SUPREME COURT COPY

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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

Case No. S050583

San Bernardino County
Superior Court No. FSB 03736

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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

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 REPLY BRIEF

Appellant's Supplemental Opening Brief ("ASOB") in this case was filed on February 22, 2008. Respondent filed Respondent's Supplemental Brief ("RSB") on April 28, 2008. Appellant now files his Supplemental Reply Brief.

IA.

THIS COURT SHOULD APPLY THE REVERSAL PER SE STANDARD OF PREJUDICE IN ASSESSING THE TRIAL JUDGE'S IMPROPER REQUIREMENT THAT APPELLANT WEAR A STUN BELT DURING TRIAL

Argument IA of the ASOB was merely an expansion of Argument I of the Appellant's Opening Brief ("AOB"). It is limited to one specific

issue: whether this Court should apply the prejudice standard of reversal per se in evaluating the error committed by the trial judge when he required appellant to wear a stun belt during trial. Appellant's Reply Brief ("ARB") raised this issue in a footnote. (See ARB at p. 11, fn. 4.)

The title of the response to Argument IA in the RSB is: "THE RECORD DOES NOT SUPPORT HOWARD'S CONTENTION THAT HE WAS COMPELLED TO WEAR A STUN BELT DURING TRIAL." (RSB at p. 2.) Respondent has already argued this point in Respondent's Brief ("RB") as has appellant in his ARB; there is no discussion of this issue in the ASOB. The record does establish, however, that appellant was wearing the stun belt during the trial. Appellant specifically objected to the use of the stun belt as being unjustified, given his prior exemplary behavior in court, and as a dangerous mechanism which could subject him to 50,000 volts should someone choose to press the button. (2 RT 504-505.) A notation in the clerk's transcript on April 4, 1995, states: "Defense objects to defendants [sic] shackles and electronic device. Motion to have them removed is denied." (2 CT 123.)

In the supplemental brief, respondent argues that the error raised here – forcible use of a stun belt – does not qualify as structural error under the case law of the United States Supreme Court. (RSB at pp. 3-5.) In his AOB and ARB, appellant acknowledged that in *People v. Mar* (2002) 28 Cal.4th 1201, this Court found in that case that the improper use of a REACT belt–a stun belt – constituted prejudicial error under *People v. Watson* (1956) 46 Cal.2d 818, 836-837. Appellant also conceded that the *Mar* decision specifically left open the question of whether the error in requiring a defendant to testify while involuntarily wearing a stun belt, without the prosecution establishing an adequate showing of potential

danger on the part of the defendant, constituted federal constitutional error subject to the more rigorous test of prejudice set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (AOB at p. 43; ARB at pp. 11-12.) Nonetheless, as the ASOB points out, this Court did compare the improper use of a stun belt and the forcible use of anti-psychotic drugs on a criminal defendant during trial, which was at issue in *Riggins v. Nevada* (1992) 504 U.S. 127. (*People v. Mar, supra,* 28 Cal.4th at pp. 1227-1228.)

In the *Riggins* decision, the defendant/petitioner claimed that his convictions for robbery and murder should be overturned because he was forcibly medicated with a psychotropic drug, Mellaril, during his trial. The United States Supreme Court agreed with Riggins that a criminal defendant has a Fourteenth Amendment due process right to be free from unwanted anti-psychotic drugs unless the state has proved an essential state interest in forcible medication. (504 U.S. at p. 138.) The Court also found that the trial judge did not have sufficient grounds to force Riggins to take Mellaril during his trial. (*Id.* at p. 129.)

While the United States Supreme Court did not specifically state that this error amounted to structural trial error, it rejected the state's claim that Riggins had to show that the compelled use of this medication adversely affected his trial. The Court stated:

> 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. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril. (See *post,* at 1823.) Like the consequences of compelling a defendant to wear prison clothing, see *Estelle v. Williams* (1976) 425 U.S. 501, 504-505, or of binding and gagging an accused during trial, see *Illinois v.Allen* (1970) 397 U.S. 337, 344, *the precise*

> *consequences of forcing anti-psychotic medication upon Riggins cannot be shown from a trial transcript.* What the testimony of doctors who examined Riggins establishes, and what we will not ignore, is a strong possibility that Riggins' defense was impaired due to the administration of Mellaril.

(*Riggins v. Nevada, supra,* 504 U.S. at p. 137, emphasis added.)

The Supreme Court also observed in *Riggins*:

> It is clearly possible that such side effects had an impact upon not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel.

(*Id.* at p. 137.)

There is indeed great similarity between forcible use of psychotropic drugs and the use of the stun belt in a case, such as this, where the defendant chooses to testify and his credibility is one of the most important components of his defense. In *Mar*, this Court recognized the harmful psychological impact of wearing a stun belt. (28 Cal.4th at p. 1227.) As this Court observed, stun belts "may impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury." (*Ibid.*) Indeed, the Supreme Court of Indiana has banned altogether the use of electronic stun belts in any Indiana courtroom because

> The stun belt, even if not activated, has the potential of compromising the defense. It has a chilling effect. It is inherently difficult to define in a particular judicial proceeding the boundary between permissible and impermissible conduct – the boundary between aggressive advocacy and a breach of order. An individual wearing a stun belt may not engage in permissible conduct because of the fear of being subjected to the pain of a 50,000 volt jolt of electricity. For example, a defendant may be reluctant to object or question the logic of a ruling-matters that a defendant has every right to do. A defendant's ability to participate in his own defense is one of the cornerstones of our judicial system. A pain infliction device

> that has the potential to compromise an individual's ability to participate in his or her own defense does not belong in a court of law.

(*Wrinkles v. State* (Ind. 2001) 749 N.E.d2d 1179, 1194, quoting *Hawkins v. Comparet-Cassani* (C.D.Cal. 1999) 33 F.Supp.2d 1244, 1262.)

In *Mar*, this Court noted that

> From the cold record before us, it is, of course, impossible to determine with any degree of precision what effect the presence of the stun belt had on the substance of defendant's testimony or on his demeanor on the witness stand.

(*Id.* at p. 1224.)

This observation mirrors the observation of the United States Supreme Court in *Riggins*:

> Like the consequences of compelling a defendant to wear prison clothing, see *Estelle v. Williams* (1976) 425 U.S. 501, 504-505,or of binding and gagging an accused during trial, see *Illinois v.Allen* (1970) 397 U.S. 337, 344, the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript.

(*Riggins v. Nevada, supra,* 504 U.S. at p. 137.)

Therefore, while this Court applied the *Watson* standard of prejudice in *Mar*, it should have chosen to follow the reasoning of the *Riggins* decision. It is impossible to determine from a cold record how the forced use of a stun belt on a defendant who, like appellant, has chosen to testify on his own behalf, affected the defendant's testimony and demeanor in front of the jury. As this and other courts have found, we do know that there is a significant psychological impact on the person forced to wear an electronic device capable of zapping him with 50,000 volts. Under those circumstances, a defendant is "occupied by anxiety over the possible triggering of the belt" and "likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate

in his defense at trial." (*United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, 1306.)

One can discern from the record in this case that appellant's demeanor during his testimony was affected by being forced to wear the stun belt because he stated on the stand that he was very nervous. (9 RT 2185.) The record also shows that appellant had trouble following some of the questions directed to him while he was testifying. (9 RT 2228, 2239, 2231, 2242.) More importantly, in his in limine motion during pre-trial proceedings, appellant told the court that he did not want to wear the stun belt, which was capable of inflicting 50,000 volts of electricity, because he was very anxious about it. (1 CT 123; 2 RT 504-505.)

Respondent cites *People v. Combs* (2004) 34 Cal.4th 821, 838-839, for the proposition that this Court should not deviate from prior decisions that courtroom shackling is harmless unless the jury saw the restraints or the shackles impaired or prejudiced defendant's right to testify or participate in his defense. (RSB at p. 6.) However, in *Combs*, this Court did not address the issue of whether this Court should follow the reasoning of *Riggins v. Nevada, supra,* concerning the prejudice analysis. Case law cannot be cited as authority for issues not decided. (*Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 73.) Accordingly, respondent cannot rely on the *Combs* opinion to defeat the argument that the error of requiring appellant to wear a stun belt during his trial is reversible per se.[1]

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1. In any event, the instant case is clearly distinguishable from *People v. Combs, supra*, where this Court found that the trial court did not abuse its discretion in requiring defendant to wear physical restraints because the record demonstrated that Combs had threatened to commit violent acts in the courtroom. (*Id.* at p. 837.) Moreover, Mr. Combs had purportedly made threats to engage courtroom deputies in physical brawls. (*Id.* at p.

Appellant urges this Court to follow and extend its reasoning in *People v. Mar, supra*, regarding the United States Supreme Court's decision in *Riggins v. Nevada, supra*, and the similarity between forced medication and the involuntary use of electronic stun belt on criminal defendants. Those two decisions focus inter alia on the psychological impact of two different mechanisms on a defendant's ability to testify on his own behalf and to participate effectively in his own defense. Both opinions also recognize how impossible it is to determine from a cold record how such psychological impact actually affected the subtle questions of defendant's mind set during trial and his demeanor before the jury. As this Court noted in the *Mar* opinion,

> From the cold record before us, it is, of course, impossible to determine with any degree of precision what effect the presence of the stun belt had on the substance of defendant's testimony or on his demeanor on the witness stand.

(28 Cal.4th at p. 1224.)

As that observation makes clear, the Court should apply a per se reversal standard when evaluating the forced use of a stun belt when the record fail to show a manifest necessity for the use of such restraints on the defendant.

838.) Those threats, coupled with the fact that the defendant Combs had been found in possession of two shanks in jail, constituted sufficient evidence on the record to impose restraints. (*Ibid.*)

XVII.

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

As appellant argued in the ASOB, the process by which juries in capital cases in California are "death-qualified" violate both the United States and California constitutions[2] because it does not accord with a capital defendant's rights to equal protection, due process and to a reliable death penalty adjudication. (ASOB at pp. 5-28.)

Respondent argues that this claim is waived because appellant did not raise it in the trial court. Not all appellate claims of error are waived, however, by a failure to make a timely objection in the lower court. As this Court observed in *People v. Vera* (1997) 15 Cal.4th 269, "[a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*Id.* at p. 276-277.) The right to an impartial jury, one not more likely to convict and/or to vote for a death sentence, is as fundamental a constitutional right as the right to a jury from which a disproportionate number of minorities, women and religious people have not been removed.

Also, respondent's waiver argument should be rejected because appellant's constitutional claims in Argument XVII raise "pure questions of law" that can be resolved without the necessity of developing any further record in the trial court. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118, 133; *People v. Hines* (1997) 15 Cal.4th 997, 1061.) Finally, this Court should exercise its discretion to consider constitutional questions raised for

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[2] The relevant provisions of the United States Constitution are the 5th, 6th, 8th, and 14th Amendments. Also applicable are sections 7, 15, 16, and 17 of article 1 Of the California Constitution.

the first time on appeal when the asserted error fundamentally affects the validity of the judgment or important issues of public policy are at issue. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; see, e.g., *People v. Ramirez* (1987) 189 Cal.App.3d 603, 618, fn. 29.) Certainly, the question of whether the death-qualification process in California violates the due process and equal protection rights of defendants being tried for capital crimes is an important issue of public policy, thus offering another reason why this Court should reject respondent's waiver argument.

Respondent cites six prior decisions of this Court which it contends have already rejected appellant's argument about the unconstitutionality of the death-qualification process in this state. (RSB at pp. 9-10.) Respondent argues, for example, that "[t]his Court has considered and rejected 'social science evidence' offered to show 'that death-qualified juries are more prone to convict than those not thus qualified.'" (RSB at p. 9.) Thus, its position, as stated in the RSB, is that it is not required to defend against appellant's argument challenging the death-qualification process in California because this Court has already considered and rejected this claim while respondent has regularly answered such challenges in other capital cases.

Moreover, since respondent argues that this Court has repeatedly denied challenges to the constitutionality of the death-qualification process in California it would have been futile for appellant to object in this case as the trial judge was bound by law to follow the case law of this Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see, e.g., *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 ["An objection in the trial court is not required if it would have been futile."]; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6 ["here the trial

court was bound by prior appellate decisions . . . and it would have been pointless to raise the issue there"]; *People v. Turner* (1990) 50 Cal.3d 668, 704, fn. 18 [no waiver for failure to object where "[t]hese challenges had consistently been rebuffed"]; *Moradi-Shalal v. Fireman's Funds Ins. Companies* (1988) 46 Cal.3d 287, 292, fn. 1 ["clearly it was pointless for defendant to ask either the trial court or appellate court to overrule one of our decisions"]; *In re Gladys R.* (1970) 1 Cal.3d 855, 861 ["we cannot expect an attorney to anticipate that an appellate court will later interpret [the law] in a manner contrary to the apparently prevalent contemporaneous interpretation"].)

Having identified no factual dispute in appellant's case which affects this argument, and relying principally upon this Court's prior decisions rejecting the merits of this claim, respondent suffers no undue burden or detriment from appellate review of Argument XVII of ASOB. There is, therefore, no basis for respondent's claim of waiver.

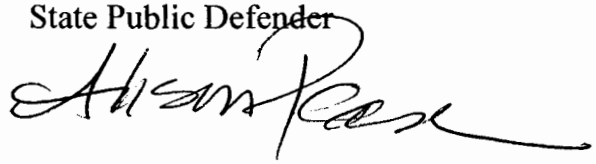
Apart from the waiver argument, appellant does not need to address any of the other contentions in the RSB regarding Argument XVII because these issues have already been adequately addressed in Appellant's Supplemental Opening Brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the supplemental opening brief, does not, however, 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.

CONCLUSION

For all of the reasons stated in Appellant's Opening Brief, his Reply Brief, his Supplemental Opening Brief, and this Supplemental Reply Brief, this Court should reverse appellant's convictions and death judgment.

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



ALISON PEASE
Deputy State Public Defender

DATED: May 23, 2008

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

I am the Deputy State Public Defender assigned to represent appellant, Demetrius C. Howard, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis generated word count, I certify that this brief excluding the tables and certificates is 2,928 words in length

Dated: May 23, 2008

Alison Pease
Attorney for Appellant

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 **May 23, 2008**, I served the attached

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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 **May 23, 2008**, at Sacramento, California.

Saundra Alvarez