SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent vs. JAMELLE EDWARD ARMSTRONG Defendant/Appellant	No S126560 Los Angeles County NA051938-01

SUPREME COURT
FILED

JUL 17 2012

Frank A. McGuire Clerk

Deputy

APPELLANT'S SUPPLEMENTAL BRIEF

TO THE HONORABLE CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

On Automatic Appeal from the Judgment of the Los Angeles County Superior Court, Honorable Tomson Ong, Judge.

GLEN NIEMY, ESQ
P.O. BOX 764
BRIDGTON, ME 04009
207 647-2600
STATE BAR # 73646
gniemy@yahoo.com

DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	No S126560
	)	
Plaintiff/Respondent	)	Los Angeles County
vs.	)	
	)	NA051938-01
JAMELLE EDWARD ARMSTRONG	)	
	)	
Defendant/Appellant	)	
	)	
_____	)	

APPELLANT'S SUPPLEMENTAL BRIEF

TO THE HONORABLE CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

On Automatic Appeal from the Judgment of the Los Angeles County Superior Court, Honorable Tomson Ong, Judge.

GLEN NIEMY, ESQ
P.O. BOX 764
BRIDGTON, ME 04009
207 647-2600
STATE BAR # 73646
gniemy@yahoo.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	No S126560
	)	
Plaintiff/Respondent	)	Los Angeles County
vs.	)	
	)	NA051938-01
JAMELLE EDWARD ARMSTRONG	)	
	)	
Defendant/Appellant	)	
	)	
	)	

APPELLANT'S SUPPLEMENTAL BRIEF

TO THE HONORABLE CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

On Automatic Appeal from the Judgment of the Los Angeles County Superior Court, Honorable Tomson Ong, Judge.

I. AUTHORITY TO FILE SUPPLEMENTAL BRIEF

According to Rule of Court 8.520 (d) (1), a party may file a supplemental brief limited to new authority, new legislation, or any other matters not available in time to be included in the party's brief on the merits.

On June 21, 2011, appellant filed his Opening Brief in the above matter. On January 9, 2012, this Court filled its opinion in *People v.*

Kenneth Pearson (2012) 53 Cal.4th 306. Pearson was one of the co-defendants of appellant, who was tried at a separate trial by the same prosecutor before the same judge.

This brief is specifically limited to the first issue of Appellant's Opening Brief; that the trial court committed fundamental constitutional error under the Sixth and Fourteenth Amendments to the United States Constitution by excluding qualified potential jurors from participating in the penalty phase. (AOB at p. 38 et seq.) This Court's holdings in *Pearson* clearly require that appellant be granted a new penalty trial this matter.

II. RELEVANT HOLDINGS OF *PEOPLE V. PEARSON* THAT HAVE A DIRECT EFFECT ON THIS COURT'S DECISION IN THE INSTANT CASE

The same prosecutorial tactics and faulty judicial reasoning used in the improper exclusion of a qualified penalty phase juror in *Pearson* were employed in the improper exclusion of multiple qualified penalty phase jurors in the instant case.[1]

The prospective juror dismissed in *Pearson* , "C.O.," indicated on

---

1. Mr. Pearson's opening brief argued the improper excusal of five (5) different prospective jurors. (2008 WL5517208.) However, as the improper excusal of even one qualified death penalty juror is enough to trigger an automatic reversal of the death judgment, this Court only discussed the improper excusal of prosepctive juror "C.O." in the *Pearson* decision. (*People v. Pearson, supra,* 53 Cal.4th at p. 327.)

her

questionnaire that she wished to serve on the jury and could be fair and unbiased. (*Pearson* at p.328.) She also indicated that she felt that California should have the death penalty and she would not automatically vote for or against the death penalty without first hearing the evidence. (*Ibid.*) She stated in the questionnaire that she was not sure "where (she) stood" as far as the death penalty was concerned and did not know if she approved of its use. However, she could follow the law and impose it at trial if she felt it was appropriate. (*Id.* at pp. 328-329.)

During the oral voir dire, "C.O." confirmed that she could impose the death penalty once she was presented with all of the facts, even though she was uncertain as to how she "felt" about capital punishment. (*Pearson* at p. 329.) The prosecutor pressed her to indicate whether she was "for or against" the death penalty, telling her that it would be unfair to both parties to seat her if she did not know what she was going to do. "C.O." reiterated that she was not saying that she could not vote for the death penalty but needed to have all of the facts. (*Ibid.*)

Dissatisfied with this response, the prosecutor told the juror that "this was the time and place, we need to know if you could actually vote for the death penalty." The juror again informed the prosecutor that she was positive that she could. (*Pearson* at p. 329.) The prosecutor again asked the

juror "what we need to know right now is, you know, if you are for the death penalty and if you could vote for it or if you're not and you can't." "C.O." stated "All I can say is that I could vote for it." (*Id.* at p. 330.)

At the request of the prosecutor, over defense objection, the trial court excused the prospective juror in that she had given "equivocal" and "conflicting" responses about capital punishment, and, therefore, she would not be an appropriate juror in this particular case." (*Pearson* at p. 330.)

> Since this juror had no strong feelings on the death penalty, by her own statements, she could not stand behind them. Therefore, when asked whether she's one that supports the death penalty, but yet couldn't impose it, this juror responded quote, 'I'm not sure where I stand,' close quote. This series of responses, coupled with her affirmation of the responses during voir dire, gives this court a view of her state of mind, shows an equivocal view on the imposition of the death penalty, and supports this court's grant of a challenge for cause. (*Ibid.*)

In overturning the penalty verdict, this Court specifically disapproved of the concept that a prospective juror need have already formed ideas as to the imposition of the death penalty as long as that juror stated he or she could follow the law and impose it. (*Pearson,* at pp. 330-331.) Referring to the prospective juror, C.O. this Court stated,

> Her general views on the death penalty were vague and largely unformed, though she thought it sometimes served the purpose of deterrence and so should not be abolished. But on whether she could vote to impose it, her responses were definite and consistent. According to the questionnaire, she would not vote automatically for life in prison regardless of

the evidence; she would not find it impossible to vote for death in every case; she could set aside whatever she had heard about the death penalty outside of court and decide defendant's punishment based only on the evidence at trial; and she was not a person who, while supporting the death penalty, could not vote to impose it. On voir dire, C.O. repeated several times that she could vote for death in an appropriate case. She never wavered on this point, and when the prosecutor expressed skepticism, C.O. reassured her, "I am positive that I could. (*Ibid.*)

This Court then made it clear that the law,

does not stand for the idea that a person is substantially impaired for jury service in a capital case because his or her ideas about the death penalty are indefinite, complicated or subject to qualifications, and we do not embrace such a rule. As the high court recently reminded us, "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." (Citation deleted) Personal opposition to the death penalty is not itself disqualifying, since "[a] prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law." (Citation deleted) It follows the mere absence of strong, definite views about the death penalty is not itself disqualifying, since a person without strong general views may also be capable of following his or her oath and the law. (*Pearson* at p. 331.)

In summary, this Court stated,

To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process. So long as a juror's views on the death penalty do not prevent or substantially impair the juror from "conscientiously consider[ing] all of the sentencing alternatives, including the death penalty where appropriate"(citation excluded), the juror is not disqualified by his or her failure to enthusiastically

support capital punishment. (*Ibid.*)

In addition, this Court clarified that it was not a prospective juror's job to "stand behind" either penalty, as would an advocate but rather to "assess the evidence, weigh the aggravating and mitigating factors deliberate with the other jurors and choose the appropriate penalty." (*Pearson* at p. 332.)

Therefore, the ultimate effect of *Pearson* was to clarify the already existing law in such a way to make it unmistakable clear that a juror need not have a fully formed opinion as to the propriety, usefulness, effectiveness or viability of the death penalty as long as they can follow the law as to its imposition.

III. APPLICATION OF *PEARSON* TO THE INSTANT CASE

In the instant case, the trial court unconstitutionally removed from the venire multiple prospective jurors for the very same reasons forbidden by *Pearson*; that they would not "promise to immovably embrace the death penalty." (*Pearson* at p. 332.) In fact, unlike *Pearson* prospective juror "C.O.," the great majority of these jurors never expressed any feeling that they may not approve of the death penalty. At least seven of the prospective jurors in the instant case expressly state that they were in favor of its imposition under the law.

