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FILE 3

Codes attached for the following
States:

Alabama		
Arizona	California	
Arkansas	Colorado	Virginia
Connecticut		Washington
Delaware		Wyoming
Florida		1/24/89
Georgia		
Idaho		
Illinois		
Indiana		
Kentucky		
Louisiana		
Maryland		
Mississippi		
Missouri		
Nebraska		
Nevada	New Hampshire	
New Jersey		
New Mexico	North Carolina	
Ohio		
Oklahoma		
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South Dakota		
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Utah		
Vermont		

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Based on the Citings to
Statutes available to us
in the time-frame; i.e.
attached listing & Codes
reflect what we were
able to come up with.
Please note I would not
consider this all inclusive. GP

enhance punishment for another offense, and presuming waiver of the right to counsel from a silent record is impermissible. *Sargent v. State*, 515 So. 2d 729 (Ala. 1987) (decided prior to enactment of this section).

Admission of records not showing whether defendant had or waived counsel held reversible error. — Where most of the records of prior convictions introduced did not reflect that the defendant had counsel or had

waived the right to counsel, and the state made no attempt to otherwise show that he had, it was reversible error to admit the records of prior convictions that did not reflect that the defendant had counsel or had waived the right to counsel. *Sargent v. State*, 515 So. 2d 729 (Ala. 1987) (decided prior to enactment of this section).

Cited in *Peagler v. State*, 516 So. 2d 1369 (Ala. 1987).

§ 13A-5-11. Fines for felonies.

When court accepting guilty plea must inform accused of potential fine. — The court which accepts a guilty plea is not obliged to inform the accused of a potential fine, which may be a direct consequence of that plea, unless the court intends to levy a fine. *Lewis v. State*, 479 So. 2d 1356 (Ala. Crim. App. 1985).

Where a fine is mandatory, failure to inform the defendant who is entering a guilty plea of its existence constitutes reversible error. *Lewis v. State*, 479 So. 2d 1356 (Ala. Crim. App. 1985).

Trial court did not err in imposing a fine of \$10,000.00 on defendant, despite failure of the jury to do so, where the trial judge imposed sentence within the statutory limits, then fixed the fine as authorized by subdivision (a)(2) of this section. *Garrett v. State*, 480 So. 2d 58 (Ala. Crim. App. 1985).

Cited in *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982).

§ 13A-5-12. Fines for misdemeanors and violations.

When court accepting guilty plea must inform accused of potential fine. — The court which accepts a guilty plea is not obliged to inform the accused of a potential fine, which may be a direct consequence of that plea, unless the court intends to levy a fine. *Lewis v. State*, 479 So. 2d 1356 (Ala. Crim. App. 1985).

Where a fine is mandatory, failure to inform the defendant who is entering a guilty plea of its existence constitutes reversible error. *Lewis v. State*, 479 So. 2d 1356 (Ala. Crim. App. 1985).

ARTICLE 2.

DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE.

I. GENERAL CONSIDERATION.

The reconstruction of the 1975 Death Penalty Law is constitutional. *Boggan v. State*, 455 So. 2d 228 (Ala. Crim. App. 1984).

Applicability of article. — The 1975 capital punishment statute, as contained in former §§ 13-11-1 through 13-11-9, was carried over intact to the new criminal code as former §§ 13A-5-30 through 13A-5-38. These sections of the new criminal code were repealed effective July 1, 1981, by the 1981 capital offense statute, but only as to conduct occurring after July 1, 1981. Therefore, conduct occurring before July 1, 1981, is governed by the pre-existing law, i.e., §§ 13A-5-30 through 13A-5-38. *Spears v. State*, 428 So. 2d 174 (Ala. Crim. App. 1982); *Julius v. State*, 455 So. 2d

984 (Ala. 1984), cert. denied, 469 U.S. 1132, 105 S. Ct. 817, 83 L. Ed. 2d 809 (1985).

Applicability of old statute. — The new death penalty statute did not repeal the old statute (§ 13A-5-30 through § 13A-5-38), as to offenses occurring prior to the effective date of the new death penalty statute. *Agee v. State*, 465 So. 2d 1196 (Ala. Crim. App. 1984).

Miscitation of a code section does not void an indictment which otherwise states an offense; and, in the absence of a showing of actual prejudice to the defendant, reference to the erroneous code section will be treated as mere surplusage. *Bush v. State*, 431 So. 2d 563 (Ala.), cert. denied, 464 U.S. 865, 104 S. Ct. 200, 78 L. Ed. 2d 175 (1983).

For case discussing jury instructions relative to lesser included offenses. See

Richardson v. State, 419 So. 2d 289 (Ala. Crim. App. 1982), cert. denied, 460 U.S. 1017, 103 S. Ct. 1262, 75 L. Ed. 2d 488 (1983).

Jury need not make specific findings as to aggravating circumstances. — There is no requirement under Alabama's new capital felony statute that the jury make specific findings as to the existence of aggravating circumstances during the sentencing phase of the proceedings. The jury's verdict whether to sentence a defendant to death or to life without parole is advisory only. It is sufficient that the trial court, which is in no way bound by the

jury's recommendation concerning sentence, is required to enter specific written findings concerning the existence or nonexistence of each aggravating circumstance. *Bush v. State*, 431 So. 2d 555 (Ala. Crim. App. 1982), aff'd, 431 So. 2d 563 (Ala.), cert. denied, 464 U.S. 865, 104 S. Ct. 200, 78 L. Ed. 2d 175 (1983).

Cited in *Coon v. State*, 431 So. 2d 569 (Ala. Crim. App. 1982); *Kennedy v. State*, 472 So. 2d 1106 (Ala. 1985).

Collateral references.

Power of court to increase severity of unlawful sentence — modern status. 28 ALR4th 147.

§ 13A-5-39. Definitions.

"During". — Murder held to have occurred "during" commission of rape and sodomy. See *Bradley v. State*, 494 So. 2d 750 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 772 (Ala. 1986), cert. denied, — U.S. —, 107 S. Ct. 1385, 94 L. Ed. 2d 699 (1987).

"Under sentence of imprisonment" was aggravating circumstance where defendant on parole. — The trial judge did not err by finding as an aggravating circumstance the fact that the capital offense was committed while defendant was under sentence of imprisonment, which is an aggravating circumstance under § 13A-5-49(1), where defendant was on parole at the time the offense was committed. *Tarver v. State*, 500 So. 2d 1232 (Ala. Crim. App.), aff'd, 500 So. 2d 1256 (Ala. 1986), cert. denied, — U.S. —, 107 S. Ct. 1385, 96 L. Ed. 2d 685 (1987).

Robbery and murder. — Even had defendant killed victim for some purpose unrelated to the theft, his taking of property from the victim after the murder constituted robbery, as the murder and the subsequent taking of the property formed a continuous chain of events. Thus the State proved robbery and murder of the victim in the course thereof beyond a reasonable doubt and to a moral certainty. *Johnson v. State*, 479 So. 2d 1377 (Ala. Crim. App. 1985).

Cited in *Crowe v. State*, 435 So. 2d 1371 (Ala. Crim. App. 1983); *Coulter v. State*, 439 So. 2d 336 (Ala. Crim. App. 1982); *Jemison v. State*, 439 So. 2d 786 (Ala. Crim. App. 1983); *Taylor v. State*, 442 So. 2d 128 (Ala. Crim. App. 1983); *Jefferson v. State*, 473 So. 2d 1100 (Ala. Crim. App. 1984).

§ 13A-5-40. Capital offenses.

(a) The following are capital offenses:

(1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

(3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant;

(4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;

(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty, regardless of whether the defendant knew or should have known the victim was an

officer or guard on duty, or because of some official or job-related act or performance of such officer or guard;

(6) Murder committed while the defendant is under sentence of life imprisonment;

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant;

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosion;

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct;

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity;

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction; and

(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.

(b) Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms "murder" and "murder by the defendant" as used in this section to define capital offenses mean murder as defined in section 13A-6-2(a)(1), but not as defined in section 13A-6-2(a)(2) and (3). Subject to the provisions of section 13A-5-41, murder as defined in section 13A-6-2(a)(2) and (3), as well as murder as defined in section 13A-6-2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section.

(c) A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense defined in subsection (a) of this section unless that defendant is legally accountable for the murder because of complicity in the murder itself under the provisions of section

13A-2-23, in addition to being guilty of the other elements of the capital offense as defined in subsection (a) of this section.

(d) To the extent that a crime other than murder is an element of a capital offense defined in subsection (a) of this section, a defendant's guilt of that other crime may also be established under section 13A-2-23. When the defendant's guilt of that other crime is established under section 13A-2-23, that crime shall be deemed to have been "committed by the defendant" within the meaning of that phrase as it is used in subsection (a) of this section. (Acts 1981, No. 81-178, p. 203, § 2; Acts 1982, No. 82-567, p. 945, § 1; Acts 1987, No. 87-709, p. 1252, § 3.)

The 1987 amendment, effective August 12, 1987, to subdivision (a)(5), added the language "regardless of whether the defendant knew or should have known the victim was an officer or guard on duty."

Code commissioner's note. — Section 1 of Acts 1987, No. 87-709 provides: "This act shall be entitled The Undercover Officers Protection Act of 1987."

Section 2 of Acts 1987, No. 87-709 provides: "The legislature hereby finds that law enforcement officers are the foot soldiers of society's defense of ordered liberty; that they literally risk their lives on a continuous basis to preserve the rights and defend the interests of law-abiding citizens and to maintain the order which is essential to our society; and that they deserve special protection when performing their duties. The legislature further finds that the protection law enforcement officers deserve and need is not provided by an interpretation of Code of Alabama 1975, § 13A-5-40(a)(5) which results in capital punishment being available in a case involving the intentional murder of an officer on duty only if it can be proven that the murderer knew that the person whom he was intentionally murdering was an officer on duty. The legislature finds that such an interpretation provides little or no protection to undercover or plain clothes officers and also reduces the protection provided officers in other situations. The legislature further finds that the amendment effected in section 3 is necessary to achieve the amount of protection of law enforcement officers which it deems essential."

I. GENERAL CONSIDERATION.

This section is not unconstitutional. See *Jackson v. State*, 452 So. 2d 895 (Ala. Crim. App. 1984).

Constitutionality of subdivision (a)(5). — Subdivision (a)(5) of this section is a reasonable exercise of legislative authority, which is neither arbitrary nor capricious in imposing capital punishment upon one who intention-

ally and knowingly takes the life of a police officer, while that officer is engaged in carrying out his appointed duties, protecting the health, welfare, and property of the citizens he serves; thus, it does not deny a defendant the equal protection of the law. *Harrell v. State*, 470 So. 2d 1309 (Ala.), cert. denied, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 276 (1985).

Effect of new statute on pre-existing law before effective date of act. — The new death penalty statute (Act No. 81-178, supra) did not repeal the old statute (§§ 13A-5-30 through 13A-5-38) as to offenses occurring prior to the effective date of Act No. 81-178. Section 20 repeals the old death penalty statute, but specifically provides: "This repeal shall not affect the application of pre-existing law to conduct occurring before the effective date of this act." *Jackson v. State*, 516 So. 2d 726 (Ala. Crim. App. 1985), remanded on other grounds, 516 So. 2d 768 (Ala. 1987).

While the indictment avers component crimes in terms of the 1975 code even though the crime arose after January 1, 1980, the effective date of the new Criminal Code, where the 1975 code offense definition is different from its new code counterpart, the 1975 component crime is the one to be pleaded and proved. *Jackson v. State*, 516 So. 2d 726 (Ala. Crim. App. 1985), remanded on other grounds, 516 So. 2d 768 (Ala. 1987).

Successive prosecutions by two states. — The double jeopardy clause of the Fifth Amendment did not bar Alabama from trying defendant for the capital offense of murder during a kidnapping after Georgia had convicted him of murder based on the same homicide, in view of the applicability of the dual sovereignty doctrine to successive prosecutions by two states. *Heath v. Alabama*, 474 U.S. 82, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985).

A 1975 code offense definition can exist as a component of a capital offense even after that particular code section has been repealed or superseded by a provision in the new criminal code. *Williams v. State*, 461 So.

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500 So. 2d 57 (Ala. Crim. App. 1985), *aff'd*, 500 So. 2d 68 (Ala. 1987).

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Commission of robbery as aggravating circumstance in prosecution for capital murder-robbery. — The trial judge did not err by finding as an aggravating circumstance the fact that the capital offense was committed while the defendant was engaged in the commission of a robbery, which is an aggravating circumstance under § 13A-5-49(4), merely because robbery was an element of the capital offense charged in the indictment, under subdivision (a)(2) of this section. *Tarver v. State*, 500 So. 2d 1232 (Ala. Crim. App. 1986), *aff'd*, 500 So. 2d 1256 (Ala. 1986), cert. denied, — U.S. —, 107 S. Ct. 3197, 96 L. Ed. 2d 685 (1987).

When intent to rob arose is jury question. — Although a robbery committed as a "mere afterthought" and unrelated to the murder will not sustain a conviction under subdivision (a)(2) for the capital offense of murder-robbery, the question of a defendant's intent at the time of the commission of the crime is usually an issue for the jury to resolve. The jury may infer from the facts and circumstances that the robbery began when the accused attacked the victim and the capital offense was consummated when the defendant took the victim's property and fled. *Connolly v. State*, 500 So. 2d 57 (Ala. Crim. App. 1985), *aff'd*, 500 So. 2d 68 (Ala. 1987).

Failure to instruct on lesser offense of

murder in capital murder-robbery prosecution. — Where there was evidence that defendant planned a murder and robbery, but the jury could have found that defendant planned the murder and only participated in the theft as an afterthought, or that defendant had no prior knowledge of the actual murder and only participated in the theft, the judgment of the circuit court would be reversed because of the court's failure to instruct the jury on the lesser included offense of murder. *Connolly v. State*, 500 So. 2d 57 (Ala. Crim. App. 1985), *aff'd*, 500 So. 2d 68 (Ala. 1987).

Failure to request cautionary instruction found not prejudice. — Although counsel was ineffective for failing to request a cautionary instruction respecting a previous conviction, the defendant was not prejudiced, as the evidence convicting him was overwhelming. *Julius v. Johnson*, 840 F.2d 1533 (11th Cir. 1988).

Identity of accomplice need not be proved under subdivision (a)(7). — While one is guilty of murder if he hires another to kill the deceased, the statute does not require proof of the identity of the accomplice who furnished the "pecuniary or other valuable consideration." *McCall v. State*, 501 So. 2d 496 (Ala. Crim. App. 1986).

This statute does not require proof of the actual killer's accomplice. *McCall v. State*, 501 So. 2d 496 (Ala. Crim. App. 1986).

§ 13A-5-41. Lesser included offenses.

Subject to the provisions of section 13A-1-9(b), the jury may find a defendant indicted for a crime defined in section 13A-5-40(a) not guilty of the capital offense but guilty of a lesser included offense or offenses. Lesser included offenses shall be defined as provided in section 13A-1-9(a), and when there is a rational basis for such a verdict, include but are not limited to, murder as defined in section 13A-6-2(a), and the accompanying other felony, if any, in the provision of section 13A-5-40(a) upon which the indictment is based. (Acts 1981, No. 81-178, p. 203, § 3; Acts 1982, No. 82-567, p. 945, § 1.)

Code commissioner's note. — This section is set out herein to correct a typographical error in the bound volume.

Use of burglary as aggravating circumstance did not violate defendant's protec-

tion against double jeopardy. *Ford v. State*, 515 So. 2d 48 (Ala. 1987).

Cited in *Lindsey v. State*, 456 So. 2d 383 (Ala. Crim. App. 1983); *Kennedy v. State*, 472 So. 2d 1106 (Ala. 1985).

the aggravating circumstances compared to that of the mitigating circumstances. *Murry v. State*, 455 So. 2d 53 (Ala. Crim. App. 1983), *rev'd* on other grounds, 455 So. 2d 72 (Ala. 1984).

The process of weighing the aggravating and mitigating circumstances is a balancing process wherein one aggravating circumstance may outweigh any amount of mitigating evidence or any number of statutory mitigating circumstances. On the other hand, the sentencer may give one mitigating factor, whether or not defined by statute, such emphasis that it outweighs several aggravating circumstances. *Clisby v. State*, 456 So. 2d 99 (Ala. Crim. App. 1983), *cert. denied*, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The sentencing authority in Alabama, the trial judge, has unlimited discretion to consider any perceived mitigating circumstances, and he can assign appropriate weight to particular mitigating circumstances. The United States Constitution does not require that specific weights be assigned to different aggravating and mitigating circumstances. *Clisby v. State*, 456 So. 2d 105 (Ala. 1984), *cert. denied*, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

There is no statutory or constitutional requirement that the jury make specific findings of aggravating or mitigating circumstances considered during the sentence phase of the proceedings. The jury's verdict is advisory only. It is sufficient that the trial court, which is in no way bound by the jury's recommendation concerning sentencing, is required to make written findings concerning the existence or non-existence of each aggravating and mitigating circumstance. *Clisby v. State*, 456 So. 2d 105 (Ala. 1984), *cert. denied*, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The harmless error rule applies in capital cases at the sentence hearing. *Whisenant v. State*, 482 So. 2d 1241 (Ala. 1983).

Prosecutor's remarks held reversible error. — Remarks made by the attorney general during his opening statement at the penalty phase of capital murder trial constituted error, and such error was not harmless. *Whisenant v. State*, 482 So. 2d 1247 (Ala. 1984). See also, *Rutledge v. State*, 482 So. 2d 1262 (Ala. 1984).

Cited in *Ritter v. Thigpen*, 668 F. Supp. 1490 (S.D. Ala. 1987); *Bell v. State*, 518 So. 2d 840 (Ala. Crim. App. 1987).

§ 13A-5-49. Aggravating circumstances.

Aggravating circumstances shall be the following:

- (1) The capital offense was committed by a person under sentence of imprisonment;
- (2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;
- (3) The defendant knowingly created a great risk of death to many persons;
- (4) The capital offense 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, rape, robbery, burglary or kidnapping;
- (5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
- (6) The capital offense was committed for pecuniary gain;
- (7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or
- (8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. (Acts 1981, No. 81-178, p. 203, § 11; Acts 1982, No. 82-567, p. 945, § 1.)

2d 697 (Ala. 1987), cert. denied. — U.S. —, 107 S. Ct. 1389, 94 L. Ed. 2d 702 (1987).

"Aggravation" in indictment was "aggravating circumstance" although not listed. — The jury and the trial judge at the sentencing hearing may find the "aggravation" averred in the indictment as the "aggravating circumstance" even though the "aggravation" is not listed. *Edwards v. State*, 515 So. 2d 86 (Ala. Crim. App. 1987).

Use of shotgun held to create great risk of death to many persons. — The trial court committed no error in finding that the aggravating circumstance provided by subdivision (3) existed, where in addition to the two persons who were actually killed by appellant, four people were certainly in a great risk of death, as they were either shot or shot at, or were in direct proximity of the shotgun blasts fired by appellant, and all of the shots were fired in a residential neighborhood and many of those residents were at risk from flying shotgun pellets. *Edwards v. State*, 515 So. 2d 86 (Ala. Crim. App. 1987).

Killing held heinous, atrocious, or cruel. — Where one of the victims was 74 years old and had severe arthritis and watched helplessly as defendant killed her daughter then turned on her, killing her in much the same fashion was enough to support a finding that the killing was especially heinous, atrocious, or cruel. *Ford v. State*, 515 So. 2d 48 (Ala. 1987).

Lack of sentencing hearing transcript in record on appeal. — Where the record on appeal of a capital conviction resulting in a death sentence included no transcript of a sentencing hearing the case would be remanded for a new sentencing hearing, because the comprehensive procedure mandated by Alabama's death penalty statute was not followed, even though the trial court entered

specific written findings regarding the existence or nonexistence of each aggravating circumstance listed in this section and/or each mitigating circumstance enumerated in § 13A-5-51 or referred to in § 13A-5-45. *Floyd v. State*, 486 So. 2d 1309 (Ala. Crim. App. 1984), aff'd, 486 So. 2d 1321 (Ala. 1986), cert. denied. — U.S. —, 107 S. Ct. 1328, 94 L. Ed. 2d 179 (1987).

Youthful offenders. — Under the Alabama statute, after one is adjudged a youthful offender, any determination of guilt shall not be deemed a conviction, and thus, could not be an aggravating circumstance under subdivision (2). *Baldwin v. State*, 456 So. 2d 117 (Ala. Crim. App. 1983), aff'd, 456 So. 2d 129 (Ala. 1984).

Adjudication of guilt in juvenile proceedings does not fall within one of the aggravating circumstances enumerated in this section. *Baldwin v. State*, 456 So. 2d 117 (Ala. Crim. App. 1983), aff'd, 456 So. 2d 129 (Ala. 1984).

Cited in *Bush v. State*, 431 So. 2d 555 (Ala. Crim. App. 1982); *Dobard v. State*, 435 So. 2d 1351 (Ala. 1983); *Luke v. State*, 444 So. 2d 393 (Ala. Crim. App. 1983); *Jones v. State*, 450 So. 2d 165 (Ala. Crim. App. 1983); *Jones v. State*, 456 So. 2d 366 (Ala. Crim. App. 1983); *Lindsey v. State*, 456 So. 2d 383 (Ala. Crim. App. 1983); *Waldrop v. State*, 459 So. 2d 953 (Ala. Crim. App. 1983); *Singleton v. State*, 465 So. 2d 432 (Ala. Crim. App. 1983); *Arthur v. State*, 472 So. 2d 650 (Ala. Crim. App. 1984); *Heath v. Alabama*, — U.S. —, 106 S. Ct. 433, — L. Ed. 2d — (1985); *Thompson v. State*, 503 So. 2d 871 (Ala. Crim. App. 1986); *Ritter v. Thompson*, 828 F.2d 662 (11th Cir. 1987); *Musgrove v. State*, 519 So. 2d 565 (Ala. Crim. App. 1986); *Hamilton v. State*, 520 So. 2d 155 (Ala. Crim. App. 1986); *Garrison v. State*, 521 So. 2d 997 (Ala. Crim. App. 1986); *Nicks v. State*, 521 So. 2d 1018 (Ala. Crim. App. 1987).

