No. S171393 (Capital Case)
(Los Angeles County Superior Court No. TA074274)

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PEOPLE OF THE STATE OF CALIFORNIA,
*Plaintiff and Respondent*,

v.

DON'TE LAMONT MCDANIEL,
*Defendant and Appellant*.

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## APPLICATION OF SIX PRESENT OR FORMER DISTRICT ATTORNEYS (DIANA BECTON, CHESA BOUDIN, GIL GARCETTI, GEORGE GASCÓN, JEFFREY ROSEN, AND TORI VERBER SALAZAR) TO FILE BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT AND BRIEF AMICI CURIAE

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Pursuant to California Rule of Court 8.520(f), amici Diana Becton, Chesa Boudin, Gil Garcetti, George Gascón, Jeffrey Rosen, and Tori Verber Salazar hereby respectfully apply to this Court for leave to file the accompanying Brief Amici Curiae in Support of Appellant in the above-captioned case.[1]

Each of the amici has a strong interest in the issues before this Court. As current and former district attorneys, each amicus has experience proving cases beyond a reasonable doubt and persuading a jury to unanimously convict. They believe these are the appropriate standards to apply in the penalty phase in a capital case, where the issue is one of life or death.

**Diana Becton.** Amicus Diana Becton served for 22 years as a judge in Contra Costa County, where she was elected as Presiding Judge. She also served as an appellate judge, both for the Contra Costa Superior Court, and as a judge pro tem for the Court of Appeal, First Appellate District. On September 17, 2017, she was sworn in as the 25th District Attorney for the County of Contra Costa. In June 2018, she was elected to a full term in office. She is the Immediate Past President of the National Association of Women Judges, the nation's leading voice for women in the judiciary. She has

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[1]No party or counsel for any party authored any portion of the brief. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. CAL. R. CT. 8.520(f)(4).

served as the Chair of the California State Bar Council on Access and Fairness. She earned a J.D. from Golden Gate University School of Law and a Masters Degree in Theological Studies from the Pacific School of Religion.

Earlier this year, District Attorney Becton supported the decision by six district attorneys to refrain from seeking the death penalty for Joseph James DeAngelo Jr., who pleaded guilty to 13 murders and 13 charges of kidnapping for purposes of robbery over a 13 year period, including some crimes from Contra Costa County. DeAngelo also admitted to 161 uncharged crimes of rape, attempted murder, robbery, burglary and kidnapping, crimes that involved 61 victims. Her office currently has several capital eligible cases that it is reviewing. District Attorney Becton is deeply concerned about the arbitrary application of capital punishment in California and the racial disparities that continue to exist with regards to the race of the jury, the race of the defendant, and the race of the victims.

**Chesa Boudin.** Amicus Chesa Boudin was elected to the position of San Francisco District Attorney in November 2019. He was a Rhodes Scholar and graduated from Yale Law School. He worked as a law clerk to the Honorable M. Margaret McKeown on the United States Court of Appeals for the Ninth Circuit and later for the Honorable Charles Breyer on the United States District Court for the Northern District of California. He then worked as a public defender in San Francisco, where he helped lead the office's bail reform unit.

District Attorney Boudin understands the impact of incarceration on a deeply personal level. Both of his parents were incarcerated throughout his childhood, and his father is still in prison. He has publicly stated that he will not seek the death penalty as the San Francisco District Attorney. He agrees with the increasing number of Californians who have come to recognize that the death penalty is not only undeniably cruel and inconsistent with the values of a human society, but also fails to deter or prevent crime.

**Gil Garcetti.** Amicus Gil Garcetti spent a total of 32 years in the Los Angeles District Attorney's Office, serving as a trial prosecutor, manager, and chief deputy district attorney, before being elected District Attorney for the County of Los Angeles in 1992. As District Attorney, Mr. Garcetti focused on addressing domestic violence, hate crimes, and street gangs. Following his tenure as District Attorney, Mr. Garcetti was appointed to the Los Angeles City Ethics Commission and served as a fellow at the Institute of Politics at the John F. Kennedy School of Government at Harvard University.

During his tenure as District Attorney, the office continued to pursue the death penalty. After leaving office, Mr. Garcetti concluded that the death penalty in California is dysfunctional and applied in an unfair manner. He has publicly called for repeal of the death penalty, and has campaigned for ballot initiatives that would have repealed the death penalty in California.

**George Gascón.** Amicus George Gascón is the former District Attorney of the City and County of San Francisco. He

started his career in 1978 as a police officer with the Los Angeles Police Department. Over the years, he worked his way up from patrol officer to Assistant Chief of Police, while earning a law degree from Western State College of Law in 1996. In 2006, he was appointed Chief of the Mesa Police Department in Arizona. In 2009, then-Mayor Gavin Newsom appointed Gascón to be San Francisco's Chief of Police. In 2011, when then-District Attorney Kamala Harris vacated her seat after being elected California's Attorney General, Newsom appointed Gascón to be San Francisco's District Attorney. He served in that role until 2019, winning re-election twice. He is currently a candidate for District Attorney of the County of Los Angeles.

While he began his career as a supporter of the death penalty, Mr. Gascón's views on the death penalty have evolved over his lengthy career in law enforcement. As a result of his experience, he came to believe that the death penalty does not make communities safer. Instead, he found that it drained limited public safety resources that could be better used on programs that actually improve the quality of life and promote safety for everyone. He also became deeply troubled by the arbitrary way capital punishment was applied in California, and its disproportionate impact on communities of color and poor people. Mr. Gascón did not seek the death penalty during his tenure as the San Francisco District Attorney.

