No. S171393

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DONTE LAMONT MCDANIEL, Defendant and Appellant.	Los Angeles Superior Ct. No. TA074274

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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

HONORABLE ROBERT J. PERRY, JUDGE

MARY K. McCOMB
State Public Defender

*ELIAS BATCHELDER
Deputy State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94607
Telephone: (510) 267-3300
Facsimile: (510) 452-8712
batchelder@ospd.ca.gov

Attorneys for Appellant

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XI.

FAILURE TO REQUIRE JURY DETERMINATIONS AT THE PENALTY PHASE OF ISSUES OF FACT UNANIMOUSLY AND BEYOND A REASONABLE DOUBT VIOLATES THE SIXTH AMENDMENT

Appellant argued in his opening brief that Penal Code[1] section 1042 and Article I, section 16 of the California Constitution require that all "issues of fact" be tried by a jury, in accordance with the common law protection of unanimity and proof beyond a reasonable doubt (hereinafter "jury protections" or "jury right protections") (AOB at 196-224.) Appellant argued that the ultimate determination of penalty and the existence of aggravating factors are indeed "issues of fact" as properly understood under state law. (See generally AOB at 203-210.) As a consequence, appellant argued that 1) unanimity is required as to aggravating factors and 2) proof beyond a reasonable doubt is required as to the ultimate penalty determination, and this Court should revisit its decisions to the contrary. (AOB at 211-223.)

In this supplemental brief, appellant makes a similar argument under the Sixth Amendment. In short, if appellant is correct – that California law designates the critical penalty phase determinations (i.e., the ultimate decision of penalty and existence of aggravating factors) as "issues of fact" under state law – this triggers application of the Sixth Amendment's jury protections. In fact, the United States Supreme Court has directly stated that the Sixth Amendment jury protections apply to "issues" including

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[1]All statutory references are to the Penal Code unless otherwise indicated.

"punishment" that are left to juries at a capital trial. (*Andres v. U.S.* (1948) 333 U.S. 740, 747 (*Andres*).)

Hildwin v. Florida (1989) 490 U.S. 638 (*Hildwin*), and *Spaziano v. Florida* (1984) 468 U.S. 447 (*Spaziano*) – the United States Supreme Court cases upon which this Court has repeatedly rested its rule that the Sixth Amendment jury right protections do not apply to the capital penalty phase, see, e.g., *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147, *People v. Lewis* (2008) 43 Cal.4th 415, 521, have been overruled. (*Hurst v. Florida* (2016) ___ U.S. ___; 136 S.Ct. 616, 624 (*Hurst*) ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*"].) It is therefore an appropriate time for this Court to reconsider its prior holdings regarding the application of the Sixth Amendment to the penalty phase of a capital trial.

A. Issues Of Fact Undergird The Scope Of The Sixth Amendment Jury Protections

No maxim of the old law "has been more carefully preserved in its integrity under our system" than that of "*[a]d qu[a]estionem juris respondent judices, ad qu[a]estionem facti respondent juratores."*[2] (*People*

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[2]Judges answer to a question of law, jurors to a question of fact. (1 Burrill, A New Law Dictionary and Glossary (1850) p. 35; see also 1 Coke, Institutes 155b (1628); Wynne, Eunomus, or Dialogues Concerning The Law And Constitution Of England (1768) § 53, p. 207 ("[T]he Province of Judge and Jury [are] distinct, the facts are left altogether to the jury, and the law does not control the fact, but arises from it"); *Ex parte U. S.* (7th Cir. 1939) 101 F.2d 870, 874) ["Th[is] guiding principle was later enshrined in our American Constitution"], citing U.S. Const. Art. III, § 2; U.S. Const. 6th Amend; *Johnson v. Louisiana* (1972) 406 U.S. 366, 371 (conc. opn. of Powell, J.) [noting that the "historical approach to the Sixth Amendment" had long ago led the Supreme Court to decide that the jury has the power to decide only "questions of fact"]; see generally *Sparf v. U.S.* (1895) 156 U.S. 51 (*Sparf*).)

v. Durrant (1897) 116 Cal. 179, 200.) *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and its progeny rest on the Sixth Amendment right, in all criminal cases, to a "trial, by an impartial jury." (U.S. Const. 6th Amend.) In turn, the essential feature of the right to a "trial[] by . . . jury" which underlies *Apprendi*, and which had been recognized for hundreds of years, was the understanding that the jury decides all "issues of fact." (See, e.g., Thayer, *A Preliminary Treatise On Evidence At The Common Law* (1898) 183-189 ("Treatise On Evidence At The Common Law"); see also *ante*, p. 3, fn. 2.)

Critically, at common law, "issues of fact" *did not simply mean factual issues*, it was merely a shorthand to reference "questions raised by the pleadings," or "ultimate issues of fact." (Treatise On Evidence At The Common Law, *supra*, at p. 187; *In re Javier A.* (1984) 159 Cal.App.3d 913, 930, fn. 9 [earliest California cases guaranteed jury trial to "issue of fact [] made by the pleadings"]; *People v. Pantages* (1931) 212 Cal. 237, 267 ["issue of fact" arises "from an allegation of ultimate fact made by one of the parties which is denied by the other"]; 4 Blackstone's Commentaries 333; see AOB at 202.) The precise form or title of the accusatory pleading was not important: "whether preferred in the shape of indictment, information, or appeal" the key was that the "truth of every accusation" was subject to the "unanimous suffrage" of a jury. (4 Blackstone's Commentaries 343.)

