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 REPLY BRIEF ON THE MERITS

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Contrary to Sanders' repeated arguments, California is not a "weighing" state within the meaning of this Court's jurisprudence on capital sentencing statutes because (1) a state statute's use of the term "weigh" at the penalty phase does not by itself determine the nature of a state's capital sentence selection process, and (2) California juries do not consider eligibility factors in deciding the appropriate penalty. The Ninth Circuit Court of Appeals' holding that California's death penalty statute is a "weighing" statute was therefore erroneous.

Moreover, the Ninth Circuit's finding there was reversible error incorrectly assessed the impact of the invalid special circumstances on the jury's penalty determination. In affirming Sanders' death penalty, the California Supreme Court's review applied a state harmless error standard that was sufficient to meet any constitutional objections. In any event, the invalid special circumstances had no substantial and injurious effect on the death verdicts because of the nature of California penalty phase trials and the facts of this case.

I.

CALIFORNIA IS NOT A "WEIGHING" STATE

Relying on the presence of the word "outweigh" and the references to special circumstances in the California statute and jury instructions, which set out the capital case penalty selection procedures, Sanders contends that California is a "weighing" state, as described in this Court's jurisprudence. Accordingly, Sanders argues, the impact on the sentence selection of the invalid use of two of the four special circumstances, which had been found true for death-eligibility purposes, should be measured under the "weighing" state rules set out in *Clemons v. Mississippi*, 494 U.S. 738 (1990). Sanders' argument is falsely premised, and it should be rejected because, when accurately assessed, California's penalty selection process is manifestly "non-weighing."

A. The Concept Of "Weighing" Is Too Amorphous To Use To Distinguish The States' Various Penalty Selection Processes

Sanders would determine the issue of whether a state has a "weighing" or "non-weighing" statute solely by the talismanic presence of the word "weigh" in the state's law. However, such a simplistic, purely mechanical approach is misguided and contrary to this Court's established "weighing"/"non-weighing" paradigm. As this Court has held, in order to be a "weighing" statute, a state law must require the weighing of sentencing factors which are also eligibility factors. *Clemons v. Mississippi*, 494 U.S. 738, 742-744.

As the State asserted in its brief on the merits, in a point tellingly unaddressed in Sanders' respondent's brief, all states require juries to weigh sentencing factors to some extent, whether the juries are directed to "weigh," "consider," or "balance." (PB, referring to California's Brief on the Merits, 23-24.) Both "weighing" and "non-weighing" states direct their juries to perform some variation of this same relative mental

process. It is not susceptible to precise naming, but if juries were doing anything *other* than weighing, considering, or balancing when they were thinking about the aggravating and mitigating factors in order to choose an appropriate penalty, their decisions would be unconstitutionally random. Meaningful evaluation of the aggravating and mitigating evidence necessarily involves comparing one against the other.

While "weighing" and "non-weighing" are useful shorthand descriptions of two general types of state penalty selection processes, the presence or absence of those precise terms is not the touchstone for categorizing a state's selection process. The mere fact that the California statute employs the term "weigh" to describe its penalty selection process does not, by itself, mean California should be labeled a "weighing" state. Indeed, in California, the selection of penalty is a normative process, with the jury selecting an "appropriate" penalty after assigning "whatever moral or sympathetic value" each juror individually deems fit the aggravating and mitigating evidence. *People v. Bacigalupo*, 6 Cal.4th 457, 470 (1993) (*Bacigalupo II*).

B. Whether A State's Penalty Selection Process Is "Weighing" Or "Non-Weighing" Is Determined By Examining The Entire Nature And Substance Of The State's Selection Procedures

In discerning from the tangle of the varied penalty selection characteristics of the states' statutes whether a particular statute merits the label "weighing," it is important to look at the nature of the items in the penalty selection equations. The impact of an invalid aggravating factor cannot be measured solely by whether the jury was directed to weigh; that impact must include looking at what was on the metaphorical penalty selection scale. In other words, the substance of the states' various aggravating factors play a pivotal role in whether a state's statute can be called "weighing."

The two hallmarks of a valid capital sentencing scheme are: (1) an eligibility decision, where the class of offenders subject to

the death penalty is genuinely narrowed by the jury finding true applicable factors which pass Eighth Amendment vagueness standards; and (2) a sentence selection decision, where the jury's choice is individualized because it is based on the defendant's culpability and all relevant mitigating evidence. *Tuilaepa v. California*, 512 U.S. 967, 971-973 (1994). A "weighing" state requires juries to include eligibility factors in their penalty selection calculus.

1. The Reference To "Special Circumstances" In California's Capital Sentencing Factors Does Not Mean California Is A "Weighing" State

State statute terminology can be confusing because the various states use overlapping terminology to describe different concepts. Some states use "aggravating" to mean considerations which factor into both eligibility and sentence selection, whereas other states use it to mean simply sentence selection factors. In California, "special circumstances" are the narrowing criteria, and aggravating and mitigating factors are separate, strictly sentencing considerations. Sanders' entire argument is based on an inaccurate blurring of the term aggravating. (See, e.g., RB, referring to Sanders' Brief for Respondent, 11, 18, 31.)

In a "weighing" state, statutory eligibility factors are also the statutory sentencing aggravating factors. In those states, "aggravating factor" means a factor which *both* narrows the class of offenders for death eligibility purposes *and* militates in favor of death in the selection process. *Barclay v. Florida*, 463 U.S. 939, 954 (1983); *Clemons*, 494 U.S. at 745; *Maynard v. Cartwright*, 486 U.S. 356, 358 (1988). The eligibility finding is part of the sentencing process. *Clemons*, at 745[1/].

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1. Sanders wrongly argues that Mississippi completes the eligibility decision at its guilt phase (RB 32). Mississippi does some narrowing for eligibility purposes at the guilt phase through the statutory definition of a capital crime, but additional narrowing occurs at the

In contrast, in "non-weighing" states, the eligibility factors are not part of the sentencing mix. In Georgia, while the eligibility decision occurs at the sentencing phase, and the eligibility factors are called "aggravating" factors, these factors are separate from the sentence selection itself. *Zant v. Stephens*, 462 U.S. 862, at 866 and 874 (1983). In Louisiana, the eligibility decision is complete at the guilt phase when the jury finds the defendant guilty of a capital crime. The eligibility factors play no role in the sentencing phase, where "aggravating" factors, which are solely sentencing factors, are considered. *Lowenfield v. Phelps*, 484 U.S. 231, 245-246 (1988).

When the eligibility and sentencing functions merge or overlap, there is a danger the resulting sentence is not an accurate assessment of the defendant's culpability and therefore the sentence is not appropriately individualized. What makes a state's capital statute "weighing" or "non-weighing" is whether eligibility factors, which narrow the class of offenders to include only those subject to death, play a role in the actual sentence selection. In "weighing" states, eligibility factors are part of the sentence selection, and in "non-weighing" states, they are not. As this Court said in *Zant*, the impact of an invalid aggravating factor on the validity of the sentence depends in part on "the *function* of the jury's finding of an aggravating circumstance under [a particular state's] capital sentencing statute. . ." *Zant*, 462 U.S. at 864, emphasis added.

In California, at the guilt phase, before the case can proceed to a sentencing phase, the jury must find true a "special circumstance," which is California's method of constitutionally narrowing the class of offenders eligible to receive the death penalty. *Tuilaepa*, 512 U.S. at 975. Thus, in California, as in Louisiana, death eligibility is fully completed at the guilt phase of the trial and forms no part of the sentencing phase or the

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sentencing phase, where the jury must find one of a specified statutory list of aggravating circumstances to be true before a death penalty may be imposed. *Stringer v. Black*, 503 U.S. 222, 225 (1992).

sentence selection. The eligibility process is over before sentencing begins.

Additionally, Sanders' argument that California is a "weighing" state depends on the inclusion of the phrase "the existence of any special circumstances found to be true" in sentencing factor (a), which directs the jury's attention to "[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. . ." Cal. Pen. Code, § 190.3, subd. (a). Sanders claims that this phrase means the special circumstances do play a role in sentence selection, similar to other "weighing" states. (RB 23.)

However, the California Supreme Court and this Court have unequivocally held that factor (a) means simply facts of the offense, including the facts underlying the special circumstances. *Tuilaepa*, 512 U.S. at 976; *People v. Medina*, 11 Cal.4th 694, 779 (1995). In fact, the California Supreme Court, in rejecting defense claims that the special circumstances reference should be excised from factor (a), has made it clear that factor (a) means nothing more than the facts of the crime, and excising the reference to special circumstances might lead the jury to incorrectly conclude it could consider the facts of the crime but not the facts of the special circumstances. *People v. Cain*, 10 Cal.4th 1, 68 (1995); *People v. Morris*, 53 Cal.3d 152, 224 (1991). Thus, special circumstances do not themselves play an independent role (RB 8) in sentence selection because they are simply subsumed into the circumstances-of-the-crime sentencing factor.

The California Supreme Court has repeatedly held California's aggravating factors are purely sentencing factors and they therefore need not meet Eighth Amendment strictures for eligibility factors. *People v. Mendoza*, 24 Cal.4th 130, 192 (2000); *People v. Musselwhite*, 17 Cal.4th 1216, 1268 (1998); *Bacigalupo II*, 6 Cal.4th at 476-477. Stated another way, it does not affect the validity of the sentence selection if an eligibility factor is invalid for Eighth Amendment eligibility

purposes because sentence selection factors are not eligibility factors and therefore are not to be constitutionally tested under the same standards applicable to eligibility factors. And, since sentencing factors are not so measured, the phrase "special circumstances" in sentencing factor (a) can only mean, as noted above, that special circumstances have no sentencing role other than as part of the circumstances of the crime.[2/] In contrast, in Florida and Mississippi, both "weighing" states, the Eighth Amendment eligibility strictures do apply to sentencing factors because the sentencing factors are also eligibility factors. *Barclay*, 463 U.S. at 951, n.8, and 953, n.11; *Clemons*, 494 U.S. at 743; *Cole v. State*, 666 So.2d 767, 782 (1995).

The jury instructions do not show California is a "weighing" state. (RB 28-29.) The applicable instructions simply described the normative decision process, and they directed the jury to weigh the sentencing factors in aggravation and mitigation. JA 149-150; *Boyde v. California*, 494 U.S. 370, 377 (1990). Since the instructions did not put any invalid eligibility/narrowing factors on the sentencing scale, California

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2. Sanders' implication that two Justices have determined California is a "weighing" state (RB 14, 37 in n. 8) is specious. *Bacigalupo II* answered the concerns of Justices O'Connor and Kennedy, who dissented from the denial of certiorari in *Pensinger v. California*, 502 U.S. 930 (1991). (See also *City of Elkhart v. Books*, 532 U.S. 1058 (2001) (Dissents from denial of certiorari are examples of "the purest form of dicta" and "potentially misleading.") After this Court granted certiorari and remanded *People v. Bacigalupo*, 1 Cal.4th 103 (1991) (*Bacigalupo I*), to California for reconsideration in light of *Stringer*, the California Supreme Court found, in *Bacigalupo II*, that the *Stringer* "weighing" state rule did not apply, and therefore California's *sentencing* factors did not need to meet the Eighth Amendment vagueness standards for *eligibility* factors; the Court specifically applied its holding to the sentencing factor (a) at issue in this case. *Bacigalupo II*, 6 Cal.4th at 479. Although one dissenting California justice opined *Stringer* should apply, and this Court would undoubtedly grant certiorari on that point, this Court, with neither of the *Pensinger* Justices dissenting, denied certiorari in *Bacigalupo II*. *Bacigalupo v. California*, 512 U.S. 1253 (1994). Thus, *Bacigalupo II* remains sound precedent.

is not a "weighing" state. *Stringer*, 503 U.S. at 229-230. Nor does the prosecutor's argument support Sanders' claim that California is a "weighing" state. (RB 29-30.) To the contrary, the prosecutor merely emphasized the facts underlying the special circumstances by arguing that the evidence in aggravation merited the death penalty. *People v. Hamilton*, 46 Cal.3d 123, 150 (1988).

In sum, unlike "weighing" states, and like "non-weighing" states, California juries do not weigh eligibility factors in choosing whether to sentence a death-eligible defendant to life in prison or execution. The sentencing calculus is not skewed (RB 22, 35) because, if the special circumstance is only invalid as an eligibility factor, but not as a sentencing factor, it has no special weight which distorts the sentence selection (RB 15) and there is nothing invalid on "death's side" of the metaphorical sentencing scale. *Bacigalupo II*, 6 Cal.4th at 475-477.

2. California Does Not Limit Which Sentencing Factors A Jury May Consider

In a "weighing" state, such as Mississippi or Florida, the dual eligibility/sentencing factor is the only aggravation a jury may weigh to determine the appropriate sentence. *Clemons*, 494 U.S. at 742-743, and n.1; *Barclay*, 463 U.S. at 953, n. 11, 954. When aggravation is thus limited, it has a prominent role in sentencing, and accordingly has the special weight *Zant* warns about. *Zant*, 462 U.S. at 891, *Stringer.*, 503 U.S. at 235-237.

In "non-weighing" Georgia, the jury is directed that it may consider the eligibility factor in selecting a sentence, but the jury is not limited to that factor. *Zant v. Stephens*, 456 U.S. 410, 411, n.1 (1982), also cited in *Zant*, 462 U.S. at 889, n. 25. In Louisiana, even though the eligibility factors can be the same as the sentencing factors, it does not matter because the sentencing factors are performing no eligibility function in the sentence selection process. *Lowenfield*, 484 U.S. at 246.

Moreover, neither Mississippi nor Florida has an overarching circumstances-of-the-crime sentencing factor. Miss.

Code Ann., § 99-19-101, subd. (5); Fla. Stat. § 921.141, subd. (5). An overarching sentencing factor enormously increases the amount of ingredients–the evidence and considerations–in the sentencing mix. When a sentencing factor is invalidated, the evidence and circumstances of that factor are removed from the jury's sentencing consideration unless a catchall factor authorizes the jury to focus on them.

Unlike "weighing" states, the "non-weighing" states have sentence selection factors permitting the jury to consider the overall circumstances of the crime and the defendant in its penalty decision. Ga. Code Ann., § 17-10-30, subd. (b); La. Code Crim. Proc. Ann., Art. 905.2. This overarching sentencing factor applies even when a particular eligibility factor is declared invalid in a particular case. Thus, in a "non-weighing" state, the jury is not directed to consider the eligibility factor and is permitted to consider evidence beyond the eligibility factors. *Zant*, 462 U.S. at 872.

Sanders disputes this fact, claiming that Mississippi and the United States allow more than the eligibility factor as aggravation at the sentencing. (RB 32-34.) The Mississippi cases Sanders cites were decided in the 1990s, after Mississippi courts changed the law to allow circumstances of the crime to factor in the sentencing decision. At the time Stringer and Clemons were tried in 1982 and 1987 respectively, the only aggravation allowed to be considered in sentence selection was the statutory aggravating factor, which was also the eligibility factor. *Clemons*, 494 U.S. at 743, n. 1; *Clemons v. State*, 535 So.2d 1354, 1361 and 1364 (1988); *Coleman v. State*, 378 So.2d 640, 648 (1979).

The United States death penalty statute, 18 U.S.C. § 3591 et seq., has not been held to be a "weighing" statute. Contrary to Sanders' claim (RB 32), whether the statute was "weighing" was not directly at issue or explicitly decided in *Jones v. United States*, 527 U.S. 373 (1999). What is clear is that in the federal statute, the eligibility factors are also the statutory aggravating factors. *Jones*, at 376-377. While the federal statute does allow

for additional, nonstatutory aggravating factors to be considered, these must be pleaded and proven so they are brought in by the state, not the jury. Moreover, the statute has no "catchall" circumstances-of-the-crime aggravating factor.

California's procedure falls into the "non-weighing" category in this regard. The jury's consideration is not limited to any specified factor in aggravation. Additionally, to the extent "special circumstances" can be said to be involved in the sentencing mix at all, they certainly are not "central in the weighing phase. . ." *Stringer*, 503 U.S. at 237. In factor (a), California has a broad catchall circumstances-of-the-crime sentencing factor. Any impact from labeling of some of the facts of the crime as special circumstances is entirely diluted by the wide array of aggravating and mitigating considerations, in factor (a) and in all the other factors.

As the Ninth Circuit has recently noted, "[t]he California death penalty statute has a unique mechanism for guiding the jury's discretion." *Belmontes v. Brown*, 494 F.3d 1094, 1131 (9th Cir. 2005). Sentencing factors are not statutorily labeled aggravating or mitigating; the jury decides the character and applicability of the factors. As required by this Court, California sentencing is an individualized determination focused "the specifics of the crime and the background and character of the defendant." *Id.*

In California, the required eligibility, or narrowing, is complete before the sentencing phase begins. Sentencing is purely the selection of the appropriate penalty. Although the statute employs the term "weigh," California is not a "weighing" state, as that term of art has evolved in this Court's jurisprudence.

C. California Has Always Been A "Non-Weighing" State

Sanders claims the California Supreme Court has characterized California as a "weighing" state, analogized to "weighing" states' statutes in analyzing California's statute, and

not consistently relied on *Zant* in assessing the impact of invalid special circumstances. (RB13, 19, 20, 23, 26-27.) His statements are wrong, take quotes out of context, and ignore the California Supreme Court's holding in *Bacigalupo II* and in subsequent cases.

The California Supreme Court has never held that California is a "weighing" state. As set out above, California juries weigh sentencing factors to reach a normative sentencing decision in capital penalty selection, but that does not make California a "weighing" state as this Court has defined the term of art because California juries do not weigh special circumstances and special circumstances are not sentencing factors.

While the California Supreme Court has analogized portions of the California statute to "weighing" states' statutes (RB 22-23), it has equally often analogized to "non-weighing" states' statutes. See, e.g., *Musselwhite*, 17 Cal.4th at 1267-1270; *People v. Montiel*, 5 Cal.4th 877, 943 (1993); *Bacigalupo II*, 6 Cal.4th 457. The Court has consistently reapplied its *Bacigalupo II* holding, namely that Eighth Amendment narrowing principles in *Stringer* do not apply to sentencing criteria. *People v. Mendoza*, 24 Cal.4th at 192; *Musselwhite*, 17 Cal.4th at 1266-1267; *People v. Avena*, 13 Cal.4th 394, 432 (1996). These holdings can only mean the Court has found California is not a "weighing" state.

This consistency is reflected in *People v. Superior Court (Engert)*, 31 Cal.3d 797 (1982), where the Court first found the heinous, atrocious, and cruel special circumstance invalid. It was invalidated *only* as a narrowing or eligibility factor, *but not* as a sentencing factor. The California Supreme Court and this Court have found factor (a) valid as a sentence selection factor. *Tuilaepa*, 512 U.S. at 976; *People v. Jenkins*, 22 Cal.4th 900, 1051 (2000).

Sanders' claim that the Court has not relied on the *Zant* "non-weighing" standard when there are invalid special circumstances (RB 23-24) is incorrect. In post-*Clemons* cases,

the Court has continued to rely on *Zant*, and in those cases where it does not cite *Zant* directly, it cites to its previous cases where it has applied *Zant* or the rule announced in *Zant*. See, e.g., *People v. Howard*, 1 Cal.4th 1132, 1195-1196 (1992). If there was any doubt California is a "non-weighing" state after *Clemons* (RB 25), *Bacigalupo II* resolved it by necessarily determining California is not a "weighing" state.[3/] To the extent the California Supreme Court cites *Clemons*, it is to illustrate that harmless error analysis may be applied in the penalty phase, not because the Court has concluded that California is a "weighing" state.[4/]

Sanders' cite to *People v. Boyd*, 38 Cal.3d 762 (1985) (RB 20) does not persuade otherwise. *Boyd* did not discuss whether California was a "weighing" state; it merely described, as

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3. Contrary to Sanders' contentions (RB 25-28), California has always consistently argued it is not a "weighing" state as that term is defined in *Clemons* and *Stringer*. Even if the State's position in other cases is relevant or binding in this case, there is nothing inconsistent between the briefs in the other cases Sanders cites and California's position in this case. As to the State's brief in *Boyde* (RB 27-28, 36), there the issue was entirely different, involving the constitutionality of the direction to the jury that it "shall" impose death if aggravating sentencing factors outweigh mitigating. The brief conveys that juries are to weigh aggravating and mitigating *sentencing* factors, not special circumstances, and, as a result, California does not have mandatory sentence selection.

As to the *Mickey* brief (RB 28), the State noted that special circumstances cannot be equated with aggravating factors for sentencing purposes. *Mickey v. California*, No. 91-1860, Response in Opposition to Petition for Writ of Certiorari, p. 11. The gist of the *Mickey* brief is that *Stringer* does not apply to California because special circumstances do not play a role in sentencing, a position in accord with the state's position in this case.

4. Sanders' cite to *People v. Holt* (RB 24-25) is equally inapposite. There were no invalid special circumstances in *Holt*; the issue was the impact of alleged guilt phase error, and the California Supreme Court cites to "weighing" state cases were to reject the defendant's claim that any guilt phase error merits automatic penalty reversal. *People v. Holt*, 15 Cal.4th 619, 693 (1997).

weighing, the process by which the jury assesses sentencing factors. Other California Supreme Court cases (RB 21-22) also describe the sentencing process, but not in the "weighing" state context, and the aggravating or mitigating sentencing factors referred to in those cases never means special circumstances. Special circumstances are not aggravating factors.[5/]

II.
THE PENALTY IS VALID UNDER *BRECHT* OR THE STATE'S HARMLESS ERROR ANALYSIS

Sanders urges that the Ninth Circuit's *Brecht* (*Brecht v. Abrahamson*, 507 U.S. 619 (1993)) error analysis was correct and was the only review of the penalty validity necessary, although he also endorses the Ninth Circuit's superfluous holding that the California Supreme Court's harmless error review was flawed. Both contentions lack merit.

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5. Sanders' claim that California has conceded it is a "weighing" state (RB 7, 19, 25-26, 28) in this case is contradicted by the prior State briefs he cites. Beginning with the direct appeal in the California Supreme Court, the State has cited *Zant* for the proposition an invalid special circumstance did not necessarily result in an invalid penalty. Respondent's Brief in California Supreme Court 119. In the state habeas corpus proceeding, the State countered Sanders' claim California was a "weighing" state with the *Zant* "non-weighing" rule and tests. Informal Response to Habeas Corpus, pp. 184-185.

On federal habeas, in the district court, the State argued any error was harmless whether California was a "weighing" or a "non-weighing" state, which is not a concession (RB 26, 28), but the simple argument of alternative theories by the State. (Answer, pp. 222-227.)

On federal habeas appeal to the Ninth Circuit, the State's position remained the same. Far from conceding California was a "weighing" state, the State, in rebutting Sanders' arguments, assumed for the sake of argument that California was a "weighing" state to discuss the California Supreme Court's harmless error analysis. (Appellee's Brief 41-49.)

A. The California Supreme Court Correctly Assessed The Impact Of The Invalid Special Circumstances

Contrary to Sanders' argument, *Brecht* does not authorize federal courts to ignore the findings of state courts. (RB 42-44-45.) *Brecht* is a rule respecting comity, designed to make reversal less likely on collateral review than on the already-exhausted direct appeal. *Brecht*, 507 U.S. at 637-638.

As the Ninth Circuit found in this case, there would be no error to review under *Brecht*, unless California is a "weighing" state, and unless the state court has failed to perform the corrective measures set out in *Clemons*. JA 12; *Morales v. Woodford*, 388 F.3d 1159, 1170-1171 (9th Cir. 2004).

First, since California is not a "weighing" state, then the invalid special circumstances played no independent role in the sentencing calculus. Since they did not result in the admission of otherwise inadmissible or inaccurate evidence, nor were they constitutionally invalid as a sentencing factor, the penalty should be affirmed under the "non-weighing" rule. *Tuggle v. Netherland*, 516 U.S. 10 (1995); *Zant*, 462 U.S. at 885; JA 98.

Second, even if California is a "weighing" state, the penalty must be affirmed because the California Supreme Court's harmless error review corrected the admission of the invalid aggravating circumstances. *Clemons*, 494 U.S. at 754; *Morales*, 388 F.3d at 1170. The California Supreme Court determined the error was harmless. (JA 98-100.) Although the Court did not cite *Chapman v. California*, 386 U.S. 18 (1967), or specifically intone the words "beyond a reasonable doubt," its citations and careful analysis make clear the Court accurately applied the *Clemons* standard. The Ninth Circuit erred in blithely dismissing the California court's review as not applying the *Chapman* standard without exploring the standard the Court did apply. (JA 17-18.)

In finding harmless error, the California Supreme Court cited *People v. Silva*, 45 Cal.3d. 604 (1988) and *People v. Allen*, 42 Cal.3d 1222 (1986). (JA 98-99.) *Silva* and *Allen* apply the California reasonable possibility test to special circumstances

error (i.e., whether it was reasonably possible the error altered the verdict). Thus, a reference to those cases is a reference to the application of that test. *Silva,* at 632; *Allen*, at 1281. Contrary to Sanders's argument (RB 47), the "reasonable possibility" test is the same, in substance and effect, as the *Chapman* beyond-a-reasonable-doubt standard, just as the State demonstrated in its brief and as this Court and the California Supreme Court have consistently held. *Brecht*, 507 U.S. at 637; *Chapman*, 386 U.S. at 24; *People v. Jones*, 29 Cal.4th 1229, 1264, n.11 (2003); PB 29.[6/] In fact, in his opening and reply briefs in the California Supreme Court appeal, Sanders himself urged that the reasonable possibility test was the correct standard to be applied to the invalid special circumstances. (Appellant's Opening Brief, pp. 195-196; Reply Brief, p. 40.)

Sanders' reliance on California cases which reference both tests (RT 47) signifies nothing; those cases mention both tests as a redundancy, not alternatives, and cases which do explicitly compare the tests, cited above, hold they are the equivalent test.

Sanders claims the reasonable possibility test is distinguishable from *Chapman* because it places the burden of proof on the defendant whereas *Chapman* does not. (RB 46-48.) That is of no moment in this case because the State, the California Supreme Court, and the Ninth Circuit did not reject Sanders' claim on that basis. Rather, in each instance, the record was analyzed to determine prejudice. Similarly, in the cases Sanders cites, error was assessed by the appellate courts without regard to either party having a burden of proof. Sanders' burden of proof discussion is therefore irrelevant here.

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6. Although Sanders is "puzzled" by the State's citation to *People v. Coffey*, 67 Cal.2d 204, at 219-220 (1967) (RB 48, n.12), *Coffey* shows that California has always equated the reasonable possibility test with the *Chapman* test.

B. The Ninth Circuit's *Brecht* Analysis Is Contradicted By The Facts

In this pre-AEDPA federal habeas corpus case, a federal court determines if invalid special circumstances had a "substantial and injurious effect" on the outcome of the case. *Brecht*, 507 U.S. at 638.[7] Both the Ninth Circuit's opinion on this issue and Sanders' brief are replete with factual misrepresentations or misunderstandings. (JA 23-24; RB 4-7, 40-41, 49.)

The *Brecht* standard favors convictions: instead of requiring any error to be found harmless beyond a reasonable doubt, the error must have had a demonstrable substantial and injurious effect on the verdicts. *Brecht*, 507 U.S. at 633. A *Brecht* reversal cannot be based on mere speculation, but must be based on a finding that the defendant was actually prejudiced; the Ninth Circuit has likened the standard to the California state error standard under which error is reversible only when it is reasonably probable that a result more favorable to the defendant would have been reached absent the error. *Calderon v. Coleman*, 525 U.S. 141, 145-146 (1998); *Duncan v. Henry*, 513 U.S. 364 (1995), citing Ninth Circuit in dissent at p. 890. The *Brecht* standard was not met in this case, so the Ninth Circuit should not have reversed Sanders' penalty.

A number of the "facts" on which the Ninth Circuit and Sanders rely are no more than defense arguments and interpretations of the evidence. The jury evaluated the witnesses' credibility and the evidence presented by both sides at the guilt phase of the trial; after conviction, the facts are those jury determinations supporting the verdict which a rational trier of fact could have found beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 314, 319 (1979).

