Land & Water Law Review

Volume 17 | Issue 2 Article 12

1982

Constitutional Law - Is the Current Test of the Constitutionality of Capital Punishment Proper - Hopkinson v. State

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CASE NOTES

CONSTITUTIONAL LAW—Is the Current Test of the Constitutionality of Capital Punishment Proper? Hopkinson v. State, 632 P.2d 79 (Wyo. 1981).

Mark Hopkinson became involved in two legal disputes in 1975. In both cases, counsel for the opposing party was Vincent Vehar. On August 6, 1977, Hopkinson directed an accomplice to place a bomb in the basement of the Vehar family home. Early the next morning this order was carried out and the resulting explosion killed Vehar, as well as his wife and son.

In July of 1978, Jeff Green, a former friend and employee of Hopkinson, disclosed to law enforcement officials Hopkinson's role in the Vehar murders and other crimes. With the aid of Green's testimony and before the trial of the Vehar murders, Hopkinson was convicted on federal charges regarding the interstate transportation of a bomb and was sentenced to the federal minimum security facility at Lompoc, California. While in prison, Hopkinson arranged by telephone for the murder of Green. Green was subsequently murdered by unknown individuals. On May 20, 1979, two days before the scheduled commencement of the grand jury investigation into the Vehar bombing, Green's body was discovered. Green had apparently been tortured prior to his death.

Hopkinson was tried by a jury and convicted on four counts of first-degree murder and two counts of conspiracy.[1] The trial judge, upon recommendation by the jury,[2] sentenced him to three consecutive terms of life imprisonment for the Vehar murders and to death for the murder of Jeff Green.[3] On appeal, the Wyoming Supreme Court affirmed the convictions and held that the death penalty was not *per se* unconstitutional.[4] Because the case was remanded for resentencing due to a technical error in the jury instructions,[5] the court did not reach the question of whether

1. Hopkinson v. State, 632 P.2d 79, 88 (Wyo. 1981).
2. WYO. STAT. § 6-4-102 (1977).
3. Hopkinson v. State, *supra* note 1, at 97.
4. *Id.* at 172, 150-52.
5. *Id.* at 172. An improper wording of the instruction on the verdict form which was submitted to the jury invalidated the imposition of the death

Wyoming's capital sentencing statutes were properly applied.

This note will survey the United States Supreme Court cases which have been instrumental in formulating the present day law on capital punishment. The salient features of Wyoming's recently enacted death penalty statutes will also be discussed. Attention will then turn to *Hopkinson*, with primary emphasis upon: 1) the adoption by the *Hopkinson* court, for purposes of the Wyoming Constitution, of the U.S. Supreme Court's three-pronged test of the constitutionality of capital punishment, and 2) the guidelines set out by the court which are designed to facilitate future application of Wyoming's death penalty statutes. Finally, the constitutional test itself will be the subject of focus. The author will argue that the current test is improper and propose a new one in its place.

MOLDING THE TEST OF CONSTITUTIONALITY

Channelling the Sentencer's Discretion:

Prior to 1972, the Supreme Court of the United States had never addressed the question of whether the death penalty constituted cruel and unusual punishment. When this delicate issue was finally confronted in *Furman v. Georgia*, the Court was constrained to a one-paragraph per curiam opinion followed by five separate concurring and four dissenting opinions.[6] Despite the sharp division among the justices, the per curiam holding in *Furman* marks one of the cornerstones in the evolving test of the constitutionality of capital punishment statutes. The Court held that "as applied" under the Georgia statute, capital punishment constituted cruel and unusual punishment.[7] More importantly, however, it did not rule that capital punishment was *per se* unconstitutional.

sentence. The jury was instructed that the death penalty could be properly imposed if they found, *inter alia*, that "*at the time of murder:* . . . The Defendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person." *Id.* at 167, 170 (emphasis in original).

6. 408 U.S. 238 (1972).
7. *Id.* at 239-40.

Furman stands for the proposition that the penalty of death may not be imposed under arbitrary and capricious sentencing procedures.[8] The sentencing authority's discretion must be directed so as to avoid imposition of the death penalty in a purely "hit or miss" fashion. As stated by Justice Stewart, "[the death sentence under review in *Furman* is] cruel and unusual in the same way that being struck by lightning is cruel and unusual."[9] Thus, out of *Furman*, arose a concept that an individual's constitutional rights are infringed upon when he is punished more severely than others whose crimes are equally reprehensible.

