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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT COPY

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

DEMETRIUS CHARLES HOWARD

Defendant and Appellant

Case No. S050583

San Bernardino County
Superior Court No. FSB 03736

SUPREME COURT
FILED

FEB 22 2008

Frederick K. Ohlrich Clerk

Deputy

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

The Honorable Judge Stanley W. Hodge

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DEATH PENALTY

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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 SUPPLEMENTAL OPENING BRIEF

This supplemental brief presents two additional arguments in appellant's automatic appeal. The first of these arguments is an elaboration on Argument I contained in both the Appellant's Opening Brief and in Appellant's Reply Brief. It is numbered IA. Because the second argument is new, it is numbered XVII, which is sequential to the last numbered argument in the opening brief.

IA.

THE TRIAL JUDGE'S ERRONEOUS DECISION REQUIRING THAT APPELLANT WEAR A STUN BELT DURING HIS TRIAL AMOUNTED TO STRUCTURAL ERROR NECESSITATING REVERSAL OF HIS CONVICTIONS AND DEATH SENTENCE

In both Appellant's Opening Brief ("AOB") and in his Reply Brief ("ARB"), appellant argued that the trial judge committed prejudicial error when he required appellant to wear a stun belt during trial, and this error mandates reversal of appellant's convictions and death sentences under either the standard of review under *Chapman v. California* (1967) 386 U.S. 18, 24 or the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836-837. (See AOB at p. 43 and ARB at pp. 11-12.) In this Supplemental Appellant's Opening Brief, appellant will further explain an assertion made in a footnote in the ARB that this Court should apply the reversal per se standard to this error. (See ARB at p. 11, fn. 4.)

A. Reversal is Required Under *Arizona v. Fulminante* and *Riggins v. Nevada*

The United States Supreme Court has developed distinct methodologies to determine whether an error of federal constitutional magnitude is subject to or defies harmless error analysis. In *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-309, the Court differentiated "structural error," which defies harmless error analysis, from "trial error," which is subject to such analysis. "'[S]tructural'" errors require automatic reversal and include: racial discrimination in the grand jury selection (*Vasquez v. Hillery* (1994) 474 U.S. 254); denial of self-representation at trial (*McKaskle v. Wiggins* (1994) 465 U.S. 168, 177-178, fn. 8); complete denial of counsel (*Gideon v. Wainwright* (1963) 372 U.S. 335); biased

adjudicator (*Tumey v. Ohio* (1927) 273 U.S. 510); defective reasonable-doubt instruction (*Sullivan v. Louisiana* (1993) 508 U.S. 275). (See also *Arizona v. Fulminante, supra*, 499 U.S. at pp. 309-310; *Neder v. United States* (1999) 527 U.S. 1, 8.) Trial error, which occurs during the prosecution of the case to the jury, may be quantitatively assessed in the context of other evidence presented to determine whether its admission was harmless beyond a reasonable doubt under the standard of *Chapman, supra*, 386 U.S. at p. 24. (*Arizona v. Fulminante, supra*, 499 U.S. at pp. 307-308.)

The error in this case is similar in kind to the error the United States Supreme Court has found cannot be subject to harmless error analysis. In 1992, the Supreme Court decided *Riggins v. Nevada* (1992) 504 U.S. 127. In that case, Mr. Riggins challenged his robbery and murder convictions on the ground that the State of Nevada unconstitutionally forced him to take an antipsychotic drug during trial. Because the Nevada courts failed to make sufficient findings to support the forced administration of the drug, the United States Supreme Court reversed. (*Id.* at p. 129.) Riggins was not required to show how the trial would have proceeded differently if he had not been given Mellaril. (*Id.* at p. 137.) The Court observed:

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. . . . Like the consequences of compelling a defendant to wear prison clothing," (*Estelle v. Williams* (1976) 425 U.S. 501, 504-505) "or of binding and gagging an accused during trial," (*Illinois v. Allen* (1969) 397 U.S. 337, 344), the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript.

(*Ibid.*)

What the United States Supreme Court would "not ignore, is a strong possibility that Riggins' defense was impaired due to the administration of

Mellaril." (*Ibid.*) The *Riggins* opinion held that, even if the Nevada Supreme Court was correct in holding that expert testimony allowed jurors to assess Riggins' demeanor fairly, "an unacceptable risk of prejudice remained." (*Id.* at p. 138.) The Nevada Supreme Court's judgment was reversed. (*Ibid.*)

In *People v. Mar* (2002) 28 Cal.4th 1201, 1227-1228, this Court recognized that the concerns raised in *Riggins* by the involuntary administration of antipsychotic medication, are the same as those raised by the compelled use of a stun belt insofar as both involve the circumstance that the State's intervention may result in the impairment, mental or psychological, of a criminal defendant's ability to participate in his defense at trial.

Riggins governs this case and requires, without an actual prejudice assessment, reversal of appellant's convictions and death judgment. The precise consequences of forcing the stun belt restraint upon appellant cannot be shown from a trial transcript. There is a strong possibility appellant's defense was impaired due to the involuntary stun belt restraint. An unacceptable risk of prejudice remains that, because of the stun belt restraint, jurors were not allowed to assess appellant's demeanor fairly during his testimony in his own defense. (*Riggins v. Nevada, supra,* 504 U.S. at pp. 129, 137-138; *Illinois v. Allen, supra*, 397 U.S. 333; *Arizona v. Fulminante, supra*, 499 U.S. 279; see also *State v. Damon* (N.J. Super. A.D. 1996) 669 A.2d 860, 863-864 [rejecting restraint harmless error doctrine].) Appellant's convictions and death judgment accordingly must be reversed.