As to speculation that the jury may have doubted Sanders'

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7. Although Sanders claims the State never disputed the Ninth Circuit's *Brecht* assessment in this case (RB 38, 39, 45), exactly the contrary is true (PB 30, n.15).

role or personal culpability in the murder (JA 23, RB 40), there is no question that Sanders was the leader of the crime spree: his botched robbery of the victims triggered the murder; he knew the victims; and he solicited the assistance of the henchman (codefendant Cebreros), who owed him a favor but who had no prior connection with the victims (JA 51). It does not matter who was the actual killer (JA 23-24, RB 40) because the jury specifically found, and the evidence supports, Sanders had the requisite intent to kill (JA 93-94).[8/] As to which, if either, assailant wanted to leave the apartment (JA 24, RB 3, 40), there was no evidence that occurred before the murder, and, further, since Sanders was the leader, if he had wanted to leave, the assailants would have left (JA 52). Whether accomplice Maxwell was charged (JA 24) was irrelevant.

Although the Ninth Circuit suggests that beating, the killing method in this case, shows less intent to kill than stabbing or shooting (JA 24), the point is unsupported and somewhat irrational. A beating death generally cannot be accidental, especially under the facts of this case where the victim was struck multiple times in the head so viciously that her skull was fractured open and her brain matter exposed and lacerated. (JA 53; RT 502.)

As to the possible involvement of Maxwell or Thompson, or Maxwell's credibility as a witness, or Thompson's out-of-court statements (JA 23-24; RB 2, 5, 40), the jury resolved such questions against Sanders beyond a reasonable doubt by finding him guilty. And whatever role the women may have had in the crimes, it was Sanders and Cebreros who alone went to the victims' apartment and attacked the victims: the surviving victim recognized Sanders and selected both from a lineup. (JA 52-53.) To the extent Sanders had an alibi defense (RB 41, JA 53), he presented those witnesses, and the jury's

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8. Thus, Sanders' assertion (RB 49) there was uncertainty about whether he intended to kill the victim or whether the killing was intentional is blatantly inaccurate.

guilty verdicts, which are supported by the evidence, show, beyond a reasonable doubt, the jury rejected that defense.

Finally, as to the suggestion that a previous trial in the case resulted in a hung jury indicates there might have been lingering doubt (JA 24; RB 1, 5, 39), that, too, is irrelevant. The prior jury quickly hung 11 to 1 for guilt, which suggests an aberrant, non-deliberating juror rather than lingering doubt. And, of course, the evidence, witnesses, and presentations at two trials are not the same. Sanders' suggestion that the second jury had some difficulty reaching a verdict (RB 39) is belied by the fact that the jury's penalty deliberations totaled just two hours, and the verdict was reached less than a half hour after the jury inquired about unanimity (CT 1880, 1882.)[9/]

At the penalty phase, there was aggravating evidence of Sanders' prior robberies and, at Sanders' personal insistence, no independent mitigating evidence was presented.

When the facts and circumstances of this case, including the reality that special circumstances are not independently factored into the sentencing mix, are accurately viewed, it is clear that the invalid felony murder and heinous murder special circumstances had no substantial and injurious effect on the jury's penalty verdict. A proper application of *Brecht* would have resulted in affirmance of the district court's denial of Sanders' habeas petition.

In short, the Ninth Circuit's invalidation of the penalty phase in this case should be reversed because: (1) California is not a "weighing" state and proper application of the "non-weighing" state standard of *Zant* shows the invalid special circumstances had no impact on the sentence; (2) if California were a "weighing" state, the state supreme court's cautionary alternative assessment of the invalid special circumstances showed any error was harmless under the equivalent of the

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9. The Court did not rely on the prosecutor's argument as contributing to the error assessment, and, despite Sanders' argument (RB 41-42), there was nothing in the penalty argument which did so.

Clemons standard; and (3) in any event, there was no actual prejudice and no substantial and injurious effect on the penalty verdict, and therefore no reversal was warranted under *Brecht*.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

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SANDERS Reply Brief on the Merits gen.wpd
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