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DEATH IS DIFFERENT: THE NEED FOR JURY UNANIMITY IN DEATH PENALTY CASES

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I. INTRODUCTION

In 1972, the Supreme Court of the United States abolished the death penalty in the United States.[3] In siding with the majority, Justice Brennan wrote that "[d]eath is a unique punishment."[4] Since then, justices have repeated the maxim that "death is different."[5] Indeed, the utter irreversibility of execution sets death apart from all other punishments.[6] A death sentence represents the jury's—and by extension the community's—judgment that the defendant has forfeited the right to live.[7]

The Supreme Court has held that death penalty cases require extensive procedural safeguards.[8] Such safeguards ensure that only defendants found guilty of the most grievous crimes receive the death penalty.[9] Those safeguards must pervade all aspects of a death penalty case, from trial to appellate review.[10]

Procedural safeguards must regulate not only the judge's role, but the

3. *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam) (holding the "imposition and carrying out of the death penalty . . . constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments").

4. *Id.* at 286 (Brennan, J., concurring).

5. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 241 (2007); *see also Furman*, 408 U.S. at 289 (Brennan, J., concurring) (stating the severity of death is found in its enormity and finality and therefore, "[d]eath . . . is in a class by itself."); *id.* at 306 (Stewart, J., concurring) (contending that the death penalty is different, not in degree, but in kind, from other forms of criminal punishment); Gregg v. Georgia, 428 U.S. 153, 188 (1976) (Stewart, Powell, and Stevens, JJ., joint opinion) (emphasizing the death penalty's uniqueness by finding that the "penalty of death is different in kind from any other punishment"); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Stewart, Powell, and Stevens, JJ., joint opinion) (postulating that the "penalty of death is qualitatively different from a sentence of imprisonment, however long"); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (finding the "penalty of death is qualitatively different"); Spaziano v. Florida, 468 U.S. 447, 459 (1984) (citing the Court's prior recognition of the "qualitative difference of the death penalty"); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) (stating the "death penalty is qualitatively different . . . and hence must be accompanied by unique safeguards"); Wainwright v. Witt, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (citing the formerly unquestioned principle that unique safeguards are necessary because the death penalty is "qualitatively different"); McCleskey v. Kemp, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) ("It hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death."); Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (finding the majority opinion, which held it to be cruel and unusual to punish mentally challenged persons with death, the "pinnacle of . . . death-is-different jurisprudence"); Ring v. Arizona, 536 U.S. 584, 605–06 (2002) (citing to a statement made during an oral argument where an attorney stated that there was "no doubt that '[d]eath is different'"); *id.* at 614 (Breyer, J., concurring) (citing to the Court's holding that the "Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty").

6. VIDMAR & HANS, *supra* note 5, at 241.

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

jury's as well.[11] By design, juries play a major role in death penalty cases.[12] They decide not only whether the defendant is guilty of a capital offense, but also whether the facts surrounding that offense are so atrocious that the defendant deserves to die.[13]

In light of the jury's significant role, all death penalty jurisdictions have a two-phase proceeding.[14] In the first phase — the trial phase — the jury must determine whether the defendant is guilty of a capital crime.[15] If the jury finds the defendant guilty, the same jury then participates in the second phase — the penalty phase — in which it determines whether the defendant's crime deserves the death penalty.[16]

Before the defendant may be sentenced to death, the prosecution must prove that one or more statutory aggravating circumstances apply.[17] Aggravating circumstances, such as murders involving torture or those committed for pecuniary gain, are thought to make a defendant more deserving of the death penalty.[18] After the prosecution's presentation of

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11. *See supra* text accompanying notes 5–8.

12. *See* VIDMAR & HANS, *supra* note 5, at 241.

13. *See id.*

14. *See id.* at 244.

15. *See* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 220 (1994).

16. *See id.*

17. Throughout this article, the terms "aggravating circumstance" and "aggravator" are used interchangeably. Similarly, the terms "mitigating factor" and "mitigator" are used interchangeably.

18. *See* VIDMAR & HANS, *supra* note 5, at 244. In Florida, for example, aggravating circumstances are limited to the following fifteen items:

> (a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation. (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. (c) The defendant knowingly created a great risk of death to many persons. (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb. (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (f) The capital felony was committed for pecuniary gain. (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. (h) The capital felony was especially heinous, atrocious, or cruel. (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties. (k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity. (l) The victim of the capital felony was a person less than 12 years of age. (m) The victim of the capital felony was particularly

aggravating circumstances, the defendant may present evidence of mitigating factors.[19] Such circumstances, which may include a defendant's age, a childhood involving abuse, or a mental defect, may mitigate the heinous nature of the crime and make the defendant less deserving of the death penalty.[20] If the jury believes the prosecution proved the existence of one or more aggravating circumstances, the jury must then weigh the aggravating circumstances against any mitigating factor.[21]

The jury's considerations of the existence of aggravating circumstances, the existence of mitigating factors, and the relative weight of those factors, determines whether the defendant should receive the death penalty.[22] Whether the defendant should receive the severe and irrevocable penalty of death is a grave decision. Therefore, before allowing the court to impose the ultimate penalty, virtually all jurisdictions that authorize the death penalty require juries to make certain decisions unanimously.[23] Indeed, for more than six hundred years, a unanimous jury verdict has "stood as a distinctive and defining feature of jury trials."[24]

Florida requires jury unanimity in virtually all criminal trials.[25] The only exception is death.[26] In this sense, the maxim that "death is different" takes on ironic tones. In Florida, once the defendant is found guilty of a capital crime, the jury, after considering the aggravating and mitigating factors, recommends the sentence to the judge.[27] The judge, however, ultimately imposes the sentence.[28] Florida stands alone among thirty-five states in allowing a simple majority of the jury both to decide whether the prosecution proved an aggravating circumstance and to recommend a sentence of death.[29] Both legal and policy grounds suggest that more than a simple majority should be required.[30] Florida should change its capital

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vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim. (n) The capital felony was committed by a criminal gang member as defined in s. 874.03. (o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or person previously designated as a sexual predator who had the sexual predator designation removed.

FLA. STAT. § 921.141(5) (2009).

19. VIDMAR & HANS, *supra* note 5, at 244.
20. *See id.*
21. *See id.*
22. *Id.*
23. *Id.* at 260.
24. ABRAMSON, *supra* note 15, at 179.
25. *See* FLA. R. CRIM. P. 3.440.
26. *See* FLA. STAT. § 921.141(3) (2009).
27. *Id.* § 921.141(1)-(2).
28. *Id.* § 921.141(3).
29. *See* discussion *infra* Parts II, III.
30. *See* discussion *infra* Parts IV.B–C, V.B.

sentencing scheme to require that a jury unanimously find an aggravator.

Part II of this Article explores the contours of Florida's capital sentencing scheme and focuses on the portion of the Florida Statutes that authorizes a mere majority of the jury to determine the existence of an aggravator. Part III examines capital sentencing schemes across the country to determine whether Florida's scheme is typical of those in other States. Part IV then explores Supreme Court precedent on capital sentencing schemes to determine whether the United States Constitution requires a state to determine aggravators unanimously. Finally, in Part V, after exploring historical and policy reasons behind the requirement that only unanimous juries render verdicts, the authors recommend that the Florida Legislature revisit its death penalty statute to require unanimous juries find the prosecution proved an aggravator.

II. UNLIKE ALL OTHER STATES, FLORIDA ALLOWS A SIMPLE MAJORITY OF THE JURY TO FIND THE PROSECUTION PROVED AN AGGRAVATING CIRCUMSTANCE

Florida, like all other states that have retained the death penalty,[31] divides capital cases into two distinct stages.[32] At the first stage, the jury hears evidence and decides whether the defendant is guilty of the crime charged.[33] To proceed to the second stage, the jury must unanimously find the defendant guilty of first-degree murder.[34] If it does, the same jury then hears evidence to decide whether statutory aggravating circumstances exist, and if they do, whether statutory, as well as non-statutory, mitigating circumstances exist that override the aggravating circumstances.[35] This second stage, labeled a "separate sentencing proceeding,"[36] is essentially another trial. Although the prosecution need not list the aggravating circumstances in the indictment,[37] it must prove the aggravating

31. For information on which states have retained the death penalty, see *infra* notes 49–55 and accompanying text.

32. *See* FLA. STAT. § 921.141(1).

33. *See id.*

34. *See* FLA. R. CRIM. P. 3.440.

35. *See* FLA. STAT. § 921.141(1)–(2). Scholars who have examined the issue suggest that a bifurcated process in which guilt is decided separately from punishment provides the soundest procedure. *Id.*; Gregg v. Georgia, 428 U.S. 153, 190–91 (1976). The drafters of the Model Penal Code concluded that if a unitary proceeding is used, "the determination of the punishment must be based on less than all the evidence that has a bearing on that issue, such for example as a previous criminal record of the accused, or evidence must be admitted on the ground that it is relevant to sentence, though it would be excluded as irrelevant or prejudicial with respect to guilt or innocence alone." *Id.* at 191 (quoting MODEL PENAL CODE § 201.6 cmt. 5 (Tentative Draft No. 9, 1959)).

