No. 14-7505

In the Supreme Court of the United States

TIMOTHY LEE HURST,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the American Bar Association ("ABA") respectfully submits this brief in support of Petitioner. Although the ABA takes no position on the death penalty *per se*, the ABA urges that Florida's capital sentencing system does not comply with this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002). Where a capital defendant has not waived his or her right to a jury, the ABA submits that compliance with *Ring* requires that a jury's vote on any aggravating circumstance necessary to allow a death sentence must be unanimous. The ABA also submits that the jury's recommendation or decision that a death sentence should be imposed must be unanimous. Unanimity, the ABA urges, is required to ensure that a death sentence is rendered as the result of the jury's full deliberation as the "conscience of the community,"[2] and within the requirements of the Constitution.

The ABA is committed to "[w]ork[ing] for just laws, including human rights, and a fair legal process," and "[a]ssur[ing] meaningful access to justice for all persons."[3] With nearly 400,000 members from all fifty

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

[3] *ABA Mission and Association Goals*, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited June 2, 2015).

states and other jurisdictions, the ABA is the leading association of legal professionals and one of the largest voluntary professional membership organizations in the United States. Its members include prosecutors, public defenders, and private defense counsel. They also include attorneys in law firms, corporations, non-profit organizations, and government agencies, as well as judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.[4] From Florida, ABA membership includes 18,537 lawyers, 2,653 law students, and 528 associates.

The position taken in this amicus brief represents the consensus of this diverse membership. It is founded on over forty years of study of the jury's role in our criminal justice system and was adopted by the ABA's House of Delegates ("HOD") as ABA Policy 108A during its Midyear Meeting in February 2015.[5] This Policy calls for governments that impose capital punishment to require that:

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[4] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of the positions in it.

[5] ABA Policy 108A was presented to the HOD as Resolution with Report 108A, a full copy of which is reprinted as the Appendix to this Brief ("ABA App."). Only Resolutions adopted by vote of the HOD become ABA policy. The HOD is composed of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, and the Attorney General of the United States, among others. *See* ABA Leadership, House of Delegates, *General Information*, http://www.americanbar.org/groups/leadership/house_of_delegates.html (last visited June 2, 2015).

> (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.

ABA App. 1.

ABA Policy 108A is the latest in a continuum of ABA policies that support jury unanimity in criminal trials. In 1974, the ABA adopted policy stating that the ABA is "opposed to the concept of less than unanimous verdicts in federal criminal cases."[6] This policy is reflected, *inter alia*, in Standard 2.10(b) of the *ABA Standards of Judicial Administration Relating to Trial Courts*,[7] Standard 15-1.1 of the *ABA Criminal Justice*

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[6] ABA Policy 134 (adopted Aug. 1974), available from the ABA.

[7] *ABA*, *Standards of Judicial Administration Relating to Trial Courts*, Standard 2.10(b) (1992 ed.) (first published in 1976), *available at* http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/trialcourtstandards.authcheckdam.pdf ("Criminal Cases. . . . The verdict of the jury should be unanimous.").

Standards,[8] and in Principle 4 of the *ABA Principles for Juries and Jury Trials*.[9]

In 1986, the challenges inherent in capital litigation led the ABA to create the Death Penalty Representation Project ("ABA Representation Project").[10] For nearly thirty years, the ABA Representation Project has worked to improve the quality and availability of counsel through all stages of capital litigation, from arrest through post-conviction collateral review. The ABA Representation Project issued *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("*Guidelines*"), which became ABA policy in 1989.[11] The ABA adopted a revised and expanded edition of the Guidelines in

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[8] *ABA Criminal Justice Standards*, Standard 15-1.1(c), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_jurytrial_blk.html ("The verdict of the jury should unanimous").

[9] *ABA Principles for Juries and Jury Trials*, Principle 4. B., *available at* http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf ("A unanimous decision should be required in all criminal cases heard by a jury").

[10] Information on the Death Penalty Representation Project is available at http://www.americanbar.org/groups/committees/death_penalty_representation.html (last visited June 2, 2015).

[11] *Available at* http://www.ambar.org/1989Guidelines (last visited June 2, 2015).

2003,[12] and they have been cited by hundreds of state and federal courts.[13] The ABA Representation Project has also recruited and trained hundreds of ABA members as volunteer attorneys to represent defendants in capital cases.

