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RAMOS, RACE, AND JUROR UNANIMITY IN CAPITAL SENTENCING

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INTRODUCTION

Supreme Court jurisprudence implies that juror unanimity should be required to sentence a capital defendant to death. In the 1972 case, *Apodaca v. Oregon*,[1] the Supreme Court held that the Sixth Amendment right to a unanimous jury verdict was not incorporated against the states.[2] In *Ramos v. Louisiana*,[3] an April 2020 opinion, the Supreme Court reversed *Apodaca*, clarified that juror unanimity for felony convictions falls within the Sixth Amendment right to a jury trial, and reiterated that the Sixth Amendment is not incorporated in a "watered-down" version against the states.[4] A focus of the *Ramos* ruling was the racially motivated origins of the non-unanimity schemes in Louisiana and Oregon—the only two states that continued the practice until present day.[5] Louisiana's non-unanimity scheme emerged as a way to undermine Black juror service during an 1898 Louisiana constitutional convention to establish white supremacy,[6] and Oregon's non-unanimity scheme emerged to dilute the influence of racial and religious minorities in jury service while the Ku Klux Klan was prominent in the state.[7] In Justice Sotomayor's *Ramos* concurrence, she

1. 406 U.S. 404 (1972).

2. *See id.* at 406.

3. 140 S. Ct. 1390 (2020).

4. *Id.* at 1397–98, 1407.

5. Oregon convicted people based on majority verdicts up until the 2020 *Ramos* ruling. Louisiana amended its state constitution to bar the non-unanimous jury scheme for convictions in 2018. S.B. 243, 2018 Reg. Sess. (La. 2018) (requiring a unanimous jury verdict for any felony conviction after January 1, 2019). As of 2019, Louisiana has the highest incarceration rate of any state at 680 incarcerated out of every 100,000 people. Oregon's incarceration rate is 353 out of every 100,000 people—less than many states but still ranking in the top half of states with the highest incarceration rates. *State-by-State Data*, THE SENTENCING PROJECT, https://www.sentencingproject.org/the-facts/#map [https://perma.cc/XN79-3T9S].

6. *Ramos*, 140 S. Ct. at 1394, 1401 (citing OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 374 (H. J. Hearsey ed., 1898)).

7. *Id.* (citing State v. Williams, No. 15CR58698, 2016 WL 11695154, at *16 (Or. Cir. Ct. Dec. 15, 2016)); *see also* Timothy Williams, *In One State, a Holdout Juror Can't Block a Conviction. That May Not Last.*, N.Y. TIMES (Feb. 23, 2020), https://www.nytimes.com/2020/02/23/us/oregon-court-case-verdicts.html (explaining the origins of the Oregon law and its connection to the rise of the Ku Klux Klan in the 1930s); Angela A. Allen-Bell, Opinion, *These Jury Systems Are Vestiges of White Supremacy*, WASH. POST (Sept. 22, 2017), https://www.washingtonpost.com/opinions/these-jury-systems-are-vestiges-of-white-supremacy/2017/09/22/d7f1897a-9f13-11e7-9c8d-cf053ff30921_story.html [https://perma.cc/GQ96-E46A] ("Anti-immigrant and anti-Semitic sentiments peaked in 1933, when a jury failed to convict a Jewish man in the murder [of] a Protestant man, instead handing down a verdict of manslaughter. The Morning Oregonian blamed the verdict on 'the vast immigration into America from southern and eastern Europe, of people untrained in the jury system.' It then accused immigrants of making 'the jury of twelve increasingly unwieldy and unsatisfactory.' The following year, Oregon passed a ballot measure to allow felony convictions based on a less-than-unanimous vote.").

acknowledged that many laws and policies in this country have had a history of racial animus and that the *Apodaca* ruling—which supported laws that were "tethered" to racial bias—was rightfully relegated to the "dustbin of history."[8]

Yet, despite the *Ramos* ruling, juror unanimity remains an issue in the realm of capital sentencing, which has a history of racial animus like non-unanimity during the guilt phase.[9] Two Supreme Court cases, *Ring v. Arizona*[10] and *Hurst v. Florida*,[11] have explained that the Sixth Amendment requires that a jury, rather than a judge alone, weigh on capital sentencing.[12] However, neither case addressed whether state courts must require that a jury unanimously vote to sentence someone to death.[13] Because neither *Ring* nor *Hurst* ruled on unanimity in state capital sentencing, and because the *Ramos* ruling was limited to convictions during the guilt phase of trials, the Supreme Court still needs to hear the issue of whether, in state court, a unanimous jury is required to sentence someone to death. Today, Alabama and Florida, both of which rank in the top five states with the most prisoners on death row,[14] do not require that a jury unanimously vote to sentence a person to death[15]—yet, the precedent set forth in *Ring*, *Hurst*, and *Ramos*, implies that the Sixth Amendment guarantees a unanimous jury verdict during capital sentencing.

The Supreme Court also needs to hear the issue of whether a jury must unanimously vote on every aggravating circumstance that

8. *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring).

9. *See, e.g.*, Raul G. Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 ST. THOMAS L. REV. 4, 25–26 (2009).

10. 536 U.S. 584 (2002).

11. 577 U.S. 92 (2016).

12. *Ring*, 536 U.S. at 585; *Hurst*, 577 U.S. at 94.

13. Federal capital sentencing requires that a jury unanimously recommend a death sentence and that a jury unanimously find any one aggravating factor. 18 U.S.C. § 3593(d), (e) (2018); *see also* Cantero & Kline, *supra* note 9, at 11 & n. 56–58 (2009) (citing 18 U.S.C. § 3593) (writing about the issue of unanimity in capital sentencing before *Hurst II*).

14. As of April 1, 2021, the total number of prisoners on death row in the United States is 2,504. Florida ranked second for the most prisoners on death row in the nation with 343 condemned prisoners (38 percent are Black) and Alabama ranked fourth with 170 condemned prisoners (50 percent are Black). California ranked first with 704 condemned prisoners (36 percent are Black). DEBORAH FINS, NAAP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. SPRING 2021: A QUARTERLY REPORT 1, 37-38 (2021), https://www.naacpldf.org/wp-content/uploads/DRUSA Spring2021.pdf [https://perma.cc/TY2R-BJRH].

15. ALA. CODE § 13A-5-46(f) (2021); State v. Poole, 297 So. 3d 487, 505 (Fla. 2020); *cf. People v. McDaniel*, 493 P.3d 815, 845–46 (Cal. 2021), *cert. denied*, 142 S. Ct. 2877 (2022) (holding that jury unanimity is not required to determine factually disputed aggravating circumstances for death penalty eligibility).

justifies a death sentence.[16] Indeed, the precedent implies that the Sixth Amendment guarantees unanimity for every factually disputed aggravating factor in states, like California, where a jury weighs any and all aggravating factors against mitigating factors. The precedent does not, however, imply that the Sixth Amendment requires a unanimous verdict as to every aggravating factor where a state's capital sentencing statute requires only one aggravating factor to increase a life sentence to a death sentence.

