

# SUPREME COURT COPY

SUPREME COURT  
FILED

*In the Supreme Court of the State of California* FEB 23 2009

**Frederick K. Ohrich** Clerk

DEPUTY

**PEOPLE OF THE STATE OF  
CALIFORNIA,**

**Plaintiff and Respondent,**

v.

**DEMETRIUS CHARLES HOWARD,**

**Defendant and Appellant.**

**CAPITAL CASE**

Case No. S050583

San Bernardino County Superior Court Case No. FSB03736  
Honorable Stanley W. Hodge, Judge

## **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF**

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# DEATH PENALTY

**TABLE OF CONTENTS**

	<b>Page</b>
Argument .....	1
I.    The trial court was not required to sua sponte order a competency hearing, and no reversal is warranted.....	1
II.   Sufficient evidence supports howard’s conviction for attempted robbery felony murder and the jury’s true finding of the attempted robbery felony murder special circumstance .....	2
Conclusion .....	14

## TABLE OF AUTHORITIES

Page

### CASES

<i>Jackson v. Virginia</i> (1979) 443 U.S. 307 [99 S.Ct. 2781, 61 L.Ed.2d 560] .....	5
<i>People v. Abilez</i> (2007) 41 Cal.4th 472 .....	11
<i>People v. Bean</i> (1988) 46 Cal.3d 919 .....	4
<i>People v. Bolin</i> (1998) 18 Cal.4th 297 .....	5
<i>People v. Huggins</i> (2006) 38 Cal.4th 175 .....	4, 11
<i>People v. Koontz</i> (2002) 27 Cal.4th 1041 .....	13
<i>People v. Lewis &amp; Oliver</i> (2006) 39 Cal.4th 970 .....	3
<i>People v. Maury</i> (2003) 30 Cal.4th 342 .....	4
<i>People v. Ochoa</i> (1993) 6 Cal.3d 1199 .....	13
<i>People v. Stanley</i> (1995) 10 Cal.4th 764 .....	4
<i>People v. Wader</i> (1993) 5 Cal.4th 610 .....	11
<i>People v. Wilson</i> (2008) 44 Cal.4th 758 .....	3

