CRIMINAL PROCEDURE—DEATH PENALTY—A CONVICTED CRIMINAL MUST BE ADEQUATELY NOTIFIED THAT THE DEATH PENALTY MAY BE IMPOSED AS A SENTENCE—*Lankford v. Idaho*, 111 S. Ct. 1723 (1991).

A convicted defendant was not always entitled to many of the same due process rights[1] at the sentencing stage that the constitution guaranteed at trial.[2] Indeed, a defendant was afforded only limited due process protection at the sentencing stage because there were fewer constitutional interests to protect.[3] The Supreme Court's policy of attempting to rehabilitate the con-

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[1] The due process owed a convicted criminal derives from the Fourteenth Amendment of the United States Constitution, which provides that "[n]o State shall . . . deprive any person of life . . . without due process of law." U.S. CONST. amend. XIV, § 1. Although not exhaustive, due process rights afforded at sentencing include "the right to challenge evidence, the right to counsel, and the right to exclude unreliable information." Robert E. Hanlon, Note, *Hard Time Lightly Given: The Standard of Persuasion at Sentencing*, 54 BROOK. L. REV. 465, 466 (1988). *See also* Gardner v. Florida, 430 U.S. 349, 360 (1977) ("the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision"); United States v. Tucker, 404 U.S. 443, 448 (1972) (it is a denial of due process for a judge to consider prior convictions that were later held to be unconstitutional when sentencing defendant); Mempa v. Rhay, 389 U.S. 128, 137 (1967) (counsel must be afforded at the sentencing stage of a criminal proceeding). The Federal Rules of Criminal Procedure list the specific procedural rights afforded a convicted defendant at sentencing. *See* FED. R. CRIM. P. 32.

[2] *See* Williams v. New York, 337 U.S. 241, 251 (1949). *See also infra* notes 30-40 and accompanying text. *See generally* John C. Coffee, Jr., *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 MICH. L. REV. 1361, 1441 (1975) (procedural reform will soon accelerate in sentencing due process); Fred Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from* Mempa v. Rhay, 47 TEX. L. REV. 1, 6 (1968) (the legislature has failed in its duty to impose sentencing procedures); James C. Weissman, *Sentencing Due Process: Evolving Constitutional Principles*, 18 WAKE FOREST L. REV. 523, 523 (1982) ("Until the past decade's scrutiny of capital punishment, sentencing due process received minimal attention. No systematic analysis of sentencing due process exists despite significant contributions from scholars in this area."); Christopher K. Tahbaz, Note, *Fairness to the End: The Right to Confront Adverse Witnesses in Capital Sentencing Proceedings*, 89 COLUM. L. REV. 1345, 1351 (1989) ("a capital offender had no constitutional due process right to confront and cross-examine adverse witnesses during a sentencing proceeding"); Note, *Right of Criminal Offenders to Challenge Reports Used in Determining Sentence*, 49 COLUM. L. REV. 567 (1949); James E. Burns, Recent Decision, 13 U. DET. L.J. 87 (1950); Vernon G. Foster, Note, 23 S. CAL. L. REV. 105 (1949); Aaron Katz, Recent Case, 23 TEMP. L.Q. 232 (1950).

[3] *See* Margaret C. Jenkins, Comment, *Intent After* Enmund v. Florida: *Not Just Another Aggravating Circumstance*, 65 B.U. L. Rev. 809, 819 (1985) ("From a constitutional prospective, the defendant is entitled to fewer due process protections at sentencing because generally there are fewer constitutionally protected interests at that stage. Due process protections are required in adversarial proceedings to protect the criminal defendants' fundamental interests.").

victed defendant with an individually tailored sentence also required the trial judge to exercise broad discretion and obtain all available information so an appropriate sentence could be imposed.[4] The Court, however, recognizing the importance of the sentencing process and the impact it had on defendant's liberty interests, began extending certain guaranteed trial rights to the sentencing process.[5] The Court realized that expanding due process protections at sentencing provided necessary safeguards and ensured fairness.[6] More significantly, the Court enhanced the complex of rights afforded a convicted defendant in a capital sentence hearing due to the death penalty's finality and severity.[7] Most recently, in *Lankford v. Idaho*,[8] the Court furthered the process due by mandating that a convicted defendant in a capital sentencing hearing be adequately notified that the death penalty may be imposed as a sentence.[9]

In *Lankford*, the Idaho prosecutor charged Bryan Lankford and his brother Mark with two counts of murder.[10] The brothers allegedly beat to death Robert and Cheryl Bravence, two travellers who were staying at a campsite.[11] At Bryan Lankford's arraignment, the trial judge stated that Bryan Lankford could be

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4 *See Williams*, 337 U.S. at 247 ("The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."). *But see Gardner*, 430 U.S. at 360 ("Indeed, the extinction of all possibility of rehabilitation is one of the aspects of the death sentence that makes it different in kind from any other sentence a State may legitimately impose.").

5 *See* Hanlon, *supra* note 1, at 465 ("The sentencing process has as much of an impact on the liberty interests of the accused as the determination of guilt or innocence, and consequently the judiciary has recognized that due process protections must be extended to sentencing to provide appropriate safeguards and to ensure fairness.").

6 *Id.*

7 *See* Jenkins, *supra* note 3, at 820 ("[T]he Supreme Court has recognized that due to the special nature of the death sentence, certain protections . . . should be provided in capital cases."); *Gardner*, 430 U.S. at 358 ("the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause").

8 111 S. Ct. 1723 (1991).

9 *Id.*

10 State v. Lankford, 747 P.2d 710, 713 (Idaho 1987).

11 *Id.* at 713. The state alleged and later proved that petitioner and his brother Mark entered the Bravences' campsite intending to steal their Volkswagen van. *Id.* Bryan Lankford first entered the campsite with a shotgun and began conversing with the Bravences. *Id.* When Cheryl left the campsite, Mark Lankford entered and ordered Robert Bravence to kneel on the ground. *Id.* Mark then took a nightstick and beat Robert to death. *Id.* When Cheryl came back to the site, Mark ordered her to kneel and beat her to death in the same manner. *Id.* The Bravences were battered "with such force that their skulls had to be reconstructed by an anthropologist before the cause of death could be scientifically determined." *Id.* After killing

sentenced to death or life imprisonment if found guilty on either charge.[12] Subsequently, Bryan Lankford was tried and found guilty by a jury on both murder counts.[13]

Prior to the sentencing hearing, at petitioner's request, the trial judge ordered the prosecutor to give written notice to both Lankford and the court as to whether the state would seek the death penalty.[14] One week later, the state explicitly responded

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the Bravences, the brothers placed the bodies in the van, drove into the woods, and buried the Bravences under debris and branches. *Id.*

[12] *Id.* at 719.

[13] *Id.* at 713. Bryan Lankford's counsel attempted to negotiate a lesser sentence by proving to the prosecutor that petitioner was not responsible for the actual killings. *Lankford*, 111 S. Ct. at 1725. Thus, Lankford took two lie-detector tests that, although not conclusive, convinced the prosecutor that Lankford's brother Mark was primarily responsible for killing both Robert and Cheryl Bravence. *Id.* (citation omitted). In fact, the prosecutor and the petitioner agreed that Bryan would plead guilty to murder in exchange for the trial judge's promise to impose "an indeterminate sentence with a 10-year minimum." *Id.* The agreement failed, however, because "the trial judge refused to make that commitment." *Id.* At trial, petitioner Lankford argued that he was "an accessory after the fact." *Lankford*, 747 P.2d at 714. Also, Lankford testified that he was dominated by his brother Mark, who was dangerous and violent, and that he thought his brother simply intended to knock the Bravences unconscious. *Id.* Moreover, Lankford testified that he did not point the shotgun at the Bravences and after they were murdered, he was hysterical and stayed in the van while Mark buried the Bravences in the woods. *Id.*

[14] *Lankford*, 747 P.2d at 719. On September 6, 1984, the trial judge entered the following presentencing order:

> IT IS HEREBY ORDERED AS FOLLOWS:
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> (1) Sentencing is set for October 12, 1984 at 9 a.m.;
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> (2) That on or before September 24, 1984 the State shall notify the Court and the Defendant in writing as to whether or not the State will be seeking and recommending that the death penalty be imposed herein. Such notification shall be filed in the same manner as if it were a formal pleading;
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> (3) That in the event the State shall seek and recommend to the Court that the death penalty be imposed herein the following shall be filed with the Court on or before September 24, 1984:
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> (a) The State shall formally file with the Court and serve upon counsel for the Defendant a statement listing the aggravating circumstances enumerated in Idaho Code § 19-2515(f) that it intends to rely upon and prove at the sentencing hearing to justify the imposition of the death penalty;
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> (b) The Defendant shall specify in a concise manner all mitigating factors which he intends to rely upon at the time of the sentencing hearing.