Part I of this Note will examine the *Ramos* opinion, which overturned *Apodaca v. Oregon*. Part II will explain the role of the juror in capital sentencing today and the racial consequences created by non-unanimity in capital sentencing. Part III will explain why *Ramos*, combined with the precedent set forth in *Ring* and *Hurst*, implies that Supreme Court precedent regarding the Sixth and Eighth Amendments guarantees a unanimous jury verdict as to death and as to every aggravating factor during capital sentencing.

I. OVERRULING *APODACA* AND NON-UNANIMITY IN SENTENCING

Until recently, Louisiana and Oregon relied on *Apodaca v. Oregon* to allow a non-unanimous jury to convict a criminal defendant of a felony.[17] A non-unanimous jury is also referred to as a "majority vote" where only ten out of twelve jurors vote for a guilty conviction—and that majority vote is sufficient for the conviction, where in most other states that majority vote would result in a mistrial.[18]

Apodaca v. Oregon was decided in 1972 in a fractured set of opinions where four Justices concluded that unanimity's costs outweighed its benefits, so the Sixth Amendment "should not stand in the way of Louisiana or Oregon."[19] Four Justices dissented, finding the same holding as *Ramos*—that unanimity is incorporated against the states.[20] Justice Lewis Powell's opinion, published in the *Apodaca* companion

16. *See McDaniel*, 493 P.3d at 845.

17. Over 1,500 people were convicted of felonies in Louisiana based on a non-unanimous jury verdict—900 of whom are serving life without parole. Associated Press, *Report: 1,500 La. Inmates Convicted by Nonunanimous Juries*, U.S. NEWS (Nov. 21, 2020, 2:12 PM), https://www.usnews.com/news/best-states/louisiana/articles/2020-11-21/report-1-500-la-inmates-convicted-by-non-unanimous-juries. At least 200 people were convicted by a non-unanimous jury in Oregon. Andrew Selsky, *Advocates to Keep Fighting Non-unanimous Jury Convictions*, AP NEWS (May 17, 2021), https://apnews.com/article/us-supreme-court-police-reform-race-and-ethnicity-government-and-politics-965c862a31489d76a3bbba14bf5ddf2f

18. *See, e.g.*, ALA. CODE § 13A-5-46(f) (2021).

19. Ramos v. Louisiana, 140 S. Ct. 1390, 1398 (2020).

20. Apodaca v. Oregon, 406 U.S. 404 (1972); *Ramos*, 140 S. Ct. at 1397.

case, *Johnson v. Louisiana*,[21] was the tiebreaker—finding that although the Sixth Amendment does require a unanimous jury verdict to convict, the right is not fully incorporated against the states.[22] This concept is now known as Justice Powell's theory of "dual-track" incorporation—that a single right can have a different meaning when applied to the federal government, as opposed to a state government.[23] The *Apodaca* Court did not consider that Louisiana and Oregon's non-unanimity schemes were rooted in racial animus (like the Court did in *Ramos*).[24]

The Court reconsidered *Apodaca* in *Ramos v. Louisiana* in 2020 after Evangelisto Ramos, who had been found guilty of second-degree murder by a ten to two jury vote in Louisiana,[25] successfully petitioned for writ of certiorari in 2019.[26] Ten jurors voted to convict Ramos, while two voted for his acquittal.[27] In any other state besides Louisiana (or Oregon), Ramos' trial would have been a mistrial because of the non-unanimous jury verdict.[28] Ramos argued that the Supreme Court should overturn *Apodaca* because unanimity is a historical component of the right to a jury trial,[29] the Court had already rejected the notion of partial incorporation,[30] and because Louisiana's non-unanimous jury rule was adopted as a strategy to establish white supremacy.[31]

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21. 406 U.S. 366 (1972) (Powell, J., concurring).

22. *Id.*; *Ramos*, 140 S. Ct. at 1398.

23. *Ramos*, 140 S. Ct. at 1398.

24. *Compare Apodaca*, 406 U.S. 404 (discussing jury unanimity without reference to any racial animus during the process), *with Ramos*, 140 S. Ct. at 1394 (discussing defendant's conviction being rooted in racial animus).

25. State v. Ramos, 231 So. 3d 44, 46 (La. Ct. App. 2017).

26. Petition for Writ of Certiorari, *Ramos*, 140 S. Ct. 1390 (No. 18-5924).

27. *Id.*

28. *Ramos*, 140 S. Ct. at 1393.

29. *Apodaca* and *Johnson* conceded that the unanimous jury was commonplace in history. *Apodaca* cited that the unanimity requirement arose during the Middle Ages and became an accepted feature of the common-law jury by the 18th century, while *Johnson* cited that the requirements of a unanimous jury in criminal cases and proof beyond a reasonable doubt are "so embedded in our constitutional law and touch so directly all the citizens and are such important barricades of liberty." Petition for Writ of Certiorari at 11, Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (No. 18-5924) (quoting Johnson v. Louisiana, 406 U.S. 356, 393 (1972) (Douglas, J., dissenting)). Sir William Blackstone also wrote about how critical juror unanimity was to protecting citizens against the Crown. *Id.* at 12.

30. "This Court has rejected 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights . . . .'" *Id.* at 8 (quoting McDonald v. City of Chicago, 561 U.S. 742, 765 (2010)).

31. "Louisiana's non-unanimous jury rule was adopted during the 1898 Louisiana Constitutional Convention, where the entire point of the Convention was to limit African-American participation in the democratic process and to 'perpetuate the supremacy of the Anglo-Saxon race in

A. Arguments for and Against Unanimity

The Supreme Court granted certiorari to determine whether the Sixth Amendment right to a jury trial (as incorporated against the states by the Fourteenth Amendment) requires a unanimous verdict to convict a defendant of a serious offense.[32] Louisiana argued that there was no compelling reason to overturn *Apodaca*, and that the Sixth Amendment does not require a unanimous verdict in a criminal case.[33] Louisiana also maintained that recent provisions of the Louisiana Constitution involving majority jury verdicts show that the scheme was not based on race or white supremacy when it was updated after 1898.[34]

Oregon[35] and many other states (even though, with the exception of Oregon, their respective state constitutions required unanimity) filed amicus briefs in favor of Louisiana.[36] Oregon conceded that the unanimity rule, if applied prospectively, may be favorable and focused on the concern that overruling *Apodaca* would disrupt forty-seven years of majority-verdict convictions.[37] The states in favor of non-unanimity claimed that the text of the Sixth Amendment does not contain any unanimity requirement and that if the Founders wanted to ensure that the Sixth Amendment protected the common-law tradition of unanimity, they could have done so.[38] Additionally, these states argued that the unanimity requirement makes it more difficult to convict defendants, and that there is no clear data that non-unanimous juries are more inaccurate than unanimous juries such that a trial cannot be considered just if a non-unanimous verdict is rendered.[39] Unanimity gives too much power to a single "holdout juror," these states contended—

Louisiana.'" *Id.* at 8–9 (citing OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA, *supra* note 6).

