Facts at 46.)

7. Age 17: February 11, 1994: Officer Jeffrey Germond

This incident is described in section J of the Statement of Facts and will not be repeated here. (AOB, Statement of Facts at 47.)

8. Age 17: July 15, 1994: Officer Valerie Godfrey

This incident is described in section J of the Statement of Facts and will not be repeated here. (AOB, Statement of Facts at 47-48.)

B. The Admission Of These Juvenile Acts Of Violence Or Threats Of Violence Deprived Winbush Of His Due Process Right To A Fair Penalty Hearing

The admission of these incidents of misconduct when Winbush was under the age of 16 or in the custody of the state as a juvenile and under the age of 18 violated his rights to due process, a fair trial by an impartial and unanimous jury, the presumption of innocence, effective confrontation of witnesses, effective assistance of counsel, equal protection, and a reliable penalty determination for several reasons.

First, as Winbush argued to the trial court, to ask the jury to impose death for misconduct done as a juvenile as young as 12 years old violated federal and state due process. (19-RT 1182.) Winbush argued that the court should exclude his prior juvenile adjudications or disciplinary write-ups because they were remote; occurred when he was between 12 and 14 years old; and any marginal probative value was outweighed by their

prejudicial and misleading effect. (5-CT 1247.) Winbush's most recent juvenile adjudication was 11 years earlier when Winbush was 12 to 14 years old. (See *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1554-1555 [court affirmed exclusion of 10-year-old murder conviction for impeachment.] (5-CT 1249.)

Just as prior juvenile adjudications committed before the age of 16 years cannot be used as a strike prior, prior juvenile acts -- at least before the age of 16 -- should not be used as a reason to condemn someone to death. (5-CT 1250; see *People v. Garcia* (1999) 21 Cal.4th 1, 9-10; Penal Code section 667, subdivision (d)(3)(A).) Fourteen is the youngest age the state may prosecute a juvenile as an adult. (Welf. & Inst. Code § 602.) It is anomalous to use an act done under the age of 14 to condemn someone to death when any crime committed by a juvenile under 14 cannot be prosecuted as an adult.

Second, "[t]he state, when it asserts jurisdiction over a minor, stands in the shoes of the parents" thereby occupying a "unique role . . . in caring for the minor's well-being." (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941; *In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1500.) It is particularly unseemly to condemn a young man to death for misconduct as a juvenile done while he was under the state's supervision and care. We recognize that parents are partially responsible for their children's actions. Similarly, when the state "stands in the shoes of the parents," it is unseemly to hold that its failure to provide an environment in which their charges do not commit acts of violence is another reason to execute a teenager whom the juvenile system has failed. Even though inmates are entitled to reasonable medical care while incarcerated, it is obvious that Winbush was not provided the kind of psychological and medical services

that should have diagnosed and treated his tendency to act out violently or inappropriately. (*Youngblood v. Gates* (1988) 200 Cal.App.3d 1302, 1330 [an inmate is "entitled to psychological or psychiatric treatment" under *Estelle v. Gamble* (1976) 429 U.S. 97, 104-105].)

Third, in *Graham v. Florida* (2010) 560 U.S. 17, 130 S.Ct. 2011, 176 L.Ed.2d 825, the United States Supreme Court ruled that a sentence of life without possibility of parole for a non-homicide crime violated the Eight Amendment, and reiterated that *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*), "established that juveniles' lack of maturity and still developing characters lessen their culpability, and that it "'is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" (*Graham v. Florida, supra*, 130 S.Ct. at 2026.) Since *Roper*, "developments in psychology and brain science have continued to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." (*Ibid.*; see also *id.* at 2038-2040 [conc. opn. of Roberts, C.J.] [there is a presumption under *Roper* "that juvenile offenders are generally less culpable than adults who commit the same crimes"]; see also *Johnson v. Texas* (1993) 509 U.S. 350, 368 ["[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside"].)

As the United States Supreme Court observed in *Roper*, "juvenile offenders cannot with reliability be classified among the worst offenders." (*Roper v. Simmons*, *supra,* 543 U.S. at 569.) In holding the death penalty

unconstitutional for perpetrators younger than 18, the court focused on "[t]hree general differences" between juveniles and adults. (*Ibid.*) First, juveniles lack maturity and responsibility and are more reckless than adults. Second, juveniles are more vulnerable to outside influences because they have less control over their surroundings. And third, a juvenile's character is not as fully formed as that of an adult.

The *Roper* Court concluded:

> "These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." (*Roper, supra*, 543 U.S. at 570 [Citations omitted].)

Before *Roper*, in *Thompson v. Oklahoma* (1988) 487 U.S. 815, 857-858 (*Thompson*) [conc. opn. of O'Connor, J.], the Supreme Court invalidated capital punishment for juveniles younger than age 16 sentenced under statutory schemes specifying "no minimum age at which the commission of a capital crime can lead to the offender's execution." The plurality in *Thompson*, relying on earlier Supreme Court precedent, observed:

> "[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older

> persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. . . . 'Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults." (*Thompson*, *supra*, 487 U.S. at 834 [citations omitted].)

Recently in *In re Nunez* (2009) 173 Cal.App.4th 709, 728-729, the court relied on the above authority and the following authority to hold that sentencing a 14-year-old juvenile to life without possibility of parole for kidnapping for ransom was cruel and unusual punishment:

> Recent psychosocial research bears out the judicial observations collected in *Thompson* concerning very young offenders. (See Cauffman & Steinberg, *Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 Behav. Sci. & L. 741, 756 (2000) ["the steepest inflection point in the development curve occurs sometime between [age] 16 and 19 years"]; Halpern-Felsher & Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults* (2001) 22 J. Applied Developmental Psych. 257 [noting important differences in decision-making competence of early adolescents in contrast with older teenagers].) Consistent with these authorities and with *Roper* and *Thompson*, our Supreme Court has long identified youth as a factor mitigating the defendant's culpability. (See, e.g., *(People v. Dillon (1983)* 34 Cal.3d 441, 479 (*Dillon*) [reversing 17-year-old's life sentence for robbery-murder].) (*In re Nunez*, *supra,* 173 Cal.App.4th at 729.)

In *People v. Bramit* (2009) 46 Cal.4th 1221, 1238-1239, this court summarily dismissed a claim similar to the one Winbush has made, explaining:

> It is well established the federal Constitution does not bar consideration of unadjudicated criminal offenses. (See, e.g., *Tuilaepa v. California* (1994) 512 U.S. 967, 976-977; *People v. Dickey* (2005) 35 Cal.4th 884, 928.)

> Moreover, evidence of violent juvenile misconduct that would have been a crime if committed as an adult is admissible under section 190.3, factor (b). (*People v. Avena* (1996) 13 Cal.4th 394, 426; *People v. Visciotti* (1992) 2 Cal.4th 1, 72.)
>
> Nevertheless, relying on *Roper v. Simmons* (2005) 543 U.S. 551, defendant contends that admission of these unadjudicated juvenile offenses denied him his rights to due process, a fair trial by an impartial and unanimous jury, the presumption of innocence, effective confrontation of witnesses, effective assistance of counsel, equal protection, and a reliable penalty determination.
>
> Defendant's reliance on *Roper v. Simmons, supra*, 543 U.S. 551, is badly misplaced. That case holds that the execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments. It says nothing about the propriety of permitting a capital jury, trying an adult, to consider evidence of violent offenses committed when the defendant was a juvenile. An Eighth Amendment analysis hinges upon whether there is a national consensus in this country against a particular punishment. (*Roper v. Simmons, supra*, 543 U.S. at pp. 562-567; *People v. Blair* (2005) 36 Cal.4th 686, 754-755.) Defendant's challenge here is to the admissibility of evidence, not the imposition of punishment.

Relying on *Bramit*, this court has summarily rejected similar claims. (See *People v. Taylor* (2010) 48 Cal. 4th 574, 652-654; *People v. Bivert* (2011) 52 Cal.4th 96, 122-123.) Winbush's challenge here is both to the admissibility of evidence and the imposition of punishment. The problem with the court's conclusion in *Bramit* is that it defies logic and basic fairness to hold that it is unconstitutional to execute a person for a *murder* done while a juvenile under the age of 18, but it is constitutional to execute a person for non-murderous acts of violence or threats of violence done while a juvenile under the age of 18. Of course *Roper*, "says nothing about the propriety of permitting a capital jury, trying an adult, to consider evidence of violent offenses committed when the defendant was a

juvenile." It did not consider the issue. That does not mean that the reasoning of *Roper* cannot shed light on the issue of the unfairness of using juvenile misconduct as a reason to execute an adult, even if his capital crime was committed as a teenager.

Winbush believes that *Roper's* reasoning now makes it untenable to use non-murderous acts of violence or threats of violence done while a juvenile under the age of 18 or 16 or 14 as a reason to execute an adult for a murder committed while over the age of 18. It cannot possibly comport with due process and the Eighth Amendment for a jury's decision whether to execute a murderer to be influenced by juvenile misconduct at the age of 8, 12 or 13 or even 17, when a murder done at that age does not warrant the death penalty. A rabid prosecutor could use normal physical fights between brothers as a reason to execute virtually any defendant who grew up with a brother close in age. What brother has not had numerous physical fights with a brother close in age?

And is there any age which this court would find to be too young to use familial or juvenile violence as a reason to kill someone? Age 14, 12, 10, 8, 6, or 4? *Roper* stands for the proposition that juvenile conduct is not as blameworthy as adult conduct and that murderous conduct below the age of 18 does not warrant the death penalty. Any logical judicial system would similarly prohibit the introduction of juvenile bad acts as aggravating circumstances: at least acts committed while as young as age 16 or 14 or 12 or 8.

At a minimum, Winbush's attempted arson at age 8 and the attempted carjacking and attempted robbery of Dejuana Logwood at gunpoint at the age of 12 should not have been admitted to help the jury decide whether Winbush should be executed when he could not have

even been tried as an adult for a crime committed at that age. It is not enough to blandly claim that Winbush was sentenced to death for the murder he committed at age 19; he was necessarily sentenced to death not only for the murder itself, but because he committed crimes at age 8 and 12, and he was a troubled teenager in the state's custody for nearly all his teenage years and routinely committed violent acts, or threatened to do so.

The cases cited by the *Bramit* court, *People v. Avena* (1996) 13 Cal.4th 394, 426; *People v. Visciotti* (1992) 2 Cal.4th 1, 72, give unreasoned conclusions, rejecting a statutory argument concerning prior violent juvenile misconduct, but not one relying on *Roper* or *Graham,* which were not decided until 2005 and 2010, respectively. *Visciotti* and *Avena* simply relied on *People v. Burton* (1989) 48 Cal.3d 843, 862 or *People v. Lucky* (1988) 45 Cal.3d 259, 295, for the proposition that evidence of violent juvenile conduct that would have been a crime if committed by an adult is admissible under section 190.3, factor (b). *Lucky* explained: "[N]othing in the 1977 or 1978 laws indicates an intent to exclude violent criminal misconduct while a juvenile as an aggravating factor, simply on grounds the misconduct resulted in a juvenile wardship adjudication." (*People v. Lucky* (1988) 45 Cal.3d 259, 295.) The use of prior violent juvenile misconduct as factor (b) criminal activity does not violate the proscription that a juvenile adjudication "shall not be deemed a conviction of a crime for any purpose" (Welf. & Inst. Code, § 203): "It is not the adjudication, but the conduct itself, which is relevant." (*People v. Lucky, supra*, 45 Cal.3d at 295-296, fn. 24; *People v. Burton*, *supra,* 48 Cal.3d at 862; *People v. Roldan* (2005) 35 Cal.4th 646, 737.)

In *People v. Rundle* (2008) 43 Cal.4th 76, 185, this Court again gave short shrift to the argument that evidence of sexual assaults "should not have been admitted because defendant was a juvenile at the time of the incidents, and thus his actions were the 'impetuous and ill-considered' product of his youth and immaturity and the admission of this evidence violated his constitutional rights to due process and a reliable verdict" with this explanation: "In any event, defendant's characterization of this evidence was a proper subject for argument to the jury concerning the weight it should be accorded, but does not establish that the jury's consideration of his juvenile adjudications was constitutional error." (*Ibid;* see *People v. Raley* (1992) 2 Cal.4th 870, 909-910 ["the penalty verdict is attributable to [defendant's] current conduct, i.e., murder with a special circumstance finding, not his past criminal activity."].)

In *People v. Cox* (1991) 53 Cal.3d 618, 690, the court upheld the introduction of violent criminal conduct under factor (b) involving the 15-year-old defendant, including two robbery incidents, one in which he stole an automobile and engaged in a high-speed chase with police officers. The *Cox* court held:

> Defendant was sentenced to death for crimes committed as an adult. The fact that the jury may have considered criminal activity he engaged in as a juvenile in determining the appropriate penalty does not implicate the Eighth Amendment as applied in *Thompson*.

People v. Lewis (2001) 26 Cal.4th 334, 376-380, considered the separate issue whether defendant knew the wrongfulness of his conduct under Penal Code section 26 when, at age 13, he murdered a sleeping man by setting him on fire. The *Lewis* court did not consider a *Thompson/Roper* challenge. Moreover, as the *Lewis* court explained:

> Section 26 provides in pertinent part: "All persons are capable of committing crimes except those belonging to the following classes: [¶] One—Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness . . . ." (See *In re Gladys R.* (1970) 1 Cal.3d 855, 864 ["Section 26 embodies a venerable truth, which is no less true for its extreme age, that a young child cannot be held to the same standard of criminal responsibility as his more experienced elders"].) However, "the presumption of a minor's incapacity [may] be rebutted by clear and convincing evidence" that the minor defendant knew the act's wrongfulness. (*In re Manuel L.* (1994) 7 Cal.4th 229, 238.) (*People v. Lewis, supra,* 26 Cal.4th at 378.)

The prosecution did not provide "clear proof" to the jury, and the jury did not find, that Winbush, at age 8, knew arson was wrongful.

Winbush requests this court to reconsider the barbaric, unconstitutional practice of using criminal acts by a child as young as 8 or 12 years old as a reason to execute him for a murder done as a teenager. Despite the judicial wordplay, the only reason such acts of juvenile violence were introduced at the penalty phase was to give the jury further reasons to condemn Winbush to death. For an act of violence or the threat of violence or a crime committed by a child to be used as a reason to execute him ignores the undisputed acknowledgement that the younger a child, the less morally responsible he is for his actions.

The evidence of juvenile misconduct was too prejudicial to be admitted or considered in any manner; it blinkers reality to believe that a jury gave this evidence only the weight it deserved – zero. If this evidence had been excluded – even if only the crimes committed before the age of 14 – it is reasonably probable and reasonably possible that the jury would not have condemned Winbush to death for this single felony murder done at age 19 after being in state custody for most of his teen years.

XI. THE COURT DEPRIVED WINBUSH OF HIS DUE PROCESS RIGHT TO A FAIR PENALTY HEARING WHEN IT OVERRULED WINBUSH'S OBJECTIONS TO INCIDENTS OF MISCONDUCT WHICH DID NOT INVOLVE VIOLENCE OR THE THREAT OF VIOLENCE WITHIN THE MEANING OF SECTION 190.3(b)

A. The Court Erred In Admitting Incidents Of Misconduct Which Did Not Involve Violence Or The Threat Of Violence Within The Meaning Of Section 190.3(B)

Winbush argued that some of his disciplinary write-ups while in juvenile hall were inadmissible in determining his penalty in this capital case because they were not criminal activity or violent conduct under factor (b) of section 190.3, and that his juvenile adjudications were inadmissible under factor (c). Counsel argued that the admission of that evidence had the effect of depriving Winbush of his due process right to a fair penalty hearing and, and requested in limine hearings on those incidents. (5-CT 1235-1537; *People v. Lewis* (2001) 26 Cal.4th 334, 378; *People v. Burton* (1989) 48 Cal.3d 843, 862; *People v. Phillips* (1985) 41 Cal.3d 29, 72-73, fn. 25; *People v. Boyd* (1985) 38 Cal.3d 762, 776; *People v. Arias* (1996) 13 Cal.4th 92, 167; *People v. Anderson* (2001) 25 Cal.4th 543, 570.)

