SUPREME COURT COPY

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

GRAYLAND WINBUSH,

Defendant and Appellant./

CAPITAL CASE

No. S117489

Alameda County Superior Court No. 128408B

On Appeal From Judgment Of The Superior Court Of California

Alameda County

Honorable Jeffrey W. Horner, Trial Judge

SUPREME COURT
FILED

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APPELLANT'S SUPPLEMENTAL BRIEF

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DEATH PENALTY

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INTRODUCTION

Winbush has argued in Argument III of his opening and reply briefs that the trial court erred in discharging Prospective Juror E.I., because (1) the state did not demonstrate that this juror was unable to follow the law or abide by her oath (AOB at 132-142; ARB at 58-60, 64-69); and (2) the trial court failed to conduct adequate voir dire to permit it to determine whether the juror's ability to perform her duties was substantially impaired. (AOB at 129-132; ARB at 62-64.) As explained in both briefs, the juror unequivocally and repeatedly stated in her questionnaire answers and voir dire responses that she could consider and impose the death penalty. (AOB at 121-126; ARB at 58-60, 63-69.) The trial court, however, essentially ignored those statements and based its ruling on a couple of allegedly ambiguous answers provided in response to the prosecutor's misleading questions. (*Ibid.*) The state has responded that E.I. "gave equivocal and conflicting responses throughout her questionnaire and voir dire" and therefore this Court should defer to the trial court's ruling. (RB at 112-114.) In support, the state relies on this Court's holdings that when a prospective juror's statements are conflicting or equivocal, a trial court may decide to discharge the juror

and that decision is binding on the reviewing court. (See RB at 112; see also *People v. Schmeck* (2005) 37 Cal.4th 240, 262-263; People v. *Mincey* (1992) 2 Cal.4th 408, 456.)

In this Supplemental Brief, appellant presents new authority -- this Court's recently-decided decision in *People v. Leon* (2015) 61 Cal.4th 569, 590-593 -- in support of his argument that the truncated and misleading voir dire was insufficient to demonstrate that Prospective Juror 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. Winbush also presents two additional arguments. First, even if this Court concludes that E.I. gave equivocal responses about her ability to consider both sentencing alternatives, the trial court erred in discharging her, because the prosecutor failed to establish that she would not follow the law. This Court's prior decisions deferring to the trial court's decision in this matter are contrary to *Adams v. Texas* (1980) 448 U.S. 38 (*Adams*) and *Gray v. Mississippi* (1987) 481 U.S. 648 (*Gray*). Second, the trial court erred in dismissing E.I. because the "substantial impairment" standard for excluding jurors in capital cases -- the standard employed by the court in this case -- is inconsistent with Winbush's Sixth Amendment right to a jury trial.[1]

I. THE TRIAL COURT DID NOT HAVE SUFFICIENT INFORMATION TO CONCLUDE THAT PROSPECTIVE JUROR E.I. WAS INCAPABLE OF PERFORMING HER DUTIES AS A CAPITAL JUROR

In *People v. Leon*, *supra*, 61 Cal.4th 569, 590-593, this Court refused to defer to the trial court's rulings excusing three prospective jurors for cause, finding that the trial court's cursory voir dire was insufficient to permit an informed determination about their

[1] By focusing on these aspects of Argument III, Winbush does not intend to abandon any other facets of that argument not addressed in this supplemental brief.

ability to serve. There, although the three dismissed jurors indicated in their questionnaires that they would automatically vote for life imprisonment without parole, they 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.) During voir dire, the trial court dismissed all three after simply repeating the questionnaire's *Witherspoon/Witt*[2] questions without asking whether they could set aside their views and follow the law in determining penalty. (*Id.* at 591.)

This Court held that these dismissals were erroneous:

> Based on their written responses alone, these jurors appeared qualified to serve. They could not be excused for cause unless further questioning established that they were in fact unable or unwilling to set aside their personal views and follow the law in determining penalty. (*People v. Leon*, *supra*, 61 Cal.4th at 592.)

As explained in *Leon*, before granting a challenge for cause, the trial court must have *sufficient information* regarding the prospective juror's state of mind to permit a *reliable* determination as to whether the juror's views would prevent or substantially impair his performance as a capital juror. (*Ibid.* [emphasis in original].) Trial courts therefore must make a conscientious attempt to determine a prospective juror's views to ensure that any juror excused meets the constitutional standard. (*Ibid.*) *Leon* concluded that "[a]n adequate *Witherspoon/Witt* voir dire cannot simply reaffirm prospective jurors' biases without also asking whether they are capable of setting them aside and determining penalty in accordance with the law." (*Id.* at 593.) Although the court below conducted voir dire, it was limited and insufficient; thus, *Leon* concluded, its conclusions were not entitled to deference. (*Ibid.*)

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[2] *Witherspoon v. Illinois* (1968) 391 U.S. 510; *Wainwright v. Witt* (1985) 469 U.S. 412 (*Witt*).