32. *Ramos*, 140 S. Ct. at 1394.

33. Brief in Opposition at 18, *Ramos*, 140 S. Ct. 1390 (No. 18-5924).

34. *Id.* at 15.

35. Brief of Amicus Curiae State of Oregon in Support of Respondent, *Ramos*, 140 S. Ct. 1390 (No. 18-5924).

36. Brief of Amicus Curiae State of Utah et al. Supporting Respondent, *Ramos*, 140 S. Ct. 1390 (No. 18-5924).

37. Brief of Amicus Curiae State of Oregon in Support of Respondent at 1–3, *Ramos*, 140 S. Ct. 1390 (No. 18-5924).

38. Brief of Amicus Curiae State of Utah et al. Supporting Respondent at 18–20, *Ramos*, 140 S. Ct. 1390 (No. 18-5924).

39. *See id.* at 26–31.

citing that 42 percent of hung juries were deadlocked with only one or two jurors holding out—resulting in more hung juries and mistrials.[40]

In views not expressed in amicus briefs, victims' rights advocates in Oregon shared the concern that unanimity would result in more mistrials, which would force victims to have to testify multiple times.[41] Or, that unanimity would make it more difficult to convict defendants, which would cause prosecutors to decline to try cases.[42] These views fit the tough-on-crime narrative that matched the climate of the Nixon era during which the Supreme Court ruled on *Apodaca*.

States that filed an amicus brief in favor of mandatory unanimity argued that unanimity improves the quality of deliberation because jurors deliberate longer, evaluate evidence more thoroughly, and address the viewpoints of each member of the jury.[43] Mandatory unanimity also ensures the consideration of minority juror viewpoints.[44] For example, when a jury is composed of individuals with varied backgrounds and perspectives the jury can draw from a base of knowledge that a single juror cannot alone possess.[45] The improved deliberative process promotes public confidence in the accuracy of jury verdicts and the legitimacy of the criminal justice system,[46] whereas non-unanimous verdicts raise doubts about the legitimacy of convictions and acquittals for serious offenses.[47]

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40. *Id.* at 27 (citing PAULA L. HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE CTS., ARE HUNG JURIES A PROBLEM? 67 (2002), https://www.ncsc-jurystudies.org/__data/assets/pdf_file/0018/6138/hung-jury-final-report.pdf [https://perma.cc/NQX7-PXEM]).

41. Williams, *supra* note 7.

42. *Id.*

43. Brief for States of New York et al. as Amici Curiae in Support of Petitioner at 13, *Ramos*, 140 S. Ct. 1390 (No. 18-5924) ("In the absence of a unanimity requirement, 'once a vote indicates that the required majority has formed, deliberations halt in a matter of minutes.'" (first quoting Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1272 (2000); and then citing various studies showing that deliberation time corresponds to the number of jurors needed to reach a verdict)).

44. *Id.* at 17 ("[A] non-unanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." (quoting AM. BAR ASS'N, PRINCIPLES FOR JURIES & JURY TRIALS 22 (2005))).

45. *Id.* (citing United States v. Lopez, 581 F. 2d 1338, 1341 (9th Cir. 1978) ("[A] veteran may have a unique perspective on a defendant's assertion that he committed a crime because of post-traumatic stress disorder. A young woman might have insight about the testimony of a rape victim. And a game hunter may evaluate a defendant's claim of accidental discharge differently than a person who has never held a weapon.").

46. *Id.* at 20–21 ("The public is more likely to believe in the fairness and legitimacy of a verdict rendered by the collected judgment of jurors from diverse backgrounds than a verdict rendered over the unanswered objection of dissenters." (citing Jeffrey Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861, 884 (2015))).

47. *Id.* at 15 (citing Edward P. Schwartz & Warren F. Schwartz, *Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules*, 80 GEO. L.J. 775, 787 (1992) (a majority verdict

The Innocence Project and the Innocence Project of New Orleans also filed an amicus brief in favor of Ramos arguing that non-unanimous jury verdicts create a high risk of wrongful convictions.[48] Out of the fifty-six wrongful conviction cases in Louisiana to date, thirteen of those cases were wrongful convictions by verdicts handed down by a non-unanimous jury.[49] In ten of those thirteen cases, the wrongfully convicted defendants were Black men.[50] Indeed, records of those juror deliberations in which the juror vote was non-unanimous and led to wrongful convictions revealed that the deliberations were short and that it was Black jurors whose votes and opinions were nullified.[51] Ultimately, in deciding *Ramos*, the Court gave more weight to the arguments in favor of Ramos.[52]

B. The Ramos *Ruling*

Justice Gorsuch wrote for the majority and relied heavily on history and values to rule in Ramos's favor.[53] Justice Gorsuch declared that the Sixth Amendment's "trial by an impartial jury" language must have referred to a unanimous jury because unanimity emerged as a "vital" common-law right in fourteenth century England,[54] and during the founding of the United States, courts regarded unanimity as "essential" to jury trials.[55] James Madison drafted the Sixth Amendment with that history of unanimity as the "backdrop"—at which point unanimous jury verdicts had been required for around 400 years.[56] Justice Gorsuch wrote that the historic right to a unanimous jury trial is incorporated against the states because the Court had already

rule increased the probability of conviction by 641 percent and the probability of acquittal by 833 percent)).

48. Brief of Innocence Project New Orleans & The Innocence Project, Amici Curiae in Support of Petitioner at 2, *Ramos*, 140 S. Ct. 1390 (No. 18-5924).

49. *Id.* at 3, 8–9.

50. *Id.* at 10.

51. *Id.* at 4, 14.

52. *Ramos*, 140 S. Ct. at 1408.

53. Justice Gorsuch delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, in which Justices Ginsburg, Breyer, Sotomayor, and Kavanaugh joined; an opinion with respect to Parts II–B, IV–B–2, and V, in which Justices Ginsburg, Breyer, and Sotomayor joined; and an opinion with respect to Part IV–A, in which Justices Ginsburg and Breyer joined. Justice Sotomayor filed an opinion concurring as to all but Part IV–A. Justice Kavanaugh filed an opinion concurring in part. *Id.* at 1393.

54. *Id.* at 1395–96 (Gorsuch, J., writing for the majority as to Part I, joined by Ginsburg, Breyer, Kavanaugh, and Sotomayor, JJ.).