To be admissible under factor (b), a threat to do violent injury must violate a penal statute and must be directed against a person or persons, not against property. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013-1014.) When the prosecution has evidence of conduct by the defendant that satisfies these statutory requirements, evidence of the surrounding circumstances is admissible to give context to the episode, even though the surrounding circumstances include other criminal activity that would

not be admissible by itself. (*People v. Livaditis* (1992) 2 Cal.4th 759, 776-777; *People v. Keenan* (1988) 46 Cal.3d 478, 526.)

Any "prior felony conviction," even of a nonviolent felony, is admissible under section 190.3, factor (c). Under factor (c), however, only the fact of the conviction is admissible, not the underlying facts of the crime. (See *People v. Gates* (1987) 43 Cal.3d 1168, 1203.)

Evidence offered to rebut defense mitigating evidence need not relate to any specific aggravating factor listed in section 190.3, as long as it relates to evidence offered by the defendant in mitigation. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 109; *People v. Cunningham* (2001) 25 Cal.4th 926, 1023.) A prosecutor does not violate *Boyd* by showing that the evidence in mitigation offered by the defendant fails to carry extenuating weight when evaluated in a broader factual context. (*People v. Frye* (1998) 18 Cal.4th 894, 1021; *People v. Hawthorne* (2009) 46 Cal.4th 67, 92.) Here, Winbush did not offer evidence of his good character and the inadmissible evidence was introduced in the prosecution's penalty case-in-chief, not as rebuttal.

1. Age 16: July 16, 19, and August 3, 1993: Juanita Ream

Juanita Ream, a teacher at CYA, testified on July 16th and 19th, and August 3rd, 1993, Winbush was threatening and disrespectful, calling her a coward and a bald-headed bitch, which led her to call security to have him removed from the classroom. (175-RT 13919-23.) Over Winbush's objection that threats to the staff at juvenile hall were not imminent threats, but future ones, the court ruled the evidence was admissible under *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153-1154 [a violation of section 69[37]

37. Section 69, in pertinent part, proscribes "attempts, by means of any threat or violence, to deter or prevent any executive officer from

requires a specific intent to interfere with the executive officer's performance of his duties]; and *People v. Tuilaepa* (1992) 4 Cal.4th 569, 590 [a violation of section 71[38] -- threatening public employees and officers and school officials – requires an intent to interfere with the performance of official duties or that his statements created a reasonable belief the threat would be carried out].) (20-RT 1240-1246.)

The court was wrong. Abusive and even threatening language does not violate a penal statute and is inadmissible under factor (b). (See *People v. Wright* (1990) 52 Cal.3d 367, 425-426.) There was no substantial showing that defendant harbored the requisite intent -- interfering with the performance of official duties -- or that his statements had the requisite effect -- creating a reasonable belief the threat would be carried out. (*People v. Boyd, supra*, 38 Cal.3d at 777; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589-591.)

2. Age 18: 1995: Officer Craig Jackson

Winbush objected to evidence that he told the parole board he often reacted aggressively to gain stature among peers and make himself feel good, because his statements were not an act of violence or threat of violence. (23-RT 1473-77, 1502-1505; 176-RT 13969-70, 13997-13999.)

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performing any duty imposed upon such officer by law . . . in the performance of his duty . . . ."

38. Section 71 provides, in pertinent part, that "[e]very person who, with intent to cause . . . any public officer or employee to do, or refrain from doing, any act in the performance of his duties, by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out, is guilty of a public offense . . . ."

The court ruled this testimony was admissible factor (b) evidence under *People v. Payton* (1992) 3 Cal.4th 1050, 1063. (23-RT 1473-1477.)

The court denied Winbush his due process rights by admitting this irrelevant testimony. In *Payton*, the prosecutor, during the penalty phase, introduced testimony of a jailhouse informant regarding defendant's statements about stabbing and raping women, and about all women being potential victims. The Court held that evidence of "statements from defendant's own mouth demonstrating his attitude toward his victims" was highly probative to support the prosecutor's argument of future dangerousness. This is a far cry from Winbush's speculative bravado about why he might have acted aggressively. Moreover, it also penalizes Winbush for having made what appears to be a candid assessment of his past behavior, showing some insight into it. The use of such statements by the state in sentencing is poor public policy because it discourages candor at parole board hearings by defendants, who will be forced to forego an honest discussion of their behavior in a helping context, out of knowledge that their admissions could be used against them.

Evidence about Winbush's alleged history of assaultive behavior with staff, even though not admitted for the truth, but for the officer's state of mind, was inadmissible. (170-RT 13295-13315; *People v. Boyd, supra*, 38 Cal.3d at 778-779.) The *Boyd* court explained that community reputation for violence was irrelevant to any of the factors listed in the statute. "The use of reputation evidence, moreover, as a basis for the death penalty would raise serious questions; community reputation may be well deserved, the result of one's behavior in the community, but it may also be the product of rumor or prejudice." (*Id.* at 778.) Thus, the trial court erred in permitting the jury to consider the above evidence as

aggravating. (*Ibid.; People v. Gonzalez* (1990) 51 Cal.3d 1179, 1233 ["a reputation for violence is not a statutory sentencing factor, and thus may not be considered as aggravating"].)

3. Age 22: July 28, 1999: Officer Dino Belluomini and Deputy Wyatt

On July 28, 1999, at the North County jail in Oakland, Winbush stated that he would assault any guards who came into his cell, but then said he was "not threatening anybody." (176-RT 13982-83, 13988-89.) Winbush turned to Deputy Wyatt and told her that she better not come up to his cell. (176-RT 13988-89.) On another occasion, Winbush had pushed his food tray back, and Deputy Wyatt caught the tray and prevented Winbush from hitting her with it. (176-RT 13992-93.) This incident is described in more detail in section J of the Statement of Facts and will not be repeated here. (AOB, Statement of Facts at 53-54.)

Over Winbush's objection, the court ruled that threats to Officer Wyatt were admissible because they were violations of section 69. (23-RT 1505-09.) The court relied on *People v. Tuilaepa* (1992) 4 Cal.4th 569, 587-589 ["a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b)"].) Winbush agrees that an immediate threat to hit an officer with a tray is a violation of section 69, but not his remark to Deputy Wyatt that she better not come up to his cell.

Abusive and even threatening language does not violate a penal statute and is inadmissible under factor (b). (See *People v. Wright* (1990) 52 Cal.3d 367, 425-426.) Again, there was no substantial showing that defendant harbored the requisite intent -- interfering with the performance of official duties -- or that his statements had the requisite effect -- creating

a reasonable belief the threat would be carried out. (*People v. Boyd, supra*, 38 Cal.3d at 777.)

4. Age 23: February 1, 2000: Officer William Humphries

This incident is described in section J of the Statement of Facts and will not be repeated here. (AOB, Statement of Facts at 54-55.)

The court overruled Winbush's pretrial objection, and found that Winbush's threats to Officer Humphries violated sections 69 and 415 [resisting an officer] and was admissible factor (b) evidence under *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153-1154. (23-RT 1510-1512.) This incident involved Winbush mouthing off at Officer Humphries. There were no actual threats or physical aggression. Humphries, however, was allowed to testify that he felt Winbush was threatening him because he knew Winbush had a history of assaultive behavior with staff (not admitted for the truth, but for state of mind). (170-RT 13295-13315.) Thereafter, Humphries testified that he was working at an Administrative Segregation Unit for violent inmates at the Alameda jail, where Winbush was housed for protective reasons. (170-RT 13295-97; 173-RT 13655.)

This was inadmissible for the reasons stated above. (See *People v. Wright* (1990) 52 Cal.3d 367, 425-426 [error to admit testimony that defendant had been housed at the adjustment center where violent inmates were routinely housed].)

5. Age 26: January 14, 2003: Officer Judith D. Miller-Thrower

Over Winbush's objection, the court permitted the prosecution to introduce more reputation evidence under Evidence Code section 1102(b). (174-RT 13776-87.) Thus, Officer Miller-Thrower testified that anytime Winbush, who was housed in Administrative Segregation, was

moved within the jail, he was in chains and restraints for the safety of the staff and other inmates. (175-RT 13941.) Officer Foster testified that Winbush had a reputation in the Sheriff's Department – based on accounts of many deputies over many years -- as being an excessively violent inmate toward staff. (174-RT 13776, 13788.)

"A reputation for violence is not a statutory sentencing factor, and thus may not be considered as aggravating." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1233; *People v. Boyd, supra*, 38 Cal.3d at 778.) Moreover, the admission of reputation evidence about violence and testimony a defendant was a person of general bad character is the equivalent of propensity evidence, which is generally inadmissible and a violation of due process of law. (See *Michelson v. United States* (1948) 335 U.S. 469; *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384-1386.)

B. The Error Was Prejudicial

The error in admitting this evidence -- in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments -- rendered fundamentally unfair and unreliable a proceeding in which the issue was whether Winbush should live or die. The fact that the court admitted reputation evidence and incidents that did not involve violence or crimes, and the fact that the jurors thus relied on a false aggravating "facts," means that the error here irreparably tainted the penalty verdict. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 585 [death sentence reversed given "possibility that the jury's belief that petitioner had been convicted of a prior felony" -- a non-lethal sexual assault -- "would be 'decisive' in the 'choice between a life sentence and a death sentence'"].) Even considering the properly

admitted evidence of defendant's criminal history and the circumstances of the instant offenses, there was a reasonable possibility and probability that the jury's penalty verdict was affected by the inadmissible evidence. (*People v. Brown* (1988) 46 Cal.3d 432, 448-449; *Caldwell v. Mississippi, supra,* 472 U.S. at 341.) This is true despite the fact that this Court seldom finds *Boyd* error prejudicial. (*People v. Wright* (1990) 52 Cal.3d 367, 425-428; but see *People v. Phillips* (1985) 41 Cal.3d 29, 82-83 [erroneous admission of evidence of defendant's murderous plots not amounting to "actual crimes"; reversal predicated on compounded effect of failure to instruct on reasonable doubt].)

XII. THE COURT ERRED IN PERMITTING THE PROSECUTOR TO CROSS-EXAMINE DR. GREENE ABOUT WHETHER WINBUSH FIT THE CRITERIA FOR ANTISOCIAL PERSONALITY DISORDER, AND ABOUT WHETHER WINBUSH WOULD BE DANGEROUS IN THE FUTURE, EVEN THOUGH SHE WAS NOT A PSYCHOLOGIST, AND PROTESTED IT WAS OUTSIDE HER RANGE OF EXPERIENCE AND EXPERTISE, THUS VIOLATING WINBUSH'S DUE PROCESS RIGHT TO A FAIR PENALTY HEARING

A. The Relevant Facts

During the defense mitigation case, the court permitted the prosecutor, over defense objection, to cross-examine Dr. Greene, who had a doctorate in special education, but was not a psychologist, about diagnostic elements of antisocial personality disorder (ASPD) from the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (DSM-IV), even though Dr. Greene repeatedly protested her expertise did not extend to diagnosing ASPD. (184-RT 14486.) The court ruled that since she used the DSM-IV in her diagnosis that Winbush suffered from learning

disabilities and attention deficit disorder with hyperactivity affects (ADHD), the prosecutor could cross-examine her about anything in the DSM-IV. (184-RT 14449-14526; 187-RT 14656.)

Dr. Greene testified that she was not familiar with ASPD, and it was outside her range of experience and expertise. (184-RT 14486.) She was not familiar with the entire DSM-IV book, as she was not a psychologist. (184-RT 14503.) Despite her lack of expertise, the court permitted the prosecutor to cross-examine Dr. Greene at length about whether Winbush fit the criteria for ASPD. (See AOB, Statement of Facts at 73-76.)

B. The Court Erred In Permitting The Prosecutor To Cross-Examine Dr. Greene About Whether Winbush Fit The Criteria For Antisocial Personality Disorder

In *People v. Seaton* (2001) 26 Cal.4th 598, 679-680, this court held:

> In his attempt to undermine Dr. Conolley's diagnosis of defendant's behavior, the prosecutor was entitled to ask whether an alternate diagnosis—that defendant suffered from an antisocial personality disorder—might be more consistent with the evidence, and he was entitled to use the chart to illustrate to the jury that defendant exhibited many of the characteristics of the latter disorder.

In *Seaton*, however, the defense expert testified defendant suffered from an anxiety disorder, he had an "avoidant" and "dependent" personality type, and defendant's most likely personality diagnosis was an "atypical combination of avoidant, paranoid, and borderline." Unlike in Winbush's case, however, there was no claim that Dr. Conolley did not have the expertise to diagnose whether the defendant had antisocial personality disorder.

In contrast, Winbush's expert, Dr. Greene, had a doctorate in special education and was not even a psychologist, and she repeatedly protested her lack of expertise about the diagnostic elements of antisocial

personality disorder from DSM-IV; she had used the DSM-IV in this case only to diagnose the childhood conditions of attention deficit disorder with hyperactivity and conduct disorder. (184-RT 14486, 14503.) Moreover, ASPD is a disorder of adults, and Dr. Greene's expertise in special education applied only to children. Thus, she could be familiar with conduct disorder, but, as she protested, have no occasion to acquire any particular knowledge of ASPD. Simply because a criminal defense lawyer uses *Witkin* to express an opinion about criminal law does not make her qualified to express an opinion about civil law. Here, the prosecutor's cross-examination of Dr. Greene was not fair rebuttal, but simply a blatant misuse of her testimony to support his own theory that defendant had ASPD or was sociopathic.

In *People v. Seaton*, *supra,* 26 Cal.4th at 679-681, this Court did not approve of this tactic, but instead faulted defense counsel for failing to object to the expert testimony, and held that any impropriety in the prosecutor's questioning was so minor that there was no reasonable possibility the result of the penalty phase would have been different if the court had refused to allow the prosecutor to inquire into the matter.

In contrast, in *People v. Daniels* (1991) 52 Cal.3d 815, 883, the prosecutor presented rebuttal testimony by a psychologist who said the defendant was a sociopath, after a defense psychologist had testified that defendant had an underlying schizophrenia. Then, at argument, the prosecutor noted that some of the acts brought out on cross-examination, such as juvenile vandalism, truancy, and habitual tardiness at work, are not only evidence of "bad character" but also diagnostic factors for sociopathy. Reviewing the diagnostic categories of DSM III, the

prosecutor demonstrated that defendant's behavior corresponded to the diagnostic factors.

The *Daniels* court rejected the defendant's argument that his sentence should be overturned because it was based in part on "unreliable evidence," i.e., hearsay and rumor which were introduced through the cross-examination of defense witnesses. (*Id.* at 883-884.) The court held that "by presenting a psychological expert defendant necessarily opened the door to cross-examination inquiring into the factual basis of the expert's opinion; likewise by presenting character evidence defendant opened the door to cross-examination inquiring into the factual basis of the witness's judgment of his character." (*Ibid.*)

In Winbush's case, the prosecutor did not present any evidence in his own case in chief or rebuttal that Winbush had been, or could be, diagnosed with antisocial personality disorder. Instead, he used his cross-examination of Dr. Greene, who had testified only about Winbush's mental conditions during his developmental years, to insinuate a diagnosis of adult antisocial personality disorder which she was unable to make. (*People v. Williams* (1997) 16 Cal.4th 153, 252 [misconduct to elicit inadmissible details of probation report in cross-examination of defense expert].)

In *People v. Davis* (2009) 46 Cal.4th 539, 620, citing *People v. Smith* (2005) 35 Cal.4th 334, 359, this court held that "defendant's presentation of Dr. Woods' diagnosis of antisocial personality disorder opened the door to rebuttal testimony questioning that diagnosis or suggesting an alternative diagnosis. In Winbush's case, there was no rebuttal evidence of ASPD, only the prosecutor's argument.

The prosecutor's cross-examination of Dr. Greene amounted to an excuse for him to testify to inadmissible facts and an inflammatory, highly prejudicial, and nonexistent diagnosis of his own making, without that testimony itself being subject to cross-examination in violation of the Confrontation Clause. (U.S.. Const., Amends. VI and XIV; and see *People v. Bell* (1989) 49 Cal.3d 502, 533-534; *Hopkinson v. Shillinger* (10th Cir. 1989) 866 F.2d 1185, 1206; see also *People v. Visciotti* (1992) 2 Cal.4th 1, 80-81 [misconduct for the prosecutor to cross-examine a defense psychologist about a study not admitted into evidence "with which the expert was not acquainted, asking questions that were assertions of fact or conclusions reached in that study, the import of which was that psychiatrists are unable to accurately diagnose schizophrenia and paranoia"].)

