IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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

APPELLANT'S THIRD SUPPLEMENTAL REPLY BRIEF

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

HONORABLE ROBERT J. PERRY

MARY K. McCOMB
State Public Defender
ELIAS BATCHELDER
Supervising Deputy State Public Defender
State Bar No. 253386
1111 Broadway, 10th Floor
Oakland, California 94607
Telephone (510) 267-3300
elias.batchelder@ospd.ca.gov

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

CONSTITUTIONS

STATE STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

JURY INSTRUCTIONS

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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

APPELLANT'S THIRD SUPPLEMENTAL REPLY BRIEF

INTRODUCTION

For over forty years, this Court has declined to apply the protection of the beyond a reasonable doubt standard to the ultimate penalty determination in the modern California capital scheme. It has similarly excepted disputed aggravating factors under Penal Code[1] section 190.3 from the protection of jury unanimity. The Court's rejection of these entwined jury

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

protections rests on a single legal conclusion: the jury right—be it enshrined under the state or federal constitutions—"does not apply to California's penalty phase proceedings." (*People v. Prieto* (2003) 30 Cal.4th 226, 272; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147 [no right to jury trial at the penalty phase, and thus no right to a unanimous jury finding on aggravating factors]; *People v. Griffin* (2004) 33 Cal.4th 536, 598 (*Griffin*) [prior rejections of similar challenges had "implicitly" considered Article 1, section 16].).)

The central thesis of Mr. McDaniel's argument is that, at least with respect to the California Constitution, this legal conclusion is incorrect. Although long overlooked, it has been settled law for almost 100 years that the jury protection of unanimity applies to the penalty determination under the California Constitution. (*People v. Hall* (1926) 199 Cal. 451, 458 (*Hall*) [absence of juror unanimity as to penalty required reversal because it was "in effect the denial of a trial by jury"].) For this reason alone, the Court should reconsider its current doctrine.

The Attorney General does not dispute Mr. McDaniel's primary contention: that the jury right of unanimity applies to

the ultimate penalty determination. The Attorney General argues merely that cases cited under the California Constitution for the proposition that a jury's penalty verdict must be unanimous "do not suggest that the determination must be made beyond a reasonable doubt." (3d Supp. RB at 21; see also 3d Supp. RB at 18 ["Together, section 1042 and article I impose a unanimity requirement for 'issues of fact'" but they "impose no additional requirements governing standards of proof at sentencing"].) But if Article I, section 16, echoed by section 1042, requires a unanimous verdict on penalty, the entire legal edifice of current doctrine collapses. No support can be found in legal history, jury right doctrine, or logic to apply unanimity—but not reasonable doubt—to the penalty phase. The two rights are invariably intertwined and always apply to the same substrate: "issues of fact." (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 296 [common law jury trial rights derived from the shared principle of "submission of issues of fact to a jury"]; see also *People v. Green* (1956) 47 Cal.2d 209, 220 (*Green*) [citing with approval federal authority for the proposition that the jury right in criminal cases "extends to *all issues*-character or degree of the

crime, guilt *and punishment-which are left to the jury*"], italics added.)

The Attorney General avoids the contradiction in part by not providing a definition for "issues of fact," other than stating that the term does not apply to the questions posed at the penalty phase trial. As Mr. McDaniel has explored at considerable length in the opening and supplemental briefs "issues of fact" are defined by the trial and the verdict. "Issues of fact," while not encompassing every picayune, subsidiary dispute at a criminal trial, embrace the "ultimate issues," and are expressed by the jury's answers to the questions posed to them at a trial. (Thayer, *"Law and Fact" in Jury Trials* (1890) 4 Harv. L. Rev. 147, 147–148 [the verdict answered an "issue on some question of fact, to say what the fact was, and the name for this thing was 'rei Veritas.' The truth of the thing about what? *About all sorts of questions*…"], italics added; see also *id.* at p. 152 ["'fact' is confined to that sort of fact, ultimate fact, which is the subject of the issue"].) The California penalty phase trial, like *all* trials before juries, creates issues of fact: the existence of prior crimes and the ultimate issue of the appropriate penalty.

In the face of this (and other) evidence regarding the meaning of "issues of fact" and its direct tie to the jury protections, the Attorney General contends that there is "no historical support for McDaniel's position[.]" (3d Supp. RB at 22.) Not so. Mr. McDaniel has presented significant historical support for his position. And he has detailed the poorly reasoned origin of the current rule. (See AOB at pp. 211-217 [explaining that current law derived from uncritical acceptance of legal positions taken by defendants attacking California's death penalty].) In fact, the very first case this Court ever decided on capital jury sentencing in 1852 assumed the jury right's application to the discretionary penalty decision. (*People v. Tanner* (1852) 2 Cal. 257 (*Tanner*); *infra* section II.A.) If resolution of this issue turns on legal history, Mr. McDaniel has surely provided an adequate basis for reconsideration.

The Attorney General's primary focus, however, is not history. Instead, it is a plea for judicial abstention. Ultimately, the Attorney General acknowledges that application of jury protections to the penalty phase is an "important" issue and would present "feasible policy reforms for the voters to consider."

(3d Supp. RB at 11; see also 3d Supp. RB at 21 [jury protections at penalty not "inadvisable, as a policy matter"]; 3d Supp. RB at 32 [issue of jury protections "more appropriately left to the electorate"].) In other words, the Attorney General asserts that this Court should refrain from intruding on what it characterizes as purely legislative questions. (3d Supp. RB at 12.)

The opposite is true. The application of the jury right—a right that California's founders proudly proclaimed would remain "inviolate forever"—is a question uniquely within this Court's province. "[T]he resolution of constitutional challenges to state laws falls within the *judicial power*, not the *legislative power*." (*Ty State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 565, italics in original, citing, *Marbury v. Madison* (1803) 5 U.S. 137, 177.)

This is not to understate the importance of the Attorney General's concession that offering jury right protections at penalty is indeed "feasible" and perhaps even "[]advisable" as a legislative matter. (3d Supp. RB at 11, 21.) That acknowledgment stands in stark and unresolvable contradiction to this Court's past assertions that the questions answered at

penalty are in fact "not susceptible to burden-of-proof quantifications." (See 3d Supp. RB at 17 [citing *People v. Virgil* (2011) 51 Cal.4th 1210, 1278.) Without saying so directly, the Attorney General has essentially agreed with Mr. McDaniel that this—and perhaps other—justifications relied upon by this Court for rejecting the jury right protections are flawed. Most importantly, the Attorney General's position undermines this Court's repeated assertions that "normative" or "moral" issues must necessarily escape the purview of the jury right. (3d Supp. RB at 15, 17, 25, 30 n. 10.) If it is indeed "feasible" to apply the jury protections to the issues determined at the penalty phase, as the Attorney General and Mr. McDaniel both agree, one can rightly question this Court's repeated insistence that these protections cannot apply because the decisions to which they apply involve moral judgment.

Such questioning focuses this Court's attention on the central issue presented here: whether the Court should reconsider its prior decisions "implicitly" rejecting the jury protections at penalty under Article I, section 16. (E.g., *Griffin*, *supra*, 33 Cal.4th at p. 598.) Mr. McDaniel submits that there

has never been a better time to do so. This Court should look with fresh eyes at the cases rejecting jury protections at the penalty phase, and should recognize the application of Article 1, section 16 and section 1042. Doing so, as expressly conceded by the Attorney General (3d Supp. RB at 33), it must reverse.

I. *STARE DECISIS* SHOULD NOT STAND AS A BARRIER TO RECONSIDERATION OF THIS COURT'S PAST DECISIONS ON THE APPLICATION OF THE STATE JURY RIGHT TO THE PENALTY PHASE

The Attorney General refrains from citing—even once—the term *stare decisis*. Beyond citing "implicit" and conclusory analysis of the state jury right, the Attorney General also provides no analysis from this Court specific to this provision. This lacuna alone suggests that this Court has not deeply and directly confronted the state constitution in this context.

Aside from restating the dictates of current law, there is only brief reference to the interests protected by *stare decisis*: the Attorney General's assertion that "lower courts have relied for decades" on the current rules. (3d Supp. RB at 12.) Whether intentional or not, the Attorney General's failure to engage in direct discussion of *stare decisis* and the almost perfunctory

reference to trial courts' past reliance highlights an important point: the reliance interests that undergird *stare decisis* do not exist in a theoretical vacuum. As Justice Jackson explained, application of *stare decisis* is decidedly practical, requiring a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other." (Jackson, *Decisional Law and Stare Decisis*, (1944) 30 A.B.A.J. 334, 334.) Both parties and this Court well understand that a "death sentence in California has only a remote possibility of ever being carried out." (*People v. Potts* (2019) 6 Cal.5th 1012, 1062–1063 (conc. opn. of Liu, J.). Any concern that correcting past mistakes is unthinkable because it will invalidate death sentences rings hollow.

