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# Justice Council

## Meeting Packet

Wednesday, January 11, 2006

9:45 AM – 11:00 AM

404 House Office Building

Allan G. Bense  
Speaker

Bruce Kyle  
Chair

**Council Meeting Notice**  
**HOUSE OF REPRESENTATIVES**

**Speaker Allan G. Bense**

**Justice Council**

**Start Date and Time:** Wednesday, January 11, 2006 09:45 am  
**End Date and Time:** Wednesday, January 11, 2006 11:00 am  
**Location:** 404 HOB  
**Duration:** 1.25 hrs

Workshop on requiring unanimous jury sentencing recommendations in death penalty cases.

**NOTICE FINALIZED on 12/30/2005 14:24 by COCHRAN.MARGARET**



## Unanimous Jury Sentencing In Death Penalty Cases

In the case of State v. Alfredie Steele, No. SC04-802 issued October 12, 2005, the Florida Supreme Court suggested 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” in death penalty cases. The issue of unanimous jury sentencing recommendations was not essential to the resolution of the case before the Court.<sup>1</sup>

That portion of the Steele opinion suggesting that the Legislature should revisit the issue was advanced on the basis of what the majority of other states have done in regard to the issue, and the fact that the federal government also requires a unanimous jury to impose a death sentence.<sup>2</sup> The Court closes this part of the opinion saying: “Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.”<sup>3</sup> The Court cites no authority currently threatening the demise of Florida’s death penalty statute, nor does the Court specify what constitutional deficiency may arise to cast Florida’s death penalty statute into jeopardy. Florida’s death penalty statute, with its nonunanimous sentencing component, has withstood constitutional attack since it was upheld by the United States Supreme Court in 1976 in Proffitt v. Florida.<sup>4</sup>

In Steele, the Court also indicates that many scholars have recognized the value of unanimous verdicts and later cites to a book review of an empirical study “indicating that ‘behavior in juries asked to reach a unanimous verdict were more thorough and grave than in majority-rule juries, and that the former were more likely to agree on the issues underlying their verdict.’”<sup>5</sup> The empirical study that was the subject of the study, however, was of juries determining the question of fact of guilt or innocence, as opposed to a jury deciding whether death is an appropriate punishment for the crime committed. It should be pointed out that what are called “issues underlying a verdict” in that context center on factual matters to determine whether the defendant *did* or *did not* commit the crime, and not on whether the defendant *should* or *should not* be sentenced to a particular punishment.

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<sup>1</sup> In Steele, the Court had before it two issues arising out the United States Supreme Court decision of Ring v. Arizona, 536 U.S. 584 (2002). Ring was the decision of the United States Supreme Court which held that jurors, rather than judges, must find the existence of at least one aggravating factor established beyond a reasonable doubt before a defendant can be subject to the death penalty as a possible punishment. The two Ring related issues before the Court in Steele were 1) whether a trial court may require the state to notify the defendant of the aggravating factors on which it intends to rely in order to establish that the defendant is eligible to be subject to the death penalty and, 2) whether the trial court may require the jury to specify each aggravating factor it finds, and the vote as to each. Although the Ring decision was issued by the United States Supreme Court in June of 2002, the Florida Supreme Court indicated in Steele that it has yet to decide the fundamental question of whether Ring applies in Florida. Justice Cantero, writing for the majority, noted that the uncertainty regarding Ring’s applicability “. . .has left trial judges groping for answers.” That being said, the Ring opinion was a decision that required further fact finding by a jury in a capital case, and did not address questions relating to whether an eligible defendant should receive a death sentence, or how the actual sentencing decision is to be made or by whom. State v. Steele, No. SC04-802.

<sup>2</sup> See, Steele, *supra* 20 – 22; See also 18 U.S.C. 3593(d) (2000).

<sup>3</sup> Steele, *supra* at 24.

<sup>4</sup> Proffitt v. Florida, 428 U.S. 242 (1976); Barclay v. Florida, 463 U.S. 939 (1983); See also Spaziano v. Florida, 468 U.S. 447 (1984) and Dobbert v. Florida, 432 U.S. 282 (1977).