Lankford, 111 S. Ct. at 1726 n.5 (citation omitted). The court also granted Lankford's pro se motion for a new lawyer but denied the new attorney's request for a trial transcript. *Id.* at 1726. The trial judge explained that Lankford's new attorney had the necessary information to prepare adequately for the sentencing hearing based upon "the preliminary hearings, the trial tapes, and the option of consulting with former defense counsel." *Id.* at 1726 n.6 (citation omitted).

that it would not pursue the death penalty sentence.[15] Moreover, from the time the state responded in the negative until the sentencing hearing, there was no mention in any of the proceedings of sentencing Bryan Lankford to death.[16]

At petitioner's sentencing hearing, neither side addressed the death penalty.[17] In fact, the prosecutor advised against the death penalty, recommending an indeterminate sentence with a minimum of approximately ten to twenty years.[18] Lankford's counsel made no reference to the death penalty sentence but argued for concurrent, indeterminate life sentences.[19] The trial judge, however, did not believe petitioner's testimony,[20] and stated that the severity of the crime warranted a harsher penalty than that suggested by either side.[21] Consequently, the trial judge sentenced petitioner Bryan Lankford to death.[22]

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15 *Id.* at 1726. The prosecutor responded that "[i]n relation to . . . Bryan Stuart Lankford, the State . . . *will not* be recommending the death penalty as to either count of first degree murder for which the defendant was earlier convicted." *Id.* (citation omitted) (emphasis in original).

16 *Id.* at 1726-27.

17 *Id.* at 1727.

18 *Id.* The prosecutor did not believe that Bryan was responsible for the actual killings. *Id.* at 1727 n.9. In fact, the prosecutor told the judge at the sentencing hearing that "Bryan has traditionally been a pretty good person, except when he's been around Mark." *Id.* (citation omitted).

19 *Id.* at 1727. In defense, Lankford's counsel brought in witnesses who testified that Bryan Lankford was a nonviolent person, and focused upon the evidence that suggested Bryan's brother Mark was the one who actually killed the Bravences. *Id.* Defense counsel attempted to portray a further aspect of petitioner's character at a hearing on a motion for continuance. Appellant's Brief at 9-10, Lankford v. Idaho, 111 S. Ct. 1723 (1991) (No. 88-7247). In that hearing, as an offer of proof, counsel for the defendant informed the court that Mrs. Maurer (defendant's mother) would testify "that Mark is violent, Mark is mean, Mark is a threat to society, Mark has threatened to kill her on occasion, Mark has threatened her sons on occasion, that she is afraid of Mark, that everyone in her family is afraid of Mark, that Bryan is afraid of Mark." *Id.* at 10. Furthermore, petitioner's mother would testify that Bryan Lankford "was a peaceful person, . . . that Bryan is not a dangerous person, that Bryan has never acted violently in all the time that she has known him, that Bryan has, in fact, been very supportive of her and has been what every mother wants for a son." *Id.*

20 *Lankford*, 111 S. Ct. at 1727. The trial judge unequivocally stated that he did not believe Bryan Lankford because "[h]e is a liar, and he is an admitted liar. He's a deceitful individual." *Id.* at 1731 n.18 (citation omitted).

21 *Id.* at 1727. In light of the amount of time Lankford already served in jail, the court pointed out that if the state's recommendation was imposed, Lankford would be eligible for parole within ten years. *Id.* at 1727-28 n.10. Indeed, the trial judge posited that the state's recommendation, in essence, would require petitioner to serve less than five years for each of the two murders. *Id.* at 1728 n.10.

22 *Id.* at 1728. The judge reasoned that petitioner and his brother were equally culpable. *Id.* The trial court stated that although it was unclear how many times either Bryan or Mark struck the victims, the evidence clearly showed that the

Lankford's counsel sought post-conviction relief claiming that the trial court violated the Fourteenth Amendment Due Process Clause by failing to sufficiently notify petitioner that the death penalty was still viable even though the state explicitly stated it would not seek such a sentence.[23] In dismissing Lankford's motion, the trial court held that petitioner was adequately notified by the Idaho Death Penalty statute[24] and added that compliance with the notice requirement was unaffected by the prosecutor's negative response.[25]

On direct appeal, the Idaho Supreme Court affirmed Bryan Lankford's conviction and sentence, reasoning that, in addition to the statutory notice, petitioner was adequately notified of the possibility of the death penalty sentence at his arraignment.[26] The United States Supreme Court granted certiorari to determine whether petitioner's constitutional right to adequate notice was violated.[27] In reversing the Idaho Supreme Court, Justice Stevens, writing for the majority,[28] stated that the Fourteenth

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Lankfords committed direct acts of violence against the Bravences that either one could have prevented. *Id.* at 1728 n.11.

[23] *Id.*

[24] IDAHO CODE § 19-2515 (1987). *See infra* notes 110 & 112 for the relevant text of the statute.

[25] *Lankford*, 111 S. Ct. at 1728.

[26] State v. Lankford, 747 P.2d 710, 719 (Idaho 1987). In a dissenting opinion, however, Justice Bistline criticized the majority's affirmance of the sentence based upon the U.S. Supreme Court decisions in *Tison v. Arizona*, 481 U.S. 137 (1987) (reckless disregard for human life coupled with major participation in the felony is sufficient to permit imposition of capital punishment) and *Enmund v. Florida*, 458 U.S. 782 (1982) (criminal culpability in determining whether to impose the death sentence must be limited to the criminal's level of participation). *Lankford*, 747 P.2d at 728 & n.3 (Bistline, J., concurring in part and dissenting in part). Justice Bistline further criticized the proportionality review undertaken by the majority. *Id.* at 727 (Bistline, J., concurring in part and dissenting in part). The justice noted that the evidence concerning petitioner's intent and the number of blows petitioner struck was equivocal. *Id.* For other proportionality reviews by the Idaho Supreme Court, see State v. Windsor, 716 P.2d 1182, 1192-93 (Idaho 1985) (death penalty sentence was held to be excessive and disproportionate where it was never contended that defendant actually killed the victim); State v. Scroggins, 716 P.2d 1152, 1159 (Idaho 1985) (death sentence was held to be excessive and disproportionate where defendant did not commit the murder but aided and abetted in the commission of a felony murder); State v. Fetterly, 710 P.2d 1202, 1209 (Idaho 1985) (death penalty for convicted murderer was not excessive or disproportionate); State v. Beam, 710 P.2d 526, 534 (Idaho 1985) (death penalty was appropriate for a defendant convicted of murder and rape).

[27] *Lankford*, 111 S. Ct. at 1725.

[28] *Id.* at 1724. Justice Stevens delivered the opinion of the Court and was joined by Justices Marshall, Blackmun, O'Connor and Kennedy. *Id.* Justice Scalia filed a dissenting opinion and was joined by Chief Justice Rehnquist, Justice White, and Justice Souter. *Id.* at 1733.

Amendment Due Process Clause was violated because Lankford and his attorney were not adequately notified that the death penalty was still a possible sentence.[29]

The Court, however, has not always afforded a convicted defendant due process protection at criminal sentencing hearings.[30] In the landmark decision of *Williams v. New York*,[31] Justice Black, writing for the majority, held that because a judge had broad discretion in sentencing a convicted offender,[32] the judge was not prohibited from considering evidence obtained extrajudicially.[33] Defendant Williams argued that his due process rights were violated because the sentencing judge, in exercising judicial discretion, relied upon evidence[34] from persons whom defendant did

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29 *Id.*

30 *See supra* note 2 and accompanying text.

31 337 U.S. 241 (1949).

