IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DON'TE LAMONT McDANIEL, Defendant and Appellant.	**Capital Case** No. S171393 (Los Angeles County Superior Court No. TA074274)

APPELLANT'S CONSOLIDATED ANSWER TO BRIEFS OF AMICUS CURIAE

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

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

Pursuant to California Rules of Court, rule 8.520(f)(7), Defendant-Appellant Don'te Lamont McDaniel submits this consolidated response to the briefs of amici curiae submitted in this case.

ARGUMENT

Seven timely and two untimely amicus briefs have been filed in this case. The first seven briefs were filed on behalf of a wide range of interested parties—from some of the

most marginalized members of our society[1] to the most politically powerful individual in the state of California.[2] These first seven briefs were all filed in support of Mr. McDaniel. Little response is required to most of these amici, other than an expression of respect for their insight and profound gratitude for their hard work. Mr. McDaniel does, however, wish to acknowledge the concerns—voiced in Governor Newsom's brief, the brief of several current and former District Attorneys,[3] and others—that the absence of jury protections at the penalty phase should be reconsidered because this lack of protections gives greater play to the impermissible factor of racial bias. In short, Mr. McDaniel believes that this concern, alone, is a strong basis for reconsideration of the current rules.

Turning to the late-filed briefs, the brief filed on behalf of the Criminal Justice Legal Foundation (CJLF) merits a more fulsome response.[4] This brief contains several historical

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[1] (See Brief of Amici Curiae Vicente Benavides Figueroa and Manuel Lopez, *People v. McDaniel*, No. S171393 (filed October 26, 2020).)

[2] (See Brief of Amicus Curiae The Honorable Gavin Newsom, *People v. McDaniel*, No. S171393 (filed October 26, 2020) (Governor's Amicus).)

[3] (See Brief Amici Curiae of Six Present or Former District Attorneys, *People v. McDaniel*, No. S171393 (filed October 26, 2020).)

[4] The brief filed on behalf of the California District Attorneys Association (CDAA) is devoted largely to complaints about Governor Newsom's amicus brief. (See Brief of Amicus Curiae California District Attorney's Association, *People v. McDaniel*, No. S171393

inaccuracies and makes other statements that are misleading, misrepresent Mr. McDaniel's position, or are otherwise incorrect. Mr. McDaniel will confine his response to those areas most pertinent.

I. CONCERNS REGARDING RACIAL DISCRIMINATION IN THE ADMINISTRATION OF THE CALIFORNIA DEATH PENALTY ARE A VALID SUBJECT FOR THIS COURT'S CONSIDERATION AND SHOULD NOT BE IGNORED IN RESOLVING THIS ISSUE

It is both notable and highly unusual that both George Gascón, the District Attorney of Los Angeles—the county in which Mr. McDaniel was tried—and Gavin Newsom, the Governor of California—the state in which he was tried—have filed briefs supporting his claim. To counsel's knowledge, this is the first and only time that a California Governor has filed an amicus brief in a criminal case, much less that a Governor has been joined by several current and former District Attorneys in filing an amicus brief in support of a criminal defendant.

There may be a variety of reasons for this extremely unusual concurrence of interests, but surely one is a recent and increased focus on the subtle and persistent structural and institutional racial discrimination that infects the administration of justice in California, including—perhaps particularly—the administration of the death penalty. Both the brief filed by Governor Newsom and that of District Attorney Gascón (along

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(filed October 28, 2020), 12-20.) CDAA's constitutional arguments do not merit a response.

with other current and former California district attorneys) lay out explicitly their concerns in this regard. Although Mr. McDaniel has, and continues, to focus his briefing largely on the history and doctrinal underpinnings of the jury right, this newfound attention to racial inequality nonetheless has great salience to this case:

> Justice Benjamin Cardozo wrote nearly a century ago: "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." (Cardozo, The Nature of the Judicial Process (1921) at p. 168.) Nor should they. As our broader cultural views on racial injustice evolve, courts and judges are compelled to acknowledge and confront the problem. (See, e.g., *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 31 (conc. opn. of Liu, J.) [citing "the troubling racial dynamics that have resulted in state-sanctioned violence, including lethal violence, against Black people throughout our history to this very day"]; *Utah v. Strieff* (2016) 136 S.Ct. 2056, 2070–2071 (dis. opn. of Sotomayor, J.) ["it is no secret that people of color are disproportionate victims of this type of scrutiny" in suspicionless stops]; *State v. Saintcalle* (Wash. 2013) 309 P.3d 326, 341 (*Saintcalle*) ["Racial inequalities permeate our criminal justice system and present important moral issues we all must grapple with."]; *Glossip v. Gross* (2015) 576 U.S. 863, 921 (dis. opn. of Breyer, J.) [contemplating how conscious and unconscious bias affect jury determinations of relative culpability in capital cases "despite their legal irrelevance"].)[5]

Notwithstanding late-arriving amici's purported certainty that racial bias plays no role in the administration of the capital

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[5] (*In re Edgerrin J.* (Cal. Ct. App., Nov. 20, 2020, No. D076461) 271 Cal.Rptr.3d 610, 626-627 (Dato, J. concurring).)

system in California, the concerns of many prosecutors who have been charged with administering (or choosing not to administer) capital cases at the trial level, and the Governor responsible in large part for overseeing the entire criminal legal system, are entitled to respectful consideration by this Court. On the other hand, claims by CJLF that structural racism does not cloud the system of capital punishment in California warrants a healthy degree of skepticism. This organization has spent decades urging courts to adopt rules that, though neutral on their face, ultimately served to prevent consideration of, and remedies for, racial discrimination.

Teague,[6] for instance—a doctrine which was originally the brainchild of counsel for CJLF and whose rejection by this Court is bemoaned in CJLF's brief[7]—ultimately prevented the defendant in that case (and thousands of similarly-situated Black defendants who had been subjected to the rampant racial discrimination in jury selection existing prior to *Batson*[8]), from raising new constitutional theories that might have entitled them

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[6] (*Teague v. Lane* (1989) 489 U.S. 288 (*Teague*).)

[7] (Amicus Brief of Criminal Justice Legal Foundation, *People v. McDaniel*, No. S171393 (filed November 22, 2020) (CJLF Amicus) at p. 41; see also *Teague*, *supra*, 489 U.S. at p. 330 (dis. opn. of Brennan, J.) ["Astonishingly, the plurality adopts this novel precondition to habeas review without benefit of oral argument on the question and with no more guidance from the litigants than a three–page discussion in an amicus brief" by CJLF].)

[8] (*Batson v. Kentucky* (1986) 476 U.S. 79.)

to remedy that discrimination in federal habeas.[9] According to CJLF's theory at the time, this result was required because there was nothing "fundamentally unfair" to a black criminal defendant in a prosecutor engaging in wholesale exclusion of black jurors on account of their race. (Amicus Brief, Criminal Justice Legal Foundation, *Teague*, *supra*, 1988 WL 1023003 at pp. 12-14.)

More recently, CJLF urged—in the name of a jury right, no less—that state law should be permitted to blind courts to overt racial bias during deliberations by seated jurors that is uncovered after trial. (See Amicus Brief of Criminal Justice Legal Foundation, *Peña-Rodriguez v. Colorado*, No. 15-606, 2016 WL 4760310 (filed September 8, 2016).) Far from advocating the position it takes in this case—that the capital system is in all important respects free from racial bias—CJLF's brief in that case acknowledged the frank reality that courts are "no stranger to the fact that racial prejudice may go undetected in jury deliberations, *especially in capital sentencing proceedings*." (*Id.* at p. 30, italics added.) CJLF, however, likely *because* the issue of invidious bias impacts so many capital cases, urged the high court to look the other way. CJLF was, and is, concerned that if courts peer too closely at the "black box" of racial bias in the jury

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[9] The prosecutor in *Teague* used all ten of his peremptory challenges to remove blacks from the jury. The jury that tried Teague was completely White.
(Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky* (1989) 25 Willamette L. Rev. 293, 343.)

room, courts will begin to examine "different types of alleged bias" and the "black box" of jury deliberation will be "blown wide open." (*Id.* at pp. 30-31.) CJLF takes a similar "see no evil" approach in this case, urging this Court to ignore decades of studies suggesting that racial discrimination touches aspects of the California death penalty system—based on its claim that such information is universally "not a reliable source of information." (CJLF Amicus at pp. 35-39.)

Mr. McDaniel takes a diametrically opposed position. Rules of decision which prevent courts from contemplating, detecting, and remediating racial discrimination are the very definition of institutional racism within the judicial system. Of course, no one study, or even numerous studies, should be accepted on blind faith, particularly where they are not subject to adversarial testing. Yet this does not render the work of countless individuals who have dedicated significant portions of their professional careers studying the death penalty wholly irrelevant. Mr. McDaniel thus unequivocally rejects CJLF's assertion that decades of studies (many peer-reviewed and repeatedly replicated) showing racial bias impacting the capital system are unreliable. Nor should they be ignored. To the contrary, Mr. McDaniel urges this Court to deeply consider the black boxes of discretionary decision-making—at every stage of the capital system—highlighted by the Governor's and the current and former District Attorneys' briefs. And he respectfully requests that this Court consider how each stage offers an opportunity for racial bias, be it conscious, unconscious, implicit,

or institutional, to warp the fair administration of justice.

Most importantly, in understanding the impacts of racial bias on the resolution of the issue before this Court, Mr. McDaniel emphasizes that this claim centers on the interpretation of jury right. Amici opposing Mr. McDaniel do not even bother to contest some of the most relevant assertions regarding discrimination presented in the Governor's brief: those respecting the structural discrimination impacting the selection of, and deliberation by, capital juries. Nor could they. The under-inclusion of jurors of color in criminal cases, and in capital cases in particular, is a systemic and well-documented problem. Whitewashing of juries occurs at every stage of jury selection: from deciding who is included on jury rolls, who reports, who is excused for economic hardship, who is disenfranchised from jury service due to prior conviction, who is excluded due to for-cause challenges, and who is excluded due to the exercise of peremptory challenges.[10] Although the Legislature has recently enacted a raft of prospective reforms to address many of these problems, capital defendants such as Mr. McDaniel have not had the benefit of these reforms and can only request fundamental procedural protections enshrined in the jury right itself.

