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No. S029551
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.

Proposed *Amici Curiae* Brief of ACLU, ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego and Imperial Counties in Support of Defendant and Appellant Johnson

Appeal from Judgement of
The Superior Court of Sacramento County, Case No. 58961
The Honorable Peter Mering, Presiding

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INTRODUCTION

Amici write to support Johnson's argument that his death sentence violates the Sixth Amendment to the U.S. Constitution and the California Constitution because the jury's decision to execute him was premised upon resolution of "issues of fact," but was not based on a unanimous agreement on the existence of any one aggravating factor (or factors) in support of death, and because the jury did not decide, beyond a reasonable doubt, that death was the appropriate sentence. Amici acknowledge that this Court, in a series of opinions, has rejected related arguments, seeking to apply the protections of *Ring v. Arizona*, 536 U.S. 584 (2002), to the California capital-sentencing scheme, because "any finding of [selection-phase] aggravating factors during the penalty phase does not 'increase[] the penalty for a crime beyond the prescribed statutory maximum'" and therefore the *Apprendi [v. New Jersey*], 530 U.S. 466 (2000) (*Apprendi*)] and *Ring* protections do not apply. *See*, *e.g.*, *People v. Prieto*, 30 Cal. 4th 226, 263 (2003); *see also People v. Merriman*, 60 Cal. 4th 1, 106 (2014) (finding that the weighing decision in the California scheme is a "normative" question). But Amici and Johnson's claim is distinct from the *Apprendi* line of cases, because it does not depend on whether the punishment imposed exceeds the statutory maximum. Rather, it involves honoring the Legislature's decision to vest all factual issues decided in California capital sentencing to the jury by applying to these jury findings the same constitutional requirements of proof beyond a reasonable doubt and unanimity that apply in all other jury trials.

Amici support Johnson's claim by showing that the common-law understanding of the jury right is one and the same with a correct understanding of the jury right afforded

by the Sixth Amendment, as enacted in 1791, and in Article I, section 3 of the California Constitution, as adopted in 1849. Stated otherwise, the jury rights guaranteed in these parallel constitutional provisions are the very same jury rights that existed at common law.

Amici show, in turn, that the common-law understanding of the jury right encompassed both the unanimity requirement and the requirement that the government prove beyond a reasonable doubt every factual issue submitted to the jury.

Applying these precepts here, every issue submitted to the capital sentencing jury under Cal. Penal Code § 190.3 must be decided unanimously and beyond a reasonable doubt. The ultimate penalty determination is not excepted from this requirement merely because it is normative, moral, or more complex than simpler issues such as whether a light was green or red. The history of the common-law jury right shows that the jury wielded enormous power, particularly within the colonies of this Nation before independence, on par or greater than that of the judge. Juries have always decided normative and moral questions, including by deciding the inherently normative issues submitted to them in criminal cases, by deciding punishment through its choice of criminal verdicts (and sometimes acquittals), and by deciding whether a defendant's behavior is so harmful as to warrant punitive damages.[1] From the time of their invention, juries have decided issues small and large. Nothing about the findings juries must make

[1] *Compare with People v. Rodriguez*, 42 Cal.3d 730, 779 (1986) (holding that the penalty phase determination "is inherently normative, not factual.").

under Cal. Penal Code § 190.3 separates them from the jury's historic, common-law role of deciding the issues entrusted to it unanimously and beyond a reasonable doubt.

Finally, as Johnson has shown in his briefing, prior precedent is no bar to the arguments here. Earlier decisions by this Court rejecting similar arguments relied on precedent that has since been reversed by the U.S. Supreme Court. *See*, *e.g.*, *Spaziano v. Florida*, 468 U.S. 447 (1984), *overruled in part by Hurst v. Florida*, 136 S. Ct. 616 (2016). Further, before the detour in case law precipitated by *Spaziano*, the U.S. Supreme Court had already held that – in the capital context – the Sixth Amendment applies to the "issue" of punishment when the Legislature has left the question to a jury at a trial. *Andres v. United States*, 333 U.S. 740, 748 (1948) ("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.") (emphasis added). And this Court has held that where the selection of penalty is made by the jury, the proceeding is "a trial in the full technical sense, . . . governed by the same . . . rules of procedure as the trial of the issue of guilt." *People v. Green*, 47 Cal. 2d 209, 236 (1956).

Now that *Hurst v. Florida* has overruled *Spaziano*, as well as *Hildwin v. Florida*, 490 U.S. 638 (1989), *Hurst*, 136 S. Ct. at 623, other state high courts, that had previously relied on these decisions to uphold their capital sentencing scheme, have changed their jurisprudence. *See Hurst v. State*, 202 So. 3d 40, 58–59 (Fla. 2016) (overruling prior precedent, to find Florida's sentencing scheme violated *Hurst*, because it did not require a unanimous jury finding of the facts required for a death sentence); *Rauf v. State*, 145

A.3d 430, 433-34 (Del. 2016) (applying *Hurst,* striking state capital sentencing scheme on Sixth Amendment grounds, and overruling prior precedent that allowed findings required for a death sentence to be made by a judge, without unanimity, and without findings beyond a reasonable doubt). Both of these state high court decisions relied on historical analysis showing the role of the common-law jury in deciding the questions needed for a death sentence, as well as the detour caused by *Spaziano*. *See*, *e.g.*, *Rauf*, 145 A.3d at 477 (Strine, C.J., concurring) ("Rather than write more and more intricate judicial decisions parsing different kinds of fact findings, I conclude that *Hurst* is best read as restoring something basic that had been lost. At no time before *Furman* [*v. Georgia*, 408 U.S. 238 (1972)] was it the general practice in the United States for someone to be put to death without a unanimous jury verdict calling for that final punishment."). For similar reasons, and as explained in the relevant history set forth further below, this Court should follow the lead of Florida and Delaware, and bring this state's jurisprudence in line with *Hurst*.

Although, before *Hurst*, this Court departed from *Green* and *Andres* when it followed *Spaziano* in a way that *Hurst* alone warrants reexamining, the question presented here is also distinct from the questions that arise when a state legislature prescribes a capital sentencing scheme with dueling or complementary roles for the judge and jury in a way that favors Johnson's claim. There is no question *here* over whether the jury is vested with authority to make every decision needed for a death sentence. It is. The sole question is whether the jury's role has been unconstitutionally diluted. As shown in Johnson's brief, further supported by the historical analysis set out below, it is.

Applying the common-law understanding of the jury right as a lens to interpret those rights set out in the U.S. and California Constitutions leads to the conclusion that all of the issues determined under Cal. Penal Code § 190.3 must be made unanimously and beyond a reasonable doubt.

I. THE JURY RIGHT UNDER THE SIXTH AMENDMENT AND THE CALIFORNIA CONSTITUTION IS THE JURY RIGHT AS UNDERSTOOD AT COMMON LAW.

Capital trials in California proceed in two phases: guilt and penalty. Under California law, the capital penalty phase is not merely a judicial sentencing proceeding, but rather a Sixth Amendment jury trial, in which a Sixth Amendment jury decides all issues of fact. *Compare Green*, 47 Cal. 2d at 236 (characterizing the penalty phase proceedings as "a trial in the full technical sense.") *with Williams v. New York*, 337 U.S. 241, 242, 246-247 (1949) (distinguishing capital scheme with judicial override of advisory jury recommendation from traditional procedural protections mandated for jury trials). Thus, both the Sixth Amendment jury right and its California counterpart should fully extend to California capital penalty-phase proceedings. When interpreting these provisions, then, the jury right under both constitutions is one and the same with the common-law jury the Framers knew in 1791, when the Bill of Rights was adopted,[2] and

[2] *See* Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 OHIO STATE L. J. 959, 961–62 (2010) (referring to "the jury of 1791" as the benchmark date for the Sixth Amendment jury right).

the common-law jury the California framers knew in 1850. *See People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 287 (Cal. 1951).[3]

A. In framing the Sixth Amendment, the founders claimed the English common-law jury right.

At the founding, the Framers' understanding of the Sixth Amendment jury trial right was identical to the English common-law right. The impetus of the Founding Fathers' specific concern for protecting trial by jury was the Crown's increasing violations of the colonists' common-law jury right. *See Duncan v. Louisiana*, 391 U.S. 145, 151–52 (1968) (recounting this history and noting that the "[j]ury trial came to America with the English colonists . . . [and r]oyal interference with the jury trial was deeply resented"). The drafters of the Declaration of Independence listed this complaint amongst their grievances, *see id.* at 152–53, and the First Continental Congress specifically "claim[ed] all the benefits secured to the subject by the English constitution, and particularly the inestimable one of trial by jury," *see* Continental Congress Resolution 5, in 1 J. OF CONTINENTAL CONGRESS 1774–1789, 69 (1904). By the time of the drafting of the United States Constitution, the common law jury right had "been in existence for several centuries" and had been accepted and celebrated by early American colonists. *Duncan*, 391 U.S. at 151–52; *see also* H.G. Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 4 U. PENN. L. REV. 197, 197–201 (1909).

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[3] Other decisions have cited the date of the 1879 Constitution, *People v. Powell*, 87 Cal. 348, 354 (1891), but the language in the jury right in criminal cases did not materially change between the 1849 and 1879 constitutions. The year 1850 is generally used in this brief.

