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EVALUATING THE CONSTITUTIONALITY OF PROPOSALS TO ALLOW NON-UNANIMOUS JURIES TO IMPOSE THE DEATH PENALTY IN GEORGIA

Lisa Caucci*

INTRODUCTION

With recent attempts by the Georgia General Assembly to pass legislation allowing non-unanimous juries to impose the death penalty, Georgia may once again figure prominently in the debate over American capital punishment standards.¹ Legislation removing the unanimity requirement for capital punishment would trigger a constitutional challenge and inevitable Supreme Court review.² This Note examines the proposed legislation in light of controlling Supreme Court opinions to predict the Court's ruling on the constitutionality of allowing death sentences to be imposed by non-unanimous juries. Part I traces the development of Georgia's current death penalty laws.³ Part II describes recent attempts to amend Georgia's death penalty provisions to allow non-unanimous juries to sentence defendants to death.⁴ Part III discusses arguments for shifting away from the traditional emphasis on unanimity in jury decisions.⁵ Part IV examines Supreme Court decisions regarding the unanimity requirement in criminal cases.⁶ Part V looks at the constitutionality of allowing judges to make final determinations of sentencing, including imposing the death penalty.⁷ Part VI examines the Supreme Court's limits on the authority of judges to increase

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1. See discussion *infra* Parts I, II.

2. Sara E. Deskins & Nancy E. Rhinehart, *Review of Selected 2007 Georgia Legislation: Criminal Procedure*, 24 GA. ST. U. L. REV. 61, 75 (2007) (citing E-mail Interview with Anne Emanuel, Professor of Law, Ga. State Univ. Coll. of Law (May 9, 2007)).

3. See discussion *infra* Part I.

4. See discussion *infra* Part II.

5. See discussion *infra* Part III.

6. See discussion *infra* Part IV.

7. See discussion *infra* Part V.

defendants' sentences.⁸ Finally, Part VII concludes that an amendment to Georgia law permitting judges to impose the death penalty despite a non-unanimous jury sentencing decision will likely survive a Supreme Court challenge.⁹

I. THE DEVELOPMENT OF GEORGIA'S CURRENT DEATH PENALTY LAW

The state of Georgia has played a controversial role in the history of American capital punishment jurisprudence.¹⁰ The Supreme Court's 1972 ruling in a Georgia death penalty case, *Furman v. Georgia*,¹¹ that the Eighth Amendment required the protection of capital defendants from "arbitrary and capricious" death penalty sentencing, led to a four-year moratorium on executions in America.¹² Thirty-five states subsequently amended their death penalty statutes to remedy the problems found by the Supreme Court in *Furman*.¹³ In 1976, while reviewing a later Georgia case, *Gregg v. Georgia*,¹⁴ the Supreme Court affirmed a death sentence pursuant to a post-*Furman* statute.¹⁵

8. See discussion *infra* Part VI.

9. See discussion *infra* Part VII.

10. In 1988, Georgia became the first state in the nation to pass legislation banning the execution of the mentally impaired. See *Georgia to Bar Executions of Retarded Killers*, N.Y. TIMES, Apr. 12, 1988, at A26. But more recently the American Bar Association issued the findings of the Georgia Death Penalty Assessment Team urging a moratorium on executions in the state of Georgia until the state addressed multiple "problem areas." See AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT iii-v (2006) (citing as the areas most needing reform: inadequate defense counsel at trial; lack of defense counsel for state habeas corpus proceedings; inadequate proportionality review; inadequate pattern jury instructions on mitigation; racial disparities in Georgia capital sentencing; inappropriate burden of proof for mentally retarded defendants facing the death penalty; and allowing the death penalty for felony murder).

11. *Furman v. Georgia*, 408 U.S. 238 (1972).

12. Laurie B. Berberich, Note, *Jury Instructions Regarding Deadlock in Capital Sentencing*, 29 HOFSTRA L. REV. 1301, 1303 (2001).

13. *Id.* at 1304.

14. *Gregg v. Georgia*, 428 U.S. 153 (1976). Along with *Gregg*, the court considered four other cases: *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); and *Roberts v. Louisiana*, 428 U.S. 325 (1976).

15. See discussion *infra* Part I.C.

A. *Furman v. Georgia*

In its 1972 review of *Furman*,¹⁶ the Supreme Court for all practical purposes found every capital punishment statute in the United States unconstitutional.¹⁷ The Court split 5–4, with each of the Justices in the majority writing a separate concurrence.¹⁸ Although there is no controlling opinion from the case, the Justices in the majority emphasized that the Eighth Amendment’s prohibition of “cruel and unusual punishment” demanded proportionality in sentencing and prohibited the arbitrary imposition of the death penalty allowed by state statutes.¹⁹

B. *Gregg v. Georgia*

Following *Furman*, state legislatures struggled to enact new death penalty schemes that would comport with the Court’s holding that states must protect capital defendants from the arbitrary imposition of the death penalty.²⁰ In *Gregg v. Georgia*, the Court held that Georgia’s new death penalty statute adequately addressed the constitutional deficiencies cited in *Furman*.²¹ Georgia’s new death penalty scheme included a bifurcated system, which separated the guilt phase from the sentencing portions of the trial.²² Georgia also mandated that the jury find proof of at least one statutory aggravating circumstance for a murder defendant to be eligible for the death penalty.²³ Finally, Georgia statute provided for automatic review of all death sentences by the Georgia Supreme Court.²⁴

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

17. James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment*, 107 COLUM. L. REV. 1, 1 (2007).

18. *Furman*, 408 U.S. at 240, 257, 306, 310, 314.

19. Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1200 (2000).

20. Berberich, *supra* note 12, at 1304.

21. *Gregg*, 428 U.S. at 207.

22. Huigens, *supra* note 19, at 1201 (citing *Gregg*, 428 U.S. at 196–207).

23. *Id.*

24. *Id.*

C. Current Georgia Death Penalty Procedure

Current Georgia law requires a jury to unanimously find the existence of at least one aggravating circumstance for a defendant to be eligible for the death penalty.²⁵ Once a jury finds the existence of an aggravating circumstance, it must then agree unanimously to impose the death penalty on the defendant.²⁶ If the jury is unable to come to a unanimous decision to impose a death sentence, the judge must then sentence the defendant to either life in prison or life without parole.²⁷

II. PROPOSED CHANGES TO GEORGIA'S DEATH PENALTY PROCEDURE

Each of the two most recent sessions of the Georgia General Assembly saw the introduction of legislation that would have allowed non-unanimous juries to impose the death penalty on a defendant convicted of a capital crime.²⁸ The proposals ultimately failed, but given the strong sentiments of their supporters,²⁹ similar proposals are likely to be introduced in upcoming sessions.