<sup>5</sup> Steele, *supra* at 22 & 23; citing Elizabeth F. Loftus & Edith Greene, Twelve Angry People: The Collective Mind of the Jury, 84 Colum. L.Rev. 1425, 1428 (1984) (reviewing Reid Hastie et al., Inside the Jury (1983))

In Spaziano v. Florida, defendant challenged an aspect Florida's death penalty statute that allows a judge to override the jury's recommendation for a life sentence and impose a death sentence.<sup>6</sup> In addressing that issue, the United States Supreme Court indicated that the "fundamental premise of the defendant's challenge was "that the capital sentencing decision is one that, in all cases, should be made by the jury."<sup>7</sup> The Court specifically addressed that fundamental premise and stated:

This Court, of course, has recognized that a capital proceeding in many respects resembles a trial on the issue of guilt or innocence. . . .[and] has concluded that the Double Jeopardy Clause bars the State from making repeated efforts to persuade a sentencer to impose the death penalty. (citations omitted). The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial. . . . despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding--a determination of the appropriate punishment to be imposed on an individual. (citations omitted). *The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.* (emphasis added).<sup>8</sup>

With respect to the right to trial by jury, the United States Supreme Court has outlined the federal constitutional minimum as follows in a case deciding the votes required for a six person jury:

We thus have held that the Constitution permits juries of less than 12 members, but that it requires at least 6. (citations omitted). And we have approved the use of certain nonunanimous verdicts in cases involving 12-person juries. Apodaca v. Oregon, *supra* (10-2); Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (9-3). . . . this case lies at the intersection of our decisions concerning jury size and unanimity. . . we do not pretend the ability to discern a priori a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. (citations omitted). But having already departed from the strictly historical requirements of jury trial, it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved. (citations omitted). . . . much the same reasons that led us . . . to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous. (footnote omitted).<sup>9</sup>

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<sup>6</sup> Spaziano v. Florida, 468 U.S. 447 (1984).

<sup>7</sup> *Id.* at 458.

<sup>8</sup> *Id.* at 459.

<sup>9</sup> Burch v. Louisiana, 441 U.S. 130 (1979).

In Florida, the Third District Court of Appeal noted:

Although Article I sections 16 and 22 of the Florida Constitution had never been interpreted to require a unanimous verdict, it has long been the legal practice of this state to require such unanimity in all criminal jury trials; Florida Rule of Criminal Procedure 3.440 memorializes this long-standing practice: "[n]o [jury] verdict may be rendered unless all of the trial jurors concur in it." No statute or rule of procedure in Florida has ever expressly abolished this unanimity requirement for any criminal jury trial in this state. (citation omitted). It is therefore settled that "[i]n this state, the verdict of the jury must be unanimous" and that any interference with this right denies the defendant a fair trial. Jones v. State, 92 So.2d 261 (Fla.1956).<sup>10</sup>

At the core of determining the level of juror consensus required to satisfy the requirements of the Sixth and Fourteenth Amendments, has been preserving the function of a criminal jury to determine the fact of a defendant's guilt or innocence with reliability. Before reaching its holding in Burch v. Louisiana that verdicts of six member juries must be unanimous, the United States Supreme Court, outlined this historical backdrop to their decision:

. . . After canvassing the common-law development of the jury and the constitutional history of the jury trial right, the Court concluded that the 12-person requirement was "a historical accident" and that there was no indication that the Framers intended to preserve in the Constitution the features of the jury system as it existed at common law. (citation omitted). Thus freed from strictly historical considerations, the Court turned to examine the function that this particular feature performs and its relation to the purposes of jury trial. (citation omitted) The purpose of trial by jury . . . is to prevent government oppression by providing a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." (citation omitted). Given this purpose, the Williams Court observed that the jury's essential feature lies in the "interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." (citation omitted) These purposes could be fulfilled, the Court believed, so long as the jury was of a sufficient size to promote group deliberation, free from outside intimidation, and to provide a fair possibility that a cross section of the community would be represented on it. The Court concluded, however, that there is "little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12--particularly if the requirement of unanimity is retained."<sup>11</sup>

Subsequently in Brown v. Louisiana, the Supreme Court summed up the purpose it intended to serve by requiring unanimity of consensus when the jury consists of only six members:

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<sup>10</sup> Flanning v. State, 597 So.2d 864. (Fla. 3<sup>rd</sup> DCA, 1992).

<sup>11</sup> Burch v. Louisiana, 441 U.S. 130, 135 (1979).

