No. 04-980

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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CAPITAL CASE
QUESTIONS PRESENTED

1. Is the California death penalty statute a "weighing statute," meaning the state court is required to determine that the presence of an invalid special circumstance, as part of one factor in the sentencing phase, was harmless beyond a reasonable doubt as to the jury's determination of the penalty?

2. If the first question is answered affirmatively, was it necessary for the state Supreme Court to specifically use the terms "harmless error" or "reasonable doubt" in determining that there was no "reasonable possibility" that the invalid special circumstance affected the jury's sentence selection?

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Statutes

TABLE OF AUTHORITIES (continued)

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OPINION OR JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) is reported as *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir. 2004). (Joint Appendix, hereinafter JA, 3-31.) The opinion of the California Supreme Court affirming Sanders' death sentence is reported as *People v. Sanders*, 51 Cal.3d 471 (1990). (JA 32-135.)

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on July 8, 2004. A petition for rehearing and rehearing en banc was denied on October 13, 2004. The state's petition for writ of certiorari was filed on January 11, 2005, and granted on March 28, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

California's capital sentencing scheme is set out, in relevant part, in California Penal Code sections 190.2 and 190.3, reprinted in the Joint Appendix at pages 136-142.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any state deprive any person or life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

A. California's Capital Sentencing Scheme

In California, a defendant is eligible for the death penalty when the jury finds him guilty of first-degree murder and finds one of the special circumstances listed in California Penal Code section 190.2 to be true.[1/] Following that determination, a defendant's case proceeds to a separate penalty phase where the trier of fact determines whether to impose death or life imprisonment without the possibility of parole.

The jury *must* consider all the evidence presented at the various phases of the trial.[2/] The jury makes the sentencing determination by "tak[ing] into account . . . if relevant" any of eleven factors contained in a "single list" of "open ended factors" set forth in California Penal Code section 190.3. *Tuilaepa*, 512 U.S. at 978-979.[3/] This unitary list of factors in

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1. In California, a "special circumstance" is the equivalent of an "aggravating circumstance," the label this Court uses for the factors which perform the necessary function of narrowing the classification of murderers eligible for the death penalty which "of necessity require an answer to a question with a factual nexus to the crime or the defendant. . . ." *Tuilaepa v. California,* 512 U.S. 967, 972-973 (1994).

2. California Penal Code section 190.4, subdivision (d), provides in pertinent part as follows: "In any case in which the defendant may be subject to the death penalty evidence presented at any prior phase of the trial . . . shall be considered at any subsequent phase of the trial. . ."

3. For sake of clarity, we refer to those eleven factors as "sentencing factors," not to be confused with the special circumstances listed

section 190.3 is different from the list of special circumstances in section 190.2. *Id.*, at 975.

These eleven sentencing factors include all manner of things concerning the circumstances of the crime, the defendant's mental state and background, his violent crimes, his prior felonies, his age, his relative culpability, "and any other circumstance extenuating the gravity of the crime." The list directs the sentencer's attention to factors relevant to the defendant's "moral culpability." *People v. Bacigalupo,* 6 Cal.4th 457, 469, 475, 477 (1993) (*Bacigalupo II*).

These factors "properly require the jury to concentrate upon the circumstances surrounding both the offense and the offender, rather than upon extraneous factors having no rational bearing on the appropriateness of the penalty." *People v. Jackson*, 28 Cal.3d 264, 316 (1980). "The statutory list of relevant factors . . . 'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty' . . . 'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate." *Pulley v. Harris*, 465 U.S. 37, 53 (1984), quoting *Harris v. Pulley*, 692 F.2d 1189, 1194-1195 (9th Cir. 1982). These factors are not propositions; they merely point the jury to particular subject matters. *Tuilaepa*, 512 U.S. at 975. The list guides the jury "regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 193 (1976).

The special circumstances are subsumed within a jury's overall consideration of the "circumstances of the crime." The first of the eleven factors listed in section 190.3, "factor (a)," includes "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." Apart from that reference in conjunction with the general circumstances of the crime, special circumstances have no role

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in section 190.2.

at all in sentence selection in California. The prosecution is only precluded from introducing, as aggravation, evidence of an offender's non-violent conduct that did not result in "non-violent misdemeanors," unadjudicated non-violent felonies, and other "trivial incidents of misconduct and ill-temper." *People v. Boyd,* 38 Cal.3d 762, 774 (1985). This limitation, of course, has no relation to evidence underlying the special circumstances.

Section 190.3 mandates that "the trier of fact shall consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." Otherwise, the sentencer must impose a sentence of life without the possibility of parole. The California Supreme Court has described this process as follows:

> The weighing of aggravating against mitigating circumstances is a mental balancing process, but not one that involves a mechanical counting of factors on either side of some imaginary scale, or the arbitrary assignment of weights to any factor. Rather, . . . a juror faced with making the requisite individualized determination whether a defendant should be sentenced to life without parole or to death is entirely free to assign whatever moral or sympathetic value that juror deems appropriate to each and all of the relevant factors. Moreover, in directing "that the jury 'shall' impose the death penalty if it finds that aggravating factors 'outweigh' mitigating," California's 1978 death penalty law does not require any juror to vote for the death penalty unless . . . that juror is convinced that death is the appropriate penalty under all the circumstances.

Bacigalupo II, 6 Cal.4th at 470 (some internal quotation marks and citations omitted).

When a California jury imposes a sentence of death, it does

not specify any sentencing factors upon which it may have relied. Indeed, California juries do not have to unanimously agree on particular aggravating and mitigating circumstances. They must merely all agree that "death is the appropriate penalty under all the circumstances." *Id.*

B. Factual Background And State Court Proceedings

In 1981, Sanders and a confederate bludgeoned Janice Allen to death and nearly killed Dale Boender in the victims' apartment during a robbery. A few days earlier, Sanders had botched a robbery on the same victims. In 1982, a Kern County, California, jury convicted Sanders of murder, attempted murder, robbery, burglary, and attempted robbery for those 1981 crimes. The jury found Sanders eligible for the death penalty at the guilt phase of the trial by finding four special circumstances true: the murder-during-a-burglary special circumstance; the murder-during-a-robbery special circumstance; the witness killing special circumstance; and the especially heinous, atrocious, and cruel murder special circumstance.

During the penalty phase, the state argued that the jury should choose the death penalty for Sanders because it was the proper penalty. The prosecutor mentioned the special circumstances, but only in passing and only as part of the circumstances of the crime, which he did emphasize along with other aggravating factors unrelated to the special circumstances; the special circumstances themselves played at most a minimal role in sentence selection. (JA 99, 142-147.) The jury set the penalty at death, and the judge later imposed the death sentence.