55. At the time of the nation's founding, the Delaware, Maryland, North Carolina, Pennsylvania, Vermont, and Virginia state constitutions explicitly required unanimity. *Id.* at 1396 n.12.

56. *Id.* at 1396.

recognized that incorporated provisions of the Bill of Rights "bear the same content" when asserted against the states—in other words, the Court had already established that the Fourteenth Amendment is not incorporated in a "watered-down" version against the states.[57]

Justice Gorsuch rejected both Justice Powell's reasoning and the four other Justices who formed the *Apodaca* majority.[58] The *Apodaca* majority overlooked that at the time of the Sixth Amendment's adoption, the right to a jury trial indeed included the right to a unanimous verdict.[59] Justice Gorsuch denounced the *Apodaca* plurality for basing their decision on the notion that the cost of unanimity outweighed the benefits because unanimity may increase the number of hung juries in state courts.[60] The plurality failed to consider the discriminatory reasons for non-unanimous juries, the studies that suggest that elimination of unanimity has only a small effect on the rate of hung juries, and that a unanimity requirement provides for open-minded and thorough deliberations.[61] Justice Gorsuch's largest criticism of the *Apodaca* plurality was that they imposed their cost-benefit analysis on the "ancient guarantee" of a unanimous jury verdict.[62]

II. REVIEWING CAPITAL SENTENCING THROUGH THE UNANIMITY LENS

Juror unanimity in the context of capital sentencing was beyond the scope of *Ramos*—the issue was limited to state convictions for serious crimes, but the holdings in *Ring*, *Hurst*, and *Ramos*, together, imply that included in the Sixth Amendment is the right to a have a jury unanimously vote for capital punishment (death) for as long as capital punishment is considered constitutional. Yet, the Supreme Court has not addressed unanimity in the state capital sentencing context. In the last twenty years, a juror's role in capital sentencing has been propounded by the Supreme Court in the *Hurst v. Florida*[63] and

57. *Id.* at 1397–98.

58. "So what could we possibly describe as the 'holding' of *Apodaca*? Really, no one has found a way to make sense of it. In later cases, this Court has labeled *Apodaca* an 'exception,' 'unusual,' and in any event 'not an endorsement' of Justice Powell's view of incorporation." *Id.* at 1399 (Gorsuch, J., writing for the majority as to Part II-B, joined by Ginsburg, Breyer, and Sotomayor, J.J.) (citing McDonald v. City of Chicago, 561 U.S. 742, 766 n.14 (2010)).

59. *Id.* at 1402.

60. *Id.* at 1401 (Gorsuch, J., writing for the majority as to Part III, joined by Ginsburg, Breyer, Kavanaugh, and Sotomayor, JJ.).

61. *Id*.

62. *Id.* at 1401–02.

63. Hurst v. Florida, 577 U.S. 92, 94 (2016).

Ring v. Arizona[64] rulings. However, because *Ring* and *Hurst* did not touch on unanimity and because *Ramos* did not explicitly apply to capital punishment, states are enabled to dispose of the concept of unanimity when sentencing people to death. Consequently, in Alabama and Florida, a person can be sentenced to death by a vote of only ten jurors[65]—even though studies have shown that non-unanimity in capital sentencing creates a heightened risk that an innocent person will be sentenced to death,[66] and federal capital sentencing requires that a jury unanimously recommend a death sentence.[67]

Moreover, just as the Court considered race in its analysis of the issue in *Ramos*, an analysis of unanimity in the capital sentencing context must also include a discussion of the racial history of capital punishment, and the discriminatory consequences of non-unanimity in capital sentencing. Capital punishment itself is linked to lynching.[68] As the Equal Justice Initiative reported in its study of lynching, southern states used capital punishment as an alternative to lynching.[69] Capital punishment was another way to impose racial violence, but it gave the illusion of fairness because capital defendants had legal representation and the penalty was imposed after a trial.[70] As of 2019, 42.2

64. Ring v. Arizona, 536 U.S. 584, 613–19 (2002) (Breyer, J., concurring); *see also* Gregg v. Georgia, 428 U.S. 153, 195 (1976) (the Eighth Amendment requires states to apply special procedural safeguards when they seek the death penalty).

65. ALA. CODE § 13A-5-46(f) (2021) ("The decision of the jury to return a verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors. . . ."); State v. Poole, 297 So. 3d 487, 505 (Fla. 2020); *see also* Rick Rojas, *2 Jurors Voted to Spare Nathaniel Woods's Life. Alabama Executed Him*., N.Y. TIMES (Mar. 5, 2020), https://www.nytimes.com/2020/03/05/us/nathaniel-woods-alabama.html [https://perma.cc/HTW8-APZ7] (explaining Alabama's practice of imposing death penalty sentences based only on a majority of juror votes rather than juror unanimity).

66. Robert Brett Dunham, *DPIC Analysis: Exoneration Data Suggests Non-unanimous Death-Sentencing Statutes Heighten Risk of Wrongful Convictions*, DEATH PENALTY INFO. CTR. (Mar. 14, 2020), https://deathpenaltyinfo.org/news/dpic-analysis-exoneration-data-suggests-non-unanimous-death-sentencing-statutes-heighten-risk-of-wrongful-convictions [https://perma.cc/P9AS-9UEC].

67. *See supra* note 13.

68. EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 62 (3d ed. 2017), https://eji.org/wp-content/uploads/2005/11/lynching-in-america-3d-ed-110121.pdf [https://perma.cc/5NX6-MTX2].

69. *Id.*

70. *See id.* (discussing the 1931 Scottsboro Boys case, where nine young Black men were charged with raping two white women in Scottsboro, Alabama—during the trial, white mobs protested outside of the courtroom demanding death for the defendants—all nine men were convicted by all-white and all-male juries within two days and seven of the nine men were sentenced to death; "Many defendants of the era learned that being sentenced to death rather than lynched did little to increase the fairness of trial, reliability of conviction, or justness of sentence.").

percent of death row inmates were white despite the fact that white people form the majority of the population in the United States.[71]

Examining racial data connected to the jury in capital sentencing reveals how non-unanimity in capital sentencing has discriminatory consequences. Black people, who statistically view capital punishment less favorably,[72] are less likely to serve on a jury in a capital case because of death qualification, in which jurors are excluded from capital proceedings if they refuse to impose the death penalty under any circumstance.[73] Black people and white people also differ in their views about mitigating and aggravating evidence. Black people are significantly more receptive to mitigating evidence than white people, and the presence of Black jurors greatly reduces the likelihood of a death sentence.[74] Indeed, Black jurors are more likely to believe that a defendant is remorseful and less likely to be dangerous in the future.[75] If a majority of jurors are white during the capital sentencing, unanimity in capital sentencing might lead to less death sentencing because Black votes will not be nullified. Because dissenting votes are often those of non-white jurors, unanimity allows for all opinions to be heard—both in criminal convictions and in capital sentencing.[76]

A. The Jury's Role in Capital Sentencing: Ring *and* Hurst

Furman v. Georgia[77] held that capital punishment may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an "arbitrary and capricious" manner.[78] The 1972 *Furman* ruling invalidated all capital punishment schemes

71. *DPIC Analysis: Racial Disparities Persisted in U.S. Death Sentences and Executions in 2019*, DEATH PENALTY INFO. CTR. (Jan. 21, 2020), https://deathpenaltyinfo.org/news/dpic-analysis-racial-disparities-persisted-in-the-u-s-death-sentences-and-executions-in-2019 [https://perma.cc/LVK6-KUTZ].