But even giving due weight to whatever reliance interests can be ascribed to largely fictional death sentences, the Attorney General misses the "most important" reliance interest: "the reliance interests of the . . . people." (*Ramos v. Louisiana* (2020) 140 S.Ct. 1390, 1408 (*Ramos*).) The jury right serves as a social compact to protect those unfortunate enough to face the condemnation of the majority, acting through the State, for their

wrongdoing. (Spooner, *An Essay on the Trial By Jury* (1852), p. 74 [jury not confined to "contested facts" but served to protect people from the "lowest orders of the political hierarchy" for the sovereign "could not wield the sword of justice until the humblest of his subjects placed the weapon in his hand" [citation].].) For reasons both historically pedigreed and forcefully current, the safeguards of unanimity and proof beyond a reasonable doubt "occupy a fundamental place in our constitutional scheme, protecting the individual defendant from the awesome power of the State." (*Johnson v. Louisiana* (1972) 406 U.S. 399, 400 (dis. opn. of Marshall, J.), *reversed by Ramos, supra*, 140 S.Ct. 1390.) The mere existence of popular legislative enactments—even those reaffirmed by narrow majorities in recent years—should not and cannot override a constitutional protection which was intended to shield the lone accused from the might of the State.

And the capital context lends particular emphasis to the principle that "[t]he force of stare decisis is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections" such as the jury right. (*Alleyne v. United States*, 570 U.S. 99, 116, n. 5; see also *Ramos*, *supra*, 140

S.Ct. 1390, 1409 (conc. opn. of Sotomayor, J.) [under *stare decisis,* States' interests in avoiding retrials "are much less weighty. They are certainly not new: Opinions that force changes in a State's criminal procedure typically impose such costs."].) *Stare decisis* should not stand as a barrier to enforcing a right that this Court has never directly interpreted under the modern capital scheme.

II. EXISTING PROCEDURAL PROTECTIONS DO NOT SUPPLANT THE NECESSITY FOR REASONABLE DOUBT OR UNANIMITY AT THE PENALTY PHASE

The Attorney General begins by confidently asserting that the California death penalty statute contains "constitutionally adequate safeguards," and thus that extending jury protections to the penalty phase is, as a constitutional matter, unnecessary. (3d Supp. RB at 13-14.) A full discussion of each of the underlying contentions supporting the Attorney General's point is beyond the scope of this brief. They nonetheless merit a brief response.

Whether the California scheme "suitably narrows" the class of death-eligible defendants—as the Attorney General maintains—is a subject of considerable debate. (Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement* (2019) 66 UCLA L.

Rev. 1394, 1403 (*Death by Stereotype*) [Briggs Initiative's sponsors promised in campaign and ballot materials that the statute "would expand the applicability of the death penalty to 'every murderer'"]; *id.* at p. 1405 [already broad statute was repeatedly expanded, leading Attorney General's Office to express "concern that the cumulative expansions of eligibility for the death penalty resulted in few crimes not being covered by the California scheme"]; *id.* at p. 1409 [prior study "found that the death-eligibility rate among California homicide cases was the highest in the nation during the study period"].)[2]

Similarly, there are strong reasons to question whether, particularly in cases from Los Angeles County, such as Mr. McDaniel's, the system is properly functioning to remove arbitrariness in capital sentencing. (See Thekmedyian, *Under*

---

[2] (See also generally Baldus et al., *Furman at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility*, (2019) 16 J. Emp. Leg. Stud. 693; Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L. Rev. 1283, 1287 [California scheme "arguably the broadest such scheme in the country"]; Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience* (2009) 93 Marq. L. Rev. 495, 497 [California "enacted the broadest death penalty law in America, with an array of special circumstances that can be applied to 87% of the murders committed in California"].)

D.A. Jackie Lacey, only people of color have been sentenced to death, report says, L.A. Times (June 18, 2019) [reporting on study showing, during 7-year tenure of current Los Angeles County District Attorney, all 22 Los Angeles County death sentences had been secured against people of color].)

There is evidence that some special circumstances may have been tailored to capture murders disproportionately committed by and charged against racial minorities. (*Death by Stereotype*, *supra*, 66 UCLA L. Rev. at p. 1397 [gang and carjacking special circumstances among "six of California's special circumstances [that] apply disparately based on race and ethnicity"].)

Indeed, *in this very case*, there is evidence that race discrimination affected the trial. The trial court below found that the prosecution intentionally discriminated on the basis of race during jury selection, and another trial court made a similar finding in the co-defendant's case. (See 5 RT 1085-1086 [trial court's finding of *Batson/Wheeler* error]; *People v. Harris*, No. S178239 [Los Angeles County Superior Court Case No. TA74314] at 10 CT 2743-2744, 2754-2755, and 11 RT 1959-2172 [mistrial

declared due to *Batson/Wheeler* error].)[3] A *Batson/Wheeler* claim remains pending in this case. (AOB at 42-84.)

Furthermore, numerous studies have found "significant evidence that removal of jurors for cause is an equally if not more significant contributor to the exclusion of Black jurors" than peremptory challenges, and that cause challenges (particularly pervasive in death cases) "may result in juries with higher levels of implicit bias." (*People v. Suarez* (2020) 10 Cal.5th 116, ___, 2020 WL 4691517 at * 44 (conc. opn. of Liu, J.).) The highly experienced trial court below noted that extremely high percentages of jurors were routinely excluded for cause in capital cases before him.[4] In this case specifically—with predictable effects on racial composition— nearly *half* of the jurors in the penalty retrial were removed for cause because they would be unable to impose death.[5] (See *People v. Martinez* (2009) 47

---

[3] The materials from the *Harris* case are the subject of a pending motion for judicial notice.

[4] 3 RT 266; 17 RT 3162 [40 to 50 percent of prospective jurors were regularly excused due to death qualification procedures].)

[5] (17 RT 3265-3271 [47 of 99 prospective jurors, (47.5 percent) were disqualified because of an inability to sentence appellant to death].)

Cal.4th 399, 459, fn. 1 (conc. and dis. opn. of Moreno, J.) [suggesting that, if shown, "[t]he exclusion of one out of three potential jurors because the attitudes toward the death penalty might predispose them to vote for life imprisonment without parole would indeed result in a jury panel 'uncommonly willing to condemn a man to die' in violation of the defendant's Sixth Amendment rights.' [Citation]."]; Justice John Paul Stevens, Address to the American Bar Association (July 31, 2015) ["It may already have become impossible to obtain a fair cross-section of impartial jurors in death cases . . . As more and more citizens become convinced that capital punishment is unwise as a matter of policy, the risk that juries in death cases will not represent a fair cross-section of the community will continue to increase."].)

Whatever the *constitutional* merit of arguments against the adequacy of existing procedural safeguards in California's capital system, as a *practical* matter the California system has failed to adequately separate the "worst of the worst" from all other murderers. It has created a system so broad that it has failed under its own weight. Current events illuminate the tragic arbitrariness of the current system. On one day, it was

announced that one of the most notorious serial killers in the state's history would receive a sentence of life without parole. (Skelton, *In California, the Death Penalty is All but Meaningless. A Life Sentence for the Golden State Killer Was the Right Move*, L.A. Times, Jul. 2, 2020). A few weeks later, this Court addressed (and was forced to reverse) a Riverside County conviction and death sentence of a man who had engaged in a home invasion robbery in which the sole decedent died not from injury inflicted by the defendant, but from a heart attack. (*People v. Henderson* (2020) 9 Cal.5th 1013.) The Attorney General's certainty that the current system requires no additional safeguards to prevent the arbitrary infliction of capital punishment in this state is belied by a more complicated reality.

To be sure, when this Court first rejected the application of jury protections to the post-*Furman* penalty scheme in *People v. Frierson* (1979) 25 Cal.3d 142, 172-188 (*Frierson*), and then under the current scheme in *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-778 (*Rodriguez*), it held that the existing protections were adequate, at least with respect to the Eighth Amendment. These holdings have been frequently reiterated. But the *Frierson* and

Rodriguez Courts were not infallible prognosticators of what protections would secure a reliable and functional capital system. Departure from existing precedent is sometimes required when "facts, or an understanding of facts, [has] changed from those which furnished the claimed justifications for the earlier constitutional resolution." (*Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 862 [finding such justification absent].) Such is the case here. The existing constitutional safeguards, and their practical failure, support—not refute—Mr. McDaniel's request for reconsideration.