32 *Id.* at 246. Defendant was convicted of first degree murder. *Id.* at 242. Under New York law, the trial court instructed the jury that if it found defendant guilty and did not recommend life imprisonment, the court was required to sentence the defendant to death; however, if the jury found defendant guilty and recommended life imprisonment, the court could either follow the jury recommendation or impose the death sentence. *Id.* at 243. Although the jury recommended a life sentence, the trial judge exercised his discretion under the statute and sentenced defendant to death. *Id.* at 244. Justice Black explained that to encourage the intelligent exercise of this discretion, the New York legislature encouraged trial judges to consider all information pertaining to the convicted criminal. *Id.* at 245. The statute allowed a judge to consider this information even if gathered from outside sources which the convicted criminal did not have an opportunity to cross-examine or confront. *Id.*

33 *Id.* at 252. Indeed, Justice Black rejected a rigid constitutional barrier precluding a trial judge from exercising broad discretion. *Id.* at 251. The Court reasoned that "[w]e cannot say that the due process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence." *Id.* at 252. *See* Roberts v. United States, 445 U.S. 552, 555-56 (1980) (the Court allowed the sentencing judge to consider the criminal's failure to cooperate with the government); United States v. Grayson, 438 U.S. 41, 53 (1978) (the Court permitted the judge, at sentencing, to take into account the criminal's behavior during the trial). *Cf.* United States v. Tucker, 404 U.S. 443, 447-48 (1972) (the Court reasoned that a sentence based in part upon prior unconstitutional convictions violated due process of law); North Carolina v. Pearce, 395 U.S. 711, 725 (1969) (the Court reasoned that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial").

34 *Williams*, 337 U.S. at 244. For instance, the judge relied upon a pre-sentence investigation report that "revealed many material facts concerning [defendant's] background which though relevant to the question of punishment could not properly have been brought to the attention of the jury in its consideration of the question of guilt." *Id.* Moreover, the judge referred to a probation report that stated defendant possessed "a morbid sexuality" and categorized him as a "menace to society." *Id.*

not have an opportunity to examine.[35] Justice Black maintained, however, that the trial judge had discretion to use out-of-court information[36] even though defendant did not have an opportunity to review it or to confront the witnesses who supplied the information.[37] The Court stated that although a judge must exclude evidence at trial that may prejudice a defendant,[38] a judge must have access to all available information to properly sentence the criminal.[39] Therefore, the Court concluded that extraneous evidence was an important element in determining the criminal's sentence, and as such, the evidence could be reviewed without violating the Fourteenth Amendment Due Process Clause.[40]

The Court distinguished *Williams*, however, in *Specht v. Patterson*,[41] by recognizing that a sentencing proceeding that requires a new finding of fact must afford a convicted criminal due process protection.[42] Defendant Specht was convicted of indecent liber-

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35 *Id.* at 245.

36 *Id.* at 243. The trial judge obtained out-of-court information pursuant to N.Y. CRIM. CODE LAW § 482, which provided in pertinent part:

> Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric [sic] or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant.

Id. at 242-43 (quoting N.Y. CRIM. CODE § 482 (McKinney 1945) (repealed)).

37 *Williams*, 337 U.S. at 245.

38 *Id.* at 246-47. *See* Colvin A. Peterson, Jr., Recent Decision, 48 MICH. L. REV. 523, 524 (1950) ("Rules of evidence are carefully designed to exclude the accused's past from the jury because of the undue prejudice, unfair surprise and collateral issues involved.").

39 *Williams*, 337 U.S. at 247. The Court pointed out that every offense does not merit the same punishment without regard to the person's past life and conduct. *Id.* Also, the Court emphatically stated: "[t]he due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." *Id.* at 251.

40 *Id.* at 252. The *Williams* decision, however, signified a departure from Townsend v. Burke, 334 U.S. 736 (1948), another seminal case decided one year earlier. Weissman, *supra* note 2, at 525. In *Townsend*, defendant pleaded guilty to charges of burglary and robbery. *Townsend*, 334 U.S. at 737. At his sentencing hearing, the defendant was not represented by an attorney. *Id.* The sentencing judge relied upon incorrect information to sentence the criminal. *Id.* at 739-40. The Supreme Court held that the prisoner was "sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." *Id.* at 741. For a discussion on the seemingly conflicting decisions of *Williams* and *Townsend*, *see* Coffee, *supra* note 2, at 1420 (describing the two evolving lines of authority in *Williams* and *Townsend* as "schizophrenic").

41 386 U.S. 605 (1967).

42 *Id.* at 608-10 (citing Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)).

ties under a state statute that carried a maximum ten year sentence.[43] The trial court, however, sentenced defendant under the Sex Offenders Act,[44] which required a new finding of fact and imposed an indeterminate term, without affording defendant notice and a full hearing.[45] The Supreme Court reversed, reasoning that a criminal could not be convicted under one statute and sentenced under another without receiving a full judicial hearing prior to imposing a magnified sentence.[46] Indeed, the Court clearly stated that a defendant in such a situation was entitled to the full panoply of pertinent safeguards that the Due Process Clause guarantees.[47]

In continuing to expand convicted defendants' rights, the Court, in *Mempa v. Rhay*,[48] unequivocally stated that due process protections extended to any criminal proceeding that substantially affected the rights of an accused.[49] Justice Marshall, writing

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[43] *Id.* at 607 (citing COLO. REV. STAT. ANN. § 40-2-32 (West 1963)).

[44] *Id.* (citing COLO. REV. STAT. ANN. §§ 39-19-1 to -19-10 (West 1963)). The Court stated that a convicted offender may be punished under § 2 of the Sex Offenders Act if the trial court "is of the opinion that any . . . person [convicted of specified sex offenses (i.e., indecent liberties)], if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." *Id.* (quoting COLO. REV. STAT. ANN. § 39-19-1 (West 1963)).

[45] *Id.* at 608. Once a trial judge determined a convicted sex offender constituted "a threat of bodily harm to members of the public," and thus was within the ambit of § 1 of the Sex Offenders Act, the judge could sentence a defendant for an indeterminate term ranging from a day to life based upon the conditions outlined in § 2 of the statute. *Id.* at 607-08 (quoting COL. REV. STAT. ANN. § 39-19-1 (West 1963)). Section 2 required the following:

> (2) A complete psychiatric examination shall have been made of him by the psychiatrists of the Colorado psychopathic hospital or by psychiatrists designated by the district court; and
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> (3) A complete written report thereof submitted to the district court. Such report shall contain all facts and findings, together with recommendations as to whether or not the person is treatable under the provisions of this article; whether or not the person should be committed to the Colorado state hospital or to the state home and training schools as mentally ill or mentally deficient. Such report shall also contain the psychiatrist's opinion as to whether or not the person could be adequately supervised on probation.

COL. REV. STAT. ANN. § 39-19-2 (West 1963).

[46] *Specht*, 386 U.S. at 609-10 (quoting *Gerchman*, 355 F.2d at 312).

[47] *Id.* The Court expostulated that "[d]ue process . . . requires that [defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Id.* at 610.

[48] 389 U.S. 128 (1967).

[49] *Id.* at 134. The Court in *Mempa* relied upon the landmark decision of Gideon v. Wainwright, 372 U.S. 335 (1963), which held that an indigent defendant has a fundamental right to counsel in felony cases. *Gideon*, 372 U.S. at 344. Prior to *Gideon*, however, the right of counsel at criminal proceedings was a nebulous con-

for the Court, declared that a defendant was entitled to representation at each phase of a criminal proceeding.[50] Moreover, the Justice stressed that sentencing was a "critical stage" at which defendant's rights can be substantially affected.[51] Consequently, the Court stated that it was improper for the trial court to impose a ten year sentence after revoking defendant's parole without affording him an attorney.[52] Justice Marshall reasoned that an at-

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cept that depended on special circumstances. *See, e.g.*, Hamilton v. Alabama, 368 U.S. 52 (1961); Moore v. Michigan, 355 U.S. 155 (1957); Townsend v. Burke, 334 U.S. 736 (1948).

In *Hamilton*, the Court held that the absence of counsel at arraignment denied defendant due process of law. *Hamilton*, 368 U.S. at 55. The Court stated that the arraignment "is a critical stage in a criminal proceeding." *Id.* at 54. "What happens there may affect the whole trial. Available defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." *Id.* The Court in *Moore* stated that it was a denial of due process when defendant did not intelligently and knowingly waive his right to counsel before entering a guilty plea. *Moore*, 355 U.S. at 164-65. The Court declared that "[t]he right to counsel is not a right confined to representation during the trial on the merits." *Id.* at 160. In *Townsend*, the Court posited that the absence of counsel at sentencing, where defendant pled guilty, deprived defendant of due process. *Townsend*, 334 U.S. at 740-41. The Court further opined that "counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner." *Id.* at 741.

Relying upon the aforementioned cases, the *Mempa* Court declared that although the Court in *Gideon* did not enunciate the specific criminal proceedings where counsel must be present, *Townsend*, *Moore*, and *Hamilton* "clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa*, 389 U.S. at 134. More specifically, the Court in *Mempa* pointed out that *Townsend* "illustrates the critical nature of sentencing in a criminal case and might well be considered to support by itself a holding that the right to counsel applies at sentencing." *Id.* at 134. For a further discussion of the right to counsel at the sentencing stage, see Sanford H. Kadish, *The Advocate and the Expert - Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 806-12 (1961).

