

**William C. Hubbard**  
President

**AMERICAN BAR ASSOCIATION**

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March 9, 2015

The Honorable Greg Evers  
Chairman, Committee on Criminal Justice  
Florida Senate  
308 Senate Office Building  
404 South Monroe Street  
Tallahassee, FL 32399

The Honorable Audrey Gibson  
Vice-Chair, Committee on Criminal Justice  
Florida Senate  
205 Senate Office Building  
404 South Monroe Street  
Tallahassee, FL 32399

The Honorable Carlos Trujillo  
Chairman, Criminal Justice Subcommittee  
Florida House of Representatives  
417 House Office Building  
402 South Monroe Street  
Tallahassee, FL 32399

The Honorable Randolph Bracy  
Ranking Member, Criminal Justice  
Subcommittee  
Florida House of Representatives  
417 House Office Building  
402 South Monroe Street  
Tallahassee, FL 32399

Dear Chairman Evers, Vice-Chair Gibson, Chairman Trujillo, and Ranking Member Bracy:

On behalf of the American Bar Association (ABA), I write to share with you our official policy and accompanying report related to the importance of jury unanimity in death penalty sentencing as you consider Senate Bill 664 and House Bill 139. I hope that this information will serve as a helpful resource as you examine and debate this important issue.

While the ABA takes no position on capital punishment generally, we have extensively studied the operation of the death penalty in the U.S. criminal justice system and have taken the position that governments should take great care to ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and minimize the risk that innocent persons may be executed. To that end, we approved a policy at our February 2015 meeting of the House of Delegates that states:

[T]he American Bar Association urges all federal, state, and territorial governments, that impose capital punishment, and the military, to require that: (1) Before a court can impose a sentence of death, a jury must unanimously recommend or vote to impose that sentence; and (2) The jury in such cases must also unanimously agree on the existence of any fact that is a prerequisite for eligibility for the death penalty and on the specific aggravating factors that have each been proven beyond a reasonable doubt.<sup>1</sup>

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<sup>1</sup> ABA Resolution 108A (Feb. 2015).

This policy was designed to complement the ABA's other extensive policies and principles reflecting its longstanding and strong support of jury verdict unanimity in all cases, not just in death penalty trials. In 1974, the ABA first formally articulated its support for the necessity of unanimity in federal criminal cases, stating that the ABA is "opposed to the concept of less than unanimous verdicts in Federal criminal cases."<sup>2</sup> The accompanying policy report detailed the rationale for its position, stating that "God's most precious gifts of life/liberty are involved in Federal criminal cases" and, as such, "our time-honored procedures for depriving a person of these precious gifts only by a unanimous verdict by a jury of his peers should be retained."<sup>3</sup>

This position is also reflected in several other ABA standards, including our widely cited *Standards Relating to Trial Courts*, *Criminal Justice Standards* and *Jury Principles* – each of which calls for jury unanimity as a general principle of American law.<sup>4</sup> Finally, the ABA convened an Assessment Team, made up of law and psychology professors, former judges, prosecutors, and defense lawyers, who completed a study of Florida's capital punishment system in 2006. That Team specifically recommended changing the state's laws allowing for non-unanimous jury recommendations that death be imposed.<sup>5</sup>

In short, the ABA has steadfastly stood by the vital and time-honored role of the American jury as fact-finder, expressing the "conscience of the community."<sup>6</sup> This deliberative function of the jury is crucial in order to ensure that a verdict or sentence is not being unfairly or arbitrarily imposed. Thus, with a decision as serious and irreversible as imposing the death penalty – arguably the most significant determination we ask our citizens to make – the ABA believes that the vote of the jury should be unanimous both in its fact-finding role on the aggravating circumstances that legally allow consideration of a death sentence and in the ultimate determination that permits a court to impose a sentence of death.

It is our understanding that the proposed legislation would bring Florida's death penalty laws into compliance with the above standards. Among other provisions designed to improve accuracy in the state's capital punishment system, the legislation would require a Florida jury's advisory sentence of death to be based on a unanimous vote supporting death, requiring the trial court to instruct the jury that each aggravating circumstance used to support the jury's recommendation of death must be proven beyond a reasonable doubt as found by a unanimous vote.

