IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	CAPTIAL CASE
Plaintiff and Respondent,	S079179
vs.	Solano No. F-C42606
ROBERT ALLEN BACON,	
Defendant and Appellant.	

Appeal From the Judgment of the Superior Court,

State of California, County of Solano

The Hon. R. Michael Smith, Judge

SUPPLEMENTAL REPLY BRIEF

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VII.
SUPPLEMENTAL REPLY CONCERNING PREJUDICE FROM REFUSAL OF DEFENDANT'S REQUESTED ACCOMPLICE CAUTIONARY INSTRUCTION

In his opening brief, appellant demonstrated that the accomplice cautionary instruction given in this case was inadequate to forestall an inaccurate assessment of Charlie Sammons' testimony as somehow less impeachable. The inadequate instruction also failed to provide a needed check on the prosecutor's specious claim that his case was somehow more elevated above the morally ambiguous, if

not discreditable, methods of obtaining evidence from criminal witnesses. The supplemental brief was devoted to examining prejudice from this error in relation to the special circumstance finding of lying in wait.

In that regard, appellant pointed to the prosecutor's own explanation as to the importance of Charlie Sammons' testimony to the prosecution's case: Sammons provided crucial details that helped establish this special circumstance. (9RT 1944-1945.) Respondent answers first superfluously by asserting that there was no instructional error at all – a position already addressed by appellant in his reply brief. But respondent's second answer is that there was other evidence of the special circumstance that rendered Sammons' testimony completely unnecessary.

As respondent argues, without Charlies Sammons' testimony, the jurors would have found the lying-in-wait special based on 1) Bill Puengatte's testimony relating that Charlie had asked Mrs. Sammons to come over the house; 2) on the forensic evidence showing that Mrs. Sammons had been raped and murdered inside Charlie's house; and 3) on appellant's own statements showing that Mrs. Sammons came to the house. (Supp. RB, pp. 3-4.) This showed, according to respondent, that "Deborah was specifically lured into the residence where appellant laid [*sic*] in wait to rape and murder her." (RB, p. 4.)

The special circumstance of lying-in-wait is imposed when the jury finds the murder to have been committed during a period of "waiting and watching for an opportune time to act, together with a concealment by ambush or some other secret design to take the other person by surprise." In addition, "[t]he lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation." (CALJIC No. 8.81.15; *People* v. *Sims* (1993) 5 Cal.4th 405, 433-434.)

Charlie Sammons testified that on October 24, 1994, appellant, in response to Charlie's animadversions against Mrs. Sammons, offered to kill her. (7RT 1492.) Two days later, Mrs. Sammons was on her way to the house to pay bills

for Charlie. According to Charlie, appellant announced he would wait in the bedrrom, and that if Sammons "wanted her taken care of," he should just knock on the bedroom door." (7RT 1487-1488, 1493-1494.) With appellant hidden in the master bedroom, the couple sat in the kitchen paying their bills. When Mrs. Sammons went into the master bedroom to put the checkbook away, Charlie, in his version, sat and waited for the deed to be done. (7RT 1496-1497.) This testimony, if believed, establishes in clear and precise detail all the elements of lying-in-wait. Moreover, in this version, one need not depend on whether Charlie did or did not lure Mrs. Sammons to the house for his homicidal purpose or on whether or not appellant knew of or shared in this entrapment; appellant's retreat into the bedroom, with his admonition to Charlie to give a signal, was all that was needed for the prosecution's purposes.

What is left when one removes Charlie Sammons' testimony? The forensic evidence alone does tend to establish that the murder occurred inside the house. Appellant's statement also established that the murder occurred inside the house. As for Puengatte's contribution, it came as follows:

> "Q. When you talked to her shortly before 5:00 o'clock, did she tell you that she was planning to do something else before she met you?
>
> "A. She said that she had to go to Vacaville to take care of some bills at her place because Charlie had called her and requested her to go up there and take care of the bills." (7RT 1471.)[1]

But all this evidence establishes with sufficient certainty to support a conviction is that Mrs. Sammons went to the Nut Tree House and was murdered there. More, as the prosecutor, recognized, was required to establish lying-in-wait, and that more came from the testimony of Charlie Sammons representing

[1] One might note that this testimony might well have encountered a meritorious hearsay objection if the defense knew that Charlie Sammons was not going to testify.

appellant as hiding in the bedroom, watching and waiting either to emerge on Charlie Samons' signal or to pounce once Mrs. Sammons entered the bedroom.