* * * *

XVII.

THE PROCESS USED IN CALIFORNIA FOR DEATH QUALIFICATION OF JURIES IS UNCONSTITUTIONAL

The death-qualification procedure used in California to select juries in capital cases is unconstitutional. As will be demonstrated *post*, the death-qualification process produces juries which are both more likely to convict and more likely to vote for death and also disportionately remove women, members of racial minorities and religious people from juries. Therefore, the use of the death-qualification procedure in California violates the rights of a capital defendant to equal protection and due process as well as the right to a reliable death penalty adjudication, in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I of the California Constitution, sections 7, 15, 16 and 17.

As the United States Supreme Court has explained: "A 'death-qualified' jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath." (*Buchanan v. Kentucky* (1987) 483 U.S. 402, 408, fn. 6 [internal citations and quotations omitted].) If a juror's ability to perform his or her duties is substantially impaired under this standard, he or she is subject to dismissal for cause. (*People v. Ashmus* (1991) 54 Cal. 3d 932, 961-962 citing *Wainwright v. Witt* (1985) 469 U.S. 41, 424 and *Adams v. Texas* (1980) 448 U.S. 38, 45.) This Court has held that the only question that a trial court needs to resolve during the death-qualification process is "whether any prospective juror has such conscientious or religious scruples about capital punishment, in the abstract, that his views would prevent or substantially impair the performance of his

duties as a juror in accordance with his instructions and his oath." (*People v. Mattson* (1990) 50 Cal. 3d 826, 845.)

A. Current Empirical Studies Prove That the Death-Qualification Process is Unconstitutional

In *Hovey v. Superior Court* (1980) 28 Cal.3d 1, and *People v. Fields* (1983) 35 Cal.3d 329, this Court began to examine the vast body of research concerning the problems caused by death-qualification procedure. Based on the statistical evidence presented in those cases, this Court concluded that California's death-qualification process in jury selection did not violate the Sixth Amendment right to an impartial guilt phase jury. Similarly, in *Lockhart v. McCree* (1986) 476 U.S. 162, 165, the United States Supreme Court relied on available statistical data and rejected a claim that death qualification violated a defendant's Sixth and Fourteenth Amendment rights to have guilt or innocence determined by an impartial jury selected from a representative cross-section of the community. (*Id.* at p.167.)

The concerns about statistical evidence stated in the *Hovey* and *Fields* decisions have been now resolved. Moreover, new evidence establishes that the factual basis on which *Lockhart* rests is no longer valid, and that this decision was based on faulty science and improper logic. The questions raised in these cases must be reevaluated in light of the new evidence.

1. The Statistical Research Since *Hovey*

In the *Hovey* case, this Court generally accepted the vast research condemning the death-qualification process, although it found one flaw in the scientific data available at the time. The "*Hovey* problem" was that the studies presented in that case did not take into account the fact that California also excluded automatic death penalty jurors via "life-qualification." (*Hovey v. Superior Court, supra*, 28 Cal.3d at pp. 18-19.) This problem has been

solved, and this Court should now acknowledge that fact.

After *Hovey*, a study was conducted that specifically addressed the "*Hovey* problem." (Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure* (1984) 78 J. American Statistical Assn. 544.) The article reviewed two studies presented in *Hovey*, the 1984 Fitzgerald and Ellsworth study and the 1984 Cowan, Thompson, and Ellsworth study. (*Id.* at pp. 545-546.) Professor Kadane's conclusion was that excluding the "always or never" group, i.e., the automatic death and automatic life jurors, results in a "distinct and substantial anti-defense bias" at the guilt phase. (*Id.* at p. 551.)

Professor Kadane conducted additional research using data unavailable at the time *Hovey* was decided. (See Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors* (1984) 8 Law & Human Behavior 115 (hereafter "Kadane, *After Hovey*").) This study, "as requested by the *Hovey* Court," proved that "the procedure of death qualification biases the jury pool against the defense." (*Id.* at p. 119.) Thus, the conclusion was a direct and specific answer to the *Hovey* problem. More recent studies have reached the same result. (See, e.g., Seltzer et al., *The Effect of Death Qualificiation on the Propensity of Jurors to Convict: The Maryland Example* (1986) 29 How. L.J. 571, 604 (hereafter "Seltzer et al.").)

Several years later, social scientists studied the attitudes about the death penalty of jurors actually called to serve in capital trials. (Luginbuhl & Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials* (1988) 12 Law & Human Behavior 263 (hereafter "Luginbuhl & Middendorf").) The study's findings took account of the automatic death jurors as required by *Hovey*. Its findings were critical of death qualification and reinforced many of the studies that the

Hovey decision had discussed. (*Id.* at pp. 276-278.)

