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

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Deputy

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

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Supreme Court

DEATH PENALTY

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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

defense-favorable evidence and including problems with the prosecution's witnesses. (*People* v. *Russell* (2006) 144 Cal.App.4th 1415, 1433 [*Watson* prejudice found because evidence not "so overwhelming that a rational jury could not reach a contrary result"]; *People* v. *Randle* (2005) 35 Cal.4th 987, 1004 [reversal where "the evidence was ... susceptible of the interpretation" favoring the defense]; *People* v. *Giardino* (2000) 82 Cal.App.4th 454, 467 [*Watson* prejudice found "because the evidence supports conflicting conclusions"]; *People* v. *Arcega, supra,* 32 Cal.3d at 524 [reversal called for where evidence "is open to the interpretation" that defendant is not guilty of charged offense].)

Essentially the same approach is taken when, as here, there is federal constitutional error. "The question is whether, on the whole record ... the error ... [is] harmless beyond a reasonable doubt." (*Rose* v. *Clark* (1986) 478 U.S. 570, 583 [internal quotation marks omitted].) In *Neder* v. *United States* (1999) 527 U.S. 1, 17, for example, the Supreme Court held that an error could be found harmless under *Chapman* if the matter to which the error pertained was "uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." (See also *id.* at 19 [asking "whether the record contains evidence that could rationally lead to a contrary finding with respect to" the matter in question].) Similarly, in *Delaware* v. *Van Arsdall* (1986) 475 U.S. 673, 684, which involved the improper denial of a defendant's opportunity to impeach a witness, the Court held that "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." (*Ibid.*)

Obviously, under the case law enumerated above, the correct prejudice inquiry does "not ... ignore reasonable inferences favoring the appellant" but requires an assessment of whether the prosecution's case was "so overwhelming that a rational jury could not reach a contrary result," whether "the evidence supports conflicting conclusions," or whether there was "evidence that could rationally lead to a contrary finding" to the one sought by the prosecution. Thus, an appellate court cannot assess prejudice by looking solely to prosecution-favorable evidence in the record or drawing only prosecution-favorable inferences.

Indeed, the state's approach to the evidentiary record and to the credibility questions posed by that record invites a violation of Winbush's Sixth and Fourteenth Amendment rights to due process, to trial by jury trial, and to present a defense. Nor can this Court make credibility determinations as a basis for finding that the many errors in this case did not improperly influence the jury's verdict. To do so would be to usurp the role of the jury and deprive Winbush of his right to have a jury make credibility determinations and to accept or reject Winbush's defense on the basis of properly admitted evidence. It is well established that Winbush has a "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt." (*Dillon v. United States* (2010) 560 U.S. 817, 828; see also *Apprendi* v. *New Jersey* (2000) 530 U.S. 466, 483-484 [discussing "the [constitutional] requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt"]; *People v. Melton* (1988) 44 Cal.3d 713, 735 [jury has the "exclusive function as the arbiter of questions of fact and the credibility of witnesses"].)

The credibility of key witnesses, such as Winbush, Dr. Ofshe, and Dr. Greene, was clearly an "essential fact." Their credibility is thus a fact entrusted to the jury by constitutional rights to a jury and to due process. (See also *Cavazos v. Smith* (2011) 565 U.S. 1, __, 132 S.Ct. 2, 4, 181 L.Ed.2d 311 ["it is the responsibility of the jury -- not the court -- to decide what conclusions should be drawn from evidence admitted at trial."]; *Blakely v. Washington* (2004) 542 U.S. 296, 308 ["the Sixth Amendment ... limits judicial power ... to the extent that the claimed judicial power infringes on the province of the jury."]; *United States v. United States Gypsum* (1978) 438 U.S. 422, 446.)

The United States Supreme Court has applied heightened scrutiny to procedures in capital cases because "death is [] different." (*Gardner v. Florida* (1977) 430 U.S. 349, 357-358; see also *Lockett v. Ohio* (1978) 438 U.S. 586; *Godfrey v. Georgia* (1980) 446 U.S. 420.) The increased concern with accuracy in capital cases has led the Supreme Court to "set strict guidelines for the type of evidence which may be admitted, must be admitted, and may not be admitted." (*Lambright v. Stewart* (9th Cir. 1998) 167 F.3d 477, 482, citing *Skipper v. South Carolina* (1986) 476 U.S. 1; *Booth v. Maryland* (1987) 482 U.S. 496.) Thus, this Court should independently review the record to determine whether the trial court's erroneous admission of prejudicial evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The state's one-sided recitation of the facts that a jury could (perhaps) have found is largely irrelevant to the task of evaluating the prejudicial impact of the errors at issue here. Moreover, because the state's discourse is potentially misleading and may divert this Court from perceiving the actual closeness of the case, the state's argument that any

errors were harmless is untenable. This was a close case by any reasonable assessment, and the errors went directly and pointedly to the heart of Winbush's defense and the prosecution's case. The death penalty verdict here is inexplicable in the absence of the serious errors addressed in both his briefs. (See AOB at 1-5.) Thus, the errors cannot be found to be harmless under any arguably proper standard.

THE STATE'S MISSTATEMENT OF FACTS

The state's rendition of the facts unnecessarily includes copious, mind-numbing, and irrelevant details, and exaggerates and embellishes the actual testimony. (RB at 3-49.) The state's misrepresentations of fact not only distort the actual record, but call into question the plausibility of its arguments in its brief regarding the seriousness of the errors and their prejudicial effect. At the risk of nitpicking, Winbush feels obliged to point out all serious examples of embellishment, exaggeration, or misrepresentation.

The state writes: "Appellant had tried to intimidate Botello by fighting with him." (RB at 4, citing 122-RT 9175.) This irrelevant and misleading statement makes Botello's testimony sound worse than it was because it is taken out of context and does not indicate that Winbush and Botello had one fight at age 14. (*Ibid.*) The actual testimony follows:

> The prosecutor: "If you [Botello] might have said to him I'm not getting you a gun ... why is it you think he was going to still call you about getting him a gun?"
>
> Botello: "Maybe he was trying to intimidate me to get him one."
>
> The prosecutor: "Had he ever tried to intimidate you before?"

Botello: "We had a fight before."

The prosecutor: "How old were you when you had a fight?"

Botello: "It was about, say about 14 or something." (122-RT 9175.)

In fact, Botello further explained that he thought it was "possible" that Winbush still held a grudge because they had a fight when they were "kids," not that Winbush had tried to intimidate him at age 14 by fighting with him. (122-RT 9198.) Even if Winbush was "maybe trying to intimidate" Botello by phoning him shortly before Beeson's murder, that had nothing to do with Winbush having a single fight with Botello, four or five years earlier, at age 14. (122-RT 9175.)

The state badly misstates the following facts: "Within a few days of his release, appellant removed the electronic ankle bracelet and began to contact friends, 'most of them[,] drug dealers,' whom he knew from middle school before he was incarcerated." (RB at 4, citing 113-RT 7468-7471; 144-RT 11253; 149-RT 11648; Supp. CT 117.) The fact that Winbush contacted friends who were mostly drug dealers was irrelevant as there was no dispute that Winbush contacted Beeson's boyfriend, Botello, a drug dealer. Moreover, Winbush had no need to remove his ankle bracelet to contact friends because he was allowed to be away from his home daily, from 8 a.m. to 5 p.m. (118-RT 7945.)

"Within a few days of his release," is not an accurate summary of the record. A "few" days has never meant 10 days in the English language. The actual evidence, including all the state's citations to the record, as well as the pages surrounding them, establishes that the earliest Winbush "removed" his electronic monitor was ten days after his release on December 12, 1995, when his ankle bracelet stopped working

at 7:04 p.m. on December 22nd. (113-RT 7468-7471 [Smith saw Winbush on December 21st or the 20th at the earliest, but does not say where or when]; 144-RT 11253 [Winbush testifies he went to Botello's home with Patterson on December 20th]; 149-RT 11648 [Winbush testifies he "contacted" old friends, mainly drug dealers]; Supp. CT 117 [Patterson told the police that Winbush kept the shotgun at his house the first night after Beeson was killed, but later gave it back to him because he was worried that the police would search him because he had "cut" his "ankle bracelet"].)

Significantly, the state ignores the direct testimony about the ankle bracelet around the time of Beeson's murder, including the fact that Winbush was allowed to be away from his home daily from 8 a.m. to 5 p.m. (118-RT 7945.) The electronic ankle bracelet monitoring records for December 22nd, the day Beeson was murdered, showed that Winbush was wearing his ankle bracelet and had gone out with permission 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 eighteen minutes late 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. (109-RT 7141; 118-RT 7934-7936, 7945-7946.) Later in its brief, the state confuses the timing, incorrectly stating that Winbush was classified as "missing," for three days beginning the evening of the murder until 7:04 p.m. (not 11:21 a.m.) on Christmas day. (RB at 18, citing 109-RT 7141; 118-RT 7933-7937, 7940-7941, 7945-7947.) Those citations confirm that Winbush's statement of facts is correct.

The state writes as if Winbush's statement to the police that he had smoked "weed" with Beeson and "she got off with an attitude," was inconsistent with other testimony. (RB at 4-5, & fn. 4, citing 129 RT 9864-9865.) Not so. The fact that Botello could not remember whether Beeson had smoked marijuana with them was not inconsistent with Winbush's testimony. (122-RT 9165.) The state's claim that it "was clear that she [Beeson] had not sat and talked" is simply not inconsistent with Winbush's testimony that Beeson had an attitude, and this testimony does not support the state's claim that Winbush ever "excluded" Beeson from a conversation. (RB at 4-5, & fn. 4, citing 116-RT 7750; 122-RT 9165.) Neither does Mosley's testimony support the state's claim that one of the reasons she and Beeson felt uncomfortable with Winbush at some other time was that Winbush had excluded them from being "around," and being "part of the guys too." (RB at 5, fn. 4.) This is a huge distortion of Mosley's testimony. What Mosley actually testified about was that it was her boyfriend, Smith, and Beeson's boyfriend, Botello, who excluded Mosley and Beeson when they "were talking about" Winbush, which "was just an uneasy situation. Because we were always invited to be around. We were part of the guys too." (116-RT 7750.) Thus, in response to being excluded by their boyfriends (not Winbush), Mosley and Beeson tried to eavesdrop on them. (*Ibid.*) Winbush was not even around when this happened; he excluded no one; and there was no evidence that contradicted Winbush's statement to the police that he smoked "weed" with Beeson and "she got off with an attitude." (129 RT 9864-9865.)

The state claims: "Botello gave him [Winbush] 40 dollars, but appellant was not placated and inexplicably acted as if Botello owed him something more." (RB at 5, citing 122-RT 9175-9176.) Not exactly.

Winbush asked Botello for some money and was disappointed Botello did not give him more than $40, because he had no money after just being released from jail. There was no testimony about Winbush not being "placated" or acting "inexplicably." Botello's testimony on the matter does not support these characterizations:

> Botello: Because he [Winbush] was like: "I ain't got no clothes," blah, blah. "Do you have some money you can help me out with?" And I gave him the $40 and he said, "Awe, that is it? That is all you are going to give me?" So I thought that was pretty weird, because I didn't have to give him nothing. (122-RT 9175-9176.)

The state says that Winbush was "furious" that Botello was gone and that Beeson would not let them in the apartment. (RB at 8, citing 113-RT 7849 [sic] [7489] [no such page as 113-RT 7849; nothing relevant on 117-RT 7849]; 117-RT 7880.) At those volumes and pages, the witnesses indicated that Winbush was "angry," "mad," and "upset." (113-RT 7489-7491; 117-RT 7880.) The use of the word "furious" is more than poetic license; it is a deliberate effort to distort the evidence as it does not convey the meaning of "angry," "mad," and "upset," the actual words the witnesses used. In fact, one could say that the state's brief is a deliberate effort to paint this murder and Winbush as much worse than they were. How else to turn a run-of-the-mill felony murder into a capital case?

The state makes another exaggerated claim: "This large back bruise [on Beeson] had small lines, consistent with Beeson's being held down by a clothed knee or shoe, or scraped across a rug." (RB at 13, citing 138-RT 10658-10659.) The actual testimony was that these speculative "possibilities" had "crossed the mind" of the forensic pathologist who performed the autopsy on Beeson, or they were "in the

realm of possibility" and could not be "excluded," not that Beeson's injuries were consistent with any particular act. (138-RT 10658-10659.)

The upshot is that this Court should not trust the state's loose characterization of the record in an attempt to make Winbush look worse than the record supports.

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

The state concedes that this Court should review the confidential documents examined by the trial court under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, to determine whether the trial court abused its discretion in refusing to disclose them. (RB at 49-50.) Under *People v. Gaines* (2009) 46 Cal.4th 172, 178-185, a remand for a showing of prejudice is the appropriate remedy for a trial court's erroneous denial of a *Pitchess* motion. Therefore, Winbush stands by his opening brief. (AOB at 78-82.)

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[1] AFTER THE PROSECUTOR PEREMPTORILY EXCUSED ALL THREE AFRICAN-AMERICANS FROM THE JURY

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

The state begins its brief by emphasizing that Patterson's defense counsel's "candid admission that neither racism, bias, nor personal misconduct were factors in the prosecutor's challenge to these jurors is additional evidence supporting the trial court's findings that the proffered reasons for the challenge were race-neutral." (RB at 57-58, citing *People v. Jones* (2011) 51 Cal.4th 346, 361 [defense counsel's failure to comment on prosecutor's race-neutral reasons for challenge supported finding that prosecutor was truthful]; see also RB 89, fn. 29.) Winbush disagrees. A prosecutor's discriminatory and racially-motivated challenges to jurors from a particular group need have nothing to do with his or her personal feelings and do not necessarily reflect racism or personal animus on the part of the attorney doing the challenging. Such challenges are strategic, meant to eliminate members of a group who might make it more difficult for the prosecutor to secure a conviction and death sentence. This may reflect the use of stereotyping, but it has nothing to do with a personal bias against the participation of that group in the legal process. A lawyer might

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79 [*Batson*]; *People v. Wheeler* (1978) 22 Cal.3d 258 [*Wheeler*].

love his mother while systematically challenging older female jurors in a case where he feels they are not a sympathetic demographic to his case. Patterson's attorney's comment merely reflected his understanding of that process; it is meaningless in the context of *Batson* error. Moreover, simply because counsel for Patterson tried to curry favor with the prosecutor does not suggest that Winbush had withdrawn his objections or had found the prosecutor's reasons to be credible. In addition, the issue in *Jones* was whether the trial court had made "a sincere and reasoned attempt to evaluate the prosecutor's credibility;" this Court held that defense counsel's failure to comment on the prosecutor's explanation, suggesting he found the prosecutor credible, was further evidence that the trial court had evaluated "the credibility of the prosecutor's reasons." This holding is not relevant to Winbush's case, where Winbush did not remain silent and conceded nothing.

The state suggests that Winbush's "statistical argument may be "a disguised attack on the venire for failure to represent a cross-section of the community." (RB at 77.) Not so. Winbush has not disguised his complaint that his jury – not the venire -- did not represent a cross-section of the community. (AOB at 132, 135, 141.) Such statistics are relevant to the *Batson* inquiry (*Miller-El v. Dretke* (2005) 545 U.S. 231, 239-241 [*Miller-El II*]), and they were strong evidence that racial prejudice was at work in this jury selection. Winbush has never claimed that statistics alone were "dispositive." (RB at 79.)

The state next claims that "appellant's statistical analysis is misleading," because it relied on "(1) a secondary publication; (2) that purports to accurately reference the 2000 U.S. Census; (3) taken two years before the jury was selected." (RB at 78.) Winbush disagrees.

First, the state does not challenge the accuracy of the "secondary publication" statistics. (See U.S. Census 2000.) Second, this Stanford University study simply used the 2000 U.S. census to make sense of the racial/ethnic diversity and residential segregation in the San Francisco Bay Area. Because the state does not contest the accuracy of the statistics, there is no reason for this Court not to rely on them. Moreover, the U.S. census taken every ten years, and within two years of a jury selection, is accurate enough to make comparisons. (RB at 76-80; see AOB at 2, fn. 1; *People v. Howard* (1992) 1 Cal.4th 1132, 149, 1160, fn. 6. [this Court takes judicial notice of the 1980 census to help resolve a *Batson* issue when the crime occurred in 1982, and the trial occurred sometime thereafter].)

The state seems confused about simple statistics. Without challenging the statistics themselves, the state irrationally posits that the fact that because only five of the seven Livermore jurors were white, while one juror was Hispanic and another was Asian, somehow suggests that "using appellant's logic, the record demonstrates that 28.5 percent of the jurors from Livermore were nonwhite." (RB at 78, citing 184-CT 52354, 52395.) While Winbush made no such "implicit suggestion," the statistics upon which Winbush relied actually support this suggestion. About 26 percent of the population of Livermore was nonwhite, because the Livermore population was 74.42 percent white, 1.49 percent black, and the rest (24 percent) were Hispanic, Asian and other. (Lopez, Racial/Ethnic Diversity and Residential Segregation in the San Francisco Bay Area, supra, at 13.) Winbush pointed out that 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. (AOB at 87.) What was remarkable about Livermore was not only the large number of whites, but the near total absence of blacks, not that there were an insignificant number of Hispanics or Asians who lived there.

The state imagines that Winbush's citation of these statistics is "based on an unsupported premise that jurors from cities, towns, or neighborhoods within a county in which one racial group predominates should be either excluded or included, depending on the race of the defendant." (RB at 78.) Nonsense. It is myopic to ignore the remarkable fact that 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). (Lopez, Racial/Ethnic Diversity and Residential Segregation in the San Francisco Bay Area, supra, at 2, 13.)

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 had a population of 399,484 or about 27.7 percent of Alameda County in 2000 -- with more than five times as many residents as Livermore. In sharp contrast to Livermore, Oakland was predominantly black in 2000 (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 state obliquely suggests that statistics are irrelevant and not subject to judicial notice, arguing that "[a]ssuming these statistics are accurate, the four corners of the appellate record contain no evidence from which a reviewing court can draw any such conclusions." (RB at 77-78, citing *People v. Waidla* (2000) 22 Cal.4th 690, 703, fn. 1, 743.) The

state is wrong. The *Waidla* Court denied a motion to take judicial notice of the record of a separate appeal of a severed codefendant. (*Ibid.*) While appellate jurisdiction is usually limited to the record on appeal, this Court, as well as many courts, has routinely taken judicial notice of the results of the federal census. (*People v. Howard*, *supra,* 1 Cal.4th at 1160, fn. 6; *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 82, fn. 8; *Preserve Shorecliff Homeowners v. City of San Clemente* (2008) 158 Cal.App.4th 1427, 1434-1435 [taking judicial notice that the population of even the largest city or county in California is only a small percentage of the population of the state as a whole]; *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 666, fn. 1 [taking judicial notice of percentage of given ethnic category as a certain percentage of state population as revealed by census figures]; *Moehring v. Thomas* (2005) 126 Cal.App.4th 1515, 1523, fn. 4; *People v. Bhakta* (2006) 135 Cal.App.4th 631, 641 [taking judicial notice that population of Los Angeles exceeded 750,000]; *Bennett v. Livermore Unified School Dist.* (1987) 193 Cal.App.3d 1012, 1015, fn. 2 [taking judicial notice of ethnic categories set forth in Department of Education publication]; but see *People v. Ramos* (1997) 15 Cal.4th 1133, 1155, fn. 2 [denying the request for judicial notice of the census principally because the data were not presented below and they could not be readily used either in evaluating the lower court's ruling or determining whether the right to trial by jury drawn from a representative cross-section of the community was violated].)

Moreover, the 2010 census, taken eight years after jury selection, indicates numbers very similar to the 2000 census for Alameda County, Oakland and Livermore: The chance that a person living in Livermore would have a black neighbor was still extremely unlikely, as its population

of 80,968 went from 74 percent white to 76.4 percent white and went from 1.49 percent black to 2.1 percent black. (http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1.) Not unexpectedly, in 2010, Oakland still had a large population of 390,724 (down from 399,484) – and still with about five times as many residents as Livermore. In sharp contrast to Livermore, Oakland still has a large black population (28 percent black and 34.5 percent white). (http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1.)

Based on the 2010 U.S. Census, the racial composition of Alameda County was 43 percent white; 26.1 percent Asian; 22.5 percent Latino; and 12.6 percent black. (http://factfinder2.census.gov/faces/ tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1.) Similarly, the 2000 U.S. Census showed the racial composition of Alameda County was: 41 percent white; 21 percent Asian; 16 percent Latino; and 15 percent black. These statistics from both the 2000 and the 2010 censuses are relevant in determining the approximate racial composition of Alameda County in 2002. (See *People v. Motton* (1985) 39 Cal.3d 596, 605-606 ["Where Blacks comprise a significant portion of the population particularly in Alameda County where blacks comprise the majority population in some areas black women are a vital part of that 'ideal cross-section of the community' that should be represented on jury panels"].)

Recently, as the Seventh Circuit explained, statistics are relevant.

