Jury Waiver in Capital Cases: An Assessment of the Voluntary, Knowing, and Intelligent Standard

Paul Mancino III

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I. Introduction

Inveterate to the American system of criminal jurisprudence is the fundamental right to trial by jury. The right to trial by jury for the criminal defendant is preserved by the Constitution of the United States in both Article III and the Sixth Amendment. In Duncan v. Louisiana, the United States Supreme Court held that the Sixth Amendment to the Constitution applied to both the federal government and to the states by incorporation into the Fourteenth Amendment. Consequently, every

* Recipient of the Howard L. Oleck award for distinguished legal writing by a student.

2 Article III, § 2 of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed." U.S. CONST. art. I, § 2, cl. 3.
3 The Sixth Amendment of the Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, ..." U.S. CONST. amend. VI.
4 391 U.S. at 145.
5 Id. at 149.
criminal defendant charged with a non-petty offense is entitled to trial by jury, whether tried in a state or federal court. 6

In capital cases, the words "trial by jury" take on added significance due to the unique aspects of the death penalty. First, as the United States Supreme Court in Gregg v. Georgia 7 noted, "There is no question that death as a punishment is unique in its severity and irrevocability." Second, the death penalty is unique given the role the jury plays in the sentencing phase of a death penalty trial. Traditionally, juries are the sole arbiters of guilt or innocence. That is, "The Sixth Amendment right to trial by jury in criminal cases is a right to have a jury decide the facts, apply the law to them, and reach a verdict." 9 The decision and imposition of the sentence is then left up to the judge. Jury sentencing in capital cases is aberrational. In capital cases, by contrast, jury sentencing is the norm, not the aberration. Of the thirty-seven states that have statutes authorizing the death penalty, 10 thirty-three states authorize the jury to determine or recommend the penalty to the judge. 11 Of these thirty-three states, twenty-nine states allow a death sentence only if the jury recommends death, provided that the defendant has not waived the jury at

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8 Id. at 187 (citation omitted).
11 Of the 37 states that have statutes authorizing the death penalty, only in four states—Arizona, Idaho, Montana, and Nebraska—does the court alone, without any input from the jury, impose the sentence. See Spaziano v. Florida, 468 U.S. 447, 463 n.9 (1984).
either the trial or sentencing stage.\textsuperscript{12} Finally, aside from the severity, irrevocability, and the uncustomary role of the jury as sentencer, the death penalty is unique in terms of the justifications for punishment. Of the four justifications for punishment—rehabilitation, incapacitation, deterrence, and retribution—retribution clearly plays the dominant role as justification for capital punishment.\textsuperscript{13} The decision to impose death is an expression of community outrage.\textsuperscript{14} Thus, because the jury represents a fair cross section of the community, the jury is in the best position to determine whether the crime committed is so heinous that the community's response must be the penalty of death.\textsuperscript{15}

Despite the added importance of the jury in capital cases, the right to trial by jury, like other constitutional rights, may be waived provided the waiver is made voluntarily, knowingly, and intelligently and with sufficient awareness of the relevant circumstances.\textsuperscript{16}

This Note analyzes both the federal and various state standards as to what constitutes a voluntary, knowing, and intelligent waiver of trial by jury in capital cases. Through this analysis it will become apparent that the various standards among the different jurisdictions of a voluntary, knowing, and intelligent waiver are marked with disparity. This Note also argues that the jury waiver statutes in many jurisdictions fail to provide enough information for the capital defendant to make a voluntary, knowing, and intelligent waiver of the right to trial by jury while cognizant of the relevant circumstances and likely consequences. This deficiency can be traced to the fact that most jury waiver statutes were formulated in the non-capital arena and fail to take into consideration the unique aspects of a death penalty proceeding. This Note then concludes with a proposal that ideally, or perhaps even quixotically, provides the capital defendant with enough information to make a voluntary, knowing, and intelligent waiver of the constitutional right to trial by jury.

\textbf{II. WHAT THE CRIMINAL DEFENDANT RELINQUISHES WHEN THE RIGHT TO TRIAL BY JURY IS WAIVED}

In non-capital cases, several motivations may underlie a criminal defendant's decision to waive his right to a jury trial: pretrial publicity; the

\textsuperscript{12} Of the 37 states authorizing the death penalty, only in Alabama, Florida and Indiana can the judge override a jury's recommendation of a life sentence. \textit{Id.} In Nevada, if the jury cannot unanimously agree on the sentence, a panel of three judges may impose the sentence. \textit{Id.}


\textsuperscript{15} \textit{Id.}

particularly heinous nature of the crime; the defendant's fear that the jury may be prejudiced because of the defendant's race, religion, or prior criminal record; or the defendant's simple wish to shorten the time of the trial. In capital cases, these motivations may be equally applicable. Yet, when a capital defendant waives his right to trial by jury, much more is relinquished than the facially apparent substitution of having a judge rather than a jury pass upon the accused's guilt or innocence.

As adumbrated in the introduction, the death penalty is qualitatively different from any other form of punishment in its severity and irrevocability, in the predominant role of the jury as the sentencer, and in the predominant justification for its imposition—retribution. It is the last of these qualitative differences which is discussed first.

A. The Jury as a Link to the Community's Evolving Standards of Decency

In general, there are four justifications for the imposition of punishment: (1) to rehabilitate the offender; (2) to incapacitate [the offender] from committing offenses in the future; (3) to deter others from committing offenses; or (4) to assuage the victim's or the community's desire for revenge or retribution. Rehabilitation is obviously not applicable to the death sentence. Incapacitation "would be served by execution, but in view of the availability of imprisonment as an alternative means of preventing the defendant from violating the law in the future, the death sentence would clearly be an excessive response to this concern." Deterrence, a consideration that factors into the death penalty decision, has not provided the court with the sole calculus upon which the decision to condemn a man to death has been made in any given case. Moreover, as one commentator notes, "the intuitive notion that the greater the punishment, the greater its inevitable deterrent value is belied by four decades of social science research demonstrating that capital punishment deters no more effectively than does life imprisonment. Consequently,

18 See, e.g., Singer v. United States, 380 U.S. 24 (1965) (In Singer, the defendant sought to shorten his trial by waiving his right to trial by jury.)
20 See supra notes 11 and 12.
21 See supra notes 13-15.
23 Id. at 478.
24 Id.
25 Id. at 480.
26 Mello and Robson, supra note 13, at 45.
this leaves retribution as the dominant, or arguably, the sole justification behind the penalty of death.\textsuperscript{37}

In \textit{Gregg v. Georgia},\textsuperscript{28} the United States Supreme Court addressed the retributionist nature of the death penalty by stating that "capital punishment is an expression of society's moral outrage at particularly offensive conduct" and that "the decision that capital punishment may be the appropriate sanction on extreme cases is an expression of the community's belief that certain crimes are so grievous . . . that the only . . . response may be the penalty of death."\textsuperscript{29}

\textbf{B. The Composite Nature and Role of the Jury and Judge}

Historically, juries have had a unique place in the theory and practice of the American system of criminal jurisprudence. In \textit{Duncan v. Louisiana},\textsuperscript{30} the United States Supreme Court stated that "[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the Government" and that this right provides the accused with "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."\textsuperscript{31} The Court further stated that the right to be tried by a jury of one's peers "reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust the plenary powers over the life and liberty of the citizens to one judge or to a group of judges."\textsuperscript{32}

Indeed, the safeguards inherent in the jury process are especially crucial when the decision of innocence or guilt leads to a decision of life or death. Because the jury represents the community, the sanction of death is essentially an expression of community outrage: "The life-or-death decision in capital cases depends upon its link to community values for its moral and constitutional legitimacy."\textsuperscript{33} Juries have traditionally provided this invaluable link between capital punishment and the community's standards of decency.\textsuperscript{34} Juries by nature are better able to assess the community's values and moral sensibility than are judges. By definition, juries represent a fair cross-section of the community.\textsuperscript{35} Juries are chosen in accordance with rules that are designed to ensure that a fair cross-section of the community is adequately represented and reflected.\textsuperscript{36}

\textsuperscript{27} The United States Supreme Court has conceded the fact that retribution plays the dominant role in the imposition of the death penalty: "While retribution clearly plays a more prominent role in the capital case, retribution is an element of all punishment society imposes . . ." Spaziano v. Florida, 468 U.S. 447, 462 (1984).