A more recent study updated the past research on death qualification based on numerous changes in society and the law, including the increase in support for the death penalty and the Supreme Court's decision in *Morgan v. Illinois* (1992) 504 U.S. 719, which required "life qualification," or the removal of the automatic death jurors. (See Haney, et al., *"Modern" Death Qualification: New Data on Its Biasing Effects* (1994) 18 Law & Human Behavior 619, 619-622 (hereafter "Haney").) The Haney study was "likely the most detailed statewide survey on Californians' death penalty attitudes ever done." (*Id.* at pp. 623, 625.) It found that: "Death-qualified juries remain significantly different from those that sit in any other kind of criminal case." (*Id.* at p. 631.)

These studies are the type of research that this Court sought in the *Hovey* opinion, and they establish that death qualification of jurors serving in capital cases, even when "life qualification" also occurs, violates the Sixth and Fourteenth Amendments and article I, sections 7, 15, 16 and 17 of the California Constitution.

2. The Factual Basis of *Lockhart* is No Longer Sound

The *Lockhart* opinion has been criticized for its analysis of both the data and the law related to death qualification. (See, e.g., Smith, *Due Process Education for the Jury: Overcoming the Bias of Death Qualified Juries* (1989) 18 Sw. U. L. Rev. 493, 528 (hereafter "Smith") [The Court's analyses in *Lockhart* were "characterized by unstated premises, fallacious argumentation and assumptions that are unexplained or undefended"]; Thompson, *Death Qualification After Wainwright v. Witt and Lockhart v. McCree* (1989) 13 Law & Human Behavior 185, 202 (hereafter "Thompson") [The *Lockhart* opinion is "poorly reasoned and unconvincing both in its

analysis of the social science evidence and its analysis of the legal issue of jury impartiality"]; Byrne, *Lockhart v. McCree: Conviction-Proneness and the Constitutionality of Death-Qualified Juries* (1986) 36 Cath. U. L. Rev. 287, 318 (hereafter "Byrne") [The opinion was a "fragmented judicial analysis," representing an "uncommon situation where the Court allows financial considerations to outweigh an individual's fundamental constitutional right to an impartial and representative jury"].)

Scholars have criticized the handling of the social science data relied upon by the Supreme Court in *Lockhart*. (See generally Moar, *Death-Qualified Juries in Capital Cases: The Supreme Court's Decision in Lockhart v. McCree* (1988) 19 Colum. Hum. Rts. L. Rev. 369, 374 (hereafter "Moar") [detailing criticism of the Court's analysis of the scientific data]; see also Bersoff & Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research* (1995) 2 U. Chi. L. Sch. Roundtable 279; , *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology* (1990) 66 Ind L.J. 137.)

In the instant case, this Court should not defer to the general holdings in *Lockhart* in deciding the federal issues at stake in this case. Because the "constitutional facts" upon which *Lockhart* was based are no longer correct, the Supreme Court's holding should not be considered controlling under the federal Constitution. (*United States v. Carolene Products* (1938) 304 U.S. 144, 153.) Accordingly, this Court needs to review the new data and re-evaluate this issue.

Lockhart also does not control the issues raised under the California Constitution. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352-354.) As Professor Smith observed:

> *Lockhart* lacks both persuasive force and rhetorical validity, and should not serve as a guide for state legislatures and judiciaries examining their own capital jury selection methods. Courts which have chosen to follow the ruling (if not the rationale) of *Lockhart* should adopt appropriate remedial measures to overcome the improper and unfair jury selection methods that the case condones.

(Smith, *supra,* 18 Sw. U. L. Rev. at p. 499.)

This Court should continue the path it began in *Hovey* and find the death-qualification process unconstitutional under the California Constitution.

a. Misinterpretation of the Scientific Data

Despite the fact that the studies presented in *Lockhart* were carried out in a "manner appropriate and acceptable to social or behavioral scientists," the United States Supreme Court categorically dismissed them. (Smith, *supra*, 18 Sw. U. L. Rev. at p. 537.) This improper scientific assessment was both key and fatal to *Lockhart*'s holding. Moreover, because the Supreme Court did not evaluate the studies as a whole body of data, it ignored their powerful cumulative effect. (*Ibid.*) When the Supreme Court found a "'flaw' in a study, or a group of studies, "[the Supreme Court] dismissed it from further consideration, never considering that alternative hypotheses left open by shortcomings in studies of one type might be ruled out by studies of another type." (Thompson, *supra,* 13 Law & Human Behavior at p. 195.) The Court dismissed any study that it deemed less than definitive. (*Ibid.*) Professor Thompson also observed: "The Court's adamant refusal to acknowledge the strength of the evidence before it casts grave doubts upon its ultimate holding in *Lockhart*." (*Ibid.*) As another researcher concluded:

> The fact that the Supreme Court can misrepresent and grossly misinterpret the findings in this study renders the Court's interpretation of all the empirical evidence before it in [*Lockhart v.*] *McCree* suspect. Social science research cannot provide answers with *absolute* certainty. We will never know precisely how many convicted

> defendants in death penalty cases would have been acquitted if death qualification did not take place prior to the guilt-innocence stage.

(Seltzer et al., *supra,* 29 How. L.J. at p. 590.)

The Supreme Court "erred in its rejection of the empirical evidence." (Moar, *supra,* 19 Colum. Hum. Rts. L. Rev. at p. 396.) "Although there are valid criticisms of some of the *Witherspoon* [1] studies and the potential effects studies, none of their independent weaknesses appear to justify the Court's rejection of the studies' significance for McCree's claim that the death-qualification procedure tends to produce guilt-prone juries." (Moar, *supra,* 19 Colum. Hum. Rts. L. Rev. at p. 382.)

In the *Lockhart* case, the Supreme Court was presented with over fifteen years of scholarly research on death-qualification procedures, using a "wide variety of stimuli, subjects, methodologies, and statistical analyses." (*Id.* at pp. 386-387.) From both a scientific and a legal perspective, "[g]iven the seriousness of the constitutional issues involved [] and the extent and unanimity of the empirical evidence, it is hard to justify [the Court's] superficial analysis and rejection of the social science research." (*Id.* at p. 387.) The *Lockhart* decision "ignored the evidence which indicates that a death-qualified jury, composed of individuals with pro-prosecution attitudes, is more likely to decide against criminal defendants than a typical jury which sits in all noncapital cases." (*Byrne*, supra, 36 Cath. U. L. Rev. at p. 315.) In deciding the issue now presented here, the Court should not rely upon the analysis of the statistics found in the *Lockhart* decision.

b. Incorrect Legal Observations

The Supreme Court in *Witherspoon* had all but accepted that, once the

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[1] *Witherspoon v. Illinois* (1968) 391 U.S. 510

"fragmentary" scientific data on the effect of death qualification on the guilt phase was solidified, the Court would act to prevent impartial guilt phase juries. "It seemed only inadequate proof of 'death-qualified' juror bias caused the Court to uphold *Witherspoon*'s guilty verdict." (Smith, *supra,* 18 Sw. U.L.Rev. at p. 518.) This Court should not follow this faulty lead, but should instead continue on its own path, as laid out by the *Hovey* decision, both in construing and applying the federal and state Constitutions properly. "The Court's holding in *Lockhart* infers [sic] that the Constitution does not guarantee the capital defendant an 'impartial jury' in the true meaning of the phrase, but merely a jury that is capable of imposing the death penalty if requested to do so by the prosecution." (Peters, *Constitutional Law: Does "Death Qualification" Spell Death for the Capital Defendant's Constitutional Right to an Impartial Jury?* (1987) 26 Washburn L.J. 382, 395.) This is not the meaning of impartiality, under either the federal or the state Constitutions, discussed in *Hovey*, nor is it the proper one.

c. The Scientific Evidence

(1) Post-*Lockhart* Data

Empirical studies of actual jurors from actual capital cases show that many jurors who had been screened to serve as capital jurors under the *Witt* standard, and who were thus death-qualified, and "who had decided a real capital defendant's fate, approached their task believing that the death penalty is the only appropriate penalty for many of the kinds of murder commonly tried as capital offenses." (Bowers, W. & Foglia, W., *Still Singularly Agonizing: The Law's Failure to Purge Arbitrariness from Capital Sentencing* (2003) 39 Crim. Law. Bull. 51, 62 (hereafter "Bowers & Foglia").)

In 1990, a group of researchers, under the leadership of Professor William J. Bowers,[2] and funded by the Law and Social Sciences Program of the National Science Foundation,[3] formed the Capital Jury Project ("CJP"). One of its purposes was to generate a comprehensive and detailed understanding of how capital jurors actually make their life or death decisions. (See Bowers, W., *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, (1995) 70 Ind. L. J. 1043.)

The work of the CJP has addressed many of the specific problems noted by the Supreme Court in the *Lockhart* decision. First, it studied actual jurors; that is, 1201 actual jurors who participated in 354 actual cases.[4] Second, because the CJP studied jurors who actually served, it necessarily studied how their decisions were influenced by their peers during jury deliberations. Third, as a result of studying actual jurors, this research data is not "contaminated" by the influence of the so-called nullifiers [automatic life jurors] because they were all excused during the death-qualification process at voir dire. (Rozelle, *"The Principled Executioner: Capital Juries' Bias and the Benefits of True Bificurcation"* (Fall 2006) 38 Ariz. St. L. J. 769, 784.)

The study done by the CJP confirms what the earlier studies described in the *Lockhart* decision showed: the death-qualification process results in juries more prone to convict and to choose the death penalty. (*Id.* at p. 785.)

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[2] Principal Research Scientist, College of Criminal Justice, Northeastern University. Ph.D., Columbia University, 1966; B.A., Washington and Lee University, 1957.

[3] The grant number is NSF SES-9013252.

[4] William J. Bowers & Wanda D. Goglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing,* (2003) 39 Crim.L. Bull. 51, 51.

Research done by the CJP has shown that the death-qualification process produces skewed juries, particularly in the following ways: (1) there are more automatic death penalty jurors; (2) many of these jurors don't understand the nature of mitigation evidence; and (3) such jurors tend to decide prematurely both to convict and to choose the death sentence. (*Id.* at pp. 787-793.)

B. Data Regarding the Impact of Death Qualification on Jurors' Race, Gender, and Religion

The Supreme Court in *Lockhart* did not address whether death qualification had a negative impact on the racial, gender, and religious composition of juries. This Court, however, acknowledged in *People v. Fields, supra,* that this issue is of constitutional dimension and required more research. Such research is now available, and it compels a finding that the death-qualification process has an adverse effect on the inclusion of important classes of people in capital juries.

Numerous studies have shown that "proportionately more blacks than whites and more women than men are against the death penalty." (Moar, *supra*, 19 Colum. Hum. Rts. L. Rev. at p. 386.) Death qualification "tends to eliminate proportionately more blacks than whites and more women than men from capital juries," adversely affecting two distinctive groups under a fair cross-section analysis. (*Id.* at p. 388.) The process has a "detrimental effect on the representation of blacks and women on capital juries." (*Id.* at p. 396.)

Professor Seltzer also found that "the process of death qualification results in juries which under-represent blacks." (Seltzer et al., *supra*, 29 How. L.J. at p. 604.) Professors Luginbuhl and Middendorf concluded that there is significant correlation between attitudes about the death penalty and the gender, race, age, and educational backgrounds of jurors. (Luginbuhl &

Middendorf, *supra*, 12 Law & Hum. Behav. at p. 269.)

C. Prosecutorial Misuse of Death Qualification

Research has shown that a "prosecutor can increase the chances of getting a conviction by putting the defendant's life at issue." (Thompson, *supra,* 13 Law & Human Behavior at p. 199, citing Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data* (1984) 8 Law & Hum. Beh. 7, 13.) Some prosecutors have acknowledged that death qualification skews the jury and that they use this unconstitutional practice to their advantage in obtaining conviction-prone juries. (*See* Garvey, *The Overproduction of Death* (2000) 100 Colum. L. Rev. 2030, 2097 & fns.163 and 164 (hereafter "Garvey"), quoting Rosenberg *Deadliest D.A.* (1995) N.Y. Times Magazine (July 16, 1995) at p. 42.)[5] The prosecutors use this voir dire practice to eliminate the segment

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[5] The Rosenberg article quotes "various former and current Pennsylvania prosecutors explaining the Philadelphia District Attorney's practice of seeking the death penalty in nearly all murder cases as self-consciously designed to give prosecutors 'a permanent thumb on the scale' enabling them to 'use everything you can' to win, including . . . "'everyone who's ever prosecuted a murder case wants a death-qualified jury,' because of the 'perception... that minorities tend to say much more often that they are opposed to the death penalty,' so that '[a] lot of Latinos and blacks will be [stricken from capital juries as a result of] these [death qualification] questions.'"(Rosenberg *Deadliest D.A.*, N.Y. Times Magazine (July 16, 1995) at p. 42.) Another article appearing in the New York Times observed: "The ability to screen jurors may invite prosecutorial gamesmanship, tempting prosecutors to charge cases as capital crimes solely to produce a "friendlier" jury. In his 1986 dissent [in *Lockhart*], Justice Marshall noted that it was all but impossible to prove that a prosecutor had engaged in this sort of 'tactical ruse.' Though facts suggesting the tactic have been present in at least a half-dozen cases, no court has overturned a conviction on this ground." (Liptak, *Facing a Jury of (Some of) One's Peers*, New York Times, July 20, 2003, Section 4.)

of the jury pool which is most likely to be critical of police and forensic testimony and least likely to discount the "beyond a reasonable doubt" standard. (*Ibid.*)

In the *Lockhart* decision, the Supreme Court declined to consider the prosecutorial motives underlying death qualification because the petitioner had not argued that death qualification was instituted as a means "for the State to arbitrarily skew the composition of capital-case juries." (*Lockhart v. McCree, supra,* 476 U.S. at p. 176.) The dissent in *Lockhart* predicted that "[t]he State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will, under today's decision, give the prosecution license to empanel a jury especially likely to return that very verdict." (*Lockhart v. McCree, supra*, 476 U.S. at p. 185 (dis. opn of Marshall, J., Brennan, J., & Stevens, J.)

The prosecutor's use of death qualification in this case violated appellant's Sixth, Eighth and Fourteenth Amendment rights and his rights under article I, sections 7, 15, 16, and 17 of the California Constitution.

D. Death Qualification in California Violates the Eighth Amendment

In California, the death-qualification process skews juries deciding capital cases, making these juries more conviction-prone and more likely to vote for a death sentence. Non-capital defendants do not face such skewed juries. This result is unacceptable under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution.

The Eighth Amendment requires "heightened reliability" in capital cases because "death is different." [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its

finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plurality opinion).)

Since death qualification results in a jury more likely to choose a death sentence, it cannot survive the "heightened reliability" requirement mandated by the Eighth Amendment. The Supreme Court has recognized the same principle when it comes to guilt determinations.

In California, instead of the "utmost care" and "heightened reliability," capital defendants face juries which are not allowed in any other type of case. The death-qualification process obviously is used only in cases where the prosecution is seeking a death sentence. Consequently, capital defendants are tried by juries at both the guilt and penalty phases that are far less "impartial" than juries provided to defendants in any other kind of criminal case.

Accordingly, the death-qualification process violates the "heightened reliability" requirement of the Eighth Amendment because it is utterly "cruel and unusual" to put a human being on trial for his life while also forcing him to face a jury that is prone to convict and condemn him to die because many if not all of the jurors who would be open to the defense evidence had been excluded. Since appellant faced such a death-qualified jury, his convictions, the special circumstance finding against him, and his death penalty must be reversed.

E. The Death-Qualification Process is Unconstitutional

Even if this Court does not condemn death qualification in principle,

the process of death qualification in California courts is nevertheless unconstitutional. The Supreme Court did not reach this issue in *Lockhart*. In *Hovey*, this Court reviewed the evidence on this issue and generally accepted it, although the decision only addressed some of the problems presented by the evidence. In the *Fields* decision, this Court improperly allowed more specific death-qualification voir dire, which exacerbated the problems of the process.

"The voir dire phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case.' The influence of the voir dire process may persist through the whole course of the trial proceedings." (*Powers v. Ohio* (1991) 499 U.S. 400, 412, quoting *Gomez v. United States* (1989) 490 U.S. 858, 874.].) As detailed in the *Hovey* decision and in recent studies, death-qualification voir dire persuades jurors to adopt pro-conviction and pro-death views. The result is that potential jurors who do not share such pro-prosecution attitudes on guilt and penalty are removed from the panel.

The very process of death qualification in this case influenced the deliberative process and the mind set of the jurors concerning their responsibilities and duties. The use of death-qualification voir dire in California violates the Sixth, Eighth and Fourteenth Amendments and article I, sections 7, 15, 16 and 17 of the California Constitution. Any verdict reached by a jury chosen in this manner cannot stand since the use of a jury whose views are skewed and biased constitutes a structural error.

F. Death Qualification Violates the Right to a Jury Trial

In *Taylor v. Lousiana* (1975) 419 U.S. 522, 530-531, the Supreme Court identified three purposes underlying the Sixth Amendment right to a jury trial, and death qualification defeats all three.

First, "the purpose of a jury is to guard against the exercise of arbitrary power--to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." (*Ibid.*) Death qualification fails to guard against "the exercise of arbitrary power." Potential jurors who may tend to question the prosecution, and would thus keep the prosecutor's power in check, are the very people excluded from the jury via death qualification.

Also, death qualification makes the "common sense judgment of the community" unavailable. The evidence now shows that a death-qualified jury fails to represent the judgment of the excluded community members. Death qualification also removes the constitutionally required "hedge against the overzealous or mistaken prosecutor" or "biased response of a judge." (*Ibid.*) Evidence shows that prosecutors intentionally use the death-qualification process to remove potential jurors so that there is no "hedge" to prevent their overzealousness. (See, e.g., Garvey, *supra*, 100 Colum.L.Rev at p. 2097 and fn. 163.)

The second purpose of the jury trial is to preserve public confidence. "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. (*Ibid.*) Death qualification fails to preserve confidence in the system and discourages community participation. (See, e.g, Moller, *Death-Qualified Juries Are the 'Conscience of the Community'?* L.A. Daily Journal, (May 31, 1988) p. 4, Col. 3 [noting the "Orwellian doublespeak" of referring to a death-qualified jury as the "conscience of the community"];"(Smith, *supra,* 18 Sw. U.L.Rev. at p. 499 ["the irony of trusting the life or death decision

to that segment of the population least likely to show mercy is apparent"]; Liptak, *Facing a Jury of (Some of) One's Peers,* New York Times (July 20, 2003), Section 4.)

The third purpose is to implement the belief that "sharing in the administration of justice is a phase of civic responsibility." (*Taylor v. Lousiana, supra,* 419 U.S. at p. 532.) The exclusion of a segment of the community from jury duty sends a message that the administration of justice is not a responsibility shared equally by all citizens.

Finally, because the death-qualification process undermines the purposes of the Sixth Amendment right to a jury trial, excluding individuals with views against the death penalty from petit juries also violates the fair cross-section requirement and the Equal Protection Clause. "We think it obvious that the concept of "distinctiveness" must be linked to the [three] purposes of the fair cross-section requirement." (*Lockhart v. McCree, supra*, 476 U.S. at p. 175.) For these reasons, death qualification violates the Sixth and Fourteenth Amendments of the United States Constitution as well as article I, sections 7, 15, 16 and 17 of the California Constitution.

G. The Prosecutor's Use of Death Qualification via Peremptory Challenges was Unconstitutional

In the instant case, the prosecutor's use of peremptory challenges to systematically exclude jurors with reservations about capital punishment denied appellant his constitutional rights. After all jurors who declared they could not impose a death sentence were excused, various prospective jurors remained who had reservations about the death penalty, but who were not excludable for cause under *Witherspoon* and *Witt*. These prospective jurors stated that they could vote for the death penalty in an appropriate case. (*Gray v. Mississippi* (1987) 481 U.S. 648, 667-668.)

However, when these jurors were called to the jury box, the prosecutor systematically used a peremptory challenge to exclude them. For example, the prosecutor used a peremptory challenge to strike Amy Harrison from the jury. Ms. Harrison's answers on the juror questionnaire showed hesitation about imposing the death sentence. In answering question #23, she chose (b), which states that she "believe[s] in the death penalty but will not vote to impose it in every case." (5 ACT 1476.) Ms. Harrison also wrote in her questionnaire that she believed that "any person who kills another is insane....and if the person is on drugs then his mind is insane at the time." (5 ACT 1480.)

Similarly, the prosecutor used a peremptory challenge to strike prospective juror Trudy Swafford, whose answers on the jury questionnaire also showed some hesitation to vote for a death sentence. For example, Ms. Swafford wrote that she would be reluctant to state in court that her verdict was death:

> I think that any moral person would have to feel somewhat reluctant to impose the death penalty on another individual. But I believe I would do what the law requires.

(10 ACT 2928.)
In answering question #23, she chose the neutral option, (c), which states that she "neither favor[s] or oppose[s] the death penalty; it would depend on the facts." (10 ACT 2926.)

The prosecutor also used a peremptory challenge against Jacqueline A. Harper, one of the few African Americans on the venire panel. In answering question #23 on the juror questionnaire, Ms. Harper chose (d), which states that she "[has] doubts about the death penalty but will not always vote against it in every case." (11 ACT 3082.) Similarly, the prosecutor peremptorily struck Ruth Anderson, whose answers on the juror

questionnaire showed a hesitancy about voting for the death sentence. While she indicated, in answering question #23, that she believed in the death penalty, Ms. Anderson also wrote that "in most cases" that the sentence of life without the possibility of parole "would be better than the death penalty." (11 ACT 3910.)

Prospective juror John Jordan was also struck from the jury by the prosecutor, and his answers on the juror questionnaire showed some qualms about the death penalty. In answering question #24, Mr. Jordan wrote: "Have doubts about the death penalty but will not always vote against it in every case." (15 ACT 4363.) Mr. Jordan also stated that he believed that the sentence of the life without parole was a more severe punishment than the death penalty. (15 ACT 4365.)

As the above examples demonstrate, the prosecutor's actions in this case denied appellant his federal and state constitutional rights to due process, equal protection, an impartial jury, a jury drawn from a fair cross-section of the community and a reliable determination of guilt and sentence under the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and related provisions of article I, sections 7, 15, 16 and 17 of the California Constitution.

The peremptory exclusion of these jurors prejudiced appellant's rights at the guilt phase for the same reasons as did the "death qualification" of the jury. Unlike death qualification done by for-cause challenges, which excludes from the jury only those whom the trial judge determines would not be able to follow their oath at the penalty phase, the elimination of these jurors through peremptory challenge involves the exclusion of persons whose ability to follow their oath and instructions at the penalty phase is unaffected by their reservations about capital punishment. Even assuming

their exclusion was harmless at the guilt phase, reversal of the death judgment is required nonetheless. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 188; *Lockett v. Ohio* (1988) 438 U.S. 586, 604.) The prosecution "stacked the deck" in favor of death by exercising its peremptory challenges to remove these jurors. The exclusion of these jurors resulted in a "jury uncommonly willing to condemn a man to die." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 521, 523.)

The prosecutor shares responsibility with the trial judge to preserve a defendant's right to a representative jury and should exercise peremptory challenges only for legitimate purposes. Since the State is forbidden from excusing a class of jurors for cause based on their death penalty skepticism, those views are not a proper basis for a peremptory challenge. The State has no legitimate interest in the removal of jurors who can follow their oaths, but who may also be skeptical about the death penalty. A jury stripped of the significant community viewpoint that these prospective jurors provide is not ideally suited to the purpose and functioning of a jury in a criminal trial. (*Ballew v. Georgia* (1978) 435 U.S. 223, 239-242.) Even if these jurors do not constitute a cognizable class for purposes of analysis of the Sixth Amendment's representative cross-section of the community issue (*Lockhart v. McCree*, *supra*, 476 U.S. at pp.174-177), they constitute a distinct group for purposes of ensuring both the reliability of a capital sentencing decision and the need for the jury to reflect the various views of the wider community. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 519.)

In *Gray v. Mississippi, supra*, the Supreme Court held the wrongful exclusion for cause of a prospective juror who was a death penalty skeptic constituted reversible error. The plurality opinion emphasized the potential prejudice to a capital defendant when death penalty skeptics are

systematically excluded from a jury by peremptory challenges. (*Gray v. Mississippi, supra*, 481 U.S. at pp. 667-668.) The systematic, peremptory exclusion of death penalty skeptics in appellant's case requires reversal of the penalty verdict.

H. Errors in Death Qualifying the Penalty Jury Requires Reversal of the Guilt Verdicts As Well

In *Witherspoon v. Illinois, supra*, 391 U.S. 510, the Supreme Court identified three separate problems regarding death qualification. First, death qualification can be so extreme as to make the jury biased at the penalty phase. Second, death qualification that is so extreme may also make the jury biased at the guilt phase. Third, even death qualification that is not so extreme biases the jury at the guilt phase.

The first issue is the one that formed the basis for the limits on death qualification in *Witherspoon*. The second and third issues were left open for further studies by the *Witherspoon* decision. However, it appears that courts have erroneously compounded these issues. (See, e.g., *Hovey v. Superior Court, supra*, 28 Cal.3d at pp. 11-12, footnotes omitted [summarizing *Witherspoon* and discussing the two issues as if they were identical]; see also *People v. Fields, supra*, 35 Cal.3d at p. 344.)

This melding of issues is incorrect. The second issue is whether death qualification that did not meet the proper standard for removal of penalty phase jurors was improper at the guilt phase. (*Witherspoon v. Illinois, supra,* 391 U.S. at pp. 516-518.) In *Witherspoon,* the Court held that because the evidence on this second issue was not yet developed, it only would reverse the penalty phase. (*Id.* at pp. 516-518, 522, fn. 21.) The third issue is whether, assuming the State properly death-qualified the jury for purposes of the penalty phase, it was proper for such death qualification

to also exclude potential jurors from the guilt phase. (*Id.* at pp. 521, fn. 19.) This was the issue involving the "guilt phase includables" discussed in the *Lockhart* and *Hovey* decisions.

This Court has routinely asserted that *Witherspoon* error as to the penalty phase jury requires the reversal of the penalty but not the guilt verdicts. (See, e.g., *People v. Ashmus* (1991) 54 Cal. 3d 932, 962.) The United States Supreme Court has not addressed this issue. This Court should alter its position on this point and find that error resulting from the death qualification of the jury also requires reversal of any convictions resulting from the guilt phase.

Since the evidence shows that a death-qualified jury is conviction-prone and different from a typical jury, this Court should reconsider the conclusion that *Witherspoon* error requires only penalty reversal. The State's only conceivable legitimate interest in death qualification is at the penalty phase. If it committed error in achieving this interest, then it has no interest in death-qualifying the guilt phase jury. Since the prosecution did death-qualify the jury in this case, appellant improperly faced a biased guilt phase jury. Moreover, an error resulting in a biased jury cannot be harmless. When this Court finds error as to the penalty phase jury's death qualification, it must also reverse appellant's guilt phase convictions.

I. Conclusion

The death-qualification process in California is irrational and unconstitutional. It prevents citizens from performing as jurors in capital cases based on their "moral and normative" beliefs despite the fact that the law specifically requires capital jurors to make "moral and normative"

decisions.[6] These citizens' voices are eliminated from the data that the courts rely on to determine whether a particular punishment offends evolving standards of decency under the Eighth Amendment. To make matters worse, California allows some case-specific death qualification; one of the effects of this process is to remove jurors who would be highly favorable to specific mitigation evidence in violation of the Eighth Amendment.

The death-qualification procedure in California also violates the equal protection and due process clauses of the Fourteenth Amendment. To their detriment, capital defendants receive vastly different juries at the guilt phase in comparison with other defendants. In addition, since death qualification results in juries which are more likely to convict and to choose the death sentence, capital defendants' guilt and penalty determinations are not made with the heightened reliability required by the Eighth Amendment.

A vast amount of scientific data demonstrates that death-qualified juries are far more conviction-prone and death-prone than any other juries. The data shows that the death-qualification process disproportionately removes minorities, women, and religious people from sitting on capital

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[6] This Court has regularly described a jury's duty at the penalty phase in California as "moral" and "normative." (See, e.g., *People v. Maury* (2003) 30 Cal.4th 342, 440; *People v. Hughes* (2002) 27 Cal.4th 287, 394; and *People v. Weaver* (2001) 26 Cal.4th 876, 985.) In *People v. Jackson* (1996) 13 Cal.4th 1164, 1229-1230, the Court noted that a penalty phase jury "performs a normative function, *applying the values of the community* to the decision after considering the circumstances of the offense and character and record of the defendant"(emphasis added). (See also *People v. Mendoza* (2000) 24 Cal.4th 130, 192 [referring to the penalty phase jury as "the representative of the community at large"] and *People v. Allen* (1986) 42 Cal.3d 1222, 1287 [referring to the penalty phase jury as "the community's representative"].)

juries in violation of the Sixth and Fourteenth Amendments. Moreover, as was true in this case, prosecutors regularly use the death-qualification process to achieve these results. The very process of death qualification skews capital juries to such a degree that they can no longer be said to be impartial and fully representative of the community.

All of these errors were present in the instant case. From beginning to end, death qualification violated appellant's rights. In this case, the process accomplished was what was expressly prohibited by the Supreme Court:

> In its quest for a jury capable of imposing the death penalty, *the State produced a jury uncommonly willing to condemn a man to die.* It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal "organized to convict." It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.

(*Lockhart v. McCree, supra,* 476 U.S. at p. 179, quoting *Witherspoon v. Illinois, supra*, 391 U.S. at pp. 520-521 (footnotes and internal citations omitted, emphasis added.)

Thus, death qualification in general and as applied in this particular case violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. Since this error is comparable to other constitutional errors in the jury selection, it requires reversal of defendant's convictions and death sentence without inquiry into prejudice. (See, e.g., *Davis v. Georgia* (1976) 429 U.S. 122, 123 [improper challenges for cause]; *People v. Stewart* (2004) 33 Cal.4th 425, 454; *Turner v. Murray* (1986) 476 U.S. 28, 37 [failure to question prospective jurors about race in

a capital case involving interracial violence].) Appellant's convictions and death sentence accordingly must be reversed.

* * * *

CONCLUSION

For all of the reasons stated in Appellant's Opening Brief, his Reply Brief, and this Supplemental Opening Brief, appellant's convictions and death judgment must be reversed.

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

ALISON PEASE
Deputy State Public Defender

DATED: February 6, 2008

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Demetrius C. Howard***
Case No.: **Crim. S050583**
San Bernardino County Superior Court No.FSB 03736

I, **Saundra Alvarez**, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within cause; my business address is 801 K Street, Suite 1100, Sacramento, California 95814.

On **February 6, 2008**, I served the attached

APPELLANT'S SUPPLEMENTAL OPENING BREIF

by placing a true copy thereof in envelopes addressed to the persons named below at the addresses shown, and by sealing and depositing said envelopes in a United States Postal Service mailbox at Sacramento, California, with postage thereon fully prepaid. There is delivery service by the United States Postal Service at the places so addressed, for there is regular communication by mail between the place of mailing and the places so addressed.

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

Executed on **February 6, 2008**, at Sacramento, California.

Saundra Alvarez