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<sup>2</sup> ABA Resolution 134 (Aug. 1974).

<sup>3</sup> *Id.*

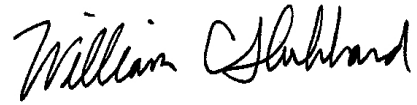
<sup>4</sup> *ABA Standards Relating to Trial Courts* (1992), Standard 2.10(b); *ABA Standards for Criminal Justice* (1978), Standard 15-1.1; *ABA Principles for Juries and Jury Trials* (2005), Principle 4.

<sup>5</sup> *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*, pg. x, September 2006 ("The State of Florida should require that the jury's sentencing verdict in capital cases be unanimous and, when the sentencing verdict is a death sentence, that the jury reach unanimous agreement on at least one aggravating circumstance.").

<sup>6</sup> *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

For these reasons, the American Bar Association urges you to pass Senate Bill 664 and House Bill 139.

Sincerely,

A handwritten signature in black ink, reading "William C. Hubbard". The signature is written in a cursive, flowing style with a large initial "W".

William C. Hubbard

Enclosure

**AMERICAN BAR ASSOCIATION**  
**ADOPTED BY THE HOUSE OF DELEGATES**

**FEBRUARY 9, 2015**

**RESOLUTION**

RESOLVED, That the American Bar Association urges all federal, state, and territorial governments, that impose capital punishment, and the military, to require that:

- (1) Before a court can impose a sentence of death, a jury must unanimously recommend or vote to impose that sentence; and
- (2) The jury in such cases must also unanimously agree on the existence of any fact that is a prerequisite for eligibility for the death penalty and on the specific aggravating factors that have each been proven beyond a reasonable doubt.

## REPORT

The vast majority of U.S. jurisdictions that have capital punishment require a jury's recommendation of a death sentence to be unanimous. However, there are a few outliers that allow a person to be sentenced to death on the recommendation of a non-unanimous jury. This Recommendation urges the retention or adoption of the unanimous jury-based sentencing schemes maintained, and successfully utilized, by the vast majority of states, the military, and the Federal government. With a decision as serious and irreversible as imposing the death penalty – arguably the most significant determination we ask our citizens to make – the American Bar Association believes that the vote of the jury should be unanimous both in its fact-finding role on the aggravating circumstances that legally allow consideration of a death sentence and in the ultimate determination that permits a court to impose a sentence of death.

As this Report outlines, this Recommendation complements the ABA's other policies and principles reflecting its longstanding and strong support of jury verdict unanimity, particularly in criminal trials, and the ABA's extensive policies on the importance of ensuring that death penalty cases are administered fairly and impartially, in accordance with due process. This Recommendation, which speaks to the particular significance of the sentencing determination in a death penalty case, shall reflect the ABA's position that when imposition of the ultimate punishment is to be permitted, unanimity in the jury's decision is essential.

### **I. Background**

The capital punishment laws currently used in the United States have been approved by the Supreme Court only since 1976, when the newly enacted death penalty statutes of Georgia, Florida, and Texas were upheld, effectively reinstating the constitutionality of the modern death penalty in *Gregg v. Georgia* and its companion cases.<sup>1</sup> Although the three capital punishment statutes provided for differing sentencing structures, all permitted jury input with schemes that the Court found guaranteed the reliability required by the Eighth Amendment.<sup>2</sup>

However, of the 32 U.S. states that currently have the death penalty, only three do not now require that the jury that votes on the life or death sentence be unanimous in its final sentencing recommendation or decision; the federal government also requires unanimity.<sup>3</sup> Alabama permits a jury to recommend a death sentence on a vote of 10-2 and that vote is not binding on the trial court.<sup>4</sup> By judicial decision, Alabama ensures that every death sentence has been based on a unanimous finding of at least one aggravating circumstance.<sup>5</sup> But Alabama also permits the judge to make a decision to issue a death sentence, even after a unanimous jury makes a recommendation for a life sentence. Delaware requires that the jury unanimously find at least one aggravating circumstance beyond a reasonable doubt and that the jury note how each juror voted on the decision whether the aggravating circumstances outweigh the mitigating

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<sup>1</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion); *Proffitt v. Florida*, 428 U.S. 242 (1976) (joint opinion); *Jurek v. Texas*, 428 U.S. 262 (1976) (joint opinion).