36. FLA. STAT. § 921.141(1).

37. Sireci v. State, 399 So. 2d 964, 970 (Fla. 1981).

circumstances beyond a reasonable doubt.[38] The defense, on the other hand, need only "reasonably convince[]" the jury about the existence of mitigating circumstances.[39]

If the jury finds that the prosecution has proven beyond a reasonable doubt one or more aggravating circumstances, it must then determine whether those circumstances warrant recommending a death sentence.[40] Then, if the jury decides that they do, it must also decide whether mitigating circumstances outweigh the aggravating circumstances.[41] Based upon the totality of the circumstances, the jury then recommends whether the defendant should be sentenced to life imprisonment or death.[42]

Florida's capital sentencing scheme is largely the same as those in other states,[43] except for one glaring flaw: Florida requires no more than a simple majority of the jury to find that one or more aggravating circumstances exist.[44] Thus, even if five out of twelve jurors (nearly 42%) believe the prosecution failed to prove, beyond a reasonable doubt, that an aggravating circumstance existed, the defendant may nevertheless receive the severe, irreversible penalty of death.[45] Perhaps even more surprising is that a simple majority need not agree on which aggravating circumstances apply.[46] The jury may still recommend a death sentence even if each juror believes a different aggravator was proven.[47] For example, one juror may believe that the murder was especially heinous, atrocious, or cruel; while another may believe that it was cold, calculated and premeditated, while yet another may believe that the murder was committed in the course of a felony, and each juror may disagree with the others as long as seven of them agrees that at least one aggravator—whichever it is—applies.

With so much at stake, many scholars find it problematic that Florida's capital sentencing scheme allows juries to decide the existence of aggravators by a mere majority vote.[48] The following section explores

38. Standard Jury Instructions in Crim. Cases – No. 96-1, 690 So. 2d 1263, 1268 (Fla. 1997).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Assuming, of course, the state has retained the death penalty and thereby has a capital sentencing scheme. *See supra* text accompanying notes 29–40. For information on which states have retained the death penalty, see *infra* notes 49–55 and accompanying text.

44. FLA. STAT. § 921.141(2)–(3).

45. *See id.*

46. *See id.*

47. *See id.*; *see also* O.H. Eaton, Jr., *Capital Punishment: An Examination of Current Issues and Trends and How These Developments May Impact the Death Penalty in Florida*, 34 STETSON L. REV. 9, 30 (2004).

48. *See, e.g.*, Eaton, *supra* note 47, at 52–53.

capital sentencing schemes in other states to determine whether Florida's scheme is typical or aberrational.

III. CAPITAL SENTENCING SCHEMES ACROSS THE NATION REQUIRE JURY UNANIMITY BEFORE A DEFENDANT CAN BE SENTENCED TO DEATH

In the United States, thirty-five states have retained the death penalty.[49] Thirty-four of those require that the jury unanimously agree on the existence of an aggravating circumstance.[50] Of those thirty-four, the vast majority—twenty-five—require by statute *both* that the jury unanimously agree on the existence of aggravators and that it unanimously recommend the death penalty.[51] Three others require by statute unanimity only as to the finding of aggravators.[52]

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49. *See generally* State v. Steele, 921 So. 2d 538 (Fla. 2005) (illustrating a comprehensive survey of states that have retained the death penalty along with commentary on Florida's capital sentencing scheme).

50. *See id.*

51. The following states require a unanimous finding on aggravators, as well as a unanimous recommendation of death, pursuant to their respective sentencing statutes: Arizona (ARIZ. REV. STAT. § 13-703.01(E), (H) (2009)); Arkansas (ARK. CODE ANN. § 5-4-603(a) (2009)); California (CAL. PENAL CODE § 190.4(a)-(b) (2009)); Colorado (COLO. REV. STAT. § 18-1.3-1201(2)(a) (2008)); Georgia (GA. CODE. ANN. § 17-10-31.1(c) (2009)); Idaho (IDAHO CODE ANN. § 19-2515(3)(b) (2009)); Illinois (720 ILL. COMP. STAT. ANN., § 5/9-1(g) (2009)); Kansas (KAN. STAT. ANN. § 21-4624(e) (2008)); Louisiana (LA. CODE CRIM. PROC. ANN. art. 905.7 (2009); State v. Sonnier, 402 So.2d 650, 657 (La. 1981)); Maryland (MD. CODE ANN., CRIM. LAW, § 2-303(i) (2009); Baker v. State, 790 A.2d 629, 636 (Md. 2002); Metheny v. State, 755 A.2d 1088, 1097 (Md. 2000)); Mississippi (MISS. CODE ANN. § 99-19-103 (2008)); New Hampshire (N.H. REV. STAT. ANN. § 630:5(IV) (2009)); Ohio (OHIO REV. CODE ANN. § 2929.03(B), (D) (2009); OHIO R. CRIM. P. 31)); Oklahoma (OKLA. STAT. tit. 21, § 701.11 (2009)); Oregon (OR. REV. STAT. § 163.150(1)(b)-(e) (2007)); Pennsylvania (42 PA. CONS. STAT. § 9711(c)(1)(iv) (2009)); South Carolina (S.C. CODE. ANN. § 16-3-20(C) (2008)); South Dakota (S.D. CODIFIED LAWS §§ 23A-26-1, 23A-27A-4) (2009)); Tennessee (TENN. CODE ANN. § 39-13-204(g) (2009)); Texas (TEX. CODE CRIM. PROC. ANN. art. 37.07 1(2) (2009)); Washington (2005 Wash. Laws ch. 68, § 4; WASH. REV. CODE §§ 10.95.060, 10.95.080 (2009)); and Wyoming (WYO. STAT. ANN. § 6-2-102(d)(ii) (2009)).

Although the North Carolina, Utah and Virginia statutes are silent as to what portion of the jury must find an aggravator, a unanimous vote in favor of a death sentence necessarily implies a unanimous finding of an aggravator, for the jury cannot recommend death unless it finds an aggravator. *See* N.C. GEN. STAT. §15A-2000 (2009); UTAH CODE ANN. § 76-3-207(5) (2009); VA. CODE ANN. § 19.2-264.4 (2009); State v. Carter, 888 P.2d 629, 655 (Utah 1995) (concluding there is no requirement that the jury find *separately* and unanimously each aggravator relied on in imposing the death penalty); Clark v. Commonwealth, 257 S.E.2d 784, 791–92 (Va. 1979) (concluding it is not necessary for jurors to *specify* that they found an aggravator or aggravators unanimously). This proposition, however, assumes the jury understands and faithfully follows the jury instructions. The federal government, when imposing the death penalty, also requires by statute that a unanimous jury render the decision. *See* 18 U.S.C. § 3593(d) (2007).

52. *See* DEL. CODE ANN. tit. 11, § 4209(d)(1) (2009) (Delaware); MONT. CODE. ANN. § 46-l-401(1)(b), (3); 46-18-301 (2007) (Montana); NEB. REV. STAT. § 29-2520(4)(f) (2009) (Nebraska).

Five more states have imposed, by case law, a requirement that the aggravators be determined unanimously.[53] Of those five states, two require *both* a unanimous jury finding of aggravators and a unanimous recommendation of death.[54] Missouri law, though less clear, appears to also mandate that a jury unanimously find the aggravators.[55]

Federal law also has retained the death penalty.[56] Like the vast majority of the states, the federal death penalty statute requires a jury to find aggravators unanimously.[57] The federal death penalty statute also requires a jury to make a unanimous sentencing recommendation to the judge.[58]

Thus, the national consensus demonstrates an overwhelming preference for requiring unanimity. This makes sense, given that the death penalty is the most serious, and most irrevocable, penalty that can be imposed. If jury unanimity is required to convict a defendant of stealing a car, all the more should it be required to sentence a defendant to death.

The national trend is useful in determining whether jury unanimity is constitutionally required.[59] The United States Supreme Court has recognized that "the near uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not."[60] Because all but one of the states that have retained the death penalty requires jury unanimity,[61] one might expect the Supreme Court to hold that the Constitution requires

53. The five states that have imposed, by case law, a requirement that the aggravators be determined unanimously are Alabama, Connecticut, Indiana, Kentucky, and Nevada. *See* McNabb v. State, 887 So. 2d 998, 1005–06 (Ala. 2004); McGriff v. State, 908 So. 2d 1024, 1037–38 (Ala. 2004); State v. Reynolds, 836 A.2d 224, 313 (Conn. 2003) (quoting Ross v. State, 646 A.2d 1318, 1352 (Conn. 1994)); State v. Barker, 809 N.E.2d 312, 316 (Ind. 2004); Soto v. Commonwealth, 139 S.W.3d 827, 871 (Ky. 2004), *cert. denied*, 544 U.S. 931 (2005); Geary v. State, 952 P.2d 431, 433 (Nev. 1998).

54. Both Connecticut and Nevada require a unanimous jury finding of aggravators and a unanimous recommendation of death. *See Reynolds*, 836 A.2d at 313 (quoting *Ross*, 646 A.2d at 1352); *Geary*, 952 P.2d at 433. Three states –Alabama, Indiana, and Kentucky–judicially require only a unanimous jury finding of aggravators. *See McNabb*, 887 So.2d at 1005–06; *McGriff*, 908 So.2d at 1037–38; *Barker*, 809 N.E. 2d at 316; *Soto*, 139 S.W. 3d at 871. North Carolina in, *State v. McKoy*, has also judicially imposed a requirement that aggravators be determined unanimously though as noted above, the North Carolina statute requires a unanimous recommendation of death, and thereby necessarily requires a unanimous finding of an aggravator. *See* State v. McKoy, 394 S.E.2d 426, 428 (N.C. 1990); *see also supra* note 51 and accompanying text.