**Jeffrey Rosen.** Amicus Jeffrey Rosen is the elected District Attorney of Santa Clara County. He joined the district attorney's Office as a junior prosecutor in 1995, after working

at several private law firms. He was elected district attorney in the fall of 2010. As district attorney, he established a Cold Case Unit using the most advanced DNA technology to investigate unsolved murders and bring justice to long suffering families. He also created a Conviction Integrity Unit to investigate innocence claims and implement the most professional and ethical practices in criminal prosecution, including: double blind eyewitness identification; Open File Discovery; a Brady Committee to investigate police officer misconduct; a collateral consequences policy to prevent undocumented individuals from deportation for non-violent, low-level offenses; a Body Worn Camera policy to increase confidence in policing; and a model protocol for the independent, objective, and transparent investigation of police officer-involved shootings.

In 2018, District Attorney Rosen traveled to Montgomery, Alabama with an interfaith group to visit The Legacy Museum, which tells the history of the United States from slavery to mass incarceration, and the National Memorial for Peace and Justice, which documents the lynching of thousands of African-Americans in the 19th and 20th centuries. He was so moved by what he experienced in Montgomery that the following year, he took his wife and daughters to The Legacy Museum and the National Memorial for Peace and Justice. These trips, along with the death of George Floyd beneath a police officer's boot, underlined the racism and arbitrariness associated with the killing of African-

Americans, and led to District Attorney Rosen's decision to no longer seek the death penalty.

**Tori Verber Salazar.** Amicus Tori Verber Salazar comes from a long line of family members in law enforcement. She rose through the ranks of the San Joaquin District Attorney's Office prosecuting gang-related homicides and became the first woman elected District Attorney in 2015. Over the course of her career, she realized the death penalty does not create a safer community and puts victim's families through years of turmoil. Furthermore, it exhausts already limited economic resources restricting the ability to prosecute current cases and put those resources into prevention. As District Attorney, her focus is to ensure public safety, including expanding Victim-Witness services, and establishing the first Family Justice Center in the County. She has addressed racial disparities by instituting sweeping reforms and innovations and has worked to restore trust in her community. She has worked with Stanford Law School challenging how officer involved fatalities are investigated and prosecuted in the State of California.

District Attorney Verber Salazar is committed to righting racial inequalities and has implemented restorative justice programs. These values guide her charging decisions, including her choice not to seek the death penalty during her tenure in office.

The attached amici curiae brief addresses one of the two questions posed by this Court in its June 17, 2020 order for supplemental briefing: "Do Penal Code section 1042 and article I,

section 16 of the California Constitution require that the jury unanimously determine beyond a reasonable doubt factually disputed aggravating evidence and the ultimate penalty verdict?" The attached brief shares amici's perspective as present and former elected District Attorneys who believe that the death penalty is arbitrarily imposed, and to explain why, in their view, this question should be answered in the affirmative.

Amici are familiar with the briefs that have been previously filed in this case. Amici believe their experience as former and present district attorneys, as reflected in the attached brief, will be of assistance to this Court in deciding the important issue raised. Amici therefore respectfully request leave to file the attached brief amici curiae in support of Appellant.

DATED: October 26, 2020

Respectfully submitted,

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## BRIEF AMICI CURIAE OF SIX PRESENT OR FORMER DISTRICT ATTORNEYS (DIANA BECTON, CHESA BOUDIN, GIL GARCETTI, GEORGE GASCÓN, JEFFFREY ROSEN, AND TORI VERBER SALAZAR) IN SUPPORT OF APPELLANT

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## INTRODUCTION

On June 17, 2020, the Court asked the parties to address the following question: "Do Penal Code section 1042 and article I, section 16 of the California Constitution require that the jury unanimously determine beyond a reasonable doubt factually disputed aggravating evidence and the ultimate penalty verdict?" This brief addresses that question from the perspective of four present district attorneys and two former district attorneys. While these amici take different positions as to whether the death penalty should be abolished, they unanimously believe that death sentences are arbitrarily imposed under the current California death penalty statutes, and that the failure to construe the California Constitution and Penal Code Section 1042 to require the jury to choose death beyond a reasonable doubt and to unanimously find disputed facts relating to aggravating circumstances exacerbates the arbitrariness inherent in the State's death penalty regime.

This brief presents the following argument. *Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny require the State to adopt a non-arbitrary means of distinguishing the few convicted murderers sentenced to die from the many murderers who receive lesser sentences. Neither California's list of the "special circumstances" that make murderers eligible for the death penalty nor its penalty phase list of "aggravating factors" fulfills that function. As a result, the selection of defendants that receive the death penalty is influenced both by irrelevant factors, such as geography and

whether the defendant is represented by a public defender or a court-appointed lawyer, and impermissible factors, such as the race and ethnicity of the defendant and the victim. Given that context, the best way to reduce the arbitrariness inherent in California's death penalty scheme, and ensure that the death sentence is chosen (if at all) for only the worst offenders and offenses, is to require that the penalty jury's decision to impose the death sentence be made beyond a reasonable doubt and that the jury's findings as to the facts giving rise to aggravating circumstances be made unanimously. In a nutshell, failure to provide these *procedural* requirements amplifies the arbitrary application of the death penalty in California caused by the State's failure to impose adequate *substantive* limits on who receives the death penalty.

## ARGUMENT

### I.

### CALIFORNIA'S CURRENT DEATH PENALTY REGIME LEADS TO THE ARBITRARY IMPOSITION OF THE DEATH SENTENCE.

#### A. *Furman* And Its Progeny Require The State To Adopt Legislative Safeguards Against The Arbitrary Imposition Of The Death Penalty.

The Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), "mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

*Gregg v. Georgia,* 428 U.S. 153, 189 (1976) (plurality opinion); *accord Zant v. Stephens*, 462 U.S. 862, 874 (1983). Thus, "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant,* 462 U.S. at 877). In other words, because death "is an extreme sanction, suitable [if at all] to the most extreme of crimes" (*Gregg*, 428 U.S. at 187 (plurality opinion)), the State must provide a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 188 (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

This narrowing function must be done in the first instance by state legislatures through the enactment of statutory aggravating circumstances (or "special circumstances," as they are called in California). *See Zant*, 462 U.S. at 878 ("statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty"). But the requirement that the death penalty not be arbitrarily imposed applies to other phases of the death penalty process, as well. For example, in *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court reversed a death sentence based on a state supreme court finding that the offense was "outrageously or wantonly vile, horrible and

inhuman," because a "person of ordinary sensibility could fairly characterize almost every murder" in those terms. *Id.* at 428–29. Likewise, the Court has held that "meaningful judicial review" of death sentences is "another safeguard that improves the reliability of the sentencing process." *California v. Brown*, 479 U.S. 538, 543 (1987). In short, "[t]he Constitution . . . requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *Id.* at 541.

### B. The California Death Penalty Statute, As Currently Administered, Does Not Perform The Narrowing Function Mandated By *Furman* And Its Progeny.

#### 1. The Special Circumstances Listed In Penal Code Section 190.3 Were Intended To, And Do, Apply To Almost Every First Degree Murder.

According to its author, State Senator John V. Briggs, the death penalty initiative enacted in 1978 was intended to "give Californians the toughest death-penalty law in the country." California Journal Ballot Proposition Analysis, CALIF. J., Nov. 1978, Special Section, at 5. Accordingly, the voters were told, in the ballot argument in favor of the measure, that the initiative would make the death penalty applicable to *all* murders: "[I]f you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death

penalty law does not apply to every murderer. Proposition 7 would." State of California, Voter's Pamphlet, at 34 (1978).

The Briggs Initiative thus amended Penal Code 190.2 to list 26 different "special circumstances" that would qualify a murder for the death penalty. *See* PENAL CODE §190.2 (1978).[2] And the present version of the same statute lists 32 special circumstances. PENAL CODE §190.2.[3]

Moreover, several of these special circumstances are quite broad. For example, California makes simple felony murder a special circumstance. Thus, any person who kills "in the commission of, or attempted commission of, or the immediate flight after committing, or attempting to commit" any of 12 listed felonies is automatically death-eligible, irrespective of the defendant's mental state. *See* PENAL CODE §190.2(a)(17), (b).[4] California also makes "lying in wait" a

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[2] These special circumstances were enumerated in 19 code subdivisions, one of which (felony murder) had nine subdivisions. PENAL CODE §190.2(a)(1)–(19)(1978). However, this Court held that Section 190.2(a)(14) was unconstitutional in *People v. Superior Court (Engert)*, 31 Cal. 3d 797, 806 (1982).

[3] The special circumstances are now enumerated in 22 code sections, one of which, Section 17, contains 12 subsections, each defining an independent basis for death eligibility. *See* PENAL CODE §190.2(a)(17)(A)–(L).

[4] Although the felony murder language of Penal Code Section 189 is not identical to the special circumstances language (referring to "perpetration" rather than "commission" and omitting any refer- ence to "flight"), both are "equally broad." *People v. Hayes*, 52 Cal. 3d 577, 631–32 (1990) (felony murder and felony murder special circumstance both apply if the killing and the felony "are parts of one continuous transaction").

special circumstance (*id.* §190.2(a)(15)), which makes most premeditated murders eligible for the death penalty. [5]

Numerous empirical studies, covering different time periods and using different methodologies and data sets, have concluded that California's special circumstance statute does what it was intended to do: make almost every first degree murder eligible for the death penalty. One study, published just this year, of murders committed in San Diego between 1978 and 1993 found that 81% of those convicted of first degree murder were factually death-eligible under Section 190.2. Steven F. Shatz, Glenn L. Pierce, & Michael Radelet, *Race, Ethnicity and the Death Penalty in San Diego County: The Predictable Consequences of Excessive Discretion*, 51 COLUM. HUMAN RIGHTS L. REV. 1070, 1086 (2020) ("*Race and Ethnicity*"). Another study published last year analyzed statewide convictions between 1978 and 2002, and found that the special circumstances listed in 2008 applied to 95% of cases that resulted in a conviction for first degree murder, 38% of convictions for second-degree murder, and 47% of convictions for voluntary manslaughter. David Baldus et al., *Furman at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility*, 16 J. EMPIRICAL

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[5] *See generally* Garth A. Osterman & Colleen Wilcox Heidenreich, *Lying in Wait: A General Circumstance*, 30 U.S.F. L. REV. 1249 (1996) (reviewing development and expansive application of lying in wait special circumstance). "[T)he lying in wait definition 'has been expanded to the point [that] it is in great danger of becoming a "general circumstance" rather than a "special circumstance," one which is present in most premeditated murders not just a narrow category of those killings.'" *Id.* at 1279 (citation omitted).

LEGAL STUD. 693, 714 (2019) ("*Furman at 45*"). A comprehensive study of all first degree murder convictions between 2003 and 2005 found a death eligibility rate of 84.6%. *See* Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender and the Death Penalty*, 27 BERKELEY J. GENDER, L. & JUST. 64, 93 (2012) ("*Chivalry*"). And a study of first degree murder convictions decided on appeal between 1988 and 1992 showed that special circumstances applied in more than 84% of the cases. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1338–43 (1997). In short, as Professor Gerald Uelmen has stated, "[t]here is nothing 'special' about the special circumstances in California's death penalty law; they have been deliberately designed to encompass nearly all first degree murders." Declaration of Gerald F. Uelmen, at 7, submitted as Exhibit 33 in *Ashmus v. Wong*, No. 3:93-cv-00594-TEH (N.D. Cal. Feb. 17, 1993).

Amici recognize that this Court has held that the special circumstances enacted through the Briggs Initiative "perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." *People v. Bacigalupo*, 6 Cal. 4th 457, 468 (1993). They do not ask the Court to revisit that holding. But, as a matter of empirical fact, the studies cited above, several of which are quite recent, demonstrate that the overwhelming majority of defendants convicted of first degree murder are potentially

death eligible, even before the most recent amendments to the definition of first degree felony murder. Consequently, the decrease in arbitrariness that *Furman* and its progeny require must occur at some other stage of the death penalty process.[6]

### 2. Given The Large Pool Of Death-Eligible Defendants, The Selection Of Those Sentenced To Death Is The Result Of Numerous Factors, Some Permissible, Some Arbitrary, And Some Impermissible.

