IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CHRISTOPHER ALAN SPENCER,<br><br>Defendant and Appellant. | **AUTOMATIC APPEAL**<br><br>Crim. S057242<br><br>Santa Clara County<br>Superior Court No. 155731 |



# APPELLANT'S SUPPLEMENTAL BRIEF

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Santa Clara

HONORABLE HUGH F. MULLIN III JUDGE

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| | ) | Santa Clara County |
| | ) | Superior Court |
| CHRISTOPHER ALAN SPENCER, | ) | No. 155731 |
| | ) | |
| Defendant and Appellant. | ) | |
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**APPELLANT'S SUPPLMENTAL BRIEF**

**INTRODUCTION**

Appellant Spencer was indicted and charged, among other things, with the robbery of Ben Graber at the Gavilan Bottle Shop on January 24, 1991 and the robbery and murder of James Madden and burglary at the LeeWards craft store on January 28, 1991. (1 CT 274-75)

On August 21, 1996, a jury convicted Appellant Spencer of capital murder for his participation in the killing and robbery of James Madden at the LeeWards craft store. (80 RT 21831-33.) During the same proceedings, Appellant Spencer was also convicted of second-degree robbery for his role as the getaway driver during the robbery of the clerk Ben Graber at the Gavilan

Bottle Shop.[1] (80 RT 21833.)[2]

The Eighth and Fourteenth Amendments of the U.S. Constitution demand individualized sentencing before the imposition of the death penalty. (See *Sumner v. Shuman* (1987) 483 U.S. 66, 75 (citing *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Eddings v. Oklahoma*, (1982) 455 U.S. 104.) This is based on the principle that punishment should "directly relate[] to the personal culpability of the criminal defendant"—and the imposition of the death penalty "should reflect a reasoned moral response to the defendant's background, character, and crime." (*Id.* at 76 (internal citations omitted).)

In violation of Appellant Spencer's Eighth and Fourteenth Amendment rights, the trial court improperly instructed the jury and the prosecutor improperly argued that the Gavilan Bottle Shop robbery which Appellant Spencer stood convicted of in the present proceedings was "other crimes" aggravating evidence as enumerated in Penal Code §190.3(b).[3] The error was exacerbated and caused significant harm to Appellant Spencer when the jury inquired whether, under §190.3(j), it could consider Appellant Spencer's role in

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[1] The prosecution presented evidence at the guilt phase that Appellant Spencer acted as the getaway driver during the Gavilan Bottle Shop. (80 RT 21833.) Mr. Graber did not identify Appellant as one of the perpetrators who entered the store. (70 RT 20873-20874.) According to Officer De La Rocha of the San Jose Police Department, Appellant told him the robbery was Daniel Silveria's idea. (75 RT 21520.)

[3] All further statutory references are to the Penal Code unless otherwise indicated.

the Gavilan Bottle Shop robbery. The trial court responded that the jury could not and further informed the jury that consideration of aggravating and mitigating circumstances could only be made as to the capital crimes.

**Relevant Facts**

Penal Code §190.3(a-c) allows for three different areas of aggravation to be presented by the prosecution. As will be shown, §190.3(a) relates to the crimes in the present proceeding, whereas §190.3(b and c) relate to criminal activity or convictions other than those for which the defendant has been convicted in the present proceeding.

Pretrial, both the Court and the prosecution believed that if a conviction were to occur the Gavilan Bottle Shop robbery should be considered by the jury as §190.3(b) "other crimes" aggravating evidence. (42 RT 3540) On numerous occasions, Appellant Spencer's jury was unequivocally informed that they should consider the robbery of the Gavilan Bottle Shop which they found Appellant guilty of, as "other crimes" aggravating evidence pursuant to P.C. §190.3(b).

Prior to the prosecution's penalty-phase opening statement, the trial court read jury instructions to the jury to assist them in evaluating the evidence as it was presented. (82 RT 21867.) Included was the instruction that discussed §190.3(b) evidence. The jury was informed that "factor (b) allows jurors to consider "[t]he presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or

implied threat to use force or violence." (82 RT 21870.)