50 *Mempa*, 389 U.S. at 134. *See supra* notes 40, 49 (discussion of Townsend v. Burke, 334 U.S. 736 (1948)); Recent Case, 9 WM. & MARY L. REV. 883, 885 (1968) ("denial of counsel worked a denial of due process to the defendant. Examples of such circumstances were not limited to a trial on the merits but included such collateral proceedings as pleading during arraignment, a hearing to determine the degree of crime to which a guilty plea had been entered and sentencing after a plea of guilty"). For a discussion of *Mempa's* impact on probation and parole revocations, see April Kestell, Comment, *Discretionary Revocation of Probation and Parole: The Import of* Mempa v. Rhay *to the Present System*, 4 U.S.F. L. Rev. 160 (1969).

51 *Mempa*, 389 U.S. at 134.

52 *Id.* at 137. Petitioner Mempa was convicted for "joyriding." *Id.* at 130. Petitioner pleaded guilty and the judge sentenced him to two years probation on the condition that he first serve thirty days in jail. *Id.* About four months after the sentencing, the prosecutor sought to have petitioner's probation revoked because he was involved in a burglary. *Id.* at 130-31.

torney should have been appointed to assist the convicted offender in gathering facts, presenting proof of mitigating circumstances, and to generally aid defendant in the presentation of his case.[53] Most importantly, however, the Court emphasized that an attorney should have been present at sentencing to ensure that the court imposed the proper sentence and that defendant exercised all available legal rights.[54]

Five years after *Mempa*, the Supreme Court, in *Morrissey v. Brewer*,[55] expanded due process protection beyond criminal proceedings by prescribing minimum procedural safeguards at parole revocation hearings.[56] At the request of Morrissey's parole officer, petitioner's parole was revoked and he was incarcerated.[57] Petitioner claimed that he was unjustly imprisoned because he was denied a hearing prior to his parole revocation.[58] Although the Court did not vest the full panoply of protections afforded a defendant in a criminal proceeding,[59] the Court held that the parolee had a liberty interest that included many integral values of unqualified liberty.[60] Thus, even though the parolee was convicted and sentenced properly, the Court asserted that due process entitled petitioner to a preliminary hearing and an opportunity to be heard prior to the revocation of his parole.[61]

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53 *Id.* at 135.

54 *Id.* at 135-36. The Court pointed out that under Washington law, certain rights may be waived if not exercised. *Id.* For instance, in the case at bar, state law precluded appeal where a defendant pleaded guilty and received probation, unless probation was later revoked and a sentence was imposed. *Id.*

55 408 U.S. 471 (1972).

56 *Id.* at 488-90. *See* Mark S. Drucker, Case Comment, Morrissey v. Brewer: *A Parolee's Bill of Rights?*, 8 NEW ENG. L. REV. 86 (1972).

57 *Morrissey*, 408 U.S. at 472-73. Originally, petitioner was convicted in 1967 for issuing false checks and was sentenced to serve no more than seven years in prison. *Id.* at 472. In 1968, petitioner was paroled. *Id.* Only seven months later, he was arrested for allegedly violating the terms of his parole by purchasing a car under another name, driving it without permission, giving fictitious statements to the police regarding his address and insurance carrier after a minor accident, acquiring credit under another name, and failing to notify his parole officer of his residence. *Id.* at 472-73.

58 *Id.* at 473.

59 *Id.* at 480.

60 *Id.* at 482.

61 *Id.* at 485-89. The Court prescribed the required minimum procedural safeguards at parole revocation hearings:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional

In the same year that *Morrissey* was decided, the Supreme Court, in the seminal case of *Furman v. Georgia*,[62] examined the constitutionality of state death penalty statutes.[63] In *Furman*, the Court consolidated three separate death penalty cases and considered whether the death penalty statutes constituted cruel and unusual punishment violative of the Eighth and Fourteenth Amendments.[64] In a *per curiam* opinion that solicited nine separate opinions, the Court held that the particular state death penalty statutes involved were unconstitutional.[65] Indeed, the Court recognized the unique and severe nature of the death penalty sentence and stated that the punishment of death differed from other punishments in kind, but not degree.[66]

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parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489. *See* Recent Case, 86 HARV. L. REV. 95, 97 (1972) (discussion of the impact due process requirements will have on probation hearings).

62 408 U.S. 238 (1972).

63 *Id.* at 239. *Id.* at 240. Justices Douglas, Brennan, Stewart, White, and Marshall filed separate concurring opinions. *Id.* at 240, 257, 306, 310, 314 (respectively). Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist filed dissenting opinions. *Id.* at 375, 405, 414, 465 (respectively). For a series of cases upholding the validity of state death penalty statutes, see Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Profitt v. Florida, 428 U.S. 242 (1976). *But see* Roberts v. Louisiana, 428 U.S. 325 (1976) (mandatory death penalty statute, even if applicable to narrow class of capital murder offenses, is unconstitutional); Woodson v. North Carolina, 428 U.S. 280 (1976) (mandatory death sentence is violative of the Eighth and Fourteenth Amendments).

64 *Furman*, 408 U.S. at 239.

65 *Id.* For a discussion on *Furman's* impact, see Victor L. Streib, *Executions Under the Post-*Furman *Capital Punishment Statutes: The Halting Progression From "Let's Do It" To "Hey, There Ain't No Point In Pulling So Tight,"* 15 RUTGERS L.J. 443 (1984); Carol S. Vance, *The Death Penalty After* Furman, 48 NOTRE DAME L. REV. 850 (1973); Malcolm E. Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia*, 25 STAN. L. REV. 62 (1972).

66 *Furman*, 408 U.S. at 287 (Brennan, J., concurring). Justice Brennan articulated that "[d]eath is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering." *Id.* Justice Stewart declared that "[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. . . . And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." *Id.* at 306 (Stewart, J., concurring). Justice Marshall stated that "[d]eath is irrevocable. . . . Death, of course, makes rehabilitation impossible. . . . [D]eath has always been viewed as the ultimate sanction." *Id.* at 346 (Marshall, J., concurring). Additionally, Justices Douglas, Brennan, Stewart, White and Marshall declared that capital sentencing procedures must not be imposed in an arbitrary and discriminatory manner. *Id.* at 256-57 (Douglas, J., concurring); *id.* at 295 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 314 (White, J., concurring); *id.* at 364-66 (Marshall, J., concurring). *See also* Woodson v. North Carolina, 428 U.S. 280, 305 (1976). In *Woodson*, the Court, in a plurality opinion, held that a statute

Building on *Furman*, the Court, in *Gardner v. Florida*,[67] reevaluated capital sentencing procedures.[68] Defendant Gardner was convicted of first degree murder for killing his wife with a blunt instrument.[69] In sentencing defendant to death, the trial judge relied upon information contained in a presentence report[70] that was not disclosed or made available to defendant's counsel.[71] The Court, in a plurality opinion, emphasized two prior constitutional developments: the recognition in *Furman* that the death sentence was severe and unique, and the requirements of *Mempa* that sentencing procedures must satisfy due process.[72] Therefore, the Court declared that because defendant was denied an opportunity to refute or mitigate the undisclosed information relied upon by the trial judge, the imposed death sentence denied defendant due process of law.[73]

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automatically imposing the death penalty for felony murder violated the Eighth and Fourteenth Amendments. *Id.* The Court reasoned that the death penalty is "qualitatively different" from an imprisonment term, regardless of how long. *Id.* Also, the Court stated that because the finality of death differs from that of imprisonment, reliability is critical in the determination that the death sentence is the proper punishment in a given case. *Id. See also* Charles L. Black, Jr., *Due Process for Death*: Jurek v. Texas *and Companion Cases*, 26 CATH. U. L. REV. 1 (1976) (discussion of the Supreme Court's handling of capital sentencing cases); Michael G. Kohn, Note, *The Death Penalty as Presently Administered Under Discretionary Sentencing Statutes is Cruel and Unusual*, 4 SETON HALL L. REV. 244 (1972).

67 430 U.S. 349 (1977).

68 *Id.* at 357.

69 *Id.* at 351. In mitigation of the offense, defendant claimed that he was on a "drinking spree" all day and had no recollection of the murder. *Id.* at 352.