In sum, Burch established that the concurrence of six jurors was constitutionally required to preserve the substance of the jury trial right and assure the reliability of its verdict. It is difficult to envision a constitutional rule that more fundamentally implicates "the fairness of the trial--the very integrity of the *fact-finding process*." (citation omitted). "The basic purpose of a trial is the *determination of truth*,"<sup>12</sup>

The reasons offered by the Florida Supreme Court suggesting a "need" for legislative change to attach some manner of unanimous jury consent to death sentences are similar to those argued by the petitioner (the defendant) before the United States Supreme Court in Spaziano:

Petitioner's primary argument is that the laws and practice in most of the States indicate a nearly unanimous recognition that juries, not judges, are better equipped to make reliable capital-sentencing decisions and that a jury's decision for life should be inviolate. The reason for that recognition, petitioner urges, is that the nature of the decision whether a defendant should live or die sets capital sentencing apart and requires that a jury have the ultimate word.<sup>13</sup>

With respect to that view the United States Supreme Court said:

We also acknowledge the presence of the majority view that capital sentencing, unlike other sentencing, should be performed by a jury. As petitioner points out, 30 out of 37 jurisdictions with a capital sentencing statute give the life-or-death decision to the jury, with only 3 of the remaining 7 allowing a judge to override a jury's recommendation of life. The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.<sup>14</sup>

...

As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme.<sup>15</sup>

Considering that when the United States Supreme Court drew its "inevitable" line requiring unanimity "somewhere", it was seeking to protect the fact finding function of the jury to preserve the fundamental right of an accused to a trial by jury, it does not follow that a requirement of unanimity is necessary or recommended to protect something that has been expressly rejected by the United States Supreme Court, and that as of now, does not exist at the state constitutional level – a constitutional right to jury sentencing or unanimous consensus of a sentencing jury.

David De La Paz, Council Director  
House Justice Council

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<sup>12</sup> Brown v. Louisiana, 443 U.S. 323 (1980).

<sup>13</sup> Spaziano, *supra* at 461.

<sup>14</sup> *Id.* at 463 & 464.

<sup>15</sup> *Id.* at 464.





**Chart/Required Unanimity in  
Jury Recommendations of  
Death**

## REQUIRED UNANIMITY IN JURY RECOMMENDATIONS OF DEATH

30 States Requiring Unanimity in Jury Recommendations of Death	Date of Implementation	Number of Persons Sentenced to Death Since Date of Implementation (1977-2004)	Number of Persons Executed Since Date of Implementation (1976-2005)
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### 28 States with Unanimity Required by Statute

Arizona	2002	14	0
Arkansas	1976	109	27
California	1978	752	12
Colorado	2003	1	0
Georgia	1976	218	39
Idaho	1977	40	1
Illinois	1977	292	12
Kansas	1994	7	0
Louisiana	1976	139	27
Maryland	1978	53	5
Mississippi	1977	152	7
New Hampshire	1977	0	0
New Jersey	1988	21	0
New Mexico	1979	14	1
New York	1995	7	0
North Carolina	1977	427	39
Ohio	1981	260	19
Oklahoma	1977	284	79
Oregon	1990	38	2
Pennsylvania	1978	320	3
South Carolina	1985	125	35
South Dakota	1979	6	0
Tennessee	1977	162	1
Texas	1973	868	355
Utah	1973	18	6
Virginia	1977	144	94
Washington	1981	30	4
Wyoming	1982	6	1

### 2 States with Judicially Required Unanimity

Connecticut	1988	9	1
Nevada	1977	133	11

This chart reflects those states that require unanimous agreement of the jury of the decision/recommendation to impose a death sentence and does not necessarily reflect those states require unanimous agreement with respect to the factual determination that one or more aggravating circumstances exist.

## ARIZONA

<http://www.azag.gov/CCC/Final-CapPun.pdf>

### **Ariz. Rev. Stat. § 13-703.01(H) Sentences of death, life imprisonment or natural life; imposition; sentencing proceedings; definitions**

H. The trier of fact shall determine unanimously whether death is the appropriate sentence. If the trier of fact is a jury and the jury unanimously determines that the death penalty is not appropriate, the court shall determine whether to impose a sentence of life or natural life.

## ARKANSAS

<http://www.state.ar.us/doc/history.html>

### **Ark. Code Ann. § 5-4-603(a) Death sentences, unanimous findings**

(a) The jury shall impose a sentence of death if it unanimously returns written findings that:

- (1) Aggravating circumstances exist beyond a reasonable doubt; and
- (2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and
- (3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.

## CALIFORNIA

[http://www.corr.ca.gov/CommunicationsOffice/CapitalPunishment/history\\_of\\_capital.asp](http://www.corr.ca.gov/CommunicationsOffice/CapitalPunishment/history_of_capital.asp)

### **Cal. Penal Code § 190.4(b) Special findings on truth of each alleged special circumstance; penalty hearing; application for modification**

(b)...If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

## COLORADO

<http://www.state.co.us/defenders/capital.html>

### **Colo. Rev. Stat. § 18-1.3-1201(2)(b)(II) Imposition of sentence in class 1 felonies-- appellate review**

(2)(b)(I) In the event that no aggravating factors are found to exist as enumerated in subsection (5) of this section, the jury shall render a verdict of life imprisonment, and the court shall sentence the defendant to life imprisonment.

(II) The jury shall not render a verdict of death unless it unanimously finds and specifies in writing that:

- (A) At least one aggravating factor has been proved; and
  - (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved.
- (c) In the event that the jury's verdict is to sentence to death, such verdict shall be unanimous and shall be binding upon the court unless the court determines, and sets forth in writing the basis and reasons for such determination, that the verdict of the jury is clearly erroneous as contrary to the weight of the evidence, in which case the court shall sentence the defendant to life imprisonment.

(d) If the jury's verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

## CONNECTICUT

<http://www.cga.ct.gov/2005/rpt/2005-R-0153.htm>

State v. Daniels, 542 A.2d 306 (Conn. 1988).

## GEORGIA

<http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.html>

### **Ga. Code Ann. § 17-10-31.1(c) Murder conviction; sentence of life imprisonment without parole**

(c) Where a jury has been impaneled to determine sentence and the jury has unanimously found the existence of at least one statutory aggravating circumstance but is unable to reach a unanimous verdict as to sentence, the judge shall dismiss the jury and shall impose a sentence of either life imprisonment or imprisonment for life without parole. In imposing sentence, the judge may sentence the defendant to imprisonment for life without parole only if the court finds beyond a reasonable doubt that the defendant committed at least one statutory aggravating circumstance and the trial court has been informed by the jury foreman that upon their last vote, a majority of the jurors cast their vote for a sentence of death or for a sentence of life imprisonment without parole; provided, however, that the trial judge may impose a sentence of life imprisonment as provided by law.

## IDAHO

### **Idaho Code § 19-2515(3)(b) Sentence in capital cases -- Special sentencing proceeding -- Statutory aggravating circumstances -- Special verdict or written findings.**

(3) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless:

(a) A notice of intent to seek the death penalty was filed and served as provided in section 18-4004A, Idaho Code; and

(b) The jury, or the court if a jury is waived, finds beyond a reasonable doubt at least one (1) statutory aggravating circumstance. Where a statutory aggravating circumstance is found, the defendant shall be sentenced to death unless mitigating circumstances which may be presented are found to be sufficiently compelling that the death penalty would be unjust. The jury shall not direct imposition of a sentence of death unless it unanimously finds at least one (1) statutory aggravating circumstance and unanimously determines that the penalty of death should be imposed.

## ILLINOIS

<http://www.truthinjustice.org/dphistory-IL.htm>

### **720 Ill. Comp. Stat. Ann. § 5/9-1(g) First degree Murder--Death penalties-- Exceptions--Separate Hearings-- Proof--Findings--Appellate procedures--Reversals (g) Procedure--Jury.**

If at the separate sentencing proceeding the jury finds that none of the factors set forth in subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If there is a unanimous finding by the jury that one or more of the factors set forth in subsection (b) exist, the jury shall

consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously, after weighing the factors in aggravation and mitigation, that death is the appropriate sentence, the court shall sentence the defendant to death. If the court does not concur with the jury determination that death is the appropriate sentence, the court shall set forth reasons in writing including what facts or circumstances the court relied upon, along with any relevant documents, that compelled the court to non-concur with the sentence. This document and any attachments shall be part of the record for appellate review. The court shall be bound by the jury's sentencing determination.

