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 REPLY 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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DEATH PENALTY

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**APPELLANT'S SUPPLMENTAL REPLY BRIEF**

**INTRODUCTION**

Appellant in this Supplemental Reply Brief will address specific matters, in light of Respondent's Supplemental Brief (herein "RSB"), where additional briefing may benefit this Court. However, no attempt will be made to respond to all of respondent's contentions, because most if not all of those contentions have already been addressed in advance in Appellant's Supplemental Brief (herein "ASB"). Any occasion of appellant not responding or replying to any particular argument, subargument or allegation made by respondent is not a concession or waiver by appellant. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

So as to avoid undue repetition, appellant assumes this Court's familiarity with the facts and arguments in the parties' prior briefing.

## 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 Graber Robbery Was Factor a Evidence

In his supplemental brief, appellant notes that the trial court instructed the jury that Penal Code section §190.3(j)[1] ("factor (j)") referred only to the robbery and murder of James Madden. (ASB 8, 9.) Appellant asserts that this instruction, given in response to the penalty jury's request for clarification of the applicability, or not, of factor j to the Graber robbery, was erroneous and precluded the jury from considering mitigating evidence that might have formed the basis for a sentence less than death, in violation of the Eighth Amendment. (See (*Smith v. Spisak* (2010) 558 U.S. 139, 144, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104 and *Lockett v. Ohio* (1978) 438 U.S. 586; ASB 9, 12.)

Appellant first asserted that the Graber robbery was fact "factor (a)" evidence; *i.e.*, circumstances of the capital murder. (ASB 9.) If it was, factor (j) was clearly applicable and the trial court's instruction was erroneous and precluded the jury from considering relevant mitigating evidence.[2] Appellant contended that the Graber robbery was a circumstance of the (Madden) crime

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[1] §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).)

[2] Respondent concedes that factor j is applicable to factor (a) evidence. (RSB 9.)

within the meaning of factor (a), because the prosecutor argued at the penalty trial that it was part of a common scheme or plan culminating in the Madden burglary/robbery/murder. )

Appellant noted that factor (a) evidence is anything materially, logically or morally connected to the charged murder. ( ASB 10; see, *People v. Blair* (2005) 36 Cal.4th 686, 749.)

Respondent argues that the Graber robbery was not factor (a) evidence. (RSB 1.) While acknowledging that any circumstance materially, logically or morally connected to the charged murder is properly categorized as a "circumstance of the offense" under factor a, (*Blair*, at p. 749; RSB 5), respondent contends that this test is not met here because the Graber and Madden offenses occurred four days apart; the victims were different and the perpetrators were different. (RSB 4.)

Respondent also acknowledges the rule that no temporal or spatial proximity is required as a prerequisite to a finding that factor a is applicable, but contends that this rule was formulated in the context of "victim impact evidence" presented to show the impact of the murder on the victim's family (*Blair*, at p. 749; see, *People v. Edwards* (1991) 54 Cal.3d 787, 833)), a circumstance inapplicable to the Graber robbery. (RSB 5.)

Respondent is incorrect on all counts.

On this issue, *Blair, supra*, is dispositive. In *Blair*, the defendant was accused of committing two murders by cyanide poisoning. He asserted that

evidence that he had previously expressed an interest in cyanide in a chemistry class two years prior to the offenses was improperly admitted as factor (a) evidence. This Court disagreed, stating that "Maverick's [the defendant's chemistry instructor] testimony was relevant *because it tended to demonstrate that defendant was peculiarly interested in cyanide* and familiar with its properties." (*Blair*, at p. 749, emphasis added.) Based on this, the Court concluded that the questioned testimony "surrounded materially, morally or logically the crime." (*Id.*)

This reasoning is directly applicable to appellant's case. The defendants in this case employed a "stun gun" as their weapon of choice in the Graber and Madden robberies, an unusual, peculiar and distinctive choice, just as Blair settled on cyanide as his distinctive weapon of choice, which tended to show knowledge of cyanide and its properties. In both cases, the peculiar choice of weapons, by itself, and evidence relating to those weapons, renders such evidence "materially, logically and morally" connected to the charged murder.

