

# SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)

Plaintiff and Respondent,

vs.

ROBERT ALLEN BACON,

Defendant and Appellant.

) CAPITAL CASE

) S079179

) Solano No. E-C42606

) SUPREME COURT

) FILED

) FEB 22 2008

) Frederick K. Ohlrich Clerk

) Deputy

Appeal From the Judgment of the Superior Court,

State of California, County of Solano

The Hon. R. Michael Smith, Judge

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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DEATH PENALTY

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**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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vs.)

) **Solano No. F-C42606**

**ROBERT ALLEN BACON,**)

**Defendant and Appellant.**)

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**APPELLANT'S SUPPLEMENTAL OPENING BRIEF**

**INTRODUCTION**

As set forth in the motion requesting permission to file this supplemental opening brief, this brief contains matters that should have been raised in the opening brief in connection with issue VII and issue XI, but were not, due to inadvertence and neglect, which this brief is intended to remedy.

## SUPPLEMENTAL ARGUMENT

### VII. IN CONNECTION WITH ISSUE VII, A LESSER LEVEL OF PREJUDICE, GOING ONLY TO THE SPECIAL CIRCUMSTANCE FINDING, SHOULD BE CONSIDERED IN THE ALTERNATIVE

In issue VII of appellant's opening brief, he argued that the court erred in refusing defense counsels' requested cautionary instruction on accomplice testimony. (AOB, pp. 105 *et seq.*) The analysis of prejudice from this error was on the basis of the credibility contest between Sammons and appellant: either Sammons was the murderer, while appellant was an accessory after the fact, or the roles were reversed. (AOB, pp. 124-126.) Appellant would also point out that the prejudice can be conceived in more limited terms. As the prosecutor conceded in his closing argument for the guilt phase, he especially needed Charlie Sammons' testimony to establish the lying-in-wait special circumstance. (9RT 1944-1945.) If this Court does not accept that the error of failing to give an adequate cautionary instruction for Charlie Sammons testimony affected the jury's finding of murder, it can nonetheless be found that it affected the finding of a lying-in-wait special circumstance, and did so under the standard of review for state error or for federal constitutional error. (*People v. Watson* (1956) 46 Cal.2<sup>nd</sup> 818, 836-837; *Chapman v. California* (1967) 386 U.S. 18, 23-24.) In all other respects, the argument for issue VII remains unchanged.

**XI.**  
**IN CONNECTION WITH ISSUE XI, IT SHOULD  
BE CONSIDERED THAT THE ELEMENTS  
TEST *ALONE*, WITHOUT ANY  
SUPPLEMENTAL EVIDENCE AS TO THE  
UNDERLYING FACTS, MAY BE USED TO  
PROVE A PRIOR MURDER SPECIAL  
PREDICATED ON AN OUT-OF-STATE  
MURDER CONVICTION**

In arguing the insufficiency of the evidence to establish appellant's conviction for second-degree murder in Arizona as qualifying for the prior murder special circumstance, appellant had hastily assumed that the entire transcript of the Arizona plea proceedings was competent evidence. This included the competing, and unadjudicated, representations of the underlying facts of the crime by the prosecutor and defense counsel. (AOB, pp. 142-146.) In his brief, respondent was only tentative about this evidence. (RB, p. 110, ["If indeed this evidence may be utilized . . . ."]) As it seems, appellant conceded the competence of this evidence too soon, and respondent's equivocation points in the proper direction: beyond the plea itself, the statements of counsel in the plea proceeding were not competent to prove the prior for purposes of a special circumstance. The following argument is substantially the same as that set forth in appellant's reply brief at pages 49 to 51.

Appellant, in his opening brief, had hastily assumed that the question left open by this Court in *People v. Martinez* (2003) 31 Cal.4<sup>th</sup> 673 was whether the reviewing court could refer to evidence adduced at the penalty trial to make up for deficiencies in the proof of the prior murder conviction for purposes of the special circumstance under section 190.2(a)(2). (See AOB, p. 148.) On closer consideration, appellant can see that the question left open was much broader: whether in fact a prior murder special circumstance conforms to the same rule governing foreign recidivist convictions generally.

In *Martinez*, this Court found defendant's Texas murder conviction to be a special circumstance for prior murder based only on the evidence that defendant

pled guilty and on an analysis of the elements of the crime to which he pled guilty. The Court noted:

“Our conclusion makes it unnecessary to reach the Attorney General’s alternative argument that we properly may consider facts and circumstances underlying the offense to which defendant pleaded guilty, facts that in this case were elicited during the penalty phase. [Citations.] 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.’ In order to apply the ‘elements’ test of [*People v.*] *Andrews* [(1989)] 49 Cal.3<sup>rd</sup> [200,] at pages 222-223 . . . , we certainly must know, at the least, the crime to which defendant pleaded.” (*People v. Martinez, supra*, 31 Cal.4<sup>th</sup> at p. 688.)