The same is true here. As discussed in both the opening and reply briefs, the trial court failed to conduct adequate voir dire to permit it to determine whether Prospective Juror E.I.'s ability to perform her duties was substantially impaired. (AOB at 129-132; Reply Brief at 62-64.) It dismissed her on the basis of one or two allegedly ambiguous answers to misleading questions regarding the aggravating and mitigating factors without permitting sufficient voir dire to show that she was capable of considering both sentencing alternatives. This case presents an even more egregious situation than that present in *Leon* in that Juror E.I. made it quite clear in her questionnaire responses that she could consider and impose a death sentence, but it was only in response to misleading questioning by the prosecutor that she arguably provided ambiguous answers regarding her ability to do so. Under these circumstances, the trial court had a responsibility to permit adequate questioning to determine the juror's capability. Moreover, even if the court believed that E.I.'s views about capital punishment would lead to an automatic vote for life, it failed to ask whether she could set aside those views and follow the law to weigh the aggravating and mitigating evidence before voting on penalty. Accordingly, the court's voir dire was insufficient to permit it to conclude that Juror E.I. was incapable of performing her duties as a capital juror. Its ruling is not entitled to deference and is erroneous, requiring reversal of the penalty verdict.

II. EVEN IF THIS COURT CONCLUDES THAT PROSPECTIVE JUROR E.I. WAS EQUIVOCAL ABOUT HER ABILITY TO VOTE FOR DEATH, THE TRIAL COURT ERRED IN DISCHARGING HER BECAUSE THE STATE FAILED TO AFFIRMATIVELY ESTABLISH THAT SHE WOULD NOT FOLLOW THE LAW

Even if this Court concludes that Prospective Juror E.I. gave equivocal responses about her ability to impose a verdict of death, the trial court erred in discharging her because the state failed to affirmatively establish that she was unable to

follow the law. In evaluating a trial court's decision to discharge jurors because of opposition to the death penalty, this Court has adopted and applied the substantive standard of review set forth in *Adams* and *Witt*. (See *People v. Holt* (1997) 15 Cal.4th 619, 650-651.) In *Adams*, the Supreme Court held that a prospective juror who opposes capital punishment may be discharged for cause only where the record shows the juror is unable to follow the law. (*Adams, supra*, 448 U.S. at 48.) *Witt* established that if a juror is to be excluded under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Witt, supra*, 469 U.S. at 423.) In applying these cases, however, this Court, in a long line of decisions stemming back to *People v. Floyd* (1970) 1 Cal.3d 694, 724, has held that where the record shows a prospective juror is equivocal about his or her ability to vote for death: (1) a trial court may decide to discharge the juror and (2) that decision is binding on the reviewing court. (See, e.g., *People v. Schmeck, supra,* 37 Cal.4th at 262-263; People v. Horning (2004) 34 Cal.4th 871, 896; *People v. Mincey, supra,* 2 Cal.4th at 456; People v. Frierson (1991) 53 Cal.3d 730, 742–743; *People v. Ghent* (1987) 43 Cal.3d 739, 768; *People v. Fields* (1984) 35 Cal.3d 329, 355-356.) Winbush submits that this rule of deference established in *Floyd* is inconsistent with Supreme Court jurisprudence, namely *Adams* and *Gray*, and that *Floyd* and the subsequent decisions applying its rule should be overruled.

This rule derives from a decision – *Floyd* -- which pre-dates *Adams* by nearly a decade. Analysis of the actual voir dire in *Adams*, as well as in cases decided by the Supreme Court since *Adams*, shows, however, that the Supreme Court embraces the opposite rule. *Adams* held that a number of jurors had been improperly excused for cause in that case, because the state had not carried its burden of proving that the jurors' views "would prevent or substantially impair the performance of [their] duties as ... juror[s] in accordance with [their] instructions and [their] oath." (*Adams, supra*, 448 U.S. at 45.)