\textsuperscript{28} 428 U.S. 153 (1976).

\textsuperscript{29} Id. at 183-84 (footnote omitted).

\textsuperscript{30} 391 U.S. 145 (1968).

\textsuperscript{31} Id. at 155-56.

\textsuperscript{32} Id. at 156.


\textsuperscript{34} Mello and Robson, \textit{supra} note 13, at 49.

\textsuperscript{35} Id.

\textsuperscript{36} Gillers, \textit{supra} note 9, at 63.
Common sense also dictates that twelve people are more likely than one to accurately express community values and public sentiment.\(^{37}\)

In capital cases, the notion that a jury represents a fair cross-section of the community is subject to a slight qualification. Through the *voire dire* process, the prosecution is permitted to challenge for cause any prospective juror who under no circumstances could vote for the imposition of the death penalty. The United States Supreme Court, in *Witherspoon v. Illinois*,\(^ {38}\) held that a prospective juror could be challenged for cause if he or she was "irrevocably committed" to vote against the death penalty "regardless of the facts and circumstances that might emerge in the course of the proceedings."\(^ {39}\) The Court also held that "a prospective juror who simply 'voiced general objections to' or had 'scruples' against the death penalty but who was 'willing to consider all of the penalties provided by state law,' could not be challenged for cause."\(^ {40}\) When those prospective jurors who under no circumstances are able to impose the death penalty are removed for cause, the resulting jury has been called a "death-qualified" jury.\(^ {41}\)

In a similar vein, the United States Supreme Court in *Lockhart v. McCree*,\(^ {42}\) held that a "death-qualified" jury does not unconstitutionally prejudice the verdict as to the defendant's guilt, nor does it violate the defendant's rights under the Sixth and Fourteenth Amendments to an impartial jury selected from a fair cross-section of the community.\(^ {43}\) In so holding, the Court stated:

> It is important to remember that not all who oppose the death penalty are subject to removal from cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.\(^ {44}\)

Therefore, the Court concluded that

the Constitution presupposes that a jury selected from a fair cross-section of the community is impartial, regardless of the mix of individual viewpoints actually represented in the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.\(^ {45}\)

\(^{37}\) *Id.*

\(^{38}\) 391 U.S. 510 (1968).

\(^{39}\) *Id.* at 522 n.21.

\(^{40}\) Gillers, *supra* note 9, at 7 (quoting *Witherspoon v. Illinois*, 391 U.S. at 522 & n.21).

\(^ {41}\) Note, *supra* note 6, at n. 2. Prospective jurors whose reservations about capital punishment would prevent or substantially impair them from making an impartial decision as to the defendant's guilt, or have made it unmistakably clear that they would never vote for the imposition of capital punishment, are known as "*Witherspoon*-excludables." *Id.* at 1086.

\(^ {42}\) 476 U.S. 162 (1986).

\(^ {43}\) *Id.*

\(^ {44}\) *Id.* at 176.

\(^ {45}\) *Id.* at 184.
Nevertheless, even with the "death-qualification" factor, the role of the jury in providing a link between contemporary capital punishment and the community's evolving standards of decency endures. And, in that regard, the importance of the jury cannot be underestimated. As the Court has repeatedly stated, "One of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system." Stated somewhat differently, the response of the jury is the response of the community.

Judges, by contrast, do not speak for the community. Unlike the jury that is composed of twelve persons, the judge is a solitary person. Thus, common sense again tells us that one person cannot represent the community as well as twelve people.

Aside from common sense, judges have generally differed from the community they represent in terms of race, sex, economic and social background. This is due in part to the statutory requirements, such as age and education, that must be satisfied before a person is eligible to become a judge.

Furthermore, the role of the judge is markedly different from that of the jury. The role of the judge is not to speak for the community, but to apply the law to the facts. It is out of the judge's province and duty to speak for the community. In order for a judge to determine what the community would say, the judge "must either assess the community's 'belief' or 'conscience' and impose his own or assume it is the community's." More simply, a judge is a legal scholar, not an ethicist who effectively evaluates a person's "moral guilt" or where the crime committed may measure on society's "moral outrage scale."

Despite the jury's ability to better reflect the community's conscience, it has been argued that judicial sentencing will lead to overall greater sentencing consistency because judges are more experienced in sentencing than a jury. While this argument may have some intuitive appeal, its underlying reasoning has been debunked. Normally, in non-capital sentencing cases, judges are more experienced than juries and therefore better able to impose sentences similar to those in analogous cases. See Proffitt v. Florida, 428 U.S. 242 (1976). The Court in Proffitt stated that "judicial sentencing should lead, if anything, to even greater consistency . . . since a trial judge is more experienced on sentencing than a jury, and therefore better able to impose sentences similar to those in analogous cases." Id. at 252.

See Gillers, supra note 9, at 59 (examining sentencing in capital cases); Mello and Robson, supra note 13, at 50.
cases, a judge looks to several factors before imposing the sentence. These factors include: the rate of recidivism for the offense; the frequency with which the crime is tried; the availability of rehabilitation resources; and the general sentencing experience culled from his own sentencing experience and from other judges' sentencing practices for similar offenders. These factors, however, are not applicable in capital cases. Even if these factors were applicable in capital cases, the actual number of capital cases over which a single judge presides and utilizes these factors in imposing a sentence is minute.

C. The Traditional Role of the Jury as the Sentencer in Capital Cases

Tradition also lends support to the proposition that juries are better equipped than judges to impose the sentence in capital cases. As touched upon in the introduction, the majority of states that allow capital punishment entrust the sentencing decisions to juries and not judges. Of the thirty-seven states with capital punishment statutes, thirty-three authorize the jury to determine or recommend the death penalty to the judge. And, of these thirty-three states, twenty-nine allow a death sentence only if the jury recommends death. In sum, the proposition that juries are better equipped to make the sentencing decision in capital cases is amply supported by history, tradition, and intuition. Further, concomitant to the death penalty as being "qualitatively" different from other forms of punishment, history, tradition, and intuition similarly support the premise that juries are "qualitatively" different from judges in the role of sentencer in the capital context.

D. Increasing the Risk of Execution by Waiving the Jury.

The decision to waive a jury trial in a capital case theoretically translates into a decision by the defendant not only to forego the "better"
sentencing entity but also to sever the invaluable link the jury maintains in the interposition between the penal system and the community conscience. Moreover, a decision to waive a jury trial increases the defendant's risk of execution.