70 *Id.* at 353. The presentence report was prepared by the Florida Parole and Probation Commission. *Id.* Although the actual information relied upon by the judge in sentencing defendant to death was not disclosed, the judge's "ultimate finding was that the felony was 'especially heinous, atrocious or cruel; and that such aggravating circumstances outweigh[] the mitigating circumstance, to-wit: none.' " *Id.* (citation omitted). Justice Stevens, writing for the Court, emphasized the fact that the record on appeal did not reveal what was contained in the presentence report. *Id.* at 354. Justice Stevens, quoted the dissenting justices from the Florida Supreme Court: "[w]e have no means of determining on review what role such 'confidential' information played in the trial judge's sentence, and thus I would overturn [defendant's] death sentence on the basis of this fundamental error alone." *Id.* (quoting Gardner v. State, 313 So.2d 675, 678 (Fla. 1975)).

71 *Id.* at 351.

72 *Id.* at 357-58. *See* Presnell v. Georgia, 439 U.S. 14, 16 (1978) ("fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial"). *See also* Witherspoon v. Illinois, 391 U.S. 510, 523 (1968) ("Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution.").

73 *Gardner*, 430 U.S. at 362. *See generally* John W. Hazard, Jr., Note, *Pre-Sentence Reports in Capital Sentencing Procedures*, 5 OHIO N.U. L. REV. 175 (1978); Risa Lieberwitz, Case Comment, *Expanding Disclosure of Presentence Investigation Reports*, 29 U.

Against the backdrop of evolving due process protection afforded a convicted offender, and in light of the heightened procedure required in capital cases, the Supreme Court, in *Lankford v. Idaho*,[74] entitled convicted defendants to another due process right at capital sentencing hearings.[75] Specifically, Justice Stevens asserted that a capital sentencing proceeding was fair only when the court provided a convicted murderer with adequate notice that the death sentence might be imposed.[76]

Justice Stevens, although recognizing the trial judge's power to impose a sentence different from the one recommended by the prosecutor, rejected the state's argument that the plain language of the statute and the trial judge's statements at petitioner's arraignment satisfied the notice requirement of the Due Process Clause.[77] The Justice reasoned that because there was no mention of the death sentence between the time the state indicated it would not pursue a capital sentence and the end of the sentencing hearing when the judge made his comments, petitioner's constitutional right of notice was destroyed.[78]

Justice Stevens also maintained that the presentencing order,[79] which required the prosecution to state its intention and submit the evidence that it intended to rely upon, narrowed the triable issues.[80] The Court asserted that the purpose of the presentencing order was to save judges and lawyers time, as there was no need to address matters that were not disputed.[81] Thus,

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FLA. L. REV. 769 (1977); John A. Mouton III, Note, *Disclosure of Presentence Reports in Capital Cases*, 38 LA. L. REV. 226 (1977); Case Comment, *Defendant's Right to Disclosure of Presentence Investigation Reports in Capital Cases*, 1977 Wash. U. L.Q. 728 (1977).

74 Lankford v. Idaho, 111 S. Ct. 1723 (1991).

75 *Id.* at 1733.

76 *Id.*

77 *Id.* at 1729. Justice Stevens stated: "the issue is one of adequate procedure rather than of substantive power." *Id.*

78 *Id.* The Court observed that "the character of the sentencing proceeding did not provide the petitioner with any indication that the trial judge contemplated death as a possible sentence. . . . Indeed, it is apparent that the parties assumed that nothing more [than imprisonment] was at stake." *Id.* The majority dismissed the dissent's reliance on an April 5, 1984 hearing, at which the trial judge indicated that regardless of the prosecutor's recommendation, the death sentence still remained a viable option. *Id.* at 1727 n.7. The court noted that the hearing took place before the state entered its negative response. *Id.* The majority also disposed of the dissent's argument that the issuing of a presentencing order indicated that the death penalty was still a viable choice; the Court suggested that such orders are common. *Id.*

79 *See supra* note 14 (presentence order).

80 *Lankford*, 111 S. Ct. at 1729.

81 *Id.* Also, the Justice declared that presentencing orders would serve no purpose if counsel could not rely upon them. *Id.*

the majority asserted that petitioner's counsel justifiably assumed arguments against the death penalty were unnecessary because the presentence order expressly provided that the state would not pursue a capital sentence.[82] While conceding that the presentencing order should not limit counsel's preparation, the Court stressed that fair notice was the bedrock of a constitutionally fair hearing.[83]

Justice Stevens provided examples of arguments that petitioner's counsel could have made had she known that the trial judge was still contemplating sentencing Bryan Lankford to death.[84] The Justice suggested that Lankford's attorney could have voiced the concern—raised by the dissenting justice in the Idaho Supreme Court—that Bryan Lankford's state of mind was mischaracterized and that the facts surrounding the case were disputed.[85] The majority also reasoned that Lankford's counsel

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82 *Id.*

83 *Id.* The Justice stated that democracy inherently respects the fundamental rights of an individual, regardless of whether the individual is convicted of a heinous crime. *Id.* at 1730 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring)). The Justice added that a democracy must act fairly by notifying a person in danger of loss as to the case against him. *Id.* (quoting *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 171-72 (Frankfurter J., concurring)).

84 *Id.* at 1730. As it stood, Lankford's attorney advanced arguments unrelated to the death penalty and focused on the time Bryan Lankford was going to spend in prison. *Id.* at 1727. Petitioner's counsel advocated a concurrent, indeterminate life sentence and discouraged a consecutive, indeterminate term that would have resulted in a twenty year term. *Id.* Lankford's counsel also argued against a fixed-life term that would have resulted in a forty-year minimum sentence. *Id.* The majority opined that if Lankford's counsel knew of the specific aggravating circumstances that the trial judge relied upon, petitioner's attorney could have attempted to refute or mitigate those circumstances. *Id.* at 1730. The aggravating circumstances that the trial judge identified for the first time at petitioner's sentencing hearing were:

> (a) At the time the murder was committed the defendant also committed another murder. . . .
> (b) The murders of the Bravences were especially heinous, atrocious or cruel, and manifested exceptional depravity. . . .
> (c) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life. . . .
> (d) the murders were defined as murder of the first degree by Idaho Code § 18-4003(d) and the murders were accompanied with the special intent to cause the deaths of Mr. and Mrs. Bravence. . . .
> (e) The defendant, by prior conduct and by the conduct in the commission of the murders at hand exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

Id. at 1730 n.15 (citation omitted).

85 *Id.* at 1730-31 (citing State v. Lankford, 747 P.2d 710, 728 (Idaho 1987)

could have argued that petitioner's level of participation did not meet the requisite standard to sentence him to death.[86] The Court reiterated that petitioner's attorney made no effort to advance these matters because she believed the death penalty sentence was eliminated as a possible outcome.[87]

Moreover, the majority posited that the aggravating circumstance that "the murders of the Bravences were especially heinous, atrocious or cruel, and manifested exceptional depravity," could arguably have been refuted by Lankford's counsel.[88] The Court reasoned that even if Lankford were the actual killer, his attorney could have argued that the evidence did not support a finding of such an aggravating circumstance.[89] Justice Stevens emphasized that petitioner's counsel did not make these arguments because the trial judge contemplated the death penalty silently.[90] In addition, Justice Stevens dismissed the state's argument that the defense had notice by declaring that it was unrealistic to believe that the notice given by the statute and the advice given at arraignment survived the prosecutor's explicit response.[91]

Furthermore, the Court rationalized that petitioner's lack of notice was demonstrated by the failure of defense counsel to submit the results of two lie-detector tests that may have shown the truthfulness of Lankford's testimony.[92] The Court expostulated

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(Bistline, J., concurring in part and dissenting in part)). *See supra* note 26 (discussion of dissenting justice's opinion).

86 *Lankford*, 111 S. Ct. at 1730 (1991). *See supra* note 28. The Court noted two Idaho cases applying this standard: State v. Small, 690 P.2d 1336, 1338 (Idaho 1984) (given that the individuals had different backgrounds and disparate roles in the commission of the crime, different sentences were justified); State v. McKinney, 687 P.2d 570, 576 (Idaho 1984) (different levels of participation warrant different sentences). *Lankford*, 111 S. Ct. at 1730 n.16.

87 *Id.*

88 *Id.* at 1731 (citation omitted). *See supra* note 84 and accompanying text (aggravating circumstances relied upon by trial judge).

89 *Id.* Justice Stevens posited: "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' " *Id.* at 1731 n.17 (quoting Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980)). The Justice continued: "The petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously." *Id.* (quoting *Godfrey*, 446 U.S. at 433 (footnote omitted)).

90 *Id.* at 1731.

