SUPREME COURT COPY

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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

SUPREME COURT
FILED
MAR 11 2015
Frank A. McGuire Clerk
Deputy

APPELLANT'S SUPPLEMENTAL LETTER BRIEF

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March 11, 2015

Hon. Frank A. McGuire, Clerk
Supreme Court of California
350 McAllister Street
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Re: *People v. Vaene Sivongxxay*, S078895

Dear Mr. McGuire:

On January 14, 2015, this Court directed the parties in the above-referenced case to file supplemental letter briefs addressing the following question:

> If the trial court fails to obtain a capital defendant's separate waiver of his right to a jury determination of the special circumstance allegation, does that failure compel automatic reversal of the special circumstance finding? (See *Ring v. Arizona* (2002) 536 U.S. 584; *Neder v. United States* (1999) 527 U.S. 1; *People v. Sandoval* (2007) 41 Cal.4th 825.)

The answer to this Court's question is 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.[1] Even if automatic reversal were not applicable, reversal of the special circumstance determination would be required under the federal harmless error standard.

I. The Facts

Appellant and codefendant Oday Mounsaveng were charged, inter alia, with one count of murder and one special circumstance: a killing while engaged in the commission of robbery. (3 CT 707-714; see Pen. Code, § 190.2, subd. (a)(17).) Shortly before the beginning of trial, the defendants' attorneys informed the trial court that their clients wished to waive their constitutional right to trial by jury. The trial

[1] The order appears to assume that appellant's putative jury waiver for the guilt phase was valid. If the guilt-phase jury waiver were invalid, as appellant has argued, then reversal of the entire trial would be automatic and there would be no need to assess the separate waiver of the special circumstance allegation. (AOB 47.)

court, following a brief monologue and a one word affirmative response from each of the defendants and the prosecutor, concluded that the waivers were valid. Following contested guilt and special circumstance proceedings, the court concluded that appellant was the shooter, both defendants were guilty of first degree murder under the felony-murder rule, and both defendants were guilty of the felony-murder special circumstance:

> On the issue of Count One, the murder charge, 187 of the Penal Code, the Court finds both defendants guilty under the felony murder rule. The Court has no problem finding beyond any reasonable doubt that Mr. Sivongxxay was a willing participant and aider and abettor, a principal player, a principal participant; that the primary criminal goal was to rob the jewelry store; that the killing was done to advance the commission of the offense or the escape therefrom. ¶ It's clear Mr. Mounsaveng – Mr. Sivongxxay was in a fierce physical confrontation and battle with the victim at the time, both bringing grave danger to the robbery itself, but also to the escape from the robbery scene.

(15 RT 3141-3142.)

> Likewise, there is ample evidence, and the Court finds beyond a reasonable doubt that the special circumstance against each defendant has been proven. There is no doubt that this murder was committed during the commission of the robbery; that both defendants – well, specifically the killer, Mr. Sivongxxay, was engaged in the robbery when the – commission of the robbery when the killing occurred, satisfying all elements to make it a murder under the felony murder rule, and that Mr. Sivongxxay was an aider and abettor, a willing participant, was a major participant, and clearly had reckless indifference to human life.

(15 RT 3142.)

According to Penal Code section 1167, "When a jury trial is waived, the judge or justice before whom the trial is had shall, at the conclusion thereof, announce his findings upon the issues of fact, which shall be in substantially the form prescribed for the general verdict of a jury and shall be entered upon the minutes." Here, the minute order states, in relevant part:

> The Court finds both defendants guilty of Count One, PC187 Murder in the First Degree, under the felony murder rule and beyond any reasonable doubt. The Court further finds the charge of PC 12022.5 (a)

> true beyond any reasonable doubt against both defendants. ¶ The Court further finds that beyond any reasonable doubt that Mr. Mounsaveng was a willing participant and aider and abettor, a principal player, a principal participant; that the primary criminal goal was to rob the jewelry store; that the killing was done to advance the commission of the offense or the escape therefrom. ¶ The Court further finds beyond a reasonable doubt that the special circumstance against each defendant has been proven.

(4 CT 919.)

II. The Constitutional Right to Trial by Jury Applies to a Special Circumstance Determination Regardless of its Characterization

The special circumstances set forth in Penal Code section 190.2 play an integral role in the architecture of California's capital sentencing scheme: when a special circumstance is alleged and found true, a defendant charged with first degree murder becomes eligible for the death penalty. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.) Special circumstances perform the same constitutionally required narrowing function as aggravating factors used by other states in their capital sentencing statutes. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 467-468.)

From the beginning of California's modern capital punishment era, this Court has concluded that a special circumstance is "sui generis"; that is, neither a crime, an enhancement, nor a sentencing factor. (*People v. Friend* (2009) 47 Cal.4th 1, 71, quoting *People v. Garcia* (1984) 36 Cal.3d 539, 552; *Ramos v. Superior Court* (1982) 32 Cal.3d 26, 32-33 [special circumstance not an enhancement]; *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 803 ("*Engert*") [special circumstance not a "sentencing function"].) But a special circumstance allegation is quite similar to a criminal offense, and, as such, the standards of specificity applicable to criminal offenses apply equally to special circumstances. (*People v. Gurule* (2002) 28 Cal.4th 557, 637; *Engert, supra*, 31 Cal.3d at p. 803.) As with criminal offenses, a special circumstance allegation contains elements (e.g., *People v. Hajek* (2014) 58 Cal.4th 1144, 1183), and requires instructions (see *People v. Cudjo* (1993) 6 Cal.4th 585, 630). A defendant has a statutory right to trial by jury for a special circumstance allegation (Pen. Code, § 190.4, subd. (a)), and its elements must be found unanimously and beyond a reasonable doubt (Pen. Code, § 190.4, subd. (a); *People v. Friend, supra*, 47 Cal.4th at p. 70; *Engert, supra*, 31 Cal.3d at p. 803).

Temporally, apart from the prior-murder special circumstance, which requires a separate proceeding following the guilt phase (Pen. Code, § 190.1, subd. (b)), the special

circumstance determination occurs during the guilt phase of a capital trial. But that determination does not occur simultaneously with the factfinder's consideration of the capital murder count: the factfinder is specifically instructed not to reach the special circumstance determination unless it has first found the defendant guilty of first degree murder. (CALJIC No. 8.80.1; CALCRIM No. 700.) Thus, this Court has not infrequently referred to its determination as a separate "phase" or "proceeding" of the trial. (See, e.g., *People v. Pearson* (2012) 53 Cal.4th 306, 327; *People v. Bivert* (2011) 52 Cal.4th 96, 108; *People v. Alexander* (2010) 49 Cal.4th 846, 920; *People v. Robinson* (2005) 37 Cal.4th 592, 637; *People v. Turner* (2004) 34 Cal.4th 406, 411; *People v. Cunningham* (2001) 25 Cal.4th 926, 1013-1014; *People v. Osband* (1996) 13 Cal.4th 622, 742-743; *People v. Garcia*, *supra*, 36 Cal.3d at p. 552, overruled on other grounds in *People v. Lee* (1987) 43 Cal.3d 666, 676 [noting "the resemblance between a special circumstance proceeding and a trial to determine guilt"].)

Before 2002, the primary distinction between a special circumstance and a crime was this Court's view that a defendant had no constitutional right to trial by jury with respect to the elements of a special circumstance. (See *People v. Odle* (1988) 45 Cal.3d 386, 411.) That distinction was eliminated when the United States Supreme Court decided *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584. *Apprendi* held that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum prescribed for that crime must be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 489-490) California's special circumstances clearly increase the penalty for a crime beyond the statutory maximum. In the absence of a true finding on such an allegation, a defendant faces a sentence of 25 years to life imprisonment; when such an allegation is found to be true, the defendant faces a sentence of either death or life without the possibility of parole. (Pen. Code, §§ 190, subd. (a) & 190.2; *People v. Chiu* (2014) 59 Cal.4th 155, 163 ["defendant convicted of first degree murder must serve a sentence of 25 years to life"].)

In *Ring v. Arizona*, *supra*, 536 U.S. 584, the high court applied *Apprendi* to capital punishment schemes and concluded that the right to trial by jury applies to the findings necessary to render a person eligible for the death penalty. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.) Such findings operate as the functional equivalent of an element of the greater criminal offense of capital murder. (*Ibid.*; see also *People v. Lewis* (2008) 43 Cal.4th 415, 521, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919-920.) Shortly after *Apprendi* and *Ring* were decided, this Court recognized that a special circumstance allegation is subject to *Ring* and that a defendant has a constitutional right to trial by jury for its determination. (See *People v. Prieto* (2003) 30 Cal.4th 226,

256; *People v. Bolden* (2002) 29 Cal.4th 515, 560.)

For the past 30 years, this Court has squarely held that "an accused whose special circumstance allegations are to be tried by a court must make a separate, personal waiver of the right to jury trial." (*People v. Memro* (1985) 38 Cal.3d 658, 704, overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) This holding was reaffirmed recently in *People v. Weaver* (2012) 53 Cal.4th 1056, 1070-1071, 1075. The requirement of a separate waiver for a special circumstance stems from the constitutional requirement that a waiver of the fundamental constitutional right to trial by jury cannot be knowing and intelligent if the accused is not aware of what is being waived.

The state and federal rights to trial by jury are fundamental constitutional rights that "reflect a profound judgment about the way in which law should be enforced and justice administered" (*Duncan v. Louisiana* (1968) 391 U.S. 145, 155), and must be "jealously preserved" (*Patton v. United States* (1930) 281 U.S. 276, 312). The federal right arises from the Sixth Amendment and carries with it the concomitant right under the Fifth and Fourteenth Amendments to proof of each element of a crime or its equivalent beyond a reasonable doubt. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 478.) Moreover, "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." (*United States v. Gaudin* (1995) 515 U.S. 506, 514-515.) When appellant refers herein to the right to trial by jury, he is referring to both the Fifth and Sixth Amendment rights. As the state right to trial by jury appears to be mostly identical to the federal right (Cal. Const., art I, § 16; cf. *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1241-1242 [noting difference in reach of state and federal rights]), the arguments made herein apply to both the state and federal rights. In *Friend*, this Court reiterated its belief that even if a special circumstance allegation is not technically a crime, a defendant is entitled to as much "protection with regard to the elements of a special circumstance than for the elements of a criminal charge." (*People v. Friend*, *supra*, 47 Cal.4th at p. 71, internal quotation marks omitted.) Thus, a separate waiver of the right to trial by jury for a special circumstance allegation is constitutionally required.

III. The Invalid Jury Waiver for the Sole Special Circumstance Is Structural Error

A. The Appropriate Remedy for a Violation of the Right to Trial by Jury Depends on the Facts and Circumstances of the Case

Violations of the right to trial by jury arise under a number of different facts and circumstances. A violation can occur during any phase of a criminal proceeding:

pretrial, where an invalid waiver of the right is accepted by the trial court (*People v. Collins* (2001) 26 Cal.4th 297, 304-305); during trial, when the trial court omits or misinstructs on an element of an offense (*Neder v. United States* (1999) 527 U.S. 1, 12-13), or directs a verdict on a count (*People v. Figueroa* (1986) 41 Cal.3d 714, 724-726); during a special circumstance determination in a capital case (see *People v. Weaver, supra*, 53 Cal.4th at pp. 1074-1075); or at sentencing (*United States v. Booker* (2005) 543 U.S. 220, 248-49; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324-325).

A violation of the right to trial by jury can be wholesale, as where no jury was ever sworn due to an invalid guilty plea. (E.g., *United States v. Shorty* (9th Cir. 2013) 741 F.3d 961, 969; *People v. Ernst* (1994) 8 Cal.4th 441, 448; *People v. Collins, supra*, 26 Cal.4th at p. 304; *People v. Sandoval* (2007) 41 Cal.4th 825, 836-838 [sentencing phase].) A violation may occur where 11 jurors sit instead of the required 12 (*United States v. Curbelo* (4th Cir. 2003) 343 F.3d 273, 281-282; *People v. Garcia* (2012) 204 Cal.App.4th 542, 549-550), or when a judge directs a verdict for the state or otherwise "override[s] or interfere[s] with the jurors' independent judgment in a manner contrary to the interests of the accused" (*United States v. Martin Linen Supply Co.* (1972) 430 U.S. 564, 572-573). Instructional error may also violate the jury trial right, including an instructional error that vitiates all of a jury's findings (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 277-280 [defective reasonable doubt instruction]), or when a trial court misinstructs or omits an instruction to a jury on an element of a criminal count or special circumstance (*Neder v. United States, supra*, 527 U.S. at pp. 12-13 [error in failing to submit element of an offense to the jury]; *People v. Mil* (2012) 53 Cal.4th 400, 409 [erroneous instructions on elements of special circumstance]).

Case law is quite clear that an invalid jury waiver that results in a wholesale violation of the right to jury is reversible per se. (*United States v. Shorty, supra*, 741 F.3d at p. 969; *United States v. Duarte-Higareda* (9th Cir. 1997) 113 F.3d 1000, 1003; *Miller v. Dormire* (8th Cir. 2002) 310 F.3d 600, 604 [defendant's attorney's waiver of jury trial was structural error requiring automatic reversal of conviction]; *Balbosa v. State* (Ga. 2002) 571 S.E.2d 368, 369 ["harmless error analysis cannot be applied to" an invalid jury trial waiver"]; *State v. Lopez* (Ct. 2004) 859 A.2d 898, 904-905; *People v. Cook* (Mich.App. 2009) 776 N.W.2d 164, 167-168 [invalid waiver of right to jury trial was structural error].) In *Rose v. Clark* (1986) 478 U.S. 570, the high court noted that where the right to trial by jury is "altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." (*Id.* at p. 578.) Such an error has consequences that are necessarily unquantifiable and indeterminate. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 281-282.) This Court has long applied

this rule. (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444; see also *People v. Collins*, *supra*, 26 Cal.4th at p. 304; *People v. Ernst*, *supra*, 8 Cal.4th at p. 448.) The rule applies even if the evidence is "overwhelming" to a reviewing court because the most important element of the right to trial by jury is "the right to have the jury, rather than the judge, reach the requisite finding." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 277.)

However, other violations of the trial right to trial by jury are not reversible per se. In *Neder v. United States*, *supra*, 527 U.S. 1, a divided high court concluded that although a misinstruction on an element of a criminal count violates the right to trial by jury, such error is not reversible per se, but rather subject to harmless error review. (*Id.* at pp. 12-13.) This Court has adopted the holding in *Neder*:

> The failure to instruct the jury on an element of an offense is federal constitutional error because it violates the defendant's due process and Sixth Amendment rights to have a jury adjudicate guilt beyond a reasonable doubt. Such error is harmless only if, after conducting a thorough review of the record, the court determines beyond a reasonable doubt that the jury verdict would have been the same absent the error.