72. A 2018 Pew Research study revealed that a 59 percent majority of white Americans favor capital punishment for those convicted of murder, while only 36 percent of Black Americans favored capital punishment. J. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, PEW RSCH. CTR. (June 11, 2018), https://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/ [https://perma.cc/DYL3-C9SY].

73. *See* Douglas Colby, Note, *Death Qualification and the Right to Trial by Jury: An Originalist Assessment*, 43 HARV. J.L. & PUB. POL'Y 815, 817–18 (2020).

74. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Juror's Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 181, 193 (2001).

75. William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 77–80 (2003).

76. *See, e.g.*, Proposed Brief of Amicus Curiae the Honorable Gavin Newsom in Support of Defendant and Appellant at 69, People v. McDaniel, 493 P.3d 815 (2021) (No. S171393).

77. 408 U.S. 238 (1972).

78. *Id.* at 436.

in the United States until the 1976 *Gregg v. Georgia*[79] ruling. In *Gregg*, the Supreme Court held that capital punishment itself does not violate the Eighth Amendment so long as it is imposed with certain procedural safeguards given the unique nature of the punishment (death) and the heightened reliability that the Eight Amendment demands.[80] Thus, during capital sentencing, jurors consider aggravating factors[81] and mitigating factors[82] before voting on whether a defendant deserves the death so as to ensure that capital punishment does not violate the Eighth Amendment under *Gregg*.[83] Moreover, the aggravating factors must "genuinely narrow" the class of offenders eligible for capital punishment to offenders who are "particularly deserving of death" and must reasonably justify killing the defendant compared to others found guilty of murder, who might, for example, serve a life without parole sentence.[84] This is known as the "narrowing requirement."[85]

In 2002, the issue of whether a jury, or a judge, must find these requisite aggravating factors came before the Supreme Court in *Ring v. Arizona* because Arizona's capital sentencing scheme allowed a judge alone to find the requisite aggravating factors necessary to sentence the defendant to death.[86] The Supreme Court ultimately held that a judge cannot alone determine the aggravating factors required for imposing death.[87] The Court based the *Ring* decision off of *Apprendi v. New Jersey*,[88] a 2000 case which held that any fact that exposes a defendant to a greater punishment than that authorized by the jury's

79. 428 U.S. 153 (1976).

80. *Id*. at 189–95.

81. *See, e.g.*, ALA. CODE § 13A-5-49 (2021) (aggravating factors may include, for example, that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses or that the victim of the capital offense was a police officer).

82. *See, e.g.*, ALA. CODE §§ 13A-5-49, -52 (2021) (mitigating factors may include, for example, that the defendant was emotionally disturbed, under extreme duress, or any other character evidence that the defendant offers).

83. The Court in *Gregg* held that a capital sentencing scheme that (1) considered aggravating and mitigating factors, and (2) required the state supreme court to review every death sentence, did not violate the Eighth Amendment because the consideration of those factors made the penalty not "wanton and freakish," like the capital sentencing scheme that was held unconstitutional in *Furman v. Georgia*. *Gregg*, 428 U.S. at 193–95.

84. Chelsea Creo Sharon, Note, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 224 (2011); *see also* Zant v. Stephens, 462 U.S. 862 (1983).

85. *See* Sharon, *supra* note 84, at 225.

86. *See* Ring v. Arizona, 536 U.S. 584, 585 (2002); *see also* Hurst v. Florida, 577 U.S. 92, 98 (2016) (discussing *Ring*).

87. *Ring*, 536 U.S. at 609.

88. 530 U.S. 466 (2000).

guilty verdict is an element that must be submitted to the jury to satisfy the Sixth Amendment.[89] Even though capital sentencing was outside the scope of *Apprendi*, the *Ring* Court held that because Arizona's sentencing scheme enabled a judge to find the facts necessary to sentence a defendant to death, the sentencing scheme violated *Apprendi*.[90] Justice Ginsburg, writing for the majority in *Ring*, declared that capital defendants are entitled to a jury determination "of any fact on which the legislature conditions an increase in their maximum punishment."[91] The Sixth Amendment's right to a jury trial as applied against the states by the Fourteenth Amendment requires that the jury make the aggravating factor determination.[92]

The Supreme Court reiterated the *Ring* holding in *Hurst v. Florida*, a 2016 Supreme Court case where Florida's capital sentencing scheme was at issue.[93] Florida's capital sentencing procedure was a "hybrid" proceeding where a jury rendered an advisory verdict of life or death, but the judge made the ultimate sentencing determination.[94] In other words, the hybrid proceeding enabled a judge to hold a separate hearing to determine whether sufficient aggravating factors existed to justify death.[95] The only difference between the Florida "hybrid" capital sentencing proceeding and Arizona's pre-*Ring* capital sentencing proceeding was that Florida incorporated a non-binding "advisory" jury verdict as to death.[96] The *Hurst* ruling struck down Florida's capital sentencing scheme—the Florida jury's non-binding advisory verdict was not the necessary factual finding required by *Ring* and *Apprendi*, and therefore, the defendant's death sentence violated the Sixth Amendment to an impartial jury.[97] *Hurst* solidified that the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a death sentence.[98]

89. *Id*. at 490.

90. *See Ring*, 536 U.S. at 609.

91. *Id.* at 589, 602 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact must be found by a jury beyond a reasonable doubt."); *see also Apprendi*, 530 U.S. at 482–83.

92. *Ring*, 536 U.S. at 597, 609 (overruling *Walton v. Arizona*, 497 U.S. 639 (1990) to the extent that *Walton* allowed a sentencing judge, without a jury, to find an aggravating circumstance to justify death).

93. Hurst v. Florida, 577 U.S. 92 (2016).

94. *Id* at 95.

95. *Id.* at 95–96.

96. *Id.* at 98–99.

97. *Id.* at 99.