55. *See* MO. R. CRIM. P. 29.01(a); Parker v. Bowersox, 188 F.3d 923, 929 (8th Cir. 1999); State v. Thompson, 134 S.W.3d 32, 33 (Mo. 2004).

56. 18 U.S.C. § 3593 (2006).

57. *Id.* § 3593(d).

58. *Id.* § 3593(e)(3).

59. *See* Burch v. Louisiana, 441 U.S. 130, 138 (1979).

60. *Id.*

61. *See supra* notes 47–53 and accompanying text.

it. However, the Court has also found that the "Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."[62] Consequently, the Court has been "unwilling to say there is any one right way for a State to set up its capital sentencing scheme."[63] The question then becomes whether Florida's scheme, which is unlike any other in the country, violates the United States Constitution. We address that question next.

IV. ALLOWING A SIMPLE MAJORITY OF A JURY TO DECIDE WHETHER THE PROSECUTION PROVED AN AGGRAVATING CIRCUMSTANCE MAY BE UNCONSTITUTIONAL

The United States Supreme Court has never considered whether more than a simple majority of a jury must decide the existence of aggravating circumstances. Nonetheless, Supreme Court precedent indicates that Florida's capital sentencing scheme may run afoul of the Sixth, Eighth, and Fourteenth Amendments.[64] Before exploring these Amendments and their effect on Florida's scheme, we first explain how the Court views death penalty cases.

A. DEATH IS DIFFERENT

The Supreme Court has consistently recognized that the death penalty is "qualitatively different" from all other punishments, and therefore "demands extraordinary procedural protection against error."[65] The Court

62. Spaziano v. Florida, 468 U.S. 447, 464 (1984).

63. *Id.*

64. *See infra* Part IV.B, C.

65. Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. L.J. CRIM. L. 117, 117 (2004); *see also* Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (finding it is cruel and unusual to punish retarded persons with death and acknowledging the "pinnacle of [the] Eighth Amendment death-is-different jurisprudence"); Ring v. Arizona, 536 U.S. 584, 605–06 (2002) (acknowledging that there is "no doubt that 'death is different'") (citation omitted); *Ring*, 536 U.S. at 614 (Breyer, J., concurring) (citing Gregg v. Georgia, 428 U.S. 153, 192 (1976) ("Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty"); McCleskey v. Kemp, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) ("It hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death"); Wainwright v. Witt, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (finding "previously unquestioned principle" that unique safeguards are necessary because death penalty is "qualitatively different"); *Spaziano*, 468 U.S. at 459 (recognizing the Court's prior recognition of the "qualitative difference" of the death penalty); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (reaffirming the Court's view "[t]hat the penalty of death is qualitatively different from any other sentence"); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("penalty of death is qualitatively different from a sentence of

has repeatedly described two aspects of capital punishment that make it "different in kind" from any form of imprisonment, including life imprisonment: first, the "finality" of the punishment makes any error "irrevocable or irreversible;"[66] and second, the death penalty is different in its "severity or enormity."[67]

B. FLORIDA'S CAPITAL SENTENCING SCHEME MAY VIOLATE THE EIGHTH AMENDMENT

Because "death is different," allowing a simple majority to render a verdict in a capital case may violate the Eighth Amendment's prohibition on cruel and unusual punishment.[68] In a landmark case—*Furman v. Georgia*—the United States Supreme Court considered whether the Eighth Amendment's prohibition on cruel and unusual punishment prohibits the death penalty.[69] The petitioner was a twenty-six-year-old black man with a sixth grade education.[70] Furman shot and killed a homeowner through a closed door while seeking to enter the house at night.[71] A jury decided that Furman should die.[72]

Furman argued that the death penalty was a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[73] The Court agreed as to Furman's case, but not because the death penalty was

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imprisonment, however long"); *Gregg*, 428 U.S. at 188 (acknowledging that penalty of death is inherently different in kind from any other punishment); Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) (finding that "[d]eath is a unique punishment").

66. *See Ring*, 536 U.S. at 616–17 (Breyer, J., concurring) (finding DNA evidence indicating that convictions of numerous persons on death row are unreliable is especially alarming since death is not reversible); *see also Wainwright*, 469 U.S. at 463 (Brennan, J., dissenting); *Spaziano*, 468 U.S. at 460 n.7; *Woodson*, 428 U.S. at 305; *Gregg*, 428 U.S. at 187; *Furman*, 408 U.S. at 290 (Brennan, J., concurring).

67. *Wainwright*, 469 U.S. at 463 (Brennan, J., dissenting); *Spaziano*, 468 U.S. at 460, 468 n.7; *Furman*, 408 U.S. at 286–90 (Brennan, J., concurring). Because of the death penalty's severity and irrevocability, at some points in time, all sitting members of the Supreme Court have endorsed the idea that the Eighth Amendment requires a death-is-different jurisprudence. *Spaziano*, 468 U.S. at 468 (Stevens, J., concurring in part and dissenting in part) ("[E]very Member of [the] Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment . . . .").

68. The Eighth Amendment of the United States Constitution states the following: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Eighth Amendment applies to the States via the Fourteenth Amendment. *Furman*, 408 U.S. at 240 (Douglas, J., concurring).

69. *Furman*, 408 U.S. at 238.

70. *Id.* at 252 (Douglas, J., concurring).

71. *Id.*

72. *Id.* at 240.

73. *Id.* at 239.

unconstitutional *per se*.[74] Indeed, some justices in the majority specifically declined to decide that issue.[75] Instead, the majority based its decision on the arbitrariness of Georgia's death sentencing procedures.[76] Because death is different,[77] the Court reasoned, the Eighth Amendment demands heightened procedural safeguards.[78] Thus, in *Furman*, the Court "connected the uniqueness of the death penalty to the uniqueness of the procedures necessary to keep death sentences from being imposed in cruel and unusual fashion."[79]

Furman stands for the uncontroversial principle that like cases should be decided alike.[80] In *Furman*, the Court recognized that the States' various capital sentencing schemes granted juries so much discretion that similar cases often produced different results: one defendant received life imprisonment while another, who had committed murder under virtually identical circumstances, was sentenced to death.[81] In response to such inconsistent outcomes, Justice Stewart concluded that "[t]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed."[82]

Although the Court found the issue so compelling that each justice wrote a separate opinion,[83] Justice Stewart's basic idea garnered a majority:

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74. *See generally id.* Two of the justices believed that the death penalty is always unconstitutional. *See id.* at 307 (Stewart, J., concurring) ("[A]t least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments. . . . But I find it unnecessary to reach the ultimate question they would decide.").

75. *Furman*, 408 U.S. at 257 (Douglas, J., concurring) ("Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.").

76. *Id.* at 256 (Douglas, J., concurring).

77. *See Ring*, 536 U.S. at 606; VIDMAR & HANS, *supra* note 5, at *passim*.

78. *Furman*, 408 U.S. at 256 (Douglas, J., concurring) ("The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.").

79. Abramson, *supra* note 65, at 118.

80. *See generally Furman*, 408 U.S. at 275 n.18 (Brennan, J., concurring) (finding death penalty unconstitutional because defendants who had committed similar capital crimes received different penalties).

81. *See id.* at 251–55 (Douglas, J., concurring); *id.* at 312 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."); *id.* at 364 (Marshall, J., concurring) ("[I]t is usually the poor, the illiterate, the underprivileged, the member of the minority group – the who because he is without means, and is defended by a court-appointed attorney – who becomes society's sacrificial lamb." (citation omitted)).

82. *Id.* at 309–10 (Stewart, J., concurring).

83. *See generally id.* (abolishing death penalty).

the Eighth and Fourteenth Amendments do not allow any punishment, let alone one as severe as the death penalty, to be imposed inconsistently.[84] Inconsistent application of the death penalty is, by definition, arbitrary.[85] And arbitrary application of the death penalty constitutes cruel and unusual punishment.[86]

Similarly, Justice White argued that a sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[87] *Furman* essentially recognized the unconstitutionality of sentencing schemes that allowed different juries to issue different verdicts in similar cases.[88]

Four years later, the Supreme Court elaborated on its holding in *Furman* when it again reviewed Georgia's capital sentencing scheme.[89] In reaction to *Furman*, Georgia, like many states, implemented an intricate capital sentencing scheme.[90] Georgia's new procedure for capital cases, like Florida's, provides for a two-stage trial. First, the jury decides the defendant's guilt.[91] Second, if the jury finds the defendant guilty, it then decides the appropriate sentence.[92]

Georgia's new scheme, replete with procedural safeguards, generated

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84. *See id.* at 247–48 (Douglas, J., concurring) ("[T]he death penalty could be unfairly or unjustly applied. The vice . . . is not in the penalty but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or any innocent parties, regardless of what the penalty is." (citation omitted)).

85. *See* Furman, 408 U.S. at 274 (Brennan, J., concurring) ("[T]he State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.").