Although the distinction between questions of fact and questions of law is occasionally blurry, in its most basic sense, "issues of fact" are defined by the trial itself, in turn guided by the Legislature's designation: "issues of fact, and only issues of fact, are to be tried by a jury. When they are so tried, the jury, and not the court, are to find the facts." Treatise On

Evidence At The Common Law, *supra,* at p. 189. In other words "[i]n the maxim, 'Ad quaestionem juris respondent judices, ad quaestionem facti respondent juratores,' the word 'quaestio' denotes an issue joined by the pleadings of the parties, or otherwise stated on the record, for decision by the appropriate tribunal. Issues of law, so joined or stated, are to be decided by the judge; issues of fact, by the jury." (*Sparf , supra*, 156 U.S. at p. 170 (dis. opn. of Gray, J.); see also Isaacs, *The Law and the Facts* (1922) 22 Colum. L. Rev. 1, 4 [criticizing the concept of an conclusive distinction between questions of law and fact and suggesting that "a great deal of confusion would be avoided if we frankly used some such expression as 'judicial questions' and 'jury questions'"].) The maxim therefore expresses the "general rule of proceeding on trials before a jury" where "it is the office of the judge to instruct the jury on points of law, and of the jury to decide on matters of fact." (1 Burrill, A New Law Dictionary and Glossary, *supra*, p. 36.) The Legislature's decision to create a penalty *trial* necessarily creates "issues of fact," for providing a verdict on issues of fact is what a jury determines in all trials. (See 3 Blackstone 330 ["Trial then is the examination of the matter of fact in issue; of which there are many different species, according to the difference of the subject, or thing to be tried"].)

Nor does the fact that the penalty phase trial answers "normative' issues alter the calculus. The central distinction at common law was not between "factual" and "non-factual" questions, but "jury questions" and "judicial questions." As between questions of fact and questions of law "[i]t is the *process* by which the result is attained which is or may be different, and *the tribunal through which such result is reached that differs*, rather than the result itself." (*Levins v. Rovegno* (1886) 71 Cal. 273, 276,

second italics added.) And it did not matter that the question involved some form of reasoning, inference, or personal judgment: jury questions ("issues of fact") are those issues which result in an answer (verdict) from the jury. (Thayer, *"Law and Fact" in Jury Trials* (1890) 4 Harv. L. Rev. 147, 150, citing *Littleton's Case*, 10 Coke 56b (1612); see also *Franzen v. Shenk* (1923) 192 Cal. 572, 589 [jury's province includes not merely to determine facts proven but "the justice of the inferences to be drawn from [] facts"].)

B. The Existence Of Aggravating Factors And The Ultimate Penalty Phase Determination Are Issues Of Fact

"The essence of trial by jury is that controverted facts shall be decided by a jury." (*People v. Hickman* (1928) 204 Cal. 470, 476.) This is precisely what occurs at the penalty phase proceeding, at least with respect to aggravating factors the truth of which is contested. For all its moral complexity, a large component of the California capital trial is nearly identical to a common law capital trial: did the defendant commit 1) the capital crime charged (factor (a)); 2) the unadjudicated crimes charged (factor (b)); 3) the adjudicated prior crimes (factor (c)); and, in light of these accusations and the mitigation case[3] 4) what is the ultimate verdict on the issue of penalty?

The existence of these aggravating factors, plead by the prosecution in its notice of aggravation, are those facts whose truth is "at issue." (*People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1236 ["despite the 'normative nature' of the penalty decision itself," the prosecution's

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[3]Obviously, the Sixth Amendment protects defendants rights and the jury protections therefore do not apply to or limit mitigation. (See *McKoy v. North Carolina* (1990) 494 U.S. 433, 435 [Eighth Amendment prohibits requiring unanimity as to mitigating factors].)

aggravating evidence may raise "disputed factual issues"]; see § 190.3 [requiring notice of aggravation]; 4 Blackstone's Commentaries 343 [precise form or title of accusatory pleading immaterial for purposes of the jury right].) And as this Court has repeatedly noted, the "ultimate issue" in a capital sentencing trial "is the appropriate penalty." (*People v. Anderson* (2001) 25 Cal.4th 543, 588; Treatise On Evidence At The Common Law, *supra*, at p. 187 ["issue of fact" includes "questions raised by the pleadings" and "ultimate issue" determined by a jury].)

That the California penalty phase proceeding is and has always been a trial, and not a mere sentencing hearing, is undebatable. The 1957 death penalty statute which first created the bifurcated proceeding specifically referred to the penalty phase as a "trial on the issue of penalty" (Former § 190.1, enacted by Stats.1957, ch. 1968, § 2, p. 3509) and this Court continues to refer to the penalty phase proceedings as a "trial." (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 113; *People v. Harris* (1989) 47 Cal.3d 1047, 1102 [ordering "new trial on the issue of penalty"]; *People v. Horning* (2004) 34 Cal.4th 871, 912 [discussing the necessity of a § 190.4, subd. (e), hearing when the defendant has waived his "jury trial on the issue of penalty"].) Indeed, as this Court has explained repeatedly, the guilt and penalty phases are just two "part[s] of a unitary trial." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365; *People v. Hamilton* (1988) 45 Cal.3d 351, 369 ["the penalty phase has no separate formal existence but is merely a stage in a unitary capital trial"].)

