No. S171393

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DON'TE LAMONT MCDANIEL,

Defendant and Appellant.

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles
Los Angeles Superior Ct.
No. TA074274

HONORABLE ROBERT J. PERRY, JUDGE

BRIEF OF AMICI CURIAE VICENTE BENAVIDES FIGUEROA AND MANUEL LOPEZ IN SUPPORT OF DEFENDANT DON'TE LAMONTE MCDANIEL

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STATEMENT OF INTEREST OF AMICI CURIAE VICENTE BENAVIDES FIGUEROA AND MANUEL LOPEZ

Vicente Benavides Figueroa spent 24 years on death row for a crime he did not commit. Mr. Benavides was a farm worker from a rural town in Mexico. He had spent over a decade in the 1980s and early 1990s seasonally traveling to California's Central Valley to pick fruit in the spring and then returning to Mexico in the fall or winter. Mr. Benavides had no criminal or violent history, and he had many close friends and family who thought of him as a kind, loving, and caring person.

In 1993, Mr. Benavides was wrongfully convicted of raping, sodomizing, behaving lewdly and lasciviously toward, and murdering his girlfriend's 21-month old daughter. The prosecution's case hinged on evidence that sexual assault caused the victim's death. But that evidence was later revealed to be false when multiple witnesses recanted their prior testimony. On this basis, Mr. Benavides sought habeas relief in 2002. It was not until 16 years later, in 2018, that the Court vacated Mr. Benavides' conviction. *In re Figueroa*, 4 Cal. 5th 576, 591 (2018).

A jury convicted Mr. Benavides and sentenced him to death. There was no requirement that the jury unanimously determine beyond a reasonable doubt factually disputed aggravating evidence or the ultimate penalty verdict. And after his conviction, Mr. Benavides's appeal and habeas petition

to this Court entered the enormous backlog of death-penalty cases. As someone who lost decades of his life to death-penalty proceedings for a crime he did not commit, Mr. Benavides has a strong interest in ensuring that such proceedings feature all of the protections provided by the California and federal constitutions.

Manuel Lopez spent over four years in jail awaiting trial after the Santa Clara County District Attorney brought charges against him—and sought the death penalty—for the alleged sexual assault and murder of his fiancé's two-year-old son. A unanimous jury found Mr. Lopez not guilty. The prosecution's case relied on a theory that Mr. Lopez murdered the victim in the course of a sexual assault. But that theory rested entirely on flawed DNA evidence that showed, at most, the undisputed fact that Mr. Lopez had been living with his fiancé and her family. Other evidence showed that the victim's primary caregiver, Mr. Lopez's fiancé, had killed her son through corporal punishment inflicted out of anger at his difficulties with potty training.

Mr. Lopez faced extreme pressure to plead guilty to life imprisonment without the possibility of parole for a crime he did not commit. Because the case involved accusations of sexual assault on a young child, the facts could have easily overwhelmed the emotions of the jury and prejudiced them against Mr. Lopez. Before trial, Mr. Lopez faced a Hobson's choice: risk the death penalty before a death-qualified jury on emotionally charged facts or

save his own life by pleading guilty to a crime he did not commit. Mr. Lopez was vindicated by the jury at trial. But as someone who faced potential capital punishment, he has a strong interest in ensuring that California's death-penalty system is fair, judicious, and complies with the requirements of the California and federal constitutions.

Innocent defendants suffer devastating and unjust harms when charged with crimes they did not commit. California's death-penalty system magnifies those effects. Unlike non-capital juries, capital juries are "death qualified," a process that disproportionately eliminates black and women jurors and biases the jury toward verdicts of guilt and sentences of death. This heightened risk of conviction and a sentence of death increases the already enormous pressure on innocent defendants accused of capital crimes like Mr. Lopez to plead guilty and to capitulate to higher sentences. And if convicted, an innocent defendant like Mr. Benavides must then wait decades for the backlogged death-penalty appeals system to address their actual innocence.

The inevitable result is that innocent defendants are convicted more often and languish longer in prison before obtaining any decision on their claims of innocence. California's death-penalty scheme—which has performed no executions in decades—serves no counterbalancing deterrent or retributive purpose that could justify these pernicious effects on innocent

defendants. Neither stare decisis, nor any other principle, poses a barrier to improving this system by instituting fair and constitutionally mandated penalty-phase procedures.

I. INTRODUCTION[1]

Whether by reason of stare decisis or merely from a desire to avoid sowing "confusion" in the lower courts,[2] this Court may feel reluctant to depart from prior decisions on the question whether a capital jury must unanimously determine beyond a reasonable doubt factually disputed aggravating evidence or the ultimate penalty verdict.[3] For two reasons discussed below, the Court should feel no such qualms.

First, there is effectively no binding precedent on point. The Court has never conducted an independent analysis of whether the California Constitution requires that each aggravating factor be found unanimously and beyond a reasonable doubt. And the Court has yet to fully engage with recent

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[1] Throughout this brief, unless otherwise indicated, emphases were added to, and internal punctuation, citations, and footnotes were omitted from, quotations.

[2] *See People v. Bawden*, 90 Cal. 195, 198 (1891) (refusing to reexamine flawed jury instructions because a change in the law purportedly would have led to "[g]reat confusion"), *disapproved of on other grounds by People v. Green*, 47 Cal. 2d 209 (1956).

[3] *See, e.g., People v. Miles*, 9 Cal. 5th 513, 605-06 (2020); *People v. Johnson*, 8 Cal. 5th 475, 527 (2019); *People v. Hartsch*, 49 Cal. 4th 472, 515 (2010); *People v. Davis*, 36 Cal. 4th 510, 572 (2005); *People v. Gordon*, 50 Cal. 3d 1223, 1273–74 (1990).

evolving federal jurisprudence on the Sixth Amendment—especially *Hurst v. Florida*,[4] where the U.S. Supreme Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find *each fact necessary* to impose a sentence of death."[5] To be sure, this Court has held that the penalty phase involves a non-factual "normative" exercise and is therefore exempt from the proof requirements imposed in *Apprendi* and *Ring*. But *Hurst*'s holding encompasses "each fact necessary" to impose a sentence of death, including factual disputes over aggravating factors that this Court has acknowledged to be non-normative.[6] And *Hurst*, read broadly, indicates that even the weighing of aggravators and mitigators is a factual finding.

Second, even assuming that there is some binding precedent on point here, stare decisis does not prevent the Court from reconsidering it. Precedent has the weakest claim on this Court when departing from it would pose relatively little threat to certainty, predictability, and stability in the law. That condition exists where the existing rule was founded upon a flawed constitutional analysis, finds no affirmative support in the statutory language, has been subjected to the consistent criticism of legal scholars, or

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[4] 577 U.S. 92 (2016).

