IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DONTE LAMONT McDANIEL, Defendant and Appellant.	CAPITAL CASE No. S171393 (Los Angeles County Superior Court No. TA074274) Hon. Robert J. Perry, Judge

APPLICATION OF CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND SANTA CLARA COUNTY PUBLIC DEFENDER TO APPEAR AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE, IN SUPPORT OF APPELLANT DONTE LAMONT McDANIEL

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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APPLICATION OF CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND SANTA CLARA COUNTY PUBLIC DEFENDER TO APPEAR AS AMICI CURIAE IN SUPPORT OF APPELLANT DONTE LAMONT McDANIEL

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.520, California Rules of Court, the California Public Defenders Association and Santa Clara County Public Defender hereby apply for permission to file the attached brief as amici curiae in support of respondent Donte Lamont McDaniel. On June 17, 2020, this Court directed the Attorney General to file a supplemental brief addressing whether "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?" These issues affect every death penalty trial in the state of California and are of significant statewide importance.

1. Interest of the California Public Defenders Association[1]

The California Public Defenders Association (hereinafter, "CPDA") is the largest organization of criminal defense attorneys in the State of California. Our membership includes approximately 4,000 attorneys who are employed as public defenders or are in private practice. CPDA has been a leader in continuing legal education for defense attorneys for over 40 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education. Our programs deal with both adult and juvenile justice.

CPDA has been granted leave to appear in over 70 California cases resulting in published opinions. (See e.g., *Facebook v. Superior Court* (*Touchstone*) (2020) ___ Cal.5th ___ [2020 WL 4691493]; *Association for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 28; *Gardner v. Appellate Division* (2019) 6 Cal.5th 998; *People v. Soto* (2018) 4 Cal.5th 968; *People v. Buycks* (2018) 5 Cal.5th 857; *Facebook, Inc. v. Superior*

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[1] The undersigned, Michael S. Ogul, on behalf of CPDA and the Santa Clara County Public Defender, certifies to this Court that no party involved in this litigation has tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of this brief, and additionally certifies that no party to this litigation has contributed any monies, services, or other form of donation to assist in the production of this brief.

Court (*Hunter*) (2018) 4 Cal.5th 1245; *San Diego County v. Commission on State Mandates* (2018) 6 Cal.5th 196; *People v. Adelmann* (2018) 4 Cal.5th 1071; *People v. Gonzales* (2017) 2 Cal.5th 858; *People v. Morales* (2016) 63 Cal.4th 399; *People v. Mosley* (2015) 60 Cal.4th 1044; *People v. Beltran* (2013) 56 Cal.4th 935; *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112; *Galindo v. Superior Court* (2010) 50 Cal.4th 1; *People v. Nguyen* (2009) 46 Cal.4th 1007; *Chambers v. Superior Court* (2007) 42 Cal.4th 673; *People v. Warner* (2006) 39 Cal.4th 548; *San Francisco v. Cobra Solutions*, *Inc.* (2006) 38 Cal.4th 839.) CPDA has also served as amicus curiae in the United States Supreme Court. (See, e.g., *Gonzales v. Duenas-Alvarez* (2007) 549 U.S. 183 [127 S.Ct. 815, 166 L.Ed.2d 683]; *Samson v. California* (2006) 547 U.S. 843 [126 S.Ct. 2193, 165 L.Ed.2d 250]; *Ewing v. California* (2003) 538 U.S. 11 [123 S.Ct. 1179, 155 L.Ed.2d 108]; *Monge v. California* (1998) 524 U.S. 721 [118 S.Ct. 2246, 141 L.Ed.2d 43]; *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413].)

In addition to our amicus work, CPDA is heavily involved in proposing and drafting legislative solutions to statewide criminal justice and juvenile law problems. Members of the CPDA Legislative Committee and CPDA's legislative advocate attend key Senate and Assembly committee meetings on a weekly basis, and take positions on hundreds of bills in a constant effort to ensure that our criminal and juvenile justice procedures, and rules of evidence, remain fair and balanced. In sum, CPDA and

its legal representatives have the necessary experience, collective wisdom, and interest in matters of justice and procedure to serve this court as amicus curiae.

2. Interest of the Santa Clara County Public Defender

Molly O'Neal is the Santa Clara County Public Defender, which employs over 130 attorneys. The Santa Clara County Public Defender represents almost 9,000 felony defendants each year, including many defendants who are charged with murder, some of who have faced the death penalty in recent jury trials (e.g., People v. Manuel Lopez, Santa Clara County Superior Court No. C1629739, a 2020 jury trial in which the undersigned author was one of the trial attorneys). The experience of the Santa Clara County Public Defender provides us with the ability to assist this Court with its analysis of the issues in this case.

The Santa Clara County Public Defender has been permitted to appear as an amicus curiae before this court on many occasions, including several in which the undersigned author submitted the amicus briefs. (See, e.g., *People v. Soto*, *supra*, 4 Cal.5th 968; *People v. Beltran*, *supra*, 56 Cal.4th 935; *Galindo v. Superior Court*, *supra*, 50 Cal.4th 1; *People v. Nguyen*, *supra*, 46 Cal.4th 1007.)

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Based on the foregoing reasons and the accompanying brief, CPDA and the Santa Clara County Public Defender apply for permission to jointly file the accompanying brief as amici curiae in support of defendant and appellant Donte Lamont McDaniel.

Dated: September 8, 2020.

Respectfully submitted,

California Public Defenders Association

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Donte Lamont McDaniel

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DONTE LAMONT McDANIEL, Defendant and Appellant.	CAPITAL CASE No. S171393 (Los Angeles County Superior Court No. TA074274) Hon. Robert J. Perry, Judge

BRIEF OF AMICI CURIAE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND SANTA CLARA COUNTY PUBLIC DEFENDER IN SUPPORT OF APPELLANT DONTE LAMONT McDANIEL

SUMMARY OF AMICI'S POSITION:

Defendant and appellant Donte Lamont McDaniel was sentenced to death by a jury that was not instructed that it must unanimously find, beyond a reasonable doubt, that any particular aggravating factor was present or that aggravation outweighed mitigation. Although this Court has repeatedly held that no such instructions are required under the federal constitution, on June 17, 2020, it ordered the prosecution to address whether "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?" As explained below, while no such instructions are required under the state or federal

constitutional prohibitions against cruel and unusual punishment, they are required under Penal Code Section 1042 and the California Constitutional right to jury trial, which provide greater protections to a capital defendant than the federal constitution. Moreover, at least to the knowledge of the undersigned amici, the distinction between the analyses of these requirements under the Sixth and Eighth Amendments has not been discussed in any decision by this Court. That distinction further illustrates why the burden of proof and unanimity requirements must be applied to factually disputed aggravating evidence and the question of whether the aggravating circumstances outweigh the mitigating circumstances.

By contrast, the reasonable doubt standard does not apply to the ultimate penalty decision of whether a capital defendant should be sentenced to death because, unlike the first two jury issues (whether aggravating factor(s) are present and, if so, whether they outweigh mitigating factors), the third and final issue is a normative decision based on the personal moral evaluation by each individual juror whether death is the appropriate sentence, that is, a juror may return a verdict of life imprisonment without possibility of parole based on mercy or sympathy despite the weight of the aggravation evidence.

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ARGUMENT:

I.