In *People v. Castaneda* (2011) 51 Cal.4th 1292, 1336-1340, this court upheld a trial court's decision to prohibit a professor of psychiatry and biobehavioral sciences from testifying that the multi-generation alcohol abuse in defendant's family suggested a genetic basis for defendant's alcohol abuse, because the expert was not educated as a physician or geneticist," and "had not done any gene testing of defendant or any of his relatives." Even if "social scientists routinely base their opinions on the assumption that there is a genetic link between [the defendant and] his or her biological family, [that] does not qualify a social scientist to testify concerning a genetic cause of substance abuse." (*Id.* at 1338.) This court held that the trial court did not abuse its discretion in concluding that the expert was "not competent to testify concerning a genetic basis for defendant's drug and alcohol problems." (*Id.* at 1337.)

"The competency of an expert is . . . relative to the topic about which the person is asked to make his statement." (*Id.* at 1336.)

Dr. Greene told the court and counsel that she was not a psychologist and had no expertise about ASPD, and there was no evidence to contradict that; yet the court permitted the prosecutor to cross-examine her about a diagnosis she was, by her own admission, not qualified or competent to make. While the prosecutor may have chosen to present rebuttal testimony, he did not do so. It was clear error for the court to permit him to turn Winbush's expert witness concerning Winbush's childhood learning disabilities and ADHD into a reluctant, protesting, and evidentially incompetent conduit for the prosecutor's own "expert" opinion about whether Winbush suffered from ASPD as an adult.

C. The Court Erred In Permitting The Prosecutor To Cross-Examine Dr. Greene About Whether Winbush Would Be Dangerous In The Future

During the defense mitigation case, the court permitted the prosecutor, over defense objection, to cross-examine Dr. Greene, a Ph.D. in special education, but not a psychologist, about future dangerousness. Over defense objections, the prosecutor cross-examined Dr. Greene on the many reports of Winbush's problems as a juvenile, including his resistance to testing, aggression, running away, poor interaction with peers, and lack of remorse. The prosecutor succeeded in getting Dr. Greene to state several times that Winbush would be dangerous in the future if not treated, and that he resisted being treated. (187-RT 14623-31; Exhs. 166 & 167.)

The prosecutor elicited testimony that at age 14, Winbush's extensive involvement in the juvenile justice system and significant

placement failures placed him at high-risk for a complete rehabilitation. (187-RT 14626; Exh. 166.) Winbush's long history of aggressiveness at school, in the home, and his current assaultiveness in the community indicated that his potential for violence was high. Mrs. Winbush said that he "beat" her up and his sister and she was not able to control her son and at times had felt intimidated by and fearful of his angry outbursts. (187-RT 14622-27; Exh. 167.)

One of the situations in which Winbush did the worst was when people were trying to get him to comply with rules. If he went to prison for life, Winbush would be in a situation where people were constantly trying to get him to comply with rules, and that was when he became angry and violent. (187-RT 14631.)

Dr. Greene agreed with the prosecutor that the best predictor of future dangerousness is past violence, if everything in the environment stayed the same and there was no treatment. (187-RT 14619-20; 14630; Exh. 147.) Dr. Greene agreed that Winbush's potential for future violence was high, given his past behavior, if nothing was changed. (187-RT 14631.) Some people who met with Winbush indicated that his potential for future violence was high. (187-RT 14623.) One psychiatrist who interviewed Winbush believed that psychoactive medications were not indicated, but his aggressive potential was above average. (187-RT 14623-24; Exh. 162.)

The court overruled Winbush's objection, arguing that since Dr. Greene testified about a study showing that inmates with ADHD did better when treated with Ritalin, the prosecutor could cross-examine about future dangerousness. (187-RT 14654-56; 184-RT 14463-64; 187-RT 14616.)

Winbush objected, stating that he believed the subject of future dangerousness was beyond the expertise of Dr. Greene and was inappropriate as a subject for cross-examination. The court noted that the linchpin of the doctor's examination and her testimony was that if Winbush was treated with Ritalin and received personal counseling in conjunction with treatments with Ritalin, there would be a greater degree of safety to other prisoners and those around him. She discussed Colorado prison studies involving the treatment of inmates in the prison system with Ritalin and counseling, and that their recidivism plummeted. Thus, because the defense brought up the subject of safety in prison, the court ruled the prosecutor could cross-examine on that subject. (*Ibid.*; *People v. Gates* (1987) 43 Cal.3d 1168, 1211; *People v. Mattson* (1990) 50 Cal.3d 826, 877-878 [testimony on "future dangerousness" was relevant impeachment testimony]; *People v. Clark* (1993) 5 Cal.4th 950, 1014-1015 [same]; 187-RT 14652-53.) The court rejected Winbush's reliance on *People v. Murtishaw* (1981) 29 Cal.3d 733, 773, finding *Murtishaw* distinguishable because there the prosecution tendered the issue of future violence of the defendant in prison. (187-RT 14654.)

The prosecutor argued that everything he asked the witness came from documents that she said she relied upon, which all contain many references that indicated that Winbush's potential for future violence is "excessively high."[39] (187-RT 14655.) The prosecutor reiterated that he had properly read portions of reports that Dr. Greene had testified she had

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39. The prosecutor's cross-examination revealed that Dr. Greene had not reviewed all the reports showing many acts of violence by Winbush between the ages of 10 and 13 years old or based her opinion on them. (187-RT 14620.)

relied on to base an opinion that strongly implied future peacefulness if Winbush was medicated. (187-RT 14656.)

Winbush explained that he was not objecting to discussing future dangerousness; he was objecting to "reading portions of the report and asking Dr. Candaleria-Greene if she agreed with psychiatric or psychological reports when she said this was not her area of expertise." The prosecutor was not questioning her about something about which she had ever expressed an opinion. (187-RT 14655.) Winbush objected to the prosecutor reading objectionable sentences out of psychological reports which were outside her area of expertise. (187-RT 14656.) For the same reasons as explained in subsection B., *supra*, the court erred in permitting the prosecutor to obtain an opinion of Dr. Greene on this topic which was beyond her expertise.

The trial court overruled Winbush's objection, because the prosecutor "was entirely within the bounds of appropriate cross-examination, given the nature of the direct testimony and the nature of the expertise that was placed before this court and before the trier of fact." (187-RT 14656.)

The prosecutor exploited this ruling in his closing argument:

> With Grayland Winbush, if you grant him leniency and give him a life sentence, what you're doing is mortgaging the life, the lives, I should say, of all the inmates that he will serve time with. You're mortgaging the lives of the staff that will work around him, with him. (188-RT 14688-89.)
>
> If he's given a life sentence . . . Grayland Winbush gets a free ride on anybody he assaults in the future, no matter how much damage he does to somebody. If he injures someone and causes them a personal fate -- suppose he snaps someone's neck and causes paralysis? You can't do anything else to him if he has a life without parole sentence only. He's all the way at the top of the line here.

> There's no additional punishment that can be given. (188-RT 14689.)
>
> His violence in the future is a near certainty. "His violence in the future is a near certainty. Even his expert witness agrees with that. And all those who deal with him are at severe risk." (188-RT 14690.)
>
> I mean, take a look at what [Dr. Greene's] opinions were basically, which was that he's got ADD and he's going to be a danger in the future. Okay. He's going to be a danger in the future. She didn't want to say that. Okay? I know it took me quite a while to get her to that point. (188-RT 14693.)

Similarly, the court used this evidence in denying Winbush's motion for modification of the death verdict stating: "Even Dr. Candaleria-Greene who was called as an expert witness by the defense in the penalty phase of the trial conceded the last part of this, that Grayland Winbush's potential for violence in the future is high." (196-RT 14998.)

Expert evidence of future dangerousness is not barred by the United States Constitution. (*Barefoot v. Estelle* (1983) 463 U.S. 880, 896-903; cf. *Simmons v. South Carolina* (1994) 512 U.S. 154, 162 [plur. opn.] [due process violated when state imposes death sentence based in part on the defendant's future dangerousness when jury not informed the alternative penalty of life imprisonment was without parole]; *Kelly v. South Carolina* (2002) 534 U.S. 246, 248 ["when 'a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant "to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel'"]; *Ramdass v. Angelone* (2000) 530 U.S. 156, 165 [plur. opn. of Kennedy, J.] [same].) Permitting open and far-ranging argument at the penalty phase does not offend the United States Constitution. (*Gregg v. Georgia* (1976) 428 U.S.

153, 203-204; *Jurek v. Texas* (1976) 428 U.S. 262, 275 [jury may determine the probability of future criminal conduct at the penalty phase].)

The law is settled, however, that expert testimony that a capital defendant will pose a danger in the future if his life is spared is inadmissible in this state. (*People v. Ervine* (2009) 47 Cal.4th 745, 797.) In *People v. Murtishaw* (1981) 29 Cal.3d 733, 773-775, the court stated:

> "One can imagine few matters more prejudicial at the penalty trial than testimony . . . that defendant, if sentenced to life without possibility of parole, would be likely to kill again." The court explained that such predictions are unreliable and frequently erroneous, have little relevance to any of the factors considered by the jury in deciding to impose the death penalty and are -- despite their unreliability -- potentially extremely prejudicial to the defendant. It is the potential for prejudice from the testimony of an "established and credentialed expert" that a defendant may or will commit future violent acts which outweighed such comments' arguable relevance to the question of aggravation. (*Id.* at 773; see *People v. Sapp* (2003) 31 Cal.4th 240, 308-309 [court assumes error, but finds it harmless because "the defense effectively countered any suggestion of defendant's future dangerousness"].)

Prosecutorial argument regarding defendant's future dangerousness in prison is permissible when based solely on evidence of the defendant's conduct, rather than expert opinion. (*People v. Thomas* (2011) 52 Cal. 4th 336, 364-365; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1179.) In Winbush's case, the issue of his future dangerousness was introduced by the prosecutor through the testimony of an "established and credentialed expert," and based on "expert testimony" in clear violation of *Murtishaw*. Even though Dr. Greene resisted this and denied having the expertise to make such predictions, the context – her status as an expert, the judge's overruling of repeated defense objections, the

prosecutor's argument that she had testified to this as an expert – told the jury that her testimony was that of an expert. This is borne out by the fact that the judge himself, at sentencing, clearly drew the same conclusion. The prosecutor did not merely argue Winbush's future dangerousness in prison based on evidence of his past conduct, but argued it was established by expert testimony: "His violence in the future is a near certainty. Even his expert witness agrees with that. And all those who deal with him are at severe risk." (188-RT 14690.)

D. The Errors Were Prejudicial

The errors rendered fundamentally unfair and unreliable a proceeding in which the issue was whether Winbush should live or die. (See generally, *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1386.) The fact that the court permitted the prosecutor to cross-examine Dr. Greene about whether Winbush fit the criteria for antisocial personality disorder, and about whether Winbush would be dangerous in the future, and to tout her answers as the opinion of an expert, even though she was not a psychologist or psychiatrist, means that the errors here irreparably tainted the penalty verdict. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 585 [death sentence reversed given "possibility that the jury's belief that petitioner had been convicted of a prior felony" -- a non-lethal sexual assault -- "would be 'decisive' in the 'choice between a life sentence and a death sentence'"].)

To make matters worse, the trial court did not admonish the jury that Dr. Greene's opinions were based on hearsay and that the underlying hearsay materials was not offered for its truth or as substantive evidence in aggravation, but only admitted for the purpose of evaluating her expert

testimony. (Cf. *People v. Hawthorne* (2009) 46 Cal.4th 67, 91-93 [cross-examination about the defendant's disciplinary violations in CYA was appropriate as the defense expert had reviewed and considered such evidence in forming an opinion on ADD, and the court instructed the jury not to consider the evidence of defendant's disciplinary violations as substantive evidence in aggravation]; *People v. Montiel* (1993) 5 Cal.4th 877, 919.)

Even considering the properly admitted evidence in aggravation, there was a reasonable possibility and probability that the jury's penalty verdict was affected by the inadmissible evidence. (*People v. Brown* (1988) 46 Cal.3d 432, 448-449; *Caldwell v. Mississippi, supra,* 472 U.S. at 341.)

To be compatible with principles of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, capital sentencing statutes must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428, [internal citations and quotation marks omitted]; *Sandoval v. Calderon* (2000) 231 F.3d 1140, 1150.) The Eighth Amendment requires that a verdict of death must be a "reasoned moral response to the defendant's background, character, and crime," not "an unguided emotional response." (*Penry v. Lynaugh*, *supra,* 492 U.S. at 328.)

The prosecutor's improper actions here and as explained in the next section, violated Winbush's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and the California Constitution, to due process, to a fair trial, to confrontation and cross-

examination, to rebut the evidence against him, to fundamental fairness, and a reliable determination of guilt and penalty. Moreover, the prosecutor's misconduct denied state law entitlements in violation of the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra,* 447 U.S. at 346.)

XIII. THE PROSECUTORS' EGREGIOUS AND PERVASIVE MISCONDUCT IN OPENING STATEMENT AND PENALTY PHASE ARGUMENTS VIOLATED WINBUSH'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR PENALTY DETERMINATION AND WAS NOT CURED BY THE COURT SUSTAINING OBJECTIONS, WHICH THE PROSECUTOR IGNORED

A. The Prosecutor's Opening Statement Violated Winbush's Due Process Right To A Fair Trial

In his guilt phase opening statement, the prosecutor deliberately committed misconduct, calling Winbush and Patterson "evil men." (105-RT 6884.) The court sustained Winbush's belated objection. (107-RT 6950.) Despite this ruling, the prosecutor called Winbush a "violent jerk" during his penalty phase opening statement, and the court again sustained Winbush's objection. (186-RT 14572.)

Arguments calling defendants names have often been held to be unconstitutional or improper. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 149 [reference to defendant as an animal]; *People v. Fosselman* (1983) 33 Cal.3d 572, 580; see also *People v. Sanders* (1995) 11 Cal.4th 475, 527 [improper reference to defendant as a "monster"]; *People v. Hunter* (1942) 49 Cal.App.2d 243, 250-251 [reference to defendant as "vulture was inappropriate and . . . improper"]; accord, *Darden v.*

Wainwright (1986) 477 U.S. 168, 181 [prosecutor committed misconduct by characterizing defendant as an animal]; *Kellogg v. Skon* (8th Cir. 1999) 176 F.3d 447, 451-452 [prosecutor committed misconduct and created inflammatory prejudice by calling defendant "monster" and "sexual deviant"]; *Miller v. Lockhart* (8th Cir. 1995) 65 F.3d 676, 682-84 [prosecutor's "inflammatory" reference to defendant as a "mad dog" who should be "put to death," along with other statements, required reversal of capital conviction and sentence]; *Ippolito v. United States* (6th Cir. 1940) 108 F.2d 668, 670-671 [conviction reversed where prosecutor referred to defendant as "rattlesnake" and "skunk"]; *Ford v. Lockhart* (E.D. Ark. 1994) 861 F.Supp. 1447, 1468 [referring to defendant as a "beast" was improper].) Such "comments also create inflammatory prejudice" and "have no place in the courtroom." (*Kellogg v. Skon*, *supra*, 176 F.3d at 452.) "[D]ramatic appeal to gut emotion has no place in the courtroom, especially in a case involving the penalty of death." (*Hance v. Zant* (11th Cir. 1983) 696 F.2d 940, 952.) "'[T]he responsibility of the prosecutor is to avoid the use of language that might deprive a defendant of a fair trial.'" (*Pacheco v. State* (Nev. 1966) 414 P.2d 100, 104.)

In *People v. Hawkins* (1995) 10 Cal.4th 920, 960-961, the prosecutor referred to defendant as "coiled like a snake," and compared the act of sentencing defendant to life in prison to "putting a rabid dog in the pound." On appeal, defendant argued that the prosecutor's dehumanizing language improperly inflamed the jury's passions and further invited them to speculate on defendant's future conduct. After noting that "[t]rial counsel failed to object to these alleged incidents of misconduct, . . . and as such, any claim is generally waived on appeal," this court said: "We do not condone the use of such terms in argument.