Although the breadth of Section 190.2 makes most first degree murders eligible for the death penalty, juries elect a death sentence in relatively few cases. For example, the statewide study published in 2019 found that a death sentence was imposed in only 4.3% of death-eligible cases. *Furman at 45, supra*, at 693. The San Diego study published this year found a death sentence rate of 4.7%. *Race and Ethnicity, supra,* at 1085–86. The study of all first degree murder convictions between 2003 and 2005 found a death sentence rate of 5.5%. *Chivalry*, *supra*, at 93. How, then, does the large pool of death-eligible defendants get winnowed down to the relatively few defendants for whom the jury chooses the death penalty?

The logical place to start is prosecutorial discretion. "Prosecutors enjoy complete discretion over whether to charge

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[6] Amici recognize that *People v. Vieira*, 35 Cal. 4th 264 (2005), rejected a claim that California's special circumstances were impermissibly broad, based on the 1997 study of published murder conviction appeals between 1988 and 1992. *Id.* at 303–04. But amici do not claim that the statute is invalid for this reason and, in addition, rely on three additional studies that postdate, and confirm, the study rejected in *Vieira*.

a special circumstance and, if so, whether to seek the death penalty." *Race and Ethnicity, supra,* at 1078. Indeed, this discretion is exercised at multiple points in the death penalty process.

First, given the breadth of the special circumstances statute, prosecutors have broad discretion in deciding whether to charge special circumstances. The statewide study of all convictions between 1978 and 2002 found that special circumstances were charged in 28% of the cases where the defendant was death eligible. *Furman at 45*, *supra,* at 724. The San Diego study found that prosecutors charged special circumstances in 27.6% of such cases. *Race and Ethnicity, supra,* at 1085.

Second, even when special circumstances are alleged, the prosecutor can waive the allegation once alleged, either unilaterally or as part of a plea bargain. According to the statewide study of convictions between 1978 and 1993, this happens in 20% of the cases in which special circumstances have been alleged. *Furman at 45*, *supra,* at 725.

Third, even after a jury finds one or more special circumstances, the prosecutor has discretion to waive the penalty trial and accept a sentence of life without the possibility of parole. *Id; see id.* at 726 ("prosecutors often do not seek a death sentence after a special circumstance has been found in the guilt trial and proceed solely to an LWOP sentence").

As present and former elected district attorneys, amici believe that prosecutorial discretion is a feature, not a bug, of

the current death penalty system. After all, district attorneys are independently-elected constitutional officers of the counties in which they serve, and are therefore politically accountable to their constituents. CAL. CONST. art. XI, §1(b). If San Francisco wants to elect district attorneys who will not seek the death penalty as a matter of principle, nothing prevents the people and their elected district attorneys from making those choices. And if the citizens of other counties want to elect district attorneys who take a different position on the death penalty, that, too, is their prerogative.

Having said that, however, amici candidly concede that prosecutorial discretion is not a complete answer to the question of how the death penalty can be constitutionally applied to winnow the few defendants who are subject to the death penalty from the overwhelming majority who are not. To begin with, because of the breadth of Section 190.2, that statute by itself cannot serve as a guide for the exercise of prosecutorial discretion. *See* Part I(B)(1), *supra*. Accordingly, the exercise of that discretion is not bound by any legal constraints set forth in the death penalty statute, and therefore cannot possibly comply with the constitutional requirement that the state adopt death penalty standards that prevent the death penalty from being imposed arbitrarily. *See* Part I(A), *supra*. Moreover, it is not clear that charging decisions do, in fact, correspond to the gravity of the offense. For example, there are many murders where the facts seem particularly egregious that are not charged as special

circumstances. Thus, the San Diego study found that almost two-thirds of the defendants with multiple special circumstances or who killed two or more victims were not charged with death. *Race and Ethnicity, supra,* at 1096.

This raises the disturbing possibility that these decisions are influenced by racial and ethnic discrimination. While the law is clear that "prosecutorial discretion cannot be exercised on the basis of race" (*McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987)), the data suggests that, unfortunately, these decisions are influenced, consciously or unconsciously, by race. For example, the San Diego study found that "[i]n cases with white victims and minority defendants, the odds the District Attorney would seek death were over seven times as high in [white victim/Latinx defendant] cases and six and a half times as high in [white victim/black defendant] cases as in cases with black or Latinx victims." *Race and Ethnicity*, *supra,* at 1095. Similarly, previous studies, in both California and other states, have found "consistent evidence of a greater probability of death sentencing and charging in cases with white victims." Catherine M. Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L. REV. 1394, 1439 (2019); *see id.* at 1412 nn. 84-85. Likewise, the statewide study of homicides between 1978 and 2002 found that "individual special circumstances apply to defendants disparately by race and ethnicity, even after controlling for case culpability, victim race, and year." *Id.* at 1441. In short,

unfettered and unreviewable prosecutorial discretion can raise as many questions as it answers.

Even apart from race, there are significant indicators that prosecutorial discretion is being used to impede, rather than advance, the winnowing process. For example, Riverside County has become one of the nation's leading producer of death sentences. In 2015, with eight new death sentences, Riverside sent more people to death row than every other state in the country except Florida and California itself. *See* Death Penalty Info. Ctr., *The Death Penalty in 2015: Year End Report*, at 3, https://files.deathpenaltyinfo.org/reports/year-end/2015YrEnd.f1560295944.pdf (last visited Oct. 21, 2020). Between 2010 and 2015, Riverside amassed 29 death sentences (not including re-sentences), the second most of any county in America. Fair Punishment Project, *Too Broken to Fix: Part I*, at 31 (Aug. 2016). Riverside's rate of death sentencing per 100 homicides was nearly nine times the rate for the rest of California (other than Kern, Los Angeles, Riverside, Orange and San Bernardino counties). *Id.* at 31 & n.280. Likewise, Orange County's rate of death sentences per homicide is the second-highest in the State, second only to Riverside County. Fair Punishment Project, *Too Broken to Fix: Part II*, at 39 (Sept. 2016). In other words, whether a defendant faces the death penalty is due in part to where the murder occurred, an irrational factor that has nothing to do

with either the culpability of the defendant or the seriousness of the offense.[7]

Moreover, whether a defendant faces the death sentence is also greatly influenced by the quality of the lawyer opposing the prosecutor: the defendant's counsel. More than 25 years ago, law professor Stephen Bright wrote that the death penalty in America was handed down not "for the worst crime, but for the worst lawyer." *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835 (1994). And the importance of a quality defense is vividly illustrated by the disparate outcomes between cases handled by public defenders compared to those handled by private, court-appointed counsel. There is no reason to believe that defendants represented by private, court-appointed counsel are more culpable, or commit graver offenses, than defendants represented by public defenders. Yet the former group is over-represented on death row. For example, the Los Angeles County Public Defender's Office handles roughly half of the trial stage death penalty cases in the county, and the Alternate Public Defender takes an additional 20% that the Public Defender's Office cannot. *Too Broken to Fix II*, *supra*,

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[7] Here, too, race matters. "[D]eath sentencing in California is highest in counties with a low population density and a high proportion of non-Hispanic white residents. The more white and more sparsely populated the county, the higher the death sentencing rate." Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 31 (2005).

at 30. Nevertheless, between 2010 and 2015, only one defendant represented by the Public Defender's office and three represented by the Alternate Public Defender's office were sentenced to death, in contrast to 26 represented by appointed private counsel. *Id.* Likewise, of the eight people sentenced to death in Riverside County in 2015, only one was represented by the public defender's office, whereas the other seven were represented by court appointed private lawyers. *Too Broken to Fix I*, *supra*, at 33.[8]

In summary, then, whether a defendant is subject to the death sentence is the result of a host of factors. Some are plainly permissible, such as the prosecutor's evaluation of the seriousness of the offense and the defendant's history. Some are arbitrary and have no relationship to these concededly legitimate factors, such as where the murder was committed and whether the defendant was represented by a public defender or private, court-appointed counsel. And, sadly, some of the factors that influence whether the defendant receives a death sentence are not only irrelevant but con-

[8] These disparate results may be due, in part, to the amount of mitigating evidence presented by defense counsel. In Los Angeles, for example, the single case handled by the public defender where a death sentence was handed down had a mitigation presentation that lasted seven days. *Too Broken to Fix II*, *supra,* at 30. "For the private bar attorneys, the average presentation was 2.4 days." *Id.* Likewise, half of the Riverside County death sentences reviewed on direct appeal between 2006 and 2015 involved the equivalent of one full day's worth or less of mitigation evidence, and two-thirds of the cases involved two days or less. *Too Broken to Fix I*, *supra*, at 33–34. "On average, only seven hours of mitigation evidence was presented during trial, and 12 percent of cases—approximately one out of every 10—had zero hours of mitigation presented." *Id.* at 34.

stitutionally impermissible, such as the race or ethnicity of the defendant and the victim.

Given these variables, there is no basis for assuming that the defendants who advance to the penalty phase of a capital case have been selected solely on the basis of the legitimate factors recognized in the Penal Code. At bottom, then, it is the jury that must decide which of these heterogeneous defendants shall live and which shall die. It is against this backdrop that we turn to the principal question posed by the Court, and demonstrate that the failure to require jury unanimity and application of the beyond a reasonable doubt standard at the penalty phase amplifies the arbitrariness at this critical stage of the death penalty process.

## II.

## THE ABSENCE OF PROCEDURAL REQUIREMENTS SUCH AS A HEIGHTENED BURDEN OF PROOF AND JURY UNANIMITY AMPLIFY ARBITRARINESS, FURTHER VIOLATING THE CONSTITUTIONAL COMMAND THAT THE DEATH PENALTY BE RESERVED FOR THE WORST OFFENSES.

Penal Code Section 190.3 provides that, after hearing evidence presented by both parties during the penalty phase of a capital trial, the jury "shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." But under current law the jury need not decide that the death penalty is warranted beyond a reasonable doubt. Some jurors might believe that death is warranted to a moral certainty. Other jurors might have doubts about whether the defendant

deserves to die but find that the balance nevertheless tips slightly in favor of death. And some jurors might fall between these extremes.

Similarly, under current law there is no requirement that the jury unanimously agree on the aggravating factors that serve as a basis for finding that the defendant deserves death. Some jurors might believe that the death penalty is warranted because of the "circumstances of the crime of which the defendant was convicted . . . and the existence of any special circumstance found to be true" in the criminal proceeding. PENAL CODE §190.3(a). Accordingly, these jurors might not need to decide whether the defendant had engaged in other "criminal activity . . . which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." *Id.* §190.3(b). Conversely, other jurors might believe that the crime for which the defendant was convicted did not warrant the death penalty, but nevertheless opt for death because of other, uncharged criminal activity that met the criteria set forth in Penal Code Section 190.3, subdivision (b). Still other jurors could believe that the defendant did not engage in other criminal conduct that involved force or violence but nevertheless decide that a death sentence was warranted because of the defendant's prior conviction of a felony. *Id.* §190.3(c). And, of course, some jurors might believe that more than one aggravating factor exists in a particular case but disagree as to the weight to be given each factor.

Accordingly, the statutory aggravating factors give the jury little guidance in making this life-or-death decision. In particular, the aggravating factors cannot perform the winnowing function mandated by *Furman* and its progeny. Indeed, this Court has recognized that the aggravating factors "do not perform a 'narrowing' function." *People v. Bacigalupo*, 6 Cal. 4th 457, 477 (1993); *see also People v. Cornwell*, 37 Cal. 4th 50, 102 (2005), *overruled on other grounds by People v. Doolin*, 45 Cal. 4th 390 (2009); *People v. Visciotti*, 2 Cal. 4th 1, 74–75 (1992), *rev'd on other grounds*, 537 U.S. 19 (2002).

There are two reasons why that is so. To begin with, the aggravating factor set forth in Section 190.3(a) simply reiterates the fact of the defendant's conviction and the special circumstance finding. Thus, every convicted defendant who faces a penalty trial is, by definition, subject to an aggravating factor finding under this portion of the statute. Consequently, this aggravating factor offers the jury no "'meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.'" *Gregg*, 428 U.S. at 188 (plurality opinion) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

Nor do the other aggravating factors listed in Section 190.3. Many convicted murderers are accused of other "criminal activity . . . which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." PENAL CODE §190.3(b). Yet the statute gives the jury no guidance for distinguishing between cases where this

factor significantly increases the defendant's culpability from those where it does not. Likewise, whether a defendant has been previously convicted of a felony (a broad category that includes even non-violent offenses) may or may not be relevant to the jury's decision, but the jury is given no guidance in making this decision.

Amici recognize that the Supreme Court has held that such guidance is not constitutionally required as a matter of federal constitutional law. *See Tuilaepa v. California*, 512 U.S. 967, 978–79 (1994); *Zant v. Stephens*, 462 U.S 862, 875 (1983). But the fact that a "capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision" (*Tuileapa*, 512 U.S. at 979), is only the beginning, and not the end, of the inquiry.

"Nowhere in the law is the interplay of procedural rules and substantive standards more critical than in the penalty phase of a capital case." *State v. Wood*, 648 P.2d 71, 81 (Utah 1982). Indeed, "[e]ven if Solomon-like wisdom were available in framing objective standards, their whole purpose could be thwarted if the governing procedural rules allowed the sentencing body to impose the death penalty in the face of evidence which creates a reasonable or substantial doubt as to the appropriateness of that penalty." *Id.* That is even more true when implementing standards that were designed to entrap every murderer, rather than those judged worthy of death by the wisdom of Solomon.

The cases cited above hold that a jury need not be given any *substantive* guidance as to when to impose the death penalty. Accordingly, the lack of *substantive* standards, coupled with the rule against arbitrariness, demands that the jury's decision be subject to stringent *procedural* safeguards. And these safeguards are not novel; instead, they are part and parcel of the "inviolate" jury trial right protected by Penal Code Section 1042 and Article I, Section 16 of the California Constitution.

### A. Failure To Require That The Jury Choose Death Beyond A Reasonable Doubt Increases The Arbitrariness In Violation Of The Constitutional Command That The Death Penalty Be Reserved For The Worst Offenses.

As the Supreme Court held in *In re Winship*, 397 U.S. 358 (1970), the "reasonable-doubt standard plays a vital role in the American scheme of criminal procedure." *Id.* at 363. That is so for multiple reasons. In the first place, applying a reasonable doubt standard reduces the likelihood of an erroneous decision where important interests are at stake. As *Winship* stated:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. (*Id.* at 364 (citation, internal quotation marks and ellipses omitted))

Moreover, the reasonable-doubt standard also "'impresses on the trier of fact the necessity of reaching a subjective state of

certitude of the facts in issue." *Id.* (citation and internal quotation marks omitted).

"These considerations assume profoundly greater importance in the process of determining whether a person convicted of murder shall be sentenced to death." *People v. Tenneson*, 788 P.2d 786, 795 (Colo. 1990). As current and former district attorneys, amici understand that it is harder for a prosecutor to secure a death sentence if the jury is told that it must choose death beyond a reasonable doubt, particularly in comparison to the present system where the jury is not given any burden of proof by which to measure whether "the aggravating circumstances outweigh the mitigating circumstances." PENAL CODE §190.3. But that is a virtue, not a defect, in any death penalty scheme that seeks to distinguish between "'the few cases in which it is imposed from the many cases in which it is not.'" *Gregg*, 428 U.S. at 188 (plurality opinion) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)). In other words, applying the reasonable doubt standard to the penalty phase will help reduce the arbitrariness inherent in California's death penalty scheme by helping to ensure that the death sentence is chosen for only the worst offenders and the worst offenses.

This winnowing function cannot occur in states where this standard is not applied. Indeed, the death penalty is imposed more frequently in states that do not apply a reasonable doubt requirement to the penalty phase.[9]

[9] *See* Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, ( . . . continued)

Conversely, "[t]o impose the death penalty, notwithstanding serious doubt as to its appropriateness, would create in some cases . . . a substantial possibility of "'arbitrary . . . treatment . . . .'" *Wood*, 648 P.2d at 83.

In addition, the reasonable doubt standard is also commensurate with the defendant's interest at stake. *Winship* held that the reasonable doubt standard should be applied in juvenile cases to reduce the margin of error, because of the "transcending value" of the defendant's interest in liberty. *See* pp.39–40, *supra*. But that is even more true when the defendant's life is at stake, where the consequences of an erroneous decision are increased by the irrevocability of a death sentence. In that context, there are compelling reasons to reduce the likelihood of error as to the defendant by requiring the state to prove its case for death beyond a reasonable doubt. *See Conservatorship of Hofferber*, 28 Cal. 3d 161, 178 (1980) ("Fact-finding error must be minimized when such drastic consequences are at stake. Hence, the facts that trigger confinement must generally be proved to a unanimous jury beyond a reasonable doubt.").

Finally, as *Winship* noted in an analogous context, using the reasonable doubt standard impresses on the jury's mind the importance of being certain that death is the appropriate penalty. *See Tenneson*, 788 P.2d at 794 ("the term 'beyond a

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70 ARK. L. REV. 267, 300 (2017) (none of the five states that imposed the death penalty most often between 2010 and 2015 applies the reasonable doubt standard to either the determination that aggravating factors outweigh mitigating ones or the ultimate penalty decision).

reasonable doubt' serves well to communicate to the jurors the degree of certainty that they must possess that any mitigating factors do not outweigh the proven statutory aggravating factors before arriving at the ultimate judgment that death is the appropriate penalty"); *Wood,* 648 P.2d at 84 (beyond a reasonable doubt standard "conveys to a decision maker a sense of the solemnity of the task and the necessity for a high degree of certitude . . . in imposing the death sentence.").

In this context, jurors are supposed to bring to bear the collective moral judgment of the community on the defendant and his or her offense. But a jury that opts for death on the basis of a belief that the evidence favors death only slightly, or that harbors reasonable doubts about that choice, has not made a choice that is commensurate with the consequences. Instead, "no defendant should suffer death unless a cross section of the community unanimously determines that should be the case, under a standard that requires them to have a high degree of confidence that execution is the just result." *Rauf v. State*, 145 A.3d 430, 437 (Del. 2016) (Strine, C.J., concurring); *see also Mills v. Maryland*, 486 U.S. 367, 383–84 (1988) ("The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case."). Indeed, "a determination of death despite reasonable doubt as to its

justness would be unthinkable. We can think of no judgment of any jury . . . in any case that has as strong a claim to the requirement of certainty as does this one." *State v. Biegenwald*, 524 A.2d 130, 155 (N.J. 1987).

These concerns are not assuaged be arguing that the decision to impose a death sentence is a normative decision, not a factual one. *See* Third Supp. Resp. Br. 25. In the first place, the "issues of fact" encompassed by Section 1042 do not exclude normative determinations, but only issues of law that must be decided by a court rather than a jury. *See* Brief of Amicus Curiae, Hadar Avirim & Gerald Uelmen, Constitutional Law Scholars, In Support of Defendant-Appellant McDaniel, at 11–14. In any event, the need to distinguish between the few murderers who supposedly deserve death from those who do not does not turn on whether that assessment is purely factual. Nor does the increased reliability that would be caused by use of a reasonable doubt standard disappear merely because that decision involves normative elements. *See Biegenwald,* 524 A.2d at 156 (adopting beyond a reasonable doubt standard for weighing aggravating and mitigating factors while recognizing that the weighing process is a judgmental determination based on conflicting values, not a fact-finding process). To the contrary, the supposedly normative elements of the penalty determination increase, rather than decrease, the need to apply the reasonable doubt standard.

### B. Failure To Require That The Jury Find The Aggravating Factors Unanimously Also Increases Arbitrariness In Violation Of The Constitutional Command That The Death Penalty Be Reserved For The Worst Offenses.

The jury unanimity issue posed by the Court is a narrow one: whether a jury must unanimously decide whether the defendant engaged in other "criminal activity . . . which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." PENAL CODE §190.3(b).[10] This issue is critical for two reasons. First, "[e]vidence of a prior criminal record is the strongest single factor that causes juries to impose the death penalty." *People v. McClellan*, 71 Cal. 2d 793, 804 n.2 (1969); *People v. Robertson*, 33 Cal. 3d 21, 54 (1982) (referring to "the overriding importance of 'other crimes' evidence to the jury's life-or-death determination"); *People v. Polk*, 63 Cal. 2d 443, 450 (1965) (other crimes evidence "may have a particularly damaging impact on the jury's determination whether the defendant should be executed").[11] Second, the Court already requires the existence of prior criminal conduct to be proved

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[10] In theory, the jury unanimity requirement should also apply to the aggravating factors set forth in subdivisions (a) and (c), but by definition the jury has already unanimously decided both the defendant's guilt and the existence of a special circumstance, thus satisfying subdivision (a), and the existence of a prior felony under subdivision (c) will rarely be the subject of a factual dispute.

[11] This Court's repeated recognition that "other crimes" evidence is "particularly damaging" at the penalty phase conflicts with its statement that requiring unanimity as to these allegations "would immerse the jurors in lengthy and complicated discussions of matters *wholly collateral* to the penalty determination which confronts them." *People v. Ghent*, 43 Cal. 3d 739, 773–74 (1987) (emphasis added).

beyond a reasonable doubt (*Robertson*, 33 Cal. 3d at 53–54), and jury unanimity is necessary to make that requirement meaningful. For example, if 11 penalty phase jurors believe that the existence of other crimes has not been established, how can the existence of that factor have been proved beyond a reasonable doubt? That is why "jury unanimity and the standard of proof beyond a reasonable doubt are slices of the same due process pie." *Conservatorship of Roulet*, 23 Cal. 3d 219, 231 (1979).

Even apart from these considerations, requiring jury unanimity is a vital aspect of the jury trial right. After all, "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Allen v. United States,* 164 U.S. 492, 501 (1896). That is because jury unanimity is an important safeguard in ensuring reliability and preventing arbitrariness, for multiple reasons.[12]

First, the unanimity requirement typically results in longer deliberations. In the absence of a unanimity requirement, "once a vote indicates that the required majority has formed, deliberations halt in a matter of minutes." Kim Taylor-Thompson, *Empty Votes in Jury Deliberations,* 113

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[12] The analysis that follows is drawn from the brief amici curiae filed by the California Attorney General and his counterparts in numerous other states in *Ramos v. Louisiana*, —U.S.—, 140 S. Ct. 1390 (2020). *See* Amici Brief for States of New York, California et al., 2019 WL 2576549, at *13–*19 (June 18, 2019). As Appellant notes in his reply brief, the Attorney General has not explained why the unanimity requirement is necessary to ensure reliability in a non-capital case but not in a capital one. *See* 3d Supp. Reply Br. 62.

HARV. L. REV. 1261, 1272 (2000) ("*Empty Votes*"). Indeed, research shows that deliberation time often corresponds to the number of jurors required to reach a verdict. *See, e.g.* REID HASTIE ET AL., INSIDE THE JURY 173–74 (1983); Dennis J. Devine, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups,* 7 PSYCH. PUB. POL'Y & L. 622, 669 (2001). For example, one mock-jury study found that 12-member juries required to reach unanimous verdicts in a murder case deliberated for an average of 135 minutes, whereas those required to reach eight- or ten-member majorities deliberated for an average of 75 minutes and 103 minutes, respectively. HASTIE, *supra*, at 60. This pattern is also visible in real-world trials. As one Louisiana juror noted after rendering a split verdict in a high-profile murder case, "[w]e knew that we only needed 10 jurors to convict, so we set out for that goal rather than the full 12." John Simerman, *Split Verdict in Cardell Hayes' Trial Shines Light on How Louisiana's Unusual Law Affects Jury Deliberations*, NEW ORLEANS ADVOC. (May 1, 2018).

Second, non-unanimous juries are substantially more likely to adopt a "verdict-driven," rather than an "evidence-driven," approach to deliberation. HASTIE, *supra*, at 165. "Verdict-driven" deliberations typically begin with a preliminary vote, focus on each juror's preferred verdict, and discuss evidence to the extent it supports a specific verdict position. *Id.* at 163. By contrast, "evidence-driven" deliberations focus on a review of the evidence "without

reference to the verdict categories, in an effort to agree upon the single most credible story that summarizes the events at the time of the alleged crime." *Id.* Unsurprisingly, the jury's review of evidence is "more disjointed and fragmentary in verdict-driven than evidence-driven" deliberations. *Id.* at 164. Other studies show that juries operating under non-unanimous rules "discuss both the law and evidence less, recall less evidence, and were less likely to correct their own mistakes about the evidence or the jury instructions." Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror,* 40 U. MICH. J.L. REFORM 569, 580 (2007) (internal quotation marks omitted). This research suggests that permitting factual disputes relating to aggravating circumstances to be decided without jury unanimity "discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable." *Empty Votes*, *supra,* at 1273.

Third, a unanimity requirement ensures that juries evaluate and respond to the viewpoints of every individual juror prior to rendering a verdict. As then-Circuit Judge Anthony Kennedy observed, "[t]he dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations." *United States v. Lopez,* 581 F.2d 1338, 1341 (9th Cir. 1978). "A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be

examined, and if possible, accepted or rejected by the entire jury." *Id.*

Fourth, and finally, the unanimity requirement ensures that the representative nature of the jury is reflected in its deliberations. "The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel v. S. Pac. Co.,* 328 U.S. 217, 220 (1946); *see also Johnson v. Louisiana,* 406 U.S. 399, 402 (1972) (Marshall, J., dissenting) (jury's "fundamental characteristic is its capacity to render a commonsense, laymen's judgment, as a representative body drawn from the community"). The unanimity requirement ensures that a jury which is drawn from a fair cross-section of the community actually considers the diverse views of its members, rather than subordinating the views of minority jurors to those of the majority. That is particularly important as a corrective to a system where, unfortunately, decisions to seek the death penalty are influenced by the race of the defendant and/or the victim. *See* pp.31–32, *supra.*

All these factors led the Attorney General to tell the United States Supreme Court that jury unanimity is required for criminal convictions, a position that the Court adopted. *Ramos v. Louisiana*, 140 S. Ct. at 1390. The same reasons apply to the jury's life-or-death decisions in the penalty phase.

## CONCLUSION

The empirical evidence cited above demonstrates that implementation of California's death penalty scheme is still

characterized by arbitrariness and discrimination. Accordingly, the Court should require the highest possible procedural protections before a jury imposes a death sentence. In criminal cases, those procedural protections traditionally require jurors to reach unanimous verdicts beyond a reasonable doubt. Indeed, the prior decisions that the capital jury makes in the course of the capital decision-making process—a finding of guilt for the potentially capital crime and a finding that at least one special circumstance is true—do require unanimous, beyond a reasonable doubt decisions. Why should the ultimate life and death decision itself be governed by anything less? The Court should therefore hold that Article I, Section 16 of the California Constitution and Penal Code Section 1042 require that the jury in the penalty phase of a capital case (1) decide beyond a reasonable doubt that death is the appropriate sentence and (2) be instructed that it must unanimously agree on the existence of the aggravating factor set forth in Penal Code Section 190.3, subdivision (b), and, where applicable, any other aggravating factor set forth in the statute.

DATED: October 26, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.204 AND 8.520

Pursuant to California Rules of Court 8.204 and 8.520, and in reliance upon the word count feature of the software used to prepare this document, I certify that the foregoing **Brief Amici Curiae of Six Present or Former District Attorneys Diana Becton, Chesa Boudin, Gil Garcetti, George Gascón, Jeffrey Rosen, and Tori Verber Salazar in Support of Appellant** contains 7,336 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

DATED: October 26, 2020

*/s/ Steven L. Mayer*
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**PROOF OF SERVICE**
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I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is Three Embarcadero Center, Tenth Floor, San Francisco, California 94111-4024.

On October 26, 2020, I served the document described as **APPLICATION OF SIX PRESENT OR FORMER DISTRICT ATTORNEYS (DIANA BECTON, CHESA BOUDIN, GIL GARCETTI, GEORGE GASCÓN, JEFFREY ROSEN, AND TORI VERBER SALAZAR) TO FILE BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT AND BRIEF AMICI CURIAE** on the interested parties in this action by sending a true copy addressed to each through TrueFiling, the electronic filing portal of the California Supreme Court, pursuant to Local Rules, which will send notification of such filing to the email addresses denoted on the case's Electronic Service List:

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

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