After *Furman*, the legislatures in thirty-five states, including Wyoming, scrambled to revise their capital punishment statutes.[10] In *Gregg v. Georgia* and its four companion cases, the Court was called upon to pass on the facial validity and application of five of these newly adopted sentencing procedures.[11] Again the Court fractured, with the centrist plurality of Stewart, Powell and Stevens dictating the result in each case.[12]

These three justices reaffirmed the notion that the death penalty is not unconstitutional under all circumstances.[13] They subjected the five statutes under review to a three-prong test which would permit infliction of the death penalty only if it was 1) consistent with contemporary values, 2) in accord with the "dignity of man"[14] and 3) imposed under sentencing procedures which provided specific objective standards to guide the jury's decisionmaking process.[15] The first two prongs determine whether capital punishment for the crime of murder is *per se* unconstitutional. The third prong is a product of *Furman*.[16]

8. Godfrey v. Georgia, 446 U.S. 420, 427 (1980).
9. Furman v. Georgia, *supra* note 6, at 309.
10. Hopkinson v. State, *supra* note 1, at 150.
11. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).
12. 428 U.S. at 158, 244, 264, 282, 327.
13. Gregg v. Georgia, *supra* note 11, at 169.
14. *Id.* at 173.
15. *Id.* at 189.
16. *Id.*

After reviewing what it termed "objective indicia that reflect the public attitude toward a given sanction,"[17] the *Gregg* Court held that the death penalty is acceptable to contemporary society.[18] It relied heavily on the fact that 35 states had enacted new death penalty statutes in the four years since *Furman*.[19] Juries were also considered a valid barometer of contemporary values.[20] The Court, however, discounted the fact that in recent decades juries had been increasingly reluctant to impose the death sentence.[21] It concluded this trend might well be a reflection of the "humane feeling" that this most irrevocable of sanctions should be reserved for a small number of cases.[22]

The dignity of man concept requires that the penalty not be excessive. The burden of proof on the issue of excessiveness, however, rests with the defendant who must overcome the presumption in favor of the sanction's validity.[23] Appellant Gregg did not sustain this "heavy burden" of proving that death was excessive punishment and therefore the Court concluded capital punishment was in accord with the dignity of man concept.[24] The inquiry into excessiveness had two aspects: First, whether the punishment involved the unnecessary and wanton infliction of pain, and second, whether the punishment was grossly disproportionate to the severity of the crime.[25]

Under the *Gregg* analysis, a penalty does not result in the unnecessary and wanton infliction of pain merely because a less severe sanction is sufficient to serve the ends of penology. To prevail, the defendant must show[26] that the sanction imposed is so totally without penological justification that it results in the gratuitous infliction of suffering.[27] The State of Georgia argued that capital punishment was

17. *Id.* at 173.
18. *Id.* at 179-82.
19. *Id.* at 180-81.
20. *Id.* at 181.
21. *Id.* at 182.
22. *Id.*
23. *Id.* at 175.
24. *Id.* at 187.
25. *Id.* at 173.
26. *Id.* at 175.
27. *Id.* at 183.

justified because it served two purposes: retribution and deterrence.[28] The Court ruled that although retribution was no longer a dominant objective of the criminal law, it was not a forbidden one.[29] Then, recognizing there was no convincing empirical evidence supporting or refuting the view that the death penalty is a greater deterrent to murder than lesser sanctions, the Court went on to hold that the resolution of this issue should rest with the legislature.[30]

With regard to the question of whether death is a disproportionate sanction, the centrist plurality summarily concluded that it is an extreme sanction suitable to the most extreme crimes.[31] Hence the Supreme Court affirmed the *Furman* proposition and held for the first time that the death penalty is not a *per se* cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution.[32]

The dividing line between the death penalty statutes of Georgia, Florida and Texas which were upheld in *Gregg* and its companion cases and those of North Carolina and Louisiana which were struck down was in the third prong of the Court's analysis. The question was whether the sentencing authority received adequate guidance with respect to various factors surrounding the crime and the defendant that the state found relevant to the sentencing decision.[33] This safeguard is intended to minimize the risk that the death sentence would be rendered in an arbitrary and capricious fashion.[34]

The legislatures of North Carolina and Louisiana incorrectly responded to *Furman* by stripping the sentencing authority of *all* discretion to choose between life imprisonment and capital punishment.[35] Once the defendant was

28. *Id.*
29. *Id.*
30. *Id.* at 185-86.
31. *Id.* at 187.
32. *Id.*
33. *Id.* at 192.
34. *Id.* at 199.
35. Woodson v. North Carolina, *supra* note 11, at 301; Roberts v. Louisiana, *supra* note 11, at 335.

convicted of murder, he automatically received the death sentence.[36] The Court reasoned that, ". . . in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and rec- of the individual offender and the circumstances of the particular offense."[37] As such, the idea is not the sentencer's discretion should be eliminated, but only that it be properly channelled.

As applied, the sentencing procedures adopted by Georgia, Florida, and Texas received the Supreme Court's approval.[38] Florida and Georgia took virtually the same approach.[39] Both sentencing systems provide for a bifurcated proceeding[40] at which the sentencing authority is apprised of information relevant to various statutorily enunciated aggravating and mitigating factors which are to be weighed in the determination of whether to impose death or life imprisonment.[41] These factors are designed to control the sentencing authority's discretion and thereby assure that death sentences are not imposed out of passion, prejudice,

36. 428 U.S. at 286, 329.

