IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

BRIEF OF AMICI CURIAE, HADAR AVIRAM AND GERALD UELMEN, CALIFORNIA CONSTITUTIONAL LAW SCHOLARS, IN SUPPORT OF DEFENDANT-APPELLANT MCDANIEL

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

THE HONORABLE ROBERT J. PERRY

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INTRODUCTION

The drafters of the federal constitution "considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.' [citation.]" (*United States v. Haymond* (2019) 139 S.Ct. 2369, 2375 (*Haymond*).) The drafters of the California Constitution considered the jury right no less important than their federal counterparts, enshrining in the State's first constitution that the right to trial by jury "shall be secured to all, and remain inviolate forever[.]"[1] The questions this Court has raised in this case relates to the scope of the state constitutional jury right, which this Court early on recognized applied to criminal trials where "an issue of fact is joined." (*Koppikus v. State Capitol Com'rs* (1860) 16 Cal. 248, 253.) The fundamental query for the Court here is whether the jury protections in question apply to the issues determined in the sentencing phase of a capital trial. This Court has, in the modern death penalty era, held that they do not. Amicus submits that a careful reading

[1] Article I, section 3 of the California Constitution of 1849.

of the history and function of the capital penalty trial demonstrates that this position—though long held—is incorrect.

The historical nature and scope of any constitutional right plays an important role in understanding the scope of its protections today. This is particularly so for interpretation of the jury right, a process which looks first to the application of the jury right at common law. (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal. 2d 283, 287.) But although beginning with an analysis of the common law, this Court has provided a critical caveat: "[t]he constitutional right of trial by jury is not to be narrowly construed." (*Id.* at p. 300.) The jury right is not applied "strictly to those cases in which it existed" at common law "but is extended to cases of like nature as may afterwards arise" and embraces all cases of "the same class thereafter arising." (*Ibid.*; see also *Haymond*, *supra*, 139 S.Ct. at pp. 2376–2377 [though application of the jury right at common law was "pretty straightforward[,]" subsequent "legislative innovations have raised harder questions"].) Thus, the analysis of the scope of the jury right under both state and federal constitutions considers not only history, but similarities in function. (*Ring v. Arizona* (2002) 536 U.S. 584, 605 (*Ring*) [Sixth Amendment applied to

Arizona capital scheme because aggravating factors were the "functional equivalent" of issues protected by jury right a common law].)

The first inquiry must be history. Of course, the modern bifurcated capital trial did not exist at our nation's founding, nor did it exist in California when the state constitution was first ratified in 1850 or later amended in 1879. However, evaluating the history of capital trials at common law and California's early legal history illustrates that—when deciding whether a defendant should live or die—the jury's function in a capital trial has from the State's founding has been safeguarded by the full range of jury protections.

As Mr. McDaniel's own brief makes clear, the jury protections were intended to protect capital defendants in the resolution of "issues of fact": those issues assigned to the jury at a common law trial. This basic premise guiding the jury right's scope is embodied by the Legislature's decision in drafting the first Penal Code in 1872 to designate issues of fact to the jury while reserving issues of law to the court. (Penal Code §§ 1042, 1124 (1872) ["[i]ssues of fact must be tried by jury[,]" and "[t]he Court must decide all questions of law which arise in the course

of a trial"].) This division of responsibility was the centerpiece of the jury trial right. As this Court has explained "[t]he right of trial by jury is fundamental. It is a right which was transmitted to us by the common law and as such is expressly guaranteed by the Constitution, and the distinctive quality of that right—its very essence—is that every person put upon *trial upon an issue involving his life* or his liberty is entitled to have *such issue* tried by a jury . . . . [citation]." (*People v. Wheeler* (1978) 22 Cal.3d 258, 266, italics added.)

And this distinction (between "issues of fact" and "issues of law") has long described the scope of jury right protections such as reasonable doubt. (*People v. Lynch* (1875) 51 Cal. 15, 26 ["beyond all reasonable doubt," accurately describes "the action of a jury upon an issue of fact in a criminal case" but the "words have no peculiarly appropriate application to the action of a court upon any issue of law"]; *People v. Kilvington* (1894) 104 Cal. 86, 93 [issues of fact "must be left to the sound judgment and discretion of the jury, and in the decision of which question the defendant is entitled to the benefit of any reasonable doubt arising upon the evidence"]; *Brummett v. County of Sacramento* (1978) 21 Cal.3d 880, 887 ["doubt must be resolved as an issue of

fact by the jury rather than of law by the court"].) A thorough review of the history of the California death penalty resolves beyond question that the penalty phase issues (the aggravating factors and the ultimate penalty) are issues of fact that grew out of a single guilt-phase verdict.

Nonetheless, this Court has repeatedly voiced its reluctance to apply the jury protections at the capital penalty phase because the "issues" decided at the penalty phase are "normative" or "non-factual." (See, e.g., *People v. Johnson* (2016) 62 Cal.4th 600, 655.) But it bears underscoring that the common law distinction was not between issues of fact and non-fact, but between issues of fact and law. (See *People v. Betts* (2005) 34 Cal.4th 1039, 1048–1049 [jurisdiction was a question of law, and thus did not implicate jury right despite often raising "factual issues related to the circumstances of the crime"].) The ultimate issue of moral culpability resolved by the jury in a California capital trial, is simply not, and has never been, a question of law. (*People v. Murback* (1883) 64 Cal. 369, 371 [the decision on punishment in a capital trial is a power with which "a court cannot interfere" and the jurors "have the exclusive right to determine, within the limits prescribed by the law which gives

them the power, the punishment for which the defendant ought to be sentenced"]; *People v. Leary* (1895) 105 Cal. 486, 496 [there exists "no power reserved to the court to review [the jury's] action" in deciding the appropriate penalty]; see also *People v. Cowgill* (1892) 93 Cal. 596, 599 [when left to the jury's consideration, "it is difficult to see how the question[] [of] whether a man . . . is more reprehensible" is a "question[] of law."].) And it is beyond question that commission of a criminal act, a component of all aggravating factors under the California scheme, is a question of fact for the jury, not questions of law for the judge.