But as we have held, the use of such opprobrious epithets is not necessarily misconduct." (*Id.* at 960-961.)

The decision in *Hawkins*, illustrates a troubling dichotomy that exists concerning the type of error complained of here. On the one hand, this court says that it does not condone the use of demeaning and dehumanizing epithets by the prosecutor at the penalty phase of a capital trial, while, on the other, it says that the use of such epithets is not necessarily misconduct. In other words, the use of such opprobrious epithets by the prosecutor is bad, but not bad enough to constitute error. Unfortunately, such a holding does nothing to discourage prosecutors from continuing to use such demeaning and dehumanizing epithets. If this court truly does not "condone" such epithets, it should lay down the law and tell prosecutors to stop using them once and for all.

People v. Wilkes (1955) 44 Cal.2d 679, 687-688, illustrates this point. In that case, the claim of error was that the prosecutor had committed prejudicial misconduct by commenting on the defendant's wife's failure to testify. In discussing this particular error, which the reviewing courts had routinely found to be harmless, this Court stated:

> Such error has repeatedly been denounced but held not to have been prejudicial in the circumstances of the particular cases in which it has occurred. Because of such repeated holdings, it appears from the brief of the People, prosecuting officials have come to the belief that erroneous conduct in this regard is, as a matter of law, not cause for reversal. The conduct here, as in previous cases where it has been rebuked but held not prejudicial, was manifestly deliberate. Regrettably, the circumstances make it apparent that we must recognize and deal with the fact that such conduct will not be discontinued as long as it is merely rebuked. (See *People v. Ford* (1948), 89 Cal.App.2d 467, 472 ["We have extended our remarks respecting misconduct in the hope that they will be taken as a serious effort to inspire a greater degree of

> responsibility, duty and caution on the part of those prosecutors who are either careless in the observance of the rights of the accused or wholly indifferent to the consequences of their misconduct. It is regrettable that so much is left for reviewing courts in the way of discouraging misconduct. Fewer judgments would have to be reversed if the trial courts were more firm in controlling the comparatively few prosecutors who need restraint."].) (*People v. Wilkes*, *supra*, 44 Cal.2d at 687-688.)

B. The Prosecutor's Specious Penalty Arguments Based On Facts Not In Evidence Violated Winbush's Due Process Right To A Fair Trial

In his initial closing argument, the prosecutor made this specious, vicious argument, turning what should have been a mitigating factor into an aggravating factor:

> [Dr. Greene] wouldn't even sit down with him face-to-face. Now whether that's a slight-of-hand legal strategy or she didn't want to be in the same room with him, don't know. But she wouldn't even sit in the same room with him. Where are the family members? They're here in the community; they're local; they're around. Where are they? Why didn't they come in here and tell you something? (188-RT 14695.)

For the prosecutor to suggest that Dr. Greene "wouldn't even sit down with [Winbush] face-to-face" which could have been because "she didn't want to be in the same room with him," is outrageous misconduct as it was based on nothing but speculation. Moreover, to use the fact that Winbush had no family support as an aggravating factor is beyond the pale. The obvious implication of the argument was that it was Winbush's fault – due to his bad character or due to their lack of love for him -- that his family members did not support him, rather than the fact that his family members were dysfunctional or otherwise would not make good witnesses, or had refused to testify. In both instances, there was no evidence about either of these two facts, thus, the prosecutor's mean-

spirited argument, which necessarily implied negative facts not in evidence, was outrageous misconduct.

Helplessly, Winbush tried to respond to one prong of the prosecutor's speculation: "None of his family members came in here and testified because Grayland didn't want to subject them to this process." (189-RT 14766.) Without realizing the irony of its ruling, the trial court sustained the prosecutor's objection that there was "no evidence of that," ignoring the fact that Winbush was simply responding to the prosecutor's argument based on no evidence.

The prosecutor, without evidence, also grossly exaggerated the pleasures of prison life:

> They had no reason to kill her. They go on. They have their life in jail, their card games, their basketball games. If they get in trouble, they have to eat the food loaf, the disciplinary loaf, and they get to look forward when they come off of the punishment and eating regular, nice, hot meals. They tortured her, and she is dead, and there are no more hot meals for her. They go on. They have no care for her or her family. They have a life in jail. There's a social life, their jobs, schools, education opportunities. . . Weekly canteen. (188-RT 14702-03.)

Winbush objected that there was no evidence about prison conditions (as opposed to CYA conditions), but the court secretly sustained the objection (without informing the jury). (188-RT 14702-03, 14708.) The court then permitted the prosecutor to suggest that prison life was the same as in the CYA:

> You've heard from evidence what life is like in jail and what life is like in the California Youth Authority. You get to play sports, basketball, card games, make home-made alcohol; there's marijuana, cookies, and enchiladas, canteen privileges. There are -- there are telephones, there are letters, there are visits. There's sex. You've

heard evidence that a full life exists behind bars. (188-RT 14703.)

Hypocritically, the court shortly thereafter sustained virtually the same objection – this time by the prosecutor -- to Winbush arguing in rebuttal about prison conditions for LWOPP prisoners in Pelican Bay close to the Oregon border, where Winbush was likely to be sent, and where visits would be minimal. (190-RT 14879-80.)

It is settled that "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (*Turner* v. *Louisiana* (1965) 379 U.S. 466, 472-473.) It is improper for a prosecutor to present potentially prejudicial "evidence" to a jury in the form of argument. (*People* v. *Pitt* (1990) 223 Cal.App.3d 606, 722.) "Argument must proceed from facts for which there is evidence, or inferences from those facts." (*People v. Ochoa* (1998) 19 Cal.4th 353, 466-467 [because there was no evidence of defendant's misconduct at the CYA, the prosecutor should not have argued that his clean record might only "mean that he didn't get caught"]; *People v. Lewis* (1990) 50 Cal.3d 262, 283.) This prosecutor intentionally violated these well-established principles, committing misconduct which this court should firmly condemn.

C. The Prosecutor's Closing Penalty Argument Attacking Winbush's Defense Counsel Violated His Due Process Right To A Fair Trial

In final closing argument, the prosecutor again deliberately committed misconduct by attacking and impugning Winbush's defense counsel for choosing the reasonable and wildly-adopted tactic of not challenging the jury's guilt verdicts while pleading for Winbush's life.

The prosecutor, however, derided Winbush's counsel for *not* "second-guessing the verdict," which meant that defense counsel had lied to the jury during the guilt phase:

> I want to remind you to think about the previous argument that you heard on behalf of Winbush at the guilt phase. It went on for about a day-and-a-half. It was all about how he is innocent. He was never there. He didn't do it. It was a false confession. Now you are being told by the same attorney for the same defendant, oh, well, he did do it. Okay. You guys are right. *We tried to fool you last time.* You guys were right. The evidence does support your verdict.
>
> It's as though it is whatever we can say to try and fool you and beat you. Whatever we can say to try and trick you into making a mistake as a jury, to get you to make the wrong decision that will favor the defendants.
>
> *We will say anything to you, anything whatsoever.* We will spend a day-and-a-half telling you that these were false confessions and he was never there. And we will rundown every witness in the case. We will call the police liars and get up here and stand right up in front of you and say you were right, the evidence supported your verdict. Okay?
>
> There is a concept in some capital cases that is referred to as lingering doubt. That is, even though the jury has made a finding of guilt, there is something in the back of their minds, well maybe they didn't do it. I just want to really emphasize to you at this point that while you heard arguments on behalf of both defendants at the end of guilt, certainly much stronger for Winbush than Patterson, but arguments from both of them inviting you or urging you to believe these -- this rubbish that was testified to, these lies that were testified to by both defendants about false confessions, and what you have been told today by lawyers for each of those defendants is that they are guilty of these murders.
>
> *So, to the extent that you heard arguments to the contrary at the end of the guilt phase, you were being intentionally misled.* And as you analyze the defense arguments here every which way they can think of to persuade you -- and let me say really loudly, to give the lenient sentence, the lesser of the two sentences, every

> argument, anything they can say no matter how it relates to the evidence you heard or anything else in this courtroom no matter how it relates to facts, morality, fairness, whatever it will take to get you to do the more lenient thing. Lenient. I'm saying it loud and clear. I want to say it in a clear and loud voice, lenient. The lesser sentence. (189-RT 14776-78 [emphasis added].)

The prosecutor continued to harangue Winbush's lawyers, this time about their reasonable argument that Beeson's murder was not the worst of the worst -- which clearly it was not. It did not involve a child or a senior or a peace officer or a witness; it did not involve sexual assault or torture; it was an unplanned murder during a robbery of one young, white woman:

> We haven't even gotten to the killing part yet, but this isn't a bad murder.
>
> *These are shameful arguments, shameful arguments.* They will tell you anything to try and get their clients a break that they don't deserve. And you contrast the guilt arguments to these arguments and you can see it.
>
> *Think about fighting for your life because you want to live.*
>
> *They are telling you this is not a bad murder. This poor woman suffered enough for a hundred murders. She suffered more than the 167 victims than the Oklahoma City bombing victims did because they all died instantly.* (189-RT 14794-96 [emphasis added].)

Finally, a defense lawyer objected to the prosecutor arguing about other cases, and the court sustained the objection. The prosecutor proceeded to ignore the court's ruling arguing:

> [Erika] suffered more than a hundred victims suffered in a bomb blast because they all went out immediately. And she slowly is being strangled.
>
> Think about how terrorized she must have been. Think about how frightening that was. But they are telling you this is not a bad heinous murder.
>
> And they are telling you these are not bad heinous murders. And they are telling you that you don't know what a serious murder is. This is a serious murder. This

> is a bad murder. This is the worst type of murder. (189-RT 14794-96.)

Instead of making another futile objection, defense counsel told the jury:

> Now, the District Attorney has cited some shortcomings of [defense counsel] Krech and myself, that we tried to mislead. We didn't try to mislead. We were good; we were bad; we were evil incarnate. Watch very closely when the judge reads you those factors in aggravation. And find out if it says anywhere in there that if you don't like the lawyer it's says it's okay to kill the client. I suspect that you won't find that. And would be a tragedy if you were going to punish Grayland for something that I did or that . . . Mr. Krech did. (190-RT 14853-54.)

It is misconduct for the prosecutor in argument to impugn the integrity of defense counsel or to suggest defense counsel has fabricated a defense. (*People v. Cash* (2002) 28 Cal.4th 703, 732-733; *People v. Bemore* (2000) 22 Cal.4th 809, 846; *People v. Hawthorne* (1992) 4 Cal.4th 43, 59-60.) When the prosecution denigrates defense counsel, there is a risk the jury will shift its attention from the evidence to the alleged defense improprieties. (*People v. Bemore, supra*, 22 Cal.4th at 846; *People v. Frye* (1998) 18 Cal.4th 894, 977-978.) "It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense. . . . " (*People v. Bemore, supra*, 22 Cal.4th at 846; *People v. Perry* (1972) 7 Cal.3d 756, 789-790; *People v. Bain* (1971) 5 Cal.3d 839, 845-847), or to imply that counsel is free to deceive the jury. (*People v. Bell* (1989) 49 Cal.3d 502, 538.) Such attacks on counsel's credibility risk focusing the jury's attention on irrelevant matters and diverting the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences therefrom. (*People v. Sandoval* (1992) 4 Cal.4th 155, 183-184, citing *People v. Thompson* (1988) 45 Cal.3d 86, 112.)

It is also misconduct for the prosecutor to suggest that jurors should place themselves in the position of a party, a victim, or the victim's family members." (See *State v. McHenry* (Kan. 2003) 78 P.3d 403, 410.) Such arguments are improper and not permitted "because they encourage the jury to depart from neutrality and to decide the case on the improper basis of personal interest and bias." (*Ibid.*; see also *Lawson v. State* (Md. 2005) 886 A.2d 876, 889-890 ["Such argument is impermissible because it 'improperly appeals to [the jurors'] prejudices and asks them to abandon their neutral fact finding role.'"] This court recently condemned the prosecutor's "purely emotional appeals," and "extended and melodramatic oration couched as a letter to the victim" because the "irrelevant information or inflammatory rhetoric . . . divert[ed] the jury's attention from its proper role [of rational deliberation on the statutory factors governing the penalty determination] or invite[d] an irrational, purely subjective response." (*People v. Gonzales* (2011) 51 Cal.4th 894, 952.)

Finally, it was improper for a prosecutor to ignore the court's ruling, and was prosecutorial misconduct because the conduct was deceptive and reprehensible. (Cf. *id.* at 920 ["while it was improper for the prosecutor to persist with his line of questioning after the court sustained an objection, this conduct did not amount to the kind of 'deceptive or reprehensible' tactic that rises to the level of prosecutorial misconduct"].)

D. The Prosecutorial Misconduct Requires Reversal

"In evaluating the effects of improper argument at the penalty phase, this Court applies the reasonable possibility standard of prejudice . . . which . . . is the 'same in substance and effect' as the beyond-a-

reasonable-doubt test for prejudice." (*Id.* at 953, citing *People v. Brown* (1988) 46 Cal.3d 432, 448.)

Clearly, the prosecutor's outrageous comments could possibly have caused the jury to believe that defense counsel had deliberately lied to them -- because counsel had "accepted" the jury's guilt verdicts -- and could not be trusted, and that Dr. Greene was too scared of Winbush to speak with him, and that his family members did not come to court because they did not care about him. The name-calling in both the guilt and penalty phase prejudiced Winbush's penalty phase more than the guilt phase.

This reprehensible prosecutorial misconduct deprived Winbush of a fair trial guaranteed by the due process clauses of the federal and state Constitutions and a fair and impartial jury. (See *Estes* v. *Texas* (1965) 381 U.S. 532, 540; *People* v. *Harris* (1989) 47 Cal.3d 1047, 1083-1084; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 470; *People* v. *Rodgers* (1979) 90 Cal.App.3d 368, 372.) Prosecutorial comment is reversible as misconduct under the federal Constitution when it "'so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Frye*, *supra,* 18 Cal.4th at 969; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-645 [prosecutorial misconduct in closing argument can render a trial so fundamentally unfair as to deny defendant due process].) Under state law, however, prosecutorial comment that falls short of rendering the trial fundamentally unfair is misconduct when it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" (*People v. Earp* (1999) 20 Cal.4th 826, 858.)

The prosecutorial misconduct was prejudicial error because of the high esteem prosecutors are held by jurors. (See *People v. Hill* (1998) 17 Cal.4th 800, 844-846.) It is not Winbush's fault the court failed to rein in the prosecutor. The prosecutorial misconduct in Winbush's case went beyond the pale and deprived him of his due process right to a fair trial. For the same reasons reversal was mandated in *Hill,* reversal is required here. (*People v. Hill* (1998) 17 Cal.4th 800, 844-847.) "A prosecutor's closing argument is an especially critical period of trial. Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694.)

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," including scrutiny of the prosecutor's penalty phase arguments. (*California v. Ramos* (1983) 463 U.S. 992, 998-999; *Caldwell v. Mississippi, supra,* 472 U.S. at 328-334, 337-341.) The misconduct denied Winbush the right to a reliable penalty determination, and requires reversal of his death sentence under the Eighth Amendment. (See e.g., *Penry v. Lynaugh, supra*, 492 U.S. at 328; *Mills v. Maryland*, *supra,* 486 U.S. at 384.) The penalty phase is not supposed to be a lynch party; it is supposed to control and direct the base emotions, such as vengeance and hatred, that an ugly crime can induce.

E. This Court Should Review The Misconduct Because An Admonition Would Not Have Cured The Harm

In Winbush's case, the nature of the misconduct was such that it was extremely unlikely that any timely objection and admonition would have cured the harm. (See *Caldwell v. Mississippi, supra,* 472 U.S. at 339

["Some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect"]; *People v. Hill, supra,* 17 Cal.4th at 845-846; *People* v. *Johnson* (1981) 121 Cal.App.3d 94, 103-104; *People* v. *Ghent* (1987) 43 Cal.3d 739, 770.)

