IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VAENE SIVONGXXAY, Defendant and Appellant.	CAPITAL CASE Case No. S078895

Fresno County Superior Court Case No. F97590200-2

APPELLANT'S REPLY TO RESPONDENT'S LETTER BRIEF

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March 24, 2014

Hon. Frank A. McGuire, Clerk
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-3600

Re: *People v. Vaene Sivongxxay*, S078895

Dear Mr. McGuire:

On January 14, 2015, this Court directed the parties to file supplemental letter briefs in the above-referenced case. This is appellant's reply to respondent's letter brief.[1]

I. The Failure to Secure an Adequate Waiver of the Right to a Jury Trial on a Special Circumstance Allegation Constitutes Structural Error

In its initial letter brief, respondent first contends that the error here does not qualify as a "structural error" under *Arizona v. Fulminate* (1991) 499 U.S. 279. (RLB, p. 4.) In *Fulminante*, the high court held that most constitutional errors are subject to harmless error review. Such review is essential:

> to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."

(RLB, p. 4, quoting *Fulminante, supra*, 499 U.S. at p. 308.)

It is true that a defective jury waiver is not on *Fulminante*'s list of structural errors; i.e., errors that compel reversal. But that list is illustrative, not exhaustive. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *People v. Allen* (2008) 44 Cal.4th 843, 870.) Since *Fulminante*, the high court has added at least two more examples to that list: (1) denial of the right to counsel of choice (*United States v. Gonzales-Lopez* (2006) 548 U.S. 140, 150); and (2) a defective reasonable doubt instruction that vitiated all of a jury's findings (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 281). Appellant has argued

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[1] The following abbreviations are used herein: "RLB" refers to respondent's letter brief; and "ALB" refers to appellant's letter brief.

that the wholesale denial of the right to trial by jury with respect to the eligibility factor[s] in a capital case is also structural error.

To the extent that respondent claims that for an error to be structural, it must affect the fundamental fairness of a trial, it is mistaken. In *United States v. Gonzales-Lopez, supra*, 548 U.S. 140, the defendant was erroneously denied his counsel of choice. There was no question that he was represented by competent counsel, no issue as to the fairness and accuracy of the trial, and no doubt as to his guilt. Yet, the high court held that the error was structural due to the difficulty of assessing the unquantifiable and indeterminate effects of the error upon the trial. (*Id.* at p. 150.)

Respondent also contends that the error in appellant's case was not structural because his trial was not "fundamentally unfair":

> Appellant had counsel and was tried before an impartial adjudicator. Verdicts were still properly given on appellant's guilt or innocence of the charged offenses, and on whether the balance of aggravating versus mitigating circumstances warranted the death penalty.

(RLB, pp. 7-8, citation omitted.) Essentially, respondent contends that the trial of a capital case is fairly conducted where there was no error with regard to the guilt phase and penalty phase proceedings. But California's capital punishment architecture has three legs, not two: the determination of guilt; the determination of death eligibility; and the determination of sentence. The special circumstance leg is not trivial. It determines death eligibility and is required by the Eighth Amendment. Where, as here, that determination is marred by structural error, it cannot be said that the whole trial was fundamentally fair.

Respondent's contention lacks merit even in noncapital cases. When a trial court errs in accepting a waiver of the right to trial by jury, a trial results where the defendant had counsel, was tried before an impartial adjudicator (a judge), and received verdicts. But a reviewing court in such cases does not apply harmless error review or determine whether the subsequent trial was fundamentally fair; automatic reversal is compelled in such cases. (ALB, p. 6, listing cases.)

II. The Complete Denial of the Right to Trial by Jury on a Special Circumstance Allegation Is Different than Instructional Error on One or More Elements of that Allegation

Respondent contends that harmless error review applies here because the error in this case was "not the same as withdrawing all elements of the offense from the jury or so vitiating the jury's findings as to effectively deny the defendant a jury trial altogether." Instead, it claims, the error was "no different than failing to submit an element of a crime or other special circumstance to the jury." (RLB, p. 8.)

