IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **PLAINTIFF AND RESPONDENT,** **V.** **JOE EDWARD JOHNSON** **DEFENDANT AND APPELLANT.**	No. S029551 Sacramento County Sup. Ct. No. 58961 Death Penalty Case

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal from Judgment of
The Superior Court of Sacramento County
The Honorable Peter Mering, Presiding

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THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT HAD NOT ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION IN THE PROSECUTOR'S EXERCISE OF PEREMPTORY CHALLENGES ON THE BASIS OF RACE

This Court recently took the opportunity "to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection" in the third step of the *Batson/Wheeler*[1] analysis. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1154 (*Gutierrez*).) This case demonstrates the need for the Court to provide similar clarification for *Batson's* first step. As with the third step determination in *Gutierrez*, the trial court in this case did not make a *reasoned* effort to ascertain whether a prima facie case had been established. Rather, the lower court's explanation for its ruling was founded on basic and incontrovertible errors of fact and misconceptions about the law. On appeal, respondent attempts to justify the trial court's ruling by pressing another misconceived analysis. Respondent asserts that a reviewing court can affirm a finding of no prima facie case if there is any imaginable race neutral justification that the prosecution *might have* utilized in challenging the potential jurors at issue. Recent decisions by this Court and the federal courts clarify that this argument is incorrect. This Court recently held that a prima facie case can be defeated only by facts that are "'clearly established' in the record and that necessarily dispel any inference of bias." (*People v. Sanchez* (2016) 63 Cal.4th 411, 434 (*Sanchez*), citations omitted.) As *Sanchez* confirmed, and recent

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). References to "*Batson*" should be understood to include the state constitutional right enunciated in *Wheeler*.

federal court decisions have echoed, the fact that "'the record *could have* supported race neutral reasons for the prosecutor's use of his peremptory challenges'" cannot defeat a prima facie case. (*Ibid.*, quoting *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1110; accord, *Currie v. McDowell* (9th Cir. 2016) 825 F.3d 603, 609 ["the state appellate court violated clearly established Federal law in its *Batson* step-one analysis by affirming [the finding of no prima facie case] because 'the record suggest[ed] grounds upon which the prosecutor might reasonably have challenged the jurors in question' [citation]"]; *Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090, 1101 [finding constitutional error where this Court, relying on *People v. Box* (2000) 23 Cal.4th 1153, upheld the finding of no prima facie case because "'the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question'"].)

Here, there is ample evidence to support a prima facie case. This includes the prosecutor striking three of five African-American jurors, his pattern of striking an African-American juror whenever there were more than two African-Americans on the panel, and that he investigated only one potential juror: an African-American. All of this is in addition to the fact that Mr. Johnson is African-American; the victims are white; the struck jurors were not inclined against the death penalty; and all had been victims of burglary, the special circumstance in this case. This showing cannot be defeated by searching the record for possible race-neutral reasons that the prosecutor never articulated. Applying the correct legal standard to the evidence in the record demonstrates that Mr. Johnson established a prima facie case.

A. Mr. Johnson Established a Prima Facie Case of Racial Discrimination in the Prosecutor's Strikes of African-American Jurors

This supplemental brief primarily addresses recent cases demonstrating the error in respondent's claim that the record rebuts Mr. Johnson's prima facie

showing. However, to provide context for what follows, and because respondent has argued the trial court correctly found no prima facie case, it is necessary to set forth the evidence supporting a prima facie case and the trial court's errors in not finding one.[2]

In raising the *Batson* challenge defense counsel argued that a number of factors supported an inference of discrimination. He pointed out that the prosecutor had excluded 60 percent of the available African-American jurors, Mr. Johnson is African-American, the excluded jurors had said that they could vote for the death penalty, and none was leaning towards life without the possibility of parole. (40 RT 13125-13129.)

The prosecutor's only response was that excluding three of five African-American jurors did not "quite reach[] a prima facie case."[3] (40 RT 13126.) Respondent argues that Mr. Johnson "made little effort" in the trial court to point to evidence other than statistical disparity to support his prima facie case. (RB at 61.) But it was the prosecutor who ignored the other factors cited by defense counsel and focused only on the statistical showing. (See ARB at 18-19.) In any event, in evaluating a step-one case this Court is not limited to counsel's presentation below but considers "the entire record of voir dire." (*People v. Scott* (2015) 61 Cal.4th 363, 384 (*Scott*).) Therefore, Mr. Johnson

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[2] Because Mr. Johnson's trial preceded the United States Supreme Court's decision in *Johnson v. California* (2005) 545 U.S. 162, and the trial court did not state the standard it was applying, this Court independently reviews that evidence. (See *Sanchez, supra*, 63 Cal.4th at p. 434.)

[3] This comment is strikingly similar to a comment by the trial judge in *Johnson v. California* that "we are very close" to a prima facie case. The United States Supreme Court observed that such statements "illustrate the imprecision of relying on judicial speculation to resolve plausible claims of discrimination" at *Batson's* first step. (*Johnson v. California*, *supra*, 545 U.S. at p. 173.)

will begin by discussing the statistical disparity and then proceed to the other factors supporting a prima facie case.

1. The Numbers

Like the prosecutor, the trial court focused exclusively on statistics in ruling that Mr. Johnson had not established a prima facie case. Unfortunately, in doing so it made a series of basic logical errors.

The court stated that "in a case where each side has 20 challenges everybody is going to exclude more than 50 percent of every group, assuming one does it on a color-blind basis." (40 RT 13126.) The court also said that, given the number of challenges allotted to each side, "two-thirds of any group on a random basis, two-thirds, 66 percent would be excluded on a totally random basis, because two out of three are leaving." (40 RT 13127.) The court said that because about 70 percent of the people who had been in the box had been excluded there was "a rather neutral process going on." (40 RT 13127.) The court also said that the exclusion rate for Caucasians "would be the same or greater than for the black persons who have come to the jury box." (40 RT 13127.)

Virtually all of the trial court's factual statements were wrong.

While it is roughly true that one would expect counsel for the two sides *together* to strike approximately 66 percent of the prospective jurors, one would expect *each side* to remove only half of those jurors, or 33 percent. Thus, the prosecutor's removal of 60 percent of the African-American potential jurors is almost twice the rate that a neutral process would produce. The trial court's statement that "everybody is going to exclude more than 50 percent of every group, assuming one does it on a color-blind basis" also reflects a fundamental mathematical error. If "everybody," meaning each side, excluded more than 50 percent of every group, the result would be impossible—the exclusion of more than 100 percent of those groups.

The trial court's statement that the prosecutor had excluded a higher percentage of Caucasians than African-Americans was also wrong. At the time of the Batson challenge, the prosecutor had struck 34 percent of the non-African-American jurors, compared to 60 percent of the African-American jurors. (See AOB at 69, fn. 14.)

While the correct statistics are far from the only evidence supporting an inference of discrimination here, many courts have found similar statistical showings compelling. (See e.g. *Crittenden v. Chappell* (9th Cir. 2015) 804 F.3d 998, 1005, 1019 [prima facie case established by exclusion of single African-American juror given totality of circumstances; court went on to find *Batson* violation]; see also AOB at 83-85, ARB at 17-18, and cases cited therein.)[4]

2. The Race of the Defendant

The trial court expressly refused to consider Mr. Johnson's race in finding no prima facie case, dismissing it as "a side issue that we need not get into." (40RT 13129; see also AOB at 70, 85.) This was again wrong. The United States Supreme Court has said that a case in which the defendant and

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[4] Respondent relies on *People v. Johnson* (2003) 30 Cal.4th 1302, 1325-26, overruled by *Johnson v. California*, *supra*, 545 U.S. 162, for the principle that "even the removal of most or all the members of a cognizable group of which the defendant is a member would not in itself establish a prima facie case of discrimination." (RB at 62.) Respondent cites *People v. Johnson* as having been "overruled on another point" by *Johnson v. California* and asserts in a parenthetical that *People v. Johnson* held that "the removal of all three African-American prospective jurors did not present a prima facie case of discrimination." (RB at 62.) However, the United States Supreme Court overruled *People v. Johnson* on *exactly* this point, holding that the defendant *had* established a prima facie case based on the exclusion of all three African-American jurors. (*Johnson v. California*, *supra*, 545 U.S. at p. 173; see also *People v. Johnson* (2006) 38 Cal.4th 1096, 1099 [on remand from United States Supreme Court noting that, in overruling this Court's prior decision, the Supreme Court had found a prima facie case].)

the excused juror are the same race "may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred." (*Powers v. Ohio* (1991) 499 U.S. 400, 416; see also *Scott, supra,* 61 Cal. 4th at p. 384 ["certain types of evidence may prove particularly relevant" in determining the existence of a prima facie case including "that the defendant is a member of the identified group"].) Respondent claims that, although the trial court said Mr. Johnson's race was a "side issue," the court "did not disagree" that "challenges on any prospective African-American panelist takes on greater significance where a defendant is also African-American." (RB at 56.) Respondent claims the court simply "opined that appellant's race was a peripheral issue where he had failed to make out a prima facie case of discriminatory intent." (RB at 56.) This makes no sense. Mr. Johnson's race is *evidence* of discriminatory intent that supports a prima facie case.

3. The Struck Jurors Supported the Death Penalty

The trial court also ignored defense counsel's point that all the struck African-American jurors had expressed a willingness to impose the death penalty and that none was leaning toward a life sentence. (40 RT 13125.) (See 15 CT 4402 [Holmes] ["I believe the death penalty [should be] used in cases where another life was taken or any crimes committed against children and senior citizens"]; 15 CT 4284 [Graham] ["I am not for or against [the death penalty] exception [sic] based on evidence in case"]; 15 CT 4352 [Harrison] ["My general feeling is that some crimes warrant it and some don't]; see also, AOB at 68-69.)

Respondent does not deny this, but rather argues that this Court cannot consider "traits that the prosecution could have viewed favorably" in determining whether Mr. Johnson established a prima facie case because such evidence is only relevant in the third step of the Batson analysis. (RB at 62.)

Respondent provides no citation in support of this narrow view of what it means to consider "the entire record" (*Sanchez, supra,* 63 Cal.4th at p. 434), or "the totality of the relevant facts" (*Johnson v. California, supra,* 545 U.S. at p. 168).

4. Other Evidence Supporting a Prima Facie Case

In addition to the facts raised by trial counsel, the required complete review of the record reveals additional evidence of discrimination—all of which was ignored by the trial court. (*Sanchez, supra,* 63 Cal.4th at p. 434; *Scott, supra,* 61 Cal.4th at p. 384.)

a. The Race of the Victims

Not only is Mr. Johnson African-American, both the murder victim and the victim of the rape introduced as evidence in aggravation were white. Both the United States Supreme Court and this Court have characterized as "'highly relevant' [the] circumstance that a black defendant was 'charged with killing his White girlfriend's child.'" (*Johnson v. California, supra,* 545 U.S. at p. 167, quoting *People v. Johnson, supra,* 30 Cal.4th at 1326; see also *People v. Scott, supra,* 61 Cal. 4th at p. 384 [observing that "certain evidence may prove particularly relevant" in determining the presence of a prima facie case including "that the victim is a member of the group to which the majority of the remaining jurors belong"]; see also, AOB at 65-66, 74, 85; ARB at 18-19.)

b. The Prosecutor Only Investigated an African American Potential Juror

The prosecutor obtained the criminal history of only one potential juror—the African-American potential juror Kenneth Malloy. Immediately before Malloy's voir dire the prosecutor revealed that he had run a computer criminal history check on "some of the jurors" and had discovered Malloy had two misdemeanor convictions for driving under the influence and had a

domestic violence arrest. (39 RT 12804-12805.) Malloy said on his questionnaire that he had never been arrested for a crime. (39 RT 12805.)[5] Defense counsel agreed that the court should look into the inconsistency, but asked whether the prosecutor had "just checked all the Black prospective jurors" for criminal records and said he was "curious" why the prosecutor ran a check on Malloy when nothing in his questionnaire suggested he was lying. (39 RT 12807-12808.) The prosecutor responded that he was only checking jurors who "sparked my interest." (39 RT 12807, 12809.)

The prosecutor refused to reveal which jurors he had checked and the trial court refused to compel him to do so. The trial court only ordered him to reveal any information he discovered that conflicted with jurors' questionnaires or voir dire responses. (39 RT 12810.) The record does not reflect that the prosecutor ever provided such information. The court said that if "there is some issue of *Wheeler*-type concerns, then the state of mind and the purpose of the prosecutor would become relevant."[6] (39 RT 12808.) However, there is no indication that the trial court considered the investigation of Malloy in evaluating Mr. Johnson's *Batson* claim.

In similar circumstances, the Nevada Supreme Court recently found discriminatory intent under the more prosecution-favorable step-three standard.

