In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **GRAYLAND WINBUSH,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S117489

Alameda County Superior Court Case No. 128408B
The Honorable Jeffrey W. Horner, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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CONSTITUTIONAL PROVISIONS

INTRODUCTION

In regard to Issue III of his opening brief, appellant presents one new authority, *People v. Leon* (2015) 61 Cal.4th 569, 590-593 (*Leon*), and two federal constitutional claims in support of his contention that the trial court erred in dismissing Prospective Juror E.I. (hereinafter "E.I.") for cause. Specifically, appellant claims that E.I. was equivocal about her unwillingness to consider a death sentence in this case, that the Sixth Amendment precludes deference to the trial court's interpretation of equivocal statements, and that the Framers of the Constitution did not intend to allow dismissal for cause of jurors who, by conscience, express their unwillingness to follow the law. Appellant is incorrect and fails to demonstrate error or prejudice in the dismissal of E.I. for cause.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR UNDER *PEOPLE V. LEON* IN EXCUSING PROSPECTIVE JUROR E.I. FOR CAUSE

Appellant contends that this Court's recent decision in *Leon*, *supra*, 61 Cal.4th at pp. 591-593, demonstrates error in the trial court's dismissal of E.I. for cause. (Supp. AOB 3-4.) He is incorrect as that case is distinguishable both legally and factually.

In *Leon*, this Court found reversible error in dismissing three jurors for cause on a record showing they were qualified to serve. (*Leon*, *supra*, 61 Cal.4th at p. 592-593.) Specifically, the dismissed jurors' questionnaire responses stated that they were opposed to the death penalty but "all definitively stated they could set aside their personal feelings and follow the law as the court explained it." (*Id.* at p. 592.) Thus, based on the questionnaire responses alone, there was insufficient cause to dismiss these jurors (*Ibid.*; *Lockhart v. McCree* (1986) 476 U.S. 162, 176.) The trial court, which had precluded voir dire by counsel, conducted a "cursory" voir

dire that merely repeated the questionnaire's four pattern questions about jurors' attitude toward the death penalty (*id.* pp. 588-589), but failed to ask the jurors "whether they were capable of setting aside this bias and imposing a verdict of death if the evidence of aggravating and mitigating factors required it. This was error." (*Id.* at p. 593.) Thus, with undisputed evidence that the dismissed jurors were able to set aside their personal attitudes toward the death penalty and follow the court's instructions, and no other basis for a finding of incapacity, the record was bereft of evidence supporting dismissal for cause. (*Ibid.*)

By contrast, the record here contained substantial evidence to support the cause dismissal based on extensive voir dire conducted, not only by the trial court, but by counsel too. (86 RT 5312-5332.) During voir dire, 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. (86 RT 5327.)

Appellant's vague contention that the prosecutor was somehow responsible through voir dire for importing ambiguity into E.I.'s views or that the trial court's questioning was deficient to demonstrate cause is meritless. (AOB 4.) The trial court specifically inquired whether E.I. would be able to listen and "hold off any decision until you heard all of the evidence, and are both of these options possible for you and in realistic and practical terms," (86 RT 5316), and whether a death verdict "might be technically" and "theoretically" possible, "but knowing yourself as you do, in reality it just isn't available," and "the only thing you could realistically return in terms of a verdict would be life in prison without parole" (86 RT 5318). Counsel for codefendant Patterson also asked whether E.I. would be willing to weigh the evidence before making a determination about death. In response to voir dire by the prosecutor, E.I. had indicated that absent

"something really different to make the people so incredibly dangerous and deranged," distinct from the scenario thus far presented, death would not be appropriate. (86 RT 5321.) Counsel for codefendant Patterson then described some of the dangerous and deranged acts[1] in the present case. Referring to E.I.'s questionnaire response noting that an intentional murder might sometimes merit a death sentence, Patterson's counsel asked, "But are you also saying you would automatically vote for life without possibility of parole in anything less than a serial killing, mass killing, you know. Thing of that nature?" E.I. acknowledged that she could not vote automatically for or against death under various circumstances, but also noted that "it is really hard to hypothesize on this," and that she had "never been in a situation like this," which suggested she was beginning to think about these questions in a less theoretical manner. (86 RT 5324.)

By the time appellant's counsel asked her directly whether she could weigh the evidence in aggravation, E.I. stated, with no ambiguity, that she could not impose a death sentence, and after further questioning, explained that she could not set aside this bias because "I don't want to live with my conscience." (86 RT 5327.)

> [Appellant's counsel]: Now, I'm not going to ask you if you could promise that you will come back with the death penalty, because I'm going to argue it is not an appropriate penalty.
>
> All I'm asking you, *would you wait and listen to the evidence in the second phase, and can you conceive that depending on what the aggravation is that you might return a verdict of death*?

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[1] Patterson's counsel stated, "What you do know or what we can tell you is that it is a 20-year-old woman who was in her apartment when it is alleged that these two men came in with the intent to rob her. That they robbed her in the course of a robbery, stabbed her repeatedly. Choked her with a belt and killed her. There is no question that it was an intentional murder." (86 RT 5322.)

A. *I don't want to send anybody to death.*

Q. You are saying you wouldn't vote for death?

A. 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—*

Q. I'm not trying to ask you to do that. I agree, I couldn't either.

Are you telling me that you would not want to return a verdict of death?

A. *No.*

[Appellant's Counsel]: I would submit it.

The Court: I'm inclined to excuse this juror. Does anyone want to be heard?

[Co-Defendant's Counsel]: Submitted.

[Prosecutor]: Submitted.

(86 RT 5327, italics added.)

As the trial court noted in describing E.I.'s impaired ability "to follow her instructions and her oath in the case before us," this "last answer, the last questions I think really eliminate any further questions on it," and noted specifically, "clearly at the end her views became crystalized that she could never return a verdict of death." (86 RT 5329.) After E.I. explained, with no ambiguity, "I don't want to live with my conscience," there was sufficient evidence of cause and it was not incumbent upon the trial court, under *Leon*, to ask, yet again, whether E.I. could, in fact, live with her conscience and weigh evidence during a penalty phase.

E.I.'s responses provided ample support in the record for the trial court's decision.

> There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. Rather, it is sufficient that the trial judge is left with the definite

impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.

(*People v. Vines* (2011) 51 Cal.4th 830, 853, quoting *People v. Gray* (2005) 37 Cal.4th 168,192, internal quotations and edit marks omitted.)

Unlike *Leon*, the record contains substantial evidence that E.I. could not put aside her views about the death penalty and follow the law as the court would instruct. Thus, appellant's contention that the trial court erred, under *Leon*, *supra*, by dismissing E.I. for cause fails.

II. E.I.'S RESPONSES IN VOIR DIRE UNEQUIVOCALLY DEMONSTRATED CAUSE FOR DISMISSAL

Appellant claims the trial court erroneously dismissed E.I. for cause based on equivocal answers. Based on this premise, he sets forth a straw-man claim that deference should not be accorded a trial court's finding of cause for dismissal when a prospective juror provides equivocal responses in voir dire. (Supp. AOB 5-6, 9.) His contention fails in the first instance since E.I.'s responses in voir dire demonstrating she could not weigh evidence to consider returning a verdict of death were *not* equivocal.

As discussed in section I., *ante*, at the end of voir dire, E.I. could not have been more clear that, rather than "wait and listen to the evidence in the second phase," or "conceive that depending on what the aggravation is," she was unwilling to "send anybody to death." (86 RT 5327.) And if that were not clear enough, defense counsel asked, yet again, "Are you telling me that you would not want to return a verdict of death?" to which E.I. responded, "No." (86 RT 5327.)[2] Thus, this is not a case in which the

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[2] Contrary to appellant's contention in reply (ARB 58), all counsel and the trial court clearly understood "no," to mean that E.I. would *not* return a verdict of death. This understanding was demonstrated by counsels' immediate submission when the trial court had earlier indicated it would likely dismiss E.I. for cause, and by the discussion that immediately

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record is unclear and deference to the trial court tips the scales on review. Rather, E.I. explained, "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," and then acknowledged she would not return a verdict of death. (86 RT 5326.) This is sufficient cause for dismissal. (*Wainwright v. Witt* (1985) 469 U.S. 412, 423-424; *Lockhart v. McCree*, *supra*, 476 U.S. at p. 178; *People v. Williams* (2013) 56 Cal.4th 165, 181-182; *People v. Ledesma* (2006) 39 Cal.4th 641, 676-677; *People v. Duff* (2014) 58 Cal.4th 527, 543 [prospective juror "made clear that she certainly desired to follow the law, but in the end could not shake substantial doubts that she would be able to do so"].)