A. House Bill 185

In January 2007, House Majority Whip Barry Fleming introduced House Bill 185.³⁰ The bill proposed allowing judges to impose a

25. GA. CODE ANN. § 17-10-31 (2008). (“Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed.”). For a complete list of statutory aggravating circumstances, see *id.* § 17-10-30(a). *But see* David McCord, *An Open Letter to Governor George Ryan Concerning How to Fix the Death Penalty System*, 32 LOY. U. CHI. L.J. 451, 453 (2001) (arguing that “[a]ggravating factors in every jurisdiction are over-inclusive,” making defendants guilty of less egregious crimes eligible for the death penalty, thus undermining the equality in sentencing mandated by *Furman*).

26. GA. CODE ANN. § 17-10-31(c) (2009) (“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.”).

27. *Id.*

28. Ben Smith & Bill Rankin, *10, Not 12, Jurors Would Decide Death Under Bill*, ATLANTA J.-CONST., Mar. 20, 2008, at 1D.

29. See discussion *infra* Part II.A.

30. Carlos Campos, *Bill: 9 Jurors to Give Death*, ATLANTA J.-CONST., Jan. 30, 2007, at 1A; H.B. 185, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

death sentence on defendants when jurors could not reach a unanimous sentencing verdict.³¹ Fleming acknowledged that the failure of juries to give death sentences to convicted killers Wesley Harris³² and William Kenny Stephens³³ influenced his support of the proposal. In fact, members of the Harris jury campaigned for the modification of the unanimity requirement.³⁴ Outraged over their inability to persuade two holdout jurors to vote for the death penalty, the former jurors spent two years lobbying lawmakers for changes to Georgia's death penalty statute.³⁵

House Bill 185 would have allowed a convicted murderer to be sentenced to death if nine of twelve jurors voted to impose the sentence.³⁶ The House Judiciary Non-Civil Committee amended the bill to change the required number of juror votes to eleven³⁷ in an effort to withstand a constitutional challenge.³⁸ Representative Fleming, the bill's sponsor, failed in his attempt to amend the bill to require only ten jurors to vote for the death penalty.³⁹

After heated debate, House Bill 185 passed the Georgia House in March 2007.⁴⁰ Some House members worried about the political ramifications of giving judges the discretion to sentence a defendant to death, including the possibility that judges facing re-election might

31. *Id.*

32. Lateef Mungin, *Gwinnett Murders Created Activists*, ATLANTA J.-CONST., Feb. 11, 2007, at 1A. In 1999, Wesley Harris abducted twenty-two-year-old Whitney Land and her two-year-old daughter Jordan from a park in Clayton County and took them at gunpoint to another metro county. Harris shot the young mother in the back, pulled her from the car and shot her twice more in the chest. Harris then shot the child as she sat strapped in her car seat. Harris used Land's cell phone to call a friend to help him burn the car with the victims' bodies still inside. *Id.*

33. *Id.* After appeals overturned the death sentences he received in his first two trials, Stephens is serving a life sentence for murdering Larry D. Stevens, a Richmond County, Georgia, Sheriff's Investigator, on January 24, 1979. *Id.*

34. *Id.*

35. *Id.* Although the jury convicted Harris for murdering Whitney Land and her daughter Jordan, the jury deadlocked ten to two during death penalty deliberations. As a result, Harris received a life sentence without parole. *Id.*

36. Deskins & Rhinehart, *supra* note 2, at 66.

37. *Id.*

38. Representative Kevin Levitas warned his fellow representatives against passing legislation "that we do not believe will pass constitutional muster." *Id.* at 68 (citing Video Recording of House Proceedings, Mar. 20, 2007 at 3 hr., 37 min., 09 sec. (remarks by Rep. Kevin Levitas (D-82nd))).

39. *Id.* at 66.

40. *Id.* at 70.

succumb to pressure to impose death sentences to avoid looking soft on crime.⁴¹ Supporters of the bill argued that there was a need to restore the public's faith in the judicial system after several cases in which "hold-out" jurors had prevented the defendant from receiving the death penalty.⁴² When the bill came before the Senate Judiciary Committee, however, Fleming did not appear to present the bill.⁴³ Unable to consider the bill without Fleming's presentation, the committee instead took a swift vote, and the bill failed unanimously.⁴⁴

B. Senate Bill 145

A second attempt to pass legislation that would have allowed a non-unanimous jury to impose the death penalty in Georgia failed in March 2008.⁴⁵ Senate Judiciary Chairman Preston Smith introduced Senate Bill 145, a bill that would have allowed district attorneys to seek sentences of life without parole in aggravated murder cases.⁴⁶ In the Georgia House, Majority Whip Barry Fleming amended the proposal to allow non-unanimous juries to sentence convicted murderers to death.⁴⁷ Accusing members of the House of "playing politics," the Senate defeated the amended statute 44–7.⁴⁸

41. *Id.* (citing Video Recording of House Proceedings, Mar. 20, 2007 at 3 hr., 50 min., 15 sec. (remarks by Rep. Randal Mangham (D-94th))) ("[W]hen you make the judge the ultimate decider, someone in that race for that superior court judgeship will look at the record and come back and say look at this soft judge who refused to impose the death penalty after ten people or eleven people say he should die."); see Campos, *supra* note 30, at 1A ("There are political considerations that are going to come into play that don't come into play when you have a largely anonymous jury . . . and no one person is the lightning rod for the decision." (quoting attorney Stephen Bright)); see also Scott E. Erlich, Comment, *The Jury Override: A Blend of Politics and Death*, 45 AM. U. L. REV. 1403, 1444 (1996) (discussing former California Supreme Court Chief Justice Rose Bird, who lost a recall election after opponents attacked her record of overturning death sentences).

42. Deskins & Rhinehart, *supra* note 2, at 67–68; see Mungin, *supra* note 32, at 1A (citing critics of the current Georgia death system who suggest that some jurors misrepresent their opposition to the death penalty in order to serve on capital juries and deliberately thwart the imposition of a death sentence).