Winbush's claim that the prosecutor committed misconduct may be waived for failure to make a timely assignment of misconduct and request an admonition. (*People v. Prieto* (2003) 30 Cal.4th 226, 259; *People* v. *Green* (1980) 27 Cal.3d 1, 27.) Given that Winbush objected to some of the prosecutor's misconduct, any further objections would have been futile and thus the error is not waived. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-821, 845-846.) Second, the Court may reach the merits of a claim where, as here, "plain error" has been committed at the penalty phase. (See *People v. Wash* (1993) 6 Cal.4th 215, 276-277 [conc. & dis. opn. of Mosk, J.].)

It would be anomalous if, in order to preserve an objection to prosecutorial improprieties, defense counsel had to request an admonition that this court in *Bandhauer* recognized would only "compound" the prejudice. (*People v. Bandhauer, supra,* 66 Cal.2d at 530; see also *People* v. *Kirkes* (1952) 39 Cal.2d 719, 726-727; *People v. Coleman* (1992) 9 Cal.App.4th 493, 497.) The errors in Winbush's case were particularly egregious because, despite any court admonition, the jury could not help but be influenced by the prosecutorial misconduct.

F. The Cumulative Effect of the Prosecutorial Misconduct was Prejudicial Error

The cumulative effect of the prosecutorial misconduct in Winbush's case requires reversal. (*People v. Hill* (1998) 17 Cal.4th 800, 844-847 [A court must assess the cumulative effect of all the prosecutorial misconduct

in determining whether a defendant has been denied his right to a fair trial]; *People v. Fosselman* (1983) 33 Cal.3d 572, 580-581; *People v. Criscione* (1981) 125 Cal.App.3d 275, 293; *People v. Hudson* (1981) 126 Cal.App.3d 733, 741.) The prosecutor's repeated instances of improper argument materially damaged Winbush's defense and likely poisoned the jury. Prejudice should be analyzed under the *Chapman* standard, both because this issue implicates the Sixth and Fourteenth Amendments under *People v. Bolton* (1979) 23 Cal.3d 208, and because cumulative prejudice analysis is appropriate because the prejudice flowing from this error must be viewed cumulatively with the general erosion of the reasonable doubt standard,

As a result, these errors should be assessed in terms of their cumulative impact as well as individually. (*People* v. *Holt* (1984) 37 Cal.3d 436; *People* v. *Ford* (1964) 60 Cal.2d 772.) Moreover, if one or more of the errors is found by this court to be of federal constitutional magnitude, the cumulative prejudice analysis must necessarily be under the *Chapman* standard. Such cumulative review under this strict standard of course calls even more clearly for reversal of the special circumstances findings.

XIV. THE COURT DEPRIVED WINBUSH OF HIS DUE PROCESS RIGHT TO A FAIR PENALTY HEARING WHEN IT PERMITTED THE PROSECUTOR TO ARGUE OVER WINBUSH'S OBJECTION THAT THE ABSENCE OF EMOTIONAL DISTURBANCE WAS A FACTOR IN AGGRAVATION BY ARGUING THAT IT MADE THE CRIME WORSE

During closing penalty argument, the court permitted the prosecutor to argue there was no evidence about the first factor in mitigation -- emotional disturbance -- thus using the alleged absence of emotional

disturbance as a factor in aggravation by implicitly arguing it made the crime worse. (187-RT 14669-70.) The court overruled Winbush's objection that the prosecutor's argument clearly made that unlawful inference. (187-RT 14681-82.) The court also denied Winbush's request to modify CALJIC No. 8.85 to strike all the factors on which there was no evidence. (179-RT 14123-26.)

Factors in mitigation, including factor (d) (extreme mental or emotional disturbance), "can only mitigate, and the absence of any of these factors may not be considered aggravating." (*People v. Doolin* (2009) 45 Cal.4th 390, 456, citing *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, 1186; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1223 [absence of a mitigating factor is not itself aggravating].)

Finally, the errors here not only tainted but likely actually influenced the verdict. In conjunction with the other penalty phase errors, it was quite likely jurors would have thought that the absence of evidence of emotional disturbance was aggravating. This was hardly an insignificant idea to plant in the jurors' minds. In a case in which the penalty determination was close, the notion that Winbush had no emotional disturbance that might have explained his actions may well have made him seem so unsympathetic that a juror otherwise disposed to spare his life would have been moved to impose the ultimate punishment. It is reasonably probable and reasonably possible that the prosecutor's highly improper argument adversely influenced the verdict of one or more jurors. (See, e.g., *Chapman v. California*, *supra*, 386 U.S. at 24; *People v. Brown, supra,* 46 Cal.3d at 448-449; *Johnson v. Mississippi*, *supra,* 486 U.S. at 585; *Strickland v. Washington, supra*, 466 U.S. at 693-695; *Caldwell v. Mississippi, supra*, 472 U.S. at 341.)

XV. THE COURT IMPROPERLY DENIED WINBUSH'S APPLICATION FOR MODIFICATION OF THE DEATH SENTENCE UNDER PENAL CODE SECTION 190.4(E) DEPRIVING WINBUSH OF A FAIR AND RELIABLE PENALTY DETERMINATION IN VIOLATION OF HIS RIGHTS SECURED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. The Court's Ruling

On July 11, 2003, the court made an oral ruling in which it refused to modify the death verdict under Penal Code sections 190.4(e), 1181(7); and 1385, after reviewing the circumstances in aggravation, concluding that the death sentence was appropriate. (196-RT 14968-75.)

The court explained in part:

> The court has reviewed the evidence, has determined, in its independent judgment, that the overwhelming weight of the evidence which this court assesses to be from testimony of credible and believable witnesses whose testimony possesses substantial and significant probative force, supports the jury's verdict of death to defendant Grayland Winbush. Following its independent review of all the testimony and evidence presented to the jury, it is this court's personal and independent assessment and judgment that the factors in aggravation overwhelming outweigh the factors in mitigation, and that the evidence in aggravation is so substantial in comparison with the evidence in mitigation that death is warranted for the defendant Grayland Winbush and not life in prison without the possibility of parole. (196-RT 14975.)
>
> If one was to engage in this further analysis to determine who of these two callus, vicious, evil, murderers, who was perhaps the more callus, the vicious, the more evil, the balance would have to tip inexorably in the direction of Grayland Winbush. He, Grayland Winbush, was the man who was less than two weeks out of a prison setting at the CYA when he committed murder. He, Grayland Winbush coveted a gun to use in committing robberies, perhaps in committing murders. (196-RT 14980.)

Winbush lied to the police, but ultimately told them the truth. (196-RT 14984.)

He was not coerced into saying these things. He was not threatened to make him say these things. There was [no] deal; there was no bargain; there was no agreement made by him or with him by anyone, ever, not the police, not the District Attorney, not his mother. (196-RT 14984.)

The [penalty witnesses against Winbush] demonstrate, again, beyond a reasonable doubt, that Grayland Winbush's pattern of violence -- often extremely severe violence -- had extended throughout his life, both before the murder of Beeson and after he committed the murder. They demonstrate that Grayland Winbush was extremely violent and is extremely violent towards virtually everyone with whom he has contact. Everyone. Everywhere, he is violent towards his peers. He is violent towards people he knows. He is violent towards strangers. He is violent towards police officers. He is violent towards counselors. He is violent towards teachers. He is violent towards persons with whom he is incarcerated, fellow inmates in custodial institutions. He is violent towards guards and other staff members in custodial institutions. (196-RT 14997; 14989-97.)

He will continue to be a cunning, manipulative, deceptive and extraordinarily violent man. Even Dr. Candaleria-Greene who was called as an expert witness by the defense in the penalty phase of the trial conceded the last part of this, that Grayland Winbush's potential for violence in the future is high. (196-RT 14998.)

No prior felony convictions. (196-RT 14998.)

With respect to attention deficit disorder with hyperactivity or ADHD. From my independent review of the evidence, I find that the disorder does not rise to the level of mental disease or defect that's contemplated by 190.3(h), and I further find that in any event this disorder did not impair the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time of the offenses.

As I previously stated I do find that the disorder which is the subject of Dr. Candaleria-Greene's testimony does constitute a factor in mitigation under Penal Code Section 190.3(K). (196-RT 15000-01, 15005.)

> I independently conclude that whatever learning disabilities Grayland Winbush may have suffered as a child, they no longer burdened him in, say, the year or two prior to murdering Beeson on December 22, 1995. (196-RT 15014.)
>
> Following my independent review of all the evidence, all of the testimony presented to the jury, it's this court's personal and independent judgment that the factors in aggravation well outweigh the factors in mitigation; that the evidence in aggravation is so substantial in comparison with the evidence in mitigation that death is warranted and not life in prison without the possibility of parole. (196-RT 15019.)
>
> Penal Code Section 1187 subdivision 7 is denied too. (196-RT 15019.)

B. The Relevant Law

"Pursuant to section 190.4, in ruling upon an application for modification of a verdict imposing the death penalty, the trial court must reweigh independently the evidence of aggravating and mitigating circumstances and then determine whether, in its independent judgment, the weight of the evidence supports the jury's verdict." (*People v. Crittenden* (1994) 9 Cal.4th 83, 150.) This independent, on-the-record evaluation is designed to make the process for imposing a sentence of death rationally reviewable, and to help ensure the reliability of any determination that death is the appropriate sentence. (See *People v. Frierson* (1979) 25 Cal. 3d 142, 178-179.) This Court subjects the trial court's ruling to independent review, scrutinizing the trial court's determination after independently considering the record, but without making "a de novo determination of penalty." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1106.)

To withstand constitutional scrutiny, the trial court must adhere to well-established limitations in conducting its section 190.4(e) review. First,

the trial court must only consider evidence that was before the jury. (*People v. Brown* (1993) 6 Cal. 4th 322, 337.) Second, the trial court must restrict its evaluation of aggravating circumstances to those specifically enumerated in California's death penalty statutory scheme. (*People v. Boyd* (1985) 38 Cal. 3d 762, 773 [matters that are not within the statutory list of aggravating factors are not to be given any weight in the penalty determination]; see § 190.3 [enumerating statutory factors].)

Importantly, because section 190.4(e)'s review procedure creates a constitutionally protected liberty interest for any defendant sentenced to death, an error or deficiency in the sentence review process can constitute a violation of a defendant's constitutional right to due process. (See *Hicks v. Oklahoma*, *supra,* 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300; *Campbell v. Blodgett* (9th Cir. 1992) 997 F.2d 512, 522.)

The court denied Winbush his right to a fair and reliable penalty determination secured by the Fifth, Sixth, Eighth and Fourteenth Amendments and failed to discharge its mandatory statutory responsibilities under section 190.4(e) when it either minimized the mitigating factors or ignored them, while at the same time exaggerating the aggravating factors and giving them undue weight. The court's findings included speculation that Winbush "coveted a gun to use in committing robberies, perhaps in committing murders." (196-RT 14980.) There was no evidence that Winbush coveted a gun to commit murder. The court erroneously relied on this speculation as a reason to impose the death sentence. The court's failure to properly review Winbush's death sentence requires the death verdict to be reversed. (See *People v. Burgener* (2003) 29 Cal.4th 833, 890-892.)

XVI. WINBUSH'S DEATH SENTENCE, IMPOSED FOR FELONY-MURDER, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW

A. The Relevant Facts

The prosecution proceeded on both first-degree, premeditation murder and felony-murder theories, and the court instructed the jury that they did not have to agree on the theory. (11-CT 2779; 166-RT 13099 CALJIC No. 8.21.) The verdicts did not indicate whether the jurors believed both theories, or just one. (11-CT 2815-2816.) The evidence of premeditation was weak, as Winbush did not bring a weapon to the robbery or discuss killing beforehand, but the evidence of felony-murder was strong, as the jury found the felony-murder special circumstance to be true. (11-CT 2816.) The special circumstance finding did *not* require the jury to find that Winbush "intended to kill," as long as the jury found that he "actually killed" someone in the commission of robbery. (11-CT 2787; 166-RT 13102; CALJIC No. 8.80.1.) The fact that the jury found that Winbush personally used a deadly weapon suggests that it found that he "actually killed." (11-CT 2815.)

B. California Authorizes The Imposition Of The Death Penalty Upon A Person Who Kills During A Felony Without Regard To His Or Her State Of Mind At The Time Of The Killing

Because the death penalty law lacks any requirement that the prosecution prove that an actual killer had a culpable state of mind with regard to the murder before a death sentence may be imposed, it violates the proportionality requirement of the Eighth Amendment as well as international human rights law governing use of the death penalty.

Winbush was death-eligible solely because he was convicted of robbery during which Beeson was killed. (See Pen. Code §§ 189, 190.2, subd.(a)(l7)(i).) While a murder conviction normally requires the prosecution to prove that the defendant had the subjective mental state of malice (either express or implied), in the case of a killing committed during a felony, or any attempted felony, listed in section 189, the prosecution can convict a defendant of first degree felony murder without proof of any mens rea with regard to the actual murder.

> "[F]irst degree felony-murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable." (*People v. Dillon, supra*, 34 Cal.3d at 477.)

This rule is reflected in the standard jury instruction for felony-murder given at Winbush's trial:

> The unlawful killing of a human being, *whether intentional, unintentional or accidental*, which occurs [during the commission or attempted commission of the crime] of robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime. (11-CT 2778; 166-RT 13099; CALJIC No. 8.21, italics added.)

Winbush was subject to the death penalty solely because of the robbery-murder special circumstance. Under California law, a defendant convicted of a murder during the commission or attempted commission of a felony may be executed even if the killing was unintentional or accidental or was committed in a panic or under the dominion of a mental

breakdown. (See *People v. Dillon* (1984) 34 Cal.3d 441, 479 [felony murder occurring during robbery "presents a very high level of . . . danger, second only to deliberate and premeditated murder with malice aforethought"].) An analysis of 803 murder convictions in Alameda County for offenses committed between 1978 and 2001 revealed that the breadth of California's death-eligibility for robbery-burglary murders is inconsistent with the proportionality principles of *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*) *and Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*). (See Steven F. Shatz, *The Eighth Amendment, The Death Penalty, and Ordinary Robbery-Burglary Murders: A California Case Study* (2007) 59 Florida L. Rev. 719.) "Overbroad definitions of death-eligibility can be seen as the root cause of most of the problems with the death penalty." (*Ibid.*)

Except in one rarely-occurring situation, under this Court's interpretation of section 190.2, subdivision (a)(17), if the defendant is the actual killer in a robbery felony-murder, the defendant also is death-eligible under the robbery-murder special circumstance. (See *People v. Hayes* (1990) 52 Cal.3d 577, 631-632 [the reach of the felony-murder special circumstances is as broad as the reach of felony murder and both apply to a killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction."]

The key case is *People v. Anderson* (1987) 43 Cal.3d 1104, 1147, where the Court held that under section 190.2, "intent to kill is not an element of the felony-murder special circumstance." Since *Anderson*, in rejecting challenges to the various felony-murder special circumstances, this Court repeatedly has held that to seek the death penalty for a felony-murder, the prosecution need not prove that the defendant had any mens

rea as to the killing. For example, in *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264, this Court rejected the defendant's argument that, to prove a felony-murder special circumstance, the prosecution was required to prove malice. In *People v. Earp* (1999) 20 Cal.4th 826, 905 & fn.15, the defendant argued that the felony-murder special circumstance required proof that the defendant acted with "reckless disregard" and could not be applied to one who killed accidentally. This Court held that the defendant's argument was foreclosed by *Anderson*. (*Ibid.*) In *People v. Smithey* (1999) 20 Cal.4th 936, 1016, this Court rejected the defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human life.

Felony-murder, while a serious crime, should not be among that narrow class of cases that are so grievous that the appropriate penalty is death. As explained in Argument XXV, D, *infra*, the Eighth Amendment prohibition against cruel and unusual punishment embodies a proportionality principle. In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the United States Supreme Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders.

The prosecution proceeded on both first-degree, premeditation murder and felony-murder theories, but the verdicts did not indicate whether the jurors believed both theories, or just one. (11-CT 2815-2816, 2779.) Thus, Winbush became eligible for a death sentence -- and a death sentence was imposed -- based solely on the commission of an unpremeditated and unintentional killing during a robbery. Moreover,

because the Constitution requires that the death penalty be reserved for the offenders with the greatest moral culpability, persons who commit felony-murder, especially an accidental, unintentional or unpremeditated homicide, do not fall into this category.