Sanders' conviction and sentence were affirmed on his automatic appeal in *Sanders*, 51 Cal.3d 471. (JA 112.). The California Supreme Court found the burglary-murder and especially heinous-atrocious-cruel special circumstances invalid. The burglary-murder special circumstance was declared invalid because the trial court's instructions impermissibly permitted the jury to find the special circumstance true based on Sanders' intent to commit an assault

when he entered the apartment.[4] The cruel, heinous atrocious special circumstance had previously been found invalid under California constitutional law.

The state high the court relied on this Court's decision in *Zant v. Stephens*, 462 U.S. 862 (1983), and on its own state law "reasonable possibility" error test, which it has ruled is the same as "beyond a reasonable doubt," to find the errors harmless as to the penalty phase. The court quoted the record and illustrated how the prosecutor had stressed the overall circumstances of the crime rather than dwelling on the particular special circumstances found true by the jury. The court held that the jury's consideration of those two invalid special circumstances, as one part of the aggravating and mitigating factors in sentence selection at the penalty phase, was "benign" and that there was "little chance" Sanders was prejudiced by it. (JA 98-100.)[5] This case became final on May 28, 1991, when this Court denied certiorari on direct appeal. *Sanders v. California,* 500 U.S. 948 (1991).

C. Federal Court Proceedings

Sanders filed an amended petition for a writ of habeas corpus in the United States District Court for the Eastern District of California on December 20, 1993.[6] The District Court denied his petition on August 24, 2001. (JA 8.) The Ninth Circuit reversed and remanded the case to the District

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4. The underlying burglary conviction was not affected.

5. In its decision, the California Supreme Court relied specifically on its prior cases of *People v. Allen*, 42 Cal.3d 1222 (1986) and *People v. Silva*, 45 Cal.3d 604 (1988), in which the court had cited its "reasonable possibility" rule in assessing the impact of invalid special circumstances on sentence selection in those capital cases.

6. Because Sanders' petition for writ of habeas corpus was filed in 1993, prior to the effective date of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in 1996, AEDPA considerations do not apply to this case.

Court with instructions to grant the writ as to the penalty unless the state granted a new penalty trial or imposed a penalty less than death. (JA 30.)

The Ninth Circuit held that California is a "weighing" state for purposes of evaluating the effect of an invalid aggravating factor on the penalty selection, and analyzed the effect of the invalid special circumstances under this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738, 745, 752 (1990). Under *Clemons,* the invalidity of an aggravating factor violates the Constitution unless a state appellate court independently reweighs the aggravating and mitigating factors or finds the error to have been harmless beyond a reasonable doubt. The Ninth Circuit reasoned that "a state death penalty regime [is] a weighing system when the sentencer [is] restricted to a weighing of aggravation against mitigation, and the sentencer [is] prevented from considering evidence in aggravation other than discrete, statutorily-defined factors." (JA 13 (internal quotation marks and citation omitted).) The court found that both elements are present in California's sentencing system. The court acknowledged "that California's system has features that are not present in all weighing states" and that the nature of the system "makes it difficult for an appellate court that later reviews the jury's sentencing system to surmise what weight the jury gave to a particular factor." (JA 14-15). The court nonetheless ruled that "California still qualifies as a weighing state, because the jury's sentencing discretion is not boundless"—the jury "must consider the defined list of aggravating factors and may not consider other aggravating factors in making its penalty determination." (JA 13, 15-16, citing *Boyd*, 38 Cal.3d at 773.)

The Ninth Circuit next held that the California Supreme Court neither independently reweighed the aggravating and mitigating factors nor engaged in a proper harmless-error analysis. As to the latter holding, the court stated that, "[a]lthough the California court did apparently conduct some type of harmless-error analysis, it did not find, as it was required

to do, that the error was harmless beyond a reasonable doubt." (JA 17 (internal quotation marks and citations omitted).) The court based this conclusion on the California Supreme Court's failure to use the words "harmless error" or "reasonable doubt" and on the California Supreme Court's "erroneous" application of the rule for "non-weighing" states.[7] (JA 17-18.) Finally, the Ninth Circuit ruled that the error was substantial and injurious under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

SUMMARY OF ARGUMENT

California is not a "weighing" state. Therefore, the California Supreme Court was not required to determine whether the jury's consideration of the "existence" of an invalid special circumstance was harmless beyond a reasonable doubt as to penalty or to reweigh the remaining sentencing factors. Furthermore, even if California was a "weighing" state, the California Supreme Court's harmless error analysis under state law met Eighth Amendment requirements for curing any error.

In a "weighing" state, the sentencer uses the same aggravating factors to determine eligibility for a death sentence and to select a death sentence. Since these factors are eligibility factors, they are ordinarily propositions with a factual nexus to the crime or the defendant. They do not embrace the circumstances of the case as a whole. The sentencer can only compare those specific aggravating factors with separate mitigating factors to choose the appropriate penalty. No other aggravating evidence may be introduced. On the other hand, in a "non-weighing" state, the sentencer's consideration of aggravating circumstances is not limited to a distinct list of discrete factors and includes all the circumstances of the crime.

California is a "non-weighing" state because sentencers do not use the same list of factors for both determining eligibility

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7. The Ninth Circuit did not address the California Supreme Court's reliance on *Allen* and *Silva* or even mention the "reasonable possibility" test.

and aggravation of sentence. Instead, a California jury first determines eligibility from a list of "special circumstances." If a special circumstance is found true, a separate penalty phase is conducted. The jury considers a single list of factors that guide its discretion in considering the circumstances of the offense and the offender. The first factor directs the jury to the circumstances of the crime, including the "existence of any special circumstances." Other factors also direct the sentencer's attention to circumstances of the crime that bear on the culpability of the offender and the seriousness of the crime. With only the minor exclusion of petty misconduct, the prosecution is permitted to introduce aggravating evidence from the defendant's background, including other violent crimes and prior felony convictions.

Unlike a "weighing" statute, California's law permits full consideration of all relevant information about the circumstances of the offense and the offender. Unlike a "weighing" state, aggravation is not parsed into discrete factors.

When an aggravating factor is found invalid in a "weighing" state, then the sentencer has considered a specific factor about the case that should never have informed its decision about the penalty. Since no other aggravation can be presented, these aggravating factors are central to the penalty selection. It is necessary to find that the impact of that invalid aggravator on the penalty decision was harmless beyond a reasonable doubt or to reweigh the remaining aggravation and mitigation.

Under California law, the invalidity of a special circumstance does not preclude a jury from considering the underlying facts of that special circumstance as part of its total consideration of the circumstances of the crime as a whole. Nor does its invalidity actually affect the relative weight the jury gives to those circumstances in determining the appropriate penalty. As long as the evidence is admissible to determine penalty and does not involve any constitutionally protected conduct, there is no error. It is not constitutionally significant

that this evidence may be improperly labeled as a "special circumstance." The concerns and protections necessary to correct the improper impact of invalid aggravating factors in "weighing" states are not implicated in the California capital sentencing scheme as long as the California Supreme Court determines the invalid special circumstance would not have made a difference in the sentence.

Furthermore, even if California is treated as a "weighing" state, the penalty in this case should be affirmed. This is because the California Supreme Court, in its opinion evaluating the impact of the invalid special circumstances on Sanders' sentence, relied on its own state law "reasonable possibility" standard, which is, by California Supreme Court definition, the same as the "beyond a reasonable doubt" standard. Thus, when the California Supreme Court explained why the impact of the invalid special circumstances was "benign," citing that state law error standard, it necessarily determined the error was harmless beyond a reasonable doubt.

Accordingly, the Ninth Circuit was wrong when it held that it could not be determined what standard California had relied on assessing the impact of the error of the jury considering the invalid special circumstances. Should California be treated as a "weighing" state, it has already performed the applicable review in this case, and the penalty should therefore be affirmed.

ARGUMENT

I.

THE CALIFORNIA DEATH PENALTY STATUTE IS NOT A "WEIGHING" STATUTE FOR PURPOSES OF ASSESSING THE IMPACT OF AN INVALID SPECIAL CIRCUMSTANCE ON THE SENTENCE SELECTION PROCESS IN THE PENALTY PHASE

A valid death penalty statute must have two characteristics. First, to avoid random and capricious application and to ensure

a measured, consistent imposition of penalty, a valid statute must include rational criteria to genuinely narrow the group of offenders to whom the penalty may be applied so that a capital murder may be properly distinguished from other murders. This occurs in the process of determining whether an offender is eligible to receive the death penalty. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). This narrowing or eligibility function can be performed by the legislature's limiting definition of capital offenses, or by jury findings of aggravating factors from a statutory list at either the guilt or penalty phase of a trial. *Lowenfield*, at 246; *Tuilaepa*, 512 U.S. at 971-973.

Once the eligibility decision has been made, the second necessary characteristic comes into play. To ensure that the penalty is imposed in an appropriate, fair, and unbiased way, the selection decision must allow for "individualized sentencing and must be expansive enough to accommodate all relevant mitigating evidence so as to assure an assessment of the defendant's [personal] culpability." *Tuilaepa*, 512 U.S. at 973. The selection decision is made at the penalty trial.

With the eligibility decision, the jury's sentencing discretion is suitably narrowed, while with the selection decision, after the eligibility threshold is crossed, the jury's sentencing discretion is broadened to take into account the "character of the individual and the circumstances of the crime." *Jones v. United States*, 527 U.S. 373, 381 (1999); *Zant v. Stephens*, 462 U.S. at 879.

In the eligibility decision, the jury is usually asked to answer a specific question or make a specific factual finding about the crimes at issue to determine if the offender qualifies for imposition of capital punishment. *Tuilaepa*, 512 U.S. at 973. In contrast, in the selection decision, after the offender has been determined to fall into the narrowed class of eligible offenders, the jury, in a broad inquiry, "is free to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. 992, 1008 (1983); *Jones*, 527 U.S. at 381.

This Court has noted that a variety of capital sentencing schemes could meet these constitutional requirements, and that states are free to formulate their own statutes within these parameters. *Spaziano v. Florida*, 468 U.S. 447, 464 (1984); *Gregg v. Georgia*, 428 U.S. at 195. "[T]here can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" *Zant*, 462 U.S. at 884, quoting *Lockett v. Ohio*, 438 U.S. 586, 695 (1978). Each capital system must be examined and evaluated on an individual basis. *Gregg*, 428 U.S. at 195.

A. To Determine The Impact Of Invalid Aggravating Factors On The Selection Of Sentence, This Court Has Distinguished Capital Sentencing Statutes Based On Whether Such Statutes Are Considered "Weighing" Or "Non-weighing"

1. Unlike "Weighing" States, "Non-Weighing" States Do Not Limit Sentence Selection To The List Of Statutory Aggravating Factors Which Are Also Used For The Eligibility Determination

In examining the federal and the various state capital punishment statutes which have come before it, this Court differentiates between those statutes in which the sentencer "weighs" specified aggravating factors in the selection decision and those statutes where no such weighing is prescribed.

In "weighing" states, the sentencer first finds a defendant eligible for the death penalty by finding true specified statutory aggravating factors. The sentencer is limited to those same aggravating factors in selecting penalty. In a "non-weighing" state, the sentencer is not limited to the specified aggravating factors found true during the eligibility phase. The "primary feature that distinguishes non-weighing systems from weighing systems" is that "statutory aggravating factors play no role in the sentencing process above the role of all other evidence. . ." *Williams v. Cain*, 125 F.3d 269, 283-284 (5th Cir. 1997);

People v. Shaw, 713 N.E.2d 1161, 1182 (Ill. 1998) (during penalty phase in "weighing" state, jury considers only the statutory aggravating factors introduced in the eligibility phase); *Flamer v. State of Delaware*, 68 F.3d 736, 748-749 (3rd Cir. 1995) (jury still considers underlying facts of invalid aggravator).

Georgia is the quintessential "non-weighing" state. In Georgia, an offender's guilt of a crime is determined at the guilt phase of a bifurcated trial. *Gregg*, 428 U.S. at 163. At a separate penalty phase, both the eligibility and selection decisions occur. Before an offender is eligible for a capital penalty, the jury must find true at least one of 10 statutorily listed "aggravating" factors, which must be found true beyond a reasonable doubt and specified in the jury's verdict; this meets the constitutional narrowing requirement. *Gregg*, at 164-165. To arrive at the selection decision, the jury is directed to"consider" any lawful aggravating and mitigating circumstances, including that statutory narrowing aggravator. *Gregg*, at 164-165; GA. Code Ann., §§ 17-10-30 and 17-10-31.

Florida and Mississippi are the most frequently cited "weighing" states.