91 *Id.*

92 *Id.* At the time Lankford's attorney motioned for post-conviction relief, she argued that the lie-detector tests evinced that Bryan Lankford was telling the truth when he stated he had no knowledge of the murders and did not participate in them. *Id.* (citation omitted). *See supra* note 13.

that although the results of the tests were inadmissible in an ordinary sentencing hearing, they were arguably allowed in capital sentencing proceedings.[93] Therefore, the majority concluded that the inadequacy of notice prevented petitioner's counsel from advancing arguments that could have influenced the trial judge to impose a lesser sentence or at least arrive at different findings.[94]

The majority also denounced the trial judge's silence in contemplating whether to sentence petitioner to death.[95] Justice Stevens emphasized the importance of fairness in procedures dealing with the death penalty due to the finality and severity of the punishment.[96] Moreover, the majority recognized[97] that a trial judge cannot use undisclosed information to determine whether a person should receive the death penalty.[98] Justice Stevens, while realizing the trial court did not use secret information to sentence petitioner Lankford to death, reasoned that the trial judge's silence after the prosecution expressed an intention not to pursue the death penalty effectively preventing the parties from debating the critical issue and thus denying the parties fair procedure.[99]

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93 *Lankford*, 111 S. Ct. at 1731. The Court stated that the Eighth and Fourteenth Amendments allow the trial court at sentencing to consider any aspects of a convicted offender's record or character and any circumstances of the particular offense that the convicted criminal proffers to avoid the death sentence. *Id.* at 1731 n.19 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)). The Court acknowledged that there is no standard procedure for determining when the death sentence should be imposed. *Id.* (quoting *Lockett*, 438 U.S. at 605). The Court, however, clearly emphasized that a statute cannot prohibit a sentencer from considering independent mitigating factors of the convicted criminal's character and record because it creates a risk that a person will be sentenced to death even though mitigating circumstances call for a less stringent punishment. *Id.* (quoting *Lockett*, 438 U.S. at 605). Indeed, the Court pronounced that "when the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* (quoting *Lockett*, 438 U.S. at 605).

94 *Id.* at 1731.

95 *Id.* at 1731-32.

96 *Id.* at 1732 (citing Gardner v. Florida, 430 U.S. 349, 357 (1977)). In *Gardner*, Justice Stevens articulated the unique nature of the death penalty. *Gardner*, 430 U.S. at 357. Moreover, the Justice indicated that society views the taking of one's life differently from any other government action. *Id.* at 357-58. Consequently, the Justice reasoned it is of the utmost importance to society that the imposition of the death penalty "be based on reason rather than caprice or emotion." *Id.* at 358. *See supra* note 66 and accompanying text (the death penalty is qualitatively different from life imprisonment).

97 Gardner v. Florida, 430 U.S. 349 (1977).

98 *Lankford*, 111 S. Ct. at 1732 (citing *Gardner*, 430 U.S. at 360).

99 *Id.* The Court supported this by reviewing its case law regarding notice, including Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)

The majority concluded by pointing out that the adversarial process would cease to function if the parties were not adequately notified.[100] The Court asserted that the adversarial process played a critical role in the search for truth and fairness.[101] Therefore, Justice Stevens declared, the trial judge's silent contemplation of the death sentence created an intolerable risk because the adversarial process could not function.[102]

In a spirited dissent, Justice Scalia disagreed that Bryan Lankford, a convicted murderer, was denied his Fourteenth Amendment due process rights.[103] Justice Scalia declared that the majority's opinion created ambiguity in the law.[104] The Justice reasoned that not only were capital defendants no longer presumed to know the law, they were presumed to have been misled by an ignorance of the law.[105] Justice Scalia pointed out that the Idaho Code clearly stated that a person convicted of first degree murder shall be sentenced to death or life imprisonment.[106] Furthermore, the Justice emphasized that Bryan Lank-

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(interested parties must be notified of the pending action so they could present their objections). *Lankford*, 111 S. Ct. at 1732 n.22. Justice Stevens concluded that "[i]n the capital context, in which the threatened loss is so severe, the need for notice is even more pronounced." *Id.*

100 *Id.* at 1732-33. The Justice relied upon Strickland v. Washington, 466 U.S. 668 (1984), which provided: "[a] capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Lankford*, 111 S. Ct. at 1733 (quoting *Strickland*, 466 U.S. at 686-87).

101 *Id.* Justice Stevens based his statement on Gardner v. Florida, 430 U.S. 349 (1977), which stated: "[o]ur belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." *Lankford*, 111 S. Ct. at 1733 (quoting *Gardner*, 430 U.S. at 360). *See* Polk County v. Dodson, 454 U.S. 312, 318 (1981) (adversarial testing will promote truth and fairness).

102 *Lankford*, 111 S. Ct. at 1732-33. *See, e.g.*, United States v. Cardenas, 917 F.2d 683, 688-89 (2d Cir. 1990) (the court reasoned that counsel must be notified and given a meaningful opportunity to present arguments before sentencing judge could impose punishment in excess of federal sentencing guidelines); Herring v. New York, 422 U.S. 853, 862 (1975) (the objective of the adversarial system that the guilty are "convicted and the innocent go free" is promoted by partisan advocacy).

103 *Lankford*, 111 S. Ct. at 1733 (Scalia, J., dissenting).

104 *Id.* at 1737 (Scalia, J., dissenting).

105 *Id.* Justice Scalia rejected the argument that the constitutional adequacy of notice was ameliorated because petitioner was "misled" by the trial judge. *Id.* at 1736 (Scalia, J., dissenting). Consequently, Justice Scalia articulated that under the majority's holding, the finality and certainty of a decision cannot be assured. *Id.*

106 *Id.* at 1733 (Scalia, J. dissenting). Justice Scalia posited: "[E]very person guilty

ford was told directly at his arraignment that he could be sentenced to death or life imprisonment if convicted on either charge of murder.[107]

Justice Scalia noted that the sentencing judge had full responsibility for determining the sentence after weighing aggravating and mitigating circumstances.[108] Moreover, the dissenting Justice articulated that if the trial court found any aggravating circumstance, the trial judge was required by law to sentence Bryan Lankford to death, unless the mitigating factors surrounding the case outweighed the aggravating circumstance.[109] Justice Scalia noted that if the trial court found any aggravating circumstance, but the death penalty was not ordered, the court was mandated by statute[110] to give its reasons, in writing, for not sen-

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of murder of the first degree shall be punished by death or by imprisonment for life." *Id.* (citing IDAHO CODE § 18-4004 (1987)).

107 *Id.* (citation omitted). In addition to quoting the statutory language, Justice Scalia asserted that Idaho case law confirms that petitioner was adequately notified. *Id.* at 1734 (Scalia, J., dissenting). Justice Scalia relied upon State v. Rossi, 672 P.2d 249 (Idaho Ct. App. 1983). *Lankford*, 111 S. Ct. at 1734 (Scalia, J., dissenting). In *Rossi*, defendant argued that the trial court abused its discretion by sentencing defendant to an imprisonment term greater than the sentence recommended by the prosecutor after plea negotiations. *Rossi*, 672 P.2d at 250. The state court held, however, that the recommendation made by the prosecutor to the court was "purely advisory." *Id.* Justice Scalia declared that although *Rossi* did not deal with a death penalty issue, there is nothing in the Idaho Code that suggests capital cases should be handled differently. *Lankford*, 111 S. Ct. at 1734 (Scalia, J., dissenting). Moreover, based upon State v. Osborn, 631 P.2d 187 (Idaho 1981), Justice Scalia summarily dismissed the argument that notice was destroyed by the state's negative response. *Lankford*, 111 S. Ct. at 1734 (Scalia, J., dissenting). In *Osborn*, the Idaho Supreme Court held that whether the prosecution had notified defendant that it would seek a capital sentence was irrelevant because the prosecutor's intentions were immaterial to the adequacy of notice. *Osborn*, 631 P.2d at 195.

108 *Lankford*, 111 S. Ct. at 1734 (Scalia, J., dissenting).

109 *Id.* Justice Scalia emphasized that IDAHO CODE § 19-2515(c) provides, in pertinent part: "[w]here *the court* finds a statutory aggravating circumstance *the court shall* sentence the defendant to death *unless the court* finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust." *Id.* (quoting IDAHO CODE § 19-2515(c) (1987) (emphasis added)).