**TABLE OF AUTHORITIES**  
**(continued)**

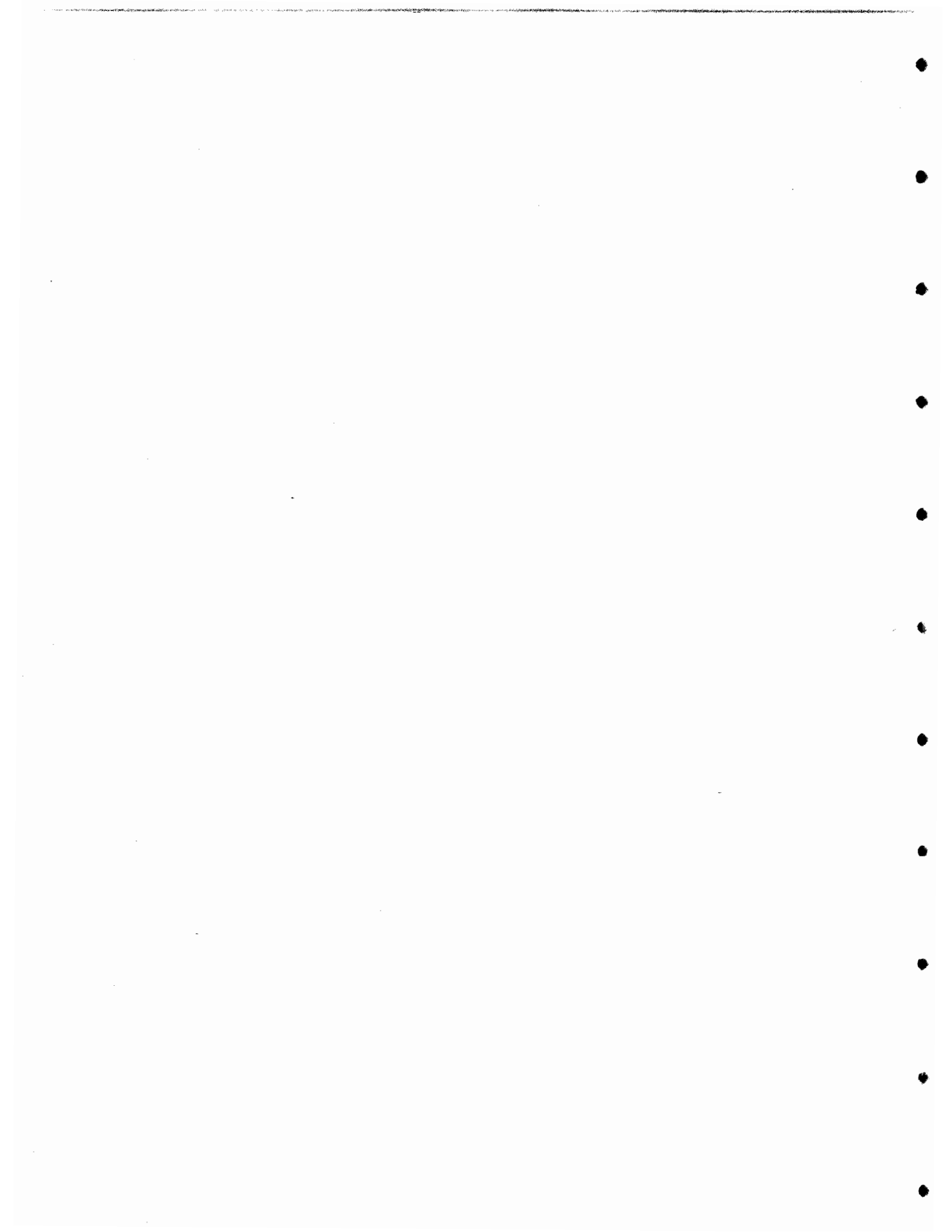
**Page**

**STATUTES**

Pen. Code, § 211 .....11

**CONSTITUTIONAL PROVISIONS**

Eighth Amendment .....2



Appellant Demetrius Charles Howard filed an opening brief on July 19, 2005. Respondent filed its responding brief on February 8, 2006. Howard filed his reply brief on December 22, 2006. On February 22, 2008, Howard filed a supplemental opening brief. Respondent filed a supplemental respondent's brief on April 28, 2008. On November 24, 2008, Howard filed a second supplemental opening brief. Pursuant to this Court order filed December 15, 2008, as amended on January 16, 2009, respondent submits this second supplemental respondent's brief.

### **ARGUMENT**

#### **I. THE TRIAL COURT WAS NOT REQUIRED TO SUA SPONTE ORDER A COMPETENCY HEARING, AND NO REVERSAL IS WARRANTED**

Howard renews his contention from his Opening Brief and Reply Brief that the trial court committed structural error when it failed to sua sponte conduct a competency hearing after Howard addressed the court at sentencing. Howard claims that because during his extensive comments that included citation to cases and argument, Howard claimed he was prescribed and had taken what he described as "antipsychotic" medication, the trial court was obligated to sua sponte conduct a competency hearing. Initially, Howard sought to have his death judgment vacated because no competency hearing was conducted. (AOB 58-68; ARB 22-26.) In his second supplemental appellant's opening brief, Howard expressly claims that his judgment of conviction should be reversed, in addition to his death sentence, based on the trial court's failure to sua sponte conduct a competency hearing. (2nd Suppl. AOB 2.) The discussion in the respondent's brief addressing the lack of merit to Howard's claim also explains why Howard is not entitled to reversal of his death judgment. (RB 41-41.) That explanation applies equally to the contentions raised in Howard's second supplemental appellant's opening

brief. Accordingly, respondent reincorporates that discussion herein by reference in response to Howard's argument in his second supplemental appellant's opening brief.