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[5] During voir dire Malloy explained that he had pleaded no contest to driving under the influence charges the preceding year (39 RT 12990-12991), and that charges stemming from a dispute with his wife had been dropped after he completed a diversion program (39 RT 12995). Neither side challenged Malloy for cause. (39 RT 13005.) The prosecutor ultimately removed Malloy with a peremptory challenge during the selection of alternate jurors. (40 RT 13155-13156.) This resulted in another *Batson* challenge by Mr. Johnson. (40 RT 13157.) No alternate jurors were used during the trial.

[6] Defense counsel responded that a *Wheeler* motion is always a possibility, and added, "I don't see why [the prosecutor] would object to informing us as to which jurors he ran a check on so that we have the same information with respect to those jurors." (39 RT 12809-12810.)

In *McCarty v. State* (Nev. 2016) 371 P.3d 1002, 1008, the prosecution claimed that it had struck an African-American prospective juror because she had a card permitting her to work in a "strip club." However, the state discovered this only after it ran a computer background check on her, something it had done for only one other juror. (*Ibid*.) The court pointed out that, if having such a card was a concern for the prosecution it would have checked all of the jurors, but it had not. (*Ibid.*) The court also noted that by searching computer records for "race neutral" reasons to strike only African-American jurors the prosecution could conceal its discriminatory intent. (*Id.* at p. 1009.) The court held that "[t]his kind of disparate treatment supports our conclusion that it is more likely than not that the reasons given for striking prospective juror 36 were mere pretext for purposeful discrimination" and that it could not overlook clear evidence of discriminatory intent in removing a juror. (*Id.* at pp. 1008-1009; see also *Foster v. Chatman* (2016) ___ U.S. ___, 136 S.Ct. 1737 [noting the importance of extrinsic evidence of discriminatory intent]; AOB at 65-66, 74, 85; ARB at 18-19.) Just as in *McCarty*, the record in this case demonstrates that the prosecutor investigated only an African-American potential juror, and did so for no apparent reason other than his race.

c. The Pattern of Strikes

There was a distinctive pattern to the prosecutor's strikes of African-American jurors: he never permitted more than two African-American jurors on the panel. The prosecution passed several times when one or two African-Americans were seated on the panel, but each of the three times a third African-American was seated, the prosecutor immediately removed that potential juror.

The first African-American juror, Danella Daniel, was seated after the prosecutor exercised his first peremptory strike. (40 RT 13103.) Seven rounds later, a second African-American juror, Hazel Densby, was seated. (40 RT 13109.) Five rounds later a third African-American juror, Lois Graham was

seated, leaving the panel with three African-American jurors for the first time. (40 RT 13112.) The defense passed and the prosecution removed Graham with a peremptory strike. (40 RT 13112.) Mr. Johnson then made his first *Batson* challenge, which was denied and is not at issue here. (40 RT 13113-13114.) Two rounds later, a fourth African-American juror, Sharon Harrison, was seated, and there were again three African-Americans on the panel. (40 RT 13121.) The defense passed and the prosecution removed Harrison with a peremptory strike. (40 RT 13121.) Two rounds later a fifth African-American juror, Shanna Holmes was seated, again leaving the panel with three African-American jurors. (40 RT 13123-13124.) The prosecution immediately removed Holmes with a peremptory strike. (40 RT 13124.) The defense then raised its second Batson challenge, the denial of which is at issue here. (40 RT 13125.)

The prosecutor's pattern of strikes—always striking an African-American juror when her addition brought the number of African-Americans on the panel to three—resembles what occurred in *Williams v. State* (Nev. 2005) 126 P.2d 627, 634. In *Williams*, the prosecutor "objected to the fact that three of the first twelve [potential] jurors were African Americans." (*Ibid.*) The Nevada Supreme Court noted that the prosecutor did not object when the court placed six African-Americans in the jury venire after the defense objected to the lack of African-Americans in the venire, but only objected when it became clear that three African-Americans had randomly been placed in the initial group of twelve jurors. (*Ibid*.) The court concluded that these facts made "[i]t is plain that the State did not want a jury containing three or more African Americans." (*Id.* at p. 635.) It is similarly plain that the prosecutor here had the same desire.

The ruling in *Williams* is in keeping with the requirement that review of a *Batson* claim must include examining the "broader patterns of practice during the jury selection" for "suspicious" actions by the prosecutor. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 253 (*Miller-El*).) An examination of those

"broader patterns" in this case—the prosecutor's decision to immediately strike an African-American juror whenever there were three African-Americans on the panel—raises a suspicion of discrimination. (*Id.* at p. 153-154; see also, *Batson, supra,* 476 U.S. at p. 97 ["a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination"].)

The fact that the pattern in this case allowed the prosecutor to pass when there were one or two African-Americans on the panel does not negate the suspicion that the prosecutor was engaging in discriminatory strikes. "The fact that the prosecutor 'passed' or accepted a jury containing two Black persons" does not end the *Batson* "inquiry, for to so hold would provide an easy means of justifying a pattern of unlawful discrimination." (*People v. Snow* (1987) 44 Cal.3d 216, 225.) In *Gutierrez* this Court found error even though the prosecutor passed five times before striking the juror at issue there, holding that such passes do not "preclude a finding that a panelist is struck on account of bias against an identifiable group, when such a strike occurs eventually instead of immediately." (*Gutierrez, supra* 2 Cal.5th at pp. 1170–1171; see also AOB at 74-75.)

d. The Struck Prospective Jurors Were Crime Victims

All three struck potential jurors either had been victims of crimes or had a close relative who had been. In all three cases one of the crimes was burglary, which was also the special circumstance in this case. (See 15 CT 4348 [Harrison's sister was victim of burglary]; 15 CT 4398 [Holmes had been burglarized twice]; 15 CT 4280 [Graham had bike stolen from her home].) Again, this is a characteristic generally seen as favorable to the prosecution. (See *People v. Gray* (2005) 37 Cal. 4th 168, 191 [potential juror "had a fear his wife and children would be the victims of sexually based crimes; because defendant was charged with just such crimes, the prosecutor may have believed

[he] would be a sympathetic juror"]; *People v. Turner* (1986) 42 Cal.3d 711, 719 ["backgrounds which suggested that, had they been white, the prosecution would not have peremptorily excused them" included fact that potential jurors had been victims of crimes]; cf. *Wheeler*, *supra*, 22 Cal. 3d at 275 ["a defendant may suspect prejudice on the part of one juror because he has been the victim of crime"].)

In light of these facts—the pattern of strikes, the investigation of an African-American potential juror, the statistical showing, the race of Mr. Johnson and the victims, and the fact that the struck jurors were all burglary victims and had no defense bias on the subject of penalty—Mr. Johnson met the "minimal" burden required to establish a prima facie showing of discrimination. (*Shirley v. Yates*, *supra*, 807 F.3d at p. 1101.)

B. Respondent's Assertion that the Evidence in the Record is Sufficient to Defeat a Prima Facie Case Is Premised on an Erroneous Legal Standard and a Selective Reading of the Record.

In its brief respondent relies on an argument that this Court has recently made clear is erroneous: that a finding of no prima facie case should be affirmed "'where the record *suggests* grounds upon which the prosecutor might reasonably have challenged the jurors in question.'" (RB at 59, quoting *People v. Guerra* (2006) 37 Cal.4th 1067, 1101, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151, emphasis added.) Because this language is present in numerous cases decided before *Johnson v. California*, this Court should clarify that it is no longer valid as a matter of federal constitutional law.

In *Sanchez* this Court rejected this "suggestion" language. It said that, "under *Johnson [v. California]*, *supra*, 545 U.S. 162, reviewing courts may not uphold a finding of no prima facie case *simply because the record suggests grounds for a valid challenge*." (*Sanchez*, *supra*, 63 Cal.4th at p. 435, fn.5, emphasis added.) Even more recently, the Ninth Circuit has repeated that it is a

constitutional violation for an appellate court to affirm a trial court's ruling that no prima facie case was established based on a finding that "the record *suggested* grounds upon with the prosecutor might reasonably have challenged the jurors in question." (*Currie v. McDowell, supra,* 825 F.3d at p. 609, emphasis added.)

At *Batson's* first step, nondiscriminatory reasons for a peremptory challenge can defeat a prima face case only if the facts "'clearly established in the record . . . *necessarily* dispel any inference of bias.' [citation.]" (*Sanchez, supra*, 63 Cal.4th at p. 434, emphasis added.) In *Sanchez* this Court also said, quoting federal cases, that the "'refutation of the inference [of discrimination] requires more than a determination that the record could have supported race-neutral reasons for the prosecutor's use of his peremptory challenges,'" (*Ibid.*, quoting *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1110), and that "'the examination of 'apparent' reasons in the record involves only reasons for the challenges that are objectively evident in the record such that there is no longer any suspicion, or inference, of discrimination in those strikes'" (*Ibid*, quoting *United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, 518, 516; see also *Gutierrez, supra,* 2 Cal.5th at p. 1169, quoting *Miller-El, supra,* 545 U.S. at p. 252 [rejecting, at step three, a justification for striking an Hispanic juror that "does not strike us as an obvious or natural inference drawn from this panelist's responses" and stating that "'[a] *Batson* challenge does not call for *a mere exercise in thinking up any rational basis*'"], emphasis added).

These holdings follow from the United States Supreme Court's rejection of speculation in step one. The burden at *Batson's* first step is not "onerous" *because* the Supreme Court seeks to avoid courts "engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." (*Johnson v. California, supra,* 545 U.S. at pp. 170, 172, citing *Paulino v. Castro,* (9th Cir. 2004) 371 F.3d 1083, 1090 ["[I]t does not matter that the prosecutor might have had good reasons . . . [w]hat matters is the real

reason they were stricken"]; *Holloway v. Horn*, (3rd Cir. 2004) 355 F.3d 707, 725 [speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory strike].)

The purpose of *Batson's* three steps is to avoid speculation and "produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." (*Johnson v. California, supra,* 545 U.S. at p. 172.) *Batson's* "three-step process thus simultaneously serves the public purposes *Batson* is designed to vindicate and encourages 'prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process.'" (*Ibid*., quoting *Hernandez v. New York* (1991) 500 U.S. 352, 358-359 (opn. of Kennedy, J.)).

The Supreme Court requires that a suspicion of discrimination be resolved at step three, based on facts, not speculation. This requirement is inconsistent with allowing anything other than overwhelmingly clear and obvious reasons for excluding a challenged juror to preclude a finding of a prima facie case at step one.

When viewed in light of the legal standards set forth in recent cases, respondent's arguments do not defeat the showing of a prima facie case made below. Relying on the faulty premise that a reviewing court can sustain a finding of no prima facie case "where the record *suggests* grounds upon which the prosecutor might *reasonably* have challenged the jurors in question" (RB at 59, emphasis added), respondent repeatedly makes variations on the argument that the record supports a "reasonable belief" by the prosecutor that the African-American prospective jurors removed were unfavorable to the prosecution. (See RB at 66 ["The prosecutor *could have reasonably believed* that prospective jurors Harris and Graham harbored a certain skepticism or distrust regarding the fairness of the criminal justice system"; "the prosecutor *could reasonably believed* [sic] that Graham's and Harrison's responses during voire [sic] dire suggested that they would be particularly sympathetic to the

mitigating evidence of childhood abuse and alleged mental illness"; "The prosecutor *could have reasonably preferred* jurors with less skepticism about the fairness of the justice system"]; 66-67 [the jurors "career choices *suggested that [they] might be* more receptive to mitigation evidence to evidence [sic] suggesting that appellant had been abused as a child and that he might have suffered brain damage"], emphasis added; see also ARB at 19-21.)

Respondent's own language demonstrates that its claims are speculative and thus fall far short of "'clearly establish[ing]" facts that "necessarily dispel any inference of bias." (*Sanchez*, *supra*, 63 Cal.4th at p. 434.) Nor is respondent aided by an examination of the record.

For example, respondent speculates that "the prosecutor *could have reasonably believed* that prospective jurors Harrison and Graham harbored *a certain skepticism or distrust* regarding the fairness of the criminal justice system." (RB at 66, emphasis added.) Respondent cites no cases to support this argument, and its language alone shows that it is entirely speculative. It is also not supported by the record.

Respondent claims that Harrison "indicated a belief that verdicts might not always be accurate." (RB at 66.) What Harrison said, in her questionnaire, is that she though sentences were "usually fair" and that while she might not always agree with the verdict from her "observing perspective" she usually agreed with the sentence. (15 CT 4349.) Respondent claims that Graham "responded equivocally to the question about the fairness of criminal sentencing." (RB at 66.) Graham said, again in her questionnaire, that "in cases she had heard about the courts seemed to be fair" but that it was difficult to judge if you were not part of it. (15 CT 4281.) Respondent does not explain how "usually fair" can be translated to "not always accurate" or how saying it is difficult to judge the fairness of a process you are no part of is "equivocal." In any event, neither of these statements is so clearly disqualifying as to "necessarily dispel any inference of bias in the prosecutor's strikes." (*Sanchez*,

supra, 63 Cal.4th at p. 434.) Indeed, a prosecutor could easily view these statements as appealing—both jurors said that they thought the courts were fair. The fact that these statements are susceptible to multiple interpretations further demonstrates that they are insufficient to defeat a prima facie case at step one.