These foundational protections were, however, at least in part, meant to protect the voices of minority jurors—both in the literal and more demographic sense. As one widely-cited

[10] (Governor's Amicus, at pp. 46-49.)

scholar[11] of the jury right explained near the time of the adoption of the first California Constitution, the jury protections exists in part to ensure respectful consideration of the views of minority jurors: "if any one juror dissents from the rest, his opinion and reasons must be heard and considered by them. They cannot treat these with contempt or indifference, for he has an absolute veto upon their verdict, and they must convince him or yield themselves, unless they are prepared to be discharged without delivering any verdict at all." (Forsyth, History of Trial by Jury (1852).) Troublingly, modern inquiry demonstrates that it is Black jurors on White-male-dominated capital juries who are most likely to "feel like an outsider," most likely to be critical of the jury's decision, and who are most regretful that they did not do or say something differently. (Bowers et. al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition* (2001) 3 U. Pa. J. Const. L. 171, 240.)

An entire brief in this case is dedicated to illustrating the coercive, and often racialized forces which mark capital jury deliberations.[12] Its arguments need not be repeated here. But as a historical matter, it suffices to say that the forces of racism in this country understood long ago that undermining robust jury protections would have the ultimate effect of empowering the

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[11] (See, e.g., *Sparf v. U.S.* (1895) 156 U.S. 51, 88 [describing Forsyth's History of Trial by Jury as a "work of merit"].)

[12] (Brief of Amici Curiae ACLU, ACLU of Northern California, and ACLU of Southern California, *People v. McDaniel* No. S171393 (filed October 22, 2020).)

majority at the expense of the populations they wished to subjugate. (See, e.g., *Ramos v. Louisiana* (2020) 140 S.Ct. 1390, 1394 (*Ramos*) [discussing the racist origins of the non-unanimity rules applied in Oregon and Louisiana]; Governor's Amicus at pp. 60-65 [discussing the disturbingly racialized origins of modern attempts to repeal California's unanimity protections in criminal cases].) As a relatively simple rule of decision, this Court endeavors to do the opposite: reading the jury right broadly. (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 300 ["The constitutional right of trial by jury is not to be narrowly construed"].) There is no suggestion that the current rules rejecting jury protections at the penalty phase are the direct product of intentional racial discrimination (though assuredly the disparate impact on defendants of color was not foremost in the minds of those who omitted these protections in the Briggs Initiative). But whatever the precise origin of the current doctrine, reaffirming robust jury protections at the penalty phase will have the ultimate effect of increasing reliability and reducing the effects of racism in the application of capital punishment.

II. RESPONSE TO AMICUS BRIEF OF CJLF

A. Principles of Stare Decisis Favor Reconsideration of the Issue Before the Court

CJLF's brief ends with discussion of the principle of *stare decisis*, but Mr. McDaniel believes that it is more fitting to begin there.

The principle of *stare decisis* begs a threshold question—a question worthy of serious consideration by members of this Court—of how the Court would resolve the issue if it *were* a

matter of first impression. To draw on a truly blank slate, one could ponder the proper result if recent immigrant George Tanner, convicted of stealing dry goods in 1852, had asked for an instruction that the jury be certain, beyond a reasonable doubt, that death was the appropriate punishment for his crime.[13] Or, framed in slightly more contemporary fashion, one could question whether—if capital defendants in the 1970's had argued for a beyond a reasonable doubt burden as to punishment and unanimity as to aggravators, instead of arguing the opposite—might current law now be different.

Post-*Furman*, several states courts *did* enforce a requirement of beyond a reasonable doubt at penalty. (AOB at pp. 221-222 [collecting cases from Colorado, New Jersey, Utah, and Nebraska].) CJLF provides no argument that they were wrong to do so. A brief thought experiment helps elucidate the correctness of these decisions as a matter of principle and fairness. Suppose that an individual juror, or even several, harbor reasonable doubts as to the propriety of the death sentence, doubts which respectful deliberations do not alleviate. One would be hard-pressed to explain in this situation why the defendant ought to be sentenced to death. To quote the New Jersey high court: "If anywhere in the criminal law a defendant is entitled to the benefit of the doubt, it is here." (*State v. Biegenwald* (N.J. 1987) 524 A.2d 130, 156; see also *People v.*

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[13] (See generally, Amicus Brief of California Constitutional Law Scholars, *People v. McDaniel*, No. S171393 (filed October 14, 2020) at pp. 16-23.) (California Constitutional Law Scholars Amicus.)

Tanneson (Colo. 1990) 788 P.2d 786, 795 (citations omitted) [the "qualitatively unique and irretrievably final nature of the death penalty make it unthinkable for jurors to impose the death penalty when they harbor a reasonable doubt as to its justness"].) But experience has taught that jurors with doubts about the appropriate punishment often *do* vote for death due to the coercive pressures of deliberation. Sadly, jurors coerced into voting for death are most frequently black jurors serving on White-male-dominated juries. (*Bowers*, *supra*, 3 U. Pa. J. Const. L. at pp. 240-241.) These jurors, not just the capital defendant, need the protection of an instruction on reasonable doubt.

The principle that jurors with reasonable doubts should not vote for death is hard to argue with. Even CJLF does not do so, resting solely on the contention that such a rule is not constitutionally required. Perhaps the eminent fairness of such a rule is why this Court approved instructions to resolve all doubts as to punishment in favor of the accused in *People v. Perry* (1925) 195 Cal. 623, 639, and *People v. Cancino* (1937) 10 Cal.2d 223, 230 (cases which CJLF does not cite or address). Yet something has nonetheless stood in the way of a principle that most would accept, at least in terms of basic fairness, as "a more satisfactory" rule (*ibid.*), being applied to the modern death penalty scheme.

Mr. McDaniel posits that a central—if not *the* central—reason that this Court has resisted applying the jury right and its protections at the penalty phase is not because of inexorable constitutional principles, but because of the effects of such a ruling. In the distant past, this Court was quite open about such

concerns, refusing to correct what it recognized was a dubious interpretation of the jury right out of fear that it would lead to reversal of pending capital cases. (See *People v. Bawden* (1891) 90 Cal. 195, 198.) But ignoring flawed doctrine in that case only caused the problem to fester, ultimately leading to reversal decades later: wasting far more time, energy, and human lives than had the error been corrected earlier. (See generally *People v. Green* (1956) 47 Cal.2d 209 (*Green*).)

In its brief, CJLF invites this Court to make a similar mistake. CJLF rests heavily on what it views as the potential costs of reversing death sentences. Without citing any evidence that capital penalties will be carried out irrespective of which way this Court's decides, CJLF hyperbolically characterizes a potential ruling for Mr. McDaniel as nothing less than a "betray[al]" of the "many families [who] have been waiting many years and attended many hearings in the hope of finally seeing justice." (CJLF Amicus at p. 41.) Similarly, CJLF complains that a ruling for Mr. McDaniel would result in a significant "waste of state resources," a "great deal" of which have already been devoted to defending sentences which could potentially be affected. (*Id* at pp. 40-41.)

Notwithstanding CJLF's heated rhetoric, the principle of "in for a penny in for a pound" is not written into the doctrine of *stare decisis*. And despite CJLF's speculation that Governor Newsom will be "h[e]ld accountable for his perfidy" for enacting a moratorium on capital punishment (CJLF Amicus at p. 41), there is no affirmative indication that the death penalty system in

California is revving up to begin executions in the near—or distant—future. Nor, perhaps most importantly, is there any evidence that victim family members and loved ones are or will be better served by continuing the current charade.

CJLF emphasizes there exist cases in which appeals are complete, but makes no serious contention that Mr. McDaniel, or any of other pending direct appeals have even a remote chance of being executed. Indeed, all current evidence is to the contrary. Los Angeles, the largest county in the state, with the largest number of death sentences, just resoundingly elected a district attorney who openly campaigned on the promise that he would not only stop seeking death sentences, but would work to resentence those already condemned.[14] If, as CJLF contends, it is the practical consequence that should drive this Court's consideration of *stare decisis*, then reconsideration of the question is unquestionably warranted.

CJLF's remaining arguments against reconsideration carry even less force. The starting point of any discussion of *stare decisis* in this context ought to be the recent precedent that cases involving fundamental protections such as the jury right relegate

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[14] (See George Gascon, *George Gascon's Plan To End The Death Penalty And Resentence Those Condemned To Death* (February 27, 2020) <https://georgegascon.org/campaign-news/george-gascons-plan-to-end-the-death-penalty-and-resentence-those-condemned-to-death/>.) Resolution of individual cases has not yet occurred and there is no definitive timeline. To forestall any additional briefing in this case, Mr. McDaniel notes that the issue in this case is purely legal, of statewide interest, and will unquestionably recur. (*Clark v. Burleigh* (1992) 4 Cal.4th 474, 481 [exception for mootness on this basis].)

the force of *stare decisis* to its "nadir." (*Alleyne v. United States* (2013) 570 U.S. 99, 116; accord *Ramos*, *supra*, 140 S.Ct. at p. 1409 (conc. opn. of Sotomayor, J.) [*stare decisis* at lowest ebb because jury protections among the "most essential" rights].)

CJLF, though refusing to engage with these recent pronouncements, avoids them by pretending that Mr. McDaniel's claim "is more a statutory argument than a constitutional one." (CJLF Amicus at p. 39.) In case there is any ambiguity, Mr. McDaniel's state law claim to which this briefing is directed relies on the California Constitution article I, section 16. Penal Code section 1042, while informing the meaning of the state jury right, does not possess independent force to require jury protections at the penalty phase which are not required by the state constitution. The claim is a constitutional one.