> [The state's position] conflicts with *Batson*, where the Court remarked that "total or seriously disproportionate exclusion of Negroes from jury venires ... is itself such an 'unequal application of the law ... as to show intentional discrimination'" (476 U.S. at 93, quoting from *Washington*

> *v. Davis*, 426 U.S. 229, 241 (1976), and *Akins v. Texas*, 325 U.S. 398, 404 (1945)).
>
> Under *Batson's* predecessor, *Swain v. Alabama* [380 U.S. 202 (1965)], statistics were the only way to show race discrimination in jury selection; nothing in the Court's opinion suggests that it swung to the other extreme by holding that statistics could not suffice even for a prima facie demonstration. By relying on employment-discrimination cases such as *Washington v. Davis*, the Court established in *Batson* that the usual means to show discrimination, including statistical analysis, are available.
>
> Later decisions, such as *Miller-El v. Dretke*, 545 U.S. 231 (2005), show that *Batson* was serious in its endorsement of statistical methods. *Miller-El* holds that striking 91% of eligible black members of the venire established a prima facie case of discrimination. (*Hooper v. Ryan* (7th Cir. 2013) 729 F.3d 782, 785.)

The state argues that the fact no African-Americans served on Winbush's jury was irrelevant in deciding whether any individual peremptory challenge was racially motivated (as opposed to finding a prima facie case at step one of *Batson*). (RB at 76-78.) Not true.

As recently explained in *Adkins v. Warden* (11th Cir. 2013) 710 F.3d 1241, 1255, where the Eleventh Circuit reversed the state court's determination that there was no *third-stage Batson* error, statistics are relevant though not sufficient by themselves:

> Again, the state here used peremptory strikes to exclude nine of eleven potential black jurors, resulting in a strike rate of eighty-two percent. Only one black juror served on Mr. Adkins's petit jury. The Supreme Court has observed that "total or seriously disproportionate exclusion of Negroes from jury venires is itself such an unequal application of the law ... as to show intentional discrimination." *See Batson,* 476 U.S. at 93 (quotation marks and citations omitted). Also here, like in *Miller-El II,* "[h]appenstance is unlikely to produce this disparity." 545 U.S. at 241 (quotation marks omitted); *see also id.* at 240 (describing the prosecutor's use of peremptories as "remarkable" where one black juror

> served on the jury, but the prosecutor peremptorily struck ten of eleven eligible black jurors). We conclude the removal of so many eligible black jurors in Mr. Adkins's case is difficult to explain on nonracial grounds. But our conclusion is not based upon statistics alone. *Adkins v. Warden*, *supra,* 710 F.3d at 1255.)

In Winbush's case, thirty percent of the prosecutor's challenges 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, even at *Batson's* third step.

The state also complains that "appellant's stated premise as to the Livermore jurors – 'the chance that a person living in Livermore *would have a black neighbor* was extremely unlikely,' (AOB 87, italics added) is itself racist, since it suggests that jurors who do not count an African-American among some of their "best friends" or acquaintances have a deficient ability to evaluate evidence impartially." (RB at 79.) This absurd speculation is not what Winbush stated or presumed. Because only 1.49 percent of the population of Livermore was black, it would certainly be "extremely unlikely" that a person living in Livermore would have a *black neighbor.* While the state seems to imagine that it is pure coincidence that 38 percent of the jurors on Winbush's Alameda County jury were from the

relatively small community of Livermore, where only a few blacks live, Winbush is not suggesting that any particular Livermore juror was racist or did not have black friends. Winbush is arguing that the *prosecutor* impermissibly excused all the black jurors from Winbush's jury and accepted seven jurors from Livermore due to *racist stereotypes*. Winbush is not complaining that any particular juror in Livermore or anywhere else was racist or did not have a black friend; he is complaining that the *prosecutor was racist* in selecting many non-black jurors from Livermore, hardly a cross-section of Alameda County, resulting in a jury without blacks.

It bears repeating that 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.)

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 Livermore, a town with a black population of 1.49 percent.

As noted above, *Miller-El II, supra,* 545 U.S. at 239-241, established that such statistics are relevant not only at *Batson's* first step, but at the third step. In upholding a *Batson* challenge at the third step, the Supreme Court relied, in part, on very similar statistical evidence at least three times in its opinion, because "a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination:

> The numbers describing the prosecution's use of peremptories are remarkable. Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. [*Miller-El v. Cockrell* (2003) 537 U.S. 322] at 331. "The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members . . . . Happenstance is unlikely to produce this disparity." *Id.*, at 342. (*Miller-El II, supra,* 545 U.S. at 240-241.) ...
>
> It is true, of course, that at some points the significance of Miller-El's evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination. [¶] In the course of drawing a jury to try a black defendant, *10 of the 11 qualified black venire panel members were peremptorily struck*. At least two of them, Fields and Warren, were ostensibly acceptable to prosecutors seeking a death verdict, and Fields was ideal. 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. (*Miller-El II, supra,* 545 U.S. at 265 [emphasis added].) ...
>
> By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.
>
> It blinks reality to deny that the State struck Fields and Warren, included in that 91%, because they were black. (*Id.* at 266.)

Similarly, it "blinks reality to deny" the prosecutor's strikes, eliminating all the blacks from Winbush's Alameda County jury, were based, "in substantial part," on "discriminatory intent" and constituted "a disproportionate number." (AOB at 112-113; see *Snyder v. Louisiana* (2008) 552 U.S. 472, 475-476, 485; see also *McGahee v. Alabama Department of Corrections* (11th Cir. 2009) 560 F.3d 1252, 1259-1270.)

The state, however, cites two cases for the proposition that "there is no one factor that trumps the prosecutor's stated reasons, if found plausible and credible, including whether the prosecutor challenged all three of the only three African-Americans to make it into 'the box' before the selection was finalized." (RB at 80.) Those cases do not stand for this proposition.

In *People v. Snow* (1987) 44 Cal.3d 216, 223-225, this Court reversed for first-stage *Batson* error where the defendant was a black man accused of murdering a Caucasian victim and the prosecutor peremptorily challenged six black venirepersons while leaving two black persons on the jury. There is nothing on the page the state cites in *Snow* to support the proposition that a prosecutor can justify the challenge of "all three of the only three African-Americans." (RB at 80, citing *People v. Snow*, *supra,* 44 Cal.3d at 225.) In fact, the *Snow* Court recognized just the opposite, holding that "the fact that the prosecutor 'passed' or accepted a jury containing two Black persons [does not] end our inquiry, for to so hold would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion." (*Ibid.*)

Similarly in *People v. Lenix* (2008) 44 Cal.4th 602, 613-614, 627-629, there is nothing to support the proposition that the prosecutor can challenge "all three of the only three African-Americans," on the basis of

relying on one or more of myriad excuses. (RB at 80.) In *Lenix*, this Court rejected a third-stage *Batson* challenge where the prosecutor excused only one black juror based on plausible reasons, and had not excused a black juror whom the prosecutor said he liked, but whom the defense excused. (*People v. Lenix; supra,* 44 Cal.4th at 610, 628-630.) Acceptance of a panel containing African-American prospective jurors "strongly suggests that race was not a motive" in the challenge of an African-American panelist. (*People v. Lomax* (2010) 49 Cal.4th 530, 576; citing *People v. Lenix, supra*, 44 Cal.4th at 629.) Here, the prosecutor never accepted the jury containing a single African-American prospective juror. The facts of *Lenix* are hardly comparable to the prosecutor excusing all three black jurors in Winbush's case. Similarly, the fact that at least one African-American ultimately served on a jury has been held to be strong evidence of no racial bias in jury selection. (RB at 79-80; see AOB 114, citing *People v. Blacksher* (2011) 52 Cal.4th 769, 801-802; see also *People v. Cornwell* (2005) 37 Cal.4th 50, 70.) Here, no blacks served on Winbush's jury.

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"]; (*Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1190, 1192 [prosecutor's mischaracterization of venire answers can be evidence of discriminatory pretext], quoting *Snyder v. Louisiana, supra,* 552 U.S. at 484.) Thus, a

prosecutor cannot legitimately strike a juror because of his or her race, even if the prosecutor has other reasons as well.

B. The Prosecutor Employed Race And Gender Stereotypes Historically Invoked To Exclude African-Americans And Women From Jury Service

It was no accident that the prosecutor excluded all African-Americans, including two African-American women from Winbush's jury. Exclusions based on race and gender continue to perpetuate stereotypes. (See *Miller-El II, supra*, 545 U.S. at 270 [conc. opn. of Breyer, J.] [commenting that "the use of race- and gender-based stereotypes in the jury selection process seems better organized and more systematized than ever before"].) "Competence to serve as a juror ultimately depends on . . . individual qualifications and ability impartially to consider evidence presented at a trial." (*Batson, supra*, 476 U.S. at 87, citing *Thiel v. S. Pac. Co.* (1946) 328 U.S. 217, 223-224 [*Thiel*].) The use of a juror's membership in a racial or gender group as a proxy for competence or impartiality "'open[s] the door to ... discriminations which are abhorrent to the democratic ideals of trial by jury.'" (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 145, fn.19 [*J.E.B.*], quoting *Thiel, supra*, 328 U.S. at 220). As the *Batson* Court observed: "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." (*Batson, supra*, 476 U.S. at 87.) Inadequate judicial enforcement of the prohibition on discriminatory jury selection validates skepticism about the fairness of our legal system. (Sandra Day O'Connor, *Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust* (Fall 1999) 36 Ct. Rev. 10, 11, available at http://aja.ncsc.dni.us/htdocs/publications-courtreview.htm.

[observing that "[t]he perception that African-Americans are not afforded equality before the law is pervasive, and requires us to take action at every level of our legal system, especially at the local level"].)

The stereotype that African-Americans will be partial to a defendant of the same race has long been used to exclude them as jurors. (See *Batson, supra*, 476 U.S. at 103-104 [conc. opn. of Marshall, J.] [providing examples of prosecutors' routine and undisguised use of peremptory challenges to strip juries of African-Americans].) Before *Batson*, prosecutors employed peremptory strikes to remove African-Americans from trials in which the accused was black as "'a matter of common sense'" and a regular "'practice.'" (Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse* (1978) 14 New Eng. L. Rev. 192, 202, 205 (*Brown*) [citations omitted] [quoting judicial opinions describing prosecutors' jury selection practices]; see also *id.* at 214, fn.126, quoting *State v. Jack* (La. 1973) 285 So.2d 204, 210 [dis. opn. of Barham, J.] [explaining how strikes "'were exercised systematically and discriminatively for the purpose of excluding all blacks from the jury'"]; *Reed v. Quarterman* (5th Cir. 2009) 555 F.3d 364, 382 [describing a manual used by the Dallas County District Attorney's Office, instructing prosecutors to avoid selecting "'any member of a minority group'" because "'[m]inority races almost always empathize with the Defendant'"].)

Although *Batson* created a new legal test, allowing a defendant to rely "solely on the facts . . . in his case" to demonstrate purposeful discrimination (*Batson, supra*, 476 U.S. at 95), prosecutors continue to base peremptory strikes on racial stereotypes. (See, e.g., *People v. Randall* (Ill. App. Ct. 1996) 671 N.E.2d 60, 65 [surmising that "new

prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations'"]; Equal Justice Initiative, *Illegal Racial Discrimination in Jury Service: A Continuing Legacy* (2010) at 14-30 [describing the prevalence of "racially biased use of peremptory strikes" post-*Batson*, and cataloguing examples of reasons that "explicitly incorporate race" or "correlate strongly with racial stereotypes"].)

As the Supreme Court discussed at length, "gender, like race, is an unconstitutional proxy for juror competence and impartiality." (*J.E.B.*, *supra,* 511 U.S. at 129.) In extending *Batson's* protection to women, the Court disavowed stereotypes historically used to exclude women from civic engagement, including jury service. (*Id.* at 131-136.) For generations, women's exclusion from civic life was based on gender stereotypes that cast them as either too sensitive or singularly focused on their roles as wife and mother. (See, e.g., *Hoyt v. Florida* (1961) 368 U.S. 57, 62 [upholding women's exemption from jury service because women occupy a unique position "as the center of home and family life"]; *Bailey v. State* (Ark. 1949) 219 S.W.2d 424, 428 [observing that criminal trials "often involve ... elements that would prove humiliating, embarrassing and degrading to a lady"].)

These stereotypes were widely used by prosecutors when *J.E.B.* was decided. (See Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service* (1993) 61 U. Cin. L. Rev. 1139, 1172 [*Babcock*] [describing "trial manuals and jury selection tracts" predicting how women jurors would behave]; *Brown, supra*, at 224 fn. 181 [quoting the Dallas County District Attorney's manual instructing that "'women's intuition can help you if you can't win your case with the facts,'" but that

"'[y]oung women too often sympathize with the Defendant"'].) These stereotypes continue to animate jury selection practices. (See *Miller-El, supra*, 545 U.S. at 271 [conc. opn. of Breyer, J.] [describing a trial consulting firm's jury selection technology for civil and criminal cases that specifies "'exact demographics,'" including race and gender, to enable lawyers to identify "'the type of jurors you should select and the type you should strike'"].)

Because of their dual identities as African-Americans and women, black women are particularly vulnerable to discriminatory peremptory challenges. Extending *Batson's* protection to women, the *J.E.B.* Court acknowledged the relationship between race and gender discrimination in the use of peremptory challenges:

> Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well- established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny. (*J.E.B., supra*, 511 U.S. at 145.)

The *J.E.B.* Court also observed that "[t]he temptation to use gender as a pretext for racial discrimination may explain why the majority of the lower court decisions extending *Batson* to gender involve the use of peremptory challenges to remove minority women" and that "[a]ll four of the gender-based peremptory cases to reach the Federal Courts of Appeals . . . involved the striking of minority women." (*Id.* at 145, fn.18; see, e.g., *United States v. Omoruyi* (9th Cir. 1993) 7 F.3d 880, 881-882

[foreshadowing *J.E.B.'s* recognition that gender may be used as a proxy for race].)

The most commonly held stereotype about African-American women in the context of jury selection is that they will not convict a black male defendant because they will emotionally respond to him as a son or husband. For example, in *Jones v. Ryan* (3d Cir. 1993) 987 F.2d 960, 973, the prosecutor challenged one juror because she had a son approximately the same age as the defendant. He struck the other because, according to the prosecutor, she was "'the same approximate age and race of the defendant'" and he was concerned she might be attracted to the defendant. (*Ibid.*; see also David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis* (2001) 3 U. Pa. J. Const. L. 3, 42 [noting that in a training videotape, Jack McMahon instructed fellow Philadelphia prosecutors to avoid selecting older black women when the defendant is a young black man because of their "'maternal instinct'"]; *Babcock, supra*, at 1147 [commenting that when prosecutors peremptorily strike African- American women, it is based on the assumption that they will "not convict young men who might be their sons or brothers"].) In the context of capital trials, this stereotype translates into the assumption that African-American women will not impose the death penalty against an African-American male defendant. This notion is a hybrid of stereotypes historically used to exclude African-Americans and women from jury service. First, it presumes that, as African-Americans, black women will be partial to defendants who share their race. Second, it presumes that, as wives and mothers, black women will not be able to rationally consider a case involving a defendant who could be their husband or son. In this sense,

the same antiquated stereotypes that were used to exclude women and African-Americans from "voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life" are at play when prosecutors and judges assume that African-American women will not impose the death penalty. (*J.E.B., supra*, 511 U.S. at 142, fn.14.)

As in other contexts, African-American women are often subjected to a double dose of discrimination in jury selection. (See *People v. Motton*, *supra,* 39 Cal.3d at 606 [noting that during jury selection, "black women face discrimination on two major counts—both race and gender—and their lives are uniquely marked by this combination"]; Jean Montoya, *"What's So Magic[al] About Black Women?" Peremptory Challenges at the Intersection of Race and Gender* (1996) 3 Mich. J. Gender & L. 369, 400 [observing that African-American women experience "intersectional or race and gender discrimination," which "is necessarily race discrimination and gender discrimination"]; *Babcock, supra*, at 1163 [arguing that "in the case of minority women, allowing gender strikes subjects them to the most virulent double discrimination: that based on a synergistic combination of race and sex"]; see *Commonwealth v. Basemore* (Pa. 2000) 744 A.2d 717, 730 [describing the same training videotape referenced above, in which prosecutor McMahon instructs that "'young black women'" are also "'very bad'" because "'they got two minorities, they're women and they're [ ] blacks, so they're downtrodden in two areas. And they somehow want to take it out on somebody, and you don't want it to be you'"].)

Striking African-American women based on "gross generalizations" regarding group views on capital punishment offends the equal protection clause. To a prosecutor, black women may be seen as undesirable jurors based on the assumption that they are unlikely to impose the death

penalty. (See, e.g., Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate* (2008) 63 Am. Psychol. 527, 530 [observing that "[i]n practice, attorneys' chief objective . . . is to select jurors whom they believe will be sympathetic to their side of the case"].) Polling data shows that women and African-Americans oppose capital punishment somewhat more frequently than men and Whites, respectively. (See Gallup poll conducted December 19-22, 2012 (January 9, 2013), http://www.gallup.com/poll/159770/death-penalty-support-stable.aspx; Gallup poll conducted June 4-24, 2007 (July 30, 2007), http://www.gallup.com/poll/28243/Racial-Disagreement-Over-Death-Penalty-Has-Varied-Historically.aspx.) There is, however, social science research demonstrating that jurors do not decide verdicts based on their racial or gender identity. (See Carol J. Mills & Wayne E. Bohannon, *Juror Characteristics: To What Extent Are They Related to Jury Verdicts* (1980) 64 Judicature 22, 27 [finding that black women are more inclined to convict defendants of color before deliberation than whites]; see also *Sommers & Norton, supra,* at 531 [stating that though "juror [racial] stereotypes tend to be global," juror behavior is "more context dependent"].)

As a matter of constitutional law, stereotypes may not be the basis of governmental action. The exclusion of African-American women based on any "gross generalizations" about their character, capabilities, or views violates the Equal Protection Clause, "even when some statistical support can be conjured up for the generalization." (*J.E.B., supra*, 511 U.S. at 139 & n.11.) Because juror competence is an individual matter, a prosecutor may not use a juror's membership in a particular racial or gender group as a proxy for "juror competence and impartiality." (*Id.* at 129.)

Judges may be just as prone as attorneys and jurors to flawed decision-making based on their own biases. (See, e.g., Jerry Kang et al., *Implicit Bias in the Courtroom* (2012) 59 UCLA L. Rev. 1124, 1146 [concluding that "the extant empirical evidence" shows that "there is no inherent reason to think that judges are immune" from bias]; Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions* (2010) 4 Harv. L. & Pol'y Rev. 149, 150 [chronicling one judge's upsetting discovery that he harbored implicit biases]; Jeffrey Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* (2009) 84 Notre Dame L. Rev. 1195, 1197 [finding that "[j]udges hold implicit racial biases" that "can influence their judgment"].)

Moreover, trial judges may overestimate their impartiality, compounding the impact of judicial bias. For example, 97 percent of judges recently surveyed believe they are in the top half relative to their colleagues in "avoid[ing] racial prejudice in decisionmaking" relative to other judges. (*Id.* at 1225.) These findings suggest that "judges are overconfident about their ability to avoid the influence of race and hence fail to engage in corrective processes." (*Id.* at 1225-1226.)

Given that trial judges harbor biases and overestimate their impartiality, it is troubling — though perhaps not surprising — that they accept the overwhelming majority of attorneys' race-neutral justifications. (See K. J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges* (1996) 71 Notre Dame L. Rev. 447, 461 [finding that prosecutors' race-neutral explanations for peremptory strikes were accepted 80 percent of the time]; M. J. Raphael & E. J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v.*

Kentucky (1993) 27 U. Mich. J. L. Reform 229, 235 [concluding that "only a small percentage of the neutral explanations for peremptory strikes were rejected"].)

Concurring in *Batson*, Justice Marshall cautioned that because "[a]ny prosecutor can assert facially neutral reasons for striking a juror," there is a danger that courts will accept these post hoc rationalizations and "the protection erected by the Court today may be illusory." (*Batson*, *supra,* 476 U.S. at 106 [conc. opn. of Marshall, J.].) More than thirty years on, "lawyers have simply learned to mask discriminatory peremptories" by furnishing race-neutral and gender-neutral reasons, and there are raging inconsistencies between trial judges' scrutiny at step three. (Nancy S. Marder, Justice Stevens, *The Peremptory Challenge, and the Jury* (2006) 74 Fordham L. Rev. 1683, 1707-1708, fns.170-171 [describing cases in which virtually identical facially neutral reasons were found satisfactory at step three by some judges and pretextual by others]; *Sommers & Norton, supra*, at 534 [surveying studies showing the boundless range of race-neutral reasons].) It is in this context, that Winbush urges this Court to review the prosecutor's peremptory challenges of both African-American women and the only African-American man.

C. The Prosecutor's Reasons To Exercise Peremptory Challenges Against All Three African-Americans Jurors Established Purposeful Racial Discrimination

1. The Prosecutor Improperly Peremptorily Challenged E.T., An African-American Juror

The state contends that the prosecutor had four good reasons to excuse Juror E.T. (RB at 58-63.) Winbush disagrees. First, the state describes E.T.'s attitude toward the death penalty as somewhat

ambiguous and uncertain. (RB at 58-59.) Not so. Her answers simply reflect a person who was not enamored of the death penalty. The bottom line, however, was that she could conceive of voting for death in "a situation where only one person's been killed, there's no rape involved, there's no cutting up the body parts, there's nothing like that going on." (79-RT 4726-4727.)

