In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DONTE LAMONT McDANIEL,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S171393

Los Angeles County Superior Court Case No. TA074274
The Honorable Robert J. Perry, Judge

THIRD SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

Article I, section 16 of the California Constitution states in pertinent part: "Trial by jury is an inviolate right and shall be secured to all" and that in "criminal actions in which a felony is charged, the jury shall consist of 12 persons." This right to a jury trial includes, in criminal cases, the right to a unanimous jury verdict. (*People v. Anzalone* (2013) 56 Cal.4th 545, 551; *People v. Collins* (1976) 17 Cal.3d 687, 693; see *Ramos v. Louisiana* (2020) 140 S.Ct. 1390, 1397.) Penal Code section 1042 provides, "Issues of fact shall be tried in the manner provided in Article I, Section 16 of the Constitution of this state."[1]

On June 17, 2020, this Court issued an order directing the State to file a supplemental brief responding to the following questions raised by appellant Donte McDaniel in his opening brief at pages 196 through 207:

> 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? If so, was appellant prejudiced by the trial court's failure to so instruct the jury?

McDaniel acknowledges that this Court has repeatedly held that the rights to unanimity and proof beyond a reasonable doubt do not apply as he contends. Nevertheless, McDaniel argues that this Court should reconsider its prior precedent because it has

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

never previously considered section 1042 in its analysis. (AOB 196-197.)

The issues raised by McDaniel are important ones. The penalty-phase requirements that McDaniel favors could be feasible policy reforms for the voters to consider; indeed, a few States have adopted similar requirements. As this Court has repeatedly recognized, however, they are not required by state or federal law. The Court should adhere to that legal position—on which the lower courts have relied for decades—and leave it to the electorate to amend the death penalty law if they see fit.

ARGUMENT

I. California law does not mandate the additional penalty-phase requirements McDaniel proposes

A. This court has repeatedly rejected identical challenges to California's death penalty scheme

Over the last four decades, this Court has repeatedly rejected all of McDaniel's claims on constitutional grounds:

> There is no requirement in the federal or the state Constitution that [1] the jury reach a unanimous agreement with respect to the factors in aggravation, [2] that jurors find the factors in aggravation to be true beyond a reasonable doubt, [3] that the jury find beyond a reasonable doubt that the circumstances in aggravation outweigh those in mitigation before imposing the death penalty, or that the jury find beyond a reasonable doubt that death is the appropriate punishment.

(*People v. Hartsch* (2010) 49 Cal.4th 472, 515 (internal citations and quotations omitted); see *People v. Davis* (2005) 36 Cal.4th

510, 572; *People v. Gordon* (1990) 50 Cal.3d 1223, 1273-1274; *People v. Frierson* (1979) 25 Cal.3d 142, 172-188.) This Court has also specifically held that article I, section 16 does not require a unanimous jury finding as to any aggravating factor underlying the death verdict. (*People v. Griffin* (2004) 33 Cal.4th 536, 598, disapproved on another ground by *People v. Riccardi* (2012) 54 Cal.4th 758.) And the Court has reaffirmed those holdings in its most recent decisions. (See *People v. Suarez* (Aug. 13, 2020) 2020 WL 4691517, *41-42; *People v. Duong* (Aug. 10, 2020) 2020 WL 4580560, *22; *People v. Morales* (Aug. 10, 2020) 2020 WL 4580556, *22; *People v. Vargas* (July 13, 2020) 2020 WL 3956868, *27; *People v. Miles* (2020) 9 Cal.5th 513, 2020 WL 2761063, *56; *People v. Johnson* (2019) 8 Cal.5th 475, 527; *People v. Anderson* (2018) 5 Cal.5th 372, 425.)

Both this Court and the Supreme Court of the United States have so held because California's death penalty scheme has features that provide constitutionally adequate safeguards against arbitrary death judgments: 1) defendants are eligible for the death penalty only once a jury has determined beyond a reasonable doubt both that they are guilty of first degree murder and that at least one special-circumstance allegation is true; 2) section 190.3 specifies the criteria that the sentencer should evaluate in selecting the penalty; and 3) there is independent review of each death judgment by both the trial judge and on automatic appeal. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 777-778.) In addition, because California's death penalty statute suitably narrows the class of death-eligible persons, and provides

for an individualized penalty determination at the sentencing and appeal stages, it "avoids the Eighth Amendment proscription of 'arbitrary' sentencing procedures." (*Id.* at p. 778, citing *Pulley v. Harris* (1984) 465 U.S. 37, 53-54, *California v. Ramos* (1983) 463 U.S. 992, 1008, and *Zant v. Stephens* (1983) 462 U.S. 862, 876-880.)

This Court accordingly rejected the requirements suggested by McDaniel based on the constitutional protections already present in the death penalty statute. (*Rodriguez*, *supra*, 42 Cal.3d at pp. 777-779.) Using the same reasoning, this Court reached the same conclusion as to the 1977 death penalty statute in *Frierson*, *supra*, 25 Cal.3d at p. 172-188. This Court also aptly noted the 1978 law "would not contravene the Eighth Amendment even if it set no standards for the sentencing of defendants already deemed death-eligible." (*Rodriguez*, *supra*, 42 Cal.3d at p. 778.) The common thread through all of this Court's opinions upholding the constitutionality of California's death penalty statute is that because of the foregoing features, jurors are permitted to exercise discretion in making their determination whether death is appropriate.