///

///

///

III. HISTORY SUPPORTS APPLICATION OF CALIFORNIA'S JURY RIGHT PROTECTIONS TO THE PENALTY PHASE

The Attorney General asserts that there is "no historical support" for Mr. McDaniel's position that California's jury right and section 1042 encompass the jury's decisions at the penalty phase. (3d Supp. RB at 22.) Mr. McDaniel respectfully disagrees.

A. California and Common Law History Support the Application of the Jury Right and the Reasonable Doubt Burden to the Ultimate Penalty Determination

The development of capital punishment in the United States reinforces the conclusion that the jury's role in capital sentencing—and thus the application of jury protections—was a consistent presence not only in California but throughout the United States at the time the California Constitution was adopted. The Attorney General, however, contends that there is no historical support for the proposition that the reasonable doubt burden applies to the jury's ultimate determination of sentence. (3d Supp. RB at 22.) Despite this contention, the Attorney General largely refuses to engage with the history cited by Mr. McDaniel.

As an initial matter, the origin of the jury protections generally, and reasonable doubt specifically, stemmed from the singular concern for defendants who would suffer death if convicted. (Supp. AOB at 17-22.) "[T]he difference in the weight of evidence required in civil and criminal cases, and the doctrine of reasonable doubt itself, are founded upon the danger of destroying life or liberty upon evidence that does not produce thorough conviction, and that danger is based, in great part, upon human experience." (*People v. Travers* (1891) 88 Cal. 233, 237.) It is historically incongruous that the very principle which drove the development of reasonable doubt—concern that defendants would be executed despite doubts as to the justice of this decision—nonetheless allows a penalty trial resulting in a death sentence untethered from the reasonable doubt protection. (See *Spooner*, *supra*, at p. 18 ["trial by jury disavows the majority principle altogether, and proceeds upon the ground that every man should be presumed to be entitled to life . . . unless it be first ascertained, *beyond a reasonable doubt*, in every individual case, that justice requires it"], italics in original.) The Attorney General provides no answer to this contradiction.

In fact, the Attorney General largely ignores the history of the jury right from which he claims to draw support. Although common law entailed an automatic death sentence for all felony convictions, the discretionary or "normative" aspect of the current scheme always existed: it merely formed a component of the verdict, allowing juries to acquit, or make factually unsupported findings, in order to exercise their discretion. (*Rauf v. State* (Del. 2016) 145 A.3d 430, 438-441 (*Rauf*) (conc. opn. of Strine, J.) [tracing history and concluding that "from the beginning of our nation's history, the jury's role as the sentencer in capital cases 'was unquestioned.'"]; see also generally Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury: 1200-1800 (1985). The exercise of jury discretion with respect to what this Court terms "moral" or "normative" issues in capital context was not a bug, but a feature, of the jury right. In the fight over jury control in England that informed the jury right in America "[i]t is significant [] not merely that the denouement of the restrictive efforts left the juries in control, but that the focus of those efforts *was principally the juries' control over the ultimate verdict,* applying law to fact . . . *and not the factfinding*

role itself." (*Jones v. U.S.* (1999) 526 U.S. 227, 247, italics added, citing Green, *supra*; see also White, *Fact-Finding and the Death Penalty: The Scope of A Capital Defendant's Right to Jury Trial* (1989) 65 Notre Dame L. Rev. 1, 31 ["the jury's fact-finding power has historically been used to temper the application of capital punishment so that it will mirror the community's perception as to when that punishment is appropriate"].)

Of course, there were later legislative innovations to guide jury discretion postdating eighteenth century common law.[6] Because forcing juries to exercise discretion through the "crude action of nullification" was considered unsatisfactory, *Rauf*, *supra*, 145 A.3d at p. 438-439 (conc. opn. of Strine, J.), legislatures in 19th century America developed two different methods to channel jury sentencing discretion: 1) separating murder into degrees and 2) creating unitary capital regimes where jurors could discretionarily affix the sentence as part of their guilt verdict. (*Id.* at p. 440, citing *Winston v. United States* (1899) 172 U.S. 303, 310–312). Everyone now unquestionably

[6] Of these, Blackstone famously forewarned. (4 Blackstone's Commentaries 342-344.)

accepts that the degree of murder, an issue which could be considered a "normative" question of moral culpability, is subject to jury protections. No less is true of the discretionary sentencing decision.

This Court has, however, held that the California penalty phase, which is merely an outgrowth of the *second* method, is free from jury protection constraints. The idea that a slight variance in legislative labeling governing capital trials would defeat the application of the jury right runs counter to the intent of the framers of the California Constitution's jury right. (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1243 [constitutional debates made clear that drafters of jury right recognized "the potential for abuse inherent in a constitutional provision that made the right to trial by jury turn on the label given the offense by the Legislature"]; AOB at 218-219.)

Moreover, nineteenth century cases which first addressed post-common law capital schemes do not support the "normative" versus "factual" distinction relied upon so heavily in the Attorney General's brief and by this Court's past cases. In *Hopt v. Utah* (1884) 110 U.S. 574 (*Hopt*), *disapproved on other ground by*

Snyder v. Massachussets (1934) 291 U.S. 97, 106, for instance, the high court found that a trial court had invaded the province of the jury. The trial court did so not by discussing the strictly "factual" question of various shades of mental state, but by telling the jury that "an atrocious and dastardly murder has been committed." (*Hopt*, *supra*, 110 U.S. at p. 582.) The high court interpreted this language of moral condemnation as an instruction that the murder was of the first degree, violating the defendant's right to have the "judgment of the jury upon the facts." (*Id.* at 583.) In other words, the "facts" to be determined by a jury addressing the degree of a crime include a "normative" dimension. The key question governing whether such facts are protected by the jury right is whether the determinations are made at a trial and presented to the jury, thus vesting the defendant with "the right to the judgment of the jury upon the facts uninfluenced by any direction from the court." (*Id.* at 583.) The critical distinction was not between factual and normative, but the age-old distinction between "issues of fact" and "issues of law." (See § 1042.)

Analysis of the earliest California case on discretionary

capital jury sentencing yields the same result. In *Tanner*, *supra*, 2 Cal. 257, this Court addressed a case arising from California's first capital regime which allowed a discretionary jury sentencing decision: a law which made grand larceny punishable by death at the discretion of the jury. (Stats. 1851, Ch. 95, § 2, pp. 406-407.) The analysis in the *Tanner* case, which turned on whether a prospective juror could be excused if he "would not hang a man for stealing," presumed that the jury protection of unanimity would apply to this discretionary decision. The juror was held properly excused because failure to do so would require other jurors—due to the assumed unanimity protection—to "bend to his [opinion]" on sentence. (*Id*. at p. 260.) And the *Tanner* case echoes the very same reasoning later applied by this Court in *Hall*: unanimity was presumed to apply because under a trial before a jury which includes penalty "[i]t is impossible to separate the verdict from its consequence, the punishment." (*Id.* at p. 259; *Hall*, *supra*, 199 Cal. at p. 456 [unanimity required because jury verdict embraced "two necessary constituent elements" of guilt and penalty].) These cases confirm that "issues of fact" are defined by the trial and the verdict, including the issue of

punishment. (*Andres v. United States* (1948) 333 U.S. 740, 748 [in criminal cases jury protections extend "to all issues—character or degree of the crime, guilt and punishment—which are left to the jury" because "a verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it."].) Again, the Attorney General does not engage with this history at all, except to attempt to limit the cases to the jury protection of unanimity.

The notes from this Court's own case file in *Tanner* further bear out Mr. McDaniel's reading. According to the court file, Attorney General Serranus Clinton Hastings "contend[ed] that the law has created two degrees of Grand Larceny; the one punishable with death; the other with imprisonment and the jury is left to decide 1st as to guilt, 2nd as to degree." (California State Archives, Supreme Court file on *People v. George Tanner* (1852) 2 Cal. 257.) In other words, Attorney General Hastings (previously the very first Chief Justice of this Court) considered a jury's discretionary capital sentencing decision—the so-called "normative" question answered at the current penalty phase—to be a form of "degree" of crime. Separation of a crime into degrees

unequivocally carries with it the full protections of the jury right such as reasonable doubt. The Attorney General's contention that reasonable doubt cannot apply to the penalty phase because the "jury's determination of the appropriate penalty does not equate to traditional factfinding" (3d Supp. RB at 14) is refuted by history.