Next, the state claims that "E.T.'s responses raised concerns that her religious views might interfere with her ability to impose the death penalty." (RB at 59.) Not so. E.T. said 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.)

The state next claims that E.T. had a negative bias toward law enforcement. (RB at 60-61.) Winbush disagrees. First, the prosecution appears to have singled out this black juror for investigation, going as far as obtaining the police report of an incident with the police, 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.) The state does not respond to this evidence that the prosecutor was looking for grounds to dismiss these black jurors. (RB at 60-61; see AOB at 96, fn. 22.) Second, the fact that E.T. had a verbal altercation with a police officer, after which she was arrested, but then not charged, does not indicate she had a bias against the police. (79-RT 4724-4725.) The state emphasizes a claim in the police report that E.T. was stopped for an attempted burglary and interfered with the police serving a warrant on another person present, allowing that person to escape. (RB at 60.) The state makes it sound as

though this were an ongoing crime and a deliberate obstruction of justice, when other statements in the record suggest something different: a domestic disturbance in which she was helping her sister or a woman friend move out of her apartment, the police showed up, there was an argument, the police find out that one of the women helping with the move has a warrant for failure to appear, and while juror E.T. is arguing with the police, the other woman gets away. (79 RT 4724; 104 RT 6686-6688.) The fact that her account was not detailed or perfectly consistent with the police officer's account does not show that she "had misrepresented the seriousness of her encounter with police." (RB at 61.)

Finally, the state claims that the "unusually limited number of questions defense counsel asked of this witness corroborated his sense that E.T. would favor the defense." (RB at 61, citing 104-RT 6691-6692.) The state contends that *People v. Ervin* (2000) 22 Cal.4th 48, 75-76, stands for the proposition that the "decision not to voir dire a prospective juror is a legitimate, plausible, race neutral reason to exercise a peremptory where the trial court makes a sincere and reasoned effort to evaluate whether such reason is a nondiscriminatory justification for the challenge." (RB at 61-63; citing *Ervin*.) Not so. While the *Ervin* court apparently approved the trial court's finding that the fact the defense accepted one juror without asking her a single question, drawing the prosecutor's suspicions regarding her neutrality, was a reasonably specific and neutral reason, the *Ervin* court found it was not a particularly "logical or substantial reason." (*Ibid.*) Moreover, in considering whether prosecutor's challenge to a black prospective juror violated *Wheeler/Batson*, this Court, in more recent cases, gave little weight to the fact that the prosecutor asked the juror only one question, where jurors

had filled out a 14-page questionnaire, the prosecutor's question was directed at her ambivalence about the death penalty, and the prosecutor engaged in perfunctory questioning of some Caucasian jurors as well. (*People v. Edwards* (2013) 57 Cal.4th 658, 698-699, citing *People v. Bell* (2007) 40 Cal.4th 582, 598-599, fn. 5 [noting the trial court's comment that "'when you have a questionnaire, it can never be a perfunctory examination'"].)

Here, defense counsel asked more than several questions. (79-RT 4729-4730.) After the court and the prosecutor extensively examined the juror, however, it would be reasonable for the defense to conclude that, along with the lengthy juror questionnaire, the juror had shared her life story to a more significant extent than almost any other juror -- aside from the other black jurors the prosecutor examined at length in order to find some excuse to challenge them. (79-RT 4718-4722 [the court]; 4723-4728 [the prosecutor].) As Winbush strenuously argued, it would be a travesty to permit the prosecutor to use the fact that the defense did not ask extensive questions of a potential juror as a "neutral" reason to excuse a minority prospective juror after being grilled by the prosecutor at length. (104-RT 6723-6725, 6738-6739.) Winbush persuasively 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 and the prosecutor. (104-RT 6723-6725, 6742.) Moreover, the trial judge limited attorney voir dire sharply, allowing the attorneys to question only to clarify a juror's answers to determine the juror's "true beliefs" on a point, but not to rehabilitate them. (49-RT 3100-3101; see RB at 51). Given these parameters, a party's refraining from questioning a juror did not logically suggest a bias, but merely that the juror's views did not need clarifying.

This is further evidence tending to show that the court did not make a sincere and reasoned effort to evaluate the prosecutor's reasons. The court seemed to go out of its way to defend the record against a *Batson* challenge, saying that he had watched the demeanor of the jurors on voir dire, and their manner in responding to the questions of the court, the prosecutor, and defense counsel. (104-RT 6763-6764; see RB at 57) The court not only emphatically defended the prosecutor against defense argument that the prosecutor had engaged in cursory questioning of some of the black jurors, he turned it into a petty snipe at defense counsel, commenting critically that the defense had sometimes asked no questions of particular jurors – an observation not only hostile but pointless, since no one was accusing the defense of *Batson* error. (104-RT 6764-6757; see RB at 54).

It is simply incorrect for the state to argue that Winbush failed "to assert any one of the multiple inferences it claimed could be drawn as the actual reason for the failure to voir dire this juror." (RB at 62.) This failure to question a juror who has already been extensively questioned is simply not "analogous to the inference of discrimination drawn from a prosecutor who fails to question prospective jurors of a cognizable group." (RB at 62, citing *People v. Taylor* (2010) 48 Cal.4th 574, 615.) It is not the defense who was suspected of discriminating or of improperly using peremptory challenges. Voir dire for no purpose other than to forestall an illogical argument under *Ervin* is in no one's interest, certainly not in the interest of judicial economy.

The state also relies on *People v. Lenix, supra,* 44 Cal.4th at 627-628, for the proposition that when "multiple inferences can be drawn, the trial court's evaluation of a particular inference must be accorded

deference." (RB at 62.) In fact, *Lenix* also reiterates that even under this deferential standard, "substantial evidence" must still support the trial court's conclusions. (*People v. Lenix*, *supra,* 44 Cal.4th at 627.) Here, substantial evidence does not support the trial court's speculation that Winbush's decision to rely on the extensive questioning by the court, the prosecutor, and Patterson's lawyers was a neutral reason for the prosecutor to excuse E.T.

To permit the *Ervin* language, based on the speculation of another Alameda County prosecutor, to be used as a "neutral" reason to excuse black jurors would insulate Alameda County, if not all of California, from *Batson/Wheeler* objections. (See *In re Freeman* (2006) 38 Cal.4th 630, 633 [Court rejects 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].)

E.T. was more than qualified to be a juror. 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.) She said she could vote for death under the circumstances of Winbush's case. (79-RT 4726-4748.) E.T. was a fair juror who would not have been excused but for her race.

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

The state contends that the prosecutor had three good reasons to excuse Juror B.C. (RB at 63-67.) Winbush disagrees.

The state first claims that "the prosecutor believed that B.C.'s prior experience as a foreperson of a 'hung' jury and her satisfaction with that experience would make her less inclined to reach a unanimous verdict, particularly in a capital case." (RB at 63, citing 104-RT 6694-6697.) In that case, however, the jury on which B.C. sat found the defendant guilty of attempted robbery and possessing a concealed weapon, but on an attempted murder charge the jury hung with B.C. in the majority on a 9-3 vote. (86-RT 5299-5300.) Thus, this hung jury did not present a legitimate cause of concern for the prosecutor. For the prosecutor to fault B.C. for being satisfied with her juror experience as foreman and finding it not stressful is ridiculous. (RB at 63; 86-RT 5298-5300.) Under this rational, the prosecutor could also have manufactured a "neutral" excuse to challenge B.C. if she had found the experience unsatisfactory and/or stressful. In short, this was just another pretextual excuse. While *People v. Turner* (1994) 8 Cal.4th 137, 170, mentioned that a prospective juror being part of a "hung jury" is "a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict," *Turner* is distinguishable. In *Turner,* there were no other details about the hung jury and the excused juror also "had an extremely poor grasp of the English language. He had to deliberate exceedingly long and there were pauses between questions. He had a very poor comprehension. He couldn't understand the instructions given to him by the court." (*Id.* at 169-170.) In contrast, B.C. appeared to handle her jury experience well and voted with the majority to convict. She can hardly be blamed for the hung jury, even if she were the foreperson.

There was absolutely no evidence for the prosecutor's assertion that B.C. "had not exercised sufficient leadership to lead other jurors

toward a unanimous outcome on a "difficult charge," and took "the easier way out to simply agree not to agree." (RB at 63, citing 104-RT 6696-6697.) Yet, the trial court repeated this pretextual assertion. (104-RT 6779.) Obviously, B.C. did not have the power to coerce the other jurors to agree, just as no other jury foreperson would have had. The prosecutor's further speculation, repeated by the court, smacks of pretense as well: "B.C.'s prior experience as a foreperson might cause jurors in appellant's trial to elect her to this leadership role again." (RB at 63, citing 104-RT 6696-6697, 6779.) As if something would have been wrong with that.

And finally, the state repeats this canard by the prosecutor: "When B.C. responded to defense counsel that she would provide her individual 'input' and vote on the case rather than going with the majority, the prosecutor 'viewed that somewhat of a challenge to her to dig in and take on the rest of the panel as perhaps she had done once before.'" (RB at 63-64, citing 104-RT 6697.) B.C. responded to the question just as virtually all the sitting jurors responded to the defense question about voting their own conscience. If she had said the opposite, the defense, if not the prosecutor, would also have complained. Moreover, this is something the jurors are formally instructed to do – to listen to the other jurors but not vote a certain way simply because the majority do. (CALJIC 17.40; CALCRIM 3550.)

And, to repeat, there was no evidence that B.C. "[dug] in and [took] on the rest of the panel as perhaps she had done once before." (*Ibid.*) B.C. and the rest of the jury on which she sat found the defendant guilty of two counts and B.C. voted in the majority in a 9-3 split on the more serious count. The more plausible explanation for the prosecutor's desperate

attempt to disparage B.C. on the basis of this manufactured excuse was to justify his racist challenge. (*Snyder v. Louisiana, supra,* 552 U.S. at 48.)

The state also claims that "the prosecutor was concerned that B.C. perceived that appellant would not get a 'fair shake' because he was too poor to afford a good lawyer -- a bias that was exacerbated when defense counsel led her to believe he was donating his time to this case." (RB at 64-64, citing 104 RT 6698-6703.) The state morphs these statements into a "distrust of the legal system, particularly its treatment of indigent defendants." (RB at 65, citing several cases.) Winbush disagrees with the facts, not the law. There was insufficient evidence that B.C. distrusted the legal system, when all her responses are viewed in context. 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 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, but whether the defense lawyers were court appointed would not affect her ability to listen to the evidence. (86-RT 5302-5303.)

Third, the state claims that "the prosecutor was concerned that B.C. was more likely to accept appellant's contention that he had given a false confession," an assertion the trial court agreed with. (RB at 66-67, citing 104-RT 6706-6707, 6785-6786.) The state also manages to morph this reasonable belief into a bias against law enforcement. (RB at 66.) Winbush disagrees. No wonder Winbush was found guilty and sentenced to death when every juror who believed in the possibility of a false confession was excused from the jury. Simply because B.C. held a sophisticated and knowledgeable belief about the possibility of false

confessions is not a legitimate reason to excuse her. (See Douglas Starr, *The Interview: Do police interrogation techniques produce false confessions?* (December 9, 2013) The New Yorker at 42 [they do].)

B.C. was more than competent as a juror. The prosecutor explained that he "certainly didn't find [B.C.] to be an insincere person." (104-RT 6753.) B.C agreed with the felony murder rule and aiding and abetting liability. (CT-87 24567-68.) She did not resent the police. (86-RT 5294.) 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.) 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.) Thus, it appears that the deciding factor for the prosecutor to excuse B.C. was her race, not one of the myriad so-called "race-neutral" reasons the prosecutor gave to excuse her.

3. The Prosecutor Improperly Peremptorily Challenged T.W., An African-American Juror

The state finally claims that the prosecutor excused T.W. for many race-neutral reasons, given that he had twice tried to excuse him for cause. (RB at 67-76.) While the prosecutor had better reasons to excuse T.W. than the two African-American women, Winbush stands by his opening brief with respect to this juror. (AOB at 98-100.) No matter what the prosecutor's excuses, Winbush's jury had no blacks, but consisted of 13 Caucasian jurors, three Hispanic jurors, and 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 according to the 2000 U. S. Census. (105-RT 6841-6842.)

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

The state concedes that 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 whether Winbush proved racial discrimination. (RB at 80-100.)

The state, however, also argues that this Court should conduct a comparison of the three excused African-American jurors with other prospective jurors challenged by the prosecutor to determine whether Winbush proved racial discrimination. (RB at 97-100, citing *People v. Lenix, supra*, 44 Cal.4th at 623-624.) Winbush disagrees. As the state concedes, this Court has held that the "reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment." (*People v. Lenix, supra*, 44 Cal.4th at 624; see also *People v. Bracey* (1994) 21 Cal.App.4th 1532, 1542.) With the seven other jurors the prosecutor challenged, who expressed views on many different issues, it is not surprising that some of their answers would overlap with the answers of the challenged black jurors. It does not prove that the prosecutor's challenges against the black jurors were not substantially motivated by racism.

E. The Prosecutor's Explanations For His Exclusion Of All Three African-Americans While Not Excusing Jurors With Similar Beliefs Suggests Racism

The state contends that Winbush's "comparative analysis fails to demonstrate the prosecutor's race-neutral reasons were a pretext for race discrimination, and indeed, the prosecutor was remarkably consistent in

exercising challenges without regard to race." (RB at 81.) The state also claims that comparative analysis "provides additional evidence demonstrating that the prosecutor's challenge was race-neutral." (RB at 89-97.) Winbush disagrees.

Winbush's case is a good example of the racist misuse of peremptory challenges that can be difficult to prove because it is so easy to find a race-neutral explanation for excusing any juror and trial judges are reluctant to attribute excusals to bias. Only the most stupid and racist prosecutors are caught -- and very infrequently -- at this game of making up excuses to challenge all the black jurors from juries involving a black male defendant and a white female victim. The examples are legion, but Justice Breyer, relying on Justice Marshall's remarks in *Batson*, explained it well in *Miller-El II, supra,* 545 U.S. at 267-268 [conc. opn. of Breyer, J.]:

> In his separate opinion, Justice Thurgood Marshall predicted that the Court's rule [in *Batson*] would not achieve its goal. The only way to "end the racial discrimination that peremptories inject into the jury-selection process," he concluded, was to "eliminat[e] peremptory challenges entirely." *Id.*, at 102-103 (concurring opinion). Today's case reinforces Justice Marshall's concerns.
>
> To begin with, this case illustrates the practical problems of proof that Justice Marshall described. As the Court's opinion makes clear, Miller-El marshaled extensive evidence of racial bias. But despite the strength of his claim, Miller-El's challenge has resulted in 17 years of largely unsuccessful and protracted litigation — including 8 different judicial proceedings and 8 different judicial opinions, and involving 23 judges, of whom 6 found the *Batson* standard violated and 16 the contrary.

It took two interventions by the U.S. Supreme Court to right this wrong done to Miller-El. (*Miller-El v. Cockrell* (2003) 537 U. S. 322; *Miller-El II, supra,* 545 U.S. 231.)

As Justice Breyer explained:

> And most importantly, at step three, *Batson* asks judges to engage in the awkward, sometime hopeless, task of second-guessing a prosecutor's instinctive judgment — the underlying basis for which may be invisible even to the prosecutor exercising the challenge. See 476 U. S., at 106 (Marshall, J., concurring) (noting that the unconscious internalization of racial stereotypes may lead litigants more easily to conclude "that a prospective black juror is 'sullen,' or 'distant,'" even though that characterization would not have sprung to mind had the prospective juror been white); see also Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B. U. L. Rev. 155, 161 (2005) ("'[s]ubtle forms of bias are automatic, unconscious, and unintentional'" and "'escape notice, even the notice of those enacting the bias'" (quoting Fiske, *What's in a Category?: Responsibility, Intent, and the Avoidability of Bias Against Outgroups*, in The Social Psychology of Good and Evil 127, 127-128 (A. Miller ed. 2004)). In such circumstances, it may be impossible for trial courts to discern if a "'seat-of-the-pants'" peremptory challenge reflects a "'seat-of-the-pants'" racial stereotype. (*Batson*, 476 U.S., at 106 (Marshall, J., concurring) (quoting *id.*, at 138 (Rehnquist, J., dissenting)). (*Miller-El II, supra,* 545 U.S. at 267-268 [conc. opn. of Breyer, J.].)

The state argues that "concerns that the criminal justice system is unfair to minorities," particularly when coupled with a reluctance to impose the death penalty, is a plausible race-neutral reason to exercise a peremptory challenge. (RB at 75, citing *People v. Vines* (2011) 51 Cal.4th 830, 850-851.) Not so.

According to Gallup polls for the past twenty years, two-thirds of black Americans think the American justice system is biased against black people, while about one-third of non-Hispanic whites believe the same (recently dropping to one-quarter). (*Gulf Grows in Black-White Views of U.S. Justice System* Bias (July 22, 2013) http://www.gallup.com/poll/

163610/gulf-grows-black-white-views-justice-system-bias.aspx; see also *People v. Harris* (2013) 57 Cal.4th 804, 865 [conc. opn. of Liu, J. ["Today, as when *Batson* was decided, it is a troubling reality, rooted in history and social context, that our black citizens are generally more skeptical about the fairness of our criminal justice system than other citizens."].)

The excused black jurors precisely mirror this poll. E.T. thought minorities were treated fairly by the criminal justice system, while B.C. and T.W. did not. (58-CT 16445; CT-87 24565; 181-CT 51635.) Thus, this purportedly "neutral" question alone could be used to support the prosecutor's peremptory challenge of two-thirds of African-Americans who answer the call for jury duty.

Most startling is that this same answer -- that minorities are treated unfairly -- by an Hispanic juror and three white jurors in Winbush's case -- did not get them excused, because, of course, the prosecutor had his "reasons." For example, Juror No. 5 stated that it was empirically proven that minorities are treated unfairly, but the prosecutor stated he did not excuse him because he was otherwise a conservative juror likely to return a death sentence. (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. (104-RT 6749-6750.) The prosecutor justified not challenging Juror No. 11, even though he said that ethnicity is, in fact, an issue in criminal justice, because Juror No. 11 had no strong opinion about that. (104-RT 6751-6752, 6740.) 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.) "'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, supra,* 584 F.3d at 1192, quoting *Snyder v. Louisiana, supra,* 552 U.S. at 484; see also *Cook v. Lamarque* (9th Cir. 2010) 593 F.3d 810, 818 [mischaracterization of juror's answer "is evidence of discriminatory pretext"]; *Jones v. West* (2d. Cir. 2009) 555 F.3d 90, 96-102 [prima facie case when prosecutor offered a pretextual excuse when he struck four of five black jurors].)

The state claims that these jurors (Nos. 5, 6, 11 and 16) who believed that minorities are treated unfairly were all rabidly pro-prosecution compared with the excused black jurors. (RB at 89-97.) Yet, the state compares these jurors only with T.W., while B.C., the second excused black juror, also believed minorities were not treated fairly by the criminal justice system. (CT-87 24565.) The comparative analysis between B.C. and the sitting jurors highlights the pretextual nature of the peremptory challenge more than with T.W., because B.C. was a more prosecution-oriented juror. (See AOB at 96-98.)

The state also claims that the three jurors (Nos. 8, 10 and 16) who answered similarly with respect to the link between money and good defense were all rabidly pro-prosecution compared with the excused black jurors. (RB at 81-89.) The state's claim again proves too much. It simply shows how a death-qualifying process that permits unjustified peremptory challenges – to the point that virtually any excuse is accepted – often

results -- as in Winbush's case – with a strongly pro-death penalty jury devoid of blacks.

Under the generous standard set by this Court, only the most moronic or racist prosecutors – white prosecutors in Texas and Louisiana come to mind – are likely to be caught challenging a black juror for impermissible reasons. (See *People v. Lenix, supra,* 44 Cal.4th at 628-630 ["possible contrary inferences do not undermine the genuineness of the prosecutor's explanation ... even hunches and idiosyncratic reasons may support a peremptory challenge"]; *People v. Williams* (2013) 56 Cal.4th 630, 700 [dis. opn. of Lui, J.] ["giv[ing] great deference to the trial court's ability to distinguish bona fide reasons from sham excuses ... in these circumstances all but drains the constitutional protection against discrimination in jury selection of any meaningful application"].) Justices Marshall, Breyer, Lui and others have it right: under this Court's extremely deferential standard, *Batson* is a dead letter, honored in theory only.

Winbush urges this Court to reconsider its policy of routinely rejecting every claim of discriminatory jury selection that has come before it in all 59 opinions this Court issued between June, 2005, when *Johnson v. California* was decided and August 2013, and in 101 of 102 of the cases between April 1993 and August 2013, whether involving claims of error at the first step or at the third step of the *Batson* process. (*People v. Harris* (2013) 57 Cal.4th 804, 891 [conc. opn. of Liu, J.] [appendix to conc. opn. of Liu, J].) For this Court to continue to find – as it has for the past 20 years -- -- in one case after another, and against compelling evidence to the contrary -- that virtually no prosecutors in California use racially-based peremptory challenges to fashion a favorable jury is a very unlikely

proposition with which the United States Supreme Court and Ninth Circuit have frequently disagreed.