§ 13A-5-50. Consideration of aggravating circumstances in sentence determination.

The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence. By way of illustration and not limitation, the aggravating circumstance specified in section 13A-5-49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of subsection (a) of section 13A-5-40. (Acts 1981, No. 81-178, p. 203, § 12; Acts 1982, No. 82-567, p. 945, § 1.)

Code commissioner's note. — This section is set out herein to correct a typographical error in the bound volume.

Use of burglary as aggravating circumstance did not violate defendant's protection against double jeopardy. *Ford v. State*, 515 So. 2d 48 (Ala. 1987).

Killing held heinous, atrocious, or cruel. — Where one of the victims was 74 years old and had severe arthritis and watched helplessly as defendant killed her daughter, then turned on her, killing her in much the same fashion was enough to support a finding that the killing was especially heinous, atrocious, or cruel. *Ford v. State*, 515 So. 2d 48 (Ala. 1987).

Murder during robbery as aggravating circumstance although charged in indictment. — The trial court did not err in finding

as an aggravating circumstance that the offense of murder was committed while defendant was engaged in the commission of a robbery, merely because this aggravating circumstance was charged in the indictment; this finding is specifically allowed by this section. *Ford v. State*, 486 So. 2d 1309 (Ala. Crim. App. 1984), *aff'd*, 486 So. 2d 1321 (Ala. 1986), *cert. denied*, — U.S. —, 107 S. Ct. 1328, 94 L. Ed. 2d 179 (1987); *Tarver v. State*, 500 So. 2d 1232 (Ala. Crim. App. 1986), *aff'd*, 500 So. 2d 1256 (Ala. 1986), *cert. denied*, — U.S. —, 107 S. Ct. 3197, 96 L. Ed. 2d 685 (1987).

Cited in *Bush v. State*, 431 So. 2d 555 (Ala. Crim. App. 1982); *Heath v. State*, 455 So. 2d 898 (Ala. Crim. App. 1983); *Heath v. Alabama*, 474 U.S. 82, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985); *Johnson v. State*, 521 So. 2d 1006 (Ala. Crim. App. 1986).

§ 13A-5-51. Mitigating circumstances — Generally.

III. Illustrative Cases.

I. GENERAL CONSIDERATION.

Death penalty scheme must allow court to consider any mitigating circumstances.

— Subject only to the loose evidentiary requirement of relevance, capital defendants have a right to offer any evidence they choose on character or record or circumstances of the offense. Further, a death penalty scheme must allow the sentencing authority to consider and give independent weight to mitigating factors in addition to those listed in the death penalty statute. While a sentencing authority may consider only those aggravating circumstances listed in the relevant statute, it may consider any mitigating factors that it wishes. *Clisby v. State*, 456 So. 2d 99 (Ala. Crim. App. 1983), *cert. denied*, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The constitution requires that the sentencer in capital cases must be permitted to consider any relevant mitigating circumstance. *Clisby v. State*, 456 So. 2d 99 (Ala. Crim. App. 1983), *cert. denied*, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The sentencing authority in Alabama, the trial judge, has unlimited discretion to consider any perceived mitigating circumstances, and he can assign appropriate weight to particular mitigating circumstances. The United States Constitution does not require that specific weights be assigned to different aggravating and mitigating circumstances. *Clisby v. State*, 456 So. 2d 105 (Ala. 1984), *cert. denied*, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The trial judge is free to consider each case individually and determine whether a particular aggravating circumstance outweighs the mitigating circumstances or vice versa. The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation. *Clisby v. State*, 456 So. 2d 105 (Ala. 1984), *cert. denied*, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The court must permit the defendant to introduce any matter relating to any mitigating circumstances including those enumerated in the Code. *Clisby v. State*, 456 So. 2d 99 (Ala. Crim. App. 1983), *cert. denied*, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The sentencer may not as a matter of law preclude any relevant mitigating factors offered by a defendant. Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. *Clisby v. State*, 456 So. 2d 99 (Ala. Crim. App. 1983), *cert. denied*, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

Age as mitigating circumstance. — The age of the offender is an important consideration for the courts, especially in the juvenile transfer hearings, § 12-15-34, and in the sentencing phase, where age is considered to be a mitigating circumstance. There is, however, no

U.S. —, 107 S. Ct. 1634, 95 L. Ed. 2d 207 (1987), decided under former § 13-11-7.

And cause must be remanded to extend court's order.

Where the trial court merely concluded "that the aggravating circumstances outweighs [sic] the mitigating circumstances", the trial court's order is insufficient "because it does not specify the mitigating circumstances enumerated, which it found insufficient to outweigh the aggravating circumstances." *Jones v. State*, 520 So. 2d 543 (Ala. Crim. App. 1984) (decided under former § 13-11-7).

III. ILLUSTRATIVE CASES.

Antisocial personality. — Where evidence

was presented that the defendant has an antisocial personality, the defendant's mental or emotional disturbance must be considered as relevant mitigating evidence. However, it is for the trial judge to determine the weight to be given that evidence. *Clisby v. State*, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

Evidence of a difficult family history and of emotional disturbance constitutes relevant mitigating evidence. *Clisby v. State*, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

§ 13A-5-52. Same — Inclusion of defendant's character, record, etc.

The court must permit the defendant to introduce any matter relating to any mitigating circumstances including those enumerated in the Code. *Clisby v. State*, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

Subject only to the loose evidentiary requirement of relevance, capital defendants have a right to offer any evidence they choose on character or record or circumstances of the offense. Further, a death penalty scheme must allow the sentencing authority to consider and give independent weight to mitigating factors in addition to those listed in the death penalty statute. While a sentencing authority may consider only those aggravating circumstances listed in the relevant statute, it may consider any mitigating factors that it wishes. *Clisby v. State*, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The sentencer may not as a matter of law preclude any relevant mitigating factors offered by a defendant. Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. *Clisby v. State*, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

Effect of mitigating circumstances. — The existence of a mitigating circumstance does not necessarily require a sentence of life

imprisonment without parole rather than death. *Clisby v. State*, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

Alleged remorse properly discounted. — In light of evidence presented against defendant, including evidence of a prior conviction for second degree murder, a prior conviction for assault with intent to rob, and eyewitness testimony that he was seen running from the scene of the murder "clapping his hands with a big smile on his face," the trial judge could have properly discounted defendant's alleged remorse and his cooperation as not being truly mitigating. *Harrell v. State*, 470 So. 2d 1309 (Ala.), cert. denied, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 276 (1985).

Marriage which ended 16 years before commission of offense and poor childhood (where defendant was 36 years old when the crime was committed) were not mitigating circumstances. *Tarver v. State*, 500 So. 2d 1232 (Ala. Crim. App.), aff'd, 500 So. 2d 1256 (Ala. 1986), cert. denied, — U.S. —, 107 S. Ct. 3197, 96 L. Ed. 2d 685 (1987).

Cited in *Bush v. State*, 431 So. 2d 555 (Ala. Crim. App. 1982); *Luke v. State*, 444 So. 2d 393 (Ala. Crim. App. 1983); *Heath v. State*, 455 So. 2d 898 (Ala. Crim. App. 1983); *Lindsey v. State*, 456 So. 2d 383 (Ala. Crim. App. 1983); *Waldrop v. State*, 459 So. 2d 953 (Ala. Crim. App. 1983); *Harrell v. State*, 470 So. 2d 1303 (Ala. Crim. App. 1984); *Duren v. State*, 507 So. 2d 111 (Ala. Crim. App. 1986); *Nicks v. State*, 521 So. 2d 1018 (Ala. Crim. App. 1987).

§ 13A-5-53. Appellate review of death sentence; scope; remand; specific determinations to be made by court; authority of court following review.

Three-tiered analysis is required in death cases: (1) Whether the crime was punishable by death; (2) whether similar crimes are being punished capitally throughout the state; and (3) whether the death sentence is appropriate in relation to the defendant. *Floyd v. State*, 486 So. 2d 1309 (Ala. Crim. App. 1984), *aff'd*, 486 So. 2d 1321 (Ala. 1986), *cert. denied*, — U.S. —, 107 S. Ct. 1328, 94 L. Ed. 2d 179 (1987), on return to remand.

In reviewing propriety of imposition of death penalty in a case the court review must include a determination of the following question: (1) Was any error adversely affecting the rights of the defendant made in the sentence proceedings? (2) Were the trial court's findings concerning the aggravating and mitigating circumstances supported by the evidence? (3) Was the death penalty the proper sentence in this case? To answer the third question, whether the death penalty was properly imposed in a case, the court must determine: (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Johnson v. State*, 521 So. 2d 1006 (Ala. Crim. App. 1986).

Scope of review. — Alabama's death penalty statute requires, as a constitutionally mandated procedure, that the court of appeals review the propriety of the imposition of the death penalty. This review must include determinations of whether any error adversely affecting the defendant's rights occurred in the sentence proceedings, whether the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence, and whether death was the proper sentence. *Floyd v. State*, 486 So. 2d 1309 (Ala. Crim. App. 1984), *aff'd*, 486 So. 2d 1321 (Ala. 1986), *cert. denied*, — U.S. —, 107 S. Ct. 1328, 94 L. Ed. 2d 179 (1987).

Lack of sentencing hearing transcript in record on appeal. — Where the record on appeal of a capital conviction resulting in a death sentence included no transcript of a sentencing hearing, the case would be remanded for a new sentencing hearing, because the comprehensive procedure mandated by Alabama's death penalty statute was not fol-

lowed, even though the trial court entered specific written findings regarding the existence or nonexistence of each aggravating circumstance listed in § 13A-5-49 and/or each mitigating circumstance enumerated in § 13A-5-51 or referred to in § 13A-5-45. *Floyd v. State*, 486 So. 2d 1309 (Ala. Crim. App. 1984), *aff'd*, 486 So. 2d 1321 (Ala. 1986), *cert. denied*, — U.S. —, 107 S. Ct. 1328, 94 L. Ed. 2d 179 (1987).

Death sentence despite cooperation in prosecution of codefendants. — While it was not inappropriate to consider the cooperation of the defendant in the prosecution of his codefendants after his own conviction, the court did not err in failing to conclude that his cooperation was of such great weight as a mitigating factor that it mandated a sentence of life imprisonment rather than a death sentence. *Floyd v. State*, 486 So. 2d 1321 (Ala. 1986), *cert. denied*, — U.S. —, 107 S. Ct. 1328, 94 L. Ed. 2d 179 (1987).

Sentence of death held not imposed under the influence of passion, prejudice, or any other arbitrary factor. *Bradley v. State*, 494 So. 2d 750 (Ala. Crim. App. 1985), *aff'd*, 494 So. 2d 772 (Ala. 1986), *cert. denied*, — U.S. —, 107 S. Ct. 1385, 94 L. Ed. 2d 699 (1987).

That charges against co-defendant/accomplice nol-prossed because of insufficient evidence does not render defendant's death sentence constitutionally excessive. — The fact that charges against a co-defendant/accomplice were nol-prossed because of insufficient evidence does not render the defendant's death sentence constitutionally excessive. *Wright v. State*, 494 So. 2d 726 (Ala. Crim. App. 1985), *aff'd*, 494 So. 2d 745 (Ala. 1986).

Defendant's sentence of death was not "disproportionately severe" despite the fact that his three co-conspirators were convicted of murder in the second degree, where all the evidence identified him as the "triggerman" and the individual who actually shot and killed the victims. *Wright v. State*, 494 So. 2d 726 (Ala. Crim. App. 1985), *aff'd*, 494 So. 2d 745 (Ala. 1986).

Killing held heinous, atrocious, or cruel. — Where one of the victims was 74 years old and had severe arthritis and watched helplessly as defendant killed her daughter, then turned on her, killing her in much the same fashion was enough to support a finding that the killing was especially heinous, atrocious,

necessity for a jury to try the facts, find defendant guilty or not guilty, and if found guilty to fix his punishment at death. *Prothro v. State*, 370 So. 2d 740 (Ala. Crim. App. 1979).

Whether the accused pleads guilty or not guilty, or refuses or declines to plead, a jury must pass upon the question of the guilt or innocence of one indicted under this article, and a jury must fix defendant's punishment if he is found guilty. Neither the Constitution of the United States nor the Constitution of Alabama gives an accused the right to dispense with a jury trial. *Prothro v. State*, 370 So. 2d 740 (Ala. Crim. App. 1979).

And sentence not permissible without verdict of jury. — This article sets forth not only the only crimes for which one may be punished by death or by life imprisonment without parole, but also the only method by which either punishment may be lawfully imposed. Neither the death sentence nor a sentence to life imprisonment without parole is permissible, whether by agreement of all concerned or not, in the absence of a verdict of a jury finding the defendant guilty and fixing his punishment at death. *Prothro v. State*, 370 So. 2d 740 (Ala. Crim. App. 1979).

Jury consideration of death sentence. — A capital jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

Trial judge sentences defendant. — The task of sentencing a defendant to death or life

imprisonment without parole must be done by the trial judge. *Hubbard v. State*, 382 So. 2d 577 (Ala. Crim. App. 1979), *aff'd*, 382 So. 2d 597 (Ala. 1980), *rev'd on remand*, 405 So. 2d 695 (Ala. 1981).

The death penalty is not necessarily a disproportionate sentence for accomplice to a killing so as to violate the eighth and fourteenth amendments, where the involvement in the capital felony is not minor. *Ritter v. State*, 375 So. 2d 270 (Ala. 1979), *vacated*, 448 U.S. 903, 100 S. Ct. 3044, 65 L. Ed. 2d 1133 (1980), — U.S. —, 102 S. Ct. 376, 69 L. Ed. 2d 1036 (1981).

Fact that local district attorneys had discretion as to whether to try defendants under the Death Penalty Act furnished no basis for inferring that capital crimes will be prosecuted on an arbitrary and capricious basis. *Beck v. State*, 365 So. 2d 985 (Ala. Crim. App.), *aff'd*, 365 So. 2d 1006 (Ala. 1978), *rev'd on other grounds*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392, *on remand*, 396 So. 2d 645 (Ala. 1981).

Indictment sufficient to charge aggravated offense. — Indictment which alleged that victim was intentionally killed while defendant was engaged in robbing him, rather than alleging that defendant was engaged in robbery and, while robbing, the victim was intentionally killed was sufficient to charge aggravated offense under death penalty statute. *Evans v. State*, 361 So. 2d 666 (Ala. 1978), *cert. denied*, 440 U.S. 930, 99 S. Ct. 1267, 59 L. Ed. 2d 486 (1979), *rev'd on remand*, 403 So. 2d 158 (Ala. Crim. App. 1981).

§§ 13A-5-30 through 13A-5-38. Repealed by Acts 1981, No. 81-178, § 20, effective July 1, 1981.

Code commissioner's note. — Acts 1981, No. 81-178, p. 203, § 20, provides that the repeal of §§ 13A-5-30 through 13A-5-38 shall

not affect the application of pre-existing law to conduct occurring before 12:01 a.m. on July 1, 1981.

§ 13A-5-39. Definitions.

As used in this article, these terms shall be defined as follows:

(1) **CAPITAL OFFENSE.** An offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole according to the provisions of this article.

(2) **DURING.** The term as used in section 13A-5-40(a) means in the course of or in connection with the commission of, or in immediate flight from the commission of the underlying felony or attempt thereof.

(3) **EXPLOSIVES AND EXPLOSION.** The terms shall have the meanings provided in section 13A-7-40(2) and (3).

(4) **BURDEN OF INTERJECTING THE ISSUE.** Shall be defined as provided in section 13A-1-2(14).

(5) **MURDER AND MURDER BY THE DEFENDANT.** Shall be defined as provided in section 13A-5-40(b).

(6) **PREVIOUSLY CONVICTED AND PRIOR CRIMINAL ACTIVITY.** As used in sections 13A-5-49(2) and 13A-5-51(1), these terms refer to events occurring before the date of the sentence hearing.

(7) **UNDER SENTENCE OF IMPRISONMENT.** As used in section 13A-5-49(1), the term means while serving a term of imprisonment, while under a suspended sentence, while on probation or parole, or while on work release, furlough, escape, or any other type of release or freedom while or after serving a term of imprisonment, other than unconditional release and freedom after expiration of the term of sentence. (Acts 1981, No. 81-178, § 1.)

Effective date. — The act which added §§ 13A-5-39 through 13A-5-59 became effective July 1, 1981.

§ 13A-5-40. Capital offenses.

(a) The following are capital offenses:

(1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

(3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant;

(4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;

(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Murder committed while the defendant is under sentence of life imprisonment;

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant;

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosions;

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct;

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity;

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction; and

(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.

(b) Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms "murder" and "murder by the defendant" as used in this section to define capital offenses mean murder as defined in section 13A-6-2(a)(1), but not as defined in section 13A-6-2(a)(2) and (3). Subject to the provisions of section 13A-5-41, murder as defined in section 13A-6-2(a)(2) and (3), as well as murder as defined in section 13A-6-2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section.

(c) A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense defined in subsection (a) of this section unless that defendant is legally accountable for the murder because of complicity in the murder itself under the provisions of section 13A-2-23, in addition to being guilty of the other elements of the capital offense as defined in subsection (a) of this section.

(d) To the extent that a crime other than murder is an element of a capital offense defined in subsection (a) of this section, a defendant's guilt of that other crime may also be established under section 13A-2-23. When the defendant's guilt of that other crime is established under section 13A-2-23, that crime shall be deemed to have been "committed by the defendant" within the meaning of that phrase as it is used in subsection (a) of this section. (Acts 1981, No. 81-178, § 2.)

I. General Consideration.

II. Decisions Under Prior Law.

I. GENERAL CONSIDERATION.

Legislative intent. — The legislature intended to punish capitally persons convicted of the aggravated offenses set forth in this section unless, at the sentencing hearing the trial judge, after weighing the aggravating and

mitigating circumstances, decided to refuse to accept the jury's sentence of death. *Kyzer v. State*, 399 So. 2d 330 (Ala. 1981).

The death penalty is not cruel and unusual punishment for the aggravated offense defined by this section. *Hubbard v. State*, 382 So. 2d 577 (Ala. Crim. App. 1979).

not permit intent to be supplied by the felony-murder doctrine. *Evans v. State*, 361 So. 2d 666 (Ala. 1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1267, 59 L. Ed. 2d 486 (1979), vacated, 448 U.S. 903, 100 S. Ct. 3044, 65 L. Ed. 2d 1133 (1980).

An accomplice is within the purview of the statute. — An accomplice may be tried, convicted and sentenced to death under the capital felony statute. *Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

An accomplice in a capital felony can be sentenced to death under the statute. *Ritter v. State*, 375 So. 2d 270 (Ala. 1979), vacated, 448 U.S. 903, 100 S. Ct. 3044, 65 L. Ed. 2d 1133 (1980).

Significant distinction between felony-murder doctrine and accomplice liability is that accomplice liability requires a greater showing of the defendant's individual intent. *Ritter v. State*, 375 So. 2d 270 (Ala. 1979), vacated, 448 U.S. 903, 100 S. Ct. 3044, 65 L. Ed. 2d 1133 (1980).

Indictment sufficient to charge aggravated offense. — Indictment which alleged that victim was intentionally killed while defendant was engaged in robbing him rather than alleging that defendant was engaged in robbery and, while robbing, the victim was intentionally killed was sufficient to charge aggravated offense under death penalty statute. *Evans v. State*, 361 So. 2d 666 (Ala. 1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1267, 59 L. Ed. 2d 486 (1979); *Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala.), vacated, 448 U.S. 903, 100 S. Ct. 3044, 65 L. Ed. 2d 1133 (1980), rev'd on remand, 403 So. 2d 154 (Ala. 1981).

Amendment of indictment removing aggravation as substantial change. — Where defendant was indicted under death penalty statute, but, pursuant to motion by state to amend indictment by removing allegation of aggravating circumstances, defendant was sentenced under first-degree murder statute, change was substantial and not within

permissible limits of statute governing amendment of indictment with consent of defendant. *Bester v. State*, 362 So. 2d 1282 (Ala. Crim. App. 1978).

Instruction as result of finding of not guilty. — In view of provision of death penalty statute which stated that if the jury finds the defendant not guilty, the defendant must be discharged, it was not improper for trial court to instruct jury in its oral charge that if defendant was acquitted in the case, he could never be tried for anything he did to murder victim. *Beck v. State*, 365 So. 2d 985 (Ala. Crim. App. 1978), aff'd, 365 So. 2d 1006 (Ala. 1978), rev'd on other grounds, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392, on remand, 396 So. 2d 645 (Ala. 1980).

Charging on aiding and abetting not error. — The trial court did not commit reversible error by charging the jury on the law of aiding and abetting under the death penalty statute. *Williamson v. State*, 370 So. 2d 1054 (Ala. Crim. App. 1978), aff'd, 370 So. 2d 1066 (Ala. 1979), rev'd on remand, 405 So. 2d 698 (Ala. Crim. App. 1981).

Judge to pronounce sentence as jury advisory only. — The question of sentence is not considered until the determination of guilt is made by the jury at the guilt phase of the bifurcated hearing. Once the jury finds the defendant guilty of one of the aggravated offenses, it fixes the punishment at death. However, it is the trial judge, who, at a separate hearing, determines whether or not the defendant is to suffer death or life imprisonment without parole. The verdict of the jury is advisory only. No sentence exists until the pronouncement by the trial judge at the conclusion of the sentence hearing. It is for this reason that the court cannot be said to be commuting a sentence of death imposed by the jury, but, in truth and in fact, it is sentencing the accused after a jury's finding of guilt. *Clements v. State*, 370 So. 2d 708 (Ala. Crim. App. 1978), rev'd in part on other grounds, 370 So. 2d 723 (Ala. 1979), overruled on other grounds, *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

§ 13A-5-41. Lesser included offenses.