As early as the Opening Statement in the penalty phase, the prosecution began representing to the jury that the Gavilan Bottle Shop robbery was a factor in aggravation as described in §190.3(b). The prosecutor explained that although it was required that he prove §190.3(b) evidence beyond a reasonable doubt, because the jury had just convicted Appellant Spencer of this crime the jury could essentially skip this step. The prosecutor stated:

[I]n order to consider as a factor in aggravation any prior criminal activity which comes in under Factor (b), you have to be convinced beyond a reasonable doubt that the defendant did, in fact, do that. Now, it's a little bit unique here, because the Gavilan Bottle Shop robbery, which is prior criminal activity you can consider as a factor in aggravation, is something you have already found to have been committed by the defendant beyond a reasonable doubt.

(82 RT 21873) The prosecutor further confused the issue when he informed the jury he did not need to reprove §190.3(a) circumstances of the crime evidence. He stated:

So it's important for you to remember I don't have to start from scratch and reintroduce all of that [circumstances of the crime evidence], because you've already heard a lot of that, which is why I will add to it and supplement it. But you can still consider what you know about the circumstances of the crime from the guilt phase.
(82 RT 21875)

He then applied this Factor (a) evidence production analysis, to the Gavilan Bottle Shop robbery even though the jury was informed that the robbery evidence was Factor (b) evidence. The prosecutor stated:

Then, ladies and gentlemen, there will be a reference I will make -- I don't have to offer any additional evidence about the Gavilan Bottle Shop robbery, because

you've already heard that evidence, but that's, as I've said, called Factor (b) evidence
(*Id.*)

Following the presentation of the penalty phase evidence, at the jury instruction settlement hearing, defense counsel Mantell objected to the inclusion of the Gavilan Bottle Shop robbery as factor (b) evidence because the text of the instruction specifically excluded evidence of crimes that the defendant was convicted of during the present proceedings. (85 RT 22265-22270.)[4] Without addressing defense counsel's concerns, the court ruled that factor (a) evidence related to the January 28th robbery and murder at the LeeWards craft store and the January 24th Gavilan Bottle Shop robbery was factor (b) evidence. (85 RT 22268.)

This Court has affirmed that §190.3(b and c) aggravating evidence relates to crimes other than those for which the defendant has been convicted. (*People v. Miranda* (1987) 44 Cal.3d 57, 105, 106.) In *Miranda*, this Court found that "[i]t would therefore be improper for the jury to consider the underlying crimes as separate and distinct aggravating circumstances under either subdivision" (*Ibid.*)

Unmistakably, in Appellant Spencer's case, his Gavilan Bottle Shop robbery conviction arose out of the present proceedings. It was the prosecutor's theory that this crime was a precursor to the LeeWards capital crime.

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[4] Mr. Mantell: "... I object to counting Gavilan Bottle Shop robbery as prior criminality within the meaning of (b)" (85 RT 22270)

Essentially, the prosecution argued it was a continuing series of events and thus justified trying the counts together. He argued:

[C]larifying what was initially item number 1 in the People's second amended 190.3 statement, the former item number 1 said "circumstances of the crimes" plural and it was intended by that to encompass not only the circumstances of the LeeWards robbery and murder, but also the other crimes: The Sportsmen's supply burglary, the Quik Stop robbery and the Gavilan bottle shop robbery, but I've spelled that out specifically in the third amended 190.3.

(40 RT 3448)

As such, the Gavilan Bottle Shop robbery surrounds the capital crime materially, morally, or logically and falls within the scope of circumstances of the crime consideration pursuant to P.C. §190.3(a) (See *People v. Blair* (2005) 36 Cal.4th 686.) Moreover, for all intents and purposes the prosecutor argued that the Gavilan Bottle Shop robbery as §190.3(b) evidence should be treated the same as §190.3(a) evidence. Specifically, the prosecutor told the jury that they did not have to go through the steps of §190.3(b) requiring a finding beyond a reasonable doubt because the jury had just done so in the guilt phase; and like circumstances of the crime the prosecution did not have to offer additional evidence because, again, the jury had just heard all of the evidence in the guilt phase.

