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# COMMENT

## MONTANA'S DEATH PENALTY AFTER STATE v. McKENZIE

Christian D. Tweeten

### I. INTRODUCTION

No issue in American jurisprudence has so captured the public's attention as the question of whether a state may constitutionally apply the death penalty for criminal offenses. The United States Supreme Court has faced the issue twice in the last four years,<sup>1</sup> and the Montana Supreme Court quite recently upheld Montana's death penalty statute<sup>2</sup> in the case of *State v. McKenzie*.<sup>3</sup> This note will review the substantive holdings of the recent death penalty cases and will suggest statutory amendments to bring Montana's capital punishment statutes within the spirit as well as the letter of the case law.

### II. FURMAN v. GEORGIA

This 1972 per curiam opinion, with five separate concurrences and four separate dissents, remains the landmark case on the application of the "cruel and unusual punishments" clause<sup>4</sup> to capital punishment statutes. In *Furman*, the Supreme Court reversed and vacated death sentences imposed on three defendants.<sup>5</sup> Although an in-depth analysis of *Furman* is beyond the scope of this note, a short discussion of the opinions of the concurring Justices will aid an understanding of Montana's legislative response to that decision.

The five concurring opinions each assert different theories for finding the statutes in question unconstitutional, but they may be roughly divided into three groups. The opinions of Justices Stewart and White approached the cases from the narrowest viewpoint, and the Court later adopted their opinions as the holding of the case.<sup>6</sup> Under their analysis, the fatal flaw in the capital sentencing procedures under consideration was that the discretion lodged in the sentencing authority permitted capricious imposition of the death

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1. *Furman v. Georgia*, 408 U.S. 238 (1972); and *Gregg v. Georgia*, 96 S.Ct. 2909 (1976); *Jurek v. Texas*, 96 S.Ct. 2950 (1976); *Proffitt v. Florida*, 96 S.Ct. 2960 (1976); *Woodson v. North Carolina*, 96 S.Ct. 2978 (1976); *Roberts v. Louisiana*, 96 S.Ct. 3001 (1976).

2. See note 49 *infra*.

3. *State v. McKenzie*, 33 St.Rptr. 1043 (1976).

4. U.S. CONST. amend. VIII.

5. Also reversed *sub nom. Furman* were *Branch v. State*, 447 S.W.2d 932 (Tex. 1969) and *Jackson v. State*, 225 Ga. 790, 171 S.E.2d 501 (1969).

6. *Gregg v. Georgia*, 96 S.Ct. 2909, 2923 n.15 (1976).

sentence. As a result, the death penalty was "exacted with great infrequency even for the most atrocious crimes and there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."<sup>7</sup> In the absence of consistent application of the sanction, these Justices held that the death penalty violates the eighth amendment.

Justice Douglas' view of the problem is somewhat more complex. Although he also focused on discretion as the crux of the question, he reserved the larger question of the facial validity of capital punishment. He found interwoven in the eighth amendment a concept of equal protection,<sup>8</sup> and argued that the constitutional failing of the death penalty lies in the fact that unbridled discretion in the sentencing authority

enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking in political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.<sup>9</sup>

Because the death penalty was arbitrarily and discriminatorily applied under the sentencing procedures then before the Court, in Justice Douglas' view the statutes violated the eighth amendment.

The broadest view of capital punishment was taken by Justices Brennan and Marshall. Although their approaches differed, they agreed that the death penalty may not constitutionally be imposed under any circumstances.

Justice Brennan felt that a penalty, in order to conform to the eighth amendment, must "comport with human dignity,"<sup>10</sup> and devised four principles<sup>11</sup> which together constitute a cumulative test of the punishment's constitutional sufficiency. Justice Brennan's conclusion is that some of the elements of the death penalty violate all of these principles to some degree. On that basis he would hold the death penalty unconstitutional on its face.

Justice Marshall devised a different four-prong test. In his view, "a punishment may be deemed cruel and unusual for any one

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7. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J. concurring).

8. *Id.* at 249 (Douglas, J. concurring).

9. *Id.* at 255.

10. *Id.* at 270 (Brennan, J. concurring).

11. Justice Brennan summarized his principles as follows:

If a punishment is unusually severe, if there is a strong probability that it will be inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the [eighth amendment].