Respondent does not explain why the error in this case is equivalent to a failure to submit one or more elements of a crime or other special circumstance to the jury. The trial court did not misinstruct on an element of a special circumstance; its error withdrew *all* of the elements of the special circumstance from a jury's determination. In a typical "misinstruction" case, valid jury findings remain on the unaffected elements. Here, there was a complete absence of valid jury findings on each and every element.[2]

This distinction was not lost upon the majority in *Neder v. United States*, *supra*, 527 U.S. 1. The fundamental disagreement between the majority and dissent in *Neder* was whether a failure to submit an element of an offense to the jury is the same as the complete denial of the right to trial by jury on that offense. The majority concluded that a failure to submit one element of an offense to the jury was not equivalent to a complete denial of the right to trial by jury. (*Id.* at pp. 13-15.) But it also reaffirmed that an error that withdraws all elements of an offense from a jury, such as a directed verdict, would compel automatic reversal. (*Id.* at p. 17, fn. 2; see also *id.* at p. 11 [noting that the jury instruction did not vitiate "all the jury's findings"].) This Court agrees. (See *People v. Mil* (2012) 53 Cal.4th 400, 413 [observing that a failure to submit all of the elements of an offense or special circumstance to the jury would clearly be structural error]; see also *People v. Duncan* (Mich. 2000) 610 N.W.2d 551, 556 [distinguishing a case where the instructions omit or misstate one or more elements of an offense from a wholesale failure to instruct on an offense; the latter is structural error].)

III. *Washington* v. *Recuenco* and *People v. Sandoval* Do Not Support Respondent's Position

Respondent contends that *Washington v. Recuenco* (2006) 548 U.S. 212, and *People v. Sandoval* (2007) 41 Cal.4th 825, support its position that the denial of the right to trial by jury on the special circumstance allegation is subject to harmless error review. Appellant discussed the inapplicability of *Sandoval* in his initial letter brief. (ALB, pp. 9-10.) *Recuenco* bears some discussion as well.

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[2] Respondent relies upon cases involving misinstruction on one or more elements of a crime or special circumstance allegation: *Neder v. United States* (1999) 527 U.S. 1, 4; *People v. Mil* (2012) 53 Cal.4th 400, 409, *People v. Prieto* (2003) 30 Cal.4th 226, 256-257; and *People v. Osband* (1996) 13 Cal.4th 622, 680-682. (RLB, pp. 5-7.) Appellant has no issue with these cases; his initial letter brief acknowledged that error relating to one or more elements of a crime or special circumstance allegation is generally subject to harmless error review. (ALB, p. 7; but see *Harrell v. State* (2014) 134 So.3d 266, 270-275 [rejecting *Neder* and holding under the state constitution that the denial of the right to have a jury decide each and every element of an offense is reversible per se].)

In *Recuenco*, a jury found the defendant guilty of several violent crimes, and also returned a true finding on an enhancement allegation that he was armed with a deadly weapon. At sentencing, the trial court imposed a sentence enhancement based on defendant being armed with a firearm. (*Washington v. Recuenco, supra*, 548 U.S. at pp. 214-215.) There was no dispute that the trial court's sentencing violated *Blakely v. Washington* (2004) 542 U.S. 296, which held that the jury trial right prohibits judges from increasing a defendant's sentence beyond the statutory maximum based on facts other than those decided by the jury beyond a reasonable doubt. The Washington Supreme Court concluded that the error was structural, but the high court reversed, finding that sentencing factors are similar to elements of an offense for purposes of the right to trial by jury and, in accordance with *Neder*, may be subject to harmless error review. (*Washington v. Recuenco, supra*, 548 U.S. at pp. 216, 218-222.)

Recuenco is distinguishable from appellant's case. First, it relied on the historical fact that sentencing factors are similar to elements. (*Washington v. Recuenco, supra*, 548 U.S. at p. 220.) But a special circumstance allegation is not a sentencing factor; it is similar to a crime. (ALB, p. 3; *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 803.) And, the error here also affected more than just an element; it was a complete denial of the jury trial right for the entire the special circumstance allegation. As discussed above, although instructional error relating to an element of an offense is subject to harmless error, the complete denial of the jury trial right for a crime is not. Finally, *Recuenco* involved *Apprendi* error (*Apprendi v. New Jersey* (2000) 530 U.S. 466), which, as appellant acknowledged, is subject to harmless error review. (ALB, p. 15.) Appellant's case involves error under *Ring v. Arizona* (2002) 536 U.S. 584, and vitiated the sole death-eligibility factor. Respondent has not identified any case where *Ring* error that resulted in the total absence of a valid eligibility factor in a capital case has been subjected to harmless error review.[3]