86. *See id.* at 249 (Douglas, J., concurring) ("A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily." (quoting Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970))); *see id.* at 274 (Brennan, J., concurring) ("[T]he State must not arbitrarily inflict a severe punishment.").

87. *Furman*, 408 U.S. at 313 (White, J., concurring).

88. *See* VIDMAR & HANS, *supra* note 5, at 244 ; ABRAMSON, *supra* note, 15 at 218 . Before *Furman*, the arbitrariness of capital sentencing schemes had become so rampant that California jurors received the following instruction:

> [T]he law itself provides no standard for the guidance of the jury in the selection of the penalty, but rather commits the whole matter . . . to the judgment, conscience, and absolute discretion of the jury. . . . The law does not forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case; however the law does forbid you from being governed by conjecture, prejudice, public opinion, or public feeling.

Id. at 216 (quoting McGautha v. California, 402 U.S. 183, 189 (1971)).

89. *See generally* Gregg v. Georgia, 428 U.S. 153 (1976).

90. *Id.* at 162–63.

91. *Id.* at 158.

92. *Id.*

another challenge. In *Gregg v. Georgia*,[93] the Supreme Court reviewed the case of Tony Gregg, who had been charged with armed robbery and murder.[94] A jury had found Gregg guilty of two counts of armed robbery and two counts of murder.[95] In accordance with Georgia procedure, the same jury needed to decide if the sentence should be life imprisonment or death.[96] The judge instructed the jury that in deciding the appropriate sentence, it could consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation.[97] The judge also instructed the jury could not consider the death penalty unless it first found beyond a reasonable doubt one of three aggravating factors.[98] The jury found the prosecution had proved two out of the three factors beyond a reasonable doubt and returned verdicts of death on each count.[99]

In his appeal to the United States Supreme Court, Gregg contended that "the punishment of death for the crime of murder is, under all circumstances, 'cruel and unusual' in violation of the Eighth and Fourteenth Amendments of the Constitution."[100] The Court disagreed and held that "the punishment of death does not invariably violate the Constitution."[101] The Court then established guidelines for evaluating the constitutionality of state capital sentencing schemes.[102]

Gregg distills the holding of *Furman*: "Because of the uniqueness of the death penalty . . . it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[103] *Furman*, the Court further explained, "mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that

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93. *Id.* at 153.
94. *Id.* at 158.
95. *Gregg*, 428 U.S. at 160.
96. *See id.*
97. *Id.* at 161.
98. *Id.* The three aggravating circumstances were as follows:

> One [–] That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of [the victims].
>
> Two [–]That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.
>
> Three [–] The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they [sic] involved the depravity of [the] mind of the defendant.

Id. (citation omitted) (second alteration in original).
99. *Id.* at 161.
100. *Id.* at 168.
101. *Gregg*, 428 U.S. at 169.
102. *See generally id.* (upholding the constitutionality of Georgia's capital sentencing scheme because the scheme effectively narrowed the class of individuals eligible for the death penalty).
103. *Id.* at 188.

discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[104] Without such limitations, the Court reasoned, "the system cannot function in a consistent and rational manner."[105]

As one means of limiting juror discretion, *Gregg* sanctions the use of statutory aggravating and mitigating factors.[106] But if a capital sentencing scheme requires only a simple majority to decide whether those factors exist and determine their relative weight, it will still fail to produce "consistent and rational" outcomes or "minimize the risk of wholly arbitrary and capricious action." Yet Florida's capital sentencing scheme requires just 58% of the jury to decide these issues.[107]

Allowing 58% of a jury to make such a decision is the judicial equivalent of a coin flip. In other words, a statutory scheme that authorizes 58% of a jury to decide whether an aggravator exists, and, therefore, whether a defendant should live or die, virtually assures inconsistent outcomes.[108] As *Furman* and *Gregg* indicate, such a scheme necessarily violates the Eighth Amendment.[109] Thus, Florida's capital sentencing scheme is likely unconstitutional.[110]

C. FLORIDA'S CAPITAL SENTENCING SCHEME MAY ALSO VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS

Like the Eighth Amendment, the Sixth and Fourteenth Amendments also prescribe the parameters of capital sentencing schemes.[111] The Sixth

104. *Id.* at 189.

105. *Id.* (citation omitted).

106. *See id.*

107. *See* FLA. STAT. § 921.141 (2009). Florida's capital sentencing scheme authorizes a simple majority of a twelve person jury to decide whether the prosecution proved an aggravator beyond a reasonable doubt. *Id.* Seven out of twelve jurors equals approximately 58.3% of the jury.

108. *See Furman*, 408 U.S. at 247–48 (Douglas, J., concurring).

109. *See id.* at 240, 306, 310; *Gregg*, 428 U.S. at 179, 188. It is well settled that the requirements of due process ban cruel and unusual punishment. *Id.* at 241 (Douglas, J., concurring) (citing Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463, 473–74 (1947) (Burton, J., dissenting); Robinson v. California, 370 U.S. 660, 667 (1962)). It is equally well settled that the ban on cruel and unusual punishment prohibits the judicial imposition of such punishments, as well as their imposition by the legislature. *Id.* (citing Weems v. United States, 217 U.S. 349, 378–82 (1910)).

110. *See supra* note 109 and accompanying text.

111. *See* U.S. CONST. amend. VI; U.S. CONST. amend. XIV. The Sixth Amendment states the following:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

Amendment, by way of the Fourteenth Amendment, guarantees a jury trial to a defendant accused of a non-petty crime in state court.[112] Moreover, the Sixth Amendment requires a minimum number of jurors find a defendant guilty of a non-petty crime.[113] The Due Process Clause of the Fourteenth Amendment states that criminal defendants may not be deprived of life or liberty without due process of law.[114] Although the Supreme Court has never decided the precise number of jurors that must render a verdict against a defendant in a capital case, or whether the jury must render such a verdict unanimously, the cases described below demonstrate how the Sixth Amendment and the Due Process Clause affect capital sentencing schemes.[115]

The Supreme Court rendered its first significant decision on jury size in *Williams v. Florida*.[116] In *Williams*, the defendant had been convicted of robbery.[117] He contended the trial court's refusal to impanel more than six members for the jury violated his Sixth Amendment rights.[118] The Court disagreed and held the constitutional guarantee of trial by jury did not require a jury of twelve members.[119] The Court found that Florida had not violated the defendant's right to a jury trial by providing for jury panels comprised of only six persons.[120] The Court found "little reason to think that the[] goals [realized by the jury system] are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained.*"[121] Thus,

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witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

112. Ballew v. Georgia, 435 U.S. 223, 229 (1978) (citing Duncan v. Louisiana, 391 U.S. 145, 159–62 (1968)). The Sixth Amendment right to a jury trial applies to the States via the Fourteenth Amendment. *Id.* A non-petty crime is any crime punishable by more than six months imprisonment. *See* Baldwin v. New York, 399 U.S. 66, 69 (1970) (concluding, in the plurality opinion of Justice White, that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized").

113. *See generally* Burch v. Louisiana, 441 U.S. 130, 137 (1979) (finding a minimum number of jurors must render a verdict if the right to a jury trial is to be preserved).

114. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides, in relevant part, the following:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

115. *See infra* notes 114–194 and accompanying text.

116. Williams v. Florida, 399 U.S. 78 (1970).

117. *Id.* at 79.

118. *Id.* at 86.

119. *Id.*

120. *Id.*

121. *Id.* at 100 (emphasis added). According to the Court in *Williams*, the Sixth Amendment,

although the Court ultimately upheld the defendant's conviction, the Court recognized the value of unanimous jury verdicts in criminal trials.[122]

Two years later, in *Apodaca v. Oregon*,[123] the Court reviewed the convictions of three individuals, all convicted of assault with a deadly weapon, burglary in a dwelling, and grand larceny.[124] Each conviction was based on non-unanimous verdicts.[125] After the Oregon Court of Appeals affirmed the convictions, the defendants sought review in the Supreme Court, arguing that conviction of a crime by a non-unanimous jury violates their Sixth Amendment right to trial by jury in criminal cases.[126]

The Supreme Court upheld Oregon's sentencing scheme, perceiving "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. . . . [T]he interest of the defendant in having the judgment of his peers . . . is equally well served."[127] The Court also rejected the contention that a non-unanimous verdict invariably violated the petitioners' right to be convicted beyond a reasonable doubt.[128] Indeed, the Court reasoned that the "Sixth Amendment does not require proof beyond a reasonable doubt at all."[129] Rather, to the extent the reasonable doubt standard provides any right at all, the right is derived not from the Sixth Amendment, but from the Due Process Clause.[130]

The Court addressed the due process argument in a different case decided that same day.[131] In *Johnson v. Louisiana*,[132] the defendant challenged a Louisiana statute that authorized a twelve-member jury to convict a defendant in a criminal case by a nine-to-three vote.[133] Johnson challenged the statute on two grounds.[134]

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rather than requiring twelve-member juries, mandated a jury only of sufficient size to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community. *Id.*

122. *Williams*, 399 U.S. at 102.

123. Apodaca v. Oregon, 406 U.S. 404 (1972).

124. *Id.* at 405–06.

125. *Id.* at 406. The vote in the cases of the first two defendants was eleven-to-one, while the vote in the case of the third defendant was ten-to-two, the minimum requisite vote for sustaining a conviction under Oregon law. *Id.*

126. *Id.*

127. *Id.* at 411.