**II. SUFFICIENT EVIDENCE SUPPORTS HOWARD'S CONVICTION FOR ATTEMPTED ROBBERY FELONY MURDER AND THE JURY'S TRUE FINDING OF THE ATTEMPTED ROBBERY FELONY MURDER SPECIAL CIRCUMSTANCE**

In his appellant's second supplemental opening brief, Howard adds a new argument: that the record does not contain sufficient evidence to establish that he had the specific intent to steal from the victim, Sherry Collins. Howard further contends the evidence was insufficient to prove that he was the other assailant who attempted to rob Ms. Collins, and was present when Mitchell Funches shot and killed her. (2nd Suppl. AOB 3-17.) Howard is incorrect. The evidence presented was sufficient to prove he was the assailant who struggled with Ms. Collins when Howard and Funches were in the commission or attempted commission of a robbery. The evidence was also sufficient to prove that Howard intended to rob Ms. Collins when he confronted her immediately after she drove her car into her garage. Since sufficient evidence supports the jury's finding Howard guilty of first degree felony murder based on the commission of a robbery or an attempted robbery and its true finding of the robbery or attempted robbery special circumstance, Howard's convictions and sentence should be affirmed.

Howard claims there is a "heightened reliability" standard required by the Eighth Amendment that governs capital cases because "death is different." (2nd Suppl. AOB 4-5.) Using this "heightened reliability" standard, Howard contends the evidence does not establish that an attempted robbery took place in this case because the evidence is insufficient to prove that Howard had the specific intent to steal from

Sherry Collins. (2nd Suppl. AOB 6-10.) Also using this “heightened reliability” standard, Howard contends the evidence is insufficient to establish that he was the assailant who struggled with Sherry Collins. (2nd Suppl. AOB 10-17.) It is well settled that the imposition of a death sentence does not warrant a different or “heightened reliability” standard for assessing the sufficiency of the evidence. In asserting his claim of insufficient evidence, Howard ignores the correct standard and fails to properly assess the evidence of his guilt. When viewed under the proper standard, sufficient evidence supports Howard’s convictions for first degree felony murder and attempted robbery, as well as the jury’s true finding of the special circumstance that Sherry Collins was murdered during the commission of a robbery or an attempted robbery.

The “standard of appellate review for determining the sufficiency of the evidence is settled” (*People v. Wilson* (2008) 44 Cal.4th 758, 806), and the reviewing court’s role is limited (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1044).

On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [162 Cal.Rptr. 431, 606 P.2d 738]; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

(*People v. Wilson, supra*, 44 Cal.4th at p. 806, quoting *People v. Abilez* (2007) 41 Cal.4th 472, 504.)

Further, in assessing the sufficiency of the evidence, a reviewing court presumes “every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.” (*People v. Wilson, supra*, 44 Cal.4th at p. 806.) The standard of review for sufficiency of the evidence is



the same in cases in which the prosecution “relies mainly on circumstantial evidence.” (*People v. Maury* (2003) 30 Cal.4th 342, 396; *People v. Bean* (1988) 46 Cal.3d 919, 932.) ““Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt.’ ‘If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.’ [Citations.] (*People v. Bean, supra.* 46 Cal.3d at pp. 932-933.) “Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.” (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

There was sufficient evidence to support the robbery conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of robbery beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560.) The same standard applies to review of the claim that there was insufficient evidence to find true the related felony-murder special circumstance. (*People v. Osband, supra,* 13 Cal.4th 622, 690, 55 Cal.Rptr.2d 26, 919 P.2d 640.)

(*People v. Huggins* (2006) 38 Cal.4th 175, 214.)

