S171393

IN THE
SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

DON'TE LAMONT MCDANIEL,
Defendant and Appellant.

(Los Angeles County Superior Court No. TA074274)

BRIEF FOR PROPOSED AMICI CURIAE JANET C. HOEFFEL, RORY K. LITTLE, EMAD H. ATIQ, AND JAMES Q. WHITMAN

CHRISTOPHER J. COX,
SBN 151650
GURTEJ SINGH, SBN 286547
HOGAN LOVELLS US LLP
4085 Campbell Ave., Suite100
Menlo Park, CA 94025
Tel: (650) 463-4000
Fax: (650) 463-4199
chris.cox@hoganlovells.com
tej.singh@hoganlovells.com

Rupinder K. Garcha,
DC 1616653*
HOGAN LOVELLS US LLP
555 13th St. NW
Washington, D.C. 20004
Tel: (202) 637-5600
Fax: (202) 637-5910
rupinder.garcha@hoganlovells.com

WILLIAM M. REGAN, NY 3066107*
ALLISON M. WUERTZ, NY 5039896*
DANIEL J. PETROKAS, NY 5779103*
PETER W. BAUTZ, NY 5657820*
HOGAN LOVELLS US LLP
390 Madison Ave.
New York, NY 10017
Tel: (212) 918-3000
Fax: (212) 918-3100
william.regan@hoganlovells.com
allison.wuertz@hoganlovells.com
daniel.petrokas@hoganlovells.com
peter.bautz@hoganlovells.com

Attorneys for Proposed Amicus Curiae Professors Janet C. Hoeffel, Rory Little, Emad H. Atiq, and James Q. Whitman

* Motion for admission *pro hac vice* pending.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Legal Dictionaries

Other Authorities

INTRODUCTION

For centuries, jury protections, such as the "beyond a reasonable doubt" standard and jury unanimity, have been essential to the criminal justice system of the United States. These protections ensure that an individual's peers are convinced of the individual's guilt before that individual loses his or her liberty—or life. Federal jurisprudence over the past two decades has ensured, however, that the "beyond a reasonable doubt" standard applies not only to the determination of guilt, but also to issues of fact that determine the severity of punishment imposed on an individual convicted of a crime. The high court has concluded that where the death penalty is imposed, the issues of fact relevant to that sentencing must be found beyond a reasonable doubt and by a unanimous jury.

Nevertheless, California has not extended these jury protections to individuals facing the imposition of a death sentence at the "penalty" phase of a criminal prosecution. This Court has distinguished U.S. Supreme Court authority concerning eligibility for the death penalty, finding that the penalty phase involves only moral determinations, not the determination of issues of fact. But this conclusion is based on

the premise that determinations of issues of fact are exempt from jury protections if they are questions of moral judgment. The Amici disagree.

The California Constitution and the California Penal Code[1] provide that "issues of fact" must be tried by a jury and with all constitutional protections associated with jury trials. A close read of legal dictionaries published during the time of the adoption of the California Constitution's jury right and the enactment of section 1042 of the Penal Code show that "issues of fact" do not exclude questions of moral judgment – they are all questions that are put to a jury during a trial and that are answered by the jury in its verdict. These contemporaneous definitions support the application of jury protections at the penalty phase.

In reaching the opposite conclusion, the California courts have placed undue focus on the federal case law's use of the term "elements." The term "elements," though widely used today, is not inherently associated with the jury right or jury protections. "Elements" was not a term frequently used in its modern sense at

[1] All references to the "Penal Code" are to the California penal code, unless otherwise noted.

the time of the adoption and amendment of the California Constitution's jury right and the enactment of section 1042 of the Penal Code. As a result, denying jury protections at the penalty phase because the jury does not address the "elements" of the crime at the time it reaches its verdict cannot be squared with the language used in the Penal Code and the California Constitution.

Jury protections are fundamental to our criminal justice system, and the requirement of a unanimous jury verdict "beyond a reasonable doubt" on the issues before the jury is one of the most critical. At the penalty phase, the jury is rendering a verdict, at a trial, and on issues of fact, and thus the jury should be required to do so unanimously and beyond a reasonable doubt.

STATEMENT OF THE CASE AND AMICUS BRIEF

In 2008, Mr. McDaniel was convicted of first-degree murder with special circumstances. Mr. McDaniel's first penalty phase ended in a mistrial. During the second penalty phase, Mr. McDaniel was sentenced to death. This automatic appeal followed, which challenges the findings at both the guilt and penalty phase.

In connection with his appeal to this Court, Mr. McDaniel argued that "Penal Code section 1042 and Article I, section 16 of the California Constitution require that all 'issues of fact' be tried by a jury, in accordance with the common law protection of unanimity and proof beyond a reasonable doubt." (Appellant's Supplemental Appellant Opening Brief at 2 (citing Appellant's Opening Brief at pp. 196-224).) Mr. McDaniel argued that

> the ultimate determination of penalty and the existence of aggravating factors are indeed 'issues of fact' as properly understood under state law. As a consequence . . . 1) unanimity is required as to aggravating factors and 2) proof beyond a reasonable doubt is required as to the ultimate penalty determination, and this Court should revisit its decision to the contrary.

(Appellant's Supplemental Appellant Opening Brief at 2.)

In response, this Court requested that the parties provide additional briefing on two specific questions related to Mr. McDaniel's argument:

> (1) Do 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? (2) If so, was appellant prejudiced by the trial court's failure to so instruct the jury?

(*En Banc* Order (Jun. 17, 2000)).

This brief is directed to the first question. Based on the contemporary understanding of the nineteenth century authors of the California Constitution and Penal Code, and as supported by the modern understanding of the constitutional right to jury trial, California's requirement that "issues of fact" must be determined by the jury requires an affirmative answer to the first of the Court's two questions. The drafters of the California Constitution plainly intended the distinction between "issues of fact" and "issues of law" to separate matters within the province of the judge from all matters left to the jury's determination. As one of the delegates to the first state constitutional convention explained:

> Every lawyer and every gentleman understands, that in all cases arising in courts of law, there are questions of two distinct and separate characters; one concerning the law, and the other concerning the facts; . . . It has been the object of the great common law of England to separate these two subjects, so divisible in their nature, and turn them over to the consideration of two distinct and separate tribunals . . . the judge to decide the law, and twelve unlawyered men to decide the facts; and the opinion of the common law is, that the jury are better judges of the facts than he who sits upon the bench; that twelve men are more competent to judge of the facts than any one man can be; and that the law and the facts are distinct and separate things.

Report of the Debates from the Convention of California on the Formation of the Constitution (1849), p. 236 (statement of Mr. Botts). This Court should extend the jury protections of unanimity and the "beyond a reasonable doubt" standard to the penalty phase, particularly in the capital context.