98. Before *Hurst*, the only remaining states that had schemes that allowed a judge to make the final death determination were Florida, Delaware, and Alabama. *Delaware Supreme Court Holds*

B. Non-unanimity Bleeds into Capital Sentencing

Because *Ring* and *Hurst* did not address unanimity and because *Ramos* did not explicitly apply to capital cases, states are enabled to dispose of unanimity in capital sentencing. Missouri and Alabama have made the news in recent years because in those states, a jury need not unanimously vote to sentence a person to death.[99] Alabama, which sentences more people to death per capita than any other state in the United States,[100] does not require a unanimous juror vote to impose death.[101] In fact, as of 2020, 80 percent of all capital sentences in Alabama involved a non-unanimous jury.[102]

A recent Florida Supreme Court case, *State v. Poole*,[103] held that neither *Hurst v. Florida*, nor the Sixth Amendment mandated that the jury unanimously recommend a death sentence[104]—the Sixth

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Death Penalty Is Unconstitutional, EQUAL JUST. INITIATIVE (Aug. 3, 2016), https://eji.org/news/delaware-supreme-court-strikes-down-death-penalty/ [https://perma.cc/462S-P8J2]; *see also* Rauf v. State, 145 A.3d 430, 434 (Del. 2016) (declaring that Delaware's capital sentencing scheme was unconstitutional and finding, based on a post-*Hurst* analysis of Delaware's capital sentencing scheme, that, during capital sentencing (1) the Constitution requires that a jury unanimously find the existence of any aggravating circumstance beyond a reasonable doubt and (2) the Constitution requires a jury to unanimously find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt).

99. As of 2018, Missouri's capital sentencing scheme allowed a judge to sentence a defendant to death if a jury was non-unanimous as to the sentence, which seemingly violates *Ring* and *Hurst*. *Missouri Judge Imposes Second Non-Unanimous Death Sentence in Four Months*, DEATH PENALTY INFO. CTR. (Jan. 17, 2018), https://deathpenaltyinfo.org/news/missouri-judge-imposes-second-non-unanimous-death-sentence-in-four-months [https://perma.cc/B8GF-XKFP].

100. *Alabama's Death Penalty*, EQUAL JUST. INITIATIVE, https://eji.org/issues/alabama-death-penalty/ [https://perma.cc/YEY2-E4GA].

101. Order Amending the Alabama Pattern Jury Instructions—Criminal for "Penalty Proceedings—Capital Cases" § 8(d), Sup. Ct. of Ala. (Sept. 27, 2018), https://judicial.alabama.gov/docs/library/docs/9-27-2018.pdf [https://perma.cc/YF9X-LLCY] ("In order to bring back a verdict of death, at least 10 of your number must vote for death . . . ."); *see also* Rojas, *supra* note 65.

102. *Supreme Court Holds Jury Verdicts Must Be Unanimous in Criminal Cases*, EQUAL JUST. INITIATIVE (Apr. 20, 2020), https://eji.org/news/supreme-court-holds-jury-verdicts-must-be-unanimous-in-criminal-cases/ [https://perma.cc/L56M-V7WY].

103. 297 So. 3d 487 (Fla. 2020).

104. *Id.* at 505. The *Poole* court also held that Florida's jurors need not unanimously find that the aggravating factors are sufficient for death and need not unanimously find that the aggravating factors outweigh the mitigating factors. *Id.* (overturning Hurst v. State, 202 So. 3d 40 (Fla. 2016), which held that a jury had to: (1) unanimously find aggravating factors beyond a reasonable doubt, (2) unanimously find that the aggravating factors were sufficient to impose death, (3) unanimously find that the aggravating factors outweigh the mitigating factors, and (4) unanimously recommend a sentence of death, and effectively superseding Florida's capital punishment statute, section 921.141 of the Florida Statutes, amended after *Hurst v. State*, which requires a unanimous vote as to death); *see also Florida Supreme Court "Recedes" from Major Death Penalty Decision Creating Uncertainty About Status of Dozens of Cases*, AM. BAR ASS'N (Mar. 10, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/spring/florida-supreme-court-state-v-poole/ (discussing *Hurst v. State* and *State v. Poole*).

Amendment only mandated that a jury unanimously find the existence of one statutory aggravating circumstance beyond a reasonable doubt.[105] The *Poole* court reasoned that the Supreme Court case *Spaziano v. Florida*[106] held that the Sixth Amendment did not require any unanimous jury recommendation of death and that *Hurst v. Florida* only overruled *Spaziano* to the extent that the case allowed a judge rather than a jury to find a necessary aggravating circumstance.[107] Moreover, the court said that even without *Spaziano*, the *Apprendi* line of cases could not be read to require a unanimous jury death recommendation—that those cases are about the facts of a crime, which the Sixth Amendment requires a jury to find.[108]

Justice Jorge Labarga of the Florida Supreme Court dissented in *Poole*—remarking that receding from the requirement that juries unanimously recommend that a defendant be sentenced to death was a retreat from the national consensus and returned Florida to its status as an absolute outlier (with the exception of Alabama) in United States jurisdictions where capital punishment is permissible.[109] He noted that at the time he wrote his dissent, Florida held the "shameful national title" of the state with the most death row exonerations and that there was every reason to maintain reasonable safeguards for ensuring that capital punishment was fairly administered.[110]

C. Supreme Court Capital Sentencing Jurisprudence Requires Unanimity

Because the Florida Supreme Court's decided *State v. Poole* before *Ramos* held that the Sixth Amendment requires unanimity in

105. *Poole*, 297 So. 3d at 491.

106. 468 U.S. 447 (1984).

107. *Poole*, 297 So. 3d at 505. Indeed, the *Hurst* discussion failed to explicitly mention anything about juror unanimity in the context of capital sentencing and only explicitly overruled *Spaziano* to the extent that it did not require a juror to make specific findings authorizing the imposition of a death sentence. *See* Hurst v. Florida, 577 U.S. 92, 101 (2016).

108. *Poole*, 297 So. 3d at 504. In January 2021, the Supreme Court declined to review *State v. Poole*, but not on the issue of unanimity for a death sentence — the Court declined to hear the issue of whether a capital sentence where the jury did not make the requisite death eligibility findings including aggravating circumstances outweighing mitigating circumstances violated the Sixth Amendment. *Poole v. Florida*, SCOTUSBLOG (Jan. 11, 2021), https://www.scotusblog.com/case-files/cases/poole-v-florida/ [https://perma.cc/2Z6T-ZNQC].

109. "The majority gives the green light to return to a practice that is not only inconsistent with laws of all but one of the twenty-nine states that retain the death penalty, but inconsistent with the law governing the federal death penalty." *Poole*, 297 So. 3d at 513 (Labarga, J., dissenting).

110. *Id.* at 515 (citing *Florida: History of the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida [https://perma.cc/3LT2-N425]).

felony sentencing, the court's analysis and holding in *State v. Poole* makes some sense based on *Ring* and *Hurst* alone, excluding consideration of other Supreme Court capital sentencing precedent (like *Furman* and *Gregg*). Because the language of *Ring* and *Hurst* focuses on the jury being required to make a finding of fact when that finding of fact may lead to a more severe sentence, one could interpret that *Ring* and *Hurst* alone entail no Sixth Amendment requirement for a unanimous verdict for a death sentence itself because the sentencing decision is not a decision of fact on which an increased punishment will be imposed. The finding of the aggravating factor is indeed what elevates the sentence to one of death.

However, Justice Labarga's *State v. Poole* dissent sets forth the proper understanding of unanimity in capital sentencing. The dissent contains similar reasoning to other Supreme Court opinions on capital punishment. For example, in *Gregg*, the Court in part considered the national consensus on capital punishment.[111] Public support for capital punishment and that the majority of states enacted new capital sentencing statutes after the *Furman* decision were considerations in the Court's ultimate holding that capital punishment can comply with the Eight Amendment.[112] Justice Labarga's *State v. Poole* dissent is a compelling argument that the national consensus is in favor of unanimity in capital sentencing because the majority of capital punishment states require unanimity in capital sentencing. Indeed, Alabama and Florida are outliers. Moreover, the Supreme Court has consistently held that because death is different—capital punishment requires unique safeguards.[113] Indeed, because non-unanimity in capital sentencing is more likely to lead to wrongful convictions,[114] a proper and necessary safeguard would be to require unanimity in capital sentencing so that capital punishment is not carried out in an "arbitrary and capricious" manner, per *Furman*.

III. UNANIMITY AT ISSUE IN CALIFORNIA LAW

In the twenty-seven states where capital punishment is legal, sentencing statutes include some or all of the following requirements (depending on the state): a jury must vote unanimously for death over a

111. *See* Gregg v. Georgia, 428 U.S. 153, 187–88 (1976).

112. *Id.* at 179–83.

113. *Id.* at 187 ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." (citing Powell v. Alabama 287 U.S. 45, 71 (1932))).

114. Dunham, *supra* note 66.

life sentence, vote unanimously that the aggravating factors justify a death sentence, vote unanimously that the aggravating factors outweigh the mitigating factors, and vote unanimously as to the existence of any one aggravating factor beyond a reasonable doubt.[115] No state requires that jurors unanimously vote on every aggravating factor used to justify a death sentence.[116] On August 26, 2020, the California Supreme Court decided on this anticipated capital sentencing unanimity issue in *People v. McDaniel*.[117] Capital defendant Don'te Lamont McDaniel argued that the California state constitution and the California Penal Code required that a jury must decide unanimously and beyond a reasonable doubt on each aggravating factor presented to the jury during capital sentencing.[118] During the penalty phase of McDaniel's trial, the state introduced numerous aggravating circumstances.[119] A defendant becomes eligible for capital punishment in California if

115. *See, e.g.*, Rauf v. State, 145 A.3d 430, 434 (Del. 2016) (finding, based on a post-*Hurst* analysis of Delaware's capital sentencing scheme, that, during capital sentencing (1) the Constitution requires that a jury unanimously find the existence of any aggravating circumstance beyond a reasonable doubt and (2) the Constitution requires a jury to unanimously find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt). Georgia requires unanimity as to the death sentence itself and as to at least one aggravating circumstance, but not as to every aggravating circumstance and requires no unanimity as to weighing of aggravating circumstances against mitigating circumstances. *See* GA. CODE ANN. § 17-10-30(b)(7) (2021); Hill v. State, 427 S.E.2d 770, 778 (Ga. 1993) ("[Jury findings] should [be] returned in the conjunctive to ensure unanimity concerning the necessary elements of the § 17-10-30(b)(7) circumstances."); Rivera v. State, 647 S.E.2d 70, 80 (Ga. 2007) (because the jury's recommendation of death for the defendant's murder conviction "was sufficient to authorize the jury to find these statutory aggravating circumstances beyond a reasonable doubt," the fact that the jury returned a disjunctive finding of other aggravating circumstances did not require reversal); GA. CODE ANN. § 17-10-31(c) (2022) ("If the jury 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."). *See generally* Cantero & Kline, *supra* note 9, at 10–11 (reporting on a 2009 survey of state capital sentencing unanimity requirements).

116. *See* ARIZ. REV. STAT. ANN. § 13-752(E) (2021); IDAHO CODE § 19-2515 (2021); ARK. CODE ANN. § 5-4-603 (2021); H.B. 2339, 84th Leg., Reg. Sess. § 68(e) (Kan. 2011) (amending Section 257 of chapter 136 of the 2010 Session Laws of Kansas); LA. CODE CRIM. PROC. ANN. art. 905.6–.7 (2021); GA. CODE ANN. § 17-10-30 (2021) (see notes); IND. CODE § 35-50-2-9 (2021); MISS. CODE ANN. § 99-19-101 (2022); OHIO REV. CODE ANN. § 2929.03 (LexisNexis 2021); OKLA. STAT. tit. 21, § 701.11 (West 2021); OR. REV. STAT. ANN. § 163.150 (West 2021); 42 PA. CONST. STAT. § 9711 (West 2022); S.C. CODE ANN. § 16-3-20 (2010); S.D. CODIFIED LAWS §§ 23A-27A-4, 23A-26-1 (2021) (requiring unanimous jury verdicts); TENN. CODE. ANN. § 39-13-204 (2021); WYO. STAT. ANN. § 6-2-102 (2021); N.C. GEN. STAT. § 15A-2000 (2021); UTAH CODE ANN. § 76-3-207 (LexisNexis 2021); NEV. REV. STAT. §§ 175.554, .556 (2019); Kentucky (KY. REV. STAT. ANN. § 532.025 (West 2022)); *see also* Cantero & Kline, *supra* note 9, at 10–11 (surveying capital sentencing statutes for unanimity requirements in 2009).

117. 493 P.3d 815 (Cal. 2021).

118. McDaniel also argued that jurors should have to decide as to death beyond a reasonable doubt. *Id.* at 843–48.

119. *Id.* at 825–26.

they are convicted of first degree murder,[120] found to be sane, and one or more special circumstances is found to be true.[121] California requires jurors to unanimously agree on a death sentence and to unanimously find that a special circumstance justifies death.[122] Before a death sentence is imposed, a jury must conclude that the aggravating circumstances outweigh the mitigating circumstances.[123] California juries must vote unanimously that the aggravating factors outweigh the mitigating circumstances and are so substantial in comparison to those mitigating circumstances that death is appropriate.[124] However, like every other state, California does not require unanimity on every factually disputed aggravating circumstance,[125] nor does California require unanimity as to the existence of aggravating circumstances.[126]

120. CAL. PENAL CODE §§ 189–190 (West 2014 & Supp. 2021) (first degree murder and punishment for first degree murder).

121. CAL. PENAL CODE §§ 190.1(c), 190.2 (list of special circumstances). Special circumstances in California are essentially the equivalent of aggravating circumstances in other states. *See, e.g.*, People v. Bacigalupo, 862 P.2d 808, 813 (Cal. 1993) ("Under our death penalty law, therefore, the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes.").

122. *See* CAL. PENAL CODE § 190.4(b) (procedure after a finding of guilty for special circumstance/first degree murder: "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.").

123. CAL. PENAL CODE § 190.3 (West 2014) ("[The jury] shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.").

124. *Id.*; *see also* Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 766, https://www.courts.ca.gov/partners/documents/calcrim-2021.pdf [https://perma.cc/K2ND-UMZ7] ("To return a judgment of death, each of you must be persuaded that the aggravating circumstances . . . outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified."). *Compare* People v. Anderson, 22 P.3d 347, 378 (Cal. 2001), *with* Rauf v. State, 145 A.3d 430, 435 (Del. 2016) (finding, based on a post-*Hurst* analysis of Delaware's capital sentencing scheme, that, during capital sentencing (1) the Constitution requires that a jury unanimously find the existence of any aggravating circumstance beyond a reasonable doubt and (2) the Constitution requires a jury to unanimously find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt).

125. CAL. PENAL CODE § 190.3; *see also* Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 766, https://www.courts.ca.gov/partners/documents/calcrim-2021.pdf [https://perma.cc/K2ND-UMZ7] ("Each of you must decide for yourself whether aggravating or mitigating factors exist. You do not all need to agree whether such factors exist.").

126. People v. Hartsch, 232 P.3d 663, 699–700 (Cal. 2010).

The court ruled against McDaniel and although McDaniel's arguments were rooted in state law, the court provided an analysis of Mr. McDaniel's argument under relevant federal law.[127] The court reasoned that the Sixth Amendment does not require that a jury unanimously agree on every aggravating circumstance in California, because in California the jury as a whole need not find any one aggravating factor to exist to justify a death sentence, and instead, the California penalty determination is a "free weighing of all of the factors relating to the defendant's culpability."[128] Moreover, the court reasoned that during the guilt phase of trial, the special circumstance elevating the crime to one eligible for capital punishment must be found beyond a reasonable doubt by a unanimous jury.[129] Once the crime has already been elevated to one eligible for a death sentence, a jury must determine, unanimously, during the penalty phase, that aggravating circumstances outweigh the mitigating circumstances so substantially that death is justified.[130] The jury need not unanimously vote on the "details of how a single, agreed-upon act was committed."[131]

The California Supreme Court explicitly did not reconsider whether the failure to require unanimity for every aggravating circumstance ran afoul of *Hurst*, *Ring*, and *Apprendi*.[132] That is because the court's earlier precedent already declared that *Hurst* did not require California to reconsider their holdings that capital punishment does

127. People v. McDaniel, 493 P.3d 815, 845 (Cal. 2021).

128. *Id.* (first citing People v. Snow, 65 P.3d 749, 799 n.32; then citing People v. Capers, 446 P.3d 726, 743–44 (Cal. 2019); and then citing People v. Rangel, 367 P.3d 649, 681 (Cal. 2016)). California jurors are instructed to "consider . . . the aggravating and mitigating circumstances. . . . [A]ssign whatever moral or sympathetic value you find appropriate . . . . [D]ecide for yourself whether aggravating or mitigating factors exist. You do not all need to agree whether such factors exist. . . . Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. . . . [Y]ou may decide that the aggravating circumstances are not substantial enough to warrant death. To return a judgment of death, each of you must be persuaded that the aggravating circumstances . . . outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified. To return a verdict of . . . death or life without the possibility of parole, all 12 of you must agree on that verdict." Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 766, https://www.courts.ca.gov/partners/documents/calcrim-2021.pdf [https://perma.cc/K2ND-UMZ7].

129. The court noted that "*Apprendi* and its progeny fundamentally concern sentencing and require any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum to be found by a unanimous jury and proved beyond a reasonable doubt." *McDaniel*, 493 P.3d at 845.

130. *Id.* at 846.

131. *Id.*

132. *Id.* at 854.

not constitute an increased sentence within the meaning of *Apprendi* or their holdings that the imposition of capital punishment did not require factual findings within the meaning of *Ring*.[133] In so ruling, many believe that California had the opportunity to make it even harder to impose capital punishment in *People v. McDaniel*[134] and failed to do so.[135] However, if the California Supreme Court had ruled in favor of McDaniel, California would have become the first capital punishment state to require juror unanimity as to every factually disputed aggravating factor.[136]

A ruling in favor of McDaniel would have made it harder to impose the death penalty in California. Because California, unlike other states, does not require the unanimous finding of at least one aggravating factor, and instead imposes a weighing of factors; jurors should have to unanimously find the existence of factually disputed aggravating circumstances because any one factor could push the jury in favor of a death sentence. Whereas, in states where only one aggravating factor is necessary to condemn a defendant, it is difficult to see how *Ring*, *Hurst*, and *Apprendi* would require unanimity as to every aggravating factor if only one factor elevates the sentence to a death sentence.

IV. CONCLUSION

Ramos, combined with the holdings in *Ring*, *Hurst*, and *Apprendi*, supports the notion that juror unanimity should also be required as to the death sentence itself. Juror unanimity is required in federal capital sentencing, and as Justice Gorsuch reiterated in *Ramos*, the Sixth Amendment is not applied in a watered-down version against the states. Because *Ramos* also emphasized that unanimity enhances the quality of juror deliberations, in addition to the racial concerns of non-unanimity, juror unanimity as to death should arguably be considered a requisite procedural safeguard per *Gregg v. Georgia* and the Eighth

133. *Id.* at 853 (first citing People v. Capers, 446 P.3d 726 (Cal. 2019); and then citing People v. Rangel, 367 P.3d 649 (Cal. 2016)).

134. Maura Dolan, *California's Top Court Weighs Overturning Hundreds of Death Penalty Sentences*, L.A. TIMES (June 3, 2021, 5:00 AM), www.latimes.com/california/story/2021-06-03/california-top-court-considers-monumental-changes-to-death-penalty [https://perma.cc/7UX3-EKH3].

135. *Id*. In his *McDaniel* concurrence, Justice Liu agreed that California's earlier precedent supported the McDaniel ruling, but he addressed the fact that the earlier precedent deserves a second look given *Apprendi*. *See McDaniel*, 493 P.3d at 854 (Liu, J., concurring).

136. *See supra* note 116.

Amendment. Moreover, in states, like California, where the death determination is made by weighing multiple aggravating factors and does not rest on one aggravating factor, *Ring*, *Hurst*, *Apprendi*, and *Ramos* require unanimity as to each aggravating factor.