Moreover, while respondent claims that the prosecution did not engage in "'desultory' questioning" (RB at 68, quoting *Wheeler*, *supra*, 22 Cal.3d at p. 281) the prosecution did not ask either potential juror about her view of the criminal justice system. (37 RT 12316-12324 [Graham]; 38 RT 12656-12665 [Harrison].) As this court recently noted in *Gutierrez*, such a failure "raises a question" as to how interested the prosecutor was in "meaningfully examining" whether the juror was biased on the issue in question. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1170.) A prosecutor would be expected to question a juror about an issue if it "'actually mattered'" to him. (*Ibid.*, quoting *Miller-El*, *supra*, 545 U.S. at p. 246.)

Respondent also claims that the prosecutor "could *reasonably believed* [sic]" that Graham and Harrison's responses *"suggested"* that they would be sympathetic to mitigating evidence of childhood abuse and "alleged mental illness." (RB at 66-67, emphasis added.) Harrison is described as having "devoted much of her life to helping abused children who became juvenile wards after criminal proceedings." (RB at 66.) However, in voir dire Harrison said the facility she worked at excluded children who had engaged in serious "criminality" saying it was "not fair to put kids that are abused with kids who have the criminal background" (38 RT 12660).

Harrison also said that, while she had extensive experience dealing with psychologists and psychiatrists, she would look carefully, and even skeptically, at any mental health testimony. (38 RT 12654-12655 ["I find some psychiatrists that can be right on target in terms of a person's behavior and causes for it, and other ones that don't have a clue."].) Such skepticism about

psychiatric testimony would presumably appeal to a prosecutor concerned about a juror's reaction to psychiatric mitigation evidence.

Graham, a former teacher and current school administrator (14 CT4275; 37 RT 12309-12310), is described by respondent as having "devoted her career to education and trying to improve children's lives" (RB at 66). Graham said that she was responsible for discipline at the school where she worked, had a great deal of contact with the police, was responsible for searching students suspected of having contraband, and had positive experiences with the police, who provided "excellent assistance to us." (37 RT 12309-12310, 12323.) Such views are also normally considered favorable to the prosecution. (See, e.g., *People v. Reynoso* (2003) 31 Cal.4th 903, 928 ["jurors with law enforcement contacts . . . would normally be deemed favorable to the prosecution"]; *People v. Allen* (1979) 23 Cal.3d 286, 291 fn. 2 [relatives and friends in law enforcement are factors the prosecution would generally find favorable].)

Thus, not only do the facts cited by respondent fail to provide evidence of an inarguable justification for rejecting these jurors, they increase the suspicion of discrimination since they show the struck jurors had characteristics the prosecution would otherwise be expected to prefer.

The cases respondent cites to support this claim all involve the third step of the *Batson* analysis. (See RB at 67 citing *People v. Ervin* (2000) 22 Cal.4th 48, 75; *People v. Barber* (1988) 200 Cal.App.3d 378, 389-394; *People v. Landry* (1996) 49 Cal.App.4th 785, 790; *People v. Turner* (1994) 8 Cal.4th 137, 171, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) However, "'the existence of grounds upon which a prosecutor could reasonably have premised a challenge does not suffice to defeat an inference of racial bias at the first step of the Batson framework [citation].'"

(*Currie v. McDowell, supra*, 825 F.3d at p. 609.) This Court should clarify that step three cases have, at best, little relevance in a step-one analysis.[7]

Respondent's speculation also stands in sharp contrast to the weightier evidence this Court has found sufficient to dispel an inference of discrimination at step one in recent cases such as *Sanchez* and *Scott*.

A number of the struck jurors in *Scott* and *Sanchez*, while not removed for cause based on their views on the death penalty, nevertheless had views that would be of great concern to a prosecutor. In several instances this Court found these questions were serious enough to provide a non-racial justification for the prosecutor's strikes.

In *Sanchez*, one of the struck jurors said he could impose the death penalty "if things are very desperate," but made clear his general opposition to the death penalty. (*Sanchez, supra*, 63 Cal.4th at p. 436.) Another struck juror

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[7] Respondent also claims that Holmes's son pleading guilty to rape in Sacramento County and her belief that he had been treated unfairly is sufficient to conclusively demonstrate that her strike was race neutral. (39RT 12750-12751.) This case, though tried in Sacramento County on a change of venue, was tried by the Sonoma County District Attorney's Office. Holmes assured the court and the prosecutor that this would not affect her decision as a juror in this case. She said that her son's case and this case were "two separate incidents" and the she knew "how to draw a line." (39RT 12761.)

Respondent cites two step-one cases: *People v. Garceau* (1993) 6 Cal.4th 140, 172, abrogated on other grounds by *People v. Yeoman* (2003) 31 Cal.4th 93, 117, and *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690, both of which predate *Johnson*, and thus were based on a constitutionally invalid standard. Respondent's reliance on these cases highlight the need for this Court to clarify the viability of older cases in light of *Johnson* and other recent decisions.

While the facts cited might constitute a sufficient justification in step three, they are not sufficiently clear to eliminate "any suspicion, or inference, of discrimination in those strikes." (*Sanchez, supra*, 63 Cal.4th at pp. 434-435.) Given the changes in the law wrought by the Supreme Court's decision in *Johnson*, pre-*Johnson* cases such as these should no longer be relied upon, another point that cries out for clarification by this Court.

had been sexually abused as a child, was recovering from recent brain surgery for a seizure disorder, was reluctant to be involved in a decision to impose the death penalty, and did "not want to be in a position to make a decision on this penalty." (*Id*. at p. 437.) The final struck juror in *Sanchez* indicated on her questionnaire that she could not vote for the death penalty and the defense had unsuccessfully challenged her for cause before the prosecution struck her. (*Id.* at p. 439.) In *Scott*, one of the struck jurors said on his questionnaire that he was unwilling to impose the death penalty under any circumstances and gave confusing responses on this topic in voir dire. (*Scott, supra*, 61 Cal.4th at p. 385.)

As already discussed, in section A.3., *ante*, this stands in stark contrast to the African-American jurors removed in this case. First, all three indicated that they could vote for the death penalty and none indicated they would lean toward a life sentence. (See 15 CT 4402 [Holmes] ["I believe the death penalty [should be] used in cases where another life was taken or any crimes committed against children and senior citizens"]; 15 CT 4284 [Graham] ["I am not for or against [the death penalty] exception [sic] based on evidence in case"]; 15 CT 4352 [Harrison] ["My general feeling is that some crimes warrant it [the death penalty] and some don't]; see also, AOB at 68-69.) Second, all three had been victims of burglary, the very crime that was the special circumstance in this case. (See 15 CT 4348 [Harrison's sister was victim of burglary]; 15 CT 4398 [Holmes had been burglarized twice]; 15 CT 4280 [Graham had bike stolen from her home].)

Respondent rests its argument that the facts it cites are sufficient to dispel the inference of discrimination on a thorough misunderstanding of the applicable law and a selective reading of the record. Application of the correct legal standard to the facts in the record demonstrates that Mr. Johnson established a prima facie case of discrimination in the selection of the jury.

C. Conclusion

The United States Supreme Court has acknowledged the difficulty of obtaining a conclusive determination as to whether racial discrimination in jury selection has occurred and has decided that the best answers are found through direct inquiry at step three. "The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." (*Johnson v. California*, *supra,* 545 U.S. at p. 172.)

Too stringent an approach to *Batson's* first step frustrates the Supreme Court's carefully constructed scheme for conducting the vital task of rooting out bias in jury selection. As Justice Liu recently observed in his concurring opinion in *Gutierrez*,

> [*Batson's*] probabilistic standard is not designed to elicit a definitive finding of deceit or racism. Instead, it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection causes to the defendant, to the excluded juror, and to "public confidence in the fairness of our system of justice." (*Batson*, *supra*, 476 U.S. at p. 87

(*Gutierrez, supra*, 2 Cal.5th 1150 at pp. 1182–1183 (conc. op. Liu, J.).)

> The United States Supreme Court has also recently reiterated that,
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> discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." The jury is to be "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State."

(*Pena-Rodriguez v. Colorado* (2017) 580 U.S.___, 137 S.Ct. 855, 868, citations omitted.)

To ensure that the third step—at which a court can obtain direct answers and minimize the risk of discrimination in jury selection—is reached in all appropriate cases, trial courts must apply the correct legal standard at step one.

The Court should take this opportunity to clarify those standards. Applying the appropriate standards, as articulated in decisions both of this Court and the United States Supreme Court, this Court must conclude that trial court erred in finding that Mr. Johnson failed to establish a prima facie case under *Batson's* first step.

In light of this error, and given that the jury selection in question occurred in 1992, 26 years ago, this Court should reverse the sentence of death and order a new penalty trial.

15.

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

In his opening brief, Mr. Johnson challenged the California death penalty scheme on grounds that this Court has rejected in previous decisions holding that the California law does not violate the federal Constitution. (AOB 178-211.) Recently, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616, 624] [hereafter "*Hurst*"].) *Hurst* provides new support to appellant's claims in Arguments 11.B.1 and 11.B.3 of his opening brief. (AOB 180-182, 183-186.) In light of *Hurst*, this Court should reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14); does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106); and does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275).

A. Under Hurst, Each Fact Necessary to Impose a Death Sentence, Including the Determination that the Aggravating Circumstances Outweigh the Mitigating Circumstances, Must Be Found By a Jury Beyond a Reasonable Doubt

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

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

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at pp. 494, 482-483.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst*, *supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Hurst*,

supra, 136 S.Ct. at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Hurst*, *supra*, 136 S.Ct. at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Ibid*.)[8]

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

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[8] The Court in *Hurst* explained:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla.Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

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

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[9] The Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

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

B. California's Death Penalty Statute Violates *Hurst* by Not Requiring that the Jury's Weighing Determination Be Found Beyond a Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring* and, *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi*/*Ring*/*Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance—in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient

mitigating circumstances to outweigh aggravating circumstances" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[10]

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

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

(*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination

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[10] As *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst*, *supra*, 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings which actually authorize the imposition of the death penalty in the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the *Ring* inquiry is one of function.

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

murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[11]

C. This Court's Interpretation of the California Death Penalty Statute in *People v. Brown* Supports the Conclusion that the Jury's Weighing Determination is a Factfinding Necessary to Impose a Sentence of Death

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

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

(*Id*. at p. 538.) The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role" (*id*. at p. 545, fn. 17) and construed this

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

language to avoid violating the federal Constitution (*id*. at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

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

(*People v. Brown*, *supra*, at p. 541, [hereafter "*Brown*"], footnotes omitted.)[12]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist

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

the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].)

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown, supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweigh the mitigation. (*Brown, supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Brown, supra*, 40 Cal.3d at p. 540.)

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

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence

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

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

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown*'s interpretation of section 190.3.[13] The requirement that the jury must find that the aggravating

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

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

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

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic

circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), make clear this two-step process for imposing a death sentence:

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

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

D. This Court Should Reconsider Its Prior Rulings that the Weighing Determination is Not a Factfinding Under *Ring* and Therefore Does Not Require Proof Beyond a Reasonable Doubt

This Court has held that the weighing determination—whether aggravating circumstances outweigh the mitigating circumstances—is not a finding of fact, but rather is a "'fundamentally normative assessment . . . that is

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

outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman*, *supra*, 60 Cal.4th at p. 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595, citations omitted; accord, *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) Mr. Johnson asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary precondition—beyond the jury's guilt-phase verdict finding a special circumstance—for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring*, and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[14] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California

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

death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 [hereafter "*Rauf*"] supports Mitchell's request that this Court revisit its holdings that the *Apprendi* and *Ring* rule do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. (*Id*. at pp. 433-434 (per curiam opn. of Strine, C.J., Holland, J. and Steitz, J ["per curium opn."]).) In Delaware, unlike Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id*. at p. 456 (per curiam opn.).) Nonetheless, in a 3 to 2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute violates *Hurst*.[15] One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Id*. at p. 434 (per curiam opn.), p. 484 (conc. opn. of Holland, J.).) With regard to this defect, the Delaware Supreme Court explained:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the

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[15]In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because (1) after the jury finds at least one statutory aggravating circumstance, the "judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non statutory aggravating circumstances" (*Rauf, supra* 145 A.3d at pp. 433-434 (per curiam opn.), p. 484 (conc. opn. of Holland, J.) [addressing Questions 1-2]) and (2) the jury is not required to find the existence of any aggravating circumstance, statutory or non statutory, unanimously and beyond a reasonable doubt (*id*. at p. 434 (per curiam opn.), pp. 485-487 (conc. opn. of Holland, J.) [addressing Question 3]).

