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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent,

v.

DEMETRIUS CHARLES HOWARD,

Defendant & Appellant.

S050583

CAPITAL CASE

San Bernardino County Superior Court No. FSB03736
The Honorable STANLEY W. HODGE, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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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 & Respondent,*	S050583
v.	
DEMETRIUS CHARLES HOWARD, *Defendant & Appellant.*	**CAPITAL CASE**

INTRODUCTION

Appellant Demetrius Charles Howard has submitted a Supplemental Opening Brief containing two arguments. The first, ARGUMENT I-A, supplements ARGUMENT I in the Opening Brief regarding Howard's contention that any error in the use of an electronic restraint device would be reversible *per se*. The second, ARGUMENT XVII, challenges the constitutionality of the process used to death-qualify juries in California. For the reasons detailed below, neither of Howard's supplemental arguments has merit. Accordingly, Howard's conviction and sentence should be affirmed in its entirety.

ARGUMENT

I-A

THE RECORD DOES NOT SUPPORT HOWARD'S CONTENTION THAT HE WAS COMPELLED TO WEAR A STUN BELT DURING TRIAL

In his Opening Brief, Howard asserted that his conviction and sentence must be overturned because any error in compelling him to wear a stun belt was not harmless regardless of whether this Court applies the harmless-error standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818, for state-law error, or the more onerous standard for error of a constitutional magnitude set forth in *Chapman v. California* (1967) 386 U.S. 18 (87 S.Ct. 824, 17 L.Ed.2d 705). (AOB 22-43; ARB[1/] 2-12.) Respondent's Brief addresses the merits of Howard's claim that the trial court erred in compelling him to wear a stun belt, and the lack of any prejudice even assuming error. (See Respondent's Brief, at pp. 22-30.) Howard's contention in his Supplemental Appellant's Opening Brief that requiring a defendant to wear a stun belt absent manifest need is reversible *per se* is meritless. (SAOB[2/] 2-4) Accordingly, Howard's supplemental contention of structural error should be rejected, and his claim of reversible error should be rejected for the reasons set forth herein, and in Respondent's Brief.

As discussed in Respondent's Brief, the record on appeal does not affirmatively reflect that Howard was actually wearing a stun belt during his trial. Indeed, the record contains only a single mention of use of an electronic device with defense counsel noting his "understand[ing]" the trial court "intends" to put an electronic device on Howard, to which the trial court

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1. Appellant's Reply Brief is referenced herein as "ARB."

2. Appellant's Supplemental Opening Brief is referenced herein as "SAOB."

acknowledged intending to use an electronic device as a "prophylactic measure." (2 RT 456, 504-505; 1 CT 123.) However, there is nothing further in the record as to whether or not the trial court followed through with this intent and actually required Howard to wear such an electrical device.[3/]

In Appellant's Supplemental Opening Brief, Howard expands upon his assertion in footnote 4 on page 11 of his Reply Brief that when a trial court forces a defendant to wear a stun belt without a showing of manifest need, the appropriate standard should be "per se reversal." (SAOB 2-3, citing *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302].) Howard's reliance upon the discussion of structural error in *Arizona v. Fulminante* is misplaced. The instances where error will be deemed structural are extremely limited, and ordering use of a stun belt absent manifest need is not a structural error automatically compelling reversal.

As the high court recently reaffirmed:

> We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, "'most constitutional errors can be harmless.'" *Neder v. United States,* 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Arizona v. Fulminante,* 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). "'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" 527 U.S., at 8, 119 S.Ct. 1827

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3. With respect to other types of restraints, the record shows that Howard's attorney's request to have handcuffs removed during pre-trial proceedings on April 22, 1994, was granted. (1 RT 6-7.) On April 3, 1995, defense counsel asked that Howard not be handcuffed during pre-trial proceedings, and the trial court denied the request but noted that Howard would not be wearing handcuffs in front of the jury. (2 RT 480.) The next day, on April 4, 1995, the colloquy occurred between defense counsel and the trial court as to whether the trial court was intending to use an electronic device during trial. (2 RT 456, 505-505.) There is no further reference in the record by counsel or the court regarding any use of an electronic restraint device.

> (quoting *Rose v. Clark*, 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal.[fn.] In such cases, the error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, *supra*, at 9, 119 S.Ct. 1827 (emphasis omitted).

(*Washington v. Recuenco* (2006) 548 U.S. 212 [126 S.Ct. 2546, 2551, 165 L.Ed.2d 466].)