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

The state does not challenge Winbush's argument that if the trial court committed *Wheeler/Batson* error, reversal of the judgment of death is required. (RB 199-200.) Therefore, Winbush stands by his opening brief. (AOB at 116-117.)

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, WHEN HER VIEWS CONCERNING THE DEATH PENALTY WOULD NOT HAVE SUBSTANTIALLY IMPAIRED THE PERFORMANCE OF HER DUTIES

A. Winbush Did Not Forfeit The Issues About The Court Denying His Challenges To Two Jurors For Cause Who Served On The Jury, Or Excusing Prospective Juror E. I. For Cause Without Permitting Adequate Voir Dire

The state grudgingly concedes that "an appellate challenge to a *Witherspoon/Witt* [*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521-522; *Wainwright v. Witt* (1985) 469 U.S. 412, 424] excusal is not forfeited by a failure to object at trial, or even by counsel's affirmative statement to the trial court that the matter is "submitted." (RB at 113, citing *People v. McKinnon* (2011) 52 Cal.4th 610, 643 [forfeiture of *Witt/Witherspoon* claim applies prospectively].) This is exactly what defense counsel did: he

submitted it, after which he ambiguously told the excused juror: "The truth is what you have told us." (86-RT 5327-5328.)

Winbush does not believe that trial counsel's ambiguous and gratuitous remark at the end of the extensive questioning of E.I. amounted to a "voluntary acquiescence to, or confirmation of, a [prospective] juror's removal," under *Uttecht v. Brown* (2007) 551 U.S. 1, 18. Defense counsel questioned E.I. at length and the trial court made factual findings. (See *ibid.; Wainwright v. Witt* (1985) 469 U.S. 412, 434-435 ["no one in the courtroom questioned the fact that her beliefs prevented her from sitting"]; *People v. Lynch* (2010) 50 Cal.4th 693, 733-734.)

The state also claims that *People v. Collins* (2010) 49 Cal.4th 175, 226-227, is "inapposite" because "the concerns the trial court raised about E.I. are contrary to appellant's claim raised for the first time on appeal." (RB at 113, fn. 38.) *Collins* says no such thing. In *Collins*, this Court held that the defendant's claim of prosecutorial misconduct was preserved after defense counsel submitted the matter after a colloquy between court and counsel." (*People v. Collins, supra,* 49 Cal.4th at 226-227.) In any event, until 2011, it was well-settled that an appellate challenge to a *Witherspoon/Witt* excusal was not forfeited by trial counsel's failure to object on the grounds argued by appellate counsel. (*People v. Nunez* (2013) 57 Cal.4th 1, 23 ["Where no objection is required to preserve an issue, an objection on one constitutional ground does not forfeit appellate counsel's right to argue for reversal on others"].)

The state contends that Winbush failed to preserve his claim on appeal that the trial court erred by not excusing Jurors No. 12 and 9 for cause because he did not exhaust his peremptory challenges or express dissatisfaction with the jury ultimately selected, as required under *People*

v. Thomas (2012) 54 Cal.4th 908, 935. (RB at 100, 107-110.) Winbush concedes that he did not exercise peremptory challenges against Jurors No. 12 and 9, and exercised only five of his 30 peremptory challenges before he accepted the jury. (104-RT 6635-6636, 6643, 6645, 6652-6655.)

The state, however, is mistaken that "rather than express dissatisfaction with the jury as constituted, defense counsel twice noted their satisfaction -- first, at the time the defense 'passed;' and second, after an in-chambers discussion with the trial court to confirm the parties' satisfaction with the selected panel." (RB at 108, citing 104-RT 6636, 6654-6656.) First, only defense counsel for Patterson stated that "the defense is very satisfied with the jury." (104-RT 6637.) Second, nowhere during the brief in-chambers discussion did Winbush express "satisfaction with the selected panel." (104-RT 6654-6656.) Instead, the court simply noted that counsel had all agreed that both sides had passed, and "that these 12 jurors were deemed to be trial jurors." (104-RT 6654-6656.) Nowhere is there any indication that Winbush was "satisfied" with the jury, or had withdrawn his motions to excuse Jurors No. 9 and 12 for cause. (80 RT 4834, 4838-4839 [juror # 9]; 95 RT 5972 [juror # 12].) Winbush also made three *Batson/Wheeler* motions, which the state does not even claim he forfeited. (104 RT 6635-6636, 6643, 6645.) To require more "indication" that Winbush was dissatisfied with the jury would be to exalt form over substance. Moreover, as Justice Werdegar explained, "the issue may be deemed preserved for appellate review if an adequate justification for the failure to satisfy these rules is provided." (*People v. Mills* (2010) 48 Cal.4th 158, 186, fn. 8, citing *People v. Wilson* (2008) 43 Cal.4th 1, 34 [conc. opn. of Werdegar, J.].) Here, Winbush had an

adequate justification. Unlike the defendant in *United States v. Martinez-Salazar* (2000) 528 U.S. 304, Winbush made the choice to pursue a Sixth Amendment challenge on appeal, rather than use a peremptory challenge at trial:

> After objecting to the District Court's denial of his for cause challenge, Martinez-Salazar had the option of letting Gilbert sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal. Instead, Martinez-Salazar elected to use a challenge to remove Gilbert because he did not want Gilbert to sit on his jury. This was Martinez-Salazar's choice. (*United States v. Martinez-Salazar, supra,* 528 U.S. at 315.)

The state claims that *Martinez-Salazar* is distinguishable because that case held that 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. (RB at 109.) Not so.

Here, Winbush took the risky approach left open in *Martinez-Salazar* and did not excuse two biased jurors on his jury, apparently in the hope and expectation that the courts would uphold his Sixth Amendment challenge on appeal, which is distinct from a complaint that he was forced to use a peremptory challenge. Winbush contends that this tactic is an adequate justification for the failure to use two of his peremptory challenges to excuse Jurors No. 12 and 9 whose rabid pro-death penalty views would "prevent or substantially impair" their ability to be fair to Winbush. Thus, this tactical decision should not waive the claim, as the state contends. (RB at 108-109.)

The state summarily claims that *People v. Boyette* (2002) 29 Cal.4th 381, 416-418, is distinguishable. (RB at 109.) Not so. In *Boyette*, this Court reasoned that the juror was biased because he was strongly in favor of the death penalty, indicated he would apply a higher standard ("I would probably have to be convinced") to a life sentence than to one of death, and felt that an offender (such as the defendant in that case) who killed more than one victim should automatically receive the death penalty. (*People v. Boyette*, *supra*, 29 Cal.4th at 418.) Unlike *Boyette,* where this Court found the error in failing to excuse the objectionable juror was harmless because the juror did not sit on the jury, Jurors No. 12 and 9 sat on Winbush's jury, and thus the error was not harmless. (*Id.* at 416-419.)

The jury selection process used at Winbush's trial resulted in a denial of his state and federal constitutional rights not only to an impartial jury, but to a representative jury. (*Taylor v. Louisiana* (1975) 419 U.S. 522, 528, 530.) A defendant who is convicted of a crime by a jury including even one biased member is entitled to a new trial. (*United States v. Martinez-Salazar, supra,* 528 U.S. at 316.) In "the special context of capital sentencing" (*Lockhart v. McCree* (1986) 476 U.S. 162, 182), the court's refusal to grant Winbush's challenges for cause to Jurors No. 12 and 9, who sat on Winbush's jury, skewed the sentencing process and rendered it unfair, unreliable, unrepresentative, and unconstitutional.

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

The state claims that the "record provides ample evidence of Juror No. 12's exasperation at defense counsel for badgering him during voir dire and misinterpreting responses asserting that he would need to hear all evidence, including penalty-phase evidence, before he could render a

decision about whether the death penalty were warranted." (RB at 100-103, 111, citing 95-RT 5964-5968.) Winbush disagrees.

First, the state's mischaracterization of Winbush's voir dire as "badgering" is simply overzealous advocacy. During voir dire, Juror No. 12 said he wanted to hear everything before making up his mind. (95-RT 5968.) He then said, however, 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 unequivocally 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 had answered "No, sometimes the alternative is better," in response to this question on his questionnaire: "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.)

Juror No. 12's written statement on his juror questionnaire is not determinative of his attitude towards the death penalty. When the additional facts about Beeson's murder were added, this juror unequivocally stated 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. (95-RT 5971.) 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., whom the court erroneously excused. (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"

The state argues that "there was substantial and consistent evidence that Juror No. 9's uneasiness about a young-adult-female victim would not affect her ability to be impartial in judging appellant." (RB at 111, citing 80 RT 4831, 4836-4837.) Winbush disagrees.

During voir dire, Juror No. 9 explained that 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.) She explained it would make her feel "uneasy," but not unfair. (80-RT 4836.) In making its findings, the court treated Juror No. 9's reservations about the appropriateness of

keeping her on the jury separately from her concerns about identifying with the victim. The two things troubling her were interrelated, and together they formed a strong basis for disqualifying her for bias. Simply because Juror No. 9 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. (80-RT 4834.) Because this juror, along with Juror No. 12, sat on Winbush's jury, reversal is required. (*People v. Boyette*, *supra*, 29 Cal.4th at 418.)

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

The state claims that Prospective Juror E.I. "stated at the outset of introductory questions by the trial court that this particular case 'doesn't seem to be the kind of case where I would vote for the death penalty,' and at the conclusion of voir dire, acknowledged, without ambiguity she would not return a death verdict, prompting appellant's counsel immediately to submit the matter." (RB at 111-112, citing 86-RT 5319, 5327.) Not so.

First, her last allegedly unambiguous answer -- "no" -- at the conclusion of voir dire was in response to Winbush's question: "Are you telling me that you would not want to return a verdict of death?" (86-RT 5327.) This double negative *again* indicated that E.I would be able to return a verdict of death. (86-RT 5323-5324.) The fact that defense counsel decided he had objected enough and could see the handwriting on the wall by simply submitting the matter does not waive the issue. (*People v. McKinnon*, *supra*, 52 Cal.4th at 643.)

What was particularly unfair about excusing Prospective Juror E.I., was that she wrote in her jury questionnaire that 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.)

E.I. even stated she would *always vote for death* if the crime was "intentional," but clarified that she did not mean "always." (102-CT 29008; 86-RT 5323-5324.) 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].)

What happened here was the obverse of how the court "rehabilitated" Juror No. 12. Because Juror No. 12's questionnaire indicated he would not automatically vote for death for every murder, the court allowed him to sit, despite the fact that 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. (183-CT 52307; 95-RT 5971, 5975-5976.)

Similarly, Prospective Juror E.I.'s questionnaire indicated she could be fair and impose the death penalty, but leading and deceptive questioning by the prosecutor and the court misleadingly transformed this qualified juror into a juror who could not impose the death penalty.

The prosecutor's description of the murder included various circumstances of the crime relevant only to mitigation, that the crime was "a drug deal gone bad," and another mitigation factor, the young age (19) of the defendants. (86-RT 5320-5321.) The prosecutor then objected to defense voir dire that would have presented a more balanced picture – including the defendants' criminal histories -- arguing that it invited E.I. to prejudge the case. (86-RT 5324-5325.) The result was that the court disqualified E.I. based on her prejudgment of the appropriate penalty on a record lacking facts that would have been important to her decision, especially the defendants' criminal histories. (86-RT 5330-5331.) The court erred in 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 understate the circumstances of the crime without mentioning any aggravating factors. (86-RT 5320-5321 [murder was essentially "a drug deal gone bad . . . And she ends up strangled and stabbed and robbed."].)

"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.)

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

The state repeatedly asserts that the court's rulings about these jurors were entitled to deference, relying on *Uttecht v. Brown* (2007) 551 U.S. 1, 9, for that unremarkable proposition. (RB at 110-113.) *Uttecht* also stands for the principle that "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 9.) If a juror's statements are not equivocal or conflicting, however, the trial court's ruling will be upheld only if it is "fairly supported by the substantial evidence in the record." (*Witt, supra*, 469 U.S. at 434; *People v. Virgil* (2011) 51 Cal.4th 1210, 1243-1244; *People v. Lynch* (2010) 50 Cal.4th 693, 735.)

Obviously, Juror No. 12's views would "prevent or substantially impair" his ability to be fair to Winbush. Neither the court nor the prosecutor was 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.) The remarks of Juror No. 12 were no more equivocal than the remarks of the biased juror in *People v. Boyette* (2002) 29 Cal.4th 381, 416-418, and thus the court erred in denying Winbush's challenge for cause against Juror No. 12.

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.) The state does not have a response to Winbush's reliance on *People v. Jimenez* (1992) 11 Cal.App.4th 1611, 1620-1622, where the court found good cause on very similar grounds 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." The state also does not respond to Winbush's reliance on *People v. Cleveland* (2004) 32 Cal.4th 704, 735-736, where a former police officer was 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." These remarks are very similar 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." Thus, the court also erred in denying Winbush's challenge for cause against Juror No. 9.

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

The state does not dispute that a defendant is not required to exhaust his peremptory challenges or express dissatisfaction with the jury selected in order to preserve a claim that the voir dire of prospective jurors was inadequate. (*People v. Pearson* (2013) 56 Cal.4th 393, 411; *People v. Bolden* (2002) 29 Cal.4th 515, 537-538.)

Remarkably, the state does not directly respond to Winbush's contention that the trial court excused Prospective Juror E.I. for cause without permitting adequate voir dire, and by applying a different standard than for Jurors No. 12 and No. 9. (RB at 100-114; AOB at 129-132.) The state's lack of a response should be considered a concession. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 ["In its respondent's brief, TBO expressly elected not to address its equitable indemnity theory ... Because TBO does not support its equitable indemnity theory by any meaningful argument with citation to law or the evidentiary record, it has abandoned

that theoretical basis for City's liability; it is equivalent to a concession."].) Similarly, the state simply does not address Winbush's contention that inadequate voir dire prevented the trial judge from removing only "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; AOB at 129-132.)

Because the state does not respond, Winbush stands by his opening brief with respect to the erroneous curtailing of voir dire, and the court's disparate treatment of the jurors in its voir dire. (AOB at 129-132.) In short, the court refused 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 understate the circumstances of the crime without mentioning any aggravating factors. (86-RT 5320-5321.) In contrast, the prosecutor told the jury in closing argument what he really believed about the circumstances of this unexceptional felony murder. (189-RT 14794-96 ["They are telling you this is not a bad murder. This poor woman suffered enough for a hundred murders ... This is the worst type of murder"]; see AOB at 130.)

Winbush will also address a case decided since the filing of his opening brief that reiterated the holding of *People v. Cash* (2002) 28 Cal.4th 703, 720-721, and supports his argument. *People v. Pearson* (2013) 56 Cal.4th 393, 412, stated:

> "[E]ither party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." In other words, a trial court errs in precluding all counsel

> "[from] ask[ing] jurors if they would automatically vote for or against death 'in cases involving any generalized facts, *whether pleaded or not*, that were likely to be shown by the evidence.'" (*Ibid.,* [citation omitted] [emphasis in original].)

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 *Pearson,* and was an abuse of discretion. Moreover, the trial court also erred by using two different standards in refusing to excuse Juror No. 12 by relying on his questionnaire, and Juror No. 9, while excusing Prospective Juror E.I. by ignoring her questionnaire.

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 contends that Prospective Juror E.I. "gave equivocal and conflicting responses throughout her questionnaire and voir dire." (RB at 112-113, 105-107, citing 102 CT 29006, 29008; 86 RT 5318-5328.) Winbush disagrees.

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 the prosecutor's misleading questions. (102-CT 29006-09; 86-RT 5318-5329.)

The fact Prospective Juror E.I. expressed difficulty voting for the death penalty is far from being a disqualifying fact. (86-RT 5323-5324; see *People v. Stewart* (2004) 33 Cal.4th 425, 442-443, 446, 449 [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].)

Here, Prospective Juror E.I.'s answers were no more ambiguous or equivocal than those of Juror No. 12, and were not ambiguous or equivocal on her questionnaire until the prosecutor and the court made them appear so. (102-CT 28973, 29006-08; 86-RT 5323-5324.) Moreover, deference does not undercut the requirement that "substantial evidence" must support the trial court's conclusion that a juror held views that would prevent or substantially impair their ability to perform their duties as jurors. (RB at 111; *People v. Cowan* (2010) 50 Cal.4th 401, 437-445.) The state complains when Winbush allegedly asked too few questions and then complains when Winbush allegedly asked too many questions, alleging that Winbush was badgering the witness. (RB at 111, 113.) This is simply overzealous advocacy in an attempt to divert attention from the prosecutor's and the court's errors. Winbush did nothing wrong during voir dire.

Even giving deference to the trial court, there is not substantial evidence in the record to support a finding that the views of Prospective Juror 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"].) The state ignores these statements and emphasizes the ambiguous answers given in response to *misleading* questions.

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, E.I 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 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.) This double negative indicated that E.I. could return a death verdict. Again, this is not evidence sufficient to disqualify this juror.

The state has a habit of simply ignoring the many cases upon which Winbush has relied. (RB at 112-114.) For example, the state has no response to Winbush's claim that his case is similar to *People v. Heard* (2003) 31 Cal.4th 946, 966, in which this Court found that the granting of the prosecution's challenge for cause was erroneous. (See AOB at 137-138.) As in *Heard*, Prospective Juror 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.) 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.)

The state also has no response to Winbush's reliance on *People v. Kaurish* (1990) 52 Cal.3d 648, 699, where this Court explained that a "prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law." (See AOB at 138.)

The state also has no response to Winbush's argument that a case involving the same trial judge as in Winbush's case illustrates Judge

Horner's inclination to excuse jurors who simply express difficulty with condemning a murderer to death. (AOB at 139-140; *People v. Martinez* (2009) 47 Cal.4th 399, 456-467 [conc. & dis. opn. of Moreno, J.].) For the same reasons explained by Justice Moreno, Judge Horner improperly excused Prospective Juror E.I. even though she unambiguously said 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. (*Ibid.;* 86-RT 5319.)

Again, the state has no response to Winbush's reliance on *People v. Pearson* (2012) 53 Cal.4th 306, 330-332. (AOB 140-142.) Thus, Winbush stands by his opening brief. (AOB 140-142.) Just as in *Pearson*, Prospective Juror 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.

Finally, the state claims that "[e]ven if error occurred, defense counsel's improper expression of his personal view of the death penalty, untethered to any evidence, was improper, and would also have provided sufficient cause to excuse this juror." (RB at 114, citing *People v. Ghent* (1987) 43 Cal.3d 739, 772 ["prosecutors should refrain from expressing personal views"].) *Ghent* is not authority for this untethered proposition which did not involve jury selection and which actually cautioned that, in the future, "prosecutors should refrain from expressing personal views which might unduly inflame the jury against the defendant." Here, nothing defense counsel said had any chance of inflaming E.I. or making her

unsuitable to be a juror. In response to E.I. ambiguously stating: "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 –," defense counsel made an off-the-cuff, ingratiating, and ultimately ambiguous remark: "I'm not trying to ask you to do that. I agree, I couldn't either." (86-RT 5327.) This exchange certainly did not give the court cause to excuse E.I., particularly because the trial court did not rely on counsel's slip of the tongue as a reason to excuse her. (*People v. Bracey* (1994) 21 Cal.App.4th 1532, 1542 [because the appellate court was reviewing the exercise of a trial court's discretion, it "would be incongruous ... to rely on reasons not cited by the trial court. Otherwise, we might uphold a discretionary order on grounds never considered by, or, worse yet, rejected by the trial court"].)

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 state does not contest that if the court erroneously excused Prospective Juror E.I. for cause, the error automatically compels the reversal of the penalty phase without any inquiry as to whether the error actually prejudiced defendant's penalty determination. (AOB at 142-144; *People v. Riccardi* (2012) 54 Cal.4th 758, 783.)

Winbush stands by his opening brief with respect to his tactical decision to acquiesce to two biased jurors on his jury to allow him to pursue a Sixth Amendment challenge on appeal. (AOB at 142-144.)

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

A. Winbush's Admissions Were Involuntary

The state disputes Winbush's claim of coercion:

> "Appellant's claim of coercion rested on a determination of credibility, namely whether appellant was truthful in claiming that officers issued threats and promises of leniency regarding the death penalty to prompt his confession, or whether the officers were truthful in testifying that no such discussion occurred.... The trial court ruled, at great length and in detail, that all the government officials who interviewed appellant were truthful and credible, and that appellant and his defense expert, Dr. Ofshe, were not credible." (RB at 127 [citations omitted].)

Winbush concedes that the trial court's positive credibility findings about Sergeants Olivas and McKenna and negative ones about Dr. Ofshe and Winbush are damaging to his argument, despite tending to show a degree of pettiness and personal animus. (RB at 124-130.) Nevertheless, Winbush reiterates that the totality of the circumstances indicates that Winbush's confessions were induced by police coercion and were 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.)