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[3] In *People v. Marshall* (1996) 13 Cal.4th 799, the jury was instructed on three counts of first degree murder, but the trial court refused to instruct the jury on the multiple-murder special-circumstance allegation, reasoning that if the jury found the defendant guilty of more than one of the charged murders, the special circumstances would be established without the need for any further finding. This Court found that the trial court erred in failing to instruct the jury on the special circumstance allegation, but concluded (1) that the error was not structural; and (2) as the factual issue posed by the omitted special circumstance jury instruction was unequivocally resolved adversely to the defendant under the properly given guilt instructions, it was harmless. (*Id.* at pp. 850-852.) However, *Marshall* was based on a defendant's statutory right to a jury trial under section 190.4. (*Id.* at pp. 850-851 & fn. 9.) Justice Kennard, in dissent,

Footnote continued on next page . . .

Respondent also contends that in *People v. Sandoval, supra*, 41 Cal.4th 825, this Court "held that the erroneous failure to present aggravating factors to a jury would be harmless error so long as a reviewing court could conclude beyond a reasonable doubt that at least one aggravating circumstance would have been found true by *a jury*." (RLB, p. 6, emphasis added.) As with *Recuenco*, *Sandoval* involved a sentencing factor, not a special circumstance. More importantly, respondent elides the fact that *Sandoval*, when applying harmless error review, did not refer to "a jury" or an hypothesized jury. It repeatedly referred to "the jury" that actually sat in that case:

> [W]e must determine whether, if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized the upper term sentence.

(*People v. Sandoval, supra*, 41 Cal.4th at p. 838.)

> [I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless.

(*Id.* at p. 839.)

> In a case such as the present one, the reviewing court cannot necessarily assume that the record reflects all of the evidence that would have been presented had aggravating circumstances been submitted to the jury.

(*Ibid.*) This Court's application of harmless error review in *Sandoval* refers time and again to the actual jury that sat in that case. (See also *id.* at pp. 840, 842, 843.)

The distinction is important because where an error results in no jury findings, or vitiates all of a jury findings, as in this case, harmless error review cannot function. "[T]o hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee." (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 279-280.)

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concluded that the error violated the right to trial by jury and was structural. (*Id.* at p. 875, fn. 4 (conc. & disn. opn. of Kennard, J.).) Her dissent was prescient as, several years later, *Ring* was decided and this Court came to agree with Justice Kennard's view: a special circumstance allegation is subject to *Ring* and must be found by a jury beyond a reasonable doubt. (ALB, pp. 4-5.)

IV. The Denial of Appellant's Right to Trial by Jury with Respect to the Sole Special Circumstance Allegation Was not Harmless

Respondent contends that the error in this case was harmless under *Chapman v. California* (1967) 386 U.S. 18:

> Because appellant was found guilty of the robbery and murder of Henry Song, the factual predicate of the robbery special circumstance was necessarily found true, and any error with regard to taking a separate waiver of the right to a jury trial on the special circumstance was harmless under *Chapman*. (3 CT 760; 4 CT 919-923; but see *People v. Marshall* [1996] 13 Cal.4th [799], 852 [special circumstance allegations other than multiple murder may not be encompassed by other jury findings and thus not necessarily harmless beyond a reasonable doubt].)

(RLB, p. 8.) This is a key point of disagreement between the parties: whether the elements required for a true finding on the felony-murder special circumstance allegation are implicit within the trial court's finding that appellant was guilty of first degree felony murder. Appellant discussed the differences between felony murder and the felony-murder special circumstance, particularly where, as here, accomplice liability is at issue. (ALB, pp. 16-18.) Respondent's "but see" citation to and parenthetical description of *Marshall* reinforces that argument: apart from the multiple murder special circumstance, "special circumstance allegations generally will not be encompassed by other jury findings." (*People v. Marshall, supra*, 13 Cal.4th at p. 852.)

The trial court here found that appellant was the shooter, was guilty of first degree felony murder, and was guilty of the felony-murder special circumstance. But its finding that appellant was the shooter is part and parcel of the felony-murder special circumstance determination, and that finding was vitiated by the erroneous jury waiver. Thus, respondent has failed to show beyond a reasonable doubt that the guilt verdict did not necessarily establish the factual predicate for the special circumstance, and the factual issues posed by the felony-murder special circumstance were necessarily resolved adversely to appellant under the trial court's first degree murder finding. Any doubt on this issue must be resolved in appellant's favor: "Given the strict standard that harmlessness be established beyond a reasonable doubt, the peculiar difficulty of analyzing prejudice in an individual case would in any event redound to the benefit of the defendant." (*People v. Mil, supra*, 53 Cal.4th at p. 412.)