ARGUMENT

I. JURY PROTECTIONS ARE CRITICAL TO THE FUNCTIONING OF OUR CRIMINAL JUSTICE SYSTEM.

Like the United States Constitution, the California Constitution provides for a fundamental right to jury trial in criminal cases. (Cal. Const., art. I, § 16.) The California Penal Code has, since its adoption in 1872, explained the meaning of this concept: in a criminal proceeding, including capital cases, the jury shall decide "all issues of fact." (Cal. Pen. Code § 1042.)[2]

The jury right is fundamental to the function of our criminal justice system. The Justices of the Supreme Court have variously described it as the "spinal column of American democracy," (*Neder v. United States* (1999) 527 U.S. 1, 30 (dis.

[2] This language in the Penal Code appeared nearly verbatim in the Criminal Practice Act of 1850. (Criminal Practice Act, § 337, Stats. 1850, ch. 119, p. 299 [Issues of fact must be tried by a jury of the county in which the indictment was found . . . ."].)

opn. of Scalia, J.), and "the great bulwark of [our] civil and political liberties." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477.)

Encompassed within the jury trial right are specific protections, including the application of the "beyond a reasonable doubt" standard. (*In re Winship* (1970) 397 U.S. 358, 364.) Recently, the U.S. Supreme Court recognized that unanimity is an essential component of the constitutional right. (*Ramos v. Louisiana* (2020) 140 S.Ct. 1390.) As expressed in the modern-day interpretation and application of the Sixth Amendment and the Fifth and Fourteenth Amendment's Due Process Clauses, the jury right, including unanimity and the "beyond a reasonable doubt" standard, undeniably belong to, and inure to the benefit of, the criminal defendant (as well as protecting society at large from uncertain criminal judgments). (See Janet C. Hoeffel (2017) *Death Beyond A Reasonable Doubt*, 70 Ark. L. Rev. 267, 270 (hereafter Hoeffel).)

Nowhere is the need for reliable jury determinations more obvious than in the capital punishment context, where the accused has their life at stake. The use of twelve person juries in this context is "normatively better than using solo judges." (See

Rory K. Little (2006) *The Eyes of the Beholders*, 4 Ohio St. Crim. L.J. 237, 252.) When applied properly, the jury right guarantees that, before one is condemned to die, "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, [shall be] confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 477) (quoting 4 W. Blackstone, Commentaries on the Laws of England (1769) at 343)); (*Ring v. Arizona* (2002) 536 U.S. 584, 588-89.) Likewise, the "beyond a reasonable doubt" standard lessens the margin of error inherent in litigation 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." (*In re Winship*, *supra*, 397 U.S. at p. 364.) In light of the foregoing, the importance of the jury right and "beyond a reasonable doubt" standard to the capital defendant cannot be understated.

No less significant, however, is the historical importance of these two jury protections to the community itself. With respect to the jury right, it is not only "the individual right of the defendant to be judged by his peers," but also "a collective right of the people to judge," and to "stand in the place of the sovereign to

impose punishment on anyone." (Hoeffel, *supra*, at 271.) It "reflect[s] traditions of common law resistance to strong assertions of government authority." (James Q. Whitman (2016) *Presumption of Innocence or Presumption of Mercy? Weighing Two Western Modes of Justice*, Texas L.Rev. 933, 948.) Indeed, "the nineteenth-century common law invested heavily in" the power of the jury to acquit, which was even then "a mechanism of exculpation with a long antistatist history." (*Id.* at 973.) Unsurprisingly then, the historical jury's role as the sentencer in capital cases "was unquestioned." (Hoeffel, *supra*, at 272) (citing Douglass (2005) *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, Colum. L.Rev. 1967, 1972).)

The dual purpose of the jury as both an individual and a collective right endures in modern times, as evidenced by the Supreme Court's opinion in *Duncan v. Louisiana* (1968) 391 U.S. 145. That case, "hailed as the signature case establishing a criminal defendant's individual right to a jury trial," also "underscored the fundamental right to a jury trial as a community right." (Hoeffel, *supra*, at 273.) In his majority opinion, Justice White explained that:

> Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

(*Duncan v. Louisiana*, *supra*, 391 U.S. at p. 156.) Thus, contemporary courts continued to recognize what *Apprendi* later described as the core purpose of the jury right: to "guard against a spirit of oppression and tyranny on the part of rulers." (*Apprendi v. New Jersey*, *supra*, at p. 477) (quoting 2 J. Story, Commentaries on the Constitution of the United States (4th ed. 1873) 540-541).)

The "beyond a reasonable doubt" standard is likewise a collective right. The standard's "moral force" protects the community by interposing a high burden before that community may condemn any of its members to death. (Hoeffel, *supra*, at 276.) Indeed, the standard emerged as a "moral comfort" rule, which was "the product of a history of Christian juries fearful of the moral consequences of returning guilty verdicts." (James Q. Whitman (2008) *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, at 3, 6.) In other words, the "beyond a reasonable doubt" standard does not exclude moral questions: it exists precisely because the criminal justice system is

addressing moral questions that result in an individual's loss of liberty or, at times, loss of life. (Hoeffel, *supra*, at 271.) The essential nature of the "beyond a reasonable doubt" standard continued to be recognized into the twentieth century, with the U.S. Supreme Court finding that 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." (See *In re Winship*, *supra*, 397 U.S. at pp. 363–64.)

Despite this historical importance, the guarantee of the jury right and the "beyond a reasonable doubt" standard in the capital context has eroded since the nineteenth century. Numerous states (including California) have adopted bifurcated schemes in which the ultimate determination of whether to impose death is left to a factfinder facing some lesser evidentiary burden, rather than a jury who must decide "beyond a reasonable doubt." Some states have removed jury determinations entirely. This inconsistency between the "venerate[ed]" jury right and the assignment to a judge of the ultimate determination between life and death did not go unnoticed by the Court:

> [O]ur people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated

> spectacle of a man's going to his death because "*a judge*" found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.

(*Ring v. Arizona*, *supra*, at p. 612) (conc. opn. of Scalia, J., joined by Thomas, J.) (emphasis in original).) Unsurprisingly, the Court's jurisprudence throughout the twenty-first century has endeavored to restore the jury right and the "beyond a reasonable doubt" standard to their historical primacy. (See Point III.A., infra, at pp. 36-44.)

II. THE CALIFORNIA CONSTITUTION AND PENAL CODE REQUIRE THE APPLICATION OF THE "BEYOND A REASONABLE DOUBT" STANDARD AND UNANIMITY AT THE PENALTY PHASE.

