SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHRISTOPHER ALAN SPENCER,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S057242

SUPREME COURT
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Deputy

Santa Clara County Superior Court Case No. 155731
The Honorable Hugh F. Mullin, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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DEATH PENALTY

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INTRODUCTION

As described in the Respondent's Brief, appellant was convicted of the robbery and murder of James Madden, the burglary of LeeWards, and the robbery of Ben Graber at the Gavilan Bottle Shop. (RB 1; see 5 CT 1277-1281.) In his supplemental opening brief, appellant challenges the trial court's rulings regarding the jury's consideration of the Graber robbery during the penalty phase. First, appellant argues the Graber robbery should have been considered as one of the "circumstances of the crime" under Penal Code section 190.3, subdivision (a) ("factor (a)") rather than as other criminal activity under section 190.3, subdivision (b) ("factor (b)"). (ASOB 9-10.) Second, appellant argues that the trial court's response to a jury question during deliberations improperly limited the jury's consideration of appellant's minimal role in the Graber robbery. (ASOB 10-12.)[1] These arguments fail.

ARGUMENT[2]

X. THE GRABER ROBBERY WAS FACTOR (B) EVIDENCE

Appellant first contends the court erred by categorizing the Graber robbery as factor (b) evidence. (ASOB 7.) He argues the robbery should have been characterized as factor (a) evidence, as it was "linked to . . . the capital crime materially, morally, and logically." (ASOB 10.) This claim fails.

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[1] Respondent notes that a substantially identical claim is made as Claim VIII in appellant's habeas petition before this Court. (See *In re Spencer*, S212368.) In response to that claim, respondent erroneously referred to section 190.3, subdivision (j), as subdivision (k). (See IR 34 & fn. 12.) Respondent apologizes for the error.

[2] Respondent maintains the Argument numbers from the Respondent's Brief, which contained Arguments I through IX.

Section 190.3 provides in pertinent part:

> If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, . . . the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.
>
> [¶] . . . [¶]
>
> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to section 190.1.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

This Court rejected an argument similar to appellant's in *People v. Prince* (2007) 40 Cal.4th 1179. In *Prince*, the defendant was convicted of six murders, five burglaries, and rape. He was also convicted of six attempted burglaries and nine completed burglaries "of homes belonging to persons other than the murder victims." (*Id.* at p. 1189.) Those crimes were committed in the same time period, in the same general location, and in manners similar to those attached to the murders. (*Id.* at pp. 1190-1205.) A jury sentenced the defendant to death. (*Id.* at p. 1189.) On appeal, the

defendant argued that the jury should not have been permitted to consider evidence of "the burglaries and attempted burglaries that were not directly connected with the capital offenses" under factor (b). (*Id.* at pp. 1291-1292.) The defendant based that argument on *People v. Miranda* (1987) 44 Cal.3d 57, 106, which states that factor (b) pertains "only to criminal activity other than the crimes for which the defendant was convicted in the present proceeding." (*Id.* at p. 1292.) This Court rejected the defendant's argument, stating:

> The quoted language does not carry the meaning that defendant attributes to it, because the issue in the *Miranda* decision involved the danger that a jury would double-count evidence under section 190.3, factor (a) (circumstances of the crime) and factor (b) (other criminal activity involving violence)[,] not whether convictions in the same proceeding that were unrelated to the capital crimes could be considered under factor (b). Evidence presented at the guilt phase may be considered at the penalty phase of the trial (§ 190.4, subd. (d)), and defendant offers no logical reason to support the conclusion that evidence that otherwise would be admissible under factor (b) would become inadmissible because of a joinder with capital offenses.

(*Ibid.*)

The reasoning of *Prince* defeats appellant's argument that the Graber robbery was improperly categorized as factor (b) evidence. First, appellant's reliance on *Miranda* and the fact that appellant was convicted of that robbery "in the present proceeding" is unavailing. (*Prince*, *supra*, 40 Cal.4th at p. 1292; see ASOB 5-6.) As explained in *Prince*, the fact that appellant was convicted of the Graber robbery in the same trial as the capital offense does not mean that the Graber robbery must be considered under factor (a).