[5] *Id.* at 94.

[6] *People v. Miranda*, 44 Cal. 3d 57, 99 (1987), *abrogated on other grounds by People v. Marshall*, 50 Cal. 3d 907 (1990).

has created inequitable or grotesque results. Each of those circumstances exist here. Mr. McDaniel's arguments reveal the flaws in this Court's decisions rejecting the unanimity and reasonable-doubt requirements as applied to aggravating factors; the relevant constitutional and statutory provisions are silent on these requirements; and scholars have long criticized the pernicious effect that the absence of those requirements has had on the penalty phase of capital cases.

Though stare decisis is granted extra weight where the public and parties have come to rely on a holding, no reliance interest exists here, because the challenged penalty-phase procedures are part of a death-penalty system that no longer serves any legitimate purpose. There is, in effect, no death penalty in California—only a sentence of life in prison with a remote chance of death, a penalty that no rational jury or legislature would impose. California's dysfunctional death-penalty system has executed only 13 inmates since 1978 and none since 2006. And the protracted appellate process means that most death-row inmates can expect to die in prison of natural causes. Under these circumstances, the death penalty cannot serve its putative purposes of deterrence and retribution. Instead, the penalty now serves two illegitimate purposes: as a means of coercing defendants—some innocent—into accepting plea agreements that provide for life in prison; and as a justification for "death qualifying" juries, a procedure that disproportionately

excludes African Americans and women from jury service in capital cases, resulting in a jury more willing to convict and more willing to accept and give weight to aggravating evidence while being less inclined to give mitigating evidence its constitutionally mandated due. Accordingly, departing from precedent here—assuming that any truly apposite precedent exists—would ameliorate one of the most pernicious effects of our dysfunctional death-penalty system by requiring death-qualified juries to meet constitutional standards before finding that aggravating factors have been proved.

Justice Holmes famously observed that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[7] The rule of law at issue here is just a few decades old, but continued adherence to it already has become, if not revolting, untenable—especially when that rule is viewed in the context of a totally dysfunctional death-penalty system that no longer serves any legitimate purpose. The Court owes that rule no loyalty.

[7] Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

II. ARGUMENT

A. No precedent requires adherence to the existing penalty-phase procedures, because this case presents novel arguments that this Court never has fully addressed in its decisions rejecting challenges to those procedures.

A series of decisions by this Court has upheld capital sentences although the jury imposed the sentence without being required to find each aggravating factor unanimously and beyond a reasonable doubt. But those decisions have no stare decisis effect here because this case raises novel arguments that the Court has never fully addressed.

Under this Court's decisions, a jury may impose a sentence of death if it finds that the "aggravating factors outweigh the mitigating circumstances," Penal Code § 190.3, and that the aggravating factors are "so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified," Judicial Council of California Criminal Jury Instructions (2020) No. 766; *see People v. Duncan*, 53 Cal. 3d 955, 978–79 (1991). Though the jury must unanimously agree on whether to impose a death sentence, this Court has rejected a requirement that the jury agree unanimously on the existence of any single aggravating factor. *See, e.g.*, *People v. Panah*, 35 Cal. 4th 395, 499 (2005). This Court's decisions also have stated that there is no California or federal constitutional requirement that juries apply the beyond-a-reasonable-doubt standard when determining

whether (1) any aggravating factors exist, (2) those factors outweigh mitigating circumstances, or (3) the death penalty is an appropriate and justified penalty. *See, e.g.*, *id.*[8] This Court has repeatedly confirmed those holdings in the four decades since the California legislature enacted the current death-penalty law in 1978.[9]

But this long lineage forms no impenetrable barrier. The precedential value of this Court's prior decisions is limited to the specific issues that the parties raised and Court decided. "It is axiomatic, of course, that cases are not authority for propositions not considered." *Alfredo A. v. Superior Court*, 6 Cal. 4th 1212, 1249 (1994).[10] It is only the "point decided by the Court, and which the reasoning illustrates and explains, [that] constitutes a judicial precedent." *Hart v. Burnett*, 15 Cal. 530, 598 (1860).

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[8] The only exception is for "other crimes" under California Penal Code, section 190.3, subdivisions (b) and (c), which the prosecution must prove beyond a reasonable doubt. *People v. Robertson*, 33 Cal. 3d 21, 54 (1982); *People v. Williams*, 49 Cal. 4th 405, 459 (2010). The Court has indicated that this exception is an "evidentiary" rule and "not constitutionally mandated." *Miranda*, 44 Cal. 3d at 98, *abrogated on other grounds by People v. Marshall*, 50 Cal. 3d 907 (1990). But Mr. McDaniel convincingly explains why this exception is constitutional in origin. *See* Sept. 11, 2020, Appellant's Third Supplemental Reply Brief at 50–65.

[9] *See, e.g.*, *People v. Rangel*, 62 Cal. 4th 1192, 1235 (2016); *People v. Homick*, 55 Cal. 4th 816, 902 (2012); *People v. Rodriguez*, 42 Cal. 3d 730, 777–78 (1986).

[10] *See also People v. Wells*, 12 Cal. 4th 979, 984 n.4 (1996) ("A case is not authority for an issue neither raised nor considered."); *People v. Gilbert*, 1 Cal. 3d 475, 482 n.7 (1969); *Ginns v. Savage*, 61 Cal. 2d 520, 524 n.2 (1964).

Mr. McDaniel raises novel arguments that the jury-trial rights found in the Sixth Amendment and in article I, section 16 of the California Constitution (as well as in Penal Code section 1042, which incorporates the latter provision) impose unanimity and beyond-a-reasonable-doubt requirements on a jury's decision to impose a sentence of death. In two key respects, this Court's decisions have yet to fully address these arguments, so those decisions present no stare decisis barrier to reconsidering penalty-phase procedures.