The limited situations where structural error has been found include the complete denial of counsel, a biased trial judge, racial discrimination in selection of a grand jury, denial of self-representation, denial of a public trial, and a defective reasonable-doubt jury instruction. (*Washington v. Recuenco*, *supra*, 126 S.Ct. at p. 2551, fn. 2, citing *Neder v. United States* (1999) 527 U.S. 1, 8 [119 S.Ct. 1827, 144 L.Ed.2d 35], citing *Johnson v. United States* (1997) 520 U.S. 461, 468 [117 S.Ct. 1544, 137 L.Ed.2d 718], in turn citing *Gideon v. Wainwright* (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799] [complete denial of counsel]; *Tumey v. Ohio* (1927) 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749] [biased trial judge]; *Vasquez v. Hillery* (1986) 474 U.S. 254 [106 S.Ct. 617, 88 L.Ed.2d 598] [racial discrimination in selection of grand jury]; *McKaskle v. Wiggins* (1984) 465 U.S. 168 [104 S.Ct. 944, 79 L.Ed.2d 122] [denial of self-representation at trial]; *Waller v. Georgia* (1984) 467 U.S. 39 [104 S.Ct. 2210, 81 L.Ed.2d 31] [denial of public trial]; *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182] [defective reasonable-doubt instruction].)

The use of a stun belt absent manifest need does not constitute an error that necessarily renders a trial fundamentally unfair or an unreliable vehicle for

determining guilt or penalty. The unnecessary use of a stun belt is subject to harmless-error analysis.[4] (*People v. Mar* (2002) 28 Cal.4th 1201, 1224-1225.)

Howard argues that a reversible *per se* standard is appropriate because of the similarities between use of a stun belt absent manifest need and the involuntary administration of antipsychotic drugs. (SAOB at 3-4, citing *Riggins v. Nevada* (1992) 504 U.S. 127 [112 S.Ct. 1810, 118 L.Ed.2d 479].)[5] This Court noted there was "some similarity" regarding psychological consequences between the forced administration of antipsychotic medication and "a court order compelling a defendant to wear a stun belt at trial over objection." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1227.) Notwithstanding that similarity, this Court notably did not find the erroneous use of a stun belt in *Mar* constituted structural error. Instead, the reversal in *Mar* rests with a finding the defendant in that particular case had been prejudiced, and that prejudice did not flow from the mere fact the defendant wore a stun belt or the absence of a record regarding whether its use was justified. Instead, the finding of prejudice which led to reversal in *Mar* rested with the "closeness" of the evidence in the case, and the factual record affirmatively showing that the defendant was afraid of injury and anxious the electrical device would be activated. (*Id.* at pp. 1224-1225.)

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4. As noted in Respondent's Brief, this Court left open the question of whether the use of a stun belt absent manifest need is subject to a harmless-error analysis under the *Watson* standard or the more onerous *Chapman* standard, because the record demonstrated prejudicial error under the lesser *Watson* standard. (RB at p. 25, fn. 9, citing *People v. Mar*, *supra*, 28 Cal.4th at p. 1125, fn. 7.)

5. The United States Supreme Court has not included *Riggins* in its list of cases wherein it has found structural error. (See *Washington v. Recuenco*, *supra*, 126 S.Ct. at p. 2551, fn. 2.) Moreover, in *Riggins*, the court noted that proving or disproving actual prejudice from the record before it would be futile.

Howard has not provided any reason for this Court to deviate from its prior decisions that "'have consistently held that courtroom shackling, even if error, was harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense.'" (*People v. Combs* (2004) 34 Cal.4th 821, 838-839, quoting *People v. Anderson* (2001) 25 Cal.4th 543, 596; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584.) There is no factual or legal support for Howard's attempt to distinguish the use of electronic restraints from other forms of restraining prisoners during trial in determining whether the erroneous use of restraints was harmless. The psychological effect from shackling and other restraints is susceptible to a harmless-error analysis. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1224-1225.) Howard does not provide any explanation as to why determining the psychological effect from the erroneous use of chains or other traditional restraint devices and whether the effect interfered with the defendant's participation in their defense would be any different than the psychological manifestations from the erroneous use of an electronic restraint.

This Court should reject Howard's effort to recast the erroneous use of electronic restraints as structural error. Moreover, for the reasons detailed in Respondent's Brief at pages 22-30, and incorporated herein by reference, even assuming error, and applying either the test enunciated in *Watson* or *Chapman*, Howard was not prejudiced.