Subject to the provisions of section 13A-1-9(b), the jury may find a defendant indicted for a crime defined in section 13A-5-40(a) not guilty of the capital offense but guilty of a lesser included offense. Lesser included offenses shall be defined as provided in section 13A-1-9(a), and when there is a rational basis for such a verdict, include but are not limited to, murder as defined in section 13A-6-2(a), and the accompanying other felony, if any, in the provision of section 13A-5-40(a) upon which the indictment is based. (Acts 1981, No. 81-178, § 3.)

Collateral references. — 23A C.J.S., Criminal Law, § 1406.
21 Am. Jur. 2d, Criminal Law, § 156.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.

§ 13A-5-42. Guilty plea; burden of proof upon state; waiver; sentencing.

A defendant who is indicted for a capital offense may plead guilty to it, but the state must in any event prove the defendant's guilt of the capital offense beyond a reasonable doubt to a jury. The guilty plea may be considered in determining whether the state has met that burden of proof. The guilty plea shall have the effect of waiving all non-jurisdictional defects in the proceeding resulting in the conviction except the sufficiency of the evidence. A defendant convicted of a capital offense after pleading guilty to it shall be sentenced according to the provisions of section 13A-5-43(d). (Acts 1981, No. 81-178, § 4.)

Collateral references. — 22 C.J.S., Criminal Law, § 424(4); 22A C.J.S., Criminal Law, § 566.

21 Am. Jur. 2d, Criminal Law, §§ 484, 495;
29 Am. Jur. 2d, Evidence, §§ 125, 1170-1172.

§ 13A-5-43. Trial of capital offenses; discharge of defendant; lesser included offenses; sentencing.

(a) In the trial of a capital offense the jury shall first hear all the admissible evidence offered on the charge or charges against the defendant. It shall then determine whether the defendant is guilty of the capital offense or offenses with which he is charged or of any lesser included offense or offenses considered pursuant to section 13A-5-41.

(b) If the defendant is found not guilty of the capital offense or offenses with which he is charged, and not guilty of any lesser included offense or offenses considered pursuant to section 13A-5-41, the defendant shall be discharged.

(c) If the defendant is found not guilty of the capital offense or offenses with which he is charged, and is found guilty of a lesser included offense or offenses considered pursuant to section 13A-5-41, sentence shall be determined and imposed as provided by law.

(d) If the defendant is found guilty of a capital offense or offenses with which he is charged, the sentence shall be determined as provided in sections 13A-5-45 through 13A-5-53. (Acts 1981, No. 81-178, § 5.)

Collateral references. — 89 C.J.S., Trial, § 487.

76 Am. Jur. 2d, Trial, §§ 1111, 1115, 1173.

§ 13A-5-44. Jury selection and separation; waiver by defendant of jury participation in sentence hearing.

(a) The selection of the jury for the trial of a capital case shall include the selection of at least two alternate jurors chosen according to procedures specified by law or court rule.

(b) The separation of the jury during the pendency of the trial of a capital case shall be governed by applicable law or court rule.

(c) Notwithstanding any other provision of law, the defendant with the consent of the state and with the approval of the court may waive the participation of a jury in the sentence hearing provided in section 13A-5-46. Provided, however, before any such waiver is valid, it must affirmatively appear in the record that the defendant himself has freely waived his right to the participation of a jury in the sentence proceeding, after having been expressly informed of such right. (Acts 1981, No. 81-178, § 6.)

Collateral references. — 50 C.J.S., *Juries*,
§ 86.

47 Am. Jur. 2d, *Jury*, §§ 7, 12, 72, 159.

§ 13A-5-45. Sentence hearing — Delay; statements and arguments; admissibility of evidence; burden of proof; mitigating and aggravating circumstances.

(a) Upon conviction of a defendant for a capital offense, the trial court shall conduct a separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death. The sentence hearing shall be conducted as soon as practicable after the defendant is convicted. Provided, however, if the sentence hearing is to be conducted before the trial judge without a jury or before the trial judge and a jury other than the trial jury, as provided elsewhere in this article, the trial court with the consent of both parties may delay the sentence hearing until it has received the pre-sentence investigation report specified in section 13A-5-47(b). Otherwise, the sentence hearing shall not be delayed pending receipt of the pre-sentence investigation report.

(b) The state and the defendant shall be allowed to make opening statements and closing arguments at the sentence hearing. The order of those statements and arguments and the order of presentation of the evidence shall be the same as at trial.

(c) At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in sections 13A-5-49, 13A-5-51 and 13A-5-52. Evidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and mitigating circumstances without the necessity of re-introducing that evidence at the sentence hearing, unless the sentence hearing is conducted before a jury other than the one before which the defendant was tried.

(d) Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama.

(e) At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances.

Provided, however, any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.

(f) Unless at least one aggravating circumstance as defined in section 13A-5-49 exists, the sentence shall be life imprisonment without parole.

(g) The defendant shall be allowed to offer any mitigating circumstance defined in sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence. (Acts 1981, No. 81-178, § 7.)

- I. General Consideration.
- II. Decisions Under Prior Law.

I. GENERAL CONSIDERATION.

The sentencing process must comply with the requirements of the due process clause of the fourteenth amendment. *Kyzer v. State*, 399 So. 2d 317 (Ala. Crim. App. 1979), rev'd on other grounds, 399 So. 2d 330 (Ala. 1981).

But the trial court need not be concerned with whether certain evidence would be admissible under the exclusionary rules of evidence. If the evidence has probative value it may be received, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. *Johnson v. State*, 399 So. 2d 859 (Ala. Crim. App. 1979), aff'd in part and rev'd in part, 399 So. 2d 873 (Ala. 1981).

The trial court is not obligated to do more than provide a fair opportunity for rebuttal. Where the record indicates that the defendant was given sufficient opportunity to rebut any hearsay statements made at the sentencing hearing, there is no error. *Johnson v. State*, 399 So. 2d 859 (Ala. Crim. App. 1979), aff'd in part and rev'd in part, 399 So. 2d 873 (Ala. 1981).

Cited in *Morrison v. State*, 398 So. 2d 730 (Ala. Crim. App. 1979); *Julius v. State*, 407 So. 2d 141 (Ala. Crim. App. 1980); *Watkins v. State*, 409 So. 2d 901 (Ala. Crim. App. 1981).

Collateral references. — 24 C.J.S., Criminal Law, §§ 1573-1576.

21 Am. Jur. 2d, Criminal Law, § 527.

Right of court to hear evidence for purpose of determining sentence to be imposed. 77 ALR 1211.

II. DECISIONS UNDER PRIOR LAW.

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-32 are included in the annotations for this section.

Sentencing process must conform with due process. — The sentencing hearing must not be a constitutional facade; though the burden of establishing mitigating circumstances must realistically rest with the defendant, this does not relieve the trial court from the requirement of due process in the sentencing hearing. *Richardson v. State*, 376 So. 2d 205 (Ala. Crim. App. 1978), aff'd, 376 So. 2d 228 (Ala. 1979).

And exclusionary rules of evidence do not apply. — The sentencing hearing is a due process hearing of the highest magnitude and the exclusionary rules of evidence play no part. The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact. *Richardson v. State*, 376 So. 2d 205 (Ala. Crim. App. 1978), aff'd, 376 So. 2d 228 (Ala. 1979).

Alabama's sentencing scheme in death cases broadly allows the accused to present evidence of mitigating circumstances. *Jacobs v. State*, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 82 (1979), overruled on other grounds, *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

Alabama's sentencing process in death cases permits consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. *Jacobs v. State*, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 82 (1979), overruled on other grounds, *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

And section does not unconstitutionally confer right to commute upon judge. — The

death penalty statute does not violate the Constitution by conferring upon the trial judge the right to commute a sentence of death. *Beck v. State*, 365 So. 2d 985 (Ala. Crim. App.), *aff'd*, 65 So. 2d 1006 (Ala. 1978), *rev'd* on other grounds, 447 U.S. 625, 100 S.Ct. 2382, 65 L. Ed. 2d 392, on remand, 396 So. 2d 645 (Ala. 1980).

Court not restricted to statutory mitigating factors. — The sentencing court considered evidence as to any matter that the court deemed relevant to sentence, and was not restricted to those mitigating factors statutorily defined. *Kyzer v. State*, 399 So. 2d 317 (Ala. Crim. App. 1979), *rev'd* on other grounds, 399 So. 2d 330 (Ala. 1981).

But the only aggravating circumstances which may be considered under the capital felony statute relating to a defendant's prior criminal history are set out in the statute. *Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979), *cert. denied*, 380 So. 2d 938 (Ala. 1980).

Remand for new hearing where improper aggravating circumstances found. — Where trial court found one or more

proper aggravating circumstances, but likewise based sentence on one or more improper aggravating circumstances, remandment to trial court for new sentencing hearing should be mandated by appellate court finding aggravating circumstances improper. *Bufford v. State*, 382 So. 2d 1162 (Ala. Crim. App.), *cert. denied*, 382 So. 2d 1175 (Ala. 1980).

Crime charged in indictment cannot be used as both criminal charge and circumstances aggravating that charge. *Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979), *cert. denied*, 380 So. 2d 938 (Ala. 1980).

Options in sentencing. — In any case in which the jury finds the defendant guilty and imposes the death sentence, the trial court is required to hold a presentence hearing to determine whether to sentence the defendant to death or to life imprisonment without parole; these are the only options for the sentencing authority. *Evans v. Britton*, 472 F. Supp. 707 (S.D. Ala. 1979), *rev'd* on other grounds, 628 F.2d 400 (5th Cir. 1980).

§ 13A-5-46. Same — Conducted before jury unless waived; trial jury to sit for unless impossible or impracticable; separation of jury; instructions to jury; advisory verdicts; vote required; mistrial; waiver of right to advisory verdict.

(a) Unless both parties with the consent of the court waive the right to have the sentence hearing conducted before a jury as provided in section 13A-5-44(c), it shall be conducted before a jury which shall return an advisory verdict as provided by subsection (e) of this section. If both parties with the consent of the court waive the right to have the hearing conducted before a jury, the trial judge shall proceed to determine sentence without an advisory verdict from a jury. Otherwise, the hearing shall be conducted before a jury as provided in the remaining subsections of this section.

(b) If the defendant was tried and convicted by a jury, the sentence hearing shall be conducted before that same jury unless it is impossible or impracticable to do so. If it is impossible or impracticable for the trial jury to sit at the sentence hearing, or if the case on appeal is remanded for a new sentence hearing before a jury, a new jury shall be impanelled to sit at the sentence hearing. The selection of that jury shall be according to the laws and rules governing the selection of a jury for the trial of a capital case.

(c) The separation of the jury during the pendency of the sentence hearing, and if the sentence hearing is before the same jury which convicted the defendant, the separation of the jury during the time between the guilty verdict and the beginning of the sentence hearing, shall be governed by the law and court rules applicable to the separation of the jury during the trial of a capital case.

(d) After hearing the evidence and the arguments of both parties at the sentence hearing, the jury shall be instructed on its function and on the

relevant law by the trial judge. The jury shall then retire to deliberate concerning the advisory verdict it is to return.

(e) After deliberation, the jury shall return an advisory verdict as follows:

(1) If the jury determines that no aggravating circumstances as defined in section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(2) If the jury determines that one or more aggravating circumstances as defined in section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(3) If the jury determines that one or more aggravating circumstances as defined in section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.

(f) The decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least ten jurors. The verdict of the jury must be in writing and must specify the vote.

(g) If the jury is unable to reach an advisory verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case. Provided, however, that, subject to the provisions of section 13A-5-44(c), after one or more mistrials both parties with the consent of the court may waive the right to have an advisory verdict from a jury, in which event the issue of sentence shall be submitted to the trial court without a recommendation from a jury. (Acts 1981, No. 81-178, § 8.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-33 are included in the annotations for this section.

Sentencing hearing should not serve function of hearing on petition for writ of error coram nobis. Once having litigated this issue before the same judge who conducted the sentencing hearing, and a determination having been made that the allegations were without merit, the defendant had no right to relitigate the same issue and argue contentions which had already been determined to be without factual support. *Hubbard v. State*, 382 So. 2d 577 (Ala. Crim. App. 1979), *aff'd*, 382 So. 2d 597 (Ala. 1980), *rev'd on remand*, 405 So. 2d 695 (Ala. 1981).

Jury verdict not binding on trial court. — The requirement that the jury fix the punishment at death if it finds the defendant guilty of a capital offense is in no way binding on the

trial court as the final sentencing authority. *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

Act not mandatory where judge empowered to alter jury verdict. — Before a death penalty can be imposed in Alabama, the trial judge is compelled to hold a separate hearing and make written findings of one or more of the aggravating circumstances set forth in the act. If the trial judge fails to find one or more aggravating circumstances, supported by the evidence, he is empowered to alter the verdict of the jury and sentence the defendant to life imprisonment without parole. Since the verdict of the jury is not binding on the trial court the act cannot under any construction be classed as mandatory. *Williamson v. State*, 370 So. 2d 1054 (Ala. Crim. App. 1978), *aff'd*, 370 So. 2d 1066 (Ala. 1979), *rev'd on remand*, 405 So. 2d 698 (Ala. Crim. App. 1981).

But crime charged in indictment cannot be used as both criminal charge and cir-

cumstance aggravating that charge. *Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Appellate court does not have statutory authority to reduce penalty and resentence the appellant itself. That duty is vested in the

trial court. *Lewis v. State*, 380 So. 2d 970 (Ala. Crim. App. 1979).

Collateral references. — 24 C.J.S. Criminal Law, §§ 1573-1576.

21 Am. Jur. 2d, Criminal Law, §§ 527-536.

§ 13A-5-47. Determination of sentence by court; pre-sentence investigation report; presentation of arguments on aggravating and mitigating circumstances; court to enter written findings; court not bound by sentence recommended by jury.

(a) After the sentence hearing has been conducted, and after the jury has returned an advisory verdict, or after such a verdict has been waived as provided in section 13A-5-46(a) or section 13A-5-46(g), the trial court shall proceed to determine the sentence.

(b) Before making the sentence determination, the trial court shall order and receive a written pre-sentence investigation report. The report shall contain the information prescribed by law or court rule for felony cases generally and any additional information specified by the trial court. No part of the report shall be kept confidential, and the parties shall have the right to respond to it and to present evidence to the court about any part of the report which is the subject of factual dispute. The report and any evidence submitted in connection with it shall be made part of the record in the case.

(c) Before imposing sentence the trial court shall permit the parties to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case. The order of the arguments shall be the same as at the trial of a case.

(d) Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in section 13A-5-49, each mitigating circumstance enumerated in section 13A-5-51, and any additional mitigating circumstances offered pursuant to section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.

(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court. (Acts 1981, No. 81-178, § 9.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-33 are included in the annotations for this section.

Legislative intent. — The legislature intended to permit the trial judge to weigh the aggravated circumstances enumerated. *Kyzer v. State*, 399 So. 2d 330 (Ala. 1981).

Statute does not unconstitutionally confer right to commute upon judge. — The death penalty statute does not violate the Constitution by conferring upon the trial judge the right to commute a sentence of death. *Beck v. State*, 365 So. 2d 985 (Ala. Crim. App. 1978), *aff'd*, 365 So. 2d 1006 (Ala. 1978), *rev'd* on other grounds, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392, on remand, 396 So. 2d 645 (Ala. 1980).

The trial court judge and not the jury is the sentencing authority. *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

The sole purpose of requiring that the trial judge, as the sentencing authority, make a written finding of the aggravating circumstance is to provide for appellate review of the sentence of death. *Kyzer v. State*, 399 So. 2d 330 (Ala. 1981).

The whole purpose of this section and §§ 13A-5-34 through 13A-5-36 (now repealed) is to allow for judicial review of a sentence of death fixed by the jury. *Kyzer v. State*, 399 So. 2d 330 (Ala. 1981).

If no mitigating circumstances exist, the order should so state. *Hubbard v. State*, 382 So. 2d 577 (Ala. Crim. App. 1979), *aff'd*, 382 So.

2d 597 (Ala. 1980), *rev'd* on remand, 405 So. 2d 695 (Ala. 1981).

And cause must be remanded for court's order to be extended. — Where court's order is insufficient because it did not specify mitigating circumstances enumerated in the statute which it found insufficient to outweigh aggravating circumstances, cause must be remanded with instructions that court's order be extended to include findings of fact from trial and mitigating circumstances, if any, considered as required by statute. *Hubbard v. State*, 382 So. 2d 577 (Ala. Crim. App. 1979), *aff'd*, 382 So. 2d 597 (Ala. 1980), *rev'd* on remand, 405 So. 2d 695 (Ala. 1981).

For circumstances, where sentence of life imprisonment without parole was not disproportionate and did not constitute cruel and unusual punishment, see *McGinnis v. State*, 382 So. 2d 605 (Ala. Crim. App. 1979), *cert. denied*, 382 So. 2d 609 (Ala. 1980).

Collateral references. — 24 C.J.S., Criminal Law, §§ 1573-1576.

21 Am. Jur. 2d, Criminal Law, §§ 527, 586.

§ 13A-5-48. Process of weighing aggravating and mitigating circumstances defined.

The process described in sections 13A-5-46(e)(2), 13A-5-46(e)(3) and section 13A-5-47(e) of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death. (Acts 1981, No. 81-178, § 10.)

Collateral references. — 24 C.J.S., Criminal Law, § 1573.

21 Am. Jur. 2d, Criminal Law, §§ 527, 584.

§ 13A-5-49. Aggravating circumstances.

Aggravating circumstances shall be the following:

- (1) The capital offense was committed by a person under sentence of imprisonment;
- (2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;
- (3) The defendant knowingly created a great risk of death to many persons;
- (4) The capital offense 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, rape, robbery, burglary or kidnapping;

(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital offense was committed for pecuniary gain;

(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. (Acts 1981, No. 81-178, § 11.)

I. General Consideration.

II. Decisions Under Prior Law.

I. GENERAL CONSIDERATION.

Section must be strictly followed. — It is imperative that trial courts in setting out aggravating circumstances follow as closely as possible the strict wording of this section. An inclination to gradually broaden the scope of aggravating circumstances beyond the strict wording of the statute will eventually lead to an unconstitutional application of the capital felony statute. *Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation. This is especially true in death penalty cases. Penal statutes are to reach no further in meaning than their words. *Berard v. State*, 402 So. 2d 1044 (Ala. Crim. App. 1981).

Crime charged in indictment cannot be used as both criminal charge and circumstance aggravating that charge. *Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

A finding of only one aggravating circumstance is sufficient to sustain the death penalty. *Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Collateral references. — 24B C.J.S., Criminal Law, § 1983(1).

21 Am. Jur. 2d, Criminal Law, § 584.

Validity of statutes prohibiting or restricting parole, probation, or suspension of sentence in cases of violent crimes. 100 ALR3d 431.

II. DECISIONS UNDER PRIOR LAW.

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-35 are included in the annotations for this section.

The whole purpose of former §§ 13A-5-33, 13A-5-34, this section and § 13A-5-36 (procedure for sentencing hearing before the judge) (now repealed) was to allow for judicial review of a sentence of death fixed by the jury. *Kyzer*

v. State, 399 So. 2d 330 (Ala. 1981).

The language of subdivision (5) cannot have been intended by the legislature to have such an expansive application as to be applied in all felony cases in which death has ensued, for it could be said that one of the purposes of inflicting any death would be to prevent identification by the victim. *Ex parte Johnson*, 399 So. 2d 873 (Ala. 1979).

The aggravating circumstance listed in subsection (8) was intended to apply to only those conscienceless or pitiless homicides which are unnecessarily torturous to the victim. *Kyzer v. State*, 399 So. 2d 330 (Ala. 1981).

Finding "aggravation" not listed in section. — The jury, and the trial judge at the sentencing hearing, may find the "aggravation" averred in the indictment was not listed in this section as an "aggravating circumstance." The jury or trial judge, as applicable, will weigh the "aggravation" or "aggravating circumstance" against any mitigating circumstances in determining whether to impose a sentence of death. *Kyzer v. State*, 399 So. 2d 330 (Ala. 1981).

The "capital felony" referred to in this section refers to an intentional killing, not to "kidnapping," "robbery," "rape," etc. *Kyzer v. State*, 399 So. 2d 330 (Ala. 1981).

Heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. *Johnson v. State*, 399 So. 2d 859 (Ala. Crim. App. 1979), aff'd in part and rev'd in part, 399 So. 2d 873 (Ala. 1981).

A finding that the homicides were "brutal" fails to conform to this section which requires a finding that the crimes was "especially heinous, atrocious or cruel." The crime was in fact brutal, but the statute requires more. *Berard v. State*, 402 So. 2d 1044 (Ala. Crim. App. 1981).

The first-degree murder of two or more victims is not, by definition, especially heinous, atrocious or cruel. *Kyzer v. State*, 399 So. 2d 330 (Ala. 1981).

"Great risk to many persons" not applicable to two robbery victims. — The aggravating circumstance that the defendant knowingly created a great risk of death to many persons is not applicable to the situation where the only possible risk of death is to the two victims of the robbery. *Ashlock v. State*, 367 So. 2d 560 (Ala. Crim. App. 1978), cert. denied, 367 So. 2d 562 (Ala. 1979).

Pecuniary gain covers murder-for-hire not stealing money. — The aggravating circumstance that the capital felony was committed for pecuniary gain covers the "murder-for-hire" situation and not the circumstance where the intentional killing was committed by the appellant while stealing money. *Ashlock v. State*, 367 So. 2d 560 (Ala. Crim. App. 1978), cert. denied, 367 So. 2d 562 (Ala. 1979).

To avoid repetition, subdivision (6) of this section should not be applied to a robbery. *Cook v. State*, 369 So. 2d 1251 (Ala. 1978).

Pecuniary gain may not be used as an aggravating circumstance in a case of capital robbery. *Bufford v. State*, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980); *Johnson v. State*, 399 So. 2d 859 (Ala. Crim. App. 1979), aff'd in part and rev'd in part, 399 So. 2d 873 (Ala. 1981).