37. Woodson v. North Carolnia, *supra* note 11, at 304.

38. Gregg v. Georgia, *supra* note 11; Proffitt v. Florida, *supra* note 11; Jurek v. Texas, *supra* note 11. The Texas capital punishment statute required the jury to answer three questions: (1) whether the conduct of the defendant causing the death was committed deliberately with the reasonable expectation that death would result; (2) whether it is probable that the defendant would commit further criminal acts constituting a threat to society; and (3) if raised by the evidence, whether the defendant's conduct was an unreasonable response to the provocation if any by the deceased. If all are answered affirmatively the death penalty will be imposed. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981).

39. The *Proffitt* Court noted that the main difference between the two sentencing systems is that in Florida the judge determines the sentence, whereas the jury renders the sentence in Georgia. Proffitt v. Florida, *supra* note 11, at 252. The Florida statute also differs from Georgia's in that it does not require the Supreme Court to conduct any specific form of review. *Id.* at 251. The Court ruled, however, that since the trial judge was required to justify the imposition of capital punishment with written findings, and since the Florida Supreme Court, like its Georgia counterpart, compares the penalty imposed in the case under review to those in similar cases, an adequate determination as to whether or not the punishment in a given case is disproprotionate can be made. *Id.*

40. In a bifurcated proceeding the question of sentence is not considered until after the verdict of guilty is returned. In the sentencing or penalty phase, the rules of evidence are relaxed. Evidence which would normally be excluded as irrelevant to the question of guilt is admitted if it bears upon the issue of punishment, such as, for example, a previous criminal record of the accused. Gregg v. Georgia, *supra* note 11, at 190-91.

41. GA. CODE ANN. § 27-2534.1(b) (1978); FLA. STAT. ANN. § 921.141 (West Supp. 1981).

whim or mistake.[42] An additional precaution inherent in both systems is the provision for automatic review of all death sentences by the state supreme court. This requirement is intended to ensure: 1) that each death sentence is proportional to the sanction imposed for similar crimes;[43] 2) that the evidence supports the findings of any statutory aggravating circumstances; and 3) that the sentence was not imposed under the influence of passion or prejudice.[44]

Tailoring the Statute—Godfrey:

The recent case of *Godfrey v. Georgia* illustrates that merely because a death penalty statute is facially valid does not mean it can be loosely applied.[45] In *Godfrey* the same statute which was upheld on its face in *Gregg* was before the Court. Unlike *Gregg*, however, the sentence was reversed in *Godfrey* because the Georgia Supreme Court adopted a broad and vague construction of one of the aggravating circumstances.[46]

The Georgia statute provides that the defendant may be sentenced to death if it is proven beyond a reasonable doubt that the particular crime "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[47] The problem in *Godfrey* was that the jury was not given adequate instruction as to what these terms meant.[48] The Court held that standing alone, the words "outrageously or wantonly vile, horrible and inhuman," could characterize almost every murder.[49] Since the narrowing construction applied in *Gregg* and subsequent cases[50] was abandoned, the jury's discretion in *Godfrey* could not be channelled by clear and objective standards. In its reversal of Mr. Godfrey's death sentence, the Court concluded that capital

42. Gregg v. Georgia, *supra* note 11, at 194-95.
43. *Id.* at 203; Proffitt v. Florida, *supra* note 11, at 251.
44. GA. CODE ANN. § 27-2537 (1978); Proffitt v. Florida, *supra* note 11, at 253, 258-59.
45. Godfrey v. Georgia, *supra* note 8.
46. *Id.* at 432-33.
47. GA. CODE ANN. § 27-2534.1(b)(7) (1978).
48. Godfrey v. Georgia, *supra* note 8, at 429.
49. *Id.* at 428-29.
50. *Id.* at 430-32.

sentencing procedures must provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not."[51]

Consideration of All Mitigating Circumstances—Lockett and Eddings:

The law of capital punishment was further refined in *Lockett v. Ohio*[52] and *Eddings v. Oklahoma.*[53] *Lockett* struck down a statute which limited the range of mitigating circumstances to be considered by the sentencing authority.[54] *Eddings* extended this princpile by holding that just as the statute may not limit mitigating factors, the sentencer could not limit relevant mitigating factors by refusing to consider them.[55] The ramifications of *Eddings* as a practical matter appear to be limited, because although it requires the consideration of all relevant mitigating circumstances, it does not appear to preclude the sentencer from giving any such circumstances a zero weight in the balancing process.

WYOMING'S CAPITAL PUNISHMENT SYSTEM

The Wyoming death penalty statute enacted following *Furman* imposed a mandatory death penalty upon conviction for first degree murder.[56] It was therefore of the type held invalid by the U.S. Supreme Court in *Woodson* and *Roberts.*[57] Predictably, this statute was invalidated by the Wyoming Supreme Court in *Kennedy v. State.*[58] Thereafter, the legislature promptly enacted the sentencing system[59] which was utilized in *Hopkinson.*

Wyoming's present capital sentencing statutes are modeled after those of Georgia and Florida. All defendants

51. *Id.* at 427-28 (quoting Furman v. Georgia, *supra* note 6, at 313 (White, J., concurring)).
52. 438 U.S. 586 (1978).
53. 50 U.S.L.W. 4161 (U.S. Jan. 19, 1982).
54. Lockett v. Ohio, *supra* note 52, at 608.
55. Eddings v. Oklahoma, *supra* note 53, at 4163-64.
56. WYO. STAT. § 6-54 (1957) (repealed 1977).
57. Woodson v. North Carolina, *supra* note 11; Roberts v. Louisiana, *supra* note 11.
58. 559 P.2d 1014 (Wyo. 1977).
59. WYO. STAT. §§ 6-4-101 to -103 (1977).

convicted of first degree murder must receive either capital punishment or life imprisonment.[60] A hearing, apart from the trial, is conducted in which the judge or jury is apprised of all evidence relevant to the sentencing decision.[61] The exclusionary rules of evidence do not apply to this sentencing hearing, except that the defendant is allowed to rebut any hearsay statements, and he must have been given prior notice of all evidence tending to establish any aggravating factors.[62] At the conclusion of the hearing the jury is instructed on the existence of aggravating and mitigating circumstances as well as other appropriate matters.[63]

Death will not be imposed unless at least one aggravating factor is found to exist beyond a reasonable doubt, and

60. *Id.* § 6-4-101(b).
61. *Id.* § 6-4-102(a)-(c).
62. *Id.* § 6-4-102(c).
63. *Id.* § 6-4-102(d). Subsections (h) and (j) of Section 6-4-102 of the Wyoming Statutes provide for mitigating and aggravating circumstances as follows:

(h) Aggravating circumstances are limited to the following:
- (i) The murder was committed by a person under sentence of imprisonment;
- (ii) The defendant was previously convicted of another murder in the first degree or a felony involving the use or therat of violence to the person;
- (iii) The defendant knowingly created a great risk of death to two (2) or more persons;
- (iv) The murder was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, sexual assault, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb;
- (v) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
- (vi) The murder was committed for pecuniary gain;
- (vii) The murder was especially heinous, atrocious or cruel;
- (viii) The murder of a judicial officer, former judicial officer, county attorney, or former county attorney, during or because of the exercise of his official duty.

(j) Mitigating circumstances shall be the following:
- (i) The defendant has no significant history of prior criminal activity;
- (ii) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
- (iii) The victim was a participant in the defendant's conduct or consented to the act;
- (iv) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;
- (v) The defendant acted under extreme duress or under the substantial domination of another person;
- (vi) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
- (vii) The age of the defendant at the time of the crime.

this factor or factors outweigh all mitigating circumstances.[64] A jury verdict in favor of capital punishment must be unanimous and is binding on the judge.[65] The jury must designate in writing all aggravating circumstances which it found.[66] Presumably this allows the appellate court to conduct a meaningful review. Life imprisonment will automatically be imposed if the jury cannot agree upon a verdict within a reasonable time.[67]

Every death sentence is automatically reviewed by the Wyoming Supreme Court.[68] The court, *inter alia*, must consider: 1) whether the death sentence was "imposed under the influence of passion, prejudice or any other arbitrary factor; 2) whether the finding of an aggravating circumstance and lack of sufficient mitigating circumstances is supported by the evidence; and 3) whether the death sentence in the case under review is disproportionate to the sanction imposed in similar cases.[69]

THE WYOMING SUPREME COURT'S ANALYSIS IN HOPKINSON

Aside from remanding the case for a new sentencing trial because of misworded jury instructions,[70] the actual holding of the *Hopkinson* court with respect to capital punishment was much more limited than initially appears. The court held that the death penalty does not *per se* violate either the United States or Wyoming Constitutions.[71] Consequently, Wyoming's death penalty statutes are facially valid. The court did not, however, reach the question, except in dictum, as to whether Wyoming's death sentencing system comports with *Furman* and *Gregg* which mandate proper channelling of the sentencing authority's discretion.[72]

64. *Id.* § 6-4-102(d)(i)(A),(B), -102(e).
65. *Id.* § 6-4-102(e) & (f). *See also* Hopkinson v. State, *supra* note 1, at 186 (Rose, C.J., dissenting in part and concurring in part).
66. WYO. STAT. § 6-4-102(e) (1977).
67. *Id.*
68. *Id.* § 6-4-103(a).
69. *Id.* § 6-4-103(d)(i)-(iii).
70. Hopkinson v. State, *supra* note 1, at 169-72; *see also supra* note 5.
71. Hopknison v. State, *supra* note 1, at 152.
72. *Id.* at 153.

In light of *Furman* and *Gregg*, the *Hopkinson* court was constrained to find that capital punishment does not under all circumstances violate the Eighth Amendment of the U.S. Constitution. However, the court was free to hold that the Wyoming Constitution[73] is more exacting than its federal counterpart. This it chose not to do.[74] Instead, the court incorporated the analysis of the centrist plurality in *Gregg* and ruled that "a rigorous examination of a sentence of death, conducted in accord with *Furman* and *Gregg* will satisfy both the U.S. and the Wyoming constitutional requirements."[75] In sum, the death penalty in Wyoming is not *per se* unconstitutional, because it is consistent with contemporary values and in accordance with "the dignity of man" concept.[76]

The issue of whether the death sentencing statutes were properly *applied* at the trial level in *Hopkinson* was not decided. Nevertheless, the court did construe various provisions of the statutes in order to facilitate their application in the future. As demonstrated by *Godfrey* and *Lockett*, the particular construction and application given these statutory provisions is critical. Therefore, the guidelines provided by the Wyoming Supreme Court in *Hopkinson* should be given as much credence at the trial level as are the actual statutes.

Of particular concern was Section 6-4-102(h)(vii) of the Wyoming Statutes which lists as an aggravating circumstance a murder which is "especially heinous, atrocious or cruel."[77] Almost any murder would seem to fall within this classification. Thus, contrary to the teachings of *Furman* and *Godfrey*, an open-ended definition of "especially heinous, atrocious or cruel" would seem to give the judge or jury free rein to impose the death penalty. Cognizant of this problem, the court narrowly construed these words. The

73. WYO. CONST. art. I, § 14. "All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted." *Id.*
74. Hopkinson v. State, *supra* note 1, at 152.
75. *Id.*
76. *Id.* at 151-52.
77. *Id.* at 153-54; WYO. STAT. § 6-4-102(h)(vii) (1977).

construction was broken into a definition of "especially heinous" and "especially atrocious or cruel."[78] The court concluded that a murder is "especially heinous" if "the consciencelessness of the defendant is not only an outrage but also a dangerous and unrestrainable threat to society."[79] Elaborating further, the court noted that the term was applicable in cases where the defendant "not only may, but probably will, kill again."[80]

Difficult problems of proof will have to be overcome by any prosecutor attempting to establish that a given murder is "especially heinous." The statutory procedures require that all aggravating circumstances must be proven beyond a reasonable doubt.[81] The burden of showing beyond a reasonable doubt that a given defendant probably will kill again seems insurmountable.

As to the term "especially atrocious or cruel", the court embraced the definition set out by the Supreme Court of Florida in *State v. Dixon.*[82] There the phrase was construed to refer only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim."[83] This definition is safe because it received the Supreme Court's approval in *Proffitt v. Florida.*[84]

By dividing the words "especially heinous, atrocious or cruel" into two terms the court effectively created two aggravating circumstances. The sentencing procedures require the jury to indicate in writing any existing aggravating circumstances which they find.[85] As previously noted, this provides a basis for meaningful review of the death sentence by the supreme court. It is therefore, advisable for trial courts to have the jury separately indicate which, if either, of these circumstances they found.

78. Hopkinson v. State, *supra* note 1, at 153-54.
79. *Id.*
80. *Id.* at 154.
81. WYO. STAT. § 6-4-102(e) (1977).
82. 283 So. 2d 1, 9 (Fla. 1973).
83. Hopkinson v. State, *supra* note 1, at 154 (quoting Proffitt v. Florida, *supra* note 11, at 255 (quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1979)).
84. Proffitt v. Florida, *supra* note 11, at 255-56.
85. WYO. STAT. § 6-4-102(e) (1977).

The *Hopkinson* court also clarified the meaning of Section 6-4-102(j) of the Wyoming Statutes which states "Mitigating circumstances shall be the following [seven specified instances]."[86] Hopkinson contended this denigrated *Lockett*, because it prohibited the sentencer from considering any relevant but unlisted mitigating factors.[87] Rejecting this argument, the court determined the statute allows all relevant mitigating factors to be deliberated.[88]

Another *Hopkinson* guideline is that the jury should not be given the option of finding aggravating circumstances for which no evidence has been offered.[89] At Hopkinson's trial, the jury was instructed as to the existence of the fourth aggravating circumstance as follows:

> The murder was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, sexual assault, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.[90]

The court found that it was error to so instruct the jury, because the prosecution presented no evidence tending to show any of the crimes listed in this aggravating factor.[91]

The final caveat is that "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death."[92] Hopkinson's death penalty was remanded because the jury was instructed that an aggravating circumstance would exist if, *"at the time of the murders:* . . . The Defendant was previously convicted of another murder in the first degree or a felony involving the use or

86. *Id.* § 6-4-102(j).
87. Hopkinson v. State, *supra* note 1, at 156-57.
88. *Id.* at 157. In future cases, trial courts should also comply with Eddings v. Oklahoma, *supra* note 53, at 4163-64, which requires the sentencer to at least consider all relevant mitigating circumstances. See also discussion on *Eddings*, *supra* notes in text accompanying notes 53 & 55.
89. Hopkinson v. State, *supra* note 1, at 166. Presumably this principle would apply to any situation where reasonable minds could not disagree that a given mitigating circumstance did not exist.
90. *Id.* at 166-67.
91. *Id.*
92. Irving v. State, 361 So. 2d 1360, 1363 (Miss. 1978).

threat of violence to the person."[93] Even though the Green murder was subsequent to the Vehar murders, the jury found this aggravating circumstance applicable with respect to Green.[94] Curiously, the court reasoned that if the language "at the time of the murders" had been excluded from the instruction there would have been no error.[95] Citing the Florida case of *Lucas v. State*,[96] the court concluded that the words "previously convicted of another murder" could properly refer to convictions entered contemporaneously in the same prosecution in which the jury has recommended the death penalty.[97]

Since prior to his trial, Hopkinson had not been convicted of murder or a felony involving the threat of violence to a person, it seems clear that the jury was thinking of the Vehar murders when it decided that this aggravating circumstance existed. It is therefore probable that if the instructions had been properly worded the jury would have reached the same result. Nevertheless, the court found the misworded instruction to be reversible error.[98] The moral is that the trial court must exercise extreme caution to avoid all error in the sentencing phase of the trial.

THE TEST OF WHETHER CAPITAL PUNISHMENT IS PER SE UNCONSTITUTIONAL—MEANINGFUL OR EMPTY RHETORIC?

When called upon to determine the constitutionality of capital punishment, the U.S. Supreme Court had the formidable task of grappling with one of the most controversial legal and moral issues of our time. The Court has fractured on virtually every such case it has decided. As a result, only three justices have formulated most of the law with respect to the validity of the death penalty under the Eighth and Fourteenth Amendments of the U.S. Constitution.

93. Hopkinson v. State, *supra* note 1, at 167 (emphasis in original).
94. *Id.*
95. *Id.* at 171.
96. 376 So. 2d 1149, 1152-53 (Fla. 1979).
97. Hopkinson v. State, *supra* note 1, at 171.
98. *Id.* at 170-72.

The job of each state's supreme court to pass on the acceptability of the death penalty in light of its respective constitution should be no less demanding than that of its federal counterpart. The rationale of the U.S. Supreme Court should be carefully examined before it is subscribed to on the state level. Further, the state courts should consider whether the drafters intended for state constitutional provisions to be more exacting than corresponding federal provisions, especially when they vary in form and wording.[99]

Assessing the U.S. Supreme Court's Test of Per Se Unconstitutionality:

As with many areas of constitutional law, the selection of a particular test to be applied by the Court in a specific context is often determinative of the uotcome of a case. This is also true in regard to the determination of whether the death penalty constitutes cruel and unusual punishment. The centrist plurality in *Gregg* starts from the premise that *any* punishment selected by a legislature should be presumed valid.[100] Accordingly, to overcome the presumption, the defendant must sustain the "heavy burden"[101] of providing either that his sentence of death is not in accord with contemporary values, or that capital punishment does not comport with the basic concept of "the dignity of man."[102]

Under the analysis of the centrist plurality, any effort to show that capital punishment is inconsistent with contemporary values is futile. The fact that the majority of legislatures have authorized capital punishment not only serves to shift the burden of proof to the defendant, but also helps to convince these justices that our society finds this sanction acceptable.[103] Legislative judgment, however, was said not to be the only objective indicia of contemporary

99. For an excellent discussion and analysis on the difference between the United States and Wyoming Constitutions with respect to the death penalty, *see* Hopkinson v. State, *supra* note 1, at 199-215 (Rose, C.J., dissenting in part and concurring in part).
100. Gregg v. Georgia, *supra* note 11, at 175.
101. *Id.*
102. *Id.* at 173-75.
103. *Id.* at 179-81.

values.[104] Juries were also said to be a reliable index of societal mores.[105] The plurality concluded that the "relative infrequency" of jury-imposed death sentences as opposed to life imprisonment does not reflect society's rejection of capital punishment *per se*.[106] Instead, it was thought this might reflect the notion that capital punishment should be reserved for the most extreme cases, and that the actions of juries in many states since *Furman* are compatible with the legislative judgments.[107] The flaw in this reasoning is that only those veniremen whose views *are* consistent with the legislature are allowed to sit on the jury.[108] Any prospective juror who believes the death penalty should not be imposed in any situation will be successfully challenged for cause on the ground that he cannot enforce the law of the state.[109] Consequently, the judgment of the legislature effectively nullifies the reliability of the jury as an objective index of contemporary values.

The defendant will find the second prong of the test, involving the dignity of man concept, an equally frustrating obstacle. A penalty does not comport with the fundamental notion of the dignity of man if it is excessive.[110] Much to the defendant's distress, however, is that even if he proves life imprisonment will satisfy the ends of penology, his life will not be spared.[111] He must show that death is "so totally without penological justification that it results in the gratuitous infliction of suffering."[112]

Retribution and deterrence were suggested by the *Gregg* plurality to be two principal purposes served by capital punishment.[113] The centrist plurality offered the following

104. *Id.* at 181.
105. *Id.*
106. *Id.* at 182.
107. *Id.*
108. In *Hopkinson*, two prospective jurors were successfully challenged for cause because, contrary to the judgment of the legislature, they believed the death penalty should not be imposed under any circumstances. Hopkinson v. State, *supra* note 1, at 157-60.
109. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968); Hopkinson v. State, *supra* note 1, at 157-60; WYO. STAT. § 7-11-105 (1977).
110. Hopkinson v. State, *supra* note 1, at 151.
111. Gregg v. Georgia, *supra* note 11, at 182-83.
112. *Id.* at 183.
113. *Id.* Without any elaboration, the centrist plurality stated in a footnote: "Another purpose that has been discussed is the incapacitation of danger-

explanation of the retributive justification for the death penalty:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve" then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.[114]

The problem with this analysis is that there was absolutely no evidence presented in *Gregg* that the imposition of life imprisonment instead of the death penalty promotes anarchy, self-help, vigilante justice or lynch law.[115]

The other principal purpose said to be served by capital punishment is deterrence.[116] Justices Stewart, Powell and Stevens[117] ruled that they assumed that capital punishment was a significant deterrent to many murders even though no empirical evidence either supported or refuted this view.[118] They further concluded that legislatures were the appropriate body to resolve the issue of whether capital punishment has any value as a deterrent.[119]

In sum, with respect to the inquiry as to whether capital punishment is in accord with contemporary values, the defendant finds himself playing a game of "heads you win, tails I lose." The enactment of the death penalty statutes by the defendant's own state, along with 34 others, not only shifts to the defendant the burden of showing the sanction is clearly inconsistent with societal values,[120] but

ous criminals and the consequent prevention of crimes that they may otherwise commit in the future." *Id.* at 183 n.28.

114. Gregg v. Georgia, *supra* note 11, at 183 (citing Furman v. Georgia, *supra* note 6, at 308 (Stewart, J., concurring)).
115. Gregg v. Georgia, *supra* note 11, at 238 (Marshall, J., dissenting).
116. *Id.* at 183.
117. The centrist plurality.
118. Gregg v. Georgia, *supra* note 11, at 185-86.
119. *Id.* at 186.
120. *Id.* at 179-81.

also serves to conclusively settle the question. He faces an equally hopeless situation in his attempt to show that capital punishment is excessive. First, there seems to be no way to refute the unsubstantiated view that capital punishment must be imposed in order to prevent the "seeds of anarchy" from being sown.[121] Second, since the proposition that the death penalty is an effective deterrent cannot be proven or disproven, he will necessarily lose on this issue as well.[122]

Proposed New Test

The *Hopkinson* court adequately followed the mandates of *Furman* and its progeny in arriving at the conclusion that capital punishment is equally permissible under the Wyoming Constitution. Consequently, the court cannot be criticized. The analysis applied by the U.S. Supreme Court to federal constitutional questions should be accorded considerable weight when identical issues are being reviewed under the state constitution. In striking out on its own, a state court runs the risk of setting uncertain and sometimes undesirable precedent.[123] With respect to capital punishment, however, it appears as though both courts have overlooked the constitutional test applied to similar issues. It is the author's opinion that the right to life is fundamental under the *substantive* aspect of the due process clause, and as such, any legislative attempt to infringe upon that right should be subjected to strict judicial scrutiny under both the Wyoming and U.S. Constitutions.[124]

Currently, under the Fourteenth Amendment of the U.S. Constitution, the right to life is only protected by *procedural* due process. Under this aspect of due process, an individual facing a death sentence is guaranteed a *fair procedure* to determine whether the defendant is in fact

121. *See id.* at 183.
122. *See id.* at 185-86. As previously discussed, the analysis of "excessiveness" under the Eighth Amendment also involves an inquiry into whether the given sanction is disproportionate in relation to the crime for which it is imposed. *Id* at 187. The *Gregg* Court summarily concluded that death is not a disproportionate penalty for the most severe crime. *Id.* Thus, defendant's problem of having an insurmountable burden of proof would be equally applicable with respect to disproportionality.
123. Comment, *Wyoming's Equal Protection Clause Mandates Fiscal Neutrality in School Funding,* 16 LAND & WATER L. REV. 691, 698-704 (1981).
124. WYO. CONST. art. I, § 6; U.S. CONST. amend. XIV, § 1.

guilty of a crime punishable by death. Procedural due process does not, however, provide inquiry into the state's authority to terminate a person's life. Hence, under the current state of the law, the defendant has no legal cause to complain if he has received a fair proceeding (and the mandates of *Furman* and its progeny are satisfied).

Substantive due process, as opposed to procedural due process, focuses on the substance of the legislation itself. Under substantive due process analysis, the U.S. Supreme Court strictly scrutinizes statutes which impinge upon, *inter alia*, the fundamental rights of association,[125] privacy,[126] and freedom of worship.[127]

While the freedoms of worship, association and privacy are basic constitutional rights, they certainly do not warrant greater protection than the right to life. As stated by Justice Brennan, "An executed person has indeed 'lost the right to have rights.' "[128] When viewed against this backdrop it seems clear that any legislative effort to terminate the fundamental right to life should be subjected to *at least* the same degree of judicial scrutiny that is imposed upon other statutes which threaten other fundamental rights.

Under heightened judicial scrutiny, state-imposed death would be allowed only where it was necessary to achieve a compelling state purpose for which there were no less drastic alternatives.[129] The state's duty to administer a criminal justice system is clearly a compelling state purpose. Moreover, the crime of murder is deserving of a very severe penalty. The state should bear the burden of proving, how-

125. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).
126. Roe v. Wade, 410 U.S. 113, 152-64 (1973).
127. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). In *Cantwell*, the U.S. Supreme Court reviewed a statute which conditioned the right to solicit money for religious purposes upon approval of a state official who was required to determine whether the applicant's cause was in fact religious. *Id.* at 301-02. The Court concluded that the statute burdened the fundamental right to freely exercise religion and accordingly invoked heightened scrutiny. *Id.* at 303. The state had a permissible interest in protecting the public from fraudulent solicitation, and this statute apparently served that end. *Id.* at 306-07. However, the statute was struck down, because it was not narrowly drawn and less onerous alternatives were available. *Id.*
128. Furman v. Georgia, *supra* note 6, at 290 (Brennan, J., concurring).
129. *See* Cantwell v. Connecticut, *supra* note 127, at 303-07.

ever, that no less severe penalty than state-imposed death will adequately serve the ends of penology.[130]

Under the test proposed here, there would no longer be an issue of whether capital punishment is per se unconstitutional. Further, it would not be necessary to determine whether the sentencing body's discretion had been properly channelled so as to avoid the capricious and arbitrary imposition of capital punishment. The only question that need be answered is whether the state fulfilled its burden of proving that it has no alternative but to terminate the defendant's fundamental right to life in order to fulfill the ends of penology.

The author would be less than candid if he contended that this test would not drastically reduce the number of death sentences being upheld. It seems, however, that in order for our Constitution to have true meaning, it must be basically consistent with respect to fundamental rights.

CONCLUSION

In *Hopkinson v. State*, the Wyoming Supreme Court found that the death penalty was not unconstitutional under all circumstances. In so doing, it held that Wyoming's Constitution is no more exacting with respect to capital punishment than its federal counterpart. The court did not decide whether the trial court properly applied Wyoming's capital sentencing statutes so as to adequately channel the jury's

130. If strict scrutiny under substantive due process is applied to capital punishment statutes, it does not necessarily follow that statutes depriving an individual of liberty or property (such as statutes imposing jail sentences for crimes or authorizing eminent domain) will have to be accorded the same treatment. Currently, under due process analysis an individual is only guaranteed a fair proceeding before he can be deprived of life, liberty and property. The author submits that the fundamental right of life is the only one of these three rights that need be subjected to heightened scrutiny under substantive due process principles. In *Gregg v. Georgia*, the Court held that death sentences should be examined more rigorously than other criminal sanctions. Gregg v. Georgia, *supra* note 11, at 204-05. The Court clearly drew this distinction because capital punishment was qualitatively different from even a sentence of life imprisonment. In his concurring opinion in *Furman*, Justice Stewart aptly stated, "[capital punishment] is unique . . . in its absolute renunciation of all that is embodied in our concept of humanity." Furman v. Georgia, *supra* note 6 at 306 (Stewart, J., concurring). This same reasoning justifies singling out death sentencing statutes, as opposed to statutes involving deprivation of liberty and property issues, for heightened judicial review under substantive due process analysis.

discretion and avoid the arbitrary and capricious imposition of the death penalty. Several guidelines were set out in dictum, however, for the purpose of facilitating the proper application of these statutes in the future.

The Wyoming and U.S. Supreme Courts presume the facial validity of death penalty statutes. Hence the defendant must sustain the burden of proving that the legislative judgment in favor of capital punishment is clearly wrong. Since the right to continue living is unquestionably a fundamental right of all persons, the judicial deference given to statutes which allow the termination of this right in any instance is drastically inconsistent with the treatment given statutes which infringe upon judicially defined fundamental rights under substantive due process analysis. The holding in any given case involving constitutional issues is often dictated by the particular test applied. Consequently, *conflicting* result oriented tests should not be used to assess the propriety of any state actions which infringe upon fundamental constitutional rights.

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