The trial court and prosecutor's erroneous characterization of the Gavilan Bottle Shop robbery as §190.3(b) rather than its correct characterization as §190.3(a) evidence was an important misstep that resulted in unfair negative consequences to Appellant Spencer.

## ARGUMENT

### APPELLANT'S CONVICTIONS AND DEATH SENTENCE MUST BE VACATED BECAUSE OF CONSTITUTIONAL ERROR IN MISCHARACTERIZING AGGRAVATING EVIDENCE AND PRECLUDING FROM THE JURY'S CONSIDERATION, APPELLANAT'S LESSER ROLE IN THE NON-CAPITAL ROBBERY

#### A. The Trial Court Committed Error When It Informed the Jury That Its Penalty Determination Could Not be Based on the Application of Penal Code §190.3(j) to §190.3(b) Other Crimes Aggravating Evidence

The trial court's improper categorization of Appellant Spencer's conviction for the Gavilan Bottle Shop robbery as §190.3(b) evidence, was detrimentally consequential to Appellant when the trial court, in response to the jury's inquiry made during penalty deliberations, informed the jury that it could only consider the mitigating elements of §190.3(j) (lesser role in the offense) as it applied to §190.3(a) (circumstances of the crime) evidence. Thus, the trial court instructed the jury that it could not find Appellant Spencer's lesser role as the getaway driver in the Gavilan Bottle Shop robbery mitigating because it was other crimes evidence (§190.3(b)) and not circumstances of the crime (§190.3(a)) evidence. Properly categorized as §190.3(a) evidence, the jury would have, pursuant to the court's response, been able to consider Appellant Spencer 's lesser role as mitigating in determining the appropriate penalty.

The issue arose on September 12, 1996 during the second day of penalty deliberations, when the jury posed a question regarding the applicability of

§190.3(j)[5] to the Gavilan Bottle Shop robbery conviction. Specifically, the jury asked: "Does Factor (j) apply to Factor (b), the robbery of Ben Graber [of the Gavilan Bottle Shop], in regard to a mitigating factor, or does Factor (j) relate only to the robbery, burglary and [capital] murder of James Madden?" (90 RT 22435.)

The court did not provide an answer to the jury at this time but did discuss the issue with counsel. Initially, the court found that, "[f]actor (j) only related to the robbery, burglary and murder of James Madden." (85 RT 22438.) Defense counsel Mantell objected to the court's finding stating:

> I agree that at the heart of the matter -- I mean, that whole list of factors pretty clearly is intended to apply only to the murder and the circumstances immediately surrounding it. On the other hand, that liquor store robbery also figures as a possible factor for the jury's consideration and I do think it's appropriate for them to take into account when they assess the moral weight of that participation to recognize that he was in that instance a peripheral player and a little more than an accomplice. I wouldn't -- I mean, I understand why we probably on our side of the case, the defense, don't have it coming to get strong endorsements from the bench, but I wouldn't want a false impression to be left with the jury that somehow those kinds of characteristics with regard to participation in that one other crime are not for their consideration at all, because that's equally false.
> (90 RT 22438.)

Further, he argued there should be "some modification to the answer beyond the obvious one that the Court just stated." (*Id.*)

The prosecution countered that "Factor (j) is a factor in mitigation that applies only to the murder. It can't be used to mitigate factor (b) activity, and

[5] §190.3(j) of California Penal Code instructs jurors to consider "whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." (P.C. §190.3(j).)

that's the law." (86 RT 22340.)

The court postposed answering the question until the following Monday. In the interim Juror Eight's mother passed away necessitating his replacement. Alternate Juror Four was selected to replace Juror Eight. (90 RT 22442.) On September 16, 1996, the court reassembled the jury, informed the jurors of the replacement of Juror Eight and said an answer to the jury question regarding factor (j) would not be provided unless, after further deliberations, the jury still requested an answer. (90 RT 22439-40.) Later that same afternoon, the jury re-asked the question: "We ask for the answer to our previous question...whether Factor (j) refers to any other situation other than the LeeWards crime [the capital crime]." (90 RT 22444.)