The recent decisions of the United States Supreme Court in *Atkins v. Virginia* (2002) 536 U.S. 304 [mentally retarded may not suffer the death penalty] and *Roper v. Simmons* (2005) 543 U.S. 551 [children under 18 years old may not be executed], recognize that lesser mental states of mentally retarded people and children also lessen the mens rea of the offender. Similarly, persons who commit unintentional or unpremeditated murders during the commission of a robbery also have lesser mens rea and are thus not deserving of the ultimate penalty.

Significantly, the vast majority of states recognize that an offender whose crime was found by the trial court to be unintentional and unaggravated by any fact other than the robbery underlying his felony-murder conviction, lacks the requisite mens rea to be deserving of society's harshest punishment. Under the "evolving standards of decency" standard that the Supreme Court uses when analyzing the "cruel and unusual" clause of the Eighth Amendment, these numbers demonstrate a national consensus against the execution of an offender whose crime was not intentional and was aggravated only by the felony underlying the death sentence. The imposition of the death penalty on a person who has killed without premeditation or intention fails the first part of the proportionality test. It is simply contrary to evolving standards of decency and does not comport with contemporary values.

Imposition of the death penalty for felony-murder fails the second part of the proportionality test as well. That is, the death penalty for

felony-murder does not serve either of the penological purposes required by the Supreme Court -- retribution and deterrence. With regard to these purposes, "[u]nless the death penalty . . . measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund, supra*, 458 U.S. at 798-799, quoting *Coker, supra,* 433 U.S. at 592.) Retribution must be calibrated to the defendant's culpability which, in turn, depends on his mental state with regard to the crime. An unpremeditated or unintentional homicide involves a very much less culpable mental state than a premeditated or intentional killing. Further, deterrence is not served because the death penalty simply cannot deter a person from causing a result he never planned, never foresaw, or never intended.

Here, the jury did not find that Winbush had a specific intent to kill, or committed premeditated murder, thus his moral culpability was considerably less than that of an intentional killer. Indeed, any unintentional homicide involves a less culpable mental state that an intentional killing. (See *Enmund, supra*, 458 U.S., at 798 ["It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally'"].) Moreover, as *Enmund* also pointed out: "putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." (*Id.* at 801.)

Although the Eighth Amendment does not specifically prohibit disproportionate sentences nor does it contain an express mandate for individualized punishment, the Supreme Court has held that the cruel and

unusual punishment clause bans sentences that are grossly disproportionate to the crime for which the defendant is convicted. (See, e.g., *Solem v. Helm* (1983) 463 U.S. 277.)

Additionally, in *Woodson v. North Carolina* (1976) 428 U.S. 280 (followed in *Lockett v. Ohio* (1978) 438 U.S. 586, 603-604), the Court set forth the requirements of individualized sentencing:

> "[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Woodson v. North Carolina, supra*, 428 U.S. at 304.)

In her dissenting opinion in *Enmund v. Florida* (1982) 458 U.S. 782, Justice O'Connor explained the proportionality concept this way:

> "In sum, in considering the petitioner's challenge, the Court should decide not only whether the petitioner's sentence of death offends contemporary standards as reflected in the responses of legislatures and juries, but also whether it is disproportionate to the harm that the petitioner caused and to the petitioner's involvement in the crime, as well as whether the procedures under which the petitioner was sentenced satisfied the constitutional requirement of individualized consideration set forth in *Lockett*." (*Enmund, supra,* 458 U.S. at 816 [dis. op. of O'Connor, J.).)

In holding that the rape of a child is not a crime for which the death penalty could be imposed, the Supreme Court rejected the notion that the death penalty could be imposed on a defendant who did not kill. (*Kennedy v. Louisiana* (2008) 554 U.S. 407, 420-421, 436-437.) The Court recognized that there was a certain amount of inconsistency in its own case law on the ultimate reach of the death penalty and admitted that it was still "in search of a unifying principle." (*Id.* at 437.) In *Kennedy*, the

Court observed that the cruel and unusual punishment clause of the Eighth Amendment springs from the evolving standards of decency that mark the progress of a maturing society. That is, the standard for extreme cruelty "'itself remains the same, but its applicability must change as the basic mores of society change.'" (*Id.* at 419.) Since punishment must be graduated and proportional to the crime, while informed by evolving standards, capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (*Id.* at 420.)

In *Enmund*, the Court held that the Eighth Amendment barred the imposition of the death penalty on a defendant who did not take life, attempt to take life, or intend to take life. (*Enmund, supra*, 458 U.S. at 789-793.) The Court reiterated the fundamental, moral distinction between a "murderer" and a "robber," noting that while "robbery is a serious crime deserving serious punishment," it is not like death in its "severity and irrevocability." (*Enmund, supra*, 458 U.S. at 797). Thus, the crime of felony-murder would be disproportionate to the offense and the death penalty could not be imposed.

Nevertheless, several years later, in *Tison,* the Court revisited the scope of the death penalty and addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty. Writing for the majority, Justice O'Connor said that the Eighth Amendment would be satisfied by proof that the defendant had acted with "reckless indifference to human life" and was a "major participant" in the underlying felony. (*Tison, supra*, 481 U.S. at 158.) *Cabana v. Bullock* (1986) 474 U.S. 376 and *Hopkins v. Reeves* (1998) 524 U.S. 88, do not

require this finding to be made by a jury, but nevertheless require this form of mens rea to be established at some point in the case, even on appeal.

Justice O'Connor explained that some unintentional murders may be among the most inhumane and dangerous. Further, the "reckless indifference" to human life by a "major participant" may evince as much moral culpability as a specific intent to kill. (*Tison, supra*, 481 U.S. at 157-158.) Justice Brennan's dissent argued that there should be a distinction for Eighth Amendment purposes between actual killers and accomplices and that the state should have to prove intent to kill in the case of accomplices. (*Tison, supra*, 481 U.S. at 168-179 [dis. opn. of Brennan, J.].)

Even in *Tison*, however, the Court specifically held that mere liability for felony-murder alone is not sufficient to warrant either the imposition of the death penalty or a true finding on a special circumstance. (*Tison, supra*, 481 U.S. at 151.) The "reckless indifference" standard of *Tison* is meant to describe a mental state short of intent to kill, yet beyond foreseeability. Its purpose is to "genuinely narrow the class of persons eligible for the death penalty" (*Zant v. Stephens, supra*, 462 U.S. at 877), so that felony-murder liability alone does not permit execution.

In *Tison*, the Court further explained:

> "A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through "Benefit of ... Clergy" would be spared." (*Tison, supra*, 481 U.S. at 156.)

Subsequently, the Supreme Court in *Roper* and *Atkins* again held that the Eighth Amendment narrows the class of persons eligible for the death penalty to those who participate in the most serious crimes and who bear extreme responsibility for those crimes. Thus, death is not an appropriate punishment in situations where the defendant, who is a juvenile or mentally retarded, has a diminished personal responsibility.

Although *Tison* has never been formally overruled, *Tison* and its companion cases of *Cabana v. Bullock, supra*, and *Hopkins v. Reeves, supra*, are at best on the fringe of Constitutional acceptability. Felony-murder -- absent an intent to kill -- expands the death penalty beyond the most culpable offenders. Although claiming to narrow the class of offender for whom the death penalty was appropriate (see *Zant v. Stephens, supra,* 462 U.S. at 877), *Tison* actually went beyond the most culpable and expanded the class of death eligible defendants to those who did not kill or had a specific intent to kill but who nevertheless possessed the other characteristics of reckless indifference and major participation.

The fault with the *Tison* criteria is seen in cases such as this one where the jury did not find that Winbush premeditated or had an intent to kill. Moreover, under the Eighth Amendment proportionality principles, the critical inquiry is not whether the appropriate procedures were followed to impose the death penalty, but rather, whether the defendant's conduct under the circumstances was individually blameworthy enough that death is the appropriate punishment. (See *Coker v. Georgia* (1977) 433 U.S. 584.) Imposing the death penalty in this case, violated the Eighth Amendment proportionality principles.

C. The Robbery-Murder Special Circumstance Violates The Eighth Amendment's Proportionality Requirement And International Law Because It Permits Imposition Of The Death Penalty Without Proof That The Defendant Had A Culpable Mens Rea As To The Killing

Given the lack of mens rea for felony-murder, the rule serves either as a means of presuming malice in order to find a homicide, or it constitutes a distinct form of homicide (akin to strict liability), based solely upon the intent to commit the underlying felony. (See generally Nelson E. Roth and Scott E. Sundby (1985) *The Felony-murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446.) The strict liability version of the rule articulates a distinct crime from traditional malice murder and does not include a mental state element for the homicide itself. (*Id.* at 448.) Conceived as an irrebuttable presumption, on the other hand, the felony-murder rule operates to conclusively "impute" the mental state required for murder from the commission of a felony, while at least theoretically retaining the mens rea for the homicide as a formal element of the crime. (*Id.* at 455-457.)

Under either view, however, felony-murder is unconstitutional as a mechanism for presuming malice. The Due Process Clause of the Fourteenth Amendment requires that the State prove every element of a criminal offense beyond a reasonable doubt. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 512 (*Sandstrom*).) Conclusive presumptions have been expressly held to violate this requirement as they "would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." (*Sandstrom, supra,* 442 U.S. at 522, quoting *Morissette v. United States* (1952) 342 U.S. 246, 274-275.) Because the constructive malice theory of felony-

murder formally retains a mens rea element for a homicide, the presumption of innocence must apply to the homicide aspect of the rule. The felony-murder rule, however, completely bypasses the presumption of innocence as to this element upon proof of a different element, the occurrence of a killing in the commission of a felony.

The Sixth and Fourteenth Amendments to the United States Constitution indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476, quoting *United States v. Gaudin* (1995) 515 U.S. 506, 510.) To require a jury to find an element of a crime solely on the basis of a presumption would unconstitutionally relieve the jury of that function. (*Sandstrom*, *supra,* 442 U.S. at 523.)

Evolving standards of decency should preclude Winbush's execution. Seven current and former death penalty states -- Montana, New Jersey, Ohio, Pennsylvania, Washington, Missouri and South Carolina -- did not recognize felony-murder as a capital offense. These states required a finding of mens rea -- intent, premeditation and deliberation, or "malice aforethought" -- in order for a murder to be eligible for the death penalty. Ten others -- Alabama, Kansas, Louisiana, New Hampshire, Utah, Virginia, Texas, Oregon, Indiana and Illinois -- have effectively abolished simple felony-murder as an offense punishable by death by requiring a finding of specific intent to kill; the felony simply serves to aggravate the murder charge to a capital offense. Connecticut's capital felony statute limits the death penalty to felony-murder that occurs during the course of a kidnapping or sexual assault. Three other states -- Tennessee, Wyoming and Nevada – have felony-murder statutes on their

books, but their appellate courts have decided that duplicate consideration of the underlying felony at both the guilt and sentencing phases does not adequately narrow the class of death-eligible murderers such that the death penalty would be reserved for the "worst" murderers. (See *Engberg v. Wyoming* (Wyo. 1991) 820 P.2d 70; *McConnell v. Nevada* (Nev. 2004) 102 P.3d 606.)

In *State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, the Tennessee Supreme Court held that the state is forbidden by the Tennessee and federal constitutional prohibitions against cruel and unusual punishment to use felony murder as an aggravating (special) circumstance on the ground that felony murder duplicates the crime itself and does not perform the constitutionally mandated task of narrowing the class of death-eligible defendants. The court concluded that the added requirements of "recklessness" and "substantial participation in the underlying felony" do not provide the required narrowing.

In *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 344, the court explained that "the felony murder narrowing device fails to meet both the quantitative and qualitative requirements for a narrowing device. It provides no meaningful narrowing and, to the extent that narrowing does exist, it does not serve to identify the defendants most deserving of death."

The *Middlebrooks* court further found:

> A simple felony-murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated and deliberate murder. If anything, the latter, which by definition involves a killing in cold blood, involves more culpability. (*Id.* at 345; see also *State v. Cherry* (N.C. 1979) 257 S.E.2d 551, 567-568 [finding it "highly incongruous" that state would make felony-murder but not premeditated murder a per se death-eligible offense].)

Thus, at least twenty-six states would not impose a death penalty under these circumstances. Another thirteen states do not impose the death penalty. Therefore, at least thirty-nine states would not execute an offender convicted of Winbush's crime. Because so many states (and the federal government) reject felony-murder as a basis for death eligibility, there is presently a national consensus against the execution of an offender whose crime was not intentional and was aggravated only by the felony underlying the death sentence, and that tally reflects an even stronger "current legislative judgment" than the Court found sufficient in *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government). (See R. Rosen, *Felony Murder And The Eighth Amendment Jurisprudence Of Death* (1990) 31 Boston College L. Rev. 1103.)

Although such legislative judgments constitute "the clearest and most reliable objective evidence of contemporary values" (*Atkins, supra*, 536 U.S. at 312), professional opinion as reflected in the Report of the Governor's Commission on Capital Punishment (Illinois) and international opinion also weigh against finding felony-murder a sufficient basis for death-eligibility. The most comprehensive recent study of a state's death penalty was conducted by the Governor's Commission on Capital Punishment in Illinois, and its conclusions reflect the current professional opinion about the administration of the death penalty. Even though Illinois's "course of a felony" eligibility factor is far narrower than California's special circumstance, requiring actual participation in the killing and intent to kill on the part of the defendant or knowledge that his acts created a strong probability of death or great bodily harm (720 ILCS 5/9-1 (b)(6)(b)), the Commission recommended eliminating this factor.

(Report of the Former Governor Ryan's Commission on Capital Punishment, April 15, 2002, at 72-73.) The Commission stated, in words which certainly apply to the California statute:

> Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view of Commission members supporting this recommendation that this eligibility factor swept too broadly and included too many different types of murders within its scope to serve the interests capital punishment is thought best to serve. (*Ibid.*)

"If the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murders, this eligibility factor does not advance that goal." (*Id.* at 72.)

Finally, California law making a defendant death-eligible for felony-murder violates international law. The United States Supreme Court has long recognized the relevance of international norms in determining "the acceptability of a particular punishment." (*Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22 (quoting *Coker v. Georgia* (1977) 433 U.S. 584, 596, fn. 10.) International norms are persuasive authority in interpreting the Eighth Amendment's ban on cruel and unusual punishment. (*Roper v. Simmons, supra*, 543 U.S. at 1198 [opn. of Kennedy, Stevens, Souter, Ginsberg, and Breyer, J.], and *id.* at 1224 [dis. opn. of O'Connor, J.].)

The United States is "virtually the only western country still recognizing a rule which makes it possible 'that the most serious sanctions known to law might be imposed for accidental homicide.'" (Roth and Sundby, *The Felony-murder Rule: A Doctrine at Constitutional Crossroads* (1985) 70 Cornell L. Rev. 446, 447-448.) England, where the doctrine

originated, abolished the felony-murder rule in 1957. (The Homicide Act, 5 & 6 Eliz. 2, ch. 11 Section 1.) The rule apparently never existed in France or Germany. (*Id.*, note 12 citing Fletcher, *Reflections on Felony-murder* (1981) 12 S.W.U.L. Rev. 413, 415, note 11.) Additionally, Article 6 (2) of the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, also provides that the death penalty may only be imposed for the "most serious crimes." (ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at p. 52, U.N. Doc, A/6316 (1966), 999 U.N.T.S. 171, entered into force on March 23, 1976 and ratified by the United States on June 8, 1992; see Argument XXVIII.)

In 1984, the Economic and Social Council of the United Nations further defined the "most serious crime" restriction in its Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. (E.S.C. res. 1984/50; GA Res. 39/118.) The Safeguards, which were endorsed by the General Assembly, instruct that the death penalty may only be imposed for intentional crimes. (*Ibid.*) The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions considers that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." (Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, U.N. Doc. CCPRICI79/Add.85, November 19, 1997.) This international law limitation applies domestically under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.)