Analysis of the responses of several of these life-leaning jurors shows that this Court's rule deferring to a trial court's determination regarding jurors who give equivocal responses is fundamentally contrary to *Adams*. In fact, the voir dire in *Adams* involved several jurors who were equivocal about whether their death penalty views would impair their performance as capital jurors. For example, Prospective Juror Mahon was unable to state that her feelings about the death penalty would not affect her deliberations. Instead, she admitted that these feelings "could effect [sic] me and I really cannot say no, it will not effect [sic] me, I'm sorry. I cannot, no." (*Adams*, No. 79-5175, Brief for Petitioner, Appendix at 3, 8.) Prospective Juror Coyle admitted she could not say her deliberations "would not be influenced by the punishment." (*Id.* at 24.) Similarly, Prospective Juror White, although not entirely sure, believed her aversion to imposing death would "probably" affect her deliberations and "didn't think" she could vote for death. (*Id.* at 27-28.) Prospective Juror Ferguson admitted that his opposition to capital punishment "might" impact his deliberations, while Prospective Juror Jenson admitted that his views on the death penalty would "probably" affect his deliberations. (*Id.* at 12, 17.) In response to these five prospective jurors' equivocal comments, the trial court -- applying a Texas rule equivalent to this Court's rule from *Floyd* -- resolved the ambiguity in the state's favor, concluding that all five could not impose death, and discharged them all for cause. Significantly, the Supreme Court did not defer to any of these five conclusions; instead, the Court ruled that the record contained insufficient evidence to justify striking any of these jurors for cause. (*Adams, supra*, 448 U.S. at 49-50.)

In assessing *Adams*, it is important to note that all five discharged life-leaning jurors had given equivocal responses. Nevertheless, the Supreme Court reversed, holding that jurors could not be discharged "because they were unable positively to state whether or not their deliberations would in any way be affected." (*Id.* at 49-50.)

In other words, when a juror gives conflicting or equivocal responses -- as did the five prospective jurors in *Adams* -- the trial court is not free to assume the worst and

discharge the jurors for cause, because when a prospective juror gives equivocal responses, the state has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror." (*Adams, supra*, 448 U.S. at 45.)

This rule in *Adams* -- precluding a for-cause challenge based on equivocal responses and specifically designed to minimize the risk of an "imbalanced jury" -- is appropriate precisely because of "the discretionary nature of the [sentencing] jury's task [in a capital case]." (*Lockhart v. McCree* (1986) 476 U.S. 162, 182-183.) In fact, as observed by *McCree*, the *Adams* rule does not apply "outside the special context of capital sentencing." (*Ibid.*)

Seven years after *Adams*, the Supreme Court addressed this same issue in *Gray*, again holding unconstitutional a trial court's exclusion of a juror who had been equivocal about her ability to serve as a capital juror. According to the Mississippi Supreme Court, the voir dire of Prospective Juror Bounds was "lengthy and confusing" and resulted in "equivocal" responses. (*Gray v. State* (Miss. 1985) 472 So.2d 409, 422.) When asked if she had any "conscientious scruples" against the death penalty, Bounds replied, "I don't know." (*Gray v. Mississippi*, No. 85-5454, Joint Appendix at 16.) When asked if she would automatically vote against imposition of death, she first explained she would "try to listen to the case" and then responded that "I don't think I would." (*Id.* at 17, 18.) When asked whether she could vote for death, she said, "I don't think I could." (*Id.* at 19.) Just like the trial court in *Adams*, the trial court in *Gray* applied the Mississippi equivalent of this Court's *Floyd* rule and discharged Bounds for cause.

Before the Supreme Court, the state "devoted a significant portion of its brief to an argument based on the deference this Court owes to findings of fact made by a trial court." (*Gray, supra*, 481 U.S. at 661, fn. 10; see *Gray v. Mississippi*, No. 85-5454, RB at 15-16, 22-23.) Of course, the state's position in *Gray* represents the precise view this

Court adopted in 1970 and has followed ever since. (*People v. Floyd*, *supra*, 1 Cal.3d at 724; *People v. Mincey, supra*, 2 Cal.4th at 456.)

Significantly, however, it is also the same position the Supreme Court rejected, not only in *Adams*, but subsequently in *Gray* as well. To the contrary, and just as it did in *Adams*, *Gray* rejected the state's arguments that (1) the trial court was free to discharge equivocal jurors for cause, and (2) a reviewing court was required to pay deference to such a discharge. In fact, not only did the Supreme Court refuse to afford any deference to the trial court's finding in *Gray*, but it concluded that the discharge of Bounds for cause violated the Constitution. (*Gray, supra*, 481 U.S. at 661, fn. 10.)

In sum, therefore, this Court's body of case law promulgating and applying the rule of deference is inconsistent with Supreme Court jurisprudence and should be overruled. Winbush is aware that the Court has rejected this argument in *People v. Schmeck*, *supra*, 37 Cal.4th at 263, stating:

> In its decision in *Witt, supra,* 469 U.S. 412 -- decided several years after *Adams* -- the high court clearly explained that despite "lack of clarity in the printed record ... there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror."

