S171393

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

DONTE LAMONT MCDANIEL,

Defendant and Appellant.

On automatic appeal from the decision of the
Los Angeles County Superior Court, Case No. TA074274
The Honorable Robert J. Perry, Judge

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

QUESTIONS PRESENTED

By an order dated June 17, 2020, this court directing briefing on these questions:

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?

This amicus curiae brief will address Question 1.

SUMMARY OF ARGUMENT

The 1978 California death penalty law is a comprehensive statute that specifies in detail which facts must be found beyond a reasonable doubt, which issues the jury must reach a unanimous decision on, and what the conse-

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quences are when the jury is unable to agree. Omission of unanimity for aggravating circumstances and of a burden of proof for either aggravating circumstances or the penalty verdict are not mere gaps in the statute but an indication that there are no such requirements.

Imposing a unanimity requirement for aggravating circumstances would make the death penalty less consistent, not more. Such a requirement is so arbitrary that a reciprocal requirement for mitigating circumstances would be unconstitutional. Jurors who agree unanimously that there are aggravating circumstances that clearly warrant a death sentence would be instructed to ignore them if they could not agree on which ones have been proved.

Neither common law nor California legal history support the requirements defendant claims. At common law the jury had no function at all in sentencing. The framers of the California Constitution clearly intended to guarantee the right as understood at common law, not an idiosyncratic "only in California" variant. Requests for instruction on a burden of proof for sentence have been regularly refused through the history of discretionary jury sentencing. There is no historical support whatever for unanimity or burden of proof requirements for factors which merely inform a sentencing decision within the range authorized for the crime.

There is no historical support for the claim that jury trial and proof beyond a reasonable doubt are intertwined such that where one applies the other does also. Defendants who plead insanity get a jury trial but bear the burden of proof. Juveniles charged in juvenile court get the benefit of the usual burden of proof on guilt, but they are not entitled to a jury trial. The two rights are distinct and have different scopes of application.

Academic studies which have not been subjected to adversarial testing are not a reliable factual basis for entertaining broad attacks on the death penalty. Experiences teaches that very often what "studies show" just is not so.

Stare decisis weighs heavily against the change proposed here. Although the claim has some constitutional connection, it remains basically one of

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statutory construction. The legislative authority could change the law if the present practice is unsatisfactory. None of the special reasons for overturning a precedent are present. The rejection of identical claims over many decades is solidly based. The present rule is not unworkable, but just the opposite. Making such a disruptive change without a solid basis would undermine public confidence in the courts.

ARGUMENT

The 1978 death penalty statute is the most heavily litigated law in this court, having been considered in hundreds of vehemently contested cases with representation by able attorneys. Yet defendant would have this court believe that the consistent understanding over four decades regarding which decisions require unanimity, proof beyond a reasonable doubt, or both, and which do not, has only been an assumption all this time, and that a contrary rule is required by a very general statute which mentions neither requirement. Further, the constitutional requirement of proof beyond a reasonable doubt has been hiding in the right to jury trial all this time, despite nearly universal recognition that it comes from the right to due process of law.

This work of creative fiction scores points for creativity, but it is still fiction.

I. The 1978 death penalty law is a comprehensive statute that clearly contemplates that the factors listed in Penal Code section 190.3 require neither unanimity nor proof beyond a reasonable doubt.

Defendant's thesis is that the early post-restoration decisions rejecting his claims were based on the litigation strategy of defense lawyers who were focused on having the death penalty law declared unconstitutional rather than making the best argument for their clients' cases, and further that this court was confined by those strategic choices. (See AOB 209-212.) In this telling, then, the court went straight to the question of whether the death penalty law's omission of the unanimity and burden of proof requirements at issue now

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rendered the law unconstitutional, without ever considering whether the statute was correctly interpreted to rule out these practices.

This theory makes some untenable assumptions. First, it assumes that the court was unaware of its duty to resolve cases on nonconstitutional grounds, if possible, and address constitutional issues only when necessary. (See *Ashwander v. Tennessee Valley Authority* (1936) 297 U.S. 288, 341, 346-348 (1936) (conc. opn. of Brandeis, J.).) That fundamental rule overrides the standard rule of not considering issues not raised in the trial court. (See Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule* (1987) 40 Vand. L.Rev. 1023, 1050-1051.) Second, it assumes that afterward a readily available argument applicable to every capital case went unused for decades despite the large number of cases and despite the standard practice of capital defense lawyers to raise every conceivable issue and some inconceivable ones.

There is a much simpler explanation. The interpretation of the statute that underlies the constitutional rulings in *People v. Frierson* (1979) 25 Cal.3d 142, and *People v. Jackson* (1980) 28 Cal.3d 264, is obviously correct. The constitutional doubt doctrine does not apply because that doctrine applies only if the alternate interpretation is plausible. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1146.)[1]

The 1977 California death penalty law was a long and detailed statute. It is obvious from the face of the law that it was drafted with awareness of the unanimity and burden of proof requirements, and it specified with care when these requirements apply and what to do if the jury cannot achieve unanimity. It detailed what findings were to be made. The 1978 law followed the pattern set the year before. It contained the same detail of procedure, but made changes on the subject of the consequences of a hung jury.

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1. The doctrine also requires that the constitutional question be "grave and doubtful" (see *ibid*.), which it is not in this case. (See Part III, *infra*.)

Section 190.1 of the Penal Code[2] details all the findings that must be made by the jury, and the order in which they are to be made. Guilt and special circumstances are determined together, except that the prior murder special circumstance is deferred until after the guilt verdict. Sanity comes next, if pleaded. The punishment decision comes last. No mention is made of any findings regarding the truth or falsity of the § 190.3 factors which merely inform the punishment decision.

Section 190.4, subdivision (a) goes into detail on the special circumstance findings. It requires a special finding on the truth of each special circumstance alleged. It requires proof beyond a reasonable doubt. For jury trials it requires unanimity and specifies with care what happens when the jury is not unanimous as to one or more special circumstances. If one or more special circumstances have been found unanimously beyond a reasonable doubt, that is enough to make the defendant eligible for the death penalty (see *infra* at pp. 17-18), and the case can move forward to the next phase.

If no special circumstance has been found unanimously and the jury is hung as to one or more, a new jury will be called to retry those circumstances. A single juror cannot veto the eligibility determination over the objection of the other jurors. (See Part II, *infra*.)

Section 190.3 describes in detail the process for the jury to make its penalty determination. The paragraphs preceding the list of circumstances describe the broad range of evidence that is admissible. The prosecution is required to give notice of the evidence it will introduce in aggravation, not the aggravating factors it will argue. This is a discovery rule, not a pleading requirement. The notice does not even have to be in writing, although that is obviously better practice. (See *People v. Miranda* (1987) 44 Cal.3d 57, 96-97.)

Section 190.3 then lists factors for the trier of fact to take into account. The factors are not separated into aggravating and mitigating lists. Some, such

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2. Subsequent section references in this brief are to the Penal Code unless otherwise specified.

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as "circumstances of the crime," can cut either way. There is no requirement for the jury to make findings on them. There is no requirement to agree unanimously on which ones are true. There is no burden of proof stated. The jury is directed to "take into account and be guided by the aggravating and mitigating circumstances referred to in this section . . . ." (§ 190.3.) It is directed to determine the penalty based on whether the aggravating outweighs the mitigating or vice versa. However, this court has interpreted the section, despite this unequivocal language, to require a decision based on the sentence the jury deems appropriate. (See *People v. Brown* (1985) 40 Cal.3d 512, 541.)

No burden of proof is stated for the final decision in section 190.3. However, section 190.4, subdivision (b) does require a unanimous verdict and specifies in detail the result of an inability of the jury to reach unanimity. If the first jury is hung, a second jury must be called to retry the penalty phase only. If the second jury is also hung, the judge may call a third jury or impose a life-without-parole sentence. As with the eligibility determination, a single juror can never veto the death penalty and force his views on the other eleven. It takes two hung juries plus a decision of the trial judge to impose a life sentence when some jurors believe a death sentence is appropriate.