But what of appellant's own more detailed description of events in his statement to Detective Grate? There, appellant stated that while Charlie and Mrs. Sammons were in the kitchen, he, appellant, remained in the back yard working until Charlie went to the store, whereupon appellant took advantage of Charlie's absence to come into the house to introduce himself to Mrs. Sammons. (SCT 1st, pp. 56, 67-69.) Taken at face value, this was "lying in wait" to make a sexual advance – an act that is not even criminal let alone capital. Indeed, a jury could have taken this part of appellant's statement at face value while still rejecting his claim not to have killed Mr. Sammons. The jurors could have concluded, for example, that appellant's attraction to Mrs. Sammons was in fact spontaneous, but that the decision to kill her arose or became firm only after she rejected sexual advances. If they also could have inferred lying in wait to commit murder as lurking beneath a prevarication on the part of appellant, the point is that nothing definite was inferable without the supplement of Charlie Sammons' testimony. In short, without Charlie Sammons' testimony, the prosecutor, as he himself recognized, had a severely diminished chance of obtaining a verdict for lying-in-wait.

So the premise of respondent's argument is wrong, while that of the trial prosecutor's argument was right: the prosecution needed Charlie Sammons' testimony to establish the special circumstance for lying in wait. Without an adequate cautionary instruction, Charlie's credibility was unduly enhanced in this case, if not to the point of undermining confidence in the jury's verdict for murder, then certainly to the point of undermining confidence in the special circumstance finding. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24.) At the very least, this finding must be reversed.

XI.
SUPPLEMENTAL REPLY ON WHETHER THE THE STATEMENTS OF THE ATTORNEYS IN THIS CASE COULD PROVIDE EVIDENCE TO QUALIFY THE FOREIGN MURDER CONVICTION FOR A SPECIAL CIRCUMSTANCE FINDING

Appellant contended, and contends, that his Arizona murder conviction could not be used as a special circumstance because the least adjudicated elements of that conviction did not qualify as murder in California. Among the evidence discussed was the competing, but unadjudicated representations of the prosecutor and defense counsel recorded in a transcript of the Arizona plea proceedings. Appellant contended that those representations did not provide sufficient evidence to bring appellant's *underlying* conduct within the definition of murder in California. (AOB, pp. 142-148.) In the reply brief and supplemental opening brief, appellant maintained this position, but added that these statements by counsel were not competent or admissible to prove that a foreign murder conviction conformed to California law. As appellant argued, the scope of competent evidence allowable for the prior murder special is more narrowly drawn than that allowed for other enhancement penalties prescribed in other statutes for prior convictions or prior prison terms.

Respondent cites this Court's opinion in *People* v. *Trevino* (2001) 26 Cal.4th 237 for the proposition that for the prior murder special circumstance, it is "conduct" that is at issue, and therefore not, presumably, only the elements of the crime. Thus, in the prior murder conviction, just as in any other prior conviction used for recidivist enhancement, the competent evidence embraces "the entire record of conviction." (*People* v. *Guerrero* (1988) 44 Cal.3rd 343, 352.) The "entire record of conviction," as respondent argues, includes representations by counsel at a plea colloquy -- a proposition for which respondent finds support in *People* v. *Sohal* (1997) 53 Cal.App.4th 911. (Supp. Resp. Brief, pp. 9-10.) As will

be demonstrated by appellant, however, even if a prior murder special is to be treated the same way as other recidivist enhancements and subject to the rule in *Guerrero*, that rule does not accommodate the statements at issue here. Appellant will also go further, and demonstrate that the prior murder special is subject to a narrower test that consists only in identifying the foreign prior of which the defendant was convicted, and then analyzing its defined elements in comparison with the elements of first or second degree murder as defined in California.

Again, if one assumes for the sake of argument that the *Guerrero* governs the prior murder special circumstance, the statements of counsel made in this case are still incompetent. In regard to the *Guerrero* test, the crux of the dispute between appellant and respondent is not of course whether the record of conviction can be used to prove a prior murder special. There is no other way to prove a prior murder special circumstance *except* by means of the record of conviction. The question is whether the "record of conviction" is conceived narrowly or broadly as to the amount of information that is deemed to be admissible and competent in order to prove the underlying conduct beyond the defined elements of the crime of conviction. This dispute is not resolved by whether or not the phrase "entire record of conviction" applies, since this Court has yet to explicitly fix a dispositive definition of what this means (*People* v. *Guerrero*, *supra*, 44 Cal.3rd at p. 356, fn. 1), except to provide alternative, but not necessarily congruent, definitions. In *People* v. *Reed* (1996) 13 Cal.4th 217, this Court identified the record of conviction as *either* the record on appeal *or*, more narrowly, "only those record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*Id.* at p. 223.)