> aggravating factors outweigh the mitigating factors . . . .” The relevant “maximum” sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Id*., at p. 485 (conc. opn. of Holland, J.).) The Delaware court is not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi*/*Ring* rule. (See e.g., *State v. Whitfield, supra*, 107 S.W.3d at pp. 257 258; *Woldt v. People, supra*, 64 P.3d at pp. 265-266; see also *Woodward v. Alabama, supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) [“The statutorily required finding that the aggravating factors of a defendant’s crime outweigh the mitigating factors is . . . [a] factual finding” under Alabama’s capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [finding that under *Apprendi* and *Ring* the finding that the aggravators outweigh the mitigators “is not a finding of fact in support of a particular sentence”]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251 253 [finding that “the weighing of aggravating and mitigating circumstances is not a fact finding endeavor” under *Apprendi* and *Ring*].)

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

16.

BECAUSE THE CALIFORNIA PENALTY PHASE PROCEEDING IS A TRIAL ON ISSUES OF FACT, STATE AND FEDERAL LAW REQUIRE THAT THE PROPRIETY OF THE SENTENCE OF DEATH AND THE AGGRAVATING FACTORS BE PROVEN BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

No maxim of the old law "has been more carefully preserved in its integrity under our system" than that of "*[a]d qu[a]estionem juris respondent judices, ad qu[a]estionem facti respondent juratores.*"[16] (*People v. Durrant* (1897) 116 Cal. 179, 200.) The principle that juries decide all issues of fact undergirds the entire common law jury trial system.[17] Therefore, the touchstone for whether state and federal jury right protections attach to a particular proceeding must rest on whether "issues of fact" are resolved by a "jury" at a "trial" as those terms were understood at common law. (*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"].)

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[16] "Judges answer to a question of law, jurors to a question of fact." (1 Burrill, A New Law Dictionary and Glossary (1850) p. 35.)

[17] See 1 Coke, Institutes 155b (1628); Wynne, Eunomus, or Dialogues Concerning The Law And Constitution Of England (1768) § 53, p. 207 ("[T]he Province of Judge and Jury [are] distinct, the facts are left altogether to the jury, and the law does not control the fact, but arises from it"); *Ex parte U. S.* (7th Cir.1939) 101 F.2d 870, 874) ["Th[is] guiding principle was later enshrined in our American Constitution"], citing U.S. Const. Art. III, § 2; U.S. Const. 6th Amend; Report of the Debates from in the Convention of California on the Formation of the Constitution (1849), p. 236 (statement of Mr. Botts) ["every lawyer and every gentleman understands" the "object of the great common law of England" to separate issues of law and fact and "turn them over to the consideration of two distinct and separate tribunals"]; *Johnson v. Louisiana* (1972) 406 U.S. 366, 371 (conc. opn. of Powell, J.) [noting that the "historical approach to the Sixth Amendment" had long ago led the Supreme Court to decide that the jury has the power to decide only "questions of fact"]; see generally *Sparf v. U.S.* (1895) 156U.S. 51 (*Sparf*).

California law has long recognized this fundamental premise. Penal Code section 1042, enacted in 1872, dictates that "[i]ssues of fact shall be tried in the manner provided in Article I, Section 16 of the Constitution of this state."[18] Yet this foundational provision of the Penal Code—and the jury trial right it incorporates—has not been fully addressed by this Court in decades of litigation regarding whether the basic requirements of a jury trial (particularly unanimity and proof beyond a reasonable doubt) apply to the aggravating factors and the verdict at the penalty phase of a capital trial. Nor have the implications of these state law provisions for the application of the Sixth Amendment jury trial right been subjected to any scrutiny.

This is hardly to say that claims regarding jury trial rights at the penalty phase have not been raised and discussed at length. Much ink has been spilled over the question of whether aggravating factors in our capital scheme increase the permissible punishment, triggering Sixth Amendment protections under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny. Although appellant disagrees, this Court has concluded that *Apprendi* does not apply at the penalty phase of a California capital trial. (See, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Ochoa* (2001) 26 Cal.4th 398, 454.) As a result, the current law is a strange hodgepodge: unanimity (but not reasonable doubt) protection applies to the ultimate verdict, and reasonable doubt (but not unanimity) applies to the aggravating factors. This counterintuitive result stems in part from this Court's continued rejection of jury rights under the framework articulated in *Apprendi*. But an exclusive focus on *Apprendi* asks and answers the wrong question.

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[18] When first enacted, Penal Code section 1042 read, "Issues of fact must be tried by a jury." (Former section 1042, enacted by Stats. 1872.) This language is nearly identical to language from the earliest criminal statutes adopted in 1850, that "[a]n issue of fact must be tried by a jury. . . ." (Stats. 1850, Ch. 119, § 337, p. 299.)

Analysis under Penal Code section 1042, and the state jury trial right it references, is not irrevocably tethered to the *Apprendi* test. (See *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1077 [nothing suggests that the drafters of the state Constitution even "had the Sixth Amendment in mind" when incorporating the jury right into the state Constitution].) Instead, the proper question under the state constitution is *not* simply whether the range of punishment is increased as dictated by *Apprendi*. Instead, the question is whether an "issue of fact" is "tried" (Pen. Code, § 1042), thus implicating the state and federal right of "trial by jury" (Cal. Const. art. 1, section 6; see also U.S. Const., 6th Amend). Focusing on "issues" under the common law, and not simply the *Apprendi* formulation, is the most historically accurate method for understanding when, and to what, jury rights attach. The burden of reasonable doubt has long been understood "as governing all issues of fact." (*People v. Chessman* (1951) 38 Cal.2d 166, 182.) And the substance of the California jury right has long required that in criminal cases "[e]ach *issue* must . . . be tried by a jury of 12 impartial persons, and the verdict must be unanimous." (*People v. Troche* (1928) 206 Cal. 35, 44, italics added.)

Appellant is aware of the long line of cases denying the rights to unanimity and proof beyond a reasonable doubt to various components of a capital trial. However, traced to their origins, these holdings derive not from any considered analysis of the current California death penalty statute or the California Constitution, but from an uncritical acceptance of litigation positions *taken by capital defendants* hoping to mount facial attacks to the California death penalty under the 8th Amendment. These original decisions, and the many subsequent decisions reaffirming them, ignore the unambiguous holding of this Court, unquestioned by this Court or the Legislature for nearly a century, that the state jury trial right *does* apply to penalty determinations in capital cases. (*People v. Hall* (1926) 199 Cal. 451, 458 (*Hall*) [failure to secure jury's unanimous agreement on penalty was "denial of a trial by jury"].) There is no

basis in logic or history to apply simply the unanimity requirement or the beyond a reasonable doubt requirement—but not both—to the ultimate penalty determination or factually disputed aggravating factors. Piecemeal application of these bedrock jury requirements runs contrary to the expressed intent of the delegates who adopted the California Constitution's jury trial provision.

If the California penalty phase involves the "trial" of "issues of fact" by a "jury" these facts must be tried in the accordance with the protections of our state Constitution, including the rights of unanimity and proof beyond a reasonable doubt (hereafter "jury trial rights" or "jury trial protections"). Thus, the ultimate penalty determination must be made beyond a reasonable doubt, and the aggravating factors must be found unanimously. And if the resolution of the questions presented to the jury during the penalty phase are "issues of fact" under *state* law, then they are likewise protected by the federal jury trial rights in the same manner. In fact, the United States Supreme Court has said that the Sixth Amendment jury protections apply to "issues" including "punishment" that are left to juries at a capital trial. (*Andres v. U.S.* (1948) 333 U.S. 740, 747 (*Andres*).)

This Court has repeatedly rested its rule that the Sixth Amendment jury right protections do not apply to the capital penalty phase on two United States Supreme Court Cases—*Spaziano v. Florida* (1984) 468 U.S. 447 (*Spaziano*) and *Hildwin v. Florida* (1989) 490 U.S. 638 (*Hildwin*). (See, e.g., *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; *In re Carpenter* (1995) 9 Cal.4th 634, 676; *People v. Lewis* (2008) 43 Cal.4th 415, 521.) But those cases have now been overruled. (*Hurst v. Florida* (2016) ___ U.S. ___; 136 S.Ct. 616, 624 (*Hurst*) ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*"].) This Court should therefore reconsider its holdings regarding the application of both Article I, Section 16 and the Sixth Amendment to the penalty phase of a capital trial.

A. Issues of Fact Undergird the Scope of Sixth Amendment Jury Protections

Apprendi and its progeny rest on the Sixth Amendment right, in all criminal cases, to a "trial, by an impartial jury." (U.S. Const. 6th Amend.) But more broadly, the essential feature of the right to a "trial[] by . . . jury," which underlies *Apprendi* and which had been recognized for hundreds of years, is the understanding that the jury decides all "issues of fact." (Thayer, *A Preliminary Treatise On Evidence At The Common Law* (1898) 183-189 ("Treatise On Evidence At The Common Law"); Mitchell, *Apprendi's Domain* (2006) 2006 Sup. Ct. Rev. 297, 302-303 [citing William Blackstone, Edward Coke, the Judiciary Act of 1789, and numerous early state criminal codes and cases all of which "described the criminal jury's role . . . to include all disputed questions of fact"]; see also fn. 17, ante.)

Critically, at common law, "issues of fact" *did not simply mean factual issues*, it was merely a shorthand to reference "questions raised by the pleadings" or "ultimate issues of fact." (Treatise On Evidence at the Common Law, *supra*, at p. 187; *In re Javier A.* (1984) 159 Cal.App.3d 913, 930, fn. 9 [earliest California cases guaranteed jury trial to "issue of fact [] made by the pleadings"]; *People v. Pantages* (1931) 212 Cal. 237, 267 ["issue of fact" arises "from an allegation of ultimate fact made by one of the parties which is denied by the other"]; 4 Blackstone's Commentaries 333 ["when the parties come to a fact, which is affirmed on one side and denied on the other, then they are said to be at issue in point of fact"]; *Dale v. City Court of City of Merced* (1951) 105 Cal.App.2d 602, 607 [the "constitutional [jury right] guarantee has to do with the *trial of issues that are made by the pleadings*"], italics added.) The precise form or title of the accusatory pleading was not important: "whether preferred in the shape of indictment, information, or appeal" the key was that the "truth of every accusation" was subject to the "unanimous suffrage" of a jury. (4 Blackstone's Commentaries 343.)

Although the distinction between questions of fact and questions of law is occasionally blurry, in their most basic sense "issues of fact" are defined by the trial itself, which is in turn guided by the Legislature's designation: "issues of fact, and only issues of fact, are to be tried by a jury. When they are so tried, the jury, and not the court, are to find the facts." (Treatise on Evidence at the Common Law, *supra*, at p. 189.) In other words "[i]n the maxim, 'Ad quaestionem juris respondent judices, ad quaestionem facti respondent juratores,' the word 'quaestio' denotes an issue joined by the pleadings of the parties, or otherwise stated on the record, for decision by the appropriate tribunal. Issues of law, so joined or stated, are to be decided by the judge; issues of fact, by the jury." (*Sparf, supra*, 156 U.S. at p. 170 (dis. opn. of Gray, J.); see also Isaacs, *The Law and the Facts* (1922) 22 Colum. L. Rev. 1, 4 [criticizing the concept of a conclusive distinction between questions of law and fact and suggesting that "a great deal of confusion would be avoided if we frankly used some such expression as 'judicial questions' and 'jury questions'"].) The maxim therefore expresses the "general rule of proceeding on trials before a jury" where "it is the office of the judge to instruct the jury on points of law, and of the jury to decide on matters of fact." (1 Burrill, A New Law Dictionary and Glossary, *supra*, p. 36.)

The Legislature's decision to create a penalty *trial* necessarily creates "issues of fact," for providing a verdict on issues of fact is what a jury determines in all trials. (See 3 Blackstone 330 ["Trial then is the examination of the matter of fact in issue; of which there are many different species, according to the difference of the subject, or thing to be tried"]; see also Stats. 1850, Ch. 119, § 348, p. 300 [defining "jury" as "twelve men accepted and sworn to try the issue"].)