Second, appellant's argument would lead to absurd results. Under appellant's interpretation of section 190.3, if a jury convicts a defendant of capital murder and other violent but unrelated offenses in the same trial,

then that jury is not allowed to consider the violent and unrelated offenses under factor (b), as the defendant was convicted of them "in the present proceeding." However, the jury would also not be permitted to consider such crimes under factor (a), as they are unrelated to the murder and thus not "circumstances of the crime." Such a jury would therefore never be allowed to consider the defendant's proven violent criminal activity. Such a result is absurd and contrary to the plain language of section 190.3, and it would defeat the purpose of the jury considering all relevant evidence to the determination of the appropriate penalty.

Third, contrary to appellant's argument, the Graber robbery was not a "circumstance" of Madden's murder to be considered only under factor (a). (See ASOB 6.) Factor (a) evidence is limited to the circumstances of the capital crime, which "extend to that which surrounds the crime materially, morally, or logically." (*People v. McDowell* (2012) 54 Cal.4th 395, 419, quoting *People v. Hamilton* (2009) 45 Cal.4th 863, 926.) The Graber robbery occurred on January 24, 1991, at a liquor store at 124 Blossom Hill Road in San Jose. (70 RT 20840.) The murder occurred on January 28, four days later, at LeeWards at 4175 Stevens Creek Boulevard in Santa Clara. (71 RT 20950.) The crimes did not involve the same victims. Nor was it shown they involved the same group of assailants—of the murder suspects, only Silveria and appellant were charged with the Graber robbery. (1 CT 231-236.) Thus, the Graber robbery was separated from the capital offenses in time and space, and was distinct from the capital offenses in victims and personnel. Furthermore, while the Graber robbery bore some similarity to the murder—i.e., the use of a stun gun and the modus operandi of accosting the victim as he closed up a shop—it bore no stronger relationship to the capital crime than the non-capital crimes properly held to be factor (b) evidence in *Prince*. Here, as in that case, there is simply no

connection "materially, morally, or logically" between the two. Accordingly, the Graber robbery was properly factor (b) evidence.

Appellant disagrees, citing portions of the prosecutor's guilt phase opening statement that he asserts "argued to the jury that the crimes were connected and had a common scheme or plan." (ASOB 10.) Relying on *People v. Blair* (2005) 36 Cal.4th 686, appellant asserts that such a connection establishes that the Graber robbery was connected "materially, morally, or logically" to the murder. (ASOB 10.) Appellant's argument fails, because *Blair* is not as broad as he wishes, and because even if it were, the prosecutor's argument did not establish—or even allege—a material, moral, or logical connection between the crimes.

Blair's proposition that factor (a) includes crimes connected "materially, morally, or logically" to the capital offense is narrow. That proposition, as with *McDowell* and *Hamilton*, quoted above, is drawn from *People v. Edwards* (1991) 54 Cal.3d 787, 833. (*Blair*, *supra*, 36 Cal.4th at p. 749; see *Hamilton*, *supra*, 45 Cal.4th at p. 926.) In *Edwards*, addressing victim impact evidence, this Court explained that "factor (a) of section 190.3 does not mean merely the immediate temporal and spatial circumstances of the crime." (*Edwards*, *supra*, 54 Cal.3d at p. 833.) Rather, factor (a) includes "evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. This holding only encompasses evidence that logically shows the harm caused by the defendant." (*Id.* at p. 835.) Thus, under that rule, the Graber robbery cannot be considered a "circumstance" of the murder here.

