MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
January 28, 1977

The meeting of this committee was called to order by Senator Turnage, Chairman, at 9:40 a.m. on the above date in Room 405 of the State Capitol Building.

ROLL CALL:

All members were present except Senator Roberts who was excused.

CONSIDERATION OF SENATE BILLS 149 and 214:

Senator Hazelbaker, District 41, sponsor of Senate Bill 149, explained that this bill has been put together by the Montana Law School, and he had been requested to sponsor it.

A proponent of S.B. 149, Brinton B. Markle of the Montana Justice Project, told the committee that the American Bar Association has refused to take a stand on whether a jury or a judge should deliver a sentence in the case of capital punishment, and that this is an important issue in Montana. He drew the committee's attention to a report (See Exhibit #1) regarding the constitutionality of the Death Penalty in Montana, and he read excerpts about jury sentencing. (See Exhibit #2)

The next proponent was Tom Dowling, Lewis & Clark County Attorney, who told the committee he was probably the only one present who has ever asked that anybody be hanged. He further said that he did not think that he could ever do it, and that he does not believe that a jury in his county would ever sentence anyone to hang. He also said that he believes a jury should be kept out of sentencing.

Charles M. O'Reilly, Montana Justice Project, a proponent, told the committee that he agreed with the previous witnesses.

At this time, the Chairman called the opponents of S.B. 149 and 214. There were none present who wished to testify. He then requested Mr. Larry Elison, a professor from the Montana Law School and an attorney on the governor's staff, to interpret these two bills for the committee. Mr. Elison said that he thinks that both bills will meet constitutional requirements, but feels more confident about S.B. 149. He then said that he is very much committed to the idea that the judiciary provide sentencing and not the jury. He suggested that the committee dovetail this bill into existing statutory design so that it will fit into the existing code.

Senator Hazelbaker said that he felt a jury would be expensive and time consuming.

Senator Turnage agreed with Larry Elison about S.B. 214 and asked the committee that they do not recommend S.B. 214 , the bill prcposed by the Board of Crime Control. He then thanked the witnesses and opened the meeting to questions by committee members.

The Chairman then asked that Mr. Elison help in making any amendments to Senate Bill 149. Mr. Elison said that he would be glad to help.

There being no further business before the committee at this time, the committee adjourned at 10:25 a.m..

Jean A. Turnage

SENATOR JEAN A. TURNAGE, Chairman

ROLL CALL

JUDICIARY COMMITTEE

45th LEGISLATIVE SESSION - - 1977 Date 1/28/77

NAME	PRESENT	ABSENT	EXCUSED
TURNAGE, Jean, Chairman	✓		
ROBERTS, Joe, Vice-Chairman			✓
MURRAY, William	✓		
OLSON, Stuart	✓		
LENSINK, Everett	✓		
REGAN, Pat	✓		
TOWE, Tom	✓		
WARDEN, Margaret	✓		

Each day attach to minutes.

SB 149, 214 (Exhibit #

CONSTITUTIONALITY OF THE DEATH PENALTY IN MONTANA

Montana's mandatory death penalty provisions, section 94-5-105 (2), R.C.M. (1947), dealing with deliberate homicide involving the killing of a police officer, and Section 94-5-304, R.C.M., (1947), dealing with aggravated kidnapping where the victim is dead as a result of the criminal conduct, are unequivocally unconstitutional. Montana's discretionary death penalty provision, Section 94-5-105 (1) (a) through (e) dealing with sentence of death for enumerated categories of deliberate homicide and providing for consideration of mitigating circumstances, is constitutional.

It is possible that Montana's procedures for review of death sentences are constitutionally inadequate so as to render any imposition of the death penalty unconstitutional whether it be imposed pursuant to the mandatory or discretionary death penalty provisions.

INTRODUCTION

The purpose of this writing is to assess the constitutionality of Montana's death penalty statutes relating to the crimes of deliberate homicide, Section 94-5-105, and aggrevated kidnaping, Section 94-5-304, R.C.M. 1947, in light of the recent U.S. Supreme Court cases dealing with the subject. See: **Gregg v Georgia,** ____U.S.____, 96 S. Ct. 2909 (1976); **Proffitt vs. Florida,** ____U.S ____, 96 S. Ct. 2960 (1976); **Jurek v. Texas,** ____U.S.____, 96 S. Ct. 2950 (1976); **Woodson v. North Carolina,** ____U.S.____, 96 S. Ct. 2978 (1976); and **Roberts v. Louisiana,** ____U.S.____, 96 S. Ct. 3001 (1976).