Assuming, for the sake of argument, that E.I.'s responses in voir dire were equivocal, appellant's invitation to have this Court "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" must be rejected. (Supp. AOB 9.) Appellant claims that California's deference on review is inconsistent with Supreme Court authority as set forth in *Gray v. Mississippi* (1987) 481 U.S. 648 [erroneous grant of cause challenge reversible error] and *Adams v. Texas* (1980) 448 U.S. 38 [Texas procedure overbroad in excluding prospective jurors from capital case who stated their deliberations would be "affected" by the penalty]), and that under *Green v. Georgia* (1996) 519 U.S. 145, California may adopt a more stringent standard of review. (Supp. AOB 9.) As a threshold matter, appellant fails to identify the fault with the prosecutor's voir dire or demonstrate that it impeded the trial court from determining

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followed E.I.'s dismissal. (86 RT 5327-5330.) (*Uttecht v. Brown* (2007) 551 U.S. 1, 17-18 [reasonable inference of prospective juror's demeanor drawn from defense counsel's failure to object to dismissal].)

whether E.I. would "conscientiously apply the law and find the facts." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.)

More significant, however, this Court has previously rejected similar claims, noting:

> 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." (*Witt*, *supra*, 469 U.S. at pp. 425–426; see *id.* at p. 428 [a trial court's finding concerning a prospective juror's state of mind "is based upon determinations of demeanor and credibility that are peculiarly within a trial court's province. Such determinations [are] entitled to deference . . . on direct review . . . ." (Fn. omitted)].) Nothing in the high court's subsequent decision in *Gray*, *supra*, 481 U.S. 648, purports to depart from or alter *Witt's* holding with regard to the deference that properly must be accorded to a trial court's finding concerning a prospective juror's state of mind; indeed, the issue before the court in *Gray* did not involve the determination of the correct standard for excusing a prospective juror under *Witt* at all, but rather the standard of prejudice that applies when a prospective juror improperly has been excused for cause under *Witt*. (*Gray*, *supra*, 481 U.S. at pp. 659–668.) Accordingly, there is no basis for reconsidering this court's uniform line of decisions on this point.

(*People v. Schmeck* (2005) 37 Cal.4th 240, 263, disapproved on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, brackets and parenthetical edit marks in original; accord *People v. Farnam* (2002) 28 Cal.4th 107, 132 and fn. 6.) Appellant's claim seeking a new standard of review is particularly weak in this case since neither counsel challenged the trial court's dismissal for cause. (*Uttecht v. Brown*, *supra*, 551 U.S. at pp. 17-18.)

Thus, appellant's premise that E.I. provided equivocal responses on voir dire and his invitation to this Court to adopt a standard of review

precluding deference to a trial court's findings and first-hand observations during voir dire, must fail.

III. THE "SUBSTANTIAL IMPAIRMENT" STANDARD DOES NOT VIOLATE THE SIXTH AMENDMENT

Appellant challenges the "substantial impairment" standard, commonly referred to as the "*Witherspoon-Witt* rule," claiming it violates his Sixth Amendment right to jury as "antithetical to the Framers' understanding of an 'impartial jury.'" (*Wainright v. Witt*, *supra*, 469 U.S. at p. 424 [a prospective juror may be excluded for cause because of his or her views on capital punishment if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'"]; see *Witherspoon v. Illinois* (1968) 391 U.S. 510; *Uttecht v. Brown* (2007) 551 U.S. 1, 18 [referring to this standard as the "*Witherspoon–Witt* rule"].) (Supp. AOB 9-11.) He argues, in essence, that because the United States Supreme Court has reversed itself on other questions involving the Sixth Amendment in the past 25 years,[3] this question too is ripe for reversal. Rather than the long-established

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[3] Appellant relies on authorities inapposite to the question of dismissal of a prospective juror for cause and addressing jury determination of facts related to punishment (e.g., *Alleyne v. Unites States* (2013) 570 U.S.__ [133 S.Ct. 2151, 2155][right to jury determination of facts that increase mandatory minimum sentence as elements of crime]; *Ring v. Arizona* (2002) 536 U.S. 584, 608 [right to jury determination of aggravating circumstance necessary for imposition of death penalty]; *Jones v. U.S.* (1999) 526 U.S. 227, 252 [jury determination of facts that increased punishment in carjacking statute]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [jury determination of fact that increases penalty of crime beyond statutory maximum]; *Blakely v. Washington* (2004) 542 U.S. 296, 305 [striking statute permitting "exceptional sentence" absent jury determination of supporting facts]), and the right of confrontation (e.g., *Crawford v. Washington* (2004) 541 U.S. 36, 68 [confrontation clause bars testimonial evidence absent unavailability with prior opportunity for cross examination]). (Supp. AOB 10-11.)

standard for cause as set forth in *Witt*, *supra*, 469 U.S. at p. 424—i.e., the prospective juror's views would prevent or substantially impair performance of duties in accordance with instructions and oath—appellant claims a constitutional right to a determination by jurors who would refuse to follow law as a matter of conscience. (Supp. AOB 10-12.) He is wrong.