Prior criminal history. — The only aggravating circumstances relating to a defendant's prior criminal history which may be considered are set out in subdivision (2) of this section. *Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Use against an individual of unproven charges is prohibited in this life or death situation. *Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Only evidence of adjudicated charge, not original charge admissible. — It is not appropriate, in considering a previously adjudicated criminal charge, to admit evidence of the original charge of assault with intent to murder, which was reduced to malicious destruction of property; instead the court must rely on the prior judge's decision that defendant's acts were most appropriately treated as malicious destruction of property. *Cook v. State*, 369 So. 2d 1251 (Ala. 1978).

Defendant's prior convictions for assault and battery and abusive language held not

convictions of felony as required by subsection (2). *Bufford v. State*, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

Inappropriate findings of aggravation. — Findings of fact that the robbery was committed for "pecuniary gain" and that the killing was "unnecessary," are inappropriate. *Lewis v. State*, 380 So. 2d 970 (Ala. Crim. App. 1979).

That a capital felony was "hateful" is not an aggravating circumstance set out in the statute. *Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

This section does not allow a crime against property by stealth to be set out as an aggravating circumstance. Neither does it enumerate as an aggravating circumstance that a defendant served time in a number of penitentiaries. *Mack v. State*, 375 So. 2d 476 (Ala. Crim. App. 1978), aff'd, 375 So. 2d 504 (Ala. 1979), vacated, 448 U.S. 903, 100 S. Ct. 3044, 65 L. Ed. 2d 1134 (1980), rev'd on remand, 405 So. 2d 701 (Ala. Crim. App. 1981).

An absence of provocation is not an aggravating circumstance listed in the capital felony section. Such a finding has no more legal effect than a finding that the crime was "unnecessary." *Revard v. State*, 402 So. 2d 1044 (Ala. Crim. App. 1981).

Robbery cannot be aggravated by robbery or else defendant is punished twice for same act. *Bufford v. State*, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

Where defendant found guilty of "robbery or attempt thereof when the victim is intentionally killed by the defendant" primary element of instant charge, robbery, cannot be used to aggravate same charge. *Bufford v. State*, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

Fact that capital felony was committed by a person under sentence of imprisonment may be considered under subsection (1) as aggravating circumstance. *Bufford v. State*, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

Appellate court must independently weigh the aggravating and mitigating circumstances in a capital case. *Lewis v. State*, 380 So. 2d 970 (Ala. Crim. App. 1979).

For trial court finding that crime was especially heinous, atrocious, and cruel under subsection (8), see *Bufford v. State*, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

§ 13A-5-50. Consideration of aggravating circumstances in sentence determination.

The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence.

By way of illustration and not limitation, the aggravating circumstance specified in section 13A-5-49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of subsection (a) of section 13A-5-40. (Acts 1981, No. 81-178, § 12.)

Collateral references. — 24B C.J.S., Criminal Law, § 1983(1).

21 Am. Jur. 2d, Criminal Law, § 584.

§ 13A-5-51. Mitigating circumstances — Generally.

Mitigating circumstances shall include, but not be limited to, the following:

- (1) The defendant has no significant history of prior criminal activity;
- (2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
- (3) The victim was a participant in the defendant's conduct or consented to it;
- (4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;
- (5) The defendant acted under extreme duress or under the substantial domination of another person;
- (6) 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; and
- (7) The age of the defendant at the time of the crime. (Acts 1981, No. 81-178, § 13.)

I General Consideration.

II Decisions Under Prior Law.

I. GENERAL CONSIDERATION.

Analysis of mitigating circumstances should be based on this section. — The safer practice would be for a trial judge to simply follow the verbiage of this section in negating aggravating circumstances rather than devising his own tests. *Berard v. State*, 402 So. 2d 1044 (Ala. Crim. App. 1981).

Collateral references. — 24B C.J.S., Criminal Law, § 1983(1).

21 Am. Jur. 2d, Criminal Law, § 584.

II. DECISIONS UNDER PRIOR LAW.

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-36 are included in the annotations for this section.

The whole purpose of former §§ 13A-5-33 through 13A-5-36 (now repealed) was to allow for judicial review of a sentence of death fixed by the jury. *Kyzer v. State*, 399 So. 2d 330 (Ala. 1981).

Subsections (2) and (6) of this section were concerned with the degree of the

accused's mental disability. *Berard v. State*, 402 So. 2d 1044 (Ala. Crim. App. 1981).

Scheme allows accused to present mitigating evidence. — Alabama's sentencing scheme in death cases broadly allows the accused to present evidence of mitigating circumstances. *Jacobs v. State*, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 82 (1979).

As constitutionally indispensable part of death penalty process. — Alabama's sentencing process in death cases permits consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. *Jacobs v. State*, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 82 (1979).

Defendant permitted to introduce any matter relating to mitigating circumstances. — At the sentencing hearing before the jury, the court must permit the defendant to introduce any matter relating to any mitigating circumstances including those enumerated in this section. *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

But existence of mitigating circumstances does not necessarily require reduction of punishment from death to life imprisonment without parole. They must be considered with, and weighed against, aggravating circumstances and the extent of aggravation of such circumstances. *Lewis v. State*, 380 So. 2d 970 (Ala. Crim. App. 1979).

A pending charge cannot be considered as criminal history. *Cook v. State*, 369 So. 2d 1251 (Ala. 1978).

The legislature has indicated that lack of a significant criminal history should operate in a convicted individual's favor, and a court cannot qualify this provision by relying on prior criminal activity which does not rise to the level

established by the legislature. *Cook v. State*, 369 So. 2d 1251 (Ala. 1978).

Where sub-normality of defendant's mind is great, the fixation of his punishment at death should not be allowed to stand. *Lewis v. State*, 380 So. 2d 970 (Ala. Crim. App. 1979).

Appellate court must independently weigh aggravating and mitigating circumstances in a capital case. *Lewis v. State*, 380 So. 2d 970 (Ala. Crim. App. 1979).

If no mitigating circumstances exist, the order should so state. *Hubbard v. State*, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 405 So. 2d 695 (Ala. 1981).

And cause must be remanded to extend court's order. — Where court's order is insufficient because it did not specify mitigating circumstances enumerated in this section which it found insufficient to outweigh aggravating circumstances; cause must be remanded with instructions that court's order be extended to include findings of fact from trial and mitigating circumstances, if any, considered as required by statute. *Hubbard v. State*, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 405 So. 2d 695 (Ala. 1981).

Trial court's finding that defendant's age of 23 was insufficient to outweigh aggravating circumstances not error. *Bufford v. State*, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

For case where the sentencing court made an independent assessment of the evidence presented and determined, independently of the jury's verdict, that the statutory mitigating circumstances were inapplicable to the appellant. see *Kyzer v. State*, 399 So. 2d 317 (Ala. Crim. App. 1979), rev'd on other grounds, 399 So. 2d 330 (Ala. 1981).

§ 13A-5-52. Same — Inclusion of defendant's character, record, etc.

In addition to the mitigating circumstances specified in section 13A-5-51, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death. (Acts 1981, No. 81-178, § 14.)

Collateral references. — 24B C.J.S., Criminal Law, § 1983(1).

21 Am. Jur. 2d, Criminal Law, § 584.

§ 13A-5-53. Appellate review of death sentence; scope; remand; specific determinations to be made by court; authority of court following review.

(a) In any case in which the death penalty is imposed, in addition to reviewing the case for any error involving the conviction, the Alabama court of criminal appeals, subject to review by the Alabama supreme court, shall also review the propriety of the death sentence. This review shall include the determination of whether any error adversely affecting the rights of the defendant was made in the sentence proceedings, whether the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence, and whether death was the proper sentence in the case. If the court determines that an error adversely affecting the rights of the defendant was made in the sentence proceedings or that one or more of the trial court's findings concerning aggravating and mitigating circumstances were not supported by the evidence, it shall remand the case for new proceedings to the extent necessary to correct the error or errors. If the appellate court finds that no error adversely affecting the rights of the defendant was made in the sentence proceedings and that the trial court's findings concerning aggravating and mitigating circumstances were supported by the evidence, it shall proceed to review the propriety of the decision that death was the proper sentence.

(b) In determining whether death was the proper sentence in the case the Alabama court of criminal appeals, subject to review by the Alabama supreme court, shall determine:

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

(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and

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

(c) The court of criminal appeals shall explicitly address each of the three questions specified in subsection (b) of this section in every case it reviews in which a sentence of death has been imposed.

(d) After performing the review specified in this section, the Alabama court of criminal appeals, subject to review by the Alabama supreme court, shall be authorized to:

(1) Affirm the sentence of death;

(2) Set the sentence of death aside and remand to the trial court for correction of any errors occurring during the sentence proceedings and for imposition of the appropriate penalty after any new sentence proceedings that are necessary, provided that such errors shall not affect the determination of guilt and shall not preclude the imposition of a sentence of death where it is determined to be proper after any new sentence proceedings that are deemed necessary; or

(3) In cases in which the death penalty is deemed inappropriate under subdivision (b)(2) or (b)(3) of this section, set the sentence of death aside and remand to the trial court with directions that the defendant be sentenced to life imprisonment without parole. (Acts 1981, No. 81-178, § 15.)

Collateral references. — 24 C.J.S., Criminal Law, §§ 1643-1647, 1831-1840.

5 Am. Jur. 2d, Appeal and Error, § 723.

§ 13A-5-54. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provisions of this article who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1981, No. 81-178, § 16.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-37 are included in the annotations for this section.

This section does not require the record to show that appointed counsel has at least five years' prior experience in the active practice of criminal law; it simply requires that the indigent accused be provided such counsel. Absent some tangible indication that the requirements were not met, a court cannot summarily rule, as a matter of law, that the statute was not complied with. *Johnson v. State*, 399 So. 2d 859 (Ala. Crim. App. 1979), *aff'd in part and rev'd in part*, 399 So. 2d 873 (Ala. 1981).

Appointment in keeping with section. — Where an attorney has practiced criminal law at the call of the criminal docket in the county for 10 years, his appointment to a case involving a capital felony is in keeping with the provision of this section requiring not less than five years prior experience in the active practice of criminal law. *Jacobs v. State*, 371 So. 2d 429 (Ala. Crim. App. 1977), *rev'd on other grounds*, 371 So. 2d 448 (Ala. 1979).

Collateral references. — 23 C.J.S., Criminal Law, § 979(1).

21 Am. Jur. 2d, Criminal Law, §§ 309-317.

Accused's right to represent himself in state criminal proceeding — modern state cases. 98 ALR2d 13.

§ 13A-5-55. Conviction and sentence of death subject to automatic review.

In all cases in which a defendant is sentenced to death, the judgment of conviction shall be subject to automatic review. The sentence of death shall be subject to review as provided in section 13A-5-53. (Acts 1981, No. 81-178, § 17.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-34 are included in the annotations for this section.

The whole purpose of §§ 13A-5-33 through 13A-5-36 (now repealed) was to allow for judicial review of a sentence of death fixed by the jury. *Kyzer v. State*, 399 So. 2d 330 (Ala. 1981).

Scope of review. — Each death sentence should be reviewed to ascertain whether the crime was in fact one properly punishable by

death, whether similar crimes throughout the state are being punished capitally and whether the sentence of death is appropriate in relation to the particular defendant. In making this final determination, the courts should examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any. *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

Collateral references. — 24 C.J.S., Criminal Law, §§ 1643-1647, 1831-1840.

5 Am. Jur. 2d, Appeal and Error, § 723.

§ 13A-5-56. Supreme court to promulgate indictment forms, verdict forms and jury instructions.

The Alabama supreme court shall promulgate pattern indictment forms for use in cases in which indictments charging offenses defined in section 13A-5-40(a) are thereafter returned. The Alabama supreme court shall also promulgate pattern verdict forms and pattern jury instructions for the trial and sentencing aspects of cases tried thereafter under this article, insofar as such verdicts and instructions relate to the particularities of cases tried under this article. (Acts 1981, No. 81-178, § 18.)

Collateral references. — 42 C.J.S., Indictments and Informations, § 35; 88 C.J.S., Trial, §§ 326, 327; 89 C.J.S., Trial, § 492.

41 Am. Jur. 2d, Indictments and Informations, § 44; 75 Am. Jur. 2d, Trial, §§ 604-640; 76 Am. Jur. 2d, Trial, § 1141.

§ 13A-5-57. Application of article to conduct after effective date.

(a) This article applies only to conduct occurring after 12:01 A.M. on July 1, 1981. Conduct occurring before 12:01 A.M. on July 1, 1981 shall be governed by pre-existing law.

(b) Sections 13A-5-30 through 13A-5-38 are hereby repealed. All other laws or parts of laws in conflict with this article are hereby repealed. This repealer shall not affect the application of pre-existing law to conduct occurring before 12:01 A.M. on July 1, 1981. (Acts 1981, No. 81-178, p. 203, §§ 19, 20.)

Code commissioner's note. — Acts 1982, No. 82-567, § 1, designated the first paragraph of this section as subsection (a) and added subsection (b).

Acts 1981, No. 81-178, § 20, provides that the repeal of §§ 13A-5-30 through 13A-5-38 shall

not affect the application of pre-existing law to conduct occurring before July 1, 1981.

Collateral references. — 22 C.J.S., Criminal Law, §§ 13, 24(1)-24(3).

21 Am. Jur. 2d, Criminal Law, §§ 16, 17.

§ 13A-5-58. Interpretation of article.

This article shall be interpreted, and if necessary reinterpreted, to be constitutional. (Acts 1981, No. 81-178, § 21.)

Collateral references. — 22 C.J.S., Criminal Law, § 13.

21 Am. Jur. 2d, Criminal Law, § 14.

§ 13A-5-59. Application of article upon finding of unconstitutionality.

It is the intent of the legislature that if the death penalty provisions of this article are declared unconstitutional and if the offensive provision or provisions cannot be reinterpreted so as to provide a constitutional death penalty, or if the death penalty is ever declared to be unconstitutional per se, that the defendants who have been sentenced to death under this article shall be re-sentenced to life imprisonment without parole. It is also the intent of the

legislature that in the event that the death penalty provisions of this article are declared unconstitutional and if they cannot be reinterpreted to provide a constitutional death penalty, or if the death penalty is ever declared to be unconstitutional per se, that defendants convicted thereafter for committing crimes specified in section 13A-5-40(a) shall be sentenced to life imprisonment without parole. (Acts 1981, No. 81-178, § 23.)

Collateral references. — 22 C.J.S., Criminal Law, § 25.

21 Am. Jur. 2d, Criminal Law, § 14.

CRIMINAL CODE

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1985) 146 Ariz. 511,

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alty is not recom-
1980) 125 Ariz. 201,

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years imposed for
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were modified to
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of prior convictions
App.1984) 142 Ariz.

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ed. State v. Mount
9 P.2d 280.

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Ariz. 411, 656 P.2d

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183 Ariz. 282, 650

l be very hesitant to
discretion in sentenc-
asonable evidence in
aggravating circumstanc-
ate v. Meador (App.
ed 1257.

Supreme court will not reduce sentence im-
posed by the trial court unless it clearly appears
excessive under the circumstances, resulting in
an abuse of discretion. State v. McGuire (App.
1981) 131 Ariz. 109, 638 P.2d 1339.

Fact that defendant appears in person before
trial judge renders such judge in most instances
more able than the supreme court to evaluate
defendant and his circumstances regarding sen-
tence imposed. State v. Ferreira (1981) 128 Ariz.
530, 627 P.2d 681.

Imposition of penalty upon conviction of crime
is entirely within discretion of trial judge and the
supreme court will not reduce such penalty un-
less it clearly appears that sentence imposed is
excessive and is result of abuse of discretion.
Id.

Sentence within statutory limits will not be
disturbed on appeal unless it is clearly excessive
and reveals an abuse of discretion; abuse of
discretion is characterized by arbitrariness or
capriciousness, and failure to adequately take
into account circumstances of offense and past
conduct and moral character of defendant.
State v. Limpus (App.1981) 128 Ariz. 371, 625
P.2d 960.

Court of appeals will not modify sentence un-
less there are unusual circumstances or it clearly
appears from record that there is abuse of dis-
cretion. State v. Scrivner (App.1979) 125 Ariz.
508, 611 P.2d 95.

Where record revealed no abuse of discretion
by sentencing court, sentence within statutory
limits will not be overturned on appeal. State v.
Baumann (1980) 125 Ariz. 404, 610 P.2d 38.

Exercise of court's wide discretion in passing
sentence will be upheld as long as it is within
statutory limits and there is no clear abuse of
discretion. State v. Whitehead (1979) 122 Ariz.
535, 596 P.2d 370.

Penalty imposed by trial court upon conviction
will not be reduced unless it clearly appears that
sentence imposed is excessive, resulting in an
abuse of trial court's discretion. State v. Jerou-
sek (1979) 121 Ariz. 420, 590 P.2d 1366.

Court of appeals exercises its power to reduce
sentence only when it clearly appears that sen-
tence is excessive. State v. Montano (App.1978)
121 Ariz. 147, 589 P.2d 21.

Supreme Court will reduce sentence if it clearly
appears that sentence is too severe, or that
trial judge abused his discretion in determining
penalty. State v. Herrera (1978) 121 Ariz. 12,
588 P.2d 305, certiorari denied 99 S.Ct. 2175, 441
U.S. 949, 60 L.Ed.2d 1054.

§ 13-703. Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without

23. Reasons for sentence

Error in failing to articulate reasons for im-
posing less than presumptive sentence, pursuant
to plea agreement, was harmless beyond a rea-
sonable doubt where change of plea proceedings
were thorough and record contained factors
which could have been found to constitute miti-
gating circumstances, plea agreement was
agreed to by the State, and no objection was
made to the trial court's failure to articulate
mitigating factors; disagreeing with *State v.*
Holstun, 139 Ariz. 196, 677 P.2d 1304. State v.
Ybarra (App.1986) 149 Ariz. 118, 716 P.2d 1055.

It is a better practice for counsel to remind
judge of need to articulate reasons and acquaint
the judge with the mitigating factors so as to
justify lesser sentence pursuant to plea agree-
ment. State v. Ybarra (App.1986) 149 Ariz. 118,
716 P.2d 1055.

Trial court was not required to state reasons
for refusing to find aggravating or mitigating
circumstances when it imposed presumptive sen-
tence of 11.25 years for second-degree burglary.
State v. Risco (App.1985) 147 Ariz. 607, 712 P.2d
454.

24. Pending proceedings

1984 amendment to this section, permitting
trial court to defer designating offense as a
felony or a misdemeanor which did not affect or
impair vested rights was procedural in nature
and could be applied to proceedings already
pending. State v. Winton (App.1987) 153 Ariz.
302, 736 P.2d 386.

25. Probation revocation

Revocation of defendant's probation on theft
offense and imposition of presumptive term on
1.5 years for theft charge upon defendant's ad-
mission of attempted computer fraud was prop-
er; at time defendant was sentenced, court had
authority to defer designation of theft offense as
felony or misdemeanor and thus could designate
offense as felony upon revocation and sentence
defendant accordingly. State v. Winton (App.
1987) 153 Ariz. 302, 736 P.2d 386.

26. Continuances

Refusal to continue sentencing following de-
fendant's conviction for child molestation and
sexual conduct with a minor in order for defend-
ant to obtain counseling records from out-of-
state witness in which victim made inconsistent
statements about defendant's conduct was not
abuse of discretion, where presentence report
contained extensive information about defend-
ant, and court listed aggravating circumstances
it would have found if such finding had been
required. State v. Smith (App.1987) 753 P.2d
1174.

possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.
4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while on parole or probation, or while on a sentence of corrections, a law enforcement officer.

8. The defendant has been previously convicted of a crime under § 13-1101, which were committed while on parole or probation, or while on a sentence of corrections, a law enforcement officer.

9. The defendant was an adult and the victim was a minor.

10. The murdered individual was performing his official duties at the time of the offense and the victim was a peace officer.

G. Mitigating circumstances which are relevant to the sentence to be imposed, including any aspect of the circumstances of the offense.

1. The defendant's conduct shall conform his conduct to the standards of the community as to constitute a defense.

2. The defendant was a peace officer at the time of the offense and constituted a defense to the offense.

3. The defendant was a peace officer at the time of the offense and constituted a defense to the offense.

4. The defendant committed the offense while on parole or probation, or while on a sentence of corrections, a law enforcement officer.

5. The defendant's conduct was such as to constitute a defense to the offense.

Historical
Laws 1982, Ch. 325, which amended this section, was repealed by S.S., Ch. 3, § 1.

The 1988 amendment, par. 10 relating to the murder of a peace officer killed in the course of the performance of his duties.

1985 Reviser's Note:
Pursuant to authority vested in the Legislature by the Constitution of the State of Arizona, the sentence of death or life imprisonment without possibility of release until the expiration of a prescribed period of time in the previous section has been amended.

Law Review Comment:
Aggravating circumstances included in the penalty statute: A review of the statute (1984).

Capital punishment. Arizona State Bar Journal, Vol. 797.

Capital sentencing in Arizona. Arizona State Bar Journal, Vol. 1.

Constitutionality of the death penalty. 19 Arizona Law Review.

Death penalty. Arizona State Bar Journal, Vol. 285.

Death penalty: Social Justice. Arizona State Bar Journal, Vol. 4, 1977.

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7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.

10. The murdered individual was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the victim was a peace officer.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

Amended by Laws 1979, Ch. 144, § 1, eff. May 1, 1979; Laws 1982, Ch. 238, § 2; Laws 1982, Ch. 325, § 5; Laws 1984, Ch. 66, § 1; Laws 1985, Ch. 364, § 8, eff. May 16, 1985; Laws 1988, Ch. 155, § 1.

Historical Note

Laws 1982, Ch. 325, which, inter alia, amended this section, was repealed by Laws 1982, 6th S.S., Ch. 3, § 1.

The 1988 amendment, in subsec. F, inserted par. 10 relating to the murder of peace officers killed in the course of their duties.

1985 Reviser's Note:

Pursuant to authority of § 41-1304.02, "Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time" was substituted for the previous section heading.

Law Review Commentaries

Aggravating circumstances of Arizona's death penalty statute: A review. 26 Ariz.L.Rev. 661 (1984).

Capital punishment. Ariz.State L.J. 4, 1977, p. 797.

Capital sentencing in Arizona: A critical evaluation. Ariz.State L.J. 1, 1984, p. 1.

Constitutionality of Arizona death penalty statute. 19 Ariz.L.Rev. 504 (1977).

Death penalty. Ariz. State L.J. 2-3, 1978, p. 285.

Death penalty: Social policy and social justice. Ariz.State L.J. 4, 1977, p. 767.

Death penalty statute, reconstruction under Watson. 22 Ariz.L.Rev. p. 1037 (1980).

Due process and use of prior guilty pleas as an aggravating circumstance. 23 Ariz.L.Rev. 1376 (1982).

Speedy trial, denial upon resentencing to death. Ariz. State L.J. 1, 1979, p. 137.

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C.J.S. Criminal Law § 1980 et seq.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

United States Supreme Court

Accomplices. Imposition of death penalty, see Enmund v. Florida, 1982, 102 S.Ct. 3368, 458 U.S. 782, 73 L.Ed.2d 1140, on remand 439 So.2d 1383, appeal after remand 459 So.2d 1160, Quashed 476 So.2d 165.

Capital sentencing scheme. Requirements, see Godfrey v. Georgia, 1980, 100 S.Ct. 1759, 446 U.S. 420, 64 L.Ed.2d 398, on remand 246 Ga. 359, 274 S.E.2d 339, appeal after remand 248 Ga. 616, 284 S.E.2d 422, certiorari denied 102 S.Ct. 1778, 456 U.S. 919, 72 L.Ed.2d 180, rehearing denied 102 S.Ct. 2286, 456 U.S. 1001, 73 L.Ed.2d 1296.

Death penalty. Elements of offense as aggravating circumstances, see Lowenfield v. Phelps,

1988, 108 S.Ct. 546, 98 L.Ed.2d 568, rehearing denied 108 S.Ct. 1126, 99 L.Ed.2d 286.

Death penalty. Imposition as denial of due process where imposed upon conviction of same offense as that relied upon to find necessary statutory aggravating circumstances, see *Presnell v. Georgia*, 1978, 99 S.Ct. 235, 439 U.S. 14, 58 L.Ed.2d 207, on remand 243 Ga. 131, 252 S.E.2d 625, certiorari denied 100 S.Ct. 176, 444 U.S. 885, 62 L.Ed.2d 115, rehearing denied 100 S.Ct. 439, 444 U.S. 957, 62 L.Ed.2d 330.

Death penalty. Mitigating circumstances, see *Eddings v. Oklahoma*, 1982, 102 S.Ct. 869, 455 U.S. 104, 71 L.Ed.2d 1, appeal after remand 688 P.2d 342, certiorari denied 105 S.Ct. 1750, 470 U.S. 1051, 84 L.Ed.2d 814.

Death penalty. Mitigating factors, see *Lockett v. Ohio*, 1978, 98 S.Ct. 2954, 438 U.S. 586, 57 L.Ed.2d 973.

Death sentence,

Jury led to believe that responsibility for determining appropriateness of sentence rested elsewhere, see *Caldwell v. Mississippi*, 1985, 105 S.Ct. 2633, 472 U.S. 320, 86 L.Ed.2d 231, on remand 481 So.2d 850, certiorari granted, and vacated 107 S.Ct. 1269, 94 L.Ed.2d 130, on remand 517 So.2d 1360.

Right of direct review, see *McDonald v. Missouri*, 1984, 104 S.Ct. 567, 464 U.S. 1306, 78 L.Ed.2d 538.

Validity in view of lesser included noncapital offense, see *Beck v. Alabama*, 1980, 100 S.Ct. 2382, 447 U.S. 625, 65 L.Ed.2d 392, on remand 396 So.2d 645, 666, appeal after remand 485 So.2d 1196, reversed 485 So.2d 1201, on remand 485 So.2d 1203, affirmed 485 So.2d 1207, appeal after remand 507 So.2d 1003.

Fifth amendment privilege. Admissibility of statements made in psychiatric examination at sentencing procedure, see *Estelle v. Smith*, 1981, 101 S.Ct. 1866, 451 U.S. 454, 68 L.Ed.2d 359.

Jury. Death qualification, see *Lockhart v. McCree*, 1986, 106 S.Ct. 1758, 476 U.S. 162, 90 L.Ed.2d 137.

Mandatory death penalty for prison inmate convicted of murder while serving life sentence without parole, see *Sumner v. Shuman*, 1987, 107 S.Ct. 2716, 97 L.Ed.2d 56.

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1. Validity

State v. Bishop (1978) 1122 [main volume] vacated 810, 58 L.Ed.2d 103, app. Ariz. 531, 622 P.2d 478.

State v. Knapp (1977) 1704, certiorari denied 98 U.S. 908, 55 L.Ed.2d 435.

State v. Jordan (1976) 11224 [main volume] vacated 911, 57 L.Ed.2d 1157.

Defendant's comments no principled way to deal with, in which death penalty imposed, and thus, this section not applied to defendants, C.A.9 (Ariz.) 1987, 840 F.2d 1157.

This section, prescribing murder was committed cruel, or depraved manner, is not constitutionally vague on its face and should be considered

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cumstances 5.1

1. Validity

State v. Bishop (1978) 118 Ariz. 263, 576 P.2d 122 [main volume] vacated 99 S.Ct. 69, 439 U.S. 810, 58 L.Ed.2d 103, appeal after remand 127 Ariz. 531, 622 P.2d 478.

State v. Knapp (1977) 114 Ariz. 531, 562 P.2d 704, certiorari denied 98 S.Ct. 1458 [main vol-
ume] 435 U.S. 908, 55 L.Ed.2d 500.

State v. Jordan (1976) 114 Ariz. 452, 561 P.2d 1224 [main volume] vacated 98 S.Ct. 3138, 438 U.S. 911, 57 L.Ed.2d 1157.

Defendant's comments and conduct provided no principled way to distinguish defendant's case, in which death penalty was imposed, from many other cases in which death penalty was not imposed, and thus, this section was not unconstitutionally applied to defendant. *Jeffers v. Ricketts*, C.A.9 (Ariz.) 1987, 832 F.2d 476.

This section, prescribing death penalty when murder was committed in "especially heinous, cruel, or depraved manner," was not unconstitutionally vague on its face, even though any murder could be considered cruel, heinous, or de-

praved; the Supreme Court appeared to have sufficiently channeled sentencing discretion to prevent arbitrary and capricious capital sentencing decisions. *Jeffers v. Ricketts*, C.A.9 (Ariz.) 1987, 832 F.2d 476.

This section, which provides for imposition of death penalty if defendant committed offense in especially heinous, cruel, or depraved manner, violated neither the Eighth nor Fourteenth Amendments, which prohibit imposing capital punishment in arbitrary or capricious manner, as applied in murder prosecution; Arizona Supreme Court had defined each of the factors set forth in this section, and affirmed death sentence consistent with criteria it set forth in previous decisions. *Chaney v. Lewis*, C.A.9 (Ariz.) 1986, 801 F.2d 1191.

Heinous, cruel or depraved aggravating factors justifying imposition of death penalty under Arizona law are not vague and capricious. *Adamson v. Ricketts*, C.A.9 (Ariz.) 1985, 758 F.2d 441, on rehearing 789 F.2d 722, reversed 107 S.Ct. 2680, 97 L.Ed.2d 1.

Arizona's death penalty statute which requires death penalty when one or more statutory aggravating circumstances are found and no mitigation exists is constitutional, although it was contended that statute was unconstitutional because it mandated death sentence on finding statutory aggravating factors and no mitigation preventing sentencer from considering all relevant mitigating evidence, since aggravating circumstances are procedural standards that ensure against arbitrary imposition of death penalty and categorically narrow class of offenders eligible for that sentence at definitional stage. *Adamson v. Ricketts*, C.A.9 (Ariz.) 1985, 758 F.2d 441, on rehearing on other grounds 789 F.2d 722, reversed 107 S.Ct. 2680, 97 L.Ed.2d 1.

Post *State v. Watson* (1978) 120 Ariz. 441, 586 P.2d 1253, version of Arizona's death penalty statute, this section, allows consideration of all mitigating factors and thus does not violate the Eighth and Fourteenth Amendments. *Knapp v. Cardwell* (C.A.1982) 667 F.2d 1253, certiorari denied 103 S.Ct. 473, 459 U.S. 1055, 74 L.Ed.2d 621.

Since the "change" in Arizona's death penalty statute, § 13-454 (repealed; now this section) as a result of the interpretation by the Arizona supreme court in *Watson* was both procedural and ameliorative, and since the only effect of *Watson* was to enlarge the ability of defendants to introduce mitigating circumstances at sentencing, no ex post facto problems arose even with respect to those defendants tried and sentenced before *Watson*. *Id.*

Arizona supreme court's *Watson* decision, which merely eliminated the restriction on cognizable mitigating circumstances previously engrafted onto Arizona's death penalty statute, § 13-454 (repealed; now this section) by *State v. Richmond*, did not amount to a judicial enlargement of the punishment for appellants' crimes committed before that decision in violation of the

ex post facto clause, despite appellants' argument that, because the statute as previously interpreted was unconstitutional, Arizona had no death penalty prior to Watson. *Id.*

Provision of Arizona death penalty statute, § 13-454 (repealed; now this section) subsection F, which listed mitigating factors, was not deleted by the Arizona supreme court in Watson, which merely eliminated the restriction on cognizable mitigating circumstances previously engrafted onto the statute by State v. Richmond, and, therefore, the post Watson version of the statute was not void for vagueness. *Id.*

Petitioner failed to establish that Arizona death sentencing scheme was based on considerations of race, gender or poverty status. *Richmond v. Ricketts*, D.Ariz.1986, 640 F.Supp. 767.

Retroactive application of Arizona supreme court's saving interpretation of death sentencing procedures of Arizona death penalty statute, § 13-454 (repealed; see, now, this section) did not amount to imposition of an ex post facto penalty. *Knapp v. Cardwell* (D.C.1980) 513 F.Supp. 4, affirmed 667 F.2d 1253, certiorari denied 103 S.Ct. 473, 459 U.S. 1055, 74 L.Ed.2d 621.

An opinion of Arizona supreme court holding that constitutional portion of Arizona's death penalty statute, § 13-454 (repealed; now this section), was "severable" from that which was unconstitutional did not delete specific statutory language but, rather, was intended to overrule Arizona supreme court's prior restrictive interpretation of the former statute by invalidating the section of former statute enumerating mitigating circumstances insofar as that section limited right of defendant to show additional mitigating circumstances; thus, death penalty statute, as interpreted by Arizona supreme court, was neither void for vagueness nor violative of U.S.C.A. Const. Amend. 8, 14. *Id.*

Double jeopardy clause did not bar resentencing of those inmates whose resentencing was pending or who had been resentenced pursuant to Arizona supreme court opinion which placed a saving interpretation on former Arizona death penalty statute, § 13-454 (see, now, this section), which had been found unconstitutional by federal district court on ground that the prior restrictive interpretation of the statute limited right of a defendant to show additional mitigating circumstances other than those specifically enumerated by statute. *Id.*

Statutory aggravating circumstance for death penalty that in committing a murder defendant knowingly created a grave risk of death to another person or persons in addition to victim of offense may be found only where others are physically present in zone of danger and is not unconstitutional as arbitrary and overbroad. *State v. McMurtrey* (1986) 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

Finding that murder was committed in cruel, heinous or depraved manner was constitutionally valid aggravating circumstance in determining whether to impose death penalty. *State v. Castaneda* (1986) 150 Ariz. 382, 724 P.2d 1.

Aggravating factors in death penalty statute [A.R.S. § 13-703] that offense be committed for "pecuniary gain" or in "heinous, cruel or depraved" manner are not unconstitutionally vague. *State v. Smith* (1985) 146 Ariz. 491, 707 P.2d 289.

Death penalty procedure provides adequate standard for weighing aggravating and mitigating circumstances and, thus, does not violate Eighth or Fourteenth Amendment. *State v. Smith* (1985) 146 Ariz. 491, 707 P.2d 289.

Statutory aggravating factors under A.R.S. § 13-703 "pecuniary gain" and "heinous, cruel or depraved" in context of death penalty are not unconstitutionally vague. *State v. Rossi* (1985) 146 Ariz. 359, 706 P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

Death penalty statute (A.R.S. § 13-703) is not unconstitutional because it lacks standards for evaluating aggravating and mitigating circumstances. *State v. Rossi* (1985) 146 Ariz. 359, 706 P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

Death penalty statute (A.R.S. § 13-703) is not unconstitutional because jury takes no part in sentencing determination or because prosecutor has discretion to decide in which cases death penalty will be sought. *State v. Rossi* (1985) 146 Ariz. 359, 706 P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

Death penalty statute [A.R.S. §§ 13-703, 13-703, subd. B] is not unconstitutional as administering cruel and unusual punishment, as placing burden upon defendant with respect to mitigation, as vesting prosecutor with discretion to decide in which cases death penalty will be sought, as failing to adequately define terms "heinous, cruel or depraved," as requiring imposition of death penalty when one aggravating circumstance exists and there are no mitigating factors, as failing to allow jury to take part in sentencing determination, or as failing to give trial court guidance as to what mitigating factors are or as to how mitigating factors are to be weighed against aggravating circumstances. *State v. Bracy* (1985) 145 Ariz. 520, 703 P.2d 464, certiorari denied 106 S.Ct. 898, 474 U.S. 1110, 88 L.Ed.2d 932.

Arizona death penalty procedure does not violate Federal Constitution on grounds of cruel and unusual punishment, of denial of jury trial on issue of sentencing, of placing burden on defendant to prove mitigating circumstances, of failing to offer guidelines for weighing aggravating and mitigating circumstances, or of failing to sufficiently define statutory language. *State v. Roscoe* (1984) 145 Ariz. 212, 700 P.2d 1312, certiorari denied 105 S.Ct. 2169, 471 U.S. 1094, 85 L.Ed.2d 525.

Arizona supreme court in (1978) 120 Ariz. 441, 586 P.2d 120, was merely legislating but was merely r Arizona death penalty statute (this section), to eliminate the nizable mitigating circumstance grafted onto the statute by the Richmond (1976) 114 Ariz. 186

Provision of § 13-703 authorizing pecuniary gain as an aggravating factor in imposition of death penalty does not violate due process as being either vague or overbroad. *State v. Nash* (1985) 143 Ariz. 491, 707 P.2d 289, certiorari denied 105 S.Ct. 261, 86 L.Ed.2d 706.

Section 13-703 provides acceptable standards for deciding aggravating circumstances outweighing mitigating circumstances and does not violate Amend. 14 in requiring the state to find that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. *State v. Nash* (1985) 143 Ariz. 491, 707 P.2d 289, certiorari denied 105 S.Ct. 1143, 86 L.Ed.2d 706.

Defendant failed to establish that Arizona death penalty statute violated U.S.C.A. Const. Art. 2, § 13 on ground that reason that a disproportionate number of Caucasians received a death sentence was not a valid factor. *Carriger* (1984) 143 Ariz. 1, 707 P.2d 289, certiorari denied 105 S.Ct. 285, 85 L.Ed.2d 864.

Section 13-703 did not violate U.S.C.A. Const. Art. 2, § 24 on ground that trial court found that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt. *State v. Nash* (1985) 143 Ariz. 491, 707 P.2d 289, certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.2d 864.

Janus-like quality of aggravating factors, heinousness and depravity, which are required to be found by the jury, does not violate due process rights of defendant to a fair trial. *State v. Gillies* (1984) 142 Ariz. 564, 707 P.2d 289, certiorari denied 105 S.Ct. 84, 84 L.Ed.2d 834.

Death penalty statute does not violate due process rights of defendant to a fair trial by shifting burden of proof to defendant. *State v. Gillies* (1984) 142 Ariz. 564, 707 P.2d 289, certiorari denied 105 S.Ct. 177, 84 L.Ed.2d 834.

Death penalty statute, which requires a finding of aggravating factors, does not violate due process rights of defendant to a fair trial by shifting burden of proof to defendant. *State v. Gillies* (1984) 142 Ariz. 564, 707 P.2d 289, certiorari denied 105 S.Ct. 177, 84 L.Ed.2d 834.

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Arizona supreme court in *State v. Watson* (1978) 120 Ariz. 441, 586 P.2d 1253, was not legislating but was merely reinterpreting the Arizona death penalty statute, § 13-454 (now this section), to eliminate the restriction on cognizable mitigating circumstances previously engrafted onto the statute by the court in *State v. Richmond* (1976) 114 Ariz. 186, 560 P.2d 41. Id.

Provision of § 13-703 authorizing use of pecuniary gain as an aggravating factor in justifying imposition of death penalty does not violate due process as being either vague or arbitrary. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 1143, 86 L.Ed.2d 706.

Section 13-703 provides constitutionally acceptable standards for deciding whether aggravating circumstances outweigh mitigating factors and does not violate U.S.C.A. Const. Amend. 14 in requiring the sentencing judge to find that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 1143, 86 L.Ed.2d 706.

Defendant failed to establish that death penalty violated U.S.C.A. Const. Amend. 14 and Const. Art. 2, § 13 on ground that racial bias was a reason that a disproportionate number of killers of Caucasians received a death penalty. *State v. Carriger* (1984) 143 Ariz. 142, 692 P.2d 991, certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.2d 864.

Section 13-703 did not violate Const. Art. 2, § 24 on ground that trial court was not required to find that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt. *State v. Carriger* (1984) 143 Ariz. 392, 692 P.2d 991, certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.2d 864.

Janus-like quality of aggravating factors of cruelty, heinousness and depravity, in that act of cruelty to victim can also reflect on perpetrator's state of mind, does not render these aggravating factors violative of U.S.C.A. Const. Amend. 14 under test which requires state to define crimes for which death sentence may be imposed in way that obviates standardless sentencing discretion. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Death penalty statute § 13-703, which places burden of establishing mitigating circumstances on defendant does not violate defendant's due process rights under U.S.C.A. Const. Amend. 14 by shifting burden of proof to him. § *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Death penalty statute, § 13-703, provides required guidance to strike balance between mandatory sentencing procedures on one hand and unbridled judicial discretion on the other, and thus does not violate U.S.C.A. Const. Amend. 14

for lack of standards, since requirement that trial judge impose death sentence if there is one aggravating factor and no mitigating factors is balanced by defendant's ability to raise any and all relevant factors in mitigation. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Death penalty statute excluding jury involvement in sentencing decision does not violate Const. Art. 2, § 15 or U.S.C.A. Const. Amends. 8 and 15. *State v. Tison* (1984) 142 Ariz. 454, 690 P.2d 755, vacated 107 S.Ct. 1676, 95 L.Ed.2d 127, rehearing denied 107 S.Ct. 3201, 96 L.Ed.2d 688.

Provisions of death penalty statute, § 13-703, are not unconstitutionally vague in violation of U.S.C.A. Const. Amend. 14. *State v. Clabourne* (1984) 142 Ariz. 335, 690 P.2d 54.

Death penalty is constitutional. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 84, certiorari denied 105 S.Ct. 1234, 469 U.S. 84, 84 L.Ed.2d 371.

This section is not unconstitutional in including commission of offense as consideration for receipt of anything of pecuniary value as aggravating circumstance even though intentional killing to eliminate a witness is not. *State v. Harding* (1984) 141 Ariz. 132, 687 P.2d 1247.

This section does not unconstitutionally fail to provide trial judge with guidance on how to balance aggravating and mitigating factors. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

This section empowering trial judge to find aggravating and mitigating factors did not deprive defendant convicted of first-degree murder of his right to trial by jury in violation of U.S.C.A. Const. Amend. 6. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

This section providing for judge rather than jury determination of sentence upon conviction of first-degree murder is not unconstitutional under U.S.C.A. Const. Amends. 8 and 14 on theory it gives no guidance as to what constitutes a mitigating circumstance or as to how to balance aggravating factors against mitigating factors. *State v. McCall* (1983) 139 Ariz. 147, 677 P.2d 920, certiorari denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d 375.

Death penalty statute, this section, is not invalid on grounds that it does not provide uniform standards for weighing and balancing aggravating and mitigating circumstances, allegedly resulting in arbitrary and capricious imposition. *State v. Summerlin* (1983) 138 Ariz. 426, 675 P.2d 686.

Arizona death penalty statute, this section, is not unconstitutional on grounds that it requires trial judge to determine whether to impose death penalty. *State v. Summerlin* (1983) 138 Ariz. 426, 675 P.2d 686.

Arizona death penalty statute is not unconstitutional as cruel and unusual punishment con-

trary to U.S.C.A. Const. Amend. 8. State v. Lambright (1983) 138 Ariz. 63, 673 P.2d 1.

Provision of this section that aggravating circumstance exists where killing is done in an especially heinous, cruel or depraved manner is not unconstitutionally vague. State v. Lambright (1983) 138 Ariz. 63, 673 P.2d 1.

A statute governing imposition of the death penalty is not unconstitutional on ground that it provides no specific standards for weighing aggravating and mitigating circumstances. State v. Jordan (1983) 137 Ariz. 504, 672 P.2d 169, appeal after remand 144 Ariz. 240, 697 P.2d 323.

Statutory scheme governing imposition of death penalty provides constitutionally adequate guidance to trial judges in deciding whether to impose a capital sentence and is not unconstitutional on ground that it is mandatory as requiring trial judges to impose penalty if one or more aggravating circumstances are found and no mitigating circumstances are found. State v. Jordan (1983) 137 Ariz. 504, 672 P.2d 169, appeal after remand 144 Ariz. 240, 697 P.2d 323.

