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IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

GRAYLAND WINBUSH,

Defendant and Appellant./

CAPITAL CASE

No. S117489

Alameda County Superior Court No. 128408B

On Appeal From Judgment Of The Superior Court Of California

Alameda County

Honorable Jeffrey W. Horner, Trial Judge

SUPREME COURT
FILED

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APPELLANT'S REPLY TO THE STATE'S RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

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DEATH PENALTY

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I. EVEN IF THIS COURT CONCLUDES THAT PROSPECTIVE JUROR E.I. WAS EQUIVOCAL ABOUT HER ABILITY TO VOTE FOR DEATH, THE TRIAL COURT DID NOT HAVE SUFFICIENT INFORMATION TO CONCLUDE THAT SHE WAS INCAPABLE OF PERFORMING HER DUTIES AS A CAPITAL JUROR BECAUSE THE STATE FAILED TO AFFIRMATIVELY ESTABLISH THAT E.I. WOULD NOT FOLLOW THE LAW

In responding to Winbush's new arguments with respect to Argument III, the state has retreated from positions it took in its responsive brief, and mischaracterized important facts. At the risk of repetition, Winbush cannot let the state's response go unanswered. Otherwise, Winbush stands by the arguments he has made in his supplemental and other briefs.

Faced with *People v. Leon* (2015) 61 Cal.4th 569, 590 (*Leon*), the state makes an amazing about-face, alleging for the first time that Prospective Juror "E.I.'s responses in voir dire demonstrating she could not weigh evidence to consider returning a verdict of death were *not* equivocal." (Supp. RB at 5 [emphasis in original].) The state ignores its concession throughout its responsive brief: "As noted at length in section III.A.3, *ante*,

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.)

If anything, E.I.'s answers in her juror questionnaire strongly indicated she could consider death, and any equivocality was due solely to a couple of somewhat ambiguous voir dire questions and answers. (102-CT 29006-09; 86-RT 5318-5329.) As explained in all of Winbush's briefs – opening, reply and supplemental -- E.I. repeatedly stated in her questionnaire and during voir dire that she could consider and impose the death penalty. (AOB at 121-126; ARB at 58-60, 63-69; Supp. Brief at 1.) E.I. wrote in her jury questionnaire that she was "moderately in favor" of the death penalty, which her other responses confirmed. (102-CT 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 if on the ballot 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. also 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.) During voir dire, E.I. explained her questionnaire answer that she would *always vote for death* if the murder was intentional as follows: "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].)

The jury questionnaire never asked if she could set aside any personal feelings with respect to the death penalty and follow the law. (102-CT 28973-29010.) Neither was E.I. asked this question during voir dire. During voir dire, E.I. unequivocally and repeatedly stated she could impose the death penalty. (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"]; 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 most of these statements, and argues that E.I. "repeatedly made clear that she would consider whether to impose a death sentence only in extreme circumstances not applicable in this case and, after giving the question additional thought, disclosed that she would not consider imposing a death penalty under any circumstances. " (Supp. RB at 2, citing 86-RT 5327.) Winbush begs to differ.

It was only after leading and deceptive questioning by the prosecutor and the court that this death-qualified juror expressed any difficulty with imposing a death sentence in this case and significantly, like the three jurors in *Leon*, E.I. was never asked whether she could set aside her personal difficulties and follow the law. The prosecutor's description of the murder made it appear mundane, characterizing the crime as "a drug deal gone bad," and noting that Winbush and Patterson were teenagers. (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 court erroneously upheld this objection and refused to allow counsel to inform E.I. of the

most basic aggravating factors, like Winbush's substantial criminal history. Instead, the court allowed the prosecutor to sugarcoat and minimize 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."].)

In contrast, the prosecutor told the jury during 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.) The prosecutor also emphasized Winbush's extensive history of violence during closing penalty argument. (188-RT 14684 ["Winbush's list of victims is long"]; 188-RT 14692 ["He's a very seasoned criminal in terms of violence, drug dealing, robberies, sexual assaults, all kinds of assaults. Highly, highly sophisticated, experienced criminal at the time of the murder"].)

The result of the prosecutor's deception during voir dire 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 Winbush's extensive criminal history for such a young man, and the fact that the prosecutor believed Erika Beeson "suffered enough for a hundred murders ... This is the worst type of murder." (*Ibid.;* 86-RT 5330-5331.)

Notably, E.I.'s statements in favor of the death penalty stand in stark contrast to the opinions of the three improperly-excused prospective jurors in *Leon*, who not only all "expressed general opposition to the death penalty," but who all indicated that "they would automatically vote for life imprisonment without parole." (*People v. Leon, supra,* 61 Cal.4th at 590.) During voir dire, Prospective Juror R.C. reiterated that he would vote for life imprisonment "[r]egardless of the evidence." (*Ibid.*) Prospective jurors D.A. and N.C. also repeated their questionnaire responses about automatic voting for life. (*Ibid.*)

When asked whether they would "automatically, and in every case, vote for a penalty of life imprisonment without the possibility of parole and never vote for death," D.A. and N.C. both responded, "Yes." (*Ibid.*) All three excused prospective jurors, however, also "answered 'yes' to questions asking if they would *change their answers* on automatic voting if instructed to set aside personal feelings and weigh aggravating and mitigating evidence before voting on penalty." (*Id.* at 590-591 [emphasis in original].)