It is true that in *Witt*, as well as in *Uttecht v. Brown* (2007) 551 U.S. 1, the Supreme Court held that federal courts must defer to state court findings of juror bias. (*Uttecht, supra,* 551 U.S. at 2, 6-7; *Witt*, *supra*, 469 U.S. at 428-430.) The rationale for that deference, however, was that both *Uttecht* and *Witt* involved collateral attacks on the state court judgment. In *Greene v. Georgia* (1996) 519 U.S. 145, 146, the Supreme Court made clear that this rule of deference is fundamentally inappropriate for cases on direct appeal. *Witt* is not "controlling authority" as to the standard of review to be applied by "state appellate courts reviewing trial courts' rulings on jury selection." *Witt* was a case arising on federal habeas, where deference to state-court findings is mandated by 28 U.S.C. § 2254(d). (*Ibid.*)

Of course, Winbush's appeal is on direct review. In light of the actual voir dire in the Supreme Court's direct review cases -- *Gray* and *Adams* – and the principles announced in *Greene*, this Court should reconsider its rule permitting the state to satisfy its burden of establishing a prospective juror's inability to serve in a capital case by eliciting equivocal answers from prospective jurors. This rule cannot be squared with (1) the principles announced and applied in *Adams* and *Gray*, (2) the Eighth Amendment developments on which they were based, and (3) the principles set forth in *Greene*. Application of the *Adams/Gray* standard to the voir dire of Prospective Juror E.I. compels a finding that the trial court in this case erred. Because E.I. merely gave equivocal responses about her ability to vote for death, the state failed to meet its burden of establishing her inability to fulfill her duties as a capital juror and she should not have been discharged for cause under *Adams* and *Gray*. Reversal of the penalty verdict is thus required here.

III. THE "SUBSTANTIAL IMPAIRMENT" STANDARD FOR EXCLUDING JURORS IN CAPITAL CASES IS INCONSISTENT WITH MODERN SIXTH AMENDMENT JURISPRUDENCE WHICH FOCUSES NOT ON IDENTIFYING AND ACCOMMODATING COMPETING INTERESTS, BUT ON THE HISTORICAL UNDERSTANDING OF THE SIXTH AMENDMENT AND THE INTENT OF THE FRAMERS

The trial court granted the prosecution's cause challenge of Prospective Juror E.I. on the basis that "her views on capital punishment would prevent or substantially impair the performance of her duties" in this capital case. (86-RT 5328-5329.) Winbush submits that this ruling was erroneous, because the "substantial impairment" standard is inconsistent with his Sixth Amendment right to a jury trial. This standard was taken from the Sixth Amendment framework erected by a series of Supreme Court cases decided before 1980, which defined the scope of the Sixth Amendment by identifying and balancing competing interests of the state and the defendant. That approach to the

Sixth Amendment, however, has been rejected by the Court in the past 20 years. The "competing interests" approach to the Sixth Amendment is neither consistent with the Court's current approach to the Sixth Amendment nor the intent of the Framers who drafted the amendment.

As noted above, in *Adams,* the Supreme Court first announced the substantial impairment standard to be applied in determining whether a prospective juror can be dismissed because of opposition to the death penalty. It held that the Sixth Amendment permitted the state to discharge any juror "based on his views about capital punishment [if] those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams, supra*, 448 U.S. at 45.) *Adams* stated that its conclusion was part of an effort "to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." (*Id.* at 43-48.) On the same day the Court decided *Adams* it issued *Ohio v. Roberts* (1980) 448 U.S. 56, also applying the Sixth Amendment. The Court's Sixth Amendment analysis in *Roberts,* following *Adams*, recognized "competing interests" between the goals of the Confrontation Clause and effective law enforcement, balanced those competing interests and held admissible the preliminary hearing testimony of an unavailable witness. (*Id.* at 64, 77.) Since 1999, however, the Supreme Court has consistently explained that the contours of the Sixth Amendment are no longer to be determined by seeking to balance competing interested, but instead are to be determined by assessing the intent of the Framers. Indeed, the Court's recent decisions show that the Court has not hesitated to overrule its prior precedents to incorporate into its Sixth Amendment jurisprudence a fidelity to the Framers' intent. (See, e.g., *Alleyne v. United States* (2013) 570 U.S. 1 [*Alleyne*], overruling *Harris v. United States* (2002) 536 U.S. 545; *Ring v. Arizona* (2002) 536 U.S. 584, 608 [*Ring*], overruling *Walton v. Arizona* (1990) 497 U.S. 639; *Crawford v. Washington* (2004) 541 U.S. 36 [*Crawford*], overruling *Ohio v. Roberts, supra*, 448 U.S. 56.) From *Jones v. United States* (1999)

526 U.S. 227, 245-248 and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477, to *Ring, Crawford, Blakeley v. Washington* (2004) 542 U.S. 296, 301, 306-308, and *Alleyne*, the Supreme Court has sought to connect Sixth Amendment jurisprudence to the historical role of juries and the intent of the Framers in adopting the Sixth Amendment.