Plainly, treating unintentional or unplanned murders on a par with intentional and reckless-indifference murders ignores the wide difference in their level of culpability. Since imposition of the death penalty for robbery murder clearly is contrary to the judgment of the overwhelming

majority of the states, recent professional opinion and international norms, it does not comport with contemporary values.

In *United States v. Cheely* (9th Cir. 1994) 21 F.3d 914, the court held that the Eighth Amendment precludes the imposition of the death penalty for a killing resulting from the use of a mail bomb. The court held that the statute was disproportionately severe and insufficiently narrow to preclude the prospect of "wanton" and "freakish" death sentencing. "The constitutional defect in [the statutes] is that they create the potential for impermissibly disparate and irrational sentencing because they encompass a broad class of death-eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them." (*Id.* at 916.) The Court illustrated its point by comparing two hypothetical scenarios to show that the death penalty could be imposed under the statute in a disparate manner. (*Id.* at 916, fn. 14.)

This analysis applies with even greater force to the felony murder special circumstance in California. Although the felony murder special circumstance may limit the number of persons to which the death penalty is applicable, it encompasses so "many levels of culpability" that the danger of "wanton and freakish" imposition of the death penalty is even greater than was present in *Cheely*. For example, a defendant would be death eligible as a result of the felony murder special circumstance, even if the defendant had acted in self-defense (*People v. Loustaunau* (1986) 181 Cal.App.3d 163, 170 [self-defense is not a defense to felony murder]), or the defendant had inadvertently run over a pedestrian after a burglary (*People v. Fuller* (1978) 86 Cal.App.3d 618, 623-624 [felony murder applies to killings during the escape from a burglary].) Thus, a less culpable defendant could be sentenced to death while a cold-blooded,

execution-style murderer could be given life without parole. These possibilities graphically illustrate how the "levels of culpability" are even greater under the California felony murder rule than under the statutes struck down by the *Cheely* court. Moreover, there need not even be a causal relationship between the felony and the homicide. (See *People v. Pock* (1993) 19 Cal.App.4th 1263, 1276.) Under *People v. Davis* (1994) 7 Cal.4th 797, 811-812, a defendant may be subjected to fetus murder, and hence, special circumstance felony murder, for the unintentional killing of a nine-week old fetus which the defendant does not even know exists.

Accordingly, the robbery-murder special circumstance violates the Eighth Amendment, and Winbush's death sentence must be set aside because the jury did not find Winbush premeditated or intentionally committed the murder during a robbery.

XVII. THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED IN THIS CASE REQUIRES REVERSAL OF THE GUILT VERDICTS AND THE JUDGMENT OF DEATH AND DEPRIVED WINBUSH OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND PENALTY PHASE

If the Court does not agree that any one error requires reversal when considered by itself, then it is necessary to assess their cumulative impact. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, & fn. 15 [reversing because "cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"].)

State law errors "that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Cooper v. Sowders*

(6th Cir. 1988) 837 F.2d 284, 286-288; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6; *Greer v. Miller* (1987) 483 U.S. 756, 764; *Donnelly v. DeChristoforo, supra,* 416 U.S. at 642-644.)

The Ninth Circuit has repeatedly noted that while some errors standing alone may be harmless, in connection with other errors they may render a trial so unfair that reversal on the basis of cumulative error is required. (*McDowell v. Calderon* (9th Cir. 1997) 107 F.2d 1351, 1368 [although no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a petitioner of the due process right to a fair trial]; *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381 [prejudice resulting from the cumulative effect of several errors required reversal even though individual errors evaluated alone might not have warranted reversal]; *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282 [while individual errors may not rise to level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal].) The cumulative effect of the multitude of errors in this case violated the due process guarantee of fundamental fairness and requires reversal of Winbush's conviction. Where a court finds prejudice as the cumulative result of multiple errors, the court need not analyze the individual effect of each error. (See *Harris by and through Ramseyer v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

In *People v. Hill* (1998) 17 Cal.4th 800, 844-848, this Court found numerous instances of prosecutorial misconduct and other errors at both stages of the death penalty trial were cumulatively prejudicial. That is, the combined, aggregate, prejudicial effect of the errors was greater than the sum of the prejudice of each error standing alone.

Similarly, in Winbush's case, there numerous instances of prosecutorial misconduct and other substantial errors, including improper admission of Winbush's coerced statements, improper photographic and victim-impact evidence, and improper admission of aggravating evidence, including evidence of Winbush's criminal acts when he was eight and 12 years old.

When a case is close, a small degree of error in the lower court should, on appeal, be considered enough to have influenced the jury to wrongfully convict the defendant. (*People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Wagner* (1975) 13 Cal.3d 612, 621; *People v. Collins* (1968) 68 Cal.2d 319, 332.) Additionally, in a close case, the cumulative effect of errors may constitute a miscarriage of justice. (*People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; *People v. Cruz* (1978) 83 Cal.App.3d 308, 334; see *United States v. McLister* (9th Cir. 1979) 608 F.2d 785.) The combined effect of instructional errors and/or evidentiary errors may create cumulative prejudice. (*People v. McGreen* (1980) 107 Cal.App.3d 504, 519-520; *People v. Ford* (1964) 60 Cal.2d 772, 798.)

In cases where multiple errors of the same type have occurred, the appropriate standard of review is, logically, the pertinent prejudice standard. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 421-422 [cumulative effect of exculpatory evidence suppressed by the government in violation of *Brady* raised a reasonable probability that the outcome of the trial would have been different and warranted habeas relief]; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1325 [cumulative effect of counsel's errors during the penalty phase created reasonable probability that, absent errors, result of penalty phase would have been different].)

Moreover, when errors of federal constitutional magnitude combine with nonconstitutional errors, *all* errors should be reviewed under a *Chapman* standard. (*People v. Woods* (2006) 146 Cal.App.4th 106, 117 [because some of prosecutor's improper arguments were of federal constitutional magnitude, cumulative effect of misconduct is assessed under the *Chapman* standard; the state has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict]; see also *United States v. Rivera* (10th Cir. 1990) 900 F.2d 1462, 1470, fn. 6 ["if any of the errors being aggregated are constitutional in nature, then the harmless-beyond-a-reasonable-doubt standard announced in *Chapman* should be used in determining whether the defendant's substantial rights were affected. Any lesser standard would potentially denigrate the protection against constitutional error announced in *Chapman*"]; see also *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1283; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1220.)

Since Winbush's case involves a number of constitutional errors, the appropriate standard for harmless error review here is the *Chapman* standard. Under *Chapman,* the state cannot establish that the cumulative effect of the multiple errors in the guilt and penalty phases was harmless beyond a reasonable doubt, as this was a close case, as evidenced by lengthy jury deliberations. (See Introduction To Argument.)

XVIII. THE DECADE OF DELAY IN PROCESSING WINBUSH'S APPEAL VIOLATED THE EIGHTH AMENDMENT, HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION, AND INTERNATIONAL LAW

A. Violation Of The Eighth Amendment, Due Process And Equal Protection

It has been almost a decade since Winbush was convicted and sentenced to death in June 2003. Through no fault of his own, Winbush was without counsel for four years until appellate counsel was appointed in June 2007. Then, through no fault of his own, the correction of the record took another three years until 2010. Then, through no fault of his own, this opening brief was not filed until early 2012. Then, through no fault of his own, the Attorney General's response will probably not be filed until 2013 and Winbush's reply brief will not be filed until 2014. Finally, this Court may take several more years to decide his appeal.

As the United States Supreme Court recognized more than a century ago, the suffering inherent in a prolonged and uncertain wait for execution is undeniable. (See *In re Medley* (1890) 134 U.S. 160, 172 ["when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it"].) It is a dehumanizing experience known to precipitate mental illness and even suicide. (See *Knight v. Florida* (1999) 528 U.S. 990, 993-998 [mem. op. on denial of cert. of Breyer, J.]; *Lackey v. Texas* (1995) 514 U.S. 1045, 1045-1047, [mem. op. on denial of cert. of Stevens, J.].) It is inconsistent with "the evolving standards of decency" which inform Eighth Amendment jurisprudence. (See *Trop v. Dulles* (1958) 356 U.S. 86, 101.)

Justice Breyer's cogent dissent from the denial of certiorari in *Knight v. Florida* (1999) 528 U.S. 990, 993-999, explained:

> It is difficult to deny the suffering inherent in a prolonged wait for execution -- a matter which courts and individual judges have long recognized. See *Lackey v. Texas*, 514 U.S. 1045, 1045-1047 (1995) (Stevens, J., respecting denial of certiorari). More than a century ago, this Court described as "horrible" the "feelings" that accompany uncertainty about whether, or when, the execution will take place. *In re Medley*, 134 U.S. 160, 172 (1890). The California Supreme Court has referred to the "dehumanizing effects of . . . lengthy imprisonment prior to execution." *People v Anderson*, 6 Cal.3d 628, 649, 493 P.2d 880, 894 (1972). In *Furman v Georgia, supra*, at 288-289, (concurring opinion), Justice Brennan wrote of the "inevitable long wait" that exacts "a frightful toll." Justice Frankfurter noted that the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." *Solesbee v Balkcom*, 339 U.S. 9, 14 (1950) (dissenting opinion). See Strafer, *Volunteering for Execution*, 74 J. Crim. L. & C. 860, 872, n 44 (1983) (a study of Florida inmates showed that 35 percent of those confined on death row attempted suicide; 42 percent seriously considered suicide). And death row conditions of special isolation may well aggravate that suffering. See Connolly, *Better Never Than Late*, 23 New Eng. J. on Crim. & Civ. Confinement 101, 121 (1997); Strafer, *supra*, at 870-871, n 37.
>
> At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes. *Lackey, supra*, at 1046. Nor can one justify lengthy delays by reference to constitutional tradition, for our Constitution was written at a time when delay between sentencing and execution could be measured in days or weeks, not decades. (*Knight v. Florida, supra*, 528 U.S. at 994-995.)

In re Christopher S. (1992) 10 Cal.App.4th 1337, 1341-1343, recognized that a defendant has a due process right "to a speedy determination of his appeal." Several federal cases have also recognized that excessive delay in the appellate process may violate due process

rights. "[W]hen a state provides a right to appeal, it must meet the requirements of due process and equal protection . . . [D]ue process can be denied by any substantial retardation of the appellate process . . . ." (*Rheuark v. Shaw* (5th Cir. 1980) 628 F.2d 297, 302.) On the other hand, "not every delay in the appeal of a case, even an inordinate one, violates due process." (*Id.* at 303.) Such claims are tested in the federal courts by applying four factors set forth in *Barker v. Wingo* (1972) 407 U.S. 514, 530-532, for evaluating the right to a speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) the degree to which the defendant asserted his or her right; and (4) the degree of prejudice to the defendant. All four factors are to be considered together in light of the circumstances of the case, as part of a "difficult and sensitive balancing process." (*Id.* at 533; see also *Coe v. Thurman* (9th Cir. 1991) 922 F.2d 528, 530-532.)

The *Coe* court explained that where a state guarantees the right to a direct appeal, as California does, the state is required to make that appeal satisfy the Due Process Clause. (*Evitts v. Lucey* (1985) 469 U.S. 387.) While the Sixth Amendment guarantees the accused a speedy trial, excessive delay in the appellate process may also violate due process. (*United States v. Antoine* (9th Cir.1990) 906 F.2d 1379, 1382; see also *Burkett v. Cunningham* (3rd Cir.1987) 826 F.2d 1208, 1221; *DeLancy v. Caldwell* (10th Cir.1984) 741 F.2d 1246, 1247; *Rheuark v. Shaw*, *supra,* 628 F.2d at 302.)

Chief Justice Harrison dissenting in *People v. Simms* (Ill. 2000) 736 N.E.2d 1092, 1142-1145, explained:

> So long as double jeopardy principles are not violated, the State must normally be given the opportunity to correct its mistakes and retry a defendant whose trial was found to be flawed. There must be a point, however, at

> which the court steps in and says enough is enough. Beyond a certain number of years and a certain number of failed attempts by the State to secure a constitutionally valid sentence of death, the litigation becomes a form of torture in and of itself. It is as if the State were holding a defective pistol to the defendant's head day and night for years on end and the weapon kept misfiring. It may eventually go off, but then again, it may not, and the defendant has no way to be sure.
>
> With each attempt by the State to secure defendant's death, the integrity of the process degrades. The passage of time brings an ever-greater likelihood that witnesses will disappear, memories will fade, and evidence will be lost. Retribution and deterrence, the two principal social purposes of capital punishment, carry less and less force. See *Lackey*, 514 U.S. at 1045-46 (Stevens, J., mem. op. on denial of cert.).

Through no fault of Winbush, the extraordinary delay in deciding this appeal violated Winbush's due process right to judicial review and the Eighth Amendment.

B. Violation Of International Law

Because of the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR and arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.[40] This is especially so where Winbush had been on death row almost nine years before a brief was filed on his behalf with this Court. (See *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.) Once

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40. As explained in AOB, Arg. XXVIII, the United States is bound by the ICCPR.

again, however, Winbush recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

In *Pratt v. Attorney General for Jamaica* (P.C. 1993) 3 SLR 995, 2 AC 1, 4 All.E.R. 769, the Privy Council held that a delay of fourteen years between the time of conviction and the carrying out of a death sentence in the case of a Jamaican prisoner was "inhuman punishment." In *Soering v. United Kingdom*, 11 Eur. Ct. H. R. (ser. A), the European Court found that "[h]owever well-intentioned and even potentially beneficial is the provision of the complex post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years [an average of six to eight years] the conditions on death row and the anguish and mounting tensions of living in the ever-present shadow of death." (See also *Vatheeswaran v. State of Tamil Nadu*, 2 S.C.R. 348, 353 (India 1983) [criticizing the "dehumanizing character of the delay" in carrying out the death penalty].)

Finally, the Supreme Court of Canada acknowledged a "widening acceptance" that "the finality of the death penalty, combined with the determination of the criminal justice system to satisfy itself fully that the conviction is not wrongful, seems inevitably to provide lengthy delays, and the associated psychological trauma." (*Minister of Justice v. Burns and Rafay*, 2001 SCC 7 (S.C. Canada, 22 March 2001) at para. 122.) Relying in part that death-sentenced inmates in Washington took an average of 11.2 years to complete state and federal post-conviction review, the court declined extradition, absent assurances the United States would not seek the death penalty. The death sentence here should be vacated.

XIX. ANY DEPRIVATION OF A STATE LAW RIGHT CONSTITUTED A VIOLATION OF FEDERAL DUE PROCESS

Fourteenth Amendment due process principles may be implicated by the state's arbitrary denial of its own domestic rules. (*Hicks v. Oklahoma*, *supra,* 447 U.S. at 346; see also, *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716; *Ford v. Wainwright* (1986) 477 U.S. 399, 411-412; *Ross v. Oklahoma* (1988) 487 U.S. 81, 91-92.)

In *People v. Marshall* (1996) 13 Cal.4th 799, 850-851, this Court held that the failure to instruct on an element of a special circumstance is a violation of state law which implicates the defendant's federal due process rights under the doctrine of *Hicks.* Misapplication of a state law that leads to a deprivation of a liberty interest may violate the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) A state's failure to follow its own death penalty procedures can raise a federal constitutional issue. (*Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295.) A state law error may render the trial so arbitrary and fundamentally unfair that it violates federal due process.'" (*Pennywell v. Rushen* (9th Cir. 1983) 705 F.2d 355, 357.)

Finally, state law errors significantly reduced the prosecutor's burden of proof and unduly reduced the reliability of the guilt and penalty determinations in this case, in violation of the Eighth and Fourteenth Amendments. (Cf. *Lockett v. Ohio* (1978) 438 U.S. 586, 602-603; *Woodson v. North Carolina* (1976) 428 U.S. 280, 303.)

XX. THIS COURT SHOULD REVIEW ALL ERRORS ON THE MERITS, RATHER THAN INVOKING PROCEDURAL BARS BECAUSE DEATH IS THE ULTIMATE PENALTY

Because of this Court's preference for procedural waivers, Winbush will relegate nearly all issues with procedural problems to his habeas petition. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267 [ineffective assistance of counsel claims properly brought in a habeas corpus proceeding].)