The understanding that the penalty phase is a trial stretches back to California's first unitary jury sentencing scheme adopted in the late 19th century. Most obviously, the jury's determination of penalty under this scheme was not separated from the capital "trial" on the issue of guilt. This

critically distinguishes early capital jury sentencing from traditional *non*-capital discretionary judicial sentencing proceedings, which had always been held (and continue to be held) before judges at hearings, not in trials before juries. (Cf. *People v. Wiley* (1995) 9 Cal.4th 580, 586 [prior conviction allegations that relate to sentencing unprotected by state jury right because "[f]rom the earliest days of statehood, trial courts in California have made factual determinations relating to the nature of the crime and the defendant's background in arriving at discretionary decisions in the sentencing process"].) The current penalty phase does *not* derive from such discretionary sentencing hearings; it is instead merely an outgrowth of the 19th century capital trial. (See *People v. Hall* (1926) 199 Cal. 451, 456 [the guilt and penalty determinations are "two necessary constituent elements" of the unitary capital trial verdict and must both be found unanimously].)

Although the penalty determination under the original California jury sentencing scheme was normally combined with the trial on the issue of guilt, California courts under the unitary jury sentencing scheme adopted in the late 19th century sometimes had occasion to order a proceeding only on the issue of punishment; namely, when there was a reversal and remand based on an error that effected only penalty. In such a case, this Court made abundantly clear that it regarded the sentencing component of a capital proceeding as a "trial on the issue of penalty." (*People v. Green* (1956) 47 Cal.2d 209, 212.) In other words, "[w]here the matter is to be determined by a jury, . . . the proceeding should be 'a trial in the full technical sense, and . . . governed by the same . . . rules of procedure' as the trial of the issue of guilt." (*Id.* at p. 236.) Of course, the most fundamental procedure of any

trial is "submission of issues of fact to a jury." (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 296; see also § 1042.)

In keeping with this concept, when "[i]n 1957 the Legislature replaced th[e] unitary proceeding with a bifurcated system" (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 9, fn. 9), it specifically noted that the "determination of the penalty" was an "issue of fact on the evidence presented." (Former § 190.1, enacted by Stats.1957, ch. 1968, § 2, p. 3509.) And while the current statute does not adopt this precise phrase – instead describing the jury as the "trier of fact"– that the jury is to decide "issues of fact" is nonetheless clear. (See Black's Law Dictionary (10th ed. 2014) p. 711 [defining "fact-finder" as "[o]ne or more persons who hear testimony and review evidence to rule on a *factual issue*"], italics added; see also *id*. at p. 959 [defining "issue of fact" as "[a] point supported by one party's evidence and controverted by another's"].)

The current statute requires in the case of a jury trial at penalty a "verdict as to what the penalty shall be." (§ 190.4, subd. (b); see also subd. (d) [describing jury sentence as "verdict"].) A "verdict," in turn, has long been understood as the jury's resolution of the "issue of fact" before it. (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 514 ["a verdict represents the definite and final expression of the jury's intent with respect to the disposition of the factual issues presented by a particular case"]; Black's Law Dictionary (10th ed. 2014) [verdict is a "jury's finding or decision on the factual issues of a case"] p. 1791; 2 Burrill, A New Law Dictionary and Glossary, *supra*, at p. 1032 [*verdit*, or verdict, is "a declaration by a jury of the truth of a matter in issue, submitted to them for trial"].)

Like any common law trial, the statute requires a unanimous verdict. (§ 190.4, subd. (b); *People v. Hall, supra*, 199 Cal. at pp. 456-458

[unanimous verdict on penalty required under state Constitution].) And the aggravating factors plead must be found beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 54 [factor (b) determination found beyond a reasonable doubt]; *People v. Williams* (2010) 49 Cal.4th 405, 459 [factor (c) found beyond a reasonable doubt]; *People v. Prieto* (2003) 30 Cal.4th 226, 256 [main component of factor (a), the existence of special circumstance murder, must be found beyond reasonable doubt].)

In sum, under California law, the penalty phase involves the resolution of 1) issues of fact 2) by a jury 3) at a trial. Which is precisely why Justice Schauer stated that section 1042 and Article I, section 16 gives a defendant charged with murder "the right, . . . *to have the jury determine* not only the question of his guilt . . . but also, if the offense be murder of the first degree, *the penalty to be imposed*." (*People v. Williams* (1948) 32 Cal.2d 78, 102, (dis. opn. of Justice Schauer).)[4] The question then, is whether the mere fact that the penalty phase proceeding involves a determination of sentence – a task traditionally assigned to judges in many non-capital proceedings – defeats the application of the Sixth Amendment. Because the penalty phase proceeding is in fact a "trial" under California

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[4]In the opening brief, appellant mistakenly attributed Justice Schauer's dissenting statements on this issue as the holding of the Court in *Williams*. (See AOB at 204-205, 218.) However, although the citation was erroneous, the point remains valid. Justice Schauer later wrote the opinion in *People v. Green* (1956) 47 Cal.2d 209 (*Green*), disapproved on another ground in *People v. Morse* (1964) 60 Cal.2d 631. *Green* overruled the majority in *Williams*. (See *People v. Green, supra*, 47 Cal.2d at p. 232.) More importantly, Justice Schauer's opinion in *People v. Green* adopted the reasoning of his dissent in *Williams* and relied extensively on the holding (enforcing some of the same principles as his dissent in *Green*) of *Andres v. United States*, *supra*, 333 U.S. 740, a case discussed in more detail below.

law, it triggers the jury protections for "trials" embodied by the Sixth Amendment. Although *Apprendi* and its progeny provide guidance on this issue, the most directly pertinent cases actually precede *Apprendi*, and more directly confront the importance of a legislative choice between trials and sentencing hearings.