*Id.* at 282.

of four distinct reasons":<sup>12</sup> extreme pain, unusualness, excessiveness in terms of legislative goals, and acceptability to popular sentiment. Justice Marshall relied on the last two concepts, also present in Justice Brennan's opinion,<sup>13</sup> to find that the death penalty constitutes cruel and unusual punishment, regardless of the procedural framework under which it is applied.

While there is no consensus among the concurring Justices as to the particular constitutional shortcomings of the statutes in question, it should be noted that all five Justices seem to rely at least in part on the notion that unbridled discretion in the sentencing authority inevitably leads to arbitrary or discriminatory application.<sup>14</sup>

### III. THE 1976 DEATH PENALTY CASES

In reaction to the *Furman* decision, the Congress of the United States and the legislatures of at least 35 States enacted modified death penalty statutes in attempts to come within the confines of the Supreme Court's decision.<sup>15</sup> These reactions took two basic approaches.<sup>16</sup> A number of States perceived *Furman* as requiring that a death penalty statute be mandatory and specific, reasoning that the absence of any discretion would cure the constitutional defect identified by Justices Stewart and White.<sup>17</sup> Some States, however, perceived *Furman* as attacking *unbridled* discretion rather than discretion *per se*. These States carefully tailored their statutes to control the discretion of the sentencing authority. This controlled discretion resulted in application of the death penalty only where certain unmitigated aggravating circumstances were present. In the 1976 death penalty cases, the United States Supreme Court upheld the second group of statutes, while invalidating their mandatory counterparts.

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12. *Id.* at 330 (Marshall, J. concurring).

13. *Id.* at 277, 279 (Brennan, J. concurring).

14. *Id.* at 253 (Douglas, J. concurring); *Id.* at 309 (Stewart, J. concurring); *Id.* at 313 (White, J. concurring); *Id.* at 330 (Marshall, J. concurring); *Id.* at 277, 279 (Brennan, J. concurring).

15. See *Gregg v. Georgia*, 96 S.Ct. 2909, 2973 (1976).

16. See Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA.ST.L.REV. 108 (1974); *Gregg v. Georgia*, 96 S.Ct. 2909, 2928 (1976).

17. Justice Stewart set forth his reservation of the question of mandatory death penalty statutes at some length. *Furman v. Georgia*, 408 U.S. 238, 307-08 (1972) (Stewart, J. concurring). Justice White focused on the infrequency of application of the death penalty as the crux of his opinion. *Id.* at 311-14 (White, J. concurring). It would be easy to conclude from these opinions that a statute providing a mandatory death sentence would be constitutionally sufficient. In the 1976 death penalty cases, Justice White dissented in the *Woodson* and *Roberts* cases, which invalidate mandatory death sentences, see *infra* at notes 39-47 and accompanying discussion.

### A. *Gregg, Jurek, and Proffitt*

In *Gregg v. Georgia*,<sup>18</sup> and *Jurek v. Texas*,<sup>19</sup> and *Proffitt v. Florida*,<sup>20</sup> the Supreme Court fleshed out the bones of the *Furman* decision by defining and limiting the statutory schemes under which capital punishment could be applied. The notion that capital punishment is *per se* impermissible was laid to rest initially in *Gregg*,<sup>21</sup> and the later cases set out principles to which a capital sentencing procedure must conform to satisfy the eighth amendment.

In *Gregg*, the Court considered a two-stage trial procedure in which the jury which rendered the verdict, or the judge in non-jury cases, holds a separate sentencing hearing, with inquiry limited to the question of whether the defendant should be sentenced to death.<sup>22</sup> The State may introduce evidence of aggravating circumstances, and the defendant may likewise attempt to establish mitigation. A sentence of death may be imposed only if the jury, or judge, finds beyond a reasonable doubt that one of ten statutorily specified aggravating circumstances exists,<sup>23</sup> and then only if the sentencing authority elects to impose that sentence.<sup>24</sup> Georgia further provides mandatory expedited review of all death sentences.<sup>25</sup>

Initially, the Court in *Gregg* undertook to define the meaning of the decision in *Furman*. That decision, they held, "mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."<sup>26</sup> The Georgia system guarantees that the jury will receive adequate information on the background of the defendant and the circumstances of the crime, and requires a finding of at least one specific and narrowly defined aggravating circumstance before the death sentence is imposed. It further requires the sentencing authority to consider any mitigating factors offered by the defendant, and provides an additional check in the expedited mandatory appellate review. The Supreme Court held that this system substantially minimizes the risk of the kind of arbitrary action condemned in *Furman*.

