

JAMES S. THOMSON
Attorney and Counselor at Law

April 20, 2012

California Supreme Court
ATTN: Frederick K. Ohlrich
Clerk of the Supreme Court
350 McAllister Street
San Francisco, CA 94102

SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk

Deputy

**Re: Oral Argument, May 2, 2012; Supplemental Authorities Letter; People v. Tully,
Case No. S030402.**

Dear Mr. Ohlrich,

On behalf of appellant, Richard Tully, the undersigned directs the Court's attention to authorities issued after the filing of his reply brief ("ARB") on September 23, 2010, which bear on resolution of the proceedings in the above referenced case.

***People v. Pearson* (January 9, 2012) 53 Cal.4th 306.**

In *Pearson*, this Court granted sentencing relief to the appellant "due to the trial court's improper excusal of a prospective juror because of her views on capital punishment." *Pearson, supra*, 53 Cal.4th at 309. Appellant alleged that the trial court erred in erroneously excluding five jurors for cause during the death-qualification portion of his jury selection. *Id.*, at 327. This Court found error only as to Juror C.O. *Ibid.*

Juror C.O. stated on her questionnaire that she could be impartial. *Pearson, supra*, 53 Cal.4th at 328. During questioning, Juror C.O. indicated that the death penalty was appropriate in some circumstances and that she could impose it accordingly. *Id.*, at 329. In response to the prosecution's case specific questions, Juror C.O. indicated that she could not decide if the death penalty was appropriate without additional facts. *Ibid.* Over defense objection, the trial court dismissed Juror C.O. "due to [her] equivocal views on capital punishment." *Id.*, at 330.

This Court reviewed the trial court's ruling for "substantial evidence." *Pearson, supra*, 53 Cal.4th at 330 (citation omitted). This Court found that the record did not indicate that "C.O.'s views regarding the death penalty would prevent or substantially impair the performance of her duties as a juror." *Ibid.* This Court noted that "the role of a capital case juror is not to 'stand behind' either penalty but to assess the evidence, weigh the aggravating and mitigating circumstances, deliberate with the other jurors, and choose the appropriate penalty." *Id.*, at 332 (citation omitted). Additionally, this Court found:

[t]o the extent the trial court excused C.O. because of what the court characterized as ‘equivocal’ views on the merits of the death penalty itself, the court rested its ruling on an erroneous view of the law. C.O.’s possession of such views (more accurately described as vague, indefinite or unformed) did not itself disqualify her from service in this case, so long as she could follow her oath to conscientiously consider the death penalty.

Pearson, supra, 53 Cal.4th at 331.

Pearson supports appellant’s claim that the trial court erred by erroneously excusing five potential jurors for cause due to their “equivocal views” on the death penalty. See Appellant’s Opening Brief (“AOB”), at 66-101; and ARB, at 101-121. Like Juror C.O. in *Pearson*, Jurors M.K. (RT 504-524), B.D. (RT 631-652), M.D. (RT 780-794), E.H. (RT 1283-1293), and T.L. (RT 1658-1666) were improperly excused in appellant’s case. These jurors were improperly dismissed because the record does not contain substantial evidence that any of the prospective jurors were unable to follow the court’s instructions or render an impartial guilt or penalty verdict. *Pearson, supra*, 53 Cal.4th at 309.

In particular, the record does not support the trial court’s exclusion of Jurors M.D. and E.H. See *Pearson, supra*, 53 Cal.4th at 309. Both jurors indicated in their questionnaires that they could impartially apply the death penalty. *Id.*, at 328. Both jurors reaffirmed those beliefs during individual questioning by the trial court and defense counsel. *Id.*, at 329. Both jurors only equivocated when the prosecution forced them to prejudge appellant’s case. *Ibid.* By erroneously excusing Jurors M.D. and E.H. for cause, the trial court denied appellant the impartial jury to which he was entitled under Article I of the California Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

United States v. Sanchez (9th Cir. November 1, 2011) 659 F.3d 1252, 1256.

In *Sanchez*, the defendant was prosecuted for violations of 21 U.S.C. § 841(a)(1), and 21 U.S.C. §§ 952, 960 (importation and distribution of cocaine). *Sanchez, supra*, 659 F.3d at 1255. During closing argument, the prosecution impugned his duress defense by stating:

[W]hy don’t we send a memo to all drug traffickers, to all persons south of the border and in Imperial County and in California—why not our nation while we’re at it. Send a memo to them and say dear drug traffickers, when you hire someone to drive a load, tell them that they were forced to do it.

Sanchez, supra, 659 F.3d at 1256.

Defense counsel failed to object to the argument and the trial court gave no curative instruction. *Sanchez, supra*, 659 F.3d at 1257-58. Nevertheless, the Ninth Circuit reversed and remanded Sanchez’s case due to the prosecutorial misconduct. *Id.*, at 1261. The Court concluded that “[t]he prosecutor’s statement did not merely comment on the evidence and arguments in the case, but also appealed to the passions, fears and vulnerabilities of the jury by

suggesting that an acquittal would make it easier for drugs to come into the United States.” *Id.*, at 1257 (citation and quotation omitted). The Ninth Circuit found that “the prosecutor’s improper conduct so affected the jury’s ability to consider the totality of the evidence fairly that it tainted the verdict and deprived [the defendant] of a fair trial.” *Ibid.* It did not fault defense counsel for failing to object because “even in the absence of objections by defense counsel, a trial judge should be alert to deviations from proper argument and take prompt corrective action as appropriate.” *Id.*, at 1258.

Sanchez supports appellant’s claim that his state and federal rights were violated when the prosecution committed misconduct by interjecting wholly irrelevant and inflammatory religious comments during closing arguments in his penalty phase. See AOB, at 430-463, and ARB, at 333-353. Appellant’s prosecutor committed egregious misconduct during closing and rebuttal arguments by using religion to “appeal to the passions, fears and vulnerabilities of the jury.” *Sanchez, supra*, 659 F.3d at 1257. Appellant’s defense counsel did not object, and added to the prejudice by introducing their own religious arguments. However, despite “the absence of objections by defense counsel, a trial judge should be alert to deviations from proper argument and take prompt corrective action as appropriate.” *Id.*, at 1258. Accordingly, like in *Sanchez*, the prosecution’s egregious misconduct in appellant’s case “so affected the jury’s ability to consider the totality of the evidence fairly that it tainted the verdict and deprived [appellant] of a fair trial.” *Id.*, at 1257.

Conclusion.

In conclusion, petitioner respectfully submits that the above referenced authorities support reversing the judgment entered in this case.

Sincerely,



JAMES S. THOMSON

Attorneys for Petitioner
RICHARD TULLY

DECLARATION OF SERVICE

Re: *People v. Tully*

Case No: S030402

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 819 Delaware Street, Berkeley, CA 94710.

On April 20, 2012, I served the attached **ORAL ARGUMENT, MAY 2, 2012; SUPPLEMENTAL AUTHORITIES LETTER; PEOPLE V. TULLY, CASE NO. S030402**, by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Berkeley, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct.

Signed on April 20, 2012 at Berkeley, California.


AARON JONES