When a detailed statute includes a requirement in some places and omits it in others, the inference is strong that the omissions are intentional. For example, when the death penalty law listed 18 special circumstances with intent-to-kill requirements for 10 of them, it is not plausible that circumstances without that requirement carry one implicitly. (See *Anderson*, 43 Cal.3d at p. 1141.)

Similarly, it is not plausible that the omission of unanimity and burden of proof requirements from certain steps of the process is accidental, particularly for steps that have never been subject to such requirements in this state before. A requirement that the jury deliberate on each aggravating circumstance until they are unanimous one way or the other would be both impractical and unenforceable, given the breadth of the factors and the fact that the jury does not make findings on the circumstances. Every circumstance of the crime is to

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be considered, and circumstances of murders are much more likely to be aggravating rather than mitigating. Capital juries have a big enough job without haggling over every detail of the crime.

If the proposal is for a single-juror veto, instructing jurors to ignore aggravating factors that eleven of them believe to be proved but one does not (see Part II, *infra*), that would be contrary to everything this law says about unanimity. At each point where unanimity is at issue, the law makes clear that it is unanimity one way or the other that is required. The 1978 law takes pains to insure that a single juror cannot veto anything.

This court did, of course, carry over one burden-of-proof requirement that it had established under prior law because neither the 1977 nor 1978 laws purported to abrogate it. In *People v. Terry* (1964) 61 Cal.2d 137, 148-149, a case under the 1957 law, this court held that an information alleging a prior crime was hearsay and inadmissible in the penalty phase. The court added a dictum in footnote 8 that the reasonable doubt rule should apply to prior crimes. This dictum was elevated to a holding in *People v. Polk* (1965) 63 Cal.2d 443. The *Polk* court noted the general rule that the evidence rules are the same in the penalty trial as in the guilt trial, and further that in guilt trials prior crimes need only be proved by a preponderance to be considered. Nonetheless, *Polk* made an exception for prior crimes evidence on nothing more than the majority's view that there "should be an exception," supported by only the *Terry* dictum. (See *id*. at pp. 450-451.) *Polk* does not say that there is any basis for the exception in the statute or in the state or federal constitution. By the time of *People v. Stanworth* (1969) 71 Cal.2d 820, 840, this rule was "settled."

People v. Robertson (1982) 33 Cal.3d 21, kept the *Polk*-*Stanworth* rule not on the basis of anything in the 1977 statute but only because nothing in that statute or its history "purports to overturn or reject the numerous judicial decisions recognizing the applicability of the reasonable doubt standard *in this special context*." (*Id*. at p. 54, italics added.) That reasoning cuts both ways. Nothing in the 1977 law or the 1978 law purports to change the pre-existing

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law that *Polk-Stanworth* is an exception, and the usual preponderance rule applies outside its "special context."

As for the final verdict, the omission of a burden of proof in a statute that goes into such detail on other aspects of making the decision can only be intentional. This statute provides for the jury to decide the penalty without a burden of proof, for the obvious reason that the concept of "proof" does not fit with the decision to be made. The penalty verdict, just like sentencing decisions in noncapital cases, is a decision regarding what is a just result given the facts, not a decision as to what the facts are.

This court has long understood the death penalty law to (1) not require proof beyond a reasonable doubt for either the aggravating circumstances or the final decision, and (2) not require unanimity or findings for the aggravating circumstances. This understanding is not based on litigating strategy in a couple of old cases or being constrained by that strategy. It is based on the plain meaning of the statute when read in its entirety and in the context of historical practice. A general statute such as section 1042 would not override the specific one even if it had anything to say on these subjects. But it does not. It merely says that issues of fact will be tried by a jury when jury trial is constitutionally required. Which issues the jury must reach unanimous agreement on and which facts must be proved beyond a reasonable doubt are issues determined by other provisions of law.

II. The single-juror veto that defendant proposes for aggravating factors would make the death penalty less consistent, not more.

Defendant claims to be asking for nothing more than the traditional protections of jury trial. (See Appellant's Third Supp. Reply Brief 12 ("A3SR").) In reality, he is asking for a rule that is foreign to California's jury trial tradition. Where the traditional requirement of jury unanimity applies, California law requires the jury to deliberate until it is *unanimous one way or the other*. If the jury cannot agree on a verdict, the matter may be tried again. (See § 1160 [guilt]; *People v. Hernandez* (2000) 22 Cal.4th 512, 516 [sanity];

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§ 190.4, subd. (a) [special circumstances]; § 190.4, subd. (b) [penalty in capital case].)

Defendant is not asking for a unanimity rule in this tradition. He is asking for a *single-juror veto* rule that allows one juror to block the other eleven from considering an aggravating circumstance, even if they believe it has been proved beyond a reasonable doubt. (See AOB 222.) Not only is such a rule not constitutionally *required*, but a single-juror veto on penalty circumstances is so arbitrary and so detrimental to the proper functioning of jury sentencing that a reciprocal rule for mitigating circumstances is constitutionally forbidden. (See *Mills v. Maryland* (1988) 486 U.S. 367, 374; *McKoy v. North Carolina* (1990) 494 U.S. 433, 439.)

A bit of background is needed here on the variety of capital sentencing statutes and how California's fits into the picture. In *Furman v. Georgia* (1972) 408 U.S. 238, the United States Supreme Court struck down nearly all existing capital sentencing statutes with a Delphic, one-paragraph *per curiam* opinion and five disparate single-justice concurrences. This was followed by a massive national wave of legislation to restore capital punishment, but legislatures had to guess what form of statute would pass muster. (See *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 446-449 (conc. opn. of Clark, J.).) A majority of the 35 states that passed such legislation, including California, "were misled by *Furman*" and enacted mandatory sentencing statutes. (See *id*. at p. 448.) These statutes were again struck down by *Woodson v. North Carolina* (1976) 428 U.S. 280, one of five cases decided together. *Gregg v. Georgia* (1976) 428 U.S. 153, is the first of the five, and they are commonly known as the *Gregg* cases.

Gregg was followed by many years of twists and turns that Justice Scalia aptly described as "the fog of confusion that is our annually improvised Eighth Amendment, 'death is different' jurisprudence." (*Morgan v. Illinois* (1992) 504 U.S. 719, 751 (dis. opn.).) The rule that emerged is that two steps are required before a murderer may be sentenced to death. There must be a narrowing of some kind that limits the death-eligible cases to a subset of

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murders, and this must be followed by an individualized sentencing proceeding at which a sentencer with discretion decides whether the particular crime and defendant warrant a sentence of death. These two steps have been designated the "eligibility decision" and the "selection decision." (See *Tuilaepa v. California* (1994) 512 U.S. 967, 971-972.)

The post-*Furman* Supreme Court appears to have been horrified that a third of the country was willing to enact retrograde mandatory sentencing, though the high court has never apologized for misleading much of the nation to the conclusion it was required. (See Scheidegger, *Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism* (2019) 17 Ohio St. J. Crim. L. 131, 147 (cited below as "Tinkering with the Machinery".) In the *Gregg* cases, and for years afterward, much of the development was to restore the discretion and individualization that *Furman* had implied was forbidden.

The Georgia and Florida approaches to the selection step upheld in *Gregg* and *Proffitt v. Florida* (1976) 428 U.S. 242, respectively, differ in how they handle aggravating circumstances, and California's law comes down between the two. In a state following the Florida model, the "aggravating circumstances" serve a dual role. At least one must be found before the death penalty can be considered (the eligibility decision), and only those circumstances are weighed on the aggravating side in the selection decision. (See *Stringer v. Black* (1992) 503 U.S. 222, 229-230.) After *Ring v. Arizona* (2002) 536 U.S. 584, and *Hurst v. Florida* (2016) 577 U.S. 92, eligibility circumstances are further limited to those found by a jury beyond a reasonable doubt, and after *Ramos v. Louisiana* (2020) 140 S.Ct. 1390, 206 L.Ed.2d 583, the jury must be unanimous. In the Georgia model, by contrast, once the eligibility decision has been made the sentencer takes into consideration all the circumstances of the case in making the selection decision, and the eligibility circumstances have no special significance. (See *Zant v. Stephens* (1983) 462 U.S. 862, 871-872.)

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In *Zant*, the high court reaffirmed the holding of the lead opinion in *Gregg* that Georgia's wide-open consideration of aggravating circumstances is not only permissible but desirable.

> " 'We think that the Georgia court *wisely* has chosen not to impose *unnecessary restrictions* on the evidence that can be offered at such a hearing and to approve open and far-ranging argument . . . . So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it *desirable* for the jury to have as much information before it as possible when it makes the sentencing decision.' " (*Id*. at pp. 886-887, italics added, quoting *Gregg*, 428 U.S. at pp. 203-204.)

Tight restrictions on aggravating evidence, like those in Florida-model states, are not only not constitutionally required, they are bad policy. In *People v. Friend* (1957) 47 Cal.2d 749, 763, fn. 7 (overruled on other grounds *People v. Love* (1961) 56 Cal.2d 720, 731), this court was critical of the restrictions on penalty evidence in the law at the time and called for "legislative attention." That attention came swiftly (see 2 Witkin, Cal. Crimes (1st ed. 1963) § 1032, pp. 977-978) with the introduction of the bifurcated trial and a wide-open scope of evidence: "of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty." (Cal. Stats. 1957, ch. 1968, § 2 (1957 version of Pen. Code, § 190.1).) The statute was neutral on its face. It imposed no burden of proof, and there was no requirement that the jury agree on particular circumstances. It was a policy of "wide leeway in the admission of evidence" (*People v. Jones* (1959) 52 Cal.2d 636, 647.)

The facial neutrality of the law's wide leeway reflects a policy that the purpose of the individualized, bifurcated sentencing hearing is not to minimize the number of death sentences handed down but rather to increase the accuracy of the proceeding in both rendering such sentences to the murderers who most deserve them and extending leniency where it is warranted. To be sure, evidence of other crimes is sufficiently powerful that this court created an

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extrastatutory requirement of proof beyond a reasonable doubt. (See *supra* at p. 15.) But the reason it is powerful is the strong consensus of our society that repeat criminals deserve more severe punishment for a given crime than one-time offenders. Evidence of other crimes is highly relevant and ought not be artificially restricted. (See *People v. Bentley* (1962) 58 Cal.2d 458, 460-461 [evidence of other crime not excluded because it was out-of-state, subsequent, cumulative, or "inflammatory"].) For other factors in aggravation, requested instructions for a burden of proof were refused in *People v. Purvis* (1961) 56 Cal.2d 93, 95.[3] Even the dissent on that point argued only for a preponderance burden, equally on the prosecution for aggravating facts and the defense for mitigating. (*Id*. at p. 102 (conc. and dis. opn. of Schauer, J.).) No one even suggested requiring jury unanimity on those facts that merely inform the verdict.

California's 1977 law was written after the Supreme Court upheld Georgia's wide scope of penalty phase evidence in *Gregg*. The 1977 law continued to allow a broad scope, and the 1978 law did so as well. Under present Penal Code section 190.3, the scope of aggravating factors are much broader than in Florida-model capital sentencing laws but narrower than the Georgia law or the California 1957 law. Only the listed factors can be considered, but the factors are quite broad. The "special circumstances" used for the eligibility decision are included in factor (a), but a great deal more can also come in. All circumstances of the crime can be considered, as can other crimes which were violent, felonious, or both. (See § 190.3 factors (a), (b), (c).)

In *Mills v. Maryland*, *supra*, the U.S. Supreme Court considered the distorting effect of requiring jury unanimity for a mitigating factor. As noted by the dissent in the Maryland court, all 12 jurors might agree that some mitigating circumstances were present, but if they could not agree on which

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3. *Purvis* and a host of other cases were overruled as to the commutation instruction, not relevant here, in *People v. Morse* (1964) 60 Cal.2d 631, 648-649.

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ones were present, they would all be precluded from considering any mitigating evidence at all. (See *Mills*, 486 U.S. at p. 374.) "[I]t would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under [these] circumstances . . . ." (*Ibid*.)

This is, of course, a federal constitutional issue only on the mitigating side. (See *id*. at pp. 374-375.) A state can constitutionally restrict aggravating evidence if its legislature so chooses, and states following the Florida model do. In the chaos between *Furman* and *Gregg* they might have though this restriction would be required, but it is still bad policy. A defendant may have a long criminal history with some success at avoiding leaving evidence. Different jurors might be convinced of different crimes yet all agree that the defendant is a lifelong thug and not a one-time offender. Telling the jurors that they must disregard this highly relevant evidence would make the capital sentencing process more arbitrary and less reliable for the same reason that the reciprocal restriction on mitigating evidence did so in *Mills*.

As the high court noted in *Zant*, *supra*, unnecessary restrictions on aggravating evidence are unwise. The state is constitutionally required under *Mills* to allow each individual juror to consider all the mitigating factors he or she deems established. The symmetry of the statute, California's pre-existing policy, and the absence of anything in the statute indicating an intent to change that policy all point in the same direction. The jury's *verdict* must be unanimous. Aggravating and mitigating factors are predicate facts supporting that verdict and do not need to be unanimous. (See *Mills*, *supra*, 486 U.S. at p. 373 [summarizing Maryland court dissent].)

III. There is no basis in common law or California legal history for drawing the line differently from the *Apprendi* line.

The role of the jury and the required burden of proof in sentencing has been vigorously litigated since the turn of the century under *Apprendi v. New Jersey* (2000) 530 U.S. 466, its progeny, and this court's application of those cases. Defendant grudgingly concedes that, under these cases, the federal

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constitutional requirements of jury trial and proof beyond a reasonable doubt apply only to the guilt trial and the determination of special circumstances, not to the penalty phase under § 190.3. (See AOB 194.) That is true, and its truth is even clearer now than it was when the AOB was written. (See *McKinney v. Arizona* (2020) 140 S.Ct. 702, 707-708, 206 L.Ed.2d 69, 75 ["in the death penalty context . . . *Ring* 'has nothing to do with jury sentencing' "].)

Yet defendant attempts to wave off this important line of cases with the magic wand of "independent force." (See AOB 198.) The *Apprendi* line cannot be dismissed so easily. No one can deny that the California Constitution has "independent force,"[4] but that does not mean it was adopted in a vacuum. The California Constitution guarantees the jury trial right as it was known at common law. (See *Koppikus v. State Capitol Commissioners* (1860) 16 Cal. 248, 253.) As the *Apprendi* line is also based on the understanding at common law, it is powerful persuasive authority.

A. The Apprendi Line.

The last third of the twentieth century saw sweeping changes in sentencing law. The country as a whole grew disenchanted with open-ended, standardless discretion in sentencing and parole, suspecting that such laws allowed punishment to depend too much on particular sentencers' views and allowed too much latitude for invidious discrimination. The *Furman* and *Gregg* cases forced "guided discretion" statutes in capital cases, replacing the open-ended discretion upheld only the year before *Furman* in *McGautha v. California* (1971) 402 U.S. 183. (See generally Tinkering with the Machinery, *supra*, 17 Ohio St. J. Crim. L. at pp. 142-151.) California replaced indeterminate sentencing in noncapital felony cases with the Determinate Sentencing Law. (See 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment § 309, p. 481.) Congress enacted the Sentencing Reform Act of 1984, creating

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4. The second paragraph of article I, section 24 was declared void as an unauthorized constitutional revision in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 355.

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the United States Sentencing Commission and the Sentencing Guidelines. Other states also added structure to their previously amorphous systems.

As sentencing came to depend more on specific factual findings and less on open-ended discretion, the U.S. Supreme Court had to reconcile the changes with two distinct but mutually reinforcing constitutional requirements: the Sixth Amendment guarantee of jury trial and the Due Process Clause's guarantee that conviction of a crime would not be based on anything less than proof beyond a reasonable doubt. The key was that both rights applied to the determination of the elements of a crime. (See *Apprendi*, 530 U.S. at p. 477.) Findings that increase the maximum sentence above that to which the defendant would otherwise be exposed create "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict," making them subject to the *Apprendi* rule. (*Id*. at p. 494, fn. 19.) Circumstances that "support[] a specific sentence *within the range* authorized by the jury's finding" remain "sentencing factor[s]" and are not subject to the *Apprendi* requirements. (*Ibid*., italics in original.)

Apprendi was in some tension with some of the Supreme Court's prior capital cases despite the majority's rather feeble effort to distinguish them. (See *id*. at pp. 496-497; cf. *id*. at pp. 522-523 (conc. opn. of Thomas, J.) ["another day"]; *id*. at p. 537 (dis. opn. of O'Connor, J.) ["plainly refutes"].) The other day that Justice Thomas foresaw was not long coming. In *Ring v. Arizona* (2002) 536 U.S. 584, the high court applied *Apprendi* to Arizona's "aggravating circumstances." These are the equivalent of California's "special circumstance" in that at least one must be found before the death penalty may be considered. (See *id*. at p. 597.) Such a factor must be found by the jury, and no broader claim was considered. (See *id*. at p. 597 & fn. 4.) Earlier cases describing Arizona's aggravating factors as "merely circumstances for consideration by the [sentencer] in exercising sentencing discretion within a statutory range of penalities" (i.e., exactly what California's § 190.3 aggravators are) were incorrect. (See *id*. at p. 601.)

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After *Ring*, the high court took a surprisingly long time to decide that it also applied to Florida's system. It finally did so in *Hurst v. Florida* (2016) 577 U.S. 92. In Florida, as in Arizona, the maximum sentence for first-degree murder is life in prison unless there is a "finding [of] at least one aggravating circumstance." (*Id*. at p. 98.) That made the statute indistinguishable from Arizona's for *Apprendi* purposes. *Hurst* overruled precedents on jury trial and capital sentencing, but only "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for imposition of the death penalty," (see *id*. at p. 102), i.e., the eligibility decision.

Even so, some state courts interpreted *Hurst* to apply the *Apprendi* requirements beyond the eligibility decision, extending it into the selection decision.[5] (See *Hurst v. State* (Fla. 2016) 202 So.3d 40, 44 (*per curiam*); *Rauf v. State* (Del. 2016) 145 A.3d 430, 433-434 (*per curiam*).) The Florida Supreme Court subsequently reconsidered, overruled *Hurst*-on-remand in part, and limited the constitutional requirements to the eligibility decision. (See *State v. Poole* (Fla. 2020) 292 So.3d 694, 697 (*per curiam*).)

This court never went down the *Hurst*-on-remand blind alley and therefore has no need to retract. Post-*Ring*, in *People v. Prieto* (2003) 30 Cal.4th 226, the court correctly recognized that California's special circumstance is the finding that is affected by *Ring*. Thus, *Ring* partially undermined a precedent regarding the harmless error standard for special circumstances (see *id*. at p. 256), but it required no change regarding the issues in the present case, unanimity and burden of proof on the § 190.3 aggravating factors and burden of proof on the ultimate penalty decision. (See *id*. at pp. 262-263.) Nothing in *Hurst* changed this conclusion. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235.)

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5. See *supra* at pp. 17-18, for an explanation of the "eligibility" and "selection" decisions in post-*Gregg* capital sentencing.

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The Arizona Supreme Court took a similarly narrow view of *Ring* as applying only to the eligibility decision. (See *State v. Styers* (2011) 227 Ariz. 186, 188, 254 P.3d 1132, 1134.) That view was affirmed in *McKinney v. Arizona*, *supra.* The high court unambiguously described *Ring* and *Hurst* as applying to the finding of "the aggravating circumstance that makes the defendant death *eligible*." (*McKinney*, *supra*, 140 S.Ct. at p. 707, 206 L.Ed.2d at p. 69, italics added.) The court quoted the holding of *Apprendi* that its rule does not apply to the " 'exercise [of] discretion—taking into consideration various factors [i.e., not limited to those found by a jury beyond a reasonable doubt] relating to both offense and offender—in imposing a judgment *within the range* prescribed by statute.' " (*Ibid*.) In short, *Prieto* and *Rangel* are correct.

B. The Relevance of the Apprendi Line.

The *Apprendi* line matters in this case, despite defendant's efforts to brush it aside, because its rationale was solidly grounded in the same common law rights to jury trial and due process that are the basis of the same rights in the California Constitution. (See *Apprendi*, 530 U.S. at p. 477; *Blakely v. Washington* (2004) 542 U.S. 296, 305-306.) The federal Bill of Rights and the California Declaration of Rights are different branches of the same tree. If they are to be construed to have different meanings, there should be "cogent reasons" for the difference. (See *People v. Buza* (2018) 4 Cal.5th 658, 685.)

Sometimes there is good reason for a different interpretation. For example, the Sixth Amendment has language on vicinage that was added to allay late eighteenth century fears of an overreaching federal government. Transportation out of state for trial is not a danger from state governments, but the possibility in federal cases relates to one of the abuses of the British government that prompted the Revolution. (See Declaration of Independence (1776), sixth paragraph of protests against acts of Parliament; *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1054-1055.) The Sixth Amendment thus has language on this subject not in the California Constitution and not applicable to its state courts. (See *Price*, at pp. 1075-1076.) Where the two

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provisions differ, the California Constitution is not always "broader," i.e., more favorable to the defendant. Sometimes is it "narrower." (See *ibid*. [rejecting "at least as broad" argument].)

Sometimes the high court deviates from the common law, at least to the extent that the Bill of Rights is "incorporated" in the Fourteenth Amendment. Such was the rule on jury unanimity from the splintered opinion in *Apodaca v. Oregon* (1972) 406 U.S. 404, until it was overruled in the splintered opinion of *Ramos v. Louisiana* (2020) 140 S.Ct. 1390, 206 L.Ed.2d 583. Where such a deviation occurs and the California provision was intended to preserve the right as known at common law, this court is entirely justified in charting a different course.

Sometimes a provision of the California Constitution is enacted with the intent of deviating from the common law, as the Constitution of 1879 did for jury unanimity in civil cases and the grand jury requirement in felony cases. (See Cal. Const., art. I, §§ 14, 16.) In that situation, also, a different course is indicated.

However, as we will show below, defendant has not made a showing that any of these are true for the issues in this case. The *Apprendi* line is correct that the common law right of jury trial ended at conviction of an offense and did not extend into discretionary sentencing. Early California legal history is fully consistent with the view that while the Legislature could give juries a role in sentencing it was not constitutionally required to do so. Defendant's contention that burden of proof is somehow intertwined with jury trial such that every decision assigned to a jury by statute automatically invokes the reasonable doubt standard has no basis in California legal history. Imposing such a requirement judicially where the statute does not is both unwise and inappropriate.

C. Common Law and Founding Era.

The role of the jury in felony sentencing at common law may be simply stated. The jury had no authority over the sentence distinct from its guilt

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verdict. After conviction there were further proceedings, but the jury had no part in them. (See 4 W. Blackstone, Commentaries (1st ed. 1769) pp. 368-369 [summarizing post-verdict proceedings].) The jury could influence sentencing via jury nullification in the guilt verdict (see, e.g., Sawyer, *"Benefit of Clergy" in Maryland and Virginia* (1990) 34 Am. J. Legal Hist. 49, 60),[6] but the fact that juries needed to resort to such a drastic measure merely illustrates that they had no voice in sentencing as such.

Nearly all felonies were nominally capital offenses at common law. (See 4 Blackstone, *supra*, at p. 98.) However, the practice known as "benefit of clergy" evolved over time from an exemption for clergymen into a device for amelioration of this harsh rule. (See *id*. at p. 364; Sawyer, *supra*, at p. 52.) By a succession of statutes, benefit of clergy was expanded to additional classes of people. (See 1 J. Stephen, A History of the Criminal Law of England (1883) p. 462.) Male commoners were eligible only if they could read until 1705, when the reading requirement was abolished. (See *ibid*.) The benefit was limited to first offenders for everyone except actual clerics. (*Id*. at p. 463.) Meanwhile, benefit of clergy was removed from the felonies deemed most serious (beginning with murder) by another succession of statutes. (See *id*. at pp. 463-466.)

The resulting system separated two tiers of felonies and separated first offenders from recidivists for the bottom tier. During the time that the reading test was in force, it also introduced a measure of discretion. The reading test was often faked by tipping the prisoner that the test was a Bible verse that he need only memorize. (See G. Dalzell, Benefit of Clergy in America (1955) pp. 24-25.)

The important point for this case is that there was no right to have the jury make this decision. In America at the time of the Founding, "The life or death decision to extend clergy was not the jury's to make. Rather, the discretion to

6. Sawyer notes a 1666 case in which a Maryland jury found a stolen cow to be worth only eleven pence, an absurdly low sum even then. (See *ibid*.)

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spare a convicted felon's life and to impose the more lenient sentence was unbounded, and belonged entirely to the court." (King, *The Origins of Felony Jury Sentencing in the United States* (2003) 78 Chi.-Kent L.Rev. 937, 948-949.) Defendant notes *State v. Carroll* (1842) 24 N.C. 257, 260, as a case holding that there was a right to have a jury determine the discrete fact of whether the defendant was a first offender. (A3SR 56.) This was long after most states had abolished benefit of clergy altogether. The Carolinas and Florida passed their reforms much later than the other states. (See King, *supra*, at p. 992.) The case certainly does not establish that jury participation in sentencing was a commonly understood part of the common law right to jury trial, given that the common law commentators make no mention of any jury participation.

In the sentencing reforms of the 1790s and early nineteenth century, state after state abandoned the system inherited from England and adopted discretionary terms of imprisonment as the penalty for most felonies. (See King, *supra*, at p. 937.) However, only three states adopted jury sentencing at that time. Most states vested the discretion in the judge, as did the first federal criminal law. (See Act of April 30, 1790, § 21, 1 Stat. 117 [bribery, "fined and imprisoned at the discretion of the court"]; see also *id*. § 31 at p. 119 [no benefit of clergy in federal system].)

The reasons the various states made the choices they did are complex and less than perfectly clear, but it does not appear that any compulsion from the constitutional right to jury trial was among them. (See King, *supra*, at p. 986.) Sentencing simply was not included in the common law right guaranteed by the early constitutions. The legislature could assign the jury a role or not, as it chose.

Defendant's claim that the burden of proof standard is somehow intertwined with the jury trial right similarly lacks common law support. The formulation "beyond a reasonable doubt" did not crystallize until after the Bill of Rights, but a higher burden for criminal cases was recognized earlier. (See *In re Winship* (1970) 397 U.S. 358, 361; see also 4 Blackstone, *supra*, at p. 352

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[“better that ten guilty persons escape . . .”].) When the rule did crystallize, it was considered part of the law of evidence. (See *Winship*, *supra*, at p. 362.) Defendant cites no basis for believing that the burden of proof was part of the law of jury trial at common law, and amicus has found none.

D. California History.

California legal history provides no basis for the assertion that the constitutional right to jury trial applies to sentencing, that every issue of fact assigned to the jury must be found beyond a reasonable doubt, or that unanimity or any burden of proof is required for jury decisions which merely lead up to the verdict, as distinguished from the verdict itself.

1. Scope of the jury trial right.

The California constitutional right to jury trial is, simply, a guarantee of the common law right. It is not an idiosyncratic “only in California” provision. The original Constitution of 1850 was drafted by a convention composed mostly of people from other states of the Union. Of the 48 delegates in attendance, 36 were from other states. (See Mason, Constitutional History of California in The Constitutions of California and the United States (2017) p. 110.) Of those, all but two had lived in California six years or less. (See *ibid*.) The provision guaranteeing the right of trial by jury in both criminal and civil cases was approved with no debate at all. (See J. Browne, Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October, 1849 (1850) p. 38.) The delegates evidently understood that they were approving a guarantee of the right as they understood it in common, i.e., as it was understood throughout the United States.

This understanding was confirmed in *Koppikus v. State Capitol Commissioners* (1860) 16 Cal. 248. Koppikus contended that an administrative procedure for determining value for eminent domain violated his constitutional right to jury trial. This court held that the term “right of trial by jury” “was used with reference to the right as it exists at common law.” (*Id*. at p. 253.)

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The Constitution's framers and ratifiers were mostly from common law jurisdictions and understood the right to apply "in cases in which it is exercised in the administration of justice according to the course of the common law, as that law is understood in the several States of the Union." (*Id*. at p. 254.) That is, the constitutional right has the scope of common law usage, and while the legislature might expand the use of juries beyond that scope, such as to sentencing, it was not constitutionally required to do so.

However, *Koppikus* goes on to say that the right applies "in actions at law, or criminal actions, where an issue of fact is made by the pleadings." (*Ibid*.) Defendant insists that the sentence choice is an issue of fact, and that aggravating circumstances are issues of fact. The first of these propositions was quickly and repeatedly rejected. The second did not arise until the 1977 statute.

California followed the usual pattern of development of capital punishment that death was initially the mandatory punishment for murder, then mandatory for murder in the first degree, then discretionary. (See *McGautha v. California* (1971) 402 U.S. 183, 198-200; Cal. Stats. 1850, ch. 99, § 21 [murder, mandatory]; Cal. Stats. 1856, ch. 139, § 2 [first-degree murder, mandatory]; Cal. Stats. 1874, ch. 508, § 1 [first-degree murder, discretionary].)

Under the 1856 statute, this court decided *People v. Lee* (1860) 17 Cal. 76. In an opinion by Justice Field, this court confirmed that "[t]he jury have nothing to do with the character or extent of the punishment; their province is solely to determine upon the question of the guilt or innocence of the accused." (*Id*. at p. 79.)

The 1856 statute also provided that if the case went to trial the jury would specify the degree in its verdict, but if the defendant was "convicted on confession in open court" (i.e., pleaded guilty) the court would determine the degree. Two years after *Koppikus*, this court upheld this statute in *People v. Noll* (1862) 20 Cal. 164. The determination of degree after a plea of guilty was not the joining of an issue of the type that would invoke the right to jury trial. *Noll* would not be good law today after *Apprendi*, of course, but it makes clear

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that the constitutional jury trial right in criminal cases did not extend beyond the verdict of guilt in early California. It did not extend to the innovation of degree as understood at the time, although the legislature could assign the determination of degree to the jury if it chose. (See also *Hallinger v. Davis* (1892) 146 U.S. 314, 319 [quoting *Noll* with approval].)

The 1874 statute providing sentencing discretion in first-degree murder cases similarly provided for that discretion to be exercised by the court if the defendant pleaded guilty. This statute was upheld in *People v. Lennox* (1885) 67 Cal. 113, 114-115, *People v. Chew Lan Ong* (1904) 141 Cal. 550, 552, and *People v. Hough* (1945) 26 Cal.2d 618, 620-621. Where there is a separate proceeding on penalty alone, the legislature may assign that function to the trial court without violating the defendant's right to jury trial. That right is for the guilt determination, not sentence.

Two early cases illustrate that when sentencing discretion was given to the jury by statute, it was within the legislature's authority to decide the consequences of the jury's inability to agree or failure to specify. *People v. Littlefield* (1855) 5 Cal. 355, involved a harsh statute from California's wild Gold Rush days that amended the larceny statute to give the jury discretion to impose the death penalty for grand larceny. The court held that if the jury did not agree to this penalty they should return a general verdict, with the implication that the pre-amendment penalty would apply. (See *id*. at p. 356.)

The 1874 amendment to the murder statute went the other way, giving the jury discretion to reduce a previously mandatory penalty, and *People v. Welch* (1874) 49 Cal. 174, interpreted it in a reciprocal manner, citing *Littlefield*. Hence the absence of a statement on penalty resulted in imposition of the pre-amendment penalty as the default. (See *id*. at pp. 179-180.) In 1874, it was not seen as contrary to the rights of the defendant for the legislature to determine the consequence of the jury's inability to agree on punishment, even if it was to impose the heavier penalty.

As a matter of statutory construction, *Welch* was likely wrong, and this court effectively disapproved *Welch* to the extent it imposed a death sentence

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following the jury's inability to agree, as opposed to its silence on punishment, in *People v. Hall* (1926) 199 Cal. 451, 456-457. As the verdict was incomplete with a statement the jury could not agree, and the law at the time did provide for a bifurcated proceeding, the whole case had to be retried. (See *id*. at p. 457.)

The main holding of *Hall* is based on a reading of the statute. (See *id*. at p. 454.) The constitutional right to jury trial is mentioned only in refuting the claim of harmless error under the constitutional harmless error provision. (See *id*. at p. 458.) *Hall*'s statement that the defendant had effectively been denied a trial by jury must be read in light of the law at the time that the jury was to try guilt and determine punishment at the same time in a single verdict. "The proceedings before the trial court amounted to the same as if the court had denied the defendant a trial by jury in the first instance and, having heard the evidence and found the defendant guilty, proceeded to impose the judgment of death." (*Id*. at p. 458.) *Hall* does not purport to overrule the cases holding that there is no constitutional right to jury trial in a proceeding to determine penalty alone. That principle was reaffirmed after *Hall* in *People v. Hough* (1945) 26 Cal.2d 618, 620-621, and *People v. King* (1970) 1 Cal.3d 791, 795.

In summary, the early California cases support the view that the constitutional right to jury trial does not include proceedings that are solely for the purpose of determining the sentence. This court's many statements over the years to the effect that article I, section 16 does not apply to the penalty phase of capital cases (see, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 272) are correct.

2. Burden of proof.

There is similarly no historical support for defendant's insistence that every "issue of fact" submitted to a jury must be proved beyond a reasonable doubt. This claim is easily refuted by examples. From the beginning, the question of insanity has been an issue of fact decided by juries. As far back as 1862, it was already "clearly settled" that the defendant was not entitled to a reasonable doubt instruction. On the contrary, the defendant had the burden of

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proof by a preponderance of the evidence. (See *People v. Myers* (1862) 20 Cal. 518, 519-520.) Insanity is undoubtedly an "issue of fact." (See § 1041, subd. 4.) Yet the defendant undoubtedly has the burden of proof (see § 25, subd. (b)) and has since the earliest days of this state.

In 1921, the legislature created a categorical exemption from capital punishment for persons under 18 years old, and at the same time it placed the burden of proof of age on the defendant. (See Cal. Stats. 1921, ch. 105, § 1.) Following the cases on insanity, this court held that the defendant was not entitled to a reasonable doubt instruction. (See *People v. Ellis* (1929) 206 Cal. 353, 357-358.) *Ellis* distinguished instructions on alibi, noting that the reasonable doubt requirement applied to elements of the prosecution's case. (See *id*. at p. 358.) When the issue "would affect only the extent of the punishment," proof beyond a reasonable doubt is not required. (See *id*. at pp. 358-359.)

Defendant asks rhetorically, "if unanimity is constitutionally required [for the penalty verdict] [citation] how can the reasonable doubt burden somehow not apply?" (AOB 206.) It does not apply to insanity. It does not apply to minority. The court has repeatedly held over many years that it does not apply to the penalty verdict. (See Respondent's Third Supp. Brief 12.)

The historical evidence that defendant claims that the burden of proof requirement emanates from the right to jury trial is extraordinarily weak. To support his claim that the framers of the California Constitution of 1879 intended to include the burden of proof in the right to jury trial, he cites the statement of a single delegate. (See AOB 206.) Mr. Reddy said, correctly, that proof beyond a reasonable doubt is an established feature of the criminal justice system. (3 K. Willis & E. Stockton, Debates and Proceedings of the Constitutional Convention of the State of California (1881) p. 1175.) His argument that a nonunanimous jury would make the reasonable doubt standard less potent is true. But his claim that changing one would require changing the other is just overblown rhetoric.

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The proposal to change to nonunanimous juries for civil cases and misdemeanors produced heated debate both in the Committee of the Whole and the Convention. (See 1 Willis & Stockton, *supra*, at pp. 294-305; 3 Willis & Stockton, *supra*, at pp. 1173-1176.) In the Convention no other delegate expressed agreement with Mr. Reddy's tying the two together. In the Committee of the Whole no one including Mr. Reddy did so. The burden of proof was mentioned as one of the many rights of the defendant, but that was all. (See 1 Willis & Stockton, *supra*, at p. 300 [remarks of Mr. Wilson].)

It is evident from the debates that Mr. Reddy was no James Madison. In the Committee of the Whole he tied the jury trial right to the whipping post, a loose association that left at least one other delegate befuddled (see *id*. at p. 301 [remarks of Mr. Reddy and Mr. Beerstecher]) and probably more than one.

Outside of this very thin evidence in the debates, defendant could only cite decades-old federal court of appeals cases from elsewhere in the country in his initial brief. (See AOB 206.) In the supplemental, he cites a rhetorical flourish of dictum in *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 231, that "[i]t would be curious indeed to grant appellant one without the other." (A3SR 40, omitting the word "appellant.") It is debatable whether *Roulet* intended that statement to apply outside the conservatorship context, but if it did there is nothing curious about it. A criminal defendant who pleads insanity gets a unanimous jury (5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 800, p. 1231) but not the reasonable doubt standard. A juvenile charged with a crime in juvenile court gets the reasonable doubt standard (see *In re Winship* (1970) 397 U.S. 358, 364) but not jury trial.

The protections of unanimous jury and proof beyond a reasonable doubt are both important features of our criminal justice system. Each has its place, and their places have a great deal of overlap, but they are not identical. Each reaches some places where the other does not.

The people of California, by initiative, have chosen to vest the penalty decision in capital cases in the jury. That decision was not constitutionally required, but most states with capital punishment have done the same. The

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people have not chosen to assign a "reasonable doubt" requirement to the jury's decision, as the subjective nature of the decision makes that standard inappropriate. That choice is fully consistent with the Constitution. The two choices are not "inextricably linked." Nothing in California's legal history makes them so.

3. Aggravating factors.

Finally, defendant cites no history for his contention that the article I, section 16 or Penal Code section 1042 require either jury unanimity or proof beyond a reasonable doubt for factual issues which merely inform the verdict. Even if we assume that the issues of fact listed in section 1041 are not exclusive, they all involve "ultimate facts." They are the things that the jury actually decides in its verdict. Section 190.3 is clear on its face that aggravating factors are merely factors to be considered in arriving at the verdict.

Defendant cites the fact that different crimes had different punishments at common law (A3SR 54), but that form of "aggravation" is different in kind from factors considered in fixing a punishment within the allowed range for a specific offense. As noted *supra*, at p. 23, defendant's citation for an 1842 North Carolina case for his claim that there was a common law right to jury participation in determining benefit of clergy does not hold water.

History does not support any of defendant's claims. This court's consistent decisions rejecting the same claims over many years have been correct.

IV. Unadjudicated studies are not a reliable source of information for broad attacks on California's death penalty.

This court's briefing order of June 17, 2020, called for briefing on discrete issues of the requirements of Penal Code section 1042 and article I, section 16 of the California Constitution. Regrettably, the briefing has sprawled beyond that question into broadside attacks on California's death penalty generally. Much of the attack consists of citations to papers of

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advocacy organizations and academics that have not been subject to adversarial testing. (See A3SR 23, fn. 2; Brief of Amicus Curiae Gavin Newsom 23-31.)

Refuting all those papers would be an enormous task, and it would not be possible within the confines of an amicus brief even if amicus CJLF were funded and staffed to undertake it (which we are not). Amicus could simply say that all of this is off-topic. However, amicus deems it prudent to point out the unreliability of academic studies on controversial topics that have not been put through the crucible of adversarial testing. What "studies show" is not necessarily so.

The best known empirical study on the death penalty is the one that was the subject of the Supreme Court's decision in *McCleskey v. Kemp* (1987) 481 U.S. 279. Yet while "everybody knows" what the study's authors *claimed* it showed, very few people know what a court, after a full adversarial trial, found that it *really* showed. For the full explanation, see Scheidegger, *Rebutting the Myths About Race and the Death Penalty* (2012) 10 Ohio St. J. Crim. L 147, 150-157. (Cited below as "Rebutting Myths.") This brief will just note the highlights.

The Baldus Study is actually two studies, one of which was commissioned by the NAACP Legal Defense and Education Fund for the specific purpose of manufacturing ammunition to attack the death penalty. (See D. Baldus, G. Woodworth & C. Pulaski, Equal Justice and the Death Penalty (1990) 44.) The study attempted to determine whether racial discrimination substantially affected the prosecutor's charging decision and the jury's sentencing decision by creating mathematical models. Trying to model human behavior with mathematics presents a host of problems, and there are many different ways to model the same subject. (See Rebutting Myths, *supra*, at pp. 151-152.) The challenge went to a full trial in federal district court, and the state challenged Baldus's conclusions with its own experts.

The court found that the model that "shows a statistically significant race of the victim effect at work on the prosecutor's decision-making . . . is totally

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invalid for it contains no variable for strength of the evidence, a factor which has universally been accepted as one which plays a large part in influencing decisions by prosecutors." (*McCleskey v. Zant* (N.D. Ga. 1984) 580 F.Supp. 338, 367.) Models that did include that variable produced a different result.[7] "The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either [the charging or sentencing] decisions in the State of Georgia." (*Id*. at p. 368, italics omitted.)

A primary reason why this important finding is so little known is that the federal court of appeals took the highly unusual step of assuming the facts of the claim in the appellant's favor despite a factual finding to the contrary after a full trial. (See *McCleskey v. Kemp* (11th Cir. 1985) 753 F.2d 877, 895; Rebutting Myths, *supra*, at p. 156.) Incredibly, even Justice Blackmun later stated "as far as I know, there has been no serious effort to impeach the Baldus study." (*Callins v. Collins* (1994) 510 U.S. 1141, 1153-1154 (dis. opn.).) Did a Supreme Court Justice not read the district court opinion in a case he reviewed? Apparently not.

Even the best-known study in the field was found not to show what its author claimed after a full adversarial trial. Similarly, in New Jersey, where the state courts decided not to follow *McCleskey* on independent state grounds, the state supreme court appointed a special master to review the data. He came to essentially the same conclusion as Judge Forrester in the *McCleskey* case. Results initially appear to show bias, but that bias disappears when the legitimate variables are properly accounted for. (See Rebutting Myths, *supra*, at pp. 158-159.)[8]

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7. The models were consistent on one point: there is no statistically significant effect of the race of the defendant. (See *id*. at pp. 367-368.)

8. It almost goes without saying that gross, unadjusted numbers that fail to take into account *any* of the legitimate reasons for so-called "disparities" have zero probative value. (See., e.g., Newsom Amicus Brief 25.)

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In the absence of litigation, studies in this area have, in the past, been challenged by other scholars who find different results after reanalyzing the data. (Compare R. Paternoster et al., An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction (2003) with Berk, Li & Hickman, Statistical Difficulties in Determining the Role of Race in Capital Cases: A Re-analysis of Data from the State of Maryland (2005) 21 J. Quantitative Criminology 365, 367-368; see also Rebutting Myths, *supra*, at pp. 159-162.)

Berk was certainly no pro-death-penalty crusader. He was a witness for the other side in *McCleskey*. (See 580 F.Supp. at p. 352.) He and his co-authors were motivated not by support or opposition for a political position but by a need to caution researchers and the public that results from this kind of modeling are "fragile." (See Berk et al., *supra*, 21 J. Quantitative Criminology at p. 386.) But that was 2005. Much has changed in 15 years. Can we depend on American academia today to self-police? Will scholars today come forward to challenge dubious methods that provide ammunition for "woke" positions, motivated only by a desire to preserve the integrity of the science? Not if they know what's good for them.

Regrettably, we live in a world where an accomplished scientist can be forced out of an administrative position for heresy in studying the relation of genetics to cognitive ability and supporting research on police shootings that produces a negative result on race bias in one situation. (See Krauss, *The Ideological Corruption of Science*, Wall Street Journal (July 12, 2020), https://www.wsj.com/articles/the-ideological-corruption-of-science-11594572501; Scheidegger, *And the Truth Shall Get You Fired*, Crime and Consequences (July 2, 2020), https://www.crimeandconsequences.blog/?p=1525.) We live in world where college professors can be attacked and severely injured by student mobs merely for hosting a controversial speaker. (See G. Lukianoff & J. Haidt, The Coddling of the American Mind (2018) ch. 4, text accompanying notes 45-53.) Scholars' freedom to challenge dogma today is at its lowest point since Galileo was haled before the Inquisition.

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With the academic marketplace of ideas in bankruptcy, that leaves only litigation as a place for genuine testing of studies. Litigation on racial bias in California's criminal justice system is coming. The Legislature, wisely or not, has authorized such claims in a statute that places very light burdens on defendants making them, raising a large possibility of factually wrong decisions in defendants' favor. (See § 745, subds. (h)(1), (h)(2).) Fortunately, they at least had the restraint to make the statute prospective only. (See § 745, subd. (j).)

For the present case, it is sufficient to say that papers that have not been tested in the crucible of adversarial proceedings should not be given weight in this court's decision. Giving them undeserved weight would be the equivalent of a seventeenth century trial in which affidavits of hostile or coerced witnesses are used as proof of guilt without confrontation and cross-examination. (See *Crawford v. Washington* (2004) 541 U.S. 36, 44 [discussing trial of Sir Walter Raleigh].)

V. Stare decisis weighs heavily against overturning the long-established rules in this case.

Stare decisis is considered to have special force in matters of statutory construction (see *Coker v. JPMorgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 689) and less so in constitutional interpretation where legislative correction of an error is not possible. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 828.) Defendant's argument in this case is something of a mixed bag. It is settled beyond dispute that the constitutional right to jury trial does not of its own force apply to sentencing; California's entire system of noncapital sentencing would be unconstitutional if it did.

The argument is that section 1042 somehow operates through the jury trial right to impose additional requirements wherever the legislative authority chooses to employ a jury, and further that this general statute overrides the long-established understanding of the statute governing the specific procedure. This is more a statutory argument than a constitutional one.

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Most importantly, the change proposed is one that the legislative authority could make if it chose to and could unmake if this court chose to make it. Because the 1978 law is an initiative, the Legislature could not make the change on its own but rather would have to submit the change to the people, who share legislative authority in this state. (See Cal. Const., art. II, §§ 1, 10, subd. (c).) But that does not alter the principle. If the change needed to be made it could be made legislatively, but that change has not been included in any amendments to date or even proposed by the Legislature to the people, while other amendments to the death penalty law have been enacted. As in *Coker*, this situation gives special force to precedent. (See 62 Cal.4th at p. 689.)

" '[E]ven in constitutional cases, the doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some special justification.' " (*Golden Gateway Center v. Golden Gateway Tenants Assn*. (2001) 26 Cal.4th 1013, 1022, quoting *Dickerson v. United States* (2000) 530 U.S. 428, 443, internal quotation marks omitted in part.)

Defendant notes that this case involves matters of procedure (A3SR 21-22), but so did *Dickerson*. While procedural cases generally involve lesser reliance considerations than substantive law cases, that is not always true. This case involves reliance in spades.

While reasonable people may disagree, the people of California have long considered capital punishment important, reaffirming it repeatedly over many years and even writing a protection for it into the Constitution. (See Cal. Const., art. I, § 27.) A great deal of resources have been expended in reviewing the judgments in these cases, much of it necessary but much also in wasteful litigation over clearly meritless claims. (See *Briggs v. Brown* (2017) 3 Cal.5th 808, 843 ["prevalence of meritless successive writ petitions"].) The Constitution also recognizes the interests of victims of crime, including the families of murder victims, in seeing justice done. (See Cal. Const., art. I, § 28, subds.

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(a)(6), (b)(9), (e).) Many families have been waiting many years and attended many hearings in the hope of finally seeing justice.

These families would be betrayed and the state resources that have been spent would be wasted if a new rule wiped out long-established precedent and overturned a large portion of the pending cases, perhaps all of them. In the federal system, the rule of *Teague v. Lane* (1989) 489 U.S. 288, 310, protects cases after the direct appeal stage, making procedural changes in noncapital cases less costly. (See *Ramos v. Louisiana* (2020) 140 S.Ct. 1390, 1407, 206 L.Ed.2d 583, 602 (plur. opn.); *id*. at p. 1419, L.Ed.2d at p. 616 (conc. opn. of Kavanaugh, J.).) But this court has not chosen to follow *Teague* as the state retroactivity standard (see *People v. Gomez* (2009) 45 Cal.4th 650, 655, fn. 3), and even if it did so the extreme delays in direct appeals have created such a large backlog that hundreds of deserved capital sentences would still be overturned.

It is true, of course, that no executions are presently being carried out. The Governor has misused his reprieve power to block them all regardless of the justice of the individual case and despite his repeated pre-election promises not to do so. (See Walters, *Newsom Does it Again with Death Row Reprieve*, Cal Matters (Mar. 18, 2019), https://calmatters.org/commentary/2019/03/gavin-newsom-death-row-reprieve/.) Even so, processing of cases continues, and there are dozens for which all normal reviews have been completed and more in the pipeline.[9] The present Governor will not be Governor forever, and we will find out in 2022 if the voters will hold him accountable for his perfidy. A valid execution method could have been established many years ago (see *Morales v. Titton* (N.D. Cal. 2006) 465 F.Supp.2d 972, 983), and district attorneys and families of murder victims now have statutory standing to require that to be done. (See Pen. Code, § 3604.1, subd. (c).) The present

9. The last count which *amicus* CJLF has was January 10, 2019, at which time there were 25. More have been completed since then, but we do not have a precise count.

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suspension of executions does not negate the enormous reliance interest in the existing judgments.

One special justification often cited for overturning a precedent is that subsequent developments have undermined it. (See *Dickerson v. United States* (2000) 530 U.S. 428, 443; see also *People v. Anderson* (1987) 43 Cal.3d 1104, 1146-1147.) No such development is present here. Quite the contrary, the *Apprendi* line of cases confirms that the 1978 law drew the line at the right place. (See *supra* at pp. 22-26.)

Stare decisis may yield to the need to overturn "badly reasoned" or "unworkable" decisions. (See *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 879, quoting *Payne v. Tennessee* (1991) 501 U.S. 808, 827; see also *Ramos v. Louisiana*, 140 S.Ct. at p. 1415, 206 L.Ed.2d at p. 611 (conc. opn. of Kavanaugh, J.) ["egregiously wrong"].) No such bad reasoning is present here. The very fact that this court has been so consistent on these important points over so many years through so many changes in its membership is a convincing demonstration by itself that the present rule has been sound all along. (See *supra* at pp. 29-33.) There is also nothing unworkable about the present rule. It is the proposed rule of forcing juries to struggle to achieve unanimity on additional issues that are not matters of ultimate fact that threatens unworkability.

Finally, no convincing case has been made that the present rule is causing substantial harm. (See *Golden Gateway*, *supra*, 26 Cal.4th at p. 1022.) Amicus Newsom protests that nonunanimous jury verdicts impair the influence of minority jurors. (Newsom Amicus Brief 58.) But penalty verdicts in California capital cases *are* unanimous, and no one has suggested that they not be. If a minority juror believes that a death sentence would be the product of bias and unjust, nothing in present law prevents that juror from holding out and hanging the jury. The proposed changes would do little to enhance the juror's position. All cases that proceed to the penalty phase have aggravating circumstances in the form of the special circumstances found in the previous phase. Even if the jurors who believe that other aggravators have been proved are instructed not

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to consider them because a single juror dissents, there is no way to enforce that requirement. The penalty remains a subjective judgment, and each juror can vote for the penalty that he or she believes is just. The true unanimity requirement is the one for the penalty verdict, and that is the only one needed.

There is one more consideration of transcendent importance. The people of California need to have confidence that we have a government of laws and not of people, that the meaning of the Constitution does not lurch to and fro with every change in the membership of this court.

> "Perhaps the most important and familiar argument for stare decisis is one of public legitimacy. The respect given the Court by the public and by the other branches of government rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy views into law. Rather, the Court is a body vested with the duty to exercise the judicial power prescribed by the Constitution. An important aspect of this is the respect that the Court shows for its own previous opinions." (*People v. King* (1993) 5 Cal.4th 59, 83 (dis. opn. of Mosk, J.), quoting Powell, *Stare Decisis and Judicial Restraint*, 1991 J. Supreme Ct. Hist. 13.)

The proposal is to toss out precedents that go back over 40 years for the aggravating circumstances and decades longer for the penalty verdict based on nothing more than a far-fetched interpretation of an 1872 statute that has never been held to have such effect before, with devastating effect on hundreds of hard-won judgments for horrible crimes. Such a step would be perceived by a great many as result-oriented judging at its worst. That is not a road this court should be traveling.

CONCLUSION

Neither article I, section 16 of the California Constitution, section 1042 of the Penal Code, nor the two in combination require any change in the

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well-established law regarding the aggravating circumstances and penalty verdict in California capital cases.

November 20, 2020

Respectfully Submitted,

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Attorney for Amicus Curiae
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)

I, Kent S. Scheidegger, hereby certify that the attached **APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT** contains 12,173 words, as indicated by the computer program used to prepare the brief, WordPerfect.

Date: November 20, 2020

Respectfully Submitted,

KYMBERLEE C. STAPLETON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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PROOF OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816.

On November 20, 2020, I served true copies of the following document described as:

APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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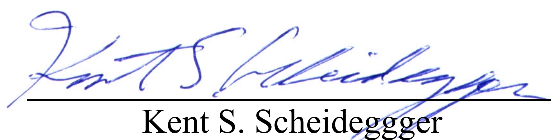
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 20, 2020, Sacramento, California.



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