The ultimate issue—the penalty of death—is an issue that, since 1851, the California Legislature has chosen to entrust to a jury. Beginning in 1874 (prior to the adoption of the current jury trial right in 1879), it was an issue that was resolved by a jury in every death penalty murder trial. The full history of applying jury protections to capital trials should inform this Court's decision on whether unanimity and reasonable doubt apply to the penalty phase.

Indeed, the first time California carried out a jury's death verdict, the execution of recent immigrant George Tanner,

provides a stark example both of how expansive the jury right was at the time as well as the importance of providing robust constitutional protections in the administration of capital punishment. (See *People v. Tanner* (1852) 2 Cal. 257 (*Tanner*).) Initially facing the lynch mob, Tanner was ultimately executed for stealing goods valued at $400. Yet this Court's resolution of the legal issues in his case demonstrate that if Tanner had asked the Court the questions it is now considering, the answer would be clear: the full range of jury protections, including unanimity and beyond a reasonable doubt, would apply.

Looking to our State's history, this Court should reverse its past precedent and hold that the California jury right encompasses a burden of beyond a reasonable doubt on the ultimate penalty determination and unanimity as to the existence of prior aggravating crimes under 190.3 subdivisions (b) and (c).

This Brief proceeds in three parts. First, it discusses the factual and legal background of George Tanner's conviction, death sentence, and appeal before this Court in 1852. Next, the Brief discusses the history of providing full jury protections at capital sentencing proceedings and details how an ill-considered

and long-overruled case took the Court off course and resulted in the removal of jury rights from the capital sentencing decision. Finally, the Brief makes the case for restoring the historical jury protections at capital sentencing proceedings.

DISCUSSION

I. George Tanner's Death Sentence Was Affirmed on the Premise that Jury Protections Applied to Guilt and Punishment Alike.

Early sentencing practices inform the constitutional role of juries in California's capital punishment system. A prime example is the case of George Tanner, the first this Court ever decided on capital jury sentencing. (See *People v. Tanner* (1852) 2 Cal. 257 (*Tanner*).) From the beginning of this Court's capital jurisprudence, it has recognized the application of the jury protections in the administration of the death penalty.

George Tanner lived in Marysville, a town about 42 miles north of Sacramento, with his wife Eliza and infant sons Henry and Thomas. (O'Hare et al., Legal Executions in California (2006) p. 11 (hereafter O'Hare); Bolaños-Geyer, William Walker: Gray-Eyed Man of Destiny, Book 2: The California (1989) pp. 125, 128 (hereafter Bolaños-Geyer); Last Will and Testament of George

Tanner <phillipsblack.org/tannergeorge>.) He owned a house and lot in town (Last Will and Testament, *supra*), but was unable to establish a profession. (O'Hare, *supra*, at p. 11.) This is likely because he was rumored to be a "'Sydney Duck,' an English felon who had been transported to Australia and later made his way to California during the gold rush." (O'Hare, *supra*, at p. 11.) Mr. Tanner's status as a disfavored Australian immigrant provides an important window into the background of his case.

In 1852, California was a new state and "[l]ynch law" was a common form of frontier justice. (Davis, *Research Uses of Coutny Court Records, 1850-1879: An Incidental Intimate Glimpes of California Life and Society: Part II* (1973) 52 Cal. Hist. Q. 338, 347 & fn. 159 (hereafter Davis); see Bolaños-Geyer, *supra*, at pp. 130–136.) The legal process was frequently thrust aside by lay citizens "impatient with the slowness of procedural due process and with the obvious weaknesses operative in the administration and enforcement of the law," who would carry out defendants' "trials" and summary executions themselves. (Davis, *supra*, at 338, 347.) Newly arrived Australian immigrants[2] in particular

[2] Over 11,000 Australians immigrated to San Francisco between mid-1849 and mid-1851. Kamiya, *When derelicts from Down*

were frequent targets of this vigilantism. (See Kamiya, *When derelicts from Down Under Overran San Francisco,* S.F. Chronicle (July 21, 2018) <https://bit.ly/2YDJf2S> [as of Aug. 20, 2020].) Australia was then known as a dumping ground for English felons and Australians faced significant xenophobia in California, where they were viewed as a cause of the lawlessness the state was fighting. (*Ibid.*) San Francisco even created a formal Committee of Vigilance, largely focused on corralling—and lynching—errant Sydney Ducks. (*Ibid.*)

It was in this context that George Tanner narrowly escaped a lynch mob, only to be sentenced to death and executed for stealing "'1500 pounds of flour, six sacks of potatoes, five kegs of syrup, two and one half barrels of meal, one keg of powder, and one half barrel of mackerel . . . of the value of $400.'" (O'Hare, *supra*, at p. 11.)

In March or April of 1852, a local resident reported Tanner to a private watchman for loading kegs and sacks bearing the logo of local trader Charles Lowe into a wagon. (*Ibid.*) Lowe had noticed items going missing from his inventory and the local

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Under Overran San Francisco, S.F. Chronicle (July 21, 2018) <https://bit.ly/2YDJf2S> [as of Aug. 20, 2020].)

resident—recognizing the supposed Sydney Duck without employment—became suspicious. (*Ibid.*) Lowe and the watchman arrested Tanner and discovered even more of Lowe's merchandise stored in Tanner's barn. (Bolaños-Geyer, *supra*, at p. 128.)

Though he initially planned to take matters into his own hands, Lowe eventually surrendered Tanner to the Marysville authorities. (O'Hare, *supra*, at p. 11.) Authorities charged Tanner with grand larceny and released him on $2000 bail. (Chamberlain & Wells, History of Yuba County, California (1879) p. 126 <https://bit.ly/2QxkX6i> [as of Oct. 6, 2020 (hereafter Chamberlain).) The town was indignant to learn that Tanner was released for stealing from a local businessman and citizens considered taking matters into their own hands. (*Ibid.*)

Likely aware of the town's prejudice against him and the serious consequences of his crime under the law, Tanner made a run for it. (See O'Hare, *supra*, at p. 11.) A "citizen's posse"[3] caught him at the edge of town and "rearrested" him. (*Ibid.*;

[3] Such posses often functioned as self-appointed judge, jury, and executioner in one, and it would not have been unheard of for a man like Tanner to be executed on the spot. See Ridge, *Disorder, Crime, and Punishment in the California Gold Rush* (1999) Mont. The Magazine of Western Hist., at pp. 23-24.