It should be noted that the proposed legislation is more than an attempt to cure the obvious or definite constitutional defects in the existing law. Rather, it represents an attempt to completely overhaul the procedures utilized in determining when and upon whom the death penalty is to be imposed. In other words, the decision to change or add to a particular existing provision was not based solely on that particular provision's ability to pass constitutional muster should it be tested in the U.S. Supreme Court, but also upon a desire to improve the procedure involved to insure that such an ominous penalty as death is fairly and justly meted out.

THE DEATH PENALTY PER SE

The five recent Supreme Court cases on the constitutionality of the death penalty address and answer many questions left unanswered by the voluminous and confusing plurality opinion in **Furman v. Georgia,** 408 U.S. 238 (1972). Assuming no radical changes in the philosophy or membership of the court in the near future it now appears clear that the punishment of death for the crime of murder is **not** constitutionally invalid per se under the 8th and 14th amendments to the U.S. Constitution. The 8th amendment, according to the court is flexible, and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." **Gregg v. Georgia,** 96 S. Ct. at p. 2925. The court viewed post-Furman enactment by 35 states of new death penalty statutes as strong evidence of society's endorsement of the death penalty and as an indication of current "standards of decency". **Gregg v. Georgia,** at p. 2928. Acknowledging that retribution and deterrence remain valid sentencing considerations, the court expressed what should be the final word on the constitutionality of the death penalty per se:

> "We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it". **Gregg v. Georgia, at p. 2932.**

PROCEDURAL CONSIDERATIONS IN IMPOSING THE DEATH PENALTY — CONSTITUTIONALLY MANDATED REQUIREMENTS AND ACCEPTABLE METHODS OF FULFILLING THEM.

Having decided that the death penalty is not, per se, unconstitutional cruel and unusual punishment under the 8th and 14th amendments, a more detailed analysis of the procedural requirements deemed necessary by the court in order to constitutionally impose the penalty is necessary. The following discussion attempts to treat the various procedural provisions of the constitutionally approved death penalty statutes of Georgia, Texas, and Florida both in terms of what the Supreme Court considers to be mandatory constitutional prerequisites and what it considers to be adequate or desirable approaches or procedures.

The Georgia statutory procedure held constitutional in **Gregg v. Georgia,** supra, sets out the various procedural requirements dealt with in all three cases. These are:

(1) jury sentencing;

(2) a bifurcated procedure for determining guilt and punishment;

(3) a consideration by the sentencing body of enumerated aggravating factors, one of which must be found in order to impose the death sentence, and any mitigating factors (not enumerated in Georgia);

(4) an automatic review procedure requiring the state supreme court to review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. (See: **Gregg v. Georgia,** 96 S. Ct. 2932-2941, and Ga. Code Ann. § 27-2534.1 and § 27-2537).

It is apparent that the procedure of jury sentencing, although present in Georgia's constitutionally approved statutory scheme, is not a constitutional requirement. The Florida procedure, also held constitutional, (see: **Proffit v. Florida, supra)** provides only for an advisory opinion by the jury as to the sentence, while the actual sentence is determined by the judge. The court makes this clear in **Proffit v. Florida, 96 S. Ct. at j. 2966,** where it stated:

> "This court has pointed out that jury sentencing in a capital case can perform an important societal function, (citation omitted), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, . . ."

Therefore, the fact that all sentences in Montana are imposed by a judge pursuant to section 95-2212, R.C.M. (1947) does not present a procedural problem in constitutionally imposing the death sentence. The proposed legislation, therefore, does not make any change in this area since it would amount to a radical and unnecessary change in Montana's criminal procedure.

The Georgia, Texas, and Florida procedures all provided for a bifurcated proceeding, i.e., separate and distinct proceedings for determining guilt on the one hand and punishment on the other. However this requirement can best be viewed as being constitutionally required only in states where the jury is included in the sentencing process as a sentencing or advisory body. In such a system as the court points out in **Gregg v. Georgia,** 96 S. Ct. at p. 2933:

> "Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question."