In 2001, the ABA launched its Death Penalty Due Process Review Project ("ABA Review Project") to conduct research and educate the public and decision-makers on the operation of capital jurisdictions' death penalty laws and processes.[14] The ABA Review Project has completed in-depth assessments for twelve states, designed to provide policy-makers in each state an objective instrument to evaluate their state's death penalty system, by comparing actual practices in the state with a series of recommendations based on the 2001 *ABA Protocols on the Administration of Capital Punishment* and the revised 2010 version of the *Protocols.*[15] The state-based assessment teams were

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[12] *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 923 (2003), *available at* http://www.ambar.org/2003Guidelines.

[13] *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387 n. 7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Criminal Specialist Investigations, Inc. v. State*, 58 So. 3d 883, 886 (Fla. 2011).

[14] Information on the ABA's Death Penalty Due Process Review Project and its jurisdictional assessments is available at http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project.html (last visited June 2, 2015).

[15] ABA, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (June

composed of academics, prosecutors, defense counsel, current and former judges, state bar representatives and state legislators, who lent their expertise and made specific recommendations for reform.[16]

The ABA Review Project completed its assessment of Florida's death penalty system in 2006, "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment" ("Florida Assessment").[17] Among the ABA Review Project's recommendations was that "[t]he 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." Florida Assessment at 308.[18]

2001), *available at* http://www.americanbar.org/content/dam/aba/migrated/irr/finaljune28.authcheckdam.pdf; *ABA Jurisdictional Assessments Chapters and Recommendations* (Jan. 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/protocols2010.authcheckdam.pdf.

[16] *See generally ABA State Death Penalty Assessments*, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html (last visited June 2, 2015).

[17] The Florida Assessment is available at http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/state_death_penalty_assessments/florida.html (last visited June 2, 2015).

[18] The Florida Assessment is discussed further in the Argument, below.

The ABA's longstanding commitment to the development of balanced policies regarding the criminal justice system, and for capital sentencing specifically, provides it with a deep respect for the role that juries play in assuring that sentences, especially death sentences, fully comply with constitutional requirements. The ABA therefore presents this *Amicus Curiae* brief.

SUMMARY OF ARGUMENT

The ABA submits that, in light of this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), Florida's death sentencing system should be held to be unconstitutional under the Sixth and Eighth Amendments. Unique among all capital punishment jurisdictions in the United States, Florida is the only jurisdiction that allows a jury to determine by majority vote both whether aggravating circumstances have been proved beyond a reasonable doubt *and* to recommend a sentence of death. Further, Florida does not require that the majority agree on *which* aggravating factor exists, or even on a single aggravating factor. And the majority does not report which aggravator(s) it finds to the judge, but reports only its recommendation. The Florida Supreme Court has concluded this is sufficient "fact-finding" because in coming to a recommendation that a death sentence be imposed, the jury has necessarily found that at least one aggravating factor has been proved.

The ABA submits that this is not jury "fact-finding" as required by *Ring*. And an extensive body of research and the ABA's forty-plus years of study of the jury's role in our criminal system has established, *inter alia*, that when only a majority vote is required, jurors do

not devote as much time, energy or emotional commitment to the punishment decision, and pro-death jurors are often able to mute the concerns of undecided or life sentence jurors by noting that a mere majority is needed to impose death.

Further, the Florida death penalty system requires that after the judge receives the recommendation of the jury – without any specification of what aggravating factors received a vote – the judge must then independently determine the existence of aggravating and mitigating circumstances, the weight to be given to each, and the sentence to be imposed. Again, the ABA submits that this is not jury "fact-finding," as required by *Ring*. And empirical research shows that, where a capital sentencing jury's recommendation is "advisory," the jurors often do not feel responsible for the sentences that they recommend, and the penalty phase deliberations are often exceedingly brief, with little discussion of the evidence.

The ABA submits that, when capital sentencing jurors do not feel responsible for the sentences they recommend, they cannot fulfill their constitutional duty as "the conscience of the community." The ABA accordingly urges this Court to rule that Florida's capital sentencing system is unconstitutional, and that only a jury's unanimous, unqualified vote on specific aggravating circumstances, as well as on any recommendation or decision for death, should be sufficient.