128. *Id.* at 411–12.

129. *Apodaca*, 406 U.S. at 412.

130. *Id.*

131. *See* Johnson v. Louisiana, 406 U.S. 356 (1972).

132. *Id.* For an excellent discussion of *Johnson*, see Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1269–72 (2000).

133. *Johnson*, 406 U.S. at 357. The statute specifically authorized a nine-to-three vote for any crimes necessarily punished by hard labor. *Id.*

134. *See id.* at 357–58.

First, Johnson argued that allowing a jury to convict him by a non-unanimous verdict violated the Due Process Clause.[135] He argued that because three jurors voted to acquit him, the jury could not possibly have found him guilty beyond a reasonable doubt.[136] The Court rejected that argument, stating that "in criminal cases due process of law is not denied by a state law . . . which dispenses with the necessity of a jury of twelve, or unanimity in the verdict."[137] The Court noted that "there is no basis for denigrating the vote of *so large a majority* of the jury."[138] The Court also concluded that "the fact remains that nine jurors – a *substantial majority* of the jury – were convinced by the evidence,"[139] and that the "disagreement of three jurors does not alone establish reasonable doubt, particularly when *such a heavy majority* of the jury, after having considered the dissenters' views, remains convinced of guilt."[140] Thus, although the Court ultimately rejected Johnson's argument, it clearly placed great weight on the statute's requirement that at least three quarters of a twelve-person jury had to find the defendant guilty of the alleged crime.[141]

Johnson's second argument raised an equal protection challenge.[142] Louisiana law authorized five jurors, who reach unanimous verdicts, to convict defendants of less serious crimes, nine of twelve jurors to convict defendants of more serious crimes, and all twelve jurors to convict a defendant of the most serious crimes.[143] The Court rejected Johnson's equal protection argument and upheld Louisiana's sentencing scheme, perceiving "nothing unconstitutional or invidiously discriminatory . . . in a State's insisting that its burden of proof be carrie[d] with more jurors where more serious crimes or more severe punishments are at issue."[144] Although the Court did not hold that a sentencing scheme *must* require a unanimous jury verdict to convict a defendant of the most serious crimes, it implicitly endorsed a sentencing scheme that requires more jurors, if not unanimous juries, to convict a defendant of a capital crime.[145]

The dissenters in *Johnson* argued that unanimity assures the reliability

135. *Id.* at 358–59.
136. *Id.* at 359.
137. *Id.* (quoting Jordan v. Massachusetts, 225 U.S. 167, 176 (1912)) (internal quotation omitted).
138. *Id.* at 361 (emphasis added).
139. *Johnson*, 406 U.S. at 362 (emphasis added).
140. *Id.* (emphasis added).
141. *Id.*
142. *Id.* at 363.
143. *Id.* at 357 n.1.
144. *Id.* (5-4 decision) (plurality opinion).
145. *See Johnson*, 406 U.S. at 364.

of the verdict[146] and protects against biased decision-making.[147] Justice Stewart wrote that only a unanimity requirement could adequately guard against the "potential bigotry" of individuals, who, due to personal prejudice, might convict a defendant on inadequate evidence or "acquit when evidence of guilt [is] clear."[148] In a separate dissent, Justice Douglas insisted that a verdict rendered by a non-unanimous jury might be unreliable.[149] Justice Douglas believed that once a jury acquired the necessary majority vote, the deliberative process would invariably be curtailed.[150] Justice Brennan voiced similar concerns.[151] He argued that unanimity ensured substantial participation by all racial, ethnic, and gender groups, whereas under a non-unanimous system, "consideration of minority views may become nothing more than a matter of majority grace."[152]

Six years later, the viewpoints of the *Johnson* dissenters gained more traction.[153] In *Ballew v. Georgia*,[154] Georgia had charged the defendant with distributing obscene materials.[155] Pursuant to Georgia law, a five-member jury convicted him.[156] The defendant appealed his conviction to the Supreme Court.[157] The Supreme Court granted certiorari to decide whether a state criminal case tried before a five-member jury deprives the accused of the right to trial by jury.[158] The Court recognized that a decline in jury size necessarily leads to "inaccurate fact-finding and incorrect application of the common sense of the community to the facts."[159] The Court also relied on empirical data to cast doubt on "the accuracy of the results achieved by smaller and smaller panels" and concluded that "progressively smaller juries are less likely to foster effective group

146. *See* 406 U.S. 380, 388 (1972) (Douglas, J., dissenting).
147. *See Johnson*, 406 U.S. at 397–98 (Stewart, J., dissenting).
148. *Id.*
149. *See* 406 U.S. at 388 (Douglas, J., dissenting separately).
150. *See id.*
151. *See* 406 U.S. 395, 395 (Brennan, J., dissenting separately).
152. *Id.* at 396.
153. *See, e.g.*, Ballew v. Georgia, 435 U.S. 223 (1978).
154. *Id.*
155. *Id.* at 225.
156. *See id.* at 226–27. Ballew moved to impanel twelve jurors, but the court denied his motion. *Id.* The five person jury deliberated for only 38 minutes. *Id.* at 227.
157. *Id.* at 228.
158. *Id.* at 224. The Court has explicitly reserved this issue. *See Williams v. Florida*, 399 U.S. 78, 91 n.28 (1970).
159. *Ballew*, 435 U.S. at 232. Among other data sets, the Court looked to mock trials held before undergraduates and former jurors to compute the percentage of "correct" decisions rendered by twelve-person and six-person panels. *Id.* at 234. In the student experiment, the twelve-person juries reached correct verdicts 83% of the time, whereas six-person juries reached correct verdicts only 69% of the time. *Id.* at 234–35. In the former juror study, the twelve-person groups reached the correct result 71% of the time, whereas the six-person groups attained the correct result only 57% of the time. *Id.* at 235.

deliberation."[160] The Court, therefore, reversed the conviction.[161]

Although *Ballew* decided a question of jury *size* rather than jury *unanimity*, it marks an important step towards requiring unanimous juries to decide capital cases. Although the Court admitted it did not "pretend to discern a clear line between six members and five,"[162] it nonetheless drew a line, thereby indicating the Sixth Amendment demands minimum standards.[163] As Justice Powell wrote in a concurring opinion, "a line has to be drawn somewhere if the substance of jury trial is to be preserved."[164]

One year later, the Court expanded this line when it decided a case "at the intersection of [the Supreme Court's] decisions concerning jury size and unanimity."[165] As in *Ballew*, the defendant in *Burch v. Louisiana*[166] was charged with distributing obscenity.[167] Pursuant to a Louisiana statute, the state tried him before a six-member jury.[168] The jury found him guilty as charged.[169] After the verdict, a jury poll indicated the jurors had voted to convict Burch five-to-one.[170] Burch then appealed his conviction, arguing the provisions of Louisiana law permitting conviction by a non-unanimous six-member jury violated the Sixth and Fourteenth Amendments.[171]

The Supreme Court of Louisiana affirmed the conviction.[172] Based on *Johnson*, it held that a five-to-one jury verdict is constitutionally permissible.[173] The Court reasoned that "[i]f 75 percent concurrence (9/12) was enough for a verdict as determined in *Johnson v. Louisiana*, then requiring 83 percent concurrence (5/6) ought to be within the permissible limits of *Johnson*."[174]

The United States Supreme Court disagreed.[175] The Court began by reviewing its own unquestioned principles that "the Constitution permits juries of less than 12 members, but that it requires at least 6. . . . And [we]

160. *Id.* at 232–34. "If a minority viewpoint is shared by 10% of the community, 28.2% of 12-member juries may be expected to have no minority representation, but 53.1% of 6-member juries would have none." *Id.* at 236.
161. *Id.* at 245.
162. *Id.* at 239.
163. *See id.*
164. *Id.* at 246 (Powell, J., concurring).
165. Burch v. Louisiana, 441 U.S. 130, 137 (1979).
166. *Id.* at 130.
167. *Id.* at 132.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Burch*, 441 U.S. at 132–33.
172. *Id.*
173. *Id.*
174. *Id.* (quoting State v. Wrestle, Inc., 360 So. 2d 831, 838 (1978)) (citations omitted).
175. *Id.* at 134.

have approved the use of certain nonunanimous verdicts in cases involving 12-person juries."[176] Nonetheless, the Court echoed Justice Powell's concurring opinion in *Ballew*[177] and recognized that "it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved."[178] The Court held that "conviction by a non-unanimous six-member jury in a state criminal trial for a non[-]petty offense deprives an accused of his constitutional right to trial by jury."[179]

The Sixth and Fourteenth Amendment cases cited above shed some light on whether a divided twelve-member jury may render a verdict in a capital case. *Williams*, *Ballew*, and *Burch* indicate, generally, that the Sixth Amendment requires a minimum number of jurors to convict a criminal defendant of a non-petty crime.[180] *Apodaca* and *Johnson* indicate that the Sixth and Fourteenth Amendments do not require a unanimous decision by a twelve-member jury.[181] Taken together, these cases hold only the following: 1) a six-member jury *must* render a unanimous verdict to convict a defendant of a non-petty crime;[182] and 2) a twelve-member jury *may* convict a defendant of a non-petty crime if it can garner nine votes.[183] These cases leave unanswered, however, the minimum number of jurors that must concur in a divided verdict rendered by a twelve-member jury in a criminal case for a non-petty crime.[184]

This line of cases—*Williams*, *Apodaca*, *Johnson*, *Ballew*, and *Burch*—all decided in the 1970s, constitute the Supreme Court's most recent decisions regarding the constitutionality of various jury configurations in criminal cases.[185] None of these cases, however, involved

176. *Id.* at 137 (citations omitted).