And, critically, it is a constitutional claim that has not previously been fully considered. Nowhere in CJLF's briefing is there even a passing reference to a serious analysis—or indeed any analysis—of the state constitutional jury right with respect to the modern death penalty system. That is because this Court has never meaningfully engaged with the state constitutional jury right on this point.

CJLF's brief concludes with a stern admonition, seemingly (and if so, troublingly) directed at this Court's newer members: "the meaning of the Constitution does not lurch to and fro with every change in membership of this court." (CJLF Amicus at p. 43, failure to capitalize "court" in original.) Mr. McDaniel notes that this is not the version of *stare decisis* that CJLF portrayed to

United States Supreme Court when it experienced a change in membership that CJLF thought would favor its interests. (Amicus Brief, Criminal Justice Legal Foundation, *Payne v. Tennessee,* No. 90-5721, 1991 WL 11007885 (filed April 5, 1990).)[15] But tension between current and former positions aside, the simplest response to CJLF's reference to the costs of the reassessing the jury right have been more ably and eloquently articulated by others.

Those who enshrined the jury right "weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed." (*Ramos*, supra, 140 S.Ct. at p. 1402.) Or, put even more succinctly, the jury right "has never been efficient; but it has always been free." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 498 (conc. opn. of Scalia, J.) (*Apprendi*).)

B. The Jury Right Extends to Issues Concerning Penalty

CJLF's argument on the merits begins with the premise that the jury right (and the concomitant jury protections of reasonable doubt and unanimity) have nothing to do with issues relating to punishment, based on common law rules which focused the jury's attention on issues of guilt, and not on issues of

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[15] In *Payne*, though the admissibility of victim impact evidence in capital trials had been resolved only two years before, CJLF urged immediate reconsideration. CJLF presented an extremely diluted view of *stare decisis* in that case, suggesting that *stare decisis* in criminal cases virtually exclusively protects prosecution reliance interests. (*Id.* at *4.)

punishment. (CJLF Amicus at pp. 26-27.) This premise is faulty, for reasons explained by the United States Supreme Court and echoed by this Court: when there *is* a trial on an issue of punishment, the jury right extends to "all issues—character or degree of the crime, guilt *and punishment*—which are left to the jury." (*Andres v. U.S.* (1948) 333 U.S. 740, 748 (*Andres*), italics added; accord, *Green*, *supra*, 47 Cal.2d at p. 220.) Curiously, CJLF does not attempt to reconcile its theory with clear language from these cases rejecting it. Indeed, CJLF doesn't even cite *Green* or *Andres*.

Regardless, the entire logical underpinning of CJLF's argument is too formalist. Mr. McDaniel concedes that common juries were not, at least formally, involved in sentencing. But sentencing at common law was merely a ministerial role. (McCall Jr., *The Emperor's New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines* (1993) 60 Tenn. L. Rev. 467, 476 ["Until the early nineteenth century, American judges traditionally had little sentencing discretion because each crime had its own fixed penalty."]; Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing* (1999) 32 Suffolk U. L. Rev. 419, 423 ["In colonial times, [the sentencing sphere]. . . was a sphere of limited impact because most crimes were capital offenses or had fixed penalties"].) The vital point is that, through their fact-finding role, common law juries had control over the sentence for homicide of various degrees of culpability, just as they do now. CJLF's claim that juries had "no voice in sentencing as such" is

simply untrue. (CJLF Amicus at p. 27.)

As a result, juries have always considered and answered moral questions in the course of their fact-finding. (Jonakait, *Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development* (2012) 10 U. N.H. L. Rev. 97, 108–109 [earliest instances of the use of reasonable doubt in English proceedings "mirror[ed] older ones in that they were not proceedings to find facts, but to make moral judgments."]; Green, Verdict According to Conscience (1985), 126 [juries brought to criminal cases "powerful feelings about the defendant's personal worth and the justice of taking his life for the act he had committed" and in homicides in particular allowed juries "more room for the kind of discretion juries had always exercised"].) Early American courts even formally recognized the jury's role in dispensing mercy through fact-finding and resolving doubts in favor of the defendant. (Morano, *Historical Development of the Interrelationship of Unanimous Verdicts and Reasonable Doubt* (1976) 10 Val. U. Rev. 223, 227, fn. 24 ("*Interrelationship of Unanimous Verdicts and Reasonable Doubt*") [discussing instructions given in *Commonwealth v. Dillon* (1792) 4 Pa. 116 including that "[i]n a doubtful case, *an error on the side of mercy* is safer"], italics added.)

As CJLF is forced to recognize, this Court has stated that the denial of the right of unanimity with respect to the appropriate punishment is the denial of the right to a jury. (*People v. Hall* (1926) 199 Cal. 451, 458 (*Hall*); CJLF Amicus at p. 32.) Thus, CJLF's overarching theory that the jury right can

have no application to a penalty decision stands on a somewhat shaky foundation. CJLF claims, in an interpretation in stark conflict with the actual words of the *Hall* opinion, that the principle in *Hall* was merely "based on a reading of the statute." (CJLF Amicus at p. 32.) But the *Hall* Court was extremely clear. It said that denial of juror unanimity as to punishment violated the state constitution—no less than three times. (*See Hall*, *supra*, 199 Cal at p. 458 ["It was in effect the denial of a trial by jury"]; *ibid*. [after referencing the state constitution "In legal effect this [jury] right was denied to the defendant in the case at bar"]; *ibid.* ["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"].) There is no ambiguity in the opinion that denial of a unanimous verdict violated the state constitution.

In the alternative, CJLF suggests that *Hall* must be limited to the context of a unitary proceeding with single verdict on the issues of guilt and punishment. (CJLF Amicus at p. 32.) Yet the existing penalty phase grew directly out of the unitary proceeding at issue at *Hall*. Indeed, although bifurcated beginning in 1957, it is still considered a single "unitary trial." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365.) Moreover, CJLF's entire reading is simply not how the California jury right is construed—limiting the jury right strictly to the precise form of proceeding that existed at common law. Instead, this Court asks whether the proceeding is of the "same class" of cases "thereafter

arising." (*People v. One 1941 Chevrolet Coupe*, *supra*, 37 Cal.2d at p. 300.

There is little question that *Hall* addressed the same "class" of case as those proceeding it and those now before the Court: capital cases in which juries controlled the penalty through their verdict. And in case there was any ambiguity that *Hall* meant what it unambiguously said—that the jury right of unanimity extends to the penalty decision in case of a trial on that issue—the language of *Andres* and *Green* eliminates it.

CJLF's effort to rely on the expressly overruled *People v. Welch* (1874) 49 Cal. 174 (*Welch*) as supporting the contrary point is troubling, to say the least. (CJLF Amicus at p. 31.) *Welch*—which had blessed non-unanimous penalty verdicts in what *Hall* subsequently recognized was flawed dicta—is not only bad law, it was repeatedly and forcefully disapproved. (See generally Amicus Brief of California Constitutional Law Scholars at pp. 35-43; see also *id.* at p. 36 ["It is difficult to understate the incorrectness of the *Welch* opinion, but Justice Schauer, the author of *Green* [which overruled *Welch* for the second time], provided this apt summary "no part of the *Welch* opinion [on the issue] is sound law" and "neither age nor repetition has hallowed the speciousness of the reasoning. [Citation.]"].)

CJLF finally points to a number of cases which, when a defendant pled guilty, upheld a judge's power to fix the degree of crime and the sentence. (CJLF Amicus at pp. 30-32.) But these cases, which trace their origin to *People v. Noll* (1862) 20 Cal. 164 (*Noll*), not only do not undermine Mr. McDaniel's argument, they

strongly support it.

As Mr. McDaniel has contended from the first, resolution of issues of fact are protected by the jury right, and when there is an issue related to punishment, and a trial on the issue is held, it is safeguarded by the jury protections. *Noll* expressly confirms these points. As this Court explained:

> The proceeding to determine the degree of the crime of murder after a plea of guilty *is not a trial*. *No issue was joined upon which there could be a trial*. There is no provision of the Constitution or of any statute which prevents a defendant from pleading guilty instead of having a trial by jury. If he elects to plead guilty to the indictment, the provision of the statute for determining the degree of the guilt for the purpose of fixing the punishment, does not deprive him of any *right of trial by jury*.

(*Noll*, *supra*, 20 Cal. at p. 165, italics added; accord, *People v. Hough* (1945) 26 Cal.2d 618, 620-621 (*Hough*).[16]

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[16] *People v. King* (1970) 1 Cal.3d 791 (*King*), which relies directly on *Hough* for point, contains overly expansive dicta that the California Constitution provides no "guarantee the right to trial by jury to determine the issue of penalty." (*Id.* at p. 795; cf. *Green*, *supra*, 47 Cal.2d at p. 220 [unanimity right extends to issues of punishment left to a jury].) *King* addressed an entirely distinct question—whether the prosecution must accept a defendant's waiver of a jury trial on penalty. In context, it is clear that the *King* court meant that there is no constitutional right to trial on the issue of penalty that cannot be waived, which is what the *King* court immediately indicated: "under former practice a defendant did not have a right to a jury trial on that issue after a guilty plea." (*Ibid.*, citing *Hough*, *supra*, 26 Cal.2d at pp. 620-621.) *King* provided no analysis on this point other than the citation to *Hough*. *Hough*, in turn, relies upon

Thus, CJLF cites yet *further* evidence that issues of fact were the central focus of the jury protections in capital cases. Not only that, *Noll* recognizes Mr. McDaniel's central point that hearings before judges, even if they resemble trials before juries and address identical issues, are different. One is a "trial" explicitly protected by the text of the jury right, and thus necessarily triggers its protections. (See Supp. AOB at pp. 3, 13-16 [explaining how flawed dicta in the now-overruled *Spaziano v. Florida* (1984) 468 U.S. 447 (*Spaziano*), which dealt with *judicial sentencing hearings* and not jury penalty trials, resulted in the high court and this Court improperly negating jury protections at the penalty phase].)[17]

Penal Code section 1041 echoes the same basic principle as *Noll*, stating that an issue of fact arises with a plea of not guilty. And this common law principle—that issues of fact do not arise via guilty plea—was recognized by the high court in *Apprendi*. (*Apprendi*, *supra*, 530 U.S. at p. 488.) But it is without question that when a defendant proceeds to trial, the degree of the crime (a

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Noll, which sets forth the accurate rule and constitutional analysis.