ARGUMENT

There is no dispute that Florida's capital sentencing system is unique among all capital punishment jurisdictions in the United States. *See* Petitioner's Brief ("Pet. Br.") at 43. As stated by the Florida Supreme Court, "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." *State v. Steele*, 921 So. 2d 538, 548 (Fla. 2006) (emphasis in original). In fact, every other state that has the death penalty now requires jury unanimity either for the finding of aggravating factors or for the jury's vote that death is appropriate, and the vast majority of states require unanimity for both.

Although the ABA takes no position on the death penalty *per se*, the ABA submits that the Sixth and Eighth Amendment considerations set out in *Ring* and other precedents, as well as the large and consistent body of empirical research and the ABA's forty-plus years of study of the jury's role in our criminal justice system, support the ABA's conclusion that a jury's majority vote is not sufficient. The ABA submits that eligibility for a death sentence should not be permitted where even one penalty-phase juror remains unconvinced that each aggravating factor that is a prerequisite to a death sentence has been proved beyond a reasonable doubt, or where that juror – or possibly a different juror – remains unconvinced that the jury's weighing of aggravating and mitigating circumstances has established a constitutionally sufficient basis on which the jury should recommend or decide that the defendant receive the ultimate

punishment. The ABA urges that only a jury's unanimous, unqualified vote should be sufficient.

The ABA also submits that when a capital defendant has not waived his or her right to a jury trial, Florida should not be permitted to require that the judge cannot know what factors the jury found and instead, must independently find and weigh the aggravating and mitigating factors, and arrive at the defendant's sentence. The ABA urges that in this requirement, Florida's death sentencing system also does not comply with the constitutional requirements of the Sixth and Eighth Amendments.

I. A Capital Sentencing Jury Should Not Be Permitted to Find and Weigh Aggravating Factors, or Recommend or Decide that a Death Sentence Should Be Imposed, Except by Unanimous Vote.

In *Ring v. Arizona*, this Court concluded that in capital sentencing, when "aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609 (internal quotation marks and citation to *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000) omitted).

Under Florida law, the aggravating circumstances that must be found before a death sentence may be imposed are enumerated in the Florida statute, Florida Statutes Annotated ("FSA") 921.141(5). In *State v. Steele*, *supra*, the Florida Supreme Court instructed that the required aggravators may be found "by a mere majority vote." 921 So. 2d at 548. That court also instructed that nothing in Florida statutory law, its

standard jury instructions, or its standard verdict form "requires a majority of the jury to agree on *which* aggravating circumstances exist." 921 So. 2d at 548. The Florida Court continued:

> [T]he jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, while three others believe that only the "committed for pecuniary gain" aggravator applies, because seven jurors believe that at least one aggravator applies. The [trial court's] order in this case, however, requires a majority vote for at least one particular aggravator.

Id. (internal statutory citations omitted).

In fact, a majority of a Florida jury is not required to agree on a single aggravating factor, and instead could find that sufficient aggravating circumstances exist even if only one juror votes for – that is, when the vote is 11-1 *against* – each specific aggravator that is considered. As former Florida Supreme Court Justice Raoul G. Cantero explained, "The jury may still recommend a death sentence even if each juror believes that a different aggravator was proven." Raoul G. Cantero and Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 St. Thomas L. Rev. 4, 9 (2009).

In addition, a Florida jury reports only its recommendation to the judge, and is not permitted to report which aggravator(s) it finds. This is sufficient, according to the *Steele* Court, because a jury is "'necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the

determination that at least one aggravating factor had been proved.'" 921 So. 2d at 546 (quoting *Jones v. United States*, 526 U.S. 227, 250-51 (1999) (referencing *Hildwin v. Florida*, 490 U.S. 638 (1989))). As the *Steele* Court stated, "The requirement of a majority vote on each aggravator is also an unnecessary expansion of *Ring*." 921 So. 2d at 546.

Florida's capital sentencing system is unique among all 33 American jurisdictions that permit capital punishment.[19] Indeed, the Florida Supreme Court has characterized Florida as "the outlier state," stating that "Florida is now the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist *and* whether to recommend the death penalty." *Steele*, 921 So. 2d at 550 (emphasis in original). And although the *Steele* Court urged its state legislature to address this situation almost a decade ago, *id.* at 548-50, Florida remains without legislation that would bring its death penalty system into compliance with *Ring*.[20]

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[19] This includes the 31 States that authorize the death penalty as of May 28, 2015, as well as the Federal and U.S. military systems.