In response to the jury question, the Court provided the following response: "The Factor (j) only relates to the robbery, burglary and murder of James Madden [§190.3(a)]." (90 RT 22445.) On September 19, 1996, the jury returned a verdict of death against Appellant Spencer. (93 RT 22453.) As stated below, the court's limitations of factor (j) was prejudicial error.

The court's response limiting the application §190.3(j) to §190.3(a) evidence is in error in two fundamental ways. First, as noted above, the Gavilan Bottle Shop robbery conviction should have been categorized as circumstances of the crime (§190.3(a)). Circumstances of the crime evidence are not limited to the capital crime itself. In addition to the plain language of the statute, this Court has further defined §190.3(a) finding that circumstances of the crime aggravating

evidence "does not mean merely the immediate temporal and spatial circumstances of the crime, but extends to that which surrounds the crime materially, morally, or logically. (See *People v. Blair* (2005) 36 Cal.4th 686 [disapproved of on other grounds by *People v. Black* (2014) 58 Cal.4th 912].)

Throughout the litigation of this case, the prosecutor and the court treated the Gavilan Bottle Shop robbery as one event in a string of events culminating in the capital crimes. The prosecutor repeatedly argued to the jury that the crimes were connected and had a common scheme or plan. (70 RT 20803, 20810-20811.) All of the crimes, including the Gavilan Bottle Shop robbery, that were joined in the indictment with the capital crimes, were tried together and presented as reasonably linked to each other extended to that which surrounded the capital crime materially, morally, and logically. (See *People v. Blair* (2005) 36 Cal.4th 686.) Thus, if appropriately categorized, the answer to the jury's question should have been "yes, you may apply §190.3(j) to Appellant Spencer's role in the Gavilan Bottle Shop robbery."

Further, the jury should not have been precluded from applying §190.3(j) to the Gavilan Bottle Shop robbery conviction, regardless of whether it was mischaracterized as §190.3(b) evidence.[6] The very purpose of §190.3(b) 'is to

[6] Nothing in the language of §190.3 in any way suggests that factor j does not apply to "factor b" evidence. Factor j simply refers to "the offense," which, based on the prior language of the statute, could refer to either the capital offense or a factor b offense, both of which are referenced in the statute. Significantly, a statute will be given its plain meaning unless doing so would lead to absurd results. (*People v. Mendoza* (2000) 23 Cal.4th 986, 907-908.) Nothing in

enable the jury to make an individualized assessment of the character and history of a defendant to determine the nature of the punishment to be imposed." (*People v. Tully* (2012) 54 Cal.4th 952, 1029, quoting *People v. Grant* (1988) 45 Cal.3d 829, 851.) Such an individualized assessment necessarily includes consideration of the defendant's role in previous violent crimes as courts have held that jurors are permitted to consider not only the presence or absence of previous violent acts, but also "all the pertinent circumstances surrounding [the crime]." (*People v. Lewis* (2001) 25 Cal.4th 610, 663, citing *People v. Ashmus* (1991) 54 Cal.3d 932, 985.) Moreover, this Court has held that "[t]he proper focus for consideration of prior violent crimes...is on the facts of the defendant's past actions as they reflect on his character"— and the evidence should direct the jury's attention on "the moral assessment of defendant's actions...." (*People v. Cain* (1995) 10 Cal.4th 1, 73.) Importantly, "the probative value of [factor (b)] evidence lies in the defendant's conduct that gave rise to the offense." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1146.)

Penal Code §190.3(j), upon which the jury sought guidance, invited the jury to give weight to whether the defendant's role in the crime was "relatively" minor. The use of the word "relatively" necessarily implies a comparison of the

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California's death penalty statute suggests that construing factor j to apply to factor b crimes would be "absurd;" to the contrary, such a construction is necessary in order to render 190.3 in compliance with the Supreme Court's death penalty jurisprudence. (See, *Fox v. Federated Department Stores, Inc.* (1979) 94 Cal.App.3d 867, 880-881 [statutes are to be presumed constitutional and construed in favor of their constitutionality].)

defendant's role with that of other perpetrators, with potential mitigating effect to be afforded to him or her whose role is found to be lesser than that of other participants. In any event, the penalty phase jurors, whose function it was to subjectively assign such weight to the evidence in question as it deemed appropriate, obviously deemed the evidence worthy of consideration as mitigating evidence, or else it would not have (twice) posed the question whether it could consider Appellant's relatively minor role in the crime. Clearly, the directive of *Lockett, Eddings, Franklin v. Lynaugh, Mills v. Maryland* and other pertinent authorities, mandating that no barriers be presented to the jury's consideration of mitigating evidence, applies to Appellant's role in the Gavilan Bottle Shop robbery.

As to the question whether such a barrier was in fact erected by the court's response to the jury, the answer, again, must be, "Yes." By merely instructing the jury that factor (j) was only applicable to the capital crimes, the court misled the jury into believing that Appellant Spencer's relative culpability in the Gavilan Bottle Shop robbery was irrelevant. The court improperly removed from consideration something the jury obviously found important. The jury should have been able to consider Appellant Spencer's level of participation in the prior crime when assessing how much weight to assign to the §190.3(b) evidence.

Appellant Spencer's level of culpability was highly relevant to any such analysis. The court's simple and misleading response that factor (j) only applied to the capital crimes, suggested that Appellant Spencer's minor role as the

getaway driver in the Gavilan Bottle Shop robbery was totally irrelevant, and based on the court's answer, the jury could have reasonably interpreted the response to preclude any consideration of Appellant Spencer's role as the "wheel man" during the weighing process.

The jury question about Appellant Spencer's level of involvement in the robbery revealed it was something the jury was wrestling with as part of its determination of Appellant Spencer's moral culpability. The prosecution cemented the unconstitutional limitations the court imposed in its response to the question when it introduced the Gavilan Bottle Shop robbery to the jury as "just one more crime involving force or violence which the defendant has been involved in" (86 RT 22337); and further, when it specifically told the jury to assign whatever moral or sympathetic value it deemed appropriate "to each and all of the factors *it was permitted* to consider." (emphasis added) (See, *People v. Bacigalupo* (1993) 6 Cal. 4th 457, 469-70.) (86 RT 22315.) The prosecutor's remarks and the court's response to the jury's question prevented the jury from properly considering how much weight to assign the §190.3(b) evidence.

**B. The Trial Court Committed Error by Limiting the Jury's Consideration of Relevant Mitigating Evidence**

Assuming arguendo, that the trial court was correct in its response to the jury limiting the application of §190.3(j), the trial court's response to the jury inquiry was still in error as it suggested to the jury that Appellant's minor role in the Gavilan Bottle Shop robbery could not be considered as mitigation. The jury

should have been informed that it could consider Appellant's limited participation as the getaway driver in the robbery under §190.3(k). But for the trial court's limitation on this relevant mitigating evidence, the jury would have taken that circumstance into account in determining a penalty.

As previously stated, the essence of the question posed by Appellant Spencer's jury was whether it could consider his minor role in the Gavilan Bottle Shop robbery as a mitigating factor. (RT 22435, 22445) The trial court's response that "circumstances in aggravation and in mitigation only apply to the homicide" clearly left the jury with the belief that it could not consider Appellant Spencer's role as the getaway driver as a mitigating circumstance. Prejudice flowed from the trial court's incorrect statement. In effect, though the jury could have legally assigned whatever moral or sympathetic value it deemed appropriate to the Gavilan Bottle Shop robbery, the trial court's error precluded it from doing so. Appellant Spencer's level of culpability in the crimes of which he was convicted, was highly relevant to any such consideration.

California's death penalty statutory mechanism, provides that in determining the penalty to be imposed in a capital case, the trier of fact must take into account various factors, including "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (See §190.3(k).) The foregoing "catchall" factor in the death-penalty statute allows the jury to consider a virtually unlimited range of mitigating circumstances. (See *People v. Frierson* (1979) 25 Cal.3d 142.) Legally valid

mitigation includes any aspect of the defendant's character or record proffered as a basis for a sentence less than death. (See *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1026 fn. 11.)

Categories of the crimes aside, the United States Supreme Court has consistently held that the Constitution prohibits imposition of the death penalty if the jury is "'precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (*Smith v. Spisak* (2010) 558 U.S. 139, 144, quoting *Eddings v. Oklahoma*, *supra*, 455 U.S. at 110, quoting *Lockett v. Ohio*, *supra* 438 U.S. at 604.)

Pursuant to these principles, the jury is charged with conducting a moral assessment of a defendant's past actions and must determine the weight of aggravating factors. Accordingly, jurors must be permitted to consider a defendant's level of participation. This is especially true when, as in this case, the same jury heard evidence during the guilt phase regarding the defendant's involvement in the crime that is later argued in aggravation under factor (b). The penalty jury may consider all evidence relevant to both aggravation and mitigation, including evidence admitted at an earlier phase. (*See People v. Carpenter* (1999) 21 Cal. 4th 1016, 1060.) In order to carry out the Constitutionally mandated "individualized sentencing," each juror is "entirely free to assign whatever moral or sympathetic value that juror deems appropriate to 'each and all' of the relevant factors." (*People v. Bacigalupo* (1993) 6 Cal.4th

457, 469-70 [internal citations omitted].)

The trial court may not prevent a jury from considering any relevant mitigating evidence—even if mitigation evidence did not fall under one of the statutorily enumerated factors listed in section §190.3. (See *People v. Avena* (1996) 13 Cal.4th 394, 439 [finding that evidence in mitigation at the penalty phase of a capital prosecution is not limited to the statutory factors so long as it is relevant].) As noted, with this fear in mind, defense counsel Mantell argued that "there should be some modification on the answer" provided to the jury. Nonetheless, the court refused and indeed left the jury with the "false impression...that somehow those characteristics with regard to participating in that one other crime are not for their consideration at all" (RT 22438).

Unquestionably, a capital defendant's criminal record is part of his "character and background" for purposes of the jury's death penalty decision. (See, *Franklin v. Lynaugh*, (1988) 487 U.S. 164, 184-185) and here, aspects of same was proffered by appellant as a basis for a sentence less than death. (90 RT 22438.) The question thus becomes, (1) whether the proffered evidence (of Appellant Spencer's lesser role in the Gavilan Bottle Shop robbery) was "mitigating" evidence within the meaning of our Supreme Court's death penalty jurisprudence; and if so, (2) whether the jury was in any manner prevented from giving "full consideration [to such] mitigating evidence . . ." *People v. Robertson*, (1989) 48 Cal.3d 18, 55, *citing Franklin v. Lynaugh, supra*, 487 U.S. 164, 192, and *Mills v. Maryland* (1988) 486 U.S. 367, 375.

The answer to both questions, clearly, is "yes."

The United States Supreme Court has explicitly held that the role of the defendant in a previous criminal act is highly relevant for a jury to consider. As the Court observed in *Sumner v. Shuman*:

> [p]ast convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant deserves to be sentenced to death for a later murder, but the inferences to be drawn concerning an inmate's character and moral culpability may vary depending on the nature of the past offense. The circumstances surrounding any past offense may vary widely as well. *Without consideration of the nature of the...offense and the circumstances surrounding the commission of that offense, the [offense] reveals little about the inmate's record or character. Even if the offense was first-degree murder, whether the defendant was the primary force in that incident, or a nontriggerman...may be relevant to both his criminal record and his character.* (483 U.S. 66, 81, emphasis added.)

In this case, Appellant Spencer's role in the robbery case was certainly offered as mitigating evidence because it suggested a lesser role by Appellant Spencer in that robbery. (*Sumner v. Schuman, supra*, 483 U.S. at p. 81.)

**C. The Court's Erroneous Response Prejudiced Appellant and Requires Reversal of the Death Sentence**

In sum, the court's response unquestionably erected a barrier to the jury's full consideration of mitigating evidence proffered by the defense, effectively precluding consideration of that evidence (appellant's lesser role in the robbery) as a mitigating factor re: the penalty determination, death or life.

This was federal constitutional error, necessitating reversal of the judgment of death. Even in situations in which the record is ambiguous as to whether the jury was precluded from giving full consideration to mitigating

evidence, a circumstance surely not present here, prejudice is presumed: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing, *Eddings v. Oklahoma*, 455 U.S. at 117, n. (O'CONNOR, J., concurring). ." (*Mills v. Maryland, supra*, 486 U.S. 367, 375

In *People v. Robertson, supra*, 48 Cal.3d 18, 55-56, this Court applied the federal constitutional "harmless error: standard of Chapman v. California (1967) 386 U.S. 18, 24, to error such as that presented here. Under that standard, the judgment of death must be vacated unless the prosecution can show that the error could not possibly have affected the verdict. (Chapman, at p. 24.)

There is no principled argument that the prosecution can meet that test in appellant's case. First, a significant theme in the defense penalty phase case was, appellant's status as a "follower" and not a "leader." (84 RT 22097-22098, 22140; 85 RT 22212, 22249.) The precluded evidence herein was directly relevant to this theme, Additionally, as discussed, the jury was obviously interested in appellant's level of participation in the Gavilan Bottle Shop robbery and could only have inquired as to the applicability of factor j if it was considering using that evidence as evidence in mitigation. Unfortunately, the precluded evidence cut to the very heart of the penalty phase defense.

Given the state of the record, the clear import of the jury's questions, their reference to factor j which directed the jury's attention to "relatively minor"

participation, and the strong presumption of prejudice at the outset, it cannot be rationally argued, let alone shown, that the preclusion of mitigating evidence under the circumstances presented here could not possibly have affected the verdict.

While respondent might attempt to point to the gruesomeness of the crime in arguing that the error was harmless beyond a reasonable doubt, the precluded evidence mitigated appellant's involvement, thus rendering appellant's participation less heinous for purposes of the subjective death penalty analysis. Even assuming appellant actively participated in the capital crime, the excluded mitigation supported the defense argument that appellant was not an instigator and was merely doing what others told him to do, an argument to which the penalty jury clearly attached relevance. A reasonable jury could have employed this evidence to determine that appellant's relative role did not warrant the death penalty, even though the crime was heinous. Respondent cannot prove the contrary beyond any reasonable doubt.

In sum, the court's error in misleading the jury into believing they were precluded from considering Appellant Spencer's role as the getaway driver in the Gavilan Bottle Shop robbery, which was obviously something the jury found important, violated of Appellant Spencer's statutory and constitutional rights, singly or cumulatively, prejudiced him and had a substantial and injurious influence or effect on the jury's sentencing determination. The conviction and imposition of the death penalty in this case are unconstitutional and require

reversal.

The Court's erroneous response prejudiced Appellant and requires reversal of the death sentence even if only one juror was unable to fully consider and weigh all statutorily relevant evidence, reversal is required.

## CONCLUSION

For the foregoing reasons, the judgment must be reversed.

DATED: October 12, 2014

Respectfully submitted,

EMRY J. ALLEN
Attorney at Law

Attorney for Appellant

## CERTIFICATION OF WORD COUNT

I, Emry J. Allen, declare that I prepared the attached Appellant's Supplemental Brief in *People v. spencer, S057242,* on a computer using Word Office 2010. According to that program, the word count of said brief, excluding tables, cover, attachments and this certificate, is 5,006 words.

Dated: October 11, 2014

EMRY J. ALLEN

## DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Christopher Alan Spencer**
Case Number: **Crim. S057242**
**Santa Clara County Superior Court No. 155731**

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is PMB 336, 5050 Laguna Blvd., Suite 112, Elk Grove, CA 95758. On the date shown below, I served the attached

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by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and depositing said envelope(s) in a United States Postal Service mailbox at Elk Grove, California, with postage thereon fully prepaid.

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

Executed on October 11, 2016, at Elk Grove, California.

/S/
Emry J. Allen