<sup>2</sup> *Gregg*, 428 U.S. at 181; *Proffitt*, 428 U.S. at 252; *Jurek*, 428 U.S. at 276.

<sup>3</sup> Fed. R. Crim. P. 31 (a).

<sup>4</sup> Ala. Code § 13A-5-46-47 (2012).

<sup>5</sup> See, e.g., *Ex parte McNabb*, 887 So. 2d 998, 1005-05 (Ala. 2004); *Ex parte Waldrop*, 859 So. 2d 1181, 1188 (Ala. 2002); *McCray v. State*, 88 So. 3d 1, 82 & n.33 (Ala. Crim. App. 2010).

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circumstances, but leaves the sentencing decision to the trial judge.<sup>6</sup> Finally, Florida requires neither a unanimous jury recommendation nor a unanimous finding by the jury that any aggravating circumstance has been proved.<sup>7</sup> A Florida jury can recommend a death sentence to the trial judge on a simple majority vote of the 12 jurors, and there is no special verdict required that would reflect the vote on the aggravating circumstances.<sup>8</sup>

In 2002 there was a sea change in terms of the legal significance of jury sentencing decisions in capital cases when, in *Ring v. Arizona*, the U.S. Supreme Court concluded that capital defendants “are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”<sup>9</sup> While the issue of whether the Sixth Amendment required the jury to make the ultimate penalty determination was not before the Court,<sup>10</sup> the Court observed that “the great majority of States responded to the Court’s Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury.”<sup>11</sup> The Court then held that because the enumerated aggravating circumstances “operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury.”<sup>12</sup>

The *Ring* Court, quoting from *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968), also generally extolled the virtue of trial by jury, explaining, “[t]he guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered.”<sup>13</sup> In a concurring opinion, Justice Scalia bemoaned the “perilous decline” in the belief in the right to a jury trial, and noted:

That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man’s going to his death because a *judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.<sup>14</sup>

Following *Ring*, the Supreme Court of Florida, in *State v. Steele*, addressed the lack of any jury-unanimity requirement in the Florida death penalty scheme and underscored the need for that state’s legislature to change its statute:

[W]e express our considered view, as the court of last resort charged with implementing Florida’s capital sentencing scheme, that in light of developments in other states and at

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<sup>6</sup> Del. Code Ann. Tit. 11, § 4209(c)(3)(A) (West 2013).

<sup>7</sup> Even in 1976, Florida’s capital sentencing scheme was particularly unique in that the jury only recommended a sentence, its recommendation need not be unanimous or by any particular numerical vote, and the trial judge was permitted to override the jury’s sentencing vote, whether it was for a life or a death sentence. See *Proffitt*, 428 U.S. at 252; see also, *Spaziano v. Florida*, 468 U.S. 447 (1984).

<sup>8</sup> Fla. Stat. §§921.141(2)-(3) (2014).

<sup>9</sup> 536 U.S. 584 at 589 (2002).

<sup>10</sup> *Id.* at 597 n.4

<sup>11</sup> *Id.* at 607-08 (footnote omitted).

<sup>12</sup> *Id.* at 609 (citation omitted).

<sup>13</sup> 536 U.S. at 609.

<sup>14</sup> *Id.* at 612 (emphasis in original).

the federal level, the legislature should revisit the statute to require some unanimity in the jury's recommendations. Florida is now the only state in the country that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote.<sup>15</sup>

To date, however, Florida's legislature has not voted to change its statute that provides for a recommendation from a simple majority of capital sentencing jurors, and Delaware and Alabama also have not taken significant steps to reform their laws.