This section, authorizing death penalty, is not arbitrary and capricious relative to notion of mitigation "sufficiently substantive to call for leniency," or to burden of proving mitigating factors; therefore, this section is not violative of prohibition against cruel and unusual punishment. State v. Harding (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

This section, authorizing the death penalty, is not violative of prohibition against cruel and unusual punishment on basis of prosecutor's authority on decision whether to seek death penalty. State v. Harding (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

This section does not violate due process by placing burden of proof of mitigating circumstances on defendant. State v. Harding (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

This section is not unconstitutional as in violation of U.S.C.A. Const. Amend. 6 by failing to involve jury in capital sentencing decision. State v. Harding (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

Legislatively propounded criteria for aggravating circumstances in death sentence statute are not impermissibly overbroad or vague. State v. Harding (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

Due process requires that defendant be advised of specific charges against him; however, there is no requirement that defendant be advised in indictment or information of statutory penalty, or that he be advised what aggravating circumstances will be presented at sentencing in event of conviction. State v. Richmond (1983)

136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

Death penalty statute, on its face and in application, does not allow for arbitrary and capricious determinations, and is thus not violative of U.S.C.A. Const. Amend. 8. State v. Richmond (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

Death penalty statute, this section, was intended to guide sentencing court's discretion, and court, under the statute, was not free to disregard anything as mitigating factor, and thus, death penalty statute did not violate U.S.C.A. Const. Amends. 8 and 14 for offering no guidance in balancing aggravating and mitigating circumstances or for allowing judge to disregard factors which should be considered in mitigation. State v. Smith (1983) 136 Ariz. 273, 635 P.2d 995.

Fact that death penalty statute, this section, relevant to conviction for first-degree murder provided only alternative of life imprisonment to sentence of death did not render statute violative of due process. State v. Gillies (1983) 135 Ariz. 500, 662 P.2d 1007, appeal after remand 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Provision of this section giving court authority to refuse to disclose to defendant such material in presentence report as court determines is required to be withheld for protection of human life and further prescribing that any withheld information should not be considered in determining existence of aggravating or mitigating circumstances was not violative of due process as precluding court from considering mitigating circumstances which would dictate against death penalty, and further, where defendant had no such information withheld from him, he had no claim for relief. State v. Gillies (1983) 135 Ariz. 500, 662 P.2d 1007, appeal after remand 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

This section, which placed burden of establishing existence of mitigating circumstances on defendant, but which did not specifically provide immunity for defendant's testimony, was not unconstitutional violation of either due process, equal protection, or U.S.C.A. Const. Amend. 5 right against self-incrimination, where this section came into play only after determination of guilt, and procedural rules, Criminal Rule 26.6, provided that any testimony by defendant under such statute was inadmissible at any later trial of defendant. State v. Gillies (1983) 135 Ariz. 500, 662 P.2d 1007, appeal after remand 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Death penalty did not constitute cruel and unusual punishment in violation of U.S.C.A. Const. Amend. 8 or A.R.S. Const. Art. 2, § 15. State v. Gillies (1983) 135 Ariz. 500, 662 P.2d 1007, appeal after remand 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Where avenues for postconviction review at state and federal, were not available to defendant who had been sentenced to death, this section, was not failing to consider mitigating factors might come into being between sentencing and carrying out of death sentence. State v. Gillies (1983) 135 Ariz. 500, 662 P.2d 1007, appeal after remand 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Arizona scheme for imposition of death penalty is not unconstitutionally vague. State v. Zarr (1983) 135 Ariz. 404, 635 P.2d 22, certiorari denied 104 S.Ct. 199, 465 U.S. 1013, 79 L.Ed.2d 246.

This section allowing trial judge to consider whether a murder was especially heinous, cruel or depraved, in deciding whether to impose death sentence, is not unconstitutionally vague. State v. Zarr (1983) 135 Ariz. 404, 635 P.2d 22, certiorari denied 104 S.Ct. 199, 465 U.S. 1013, 79 L.Ed.2d 246.

This section is not unconstitutional on ground that it does not allow sentencer to consider defendant's mens rea in determining existence of mitigating circumstance. Subsection clearly allows trial judge to offer and sentencing court to consider mitigating circumstance in making sentencing decision, including the defendant's testimony at sentencing hearing, defendant's mental state at time of crime.

This section, which only requires sentencing court to consider any mitigating circumstances, which preclude both aggravating and mitigating circumstances, are sufficient for leniency and which require sentencing court to exercise discretion in weighing the diverse frailties of human nature. State v. Zarr (1983) 135 Ariz. 404, 635 P.2d 22, certiorari denied 104 S.Ct. 199, 465 U.S. 1013, 79 L.Ed.2d 246.

Death penalty statute does not violate due process by allowing arbitrary selection of aggravating factors where there is no guidance in statute. State v. Worat (1983) 135 Ariz. 500, 662 P.2d 1007, appeal after remand 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Death penalty sentence is not unconstitutional. State v. Zarr (1983) 135 Ariz. 404, 635 P.2d 22, certiorari denied 104 S.Ct. 199, 465 U.S. 1013, 79 L.Ed.2d 246.

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Where avenues for postconviction relief, both state and federal, were not closed to defendant who had been sentenced to death, death penalty statute, this section, was not unconstitutional for failing to consider mitigating factors which might come into being between time of sentencing and carrying out of death penalty. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007, appeal after remand 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Arizona scheme for imposition of death penalty is not unconstitutionally vague. *State v. Jeffers* (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

This section allowing trial court to consider whether a murder was committed in an especially heinous, cruel or depraved manner as an aggravating circumstance is not unconstitutionally vague. *State v. Zaragoza* (1983) 135 Ariz. 63, 659 P.2d 22, certiorari denied 103 S.Ct. 3097, 462 U.S. 1124, 77 L.Ed.2d 1356.

This section is not unconstitutional on ground that it does not allow sentencing judge to consider defendant's mens rea at time of crime as a mitigating circumstance in sentencing, in that subsection clearly allows defense or prosecution to offer and sentencing judge to consider any mitigating circumstance relevant to sentencing decision, including the defendant's mens rea, and at sentencing hearing, defendant raised and sentencing judge considered question of defendant's mens rea at time of crime. Id.

This section, which only applies to first-degree murder, which sets out specific lists of aggravating and mitigating circumstances and requires court to consider any other relevant mitigating circumstances, which provides that, if there are both aggravating and mitigating circumstances, court must determine whether mitigating circumstances are sufficiently substantial to call for leniency and which has been interpreted as requiring court to carefully consider all the compassionate or mitigating factors stemming from the diverse frailties of humankind, provides constitutionally adequate standards to guide sentencing discretion. *State v. Gretzler* (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

Death penalty statute (this section) does not violate due process despite contention that it allows arbitrary selection of death penalty because there is no guidance provided as to what constitutes mitigating circumstance or how to balance aggravating factors against mitigating factors. *State v. Woratzeck* (1982) 134 Ariz. 452, 657 P.2d 865.

Death penalty sentencing procedure in Arizona is constitutional. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

Due process in a death penalty sentencing hearing requires that prosecution disclose aggravating circumstances state will seek to prove, disclose evidence state will use, and make disclosures sufficiently in advance of hearing that defendant will have a reasonable opportunity to prepare rebuttal. Id.

Death penalty statute, § 13-454 (repealed; see, now, this section), was not unconstitutional, despite defendant's assertion that former statute was ex post facto law, that prosecution was not required by former statute to prove totality of aggravating circumstances outweighed totality of mitigating circumstances beyond reasonable doubt, and that former statute left imposition of death of one-man judge rather than to jury. *State v. Schad* (1981) 129 Ariz. 557, 633 P.2d 366, certiorari denied 102 S.Ct. 1492, 455 U.S. 983, 71 L.Ed.2d 693.

Defendant was not denied due process on grounds that the death penalty statute, § 13-454 (repealed; now this section), improperly fixed burden of proof because it required defendant to prove the existence of mitigating factors, but did not require prosecution to establish existence of aggravating circumstances beyond a reasonable doubt, in that facts which tend to show mitigation were peculiarly within the knowledge of a defendant. *State v. Greenawalt* (1981) 128 Ariz. 150, 624 P.2d 828, certiorari denied 102 S.Ct. 364, 454 U.S. 882, 70 L.Ed.2d 191.

Death penalty statute, § 13-454 (repealed; see, now, this section), is severable. Id.

Imposition of death penalty does not constitute cruel and unusual punishment in violation of U.S.C.A.Const. Amend. 8. Id.

Arizona's death penalty statute, § 13-454 (renumbered as this section), did not violate U.S.C.A.Const. Amend. 8. *State v. Clark* (1980) 126 Ariz. 428, 616 P.2d 888, certiorari denied 101 S.Ct. 796, 449 U.S. 1067, 66 L.Ed.2d 612.

State death penalty statute, § 13-454 (renumbered as this section), did not violate due process of law by failing to offer guidelines as to what mitigating circumstances could be considered and how they were to be weighed against statutory aggravated circumstances. *State v. Jordan* (1980) 126 Ariz. 283, 614 P.2d 825, certiorari denied 101 S.Ct. 408, 449 U.S. 986, 66 L.Ed.2d 251.

Death penalty statute, § 13-454 (repealed, see, now, this section), was not rendered unconstitutional by fact that it provided for fixing the penalty by a judge rather than a jury. *State v. Smith* (1980) 125 Ariz. 412, 610 P.2d 46.

Death penalty statute, A.R.S. § 13-454 (repealed, see, now, this section) does not constitute cruel and unusual punishment. *State v. Madsen* (1980) 125 Ariz. 346, 609 P.2d 1046, certiorari denied 101 S.Ct. 213, 449 U.S. 873, 66 L.Ed.2d 93.

A.R.S. § 13-454 (repealed, see, now, this section) was not violative of due process, though it was asserted that arbitrariness would result because courts were given no guidance as to what

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Note 1

could be considered in mitigation and no guidance in balancing quantity or quality of any mitigating factors against quantity or quality of any aggravating factors. *State v. Mata* (1980) 125 Ariz. 233, 609 P.2d 48, certiorari denied 101 S.Ct. 338, 449 U.S. 938, 66 L.Ed.2d 161.

Imposition of the death penalty on a 16-year-old is not necessarily an abuse of discretion or cruel and unusual punishment. *State v. Valencia* (1979) 124 Ariz. 139, 602 P.2d 807, appeal after remand 132 Ariz. 248, 645 P.2d 239.

Except for subsec. F dealing with defendant's right to show mitigating circumstances other than those statutorily enumerated, death penalty statute, § 13-454 (renumbered as this section), was constitutional. *State v. Carriger* (1979) 123 Ariz. 335, 599 P.2d 788, certiorari denied 100 S.Ct. 741, 444 U.S. 1049, 62 L.Ed.2d 736.

Where defendant was sentenced pursuant to portions of former § 13-454 [see, now, this section] which was held unconstitutional, murder conviction was remanded for resentencing. *State v. Edwards* (1979) 122 Ariz. 206, 594 P.2d 72, reversed on other grounds 101 S.Ct. 1880, 451 U.S. 477, 68 L.Ed.2d 378, rehearing denied 101 S.Ct. 3128, 452 U.S. 973, 69 L.Ed.2d 984.

Allowing trial judge, not jury, to determine mitigating and aggravating circumstances is not a denial of defendant's right to trial by jury under U.S.C.A. Const. Amend. 6. *State v. Watson* (1978) 120 Ariz. 441, 586 P.2d 1253, certiorari denied 99 S.Ct. 1254, 440 U.S. 924, 59 L.Ed.2d 478, appeal after remand 129 Ariz. 60, 628 P.2d 943.

Constitutional provisions of death penalty statute, § 13-454 (repealed; see, now, this section), were severable from unconstitutional provision limiting mitigating circumstances to be considered. *Id.*

Death penalty statute, § 13-454 (repealed; see, now, this section), insofar as it limited right of defendant to show mitigating circumstances other than those enumerated in statute, was unconstitutional. *Id.*

Due process was not offended by requirement of § 13-454 (repealed; see, now, this section) that defendant prove mitigating circumstances in order to reduce sentence from death to life imprisonment. *Id.*

2. Construction and application

In death penalty case, only after concluding that defendant has proved by preponderance of evidence certain mitigating circumstances must trial judge determine whether proven mitigating circumstances warrant leniency, and if trial judge concludes that proven mitigating circumstances warrant leniency, then he must impose life sentence, but if trial judge concludes that proven mitigating circumstances do not warrant leniency then he must impose death sentence. *State v. Rossi* (1987) 154 Ariz. 245, 741 P.2d 1223.

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Section 13-703 pertaining to sentence of death or life imprisonment without possibility of parole for 25 years applies only to first-degree murder convictions. *State v. Meeker* (1984) 143 Ariz. 256, 693 P.2d 911.

Where circumstances of sentencing made it unclear which death penalty statute defendant was sentenced under, and defendant faced same penalty and procedure under either statute, there was no constitutional defect in sentencing defendant under statute not yet in effect when he committed the crime. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

Defendant who knowingly created a grave risk of death to three children of murder victim when he tried to dispose of victim's body by burning down house while children were inside was properly sentenced to death. *Id.*

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, conducting aggravation-mitigation hearing pursuant to both the death penalty statute, this section, which was in effect between October 1, 1978 and April 30, 1979, and two court decisions was proper, contrary to contention that application of one of such decisions to statute resulted in creation of a judicially enacted penalty. *State v. Vickers* (1981) 129 Ariz. 506, 633 P.2d 315.

Death penalty statute, this section, required that sentencing hearing, special verdict and sentencing be carried out by same judge who presided at trial. *State v. McDaniel* (1980) 127 Ariz. 13, 617 P.2d 1129, appeal after remand 136 Ariz. 188, 665 P.2d 70.

2.2. Effective assistance of counsel

Where defendant was wrongly informed by his attorney that any incriminating statements he might make at sentencing hearing after his conviction of first-degree murder would be admissible in any new trial, and defendant relied on such advice in failing to present any mitigating evidence, although state intended to prove, and did prove, aggravating factor, defendant was denied effective assistance of counsel amounting to fundamental error, and was entitled to new presentence investigation and hearing to determine whether death sentence was properly imposed. *State v. Smith* (1983) 136 Ariz. 273, 665 P.2d 995.

2.3. Double jeopardy

Double jeopardy clause did not bar second capital sentencing of Arizona defendants based on the "especially heinous" aggravating circumstance where in reversing first conviction and remanding for retrial on other grounds the state Supreme Court held that trial judge erred in finding "pecuniary scheme" circumstance limited to contract killings and on remand the trial judge imposed death sentence based on that circumstance; trial judge's initial rejection of "pecuniary gain" aggravating circumstance was not an acquittal of that circumstance and because re-

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viewing court did not find the insufficient to justify imposition there was no death penalty "ac court. *Poland v. Arizona*, Ariz. 1749, 476 U.S. 147, 90 L.Ed.2d 1

Since Arizona capital sentence are comparable to a trial, double of U.S.C.A. Const. Amend. 5 pr from sentencing defendant to sentence which he had initial conviction of felony-murder w appeal, notwithstanding that s posed by a judge or that in im life sentence, which constitute the death penalty, the trial co the pecuniary gain aggravating limited to killings for hire and : killings to rob. *Arizona v. R* S.Ct. 2305, 467 U.S. 203, 81 L.

Double-jeopardy principles c defendant's prior conviction to by finding as an aggravating f ant had been previously conv involving use or threat of vi person. *State v. Poland* (1985) P.2d 183, affirmed 106 S.Ct. 1 90 L.Ed.2d 123.

Death sentence on retrial of was not barred by double i appellate court, on appeal fr held that death penalty could upon the single aggravating . there because there was insu support it, since there was no of the death penalty as defen to death at end of first tria (1985) 144 Ariz. 388, 698 P.2 S.Ct. 1749, 476 U.S. 147, 90

Special capital sentencing, volved separate hearing and to aggravating and mitiga and rendering of special v thereto, had nature of tri: jeopardy attached, and, her imprisonment necessarily ac whatever was required for penalty, and, upon remand c ing on murder charge, defe stitutionally be given deat Rumsey (1983) 136 Ariz. 1 firmed 104 S.Ct. 2305, 467 164.

2.5. Life sentence

There is no common-lav matically reduces a death s onment immediately upon state's death penalty law. (C.A.1982) 667 F.2d 1253, S.Ct. 473, 459 U.S. 1055, 7

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viewing court did not find the evidence legally insufficient to justify imposition of death penalty there was no death penalty "acquittal" by that court. *Poland v. Arizona*, Ariz. 1986, 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Since Arizona capital sentencing proceedings are comparable to a trial, double jeopardy clause of U.S.C.A. Const. Amend. 5 prohibited Arizona from sentencing defendant to death after life sentence which he had initially received upon conviction of felony-murder was set aside on appeal, notwithstanding that sentence was imposed by a judge or that in imposing the initial life sentence, which constituted an acquittal of the death penalty, the trial court misconstrued the pecuniary gain aggravating circumstance as limited to killings for hire and as not applying to killings to rob. *Arizona v. Rumsey* (1984) 104 S.Ct. 2305, 467 U.S. 203, 81 L.Ed.2d 164.

Double-jeopardy principles do not bar use of defendant's prior conviction to enhance sentence by finding as an aggravating factor that defendant had been previously convicted of a felony involving use or threat of violence on another person. *State v. Poland* (1985) 144 Ariz. 388, 698 P.2d 183, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Death sentence on retrial of murder conviction was not barred by double jeopardy, although appellate court, on appeal from prior conviction, held that death penalty could not be based solely upon the single aggravating circumstance found there because there was insufficient evidence to support it, since there was no implied "acquittal" of the death penalty as defendant was sentenced to death at end of first trial. *State v. Poland* (1985) 144 Ariz. 388, 698 P.2d 183, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Special capital sentencing procedure, which involved separate hearing and specific findings as to aggravating and mitigating circumstances and rendering of special verdict with respect thereto, had nature of trial, to which double jeopardy attached, and, hence, sentence of life imprisonment necessarily acquitted defendant of whatever was required for imposition of death penalty, and, upon remand of case for resentencing on murder charge, defendant could not constitutionally be given death penalty. *State v. Rumsey* (1983) 136 Ariz. 166, 665 P.2d 48, affirmed 104 S.Ct. 2305, 467 U.S. 203, 81 L.Ed.2d 164.

2.5. Life sentence

There is no common-law doctrine that automatically reduces a death sentence to life imprisonment immediately upon the invalidation of a state's death penalty law. *Knapp v. Cardwell* (C.A.1982) 667 F.2d 1253, certiorari denied 103 S.Ct. 473, 459 U.S. 1055, 74 L.Ed.2d 621.

Invalidation of the previous Arizona sentencing procedure by *Watson*, in which the Arizona supreme court eliminated the restriction on cognizable mitigating circumstances which it had previously engrafted onto § 13-454 (repealed;

now this section), did not result, under Arizona law, in the acquisition of a fully matured right in each defendant to receive a life sentence. *Id.*

3. Death sentence—In general

State v. Jordan (1976) 114 Ariz. 452, 561 P.2d 1224 [main volume] vacated 98 S.Ct. 3138, 438 U.S. 911, 57 L.Ed.2d 1157.

Imposition of death penalty upon conviction of first-degree murder, armed robbery, aggravated assault, and theft of property with a value of more than \$1,000 was based upon aggravating circumstances that defendant had previously been convicted of other felonies involving use or threat of violence to other persons, that defendant knowingly created a great risk of death to another person, and that defendant committed offense as consideration for receipt, or an expectation of receipt, of something of pecuniary value and was not excessive despite defendant's advanced age of 67 and evidence of mental impairment. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 1143, 86 L.Ed.2d 706.

Death penalty is not to be imposed for every case of first-degree murder but is reserved for cases where manner in which crime was committed raises it above the norm of first-degree murders. *State v. Hensley* (1984) 142 Ariz. 598, 691 P.2d 689.

In order to impose sentence of death, trial judge must find existence of one or more aggravating factors beyond a reasonable doubt. *State v. Hensley* (1984) 142 Ariz. 598, 691 P.2d 689.

Where record provided substantial support for conclusion that defendant killed, attempted to kill, or intended to kill, he was properly sentenced under the death penalty statute, § 13-703. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

When jury, having been instructed on felony-murder, finds defendant guilty of first-degree murder, trial court must find that defendant killed, attempted to kill, or intended to kill before it can impose death penalty. *State v. Emery* (1984) 141 Ariz. 549, 688 P.2d 175.

Where it could not be determined whether defendant or his accomplice had actually killed victim, or whether defendant had intended such killing, defendant convicted of first-degree murder for his participation in criminal episode resulting in killing could not be sentenced to death. *State v. Emery* (1984) 141 Ariz. 549, 688 P.2d 175.

Defendant was not entitled to have his death sentence set aside under mandate of *Witherspoon*, since the jury in Arizona determines only guilt or innocence. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

Imposition of death penalty upon defendant, who had been convicted of the murder of his 73-year-old landlord, did not violate U.S.C.A.

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Const. Amend. 8 in light of finding by the trial court that defendant was the individual who actually committed the offense. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

Where jury may have found defendant guilty of first-degree murder based on a felony-murder theory, trial court has to determine beyond a reasonable doubt prior to imposing death sentence that defendant killed, attempted to kill, or intended to kill. *State v. Kinkade* (1984) 140 Ariz. 91, 680 P.2d 801, appeal after remand 147 Ariz. 250, 709 P.2d 884.

Considering prior cases in which death penalty was imposed upon a finding of the same aggravating circumstances and prior cases where death penalty was lessened to a sentence of life imprisonment, death penalty was not disproportionate to penalties in prior cases, and thus penalty was justified. *State v. McCall* (1983) 139 Ariz. 147, 677 P.2d 920, certiorari denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d 375.

Death sentence was not invalid because trial judge did not specifically find, in resentencing petitioner after remand, that petitioner intended to kill as long as it was determined on appeal prior to remand that petitioner intended to kill. *State v. Jordan* (1983) 137 Ariz. 504, 672 P.2d 169, appeal after remand 144 Ariz. 240, 697 P.2d 323.