[20] The ABA and its members in Florida have continued to raise awareness of this issue, including as recently as March 2015 when the ABA President wrote to Florida legislators and encouraged them to adopt the over-due changes to Florida's death sentencing scheme. *See ABA Supports Florida Legislation to Require Unanimity in Death Penalty Verdicts and Sentencing*, http://www.americanbar.org/news/abanews/aba-news-archives/2015/03/aba_supports_florida.html (last visited, June 2, 2015).

With full respect for the diversity among States that our federal system enshrines, the ABA submits that Florida's system of requiring only a majority vote – as well as the requirement that Florida juries may not report which, if any, aggravating circumstance(s) they find – means the Sixth Amendment protections set out in *Ring* cannot be assured, and a reviewing court cannot determine whether the constitutional requirements, including due process and Eighth Amendment requirements, have been met. *Cf*. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (suggesting that requiring a capital "sentencing authority to specify the factors it relied upon" may be necessary to avoid unconstitutional arbitrariness).[21]

The ABA submits that, instead, Florida's capital sentencing juries should be required to find any such aggravating factors by unanimous – and not by majority, or even singular – vote, and to specify the factors so found. As Petitioner demonstrates, since *Steele* was decided in 2006, Florida has become the only capital punishment state that does not require jury

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[21] In fact, of the twelve state capital systems for which the ABA Review Project has completed assessments, ten require special jury findings on specific aggravators, most by a special verdict form. *See* Ariz. Rev. Stat. 13-752(E); Ga. Code. Ann. 17-10-30(c) (West 2012); Ind. Code 35-50-2-9(d) (West 2014); Ky. Rev. Stat. Ann. 532.025(3) (West 2012); Mo. Ann. Stat. 565.030(4) (West 2014); Ohio Rev. Code Ann. 2929.03(B) (West 2008); 42 Pa. Cons. Stat. Ann. 9711(f)(1) (West 2015); Tenn. Code Ann. 39-13-204(g)(2)(A) (West 2014); Tex. Code Crim. Proc. art. 37.071 (1991); *Prieto v. Commonwealth*, 682 S.E.2d 910, 935 (Va. 2009). Florida and Alabama remain outliers in this regard. *See* Ala. Code 13A-5-47(d) (1975); *Ex parte McGriff*, 908 So. 2d 1024 (Ala. 2004).

unanimity on aggravating factors, either to make a defendant death eligible or to impose a death sentence. Pet. Br. at 43 & n.15.[22]

As this Court has stated, 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." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The line is particularly clear in this case.

Indeed, in the Executive Summary to its Florida Assessment, the ABA Review Project stated that two "problems areas" were "Significant Capital Juror Confusion" and "Lack of Unanimity in Jury's Sentencing Decisions in Capital Cases." Florida Assessment at vi.[23] The Project cited research showing that many Florida capital jurors did not understand their role and responsibilities when deciding whether to impose a death sentence. *Id.* at x. They were often confused about components of capital sentencing, including how they were to conduct the statutorily required weighing of aggravation and mitigation

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[22] In addition to Utah and Virginia authorities that Petitioner cites (Pet. Br. at 43 n.15), *see* California Penal Code 190.4 (capital jury must "make a special finding on the truth of each alleged special circumstance"). Also, unlike in Florida, capital juries in Utah, Virginia, and California must then *unanimously* recommend the death penalty. *See Steele*, 921 So. 2d at 549 (citing Utah and Virginia cases and statutes); *People v. Prieto*, 30 Cal. 4th 226, 275 (Cal. 2003).

[23] The Florida Assessment is available at http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/florida/report.authcheckdam.pdf (last visited June 2, 2015).

evidence to arrive at their recommendation. *Id.* at 305. For example, over 35 percent of the interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation; 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt; and 36 percent believed they were required to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved." *Id.* at vi. In addition, in its Florida Assessment, the ABA Review Project noted that, despite data showing a severe misunderstanding of the jury instructions on aggravating and mitigating circumstances, only 6 percent of the jurors interviewed believed they had difficulty understanding the jury instructions, and only 21.6 percent even asked the judge for clarification. *Id.* at 305.

The Florida Assessment also cited research positing that meaningful deliberation by capital sentencing juries was discouraged by Florida's practice of not requiring a unanimous jury recommendation for a death sentence. *Id.* The Assessment cited narrative accounts of juror interviews that indicated (1) jurors did not devote much time, energy, or emotional commitment to the punishment decision; and (2) pro-death jurors were able to mute the concerns of undecided or life sentence jurors by noting that a mere majority was needed to impose death. *Id.* at 306. One juror even recounted that when a few jurors indicated opposition to recommending death, the jury simply discussed that the decision did not have to be unanimous and called for a vote. *Id.*

Thus, as former Florida Supreme Court Justice Cantero has written, non-unanimous jury procedures

"invariably empower superficial, narrow, and prejudiced arguments." Cantero & Kline, *supra*, at 31-32; *see also* Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000) (research demonstrates that "majority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable"); *see generally* Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 Hastings L. J. 103 (2010) (research demonstrates that a unanimity requirement leads to a substantively different and often multi-staged deliberative process).

Research also shows that if there is no requirement that the decision be unanimous, individual jurors are less confident in their decisions. *See, e.g.*, Michael J. Sacks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. Cal. Interdisc. L.J. 1, 41 (1997) ("[T]he existence of dissenters left even the majority with some lingering doubts that it had reached the right verdict."). As the ABA Review Project concluded: "The State of Florida should require that the jury's sentencing verdict in a capital case be unanimous and, when the sentencing verdict is a death sentence, that the jury reach unanimous agreement on at least one aggravating circumstance." Florida Assessment at x.

The ABA urges, based on its four-plus decades of empirical research and study, including the Florida Assessment, that a capital sentencing jury should not be permitted to make its determination by a majority vote. *See, e.g.*, ABA App. 6-11, 11-14. Instead, each penalty-phase juror should be convinced that each

aggravating factor that is used to support a death sentence has been proved beyond a reasonable doubt, and a death sentence should not constitutionally be permitted if any juror remains unconvinced that the jury's weighing of aggravating and mitigating circumstances has established a constitutionally sufficient basis on which the jury should recommend or decide for death.

The ABA urges that only a requirement of unanimity on these aspects is sufficient because, *inter alia*, it "encourages jurors to devote more time and thought to deliberations, and empowers minority jurors to voice their opinions and fully participate in the process," and it "increases the reliability of jury determinations." ABA App. at 8.[24]

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[24] The ABA has long asserted that unanimity should be required in all jury verdicts. *See* Brief of Amicus Curiae American Bar Association in *Lee v. Louisiana*, No. 07-1523 (June 7, 2008), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_news_leevslouisiana.authcheckdam.pdf (discussing empirical research on non-unanimous jury verdicts); *see also ABA Standards Relating to Trial Courts*, *available at* http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/trialcourtstandards.authcheckdam.pdf (calling for unanimous jury verdicts in all criminal cases); *ABA Criminal Justice Standards*, Standard 15-1.1, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_jurytrial_blk.html (calling for unanimous jury verdicts in all cases "in which confinement in jail or prison may be imposed"); *ABA Principles for Juries and Jury Trials*, Principle 4. B., *available at* http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf ("unanimous decision should be required in all criminal cases heard by a jury").

As Justice Kennedy has noted, "[j]ury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs . . . and that the jury's ultimate decision will reflect the conscience of the community." *McKoy v. North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring in the judgment).[25] In capital cases in which the sentencing jury must deliberate "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," ABA App. 1, the ABA urges that jury unanimity must be required.

II. When a Capital Defendant Has Not Waived the Right to a Jury, a Death Sentence Should Not Be Imposed Based on an Independent Determination by the Court.

The ABA submits that implicit in this Court's holding in *Ring* is that, when a capital defendant has not waived his or her right to a jury trial, the court cannot impose a death sentence unless that sentence is based on one or more aggravating factors that the jury has identified as proved beyond a reasonable doubt. Under Florida's system, however, not only does the judge not know what factors the jury found, but Florida law requires that the judge must independently find and weigh factors to arrive at the defendant's sentence.

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[25] In *McKoy*, this Court held that capital jurors cannot be required to be unanimous regarding the existence of *mitigating* factors. 494 U.S. at 443. But the Court rejected any notion that there must be "symmetry" regarding requirements for jury findings of aggravating factors. *Id*.; *accord id*. at 452 (Kennedy, J., concurring).

As discussed above (pp. 10-11), a capital sentencing jury in Florida may make its sentencing recommendation based on a majority vote, and may do so without agreeing on *which* aggravating circumstances exist – it may even recommend a death sentence when each juror believes that a different aggravator was proven. Cantero & Kline, 22 St. Thomas L. Rev. at 9. While the ABA contends that the jury should be required to unanimously agree on each necessary aggravating factor, the ABA also urges that Florida's capital sentencing system has an additional significant problem: as the *Steele* Court concluded, Florida law prohibits a trial court from even asking the jury to specify – through a special verdict form or otherwise – the aggravating circumstances on which the jury has based its recommendation. *Steele,* 921 So. 2d at 550. Instead, the trial judge must "independently determine the existence of aggravating and mitigating circumstances, and the weight to be given to each" in determining a capital defendant's sentence. *Id.* at 546. In fact, the *Steele* Court concluded that a Florida trial court *cannot* use a special verdict form on which the jury specifies what aggravating circumstances – if any – it has agreed on, stating:

> Unless and until a majority of this Court concludes that *Ring* applies in Florida, *and* that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statute . . . , the trial court's order [requiring a special verdict form] imposes a substantive burden on the state

> not found in the statute and not constitutionally required.

Id. at 545-46.

According to the *Steele* Court, prohibiting a trial court from even asking the jury to specify the factors it found "fosters [the judge's] independence because the trial court . . . has no jury findings on which to rely. Individual jury findings on aggravating factors would contradict this settled practice." *Id.* at 546; *see also* FSA 921.141(3) (trial court has independent statutory duty to impose a sentence of life imprisonment or death "notwithstanding the recommendation of a majority of the jury"); *Russ v. State*, 73 So. 3d 178, 198 (Fla. 2011) (court "required to make independent findings on aggravation, mitigation, and weight.").

The ABA urges that Florida's desire for judicial independence is contrary to this Court's holding in *Ring* that aggravating circumstances must be found by a jury, 536 U.S. at 609, and to its implication that clear jury findings are constitutionally required. *Compare id.* (*overruling Walton v. Arizona*, 497 U.S. 639 (1990), "to the extent [*Walton*] allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."). And, the ABA urges, Florida's requirement that a judge independently weigh the aggravating and mitigating factors to arrive at its own conclusion as to the appropriate sentence is contrary to the Eighth Amendment's requirement of special procedural safeguards when a State seeks the death penalty. As Justice Breyer has concluded, "the Eighth Amendment requires that a jury, not a judge, make the decision to

sentence a defendant to death." *Ring*, 536 U.S. at 614 (Breyer, J., concurring).

Further, the ABA respectfully submits that Florida's system undermines a jury's ability to arrive at a considered recommendation as to the appropriate sentence when life or death is at issue. As research shows, when a capital jury makes a sentencing recommendation but knows that the final sentencing authority is left to the judge, capital jurors "do *not* feel responsible for the sentences that they recommend," and "penalty phase deliberations are often exceedingly brief with very little discussion of the evidence." Ross Kleinstuber, *"Only a Recommendation": How Delaware Capital Sentencing Law Subverts Meaningful Deliberations and Jurors' Feelings of Responsibility*, 19 Widener L. Rev. 321, 331 (2013) (emphasis in original).

The ABA urges that, when the members of a capital sentencing jury – and especially a jury under Florida's capital sentencing system – do not feel responsible for the sentences they recommend, they cannot fulfill their constitutional duty as the "link between contemporary community values and the penal system" that a jury is to forge each time it makes "a selection . . . between life imprisonment and death for a defendant convicted in a capital case[.]" *Gregg v. Georgia*, 428 U.S. 153, 181 (1976). As Justice Breyer stated in his *Ring* concurrence, "jurors possess an important comparative advantage over judges. In principle, they are more attuned to the community's moral sensibility" and they "reflect more accurately the composition and experiences of the community as a whole. Hence, they are more likely to express the conscience of the community on the ultimate question of life or death."

536 U.S. at 615 (Breyer, J., concurring in the judgment) (internal quotation marks and citations omitted).

In order to act as the "conscience of the community" when considering whether to recommend that a defendant receive the ultimate punishment of death, it is essential that members of the jury fully accept the responsibility entrusted to them. Acceptance of this responsibility is essential, the ABA submits, to ensure that any death sentence that results will not be imposed lightly, unfairly or arbitrarily, but instead, and beyond a reasonable doubt, will be legally, morally, and constitutionally warranted.

CONCLUSION

For all of the foregoing reasons, the ABA respectfully urges the judgment of the Florida Supreme Court be reversed.

Respectfully submitted,

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AMERICAN BAR ASSOCIATION

DEATH PENALTY DUE PROCESS REVIEW PROJECT

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RESOLUTION AND REPORT TO THE HOUSE OF DELEGATES (February 2015)

RESOLUTION #108A

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.[1] 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.[2]

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.[3] 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.[4] By judicial decision, Alabama ensures that every death sentence has been based on a unanimous finding of at least one aggravating circumstance.[5] 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

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[1] *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).

[2] *Gregg*, 428 U.S. at 181; *Proffitt*, 428 U.S. at 252; *Jurek*, 428 U.S. at 276.

[3] Fed. R. Crim. P. 31 (a).

[4] Ala. Code § 13A-5-46-47 (2012).

[5] *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).

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 circumstances, but leaves the sentencing decision to the trial judge.[6] Finally, Florida requires neither a unanimous jury recommendation nor a unanimous finding by the jury that any aggravating circumstance has been proved.[7] 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.[8]

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."[9] While the issue of whether the Sixth Amendment required the jury to make the ultimate

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[6] Del. Code Ann. Tit. 11, § 4209(c)(3)(A) (West 2013).

[7] 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).

[8] Fla. Stat. §§921.141(2)-(3) (2014).

[9] 536 U.S. 584 at 589 (2002).

penalty determination was not before the Court,[10] 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."[11] 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."[12]

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."[13] 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

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[10] *Id.* at 597 n.4

[11] *Id.* at 607-08 (footnote omitted).

[12] *Id.* at 609 (citation omitted).

[13] 536 U.S. at 609.

> regularly imposing the death penalty without it.[14]

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 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.[15]

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 14th Century and in American jurisprudence as

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[14] *Id.* at 612 (emphasis in original).

[15] 921 So. 2d 538 at 548 (Fla. 2005) (emphasis in original).

early as the 19th Century,[16] 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."[17] 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.[18] 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

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[16] *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).

[17] Kim Taylor-Thompson, *Empty Votes in Jury* Deliberations, 113 Harv. L. Rev. 1261, 1263 (2000).

[18] *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 Phsycol. Pub. Pol'y & L 622, 669 (2001)

> merits and not merely on the whims of a majority.[19]

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 condemned to death arbitrarily and capriciously.[20] 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."[21] To address the Furman Court's concerns that capital sentencers had unguided discretion, legislatures subsequently delineated aggravating circumstances

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[19] 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).

[20] *See*, *e.g.*, 408 U.S. at 313 (White, J., concurring).

[21] *Id.*

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.[22] 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.[23] 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,"[24] 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

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[22] *See*, *e.g.*, *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion); *Gregg v. Georgia*, 428 U.S. at 196-97; *Profitt v. Florida*, 428 U.S. at 258.

[23] *Ring*, 536 U.S. at 609 (citation omitted).

[24] ABA Resolution 107 (Feb. 1997).

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.[25] And the reasonable doubt standard is the "prime instrument for reducing the risk of [sentences] resting on factual error."[26] 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

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[25] 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.

[26] *In re Winship*, 397 U.S. 358, 363 (1970).

exonerated from death row nationwide, and 25 of those, more than any other state, come from Florida, where there is no unanimity requirement on the aggravating-circumstance findings and a simple majority of jurors can authorize a death sentence.[27]

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."[28]

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

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

[28] *See* ABA Resolution 134 (Aug. 1974).

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.[29] 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."[30] 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."[31] In the

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[29] *ABA Standards for Criminal Justice (1978); ABA Principles for Juries and Jury Trials (2005).*

[30] *ABA Principles for Juries and Jury Trials* at 25 *(2005).*

[31] *Id.* at 24-25 (internal citations omitted).

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.[32]

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 administration of capital punishment in twelve U.S. states.[33] 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.[34]

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[32] David C. Baldus et al., *Equal Justice and the Death Penalty,* 150 (1990).

[33] 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 (Last visited Nov. 14, 2014).

[34] *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

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."[35] 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

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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.").

[35] *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

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,[36] 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.[37]

Respectfully submitted,

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[36] *See Burch v. Louisiana*, 441 U.S. 130 (1979).

[37] Cantero & Kline, *supra,* at 17-25.