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 OPENING BRIEF

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

Honorable Stanley W. Hodge, Judge

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

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

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IIIA.

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT FAILED TO HOLD A COMPETENCY HEARING AND GRANT APPELLANT'S MOTION FOR A NEW TRIAL DESPITE SUBSTANTIAL EVIDENCE APPELLANT'S MEDICATION HAD RENDERED HIM INCOMPETENT

In both Appellant's Opening Brief ("AOB") and in his Reply Brief ("ARB"), appellant argued that the trial judge committed structural error when he failed to hold a competency hearing after appellant raised the issue that, as a result of anti-psychotic medication that he was taking during trial, he was incompetent to stand trial. (AOB at pp. 58-68; ARB at pp. 22-26.) Once a trial judge becomes aware of substantial evidence which objectively generates a doubt as to appellant's competency, a trial judge has a duty to suspend criminal proceedings and conduct a competency hearing. (*People v. Pennington* (1967) 66 Cal.2d 508, 518; *People v. Garcia* (2008) 159 Cal.App.4th 163, 170.) This error was structural. (*Rohan v. Woodford* (9th Cir. 2003) 334 F.3d 803, 818.)

In appellant's opening brief and in his reply brief, in describing the relief necessary as the result of the trial judge's failure to pursue the competency issue, appellant asked only for the reversal of the death judgment. That request was insufficient. This error requires reversal of appellant's convictions as well as reversal of the death judgment.

* * * * *

XVIII.

THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE EITHER A FIRST DEGREE ATTEMPTED ROBBERY FELONY MURDER OR THE ATTEMPTED ROBBERY FELONY MURDER SPECIAL CIRCUMSTANCE

A. The Prosecutor Did Not Prove an Attempted Robbery

The sole basis for both the murder charge and the special circumstance allegation in this case was an alleged attempted robbery which resulted in the death of the victim, Sherry Collins. As to the murder charge, the prosecutor argued that appellant had committed a first degree attempted robbery felony murder, and the jury was instructed solely on the elements of that crime. Similarly, the only special circumstance alleged and found true was that the murder of Ms. Collins had occurred during the commission or attempted commission of a robbery.

1. The Standards for Assessing Sufficiency of Evidence

The due process clause of the Fourteenth Amendment of the United States Constitution and article 1, section 15, of the California Constitution prohibit the imposition of criminal sanctions when there is insufficient proof of guilt. (See, e.g., *Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Holt* (1997) 15 Cal.4th 619, 667.) The test of whether evidence is sufficient to support a conviction is "whether a rational trier of fact could find defendant guilty beyond a reasonable doubt." (*Ibid.*) In making this assessment an 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." (*Ibid.*, emphasis

added.) [1] Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence. (*People v. Marshall* (1999) 15 Cal.4th 1, 35.) [2] Thus, "a finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed." (*People v. Rowland* (1982) 134 Cal.App.3d 1, 8-9.) As discussed below, the convictions in this case were based upon nothing more than conjecture and surmise and therefore cannot be affirmed.

2. The Standard Applicable in a Death Penalty Case

In a death penalty case, both the conviction and the sentence are subject to an even higher level of scrutiny because the Eighth Amendment requires heightened reliability. This requirement for heightened reliability applies equally to the guilt and penalty phases of a capital case. In *Beck v. Alabama* (1980) 447 U.S. 625, the Supreme Court held that the federal due process clause requires jury instructions on lesser included offenses in all capital trials when a reasonable view of the evidence would have supported such conviction. The Court noted that rules governing the guilt determination in a capital crime, like those involving the sentencing determination, must assure reliability:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated

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1 See also *People v. Johnson* (1980) 26 Cal.3d 557, 576-577 [citations omitted].

2 See also *People v. Redmond* (1969) 71 Cal.2d 745, 755 [evidence that raises a strong suspicion of guilt is not sufficient to support a conviction; suspicion is not evidence but merely raises a possibility].

> procedural rules that tended to diminish the reliability of the sentencing determination. [Footnote omitted.] The same reasoning must apply to rules that diminish *the reliability of the guilt determination*. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

(*Id.* at p. 638, emphasis added.)

The Supreme Court has required a heightened standard of reliability in the fact-finding processes of a capital case. For example, in *Ford v. Wainwright* (1986) 477 U.S. 399, the Court invalidated a state's post-conviction procedures for determining the sanity of a death row prisoner. The *Ford* decision stated:

> In capital proceedings generally, this Court has demanded that fact finding procedures aspire to a heightened standard of reliability. (See, e.g., *Spaziano v. Florida* (1984) 468 U.S. 447, 456.) This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (opinion of Steward, Powell and Stevens, JJ.).)

(*Id.* at p. 411-412.)

In *Ford, supra*, the Court applied a heightened standard of due process to proceedings occurring after the conclusion of the sentencing phase. Both the *Beck* and the *Ford* decisions show that the Eighth Amendment requires a heightened standard of reliability whenever the determination is being made about whether death is an appropriate sentence. Therefore, the evidence offered by the prosecution in this case to prove appellant's guilt and to obtain a death verdict from the jury must be assessed in light of this need for heightened reliability.

3. The Evidence did not Establish That an Attempted Robbery Took Place in this Case

During his closing argument to the jury at the conclusion of the guilt phase trial, the deputy district attorney identified the following evidence as establishing that defendant was guilty of an attempted robbery special circumstance murder. First, the prosecutor mentioned the five elements of robbery and acknowledged that "*[w]e don't have any evidence that anything was taken in this case*; therefore, attempt, not completed, all five not completed, ineffectual." (9 RT 2397; italics added.) The prosecutor noted that the victim in this case was not "agreeable," stating: "The evidence is she's yelling, screaming, kicking." (9 RT 2397.)

Citing the testimony of Randy Collins,[3] the victim's daughter who was in the passenger seat of the car when the victim was killed, the prosecutor asserted:

> There is one man at the driver's door the minute the door is opened and she [Sherry Collins] starts to get out. That's by Randy. He immediately attacks Sherry Collins, immediately. Is there any other rational explanation for what was going down that very moment at

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[3] In his closing argument, the prosecutor acknowledged that Randy's "testimony" largely came through other witnesses. (9 RT 2398.) At trial Randy was not able to remember very much about what happened when her mother was killed. (7 RT 1782-1788.) For example, Randy could not remember what the man fighting with her mother on the driver's side of the car was wearing. (7 RT 1786.) She also testified that neither her mother or the man with whom she was fighting said anything. (7 RT 1786.) Over the hearsay objection of defense counsel, Detective Blackwell was allowed to testify about what Randy told him in his interview of her on December 10, 1992, four days after her mother was killed. (7 RT 1791-1796.) Pursuant to Evidence Code section 1237, the trial judge permitted Blackwell to read to the jury portions of the report he had prepared describing his interview of Randy. (7 RT 1796-1801.)

> that car door with her and that man and the back up on the other side of the car? No. Physical evidence. The testimony of Randy alone tells you that robbery, a car-jacking is going down.

(9 RT 2398.)

It, therefore, was the position of the prosecution that the only inference possible from the fact that there was physical resistance by the victim when she encountered two men on either side of her car was that the men had attempted to rob her.

During his guilt phase closing argument, the prosecutor also cited the testimony of Cedric Torrence who claimed that he heard appellant and Mitchell Funches talking about doing a "jacking" earlier on the day that Sherry Collins was killed. (9 RT 2401.) The prosecutor also asserted that both Torrance and appellant agreed that "jacking" meant a robbery of some sort. (9 RT 2410.)

As this Court observed in *People v. Holt, supra,* 15 Cal.4th at p. 667, this Court must "look[s] 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." The testimony of Cedric Torrence was contradicted by much other evidence. For example, Torrence testified during an Evidence Code section 402 hearing, which preceded his testimony at trial, that on December 6, 1992, the day that the murder in this case occurred, he had played football with a group of men, including appellant, and spent time hanging out in a garage on his street. (7 RT 1602.) Torrence claimed that he saw appellant with a gun, a black .357, about a foot long. (7 RT 1603.) Torrence also agreed that on February 10, 1993, when he was first questioned by police about this case, he told Detective Blackwell that appellant had a "big" gun. (7 RT 1681.) The gun Torrence

identified at trial was not a foot long; he also changed his story at trial, saying that the gun was "average-sized." (7 RT 1604; 9 RT 2415.)

At trial, Torrence claimed that when the group was in the garage across the street from Torrence's house, he heard Funches and appellant talking about doing a "jacking." (7 RT 1661-1663.) At trial, Torrence testified that appellant and he were alone in the garage when appellant took out his gun. (7 RT 1696.) However, Torrence then acknowledged that he earlier had told police that he was never alone in the garage with appellant. (7 RT 1696-1697.) He also conceded that he had told the police that others were present when appellant and Funches allegedly were discussing a "jacking." (7 RT 1700-1701.)

The testimony of other men who were with both Cedric Torrence and appellant for the football game and gathering in the garage on the day of the murder contradicted Torrence's claims about appellant having a gun. For example, Danny Rivera[4] testified that he did not see any guns that day on appellant or anyone else in the group. (8 RT 2078.) Danny also did not hear appellant talk about doing a robbery or "jacking" that day. (8 RT 2080.) He also disputed Torrence's testimony that there were two other men named Marvin and Roosevelt present at the football and at the gathering in the garage. (8 RT 2082.)

Danny's brother, George Rivera, also testified about the gathering of friends, including appellant and Cedric Torrence, during the late afternoon on the day of the crime in this case. George testified that he took appellant in his car to the high school where this group played football and that he did

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Because Danny Rivera's brother, George Rivera, also testified at appellant's trial, this brief will refer to them as Danny and George.

not see appellant with a gun. (9 RT 2276-2277, 2279.) He also testified that he never heard anyone in this group, including appellant and Funches, talk about a robbery or a "jacking." (9 RT 2280-2281.) Like his brother, George denied that there was anyone named Marvin or Roosevelt present at these activities. (9 RT 2281.)

Roosevelt Eshmon testified that he had known Cedric Torrence for about ten years. (9 RT 2288.) He disputed Torrance's testimony that he was among the men who were at the gathering in the garage. Eshmon testified that he had never been in the garage opposite the residence of Torrence's mother with Mitchell Funches and appellant, nor had he ever heard those two talk about doing a "jacking." (9 RT 2289.)

Cedric Torrence also claimed that when later that evening appellant called him from an apartment up near the crime scene, appellant had told him he was "strapped," meaning that he was wearing a gun. (7 RT 1668.) However, another prosecution witness, James Chism, from whose apartment appellant telephoned Torrence, testified that he did not hear appellant say anything about a gun. (7 RT 1876.)

As the above summary of the evidence makes clear, the record in this case does not contain sufficient evidence to establish that appellant had the specific intent to commit a robbery of Sherry Collins. To be convicted of attempted robbery, the perpetrator must harbor a specific intent to commit robbery and commit a direct but ineffectual act toward the commission of the crime. (*People v. Medina* (2007) 41 Cal.4th 685, 694.) To prove an attempted robbery-felony murder, the prosecution must show that a murder was "committed in the perpetration of, or attempt to perpetrate" robbery. (Penal Code section 189.) To prove the robbery-murder special circumstance, the prosecution must show beyond a reasonable doubt that

defendant had formed the specific intent to steal before or while killing the victim. (*People v. Valdez* (2004) 32 Cal.4th 73, 105.) The whole record in this case, "not just the evidence favorable to the respondent," does not contain substantial evidence of a specific intent to rob Sherry Collins. (*People v. Holt, supra,* 15 Cal.4th at p. 667.) The mere fact that there was a fight or scuffle between the victim and one of her assailants does constitute by itself sufficient evidence that the assailants had a specific intent to commit a robbery. Accordingly, the guilty verdicts for first degree murder and the finding of a special circumstance attempted-robbery-felony murder must be reversed.

B. The Evidence Was Insufficient to Prove that Appellant Was One of the Assailants in this Case

The evidence presented in this case tying appellant to the crime scene was minimal. From the beginning, the prosecution identified co-defendant, Mitchell Funches,[5] as the person who shot Sherry Collins. There was physical evidence which tied Funches to the killing of Ms. Collins. On the evening of December 6, 1992, Officer Edward Brock of the California State University Police heard on the police radio that there had been a shooting at the Acacia Park Apartments, which are near the campus of the California State University at San Bernardino. Officer Brock subsequently

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On March 3, 1994, the Grand Jury of San Bernardino County indicted both appellant and Mitchell Funches for the murder of Sherry Collins. (1 CT 2-4.) After Funches was found mentally incompetent to stand trial, his case was severed, on April 3, 1995, from appellant's. Ultimately, Funches was restored to competency and was convicted of first degree murder by a jury. Later, Funches admitted the special circumstance of attempted robbery and was sentenced to life without the possibility of parole for the murder of Ms. Collins. (1 CT 98; CT Supp.C 334-335, 343-344, 346.)

learned that two suspects were thought to be in the area of the University Park Apartments. (8 RT 1911-1913.) While driving through a mini-mall, Officer Brock saw a black man; he stopped his car and called out to him. That man, Mitchell Funches, ended up shooting at Officer Brock, wounding him in the abdomen. (8 RT 1914-1917.) Funches was arrested shortly after by a San Bernardino officer, and Funches' gun was recovered. (8 RT 1943-1947.) Ballistics testing showed that the bullet that killed Sherry Collins came from Funches' gun. (8 RT 1949, 1990-1992, 2084-2085, 2091-2095.) In addition, Funches' fingerprint was found on the passenger side door handle of Sherry Collins' car. (8 RT 1810-1814.)

While substantial physical evidence tied Mitchell Funches to the killing of Sherry Collins, there was no such evidence tying appellant to the crime. There were no fingerprints of appellant found in or on the victim's car or near the crime scene. The only physical evidence tying appellant to Ms. Collins was some fiber evidence which even the prosecutor's expert, criminalist Craig Oguino of the San Bernardino Sheriff's Crime Laboratory, admitted was not definitive.

Mr. Oguino examined fibers taken from the soles of Ms. Collins' shoes and compared it to fibers from the poncho[6] and pants that appellant was wearing when he was arrested on December 6, 1992. The most that the prosecution's criminalist could say was that fibers found on the victim's shoes were *consistent* with fibers found in appellant's pants and on his poncho. (8 RT 2141-2142; italics added.) Oguino further conceded that one of those fibers –a white cotton fiber– which he found both in appellant's

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Mr. Oguino described this poncho as a "gray nightshirt." (8 RT 2123.)

black jeans and on the soles of the victim's shoes is found "in most garments." (8 RT 2143.) Similarly, the white polyester fiber also found on both appellant's shirt (or poncho) and on the shoe of the victim is "very common." Mr. Oguino also agreed that the black cotton fibers that he found in the pants and on the victim's shoes were found in "great abundance." (8 RT 2144.) The criminalist further conceded that the black jeans worn by appellant were common. (8 RT 2148.) Oguino agreed that when he said the fibers on the victim's shoes and in appellant's clothing were "consistent" that did not mean that they were identical. (8 RT 2156.) He testified:

> When I use the term 'consistent,' it means that I feel that there is a strong connection between the two items. However, I cannot positively prove that.

(8 RT 2157.)

Over the objection of defense counsel,[7] the prosecution introduced into evidence a gun which was found six days after the murder of Sherry Collins in the apartment complex at 1616 Kendall Street. There were no fingerprints on this .357 caliber revolver or on the ammunition still inside it. (9 RT 2183-2184.) The only evidence tying appellant to this gun was the fact the gun was found in the vicinity of an apartment where one witness testified that she saw appellant and the fact that Cedric Torrence identified it as the gun he supposedly saw in appellant's possession earlier in the day of Sherry Collins' murder. This identification evidence was, however, questionable.

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[7] See Argument IV, pages 69-81, in AOB and pages 27-31 in the ARB.

Mr. and Mrs. Manzella testified that they lived in apartment number 2 at 1660 Kendall Drive on December 6, 1992, the night when Sherry Collins was killed. (7 RT 1848.) Mr. Manzella testified that on that evening, he heard a knock, opened the door and saw an African-American man, with his back to Manzella, talking to the neighbor in apartment number 3, the door of which was just opposite the Manzellas' apartment. Manzella shut the door after one or two seconds; he said he could not identify the man. (7 RT 1850, 1852.)

His wife, who was behind Manzella when he opened up the door that evening, claimed that she could identify the African-American standing at her neighbor's door. Several days after December 6, she identified appellant in a photographic line-up shown to her by police. (7 RT 1856.) Mrs. Manzella agreed with her husband's testimony that their door was only open for a second or two, but she claimed that the man had turned his head to the side, allowing her to see his face. (7 RT 1859.) When on cross-examination she was asked if she had said "looks like this one" when she pointed to No. 3 (appellant) in the photo line-up, Mrs. Manzella said she couldn't remember. (7 RT 1860.) She also agreed that the photograph of appellant was the only one in the line-up where the man wore a pullover. (7 RT 1860.)

Cedric Torrence's identification of the gun was also tenuous. At the Evidence Code section 402 hearing which took place before Torrence testified at trial, he admitted to having trouble identifying the gun. (7 RT 1604.) Initially, Torrence described the gun he supposedly saw in appellant's hands as being a .357 black handgun of average size. (7 RT 1603.) However, when asked to show the gun's length, he put his hands about a foot apart. (7 RT 1603.) Over the course of his testimony at the 402

hearing, Torrence vacillated about the number of times he had seen the gun on the day of the murder and where he had seen it. (7 RT 1606-1608; 1611-1613.) Having been able to use the evidentiary hearing as a dress rehearsal for his testimony, it is not surprising that Torrence made a stronger identification of the gun at trial. (7 RT 1657, 1664, 1675-1676.) Nonetheless, he was impeached on his prior inconsistent statements regarding the gun. (7 RT 1681, 1693-1694, 1696-1697.) It was on this very flimsy evidence that the prosecution was allowed to introduce the gun, found six days after the murder, into evidence and to argue to the jury that the gun belonged to appellant.

In his guilt phase closing argument, the prosecutor asserted that Randy Collins, the young daughter of the victim, had provided enough information to identify appellant as the man who was next to the driver side of the car and who had tussled with her mother. (9 RT 2411-2412.) The prosecutor acknowledged that Randy could not identify appellant as one of the assailants. (9 RT 2411.) However, he argued, Randy did identify, in a photo line-up shown to her several days after the crime, appellant's "big white shirt." (9 RT 2412.) The actual evidence presented was, however, much more ambiguous. Although Randy did testify at trial, she could not remember much about the day her mother was murdered. (7 RT 1782-1788.) Police officers were allowed to testify about statements made by her soon after the murder.

Officer Jeffrey Lotspeich of the San Bernardino Police Department spoke to Randy right after the murder. He testified that Randy had told him that two men were fighting with her mother while she was in the car with her in the carport. Her mother was screaming. As this was happening, her mother was shot, and Randy ran away because she was afraid. She

described one of the men as having dark colored clothing and the other man as wearing a white shirt and dark colored pants. (7 RT 1778.) Officer Lotspeich said that Randy didn't seem to understand what a gun was, and she couldn't tell him the race of the two men. (7 RT 1780.)

During the trial, Sargeant Dale Blackwell read portions of the report he wrote about his interview of Randy Collins on December 10, 1992. According to Blackwell's report, Randy said that on the evening of December 6, 1992, her mother drove their car into the garage at their apartment complex and parked. When her mother opened her car door, the dome light inside the car came on. Randy described seeing two "bad men" walk up to either side of the car. They wore "big clothes" and white shirts. Her mother turned in her seat and kicked at the man on her side of the car. Randy didn't hear the men saying anything, but her mother was screaming, "Get out." She heard a gun and then after her mother was shot, she saw the man next to her mother's door holding a gun by his stomach. (7 RT 1805-1806.)

Another witness, Virginia Garduno, also testified about what Randy Collins had said about the killing of her mother on the night it occurred. On December 6, 1992, Ms. Garduno was living in the Acacia Park Apartments at North Little Mountain Drive. About 7 p.m., she heard a loud popping noise, a big bang which she initially thought was somebody running into the garage. A short time later there was a knock at her door, and Garduno heard a voice repeatedly saying, "Open the door." When she opened door, she found the little girl crying and looking scared. She told Garduno that there were guys chasing her, and they had shot her mother. According to Garduno, the little girl, later identified as Randy Collins, said that the men were black and one of them was carrying a bat. (7 RT 1720-1721.)

As the above summary shows, the evidence from Randy Collins about the two men involved in the killing of her mother was not only scant but contradictory. As the prosecutor acknowledged, she could not identify appellant. She could identify only a white shirt on a man in a photograph in a photographic line-up. Such an identification does not constitute substantial evidence. Ms. Garduno testified that Randy said the two men chasing her were black; however, shortly after that, when Officer Lotspeich asked Randy to state the race of the assailants, she could not do it. Ms. Garduno also testified that Randy had said that one of the men was carrying a bat. The prosecution did not present any evidence that either appellant or Mr. Funches, both arrested shortly after the incident, had a bat in his possession. There also was no evidence that a bat was ever found by anyone involved in investigating this crime.

The only physical evidence tying appellant to this crime was the fiber evidence, which was far from compelling. As the prosecution expert witness conceded, the most he could say about the fibers found on the soles of the victim's shoes was that they were consistent with some fibers found in appellant's clothing. Such evidence does not meet the test for substantial evidence, that is, evidence that is reasonable, credible and of solid value. (See, e.g., *People v. Cuevas* (1996) 12 Cal.4th 252, 260-261.)

The identification evidence offered by the prosecution in this case was completely inadequate. It was undisputed that appellant was in the area near the apartment building where Sherry Collins was killed. Appellant testified to that fact. (9 RT 2201-2208.) However, "[m]ere presence at the scene of a crime which does not itself assist the commission of the crime or mere knowledge that a crime is being committed and the failure to prevent it" does not permit imposition of criminal liability. (*In re Michael T.* (1978)

84 Cal.App.3d 907, 911; see also *Pinell v. Superior Court* (1965) 232 Cal.App.2d 284, 287.) Therefore, the evidence offered by prosecution witnesses, such as Mrs. Manzella and Mr. Chism, about seeing appellant in their apartment complex did not constitute substantial evidence that appellant was one of the assailants involved in the killing of Ms. Collins.

CONCLUSION

For all of the foregoing reasons, the Court should reverse appellant's convictions of first degree felony murder and attempted robbery as well as the special circumstance finding of an attempted robbery felony murder. The prosecution failed to produce substantial evidence to support the prosecution's charge that the killing of Sherry Collins occurred during an attempted robbery or that appellant was involved in that killing. Accordingly, given this insufficiency of evidence, the sentence of death must also be reversed.

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

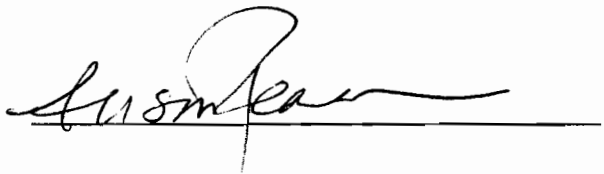
ALISON PEASE
Deputy State Public Defender

Dated: November 10, 2008

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 4,687 words in length.

DATED: November 10, 2008



ALISON PEASE
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Demetrius Howard***

Crim. No. **S050583**
San Bernardino County
Superior Court No. FSB 03736

I, KRISTIN TWINING, 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 OPENING BRIEF

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/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 **November 10, 2008**, as follows:

Demetrius C. Howard
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **November 10, 2008,** at Sacramento, California

Kristin Twining