177. Ballew v. Georgia, 435 U.S. 223, 245–46 (1978) (Powell, J., concurring).

178. *Burch*, 441 U.S. at 137.

179. *Id.* at 134, 138.

> We are buttressed in this view by the current jury practices of the several States. It appears that of those States that utilize six-member juries in trials of non[-]petty offenses, only two, including Louisiana, also allow non[-]unanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.

Id. at 138 (alteration in original).

180. *See supra* notes 116–22, 154–64, 166–79 and accompanying text.

181. *See supra* notes 116–23, 132–39 and accompanying text.

182. *See supra* notes 172–79 and accompanying text.

183. *See supra* notes 137–41 and accompanying text.

184. *See generally supra* notes 116–79 and accompanying text. The Court in *Burch* "intimate[d] no view as to the constitutionality of non[-]unanimous verdicts rendered by juries comprised of more than six members." 441 U.S. at 138 n.11.

185. *Burch*, 441 U.S. 130; Ballew v. Georgia, 435 U.S. 223 (1978); Johnson v. Louisiana, 406 U.S. 356 (May 22, 1972); Apodaca v. Oregon, 406 U.S. 404 (May 22, 1972); Williams v. Florida, 339 U.S. 78 (1970). Last year, the Supreme Court of the United States chose not to review a case wherein the State of Louisiana convicted a defendant of second-degree murder. Editorial, *Will*

capital crimes.[186] Consequently, they provide limited guidance on the constitutionality of the jury configuration contemplated in Florida's capital sentencing scheme.[187]

Burch, *Ballew*, and *Williams* support the argument that the Sixth Amendment renders Florida's capital sentencing scheme unconstitutional.[188] When one considers these cases in light of the Supreme Court's extensive "death is different" jurisprudence,[189] the Court's explicit approval of larger juries for more serious crimes,[190] and the Court's instruction that the Sixth Amendment requires capital sentencing schemes to "draw lines" regarding minimum numbers of jurors and majority size,[191] it is reasonable to expect that the Supreme Court, when faced with the issue, may hold that the Sixth Amendment requires capital sentencing schemes to incorporate large juries that must render super-majority, if not unanimous, verdicts in capital cases.[192]

In addition to the Sixth Amendment argument, *Johnson* supports the argument that in a capital case, at least, a super-majority (or unanimity) is required by the Due Process Clause.[193] Indeed, in *Johnson*, in concluding that the statutory scheme at issue did *not* violate the Due Process Clause, the Court repeatedly relied on the significant jury majority in that case.[194] Again, relying on the Court's extensive "death is different" jurisprudence and the notion that death penalty cases require even more procedural safeguards than other cases, one would think that in a death penalty case the Due Process Clause requires a substantial majority, if not a unanimous

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'11 Angry Men' Do?, L.A. TIMES, Oct. 28, 2008, at A22. Although several commentators in the media took the Court's decision to deny certiorari to mean that the Court ratified the use of non-unanimous juries in murder trials, *see, e.g., id.*, the Court has made clear that its decision not to grant certiorari in a case does not indicate the Court's opinion on an issue, United States v. Carver, 260 U.S. 482, 490 (1923). "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *Carver*, 260 U.S. at 490; *see also* Brown v. Allen, 344 U.S. 443, 459–64 (1953); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917–19 (1950).

186. *See generally Burch*, 441 U.S. at 131 (reviewing obscenity conviction); *Ballew*, 435 U.S. at 226–28 (reviewing obscenity conviction); *Johnson*, 406 U.S. at 358 (reviewing robbery conviction); *Apodaca*, 406 U.S. at 405 (reviewing convictions for assault with a deadly weapon, burglary in a dwelling, and grand larceny); *Williams*, 399 U.S. at 86 (reviewing robbery conviction).

187. *See generally* discussion *supra* Part IV.C.

188. *See infra* notes 189–92 and accompanying text.

189. *See supra* notes 65–67 and accompanying text.

190. *See Johnson*, 406 U.S. at 364.

191. *See Burch*, 441 U.S. at 138; *Ballew*, 435 U.S. at 228.

192. *See generally supra* notes 111–15 and accompanying text.

193. *See supra* note 135 and accompanying text.

194. *Id.*

jury, to render a verdict.[195] Indeed, if the Due Process Clause requires a substantial majority to render a verdict in a non-petty criminal case that does *not* contemplate the death penalty, then it must require *at least* that much in a capital case.[196]

D. NO SUBSTANTIVE DIFFERENCE EXISTS BETWEEN A JURY VERDICT AT TRIAL AND A JURY'S DETERMINATION OF AGGRAVATING CIRCUMSTANCES AT A SEPARATE SENTENCING PROCEEDING

Despite the extensive Supreme Court precedent cited above, proponents of Florida's capital sentencing scheme may argue that the Sixth and Fourteenth Amendments do not render Florida's scheme unconstitutional. Such proponents will likely contend that the precedent addresses only the validity of jury "verdicts," and a jury's determination of aggravators at a separate sentencing procedure is different from a verdict.[197] This argument should fail.

The Supreme Court has never decided whether any difference exists between a jury verdict at trial and a jury's determination of aggravating circumstances in a separate sentencing proceeding. Nonetheless, Supreme Court precedent indicates that the Court would find no substantive difference.[198] This conclusion stems from the Supreme Court decisions in *Apprendi v. New Jersey*[199] and *Ring v. Arizona*.[200]

In *Apprendi*, the defendant challenged his conviction for second-degree possession of a firearm, an offense carrying a maximum penalty of ten years under New Jersey law.[201] The sentencing judge, however, sentenced the defendant to twelve years in prison—two years over the maximum—finding that the defendant's crime had been motivated by

195. *See supra* notes 65–67 and accompanying text. Although *Apodaca* and *Johnson* authorize convictions based on non-unanimous verdicts in criminal trials for non-petty crimes, *see supra* notes 123–45 and accompanying text, the extensive "death is different" precedent would allow the Court to find that the Sixth and Eighth Amendments require unanimous jury verdicts for capital crimes without forcing the Court to overrule *Apodaca* or *Johnson*.

196. *See Johnson*, 406 U.S. at 362. To be clear, the Supreme Court has never decided whether less than a substantial majority of a jury can render a verdict in a non-petty criminal case. *Id.* Nonetheless, *Johnson* indicates the Court would find such a constitutional requirement if presented with the question. *See id.* at 362–63.

197. Such proponents will further point out that in Florida the verdict in a capital case — i.e., the jury's determination of guilt or innocence at trial — is rendered unanimously. *But see infra* notes 197–227 and accompanying text.

198. *See infra* notes 199–228 and accompanying text.

199. Apprendi v. New Jersey, 530 U.S. 466 (2000).

200. Ring v. Arizona, 536 U.S. 584 (2002).

201. *Apprendi*, 530 U.S. at 468–70.

racial animus.[202]

The Supreme Court held that the sentence violated the defendant's right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[203] New Jersey argued that the factual finding of racial animus was not an element of the crime, but a "sentencing enhancement."[204] The Court, however, viewed the argument as creating a distinction without a difference.[205] As the Court noted, "[m]erely using the label 'sentence enhancement' to describe the [factual finding at the sentencing phase] surely does not provide a principled basis for treating [the two phases] differently."[206] The dispositive question, the Court said, "is one not of form, but of effect."[207]

Two years later, applying the effect-over-form analysis, the Court considered Arizona's death penalty statute.[208] Arizona prosecuted Timothy Ring for robbing and murdering the driver of a Wells Fargo armed van.[209] The jury found the defendant guilty.[210] Thereafter, pursuant to Arizona's death penalty statute, the judge made factual findings on aggravating circumstances.[211] The judge found that aggravating circumstances applied, and sentenced Ring to death.[212] The Arizona Supreme Court affirmed the conviction.[213]

Ring challenged the constitutionality of Arizona's death penalty statute.[214] He asked the United States Supreme Court to decide whether the judge may find aggravating factors, as provided by Arizona law, or whether the Sixth Amendment jury-trial guarantee required that a jury determine

202. *Id.* at 471.

203. *Id.* at 477 (citing United States v. Gaudin, 515 U.S. 506, 510 (1995)) (alternation in original).

204. *See id.* at 495–96.

205. *See id.* at 494.

206. *Id.* at 476.

207. *Apprendi*, 530 U.S. at 494.

208. *See* Ring v. Arizona, 536 U.S. 584, 602 (2002).

209. *See id.* at 589.

210. *Id.* at 591.

211. *See id.* at 592–95. Arizona's first-degree murder statute provided that after the jury determined the defendant's guilt, the judge who presided at trial would "conduct a separate sentencing hearing to determine the existence or nonexistence of certain enumerated circumstances . . . for the purpose of determining the sentence to be imposed" and that "[t]he hearing shall be conducted before the court alone[;] [t]he court alone shall make all factual determinations required by this section or the constitution of the United States or this state." *Id.* at 592 (quoting ARIZ. REV. STAT. ANN. § 13-703(c) (2001)).

