SUPREME COURT COPY

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IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

CAPITAL CASE

No. S117489

vs.

Alameda County Superior Court No. 128408B

GRAYLAND WINBUSH,

Defendant and Appellant./

On Appeal From Judgment Of The Superior Court Of California

Alameda County

Honorable Jeffrey W. Horner, Trial Judge

SUPREME COURT
FILED

APR 16 2014

Frank A. McGuire Clerk

Deputy

APPELLANT'S REPLY BRIEF ~~ON THE MERITS~~

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DEATH PENALTY

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IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

No. S117489

vs.

Alameda County Superior Court No. 128408B

GRAYLAND WINBUSH,

Defendant and Appellant./

OVERVIEW OF APPELLANT'S REPLY BRIEF

In this reply brief, Mr. Winbush will address specific contentions made by the state that necessitate an answer in order to present the issues fully to this Court. This brief will focus on the substantive and procedural issues the state raises that need further argument or explanation, and will reply only to those arguments by the state which require a special reply. Winbush will not reply to the state's contentions which are adequately addressed in his opening brief. The absence of a reply by Winbush to any particular contention or allegation made by the state, or to reassert any particular point made in his opening brief, does not constitute a concession, abandonment or waiver of the point by Winbush, but rather reflects his view that the issue has been adequately presented and the positions of the parties fully joined. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.) The arguments in this reply are numbered to correspond to the argument numbers in his opening brief.

The state devotes only half a page to Winbush's penalty phase mitigation evidence, presumably satisfied with Winbush's detailed

rendition of this evidence, which Winbush trusts that this Court, unlike the state, will consider. (RB at 48; AOB at 58-77.)

The state writes as if Winbush is one of the worst of the worst murderers, as the prosecutor had urged. Far from it. 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 juvenile past, had he committed any prior homicide. In most jurisdictions, the unplanned strangulation and stabbing of a young woman by a teenager during a robbery that netted less than an ounce of marijuana, approximately $300 in cash, a shotgun and a graphic equalizer, would not have been charged as a capital case.

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 Erika Beeson beforehand, and the state does not rely on this possible theory on appeal, as the words premeditation and premeditated are found nowhere in its brief, except once in a quote describing another case, not Winbush's case. (RB at 203.)

In contrast, 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.) Both the United States Supreme Court and this Court agree that a mens rea less than a premeditated intent to kill is mitigating. (See, e.g., *Enmund v. Florida* (1982) 458 U.S. 782, 798-799; *People v. Osband* (1996) 13 Cal.4th 622, 683-684.) This felony murder 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.

The state, however, will not admit that racism played a role in this capital prosecution. (RB at 167-169.) 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. Winbush, a 19-year old, African-American teenager, killed 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. Racism infected and permeated 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 state also argues that Winbush's past was a factor in aggravation. (RB at 37-40, 168, 206-214.) In fact, the state's custody and care of Winbush while in the California Youth Authority (CYA) during most of his teenage years contributed to his impulsive and violent tendencies. In 1991, when Winbush was 14 years old, he was convicted and sent to the CYA, where he spent the next four years, until his release on parole

on December 12, 1995, at 19 years of age. (109-RT 7190; 133-RT 10124-10125; 144-RT 11246, 11250-11252.) It is particularly unseemly to condemn a young man to death for juvenile misconduct 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 heartless to hold that its failure to provide an environment in which their charges do not commit acts of violence is instead just another reason to execute Winbush for acts done as a teenage ward of the state. The state does not dispute that even though inmates are entitled to reasonable medical care while incarcerated, there is no evidence that the CYA provided Winbush the kind of psychological and medical services that should have diagnosed and treated his tendency to act out violently. (AOB at 238-239.)

THE ERRORS WERE PREJUDICIAL IN THIS CLOSE CASE

The state's fallback position throughout its brief is that, despite admitted or possible errors, the errors were not prejudicial because the evidence of guilt and aggravation was overwhelming. (See RB at 134-136, 153-155, 158, 181.) Winbush disagrees. Contrary to the state's claim of overwhelming evidence, 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 a verdict of life without possibility of parole (LWOPP) as to Patterson. (RB at 153-155; 11-CT 2716-2722, 2881-2892; see *In re Martin* (1987) 44 Cal.3d 1, 51; *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1140-1141 [three days of

deliberations]; *In re Sakarias* (2005) 35 Cal.4th 140, 167 ["penalty jury deliberated for more than 10 hours over three days"].)

The state, however, claims that the fact the jury did not condemn Patterson to death shows what an unbiased jury and fair trial Winbush had. (RB at 168-169, 178, 181.) Winbush disagrees. What this discrepancy primarily shows is that compared to Patterson, Winbush's role in the killing and his prior bad acts were worse. If the jury had not been given the option of a split verdict to ease their consciences – if the jury had understood the mundane nature of this felony murder compared to truly horrific murders that the death penalty is supposed to be reserved for – and if Winbush had received a fair trial without the serious errors explained below -- there is a reasonable possibility the jury would not have condemned Winbush to death. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836; see also, *People v. Gonzales* (1967) 66 Cal.2d 482, 494 [in close case, "any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial."].)

"There is, as former Chief Justice Roger Traynor has observed, 'a striking difference between appellate review to determine whether an error affected a judgment and the usual appellate review to determine whether there is substantial evidence to support a judgment.'" (*People v. Arcega* (1982) 32 Cal.3d 504, 524, quoting Traynor (1970) *The Riddle of Harmless Error* at 26-27.)

"In appraising the prejudicial effect of trial court error, an appellate court does not halt on the rim of substantial evidence or ignore reasonable inferences favoring the appellant." (*People v. Butts* (1965) 236 Cal.App.2d 817, 832.) Rather, the reviewing court looks to the whole record, including