Unlike these recent cases -- which specifically consider the Framers' intent when interpreting the Sixth Amendment's protections -- the substantial impairment test announced in *Adams* did not consider the Framers' intent and contradicts the intent and understanding of the Framers of the Sixth Amendment, thus violating that amendment Instead, the Court's death qualification decisions imported into the Sixth Amendment a balancing test which sought to accommodate the State's interest in implementing its death penalty system while trying to avoid unduly stacking the deck against a defendant. The Supreme Court has never examined whether there is any historical support for the *Adams* death qualification standard. (See, e.g., *Lockhart v. McCree* (1986) 476 U.S. 162; *Uttecht v. Brown, supra,* 551 U.S. at 9 [balancing of interests].)

Permitting jurors to be struck for cause because of their views toward the death penalty is antithetical to the Framers' understanding of an "impartial jury." When the Sixth Amendment was adopted, neither prosecutors nor defense counsel were permitted to exclude a juror based on that individual's attitude toward the death penalty. Jurors were permitted to consult their conscience and, in this limited way, "find the law" in addition to "finding the facts."

Indeed, this was -- and should continue to be -- a critical component of the Sixth Amendment's "impartial jury" protection. Steeped in the experience of overreaching criminal laws (such as libel laws that were used to punish political dissidents), the Framers considered the jury to be the conscience of the community, serving as an important bulwark against the machinery of the judiciary. The jury was free to use its verdict to reject the application of a law that it deemed unjust -- indeed, it was its duty to

do so -- and this was (and should again be) at the heart of the "impartial jury" guaranteed to all criminal defendants under the Sixth Amendment.

At common law, striking a juror on the basis of bias, or "propter affectum," was limited to circumstances in which the jury had a bias toward a party (relational bias); it did not include striking a juror on the basis of her opinion of the law or the range of punishment for breaking the law. (3 William Blackstone, *Commentaries on the Laws of England* at 363; *United States v. Burr* (C.C.Va. 1807) 25 F. Cas.49, 50 [Marshall, C. J.]; see John Hostettler (2004) *Criminal Jury Old and New: Jury Power from Early Times to the Present Day* at 82; *People v. Croswell* (N.Y. Su 1804) 3 Johns. Cas. 337, 346 [Alexander Hamilton's argument that jury is bound to follow its conscience].)

At base, the notion of striking a juror because of his opinion on the propriety of the law was entirely foreign to the nation's founders. In fact, it was expected that the jurors would follow their conscience and render a verdict that was against a law they deemed unjust. (1 *Legal Papers of John Adams* at 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); see also Akhil Reed Amar, *America's Constitution* at 238 (2005) ["Alongside their right and power to acquit against the evidence, eighteenth century jurors also claimed the right and power to determining legal as well as factual issues -- to judge both law and fact 'completely' -- when rendering any general verdict"]; *Georgia v. Brailsford* (1794) 3 U.S. 1, 4; see Federalist 83 (Hamilton), reprinted in *The Federalist Papers* at 491, 499 (Clinton Rossiter ed., 1961).

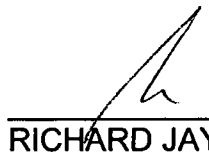
The current death-qualification "substantial impairment" standard reflects none of this – and conflicts with all of it. That standard thus contradicts the intent of the Framers of the Sixth Amendment and erodes the amendment's guarantee of an impartial jury. Application of that test in this case violated Winbush's Sixth Amendment rights and requires reversal of the penalty judgment.

CONCLUSION

For all of the reasons stated above, as well as in the Opening and Reply Briefs, Winbush respectfully submits that the trial court erred in discharging Prospective Juror E.I., thus requiring reversal of the penalty verdict. Mr. Winbush was entitled to a jury not stacked with death penalty aficionados.

Dated: September 8, 2015

Respectfully submitted,



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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 SUPPLEMENTAL BRIEF on September 8, 2015, by depositing copies in the United States mail at Redway, California, with postage prepaid thereon, and addressed as follows:

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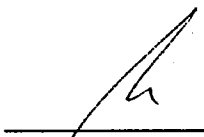

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