XVII

CALIFORNIA'S DEATH-QUALIFICATION PROCESS FOR JURY VOIR DIRE IN CAPITAL CASES IS CONSTITUTIONAL

Howard claims the death-qualification process to select juries in capital cases in California is unconstitutional because it produces juries more likely to convict and more likely to vote for death, and it disproportionately removes

women and members of racial minorities and "religious people" from juries. Howard asserts that due to the flawed death-qualification process in jury selection, his conviction and sentence must be reversed. (SAOB 5-28.) Howard did not preserve the claims he now asserts on appeal regarding jury selection, due to his failure to object in the trial court. He has therefore waived the claims. Even assuming *arguendo* the claims are not waived, they are without merit. Howard's conviction and sentence should be affirmed.

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 [their] oath." (*Buchanan v. Kentucky* (1987) 483 U.S. 402, 408, fn. 6 [107 S.Ct. 2906, 97 L.Ed.2d 336], quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *Adams v. Texas* (1980) 448 U.S. 38, 45 [100 S.Ct. 2521, 65 L.Ed.2d 581].)

As this Court explained in *People v. Cash* (2002) 28 Cal.4th 703:

> Prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) "The real question is ""whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror.*'''" (*People v. Ochoa* (2001) 26 Cal.4th 398, 431 . . . , quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1318 . . . , quoting in turn *People v. Hill* (1992) 3 Cal.4th 959, 1003 . . . .) Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728 [112 S.Ct. 2222, 2228-2229, 119 L.Ed.2d 492]), it is equally true that the "real question" is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror.

(*People v. Cash*, *supra*, 28 Cal.4th at pp. 719-720.)

Howard failed to object to the death-qualification voir dire on the grounds he now asserts and, therefore, has failed to preserve the issues for appeal. (*People v. Gurule* (2002) 28 Cal.4th 557, 597, citing *People v. Avena* (1996) 13 Cal.4th 394, 413; *People v. Howard* (1992) 1 Cal.4th 1132, 1157; *People v. Mickey* (1991) 54 Cal.3d 612, 663.) Moreover, even if Howard had properly preserved his claim on appeal, his contentions have no merit.

The United States Supreme Court has previously rejected the constitutional attacks Howard is asserting. In *Lockhart v. McCree* (1986) 476 U.S. 162 (106 S.Ct. 1758, 90 L.Ed.2d 137), the defendant offered social-science studies suggesting that juries from which jurors who were opposed to the death penalty were excluded were more "conviction prone" than other juries. (*Id.* at p. 167.) While the high court questioned the validity of these studies, it nevertheless adopted them for the purpose of the decision. (*Id.* at pp. 168-173.) The court held that even assuming *arguendo* a death-qualified jury was conviction prone, it did not violate the fair cross-section requirement because the petit jury was involved and not the jury venire. Even if the fair cross-section requirement were applied to a petit jury, a group of people sharing a fixed opposition to the death penalty was not a cognizable group within the meaning of the Fourteenth Amendment. (*Id.* at pp. 173-178.) The court further found that there was nothing to suggest the jurors who were actually impaneled to hear McCree's case were partial. (*Id.* at p. 184.)

Howard asserts that since the "constitutional facts" upon which the *Lockhart* decision rests are "no longer correct," the decision "should not be considered controlling under the federal Constitution." (SAOB 9) However, this Court "may not depart from the high court ruling as to the United States Constitution." (*People v. Steele* (2002) 27 Cal.4th 1230, 1243.) Howard's contention that the "factual basis" for the United States Supreme Court's

decision in *Lockhart v. McCree*, *supra*, 476 U.S. 162, is "no longer sound" is equally flawed.

Howard claims "statistical research" conducted since *Hovey v. Superior Court* (1980) 28 Cal.3d 1, shows that "'the procedure of death qualification biases the jury pool against the defense,'" and thus demonstrates the jury selection process in California is unconstitutional. Howard maintains "empirical studies of actual jurors from actual capital cases" show that the death-qualification process "produces skewed juries" because there are "more automatic death penalty jurors," "many of these jurors don't understand the nature of mitigation evidence," and "such jurors tend to decide prematurely both to convict and to choose the death sentence." (SAOB 6-14.) Howard is incorrect.