Full consideration of all the factors compels a determination that Winbush's confessions – during lengthy and repeated interrogations and a period of isolation for over 16 hours – were involuntary because his will was overborne by the suggestive and coercive techniques used by the interrogators, which exploited his vulnerabilities. "Periods of isolation" is a better description than what the court and the state kept referring to as "breaks." (RB 116, 131.) Far from breaking up the interrogation, such intervals are definitely a part of the process of breaking down the suspect, as the officers disappear for intervals of time, leaving the suspect in the same psychological environment as the questioning – away from the familiar, under the control of others, and without support – to worry about what is happening to him and what the officers are doing in their absences. (15-RT 906, 920-921, Exhibit 13; 21-RT 1334.)

Coerced confessions are inadmissible under the Fourteenth Amendment "not because such confessions are unlikely to be true but because the methods used to extract them" are offensive. (*Rogers v. Richmond* (1961) 365 U.S. 534. 540–541.) The use in a criminal prosecution of involuntary confessions constitutes a denial of due process of law under both the federal and state Constitutions. (*Lego v. Twomey* (1972) 404 U.S. 477, 483; *People v. Neal* (2003) 31 Cal.4th 63, 67-68.)

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

Winbush disagrees with the state's claims that even if Winbush's confession was coerced, its admission was harmless beyond a reasonable doubt. (RB at 134-136.) The state first suggests: "Appellant's testimony at trial allowed admission of all his prior statements for purposes of impeachment." (RB at 134.) Not so. *Coerced* statements cannot be

used to impeach. (*People v. Underwood* (1964) 61 Cal.2d 113, 124 ["the prosecution [is] precluded from impeaching any witness by the use of an involuntary statement"]; *People v. Neal*, *supra,* 31 Cal.4th at 67-68; cf. *Harris v. New York* (1971) 401 U.S. 222 [a statement inadmissible for violating *Miranda* may be used to impeach a defendant's credibility if the statement is otherwise trustworthy].)

The state next alleges that

> Other witnesses, too, placed him at the crime scene. Tyrone Freeman's testimony established that appellant had confessed to the murder and provided details known only to the murderer. Patterson's taped confession ... also implicated appellant.
>
> Notwithstanding Patterson's attempt to recant some of his statements at trial, he admitted that others had told him that appellant was bragging about having committed the murder. ... Patterson knew, for example, that Beeson had been bludgeoned in the back of the head with the gun, and that there was enough blood that after the crime that appellant had to change clothes, and Patterson needed to change his shoes. (RB at 134-135 [citations omitted].)
>
> There was abundant circumstantial evidence that connected appellant to the crime. Appellant's electronic monitoring device showed he left the house shortly before the crime. Botello and appellant testified about appellant's desire to obtain a gun, and Botello testified that appellant told him he wanted the gun to do a robbery. Officers Kozicki and Banks testified that witnesses told them that appellant wanted to rob Botello and to kill people. Botello testified that appellant had given him a deadline of December 22, 1995 and he and Smith both spent time dodging appellant that day. (RB at 135 [citations omitted].)

The jury, however, did not find Patterson credible, and, in the absence of Winbush's own confessions, was likely to reject Patterson's efforts to blame Winbush, 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 insufficient to convict him in the absence of his confessions.

These bits of circumstantial evidence -- some evidence of tension between him and Botello and a plan to rob someone else -- do not connect Winbush specifically to the crime. Botello, after all, was a drug dealer, and the robbery could have been committed by just about anyone in the neighborhood who knew he had drugs and money in his apartment.

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* (1991) 499 U.S. 279, 296.)

The state next contends:

> Moreover, assuming error only as to appellant's statements to law enforcement, then appellant's phone call to his mother is additional evidence undermining his defense theory since he confessed to her too, and told her he was "telling the story straight" to the police. Indeed, appellant testified that he told his mother that he told her "the truth," even after she protested initially that she did not want to know. He also told his mother, contrary to his claim that Patterson had falsely accused him of the crime, that he and Patterson not only had committed the crime together, but that he alone was culpable for having stabbed Beeson. (RB at 135-136 [citations omitted].)

It is remarkable that state relies on Winbush's "truthful" statement to his mother with respect to the incriminating statements, but then disputes that Winbush was telling the truth when he told his mother that he had confessed to avoid the death penalty. (21-RT 1350-1356.) 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.) Moreover, there is no evidence sufficient to dissipate the taint of the initial illegal conduct coercing Winbush's confessions prior to Winbush's phone call with his mother and the numerous unrecorded interrogations. Thus, all subsequent conversations are the inadmissible fruit of the unrecorded coercive interrogations. (*People v. Beardslee* (1991) 53 Cal.3d 68, 108; *People v. Montano* (1991) 226 Cal.App.3d 914.)

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.) In fact, the state refers to Winbush's "five taped confessions," as part of the alleged "overwhelming evidence of guilt." (RB at 153.)

The state has no specific response to Winbush's contention that the introduction of these wrongfully-obtained statements was not harmless error with respect to the imposition of the death penalty. (RB at 114-136; AOB at 166.) 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 this reliance on Winbush's statements at the penalty phase, it certainly cannot be said that the admission of his statements in contravention of his constitutional rights was harmless beyond a reasonable doubt, at least with respect to the penalty phase. (*People v. Neal, supra,* 31 Cal.4th at 86-87.)

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 Court Abused Its Discretion By Denying Severance

The state argues that the trial court did not abuse its discretion in refusing to sever his case from Patterson's case "since the defenses of appellant and his codefendant, far from antagonistic, were complimentary." (RB at 140-141, citing *People v. Diggs* (1986) 177 Cal.App.3d 958, 972.) The state explained:

> Notwithstanding their statements to police implicating each other in the murder, appellant and Patterson each testified that they had made false confessions and that they were not present at the murder. Far from offering a defense precluding the other party's acquittal; each defendant corroborated the other party's theory that police had individually coerced them to provide a false confession. Contrary to appellant's claim, Patterson did not "abandon" his claim that he was absent during the crime. Rather, using the metaphor of a road that forked in two directions, Patterson argued alternative exculpatory theories. (RB at 140-141 [citations omitted].)

Winbush disagrees. As recently summarized by this Court:

> The court may, in its discretion, order separate trials if, among other reasons, there is an incriminating confession by one defendant that implicates a codefendant, or if the defendants will present conflicting defenses." "Additionally, severance may be called for 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.'" *People v. Souza* (2012) 54 Cal.4th 90, 109 [citations omitted].)

In Winbush's case, counsel for Patterson successfully placed the blame on Winbush, while deflecting blame from himself. (156-RT

12236-37.) The state does not directly respond to Winbush's contention that the court should have impaneled separate juries for the defendants to minimize any impact the defendants' respective trial strategies might have on the other defendant, as was done in *People v. Cummings* (1993) 4 Cal.4th 1233, 1286-1287. (AOB 175-176.)

1. The Anonymous Call Of Julia Phillips

The state disputes Winbush's claim that admission of Julia Phillips's anonymous phone call during the guilt phase for a limited purpose against Patterson was unduly prejudicial and warranted severance, in part because the jury was instructed on the limited purpose of this evidence immediately before the tape was played and must be presumed to have followed the instruction. (RB at 142-143, citing 127 RT 9697-9698.) The prosecutor introduced a taped call from Phillips who said that she had information about a "young Caucasian girl" being robbed and stabbed in Berkeley on the day after Christmas, and that 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 79-82; 127-RT 9694-9696, 9698; 130-RT 9946-9948; 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 it arguably gave Patterson a motive to assault and attempt to kill Phillips, thus tending to prove Patterson's consciousness of guilt with respect to those crimes. (139-RT 10755.) It was unrealistic to believe that the jury would not consider this highly prejudicial evidence against Winbush -- an alleged confession -- despite the limiting instruction.

It seems like an almost impossible mental exercise for the jury not to use this evidence against Winbush while still finding it relevant on the issue of Patterson's consciousness of guilt. Phillips's statement mentioned only Winbush, not Patterson. To get from that statement to a conclusion that Patterson's response to it reflected his own consciousness of guilt required them to conclude that Winbush's confession was true, because Phillips's statement could only implicate Patterson if he was involved in the homicide with Winbush. This testimony would not have been admitted at a separate trial.

2. The Jailhouse Testimony Of Tyrone Freeman

The state also disputes Winbush's claims that the fact that Patterson's counsel elicited testimony during examination of various witnesses that implicated Winbush warranted severance. "The mere fact that a damaging cross-examination that the prosecution could have undertaken was performed instead by codefendant's counsel did not compromise any of defendant's constitutional or statutory rights." (RB at 142-143, citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1208.) Winbush disagrees.

Mid-trial, Patterson virtually 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, after the prosecutor had earlier stated that he was not intending to call Freeman as a witness, because he was an unreliable jail-house informant. (156 RT 12164-88; 10-CT 2693; 18-RT 1084, 1094.) Patterson inexplicably introduced this testimony about Winbush's alleged confession, even though it implicated both of them. (155 RT 12083-85.)

The state argues that Winbush's position that the prosecutor would never have introduced the testimony of Tyrone Freeman in a separate trial was speculation and that Winbush's citation to the record "does not support his claim that '[t]he prosecutor had decided that he was not intending to call Freeman as a witness, because he was an unreliable jail-house informant.'" (RB at 142, citing AOB 169, 175.) Not so. First, Winbush argued only that the "prosecutor had decided that he was not intending to call Freeman as a witness, because he was an unreliable jail-house informant." (AOB 169, 175.) Here are the prosecutor's own words: "It is not my intention at this time to use Mr. Freeman." (18-RT 1094.) "I can tell you it would be my preference not to call him. And when I have a choice, I don't call jail-house informants. It is just easier that way. So, I don't want to close off my options, but leaning pretty heavily in that direction." (17-RT 1085-1086.) There is no evidence to support the state's speculation that the prosecutor might have introduced Freeman's testimony in rebuttal, if Patterson had not. (RB at 142-143.)

The state challenges Winbush's claim that he was entitled to be tried separately at the penalty phase because he was judged more harshly next to his codefendant and prejudiced as to individualized sentencing . (RB at 144-145, citing AOB 173-174.) The state claims that "the record provides weak support for this claim." Not so. Patterson's attorneys strenuously and successfully argued to the jury that Patterson should be spared the death penalty, because Winbush was largely responsible for the murder and was incorrigible. (AOB 171-172, citing 189-RT 14739-40; 14757-58; 190-RT 14820-23.)

The court's discretion in ruling on a severance motion is guided by the factors enumerated in *People v. Massie* (1967) 66 Cal.2d 899, 917.

(*People v. Souza*, *supra,* 54 Cal.4th at 110; see AOB at 174-175.) Applying these factors, severance was required because Winbush was severely prejudiced by the prejudicial association with Patterson, because they had conflicting defenses, which resulted in highly prejudicial testimony that otherwise would not have been admitted at Winbush's trial. Neither Patterson's incriminating taped statements nor his trial testimony blaming Winbush, would have been admissible at Winbush's separate trial, where Patterson would have had no reason to testify. (AOB at 169-172.)

B. The Error Requires Reversal

The state agrees that 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." (RB at 139, 145; see *People v. Coffman* (2004) 34 Cal.4th 1, 40-44.)

The state relies on the fact that because the jury gave Patterson a LWOPP sentence, the jury must have assessed independently the appropriateness of the death penalty for Winbush and Patterson. (RB at 144-145.) Unlike *People v. Ervin* (2000) 22 Cal.4th 48, 95-96, 78-79, and *People v. Taylor* (2001) 26 Cal.4th 1155, 1173, the split verdicts in Winbush's case indicated that Patterson's attempt to pin the blame on Winbush worked. Winbush did not deserve a more severe penalty than his codefendant. It was Winbush alone who had had a troubled childhood, mainly in state custody; it was Winbush alone who had no family support. (See *Boyde v. California* (1990) 494 U.S. 370, 382 ["a disadvantaged background" or "emotional and mental problems" are mitigating].) Simply because the jury found Winbush killed Beeson is not enough by itself to condemn him to a death sentence that his cohort escaped.

In *United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 897, the court distinguished *Zafiro v. United States* (1993) 506 U.S. 534, 539, and reversed for the following reasons:

> "[A]lthough the district court's initial denial of Mayfield's severance motion was understandable, based on pretrial representations made by the government about the evidence that would be admitted, the district court abused its discretion when at trial it gave Gilbert's counsel free rein to introduce evidence against Mayfield and act as a second prosecutor. Gilbert's counsel's trial tactics necessitated severance or some alternative means of mitigating the substantial risk of prejudice."

Similarly, Winbush was severely prejudiced because the court gave Patterson's counsel free rein "to introduce evidence against [him] and act as a second prosecutor." In addition, the consolidation of the codefendants led to a distortion of the evidence suggesting Winbush was far more culpable than Patterson, and which unfairly bolstered the prosecution's case against Winbush. Had Winbush received a separate penalty trial, 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. (See ARB at 4-9; AOB at 176-178.)

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

The state argues that Winbush's "claims based on federal constitutional violation are forfeited by his failure [to] assert a specific or timely objection." (RB at 153, citing *People v. Riggs* (2008) 44 Cal.4th 248, 304.) Not so. The *Riggs* court itself cited the controlling authority that "defendant may argue an additional legal consequence of the asserted error in overruling the Evidence Code section 352 objection is a violation of due process." (*People v. Partida* (2005) 37 Cal.4th 428, 436-438; see also *People v. Lopez* (2013) 56 Cal.4th 1028, 1045-1046, fn. 6 [defendant's unspecified objection on constitutional grounds was sufficient to preserve the issue on appeal].) As this Court has repeatedly held, a constitutional claim is not forfeited on appeal when, as here, "the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809; *People v. Carasi* (2008) 44 Cal.4th 1263, 1289 fn. 15; *People v. Carey* (2007) 41 Cal.4th 109, 126-127 [Evid. Code § 352 objection preserves constitutional claims on appeal].)

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.) 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. (See *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548-549.)

The state argues that Winbush's "claim that Beeson's nakedness was misleading or inflammatory is specious as nothing about the crime-scene photos even remotely suggested there was a sexual angle to appellant's crime." (RB at 150-151.) Winbush disagrees. 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's dead body was fully clothed when found. (108-RT 7054, 7084-7086.)

The prejudicial nature of the evidence, however, was substantial. The photographs of Beeson's nude body, at a minimum, were misleading as they subliminally suggested a sexual component to the murder, when there was no evidence of such. 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 graphic, nude 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* (1997) 16 Cal.4th 1, 18.)

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

The state argues that the photographs were simply "demonstrative" of the evidence, and harmless in any event because of the "overwhelming evidence of guilt." (RB at 153.) Winbush disagrees for the reasons explained in his opening brief and earlier in this brief. (AOB at 184-186; ARB at 4-9.)

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

The state essentially argues that routinely stationing bailiffs next to all capital defendants who testify is permissible, even though it is based on nothing more than "generic policy." (RB at 156-158.) The state also argues that the trial court's showing in Winbush's case is "more analogous to the showing made in *Stevens* than in *Hernandez*." (RB at 157.) Not so.

In *People v. Stevens* (2009) 47 Cal.4th 625, 643, this Court held that "the trial court must exercise its own discretion" in stationing a security officer at the witness stand, and "may not simply defer to a generic policy." In *Stevens*, the trial court met this standard when it stated reasons for its decision, and demonstrated that it had weighed the need for this security measure against potential prejudice to the defendant. (RB at 156, citing *Stevens, supra,* 47 Cal.4th at 642-643.) There was no similar evidence in Winbush's case; thus the trial court violated even this minimal stricture by simply deferring to its general practice and the alleged generic policy of the Alameda County Superior Court. (28-RT 1802-1805.) Similarly, in

People v. Hernandez (2011) 51 Cal.4th 733, 742-744, this Court reaffirmed that the trial court erred in elevating a standard policy above individualized concerns and basing its decision on a generic policy. The *Hernandez* Court explained: "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." (*Id.* at 744.)

The state claims that "unlike *Hernandez*, which applied the practice routinely to defendants in all criminal cases, the trial court in this case limited its practice to "defendants *with the charges we have before us*." (RB at 157, citing 28 RT 1803 [italics added by the state].) This is a distinction without a difference. The state tries to distinguish *Stevens* and *Hernandez*, by arguing that the "trial court was well aware of the gravity of those charges, along with allegations of criminal activity involving force, violence, or threats of violence pertaining to 44 uncharged incidents from a hearing, concluded one day earlier, on admission of Factor B evidence." (RB at 157, citing 16 RT 1697.) This is a ridiculous claim.

First, the trial court gave no such reasons, and "an appellate court will not examine the record in search of valid, case-specific reasons to support the order." (*People v. Hernandez*, *supra,* 51 Cal.4th at 744.) Second, neither *Stevens* nor *Hernandez* held that a generic policy to station a security officer at the witness stand of a capital defendant is permissible, simply based on the fact that he or she is charged with capital crimes. Rather, factors justifying extraordinary security measures, even in a capital case, 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 [capital case].)

Even though the court had heard such evidence in the form of the previous day's hearing on various incidents of Winbush's out-of-control behavior, including toward deputies, there is no evidence in the record that the court considered this evidence. Instead, the court applied the general policy not only to Winbush but to Patterson, about whom no allegations of out-of-court misconduct had been made.

Because the trial court conceded that Winbush was a "perfect gentleman" in court, and because there was no evidence he was not, 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.)

The state admits that this procedure applied only to Winbush and Patterson, the only in-custody witnesses to testify, but then imagines that it lessened the prejudice because "the court stated it would apply the same practice to all in-custody witnesses, including witnesses for the prosecution, thus crafting a procedure that avoided undue prejudice to the defense." (RB at 156-157, citing 28 RT 1805.) The court's ruling belies the state's attempt to argue that the court did not simply follow a generic "practice," and it certainly did not lessen the prejudice to Winbush that only he and Patterson were actually subjected to this security measure; it highlighted the prejudice.

The state finally contends that it was not "reasonably probable" that placement of a sheriff's deputy near [Winbush] when he testified affected

the verdict, and that any error was "harmless beyond a reasonable doubt," because of the "overwhelming" evidence. (RB at 158.) Winbush stands by his contention that this is federal constitutional error, which must be reviewed under *Chapman v. California* (1967) 386 U.S. 18, 24. (AOB 190-191.) Whether 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 on how the jury judged his credibility – including his claim that his confessions were coerced. Being tailed by the bailiff, even as Winbush sat in the witness chair -- as if he might jump on a juror unless closely watched -- cannot help but have prejudiced him. (*People v. Stevens*, *supra,* 47 Cal.4th at 651 [dis. opn. of Moreno, J.] ["the defendant need not demonstrate actual prejudice to make out a due process violation [for this error]. The State must prove 'beyond a reasonable doubt that the . . . error complained of did not contribute to the verdict obtained.")

For the same reasons, reversal is required here, because the state has not and 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 while Winbush testified.

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 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

The state claims that Penal Code section 1102.6 authorized Beeson's mother and sister to watch the trial, despite the fact they were crying and were victim-impact witnesses. (RB at 161-165; 106-RT 6894-6898; 148-RT 11611.) Not so. A statute cannot trump Winbush's federal constitutional right to a fair penalty determination. (See *Holbrook v. Flynn* (1986) 475 U.S. 560, 572 [spectator conduct violates the federal Constitution if it is "so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial"].)

The state relies on *People v. Myles* (2012) 53 Cal.4th 1181, 1214-1216, which held that the record was insufficient to show the defendant was prejudiced by the presence of the victim's wife at trial, even though jurors observed her nodding during the testimony of a prosecution witness, crying, and receiving comfort from support persons. (RB at 162-164.) Here, the trial court should have required the prosecutor to choose: either allow Beeson's mother and sister to watch the trial, which would have conveyed their emotions about Beeson, or testify, but not both.

Winbush stands by his opening brief that 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." (AOB at 199-200; see *People v. Lucero* (1988) 44 Cal.3d 1006, 1022-1024.)

B. 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 state claims that cases such as *People v. McKinnon* (2011) 52 Cal.4th 610, 690, and *Payne v. Tennessee* (1991) 501 U.S. 808, 825, [*Payne*] authorized the victim impact evidence. (RB at 165-167.) The state argues that the "rationale for allowing victim impact evidence discussed in *Payne* -- counteracting the mitigating evidence offered by a defendant -- applies with equal force here. The defense had no issue asking jurors to compare appellant with his victim in seeking their sympathy." (RB at 166.)

Winbush disagrees. The prosecutor in Winbush's case crossed the line by requesting a death verdict based significantly on an invidious comparison between the societal worth of the deceased and the societal worth of the defendant. 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.

The state contends that Winbush's "claim that 'racism, subliminally and explicitly, infected and permeated [appellant's] trial' is staunchly contradicted by the record," and specious as "demonstrated by the jurors' decision not to impose the death penalty against Patterson who was also

an African-American man found guilty of murdering the same victim." (RB at 167-169, 178.) The state also argues that Winbush's contention that victim impact evidence was designed to appeal to racial prejudice is without support in the record, as if only overtly racist appeals are forbidden. (RB at 167-169.) The state argues it was sufficient that the trial court granted Winbush's request to include a question in the juror questionnaire specifically designed to elicit racial bias based on the defendants as young black males, and the victim as a young white female. (RB at 178, 168-169, & fn. 56, citing 50 RT 3223-3224; 9 CT 2419.) Winbush disagrees.