Penal Code section 1042 provides that "[i]ssues of fact shall be tried in the manner provided in Article I, section 16 of the Constitution of this state." (Pen. Code § 1042.)[3] In turn, Article I, section 16 of the California Constitution states that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." This Court, however, has concluded that these jury protections do not apply

[3] When it was first enacted, Penal Code section 1042 provided that "[i]ssues of fact must be tried by jury."

to the penalty phase of California's criminal justice proceedings. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 272.)

The proper interpretation of "issues of fact" should be drawn from the definitions in use at the time that Penal Code section 1042 and the California Constitution were enacted. A review of legal dictionaries from that era show that "issues of fact" are to be decided by the jury at trial, as opposed to "issues of law" that are the province of the court. None of the definitions supports this Court's jurisprudence applying the "beyond a reasonable doubt" standard and jury unanimity only to the guilt phase, and not the penalty phase, of capital prosecution.

A. The Penalty Phase Addresses "Issues of Fact," a Term Historically Interpreted to Mean All Questions Decided By Juries at Trial.

Together, section 1042 of the penal code and Article I, section 16 of the California Constitution provide a criminal defendant with jury protections for the determination of "issues of fact," which is undefined those texts. (See Cal. Pen. Code, § 1042; Cal. Const., art. I, § 16.) Courts in this state regularly look to contemporaneous legal dictionaries to determine the meaning of undefined words and phrases in statutes and constitutions. (See, e.g., *Legal Servs. for Prisoner with Children*

v. Brown (2009) 170 Cal.App.4th 447, 460-61; *De Vries v. Regent of Univ. of California* (2016) 6 Cal.App.5th 574, 590-91.) The phrase "issues of fact" is defined by its basic components: the words "issue" and "fact." Historical definitions of "issue" and "fact" – along with related definitions of critical terms like "jury" and "trial" – illustrate that "issues of fact" historically referred to disputed facts that were for juries to decide at trial.

The most basic definition of "fact" is an action, occurrence, circumstance, or other thing that has been done. (See, e.g., Abbott, Dictionary of Terms and Phrases Used in American or English Jurisprudence (vol. 1) (1879) at 475 ["An actual occurrence; a circumstance or event' something which has been done."]; Anderson, A Dictionary of Law (1889) at 443 ["Anything done, or said; an act or action; an actual occurrence; a circumstance; whatever comes to pass; an event"].)[4]; Some legal dictionaries went so far as to note in their definition of "fact" specifically that facts are determined by a jury. (See, e.g., Anderson, *supra*, at 443 ["Questions of fact are said to be solved

[4] (See also Bouvier, A Law Dictionary (vol. 1) (15th ed. 1883) at 640 ["An action; a thing done. A circumstance."] (hereafter Bouvier II).)

by the jury. . ."]; Black, A Dictionary of Law (1891) at 469 [stating that "questions of fact are for the jury"]; Bouvier, A Law Dictionary (vol. 1) (11th ed. 1864) at 506 ["Facts are generally determined by a jury . . ."] (hereafter Bouvier I).)

"Issue," in the pleadings context, was defined as a "point" or "point of matter" that is disputed by two parties; in other words, a point that one side affirms and the other side denies. (See Potts, A Compendious Law Dictionary (1803) at pp. 402-403 ["[I]n the course of pleading, the parties in the cause affirm a thing on one side and deny it on the other, they are then said to be at issue . . . [the issue] must be determined either in favour of the plaintiff or defendant."]; Bouvier I, *supra*, at 668 ["[A] single, certain and material point issuing out of the allegations of the parties, and consisting, regularly, of an affirmative and negative."].[5] As Burrill's *A New Law Dictionary and Glossary* (1860) concisely

---

[5] (See also Tomlins, The Law-Dictionary (vol. 2) (1835) at 755-756 ["When in the course of pleading the parties in a cause come to a point, which is affirmed on one side and denied on the other, they are then said to be at issue"]; Wharton, Law, Lexicon or Dictionary of Jurisprudence (1860) at 417 ["The point in question . . . between contending parties in a suit or action, when one side affirms and the other denies."]; Anderson, *supra*, at 569 ["A single, certain, and material point, arising out of the allegations or pleadings of the parties . . . ."].)

put, an issue is "the essence of the whole matter in controversy between two parties." (*Id.* at 99; see also Anderson, *supra*, at 569 ["The disputed point or question."].)

Many legal dictionaries added that an issue was "to be tried by a jury." (Williams, A Compendious and Comprehensive Law Dictionary (1816) at 542 [Issue "signifies the point of matter; issuing out of the allegation and pleas of the plaintiff and defendant in a cause, to be tried by a jury of twelve men.]; Whishaw, A New Law Dictionary (1829) at 167 [Issue "generally signifies the point of matter issuing out of the allegations and pleas of the plaintiff and defendant in a cause to be tried by a jury of twelve men."].) Other dictionaries defined "issue" in reference to trial or tribunal. (Wharton, *supra*, at 417 ["The cause is then fit for trial, in order that a decision may be made in the matter."]; Abbott, *supra*, at 647 [defining issue as "a point or question in dispute between the parties to an action, eliminated by their pleadings, in proper form for trial."]; Black, *supra*, at 645 ["The disputed point or question to which the parties in an action have narrowed their several allegations, and upon which they are desirous of obtaining the decision of the proper tribunal."].)

It naturally follows from the definitions of "fact" and "issue" that an "issue of fact" is a disputed fact—an action, circumstance, occurrence or statement—to be decided in favor of a party by a jury. (Tomlins, *supra*, at 756 ["An issue in fact is where the plaintiff and defendant have agreed upon a point to be tried by a jury."]; Black, *supra*, at 646 ["An issue taken upon or consisting of matter of *fact*, the fact only, and not the law being disputed, and which is to be tried by a jury."].)[6] Indeed, many dictionaries emphasized that issues of fact could only be tried by a jury. (Williams, *supra*, at 542 ["The issues upon matter of fact, are, whether the fact is true or false, which are triable by a jury only"]; Whishaw, *supra*, at 167 [same].)[7]

In defining "issue of fact," nineteenth century legal dictionaries did not distinguish an "issue of fact" from an "issue of

---

[6] (See also Burrill, *supra*, at 99 ["An issue taken upon, or consisting of matter of fact; the fact only, and not the law, being disputed; and which to be tried by a jury."]; Wharton, *supra*, at 417 [stating that an issue in fact is "tried by a jury"].)