Consequently, the jury right adopted in the United States Constitution was not a lesser, watered-down version of the common law right, but the full-fledged English common law right as it existed in 1791. *See, e.g.*, *Blakeley v. Washington*, 542 U.S. 296, 306, 313 (2004) (examining the power of the jury in light of the Framers' original intent); *United States v. Booker*, 543 U.S. 220, 238–39 (2005) ("Those principles…are not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law."). Inherent in this common law right was the understanding that criminal defendants had a constitutional right to have a jury answer any questions of fact both unanimously and beyond a reasonable doubt.

B. The California Constitution claimed the English common law jury right as understood at its adoption.

Under the California Constitution, "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil case three-fourths of the jury may render a verdict." CAL. CONST. Art. I §16. While the text does not explicitly define "trial by jury" or specify its scope, this Court has noted repeatedly that the California Constitution adopted the jury right as it existed at common law in 1850. *See Powell*, 87 Cal. at 355 ("Our constitution does not define the right of trial by jury. It was a right then existing, the extent, scope, and limitations of which were well understood, and the constitution simply provides that such right shall be secured, and remain inviolate."); *Martin v. Superior Court*, 168 P. 135, 136 (Cal. 1917); ("Little needs to be said as to the meaning of the language of our Political Code (section 4468), which makes the common law of England, so far as it is

not repugnant to nor inconsistent with our constitution and laws, the rule of decision in all the courts of this state."); *One 1941 Chevrolet Coupe*, 37 Cal. 2d at 287 ("The right to trial by jury guaranteed by the Constitution is the right as it existed at common law at the time the Constitution was adopted…[t]he common law respecting trial by jury as it existed in 1850 is the rule of decision in this state."); *Cline v. Superior Court of Los Angeles County*, 193 P. 929, 932 (Cal. 1920) ("It is a settled proposition of law in this state that the right of trial by jury there referred to is the right as it existed at common law . . . under the common law of England."); *McComb v. Comm'n on Judicial Performance*, 564 P.2d 1, 6 (Cal. 1977) ("The right to a trial by jury . . . is the right as it existed at common law at the time the [United States and California] Constitutions were adopted.").

Additionally, while this Court has stated that the legislature may "establish reasonable regulations or conditions on the enjoyment of the right," *People v. Collins*, 552 P.2d 742, 745 (Cal. 1976), it has also held that "all the substantial incidents and consequences which pertain to the right of trial by jury at common law are beyond the reach of hostile legislation and are preserved in their ancient, substantial extent as they existed at common law," *People v. Peete*, 202 P. 51, 65 (Cal. Dist. Ct. App. 1921). This Court's precedent has therefore established clearly that the "jury right" under the California Constitution is defined by reference to the common law at the time that both Constitutions—United States and California—were adopted. As such, to determine the true scope of a criminal proceeding, it is necessary to look to the original definition at common law.

II. THE CALIFORNIA CAPITAL SENTENCING SCHEME VIOLATES THE COMMON-LAW JURY RIGHT TO HAVE ALL ISSUES OF FACT TO BE PROVEN BEYOND A REASONABLE DOUBT.

In *Ring*, 536 U.S. at 609, the U.S. Supreme Court held that the Arizona capital sentencing scheme violated the defendant's Sixth Amendment right to a jury trial in capital prosecutions because it allowed a judge alone to determine the presence or absence of aggravating factors required for the imposition of the death penalty. *Id*. The Court relied heavily on its previous decision in *Apprendi*, 530 U.S. at 478, holding that a defendant cannot receive a penalty exceeding the maximum he would otherwise receive if punished according to the *facts* in the jury verdict alone. *Ring*, 536 U.S. at 602 (citing *Apprendi*, 530 U.S. at 483). Recently, in *Hurst,* 136 S. Ct. at 622, the Court reaffirmed these holdings and applied them to strike Florida's capital sentencing scheme for similar reasons. The Court found the scheme violated the Sixth Amendment jury right because the advisory jury merely made a sentencing *recommendation* to the judge, and the judge still made all important fact findings needed for a death sentence, and without which a death sentence could not be returned. *See id*. at 622. The Court noted the following requirements for a death sentence under Florida law: first that "sufficient aggravating circumstances exist" and second "that there are insufficient mitigating circumstances to outweigh aggravating circumstances[.]" *Id.* (citing Fla. Stat. § 921.141(3)).

Similar to Florida, California requires that "the aggravating circumstances outweigh the mitigating circumstances" before the jury may impose a sentence of death. Pen. Code § 190.3. As in Florida, this requirement includes a subsidiary determination on the issue of whether specified aggravating circumstances exist. Distinct from Florida,

California already entrusts this decision to the jury, and therefore, as Johnson has shown, the full protections of the U.S. and California jury right should apply.

In a line of cases predating *Hurst*,[4] however, this Court has held that all determinations in the California capital scheme are not factual, but rather encompass a "'fundamentally *normative* assessment . . . that is outside the scope of *Ring* and *Apprendi*.'" *Merriman*, 60 Cal. 4th at 106 (quoting *People v. Griffin*, 33 Cal. 4th 536, 595 (2004) (other citations omitted) (emphasis added). The Court has also called the determination a "moral" determination. *People v. Hawthorne,* 4 Cal. 4th 43, 79 (1992) (emphasis added).

The normative component of the inquiry, however, is no reason to exclude this jury-assigned finding from the protection of the Sixth Amendment and the California Constitution that attach to issues of fact entrusted to the jury. This is so because the "constitutional right of trial by jury is . . . not limited strictly to those cases in which it existed before the adoption of the Constitution but is extended to cases of like nature as may afterwards arise. It embraces cases of the same class thereafter arising." *One 1941 Chevrolet Coupe*, 37 Cal. 2d at 300. Similarly, to determine whether the Sixth Amendment jury right under the U.S. Constitution applies, courts look to whether the right in question "existed during the years surrounding our Nation's founding." *Apprendi*, 530 U.S. at 478. The answer to these questions is yes – the right to a jury decision made

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[4] Hurst made clear that the weighing determination set out in the Florida statute was one the jury needed to make. *Hurst*, 136 S. Ct. at p. 622.

under the beyond a reasonable doubt standard, on every issue submitted to the jury, existed in 1791 and 1850 – however the weighing determination may be characterized.

As shown below, first, at the relevant times of 1791 and 1850, proof beyond a reasonable doubt was required and viewed as part of the jury right. Second, at common law, the ultimate penalty determination would have been considered a factual determination, reserved for the jury, subject to this standard of proof, and familiar due to the moral and normative determinations that common-law juries were already frequently called to make. Examples of juries deciding normative questions abound, and are set out in the next two subsections (B) & (C). Third, in any case, all jury factual questions are in effect weighing determinations, which makes attempts to distinguish between normative and fact-bound questions in the end illusory. *See* Point III (D), *infra*.

A. The jury right at common law included the right to a jury determination that the government had provided proof beyond a reasonable doubt on every issue submitted to the jury.

The emphasis on doubt, and particularly guilt beyond a *reasonable* doubt, can be traced back to the early English common law's emphasis on mercy over severity in jury sentencing, evident more than a century before the Bill of Rights was adopted. In his 1681 treatise on the role of grand juries, John Somers, Baron of Eversham, noted that "all laws in *doubtful* cases direct a suspension of judgment, or a sentence in favor of the accused person . . .Our ancestors took great care, that suspicious and probable causes should not bring any man's life and estate into danger." JOHN SOMERS, BARON SOMERS, THE SECURITY OF ENGLISHMAN'S LIVES: OR, THE TRUST, POWER, AND DUTY OF GRAND

JURIES OF ENGLAND 84 (1681) (hereinafter "SECURITY OF ENGLISHMEN'S LIVES") (emphasis added).

Other treatises also espoused the value of mercy in sentencing. *See, e.g.*, SIR JOHN MAYNARD, TREATISE: A GUIDE TO ENGLISH JURIES 49 (1699) ("Justice leans that way which is the milder. One brings an appeal, if the Jury be Doubtful, the Defendant shall acquit, and the Appellour imprisoned"). Notably, Maynard's Treatise specifically ascribes to the English Parliament the belief that it was "more fit the Party should be acquitted than prosecuted, where the Case was doubtful." MAYNARD, A GUIDE TO ENGLISH JURIES at 51. As such, "one must know beyond all doubt . . . If a Jury doubt at any time, they must find for the Defendant." *Id.*

A 1774 Dublin Compendium explained the importance of reasonable doubt as follows: "It is a certain Rule in all Special Verdicts, that if the Jury find Point in Issue, and only put a special Doubt to the Court in a Matter of Law, it is a good Verdict; but if they do not find a sufficient Matter of Fact to bring Light enough to the Court to resolve that Doubt, than it is an imperfect verdict . . . ." THE COMPLETE JURYMAN: OR, A COMPENDIUM OF THE LAWS RELATING TO JURORS 240–41 (John Murphy ed., 1774). The author based his observation on the "clear and evident reason" that "the Jury are Judges of the Fact, [and] the Judges are to judge and determine the Law arising on that Fact." *Id.* If the jury had any doubt in the facts sufficient to uphold the verdict, then "a *Venire Facias de novo*," or new jury, would be empaneled to re-find the relevant facts. *Id.*

The standard of reasonable doubt was also acknowledged and invoked in early American cases. In the 1770 Boston Massacre Trials, John Adams, defending the British

soldiers, told the jury that "[w]here you are doubtful never act: that is, if you doubt of the prisoner's guilt, never declare him guilty; *that is always the rule*, especially in cases of life." LEGAL PAPERS OF JOHN ADAMS 243 (L. Kinvin Wroth and Hiller B. Zobel, eds., 1965) (hereinafter Wroth and Zobel) (emphasis added). By contrast, Thomas Paine, arguing for the Crown, did not dispute that the jury's doubt would be decisive; he merely emphasized that the doubts needed to be *reasonable*. Speaking to the jury, he requested that "if . . . in the examination of this Cause the evidence is not sufficient to Convince beyond *reasonable doubt* of the Guilt of all or any of the Prisoners by the Benignity and Reason of the Law you will acquit them, but if the Evidence be sufficient to convince you of their Guilt beyond reasonable Doubt the Justice of the Law will require you to declare them guilty . . . " Wroth and Zobel, *supra*, at 271 (emphasis added).[5]

In his 1791 lecture on the jury, Justice James Wilson emphasized this principle by recounting a story of a judge Frebern whom Alfred hanged "because he judged Harpin to death, when the jurors were in doubt as to their verdict; for where there is a doubt, they should save rather than condemn." *See* COLLECTED WORKS OF JAMES WILSON 970 (K. Hall & M. Hall eds., 2007).[6] *See also id.* ("Does [the juror] doubt? He should acquit.").

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[5] If this had been a new formulation, "we might expect to find contemporaries commenting on it at its emergence. Nothing in the Boston Massacre trials itself indicates that a new standard was being articulated, and, at least so far, no one has pointed out any account of those proceedings from that time that suggests an unprecedented test was being argued and instructed." Randolph N. Jonakait, *Finding the Original Meaning of American Criminal Procedure Rights: Lessons From Reasonable Doubt's Development*, 10 U. N.H. L. Rev. 97, 156–57 (2012).

[6] Before President Washington appointed him to the United States Supreme Court, Justice Wilson helped to shape both the Declaration of Independence and the original Constitution. He was one of few to sign both documents. See COLLECTED WORKS OF JAMES WILSON, supra, at xi. He is widely recognized as an architect of our republic. *Id.* His Philadelphia lectures on the Constitution were widely attended by the Nation's founders, including the President. *Id.* at 403.

As Justice Wilson put it, "It is only when the clearest conviction is in full and undivided possession of the mind, that the voice of conviction ought to be pronounced." *Id.*

In this lecture, Justice Wilson also specifically linked this standard of proof with the requirement of unanimity, noting a similar story of Alfred hanging a different judge to death who had judged an accused to death over the objection of three jurors. *Id.* He explained: "If to a verdict of conviction, the undoubted and the unanimous sentiment of the twelve jurors be of indispensable necessity; the consequence unquestionably is, that a single doubt or a single dissent must produce a verdict of acquittal." *Id.* at 985, 1010 ("If a single doubt remain in the mind of any juror, that doubt should produce his dissent, and the dissent of a single juror, according to the principles which we have explained, and, we trust, established, will produce a verdict of acquittal by all.").

It should be acknowledged that in *Apodaca v. Oregon*, a four-judge plurality of the U.S. Supreme Court asserted imprecisely that "the reasonable-doubt standard developed separately from both the jury trial and the unanimous verdict . . . [and] did not crystallize in this country until after the Constitution was adopted." 406 U.S. 404, 411 (1972) (citing *In re Winship*, 397 U.S. 358, 363 – 64 (1970)).[7] Specifically, the Court asserted that the standard of reasonable doubt did not crystallize until 1798. *Apodaca*, 406 U.S. at 412 (citing *Winship*, 397 U.S. at 361); *id.* at 412 n.6 ("[T]he requirement of proof beyond a reasonable doubt first crystallized in the case of *Rex v. Finny*, a high treason case tried in

[7] The context was the four-justice plurality's rejection of the contention by the petitioner that the unanimity was required "in order to give substance to the reasonable-doubt standard otherwise mandated by the Due Process Clause." *Apodaca*, 406 U.S. at 411.

Dublin in 1798.").[8] The four-justice plurality's reliance on *Winship* for this proposition, however, is questionable. The Court in *Winship* did not decide the *earliest* date the reasonable doubt standard had crystalized but rather the *latest.* 397 U.S. at 361 (stating the formulation "seems to have occurred *as late as* 1798") (emphasis added). The Court in *Winship* did not need to go beyond its 1798 observation to resolve the questions before it, and did not do so. Moreover, as shown above, contrary to the four justice-plurality and the law it cited, amici have provided abundant evidence that the standard (if not a more stringent version requiring that *all* doubts be resolved in favor of the accused) was part of the common-law jury right itself, at least by 1791.

Finally, any difference between the timing when doubt and reasonable doubt became the standard is here academic. If, as shown, the requirement of proof beyond doubt was part and parcel of the jury right in 1791, then the debate should be at an end. Johnson is not arguing that, to sentence him to death, the sentencing determination must

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[8] The four-judge plurality's claim that this 1798 Irish treason case was where the standard crystalized was demonstrably incorrect. The language of reasonable doubt appeared in the Irish treason cases of 1793, at least five years earlier. *See*, *e.g.*, *Proceedings in the Case of Daniel Isaac Eaton (Eaton's Case)*, 22 How. St. Tr. 753, 757–58 (1793) ("In the outset of the case, I say this, representing the public, if you have any serious, sober, rational doubts about the guilt of the defendant, upon any of the fair topics, that may be adduced before you, in God's name pronounce him Not Guilty."); *Proceedings Against William Frend (Frend's Case)*, 22 How. St. Tr. 523, 687 (1793) ("In an application for a mandamus to restore, it is not necessary that it should clearly appear that injustice has been done; it is sufficient to raise a reasonable doubt in the Court whether it has or not . . . ."). Moreover, it is clear from the authorities explored above, that this 1793 usage of the standard was based on common-law requirements set out much earlier. *See also State v. Wilson*, 1 N.J.L. 439, 442 (1793) (jury charge "that where reasonable doubts exist, the jury, particular in capital cases, should incline to acquit rather than condemn"). And the common-law rule that doubt required a jury to acquit goes back at least a century earlier. UNKNOWN, A GUIDE TO JURIES, SETTING FORTH THEIR ANTIQUITY, POWER, AND DUTY 68 (1682) ("If a jury doubt at any time, they must find for the Defendant."). *Id.* at 65 ([I]f the jury be doubtful, the Defendant shall be acquitted[.]").

be proven in the State's favor beyond doubt (or all doubt). If, at common law, his jury right included a right to have the State prove its allegations beyond doubt, then that necessarily means Johnson was entitled at his capital sentencing to have the State make this showing beyond a reasonable doubt. Furthermore, the result is the same even if the right to proof beyond a reasonable doubt is a protection only under the Due Process Clause of the Fourteenth Amendment. Because the U.S. Supreme Court has since acknowledged that the Sixth Amendment jury right and the due-process right to proof beyond a reasonable doubt are inextricably intertwined,[9] *Hurst* certainly gives rise to the need to reexamine application of this due-process requirement.

Regardless of the federal right, the reasonable doubt standard had certainly crystallized by 1850, when California first adopted the jury right. *See, e.g.*, *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850) (explaining the meaning of "reasonable doubt"); *Ogletree v. State*, 28 Ala. 693, 702 (1856) (explaining that "in a criminal case, the state is required to prove, beyond all reasonable doubt, the facts which constitute the offense"); *State v. Crawford*, 11 Kan. 32, 43 – 44 (1873) (same); *State v. Wingo*, 66 Mo. 181, 182-83 (1877) (same); *People v. Hurtado*, 63 Cal. 288, 292 (1883) (same); *People v. Elster*, 3 P. 884, 885 (Cal. 1884) (same).

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[9] *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) ("It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.") (emphasis in original).

The standard of reasonable doubt is rooted in both the United States Constitution and the California Constitution. As such, it should be required in all criminal cases, on all issues submitted to the jury. As shown below, these issues includes the existence of aggravating factors and the ultimate penalty determination.

B. Juries have always decided normative and moral questions.

This Court has repeatedly called the sentencing question in the California capital-sentencing scheme a "'fundamentally *normative* assessment[,]" *Merriman*, 60 Cal. 4th at 106 (quoting *Griffin*, 33 Cal. 4th at 595), and a "moral" determination. *Hawthorne,* 4 Cal. 4th at 79. But that characterization does not take the ultimate penalty determination outside the realm of issues juries must decide unanimously and beyond a reasonable doubt. Rather, common-law juries of 1791 and 1850 were historically charged with making normative assessments, placing such determinations squarely within the protection that the Sixth Amendment and the California Constitution envision.

A "normative question" asks what should we do, based on moral or other societal concerns. *See*, *e.g.*, Matthew Silverstein, *Inescapability and Normativity*, 6 J. Ethics & Soc. Phil. 1, 12 (2012). The quintessential normative question in the law involves reasonableness, i.e., what is a reasonable belief, or reasonable prudence or conduct, or a reasonable time period? What may be deemed reasonable is informed uniquely by our norms, as shown by the definition of reasonable: "Agreeable to reason; *just*; *proper*." Black's Legal Free Online Dictionary (2d ed.), https://thelawdictionary.org/reasonable/ (emphasis added). The question of reasonableness arises frequently in civil cases, bound up in facts, and typically decided by the jury. This has been so since the time of the early

common law.[10] But reasonableness is also a finding frequently required by juries rendering their criminal verdicts, and this tradition too extends back to the pre-1791 common law.

Self-defense & Manslaughter: Both of these common-law doctrines incorporate reasonableness, including in the legal charges on which juries render their verdicts. Most famously, in the Boston Massacre trial, known well by the framers among others, the judges instructed the jury on self defense, the basis for the acquittal of six of the soldiers, and manslaughter, on which the remaining two were convicted. *The Trial of William Wemms, James Hartegan, William M'Cauley, Hugh White, Matthew, Killroy, William Warren, John Carrol, and High Montgomery, Soldiers in his Majesty's 29th Regiment of Foot, for the Murder of Crispus Attucks, Samuel Gray, Samuel Maverick, James Caldwell, and Patrick Carr, on Monday-Evening* 207-08 (Boston: J. Fleeming 1770) (contemporaneous record of the trial of the soldiers accused in the Boston Massacre).

Regarding self defense, the jury was charged that if "the blows with clubs were, by an enraged multitude, aimed at the party in general, each one might *reasonably think* his own life in danger" and therefore could use deadly force to repel the multitude. *Id.* at 195

[10] *See*, *e.g.*, *Eaton v. Southby,* 125 Eng. Rep. 1094, 1096 (1738) (holding that whether a "reasonable time" had passed was an issue for the "jury, who upon hearing the evidence would have been the proper judges of it"); *Fenwick v. Sears's Adm'rs*, 5 U.S. 259, 274 (1803) (finding jury "competent to decide" question of whether "reasonable notice" had been given); *Haskins v. Hamilton Mut. Ins. Co.*, in Horace Gray, Jr., Reports of Cases Argued and Determined in the Supreme Judicial Court of the Commonwealth of Massachusetts 432, 437 (1855) ("We have no doubt that the question, whether the machinery was finished within a reasonable time, was rightly left to the jury.").

(emphasis added). *See also Beard v. United States*, 158 U.S. 550, 560 (1895) (relying on English cases going back before time of independence in setting out the common-law castle doctrine: "the question for the jury was whether, without fleeing from his adversary, he had, at the moment he struck the deceased, *reasonable grounds to believe*, and in good faith believed, that he could not save his life or protect himself from great bodily harm except by" striking his adversary) (emphasis added).

With respect to manslaughter, the Boston-massacre jury was instructed, "So if one, on angry words, assaults another by wringing his nose, and he thereupon *immediately* draws his sword and kills the assailant, it is but Manslaughter, because the peace is broken, with an indignity to him that received the assault, and he being affronted, might *reasonably* apprehend the other had some further design on him." *The Trial of William Wemms*, *supra*, at 181-82 (first emphasis in original, second added). *See also* A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES (hereafter Crown Cases) 297 (holding that homicide found to stem from a sudden quarrel, without "reasonable time for cooling" of blood, is manslaughter).[11]

Malice: In the common-law, going back centuries, and including up to the time the Bill of Rights was enacted, a murder conviction required proof of malice, or malice aforethought. *See generally Mullaney v. Wilbur*, 421 U.S. 684, 693 (1975) (tracing this common law requirement, and noting that homicide "without such malice" was

[11] The U.S. Supreme Court frequently cites the cases set out in this book as illustrations of the common law. *See*, *e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 559 (2004) (citing this source).

manslaughter, eligible for benefit of clergy). *See* Point II (B), *infra*. Whether a person acted with malice is not a straight-forward factual determination. Justice Wilson's 1791 charge to a grand jury on the definition of malice illustrates its inherent subjectivity and the attendant task of weighing circumstances assigned to the jury. *See* COLLECTED WORKS OF JAMES WILSON 330-31. Referencing the cases at common law, Justice Wilson instructed the grand jurors that malice turned on "the circumstances of deliberation and cruelty concurring," whether they betrayed "a mind grievously depraved," acting "from motives highly criminal[,]" without regard for "social duty, and fatally bent upon mischief." *Id.* He instructed that all of these considerations must be "collected and inferred from the circumstances of the transaction. . . . Every circumstance may weigh something in the scale of justice." *Id.* *See also* Thomas A. Green, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800 185 (1985) (hereafter, VERDICT ACCORDING TO CONSCIENCE) ("When was there malice in the heart? That mixed question of law and fact required interpretation, an application of reason to the facts and, thus, a judgment according to divine inspiration. In short, it was within the province of the jury.").[12]

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[12] The subjective question of malice set the stage for the later normative question several states adopted, in some form or fashion, from the 1962 Model Penal Code as an aggravating circumstance in their capital sentencing schemes – whether a crime was especially heinous, atrocious, and cruel. Somewhere in the neighborhood of two dozen states "permit imposition of the death penalty based on a finding that the murder was, in some ill-defined way, worse than other murders. The states use a variety of terms to denote this aggravating circumstance, with most statutes containing, either alone or in some combination, the terms 'especially heinous, atrocious, or cruel,' 'depravity of mind,' or 'outrageously vile wanton or inhuman.'" Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases – The Standardless Standard*, 64 N.C. L. Rev. 941, 943 (1986).

Unlawful act: This Court has noted that words "such as 'unlawful act, not amounting to felony' have been included in most definitions of manslaughter since the time of Blackstone." *People v. Stuart*, 47 Cal. 2d 167, 173 (1956) (citing 4 Bl. Comm. Homicide, § 191; Stefan A. Riesenfeld*, Negligent Homicide: A Study in Statutory Interpretation*, 25 Cal. L. Rev. 21-22 (1936)). Even since the time of Lord Hale,[13] "'unlawful act' as it pertains to manslaughter had been interpreted as meaning an act that aside from its unlawfulness was of such a dangerous nature as to justify a conviction of manslaughter if done intentionally or *without due caution*." *Id.* at 174. The amount of caution "due" is of course a normative question, one juries were answering a century before independence.

Accident: Even determinations which seem to lend themselves to a perfectly to "factual" analysis often required juries to consider normative components. At the common law of England pre-independence, homicide "occasioned by accident, which human prudence could not foresee or prevent" was not murder. CROWN CASES 255. Whether human prudence could have foreseen or prevented the homicide was a normative question for the jury, for it depended on the level of prudence expected. For example, a judge instructed the jury that a man who touched the trigger of his gun as he picked it up, shooting and killing his wife, should be acquitted if he "had reasonable grounds to believe [the gun] was not loaded." *Id.* at 265.

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[13] The English Barrister, scholar, and judge, Lord Hale, died in 1676. *See* George O. Costigan, *The Date and Authorship of the Statute of Frauds*, 26 Harv. L. Rev. 329, 330 n.3 (1913).

Punitive damages: This doctrine does not center on reasonableness, and does not reside in the criminal law, but the common-law decision whether to award punitive damages is very similar to the weighing of aggravation and mitigation under California's capital sentencing scheme. The common law roots of punitive damages are well-recognized. As the Supreme Court has stated, "[u]nder the traditional common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct ." *Pac. Mut. Life. Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) (internal citations omitted). Justice Blackmun also noted that punitive damages "have long been part of state tort law," such that "Blackstone appears to have noted their use." *Id.*; *see also* 3 WILLIAM BLACKSTONE COMMENTARIES *137–*38 (1765–1769). In particular, because the rationales supporting punitive damages were rooted in both tort and criminal law, scholars have noted that the history of punitive damages is fraught with "tension between judicial attempts to control doctrinal development of the law of damages and the ostensibly uncontrolled role of juries in awarding damages" without legal recourse. Jason Taliadoros, *The Roots of Punitive Damages at Common Law: A Longer History*, 64 CLEVELAND STATE L. REV. 251, 254 (2016).

Early English cases contain multiple references to the jury's role in punitive damages. Most famous among these cases are *Wilkes v. Wood*, 98 Eng. Rep. 489 (1763), and *Huckle v. Money*, 95 Eng. Rep. 768 (1763). In *Wilkes*, the jury was asked to decide the punitive damages in an action for trespass against an officer who had searched Wilkes's residence pursuant to a general arrest warrant. *Wilkes*, 98 Eng. Rep. at 498–99.

In instructing the jury, the judge noted that "damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding in the future, and as a proof of the detestation of the jury to the action itself." *Id.* at 499. Likewise, in *Huckle*, a civil jury awarded 300 pounds in punitive damages after government messengers, acting under orders from the Secretary of State, confined a printer for six hours. *See Huckle*, 95 Eng. Rep. 768. Upon review, Chief Justice Pratt refused to set aside the jury verdict as excessive, explaining that "[I] think they have done right in giving exemplary damages. To enter a man's home by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition . . . it was a most daring public attack upon the liberty of the subject." *Id.* at 769. Early American juries also appear to have been tasked with determining punitive damages. *See, e.g.*, *Genay v. Norris*, 1 S.C.L. (1 Bay) 6, 6 (1784) (charging the jury to consider "exemplary damages" for the injuries resulting from a drunken confrontation); *Coryell v. Colbaugh*, 1 N.J.L. 77, 77 (1791) (affirming "exemplary damages" awarded by jury in an action for breach of promise of marriage).

Common-law juries were no strangers to normative and moral questions, including in criminal cases. Because their work before the adoption of the Constitution is of like nature to the sentencing determination in the capital statute, the full constitutional right extends to the issue the state puts to capital juries. *One 1941 Chevrolet Coupe*, 37 Cal. 2d at 300. In other words, the California and U.S. Constitutions require that the ultimate penalty determination be made not only unanimously, but also beyond a reasonable doubt.

C. At common law, juries also made normative decisions when finding verdicts in criminal cases.

In finding that capital sentencing determinations defy the application of jury protections as normative and moral questions, *Merriman*, 60 Cal. 4th at 106, *Hawthorne*, 4 Cal. 4th at 79, this Court failed to take into account the long history of similar normative questions answered by common-law juries. Juries' verdicts, frequently depending on normative evaluations, in turn determined whether the accused would be executed. In the wake of *Hurst*, it is an apt time to reexamine this important history.

Although judges formally controlled sentences in the common law era, juries were considered "de facto sentencers with substantial power." Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 692 (2010) (internal citations omitted). This observation was especially true in the capital context. During the colonial period, many English laws called for the death penalty for an enormously wide range of crimes. SOL RUBIN, THE LAW OF CRIMINAL CORRECTION 30–31 (2d ed. 1973). But many people were not sentenced to death, even if they had committed those crimes. The colonists disliked the laws and their especially harsh penalties. J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800 411–12 (1986).

They showed it in their jury verdicts. *Id*. at 424. While juries technically could not choose the sentence defendants would ultimately receive, juries frequently used their power over the verdict to manipulate what punishment defendants were due. *Id*. Three examples illustrate the point. First, with many larcenies, juries removed the possibility of

a capital sentence by finding that the offender was guilty of a theft less than a defined amount. *Id*. *See also* VERDICT ACCORDING TO CONSCIENCE, *supra*, at 107 ("Many of those indicted for grand larceny were, by virtue of the jury's undervaluation of the goods stolen or their own plea of guilty to a lesser offense, convicted of petty larceny, which was not capital[.]").[14]

Second, before there were gradations in homicide, English juries would frequently acquit under the theory that the homicide was committed in self defense. Thomas A. Green, *The Jury and the English Law of Homicide*, 1200-1600, 74 Mich. L. Rev. 413, 415, 427-36 (1976). Based on his study of the old English verdicts, Professor Green found that "the frequent recourse to such findings resulted mainly from the jury's desire to save the lives of defendants who had committed simple homicide." *Id.* at 431. The juries did so to limit homicide convictions to the "most culpable homicides." *Id.* at 432. *See also id*. at 416 (finding "the local community considered" execution "appropriate mainly for the real evildoer: the stealthy slayer who took his victim by surprise and without provocation"); *McGautha v. California*, 402 U.S. 183, 197-98 (1971) (recounting this history), *overruled on other grounds by Furman v. Georgia*, 408 U.S. 238 (1972); *See also Rauf*, 145 A.3d at 438 n.17, 465 n.214 (Strine, C.J., concurring) (relying on Green's work, in part, to find that the "starkest way in which juries . . . determined

[14] The author Professor Green is a legal historian, now emeritus, at the University of Michigan. His work has been relied upon by the U.S. Supreme Court. *See*, *e.g.*, *Jones v. United States*, 526 U.S. 227, 246 (1999) (citing Green); *Walton v. Arizona*, 497 U.S. 639, 711 n.3 (1990) (Stevens, J., dissenting) (citing Green's work), *overruled by Ring v. Arizona*, 536 U.S. 536, 586 (2002)).

whether the defendant should live or die . . . was by acquitting a defendant who was obviously guilty”).

Third, once the verdict of manslaughter became available, the jury later employed the “benefit of clergy,” originally designed to try and punish ordained clergy in the Church rather than the courts, when it was extended (in the courts) to anyone literate enough to recite a Bible verse. VERDICT ACCORDING TO CONSCIENCE, *supra*, at 117.[15] Since most people could recite the verse, the main factual issue was whether the crime was one that qualified for the benefit, which the jury decided. For homicide cases, that meant deciding whether the crime was manslaughter or murder. *Id.* at 121-22. As jurors “recogniz[ed] that benefit of clergy provided an alternative sanction [to execution] for simple homicide,” the conviction rate went up, and the previously high rate of self-defense verdicts went down. *Id.* at 122. The percentage of offenders condemned to death, over this period, “remained about the same,” *id.* at 122, preserving over time the jury’s unique role as arbiter of community sentiment. *See also McGautha*, 402 U.S. at 197-98 (recounting this same history); *Hurst*, 202 So. 3d at 55 (“In capital cases, Florida’s early laws also indicate that jurors controlled which defendants would receive death . . . [because] the jury’s factual findings on the elements of the crime also necessarily served as the elements necessary for imposition of a sentence of death.”).

[15] The accused afforded the benefit of clergy would be branded (with a letter signifying their offense, so they could not get the benefit a second time), and imprisoned for a year. VERDICT ACCORDING TO CONSCIENCE, *supra*, at 118.

The English jury's common-law role in sentencing continued in the states of our young nation. Led by Pennsylvania in 1794, the states separated murder into degrees, confining mandatory execution to deliberate and intentional killings. *Woodson v. North Carolina*, 428 U.S. 280, 290 (1976) (plurality decision) (recounting this history). "Degrees of murder were in large measure introduced to allow juries to convict a defendant of a degree of homicide while not exposing the defendant to death." *Rauf*, 145 A.3d at 439 (Strine, C.J., concurring (similarly recounting this history). *See also People v. March*, 6 Cal. 543, 545 (Cal. 1856) (citing *Hill v. Comm.*, 2 Gratt. 594, 43 Va. 594 (Va. 1845) in applying law to distinguish between first-degree murder, authorizing a death sentence, and lesser degrees, which did not).

Thus, as common-law juries sought to mitigate the harshness of the criminal justice system, their "fact-finding" at common law has always included an assessment of a personal worth of the defendant. *See* VERDICT ACCORDING TO CONSCIENCE, at 98. Overall, the jury was tasked with reflecting society's views "about the appropriate circumstances under which a person's life might be surrendered to the Crown." *Id.* at 20.

Of all of this, the founders were well aware, viewing the jury right as a bulwark against potential judicial corruption and as a source of impartiality. 5 THE COMPLETE ANTI-FEDERALIST 39 (Herbert J. Storing ed., 1981). Indeed, "[r]ather than this practice of nullification leading to hostility by our founding generation, it was seen as an example of the bedrock importance of the jury in securing the liberties of our citizens." *Rauf*, 145 A.3d at 439, n.18-19 (Strine, C.J., concurring) (citing, inter alia, the writings of John Adams). Because juries were drawn from the body of the people, they secured the

people's "just and rightful controul in the judicial department." 2 THE COMPLETE ANTI-FEDERALIST 320 (Herbert J. Storing ed., 1981). The ability for juries to issue general verdicts, unanimously deciding the totality of the issues submitted under a single standard of proof, strengthened their power to control the execution of the law and tailor its application to their own community.[16] *Id*. By having such verdicts, many states recognized that it allowed a jury to accord their judgment with the "moral sense of the community." 1 Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910). Ultimately, the colonists' negative experiences with English judges led to a trend of colonial American juries continuing on to wield this significant power. NATIONAL COMMITTEE ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE 27 (1931).

D. The line between empirical fact determinations decided by the jury and normative questions proves illusory.

Where is the dividing line between normative and empirical questions? Roughly a decade after the Bill of Rights was adopted, the U.S. Supreme Court held: "It is the province of the jury and not of the court to fix the value of sterling money." *Thompson v. Jameson*, 5 U.S. 282, 290 (1803). Sterling money, the money of the English Crown that later became the pound, has an empirical value in U.S. dollars, but finding it cannot be

[16] Even though judges at common law did have the power to order special verdicts, it was seldom employed and soon disfavored. John H. Langbein, The English Criminal Trial Jury on the Eve of the French Revolution, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY, 1700-1900 38 (Antonio Padoa Schioppa ed., 1987). Regardless, when judges did order the jury to issue special verdicts, they retained much of the characteristics of a general verdict, such as the requirement that the jury be unanimous upon their judgment, encompassing all necessary parts of their judgment. *See id*.

done without a normative assessment. Is the assessment of the exchange market rosy, or jaundiced? As shown above, morals also seep into the empirical evaluations jurors undertake because of the stakes involved. The jury right should not hinge on the false dichotomy between the normative and the empirical. The better system is the one proposed by Johnson: all issues submitted to the jury, however characterized, are issues to which the full constitutional jury right applies.

The light was red, or it was green. Facts are facts, but jury fact *finding* is different. It is an interpretation of the evidence to reach a factual conclusion. This was well known at common law, and by the framers of the U.S. and California constitutions. Four years after the Bill of Rights was adopted, the U.S. Supreme Court recognized that in our justice system, facts, evidence, and fact finding, are all separate things. The process entails the jury inferring facts from evidence: "[W]e are not bound to receive for truth, everything which they alledge; nor, indeed, can we give any of their statements the validity and force of a fact; since, they only amount to evidence; and it is the peculiar and exclusive province of the jury to infer facts from the evidence." *Bingham v. Cabot*, 3 U.S. 19, 33 (1795).

Reaching the same conclusion by tracing the common law back two centuries, Professor James Thayer wrote in 1890 on this issue. *See* James B. Thayer, *"Law and Fact" in Jury Trials*, 4 Harv. L. Rev. 147 (1890). He wrote that the jury determination "involves a process of reasoning, of inference, and judgment[.]" *Id.* at 150. Using this process, it is "the office of the jurors 'to adjudge upon their evidence concerning matter

of fact, and therupon to give their verdict, and not to leave matter of evidence to the court[.]'" *Id.* (quoting *Littleton's Case*, 77 Eng. Rep. 1006, 1011 (1612)).

The process of fact finding is complicated. "There comes up for consideration, then, this matter of reasoning: a thing which intervenes, in questions of negligence and the like, between the primary facts, or what may be called the raw material of the case, and the secondary or ultimate facts." *Id.* at 154. And the process is itself value laden: "When it is said that fact is for the jury, the fact intended, as we have seen, is that which is in issue, the ultimate fact, that to which the law annexes consequences[.]" *Id.* at 156. Although Professor Green, as reviewed above, showed that the consequences attached can sometimes lead to dramatic differences in the outcomes of cases, more subtle differences, perhaps not even perceptible to the jury, are also in play.

Lecturing on the role of the jury in 1791, Justice Wilson similarly observed that the answers to the questions posed to juries are frequently not cut and dry. They are rather a question of interpretation of the evidence, and the level of community satisfaction with the evidence required, in criminal cases, before a person may be condemned. He thus taught:

> [W]here the representatives are not indifferent, and, consequently, may not be impartial, their unanimous suffrage may be considered as nothing more, than what is necessary to found a fair presumption concerning the sentiments of a majority of the whole community, had the whole community been personally present. In such a situation, therefore, we may probably be justified in recurring to our position—that the evidence, upon which a citizen is condemned, should be such as would govern the judgment of the whole society: and we may require the unanimous suffrage

> of the deputed body who try, as the necessary and proper evidence of that judgment.

Collected Works of James Wilson 960-61. Although explaining here the rationale for jury unanimity, Justice Wilson was also illustrating that community sentiment plays a role in the consequential decisions juries make.

Similarly, Justice Wilson noted that the assessment of jurors deciding complex issues about the damages a plaintiff should recover will differ juror by juror, according to each juror's situation and character:

> Each of those various opinions may be composed from a variety of combining circumstances, the precise force of any of which can never be liquidated by any known methods of calculation. Those combining circumstances will arise from the situation and character of the plaintiff, from the situation and character of the defendant, from the nature and kind of the injury, and from the nature and extent of the loss. *In the mind of each of the jurors, according to his situation and character, each of those combining circumstances may produce an effect, different from that which is produced by them in the mind of every other juror*.

Collected Works of James Wilson 990 (emphasis added). Justice Wilson did not derive from this complexity that juries ought not make such decisions. *Id.* Quite the opposite, he extolled the role of the jury, comparing it to a temple protecting freedom and innocence. *Id.* at 1011.

An example from this Court's early law further illustrates. In *Brumagim v. Bradshaw*, 39 Cal. 24 (1870), the dispute was whether adverse possession was established, which common-law juries have decided for centuries. *See* David Millon, *Positivism in the Historiography of the Common Law*, 1989 Wis. L. Rev. 669, 691 (referring to adverse possession by its predecessor term, disseisin, and tracing the law

under which juries decide this issue back to the middle ages). This was not a red light, green light question. It was instead a question of interpreting facts, in the context of community norms. More precisely, were "the acts of dominion . . . *adapted to the particular land, its condition, locality and appropriate use*[?]"*Brumagim,* 39 Cal. at 46 (emphasis added). *See also Positivism in the Historiography of the Common Law*, 1989 Wis. L. Rev. at 690 (concluding that the question of adverse possession is a normative question). This Court reversed the judgment of the trial court in *Brumagim* because the trial judge's instruction, directing a verdict of adverse possession if particular facts had been proven, trampled on "the peculiar province of the jury to decide" this (normative) question. *Brumagin*, 39 Cal. at 44 (citing *Wolf v. Baldwin*, 19 Cal. 306, 312-13, 317 (1861)).

Finally, albeit neither in the period when the Bill of Rights nor when the California Constitution was adopted, this Court itself has shown that the normative task of weighing the circumstances before sentencing a person to death is one amenable to proof beyond a reasonable doubt. *People v. Coleman*, 20 Cal. 2d 399, 406 (1942) ("It was held [in *People v. Perry*, 195 Cal. 623 (1925)] that the exercise of the jury's discretion was confined to a consideration of the facts and circumstances attending the commission of the crime, and after such consideration if any doubt be engendered as to the punishment to be imposed, the jury should not impose the extreme penalty."), *overruled on other grounds in part by People v. Wells*, 33 Cal. 2d 330, 345-46 (1949). *See also Rauf*, 145 A.3d at 434 (requiring "the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist" to be made by a jury making

that finding "unanimously and beyond a reasonable doubt to comport with federal constitutional standards"); *State v. Biegenwald,* 106 N.J. 13, 62 (1987) (holding "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") (emphasis in original); *Johnson* Supp. Br. at 90 n.3 (collecting four different state statutes requiring weighing to be proven beyond a reasonable doubt).

Disentangling normative questions from a jury's role in empirical factfinding appears to be impossible, and proves inconsistent with the historic role of the jury, including at the time both the U.S. and California Constitutions were adopted. And it appears unnecessary, because juries can make normative findings beyond a reasonable doubt.

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Juries have always answered normative questions, as part of their fact finding, and often as the primary issue before them. They have done so as part of their specifically-assigned duty (e.g., deciding malice, self defense, punitive damages), and while motivated to prevent the execution of an accused felt to deserve mercy (benefit of clergy, devaluing goods in larceny cases, and determining the degree of murder). And they have done so in ways that so thoroughly intermingle with what is thought of as empirical factfinding as to make it impossible to separate the two. Because juries have always decided normative questions, the better way to determine whether the jury right fully applies is the way Johnson has proposed: to ask simply whether an issue has been submitted to the jury and is required to be found in the State's favor for a death sentence.

Johnson, Supp. AOB, at 45-47, 88-89. Thus, the State must both prove the issues put to the jury – the existence of aggravating circumstances and the ultimate penalty determination – beyond a reasonable doubt.

III. THE CALIFORNIA CAPITAL SENTENCING SCHEME VIOLATES THE COMMON-LAW JURY RIGHT TO A UNANIMOUS JURY.

Just as the common-law jury right enshrined in the Sixth Amendment and the California Constitution requires the State to prove every required finding for death beyond a reasonable doubt, so too does it require that the jury's decision be unanimous. Although it is possible to construe the California capital sentencing statute to require unanimity as to the existence of aggravating factors, *Johnson*, AOB, at 212-214, the Court has not done so and the trial court did not require unanimity for Johnson's death sentence. As shown below, and in Johnson's briefing, honoring his jury right requires reversing his death sentence.

To sentence Johnson to death, the State relied on the circumstances of the crime under section 190.3 (factor (a)), two previously uncharged aggravating acts of criminal violence under section 190.3 (factor (b)), and four prior convictions under section 190.3 (factor (c)). Johnson Opening Br., at 15-17, 57, 134. Under CALJIC No. 8.87, the jury was instructed that it did not have to be unanimous on the aggravators found, or on the aggravators considered in the weighing question. 47 RT 1584-86; 6 CT 1247-48. This reflects established case law. *See*, *e.g.*, *People v. Caro*, 46 Cal. 3d 1035, 1057 (1988) ("There is no requirement of unanimity . . . and it is entirely proper under the statute for individual jurors who find the aggravating circumstance beyond a reasonable doubt to

consider that evidence in the weighing process.").[17] This means the jury could have sentenced Johnson to death without being unanimous on the aggravating factors it found to outweigh the mitigating factors.

As Johnson has shown in his briefing, this line of precedent is faulty, built upon the acceptance of assumptions initially made during early litigation of California's capital statute, and fortified by U.S. Supreme Court precedent which *Hurst* has since overturned. Johnson Supp. AOB, 71-74 (discussing reliance in case law on *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984)); 80-83 (showing how assumptions about statute submitted in argument became, with apparently little reasoning, the accepted requirements of the statute). Johnson's argument for reversal of this Court's precedent is buttressed by the clear history showing the jury right at common law was the right to a unanimous jury, on every issue submitted to the jury.

A. Unanimity is integral to the common-law jury right.

By the founding of our Nation, unanimity had been integral to the English jury right for centuries. *See, e.g.*, 4 BLACKSTONE COMMENTARIES 343; VERDICT ACCORDING TO CONSCIENCE, *supra*, at 18; JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 72 (Basic Books 1994); JOHN GUINTHER, THE JURY IN AMERICA 12 (1988) (reviewing English foundation).

Blackstone provided perhaps the most famous description of the English jury right as including unanimity. He explained that "the founders of English law have with excellent forecast contrived" that no man should be convicted except upon an indictment

[17] *See also Prieto*, 30 Cal.4th at 263 (rejecting unanimity requirement post *Ring*).

"confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion." 4 BLACKSTONE COMMENTARIES 343. The protection of unanimous juries had life and death consequences in founding-era England, where "more than 200 offenses [were] then punishable by death[.]" *Woodson,* 428 U.S. at 289.

The Court in *Apodaca* recognized that "the requirement of unanimity arose in the Middle Ages[.]" 406 U.S. at 407. Historians record the first "instance of a unanimous verdict . . . in 1367, when an English Court refused to accept an 11-1 guilty vote after the lone holdout stated he would rather die in prison than consent to convict." Abramson, *supra*, at 179; *see also* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 171 (1986).

In 1670, the Crown tried William Penn in the Old Bailey on charges of speaking and preaching on a street and thereby causing "a great concourse and tumult of people in the street [who] . . . a long time did remain and continue, in contempt of . . . the King, and of his law, to great disturbance of his peace." VERDICT ACCORDING TO CONSCIENCE 222-25; *see also* Abramson, *supra*, at 72; Guinther, *supra*, at 24-25. After one and a half hours, the twelve jurors deadlocked. Abramson, *supra*, at 71. Eight voted for conviction, but four would agree to nothing more than that Penn had "preached to an assembly of persons[.]"VERDICT ACCORDING TO CONSCIENCE, *supra*, at 224.