In all events, the prosecutor did not assert a material, moral, or logical connection between the Graber robbery and the murder. Appellant's first citation is to the prosecutor's recitation of the charges against appellant; this is hardly an argument that the crimes were connected in any manner except being brought in the same proceedings. (ASOB 10, citing 70 RT

20803.) Appellant's second citation is to the prosecutor's argument that after the Graber robbery went so well—Silveria and Rackley accosting Graber as he closed up the liquor store alone—the group planned to accost Madden outside LeeWards in a similar manner, as they ultimately did. (ASOB 10, citing 70 RT 20810-20811.) However, as described, the fact that the two crimes may have shared a similar modus operandi does not mean that they were connected "materially, morally, or logically." The Graber robbery was an entirely separate criminal act, committed days before and miles away from the murder by different people against different victims. Accordingly, the trial court properly categorized it as factor (b) evidence.

XI. THE TRIAL COURT PROPERLY RESPONDED TO A JURY QUESTION

Appellant contends the court erroneously responded to a jury question regarding factors (b) and (j). (ASOB 10.) Appellant's argument fails.

A. Background

During a discussion of the penalty phase instructions, defense counsel objected to the Graber robbery being considered as factor (b) evidence. (85 RT 22265-22271.) Counsel argued that since appellant was convicted of the robbery during the same proceedings as he was convicted of capital murder, the robbery must be factor (a) evidence. (85 RT 22265; see CALJIC No. 8.85, subd. (b) [factor (b) evidence is "The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings"]; § 190.3, subd. (a) [factor (a) evidence is evidence of "The circumstances of the crime of which the defendant was convicted in the present proceeding"].) Counsel also argued that the Graber robbery was part of a course of criminal conduct that resulted in the murder, and therefore should properly

be grouped together under factor (a) with the other crimes. (85 RT 22266-22268.) The trial court noted appellant's objection. (85 RT 22270.)

The jury was instructed from CALJIC No. 8.85 in pertinent part:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance(s) found to be true.
>
> (b) The presence or absence of criminal activity by the defendant, other than the crime(s) for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> [¶] . . . [¶]
>
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(5 CT 1420-1421; 86 RT 22302-22304.)[3]

The jury was instructed from CALJIC No. 8.87 to consider the Graber robbery as factor (b) evidence:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal act or activity which involved the express or implied use of force or violence or the threat of force or violence under Factor B, to wit: [¶] Robbery of Ben Graber at the Gavilan Bottle Shop.

(5 CT 1429; 86 RT 22306.)

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[3] Section 190.3, subdivision (j), directs the trier of fact to take into account "Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor."

After some deliberation, the jury submitted the following question regarding factors listed in section 190.3: "Does Factor (j) apply to Factor (b), the robbery of Ben Graber, in regard to a mitigating factor, or does Factor (j) relate only to the robbery, burglary[,] and murder of James Madden?" (89 RT 22435.) The court indicated its initial opinion was that factor (j) "only relates to the robbery, burglary and murder of James Madden." (90 RT 22438.) Defense counsel agreed, with a reservation:

> 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 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.) Defense counsel requested "some modification on the answer beyond the obvious one that the Court just stated." (90 RT 22439.) The court decided to wait—a seated juror's mother had passed away, and that juror had to be replaced. Accordingly, the court declined to answer the jury's question at that time. (90 RT 22439, 22443.)

The re-constituted jury re-asked the question shortly thereafter: "We ask for the answer to our previous question submitted on Jury Communication Number Two, whether Factor (j) refers to any other situation other than the LeeWards crime." (90 RT 22444.) To the attorneys, the court indicated that "the answer is going to be no, because it does not. Circumstances in aggravation and in mitigation only apply to the

homicide and . . . any other crimes that were involved at the same time, and the Ben Graber robbery was four days before." (90 RT 22444.)[4] The court told the jury, "The Factor (j) only relates to the robbery, burglary[,] and murder of James Madden." (90 RT 22445.) The jury indicated it had no questions regarding that response. (90 RT 22445.) Three days later, the jury returned a death verdict. (93 RT 22453.)

B. The Trial Court's Response was Proper

Appellant argues that the court's response was error, even if the Graber robbery was properly factor (b) evidence. (ASOB 10.) Appellant notes that the jury must assess factor (b) evidence with, among other things, "consideration of the defendant's role." (ASOB 11.) He contends that the trial court's response to the jury question "misled the jury into believing that [appellant]'s relative culpability in the Gavilan Bottle Shop robbery was irrelevant." (ASOB 12.) This argument fails.