Neither federal Constitution nor Arizona supreme court require that imposition of death penalty precisely reflect composition of general population. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

In first-degree murder prosecution, imposition of death penalty was not disproportionate to penalty imposed in similar cases, in which defendants robbed and murdered their victims. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

No ex post facto violation resulted from fact that defendant, who was convicted of first-degree murder, was sentenced pursuant to this section which became effective subsequent to the time the offense was committed since the changes embodied in this section were both procedural and ameliorative. *State v. Adamson* (1983) 136 Ariz. 250, 665 P.2d 972, certiorari denied 104 S.Ct. 204, 464 U.S. 866, 78 L.Ed.2d 178.

Where jury might have found defendant guilty of first-degree murder based on felony-murder theory, trial judge must determine beyond reasonable doubt prior to imposing sentence of death that defendant killed, attempted to kill, or intended to kill. *State v. McDaniel* (1983) 136 Ariz. 188, 665 P.2d 70.

Where defendant, with another, participated in robbery and beating of victim and bound victim's hands and legs, wrapped him in blankets, and

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locked him in trunk of car wherein victim died due to heat exhaustion or suffocation, defendant did in fact "kill" victim, for purpose of determining whether death sentence could be properly imposed. *State v. McDaniel* (1983) 136 Ariz. 188, 665 P.2d 70.

Independent review of record demonstrated that murder was not committed in an especially cruel, heinous or depraved manner and that murder was not committed in expectation of receipt or something of pecuniary value; in addition, record demonstrated in mitigation that defendant had no other convictions as adult and that defendant's capacity to appreciate wrongfulness of his conduct or to conform his conduct to requirements of law was significantly impaired; therefore, defendant was improperly sentenced to death. *State v. Graham* (1983) 135 Ariz. 209, 660 P.2d 460.

Trial court, on remand for resentencing in first-degree murder case, may take into account new interpretations of the death penalty statute occurring between the first and second sentencing. *State v. Gretzler* (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

In first-degree murder case in which there were aggravating circumstances consisting of defendant's prior convictions for crimes punishable by life imprisonment or death, prior convictions for felonies involving use or threat of violence and commission of the murder offenses in expectation of receiving something of pecuniary value and in especially heinous, cruel or depraved manner and in which there were mitigating circumstances relating to fact that he had significant, partial mental impairment and that he had unhappy childhood, death sentence was not disproportionate to penalty imposed in similar cases. *Id.*

On remand for resentencing in proceeding in which defendant had been convicted of two counts of first-degree murder and sentenced to death on basis of certain aggravating circumstances, State was justified in attempting to establish two additional aggravating factors consisting of committing the offenses in expectation of receiving something of pecuniary value and committing the offenses in especially heinous, cruel or depraved manner, in view of fact that the law on both factors was substantially clarified after the original sentencing; giving consideration to such factors on resentencing did not violate double jeopardy provision. *Id.*

Rule that death sentence cannot be executed if jury finding defendant guilty was culled of veniremen stating general objections to death penalty or expressing conscientious or religious scruples against its imposition was inapplicable when defendant was sentenced to life imprisonment without possibility of parole for 25 years, not to death. *State v. Thomas* (1982) 133 Ariz. 533, 652 P.2d 1380.

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Where indictment charging first-degree murder was sufficient to inform defendant not only of crime charged, but of sentence to be imposed in case of conviction, state's failure to charge defendant with statutory procedural provisions required by section (now this section) for sentencing in death penalty cases did not constitute error. *State v. Blazak* (1982) 131 Ariz. 694, certiorari denied 103 S.Ct. 74 L.Ed.2d 149.

Where shooting during course of first-degree murder was intentional and was done by defendant, imposition of death penalty did not constitute unusual punishment nor was it disproportionate to offense committed. *Id.*

As long as death penalty is not arbitrary and capricious manner, it is constitutional by federal or state law.

Though a great risk of death to others, where bodies of victim and defendant were found around automobile which had been abandoned by defendant and his companions after abandonment of vehicle, imposition of death penalty on ground that homicides were committed by defendant and his companions with which to continue the crime was not unusual punishment. *Tison* (1981) 129 Ariz. 546, 633 P.2d 119, certiorari denied 103 S.Ct. 180, 459 U.S. 147, rehearing denied 103 S.Ct. 1024, 74 L.Ed.2d 520.

Death penalty did not per se constitute unusual punishment. *(1981) 129 Ariz. 506, 633 P.2d 119.*

Death penalty should be imposed in most aggravating circumstances that are so shocking and that go far above the murder standards above the murders, or the background of the defendant apart from the usual Watson (1981) 129 Ariz. 60.

Death penalty was not manifestly excessive for defendant convicted of first-degree murder, in view of mitigating circumstances of defendant's behavior in prison, his attitude, his age (21) at the time of the crime, the fact that victim shot first, and that defendant received a life sentence. *Id.*

For purposes of death penalty, § 13-454 (renumbered as § 13-454) in homicide prosecution establishing circumstances warranting death penalty and did not establish circumstances calling for leniency. *(1980) 126 Ariz. 428, 616*

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Where indictment charging defendant with first-degree murder was sufficient on its face to inform defendant not only of crime of which he was charged, but of sentence he was facing, state's failure to charge defendant under special statutory procedural provision, § 13-454 (repealed; now this section) for sentencing in death penalty cases did not constitute inadequate notice that death sentence might be imposed. *State v. Blazak* (1982) 131 Ariz. 598, 643 P.2d 694, certiorari denied 103 S.Ct. 184, 459 U.S. 882, 74 L.Ed.2d 149.

Where shooting during course of robbery was intentional and was done by defendant, imposition of death penalty did constitute cruel and unusual punishment nor was sentence excessive or disproportionate to offense, despite assertion that imposition of death penalty in felony-murder cases constitutes cruel and unusual punishment. *Id.*

As long as death penalty is not imposed in an arbitrary and capricious manner, it is not unconstitutional by federal or state standards. *Id.*

Though a great risk of death was not created to others, where bodies of victims were in and around automobile which had been used by defendant and his companions in an escape and, after abandonment of vehicle, defendant and his companions left scene of homicides in another vehicle, imposition of death penalty was justified on ground that homicides were committed by defendant and his companions to secure a vehicle with which to continue their flight. *State v. Tison* (1981) 129 Ariz. 546, 633 P.2d 355, certiorari denied 103 S.Ct. 180, 459 U.S. 882, 74 L.Ed.2d 147, rehearing denied 103 S.Ct. 391, 459 U.S. 1024, 74 L.Ed.2d 520.

Death penalty did not per se constitute cruel and unusual punishment. *State v. Vickers* (1981) 129 Ariz. 506, 633 P.2d 315.

Death penalty should be reserved only for the most aggravating circumstances, circumstances that are so shocking and repugnant that the murder standards above the norm of first-degree murders, or the background of defendant sets him apart from the usual murderer. *State v. Watson* (1981) 129 Ariz. 60, 628 P.2d 943.

Death penalty was not mandated for defendant convicted of first-degree murder, since the mitigating circumstances of defendant's model behavior in prison, his attempts to further his education, his age (21) at time of murder, the fact that victim shot first, and the fact that codefendant received a life sentence rather than death outweighed the two aggravating circumstances arising out of defendant's prior conviction of robbery. *Id.*

For purposes of death penalty statute, § 13-454 (renumbered as this section) evidence in homicide prosecution established aggravating circumstances warranting imposition of death penalty and did not establish mitigating circumstances calling for leniency. *State v. Clark* (1980) 126 Ariz. 428, 616 P.2d 888, certiorari

denied 101 S.Ct. 796, 449 U.S. 1067, 66 L.Ed.2d 612.

In death penalty case, sentence was not to be executed as long as pending collateral proceedings had not been finally decided adversely to defendant. *State v. Jordan* (1980) 126 Ariz. 283, 614 P.2d 825, certiorari denied 101 S.Ct. 408, 449 U.S. 986, 66 L.Ed.2d 251.

Sentence of death is not per se cruel and unusual punishment in violation of Eighth and Fourteenth Amendments to United States Constitution. *Id.*

Defendant, who had been sentenced to death, was entitled to resentencing based on challenge to constitutionality of Arizona death penalty statute, § 13-454 (renumbered as this section). *State v. Gretzler* (1980) 126 Ariz. 60, 612 P.2d 1023, appeal after remand 128 Ariz. 583, 627 P.2d 1081, appeal after remand 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

Fact that death penalty was not imposed on codefendant did not establish that death penalty imposed on defendant was freakishly imposed. *State v. Steelman* (1980) 126 Ariz. 19, 612 P.2d 475, certiorari denied 101 S.Ct. 287, 449 U.S. 913, 66 L.Ed.2d 141.

Where records showed that defendant took active and deliberate part in killings, authorized imposition of death penalty even though there was evidence that would support felony-murder theory and prosecutor argued that theory to jury. *Id.*

Imposition of death sentence for first-degree murder committed by defendant, who committed such offense in especially heinous, cruel or depraved manner and who had been convicted of another offense punishable by life imprisonment or death, was not excessive in relation to penalty imposed in similar cases, considering both the crime and the defendant. *State v. Mata* (1980) 125 Ariz. 233, 609 P.2d 48, certiorari denied 101 S.Ct. 338, 449 U.S. 938, 66 L.Ed.2d 161.

Even if death penalty could not be imposed in felony-murder situation, such rule would not apply where defendant, convicted of first-degree murder, had shot his victim five times without aid of an accomplice, in that a felony-murder situation was not present. *State v. Arnett* (1980) 125 Ariz. 201, 608 P.2d 778.

Defendant who received death penalty for first-degree murder must be resentenced in light of recent United States Supreme Court decisions casting serious question on Arizona death penalty statutes. *State v. Steelman* (1978) 120 Ariz. 301, 585 P.2d 1213, appeal after remand 126 Ariz. 19, 612 P.2d 475, certiorari denied 101 S.Ct. 287, 449 U.S. 913, 66 L.Ed.2d 141.

3.1. — Prosecutorial discretion, death sentence

Fact that prosecutor has discretion in charging and deciding whether to ask for death penalty

does not render imposition of capital sentences unconstitutionally arbitrary. *State v. Gretzler* (1980) 126 Ariz. 60, 612 P.2d 1023, appeal after remand 128 Ariz. 583, 627 P.2d 1081, appeal after remand 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

In view of murder spree which resulted in defendant's conviction, prosecutor's decision to seek death penalty was not an abuse of discretion. *Id.*

3.15. — Intent, death sentence

Evidence that defendant helped accomplice bind victims, helped them to car and drove them to desert where they were murdered, and verbally encouraged accomplice in killing one victim, was sufficient to support finding that defendant intended to kill victims for purpose of determining whether death penalty could be imposed. *State v. Correll* (1986) 148 Ariz. 468, 715 P.2d 721.

Evidence was insufficient to support finding that defendant intended to kill victim, and defendant could not be sentenced to death on that murder count, where accomplice had dragged victim into bedroom after she was bound and was last person to be seen with victim. *State v. Correll* (1986) 148 Ariz. 468, 715 P.2d 721.

For purposes of determining whether defendant killed, attempted to kill, or intended to kill victim, in determining propriety of death penalty, "intended to kill" encompasses situation where defendant contemplated, anticipated, or intended that lethal force would or might be used or that life would or might be taken in accomplishing underlying felony. *State v. Emery* (1984) 141 Ariz. 549, 688 P.2d 175.

In light of insufficient evidence that defendant intended to kill victim who was beaten and locked in trunk of car, sentence of death for first-degree murder could not stand, and sentence of life imprisonment without possibility of parole for 25 years was warranted, even though offense had been committed in especially heinous, cruel, or depraved manner. *State v. McDaniel* (1983) 136 Ariz. 188, 665 P.2d 70.

3.2. — Resentencing, death sentence

Where defendant who was resentenced presented no evidence that sentencing judge entertained actual bias or prejudice against him, defendant failed to show prejudice or deprivation of due process. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

In resentencing defendant, convicted of first-degree murder, trial court did not err in failing to find his improved conduct and character to be mitigating circumstance; though it would have been arbitrary decision had court refused to consider the evidence, it was sufficient that court did consider the evidence but found it unpersuasive. *State v. Richmond* (1983) 136

Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

Resentencing defendant was not violation of ex post facto prohibitions, double jeopardy prohibitions, or of due process and separation of powers requirements. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

Defendant was not prejudiced by six-year delay in resentencing where such delay resulted in defendant having opportunity to present additional evidence as negation of sentence, and sentence he received at resentencing was no harsher than original sentence. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

Six-year delay in resentencing of defendant did not deprive defendant of constitutional right to speedy trial, in that right to speedy trial does not extend to sentencing. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

Trial court's resentencing of defendant did not deny defendant his alleged constitutional right to have jury decide presence of aggravating or mitigating circumstances. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

Where supreme court struck down three of four aggravating circumstances found by trial court in sentencing defendant after his conviction of first-degree murder and other crimes, and trial court had indicated that there were mitigating circumstances but they were not sufficiently substantial to call for leniency, case was properly remanded to trial court for resentencing. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007, appeal after remand 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Reimposition of death sentence after defendant's murder case had been remanded for resentencing did not violate due process clause, ex post facto clause, double jeopardy guarantee, prohibition against judicially created penalties or guarantee of republican form of government and separation of powers. *State v. Jeffers* (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

There was no error in imposing death penalty on defendant after his case was remanded for resentencing where defendant did not receive harsher sentence than he received in original sentencing. *Id.*

In proceeding in which defendant had been convicted of first-degree murder and was sentenced to death, resentencing defendant to death, under certain state Supreme Court decision, did not violate double jeopardy prohibition. *State v. Gretzler* (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

In proceeding in which death, resentencing defendant to death, under certain state Supreme Court decision, did not constitute violation of due process. *Id.*

In proceeding in which defendant had been convicted of first-degree murder and sentenced to death, under certain state Supreme Court decision, did not constitute violation of due process. *Id.*

3.3. — Stipulations

Where issue involves stipulation, a stipulation s broader effect than that establishes was intended parties; intended effect be broadened by technique when defendant failed to foresee such a (1983) 137 Ariz. 80, 666

3.35. — Felony murder

Court properly made defendant participated and intended to kill death penalty. *State v. 21, 734 P.2d 563, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.*

Where trial court made defendant and codefendant, that killing common strangling victim, victim while she was being clear finding that defendant intended to kill, and the jury was not precluded on imposition of death murder theory. *State v. 79, 673 P.2d 17, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.*

Where trial court made defendant and codefendant, that killing common strangling victim, victim while she was being clear finding that defendant intended to kill, and the jury was not precluded on imposition of death murder theory. *State v. 79, 673 P.2d 17, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.*

3.4. — Accomplice

Imposition of death sentence on defendant killed, attempted to kill, even though defendant was not convicted of first-degree murder. *State v. Hooper* (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

Where trial court made defendant and codefendant, that killing common

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In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, resentencing defendant to death, under certain state Supreme Court decision, did not violate ex post facto laws. *Id.*

In proceeding in which defendant had been convicted of first-degree murder and was sentenced to death, resentencing defendant to death, under certain state Supreme Court decision, did not constitute judicially created penalty in violation of due process and separation of powers. *Id.*

3.3. — Stipulations, death sentence

Where issue involves imposition of the death penalty, a stipulation should not be given any broader effect than that which the record clearly establishes was intended and discussed by the parties; intended effect of stipulation should not be broadened by technical application of a statute when defendant and his counsel evidently failed to foresee such a result. *State v. Hensley* (1983) 137 Ariz. 80, 669 P.2d 58.

3.35. — Felony murder, death sentence

Court properly made requisite finding that defendant participated in actual killing of victim and intended to kill him prior to imposition of death penalty. *State v. LaGrand* (1987) 153 Ariz. 21, 734 P.2d 563, certiorari denied 108 S.Ct. 207, 98 L.Ed.2d 158.

Where trial court made specific findings that defendant and codefendant discussed killing victim, that killing commenced when defendant began strangling victim, and that defendant held victim while she was being stabbed, there was a clear finding that defendant both killed and intended to kill, and thus imposition of death penalty was not precluded under rule placing limits on imposition of death penalty based on felony-murder theory. *State v. Smith* (1983) 138 Ariz. 79, 673 P.2d 17, certiorari denied 104 S.Ct. 1429, 465 U.S. 1074, 79 L.Ed.2d 753.

Where trial court made specific findings that defendant and codefendant discussed killing victim, that killing commenced when defendant began strangling victim, and that defendant held victim while she was being stabbed, there was a clear finding that defendant both killed and intended to kill, and thus imposition of death penalty was not precluded under rule placing limits on imposition of death penalty based on accomplice theory. *State v. Smith* (1983) 138 Ariz. 79, 673 P.2d 17, certiorari denied 104 S.Ct. 1429, 465 U.S. 1074, 79 L.Ed.2d 753.

3.4. — Accomplices, death sentence

Imposition of death penalty was proper where defendant killed, attempted to kill or intended to kill, even though defendant had accomplices. *State v. Hooper* (1985) 145 Ariz. 538, 703 P.2d 482, certiorari denied 106 S.Ct. 834, 474 U.S. 1073, 88 L.Ed.2d 805.

Where trial court made specific findings that defendant and codefendant discussed killing victim, that killing commenced when defendant be-

gan strangling victim, and that defendant held victim while she was being stabbed, there was a clear finding that defendant both killed and intended to kill, and thus imposition of death penalty was not precluded under rule placing limits on imposition of death penalty based on felony-murder theory. *State v. Smith* (1983) 138 Ariz. 79, 673 P.2d 17, certiorari denied 104 S.Ct. 1429, 465 U.S. 1074, 79 L.Ed.2d 753.

Where trial court made specific findings that defendant and codefendant discussed killing victim, that killing commenced when defendant began strangling victim, and that defendant held victim while she was being stabbed, there was a clear finding that defendant both killed and intended to kill, and thus imposition of death penalty was not precluded under rule placing limits on imposition of death penalty based on accomplice theory. *State v. Smith* (1983) 138 Ariz. 79, 673 P.2d 17, certiorari denied 104 S.Ct. 1429, 465 U.S. 1074, 79 L.Ed.2d 753.

3.5. — Notice of death sentence

Implication that imposition of death penalty was possible was clear from record and was clear to defendant, though trial judge did not clearly state that defendant's admitting prior convictions of aggravated assault, assault with intent to commit rape, assault with deadly weapon, armed burglary, and lewd and lascivious acts could result in imposition of death penalty for defendant's conviction of first degree murder, where trial judge had discussed death penalty in defendant's presence. *State v. Castaneda* (1986) 150 Ariz. 382, 724 P.2d 1.

Defendant had adequate of possibility of death penalty by virtue of being charged under § 13-453 (repealed, see, now, § 13-701 et seq.) providing for life imprisonment or death as penalties for first-degree murder. *State v. Smith* (1980) 125 Ariz. 412, 610 P.2d 46.

3.6. — Reduction of sentence, death sentence

Contrary to findings of trial court, first-degree murder of defendant's wife was not committed in any especially depraved manner nor was crime committed with expectation of financial gain; thus, defendant's sentence would be reduced from death to life imprisonment without possibility of parole for 25 years. *State v. Madsen* (1980) 125 Ariz. 346, 609 P.2d 1046, certiorari denied 101 S.Ct. 213, 449 U.S. 873, 66 L.Ed.2d 93.

3.7. — Proportionality, death sentence

Death penalty for brutal murders of two children was not excessive or disproportionate. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

Imposition of death penalty on defendant convicted of murdering 12-year-old boy after having kidnapped and sexually abused him was not excessive or disproportionate to penalty imposed in similar cases; circumstances of murder indicated it was above norm of first-degree murders and that defendant was above norm of first-degree

murderers. *State v. Castaneda* (1986) 150 Ariz. 382, 724 P.2d 1.

Death sentence for murders was not excessive or disproportionate to penalty imposed in similar cases, though defendant did not actually kill victims, where there were no sufficient mitigating circumstances calling for leniency and murders were committed in cruel, heinous and depraved manner, and for pecuniary gain, and defendant had prior convictions for crimes involving violence. *State v. Correll* (1986) 148 Ariz. 468, 745 P.2d 721.

Imposition of death sentence upon conviction for first-degree murder was not disproportionate to penalty imposed in similar cases where defendant had three previous convictions involving dangerous crimes, he was on parole at time of killing, killing, while not "cruel" as that word is used in death penalty statute, was cold, deliberate, and intentionally committed to gain access to cash drawer in convenience store, and defendant could have abandoned robbery attempt, but chose to complete it by killing. *State v. Smith* (1985) 146 Ariz. 491, 707 P.2d 289.

Defendant was not entitled to mitigation of sentence for first-degree murder due to any disparate treatment of codefendant where codefendant was significantly less culpable than defendant due to his age, first offender status, genuine remorse, and less active role in the commission of crime. *State v. Gerlaugh* (1985) 144 Ariz. 449, 698 P.2d 694.

Imposition of death sentence upon defendant found to have committed two murders for pecuniary gain without mitigating factors sufficiently substantial to call for leniency was proportionate to sentences imposed in state upon other defendants who committed murders having similar degree of aggravation. *State v. Poland* (1985) 144 Ariz. 412, 698 P.2d 207, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Imposition of death penalty in prosecution arising from fatal injuries which occurred in course of armed robbery was not so disproportionate to penalties imposed in prior cases as to require reversal. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 143, 86 L.Ed.2d 706.

Sentence of death for defendant who murdered three individuals in course of robbery of a bar was not disproportionate to penalty imposed in similar cases, considering both the crime and the defendant. *State v. Hensley* (1984) 142 Ariz. 598, 691 P.2d 689.

Where codefendant was sentenced to life imprisonment, and defendant received death sentence, question was not whether codefendant should have been executed, but whether execution of defendant was lawful and appropriate. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 84 L.Ed.2d 834.

Codefendant's sentence to life imprisonment was not mitigating factor in relation to death penalty for murder, where any resulting inequity

between codefendant's sentence and defendant's death sentence was consequence induced by plea bargaining system. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 84 L.Ed.2d 834.