In exercising that discretion, this Court has long recognized that a jury's determination of the appropriate penalty does not equate to traditional factfinding. Rather, "at the penalty phase, the choice between death and life imprisonment without possibility of parole depends on a determination as to which of the two penalties is appropriate, which in turn depends on a determination whether the evidence in aggravation substantially

outweighs that in mitigation." (*Griffin*, *supra*, 33 Cal.4th at p. 595.) Those determinations "do not entail the finding of facts that can increase the punishment for murder of the first degree beyond the maximum otherwise prescribed." (*Ibid.*; *People v. Duff* (2014) 58 Cal.4th 527, 569.) Instead, they "constitute a single fundamentally normative assessment" of the appropriate penalty (*Griffin*, *supra*, 33 Cal.4th at p. 595), in which each juror engages in "'an *individualized* determination on the basis of the character of the individual and the circumstances of the crime'" (*People v. Brown* (1985) 40 Cal.3d 512, 540, quoting *Zant*, *supra*, 462 U.S. at p. 879, italics in original), and applies his or her "own moral standards to the aggravating and mitigating evidence'" (*Davis*, *supra*, 36 Cal.4th at p. 572, quoting *People v. Mendoza* (2000) 24 Cal.4th 130, 192). (See *People v. Capers* (2019) 7 Cal.5th 989, 1014, cert. denied sub nom. *Capers v. California* (2020) 206 L.Ed.2d 476 ["As we explained in *Prieto*, the jury's penalty determination is normative, not factual, and is 'analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.'"], quoting *People v. Prieto* (2003) 30 Cal.4th 226, 275.)

Contrary to McDaniel's position (AOB 202), the history of California's death penalty, and the use of the term "trier of fact," do not suggest that the penalty-phase decision was viewed as an issue of fact. Although the language in section 190.1 in the 1957 statute referred to a "trier of fact," it also referred to the penalty phase as "further proceedings" rather than a trial, and did not require any specific findings of fact for the selection of the

penalty. (See Stats. 1957, ch. 1968, § 2, pp. 3509-3510.) The 1977 version of section 190.3 and the current version of the statute also refer to the penalty phase as "proceedings." (§ 190.3; accord, Stats. 1977, ch. 316, § 11, pp. 1258-1259.)[2] This strongly suggests that the determination of penalty is different from a trial on the determination of guilt, and therefore not all of the attendant trial rights apply equally in the penalty phase.

Section 1041 is illuminating on this point. It explicitly sets forth the four discrete instances upon which an "issue of fact" arises: (1) a plea of not guilty; (2) a plea of a former conviction or acquittal of the same offense; (3) a plea of once in jeopardy; and (4) a plea of not guilty by reason of insanity. (§ 1041.) Notably, section 1041 does not state that issues of fact arise at the penalty phase of a capital trial. Indeed, there is no mechanism by which a defendant can plead to a particular sentence at the penalty phase. (See § 190.3, subd. (b) ["If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people."].) This is an additional indication that the Legislature and the voters, which enacted the 1977 and 1978 versions of the death penalty statute respectively, did not consider the penalty phase to be a trial on issues of fact.

Instead, while jurors hear all the same evidence and argument at the penalty-phase trial, each juror must be free to reject death if the juror decides on the basis of any

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[2] Further, absent from section 190.3 are the words "find" or "finding," because it is not the obligation of the trier of fact to make any.

constitutionally relevant evidence or observation that it is not the appropriate penalty. And, because the jury's penalty-phase task "is inherently moral and normative," as opposed to factual, it is "not susceptible to a burden-of-proof quantification." (*People v. Virgil* (2011) 51 Cal.4th 1210, 1278, internal quotation marks omitted; *Davis*, *supra*, 36 Cal.4th at p. 572 ["the Legislature properly could conclude that imposing the strict requirements of the beyond-a-reasonable-doubt standard, jury unanimity, and a statement of reasons would be unsuited to capital sentencing"]; *Rodriguez*, *supra*, 42 Cal.3d at p. 779.) Indeed, the weighing required by jurors is a "mental balancing process," not a "mechanical counting of factors" on a scale, and jurors are "free to assign whatever moral or sympathetic value" they find "appropriate to each and all of the various factors [they are] permitted to consider." (*Brown*, *supra*, 40 Cal.3d at p. 541; accord, CALJIC 8.88; *People v. Tafoya* (2007) 42 Cal.4th 147, 189 [approving CALJIC 8.88]; *Allen v. Woodford* (9th Cir. 2004) 395 F.3d 979, 1010-1011 [same].)

Rodriguez, *Frierson*, and this Court's related opinions were hardly "historical accidents" lacking "careful reasoning," as McDaniel describes them. (AOB 209-215.)[3] Rather, in these

[3] McDaniel also complains this Court has so far failed to acknowledge Justice Newman's concurrence in *People v. Jackson* (1980) 28 Cal.3d 264, 318, which McDaniel claims endorsed reading a beyond-a-reasonable-doubt burden and jury unanimity requirements into the statute to comport with constitutional requirements. Justice Newman actually stated that if the Supreme Court of the United States were to prescribe such

early opinions, this Court comprehensively evaluated the constitutionality of the 1977 and 1978 death penalty statutes, made no uncritical assumptions about the procedural requirements set forth in these statutes, and reached conclusions that were in harmony with the statutory language as well as constitutional jurisprudence from the Supreme Court of the United States.

Section 1042 does not require this Court to revisit that precedent. As explained further below, section 1042 requires a jury to resolve all "issues of fact" in accordance with article I, section 16 of the California Constitution. Together, section 1042 and article I impose a unanimity requirement for "issues of fact." Section 1042 imposes no additional requirements governing standards of proof at sentencing. (AOB 194, 196, 200, 205-206.) The burden is supplied by other statutes or the Due Process Clause, and this Court has already held that the California Constitution does not require proof of foundational facts or a death verdict beyond a reasonable doubt. Nor does section 1042 require reconsidering whether a jury must be unanimous about what aggravating evidence may be considered in a penalty verdict. Those assessments are not "issues of fact" within the meaning of section 1042 (AOB 194-196, 201-202, 204); instead, as this Court has reasoned, aggravating evidence is the type of "foundational fact" that does not require unanimity.