Nor does the characterization that the penalty phase trial answers "normative" issues alter the calculus. The central distinction at common law was not between "factual" and "non-factual" questions, but "jury questions"

and "judicial questions." (*People v. Lynch* (1875) 51 Cal. 15, 26 [phrase "beyond all reasonable doubt" appropriately refers to "the action of a jury upon an issue of fact" not the "action of a court upon any issue of law"].) As between questions of fact and questions of law "[i]t is the *process* by which the result is attained which is or may be different, and *the tribunal through which such result is reached that differs*, rather than the result itself." (*Levins v. Rovegno* (1886) 71 Cal. 273, 276, second italics added.) And it did not matter that the question involved some form of reasoning, inference, or personal judgment: jury questions ("issues of fact") are those issues that result in an answer (verdict) from the jury. (Thayer, *"Law and Fact" in Jury Trials* (1890) 4 Harv. L. Rev. 147, 150, citing *Littleton's Case*, 10 Coke 56b (1612); see also *Franzen v. Shenk* (1923) 192 Cal. 572, 589 [jury's province includes not merely to determine facts proven but "the justice of the inferences to be drawn from [] facts"].) As Blackstone explained, although the questions varied (3 Blackstone 330) the answering of the "issue" by the verdict marked when "trial by jury" was complete (3 Blackstone 379 ["when the jury have delivered their verdict and it is recorded in court, they are discharged; and so ends the *trial by jury*."], italics added).

B. The Existence of Aggravating Factors and the Ultimate Penalty Phase Determination Are Issues of Fact

"The essence of trial by jury is that controverted facts shall be decided by a jury." (*People v. Hickman* (1928) 204 Cal. 470, 476.) This is precisely what occurs at the penalty phase proceeding, at least with respect to aggravating factors whose truth is contested. For all its moral complexity, the questions in a California capital trial are nearly identical to those in a common law capital trial: did the defendant commit 1) the capital crime charged ("factor (a)"); 2) the unadjudicated crimes charged ("factor (b)"); 3) the adjudicated

prior crimes ("factor (c)"); and, in light of these accusations and the mitigation case,[19] 4) what is the ultimate verdict on the issue of penalty?

The existence of aggravating factors (accusations of criminal conduct) pled by the prosecution in its notice of aggravation are the facts whose truth is "at issue." (See *People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1236 ["despite the 'normative nature' of the penalty decision itself," the prosecution's aggravating evidence may raise "disputed factual issues"]; § 190.3 [requiring notice of aggravation]; 4 Blackstone's Commentaries 343 [precise form or title of accusatory pleading immaterial for purposes of the jury right].) And, as this Court has repeatedly noted, the "ultimate issue" in a capital sentencing trial "is the appropriate penalty." (*People v. Anderson* (2001) 25 Cal.4th 543, 588; Treatise on Evidence at the Common Law, *supra*, at p. 187 ["issue of fact" includes "questions raised by the pleadings" and "ultimate issue" determined by a jury].)

This is not to say that every contested fact during the penalty phase (or the guilt phase) is an "issue of fact." 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"].) But as to

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

those issues necessarily embraced in the jury's verdict—those to which the law attaches effect—the jury rights apply.

The analytic error, introduced in flawed dictum in the now-overruled *Spaziano* and discussed in detail below, is the conclusion that that because the penalty phase trial relates to sentencing, it is simply a sentencing hearing and therefore does not implicate the right of trial by jury. There is truth to the major premise that sentencing hearings do not normally constitute trials and are not subject to many of the procedural constraints mandated by the state and federal constitution for trials. As this Court has noted, jury rights do not apply to sentencing because "[f]rom the earliest days of statehood, trial courts in California have made factual determinations relating to the nature of the crime and the defendant's background in arriving at discretionary decisions in the sentencing process." (*People v. Wiley* (1995) 9 Cal.4th 580, 586; see also *Williams v. New York* (1949) 337 U.S. 241, 246 [evidentiary standards for trials not constitutionally imposed at sentencing because "courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law"].)

But the minor premise—that the capital penalty phase is simply a sentencing hearing—flies in the face of both form and history. The California penalty phase does *not* derive from discretionary sentencing hearings; it is instead an outgrowth of the 19th century capital trial. (See *Hall*, *supra*, 199 Cal. at p. 456 [the guilt and penalty determinations are "two necessary constituent elements" of the unitary capital trial verdict and must both be found unanimously].) That the California penalty phase proceeding has always been a trial, and not a mere sentencing hearing, is undebatable.

The 1957 death penalty statute, which first created the bifurcated proceeding, specifically referred to the penalty phase as a "trial on the issue of

penalty" (Former § 190.1, enacted by Stats.1957, ch. 1968, § 2, p. 3509) and this Court continues to refer to the penalty phase proceedings as a "trial." (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 113; *People v. Harris* (1989) 47 Cal.3d 1047, 1102 [ordering "new trial on the issue of penalty"]; *People v. Horning* (2004) 34 Cal.4th 871, 912 [discussing the necessity of a § 190.4, subd. (e), hearing when the defendant has waived his "jury trial on the issue of penalty"].) Indeed, as this Court has explained repeatedly, the guilt and penalty phases are just two "part[s] of a unitary trial." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365; *People v. Hamilton* (1988) 45 Cal.3d 351, 369 ["the penalty phase has no separate formal existence but is merely a stage in a unitary capital trial"].)

Even when the old unitary sentencing scheme was bifurcated (due to appellate reversal on penalty only), this Court explained that it regarded the sentencing component of a capital proceeding as a "trial on the issue of penalty." (*People v. Green* (1956) 47 Cal.2d 209, 212.) In other words, "[w]here the matter is to be determined by a jury, . . . the proceeding should be 'a trial in the full technical sense, and . . . governed by the same . . . rules of procedure' as the trial of the issue of guilt." (*Id.* at p. 236.) Of course, the most fundamental procedure of any trial is "submission of issues of fact to a jury." (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 296; see also § 1042.)

In keeping with this concept, when "[i]n 1957 the Legislature replaced th[e] unitary proceeding with a bifurcated system" (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 9, fn. 9), it specifically noted that the "determination of the penalty" was held before the jury "trying the issue of fact on the evidence presented" (Former § 190.1, enacted by Stats.1957, ch. 1968, § 2, p. 3509). And while the current statute does not adopt this precise phrase—instead describing the jury as the "trier of fact"—that the jury is to decide "issues of fact" is nonetheless clear. (See Black's Law Dictionary (10th ed. 2014) p. 711

[defining "fact-finder" as "[o]ne or more persons who hear testimony and review evidence to rule on a *factual issue*"], italics added; see also *id*. at p. 959 [defining "issue of fact" as "[a] point supported by one party's evidence and controverted by another's"].)

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

Like any common law trial, the current statute requires a unanimous verdict. (§ 190.4, subd. (b); *People v. Hall, supra*, 199 Cal. at pp. 456-457 [unanimous verdict on penalty required under state Constitution].) And the aggravating factors plead must be found beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 54 [factor (b) determination found beyond a reasonable doubt]; *People v. Williams* (2010) 49 Cal.4th 405, 459 [factor (c) found beyond a reasonable doubt]; *People v. Prieto* (2003) 30 Cal.4th 226, 256 [main component of factor (a), the existence of special circumstance murder, must be found beyond reasonable doubt].)

In sum, under California law, the penalty phase involves the resolution of 1) issues of fact, 2) by a jury, 3) at a trial. The question is whether the mere fact that the penalty phase proceeding involves a determination of sentence—a task traditionally assigned to judges in many non-capital proceedings—defeats

the application of the Article I, section 16 and the Sixth Amendment. Prior to the unfortunate dicta in *Spaziono*, both this Court and the United States Supreme Court held to the contrary.

C. *People v. Hall*[20] and *Andres v. U.S.*[21] Dictate That the Legislative Choice to Create a Jury Right on the Issue of Penalty Makes These Trials Subject To Jury Trial Protections

Apprendi, and all of the cases in the *Apprendi* line, involve legislative determinations that *judges* were to answer certain factual questions relevant to sentencing. This is not what occurs during California capital cases, nor is it what occurs in the overwhelming majority of capital schemes throughout the country. Instead, California assigns to a *jury* the task of determining the issues at a capital trial. This decision has a profound impact on the application of the jury trial rights, both as a matter of textualism and history.

In keeping with the premise that the penalty determination was an "issue of fact" protected by the traditional jury trial guarantees, the courts of California have long required that the penalty verdict in a capital case "must be the result of the unanimous agreement of the jurors." (*Hall*, *supra*, 199 Cal. at p. 456; see also *People v. Green*, *supra*, 47 Cal.2d at p. 224 ["There is nothing in the statute which authorizes holding that the jurors are not required to agree *unanimously on the penalty* just as they must agree unanimously on the questions of guilt and class and degree of offense"], italics added.)

In *Hall*, although the jury unanimously convicted the defendant of first degree murder, the verdict indicated "we . . . cannot come to an [sic] unanimous agreement as to degree of punishment." (*Hall*, *supra*, 199 Cal. at p. 453.) The judge nonetheless sentenced the defendant to death. (*Ibid*.) The *Hall*

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[20] (1926) 199 Cal. 451

[21] (1948) 333 U.S. 740

court was unequivocal: because the law entrusted the finding to a jury, the verdict "in such a case must be the result of the unanimous agreement of the jurors and the verdict is incomplete unless, as returned, it embraces the two necessary constituent elements" of guilt and penalty. (*Id.* at p. 456.) A death sentence absent a unanimous penalty finding by a jury violated the California Constitution's jury right. (*Id.* at p. 459 [death sentence issued by non-unanimous jury was "in effect the denial of a trial by jury," and "however degraded and hardened a criminal the evidence may disclose an accused to be, he is entitled under the Constitution to trial by jury"].)

Some early California cases also concluded that the reasonable doubt protection applied to the jury's determination of penalty. For instance, in *People v. Cancino* (1937) 10 Cal.2d 223, although finding no error, the Court approved the instruction to jurors "that if they entertain a reasonable doubt as to which one of two or more punishments should be imposed, it is their duty to impose the lesser." (*Id.* at p. 230.) It said that "[t]his rule should prevail in every case where the punishment is divided into degrees and the jury is given discretion as to the punishment." (*Ibid*; see also *People v. Sampsell* (1950) 34 Cal.2d 757, 760 [jury given the instruction approved in *People v. Cancino*, *supra*, 10 Cal.2d 223].) Similarly, in the earlier case of *People v. Perry* (1925) 195 Cal. 623 the Court approved instructing that "'[i]f the jury should be in doubt as to the proper penalty to inflict the jury should resolve that doubt in favor of the defendant and fix the lesser penalty, that is, confinement in the state prison for life.'" (*Id.* at p. 640.) This accurately described the jury's "duty" to determine penalty such that the jury was under "no misapprehension" based on other challenged instructions. (*Ibid.*)

This is not to say that decisions from this Court were always consistent on the application of the reasonable doubt burden to penalty determinations. There are contrary cases explicitly rejecting the reasonable doubt burden. (See, e.g., *People v. Purvis* (1961) 56 Cal.2d 93, 95, overruled on other grounds by

People v. Morse (1964) 60 Cal.2d 631 [rejecting claimed error that instructions should require jury's penalty determination to only consider facts proven beyond a reasonable doubt and that reasonable doubt burden should apply to choice of penalty].) But cases such as *Purvis*—which deny any reasonable doubt burden as to the verdict or the aggravating evidence—set up an irreconcilable conflict that persists to this day: if unanimity is constitutionally required (see *Hall*, *supra*, 199 Cal. at p. 456), how can the reasonable doubt burden somehow not apply?

The conclusion that the jury right of unanimity—but not reasonable doubt—could apply to a proceeding is manifestly contradicted by the intent of the drafters of article I, section 16. The framers of the state jury right believed that the unanimity requirement and the beyond a reasonable doubt burden were inextricably intertwined. (See 3 Debates and Proceedings, Cal. Const. Convention, *supra*, p. 1175 (statement of Mr. Reddy) [proposal to limit unanimity requirement to felony cases would upset the "fundamental principle of criminal jurisprudence" that defendants are "entitled to the benefit of all reasonable doubts" and would therefore require not only change in juror unanimity but also a shift to a "preponderance of the evidence" standard]; 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"]; *United States v. Correa-Ventura* (5th Cir. 1993) 6 F.3d 1070, 1076) [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"].) Severing the two rights is not only a historical anomaly, but violates this Court's modern understanding of the interrelationship of the two rights. This Court has repeatedly and "explicitly recognized that jury unanimity and the standard of proof beyond a reasonable

doubt are slices of the same due process pie." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 231.)

In *Andres, supra,* 333 U.S. 740, the United States Supreme Court embraced the same approach that this Court took in *Hall*. *Andres* dealt with a federal death penalty statute under a unitary regime. The federal statute provided the death penalty for certain murder offenses, but Congress had amended it to allow the jury to "qualify their verdict by adding thereto 'without capital punishment.'" (*Andres, supra,* 333 U.S. at p. 747.) At issue was whether this statute required a unanimous jury determination in favor of death, and, if so, whether the instructions properly conveyed this requirement to the jury. (*Id.* at pp. 748-752.) The Court's analysis was straightforward and in harmony with the common law tradition that "issues" tried by the jury were protected:

> Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. *In criminal cases* this requirement of unanimity extends to *all issues*—character or degree of the crime, guilt *and punishment—which are left to the jury.*

(*Id.* at p. 748, italics added.)

