SUPREME COURT COPY

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In the Supreme Court of the State of California

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

SUPREME COURT
FILED

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REPLY TO APPELLANT'S SUPPLEMENTAL LETTER BRIEF

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INTRODUCTION

Appellant asserts that under the facts and circumstances of this case, the trial court's failure to obtain a separate, valid waiver of appellant's right to trial by jury of the special circumstance allegation compels automatic reversal of the special circumstance finding. According to appellant, "Even if automatic reversal were not applicable, reversal of the special circumstance determination would be required under the federal harmless error standard." (ASLB 1.)[1] For the reasons stated in respondent's brief, in respondent's supplemental letter brief, and below, appellant is incorrect.

ARGUMENT

I. APPELLANT HAS A CONSTITUTIONAL RIGHT TO JURY DETERMINATION OF THE SPECIAL CIRCUMSTANCE ALLEGATION

Appellant first asserts that the constitutional right to trial by jury applies to a special circumstance determination. (ASLB 3 [heading].) Respondent does not dispute the constitutional nature of a special circumstance determination. (See RSLB at pp. 1-2 [asserting the *Chapman*[2] standard applies].)

II. THE FACT THAT THE PRESENT CASE WAS TRIED BEFORE THE COURT INSTEAD OF A JURY DOES NOT RENDER ANY FAILURE TO TAKE A VALID JURY TRIAL WAIVER ON THE SPECIAL CIRCUMSTANCE ALLEGATION STRUCTURAL

Appellant asserts an invalid waiver of the right to jury trial on the special circumstance allegation is structural error. (ASLB at pp. 5-8.)

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[1] "RB" refers to Respondent's Brief; "ASLB" refers to Appellant's Supplemental Letter Brief; "RSLB" refers to Respondent's Supplemental Letter Brief.

[2] *Chapman v. California* (1967) 386 U.S. 18, 24.

According to appellant, "Where there is a complete deprivation of the right, reversal is automatic. Where there has not been a complete denial, the error may be either reversible per se or subject to harmless error review, depending on the facts and circumstances of the case." (ASLB 8.) Appellant thus concedes, and respondent agrees, that less than a complete deprivation of the right to jury trial may be deemed harmless under the *Chapman* standard. (See RSLB at 5-8, citing, inter alia, *Neder v. United States* (1999) 527 U.S. 1, 4; *People v. Mil* (2012) 53 Cal.4th 400, 409; *People v. Marshall* (1996) 13 Cal.4th 799, 850.)

Appellant attempts to distinguish *Neder* and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). According to appellant,

> In both *Sandoval* and *Neder*, unlike appellant's case, there was a jury. Where a jury makes guilt findings, and the record shows that the jury would necessarily have resolved the finding at issue when it made its guilt determination . . . then harmless error review may be applied. *Harmless error review may not be applied, however, where there is no jury and no jury findings that relate to or resolve the matter at hand.*

(ASLB 10, emphasis added.) Appellant is simply wrong on this point.

Both the United States Supreme Court and this Court have determined that the failure to submit an element or sentencing factor to the jury is subject to harmless error analysis. (*Washington v. Recuenco* (2006) 548 U.S. 212, 221-222 (*Recuenco*); *Sandoval, supra,* 41 Cal.4th at pp. 838-839; *People v. Mil, supra,* 53 Cal.4th at p. 409.)

In *Neder*, the United States Supreme Court rejected the assertion that failure to instruct on an element of an offense could only be found harmless if other facts found by the jury were the functional equivalent of the omitted element. (*Neder v. United States, supra,* 527 U.S. at p. 13.) The *Neder* court further rejected the notion that relying on overwhelming

evidence the jury did not actually consider would allow directed verdicts: "[A]t bottom this is simply another form of the argument that a failure to instruct on any element of the crime is not subject to harmless-error analysis." (*Id.* at p. 17.) Rather, the Supreme Court articulated the following standard: "Is it clear beyond a reasonable doubt that *a rational jury* would have found the defendant guilty absent the error?" (*Id.* at p. 18, emphasis added.)

Appellant looks to *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, to support his proposition that harmless error review may not be applied where there is no jury and no jury findings that relate to or resolve the issue at hand. (ASLB 10.) However, in *Sullivan*, a faulty reasonable-doubt instruction effectively vitiated all of the jury's findings. (*Id.* at p. 281.) Here, any faulty jury trial waiver on the special circumstance allegation did not negate any of the trial court's other findings in the case with regard to the elements of the offenses committed or the balance of aggravating and mitigating factors with regard to the decision to impose the death penalty. In the context of failing to instruct the jury on an element of an offense, the *Neder* court specifically declined to extend the holding of *Sullivan* in the fashion suggested by appellant. (*Neder v. United States, supra,* 527 U.S. at p. 15.)

Similarly, in *Washington v. Recuenco*, in holding that failure to submit a sentencing factor to the jury was subject to harmless error review, the United States Supreme Court declined to give a broad interpretation to the language in *Sullivan* that rejected harmless error analysis because there was no jury verdict of guilty-beyond-a-reasonable-doubt: "this strand of reasoning in *Sullivan* does provide support for [respondent]'s position" but

"a broad interpretation of our language from *Sullivan* is inconsistent with our case law." (*Washington v. Recuenco, supra,* 548 U.S. at p. 222, fn. 4.)

In *Mil*, the trial court failed to instruct the jury on two elements of a felony-murder special circumstance allegation. (*Mil, supra*, 53 Cal.4th at p. 409.) This Court expressly rejected the defendant's argument that the omission of the two elements was structural error even though the omission of two elements prevented the jury from providing a complete verdict on every element. (*Id.* at pp. 410-414.)

> The critical inquiry, in our view, is not the *number* of omitted elements but the *nature* of the issues removed from the jury's consideration. Where the effect of the omission can be "quantitatively assessed" in the context of the entire record (and does not otherwise qualify as structural error), the failure to instruct on one or more elements is mere "'trial error'" and thus amenable to harmless-error review.

(*Id.* at pp. 413-414, citing *Arizona v. Fulminate* (1991) 499 U.S. 279, 307-308.)

In *Sandoval*, this Court determined that the failure to obtain a jury finding on an aggravating factor was subject to harmless error. (*Sandoval, supra*, 41 Cal.4th at pp. 838-839.) Although *Sandoval* involved California's Determinate Sentencing Law, this Court was called upon to apply the constitutional principle, established in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), that every fact that increased the statutory maximum penalty had to be submitted to the jury and proven beyond a reasonable doubt. (*Sandoval, supra*, 41 Cal.4th at p. 838.) This Court stated,

> [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 may properly be found harmless.

(*Id.* at p. 839.)

Thus, this Court's holdings in *Sandoval* and *Mil,* and the Supreme Court's holdings in *Neder* and *Recuenco* are directly contrary to appellant's assertions, and appellant can find no succor in the holding or reasoning of *Sullivan.*

In the context of lesser included offenses, this Court has rejected the assertion that a failure to instruct the jury is prejudicial unless the jury necessarily resolved the factual question adversely to the defendant. (*People v. Breverman* (1998) 19 Cal.4th 142, 164-165.)

III. FOR PURPOSES OF HARMLESS ERROR ANALYSIS, A SPECIAL CIRCUMSTANCE ALLEGATION IS THE EQUIVALENT OF AN ELEMENT OF AN OFFENSE RATHER THAN A SEPARATE PHASE OF THE TRIAL

Appellant asserts the trial court's failure to obtain a separate waiver of his right to a jury trial on the special circumstance was structural error, stating, "The error in appellant's case did not occur during the presentation of the case to the jury. There was no jury. The error was the complete absence of a jury during a critical phase of the proceedings: the special circumstance phase of the trial." (ASLB 11.) Appellant is incorrect.

As explicated in respondent's letter brief, in *Recuenco*, the United States Supreme Court analogized the failure to submit a sentencing factor to the jury to the failure to submit an element of an offense to the jury, which is subject to harmless error analysis. (*Washington v. Recuenco, supra,* 548 U.S. at p. 222.) In *Sandoval*, this Court followed *Recuenco* in treating aggravating circumstances as similar to elements of a crime for harmless error purposes. (*Sandoval, supra,* 41 Cal.4th at p. 838.) Similarly, in *Ring v. Arizona* (2002) 536 U.S. 584, in finding a constitutional right to jury trial on sentencing factors making a defendant eligible for the death penalty, the United States Supreme Court stated, "Because Arizona's enumerated aggravating factors operate as '"the

functional equivalent of an element of a greater offense,"' [citation], the Sixth Amendment requires that they be found by a jury." (*Ring v. Arizona, supra,* 536 U.S. at p. 609.)

Thus, for purposes of a defendant's Sixth Amendment right to a jury trial, the United States Supreme Court has treated both special circumstance allegations and sentencing factors in general not as an entirely separate phase of the trial, or as an entirely separate offense, as appellant suggests (ASLB at pp. 3-4, 11), but as the equivalent of an element of the offense. Accordingly, under the reasoning of *Neder*, a trial court's failure to take a separate, proper waiver of the right to jury trial on the issue of a special circumstance allegation is subject to harmless error review. (RSLB 5, citing *Neder v. United States, supra,* 527 U.S. at p. 4.)

Appellant looks to *Carella v. California* (1989) 491 U.S. 263, 268, to support the proposition that the right to trial by jury is a "structural guarantee." (ASLB 11.)[3] In *Carella*, the jury was instructed with mandatory presumptions that directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses and relieved the state of its burden of proving every essential element of the charged crime beyond a reasonable doubt. (*Id.* at p. 266.) Nevertheless, the *Carella* court did not find the error to be structural, and instead remanded the case for a determination whether the error was harmless. (*Id.* at pp. 266-267.) *Carella* provides no support for appellant's proposition that failure to properly take a jury trial waiver on a special circumstance allegation is structural error requiring reversal.

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[3] Respondent notes that appellant cites a concurring opinion of Justice Scalia for this proposition. (ASLB 11.)

Appellant similarly looks to this Court's decision in *People v. Collins* (2001) 26 Cal.4th 297 for the proposition that denial of the right to a jury trial is structural error. (ASLB 13, citing *Collins, supra,* 26 Cal.4th at p. 311.) However, in *Collins*, the trial court improperly induced the defendant to waive his entire right to a jury trial on the promise of some unspecified benefit. (*Id.* at p. 304.) This is not comparable with the circumstances of the present case, in which the defendant properly waived jury trial on the guilt determination and penalty phase of the trial.

Finally, appellant relies on *United States v. Curbelo* (4th Cir. 2003) 343 F.3d 273, 281, in which the federal appellate court reversed a conviction in which a defendant's guilt was decided by an eleven-person jury. Again, this is entirely distinguishable from present case, which involves an apparently inadequate waiver of jury trial on a special circumstance allegation.

IV. UNDER THE *CHAPMAN* STANDARD, ANY ERROR WAS HARMLESS

Appellant asserts that reversal is required in the present case even under the *Chapman* standard. (ASLB at pp. 15-18.) Appellant specifically asserts, "There was a wholesale violation of his right to trial by jury on the sole special circumstance. Moreover, appellant did not admit the special circumstance; he contested it. And the evidence relevant to the special circumstance was conflicting." (ASLB 16.) Not so. Any violation of appellant's right to jury trial on the special circumstance was no more a "wholesale" violation of his right to a jury trial than, for example, the failure to submit a sentencing factor to the jury in *Recuenco*, or the failure to obtain a separate jury finding on the special circumstance in *People v. Marshall, supra,* 13 Cal.4th at page 799, both of which were subject to

harmless error analysis. (*Recuenco, supra,* 548 U.S. at p. 222; *Marshall, supra,* 13 Cal.4th at pp. 851-853.) Accordingly, this would not affect the harmless error analysis.

As for appellant's assertion that there was conflicting evidence, as discussed in respondent's brief and respondent's supplemental letter brief, the trial court found appellant guilty of both robbery and murder of Henry Song and, in any event, evidence that Song was murdered in the course of a robbery was overwhelming. (RSLB 8; RB 50.) Appellant asserts a jury might have disagreed with the trial court's findings regarding whether appellant was the actual shooter. (ASLB 17.) Appellant ignores his statements to law enforcement that he shot the store owner. (13 SRT 2596, 2618-2619.)

In any event, appellant acknowledges that a nonkiller can be eligible for the death penalty if he personally had the intent to kill or was a major participant in the commission of the robbery and acted with reckless indifference to human life. In the present case, there was no reasonable doubt that appellant was a major participant, given that appellant pointed a gun at Seak Ang Hor and told her to take out money, and later engaged in a struggle with Henry Song. (10 SRT 1915; 11 SRT 2015-2017.) There was no reasonable doubt that appellant acted with reckless indifference to human life given his use of a gun and his willingness to engage in a struggle with Henry Song. (10 SRT 1907; 11 RT 2015-2016.) This is particularly true considering evidence of appellant's violence during other robberies. (8 SRT 1333-1334 [appellant kicks Xeng Her in the head]; 9 SRT 1446-1448, 1608-1611 [appellant and Mounsaveng beat Kee Meng Suy into unconsciousness].)

Appellant argues,

> The inquiry here is not the sufficiency of the evidence, or whether the evidence appears overwhelming to this Court. The error denied appellant the jury to which he was constitutionally entitled. And it contributed to the trial court's findings. It is not possible to determine beyond a reasonable doubt how a properly impanelled jury would have decided the special circumstance issues in this case.

(ASLB 18.) Appellant's assertion is simply another way of saying that any error with regard to taking the waiver of jury trial on the special circumstance allegation is not amenable to harmless error analysis. (See, *Neder, supra,* 527 U.S. at p. 17.) For the reasons previously stated, that assertion is simply incorrect.

CONCLUSION

Appellant's conclusion quotes a concurring opinion for the proposition that the "traditional belief in the right of trial by jury is in perilous decline." (ASLB 18-19, citing *Ring v. Arizona, supra,* 536 U.S. at p. 612 (conc. opn. of Scalia, J.).) However, the Supreme Court's majority opinion in *Neder* noted that reversal for error regardless of effect on the judgment encourages abuse of the judicial process and engenders public ridicule of it. (*Neder v. United States, supra,* 527 U.S. at p. 18.) In the present case, appellant properly waived his right to jury trial on the guilt phase and penalty phase of trial. He had the assistance of counsel, the opportunity to cross-examine witnesses and present evidence on his behalf, and trial before an impartial factfinder. Given these circumstances, reversing the special circumstance allegation without harmless error analysis would lead to the adverse results cited by the Supreme Court in *Neder*. For the reasons previously stated in the present brief, as well as

respondent's brief and respondent's supplemental letter brief, any error with regard to taking a waiver of the right to jury trial on the special circumstance allegation is amenable to harmless error analysis under the *Chapman* standard, and, under that standard, is harmless on the facts of the present case. Appellant's contentions to the contrary fail.

Dated: March 23, 2015. Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Reply to Appellant's Supplemental Letter Brief** uses a 13 point Times New Roman font and contains 2,620 words.

Dated: March 23, 2015.

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Sivongxxay***
Case No.: **S078895**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On March 24, 2015, I served the attached **Reply to Appellant's Supplemental Letter Brief** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, California 93721, addressed as follows:

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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 24, 2015, at Fresno, California.

Debbie Pereira-Young
Declarant

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