SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DEMETRIUS CHARLES HOWARD, Defendant and Appellant.	CRIM. No. S050583 Automatic Appeal (Capital Case) San Bernardino County Superior Court No. FSB 03736

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

Automatic Appeal from the Judgment of
Death of the Superior Court of San Bernardino County

Honorable Stanley W. Hodge, Judge

SUPREME COURT
FILED
APR 2 9 2008
Frederick K. Ohlrich Clerk
Deputy

MICHAEL J. HERSEK
State Public Defender

ALISON PEASE, State Bar No. 91398
Senior Deputy State Public Defender
Office of the State Public Defender

801 K Street, 11th Floor
Sacramento, California 95814
Telephone: (916) 322-2676

Attorneys for Appellant

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE/S**

CONSTITUTION

MICHAEL J. HERSEK
State Public Defender
ALISON PEASE (CA Bar No. 91398)
Senior Deputy State Public Defender
801 K Street, Suite 1100
Sacramento, CA 95814
Telephone: (916) 322-2676

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **vs.** **DEMETRIUS CHARLES HOWARD,** **Defendant and Appellant.**	**CRIM. No. S050583** **Automatic Appeal** **(Capital Case)** **San Bernardino County Superior Court No. FSB 03736**

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

In this Second Supplemental Reply Brief ("2dSRB"), appellant addresses only those contentions in the Second Supplemental Respondent's Brief ("2dRB") that require further discussion for the proper determination of the issues raised on appeal. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening or supplemental briefs, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

XVIII.

THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE THAT APPELLANT COMMITTED ATTEMPTED ROBBERY FELONY MURDER OR THE ATTEMPTED ROBBERY FELONY MURDER SPECIAL CIRCUMSTANCE

Respondent's brief fails to address adequately the arguments made in the 2dSOB regarding the insufficiency of evidence proving the existence of an attempted robbery felony murder and of an attempted robbery felony murder special circumstance. In that brief, appellant argued that the evidence did not establish that the murder in this case amounted to an attempted robbery felony murder, and the prosecution failed to prove that appellant was involved in this crime in any way.

In discussing the standards for assessing the sufficiency of evidence, appellant noted in the 2dSOB that the United States Supreme Court has consistently stated that in death penalty cases the Eighth Amendment requires that fact-finding procedures meet a heightened standard of reliability. (See, e.g., *Ford v. Wainwright* (1986) 477 U.S. 399, 411-412.) Without discussing any of the case law cited by appellant regarding the Eighth Amendment, respondent simply rejects this argument by stating:

> It is well settled that the imposition of a death sentence does not warrant a different or 'heightened reliability' standard for assessing the sufficiency of the evidence.

(RB at p. 3.)

Respondent also argues:

> In asserting his claim of insufficient evidence, Howard ignores the correct standard and fails to properly assess the evidence of his guilt.

(RB at p. 3.)

In the 2dSOB, appellant cited this Court's decisions in *People v Holt* (1997) 15 Cal.4th 619, 667; *People v. Marshall* (1999) 15 Cal.4th 1, 35; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577, and *People v. Redmond* (1969) 71 Cal.2d 745, 755. Each of these decisions remain good law, but respondent has not addressed any of them or the principles for which they were cited in the 2dSOB. Therefore, respondent's assertion that appellant "ignores the correct standard" for determining sufficiency of the evidence is incorrect and unsupported.

Respondent's rendition of the facts supporting the identification of appellant as the second person involved in the crimes in this case is not accurate. For example, respondent asserts that on the day of the crime Howard left a black .357 gun with Cedric Torrance and retrieved it that same day. (RB at p.5.) However, the record shows that Torrance contradicted himself in his description of the gun. For example, he agreed during cross-examination at appellant's trial that he had told the police that the gun appellant had was about a foot long and was a "big" gun. (7 RT 1681.) It is undisputed that the gun (marked as Exhibit 3), introduced at trial as being appellant's .357 gun is not a foot long. Even Torrance admitted at trial that this gun was of "average" size. (7 RT 1604.)

Respondent also claims that the victim, Sherry Collins, fought with appellant in the garage and that Howard was carrying a gun. (RB at p. 6.) The only record citations offered by the respondent, 7 RT 1733 and 8 RT 2053-2056, do not support these assertions. As pointed out in the 2dSOB, no one identified appellant as the assailant who had been on the driver's side of the vehicle and had fought with Ms. Collins. Her 5-year old daughter, Randy, who was in the passenger's side of the car, never identified appellant as that person. (2dSOB at pp. 14-15.) Indeed, when she

testified at trial, Randy could not remember much about what happened when her mother was killed. (7 RT 1782-1788.) She could not even remember the clothing worn by the man on the driver's side of the car with whom her mother was fighting. (7 RT 1786.) Randy's earlier descriptions of the clothing worn by the assailants were at the core of the prosecution's claims that appellant was one of them.

The only evidence offered at trial of what this person looked like, according to Randy, came from other witnesses who testified about the conflicting statements Randy made on the night of the killing and several days after. For example, Officer Jeffrey Lotspeich testified about his interview of Randy right after the incident. She couldn't tell him the race of the two men involved. (7 RT 1780.) The only thing about their appearance she remembered was that one was wearing dark clothing and the other was wearing a white shirt and dark colored pants. (7 RT 1778.) Another police witness, Sargeant Dale Blackwell, testified about his interview of Randy Collins four days after the killing. She told him that the two "bad men" wore big clothes and white shirts. (7 RT 1805-1806.) At this interview, Randy said both men had guns. (7 RT 1806.)

Another prosecution witness, Virginia Garduno, also testified about statements allegedly made by Randy right after the killing. Randy knocked on the door of Garduno's apartment. According to Ms. Garduno, Randy told her that guys were chasing her and had shot her mother. Garduno claimed that Randy said the men were black and one was carrying bat. (7 RT 1720-1721.) These statements by Randy don't square with her statements, just moments later, to Officer Lotspeich. At that time, Randy couldn't remember the race of the assailants nor did she appear to understand what a gun is. (7 RT 1778, 1780.)

Given the contradictory and vague nature of the evidence concerning the appearance of the men whom Randy Collins saw assault her mother, the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that appellant was one of the two men involved in this crime.

In addition, the physical evidence tying appellant to the crime scene was equally tenuous. Indeed, the prosecution presented only fiber evidence, which did not constitute "substantial evidence;" that is, evidence that is reasonable, credible and of solid value. (See, e.g., *People v. Johnson*, *supra* 26 Cal.3d 557, 576-578.) As discussed in the 2dSOB, while the prosecution expert determined that the fibers found on the soles of the victim's shoes were consistent with fibers found in appellant's pants and poncho, these fibers are very common in all fabrics. (8 RT 2141-2144.) Dr. Oguino, the prosecution's expert on fibers, testified that the fibers taken from the shoes and the fibers in appellant's clothing were "consistent." (8 RT 2142.) Oguino further testified that to be "consistent" did not mean the fibers were identical, nor could he prove that the fibers found on the victim's shoes came from appellant's clothing. (8 RT 2156-2157.) If the prosecution witness agreed that he could not prove that these fibers came from appellant's clothing, certainly such evidence is not the basis of identifying appellant as the assailant beyond a reasonable doubt. Moreover, although there was ample physical evidence (including his fingerprint on the door of Ms. Collins' car and ballistics showing that the gun in his possession at the time of his arrest was the murder weapon) tying the actual shooter in this case, Mitchell Funches, to the crime scene, there is nothing but very dubious fiber evidence tying appellant to it.

The other evidence described in respondent's brief (2dSRB at pp. 6-9), including the testimony of Steve Larsen, Theresa Brown, Michael and Laurie Manzella, and James Chism, does not add any heft to the evidence purportedly proving that appellant was one of the perpetrators in this case. Mr. Larsen said he saw two black men running in the wash area behind his house, which bordered one side of the Acacia Park Apartment complex, on the night of the killing. He testified that one of these men, whom he later identified as Mitchell Funches, was wearing all dark clothes and the other one had a white shirt. Larsen could not identify this second man. (7 RT 1837-1841, 1908.) Ms. Brown, another resident of the University Village Apartments, saw a man wearing a white pullover with hood, but she could not identify this man as being appellant. (7 RT 1831.)

In the description of the testimony of Michael and Laurie Manzella, respondent asserts: "When Mr. And Mrs. Manzella opened the door, *they* saw Howard speaking with the people in the apartment across from theirs, apartment three." (2dSRB at p. 8, emphasis added.) This is not true. Mr. Manzella testified that he could not identify the man he saw outside his front door that night. This man had his back to the Manzellas' apartment door. (7 RT 1850, 1852.) Mrs. Manzella claimed that, although their door was open only a second or two, she could see the man's face because he turned his head to one side. (7 RT 1859.) When the police showed her a photographic line-up several days later after the murder, she pointed to appellant's picture. (7 RT 1856.) Appellant's photo was the only one in this photographic line-up in which the subject wore a pullover, which is what Mrs. Manzella said the man was wearing that night. (7 RT 1860.)

All of the witnesses cited by respondent, save for Mrs. Manzella, could only describe the second man by vague descriptions of very common

clothing, a light-colored shirt or pullover and dark pants. Certainly, such evidence is too vague to constitute substantial evidence that appellant was this second assailant because he was wearing a light-colored pullover and dark jeans at the time of his arrest on the night Ms. Collins was killed. Mrs. Manzella's identification of appellant was manifestly unreliable. First, she acknowledged that it was based on a side view of his face, while his back was to her, for a one to two second time period. (7 RT 1859.) Second, Mrs. Manzella was more sure of her identification of appellant at trial, almost three years after her encounter with him, than she was just days after the crime. At the time she was shown the photographic lineup (Exhibit No. 35), four days after the murder, Mrs. Manzella simply said that the photograph of appellant "looks like this one." (7 RT 1860.) In that photographic line-up, appellant was the only one wearing a light-colored pullover. (7 RT 1860-1861.)

Respondent also cites the testimony of James Chism as evidence supporting the verdicts against appellant. The testimony of Mr. Chism did not contradict appellant's own testimony about their meeting at the University Village Apartments. Respondent emphasizes that when Chism and appellant were walking out of the apartment complex, appellant did not go toward the El Pollo Loco even though he earlier had asked Chism for directions to the restaurant. (2dRB at p. 12.) At trial appellant explained that he did not walk toward the El Pollo Loco because, after seeing police there, he was concerned that, as an African-American parolee, he might be stopped by the police. (9 RT 2219.) Chism's testimony also supported appellant's testimony on a crucial point; that is, when appellant used Chism's phone to call Cedric Torrance, Chism did not hear appellant talk about having a gun or having a "strap" on. (7 RT 1876.) Cedric Torrance

had testified at trial that appellant told him during this phone conversation that he had a "strap" on. (7 RT 1668.)

Under the due process clauses of both the Fourteenth Amendment of the United States Constitution and article I, section 15 of the California Constitution, the test of whether evidence is sufficient to support a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, by rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Holt, supra,* 15 Cal.4th 619, 667, citing inter alia *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In making this assessment the appellate court *looks to the whole record, not just the evidence favorable to the respondent to determine if the evidence supporting the verdict is substantial in light of other facts*. (*People v. Holt*, *supra*, 15 Cal.4th at p. 668, emphasis added.) Looking at the entire record in this case and applying the standard for determining sufficiency of evidence as set forth in *Holt* decision, it is clear that there is not substantial evidence supporting the convictions of attempted robbery felony murder or the special circumstance nor is there substantial evidence that appellant was involved in this murder. Accordingly, appellant's challenge to the sufficiency of evidence in this case should prevail.

// //

// //

// //

CONCLUSION

For all of the foregoing reasons as well as for those stated in appellant's second supplemental opening brief, his convictions must be reversed and his judgment of death vacated.

Dated: April 22, 2009

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

ALISON PEASE
Deputy State Public Defender
Attorneys for Appellant Howard

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2))

I, ALISON PEASE, am the Deputy State Public Defender assigned to represent appellant DEMETRIUS CHARLES HOWARD in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 2,241 words in length.

DATED: April 22, 2009

Alison Pease

ALISON PEASE
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Demetrius Howard***
Case Number: **Supreme Court No. S050583**
San Bernardino Superior Court No. FSB 03736

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

by enclosing them in an envelope and
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ **X** / **placing** the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on **April 22, 2009**, as follows:

Mr. Demetrius C. Howard
P.O. Box C-92812
San Quentin State Prison
San Quentin, CA 94974

Adrianne S. Denault
Deputy Attorney General
Office of the Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101

Laura Murray
Attorney at Law
California Appellate Project
101 Second Street, # 600
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **April 22, 2009**, at Sacramento, California.

Saundra Alvarez

SAUNDRA ALVAREZ