In Florida, an offender must be found guilty of a capital crime at the guilt phase of a bifurcated trial, while the eligibility and selection decisions occur in two later trial phases. *Sochor v. Florida*, 504 U.S. 527, 529 (1992); Fla. Stat. § 921.141. A jury performs an advisory function to the judge. *Sochor*, at 529. To choose death, the judge must specify at least one aggravating circumstance from the statutory list of eligibility factors, and must specifically find that those aggravating circumstances outweigh any mitigating circumstances. *Sochor*, at 529. Although the federal constitution does not require it, these aggravating factors are "exclusive" and no other aggravating evidence may be considered. *Barclay v. Florida*, 463 U.S. 939, 950, 966-967 (1983); *Williams*, 125 F.3d at 268.

In Mississippi, a jury finds an offender guilty of a capital murder in the guilt phase of a bifurcated trial. The eligibility

and selection functions occur at the second phase of the trial, where, to impose a punishment of death, the jury must make unanimous written findings that: there are aggravating circumstances, selected from amongst a statutorily-enumerated list; and such aggravating circumstances are not outweighed by any mitigating circumstances which may have been found based on a statutorily-enumerated list. *Stringer v. Black*, 503 U.S. 222, 225 (1992); Miss. Code Ann., § 99-19-901. The eligibility and selection decisions are both made during the penalty phase of a Mississippi trial. As in Florida, the only aggravation to be considered is the same aggravating circumstance which makes the offender eligible for capital punishment. *Stringer v. Jackson,* 862 F.2d 1108, 1114 (5th Cir. 1998) rev'd *sub nom* on another point in *Stringer v. Black*, 503 U.S. at 237.

The difference between the capital sentencing systems in Georgia and those in Florida and Mississippi has been the basis for this Court's two different methods of evaluating the impact of an invalid aggravating factor in each state's system. The primary difference is the focus of "weighing" states on statutory aggravating factors for sentence selection. *Williams*, 125 F.3d at 283.

In "non-weighing" Georgia, the aggravating circumstances have no "role in guiding the sentencing body in the exercise of its discretion" because there is no "special weight" to the presence of more than one aggravating circumstance in determining penalty. Thus, the effect of an invalid aggravating circumstance is less constitutionally significant than in so-called "weighing" systems. *Zant*, 462 U.S. at 874, 879, 891.

In "non-weighing" systems, if there are other, valid aggravating circumstances, in addition to the one found invalid, the invalid aggravating factor will not nullify the penalty as long as (1) the reason the circumstance was invalid does not implicate due process, and (2) the evidence underlying the invalid circumstance was "nevertheless fully admissible." *Zant*, at 885-886. The invalid factor does not unduly affect the selection process or make the penalty selection arbitrary or

capricious. *Tuggle v. Netherland*, 516 U.S. 10 (1995).

In "weighing" states such as Florida and Mississippi, on the other hand, an invalid aggravating circumstance can "skew" the weighing process so a different approach is necessary. *Jones v. United States*, 527 U.S. 373, 398 (1999). If an aggravating factor is vague, then its application will vary from case to case. This introduces an unacceptable possibility of randomness between defendants and cases in the selection of sentence. *Flamer*, 68 F.3d at 749. Furthermore, if the factor is invalid, then the sentencer is considering an "illusory" circumstance because the jury should not be considering this factor or its underlying evidence at all. *Stringer*, 503 U.S. at 235.

The statutory aggravating circumstance in a "weighing" state has a key role in sentence selection because it is the only factor militating in favor of the more severe penalty. When a jury has weighed an invalid aggravating circumstance, the state appellate court can only cure the error and uphold imposition of the death penalty by either reweighing the aggravating and mitigating evidence absent the invalid aggravating circumstance, or by engaging in constitutional harmless error review. *Clemons*, 494 U.S. at 741 and 754. Whether the sentence is to be vacated depends on the function of the aggravating circumstances and the reason why the aggravating circumstance was invalidated. *Barclay v. Florida*, 463 U.S. 939, 951 (1983); *Zant,* 462 U.S. at 864.

In sum, the "weighing" state rule should apply only to states where the aggravation to be weighed is restricted to those factors used to establish eligibility. Moreover, in this case, the Ninth Circuit erroneously characterized California as a "weighing" state, and thereby improperly reversed the death penalty imposed by a California jury.

2. Unlike "Weighing" States, California Does Not Limit The Sentencer To The Eligibility Factors As The Sole Aggravating Factors In Sentencing Selection And Otherwise Minimizes The Significance Of Particular Special Circumstances In The Penalty Phase

As noted above, for any state's capital sentencing statute to meet the Eighth Amendment goal of clear and objective standards, there must be at least one eligibility factor found true which genuinely narrows the class of murderers to whom the death penalty applies. *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Lowenfield*, 484 U.S. at 244, 246.

In most "weighing" states, the statutory aggravating factor, found true at the sentencing hearing, is that required eligibility factor. However, in most "weighing" states, that same statutory factor additionally operates as the exclusive factor in aggravation for the sentence selection. Thus, for example, in the "weighing" states of Florida and Mississippi, the applicable statutory aggravating factor functions as eligibility factor, and also as the sole aggravation to be weighed against any mitigating factors found at the sentencing. *Sochor*, 504 U.S. at 529-530; *Stringer*, 503 U.S. at 229.

The rationale underlying *Stringer* and *Clemons* properly applies in those states because if an aggravating factor is invalid, then the jury's sentence selection may well have been influenced or altered by this improper factor.

In sharp contrast, in California, the special circumstance(s) found true by the jury at the guilt phase are aggravating factors at sentencing,[8/] but they are only one of many sentencing factors

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8. As argued above, the inclusion of the phrase "special circumstances" in the sentencing factor (a) in California Penal Code section 190.3 does not mean that special circumstances are independent sentencing factors. Special circumstances are merely subsumed into the circumstances-of-the-crime umbrella set out in factor (a).

for the jury to consider. With the exception of that one subordinate clause reference to special circumstances in factor (a), none of the sentencing factors in California Penal Code section 190.3 is the same as the special circumstances in California Penal Code section 190.2. Under California law, the special circumstances found true are "simply part of the mix of aggravating and mitigating evidence that the jury [can] consider as a whole in determining" penalty. See *Williams*, 125 F.3d at 283. Accordingly, when the "especially heinous, atrocious, and cruel" and burglary-murder special circumstances were declared invalid in this case, no "thumb had been removed from death's side of the scale" because the jury could still consider the evidence underlying those factors. *Stringer*, 503 U.S. at 232; *Williams*, 125 F.3d at 284; *Coleman v. Ryan*, 196 F.3d at 798 (7th Cir. 1999) (jury properly considered the way the victim was killed even if the manner of death could not come before the jury as a statutory aggravating factor); *Hampton v. Page*, 103 F.3d 1338, 1343-1345 (7th Cir. 1997) (sentencer still free to consider burglary even if it was not sufficient as an aggravating factor).

None of the sentencing factors listed in California Penal Code section 190.3 are delineated as either aggravating or mitigating, leaving it up to the jury to determine if each factor is present and whether it tends to aggravate or mitigate the sentence. Cal. Pen. Code, § 190.3; JA 140-141; *People v. Anderson*, 25 Cal.4th 543, 601 (2001). This contrasts with other states where the sentencing factors are labeled, and it matters because the impact on sentencing of an invalid aggravating factor is lessened if it is not so labeled.

Furthermore, California's sentencing factors are not propositional, i.e., they do not require a specific answer, nor can many be answered in a yes or no manner. This matters because propositional factors are more susceptible to improper conclusions or weighing than factors which merely direct the jurors' attention to a category of circumstances. *Tuilaepa*, 512 U.S. at 974.

The fact that, in California, unlike other states, the eligibility decision occurs at the guilt phase, rather than during the penalty phase, also diminishes any chance the jury would consider an invalid eligibility factor in selecting the penalty. The "inherent tension" which this Court has noted exists between a factor's dual role in eligibility and selection decisions, which can make error more likely when the two decisions are made at the same trial phase and in the same deliberation, is considerably lessened when, as in California, the eligibility and selection decisions do not occur together. *Tuilaepa*, 512 U.S. at 973.

Furthermore, the procedural differences between California's sentence selection procedures and those in other states show that California's penalty trials are dispositively less susceptible to the capital sentencing error which occurs in "weighing" states.

There is no "special weight" whatsoever on the special circumstances in determining penalty. *Zant*, 462 U.S. at 873, 891. The particular special circumstances found to be true as eligibility factors are not mentioned in the statute or the jury instructions. Factor (a) encompasses much more than just the special circumstances; its gist is to point out that the jury should consider the facts of the crimes at issue. The special circumstances' effect on sentence selection, if any, is therefore entirely diluted as compared to the "weighing" states, where the aggravating factor used for eligibility and selection purposes is the only aggravation. It would be simply inaccurate to isolate the special circumstances, in the sentencing context, and elevate them to a pivotal role in sentencing selection. The generalized reference to the "existence of special circumstances" in factor (a) is consistent with other listed factors which also guide the jury's consideration of the circumstances of the crime as a whole.

California's system is like Georgia's because the special circumstance is but one of many factors, and it has no special role in sentencing. Unlike "weighing" states, where aggravating

factors are strictly limited, California and Georgia juries are instructed to consider all the facts and circumstances of the crime.

It is significant that Georgia's statutory language, which has consistently been interpreted as giving the jury unfettered discretion to select a penalty, and consistently characterized as referring the jury to the circumstances of the crime, contains the same phraseology as California's factor (a). The Georgia statute directs the jury to consider, in selecting penalty, "any mitigating circumstances or aggravating circumstances otherwise authorized by law and *any of the following statutory aggravating circumstances which may be supported by the evidence.*" GA. Code Ann., § 17-10-30, subd. (b), emphasis added. The jury in Georgia considers all circumstances from all phases of the trial and "all the facts and circumstances of the case. . ." *Zant*, 462 U.S. at 872. This language, of course, is exactly parallel to the California sentencing factor (a) language directing the jury's attention to "any special circumstances found to be true." Cal. Pen. Code, § 190.3; JA 140.

The language in the California statute should not have the effect of converting California into a "weighing" state. Rather, if it means circumstances of the crime in Georgia, it should mean the same thing in California.

Therefore, it should be insignificant that evidence of the circumstances of the crime is considered by the jury at the penalty phase under the invalid rubric of a special circumstance. "[A]ny possible impact" from that label "could not fairly be regarded as a constitutional defect in the sentencing process." *Zant*, 462 U.S. at 889; *Flamer*, 68 F.3d at 753. Nothing about the California statute or instructions to the jury gives "special circumstances" any "special weight" in the sentence selection. Rather, they are covered by the overarching "circumstances of the crime" and the other factors that highlight relevant considerations about the offense and the offender. If a particular special circumstance is declared invalid, the evidence underlying that special circumstance is saved by the jury's

proper consideration of the "circumstances of the crime."

3. Since California Is A "Non-Weighing" State, Sanders Was Not Prejudiced By The Two Invalid Special Circumstances In His Case

The invalidation of two of the special circumstances in this case did not affect the jury's selection of the death sentence. The prosecution's reliance on the "especially heinous, atrocious, and cruel" special circumstance did not lead to the introduction of any evidence that was not otherwise admissible at the guilt or penalty phases of Sanders' trial. The evidence underlying that special circumstance was properly considered as part of the circumstances of the crime. *Clemons,* 494 U.S. at 754, fn. 5; *People v. Superior Court (Engert)*, 31 Cal.3d 797, 805-806, n.7 (1982). Similarly, the evidence of Sanders' burglary was properly admitted as evidence of the circumstances of his crime even if it was not properly considered as a burglary-murder special circumstance. These were special circumstances "invalidated by the Supreme Court on grounds of vagueness, whose terms plausibly described aspects of the defendant's background that were properly before the jury and whose accuracy was unchallenged." *Zant*, 462 U.S. at 887.

Under the United States Constitution and California law, there is no infirmity in instructing the jury during the selection phase to consider the circumstances of the crime including the existence of special circumstances found true even if some of those special circumstances are invalid. For instance, in this case, nothing in the United States Constitution prohibits a court from instruction a jury to consider the "heinous, atrocious, and cruel" *nature* of the murders and that burglary that Sanders committed in conjunction with the crimes, even if neither of those factors by themselves would make Sanders *eligible* for imposition of the death sentence. *Zant*, 462 U.S. at 888; *Coleman*, 196 F.3d at 799.

B. The Ninth Circuit's Characterization Of California As A "Weighing" State In This Case Was Flawed

In this case, the Ninth Circuit held that California was a "weighing" state because a California death penalty jury is (1) restricted to weighing aggravation and mitigating in selecting the penalty, and (2) since the only aggravation is discrete, statutorily-defined factors, the jury does not have boundless discretion, as is required in a "non-weighing" state. *Sanders*, 373 F.3d at 1060-1061; JA 13-15. This conclusion is simplistic, erroneous, and based on false premises about the California death penalty statute.

1. The California Statute Does Not Limit The Evidence In Aggravation Of Sentence

The factors being weighed as part of the penalty determination are not the same type as those weighed in "weighing" states. The sentencing factors listed in the California statute are not the eligibility, or statutory aggravating, factors at the root of "weighing" states' penalty decisions. Cal. Pen. Code, §§ 190.2 and 190.3; Miss. Code Ann., § 00-19-101. The "weighing" states' aggravating factors are the identical propositional, specific, factual items used to narrow the class of offenders eligible for capital punishment. This contrasts with California's list of sentencing factors describing aspects of the offender and the crime which are recommended to the jury for weighing as part of the jury's decision.

While the sentencing factors are listed in California's sentencing statute, they certainly are not the discrete or finite factors which define a "weighing" state. None of these sentencing factors is labeled either aggravating or mitigating. They are not propositional factors. They are broad and inclusive, especially factor (a), which, like Georgia's sentencing directive, prescribes consideration of the facts and circumstances of the crime. Stated another way, while there is

a statutory list of sentencing factors, it is not a limiting list, but an "open-ended" expansive one, phrased to include virtually everything about the crime and the offender for the jury's consideration and evaluation.

In this case, the Ninth Circuit looked at the California law, but overlooked or disregarded a basic provision of the statute.[9/] The Ninth Circuit held California is a "weighing" state because, since the jury can only consider as aggravation the "defined list of aggravating factors [in Penal Code section 190.3], the jury's discretion is not boundless." *Sanders*, 373 F.3d at 1062; JA 15. In so holding, the Ninth Circuit did not take into account the nature and substance of the list of sentencing factors in Penal Code section 190.3, namely, that the list is not merely aggravating, it is not limited to eligibility factors, and, particularly in factor (a), by directing the jury to the facts and circumstances of the offenses, it is so broad as to confer wide jury discretion to select the appropriate penalty. The Ninth Circuit's false premise in its syllogistic reasoning defeats its conclusion that California is a "weighing" state.

It is true that the prosecution is limited as to the evidence it may introduce in the penalty phase. The California Supreme Court has interpreted the statute as precluding aggravating evidence unless it relates to the circumstances of the crime, the murderer's prior felonies, or the murderer's other violent criminal acts. The only actual boundary to the jury's discretion is that the prosecution cannot introduce, in its case-in-chief at the penalty phase, evidence of the defendant's prior misdemeanors, unadjudicated non-violent felonies and petty or trivial misconduct. This *de minimis* limitation of evidence of

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9. The Ninth Circuit dismissed California's reliance on *Zant* rather than on *Clemons*, suggesting that perhaps the state court was unaware of *Clemons* since it was a relatively recent decision when California decided this case. *Sanders*, 373 F.3d at 1063; JA 16-17. However, this ignores and demeans California's consistent reliance on the *Zant* standard as the proper standard to apply to its law, both before and after *Sanders*. See *Allen*, 42 Cal.3d at 1281; *Bacigalupo II*, 6 Cal.4th at 474.

the murderer's background has nothing to do with special circumstances that are properly considered as part of the circumstances of the offense, and it does not materially distinguish California's law from the wide-open discretion available to juries in "non-weighing" states. *Boyd*, 38 Cal.3d at 774.

In short, California is not a "weighing" state because the nature and substance of its capital penalty selection, along with its state Supreme Court assessment of its statute, significantly distinguish it from "weighing" states.

2. The Term "Outweighs" In The California Law Does Not Mean California Is A "Weighing" State

The mere presence of the word "outweighs" in the California statute does not mean that California is a "weighing" state. *Coleman*, 196 F.3d at 798; *Williams v. Calderon*, 52 F.3d 1465, 1477 (9th Cir. 1995); *Flamer*, 68 F.3d at 749; cf. *Richmond v. Lewis*, 506 U.S. 40 (1992). The California Supreme Court has explained that "the word 'weighing' is a metaphor for a process which by nature is incapable of precise definition." *People v. Brown*, 40 Cal.3d 512, 541 (1985). It is a deliberative, normative process, in which the jury makes a moral assessment, rather than a mechanical finding or counting of facts or circumstances. *People v. Musselwhite*, 17 Cal.4th 1216, 1267 (1998); *Bacigalupo II*, 6 Cal.4th at 468-470, 476.

As the statute makes clear, the jury is to "consider, take into account, and be guided by" the sentencing factors in selecting the appropriate penalty. Cal. Pen. Code, § 190.3. There is little denotive or connotative difference between "weigh," "consider," and "balance." Recourse to a basic dictionary shows this conceptual overlap. Indeed, the California Supreme Court held that this language is "essentially equivalent." *People v. Frierson*, 25 Cal.3d 142, 180 (1979); *see also People v. Jackson*, 28 Cal.3d 264, 315 (1980); *Harris v. Pulley*, 692 F.2d at 1195 overruled on another point in *Pulley v. Harris,* 465 U.S. at 37.

"Weigh" means "to consider and choose carefully," "to balance or ponder in one's mind," or "to consider in order to make a choice." Webster's New World Dictionary, Second College Edition, 1980, p. 1612. "Consider" means "to look at carefully; examine," or "to think about in order to decide; ponder," or "to keep in mind; take into account." *Id.*, at 303. Similarly, "balance" means "the power or ability to decide." *Id.*, at 105.

Distinguishing between these concepts would be an elusive goal. In California, no attempt is made to do so, for the penalty selection process encompasses all of these mental processes. *Bacigalupo II*, 6 Cal.4th at 468-470.

"Weighing," "considering," and "balancing" are so close in meaning as to be synonymous. The reality is that "weighing" plays a role in all states' sentencing determinations. For example, in the "non-weighing" state of Georgia, while the jury is statutorily described as "considering" aggravation and mitigation in selecting a penalty, that term is used interchangeably with the term "weighing" in describing a Georgia jury's deliberative process, even in this Court's jurisprudence. *Zant*, 462 U.S. at 880. Indeed, in *Gregg* itself, this Court collectively described the selection process of the capital statutes of a number of states, including Florida and Georgia, as weighing factors. *Gregg*, 428 U.S. at 180, and 193-195; *McCleskey v. Kemp*, 481 U.S. 279, 314-315, n.37 (1987) (referring generically to jury discretion to "evaluate and weigh" sentencing factors.)

Because these concepts are so similar and do overlap, a state's use of the word "weigh" should not be the touchstone for the categorizing of its capital sentence law as "weighing" or "non-weighing." This is especially true in California, where it is clear the penalty selection process includes much more than mere mechanical, literal weighing of statutory aggravating factors.

3. The Ninth Circuit Ignored The Fact That California Does Not View Itself As A "Weighing" State

The California Supreme Court has repeatedly concluded California is not a "weighing" state. As this Court has made clear, how a state evaluates and defines its own death penalty law is dispositive because each state is the final arbiter of its law. *Profitt v. Florida*, 428 U.S. 242, 255 (1976); *Gregg*, 428 U.S. at 202; *Stringer*, 503 U.S. at 235. "It would be a strange rule of federalism that ignores the view of the highest court of the state as to the meaning of its own law." *Id.*

First, in cases assessing the impact of invalid special circumstances on California's penalty selection process, the California Supreme Court has always relied on the "non-weighing" state rules set out by this Court in *Zant,* just as it did in this case. *People v. Beardslee*, 53 Cal.3d 68, 95-96 (1991); *People v. Pensinger*, 52 Cal.3d 1210, 1271 (1991); *Sanders*, 52 Cal.3d at 520-521; *People v. Adcox*, 47 Cal.3d 207, 252 (1988); *Silva*, 45 Cal.3d at 632; *People v. Wade*, 44 Cal.3d 975, 998 (1988); *Allen*, 42 Cal.3d at 1281.

Second, when this Court specifically directed the California Supreme Court to consider the effect of an invalid special circumstance in light of the "weighing" state case of *Stringer*, the California Supreme Court's subsequent decision clearly distinguished the California death penalty law from that of the "weighing" state of Mississippi, which had been addressed in *Stringer*. *Bacigalupo II*, 6 Cal.4th 457.[10/]

The California court held that while California juries are directed to "weigh" sentencing factors, those sentencing factors

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10. This Court granted certiorari in *People v. Bacigalupo*, 1 Cal.4th 103 (1991) (*Bacigalupo I*). After *Stringer* was decided in 1992, this Court vacated certiorari and remanded the case for consideration in light of *Stringer* (*Bacigalupo v. California*, 506 U.S. 802 (1992)), which resulted in the decision in *Bacigalupo II*.

are not subject to Eighth Amendment vagueness analysis because the sentencing factors do not perform a narrowing function as part of the penalty selection process. *Bacigalupo II*, 6 Cal.4th at 477. Since all of the California sentencing factors are for sentence selection, and since California's sentence selection process is a normative one, wherein the jury assesses moral culpability, it is unnecessary to subject sentencing factors to Eighth Amendment standards. *Bacigalupo II*, at 475-477. To the extent that special circumstances, which must perform a narrowing function at the guilt phase, are mentioned in sentencing factor (a), they have completed their narrowing function and are subsumed into the circumstances of the crime at the penalty selection phase. *Bacigalupo II*, at 469-470, 477.[11/]

In interpreting and assessing its own law, California has explicitly held that the mere mention of "special circumstances" in the statute as an aspect of the sentencing factor (a) has no particular substantive or legal significance.

In *Bacigalupo II*, the California Supreme Court, in rejecting Bacigalupo's claim that sentencing factor (a) was impermissibly vague, summarized the factor as "the circumstances of the crime" and accorded no significance to the mention of special circumstances. *Bacigalupo II*, 6 Cal.4th at 679.

In *Silva* the California Supreme Court stated that the mention of "special circumstances" as a part of factor (a) in the prosecutor's argument drew the jury's attention to the "facts behind those findings" rather than to the fact the jury had found the special circumstances true in the guilt phase. *Silva*, 45 CAL.3d at 634. The California Supreme Court has also noted "the jury is not apt to give undue weight to the fact underlying the present offenses merely because those facts also give rise to a special circumstance. [Citations.]" *People v. Medina,* 11

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11. This Court denied certiorari in *Bacigalupo II*. *Bacigalupo v. California*, 512 U.S. 1253 (1994).

Cal.4th 694, 779 (1995).[12/]

This Court, in rejecting a similar vagueness challenge to the California sentencing factor (a) in *Tuilaepa*, also characterized the factor as the "circumstances of the crime," noting that such circumstances are "a traditional subject for consideration by the sentencer" which "should" be considered, and concluding that, with factor (a), California has instructed the jury "to consider a relevant subject matter. . . in understandable terms." *Tuilaepa*, 512 U.S. at 976. The *Tuilaepa* language was subsequently quoted by the California Supreme Court in denying yet another challenge to factor (a). *People v. Jenkins*, 22 Cal.4th 900, 1051 (2000).[13/]

The reason the special circumstances are mentioned in factor (a) is to ensure the jury considers both the facts of the crimes and the facts underlying the special circumstances. As the California Supreme Court noted in rebuffing a claim the special circumstance language should be omitted from the jury instructions, "the manifest purpose of factor (a) [is] to inform jurors that they should consider, as one factor, the totality of the circumstances involved in the criminal episode that is on trial." *People v. Cain*, 10 Cal.4th 1, 68 (1995), quoting *People v. Morris*, 53 Cal.3d 152, 224 (1991). The California Supreme Court's dispositive and correct conclusion that special circumstances are not critical in sentence selection was not accorded proper significance by the Ninth Circuit. *Stringer*, 503 U.S. at 234, 237.

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12. As the California death penalty law makes clear, "evidence presented at any prior phase of the trial . . . shall be considered on any subsequent phase of the trial" in a capital case. Cal. Pen. Code, § 190.4, subd. (d).

13. On the other hand, a "special circumstance" based simply on the "circumstances of the crime" would be insufficient for determining eligibility for the death penalty. *See Maynard v. Cartwright*, 486 U.S. 356, 360-361 (1988).

II.

THE CALIFORNIA SUPREME COURT'S HARMLESS ERROR REVIEW REFERRED TO ITS STATE "REASONABLE POSSIBILITY" TEST, WHICH IS THE EQUIVALENT OF "HARMLESS ERROR" AND "BEYOND A REASONABLE DOUBT"

In assessing the impact of the invalid special circumstances, found true in the guilt phase of the trial for eligibility purposes, on the sentencing factors and the validity of penalty selection, in the penalty phase, the California Supreme Court concluded in this case that the jurors would not have been "swayed by abstract concepts" of the special circumstances, noting there was "little chance" of any adverse effect from the invalid special circumstances, and citing California precedents. *Sanders*, 51 Cal.3d at 521; JA 99.

The Ninth Circuit faulted this harmless error analysis, concluding that it had "substantial uncertainty" California had found the error harmless beyond a reasonable doubt absent the use of the words "harmless error" or "reasonable doubt." *Sanders,* 373 F.3d at 1063; JA 19.

This Court has held that, in a "weighing" state, a death penalty imposed based on an invalid aggravating factor can nonetheless be affirmed if the error in considering the invalid aggravation is found harmless beyond a reasonable doubt.[14/] *Sochor*, 504 U.S. at 532. However, contrary to the Ninth Circuit's holding, that standard need not be explicitly stated on the record.

Assuming California is a "weighing" state, so that application of a harmless error test was necessary to rectify the error of an invalid special circumstance factoring in the penalty

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14. The penalty can also be affirmed if the appellate court reweighs the aggravation and mitigation absent the offending factor, although that method of curing the error does not factor into this case. *Sochor*, 504 U.S. at 532.

selection, the record shows the California Supreme Court did apply the correct harmless-error standard.

First, no specific, ritualistic language need be included in the state court's harmless-error analysis. State courts need not "adopt 'a particular formulaic indication' before their review for harmless error will pass scrutiny." *Jones*, 527 U.S. at 404, citing *Sochor*, 504 U.S. at 540; *Hampton v. Page*, 103 F.3d at 1344. Thus, the California Supreme Court was not required to state the specific harmless-beyond-a-reasonable-doubt language in its decision.

Second, despite the Ninth Circuit's suggestion to the contrary, it is clear the California Supreme Court did apply the proper error standard and analysis in this case. In its opinion in this case finding the impact of the invalid special circumstances harmless, the California Supreme Court explicitly cited two California cases, *Allen*, 42 Cal.3d 1222, and *Silva*, 45 Cal.3d 604. *Sanders*, 51 Cal.3d at 521, JA 98-99.

Both *Allen* and *Silva* were cases evaluating the impact of one or more invalid special circumstances on the sentence selection process. These cases found that whether the impact of an invalid special circumstance on the jury's penalty selection decision was "substantial error," necessitating reversal of the penalty, "requires 'a careful consideration whether there is any reasonable possibility that [the] error affected the verdict.' [Citations omitted, brackets in original]." *Allen*, 42 Cal.3d at 1281; *Silva*, 45 Cal.3d at 632.

The "reasonable possibility" standard applied by the California Supreme Court in *Allen*, in *Silva*, and in this case is the same beyond-a-reasonable-doubt standard which this Court has indicated should be applied in this situation. "Our state reasonable possibility standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24." *People v. Jones*, 29 Cal.4th 1229, 1264, n.11 (2003); *People v. Ashmus*, 54 Cal.3d 932, 965 (1991); *People v. Coffey*, 67 Cal.2d 204, 219 (1967) (equating "reasonable possibility" with "harmless-

beyond-a-reasonable-doubt" test for harmless error).

Accordingly, if California is a "weighing" state, so that harmless error review was necessary to assess the impact of the invalid special circumstances on penalty selection, that review was properly performed in this case by the California Supreme Court when it reviewed the issue and found the impact of the invalid special circumstances "benign." *Sanders*, 51 Cal.3d at 521; JA 99. No talismanic incantation was required.

The court's conclusion that the error was benign is correct, given the following reasons, extant in the record and cited by the California Supreme Court. The prosecutor did not rely on the special circumstances in his closing argument, except as they constituted circumstances of the capital crimes, nor did he urge the jury to rely on the number of special circumstances in the case; he argued that death was the proper and appropriate penalty because of the circumstances of the crimes and Sanders' prior offenses. *Sanders*, 51 Cal.3d at 521; JA 99, 142-147. The evidence constituting these special circumstances was completely and properly admissible. It was also unlikely the invalid special circumstances had any significant impact on the penalty selection, given the complete dearth of mitigating evidence and argument resulting from Sanders' adamant personal choice that none be presented.

For all these reasons, it is clear that California did review this case according to the proper harmless-error standard, and that the error of the invalid special circumstances being included as part of one sentencing factor was harmless beyond a reasonable doubt. As a result, Sanders did receive the discretionary, individualized sentencing consideration to which he was entitled under the Eighth Amendment.[15/] *Clemons*, 494

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15. For all these same reasons, the State submits that the Ninth Circuit also erred in concluding, as a matter of federal collateral review, that the invalid special circumstances had a "substantial and injurious effect" on the outcome of the case. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

The Ninth Circuit relied on misperceptions of the penalty selection process in California, and on the role of aggravating circumstances in

U.S. at 748; *Jones*, 527 U.S. at 402-404.

Moreover, even if special circumstances were sentence selection factors, there was no error because it does not matter, for sentence selection purposes, whether they were invalid as eligibility factors.

Once eligibility is determined, the factors used for sentence selection should be broad and inclusive rather than specific or narrow. *Stringer*, 503 U.S. at 229; *Ramos*, 463 U.S. at 1008. To be valid, sentence selection factors need only be sufficiently defined so the jury can understand their meaning, and broad enough to allow the jury to consider all relevant mitigating evidence about the offender. *Jones*, 527 U.S. at 400; *Tuilaepa*, 512 U.S. at 972-973; *Bacigalupo II*, 6 Cal.4th at 477. In this case, the burglary and heinous-atrocious-cruel special circumstances were not invalid because they contained any erroneous, inadmissible, or misleading information. *Barclay*, 463 U.S. at 968. Therefore, to the extent special circumstances had any role as a sentencing factor in this case, the jury properly considered them as sentence selection factors, for which purpose they were perfectly valid notwithstanding their invalidity as eligibility factors.

If, as the State asserts, California is not a "weighing" state, this Court should affirm the penalty in this case because there were other, valid eligibility factors remaining, and there was no protected conduct or inadmissible or inaccurate evidence involved in the two special circumstances later found invalid. *Stringer*, 503 U.S. at 229; *Zant*, 463 U.S. at 885-888.

Finally, if California is a "weighing" state, this Court should affirm the penalty in this case because the California Supreme Court's review corrected any infirmity in the penalty

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"weighing" states rather than on the role of special circumstances and sentencing factors in California, as well as on incorrect conclusions about the facts in the case. An accurate *Brecht* analysis using the actual provisions of California death penalty law and the actual facts of this case would have resulted in an affirmance of the sentence.

by finding the impact of the invalid special circumstances on the penalty selection process to have been harmless beyond a reasonable doubt. *Sochor,* 504 U.S. at 532.[16/]

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16. Even if this Court should determine that California is a "weighing" state and the California Supreme Court's harmless error review was inadequate, the proper remedy is not to reverse the penalty but to remand the case for proper state court review. Although this case is before this Court on federal habeas collateral review rather than direct appeal, remand to the Court of Appeals and thence to the state court is proper. *Richmond v. Lewis*, 506 U.S. 40, 52 (1992); *Parker v. Dugger*, 498 U.S. 308, 323 (1991).

CONCLUSION

For the foregoing reasons, the State of California respectfully submits that the judgment of the Ninth Circuit Court of Appeals should be reversed.

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