## II. The Importance of Unanimity

Not only is the principle that juries should be unanimous steeped in the common law dating back to the 14<sup>th</sup> Century and in American jurisprudence as early as the 19<sup>th</sup> Century,<sup>16</sup> but more recent jury research over the past two decades has established that eliminating the unanimity requirement "can result in truncating or even eliminating jury deliberations."<sup>17</sup> Empirical studies have revealed that, without a unanimity requirement for a recommendation of death, capital jurors do not devote the same energy or emotional commitment to the discussion among jurors on the ultimate sentencing decision, and pro-death jurors are able to overpower and ultimately silence undecided or minority viewpoint jurors.<sup>18</sup> As Cantero & Kline aptly explain:

[C]ourts that allow a non-unanimous jury to render a verdict invariably empower superficial, narrow, and prejudiced arguments that appeal only to certain groups. Unanimous verdicts ensure that defendants are convicted on the merits and not merely on the whims of a majority.<sup>19</sup>

Thus, the data suggest that any measure that encourages jurors to devote more time and thought to deliberations, and empowers minority jurors to voice their opinions and fully participate in the process, increases the reliability of jury determinations and is a constitutional imperative. It is crucial that jurors seriously discuss and consider all of the evidence, both with regard to aggravation and mitigation, before issuing a recommendation or decision supporting a death sentence.

Reaching a unanimous consensus is particularly critical when the jury is determining what aggravating circumstances, if any, have been proven. When the Supreme Court invalidated the death penalty in *Furman v. Georgia*, the central concern was that defendants were being

<sup>15</sup> 921 So. 2d 538 at 548 (Fla. 2005) (emphasis in original).

<sup>16</sup> See Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 586 (1993); *American Publishing Co. v. Fisher*, 166 U.S. 464 (1897).

<sup>17</sup> Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1263 (2000).

<sup>18</sup> See William J. Bowers et al., *The Decision Makers: An Empirical Examination of the Way the Role of the Judges and Jury Influence Death penalty Decision-Making*, 63 Wash. & Lee L. Rev. (2006); Samuel Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597 (2006); Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001).

<sup>19</sup> Raoul G. Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 St. Thomas Law Rev. 31-32 (2009) (Footnotes omitted).

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condemned to death arbitrarily and capriciously.<sup>20</sup> In an oft quoted assessment, Justice White pointed out that the schemes under review provided “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”<sup>21</sup> To address the Furman Court’s concerns that capital sentencers had unguided discretion, legislatures subsequently delineated aggravating circumstances that – whether or not one or more of them were prerequisites to consideration of capital punishment – were justified as channeling the jury’s discretion and narrowing the scope of homicides for which the death penalty may be imposed in order to establish less arbitrary – and constitutional – death penalty statutes.<sup>22</sup> They clearly are, as the Supreme Court has said, the functional equivalent of elements of the offense when their existence is a prerequisite to imposing the death penalty.<sup>23</sup> But aggravating circumstances also play a special role that can lead to a death rather than life outcome when they are otherwise considered as part of a sentencing determination.

Because the ABA has long sought to ensure that “death penalty cases are administered fairly and impartially,”<sup>24</sup> it is manifest that the jury’s determination that any aggravating circumstance has been established should be by a unanimous vote, upon proof beyond a reasonable doubt. Indeed, capital juries are often asked to weigh evidence of one or multiple statutorily-specified aggravating factors against mitigation evidence, or are allowed to consider additional or “catch-all” evidence as aggravating that was not proven as an element of the crime but may otherwise justify the death penalty. Therefore, under most death penalty schemes, evidence of specific aggravators clearly plays a special role in determining whether or not the death penalty is ultimately appropriate.

Plus, this is a complicated and unique analysis being requested of a capital sentencing jury – or any jury, for that matter. Requiring unanimity on this most crucial determination, as discussed above, promotes a thorough and reasoned resolution.<sup>25</sup> And the reasonable doubt standard is the “prime instrument for reducing the risk of [sentences] resting on factual error.”<sup>26</sup> When aggravating circumstances must be unanimously found beyond a reasonable doubt a community’s confidence that its capital scheme is designed to defeat arbitrary and capricious infliction of the death sentence is likely enhanced, as is the integrity of the entire process.

Additionally, to the extent that lack of unanimity on the finding of an aggravating circumstance or on the final sentencing verdict reflects jurors’ lack of complete confidence in the evidence presented to them, the constantly growing number of exonerations of death-sentenced individuals nationwide supports the value of jury unanimity. Indeed, there are now 147 individuals exonerated from death row nationwide, and 25 of those, more than any other state, come from

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<sup>20</sup> See, e.g., 408 U.S. at 313 (White, J., concurring).