Under this theory, appellant elevates jury nullification to a constitutional right. The Sixth Amendment, however, provides for "an impartial jury"—not a lawless one. (U.S. Const., 6th Amend.) "We have consistently rejected this view of jury impartiality, including as recently as last Term when we squarely held that an impartial *jury* consists of nothing more than 'jurors who will conscientiously apply the law and find the facts.'" (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 178.) "Disqualified jurors are properly excused for cause, not on the basis of their personal, moral beliefs regarding the death penalty, but because of their inability to 'temporarily set aside their own beliefs in deference to the rule of law.'" (*People v. Taylor* (2010) 48 Cal.4th 574, 604.) There is no Sixth Amendment right to trial by jurors who would refuse to follow the law. (*People v. Williams* (2001) 25 Cal.4th 441, 449-463, disapproved on other grounds in *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052 [rejecting jury nullification as Sixth Amendment right and reviewing the "deep roots" of authority supporting dismissal for cause of jurors unwilling to follow instruction].) Indeed, appellant's contention would preclude dismissal for cause when a prospective juror, by conscience, chose to disregard instructions and *impose* a death sentence.[4]

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[4] "As *Powell* and *Dunn* emphasize, nullification may run in favor of the defendant, in the form that is called lenity. (*United States v. Powell, supra,* 469 U.S. at p. 65 [105 S.Ct. 477]; accord, *Dunn v. United States, supra,* 284 U.S. at p. 393 [52 S.Ct. 190].) But, as they fail to acknowledge, nullification may also run against the defendant, in the form that may be

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Appellant's reliance on secondary sources does not negate the *Witt-Witherspoon* rule for dismissal or the longstanding authority finding unwillingness to follow instruction as cause for dismissal. (*Williams*, *supra*, 25 Cal.4th at pp. 449-463.) His reliance on *Unites States v. Burr* (1807) 25 F.Case. 49, 50, and *Georgia v. Brailsford* (1794) 3 U.S. 1, 14, compels no different result as those cases address the province of the jury to determine factual questions distinct from the province of the judiciary to determine issues of law. (*Sparf v. U.S.* (1895) 156 U.S. 51, 64-67.)

Appellant's novel theory that the Constitution's Framers intended to establish a legal system that permitted jurors to disregard the rule of law is meritless. His claim that dismissal for cause under the *Witt-Witherspoon* rule is inconsistent with Sixth Amendment right to an impartial jury fails.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

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called hostility. (Muller, [*The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts* (1998)] 111 Harv. L.Rev. [771,] 803–806.) In either direction, it amounts to 'illegality.' (*United States v. Powell, supra,* 469 U.S. at p. 66 [105 S.Ct. 471].)" (*People v. Palmer* (2001), 24 Cal. 4th 856, 868, brackets for "S.Ct." citations in original.)

Dated: October 6, 2015

Respectfully submitted,

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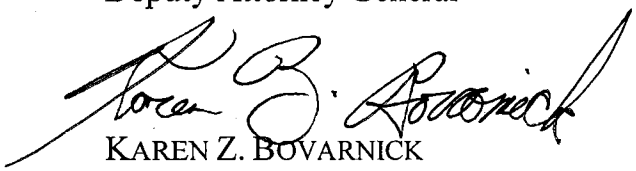

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 3,132 words.

Dated: October 6, 2015

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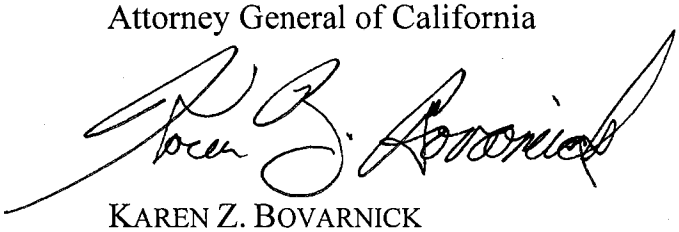

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DECLARATION OF SERVICE BY U.S. MAIL

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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 6, 2015, at San Francisco, California.

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