C. *Andres v. U.S.* (1948) 333 U.S. 740 Dictates The Effect Of A Legislative Choice To Assign Issues Of Fact To The Jury At A Trial On The Issue Of Penalty

Apprendi, and all of the cases in the *Apprendi* line, involve legislative determinations that *judges* were to answer certain factual questions relevant to sentencing. The most significant United States Supreme Court case to directly examine the Sixth Amendment consequence of the legislative decision to provide the *jury* the responsibility of determining the issue of punishment at a capital trial is *Andres v. U.S., supra*, 333 U.S. 740, 747 (*Andres*).

Andres dealt with a federal death penalty statute under a unitary regime, which provided the death penalty for certain murder offenses, but which Congress amended to allow the jury to "qualify their verdict by adding thereto 'without capital punishment.'" (*Andres, supra*, 333 U.S. at p. 747.) At issue was whether this statute required a unanimous jury determination in favor of death, and, if so, whether the instructions properly conveyed this requirement to the jury. (See *id.* at pp. 748-752.) With respect to the issue of whether the Sixth Amendment mandated the statute bestow the right to unanimity on the issue of penalty, the Court's analysis was straightforward and in harmony with the common law tradition that "issues" tried by the jury were protected:

> 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.*

(*Andres,* 333 U.S. at p. 748, italics added.)

The Court explained that this was true because a "verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it." (*Andres,* 333 U.S. at p. 748; see also *Stone v. Superior Court, supra*, 31 Cal.3d at 514 ["a verdict represents the definite and final expression of the jury's intent with respect to the disposition of the factual issues presented by a particular case"]; 2 Burrill, A New Law Dictionary and Glossary, *supra,* at p. 1032 [verdict is "a declaration by a jury of the truth of a matter in issue"].) In other words, under *Andres*, if the legislature assigns the jury the task of rendering its verdict on an issue of fact at a trial, *even on the issue of penalty*, Sixth Amendment protection applies.[5]

The next United States Supreme Court decision touching on the significance of the existence of a jury trial on the issue of penalty was

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[5]Nor was *Andres* alone in the determination that the jury right protections applied to capital proceedings on the issue of punishment. As mentioned in appellant's opening brief (AOB 206-208) California has long applied the jury protection of unanimity to the punishment determination under the state Constitution. (*People v. Green* (1956) 47 Cal.2d 209, 221, 224-226 [approving *Andres* and reaffirming decision of *People v. Hall* (1926) 199 Cal. 451, 456-458 that unanimity right extends to penalty under California Constitution].) And other courts applied similar reasoning. (See, e.g., *Smith v. U.S.* (9th Cir. 1931) 47 F.2d 518, 520 ["Unanimity in a verdict, unless otherwise provided by statute, is one of the incidents and essentials of a jury trial. In a criminal case, this unanimity extends to. . . the kind or character of punishment, where that question is left to the determination of the jury"].)

Bullington v. Missouri (1981) 451 U.S. 430 (*Bullington*), a double jeopardy case.[6] The court in *Bullington* recognized the existence of a traditional trial-sentencing distinction with respect to the double jeopardy protections. But the court explained that a capital sentencing *trial* "differs significantly" from traditional judicial sentencing hearings, honing in on the marked similarities between a capital penalty phase and a common law trial. (See *id*. at p. 438 [noting absence of unbounded jury discretion, binary choice between two alternatives, and proof beyond reasonable doubt standard of proof, and concluding the penalty phase "resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence"].) The *Bullington* Court specifically noted that the penalty phase was "itself a trial on the issue of punishment so precisely defined by the Missouri statutes." (*Ibid*; see also *id*. at p. 438, fn. 10 [finding it not "without significance" that state law referred to the penalty hearing as a "trial"].)

D. The United States Supreme Court Takes A Wrong Turn: The Expansive Dicta Of *Spaziano* Undermines The Historical Understanding Of The Jury Right As Applying To Trials On Issues Of Fact, Including Punishment

Despite the clear focus of *Andres* and *Bullington* on issues of fact designated by the Legislature for trial by jury – even on the issue of

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[6]Although *Bullington* involved double jeopardy, and not the Sixth Amendment, "the high court has indicated that the principles underlying the double jeopardy clause on the one hand, and the reasonable doubt burden of proof and right to jury trial on the other, are not wholly distinct." (*People v. Seel* (2004) 34 Cal.4th 535, 547, citing *Almendarez–Torres v. United States* (1998) 523 U.S. 224 247.) After all, like the Sixth Amendment, application of the double jeopardy clause hinges in part on whether a prior jury found "an issue of fact" or the "ultimate fact" in favor of the defendant. (*Bobby v. Bies* (2009) 556 U.S. 825, 834, 836.)

punishment – the United States Supreme Court cast unnecessary doubt on this precedent in a series of decisions beginning with *Spaziano, supra*, 468 U.S. 447 overruled by *Hurst v. Florida, supra*, ___ U.S. ___136 S.Ct. 616. The statements in *Spaziano,* discussed in more detail below, were repeated and cited by various other Supreme Court cases, several of which, like *Spaziano*, have now been overruled. (See, e.g., *Hildwin*, *supra*, 490 U.S. at p. 639, overruled by *Hurst v. Florida, supra*, ___ U.S. ___; 136 S.Ct. 616; *Walton v. Arizona* (1990) 497 U.S. 639, 647, overruled by *Ring v. Arizona* (2002) 536 U.S. 584.)

In *Spaziano*, the defendant challenged the Florida practice of judicial override of a jury penalty recommendation. (*Spaziano, supra,* 468 U.S. at p. 457.) Although the issue in *Spaziano* was thus narrowly framed, the court decided to issue several expansive statements regarding arguments that the appellant "did not urge" (*id*. at p. 458), namely whether "capital sentencing is so much like a trial on guilt or innocence that it is controlled by the Court's decision in *Duncan v. Louisiana*, 391 U.S. 145, [] (1968)." (*Spaziano, supra*, 468 U.S. at p. 458.)

Without the benefit of briefing on the topic, the Court distinguished *Bullington* and announced in dicta that "[t]he fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial." (*Spaziano, supra*, 468 U.S. at p. 459.) After noting the obvious difference that double jeopardy protects against "wear[ing] a defendant down" in retrials, the Court identified the "most important" reason to distinguish between the Sixth Amendment and Double Jeopardy in this respect:

> [A] capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual. [citations]. The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.

(*Spaziano, supra*, 468 U.S. at p. 459)

Notably absent from the freewheeling exposition in *Spaziano* was any mention of the Supreme Court's decision in *Andres, supra*, 333 U.S. at p. 747, which had specified that Sixth Amendment jury rights *do* apply when a jury was tasked with rendering a verdict after a trial including the issue of punishment. (See *Rauf v. State* (Del. 2016) 145 A.3d 430, 450 (conc. opn. of Shrine, J.) [finding the Sixth Amendment to apply to capital selection phase and criticizing the Sixth Amendment reasoning in *Spaziano* as "cursory"].) Given that the *Spaziano* Court was intending to distinguish application of *Duncan v. Louisiana* (1968) 391 U.S. 145, this oversight is telling. Justice Harlan's opinion in *Duncan* clearly referred to the *Andres* holding that "trial by jury [in that case, on the issue of punishment] has been held to require a unanimous verdict of jurors." (*Id.* at p. 182 & fn. 21 (dis. opn. of Harlan, J.); see also *Johnson v. Louisiana* (1972) 406 U.S. 380, 383 (dis. opn. of Douglas, J.) ["We held unanimously in 1948" in *Andres* that Sixth Amendment unanimity right "extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury"].)

The most likely explanation for failure to account for *Andres* was the fact that the entire discussion in *Spaziano* was *not* intended to apply to a jury "trial" on the "issue of punishment." The Florida law examined in *Spaziano* did not create such a proceeding: it created a "sentencing hearing" at which the "majority" of the jury merely provides a "sentencing

recommendation" which is "merely advisory." (*Spaziano, supra*, 468 U.S. at p. 451; *Hurst*, *supra*, 136 S.Ct. at p. 620 [Florida law creates an "evidentiary hearing" at which the jury renders an "advisory sentence"]; cf. *Parklane Hosiery Co. v. Shore*, (1979) 439 U.S. 322, 337, fn. 24 ["an advisory jury . . . would not in any event have been a Seventh Amendment jury"].)[7]

The cursory reasoning of the *Spaziano* majority, suggesting that a capital sentencing proceeding is never "like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial" is manifestly incorrect. Any historical analysis of the Sixth Amendment conclusively demonstrates that a jury trial was understood at the time of the founding to encompass jury determinations on "issues of fact." (See Mitchell, *Apprendi's Domain* (2006) 2006 Sup. Ct. Rev. 297, 302-303 [citing William Blackstone, Edward Coke, the Judiciary Act of 1789, and numerous early state criminal codes and cases all of which "described the criminal jury's role . . . to include all disputed questions of fact"].)

Perhaps more importantly, the reasoning of *Spaziano* has been repudiated by the United States Supreme Court. Beginning with *Apprendi*, the high court has again and again reasserted the historical understanding that the Sixth Amendment is indeed concerned with jury determinations of factual issues that affect punishment, in particular at capital sentencing proceedings. (*Ring v. Arizona*, *supra*, 536 U.S. 584; *Hurst v. Florida*

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[7]The scheme in Arizona, upheld in *Walton*, likewise did not create a jury trial on the issue of punishment. (*Walton v. Arizona* , *supra*, 497 U.S. at pp. 643, 651 [Arizona law creates a "separate sentencing hearing" which is "conducted before the court alone," and thus complaints about jury protections are " beside the point"].)

(2016) ___ U.S. ___, 136 S.Ct. 616; see also *Walton v. Arizona, supra*, 497 U.S. at p. 713 (dis. opn. of Stevens, J.) [decisions such as *Spaziano* had "encroached upon the factfinding function that has so long been entrusted to the jury"].)

E. Because The Doctrine Of 'In Favorem Vitae' Underlies Application Of Both Reasonable Doubt And Unanimity Requirements In The United States, These Protections Unquestionably Should Apply To A Capital Trial On The Issue Of Penalty

Assuming that appellant is correct in his argument that the California penalty phase is indeed a "trial[] by . . . jury" on issues of fact as understood under the Sixth Amendment, there is a final question which this Court must answer: do the jury right protections apply to all determinations of issues of fact? Given the history of the reasonable doubt and unanimity requirements and their longstanding application as a protection to defendants in capital trials, the answer should be yes.

It was an accepted tenet under English Common law at the time of the founding "that, in favorem vitae ('in favor of life'), indictments, statutes and procedural rules in capital cases had to be 'construed literally and strictly.'" Thurschwell, *Federal Courts, The Death Penalty, and the Due Process Clause* (2001) 14 Fed.Sent.R. 14, 17; Miller, *The System of Trial by Jury* (1887) 21 Am. L. Rev. 859, 866 ["The heaviness and severity of the penalty, . . . have infused into the spirit of the English law the general proposition that a defendant under such circumstances should be dealt with in such a manner as to secure all his rights and protect him from possible injustice"].) And history indicates that both the burden of proof beyond a reasonable doubt and the requirement of unanimity were, as a result of the doctrine of *in favorem vitae,* intended to safeguard capital defendants.