On the other hand, this Court seems to have implied a choice by opting in practice for the narrower alternative set forth in *Reed.* In *People* v. *Trujillo* (2006) 40 Cal.4th 165, it was ruled that the defendant's statements in a probation report could not be deemed part of the "record of conviction" for purposes of proving a prior conviction enhancement. The rationale for this ruling was that such

statements made to a probation officer after entry of a plea "do not 'reflect [] the facts of the offense for which the defendant was convicted.'" (*Id.*, at p. 179.) This is the narrower test set forth in *Reed*, and indeed, the internal quotation marks refer to *Reed*. When one considers also that a probation report is certainly a part of the record on appeal, the conclusion seems safe that the test for recidivist enhancements takes a narrow view of the scope of the "record of conviction."

If this same test applies to the prior murder special, then it is fairly certain that the statements by the prosecutor and defense counsel made in the plea proceedings in Arizona fail. The statements cannot be deemed reliably to reflect the facts of the offense. The adversarial representations were inconsistent with each other. Neither counsel stipulated to the representation of the other counsel. And the presiding judge made no adjudication as to which set of facts were deemed to inform the imminent guilty plea that appellant was to enter. If, in *Trujillo*, a direct statement by the defendant to his probation officer could not be used to supplement the evidence and show the defendant's underlying conduct, then *a fortiori* the second-hand, conflicting representations by counsel are not within the "record of conviction." *People* v. *Sohal* (1997) 53 Cal.App.4th 911, if it even survives *Trujillo*, has no effect on the conclusion in this case since *Sohal* invovled a *stipulation* by defense counsel to the prosecutor's representation of the facts predicating the guilty plea. (*Id.* at pp. 914-915.)

Thus, if the *Guerrero* test, which applies to both domestic and foreign prior convictions for recidivist enhancements (*People* v. *Myers* (1993) 5 Cal.4th 1193, 1200-1202; *People* v. *Riel* (2000) 22 Cal.4th 1153, 1205), also applies to the prior murder special in Penal Code section 190.2(a)(2), then appellant is still correct: the statements of counsel in the plea transcript are not cognizable for establishing the eligibility of the Arizona murder conviction for treatment as a special circumstance in this case.

But appellant's actual position goes farther. What constitutes the "record of conviction" for the prior murder special is drawn even more narrowly. The reason

for this is not policies set forth in this or that opinion by this Court in regard to recidivist enhancements under other statutory schemes, but because Penal Code section 190.2(a)(2) itself confines the matter to 1) documentary evidence that identifies the foreign crime of conviction, and 2) the least adjudicated elements of that crime as defined.

Penal Code section 190.2(a)(2) allows a foreign murder conviction to be used as a special circumstance when the "offense committed in another jurisdiction . . . would be punishable as first or second degree murder" in California. An "offense in another jurisdiction" must therefore be the equivalent of California's first or second degree murder. The latter are clearly defined offenses in the California Penal Code and in the case law construing the relevant statutory provisions. "Offense" is a legal term denoting a statutory or common law definition of a proscribed act for which there is a criminal punishment. (See Pen. Code, § 15.) There is nothing in section 190.2(a)(2) that suggests that specific, underlying conduct beyond that necessary to satisfy the definitional elements of the foreign prior is at issue in the prior murder special circumstance. One would think that the plain meaning of the statute supports appellant's position that the test for a foreign prior murder conviction is the narrow test based on the elements of the crime of conviction compared with the elements of California murder.

But in *People* v. *Martinez* (2003) 31 Cal.4th 673, this Court left it an open question whether the "facts and circumstances underlying the offense to which defendant pleaded guilty" can be consulted as evidence to establish the prior murder special or whether the "elements" test of *People* v. *Andrews* (1989) 49 Cal.3rd 200 was the appropriate measure. (*People* v. *Martinez*, *supra*, 31 Cal.4th at p. 688.) If the matter were simple, one would expect no reticence in proncouncing even in dicta either that the elements test controlled or that the then 15 year-old (and now 20 year old) *Guerrero* decision controlled.

The recidivist enhancement at issue in *Guerrero* was the serious felony enhancement of Penal Code section 667(a), which incorporated the list of serious felonies set forth in section 1192.7. This list included defined crimes, but it also included descriptions of conduct that fit no definition of a public offense. In *Guerrero* it was "burglary of a residence," which went beyond the statutory definition of burglary. It was in this context that *Guerrero* developed its rule regarding the "entire record of conviction," since underlying conduct was, of necessity, at issue in the enhancement.