43. Campos, *supra* note 30, at 4B.

44. *Id.*

45. Bill Rankin, *Legislature 2008, Senate Delivers Its Verdict; Plan Rejected: Proposal Would Have Allowed Non-Unanimous Jury Decisions in Capital Cases*, ATLANTA J.-CONST., Mar. 21, 2008, at 5E.

46. Smith & Rankin, *supra* note 28; S.B. 145, 149th Gen. Assem., Reg. Sess. (Ga. 2008).

47. Rankin, *supra* note 45.

48. *Id.* Fleming proposed the bill while seeking the Republican nomination for the 10th Congressional District of Georgia. *Id.*

III. THE MOVEMENT AWAY FROM UNANIMITY REQUIREMENTS IN CRIMINAL TRIALS

As in other states that have considered measures to relax unanimity requirements,⁴⁹ the Georgia proposals arose in the aftermath of a high-profile case in which a minority of jurors prevented the imposition of a death sentence on the defendant.⁵⁰ Indeed, attempts to change Georgia's sentencing statute to allow a death sentence without a unanimous jury decision are part of a larger movement to shift the American jury system away from unanimity.⁵¹ Proposals to remove the unanimity requirement from criminal trial verdicts⁵² are a result, in part, of the widespread public perception that juries are increasingly unable to reach verdicts in criminal trials, and that as a result, guilty defendants are walking free.⁵³ When juries deadlock in controversial cases, critics of the jury system seize upon the public's outrage "to urge radical correction of the current system," including dispensing with the unanimity requirement in death penalty sentencing procedures.⁵⁴

49. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1265–66 (2000) (noting the verdict in the O.J. Simpson case as an example of a high-profile verdict that resulted in calls for a reform of the jury system); see also James Kachmar, Comment, *Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials*, 28 PAC. L.J. 273, 293 (1996) (discussing the Simpson case and the efforts of Fred Goldman, the father of one of Simpson's alleged victims, to amend the California Constitution to allow juries in non-death penalty criminal cases to render a guilty verdict with only a five-sixths' majority). See also Robin Lutz, Comment, *Experimenting with Death: An Examination of Colorado's Use of the Three-Judge Panel in Capital Sentencing*, 73 U. COLO. L. REV. 227, 247–48 (2002) (discussing the life sentence given by a panel of judges to convicted murderer Donta Page, which led to an unsuccessful proposal to reform Colorado's sentencing procedure to allow ten of twelve jurors to agree on a recommendation of a death sentence).

50. See discussion *supra* Part II.A.

51. See generally Edward P. Schwartz & Warren F. Schwartz, *And So Say Some of Us . . . What to Do When Jurors Disagree*, 9 S. CAL. INTERDISC. L.J. 429 (2000).

52. The National Coalition to Abolish the Death Penalty (NCADP) refers to these proposals as "reaction bills." Leigh Dingerson, *Reclaiming the Gavel: Making Sense out of the Death Penalty Debate in State Legislatures*, 18 N.Y.U. REV. L. & SOC. CHANGE 873, 877–78 (1991).

53. Kachmar, *supra* note 49, at 293.

54. Taylor-Thompson, *supra* note 49, at 1265–66.

A. Arguments for Retaining the Unanimity Requirement in Criminal Verdicts

Supporters of retaining the unanimity standard argue that the quality of jury deliberations will suffer if non-unanimous verdicts are permitted in criminal trials.⁵⁵ In other words, requiring consensus forces jurors to deliberate over the evidence and encourages engagement with the viewpoints of other jurors.⁵⁶ However, a jury that is not required to come to a consensus, but only to reach a majority decision, will have no incentive to prolong deliberations once that majority has been reached.⁵⁷ When a jury reaches the number of votes necessary for a verdict, the majority of jurors are free to simply ignore the views of jurors who disagree.⁵⁸ As Jeffrey Abramson writes:

If they are instructed to return a unanimous verdict, jurors know their task is not to vote. For all their differences, they must approach justice through conversation and the art of persuading or being persuaded in turn. Majority verdicts signal an entirely different type of behavior, where jurors ultimately remain free to assert their different interests and opinions against one another. The distinctive genius of the jury system has been to emphasize deliberation more than voting and representation. Abolishing the unanimous verdict would weaken the conversations through which laypersons educate one another about their common sense of justice.⁵⁹

Proponents of unanimity also point out that dispensing with the unanimity requirement could lead to a loss of confidence in the judicial system among minority communities.⁶⁰ If primarily white

55. Kachmar, *supra* note 49, at 305.

56. Taylor-Thompson, *supra* note 49, at 1274.

57. Kachmar, *supra* note 49, at 305.

58. *Id.* at 305.

59. Schwartz & Schwartz, *supra* note 51, at 454 (citing JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 205 (1994)).

60. Kachmar, *supra* note 49, at 303–04.

juries are routinely able to come to majority verdicts without having to try to build a consensus of all the jurors, those jurors who are members of racial or ethnic minorities may sense that their views are being marginalized.⁶¹ Subsequently, members of minority communities may become reluctant to participate in the judicial process if they believe that “their voices are being silenced in the jury room.”⁶²

B. Arguments for Dispensing with the Unanimity Requirement in Criminal Verdicts

Proponents of dispensing with the unanimity requirement argue that the emphasis on unanimity is merely a relic of English custom and an “historical accident.”⁶³ Several other countries with legal systems based on the British system have already relaxed the unanimity requirement.⁶⁴ Critics argue that Americans err by placing faith in unanimous jury verdicts because the emphasis on unanimity “encourages jurors to vote insincerely” for the sake of creating “an illusion of consensus.”⁶⁵ In fact, they argue, allowing juries to reach decisions on the basis of majority or supermajority is much more closely tied to American “political and constitutional culture”⁶⁶ than the requirement of juror unanimity.

Moreover, proponents of relaxing the unanimity requirement deny that allowing majority verdicts will diminish the quality of jury deliberations, pointing out that unanimous juries may be faced with the problem of the “eccentric holdout” who refuses to take part in jury deliberations.⁶⁷ Champions of majority verdicts insist that their

61. *Id.* at 303.

62. *Id.*

63. Schwartz & Schwartz, *supra* note 51, at 444 (citing SIR P. DEVLIN, TRIAL BY JURY 48 (1988)).

64. *Id.* at 445–47. England requires only ten of twelve jurors to agree on a verdict, Australian states have adopted standards of ranging from nine to twelve, and Ireland and Northern Ireland need only ten votes out of juries of either eleven or twelve. *Id.*

65. *Id.* at 430.

66. Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L.Q. 141, 147 (2006). “Why the obsession with unanimity here—and why is that the baseline decision rule when almost no other decision in public political life gets made by unanimous consent?” *Id.* at 142.

67. Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1191 (1995).

scheme can still “preserve the ideal of jury deliberation and self-education,” and that judges will play an important role in advising juries to focus on evidence and to delay voting until each juror has had an opportunity to voice his or her opinion.⁶⁸ Proponents also suggest that rather than disenfranchising minorities, allowing non-unanimous verdicts will empower those in the minority to voice their dissent rather than submit to pressure to accept a majority verdict with which they disagree.⁶⁹

The Supreme Court has upheld moves away from unanimity in supermajority statutes passed in Oregon and Louisiana.⁷⁰ But the Oregon and Louisiana statutes concerned criminal verdicts in non-capital cases.⁷¹ That each of these states made an exception for capital cases points to recognition that the death penalty is “different.”⁷² With public support for the death penalty on the wane, is there justification for extending a relaxation of the unanimity requirement to the sentencing phase and making it easier to sentence a defendant to death?⁷³

68. *Id.* However, the author’s suggestion that under a majority verdict scheme, “jurors should talk to and listen to each other seriously and with respect,” is both short on specifics and indistinguishable from expectations of jurors under the current unanimous verdict system. *Id.*

69. *Id.* at 195–96.

70. Schwartz & Schwartz, *supra* note 51, at 447; see *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

71. Leib, *supra* note 66, at 141.

72. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). *But see* Daniel P. Collins, *Making Juries Better Factfinders*, 20 HARV. J.L. & PUB. POL’Y 489, 497–98 (1997):

Because, in my view, the Constitution compels a unanimous jury of [twelve] citizens, I would not advocate . . . the use of non-unanimous juries. [H]owever . . . I do not advocate a unanimity requirement for capital sentencing juries. [Unanimous capital juries] fail to take account of the important differences between the function of a jury at trial and its function at sentencing. . . . [A] criminal trial jury is intended to be an accurate determiner of factual guilt, but a capital sentencing jury is essentially making a normative, moral judgment. Given the diversity of views that exist on the subject of capital punishment, I think in many cases insistence on a unanimous verdict is more than we should reasonably expect.

73. Deskins & Rhinehart, *supra* note 2, at 63 (citing DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2007), available at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>).

IV. THE SUPREME COURT PERMITS NON-UNANIMOUS JURY VERDICTS IN CRIMINAL CASES

The proposed amendment to Georgia's death penalty statute would allow a death sentence to be imposed without a unanimous jury sentencing decision.⁷⁴ This shift away from the unanimity requirement is the most striking change in the Georgia proposal. Yet the Supreme Court held in *Apodaca v. Oregon* and *Johnson v. Louisiana* that the Constitution does not require unanimous jury verdicts in the guilt phase of criminal cases.⁷⁵ However, neither the Oregon nor the Louisiana statute at issue in those cases permitted non-unanimous jury verdicts in capital cases.⁷⁶

A. *Apodaca v. Oregon*

In 1972, the Supreme Court held in *Apodaca* that a state criminal conviction by a non-unanimous jury did not violate the constitutional right to trial by jury.⁷⁷ The petitioners in *Apodaca* were convicted in separate trials under Oregon law, which permitted non-capital criminal convictions by "less-than-unanimous" juries.⁷⁸

The petitioners noted the Court's earlier holding in *Duncan v. Louisiana* that the Sixth Amendment's jury trial requirement applied to the states through the Due Process Clause of the Fourteenth Amendment, and argued that a requirement of unanimous jury verdicts should also extend to the states.⁷⁹ However, the Court concluded that because the Sixth Amendment did not require

74. See discussion *supra* Part II.

75. See discussion *infra* Part IV.A–B.

76. See discussion *infra* Part IV.A–B.

77. *Apodaca v. Oregon*, 406 U.S. 404, 404 (1972). Robert Apodaca was convicted of assault with a deadly weapon and convicted by an 11–1 jury vote. Henry Morgan Cooper, Jr. was convicted of burglary in a dwelling by a 10–2 jury vote. James Arnold Madden was convicted of grand larceny by an 11–1 vote. *Id.* at 405–06.

78. *Id.* at 406 n.1 (citing OR. CONST. art I, § 11 (1934)) (“[T]en members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict . . .”).

79. *Apodaca*, 406 U.S. at 411–12; see also *Duncan v. Louisiana*, 391 U.S. 145 (1968).

unanimity, a unanimity requirement “was not of constitutional stature” and thus did not implicate the Due Process Clause.⁸⁰

The Court also dismissed the petitioner’s argument that unanimity was required for “effective application” of the requirement that juries reflect a cross-section of the community.⁸¹ The petitioners argued that allowing non-unanimous jury verdicts could effectively silence minority communities in the jury room.⁸² But the Court held that the Constitution did not require that “every distinct voice in the community” had a right to be heard in every jury deliberation.⁸³ The Constitution only forbids “systematic exclusion” of minority populations from the jury pool.⁸⁴ The Court dismissed the idea that minority viewpoints would not be adequately represented “simply because they may be outvoted in the final result.”⁸⁵

The Court also refused to accept the argument that non-unanimous jury verdicts would lead to higher conviction rates of minority defendants.⁸⁶ However, as one commentator has pointed out, the Court failed to provide any legal rationale for this position, relying instead “on sweeping assumptions about the psychology of jury decision-making.”⁸⁷

B. Johnson v. Louisiana

The Supreme Court held in *Johnson v. Louisiana*, a case decided the same day as *Apodaca*, that Louisiana could allow non-unanimous

80. *Apodaca*, 406 U.S. at 406.

81. *Id.* at 412.

82. *Id.* at 412–13.

83. *Id.* at 413.

84. *Id.* (“No group, in short, has the right to block convictions; it has only the right to participate in the overall legal processes by which criminal guilt and innocence are determined.”).

85. *Id.* *But see* Taylor-Thompson, *supra* note 49, at 1269 (“The Court cited no precedent or jury research to reach this conclusion. It simply rejected the petitioners’ assumption in favor of its own. . . . [T]he Court made an interesting leap: it equated presence with influence.”).

86. *Apodaca*, 406 U.S. at 413–14 (“We simply find no proof for the notion that a majority will disregard its instructions and cast its votes for guilt or innocence based on prejudice rather than the evidence.”).

87. Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J. L. REFORM 569, 576 (2007).

juries to convict defendants in non-capital criminal cases.⁸⁸ Louisiana law permitted criminal defendants to be convicted through various means—by a judge, by a unanimous jury of five, or by nine members of a jury of twelve—depending on the nature of the crime and the severity of the punishment.⁸⁹

The Court rejected Johnson’s argument that the Due Process Clause required a unanimous jury decision in order to meet the reasonable doubt standard.⁹⁰ Instead, the Court reasoned that because nine of the jurors had voted for a conviction, Louisiana had met its standard of reasonable doubt.⁹¹ The Court also rejected the argument that Louisiana violated the Equal Protection Clause by requiring different numbers of votes for convictions depending on the severity of the crime and possible punishment, holding that the State had the discretion to raise its burden of proof in accordance with the crime.⁹²

As in *Apodaca*, the majority in *Johnson* again dismissed the contention that permitting non-unanimous convictions would allow the majority of jurors to dismiss the doubts of the minority.⁹³ However, Justice Stewart in his dissent argued that “community confidence” in the criminal justice system would decline if “a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines.”⁹⁴

88. *Johnson*, 406 U.S. at 356. Frank Johnson was convicted of armed robbery by a nine-to-three jury verdict. *Id.* at 358.

89. *Id.* at 357–58 n.1 (citing LA. CONST. art VII, § 41 (1921)) (“All cases in which the punishment may not be hard labor shall, unless otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.”).

90. *Johnson*, 406 U.S. at 359.

91. *Id.* at 362 (“That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard.”).

92. *Id.* at 364 (“We perceive nothing unconstitutional or invidiously discriminatory, however, in a State’s insisting that its burden of proof be carried with more jurors where more serious crimes or more severe punishments are at issue.”).

93. *Id.* at 361 (“We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict.”).

94. *Id.* at 397 (Stewart, J., dissenting) (“Under today’s judgment, nine jurors can simply ignore the views of their fellow panel members of a different race or class.”).

Although the Court's rulings in *Apodaca* and *Johnson* permitted states to allow non-unanimous verdicts in criminal trials, only two states have chosen to do so.⁹⁵ Furthermore, federal criminal trials continue to require unanimous verdicts.⁹⁶ The *Apodaca* and *Johnson* rulings have been criticized because of the potential harm that allowing majority verdicts may have on the quality of jury deliberations.⁹⁷ Juries that are only required to reach a majority opinion may fail to fully "explore all possible arguments for the defendant's innocence."⁹⁸ In addition, such juries may fail to give jurors in the minority opinion "a chance to convince the majority that the defendant is guilty only of a lesser included offense," increasing the possibility of a "verdict born of prejudice or bigotry" if the jury is "split along race or class lines."⁹⁹

V. THE SUPREME COURT PERMITS JUDGES ALONE TO IMPOSE DEATH SENTENCES

In the recent bills to change Georgia's death penalty proceedings, a criminal defendant could be sentenced to death by either a unanimous jury decision, or by the trial judge alone if the required majority of a jury voted for a death sentence.¹⁰⁰ This jury override mechanism, though marking a significant change for the state of Georgia, comports with Supreme Court holdings that jury participation is not required in capital sentencing.¹⁰¹

A. *Spaziano v. Florida*

In 1984, the Supreme Court in *Spaziano v. Florida* upheld a Florida law permitting a judge to impose a death sentence after the

95. Michael H. Glasser, Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 671 (1997).

96. *Id.* at 670.

97. *The Supreme Court, 1971 Term—Nonunanimous Jury Verdicts*, 86 HARV. L. REV. 148, 154 (1972).

98. *Id.*

99. *Id.*

100. See discussion *supra* Part II.

101. Lutz, *supra* note 49, at 228–29.

jury had recommended life imprisonment.¹⁰² Florida law gave the jury only an advisory role in sentencing.¹⁰³ Once the jury found that aggravating circumstances existed, the trial judge in *Spaziano* was authorized to conduct an independent sentencing assessment—“weighing . . . the aggravating and mitigating circumstances” to determine whether to sentence the defendant to life in prison or death.¹⁰⁴

Spaziano argued that allowing a judge to override a jury sentencing recommendation violated the Eighth Amendment’s prohibition against “cruel and unusual punishments.”¹⁰⁵ But the Court said that its *Furman* holding that state death penalty statutes must guard against arbitrary and capricious capital sentencing was not intended to suggest “that the sentence must or should be imposed by a jury.”¹⁰⁶ The Court also rejected *Spaziano*’s argument that allowing the judge to make the sentencing decision violated the Sixth Amendment’s guarantee of a right to jury trial, holding that “[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.”¹⁰⁷

Spaziano also argued that Florida’s statute violated the Fifth Amendment’s Double Jeopardy Clause by allowing the State two chances at imposing a death penalty, first in the jury sentencing phase and again during the judge’s deliberation of sentence.¹⁰⁸ The Court

102. *Spaziano v. Florida*, 468 U.S. 447, 449 (1984) (“We . . . reject petitioner’s argument that . . . the Florida standards for overriding a jury’s sentencing recommendation are so broad and vague as to violate the constitutional requirement of reliability in capital sentencing.”). Joseph Robert *Spaziano* was convicted of first-degree murder. *Id.* at 450.

103. *Id.* at 451. “Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts . . .” FLA. STAT. § 921.141(3) (1983).

104. *Spaziano*, 468 U.S. at 451.

105. *Id.* at 457–58.

106. “[T]here certainly is nothing in the safeguards necessitated by the Court’s recognition of the qualitative difference of the death penalty that requires that the sentence be imposed by a jury.” *Id.* at 460. “If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.” *Id.* (citing *Zant v. Stephens*, 462 U.S. 862, 873–80 (1983)). “It must allow the sentencer to consider the individual circumstances of the defendant, his background, and his crime.” *Id.* (citing *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978)).

107. *Id.* at 459.

108. *Id.* at 458.

held that because the jury sentencing verdict was only advisory, the Double Jeopardy Clause did not apply.¹⁰⁹

Finally, Spaziano argued that the unique nature of the death penalty as “an expression of community outrage” necessitated that the sentence be imposed by the jury as “the voice of the community.”¹¹⁰ The Court rejected this argument, reasoning that the community’s voice may be expressed through other means, specifically through legislation that permits death sentences, defines aggravating and mitigating circumstances, and sets standards for capital sentencing.¹¹¹

The Court made note in its decision of “the significant safeguard the *Tedder* standard affords a capital defendant in Florida.”¹¹² Under *Tedder*, the “jury recommendation” for sentencing “should be given great weight” and “the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.”¹¹³ However, one commentator points out that by praising *Tedder* the Court undercut its own ruling.¹¹⁴ Though *Spaziano* held that a judge alone could impose a sentence, the “Court’s ostensible support of Florida’s *Tedder* safeguard is the Court’s unspoken allegiance to the very principle it purported to reject—capital sentencing is, in truth, the jury’s job.”¹¹⁵

B. *Harris v. Alabama*

In its 1995 decision in *Harris v. Alabama*, the Supreme Court considered a statute similar to the Florida law at issue in *Spaziano*.¹¹⁶

109. *Id.* at 458–59 (“[T]he Court has concluded that the Double Jeopardy Clause bars the State from making repeated efforts to persuade a sentencer to impose the death penalty. . . . [But] [t]here is no similar danger involved in denying a defendant a jury trial on the sentencing issue of life or death.”).

110. *Spaziano*, 468 U.S. at 461.

111. *Id.* at 462–63 (“The point is simply that the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge.”).

112. *Id.* at 465.

113. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

114. Amy D. Ronner, *When Judges Impose the Death Penalty After the Jury Recommends Life: Harris v. Alabama As the Excision of the Tympanic Membrane in an Augmentedly Death-Biased Procedure*, 23 HASTINGS CONST. L.Q. 217, 248 (1995).

115. *Id.*

116. *Harris v. Alabama*, 513 U.S. 504 (1995).

The Alabama statute entitled a capital defendant to a jury sentencing hearing at which aggravating and mitigating factors were presented.¹¹⁷ The jury weighed those factors and then offered an advisory verdict to the judge.¹¹⁸ Although the jury was allowed to recommend death only if a minimum of ten jurors voted for it, the trial judge was permitted to do his own analysis of the aggravating and mitigating factors before final sentencing was determined.¹¹⁹ In Harris's case, the jury recommended a sentence of life without parole, but the trial judge found the aggravating circumstances outweighed the mitigating circumstances, and imposed the death penalty.¹²⁰

Harris contended that the jury sentencing verdicts must be "more than advisory" and that the jury should have "the key sentencing role, subject only to review by the judge."¹²¹ Harris noted that Florida judges were required to give "great weight" to the jury's sentencing recommendation, while the Alabama statute set no standard for the weight the trial judge was to give to the jury's advisory verdict.¹²² Harris further contended that because Alabama judges did not always provide specific reasons for imposing a sentence different from the jury's recommendation, judges in different trials might be giving different weights to the jury sentencing verdicts.¹²³

117. *Id.* at 506 (citing ALA. CODE § 13A-5-46 (1994)).

118. *Id.*

119. *Id.*

120. Louise Harris solicited her lover, Lorenzo McCarter, to hire someone to kill her husband, a deputy sheriff. The Supreme Court noted that Harris was a mother of seven who held three jobs, participated in her church, and whose "strong character" was attested to by many witnesses at her sentencing hearing. However, McCarter testified that Harris was motivated by receiving her husband's death benefits of \$250,000. The sentencing judge found that the single statutory mitigating factor, Harris's lack of prior convictions, was outweighed by the one statutory aggravating circumstance, the commission of murder for pecuniary gain. *Id.* at 507-08.

121. *Id.* at 512.

122. *Harris*, 513 U.S. at 509 (citing *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975)) ("[T]rial judges must give 'great weight' to the jury's recommendation and may not override the advisory verdict unless 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.'").

123. *Id.* at 514.

The Court rejected Harris's argument, noting that it had already held that judges alone could impose death sentences.¹²⁴ The Court further held that Alabama's "standardless jury override scheme" did not violate the Eighth Amendment's prohibition on "cruel and unusual" punishment.¹²⁵ The *Tedder* "great weight" standard that Florida judges were to accord to jury sentencing advisories was not "constitutionally required."¹²⁶ The Court declined to impose "a specific degree of weight" for judges to place on a jury advisory verdict, reasoning that it would be acting as a legislator if it created such a standard for Alabama judges.¹²⁷

The *Harris* ruling was criticized as a movement away from the Court's post-*Furman* jurisprudence.¹²⁸ Critics complain that by permitting Alabama's standardless jury override, the Supreme Court essentially backed away from the notion of protecting capital defendants from arbitrary and capricious imposition of death sentences.¹²⁹ As one commentator argued, "*Harris* endorsed the view that one person should have the unbridled power to impose death over the collective judgment of twelve."¹³⁰

VI. THE SUPREME COURT LIMITS A JUDGE'S AUTHORITY TO INCREASE CRIMINAL SENTENCES

The proposed amendments to Georgia's capital sentencing procedure would permit a judge to impose a death sentence upon a defendant even if the jury is unable to come to a unanimous

124. *Id.* at 515 ("The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it proper weight.").

125. Erlich, *supra* note 41, at 1430.

126. *Harris*, 513 U.S. at 511 ("We thus made clear that, our praise for *Tedder* notwithstanding, the hallmark of the analysis is not the particular weight a State chooses to place upon the jury's advice, but whether the scheme adequately channels the sentencer's discretion so as to prevent arbitrary results.").

127. Erlich, *supra* note 41, at 1430-31.

128. *Id.* at 1430.

129. *Id.* at 1431.

130. *Id.* at 1431 ("This arrangement is problematic for two reasons. First, it tends to dilute the community's voice as represented by the collegial body—the jury. Second, it gives judges the unchecked power to impose death.").

determination that death is the appropriate punishment.¹³¹ While the U.S. Supreme Court does not require a jury to participate in capital sentencing, the Court has held that a jury must make any determination of facts that could lead to a capital sentence.¹³²

In *Ring v. Arizona* in 2002, the Supreme Court declared invalid an Arizona statute permitting the trial judge to make the sole determination of aggravating circumstances in a capital case.¹³³ Ring was convicted of felony murder during an armed robbery, but under Arizona law, he could not receive a death sentence without additional findings of aggravated circumstances.¹³⁴ Arizona law provided for a separate non-jury hearing to allow the judge to determine the existence of aggravated circumstances.¹³⁵ Following that hearing, the judge found the existence of aggravating circumstances and sentenced Ring to death.¹³⁶

Ring challenged his death sentence on the grounds that allowing the judge to be the sole trier of facts that increased his maximum penalty violated the Sixth and Fourteenth Amendments.¹³⁷ The Court rejected the State's argument that allowing judges to determine aggravating circumstances might be a "better . . . guarantee against the arbitrary imposition of the death penalty," reasoning that "[t]he Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders."¹³⁸ Two years earlier, the Court had held in *Apprendi v. New Jersey* that the Due Process Clause of the Fourteenth Amendment required that any fact with the potential for increasing the sentence for a criminal defendant must be submitted to the jury and meet the reasonable

131. See discussion *supra* Part II.

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

133. *Id.* at 589 ("Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.")

134. *Id.* at 593 (citing ARIZ. REV. STAT. ANN. § 13-703(F) (2001)).

135. *Id.* at 592-93 (citing ARIZ. REV. STAT. ANN. § 13-703(C) (2001)).

136. *Id.* at 594-95. The judge found two aggravating circumstances: that Ring committed the crime for pecuniary gain and in "an especially heinous, cruel or depraved manner." The judge found Ring's minimal criminal record a non-statutory mitigating factor that did not call for leniency. *Id.*

137. *Id.* at 595.

138. *Ring*, 536 U.S. at 607 (citing Transcript of Oral Argument at 32).

doubt standard.¹³⁹ In *Ring*, the Court applied the *Apprendi* ruling to capital defendants, holding that if elements that could extend a defendant's sentence must be put before a jury, "the Sixth Amendment would be senselessly diminished" unless a jury was also required to do "the factfinding necessary to put him to death."¹⁴⁰ A commentator agreeing with the *Ring* decision put it in the following terms: "[w]hy should a capital defendant actually enjoy less protection under the Constitution than an ordinary criminal defendant?"¹⁴¹

VII. HOW WOULD THE SUPREME COURT RULE ON GEORGIA'S PROPOSED CHANGES TO DEATH PENALTY PROCEEDINGS?

The proposed change to Georgia's death penalty statute would allow a judge to impose a death sentence on a defendant even if the jury does not unanimously agree that the death penalty should be imposed.¹⁴² This proposal comports with Supreme Court rulings that jury unanimity is not a constitutional requirement and that judges alone may impose a death penalty.¹⁴³

The real question, then, is whether the Supreme Court is willing to extend its holding that jury unanimity is not a constitutional requirement in the criminal phase of a trial to the sentencing portion of a capital case. That question may ultimately turn not on precedent, but on an increasing awareness of the role that race plays in the criminal justice system.

139. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.")

140. *Ring*, 536 U.S. at 609; *see also id.* at 610 (Scalia, J., concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or *Mary Jane*—must be found by the jury beyond a reasonable doubt.")

141. John M. Challis, *I'm Sorry Your Honor, You Will Not Decide My Fate Today: The Role of Judges in the Imposition of the Death Penalty: A Note on Ring v. Arizona*, 22 ST. LOUIS U. PUB. L. REV. 521, 556 (2003).

142. *See* discussion *supra* Part II.A–B.

143. *See* discussion *supra* Part IV.

A. Georgia Proposals Comport with Supreme Court Precedent

The proposed changes to Georgia's death penalty sentencing procedures would eliminate the jury unanimity requirement in sentencing.¹⁴⁴ Given that the Supreme Court held over thirty-five years ago in *Apodaca v. Oregon* and *Johnson v. Louisiana* that jury decisions in the guilt phase of a trial did not need to be unanimous, the Georgia proposal would seem to comport with the Court's current position.¹⁴⁵ However, it is telling that neither the Oregon nor Louisiana statutes at issue in those Court holdings permitted non-unanimous jury verdicts in capital cases.¹⁴⁶ Therefore, it remains unclear whether the court would be willing to extend the *Apodaca* and *Johnson* holdings to the guilt phase of a capital case.

But the guilt phase is not at issue in the proposed Georgia reforms. Rather, only the sentencing phase of a capital trial would be affected.¹⁴⁷ The Court held in both *Spaziano v. Florida* and *Harris v. Alabama* that the Constitution does not require jury participation in the sentencing portion of a capital case.¹⁴⁸ A judge alone may impose a capital sentence on a defendant.¹⁴⁹

The Supreme Court has limited the role of the judge in increasing the maximum sentence a defendant faces.¹⁵⁰ In *Ring v. Arizona*, the Court held that a jury must make the determination of any facts that could increase a defendant's sentence, including the existence of aggravating circumstances that could trigger a defendant's eligibility for the death penalty.¹⁵¹ The proposed changes in Georgia incorporate this rule.¹⁵² Any aggravating circumstances would still have to be found by the jury.¹⁵³ Under the proposed guidelines, if the jury found one or more aggravating circumstances and if the required majority

144. See discussion *supra* Part II.A–B.

145. See discussion *supra* Part IV.

146. See discussion *supra* Part IV.

147. See discussion *supra* Part II.A–B.

148. See discussion *supra* Part V.

149. See discussion *supra* Part V.

150. See discussion *supra* Part VI.

151. See discussion *supra* Part VI.

152. See discussion *supra* Part II.A–B.

153. See discussion *supra* Part II.A–B.

of jurors voted in favor of a death sentence, the judge could then impose such a sentence.¹⁵⁴

B. *Schriro v. Summerlin*

In 2004, the Supreme Court ruled in *Schriro v. Summerlin* that its *Ring* holding was procedural and did not announce a watershed rule of criminal procedure.¹⁵⁵ Therefore, the *Ring* holding that juries rather than judges must find aggravating circumstances necessary to impose the death penalty did not apply to cases already final on direct review.¹⁵⁶

In the *Schriro* dissent, Justice Breyer argued that the Eighth Amendment required juries to make capital sentencing decisions.¹⁵⁷ Breyer's dissent called jury sentencing in capital cases "a fundamental aspect of constitutional liberty" and also claimed juries were "more likely to produce an accurate assessment of whether death is the appropriate punishment."¹⁵⁸ The dissent further argued that capital cases "can[not] tolerate" the same "risk of error" as non-capital cases, citing Justice Burger's concurrence in *Ake v. Oklahoma* that "[i]n capital cases the finality of the sentence imposed warrants protection that may or may not be required in other cases."¹⁵⁹

C. *Snyder v. Louisiana*

Significantly, *Schriro* was decided by only a 5–4 majority.¹⁶⁰ Two of the Justices in the majority, William Rehnquist and Sandra Day

154. See discussion *supra* Part II.A–B.

155. *Schriro v. Summerlin*, 542 U.S. 348 (2004).

156. *Id.* But see Kenneth C. Haas, *The Emerging Death Penalty Jurisprudence of the Roberts Court*, PIERCE L. REV. 387, 397 (2008) (noting that some legal scholars argue that requiring juries to make the determination of aggravating circumstances necessary for the death penalty will nevertheless lead to the imposition of fewer death sentences).

157. *Schriro*, 542 U.S. at 360 (Breyer, J., dissenting) ("I believe the Eighth Amendment demands the use of a jury in capital sentencing because a death sentence must reflect a community-based judgment that the sentence constitutes proper retribution.").

158. *Id.*

159. *Id.* at 362–63 (Breyer, J., dissenting) (citing *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, J., dissenting)).

160. *Id.* at 348.

O'Connor, are no longer on the Court.¹⁶¹ In 2005, John Roberts replaced Rehnquist as Chief Justice of the Supreme Court.¹⁶² Several months later, Samuel Alito replaced Justice O'Connor.¹⁶³ This change in composition of the Supreme Court, however, does not necessarily portend any deviation from the Rehnquist Court rulings in death penalty cases. As one commentator has noted, the Roberts Court has already weakened procedural safeguards for capital defendants.¹⁶⁴ However, an examination of a 2008 Roberts Court ruling indicates that predicting Supreme Court decisions on capital matters may be more complicated than anticipated.¹⁶⁵

In 2008, the Court in a 7–2 decision reversed a murder conviction in *Snyder v. Louisiana* after finding that the prosecutor may have engaged in racial discrimination in striking a prospective black juror from the jury pool.¹⁶⁶ After challenges for cause, a panel of eighty-five prospective jurors was reduced to thirty-six potential jurors, only five of whom were black.¹⁶⁷ All five were removed from the pool through prosecutorial peremptory strikes.¹⁶⁸ The Court acknowledged the traditional deference given to the trial court when evaluating “discriminatory intent” in peremptory challenges.¹⁶⁹ However, the Court found evidence of racial discrimination in the dismissal of one of the prospective black jurors, noting that two white jurors had equally or more compelling hardship reasons to be struck from the pool.¹⁷⁰ Because the trial court judge made no finding regarding the prosecution’s claim that the black juror in question “appeared nervous,” the Supreme Court ruled that it could not presume that the

161. Haas, *supra* note 156, at 387.

162. *Id.*

163. *Id.*

164. *Id.* at 388 (“The Roberts Court has loosened the standards for evaluating the competence of capital defense attorneys, strengthened the hands of capital prosecutors, and upheld strict and constitutionally vulnerable statutory and procedural roadblocks to the appellate review of capital sentences.”).

165. *Id.* at 436 (predicting that Allen Snyder’s death sentence would be upheld by a 5–4 Supreme Court decision).

166. *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008).

167. *Id.* at 1207.

168. *Id.*

169. *Id.* at 1205.

170. *Id.* at 1211–12.

trial court accepted the prosecutor's proffered justifications for the strike.¹⁷¹

This decision was counter to at least one commentator's prediction that Roberts and Alito would uphold Snyder's death sentence.¹⁷² Alito's vote in particular was surprising, given that he was not expected to share in his predecessor O'Connor's skepticism of lower court rejections of claims of racial prejudice by capital defendants.¹⁷³

Thirty-six years have passed since the Supreme Court insisted upon safeguards in death penalty statutes to protect capital defendants from "arbitrary and capricious" imposition of the death penalty.¹⁷⁴ Fewer death sentences have been imposed in recent years, with only forty-two death sentences imposed in 2007, the lowest number since 1994.¹⁷⁵ This downward trend in death penalty sentencing corresponds to declining public support for the death penalty.¹⁷⁶ The legal careers of Chief Justice Roberts and Justice Alito have taken place entirely in the post-*Furman* years.¹⁷⁷ Their votes in *Snyder* to reverse a murder conviction due to possible prosecutorial racial discrimination may indicate a changing perception of the role of race in the justice system.¹⁷⁸ If even the most conservative Justices recognize the reality of racial discrimination in criminal trials, the Supreme Court may have reservations about allowing death sentences to be imposed in situations where the jury may split along racial lines, and thus decline to allow judges to impose death sentences when the jury fails to come to a unanimous decision on a death sentence.¹⁷⁹

Yet given the Court's holding in *Harris* that a judge alone may impose the death penalty, even when the jury recommends a lesser

171. *Id.* at 1209.

172. Haas, *supra* note 156, at 437.

173. *Id.* at 436-37.

174. See discussion *supra* Part I.

175. Haas, *supra* note 156, at 428.

176. *Id.* at 428.

177. Chief Justice Roberts graduated from law school in 1979. Justice Alito began his legal career in 1976. The Justices of the Supreme Court, <http://www.supremecourt.us/about/biographiescurrent.pdf> (last visited Feb. 14, 2010).

178. See discussion *supra* Part V.C.

179. See discussion *supra* Part III.A.

sentence, current precedent suggests that the Georgia proposal, if it passes the Georgia General Assembly, will survive a Supreme Court review.¹⁸⁰ The Court will likely find that the statute itself is a sufficient means of expressing the “community’s voice.”¹⁸¹

CONCLUSION

The proposed changes to allow a death sentence to be imposed by a judge when a jury cannot come to a unanimous decision must pass the constitutional requirements established by Supreme Court precedent in order to achieve legal effect.¹⁸² The Court has ruled that unanimous jury verdicts are not required in the guilt phase of criminal trials.¹⁸³ The Court has also held that judges alone may impose death sentences, although juries alone are responsible for findings of fact that can increase the potential sentencing of a defendant.¹⁸⁴ This ruling extends to the determination of any aggravating circumstances that would make a defendant eligible for a capital sentence.¹⁸⁵

An increasing awareness of the role racial discrimination plays in criminal trials may inform any Supreme Court ruling on the proposed Georgia statute.¹⁸⁶ But unless or until *Harris* is reversed, a statute allowing a judge to impose the death penalty even if the jury fails to come to a unanimous death sentencing decision would appear to be constitutional.

180. See discussion *supra* Parts II, V.B.

181. *Spaziano v. Florida*, 468 U.S. 447, 462 (1984).

182. See discussion *supra* Parts IV–VI.

183. See discussion *supra* Part IV.

184. See discussion *supra* Parts V–VI.

185. See discussion *supra* Part VI.

186. See discussion *supra* Part VII.B.