Winbush respectfully requests this Court to follow the example of the Kentucky and Pennsylvania Supreme Courts and review all errors on the merits. It is a defective system that would kill someone simply because his court-appointed attorney was too stupid, stressed, preoccupied, or incompetent to raise all possible issues in their proper contexts with appropriate citation to all relevant state and federal constitutional grounds. While the justice system may have some legitimate interests, in most criminal cases, to rely on trial counsel to object on all grounds to preserve the issue, it is unseemly to have the same rules apply to death cases. Capital case litigation should not be reduced to some kind of arcane game, where the omissions of appointed defense counsel seal the fate of the condemned. The state should not execute people before this Court reviews all errors on their merits.

In *Rogers v. Commonwealth* (Ky. 1999) 992 S.W.2d 183, 187, the Kentucky Supreme Court explained:

> [U]npreserved errors are reviewable in a case where the death penalty has been imposed. . . . The rationale for this rule is fairly straightforward. Death is unlike all other sanctions the Commonwealth is permitted to visit upon wrongdoers . . . . Accordingly, the invocation of the death penalty requires greater caution than is normally necessary in the criminal justice process.

In *Commonwealth v. O'Donnell* (1999) 746 A.2d 198, 204, the Pennsylvania Supreme Court explained:

> [I]t is the practice of this Court to relax our waiver rules in death penalty cases because of the irrevocable and final nature of the death penalty. . . . [S]ignificant issues perceived sua sponte by this Court, or raised by the parties, will be addressed and, *if possible from the record,* resolved."

Similarly, this Court should discontinue the "gotcha" nature of dismissing claims on the arcane and technical minutiae forfeiture "rules," particularly when a life is at stake.

XXI. CLAIMS RAISED IN THE HABEAS PETITION ARE INCORPORATED BY REFERENCE, BUT ONLY IF THIS COURT DETERMINES THAT SUCH CLAIMS SHOULD HAVE BEEN RAISED ON APPEAL

Winbush intends to file a habeas petition related to his conviction. If this Court determines that any habeas claims should have been raised in this appeal, however, Winbush incorporates each and every allegation based on the trial and appellate record. Because of the large size of this opening brief, Winbush does not wish to burden the Court with possibly unnecessary briefing that would be duplicative of his habeas petition.

SECTION 4 – PRESERVING FEDERAL CONSTITUTIONAL CLAIMS

XXII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT WINBUSH'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, Winbush presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system. In addition, Winbush must present the following issues that this Court has already rejected and are settled under state law to preserve the issues for United States Supreme Court review or federal habeas corpus review. (*Smith v. Murray* (1986) 477 U.S. 527, 536 [habeas review].)

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 178-179 & fn. 6, 173-175; see also *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks

on arbitrariness that it would not pass constitutional muster without such review].)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree

with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

XXIII. WINBUSH'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.2 IS IMPERMISSIBLY BROAD

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." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023 [citations omitted].) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make *all* murderers eligible. (See 1978 Voter's Pamphlet, at 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against Winbush the statute contained 32 special circumstances

purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (See Argument XV, *supra.*) The U.S. 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, and strike down the death penalty scheme currently in effect as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[41] (See Arguments XV, *supra,* XXIV, XXV,, *infra.*)

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41. In a habeas petition, Winbush plans to present empirical evidence confirming that section 190.2 as applied, fails to genuinely narrow the class of persons eligible for the death penalty, as well as evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

XXIV. WINBUSH'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. (*People v. Dyer* (1988) 45 Cal.3d 26, 78; see also CALJIC No. 8.88 (2006), par. 3; CALCRIM No. 763 (2011), par. 2.) The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime (*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10), or having had a "hatred of religion," (*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582), or threatened witnesses after his arrest (*People v. Hardy* (1992) 2 Cal.4th 86, 204), or disposed of the victim's body in a manner that precluded its recovery. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.) It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the

victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657; Argument VII, *supra*.)

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* (1994) 512 U.S. 967), it has been used in ways so arbitrary as to violate both the federal due process of law and the Eighth Amendment.

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. (*People v. Tuilaepa*, *supra*, 512 U.S. at 986-990 [dis. opn. of Blackmun, J].) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision 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* (1988) 486 U.S. 356, 363.) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

XXV. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. Except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

A. Winbush's Death Verdict Was Not Premised On Findings Beyond A Reasonable Doubt By A Unanimous Jury That One Or More Aggravating Factors Existed And That These Factors Outweighed Mitigating Factors; His Constitutional Right To Jury Determination Beyond A Reasonable Doubt Of All Facts Essential To The Imposition Of A Death Penalty Was Thereby Violated

Except as to prior criminality, Winbush's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [*Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [*Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [*Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [*Cunningham*]. Winbush made these objections. (179-RT 14135-49.)

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, supra,* 530 U.S. at 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring, supra,* 536 U.S. at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639), it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.* at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. (*Id.* at 609.) *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt. (*Id.* at 599-609.)

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the

relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220 (*Booker*), the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham supra*, 549 U.S. at 274.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (*Id.* at 282.)

1. In the Wake of *Apprendi, Ring, Blakely*, and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt

California law as interpreted by this Court 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 criminality relied upon as

an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*, 16 Cal.4th at 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[42] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to Winbush's jury, "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.*" (11-CT 2932; 190-RT 14870; CALJIC No. 8.88 [1989 Revision] [emphasis added].)

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

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42. This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

substantially outweigh mitigating factors.[43] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[44]

This Court has repeatedly rejected the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that

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43. In *Johnson v. State* (Nev. 2002) 59 P.3d 450, 460, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'"

44. This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown* (1985) 40 Cal.3d 512, 541.)

traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range."

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[45] In *Cunningham*, the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Cunningham, supra,* 549 U.S. at 276-279.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra*, 549 U.S. at 290-291.) *Cunningham* then examined this Court's development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* at 293.)

The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the

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45. *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black, supra*, 35 Cal.4th at 1253; *Cunningham, supra*, 549 U.S. at 289.)

concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. (See *Blakely, supra,* 542 U.S., at 307-308; but see *Black, supra,* 35 Cal.4th, at 1260 [stating, remarkably, that "[t]he high court precedents do not draw a bright line"]. (*Cunningham, supra,* 549 U.S. at 291.) In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto* (2003) 30 Cal.4th 226, 263.)

This holding is simply wrong. As section 190(a)[46] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed

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46. Section 190(a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra,* 549 U.S. at 279.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. (*Ring*, *supra,* 536 U.S. at 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC No. 8.88; CALCRIM No. 766.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, *supra,* 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely, supra*, 542 U.S. at 328; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

2. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty

phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)[47]

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring, supra,* 536 U.S. at 609:

> Capital defendants, no less than non-capital defendants, we conclude, 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.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that

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47. See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala. L. Rev. 1091, 1126-1127 [noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death].

make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

B. The Due Process And The Cruel And Unusual Punishment Clauses Of The State And Federal Constitution Require That The Jury In A Capital Case Be Instructed That They May Impose A Sentence Of Death Only If They Are Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Exist And Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia*

(1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra,* 397 U.S. at 363-364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Thomas* (1977) 19 Cal.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . 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." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." (*Santosky v. Kramer*, *supra,* 455 U.S. at 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra,* 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court foreshadowed *Ring*, and expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement 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.'" (*Monge v. California*, *supra*, 524 U.S. at 732 [emphasis added], citing *Bullington v. Missouri*, *supra,* 451 U.S. at 441, quoting *Addington v. Texas*, *supra,* 441 U.S. at 423-424.)

The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence. (*Ibid.*)

C. California Law Violates The Sixth, 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 failure to require written or other specific findings by the jury regarding aggravating factors deprived Winbush of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at 543; *Gregg v. Georgia*, *supra*, 428 U.S. a 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra,* 16 Cal.4th at 1255), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are

otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at 269.)[48] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) 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* (9th Cir. 1990) 897 F.2d 417, 421; *Ring, supra;* Section D, *infra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

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48. A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra,* 548 U.S. at 177-178 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

D. California's Death Penalty Statute As Interpreted By This Court Forbids Inter-Case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, Or Disproportionate Impositions Of The Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.*" (*Ibid.* [emphasis added].)

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law -- which the court upheld against a challenge for lack of comparative, proportionality review -- itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra,* 465 U.S. at 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that cannot be charged with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Section A, *supra*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *supra*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *supra*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra,* 548 U.S. at 177-178), this absence renders that scheme unconstitutional.

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 the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

E. The Prosecution May Not Rely In The Penalty Phase On Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible For The Prosecutor To Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve As A Factor In Aggravation Unless Found To Be True Beyond A Reasonable Doubt By A Unanimous Jury

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated violent acts allegedly committed by Winbush while he was incarcerated in the CYA or in Alameda County jail. (AOB, Statement of Facts at 45-49, 51-58.)

The U.S. Supreme Court's recent decisions in *Booker*, *Blakely, Ring,* and *Apprendi*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Winbush's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

F. The Failure To Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators Precluded A Fair, Reliable, And Evenhanded Administration Of The Capital Sanction

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina*, *supra,* 428 U.S. at 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court, however, has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury

> to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft* [(2000) 23 Cal.4th 978,] 1078-1079; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" (*People v. Arias* [(1996) 13 Cal.4th 92,] 188.) (*People v. Morrison* (2004) 34 Cal.4th 698, 730; [emphasis added].)

This assertion is demonstrably false, as evidence to the contrary lies within *Morrison* itself. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*People v. Morrison, supra,* 34 Cal.4th at 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, jurors can hardly be expected to avoid making this same mistake. Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that Winbush's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived him of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated Winbush's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the

Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

It is likely that Winbush's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. (See also Argument XIII.) This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated Winbush "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

XXVI. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non- capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Kirkpatrick (1994)* 7 Cal.4th 988, 1025-1026; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[49] as in *Snow*,[50] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at 41.) However apt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.420, subd. (b) now provides: "In exercising his or her discretion in selecting one of the three authorized prison terms referred to in section 1170(b), the sentencing judge may

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49. "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto, supra*, 30 Cal.4th at 275.)

50. "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*People v. Snow, supra*, 30 Cal.4th at 126, fn. 3.)

consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing. California Rules of Court, rule 4.420, subd. (e) provides: "The reasons for selecting one of the three authorized prison terms referred to in section 1170(b) must be stated orally on the record."

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Argument XXV, A., B., *supra*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Argument XXV, C., *supra*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws. (*Bush v. Gore* (2000) 531 U.S. 98.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring*, *supra,* 536 U.S. at 604.)

XXVII. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, *"The Death Penalty: List of Abolitionist and Retentionist Countries"* (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at 316, fn. 21.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment*

for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112; see Argument XXVIII.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Winbush's death sentence should be set aside.

XXVIII. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT WINBUSH'S CONVICTIONS AND PENALTY BE SET ASIDE

Winbush was denied his right to a fair trial by an impartial prosecutor and an independent tribunal, and his right to the minimum guarantees for the defense under customary international law as informed by the Universal Declaration of Human Rights, the ICCPR, and the American Declaration of the Rights and Duties of Man (American Declaration).

While Winbush's rights under state and federal constitutions have been violated, these violations are being alleged under international law as well, as the first step in exhausting administrative remedies in order to

bring Winbush's claim in front of the Inter-American Commission on Human Rights.

The two principle sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with federal statutes. (U.S. Const. Article VI, § 1, clause 2.) Customary international law is equated with federal common law. (*Edye v. Robertson* (1884) 112 U.S. 580.) International law must be considered and administered in United States courts whenever questions of right depending on it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 102.) When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33.) The United States Constitution also authorizes Congress to "define and punish . . . offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. Article I, § 8.) Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252.)

The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." (Article 1(3) of the UN Charter, June 26, 1945, 59

Stat. 1031, T.S. 993.) By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the UN drafted and adopted both the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide. (78 U.N.T.S. 277, *entered into force* January 12, 1951.) The Universal Declaration is part of the International Bill of Human Rights, which also includes the ICCPR, the Optional Protocol to the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and the human rights provisions of the UN Charter. (See generally Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731.) These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations.

Article 18 of the Vienna Convention on the Laws of Treaties provides that a signatory to a treaty must refrain from acts which would defeat the object and purpose of the treaty until the signatory either makes its intention clear not to become a party, or ratifies the treaty. Though the United States courts have not strictly applied Article 18, they have looked to signed, unratified treaties as evidence of customary international law. (See, e.g., *Inupiat Community of the Arctic Slope v. United States* (9th Cir. 1984) 746 F.2d 570 [citing the ICCPR].)

The United States, through signing and ratifying the ICCPR, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. When the United States has signed or ratified a treaty,

it cannot ignore this codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms of the U.S. Constitution. (Restatement Third of the Foreign Relations Law of the United States, § 102.)

According to 22 U.S.C. § 2304(a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries." (22 U.S.C. § 2304(a)(1).) The provisions of the Universal Declaration are accepted by United States courts as customary international law. In *Filartiga v. Pena-Irala* (2d Cir. 1980) 630 F.2d 876, 882, the court held that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights."

The ICCPR, to which the United States is bound, incorporates the protections of the Universal Declaration. The United States may not say: "Your government is bound by certain clauses of the Covenant though we in the United States are not bound." (Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures* (1993) 42 DePaul L. Rev. 1241, 1242.)

The factual and legal issues presented in this brief demonstrate that Winbush was denied his right to a fair and impartial trial and sentencing phase in violation of customary international law as evidenced by Articles 6 and 14 of the ICCPR as well as Articles 1 and 26 of the American Declaration.

Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary

notwithstanding." (See *Zschernig v. Miller* (1968) 389 U.S. 429, 440-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.

The ICCPR imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give effect to those rights. Under the Constitution, a treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." (*Asakura v. Seattle* (1924) 265 U.S. 332, 341.) Moreover, treaties designed to protect individual rights should be construed as self-executing. (*United States v. Noriega* (S.D.Fla. 1992) 808 F.Supp. 791-798.) Though reservations by the United States provide that the treaties may not be self-executing, the ICCPR is still a forceful source of customary international law and as such is binding upon the United States.

Article 14 provides, "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 6 declares that "[n]o one shall be arbitrarily deprived of his life . . . [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court." (ICCPR, *supra*, 999 U.N.T.S. 717.) Likewise, these protections are found in the American Declaration: Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and Article 26 protects the right of due process of law. (American Declaration of the Rights and Duties of Man, *supra*.)

In cases where the UN Human Rights Committee has found that a State party violated Article 14 of the ICCPR, in that a defendant had been denied a fair trial and appeal, the Committee has held that the imposition of the sentence of death also was a violation of Article 6 of the ICCPR. (*Report of the Human Rights Committee* (1994) at 72, 49 UN GAOR Supp. (No. 40) at 72, UN Doc. A/49/40.)

The due process violations that Winbush suffered throughout his trial and sentencing phase are prohibited by customary international law, as informed by such instruments as the ICCPR and the American Declaration. The United States is bound by such, and must honor its role in the international community by recognizing the human rights standards in our own country to which we hold other countries accountable. Because international treaties ratified by the United States are binding on state courts, the death penalty here is invalid, and under the Eighth Amendment. (See *Atkins v. Virginia*, *supra,* 536 U.S. 304, fn. 21; *Stanford v. Kentucky*, *supra,* 492 U.S. at 389-390 [dis. opn. of Brennan, J.].)

CONCLUSION

Winbush respectfully requests this Court to reverse the judgment below and grant him a new trial, or, at a minimum, reverse the judgment of death and remand for a new penalty hearing.

Dated: March 26, 2012

Respectfully submitted,

RICHARD JAY MOLLER,
Attorney for Grayland Winbush
By Appointment Of
The Supreme Court

PROOF OF SERVICE and WORD COUNT CERTIFICATION

I, RICHARD JAY MOLLER, declare that I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is P.O. Box 1669, Redway, CA 95560-1669. I served the foregoing APPELLANT'S OPENING BRIEF on March 26, 2012, by depositing copies in the United States mail at Redway, California, with postage prepaid thereon, and addressed as follows:

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I declare under penalty of perjury that according to Microsoft Word the word count on this brief is 101,649 words, that the foregoing is true and correct and that this declaration was executed on March 26, 2012, at Redway, California.

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