There is not enough space allotted by Court rule to fully discuss how

the *Pearson* decision directly applied to each of the nine improperly excused jurors in the instant case. However, the excusal of Gerald Pfefer, was a perfect example of what this Court expressly forbid in *Pearson*. He was one of these jurors who stated that he was neither strongly in favor nor strongly against the death penalty, but could listen to all of the facts and base his verdict, life or death, upon the application of the law to them. (AOB 48, 7 RT 1415-1416.) In fact, during the course of the oral voir, Mr. Pfefer restated his lack of impairment to impose the death penalty no less that *thirteen* different occasions. (7 RT 1411, 7 RT 1412-1413;7 RT 1418 (two separate occasions);7 RT 1419-1420; 7 RT 1423; 7 RT 1424; 7 RT 1425; 7 RT 1427; 7 RT 1428; 7 RT 1431; 7 RT 1432; 7 RT 1433.)

However, this did not satisfy the prosecutor, who more than once insisted upon knowing how the juror could possibly know when he could vote for the death penalty as he was "torn between" the two possible penalties.[2] (7 RT 1418-1419, 7 RT 1425; AOB 49-50; 53.) In spite of being told on these many occasions by Mr. Pfefer that he could and would follow the law and not be impaired in making his ultimate decision, the prosecutor continued to ask how the juror could possibly follow the law if he did not know exactly how he felt about the death penalty. (7 RT 1424 AOB pg. 52;

---

2. In his answer to Q. 228 of the questionnaire, Mr. Pfefer used this language. However, throughout the questionnaire he made clear that he would base his decision on the law and facts. (AOB 45-46.)

7 RT 1435; AOB pg. 58.)

The prosecutor's stated reasoning behind her challenge was exactly the same reasoning that caused the death verdict in *Pearson* to be overturned. She argued that Mr. Pfefer should be excused because he didn't know how he "felt" about the death penalty and didn't know whether he was "for or against" it, therefore he was too impaired to impose it. (7 RT 1438.) The prosecutor also argued that as Mr. Pfefer did not believe that the death penalty was an effective deterrent, he was not qualified to sit as a juror. (*Ibid.*)[3] The trial court essentially adopted the prosecutor's argument. (7 RT 1438-1439)[4]

Gerald Pfefer was precisely the type of juror that *Pearson* ruled could not be constitutionally excused for cause. He was neither an advocate for nor against the death penalty. He saw possible benefits to both penalties. More importantly, he stated over and over that he understood the law and could follow it.

Further, throughout the oral voir, the prosecutor used a series of hypothetical scenarios, which had nothing to do with facts of the instant

---

3. The prosecutor also argued many factual inaccuracies that were dispelled in the AOB at p. 59.)

4. The trial court's excusal of Mr. Pfefer was also rife with factual inaccuracies and baseless judgments as to the prospective juror's motivations, it appeared that it was paying no attention at all to what Mr. Pfefer actually said. (AOB 61-62.)

case. These hypotheticals were nothing more than artificial and unconstitutional vetting devices designed to eliminate prospective jurors who were not advocates for the imposition of the death penalty for every situation conceivable by law. These hypotheticals were nothing but thinly disguised loyalty oaths toward the cause of capital punishment, requiring the type of unwavering allegiance to the death penalty that *Pearson* firmly rejected. As argued in the AOB, these hypothetical scenarios were of factual situations under which only the most ardent supporters of the death penalty could readily agree to impose that punishment (AOB 79).

One of these scenarios employed by the prosecutor was the so called "bank robbery" hypothetical in which one defendant enters a bank to commit a robbery, while a second serves as a lookout and the third defendant waits in a more remote location in a get-away car. The person in the bank kills someone during the robbery. (7 RT 1432.) Only those jurors would were irrevocably committed to the death penalty would not stop and pause before committing themselves to its imposition upon an individual who had simply driven the bank robber to the general scene of the crime, without regarding he intent and prior knowledge of the driver. Yet by holding the prospective jurors to this standard, the trial court violated *Pearson* by assuring a venire panel unconstitutionally "uncommonly willing" to impose the death penalty.

Use of this particular hypothetical was used to unconstitutionally excuse several other of the prospective jurors referenced in Appellant's Opening Brief. Leonardo Bijelic was removed because the trial court stated that Mr. Bijelic could not impose the death penalty in an aiding and abetting case because he stated that his imposition of death on the person in the car might be limited to situations where that defendant knew that the person in the bank had a gun. (AOB 75-77.)[5] Again, the trial court violated the *Pearson* doctrine which forbade the excusal of a prospective juror on the ground that he or she was not a devoted adherent to the death penalty, virtually regardless of the factual situation.