One of the earliest references to the reasonable doubt standard in American jurisprudence made the connection explicit, repeating the trial court's instruction that "where reasonable doubts exist, the jury, particularly in capital cases, should incline to acquit rather than condemn" and that "doubts should be determined in favor of life." (*State v. Wilson* (1793) 1 N.J.L. 439, 442; see also Jonakait, *Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development* (2012) 10 U. N.H. L. Rev. 97, 154, fn. 233 [*State v. Wilson* was the "third known use of the reasonable doubt [standard] by an American court"].) That reasonable doubt was understood as a protection "in favorem vitae" created at least some early debate as to whether the doctrine of reasonable doubt even applied outside the capital context. (See *State v. Turner* (Ohio 1831) Wright 20, 29 overruled by *Fuller v State* (1861) 12 Ohio St 433) [reasonable doubt rule adopted "in favor of *life*" and was inapplicable to non-capital charges]; *State v. Sears* (1867) 61 N.C. 146, 147 ["Whether the doctrine of reasonable doubt, as it is commonly called, applies to misdemeanors, or only to capital cases in favorem vitæ, seems not to be settled in this State. There are dicta on both sides of the question"]; see also Note, *Proof Beyond A Reasonable Doubt in Juvenile Proceedings* (1970) 84 Harv. L. Rev. 156, 157 [the rule was originally applied "only in capital cases"].) Clearly, the early debate was resolved in favor of extending the reasonable doubt protection to non-capital trials. But it would be incongruous for jury protections which originated out of unique concern for capital defendants to have no application to a jury trial on the issue of the death penalty. (*Cf.* Thurschwell, *supra*, at pp. 17-18 [tracing doctrine of "in favorem vitae" in the United States and illustrating how that doctrine served as a partial basis for the *Apprendi*-line]; see also 4 Blackstone 344

[encroachment on jury right threatened jury resolution of "questions of the most momentous concern," i.e. capital trials].)

Similarly, there is "strong reason" to believe that the common law requirement of unanimity also grew of out of the doctrine of *in favorem vitae*. (See A History of The English Judicature, in The Law Journal (1882), p. 537.); Hans and Vidmar, Judging the Jury (1986), pp. 171-772 [arguing that unanimity requirement may have derived from the harshness of common law penalties]; see also 4 Blackstone 306 ["no man can be convicted . . . of any capital offense" absent unanimity].) But whatever the precise origins of the unanimity requirement, the nation's founding fathers certainly believed that unanimity was "particularly" important in capital cases. (Jonakait, *supra*, at p. 122 [citing James Wilson in 1 McCloskey, The Works of James Wilson (1967) p. 503].) And nowhere did the early American courts express greater concern for unanimity than in capital cases. (See, e.g., *United States v. Perez* (1824) 22 U.S. 579, 580 (Story, J.) [stating regarding hung juries that "in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner"].)[8] Unsurprisingly, in light of this historical

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[8](See also *Atkins v. State* (1855) 16 Ark. 568, 578 [encouraging caution before discharge of hung juries and quoting Justice Story in *Perez*]; *Monroe v. State* (1848) 5 Ga. 85, 148 [reversing capital murder conviction due to sequestration arrangements that undermined unanimity and stating: "God forbid that the prisoner should be sent to pray of the mercy of the Executive, a reprieve for an offence of which he has not been legally convicted"]; *Nomaque v. People* (1825) 1 Ill. 145, 148-50 [similar concern about practice promoting non-unanimous verdict in capital case]; *Ned v. State* (Ala. 1838); 7 Port. 187, 216; *Commonwealth v. Roby* (1832) 29 Mass. 496, 519-20; *State v. Garrigues* (Super. L. & Eq. 1795) 2 N.C. 241, 241-42; *Commonwealth v. Cook* (Pa. 1822) 6 Serg. & Rawle 577, 585; *State* (continued...)

understanding, "[a]t no time before *Furman* was it the general practice in the United States for someone to be put to death without a unanimous jury verdict." (*Rauf v. State, supra*, 145 A.3d at p. 477; see also see also *Hurst v. State* (Fla. 2016) 202 So.3d 40, 57 [according state constitutional unanimity protection during penalty phase due to "a longstanding history requiring unanimous jury verdicts"].)

In light of the centuries long history of requiring unanimity in capital cases, the four-judge plurality in *Apodaca v. Oregon* (1972) 406 U.S. 404 (*Apodaca*) should not prevent this Court from recognizing a Sixth Amendment right of unanimity for a jury's determination of aggravating factors in California's death penalty scheme. Although *Apodaca* held that jury unanimity requirement was not incorporated against the states in non-capital criminal trials, the plurality specifically acknowledged it was not deciding a capital case. (406 U.S. at p. 406, fn.1 [quoting Oregon Constitution limiting non-unanimous juries to non-capital cases].) Further, the United States Supreme Court has since called Justice Powell's opinion in that case – with which no other justice concurred and which generated the crucial fifth vote – into question. (See *McDonald v. City of Chicago, Ill.* (2010) 561 U.S. 742, 766, fn.14 [identifying *Apodaca* as the sole exception in a long line of cases holding that incorporated Bill of Rights protections are to be enforced under the Fourteenth Amendment equally against the states and the federal government and noting the decision was "the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation"].)

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[8](...continued)
v. McLemore (S.C. L. & Eq. 1835) 20 S.C.L. 680, 683.)