There is clearly no principled distinction, for purposes of factor (a) analysis, between evidence of cyanide as a weapon of choice in a murder effected by means of cyanide poisoning, and evidence of the peculiar choice of a stun gun as a weapon of choice for purposes of committing robberies, including the Madden robbery. This is especially true given that Graber robbery occurred only four days prior to the Madden robbery. Indeed, on question of whether the

Graber robbery is in fact properly categorized as "factor (a)" evidence, the present case is stronger than *Blair* on its facts.[3]

### B. The Trial Court In Any Event Committed Error by Limiting the Jury's Consideration of Relevant Mitigating Evidence

Assuming, *arguendo*, that the Graber robbery could only have been properly categorized as Factor (b) evidence, *i.e.*, "[t]he 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," the trial court's response to the jury inquiry was still erroneous as it suggested to the jury that Appellant's minor role in the Graber robbery could not be considered as mitigation as to the Madden murder.

Respondent contends that the court's instruction was correct, asserting that factor (j) does not apply to factor (b) evidence, here, the Graber robbery. (RSB 9.)

Again, assuming arguendo that the Graber robbery can only be deemed factor b evidence, respondent's argument is without merit because however, the evidence in question is categorized, the trial court's instruction had the practical effect of precluding the jury from considering relevant mitigating evidence that

[3] In *Blair*, this issue did not arise in the context of 'victim impact" evidence. This fact did not prevent this Court from addressing the issue. (*Blair*, at p. 749; *cf.* RSB 5, where respondent argues that the Graber robbery did not relate to the effect of the Madden murder on the victim's family; therefore, it could not be factor (a) evidence.)

the jury might have employed to impose a sentence less than death, i.e., appellant's conceded (RSB 13, fn. 5) minor role in the Graber robbery.

Indeed, respondent readily concedes that "the purpose of . . . 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 [citations] . . . 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 the Madden murder . . . *Indeed, factor (b) evidence 'encompasses not only the evidence of such activity, but also the pertinent circumstances of that activity.* [citation.] . . . It is for the jury to determine 'the weight, if any, to be given to these incidents for the purpose of the [individualized] assessment of a defendant's character and history . . .'" (RSB 10-11, emphasis added.)

Appellant's degree of involvement in the Graber robbery is clearly "a pertinent circumstance of that activity." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1377; see also, ASB 16-17 and authorities there cited.) Part and parcel of appellant's involvement in in the Graber robbery was, the question whether his role was relatively minor. (*Id.*)

In this case, the jurors specifically asked whether they could consider appellant's minor role in the Graber robbery as a mitigating factor in determining the penalty for the Madden murder. The trial court instructed that it could not. This was clearly erroneous. As indicated, respondent all but concedes the point.

("Indeed, respondent readily concedes that "the purpose of . . . 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 [citations] . . . 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 the Madden murder . . . *Indeed, factor (b) evidence 'encompasses not only the evidence of such activity, but also the pertinent circumstances of that activity.* [citation.] . . ."") (RSB 10-11, emphasis added.)

For the foregoing reasons, respondent's reference to *People v. Keenan* (1988) 46 Cal.3d 478, 513, (RSB 9), is unhelpful. Respondent notes that in a footnote in *Keenan*, this Court referred to factor (j) as relating to a lesser role in the capital crime. (RSB 9, citing *Keenan*, at p. 513, fn. 15.)

First, this reference discusses only whether factor (j) applies to factor (a) evidence. It makes no mention of factor (b) evidence, or whether factor (j) applies to factor (b) also; and certainly does not preclude application of factor (j) to factor (b) evidence. Indeed, it does not purport to address the issue. Cases are not authority for propositions not considered. (*People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.)

Second, even if factor (j) were deemed inapplicable to factor (b) evidence, this would be of no benefit to respondent because by the terms of respondent's own briefing, appellant's lesser involvement in the Graber robbery was a mitigating factor, which possibly could have formed the basis for a sentence less

than death, that appellant was entitled to have the jury consider. By virtue of the trial court's instruction, the jury was precluded from considering this mitigating evidence. This was error. Stated another way, if respondent is correct that factor (j) applies only to factor (a) evidence, and the Graber robbery is deemed to be factor (b) evidence only, then factor (j) as applied in *this* case violates the Eighth Amendment to the United States Constitution.

Respondent argues that the jurors were not misled by the trial court's instruction because such instruction was a correct statement of the law. (RSB 11.) As stated above, if it was, that law as applied in appellant's case violated the Eight Amendment. In fact, respondent has it backwards: The offending instruction misled the jury because it incorrectly precluded the jurors from considering relevant mitigating evidence. The instruction was therefore ***not*** a "correct" statement of the law because under the Eighth Amendment, appellant was entitled to present, and the jurors were entitled to consider, all relevant mitigating evidence. Respondent's argument is nothing more than a thin tautology, assuming the truth of the proposition sought to be proved (the validity of factor (j) as applied in this case). Lacking any further analysis, respondent's argument should be ignored.

Respondent contends that the trial court's instruction pursuant to the "catchall" provision of section 190.3(k), which states in substance that the jurors may consider any evidence that might tend to form the basis of a sentence less than death, precluded any chance that the jury would be misled by the court's

instruction, and ameliorated the prosecutor's argument that the jury was free to assign whatever weight to the factors it was *permitted* to consider (thus *excluding* appellant's lesser role in the Graber robbery, by the terms of the trial court's instruction). (RSB 12.) It is apparently respondent's position that factor(k)'s seemingly all-encompassing language, necessarily overrode the error of the court and compounding error of the prosecutor. Respondent is wrong. Respondent ignores the fundamental principle that where a general provision and a specific provision are in conflict, the latter prevails and is deemed an exception to the general provision. (*In re Miller* (1999) 21 Cal.4th 883, 895.)

Here, the jurors were instructed pursuant to Penal Code section 190.3. Thereafter, the jurors still had questions about the application of factor (j) to the Graber robbery. This *notwithstanding* the charge pursuant to factor (k). Obviously, that charge did not resolve the jurors' problem or answer its question. The jurors therefore asked the trial court for a clarification. The court provided it. This instruction was given for purposes of addressing a specific question by the jurors, and subsequent to the unhelpful factor (k) instruction.

Under these circumstances, the jurors cannot be presumed to have followed factor (k) because it is plain from the face of their question to the court that they did not know if factor (k) applied to the situation before them. To the extent the court's subsequent, more specific instruction, was inconsistent with factor (k), the subsequent instruction must prevail. Indeed, absent a showing to the contrary, it must be presumed that they followed the subsequent, clarifying

instruction. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1115, citing *People v. Anderson* (1987) 43 Cal.3d 1104, 1120 [jurors presumed to have followed limiting instruction].)

Thus, appellant, contrary to respondent's contention (RSB 12), is correct in asserting that the respondent's argument referring to factors the jurors were "permitted" to consider, "cemented" the error. By the explicit terms of the court's charge, the jurors were not "permitted" to consider appellant's lesser involvement in the Graber robbery in determining the penalty to be imposed for the Madden homicide.

> As Judge Kozinski so cogently observed in *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323: "Evidence matters; closing argument matters; *statements from the prosecutor matter a great deal.*" (Id., emphasis added.)

In sum, it cannot be presumed that the jurors followed factor (k) on this question because it is clear by the very terms of their question to the trial judge that they were unable to do so and in fact had not to that point. On the other hand, it is presumed that they followed the limiting instruction, which effectively limited the application of factor (k) relative to the question re: the applicability of factor (j) to the Graber robbery, and in response to the jurors' specific inquiries on this topic. (*People v. Guerra, supra,* 37 Cal.4th 1067, 1115, citing *People v. Anderson, supra,* 43 Cal.3d 1104, 1120.)