First, this Court has never fully addressed whether California's jury-trial right requires that each aggravating factor be found unanimously and beyond a reasonable doubt. Instead, this Court's decisions on that issue—whether evaluated as a question of cruel and unusual punishment, due process, equal protection, or the right to a jury trial—have primarily analyzed the United States Constitution and then extended those holdings to the California Constitution with little or no additional analysis. For example, one of the first cases upholding the operative California death-penalty statute in the face of a constitutional challenge, *People v. Rodriguez*, 42 Cal. 3d at 777, held that the safeguards in place were sufficient under the Eighth Amendment.[11] The Court later explained in *People v. Berryman* that the

[11] *Rodriguez*, 42 Cal. 3d at 777 (citing *People v. Frierson*, 25 Cal. 3d 142, 176-184, 195-196 (1979), and *People v. Jackson*, 28 Cal. 3d 264, 315–17 (1980)).

holdings in *Rodriguez* and its progeny had "impliedly and generally" applied to the California Constitution as well.[12] Since then, the Court has often cited this line of cases, concluding without discussion that "[n]othing in the state or federal Constitution" requires unanimity or findings beyond a reasonable doubt.[13]

The same pattern has characterized this Court's treatment of the right to a jury trial at the penalty phase. In 1991, in *People v. Bacigalupo*, this Court rejected a challenge based on the right to a jury trial because, at the time, "the Sixth Amendment provide[d] no right to jury sentencing in a death penalty case."[14] And this Court has evaluated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny (discussed below) as a federal Sixth Amendment issue without considering whether an equivalent or broader

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[12] *People v. Berryman*, 6 Cal. 4th 1048, 1101-02 (1993), *overruled on other grounds by People v. Hill*, 17 Cal. 4th 800 (1998); *see also People v. Gates*, 43 Cal. 3d 1168, 1201 (1987) (holding that *Rodriguez* applied to arguments regarding "cruel and/or unusual punishment" under both "federal and state Constitutions"), *disapproved of on other grounds by People v. Williams*, 49 Cal. 4th 405 (2010); *People v. Malone*, 47 Cal. 3d 1, 59-60 (1988) (same for due-process challenge to the 1978 statute).

[13] *People v. Duff*, 58 Cal. 4th 527, 569 (2014); *People v. Gamache*, 48 Cal. 4th 347, 406–07 (2010); *see also Panah*, 35 Cal. 4th at 499 ("[N]either the federal nor state constitution requires the jury to unanimously agree as to aggravating factors."); *People v. Mickey*, 54 Cal. 3d 612, 701-702 (1991) (same for due process, equal protection, and cruel and unusual punishment guarantees).

[14] *People v. Bacigalupo*, 1 Cal. 4th 103, 147 (1991) (citing *Hildwin v. Florida*, 490 U.S. 638, 640 (1989)), *vacated on other grounds*, 506 U.S. 802 (1992).

principle exists under the California Constitution. *See, e.g.*, *Duff*, 58 Cal. 4th at 569; *People v. Ochoa*, 26 Cal. 4th 398, 453 (2001). This is so despite warnings from former Justice Werdegar that *Apprendi* may have "invalidated" this Court's prior "assumptions about the traditional respective roles of courts and juries." *People v. Epps*, 25 Cal. 4th 19, 32 (2001) (Werdegar, J., concurring). This Court's analysis of penalty-phase procedures and burdens has only rarely mentioned the California Constitution's jury-trial right; and when it has done so, it has merely stated that its past decisions had "implicitly" encompassed that right. *People v. Griffin*, 33 Cal. 4th 536, 598 (2004), *disapproved on other grounds by People v. Riccardi*, 54 Cal. 4th 758 (2012).

Though this Court will give "respectful consideration" to the United States Supreme Court's interpretation of "parallel" language in the federal constitution, *see People v. Buza*, 4 Cal. 5th 658, 684 (2018), "the California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants' rights than the federal Constitution." *People v. Fields*, 13 Cal. 4th 289, 298 (1996); *see also* Cal. Const., art. I, § 24, cl. 1 ("Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."). And regarding the jury-trial right in particular, this Court has held that the California Constitution's drafters did not "ha[ve] the Sixth Amendment in

mind" but rather the "***common law*** right to jury trial." *Price v. Superior Court*, 25 Cal. 4th 1046, 1077 (2001); *see also People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 287 (1951). To give article I, section 16 of the California Constitution "independent force," this Court must consider whether this state jury-trial right provides broader protections than the Sixth Amendment.

Second, this Court has yet to fully address recent evolving federal jurisprudence on the Sixth Amendment. *Apprendi* and *Ring* held that, under the Sixth Amendment, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." *Apprendi,* 530 U.S. at 490; *Ring v. Arizona*, 536 U.S. 584, 589 (2002). This Court has upheld California's death-penalty scheme as compliant with *Apprendi* and *Ring* because, in the *guilt* phase, a jury makes the special-circumstance findings that expose a defendant to a potential death sentence unanimously and beyond a reasonable doubt. *See, e.g.*, *People v. Lewis*, 43 Cal. 4th 415, 521 (2008), *disapproved on other grounds by People v. Black*, 58 Cal. 4th 912, 919-20 (2014). That procedure, according to this Court, "satisfies the requirements of the Sixth Amendment as articulated in *Apprendi* and *Ring*." *Id.*

In contrast, this Court has held that there is "no federal constitutional requirement," including under the Sixth Amendment, "that a jury then

conduct the weighing of aggravating and mitigating circumstances and determine the appropriate sentence." *Id.* To reach that conclusion, the Court has relied on *Spaziano v. Florida*, 468 U.S. 447, 465 (1984), and on *Hildwin v. Florida*, 490 U.S. 638, 640 (1989), for the principle that there is "no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." *Lewis*, 43 Cal. 4th at 521 (quoting *Spaziano*); *see also Bacigalupo*, 1 Cal. 4th at 147 (quoting *Hildwin* for same principle).

This Court has additionally refused to apply Sixth Amendment jury-trial procedural protections, including those in *Apprendi* and *Ring*, to the penalty phase because of the character of the jury's penalty analysis. The Court has held that factual disputes regarding aggravating factors need not be resolved unanimously because such facts are "foundational" findings. *Miranda*, 44 Cal. 3d at 99. And it has rejected the application of *Ring* and *Apprendi* to the penalty phase on the theory that the jury's task is "a single fundamentally normative assessment" rather than one involving findings of fact. *Duff*, 58 Cal. 4th at 569.

But the United States Supreme Court significantly expanded *Apprendi* and *Ring* in *Hurst v. Florida*, 577 U.S. 92 (2016). In *Hurst*, the high court held that "[t]he Sixth Amendment requires a jury, not a judge, to find ***each fact necessary*** to impose a sentence of death." *Id.* at 94. The Sixth

Amendment thus now applies to *each* factual finding that must be made to sentence a defendant to death, not just those that increase the maximum potential sentence. *See Rauf v. State*, 145 A.3d 430, 436 (Del. 2016) (Strine, C.J., concurring). The *Hurst* court recognized that this holding conflicted with its prior holdings in *Spaziano* and *Hildwin* that there was no constitutional imperative for a jury to make the findings that authorize imposing the death penalty. *Id.* at 102. As a result, the *Hurst* court overruled those decisions to the extent that they allowed a judge, rather than a jury, to find facts "necessary for imposition of the death penalty." *Id.*

Hurst's holding that jury-trial rights apply to "each fact necessary to impose a sentence of death" also indicates that a jury must resolve factual disputes at the penalty phase, despite the "foundational" nature of some of those disputes and the overall "normative" nature of the penalty determination. Indeed, *Hurst*'s holding does not distinguish "foundational" facts from "ultimate" ones. And there are often factual findings necessary at the penalty phase, including the existence of prior crimes, that fall within the realm of traditional, rather than "normative," fact-finding. *See, e.g.*, *People v. Superior Court (Mitchell)*, 5 Cal.4th 1229, 1236 (1993) (indicating that penalty-phase evidence "may raise disputed factual issues").

Hurst suggests that the weighing of aggravating and mitigating circumstances is likewise a factual question when it quotes Florida's death-

penalty statute, which characterizes as "***the facts***" the findings "[t]hat "sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Hurst*, 577 U.S. at 100. Justice Sotomayor, the author of the majority opinion in *Hurst*, had also previously stated in a dissent from denial of certiorari in another case that penalty-phase weighing determinations are "factual finding[s]." *Woodward v. Alabama*, 134 S. Ct. 405, 411 (2013) (Sotomayor, J., dissenting). That prior statement gives context to *Hurst*'s holding that a jury must decide "each fact necessary" to impose a death sentence and implies that it includes the jury's weighing of aggravators and mitigators. *See Rauf*, 145 A.3d at 460 & n.197 (discussing the *Woodward* dissent as potentially affecting the interpretation of *Hurst*).

This Court has yet to address these substantive changes in the law. In *Rangel*, this Court rejected an argument that *Hurst* required unanimity and beyond-a-reasonable-doubt decisionmaking at the penalty phase under the Sixth Amendment. 62 Cal. 4th at 1235 & n.16. But *Rangel* reached that conclusion by factually distinguishing the Florida death-penalty scheme, which, unlike California's, gave the judge the ultimate authority to disregard the jury's recommendation and to make the finding that at least one "aggravating factor" was present. *Id.* Neither *Rangel* nor any subsequent decision has addressed *Hurst*'s expansion of *Apprendi* and *Ring* or the

overruling of *Spaziano* and *Hildwin*.[15] Nor has the Court reexamined, in light of *Hurst*, what penalty-phase findings constitute "fact-finding." Thus, this Court's precedents have yet to fully address, and create no precedent concerning, *Hurst*'s expansion of Sixth Amendment protections in the penalty phase of a capital case.[16]

B. Even if relevant and binding precedent exists, this case easily meets this Court's conditions for departing from that precedent.

Even assuming that there is binding precedent rejecting the need to find aggravating circumstances unanimously and beyond a reasonable doubt, stare decisis would not prevent the Court from considering its analysis anew.

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[15] *See, e.g.*, *People v. Silveria*, 10 Cal. 5th 195, 325 (2020) (case citing and dismissing *Hurst* on the same grounds cited in *Rangel*); *People v. Powell*, 6 Cal. 5th 136, 193 n.36 (2018) (same); *see also People v. Capers*, 7 Cal. 5th 989, 1014 (2019) (equating, without analysis, *Hurst*'s holding with that in *Ring*).

[16] Although the above arguments reflect a "broad reading" of *Hurst*, "[t]he logical progression after *Hurst* is to demand that *all* findings . . . required for imposition of death, including the finding that death is the appropriate punishment, be made by a jury beyond a reasonable doubt." Janet C. Hoeffel, *Death Beyond A Reasonable Doubt*, 70 Ark. L. Rev. 267, 269 (2017) (emphasis in original). Thus, it follows that this Court's decisions lack precedential value because they have yet to address *Hurst's* broad reading or what that decision logically requires for Sixth Amendment rights at the penalty phase.

1. The doctrine of stare decisis is a flexible one that allows departure from precedent in multiple circumstances.

While the doctrine of stare decisis is valuable and important within our judicial system, it does not erect an impenetrable wall around prior precedent.

"Because of the need for certainty, predictability, and stability in the law," this Court does not "lightly overturn [its] prior opinions." *People v. Mendoza*, 23 Cal. 4th 896, 924 (2000) (overturning prior precedent); *see also Moradi-Shalal v. Fireman's Fund Ins. Co.,* 46 Cal. 3d 287, 296 (1988) (same). This is especially true where "there are private or legislative reliance interests that have sprung up in dependence on the existing rule" and "costs . . . would result to those interests if the rule were changed." *People v. Cuevas*, 12 Cal. 4th 252, 270 (1995). Reliance interests are therefore "[a] central factor" in the stare decisis analysis. *Id.* Even so, the policy of stare decisis "is a flexible one" that "permits this court to reconsider, and ultimately to depart from, [its] own prior precedent in an appropriate case." *Moradi–Shalal,* 46 Cal. 3d at 296.

This flexibility is crucial because "[c]ourt-made error should not be shielded from correction." *People v. King*, 5 Cal. 4th 59, 78–79 (1993) (overruling a previous opinion of this court, but doing so only prospectively due to reliance and *ex post facto* concerns). Indeed, this Court, as "the highest

court in California, should not feel constrained to follow 'unworkable' or 'badly reasoned' decisions, any more than the United States Supreme Court does." *Johnson v. Dep't of Justice*, 60 Cal. 4th 871, 879 (2015). This is especially true here because "[t]he force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013). Over the years, this Court has found good reason to overturn its precedent in a number of circumstances relevant to its analysis here.

First, this Court has departed from prior precedent when it found its prior analysis to be "flawed." *People v. King*, 5 Cal. 4th 59, 78 (1993). In *Johnson*, for example, this Court reconsidered precedent regarding due-process rights because it found that its prior "flawed constitutional analysis [was] having a broad impact, and 'correction through legislative action [was] practically impossible.'" 60 Cal. 4th at 875 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

Second, this Court has overturned precedent that found "no support in the statutory language." *King*, 5 Cal. 4th at 77. In *King*, the Court grappled with Penal Code section 12022.5, which "provides for a sentence enhancement when a person uses a firearm in the commission or attempted commission of a felony." *Id.* at 63. The defendant had shot two victims in rapid succession during a robbery. The question was whether, under *In re*

Culbreth, 17 Cal. 3d 330, 333 (1976), "even if there are multiple counts involving multiple victims of violent crime, the enhancement may be imposed only once." *King*, 5 Cal. 4th at 63. On review, this Court rejected the "single occasion" rule of *Culbreth*, in part based on the observation that nothing in the statutory language "limits the enhancements to one for every separate occasion." *Id.* at 77.

Third, this Court has determined that stare decisis cannot shield prior court error from revision when precedent has established a rule that is "almost impossible to implement in a nonarbitrary fashion" or that "ha[s] yielded illogical and grotesque results." *King*, 5 Cal. 4th at 79. In *Moradi-Shalal*, the Court reexamined its previous opinion in *Royal Globe Insurance Co. v. Superior Court*, 23 Cal. 3d 880 (1979), in which it had held that "a private litigant could bring an action to impose civil liability on an insurer for engaging in unfair claims settlement practices." *Moradi-Shalal*, 46 Cal. 3d at 294. The *Moradi-Shalal* court determined that the *Royal Globe* ruling had "generated and [would] continue to produce inequitable results, costly multiple litigation, and unnecessary confusion unless we overrule it." *Id.* at 297.[17]

[17] *See also Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 93 (1995) (overruling decision where "developments occurring subsequent to [that] decision convince us that it was incorrectly decided, that it has generated unnecessary confusion, costly litigation, and inequitable results,

***Fourth*,** this Court has reexamined decisions in light of consistent criticism. This Court has cited scholarly criticism as a basis for overruling precedent. *See, e.g. Moradi-Shalal,* 46 Cal. 3d at 298 (overruling a prior decision while noting that scholarly "[c]ommentary on [it had] been generally critical"). And in *King*, the Court noted that "[s]ubsequent Court of Appeal opinions have not been kind to the *Culbreth* rule," and discussed judicial criticism of *Culbreth* in the intervening years. *King,* 5 Cal. 4th at 72–75.[18]

2. Prior decisions rejecting unanimity and beyond-a-reasonable-doubt decisionmaking in capital sentencing fall easily within this Court's criteria for departing from precedent.

The holdings that might otherwise appear to present an impediment to reform here easily meet all of this Court's above-described criteria for departing from precedent.

"Flawed" analysis. The Court's prior decisions rejecting unanimity and beyond-a-reasonable-doubt decisionmaking in capital sentencing were "flawed" and therefore do not deserve continued adherence as precedent. *See King*, 5 Cal. 4th at 78; *Johnson*, 60 Cal. 4th at 875. Mr. McDaniel convincingly argues in his opening and supplemental briefing that the

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and that it will continue to produce such effects unless and until we overrule it.").

[18] Despite these comments by the Court, it also bears remembering that "[e]rroneous precedent need not be dated or widely criticized to warrant overruling." *Johnson*, 60 Cal. 4th at 880.

"inviolate" jury-trial right guaranteed by article I, section 16 of the California Constitution (and incorporated in California Penal Code section 1042) and by the U.S. Constitution's Sixth Amendment requires that a jury decide penalty-phase issues unanimously and beyond a reasonable doubt. And, as discussed above and in Mr. McDaniel's briefing, the Court's decisions rejecting that requirement have never independently analyzed the California Constitution. Nor has the Court fully addressed *Hurst*'s expansion of *Apprendi* and *Ring*. Stare decisis thus presents no barrier to correcting the flaws in the reasoning and result of this Court's prior decisions.

No textual support. The provisions concerning the right to a jury trial—the Sixth Amendment; article I, section 16 of the California Constitution; and Penal Code section 1042, which incorporates the latter provision—provide no affirmative support for this Court's rejection of jury unanimity and beyond-a-reasonable-doubt decisionmaking at the penalty phase. Even the statute setting forth penalty-phase procedures, Penal Code § 190.3, provides no explicit bar to imposing such standards. The Court's precedents thus find no affirmative support in the language of any relevant constitutional or statutory provision.

Inequitable results. The absence of unanimity and reasonable-doubt requirements at the penalty phase has contributed to a death-penalty system that creates "inequitable results," a recognized basis for departing from

precedent. *Moradi-Shalal*, 46 Cal. 3d at 297. A continuing failing of the death-penalty system is the fact that many individuals like Mr. Benavides are wrongly sentenced to death after being convicted of crimes they did not commit. One statistical study predicted that 4.1% of death-sentenced individuals would eventually be exonerated of their crimes because they were factually innocent.[19] In California, since 1978, 72 people have had their death sentences reduced to life in prison, 11 have been released from prison, and six were fully exonerated.[20]

Just as California's death-penalty system results in numerous wrongful convictions, so, too, does it result in wrongful death sentences. This Court's refusal to impose unanimity and reasonable-doubt requirements at the penalty phase likely contributes to these wrongful sentences of death. The criminal-justice system already uses these procedural requirements as important tools for minimizing wrongful convictions at the guilt phase. The "reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970).

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[19] Samuel Gross, et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 20 PNAS 7230 (May 20, 2014), https://www.pnas.org/content/111/20/7230.

[20] Liliana Segura & Jordan Smith, *"There are Innocent People on Death Row" – Citing Wrongful Convictions, California Governor Halts Executions*, THE INTERCEPT (March 13, 2019), https://theintercept.com/2019/03/13/california-death-penalty-moratorium/.

Jury unanimity, meanwhile, prevents a jury from convicting the defendant despite "not agree[ing] on any particular crime." *People v. Hernandez*, 217 Cal. App. 4th 559, 570 (2013). The failure to give a unanimity instruction "has the effect of lowering the prosecution's burden of proof" and "runs the risk of a conviction when there is not proof beyond a reasonable doubt." *Id.* By foregoing these safeguards at the penalty phase, this Court has created a higher likelihood that death sentences will be imposed based on factual error.

Besides factual error, jurors report widespread pre-judging of the sentence in death-penalty cases in contradiction to their instructions. Almost half of surveyed capital jurors (48.3%) in Capital Jury Project data stated that they "knew what the punishment should be during the guilt phase of trial." Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 62 (2001). And as discussed below, the jury in capital cases is "death-qualified," meaning that only jurors willing to impose a death sentence are seated. Unsurprisingly, those jurors are more likely to convict and impose death and to discount mitigating circumstances in their analysis. *See* Mona Lynch & Craig Haney*, Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 L. & POL'Y 148 (2018) [hereinafter *Death Qualification*].

Imposing unanimity and reasonable-doubt requirements on the jury at the penalty phase would signal the distinct importance and weight of the penalty-phase determination. A beyond-a-reasonable-doubt burden would have the clear "symbolic effect" of telling jurors that the "degree of confidence our society thinks [the juror] should have" is similar to that for the guilt determination. *In re Angelia P.*, 28 Cal. 3d 908, 919 (1981) (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)). It would require the jury to "render[] decisions with the degree of certitude proportional to the interests at stake."[21] Jury unanimity has similarly been found to have multiple benefits, "including more open-minded and more thorough deliberations." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 & n.46 (2020). Wrongful imposition of the death penalty and juror pre-judgment at the penalty phase are problems that demand solutions. Thus, the Court's rulings rejecting jury unanimity and beyond-a-reasonable-doubt decisionmaking can be laid to rest, as they are part of the currently "inequitable" penalty-phase procedures. *Moradi-Shalal*, 46 Cal. 3d at 297.

Scholarly Criticism. California's death penalty scheme has been subject to significant and consistent criticism, as discussed at length below.

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[21] Linda E. Carter, *A Beyond A Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness*, 52 OHIO ST. L.J. 195, 208 (1991).

But so, too, have scholars argued the need for changes to the penalty-phase procedures at issue here. *See, e.g.*, Hoeffel, *supra* note 16, at 278.[22] And in this case, a group of amici scholars have argued for a departure from this Court's precedent on unanimity and the beyond-a-reasonable-doubt standard at the penalty phase.[23]

For all these reasons, this Court is empowered to reexamine its prior rulings relating to capital-sentencing aggravating factors.

3. The Court should feel no qualms about departing from precedent here, where the challenged penalty-phase procedures are part of a death-penalty system that no longer serves any legitimate purpose.

The obligation to follow existing criminal-law procedures should be at its lowest ebb when those procedures have long since ceased to serve any legitimate law-enforcement or penological purpose. Under such circumstances, no one can plausibly argue that substantial "private or legislative reliance interests" have "sprung up in dependence on the existing

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[22] *See also, e.g.*, Carter, *supra* note 21; Beth S. Brinkmann, *The Presumption of Life: A Starting Point for A Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 363 (1984); Damien P. DeLaney, *Better to Let Ten Guilty Men Live: The Presumption of Life--A Principle to Govern Capital Sentencing*, 14 CAP. DEF. J. 283, 294 (2002); Robert M. Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 SANTA CLARA L. REV. 101, 110–11 (2003).

[23] *See* Amici Curiae Brief of Professors Rory Little, Emad Atiq, Janet C. Hoeffel, and James Q. Whitman in Support of Defendant and Appellant Don'te McDaniel.

rule" and would suffer cognizable "costs" if the rule were changed. *Cuevas*, 12 Cal. 4th at 270 (overturning precedent on corroboration of out-of-court identifications). And there likewise should be no concern that overturning precedent would undermine "certainty, predictability, and stability in the law." *Mendoza*, 23 Cal. 4th at 924.

That is the situation here. For many years now, California's death-penalty system has been so dysfunctional as to be incapable of serving its putative purposes of deterrence and retribution. As a member of this Court has observed, "[a] death sentence in California has only a remote possibility of ever being carried out." *People v. Potts*, 6 Cal. 5th 1012, 1062–63 (2019) (Liu, J., concurring). "As a result, California's death penalty is an expensive and dysfunctional system that does not deliver justice or closure in a timely manner, if at all." *Id*. at 1063. Instead, the penalty now serves two illegitimate purposes: providing prosecutors with (1) a hammer to hold over the heads of indigent (and sometimes innocent) defendants to coerce them into guilty pleas, as occurred in the case of one of the amici; and (2) a justification for "death-qualifying" juries and thereby eliminating black and female jurors who are less likely to convict defendants or to sentence them to death.

In reality, there is no such thing as a death sentence in California. There is instead "a sentence of life in prison, with the remote possibility of

death—a sentence no rational jury or legislature could ever impose." *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1062 (C.D. Cal. 2014), *rev'd*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015). The truth is that no one is being executed under the present system, which has proved impossible to "reform." In 1972, this Court invalidated the state's death penalty in *People v. Anderson*,[24] resulting in the resentencing of 107 death-row inmates.[25] Months later, Proposition 17 reinstated the penalty.[26] Between 1978, when the current death-penalty system was adopted, and today, only 13 executions have occurred; yet more than 1,000 inmates have been sentenced to death, due in part to an ever-expanding list of "murders with special circumstances" punishable by death.[27] Between Aaron Miller's execution in 1967 and Robert Alton Harris's

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[24] 6 Cal. 3d 628 (1972).

[25] Death Penalty Information Center, *Milestones in Abolition and Reinstatement*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/california [hereinafter *DPIC Milestones*].

[26] *See* Voter Information Guide for 1972, General Election, Part I (Arguments) at pp. 42–44 & Part II (Appendix) at p. 20, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1773&context=ca_ballot_props; *DPIC Milestones*.

[27] *See Jones*, 31 F. Supp. 3d at 1053 & n.1; *id.* at 1062; Penal Code § 190.2 (listing dozens of special circumstances warranting death). Between 1978 and 2011, voter initiatives expanded the number of crimes that authorize capital punishment from 12 to 39. Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S160 (2011).

in 1992, the number of executions carried out in California was zero.[28] Executions ceased in 2006 as the result of protracted litigation over the combination of drugs used to carry out lethal injections.[29] And in March of 2019, Governor Newsom declared a moratorium on further executions and a temporary reprieve for all 737 prisoners then on death row.[30] His executive order noted that "California's death penalty system is unfair, unjust, wasteful, protracted and does not make our state safer."[31]

As the number of death-row inmates grows and the frequency of executions drops to zero, it has become less and less likely that any given inmate ever will be executed. Indeed, any execution that occurred now would represent so isolated and extraordinary an event—or, put another way, would be "so wantonly and so freakishly imposed"[32]—as to arguably violate the Eighth Amendment on that ground alone. The Eighth Amendment aside, the penalty-phase procedure challenged here must be deemed "impossible to

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[28] See Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L. J. 225, 225 & n.1 (1992).

[29] *See* University of Michigan Civil Rights Clearinghouse, Case Profile: *Morales v. Hickman,* https://www.clearinghouse.net/detail.php?id=9823 (summarizing history of lethal-injection litigation).

[30] Executive Order N-09-19, https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf.

[31] *Id.*

[32] *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

implement in a nonarbitrary fashion"[33] and thus unworthy of perpetuation through stare decisis.

One principal reason for this arbitrariness is delay, which plagues every stage in the capital appellate process. It typically takes three to five years before counsel are appointed for the inmate's direct appeal to this Court, another two to three years before that appeal is argued, and at least eight to ten years before counsel is appointed to conduct state habeas review. *Jones*, 31 F. Supp. 3d at 1066. Underfunding then delays the investigation of potential claims, and another four years pass before this Court denies the inmate's claims. Because those denials tend to be summary, adjudication of the inmate's federal habeas claims is further delayed. And many inmates are then required to stay their federal cases in order to exhaust claims in state court. *Id*. Finally, "in more than half of all cases in which the federal courts have reviewed a California inmate's death sentence on habeas review, the inmate has been granted relief from the death sentence." *Id*. at 1067.

Proposals to make the system less dilatory have come to naught. These have included "substantially increasing" the compensation of private attorneys who take capital cases, "dramatically expanding" the Habeas Corpus Resource Center, and amending the state Constitution to give this

[33] *King*, 5 Cal. 4th at 78–79.

Court discretion to transfer death-penalty appeals to the intermediate courts. None of those reforms was implemented. *Potts*, 6 Cal. 5th at 1065 (Liu, J., concurring); *see also* CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, FINAL REPORT, at 19–21 (2008).[34] In 2016, voters approved Proposition 66 to reform the state-habeas process; but the efficacy of those reforms "remains to be seen," *Potts*, 6 Cal. 5th at 1066 (Liu, J., concurring), and there are compelling reasons for skepticism. *See id*. at 1065–67. This history of failed reform does not bode well for the "'correction" of penalty-phase procedures "through legislative action." *Johnson*, 60 Cal. 4th at 875.

A system this broken cannot serve either of its stated purposes—deterrence and retribution. "[T]he law, and common sense itself, have long recognized that the deterrent effect of any punishment is contingent upon the certainty and timeliness of its imposition." *Jones*, 31 F. Supp. 3d at 1064. But "[i]n California, the system in which the death penalty is administered can only be described as dysfunctional. The delay inherent in California's system is so extraordinary that it alone seriously undermines the continued deterrent effect of the State's death penalty." *Id*. In California, a death row inmate likely will wait 25 years before his execution "becomes even a reasonable possibility." *Id*. at 1065. Indeed, since 1978, 120 inmates have

[34] https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs.

died on death row for reasons other than execution, "the vast majority due to natural causes." *Potts*, 6 Cal. 5th at 1064 (Liu, J., concurring). As former Chief Justice Ronald George put it, "[W]e're expending a tremendous amount of effort and expense to impose death sentences and send people to death row under circumstances that almost totally undermine the deterrent effect of the death penalty." *Id*.

Thus, "[t]he reasonable expectation of an individual contemplating a capital crime in California . . . is that if he is caught, it does not matter whether he is sentenced to death—he realistically faces only life imprisonment." *Jones*, 31 F. Supp. 3d at 1064. "Under such a system, the death penalty is about as effective a deterrent to capital crime as the possibility of a lightning strike is to going outside in the rain." *Id*.

Delay likewise undermines the goal of retribution. "[T]he ability of an execution to provide moral and emotional closure to a shocked community diminishe[s] as the connection between crime and punishment becomes more attenuated and more arbitrary." *Ceja v. Stewart*, 134 F.3d 1368, 1374 (9th Cir. 1998) (Fletcher, J., dissenting). Thus, "[t]here can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution." *Coleman v. Balkcom*, 451 U.S. 949, 960 (1981) (Rehnquist, J., dissenting from denial of certiorari, 101 S. Ct. 2994).

If California's death penalty serves neither of its putative purposes, what purposes (if any) ***does*** it serve? As suggested above, only two: providing prosecutors with (1) a hammer to coerce defendants—some innocent, like amici—into plea bargains; and (2) a means of death-qualifying juries and thereby biasing them toward the prosecution.

Coerced plea bargains. Plea bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense." *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting). Exposure to the ultimate penalty places almost unbearable psychological pressure on defendants to plead guilty to crimes—even ones they did not commit. Equal Justice USA cites the following examples of cases in which the death penalty was used to coerce plea bargains from innocent defendants.[35]

- When attempting to solve a 1985 rape and murder in Beatrice, Nebraska, investigators threatened several suspects with the death penalty and obtained what turned out to be false confessions. Biological evidence from the crime scene did not match the "Beatrice Six" and should have persuaded

[35] *See The Plea Bargain Myth: Securing Life with Death*, EQUAL JUSTICE USA, https://ejusa.org/wp-content/uploads/EJUSA-DP-factsheet-plea-bargains-1.pdf [hereinafter *Securing Life with Death*].

investigators of their innocence. Instead, relying on false confessions to build their case, prosecutors obtained convictions against the Six, who collectively spent over 75 years behind bars before DNA evidence exonerated them.[36] Their counsel has explained that "the threat of execution was the biggest factor in persuading two people to actually believe they were present and getting two others to plead no contest."[37]

- Chris Ochoa was sentenced to life for the 1988 rape and murder of Nancy DePriest in Austin, Texas. After being threatened with the death penalty, he pled guilty to the murder and accused his friend, Richard Danziger, of the rape. Years later, the real killer sent letters to officials taking responsibility for the crime; he also stated that he did not know either Ochoa or Danziger and did not know why they would confess to a crime that he had committed.

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[36] *Id.*; *see also* Meagan Flynn, *Six people were convicted of a murder they didn't even remember. Now a county owes them $28 million*, WASHINGTON POST (Mar. 6, 2019), https://www.washingtonpost.com/nation/2019/03/06/six-people-were-convicted-murder-they-didnt-even-remember-now-county-owes-them-million; Joe Duggan, *Beatrice Six win millions in civil rights claims, but 'no amount of money' will replace years lost, one family says*, OMAHA WORLD-HERALD, July 8, 2016, updated Oct 16, 2019, https://omaha.com/news/nebraska/beatrice-six-win-millions-in-civil-rights-claims-but-no/article_cfb0beb4-3fc6-11e6-b40a-c78b5ad1ca04.html

[37] *JoAnn Taylor's Lawyer Answers 7 Key Questions About her Guilty Plea Case*, INNOCENCE PROJECT, https://www.innocenceproject.org/7-key-questions-joann-taylor.

In 2001, DNA testing revealed that both Ochoa and Danziger were innocent. They were exonerated and released; but that relief came too late for Danziger, who had sustained brain damage from a severe beating in prison and had to be placed in his sister's care.[38]

- In 1991, the state of Maryland threatened Anthony Gray with the death penalty for a murder in Calvert County. He confessed to the crime and was sentenced to life, even though neither DNA, nor fingerprints matched him or his co-defendants. Gray spent eight years in prison before being exonerated and freed—including a year and a half after the person actually responsible for the murder had been found and convicted.[39]

According to the Innocence Project, more than one out of four people sentenced to death but later exonerated by DNA evidence made a false confession or incriminating statement.[40] And it's not just defendants who may feel irresistible pressure to capitulate in the face of a potential death sentence: Their attorneys may feel ethically *obligated* to obtain and then

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[38] *Securing Life with Death*; *Chris Ochoa, Time Served: 13 years*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/christopher-ochoa.

[39] *Securing Life with Death*; *Anthony Gray, Time Served: 8 years*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/anthony-gray.

[40] *See also Securing Life with Death*.

"sell" the defendant a plea deal that avoids a death sentence, even if the defendant is innocent or has substantial guilt-phase defenses. In fact, the ABA Guidelines state that attorneys have a *duty* to seek negotiated pleas in capital cases. *See* AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.9.1.A;[41] *see also* WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 144 (2006) [hereinafter *Shadow of Death*]. The late legal scholar Welsh S. White, one of the nation's preeminent death-penalty authorities, explained: "In many, if not most, capital cases, a competent defense attorney should . . . seek to obtain a favorable plea offer from the prosecutor and, if such an offer is obtained, seek to persuade the defendant to accept it." *Shadow of Death* at 146. He added: "In many capital cases, a favorable plea offer from the prosecutor will be *any offer that allows the defendant to avoid the possibility of a death sentence*." *Id.* at 147. The death penalty thus transforms what might otherwise look like a very bad plea deal into one that defense counsel regards as a "win" that she has an ethical duty to pursue and urge her client to accept. For this reason, David Bruck, an advisor to attorneys appointed to represent capital defendants, considers it his "first priority" to convince those attorneys "that

[41] https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.pdf.

what is often needed is not a skilled trial lawyer but a 'world class cop-out artist.'" *Id.* at 145–46.

Death-qualified juries. Persons called to jury service in capital cases are subjected to a "unique process" in which they are questioned about their attitudes toward the death penalty; and if those attitudes are strong enough to "prevent or substantially impair" them from considering imposing the death penalty, they are excluded from serving. *Death Qualification* at 148. The resulting "death-qualified" jury is "more likely to be white and male, to hold attitudes that are less supportive of due process ideals, and to hold more 'out-group' biases, including having negative attitudes toward women, racial minorities, gays, the elderly, and the physically disabled." *Id*. at 148–49. According to Federal Death Penalty Resource Counselor Michael Burt, "death-qualified juries do not evaluate evidence in the same way as other juries and are thus much more likely than other juries to credit the prosecution's evidence and less likely to acquit the defendant or to find him guilty of a lesser [i.e., noncapital] offense." *Shadow of Death* at 78. Criminal attorneys who do not normally try capital cases may fail to understand this effect and therefore may underinvest in defending the penalty phase because they mistakenly overestimate their chances of winning in the guilt phase. *See id*. at 78–79.

Empirical evidence that death-qualified juries have a greater propensity to convict and (unsurprisingly) to impose death is overwhelming. "[A] robust body of research has found that death-qualified jurors, as a group, tend to be more conviction prone and death prone compared to jury-eligible citizens in general." *Death Qualification* at 148. "Although modern death qualification procedures are supposed to identify and remove potential jurors at both ends of the attitudinal spectrum, research suggests that strong death penalty supporters—even those whose views should perhaps disqualify them—are much more likely to be deemed 'fit to serve' than those who strongly oppose capital punishment." *Id*. at 149. "Consequently death-qualified juries tend to be significantly more in favor of the death penalty than jury pools in general." *Id*.

The conviction- and death-prone nature of death-qualified jurors has real-world effects on innocent defendants. Death-qualified jurors are more likely to look skeptically on an innocent defendant's guilt-phase defense and the evidence in mitigation, and thus are more likely to convict and impose the death penalty on people, like amici, who committed no crime. This higher likelihood of conviction and a death sentence, in turn, intensifies the already enormous pressure on innocent defendants to plead guilty.

Juror attitudes toward the death penalty also "essentially work as proxies for race. In that sense, death qualification can function to racially

exclude, and it can do so even more systematically than the unconstitutional pretexts that prosecutors have sometime offered as reasons to justify their use of peremptory challenges to prevent African Americans from serving as jurors." *Id*. at 166.[42] "Equally troubling is the fact that the very group whose lived experiences are disproportionately excluded from participation—African Americans—is the one that [research has shown to be] much more likely to *correctly* identify and apply specific mitigating factors as reasons to favor life over death sentences and much less likely to *incorrectly* use mitigating factors in favor of death over life sentences (as compared, in both instances, to their white counterparts . . . .)." *Id*. (emphases in original). "In essence, by creating a jury whose members are unusually hostile to mitigation, death qualification may functionally undermine capital defendants' ability to have their case in mitigation accurately heard, properly understood, and effectively acted upon," especially in cases involving African American defendants. *Id*. at 167. "This is effectively analogous to a court seating jurors who are conversant in a language that is different from the one spoken by the defense side of the case." *Id*.

[42] Death qualification also makes peremptory challenges a more potent tool for excluding African Americans from capital juries, as the "protracted line of questioning" that often accompanies death qualification "invariably" surfaces reservations about the death penalty—reservations that prosecutors are not constitutionally barred from using when eliminating jurors via peremptory challenge. *Id*. at 166.

Death qualification also affects the way juries handle aggravating evidence—the very issue in Mr. McDaniel's case. "Despite the centrality of 'mitigation' in a constitutional system of death sentencing, empirical research indicates that death-qualified potential jurors are more likely to disregard or misuse mitigating as opposed to aggravating evidence." *Id*. at 152. A recent survey of Solano county potential jurors revealed that "white respondents were significantly more receptive to aggravating evidence and were more inclined to weigh these specific items in favor of a death sentence compared to African American respondents." *Id*. at 164. Thus, requiring capital juries to find each aggravating circumstance unanimously and beyond a reasonable doubt might ameliorate one of the pernicious effects of death qualification. At the very least, though, the dysfunctional and illegitimate nature of the current death-penalty system should lighten the burden of precedent on this Court as it reconsiders how aggravating circumstances are proved in California.

III. CONCLUSION

The aggravating circumstances for which a life may be taken by the State of California should be proved, like other critical elements in a criminal proceeding, unanimously and beyond a reasonable doubt. No matter how many times the contrary rule has been stated and applied in prior cases, that rule is so out of line with settled expectations of what our law should be that

the only certainty its perpetuation could impart is a certainty of gross and continuing injustice. Amici and other innocent defendants like them have suffered, and will continue to suffer, the consequences of California's death-penalty scheme as measured by scores of wrongful guilty pleas and decades of wrongful incarceration. In the face of these burdens and the lack of any rational purpose for California's current scheme, stare decisis poses no barrier to this Court taking action to impose fair, constitutionally mandated protections on the penalty phase.

Respectfully submitted,

Dated: October 26, 2020

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court 8.504(a), 8.504(d)(1) and 8.204(c)(1), and in reliance upon the word count feature of the software used, I certify that the attached Brief of Amici Curiae Vicente Benavides Figueroa and Manuel Lopez in Support of Defendant Don'te Lamonte McDaniel contains 9,379 words, excluding parts not required to be counted under Rule 8.204(c)(3).

Dated: October 26, 2020

/s/ Steven A. Hirsch
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JO W. GOLUB
JASON GEORGE

DECLARATION OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker, Van Nest & Peters LLP, 633 Battery Street, San Francisco, CA 94111-1809.

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Executed on October 27, 2020, at San Francisco, California.

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

Elizabeth Myrddin

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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/s/Steven Hirsch

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