And perhaps most importantly in light of *Hurst*, the *Apprendi* line of cases has repeatedly assumed the applicability of the unanimity rule to state criminal prosecutions. (See *Apprendi*, *supra*, 530 U.S. at p. 477 [noting requirement of facts "confirmed by the unanimous suffrage of twelve of [accused's] equals and neighbours" and quoting Blackstone]; *Blakely v. Washington* (2004) 542 U.S. 296, 303 [quoting *Apprendi* and Blackstone]; *S. Union Co. v. United States* (2012) __ U.S. __, 132 S. Ct. 2344, 2355 [same]; see also *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

As this Court has long recognized, "jury unanimity and the standard of proof beyond a reasonable doubt are slices of the same due process pie." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 231.) As the United States Supreme Court has recognized that unanimity applies to issues including punishment, *Andres,* 333 U.S. at p. 748, there is no basis in doctrine or history to apply the jury right protections, piecemeal, to the issues of fact addressed in a capital penalty phase trial.

F. This Court Should Reconsider It's Rejection Of The Jury Protections For Aggravating Factors And The Ultimate Issue Of Punishment In Light Of *Hurst*

"The force of stare decisis is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." (*Alleyne v. United States* (2013) __ U.S. __; 133 S.Ct. 2151, 2163, fn. 5 [overruling *Harris v. U.S.* (2002) 536 U.S. 545].) The Sixth Amendment's jury protections, hinging upon the basic right of a criminal defendant to have issues of fact found by a jury, are just such fundamental rights. (*Ibid*; *People v. Durrant*, *supra,* 116 Cal. at p. 200 [no rule of the old law "more carefully preserved in its integrity under our system" than the division between judge and jury on issues of fact].)

As detailed in appellant's opening brief, this Court's holdings that the jury protection rights do not extend to the penalty trial originate from uncritical acceptance of legal positions taken by capital defendants attacking the California death penalty. (AOB 211-217.) Because the current statute is silent on the application of reasonable doubt as to penalty and unanimity as to aggravating factors, these procedural protections can and should be read into the statute if constitutionally required. (See AOB 214 [early California decisions initially assuming the absence of these protections contained the "*specific caveat* that beyond a reasonable doubt and unanimity requirements could be read into the existing statute"], italics in original.)

More importantly, the foundation for the logic of this Court's precedent rejecting application of the Sixth Amendment has been "washed away" with the overruling of several opinions on which they rested. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1141 [overruling *Carlos v.*

Superior Court (1983) 35 Cal.3d 131 because "one of the bases of *Carlos* has proved to be unsound"].) *Spaziano*, *Hildwin,* and *Walton*, have all been overruled. What remains is controlling Supreme Court precedent which holds that the Sixth Amendment applies to issues of fact, including punishment, when left to a jury at trial. (*Andres, supra*, 333 U.S. at p. 747.) As a result, the jury protection of unanimity should have been applied (and the jury so instructed) to the jury's finding of the existence of aggravating factors. And the burden of proof beyond a reasonable doubt should have been applied (and the jury so instructed) to the ultimate issue of punishment. That did not occur below. For the reasons articulated in the opening brief, (AOB at 224-227) this requires reversal of appellant's sentence.

XII.

CALIFORNIA'S DEATH PENALTY STATUTE AND CALJIC INSTRUCTIONS, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATE THE UNITED STATES CONSTITUTION

In his opening brief, appellant challenged the California death penalty scheme on grounds that this Court has rejected in previous decisions holding that the California law does not violate the federal Constitution. (AOB 231-236.) Recently, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) ___ U.S. ___; 136 S.Ct. 616, 624 [hereafter "*Hurst*"].) *Hurst* provides new support to appellant's claims in

Arguments X.C.1 and X.C.3 of his opening brief. (AOB 231-233, 235-236.) In light of *Hurst*, this Court should reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14); does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106); and does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275).

A. Under *Hurst*, Each Fact Necessary To Impose A Death Sentence, Including The Determination That The Aggravating Circumstances Outweigh The Mitigating Circumstances, Must Be Found By A Jury Beyond A Reasonable Doubt

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589 [hereafter "*Ring*"]; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483 [hereafter "*Apprendi*"].) As the Court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at pp. 494, 482-483.) Applying this mandate, the high court invalidated Florida's

death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst*, *supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Hurst*, *supra*, at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Hurst*, *supra*, at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Ibid*.)[9]

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[9]The Court in *Hurst* explained:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla.Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there

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The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring*, *supra*, 536 U.S. at p. 597, fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, 536 U.S. at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) The Court

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[9](...continued)
are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

(*Hurst*, *supra*, 136 S.Ct. at p. 622.)

reiterated this fundamental principle throughout the opinion.[10] The Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

B. California's Death Penalty Statute Violates *Hurst* By Not Requiring That The Jury's Weighing Determination Be Found Beyond A Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings

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[10]See *id*. at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id*. at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id*. at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary for imposition of the death penalty*," italics added].

necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi*/*Ring*/*Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[11]

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[11]As *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst*, *supra*, 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings which actually authorize the imposition of the death penalty in the sentencing hearing, and not in the

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Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622 [in Florida the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but what is its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) So did Justice Scalia in *Ring*:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

(*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie*

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[11](...continued)
sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

(2012) 54 Cal.4th 1302, 1366.) At bottom, the *Ring* inquiry is one of function.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, § 190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5].) When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Penal Code section 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].) Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a

greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[12]

C. This Court's Interpretation Of The California Death Penalty Statute In *People v. Brown* Supports The Conclusion That The Jury's Weighing Determination Is A Factfinding Necessary To Impose A Sentence of Death

This Court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512 (revd. on other grounds *sub nom*. *California v. Brown* (1987) 479 U.S. 538) does not require a different conclusion. In *Brown*, the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*Id*. at pp. 538-539.) As the Court explained:

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors . . . Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

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[12]Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) ___ U.S. ___; 134 S.Ct. 405, 410-411. (dis. opn. from denial of certiorari, Sotomayor, J.).)