[7] (See also Bouvier I, *supra*, at 668 ["An issue in fact, is one in which the parties disagree as to their existence one affirming they exist, and the other denying it."]; Abbott, *supra*, at 647 ["An issue of fact is one which arises upon a denial of an averment of matter of fact, and presents a question of fact for determination upon evidence."].)

morals" or otherwise exclude moral questions from the realm of "issues of fact." Instead, nineteenth century legal dictionaries defined "fact" in opposition to "law" and "issue of fact" in opposition to "issue of law."[8] (Black, *supra*, at 469 ["'Fact'" is very frequently used in opposition or contrast to 'law.'"]; Tomlins, *supra*, at 756 [comparing "issue in fact" to "issue in law" which is "where there is demurrer to a declaration, please, and a joinder in a demurrer, which is to be determined by the judges"]; Wharton, *supra*, at 417 [comparing issue in fact to issue in law]; Abbott, *supra*, at 647 [same].)[9]

---

[8] "Issue of law" or "issue in law" was defined as "[a]n issue upon matter of law, or consisting of matter of law, being produced by a demurrer on the one side, and a joinder in demurrer on the other." (Black, *supra*, at 646; Burrill, *supra*, at 99.) Some dictionaries also defined issues or questions of law as those resolved by the court. (Anderson, *supra*, at 443 ["Questions of fact are said to be solved by the jury, questions of law by the court."]; Tomlins, *supra*, at 756 [stating that an issue in law is to be determined "by the judges"]; Wharton, *supra*, at 417 [stating that issues in law are "determined by the court in banco."].)

[9] (See also Abbott, *supra*, at 525 ["The word [fact] is much used in phrases which contract it with law. Law is a principle, fact is an event. Law is conceived, fact is actual. Law is a rule of duty, fact is that which has been according to or in contravention of the rule."]; Bouvier II, *supra*, at 640 ["Fact is much used on modern times in distinction from law. Thus, in every case to be tried there are facts to be shown to exist to which the law is to be applied."]; Anderson, *supra*, at 455 ["'Fact'" is contrasted with

In sum, there is no historical evidence that the term "issues of fact" was used to limit jury protections to questions of guilt, while denying those protections to a "moral" question of punishment. To the contrary, as Chief Justice Shaw's widely accepted definition of reasonable doubt explains, the standard exists *because* it acts on "moral evidence." (*Commonwealth v. Webster* (1850) 59 Mass. 295, 320.)

B. The Meaning of "Issue of Fact" Must Be Read in Accordance with Definitions of Related Terms.

To fully understand what was meant by "issue of fact," the term must be read in the context of the numerous related terms and how they were defined in the nineteenth century. The definition of "issues of fact" is inextricably linked to the definitions of the "trial," the "jury," and the "verdict."

"Trial" was defined as an examination of the facts in issue or the point in issue. (Tomlins, *supra*, at 700 ["Trial is the examination of the matter of fact in issue"]; Abbott, *supra*, at 605 ["More strictly, it is the examination of the matter of fact in issue: of this there are many species, according to the difference of the

---

'law.' Law is a principle, fact is an event . . . Facts, not evidence are to be pleaded; and are proven by moral evidence."].)

subject to be tried; as for example, trial . . . by jury."]; Anderson, *supra*, at 1054 ["The examination of the matter of fact in issue."].) Many legal dictionaries went further to define "trial" as the process by which a competent tribunal determined or adjudicated an issue, issued a judgment or administered justice. (Potts, *supra*, at 587 [defining trial as "the proceeding of a court of law, when the parties are at issue . . . to enable the court, deliberately weighing the evidence given on both sides, to draw a true conclusion, and administer justice accordingly"]; Williams, *supra*, at 973 [defining trial as "the trial and examination of the point in issue, and of the question between the parties, where upon the judgment may be given"].)[10]

---

[10] (Whishaw, *supra*, at 321 [Trial is "the trial and examination of the point in issue, and of the question between the parties, whereupon the judgment may be given"]; Bouvier, A Law Dictionary (vol. 2) (1839) at 451 [A trial "is the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue."] (hereafter Bouvier III); Holthouse, A New Law Dictionary (1847) at 435 [stating that trial is "formal method of examining and adjudicating upon the matter of fact in dispute between a plaintiff and defendant in a court of law"]; Rapalje & Lawrence, A Dictionary of American and English Law (vol. 2) (1883) at 1293 ["Trial is that step in an action, prosecution or other judicial proceeding, by which the questions of fact in issue are decided . . . ."]; Black, *supra*, at 1188 ["The examination before a competent tribunal, according to the law of the land, of

Juries are the tribunals which hear matters or issues of fact and pass judgment—or declare the truth—on the evidence before them. (Potts, *supra*, at 406 ["[P]ersons sworn to enquire of and try some matter of fact, and to declare the truth upon such evidence as shall be laid before them. The jury are sworn judges upon all evidence in any matter of fact."]; Whishaw, *supra*, at 169 ["[P]ersons sworn to inquire of and try some matter of fact, and to declare the truth upon such evidence as shall be laid before them. The jury are sworn judges upon all evidence in any matter of fact.].)[11]

---

the facts or law put in issue in a cause, for the purpose of determining such issue. . . . A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact."].)

[11] (Tomlins, *supra*, at 780 ["[M]en sworn to inquire of, and try, a matter of fact, and declare the truth, upon such evidence as shall be delivered them in a cause; and they were sworn judges upon evidence in matters of fact."]; Abbott, *supra*, at 672 ["A body of men summoned and sworn to decide the facts of a controversy on trial; that branch of a court which is charged with the determination of the facts."]; Rapalje & Lawrence, A Dictionary of American and English Law (vol. 1) (1883) at 703 ["A jury is a number of persons summoned to inquire on oath into a question of fact depending in a judicial proceeding."]; Black, *supra*, at 664 ["A certain number of men, selected according to law, and sworn . . . to inquire of certain matters of fact, and declare the truth upon evidence to be laid before them."]; Anderson, *supra*, at 582 ["A body of persons sworn, or affirmed, to decide a matter of fact in controversy in a court of justice.].)

In other words, the jury delivered the verdict on evidence of facts before them. (See, e.g., Holthouse, *supra*, at 257 ["A certain number of men (usually twelve) to whose decision the matter in dispute between a plaintiff and defendant is submitted, and who are bound upon their oaths to decide (or give their *verdict*) according to the evidence which is laid before them on trial of the cause."]; Wharton, *supra*, at 428 [defining jury as "a company of men sworn to deliver a verdict upon such evidence of facts as shall be delivered to them touching the matter in question"].)

Logically, then, the verdict is defined as the answer of the jury on the matters, points, or issues of fact committed to their trial. (Potts, *supra*, at pp. 593-594 ["the answer of a jury, made upon any cause, civil, or criminal, committed by the court to their examination"]; Bouvier III, *supra*, at 467 [Verdict "[i]s the unanimous decision made by a jury and reported to the court of the matters lawfully submitted to them in the course of the trial of a cause.]; Anderson, *supra*, at 1097 ["The saying of the truth.