Simply because the racism was hidden and subtle does not mean it did not exist. 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. (AOB at 209-210.) 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. 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 evidence and arguments, racism infected and permeated Winbush's trial. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 308-314 [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]. Evidence which glorified the homicide victim and emphasized her virtues exacerbated this disparity.

The state claims that *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564 is "inapposite," because Winbush "fails to show how the State acts arbitrarily, or treats him differently from other defendants accused of murder." (RB at 167.) Winbush has argued that the facts of his case are no worse than the average felony murder, which would not have resulted in a capital prosecution in most jurisdictions. Case law, however, precludes Winbush from showing how the state acted arbitrarily and treated him differently than other defendants accused of similar murders. (See, e.g., *People v. Lang* (1989) 49 Cal.3d 991, 1043 [intercase proportionality review is neither required nor authorized under California law]; *People v. Allen* (1986) 42 Cal.3d 1222, 1285-1288 [equal protection does not require "disparate sentence" review of death sentences under Pen. Code, § 1170, subd. (f)]; *Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [United States Constitution does not require such review].)

The state does not have a response to Winbush's footnote that there is a "disquieting similarity between the underlying problems of Winbush and Beeson." (See AOB at 209-210, fn. 32.) 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.

C. 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 state argues that admission of the testimony and documentary victim impact evidence in this case was "well within constitutional standards and neither excessive nor inflammatory." (RB at 169-171.) Winbush disagrees.

The victim impact evidence in this case was not limited to a recital of the virtues and achievements of Beeson herself; it was voluminous, detailed, and emotionally-charged; Beeson's mother and sister testified at length regarding the grief, pain, and enduring sense of loss they suffered as a result of her death. (AOB at 39-42.)

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 fact Erika's father, Fred, appeared "totally devastated;" "the life just kind of went out of him," and died six months after Erika's death. (177-RT 14051-52.) This testimony exceeded acceptable limits. (*People v. Brady* (2010) 50 Cal.4th 547, 577-578 [improper for the victim's sister to testify that their mother had given up on life six months after the

murder]; *People v. Carrington* (2009) 47 Cal.4th 145, 197 [trial court correctly told a witness it was improper to speculate that the victim's death may have contributed to the death of the victim's mother].)

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 a video of her life played at penalty phase closing argument. 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 evidence was so out of proportion to the evidence introduced in other cases as to shift the focus of the jury from "a reasoned moral response" to Winbush's personal culpability and the circumstances of his crime (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319), to a passionate, irrational, and purely subjective response to the sorrow of the surviving Beeson family members. (See *Cargle v. State* (Ok.Cr.App. 1995) 909 P.2d 806, 830 ["The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process."]')

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 Beeson's life approved in *Payne*, *supra*, 501 U.S. at 827. (See Exhibit 38, Court Exhibit 105.) It did not merely humanize Beeson; 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) 809F.2d 702, 749 [emphasis in original] [conc. and dis. opn. of Johnson, J.].) There was no way defense counsel could counter the highly emotional effect this evidence had on Winbush's jury and its penalty determination, particularly its use in penalty phase closing argument. (188-RT 14692, 14704-06.)

D. The Trial Court Erred in Admitting Evidence Concerning Erika's Funeral and Visits to Her Grave

The state argues that the trial court correctly overruled Winbush's objections for the reasons it stated, and with respect to one matter, that Winbush had forfeited his claim that Beeson's father "kept stroking the top of the box" that contained Beeson's remains, because defense counsel stated he had no objection "to the stroking of the box." (RB at 171-176, citing 44 RT 2753; *People v. Partida* (2005) 37 Cal.4th 428, 435.) Winbush disagrees, as Beeson's father stroking the box was the least of the prejudicial testimony. 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 made Lisa very angry, because she thought the funeral home could have handled it better. (177-RT 14065.)

This evidence concerning Beeson's funeral and visits to Beeson's grave by her sister Lisa was particularly prejudicial because it exceeded "a quick glimpse" of Beeson's life under *Payne*, and it inappropriately drew the jury into the mourning process. (AOB at 214-215.)

E. The Admission Of The Misleading Eighteen-Minute Videotape Denied Winbush Due Process

The state argues that admission of videotapes or video montages of a crime victim at penalty phase closing argument was proper under this Court's precedent, and was not inflammatory and confusing. (RB at 178-180.) The state also argues that it somehow is relevant that the video was not received in evidence, but rather was used only as a demonstrative aid for closing argument, and consisted only of selected evidence already presented. (RB at 178, citing 183-RT 14425, 14427; Court's Exh. 105.) Winbush disagrees.

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, and *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 use of victim impact videos, such as the one in Winbush's case, injected excessive emotionalism into the capital sentencing process, and was editorialized evidence because the very point of using a victim impact video is to manipulate the emotions of the viewer. (AOB at 219-220.)

The montage in this case was more inflammatory than the "usual" nostalgic memorial put together by a victim's family. This montage was made by the prosecutor and included types of negative, inflammatory material a family probably would not have, such as photographs of Beeson's body at the crime scene, and voiceovers from the defendants' confessions.

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.

F. The Victim Impact Evidence And Videotape Were Prejudicial

The state contends that any possible error was harmless because the jury imposed a death sentence on Winbush alone, thus demonstrating that the evidence did not divert the jury's attention from its proper role or invite an irrational, purely subjective response. (RB at 180-181.) Moreover, the state argues that the trial court summary of the evidence in aggravation against Winbush was overwhelming in quantity and quality and evidence of circumstances in mitigation was weak, and thus harmless beyond a reasonable doubt. (RB at 188-181, citing 196-RT 14976-15019.) Winbush disagrees for the reasons explained in his opening brief and this brief. (AOB at 221-223; ARB at 4-9.)

The improperly admitted victim impact evidence and the prosecutors' exploitation of it during closing arguments, was not harmless error beyond a reasonable doubt. A significant portion of the prosecution's penalty phase evidentiary presentation was devoted solely to victim impact evidence. (AOB 204-205.) Thus, the error of admitting this victim-

impact evidence – which far exceeded the "quick glimpse" of Beeson's life -- and the prosecutor's argument was not harmless beyond a reasonable doubt. (*Payne, supra,* 501 U.S. at 822-823, 825, 830-831, fn. 2 [conc. opn. of O'Connor, J.].)

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'S ABILITY TO RECALL, NOT FOR THE TRUTH OF THE MATTER

A. 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

The state claims that there was sufficient evidence that Winbush's three assaults on Phillips were crimes involving violence or the threat of violence under section 190.3, subdivision (b). (RB at 182-184.)

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, though she admitted that he never beat her or hit her. (170-RT 13360-76, 13386.) This ambiguous, inconsistent, testimony, some of it without foundation (e.g. she thought Winbush was "very violent"), did not satisfy the "crime" and/or "violence" requirement of section 190.3, 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.) Winbush stands by his opening brief that this was not substantial evidence from which a jury could conclude beyond a reasonable doubt that violent criminal activity occurred or was threatened. (AOB at 224-226.)

B. 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

The state argues that the "trial court reasonably exercised its discretion in precluding the defense from further examination without a showing that it had a reasonable and good faith basis to inquire further once Julia Phillips denied having asserted she was raped, regardless whether the assertion was true or false," and reasonably denied Winbush's request for a continuance. (RB at 186-187.) Winbush disagrees.

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 improperly sustained the prosecutor's objection under Evidence Code section 352. (170-RT 13391-99.) Winbush argued he had a right to impeach Phillips with a prior false report of rape. (171-RT 13406-32; see *People v. Randle* (1982) 130 Cal.App.3d 286, 295-296.)

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 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 state argues that defense counsel was on notice that the prosecutor would be presenting Philips's testimony and did not exercise due diligence to secure the witnesses. (RB at 187.) Winbush, however, could not have anticipated that the court would refuse to allow him to cross examine Philips on her false rape claim unless he laid a foundation for the cross in a hearing with witnesses to the false accusation. This is a not a normal requirement for merely showing a good faith basis for a cross examination question. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1170-1171 [the prosecutor need not prove acts of misconduct to inquire of a character witness whether he has heard of such misconduct, so long as the prosecutor has a good faith belief that misconduct actually took place].)

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.) 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 alleged 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].)

C. The Court Deprived Winbush Of His Due Process Right To A Fair Penalty Hearing When It Permitted Highly Inflammatory Evidence Purportedly To Support Phillips's Ability To Recall, Not For The Truth Of The Matter; And The Limiting Instruction Was Ineffective

The state contends that after "extensive cross-examination attacking Phillips's memory pertaining to various police reports, the trial court correctly admitted the challenged evidence for the limited purpose of establishing her ability to recall the events on the day she made an anonymous call to police. (RB at 188-195.) Winbush disagrees.

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. (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's 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.)

The marginal probative value of this testimony paled in comparison to this 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's 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, but 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.)

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 unchallenged witness statements that went to the core of his theory of guilt, knowing the jurors would be unable to ignore their content. (*People v. Bell* (2007) 40 Cal.4th 582, 608, *People v. Song* (2004) 124 Cal.App.4th 973, 982-983; *People v. Coleman* (1985) 38 Cal.3d 69, 92-93.)

Here there was no evidence of unavailability of Charles or Lakeisha, and Winbush had no opportunity to cross-examine these witnesses. (*Crawford v. Washington* (2004) 541 U.S. 36, 59 [*Crawford*] ["Testimonial statements of witnesses absent from trial have been

admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine"].) 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.)

The state claims the statements by Charles to Lakeisha, and by Lakeisha to Phillips, implicating Winbush in the murder, were not prejudicial given their limited purpose because the trial court reasonably admitted this evidence as relevant to the Factor B crimes against Phillips, particularly because Winbush had already been found guilty of Beeson's murder. (RB at 195-196.) The state also claims that any error was harmless because the jury was well-aware from all of Phillips's testimony that she "had a strong motive for favoring the prosecution with [her] testimony," and her anonymous call to police reporting Winbush's complicity in the murder was not based on personal knowledge. (RB at 197.) Winbush disagrees. If the jury had any residual doubts about Winbush's guilt, this hearsay evidence would have dispelled them.

Finally, as usual, the state claims that "the evidence in aggravation against appellant was overwhelming in quantity and quality, and the evidence in mitigation was weak, making any error harmless beyond a reasonable doubt." (RB at 197, citing 196-RT 14976- 15019.) Winbush disagrees for the same reasons explained at the start of this brief. (ARB at 4-9.)

X. THE COURT DEPRIVED WINBUSH OF HIS DUE PROCESS RIGHT TO A FAIR PENALTY HEARING WHEN IT OVERRULED HIS 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. Winbush Adequately Objected

The state first claims that with "the exception of a general reference to appellant's 'attempted arson at age 8,' appellant fails to identify and does not provide record citations for specific testimony he claims was erroneously admitted." (RB at 198, citing *People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) Not true. Winbush specifically referenced not only the attempted arson at age 8, but many other juvenile offenses. (AOB 234-237, 42-48.)

The state claims that Winbush forfeited the issue by failing to object. (RB at 199-200.) Not so. Winbush specifically objected: "to ask the jury to impose the death penalty for conduct done when someone was 11-years old, I think is a violation of due process under the state and federal constitution." (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 1247-1250.) Winbush argued that his most recent juvenile adjudications were too remote as they happened 11 years earlier when Winbush was 12 to 14 years old. (5-CT 1248-1250, citing

People v. Pitts (1990) 223 Cal.App.3d 1547, 1554-1555 [court affirmed exclusion of 10-year-old murder conviction for impeachment.]

Over these due process objections, 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.)

The prosecutor's cross-examination of Dr. Greene about 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.[2] (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 230-232.) No juror could be expected to understand this ridiculous distinction: either the jury could consider evidence that Winbush was an arsonist at age 8 and a troubled youth, or it could not.

The state does not answer Winbush's contention that the prosecutor referred to these crimes for the truth of the matter in closing argument,

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2. 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 at 259-265.)

which clearly demonstrates 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 Winbush would be dangerous in the future (an opinion with which the prosecutor agreed). (AOB at 235-236; quoting from 188-RT 14694-95.) For example, in *People v. Valentine* (1988) 207 Cal.App.3d 697, 705, the court held that limiting instructions which "were in direct opposition to what the prosecutor told the jury ... would not cure the error committed."

Winbush is not complaining about the court giving a limiting instruction; and the fact that Winbush requested a limiting instruction to lessen the prejudice of the admission of the evidence in the first place, in no way affected his earlier objections, and there is no case that states it does. The court's in limine rulings were binding throughout trial. (26-RT 1734-1735; 176-RT 13998.)

The issue was not the limiting instructions, but their inadequacy to cure the harm from the admission of evidence. The state makes a silly "slippery slope" argument, arguing that Winbush's "implicit argument is that jurors cannot follow instructions, and if carried to its logical conclusion, would preclude attacking an expert's credibility by demonstrating the basis for a poorly-reasoned opinion." (RB at 198.) Not so. Winbush is simply arguing that the jurors would not have been able to avoid considering the evidence at issue here for its truth, despite limiting instructions. Courts have recognized that some evidence is so overwhelming – confessions, for example – that no one should expect limiting instructions to work. (See *Bruton v. United States* (1968) 391 U.S. 123, 126-137 (*Bruton*) [holding that the admission, at a joint trial, of a nontestifying defendant's confession implicating a codefendant, even with

an appropriate limiting instruction, violates the codefendant's rights under the confrontation clause].)

The error was also not cured because defense counsel reiterated that the hearsay evidence of Winbush's juvenile priors "does not, however, put the facts in evidence. It is only put in for the purpose of judging the opinion presented to us by the expert witness." (RB at 199, citing 185-RT 14531.) As noted in *People v. Odom* (1969) 71 Cal.2d 709, 714, the "fact that the attorney for defendant, in his closing argument, told the jurors that the People had introduced the extrajudicial statements 'not to prove their case but so as to impeach him' does not cure the trial court's error in failing to render a limiting instruction."

In Winbush's case, it was the prosecutor in closing arguments who ignored the purportedly limited use of this testimony, which error could not be cured either by what defense counsel said or by what the court instructed. In *People v. Fletcher* (1996) 13 Cal.4th 451, 471, for example, this Court held that the "prejudicial effect of the [*Bruton*] error was compounded by the prosecutor's argument to the jury, during which he urged the jury to consider Fletcher's extrajudicial statement in determining not only his guilt but Moord's as well." This Court agreed with the defendant that this argument "demonstrates that not even the prosecutor -- a trained attorney with sufficient experience to be assigned to homicide cases -- could limit the statement to Fletcher and ignore it when arguing [Moord's] guilt. If the legally trained prosecutor was unable to limit the statement to Fletcher, we safely can infer that this was true of the lay jurors as well." (*Ibid.*)

Similarly, the jury had every reason to ignore the court's limiting instruction given the day before -- just as the prosecutor did. (186-RT

14549-50.) The prosecutor's declaratory sentences: "He was a fire setter," and "He tried to stab a teacher," cannot be construed as anything but statements of fact. The limiting instructions were ineffectual, if not pretextual, given the prosecutor's use of this evidence for its truth. (See AOB at 230-232.)

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 state claims that the "law does not support" any of Winbush's claims that admission of these incidents of misconduct when Winbush was under the age of 14, 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. (RB at 201-204.)

First, the state has no direct response to Winbush's argument that 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 -- – or, indeed, prosecuted at all in the absence of clear proof that the child knew of its wrongfulness at the time.. (5-CT 1250; Welf. & Inst. Code § 602; Pen. Code § 26.) 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 a teenager to death. (*People v. Garcia* (1999) 21 Cal.4th 1, 9-10; Pen. Code § 667(d)(3)(A).)

Second, the state has no response to Winbush's argument that it is particularly unseemly to condemn a teenager to death for juvenile misconduct done while he was under the state's supervision and care. (AOB at 238-239, citing *In re Antonio R.* (2000) 78 Cal.App.4th 937, 941.) 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. The state has no response to Winbush's claim that he was not provided the kind of psychological and medical services to which he was entitled that should have diagnosed and treated his tendency to act out violently. (AOB at 238-239.)

Since the filing of Winbush's opening brief, the United States Supreme Court ruled in *Miller v. Alabama* (2012) 567 U.S. __, 132 S.Ct. 2455, 2460, 183 L.Ed.2d 407, that committing a juvenile to a mandatory sentence of life without possibility of parole for a homicide crime violated the Eighth Amendment. The *Miller* court relied on *Graham v. Florida* (2010) 560 U.S. 17, and *Roper v. Simmons* (2005) 543 U.S. 551, where the Court distinguished children from adults in three ways. "First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and headless risk-taking. Second, children 'are more vulnerable ... to negative influences and outside pressures'" and have less control over their environment. And third, a child's character is not as 'well formed' as an adult's." (*Miller v. Alabama*, *supra,* 132 S.Ct. at 2464 [citations omitted].) The *Miller* Court reasoned that those qualities -- of transient rashness, proclivity for risk, and inability to assess consequences — both lessened a child's "moral culpability" and

enhanced the prospect that, as the years go by and neurological development occurs, his "deficiencies will be reformed." (*Id.* at 2464-2465.)

The *Miller* Court explained: "Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." (*Id.* at 2465.) It established that an "'offender's age is relevant to the Eighth Amendment,'" and that "'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'" (*Id.* at 2466.) By removing consideration of the offender's age, a mandatory life-without-parole sentencing scheme "contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." (*Id.* at 2466; see *People v. Caballero* (2012) 55 Cal.4th 262, 266-269 [the state must afford a juvenile convicted of a nonhomicide offense a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," and that "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity"].)

In *People v. Bramit* (2009) 46 Cal.4th 1221, 1238-1239, *People v. Taylor* (2010) 48 Cal.4th 574, 652-654; and *People v. Bivert* (2011) 52 Cal.4th 96, 122-123, this Court summarily dismissed claims similar to the one Winbush has made here. The problem with the Court's conclusion in these cases 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 acts of violence or threats of violence done while a juvenile under the age of 18.

Winbush believes that *Miller's* reasoning makes it untenable to use 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 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 physical, childhood fights with a brother close in age? Or, in a rabid prosecutor's terminology: "repeated assaults and batteries" on his brother.

The state's argument and the court's ruling, however, assumes that there is no age which this Court would find to be too young to use familial or juvenile violence as a reason to execute someone, whether age 14, 12, 10, 8, 6, or 4. (See RB at 202-203; 19-RT 1187, 1183.) *Roper* stands for the proposition that juvenile conduct is not as blameworthy as adult conduct and that even murderous conduct below the age of 18 does not warrant the death penalty. Any rational judicial system would similarly prohibit the introduction of lesser 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 as a juvenile as young as 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.

As is typical, the state simply ignores Winbush's argument that the court should not have admitted the bad acts committed under age 14 given *People v. Lewis* (2001) 26 Cal.4th 334, 376-380, and Penal Code section 26 which presumes that children under the age of 14 are not capable of committing a crime, "in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." (AOB at 245-246.) "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." (*In re Gladys R.* (1970) 1 Cal.3d 855, 864.) Here, the prosecution did not provide "clear proof" to the court or the jury that Winbush understood the wrongfulness of his juvenile bad acts, and neither the court nor the jury explicitly found that Winbush knew the acts he committed under the age of 14 were wrongful.

Recently, in *People v. Cottone* (2013) 57 Cal.4th 269, 285-293, this Court held that when evidence is offered under Evidence Code section 1108 that the defendant committed an uncharged prior sexual offense when he was under the age of 14, the defendant is entitled to a determination, under Penal Code section 26, whether there is clear and convincing proof that he appreciated the wrongfulness of his act – that is whether the defendant had the capacity to commit an unadjudicated

juvenile offense. That determination must be made by the trial judge, and if the judge finds against the defendant the jury is not permitted to reassess the issue of capacity. (*Id.* at 285, 288-290.) *Cottone* supersedes this Court's suggestion in *People v. Lewis*, *supra,* 26 Cal.4th at 379-380, that trial judges can properly allow the jury to determine the issue of capacity when the prosecution offers as aggravation crimes committed when the defendant was under the age of 14. (See *People v. Cottone*, *supra,* 57 Cal.4th at 290-293.)

Winbush requests this Court to reconsider allowing an act of violence or the threat of violence or a crime committed by a child under 18 years old, but particularly as young as 8 or 12 or 14 years old, to be considered as a reason to execute him for a murder done as a teenager. Such a ruling ignores the undisputed acknowledgement that the younger the children, the less morally responsible they are for their actions.

The evidence of juvenile misconduct was too prejudicial to be admitted or considered in any manner; it blinkers reality to believe that the jury gave this evidence only the weight it deserved – zero. If this evidence had been excluded – even if only about 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 nearly all 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)

The state sets out the basic principles of law relevant to this issue, with which Winbush has no dispute. (RB at 204-206.) The state does not dispute that this evidence was not offered to rebut defense mitigating evidence, as this evidence was introduced in the prosecution's penalty case-in-chief and Winbush did not offer evidence of his good character.

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

The state suggests that Winbush's claim was "arguably forfeited," because he failed to object at trial, even though the state does not dispute that Winbush objected pretrial and the court's in limine rulings were binding at trial. (RB at 207; 26-RT 1734-1735; 176-RT 13998.)

