IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ROBERT ALLEN BACON,** Defendant and Appellant.	S079179 **CAPITAL CASE**

Solano County Superior Court No. FC42606
The Honorable R. Michael Smith, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

In an order dated February 22, 2008, this Court granted appellant's request to file a supplemental opening brief and directed respondent to file a supplemental brief.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR BY DECLINING TO GIVE JUSTICE KENNARD'S PROPOSED CAUTIONARY INSTRUCTION AND THE APPROVED INSTRUCTION WHICH WAS GIVEN DID NOT AFFECT THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE

In Argument VI of appellant's opening brief, appellant asserted that the trial court erred by refusing to give a special cautionary instruction on accomplice testimony like that set forth in Justice Kennard's concurring opinion in *People v. Guiuan* (1998) 18 Cal.4th 558. Appellant claimed he was prejudiced by the refusal to give the special cautionary instruction because his murder conviction was based on the "credibility contest between [Charlie] Sammons and appellant: either Sammons was the murderer, while appellant was an accessory after the fact, or the roles were reversed." (SAOB 2.)[1/]

In his supplemental brief, appellant now argues that even if the Court determines that the alleged instructional error did not affect the murder charge, "it can nonetheless be found that it affected the finding of a lying-in-wait special circumstance and that it did so under the standard of review for state error or for federal constitutional error." (SAOB 2.) Appellant supports this claim by noting that during closing argument, the prosecutor stated:

> The second reason that it's important for you to have heard Mr. Sammons [testify] is to establish the lying in wait special circumstance. We know, based solely on Mr. Bacon's statement, that he was asked to kill Mrs. Sammons. The defendant himself admitted that. But we didn't know exactly some of the circumstances surrounding that until you heard . . . Mr. Sammons testify.

(9 RT 1944-1945.)

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1. SAOB refers to appellant's supplemental opening brief.

Appellant's claim is meritless because: (1) the jury was given the approved instruction on accomplice testimony; and (2) the lying-in-wait special circumstance was not dependent on Sammons's testimony, and was also supported by other evidence showing that Deborah was lured to Sammons's home on the pretext of paying bills so that she could be murdered there.

As discussed in respondent's brief, the jury was instructed in accordance with the cautionary instruction specifically approved by the *Guiuan* majority. (9 RT 1918.) Indeed those standard instructions were even modified to pinpoint appellant's view of the evidence. Thus, the trial court modified the standard version of CALJIC No. 3.18 by specifically directing the jury to consider whether Sammons had any expectation of benefits which might induce him to provide false testimony. Therefore, rather than simply directing the jury to consider Sammons's testimony with "care and caution" as the standard instruction provides, the pinpoint instruction in this case specifically directed the jury to consider whether Sammons's testimony was influenced by the hope for favorable treatment. (9 RT 1918.) Accordingly, contrary to appellant's contention, the jury was instructed to view Sammons's testimony with the requisite degree of "care and caution," and was also admonished to consider whether his testimony was influenced by his desire for a plea deal.

Furthermore, appellant's claim of prejudice regarding the alleged instructional error is predicated on the mistaken notion that the lying-in-wait special circumstance was based exclusively on Sammons's testimony. The record establishes, however, that even had Sammons not testified about appellant lying in wait to murder Deborah, ample evidence supported the special circumstance. Thus, Deborah's boyfriend, Bill Peunngate, testified that on the night of the murder, Deborah told him that she would be late for their date that evening because Sammons had asked her to come over "to take care of some bills at her place." (7 RT 1471.) Peunngate's testimony, together with

forensic evidence showing that appellant subsequently raped and murdered Deborah inside the home, shows that Deborah was specifically lured to the residence where appellant laid in wait to rape and murder her.

Moreover, appellant's own statements to the police reinforced the validity of the lying-in-wait special circumstance. During the police interview, appellant admitted that while helping Sammons with a painting project, Sammons had talked to him "about doing her," i.e., murdering Deborah. (1 CT 112.) Indeed, during one rendition of events, appellant stated that after Deborah arrived at the family residence, Sammons had gone to the store and told him that he "knew what needed to be done." (1 CT 113.)

Appellant then asserted that he and Deborah engaged in consensual intercourse while Sammons was at the store. (1 CT 115.) Appellant claimed that he resumed painting after he and Deborah had intercourse, only to discover that Sammons had murdered Deborah while he was outside painting. (1 CT 117.) Accordingly, when viewed in combination, the evidence from both Peunngate and appellant showed that there was a pre-conceived plan to lure Deborah to the family residence on the pretext of paying bills so that she could be killed inside the residence. Given the abundant evidence regarding the deadly trap set for Deborah, ample evidence supported the lying-in-wait special circumstance—with or without Sammons's testimony on that topic. Because appellant cannot establish a reasonable likelihood that the special circumstance finding would not have been found true absent the alleged instructional error, his claim should be rejected. (*People v. Wharton* (1991) 53 Cal.3d 522, 571; *People v. Watson* (1956) 46 Cal.2d 818.)

II.

THE TRIAL COURT CORRECTLY REVIEWED THE ENTIRE RECORD OF APPELLANT'S ARIZONA MURDER CONVICTION WHEN DETERMINING WHETHER IT QUALIFIED AS A SPECIAL CIRCUMSTANCE

Appellant asserts that in determining whether his previous Arizona murder conviction supported the prior-murder special circumstance (Pen. Code, § 190.2, subd. (a)(2)), the court was limited to looking solely at the statutory elements of the Arizona conviction under *People v. Andrews* (1989) 49 Cal.3d 200, and was precluded from reviewing the actual record of conviction. Respondent disagrees.

Under section 190.2, subdivision (a)(2), defendants who have previously been convicted of murder "may be sentenced to death." (Pen. Code, § 190.2, subd. (a)(2).)[2/] Where the prior murder occurred in a foreign jurisdiction, it will qualify as a special circumstance if the offense would have been "punishable as first or second degree murder" under California law. (Pen. Code, § 190.2, subd. (a)(2); *People v. Andrews*, *supra*, 49 Cal.3d 200, 223.) In *People v. Andrews*, *supra*, 49 Cal.3d 200, the Court held that the intent of section 190.2, subdivision (a)(2), is to limit the use of foreign convictions to those which include all the elements of the offense of murder in California. (*People v. Andrews*, *supra*, 49 Cal.3d 200, 223.) The *Andrews* Court then concluded that "because it would have been *'possible* for [the defendant] to have been convicted of murder' in this state, the offense would have been 'punishable' here." (*People v. Martinez* (2003) 31 Cal.4th 673, 686, emphasis in original, quoting *People v. Andrews*, *supra*, 49 Cal.3d 200, 223.)

In *People v. Martinez*, *supra*, 31 Cal.4th 673, the Court evaluated the propriety of a prior-murder special circumstance by comparing the statutory

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2. Unless otherwise stated, all statutory references are to the Penal Code.

elements needed to prove first or second degree murder in California, with those of the Texas murder statute under which the defendant was convicted.[3/] (*Id.* at pp. 682-683.) After comparing the statutory elements and reviewing the indictment, the Court concluded that by "pleading guilty to unlawfully, intentionally, and knowingly shooting someone, the defendant . . . admitted committing an act that had the *capacity* of being punished as murder in this state. In *Andrews*'s words, it was entirely 'possible' to have convicted defendant of second degree murder in California. (Citation.)" (*People v. Martinez, supra*, 31 Cal.4th at p. 686.)

In making the foregoing determination, however, the Court left open the question of whether the actual record of conviction may be reviewed to determine if a foreign murder conviction satisfies the requirements for murder in California. (*Id.* at pp. 685-687.) The Court stated:

> Our conclusion makes it unnecessary to reach the Attorney General's alternative argument that we properly may consider the facts and circumstances underlying the offense to which defendant pleaded guilty, facts that in this case were elicited during the penalty phase. (See *People v. Trevino, supra*, 26 Cal.4th at p. 241 [inquiring whether "conduct" of the offender satisfied all elements of California law]; *Andrews, supra*, 49 Cal.3d at p. 223 [inquiring whether prior offense included "all the elements of the offense of murder in California"]; cf. *People v. Guerrero* (1988) 44 Cal.3d 343, 345 [allowing reference to "entire record" in determining whether prior offense was "serious felony" for purposes of sentence enhancement].) Contrary to defendant's contention, our reliance on the wording of the Texas indictment to determine what crime defendant committed would not constitute improper consideration of extraneous "facts and circumstances underlying the offense."

(*Id.* at p. 688.)

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3. The Court initially reviewed both the Texas statute and case law interpreting the statute. However, because Texas case law was unclear as to whether murder required a specific intent to kill, versus a general intent to do the act causing death, the Court ultimately relied on the statutory language alone. (*People v. Martinez, supra*, 31 Cal.4th at pp. 687-688.)

Relying on the foregoing passage, appellant now contends that "the only competent evidence of the prior conviction . . . is that evidence narrowly confined to show which crime in the foreign jurisdiction the defendant had been convicted of." (SAOB 4.) In so contending, appellant retracts his previous argument that statements of counsel could be used to determine the nature of a prior murder conviction. (AOB 48.) Appellant claims his previous argument was based "on the uncritical assumption that a prior murder conviction under section 190.2(a)(2) is determined, like all recidivist convictions, by means of the 'entire record of conviction.'" (SAOB 4.) Appellant now asserts that a comparison of the language in section 190.2—the statute at issue here—with that of section 668—the general recidivist statute—shows that section 190.2 is more narrowly drawn and thus does not encompass evidence allowed under section 668. (SAOB 5 ["The generalizing tendency of section 190.2(a)(2), especially when compared with section 668, is clear . . . and indicates an intent that the determination of a prior murder special be confined more narrowly to the elements of the foreign murder conviction"].)

Appellant relies on *People v. Trevino* (2001) 26 Cal.4th 237, in support of this claim. In *Trevino*, the defendant challenged the prior-murder special circumstance finding which was based on a homicide he had previously committed when he was 15 years old. The defendant asserted that the special circumstance could not be imposed because at the time he committed the prior homicide, his status as a juvenile would have foreclosed such a conviction under California law. (*Id.* at p. 240.)

In analyzing this contention, this Court first reviewed the statutory language of section 192, which provides that "an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree." (Pen. Code, § 190.2, subd. (a)(2).) The *Trevino* Court found that based on "the

ordinary meaning of this text, a conviction in another jurisdiction may be used if the '*offense*' would be punishable as first or second degree murder if committed in California." (*People v. Trevino* , *supra*, 26 Cal.4th at pp. 241-242, italics added.)

The Court then contrasted section 190.2's language with the language set forth in section 668, a general recidivist statute. Unlike section 190.2, which referred simply to an "offense," section 668 specifically referred to a person, and provided as follows:

> Every *person* who has been convicted in any other. . . jurisdiction of an offense for which, if committed within this state, that person could have been punished under the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed by law and to the same extent as if that prior conviction had taken place in a court of this state.

(*Id.* at p. 241, italics added.) Based on "the plain meaning of this text," the *Trevino* Court concluded that under section 668, a foreign conviction

> may be used if the same 'person' could have been punished by imprisonment for the same conduct had it been committed in this state. Thus, section 668 would permit consideration of a defendant's age in determining whether that defendant could have been imprisoned for the same conduct in California.

(*Id.* at pp. 241-242.) The Court then contrasted section 668's reference to a person, with section 190.2's reference to an offense, and noted:

> The Legislature, when it used wording distinctly different from section 668 to define the circumstances under which offenses committed in other jurisdictions would qualify for use under the prior-murder special-circumstance provision of the 1977 death penalty law, *did not intend to incorporate all the restrictions of section 668*. And we infer that the voters had the same intent when they used the language of the 1977 death penalty law's prior-murder special-circumstance provision in section 190.2. We therefore conclude that under section 190.2, subdivision (a)(2), the determination whether a conviction in another jurisdiction qualifies under California's prior-murder special circumstance depends entirely upon whether the *offense* committed in the other jurisdiction involved *conduct* that satisfies all the elements of

first or second degree murder under California law.

(*Id.* at p. 242, italics added.) Consequently, the Court concluded that "the focus [of the statute] is on the *conduct*, not the age or other personal characteristics of the person who engaged in that *conduct*. It is the *offense*, and not necessarily the offender, that must satisfy statutory requirements for punishment under California law as first or second degree murder." (*Ibid.*, italics added.) *Trevino* therefore establishes that when determining the validity of a prior-murder special circumstance, the Court evaluates the "conduct" underlying the foreign conviction, rather than simply reviewing the bare elements of the crime as appellant contends. Accordingly, in order to assess the conduct underlying a foreign conviction, the court must necessarily review the entire record of conviction, a process routinely employed when imposing other sentence enhancements based on foreign convictions.

Thus, in *People v. Guerrero* (1988) 44 Cal.3d 343, this Court concluded that when determining whether a prior conviction constituted a serious felony under Proposition 8, a court is not confined to "matters necessarily established by the prior judgment of conviction." (*Id.* at p. 348.) Rather, the court may look to "the entire record of the conviction" to determine the nature of the prior conviction. (*Id* at p. 352.) The *Guerrero* Court explained the rationale for this rule:

> To allow the trier of fact to look to the entire record of the conviction is certainly reasonable: it promotes the efficient administration of justice and, specifically, furthers the evident intent of the people in establishing an enhancement for 'burglary of a residence' -- *a term that refers to conduct*, not a specific crime.

(*Ibid.*, italics added; accord, *People v. Kelii* (1999) 21 Cal.4th 452, 456-457 [court reviews entire record of conviction to determine whether prior conviction constitutes a serious felony under Three Strikes law].)

In order to assess the conduct underlying a prior conviction, the court may review the information and transcripts of plea colloquies since those documents

are part of the "record of conviction" as that term was used in *Guerrero*. (*People v. Sohal* (1997) 53 Cal.App.4th 911, 916.) In *Sohal*, the appellate court held that the attorneys' descriptions of the defendant's conduct were properly used to support a prior conviction allegation. (*Id.* at p. 916.) Accordingly, where the pleadings and plea are, standing alone, insufficient to establish that a prior conviction is a "serious felony," either direct or adoptive admissions made during the plea colloquy may be adequate to sustain a "serious felony" finding. (*People v. Sohal*, *supra*, 53 Cal.App.4th at p. 916 [adoptive admission]; *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350 [direct admission].)

Here, as in *Sohal*, the trial court was permitted to review the statements of counsel during the plea proceeding—as well as the entire record of conviction— when determining whether appellant's Arizona murder conviction qualified as a prior-murder special circumstance. Since courts are routinely permitted to review the entire record of conviction when determining the applicability of other recidivist statutes, and the capital sentencing scheme is intended to be broader than other recidivist laws, the same result should obtain in this case. (See *People v. Trevino* , *supra*, 26 Cal.4th at pp. 241-242, italics added ["1977 death penalty law *did not intend to incorporate all the restrictions of section 668*"].) Therefore, appellant's claim to the contrary should be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: March 27, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached DOCUMENT TITLE uses a 13 point Times New Roman font and contains 2767 words.

Dated: March 27, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Bacon*** **CAPITAL CASE**

No.: **S079179**

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 that same day in the ordinary course of business.

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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 March 27, 2008, at San Francisco, California.

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