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V. Conclusion

Respondent portends dire repercussions should this Court reverse the special circumstance determination:

> Holding such error to be structural, where a jury trial waiver was otherwise properly taken would cause the very kinds of problems that the *Neder* court cited: abuse of the judicial process and public ridicule of it. Accordingly, any error in failing to take a separate jury trial waiver of the special circumstance allegation was not structural.

(RLB, p. 8.) The premise of this contention, that "a jury trial waiver was otherwise properly taken," is mistaken. This Court's directive to the parties assumes that a jury trial waiver was not properly taken with respect to a critical phase of the proceedings: the determination of whether appellant would be eligible for the death penalty.

The portent of public ridicule is also grossly misplaced.[4] In appellant's view, protecting the right to trial by jury is not something to be derided. The public may not be aware of the "impressive pedigree" of the right (*People v. Hovarter* (2008) 44 Cal.4th 983, 1026, fn. 18), that it is of "surpassing importance" (*Apprendi v. New Jersey*, *supra*,

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[4] The "public ridicule" quote emanates from a passage in Chief Justice Traynor's seminal book, The Riddle of Harmless Error (1970), where he discusses two polar approaches to appellate review. The quote relates to the "all too easy" approach to reversal. The preceding paragraph discusses the pitfalls of an "all too ready" to affirm approach:

> Appellate judges, persuaded by the record that the defendant committed some crime, are often reluctant to open the way to a new trial, given not only the risk of draining judicial resources but also the risk that a guilty defendant may go free. The very reluctance of judges to confront such risks, however, serves to condone errors that may affect a judgment and thus engenders a still more serious risk, the risk of impairing the integrity of appellate review. Nothing is gained by running such a risk and much is lost.

(*Id.* at p. 50.) Chief Justice Traynor also wisely observed that:

> If appellate judges forthrightly opened the way to a new trial whenever a judgment was contaminated by error, there would be a cleansing effect on the trial process. A sharp appellate watch would in the long run deter error at the outset, thereby lessening the need of appeal and retrials.

(*Ibid.*)

530 U.S. at p. 476), that it is an essential bulwark of their civil and political liberties intended to prevent oppression (*Duncan v. Louisi*ana (1968) 391 U.S. 145, 155), that it is a "circuitbreaker in the State's machinery of justice" (*Blakely v. Washington* (2004) 542 U.S. 296, 306), or that it must be jealously preserved (*Patton v. United States* (1930) 281 U.S. 276). But our Founders were well aware of its importance:

> [T]he friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them, it consists of this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."

(The Federalist No. 83 (Clinton Rossiter ed. 1961), p. 498.)

Perhaps respondent's contention is intended to shift this Court's focus away from who caused the error (the trial court); the importance of the right involved; the accused whose rights were violated (an uneducated immigrant); and who has the burden to show that the error was harmless (respondent). Perhaps respondent is appealing to a sense that reversal would be to allow a criminal to escape a richly deserved sentence based on an irrelevant technicality. But few would describe the right to trial by jury as an "irrelevant technicality." Nor can a sentence be "'richly deserved' under our Constitution if the facts supporting the sentence have not been proven as constitutionally required." (*United States v. Hunt* (9th Cir. 2011) 656 F.3d 906, 916.) Or, as Judge Harry Edwards put it: "The law can be an aggravating thing. It imposes duties and responsibilities, and it sometimes forces results that many people in society find unpalatable." (Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?* (1995) 70 N.Y.U. L.Rev. 1167, 1168.)

The trial court's failure to obtain a separate waiver of appellant's right to a jury determination of the special circumstance allegation compels automatic reversal of the special circumstance finding, and in any case, was not harmless.

Thank you for bringing this letter to the Court's attention.

Respectfully submitted,

Michael J. Hersek
State Public Defender

Douglas Ward
Senior Deputy State Public Defender

Attorneys for Appellant

DECLARATION OF SERVICE

DECLARATION OF SERVICE BY MAIL

Case Name: *People v. Vaene Sivongxxay*
Case Number: **Supreme Court No. S078895**

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a copy of the following document(s):

APPELLANT'S REPLY TO RESPONDENT'S LETTER BRIEF

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Each said envelope was then, on **March 24, 2015**, sealed and deposited in the United States Mail at Oakland, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on **March 24, 2015**, at Oakland, California.

Neva Wandersee