[17] CJLF admits, and Mr. McDaniel agrees, that having a judge find the degree of murder is unconstitutional under federal law after *Apprendi*, even if the defendant pleads guilty. (CJLF Amicus at p. 30.) But the point that cases such as *Noll* dictate that the jury trial right did "not extend beyond the verdict of guilt" is not sustainable. (CJLF Amicus at p. 31.) The jury right simply did not extend beyond the jury trial, whether on guilt or any other issue.

question only affecting punishment) was always considered a jury question protected by the jury right and the reasonable doubt burden. (*People v. Ah Lee* (1882) 60 Cal. 85, 86 ["well-settled" that question of degree was "peculiarly the province of the jury to determine [citation.]"].)

C. Unanimity and Reasonable Doubt Are Interconnected and Inseparable and Apply to Issues of Fact

1. History Strongly Supports the View that the Two Rights Are Intimately Connected

Hall, *Andres*, and *Green* all indicate that the jury protection of unanimity applies to issues determined at a penalty trial. Although CJLF does not address the explicit language of *Andres* reiterated in *Green*, its pointed failure to respond to these cases seems to be an implicit recognition of the weakness in claiming that the jury right protections cannot extend to a penalty decision. CJLF thus spends considerable effort claiming that unanimity and reasonable doubt are not interconnected. By attempting to decouple these twin protections, CJLF endeavors to avoid the inherent tension of applying one jury protection to issues at the penalty phase without the other. This effort, too, fails.

This Court, and others, have explicitly coupled these rights. (3d Supp. ARB at pp. 39-40.) CJLF brushes aside these statements as mere "dicta," "rhetorical flourish," and "federal court of appeals cases" from "elsewhere in the country." (CJLF Amicus at p. 34.) Not so.

To the contrary, "[f]or centuries it was taken for granted that the unanimous jury was an integral part of the trial by jury, a necessary corollary to providing a case beyond a reasonable doubt." (Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (1994), in Winters, *The Right to a Trial by Jury* (2005), 72.) The plurality's mistaken decisions in *Johnson v. Louisiana* (1972) 406 U.S. 356 (*Johnson*) and *Apodaca v. Oregon* (1972) 406 U.S. 404 (*Apodaca*)—the primary cases sowing doubt as to the two rights' logical connection—have since been overruled. (See Abramson, *supra* at p. 72 [explaining that *Johnson* and *Apodaca* resulted in the cleaving of the two paired rights]*;* see also *Interrelationship of Unanimous Verdicts and Reasonable Doubt*, *supra*, at p. 224 [arguing that *Johnson* and *Apodaca* were wrongly decided and that early American caselaw ensured the "interdependence and integration" of unanimity and reasonable doubt as "a combined standard of proof and persuasion"].)

The now-vindicated dissenters in *Johnson* "emphatically endorsed" the "connection between unanimity and proof beyond a reasonable doubt." (*Abramson*, *supra*, at pp. 79-80; *Johnson*, *supra*, 406 U.S. at p. 392 (dis. opn. of Douglas, J.) ["one is necessary for a proper effectuation of the other"]; *id.* at p. 399 (dis. opn. of Marshall, J.) ["Today the Court cuts the heart out of two of the most important and *inseparable* safeguards the Bill of Rights offers a criminal defendant"], italics added; *Ramos*, *supra*, 140 S.Ct. at p. 1418 (conc. opn. of Kavanaugh, J.) [Marshall "forcefully explained" in his dissent that the decision to allow

non-unanimous verdicts "'undermines the principle on which our whole notion of jury now rests.' [Citation]"].)

The idea that the two rights were tightly connected was a widely prevailing view up to the flawed decisions in *Johnson* and *Apodaca*, and even after. Prosecutors themselves recognized this fact. (See National District Attorneys Association, National Prosecution Standards, Std. 17-4 (1977) [recommending unanimous verdicts in capital cases notwithstanding *Apodaca* and observing that "[t]raditionalists" maintain that "the unanimous verdict developed over time because it was essential to a system of justice which requires proof beyond a reasonable doubt. Despite the fact that the two factors may have developed distinctly historically, they are now so intertwined as to be inseparable"].)

Mr. McDaniel will not gather every case but cites one as an example of the prevailing view near the time of the adoption of the current California jury right. As the Maine high court explained, the two protections of unanimity and reasonable doubt—together—formed the "very essence" of the jury right:

> The very essence of 'trial by jury' is the right of each juror to weigh the evidence for himself, and, in the exercise of his own reasoning faculties, determine whether or not the facts involved in the issue are proved. And if this right is taken from the juror, if he is not allowed to weigh the evidence for himself, is not allowed to use his own reasoning faculties, but, on the contrary, is obliged to accept the evidence at the weight which others have affixed to it, and to return and affirm a verdict which he does not believe to be true, or of the truth of which he has reasonable doubts, then, very clearly, the substance, the very essence, of 'trial by jury' will be taken away, and its form only will remain.

(*State v. Intoxicating Liquors* (1888) 80 Me. 57, 57.)

Perhaps most important, the same interconnection between these two inseparable, bedrock rights noted by the dissenters in *Johnson* was expressed by the drafters of the California jury right as they debated the current jury provision. (3 Stockton and Willis, Debates and Proceedings, Cal. Const. Convention (1878-1879), 1175 (Debates and Proceedings) (statement of Mr. Reddy).) Remarkably, CJLF attempts to explain this away by denigrating one of the delegates at the convention (who, according to CJLF, was a "no James Madison"[18] and was simply a "single delegate" engaging in "overblown rhetoric"). (CJLF Amicus at pp. 33-34.) CJLF claims that "no other delegate expressed agreement with Mr. Reddy's tying [unanimity and reasonable doubt] together." (CJLF Amicus at p. 34.) CJLF is, again, wrong.

In the Committee of the Whole, another delegate expressed almost exactly same argument later expressed by Mr. Reddy: that the proposal to remove unanimity in misdemeanor cases was "criminal law and civil law mixed up together." (1 Debates and Proceedings, *supra*, at p. 302 (statement of Mr. Johnson).) As Mr. Johnson explained "civil cases depend upon the weight of

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[18] CJLF's critique of Mr. Reddy, who tied the debate on the jury right to themes that arose during prior heated debate on the whipping post clause, is wholly misguided. (CJLF Amicus at p. 34.) The debate on the whipping post clause (an unsuccessful proposal to amend the cruel or unusual clause to reintroduce the practice) is perhaps one of the most revealing and important debates in the entire convention touching on the issues of punishment, and our states' evolving standards of decency under the state cruel or unusual punishment clause. (See generally, 1 Debates and Proceedings, *supra*, at pp. 243-247.)

probabilities" but "[i]n criminal cases it is not so." (*Ibid.*) Because criminal cases demanded the higher burden of proof of "beyond a reasonable doubt" he suggested that unanimity could only be eliminated in civil cases, where there was "some sense in the argument so far as the weight of probabilities is concerned." (*Ibid.*)[19] This was, in substance, the position that passed the convention and was adopted into our current constitution. Civil cases, with their lowered burden of proof, do not require unanimity. Criminal cases do. The result itself is indication that the drafters believed the right of unanimity and other safeguards protecting criminal trials were necessarily interconnected.

2. CJLF's Examples Purporting to Show an Absence of Connection Between Unanimity and Reasonable Doubt Are Inapposite

Ultimately, CJLF's theory that the two rights are divisible rests heavily on the contention that their connection is "easily refuted by examples." (CJLF Amicus at p. 32.) But the examples it provides are inapplicable. CJLF begins by pointing to affirmative defenses (minority and insanity), in which a defendant was not historically entitled to a beyond a reasonable doubt protection. (CJLF Amicus at pp. 32-33.) CJLF then turns to juvenile proceedings, in which a defendant is entitled to

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[19] Mr. Johnson spoke in the familiar terms of "guilt" and "innocence," not issues of punishment. (*Ibid.*) There is no discussion of jury consideration of issues of punishment in the constitutional debates. But the central point is that the delegates were well-familiar with, and endorsed, the inseparable connection between reasonable doubt and unanimity.

reasonable doubt, but not a jury trial. (CJLF Amicus at p. 34.) Neither are relevant to the issue before the Court.

The standards governing juvenile proceedings can be addressed quickly because they are wholly irrelevant. Juveniles are not entitled to juries. So juvenile proceedings have nothing to do with the jury right or jury protections, even though they are protected by reasonable doubt as a matter of due process. (*In re Winship* (1970) 397 U.S. 358, 365–366 (*Winship*).) Applying a requirement of "unanimity" to a judge's decision makes no sense (though, such that it matters, the decision of the judge in a juvenile proceeding, like all decisions by individual factfinders is "unanimous.") But the comparison to juvenile proceedings is simply inapt and sheds no light on the question before this Court.

The attempt to analogize the issues of fact at the penalty phase to affirmative defenses is also a red herring. The jury protections attach to the "accusations" made by the prosecution. (4 Blackstone's Commentaries 343; see also *Apprendi*, *supra*, 530 U.S. at p. 477.) It is a "well-known general rule that the burden of proof is on the party holding the affirmative of an issue." (*In re Latour's Estate* (1903) 140 Cal. 414, 439.) In criminal cases, with respect to affirmative defenses, this principle has always had important consequences: "There is a marked difference in the degree of proof required to establish any fact against the defendant and that sufficient to establish any in his favor. *As against the defendant*, *every fact material to the issue must be proved to a moral certainty, and beyond a reasonable doubt*[.]"

(*People v. Ribolsi* (1891) 89 Cal. 492, 499–500.)[20]

Because the prosecution still had the duty to prove its accusations, Courts in this state and across the country long ago adopted common law rules and permitted Legislatures some authority to place the burden on defendants to prove certain affirmative defenses. (See, e.g., *People v. Myers* (1862) 20 Cal. 518, 520 [burden rests on defendant to prove sanity because "sanity is not a fact to be affirmatively established by the prosecution"]; see also 4 Blackstone 201 [burden of proving affirmative defenses to murder was borne by defendant].) For this reason, *Apprendi* expressly limited its discussion of the jury right to exclude any debate about how to treat affirmative defenses. (*Apprendi*, *supra*, 530 U.S. at p. 475 [limits on States "manipulating" affirmative defenses to invade jury right was not at issue].)

The high court has, however, previously held that State Legislatures are free to invert the reasonable doubt burden with respect to the affirmative defense of insanity and place it on the defendant. (*Leland v. Oregon* (1952) 343 U.S. 790, 794 [upholding practice despite Oregon being the only state in the country which adopted this system].) Or, as the United States Supreme Court recently held, states may eliminate the affirmative defense of insanity altogether (*Kahler v. Kansas*

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[20] For reasons relating to the Eighth Amendment, not the jury right, any issues a *defendant* seeks to prove at the penalty phase cannot be constrained by juror unanimity or a burden of a showing beyond a reasonable doubt. (*Mills v. Maryland* (1988) 486 U.S. 367, 374; *McKoy v. North Carolina* (1990) 494 U.S. 433, 439.)

(2020) 140 S.Ct. 1021, 1027), *provided* that the defendant can still raise mental health evidence to "defend himself against a criminal charge," i.e., respond to the prosecutor's accusations and establish doubt as to their truth. (*Id.* at p. 1030.)

Of course, some cases raise difficult questions about what concepts constitute true affirmative defenses, as opposed to accusations by the prosecution which require a beyond a reasonable doubt burden, the distinction between which may occasionally be blurry. (See *Mullaney v. Wilbur* (1975) 421 U.S. 684, 703 [absence of heat of passion and sudden provocation must be proven beyond a reasonable doubt].) But, as in *Apprendi*, there is no need to address the contours of that rule in this case. As in *Apprendi*, there is "no ambiguity" as to whether the issues under discussion at the penalty phase are affirmative defenses. (*Apprendi*, *supra*, 530 U.S. at p. 475.) The issues of fact resolved at the penalty phase—the defendant's commission of prior crimes and the ultimate issue of whether the defendant deserves death—bear not even the slightest relation to affirmative defenses. They are quite clearly the issues that the *prosecution* seeks to advance.

Moreover, the entire argument that these issues are like affirmative defenses proves too much. As a natural extension of CJLF's logic, legislatures would be free place the heavy reasonable doubt burden *on the defendant* in a capital trial to prove his entitlement to life, or to *disprove* the prosecution's accusation that he had committed a prior criminal acts at the penalty phase. This cannot be the law.

And indeed, it was not the law. The aggravating fact that a defendant committed a prior crime—removing from him the benefit of clergy—was a jury question at common law when the defendant denied he had committed it. (3d Supp. ARB at pp. 55-56.) CJLF asserts that Mr. McDaniel misunderstands the benefit of clergy, and the common law rules applicable to a denial of a prior criminal act removing this benefit. CJLF posits that a defendant had "no right to have a jury make this decision." (CJLF Amicus at pp. 27-28, citing King, *The Origins of Felony Jury Sentencing in the United States* (2003), 78 Chi.-Kent L. Rev. 937, 948-949.) CJLF, however, is the mistaken party.

Professor King, in the very authority on which CJLF relies, explains the rule very clearly: "If the defendant contested the allegation of prior conviction, *a jury would determine its accuracy*. After the practice of branding offenders had been abandoned, but before identification techniques such as fingerprinting were developed, *resolving the issue* of whether or not a defendant was the same person named in a court record required *a full-fledged trial* including witnesses." (King, *supra,* 78 Chi.-Kent L. Rev. at pp. 968–969, italics added.) This was the common law rule in America and in England as well. (*Ibid.*; Leach, Cases in Crown Law (1792), 312-313 [discussing *Scott's Case* (1785), in which the defendant denied committing the prior crime, after which "as issue was joined" and a "jury . . . sworn well and truly to try" whether Scott had previously been convicted and "received the benefit of his clergy"].) This rule not only refutes CJLF's position, but casts serious doubt on this Court's prior refusal to apply the

jury right to prior criminal conduct. After all, the aggravating fact of prior serious crimes looks much the same now as it did centuries ago. (See also 3d Supp AOB at 55 [common law rule that "special aggravations" were protected by jury right].)

CJLF's final argument is that the jury's decision at penalty is simply "informed by" the finding of accusations of past criminal conduct and thus escapes the purview of the jury right. (CJLF Amicus at p. 35.) This contention fares little better. If all legislatures and judges had to do to avoid the jury right protections was to tell juries they should be "informed" by the issues they resolved, the jury right would not be much of a right at all. The reality, recognized by this Court, is that prior accusations of serious criminal conduct do not merely "inform" the verdict, they are the "strongest single factor that cause[d] juries to impose the death penalty." (*People v. McClellan* (1969) 71 Cal.2d 793, 805, fn. 2 (*McClellan*).) The drafters of the state constitution explicitly rejected legislative labeling as an end run around the jury right. (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1243 (*Mitchell*).) It is highly doubtful that they would have accepted the subtle semantic distinction suggested by CJLF.

D. Applying the State Jury Right to the Selection Phase Does Not Contravene the High Court's Interpretation of the Sixth Amendment

CJLF repeatedly accuses Mr. McDaniel of attempting to "brush aside" federal law as articulated in the *Apprendi* line and apply what it characterizes as the "magic wand" of independent state constitutional grounds to request an "only in California"

interpretation of the jury right. (CJLF Amicus at pp. 10, 22, 25, 29.) These assertions are a sign that CJLF overlooked much of the briefing in the case. As this Court is well aware, Mr. McDaniel filed separate claims arguing both that (1) this Court's interpretation of *Apprendi* is incorrect (Supp. AOB at pp. 23-39) and (2) his state jury right claim is equally valid under federal law. (Supp AOB at pp. 2-23.) However, the order of this Court requested that the Attorney General and Mr. McDaniel provide further briefing only on the state constitutional claim. (Order, *People v. McDaniel*, No. S171393 (filed June 17, 2020).) Defining issues for supplemental briefing is wholly within the Court's prerogative and Mr. McDaniel has unsurprisingly chosen to respect this decision. Nonetheless, CJLF's discussion of the Sixth Amendment raises relevant questions about how this Court should interpret California's analogous jury right.

Despite CJLF's criticism, there is nothing improper in a state high court focusing on the interpretation of its own founding documents without resort to construction of the United States Constitution. When state courts depart from federal precedent, "it may be because a state's distinct constitutional text or history points to a different result, and state courts should look first to state-specific sources in deciding an issue of state constitutional law." (The Honorable Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal* (2017) 92 N.Y.U. L. Rev. 1307, 1312; see also The Honorable William Brennan, *State Constitutions and the Protection of Individual Rights* (1977) 90 Harv. L. Rev. 489, 498 [noting that the high court had undermined key Sixth Amendment rights, and specifically calling out the failure to apply

unanimity when reasonable doubt was required].) Indeed, some state courts have, as a rule of decision, mandated that state constitutional issues be addressed first, without resorting to unnecessary interpretation of federal law. (See, e.g., *State v. Gregory* (2018) 192 Wash.2d 1, 14 [applying this rule to consideration of a death penalty challenge].)

This is not to suggest that this Court should completely ignore federal precedents. As Justice Kruger recently reiterated writing for the Court in *People v. Buza* (2018) 4 Cal.5th 658 (*Buza*), federal law interpreting analogous rights is "'entitled to respectful consideration.' [Citation.]" (*Id.* at p. 684.) Mr. McDaniel has, in fact, relied heavily on cases from the high court. But how this Court should weigh federal precedent in analyzing analogous provisions of the California Constitution depends heavily on a threshold question: whether "the United State Supreme Court has resolved the question[.]" (*Id.* at p. 686.) This consideration is controlling in this case. CJLF has presented no evidence that the high court has squarely addressed the question before this Court. And, even if it had, in this context there are compelling reasons to interpret the California Constitution independently.

1. Federal Law Supports Mr. McDaniel's Argument, and at a Minimum Does not Foreclose It

In its application for relief from default, CJLF claimed that the high court in *McKinney v. Arizona* (2020) 140 S.Ct. 702 (*McKinney*) "resolved what had been a major split of authority among state supreme courts" on the application of *Apprendi* to the selection phase. (CJLF Application from Relief from Default,

People v. McDaniel, No. S171393 (filed Nov. 4, 2020). CJLF seems to have retreated from this broad and unsupported claim. (CJLF Amicus at p. 25 [stating only that the law is "clearer now" after *McKinney*].) But it bears emphasizing: *McKinney* did not even acknowledge—much less resolve—a split of authority.

A split of authority does exist. Some state high courts have held that the principles of *Apprendi*, *Ring*,[21] or *Hurst*[22] apply to issues at the selection phase of a penalty trial. (*Rauf v. State* (Del. 2016) 145 A.3d 430, 433 (per curiam opn. of Strine, C.J., Holland J., and Steitz); *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266.) Other state high courts have vacillated about whether jury right protections apply to selection phase decisions. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 261 [weighing of aggravators is a factual finding under *Apprendi* and *Ring*], *overruled by State v. Wood* (Mo. 2019) 580 S.W.3d 566, 586; see also *Hurst v. State* (Fla. 2016) 202 So.3d 40, 57 [unanimity applies to selection phase under state constitution] *overruled by State v. Poole* (Fla. 2020) 297 So.3d 487.) At least one United States Supreme Court justice (the author of *Hurst*) has called for *Apprendi* to be applied to the selection phase. (See *Woodward v. Alabama* (2013) 134 S.Ct 405, 410-411 (dis. opn. from denial of cert., Sotomayor, J.).) This Court has joined others holding a contrary view. Despite countless petitions for certiorari on precisely this subject, the United State Supreme Court has not resolved the split of authority.

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[21] (*Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*).)

[22] (*Hurst v. Florida* (2016) 577 U.S. 92 (*Hurst*).)

McKinney does not discuss this conflict among the states and certainly does not settle it. To begin with, and as the United States Supreme Court itself expressed in *McKinney* "[t]he issue in this case is narrow." (*McKinney*, *supra*, 140 S.Ct. at p. 706.) As described by the high court, the issue in *McKinney* was as follows: "McKinney contends that after the Ninth Circuit identified an *Eddings*[23] error, the Arizona Supreme Court could not itself reweigh the aggravating and mitigating circumstances. Rather, according to McKinney, a jury must resentence him." (*Ibid.*) The only tie to the *Apprendi* line was whether appellate reweighing to cure errors effecting the penalty, *see Clemons v. Mississippi* (1990) 494 U.S. 738 (*Clemons*), was still good law after *Ring*. The Supreme Court held that *Clemons* was still good law. (*McKinney*, *supra*, 140 S.Ct. at p. 709.)

CJLF makes much hay about three sentences in *McKinney*. First, that *Ring* has "nothing to do with jury sentencing." (CJLF Amicus at p. 22, citing *McKinney, supra*, 140 S.Ct. at p. 708.) This much was obvious because, before *Ring*, Arizona did not provide for jury sentencing. The high court did find that the Arizona procedure of judicial determination of death-eligibility was unconstitutional. But this does not answer whether the concepts articulated in *Apprendi* could apply to the selection phase had Arizona chosen to have a jury trial on the issue of penalty, as does California.

CJLF also points to the statement in *McKinney* that under "*Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible." (CJLF Amicus at p. 25, citing *McKinney*, *supra*, 140 S.Ct. 702, 707.) Again, this much was

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[23] (*Eddings v. Oklahoma* (2020) 455 U.S. 104.)

already clear and is wholly uncontroversial. Indeed, this Court has already accepted it. (*People v. Prieto* (2003) 30 Cal.4th 226, 256 [prior caselaw holding that special circumstance finding was not encompassed by jury right is "now erroneous" after *Ring*].) The nonchalant statement of fact in *McKinney* does not necessarily serve as a *limiting principle* with respect to the application of the *Apprendi* line to the selection phase. And it does not and cannot speak to the effect of creating issues of fact for a jury at a penalty trial, as California has done. At issue in *McKinney* was appellate reweighing where there *was no jury trial on penalty*. It would have been dicta upon dicta for the Supreme Court to resolve, in addressing the validity of *Clemons* appellate procedures, the trial-level implications of a penalty jury trial scheme that did not exist in that case.

CJLF finally stresses *McKinney*'s statement that "in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." (CJLF Amicus at p. 25.) This much is also not particularly illuminating. Not all states are "weighing" states, such weighing is certainly not constitutionally required, and it has long been the rule that state high courts can conduct appellate "reweighing." (*Clemons*, *supra*, 494 U.S. 738.)

Certainly, none of these oblique statements from *McKinney* supersede the clear directive of *Andres*: that the jury right extends to "all issues—character or degree of the crime, guilt and

punishment—which are left to the jury." (*Andres*, *supra*, 333 U.S. at p. 748.) Mr. McDaniel notes that *Andres* maintains its vitality as properly describing the application of the jury right to *all jury verdicts*. Justice Thomas (whose statements from *Ring* CJLF quotes when repeated by the majority in *McKinney*) cited the *very passage* from *Andres* cited by Mr. McDaniel. (See *Ramos*, *supra*, 140 S.Ct. at p. 1421 (conc. opn. of Thomas, J.) ["In *Andres v. United States*, 333 U.S. 740, the Court repeated that '[u]nanimity in jury verdicts is required' by the Sixth Amendment, ***id.* at p. 748**"], emphasis added; compare *Andres*, *supra*, 333 U.S. at p. 748 ["Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it."].)

In short, federal law supports this claim, and certainly has not settled it against Mr. McDaniel. Reconsidering this Court's past decisions on the state jury right is hardly a refusal to afford "respectful consideration" to the high court. (*Buza*, *supra*, 4 Cal.5th at p. 684.)

2. There Are Strong Reasons to Resolve This Case Differently Under the California Constitution

As Mr. McDaniel has argued, federal law supports his claim. And, because this Court has never substantively analyzed this issue under Article I, section 16, it essentially addresses a novel issue. But, given that this Court has interpreted the rule of *Apprendi* as not applying to the selection phase, CJLF's assertion that Mr.

McDaniel has not presented "cogent reasons" for a different interpretation under the state jury right nonetheless merits a response. (CJLF Amicus at p. 11.)

The first answer must be that this claim is not the doctrinally the same. This claim does not contend that the penalty phase "increases the statutory maximum" under *Apprendi*, but instead urges that it resolves issues of fact entitled to jury protections. (*Compare* Supp AOB at pp. 2-23; *with id*. at pp. 23-30.) But even were this distinction insufficient, there are several other reasons to distinguish between the two analogous constitutional provisions.

To begin with, the text of Article I, section 16, obviously differs from the Sixth Amendment. This distinction is vital. As this Court has noted, different results are more likely when the different language of the state and federal provisions suggests the issue should be resolved differently. (*People v. Teresinski* (1982) 30 Cal.3d 822, 836 (*Teresinski*); compare *Buza, supra*, 4 Cal.5th at p. 669 [concurring with federal rule interpreting "essentially identical language"] *with Price v. Superior Court* (2001) 25 Cal.4th 1046, 1076 [different result where original language of jury right provision "does not track the wording of the jury trial provision of the Sixth Amendment"].)

As a general matter, the language of the original constitution contained perhaps the most full-throated endorsement of the jury right that could possibly be afforded: "The right of trial by jury shall be secured to all, and remain inviolate forever. . ." (Former Cal. Const. Article I, section 3 (1849).) Given this paramount concern, it is unsurprising that from its very first decision interpreting the

right, this Court made clear that "it is the duty of this Court to remove every obstacle in the way of a free exercise of this right, and that it should not be interfered with on the part of the Courts[.]" (*Payne v. Pacific Mail S.S. Co.* (1850) 1 Cal. 33, 37.)

Most important to resolution of the issue before the Court, there was a lengthy debate about the scope of the state jury right, specifically concerning the scope of application of the fundamental jury protection of unanimity. (*Teresinski*, *supra*, 30 Cal.3d at p. 836 ["history of the California provision" critical in determining whether state and federal provisions require different interpretation].) From analyzing the content of this debate, and the line of state decisions interpreting the Article I, section 16, this Court has discerned that "[t]here is a fundamental difference between the reach of the federal and state constitutional guaranties of the right to a jury trial." (*Mitchell*, *supra*, 49 Cal.3d at p. 1241.) Thus, entertaining the possibility of a different result under the state constitution is by no means employing "magic wand," (CJLF Amicus at p. 25), but simply reflects established jurisprudence of this Court.

In assessing the recognized differences, this Court has stressed two principle distinctions between the California jury right and the Sixth Amendment. Both relate to the *scope of application*: which proceedings are encompassed by the jury right and its protections. First, as noted above, the drafters of the California right took to heart Blackstone's concern regarding legislative innovations undermining the jury right, and clearly rejected the idea that legislative labeling could defeat application of the jury right. (*Mitchell*, *supra*, 49 Cal.3d at p. 1243; 4 Blackstone 343-344.)

The idea that the legislative introduction of a bifurcated proceeding in 1957 defeats that application of the jury right to issues of penalty as recognized in *Hall*, (CJLF Amicus at p. 32), runs directly counter to this principle.

Second, this Court has held that the California jury right is not limited in the scope of its application in ways acceptable under the Sixth Amendment: "petty" versus "serious" crimes. (*Mitchell*, *supra*, 49 Cal.3d at p. 1241; cf. *Ramos*, *supra*, 140 S.Ct. at p. 1394, fn.7 [reaffirming distinction under federal law].) The idea that under the California constitution a single day in prison would trigger the fully panoply of jury rights, but the resolution of life-and-death issues is entirely exempt from such safeguards is baffling. And indeed, from the debates on the jury right, the *opposite* concern is manifest. Many of those who were willing to dispense with unanimity in criminal cases were unwilling to do so in cases whose punishments were equivalent to modern special circumstances. (1 Debates and Proceedings, *supra*, 297 (statement of Mr. Barry) ["I would not offer this provision . . . in cases involving life imprisonment or death"].) A compromise position was set forth which embodied this unique concern for capital cases. (Debates and Proceedings, *supra*, 1189 (Statement of Mr. Wilson) [offering amendment eliminating unanimity in criminal cases "other than cases of homicide"].) The compromise was ultimately rejected, but nonetheless indicates that jury protections in capital cases were particularly important to the delegates. This concern remained forceful in subsequent proposals to limit the safeguard of unanimity in criminal cases. (Proceedings of the First Annual Convention of

the California Bar Association (1910) at pp. 49-50 [recommendation that Constitution be amended to eliminate unanimity "except where the death penalty, or penalty of life imprisonment may be pronounced."].)

From the two specific concerns described above can be derived a general—and quite powerful—doctrine of construction regarding the scope of the California jury right, one which has no federal analogue: "The constitutional right of trial by jury is not to be narrowly construed." (*People v. One 1941 Chevrolet Coupe*, *supra*, 37 Cal.2d at p. 300.) This rule alone suffices to support a difference in state and federal constitutions. Although arguments can be made on either side, the state constitution should be broadly construed to provide protections in cases of the same general class as those that proceeded them. (*Ibid.*)

Other factors, too, support a distinction between state and federal law. State courts "often give respectful consideration to relevant decisions of sister states" in assessing their own constitutions. (*Buza*, *supra*, 4 Cal.5th at p. 702 (dis. opn. of Liu, J.); *People v. Superior Court* (1988) 46 Cal.3d 381, 399 [assessing decisions of "our sister states" though they "are not unanimous on this point"].) And this Court takes account of "incisive academic criticism of [high court] decisions" in assessing whether the state constitution merits a distinct interpretation. (*Teresinski*, *supra*, 30 Cal.3d at p. 836.) A "number of state supreme courts in death penalty cases have thoroughly analyzed the question of the measure of persuasion and concluded that the 'beyond a reasonable doubt' standard is necessary 'to communicate to the jurors the degree of

certainty that they must possess . . . ." (*U.S. v. Gabrion* (6th Cir. 2011) 648 F.3d 307, 326 reversed by *U.S. v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc.)[24] Likewise, numerous, thoughtful academic criticisms have been made of rules limiting jury rights, such as the reasonable doubt standard, to the eligibility phase. (See, e.g., Hoeffel, *Death Beyond A Reasonable Doubt* (2017) 70 Ark. L. Rev. 267; Atiq, *Legal vs. Factual Normative Questions & the True Scope of* Ring (2018) 32 Notre Dame Journal of L., Ethics, & Public Policy 47; Carter, *A Beyond A Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness* (1991) 52 Ohio St. L.J. 195.) Some of these very scholars presented a brief to this Court urging reconsideration of the current rule.[25]

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[24] The en banc majority in *U.S. v. Gabrion* rested on the same interpretation of *Apprendi* as this Court—distinguishing between "moral" and "factual" questions. (*U.S. v. Gabrion*, *supra*, 719 F.3d at p. 533.) This distinction, briefed extensively by Mr. McDaniel and several amici, is historically incorrect. (See Jury Right Scholars Amicus at pp. 20-34; Amicus Brief of California Constitutional Law Scholars 23-48.) The proper distinction is not between moral facts and empirical facts but between issues of fact and issues of law. (See, e.g., Carpenter, *The Trial of Col. Aaron Burr* (1807) [statement of founding father Luther Martin: the "great principle of law" is that "[i]f a juror has one reasonable doubt as to *facts*; or if the Court have one reasonable doubt as to *law*, they would violate every sacred duty imposed upon them by God and their country; and hazard its interest, it may be, forever, if they should go on the side of injustice. And if there is a doubt, as to law or fact, justice and humanity demand . . . that the verdict should be given in favor of the person whose life is at stake. . ."].)

[25] (Amicus Brief of Amici Curiae Janet C. Hoeffel, Rory K. Little, Emad H. Atiq, and James Q. Whitman, *People v. McDaniel*, N. S171393 (filed Oct. 26, 2020. (Jury Right Scholars Amicus).)

This Court has also "been influenced not to follow parallel federal decisions by the vigor of the dissenting opinions[]" in the high court (See *Teresinski*, *supra*, 30 Cal.3d at p. 836.) The central thesis of CJLF's brief, and this Court's doctrine rejecting jury protections at the penalty phase under federal law, has been reliance on the idea that the jury right does not extend to jury sentencing decisions in capital cases. As a matter of state law, this proposition is incorrect under *Hall*.

But under federal law, this flawed position can be traced backed to the highly-criticized[26] (and now-overruled) high court decisions in *Spaziano* and *Hildwin*.[27] (See *People v. Lewis* (2008) 43 Cal.4th 415, 521 [rejecting Sixth amendment challenge because "the high court in *Apprendi* and *Ring* did not purport to overrule its holding in *Spaziano*[.]."]; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147 [under *Hildwin*, "even where the sentence turns on specific findings of fact" no Sixth Amendment violation because aggravators are merely "sentencing factors" and there is "no Sixth Amendment right to jury sentencing"].)

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[26] (Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing* (2005) 105 Colum. L. Rev. 1967, 1985 [*Spaziano*'s Sixth Amendment ruling is "remarkable for its brevity and . . . for its shallow analysis. The portion of the opinion dealing with the Sixth Amendment occupies only two paragraphs. It makes no mention of the constitutional text. It says nothing of the history, origin, and purpose of the Sixth Amendment right to a jury."]; *Rauf*, *supra*, 145 A.3d at p. 450 [*Spaziano* analysis "cursory].)

[27] (*Spaziano*, *supra*, 468 U.S. 447 and *Hildwin v. Florida* (1989) 490 U.S. 638 (*Hildwin*), overruled by *Hurst*, *supra*, 577 U.S. 92.)

Now that *Spaziano* and *Hildwin* have been overruled, this Court would do well to consider Justice Steven's dissenting opinion on the central point in *Spaziano*, which sets forth the better view. Although it is unnecessary to reiterate the entirety of that opinion, its fundamental argument is that adopted by Mr. McDaniel: "The same consideration that supports a constitutional entitlement to a trial by a jury rather than a judge at the guilt or innocence stage—the right to have an authentic representative of the community apply its lay perspective to the determination that must precede a deprivation of liberty—*applies with special force to the determination that must precede a deprivation of life*." (*Spaziano*, *supra*, 468 U.S. at p. 483 (conc. and dis. opn. of Stevens, J.), italics added.)

CJLF itself, though perhaps unintentionally, provides a final point of distinction which would warrant a different result under the California constitution: the different dates associated with the adoption of the federal and state constitutions. In arguing that reasonable doubt and unanimity are necessarily distinct from one another, CJLF argues that the beyond a reasonable doubt standard did not crystallize "until after the Bill of Rights" was adopted (as contrasted with unanimity, whose development stretched back centuries earlier). (CJLF Amicus at pp. 28-29, citing *Winship*, *supra*, 397 U.S. at p. 361.) Thus, CJLF argues that the two rights cannot be inseparably connected. (CJLF Amicus at p. 28.)

CJLF's ultimate point fails because it is factually inaccurate. The high court's claim in *Winship*, that reasonable doubt's first use as a burden of proof "seems to have occurred as late as 1798"

(*Winship*, *supra*, 397 U.S. at p. 361) has been proven false. Scholarly research after *Winship* was decided reveals that the reasonable doubt burden began being used in America *before* the Bill of Rights was adopted, famously in the defense provided by British soldiers in the Boston Massacre trials by John Adams. (Morano, *A Reexamination of the Development of the Reasonable Doubt Rule* (1975) 55 B.U. L. Rev. 507, 516; Jonakait, *supra*, 10 U. N.H. L. Rev. at p. 102 [discussing Morano's "path-breaking" research].) Subsequent research by leading reasonable doubt scholar (and amicus in this case) James Q. Whitman established that the rule of reasonable doubt was also established in England prior to the adoption of the Bill of Rights. (See *id.* at p. 102, citing Whitman, The Origin of Reasonable Doubt: The Theological Roots of the Criminal Trial (2008) ["scholars have found that English courts as early as the 1780's instructed juries about reasonable doubt"].)

Thus, CJLF's claim that the two rights *cannot* be connected because they were not both established in the United States at the time of the adoption of the jury right in the Sixth Amendment is wrong as a matter of historical fact. (CJLF Amicus at p. 29 ["Defendant cites no basis for believing that the burden of proof was part of the law of jury trial at common law"].) Indeed, by the mid-1790's the concept of reasonable doubt was firmly established and in widespread use at common law. (See 40 The Parliamentary Register; or History of the Proceedings and Debates of the House of Commons, 140 (1795) (remarks of Mr. Adair[28]) [noting that in

[28] James Adair was a judge, serjeant at law, and member of parliament, who was a King's Serjeant in the Common Court of

criminal cases the standard of beyond a reasonable doubt as a burden of proof was already not only a principle of the "general law" but was the "law given to the jury" by judges].)[29]

But although CJLF is incorrect to suggest that reasonable doubt as understood as the burden of proof was not part of the common law at the time of the adoption of the Sixth Amendment, (CJLF at pp. 28-29), it is accurate to state that the doctrine of reasonable doubt was, at that time, relatively newly established. Arguably, the connection between unanimity and reasonable doubt as paired rights was thus not strongly established until later. Certainly, at the time of the debate on the California jury right in 1879, delegates were openly expressing the firm and necessary connection between reasonable doubt and unanimity in criminal trials. *See supra.* By the mid-Twentieth Century, courts considered

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Pleas beginning in the 1780's. (See Woolrych, Lives of Eminent Serjeants-At-Law of the English Bar (1869) 660-675.)

[29] CJLF's contention that the "beyond a reasonable doubt" rule was simply part of the "law of evidence" is somewhat confusing. (CJLF Amicus at pp. 28-29.) To the extent it was a law of evidence, it was quite plainly the law of evidence governing common law criminal jury trials, which is the basis for the California constitutional jury right. Moreover, the historical connection to the law of evidence does not assist CJLF's position. (*Apodaca*, *supra*, 406 U.S. at p. 412, tracing origin of the doctrine of reasonable doubt, inaccurately, through McCormick to 1 MacNally, Rules of Evidence on Pleas of the Crown, 4 (1811).) A described by MacNally the rule of reasonable doubt was a rule "in favorem vitae" whereby if there was "reasonable doubt" concerning the "issue" the jurors were "bound by conscience" to deliver a verdict for the defendant. (MacNally, Rules of Evidence on Pleas of the Crown, 2 (1802).) Because of its origin as a rule *in favorem vitae*, reasonable doubt should certainly be applied to juries' capital sentencing decisions.

the matter well and truly settled. (See, e.g., *Billeci v. U.S.* (D.C. Cir. 1950) 184 F.2d 394, 403 [among the "indestructible principles of our criminal law" was that "*[a]ll twelve* jurors must be convinced beyond that [reasonable] doubt . . . These principles are not pious platitudes recited to placate the shares of venerated legal ancients. They are working rules of law binding upon the court."], italics added.)

As discussed above, the dissenters in the high court in *Johnson* unequivocally believed that the two rights were inseparable. And it appears that they were vindicated in *Ramos*. But in case there were doubts on this score under a federal jury right adopted in 1791, this Court's statements that the rights are necessarily conjoined, (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 231), is well supported as an independent matter for a California jury right adopted many decades later. In other words, if the California Constitution extends unanimity protections to the penalty phase, (*Hall*, *supra,* 199 Cal at p. 458), it unquestionably also supplies the burden of proof beyond a reasonable doubt.

E. A Penalty Phase Free of Jury Right Safeguards Does Not Render Death Sentences More Reliable

Mr. McDaniel concludes by addressing CJLF's arguments regarding the reliability implications of the rules he proposes. Reliability is certainly an appropriate concern, since it forms the touchstone of much of this Court's capital jurisprudence. But CJLF's purported interest in reliability reveals, at best, fundamental misconceptions about the purposes of the procedural protections which attach to the jury right and the penalty phase. At

worst, it betrays a telling disregard for those who bears the costs of rules CJLF supports.

1. Applying a Requirement Unanimity to Aggravating Crimes Will Serve to Increase, not Decrease, Reliability

According to CJLF, applying jury protections to aggravating factors at the penalty phase is "bad policy," and will make the death penalty "less consistent" and even "arbitrary." (CJLF Amicus at pp. 16-17.) These warnings deserve to be taken with a grain, even a heaping tablespoon, of salt. CJLF admits that a wide array of states follow what it dubs the "Florida model." These states restrict evidence admitted at the penalty phase to aggravators found—unanimously and beyond a reasonable doubt—at the eligibility phase. (CJLF Amicus at p. 19.) There is not the slightest evidence that Florida, or any other state, has been unable to secure an adequate number of death sentences under this regime.[30] And surely CJLF has never pressed the point that these systems are unreliable or arbitrary in any capital proceeding in these states.

But a more fundamental flaw taints CJLF's logic. CJLF's basic premise is that the "wide leeway" given to aggravating evidence at the penalty phase is part of a scheme which *rejects* any policy "to minimize the number of death sentences handed down[.]" (CJLF Amicus at p. 19.) CJLF claims that this policy—"critical of

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[30] In fact, Florida has among the highest death sentencing rates per murder, and per capita, in the nation. (Death Penalty Information Center, *Death Sentencing Rates* (December 21, 2020) <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentencing-rates>.)

restrictions on penalty evidence"—originated from a comment in *People v. Friend* (1957) 47 Cal.2d 749, 763 fn.7 (*Friend*), which resulted in modern rules spurning "[t]ight restrictions on aggravating evidence." (CJLF Amicus at p. 19.)

CJLF has history not only wrong, but backwards. Justice Schauer's opinion in *Friend* was actually critical of restrictions on *mitigating* evidence. (*Friend*, *supra*, 47 Cal.2d at p. 763.) And it was part of a line of cases (beginning with Justice Schauer's opinion in *Green, supra*, 47 Cal.2d 209), which "heralded an era in which the court increasingly restricted the jury's discretion to impose a death sentence." (Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases-A Comparison & Critique* (1991) 26 U.S.F. L. Rev. 41, 59.) Among these restrictions was the very rule at issue in this case, that a jury could consider aggravating crimes "only if it was convinced beyond a reasonable doubt that the defendant had committed them." (*Ibid.*, citing *McClellan, supra*, 71 Cal.2d at p. 804.) The most natural reading of this doctrine under the 1957 statute is that it *included* unanimity. The "jury" (i.e., the "*entire* jury") had to be convinced beyond a reasonable doubt of the truth of prior crimes. (3d Supp. ARB at pp. 58-59.) Thus, CJLF's argument the modern law should be limited to the "exception" under the 1957 statute (CJLF Amicus at pp. 15-16) is wholly unresponsive to the history of that exception.

CJLF also claims that unanimity as to aggravating crimes at penalty would create a "single person veto" rendering the penalty decision less reliable. (CJLF Amicus at pp. 16-17.) This reasoning

is faulty. Limitations on unadjudicated offenses serve the interests of reliability. Eight states have expressly prohibited "the introduction of unadjudicated criminal offenses in the penalty phases of capital trials" and "all predicate their decisions in some fashion on the principles of fairness, reliability, and freedom from unfair prejudice." (Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials* (1993) 93 Colum. L. Rev. 1249, 1251.) Numerous states, including California, recognize the potential unreliability of unadjudicated offenses and have imposed procedural restrictions on their introduction *for this very reason*. (*Id.* at pp. 1271-1276.)

Moreover, a rule respecting the jury right does not amount to a single juror veto. If unanimity with respect to aggravating crimes is required, jurors would still be free to vote for death, notwithstanding significant weaknesses in proof of other crimes evidence. If such evidence is so weak that one or more jurors might reject it (notwithstanding the highly prejudicial fact that the defendant has already been found guilty of capital murder), *and* the holistic case in aggravation excluding this evidence is *also* relatively weak, it is of course possible that the jury *might* hang on the issue of penalty. But this is hardly a sign of unreliability. And, in that event, the prosecution would be free to retry the penalty. The only "veto" would arise when "but for" the weak aggravating crimes—on which the jury could not agree—the jury would unanimously elect a life sentence. Allowing a death sentence in that scenario definitively demonstrates a *lack* of reliability.

Related reliability concerns played out in this very case. Mr. McDaniel was so certain that he would be acquitted on the prior aggravating crime of the Akkelli Holley murder (which was originally charged along with the other crimes) that he *demanded* a trial on that issue to avoid its introduction at penalty. (2 CT 480-485 [motion].) The prosecution successfully opposed, electing to introduce the crime instead at penalty, with its decreased protections. (2 CT 516-520 [opposition]; 3 RT 403 [ruling].) The current capital scheme encourages this type of disturbing gamesmanship.

The existing regime also eliminates unanimity with respect to aggravating crimes with an inherent tendency to trigger jurors' implicit bias: those concerning Black defendants and their interactions with law enforcement. Such crimes arise with relative frequency in capital cases. (See, e.g., AOB at p. 26 [prison guard fractured his hand beating Mr. McDaniel, then handcuffed and waist-chained, allegedly due to assault Mr. McDaniel initiated]; AOB at pp. 24-25 & 20 RT 3910-3913 [255lb officer, with formal training in boxing and jujitsu, along with two other police officers, using baton, engaged in what eye-witness described as "police brutality" against defendant, but which prosecution alleged was assault initiated by Mr. McDaniel].) CJLF noticeably does not discuss these types of aggravating crimes in asserting that non-unanimity furthers reliability. Mr. McDaniel, however, firmly believes that requiring jurors with a diversity of experience to agree on the existence of aggravating crimes will increase, not decrease, penalty phase reliability.

2. Applying a Reasonable Doubt Burden as to the Ultimate Verdict Will Also Increase Reliability

The function of a standard of proof "is to instruct the factfinder concerning the degree of confidence our society thinks the factfinder should have" and "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487.) This Court has "noted that the standard of proof may depend upon the 'gravity of the consequences that would result from an erroneous determination of the issue involved.' [Citation.]" (*Ibid.*) Surely these concerns militate in favor of reasonable doubt at penalty. CJLF does not explain why the absence of this burden furthers an interest in reliability, other than its generalized assertion that the California death penalty procedures do not, and should not, "minimize the number of death sentences handed down[.]" (CJLF Amicus at p. 19.)

Disregard for procedures—such as a high burden of proof—which would minimize the number of death sentences, is the original sin of the modern California death penalty. In application, failure to limit the number of death sentences has doomed the system's functioning. Adding procedural safeguards such as unanimity and reasonable doubt to a jury's deliberations, by definition, increases reliability. This is precisely what the Attorney General has argued in other cases. (3d Supp ARB at pp. 61-62 [discussing Attorney General's amicus brief in *Ramos*].) On this score, Mr. McDaniel agrees with opposing counsel. Requiring jurors be certain of their death verdict, beyond a reasonable doubt, will

serve to weed out doubtful cases and will improve the reliability of capital verdicts.

CONCLUSION

The California jury right, while grounded solidly in the common law, has never been a right frozen in place. In fact, this Court recognized in one of its first cases interpreting the jury right that common law—which defined the jury right—itself evolved over time to serve the interests of the people it served to protect. "Without some corrective, our system of jurisprudence would become clumsy and unwieldy; and the immense delay and costs to litigants would render it a curse, instead of what it was designed to be, a blessing." (*Russell v. Elliott* (1852) 2 Cal. 245, 248.) These words remain as true today as they were at the dawn of California's statehood.

For the reasons set forth above, the sentence must be reversed.

DATED: December 23, 2020

Respectfully submitted,

MARY K. McCOMB
State Public Defender

/s/

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Attorneys for Appellant

CERTIFICATE OF COUNSEL

I, ELIAS BATCHELDER, am a Senior Deputy State Public Defender, and am appellate counsel for DON'TE McDANIEL 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 14,251 words in length.

DATED: December 23, 2020

/s/
ELIAS BATCHELDER
Attorney

DECLARATION OF SERVICE

Re: PEOPLE v. DON'TE McDANIEL — Supreme Court No. S171393 (Superior Court No. TA074274)

I, Marcus Thomas, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; I served a true copy of the attached:

APPELLANT'S CONSOLIDATED ANSWER TO BRIEFS OF AMICUS CURIAE

on each of the following, by placing same in an envelope with postage prepaid. The envelopes were addressed and mailed on **December 23, 2020** as follows:

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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. Signed on **December 23, 2020,** at Sacramento, California.

/s/ Marcus Thomas
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