

Section 3.01: Death penalty procedures

of a mitigating factor, whether the aggravating factor(s) alone are sufficient to justify a sentence of death;

- (ii) determine whether defendant should be sentenced to death, to life imprisonment without possibility of release, or some other sentence, a decision that must be unanimous.²¹

(2) *for § 848(e) offenses:*

determine—based on consideration of whether the aggravating factors sufficiently outweigh any mitigating factors, or in the absence of mitigating factors, whether the aggravating factors alone are sufficient to justify a sentence of death—whether the death penalty should be imposed. The jury may find in favor of the death penalty only by unanimous vote.

- (i) Regardless of its findings about aggravating and mitigating factors, the jury is never required to find in favor of a death sentence.²²
- (j) The jury shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or any victim in considering whether a sentence of death is justified, and must not impose a death sentence unless it would do so no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim. The jurors must sign a certificate to this effect when a death sentence is returned. 18 U.S.C. § 3593(f); 21 U.S.C. § 848(o)(1).

- 6. Consider retaining the alternates after the jury retires. Fed. R. Crim. P. 24(c)(3). (Note that, although Fed. R. Crim. P. 23(b) permits a court to accept a verdict from

21. Although § 3593(e) states that the jury may unanimously recommend “some other lesser sentence,” § 3594 implies that the court may still impose a sentence of life without release. *See also* Jones v. United States, 119 S. Ct. 2090, 2098–100 (1999) (indicating that “otherwise” clause of § 3594 leaves sentencing determination to court if jury cannot agree unanimously on a sentence).

22. This is explicitly stated in § 848(k) and is implicit in § 3593(e) from the jury’s authorization to choose a lesser sanction.