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

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

Bullington v. Missouri (1981) 451 U.S. 430 (*Bullington*), a double jeopardy case.[1] The court in *Bullington* recognized the existence of a traditional trial-sentencing distinction with respect to double jeopardy protections. But the court explained that a capital sentencing *trial* "differs significantly" from traditional judicial sentencing hearings, honing in on the marked similarities between a capital penalty phase and a common law trial. (See *id.* at p. 438 [noting absence of unbounded jury discretion, binary choice between two alternatives, and proof beyond reasonable doubt standard, and concluding the penalty phase "resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence"].) The *Bullington* Court noted that the penalty phase was "itself a trial on the issue of punishment so precisely defined by the Missouri statutes." (*Ibid*; see also *id.* at p. 438, fn. 10 [finding it not "without significance" that state law referred to the penalty hearing as a "trial"].)

D. The United States Supreme Court Takes a Wrong Turn: The Expansive Dicta of *Spaziano* Undermines the Historical Understanding of the Jury Right as Applying To Trials on Issues of Fact, Including Punishment

Despite the clear focus of *Andres* and *Bullington* on issues of fact designated by the Legislature for trial by jury—even on the issue of punishment—the United States Supreme Court cast unnecessary doubt on this

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

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

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

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

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

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

Notably absent from *Spaziano* is any mention of the Supreme Court's decision in *Andres, supra*, 333 U.S. at p. 747, which said that Sixth Amendment jury rights *do* apply when a jury is tasked by the Legislature with rendering a verdict after a trial, including a trial on the issue of punishment. (See *Rauf v. State* (Del. 2016) 145 A.3d 430, 450 (conc. opn. of Shrine, J.) [finding Sixth Amendment applies to capital selection phase and criticizing the Sixth Amendment reasoning in *Spaziano* as "cursory"].) Given that the *Spaziano* Court intended to distinguish application of *Duncan v. Louisiana* (1968) 391 U.S. 145, this oversight is telling. Justice Harlan's opinion in *Duncan* referred to the *Andres* holding that "trial by jury [in that case, on the issue of punishment] has been held to require a unanimous verdict of jurors." (*Id.* at p. 182 & fn. 21 (dis. opn. of Harlan, J.), citing *Andres, supra*, 333 U.S. 740; see also *Johnson v. Louisiana* (1972) 406 U.S. 380, 383 (dis. opn. of Douglas, J.) ["We held unanimously in 1948" in *Andres* that Sixth Amendment unanimity right "extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury"].)

The most likely explanation for the failure to account for *Andres* is that the discussion in *Spaziano* was *not* intended to apply to a jury "trial" on the "issue of punishment." The Florida law examined in *Spaziano* did not create such a proceeding: the Florida legislature had created a "sentencing hearing" at which the "majority" of the jury provided a "sentencing recommendation," which was "merely advisory." (*Spaziano, supra*, 468 U.S. at p. 451; *Hurst, supra*, 136 S.Ct. at p. 620 [Florida law creates an "evidentiary hearing" at which the jury renders an "advisory sentence"]; cf. *Parklane Hosiery Co. v.*

Shore (1979) 439 U.S. 322, 337, fn. 24 ["an advisory jury . . . would not in any event have been a Seventh Amendment jury"].)[22]

The cursory reasoning of *Spaziano*, suggesting that a capital sentencing proceeding is never "like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial," is incorrect. Historical analysis of the Sixth Amendment demonstrates that a jury trial was understood at the time of the founding to encompass jury determinations on "issues of fact." Regardless, the sentencing proceeding in California is not "like a trial," as discussed in *Spaziano*, it *is* a trial. However, this Court has nevertheless invoked *Spaziano* for the proposition that the Sixth Amendment is satisfied regardless of whether its jury protections are applied, because there is no need for a penalty phase jury trial in the first place. (See *People v. Lewis* (2008) 43 Cal.4th 415, 521 [rejecting Sixth amendment challenge because "the high court in *Apprendi* and *Ring* did not purport to overrule its holding in *Spaziano v. Florida* (1984) 468 U.S. 447, 465"].)

Now is the time to reconsider this position. The reasoning of *Spaziano* has been repudiated by the United States Supreme Court. Beginning with *Apprendi*, the high court has repeatedly reasserted the historical understanding that the Sixth Amendment is concerned with jury determinations of factual issues that affect punishment, in particular at capital sentencing proceedings. (*Ring v. Arizona*, *supra*, 536 U.S. 584; *Hurst v. Florida*, *supra*, 136 S.Ct. 616; see also *Walton v. Arizona*, *supra*, 497 U.S. at p. 713 (dis. opn. of Stevens, J.) [decisions such as *Spaziano* "encroached upon the factfinding function that has so long been entrusted to the jury"].) The appropriate question is *not* whether

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

every defendant has the constitutional right to a penalty phase jury trial. The question is whether, when a jury trial *is* provided under state law, do constitutional "jury trial" protections attach. Both this Court and the United States Supreme Court have held that they do.

E. Because the Doctrine of 'In Favorem Vitae' Underlies Application of both Reasonable Doubt and Unanimity Requirements in the United States, These Protections Unquestionably Should Apply To a Capital Trial on the Issue of Penalty

Assuming that appellant is correct that the California penalty phase is a "trial[] by . . . jury" on issues of fact as understood under the Sixth Amendment and Article I, section 16, this Court must answer a final question: do the jury right protections apply to all determinations of issues of fact in a capital trial? Given the history of the reasonable doubt and unanimity requirements and their longstanding application as a protection to defendants in capital trials, the answer should be yes.

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

One of the earliest references to the reasonable doubt standard in American jurisprudence made the connection explicit, repeating the trial court's

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

Similarly, there is "strong reason" to believe that the common law requirement of unanimity also grew of out of the doctrine of *in favorem vitae*. (See A History of the English Judicature, in The Law Journal (1882), p. 537.);

Hans and Vidmar, Judging the Jury (1986), pp. 171-772 [arguing that unanimity requirement may have derived from the harshness of common law penalties]; see also 4 Blackstone 306 ["no man can be convicted . . . of any capital offense" absent unanimity].) But whatever the precise origins of the unanimity requirement, the nation's founders certainly believed that unanimity was "particularly" important in capital cases. (Jonakait, *supra*, at p. 122 citing James Wilson in 1 McCloskey, The Works of James Wilson (1967) p. 503.) And nowhere did the early American courts express greater concern for unanimity than in capital cases. (See, e.g., *United States v. Perez* (1824) 22 U.S. 579, 580 (Story, J.) [stating regarding hung juries that "in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner"].)[23]

Nor is there any hint in the historical record that jury unanimity was intended to be limited to the issue of guilt. As one treatise read by the founding fathers[24] framed the issue: "And any thing now which any jury can be said to

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[23] See also *Atkins v. State* (1855) 16 Ark. 568, 578 [encouraging caution before discharge of hung juries and quoting Justice Story in *Perez*]; *Monroe v. State* (1848) 5 Ga. 85, 148 [reversing capital murder conviction due to sequestration arrangements that undermined unanimity and stating: "God forbid that the prisoner should be sent to pray of the mercy of the Executive, a reprieve for an offence of which he has not been legally convicted"]; *Nomaque v. People* (1825) 1 Ill. 145, 148-50 [similar concern about practice promoting non-unanimous verdict in capital case]; *Ned v. State* (Ala. 1838) 7 Port. 187, 216; *Commonwealth v. Roby* (1832) 29 Mass. 496, 519-20; *State v. Garrigues* (Super. L. & Eq. 1795) 2 N.C. 241, 241-42; *Commonwealth v. Cook* (Pa. 1822) 6 Serg. & Rawle 577, 585; *State v. McLemore* (Ct. App. L. & Eq. 1835) 20 S.C.L. 680, 683.

[24] See Letter from Thomas Jefferson to the Abbé Arnoux, 19 July 1789, *Founders Online*, National Archives, last modified February 1, 2018, http://founders.archives.gov/documents/Jefferson/01-15-02-0275. (Original source: *The Papers of Thomas Jefferson*, vol. 15, *27 March 1789–30 November 1789*, ed. Julian P. Boyd. Princeton: Princeton University Press, 1958, pp. 282–283) [listing all treatises on juries that Jefferson could recollect

do, must have the joint consent of twelve." (John Maynard, A Guide To Juries: Setting Forth Their Antiquity, Power, and Duty, from the Common Law and Statutes (1699) at p. 9.)

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

In *Apodaca v. Oregon* (1972) 406 U.S. 404 (*Apodaca*) the Court held that the Sixth Amendment jury unanimity requirement was not incorporated against the states in non-capital criminal trials. In light of the centuries long history of requiring unanimity in capital cases, the holding of the four-judge plurality should not prevent this Court from recognizing a right of unanimity for a jury's determination of aggravating factors in California's death penalty scheme. The holding of *Apodaca*, which rests on the incorporation doctrine, has no bearing on the application of Article I, section 16. Moreover, the plurality in *Apodaca* acknowledged that it was not deciding a capital case. (406 U.S. at p. 406, fn.1 [quoting Oregon Constitution limiting non-unanimous juries to non-capital cases].) Further, the United States Supreme Court has since called Justice Powell's concurrence—in which no other justice concurred and which provided the fifth vote for the judgment—into question. (See *McDonald v. City of Chicago, Ill.* (2010) 561 U.S. 742, 766, fn.14 [identifying *Apodaca* as the sole exception in a long line of cases holding that incorporated Bill of Rights protections are to be enforced under the Fourteenth Amendment equally against the states and the federal government and noting the decision

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and praising juries as the body that determines "all matters of fact, leaving to the permanent judges to decide the law resulting from those facts"].

was "the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation"].)

Finally, in light of *Hurst*, the *Apprendi* line of cases has repeatedly assumed the applicability of the unanimity rule to state criminal prosecutions. (See *Apprendi*, *supra*, 530 U.S. at p. 477 [noting requirement of facts "confirmed by the unanimous suffrage of twelve of [accused's] equals and neighbours" and quoting Blackstone]; *Blakely v. Washington* (2004) 542 U.S. 296, 303 [quoting *Apprendi* and Blackstone]; *S. Union Co. v. United States* (2012) 567 U.S. 343, 356 [same]; see also *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

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

F. The Reasoning in this Court's Prior Decisions Rejecting Application of the Jury Trial Rights Warrants Reconsideration

This Court has not hesitated to overrule opinions—even those long entrenched—when they rested on "uncritical" analysis of the key doctrine that supported their holdings. (See, e.g., *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 528 [overruling *People v. Elliot* (1960) 54 Cal.2d 498 based on "uncritical" analysis of the term "jurisdiction" as it applied preliminary hearings].) This reflects the policy that "[a]lthough the doctrine of stare decisis does indeed serve important values, it nevertheless should not shield court-created error from correction." (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 504, internal citations omitted.) This

Court's holdings regarding the absence of unanimity and beyond reasonable doubt requirements in the penalty phase originate in part from historical accident rather than critical analysis, and therefore warrant reconsideration.

Equally important, "[t]he force of stare decisis is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." (*Alleyne v. United States* (2013) 570 U.S. 99, 116, fn. 5 [overruling *Harris v. United States* (2002) 536 U.S. 545].) The Sixth Amendment's jury protections, hinging upon the basic right of a criminal defendant to have issues of fact found by a jury, are just such fundamental rights. (*Ibid*.) And the state jury trial right, intended to stay "inviolate forever," (Art. I, sec. 16) embraces the most sacrosanct values of our criminal system (*People v. Durrant*, *supra,* 116 Cal. at p. 200 [no rule of the old law "more carefully preserved in its integrity under our system" than the division between judge and jury on issues of fact]).

The foundation for the logic of this Court's precedent rejecting application of the Sixth Amendment and the state jury right has been "washed away" with the overruling of several opinions on which they rested. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1141 [overruling *Carlos v. Superior Court* (1983) 35 Cal.3d 131 because "one of the bases of *Carlos* has proved to be unsound"].) *Spaziano*, *Hildwin*, and *Walton*—all relied upon by this Court in denying jury protections at the penalty phase—have all been overruled. What remains is state and federal Supreme Court precedent holding that the Sixth Amendment and the state jury right apply to issues, including punishment, when decided by a jury at trial. (*Andres*, *supra*, 333 U.S. at p. 747; *Hall*, *supra*, 199 Cal. atp p. 456-458.) For these reasons, the force of stare decisis should not restrain this Court from correcting its past errors.