**C. Prejudice**

Respondent contends that in any event, even if the court's "clarifying" instruction was incorrect, appellant was not prejudiced thereby. Respondent relies on the "horrendous" nature of the offense, and the relatively minor role, per respondent, played by the Graber robbery in the prosecution's penalty phase case. (RB 13.) However, under the circumstances presented here, respondent cannot show that the error was harmless beyond a reasonable doubt; that is, could not possibly have affected the death verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

This is because whatever respondent's evaluation of the relative importance of appellant's role in the Graber robbery, it was clearly important to the jurors. The jurors asked, in effect, whether appellant's relatively minor role in the Graber robbery could be considered by them as a basis for a judgment less than death, not once, but *twice*. That a verdict was not reached for another three days (*cf.*, RSB 13), only goes to show the closeness of the case, even given the heinousness of the murder.

Indeed, under the circumstances, "this is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances." (*Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849, citing *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1081; see, also, *Clabourne v. Lewis* (9th Cir. 1995) 64 F.3d 1373, 1387 [penalty phase not a "lost cause" for the defense notwithstanding counsel's belief that I don't think anything could have

saved [the defendant] from the death penalty . . . ].) Here, the mere fact that the jurors asked the question they did, demonstrated that they were struggling with the penalty determination in this case. (*Silva, supra*, at p. 849.)

Importantly, the jurors' question went directly to the lead "defense" at the penalty trial, that is, that appellant was a follower and not a leader. Giving weight to appellant's relatively minor role in the Graber robbery could have animated this otherwise lackluster defense, in the jurors' minds. (*Clabourne, supra*, at pp. 1386-1387 [trial counsel's failure to present evidence that the defendant acted under the influence of the domineering codefendant was a major factor undermining confidence in the death verdict, necessitating reversal of the judgment of death].)

Additionally, it merits mention that a prior penalty trial of two of the other perpetrators in this case (Silveria, Travis) ended in a hung jury, a factor which is relevant to the "prejudice" assessment in appellant's case. (14 ST CT 3481, 3586; see, Appellant's Opening Brief, p. 6; *Silva v. Woodford, supra,* at p. 849.)

In sum, (1) the jurors here were obviously struggling with the penalty determination in this case, as evidenced by the length of deliberations; (2) the jurors required clarification of the instructions on mitigation; (3) the "pinpoint" nature of the jury's question went directly to the penalty phase defense presented (meager as it was as presented), suggesting a willingness to give force and effect to that defense based on appellant's relatively minor role in the Graber robbery; and (4) a prior trial of two of appellant's codefendants had generated a hung jury.

Given these facts, it may well be that if the jury had been allowed to consider appellant's apparent non-leadership (*i.e.*, a "follower") role in the Graber robbery, only four days prior to the Madden murder, a judgment less than death may well have been reached. At a minimum, it cannot be said with confidence that the exclusion of mitigating evidence demonstrably supportive of the penalty phase defense, could not possibly have affected the death verdict herein. *(Chapman, supra,* 386 U.S. 18, 24.) Accordingly, the judgment of death must be reversed.

## CONCLUSION

For the foregoing reasons, the judgment must be reversed.

DATED: August 10, 2015

Respectfully submitted,

EMRY J. ALLEN
Attorney at Law

Attorney for Appellant

**CERTIFICATION OF WORD COUNT**

I, Emry J. Allen, hereby declare that I prepared the attached Appellant's Supplemental Reply Brief in *People v. Christopher Alan Spencer,* (S057242) on a computer using Word Office 2010, and that the word count of said brief is 3,089 words.

Dated: August 10, 2015

_____

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 August , 2015, at Elk Grove, California.

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