(*Id*. at p. 538.) The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role" (*id*. at p. 545, fn. 17) and construed this language to avoid violating the federal Constitution (*id*. at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

> [T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*People v. Brown*, *supra*, at p. 541, [hereafter "*Brown*"], footnotes omitted.)[13]

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[13]In *Boyde v. California* (1990) 494 U.S. 370, 377, the Supreme Court held that the mandatory "shall impose" language of the pre-*Brown* jury instruction implementing Penal Code section 190.3 did not violate the Eighth Amendment requirement of individualized sentencing in capital cases. Post-*Boyde*, California has continued to use *Brown*'s gloss on the

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Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].)

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown*, *supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language

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[13](...continued)
sentencing instruction.

limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweighs the mitigation. (*Brown*, *supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Brown*, *supra*, 40 Cal.3d at p. 540.)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, this Court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla. Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He *may* impose death if satisfied in writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." (*Id*., subd. (3).)

(*Brown*, *supra*, 40 Cal.3d at p. 542, italics added.) In *Brown*, the Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentencer finds the aggravating circumstances outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown*'s interpretation of section 190.3.[14] The requirement that the jury must find that the aggravating circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant

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[14]CALJIC No. 8.84.2 (4th ed. 1986 revision) provided:

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

From 1988 to the present, CALJIC No. 8.88, closely tracking the language of *Brown*, has provided in relevant part:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), make clear this two-step process for imposing a death sentence:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both* outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.) As discussed above, *Hurst*, *supra*, 136 S.Ct. at p. 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

D. This Court Should Reconsider Its Prior Rulings That The Weighing Determination Is Not A Factfinding Under *Ring* And Therefore Does Not Require Proof Beyond A Reasonable Doubt

This Court has held that the weighing determination – whether aggravating circumstances outweigh the mitigating circumstances – is not a finding of fact, but rather is a "'fundamentally normative assessment . . . that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman*, *supra*, 60 Cal.4th at p. 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595, citations omitted; accord, *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) Appellant asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the

mitigating circumstances? An affirmative answer is a necessary precondition – beyond the jury's guilt-phase verdict finding a special circumstance – for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[15] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (2016) 145 A.3d 430 [hereafter "*Rauf*"] supports Mitchell's request that this Court revisit its holdings that the *Apprendi* and *Ring* rule do not apply to

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[15]The *Apprendi*/*Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts are found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Thus, once the jury finds a fact required for a death sentence, it still may be authorized to return the lesser sentence of life imprisonment without the possibility of parole.

California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. (*Rauf*, *supra*, 145 A.3d at p. 433 (*per curiam* opn. of Strine, C.J., Holland, J. and Steitz, J.).) In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id*. at p. 456.) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court found the state's death penalty statute violates *Hurst*.[16] One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Id*. at p. 433-434; see *id*. at p. 486 (conc. opn. of Holland, J.).) With regard to this defect, the Delaware Supreme Court explained:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors . . . ." The relevant "maximum" sentence, for Sixth Amendment

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[16]In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because: (1) after the jury finds at least one statutory aggravating circumstance, the "judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory aggravating circumstances" (*Rauf*, *supra*, at *1-2 (*per curiam* opn.) [addressing Questions 1-2] and at *37-38 (conc. opn. of Holland, J.)); and (2) the jury is not required to find the existence of any aggravating circumstance, statutory or non-statutory, unanimously and beyond a reasonable doubt (*id*. at *2 (*per curiam* opn.) [addressing Question 3] and at *39 (conc. opn. of Holland, J.)).

> purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Ibid*.) The Delaware court is not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi*/*Ring* rule. (See e.g., *State v. Whitfield*, *supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People*, *supra*, 64 P.3d at pp. 265-266; see also *Woodward v. Alabama*, *supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [concluding that – under *Apprendi* – the determination that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this finding be made, by a jury and beyond a reasonable doubt.

CONCLUSION

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

DATED: May 9, 2017

Respectfully submitted,

MARY McCOMB
State Public Defender

ELIAS BATCHELDER
Deputy State Public Defender

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Elias Batchelder, am the attorney assigned to represent appellant in this automatic appeal. I conducted 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 approximately 11,253 words in length.

DATED: May 9, 2017

ELIAS BATCHELDER

DECLARATION OF SERVICE BY MAIL

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Superior Court No. TA074274

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APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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Kathy Pomerantz, Deputy Attorney General
Office of the Attorney General
300 S. Spring St., Ste. 1702
Los Angeles, CA 90013

Donte McDaniel #G-53365
CSP-SQ
4-EB-41
San Quentin, CA 94974

LeQuincy Stuart
Clerk of the Court–Appeals Division
Los Angeles County Superior Court
210 W. Temple St.
Los Angeles, CA 90012

James Brewer, Esq.
333 Washington Blvd. #449
Marina Del Rey, CA 90292

John Daley, Esq.
7119 West Sunset Blvd. #1033
Los Angeles, CA 90046

California Appellate Project
101 Second St., Suite 600
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **May 9, 2017,** at Oakland, California.

_____
NEVA WANDERSEE