This Court held that the trial court abused its discretion by dismissing these three prospective jurors for cause over defense objection and without asking whether they could set aside their anti-death penalty views and follow the law in determining penalty. (*Id.* at 590-593.) Similarly, E.I. was never asked and never answered whether she could set aside her personal feelings and follow the law to weigh the aggravating and mitigating evidence in determining penalty. (102-CT 28972-29012; 86-RT 5312-5327.) Thus, *People v. Leon, supra,* 61 Cal.4th at 590-593, strongly supports Winbush's contention that the truncated and misleading voir dire was insufficient to demonstrate that E.I. was incapable of performing her duties as a capital juror; the court did not have sufficient information to conclude that she could not conscientiously consider all sentencing alternatives.

The state's next argument fails to satisfy its burden of proof. As noted in Winbush's Supplemental Brief, *Witt* established that if a juror is to be excluded under *Adams v. Texas* (1980) 448 U.S. 38, it is the state's burden to prove the juror meets the criteria for dismissal. (Supp. Brief at 5; *Wainwright v. Witt* (1985) 469 U.S. 412, 423 ["where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality"].) The state argues that there was no ambiguity about E.I.'s last answer -- "no" -- in response to Winbush's question: "Are you telling me that you would not want to return a verdict of death?" (86-RT 5327.) According to the state, the parties

understood this response to mean that E.I. would *not* return a verdict of death.[1] (Supp. RB at 5, fn. 2.) Winbush disagrees. Read literally and logically, E.I.'s response "no" was nothing more than an answer to the question asked. In other words, E.I. was NOT telling defense counsel that she would not want to return a verdict of death, and thus this double negative again indicated that E.I. would be able to consider returning a verdict of death. Regardless of whose interpretation is correct, it is clear that, at best, E.I.'s answer was ambiguous and equivocal. The state cannot meet its burden of demonstrating that E.I. was unable to perform her duties as a capital juror on the basis of such an ambiguous response.

Moreover, whether E.I. "would not want to return a verdict of death" was not the critical, $64,000 question under *Leon*. Even if E.I. did not "want to return a verdict of death," she was never asked nor did she volunteer whether she could set aside this new-found "feeling" -- first adduced during voir dire and in sharp contrast to her answers in her questionnaire -- and follow the law in determining penalty. Similarly, after E.I. made the ambiguous responses, "I don't want to live with my conscience," and "I don't want to send anyone to death," she was never asked if she could set aside those feelings and follow the law, given her pro-death penalty views expressed not only in her questionnaire, but also during most of her voir dire. (86-RT 5327; see *People v. Leon, supra,* 61 Cal.4th at 593 [the court erred by not inquiring "about the jurors' ability to set aside their biases and follow the law despite clear statements in the questionnaires expressing the jurors' willingness to do so"].)

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[1] The trial court stated that the "last answer, the last questions I think really eliminate any further questions on it," and also stated, "clearly at the end her views became crystalized that she could never return a verdict of death." (86-RT 5329.) There is an equally reasonable (and perhaps more logical) interpretation which disputes this understanding.

The state's allegation that the defense did not challenge the trial court's dismissal of E.I. is ludicrous. (Supp. RB at 7.) 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 forfeit the issue or suggest that he understood the double negative as a simple negative, as the state claims. (Supp. RB at 5, fn. 2; *People v. McKinnon* (2011) 52 Cal.4th 610, 637 [objection to juror excusal is not forfeited by counsel's affirmative statement to the trial court that the matter is "submitted"].) In the face of this ambiguity, the state has failed to carry its burden of proof sufficient to justify excusing E.I. for cause.

II. THE COURT ERRONEOUSLY EXCUSED PROSPECTIVE JUROR E.I. FOR CAUSE WITHOUT PERMITTING ADEQUATE VOIR DIRE, AND BY APPLYING A DIFFERENT STANDARD THAN APPLIED TO JURORS NO. 12 AND NO. 9

Reaffirming its decision to avoid directly responding to Winbush's contention that the trial court excused E.I. for cause without permitting adequate voir dire, and by applying a different standard than applied to Jurors No. 12 and No. 9, the state characterizes his argument as "vague." (Supp. RB at 2; see RB at 100-114; AOB at 129-132.) Winbush disagrees.

Here, the trial court's limitations on describing Ms. 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 *People v. Cash* (2002) 28 Cal.4th 703, 720-721, and *People v. Pearson* (2013) 56 Cal.4th 393, 412, and was an abuse of discretion. Moreover, the trial court erred by using two different standards in evaluating prospective jurors' qualifications to serve – (1) relying on Juror No. 12's questionnaire responses in refusing to excuse him, while (2) essentially ignoring E.I.'s questionnaire answers, which strongly and unequivocally

indicated she could consider death, in excluding her. (ARB at 64-69; 102-CT 29006-09; 86-RT 5318-5329.)

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.) That E.I. eventually expressed difficulty voting for the death penalty – after deceptive voir dire -- is far from being a disqualifying fact. (86-RT 5323-5324; see *People v. Stewart* (2004) 33 Cal.4th 425, 442-449 [a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty].)

CONCLUSION

For all of the reasons stated above, as well as in the Opening, Reply and Supplemental Briefs, Winbush respectfully submits that the trial court erred in discharging Prospective Juror E.I. for cause, thus requiring reversal of the penalty verdict. Winbush was entitled to a jury not stacked solely with death penalty aficionados. (*Uttecht v. Brown* (2007) 551 U.S. 1, 9 ["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"].)

Dated: November 4, 2015

Respectfully submitted,

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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 TO THE STATE'S RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF on November 4, 2015, by depositing copies in the United States mail at Redway, California, with postage prepaid thereon, and addressed as follows:

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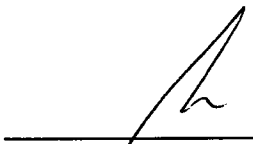

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