The state next claims the prosecutor, pretrial, "presented sufficient evidence of force, violence, or threat of violence, and violation of sections 69 and 415." (RB at 207-208.) Winbush disagrees. Juanita Ream, a teacher at CYA, testified on July 16th and 19th, and August 3rd, 1993, that 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 on July 16th. (175-RT 13919-23.) In addition to this evidence, the state argues that other incidents of bad conduct – involving angry language and challenges to fight made to Officer Spinks and Daniel Bittick as Winbush was searched and handcuffed -- occurring after this

abusive language incident -- somehow transforms abusive language into serious threats against Ream. (RB at 207-210.) Winbush disagrees that later acts retroactively made his earlier abusive language in the classroom into a crime of violence.

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*, *supra,* 4 Cal.4th at 589-591.)

Ream did testify that she felt threatened by Winbush's defiance in class. (RB at 209, citing 175-RT 13922-13933.) But from the evidence it also appeared that the behavior which made her feel that way did not involve threats, just trash talk. It is not a crime simply because someone feels threatened, if no threat was made.

2. Age 18: 1995: Officer Craig Jackson

The state argues that Officer Jackson's testimony that Winbush told the parole board he often reacted aggressively to gain stature among peers and make himself feel good (his "self-expressed attitude toward his victims") was "directly relevant to the plethora of Factor B criminal activities admitted that occurred before appellant transferred to 'Chad' and changed his ways." (RB at 212-213.) Winbush disagrees.

The state relies on *People v. Payton* (1992) 3 Cal.4th 1050, 1063, where this Court held that evidence of "statements from defendant's own mouth demonstrating his attitude toward his victims" (all women were

potential rape victims) was highly probative to support the prosecutor's argument of future dangerousness. (RB at 212-213.) The state's concession that the trial court did not rely on future dangerousness in finding this evidence admissible supports Winbush's argument that the evidence was not admissible under *Payton*. (RB at 213.) Payton's statements, which related, both in factual content and attitude, closely to the crime of which he was convicted, are a far cry from Winbush's attempts at constructive insight into why he might have acted aggressively in the past. Moreover, the use of such statements by the state in sentencing is poor public policy because it discourages candor at parole board hearings by defendants. The state's reliance on *People v. Wallace* (2008) 44 Cal.4th 1032, 1081, is misplaced as that situation is even more far afield from this one than *Payton*. (RB at 213.) In *Wallace*, the defendant was arrested for threatening someone with a gun (the underlying factor (b) crime) and went berserk in the police car on the way to the station, thrashing around, biting the upholstery, and kicking out some windows. This Court responded to the defendant's argument that admitting this evidence was *Boyd* error by holding it was a circumstance of the prior crime.

The state also relies on an observation this Court made in *People v. Nelson* (2011) 51 Cal.4th 198, 221-224, to the effect that song lyrics written by the defendant which allegedly spoke about his desire to kill police officers "might have been relevant to the defendant's remorseless state of mind when he committed the principal murder, i.e., "Factor A" evidence." (RB at 213.) The song lyrics in *Nelson* did not express his desire at all. They were a rap ballad about a fictional character called "the youngsta" and his exploits in the "hood, including running hookers and

shooting at cops." (*People v. Nelson, supra,* 51 Cal.4th at 221-222, & fn. 21.) This Court's statement that the lyrics might have been relevant to an incident where the defendant was accused of shooting at a police car was dictum, since it did not reach the merits of the defendant's claim that the lyrics were erroneously admitted, simply finding that any error would have been harmless. (*Id.* at 224.) Again the state appears to be grasping at straws to suggest that the two types of evidence are similar. The state's arguments do not persuasively challenge Winbush's reliance on *People v. Boyd, supra*, 38 Cal.3d at 778-779, and *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1233, which hold that "a reputation for violence is not a statutory sentencing factor, and thus may not be considered as aggravating."

The state finally argues that any error was harmless beyond a reasonable doubt, because the testimony "favored appellant," and thus it was not reasonably possible the error affected the verdict. (RB at 214.) This claim is specious as this testimony placed Winbush in a bad light; Winbush strenuously argued for its exclusion, and the prosecutor argued for its admission, and argued the inference that Winbush had faked contrition for his behavior as a ploy to get paroled from the CYA and that the evidence of his good behavior in the year before his release showed that he could control himself when he chose to. (23-RT 1473-77, 1502-1505; 176-RT 13997-13999.)

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.)

The state argues that this remark, which "followed an earlier threat, an incident of violence, and removal of appellant's shackles, and preceded his refusal to enter the pod, could only be understood as a threat." (RB at 215-216.) Winbush disagrees. Abusive and even threatening language does not violate a penal statute and is inadmissible under factor (b). (See *People v. Wright*, *supra,* 52 Cal.3d at 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

The state claims that the court correctly found that Winbush's mouthing off at Officer Humphries was admissible factor (b) evidence under *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153-1154. (RB at 216-217, citing 23-RT 1512.) Winbush begs to differ for the reasons cited in his opening brief. (AOB at 252.)

The state then appears to argue that Winbush's objection was not sufficient to incorporate an objection to Humphries' testimony that he felt Winbush was threatening him because he knew Winbush had a history of assaultive behavior with staff and Winbush was housed in Administrative Segregation Unit for violent inmates. (RB at 217; see 170-RT 13295-13315; 173-RT 13655.) Not so. In admitting these alleged threats, the trial court relied on the "context" of the situation, which clearly involved Winbush's history of assaultive behavior with staff and the fact he was

housed in Administrative Segregation Unit for violent inmates. Without the context, it is difficult to see how Winbush's ambiguous statements could be seen as threatening. Thus, the objection to the statements was adequate to put the court on notice of the breadth of the objection. This testimony was inadmissible. (See *People v. Wright*, *supra,* 52 Cal.3d at 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

The state claims that "having raised the issue of appellant's demeanor initially, and having elicited from Deputy Foster that it was like that of any other inmate and never caused him problems over a period of years, the defense opened the door to impeachment or rebuttal evidence about whether Foster knew appellant to be dangerous." (RB at 220-221.) With respect to Officer Miller-Thrower's testimony 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, the state also claims that Winbush's "failure to object to this testimony at trial forfeits his claim on appeal," and "the claim fails as the testimony provides context for details that were part and parcel with his being reasonably questioned about contraband, chained, separated, and searched." (RB at 221-224, 222, citing *People v. Thomas* (2011) 51 Cal.4th 449, 505.) Winbush disagrees.

Once the court overruled Winbush's objection to reputation evidence with respect to Officer Foster (174-RT 13776-87), it would have been futile to make another objection. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-821, 845-846.) "A reputation for violence is not a

statutory sentencing factor, and thus may not be considered as aggravating." (*People v. Gonzalez*, *supra,* 51 Cal.3d at 1233.)

B. The Error Was Prejudicial

The state finally contends that any error in admitting this evidence was harmless beyond a reasonable doubt, because "the evidence in aggravation against appellant was overwhelming in quantity and quality, and the evidence in mitigation was weak." (RB at 223-224.) Winbush disagrees. (ARB at 4-9.) 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 false aggravating "facts," means that the errors here irreparably tainted the penalty verdict. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 585; 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 Court Erred In Permitting The Prosecutor To Cross-Examine Dr. Greene About Whether Winbush Fit The Criteria For Antisocial Personality Disorder

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 or a psychiatrist, about diagnostic elements of antisocial personality disorder (ASPD) from *The Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition (1994) (DSM-IV), even though Dr. Greene repeatedly protested her expertise did not extend to diagnosing ASPD, and she was not familiar with the entire DSM-IV book, as she was not a psychologist. (184-RT 14486, 14503.) 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, including whether Winbush fit the criteria for ASPD. (See AOB at 73-76; 184-RT 14449-14526; 187-RT 14656.)

The state argues that once "Dr. Candelaria-Greene suggested a broad-based link between appellant's past conduct and his learning disabilities, i.e., suggesting a diagnosis, the prosecutor could attack her

credibility by "questioning that diagnosis or suggesting an alternative diagnosis." (RB at 231, citing *People v. Smith* (2005) 35 Cal.4th 334, 359; and *People v. Clark* (2011) 52 Cal.4th 856, 936.) Winbush begs to differ.

Neither of the cases on which the state relies approved the cross-examination of a defense witness about a subject she admittedly knew nothing about. *People v. Smith* (2005) 35 Cal.4th 334, 359, holds that when "a mental health expert offers a diagnosis, this opens the door to rebuttal testimony questioning that diagnosis or suggesting an alternative diagnosis." (*Ibid.*, citing *People v. Carpenter* (1997) 15 Cal.4th 312, 406 [rebuttal testimony approved].) Such a diagnosis opens the door to "rebuttal testimony," not cross-examination of an expert about material outside the field of his or her expertise. (See *Buchanan v. Kentucky* (1987) 483 U. S. 402, 422-424 [holding that the prosecution's use of rebuttal expert testimony is permissible where a defendant "presents psychiatric evidence"]; *Kansas v. Cheever* (2013) __ U.S. __, 134 S.Ct. 596, 601-602, 187 L.Ed.2d 519 [same].)

People v. Mills (2010) 48 Cal.4th 158, 205-207, upheld the admission of two charts that listed the symptoms of antisocial personality disorder and conduct disorder, as set forth in the DSM-IV. In that case, unlike Winbush's case, the defense experts testified that defendant suffered "moderate to severe" PTSD, as a result of his chaotic and violent childhood, and also addressed whether defendant suffered from ASPD. (*Id.* at 205-206.) After concluding that the defendant had forfeited this claim, this Court stated:

> Because "the defense experts relied on the DSM-IV to reach their opinions, the prosecutor was permitted to explore their familiarity with the DSM-IV on cross-examination. (Evid. Code, § 721; *People v. Kozel* (1982)

> 133 Cal.App.3d 507, 535.) . . . The various DSM-IV criteria for PTSD, APD [ASPD], and conduct disorder were thus already before the jury when the court admitted both defendant's exhibits and those proffered by the prosecutor."

The experts in *Mills* proffered diagnoses of the defendant as an adult that included a discussion of the symptoms of ASPD. Neither expert indicated that his or her training and expertise did not extend to determining whether a patient suffered from that condition; the only dispute on cross examination was whether the DSM-IV supported their opinions that the defendant did not exhibit all the symptoms of it. In sharp contrast, Winbush's defense expert offered no opinion on ASPD and made it clear that the limited nature of her expertise did not permit her to make a valid diagnosis. The fact that on cross examination she was able to read the sections of the DSM-IV on ASPD and admit that some of Winbush's behavior, as described in jail and CYA records matched listed criteria for that disorder, did not make her qualified to offer an opinion on ASPD. A rote comparison of the sort through which she was led by the prosecutor could have been made by any lay person.

Neither Evidence Code section 721 subdivision (b) nor *People v. Kozel* (1982) 133 Cal.App.3d 507, 535, are support for the proposition that in the process of cross-examining a defense expert, the prosecutor can force her to venture an opinion on which she has no expertise. In *Kozel,* for example, the "cross-examination disclosed that the witness possessed detailed knowledge of that edition of the Manual the prosecutor had before him as he questioned her on the characteristics of schizophrenia, and that she had considered the presence or the absence of the symptoms listed in the book in forming her opinion concerning appellant." (*Ibid.*) In

Winbush's case, Dr. Greene did not consider or use the DSM-IV to diagnose or even consider ASPD, as it was outside her expertise.

Under Evidence Code section 721, subdivision (b), the "adverse party may . . . inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness." Additionally, Evidence Code section 721, subdivision (a), provides in pertinent part that "a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to . . . the matter upon which his or her opinion is based and the reasons for his or her opinion." Such cross-examination properly includes documents and records examined by an expert witness in preparing his or her testimony. (*People v. Smith* (2007) 40 Cal.4th 483, 509; *People v. Osband* (1996) 13 Cal.4th 622, 712.) Obviously, Dr. Greene, who repeatedly protested her expertise did not extend to diagnosing ASPD, had not relied on the DSM-IV to diagnose ASPD, and thus, the prosecutor could not use her to present evidence that Winbush may have suffered from ASPD.

Dr. Greene had a doctorate in special education and was not a psychologist or a psychiatrist, and she repeatedly protested her lack of expertise about the diagnostic elements of ASPD 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. Here, the prosecutor's cross-examination of Dr. Greene was not only an unfounded attack on her

testimony, but an attempt to use her to support his own theory that defendant had ASPD, that is, he was sociopathic or psychopathic.

The state argues that *People v. Daniels* (1991) 52 Cal.3d 815, 883, where the prosecution used a rebuttal expert "to establish the diagnostic factors for sociopathy," is not controlling because the Court "established no rule of 'competing experts' to attack a defense-expert diagnosis," and "the Court characterized impeachment of the defendant's witness as 'cross-examination,' rather than rebuttal." (RB at 233.) Winbush does not dispute that the *Daniels* 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." (*People v. Daniels, supra,* 52 Cal.3d at 883-884; see AOB at 256-257.) In Winbush's case, however, Dr. Greene never voluntarily offered an opinion that Winbush had ASPD or was sociopathic, so she had not "opened the door to cross-examination" inquiring into the factual basis of an opinion she was unqualified to make and never made.

The state also claims that *People v. Williams* (1997) 16 Cal.4th 153, 251-252, is inapposite, because in *Williams*, this Court considered whether the prosecutor had committed misconduct in introducing hearsay during cross-examination by reading from a probation report, ruled inadmissible, rather than asking the defense expert whether he was familiar with or had relied on the probation report in rendering an opinion. (RB at 234, citing *People v. Williams, supra*, 16 Cal.4th at 252.) Winbush disagrees. In his case, the prosecutor did not present any evidence in his case in chief or rebuttal that Winbush had been, or could be, diagnosed

with ASPD. Instead, he used his cross-examination of Dr. Greene, who had testified only about Winbush's learning disabilities and their behavioral manifestations during his developmental years, to insinuate a diagnosis of adult ASPD which she was unable to make. Just as it was misconduct to elicit inadmissible details of a probation report in cross-examination of a defense expert in *Williams*, it was misconduct for the prosecutor to question Dr. Greene on a topic about which she had no knowledge, let alone expertise.

The state claims that Winbush has mischaracterized *People v. Davis* (2009) 46 Cal.4th 539, 620, and is "inapposite." (RB at 233-234.) The state also argues that Winbush incorrectly relied on *Davis* by incorrectly claiming that impeachment of his expert with an alternative diagnosis requires a rebuttal expert. (RB at 232-233, citing AOB 257.) Not so. In *Davis*, the parties agreed that defendant suffered from antisocial personality disorder, and disputed whether the prosecution could cross-examine the defense expert and present a rebuttal expert on lack of remorse as an element of the disorder, distinct from a factor in aggravation. (*People v. Davis*, *supra,* 46 Cal.4th at 620.) The *Davis* Court held that "defendant's presentation of Dr. Woods's diagnosis of antisocial personality disorder opened the door to rebuttal testimony questioning that diagnosis or suggesting an alternative diagnosis." (*Ibid.*) In Winbush's case, however, Dr. Greene did not offer an ASPD diagnosis, and the prosecution did not offer rebuttal evidence, but only cross-examination of an unqualified witness. *Davis* is not authority for what happened in Winbush's case.

Here, the prosecutor used Dr. Green as a conduit to relay to the jury otherwise inadmissible hearsay evidence. (See *United States v.*

Gomez (9th Cir. 2013) 725 F.3d 1121, 1129 [witness used as "conduit or transmitter" who parrots testimonial hearsay rather than testify as a true expert on some specialized factual situation results in an impermissible end run around *Crawford v. Washington* (2004) 541 U.S. 36]; *United States v. Johnson* (4th Cir. 2009) 587 F.3d 625, 635 [*Crawford* implicated if expert "is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation"]; *United States v. Lombardozzi* (2d Cir. 2007) 491 F.3d 61, 72 [although expert may rely on inadmissible hearsay in forming opinion, expert "may not simply repeat 'hearsay evidence without applying any expertise whatsoever' because it enables the government to put before the jury an 'out-of-court declaration of another, not subject to cross-examination . . . for the truth of the matter asserted'"].)

This Court's unanimous ruling in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 769 (*Sargon*), gave renewed life to the gatekeeper duties of trial judges in vetting proffered expert testimony pre-trial, using five potential exclusionary bases. In performing this essential gatekeeping function, the trial court must first look to Evidence Code section 801, which provides:

> "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter ... that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (*Sargon, supra,* 55 Cal.4th at 769-770.)

An "expert opinion has no value if its basis is unsound." (*Ibid.*) Under Evidence Code section 801, "the matter relied upon [by the expert] must provide a reasonable basis for the particular opinion offered." (*Id.* at 770.) An expert's proposed opinion must be excluded by the trial court if it is speculative or irrelevant; it cannot be based on speculative testimony or "assumptions without evidentiary support." (*Ibid.*) Where the opinion of an expert is without adequate foundation and the opinion is grounded in speculation, conjecture, or a leap of logic, the trial court should act as gatekeeper and exclude it. If the court fails to do so, it abuses its discretion. (*Id.* at 769-774, 774-782) In addition to employing the Evidence Code section 801 test, the trial judge, as the gatekeeper, must also vet a challenged opinion under Evidence Code section 802.[3]

An expert in one area cannot stray to other areas for which she is not proven qualified. (*People v. Pearson* (2013) 56 Cal.4th 393, 445-446 [a qualified radiologist was not shown to be an expert regarding the effect of fossae abnormalities on human behavior and his testimony on that issue should not have been permitted]; *Salasguevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379, 384-387 [reversing grant of summary judgment in favor of the defense in a medical malpractice action where the defendants relied on the deposition testimony of the plaintiff's own doctor because nothing in the record demonstrated that the doctor

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3. Evidence Code section 802 states: "A witness testifying in the form of an opinion may state ... the reasons for his opinion and the matter ... upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."

was a specialist qualified to render an opinion on the precise issues involved in the action].) The *Pearson* court explained:

> "The prosecution failed to demonstrate the radiologist was qualified under Evidence Code section 720 to testify regarding the effect of fossae abnormalities on human behavior ... Evidence of this nature is ordinarily admitted through the testimony of a qualified psychiatrist or neuropsychiatrist." (*People v. Pearson, supra,* 56 Cal.4th at 446, citing *People v. Danks* (2004) 32 Cal.4th 269, 286-287 [testimony of neuropsychiatrist offered to show that the defendant's brain abnormalities affected his impulse control].)

Similarly, the cases are legion where the prosecution presented a psychiatrist to testify on rebuttal that defendant suffered from a personality disorder. (See *People v. Dunkle* (2005) 36 Cal.4th 861, 879-880 [the prosecution presented a psychiatrist to testify on rebuttal that defendant suffered from a mixed personality disorder with antisocial, borderline and narcissistic traits, and sexual sadism]; *People v. Davis* (2009) 46 Cal.4th 539, 568 [the prosecution presented a psychiatrist and a clinical therapist, who was also a forensic psychologist, to testify on rebuttal that defendant suffered from ASPD].)

In *People v. Watson* (2008) 43 Cal.4th 652, 692, this Court held that the trial court did not abuse its discretion in excluding the testimony of a defense penalty phase investigator about the stresses of prison life and an individual's ability to adapt to such circumstances because even though he "had a significant educational background in criminal justice and was experienced in noncapital sentencing alternatives ... he was not a psychologist and candidly acknowledged he was not qualified to offer an expert opinion as to the psychological impact of defendant's upbringing on

his current behavior or how defendant would actually adjust to life in prison." These facts are virtually identical to the facts of Winbush's case.

Tellingly, the state has no response to Winbush's reliance on *People v. Visciotti* (1992) 2 Cal.4th 1, 80-81, which found the prosecutor committed misconduct when he cross-examined a defense psychologist about a study not admitted into evidence "with which the expert was not acquainted, and asked 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." (AOB at 258.) Similarly, the prosecutor on Winbush's case questioned Dr. Greene about sections of the DSM-IV with which she was not acquainted and argued that Winbush was a sociopath without any evidence from someone actually qualified to render such an opinion.

The state claims that *People v. Castaneda* (2011) 51 Cal.4th 1292, 1335-1336, is inapposite, because "the defense expert was determined not qualified to render an opinion." (RB at 234.) Not so. Dr. Greene was simply not qualified to render an opinion on ASPD; she 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. This violated *Castaneda*: "The competency of an expert is ... relative to the topic about which the person is asked to make his statement." (*People v. Castaneda*, *supra,* 51 Cal.4th at 1336.)

While the prosecutor may have chosen to present rebuttal testimony, he did not do so, presumably because he could not find an expert to so testify. 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.

The state also argues:

> "Appellant presents a false comparison between the DSM IV and Witkin's legal treatise, claiming that a criminal lawyer is not qualified to render an opinion about civil law just because Witkin publishes treatises in both areas. (AOB 256.) As a threshold matter, Witkin is a secondary treatise rather than a diagnostic manual. But even assuming it were not, an attorney, regardless of area of expertise, can opine that certain conduct may give rise to both civil and criminal liability, and discuss basic distinctions between the two areas." (RB at 231-232, fn. 66.)