1. This Court's View That There Is No Requirement of Unanimity or Findings Beyond a Reasonable Doubt Stems Not From Reasoned Analysis but From Uncritical Acceptance of Legal Positions Taken by Defendants Attacking California's Death Penalty

a. This Court Initially Held That the Jury Trial Protections Could Be Imputed into the 1977 Statute

In the first decision interpreting the 1977 death penalty statute, *People v. Frierson* (1979) 25 Cal.3d 142 (*Frierson*), the defendant mounted a facial attack on the California death penalty scheme based on the absence of adequate constitutional safeguards. Critically, hoping to show that the statute was unreliable, the *defendant* assumed that California law did not require the trier of fact to find "beyond a reasonable doubt the existence of aggravating circumstances which outweigh the mitigating circumstances," and claimed this deficiency in the statute violated the state and federal Constitutions. (*Id.* at p. 180 (plur. opn. of Richardson, J.).) The plurality, in rejecting the facial challenge, concluded that the 1977 statute was "not constitutionally vulnerable because of its failure to provide a different method of proving or weighing the relevant statutory considerations specified therein." (*Ibid.*) However, it did so without analyzing the defendant's assumption that the California scheme did not require proof beyond a reasonable doubt as to the ultimate sentencing determination, or engaging in any state-law analysis with respect to burden of proof or unanimity.

In his concurrence (which provided the necessary majority for the plurality), Justice Mosk, joined by Justice Newman, more accurately noted that the statute did not require the "sentencing authority to expressly find that at least one of the statutory aggravating factors is proved beyond a reasonable doubt, as in Georgia." (*Frierson, supra,* 25 Cal.3d at p. 192 (conc. opn. of Mosk, J.).) He noted that "numerous [] questions were left unanswered by *Gregg* [*v. Georgia* (1976) 428 U.S. 153]" including (1) whether "the jury

[must] unanimously agree on which aggravating factors are established by the evidence"; (2) whether they must make these "find[ings] beyond a reasonable doubt"; and (3) whether before imposing a sentence of death, the jury must "unanimously agree that the aggravating factors outweigh the mitigating factors" and "[m]ust that finding also be beyond a reasonable doubt[.]" (*Frierson, supra,* 25 Cal.3d at p. 193 & fn. 8 (conc. opn. of Mosk, J.).)

Given that the judgment was reversed on other grounds, Justice Mosk noted that it would be "prudent to refrain from unnecessary advisory opinions on what are the precise constitutional requirements of *Furman* and *Gregg* et al. and whether the 1977 death penalty legislation in California complies with those requirements." (*Frierson, supra,* 25 Cal.3d at p. 194 (conc. opn. of Mosk, J.).) However, he did find that the 1977 statute was not facially unconstitutional under *federal* law and therefore allowed retrial of the defendant. (*Id.* at p. 196.)

Soon thereafter, in *People v. Jackson* (1980) 28 Cal.3d 264, the plurality again rejected various facial constitutional attacks to the 1977 death penalty statute. (*Id*. at pp. 315-317 (plur. opn. of Richardson, J.).) The plurality noted that "[m]ost of the arguments advanced by defendant were discussed at considerable length in *People v. Frierson*, supra, 25 Cal.3d 142, 172-188, 191-195, and we do not repeat them here." (*Id.* at p. 315.) Although addressing the challenge to a lack of written findings, *Jackson* did not separately address facial attacks based on the alleged lack of unanimity and beyond a reasonable doubt requirements other than to conclude that the lack of "adequate safeguards" was addressed in *Frierson*. (*Id.* at p. 316.)

The dissenters complained that, among various procedural deficiencies in the 1977 statute, there was no express requirement that "the sentencing authority [] find that at least one of the statutory aggravating factors is proved beyond a reasonable doubt" or any express "requirement that the jury be unanimous in finding the statutory aggravating factor or factors upon which it bases its decision on penalty." (*People v. Jackson, supra*, 28 Cal.3d at p. 337

(dis. opn. of Mosk, J.); see also *id.* at pp. 357, 363 (dis. opn. of Bird, C.J.) [complaining that the statute did not explicitly provide for written findings indicating unanimity as to aggravating factors or provide evidence that jury reached determinations on aggravating factors beyond a reasonable doubt].)

In a brief concurrence, Justice Newman (whose vote was necessary for the affirmance) wrote to explain why he did not "subscribe fully to any colleague's views." (See *People v. Jackson*, *supra*, 28 Cal.3d at p. 318 (conc. opn. of Newman, J.).) In particular, Justice Newman expressed concern that legislative drafters could not anticipate every procedural issue applicable to complex death penalty procedures. (*Ibid*.) He explained that the concerns voiced by the dissenters were therefore insufficient to facially invalidate the statute because:

> California courts . . . are not timid in reading into legislation various procedural and other rules deemed constitutionally required that the draftsmen may have overlooked or rejected. That is demonstrably true as to countless requirements on matters *such as unanimous verdict, proof beyond a reasonable doubt and jury or judge findings.*

(*Id.* at p. 319 (conc. opn. of Newman, J.), italics added.)

In sum, the 1977 law was first affirmed as constitutional only with respect to federal requirements in *Frierson*. (See *Frierson*, *supra*, 25 Cal.3d 142 at p. 196 (conc. opn. of Mosk, J.). In *Jackson*, it was upheld against facial attack with the *specific caveat* that beyond a reasonable doubt and unanimity requirements could be read into the existing statute. (*People v. Jackson*, *supra*, 28 Cal.3d at p. 318 (conc. opn. of Newman, J.); see also *id.* at p. 338 (dis. opn. of Bird, C.J.) ["Justice Newman explicitly claims it would be proper for this court to read into the death penalty statute all present and future constitutional requirements omitted by the Legislature"].) However, because capital defendants repeatedly took the position that the procedural safeguards were absent in order to mount facial attacks to the death penalty statutes—rather than

asserting that the protection should be read into the statute—defense assertions in *Frierson* and *Jackson* were uncritically repeated by later Courts. This superficial analysis ultimately read out fundamental jury requirements firmly entrenched in the California and federal constitutions and mandated by Penal Code section 1042.

b. The Holdings Under the 1977 Statute Were Applied To the 1978 Briggs Initiative

This Court's first substantive discussion of the unanimity issue under the 1978 death penalty statute was in *People v. Rodriguez* (1986) 42 Cal.3d 730.[1] There, the Court upheld, in a four to three decision, the 1978 initiative against facial attacks, explaining with relatively brief analysis that "[m]ost of these challenges were rejected as to the 1977 law." (*Id.* at p. 777 [citing the plurality opinions in *People v. Jackson, supra*, 28 Cal.3d 264, 315-317 and *People v. Frierson, supra*, 25 Cal.3d at pp. 176-184].) As in *Frierson*, the Court accepted without analysis the defendant's contentions that the 1978 death penalty statute did not require "jury unanimity on the dispositive aggravating factors, a finding that aggravating factors outweigh mitigating beyond a reasonable doubt," or "a finding beyond a reasonable doubt that death is the

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[1] The court also discussed the unanimity issue under the 1978 death penalty statute in *People v. Easley* (1982) 187 Cal.Rptr. 745, but that decision has no force or effect as it was later reheard due to inadequate briefing. (*People v. Easley* (1982) 33 Cal.3d 65; *People v. Easley* (1983) 34 Cal.3d 858, 863.) The analysis in the vacated *Easley* opinion was extremely cursory. Rejecting the claimed error in failing to instruct on unanimity with regard to aggravating factors, the Court stated that "we find no authority for the proposition that a more specific instruction [on unanimity] must be given sua sponte" and separately noted that the "defendant cites no cases or statutory provisions which suggest that the penalty phase jurors are forbidden to consider evidence of the defendant's prior crimes unless they unanimously find the defendant guilty of those crimes." (*People v. Easley, supra,* 33 Cal.3d 65; 187 Cal.Rptr. 745 at p. 760.)

appropriate penalty." (*Id.* at p. 777.) These contentions—assumed correct—did not render the California death penalty facially unconstitutional. (*Id.* at 777-779.)

The *Rodriguez* opinion contained no specific state-law analysis as to the correctness of the defendant's assumptions, only a conclusion that "the 1978 statute is similar in all relevant respects" to the 1977 law. (*People v. Rodriguez, supra*, 42 Cal.3d at p. 778; see also *People v. Allen* (1986) 42 Cal.3d 1222, 1285-1286 [rejecting similar facial attacks].) Critically, *Rodriguez* cited for its authority on these matters the Court's earlier decision in *Jackson*, which, as noted above, provided that reasonable doubt burdens and unanimity requirements could be read into the statute. (*People v. Jackson, supra*, 28 Cal.3d at p. 318 (conc. opn. of Newman, J.); see also *id.* at p. 338 (dis. opn. of Bird, C.J.).)

c. Uncritical Application of Prior Cases Resulted in the Jury Right Protections Being Read Out of the 1978 Briggs Initiative

While this Court's initial cases uncritically accepted defendants' positions that there was no unanimity or beyond a reasonable doubt requirement under state law, later cases affirmatively held that to be true. However, the decisions in those cases often provided no citation for the principles articulated or simply cited *People v. Rodriguez, supra*, 42 Cal.3d 730 or other cases. (See, e.g., *People v. Gates* (1987) 43 Cal.3d 1168, 1201 [no requirement that weighing decision be found beyond a reasonable doubt]; *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]; *People v. Miranda* (1987) 44 Cal.3d 57, 99, 107 [no unanimity required for factor (b) or beyond reasonable doubt requirement as to ultimate penalty determination]; *People v. Jennings* (1988) 46 Cal.3d 963, 988 [accord]; *People v. Williams* (1988) 44 Cal.3d 883, 960 [approving instruction

that the prosecution has "no burden of proof" under the 1978 statute with respect to the penalty phase determination].)

None of these cases cited or mentioned article I, section 16 specifically. However, their holdings have been repeated countless times, including in cases with some reference to the state Constitution. (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1102 [noting that previous decisions rejecting unanimity requirement spoke "impliedly and generally of U.S. Const. and Cal. Const."]; *People v. Duff* (2014) 58 Cal.4th 527, 569 [nothing in the "state or federal Constitutions" requires a jury to "unanimously agree on any particular aggravating circumstances, [] find true beyond a reasonable doubt any particular aggravating circumstances, or [] find that aggravating factors outweigh mitigating factors beyond a reasonable doubt"].)

2. This Court Should Reexamine the Logic Behind Its Rejection of the Unanimity and the Beyond a Reasonable Doubt Burden to Factually Disputed Aggravating Evidence and the Ultimate Penalty Determination

To counsel's knowledge, there are no capital decisions by this Court directly addressing the application of article I, section 16 or Penal Code section 1042 to unanimity and beyond a reasonable doubt requirements for factually disputed aggravating evidence or the ultimate penalty determination. And this Court has so far failed to adopt the view expressed in Justice Newman's concurrence in *People v. Jackson*, *supra*, 28 Cal.3d 264—that these jury trial rights could be read into the statute to comport with constitutional requirements. (See *id*. at p. 318 (conc. opn. of Newman, J.).) However, this Court has spoken numerous times on the topic in rejecting similar challenges under other state and federal constitutional amendments, particularly the analogous right to a jury trial under the Sixth Amendment. In these discussions, this Court has provided several justifications for rejecting the reasonable doubt

burden and unanimity requirements, none of which defeat application of the California constitutional jury rights to issues of fact.

a. Attaching the Label 'Normative' Does Not Render Issues of Fact Any Less Issues of Fact

One often-repeated argument is that determinations made at the penalty phase "do not amount to the finding of facts, but rather constitute a single fundamentally normative assessment [citations] that is outside the scope of *Apprendi* [*v. New Jersey*, *supra*, 530 U.S. 466] and its progeny. [Citation.]" (*People v. Duff*, *supra*, 58 Cal.4th at p. 569.) As noted above, even when the penalty phase determination under the late 19th century scheme was *entirely* discretionary and did not require subsidiary determinations of factually disputed crimes, this Court said that the California jury right applied. (*Hall*, *supra*, 199 Cal. at p. 458.) A large component of the modern capital trial is now almost identical to a common law trial: determining whether the defendant committed a predicate crime (factor (a)) and a series of other crimes (the aggravating felonies considered under factors (b) & (c)).

Perhaps most importantly, that a proceeding determines "normative" instead of "factual" issues is simply a label attached to the process the jury uses to reach a conclusion. Any number of issues a jury decides (for instance, various degrees of culpability in mental states) could be labeled as "normative." (See *People v. Gibson* (1861) 17 Cal. 283, 285 [separation between first and second degree murder was intended to show that the murder was "peculiarly atrocious"].) Indeed, early cases considered "guilt" and "degree" of murder as distinct determinations, both of which necessitated a reasonable doubt burden. (See, e.g. *People v. West* (1875) 49 Cal. 610, 612 [reasonable doubts as to murderer's "guilt, *or of the grade of his offense*, should be resolved in his favor"], italics added.) The requirements of the California Constitution cannot be negated by labeling as "normative" a question traditionally reserved to the

jury. This would contradict the expressed intent of the drafters of the jury right. (See 1 Debates and Proceedings, Cal. Const. Convention, *supra*, p. 302 (statement of Mr. Barbour) [warning that labels assigned to statutes may be easily changed]; *Mitchell v. Superior Court* (1988) 49 Cal.3d 1230, 1243 ["the delegates disagreed with the notion that the right to jury trial should depend on the legislative characterization of an offense"].) And in fact, the common law specifically required jury protections for what they deemed "special aggravations" when they constituted the "matter in issue." (See Hawles, An Englishman's Right (1680), at p. 21 [providing examples of crimes that were more highly culpable because a specific *mens rea*].) The "issues of fact" embodied in aggravating circumstances under the California capital scheme are no more directed at vague degrees of "normative" culpability than the common law "special aggravation." They simply ask whether the defendant committed a prior crime. (See, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 720 [under factor (b) "the question whether the acts occurred" is a "factual matter for the jury"].)

