No. S171393

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

People of the State of California,
Plaintiff and Respondent,
v.
Don’te Lamont McDaniel,
Defendant and Appellant.

CAPITAL CASE

Proposed Brief of *Amici Curiae* ACLU, ACLU of Northern California, and ACLU of Southern California in Support of Defendant and Appellant McDaniel

Appeal from Judgement of
The Superior Court of Los Angeles County, Case No. TA074274
The Honorable Robert J. Perry, Presiding

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INTRODUCTION

Owing to its increasingly visible failures to ensure equal justice under law, our justice system is in crisis. For many, its legitimacy has become a question mark, with "distrust of law enforcement and the justice system arising from the experiences of Black Americans." *People v. Triplett* (Ca. Aug. 31, 2020) B298914 (Liu, J., dissenting, at 2).[1] Nowhere should this concern loom larger than where the system is reviewing a judgment exacting its most severe and irreversible punishment – execution. The legitimacy of the death penalty depends, among other things, on the care with which our courts jealously safeguard the jury's vital role. "The jury lies at the heart of California's criminal justice system and its capital sentencing scheme." *People v. Daniels* (2017) 3 Cal.5th 961, 967 (conc. opn. and dis. opn. of Cuellar, J.). But under California's current capital sentencing procedures, minority voices on the jury, often the voices of Black people and other people of color, are set aside and alienated because the majority, by sheer force of number, may insist on execution without "reaching [the] subjective state of certitude," *In re Winship* (1970) 397 U.S. 358, 364, that is warranted before the State ends a person's life.

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[1] *See also*, *e.g.*, Brie McLemore, *Procedural Justice, Legal Estrangement, and the Black People's Grand Jury* (2019) 105 Va. L. Rev. 371, 373 ("Activists associated with the . . . Black community members . . . more broadly – continuously expressed sentiments of both procedural injustice and legal estrangement, which are two prominent theories that have emerged to explain how communities of color come to see formal legal structures as illegitimate. The critiques lodged by Black activists and residents . . . were not limited solely to police-community relations: they expressed a specific contempt for the legal system, which was situated as a separate structure from policing as a whole.").

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In this case, the Court has asked for briefing on whether "section 1042 and article I, section 16 of the California Constitution require that the jury unanimously determine beyond a reasonable doubt factually disputed aggravating evidence and the ultimate penalty verdict[.]" Although amici concur in the arguments Mr. McDaniel has offered as to why California law requires proof beyond a reasonable doubt that a death sentence is warranted, amici seek to focus the Court's attention on a narrower yet crucial part of this conversation. Amici address the need for the reasonable doubt standard in protecting the voices of the minority – frequently Black jurors and jurors of color – in the capital jury room. Protection of these voices, in turn, would enhance the legitimacy of capital-sentencing decisions, as well as the vital institution of the jury itself.

In this brief, amici thus will show:

1) that the legitimacy of California's capital sentencing scheme depends on a properly-functioning jury;

2) that the participation of jurors of color, threatened in the first instance by California jury selection practices, is potentially decisive on the question of life or death;

3) that, in practice, the voices of people of color who do make it onto capital juries may be silenced, sidelined and disrespected, because the current capital sentencing scheme gives them insufficient tools to protect minority viewpoints; and

4) requiring proof beyond a reasonable doubt that the aggravators outweigh the mitigators, and therefore that death is the appropriate punishment,

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would go a long way towards protecting minority voices in the jury room from a majority that relies on the power of sheer numbers.

The crisis of confidence in California's criminal justice system, paralleling that in the rest of America, will not be easily fixed. The roots of this problem have grown deep and spread widely. But, consistent with California law and the Constitution, requiring California prosecutors to prove beyond a reasonable doubt that death is warranted will represent a needed step in the right direction towards the goal of equal justice.

ARGUMENT

I. The legitimacy of California's capital sentencing scheme depends on the verdict of a unanimous jury, fully encompassing the diverse viewpoints of the community.

"[O]ne of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system." *Witherspoon v. Illinois* (1968) 391 U.S. 510, 519 n.15; *see also Schriro v. Summerlin* (2004) 542 U.S. 348, 360 (Breyer, J., dissenting) (noting the Eighth Amendment requires a "community-based judgment that the [death] sentence constitutes proper retribution")

The jury plays a role "critical to public confidence in the fairness of the criminal justice system." *Taylor v. Louisiana* (1975) 419 U.S. 522, 530. This institution brings ordinary people, from all walks of life, into the justice process, including both those in the racial majority and those in the racial minority. *See, e.g.*, *Strauder v. West Virginia* (1879) 100 U.S. 303, 304, 310-11 (striking state law that made Black citizens ineligible

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for jury service). These diverse bodies, in turn, stand as "one of the Constitution's most vital protections against arbitrary government." *United States v. Haymond* (2019) 139 S. Ct. 2369, 2373 (plurality opinion). They serve as "'the great bulwark of [our] civil and political liberties.'" *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477 (quoting 2 J. Story, *Commentaries on the Constitution of the United States* (4th ed. 1873) 540-41).

Juries similarly protect the accused's right to "life and liberty against race or color prejudice." *Pena-Rodriguez v. Colorado* (2017) 137 S. Ct. 855, 868 (quotation marks omitted). "[T]he broad representative character of the jury" promotes a "diffused impartiality[.]" *Thiel v. S. Pac. Co.* (1946) 328 U.S. 217, 227 (Frankfurter, J., dissenting). One of the "greatest benefits" of the jury inheres in "the security it gives the people that they, as jurors, actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse." *Balzac v. Porto Rico* (1922) 258 U.S. 298, 310*; see also Duncan v. Louisiana* (1968) 391 U.S. 145, 156 (observing that jury "safeguard[s] against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"). As applied to the context of capital sentencing, the jury "minimize[s] the risk of wholly arbitrary and capricious action." *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.).

California equally heralds the jury right, honors the jury's vital role in capital sentencing, *see*, *e.g.*, *Daniels*, 3 Cal.5th at 967 (conc. opn. and dis. opn. of Cuellar, J.), and values the role of diverse community members' viewpoints within this process. "It is important to recognize that in the penalty phase, no less than in the guilt phase, the jury serves as a representative of community values." *Hovey v. Superior Court* (1980) 28

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Cal.3d 1, 73. But, the Court has cautioned, a "penalty jury can speak for the community only insofar as the pool of jurors from which it is drawn represents the full range of relevant community attitudes." *Id.* Diverse voices must be heard for the system to work. "Diversity serves to complement as well as neutralize viewpoints and attitudes. [It] enhances the accuracy of a jury's decision making by improving its ability to recognize and appropriately evaluate evidence." *Id.* at 23.

Under California law, death may not be imposed absent the unanimous assent of the jury. Pen. Code, § 190.4(b); *People v. Hall* (1926) 199 Cal. 451, 456-58. As will be shown below, it is true unanimity – of diverse voices assenting to a punishment of death – that is at stake in this case. As will be shown, the watered down "unanimity" permitted under current interpretations of California law means that minority voices and viewpoints can be and are sidelined, set aside and disrespected, in violation of the California Constitution and basic precepts of justice.

II. Already under threat in the current justice system, the participation of jurors of color tends to shape capital sentencing decisions.

It is of concern to amici, the community and to Black defendants, such as Mr. McDaniel, that the voices of jurors of color can be easily silenced in current California jury deliberations, as shown below. *See* Point III, *infra*. This concern is exacerbated because jurors of color are likely to play a crucial role in capital sentencing deliberations and yet, as the Governor's amicus brief details, are systematically excluded from capital

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juries through intentional discrimination in prosecutors' use of peremptory strikes,[2] and through the process of "death qualification."[3] Indeed, this case mirrors that exclusion. In Mr. McDaniel's trial, and that of his codefendant, the trial court found that the prosecutor had intentionally used peremptory strikes to remove Black jurors. *See* App.'s Third Supp. Reply Br. at 24-25. After a more diverse jury found Mr. McDaniel guilty, but hung on the issue of sentence, a second jury was impaneled. In that process, the State culled the jury of people of color through aggressive exclusion of jurors who could not impose a death sentence, *id.* at 25, and the resulting sentencing jury was left with only a single Black juror. *Id*. One of Mr. McDaniel's claims on direct appeal is a claim under *Batson v. Kentucky* (1986) 476 U.S. 79. *See* App. Opening Br. at 42-84.

As empirical studies document, those jurors of color, particularly Black jurors, who do make it onto capital juries play consequential roles. A consortium of scholars in the Capital Jury Project (CJP) collected extensive interview data from roughly 1,200 jurors who served in over 250 capital cases in 14 states over a number of years, California among them. *See* William J. Bowers, *The Capital Jury Project: Rationale,*

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[2] *See* Assem. Bill No. 3070, approved by Governor, Sept. 30, 2020, (2019-2020 Reg. Sess.) § (1)(b) (finding history of intentional use of peremptory strikes to discriminate against jurors of color); Assem. Bill No. 2542, approved by Governor, Sept. 30, 2020, (2019-2020 Reg. Sess.) (California Racial Justice Act of 2020), § 2 (c) (similar).
[3] *See Wainwright v. Witt* (1985) 469 U.S. 412, 424 (permitting cause challenges for jurors who cannot meaningfully consider imposing a death sentence). As the Governor's brief details, this process further culls Black jurors from capital juries. *See also People v. Suarez* (2020) 10 Cal.5th 116, 194 (Liu, J., concurring) (citing empirical studies and finding "significant evidence that removal of jurors" as part of death qualification is "an equally if not more significant contributor to the exclusion of Black jurors" than discriminatory use of peremptory strikes).

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Design, and Preview of Early Findings (1995) 70 Ind. L.J. 1043, 1078 n.190. The CJP's mission was to generate "a comprehensive and detailed understanding of how capital jurors actually make their life or death decision." *Id.* at 1101.

Based on the information the CJP collected during juror interviews, it found that the race of jurors regularly influenced their decision during the penalty phase of a capital case. Specifically, in cases in which the defendant was Black, the victim was white, and five or more white males served on the jury, 63% of juries voted for execution. *See* Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition* (2001) 3 U. Pa. J. Const. L. 171, 191–96. But, in this same defendant-victim combination by race, if even one Black male was on the jury, only 37.5% of juries voted for the death penalty. *See id.* In instances where the defendant and the victims were both white, although with less statistically significant outcomes, juries comprised of at least three Black women were less likely to return death sentences. *See id.* So too did death sentences drop, in the cases of Black defendants and Black victims, with the presence of one or more Black jurors. *See id.*

The CJP has also found that Black male jurors were more likely to believe that a defendant was remorseful, more likely to consider residual doubt, and less likely to believe that a defendant would be dangerous in the future. Bowers & Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing* (2003) 39 Crim. L. Bull. 51, 77–80.

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More broadly, social scientists have observed greater opposition to the death penalty in the Black community,[4] "best explained by a historically rooted fear of state power" and "racially motivated lynchings." *See* James Unnever, Francis Cullen & Cheryl Lero Johnson, *Race, Racism, and Support for Capital Punishment* (2008) 37 Crime & Just. 45, 45, 83. Black people in our Nation have experienced the State as an institution that protects white interests, and the criminal justice system "as unjust and potentially an instrument of oppression," which "foster[s] wariness among African Americans about the state's power to take life." *Id.* at 82. These viewpoints only promise to continue with recent events such as the shocking police killings of George Floyd, Breonna Taylor, and many other Black persons.[5] *See also* Cathal Conneely, *Supreme Court of California Issues Statement on Equality and Inclusion* (June 11, 2020), https://newsroom.courts.ca.gov/news/supreme-court-california-issues-statement-equality-and-inclusion ("We must acknowledge that, in addition to overt bigotry, inattention and

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[4] In a recent Pew Research poll, a "59% majority of whites favor the death penalty for those convicted of murder, compared with 47% of Hispanics and 36% of blacks." J. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up* (June 11, 2018), https://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/.

[5] *See also* Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box – How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* 40 (June 2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf (reviewing studies in support of the following conclusion: "Decades of social science research confirms that African Americans and Whites differ in their views of the criminal legal system, with more Blacks consistently expressing the opinion that the system is racially discriminatory. The reasons for the divide in perception are embedded in the historic and present-day differences . . . between how the two groups experience the criminal legal system, including their interactions with law enforcement.").

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complacency have allowed tacit toleration of the intolerable. These are burdens particularly borne by African Americans as well as Indigenous Peoples singled out for disparate treatment in the United States Constitution when it was ratified.”).

In *Turner v. Murray* (1986) 476 U.S. 28, 35, the U.S. Supreme Court observed how the racist viewpoints of jurors influence and infect the capital sentencing deliberations concerning a Black defendant (viewpoints unlikely to be held by Black jurors):

> On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner’s crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner’s evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror’s decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner’s crime, might incline a juror to favor the death penalty.

Id. Thus, whatever the general views of the death penalty in the Black community, for Black defendants such as Mr. McDaniel, having Black jurors with a voice in the sentencing deliberation is of vital importance: this presence will reduce the likelihood of racist views deciding whether he may live or must be executed. *See also Strauder*, 100 U.S. at 308 (“The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of [the defendant’s] neighbors, fellows, associates, persons having the same legal status in society as that which [the defendant] holds.”).

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III. Current California law leaves life-holdout jurors – who are frequently people of color – sidelined, alienated, and without a legal anchor protecting their legitimate sentencing views.

As noted above, a California jury verdict for death – and the finding that aggravating factors outweigh those in mitigation – must be a unanimous one. Pen. Code, § 190.4(b). In fashioning this State's death penalty scheme, the Legislature has so decreed, consistent with this Court's precedent. *Hall*, 199 Cal. at 456-58. The corollary to the unanimous jury requirement in capital sentencing is the U.S. Supreme Court's rule that jurors need not unanimously decide to weigh any particular mitigating factor; rather, the question of mitigation must be left to each, individual juror. *Mills v. Maryland* (1988) 486 U.S. 367, 383-84. The definition of mitigation – any reason to spare the life of a person convicted of a capital murder – is expansive, *see Lockett v. Ohio* (1978) 438 U.S. 586, 604, and includes "the diverse frailties of humankind." *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.

With these concepts in mind, a California juror, having seen and heard the evidence in a capital trial, and listened to the views of fellow jurors, should be entitled to *respect* if she believed that the mitigation were sufficient for a life sentence (or, in the terms of Pen. Code, § 190.3, that the aggravating factors did not outweigh those in mitigation).[6] Her decision would necessarily be based on many factors, including, properly, her own "everyday life and experience[,]" *People v. Riel* (2000) 22 Cal.4th

[6] *See Wellons v. Hall* (2010) 558 U.S. 220, 220 ("From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect.").

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1153, 1219; and her view in this regard would be both as valid as the views of any other juror, and deeply personal.[7] At a minimum, and as shown further below, *see* Point IV, *infra*, the requirement of unanimity should be upheld by precluding a finding of a unanimous verdict when individual jurors, exercising their individual discretion based in part on their unique experiences, have a reasonable doubt whether death is the appropriate punishment.