Clearly, this Court in the above passage was referring not only to penalty phase evidence, but also to guilt phase evidence on the prior conviction itself. *If* the *Andrews* test applies, then, arguably, the rule is that the only competent evidence of the prior conviction in this context is that evidence narrowly confined to show which crime in the foreign jurisdiction the defendant had been convicted of. If so, the unadjudicated factual representations and characterizations of the crime by either the prosecutor or defense counsel, as occurred here (see AOB, pp. 143-145), are simply not competent. It is appellant’s contention that the *Andrews* test does apply here to preclude consideration of the statements of counsel at the Arizona plea hearing.

The omission of this contention from the opening brief was predicated not only on a misreading of *Martinez*, but on the uncritical assumption that a prior murder conviction under § 190.2(a)(2) is determined, like all recidivist prior convictions, by means of the “entire record of conviction.” (*People v. Guerrero* (1988) 44 Cal.3<sup>rd</sup> 343, 355; *People v. Myers* (1993) 5 Cal.4<sup>th</sup> 1193, 1195.) However, the language of the statute regarding all other recidivist priors (§ 668)

and the language of the statute governing the prior murder special circumstance is different, and the former does not govern the latter. (*People v. Trevino* (2001) 26 Cal.4<sup>th</sup> 237, 241 and fn. 2.)

Section 190.2(a)(2) provides in relevant part: “For purposes 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.” Section 668 provides:

“Every person who has been convicted in any other state, government, county, or 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. The application of this section includes, but is not limited to, all statutes that provide for an enhancement or a term of imprisonment based on a prior conviction or a prior prison term.”

Section 668 refers to the hypothetical conviction in this state of the “person” who committed the foreign offense as the measure of whether that offense can be used for recidivist enhancement. Section 190.2(a)(2) refers to “the offense” being “punishable” as first- or second-degree murder if committed by *anyone* within California. The generalizing tendency of Section 190.2(a)(2), especially when compared with section 668, is clear (see *People v. Trevino*, *supra*, 26 Cal.4<sup>th</sup> at p. 241), and it indicates an intent that the determination of a prior murder special be confined more narrowly to the elements of the foreign murder conviction. Hence, the *Andrews* test is dictated by statute. Again, under *Andrews*, the unadjudicated opinions of the prosecutor and defense counsel do not constitute competent evidence.

The conclusion that the *Andrews* test is dictated by statute is buttressed by the rule that statutes should be interpreted to avoid constitutional problems. (*People v. Brown* (1993) 6 Cal.4<sup>th</sup> 322, 335; *In re Catherine H.* (2002) 102 Cal.App.4<sup>th</sup> 1284, 1292.) To allow inquiry into the actual conduct underlying prior conviction, beyond the narrow documentary evidence establishing the fact of the conviction itself, becomes more like the type of criminal justice fact-finding that is subject to the due process protections of the federal constitution (*Shepard v. United States* (2005) 544 U.S. 13, 25-26), which includes not only the right to a jury determination on proof beyond a reasonable doubt, but also Fifth Amendment protections against double jeopardy. (*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111-1112; *People v. Seel* (2004) 34 Cal.4<sup>th</sup> 535, 541.) In short, there would arise the question of whether the defendant must be retried *on the facts of the case* in order to satisfy due process, or whether he could even be retried at all under the Fifth Amendment. These are by no means easily resolved under existing law.

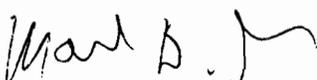
It follows from all this, that, although appellant believes his argument regarding the evidentiary significance of the plea proceedings is correct, that argument may nonetheless be moot. For, it seems, under section 190.2(a)(2), the only competent evidence contained within the transcript of those plea proceedings is that appellant entered a plea to a charge of second-degree murder in Arizona. The remainder of the question is then determined by an analysis of the elements of this crime, and only the elements.

## CONCLUSION

For the reasons stated in the opening brief, in this brief, and in appellant's reply brief in connection with issue VIII, at the very least the lying-in-wait special must be reversed. For the reasons stated in these briefs in connection with issue XI, the prior murder special must be reversed.

Dated: February 18, 2008

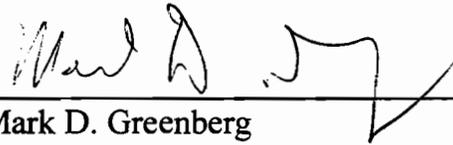
Respectfully submitted,

  
\_\_\_\_\_  
Mark D. Greenberg  
Attorney for Appellant

## CERTIFICATION OF WORD-COUNT

I am attorney for appellant in the above-titled action. This document 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 proof of service, and this certificate, this document contains 1614 words.

Dated: February 18, 2008

A handwritten signature in cursive script, appearing to read "Mark D. Greenberg", is written over a horizontal line. The signature is positioned to the right of the typed name.

Mark D. Greenberg  
Attorney for Appellant

[CCP Sec. 1013A(2)]q

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:

**APPELLANT'S SUPPLEMENTAL OPENING 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 February 19, 2008, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 19, 2008 at Oakland, California.

---

Mark D. Greenberg  
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