Regardless, the question of whether the jury right is triggered is not a question of malleable labels such as "normative," but "a purely historical question, a fact which is to be ascertained like any other social, political or legal fact.' [Citations.]" (*Franchise Tax Bd. v. Superior Court* (2011) 51 Cal.4th 1006, 1010.) Since the dawn of non-mandatory capital sentencing in California, the questions answered regarding penalty have been questions of fact reserved in the first instance to the jury. (*In re Anderson* (1968) 69 Cal.2d 613, 621 [discussing how, under the amendments of 1873–1874,[2] Penal Code section

[2] At the time of the 1873 amendments, which first created jury sentencing in capital cases, the *only* trier of fact available was a jury. It was not possible for a judge to try a case, as bench trials in felony cases were not permitted until later. (See *People v. Smith* (1933) 218 Cal. 484, 488 [discussing 1928 amendment to constitutional jury right to permit waiver of jury].)

190 "vest[ed] in the trier of fact discretion to fix the penalty at death or life imprisonment"].) Although subsequent amendments added subsidiary determinations labeled "aggravation" to the "issues of fact" tried (former § 190.1, enacted by Stats.1957, ch. 1968, § 2, p. 3509), this does not change whether the jury right and burden of proof protections apply.

The question is simply whether the proceeding is "of the same class" of action which would have called for a jury trial at common law. (*People v. One 1941 Chevrolet Coupe*, *supra*, 37 Cal.2d at p. 300.) If it is, "the right is carried over to the new statute." (*People v. Anderson* (1987) 191 Cal.App.3d 207, 219.) The current scheme is of the "same class" as prior schemes to which the jury right attached. (*Hall*, *supra*, 199 Cal. at p. 459.) Under every capital scheme ever adopted in California, juries have made the factual determinations that condemn defendants to death. Therefore, the "normative" label cannot defeat application of the jury trial right.

b. This Court's Conclusion that Application of the Reasonable Doubt Standard at Penalty Is Impossible Because the Questions at Issue Are "Not Susceptible to a Burden-of-Proof Quantification" Should Be Reconsidered

In addition to concluding that the penalty phase issues are "normative," this Court has frequently rejected application of the reasonable doubt standard to the ultimate penalty phase determination and certain aggravating facts because they are "not susceptible to a burden-of-proof quantification." (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) This justification rests on an in complete view of "reasonable doubt."

As explained by the Supreme Court of Connecticut in applying a reasonable doubt burden to the outcome of weighing of aggravating and mitigating evidence:

> We disagree with the dissent . . . suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that

> determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. . . . the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238 fn. 37; see also *U.S. v. Correa-Ventura, supra*, 6 F.3d at p. 1076-1077 [both unanimity and reasonable doubt were "conceived as a means of guaranteeing that each of the jurors 'reach [ ] a subjective state of certitude' with respect to a criminal defendant's culpability. [Citation]"].)

Connecticut is not alone in applying the reasonable doubt standard to the weighing of aggravating and mitigating factors, the proof of aggravating evidence, or both. Many states, even in the absence of explicit textual requirements, have read the reasonable doubt burden into their death penalty schemes. (See, e.g, *People v. Tenneson* (Colo. 1990) 788 P.2d 786, 795, citations omitted ["qualitatively unique and irretrievably final nature of the death penalty make it unthinkable for jurors to impose the death penalty when they harbor a reasonable doubt as to its justness"]; *State v. Biegenwald* (1987) 106 N.J. 13, 62 ["If anywhere in the criminal law a defendant is entitled to the benefit of the doubt, it is here. We therefore hold that as a matter of fundamental fairness the jury must find that aggravating factors outweigh mitigating factors, and this balance must be found beyond a reasonable doubt"]; *State v. Wood* (Utah 1982) 648 P.2d 71, 81, 83 [to impose the death

penalty "notwithstanding serious doubt as to its appropriateness" would create unacceptable risk of arbitrariness and disproportionality]; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888 disapproved on other grounds by *State v. Reeves* (Neb. 1990) 453 N.W.2d 359 [reading reasonable doubt burden into silent statute].)

And many states explicitly require that either the ultimate determination or the aggravating circumstances be proven beyond a reasonable doubt.[3] This Court should reconsider its conclusion that the penalty phase is "not susceptible" to reasonable doubt burdens (*People v. McKinzie*, *supra*, 54 Cal.4th at p. 1366), given that numerous jurisdictions have been applying the reasonable doubt burden for years.

c. This Court's Rule that There Is No Requirement of Unanimity for "Foundational Facts" Is Inconsistent with the Rule that Juries Must Be Unanimous as To Discrete Criminal Acts

One of this Court's earliest decisions rejecting the question of unanimity with respect to other criminal acts that are disputed at the penalty phase was *People v. Miranda*, *supra*, 44 Cal.3d 57. There, the court held that "unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding. A defendant is, of course,

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[3] See, e.g., Ark.Code Ann. § 5–4–603 [aggravating circumstance must be found unanimously and beyond a reasonable doubt and must outweigh mitigating circumstances beyond a reasonable doubt]; Former N.J. Stat. Ann. § 2C:11–3(c)(3) (2006) [aggravating circumstance must be found beyond a reasonable doubt]; N.Y.Crim. Proc. Law § 400.27(3) & (11)(a) [jury must find aggravating factors unanimously and beyond a reasonable doubt, and must find aggravators outweigh mitigation beyond a reasonable doubt]; Ohio Rev.Code Ann. § 2929.03(D)(1) [beyond reasonable doubt burden applies to weighing of aggravating and mitigating factors]; Tenn.Code Ann. § 39–13–204(g)(1) (A) & (B) [aggravating circumstances and weighing must be beyond a reasonable doubt].

entitled to a unanimous jury verdict in the final determination as to penalty." (*Id.* at p. 99.) But there is no principled reason to distinguish a jury's conclusion, beyond a reasonable doubt, that a defendant is guilty of a crime when that determination is made in a capital sentencing proceeding rather than a trial to determine guilt or innocence.

In the later "the jury must agree unanimously the defendant is guilty of a specific crime. [Citation.] Therefore, cases have long held that, when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132, citing Cal. Const., art. I, § 16.) This is precisely the analysis required by factors (b) and (c) of Penal Code section 190.3: jury determination of multiple "discrete crimes." (Cf. *People v. Russo, supra*, 25 Cal.4th at pp. 1134-1135. [overt acts in furtherance of a conspiracy are not discrete crimes].)

This is not to say that the requirements of unanimity and reasonable doubt extend to the "minute details of how a single, agreed-upon act was committed." (*People v. Mickle* (1991) 54 Cal.3d 140, 178.) They do not. (*Ibid.*)[4] But the constitutional guarantee encompasses "the trial of issues that are made by the pleadings." (*Dale v. City Court of City of Merced*, *supra*, 105 Cal.App.2d at p. 607; *Koppikus v. State Capitol Comrs.*, *supra*, 16 Cal. at p. 254 ["It is a right . . . which can only be claimed in . . . criminal actions, where an issue of fact is made by the pleadings"].) Because the aggravating factors and the punishment of death must be raised in pleadings (see § 190.3 [notice of aggravating evidence required]; *Lankford v. Idaho* (1991) 500 U.S. 110, 127

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[4] This should assuage the concern voiced in *People v. Ghent* (1987) 43 Cal.3d 739, that jurors would become mired in "lengthy and complicated discussions of matters wholly collateral to the penalty determination which confronts them." (*Id.* at pp. 773-774.)

[notice of capital punishment required]), they are issues of fact that must be determined unanimously and beyond a reasonable doubt.

G. Failure to Instruct that the Ultimate Penalty Determination Must Be Made Beyond a Reasonable Doubt and that Section 190.3, Factor (b) Must Be Found Unanimously Requires Reversal

California courts have long held that violation of the state constitutional right to unanimity is structural error under the state Constitution. (*People v. Hall*, *supra*, 199 Cal. at p. 456; *People v. Traugott* (2010) 184 Cal.App.4th 492, 505 [11-person verdict is structural error].) And the concept of beyond a reasonable doubt is so basic to the administration of criminal law that failure to instruct on it at the guilt phase violates the right to a fair trial and is also not subject to harmless error analysis. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-281.)

Appellant's claim, however, brings the Court into uncharted territory. This Court has never held that unanimity is required as to the finding of particular aggravating circumstances, nor has it held that reasonable doubt burden is applicable to the ultimate verdict. Therefore, it has obviously never expressed a view on the appropriate test for assessing error.

As to failure to instruct on unanimity for particular incidents in aggravation, appellant believes that the appropriate test must be that of *Chapman v. California* for the Sixth Amendment error and *People v. Brown* (1988) 46 Cal.3d 432, 447 for the state constitutional error. This Court has indicated that these two standards are equivalent. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 [equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard of *Chapman*].)

As to the failure to instruct on reasonable doubt for the verdict itself, appellant believes structural error is the only appropriate test. Failure to instruct on reasonable doubt as to one component of the prosecution case is one thing. (See *People v. Avena* (1996) 13 Cal.4th 394, 429 ["*Robertson* error" subject to

harmlessness analysis].) But failure to subject the ultimate decision on sentence to the crucible of reasonable doubt is quite another. (See *People v. O'Neill* (Colo. 1990) 803 P.2d 164, 179 [failure to instruct on reasonable doubt burden subject to automatic reversal because the burden is intended to "ensure the reliability of any jury decision sentencing a defendant to death"]; *State v. Rizzo* (2003) 266 Conn. 171, 242 [failure to instruct on reasonable doubt burden warrants automatic reversal].) In fact, failure to require each juror to find the death verdict warranted beyond a reasonable doubt is much like failure to require unanimity in a death verdict, which this Court has already held requires automatic reversal. (*Hall*, *supra*, 199 Cal. at p. 459.) And, as explained in *Sullivan*, when the required burden of beyond a reasonable doubt has not been satisfied "there has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of *Chapman* review is simply absent." (*Sullivan*, *supra*, 508 U.S. at p. 280.)

Regardless of the prejudice standard employed, it cannot be said in this case that the failure to require unanimity as to aggravating factors or a reasonable doubt burden as to the ultimate verdict was harmless.

As discussed in Mr. Johnson's opening brief, this was a close case at the penalty phase. There was only a single homicide. Appellant presented a lengthy penalty defense focusing on lingering doubt, the affects of appellant's childhood and background on his behavior, the failure of the juvenile court system to help appellant during his youth, appellant's mental illness and abnormal brain activity, and his positive adjustment to prison. (See AOB, pp. 19-31.) The first penalty retrial ended in a mistrial after the jury could not reach a unanimous decision. (4 CT 984.) The second jury did not reach a verdict until the fifth day of deliberations. (6 CT 1331.) Moreover, this error must be considered cumulatively, with the other errors committed that infected the penalty retrial. (See AOB, pp. 172-177.) Considering the closeness of the case and the importance of the jury rights at issue, even if this court does not find the

failure to require proof beyond a reasonable doubt as to the ultimate penalty structural error, it must find that failure, and the failure to require unanimity as to the aggravating factors, prejudicial, and reverse Mr. Johnson's death sentence.

CONCLUSION

For the reasons stated in this brief and in Mr. Johnson's opening and reply briefs, the judgment must be reversed.

Dated: April 24, 2018

Respectfully submitted,

Mary K. McComb
State Public Defender

/s/ Andrew C. Shear
Andrew C. Shear
Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.360)

I am the Deputy State Public Defender assigned to represent appellant, JOE EDWARD JOHNSON, 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, excluding tables and certificates, is 22,088 words in length.

DATED: April 24, 2018

/s/ Andrew C. Shear
ANDREW C. SHEAR
Deputy State Public Defender

Attorney for Appellant

DECLARATION OF SERVICE

Case Name: ***People v. Joe Edward Johnson***
Case Number: **Supreme Court No. S029551**
Sacramento County Superior Court No. 58961

I, Jon Nichols, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a copy of the following document(s):

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April 24, 2018

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April 24, 2018

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **April 24, 2018**, at Oakland, California.

/s/ Jon Nichols

_____
DECLARANT

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. JOHNSON (JOE EDWARD)**
Case Number: **S029551**
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Date

/s/Andrew Shear

Signature

Shear, Andrew (244709)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm