SUPREME COURT COPY

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No. S171393

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DONTE LAMONT MCDANIEL, Defendant and Appellant.	Los Angeles Superior Ct. No. TA074274

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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

HONORABLE ROBERT J. PERRY, JUDGE

SUPREME COURT
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Jorge Navarrete Clerk
Deputy

MARY K. McCOMB
State Public Defender

*ELIAS BATCHELDER
Deputy State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94607
Telephone: (510) 267-3300
Facsimile: (510) 452-8712
batchelder@ospd.ca.gov

Attorneys for Appellant

DEATH PENALTY

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APPELLANT'S SUPPLEMENTAL OPENING BRIEF

XI.

FAILURE TO REQUIRE JURY DETERMINATIONS AT THE PENALTY PHASE OF ISSUES OF FACT UNANIMOUSLY AND BEYOND A REASONABLE DOUBT VIOLATES THE SIXTH AMENDMENT

Appellant argued in his opening brief that Penal Code[1] section 1042 and Article I, section 16 of the California Constitution require that all "issues of fact" be tried by a jury, in accordance with the common law protection of unanimity and proof beyond a reasonable doubt (hereinafter "jury protections" or "jury right protections") (AOB at 196-224.) Appellant argued that the ultimate determination of penalty and the existence of aggravating factors are indeed "issues of fact" as properly understood under state law. (See generally AOB at 203-210.) As a consequence, appellant argued that 1) unanimity is required as to aggravating factors and 2) proof beyond a reasonable doubt is required as to the ultimate penalty determination, and this Court should revisit its decisions to the contrary. (AOB at 211-223.)

In this supplemental brief, appellant makes a similar argument under the Sixth Amendment. In short, if appellant is correct – that California law designates the critical penalty phase determinations (i.e., the ultimate decision of penalty and existence of aggravating factors) as "issues of fact" under state law – this triggers application of the Sixth Amendment's jury protections. In fact, the United States Supreme Court has directly stated that the Sixth Amendment jury protections apply to "issues" including

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

"punishment" that are left to juries at a capital trial. (*Andres v. U.S.* (1948) 333 U.S. 740, 747 (*Andres*).)

Hildwin v. Florida (1989) 490 U.S. 638 (*Hildwin*), and *Spaziano v. Florida* (1984) 468 U.S. 447 (*Spaziano*) – the United States Supreme Court cases upon which this Court has repeatedly rested its rule that the Sixth Amendment jury right protections do not apply to the capital penalty phase, see, e.g., *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147, *People v. Lewis* (2008) 43 Cal.4th 415, 521, have been overruled. (*Hurst v. Florida* (2016) ___ U.S. ___; 136 S.Ct. 616, 624 (*Hurst*) ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*"].) It is therefore an appropriate time for this Court to reconsider its prior holdings regarding the application of the Sixth Amendment to the penalty phase of a capital trial.

A. Issues Of Fact Undergird The Scope Of The Sixth Amendment Jury Protections

No maxim of the old law "has been more carefully preserved in its integrity under our system" than that of "*[a]d qu[a]estionem juris respondent judices, ad qu[a]estionem facti respondent juratores.*"[2] (*People*

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[2]Judges answer to a question of law, jurors to a question of fact. (1 Burrill, A New Law Dictionary and Glossary (1850) p. 35; see also 1 Coke, Institutes 155b (1628); Wynne, Eunomus, or Dialogues Concerning The Law And Constitution Of England (1768) § 53, p. 207 ("[T]he Province of Judge and Jury [are] distinct, the facts are left altogether to the jury, and the law does not control the fact, but arises from it"); *Ex parte U. S.* (7th Cir. 1939) 101 F.2d 870, 874) ["Th[is] guiding principle was later enshrined in our American Constitution"], citing U.S. Const. Art. III, § 2; U.S. Const. 6th Amend; *Johnson v. Louisiana* (1972) 406 U.S. 366, 371 (conc. opn. of Powell, J.) [noting that the "historical approach to the Sixth Amendment" had long ago led the Supreme Court to decide that the jury has the power to decide only "questions of fact"]; see generally *Sparf v. U.S.* (1895) 156 U.S. 51 (*Sparf*).)

v. Durrant (1897) 116 Cal. 179, 200.) *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and its progeny rest on the Sixth Amendment right, in all criminal cases, to a "trial, by an impartial jury." (U.S. Const. 6th Amend.) In turn, the essential feature of the right to a "trial[] by . . . jury" which underlies *Apprendi*, and which had been recognized for hundreds of years, was the understanding that the jury decides all "issues of fact." (See, e.g., Thayer, *A Preliminary Treatise On Evidence At The Common Law* (1898) 183-189 ("Treatise On Evidence At The Common Law"); see also *ante*, p. 3, fn. 2.)

Critically, at common law, "issues of fact" *did not simply mean factual issues*, it was merely a shorthand to reference "questions raised by the pleadings," or "ultimate issues of fact." (Treatise On Evidence At The Common Law, *supra*, at p. 187; *In re Javier A.* (1984) 159 Cal.App.3d 913, 930, fn. 9 [earliest California cases guaranteed jury trial to "issue of fact [] made by the pleadings"]; *People v. Pantages* (1931) 212 Cal. 237, 267 ["issue of fact" arises "from an allegation of ultimate fact made by one of the parties which is denied by the other"]; 4 Blackstone's Commentaries 333; see AOB at 202.) The precise form or title of the accusatory pleading was not important: "whether preferred in the shape of indictment, information, or appeal" the key was that the "truth of every accusation" was subject to the "unanimous suffrage" of a jury. (4 Blackstone's Commentaries 343.)

Although the distinction between questions of fact and questions of law is occasionally blurry, in its most basic sense, "issues of fact" are defined by the trial itself, in turn guided by the Legislature's designation: "issues of fact, and only issues of fact, are to be tried by a jury. When they are so tried, the jury, and not the court, are to find the facts." Treatise On

Evidence At The Common Law, *supra,* at p. 189. In other words "[i]n the maxim, 'Ad quaestionem juris respondent judices, ad quaestionem facti respondent juratores,' the word 'quaestio' denotes an issue joined by the pleadings of the parties, or otherwise stated on the record, for decision by the appropriate tribunal. Issues of law, so joined or stated, are to be decided by the judge; issues of fact, by the jury." (*Sparf*, *supra*, 156 U.S. at p. 170 (dis. opn. of Gray, J.); see also Isaacs, *The Law and the Facts* (1922) 22 Colum. L. Rev. 1, 4 [criticizing the concept of an conclusive distinction between questions of law and fact and suggesting that "a great deal of confusion would be avoided if we frankly used some such expression as 'judicial questions' and 'jury questions'"].) The maxim therefore expresses the "general rule of proceeding on trials before a jury" where "it is the office of the judge to instruct the jury on points of law, and of the jury to decide on matters of fact." (1 Burrill, A New Law Dictionary and Glossary, *supra*, p. 36.) The Legislature's decision to create a penalty *trial* necessarily creates "issues of fact," for providing a verdict on issues of fact is what a jury determines in all trials. (See 3 Blackstone 330 ["Trial then is the examination of the matter of fact in issue; of which there are many different species, according to the difference of the subject, or thing to be tried"].)

Nor does the fact that the penalty phase trial answers "normative' issues alter the calculus. The central distinction at common law was not between "factual" and "non-factual" questions, but "jury questions" and "judicial questions." As between questions of fact and questions of law "[i]t is the *process* by which the result is attained which is or may be different, and *the tribunal through which such result is reached that differs*, rather than the result itself." (*Levins v. Rovegno* (1886) 71 Cal. 273, 276,

second italics added.) And it did not matter that the question involved some form of reasoning, inference, or personal judgment: jury questions ("issues of fact") are those issues which result in an answer (verdict) from the jury. (Thayer, *"Law and Fact" in Jury Trials* (1890) 4 Harv. L. Rev. 147, 150, citing *Littleton's Case*, 10 Coke 56b (1612); see also *Franzen v. Shenk* (1923) 192 Cal. 572, 589 [jury's province includes not merely to determine facts proven but "the justice of the inferences to be drawn from [] facts"].)

B. The Existence Of Aggravating Factors And The Ultimate Penalty Phase Determination Are Issues Of Fact

"The essence of trial by jury is that controverted facts shall be decided by a jury." (*People v. Hickman* (1928) 204 Cal. 470, 476.) This is precisely what occurs at the penalty phase proceeding, at least with respect to aggravating factors the truth of which is contested. For all its moral complexity, a large component of the California capital trial is nearly identical to a common law capital trial: did the defendant commit 1) the capital crime charged (factor (a)); 2) the unadjudicated crimes charged (factor (b)); 3) the adjudicated prior crimes (factor (c)); and, in light of these accusations and the mitigation case[3] 4) what is the ultimate verdict on the issue of penalty?

The existence of these aggravating factors, plead by the prosecution in its notice of aggravation, are those facts whose truth is "at issue." (*People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1236 ["despite the 'normative nature' of the penalty decision itself," the prosecution's

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

aggravating evidence may raise "disputed factual issues"]; see § 190.3 [requiring notice of aggravation]; 4 Blackstone's Commentaries 343 [precise form or title of accusatory pleading immaterial for purposes of the jury right].) And as this Court has repeatedly noted, the "ultimate issue" in a capital sentencing trial "is the appropriate penalty." (*People v. Anderson* (2001) 25 Cal.4th 543, 588; Treatise On Evidence At The Common Law, *supra*, at p. 187 ["issue of fact" includes "questions raised by the pleadings" and "ultimate issue" determined by a jury].)

That the California penalty phase proceeding is and has always been a trial, and not a mere sentencing hearing, is undebatable. The 1957 death penalty statute which first created the bifurcated proceeding specifically referred to the penalty phase as a "trial on the issue of penalty" (Former § 190.1, enacted by Stats.1957, ch. 1968, § 2, p. 3509) and this Court continues to refer to the penalty phase proceedings as a "trial." (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 113; *People v. Harris* (1989) 47 Cal.3d 1047, 1102 [ordering "new trial on the issue of penalty"]; *People v. Horning* (2004) 34 Cal.4th 871, 912 [discussing the necessity of a § 190.4, subd. (e), hearing when the defendant has waived his "jury trial on the issue of penalty"].) Indeed, as this Court has explained repeatedly, the guilt and penalty phases are just two "part[s] of a unitary trial." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365; *People v. Hamilton* (1988) 45 Cal.3d 351, 369 ["the penalty phase has no separate formal existence but is merely a stage in a unitary capital trial"].)

The understanding that the penalty phase is a trial stretches back to California's first unitary jury sentencing scheme adopted in the late 19th century. Most obviously, the jury's determination of penalty under this scheme was not separated from the capital "trial" on the issue of guilt. This

critically distinguishes early capital jury sentencing from traditional *non*-capital discretionary judicial sentencing proceedings, which had always been held (and continue to be held) before judges at hearings, not in trials before juries. (Cf. *People v. Wiley* (1995) 9 Cal.4th 580, 586 [prior conviction allegations that relate to sentencing unprotected by state jury right because "[f]rom the earliest days of statehood, trial courts in California have made factual determinations relating to the nature of the crime and the defendant's background in arriving at discretionary decisions in the sentencing process"].) The current penalty phase does *not* derive from such discretionary sentencing hearings; it is instead merely an outgrowth of the 19th century capital trial. (See *People v. Hall* (1926) 199 Cal. 451, 456 [the guilt and penalty determinations are "two necessary constituent elements" of the unitary capital trial verdict and must both be found unanimously].)

Although the penalty determination under the original California jury sentencing scheme was normally combined with the trial on the issue of guilt, California courts under the unitary jury sentencing scheme adopted in the late 19th century sometimes had occasion to order a proceeding only on the issue of punishment; namely, when there was a reversal and remand based on an error that effected only penalty. In such a case, this Court made abundantly clear that it regarded the sentencing component of a capital proceeding as a "trial on the issue of penalty." (*People v. Green* (1956) 47 Cal.2d 209, 212.) In other words, "[w]here the matter is to be determined by a jury, . . . the proceeding should be 'a trial in the full technical sense, and . . . governed by the same . . . rules of procedure' as the trial of the issue of guilt." (*Id.* at p. 236.) Of course, the most fundamental procedure of any

trial is "submission of issues of fact to a jury." (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 296; see also § 1042.)

In keeping with this concept, when "[i]n 1957 the Legislature replaced th[e] unitary proceeding with a bifurcated system" (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 9, fn. 9), it specifically noted that the "determination of the penalty" was an "issue of fact on the evidence presented." (Former § 190.1, enacted by Stats.1957, ch. 1968, § 2, p. 3509.) And while the current statute does not adopt this precise phrase – instead describing the jury as the "trier of fact"– that the jury is to decide "issues of fact" is nonetheless clear. (See Black's Law Dictionary (10th ed. 2014) p. 711 [defining "fact-finder" as "[o]ne or more persons who hear testimony and review evidence to rule on a *factual issue*"], italics added; see also *id.* at p. 959 [defining "issue of fact" as "[a] point supported by one party's evidence and controverted by another's"].)

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

Like any common law trial, the statute requires a unanimous verdict. (§ 190.4, subd. (b); *People v. Hall, supra*, 199 Cal. at pp. 456-458

[unanimous verdict on penalty required under state Constitution].) And the aggravating factors plead must be found beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 54 [factor (b) determination found beyond a reasonable doubt]; *People v. Williams* (2010) 49 Cal.4th 405, 459 [factor (c) found beyond a reasonable doubt]; *People v. Prieto* (2003) 30 Cal.4th 226, 256 [main component of factor (a), the existence of special circumstance murder, must be found beyond reasonable doubt].)

In sum, under California law, the penalty phase involves the resolution of 1) issues of fact 2) by a jury 3) at a trial. Which is precisely why Justice Schauer stated that section 1042 and Article I, section 16 gives a defendant charged with murder "the right, . . . *to have the jury determine* not only the question of his guilt . . . but also, if the offense be murder of the first degree, *the penalty to be imposed*." (*People v. Williams* (1948) 32 Cal.2d 78, 102, (dis. opn. of Justice Schauer).)[4] The question then, is whether the mere fact that the penalty phase proceeding involves a determination of sentence – a task traditionally assigned to judges in many non-capital proceedings – defeats the application of the Sixth Amendment. Because the penalty phase proceeding is in fact a "trial" under California

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[4]In the opening brief, appellant mistakenly attributed Justice Schauer's dissenting statements on this issue as the holding of the Court in *Williams*. (See AOB at 204-205, 218.) However, although the citation was erroneous, the point remains valid. Justice Schauer later wrote the opinion in *People v. Green* (1956) 47 Cal.2d 209 (*Green*), disapproved on another ground in *People v. Morse* (1964) 60 Cal.2d 631. *Green* overruled the majority in *Williams*. (See *People v. Green, supra*, 47 Cal.2d at p. 232.) More importantly, Justice Schauer's opinion in *People v. Green* adopted the reasoning of his dissent in *Williams* and relied extensively on the holding (enforcing some of the same principles as his dissent in *Green*) of *Andres v. United States*, *supra*, 333 U.S. 740, a case discussed in more detail below.

law, it triggers the jury protections for "trials" embodied by the Sixth Amendment. Although *Apprendi* and its progeny provide guidance on this issue, the most directly pertinent cases actually precede *Apprendi*, and more directly confront the importance of a legislative choice between trials and sentencing hearings.

C. *Andres v. U.S.* (1948) 333 U.S. 740 Dictates The Effect Of A Legislative Choice To Assign Issues Of Fact To The Jury At A Trial On The Issue Of Penalty

Apprendi, and all of the cases in the *Apprendi* line, involve legislative determinations that *judges* were to answer certain factual questions relevant to sentencing. The most significant United States Supreme Court case to directly examine the Sixth Amendment consequence of the legislative decision to provide the *jury* the responsibility of determining the issue of punishment at a capital trial is *Andres v. U.S., supra*, 333 U.S. 740, 747 (*Andres*).

Andres dealt with a federal death penalty statute under a unitary regime, which provided the death penalty for certain murder offenses, but which Congress amended to allow the jury to "qualify their verdict by adding thereto 'without capital punishment.'" (*Andres, supra*, 333 U.S. at p. 747.) At issue was whether this statute required a unanimous jury determination in favor of death, and, if so, whether the instructions properly conveyed this requirement to the jury. (See *id.* at pp. 748-752.) With respect to the issue of whether the Sixth Amendment mandated the statute bestow the right to unanimity on the issue of penalty, the Court's analysis was straightforward and in harmony with the common law tradition that "issues" tried by the jury were protected:

> Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. *In criminal cases* this requirement of unanimity

> extends to *all issues*—character or degree of the crime, guilt *and punishment—which are left to the jury.*

(*Andres,* 333 U.S. at p. 748, italics added.)

The Court explained that this was true because a "verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it." (*Andres,* 333 U.S. at p. 748; see also *Stone v. Superior Court, supra*, 31 Cal.3d at 514 ["a verdict represents the definite and final expression of the jury's intent with respect to the disposition of the factual issues presented by a particular case"]; 2 Burrill, A New Law Dictionary and Glossary, *supra,* at p. 1032 [verdict is "a declaration by a jury of the truth of a matter in issue"].) In other words, under *Andres*, if the legislature assigns the jury the task of rendering its verdict on an issue of fact at a trial, *even on the issue of penalty*, Sixth Amendment protection applies.[5]

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

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[5]Nor was *Andres* alone in the determination that the jury right protections applied to capital proceedings on the issue of punishment. As mentioned in appellant's opening brief (AOB 206-208) California has long applied the jury protection of unanimity to the punishment determination under the state Constitution. (*People v. Green* (1956) 47 Cal.2d 209, 221, 224-226 [approving *Andres* and reaffirming decision of *People v. Hall* (1926) 199 Cal. 451, 456-458 that unanimity right extends to penalty under California Constitution].) And other courts applied similar reasoning. (See, e.g., *Smith v. U.S.* (9th Cir. 1931) 47 F.2d 518, 520 ["Unanimity in a verdict, unless otherwise provided by statute, is one of the incidents and essentials of a jury trial. In a criminal case, this unanimity extends to. . . the kind or character of punishment, where that question is left to the determination of the jury"].)

Bullington v. Missouri (1981) 451 U.S. 430 (*Bullington*), a double jeopardy case.[6] The court in *Bullington* recognized the existence of a traditional trial-sentencing distinction with respect to the double jeopardy protections. But the court explained that a capital sentencing *trial* "differs significantly" from traditional judicial sentencing hearings, honing in on the marked similarities between a capital penalty phase and a common law trial. (See *id.* at p. 438 [noting absence of unbounded jury discretion, binary choice between two alternatives, and proof beyond reasonable doubt standard of proof, and concluding the penalty phase "resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence"].) The *Bullington* Court specifically noted that the penalty phase was "itself a trial on the issue of punishment so precisely defined by the Missouri statutes." (*Ibid*; see also *id.* at p. 438, fn. 10 [finding it not "without significance" that state law referred to the penalty hearing as a "trial"].)

D. The United States Supreme Court Takes A Wrong Turn: The Expansive Dicta Of *Spaziano* Undermines The Historical Understanding Of The Jury Right As Applying To Trials On Issues Of Fact, Including Punishment

Despite the clear focus of *Andres* and *Bullington* on issues of fact designated by the Legislature for trial by jury – even on the issue of

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