110 The relevant Idaho provision states:

> Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

IDAHO CODE § 19-2515(e) (1987).

tencing petitioner to death.[111] Justice Scalia also explained that the trial judge was not dependent upon the aggravating circumstances brought forth by the prosecutor; moreover, once the evidence was admitted to the court, it did not have to be repeated to be considered at the sentencing hearing.[112] Justice Scalia posited that Lankford's conviction on two murder counts should have alerted petitioner's counsel that the trial judge would find at least one statutory aggravating circumstance.[113] Therefore, Justice Scalia reasoned that Lankford was adequately notified because the trial judge, as a matter of law, was required to sentence petitioner to death unless the mitigating factors presented outweighed the aggravating circumstance.[114]

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111 *Lankford*, 111 S. Ct. at 1734 (Scalia, J., dissenting).

112 *Id.* This was mandated by IDAHO CODE § 19-2515(d), which stated:

> In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

IDAHO CODE § 19-2515(d) (1987).

113 *Lankford*, 111 S. Ct. at 1734 (Scalia, J., dissenting). The dissent quoted the statutory aggravating circumstance described in IDAHO CODE § 19-2515(g)(2) (1987). "At the time the murder was committed the defendant also committed another murder." *Lankford*, 111 S. Ct. at 1734 (Scalia, J., dissenting) (quoting IDAHO CODE § 19-2515(g)(2) (1987)). *See supra* note 84 and accompanying text (aggravating circumstances relied on by trial judge). Justice Scalia pointed out that the Lankfords brutally smashed the skulls of Robert and Cheryl Bravence while the couple offered no resistance and were submissively kneeling on the ground. *Lankford*, 111 S. Ct. at 1734 n.1 (Scalia, J., dissenting) (citing State v. Lankford, 747 P.2d 710, 713 (Idaho 1987)). Moreover, the dissenting justice noted that after the Lankfords killed the Bravences, they drove the dead couple into the woods and left their bodies under debris and branches where the bodies remained undiscovered for three months. *Id.* Justice Scalia pointed out that competent counsel should therefore have anticipated that the judge would find statutory aggravating circumstances. *Id. See* IDAHO CODE § 19-2515(g)(5) (1987) (an aggravating circumstance will be found if the killing was "especially heinous, atrocious or cruel, manifesting exceptional depravity"); IDAHO CODE § 19-2515(g)(6) (1987) (an aggravating circumstance will be found if "the defendant exhibited utter disregard for human life").

114 *Lankford*, 111 S. Ct. at 1734 (Scalia, J., dissenting).

Justice Scalia also rejected the majority's conclusion that the presentencing order was comparable to a pretrial order limiting the issues.[115] The Justice stated it was unreasonable to assume that the presentencing order limited the triable issues because the trial court neither expressly stated such limitations, nor indicated in any other way that it was limited by the prosecutor's recommendation.[116] Justice Scalia further pointed out that a pretrial order narrowing the triable issues was usually entered under a statute or rule that explicitly set forth the order's preclusive effect.[117] Moreover, the Justice emphasized that although a capital sentence would be unlikely because no one would be arguing for it, the order did not preclude the judge from sentencing petitioner to death.[118]

Justice Scalia continued by stating that the trial judge never intended to be restricted at the sentencing hearing, but simply issued the presentencing order[119] at the request of petitioner's counsel.[120] In fact, the Justice emphasized that after ordering the prosecution to state its intentions, the trial judge ordered a presentence investigation and an inquiry into the statutory aggra-

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115 *Id.* at 1734-35 (Scalia, J., dissenting).

116 *Id.* at 1735 (Scalia, J., dissenting).

117 *Id. See, e.g.*, FED. R. CIV. P. 16(e) (an order entered after a pretrial conference shall control subsequent proceedings). The Justice noted that if there is no specific rule or statute, the order itself should define the preclusive effect. *Lankford*, 111 S. Ct. at 1735 (Scalia, J., dissenting). In the case *sub judice*, the presentencing order did not explicitly narrow or limit the issues; thus, Justice Scalia declared that the only reasonable inference that could be drawn from the order was that it required the prosecution to simply state whether it would pursue the death penalty. *Id.*

118 *Id.*

119 *See Id.* at 1726 n.5 (text of order). The trial judge granted the motion for a presentence order on September 6, 1984. *Id.* at 1726.

120 *Id.* at 1735. Justice Scalia set out the actual dialogue that took place between Mr. Longeteig (petitioner's counsel prior to his *pro se* motion) and the trial judge on April 5, 1984 to stress that the trial judge never intended to be bound:

> *Mr. Longeteig*: I wonder could the court fix a time in which the state would file a notice of its intention in respect to capital punishment. This would materially, depending on what he does, alter our course of action in this matter.
>
> *The Court*: I don't know that there is any provision that the state notify.
>
> *Mr. Longeteig*: I'm not aware of any either. I think it would be a matter of the discretion of the court. But I would request that.
>
> *The Court*: Oh, well, Mr. Albers the prosecutor apparently doesn't have any objections to your request. He's indicated that, I think, as soon as he knows for sure what he wants to do, he'll tell you.
>
> *Mr. Longeteig*: That's satisfactory.

Id. (citation omitted).

vating circumstances surrounding the case.[121] Therefore, Justice Scalia reasoned, the death penalty still remained an issue because only death penalty cases required presentence investigations and inquiries.[122]

Justice Scalia illustrated that Lankford's counsel remained aware that the death penalty was a viable choice.[123] For instance, although the prosecutor argued for life imprisonment with the possibility of parole, petitioner's counsel argued against the more severe sentence of life without the possibility of parole.[124] Justice Scalia rationalized that it was peculiar for petitioner's counsel to assume that the judge could exceed the state's recommendation with regard to all sentences but the death penalty.[125]

Moreover, Justice Scalia expostulated, if Lankford's counsel truly believed that the trial judge did not intend to impose the death sentence, Lankford's counsel would have aggressively objected when the judge stated at the end of the sentencing hearing that the death penalty was still being contemplated.[126] Justice Scalia reasoned that petitioner's counsel was not shocked by the

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121 *Id.* at 1735-36 (Scalia, J., dissenting). Justice Scalia emphasized that even though the trial judge entered the presentencing order, it was clear that he did not intend to dismiss the death penalty when he stated: "[t]here obviously needs to be an inquiry pursuant to § 19-2515 as to the statutory aggravating circumstances . . . regardless whether or not the state intends to pursue the death penalty." *Id.* at 1735 (Scalia, J. dissenting) (citation omitted).

122 *Id.* at 1735-36 (Scalia, J. dissenting). Justice Scalia did not find persuasive the majority's reasoning that notice was inadequate because the trial judge ordered the presentence investigation and inquiry into the aggravating circumstances prior to the state's negative response. *Id.* at 1736 n.2 (Scalia, J., dissenting). Justice Scalia countered that the judge clearly stated that the procedures for imposing the death sentence would be followed "*whether or not* the state intends to pursue the death penalty." *Id.* (citation omitted) (emphasis added). Moreover, although Justice Scalia recognized that petitioner's counsel changed after the April 5 meeting, the Justice stated that the new attorney should have inquired about the relevant information pertaining to the case. *Id.* (citation omitted). Justice Scalia pointed out that the trial judge "specifically ordered Mr. Longeteig [petitioner's original counsel] to remain in the case and be at [the new attorney's] 'beck and call.' " *Id.* (citation omitted). *But see supra* note 78 (majority's argument).

123 *Lankford*, 111 S. Ct. at 1736 (Scalia, J., dissenting).

124 *Id. See supra* notes 13, 18-19 and accompanying text (discussion of sentencing terms advocated by each side).

125 *Lankford*, 111 S. Ct. at 1736 (Scalia, J., dissenting).