The bench "berated the four and sent the jury away to reconsider its decision." *Id.* at 224-25. The formerly divided jury next united around a "verdict" that Penn merely spoke on the street, which the court rejected. *Id.* at 225. The jury ultimately reached a

unanimous verdict of not guilty. *Id*. The course of history for this early colonial leader thus may well have turned on the English protection of a unanimous jury verdict.[18]

Such a proud English jury tradition of unanimity directly informed the American adoption of the requirement. Writing at founding, John Adams explained that "it is the unanimity of the jury that preserves the rights of mankind." 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES 376 (Philadelphia, William Cobbett 1797). Soon thereafter, during the famous trial of Aaron Burr, the Circuit Court for the District of Virginia traced the trial by jury right to the common law. *United States v. Burr*, 25 F. Cas. 55, 141 (C.C.D. Va. 1807). The court explained that, as a matter of construing the constitution, the jury right includes the requirement "that the jury must be unanimous in the opinion which they pronounce." *Id*. *See also Rauf*, 145 A.3d at 437 (Strine, C.J., concurring) ("From the inception of our Republic, the unanimity requirement and the beyond a reasonable doubt standard have been integral to the jury's role in ensuring that no defendant should suffer death unless a cross section of the community unanimously determines that should be the case, under a standard that requires them to have a high degree of confidence that execution is the just result.") (reviewing history of the common-law jury right); *Hurst*, 202 So. 3d at 54 ("The right to a unanimous jury in English jurisprudence has roots reaching back centuries, as

[18] Later works on the history of the jury emphasize the importance of not forcing jurors to give verdicts against their judgment. THE COMPLETE JURY MAN: OR, A COMPENDIUM OF THE LAWS RELATING TO JURORS 180 (1752).

evidenced by Sir William Blackstone in his Commentaries on the Laws of England, originally published from 1765 through 1769.").

Early practices by the states also confirm the centrality of the unanimity requirement to the American system of government. The same year the U.S. Constitution was ratified, a Connecticut state court stated that only where the minority acquiesces to the opinion of the majority can a verdict be valid. *Apthorp v. Backus*, 1 Kirby 407, 416–17 (Conn. 1788). When some Eastern states tried to abolish the practice of unanimity, they faced difficulty because their state constitutions were framed after those of the original colonies and those constitutions emphasized the inviolability of the jury right. Ben B. Lindsay, *The Unanimity of Jury Verdicts*, 5 THE VIRGINIA LAW REGISTER 133, 134 (Jul. 1899). It took until 1869 for a state, Montana, to "invad[e] the hoary requirement of unanimity" and pass an act requiring only three fourths for a valid verdict in civil cases. MAXIMUS A. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM 238 (1894). A decade later, as California debated amendments to its own constitutional jury protections "[p]roposals that would have allowed conviction by less than a unanimous jury, or that distinguished between types of criminal offenses based on the severity of punishment, were strongly denounced." *Mitchell v. Superior Court*, 783 P.2d 731, 738 (Cal. 1989).

At common law, it was also well understood that verdicts were comprised of elements, sometimes with other names, but always to which common-law requirements applied. *See Ring*, 536 U.S. at 610 (Scalia, J., concurring) (noting it matters not whether such findings are labeled "Mary Jane"). "Trial by jury has been understood to require that

'*the truth of every accusation* . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors . . ." *Apprendi*, 530 U.S. at 477 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)). The requirement of unanimity thus extends to the findings needed for a verdict.

B. *Apodaca* Does Not Preclude These Results.

In *Apodaca*, the Supreme Court upheld, 5-4, an Oregon statute that allowed individuals to be convicted by 11-1 or 10-2 verdicts in noncapital criminal cases. *Apodaca*, 406 U.S. at 407, 411. Ultimately, the plurality "perceive[d] no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Id.* at 411. For several reasons, *Apodaca* does not preclude this Court from finding that the Sixth Amendment requires unanimity in capital sentencing proceedings.

First, as the plurality noted, the Oregon statute at issue only applied to non-capital cases. *See Apodaca*, 406 U.S. at 406 n.1 (quoting the Oregon Constitution, specifically exempted capital cases from the requirement of a non-unanimous jury). The court did *not* decide that non-unanimous juries would be acceptable or constitutional for capital juries, let alone for specific instances involving fact finding that would make a person eligible for execution. Such a distinction makes "a significant constitutional difference," *Beck v. Alabama*, 447 U.S. 625, 637 (1980), because the Supreme Court has cautioned against "procedural rules that tended to diminish the reliability of the sentencing determination." *Id.* at 638. The lack of unanimity in sentencing phase factors, as California's scheme is currently construed, directly affects the reliability of the sentencing proceeding. *See, e.g.*,

Hurst, 202 So. 3d at 58–59 (recognizing and explaining why unanimous verdicts are inherently more reliable); *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988) (noting that "[u]nder ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps assure the reliability of the ultimate verdict," and concluding that "jury unanimity is an especially important safeguard at a capital sentencing hearing").

Second, only four justices believed that the Sixth Amendment jury right does not encompass jury unanimity. *Apodaca*, 406 U.S. at 410. By contrast, five justices found that the Sixth Amendment right *does* require unanimous juries. *Id.* at 414 (Stewart, J., dissenting); *Johnson v. Louisiana*, 406 U.S. 380, 382 (1972) (Douglas, J., dissenting). While four justices would have held that the Sixth Amendment requires unanimous juries in state criminal trials, Justice Powell concurred narrowly in *Apodaca* due to his belief that the Sixth Amendment only requires unanimity with regard to federal criminal trials, *see Johnson*, 406 U.S. at 371 (Powell, J., concurring), and does not extend to the states because "there is no sound basis for interpreting the Fourteenth Amendment to require blind adherence by the States to all details of the federal Sixth Amendment standards," *id.* at 375. However, the Supreme Court has since questioned Justice Powell's skepticism. *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 766 n.14 (2010) (identifying *Apodaca* as the sole exception in a long line of cases holding that incorporated Bill of Rights protections are to be equally enforced against the state and federal governments and noting that the decision was "the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation"). Under the prevailing view

of incorporation, if five Justices agreed that the Sixth Amendment right includes the right to a unanimous jury, then that standard is to be applied evenly against the federal government and the states. *See also Rauf*, 145 A.3d at 480 n.300 (Strine, C.J., concurring) (citing *McDonald* to reach the same conclusion); *id.* at 484-85 (Holland, J. concurring) (same).

Third, not even the plurality entirely denigrated the important role of unanimity in the jury right. Again, it merely saw "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Apodaca*, 406 U.S. at 411. California law, by contrast, permits juries to make the critical weighing determination under Penal Law Pen. Code §§ 190.3, 190.4, without any requirement that 10 or 11 jurors agree on the aggravating factors they are weighing. In California, even if just one juror believes that a given aggravating crime has been proven she may use that crime as a circumstance in aggravation.

Fourth, and most to the point of this historical brief, the four-justice plurality's conclusions about the history of the Sixth Amendment and the framers' understandings of the jury right were simply incorrect. The plurality acknowledged but rejected the possibility that Congress "eliminated references to unanimity" not for substantive effect, but "because [it was] thought already to be implicit in the very concept of the jury." *Apodaca*, 406 U.S. at 409–10. As shown in the detailed history above, the plurality chose the wrong alternative: framers, judges, and scholars writing before, during and after the Bill of Rights was written and ratified all agreed that the jury right our Founders fought for *was* the English common law right. That right indisputably encompassed unanimity.

Fifth, since *Apodaca*, the U.S. Supreme Court has repeatedly assumed the applicability of the unanimity rule to state criminal prosecutions. *See Apprendi*, 530 U.S. at 477 (quoting Blackstone and noting requirement of facts "confirmed by the unanimous suffrage of twelve of [accused's] equals and neighbours"); *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (quoting *Apprendi* and Blackstone); *S. Union Co. v. United States*, 567 U.S. 343, 356 (2012) (same). *See also Ring*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

C. Regardless, the California right is not affected by *Apodaca*.

Article I, Section 16 of the California Constitution, expressly recognizes jury unanimity as an "inviolate right" and is expressly and unambiguously required in all criminal cases. CAL. CONST. art. I, § 16. Thus, California jurors are not bound by *Apodaca*, but by the California Constitution's requirement of unanimous criminal juries. *See People v. Collins*, 17 Cal. 3d 687, 691-93 (1976) ("Among the essential elements of the right to trial by jury are the requirements that a jury in a felony prosecution consist of 12 persons and that its verdict be unanimous.").

Further, even well-publicized efforts to amend California's unanimity requirement have exempted capital cases. In 1995, following the highly-publicized acquittal of O.J. Simpson, two California legislators proposed constitutional amendments to end the constitutional unanimity requirement. Assembly member Richard Rainey's proposed amendment would have amended Section 16 to allow a non-capital criminal conviction or acquittal when "five sixths" of the jury had agreed upon a verdict, while Senator Charles Calderon's proposed amendment would have permitted a conviction or acquittal based on

an 11-1 verdict. *See* Jeremy Osher, *Jury Unanimity in California: Should it Stay or Should it Go*, 29 Loyola of Los Angeles L. Rev. 1319, 1323 – 24 (1996); James Kachmar, *Silencing the Minority: Permitting Non-Unanimous Jury Verdicts in Criminal Trials*, 28 PAC. L. J. 273, 291 – 93 (1996). Neither of these proposals included capital cases: Rainey's excluded capital cases specifically, while Calderon's proposal excluded criminal actions where the jury could sentence the defendant to death or to life without the possibility of parole. *See* Kachmar, *supra*, at n.165 (Calderon) and n.170 (Rainey); *see also* Harriet Chiang, *Plan to End Unanimous Verdicts Stalls in Assembly Committee*, S. F. Chron. (May 10, 1995), *available at* https://www.sfgate.com/news/article/Plan-to-End-Unanimous-Verdicts-Stalls-in-Assembly-3033957.php. Likewise, the Public Safety Protection Act, a voter-led initiative to amend the Constitution, specifically exempted "criminal action[s] in which the death penalty is sought" from its proposal to allow 10-2 or 11-1 jury verdicts. *See* Kachmar, *supra*, at 293.