In his article Deciding Who Dies, Professor Stephen Gillers delineates six factors that affect a capital defendant's risk of execution. A capital defendant's risk of execution is increased by:

(a) excluding information which might have influenced the sentencer favorably toward the defendant;
(b) telling the sentencer how to weigh the information it credits;
(c) having a judge determine penalty, because judicial sentencing has been shown to lead to a greater number of death sentences than does jury sentencing;
(d) controlling who may sit on the sentencing jury;
(e) if the sentencer is a jury, by manipulating the number of jurors needed to agree to a particular sentence. This can vary from requiring death unless the jury is unanimous for a lessor sentence to requiring a unanimous jury for a sentence of death. . . .
(f) defining the burdens of production and persuasion of facts that must be found before death may be imposed or must be excluded.60

Three of these factors, (c), (d), and (e), are factors of consequence when a capital defendant waives a trial by jury. First, by waiving a jury, the capital defendant has chosen to have a judge, as opposed to a jury, determine the penalty. Generally, judges are more inclined to impose the death penalty than are juries. To illustrate, out of one hundred twenty cases in which a jury's decision on the penalty has been overridden, Florida judges have imposed the death penalty in one hundred five of these cases despite the jury's recommendation of life imprisonment. 61 Similarly, about twenty-two percent of the inmates currently on Alabama's death row are there because the judge overrode the jury's recommendation of life without parole and imposed the death sentence.62

60 Gillers, supra note 9, at 20-21.
61 Marilyn Milloy, The Death Penalty: Yea or Nay; Florida's Law There to Stay, NEWSDAY, June 20, 1989, at 5. Florida is a good state to demonstrate the proclivity of judges that impose the death penalty with greater frequency than the jury because it is one of three states that allows the judge to override a jury's recommendation of life imprisonment. See also Spaziano, 468 U.S. at 463 n.9.
62 Marcia Coyle, Counsel's Guiding Hand is Often Handicapped By the System it Serves Alabama: An Adverse Legislature, Economy, NATIONAL LAW JOURNAL, June 11, 1990, at 35, col. 3. Like Florida, Alabama is one of three states in which the jury's verdict in the penalty phase is advisory and the judge is permitted to override the jury's recommendation of life imprisonment and impose the death penalty. See also, Spaziano, 468 U.S. at 463 n.9.
Another study has confirmed the same result. Out of one hundred eleven cases in which the crime committed was punishable by death, judges imposed the death penalty more frequently than juries. In eighty-three cases (74%), the judge would have imposed a prison sentence as compared to ninety cases (81%) in which the jury would have imposed a prison sentence. In twenty-eight cases (26%), the judge would have imposed the death penalty as opposed to twenty-one cases (19%) in which the jury would have imposed the death sentence.

Once again, this phenomenon can be traced to the qualitative differences between judges and juries canvassed above. It further lends support to the proposition that juries rather than judges more accurately depict community feelings in ascertaining whether or not the appropriate sanction for the crime committed is death.

Second, when a criminal defendant is tried by a jury, he is entitled to participate in the selection of jurors through the voir dire procedure. By waiving a trial by jury, the capital defendant has relinquished any latitude, resulting from the voir dire procedure, that he or she possesses in controlling who may sit on the sentencing jury. Instead, the capital defendant has opted for a judge, a solitary person over which he or she has no latitude in choosing.

Finally, the decision to waive the right to trial by jury effectively reduces the number needed for unanimity from twelve to three or one, depending upon the state statute. This consequence can be labeled as the “quantitative” difference between the judge and the jury as the sentencing entity. It simply is the difference between twelve people as opposed to three persons or a solitary person deciding on the appropriate penalty.

Currently, unanimity among jury members is required either explicitly or implicitly before the death penalty may be imposed. No state will allow the imposition of death by a non-unanimous jury. Thus, a sole dissenter out of a twelve member jury will bar the imposition of the death penalty. Concomitantly, intuition again dictates that as the number of persons composing a jury increases, the chances that one person will dissent, thus precluding the imposition of the death penalty, statistically increase as well.

Consequently, when a jury is waived in favor of a judge or judges, the probability that one judge will dissent is greatly reduced. Moreover, waiving a jury in the capital case is more than a simple numerical reduction of the number needed for unanimity. As discussed above, judges are qualitatively different from their counterpart jurors; judges are more prone to impose the death penalty than jurors. As a result, the criminal de-
The defendant has increased the risk of execution not only by reducing the number needed for unanimity but also by selecting the sentencing entity from a group that is more inclined to impose the death penalty.

III. THE FEDERAL STANDARD OF A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF TRIAL BY JURY

This section first discusses the federal standard of a voluntary, knowing and intelligent waiver of trial by jury for two primary reasons. First, the standard was formulated in the context of the non-capital case in which the penalty and the role of the jury are substantially less than the counterpart capital case. Second, because the penalty and the role of the jury is substantially less, the federal standard provides an analytically useful basis for comparison against the various states’ requirements as to what constitutes a voluntary, knowing, and intelligent waiver of trial by jury in the capital case, highlighting the inadequacies of such standards.

In Johnson v. Zerbst, the United States Supreme Court defined a waiver of a fundamental constitutional right as being “an intentional relinquishment or abandonment of a known right or privilege.” The Court went on to say that it is the trial judge’s “serious and weighty responsibility . . . of determining whether there is an intelligent and competent waiver by the accused.” In each case, that determination must depend “upon the particular facts and circumstances surrounding that case, including background, experience, and conduct of the accused.”

In Patton v. United States, the United States Supreme Court specifically addressed the issue of waiver of the constitutional right to trial by jury in criminal cases. The Court, emphasizing the important role of the jury trial in our system of criminal jurisprudence, stated:

Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote,

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304 U.S. 458, 464 (1938).
Id. at 465.
Id. at 464.
281 U.S. 276 (1930).
but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.\textsuperscript{74}

As both \textit{Johnson} and the oft-quoted language from \textit{Patton} illustrate, the trial court judge plays a crucial role in determining whether a proposed waiver is in fact being offered voluntarily, knowingly, and intelligently; it is a determination that depends upon the unique circumstances of each case.\textsuperscript{75}

Currently, waiver of trial by jury is governed by Federal Rule of Criminal Procedure 23(a),\textsuperscript{76} a codification of both the holding and dicta embodied in \textit{Patton v. United States}.\textsuperscript{77} Thus, in order for a defendant to waive his or her right to trial by jury, four requirements must be satisfied: (1) the waiver must be in writing; (2) the government must consent to the waiver; (3) the trial court must accept the waiver; and (4) the waiver must be made voluntarily, knowingly, and intelligently.\textsuperscript{78} As noted above, the trial court judge bears the responsibility of insuring that the defendant's decision to waive the right to trial by jury is voluntary, knowing, and intelligent. Consequently, the trial court judge must first assess the defendant's mental ability to make an intelligent decision along with the defendant's awareness of the burdens and benefits of electing to forego a jury trial.\textsuperscript{79} The defendant must demonstrate some knowledge of the jury trial right prior to the trial court's approval of the waiver.\textsuperscript{80} A defendant ignorant of the nature of the jury trial right cannot intelligently weigh the value of that right as well as its commensurate safeguards.\textsuperscript{81} Moreover, in light of \textit{Patton}'s pronouncement that trial by jury is the constitutionally preferred means of disposition of the criminal case, the trial court bears substantial responsibility for jealously preserving the jury trial.\textsuperscript{82}

Heeding \textit{Patton}'s call that the validity of waiver is "not to be discharged as a mere matter of rote, but [rather] with sound and advised discretion,"\textsuperscript{83}
the various federal circuit courts have suggested that the trial courts should conduct colloquies with the defendant on the record to insure that the defendant understands the right to trial by jury and the consequences of the decision to waive that right.\textsuperscript{84}

It is the better practice for a district judge when advised by a defendant that he desires to waive his right to a jury trial, to interrogate the defendant so as to satisfy himself that the defendant is fully apprised of his rights and freely and voluntarily desires to relinquish them. Such an interrogation would provide the district judge with an additional factual basis on which to grant or withhold his approval of the waiver.\textsuperscript{85}

Similarly, the Sixth Circuit in \textit{United States v. Martin} stated that "[w]e implore the district courts to personally inform each defendant of the benefits and burdens of jury trials on the record prior to accepting a proffered waiver."\textsuperscript{86}

Substantively, the courts have repeatedly stated that during this colloquy, the defendant, at a minimum, should be informed that a jury is composed of twelve members of the community; that the defendant may participate in the selection of the jurors; that the verdict of the jury must be unanimous; and that a judge alone will decide guilt or innocence should the defendant waive the right to trial by jury.\textsuperscript{87}

\textsuperscript{84} See, e.g., United States v. Cochran, 770 F.2d 850, 852 (9th Cir. 1989) ("Trial courts should conduct colloquies with the defendant before accepting a waiver of the right to jury trial.") (emphasis in original); United States v. Anderson, 704 F.2d 117, 119 (3rd Cir. 1983) ("We believe that a colloquy between the district judge and the defendant is preferable to the mere acceptance by the court of the written waiver and the filing of it in the record of the case."); United States v. Scott, 583 F.2d 362 (7th Cir. 1978) ("The preferable procedure is to interrogate the defendant on the subject of waiver . . ."); United States v. David, 511 F.2d 355, 361 (D.C. Cir. 1975) ("Trial judges would be well-advised to directly question the defendant in all cases to determine the validity of any proffered waiver of jury trial.").

\textsuperscript{85} United States v. Cochran, 770 F.2d 850, 852 (9th Cir. 1985) (quoting United States v. Hunt, 413 F.2d 983, 984 (4th Cir. 1969)).

\textsuperscript{86} United States v. Martin, 704 F.2d 267, 274 (6th Cir. 1983).

\textsuperscript{87} See, e.g., United States v. Martin, 704 F.2d 267, 274 (6th Cir. 1983); United States v. Cochran, 770 F.2d 850, 853 (9th Cir. 1985); United States v. Delgado, 635 F.2d 889, 890 (7th Cir. 1981).

In \textit{United States v. Anderson}, the court made reference to the \textit{Bench Book for United States District Court Judges} as containing a suggested colloquy and urged the district courts to follow those procedures outlined in the book whenever practicable. 704 F.2d 117, 119 (3rd Cir. 1983). The following is an excerpt taken from that book:

\textit{Preliminary Questions for Defendant}

1. The court is informed that you desire to waive your right to a jury trial. Is that correct?
2. Before accepting your waiver to a jury trial, there are a number of questions I will ask you to assure that it is a valid waiver. If you do not understand any of the questions or at any time wish to interrupt the proceeding to consult further with your attorney, please say so, since it is essential to a valid waiver that you understand each question before you answer. Do you understand?
The Seventh Circuit has gone one step beyond the exhortation of the other circuit courts and has made an interrogation of the defendant mandatory before a district court judge accepts a waiver of a jury trial. Therefore, subsequent to the implementation of this rule, the failure to interrogate the defendant has led to *ipso facto* reversal on appeal.

3. What is your full true name?
4. How old are you?
5. How far did you go in school?
6. What is your employment background?
7. Have you taken any drugs, medicine, or pills, or drunk any alcoholic beverage in the past 24 hours?
8. Do you understand that you are entitled to a trial by jury on the charges filed against you?
9. Do you understand that a jury trial means that you are tried by a jury consisting of 12 people and that all the jurors must agree on the verdict?
10. Do you understand that you have a right to participate in the selection of the jury?
11. Do you understand that if I approve your waiver of a jury trial, the court will try the case and determine your innocence or guilt?
12. Have you discussed with your attorney your right to a jury trial?
13. Have you discussed with your attorney the advantages and disadvantages of a jury trial? Do you want to discuss it further with your attorney?

**Questions of Counsel**

In determining whether the accused has made a 'knowing and voluntary' waiver and is competent to waive, inquiry should be made of both defense counsel and the prosecutor.

**Defense Counsel**

1. Have you discussed with the defendant the advantages and disadvantages of a jury trial?
2. Do you have any doubt that the defendant is making a 'knowing and voluntary' waiver of the right to a jury trial?
3. Has anything come to your attention which suggests a question as to the defendant's competence to waive a jury trial?

**Prosecutor**

Has anything come to your attention which suggests a question as to the defendant's competence to waive a jury trial?

**Form of Waiver and Oral Finding**

A written waiver of a jury trial must be signed by the defendant, approved by the attorney for the defendant, consented to by the government, and approved by the court. It is suggested that the court orally find as follows: That defendant has knowledge and voluntarily waived his right to a jury trial and I approve the waiver.

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88 United States v. Scott, 583 F.2d 362, 364 (7th Cir. 1978).
89 See, e.g., United States v. Delgado, 635 F.2d 889 (7th Cir. 1981). In this case, the following colloquy occurred between the court and the defendant, leading to a reversal because the inquiry made by the trial court was insufficient.

THE COURT: This is your signature on here, Mr. Delgado?
THE DEFENDANT: Yes.
THE COURT: Mr. Haas read it to you?
THE DEFENDANT: Yes.
THE COURT: You voluntarily give up your right to a trial by jury, is that correct?
THE DEFENDANT: Yes.
THE COURT: Is that also on advice of your attorney?
THE DEFENDANT: Yes.

*Id.* at 890.
Such an interrogation, whether performed subject to an imploration or a mandatory requirement, serves three efficacious purposes. First, by engaging in a colloquy with the defendant, the trial judge is in a better position to ascertain whether the defendant knows what the right to trial by jury guarantees and the consequences of waiver, thus ensuring that the waiver is voluntary, knowing, and intelligent. Second, it promotes judicial economy by avoiding challenges to the validity of waivers on appeal or through habeas corpus proceedings, enhancing the finality of convictions. Third, because of the importance of the right to jury trial, it emphasizes the seriousness of the decision to the defendant. Furthermore, retrospective challenges made by the defendant questioning the validity of a waiver have proven futile.

In short, engaging in a colloquy with the defendant is in reality a simple procedure. The benefits derived from such a procedure substantially outweigh any burdens associated with it. As the court in United States v. Cochran incisively stated, "There is, thus every reason for district court judges to conduct a colloquy before accepting a waiver of the right to trial by jury and no apparent reason for not doing so."

IV. THE STATES' STANDARDS OF A VOLUNTARY, KNOWING, AND INTELLIGENT WAIVER OF TRIAL BY JURY

With the federal procedures, formulated in the non-capital context outlined above, this section discusses the disparity among the states as to what constitutes a voluntary, knowing and intelligent waiver of a jury trial in the capital context. Unlike the non-capital case, the decision to waive a jury trial in a capital case entails substantially much more than a superficial substitution of judge for jury as the arbiter of guilt or innocence. As discussed in section two, the death penalty is unique in many respects—its severity and irrevocability, the role the jury plays as sentencer in the majority of the states and in the interposition between the penal system and the community's evolving standards of decency. Thus, given these unique aspects of the death penalty, this section argues that the capital defendant is not sufficiently informed by the trial court of these aspects to make a voluntary, knowing, and intelligent waiver of the right to trial by jury.

Another important point that must be borne in mind with respect to a capital jury trial waiver is the Court's statement in Patton v. United States that the trial court's determination of a defendant's intelligent

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281 U.S. 276 (1930).
consent to waiver should not be "discharged as a matter of rote, but with sound and advised discretion . . . and with a caution increasing in degree as the offenses dealt with increase in gravity." Accordingly, because the death penalty is the appropriate sanction to only the most serious offenses, a logical application of Patton's reasoning would indicate that the colloquy between the trial court and defendant should contain substantially more than the colloquy performed during a non-capital waiver. Yet, in actuality, the courts vary widely as to the sufficiency of a voluntary, knowing, and intelligent waiver.

As the previous section illustrated, the federal courts, either pursuant to exhortation or mandatory requirement, engage in a colloquy with the defendant. Through the colloquy, the defendant is informed that a jury is composed of twelve members of the community; that the defendant may participate in the selection of the jurors; that the verdict must be unanimous; and that the judge alone will decide guilt or innocence should the defendant waive the right to trial by jury. By stark comparison, some states do not require a colloquy between the trial court and the defendant. In those states that have a colloquy-type requirement, the capital defendant is not sufficiently informed of the nature and function of a jury to make a voluntary, knowing, and intelligent waiver.

In Kennedy v. State, the defendant contested the validity of his jury trial waiver. The defendant asserted that his waiver was not entered voluntarily, knowingly, and intelligently because he was uninformed as to the differences between a trial by the court and a trial by jury. In the former, for example, the court does not judge the credibility of the witnesses or weigh conflicting evidence.

The defendant grounded his assertion on the holdings of Johnson v. Zerbst and Brady v. United States. In Johnson v. Zerbst, the United States Supreme Court held that the trial court has a duty to determine whether there is an intelligent and competent waiver of the accused's right to counsel. In Brady v. United States, the Court similarly held that the record must affirmatively demonstrate that the accused voluntarily, knowingly, and intelligently entered the plea of guilty. The de-

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97 Id. at 312-13 (emphasis added).
98 See supra note 70 and accompanying text.
99 393 N.E.2d 139 (Ind. 1979).
100 The following constituted the entire colloquy between the trial court and the defendant:
   THE COURT: Is that correct with you, Mr. Kennedy, you wish to waive trial by jury and have the trial just by myself, is that correct?
   THE DEFENDANT: Yes.
   Id. at 142.
101 Id.
102 304 U.S. 458 (1938).
fendant argued that these holdings were applicable to the waiver of the right to trial by jury.\footnote{106} The Indiana Supreme Court rejected the defendant's assertion by distinguishing these cases in view of the fact that the former involved the accused's right to counsel and the latter involved the accused's plea of guilty.\footnote{107} The court thus held that there is "no parallel statutory or constitutional requirement that the trial judge explain the differences between a trial by the court and by jury or is there any requirement that defendant understand the difference."\footnote{108} In actuality, the court, by distinguishing the right to trial by jury from the right to counsel or the rights waived when a plea of guilty is entered, belied the very essence of the right to trial by jury—namely, that it is a constitutional right. And, as a constitutional right, a waiver "not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences."\footnote{109} Therefore, the interrogation of a defendant during a plea of guilty or waiver of the right to counsel is equally applicable to a waiver of trial by jury.

The court also cited the Seventh Circuit's holding in \textit{United States v. Scott}\footnote{110} for further support that an interrogation of the defendant before accepting a jury trial waiver is not required by the Sixth Amendment. Ironically, it was the \textit{Scott} decision from which burgeoned the Seventh Circuit's formal adoption of a mandatory requirement that federal courts interrogate the accused to ensure that he or she understands the right to a jury trial and the consequences of a waiver.\footnote{111}

Recently, the Ohio Supreme Court in \textit{State v. Jells}\footnote{112} addressed a capital defendant's similar contention that his waiver of trial by jury was not made voluntarily, knowingly, and intelligently. The defendant argued that the trial judge should have conducted a more thorough inquiry before accepting the waiver.\footnote{113} In rejecting this contention, the court stated that

\footnotesize

\begin{verbatim}
106 Kennedy v. State, 393 N.E.2d 139, 142 (Ind. 1979).
107 Id.
108 Id.
110 583 F.2d 362 (7th Cir. 1978).
111 See supra notes 79-81 and accompanying text.
113 Id. at 467. The defendant and trial judge engaged in the following colloquy:
THE COURT: Reginald, is that your signature?
THE DEFENDANT: Yes, it is, sir.
THE COURT: You did this of your own free will?
THE DEFENDANT: Yes, I did.
THE COURT: Nobody forced you to do this?
THE DEFENDANT: No, sir.
THE COURT: All right.
MR. HUBBARD [defense counsel]: I have witnessed his signature Your Honor.
THE COURT: This will be made part of the record.
Id. at 468. In \textit{United States v. Delgado}, a similar type colloquy between the judge and defendant was held to be insufficient, warranting reversal. 635 F.2d 889, 890 (7th Cir. 1981). See supra note 72 for this colloquy.
\end{verbatim}

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there is no requirement for the trial court to interrogate the defendant to ascertain whether he or she is fully apprised of the right to a jury trial, although the court conceded that this may be the better practice. The court found no error in this case because the waiver complied with both the requirements of the Ohio Criminal Rules and the Ohio Revised Code. Thus, the court concluded that the waiver was voluntarily, knowingly, and intelligently entered.

While the Ohio Supreme Court may have correctly concluded that the procedures followed in *Jells* were constitutionally sufficient, such a procedure nevertheless fails to adequately inform the defendant of the implications of a waiver needed for a voluntary, knowing, and intelligent waiver. For example, the waiver form signed by the defendant governs both non-capital and capital cases. Thus, at the outset, the waiver form fails to take into consideration the unique aspects of a death penalty case

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114 State v. Jells, 559 N.E.2d 464, 468 (Ohio 1990). Like Ohio, Florida does not require a personal, on-the-record colloquy with the defendant for a waiver to be effective. See, e.g., State v. Griffith, 561 So. 2d 528 (Fla. 1990). The court stated: Although we expressly hold that the trial court did not have an affirmative duty to make a record inquiry concerning Griffith’s waiver of a trial by a twelve-person jury, when a defense waiver is required as to any aspect or proceeding of a trial, it would be the better procedure for the trial court to make an inquiry of the defendant and to have the waiver appear on the record. The matter would thus be laid to rest and preclude any appeal or postconviction claims of ineffective assistance of counsel. Id. at 530-31 n.5.

By contrast, the court in Walker v. State, 578 P.2d 1388, (Ala. 1978), stated that “we believe that waiver of the right to trial by a jury of twelve persons requires that the court personally address the defendant, and that failure to do so is error per se.” Id. at 1389-90. Similarly, Pennsylvania Criminal Procedure Rule 1101 requires an on-the-record colloquy that indicates the accused “knew the essential ingredients of a jury trial which are necessary to understand the significance of the right he was waiving.” Commonwealth v. Candia, 428 A.2d 993, 995 (Pa. 1981).

115 Rule 23(A) of the Ohio Rules of Criminal Procedure provides in pertinent part: “In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury.” OHIO R. CRIM. P. 23(A).

116 Ohio Revised Code § 2945.05 provides: In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: “I ______, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury.” Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial. OHIO REV. CODE ANN. § 2945.05 (Baldwin 1990).


118 See OHIO REV. CODE ANN. § 2945.05 (Baldwin 1990).
that sets it apart from a non-capital case.\textsuperscript{119} In Ohio, a person who is accused of an offense punishable by death and elects to waive a jury trial will then be tried by a panel of three judges as opposed to one judge\textsuperscript{120} as the waiver form seems to indicate.\textsuperscript{121}

More importantly, the defendant is also not apprised of the basic nature and role of the jury. For example, in contrast to the federal procedure, an Ohio capital defendant is not informed that a jury is composed of twelve members of the community, and that in order to be convicted, the verdict of the jury must be unanimous. Not only does the Ohio procedure fail to comport with the suggested procedure followed by the federal courts in the non-capital context, but it also fails to adequately inform the defendant of the more significant role of the jury in a capital case and the implications stemming from a waiver.

In Ohio, the jury is entrusted with the task of weighing the aggravating circumstances and mitigating factors.\textsuperscript{122} If all twelve members unanimously find that the aggravating circumstances outweigh the mitigating factors, the jury must recommend the sentence of death.\textsuperscript{123} This recom-
mendation, however, is only advisory and not binding upon the court. The final decision as to whether the death penalty shall be imposed is bestowed upon the trial court judge. On the other hand, if the jury is unable to unanimously find that the aggravating circumstances outweigh the mitigating factors, the jury must recommend either of two possible life imprisonment sentences. This particular recommendation is binding upon the court, and, unlike Alabama, Florida, and Indiana, the trial court cannot override the jury's recommendation of a life sentence by imposing a death sentence.

124 Id. at (D)(3)
125 Ohio Revised Code Section 2929.03(D)(2) provides:

Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment. If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

See supra note 12. Tactically, in Ohio, why would an attorney advise his/her client to waive? A jury's recommendation that the defendant be sentenced to death is only advisory whereas a recommendation of life imprisonment is binding upon the court and thus must be followed. In section one of this Note, I demonstrated that judges are more apt to impose the death penalty than are juries. See supra notes 49-53 and accompanying text. Therefore, a decision to waive a jury increases a defendant's risk of execution. Moreover, even if the jury recommends the death sentence, a judge is not required to follow such a recommendation and may reduce the penalty to less than death. Yet, a jury's recommendation for life imprisonment, which is more likely to occur if the jury is the sentencer as opposed to judge, must be followed by the judge. The judge is not empowered to overrule a recommendation for life imprisonment and impose a death sentence.

A defendant who does not waive a jury trial is able to take advantage of the jury's tendency to impose life imprisonment as opposed to a death sentence. The defendant still retains the chance that the judge will not impose a death sentence should the jury's recommendation be the penalty of death. Conversely, a decision to forego a trial by jury is a decision to relinquish two chances, the judge and jury, for a sentence of life imprisonment.

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Knowledge of the factors that compose a state's capital sentencing scheme is an essential prerequisite to a voluntary, knowing, and intelligent waiver of trial by jury. These factors weigh heavily upon any rational defendant's decision to forego a jury trial. For example, all states that allow capital punishment either implicitly or explicitly require unanimity before a sentence of death can be imposed. Therefore, if one juror refuses to agree on the death penalty, its imposition is precluded. As a corollary, common sense indicates that it is much easier to persuade one out of twelve persons not to impose the death penalty as opposed to persuading one out of three persons or one person sitting in judgment not to do so. As a result, a defendant's chances of receiving the death penalty statistically diminish if he asserts his right to trial by jury. Moreover, given the structure of Ohio's capital sentencing scheme, the persuasion of one juror that the penalty shall not be death is a profound significance to the defendant. Therefore, knowledge of the unanimity requirement and the binding effect of a non-unanimous jury that the penalty will be life imprisonment instead of death is essential for the defendant to make a voluntary, knowing, and intelligent waiver.

In a dissenting opinion from denial of certiorari, Justice Marshall, with whom Justice Brennan joined, addressed the issue of juror unanimity and its effect upon a defendant's waiver decision in *Robertson v. California*. Calling the issue one of "profound constitutional significance," Justice Marshall questioned "whether the defendant's waiver of his right to [trial by] jury in a capital sentencing proceeding is [in fact] voluntary, knowing, and intelligent when no evidence indicates that [the defendant] was aware of a [California] statute requiring the court to impose a life sentence if the sentencing jury failed to reach a unanimous decision." The statute at issue in *Robertson* stated that "[i]f 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 impose a punishment of confinement in state prison for life without the possibility of parole."
At no time during the colloquy with the defendant did the trial judge read or paraphrase the jury deadlock provision. The defendant con-

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.

CAL. PENAL CODE § 190.4(b) (West 1985).

Before a waiver is accepted by the court in California, the court must personally address the defendant. Rule 18.1(b)(1) states in pertinent part that "before accepting a waiver the court shall address the defendant personally, advise him of his right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent." CAL. R. CRIM. P. 18.1(b)(1).

Robertson v. California, 493 U.S. 879 (1989) (Marshall, J., dissenting). The following excerpts were taken from the colloquy between the court and the defendant:

THE COURT: Mr. Robertson, under the law you do have a right to waive your right to jury. Of course, the District Attorney has a right to a jury trial, too. Before the Court can accept it, it will require a waiver from the District Attorney's office, also. Under the law the Court, although you have the right to do that, the Court is required to make inquiry of you to be sure that it is a knowing and intelligent waiver before the Court can consent to it. So, I am going to go through some questions which have been provided to me by the District Attorney as a condition of their consenting to waive the jury, also, and I want to discuss this with you very briefly.

You understand that your position of dire or severe jeopardy in the re-hearing of your trial's penalty phase will not be reduced by the fact you are choosing a court trial rather than a jury trial; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You also understand that you should be aware that you are in exactly the same jeopardy regardless of the method of trial which you personally will choose? Your position will not be altered in any degree. Neither the evidence nor the legally appropriate outcome dictated by the evidence will be altered, only the avenue of your alternate sentencing will be changed in any way; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You understand, also, that if you do waive jury and submit it to the Court, the Court will act solely. If you have a jury trial, before a verdict can be returned either way, it requires unanimous agreement of all 12 jurors; do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And understanding that you still wish to waive and give up your right to have a jury?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that my personal philosophy, if any, concerning [the] death penalty will not affect or interfere with my evaluation of the evidence or application of the law; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, you, by waiving your right to a jury trial, are doing so with the awareness that the Court will behave as a jury, a jury that has sworn that it will sentence you to death if appropriate under the law and the evidence; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And the other side of that, of course, is that the Court will sentence you to life in prison without the possibility of parole if the Court finds, after reviewing all the evidence, that that is appropriate under the law and the evidence; you understand that, also?
tended that the court's failure to do so was in error, warranting a reversal of the death sentence. 135

The California Supreme Court rejected this contention by presuming that the defendant's counsel had informed the defendant of the effect of a jury deadlock. 136 In response, Justice Marshall stated:

[A] presumption that defendant's counsel will always inform him of the relevant factors in a decision to waive constitutional rights amounts to a rule that all waivers made after the defendant has retained counsel necessarily will be considered voluntary, knowing, and intelligent. Such a rule offends common sense and impermissibly strips a defendant of constitutional protections long recognized by this court. 137

Justice Marshall further remarked that a presumption that a defendant is familiar with the respective state's capital sentencing law, and in particular, the effect of a jury deadlock is especially inappropriate in a capital

THE DEFENDANT: Yes, sir.
THE COURT: You understand that by waiving your right to a jury trial on the issue of your penalty and by a requesting a court trial you are not lessening, reducing or eliminating the possibility of your penalty being set at death if the evidence supports such a penalty; do you understand that?
THE DEFENDANT: Yes, sir.
THE COURT: You understand that by waiving your right to jury trial you are not receiving any promises from anyone, either express or implied, of leniency or special consideration; do you understand that?
THE DEFENDANT: Yes, sir.
THE COURT: Having been made aware of the Court's legal obligations and the Court's planned course of conduct required by the law, is it your desire to give up your right to a jury trial on the issue of your penalty and request a court trial?
THE DEFENDANT: Yes, sir.
THE COURT: In making your decision to waive your rights to a jury trial, has anyone made any direct or implied threats to you?
THE DEFENDANT: No, sir.
THE COURT: Or has anybody made any direct or implied promises to you?
THE DEFENDANT: No, sir.
THE COURT: In making your decision to waive your right to a jury trial, do you believe that you have received any kind of pressure from anyone?
THE DEFENDANT: No, sir.
THE COURT: Is your decision to waive your right to a jury trial freely and voluntarily made?
THE DEFENDANT: Yes, sir.
THE COURT: And do you have any questions concerning your waiver?
THE DEFENDANT: No, sir.
THE COURT: I take it counsel again join with the defendant in the waiver?
MR. WELCH: Counsel joins, yes, Your Honor.
(quoted from People v. Robertson, 767 P.2d at 1117 n.5, cert. denied, 493 U.S. 879 (1989)).

136 Id. at 1117, cert. denied, 110 S. Ct. at 217.
proceeding. As an illustration, a "hung jury" does not result in a mistrial, the traditional result in a non-capital proceeding, but rather the automatic imposition of a certain penalty. In the majority of states that have statutes imposing the death penalty, a jury's failure to unanimously agree on the death penalty results in the automatic imposition of a penalty less than death. Therefore, informing a defendant of the peculiar ramifications of a jury deadlock on a defendant's sentence "is plainly relevant, if not central, to a rational defendant's choice between being sentenced by a judge or a jury."

Despite the importance of the unanimity requirement and the effect that a non-unanimous jury has upon a defendant's sentence, courts have stated that a defendant need not be informed that a unanimous verdict is needed for the imposition of the death penalty. In People v. Ruiz, a capital defendant asserted that his waiver of the right to trial by jury at the sentencing phase of his trial was not voluntary, knowing, and intelligent because he was not informed of the non-unanimity rule—to wit, that the favorable vote of a single juror will preclude the imposition of the death penalty. The Supreme Court of Illinois rejected the de-

138 Id.
139 See generally, Gillers supra note 9, at 101-19 (Appendix I showing judge's power if jury does not agree unanimously on sentence).
141 See supra note 121.
142 547 N.E.2d 170 (Ill. 1989).
143 Id. at 178. The Illinois jury waiver statute provides: "Every person accused of an offense shall have the right to a trial by jury unless understandingly waived by the defendant in open court." Ill. Ann. Stat. ch 38, para. 103-6 (Smith-Hurd 1985). In Ruiz, the following colloquy was engaged in between the trial court and the defendant:

MR. GREEN [defense counsel]: We are going to waive the jury and submit the cause to the court, but I ask the matter be continued for a week.
THE COURT: I want to make sure your client understands what he's doing. Do you understand that the provisions of the act at this time, first two questions, are left, Number one, whether this case would fit under the death provisions of the Illinois Statute and number two, whether you should be entitled to the penalty of death in the State of Illinois.
This can be decided by this jury or you may waive your right to this jury and have the Court, and the Court alone decide whether it should be imposed or not, meaning that I alone will have that responsibility. Do you understand that?
THE DEFENDANT: Yes.
THE COURT: Do you wish to waive your right to a jury trial as far as this is concerned, and have the court and the Court alone decide whether the death penalty should be imposed or not?
THE DEFENDANT: Yes.
THE COURT: This you discussed with your attorney before?
THE DEFENDANT: Yes sir.

THE COURT: Do you understand that this is a Constitutional right that is guaranteed to you, do you understand that sir?
THE DEFENDANT: Yes, sir.
THE COURT: Let the record show that he has signed the waiver in open court.
People v. Ruiz, 547 N.E.2d 170, 178 (Ill. 1989).
fendant’s assertion that his waiver was not voluntary, knowing, and intelligent by stating that “[w]e have in the past declined to impose a requirement that a defendant be expressly advised of the non-unanimity rule—that the favorable vote of a single juror will preclude the imposition of the death penalty—as a condition of a valid jury waiver at a capital sentencing hearing.” The Ruiz Court further stated that there is not “a requirement that the trial judge advise a defendant that the jury’s decision to impose the death penalty must be unanimous.”

Illinois courts have also held that waiver of the right to a jury trial is valid where the accused permits his attorney in his presence and without objection to expressly advise the court of the client’s decision to waive the jury trial. The courts have presumed that when the attorney informs the court of the client’s waiver decision, the client has knowingly and understandably consented to the waiver and its implications. But, as Justice Marshall remarked in Robertson v. California, such a presumption “offends common sense.”

In comparison to the procedures followed by the courts cited above, some courts have adopted better approaches. For example, the court in Harris v. State held that the court must explain the effect of a jury deadlock provision in order for a waiver to be effective. The provision at issue in this case stated that “[i]f the jury, within a reasonable time, is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life.” The defendant contended that the trial court’s failure to inform him of this provision left him unaware of what he was relinquishing, and therefore could not make a voluntary, knowing, and intelligent waiver. Specifically, the defendant contended that “he gave up a sentencing proceeding where unanimity would be required for death, but only one holdout would result in the imposition of a life sentence.” The Maryland Court of Appeals agreed with this contention. The court stated that “[i]t is not difficult to see how this additional information [the effect of jury deadlock] may very well be

14 Id. at 179.
145 Id.
146 See, e.g., People v. Spain, 415 N.E.2d 456 (Ill. 1980); People v. Rynberk, 415 N.E.2d 1087 (Ill. 1980).
147 People v. Morgan, 492 N.E.2d 1303 (Ill. 1986).
149 455 A.2d 979 (Md. 1983).
150 Id. at 984. Maryland also requires a colloquy with the defendant before a waiver of a jury trial is accepted. Rule 4-246(b), derived from former Rule 735(b) provides:
[A] defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until it determines, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the Attorney for the defendant, or any combination thereof, that the waiver is made knowingly and voluntarily.

MD. R. CRIM. P. 4-246(b).
151 Harris v. State, 455 A.2d 979, 984 (Md. 1983).
152 Id. at 984.
significant to one convicted of first degree murder and facing a possible sentence of death. We believe this information should have been given to the [defendant]."\textsuperscript{153}

A similar result was achieved by the Supreme Court of South Carolina in \textit{State v. Arthur}.\textsuperscript{154} Once again, the defendant challenged the validity of his jury trial waiver on the grounds that it was not entered voluntarily, knowingly, or intelligently. During the entire colloquy with the defendant, the court only asked the defendant if he consented to have a judge try the case rather than a jury without explaining the differences between a trial by jury and a trial by the court.\textsuperscript{155} The court stated that none of the questions propounded to the defendant were of the nature to elicit a meaningful response. The court also failed to inform the defendant of "the essential ingredients of a jury trial which are necessary to understand the significance of the right he was waiving."\textsuperscript{156} The court, therefore, held that an acceptance of a jury trial waiver must be based upon a written record that clearly demonstrates that the waiver was made voluntarily, knowingly, and intelligently; such can only be accomplished through a searching interrogation of the accused by the trial court itself."\textsuperscript{157}

The court further warned against a court's acceptance of a waiver based upon a defendant's statement that his attorney advised him of the consequences of the waiver before the waiver was proffered, without first conducting its own direct interrogation of the defendant. To do so, "simply underscores the peril inherent in the acceptance of waivers by criminal defendants. [A] peril [that] is manifestly enhanced where the charge is death penalty murder. . . ."\textsuperscript{158}

\textsuperscript{153} \textit{Id.} at 984. Defendant Harris again contended that his waiver of jury trial was not made knowingly and voluntarily in \textit{Harris v. State}, 539 A.2d 637 (Md. 1988) (Harris II). The court rejected this contention because of its conclusion that the defendant was familiar with the jury sentencing procedures. This familiarity resulted from the court's explanation to Harris of the pertinent sentencing procedures in his earlier capital case, \textit{Harris v. State}, 455 A.2d 979 (Md. 1983).

\textsuperscript{154} 374 S.E.2d 291 (S.C. 1988).

\textsuperscript{155} The entire colloquy with the defendant was as follows:

\begin{verbatim}
MR. BLUME: Your Honor, I think the thing that we need to put on the record is that the Defense waived the Defendant's right to a jury and agreed to try this case before Your Honor alone, and that was done with the Defendant's full knowledge, and on our advice.

COURT: Was that the consensus of all four attorneys?

MR. BLUME: It was a—unanimous. All four attorneys were in agreement that that was the best way to proceed in this case, and the Defendant agreed.

COURT: Mr. Arthur, did you agree to that too?

MR. ARTHUR: Yes, sir.

COURT: To proceed before just the Judge and not before the jury?

MR. ARTHUR: Yes sir, Your Honor.

COURT: All right, you got any questions you want to ask me about the difference in the two before we get started?

MR. ARTHUR: No sir, Your Honor.

\end{verbatim}

\textit{Id.} at 293.

\textsuperscript{156} \textit{Id.} (quoting \textit{Commonwealth v. Williams}, 312 A.2d 597, 600 (Pa. 1973)).

\textsuperscript{157} \textit{Id.}

In conclusion, the court reiterated that "[b]efore accepting a proffered waiver in a criminal proceeding the trial court must conduct its own direct and independent interrogation of the defendant. This insures that the waiver is, in fact, knowing and voluntary in protection of the defendant's rights."159

V. PROPOSED PROCEDURE

As this Note has discussed, the right to trial by jury in a capital case is of manifest importance. Likewise, the implications and ramifications stemming from a jury waiver are, from the defendant's standpoint, of equal if not greater importance. Moreover, retrospective review of challenges made by defendant's contesting the validity of jury waivers have proven futile. Therefore, this Note implores the courts to adopt a formal, mandatory, on-the-record colloquy with the defendant analogous to Rule 11 of the Federal Rules of Criminal Procedure.160 Failure to perform this interrogation should result in ipso facto reversal.

Initially, the court must inform the defendant that a capital proceeding is divided into two phases: the guilt determination phase and the subsequent sentencing phase. Because the first phase is the guilt determination phase and is identical to the typical trial, the courts should follow the procedure adopted by the federal circuit courts. That is, the court must inform the defendant that a jury is composed of twelve members of the community and that the defendant may participate in the selection of the jurors. In order to be found guilty, the court must inform the defendant that the verdict must be unanimous and that a judge or panel of judges will decide the defendant's guilt or innocence should the defendant waive the right to trial by jury.161

159 Id.

160 See generally Fed. R. Crim. P. 11. In brief, Rule 11 requires the court to inquire whether a defendant who pleads guilty understands the nature of the charge against him and whether he is aware of the consequences of his pleas. The Court in McCarthy v. United States, 394 U.S. 459, 465 (1969), addressed the purposes behind Rule 11:

First, ... it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

Similarly, the Court's reasoning in McCarthy is equally applicable to proposed procedure set forth in this Note.

161 See supra note 70 and accompanying text.
Contingent upon finding the defendant guilty, the next phase is the sentencing phase. With respect to the sentencing phase, the court must first inform the defendant that the jury is given the task of weighing the aggravating circumstances and mitigating factors. The court must also inform the defendant that before the death penalty may be imposed, the verdict must be unanimous; all twelve members must agree and recommend that the death penalty should be imposed. Conversely, the court should inform the defendant that if one juror cannot agree on the penalty of death, the court is precluded from imposing the death penalty. Also, the defendant must be informed of the effect of a “jury deadlock.” What happens if the jury cannot unanimously agree on the death penalty? Does “jury deadlock” result in the automatic imposition of a penalty less than death or must the judge impanel a new jury? Finally, the court must inform the defendant as to what effect the jury’s recommendation is upon the court. Is the jury’s recommendation binding upon the court and thus must be followed by the court? And, if not, what power does the judge have if he or she is not in accord with the jury’s recommendation? Must the judge then impose a penalty less than death or is the judge permitted to override the jury’s recommendation and impose the death penalty over life imprisonment?

Imparting this information to the defendant will help to ensure that the defendant understands the basic mechanics of a jury trial in a capital proceeding and therefore can make an informed decision.

VI. Conclusion

The death penalty is unique unto itself in many respects. One notable aspect that sets the death penalty apart from other forms of punishment is the uncustomary role the jury plays as the sentencer. Consequently, the right to trial by jury in a death penalty proceeding is intrinsically different; twelve members of the community are chosen to speak for the community, assess the “moral guilt” of the defendant, and recommend the appropriate sanction by correlating the crime committed with the community’s moral sensibilities. The right to trial by jury, however, is not absolute. Like other constitutional rights, the right to trial by jury can be waived by the defendant, provided that the waiver is voluntary, knowing, and intelligent. However, the courts’ standards as to the sufficiency of a voluntary, knowing, and intelligent waiver vary widely. The focal point of this Note has been whether the capital defendant has the ability to make a voluntary, knowing, and intelligent waiver of the right to trial by jury. This Note has argued that a capital defendant’s knowledge of the right to trial by jury in general, and more specifically, the role the jury plays in a state’s capital sentencing scheme is insufficient to make a voluntary, knowing, and intelligent waiver.

In an effort to remedy this deficiency, this Note implores that the courts conduct a mandatory interrogation of the defendant, apprising him or her of the nature and function of the jury and the jury’s respective role
in the state’s capital sentencing scheme. The adaptation of such a procedure will help to more effectively ensure that the waiver is voluntary, knowing, and intelligent. It will also emphasize to the defendant the seriousness and significance of the waiver, and in the end, will save the courts’ time and effort by obviating challenges to the validity of waivers on appeal or through habeas corpus proceedings. Indeed, as Justice Marshall observed, “Requiring the court to impart this information accurately is hardly imposing an unreasonable burden where the issue is literally one of life and death.”

APPENDIX

Subsequent to the writing of this Note, the decision rendered by the Ohio Supreme Court in State v. Jells was appealed to the United States Supreme Court. On the eve of publication of this Note, certiorari was denied. In his dissenting opinion from denial of certiorari, Justice Marshall addressed the question of “whether petitioner’s waiver of his right to a jury trial was knowing and voluntary when there is no evidence that petitioner was aware that his waiver also applied to his right to be sentenced by a jury that could not impose death by less than a unanimous vote and without the trial judge’s independent agreement that death was the proper sentence.” Absent the imparting of this critical information, Justice Marshall stated that “petitioner could not be understood to have made a ‘knowing’ decision” in waiving his right to trial by jury.

In so doing, Justice Marshall first addressed the vital role that the jury plays in Ohio’s capital sentencing scheme. In that regard, Justice Marshall observed:

Under the Ohio Rule of Criminal Procedure, a felony defendant who does not waive the right to a jury trial is tried by a twelve-person jury. When the defendant is accused of a crime punishable by death, the same jury presides at both the guilt and penalty phase. Unless the jury unanimously finds beyond reasonable doubt that death is the proper sentence, the defendant must be sentenced to life imprisonment with parole eligibility after twenty or thirty years imprisonment. Significantly, even if the jury unanimously recommends the death penalty, the trial court must independently find beyond reasonable doubt that death is the correct sentence before the defendant may be sentenced to death.

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164 Id. (Marshall, J., dissenting)
165 Id.
166 Id. at 1020-21 (internal citations omitted).
Citing the proposition that defendants who employ waivers of certain constitutional rights such as a waiver through a guilty plea of the right to trial or a waiver of the right to counsel must be made cognizant of the "relevant circumstances and likely consequences," Justice Marshall opined that an open court colloquy is needed to "determine whether the defendant's waiver [of a jury trial] is made freely and intelligently." According to Justice Marshall, this reasoning applies with even greater force "when a capital defendant's waiver of his jury trial right included a waiver of his right to jury sentencing." In those instances "a searching inquiry by the trial judge into the voluntary and knowing nature of the waiver is not only sound practice but is constitutionally compelled.

Against that background, Justice Marshall then addressed the particularly far-reaching consequences under Ohio law of a capital defendant's jury trial waiver. Justice Marshall saliently observed:

As noted, had petitioner not waived his jury trial right in favor of the three judge panel, his life would have been spared unless all twelve jurors could have agreed that death was the proper sentence, and unless the trial judge then independently determined that the jury reached the correct result. The practical effect of petitioner in waiver, then, was to forfeit the right to have ten additional decision makers review his punishment — each of whom would have had the power to veto his death sentence and some of whom might well have been less likely to vote for the death sentence than the three judges on the panel.

In light of these consequences, Justice Marshall concluded that the trial court inquiry was constitutionally inadequate. Justice Marshall noted:

The court did not determine whether petitioner fully understood his entitlement to a jury trial — that is, whether he had signed the waiver "with sufficient awareness of the relevant circumstances and likely consequences" of his act. Nor did the waiver itself cure this defect, since it did no more than inform petitioner of his "constitutional right to be tried by jury." It did not explain to him that he was also waiving his right to be sentenced by a jury or that, in the absence of a waiver, he could be sentenced to death only upon the jury's unanimous vote and the independent approval of the trial judge.

PAUL MANCINO, III

168 Id.
169 Id.
170 Id.
172 Id. at 1022-23 (internal citations omitted).