126 *Id.* at 1737 (Scalia, J., dissenting). At the end of the sentencing hearing, the trial judge "stated that the available sentences included '[f]or example, a fixed term of 40 years *or death* or a fixed life sentence. So there are a great number of possibilities available to this [c]ourt.' " *Id.* (citation omitted) (emphasis added). Justice Scalia pointed out that petitioner's counsel "was aggressive enough in objecting to another portion of the judge's concluding statement, two pages later in the transcript, that the judge interrupted with 'Counsel, I'm not here to argue with you.' " *Id.* (citation omitted).

statement because defense counsel understood that a capital sentence was still possible.[127] Finally, Justice Scalia concluded that the majority's opinion adopted a vacuous and ambiguous principle of law because petitioner could simply argue that he reasonably believed the death penalty was not at issue.[128]

In *Lankford v. Idaho*, the majority aptly preserved the sanctity of the Due Process Clause by recognizing the unique nature of the death penalty sentence.[129] The majority correctly concluded that the trial judge issued the presentencing order to limit the triable issues at defendant's sentencing hearing.[130] Clearly, the presentencing order's express language implied that defendant did not have to argue or present mitigating factors unless the state sought the death penalty.[131] Thus, Lankford acted reasonably when he assumed that he did not have to present any mitigating factors in light of the state's negative response. Moreover, the majority correctly adhered to the principle espoused in *Gardner v. Florida* that the death sentence must be based on reason.[132] The Court would have defied reasonable expectations if it held that the presentencing order served no other purpose but to state what sentences the prosecution intended to pursue. The issuance of the order reasonably allowed petitioner Lankford to

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127 *Id.* Justice Scalia also rejected the argument that because petitioner's counsel did not raise any death penalty issues, it can be inferred that the defense counsel detrimentally relied upon the presentencing order. *Id.* Justice Scalia stated "[t]hat is not terribly persuasive evidence, since all the arguments made against a life sentence or a minimum term of more than 10 years would apply *a fortiori* against a sentence of death." *Id.* Justice Scalia asserted several possibilities that would explain why counsel did not present any death penalty arguments at the sentencing hearing. *Id.* The Justice hypothesized, for example, that petitioner's counsel may have believed that although the death penalty was still a possible choice, it seemed extremely unlikely that it would be imposed. *Id.* Furthermore, the dissent theorized that Lankford's counsel may not have addressed the death penalty because she did not want to attract attention to it or indicate that it was still a possible option. *Id.* Moreover, Justice Scalia posited that petitioner's counsel could have simply been negligent in her failure to address the death penalty issue. *Id.* Justice Scalia suggested that petitioner Lankford may have a suit against his attorney for ineffective assistance. *Id.*

128 *Id.* Justice Scalia stated that "we seemingly adopt the topsy-turvy principle that the capital defendant cannot be presumed to know the law, but must be presumed to have detrimentally relied upon a misunderstanding of the law or a misrepresentation of the judge." *Id.*

129 *Id.* at 1732.

130 *Id.* at 1729.

131 *See Id.* at 1732. *See also* note 14 (text of presentence order as issued by the trial judge).

132 *Id.* at 1732 (quoting Gardner v. Florida, 430 U.S. 349, 357-58 (1977)).

assume that the trial judge's order superseded all other statutory procedures pertaining to the death penalty.

The dissenting Justices failed to recognize the unique and severe nature of the death penalty sentence as illustrated by Justice Scalia's reliance upon the non-capital case of *State v. Rossi*, which held that a prosecutor's recommendation was purely advisory.[133] Instead, Justice Scalia clearly suggested that there was no difference between capital and non-capital cases.[134] Indeed, Justice Scalia's statement contravened the very essence of *Furman*, in which the Supreme Court succinctly stated that the death penalty differed from other types of punishment.[135] Also, the statement evinced an attitude on the part of the Justices that seemed to carelessly disregard Lankford's death sentence.

Moreover, the majority's decision does not, as the dissent suggests, establish vast uncertainty in criminal sentencing procedure.[136] Instead, the majority sends an unequivocal message to state prosecutors declaring that a convicted criminal cannot be sentenced to death unless he is afforded the utmost in due process protection. If anything, the majority's decision requires state sentencing procedures to adhere to strict guidelines or fail constitutional scrutiny. Certainly, given the finality of the death sentence, the majority's prudent approach is preferable because it ensures that certain requirements are fulfilled before sentencing a criminal to death. The dissent's approach, on the other hand, attempts to place the judicial burden on the criminal and sacrifice his due process rights for the sake of certainty.

Although Idaho has a bi-furcated trial system, perhaps the state could adopt a system that allows the jury, instead of the trial judge, to determine the extent of the aggravating and mitigating circumstances.[137] For instance, the prosecution would have to

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133 *Id.* at 1734 (Scalia, J., dissenting).

134 *Id.* Justice Scalia stated, "nothing in any provision of the Idaho Code or in Idaho case law suggests that the rule in capital cases would be any different." *Id.*

135 Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

136 *Lankford*, 111 S. Ct. at 1736 (Scalia, J., dissenting).

137 Indeed, the majority of states have statutes that require a jury to impose the death sentence. *See* ARK. CODE. ANN. § 5-4-603 (Michie Supp. 1989); CAL. PENAL CODE § 190.3 (West 1988); COLO. REV. STAT. ANN. § 16-11-103 (West 1990 & Supp. 1991); CONN. GEN. STAT. ANN. § 53a-46a (West 1985); DEL. CODE ANN. tit. 11, § 4209 (1987 & Supp. 1990); GA. CODE ANN. §§ 17-10-30 to -32 (Michie 1990); ILL. ANN. STAT. ch. 38, para. 9-1 (Smith-Hurd 1979 & Supp. 1991); KY. REV. STAT. ANN. § 532.025 (Michie/Bobbs-Merrill 1990); MD. CRIM. LAW CODE ANN. § 413 (1992); NEV. REV. STAT. ANN. §§ 175.554, .556 (Michie 1986) (if the jury is not unanimous in its decision, the court may impose the death sentence); N.H. REV. STAT. ANN. § 630:5 (1986 & Supp. 1991); N.J. STAT. ANN. § 2C:11-3 (West Supp.

present the jury with the actual aggravating circumstances it will rely upon while defendant would have the obligation of presenting all available mitigating circumstances.[138] In this way, the tremendous decision of sentencing a criminal to death is taken out of the judge's hands and placed with the jury.[139] Most importantly, there will be no need to determine whether the defendant actually received notice of the possible sentence because the defendant could only be sentenced to death if the issues are directly

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1991); N.M. STAT. ANN. § 31-20A-3 (Michie 1990); N.C. GEN. STAT. § 15A-2000 (1991); OHIO REV. CODE ANN. § 2929.03 (Anderson 1987); OKLA. STAT. ANN. tit. 21, § 701.11 (West Supp. 1992); 42 PA. CONS. STAT. ANN. § 9711(f) (1982); S.C. CODE ANN. § 16-3-20 (Law. Co-op. Supp. 1990); S.D. CODIFIED LAWS ANN. § 23A-27A-4 (1988); TENN. CODE ANN. § 39-13-204 (1991); TEX. CRIM. PROC. CODE ANN. § 37.071 (West Supp. 1992); UTAH CODE ANN. § 76-3-207 (Supp. 1991); VA. CODE ANN. § 19.2-264.4 (Michie 1990); WASH. REV. CODE ANN. § 10.95.030 (West 1990); WYO. STAT. § 6-2-102 (1983).

138 For instance, § 2C:11-3(c) of the New Jersey Criminal Code provides the following procedural requirements before sentencing a convicted defendant to death:

> (1) The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death . . . .
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> Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt, except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury. . . .
>
> (2)(a) At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors . . . . The defendant shall have the burden of producing evidence of the existence of any mitigating factors . . . but shall not have a burden with regard to the establishment of a mitigating factor.

N.J. STAT. ANN. § 2C:11-3 (West Supp. 1991). For a historical discussion of death sentencing in New Jersey, see Hugo A. Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Thomas W. Cavanagh, Jr. and Frank J. Zinna, Note, *The Constitutionality and Desirability of Bifurcated Trials and Sentencing Standards*, 2 SETON HALL L. REV. 427 (1971); Hon. Irwin I. Kimmelman, *The Death Penalty in New Jersey*, 103 N.J. LAWYER 9 (1983).

139 Two Idaho Supreme Court justices advocate jury determinations for capital sentences, arguing that a right to a jury in capital sentencing is found in the state constitution. *See* State v. Lankford, 747 P.2d 710, 726 (Idaho 1987) (Huntley, J., concurring) ("Idaho's death sentence procedure, in failing to utilize the jury in the process, violates the Idaho Constitution"); State v. Creech, 670 P.2d 463, 478 (1983) (Huntley, J., dissenting) ("jury participation in the capital sentencing process is part of the right to 'trial by jury' as guaranteed inviolate by Art. 1, § 7 of the Idaho Constitution"); *id.* at 487 (Bistline, J., dissenting) ("for over 110 years it was the jury who made the decision of death or life").

presented to the jury as questions of fact during the sentencing phase of trial. The stricter procedures will crystallize the exact nature of the debate, whereas the current Idaho system allows a judge to whimsically employ the death sentence unbeknownst to defendant.[140]

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[140] In additional to Idaho, a minority of states allow the court to independently impose the death sentence. *See e.g.* ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1991); MONT. CODE ANN. § 46-18-301 (1991); NEB. REV. STAT. § 29-2520 (1989).