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion); *Gregg v. Georgia*, 428 U.S. at 196-97; *Proffitt v. Florida*, 428 U.S. at 258.

<sup>23</sup> *Ring*, 536 U.S. at 609 (citation omitted).

<sup>24</sup> ABA Resolution 107 (Feb. 1997).

<sup>25</sup> Capital jury researchers have found that jurors are often confused about how to conduct the statutorily required weighing of aggravation and mitigation evidence. See e.g. William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L. J. 1043 (1995). Thus, requiring jurors to methodically determine unanimity on each aggravating factor presented may help prevent truncation of this process.

<sup>26</sup> *In re Winship*, 397 U.S. 358, 363 (1970).



Florida, where there is no unanimity requirement on the aggravating-circumstance findings and a simple majority of jurors can authorize a death sentence.<sup>27</sup>

### III. Existing ABA Policies Support Unanimous Verdicts

In recognition of these principles of American justice and the empirical evidence discussed above, the ABA has enacted several policies related to the importance of unanimity in jury verdicts, but not yet on jury death penalty sentencing determinations. In 1974, the ABA first took a firm stance on the necessity of unanimity in federal criminal cases. The resolution states that the ABA is “opposed to the concept of less than unanimous verdicts in Federal criminal cases.” In the accompanying policy report, the Committee detailed the rationale for its position, stating that “God’s most precious gifts of life/liberty are involved in Federal criminal cases” and as such, “our time-honored procedures for depriving a person of these precious gifts only by a unanimous verdict by a jury of his peers should be retained.”<sup>28</sup>

Subsequently, the Commission on Standards of Judicial Administration published *Standards Relating to Trial Courts*, calling for all criminal case jury verdicts to be unanimous, not just federal cases. The ABA also has promulgated its extensive and widely-cited *Criminal Justice Standards* and *Jury Principles* that both reflect the ABA’s strong position favoring unanimous jury verdicts in all criminal cases.<sup>29</sup> Specifically, Standard 15-1.1 (c) calls for a unanimous jury verdict in all cases “in which confinement in jail or prison may be imposed,” and Jury Principle 4 (b), promulgated in 2005, uses similar language, saying “a unanimous decision should be required in all criminal cases heard by a jury.”

The accompanying commentary for Jury Principle 4 cites both historical and empirical reasons that jury unanimity is vitally important, including findings like the research cited above and other evidence. In criminal trials, there is a heightened need for accuracy when “a person’s liberty is at risk and society faces the threat of mistaken acquittal or conviction.”<sup>30</sup> Several studies have shown that unanimous verdicts provide this accuracy through increased minority juror participation. As the accompanying commentary notes, unanimous verdicts require “each point of view to be considered and all jurors persuaded.” Wide ranging discussions with all jurors participating are “likely to be more accurate” than the non-unanimous alternative. Moreover, a non-unanimous verdict “fosters a public perception of unfairness and undermines acceptance of verdicts and the legitimacy of the jury system.”<sup>31</sup> In the death-penalty realm, this perception is exacerbated by the statistical evidence that, after controlling for variables, black defendants who kill white victims have a significantly greater chance of being sentenced to death.<sup>32</sup>

Additionally, the ABA’s Death Penalty Due Process Review Project, in conjunction with independent state-based experts, has coordinated comprehensive studies and analyses of the

<sup>27</sup> Death Penalty Information Center, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st> (last visited Nov. 14, 2014).

<sup>28</sup> See ABA Resolution 134 (Aug. 1974).

<sup>29</sup> ABA *Standards for Criminal Justice* (1978); ABA *Principles for Juries and Jury Trials* (2005).

<sup>30</sup> ABA *Principles for Juries and Jury Trials* at 25 (2005).

<sup>31</sup> *Id.* at 24-25 (internal citations omitted).

<sup>32</sup> David C. Baldus et al., *Equal Justice and the Death Penalty*, 150 (1990).

administration of capital punishment in twelve U.S. states.<sup>33</sup> The assessments were designed to give jurisdictions an objective instrument to evaluate their administration of the death penalty, by comparing the actual practices in the state with a series of recommendations based on the original 2001 *ABA Protocols on the Administration of Capital Punishment* and the revised version in 2010. The Project completed assessments of both Florida and Alabama in 2006, and in both reports the Assessment Teams, made up of law and psychology professors, former judges, prosecutors, and defense lawyers, specifically recommended changing the states' laws allowing for non-unanimous jury recommendations that death be imposed.<sup>34</sup>

Finally, the ABA has sought meaningful application of its overarching position favoring jury verdict unanimity, submitting an *amicus curiae* brief in *Lee v. Louisiana* before the Supreme Court of the United States in 2008. The ABA asked the Court to grant certiorari in *Lee* to consider whether the Sixth Amendment right to jury trial, as applied to the States through the Fourteenth Amendment, should allow a criminal conviction based on a non-unanimous jury verdict. The brief noted that the "ABA's long-standing position on jury unanimity in criminal trials is the result of its continuing and comprehensive study of the jury's role in the criminal justice system" and extensively cited the aforementioned policies calling for unanimous jury verdicts set forth in the *ABA Criminal Justice Standards on Trial by Jury* and the *ABA Jury Principles*.

#### IV. Conclusion

In short, the ABA believes in the vital and time-honored role of the American jury as fact-finder, expressing the "conscience of the community."<sup>35</sup> For the reasons stated in this Report and in the other ABA policies surrounding the importance of verdict unanimity and the reasonable doubt standard, all capital jurisdictions should require their sentencing juries to determine unanimously and beyond a reasonable doubt the existence of any aggravating circumstance, and, ultimately, to reach a unanimous determination that a death sentence is legally warranted in a particular case. This deliberative function is crucial in order to ensure that the death sentence is not being unfairly or arbitrarily imposed. The decisions from the United States Supreme Court on the size and vote requirements for petit juries generally,<sup>36</sup> coupled with the empirical data about jury behavior and the capital jurisprudence that underscores that "death is different," reinforce the significance of and need for juror unanimity in the determination whether a man or woman lives or dies.<sup>37</sup>

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<sup>33</sup> ABA Death Penalty Due Process Review Project, [http://www.americanbar.org/groups/individual\\_rights/projects/death\\_penalty\\_due\\_process\\_review\\_project/death\\_penalty\\_assessments.html](http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/death_penalty_assessments.html) (Last visited Nov. 14, 2014).

<sup>34</sup> *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*, pg. x, September 2006 ("The State of Florida should require that the jury's sentencing verdict in capital cases be unanimous and, when the sentencing verdict is a death sentence, that the jury reach unanimous agreement on at least one aggravating circumstance."); *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report*, pg. vi, June 2006 ("The State of Alabama should require that the jury be unanimous before it may recommend a sentence of death.").

<sup>35</sup> *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

<sup>36</sup> *See Burch v. Louisiana*, 441 U.S. 130 (1979).

<sup>37</sup> *Cantero & Kline, supra*, at 17-25.

Respectfully submitted,

Virginia E. Sloan, Chair  
Death Penalty Due Process Review Project  
February 2015

Mark I. Schickman, Chair  
Section of Individual Rights and Responsibilities  
February 2015

## GENERAL INFORMATION FORM

Submitting Entity: Death Penalty Due Process Review Project, Co-sponsor: Section of Individual Rights and Responsibilities

Submitted By: Virginia Sloan, Chair, Death Penalty Due Process Review Project; Mark I. Schickman, Chair, Section of Individual Rights and Responsibilities

1. Summary of Resolution(s).

This Recommendation addresses the particular significance of the sentencing determination in a death penalty case and calls upon all jurisdictions with capital punishment to require the jury to unanimously recommend or vote for a death sentence before such punishment can be imposed. Additionally, a capital sentencing jury should unanimously agree on the existence of any fact whose existence is a prerequisite for eligibility for death, and unanimously agree on the specific aggravating factors that have each been proven beyond a reasonable doubt.