In *People* v. *Myers*, *supra*, 5 Cal.4th 1193, the Court was confronted with whether the *Guerrero* rule applied to foreign priors under section 667(a). The provision for foreign priors in that statute requires that "any offense committed in another jurisdiction . . . include[] all of the elements of any serious felony . . ." – language that seems just as plain as that in Penal Code section 190.2(a)(2). However, in *Myers*, this Court noted that the intent of the electorate, which enacted section 667(a) in 1982, was that underlying conduct *was* the issue even for the domestic priors. This was clearly evidenced by the list of serious felonies that included descriptive conduct as well as defined offenses. There was no suggestion that the electorate was led to believe that foreign priors were to be treated any differently. (*People* v. *Myers*, *supra*, at pp. 1199-1200.)

Section 190.2(a)(2) was also an electoral enactment in 1978 as part of the death penalty law enacted that year. Further, the prior murder special of that year is identical to the death penalty law enacted legislatively in 1977. (*People* v. *Andrews* (1989) 49 Cal.3rd 200, 222; *People* v. *Trevino*, *supra*, 26 Cal.4th 237, 241.) What did the 1977 Legislature and the 1978 electorate intend? Was it the same intention manifested by the 1982 electorate that enacted Section 667(a)? There is strong reason to doubt it.

First, from the domestic pole, there are no *descriptive* murder convictions that qualify for special circumstance treatment. Thus for example, a defendant with a prior conviction for a violation of California's Penal Code section 273ab,

assault resulting in the death of a child under 8, which is defined as the deadly application of "force that to a reasonable person would be likely to produce great bodily injury," cannot be rendered qualified for treatment as a prior murder special by evidence in the record of conviction that shows the *actual* crime to have been committed with implied or express malice aforethought. There is simply nothing in the structure or language of Section 190.2(a)(2) that would tolerate such a result, and this distinguishes section 190.2(a)(2) form section 667(a). For if, *per Myers*, the treatment of domestic priors signals the intended treatment of foreign priors, then for 190.2(a)(2), one must assess foreign priors based only on their adjudicated elements as a matter of statutory mandate.

Secondly, the rule in *Guerrero* was also based on what purported to be a correction of the misreading of *In re Finley* (1968) 68 Cal.2nd 389. In *Finley*, a case dealing with the recidivist sentencing statute that existed at that time, this Court stated that "unless the record . . . established the *adjudicated elements* of the previous offense, the court will assume that the prior conviction was for the least offense punishable under the foreign statute. (*Id.*, at p. 391, emphasis added.) Further, the suggestion in *Finley* was that there was only so far one could go to establish the adjudicated elements since "[n]either the People nor the defendant can go behind those adjudicated elements in an attempt to show that he committed a greater, lesser, or different offense." (*Id.* at p. 393.) This language was understood to mean that the assessment of prior convictions was confined to the adjudicated elements test, and in three decisions dealing with recidivist enhancement statutes, including section 667(a), this Court so understood the formulations in *Finley*. (*People* v. *Crowson* (1983) 33 Cal.3rd 623, 632, 634; *People* v. *Jackson* (1985) 37 Cal.3rd 826, 834-836; *People* v. *Alfaro* (1986) 42 Cal.3rd 627.)

Guerrero held that these cases all misread *Finley*, whose holding in fact allowed evidence of underlying conduct derivable from the record of conviction, but applied the elements test only when such information was not available.

(*People* v. *Guerrero*, *supra*, 44 Cal.3rd at pp. 348-355.) Whether or not *Guerrero* is correct, however, is immaterial. What is material is how the 1977 Legislature and the 1978 electorate understood the test for a prior conviction. That the "misunderstanding" of *Finley* was the predominant understanding of the law from 1968 through 1988 when *Guerrero* appeared is established by the opinions in *Crowson*, *Jackson*, and *Alfaro*. A misunderstanding of the law that is nonetheless lawfully enacted as law *is* the law. (*People* v. *Dillon* (1983) 34 Cal.3rd 441, 471-472.)

Thirdly, there is the rule of lenity, which holds that where there is more than one reasonable interpretation of a penal statute otherwise unclear, the interpretation most favorable to the criminal defendant prevails. (*People* v. *Canty* (2004) 32 Cal.4th 1266, 1277.) In the instant case, given the use of the word "offense" in the statute, given the plausible understanding of *Finley* as establishing an adjudicated elements test, and given that this plausibility was vouchsafed by this Court's own opinions in *Crowson*, *Jackson*, and *Alfaro*, one is thereby forced to conclude that Penal Code section 190.2(a)(2) is governed by the adjudicated elements test.