And at 96 S. Ct. p. 2935, the court further states:

> "As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information".

This infirmity is not present in a judicial sentencing jurisdiction such as Montana where the procedure is automatically bifurcated due to the separate functions of judge and jury in fixing guilt and determining punishment. In general, as a matter of necessity and practice, a separate sentencing hearing is held in Montana's district courts, however, for clarity, the proposed legislation expressly requires a separate sentencing hearing and specifies what is to be considered at that hearing. Although perhaps not constitutionally required due to the use of judicial rather than jury sentencing in Montana, the provisions (sections 1 and 2 of the proposed legislation) were considered desirable as procedural guidelines for a comprehensive statutory scheme for the imposition of the death penalty in Montana.

If there is one immutable constitutional principal that rings crystal clear from a reading of the five recent Supreme Court decisions on the death penalty being considered herein, it is that any state which desires to impose the death penalty must as an integral part of its procedure for imposing the penalty, provide for the consideration of the character and propensities of the individual offender and the circumstances of the particular offense. The statutes of Georgia Texas, and Florida approved by the court had met this constitutional requirement by providing that the sentencer consider both aggravating and mitigating

circumstances relating to the offense and the offender before passing a sentence of death. All three of the states' statutes enumerated aggravating factors which narrowed the situations in which the death penalty could be imposed based on either the nature of the offender or the offense. The Montana statute concerning the death sentence for deliberate homicide, 94-5-105, and the statute concerning sentence of death for the narrow category of kidnaping in which the victim is dead as a result of the criminal conduct, 94-5-304, therefore appear constitutionally adequate in this regard. Whether or not specific mitigating factors have to be statutorily enumerated is another question, however. It appears that the answer is no, since only the Florida statute contained such an enumeration, (see: Fla. Stat. Ann. § 921.141) while the Georgia statute mentioned consideration of mitigating factors only in a general sense without enumerating them (see: Ga. Code Ann. § 27-2534.1), and the Texas statute did not even expressly speak of consideration of mitigating circumstances but was only construed to include such consideration by the Texas Court of Criminal appeals (see: Texas Penal Code § 19.03 and Texas Code of Crim. Proc., Art. 37.071). It is equally evident, however, that although mitigating factors need not be statutorily enumerated, **they must be allowed to be considered** in determining sentence. The court articulated this constitutitonal requirement in **Jurek v. Texas,** 96 S. Ct. at p. 2956 where, it stated:

> " . . . a sentencing system that allowed the jury to consider only aggravating factors would almost certainly fall short of providing the individualized sentencing determination that we today have held in **Woodson v. North Carolina,** (citation omitted) to be required by the Eight and Fourteenth Amendments. . . . Thus, in order to meet the requirements of the Eighth and Fourteenth Amendments, a capital sentencing system must allow the sentencing authority to consider mitigating circumstances."

Turning again to the Montana statutes, it appears that this constitutionally mandated procedural requirement is adequately provided for in the case of section 94-5-105 (1) (a) through (e) but fatally absent in sections 94-5-105 (2) and 94-5-304. The provision in 94-5-105 (1) which provides for imposition of the death sentence for enumerated types of deliberate homicide "unless there are mitigating circumstances" has unwittingly salvaged the constitutionality of that section, while the removal of such language by amendment in 1974 in regard to the killing of a police officer (94-5-105 (2)) and aggravated kitnaping where the victim is killed (94-5-304) has rendered those provisions unconstitutional under the recent cases.

The proposed legislation adopts the Florida scheme of enumerating specific mitigating factors which are to be considered in imposing the death penalty. As has already been noted, this is probably not constitutionally required, but in both Georgia (see: **Coley v. State,** 231 Ga. 829, 834, 204 S.E. 2nd 612, 615) and Texas (see: **Jurek v. Texas,** 522 S.W. 2nd 939, 940) where mitigating factors were not enumerated, they were supplied by judicial construction or interpretation. Due to this fact and the heavy emphasis which the Supreme Court places on the necessity of providing the sentencing authority with adequate standards and guidelines to insure objective consideration of the particularized circumstances of the individual offense and offender, the adoption of an enumerated list of mitigating circumstances was deemed a desirable change in the Montana law.

The last, but certainly not the least, of the procedural requirements discussed by the court is that of automatic appeal or review of death sentences. All three of the statutory schemes approved by the cases provide for this type of automatic expeditious review. (See: Ga. Code Ann. § 27-2537, Fla. Stat. Ann. § 921.141 (4) and Texas Code of Crim. Proc.. Art. 37.071). Whether or not a special type of "automatic" review of all death sentences is constitutionally mandated under the 8th and 14th amendments is not entirely clear from reading the decisions. At the very least, however, the court expresses an extremely strong preference for the utilization of such a review procedure. Speaking of the Georgia statute which specifies that "automatic" review shall consist of a determination of whether the death sentence was imposed under the influence of passion and prejudice or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, the court in **Gregg v. Georgia,** 96 S. Ct. at p. 2940 stated:

> "The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty."

In the case of the Florida statute which provides for automatic review but does not specify a par-

ticular type or form of review, the court noted in **Proffitt v. Florida,** 96 S. Ct. 96 at p. 2966 that since "the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each such sentence is made possible". The court also noted the Florida Supreme Court case of **State v. Dixon,** 283 So. 2d 1, (1973), which adopted the concept of proportionality review in death sentence cases. In that case, the Florida Supreme Court considered its function to be to:

> "guarantee . . . that the (aggravating and mitigating) reasons present in one case will reach a similar result to that reached under similar circumstances in another case . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." **State v. Nixon,** at p. 10.

The question is, then, are the existing avenues of review and appeal, now open to the recipient of the death penalty in Montana, constitutionally adequate? The two forms of review available in Montana are direct appeal pursuant to Chapter 24, Title 95, R.C.M. (1947) and sentence review before the Montana Sentence Review Division pursuant to Chapter 25, Title 95, R.C.M. (1947). To begin with, neither of these methods of review is automatic. They both must be initiated and perfected by the convicted defendant, and secondly they do not specify any guidelines, (as did the Georgia statute), as to what factors are to be reviewed in order to insure that the death penalty is not imposed arbitrarily or freakishly. One might successfully argue that, despite these insufficiencies, Montana's provisions are adequate as applied on a case by case basis. That is, if a person under sentence of death is in fact given an appeal or sentence review, and if the reviewing body does in fact conduct a comparison or proportionality type of review to insure that the sentence is not disproportionate to those imposed in similar cases, then the sentence of death in the particular case is constitutionally valid since a "meaningful" appellate review as required by the Supreme Court cases has in fact been afforded. However, in order to avoid this problem of interpretation and due to the emphasis placed by the court upon the need for extraordinary safeguards and procedures to fairly impose the death penalty due to the inherently "unique" and "final" nature of the penalty it was considered both necessary and desirable to create for Montana a special "automatic" review procedure to be utilized in death sentence cases. The proposed legislation provides that the Montana Supreme Court conduct this review, rather than the Sentence Review Division due again to the serious nature of the penalty being reviewed. It should be noted that the procedure adopted in the proposed bill is not carved in stone since there are many conceivable ways of insuring the type of meaningful review required by the U.S. Supreme Court. The procedure adopted is, however, patterned after the Georgia procedure for which the Court expressed a marked preference.

CONSTITUTIONALITY OF MANDATORY DEATH PENALTY STATUTES — MONTANA'S MANDATORY PROVISIONS FOR KIDNAPING *(94-5-304)* AND KILLING A PEACE OFFICER *(94-5-105(2))*.

Subsequent to **Furman v. Georgia,** supra, which held that because of the uniqueness of the death penalty it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an "arbitrary", "capricious" or "freakish" manner, the states were left with the problem of interpreting the nine separate opinions of the case in order to discover what constitutional requirements must be met in order to retain and impose the death penalty. The various states have adopted two basic approaches in the attempt to comply with the pronouncements of the **Furman** decision. The first approach was characterized by specifying the factors to be weighed and the procedures to be followed in imposing the death sentence, and the second by making the death penalty mandatory for specified crimes. (See: **Gregg v. Georgia, supra,** p. 2928, footnote 23 for complete citations to all state post-Furman statutes). In view of **Woodson v. North Carolina, and Roberts v. Louisiana,** supra, it is apparent that the latter approach of making the death penalty mandatory is unconstitutional under the 8th and 14th amendments. In these two cases the court was dealing with mandatory death penalty statutes for specific types of crimes or categories of crime. Addressing the constitutionality of the North Carolina statute the court said:

> "A separate deficiency of North Carolina's mandatory death sentence statute is its failure to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences. Central to the limited holding in Furman was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and

Fourteenth Amendments." **Woodson ..v. North Carolina**, at p. 2990. (emphasis added)

It is thus apparent from **Woodson** that the **Furman** decision is to be interpreted as a limited holding condemning only the "standardless" exercise of discretion and not the mere existance of discretion in the sentencing process. In the words of the court, "mandatory statutes in response to Furman have simply papered over the problem of unguided and unchecked jury discretion". **Woodson v. North Carolina** at p. 2990. The common misconception that mandatory death penalties were the answer to **Furman** is emphatically refuted in **Woodson v. North Carolina** at p. 2991 where the court stated:

> "While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death it does **not** fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."

Perhaps the greatest constitutional defect inherent in the mandatory death penalty statutes condemned by the court was their failure to allow the particularized consideration of the individual offender and the circumstances of the offense. In the words of the court:

> " . . . we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, (citation omitted), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death". **Woodson v. North Carolina,** at p. 2991.

In **Roberts v. Louisiana,** the same basic issue was resolved in the same manner. There, however, the court was confronted with a mandatory death penalty statute which was significantly more limited in its scope of application in that it limited the mandatory death penalty to five categories of homicide. Here again, however, the court struck down the statute. stating at 96 S. Ct. 3006:

> "The constitutional vice of mandatory death sentence statutes—lack of focus on the circumstances of the particular offense and the character and propensities of the offender —is not resolved by Louisiana's limitation of first degree murder to various categories of killings. The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute. Even the other more narrowly drawn categories of first-degree murder in the Louisiana law afford no meaningful opportunity for consideration of **mitigating factors** presented by the circumstances of the particular crime or by the attributes of the individual offender. (emphasis added)

With the possible exception of the unique category of a homicide committed by a person serving a life sentence, (see **Woodson v. North Carolina,** 96 S. Ct. 2983, footnote 7, and **Roberts v. Louisiana,** 96 S. Ct. 3006, 3007, footnote 9) it appears almost certain that any form of mandatory death penalty, regardless of its narrow scope or limited application to specific types or categories of crimes is unconstitutional.

This leads to the inescapable conclusion that section 94-5-304 R.C.M. 1947, providing for a mandatory sentence of death for aggravated kidnaping where the victim is dead as a result, is patently unconstitutional. The statute provides:

> "94-5-304. Sentence of death for aggravated kidnaping. A court shall impose the sentence of death following conviction of aggravated kidnaping if it finds that the victim is dead as the result of the criminal conduct."

Unfortunately, the 1974 amendment, which deleted the words "unless there are mitigating circumstances" which appeared in the former section 94-5-304, has the effect of rendering it unconstitutional under the recent Supreme Court cases. (see: **Woodson** and **Roberts,** supra).

A similar situation exists in regard to subsection (2) of section 94-5-105 R.C.M. (1947) which was added by amendment to that section in 1974. That subsection creates a mandatory death penalty in the case of a deliberate homicide in which the victim is a peace officer killed while performing his duty. The amendment removed this category of deliberate homicide from the list of categories under subsection (1) of section 94-5-105 for which the death penalty is required "unless there are

mitigating circumstances", and made the death penalty absolutely mandatory for killing a peace officer. The subsection provides:

> "94-5-105. Sentence of death for deliberate homicide.
> (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 in which the victim was a peace officer killed while performing his duty the court **shall impose** a sentence of death." (emphasis added).

Therefore, due to the unqualified mandatory character of sections 94-5-105 (2) and 94-5-304 and their resulting failure to provide the constitutionally indispensible requirement that the character and record of the individual offender and the circumstances of the particular offense be considered in determining whether or not to impose the death penalty, these statutes can only be regarded as unconstitutional and are in need of revision if the death penalty is to be effectively imposed for these crimes.

The proposed legislation cures the constitutional defect of these sections by adopting a single procedural system for imposition of the death penalty in all cases. It totally rejects the imposition of mandatory death sentences and adopts a constitutionally approved procedure consisting of a separate sentencing hearing in which both aggravating and mitigating circumstances relating to the offender and the offense are considered, and a procedure for automatic review of all death sentences in accordance with specific statutory guidelines. (See: **Gregg v. Georgia, Jurek v. Texas, and Proffit v. Florida,** supra).

(Exhibit #2)

ant will commit other crimes to the types of programs and facilities which may induce a change in the pattern of activity which led to the offense.

It must be granted, of course, that many trial judges lack the necessary expertise to make a proper sentencing decision. The answer does not lie, however, in retention of the power by an even less qualified jury. The answer lies in better trained and better selected judges, plus the help that devices such as those suggested in Parts IV and VII of this report can offer. These, coupled with a requirement that the sentencing decision be forced into the open (see § 5.6, *infra*) and subject to review (see ABA STANDARDS, APPELLATE REVIEW OF SENTENCES [Tent. Draft, April 1967]), at least offer the hope of more constructive sentences. That this approach may still fall short of perfection is of a wholly different order than the clear inadequacy of leaving the determination to an uninformed and unprofessional jury.

c. Capital punishment

The Advisory Committee recognizes, on the other hand, that there are considerations which argue for retention of a role for the jury in cases where imposition of the death penalty is at issue. Indeed, the pattern in capital cases in this country, in contrast to cases where the death penalty is not at stake, is to involve the jury in one way or another in the sentencing decision. See Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968 n.1 (1967); MODEL PENAL CODE, Appendix D (Tent. Draft No. 9, 1959).

The major factors which have produced this result are threefold: the strong possibility that a jury may refuse to convict in some cases unless it can assure itself that the defendant will not be executed; the belief that imposition of the death penalty ought to reflect more of a community consensus than can be marshalled by one man; and the resistance of judges to a procedure that will devolve upon them so momentous and irrevocable a decision. See generally Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953); MODEL PENAL CODE § 201.6, comment, pp. 73-74 (Tent. Draft No. 9, 1959). Compare GREAT BRITAIN, REPORT OF THE

Submitted by
Brinton Markle, Dept. Crime C

ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-53, ¶¶ 548-50, pp. 193-94 (1953).

Since this report does not speak to the question of retention of capital punishment, the procedures for imposition of the death sentence, if it is to be retained, are likewise beyond its scope. Accordingly, section 1.1 explicitly limits the position against jury involvement in the sentencing process to non-capital cases, thus reserving the possibility of a role for the jury in death cases.

PART II. STATUTORY STRUCTURE AND JUDICIAL DISCRETION—RANGE OF ALTERNATIVES

2.1 General principles: statutory structure.

(a) All crimes should be classified for the purpose of sentencing into categories which reflect substantial differences in gravity. The categories should be very few in number. Each should specify the sentencing alternatives available for offenses which fall within it. The penal codes of each jurisdiction should be revised where necessary to accomplish this result.

(b) The sentencing court should be provided in all cases with a wide range of alternatives, with gradations of supervisory, supportive and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case.

(c) The legislature should not specify a mandatory sentence for any sentencing category or for any particular offense.

(d) It should be recognized that in many instances in this country the prison sentences which are now authorized, and sometimes required, are significantly higher than are needed in the vast majority of cases in order adequately to protect the interests of the public. Except for a very few particularly serious offenses, and except under the circumstances set forth in section 2.5(b) (special term for certain types of offenders), the maximum authorized prison term ought to be five years and only rarely ten.

DATE 1-25-77

COMMITTEE ON Judiciary Sen. BILL NO. 149 + 214

VISITOR'S REGISTER Please Note Bill No.

NAME	REPRESENTING	Check One Support	Check One Oppose
Kay Brueck	League of Women Voters of Montana		✓ 149
Ernest Beatty	Montana Farmers Union	149 ✓ 214 ✓	
[illegible] B. Mackey	Montana Justice Project	149	
Charles McNally	Montana Justice Project	149	
Brett Shafer	Correspondent NNS Nugget	149 ✓ 214 ✓	
Tom Dowling	Mont. Cty. Atty Assn	149-214	
Larry Elison	Law School -	interpret only	
Richard W Conner	MT County Atty Assoc	149	