The finding of a jury. The answer of the jury to the questions of fact contained in the issue formed by the pleadings."].)[12]

Numerous dictionaries defined the verdict as having to be unanimous. (Williams, *supra*, at 980 ["is the answer of a jury given to the court, concerning the matter of fact in any cause committed to their trial; wherein every one of the twelve jurors must agree, or it cannot be a verdict. And the jurors are to try the fact, and the judges to judge according to the law that onsets upon it."]; Whishaw, *supra*, at 325 [Verdict "is the answer of a jury given to the court concerning the matter of fact in any cause committed to their trial, wherein every one of the twelve jurors must agree, or it cannot be a verdict."]; Holthouse, *supra*, at 446 ["A verdict is the unanimous judgment or opinion of the jury on the point or issue submitted to them."])[13]

---

[12] (Wharton, *supra*, at 788 ["the determination of a jury declared to a judge"]; Burrill, *supra*, at 583 ["Literally, a saying or declaration of the truth . . . . The opinion declared by a jury as to the truth of matters of fact submitted to them for trial. The determination of a jury upon the matters of fact in issue in a cause, after hearing the case, the evidence, and the charge of the court. The finding of a jury in favor of one or the other party to an action at law, with such damages (in case of a finding for the plaintiff,) as they consider him entitled to."].)

[13] (Abbott, Dictionary of Terms and Phrases (vol. 2) (1879) at 631 ["Verdict is the answer of a jury given to the court,

C. These Definitions Support the Application of the Jury Right to the Penalty Phase Trial in California.

Article I, section 16 of the California State Constitution guarantees the people the right to trial by jury. Penal Code § 1042 calls for issues of fact to be tried consistent with Article I, section 16—by a jury. While the penalty phase involves punishment rather than guilt, it nonetheless addresses "issues of fact" rather than "issues of law" when it asks a jury to weigh aggravating and mitigating circumstances and decide whether death is the appropriate punishment. As is apparent from contemporaneous, nineteenth century definitions of the terms discussed above, questions answered at trial are either "issues of fact" or "issues of law," with "issues of fact" consisting of questions posed to the jury and on which the jury renders a verdict. The questions asked of a jury at the penalty phase fit

---

concerning the matter of fact in any cause committed to their trial; wherein every one of the twelve jurors must agree or it cannot be a verdict. . . . A verdict is the unanimous judgment or opinion of the jury on the point or issue submitted to them."]; Rapalje & Lawrence (vol. 2), *supra*, at 1326 ["A verdict is the opinion of a jury . . . on a question of fact in a civil or criminal proceeding. The verdict of a jury must be unanimous."]; Black, *supra*, at 1216 ["The formal and unanimous decision or finding of a jury, impaneled and sworn for the trial of a cause, upon the matters or questions duly submitted to them upon the trial."].)

this definition of "issues of fact," and bear no resemblance to the "issues of law" that are resolved by the judge. Guided by history, this Court should extend the jury protections of unanimity and the "beyond a reasonable doubt" standard to the penalty phase of criminal proceedings.

D. Even If Viewed as Moral, the Questions Asked at the Penalty Phase Are Questions of Fact.

In addition to there being no textual basis to conclude that the term "issues of fact" in the California Constitution and Penal Code excludes moral questions, moral questions are often recognized as "issues of fact" – as is the case here. Normative (as opposed to empirical) questions, including moral questions, historically have been and indeed should be treated as questions of fact if they are answered based on the specific circumstances of a case, and not based on general social mores. (See Emad Atiq (2018) *Legal vs. Factual Normative Questions & the True Scope of Ring*, 32 Notre Dame Journal of L., Ethics & Pub. Policy 47, 105.)

Even when characterized as a moral question, a determination that the death penalty is warranted is exactly the type of moral question that should be treated as an issue of fact. The weighing of mitigating and aggravating factors turns on

specific facts, not generalities.[14] "An affirmative answer to the death penalty question must be settled by morally weighing the particular facts in the defendant's case and considering whether the death penalty would be consistent with the fundamental rights of persons." (*Id.*) The necessarily individualized nature of the inquiry at the penalty phase is confirmed by the fact that "[c]onventions cannot *favor* imposition of the death penalty where the penalty is morally undeserved, given the gravity of the harm inflicted and the importance of protecting defendants from undeserved execution." (*Id.*) If the death penalty could be imposed simply based on generalities or social conventions, then there would be no need for a "reasoned *moral* response to the defendant's background, character, and crime." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319.) Due to the nature of the type of moral question dealt with at the penalty phase, the imposition of the death penalty should be treated as an issue of fact,

---

[14] This is reflected in the federal death penalty statute, which requires first that any aggravating factor be found beyond a reasonable doubt by a unanimous jury, and then that a unanimous jury must determine that aggravating factors outweigh mitigating factors in determining whether death is an appropriate punishment. (See 18 U.S.C. § 3593.)

mandating the application of jury protections as provided by the California Constitution and the Penal Code.

III. THE TERM "ELEMENTS" IS A RED HERRING.

Both the decision of the court below, as well as this Court's historic interpretation of the Supreme Court's decision in *Apprendi v. New Jersey*, are inconsistent with the clear holding of that case and its progeny: the focus of jury protections is on function rather than form. This Court repeatedly has sought to distinguish the rationale and holdings in *Apprendi* and its progeny in several ways, including by focusing on *Apprendi*'s use of the term "elements." (See, e.g., *People v. Prieto, supra*, 30 Cal.4th at p. 262) [applying *Apprendi* only to the "functional equivalent of an element of the offense"]; *People v. Contreras* (2013) 58 Cal.4th 123, 149) [only "sentencing factors having such an "'elemental' nature" must be submitted to a jury and proved by the state beyond a reasonable doubt."].).

This focus on the elements of the offense is not consistent with the legal lexicon that existed at the time of the adoption and amendment of the California Constitution's jury right or the enactment of section 1042 of the Penal Code. Neither text uses the term "elements," a term rarely used in the nineteenth

century. Consequently, this Court should not deny jury protections to individuals facing the imposition of a death sentence at the penalty phase merely because the Supreme Court elected to use the modern term "elements."