B. The Attorney General's Remaining Critiques of Reasonable Doubt at Penalty Are Flawed

As detailed above, careful examination of history demonstrates that the reasonable doubt burden extends to a jury's ultimate decision on the issue of punishment. Yet the Attorney General fails to grapple with much of the history appellant sets out. Instead, the Attorney General makes a hodgepodge of points, many of which do not withstand scrutiny, claiming that history and doctrine support the current rule.

The Attorney General begins with the unfounded claim that the reasonable doubt burden is unrelated to the California Constitution's jury right or section 1042 because these provisions do not "[o]n their face" mention reasonable doubt. (3d Supp. RB at 19; but see 3d Supp. RB at 18 [conceding that section 1042 and Article 16 require unanimity as to "issues of fact," despite neither

provision expressly mentioning unanimity].) The Attorney General's logic appears to be that the reasonable doubt burden, while required in all criminal trials, did not "originate" from the jury right, but derives instead from due process. (3d Supp. RB at 19, citing *In re Winship* (1970) 397 U.S. 358.) This contention has it backwards. The Attorney General is correct insofar as the reasonable doubt burden was so ingrained in the American system of criminal jury trial as to become implicit in the concept of due process (and as a result, the burden is required as a matter of federal law in state criminal trials). (*Id*. at 364.) As recently recognized by the high court, so has unanimity. (See generally *Ramos*, *supra*, 140 S.Ct. 1390.) However, the reasonable doubt burden in California unquestionably derives from the state jury right, which reflects the jury right as it existed at common law. (AOB at 197.) Reasonable doubt in criminal trials, implicit in the word "jury," was grounded in the jury right long before *Winship*, and long before the doctrine of incorporation. (See, e.g., *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["The jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"]; Maynard, A Guide to Juries: Setting for their

Antiquity, Power and Duty, From the Common-Law and Statutes (1699) at p. 52 ["If a Jury doubt at any time, they must find for the Defendant"].)

The Attorney General also attacks Mr. McDaniel's assertion that reasonable doubt and unanimity are "inextricably intertwined"—a point made to diffuse the contradiction that under current law the jury right of unanimity applies to the penalty decision, while reasonable doubt does not. (3d Supp. RB at 20, citing AOB at 206.) The Attorney General ignores that this principle is reflected in the very debates on the California Constitution's jury right. (AOB at 208, citing 3 Willis and Stockton, Debates and Proceedings, Cal. Const. Convention, 1878-1879, p. 1175 (statement of Mr. Reddy) [removing the protection of unanimity would effectively require changing the burden of proof in criminal trials].) The Attorney General nonetheless claims the "cases" do not support the proposition. The Attorney General is, again, incorrect.

As this Court has colorfully explained, the two rights are indeed naturally and in inexorably entwined: "jury unanimity and the standard of proof beyond a reasonable doubt are slices of

the same due process pie. It would be curious indeed to grant [] one without the other." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 231; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 186 [when required "failure to give a unanimity instruction has the effect of lowering the prosecution's burden of proof"]; see also *Hibdon v. United States* (6th Cir. 1953) 204 F.2d 834, 838 ["The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof"]; *U.S. v. Correa-Ventura* (5th Cir. 1993) 6 F.3d 1070, 1077) [discussing common law origins of unanimity and beyond a reasonable doubt requirements and concluding that "[t]he unanimity rule is a corollary to the reasonable-doubt standard" and is "employed to give substance to the reasonable-doubt standard"]; *Johnson v. Louisiana*, *supra*, 406 U.S. at p. 392 (dis. opn. of Douglas, J.) ["one is necessary for a proper effectuation of the other"].)[7] While the coupled rights have been severed, this

[7] In support of the incorrect contention that reasonable doubt and unanimity are *not* intertwined, the Attorney General highlights a citational error made in the opening brief, in which a statement from the dissenting opinion in *People v. Williams* (1948) 32 Cal.2d 78 (*Williams*) was incorrectly attributed by appellant's counsel to the majority. (3d Supp. RB at 20-21.) Although not mentioned by the Attorney General, this mistake was

anomaly is due to doctrinal error, not historical practice.

In an unrelated argument, the Attorney General attempts to address the language of the 1957 statute, which first bifurcated the penalty phase proceeding and recognized that the appropriate penalty was an "issue of fact." (3d Supp. RB at 15-16.) The language is indisputable: "[t]he determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying *the issue of fact* on the evidence presented." (Former § 190.1, enacted by Stats.1957, ch. 1968, § 2,p. 3509, italics added.) The Attorney General does nothing to contest or explain this plain language, except to point out that the statute did not "secretly" embed jury protections into the

---

acknowledged and explained in the Supplemental Opening Brief. (Supp. AOB at p. 10 n.4.) To reiterate, Justice Schauer's dissenting opinion in *Williams* directly linked section 1042 and Article 1, section 16, to the capital penalty decision. (*Williams*, *supra*, 32 Cal.2d at p. 102, (dis. opn. of Schauer, J.).) Justice Schauer's dissent later became a majority—overruling *Williams*. (*Green, supra*, 47 Cal.2d at p. 232.) *Green* adopted the same reasoning as Justice Schauer's prior dissent—and that of Mr. McDaniel—that the jury right of unanimity extends to all "issues" presented to the jury including penalty. (47 Cal.2d at p. 220; see *Ring v. Arizona* (2002) 536 U.S. 584, 599, citing *Walton v. Arizona* (1990) 497 U.S. 639, 709 (dis. opn. of Stevens, J.) [relying on past dissent in *Walton* when overruling the *Walton* majority].) Appellate counsel apologizes for his error.

current scheme. (3d Supp. RB at 30 n. 9 [arguing that the electorate "knew how to impose unanimity requirements when required"].) But Mr. McDaniel's argument is not that the Legislature, *sub silentio*, included jury right protections in the 1957 or current statute, any more than the New Jersey legislature intended to affix jury right protections to the statute at issue in the *Apprendi*[8] case. The trigger for the protections—whether or not intended—was the creation of a "trial" by "jury" on an "issue of fact."

Unable to provide an explanation for the use of the term "issue of fact" in the 1957 precursor to the current scheme, the Attorney General focuses on the 1957 statute's reference to the penalty phase as "'further proceedings' rather than a trial"—language which is echoed in the current statute. (3d Supp. RB at 15, citing Former § 190.1.) This point is not well taken. The 1957 statute unequivocally stated that the "further proceedings" involved the "jury *trying* the issue of fact on the evidence presented." (*Ibid*., italics added.) Later, in discussing the effect of a nonunanimous verdict on penalty, the statute again stated

[8] *Apprendi v. New Jersey* (2000) 530 U.S. 466.

that the jury is "*trying* the issue of penalty." (*Ibid.*, italics added.) If more clarity were required, the statute specifically explained that the trial court had the authority to order a "*new trial* on the issue of penalty" in the event of a mistrial on penalty only. (*Ibid.*, italics added.) The use of the term "proceedings" does not suggest—"strongly" or otherwise—that the "determination of penalty" is somehow "different from a trial[.]" (3d Supp. RB at 16.)

The Attorney General also points to section 1041, which sets forth when an "issue of fact" arises. (3d Supp. RB at 16.) The Attorney General makes the anachronistic point that section 1041—enacted in 1872 and last amended in 1949—"[n]otably, [citation] does not state that issues of fact arise at the penalty phase of a capital trial"—a proceeding which was first created in 1957. (3d Supp. RB at 16.) That section 1041 would not list a proceeding that had not yet been created yet is hardly surprising. Nor should the Legislature be expected to amend section 1401 every time it creates a new "issue of fact" to make the point clear, particularly when the 1957 statute was explicit on the matter. Although it creates new varieties of "issues of fact" with great

frequency, the Legislature has only amended section 1041 twice in 150 years.

More fundamentally, the Attorney General misunderstands the import of section 1041. An issue of fact arises when there is to be a trial: when the defendant pleads not guilty. (§ 1401 subd. (1).) Section 1041 recognizes that when "*no issue is to be tried*, as in the case of a plea of guilty, then the guarantee [of the jury right] has no application, for there are no issues and there can be no trial." (*Dale v. City Court of City of Merced* (1951) 105 Cal.App.2d 602, 607; see also *Apprendi*, *supra*, 530 U.S. at p. 488 [distinguishing prior case, *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224: "because [the defendant] had [plead guilty to prior crimes] . . . no question concerning the right to a jury trial or *the standard of proof* that would apply *to a contested issue of fact* was before the Court"], italics added.) By pleading "not guilty," and demanding the jury trial to which he or she is entitled—be it on guilt alone or guilt and penalty—a defendant creates an issue of fact. Resolving these issues is the purpose of jury trials.