The failure of these proposals underscores that jury unanimity in California remains an absolute right that is not precluded by *Apodaca*. *Cf. Hurst*, 202 So. 3d at 57 ("[T]his Court, in interpreting the *Florida Constitution* and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution.") (emphasis added).

Thus, regardless of *Apodaca*'s ongoing validity with respect to federal constitutional law, the decision does not prevent this Court from ruling in accordance with the common-law understanding that the jury right encompasses unanimity and with this state's strong tradition of requiring unanimity, particularly in capital trials.

D. Applying the right to a unanimous jury requires, contrary to California law, the jury to be unanimous on at least on aggravating circumstance, and that only unanimously-found aggravators may be weighed against the mitigation.

What does the common-law right to unanimity, enshrined in the California Constitution and the Sixth Amendment, mean for California's capital sentencing scheme, and Johnson's sentence in particular? It means that the system, as interpreted in this Court's case law, and applied at Johnson's capital sentencing, violates these Constitutional rights. As shown above, the jury was not required to be unanimous in its decision of any single aggravating circumstance it found, nor in which aggravating circumstances, unanimously found, were being considered in the weighing question. This violates the Sixth Amendment and the California Constitution. *See Hurst*, 202 So. 3d at 53-54 (concluding that "just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury[,] including "finding the existence of any aggravating factor"); *Rauf*, 145 A.3d at 434 (requiring "finding of the existence of 'any aggravating circumstance,'" to be found by the jury unanimously).

Long ago, the U.S. Supreme Court held that the issues a jury must decide before imposing a death sentence must be decided unanimously. In *Andres*, 333 U.S. at 747-48, the Court held that the jury deciding whether to convict under the federal capital-sentencing statute had to be unanimous in its determination that death was the appropriate sentence. *Id.* The federal scheme provided for a unitary trial, at which the jury could

append to a verdict of guilty, "without capital punishment." *Id.* at 747 (internal quotation marks omitted). The Court held that that the jury had to be unanimous on both issues submitted to it – guilt of the capital offense, and whether to reject the option to extend mercy. *Id.* at 752.

Similarly, on remand from the U.S. Supreme Court in *Hurst*, 136 S. Ct. at 616, the Florida Supreme Court cited its own history and concluded that under "Florida's state constitutional right to trial by jury, and our Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed." *Hurst*, 202 So. 3d at 59. This includes "finding the existence of any aggravating factor." *Id.* at 54. *See also* id. at 57 ("*Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous.").

Interpreting the decision of the U.S. Supreme Court in *Hurst*, and undertaking its own deep historical review, the Delaware Supreme Court held that the Sixth Amendment requires not only that Delaware's requisite weighing determination be unanimously found, but also "the existence of 'any statutory aggravating circumstance[.]" *Rauf*, 145 A.3d at 456.

In reaching these decisions, the Delaware and Florida Supreme Courts each reversed long lines of former state precedent that had relied on *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989) – the two decisions specifically reversed in *Hurst*, 136 S. Ct. at 616. *See Rauf*, 145 A.3d at 434 ("This

Court's prior cases on the constitutionality of Delaware's capital sentencing scheme are hereby overruled to the extent they are inconsistent with the answers in this opinion."); *Hurst*, 202 So. 3d at 44 (noting that the U.S. Supreme Court decision abrogated "this Court's decisions" in four different cases that had upheld Florida's previous, non-unanimous jury recommendation scheme). For similar reasons, and for the reasons set out in Johnson's briefing and here, this Court should do the same.

Finally, it should be noted that the findings of which aggravators are proven, and therefore the jury may permissibly weigh against the mitigating factors, is not akin to different means of committing the same crime, on which a jury need not be unanimous. *See*, *e.g.*, *Schad v. Arizona*, 501 U.S. 624, 644 (1991). That is so because the alternate aggravators at issue here each establish or involve a *different* crime. As Justice Scalia emphasized in his concurring opinion in *Schad*, "We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the 'moral equivalence' of those two acts." *Id.* at 651 (Scalia, J., concurring). *See also People v. Russo*, 25 Cal. 4th 1124, 1132 (Cal. 2001) ("This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' . . . The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.") (internal quotation marks and citations omitted) (emphasis in original).

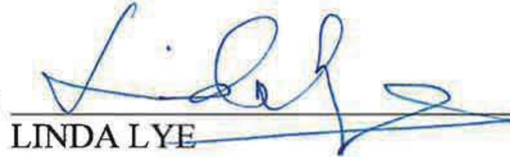
CONCLUSION

For the reasons set forth above, this Court should find that California's capital sentencing scheme, as applied in Johnson's case, violated his Sixth Amendment and California Constitution's jury rights to a unanimous jury verdict and to having the State prove every issue submitted to the jury beyond a reasonable doubt.

Respectfully submitted,

Dated: August 21, 2018

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

By: 
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Attorneys for *Amici Curiae* ACLU, ACLU of Northern California, ACLU of Southern California and ACLU of San Diego and Imperial Counties

CERTIFICATE OF COMPLIANCE

I certify under Rule of Court 8.520(c) that the text in the attached Brief of *Amici Curiae* contains 13,722 words, including footnotes, but not including the caption, table of contents, table of authorities, application, signature blocks, or this certification, as calculated by Microsoft Word.

Dated: August 21, 2018 By: /s/ Linda Lye

LINDA LYE

Attorneys for *Amici Curiae* ACLU of Northern California, ACLU of Southern California and ACLU of San Diego and Imperial Counties

PROOF OF SERVICE

I, Angela Castellanos, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City of San Francisco, County of San Francisco, California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of the American Civil Liberties Union Foundation of Northern California, and my business address is 39 Drumm Street, California 94111.

On August 21, 2018, I served the following document(s):

Application for Pro Hac Vice Admission of Brian William Stull;
Memorandum of Points and Authorities in Support;
Verified Application of Brian William Stull; [Proposed] Order

Application for Leave to File *Amici* Brief of ACLU, ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego and Imperial Counties in Support of Defendant and Appellant Johnson

Proposed *Amici Curiae* Brief of ACLU, ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego and Imperial Counties in Support of Defendant and Appellant Johnson

In the Following Case:
People of the State of California v. Joe Edward Johnson
No. S029551

on the parties stated below by the following means of service:

By U.S. Mail enclosing a true copy in a sealed envelope in a designated area for outgoing mail, addressed with the mentioned addressees. I am readily familiar with the business practices of the ACLU Foundation of Northern California for collection and processing of correspondence for mailing with the United States Postal Service and correspondence so collected and processed is deposited with the United States Postal Service on the same date in the ordinary course of business. The envelopes were addresses and mailed on **August 21, 2018,** as follows:

Joe Edward Johnson
C-31602
North Seg. 16-South
San Quentin State Prison
San Quentin, CA 94974

Clerk of the Supreme Court for
delivery to the Honorable Peter
Mering
720 Ninth St.
Sacramento, CA 95814

By Electronic Service via TrueFiling, addressed to the email addresses listed below. I am readily familiar with the practices and procedures for TrueFiling.

Melissa Lipon, DAG
Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94424
VIA TRUEFILING @
Melissa.lipon@doj.ca.gov on
August 21, 2018

Michael J. Hersek
Habeas Corpus Resource Center
303 2nd St
San Francisco, CA 94107
VIA TRUEFILING @
mhersek@hcrc.ca.gov on
August 21, 2018

Andrew Shear
Office of the State Public Defender
1111 Broadway, Suite 1000
Oakland, CA 94607
VIA TRUEFILING @
andrew.shear@ospd.ca.gov on
August 21, 2018

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on August 21, 2018 at San Francisco, California.

Angela Castellanos,

DECLARANT

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 9/26/2018 by April Boelk, Deputy Clerk

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**
Lower Court Case Number:

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

2. My email address used to e-serve: **llye@aclunc.org**

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

Title(s) of papers e-served:

Filing Type	Document Title
APPLICATION	Application for Leave to File Amici Brief
AMICUS CURIAE BRIEF	Proposed Amici Curiae Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Attorney General - Sacramento Office Melissa Lipon, Deputy Attorney General SAG	sacawttrufiling@doj.ca.gov	e-Service	8/21/2018 5:44:01 PM
Attorney General - Sacramento Office Melissa Lipon, Deputy Attorney General SAG	sacawttruefiling@doj.ca.gov	e-Service	8/21/2018 5:44:01 PM
Habeas Corpus Resource Center Michael J. Hersek, Executive Director HRC	mhersek@hcrc.ca.gov	e-Service	8/21/2018 5:44:01 PM
Andrew Shear Office of the State Public Defender 244709	andrew.shear@ospd.ca.gov	e-Service	8/21/2018 5:44:01 PM
Linda Lye American Civil Liberties Union Foundation of Northern California 215584	llye@aclunc.org	e-Service	8/21/2018 5:44:01 PM

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

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

8/21/2018
Date

/s/Linda Lye
Signature

Lye, Linda (215584)

Last Name, First Name (PNum)

American Civil Liberties Union Foundation of Northern California

Law Firm