Chamberlain, *supra*, at p. 126.) The posse took Tanner to the Marysville town "Plaza" and appointed 25 "well known persons" to serve as his "jury." (Chamberlain, *supra*, at p. 126.) The crowd of citizens formed an angry mob, calling for him to be hanged on the spot. (Chamberlain, *supra*, at p. 126; Bolaños-Geyer, *supra*, at p. 128.) Tanner's wife appeared with their infant sons, pleading for mercy and her husband's life, but the mob would not be assuaged. (Bolaños-Geyer, *supra*, at p. 128.) After a few hours of discussion, the "jury" decided Tanner should die. (*Ibid.*)

What could have been the end of Tanner's story became the first of multiple times that state authorities would intervene to protect his procedural rights. The Marysville mayor barged into the so-called "deliberation room" and made a valiant appeal for Tanner to receive his constitutional rights. (Bolaños-Geyer, *supra*, at p. 128.) The committee agreed to let him go—on the assumption that he would be dealt with by the angry crowd in the square. (*Ibid.*) Here the mayor and law enforcement intervened again—officers immediately surrounded Tanner and took him to jail where he was "kept . . . in irons," and safety, until his trial in April 1852. (O'Hare, *supra*, at p. 11; Bolaños-Geyer, *supra*, at pp. 128–129.)

The law at the time provided that grand larceny could be punished by up to 10 years in prison or death.[4] (Shuck, *Death Penalty for Larceny* (Spring/Summer 2010) CSCHS Newsletter, at p. 14.) At trial, Tanner was represented by William Walker—the very man who had led the legislative push to *increase* the penalties for larceny. (Bolaños-Geyer, *supra*, at pp. 127, 129.) The jury found Tanner guilty and, on April 19, sentenced him to death. (O'Hare, *supra*, at p. 11.) The shop owners who Tanner stole from—while strong advocates for his punishment—ultimately did not want him hanged. After his conviction, they "did all they could to secure a commutation of his sentence." (*Hanged for Stealing Not by Vigilantes but by the Laws of California. A Black Blot on History's Page.*, S.F. Examiner (May 17, 1891) p. 11.)

Tanner's verdict was affirmed by the Yuba County District Court. (*Tanner, supra*, 2 Cal. at pp. 258–259; Bolaños-Geyer, *supra*, at p. 129.) In his appeal to this Court, he argued that his

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[4] By 1851, it was clear that the laws passed in the Legislature's first session had been insufficient to establish law and order. See Bolaños-Geyer, *supra*, at pp. 127-128. To address lawlessness, including rising vigilantism, the Legislature took a number of steps including making both robbery and grand larceny eligible for the death penalty. *See* Davis, *supra*, 52 Cal. Hist. Q. at p. 345.

trial was tainted because the state's attorney removed a prospective juror who indicated he would never consider the death penalty in a grand larceny case. (*Ibid.*; see *Tanner*, at pp. 258–259.) This Court affirmed the death sentence, reasoning that "[i]t is *impossible* to separate the verdict from its consequence, the punishment." (*Tanner*, at p. 259, emphasis added.) The Court held it would be "a mockery of justice" to allow a potential juror to sit on a jury when "he would not, under any circumstances, consent to the highest punishment provided for a breach of that law" because he would have forced "his fellow jurors . . . [to] shape their verdict to his preconceived opinions."[5] (*Tanner*, at pp. 259–260.) Tanner was granted a rehearing but his objections were again overruled. (*Tanner*, *supra*, 2 Cal. at p. 260.)

George Tanner was executed on July 23, 1852. (See Bolaños-Geyer, *supra*, at pp. 136–137.) For weeks after his death, Eliza Tanner spent each day "'dressed in a garb of deepest

[5] In affirming the death sentence, Chief Justice Murray expressed the Court's "regret that our [L]egislature have considered it necessary to thus retrograde, and in the face of the wisdom and experience of the present day, resort to a punishment, for less crimes than murder, which is alike disgusting and abhorrent to the common sense of every enlightened people." *Tanner, supra,* 2 Cal. at p. 258. The Legislature repealed the death penalty for larceny within five years. *Hanged for Stealing*, *supra*, at p. 11.

morning, holding each of her children by the hand, and traversing the streets, apparently in great distress.'" (O'Hare, *supra*, at p. 11.)

Though he was executed for a crime from which the death penalty would soon be abolished, George Tanner's case demonstrates key procedural rights held by capital defendants in California in 1852. And as discussed below, the resolution of the legal issues in his case make clear that this Court would not have hesitated to apply the full range of jury protections to his case had it been asked to do so in 1852.

II. California's Bifurcated Capital Sentencing System Draws on a Long Tradition of Treating Guilt and Punishment as Jury Determinations in Capital Cases.

One of the primary flaws of this Court's decisions rejecting the application of jury protections to the penalty phase is its assumption that, since the penalty phase is simply a sentencing hearing (a judicial proceeding from which application of the jury right draws neither functional nor historical support), it would be inappropriate to apply jury protections to *any* determination of a capital sentence, even if made on issues of fact, by a jury, at a trial. (See *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147 [even

when the "the sentence turns on specific findings of fact" there is no Sixth Amendment violation "[b]ecause the Sixth Amendment provides no right to jury sentencing in death penalty cases"]; but see *Ring v. Arizona* (2002) 536 U.S. 584, 589 ["Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"].) The notion that the penalty phase is merely a sentencing hearing is incorrect.

The California penalty phase does not derive from a judicial sentencing hearing, but from a jury trial. Much of the reasoning supporting the unsound view that the penalty phase is simply a sentencing hearing is premised upon flawed dicta from now-overruled cases such as *Hildwin v. Florida* (1989) 490 U.S. 638 and *Spaziano v. Florida* (1984) 468 U.S. 447, which upheld *judicial* capital sentencing schemes (See *Hurst v. Florida* (2015) 577 U.S. 92, 102.) California, unlike Florida, created a jury trial on the issue of penalty. Thus, there is far greater force to the argument that the jury trial rights should apply to the California penalty phase. Nor is there truth to the implicit assumption that penalty phase is like a sentencing hearing because only judges,

and not common law juries, wielded factfinding power to resolve proper sentences. Such reasoning fails to appreciate the long tradition of juries resolving capital sentencing questions.

A. The Development of the Discretionary Jury Sentencing Schemes Demonstrates that Jury Protections Were Meant to Extend to Death Sentencing Proceedings

The bifurcated capital sentencing proceeding in California does not find its roots in traditional sentencing hearings, over which a judge presides. Rather, it is an outgrowth of unitary capital trials originating in the nineteenth century, which were subject to the discretion of juries, and which were themselves an outgrowth of the common law capital murder trial. At the time of the nation's founding, the country adopted the unitary capital trial tradition tracing back to the early thirteenth century. (Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200–1800* (1985) 28–64.)

That tradition, and the early American experience, frequently involved juries exercising their discretion in the interests of equity and justice. "In the decades surrounding the American Revolution, the practice of juries issuing partial verdicts or downvaluing stolen goods in order to avoid death

sentences was widespread . . . ." (Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, (2005) 105 Colum. L. Review 1967, 2013.) Like capital trials today, because "[o]nly a small fraction of eighteenth-century criminal trials were genuinely contested inquiries into guilt or innocence[,] . . . to the extent that trial had a function in such cases beyond formalizing the inevitable conclusion of guilt, it was to decide the sanction." (Langbein, (2003) *The Origins of Adversary Criminal Trial* 59.)

These early juries regularly exercised sentencing power by utilizing this factfinding authority in order to preclude imposition of the death penalty. And "[a]t least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 293; *Andres v. United States* (1948) 333 U.S. 740, 753) (*Andres*) (conc. opn. of Frankfurter, J.) [noting common practice of jury nullification].) Thus, the jury's role in early capital sentencing consisted of two interrelated but separate components—decisions resolving guilt *and* punishment—that occurred during the trial proceedings and

which were protected by the jury trial rights of reasonable doubt and unanimity.

As the high court detailed in *Winston v. United States* (1899) 172 U.S. 303 (*Winston*), the "hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a capital conviction" induced American legislatures soon after the founding "to allow some cases of murder to be punished by imprisonment, instead of by death." (*Id.* at p. 310). By the end of the nineteenth century "that end ha[d] been generally attained in one of two ways." (*Ibid.*)

The first was the division of murder into degrees, creating a jury question "requiring the degree of murder to be found by the jury, and providing that the courts shall pass sentence of death in those cases only in which the jury return a verdict of guilty of murder in the first degree[.] (*Winston*, *supra*, 172 U.S. at p. 310–311.) Although ostensibly altering the definition of the crime, the separation of murder into degrees was clearly an effort to assess guilt and punishment through the factfinding power of the jury, and was also clearly protected by the jury protections of unanimity and reasonable doubt.

However, the attempt to measure culpability through "degree" of murder, proved difficult. Intractable problems in "laying down exact and satisfactory definitions of degrees in the crime of murder, applicable to all possible circumstances" led other legislatures, including the United States congress (and California) to adopt a second method: "the more simple and flexible rule of conferring upon the jury, in every case of murder, the right of deciding whether it shall be punished by death or by imprisonment." (*Winston*, *supra*, 172 U.S. at p. 312.) The *Winston* Court, though recognizing both approaches as legitimate, never blessed the second method as a proper end run around the traditional safeguards of reasonable doubt and unanimity that were staunchly protected under the first. To the contrary, the Court underscored its past rulings as demonstrating "the steadfastness with which the full and free exercise by the jury of powers newly conferred upon them" by legislative innovations "have been upheld and guarded by this court" against any intrusion on the jury's power by "the rulings and instructions of the judge presiding at the trial." (*Id.* at p. 312.) And the high court ultimately the rejected the limitation upon the jury's power in the *Winston* case. (*Id.* at p. 312 [court's

instruction to jury that life sentence was prohibited "unless mitigating or palliating circumstances were proved" was improper because it invaded jury's province].) The penalty decision was a question for the "jury, and [] the jury alone." (*Winston*, *supra*, 172 U.S. at p. 313.) It was an issue of fact.

Several decades later, the United States Supreme Court confirmed the constitutional basis of its statutory construction: jury rights applied to unitary discretionary capital sentencing schemes whenever the issue of punishment was resolved by a jury. (*Andres*, *supra*, 333 U.S. at p. 748. , 748). Under the Sixth Amendment, "[i]n 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." (*Ibid.*) This result obtained because "[a] verdict embodies in a single finding the conclusions by the jury upon *all the questions* submitted to it." (*Ibid.*) Although the question of punishment was later divided by many states into a separate proceeding, this bifurcation provides no reason to change the application of the jury protections embodied in California's constitution.

B. California's Early Legal History Demonstrates that Jury Protections Were Intended to Safeguard Juries' Discretionary Penalty Decisions

1. Early Statutes and Decisions (1851–1876) Confirm the Jury Protections' Role in Safeguarding Punishment in Discretionary Capital Sentencing

In California, the tradition of expressly authorizing jury discretion in capital sentencing began almost immediately after the declaration of statehood. In 1851, the Legislature determined that it would increase the punishment for grand larceny from a term of imprisonment to either a term of imprisonment or death, "in the discretion of the jury." (Stats. 1851, Ch. 95, § 2, pp. 406–407.) Even in a more punitive era, this statute was considered so harsh that this Court described it as "disgusting and abhorrent to the common sense of every enlightened people." (*Tanner*, *supra*, 2 Cal. at p. 258.) The authorization of such a harsh punishment for a relatively minor offense—in Mr. Tanner's case stealing various food items and dry goods—is itself evidence that critical jury protections such as unanimity and reasonable doubt would have applied to the jury's discretionary decision. (*People v. Belton* (1979) 23 Cal.3d 516, 520 [procedural protections such as reasonable doubt were intended "originally to ameliorate the

severity of the early English common law"].) But *Tanner*'s reasoning provides additional evidence that the justices of the first Supreme Court presumed that the fundamental jury protections would apply to discretionary jury decision on penalty.

A prospective juror in the *Tanner* case was disqualified because he stated he would not "hang a man for stealing," though he made no indication that he would be unable to render a guilty verdict under the discretionary scheme. (*Tanner*, 2 Cal. at p. 258.) The defendant presented a strong textual argument that the juror disqualification statute only provided for disqualification of jurors whose scruples would "preclude his finding the defendant *guilty*." (*Ibid.*, italics added.) This Court rejected the argument.

The entire analysis in *Tanner* hinged on the idea that the jury right of unanimity applied to the discretionary sentencing decision under the new grand larceny law. Allowing the scrupled juror to sit on the case would defeat the intent of the law, the Court reasoned, because unanimity would require that the other jurors "shape their verdict to his preconceived opinions" and therefore mandate their opinions on the proper punishment "should bend to his." (*Id.* at p. 260.) If unanimity did not apply to

the discretionary punishment determination, this reasoning would not follow. Thus, if this Court in *Tanner* had been asked the questions before it today, there can be little doubt that it would have applied the protections the Defendant-Appellant here seeks.

This Court's later decision in *People v. Littlefield* (1855) 5 Cal. 355 (*Littlefield*), confirmed this view. "It was the intention of the Legislature that the jury should only assess the punishment, when in the exercise of their discretion they thought that the defendant deserved the punishment of death." (*Id.* at p. 356.) If "the jurors did not agree to such punishment upon finding the defendant guilty, then that they should find a general verdict." (*Ibid.*)

The very idea of capital larceny was abandoned a few years later by the Legislature in the very same law that first divided murder into degrees. (See Stats. 1856, Ch. 139, § 2, 7, pp. 219–220.) This new variation of culpability was one to which the jury protections of reasonable doubt and unanimity clearly applied. (See, e.g., *People v. West* (1875) 49 Cal. 610, 612 [reasonable doubts as to murderer's "guilt, or of the grade of his offense, should be resolved in his favor"].) This was so even when the true

issue was not guilt, but a moral assessment of proper punishment. (See *People v. Dixon* (1979) 24 Cal.3d 43, 51 [after murder was separated into degrees, cases regularly arose in which the jury failed to fix the degree of the crime "in circumstances indicating that an act of leniency was intended"].) The early cases all indicated that degree of murder (an issue of moral culpability) was clearly a question for the jury and could not be determined from a general verdict of guilt by the court. (*People v. Marquis* (1860) 15 Cal. 38, 38 ["the Court, in a capital case, cannot assume that [the jury] designed, from a general finding, to fix the grade of the crime"]; *People v. Campbell* (1870) 40 Cal. 129, 131 ["the Trial Jury is the only power authorized by law, in this State, to designate the degree of murder of which they may find the person guilty"].)

The separation of murder into degrees carried over into the original Penal Code of 1872, but two years later section 190 was "amended to provide an alternative penalty of life imprisonment 'at the discretion of the jury.'" (*People v. Ray* (1996) 13 Cal.4th 313, 363; Cal. Code Amends. 1873–1874, ch. 508, § 1, p. 457.) This Court, though not using the term "reasonable doubt," soon underscored that under this new statute the jury's sentencing

discretion required a high degree of certainty that death was appropriate based upon the heinousness of the crime. In one of the earliest decisions interpreting the 1874 statute, the Court wrote that "[i]n determining between these penalties juries should be, and doubtless are, influenced by a consideration of the degree of atrocity with which the particular murder has been attended." (*People v. Atherton* (1876) 51 Cal. 495, 496.) However, the Court cautioned, the "purpose of the statute" was not that "the extreme penalty should absolutely be imposed in all cases of murder, even in the first degree, but only in certain cases . . . [where] attendant circumstances, *demand* the imposition of such a penalty." (*Id.* at pp. 496–497, italics added.) Thus, it was critical "not only that the jury should be correctly instructed upon the points of law involved in the solution of the principal question of the guilt or innocence of the prisoner, but that they should not be misdirected upon propositions going to make up their determination as to the character of the penalty to be inflicted upon a conviction of that offense." (*Id.* at p. 497.) Since the judge's instructions in the *Atherton* case invaded the jury's determination of the issue of the defendant's *culpability* (by suggesting that "1. That deceased was, in point of fact, not

armed" and "2. That the prisoner knew this as a fact"), the entire verdict was reversed. (*Id.* at pp. 498–499.)

2. This Court Erroneously, but Temporarily, Clouded the Application of the Jury Protection of Unanimity to the Penalty Decision

In a decision issued the same year the 1874 murder statute was adopted, this Court made a grievous error in suggesting that the safeguard of unanimity did not apply to the jury's discretionary penalty decision. (*People v. Welch* (1874) 49 Cal. 174 (*Welch*).) As discussed below, neither the *Welch* holding, nor its broad dicta abridging the right of unanimity, withstood future judicial scrutiny: 1) its holding was repeatedly criticized by this Court; 2) it contradicted the reasoning of the United States Supreme Court in *Winston v. United States*, *supra*, 172 U.S. 303; 3) its illogical premise was implicitly repudiated by the drafter's of the 1879 jury right; 4) it was effectively disapproved in part by *People v. Hall* (1926), 199 Cal. 451, 456–458 (*Hall*); and 4) any vestige of the *Welch* opinion was eradicated in *People v. Green* (1956) 47 Cal.2d 209, 229 (*Green*), which explicitly overruled *Welch*.

It is difficult to understate the incorrectness of the *Welch* opinion, but Justice Schauer, the author of *Green*, 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." (*People v. Williams* (1948) 32 Cal.2d 78, 99 (*Williams*) (dis. opn. of Schauer, J.) The errors in *Welch* decision, though later corrected, and ultimately completely repudiated, cast a long a shadow on the application of the jury rights to California's capital trials. But the strong disavowal of the *Welch* opinion itself offers significant evidence supporting the application to jury rights to the penalty component of a capital trial.

The basic issue in *Welch* was what to do when the jury verdict encompassed first-degree murder but failed to specify the appropriate punishment. (*Welch*, *supra*, 49 Cal. at p. 178.) The opinion first noted out-of-state authority for the proposition that when a statute "imposed on the jury of fixing the [punishment], and the verdict did not ascertain [the punishment], it should be set aside." (*Id.* at p. 179.) However, it distinguished this rule, reasoning that the statute should instead be construed to mean a life sentence was proper "only where the jury is satisfied that the

lighter penalty should be imposed." (*Id.* at p. 180.) The court observed that the 1851 grand larceny statute had been given the exact opposite construction. (*Ibid.* [reciting *Littlefield*'s holding that in the case of juror disagreement on penalty, a general verdict without a death penalty recommendation should issue].) However, it argued that "in view of the former punishment for the crime of murder of the first degree, and the history of legislation on the subject" a contrary interpretation of the murder statute was required. (*Id.* at p 180. [the statute "should be construed as if it read: 'Shall suffer death, or (in the discretion of the jury) imprisonment in the State prison for life.'"].)

Construing the Legislature's history of *restricting* the use of the death penalty as necessitating a *broader* application of the death penalty for ambiguous verdicts (thus permitting judicial imposition of a death verdict even when the jury was silent on the issue), was only one problematic feature of the *Welch* analysis. In a portion of the opinion denying a petition for rehearing, the Court went even further, suggesting in dicta that even when there was *affirmative* evidence of juror disagreement (as oppose to mere silence) a death verdict must be imposed. (*People v. Welch*, *supra*, 49 Cal. at p. 185, ["If a jury shall agree

that a defendant is guilty of murder of the first degree, *but cannot agree that the punishment shall be imprisonment for life*, or shall not declare that the punishment shall be such imprisonment, *it will be the duty of the Court to pronounce judgment of death*"], italics added.) In other words, the *Welch* opinion not only denied defendants the protection of unanimity in the jury verdict, it inverted it. Unanimity, which under *Littleton* and the common law had shielded defendants from capital punishment, now served as a sword for the State: absent a unanimous recommendation of mercy, defendants would be sentenced to death.

This transposed application of unanimity violated, at least in spirit, the intent of the drafter's of the modern jury right. At the 1879 Constitutional Convention, when a proposal was put forward to limit unanimity to felonies, it was "strongly denounced." (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1243.) More pertinently, again and again throughout debates on proposals to limit the jury right, the delegates rose to state that the right of unanimity was meant to *protect* criminal defendants, particularly when life was at stake. (See 1 Debates and Proceedings the Constitutional Convention of the State of

California (1879) 255 (Debates) (Statement of Mr. Laine) [proposal which would allow jury number to be reduced by Legislature threatened to "destroy the right of trial by jury altogether"]; *ibid.* (Statement of Mr. McFarland) ["I do not believe that any one man, be it judge or jury, should have the right to pass upon the life . . . of any citizen"]; *id.* at 256 (Statement of Mr. Barnes) ["If a man is to be hung by a jury, he should be hung by the whole jury, and not by any part of a jury, and he should not be hung in any other manner"]; *id.* at 294 (Statement of Mr. Hale) [the delegates did not support "a less number than all members of a jury to render a verdict in all [criminal] cases whatever"]; *id.* at p. 295 (statement of Mr. Barnes) ["the infallibility of the verdict of a jury rests on it being unanimous"]; *id.* at p. 296 (Statement of Mr. Barry ["I believe in throwing all the safeguards that can be thrown in cases involving life and liberty[,]" "a capital conviction [being] the most serious[,]" and though all were familiar with unfairly hung juries in capital cases, he would not support a less-than-unanimous verdict in "a capital case—a case involving imprisonment for life, or death"]; 3 Debates, *supra*, at p. 1174 (Statement of Mr. Andrews) ["If there is anything more dear to the American heart than another, it is that a man shall not be

deprived of life . . . without the unanimous verdict of twelve good men"].)

Over the years, the reasoning in *Welch* became the subject of disapproval and judicial criticism by this Court and, implicitly, the high court. (See *People v. Bawden* (1891) 90 Cal. 195, 197–198 (*Bawden*) [if issue were of first impression, there would exist "strong reasons" to revisit instructions based on *Welch* as the invading the jury's province, and discouraging future instructions]; *Winston*, *supra*, 172 U.S. at p. 313 [relying on *Bawden* to reject similar instruction under federal law because it amounted to judicial interference in the question of punishment which was a question for the "jury, and [] the jury alone"]; *People v. Bollinger* (1925) 196 Cal. 191, 208 (*Bollinger*) [instructions based on *Welch* were "opposed" to the Penal Code, but declining to find error in the instruction]; *People v. Kolez* (1944) 23 Cal.2d 670, 674 (*Kolez*) (conc. opn. of Traynor, J.) [collecting numerous California cases and noting that "[f]or over fifty years precedents have accumulated condemning such instructions"].)

The year after *Bollinger* was decided, this Court corrected the most egregious error of *Welch*—its dicta suggesting that the right of unanimity did not apply to the penalty determination.

(*People v. Hall*, *supra*, 199 Cal. at p. 456 [the verdict on penalty "must be the result of the unanimous agreement of the jurors"].) In *Hall*, there was affirmative evidence of jury disagreement on penalty in the verdict itself. (*Id.* at p. 453.) The Court found it patently incorrect to conclude that "when the jury found the defendant guilty of murder in the first degree, but disagreed as to the penalty, it thereby fixed the death penalty." (*Id.* at p. 457.) Because absent unanimity there was no penalty determination on the issue, *ibid.*, judicial imposition of a death sentence was "in effect, the denial of a trial by jury." (*Id.* at p. 458.) In a narrow construction of *Welch* and the decisions following it, the *Hall* Court found that the silence of the jury on the issue of penalty in those cases was sufficient for unanimity only because *other* instructions clearly indicated what the result of a silent verdict would have been. (*Id.* at p. 455–456, citing *Bollinger*, *supra*, 196 Cal. at p. 205.) Thus, for almost 100 years, it has been the uncontested law of this state that the jury right of unanimity applies to the jury's determination of sentence.

However, trial courts persisted in giving the *Welch*-based instructions warned against in *Bawden* and *Bollinger*—instructions which stated that the jury could not find for life

unless it agreed upon some mitigating circumstance. Beginning with Justice Traynor's concurrence in *Kolez*, members of the Court began to strongly question the vitality of any remnants of the *Welch* decision. (*Kolez, supra*, 23 Cal.2d at pp. 673–676 (conc. opn of Traynor, J.) In *Williams*, Justice Schauer, joined by Justices Traynor and Carter, provided a detailed explication of why the *Welch* opinion was wrong from the day it was decided. (*Williams*, 32 Cal.2d at pp. 90–104 (dis. opn. of Schauer, J.).)

The *Williams* dissent, thereafter adopted by the majority opinion in *Green* several years later, provides clear guidance on the scope of the jury right and its application to the jury's decision on penalty. Explicitly referring to the state constitutional right to a jury trial and the section 1042 of the Penal Code (designating "issues of fact" to the jury), Justice Schauer explained that these provisions and the capital murder statute "give to a defendant charged with murder *the right*, where he does not waive a jury trial, *to have the jury determine* not only the question of his guilt or innocence and the question of the class and degree of the offense, but also, if the offense be murder of the first degree, *the penalty to be imposed*." (*Williams*, *supra*, 32 Cal.2d at p. 102 (dis. opn. of Schauer, J.), italics added.)

In other words, the suggestion in *Spaziano* that the Sixth Amendment did not apply to a penalty phase because there was no right to jury sentencing, *Spaziano*, *supra*, 468 U.S. at p. 459, was disputed in light of the Legislature's decision to create a jury trial on the issue of penalty.[6] (*Williams*, *supra*, 32 Cal.2d at p. 99 (dis. opn. Schauer, J.) ["The responsibility for making the selection of punishments is placed squarely on the jury by the legislature and the courts should leave it there."].)

Green, which overruled *Welch* in its entirety, elaborated on why the jury right applied to the penalty phase determination. Citing *Hall*, *supra*, 199 Cal. at p. 455, Justice Schauer underscored the distinction between law and fact that had always undergirded the jury right. (*Green, supra*, 47 Cal.2d at p. 224 ["it is for *jury*—not the law—to fix the penalty"], italics in original.) And citing *Andres*, *supra*, 333 U.S. at p. 748, the Court reiterated its language that jury protections extended "to all issues—character or degree of the crime, guilt *and punishment*—which are left to the jury." (*Green, supra*, 47 Cal.2d at p. 220, italics added.) The following year, when California became the first

[6] This legislative directive also distinguishes the recent contrary interpretation of the scope of the federal jury rights. (See *McKinney v. Arizona* (2020) 140 S. Ct. 702, 707.)

state to formalize the distinction between guilt and penalty in bifurcated capital trials, it codified that the penalty issue was an "issue of fact" for the jury as discussed in *Green* and *Williams*. (*See* Stats. 1957, ch. 1968, § 2, p. 3510 ["determination of the penalty . . . shall be in the discretion of the . . . jury trying the issue of fact on the evidence presented"].)

3. In the Shadow of the Erroneous Welch Decision, this Court Clouded the Application of Reasonable Doubt to the Penalty Determination, then Admitted Error, but Failed to Explicitly Overrule Past Precedent

As noted above, some of the earliest decisions interpreting discretionary jury sentencing this Court emphasized the high degree of certainty required for a death verdict. (*People v. Atherton*, *supra*, 51 Cal. at p. 496–497 [death penalty should be imposed "only in certain cases . . . [where] attendant circumstances, *demand* the imposition of such a penalty"], italics added.) And many early trial courts gave instructions suggesting that the reasonable doubt burden applied to all matters in the jury's purview. (*People v. Eubanks* (1890) 86 Cal. 295, 297 [jury was correctly and "clearly told in the charge that as to *all* . . . *matters*" excluding affirmative defense of insanity, "they must

give [the defendant] the benefit of every reasonable doubt"][7]; *People v. Pico* (1882) 62 Cal. 50, 54 [similar].)

However, in *People v. Ross* (1901) 134 Cal. 256, this Court for the first time rejected the propriety of an instruction that reasonable doubts as to penalty should be resolved in a defendant's favor. (*Id.* at p. 258–259.) The Court's reasoning was that a reasonable doubt instruction as to penalty would constitute an improper attempt by "the court to . . . control [the jury's] exercise of this discretion, by presenting to them reasons for exercising it in one mode rather than in another." (*Ibid.*) *Ross*'s reasoning makes little sense—the burden of reasonable doubt has never been considered a judicial encroachment into the jury's domain. (*Cf. Haymond*, *supra*, 139 S.Ct. at p. 2378 [jury rights protected defendants and were intended to "limit the judge's power to punish"].) But *Ross*'s holding flows from the

[7] The *Eubanks* court explained that "all [] matters" to which the reasonable doubt instruction had applied included the defendant's "peculiar defenses, as above indicated." (*Ibid.*) These "peculiar defenses" encompassed a purely penalty-based argument, independent of guilt or elements thereof. (*See id.* at p. 296 [defense was that defendant's "impaired mentality" which he "inherited from an insane mother," combined with "long and continuous use of alcoholic liquors" resulted in a "mental condition . . . such [that] . . . he should not be adjudged guilty of murder in the first degree, *or, at least, he should not be subjected to the death penalty*"], italics added.)

then-prevailing (and erroneous) dicta from *Welch*, which had suggested that unanimity required the entire jury to agree on the existence of mitigating circumstances prior to offering a life sentence. (*Welch*, *supra*, 49 Cal. at pp. 179, 185.) If reasonable doubt was applied to the penalty phase prior to correction of the error in *Welch*, it could, like unanimity, be weaponized against the defendant: requiring the jury to unanimously agree, *beyond a reasonable doubt*, on a life sentence. (See *ibid.*)

Like the *Welch* decision before it, the idea set forth in *Ross* that reasonable doubt could not apply to the penalty phase decision was in considerable tension with the principles of those who drafted the jury right. (See 1 Debates, *supra*, at p. 300 (statement of Mr. Wilson) ["*Everything leans to the side of mercy in our system*. Give the accused the benefit of *every doubt*; and if there is any rational doubt upon the mind of any one of the twelve jurors, the Court instructs him to give the benefit of that doubt to the prisoner"], italics added.) Also like *Welch*, the rule of *Ross* was soon confirmed by this Court as incorrect.

Thus, in *People v. Perry* (1925) 195 Cal. 623 (*Perry*), the Court approved instructing that "'[i]f the jury should be in doubt as to the proper penalty to inflict the jury should resolve that

doubt in favor of the defendant and fix the lesser penalty, that is, confinement in the state prison for life.'" (*Id.* at p. 640; see also *People v. Coleman* (1942) 20 Cal.2d 399, 406 [it was "held" in *Perry* that "if any doubt be engendered as to the punishment to be imposed, the jury should not impose the extreme penalty"].) And in *People v. Cancino* (1937) 10 Cal.2d 223, this Court similarly approved an instruction "that if [the jurors] entertain a reasonable doubt as to which one of two or more punishments should be imposed, it is their duty to impose the lesser." (*Id.* at p. 230.) The Court stated that "[t]his rule should prevail in every case where the punishment is divided into degrees and the jury is given discretion as to the punishment." (*Ibid.*; see also *People v. Friend* (1957) 47 Cal.2d 749, 756 [condemning "any suggestion" that the punishment "favored by law is death"].) The rule of *Perry* and *Cancino*, that any doubts as to penalty should be resolved in favor of the defendant, was in harmony with the principles embraced by the drafter's of the jury right that "[e]verything leans to the side of mercy in our system." (1 Debates, *supra*, at p. 300 (statement of Mr. Wilson).)

In sum, this Court's modern insistence that that reasonable doubt not is not "susceptible to a burden-of-proof quantification,"

see, *e.g.*, *People v. Hawthorne* (1992) 4 Cal.4th 43, 79, overlooks historical evidence. Juries stretching back to the earliest discretionary capital murder trials had been instructed that reasonable doubt applied to "all matters" in the jury's domain and cases stretching back almost 100 years attached the protection of reasonable doubt to the issue of punishment.

Ross and its progeny were later followed without mention of the contrary rule. (*People v. Purvis* (1961) 56 Cal.2d 93, 96.) But these holdings decoupled the protection of unanimity (which still applies to the penalty determination) from reasonable doubt. A cleaving of these rights runs counter to the intent of the drafters of the jury right. (3 Debates, *supra*, p. 1175 (statement of Mr. Reddy) [because unanimity and reasonable doubt were related protections, eliminating unanimity in criminal cases would require lowering burden of proof].) And it is impossible that only one right should apply based on the idea that the jury right has *no* application to the penalty phase. (*People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 147.)

III. This Court Should Restore Jury Protections to Their Historical Role.

As Justice Traynor eloquently put it, "[n]othing is gained and much is lost by insisting upon a mechanical adherence to precedent that perpetuates an admittedly erroneous interpretation[.]" (*Kolez*, 23 Cal.2d at p. 676 (conc. opn. of Traynor, J.). As the United States Supreme Court recently observed about the Sixth Amendment's unanimity guarantee, "Wherever we might look to determine [the meaning of the jury right at the time of its adoption]—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict." (*Ramos v. Louisiana* (2020) 140 S.Ct. 1390, 1395.) This Court's modern precedents—precedents that deny to capital defendants the very jury rights that were always aimed foremost at safeguarding the lives of capital defendants—rest on a basic concept that this Court has recognized is incorrect: that the jury right and its protections have no application to the penalty phase trial.

The Court's extant jurisprudence was taken off course by a single erroneous decision, *Welch*, a decision that has been sharply

criticized and ultimately overruled. However, the profound, life and death, implications flowing from it remain. As McDaniel's brief makes clear, this Court's modern jurisprudence rests on distinctions wholly at odds with the original purposes for and practices enforcing the jury right. This Court should reverse the decision below and restore the full protections envisioned by the jury right.

CONCLUSION

For the foregoing reasons, this Court should find for Mr. McDaniel and reverse the trial court judgment.

DATED: October 13, 2020

Respectfully submitted,

By: /s/John Mills
JOHN MILLS
Attorney for Amici

CERTIFICATE OF COMPLIANCE

I certify under Rule of Court 8.520(c) that the text in the attached Brief of Amicus Curiae contains 8,734 words, including footnotes, but not including the caption, table of contents, table of authorities, application, signature blocks, and this certification, as calculated by Microsoft Word.

DATED: October 13, 2020

By: John Mills
JOHN MILLS
Attorney for *Amici*

DECLARATION OF SERVICE

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

I, John Mills, declare that I am over 18 years of age, and not a party to the within case; that my business address is 1721 Broadway, Suite 201; Oakland, California 94612. I served a true copy of the attached:

BRIEF OF AMICI CURIAE

on each of the following, by placing same in an envelope with postage prepaid. The envelopes were addressed and mailed on October 13, 2020 as follows:

Hon. Robert J. Perry
Los Angeles County Superior Court
Clara Shortridge Foltz Criminal Justice Center
Department 104
210 West Temple Street
Los Angeles, CA 90012

The remainder of the parties were served via TrueFiling on October 13, 2020.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **October 13, 2020** at Berkeley, California.

/s/John Mills
John Mills