The trial court properly responded to the jury question. The plain language of section 190.3, subdivision (j), renders it applicable only to the capital offense for which a defendant is committed. The phrase "the offense" in subdivision (j) refers to the capital murder described previously in the statute. It does not refer to any other offense. (See *People v. Keenan* (1988) 46 Cal.3d 478, 513, fn. 15 [describing factor (j) as "minor participation in the capital offense"].) Indeed, the absence of an alternative plural to "offense" (i.e., "the offense or offenses") demonstrates the legislature's intent that factor (j) relate only to the capital offense, not every crime of which a defendant might concomitantly be convicted. The same result is true of the other factors, which use similar phrases to establish their relationship to the capital offense. (See, e.g., *People v. Bunyard* (2009) 45

[4] Defense counsel's objection was noted. (90 RT 22445.)

Cal.4th 836, 859 [factor (a) refers to circumstances of "the present crime that has made the defendant eligible for the death penalty"].)

That plain meaning is supported by a consideration of the jury's sole concern during the penalty phase—to determine the appropriate penalty for Madden's murder. To that end, capital juries are instructed to consider the factors enunciated by section 190.3. In particular, "[t]he purpose of [section] 190.3, factor (b) 'is to 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.) Thus, to the extent evidence of the Graber robbery shed light on appellant's character, the jurors were entitled to consider it when determining the appropriate penalty for Madden's murder. However, the jury was *not* tasked with determining the appropriate penalty for the Graber robbery. The statutory factors, including subdivision (j), therefore did not apply to that crime. In other words, appellant's possibly limited role in the factor (b) activity could not qualify as a mitigating factor under section 190.3, subdivision (j); it could affect only the weight the jurors assigned the aggravating factor (b) evidence. The trial court's response to the jury question thus correctly indicated that factor (j) was a consideration only for the determination of what penalty to impose on appellant for murder, not for any other purpose.

Petitioner asserts that the court's response "misled the jury into believing that [petitioner]'s relative culpability in the Gavilan Bottle Shop robbery was irrelevant . . . when assessing how much weight to assign to the [factor] (b) evidence." (ASOB 12.) Indeed, factor (b) evidence "encompasses not only the existence of such activity but also all the pertinent circumstances of that activity." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1377.) It is for the jury to determine "the weight, if any, to

be given to these incidents for the purposes of the individualized assessment of [a defendant's] character and history . . . ." (*Tully*, *supra*, 54 Cal.4th at pp. 1029-1030.) Appellant contends that the court's response to the jury question prevented the jury from considering the mitigating evidence of his limited involvement in the Graber robbery. (ASOB 12.) Not so.

Considering the instructions and arguments as a whole, it is not reasonably likely that the court's response misled the jurors. (*People v. Smithey* (1999) 20 Cal.4th 936, 1003-1004; see *People v. Boyce* (2014) 59 Cal.4th 672, 699.) As discussed above, the response was legally correct and thus could not be "misleading."

Nor did the court abuse its discretion by determining that no further explanation was required in the response. (See *Boyce*, *supra*, 59 Cal.4th at pp. 699-700.) "The trial court responded to the jury's question; it was not required to do more." (*People v. Burton* (1989) 48 Cal.3d 843, 866 [trial court not obligated to direct jury to another factor beyond its question].) As described above, factor (j) cannot mitigate the murder based upon appellant's limited involvement in factor (b) crime; the extent of appellant's involvement in the Graber robbery was relevant only to the aggravating weight of factor (b) itself. Indeed, the jury had been properly instructed on that point. Specifically, the court had instructed the jurors that they could each assign whatever moral or sympathetic weight they decided to each of the factors, including factor (b) (5 CT 1427, 1430), and the prosecutor had emphasized that point (86 RT 22319, 22319-22320, 22321, 22323-22324, 22336 [factor (b) specifically], 22352). Moreover, the court also instructed the jury on the "catch-all" mitigating factor (k), which directed the jury to consider:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any

> sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less tha[n] death, whether or not related to the offense for which he is on trial.