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18. *Gregg v. Georgia*, 96 S.Ct. 2909 (1976).

19. *Jurek v. Texas*, 96 S.Ct. 2950 (1976).

20. *Proffitt v. Florida*, 96 S.Ct. 2960 (1976).

21. *Gregg v. Georgia*, 96 S.Ct. 2909, 2922-32 (1976).

22. GA. CODE ANN. §§ 27-2503(b), 27-2534.1 (Supp. 1976).

23. *Id.* § 27-2534.1.

24. *Id.* § 27-3102.

25. *Id.* § 27-2537.

26. *Gregg v. Georgia*, 96 S.Ct. 2909, 2932 (1976).

The statutory scheme considered in *Jurek*<sup>27</sup> presents interesting variations on the *Gregg* theme. Texas includes within its range of capital offenses a much smaller number of crimes. Under the Georgia statute, anyone convicted of murder is forwarded automatically to the capital sentencing procedure.<sup>28</sup> In Texas, only five narrowly defined types of homicide carry a potential death sentence.<sup>29</sup> Although Texas also provides a two-stage trial in capital cases, the jury function is somewhat different. Texas juries are given three "statutory questions"<sup>30</sup> which must all be answered in the affirmative before the sentence of death will be imposed. Texas also provides mandatory expedited appellate review of a capital sentence.<sup>31</sup>

The Court found the Texas procedure constitutional. The post-conviction hearing provides the necessary data to the jury, and the jury's discretion is sufficiently focused and directed by the limited class of capital offenses and the three-fold finding of fact which must be made before a death sentence may be imposed.

*Jurek* also expanded on a concept first mentioned in *Gregg*. While the Texas statute requires a finding of aggravation before imposition of the death penalty, there is no explicit statutory authorization for consideration of mitigation. The Court focused on this problem, noting that "in order to meet the Eighth and Four-

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27. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon) (Supp. 1976).

28. GA. CODE ANN. § 26-1101.

29. Capital murder is defined in TEX. PENAL CODE ANN. § 19.02 (Vernon)(1974):

(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code [intentional or knowing murder] and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(b) An offense under this section is a capital felony.

30. The statutory questions are enumerated in TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon) (Supp. 1976):

(1) whether the conduct of the defendant which caused the death of the deceased was committed deliberately, and with the reasonable expectation that the death of the deceased or another would result;

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

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

31. TEX. CODE CRIM. PROC. ANN. art. 37.071(f) (Vernon) (Supp. 1976).

teenth Amendments, a capital sentencing procedure must allow the sentencing authority to consider mitigating circumstances."<sup>32</sup> The Court resolved the problem by resorting to the construction placed on the Texas statute by the appellate courts of that State. The Texas Court of Criminal Appeals ruled in *Jurek v. State*<sup>33</sup> that, in its consideration of the likelihood that the defendant will be a continuing threat to society (the second statutory question), mitigating factors are definitely relevant and may be introduced.<sup>34</sup>

Florida's procedure<sup>35</sup> provides still another example of a constitutionally valid statutory scheme. It differs from the Georgia and Texas statutes in two basic respects: Florida provides a list of specific mitigating circumstances which must be considered by the sentencing authority,<sup>36</sup> and the jury determination of sentence in Florida is advisory only, with final authority vested in the judge to impose sentence.<sup>37</sup> The Court gave little consideration to the statutory list of mitigating circumstances, but dealt at some length with the constitutional validity of judicial sentencing. The Court concluded that, while jury sentencing has advantages and may be desirable, it has never been held to be constitutionally required.<sup>38</sup> As long as the sentencing authority, be it judge or jury, has sufficient information and guidance to make a principled decision, the requirements of *Furman* are satisfied.

### B. *Woodson and Roberts*

In two other cases decided with the *Gregg* trilogy, statutes which embody a different response to *Furman* are considered and

32. *Jurek v. Texas*, 96 S.Ct. 2950, 2956 (1976).

33. *Jurek v. State*, 522 S.W.2d 934 (Tex. 1975).

34. *Id.* at 939-40.

35. FLA. STAT. § 921.141 (1975).

36. The mitigating circumstances are listed as follows:

- (6) Mitigating circumstances shall be the following:
- (a) The defendant has no significant history of prior criminal activity.
  - (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
  - (c) The victim was a participant in the defendant's conduct or consented to the act.
  - (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
  - (e) The defendant acted under extreme duress or under the substantial domination of another.
  - (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
  - (g) The age of the defendant at the time of the crime.

*Id.*

37. *Id.*

38. *Proffitt v. Florida*, 96 S.Ct. 2960, 2966 (1976).

rejected. Unlike the statutes considered above, the death penalty statutes of North Carolina<sup>39</sup> and Louisiana<sup>40</sup> eliminated unbridled discretion by eliminating (at least superficially) *all* discretion. The Court's analysis of the constitutional failings of these statutes further defines the *Furman* holding.

The statutory scheme considered in *Woodson v. North Carolina* defined first degree murder and provided that the punishment for the offense "shall be" death. The Court first noted that such a system is inconsistent with contemporary values.<sup>41</sup> More importantly, the Court further found that the statute failed to correct the unbridled discretion attacked in *Furman*.<sup>42</sup> The Court supported this second rationale by reasoning that juries may decline to convict a defendant of a capital offense solely to avoid the imposition of a mandatory death sentence.<sup>44</sup> The jury will still perform a discretionary sentencing analysis, with its decision expressed in terms of guilt or innocence rather than life or death.<sup>45</sup> This problem is exacerbated by the impossibility of judicial review of such a "mandatory" sent-

39. N.C. GEN. STAT. §§ 14-17 (Supp. 1975) provides:

Murder in the first and second degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary, or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.

40. LA. REV. STAT. ANN. § 14:30 (Supp. 1976) provides:

First degree murder:

First degree murder is the killing of a human being:

- (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated burglary, or armed robbery; or
- (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
- (3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
- (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
- (5) When the offender has a specific intent to commit murder and has been offered or has received anything of value for committing the murder.

Whoever commits the crime of first degree murder shall be punished by death.

41. *Woodson v. North Carolina*, 96 S.Ct. 2978, 2983-90 (1976).

42. *Id.* at 2990-92.

43. *Id.* at 2990.

44. *Id.* at 2990-91.

45. North Carolina's mandatory death penalty provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. *Id.* at 2991.



ence. The result is that mandatory statutes are as constitutionally deficient as completely discretionary ones.

The same conclusion was reached in *Roberts v. Louisiana*. Louisiana provided a system of responsive verdicts<sup>46</sup> under which the jury was instructed on an enumerated list of lesser included offenses, and could thereafter return a verdict of guilty of the offense charged or of any of the included offenses, whether raised by the evidence or not. Louisiana also offered a narrowed list of capital homicides similar to that offered by the Texas statute.<sup>47</sup> The Court held that the primary failure of this system arose from its lack of guidelines. The jury is given no principles on which to differentiate the capital cases from the non-capital ones. Under such circumstances, there is no safeguard against arbitrary and capricious sentencing.

### C. Principles of the Cases

The procedures held to be constitutionally valid in these cases have several common elements. All provide for a bifurcated trial with a separate evidentiary hearing on the question of sentencing. All involve the jury, either primarily as the sentencing authority or secondarily as an advisory body. All provide specific and narrowly defined statutory guidelines employed by the sentencing authority in making its determination. Finally, all provide mandatory, expedited judicial review of trial court's specific findings which gave rise to the death sentence. These decisions hold that some of these characteristics are constitutionally mandated, while others are not.<sup>48</sup> Clearly, however, each is important in guaranteeing that the death sentence will be imposed in a manner consistent with *Furman*.

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46. LA. CODE CRIM. PRO. ANN. art. 814(A) (Supp. 1976) provides in part: The only responsive verdicts which may be rendered where the indictment charges the following offenses are:

1. First degree murder:  
Guilty.  
Guilty of second degree murder.  
Guilty of manslaughter.  
Not guilty.

47. TEX. PENAL CODE ANN. § 19.02 (Vernon)(1974); LA. REV. STAT. ANN. § 14:30 (Supp. 1976). See text notes 29 and 40 *supra*.

48. It is clear that guidelines and information for the sentencing authority are requirements of constitutional stature. *Gregg v. Georgia*, 96 S.Ct. 2909, 2935 (1976). See *State v. McKenzie*, 33 St.Rptr. 1043, 1072-73 (1976)(Haswell, J., concurring). In *Proffitt v. Florida*, 96 S.Ct. 2960, 2967 (1976), the Court indicates that jury sentencing is desirable but not constitutionally mandated.

## IV. STATE V. MCKENZIE

As part of its 1973 revision of the Montana Criminal Code, the Montana legislature enacted death penalty statutes for two classes of criminal offenses.<sup>49</sup> In the 1976 case of *State v. McKenzie*, the Montana Supreme Court ruled that those statutes, as enacted,<sup>50</sup> satisfy the requirements of *Furman*.

McKenzie was convicted of the offenses of aggravated kidnapping and deliberate homicide in the death of a rural school teacher. Under the provisions of Montana's sentencing procedure,<sup>51</sup> the trial court ordered a presentence investigation and report.<sup>52</sup> The defendant moved for mitigation, but the court denied the motion and imposed the death penalty.<sup>53</sup>

On appeal, the Supreme Court of Montana considered twenty-five separate specifications of error submitted by the defendant,

49. REVISED CODES OF MONTANA (1947)[hereinafter cited as R.C.M. 1947], § 94-5-105, reads as follows:

Sentence of death for deliberate homicide.

(1) When a defendant is convicted of the offense of deliberate homicide, the court shall impose a sentence of death in the following circumstances unless there are mitigating circumstances:

- (a) The deliberate homicide was committed by a person serving a sentence of imprisonment in the state prison; or
- (b) The defendant was previously convicted of another deliberate homicide; or
- (c) The deliberate homicide was committed by means of torture; or
- (d) The deliberate homicide was committed by a person lying in wait or ambush; or
- (e) The deliberate homicide was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

(2) Notwithstanding the provisions of subsection (1) and regardless of circumstances, when a defendant is convicted of the offense of deliberate homicide under subsection (1)(a) of section 94-5-102 [a knowing or purposeful homicide] in which the victim was a peace officer killed while performing his duty the court shall impose a sentence of death.

R.C.M. 1947, § 94-5-304, as enacted in 1973, read as follows:

Sentence of death for aggravated kidnapping. A court shall impose the sentence of death following conviction of aggravated kidnapping if it finds that the victim is dead as a result of the criminal conduct, unless there are mitigating circumstances.

This section was amended by Sec.1, ch. 126, L.1974, to delete "unless there are mitigating circumstances."

50. The *McKenzie* case preceded the 1974 amendment, and was decided under the statute as originally enacted. *State v. McKenzie*, 33 St.Rptr. 1043, 1049-50 (1976).

51. R.C.M. 1947, Title 95, Chapter 22.

52. R.C.M. 1947, § 95-2204, provides, *inter alia*, the contents of the report: [T]he probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. . . .

53. R.C.M. 1947, § 95-2212, establishes that the judge rather than the jury is the sentencing authority in Montana.

including an attack on the constitutionality of Montana's death penalty provisions.

In addressing the death penalty issue, the court noted that *Gregg* required information and guidance for the sentencing authority to prevent arbitrary and capricious sentencing.<sup>54</sup> However, the court first addressed the problem of judicial sentencing, holding, as the United States Supreme Court did in *Proffitt*, that sentencing by a jury is not a constitutional requirement.

The court then dealt with the substantive sufficiency of the Montana system, noting that Montana, like Texas, directs the discretion of the sentencing authority by restricting the number of offenses for which the death sentence may be imposed. Further, information for the sentencing authority is provided by the presentence investigation and report, and the appropriateness of the sentence and its legality are subject to two levels of post-conviction review.<sup>55</sup> In sum, the court held that Montana's capital sentencing procedure was so similar to those found constitutional in the *Gregg* trilogy that it too was constitutionally sufficient.

As the concurring opinion of Justice Haswell points out, however, the majority in *McKenzie* inadequately explains the precise application of the *Gregg* test to Montana's procedure. The concurring opinion attempted to supply the deficiency. Justice Haswell read *Gregg* as establishing three criteria which must be met by a death penalty statute: specific statutory aggravating circumstances, separate review of mitigation, and prompt judicial review.<sup>56</sup> Addressing the first criterion, Justice Haswell found that the narrow limitation of the categories of capital offenses essentially requires that a statutory aggravating circumstance be found.<sup>57</sup> Further, the Montana statute requires consideration of mitigating circumstances and of the particular circumstances of each offense and defendant in the presentence report.<sup>58</sup> In addition, Justice Haswell noted that a defendant may seek a hearing to present additional testimony on the question of mitigation.<sup>59</sup> Finally, the sentence review and appeal provisions guarantee the availability of prompt judicial review. He concluded that the Montana system "affords defendant the procedural safeguards necessary to protect his substantive right to be sentenced without arbitrariness or caprice."<sup>60</sup>

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54. *State v. McKenzie*, 33 St.Rptr. 1043, 1057 (1976).

55. R.C.M. 1947, Title 95, Chapters 24 and 25.

56. *State v. McKenzie*, 33 St. Rptr. 1043, 1972-73 (1976)(Haswell, J., concurring).

57. *Id.* at 1072.

58. *Id.* at 1073.

59. See *infra* at note 63 and accompanying discussion.

60. *State v. McKenzie*, 33 St.Rptr. 1043, 1073 (1976)(Haswell, J., concurring).

Justice Haswell's concurrence presents a cogent argument in favor of the Montana scheme, but his analysis overlooks some of the flaws in the Montana system. Initially, it is doubtful that the statutorily narrow range of capital crimes is sufficient by itself to provide guidance to the sentencing authority. The Texas scheme upheld in *Jurek*, on which the majority so heavily relies, requires an additional finding of aggravation in the jury answers to the statutory questions, although the constitutional significance of the additional findings is not made clear by the *Jurek* opinion.

Further, the statutory authority for a defendant to request a hearing to present evidence of mitigation is unclear. The Montana Criminal Code prior to 1967 contained such an explicit authorization,<sup>61</sup> but the statutes were repealed in the general revision of the criminal code. Thus, though McKenzie was in fact accorded such an opportunity, his right was not statutorily based. Justice Haswell failed to cite any authority for his position in that regard. The Montana judicial review provisions may be extensive, but they are not mandatory and expedited, as are the provisions of the Georgia, Texas, and Florida laws.

## V. CONCLUSION

Despite Justice Haswell's attempt to clarify the status of Montana's capital punishment statutes, it remains uncertain whether the statutes will pass constitutional muster. The amendment of the death penalty provision of the aggravated kidnapping statute following the *McKenzie* case,<sup>62</sup> making the death penalty mandatory for certain offenses within that statute, renders that portion of the death penalty scheme highly susceptible to constitutional attack under the *Woodson* and *Roberts* cases. However, even if the Montana approach to capital punishment is found to be valid, Montana should consider changes in its statutes which will recognize the concerns, expressed by Justice Brennan in *Furman*, that the most severe and final of all criminal sanctions should be imposed only under a procedural framework which recognizes the uniqueness of that sanction.<sup>63</sup> Such a framework should include the jury in the sentencing procedure in at least an advisory capacity, since the jury can play a vital role in maintaining a link between the penal system and contemporary community values.<sup>64</sup> It should also provide the defendant with a statutorily guaranteed right to a hearing at which

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61. R.C.M. 1947, §§ 94-7813, 94-7814, repealed Sec.2, ch. 196, L. 1967. See Kuhl v. District Court, 139 Mont. 536, 366 P.2d 347 (1961).

62. R.C.M. 1947, § 94-5-105.

63. *Furman v. Georgia*, 408 U.S. 238, 286 (1972).

64. *Furman v. Georgia*, 408 U.S. 238, 388 (1972) (Burger, C.J., dissenting).

he can present evidence of mitigating circumstances. The presence investigation and report cannot alone guarantee that the defendant will have sufficient opportunity to establish mitigation. Finally, the Montana system should provide mandatory, expedited review of capital sentences to provide a quick and sure determination of the legality and appropriateness of the sentence. Without safeguards such as these, the spirit of the *Furman* decision, which recognizes that the most unique of sanctions requires a unique procedural framework, cannot be fully satisfied.<sup>65</sup>

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65. At this writing, two bills to modify Montana's approach to the capital punishment problem have been introduced in the 45th Legislative Assembly of the State of Montana. Senate Bill No. 149, introduced at the request of the Montana Board of Crime Control, would adopt an approach similar to the Florida statutes discussed at notes 35-38 *supra*. The bill would require a post-conviction hearing to consider enumerated aggravating and mitigating circumstances. It would require the trial judge to make written findings of fact in support of his sentence, and would provide mandatory expedited appellate review.

Senate Bill No. 214 would provide a procedure similar to the scheme ruled constitutional in *Jurek v. Texas*, note 1 *supra*. See discussion notes 27-34. The bill would provide a mandatory post-conviction hearing before the jury, for consideration of the Texas statutory questions. Mitigation is not explicitly mentioned, but the Texas Supreme Court read mitigation into a similar statute (see p. 214 & note 33 *supra*), and Montana's Supreme Court would probably do likewise. The bill requires no written findings by the jury, but it does provide mandatory expedited appellate review.