This 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." (*People v. Jackson* (1996) 13 Cal.4th 1164; *People v. Lenart* (2004) 32 Cal.4th 1107, 1120.) This Court concluded that such evidence does not support a constitutional prohibition of death qualification. (*People v. Jackson*, *supra*, at pp. 1198-1199.) Additionally, in *People v. Cummings* (1993) 4 Cal.4th 1233, 1270, this Court held that death qualification does not violate a defendant's Fourteenth Amendment right to a fair trial, and in *People v. Carrera* (1989) 49 Cal.3d 291, 333, held that death qualification does not violate a defendant's Sixth Amendment right to a fair and impartial jury. (Accord, *People v. Gurule*, *supra*, 28 Cal.4th at p. 597; see SAOB 18-20.) In *People v. Catlin* (2001) 26 Cal.4th 81, 112, this Court held that death qualification does not violate the state constitutional right to an impartial jury.

This Court has also found that death qualification does not "improperly discriminate against racial minorities" (*People v. Gurule*, *supra*, at p. 597, citing *People v. Johnson* (1989) 47 Cal.3d 1194, 1214-1215), nor does it produce a

"conviction-prone or death-penalty-prone jury" (*People v. Gurule*, *supra*, 28 Cal.4th at p. 597, citing *People v. Carrera*, *supra*, 49 Cal.3d at p. 331). In *People v. Stanley* (1995) 10 Cal.4th 764, 797-798, this Court held that death qualification does not violate a capital defendant's right to an impartial or representative jury. (See SAOB 14, 16-17.)

Again, this Court has found, contrary to Howard's contention (SAOB 20-24), that a prosecutor's use of peremptory challenges to exclude jurors who have reservations regarding capital punishment "does not exacerbate the alleged problem" to improperly discriminate against racial minorities or result in anything other than an impartial and representative jury. (*People v. Gurule*, *supra*, at p. 597, citing *People v. Carrera*, *supra*, at p. 331.)

> Defendant claims that the prosecutor used his peremptory challenges to systematically exclude prospective jurors who professed skepticism about the death penalty but were not excludable for cause on that basis. He further claims that as a result he was denied due process, that right to an impartial jury, and the right to a reliable determination of guilt and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California equivalents. We have rejected substantially similar contentions (*People v. Marshall* (1990) 50 Cal.3d 907, 927 [269 Cal.Rptr. 269, 790 P.2d 676]), and decline to reconsider them here.

(*People v. Jackson*, *supra*, 13 Cal.4th at p. 1200.)

Contrary to Howard's contention, the United States Supreme Court has "rejected the view that individuals who can be characterized as a group 'defined solely in terms of shared attitudes' toward imposing the death penalty are a 'distinctive group' for fair cross-section claims under the federal Constitution." (*People v. Lenart*, *supra*, 32 Cal.4th at pp. 1120-1121, citing *Lockhart v. McCree*, *supra*, 476 U.S. at p. 174.) This Court has also rejected this claim under the state Constitution. (*People v. Lenart*, *supra*, at p. 1121, citing *People v. Jackson*, *supra*, at p. 1198; *People v. Ashmus* (1991) 54 Cal.3d 932, 956.)

As in those cases, Howard offers no persuasive reason for this Court to reconsider this holding.

Howard has failed to demonstrate that the jury which actually heard his case was anything other than fair and impartial. The death qualification in this case was not so "extreme" as to create a jury biased in either the guilt or penalty phases. (See SAOB 24-25.) Howard cites to no evidence that the jurors in this case acted on anything other than their "moral and normative" beliefs in reaching the sentencing decision. (SAOB 25-26.)

The death-qualification procedure employed in California generally, and in this case specifically, does not violate either the United States or the California Constitutions. This Court has decided the issues raised in this argument contrary to Howard's contentions, and he has not presented any persuasive reason to revisit or overturn those precedents. Accordingly, Howard's conviction and sentence should be affirmed.

CONCLUSION

For the reasons stated in the Respondent's Brief, and this Respondent's Supplemental Brief, respondent respectfully requests the judgment be affirmed in its entirety.

Dated: April 21, 2008.

Respectfully submitted,

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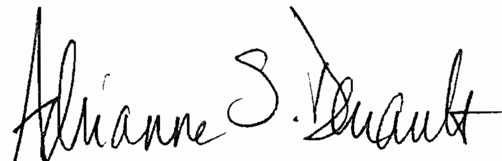

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13-point Times New Roman font and contains 3051 words.

Dated: April 21, 2008.

Respectfully submitted,

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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 **April 21, 2008**, I served the attached

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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 **April 21, 2008**.

STEPHEN MCGEE
Typed Name

Signature