The state's comparison illustrates its basic lack of understanding of the concept of expertise. The ability to consult Witkin's treatise for information about an area of law does not make an attorney an expert in, say, patent law or capital defense, any more than an orthopedist's likely knowledge of some medical information about heart disease, recalled from medical school, would make him or her an expert in cardiology. The obvious point of Winbush's analogy was that just as lawyers do not have expertise about all areas of the law, mental health professionals do not necessarily have expertise about all the hundreds of mental disorders that the DSM-IV discusses. The DSM-IV "is recognized by the courts as a standard reference work (of nearly a thousand pages) containing a comprehensive classification and terminology of mental disorders." (*People v. Mills, supra,* 48 Cal.4th at p. 205, fn. 17.) Simply because Dr. Greene, a non-psychologist specialist in childhood learning disorders, consulted relevant parts of this standard reference as part of her research

in diagnosing ADHD in Winbush, was not sufficient reason to permit the prosecutor to force her to recite excerpts from entirely different parts of the manual to suggest the psychological diagnosis that Winbush suffered from was ASPD, a field in which she had no expertise.

Mental health professionals have remained undecided about what constitutes ASPD, which is "clearly chronicled in the successive versions of the DSM." (Richard Rogers, *Diagnostic and Structured Interviewing: A Handbook for Psychologists* (1995) at 229.) "Psychologists are confronted with a bewildering array of symptoms that have been associated with the diagnosis of [ASPD]." (*Ibid.*) "Clinical interviews play a preeminent role in diagnostic evaluations and are instrumental to all psychological assessments." (*Id.* at 2.) There are many techniques to assess ASPD, including structured interviews and checklists, including a revised 20-item version of the Psychopathy Checklist (PCL-R). (*Id.* at 2-25, 221-243.)

In 2013, the *Diagnostic and Statistical Manual of Mental Disorders*, 5th Edition explained that it was meant as a "tool for clinicians." (*Diagnostic and Statistical Manual of Mental Disorders*, 5th Edition (2013) Preface at xli.) Personality disorders such as ASPD have been placed in Section III "to highlight disorders that require further study but *are not sufficiently well established to be a part of the official classification of mental disorders for routine clinical use*." (*Id.* at xliii [emphasis added].) Section III aims to "address numerous shortcomings of the current approach to personality disorders," including antisocial personality disorders. (*Id.* at 761.) These unofficial categories of mental disease are not meant as forensic instruments, and do not meet the *Sargon* criteria.

Here, the prosecution used the defense expert on childhood development, over strenuous objections, to try to establish that Winbush

suffered as an adult from ASPD, even though she had not interviewed him, tested him, or made this controversial diagnosis. This was clear error. (See *Rosen v. Ciba-Geigy Co.* (7th Cir. 1996) 78 F.3d 316, 319 [cardiologist's proposed testimony on nicotine patch as causative of heart attack excluded because "the courtroom is not the place for scientific guesswork"]; *People v. Vang* (2011) 52 Cal.4th 1038, 1046 ["Exclusion of expert opinions that rest on guess, surmise or conjecture is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?"] [citations omitted].) "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issues of guilt or innocence." (*People v. Castro* (1985) 38 Cal.3d 301, 313, quoting *Bruton v. United States, supra*, 391 U.S. at 132, fn. 6.)

Junk expert testimony is nothing new. In 17th century New England, "'the general characteristics' of children believed to be under the spell of a witch were the principal evidence that witchcraft had taken place." These preposterous witchcraft theories were used to justify executing women in the Salem trials. (*United States v. Bighead* (9th Cir. 2000) 128 F.3d 1329, 1337 [Noonan, J., dissenting].) A century before the Salem trials, Galileo was tried and convicted for his "heretical" adherence to the belief in a heliocentric solar system that challenged the existing doctrine that the earth was the center of the solar system. Here, Winbush was sentenced to death because his expert witness with a doctorate in special education, who testified about childhood conditions of attention deficit disorder with hyperactivity and conduct disorder, was then forced to render an opinion about whether Winbush was a psychopath or sociopath

under the DSM-IV criteria, an area about which she knew nothing, since she was not a psychologist or psychiatrist. (184-RT 14486, 14503.)

The prosecutor's cross-examination of Dr. Greene amounted to an excuse for the prosecutor to insinuate an inflammatory, highly prejudicial, and false diagnosis of his own making, without the prosecutor's opinion being subject to cross-examination in violation of the Confrontation Clause. (AOB at 258; *Delaware* v. *Van Arsdall* (1986) 475 U.S. 673, 684.)

B. The Court Erred In Permitting The Prosecutor To Cross-Examine Dr. Greene About Whether Winbush Would Be Dangerous In The Future

The state contends that Winbush, "not the prosecutor, raised the issue of future dangerousness when his expert, Dr. Candelaria-Greene, testified that, if medicated, prisoners with appellant's diagnosis serving life terms exhibited 'a greater degree of safety ... Because there was better able ability [sic] to control impulses.' Having thus raised the issue of future dangerousness, the trial court did not err in allowing the prosecutor to cross-examine appellant's expert on this issue." (RB at 234-235, citing *People v. Jones* (2003) 29 Cal.4th 1 229, 1260-1261.) Winbush disagrees.

Winbush's objection was focused on the same problem as with Dr. Greene's compelled ASPD diagnosis. Dr. Greene, with a Ph.D. in special education, but not a psychologist, was unqualified to testify about future dangerousness. 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." (187-RT 14655.) Winbush objected to the prosecutor questioning Dr. Greene about something about which she had never expressed an opinion,

and reading objectionable sentences out of psychological reports which were outside her area of expertise. (187-RT 14655-56.) For the same reasons as explained in the above subsection, the court erred in permitting the prosecutor to obtain an opinion from Dr. Greene on this topic which was beyond her expertise and by using Dr. Green largely as a conduit to relay to the jury otherwise inadmissible hearsay evidence without applying her expertise in connection with the hearsay statements.

The prosecutor exploited this ruling in his closing argument by urging the jury to kill Winbush so that he could not hurt others. (188-RT 14688-93; AOB at 262-263.) 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 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; *People v. Murtishaw* (1981) 29 Cal.3d 733, 773-775; *People v. Sapp* (2003) 31 Cal.4th 240, 308-309.) 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.)

C. The Errors Were Prejudicial

The state argues that any errors were harmless for the usual reasons. (RB at 235-236.) The state also argues that "there was abundant evidence of appellant's future dangerousness in prison independent of Dr. Candelaria-Greene's testimony," and the prosecutor urged jurors "to disregard her testimony altogether." (RB at 235-236.) The prosecutor's argument relying on Dr. Greene's testimony belies the state's contention. (188-RT 14690, 14693.)

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 and was not applying her expertise to the hearsay documents, means that the errors here irreparably tainted the penalty verdict. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 585; John F. Edens, et al., (2005) *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Defendants Labeled Psychopathic*

Considered More Deserving of Death?, 23 Behav. Sci. & Law 603 [the authors answer their title question in the affirmative].)

The state does not directly respond to Winbush's contention that the prejudice was heightened because, 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. (AOB at 265-266; *People v. Hawthorne* (2009) 46 Cal.4th 67, 91-93.)

Unlike *People v. Pearson, supra,* 56 Cal.4th at 446, the erroneous admission of expert testimony was not harmless under the *Watson* standard. (See *People v. Watson*, *supra,* 46 Cal.2d at 836.) In *Pearson*, the defendant's sole defense was that due to a myriad of mental disorders, he did not premeditate and deliberate the murders, and the defense neuropsychologist, who testified to this effect, "did not rely heavily on the brain abnormalities in forming her opinion regarding defendant's psychopathology, and hence [the inadmissible expert] testimony that the fossae had no effect on defendant's behavior would not greatly have affected the jury's assessment of her opinion." (*People v. Pearson, supra*, 56 Cal.4th at 446.) Moreover, the "prosecution's evidence that defendant premeditated and deliberated the murders was overwhelming." (*Ibid.*) In sharp contrast, the only testimony that suggested Winbush was a sociopath, rather than a youth whose angry, impulsive and self-defeating behavior resulted from severe learning disabilities, was Dr. Greene's coerced and inadmissible testimony about a matter of which she had no expertise; and this was not harmless beyond a reasonable doubt. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

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.)

The state claims that "appellant arguably failed to preserve these issues through timely and specific objections at trial. He objected to the word 'evil' in opening argument, a day late, and failed to object to the use of 'jerk' when the prosecutor provided a definition of the word that placed it in context for purposes of the hypothetical." (RB at 237.) Winbush disagrees. His first objection satisfied the purpose for preserving an objection. The prosecutor's temerity by skirting the court's ruling and defining the word "jerk," does not retroactively forfeit the issue, and no case suggests otherwise.

The state next argues that this Court has approved of the word evil and tolerated far more derogatory epithets, such as human monster and "perverted murderous cancer." (RB at 237-238.) Winbush stands by the

cases cited in his opening brief that calling capital defendants names is unconstitutional and improper. (AOB at 267-268.)

The state next argues that "there was overwhelming evidence to support use of the epithets of 'evil,' and 'jerk,'" and that their use was harmless because "these epithets played an extremely minor role, in comparison to the lengthy discussion of defendant's prior criminal and violent acts." (RB at 239.) Winbush has addressed the state's meritless overwhelming-evidence argument. (See ARB at 4-9.)

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 the following 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 [sic] 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.

The state's excuse is that the prosecutor used "conditional phrasing," and there was "plenty of evidence, moreover, to infer that appellant was dangerous." (RB at 241.) Then, the state halfheartedly concedes the error, but reasserts its fallback position – "to the extent ...

there was insufficient evidence that Dr. Candelaria-Greene was frightened to meet with him, it was not reasonably possible to have affected the penalty verdict." (RB at 241.) There was absolutely no evidence that Dr. Greene was "frightened to meet" with Winbush, but that was the unmistakable import of the prosecutor's argument. 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.)

Next, the state argues that Winbush forfeited his complaint about the prosecutor using the fact that Winbush had no family support as an aggravating factor. (RB at 241-242.) Winbush disagrees. Winbush tried to respond to this prong of the prosecutor's speculation by arguing in rebuttal: "None of his family members came in here and testified because Grayland didn't want to subject them to this process." (189-RT 14766.) The trial court, however, 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. It is this secondary ruling that makes the state's forfeiture argument meritless.

The state, however, claims that "responding to the prosecutor's argument in rebuttal is not an exception to the general rule requiring objection." (RB at 242, citing *Clark, supra*, 52 Cal. 4th at 960; see *People v. Clair* (1992) 2 Cal.4th 629, 662; *Blacksher, supra*, 52 Cal.4th at 839; and *People v. Riel* (2000) 22 Cal.4th 1153, 1213.) None of those cases remotely involve the situation here, where the court erroneously sustained an objection on the grounds of no evidentiary support, when Winbush was simply trying to respond to the prosecutor's argument that had no

evidentiary support. Moreover, it was proper for Winbush to argue that a reasonable inference of his testimony that his mother did not attend trial because "she can't handle it," was because he did not want to subject her, or any other family member, to the process. (See RB at 242, fn. 69, citing 148-RT 11577.)

With respect to the merits, the state argues that the "prosecutor never suggested defendant had a legal burden to present family members in mitigation. He merely commented, as is permitted, on defendant's failure to call logical witnesses." (RB at 242-243, citing *People v. Zambrano* (2007) 41 Cal.4th 1082, [1173-1174]. The state's further citation to *People v. Medina* (1995) 11 Cal.4th 694, 758, is unfathomable as it has nothing to do with this topic.

In any event, the prosecutor's argument in Winbush's case was quite objectionable. 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 have made good witnesses, or had refused to testify. In both instances, there was no evidence about either of these facts, thus, the prosecutor's mean-spirited argument, which necessarily implied negative facts not in evidence, was outrageous misconduct.

The prosecutor, without evidence, also grossly exaggerated the pleasures of prison life. (AOB at 271-272, citing 188-RT 14702-03.) Winbush objected that there was no evidence about prison conditions (as opposed to CYA conditions), and the court secretly sustained the objection (without informing the jury). (188-RT 14702-03, 14708.)

The state argues that it was Winbush's fault the court did not admonish the jury, which forfeits his claim of misconduct. (RB at 244, citing *People v. Redd* (2010) 48 Cal.4th 691, 753.) Not so. Unlike *Redd*, the trial judge in this case committed the separate error of shortly thereafter sustaining virtually the same objection – this time by the prosecutor -- to Winbush arguing in rebuttal about prison conditions for LWOPP prisoners in Pelican Bay, where Winbush was likely to be sent, and where visits would be minimal. (190-RT 14879-80.)

The state also argues that there was no misconduct because "neither side presented [prison] as a pleasant penalty option in and of itself." (RB at 244-246.) Winbush disagrees. The court permitted the prosecutor to suggest that prison life was quite "pleasant," and no different than life at 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.)

The court did nothing to stop the prosecutor from intentionally referred to potentially prejudicial "facts" not in evidence" in the form of argument, which requires reversal. (See *People* v. *Pitts* (1990) 223 Cal.App.3d 606, 702, 815-817.)

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 guilty verdicts while pleading for Winbush's life.

The state argues that Winbush's claim is forfeited, and if considered on the merits, there is insufficient evidence of misconduct, and even if arguably misconduct, it was insufficient to render the trial unfair. (RB at 246-247.) The state argues that Winbush forfeited any claim on appeal, and that an objection would not have been futile. (RB at 250-251.) Winbush stands by his opening brief on this point. (AOB 278-279.) Instead of making another futile objection, defense counsel meekly told the jury that they had not tried to mislead the jury. (190-RT 14853-54.) No objection or admonition would have cured the error. (*Caldwell v. Mississippi, supra,* 472 U.S. at 339.) Winbush is excused from objecting to every single incident of prosecutorial misconduct, because even when he did object, the prosecutor ignored the court's ruling sustaining the objection. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-821, 845-846.)

The prosecutor's outrageous argument was directed at Winbush's counsel for *not* "second-guessing the verdict," which meant that defense counsel for Winbush 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....*
>
> *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. (AOB 273-274; 189-RT 14776-78, 14794-96 [emphasis added].)

The only "shameful" argument was the prosecutor's argument. Winbush faced a Catch-22 situation: damned if he accepted the jury's verdict; damned if he did not. If defense counsel had not accepted the jury's verdict, it is not hard to imagine the prosecutor would have vilified defense counsel for implicitly calling the jurors "unreasonable," or "deluded," or "stupid," for finding Winbush guilty.

Shockingly, the state actually tries to justify the prosecutor's invective, but cites cases where the prosecutor's argument was far milder than the argument in this case. (RB at 250, citing *People v. Medina, supra,* 11 Cal.4th at 759 ["'any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something"].) The state also relies on cases that provide an example of this Court not reversing convictions for similar, though more mild, kinds of arguments. (RB at 250-251.) In *People v. Bell* (1989) 49 Cal.3d 502, 538, this Court somewhat disapproved of the prosecutor arguing that it was defense counsel's "job to get this man off. He wants to confuse you." This Court thought the remarks were ambiguous, but "to the extent that the remarks might be understood to suggest that counsel was obligated or

permitted to present a defense dishonestly, the argument was improper." (*Ibid.*) Then, in *People v. Gionis,* (1995) 9 Cal.4th 1196, 1216-1218, and fn. 13, this Court relied on *Bell*, in approving a prosecutor's argument that was "far milder than the remarks" in *Bell*, and because it "did not imply that counsel was offering a dishonest defense."

The vicious remarks of the prosecutor here – calling defense counsel liars who "will say anything to you" – simply because they accepted the jury's verdict – explicitly suggested dishonesty, and are far worse than those condemned in *People v. Hawthorne* (1992) 4 Cal.4th 43, 59-60, fn. 8, where the prosecutor argued that, while the state was obligated to present the truth and to make sure no innocent person was convicted, defense counsel was expected and permitted by law to disregard the truth in defense of his client. (See AOB at 275.) To give this Court's imprimatur to this kind of argument will undoubtedly encourage it. (*Brown, Winfield & Canzoneri Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1256 [conc. opn. of Werdegar, J.] ["By giving our imprimatur to [it], we inevitably will encourage its spread"]

The state also urges: "Clearly the comments were not unduly inflammatory as the jury imposed different penalties for appellant and his codefendant, notwithstanding prosecutor's comments directed toward both defendants." (RB at 251.) Nonsense. (ARB at 4-9.) The state then argues that the "prosecutor did not suggest that defense counsel had fabricated or deceived the jury as to the evidence of factors in aggravation and mitigation they were to consider." (RB at 250-251, citing *People v. Clark, supra*, 52 Cal.4th at 961.) The prosecutor's argument also told the jury that defense counsel had misled the jury about the circumstances of the crime and the underlying guilt of the defendants. One must willfully

turn a blind eye not to realize that the only reason to call Winbush's lawyers liars who will say anything and make any kind of "shameful argument," was to try to convince the jury to return a death verdict. (AOB 273-274; 189-RT 14776-78, 14794-96.) Obviously, the only reason for the prosecutor to impugn defense counsel at the penalty phase was to undercut their credibility in arguing for Winbush's life, and certainly concerned the "evidence of factors in aggravation and mitigation." The prosecutor's vicious invective was a deliberate part of his intemperate crusade to execute Winbush.

The state then argues that even "assuming the prosecutor's comments were denigrating or discourteous, the conduct was neither egregious nor systematic to render appellant's trial fundamentally unfair." (RB at 251.) The state cites *People v. Espinoza* (1992) 3 Cal.4th 806, 820, for the proposition that a prosecutor's behavior may on occasion be "rude and intemperate," while not comprising a "pattern of egregious misbehavior making the trial fundamentally unfair." (RB at 251.)

In Winbush's case, the prosecutor was routinely out of control and infected Winbush's penalty phase – at a minimum – with such prejudice that Winbush deserves a new one. For example, the prosecutor proceeded to compare Beeson's death with "the 167 victims than the Oklahoma City bombing victims" and suggested the bombing victims suffered less because "they all died instantly." (189-RT 14794-96.) Even after the court sustained a defense objection to this foundationless argument, the prosecutor proceeded to ignore the court's ruling, reiterating this baseless speculation: "[Erika] suffered more than a hundred victims suffered in a bomb blast because they all went out immediately. And she slowly is being strangled." (189-RT 14794-96.) The state facetiously

suggests that the prosecutor did not ignore the court's ruling by speaking of a generic bombing, rather than the Oklahoma City bombing, a distinction without a difference, after the prosecutor mentioned the Oklahoma City bombing. (RB at 253; see *People v. Gonzales* (2011) 51 Cal.4th 894, 920 ["it was improper for the prosecutor to persist with his line of questioning after the court sustained an objection"].)

The state suggests it was "ironic" that Winbush had earlier opposed the prosecutor's motion to exclude such references to notorious cases. (RB at 253, fn. 72, citing 180-RT 14169-14191.) If there is an irony here, it is that of the prosecutor objecting to Winbush's request to reference other cases, and then violating the exclusionary order he himself sought. Winbush stands by his argument that it is 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." (AOB at 276.)

D. The Prosecutorial Misconduct Requires Reversal

The state argues that any error was harmless beyond a reasonable doubt, because it did not deprive Winbush of a fair trial, "the evidence in aggravation against appellant was overwhelming in quantity and quality," and "the relative weight of the victim impact evidence was minor." (RB at 253-254, citing 196 RT 14986-14989.) Not so. (ARB at 1-9.)

The prosecutor's over-the-top rhetoric reveals a near desperation to turn this mundane murder into one of the worst of the worst, for which the death penalty is supposed to be reserved. Clearly, the prosecutor's outrageous comments could have caused the jury to believe that defense counsel had deliberately lied to them earlier -- because counsel had now "accepted" the jury's guilty verdicts -- and therefore nothing they said

could now 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. These arguments and the name-calling in both the guilt and penalty phase particularly prejudiced Winbush's penalty phase, where, as exemplified by the life verdict rendered in favor of Patterson, the case for death was a close one.

E. The Cumulative Effect of the Prosecutorial Misconduct was Prejudicial Error

The state argues that there was no cumulative prejudice, because the errors did not undermine the facts supporting guilt, nor result in prejudice. (RB at 254.) Winbush disagrees. (AOB at 279-280.) The prosecutor's repeated instances of improper argument materially damaged Winbush's defense and likely poisoned the jury, requiring reversal. Prejudice should be analyzed under the *Chapman* standard, both because these errors violate *People v. Bolton* (1979) 23 Cal.3d 208, and because the prejudice flowing from these errors must be viewed cumulatively with the general erosion of the reasonable doubt standard.

XIV. ARGUMENTS XIV THROUGH XXVIII HAVE BEEN FULLY PRESENTED

Winbush has fully presented Arguments XIV through XXVIII in the AOB and nothing further is needed in reply. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

CONCLUSION

For the reasons stated in this reply brief and his opening brief, 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: April 16, 2014

Respectfully submitted,

RICHARD JAY MOLLER
Attorney for Appellant 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 REPLY BRIEF on April 16, 2014, by depositing copies in the United States mail at Oakland, California, with postage prepaid thereon, and addressed as follows:

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I declare under penalty of perjury under the laws of California that according to Microsoft Word the word count on this brief is 42,090 words, that the foregoing is true and correct and that this declaration was executed on April 16, 2014, at Oakland, California.

RICHARD JAY MOLLER