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requirements in the future, courts could read such requirements into the statute to preserve its constitutionality. (*Id.* at pp. 318-319.) As shown herein, the high court has never prescribed such requirements for a jury's death penalty determinations.

B. Neither section 1042 nor the California Constitution requires proof of a penalty verdict beyond a reasonable doubt

On their face, neither section 1042 nor article I, section 16 mandates a burden of proof. Nor does requirement of proof beyond a reasonable doubt originate from either of these sources. Rather, this requirement, where applicable, is imposed by the due process clauses of the United States and California Constitutions. (See *In re Winship* (1970) 397 U.S. 358, 364 ["Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused *against conviction* except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," italics added]; Cal. Const., art. I, sec. 15 [state due process clause].)

The beyond-a-reasonable-doubt burden of proof is also codified in section 1096, which states, "A defendant in a criminal action is presumed to be innocent until the contrary is proved, . . . but the effect of this presumption is only to place upon the state the burden of proving him or her guilty beyond a reasonable doubt." Therefore, in California, all crimes and special-circumstance allegations that make a defendant eligible for the death penalty must be found true beyond a reasonable doubt. (§ 1096; § 190.4, subd. (a) ["In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that [it] is not true."]; see 9CT 2232-2233 [instructing McDaniel's jury with CALJIC 8.80.1: "The People have the burden of proving the truth of a special circumstance. If you have

a reasonable doubt as to whether a special circumstance is true, you must find it to be not true."].) Because that burden of proof is not derived from the right to a jury trial, neither section 1042 nor article 1, section 16 requires it.

To be sure, this Court has required a beyond-a-reasonable doubt burden of proof for two categories of evidence before any individual juror may consider the evidence during the penalty phase. (§ 190.3, subds. (b) and (c).) Because evidence of prior crimes of violence had the potential to be particularly influential on a penalty-phase jury's verdict of death, this Court concluded that it was important that such evidence be reliable and proven beyond a reasonable doubt. (*People v. McClellan* (1969) 71 Cal.2d 793, 804, fn. 2; *People v. Polk* (1965) 63 Cal.2d 443, 450-451; see also *People v. Balderas* (1985) 41 Cal.3d 144, 205, fn. 32.) This Court extended that holding to prior criminal activity that resulted in a conviction (see *People v. Williams* (2010) 49 Cal.4th 405, 459). But the concerns that informed the Court's analysis did not invoke either section 1042 or article I, section 16 of the California Constitution. Section 1042 therefore offers no basis to reconsider this Court's long-established precedents.

McDaniel attempts to incorporate a burden of proof requirement into section 1042 by claiming that the right to a jury trial and the burden of proof are "inextricably intertwined." (See AOB 206; see also generally AOB 198-206.) But none of the cases McDaniel cites supports his argument. McDaniel's reliance on *People v. Williams* (1948) 32 Cal.2d 78 is representative. Not only does McDaniel quote from Justice Schauer's dissenting

opinion as *Williams*'s holding (AOB 202-203), but Justice Schauer's dissent criticized an instruction only because it did not ensure a unanimous penalty verdict. It did not address the burden of proof required to consider aggravating evidence or the penalty verdict. (*Williams, supra*, 32 Cal.2d at p. 103, Schauer, J. diss. opn.)

Similarly, the cases McDaniel cites for the proposition that a jury's penalty verdict must be unanimous (see, e.g., *People v. Hall* (1926) 199 Cal. 451, 456), do not suggest that the determination must be made beyond a reasonable doubt. (See AOB 204-206.) For example, in *People v. Cancino* (1937) 10 Cal.2d 223, this Court did not hold that the Constitution required a beyond-a-reasonable-doubt standard for the death penalty determination, even though it expressed a preference for such an instruction. (See AOB 205-206.) The Court "agree[d] that it would be more satisfactory in death penalty cases if the court would instruct the jurors that if they entertain a reasonable doubt as to which one of two or more punishments should be imposed, it is their duty to impose the lesser," and "[t]his rule should prevail in every case where the punishment is divided into degrees and the jury is given discretion as to the punishment." (*Cancino, supra*, 10 Cal.2d at p. 230.) But *Cancino* found no error in failing to give such an instruction. Instead, it affirmed instructions that committed the penalty to the jury's discretion, without any mention of a standard or burden of proof. (*Ibid.*)

This is not to say that it would be impossible or even inadvisable, as a policy matter, to require instructions that

compel a jury to find the penalty appropriate beyond a reasonable doubt. Arkansas imposes a burden of proof by statute (Ark. Code Ann. § 5-4-603, subd. (a)), and Utah and Connecticut have interpreted their statutory scheme to require proof beyond a reasonable doubt as to whether death is the appropriate penalty.[4] (See *State v. Rizzo* (2003) 266 Conn. 171, 201-242 [holding that state constitutional concerns supported reading the beyond-a-reasonable-doubt burden into the state statute as to the weighing of aggravating and mitigating factors and the ultimate penalty, even though it was not required by federal constitutional jurisprudence]; *State v. Wood* (Utah 1982) 648 P.2d 71, 83 [holding that imposition of the death penalty must be made under the reasonable-doubt standard based on legislative intent and because it "strikes the best balance between the interests of the state and the individual for most of the reasons stated in *In re Winship* . . . ."].)

Still, there is no historical support for McDaniel's position that California's constitutional jury trial right was intended to encompass, or implicitly includes, the right to have a capital verdict determined beyond a reasonable doubt. Nor does section 1042 incorporate any such burden of proof. While the electorate may choose to require such a burden of proof, as other states

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[4] Connecticut abolished its death penalty prospectively in 2012, and thereafter their Supreme Court held that its death penalty law violated the state constitution's due process clause as to all remaining death row inmates. (*State v. Santiago* (2015) 318 Conn. 1.)

have done by legislation, neither the California constitution nor section 1042 require it.[5]

C. Neither section 1042 nor the California Constitution requires proof beyond a reasonable doubt or juror unanimity as to aggravating factors

1. Proof beyond a reasonable doubt

As noted above, neither section 1042 nor the right to a jury trial under article I, section 16 of the California Constitution incorporates any requirements about a burden of proof. Section 1042 therefore provides no basis for revisiting this Court's precedents, which have uniformly concluded that most aggravating factors are not required to be proven beyond a reasonable doubt.[6] (See *People v. Gordon*, *supra*, 50 Cal.3d at pp. 1273-1274.) Although this Court has required proof beyond a reasonable doubt for certain aggravating factors—prior crimes and prior criminal activity—those requirements are not rooted in section 1042 or the constitutional right to a jury trial; therefore, they do not support McDaniel's claims. In any event, a burden of proof requirement should not be extended to other aggravating factors for two reasons.

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[5] The current death penalty statute was adopted by voters in 1978 through Proposition 7 (*Rodriguez*, *supra*, 42 Cal.3d at p. 777) and the Legislature cannot amend or repeal it (*People v. Cooper* (2002) 27 Cal.4th 38, 44, citing *In re Oluwa* (1989) 207 Cal.App.3d 439, 445-446).

[6] Moreover, as explained in Section I.C.2, *post*, disputed aggravating factors do not raise "issues of fact" within the meaning of section 1042.

First, this Court mandated a beyond-a-reasonable-doubt burden of proof for evidence of prior unadjudicated criminal activity (now admissible pursuant to § 190.3, subdivision (b)) *prior to* the enactment of the current death penalty statute. (*Polk*, *supra*, 63 Cal.2d at pp. 450-451, citing *People v. Terry* (1964) 61 Cal.2d 137, 149, fn. 8; *People v. Stanworth* (1969) 71 Cal.2d 820, 840; see also *Balderas*, *supra*, 41 Cal.3d at p. 205, fn. 32.) This Court naturally extended it to the same category of evidence in section 190.3, subdivison (c)[7]—prior criminal activity that resulted in a conviction. (See *Williams*, *supra*, 49 Cal.4th at p. 459.) Because nothing in the 1978 death penalty statute purported to repeal this protection (see *People v. Robertson* (1982) 33 Cal.3d 21, 53-54), such a well-settled principle of this Court's jurisprudence was fairly read into California's death penalty scheme. The same is not true of all other aggravating factors.

Second, the circumstances of the crime (§ 190.3, subd. (a)) can be either aggravating or mitigating; in either event, they are not readily susceptible to proof beyond a reasonable doubt. While the fact of a defendant's guilt is established at the first phase of the trial, that determination means only that the defendant satisfies the statutory elements of the offense. The "circumstances" of the crime casts a much wider net, encompassing not only the elements of the crime, but also the individual juror's personal, subjective reaction to the surrounding

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[7] This aggravating factor was added for the first time to the current version of the death penalty statute. (See Ballot Pamp., Gen. Elec. (Nov. 7, 1978), text of Prop. 7, pp. 43-44; § 190.3, subd. (c).)

aspects of the crime. (See e.g., *People v. Tully* (2012) 54 Cal.4th 852, 1030-1031 [noting that that "devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a)"], citations and internal quotations omitted.) These circumstances are not historical facts that are proved by objective evidence; rather, they are moral and normative reactions to the considered offenses that are not readily susceptible to proof beyond a reasonable doubt.[8]

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[8] In the three States that require aggravating factors be proven beyond a reasonable doubt, those aggravating factors serve as a screening mechanism to provide for death penalty eligibility, in the way that California relies on special-circumstance allegations. (See e.g., *Johnson v. State* (Ark. 1992) 823 S.W.2d 800, 805-806 [recognizing that under the current version of Arkansas's capital murder statute, the narrowing of death eligible defendants "primarily occurs in the penalty phase of the trial"], citing Ark. Code Ann. § 5-4-603, subd. (a); Ohio Rev. Code Ann. § 2929.03, subd. (B) ["If the indictment . . . charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and . . . . whether the offender is guilty or not guilty of each specification."]; *Andrews v. Shulsen* (10th Cir. 1986) 802 F.2d 1256, 1261-1262 [citing Utah Code Ann. § 76-3-202 and noting that Utah "has restricted capital homicides to intentional or knowing murders committed under eight aggravating circumstances"]; Utah Code Ann. § 76-3-207(3) [noting that aggravating circumstances to be considered at the penalty phase include those outlined in Utah Code Ann. § 76-3-202].)

2. Unanimity

Although section 1042 requires "issues of fact" to be resolved unanimously, as explained *ante* in Section I.A, not all factual determinations are "issues of fact" that require jury unanimity. (§ 1042.) It therefore does not require juror unanimity with respect to which of the aggravating factors alleged by the prosecutor support the verdict, or regarding the existence of particular aggravating factors. Requiring jurors to agree on facts at the penalty phase would run counter to the general principle that, even at a guilt-phase trial, jurors do not have to unanimously agree on all of the facts underlying their decision. In determining guilt in a criminal case, a jury verdict must be unanimous. (*People v. Jones* (1990) 51 Cal.3d 294, 321, citing Cal. Const., art. I, § 16; *Collins, supra*, 17 Cal.3d at p. 693.) Additionally, the jury must agree unanimously that the defendant is guilty of a specific act that constitutes a crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 ["when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act"]; *People v. Diedrich* (1982) 31 Cal.3d 263, 281.)

But the unanimity rule does not extend to the specific details of how a single, agreed-upon act was committed. (*People v. Mickle* (1991) 54 Cal.3d 140, 178.) Jurors may convict a defendant of a crime, such as first degree murder, based on different theories of liability (when more than one theory has been advanced). (*Vargas, supra*, 2020 WL 3956868, *21; *People v.*

Milan (1973) 9 Cal.3d 185, 195.) A jury is not required during the guilt phase to make preliminary unanimous findings about the credibility of a witness or the believability of an expert. (See, e.g., *People v. McDonald* (1984) 37 Cal.3d 351, 371 ["The jurors retain both the power and the duty to judge the credibility and weight of all testimony in the case."].) And jury unanimity is not required before any single juror may consider evidence of uncharged prior crimes—even if an individual juror must find by a preponderance of the evidence that the uncharged crime occurred. (See, e.g., CALJIC 2.50.01; cf. *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013.)

Just as it is permissible to do so at the guilt phase of a trial, a penalty-phase jury is permitted to reach a unanimous verdict that death is the appropriate punishment based on different aggravating factors, without first agreeing on their existence. Indeed, this Court has recognized that disputed aggravating factors in a penalty-phase trial are "foundational" matters that do not require jury unanimity. (*People v. Miranda* (1987) 44 Cal.3d 57, 99 ["Generally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding. A defendant is, of course, entitled to a unanimous jury verdict in the final determination as to penalty. The jury here was so instructed."]; *People v. Hines* (1997) 15 Cal.4th 997, 1067 ["Jury unanimity on such 'foundational' matters is not required."].)

Each juror is permitted to consider the "circumstances of the crime," the "presence or absence of criminal activity" involving

the "use of force or violence," the existence of prior convictions, whether the offense was committed while the defendant was under the influence of extreme mental disturbance, or whether the defendant committed the offense reasonably believing that his conduct was morally justified. (§ 190.3, subds. (a)-(f).) Even if factual assessments go into those penalty-phase considerations, they are "foundational," like the determinations that go into assessing witness credibility or considering prior uncharged crimes during the guilt phase. As such, they are not the type of "issues of fact" triggering the unanimity requirements of article I, section 16 incorporated into section 1042.

Indeed, this Court has specifically held article I, section 16 does not require a unanimous jury finding as to any aggravating factor underlying the death verdict. (*Griffin*, *supra*, 33 Cal.4th at p. 598.) That is consistent with this Court's observation that "[t]here is no requirement in the federal or the state Constitution that . . . the jury reach a unanimous agreement with respect to the factors in aggravation." (*Hartsch*, *supra*, 49 Cal.4th at p. 515 (internal citations and quotations omitted); see *Davis*, *supra*, 36 Cal.4th at p. 572 [holding that neither a defendant's U.S. Const. Sixth, Eighth, nor Fourteenth Amendment rights nor "their state constitutional counterparts" require unanimous findings as to the existence of aggravating factors].)

McDaniel claims this Court's precedent rejecting the need for unanimity for "foundational facts" is "inconsistent with the rule that juries must be unanimous as to discrete criminal acts." (AOB 220.) According to McDaniel, to "the extent that the

aggravating factors and the punishment of death are required to be raised in pleadings (see § 190.3 [notice of aggravating evidence required]; *Lankford v. Idaho* (1991) 500 U.S. 110, 127 [notice of capital punishment required]), they are therefore issues of fact which require unanimous determination beyond a reasonable doubt." (AOB 220-221.) But McDaniel was not entitled to jury unanimity as to foundational matters or subordinate determinations. Thus, even as to evidence presented under factors (b) and (c), there is no need that the entire jury find the prosecution met its burden of proof before a single juror may consider this evidence. (*Miranda, supra*, 44 Cal.3d at p. 99, disapproved on another point in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

This is an essential component of California's death sentencing scheme: that each juror must be personally and individually persuaded that death is the appropriate punishment based upon their personal assessment of the relative moral weight of the factors in aggravation and mitigation. Only when all 12 jurors have each independently come to the conclusion that the circumstances warrant death based on their own view of the evidence may a death sentence be selected. To require a unanimous jury finding on aggravating factors such as whether the circumstances of the offense justify death would begin to erode that individualized inquiry. (See *Tuilaepa v. California* (1994) 512 U.S. 967, 972 ["What is important at the selection stage is an individualized determination on the basis of the

character of the individual and the circumstances of the crime."], quoting *Zant*, *supra*, 462 U.S. at p. 879.)

McDaniel also contends that "the history of the death penalty in California suggests that the penalty phase verdict was itself considered an issue of fact," supporting his claim to unanimity on aggravating factors. (AOB 202.)[9] But even if so, the statutory scheme already requires the *verdict* to be unanimous (§ 190.4, subd. (b)), which is all that section 1042 or article I, section 16—if applicable—would command under McDaniel's reading of history. (See *Anzalone*, *supra*, 56 Cal.4th at p. 551.)[10] McDaniel received a jury trial as to the appropriate penalty, and all 12 jurors had to unanimously agree that the aggravating factors outweighed the mitigating factors, and that death was the appropriate punishment. (See 9CT 2449 [instructing McDaniel's jury with CALJIC 8.88: "To return a

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[9] McDaniel draws support from the language in a predecessor death penalty statute that left the penalty determination to the "discretion of the court or the jury trying the issue of fact on the evidence presented." (AOB 202.) But that says nothing about whether foundational facts that bear on a penalty verdict are "issues of fact." McDaniel makes a similar argument by pointing to section 190.3 and its reference to the "trier of fact" making the penalty determination. (AOB 207-208.) But "trier of fact" is shorthand for the entity making the penalty determination; it did not secretly embed unanimity requirements into the statute by calling the decisionmaker a "trier of fact." The electorate demonstrated it knew how to impose unanimity requirements when required. (See, e.g., § 190.4 [explicitly requiring unanimity for the verdict].)

[10] And as explained *ante* in Section 1.A, this Court has observed that the ultimate penalty verdict is not a factual assessment, but a normative one.

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," italics added].) Any historical tradition about unanimous penalty *verdicts* says nothing about whether *foundational facts* require unanimity. As this Court has consistently held—in both guilt and penalty phase analyses—juror unanimity is not required as to disputed foundational facts before a jury may consider them.

Again, where other states have required unanimity as to the *existence* of aggravating factors, such imposition has been statutorily mandated. (See e.g., Ark. Code Ann. § 5-4-603, subd. (a); Tex. Code Crim. Proc. Ann. art. 37.071, sec. 2(b)-(c).) Thus, a death penalty scheme could require unanimity as to aggravating factors. While it might be difficult to apply to the circumstances of the crime (§ 190.3, subd. (a)), unanimity requirements could be applied more easily to the other aggravating factors, i.e., prior convictions and uncharged crimes (§ 190.3, subds. (b), (c)). As to these latter factors, requiring unanimity would erect additional safeguards before a jury could impose a death verdict.[11]

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[11] As outlined in the previous section, Arkansas, Ohio, and Utah use "aggravating factors" in the way California uses special-circumstance allegations—as a way to narrow the class of death eligible defendants. Thus, California already provides the same unanimity protections that these states do because special-circumstance allegations must be proved unanimously true prior to the commencement of the penalty phase. (See § 190.4, subd. (a) ["In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous

Nevertheless, whether the additional requirement of unanimity should be imposed as McDaniel proposes is more appropriately left to the electorate.

II. McDaniel was prejudiced by any failure to instruct on proof beyond a reasonable doubt as to penalty but any error as to aggravating factors was harmless

If the Court concludes that the instructions proposed by McDaniel are required, assessing whether McDaniel was prejudiced is a difficult task. Ordinarily, instructional error at the penalty phase of a capital trial is analyzed under the reasonable-possibility test. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) This Court affirms the judgment unless it concludes "there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*Ibid.*)[12] Some errors, however, are not susceptible to "harmless error" analysis. Errors that "go to the very construction of the trial mechanism—a biased judge, total

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verdict that one or more of the special circumstances are true, . . . the court shall dismiss the jury and shall order a new jury impaneled to try the issues . . . ."].)

[12] The "reasonable possibility" standard is "the same, in substance and effect," as the harmless-beyond-a-reasonable-doubt standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11; accord, *People v. Cage* (2015) 62 Cal.4th 256, 289; *People v. Cowan* (2010) 50 Cal.4th 401, 491; see *McKinney v. Arizona* (2020) 140 S.Ct. 702, 708 [penalty-phase errors involving factors in aggravation and mitigation are amenable to harmless error analysis].)

absence of counsel, the failure of a jury to reach any verdict on an essential element"—are structural errors that require no proof of harm. (*People v. Gamache* (2010) 48 Cal.4th 347, 396.) While an "error that erroneously adds to or subtracts from the record before the jury can 'be quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt,'" structural errors may not. (*Ibid.*)

If the Court holds that the ultimate penalty verdict requires proof beyond a reasonable doubt, McDaniel can establish prejudice regardless of whether the reasonable possibility or structural error standard applies. In contrast, any error with respect to a requirement for unanimity or proof beyond a reasonable doubt regarding specific aggravating factors may be quantitatively assessed in the context of the other evidence presented, and the evidence adduced at the penalty phase in this case demonstrates that any such error was harmless beyond a reasonable doubt.

A. Proof beyond a reasonable doubt as to penalty

If the trial court erred by failing to require a death verdict by proof beyond a reasonable doubt, McDaniel was prejudiced and is entitled to a new penalty-phase trial. Because the penalty assessment is "inherently moral and normative" (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1278), it is exceedingly difficult to assess whether there is a realistic possibility that the jury would have rendered a different verdict had they been instructed that their normative assessment must have been guided by a burden of

proof beyond a reasonable doubt. While the penalty-phase jurors undoubtedly took their solemn duties seriously before arriving at their verdict, it is nearly impossible to reproduce the "mental balancing process" where the jurors are "free to assign whatever moral or sympathetic value" they find "appropriate to each and all of the various factors [they are] permitted to consider," in assessing prejudice. (*Brown*, *supra*, 40 Cal.3d at p. 541.)

The same result would follow if the error were considered structural. In *Sullivan v. Louisiana* (1993) 508 U.S. 275, the Supreme Court of the United States held that a constitutionally deficient instruction on reasonable doubt given at the guilt phase was not subject to harmless error review. (*Id.* at pp. 277, 280-282.) For harmless-error analysis to apply to instructional errors, the error in question cannot "categorically vitiat[e] *all* the jury's findings." (*Hedgpeth v. Pulido* (2008) 555 U.S. 57, 61, citations and internal quotation marks omitted, original italics.) The omission of a burden of proof as to the ultimate penalty verdict is similar, and the instructional error would not be susceptible to harmless-error review because the error would categorically vitiate all the jury's findings regarding penalty. (See also *State v. Wood*, *supra*, 648 P.2d 71 (per curiam) [finding structural error when the trial judge imposed the death penalty on a finding that the aggravating factors preponderated over the mitigating factors, and where that same judge failed to apply any burden of proof to whether the imposition of the death penalty was justified].)

B. Unanimity and proof beyond a reasonable doubt as to aggravating factors

Failing to instruct on unanimity and proof beyond a reasonable doubt with respect to the factually disputed aggravating factors does not vitiate the jurors' findings. Instead, it is the type of error that "adds to or subtracts from the record before the jury," and any harm "can 'be quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.'" (*Gamache*, *supra*, 48 Cal.4th at p. 396.) This Court has already held that the failure to instruct jurors about the burden of proof on section 190.3, subdivision (b) and (c) factors is assessed for prejudice. (*Brown*, *supra*, 46 Cal.3d at p. 448.) The same is true of McDaniel's claims regarding unanimity. There is no reasonable possibility that the jury would have returned a different penalty verdict, even if they would have been required to conclude unanimously that certain aggravating evidence had been proven beyond a reasonable doubt.[13]

1. Section 190.3, factor (a) evidence

The circumstances of the murders and attempted murders McDaniel committed were shocking, and, on their own, were so

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[13] McDaniel does not claim harm from the failure to require proof of all aggravating factors beyond a reasonable doubt. (AOB 221-224.) He claims prejudice only from the absence of a unanimity instruction. In any event, the jury was instructed that aggravating factors under sections 190.3, subdivisions (b) and (c), had to be proven beyond a reasonable doubt. (9CT 2448-2449 [instructing McDaniel's jury with CALJIC 8.86 and CALJIC 8.87].)

compelling that instructions on unanimity or a burden of proof as to factors in aggravation would have had no effect on the jury's verdict. Not surprisingly, McDaniel did not address the factor (a) evidence in his opening brief, likely because the circumstances of the crimes were so horrific. The ambush began when McDaniel pointed a gun at Elois Garner's head and ordered her to knock on Annette Anderson's door so he could surreptitiously enter the apartment. Then, armed with a nine-millimeter semiautomatic handgun, McDaniel burst inside and methodically shot not only George Brooks, but the three innocent female bystanders who were with him. All four victims were unarmed. As the prosecutor argued, McDaniel was "like a hunter going through and just taking people out." (24RT 4552.) Many of the shots were fired at close range and at the victims' faces. The prosecutor aptly described the scene as a "bloodbath." (24RT 4522-4523, 4543, 4550.) Debra Johnson testified there were so many shots fired that they "lit up" the kitchen. (8RT 1690, 1692.). And a coroner's investigator testified that that there was so much blood in the apartment that it left a metallic taste in her mouth. The kitchen floor was sticky with blood, and her shoe coverings were quickly saturated. (19RT 3618.)

The gunshot wounds suffered by the victims were gruesome. Brooks sustained seven gunshot wounds. (7RT 1515-1517, 1519.) McDaniel shot Brooks in the face from half an inch to two feet away as Brooks laid on the ground. Brooks sustained a gunshot to his forehead that penetrated his brain. The bullet from a gunshot to his left eye passed through the right eye and exited

through the right eyelid. Another bullet, which was fired through Brooks's upper lip, passed through his jaw and skull and into his brain. (7RT 1520-1522, 1526-1527.)

Anderson, a grandmother of two and a cancer patient, was the matriarch of her family. (21RT 4091, 4094-4095.) She was the first victim shot by McDaniel as he entered her apartment. A medium caliber bullet entered just below her left eye and traveled to her brain. Stippling near the wound indicated Anderson was shot from half an inch to two feet away. (7RT 1389-1394.) A bullet, fired through the middle of her chest, ripped through Anderson's heart, diaphragm, and liver before exiting through her back. (7RT 1395-1396, 1400.)

Like Brooks and Anderson, Janice Williams suffered traumatic gunshot wounds to her face. As McDaniel came through the door, he shot her in the mouth. (6RT 1202.) The bullet passed through Williams's mouth and exited through her neck. As a result, her mouth was paralyzed, and she lost half of her tongue. Williams was also shot in the arms and legs and had a "pipe" in one leg to help her walk. She was hospitalized for three to four months. (6RT 1204-1205.)

Johnson, who was initially asleep on the living room floor, did not escape McDaniel's wrath. He stood over her and shot her in the arm from close range as she tried to cover her face. The bullet passed through her arm, tore through the right side of her mouth, and exited through the left side. Johnson was also shot in the chest. At the time of the trial, she had undergone five

surgeries and a sixth was scheduled. (8RT 1685-1687, 1690-1691, 1694-1695, 1718-1719.)

McDaniel's behavior after the murders was also disturbing. At Hawes's house, he watched a news report about the shooting and bragged about it. He showed no remorse for what had happened. If anything, McDaniel acted as though the shooting was a big joke. (6RT 1248-1253, 1255-1256.) In December 2004, the police found a newspaper article about the murders and trial materials that McDaniel had sent to Hawes in her house. Transcripts of witnesses' statements were included with the materials. (7RT 1465-1467.) McDaniel's boasting over the heinous crimes he had committed and the preservation of the newspaper article about those crimes showed he was a callous killer who had no remorse for his actions.

2. Section 190.3, factor (c) evidence

The one prior conviction introduced under section 190.3, factor (c)—a 2002 conviction for possession of an assault weapon—is not addressed by McDaniel, likely because it was supported by overwhelming, uncontested evidence. Los Angeles Police officers saw McDaniel walking between buildings in Nickerson Gardens in the early evening. When McDaniel saw the officers, he ran away. He had a TEC 9 semiautomatic pistol in his left hand and kept his right leg straight as he ran. McDaniel ducked into a building, and the police located him inside the kitchen of one of the units. The TEC 9 handgun was hidden under the stove top. The police also recovered an Uzi assault rifle that was hidden under a bed in the unit. A black

thread that matched the stitching on McDaniel's shorts was on the rifle. (20RT 3797-3801, 3815-3823; see 20RT 3828-3829 [introducing certified document reflecting McDaniel's conviction as People's Exhibit 120]; 22RT 4332-4334 [admitting all People's exhibits into evidence].)

3. Section 190.3, factor (b) evidence

Contrary to McDaniel's argument, there were not "numerous disputed 'issues of fact'" with respect to the uncharged crimes evidence. (AOB 222.) For example, the evidence of McDaniel's murder of Akkeli Holley was strong. McDaniel relies on an inconsistency in Kathryn Washington's testimony and her admission that she daily used hallucinogenic drugs to challenge her credibility. (AOB 222.) Although Washington testified that she did not witness the murder (19RT 3725-3726), the prosecutor impeached her with a portion of her videotaped interview with the police wherein she identified McDaniel as Holley's killer (see 19RT 3726; 20RT 3851-3856). This information was particularly credible given that she offered it during a police interview about the instant case. The police did not ask Washington about the Holley murder; rather, she volunteered the information during an investigation of unrelated crimes. (See 21RT 3984-3985.) In addition, the evidence demonstrated that Washington was a reluctant witness, which explained why her testimony differed from what she had told the police. (See 19RT 3855-3856; 23RT 4540.)

And the evidence unmistakably proved that McDaniel murdered Ronnie Chapman. Although Jeanette Geter initially

testified that either McDaniel or his brother had shot Chapman (19RT 3646; see AOB 223), she later testified that McDaniel was the person who had shot him (19RT 3648). Geter also testified she told the police that she was "positive" McDaniel had shot Chapman, and the police officer who interviewed her on the day Chapman was shot corroborated this testimony. (19RT 3650-3651; see 20RT 3804-3805.)

The 2003 assault of Officer Gerardo Davila is yet another incident that was proven by substantial evidence. Here, McDaniel only asserts that an eyewitness to the assault, Joshua Smith, "testified to facts suggesting that the alleged assault was actually an unwarranted act of police brutality." (AOB 223-224.) Smith, however, had been friends with McDaniel since 1995, was a fellow member of the Bounty Hunters, and demonstrated a clear bias in favor of McDaniel. Smith did not have a good view of what was occurring because he was about 10 feet away from McDaniel when he claimed to have seen Officer Davila take a swing McDaniel. (22RT 4144-4146, 4149-4150.) And, at the time of his testimony, Smith was serving a prison term for aiding and abetting an assault and robbery. His credibility and his characterization of the incident with Officer Davila were untrustworthy.

The evidence of the 1995 armed robbery of Javier Guerrero was uncontested and well-supported. Guerrero unequivocally testified that one of the three Black males who had robbed him also pointed a gun to his forehead. (See 20RT 3764, 3772.) Immediately after the robbery, the police arrived and took

Guerrero to a field show-up, where he was presented with three or four different groups of suspects. He identified McDaniel as one of the people who had robbed him. (20RT 3766-3768, 3770.) This evidence showed that McDaniel was, at the very least, an aider and abettor in the robbery. That Guerrero was shown several different suspects shortly after the incident and that he only picked one, McDaniel, lent credibility to his testimony and identification of McDaniel.

The majority of the other uncharged crimes were uncontested and supported by overwhelming evidence including the incident at the middle school where McDaniel asked a security officer if he was "strapped" and then threatened he would return to the school to shoot the security officer (see 20RT 3785-3789), the 2001 incident involving McDaniel's possession of a .357 caliber revolver (see 20RT 3829-3832), the 2006 battery upon a sheriff's deputy in the Compton courthouse lock-up (see 20RT 3919-3922), and the 2006 feces-throwing incident (see 21RT 3970-3793).[14]

Finally, McDaniel challenges the strength of the evidence of his possession of a shank in jail, arguing it was contested and "hardly overwhelming." (AOB 223.) But this is the only criminal

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[14] McDaniel's argument regarding the jury's questions about "uncharged criminal acts" (see AOB 224) is unavailing. Those questions were a result of an erroneous instruction that the trial court corrected. (Compare 25RT 4732; 9CT 2421-2423 [revised CALJIC 8.87], with 25RT 4738-4743; 9CT 2455 [original CALJIC 8.87]; see 25RT 4749, 4762-4763; 9CT 2430-2431.)

activity that was not as well-supported as the others, which were numerous and more serious.

4. Any error was harmless

In sum, the aggravating evidence—the horrific circumstances of the crime, McDaniel's prior conviction, and his uncharged crimes—was voluminous and in most respects proven with strong evidence, if not completely uncontested. By contrast, the mitigating evidence, which focused largely on McDaniel's social history and upbringing that forced him to become a gang member, was not particularly strong. On this record, it is not reasonably possible that the jury would have rendered a different verdict had it been instructed to unanimously find the truth of the aggravating factors beyond a reasonable doubt. Accordingly, any instructional error was harmless.

CONCLUSION

The judgment and the sentence of death should be affirmed.

Dated: August 14, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **THIRD SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Century Schoolbook font and contains **8,232** words.

Dated: August 14, 2020

XAVIER BECERRA
Attorney General of California

KATHY S. POMERANTZ
Deputy Attorney General
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DECLARATION OF ELECTRONIC SERVICE

Case Name: People v. Donte Lamont McDaniel No.:S171393

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On August 14, 2020, I electronically served the attached THIRD SUPPLEMENTAL RESPONDENT'S BRIEF by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence.

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Los Angeles County Superior Court
Via Email: TTSou@lacourt.org
(Clerk of The Hon. Robert J. Perry)

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Legal Affairs Secretary
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California Appellate Project (CAP-SF)
Via Email: filing@capsf.org

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 14, 2020, at Los Angeles, California.

Nora Fung
Declarant

Signature

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