(5 CT 1421.) Thus, considering the instructions and argument as a whole, the jury was aware of its ability to consider the extent of appellant's involvement in the Graber robbery when determining the appropriate penalty. Accordingly, it is not reasonably likely the trial court's legally correct response to the jury's question misled the jury.

Appellant disagrees and asserts that the prosecutor's argument contributed to the jury's misunderstanding. The prosecutor had argued to the jurors that they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (86 RT 22319; see 86 RT 22323-22324, 22352.) Appellant asserts such argument actually "cemented" the trial court's error because it limited the jury to the factors it was "*permitted* to consider." (ASOB 13 [adding emphasis to prosecutor's argument].) This argument fails.

First, the prosecutor's argument was proper. The jury was entitled to consider the Graber robbery under factor (b), and the prosecutor explicitly argued that the jurors should assign that factor whatever moral weight they determined. This was proper argument, not an attempt to prevent the jury from considering relevant mitigating evidence.

Second, any possible confusion over that portion of the prosecutor's argument was ameliorated by his subsequent argument regarding factor (k), in which he did not seek to limit the jury's consideration of the Graber robbery in any way. (See 86 RT 22345-22349; see also 86 RT 22374 [defense counsel arguing factor (k) includes "every last thing in this world . . ., everything that might possibly be available to urge against death"].)

In all events, the prosecutor's comments preceded the jury question at issue and did not mislead the jurors. Accordingly, it is not reasonably likely the jury understood the court's response to its question in a manner that precluded its consideration of mitigating evidence.

C. Any Error was Harmless

Assuming the trial court erred and the jury was misled to believe it could not consider the extent of appellant's role in the Graber robbery,[5] the error was harmless beyond a reasonable doubt. (See *People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032 [applying *Chapman v. California* (1967) 386 U.S. 18, to jury instructions barring consideration of relevant mitigating evidence].) The factor (b) evidence was far from critical aggravating evidence. Indeed, the prosecutor explicitly minimized its significance; he argued that the factor (a) evidence was the compelling evidence for a death sentence. He noted "there's a little bit more evidence in aggravation under Factor (b), . . . but I will indicate that it's Factor (a) . . . that is what is morally compelling and which I submit warrants the death penalty in this case." (86 RT 22334-22335.) Similarly, defense counsel only passingly mentioned appellant's role as the "wheelman" of the Graber robbery, and did not argue that such limited involvement lessened the aggravating impact of the factor (b) evidence. (86 RT 22368.) Indeed, the circumstances of the murder were horrendous and warranted the death penalty regardless of the extent of appellant's involvement in the Graber robbery. (See RB 47 [Arg. VI(D)].) Third, the jury continued deliberating for three days after the trial court answered its question on factor (j), indicating that the court's response was not a lynchpin issue and that the

[5] It must further be assumed that the jury would have determined appellant's role in the Graber robbery to be mitigating—in other words, that the jury credited that appellant was "only" the getaway driver, rather than a callous and cold-hearted criminal-for-hire.

significance of the Graber robbery was far from determinative of the jury's deliberations. Accordingly, any error was harmless beyond a reasonable doubt.

Dated: January 21, 2015

Respectfully submitted,

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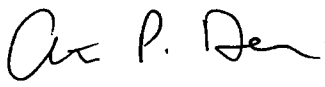

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Supplemental Brief** uses a 13 point Times New Roman font and contains 4,155 words.

Dated: January 21, 2015

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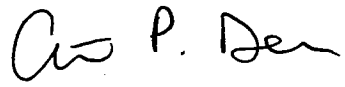

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DECLARATION OF SERVICE BY U.S. MAIL

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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 22, 2015, I served the attached **Supplemental Respondent's Brief** by placing true copies enclosed in sealed envelopes in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 22, 2015, at San Francisco, California.

J. Espinosa
Declarant


Signature