And yet, the respect of diverse viewpoints is often absent. As shown below, the views of California life holdouts are frequently disrespected, sidelined, and overridden by other jurors, and sometimes with the assistance of trial courts. Although this type of coercion is of particularly grave concern when it functions to exclude jurors of color, it knows no racial boundaries. When the views of *any* California capital juror are disrespected and pushed aside, the system fails – both for the accused, on whose very life enforcing the jury right hinges, and for the juror, who seeks to answer the call to serve in the "most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi* (2019) 588 U.S. __, __ 139 S. Ct. 2228, 2238.

For example, in *People v. Wilson* (2008) 44 Cal.4th 758, 813–15, a Black juror, who saw mitigation in the difficult upbringing of a Black defendant, was disrespected and

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[7] *See Witherspoon*, 391 U.S. at 519 (describing a juror's decision between life and death as a "discretionary judgment"); *Turner*, 476 U.S. at 33-34 ("In a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'") (quoting *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340, n.7 (citation internal to *Caldwell* and quotation marks omitted)).

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dismissed, through the combined actions of a juror and the trial judge. After initially voting for death, the Black juror held out for a life sentence, based on the defendant's upbringing. Prompted by a complaining juror from the majority favoring life, the trial judge questioned and ultimately dismissed the Black juror. *Id.* The complaining juror's note to the court dismissed the Black juror's views about Mr. Wilson's upbringing as irrelevant and inappropriate:

> The [] juror has now decided that he is not able to sentence the defendant to death because he just can't do it and when confronted by the other 11 jurors on his reason, because he was asked at the beginning, he has suddenly changed his mind an[d] only offers the fact that we are not "Black" and would not understand. Correct me if I am wrong but was [B]lack ever an issue.
> . . .
>
> This same juror also stated to me something . . . that this is what you expect when you have no authority figure, this type of behavior and how can you hold someone responsible for their actions, leading me to believe that his mind was made up at the beginning instead of at the end.
>
> He has been asked if he could consider relevant information and continues with the "I do not expect you to understand[."]
> . . .
>
> The juror was also noted to state "If this guy came from a good family + had a college ed[ucation] then I'd say 'burn him[.]' But Black people don't admit being abused[.] 'It's a father + son thing. You can't understand—you ['re] not Black.'" THIS IS IRRELEVANT! + not an issue in deliberations."

Id. at 815.[8]

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[8] This Court reversed the penalty determination due to error in the trial court's dismissal of the Black juror. *Wilson*, 44 Cal.4th at 813–14.

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Sometimes, based on the available records and/or published decisions, the races of the jurors diminished and disrespected are unknown, but their ability to relate to the defendant facing the death penalty is obvious. In *People v. Nelson* (2016) 1 Cal.5th 513, 561, for example, following a hung jury in a first penalty phase, a new jury was impaneled and reached an impasse at a vote of 10 to 2 for death, in a case where the mental health of the defendant was a significant issue. *Id.* at 527, 561. Called into court, the foreperson reported that "further deliberations would not serve any useful purpose because some jurors had indicated 'there is no more changing their mind[s].'" *Id.* at 561. At the prosecutor's suggestion, the judge questioned the jurors in writing and in open court, including on what might help them to reach a verdict. The foreperson's answer: "'You can dismiss two jurors who are not fair to both sides and are unreasonable in thinking. They lack common sense and are more responsive to their feelings instead of the law.'" *Id.* at 565. In this colloquy, the foreperson stated that "in the opinion of the holdouts, 'the aggravating factors were not compelling. They found the mitigating factors to be compelling.'" *Id.* After questioning all of the jurors, the trial court dismissed one of the holdout jurors, who both worked in the mental health field and herself was diagnosed with mental illness. *Id.* at 566-67. The basis was purported inaccuracies in her jury questionnaire, learned of through this questioning process. *Id*. This Court reversed.[9]

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[9] On appeal, this Court found, in the absence of any report of misconduct, the trial court's intrusion into the deliberative process through this questioning was reversible error and, further, that the "selective scrutiny to which [the dismissed juror] was subjected and the dubiousness of the trial court's grounds for excusing her further highlight the impropriety

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In other cases, what is clear is that the goal of a unanimous jury becomes a rule the trial judge and some jurors feel bound to enforce, even at the cost of overriding a juror of color. In *People v. Romaine Martin*, Case Number S235017 (Ca.), a trial judge dismissed a juror who insisted on a life sentence for a Black defendant, in a gang-related case for "failure to deliberate." Tr. 8878.[10] In fact, the juror was a holdout for life who would not give in to pressure from other jurors. Juror No. 7 was a soft-spoken person of Latinx descent, who told the judge, as other jurors agreed, that the majority was upset and would not accept Juror No. 7's reasons for voting for life. Tr. 8761, 8699, 8726, 8743-44. These reasons related to the gang context of the crime (which the juror knew about from experiencing a similar background) and doubt that the defendant was the shooter. Tr. 8848, 8736, 8841, 8845, 8848, 8851, 8855, 8858, 8736, 8842, 8851. But, rather than respecting this judgment, the other jurors kept asking questions, "a thousand times," which Juror No. 7 repeatedly tried to answer until becoming fed up with the badgering. Tr. 8766. Once the court replaced Juror No. 7 with an alternate, the jury voted unanimously for death.

Abuse and intimidation are yet other concerning themes. In *In re Alfredo Alvarado Padilla*, No. S110741 (Ca.), this Court appointed the Superior Court to hear evidence

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of the court's unwarranted intrusion into the deliberative process and its coercive effect." *Nelson*, 1 Cal.5th at 571-73.

[10] The case number in the Superior Court, for the County of Riverside, is RIF1102662. The case is now in this Court, pending briefing on direct appeal. Citations to the transcript are to the page numbers of the hearing on this issue. An electronic copy of the transcript cited is in the possession of amici.

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concerning a completely different type of misconduct by a juror who was a corrections officer, but held a hearing in which much of the testimony concerned the officer's intimidation of other jurors. *See In re Alfredo Alvarado Padilla* (Superior Ct. Stanislaus Co. Feb. 27, 2007) No. 1066762, Findings and Decision.[11] Following the hearing, the lower court found credible the testimony of three different jurors who "obviously felt intimidated by [the corrections officer's] blustery manner and his superior knowledge of the criminal justice system." *Id.* at 10. "It is not clear," the lower court wrote, "to what extent the reluctant jurors looked to the jury instructions to guide their decisions or to gather the strength necessary to stand their ground." *Id.* The corrections officer was "scary," "intense," "angry," called fellow jurors "bleeding hearts," "poked someone in the chest," pounded on the table and yelled, and grew frustrated with the life holdouts. *Id.* at 5-8. He was sometimes joined in these actions by a second juror who was a parole officer. *Id.* at 5-8.

In re Ronald Lee Bell, Case No. S04446 (Ca.) is a case where the raw power of a majority dismissed the defendant-sympathetic views of a sole Black juror and forced him to vote for death for a Black defendant. At trial and on direct appeal, Mr. Bell had been unsuccessful in his claim that his trial jury had been selected from a county system that

[11] Specifically, the lower court was directed to determine whether a juror had made up his mind to sentence Mr. Padilla to death before the penalty phase began and whether he had discussed the case with his wife before it was over. The order of the lower court is on file with amici, and this Court's public docket (No. S110741) contains its minute order directing the lower court to address this issue. The docket also reflects that, roughly a year after the lower court's hearing but before the litigation in this Court was complete, Mr. Padilla died and his case was dismissed as moot.

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"produced venires [] reflect[ing] a substantial and continuous underrepresentation of the Black population of the community." *People v. Bell* (1989) 49 Cal.3d 502, 562 (Broussard, J., dissenting). Only a single Black person made it onto the jury. Mr. Bell attached the declaration of this juror, Milton Earl McGee, to his subsequent habeas petition.[12] Mr. McGee, the Black juror, felt isolated and disrespected in the jury room, believed that Mr. Bell's background warranted a life sentence, but felt compelled to go along with the death vote of the majority:

> 3. I was the only black person on Ronnie Bell's jury, which was uncomfortable at times. I still remember trying to make a point to the other jurors during our deliberations, and a woman seated next to me came right out and said she did not believe a word I was saying. I was glad to get out of that jury room when the trial was over.
>
> 4. I knew that Ronnie Bell was from Richmond, and I wanted to hear more about his upbringing during the trial. I thought he might have come from a rough neighborhood, and I suspected that he had not been raised up right. But nothing about his background was presented to us in court.
>
> 5. If it were up to me individually, I would not have sentenced Ronnie Bell to death. . . . I did not think that what

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[12] Mr. Bell raised the misconduct issue as Claim XII of his petition. The petition and referenced exhibits are on file with amici. The minute order denying Mr. Bell's habeas petition on this Court's online docket (Case No. S04446) addressed and dismissed a handful of claims by reference to their specific number, and the rest (apparently including Claim XII) as "untimely and procedurally barred." Order, June 21, 1995. With federal habeas litigation still apparently pending, *see Bell v. Chappell* (N.D. Cal. Sept. 28, 2012) No. C-99-20615-RMW, 2012 WL 4482580 (unpublished order), Mr. Bell recently died of natural causes. *See* News Release, *Condemned Inmate Ronald Bell Dies* (March 11, 2019), https://www.cdcr.ca.gov/news/2019/03/11/condemned-inmate-ronald-bell-dies/#:~:text=Bell%20was%20sentenced%20to%20death,row%20since%20June%206%2C%201984.

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> Mr. Bell did deserved the gas chamber, but that was what the other jurors wanted, so I had to go along with the group.

In re Ronald Lee Bell Petition, Exhibit 29. A white juror dismissed Mr. McGee's judgment on the appropriate sentence for Mr. Bell as a vote based merely on a race-based kinship:

> There was one juror who did not want to sentence Mr. Bell to death, possibly because he felt kinship towards him as a fellow black man. If Mr. Bell had been white, I do not think the juror would have had any problem with sentencing him to death. The juror never said such, but that was my impression.

In re Ronald Lee Bell Petition, at Exhibit 28. *See also In re Beltran*, No. 2007 No. LA039740, Habeas Petition (Super. Ct. L.A. County) (attached juror declarations from both the holdout and another juror state that the life holdout was subjected to enormous pressure prior to changing his vote to death, and the holdout describes succumbing to the will of the majority and regretting the decision);[13] *In re Oscar Raymond Butler*, S178123, Habeas Petition (Ca.) (attached juror declaration of Roy Brown notes that the jury deadlocked twice on the sentence of a defendant with mixed racial heritage, and that one of the holdouts was a Black woman); [14] *In re Jessee Andrews*, S017657, Habeas Petition (Ca.) (attached juror declaration of juror Martin, in case of Black defendant, states that a holdout for life cited lingering doubt about Mr. Andrew's guilt, while the declaration of juror Bernard states as follows: "The lady who looked Mexican said it wasn't right to kill Jesse. We explained to her that she couldn't base her decision on her feelings, and that

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[13] This petition remains pending.
[14] This petition remains pending, for hearing in the Superior Court.

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she had to decide, based solely on the evidence presented. . . . We took several votes before we got the lady juror to change her vote to death. We reminded her that she couldn't base her decision on her feelings.").[15]

Again, available case details do not always disclose the race of holdouts for life, but it is neither contended nor expected that all life holdouts are people of color: the diverse frailties of humankind that may prompt a juror to grant mercy speak to jurors of every race and background. Below, amici show why protecting the jury right (that the State must prove death is appropriate beyond a reasonable doubt) is urgent to ensure that the views of *all* capital jurors are respected, regardless of race. *See* Point IV, *infra*.

But amici's concerns that the views of holdouts of color are disrespected apply with special force given the current crisis of confidence in the legitimacy of the criminal justice system. And these concerns are multiplied given the studies documenting that Black jurors not only frequently find themselves as disrespected holdouts for life,[16] but also have "reported tales of exclusion, bullying, brow beating, patronizing coercion, and covert accusations of reverse racism by white jurors when they opted for life in their

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[15] It is not clear from available records whether these declarations were part of a juror claim, but the petition was ultimately denied. *See* Minute Order Aug. 26, 2002. *But see Andrews v. Davis* (9th Cir. 2019) 944 F.3d 1092, 1121 (granting federal habeas relief as to sentencing, on ineffective assistance claim).

[16] *See* Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. at 252-57 (documenting cases in which Black holdouts for life were pressured into death verdicts, and the cases of exceptional Black holdouts, including in a California case, where despite antagonism by white majority, Black holdouts either blocked a death sentence or persuaded the jury to reach a life verdict).

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deliberations." Mona Lynch (2003) *The Truth of Verdicts? A Social Psychological Examination of A Theory of the Trial*, 28 Law & Soc. Inquiry 539, 544 (citing Benjamin D. Fleury-Steiner, *Jurors' Stories of Death: How America's Death Penalty Invests in Inequality* 103-128 (U. Mich. Press 2004)).[17] In these deliberations, defendants of color were "categorized in ways that reflect deep racial animosity and that highlighted difference from 'us' on the part of white jurors, who constituted the majority in nearly all cases." *Id. See also, e.g.,* Fleury-Steiner, *supra*, at 70 (Black juror describing her attempts to discuss with white jurors a Black capital defendant's background and upbringing, how white jurors only wanted to talk but not listen to her views, and this juror's desire for more "black on the jury to balance that out"), 153 (similar experience of two other Black jurors).

IV. Respecting the jury right under the California Constitution, by requiring the State to prove beyond a reasonable doubt that execution is warranted, would help to repair the damage to the legitimacy of the justice system.

Attempting to analyze the effect of an erroneous reasonable doubt instruction on a jury, Justice Scalia (writing for the Court) once explained: "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate." *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280. So too here: the precise

[17] At the time of Professor Lynch's article, the book she was citing by Professor Fleury-Steiner remained forthcoming and her article thus did not include the page numbers. Amici have added the relevant page numbers to this citation.

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effect a reasonable-doubt instruction at capital sentencing *would have had* in light of the disrespect and undue pressure holdout jurors have frequently faced is not yet knowable for two reasons. First, California has not yet enforced its constitutional jury right in this matter; second, even when this burden of proof does apply in other contexts, juror deliberations are private and their contents often remain unknown.

Nonetheless, because "art imitates life," *Henried v. Four Star Television* (Cal. Ct. App. 1968) 72 Cal. Rptr. 223, 224, it provides a ready example of the power the reasonable standard can represent in the hands of a holdout juror. In the famous film, *Twelve Angry Men*, a single juror began the deliberations giving voice to the ultimate unanimous verdict of not guilty. Reginald Rose, *Twelve Angry Men* (screenplay version of the film) (Orion-Nova Productions 1957), https://www.studiobinder.com/blog/12-angry-men-script-screenplay-pdf-download. The single juror built from his solitary position of principle, persuading juror by juror. When he and his fellow jurors met with hostility and sometimes disrespect, they invoked their reasonable doubt that the government had met its burden:

> I don't have to defend my decision to you! I have a reasonable doubt in my mind.

Id. at 81. And reasonable doubt then became a part of the jurors' deliberations:

> We may be trying to return a guilty man to the community. No one can really know. But we have a reasonable doubt, and this is a safeguard which has enormous value to our system. No jury can declare a man guilty unless it's sure. . . . . We nine can't understand how you three [for guilt] are still so sure.

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Id. at 132. Later, the juror who had been the last holdout for guilt asks another juror, who had changed his vote to not guilty: "What's the matter with you!" *Id.* at 142. And the juror's response was: "I have a reasonable doubt now. It's eleven to one." *Id.* Ultimately, the jury unanimously acquits. *Id.* at 149.

And that is how it should be in a California sentencing deliberation room if our system is ready to practice the respect for jurors that it preaches. *See, e.g.*, *Flowers*, 139 S. Ct. at 2238 ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.") A juror who has, in their *individual* discretion, *Mills*, 486 U.S. at 383-84, recognized any sort of mitigation warranting a sentence less than death in their own subjective judgment, *Witherspoon*, 391 U.S. at 519,[18] necessarily has a reasonable doubt about whether the State has proven the aggravating circumstances outweighed those in mitigation. Such a juror – take any of the holdouts described *supra* – ought to be able to rise and cite the State's failure to meet its heavy burden of proving death is appropriate beyond a reasonable doubt. Such a juror should be able to invoke the same burden the jurors in the famous film cited, including as a shield in the face of coercion and intimidation. And such jurors should not, as they have time and again, be forced to justify an individual, discretionary judgment that death is not the appropriate punishment.

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[18] As counsel for Mr. McDaniel has ably shown, this "normative" or discretionary aspect of a death sentencing decision in no way removes it from the ambit of decisions every California defendant has a constitutional right to have a jury make. *See* App. Third Supp. Reply Br. at 32-37. *See also* Amicus Brief for American Civil Liberties Union et al., 17-34, *People v. Johnson* (2019) 8 Cal.5th 475, 511-14.

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This requirement would be consistent with the Eighth and Fourteenth Amendments to the U.S. Constitution and is required under California law for all of the reasons Mr. McDaniel has argued. And it is the only outcome consistent with both the unanimity requirement all parties agree apply when a jury is tasked with a capital sentencing decision, and the severe and irrevocable nature of the penalty on which the jury is deliberating.

With respect to jury unanimity, that historic constitutional requirement goes with the State's burden of proof beyond a reasonable doubt like peanut butter goes with jelly. As this Court has explained, "juror unanimity and the standard of proof beyond a reasonable doubt are slices of the same due process pie." *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 231. *See also People v. Wolfe* (2003) 114 Cal.App.4th 177, 188 (permitting a non-unanimous conviction "lowers the prosecution's burden of proof and therefore violates federal constitutional law").

As Justice Marshall explained in a dissenting opinion from a case that the U.S. Supreme Court recently overruled, in an opinion clarifying that the Sixth Amendment requires unanimous juries,[19] a non-unanimous jury decision is, by definition, one in which the government has failed to prove its case beyond a reasonable doubt:

> More distressing still than the Court's treatment of the right to jury trial is the cavalier treatment the Court gives to proof beyond a reasonable doubt. The Court asserts that when a jury votes nine to three for conviction, the doubts of the three do not impeach the verdict of the nine. The argument seems to be that since, under *Williams [v. Florida*, 399 U.S. 78

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[19] *See Ramos v. Louisiana* (2020) __ U.S. __, 140 S. Ct. 1390.

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> (1970)], nine jurors are enough to convict, the three dissenters are mere surplusage. But there is all the difference in the world between three jurors who are not there, and three jurors who entertain doubts after hearing all the evidence. In the first case we can never know, and it is senseless to ask, whether the prosecutor might have persuaded additional jurors had they been present. *But in the second case we know what has happened: the prosecutor has tried and failed to persuade those jurors of the defendant's guilt. In such circumstances, it does violence to language and to logic to say that the government has proved the defendant's guilt beyond a reasonable doubt.*

Johnson v. Louisiana (1972) 406 U.S. 399, 400–01 (Marshall, J., dissenting). The corollary is also true here: if the State has not persuaded each juror beyond a reasonable doubt that death is the appropriate punishment, then it has failed to garner a unanimous verdict for death. Jurors need to know this.

Instructing on reasonable doubt when the stakes are a defendant's very life is the only thing consistent with this Court's tradition of affording criminal defendants the benefit of the doubt wherever possible. The Court "first stated in *Ex parte Rosenheim* (1890) 83 Cal. 388, 391 [23 P. 372], a criminal case, and [has] reiterated many times since, . . . the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute . . . " *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312.[20] *See, e.g.*, *People v. Daugherty* (Cal. Ct. App. 1981) 123 Cal.App.3d

[20] More recently, this Court clarified that the rule of lenity, requiring courts to apply the less punitive of two plausible interpretations of a law, does not operate in a vacuum. *People v. Cornett* (2012) 53 Cal.4th 1261, 1271. To determine if the more lenient

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314, 319 (noting that if a plea agreement had ambiguity, a court "would be obliged to resolve it in favor of defendant" under the rule of *Rosenheim*).

Similarly, the Court has held that the State must meet its burden of proof beyond a reasonable doubt in non-criminal proceedings, when it seeks to detain a sex offender with a mental disorder, just as the U.S. Supreme Court has held the burden applies when the government seeks to detain a juvenile offender. *People v. Burnick* (1975) 14 Cal.3d 306, 318-19 (citing *Winship*, 397 U.S. at 363). In so ruling, the Court emphasized the "massive curtailment of liberty" entailed with each type of detention. *Id.* at 319.

The U.S. Supreme Court's opinion in *Winship* looked to three salient factors when deciding the burden of proof the government must meet before it intrudes on a person's liberty: first is the level of intrusion on a person's liberty the government seeks to justify; second is the proper allocation of risk, i.e., which party should face the greater risk of an erroneous decision; third is the level of certitude a jury must have about the government's allegations before a particular government intrusion may be justified. 397 U.S. at 363-64. The Court's words should guide this Court's decision here:

> The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in *Speiser v. Randall*, [357 U.S. 513, 525-26 (1958)]: "There is always in litigation a margin

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interpretation of a law is in fact plausible, the intent of the law must be considered. *Id.* That, however, does not change the overall principle.

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> of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967).

Winship, 397 U.S. at 363-64. *See also Ivan V. v. City of New York* (1972) 407 U.S. 203, 203 (noting that "proof beyond a reasonable doubt is among the essentials of due process and fair treatment that must be afforded at the adjudicatory stage").

Just as this Court and the U.S. Supreme Court have recognized that the reasonable doubt standard applies well beyond the narrow context of the State proving the elements of a crime, so too other state courts, with capital sentencing statutes like California's that are silent on the burden of proof, have held that these principles are in force at the penalty trial when the State must prove that execution is appropriate. The reasonable doubt standard is necessary in order to convey to the capital jurors of these states the certitude that they should have before agreeing with the State's request to execute. *See State v. Rizzo* (2003) 266 Conn. 171, 209 ("Thus, it is fair to say that, in our legal system, we employ the applicable burden of persuasion to guide the fact finder, in its process of coming to a decision, regarding the sense of solemnity and the subjective degree of certitude that it must have in order to reach that decision."); *State v. Biegenwald* (N.J.

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1987) 524 A.2d 130, 155 ("We can think of no judgment of any jury in this state in any case that has as strong a claim to the requirement of certainty as does this one."); *State v. Wood* (Utah 1982) 648 P.2d 71, 81-84 (citing *Winship* and the need for a high degree of confidence that execution is appropriate); *id.* at 84 (citing "the necessity for a high degree of certitude"); *People v. Tenneson* (Colo. 1990) 788 P.2d 786, 794 (finding that the beyond a reasonable doubt standard "serves well to communicate to the jurors the degree of certainty that they must possess").

What is required for persons facing detention because of sex offenses, what is required for juveniles facing detention, what is required when the State seeks to prove a crime, what is required in other capital states, and what is required for *Twelve Angry* jurors ought to be required when California seeks a death sentence. California jurors who make the most solemn and serious decision our system could ever ask must also have the benefit of this instruction to guide their deliberations and shield their individual judgments. Indeed, as the Governor's amicus brief demonstrates, empirical studies have found the clarifying effect reasonable doubt instructions have on the jury's understanding of the decisions before them[21] – clarification badly needed in a system where a majority for death may easily use its raw power to insist upon it over the objections of

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[21] Jeffrey E. Pfeifer & James R. P. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. Appl. Soc. Psych. 1713, 1720-21 (1991); Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. Pers. & Soc. Psych. 21, 30-31 (1988).

outnumbered people of color who lack a strong legal standard in which to anchor their judgment.

As shown above, apprizing the jury of the certitude it must have before granting the State's request to execute, and fully placing the burden on the State to eliminate any reasonable doubt before executing, not only would place California in compliance with its own law, as Mr. McDaniel as shown, but would go a long way in helping jurors to regain the respect to which they are entitled, and, in turn, our system to regain some legitimacy. This is the respect to which every juror is entitled, and the respect sorely lacking in capital sentencing deliberations in which one or more jurors hold out for life against a majority seeking death. This is important for all capital jurors, but may in particular, as shown above, affect Black jurors who, in their discretion, based on their own views and life experiences, vote for life.

True, it is naïve to expect a holding applying the reasonable doubt standard to capital sentencing decisions to repair the crisis of confidence California's judicial system currently faces. But it would be a strong step in the right direction. As shown here, this Court should take it.

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CONCLUSION

This Court should hold that Penal Code section 1042 and article I, section 16 of the California Constitution require that the jury unanimously determine beyond a reasonable doubt factually disputed aggravating evidence and the ultimate penalty verdict. The legitimacy of our criminal justice system, respect for juries, and people's lives are all at stake.

DATED: October 21, 2020

Respectfully submitted,

/s/ Shilpi Agarwal
SHILPI AGARWAL
Attorney for Amici Curiae

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CERTIFICATE OF COMPLIANCE

I certify that the attached **AMICI BRIEF** uses a 13-point Times New Roman font and contains **9,302** words.

Dated: October 21, 2020

/s/ Shilpi Agarwal
SHILPI AGARWAL
Attorney for Amici Curiae

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