The trial court used the same constitutionally flawed reasoning to exclude prospective Juror Sam Rutigliano, who stated that while he could follow the law in all aspects, he would probably not be able to impose the death penalty on the defendant driver unless that he knew that there was going to be an unjustified shooting in the bank. This pattern of unconstitutional excusals of jurors who had any hesitation as the virtual unlimited imposition of the death penalty continued with the excusals of prospective juror's Morales (AOB 99-100) and Salazar. (AOB 107 et seq.)

---

5. As stated in the AOB, this hypothetical was legally defective in that to impose the death penalty on an aider and abettor he must have acted with the intent to kill, or with reckless indifference to human life and must be a major participant. Therefore, it may have been legally impossible to impose the death penalty on the hypothetical defendant. (AOB at pp. 66-67.)

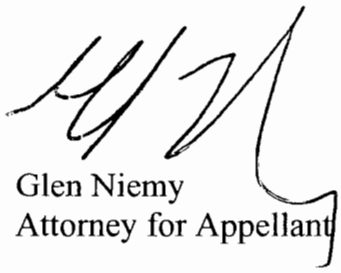
Perhaps the most extreme manifestation of the trial court's *Pearson*-incompatible "logic" was the excusal of prospective juror Mila Hanson, yet another juror who said that she has no personal beliefs or philosophies that would prevent her from following the CALJIC 8.88 and the law of this Court. The trial court granted the prosecutor's challenge for cause on the ground that Ms. Hanson stated that she would only impose the death penalty on "bad" people. (AOB 120.)

Such reasoning, violated every precept and instruction set forth by Penal Code section 190.2, and the decisions of the United States Supreme Court and this Court regarding excusals of death jurors for cause. Essentially, the trial court posited a law that would exclude prospective penalty phase jurors for their unwillingness to execute "good" people. In other words, according the trial court, every juror who sits on a capital jury must be willing to execute all defendants regardless of their character, thereby eradicating, in one fell swoop, the entire penalty paradigm so carefully developed by legislators and the courts.

The legal and moral absurdity of a capital jury limited to persons so "uncommonly willing" to advocate and impose the death penalty is chilling, indeed. In due consideration of its decision in *Pearson* and the other cases raised in appellant's Opening Brief, this Court should reverse the penalty verdict in this case.

July 16, 2012

Respectfully submitted,



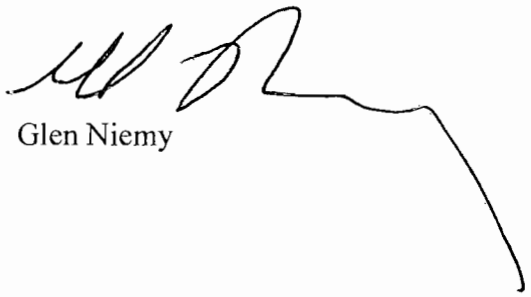
Glen Niemy
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Supplemental Brief uses a 13 point New Times Roman type and is 2745 words in length.

July 16, 2012

Respectfully submitted,



Glen Niemy

DECLARATION OF SERVICE

People v. Jamelle Armstrong
S126560

I, Glen Niemy, declare that I am over the age of 18 years, not a party to this action, my business address is P.O. Box 764, Bridgton, ME 04009. I served a copy of the attached Appellant's Supplemental Brief, on each of the following by placing the same in an envelope addressed respectively

Clerk, California Supreme Court
350 McAllister St
San Francisco, CA 94102
(original and 13 copies)

District Attorney for Los Angeles County
210 West Temple St
Los Angeles, CA 90012

Los Angeles Superior Court
Death Penalty Appeals
210 West Temple St
Los Angeles, CA 90012

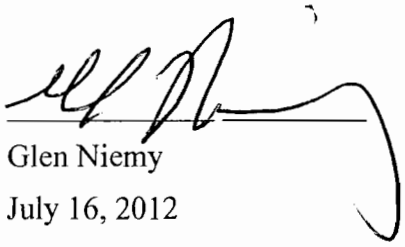
Office of the Attorney General
300 S. Spring St
Los Angeles, CA 90013

Kathy Armstrong
3060 El Cerrito Plaza PMB 356
El Cerrito, CA 94530

Jamelle Armstrong
V44482
San Quentin Prison
San Quentin, CA 94974

Each envelop was then on July 16, 2012,sealed and placed in the United States Mail at Bridgton, ME 04009, County of Cumberland, the county in which I have my law office, with the postage thereon fully prepaid.

I certify under penalty of perjury under the laws of
the State of California that the foregoing is true and correct



Glen Niemy
July 16, 2012