212. *See id.* at 594–95. The judge determined that Ring committed the offense in exchange for something of "pecuniary value" and that the offense was committed in "an especially heinous, cruel, or depraved manner." *Id.*

213. *Id.* at 596.

214. *Ring*, 536 U.S. at 597.

them.[215]

Relying on *Apprendi*,[216] the Court found that although Arizona's death penalty statute provided all the substantive and procedural protections required by *Furman* and *Gregg*, the statute was unconstitutional to the extent it authorized the judge, rather than the jury, to determine the defendant's punishment.[217] The Court repeated that "the relevant inquiry is one not of form, but of effect."[218] Thus, according to the Court, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt."[219] Because "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict," Ring's death sentence violated the Sixth Amendment right to jury trial.[220]

In both *Apprendi* and *Ring*, the Supreme Court emphasized that, when it comes to deciding facts that affect a defendant's sentence, effect trumps form.[221] Therefore, a jury's decision about aggravators is substantively identical to a "verdict" because it requires a jury to evaluate evidence and find certain facts that will be relevant to sentencing.[222] *Apprendi* and *Ring* make clear that sentencing factors used to increase the maximum allowable punishment are the same as elements of a crime.[223] Aggravators are a type of sentencing factor.[224] Accordingly, they are "elements." When a jury decides that the prosecution proved the elements of a crime, the jury renders a guilty verdict.[225] Consequently, when a jury decides that the prosecution proves aggravators, the jury renders a guilty verdict-equivalent that will make the difference among a sentence to a term of years, up to life imprisonment, and a sentence of death.[226]

Put another way, if a jury finds that a defendant is "guilty" of an aggravating circumstance, the jury is essentially deciding that the defendant

215. *See id.*
216. *See id.* at 609.
217. *See id.* at 603–04.
218. *Id.* at 604 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)).
219. *Id.* at 602.
220. *Ring*, 536 U.S. at 604 (quoting *Apprendi*, 530 U.S. at 494) (alterations in original).
221. *Apprendi*, 530 U.S. at 494 ("[T]he relevant inquiry is one not of form, but of effect . . . ."); *Ring*, 530 U.S. at 602 ("The dispositive question . . . 'is one not of form, but of effect.'").
222. *See Ring*, 536 U.S. at 598 (citing Walton v. Arizona, 497 U.S. 639, 648 (1990)).
223. *See id.* at 598–99 (citing *Walton*, 497 U.S. at 709 n.1).
224. *See id.* at 605.
225. *See* United States v. Bishop 264 F.3d 535, 549 (5th Cir. 2001) (stating that a guilty verdict will be upheld if "any rational trier of fact could have found proof of the essential elements of the crime beyond a reasonable doubt").
226. *See Ring*, 536 U.S. at 597.

committed a different, more culpable crime, and thereby eligible for a different, more severe penalty, than if it had found the defendant "not guilty" of an aggravating circumstance.[227] Therefore, the jury's decision about the existence of aggravators is, in effect if not in form, a verdict.

Because a jury's decision about aggravating factors constitutes a verdict for purposes of imposing a sentence of death, the Sixth and Fourteenth Amendments to the Constitution most likely require that such a decision be made unanimously.[228]

V. THE FLORIDA LEGISLATURE MUST REVISIT THE STATE'S CAPITAL SENTENCING SCHEME

In light of the above, it appears that the Sixth, Eighth, and Fourteenth Amendments render Florida's Capital Sentencing Scheme unconstitutional to the extent it allows less than a substantial majority of the jury to find the existence of an aggravator. Thus, the Florida Legislature should modify its capital sentencing scheme.

The Florida Legislature may be able to satisfy constitutional requirements by allowing a substantial majority of the jury, rather than a unanimous jury, to find the existence of an aggravator.[229] Nonetheless, the Legislature would be wise to require unanimity, as does every other death penalty state.[230] The next sections explore the history and the policy reasons behind unanimity requirements.

A. THE HISTORY OF UNANIMOUS VERDICTS

The earliest record of a unanimous jury verdict dates back to 1367.[231] At that time, a lone holdout juror stated that he would rather die in prison than vote to convict the defendant, but the English Court refused to accept an 11-1 guilty vote.[232] By the late 14th Century, English courts had adopted a widespread preference for unanimous verdicts.[233] Within four

227. *See id.*

228. *See supra* Part IV.C.

229. *See infra* Part V.B.

230. *See, e.g.*, Kelly v. South Carolina, 534 U.S. 246, 252 n.2 (2002) (affirming application of South Carolina statute imposing a unanimous jury decision that aggravating circumstances existed); Romana v. Oklahoma, 512 U.S. 1, 4 (1994) (validating Oklahoma statute which requires jury to unanimously find that aggravating circumstances outweigh the mitigating circumstances before issuing a death sentence); Blystone v. Pennsylvania, 494 U.S. 299, 302 (1990) (upholding Pennsylvania statute requiring jury to unanimously find at least one aggravating circumstance to impose death penalty).

231. ABRAMSON, *supra* note 15, at 179.

232. *Id.* at 179.

233. *Id.*; *see also* Emil J. Bove III, *Preserving the Value of Unanimous Jury Verdicts in Anti-*

hundred years, unanimous juries "had become an accepted feature of the common law."[234] Legal historians have noted four main explanations for requiring unanimity.[235]

First, hundreds of years ago, the criminal justice system lacked many of the procedural safeguards afforded today.[236] Second, courts performed trials by compurgation, in which the court added to the original number of 12 compurgators until one party had 12 compurgators on its side.[237] Supposedly, when the courts abandoned this approach, the requirement remained that one side had to obtain the votes of all twelve jurors.[238] Third, unlike modern juries, those in medieval times consisted of jurors who had personal knowledge of the facts.[239] The medieval mind believed there could be only one correct answer to a conflict, which meant there was no place for reasonable jurors to disagree.[240] If reasonable jurors cannot disagree, the only correct verdict must, necessarily, be a unanimous one.[241] Fourth, the medieval concepts of consent required juries to render unanimous verdicts.[242] The very word "consent" connoted unanimity.[243] Evidence exists that in the 14th century, Parliament could not bind the community or individual members to a legal decision unless the members of Parliament unanimously rendered the decision.[244] Only in the 15th century, when unanimity became increasingly harder to obtain, did Parliament begin to allow majority decisions.[245]

Deadlock Instructions, 97 GEO. L. J. 251, 267 (2008).

234. Apodaca v. Oregon, 406 U.S. 404, 409 (1972). In the seventeenth century, some American colonies erroneously authorized majority verdicts based on their unfamiliarity with common law procedures. ABRAMSON, *supra* note 15, at 179.

235. *See Apodaca*, 406 U.S. at 409 n.2.

236. *Id.* (citing LESTER B. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 347–351 (1947); William Haralson, *Unanimous Jury Verdicts in Criminal Cases*, 21 MISS. L.J. 185, 191 (1950)). For example, virtually every crime, no matter how petty, was punishable by death in medieval England and judges *made their own rules* of procedure. *See id.*

237. *Id.* (citing PATRICK DEVLIN, TRIAL BY JURY 48–49 (1956); John V. Ryan, Criminal Law Comment, *Less than Unanimous Jury Verdicts in Criminal Trials*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 211, 213 (1967)).

238. *Id.*

239. *Id.* (citing THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 131 (Little, Brown & Co. 5th ed. 1956) (1929)).

240. *Id.*

241. *Apodaca*, 406 U.S. at 409 n.2.

242. *Id.*

243. *Id.* (citing MAUDET V. CLARKE, MEDIEVAL REPRESENTATION AND CONSENT 251 (Russell & Russell, Inc. 1964)).

244. *Id.* (citing CLARKE, supra note 243, at 335–36; PLUCKNETT, THE LANCASTRIAN CONSTITUTION, IN TUDOR STUDIES 161, 169–70 (R. Seton-Watson ed. 1924)).

245. *Id.* (citing CLARKE, *supra* note 243, at 266–67). A similar concern arose in America in the eighteenth century. *See id.* (citing Michael Zuckerman, *The Social Context of Democracy in Massachusetts*, 25 WM. & MARY Q. (3d ser.) 523, 526–27, 540–44 (1968)).

The unanimity requirement in England's common law became firmly entrenched in America's jurisprudence.[246] Indeed, over one hundred years ago, the United States Supreme Court noted that "it was beyond question that a jury in a criminal case must return a unanimous verdict."[247] In an 1898 case, the Supreme Court noted that "[t]he wise men who framed the Constitution of the United States and the people who approved it were of [the] opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors."[248]

For more than two hundred years, the unanimity requirement was a bedrock principle of our jurisprudence.[249] The Supreme Court never heard a case explicitly disputing the unanimity requirement in criminal cases.[250] To the contrary, the Supreme Court repeatedly extolled the virtues of jury unanimity.[251] Beginning in 1972, however, the Supreme Court dismissed the unanimous verdict requirement in state criminal cases as a historical accident lacking stature, and it started to move toward requiring only super-majority votes.[252]

In a series of decisions, the Supreme Court found that unanimity is not constitutionally required.[253] According to the Court, the elimination of the unanimity requirement would not materially affect the essential function of the criminal jury – "placing between the accused and

246. *Id.* at 409 n.3 (citing F. H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 13–21 (Univ. of Kansas Press 1951); JOHN M. MURRIN, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, *in* COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 549, 568 (Stanley N. Katz & John M. Murrin eds., 3d. ed. 1983) (1971)).

247. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1267 n.24 (2000) (citing Thompson v. Utah, 170 U.S. 343, 351 (1898)).

248. *Thompson*, 170 U.S. at 353.

249. *See* ABRAMSON, *supra* note 15, at 179.

250. *See id.* at 179.

251. *See* Taylor-Thompson, *supra* note 247, at 1267 n.24 (citing Andres v. United States, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required when the Sixth and Seventh Amendments apply . . . ."); Patton v. United States, 281 U.S. 276, 288 (1930) (indicating that a right to a jury trial should be understood to require a unanimous verdict of twelve jurors, as at common law); Maxwell v. Dow, 176 U.S. 581, 586 (1900) ("[A]s the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be a unanimous verdict of twelve jurors in all Federal courts where a jury trial is held . . . ."); *Thompson*, 170 U.S. at 351 (indicating that because the defendant committed his crime while Utah was still a federal territory, he had the "constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.")).

252. ABRAMSON, *supra* note 15, at 180; *see also* Michael H. Glasser, Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 665 (1997).

253. *See supra* Part III.

government 'the common-sense judgment of a group of laymen' drawn from a cross section of the community."[254] The Court reasoned that allowing an overwhelming majority, rather than a unanimous jury, to render a verdict would not lessen the reliability of verdicts or the representative nature of jury verdicts, because deliberation would go on as before and the case still had to be proven beyond a reasonable doubt.[255] These decisions, as demonstrated above, do not save Florida's capital sentencing scheme.[256]

B. DESPITE A TREND AWAY FROM UNANIMOUS VERDICTS, SEVERAL POLICY ARGUMENTS SUPPORT THE NEED FOR UNANIMOUS VERDICTS

Although a series of Supreme Court decisions have allowed the states to require less than unanimous verdicts in criminal cases,[257] such a requirement remains sound practice. As one commentator has said, unlike majority rule, "[t]he unanimous verdict rule gives concrete expression to a different set of democratic aspirations — keyed to deliberation rather than voting and to consensus rather than division."[258] Perhaps more important, a unanimous verdict provides symbolic importance.[259] A unanimous jury verdict in a criminal trial "affixes a stamp of legitimacy to the outcome of the criminal process."[260]

The unanimity requirement also gives meaning to each juror's vote, thereby preventing a simple majority of the jury from ignoring an individual juror's voice when imposing a death sentence against a fellow citizen.[261] Put another way, courts that allow a non-unanimous jury to render a verdict invariably empower superficial, narrow, and prejudiced arguments that appeal only to certain groups.[262] Unanimous verdicts ensure that defendants are convicted on the merits and not merely on the whims of

254. ABRAMSON, *supra* note 15, at 180 (quoting *Apodaca,* 406 U.S. 404, 410 (1972)).

255. *See id.* (citing *Apodaca*, 406 U.S. at 410; Johnson v. Louisiana, 406 U.S. 356, 359–63 (1972)).

256. *See infra* Part V.B.

257. *See id.*

258. ABRAMSON, *supra* note 15, at 183.

259. Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1439 (1997) (recognizing that commentators have viewed unanimity "as the truly legitimate rule").

260. Bove, *supra* note 233, at 267.

261. Taylor-Thompson, *supra* note 247, at 1263 ("Jury research conducted in the past two decades reveals that eliminating the obligation to secure each person's agreement on the verdict can result in truncating or even eliminating jury deliberations."); *see also* ABRAMSON, *supra* note 15, at 183 ("[I]ndividual views cannot simply be ignored or outvoted.").

262. ABRAMSON, *supra* note 15, at 183.

a majority.[263]

Jury verdicts presumably reflect the community's values.[264] Indeed, the Court has said that "one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system."[265] Unanimous verdicts are more likely to fulfill the jury's role as the voice of the community's conscience.[266] When less than a unanimous jury is allowed to speak for the community, the likelihood increases that the jury will misrepresent community values.[267]

Perhaps most importantly, several scholars assert that unanimous juries tend to perform more thorough deliberations and therefore achieve the "correct" result more often than juries that render decisions by a majority.[268] Empirical evidence suggests that majority-rule juries vote too soon and render verdicts too quickly.[269] Specifically, majority-rule juries tend to adopt a verdict-driven deliberation style, in which jurors vote early and conduct discussions in an adversarial manner, rather than an evidence-driven style, in which jurors first discuss the evidence as one group and vote later.[270]

The Connecticut Supreme Court has recognized the benefits of requiring jury unanimity:

> [W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. The "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate" convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the [Supreme Court of the United States] has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital

263. *See id.*

264. *See* Gregg v. Georgia, 428 U.S. 153, 181 (1976) ("The jury also is a significant and reliable objective index of contemporary values because it is so directly involved.").

265. *Id.* (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).

266. *See* Schriro v. Summerlin, 542 U.S. 348, 360 (2004) (Breyer, J. dissenting).

267. *See id.*

268. *See* Taylor-Thompson, *supra* note 247, at 1272–76.

269. REID HASTIE ET AL., INSIDE THE JURY 173 (The Lawbook Exchange, Ltd. 1983) (2004).

270. *Id.* at 173–74.

sentencing jury in reaching such a reasoned decision.[271]

The North Carolina Supreme Court has similarly extolled the virtues of unanimous juries:

> The policy reasons for the requirement of jury unanimity are clear. First, the jury unanimity requirement is "an accepted, vital mechanism to ensure that *real* and *full* deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." Second, the jury unanimity requirement prevents the jury from evading its duty to make a sentence recommendation. If jury unanimity is not required, then a jury that was uncomfortable in deciding life and death issues simply could "agree to disagree" and escape its duty to render a decision. This Court has refused to make any ruling which would tend to encourage a jury to avoid its responsibility by any such device.[272]

In light of the sound policy reasons behind unanimity requirements, especially for capital cases, even if it is not constitutionally required, the Florida Legislature would be wise to amend Florida's capital sentencing scheme to require jury unanimity in determining aggravating circumstances, or at least in recommending a sentence of death.

VI. CONCLUSION

The death penalty is the most severe, irrevocable penalty in criminal law.[273] Nonetheless, Florida stands alone in allowing a simple majority of the jury both to recommend a sentence of death and to decide whether aggravating circumstances exist, and does not even require that majority to decide on the same aggravator.[274] Every other state that has retained the death penalty requires a jury to unanimously decide whether the prosecution has proven an aggravating circumstance.[275] Moreover, an examination of Supreme Court precedent reveals that the Sixth, Eighth, and

271. State v. Daniels, 542 A.2d 306, 315 (Conn. 1988) (internal citations and quotations omitted); *see also* Andres v. United States, 333 U.S. 740, 749 (1948) (upholding lower court's interpretation of a federal statute to require jury unanimity as to both guilt and punishment and reasoning that such a requirement "is more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system"); Elizabeth F. Loftus & Edith Greene, *Twelve Angry People: The Collective Mind of the Jury*, 84 COLUM. L. REV. 1425, 1428 (1984) (reviewing HASTIE ET AL., *supra* note 269 (discussing an empirical study indicating that "behavior in juries asked to reach a unanimous verdict is more thorough and grave than in majority-rule juries, and that the former were more likely than the latter jurors to agree on the issues underlying their verdict.")).

272. State v. McCarver, 462 S.E.2d 25, 39 (N.C. 1995) (internal citations and quotations omitted) (deciding that a jury must render a unanimous decision regarding the existence of aggravators).

273. *See supra* notes 3–7 and 65–67 and accompanying text.

274. *See supra* notes 26–30, 32–48 and accompanying text.

275. *See supra* notes 49–58 and accompanying text.

Fourteenth Amendments to the Constitution of the United States likely require a jury to determine the existence of aggravators by more than a mere majority vote.[276] Proponents of Florida's capital sentencing scheme might argue that although the statute authorizes a simple majority of the jury to determine whether the prosecution has proved an aggravator, the jury indeed renders a unanimous verdict as to the defendant's guilt.[277] This argument is unavailing because, after *Apprendi* and *Ring*, there is no substantive difference between a jury verdict as to guilt and a jury's determination of aggravators.[278] Thus, the Florida Legislature should revisit its capital sentencing scheme to require more than a mere majority to decide whether the prosecution has proved an aggravator. Although Supreme Court precedent suggests that a substantial majority of the jury, rather than a unanimous jury, may decide whether the prosecution has proved an aggravator,[279] the Florida Legislature would be wise to require juries to render unanimous decisions regarding aggravators. Not only would such a requirement surely satisfy constitutional requirements, but it would improve jury deliberation, more accurately reflect the community's values, and reduce the likelihood of inconsistent, arbitrary death sentences. It would also finally bring Florida in line with all other states, which have retained the death penalty.

276. *See supra* notes 68–196 and accompanying text.
277. *See supra* notes 31–48 and accompanying text.
278. *See supra* notes 197–228 and accompanying text.
279. *See supra* notes 116–96 and accompanying text.