NO JUROR MAY CONSIDER ANY EVIDENCE AS AGGRAVATION UNLESS THE JURY UNANIMOUSLY FINDS THAT THE AGGRAVATING FACTOR HAS BEEN PROVEN BEYOND A REASONABLE DOUBT

This Court has repeatedly rejected arguments that the federal constitution prohibits a penalty jury from considering any factor as aggravation unless the jurors unanimously agree that the aggravating factor has been proven beyond a reasonable doubt. (See, e.g., *People v. Capers* (2019) 7 Cal.5th 989, 1014; *People v. Ochoa* (2001) 26 Cal.4th 398, 453-454; *People v. Anderson* (2001) 25 Cal.4th 543, 589-590; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Navarette* (2003) 30 Cal.4th 459, 520-521; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263; *People v. Morrison* (2004) 34 Cal.4th 698, 731; *People v. Cleveland* (2004) 32 Cal.4th 704, 765.) In reaching these decisions, this Court found that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S. Ct. 2428, 153 L. Ed. 2d 556] had no application to the California death penalty scheme. However, the more recent decisions by the United States Supreme Court in *Hurst v. Florida* (2016) 577 U.S. ___ [136 S.Ct. 616, 193 L.Ed.2d 504], *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], and *Kansas v. Marsh* (2006) 548 U.S. 163 [126 S.Ct. 2516, 165 L.Ed.2d 429] illustrate a critical distinction

between the analysis of a "normative" or moral death penalty decision under the Eighth Amendment, and the Sixth Amendment rules applicable to the findings of fact underlying the ultimate moral decision. At least as far as amici curiae are aware, no California decision addresses this distinction.

Amici respectfully submits these High Court precedents demonstrate that the Sixth and Fourteenth Amendments require that any aggravating factor must be found true, in writing, beyond a reasonable doubt, by a unanimous jury, before that factor may be considered as a basis for sentencing a capital defendant to death, and require that a unanimous jury must find, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances.

Further, the independent state constitutional guarantee to a jury trial (California Constitution, Article I, sections 16 and 24) require even broader protections than provided under the federal constitution. On the other hand, the Eighth Amendment does not require the prosecution to prove that death is the appropriate sentence, because the Eighth Amendment does not require any particular method for determining the appropriateness of the death penalty once aggravating factors have been proven beyond a reasonable doubt by a unanimous jury.

A. The Sixth Amendment Requirements of Proof Beyond a Reasonable Doubt to a Unanimous Jury Apply to any Fact or Factor Used to Increase Punishment

Apprendi v. New Jersey, *supra*, 530 U.S. 466, 490, held "that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The *Apprendi* Court cautioned that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) As further clarified in *Blakely v. Washington* (2004) 542 U.S. 296, 303 [124 S.Ct. 2531, 2536, 159 L.Ed.2d 403], "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (Original emphasis.) "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (*Blakely*, *supra*, 542 U.S. at pp. 303-304.)

It is now beyond question that the Sixth Amendment prohibits a sentencer from considering any fact or factor as a basis for increasing the punishment of a criminal defendant unless that factor has been found true, beyond a reasonable doubt, by a unanimous jury. (*Cunningham v. California*, *supra*, 549 U.S. 270, 288-289 [127 S.Ct. 856, 166 L.Ed.2d 856, 868].) As observed by the High Court in *Cunningham*: "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be

found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Id*. at p. 281.) Thus, although the sentencing statute provides a maximum sentence for the conviction at issue, if the maximum sentence cannot be imposed without a finding of aggravating factors beyond the elements of the crime itself, the Sixth Amendment prohibits imposition of the maximum sentence unless those factors have been found true, beyond a reasonable doubt, by a unanimous jury. (*Cunningham*, *supra*, 549 U.S. at pp. 288-289.)

B. The Sixth Amendment Requirements Apply to Any Aggravating Factor Used to Support a Death Sentence

In *Ring v. Arizona*, *supra*, 536 U.S. 584 [122 S. Ct. 2428, 153 L. Ed. 2d 556], the United States Supreme Court vacated a death sentence pronounced by a judge because, under Arizona law, it was the judge, not the jury, who found the aggravating circumstances that were the prerequisite to a death sentence. Without the finding of the aggravating circumstances, the maximum sentence was life imprisonment. Relying on its previous holding in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 483, that "a defendant [may not] be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone . . ." (original emphasis), the Court held that the Sixth Amendment prohibits a "judge, sitting without a jury, [from finding] an aggravating

circumstance necessary for imposition of the death penalty." (*Ring*, *supra*, 536 U.S. 584, 609.)

Ring further holds that, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact no matter how the State labels it must be found by a jury beyond a reasonable doubt." (*Id*. at p. 602.) Indeed, Justice Scalia's concurring opinion states "that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives whether the statute calls them elements of the offense, sentencing factors, or Mary Jane must be found by the jury beyond a reasonable doubt." (536 U.S. 584, 610 (conc. opn., Scalia, J.)) He concluded, "wherever *factors* [required for a death sentence] exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt." (*Id*. at 512, emphasis added.)

C. Under California Law, A Death Sentence Cannot be Imposed Solely Based on Defendant's Conviction of Special Circumstances Murder but, Instead, Requires a Finding of Aggravating Factors and That Aggravation Outweighs Mitigation

Although Penal Code Section 190.2, subdivision (a), provides that the punishment for first degree murder with at least one special circumstance is either death or life imprisonment without the possibility of parole, California law is

well settled that a finding of an aggravating factor is a prerequisite to the imposition of a death sentence. The last paragraph of Penal Code section 190.3 provides in pertinent part that the trier of fact "shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." Similarly, CALJIC 8.88 and CALCRIM 766 require the jury to find that the aggravating circumstances outweigh mitigating circumstances in order to return a death sentence. (See, e.g., Caljic 8.88: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." CALCRIM 766 provides in pertinent part: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.") Manifestly, before *substantial* aggravating circumstances can outweigh mitigating circumstances, there must first be aggravating circumstances to consider. Thus, a sentence of death is not permitted under California law unless each juror has found the presence of one or more aggravating circumstances.

Further, although Penal Code Section 190.3, factor (a), provides that the circumstances of the first degree murder conviction(s) and special circumstance(s) finding may be

considered as a factor in aggravation, the mere finding of guilt on special circumstances murder is insufficient to support a death sentence because this Court has repeatedly recognized that factor (a), the circumstances of the crime, may be mitigating as opposed to aggravating in any given case. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1189; *People v. Smith* (2003) 30 Cal.4th 581, 639; *People v. Haskett* (1990) 52 Cal.3d 210, 229, fn. 5.) Thus, in order to consider the circumstances of the crime as aggravating, the jury must find some fact about the crime is "a circumstance above and beyond the essential constituents of a crime which increases its guilt or enormity or adds to its injurious consequences." (*People v. Davenport* (1985) 41 Cal.3d 247, 289; accord, CALJIC 8.88 and CALCRIM 763.)

A comparison to determinate sentencing under Penal Code Section 1170 is illustrative. Under California's determinate sentencing law, statutes which define felony offenses that are punishable by a determinate term generally include a specific provision setting forth a low, middle and upper term for the respective felony. These terms are set forth in the very same statute which defines the felony offense, much as Penal Code Section 190.2, subdivision (a), sets forth the potential punishments for the special circumstance murders which are defined in the very same subdivision. Under the determinate sentencing provisions of Penal Code Section 1170, subdivision (a)(3), the sentencer is directed to the sentencing factors promulgated by the Judicial Council, and pursuant to subdivision

(b) of that statute, "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime."

Rule 4.421 of the California Rules of Court sets forth the aggravating circumstances promulgated by the Judicial Council, including facts relating to the crime which may constitute aggravating circumstances under subdivision (a). These facts are above and beyond the statutory elements of the felony offense. Although the sentencer may find aggravating factors from the facts relating to the crime based on the very same evidence presented at the trial in which the defendant was found guilty, that finding of aggravation is made at a separate sentencing hearing. Likewise, under Penal Code Section 190.3, although the sentencer may find aggravation from the circumstances of the crime based on the very same evidence which was presented at the guilt phase, that finding of aggravation is made at the separate penalty phase. Thus, imposition of the maximum sentence permitted by the statutory offense in both situations is dependent on a further finding of aggravation as defined in a different provision of law. Even before *Cunningham v. California*, *supra*, 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], a defendant could not be sentenced to the upper term unless the sentencer found the existence of aggravating factors above and beyond the elements of the statutory felony offense. So it is with any attempt to impose a death sentence in California: a defendant cannot be sentenced to death unless the sentencer

finds the existence of at least one aggravating factor above and beyond the elements of the special circumstance murder conviction.

The other potential aggravating factors which might be utilized to impose a death sentence under Penal Code Section 190.3 also require proof of the existence of those factors at the penalty phase. Before evidence of other violent criminal activity may be found under factor (b), the prosecution must prove the commission of such conduct at the penalty phase. Before a prior felony conviction may be considered under factor (c), the prosecution must prove the existence of such prior conviction. Once again, although the finding of those aggravating factors may be based on evidence presented at the guilt phase of the trial, the finding of these aggravating factors is made at the penalty phase. And to be clear, these findings are factual findings, not moral or normative questions: the defendant either did or did not engage in other violent criminal activity, and either did or did not suffer a prior felony conviction.

Moreover, not only must the jury find the presence of aggravating circumstances but, in addition, it must find (1) "that the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code sec. 190.3), and further, (2) that the aggravating factors are so substantial in comparison to mitigation that death is warranted (CALCRIM 766: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both outweigh* the mitigating

circumstances *and are also so substantial in comparison* to the mitigating circumstances that a sentence of death is appropriate and justified." Emphasis added.). As this Court recognized in *People v. Murtishaw* (1989) 49 Cal.3d 1001, 1027, in order to vote for the death penalty, a juror "must believe aggravation is so relatively great, and mitigation so comparatively minor, that the defendant deserves death rather than society's next most serious punishment, life in prison without parole." (See, also, *People v. Breaux* (1991) 1 Cal.4th 281, 316, observing that a jury can "return a death verdict only if aggravating circumstances predominated and death is the appropriate verdict.")

Therefore, there can be no dispute that California law requires the finding of at least one aggravating factor as a prerequisite to any death sentence, and that the aggravating circumstances outweigh the mitigating circumstances. Both findings must be made before a death sentence may even be considered.

D. Since a Death Sentence is Contingent on the Finding of an Aggravating Factor, the Sixth Amendment Requirements of Proof Beyond a Reasonable Doubt, to a Unanimous Jury, Apply to the Finding of any such Factor in Aggravation

In *Blakely v. Washington* (2004) 542 U.S. 296, 301-302 [124 S.Ct. 2531, 2536, 159 L.Ed.2d 403], the United States Supreme Court reiterated the rule that, under the Sixth Amendment's guarantee of the right to a jury trial:

> "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

> prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure §§ 87, p 55 (2d ed. 1872).

Moreover, the *Blakely* Court specifically explained that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* 542 U.S. at p. 303 [124 S.Ct. at p. 2537]; original emphasis.)

The *Blakely* Court rejected the prosecution's analogy to *Williams v. New York* (1949) 337 U.S. 241 [93 L. Ed. 1337, 69 S. Ct. 1079], which "allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death." (*Blakely*, 542 U.S. at pp. 304-305 [124 S.Ct. at p. 2538].) Instead, Justice Scalia and the *Blakely* majority emphasized that the statute in *Williams* did not require any specific findings but allowed the judge to sentence the defendant "'to death giving no reason at all.'" (542 U.S. at p. 305.) Thus, the *Blakely* court reversed the non-capital defendant's sentence because it was based on "a disputed finding" that was

not found true by a unanimous jury. (*Id*. at p. 313 [124 S.Ct. at p. 2543].)

As explained in section C., *ante*, pp. 20-25, Penal Code Section 190.3 prohibits a death sentence unless the jury (or judge, where a jury has been waived) not only finds the existence of aggravating factors and that aggravation outweighs mitigation, but further determines that the aggravating factors are so substantial in comparison to the mitigating factors that a sentence of death is appropriate. Thus, unlike *Williams*, a California capital defendant cannot be sentenced "'to death giving no reason at all.'" Instead, the imposition of a death sentence is dependent on the determination of the presence or absence of factors in aggravation and whether aggravating factors outweigh mitigating factors, which are "disputed" issues as in *Blakely*. (542 U.S. at p. 313 [124 S.Ct. at p. 2543].) Therefore, as in *Ring v. Arizona*, *supra*, 536 U.S. 584 [122 S. Ct. 2428, 153 L. Ed. 2d 556], the California requirements that a death sentence cannot be returned unless there is not only aggravation, but that aggravation outweighs mitigation, are subject to the Sixth Amendment requirements of unanimous jury findings beyond a reasonable doubt. These requirements of proof beyond a reasonable doubt and unanimity must be honored under the Sixth Amendment *before* the jurors may turn to the normative or moral assessment whether the aggravating circumstances are so substantial in comparison to the mitigating circumstances that death is the appropriate sentence.

The fact that a California capital defendant has the right to have a unanimous jury decide the ultimate question of life or death is not sufficient to comply with the corollary requirements of the Sixth Amendment to a unanimous jury finding, beyond a reasonable doubt, on each fact essential to a death sentence. Indeed, *Ring* specifically holds that, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact no matter how the State labels it must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. 584, 602.) Further, *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 483, and *Blakely v. Washington*, *supra*, 542 U.S. 296, 301-302, 313 [124 S.Ct. 2531, 2536, 2543], expressly require these findings to be made by a unanimous jury.

These Sixth Amendment requirements apply to findings of aggravation at penalty phase because a capital defendant cannot be sentenced to death at the conclusion of the guilt phase merely on the basis of the murder conviction and special circumstance findings. Instead, life imprisonment without the possibility of parole is the maximum sentence which can be imposed without a finding of aggravation at the penalty phase (*Blakely v. Washington*, *supra*, 542 U.S. 296, 303 [124 S.Ct. 2531, 2537]); a death sentence is "contingent" on the finding of aggravation at penalty phase (*Ring v. Arizona*, *supra*, 536 U.S. 584, 602); and since the finding of aggravation is "essential" to the imposition of a death sentence, it must be proven beyond a reasonable doubt to a unanimous jury, regardless of "whether the statute calls them

elements of the offense, sentencing factors, or Mary Jane" (*Ring*, *supra*, 536 U.S. at p. 612 (conc. opn., Scalia, J.)).

E. *Hurst v. Florida* (2016) 577 U.S. ___ [136 S.Ct. 616, 193 L.Ed.2d 504] and *Cunningham v. California*, *supra*, 549 U.S. 270[127 S.Ct. 856, 166 L.Ed.2d 856] demonstrate that the Sixth Amendment Jury Trial Guarantees Apply to Aggravating Factors Used to Support a Death Sentence

As noted at the outset of this discussion, this Court has repeatedly rejected application of *Apprendi*, *Ring*, and *Blakely* to Penal Code Section 190.3. (See, e.g., *People v. Capers*, *supra*, 7 Cal.5th 989, 1014; *People v. Ochoa*, *supra*, 26 Cal.4th 398, 453-454; *People v. Anderson*, *supra*, 25 Cal.4th 543, 589-590; *People v. Snow*, *supra*, 30 Cal.4th 43, 126, fn. 32; *People v. Navarette*, *supra*, 30 Cal.4th 459, 520-521; *People v. Prieto*, *supra*, 30 Cal.4th 226, 262-263; *People v. Morrison*, *supra*, 34 Cal.4th 698, 731; *People v. Cleveland*, *supra*, 32 Cal.4th 704, 765.) However, these decisions do not discuss the distinction between the Sixth Amendment's requirements applicable to jury findings of aggravating facts, and the Eighth Amendment's authorization of a normative or moral standard in applying the death penalty after the aggravating findings have been made in compliance with the Sixth Amendment. (Cf. *Hurst v. Florida*, *supra*, 577 U.S. ___ [136 S.Ct. 616, 193 L.Ed.2d 504] and *Cunningham v. California*, *supra*, 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].

In response to *Apprendi*, *People v. Anderson*, *supra*, 25 Cal.4th 543, 589-590, fn. 14, held that:

> under the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without possibility of parole. (§ 190.2, subd. (a).) Hence, facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi*.

After *Ring* was decided in 2002, *People v. Snow*, *supra*, 30 Cal.4th 43, 126, fn. 32, simply quoted the foregoing holding in *Anderson*, adding that *Ring* "does not change this analysis." The *Snow* Court distinguished *Ring* as follows:

> Under the Arizona capital sentencing scheme invalidated in *Ring*, a defendant convicted of first degree murder could be sentenced to death if, and only if, the trial court first found at least one of the enumerated aggravating factors true. ([*Ring*, *supra*,] at p. 603 [122 S.Ct. at p. 2440].) Under California's scheme, in contrast, each juror must believe the circumstances in aggravation substantially outweigh those in mitigation, but the jury as a whole need not find any one aggravating factor to exist. The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another. Nothing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally must find any aggravating factor true beyond a reasonable doubt.

(*Snow*, *supra*, 30 Cal.4th 43, 126, fn. 32.)

After *Blakely* was decided, *People v. Morrison*, *supra*, 34 Cal.4th 698, 731, rejected the notion that *Blakely* had any impact on the claim that a capital defendant had the right to require a unanimous jury finding beyond a reasonable doubt on aggravating factors, stating that *Blakely*

> simply relied on *Apprendi* and *Ring* to conclude that a state noncapital criminal defendant's Sixth Amendment right to trial by jury was violated where the facts supporting his sentence, which was above the standard range for the crime he committed, were neither admitted by the defendant nor found by a jury to be true beyond a reasonable doubt.

Amici begs to differ for two reasons. First, a comparison of *People v. Black* (2005) 35 Cal.4th 1238, with *Hurst v. Florida*, *supra*, 577 U.S. ___ [136 S.Ct. 616, 193 L.Ed.2d 504] and *Cunningham v. California*, *supra*, 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], demonstrates that the Sixth Amendment requires aggravating factors in support of a death sentence to be found true beyond a reasonable doubt by a unanimous jury, regardless of whether a finding of special circumstances alone allows for a potential maximum punishment of death. Second, *Kansas v. Marsh*, *supra*, 548 U.S. 163 [126 S.Ct. 2516, 165 L.Ed.2d 429] illustrates that, although California's standard of utilizing a "free weighing of all the factors relating to the defendant's culpability" (*People v. Snow*, *supra*, 30 Cal.4th 43, 126, fn. 32) in choosing death or life imprisonment without the possibility of parole satisfies the Eighth Amendment requirements of narrowing and guided discretion, compliance

with those Eighth Amendment standards does not escape the separate Sixth Amendment requirement that any aggravating factor or factual finding used as the basis for a death sentence must be proven beyond a reasonable doubt to a unanimous jury.

In *People v. Black*, *supra*, 35 Cal.4th 1238, 1254, this Court held that "the upper term is the 'statutory maximum'" permitted for the defendant's conviction, just as it held in *People v. Snow*, *supra*, 30 Cal.4th 43, 126, fn. 32, that "'death *is* no more than the prescribed statutory maximum for the offense'" (quoting from *People v. Anderson*, *supra*, 25 Cal.4th 543, 589-590, fn. 14 (original emphasis)). In *Cunningham*, however, the United States Supreme Court expressly rejected *Black*, holding that, since the upper term could not be imposed without finding factors in aggravation, those factors must be found true, beyond a reasonable doubt, by a unanimous jury, before a defendant could be sentenced to more than the middle term. Since *Cunningham* flatly holds that the Sixth Amendment prohibits an upper term from being imposed unless a unanimous jury finds the requisite aggravating factor has been proven beyond a reasonable doubt, the same requirement applies to the aggravating factors which are a prerequisite to a death sentence. In both situations– determinate sentences under Penal Code section 1170 and death sentences under Penal Code section 190.3–a finding of aggravation is a prerequisite to the greater sentence. In both situations, the finding of aggravation is not present from the guilty verdict alone. In both situations, although the sentencer

may find aggravation from the facts of the offense itself, even those findings of "aggravation" are made at the sentencing hearing, and not "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely v. Washington*, *supra*, 542 U.S. 296, 303 (original emphasis). Accord: *Cunningham v. California*, *supra*, 549 U.S. 270, 288-289 [166 L.Ed.2d 856, 873].) In both situations, the presence or absence of aggravation is a fact in dispute. Thus, in both situations, the Sixth Amendment requires that aggravating factors must be found true beyond a reasonable doubt, in writing, by a unanimous jury.

Further, although California's "free weighing" or normative standard guiding the penalty jury's ultimate sentencing choice of life or death complies with the Eighth Amendment, *Hurst v. Florida*, *supra*, 577 U.S. ___ [136 S.Ct. 616, 193 L.Ed.2d 504] and *Kansas v. Marsh*, *supra*, 548 U.S. 163 [126 S.Ct. 2516, 165 L.Ed.2d 429] demonstrate that such compliance does not excuse the failure to comply with the Sixth Amendment's prohibition against the consideration of aggravating factors unless they have first been found true beyond a reasonable doubt by a unanimous jury. Plainly, the Sixth and Eighth Amendments address different issues and impose different requirements. As illustrated by *Marsh*, compliance with one does not constitute compliance with the other.

In *Marsh*, the United States Supreme Court rejected an Eighth Amendment challenge to Kansas' death penalty statute

that was based on the defendant's claim that the statute "establishes an unconstitutional presumption in favor of death because it directs imposition of the death penalty when aggravating and mitigating circumstances are in equipoise." (548 U.S. 163, 166 [126 S.Ct. 2516, 2520].) The *Marsh* Court ruled that the case "is controlled by *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), overruled on other grounds, *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)." (*Marsh*, *supra*, 548 U.S. at p. 169 [126 S.Ct. at p. 2522].) It is crucial to recognize that *Marsh* affirmed the Eighth Amendment holding in *Walton*, while recognizing that the Sixth Amendment holding in *Walton* had been overruled in *Ring*. *Ring* manifestly continues to reflect our highest Court's view of the Sixth Amendment, as evidenced in 2007 by *Cunningham v. California*, *supra*, 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] and in 2016 by *Hurst v. Florida*, *supra*, 577 U.S. ___ [136 S.Ct. 616, 193 L.Ed.2d 504].

The *Walton* Court was faced with both Sixth Amendment and Eighth Amendment challenges to Arizona's death penalty statute. In part II of the opinion, the Court rejected the defendant's argument "that every finding of fact underlying the sentencing decision must be made by a jury, not by a judge, and that the Arizona scheme would be constitutional only if a jury decides what aggravating and mitigating circumstances are present in a given case and the trial judge then imposes sentence based on those findings." (*Walton v. Arizona*, *supra*, 497 U.S.

639, 647.) Thus, the Court held "that the Arizona capital sentencing scheme does not violate the Sixth Amendment." (*Id.* at p. 649.) However, part II of the opinion, that is, the resolution of the Sixth Amendment issue, was expressly overruled in *Ring v. Arizona*, *supra*, 536 U.S. 584, 589, 609, where the Court held that the Sixth Amendment requires a jury to find any aggravating factors which are necessary to the imposition of the death penalty. On the other hand, *Ring* left untouched *Walton*'s resolution of the Eighth Amendment issue.

The Eighth Amendment issue in *Walton* concerned whether "the Arizona statute violates the Eighth and Fourteenth Amendments because it imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency." (*Walton v. Arizona*, *supra*, 497 U.S. 639, 649.) The Court distilled the governing Eighth Amendment principle as follows: "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." (*Id.* at p. 650.) Thus, the Court rejected the defendant's Eighth Amendment challenge in Part III of the opinion (*id.* at pp. 649-650), and in Part IV of the opinion, further ruled that the Arizona statute did not create an unconstitutional

presumption favoring death, in violation of the Eighth Amendment, by providing for the imposition of "the death penalty if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency" (*id.* at pp. 651-652). In the course of the latter holding, the *Walton* Court relied on its previous decision in *Boyde v. California* (1990) 494 U.S. 370, 374 [110 S. Ct. 1190, 108 L. Ed. 2d 316], upholding California's weighing instruction, which requires the imposition of a death sentence where "the aggravating circumstances outweigh the mitigating circumstances . . . ." Once again, it bears emphasis that *Boyde* was an Eighth Amendment case and did not raise any Sixth Amendment issues. (*Boyde*, *supra*, 494 U.S. at p. 372.)

Marsh is concerned with the Eighth Amendment's requirement of giving full effect and consideration to a defendant's mitigation evidence. As emphasized in *Marsh*, the United States Supreme Court has never required any particular "'method for balancing mitigating and aggravating factors'" (548 U.S. at p. 175 [126 S.Ct. at p. 2525]). Indeed, the *Marsh* Court observed that *Walton* held "that a state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances." (*Id.* at p. 173 [126 S.Ct. at p. 2524].)

Marsh, however, does not excuse the Sixth Amendment requirement, articulated in *Ring*, that any aggravating factors which are used as the basis for the imposition of a death sentence

must be found true, beyond a reasonable doubt, by a unanimous jury. In fact, the Kansas statute upheld in *Marsh* required the jury to find "beyond a reasonable doubt the existence of one or more statutorily enumerated aggravating circumstances."

By contrast, *Hurst v. Florida*, *supra*, 577 U.S. ___ [136 S.Ct. 616, 193 L.Ed.2d 504], held that Florida's death penalty statute is unconstitutional because the judge, not the jury, makes the decision whether to impose a death sentence based on findings made by the judge after weighing the aggravating and mitigating circumstances at the sentencing hearing. Under Florida law, a defendant convicted of capital murder may be sentenced to death or life imprisonment without parole. After the defendant is convicted of capital murder, "the sentencing judge conducts an evidentiary hearing before a jury" and "the jury renders an 'advisory sentence'." However, the judge is the one who determines the sentence and is not bound by the jury's "advisory sentence". Although Mr. Hurst's jury recommended a death sentence, he was denied his Sixth Amendment right to jury trial under *Ring v. Arizona*, *supra*, 536 U.S. 584 because the jury did not make the sentencing determination but only recommended an advisory sentence. Further, although Florida law provided for a maximum potential sentence of death for first-degree murder, a death sentence could not be imposed merely on the basis of a conviction for first-degree murder; instead, additional judge-made findings were required. The Sixth

Amendment requires these findings to be made by a jury. (*Hurst*, *supra*, 136 S.Ct. at p. 632.)

Although this Court has repeatedly stated that *Ring* and its progeny have no effect on our death penalty statute because, under California law, death is no more than the permissible sentence allowed for a jury verdict finding the defendant guilty of special circumstance murder (see, e.g., *People v. Capers*, *supra*, 7 Cal.5th 989, 1014; *People v. Prieto*, *supra*, 30 Cal.4th 226, 263), the identical argument was made–and rejected–by the High Court in *Hurst*.[2]

Unfortunately, *none* of the capital decisions by this Court discussing *Hurst*, *Cunningham*, *Apprendi*, *Ring*, or *Blakely* address the distinction between these Sixth and Eighth Amendment issues. Instead of acknowledging that aggravating

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[2] See also the opinion of Justice Sotomayor dissenting from the denial of certiorari in *Woodward v. Alabama* (2013) 571 U.S. ___ [134 S.Ct. 405]: "a defendant is eligible for the death penalty in Alabama only upon a specific factual finding that any aggravating factors outweigh the mitigating factors he has presented. See Ala. Code §§13A–5–46(e), 13A–5–47(e). ***The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is therefore necessary to impose the death penalty. It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole. Under Apprendi and Ring, a finding that has such an effect must be made by a jury***." (Emphasis added.) These observations apply with equal force to the California death penalty statute.

factors necessary to a death sentence are governed by the Sixth Amendment, the California decisions rely on the rationale that the "final step" of weighing the aggravating and mitigating factors is not prohibited by *Apprendi* or *Ring*. While the latter statement is correct, *Cunningham*'s rejection of *Black* demonstrates that the former position is wrong, and *Marsh* and *Hurst* illustrate that the latter rationale fails to address the Sixth Amendment issue; in other words, while California's "normative" process satisfies the Eighth Amendment, it violates the Sixth Amendment.

The failure to recognize this crucial distinction is perhaps best revealed by *People v. Ochoa*, *supra*, 26 Cal.4th 398, 453. Relying on *Walton v. Arizona*, *supra*, 497 U.S. 639, *Ochoa* rejected the defendant's claim that a finding of aggravation under Penal Code Section 190.3, factor (b), required a unanimous finding beyond a reasonable doubt by a penalty jury under *Apprendi*. The *Ochoa* court observed that *Walton* had been distinguished by the United States Supreme Court in *Apprendi*, and described *Walton*'s holding as compelling

> rejection of defendant's instant claim. Arizona law provided that convicted first degree murderers were subject to a hearing in which the trial court decided whether to sentence the defendant to death or life imprisonment. A finding of first degree murder in Arizona was thus the functional equivalent of a finding of first degree murder with a section 190.2 special circumstance in California; both events narrowed the possible range of sentences to death or life imprisonment.

(*Ochoa*, *supra*, 26 Cal.4th 398, 453.) Completing its analogy, the *Ochoa* court held:

> In Arizona, the requisite fact [permitting a death sentence] is the defendant's commission of first degree murder; in California, it is the defendant's commission of first degree murder with a special circumstance. Once the jury has so found, however, there is no further *Apprendi* bar to a death sentence.

(*Id*. at pp. 453-454.) Thus, *Ochoa* essentially used an Eighth Amendment analysis, centered on the narrowing requirement imposed by *Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346], and *Gregg v. Georgia* (1976) 428 U.S. 153 [96 S.Ct. 2909, 49 L.Ed.2d 859].

As noted above, *Ring* overruled *Walton*'s holding that the Sixth Amendment was inapplicable to aggravating factors under the Arizona death penalty statute. Instead, *Ring* squarely held that the Sixth Amendment requirement of proof beyond a reasonable doubt by a unanimous jury applies to "an aggravating circumstance necessary for imposition of the death penalty." (*Ring*, *supra*, 536 U.S. 584, 609.) In light of *Hurst*, *Ring*, *Blakely* and *Cunningham*, the aggravating factor at issue in *Ochoa*–other violent criminal activity under Penal Code Section 190.3, factor (b)–is a finding which can only be made by a unanimous jury, beyond a reasonable doubt. To be fair to the *Ochoa* Court, *Hurst*, *Ring*, *Blakely* and *Cunningham* were all decided after *Ochoa*. However, just as *Cunningham* found that *People v. Black*, *supra*, 35 Cal.4th 1238, was wrong in its interpretation of the Sixth

Amendment right to jury trial, it is now apparent that *Ochoa* and its progeny, including *People v. Capers*, *supra*, 7 Cal.5th 989, 1014, were likewise wrong in their interpretation of the right to jury trial. Indeed, the only case cited in *Ochoa* as supporting its reasoning, and that articulated in *Anderson*, *supra*, 25 Cal.4th 543, 589-590, was *United States v. Allen* (8th Cir. 2001) 247 F.3d 741, 763. (*Ochoa*, 26 Cal.4th 398, 454.) But the subsequent history of *Allen* reveals that certiorari was granted (*Allen v. United States* (2002) 536 U.S. 953 [122 S.Ct. 2653, 153 L.Ed.2d 830]), eventually followed by the issuance of a new decision by the Eighth Circuit, which accepted *Ring*'s Sixth Amendment holding and carried it a step further to hold that the Fifth Amendment requires an indictment to "include at least one statutory aggravating factor to satisfy the Fifth Amendment because that is what is required to elevate the available statutory maximum sentence from life imprisonment to death." (*United States v. Allen* (8th Cir. 2005) 406 F.3d 940, 943.)

Amici humbly requests this Court to recognize the crucial distinction between the United States Supreme Court's Sixth Amendment jurisprudence requiring a unanimous jury to find, beyond a reasonable doubt, the existence of any aggravating factor used to impose a death sentence and that aggravation outweighs mitigation, and the High Court's Eighth Amendment jurisprudence concerning the various methods by which the sentencer may choose to give weight to mitigation or find that the death penalty is not appropriate *after the aggravating factors*

have been found true, and found to outweigh the mitigating factors, by a unanimous jury beyond a reasonable doubt.

F. This Court Should Conclude that the Independent Provisions of the California Constitution, Article I, Section 16, Prohibit a Death Sentence Unless the Jury Has Unanimously Found, Beyond a Reasonable Doubt, the Existence of at least One Aggravating Circumstance and that the Aggravating Circumstance(s) Outweigh the Mitigating Circumstance(s).

The state constitutional right to a jury trial is found in Article I, Section 16, of the California Constitution, which provides in pertinent part: "Trial by jury is an inviolate right and shall be secured to all.... A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel."

The California Constitution further provides that the "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." (Art. I, Sec. 24, first sentence.) As observed in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 354:

> This declaration of independence made explicit a preexisting fundamental principle of constitutional jurisprudence (see Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 5, 1974), analysis by Legislative Analyst, p. 26), and in the years that followed served as the basis for numerous decisions interpreting the state Constitution as extending protection to our citizens beyond the limits imposed by the high court under the federal Constitution. (See, e.g., *People v. Houston, supra,* 42 Cal.3d 595, 609–610, 230

Cal.Rptr. 141, 724 P.2d 1166 [self-incrimination privilege]; *People v. Ramos* (1984) 37 Cal.3d 136, 152, 207 Cal.Rptr. 800, 689 P.2d 430 [due process clause]; *People v. Bustamante* (1981) 30 Cal.3d 88, 97–99, 177 Cal.Rptr. 576, 634 P.2d 927 [right to counsel]; *People v. Pettingill* (1978) 21 Cal.3d 231, 247–248, 145 Cal.Rptr. 861, 578 P.2d 108 [self-incrimination privilege]; *People v. Hannon* (1977) 19 Cal.3d 588, 606–608, 138 Cal.Rptr. 885, 564 P.2d 1203 [right to speedy trial]; *People v. Disbrow, supra,* 16 Cal.3d 101, 114–115, 127 Cal.Rptr. 360, 545 P.2d 272 [self-incrimination privilege]; *People v. Norman, supra,* 14 Cal.3d 929, 939, 123 Cal.Rptr. 109, 538 P.2d 237 [unreasonable search and seizure]; *People v. Brisendine* (1975) 13 Cal.3d 528, 548–552, 119 Cal.Rptr. 315, 531 P.2d 1099 [same].)

The independence and scope of the California constitutional right to a jury trial has been observed on multiple occasions. As recognized in *People v. Ernst* (1994) 8 Cal.4th 441, 445, a defendant's waiver of the right to jury trial under the California Constitution must be "*expressed in open court by the defendant and the defendant's counsel*" (quoting from the California Constitution, Art. I, Sec. 16, first sentence; emphasis supplied in *Ernst*.) Consequently, *Ernst* held that the lack of an express waiver of the right to jury trial was error under the California Constitution, regardless of whether it would be error under the totality of the circumstances test applicable under the federal constitution. (8 Cal.4th at p. 446.) Similarly, *People v. Daniels* (2017) 3 Cal.5th 961, 1003, observed that, "[*i*]*n California*, an effective waiver of the right to a jury trial requires that a defendant's waiver be express, voluntary, knowing, and

intelligent." (Emphasis added; relying on, *inter alia*, *People v. Holmes* (1960) 54 Cal.2d 442, 443-444.)

Although not required by the federal constitution, in *People v. Sivongxxay* (2017) 3 Cal.5th 151, 169, this Court "offer[ed] some general guidance to help ensure that a defendant's jury trial waiver is knowing and intelligent, and to facilitate the resolution of a challenge to a jury waiver on appeal." Specifically:

> Going forward, we recommend that trial courts advise a defendant of the basic mechanics of a jury trial in a waiver colloquy, including but not necessarily limited to the facts that (1) a jury is made up of 12 members of the community; (2) a defendant through his or her counsel may participate in jury selection; (3) all 12 jurors must unanimously agree in order to render a verdict; and (4) if a defendant waives the right to a jury trial, a judge alone will decide his or her guilt or innocence. We also recommend that the trial judge take additional steps as appropriate to ensure, on the record, that the defendant comprehends what the jury trial right entails.

(*Ibid*.)

Moreover, the drafters and proponents of Proposition 115 at the 1990 Primary Election affirmed the special independence of the right to jury trial under the California Constitution, in marked distinction to the other constitutional rights guaranteed to a criminal defendant by both the federal and state constitutions. As approved by the electorate, Proposition 115 would have amended Article I, Section 24, to provide that the rights of a criminal

> defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, *shall be construed by the courts of this State in a manner consistent with the Constitution of the United States*.

(Emphasis added.) Conspicuous by its omission was the "inviolate right" of a criminal defendant to a jury trial guaranteed by Article I, Section 16, of the California Constitution. Pointing to the foregoing omission, the Attorney General explained that the initiative's language was not meant to restrict the scope of the right to jury trial under the California Constitution. (*Raven v. Deukmejian*, *supra*, 52 Cal.3d 336, 351.)

In addition, this Court has interpreted the California Constitution more broadly when necessary to ensure the reliability of a death sentence. In *People v. Horton* (1995) 11 Cal.4th 1068, this Court reversed the death judgment because it was based, in part, on a prior murder special circumstance that arose from a prior Illinois conviction for murder. The defendant complained that his motion to strike the prior murder conviction should have been granted on the grounds that he was denied the effective assistance of counsel at a critical stage of the prior proceedings. The California trial court and the prosecution

rejected his position, asserting that the United States Supreme Court's decision in *Custis v. United States* (1994) 511 U.S. 485 [114 S.Ct. 1732, 128 L.Ed.2d 517] precluded a motion to strike a prior conviction unless it was based on the denial of his right to have counsel appointed to represent him. This Court concluded:

> Upon a close review of the *Custis* decision and the parties supplemental briefing, we agree with defendant that *Custis* neither compels nor justifies a modification of existing California law governing a collateral attack, *in a capital proceeding,* upon a prior conviction that the prosecution has alleged as a special circumstance rendering the defendant eligible for the death penalty.

(11 Cal.4th at p. 1134; original emphasis.)

In so ruling, this Court rejected arguments that it should defer to the judgments of the Illinois state courts, who had ruled against the defendant on the identical issues, explaining that,

> notwithstanding the proper deference that normally should be accorded the judgments of sister states, where an error in an appellate court's prior review of an alleged constitutional violation appears on the face of the judgment itself, and the claimed violation is tantamount to a complete denial of representation at a critical trial stage, the prior judgment should not bar a defendant from raising that claim in a California capital proceeding.

(*Id*. at p. 1138.) The *Horton* Court concluded:

> we believe that the increased need for reliability in the death determination process warrants a rule that permits a defendant, at least in the context of capital proceedings, to challenge the constitutional validity of a prior conviction (alleged as the basis of a special

> circumstance) on the fundamental ground raised in the present case, even where the issue has been decided adversely to the defendant in the direct appeal of the prior conviction.

(At p. 1139.)

By contrast, when this Court later addressed the same issue in the context of a non-capital case, it distinguished *Horton* and followed *Custis*, holding that "[n]othing in the language of our state Constitution, or in our past decisions construing its provisions, presents a 'cogent reason' for us to reach an interpretation of our state constitutional requirements different from that under the federal Constitution, as determined in *Custis*." (*Garcia v. Superior Court* (1997) 14 Cal.4th 953, 963.) Thus, the *Garcia* Court concluded

> that a defendant whose sentence for a noncapital offense is subject to enhancement because of a prior conviction may not employ the current prosecution as a forum for challenging the validity of the prior conviction based upon alleged ineffective assistance of counsel in the prior proceeding.

(*Id*. at p. 966, fn. omitted.)

In short, a comparison of *Horton* with *Garcia* demonstrates that this Court applied *California law* in declining to apply the High Court's decision in *Custis* in a death penalty case while binding itself to *Custis* in the noncapital context. And this Court explained that the reason for the distinction is "the increased need for reliability in the death determination process…." (*Horton*, *supra*, 11 Cal.4th at p. 1139.)

In order for the death penalty to be constitutionally applied, the sentencing jury must not only give meaningful consideration to the nature of the particular murder and "the particularized characteristics of the individual defendant", but "the jury's discretion is channeled." (*Gregg v. Georgia*, *supra*, 438 U.S. 153, 206 [96 S.Ct. 2909, 2941, 49 L.Ed.2d 859].) It is often said that the death penalty is reserved for the "worst of the worst." (See, e.g., *People v. Carasi* (2008) 44 Cal.4th 1263, 1315; *People v. Benavides* (2005) 35 Cal.4th 69, 110; *People v. Farley* (2009) 46 Cal.4th 1053, 1131. See also *Roper v. Simmons* (2005) 543 U.S. 551, 553 [125 S.Ct. 1183, 1186, 161 L.Ed.2d 1].) To sentence a capital murderer to death in a constitutional manner, each of the twelve individual jurors must make the personal moral judgment that the circumstances of the particular murder and the particular defendant make the death penalty the appropriate punishment, but each juror is required to apply the guidelines of the law before making his or her personal moral judgment. A juror is not allowed to arbitrarily conclude that death is the appropriate punishment based on factors or considerations that are not allowed by the law. Instead, death may be imposed only on the basis of the aggravating factors that are specifically enumerated in Penal Code Section 190.3, and even then, only where those factors outweigh the mitigating factors. These factors and findings then guide the individual jurors in the exercise of their personal moral judgment.

Respectfully, amici submits that the guided discretion necessary to implement California's normative death penalty weighing process requires the application of the beyond-a-reasonable-doubt standard in order to achieve greater reliability in the determination of whether the individual defendant is truly the worst of the worst and should be sentenced to death. Whether or not the federal Constitution requires a California capital jury to unanimously find beyond a reasonable doubt that a particular aggravating factor exists or that the aggravating factors outweigh the mitigating factors, that burden of proof is required under the California Constitution because of the greater protection afforded defendants under California's right to jury trial (California Constitution, Art. I, Sec. 16), and this Court's recognition that "the increased need for reliability in the death determination process" (*Horton*, *supra*, 11 Cal.4th at p. 1139) is "a 'cogent reason' … to reach an interpretation of our state constitutional requirements different from that under the federal Constitution…" (cf., *Garcia*, *supra*, 14 Cal.4th 953, 966).

G. The Attorney General's Objections to Requiring Aggravation Findings to be Made Unanimously Beyond a Reasonable Doubt are Contrary to Law and Unsupported by Precedent.

The Attorney General claims that this Court has previously held that the right to jury trial under Article I, Section 16, does not require unanimity or proof beyond a reasonable doubt concerning the existence of aggravating factors or whether they outweigh mitigation. (Third Supplemental Respondent's Brief, p.

12.) But as cogently explained by McDaniel (AOB, pp. 211-218), this Court has never squarely addressed the issue under the independent State Constitution. Moreover, it is well settled that "'an opinion is not authority for a proposition not therein considered.'" (*Yost v. Forestiere* (2020) 51 Cal.App.5th 509, 526, quoting from *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

The Attorney General then insists that a penalty phase is neither a trial nor involves the resolution of any "issues of fact." (Third Supplemental Respondent's Brief, pp. 15-16.) But amici respectfully submits that questions such as whether the individual capital defendant on trial committed other violent criminal activity or suffered a prior felony conviction are dependent on the resolution of issues of fact.[3]

Amici agrees with the Attorney General that the federal constitution requires that any individual juror must be invested with the authority to reject the death penalty and return a sentence of life imprisonment without the possibility of parole based on their "inherently moral and normative" evaluation of the evidence, and that the juror's evaluation of whether or not to grant mercy is "not susceptible to a burden-of-proof

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[3] Amici recognizes that the question of whether the other criminal activity involved violence is a question of law for the trial judge. However, whether the individual defendant did, in fact, engage in that activity and whether the elements of that crime have been established are factual issues that must be proven beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-56.)

quantification". (Third Supplemental Respondent's Brief, pp. 16-17.) But as explained above in sections B through E, *ante*, pp. 19-42, there are no aggravating *facts* to weigh or evaluate unless those *facts* have first been established. Nor is there any need to evaluate whether or not to grant mercy unless the jury first concludes that the aggravating circumstances outweigh the mitigating circumstances. (*Ante*, pp. 24-25.) Since the California Constitution and Penal Code Section 1042 require that the right to jury trial applies to "issues of fact", the hallmarks of a jury trial apply to the question of whether those aggravating *facts* have been established, and to the factual question whether those aggravating *facts* outweigh the mitigating *facts*. In short, there is no moral or normative evaluation to be made unless and until the jury has unanimously agreed that aggravating *facts* have been proven beyond a reasonable doubt, and that the *factors* in aggravation outweigh the factors in mitigation.

Importantly, the Attorney General tries to escape the requirement of proof beyond a reasonable doubt by characterizing the standard of proof as being set exclusively by the due process clause. But that mischaracterizes the teachings of our High Court. While *In re Winship* (1970) 397 U.S. 358, 364, held that the Due Process Clause imposes the standard of proof beyond a reasonable doubt in a criminal case, the Supreme Court has repeatedly affirmed that *the right to jury trial*, in conjunction with the Due Process Clause, requires that the essential facts must "be proved to a jury beyond a reasonable doubt." (*Hurst v.*

Florida, *supra*, U.S. ___, 136 S.Ct. 616, 621, 193 L.Ed.2d 504. Accord: *Alleyne v. United States* (2013) 570 U.S. [133 S.Ct. 2151, 2156, 186 L.Ed.2d 314]; *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 482-483, 494 [120 S.Ct. 2348, 147 L.Ed.2d 435].) Indeed, as the late Justice Antonin Scalia wrote for a unanimous Supreme Court in *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 [113 S.Ct. 2078, 124 L.Ed.2d 182]:

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. ***In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt***.