Finally, the Attorney General disagrees with Mr. McDaniel's accounting of how this Court first rejected jury

protections in California's post-*Furman* capital schemes: by accepting—without careful analysis—positions taken by capital defendants. (3d Supp. RB at 17-18; see AOB at 209-215.) Mr. McDaniel stands by his prior description of legal history. This is not to say that decisions such as *Frierson*, *Jackson,*[9] or *Rodriguez*, were necessarily incorrect as a matter of statutory interpretation. The Attorney General correctly notes that the conclusions these cases reached were "in harmony with the statutory language" (which is to say, the statutes at issue did not mention reasonable doubt at penalty and the decisions did not impute it). (3d Supp. RB at 18.) And the decisions, though not conducting analysis of the jury right (or any analysis other than to accept the defendant's positions that reasonable doubt was absent from the statute), agreed in result with past decisions of this Court considering and rejecting reasonable doubt at penalty under the 1957 statute. (AOB at 207-208.)

The overarching point is that these early decisions interpreting the 1977 and 1978 capital schemes, though exhaustive and carefully reasoned on a variety of points

[9] *People v. Jackson* (1980) 28 Cal.3d 264 (*Jackson*).

presented to them, lacked analysis of the jury right now at issue. They accepted at face value the legal positions of the defendants: that the statute did not require a reasonable doubt burden as to penalty. Perhaps more importantly, because these decisions are the ultimate focus of the *stare decisis* question this Court is asked to consider, they provide no support for the rejection of a beyond a reasonable doubt burden at penalty under Article I, section 16. Far from accepting current doctrine that reasonable doubt is *impossible* to apply at penalty, or that jury right protections are inappropriate for "normative" questions, (3d Supp. RB at 17), the controlling concurrence in *Jackson*, *supra*, 28 Cal.3d at p. 318 (conc. opn. of Newman, J.), announced that such protections could be read into the current scheme. (3d Supp. RB at 17, n. 3; AOB at 213-214.)

Finally, the Attorney General brushes aside cases such as *People v. Cancino* (1937) 10 Cal.2d 223, which approved of a reasonable doubt instruction as to penalty and stated that it correctly described the "duty" of the jury. (3d Supp. RB at 19; see also *People v. Perry* (1925) 195 Cal. 623,639 [same] (*Perry*).) According to the Attorney General, such cases do not matter

because they ultimately found no reversible error. (3d Supp. RB at 21.) But identification of *prejudicial* error is not necessary for a holding of this Court to carry force. (Former Article VI, § 4 1/2; Cal. Const. Article VI, § 13.) In fact, this Court later described the teaching of *Perry*—that "if any doubt be engendered as to the punishment to be imposed, the jury should not impose the extreme penalty"—as what the *Perry* court "held." (*People v. Coleman* (1942) 20 Cal.2d 399, 406.) But bickering about the precise contours of prior holdings is beside the point. There are many cases explicitly and directly holding against Mr. McDaniel. The purpose of citing early cases on reasonable doubt at penalty is to demonstrate significant doctrinal conflict underlying the current rule. This Court did not always accept the idea that reasonable doubt had no possible application to penalty. With a fuller examination of history, this Court should reconsider the current rule. (See, e.g., *Ramos, supra*, 140 S.Ct. 1390.)

C. History Strongly Supports the Principle that the Protection of Unanimity Should Apply to the Existence of Disputed Aggravating Crimes

The next question before this Court is whether the jury right under Article I, section 16, as referenced in section 1042,

extends to the disputed aggravating factors at issue during the penalty phase, thus requiring a unanimity instruction. Although various components of the aggravating factors are subject to a reasonable doubt burden, this Court has long held that there is no requirement for jury unanimity on aggravating factors used in the penalty determination. (See, e.g., *People v. Ghent* (1987) 43 Cal.3d 739, 773-774 [no unanimity required for aggravating evidence under section 190.3, factor (b), despite reasonable doubt burden applying].)

The Attorney General makes different points with respect to different aggravating factors. As to factor (a), the circumstances of the crime, the Attorney General argues that it is "not readily susceptible to proof beyond a reasonable doubt" (and presumably unanimity) because it includes "moral and normative" considerations such as victim impact. (3d Supp. RB at 24-25.) This is of no moment. Mr. McDaniel submits that only the findings of the jury at guilt, already subject to reasonable doubt and unanimity, are issues of fact under factor (a).

With respect to factors (b) and (c), which are generally discrete prior crimes that could and should be subject to

unanimity, the Attorney General makes two basic arguments. First, the Attorney General argues that the rule extending beyond-a-reasonable-doubt protections to factor (b) and (c) crimes is the product of statutory interpretation. In the Attorney General's telling, unanimity is not required for prior crimes under the current scheme because it was not, like reasonable doubt, required under the 1957 scheme. (3d Supp. RB at 24.) Second, the Attorney General analogizes to rules at a guilt phase trial, in which "jurors do not have to unanimously agree on all of the facts underlying their decision." (3d Supp. RB at 26-27.) Because crimes are "foundational," the Attorney General claims that they need not be the product of agreement among jurors.

Neither contentions is true. The history of the 1957 statute illustrates that it had been interpreted to provide the same protections provided at a guilt trial—which would include unanimity. And the concept that entire crimes are merely "foundational" is contradicted by both common law history and this Court's current caselaw on unanimity for "discrete" crimes. (*People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135.)

1. Jury Protections Only Apply to the Existence of Crimes Charged as Aggravation: the Crime(s) Found at Guilt and Prior Crimes Introduced at Penalty

The Attorney General begins its analysis of whether the jury right extends to the aggravating factors by confronting a paper tiger: reasonable doubt as to disputed aggravating factors. (3d Supp. RB at 24-25.) Reasonable doubt is *already* required for each "issue of fact" which inheres in these aggravating factors. (Supp. AOB at p. 10.)

The Attorney General notes, and Mr. McDaniel agrees, that this Court has held that aggravating factors writ large encompass more than merely the *existence* of the defendant's past crimes. (See 3d Supp. RB at 24 [factor (a) casts a "wider net" than the elements of the instant crime and includes victim impact].) However, as Mr. McDaniel has argued, section 1042 and Article I, section 16, only apply to "issues of fact." Issues of fact do not include every single evidentiary component of any trial or the subcomponents thereof—only the "ultimate issues" which the jury must decide. (*Thayer*, *supra*, 4 Harv. L. Rev. at p. 152.) As the United States Supreme Court has explained "'ultimate' or 'elemental' fact[s]" are premised on the existence of

"'evidentiary' or 'basic' facts," and the jury right protections simply ensure that the "factfinder's responsibility at trial, based on evidence adduced by the State, [is] to find the ultimate facts beyond a reasonable doubt." (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 156; cf. *The Evergreens v. Nunan* (2d Cir. 1944) 141 F.2d 927, 928 (Learned Hand, J.) ["ultimate" facts are limited to those "which the law makes the occasion for imposing its sanctions"]; Black's Law Dictionary (1st Ed. 1891) 1197 [ultimate facts are the "facts in issue" as opposed to the "evidential facts"]; Anderson, Dictionary of Law (1893) 1065 ["evidential facts serve to establish or disprove the issues, the issues are, therefore, the ultimate facts"].) Mr. McDaniel has argued that, as applied to aggravators, the term "issues of fact" encompasses only the existence of charged and prior crimes, the central building blocks of aggravation in the California scheme, and not every component included within each aggravator's scope.

The issue of fact at the center of factor (a)—the existence of special circumstance murder and other charged crimes—is the subject of the guilt trial and must already be found beyond reasonable doubt. (*People v. Rogers* (2006) 39 Cal.4th 826, 909

[factor (a) includes the presence of any special circumstance found to be true and any other crime found during the guilt phase].) So the Attorney General is wholly incorrect when stating without qualification that factor (a) is "not readily susceptible to proof beyond a reasonable doubt." (3d Supp. RB at 24.) In this case, for instance, the jury considering penalty was provided with, and instructed to accept, the prior jury's findings at guilt. (25 RT 4680-4681.)

The *existence* of the prior unadjudicated crime with an implicit or explicit threat of violence under factor (b) must also already be proved beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 54 (*Robertson*.) California law has in fact devoted an entire proceeding—the so-called "*Phillips* hearing"[10] to determine "whether each element of an uncharged crime offered in aggravation is supported by substantial evidence." (*People v. Arias* (1996) 13 Cal.4th 92, 166, fn. 29.) An aggravator which is suited to such analysis for factual sufficiency unquestionably embraces an issue of fact.

Finally, this Court has adopted a similar statutory

[10] (*People v. Phillips* (1985) 41 Cal.3d 29.)

interpretation of factor (c), requiring a beyond a reasonable doubt burden when it is disputed. (*People v. Williams* (2010) 49 Cal.4th 405, 459.) Although the existence of the prior crime of conviction is rarely challenged, to the extent that it is an issue for the jury (for instance, if there is a possible issue with respect to the identity of who was convicted), it is also an issue of fact. (*See id.* at 459-461.)

2. Legal History and the Origin of the Reasonable Doubt Protection as to Aggravating Factors Supports a Requirement of Unanimity

The real question, as an overlapping matter of both statutory and constitutional interpretation, is why reasonable doubt has been applied to factor (b) and (c), but unanimity has been treated as a disfavored stepchild with respect to these indisputably factual issues. (*Conservatorship of Roulet*, *supra*, 23 Cal.3d at p. 231 [it would be "curious indeed" to grant "one without the other"].) Mr. McDaniel provides several reasons to reconsider the current rule. First, "aggravation" was hardly a foreign concept to the common law and was always protected by the jury right. Second, contrary to the Attorney General's suggestion, the history of incorporating the reasonable doubt

protection to prior crimes under the 1957 statute shows that the protection was directly linked to the jury right and applied the "same safeguards" available at the guilt phase, which would include unanimity. Third, the Attorney General himself has argued that unanimity is critical to ensure reliability, the central focus of post-*Furman* capital schemes. Finally, there is no legal support for the concept that an entire "discrete" crime need not be found unanimously at guilt, and there should be no such rule at penalty.

a. Aggravation Existed at Common Law at the Time the California Constitution was Adopted and Was Subject to Jury Protections

The idea of "aggravation" to differentiate similar species of crimes is not a new one. (4 Blackstone's Commentaries 16 [describing some, among the "thousand other incidents, [which] may aggravate or extenuate the crime"].) English statutory law had often deviated from common law crimes to create "no less than an hundred and sixty . . . felonies to be without the benefit of clergy,[11] or, in other words, to be worthy of instant death." (4

[11] The doctrine of benefit of clergy allowed in some cases for any clergymen, and then any literate man, and eventually anyone at

Blackstone's Commentaries 18.) As a result, juries would—exercising "compassion"— "acquit or mitigate the nature of the offence." (4 Blackstone's Commentaries 19.) In other words, statutory aggravation has long existed, and has always been subject to the jury protection.

Moreover, the rule respecting these "special aggravations" or "statute aggravations" deviating from the common law crimes was clear: "they must be laid and proved" i.e. found unanimously and beyond a reasonable doubt by a jury. (Gilbert, 2 Law of Evidence (1791), 877.) Indeed, commission of prior crimes—the primary subject of factors (b) and (c)—were built into the benefit of clergy as an aggravating factor, as the benefit was removed after conviction of a prior clergiable felony. (28 Blackstone's Commentaries 366.) As a reflection of the desire to secure irrefutable proof of prior convictions, convicts were branded. (King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to Apprendi* (2014) 97 Marq. L. Rev. 523, 527 [practice of branding continued in early

---

all, to escape the death penalty for a first offense. (Kalt, *The Exclusion of Felons from Jury Service* (2003) 53 Am. U. L. Rev. 65, 175.)

America: "[t]he brand identified [the defendant] as a convicted felon and prevented him from claiming the privilege a second time, guaranteeing that any additional felony would be his last"].) An allegation of such a prior conviction was an issue of fact protected by the jury right. (See *State v. Carroll* (1842) 24 N.C. 257, 260 [allegation must be plead and "submitted to a jury, which [a defendant contesting the issue] is entitled to by law"].)

In sum, nothing in common law or early American history suggests that prior crimes were somehow exempt from the jury protections.

b. Decisions Under the 1957 Statute Incorporated the Jury Protections Applicable to the Guilt Trial

Turning to more recent history, the Attorney General concedes that reasonable doubt applies to the existence of prior crimes. The Attorney General argues, however, that under current law this burden is statutory, not the direct product of the jury right. (3d Supp. RB at 24.) The Attorney General explains that, in *Robertson*, this Court incorporated the beyond a reasonable doubt burden into the modern scheme by looking at the 1957 scheme. *Robertson* reasoned there was a lack of

legislative intent to depart from prior interpretations of the 1957 statute, in which this Court had applied the burden to other crimes evidence at penalty. (3d Supp. RB at 24, citing, *Robertson*, *supra*, 33 Cal.3d at 53-54; *People v. Terry* (1964) 61 Cal.2d 137, 149, fn. 8 (*Terry*); *People v. Stanworth* (1969) 71 Cal.2d 820, 840.)

What the Attorney General fails to mention is the *reasoning* behind adopting these protections in the 1957 scheme in *Terry*. As this Court explained, reasonable doubt should be applied because "in the penalty trial *the same safeguards* should be accorded a defendant as those which protect him *in the trial in which guilt is established*." (*Terry*, *supra*, 61 Cal.2d at p.149, fn. 8, italics added; accord *People v. Stanworth*, *supra*, 71 Cal.2d at p. 840.) *Terry* in turned cited *People v. Hamilton* (1963) 60 Cal.2d 105, 130 (*Hamilton*), which adopted the corpus delicti protection for other crimes at penalty (a protection which continues to apply to prior crimes in the modern capital scheme).[12] And *Hamilton* brings the matter full circle, citing for its support *Green*, *supra*, 47 Cal.2d 209, a case ultimately concerning the invasion of the

[12] (*People v. Valencia* (2008) 43 Cal.4th 268, 297.)

jury right and discussing the jury right protection of unanimity applying to "issues" left to the jury. (*Green*, *supra*, 47 Cal.2d at p. 220.) The *Hamilton* court cited *Green* for the following proposition "[w]here the matter is to be *determined by a jury*, however, it would appear that the proceeding should be 'a trial in the full technical sense, and . . . governed by the same . . . rules of procedure' as the trial of the issue of guilt. [Citation]." (*Hamilton*, *supra*, 60 Cal.2d at p. 130, italics added.)

Reviewing these cases exposes the thin support for the current rule omitting unanimity as to aggravating factors. To be fair, this Court subsequently construed *Robertson* as establishing—"implicitly"—that the reasonable doubt "rule is an evidentiary one and is not constitutionally mandated." (*People v. Miranda* (1987) 44 Cal.3d 57, 98 (*Miranda*).) But a more careful look at history illustrates that prior crimes evidence under the 1957 statute was safeguarded by the "same" protections that would apply at the guilt phase. (*Terry*, *supra*, 61 Cal.2d at p.149, fn. 8; *Hamilton*, *supra*, 60 Cal.2d at p. 130.) This would naturally include both reasonable doubt *and unanimity*.

Indeed, a strong argument could be made that the

instructions established under the 1957 statute *did* include a right to jury unanimity as to prior crimes. Such instructions generally stated that "If, after a consideration of all the evidence in this case, *you* have a reasonable doubt that the Defendant [committed the alleged prior crime] then *you* may not consider such evidence in aggravation of the penalty." (See, e.g., *People v. Mitchell* (1966) 63 Cal.2d 805, 817 [citing instruction], italics added.) While the English language does not differentiate between the plural and singular form of "you," centuries of history suggests that such instructions referred to the entire jury, and not its individual members. (Maynard, *supra*, at p. 9 ["And *any thing* now which any jury can be said to do, must have the joint consent of twelve"], italics added.) This Court seemed to have assumed the same. (*People v. Polk* (1965) 63 Cal.2d 443, 451 ["at the trial on the issue of penalty *they* [the jury] must be convinced beyond a reasonable doubt" of prior crimes], italics added.)

The Attorney General's blanket claim that "the concerns that informed the Court's analysis [in *Robertson*] did not invoke either section 1042 or article I, section 16 of the California

Constitution[,]" while true, oversimplifies history. (3d Supp. RB at 20.) A straight line can be drawn from the reasonable doubt rule in *Robertson* to *Green*, a case concerning the jury right which proposed that the penalty decision was a "trial" in the "full technical sense" and should be governed by the same rules of procedure. (*Green*, *supra*, 47 Cal.2d 209, 236.)[13] Indeed, the very reason the *Green* court stated this rule was its determination that the penalty retrial it had ordered was not a sentencing hearing before a judge, but a trial "to be determined by a jury." (*Ibid*.)

c. Reliability Concerns Underscore the Need for Unanimity as to Disputed Aggravating Factors

The Attorney General highlights an important point about *why* the reasonable doubt burden was adopted as to aggravating prior crimes: "[b]ecause evidence of prior crimes of violence had

---

[13] Justice Schauer's *Williams* dissent—preceding his majority opinion in *Green* (overruling the *Williams* majority) —made the tie between the penalty decision, Article I, section 16 and section 1042 explicit. (*Williams*, *supra*, 32 Cal.2d at p.102, (dis. opn. of Schauer, J.) [former Article I, section 7 and section 1042 "give to a defendant charged with murder the right, . . . to have the jury determine not only the question of his guilt or innocence and the question of the class and degree of the offense, but also, if the offense be murder of the first degree, the penalty to be imposed"].)

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." (3d Supp. RB at 20; see also *Robertson*, *supra*, 33 Cal.3d at p. 53 [reasonable doubt instruction "vital to a proper consideration of the evidence, and the court should so instruct *sua sponte*. [Citation]."].) The heightened need for reliability was the same concern that underlay the imposition of reasonable doubt burden to prior crimes under the 1957 statute. (*People v. McClellan* (1969) 71 Cal.2d 793, 805 & fn. 2 [reasonable doubt rule required under the 1957 statute because of the "great impact on the jury" of prior crimes, which were "the strongest single factor that cause[d] juries to impose the death penalty"].)

As the Attorney General recently argued before the high court, requiring unanimity in resolving accusations of criminal conduct similarly ensures reliability. (Amicus Brief for States of New York, California, et al. *Ramos v. Louisiana*, 140 S.Ct. 1390, 2019 WL 2576549 at *9 [unanimity "contributes to more fair and reliable verdicts, which in turn reinforce public confidence in the legitimacy of the criminal justice system. The unanimity

requirement is therefore a critical component of the States' constitutional obligation to administer fair and impartial criminal jury trials."]; see also *id*. at p. 24 ["[a] 'dissenter who has an honest disagreement with the rest of the jury regarding the existence or absence of reasonable doubt deserves as much respect and deference as any member of the overwhelming majority. [citation.]"].) True, *Ramos* involved non-capital guilt trials. But it defies explanation to assert that reasonable doubt and unanimity must work together to ensure reliability in cases in which a prison term is at issue, but a half-measure will suffice when life is at stake.

d. The Attorney General's Claim that Prior Crimes are Merely "Foundational" Issues Contradicts a Jury Right Applicable to Accusations of Crime

Both parties agree that unanimity "does not extend to the specific details of how a single, agreed-upon act was committed" nor must a jury make unanimous findings "about the credibility of a witness or the believability of an expert." (3d Supp. RB at 26-27; see AOB at 223.) Where Mr. McDaniel and the Attorney General depart company is whether aggravators at penalty are

issues of fact. The Attorney General makes the analogy between prior crimes introduced at penalty and prior crimes which are sometimes introduced at guilt for narrow evidentiary purposes. (3d Supp. RB at 27, citing CALJIC 2.50.01 and *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013.) But the Attorney General relies upon cases and instruction that relate to evidentiary inferences, not issues of fact. The aggravators at penalty are not used for an evidentiary inference. They are presented to the jury as an issue of fact: did the crimes occur and thus can they be used in weighing the ultimate penalty determination. (*People v. Nakahara* (2003) 30 Cal.4th 705, 720.) This is a "factual matter" and is "for the jury." (*Ibid*.)

As this Court has held, unanimity is generally required for "discrete crimes." (AOB at 223, citing *People v. Russo*, *supra*, 25 Cal.4th at pp. 1134-1135; see also 4 Blackstone's Commentaries 343 [every "accusation" must be answered by unanimous verdict].) However, the Attorney General repeatedly argues that unanimity is not required because prior crimes are merely "foundational." (3d Supp. RB at 18, 27, 28, 29, 30 fn. 9, 31). *Miranda*, *supra*, 44 Cal.3d 57, cited repeatedly (3d Supp. RB at

27, 29), contains the central analytic flaw on which the Attorney General's argument depends. Although the case makes the supported contention that certain "foundational matters" are not subject to the requirement of unanimity, it's inclusion of an *entire crime* as a merely "foundational" matter is historically unsupportable. (*Miranda*, supra, 44 Cal.3d at p. 99; cf. *supra*, section II.C.2.a.)

The Attorney General also incorrectly combines the existence of a crime—the issue of fact—with other aspects of the aggravating factors. The Attorney General argues that "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" required by the Eighth Amendment. (See 3d Supp. RB at 29.) Mr. McDaniel vehemently disagrees with the idea that the Eighth Amendment protection of individualized consideration for individual defendants is in any way "eroded" by ensuring that the aggravation considered by the jury is found unanimously and beyond a reasonable doubt.

Regardless, Mr. McDaniel does not ask for juror unanimity

regarding how morally culpable each aggravating crime is. He simply asks for juror unanimity for the *existence* of the crime, just as he received a reasonable doubt instruction for the same factual issue. The Attorney General notes that other states "have required unanimity as to the *existence* of aggravating factors." (RB at 31, italics in original.) And the Attorney General explicitly concedes that this Court "could [] appl[y]" unanimity to the existence of "prior convictions and uncharged crimes" as Mr. McDaniel has requested. (RB at 31.)

Such a rule not only could—but should—be applied to guarantee reliability regarding the "strongest single factor that causes juries to impose the death penalty." (*People v. McClellan*, *supra*, 71 Cal.2d at p. 805, fn.2.) As discussed below, there were numerous incidents in aggravation where Mr. McDaniel strongly contested that a crime even occurred. (*See infra*.) This Court should reconsider its rule on unanimity, if only for the reason that the Attorney General himself proposes: "requiring unanimity would erect additional safeguards before a jury could impose a death verdict." (RB at 31.)

IV. FAILURE TO APPLY THE JURY PROTECTIONS TO THE PENALTY DECISION IS PREJUDICIAL.

A. Failure to Provide Reasonable Doubt Instruction Is Structural Error

Mr. McDaniel begins analysis of prejudice with another point of agreement between himself and the Attorney General: his sentence must be reversed if a reasonable doubt instruction is required. (3d Supp. RB at 33 [if correct, Mr. McDaniel "was prejudiced and is entitled to a new penalty-phase trial"].) The Attorney General does not take a final position on which prejudice test applies. (RB at 33-34 [same result applies under either *Brown*[14] test or structural error].) Structural error is the proper analysis. As the Attorney General acknowledges, in *Sullivan v. Louisiana* (1993) 508 U.S. 275, the high court identified failure to provide a reasonable doubt instruction at guilt as structural error. (RB at 34.) There is no reason to enforce a lower standard for failure to provide a reasonable doubt instruction at penalty than at guilt. This Court's cases demonstrate the opposite: holding that the standard of prejudice must be *more* exacting when analyzing penalty phase errors.

---

[14] (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

As this Court delineated in *People v. Hamilton* (1963) 60 Cal.2d 105, reversed on other grounds by *People v. Morse* (1964) 60 Cal.2d 631, "in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence" and "error and misconduct in the penalty trial 'implicitly invites reversal in every case. Only under extraordinary circumstances can the constitutional provision ([former] art. VI, s 4 1/2) save the verdict.'" (*Id.* at p. 137.) As Justice Tobriner later explained, in the penalty phase

> The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded twelve times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
> ¶
> We cannot determine if other evidence before the jury would neutralize the impact of an error and uphold a verdict. Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty despite any error. Yet who can say that these very factors might not have demonstrated to a particular juror that a defendant, although legally sane, acted under the demands of some inner compulsion and should not die? We are unable to ascertain whether an error which is

> not purely insubstantial would cause a different result; we lack the criteria for objective judgment.

(*People v. Hines* (1964) 61 Cal.2d 164, 169; see also *People v. Brown*, *supra*, 46 Cal.3d at p. 447 [citing *Hines* and *Hamilton* for the principle that "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial"].)

The reasonable doubt burden touches upon the entirety of evidence available to the jury at penalty. As this Court has recently made clear, structural error is available under the state constitution for errors analogous to structural errors under the federal constitution. (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1133.) This is such an error.

B. Failure to Provide a Unanimity Instruction Requires Reversal

Mr. McDaniel also agrees with the Attorney General that the proper standard for prejudice with respect to the

unanimity requirement is the *Brown* test. (RB at 35.)[15] However, Mr. McDaniel disagrees with the Attorney General's application of *Brown* to this claim. He also strongly disagrees with the Attorney General's assertion that any error was harmless.

The central analytic flaw in the Attorney General's prejudice analysis is his failure to recognize that each disputed aggravator (those constituting "issues of fact") is infected with profound error. As this Court has explained, *Brown* error is equivalent to *Chapman* error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 479 [two standards are "are the same in substance and effect. [Citation.]".) Thus, the Attorney General must prove, beyond a reasonable doubt, that the failure to require unanimity did not impact the

---

[15] This Court's cases hold that the analogous "*Robertson* error" (failure to instruct the jury to find prior crimes beyond a reasonable doubt) is only state law error. (*People v. Brown* (1988) 46 Cal.3d 432, 446.) Although it does not change the prejudice analysis because state and federal error tests are equivalent, Mr. McDaniel disagrees on this point. Allowing a penalty jury to consider aggravating crimes which were not found unanimously and which state law does not permit constitutes federal error under the Sixth Amendment, Eighth Amendment, and due process clause of the Fourteenth Amendment.

jury's verdict. Applying this calculus to the individual aggravators, the Attorney general must prove—beyond a reasonable doubt—that *no juror* could have entertained a reasonable doubt with respect to any of the underlying incidents. (Cf. RB at 40 [erroneously arguing that aggravating incident was not infected by error because it was supported by "substantial evidence"].) Then, striking each incident which does not satisfy this stringent test, the Attorney General must prove beyond a reasonable doubt that the verdict would have been the same absent the error. This, the Attorney General cannot do.

For instance, the Attorney General claims that the evidence that Mr. McDaniel had previously killed Akkelli Holley was "strong." (RB at p. 39.) This grossly overstates the strength of the evidence. (See AOB at 225 [the "sole witness" to the Holley killing "denied witnessing the murder. . . [and] testified that around the time Holley was shot and on the day he was shot she was using a number of drugs on a daily basis, including PCP, cocaine, marijuana, alcohol, and methamphetamine. . . . drugs [that] would

cause her to hallucinate and make her see things that were not there".) It is certainly *possible* that jurors would have entirely discredited Kathryn Washington's trial testimony and relied instead on her statement to police as accurate recitation of the events, as the Attorney General argues. (RB at 39.) But that was by no means assured. Certainly, the Attorney General's confidence that a drug addict's testimony to a police officer during a hostile interrogation is always "particularly credible" would not necessarily be shared by all jurors. (RB at 39.)

The Attorney General admits that the sole witness to the other most serious incident in aggravation—the shooting of Ronnie Chapman—testified that it may have been either Mr. McDaniel or his brother who committed the crime. (RB at 40.) The officer who took the witnesses' statement *himself* admitted that the two look "a lot alike" and that they were sometimes referred to as "twins." (AOB at 225.) The Attorney General is nonetheless *certain* that no juror could have entertained doubt because the eyewitness (Jeannette Geter) elsewhere in her testimony

stated that Mr. McDaniel was the shooter. (RB at 40.) The fact that the sole witness gave shifting testimony on her identification is hardly a sturdy foundation on which to predicate a finding of harmlessness beyond a reasonable doubt.

The Attorney General acknowledges that Mr. McDaniel provided an eyewitness to the alleged 2003 assault of Officer Gerardo, Joshua Smith, who explained that the "assault" by Mr. McDaniel was instead an act of police brutality by Officer Gerardo. (RB at 40.) Although jurors are normally entitled to resolve such dueling testimony, the Attorney General claims that no juror could have entertained doubt because the Mr. Smith was a friend of Mr. McDaniel and did not have a "good view" because he was "10 feet away." (RB at 40.) This argument borders on frivolous.

The Attorney General admits that evidence of Mr. McDaniel's alleged possession of a shank in jail pending trial was "not as well-supported as the others" (RB at 4041)—a significant concession given the weaknesses in the

evidence for the other alleged crimes. (See AOB at 225-226.) But the Attorney General fails to acknowledge how concerned jurors might be for the safety and well-being of guards who would be required to supervise him if sentenced to life without parole. (See 24 RT 4545 [prosecutor, brandishing shank to jurors: "It doesn't matter if you take his gun away, because he will find a way" he will "create this instrumentality of death"].)

Most troubling, the Attorney General completely ignores strong indications that this was a close case in which the jury focused heavily on the uncharged crimes. (See AOB at 227 [jury repeatedly requested reinstruction on uncharged crimes and "deliberated – after a prior jury hung – for over 20 hours over the course of four days"].) The Attorney General cannot meet its high burden under *Brown*. Mr. McDaniel's sentence must be reversed.

///

///

///

CONCLUSION

For the reasons set forth above, the entire judgment must be reversed.

DATED: September 11, 2020

Respectfully submitted,

MARY K. McCOMB
State Public Defender

/s/

ELIAS BATCHELDER
Supervising Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

I, ELIAS BATCHELDER, am a Senior Deputy State Public Defender, and am appellate counsel for DON'TE McDANIEL in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 11,988 words in length.

DATED: September 11, 2020

/s/
ELIAS BATCHELDER
Attorney

DECLARATION OF SERVICE

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

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

APPELLANT'S THIRD SUPPLEMENTAL REPLY BRIEF

on each of the following, by placing same in an envelope with postage prepaid. The envelopes were addressed and mailed on **September 11, 2020** as follows:

Don'te Lamont McDaniel, #G-53365
CSP-SQ
4-EB-19
San Quentin, CA 94974

The following were served the aforementioned document(s) electronically via TrueFiling on **September 11, 2020**:

Office of the Attorney General
Attn: Kathy Pomerantz
300 S Spring St Ste 1702,
Los Angeles, CA 90013-1256
Kathy.Pomerantz@doj.ca.gov

The Honorable Robert J. Perry, Judge
Los Angeles County Superior Court
TTSou@lacourt.org
(Clerk of The Hon. Robert J. Perry)

Sonja Hardy
Death Penalty Appeals Clerk
Los Angeles County Superior Court
Criminal Appeals Unit
SRHardy@lacourt.org

California Appellate Project
101 Second St., Suite 600
San Francisco, CA 94105
filing@capsf.org

Governor's Office
Kelli Evans
Chief Deputy Legal
Affairs Secretary
1303 10th St, Suite 1173
Sacramento, CA 95814
kelli.evans@gov.ca.gov

Michael Ogul
Deputy Public Defender
Santa Clara County
120 West Mission Street
San Jose, CA 95110
michael.ogul@pdo.sccgov.org
(Counsel for Amicus Curiae: California Public Defenders Association & Santa Clara County Public Defender)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **September 11, 2020,** at Sacramento, California.

/s/ Kecia Bailey
KECIA BAILEY

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. McDANIEL (DONTE LAMONT)**
Case Number: **S171393**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **elias.batchelder@ospd.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
SUPPLEMENTAL BRIEF	McDaniel_3D_SUPPLEMENTAL_ARB_171393

Service Recipients:

Person Served	Email Address	Type	Date / Time
Michael Ogul Santa Clara County Public Defender Office 95812	michael.ogul@pdo.sccgov.org	e-Serve	9/11/2020 12:11:11 PM
Office Office Of The Attorney General Court Added	docketinglaawt@doj.ca.gov	e-Serve	9/11/2020 12:11:11 PM
Kathy Pomerantz Office of the Attorney General 239358	kathy.pomerantz@doj.ca.gov	e-Serve	9/11/2020 12:11:11 PM
Office Office Of The State Public Defender-Sac Timothy Foley, Sr. Deputy State Public Defender 000000	docketing@ospd.ca.gov	e-Serve	9/11/2020 12:11:11 PM
Kelli Evans	kelli.evans@gov.ca.gov	e-Serve	9/11/2020 12:11:11 PM
California Appellate Project	filing@capsf.org	e-Serve	9/11/2020 12:11:11 PM
Hon. Robert J. Perry	TTSou@lacourt.org	e-Serve	9/11/2020 12:11:11 PM
Sonja Hardy	SRHardy@lacourt.org	e-Serve	9/11/2020 12:11:11 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

9/11/2020

Date

/s/Kecia Bailey

Signature

Batchelder, Elias (253386)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm