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Constitutionality of the New Mexico Capital Punishment Statute

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CONSTITUTIONALITY OF THE NEW MEXICO CAPITAL PUNISHMENT STATUTE*

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With the sentencing to death of William Wayne Gilbert, and with the numerous trials in progress arising from the New Mexico Penitentiary murders in February of 1980, the constitutionality of the 1979 New Mexico death penalty statute[1] will soon be tested. Capital sentencing procedure has become one of the most important aspects of capital punishment. The issue now is not so much whether the death penalty itself is reasonable under the eighth amendment, but whether sentencing practice meets fourteenth amendment due process requirements and thus meets eighth amendment standards of decency.[2] This article presents an analysis of capital sentencing procedure in New Mexico as tested against the constitutional standards set forth by the United States Supreme Court. The law in question has been rewritten almost in its entirety since a previous capital felony punishment statute was invalidated by the New Mexico Supreme Court.[3] Legislators have drafted the new statute carefully, modeling it after state laws which have implicitly passed constitutional muster, so that there would be little question of the validity of the statute.[4] Upon initial examination, it appears that they have succeeded.

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1. N.M. Stat. Ann. § § 31-18-14; 31-20A-1 to -6; 31-14-11 to -14 (Supp. 1979).

2. *See* Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. Pa. L. Rev. 989 (1978), for the premise that *Gregg v. Georgia* and its companion cases were decided on procedural, rather than substantive, eighth amendment rationale. The article discusses in detail the eighth amendment cruel and unusual standard as applied to capital punishment. *See also* Note, *The Impact of a Sliding-Scale Approach to Due Process of Capital Punishment Litigation*, 30 Syracuse L. Rev. 675 (1979), discussing the "sliding-scale" effect that affords greater procedural due process protection to capital offenders.

3. State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

4. No value judgments of any kind have been made as to the moral and ethical implications of capital punishment; this analysis of necessity remained as legally objective as possible. *See* Bedau, *The Death Penalty: Social Policy and Social Justice*, 1977 Ariz. St. L.J. 767, and response by Van de Haag, *A Response to Bedau*, 1977 Ariz. St. L.J. 797, for an interchange on the ethical and philosophical aspects of capital punishment. *See also* Balske, *New Strategies for the Defense of Capital Cases*, 13 Akron L. Rev. 331 (1979), a handbook guide for attorneys defending capital felony defendants.

I. HISTORY OF NEW MEXICO CAPITAL PUNISHMENT LAW

The New Mexico statute enacted in 1963 dealing with capital punishment provided as follows:

> 40A-29-2. Sentencing authority.—Capital felonies.—When a defendant has been convicted of a capital felony the judge shall sentence that person to death, unless the jury trying such case shall recommend life imprisonment; provided that in cases wherein the defendant has entered a plea of guilty to the commission of a capital felony, the court may in lieu of sentencing such a person to death, sentence the defendant to life imprisonment.
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> 40A-29-2.1. Capital punishment limited.—Punishment by death for any crime is abolished except for the crime of killing a police officer or prison or jail guard while in the performance of his duties and except if the jury recommends the death penalty when the defendant commits a second capital felony after time for due deliberation following commission of a capital felony.
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> 40A-29-2.2. Maximum punishment.—All crimes for which capital punishment is abolished by section 1 [40A-29-2.1] are punishable by a penalty of life imprisonment in the state penitentiary.
>
> 40A-29-2.3. Persons previously sentenced to death.—Any person currently under penalty of death shall have such penalty revoked, and a penalty of life imprisonment substituted.[5]

In 1973 section 40A-29-2 was amended to impose a mandatory death sentence upon conviction of a capital felony and sections 40A-29-2.1 to 2.3 were repealed. These actions were taken in response to the U.S. Supreme Court's decision in *Furman v. Georgia*,[6] which admonished the states to eliminate unbridled jury discretion in sentencing a convicted person to death.[7] However, in light of the court's decision in *Woodson v. North Carolina*,[8] the New Mexico Supreme Court in 1976, in *State v. Rondeau*,[9] held that the mandatory sentencing provision was unconstitutional.

In *Woodson* the U.S. Supreme Court in a 5-4 decision found that a mandatory imposition of the death penalty upon determination that a capital felony had been committed constituted a violation of the eighth and fourteenth amendments. The court found that societal

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5. N.M. Stat. Ann. § § 40A-29-1 to -2.3 (Repl. 1972).
6. 408 U.S. 238 (1971).
7. For an analysis of the different underlying theories adopted by Justices Stewart and White in reaching the same conclusion in *Furman*, *see* Palmer, *Two Perspectives on Structuring Discretion: Justices Stewart and White on the Death Penalty*, 70 J. Crim. L.C. & P.S. 194 (1979).
8. 428 U.S. 280 (1976).
9. 89 N.M. 408, 553 P.2d 688 (1976).

norms and respect for human dignity required consideration of the character of the individual and the circumstances presented. In *Roberts v. Louisiana,*[10] the court also struck down the Louisiana death penalty law because it contained a mandatory death sentence provision.

Following the mandate of the Supreme Court, in *Rondeau* the New Mexico Supreme Court found this state's statute to be similarly defective: "Withholding all discretion is equally constitutionally repugnant and *Woodson* calls for 'objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death.' "[11] The state supreme court overruled an earlier case, *Serna v. Hodges,*[12] insofar as it held that section 40A-28-2 was constitutional, but it reaffirmed the position enunciated in *Serna* that the death penalty does not *per se* amount to cruel and unusual punishment in violation of the eighth amendment of article II, section 13, of the New Mexico Constitution.

After the invalidation of the 1973 amendment to the New Mexico capital punishment statute, a new law was not enacted until 1979. In the meantime, the court in *Rondeau* had provided that capital offenders were subject to the former 1963 and 1969 death penalty statutes, section 40A-29-2 through 2.3.[13] However, section 40A-29-2.1 was "inapplicable," and since only section 40A-29-2.2, providing for life sentence, could withstand constitutional scrutiny, it was the sole provision of the statute in effect until 1979.

II. DEVELOPMENT OF MODERN DEATH PENALTY STANDARDS BY THE SUPREME COURT

The New Mexico capital punishment laws are modeled after those of Florida, Georgia, and Texas—states whose death penalty statutes have withstood constitutional scrutiny.[14] A review of the Supreme Court death penalty cases since 1972 will illustrate the development of the law of capital punishment, especially in these three states.

In the landmark decision of *Furman v. Georgia,*[15] the Court did

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10. 428 U.S. 325 (1976).
11. 89 N.M. 408, 412, 553 P.2d 688, 692 (1976).
12. 89 N.M. 351, 552 P.2d 787 (1976).
13. N.M. Stat. Ann. §§ 40A-29-2 to -2.3 (Repl. 1972); *see* State v. Rondeau, 89 N.M. at 412, 553 P.2d at 692, citing Town of Las Cruces v. El Paso Cotton Industries, 43 N.M. 304, 92 P.2d 985 (1939).
14. Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976). *See* Fla. Stat. Ann. § 921.141 (Supp. 1980); Ga. Code Ann. § 27-2537 (Supp. 1975); Texas Code Crim. Pro. Art. 37.071 (Supp. 1975-1976).
15. 408 U.S. 238 (1971).

not find the death penalty *per se* unconstitutional,[16] but held that giving to juries the untrammeled discretion to impose the death sentence constituted a violation of the eighth and fourteenth amendments.[17] A divided Court in *Furman* generally warned, in several different opinions, against a scheme that would allow the death sentence to be imposed in an arbitrary and capricious, or "freakish," manner. This decision prompted many states, including New Mexico, to amend their death penalty laws to comply with the standards, albeit unclear, set forth in the *Furman* decision.

In 1976 the Supreme Court considered the post-*Furman* legislation of five states.[18] The constitutional adequacy of state sentencing schemes was then becoming the focus of Supreme Court attention in death penalty cases.[19] In *Gregg v. Georgia,*[20] *Profitt v. Florida,*[21] and *Jurek v. Texas,*[22] the laws of Georgia, Florida and Texas were upheld in their use of controlled discretion in the capital sentencing procedure. These states' laws generally provided for: 1) a bifurcated hearing wherein the death penalty was considered separately after a guilty verdict had been rendered in a capital felony case; 2) a consideration of aggravating and mitigating circumstances behind the murder; and 3) automatic and complete appellate review of any case involving the death penalty.[23] In *Gregg,* the United States Supreme Court attempted to provide some general guidance to state drafters:

> In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. 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.
>
> We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing

16. Only Justices Brennan and Marshall steadfastly have maintained that the death penalty is *per se* a cruel and unusual form of punishment. The plurality in Gregg v. Georgia, 428 U.S. 153 (1976), specifically rejected such a conclusion.

17. Note that Massachusetts, relying heavily on Justice Brennan's concurrence in *Furman,* has recently declared the death penalty itself cruel and unusual punishment in violation of the eighth amendment. District Attorney v. Watson, 49 U.S.L.W. ____ (1980).

18. Gregg v. Georgia, 428 U.S. 153, 195 (1976).

19. *See* note 2 *supra.*

20. 428 U.S. 153 (1976).

21. 428 U.S. 244 (1976).

22. 428 U.S. 262 (1976).

23. *But see* Scofield, *Due Process in the United States Supreme Court and the Death of the Texas Capital Murder Statute,* 8 Am. J. Crim. L. 1 (March, 1980), concluding that Texas' capital murder laws do not meet constitutional eighth and fourteenth amendment standards.

> system constructed along these general lines would inevitably satisfy the concerns of *Furman,* for each distinct system must be examined on an individual basis. Rather, we have embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting *Furman's* constitutional concerns.[24]

As noted above, the statutes of North Carolina and Louisiana were struck down[25] in 1976 because they provided for mandatory death sentencing. These cases did not present questions as to the sufficiency of statutory sentencing procedure. In *Gardner v. Florida,*[26] however, the Supreme Court found a violation of procedural due process where a death sentence was affirmed based upon an incomplete court record which excluded part of a confidential presentence report. And in *Coker v. Georgia,*[27] the Court held that death is too severe a penalty to impose for the rape of an adult woman.

In 1978, the Court provided states with further guidance for establishing constitutionally permissible sentencing procedures. In *Lockett v. Ohio,*[28] and *Bell v. Ohio,*[29] the Court invalidated the Ohio death penalty statute because it did not permit the "individualized consideration" of mitigating factors that is required by the eighth and fourteenth amendments. The Court found that the sentencing authority must be able to consider the character and record of the defendant because a decision based on these considerations is "a constitutionally indispensable part of the process of inflicting the penalty of death."[30] In 1979 the Court held that due process rights were violated by exclusion based on standard hearsay rules of evidence relevant to the penalty decision.[31] The Court found that "in these unique circumstances" the hearsay rules may not be "applied mechanistically" to defeat justice.[32]

Several important cases dealing with the death penalty were decided by the Court in 1980. In *Beck v. Alabama,*[33] the Court held that applying the death penalty violates the constitution if the jury is not allowed to consider a lesser included offense. The Georgia Su-

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24. *See* Gregg v. Georgia, 428 U.S. 153, 195 (1976).
25. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). *See* Comment, *Evolving Standards of Decency: The Constitutionality of North Carolina's Capital Punishment Statute,* 16 Wake Forest L. Rev. 737 (1980).
26. 430 U.S. 349 (1976).
27. 428 U.S. 153 (1976).
28. 438 U.S. 586 (1978).
29. 438 U.S. 637 (1978).
30. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
31. Green v. Georgia, 442 U.S. 95 (1979).
32. *Id.* at 97.
33. 48 U.S.L.W. 4801 (1980).

preme Court's construction of certain aggravating circumstances was found to be so vague and broad as to be unconstitutional in *Godfrey v. Georgia.*[34] Finally, in *Adams v. Texas,*[35] a Texas statute requiring potential jurors to swear that their consideration would not be affected by a potential death penalty was found to be an unconstitutional narrowing of the doctrine of *Witherspoon v. Illinois,*[36] which held that potential jurors cannot be excluded merely because they voice a general objection to the death penalty.

III. THE 1979 NEW MEXICO CAPITAL PUNISHMENT STATUTE

The New Mexico statute contains elements of the laws of Georgia, Florida and Texas. The 1979 statute has been almost completely redrafted.[37] Sections 31-20A-1 through 3[38] provide for the exercise of capital sentencing authority in a separate sentencing procedure at which additional evidence and argument may be presented. Deliberations must include the weighing of aggravating and mitigating circumstance and the finding of at least one aggravating circumstance beyond a reasonable doubt. Section 31-20A-4 provides for automatic appellate review, with specific limitations on when the death penalty may be imposed. A new sentencing proceeding is required in case of error in sentencing resulting in remand. Sections 31-20A-5 and 6 set out the aggravating and mitigating circumstances, and sections 31-14-11 through 14 set out the manner and place of execution. Each section must be analyzed and compared to the laws of other states to determine the constitutionality of the statute as a whole.

Before the actual sentencing procedure is considered, however, it should be noted that the definition of first degree murder was amended by the 1980 New Mexico legislature.[39] This definition now reads:

> 30-2-1. MURDER.–
>
> A. murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused:
>
> (1) by any kind of willful, deliberate and premeditated killing;

34. 100 S. Ct. 1759 (1980). For an in-depth analysis of the *Godfrey* case, *see* Donohue, *Godfrey v. Georgia: Creative Federalism, the Eighth Amendment, and the Evolving Law of Death,* 30 Catholic Univ. L. Rev. 13 (1980).

35. 48 U.S.L.W. 4869 (1980).

36. 391 U.S. 510 (1968).

37. The 1981 New Mexico Legislature considered a bill which would have repealed the death penalty in its entirety. This bill was not passed by the House Judiciary Committee.

38. N.M. Stat. Ann. § § 31-20A-1 to -3 (Supp. 1980).

39. 1980 N.M. Laws, ch. 21, § 2-1 (codified at N.M. Stat. Ann. § 30-2-1 (Supp. 1980)).

> (2) in the commission of or attempt to commit any felony; or
>
> (3) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life.
>
> Whoever commits murder in the first degree is guilty of a capital felony.

The phrase "malice aforethought, either express or implied" was omitted and replaced with the phrase "without lawful justification or excuse." In addition, two categories of first degree murder were omitted:[40] "by means of poison, lying in wait or torture," and "from a deliberate and premeditated design unlawfully and maliciously to effect the death of any human being." Because no legislative history is available, it is difficult to ascertain the reasons for these changes. The most generally considered reason for the omission of "malice aforethought" is that courts and juries have had difficulty with the construction and application of the phrase.

A problem which may arise when the courts apply this definition of murder is that, when used in conjunction with the capital sentencing procedure, the death penalty conceivably may be imposed without the defendant ever having possessed an intent to kill. This problem will be discussed later.

A. Sentencing Procedure

Section 31-18-14, providing for sentencing authority in capital felonies, has remained essentially unchanged since 1977. It provides:

> A. When a defendant has been convicted of a capital felony, he shall be punished by life imprisonment or death. The punishment shall be imposed after a sentencing hearing separate from the trial or guilty plea proceeding. However, if the defendant has not reached the age of majority at the time of the commission of the capital felony for which he was convicted, he shall be sentenced to life imprisonment.
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> B. In the event the death penalty in a capital felony case is held to be unconstitutional or otherwise invalidated by the supreme court of the state of New Mexico or the Supreme Court of the United States, the person previously sentenced to death for a capital felony shall be sentenced to life imprisonment.

The death sentence is no longer mandatory under this section.[41] Section 31-20A-2 sets out the manner of conducting the bifurcated proceeding which is held to determine whether the penalty must be

40. N.M. Stat. Ann. § 30-2-1 (Supp. 1979).
41. State v. Rondeau, 89 N.M. 408, 533 P.2d 688 (1976).

death or life imprisonment.[42] The proceeding is conducted before the same jury that convicted the defendant, or before the same judge in a non-jury trial.[43] Such a bifurcated procedure has been expressly approved in *Gregg v. Georgia:*

> Those who have studied the question suggest that a bifurcated procedure—one in which the question of sentence is not considered until the determination of guilt has been made—is the best answer. . . .
>
> . . . .
>
> . . . When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman.*[44]

A separate sentencing procedure is also provided for by statute in Texas[45] and in Florida.[46]

During the sentencing proceeding "all evidence admitted at the trial shall be considered and additional evidence may be presented as to the circumstances of the crime and as to any aggravating or mitigating circumstances."[47] There are provisions for instructions and additional argument if the proceeding is held before a jury. The Texas statute also provides for additional argument "for or against the sentence of death."[48] This kind of procedure appears to be the norm in capital sentencing. In Florida, for example, "[e]vidence may be presented on any matter the judge deems relevant to sentencing

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42. N.M. Stat. Ann. § 31-20A-2 (Supp. 1979) provides:
Determination of sentence.
A. Capital sentencing deliberations shall be guided by the following considerations:
(1) whether aggravating circumstances exist as enumerated in section 6 [31-20A-5 N.M. Stat. Ann. (1978)] of this act;
(2) whether mitigating circumstances exist as enumerated in section 7 [31-20A-6 N.M. Stat. Ann. (1978)] of this act; and
(3) whether other mitigating circumstances exist.
B. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the jury or judge shall determine whether the defendant should be sentenced to death or life imprisonment.

43. N.M. Stat. Ann. § 31-20A-1 (Supp. 1979).

44. 428 U.S. 153, 190-92 (1976).

45. The bifurcated procedure was approved in Jurek v. Texas, 428 U.S. 262 (1976).

46. Fla. Stat. § 921.141 (1979). This type of proceeding was reviewed in detail by the Florida Supreme Court in State v. Dixon, 283 So. 2d 1 (Fla. 1973), *cert. denied,* 416 U.S. 943 (1974). For a discussion of Florida's new death penalty statute, *see* Boyd & Logue, *Developments in the Application of Florida's Capital Felony Sentencing Law,* 34 U. Miami L. Rev. 441 (May 1980).

47. N.M. Stat. Ann. § 31-20A-1(C) (Supp. 1979).

48. Jurek v. Texas, 428 U.S. 262, 267 (1976).

and must include matters relating to certain legislatively specified aggravating and mitigating circumstances."[49] The Supreme Court also approved of the liberal admission of evidence in pre-sentence hearings in Georgia:

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. *See, e.g., Brown v. State,* 235 Ga. 644, 220 S.E.2d 922 (1975). So long as the evidence introduced and the arguments made at the pre-sentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.[50]

Indeed, hearsay evidence is admissible at the hearing, as required by *Green v. Georgia.*[51] In *Green* the Court held that exclusion of hearsay evidence at the penalty stage constitutes a violation of due process. In sum, New Mexico's statutory provisions for a complete sentencing procedure appear to comport with the available directives of the Supreme Court.

The New Mexico statute[52] provides for consideration during deliberations of any aggravating and mitigating circumstances. These are additional factual circumstances to be considered which generally enhance or diminish the probability that the death penalty will be imposed. Aggravating and mitigating circumstances, if found, are to be weighed separately, then weighed against each other. In addition, both the characteristics of the defendant and the crime must be considered. A similar process was discussed in *Gregg v. Georgia:*

> While some have suggested that standards to guide a trial jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case." ALI, Model Penal Code Sec. 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959) (emphasis in original). While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary.[53]

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49. Proffitt v. Florida, 428 U.S. 242, 248 (1976).
50. Gregg v. Georgia, 428 U.S. 153, 203-04 (1976).
51. 442 U.S. 95 (1979).
52. N.M. Stat. Ann. § 31-20A-2 (Supp. 1979).
53. 428 U.S. 153, 193-95 (1976).

It should be noted that in New Mexico aggravating circumstances are *limited* to those specified in section 31-20A-5, while mitigating circumstances are expressly unlimited, as in Florida.[54]

Section 31-20A-3 presents potential problems. That section provides for sentencing by the court after deliberation.[55] To impose the death penalty, a jury must find unanimously beyond a reasonable doubt that at least one of the specified aggravating circumstances exists, and must also unanimously specify the death sentence. If these conditions are not met, the court must sentence the defendant to life imprisonment. In a non-jury proceeding, the judge must find beyond a reasonable doubt and specify at least one aggravating circumstance to justify imposing the death penalty. The laws of Georgia, Florida and Texas also require the finding of at least one aggravating circumstance beyond a reasonable doubt. However, unlike in these three states, written findings are not required in New Mexico. In Florida:

> The statute requires that if the trial court imposes a sentence of death, "it shall set forth in writing its findings upon which the sentence of death is based as to facts: (a) that sufficient statutory aggravating circumstances exist . . . and (b) that there are insufficient statutory mitigating circumstances . . . to outweigh the aggravating circumstances."[56]

In Texas the jury must answer three questions in the affirmative beyond a reasonable doubt before imposing the death penalty:

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

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54. *See* Proffit v. Florida, 428 U.S. 242, 250 (1976).

55. N.M. Stat. Ann. § 31-20A-3 (Supp. 1979) provides:

Court sentencing.

In a jury sentencing proceeding in which the jury unanimously finds beyond a reasonable doubt and specifies at least one of the aggravating circumstances enumerated in section 6 [31-20A-5 N.M. Stat. Ann. (1978)] of this act, and unanimously specifies the sentence of death pursuant to section 3 [31-20A-2 N.M. Stat. Ann. (1978)] of this act, the court shall sentence the defendant to death. Where a sentence of death is not unanimously specified, or the jury does not make the required finding, or the jury is unable to reach a unanimous verdict, the court shall sentence the defendant to life imprisonment. In a non-jury sentencing proceeding and in cases involving a plea of guilty, where no jury has been demanded, the judge shall determine and impose the sentence, but he shall not impose the sentence of death except upon a finding beyond a reasonable doubt and specification of at least one of the aggravating circumstances enumerated in section 6 [31-20A-5 N.M. Stat. Ann. (1978)] of this act.

56. Proffitt v. Florida, 428 U.S. at 250 (citing Fla. Stat. Ann. § 931.141(3) (Supp. 1976-1977)).

> (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. Art. 37.071(b) (Supp. 1975-1976).[57]

While mentioning these procedures when considering the aggravating circumstances requirement, the United States Supreme Court has never discussed the potential for incomplete appellate review because of inadequate written findings. The pivotal question, then, is whether "meaningful appellate review of each such sentence is made possible,"[58] even if written findings are not required. Of course, the New Mexico Supreme Court will have the entire trial and sentencing record available for review, as well as jury instructions and specification of aggravating circumstances found in each case.[59] However, the actual process of weighing the aggravating against the mitigating circumstances will not be reviewable, and any mitigating circumstances that were considered and rejected possibly could be passed over in the review process. The record available at the sentencing hearing might suffice to point out how any such circumstances were brought out and considered.

Other questions arise in the context of sentencing: Does the law require a finding that *each* aggravating circumstance specified be established beyond a reasonable doubt? Must the overall determination that aggravating circumstances outweigh mitigating circumstances be established beyond a reasonable doubt? It may be argued that under *In re Winship*[60] and *Mullaney v. Wilbur*[61] the state must establish *all* elements of a criminal offense, including sentencing, beyond a reasonable doubt. Neither statute nor existing case law answers these questions.[62]

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57. Jurek v. Texas, 428 U.S. 262, 269 (1976).

58. Proffitt v. Florida, 428 U.S. 242, 251 (1976); *see* discussion of appellate review at text accompanying notes 85-95a *infra.*

59. *See* Gardiner v. Florida, 438 U.S. 347 (1978), holding that the record must be "complete" for appellate review.

60. 397 U.S. 358 (1970).

61. 421 U.S. 684 (1975).

62. *But see* State v. Pierre, 572 P.2d 1338, 1347 (Utah, 1977), holding that the mandates of *Mullaney* do not apply at the penalty phase. Of possible import to the federal courts' review process is Jackson v. Virginia, 443 U.S. 307 (1970), in which the court held that a federal court upon review of a habeas corpus petition claiming conviction of first degree murder upon insufficient evidence, must consider not whether *any* evidence supports a state court conviction, but whether there was sufficient evidence to convince a rational trier of fact to find guilt beyond a reasonable doubt.

B. Aggravating and Mitigating Circumstances

Section 31-20A-5 enumerates and limits the aggravating circumstances that may be considered at the sentencing proceeding.[63] Subsections A through E are substantively the same as those enumerated in the Texas statute.[64] They are also similar to the circumstances suggested in the Model Penal Code.[65] Only section 31-20A-5(F), establishing that the murder of a witness to prevent reporting of a crime or for retaliation is an aggravating circumstance, is unique to New Mexico law, although it is similar to Florida's statute: "The capital felony was committed to disrupt or hinder the unlawful exercise of any governmental function or the enforcement of laws."[66]

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63. N.M. Stat. Ann. § 31-20A-5 (Supp. 1979):

Aggravating circumstances.

The aggravating circumstances to be considered by the sentencing court or jury pursuant to the provisions of section 3 [31-20A-2 NMSA 1978] of this act are limited to the following:

A. the victim was a peace officer who was acting in the lawful discharge of an official duty when he was murdered;

B. the murder was committed with intent to kill in the commission of or attempt to commit kidnapping, criminal sexual contact of a minor or criminal sexual penetration;

C. the murder was committed with the intent to kill by the defendant while attempting to escape from a penal institution of New Mexico;

D. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee of the corrections division;

E. the capital felony was committed for hire; and

F. the capital felony was murder of a witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding, or for retaliation for a victim having testified in any criminal proceeding.

At the date of submission of this article, three bills had been introduced and were being considered by the 1981 New Mexico legislature. House Bill 102 and Senate Bill 68 would add the following aggravating circumstance:

D. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the premises of a penal institution in New Mexico. As used in this subsection "penal institution" includes facilities under the jurisdiction of the corrections and criminal rehabilitation department and county and municipal jails.

In addition, section 31-20A-5(D) would be amended as follows: "E. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee of the corrections *and criminal rehabilitation department.*"

House Bill 509 proposes the same changes as above, but would add yet another circumstance: "H. the murder was committed with intent to kill in the commission of aggravated arson."

These revisions are being proposed in reaction to the atrocities committed in the February, 1980, New Mexico Penitentiary prison riots. However, the revisions would apply only to capital felonies committed after the effective date of the bills. All are denoted as emergency measures.

64. Tex. Penal Code Ann. tit. 5, § 19.03 (Vernon 1974).

65. *See* Model Penal Code § 210.6 (Proposed Official Draft, 1962).

66. Fla. Stat. Ann. § 921.141(5)(g) (1979).

Notably missing from the New Mexico statute is the following controversial aggravating circumstance: "The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity."[67] Although this provision, as interpreted by the Florida Supreme Court, was upheld in *Proffitt v. Florida,* the United States Supreme Court found a similar provision to be invalid in Georgia.[68] The Court held that the Georgia Supreme Court had adopted a construction of the provision that was unconstitutionally vague and broad, thus violating the eighth and fourteenth amendments.[69]

The statutory aggravating circumstances in New Mexico are, on the whole, carefully drafted with an awareness of accepted and developing law in the area. A constitutional problem that may arise, however, is that there are conceivable situations in which the death penalty may be imposed under New Mexico law without the defendant ever having had the intent to kill. Courts should scrutinize the circumstances of such a case very carefully to determine whether such extreme punishment would be either constitutional or conscionable in such a situation.

The most obvious example is the accidental killing committed "in the commission of or attempt to commit any felony"[70] with the aggravating circumstance that the victim was a police officer.[71] Or, the defendant could have been hired to "rough up" or injure another, with no intent on anyone's part to kill the victim.[72] There, the unintended killing may be committed in the commission of a felony, such as aggravated assault, and thus may qualify as first degree murder. With the added aggravated circumstance that "the capital felony was committed for hire,"[73] such a defendant may receive the death penalty. The case of felony murder is particularly worrisome because of the New Mexico Supreme Court's decision in *State v. Harrison,*[74] in which the court seemed to expand in dicta the scope of felony murder: "A policeman who shoots at an escaping robber but misses and kills an innocent bystander would be considered a dependent, inter-

67. *See* Model Penal Code § 210.6(3)(h).

68. Godfrey v. Georgia, 446 U.S. 420 (1980). *See* Donohue, *Godfrey v. Georgia: Creative Federalism, the Eighth Amendment, and the Evolving Law of Death,* 30 Cath. U.L. Rev. 13 (1980).

69. In keeping with the exclusion of the term "malice aforethought" from New Mexico statutory language, a proposed amendment to include the additional aggravating circumstance, "G. the murder was committed with express malice aforethought . . . ," was not adopted. *See* note 60 *supra.*

70. *See* N.M. Stat. Ann. § 30-2-1A(2) (Supp. 1980).

71. N.M. Stat. Ann. § 31-20A-5(A) (Supp. 1980).

72. *See* Amsterdam, Death Penalty Rptr. (1980).

73. N.M. Stat. Ann. § 31-20A-5(E) (Supp. 1980).

74. 90 N.M. 439, 546 P.2d 1321 (1977).

vening force, and the robber would be criminally liable for felony murder under this test."[75] In a later decision, *Jackson v. State,*[76] the court held that felony murder is not applicable when a victim of a crime kills one of the perpetrators.

The supreme court might well remand for resentencing in these cases because "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[77] It would be unwise, however, to rely on such a statutory provision because it assumes that similar cases have arisen in which courts have not imposed the death penalty in these circumstances. In *Gregg v. Georgia,* the Court found that death was not a punishment that is disproportionate to the crime of murder, "when a life has been taken deliberately by the offender."[78] However, the Court noted specifically:

> We do not address here the question whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life—for example, when capital punishment is imposed for rape, kidnapping, or armed robbery that does not result in the death of any human being.[79]

In later cases the Court found the death penalty disproportionate to the crime, and therefore unconstitutional, where the victim was not killed.[80] At least one United States Supreme Court Justice, Justice White, has stated expicitly that the intent to kill must be present in order to impose the death penalty when the victim has died:

> [I]t violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.
>
> It is now established that a penalty constitutes cruel and unusual punishment if it is excessive in relation to the crime for which it is imposed. A punishment is disproportionate "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain

75. *Id.* at 442 n.1, 546 P.2d at 1324 n.1.

76. 92 N.M. 461, 589 P.2d 1052 (1979).

77. N.M. Stat. Ann. § 31-20A-4(C)(4) (Supp. 1980); *See* Note, *The Constitutionality of Imposing the Death Penalty for Felony Murder,* 15 Hous. L. Rev. 356 (1978), concluding that a death penalty for felony-murder is unconstitutional.

78. Gregg v. Georgia, 428 U.S. 153, 187 (1976).

79. *Id.*

80. Coker v. Georgia, 433 U.S. 584 (1977) (rape); Eberheart v. Georgia, 433 U.S. 917 (1977) (rape and kidnapping).

> and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." *Coker v. Georgia,* 433 U.S. 584, 592 (1977) (opinion of WHITE, J.). Because it has been extremely rare that the death penalty has been imposed upon those who were not found to have intended the death of the victim, the punishment of death violates both tests under the circumstances present here.[81]

Given language such as this, the New Mexico statute may not survive constitutional scrutiny where the death of the victim was not intentional. It should be noted that this situation would probably arise only under the statute[82] concerning the commission or attempt of a felony. However, the strong language of Justice White in *Lockett* could be construed to cast doubt upon the constitutionality of the statute which imposes the death penalty for murder committed "by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life." In New Mexico the phrase "intent to kill" was added to sections 31-20A-5(C) and 31-20A-5(D) by the House Judiciary Committee, indicating that the legislature may well have been aware that omission of intent to kill may cause the death penalty to be unconstitutional.[83]

In accordance with the Supreme Court's decision in *Lockett v. Ohio,*[84] section 31-20A-6 sets out mitigating circumstances that may

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81. In addition, Justice White stated:

> I recognize that approximately half of the States have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death. The ultimate judgment of the American people concerning the imposition of the death penalty upon such defendants, however, is revealed not only by the content of statutes and by the imposition of capital sentences but also by the frequency with which society is prepared actually to inflict the punishment of death. *See* Furman v. Georgia, 408 U.S. 238 (1972). It is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of the crime.
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> . . . .
>
> [T]here is a vast difference between permitting a factfinder to consider a defendant's willingness to engage in criminal conduct which poses a substantial risk of death in deciding whether to infer that he acted with a purpose to take life, and defining such conduct as an ultimate fact equivalent to possessing a purpose to kill as Ohio has done. See *United States v. United States Gypsum Co., ante,* p. 422.

Lockett v. Ohio, 438 U.S. 586, 624-25, 627 (1976) (White, J. concurring).

82. N.M. Stat. Ann. § 30-1(A)(2) (Supp. 1980).

83. There is a question whether the legislature purposely left out "intent" in the case of felony murder.

84. 438 U.S. 586 (1976).

be considered in sentencing a defendant. The list, however, is not exclusive.[85] In *Lockett* the Court stated:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . .
>
> . . . .
>
> The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors. (Emphasis in original).[86]

Almost all of the mitigating circumstances listed in the New Mexico statute are taken from the Model Penal Code, and were approved in *Gregg v. Georgia*[87] and in *Proffitt v. Florida,*[88] where "imprecision of mitigating circumstances" was an objection that was rejected by the Court.[89] The only listed circumstances that appear to be unique to New Mexico are section 31-20A-5(G), "the defendant is likely to be rehabilitated"; and section 31-20A-5(H), "the defendant cooperated with authorities."[90] Allowing these factors to be considered is consistent with the spirit and purpose behind the consideration of mitigating circumstances, in that these factors would reasonably be considered by the sentencing authority. Indeed, Texas law is similar, requiring the jury to determine whether the defendant "would commit criminal acts of violence that would constitute a continuing threat to society."[91]

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85. N.M. Stat. Ann. § 31-20A-6 (Supp. 1980) provides:
Determination of Sentence.
A. Capital sentencing deliberations shall be guided by the following considerations:
(1) whether aggravating circumstances exist as enumerated in § 6 of this act;
(2) whether mitigating circumstances exist as enumerated in § 7 of this act; and
(3) whether other mitigating circumstances exist.
B. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the jury or judge shall determine whether the defendant should be sentenced to death or life imprisonment.

86. Lockett v. Ohio, 438 U.S. 586, 603, 604 (1978); *accord,* Bell v. Ohio, 438 U.S. 637 (1978).

87. 428 U.S. 153 (1976).

88. 428 U.S. 242 (1976).

89. Gregg v. Georgia, 428 U.S. at 200-04; Proffitt v. Florida, 428 U.S. at 255-58.

90. N.M. Stat. Ann. § 31-20A-6(G)-(H) (Supp. 1980).

91. Tex. Crim. Pro. Code Ann. 37.071(b)(2) (Vernon 1980).

C. *Appellate Review*

One of the most important protections afforded in the capital sentencing procedure is automatic appellate review after judgment and sentencing.[92] The United States Supreme Court has approved the "important additional safeguard" of automatic review:

> As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases. Sec. 27-2537 (c) (Supp. 1975).[93]

Detailed review is provided for by the New Mexico statute,[94] even

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92. N.M. Stat. Ann. § 31-20A-4 (Supp. 1980).
93. Gregg v. Georgia, 428 U.S. 153, 198 (1976).
94. N.M. Stat. Ann. § 31-20A-4 (Supp. 1980):

Review of judgment and sentence.

A. The judgment of conviction and sentence of death shall be automatically reviewed by the supreme court of the state of New Mexico.

B. In addition to the other matters on appeal, the supreme court shall rule on the validity of the death sentence.

C. The death penalty shall not be imposed if:

(1) the evidence does not support the finding of a statutory aggravating circumstance;

(2) the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances;

(3) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. No error in the sentencing proceeding shall result in the reversal of the conviction of a capital felony. If the trial court is reversed on appeal because of error only in the sentencing proceeding, the supreme court shall remand solely for a new sentencing proceeding. The new sentencing proceeding ordered and mandated shall apply only to the issue of punishment.

E. In cases of remand for a new sentencing proceeding, all exhibits and a transcript of all testimony and other evidence admitted in the prior trial and sentencing proceeding shall be admissible in the new sentencing proceeding, and:

(1) if the sentencing proceeding was before a jury, a new jury shall be impaneled for the new sentencing proceeding;

(2) if the sentencing proceeding was before a judge, the original trial judge shall conduct the new sentencing proceeding; or

(3) if the sentencing proceeding was before a judge and the original trial judge is unable or unavailable to conduct a new sentencing proceeding, then another judge shall be designated to conduct the new sentencing proceeding and the parties are entitled to disqualify the new judge on the grounds set forth in Section 38-3-9 NMSA 1978 before the newly designated judge exercises any discretion.

though the recent Supreme Court cases did not establish a clear mandate for appellate review of sentencing procedure. Unless the appellate court takes upon itself the role of ensuring complete and thorough review of the sentencing process, a skeletal statutory directive may not suffice to protect the constitutional rights of the defendant. Indeed, it has been concluded by some that the capital appellate review systems of Georgia, Florida, and Texas are constitutionally inadequate and are lacking in uniformity.[95] The general statutory directives given to New Mexico courts are intended only to guide the courts in assuming the responsibility for adequate review.

In general, section 31-20A-4 follows the Georgia statute in providing that the appeals court "may not affirm a judgment of death until it has independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance."[96] The Supreme Court of New Mexico may not allow the death penalty to be imposed if any one of four enumerated factors exists:

> (1) the evidence does not support the finding of a statutory aggravating circumstance;
>
> (2) the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances;
>
> (3) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; or
>
> (4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[97]

No provision is made, however, for retaining and preserving the records of capital felony cases so that similar cases may be compared. Under Georgia law the state supreme court must obtain and preserve records of all capital cases in which the death penalty was imposed after January 1, 1970.[98] The law also provides for appointment of a special assistant to the court. The Florida and Texas statutes do not provide for case comparison in such detail, but:

> the Supreme Court of Florida, like its Georgia counterpart, considers

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95. Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97 (1979).

96. *See* Ga. Code Ann. § 27-2537(c)(2) (Repl. 1978); Godfrey v. Georgia, 446 U.S. 420 (1980).

97. N.M. Stat. Ann. § 31-20A-4 (Supp. 1980). It is interesting to note that subsection (2) was added by amendment while still in bill form by the New Mexico House Judiciary Committee. Provision (4) is identical to that of Georgia. Ga. Code Ann. § 27-2537(3) (Repl. 1978).

98. Ga. Code Ann. § 27-2537(f) (Repl. 1978).

> 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. . . .[99]

The Supreme Court of New Mexico presumably would compare case records even without a detailed statutory mandate to do so, and the language of the United States Supreme Court implicitly assumes that such comparisons will be made. Without a consistent body of appellate case law on capital sentencing in this jurisdiction, evaluation of the review process is difficult. New Mexico judges and attorneys would be well advised to keep apprised of the case law comparisons made by other states, and of the problems encountered therein.[100] It must appear in all events that the appellate court "has taken its review responsibilities seriously."[101]

The possibility that the trial court will be reversed on its sentencing decision alone is addressed in section 31-20A-4.[102] In this event the case is remanded for a new sentencing hearing, complete with transcript and exhibits, before a new jury. This portion of the statute is well drafted so as to avoid successful constitutional challenges.

D. Manner of Execution

Finally, sections 31-14-11 through -14, as amended in 1979,[103] set out the manner of execution—intravenous injection. The method of

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99. Proffitt v. Florida, 428 U.S. 242, 251 (1976) (citing State v. Dixon, 283 So. 2d 1, 10 (1973)).

100. *See* Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97 (1979), concluding that Texas suffers from a lack of capital appellate state law.

101. Gregg v. Georgia, 428 U.S. 153, 205 (1976).

102. N.M. Stat. Ann. § 31-20A-4(D)-(E) (Supp. 1980).

103. N.M. Stat. Ann. § 31-14-11 (Supp. 1980) provides:

> PUNISHMENT OF DEATH—HOW INFLICTED. The manner of inflicting punishment of death shall be by administration of a continuous, intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent.

Id. § 31-14-12 provides:

> PLACE OF EXECUTION; DIRECTION OF WARDEN. The warden of the penitentiary of New Mexico shall provide a suitable and efficient room or place enclosed from public view, within the walls of the state penitentiary, and therein provide all necessary appliances requisite for carrying into execution the death penalty. The punishment of death shall, in each individual case of death sentence pronounced in this state, be inflicted under the direction of the warden in the room or place so provided for that purpose.

Id. § 31-14-14 provides:

> STATUTORY REFERENCES TO EXECUTION. All references in the laws of the state of New Mexico relating to execution by electrocution or by lethal gas shall, insofar as such provisions are applicable, apply to, and mean, execution by means of injection, except as to capital offenses already committed.

execution previously used was lethal gas.[104] Texas and Oklahoma also employ the lethal injection method.[105] An argument may be presented that such a method is cruel and unusual because it may be painful.[106] However, this form of execution has been upheld in Texas as a valid and constitutional delegation of authority,[107] and as a method that does not constitute cruel and unusual punishment forbidden by the eighth or the fourteenth amendments.[108]

It appears that, in light of the fact that public shooting and electrocution have been held not to be unnecessarily cruel,[109] death by injection can also withstand attacks alleging cruelty. Indeed, some have concluded that lethal injection is the most humane of the present methods of execution.[110] However, to meet constitutional requirements, the statute must not be impermissibly vague in setting forth the manner of execution.[111] In New Mexico, as in Texas, "neither the *exact* substance to be injected nor the procedures surrounding the administration of the lethal dose are expressly set forth,"[112] yet similar statutes have been held not to be unconstitutionally vague.

The latest potential problem that has developed in imposing the death penalty is in the act of performing an execution by injection. The American Medical Association has resolved to resist any attempt to have a medical doctor perform the injection, or indeed even to prescribe the lethal drug, because such action would violate the Hippocratic Oath taken by physicians.[113] This policy could cause an indefinite delay in carrying out any death sentence. Although the New Mexico legislature may be asked to solve this problem, no bills were introduced in the 1981 legislative session dealing with this issue. The following procedure for performing an execution by injection is suggested. A warden or other corrections official could be trained to give injections. It is doubtful that a medical professional would ob-

104. N.M. Stat. Ann. § 31-14-11 (1978).

105. Tex. Crim. Pro. Ann. § 43.14 (Vernon 1980); Okla. Stat. Ann. tit. 21, § 701.9-13 (Supp. 1979).

106. For an interesting discussion of what constitutes "cruel and unusual" punishment in the infliction of the death penalty, *see* Comment, *Evolutions of the Death Penalty*, 28 De Paul L. Rev. 351 (1979).

107. Felder v. State, 564 S.W.2d 776 (Crim. App.), *cert. denied*, 440 U.S. 950 (1980).

108. Earvin v. State, 582 S.W.2d 794 (Crim. App.), *cert. denied*, 100 S. Ct. 238 (1979).

109. Wilkerson v. Utah, 99 U.S. 130 (1878); *In re* Kemmler, 136 U.S. 436 (1880).

110. Gardner, *Executions and Indignities–An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 Ohio St. L.J. 96, 128 (1978).

111. Note, *Capital Punishment–Texas Statutes Amended to Provide for Execution by Intravenous Injection of a Lethal Substance*, 9 St. Mary's L.J. 359 (1977).

112. *Id.* at 362.

113. However, many individual doctors have indicated their personal willingness to prescribe the drug and/or assist in performing the injection in spite of AMA resolutions.

ject merely to training the official. An initial injection of sodium thiopenthal[114] could then be given so that the inmate would lose consciousness painlessly. The lethal injection then could be given by the warden after obtaining the dosage through a court order, not a prescription.[115] This procedure would be totally painless, and might be less objectionable to the medical profession. If execution inevitably is to be used as a constitutionally permissible form of punishment, medical science should be used to achieve the most humane and dignified result.

CONCLUSION

The capital sentencing procedure in New Mexico appears to be very carefully formulated, using almost exclusively statutory language that has already withstood constitutional scrutiny by the United States Supreme Court. Courts must, however, pay close attention to the statute's application of the death penalty in each instance. A major trouble spot lies in the possibility of imposing capital punishment in a case of non-intentional killing. Some other questions remain unanswered: Are written findings of fact constitutionally required to ensure meaningful appellate review? And what is the constitutionally required standard of review of the finding of aggravating circumstances, as outweighed by mitigating circumstances? Whether or not the death penalty has any value as a deterrent,[116] if society chooses to employ such punishment, for whatever reason, close consideration must be given to the procedural fairness afforded the defendant, and care must be taken to ensure that the courts have applied in a constitutional manner a law which is, on its face, constitutionally sound.

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114. A drug used as an anesthesia in surgery.

115. In the extreme, several intravenous solutions ("I.V.'s") could be introduced at one time, creating the effect of "blanks" in a firing squad. All I.V.'s but one could be merely saline solutions; only one would contain the lethal substance.

116. *See* Bailey, *The Deterrent Effect of the Death Penalty for Murder in California*, 52 S. Cal. L. Rev. 743, 764 (1979), for an in-depth statistical study on the deterrent effect of the death penalty, concluding that there is "no evidence that the certainty of execution provides an effective deterrent to murder." The same conclusion is reached in Comment, *Deterrence and the Death Penalty: A Temporal Cross-Sectional Approach*, 70 J. Crim. L. & Criminology 235 (1979).