(*People v. Banks* (2014) 59 Cal.4th 1113, 1153, internal citations and quotation marks omitted.) And it has applied that holding to misinstruction on a special circumstance allegation. (E.g., *People v. Mil*, *supra*, 53 Cal.4th at p. 409.) The high court has also held that the erroneous failure to submit a sentencing factor to the jury is subject to harmless error review. (*Washington v. Recuenco* (2006) 548 U.S. 212, 219-222.) This Court agrees. (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 838.)

Nonetheless, there are limits to the application of harmless error review to instructional error. If an instructional error vitiates all of the jury's findings, then harmless error review does not apply. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p 281 [erroneous reasonable doubt instruction]; see also *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 61 (per curiam).) This Court, too, has observed that the erroneous omission of "substantially all of the elements" in the instructions on an offense would be reversible per se. (*People v. Mil*, *supra*, 53 Cal.4th at p. 413, citing *People v. Cummings* (1993) 4 Cal.4th 1233, 1315.) In *Mil*, the Court noted that it would not "foreclose the possibility that there may be some instances in which a trial court's instruction removing an issue from the jury's consideration will be the equivalent of failing to submit the entire case to the jury – an error that clearly would be a structural rather than a trial error." (*People v. Mil*, *supra*, 53 Cal.4th at p. 413, internal quotation marks omitted; see also Fairfax, *Harmless Constitutional Error and the Institutional Significance of the Jury* (2008) 76 Fordham L. Rev. 2027, 2057, fn. 161 [at *Neder* oral argument, solicitor general conceded

that harmless error review could apply to multiple omitted elements].)

In short, there is no single rule for determining whether a violation of the right to trial by jury is reversible per se or subject to harmless error review. 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.

In appellant's case, the error is an invalid jury waiver with respect to the sole special circumstance alleged. In *People v. Memro, supra*, 38 Cal.3d 658, this Court left open the question of whether such an error could be subject to harmless error review. (*Id.* at p. 704.) Similarly, the high court in *Ring* did not reach the state's assertion that the error was harmless. (*Ring v. Arizona, supra*, 536 U.S. at p. 609, fn. 7.)

B. *Neder v. United States* and *People v. Sandoval* Do Not Provide the Answer to the Question Posed By This Court

This Court's directive to the parties cites two noncapital cases: *Neder v. United States, supra*, 527 U.S. 1 and *People v. Sandoval, supra*, 41 Cal.4th 825. In each case, the federal harmless error standard of review was applied to a violation of the right to trial by jury. However, each is fully distinguishable from the issue raised in appellant's case.

In *Neder*, the trial court omitted one element of the offense in its instructions to the jury. In a sharply divided opinion,[2] the high court concluded that the error violated the right to trial by jury, but that it was subject to harmless error review. (*Neder v. United States, supra*, 527 U.S. at pp. 12-13.) It is important to understand what Neder actually held. The debate in *Neder* centered on whether harmless error review applies when the jury could have concluded, based on evidence in the record, that the element was proven (the majority's view) or whether automatic reversal is required where the jury did not actually make a determination on the omitted element (the dissent's view). *Neder* therefore actually held that harmless error review applied in that case because there was evidence in the trial record from which the jury that heard Neder's case could have concluded that the missing element had been proven beyond a reasonable doubt.

Thus, in *Neder*, there was a jury, the jury was presented with all of the evidence, and the error affected only one element of several. The error did not vitiate all of the

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[2] Justice Scalia, in dissent, accused the majority of tolerating malpractice on "the spinal column of American democracy." (*Neder v. United States, supra*, 527 U.S. at p. 28 (dis. opn. of Scalia, J.).)

jury's findings, and the reviewing court was able to perform harmless error review by reviewing the record evidence. In appellant's case, the violation of the right to trial by jury was wholesale as to the sole special circumstance; it vitiated all of the trial court's findings regarding the issue. Moreover, the sole special circumstance in appellant's case was contested. Appellant's trial counsel made a motion at the guilt phase to dismiss pursuant to Penal Code section 1118. He raised a duress defense, and presented evidence that appellant had cocaine in his blood at the time of the crime. (13 RT 2574-2578; 13 RT 2601-2609; 15 RT 3100; 15 RT 3117.) Due to the poor quality of the store's surveillance video, the prosecutor argued at guilt that there were four possible scenarios as to who said what at the homicide crime scene (14 RT 2747-2748), although she argued that appellant was the actual shooter (15 RT 3129-3130). Appellant's trial counsel argued that the felony-murder special circumstance did not apply due to the "exigency" of the moment. (15 RT 3117.) Mounsaveng's trial counsel specifically argued that the special circumstance allegation had not been proven because the defendants did not commit a murder to advance or carry out a robbery. (15 RT 3129.) And the trial court found the prosecution's crime reconstruction expert to be "incredible." (15 RT 3140.) In short, appellant did not admit the special circumstance; he contested it. And the evidence relevant to the special circumstance was conflicting.

In *Sandoval*, a jury found the defendant guilty of voluntary manslaughter and attempted voluntary manslaughter. At sentencing, the trial court imposed an upper term for one offense and consecutive sentences for the others, basing its imposition of the upper term sentence on the great amount of violence and callous behavior demonstrated, defendant's lack of concern for the consequences of her actions, the vulnerability of the victims, and the evidence of planning and premeditation. (*People v. Sandoval, supra*, 41 Cal.4th 825 at pp. 831-832.) This Court concluded that the trial court's actions violated the right to trial by jury. (*Id.* at pp. 837-838.) Nevertheless, relying on *Washington v. Recuenco, supra*, 548 U.S. 212, which found no distinction between an element of a crime and a sentencing factor, this Court concluded that such an error is subject to federal harmless error analysis. (*People v. Sandoval, supra*, 41 Cal.4th at p. 838.) The Court held that where this type of error is concerned, the typical standard of review for harmless error – whether the error contributed to the verdict obtained – does not apply because a jury's verdict on the charged offense is not at issue. Rather, the Court reasoned, "we 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." (*Ibid.*) The Court then analyzed the separate aggravating factors found true by the trial court, and determined that the error in denying a jury trial was not harmless beyond a reasonable doubt. (*Id.* at

p. 843.)

At this point, the inapplicability of *Sandoval* and *Neder* to appellant's case is clear. 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– an element in *Neder*, and a sentencing aggravator in *Sandoval* – 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. The issue is not who made the valid findings to which harmless error review may be applied; nor is it whether a judge who makes valid findings is fair. The issue is who must that factfinder be. Harmless error review looks "to the basis on which 'the jury actually rested its verdict.'" (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 404.) In *Neder* and *Sandoval*, that factfinder was a jury, as is required by the right to trial by jury; in appellant's case it was a judge.

This Court in *Sandoval* continued: "[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." (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 839, emphasis added.) Similarly, in *People v. Myles* (2012) 53 Cal.4th 1181, 1220-1222, this Court concluded that *Sandoval* asks whether the jury's verdict would have authorized the upper term had the question of the existence of an aggravating circumstance had been submitted to the jury.

Sandoval and *Myles* assessed the effect of the error in light of "the jury's" findings. In appellant's case there was no jury and no jury findings upon which a reviewing court could apply harmless error review. What *Neder* and *Sandoval* share in common is that the defendants in each case had a jury trial, jury verdicts were rendered, and a record was produced that could be examined for purposes of harmless error review. On the other hand, in appellant's case, the trial court's error resulted in the complete absence of a jury; all findings were made by a judge, not by a jury. Thus, there are no jury findings upon which this Court could apply harmless error review.

Accordingly, neither *Neder* nor *Sandoval* provides the answer to this Court's question: whether the invalid waiver of appellant's right to a jury determination of the special circumstance allegation compels automatic reversal of the special circumstance finding. To answer that question, appellant turns to whether the nature of the error compels automatic reversal of the special circumstance finding.

C. The Invalid Jury Waiver for a Special Circumstance Is Structural Error

Most constitutional errors are subject to harmless error review, even when important constitutional protections are at issue. (*People v. Aranda* (2012) 55 Cal.4th 342, 366.) There is no single test for determining whether an error is structural (requiring reversal per se) versus trial error (subject to harmless error review). To make this determination, courts "must look not only at the right violated, but also at the particular nature, context, and significance of the violation." (*United States v. Gonzalez* (2d Cir. 1997) 110 F.3d 936, 946, internal quotations marks omitted.)

An error is structural if it contains a defect in the framework within which the trial proceeds, has a pervasive effect, or defies harmless error analysis. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149, fn. 4 ["we rest our conclusion of structural error upon the difficulty of assessing the effect of the error"]; *People v. Aranda, supra*, 55 Cal.4th at pp. 363-365.) An error is also structural where its effect cannot be "quantitatively assessed" in the context of the entire record. (*People v. Mil, supra*, 53 Cal.4th at pp. 413-414; see also *Brecht v. Abrahamson* (1993) 507 U.S. 619, 629.) Certain errors are structural, "not because they defy harmless error analysis, but because prejudice is irrelevant and reversal deemed essential to vindicate the particular constitutional right at issue." (*In re James F.* (2008) 42 Cal.4th 901, 917, citing *United States v. Gonzalez-Lopez, supra*, 548 U.S. at p. 149, fn. 4; cf. *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8 [harmless error analysis inapplicable to deprivation of right to self-representation because exercising right increases chance of guilty verdict].) And an error may be structural if it categorically vitiates all of a jury's findings. In such a case, a reviewing court can only engage in pure speculation regarding its view of what a reasonable jury would have done. And when it does that, "the wrong entity" finds a defendant guilty. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 281.) By contrast, trial error is typically an error that occurs "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented." (*Arizona v. Fulminate, supra*, 499 U.S. at pp. 307-308.)

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. As such, there was a defect in the framework in which a trial normally proceeds. The right to trial by jury is no mere trial right; it is a "structural guarantee." (*Carella v. California* (1989) 491 U.S. 263, 268 (conc. opn. of Scalia, J.).) It is part and parcel of the "framework" in which a trial proceeds, not a "mere procedural formality, but a

fundamental reservation of power in our constitutional structure." (*Blakely v. Washington* (2004) 542 U.S. 296, 306.)

The error also defies harmless error analysis as its effect cannot be quantitatively assessed in light of the entire record. Any doubt on this point must evanescence in light of *Sullivan v. Louisiana, supra*, 508 U.S. 275, where the high court unanimously held that a constitutionally deficient reasonable doubt instruction violated the right to trial by jury and required reversal per se. The Court first opined what should be evident to all: the most important element of the right to trial by jury is "to have the jury, rather than the judge, reach the requisite finding of guilty." (*Id.* at p. 277.) The high court then turned to the issue of whether such an error was subject to harmless error review, and found the answer in *Chapman v. California* (1967) 386 U.S. 18.

Consistent with the jury trial guarantee, the question *Chapman* instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.) In other words, harmless error review looks "to the basis on which 'the jury actually rested its verdict.'" (*Ibid*, quoting *Yates v. Evatt, supra*, 500 U.S. at p. 404.) Where, as here, there is no jury verdict due to the invalid jury waiver, it is not possible for a reviewing court to conduct harmless error review. The high court in *Sullivan* opined:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to 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. [Citations.] Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. . . . There is no object, so to speak, upon which harmless-error scrutiny can operate.

(*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 279-280.) An attempt to apply harmless error review to the denial of the right to trial by jury is doomed to failure because:

> The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt-not that the

> jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

(*Id.* at p. 280, citations omitted.)

Not content to rest its conclusion solely on the inapplicability of harmless error review, *Sullivan* also utilized a separate "mode of analysis" – the distinction between structural and trial error identified in Fulminante. The high court held that the denial of a jury verdict "is certainly an error of the former sort, the jury guarantee being a basic protectio[n] whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. . . . The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282, internal citations and quotation marks omitted, brackets in original.)

The same result was reached in *United States v. Gonzalez-Lopez*, *supra*, 548 U.S. 140, where the defendant was erroneously deprived of counsel of choice in violation of the Sixth Amendment. In listing examples of structural defects, the Court included "the denial of the right to trial by jury" by virtue of a defective reasonable doubt instruction. (*Id.* at p. 149, citing *Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) *Gonzales-Lopez* reasoned that the error was structural due to the difficulty of assessing the effect of the error upon the trial in that case: an error with "consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error." (*United States v. Gonzales-Lopez*, *supra*, 548 U.S. at p. 150, internal quotation marks omitted.) Significantly, the high court stressed that harmless error review was nearly impossible when a reviewing court is speculating on what a hypothetical person would have done, and then speculating upon what effect that might have had on the trial. (*Id.* at pp. 150-151.) To apply harmless error analysis to appellant's case would require just that: speculation upon what a hypothetical jury would have done in the trial. The difficulty of assessing the effect of the error upon the trial in appellant's case is insurmountable.

In *People v. Collins*, *supra*, 26 Cal.4th 297, this Court clearly held that "[u]nder the federal Constitution, the right to trial by jury is recognized as fundamental, and its denial is 'structural error,' compelling reversal of a judgment of conviction without the necessity of a determination of prejudice." (*Id.* at p. 311.) The same result obtains under the California Constitution: as the right to jury trial is fundamental and its denial

is considered a "structural defect in the proceedings," the result is a "miscarriage of justice" under the state Constitution. (*Ibid.*)

As discussed above, misinstruction on an element of an offense or a special circumstance does not compel automatic reversal of a special circumstance finding. But a complete denial of the right to trial by jury does require automatic reversal. In addition to the authorities cited above, in *Rose v. Clark, supra*, 478 U.S. 570, the Court noted that if the right to trial by jury is "altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." (*Id.* at p. 578.) As Justice Scalia penned, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." (*Carella v. California, supra*, 491 U.S. at p. 269, internal quotation marks omitted (conc. opn. of Scalia, J.).) Indeed, even less than a complete denial of the jury trial right – as where 11 jurors sit when 12 are required – has been found to be structural error. (*United States v. Curbelo, supra*, 343 F.3d at pp. 281-282.)

In appellant's case, the error, a denial of the right to trial by jury, does not fit within the definition of "trial error." It did not occur during the presentation of evidence and is a defect in the structural framework of a criminal trial. It produced consequences that are unquantifiable and indeterminate. It defies harmless error analysis because *Chapman* requires a conclusion that the guilty verdict actually rendered in this trial was surely unattributable to the error; that cannot be said where the special circumstance determination by the judge was directly attributable to the error. It had the same effect as the error in Sullivan: categorically vitiating any potential findings by a jury. Harmless error review in such cases can only apply only when a jury has actually performed its function under the Fifth, Sixth, and Eighth Amendments. Thus, the answer to this Court's question can be arrived at through several analytical routes, but it is always the same: a failure to obtain a valid waiver of a capital defendant's right to a jury determination of the sole special circumstance allegation compels automatic reversal of the special circumstance finding.

It should make no difference were this Court to find that the putative jury waiver was valid for the guilt determination. The right to trial by jury applies to the guilt, special circumstance, and penalty phases of a capital trial. Guilt may be spelt out in the record. But the special circumstance allegation must be determined by a jury according to the procedure and standards appropriate for criminal trials. As noted, "to 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 p. 279.)

The Fourth Circuit, in *United States v. Curbelo*, *supra*, 343 F.3d 273, where the error involved the seating of 11 jurors instead of the required 12, did not mince words:

> To be sure, we could review the trial transcript, weigh the relative credibility of witnesses ourselves, and make an independent assessment of Curbelo's guilt. However, the Supreme Court has repeatedly instructed that such determinations are exclusively reserved in our system of justice for the jury, and are not to be undertaken by an appellate court.

(*Id.* at p. 281.) Application of harmless error review in this case would be an attempt to remedy the error of judge-made findings by providing appellate court findings as to the same question. That is to say, the reviewing court would be finding facts in order to correct the constitutional error of a judge finding those same facts. Reversal of the special circumstance finding is required to vindicate the fundamental right to trial by jury.

IV. Even if Automatic Reversal Were Not Required, then Reversal Would Be Required Under the Federal Harmless Error Standard

Under the federal harmless error standard set forth in *Chapman v. California*, *supra*, 386 U.S. at p. 24, federal constitutional error may be harmless where the verdict actually rendered in the trial was surely unattributable to the error. If there is "'a reasonable possibility'" that the error might have contributed to the verdict, reversal is required. (*Ibid.*) Respondent, not appellant bears the burden of proving that the error was harmless, and it must convince this Court beyond a reasonable doubt. In *People v. Mil*, *supra*, 53 Cal.4th 400, this Court noted that "[g]iven 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." (*Id.* at p. 412.)

There is no question that *Apprendi* error is subject to harmless error review. (See *Washington v. Recuenco*, *supra*, 548 U.S. at pp. 218-222.) With respect to *Ring* error, in *Murdaugh v. Ryan* (9th Cir. 2013) 724 F.3d 1104, the Ninth Circuit considered it well-settled that *Ring* error was subject to harmless error review. But this statement was a function of the structure of Arizona's capital sentencing scheme and the procedural implications of federal habeas corpus review of a state court case. (*Id.* at pp. 1114-1118.) *Ryan* did not address whether *Ring* error would be subject to harmless error review where, as in appellant's case, the sole eligibility factor was invalid. *Ryan*

found that, since the decision in *Ring*, the Arizona Supreme Court had addressed 21 cases with *Ring* error; the state court concluded that the error was not structural, based in part on *Neder v. United States*, *supra*, 527 U.S. at p. 8; and, in 19 of these case, the state court found that the error was not harmless and remanded for resentencing. (*Id.* at p. 1114 [listing cases]; see also Marceau, *Arizona's Ring Cycle* (2012) 44 Ariz. St. L. Rev. 1061, 1077-1082 [discussing the Arizona Supreme Court's application of harmless error review to the remanded *Ring* cases].) The Ninth Circuit concluded that the *Ring* error was not harmless even under the less-exacting federal harmless error standard of review set forth in *Brecht v. Abrahamson*, *supra*, 507 U.S. at p. 637. (*Murdaugh v. Ryan*, *supra*, 724 F.3d at pp. 1118-1121.)

In *Mil*, this Court applied harmless error review to instructional error on a special circumstance and noted: "*Neder* instructs us to conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless." (*People v. Mil*, *supra*, 53 Cal.4th at p. 415.) An instructional error may also be harmless when the defendant concedes the element. (*People v. Jennings* (2010) 50 Cal.4th 616, 677-678.)

Here, as argued above, the error was not a partial error such as an instructional error on an element of a special circumstance. 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. Although there may have been sufficient evidence to support the trial court's findings, the evidence did not necessarily compel those findings. In a similar case, *People v. Moreno* (1991) 228 Cal.App.3d 564, 579, disapproved on other grounds in *People v. Wrest* (1992) 3 Cal.4th 1088, 1104-1105, the court of appeal found that denial of the statutory right to jury trial on a felony-murder special circumstance was not harmless because, although the evidence may have been sufficient to uphold the trial court's findings regarding the special circumstance:

> [T]he evidence did not necessarily compel that finding. Different reasonable inferences could be drawn as to whether the burglary and attempted robbery were committed separately from or only as an incident to appellants' primary objective-murder. Each of appellants' trial counsel strenuously argued this theory to the court . . . . Although the court rejected the arguments, we cannot say that a rational jury would

> have necessarily done so. Deprivation of a jury trial on those special circumstance allegations was not harmless beyond a reasonable doubt.

(*People v. Moreno, supra*, 228 Cal.App.3d at p. 1105.)

Where an error results in no valid findings on a count or a special circumstance, reviewing courts applying the *Chapman* standard at times look to whether the required findings are implicit in other, valid findings made by the factfinder. (E.g., *People v. Coffman* (2004) 34 Cal.4th 1, 96; *People v. Lara* (1994) 30 Cal.App.4th 658, 669; cf. *United States v. Booker, supra*, 543 U.S. at p. 231 [*Ring* error might be harmless where "the necessary finding was implicit in the jury's guilty verdict"].) However, even assuming, for sake of argument, that appellant validly waived the right to trial by jury for purposes of the guilt phase, and that the trial court found appellant guilty of first degree felony murder, the totality of required findings for the felony-murder special circumstance are not implicit in the guilt phase findings. Although the elements of felony murder and the felony-murder special circumstance may coincide in a given case (see *People v. Castaneda* (2011) 51 Cal.4th 1292, 1328; *People v. Elliot* (2005) 37 Cal.4th 453, 476), they are not identical, particularly where, as here, accomplice liability is at issue. (See *People v. Mil, supra*, 53 Cal.4th at p. 416 [noting factors distinguishing special circumstance felony murder from first degree felony murder]; cf. *People v. Jennings, supra*, 50 Cal.4th at p. 639 [rejecting argument that murder-by-poison special circumstance "merely repeats" the definition of first degree murder by poison].)

Appellant and codefendant Mounsaveng sharply disputed who was the actual shooter. The trial court's finding that appellant was the shooter is part and parcel of the felony-murder special-circumstance determination. But that finding was a result of and vitiated by the invalid jury waiver. A jury hearing all of the evidence may have disagreed with the trial court's findings. And a jury would have been instructed that "a nonkiller, under the felony-murder special-circumstance allegations, must (1) have personally had the intent to kill or (2) have been a major participant in the commission of the burglary or robbery and have acted with reckless indifference to human life." (*People v. Mil, supra*, 53 Cal.4th at pp. 408-409; see also *People v. Rountree* (2013) 56 Cal.4th 823, 854; Pen. Code, § 190.2, subd. (d).)[3] As noted, "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and

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[3] Justice Liu's concurring opinion in *In re Coley* (2010) 55 Cal.4th 524, notes that "although *Cabana v. Bullock* (1986) 474 U.S. 376, held that the Sixth Amendment does not require an Enmund finding to be made by a jury, that case preceded *Apprendi* and *Ring*. (*Id.* at p. 566 (conc. opn. of Liu, J.).)

draw the ultimate conclusion of guilt or innocence." (*United States v. Gaudin, supra*, 515 U.S. at pp. 514-515.) Nor is the necessary finding implicit in the "personal use" allegations that the trial court found to be true. (*People v. Jones* (2003) 30 Cal.4th 1084, 1119-1120.)

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. What a non-existent jury would have done is one of the great unknowables. "Only a very foolish lawyer will dare guess the outcome of a jury trial." (J. Frank (1930) *Law and the Modern Mind*, at p. 186.)

Moreover, to pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 877.) In other words, not every murder can be death eligible. (See *Tuilaepa v. California, supra*, 512 U.S. at p. 972.) In California, a defendant convicted of first degree felony murder is not eligible for death. It is only when the felony-murder special circumstance (or other special circumstance) allegation is found to be true that a defendant becomes death eligible. If first degree felony murder had the same elements as the felony-murder special circumstances, then the narrowing required by the federal Constitution would not occur.

Finally, this case must be distinguished from cases where one special circumstance finding is found to be invalid, but other special circumstances exist. (E.g., *People v. Hajek* (2014) 58 Cal.4th 1144, 1186-1187.) So long as one eligibility factor exists, this Court has found the erroneous special circumstance finding to be harmless. Here, however, there was only one special circumstance. As the invalid jury waiver vitiated that sole eligibility factor, reversal is required. (*People v. Marshall* (1997) 15 Cal.4th 1, 44.)

V. Conclusion

The importance accorded to the right to trial by jury, including the recognition of its centrality to the entire framework of our criminal justice system, particularly in capital cases, is universally accepted. As Justice Scalia observed in his concurring opinion in *Ring*:

> [O]ur people's traditional belief in the right of trial by jury is in perilous

> decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because a judge found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 612 (conc. opn. of Scalia, J.).) The trial court's failure to obtain appellant's separate waiver of his right to a jury determination of the sole special circumstance allegation compels automatic reversal of the special circumstance finding.

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 SUPPLEMENTAL LETTER BRIEF

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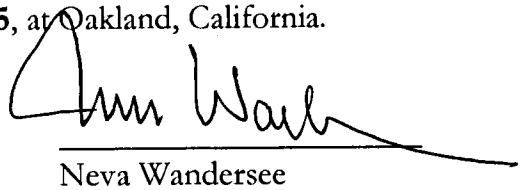
I declare under penalty of perjury that the foregoing is true and correct.

Signed on **March 11, 2015**, at Oakland, California.



Neva Wandersee