If after weighing the factors in aggravation and mitigation, one or more jurors determines that death is not the appropriate sentence, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

## **KANSAS**

<http://www.kscourts.org/lawwise/febwise.htm#capital>

**Kan. Stat. Ann. § 21-4624(e) Same; proceeding to determine if person shall be sentenced to death; notice; trial judge; jury; imprisonment for life without the possibility of parole.**

(e) If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole. The jury, if its verdict is a unanimous recommendation of a sentence of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstances which it found beyond a reasonable doubt. If, after a reasonable time for deliberation, the jury is unable to reach a verdict, the judge shall dismiss the jury and impose a sentence of life without the possibility of parole and shall commit the defendant to the custody of the secretary of corrections. In nonjury cases, the court shall follow the requirements of this subsection in determining the sentence to be imposed.

## **LOUISIANA**

**La. Code Crim. Proc. Ann. art. 905.7. Form of determination**

The form of jury determination shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury unanimously determines that the defendant should be sentenced to death.

Aggravating circumstance or circumstances found:

s/ \_\_\_\_\_

Foreman"

or

"The jury unanimously determines that the defendant should be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/ \_\_\_\_\_

Foreman"

### MARYLAND

[http://www.sailor.lib.md.us/md/docs/death\\_pen/](http://www.sailor.lib.md.us/md/docs/death_pen/)

#### **Md. Code Ann., Crim. Law § 2-303(i) First degree murder--Sentencing procedure--Death penalty**

(i)(1) If the court or jury finds that one or more of the mitigating circumstances under subsection (h) of this section exists, it shall determine by a preponderance of the evidence whether the aggravating circumstances under subsection (g) of this section outweigh the mitigating circumstances.

(2) If the court or jury finds that the aggravating circumstances:

(i) outweigh the mitigating circumstances, a death sentence shall be imposed; or

(ii) do not outweigh the mitigating circumstances, a death sentence may not be imposed.

(3) If the determination is by a jury, a decision to impose a death sentence must be unanimous and shall be signed by the jury foreperson.

(4) A court or jury shall put its determination in writing and shall state specifically:

(i) each aggravating circumstance found;

(ii) each mitigating circumstance found;

(iii) whether any aggravating circumstances found under subsection (g) of this section outweigh the mitigating circumstances found under subsection (h) of this section;

(iv) whether the aggravating circumstances found under subsection (g) of this section do not outweigh the mitigating circumstances found under subsection (h) of this section; and

(v) the sentence determined under subsection (g)(2) of this section or paragraphs (1) and (2) of this subsection.

### MISSISSIPPI

<http://mshistory.k12.ms.us/features/feature57/punishment.htm>

#### **Miss. Code Ann. § 99-19-103 Instructions; verdict; failure to agree on punishment**

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravated circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

## **NEW HAMPSHIRE**

### **N.H. Rev. Stat. Ann § 630:5(IV) Procedure in Capital Murder.**

IV. The jury shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factors set forth in paragraph VII, which are found to exist. If one of the aggravating factors set forth in subparagraph VII(a) and another of the aggravating factors set forth in subparagraphs VII(b)-(j) is found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subparagraph I(b) may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this section, regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If an aggravating factor set forth in subparagraph VII(a) is not found to exist or an aggravating factor set forth in subparagraph VII(a) is found to exist but no other aggravating factor set forth in paragraph VII is found to exist, the court shall impose a sentence of life imprisonment without possibility of parole. If an aggravating factor set forth in subparagraph VII(a) and one or more of the aggravating factors set forth in subparagraph VII (b)-(j) are found to exist, the jury shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, if the jury concludes that the aggravating factors outweigh the mitigating factors or that the aggravating factors, in the absence of any mitigating factors, are themselves sufficient to justify a death sentence, the jury, by unanimous vote only, may recommend that a sentence of death be imposed rather than a sentence of life imprisonment without possibility of parole. The jury, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.

## **NEW MEXICO**

<http://www.angelo.edu/services/library/librarians/mallan/capital-punishment-nm.htm>

### **N.M. Stat. Ann. § 31-20A-3. Court sentencing**

In a jury sentencing proceeding in which the jury unanimously finds beyond a reasonable doubt and specifies at least one of the aggravating circumstances enumerated in Section 6 of this act, and unanimously specifies the sentence of death pursuant to Section 3 of this act, the court shall sentence the defendant to death. Where a sentence of death is not unanimously specified, or the jury does not make the required finding, or the jury is unable to reach a unanimous verdict, the court shall sentence the defendant to life imprisonment. In a nonjury sentencing proceeding and in cases involving a plea of guilty, where no jury has been demanded, the judge shall determine and impose the sentence, but he shall not impose the sentence of death except upon a finding beyond a reasonable doubt and specification of at least one of the aggravating circumstances enumerated in Section 6 of this act.

## **NEW YORK**

<http://justice.uaa.alaska.edu/death/history.html>

**N.Y. Crim. Proc. Law § 400.27(7)(b) Procedure for determining sentence upon conviction for the offense of murder in the first degree**

(7)(b) In order to be deemed established, an aggravating factor set forth in this subdivision must be proven by the people beyond a reasonable doubt and the jury must unanimously find such factor to have been so proven. The defendant may present evidence relating to an aggravating factor defined in this subdivision and either party may offer evidence in rebuttal. Any evidence presented by either party relating to such factor shall be subject to the rules governing admission of evidence in the trial of a criminal action.

10. At the conclusion of all the evidence, the people and the defendant may present argument in summation for or against the sentence sought by the people. The people may deliver the first summation and the defendant may then deliver the last summation. Thereafter, the court shall deliver a charge to the jury on any matters appropriate in the circumstances. In its charge, the court must instruct the jury that with respect to each count of murder in the first degree the jury should consider whether or not a sentence of death should be imposed and whether or not a sentence of life imprisonment without parole should be imposed, and that the jury must be unanimous with respect to either sentence. The court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life. Following the court's charge, the jury shall retire to consider the sentence to be imposed. Unless inconsistent with the provisions of this section, the provisions of sections 310.10, 310.20 and 310.30 shall govern the deliberations of the jury.

**NEVADA**

Geary v. State, 952 P.ed 431, 433 (Nev. 1998).

**OKLAHOMA**

<http://www.doc.state.ok.us/DOCS/CapitalP.HTM>

**Okla. Stat. tit. 21 § 701.11. Instructions--Jury findings of aggravating circumstances**

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt.

In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life without parole or imprisonment for life.

**OHIO**

<http://www.ohiodeathrow.com/>

**Ohio Rev. Code Ann. § 2929.03(D)(2) Imposing sentence for a capital offense; procedures; proof of relevant factors; alternative sentences**



(D)(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

## **OREGON**

<http://members.tripod.com/ocadp/history.htm>

### **Or. Rev. Stat. § 163.150 (1)(b)-(e). Sentencing; aggravated murder**

(b) Upon the conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

(C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and

(D) Whether the defendant should receive a death sentence.

(c)(A) The court shall instruct the jury to consider, in determining the issues in paragraph (b) of this subsection, any mitigating circumstances offered in evidence, including but not limited to the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed.

(B) The court shall instruct the jury to answer the question in paragraph (b)(D) of this subsection "no" if, after considering any aggravating evidence and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense and any victim impact evidence as described in paragraph (a) of this subsection, one or more of the jurors believe that the defendant should not receive a death sentence.

(d) The state must prove each issue submitted under paragraph (b)(A) to (C) of this subsection beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue considered.

(e) The court shall charge the jury that it may not answer any issue "yes," under paragraph (b) of this subsection unless it agrees unanimously.

(f) If the jury returns an affirmative finding on each issue considered under paragraph (b) of this subsection, the trial judge shall sentence the defendant to death.

## **PENNSYLVANIA**

[http://pittsburgh.about.com/cs/pennsylvania/a/death\\_penalty.htm](http://pittsburgh.about.com/cs/pennsylvania/a/death_penalty.htm)

**42 Pa. Const. Stat. § 9711(c)(1)(iv) Sentencing procedure for murder of the first degree**

**(c) Instructions to jury.--**

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) the aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) the verdict must be a **sentence of death** if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

(2) The court shall instruct the jury that if it finds at least one aggravating circumstance and at least one mitigating circumstance, it shall consider, in weighing the aggravating and mitigating circumstances, any evidence presented about the victim and about the impact of the murder on the victim's family. The court shall also instruct the jury on any other matter that may be just and proper under the circumstances.

**SOUTH CAROLINA**

<http://www.doc.sc.gov/PublicInformation/CapitalPunishment/LegalBackground.htm>

**S.C. Code Ann. § 16-3-20(C) Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.**

(C)... Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of

the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

## **SOUTH DAKOTA**

[http://www.state.sd.us/corrections/FAQ\\_Capital\\_Punishment.htm](http://www.state.sd.us/corrections/FAQ_Capital_Punishment.htm)

### **S.D. Codified Laws § 23A-26-1 (Rule 31(a)) Unanimous verdict required--Return in open court**

A jury verdict shall be unanimous. It shall be returned by the jury to the judge or magistrate in open court. When the jurors appear, they must be asked by the court or the clerk whether they have agreed upon their verdict. If the foreman answers in the affirmative, they must, on being required, declare the same.

## **TENNESSEE**

<http://216.239.51.104/custom?q=cache:4BshHfatWYUJ:www.tsc.state.tn.us/geninfo/Publications/dpbrochure.pdf+tennessee+death+penalty+history&hl=en&ie=UTF-8&client=pub-7531083548747741>

### **Tenn. Code Ann. § 39-13-204(g) First degree murder; sentencing; factors**

(g)(1) If the jury unanimously determines that:

(A) At least one (1) statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt; and

(B) Such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt;  
then the sentence shall be death.

## **TEXAS**

<http://www.txexecutions.org/history.asp>

### **Tex. Code Crim. Proc. Ann. art. 37.071(2) Procedure in capital case**

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

(2) The court shall:

(A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the institutional division of the Texas Department of Criminal Justice for life without parole; and

(B) charge the jury that a defendant sentenced to confinement for life without parole under this article is ineligible for release from the department on parole.

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;

## **UTAH**

<http://www.media.utah.edu/UHE/c/CAPITOLPUN.html>

**Utah Code Ann. § 76-3-207 Capital felony--Sentencing proceeding**

(5)(a) The court or jury, as the case may be, shall retire to consider the penalty. Except as provided in Subsection 76-3-207.5(2), in all proceedings before a jury, under this section, it shall be instructed as to the punishment to be imposed upon a unanimous decision for death and that the penalty of either an indeterminate prison term of not less than 20 years and which may be for life or life in prison without parole, shall be imposed if a unanimous decision for death is not found.

(b) The death penalty shall only be imposed if, after considering the totality of the aggravating and mitigating circumstances, the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances. If the jury reports unanimous agreement to impose the sentence of death, the court shall discharge the jury and shall impose the sentence of death.

(c) If the jury is unable to reach a unanimous decision imposing the sentence of death or the state is not seeking the death penalty, the jury shall then determine whether the penalty of life in prison without parole shall be imposed, except as provided in Subsection 76-3-207.5(2). The penalty of life in prison without parole shall only be imposed if the jury determines that the sentence of life in prison without parole is appropriate. If the jury reports agreement by ten jurors or more to impose the sentence of life in prison without parole, the court shall discharge the jury and shall impose the sentence of life in prison without parole. If ten jurors or more do not agree upon a sentence of life in prison without parole, the court shall discharge the jury and impose an indeterminate prison term of not less than 20 years and which may be for life.

**VIRGINIA**

<http://www.vadp.org/info.htm>

**Va. Code Ann. § 19.2-264.4(D) Sentence proceeding**

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed.....foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at (i) imprisonment for life; or (ii) imprisonment for life and a fine of \$.....

Signed.....foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

#### **WASHINGTON**

<http://www.doc.wa.gov/deathpenalty/deathpnlty.htm>

**Wash. Rev. Code § 10.95.060 Special sentencing proceeding--Jury instructions--  
Opening statements--Evidence--Arguments--Question for jury**

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

#### **WYOMING**

**Wyo. Stat. Ann. § 6-2-102(d)(ii) Presentence hearing for murder in the first degree; mitigating and aggravating circumstances; effect of error in hearing.**

(ii) The jury shall consider aggravating and mitigating circumstances unanimously found to exist, and each individual juror may also consider any mitigating circumstances found by that juror to exist. If the jury reports unanimous agreement to impose the sentence of death, the court shall discharge the jury and shall impose the sentence of death. If the jury is unable to reach a unanimous verdict imposing the sentence of death within a reasonable time, the court shall instruct the jury to determine by a unanimous vote whether the penalty of life imprisonment without parole shall be imposed. If the jury is unable to reach a unanimous verdict imposing the penalty of life imprisonment without parole within a reasonable time, the court shall discharge the jury and impose the sentence of life imprisonment;

**NUMBERS OF PERSONS SENTENCED TO DEATH AND EXECUTED SINCE  
DATE OF IMPLEMENTATION COMPILED FROM:**

**Death Penalty Information Center: <http://www.deathpenaltyinfo.org/>**