2. Approval by Submitting Entity.

Yes, the Steering Committee of the Death Penalty Due Process Review Project approved the Recommendation. The Council of the Section of Individual Rights and Responsibilities approved the Recommendation on November 8, 2014 at the Section's Fall Meeting in Snowbird, Utah.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The American Bar Association has no existing policies specific to death penalty sentencing jury recommendations. However, this resolution complements extensive ABA policies on the importance of jury verdict unanimity in criminal cases, as well as the ABA policies related to the death penalty that seek to protect the constitutional rights of persons facing possible death sentences, including the 1997 ABA Policy Supporting a Temporary Halt on Executions in the United States and the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A. The report is not late filed, but the Recommendation should be considered at the 2015 Mid-Year meeting so that the ABA is able to engage in the policy discussions surrounding reform legislation to be introduced in January 2015 in Florida.

6. Status of Legislation.

There is no relevant legislation pending in Congress, but there was legislation introduced in the Florida Legislature last year, SB 344, introduced by Senator Altman, that would change Florida's existing law to comply with this Recommendation. As that bill did not pass in the last legislative cycle, legislators have expressed the intention to re-file a version of the bill in 2015.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If this recommendation and resolution are approved by the House of Delegates, the sponsors will use that approval to provide information to policymakers and other stakeholders about the importance of juror unanimity in capital sentencing. The policy will support the filing of amicus briefs in cases that present issues related to death sentences imposed by non-unanimous juries. The sponsors will also use the policy to consult on issues related to jury unanimity when called upon to do so by judges, lawyers, government entities, and bar associations.

8. Cost to the Association.

None.

9. Disclosure of Interest.

N/A.

10. Referrals.

Death Penalty Representation Project  
 Criminal Justice Section  
 Government and Public Sector Lawyers Division  
 Section of International Law  
 Section of Litigation  
 Section of State and Local Government Law  
 Tort Trial and Insurance Practice Section  
 Judicial Division  
 Law Student Division  
 Solo, Small Firm and General Practice Division  
 Senior Lawyers Division  
 Young Lawyers Division  
 Center for Racial & Ethnic Diversity  
 Standing Committee on Legal Aid and Indigent Defense

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## 11. Contact Name and Address Information (prior to the meeting)

Misty Thomas, Director  
ABA Death Penalty Due Process Review Project  
1050 Connecticut Ave, NW  
Washington, DC, 20036,  
Tel: 202-662-1595  
Cell: 202-210-8894  
E-mail: [misty.thomas@americanbar.org](mailto:misty.thomas@americanbar.org)

## 12. Contact Name and Address Information. (Who will present the report to the House?)

Walter White, Delegate  
ABA Section of Individual Rights and Responsibilities  
McGuire Woods LLP  
11 Pilgrim Street  
London EC4V 6RN, United Kingdom  
Tel: 202-857-1707  
Email: [wwhite@mcguirewoods.com](mailto:wwhite@mcguirewoods.com)

## **EXECUTIVE SUMMARY**

### 1. Summary of the Resolution

This Recommendation addresses the particular significance of the sentencing determination in a death penalty case and calls upon all jurisdictions with capital punishment to require the jury to unanimously recommend or vote for a death sentence before such punishment can be imposed. Additionally, a capital sentencing jury should unanimously agree on the existence of any fact whose existence is a prerequisite for eligibility for death, and unanimously agree on the specific aggravating factors that have each been proven beyond a reasonable doubt.

### 2. Summary of the Issue that the Resolution Addresses

This resolution addresses the outlier policies in a handful of states that do not require a jury to be unanimous before imposing the sentence of death. This resolution clarifies that the ABA's long-standing policies in favor of unanimous jury verdicts also extends to the profoundly significant decision by a jury of whether a person convicted of a capital crime should be put to death.

### 3. Please Explain How the Proposed Policy Position will address the issue

The proposed policy will clarify the ABA's view on the best practice in this area of criminal law and highlight the outlier status of the three places that still allow non-unanimous decisions to lead to a recommendation of death.

### 4. Summary of Minority Views

There has been no opposition raised or any minority views expressed within the American Bar Association to this Recommendation. The opposition in the outlier states is usually based on a claim that a unanimity requirement would reduce the number of sentences of death imposed in that jurisdiction and lead to a reduction in the availability of the death sentence generally.