Citing to a limited portion of the prosecutor’s closing argument pertaining to testimony by five-year-old Randy Collins, Howard claims the evidence does not establish an attempted robbery took place. In further support of this claim, Howard cites to evidence that contradicts prosecution witness Cedric Torrence’s testimony. (2nd Suppl. AOB 6-10.) This is not the correct standard for accessing sufficiency of the evidence. It is not

whether there was impeaching evidence presented or that a witness may have contradicted his or herself. The standard is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia, supra*, 443 U.S. at p. 319.) Reversal based on a claim of insufficiency of the evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’” (*People v. Bolin* (1998) 18 Cal.4th 297, 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.) Here, reversal is unwarranted.

On the day Sherry Collins was shot to death, December 6, 1992, Howard spent the day with Cedric Torrence. Howard left his black .357 gun at Torrence’s house. Later the same day, Howard retrieved his black .357 gun and placed it in his back belt area. (7RT 1655-1656, 1659, 1692-1693.) That day Howard was dressed in a black T-shirt, black pants, and he wore a hooded light multi-colored, pancho-type pullover sweater-shirt. (7RT 1658-1660, 1672, 1694; 8RT 2072-2074; Ex. 2 [photograph shows clothing Howard wore the night of Collins’s murder].) At one point that day, Howard was in a garage in Torrence’s neighborhood. Also present was Mitchell Funches, the person who fired the fatal shot that killed Collins. Torrence overheard Howard and Funches planning a “jacking” which Torrence explained was a slang term for robbing or stealing from someone. (7RT 1662-1663.) Torrence misunderstood Howard’s and Funches’ comments and thought they asked him to take them some place to commit the “jacking.” When Torrence told them he did not want to be involved, Howard said, “Well, we wasn’t talking to you.” When Torrence warned that they could get caught, Howard told him he would not get caught for he would go out shooting if he was caught. Funches expressed his desire to participate. Funches had a chrome .380 automatic gun. (7RT

1662-1663, 1729-1730.) Howard and Funches left the garage together, walking down the street, side-by-side. (9RT 2283.)

That evening, Sherry Collins drove her Hyundai into her garage in the Acacia Park Apartments with her five-year-old daughter, Randy Collins, in the front passenger seat. When Collins opened her car door, Howard holding a gun confronted her. Collins fought with Howard while she was sitting in the front driver seat. She kicked him. As Collins struggled with Howard, Funches, who was standing on the passenger side of the car, shot Collins in the head, rendering her immediately unconscious. (7RT 1733; 8RT 2053-2056.)

Randy crawled over her mother's body to get out of the car and ran to a neighbor's apartment. (7RT 1782-1788, 1804-1806, 1733, 1810.) Randy was crying and pleading for someone to open the door because some guys were chasing her. The neighbor opened her door and let Randy in. Randy told the neighbor that there were two black men and "my mommy's dead." (7RT 1720-1721.)

Another neighbor heard the sound of a gunshot and went into Collins's dark garage. He tried to turn on the light, but it was not working. The neighbor called for help.

That same night, Randy spoke with a San Bernardino police officer. She was extremely frightened, crying and sobbing. Randy said two men fought with her mom while she was in the car in the garage. Her mom fought with the men and screamed. The men shot her mom, and Randy was frightened so she ran away. Randy described the assailants as two black men, one wearing dark colored clothing, and the other was wearing a white shirt and dark colored pants. This initial description was broadcast on the police radio frequency. (7RT 1777-1778, 1780.)

Steve Larsen lived on Ranch Road which was near the Acacia Park Apartment complex. He was listening to the police scanner and heard a call

that a woman had been shot at the Acacia Park Apartment complex. Larsen heard the description of the assailants and that the two black males were heading west through the wash area which was directly behind Larsen's house. Larsen went into his backyard and looked over the wall into the wash area. About eight to ten feet away he saw two black males running and then walking along the wall, coming towards him. One of the men had on a white top and dark pants, and the other was dressed in all dark clothing. Larsen hollered, "Hey, stop" and then ducked down. He next heard the sound of running feet in the sand. The men were heading for University Avenue. (7RT 1835-1837.)

When Larsen looked back over the wall, the two men were gone. Dogs in the neighbor's yard were barking. Larsen ran into his house and told his wife to call 9-1-1, and tell the police two men ran from the wash, over the wall into a neighbor's yard. Larsen then ran out his front door and saw the same two men running down his street. Larsen again yelled for the men to stop. The man in the lead was wearing a white shirt. Larsen identified the man who wore dark clothes as Funches. Both men stopped and looked at Larsen. The man in the white shirt mumbled something to Funches and both men took off running. (7RT 1837-1841, 1908.)

The only way out of the area was to follow the streets to Kendall or go over the wall of the apartment complex at University and Kendall, the University Village Apartments. The back of this apartment complex wraps around the back side of the housing track that contains Larsen's home. (7RT 1840, 1843.)

Theresa Brown lived in an upstairs apartment in the University Village apartment complex. Around 7:00 to 7:10 p.m., Brown heard helicopters circling above which caused her to look out her window. She saw a black man wearing all dark clothing at the apartment door kitty-corner to hers. A few minutes later Brown looked out her window and

again saw the same man back up as far as he could get into a recessed area with his back to a wall. Ms. Brown called the police who told her to look out another window, so she looked out to the lower walkway. There she saw another man wearing a white pullover with a hood and dark baggy pants. (7RT 1831-1833.)

Ms. Brown's downstairs neighbors, Michael and Laurie Manzella, the residents of 1660 Kendall Drive, apartment two, in San Bernardino, were home watching television when they heard a knock on the door. When Mr. and Mrs. Manzella opened the door, they saw Howard speaking with the people in the apartment across from theirs, apartment three. Howard had on a white shirt-like sweater, pullover with a hood and a pocket in front, and dark pants. Mrs. Manzella was drawn to Howard's shirt because she had been searching for such a shirt and learned it was really hard to find. (7RT 1848-1858. 1862; 8RT 1995-1997; Ex. 35 [photographic line-up photo no. 3 chosen by Mrs. Manzella was Howard].)

James Chism left his apartment at University Village Apartments and saw Howard sitting on the stairs above his apartment. Howard told Chism his name was "Bald." Howard was wearing dark pants and a "Lopez jacket" - a pullover with a hood and a pocket in front. Howard asked Chism how to get out of the apartment complex, which Chism found strange since there was only one way to drive in and out of the complex. (7RT 1864, 1867-1871, 1874; 8RT 1995-1996; Ex. 35 [photograph no. 3, the one Chism chose, was Howard].)

Howard asked Chism for a ride home and Chism said no. Howard asked to use Chism's telephone and he agreed. During the telephone conversation, Howard handed the phone to Chism to give directions to someone who was coming from the Cajon High School area. Chism used El Pollo Loco as a reference point. Chism had the impression that Howard did not want to leave, so Chism got his jacket. Chism told Howard how to

get to the El Pollo Loco and then left. As he was leaving, Chism's roommates walked up and told him something had happened outside the El Pollo Loco, that a police officer had been shot, and that someone had run into the apartment complex. (7RT 1865-1867, 1872.) Chism walked out with his roommates and Howard. Instead of heading toward the El Pollo Loco, Howard turned in the opposite direction than the one Chism had told him to go to get to El Pollo Loco. (7RT 1872-1873.)

Torrence was the person Howard called from Chism's apartment. Howard told Torrence he was stranded, and he had his "strap" on, i.e. Howard had a gun. Howard wanted Torrence to pick him up at the El Pollo Loco at University and Kendall. Although Torrence did not want to get involved, he drove to the El Pollo Loco parking lot. When he arrived he saw lots of police and yellow police tape. Torrence left because he did not want to get involved. (7RT 1667-1668, 1702.)

A California State University San Bernardino police officer was patrolling the area in a marked California State University police car on December 6, 1992, looking for a suspect described as a black male, wearing a pancho-type gray-colored jacket and dark colored pants. The officer was aware that another officer had been shot that evening. Around 10:00 p.m., at 395 Kendall Drive, east of Little Mountain Drive, the officer saw Howard standing in front of a 7-11 store talking on the telephone. He noted that Howard matched the description being broadcast in connection with the shooting death earlier that evening. (8RT 2023-2025.)

The California State University police officer pulled his car into the 7-11 parking lot and made eye contact with Howard, who then looked down and tapped his foot. Howard appeared nervous, so the officer drew his gun and ordered Howard to stay in place, keep his hands in his pockets, slowly turn around, and drop to a kneeling position. Howard complied. He did not have any weapons. When asked for his name and birth date, Howard

told the officer he was Shauntik Wilcox and his date of birth was January 19, 1967. The officer arrested Howard. At the time of his arrest, Howard was wearing black Levi pants and a gray pancho-type jacket with a hood and a pocket in front. (8RT 2023-2030; Exs. 2, 32 [pants] & 33 [jacket].)

Howard telephoned Torrence about two days after the murder and wanted to know if the police had contacted him, which they had not. Howard told Torrence that if the police contacted him, he was to tell them he dropped Howard off at the El Pollo Loco at 9:00 p.m. (7RT 1668-1669.)

Days after the murder, seven-year-old Darin Greenwood was playing outside his University Village apartment when he kicked his ball into the ivy near apartment three. Greenwood went into the ivy to get the ball which had landed next to a black gun with a brown handle. Greenwood took the gun to show his aunt and when his mother got home, she called the police. The gun was loaded with bullets. Torrence identified this gun as the one Howard possessed on December 6, 1992. (8RT 1971-1973; Ex. 3 [gun].)

San Bernardino County Sheriff's Crime Laboratory Criminalist Craig Ogino examined Howard's and Sherry Collins' clothing and shoes for trace evidence such as hair and fibers. (8RT 2113-2117.) Criminalist Ogino prepared a videotape, without audio, of his examination of the items that was played for the jury while he described the examination and results. (8RT 2130-2138; Ex. 74 [video of microscopic examination of fibers on shoes, gray shirt and black pants].) Fibers found in the bottom grooves of Collins's shoes were consistent with fibers from Howard's clothing. It is unlikely that the fibers adhered to her shoes from her walking around because the fibers were not flattened over. This indicates the fibers were probably deposited while the shoe was up in the air and never came down on any horizontal or vertical surface. (8RT 2118-2127, 2139-2142, 2165-2171.)

From the evidence presented, viewed in its entirety, it is reasonable to infer that when Howard confronted Sherry Collins pointing a gun at her as she attempted to exit her car in her garage that he intended to steal from her. Earlier in the day, Howard and Funches had discussed committing a robbery while hanging out in the garage in Torrence's neighborhood. Howard and Funches confirmed they were each armed with a gun. It is reasonable to infer that Howard intended to rob Collins based on his discussion with Funches, being armed with a gun, and his actions when he confronted Sherry Collins. "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) To be convicted of robbery, the perpetrator must intend to permanently deprive the victim of the property. (*People v. Huggins, supra*, 38 Cal.4th at p. 214, citing *People v. Seaton* (2001) 26 Cal.4th 598, 671 and *People v. Wader* (1993) 5 Cal.4th 610, 645-646.) "Robbery requires the 'intent to steal ... either before or during the commission of the act of force'" (*People v. Huggins, supra*, 38 Cal.4th at p. 214, quoting *People v. Marshall* (1997) 15 Cal.4th 1, 34.) Substantial evidence shows that all the essential elements of robbery were presented to the jury. Moreover, the intent required for robbery may be based on circumstantial evidence, and "is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime." (*People v. Abilez, supra*, 41 Cal.4th at p. 507, quoting *People v. Lewis* (2001) 25 Cal.4th 610, 643.)

Howard also contends the evidence was insufficient that he was the assailant who attempted to rob Sherry Collins. (2nd Suppl. AOB 10-17.) Again, Howard does not access the evidence under the appropriate standard. When the evidence is viewed properly, substantial evidence



shows that Howard was the assailant who struggled with Sherry Collins when she was shot to death.

Howard and Funches discussed committing a robbery. Two men confronted Sherry Collins in her garage. While Randy Collins did not affirmatively identify Howard's face, when shown the photographic lineup, she identified Howard by his clothing matching those of the man who struggled with her mother. Mr. Larsen also identified the clothing Howard was wearing as being worn by the man who was running with Funches coming from the Acacia Park Apartments shortly after the murder of Sherry Collins. Ms. Brown also identified Howard's clothing along with Funches' when she looked out her window after hearing helicopters overhead. Mrs. Manzella identified Howard and the clothing he was wearing. Howard's reliance on the fact Mr. Manzella could not identify him is misplaced because the jury heard evidence of this fact and it does not diminish the evidence that supports Howard's convictions.

Mr. Chism, who lived in the same apartment complex, did positively identify Howard. Although there was only one way to drive into and out of the University Village Apartments, Howard did not know how to get out of the complex. Chism gave directions to Torrence over the telephone using the El Pollo Loco restaurant as a point of reference. Unbeknownst to them, this was the near the area where Funches shot the police officer. Thus, when Chism, his roommates, and Howard walked out of the University Village Apartments and saw the police activity over near El Pollo Loco, Howard turned in the opposite direction and walked away. There is a reason Howard avoided an area with a law enforcement presence, and it is reasonable to infer the reason is because Howard had been involved in the attempted robbery and murder of Sherry Collins earlier in the evening. The same is true as to why Howard provided multiple false names to Chism and the police officer who encountered him at the 7-11.

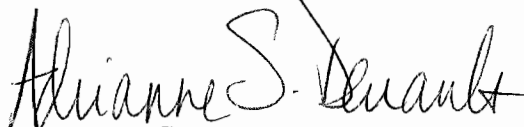
Finally, in his second supplemental appellant's opening brief, Howard again attacks the credibility of Torrence. Howard also points to contradictions in Randy Collins's testimony concerning the events of the encounter with the two armed men in the garage when her mother was shot. A reviewing court does not substitute its evaluation of a witness's credibility for that of the fact finder. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078; *People v. Ochoa* (1993) 6 Cal.3d 1199, 1206. When Torrence's and Randy Collins's testimony is assessed in combination with all of the evidence presented below, the record clearly demonstrates sufficient evidence supports Howard's convictions for first degree felony murder, attempted robbery, and the true special circumstance finding that the murder of Sherry Collins occurred during the commission or attempted commission of robbery. Accordingly, Howard's insufficiency of the evidence claim should be rejected.

## CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: February 9, 2009

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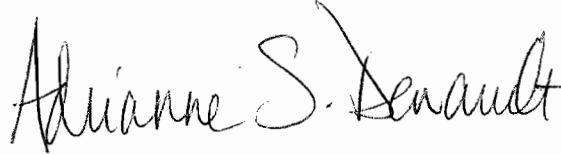
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**CERTIFICATE OF COMPLIANCE**

I certify that the attached **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 3994 words.

Dated: February 9, 2009

EDMUND G. BROWN JR.  
Attorney General of California

A handwritten signature in black ink that reads "Adrienne S. Denault". The signature is written in a cursive style with a large initial 'A' and a long, sweeping underline.

ADRIANNE S. DENAULT  
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**DECLARATION OF SERVICE BY MAIL**

I declare that I am employed in the County of San Diego, California; that I am over 18 years of age and am not a party to the within-entitled cause; that my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, California 92186-5266; and that on **February 9, 2009**, I served the attached

<b>SECOND SUPPLEMENTAL RESPONDENT'S BRIEF</b>	<i>People v. Howard</i> California Supreme Court S050583 <b>CAPITAL CASE</b>
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by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General, for deposit in the United States Postal Service that same day in the ordinary course of business, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Diego, California, on **February 9, 2009**.

CAROLE MCGRAW

Typed Name

*Carole McGraw*

Signature