A. The Scope of Jury Protections As Discussed in Federal Case Law Are Not Limited to Determinations of "Elements."

Apprendi was the "watershed case" in the U.S. Supreme Court's effort throughout the twenty-first century "to define and expand the parameters of the Sixth Amendment right to a jury trial consistent with its understanding of the right at the time of this nation's founding." (Hoeffel, *supra*, at 280.) In *Apprendi*, the Court considered whether the Sixth Amendment jury right extended to a judge's imposition of a hate crime "sentence enhancement" following a guilty verdict. (*Apprendi v. New Jersey*, supra, 530 U.S. at p. 494.) The Court found that it did, explaining that the constitutional question does not focus on "label[s]," but on the effect the finding would have on the defendant. (*Id.*) The Court relied on its opinion in *Winship*, which held that "every fact necessary to constitute the crime [charged]," rather than "elements," must be found beyond a reasonable doubt. (*Id.* at p. 477.) According to the *Apprendi*

Court, the key inquiry is what role the jury played in the determination of specified facts necessary for the punishment imposed, not only whether the jury determined every "element" of the crime charged. Where some finding of fact made by the judge had the *effect* of imposing a greater punishment than what the jury verdict permitted standing alone, the Sixth Amendment was violated.

Subsequent decisions of the Supreme Court have emphasized this effects-based approach. For example, in *Cunningham v. California* (2007) 549 U.S. 270, the Court applied *Apprendi* to California's Determinate Sentencing Laws ("DSL"). (*Id.* at 288.) Under the DSL, a judge in the sentencing phase was permitted to impose an upper term sentence where such a sentence was justified due to judicially determined "aggravating circumstances." (*Id.*) This was a broad category, and judges were afforded "ample discretion" in determining whether aggravating circumstances were present. (*Id.* at 272.) However, the DSL explicitly excluded from this broad category any "element of the charged offense, essential to a jury's determination of guilt . . ." (*Id.* at 288 (emphasis added).) Nonetheless, because the judge's finding of an aggravating circumstance allowed the court to

impose a punishment greater than what was authorized by the jury's verdict alone, the Sixth Amendment's jury right was violated. (*Id.* at pp. 290-91.)

Three years before *Cunningham*, the court in *Blakely v. Washington* (2004) 542 U.S. 296 reached a similar conclusion as to Washington's determinate sentencing scheme. In *Blakely*, the defendant pled guilty to kidnapping. Under Washington law, this offense mandated a "standard" sentence of 49 to 53 months, unless the judge found "aggravating facts." Although the prosecutor recommended a sentence within that range, the judge sentenced the defendant to 90 months based on a finding that he acted with "deliberate cruelty." (*Id.* at 300.) The Supreme Court found that this application of Washington's sentencing scheme violated the Sixth Amendment as it allowed the judge, rather than the jury, to find the existence of "any particular fact" that the law makes essential to defendant's punishment. (*Id.* at 301.)

The Court in *Blakely* also rejected Washington's argument that the jury verdict alone was sufficient to authorize *any* sentence within the applicable sentencing guidelines because under Washington law, the judge was *required* to find additional facts in order to impose the greater sentence in this case. This

distinction is critical because it shows that the jury trial protection does not fall away once a defendant is merely "death eligible," but persists and applies to all findings necessary before the death penalty is imposed. (Hoeffel, *supra*, at 283.)

Apprendi was extended to the capital punishment context in *Ring v. Arizona*. In that case, the Court overruled *Walton v. Arizona*,[15] which previously upheld the Arizona sentencing scheme as constitutional. (*Id.* at p. 589.) In *Ring*, and in light of *Apprendi*, the Court found that *Walton* could not survive and rejected the merely linguistic distinction it articulated between "elements" and "sentencing considerations" in *Walton*. (*Ring v. Arizona*, *supra*, 536 U.S. at pp. 589, 603-04.) As discussed in *Ring*, the Arizona capital sentencing scheme interposed certain procedural safeguards between a finding of guilt and the imposition of a death sentence. One such safeguard was that the trial judge, rather than the jury, was to determine whether death was the appropriate penalty based on certain additional factual determinations. (*Id.*) According to the Arizona Supreme Court, this scheme could be reconciled with *Apprendi* because the

[15] (1990) 497 U.S. 639.

judge's determination that death was the appropriate punishment was not itself a determination of any "element" of the crime, but rather a "sentencing consideration" outside the ambit of *Apprendi*. (*Id.*)

The late Justice Ginsburg, writing on behalf of a 7-2 majority, rejected this argument. Harking back to *Apprendi's* instruction that "the relevant inquiry is one not of form, but of effect, the U.S. Supreme Court found that the Sixth Amendment jury right was implicated because "'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict [alone].'" (*Id.* at 604.) Justice Ginsburg noted that "*Apprendi* repeatedly instructs . . . that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." (*Id.* at pp. 604-05.) Instead, as Justice Scalia explained in his concurrence, findings "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." (*Id.* at 610.)

However, the California Supreme Court has repeatedly attempted to distinguish its penalty phase scheme from the *Apprendi* and *Ring* line of cases. This Court has interpreted *Apprendi* to apply only to the "functional equivalent of element[s] of the offense"—which are submitted to a jury for adjudication and must be proven beyond a reasonable doubt. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 262) (citing *Ring*)); see also *People v. Contreras, supra*, 58 Cal.4th at p. 149 [stating that only "sentencing factors having such an "'elemental' nature" must be submitted to a jury and proved by the state beyond a reasonable doubt."].) The Court has reasoned that jury protections do not apply to the penalty phase because, after the guilt phase of trial, "no further facts need to be proved in order to increase the punishment to either death or life imprisonment without possibility of parole, because both now are prescribed as potential penalties." (*People v. Griffin* (2004) 33 Cal.4th 536, 595, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758.) Furthermore, the Court has held that *Apprendi* and *Ring* do not apply to penalty phase determinations in California because considerations of aggravating and mitigating factors during the penalty phase of trial are moral questions,

rather than factual questions. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) Despite the Court's position, the Court has conceded that "the jury must make certain *factual* findings in order to consider circumstances as aggravating factors." (*Id.,* emphasis added.) The jury's factual findings on the aggravating factors ultimately affect whether a defendant is to be sentenced to death or life in prison.

Despite the California Supreme Court's position, two recent opinions by Justice Sotomayor have further crystalized the effects-based approach set out in *Apprendi* and extended to the capital punishment cases in *Ring*. In 2013, Justice Sotomayor, along with Justice Breyer, issued a dissenting opinion to the Court's denial of certiorari in a case involving the Alabama capital sentencing statute. (*Woodward v. Alabama* (2013) 134 S. Ct. 405, 410–11) (Sotomayor, J., dissenting from denial of certiorari). Justice Sotomayor observed:

> 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.

(Id.) Later, in *Hurst v. Florida* (2016) 136 S.Ct. 616, Justice Sotomayor drew heavily on *Ring* in validating Florida's capital punishment scheme. Like Arizona at the time of *Ring*, Florida did not require a jury to make the critical findings necessary to impose the death penalty. (*Id.* at 622.) Justice Sotomayor wrote a majority opinion finding Florida's scheme invalid because it required the judge, rather than the jury, to make the findings necessary to impose a sentence of death rather than life imprisonment. Her opinion made few references to the word "element," instead referencing "aggravating and mitigating factors," "findings," and "factual findings." *Woodward* and *Hurst* make clear that *any* finding that is required for a death sentence – such as a finding on aggravating factors – but not for a lesser punishment, must be found by the jury beyond a reasonable doubt.

With this framework in mind, it is apparent that California's capital sentencing scheme is as inconsistent with *Apprendi* and the Sixth Amendment as the Arizona and Florida schemes before it. (See *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-63.) In California the maximum punishment for first-degree murder is imprisonment for a term of 25 years to life. (Pen. Code,

§ 190(a) (cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5).) If a jury returns a verdict of first-degree murder with a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2(a).) However, a death sentence – rather than life imprisonment – can be imposed only if the trier of fact, in a separate proceeding, also "concludes that the aggravating circumstances outweigh the mitigating circumstances" and, ultimately, that a death sentence is appropriate. (Pen. Code, § 190.3; see also, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794.) Thus, under Penal Code section 190.3, this weighing of aggravating versus mitigating circumstances exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first-degree murder with a special circumstance alone (life in prison without parole). As such, the California scheme violates the Sixth Amendment just the same as the schemes in *Ring* and *Hurst*. Such a determination is therefore properly made by a unanimous jury beyond a reasonable doubt, whether it is an "element" of the underlying offense or not.

B. The Term "Elements" Was Not Widely Used at the Time of the Adoption and Amendment of the California Constitution.

The California Supreme Court, in discussing the right of trial by jury in the years following the adoption and amendment of the California Constitution's jury right has recognized that, while the right of a trial by jury was not defined in the constitution, the right existed as it did under common law. (*People v. Powell* (1891) 87 Cal. 348, 355-56) ["Our constitution does not define the right of trial by jury. It was a right then existing, the extent, scope, and limitations of which were well understood, and the constitution simply provides that such right shall be secured and remain inviolate. . . . We have seen that this was the well-understood common-law right."].). The court explained that, although civil law was in force in California when the constitution was adopted, the framers of the Constitution were "from states where common law prevail[ed], and where the *language used ha[d] a well-defined meaning*." (*Id.* at 356 (emphasis added).)

The term "elements" was not common parlance during the nineteenth century. A survey of fourteen legal dictionaries published between from 1803 to 1891 – many of which were

recognized by Justice Scalia as the most prominent and influential legal dictionaries of the time – shows that none defined the term "element."[16] Nor did any use the term "element" in defining "issue," "fact," "jury," "trial," or "verdict." (See App'x A, noting lack of definition for "elements" in all dictionaries surveyed.) Instead, the definitions focused on whether a particular question was an "issue of fact" or an "issue of law." The former was unequivocally commanded to the jury for resolution: the term "verdict" is defined as the jury's answer to issues of fact. (See Point II.B., supra, at pp. 29-31.)

In *Koppikus v. State Capitol Comm'rs* (1860) 16 Cal. 248, 253, the Court described the state constitutional jury right as it was understood at the time, focusing, again, on "issues of facts,"

---

[16] (See Potts, A Compendious Law Dictionary (1803); Williams; A Compendious and Comprehensive Law Dictionary (1816); Whishaw, A New Law Dictionary (1829); Bouvier, A Law Dictionary (1864); Holthouse, A New Law Dictionary (1847); Tomlins, The Law-Dictionary (1835); Burrill, A New Law Dictionary and Glossary (1850); Burrill, A New Law Dictionary and Glossary (1859); Burrill, A New Law Dictionary and Glossary (1860); Wharton, Law Lexicon or Dictionary of Jurisprudence (1860); Abbott, Dictionary of Terms and Phrases Used In American or English Jurisprudence (1879); Bouvier, A Law Dictionary (1883); Rapalje & Lawrence, A Dictionary of American and English Law (1883); Anderson, A Dictionary of Law (1889); Black, A Dictionary of Law (1891).)

not "elements": "[t]he provision of the Constitution, that 'the right of trial by jury shall be secured to all, and remain inviolate forever,' applies only to civil and criminal cases in which an *issue of fact* is joined." (Emphasis added.) The Court also noted that the provision was intended "for the protection and security of the citizen in his life, liberty, and property, and to protect all three against the exercise of arbitrary power." (*People v. King* (1865) 28 Cal. 265, 270.) This Court should reverse its prior jurisprudence distinguishing *Apprendi* and related case law that focused on the focus on the term "elements" and extend the jury protections of unanimity and the "beyond a reasonable doubt" standard to the penalty phase.

IV. THE LEGISLATURE HAS SOME FLEXIBILITY IN ASSIGNING ISSUES TO DIFFERENT PROCEEDINGS, BUT NOT IN EXEMPTING THEM FROM JURY PROTECTIONS

While a legislature has some flexibility in assigning issues to different proceedings, there are constitutional limits preventing a legislature from stripping jury protections from certain findings.

Respondent relies heavily on this Court's precedent that the penalty phase involves determinations of the morality, not findings of fact, to argue that California's death penalty scheme

does not run afoul of the California constitutional and statutory jury protections, but that is a distinction without a difference. In *Davis*, this Court stated that assessing the proper penalty in the penalty phase of a capital trial is "essentially a normative" process. (*People v. Davis* (2005) 36 Cal.4th 510, 572.) Because the process is normative rather than factual, this Court stated a legislature could assign the penalty phase less jury protections than the guilt trial. (*Id.*) Likewise, in *Prieto*, this Court distinguished *Ring* by stating that though certain factual findings were needed, they did not increase the penalty beyond the statutory maximum and that the process was "inherently moral and normative, not factual." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) Other cases describe this conclusion in terms of not requiring a burden of proof and persuasion on the prosecutor because the process is moral and normative rather than factual. (See, e.g., *People v. Williams* (2008) 43 Cal. 4th 584, 648-49); *People v. Hayes* (1990) 52 Cal. 3d 577, 642-43.)

But Respondent misses the point. It does not matter whether a process is labeled normative or factual – if a fact will aggravate or mitigate a sentence, then such factual finding is subject to California's constitutional and statutory jury

protections, discussed Point I (pp. 14-35), and the protections of the U.S. Constitution. Even if there were some meaningful distinction between normative/moral determinations and other factual findings, a legislature may not, through clever labeling, exempt what are, in fact, factual findings from jury protections by calling them something else.

This concern with substance over form appears throughout the U.S. Supreme Court's precedents, as discussed above. (See Point III.A., supra, at pp. 36-44.); see also *Ring v. Arizona, supra*, 536 U.S. at p. 610 (noting that the Sixth Amendment requires that "all facts essential to imposition of the level of punishment . . . must be found by the jury beyond a reasonable doubt.") (conc. opn. of Scalia, J.); *Cunningham v. California*, *supra*, 549 U.S. at p. 290 ("If the jury's verdict alone does not authorize the sentence, . . . the Sixth Amendment requirement is not satisfied.").) Last year, the U.S. Supreme Court noted that "a State [may not] evade this traditional restraint on the judicial power [of jury findings] by simply calling the process of finding new facts and imposing a new punishment a judicial sentencing enhancement." (*United States v. Haymond* (2019) 139 S.Ct. 2369, 2377.)

Even now-overruled cases permitting even greater flexibility for legislatures to assign certain findings to "sentencing factors" which need not be submitted to a jury have held there are limits on the legislature's discretion. In *Harris*, the Supreme Court noted that while "[t]he Constitution permits legislatures to make the distinction between elements and sentencing factors, . . . it imposes some limitations as well. For if it did not, legislatures could evade the indictment, jury, and proof requirements by labeling almost every relevant fact a sentencing factor." (*Harris v. United States* (2002) 536 U.S. 545, 549, *overruled by Alleyne v. United States* (2013) 570 U.S. 99.)

This reasoning permeated the case law even before *Apprendi* and *Ring*, with federal courts holding that while the legislature had broad discretion to assign certain findings to sentencing factors, there were constitutional limits to prevent abuse by a legislature. (See *United States v. Claiborne* (E.D. Va. 2005) 388 F.Supp.2d 676, 684-86 (collecting cases).) Federal courts in California recognized these limits pre-*Ring* as well. (*Nichols v. McCormick* (9th Cir. 1991) 946 F.2d 695, 700 (though courts "generally defer to state legislative classification of such factors . . . there are constitutional limits beyond which a

legislature cannot go."); *United States v. Kelly* (S.D. Cal. 2000) 105 F.Supp.2d 1107, 1110 ("Generally, legislatures are free to choose the elements that define their crimes. Nonetheless, the Supreme Court has recognized for more than twenty years that some constitutional limit[s] constrains the legislature's ability to circumvent the rule in *Winship* by reclassify[ing] an element of a crime as a sentencing factor.").)

Taken together, this long line of cases holds that, while the legislature has a great deal of flexibility in what it assigns to sentencing and what it assigns as formal elements of a crime, there are constitutional limits on what a legislature may do. A legislature may not, through creative labeling, place a factual finding in the hands of a judge rather than jury. Nor may the legislature permit a finding based on less than beyond a reasonable doubt by artfully moving a factual finding needed for an enhanced sentence into a different phase of a trial. At a bare minimum, when a legislature creates a trial by jury, it cannot simultaneously exempt the trial from jury trial protections.

CONCLUSION

Defendants respectfully request that the Court apply the same jury protections to the penalty phase as to the guilt phase.

Dated: October 26, 2020

Respectfully submitted,

By: */s/ Christopher J. Cox*

WILLIAM M. REGAN, NY 3066107*
ALLISON M. WUERTZ, NY 5039896*
DANIEL J. PETROKAS, NY 5779103*
PETER W. BAUTZ, NY 5657820*
HOGAN LOVELLS US LLP
390 Madison Ave.
New York, NY 10017
Tel: (212) 918-3000
Fax: (212) 918-3100
william.regan@hoganlovells.com
allison.wuertz@hoganlovells.com
daniel.petrokas@hoganlovells.com
peter.bautz@hoganlovells.com

CHRISTOPHER J. COX, SBN 151650
GURTEJ SINGH, SBN 286547
HOGAN LOVELLS US LLP
4085 Campbell Ave., Suite100
Menlo Park, CA 94025
Tel: (650) 463-4000
Fax: (650) 463-4199
chris.cox@hoganlovells.com
tej.singh@hoganlovells.com

RUPINDER K. GARCHA, DC 1616653*
HOGAN LOVELLS US LLP
555 13th St. NW
Washington, D.C. 20004
Tel: (202) 637-5600
Fax: (202) 637-5910
rupinder.garcha@hoganlovells.com

Attorneys for Proposed Amicus Curiae Professors Janet C. Hoeffel, Rory Little, Emad H. Atiq, and James Q. Whitman

* Motion for admission *pro hac vice* pending.

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(1)(A))

I, Christopher J. Cox, am a partner at the law firm Hogan Lovells US LLP, and am counsel for *amici curiae* Janet C. Hoeffel, Rory K. Little, Emad Atiq, and James Q. Whitman in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 9,426 words in length.

DATED: October 26, 2020

/s/ Christopher J. Cox
Christopher J. Cox

DECLARATION OF SERVICE

Case Name: ***People v. Don'te McDaniel***
Case Number: **Cal. Supreme Court No. S171393**
Los Angeles County Superior Court Case No. TA074274

I, Christopher J. Cox, declare as follows: I am over the age of 18, not a party to this case. My business address is 4085 Campbell Ave., Suite 100, Menlo Park, CA 94025.

On October 26, 2020, I served a true copy of the following document(s):

AMICI CURIAE BRIEF FOR PROPOSED AMICI CURIAE JANET C. HOEFFEL, RORY K. LITTLE, EMAD ATIQ, AND JAMES Q. WHITMAN; DECLARATION OF CHRISTOPHER J. COX

The following were served the aforementioned document(s) electronically via TrueFiling on **October 26, 2020**:

Office of the State Public Defender Attn: Elias Batchelder 1111 Broadway, Suite 1000 Oakland, CA 94607 elias.batchelder@ospd.ca.gov	Office of the Attorney General Attn: Kathy Pomer 300 S Spring St., Suite 1702 Los Angeles, CA 90013-1256 Kathy.Pomerantz@doj.ca.gov
The Honorable Robert J. Perry, Judge Los Angeles County Superior Court TTSou@lacourt.org (Clerk of The Hon. Robert J. Perry)	Sonja Hardy Death Penalty Appeals Clerk Los Angeles County Superior Court Criminal Appeals Unit SRHardy@lacourt.org

California Appellate Project 101 Second St., Suite 600 San Francisco, CA 94105 filing@capsf.org	Governor's Office Kelli Evans Chief Deputy Legal Affairs Secretary 1303 10th St, Suite 1173 Sacramento, CA 95814 kelli.evans@gov.ca.gov
Michael Ogul Deputy Public Defender Santa Clara County 120 West Mission Street San Jose, CA 95110 michael.ogul@pdo.sccgov.org (Counsel for Amicus Curiae: California Public Defenders Association & Santa Clara County Public Defender)	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on October 26, 2020, at Woodside, California.

/s/ Christopher J. Cox
Christopher J. Cox