(Initial emphasis supplied by the Court; bold italics added to the final sentence.)

The crux of the Attorney General's response to appellant's constitutional argument is the attack on McDaniel's "claim[] that the right to a jury trial and the burden of proof are 'inextricably intertwined'", which the Attorney General contends is unsupported. (Third Supplemental Respondent's Brief, p. 20.) But the foregoing holding by the unanimous court in *Sullivan* not only buttresses McDaniel's constitutional argument but eliminates the foundation of the prosecution's position herein.

The Attorney General also asserts that the circumstances of the crime (Penal Code section 190.3, factor (a)) "are not readily susceptible to proof beyond a reasonable doubt". (Third Supplemental Respondent's Brief, p. 24.) However, the Attorney General fails to acknowledge settled law that defines when the circumstances of the crime may be considered "aggravating" as opposed to mitigating or neutral. As noted above, the circumstances of the crime can only be considered aggravating when the facts demonstrate "a circumstance above and beyond the essential constituents of a crime which increases its guilt or enormity or adds to its injurious consequences." (*People v. Davenport*, *supra*, 41 Cal.3d 247, 289; accord, CALJIC 8.88 and CALCRIM 763.) Whether or not such a circumstance has been established by the evidence is an issue of fact that is capable of being determined by application of the reasonable doubt standard. While a juror may apply her "personal, subjective reaction to the surrounding aspects of the crime" (Third Supplemental Respondent's Brief, pp. 24-25), she may do so only after finding, as a factual matter, that the evidence has established that such aspects are "above and beyond the essential constituents" of the crime and "increase[] its guilt or enormity or adds to its injurious consequences." In other words, the juror applies her "personal, subjective reaction" in evaluating whether the aggravating circumstances of the crime, if any, make death the appropriate sentence, but must apply the legal standard in finding whether or not the circumstances of the crime are

aggravating in the first place. Otherwise, a juror would be allowed to impose a death sentence merely on the basis of the bare minimum elements of the capital crime itself, which would be patently unconstitutional. (See, e.g., *Morgan v. Illinois* (1992) 504 U.S. 719, 729 [112 S.Ct. 2222, 119 L.Ed.2d 492], *Ross v. Oklahoma* (1988) 487 U.S. 81, 84-85 [108 S.Ct. 2273, 101 L.Ed.2d 80]; *People v. Cash* (2002) 28 Cal.4th 703, 719-720.) Thus, contrary to the postulation formulated by the Attorney General, the application of the jury trial right to the question of whether the circumstances of the crime have been proven to be aggravating does not depend on "whether the circumstances of the offense justify death" (Third Supplemental Respondent's Brief, p. 29); instead, the jury trial requirements apply to whether the prosecution has demonstrated "a circumstance above and beyond the essential constituents of a crime which increases its guilt or enormity or adds to its injurious consequences." (*Davenport*, *supra*, 41 Cal.3d at p. 289.)

Similar complaints about application of the reasonable-doubt standard to the question of whether the aggravating circumstances outweigh the mitigating circumstances are unavailing. McDaniel has cited several state statutes in his Opening Brief that prohibit a death sentence unless the jury determines that death is appropriate beyond a reasonable doubt (AOB pp. 220-222), and experience with these statutes over the last 45 years demonstrates that juries and reviewing courts are capable applying the reasonable-doubt standard.

Finally, the Attorney General insists that the requirement of "unanimity as to the *existence* of aggravating factors" is limited to creations by statutory mandates. (Third Supplemental Respondent's Brief, p. 31.) While the unanimity requirement is "statutorily mandated" by some statutory capital punishment procedures, it was imposed by the High Court on federal constitutional grounds in *Ring* and *Hurst*, both *supra*, which found both death penalty schemes unconstitutional because of the failure to comply with the unanimous jury requirement. (*Hurst*, *supra*, 136 S.Ct. at p. 622; *Ring*, *supra*, 536 U.S. at p. 604.)

Although Mr. McDaniel developed his independent state constitutional argument in his opening brief, the Attorney General failed to meaningfully respond in his Respondent's Brief. This Court then directed the Attorney General to file a supplemental brief addressing whether "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 Attorney General does not dispute that policy reasons may well justify an answer in the affirmative. Moreover, the foundation of his objections are inaccurate. Policy, statutory, and constitutional considerations lead to the conclusion that both the statutory and California Constitutional provisions require such findings to be made beyond a reasonable doubt by a unanimous jury.

CONCLUSION:

The High Court decisions in *Hurst v. Florida*, *supra*, 577 U.S. ___ [136 S.Ct. 616, 193 L.Ed.2d 504], *Cunningham v. California*, *supra*, 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] and *Kansas v. Marsh*, *supra*, 548 U.S. 163 [126 S.Ct. 2516, 165 L.Ed.2d 429], illustrate a crucial distinction governing capital jurisprudence under the Sixth and Eighth Amendments. While the normative aspects of the California death penalty comply with the Eighth Amendment and its California equivalent, the ultimate moral decision whether to reject the death penalty only arises after findings are made that both (1) one or more aggravating factors are present, and (2) the aggravating factor(s) outweigh the mitigating factor(s). These findings, which are prerequisites before proceeding to a normative determination that may result in a death sentence, are subject to the Sixth Amendment and state constitutional requirements applicable to a jury trial: they must be made beyond a reasonable doubt by a unanimous jury.

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Further, the increased need for reliability in the death determination process and the greater scope of the right to jury trial guaranteed by the California Constitution present cogent reasons for this Court to require these findings to be made beyond a reasonable doubt by a unanimous jury under Article I, section 16, of the State Constitution and Penal Code section 1042, independently from the provisions of the federal Constitution.
Dated: September 8, 2020.

Respectfully submitted,

California Public Defenders Association

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Donte Lamont McDaniel

CERTIFICATE OF WORD COUNT

I, Michael S. Ogul, counsel for amici curiae California Public Defenders Association and the Santa Clara County Public Defender, hereby certify that the word count of the attached application to file amicus brief and brief of amici curiae in support of petitioner is 11,393 words in Century Schoolbook font size 13, excluding the tables and cover, as computed by the word count function of Word, the word processing program used to prepare this brief.

DATED: September 8, 2020.

/s/ Michael S. Ogul

Michael S. Ogul
Deputy Public Defender
California State Bar No. 95812

DECLARATION OF SERVICE

People v. Donte Lamont McDaniel
Supreme Court No. S171393
Los Angeles County Superior Court No. TA074274

I, the undersigned, declare under penalty of perjury as follows:

I am a citizen of the United States. I am over the age of eighteen years and am not a party to this action. My business address is the Office of the Public Defender, 120 W. Mission Street, San Jose, CA 95110.

I served the attached **APPLICATION OF CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND SANTA CLARA COUNTY PUBLIC DEFENDER TO APPEAR AS AMICUS CURIAE, AND BRIEF OF AMICI CURIAE, IN SUPPORT OF APPELLANT DONTE LAMONT McDANIEL,** on the parties below in the manner identified:

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(**via Truefiling**, without an error report, on September 8, 2020)

Honorable Robert J. Perry
Judge of the Superior Court for the County of Los Angeles
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And Via United States mail by depositing a complete copy in the United States mail in the ordinary course of business on September 8, 2020, with postage prepaid, addressed to:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on this 8th day of September, 2020, at San Jose, California.

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