Finally, what of respondent's claim that this Court in *People* v. *Trevino*, *supra*, 26 Cal.4th 237 has held that under section 190.2(a)(2), underlying conduct is at issue? The difficulty is that *Trevino* does not use the term "underlying conduct," but only the term "conduct" in a context that seems to mean no more than the conduct defined by the elements of the crime. At issue in *Trevino* was whether a Texas murder conviction of defendant when he was 15 years old could be used as a prior murder special, when in California, a 15-year-old could not be tried as an adult for murder. The Court rejected the defendant's claim and held that the prior conviction was not disqualified because of this discrepancy between Texas and California law:

> "The provision we must construe reads: 'For the purpose of this paragraph, 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.' (§ 190.2, subd. (a)(2).) According to 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. Thus, the focus 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." (*Trevino*, *supra*, at p. 241.)

The term "conduct" was used as a contrast to the concept of the criminal defendant's legal status as a person quite apart from the criminal conduct itself. There is nothing here to imply any more than that the actions proscribed *definitionally* by the foreign statute are at issue. In this regard, *Trevino* relies on *People* v. *Andrews*, *supra* 49 Cal.3rd 200, which held that the absence of a procedure in Alabama equivalent to a juvenile fitness hearing for defendants between the ages of 16 and 18 in California did not prevent the use of the prior in that case as a special circumstance. *Andrews*, instead of the term "conduct," used expressly the term "elements":

> "In some states a defendant is not entitled to a preliminary hearing. [Citations.] In others, a jury consisting of fewer than 12 persons can determine guilt. [Citation.] In still others there is no fitness hearing to determine whether a 16 year-old should be treated as an adult. While any one of these procedural differences might conceivably spell the difference between a murder conviction and some other result, nothing before us indicates that the Legislature, in enacting the 1977 death penalty legislation, or the electorate, in later duplicating its language, intended that the prosecution's ability to use convictions from other states should turn on such questions. Rather, it appears the intent was to limit the use of foreign convictions to those which include all the elements of the offense of murder in

California, and defendant has failed to show otherwise." (*People* v. *Andrews*, *supra*, at pp. 222-223.)

There is no difference whatsoever between *Trevino*'s "conduct" and *Andrews* "elements." Respondent's claim that *Trevino* holds against appellant's position is meritless.

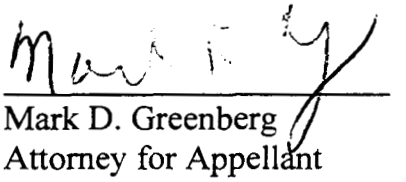
However one approaches the problem then, the statements of counsel at the plea proceedings in the Arizona case are not admissible or competent evidence to establish the prior Arizona murder conviction as a special circumstance under Section 190.2(a)(2). Under the *Guerrero* test, they are not part of the "record of conviction." Under the so-called "elements" test for the special circumstance, they contain unadjudicated material that exceed the definitional elements of the crime of conviction. Finally, as noted in the opening brief, even if they are considered, they do not add any evidence of sufficiently ponderable weight to show that appellant was *not* convicted of a form of Arizona second-degree murder that clearly falls outside the definition of murder in California. The special circumstance finding of prior conviction for murder must be reversed.

CONCLUSION

For the reasons set forth in appellant's briefs, if his murder conviction is not reversible, then, at least, the special circumstances for lying-in-wait and for prior murder conviction are.

Dated: April 7, 2008

Respectfully submitted,



Mark D. Greenberg
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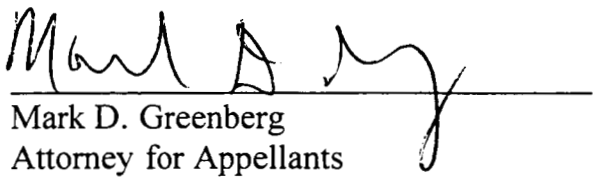
CERTIFICATION OF WORD-COUNT

I am attorney for appellant in the above-titled action. This petition has been produced by computer, and in reliance on the word-count function of the computer program used to produce this document, I hereby certify that, exclusive of the table of contents, the attached court of appeal decisions, and this certificate, this document contains 4134 words.

Dated: April 8, 2008



Mark D. Greenberg
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[CCP Sec. 1013A(2)]
The undersigned certifies that he is an active member of the State Bar of California, not a party to the within action, and his business address is 484 Lake Park Avenue, No. 429, Oakland, California; that he served a copy of the following documents:

SUPPLEMENTAL REPLY BRIEF

by placing same in a sealed envelope, fully prepaying the postage thereon, and depositing said envelope in the United States mail at Oakland, California on April 9, 2008, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaraton was executed on April 9, 2008 at Oakland, California.

Mark D. Greenberg
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