Defendant's death sentence was neither disproportionate nor excessive as compared to sentences of similarly situated defendants, where, although Supreme Court did not know whether defendant or codefendant wielded rock that killed victim, who had been kidnapped and raped, it was certain that defendant intended victim's death and aided in her burial. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 84 L.Ed.2d 834.

Defendant's death sentence was proportionate to sentences imposed on other defendants for murders committed in a similar manner. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

Death penalty for first-degree murder was proportional to the crime, where the murder was committed in the expectation of the receipt of something of pecuniary value and defendant had previously been convicted of kidnapping, and where those two aggravating circumstances outweighed the evidence presented in mitigation. *State v. Smith* (1984) 141 Ariz. 510, 687 P.2d 1265.

Imposition of death penalty on defendant convicted of first-degree murder was not disproportionate in light of finding of aggravating circumstances of defendant's conviction for prior crime for which sentence of death was impossible, defendant's prior conviction of felony involving use or threat of violence on another person, commission of murder in expectation of pecuniary gain, and commission of murder in especially heinous, cruel, or depraved manner. *State v. Harding* (1984) 141 Ariz. 492, 687 P.2d 1247.

In conviction for murder of sheriff's deputy, death sentence was proportional to penalties in other cases where officer was shot several times by defendant, at close range, nearly severing officer's left arm, defendant shot even after officer was disabled, and then left officer, who was conscious for 30 minutes after the attack, to bleed to death. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

Imposition of the death penalty upon defendant, who was convicted of first-degree murder in regard to the killing of defendant's 7th-old landlady in order that defendant could retain approximately \$500 in rent money he had collected for landlady, was not disproportionate to imposition of the death penalty in prior cases in the State. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

Death penalty imposed upon defendant who participated in beating victim with fists, board and rocks for an extended period of time until victim expired, then threw victim's body down a

mine shaft, was not disproportionate to penalty imposed in similar cases. *State v. [unintelligible]* 141 Ariz. 141, 685 P.2d 1293, 105 S.Ct. 398, 469 U.S. 990, 1

Imposition of death penalty upon defendant who, along with another assailant, held gun on victim while victim was in mine shaft, beat victim with rocks, then threw more rocks, then threw down mine shaft, was not disproportionate to penalty imposed in similar cases. *State v. [unintelligible]* (1984) 141 Ariz. 132, 685

That State's witness received turn for her testimony against defendant to create a disproportionate result in imposition of death sentence for murder, as codefendant received life sentence received by defendant. *State v. [unintelligible]* (1983) 138 Ariz. 63, 673 P.2d 1

Death sentence received by defendant was proportional to disposition of prior crimes involving same aggravating circumstance, that murder was especially heinous, cruel or depraved, was not disproportionate to other sentences. It was held that leniency was warranted of the more compelling mitigating factors than were present in instant case. *State v. Lambright* (1983) 138 Ariz. 65

While disposition of other crimes is an important factor in determining proportionality of capital sentence, consideration of propriety of sentence in light of disposition of persons involved in crimes. *State v. Lambright* (1983) 138 Ariz. 673 P.2d 1.

Favorable treatment accorded defendant by police can, under certain circumstances, be a weight in considering proportionality of sentence. *State v. Lambright* (1983) 138 Ariz. 673 P.2d 1.

3.8. — Sufficiency of evidence to support death sentence.

Fact that neither of the co-defendants received the death penalty was insufficient to show that defendant's sentence was imposed by reason of racial animus. Fact that it was defendant who did the actual killing and not the co-defendant who strangled and stabbed victim. *State v. Clabourne* (1984) 142 Ariz. 142

4. Aggravating or mitigating factors.

In general. *State v. Knapp* (1977) 117 Ariz. 704, certiorari denied 98 S.Ct. 1300, 435 U.S. 908, 55 L.Ed.2d 1066.

For purposes of imposing death sentence under Arizona law based on aggravating factors, murder was committed in especially heinous and depraved manner, defendant could reasonably be expected to have known that his conduct was a substantial likelihood of death. *Adamson v. Rickett*

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imposed in similar cases. State v. James (1984)
141 Ariz. 141, 685 P.2d 1293, certiorari denied
105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

Imposition of death penalty upon defendant
who, along with another assailant, beat victim,
held gun on victim while victim was driving to
mine shaft, beat victim with rocks, a board, and
then with more rocks, then threw victim's body
down mine shaft, was not disproportionate to
penalty imposed in similar cases. State v. Lib-
berton (1984) 141 Ariz. 132, 685 P.2d 1284.

That State's witness received immunity in re-
turn for her testimony against defendant did not
create a disproportionate result so as to preclude
imposition of death sentence on defendant for
murder, as codefendant received same sentence
received by defendant. State v. Lambright
(1983) 138 Ariz. 63, 673 P.2d 1.

Death sentence received by defendant was
proportional to disposition of persons involved in
crimes involving same aggravating circum-
stance, that murder was committed in an espe-
cially heinous, cruel or depraved manner, and
was not disproportionate to other cases in which
it was held that leniency was appropriate in light
of the more compelling mitigating circumstances
than were present in instant case. State v.
Lambright (1983) 138 Ariz. 63, 673 P.2d 1.

While disposition of other persons involved in
crime is an important factor in determining pro-
portionality of capital sentence, court must also
consider propriety of sentence in relation to dis-
position of persons involved in other similar
crimes. State v. Lambright (1983) 138 Ariz. 63,
673 P.2d 1.

Favorable treatment accorded to an accom-
plice can, under certain circumstances, be given
weight in considering proportionality of capital
sentence. State v. Lambright (1983) 138 Ariz.
63, 673 P.2d 1.

3.8. — Sufficiency of evidence, proportion- ality, death sentence

Fact that neither of the codefendants received
the death penalty was insufficient to establish
that defendant's sentence was disproportionate
by reason of racial animus or otherwise, given
fact that it was defendant, not codefendants,
who did the actual killing and that it was defend-
ant who strangled and stabbed victim. State v.
Clabourne (1984) 142 Ariz. 335, 690 P.2d 54.

4. Aggravating or mitigating circumstances— In general

State v. Knapp (1977) 114 Ariz. 531, 562 P.2d
704, certiorari denied 98 S.Ct. 1458 [main vol-
ume] 435 U.S. 908, 55 L.Ed.2d 500.

For purposes of imposing death penalty under
Arizona law based on aggravating factor that
murder was committed in especially cruel, hei-
nous and depraved manner, it was sufficient that
defendant could reasonably foresee that there
was substantial likelihood that victim would suf-
fer. Adamson v. Ricketts, C.A.9 (Ariz.) 1985,

758 F.2d 441, on rehearing 789 F.2d 722, re-
versed 107 S.Ct. 2680, 97 L.Ed.2d 1 granted 107
S.Ct. 62, 93 L.Ed.2d 21.

A Watson resentencing hearing at which any
evidence of both aggravating and mitigating cir-
cumstances is received would not violate appel-
lants' constitutional rights, even if the evidence
developed or was discovered after the original
sentencing hearing or was not introduced there
for some other reason. Knapp v. Cardwell (C.A.
1982) 667 F.2d 1253, certiorari denied 103 S.Ct.
473, 459 U.S. 1055, 74 L.Ed.2d 621.

Victim's suffering severe mental anguish
throughout course of offenses prior to his death
and victim's young age, slight build, and his
being at mercy of defendant with no reasonable
opportunity to defend himself were not specifi-
cally provided for as aggravating circumstances
in death penalty statute and, therefore, such
findings should not have been made in determin-
ing whether to impose death penalty. State v.
Castaneda (1986) 150 Ariz. 382, 724 P.2d 1.

Defendant's opposition to death penalty and
contention that death penalty was immoral was
not mitigating circumstance sufficiently substan-
tial to outweigh aggravating circumstances.
State v. Hooper (1985) 145 Ariz. 538, 703 P.2d
482, certiorari denied 106 S.Ct. 834, 474 U.S.
1073, 88 L.Ed.2d 805.

Felony-murder instruction cannot be mitigat-
ing factor in considering death penalty if there is
no doubt as to defendant's intention to kill.
State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655,
certiorari denied 105 S.Ct. 1775, 470 U.S. 1059,
84 L.Ed.2d 834.

While trial judge cannot assign numerical
equivalents to such factors as cruelty or duress
in his consideration of aggravating and mitigat-
ing circumstances, this does not mean that he is
given unbridled discretion in imposition of death
penalty. State v. Gillies (1984) 142 Ariz. 564, 691
P.2d 655, certiorari denied 105 S.Ct. 1775, 470
U.S. 1059, 84 L.Ed.2d 834.

Felony-murder instruction was not mitigating
factor with respect to death penalty, where there
was no doubt about defendant's intention to kill
victim. State v. Gillies (1984) 142 Ariz. 564, 691
P.2d 655, certiorari denied 105 S.Ct. 1775, 470
U.S. 1059, 84 L.Ed.2d 834.

After defendant's conviction for first-degree
murder, trial court considered all possible miti-
gating circumstances in sentencing defendant to
death where it considered each mitigating cir-
cumstance enumerated in this section and con-
sidered all testimony and evidence received with
regard to all aspects of defendant's character,
propensities, record, and circumstances of of-
fense and concluded that there were no mitiga-
ting circumstances sufficient to call for leniency,
although defendant claimed lack of harm to oth-
er victims, his family background, and fac: that
accomplice received a lesser sentence as mitiga-
ting factors. State v. Chaney (1984) 141 Ariz.
295, 686 P.2d 1265.

Trial court did not fail to fulfill its duty to consider all mitigating factors presented by defendant, convicted of murder in the first degree, even though trial court did not specifically address those circumstances proffered by defendant which were not explicitly enumerated by this section. *State v. Fisher* (1981) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

Provision of this section requiring a trial court to set forth its findings concerning mitigating circumstances surrounding a killing does not require a trial court to set forth findings concerning mitigating circumstances offered by a defendant that are not explicitly enumerated by statute. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

When a defendant is being sentenced for first-degree murder, sentencing court must consider, in addition to statutory mitigating circumstances, any aspect of defendant's character or record and any circumstance of the offense relevant to determining whether a sentence less than death might be appropriate. *State v. McCall* (1983) 139 Ariz. 147, 677 P.2d 920, certiorari denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d 375.

With regard to defendant's contention that testimony used to establish aggravating circumstances was contradictory, and that such contradictions should be considered a mitigating circumstance, quality of evidence at defendant's trial was a proper consideration for sentencing court and for Supreme Court on review, but such mitigation evidence was not sufficiently substantial to outweigh existing aggravating circumstances. *State v. McCall* (1983) 139 Ariz. 147, 677 P.2d 920, certiorari denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d 375.

Elimination of one aggravating factor found by trial court does not mandate a remand to the trial court for resentencing. *State v. McCall* (1983) 139 Ariz. 147, 677 P.2d 920, certiorari denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d 375.

Death penalty was properly imposed, as victim's suffering of great mental anguish and physical pain prior to her death established cruelty for purposes of statutory aggravating circumstance, and as mitigation that defendant had low intelligence, lack of prior record of serious crime, evidence suggesting remorse, his favorable adjustment to new marital and parental responsibility, and that State's key witness, who participated in crime, was granted immunity from prosecution, was not sufficiently substantial to call for leniency in light of the extreme cruelty and brutality of the crime. *State v. Smith* (1983) 138 Ariz. 79, 673 P.2d 17, certiorari denied 104 S.Ct. 1429, 465 U.S. 1074, 79 L.Ed.2d 753.

On remand for resentencing, the trial court should not have found aggravating circumstances that were not proved by State at first sentencing

and, hence, should not have found that the murder was especially heinous, cruel, or depraved, but since the State was justified in its attempt to establish an additional aggravating effect as to which the law had been substantially clarified since the time of the original sentencing, the trial court was not precluded from finding that the murder was committed for pecuniary gain. *State v. Jordan* (1983) 137 Ariz. 504, 672 P.2d 169, appeal after remand 144 Ariz. 240, 697 P.2d 323.

Finding of the trial judge in resentencing petitioner that no mitigating circumstances existed to preclude imposition of the death penalty was not factually wrong and was not a violation of the petitioner's rights under U.S.C.A. Const. Amends. 8 and 14. *State v. Jordan* (1983) 137 Ariz. 504, 672 P.2d 169, appeal after remand 144 Ariz. 240, 697 P.2d 323.

Independent review of death sentence case demonstrated no mitigating circumstances sufficiently substantial to call for leniency in imposition of sentence. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

Presence of any one of elements of cruelty, heinousness, or depravity is sufficient to constitute aggravating circumstance under provision of this section making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

When defendant is being sentenced for first-degree murder, sentencer must consider, as mitigating circumstance, any aspect of defendant's character or record and any circumstance of offense relevant in determining whether sentence less severe than death is appropriate, and sentencer may not refuse to consider, as matter of law, relevant evidence presented in mitigation; reason for such requirement is to ensure that death penalty is not imposed in spite of factors that may call for less severe penalty. *State v. McMurtrey* (1983) 136 Ariz. 93, 664 P.2d 637, certiorari denied 104 S.Ct. 180, 464 U.S. 858, 78 L.Ed.2d 161, and appeal after remand 143 Ariz. 71, 691 P.2d 1099, appeal after remand 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

In sentencing defendant after conviction of first-degree murder, trial court is not required to find a mitigating circumstance, nor is it required to make statement that none has been found; court must, however, consider evidence presented as to mitigating circumstances. *State v. McMurtrey* (1983) 136 Ariz. 93, 664 P.2d 637, certiorari denied 104 S.Ct. 180, 464 U.S. 858, 78 L.Ed.2d 161, and appeal after remand 143 Ariz. 71, 691 P.2d 1099, appeal after remand 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

Where defendant's accomplice received life imprisonment in exchange for pleading guilty to

first-degree murder, approached concerning accomplice's life sentence considered mitigating circumstance defendant or in consequence resulting inequity as consequence inducement. *State v. Gillies* (1983) 137 Ariz. 504, 672 P.2d 169, appeal after remand 144 Ariz. 240, 697 P.2d 323.

Where defendant events leading to death all times during murder handed his accomplice strike victim, and help with rocks, defendant was substantial and in fact could properly be found to have been instructed in felony-murder and had knowledge of first-degree murder which theory defendant State v. Gillies (1983) 137 Ariz. 504, 672 P.2d 169, appeal after remand 144 Ariz. 240, 697 P.2d 323.

In first-degree murder case, medical testimony to defense psychiatrist's influence of social factors including defendant's prior conduct for impeachment considered all evidence posttrial hearings to aggravating factors sufficient for leniency. *State v. Jordan* (1983) 137 Ariz. 504, 672 P.2d 169, appeal after remand 144 Ariz. 240, 697 P.2d 323.

Mitigating circumstance of defendant was only 19 years of age, weigh aggravating factors committed in expectation of value and was not heinous, cruel and imposition of death penalty. *Gerlaugh* (1983) 135 Ariz. 63, 659 P.2d 3097, 462 U.S. 3097.

Defendant convicted properly received death sentence for aggravating circumstances defendant had previous felonies involving use of a firearm on another and he committed heinous and depraved factors were present. *State v. Smith* (1983) 138 Ariz. 79, 673 P.2d 17, certiorari denied 104 S.Ct. 1429, 465 U.S. 1074, 79 L.Ed.2d 753.

Since it would be absence of any evidence who beats a 78-year-old man to death, her bleeding in an area with substantial cause death, the giving

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first-degree murder, and defendant was also approached concerning similar plea bargain, but chose instead to exercise his right to trial, fact of accomplice's life sentence was not to be considered mitigating circumstance in sentencing defendant or in consideration of death penalty, as any resulting inequity between two sentences was consequence induced by plea-bargaining system. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007, appeal after remand 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Where defendant actively participated in events leading to death of victim, was present at all times during murder, did nothing to interfere, handed his accomplice rock which was used to strike victim, and helped bury unconscious victim with rocks, defendant's participation in murder was substantial and intentional, and death penalty could properly be imposed, even though jury had been instructed on both premeditation and felony-murder and had returned verdict of guilty of first-degree murder without specifying under which theory defendant had been found guilty. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007, appeal after remand 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

In first-degree murder case, trial court had medical testimony concerning information given to defense psychiatrist while defendant was under influence of sodium amytal and evidence including defendant's own testimony along with defendant's prior conviction for forgery introduced for impeachment purposes and trial court considered all evidence presented at trial and at posttrial hearings to properly find that no mitigating factors sufficiently substantial to call for leniency. *State v. Jeffers* (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

Mitigating circumstances, including fact defendant was only 19 years of age, did not outweigh aggravating factors that homicide was committed in expectation of receipt of something of value and was committed in an especially heinous, cruel and depraved manner, so that imposition of death penalty was proper. *State v. Gerlaugh* (1983) 135 Ariz. 89, 659 P.2d 642.

Defendant convicted of first-degree murder properly received death penalty since two aggravating circumstances were present, namely, that defendant had previously been convicted of two felonies involving use or threat of violence on another and he committed instant murder in a heinous and depraved manner, and no mitigating factors were present. *State v. Zaragoza* (1983) 135 Ariz. 63, 659 P.2d 22, certiorari denied 103 S.Ct. 3097, 462 U.S. 1124, 77 L.Ed.2d 1356.

Since it would be reasonable to conclude, in absence of any evidence to contrary, that one who beats a 78-year-old woman and then leaves her bleeding in an alley intended to kill or knew with substantial certainty that his action would cause death, the giving of felony-murder instruc-

tion was not relevant in determining whether defendant should receive a death sentence and therefore was not a mitigating circumstance. *Id.*

Aggravating circumstances, consisting of fact that defendant, who was convicted of two counts of first-degree murder, had prior convictions for crime punishable by life imprisonment or death and prior convictions for felonies involving use or threat of violence, were sufficiently grave to support a death penalty. *State v. Gretzler* (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed. 2d 1452.

In proceeding in which defendant was convicted of first-degree murder and sentenced to death, aggravating circumstances consisting of prior convictions for crimes punishable by life imprisonment or death, prior convictions for felonies involving use or threat of violence, commission of offenses in expectation of receiving something of pecuniary value and their commission in especially heinous, cruel or depraved manner were not outweighed by mitigating factors relating to fact that he had significant partial mental impairment and that he had unhappy childhood in which his father was very demanding of achievement and gave defendant little approval or encouragement. *Id.*

At punishment or sentencing stage, defendant's attorney at minimum has obligation to challenge the admission of aggravating evidence where reasonably possible and to present available pertinent mitigating evidence. *State v. Carriger* (1982) 132 Ariz. 301, 645 P.2d 816, appeal after remand 143 Ariz. 142, 692 P.2d 991 certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.2d 864.

Where murder was one for pecuniary gain and involved a great risk to others at time of shooting, and prior record of defendant took defendant out of norm of first-degree murderers, death penalty was appropriate. *State v. Blazak* (1982) 131 Ariz. 598 643 P.2d 694, certiorari denied 103 S.Ct. 184, 459 U.S. 882, 74 L.Ed.2d 149.

For the death penalty to be imposed, the state must prove beyond a reasonable doubt the existence of at least one aggravating circumstance. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

Concealment of murder is legally part of the murder transaction, for purpose of aggravating circumstance statute (this section). *Id.*

Mitigation circumstances offered by defendant were not sufficiently substantial to call for leniency in sentencing hearing, and defendant was properly sentenced to death. *Id.*

In prosecution for first-degree murder, aggravating factors, including fact that defendant was convicted of other offenses in state of Arizona, and defendant committed offense in especially heinous, cruel, or depraved manner, were suffi-

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Note 4

cient to support death penalty. *State v. Smith* (1981) 131 Ariz. 29, 638 P.2d 696.

Mitigating circumstances, that defendant was model prisoner and that felony-murder instruction was given in his first-degree murder trial, did not outweigh aggravating circumstances, that defendant, who was 35 years old, strangled 74-year-old man, so as to call for leniency in imposing sentence other than death. *State v. Schad* (1981) 129 Ariz. 557, 633 P.2d 366, certiorari denied 102 S.Ct. 1492, 450 U.S. 983, 71 L.Ed.2d 693.

Letters written on behalf of defendant, to effect that he was essentially a peaceful person, were not of much value in light of evidence that defendant exhibited his willingness to use force and violence at time of prison breakout and on subsequent occasions of violent criminal conduct and, when considered separately and collectively, were not sufficient mitigating circumstances to warrant leniency from death penalty. *State v. Tison* (1981) 129 Ariz. 546, 633 P.2d 355, certiorari denied 103 S.Ct. 180, 459 U.S. 882, 74 L.Ed.2d 147, rehearing denied 103 S.Ct. 391, 459 U.S. 1024, 74 L.Ed.2d 520.

That numerous persons wrote letters on defendant's behalf despite his conviction of four counts of first-degree murder and pointed out defendant's prior nonviolent character was not such a mitigating circumstance as to preclude imposition of death penalty where evidence from beginning to end established the ruthless character of the participants in the offenses. *Id.*

Fact that prison officials, who assertedly knew of defendant's history of violence, housed defendant with cellmate subsequently killed by defendant, was not a mitigating circumstance, for purpose of determining whether death sentence should be imposed against defendant, particularly in light of fact that defendant and cellmate had made independent requests that they be permitted to share a cell. *State v. Vickers* (1981) 129 Ariz. 506, 633 P.2d 315.

Where certified copies of first-degree murder convictions of defendant supported finding that defendant had been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was impossible, and testimony of sheriff showed beyond question that defendant had been convicted of a felony in United States involving use of threat of violence on another person, thereby satisfying second aggravating circumstance, a prior felony conviction involving use or threat of violence on another person, additional aggravating circumstances found in the sentencing hearing were properly established. *State v. Greenawalt* (1981) 128 Ariz. 150, 624 P.2d 828, certiorari denied 102 S.Ct. 364, 454 U.S. 882, 70 L.Ed.2d 191.

Defendant presented no evidence from which court could determine that defendant's participation in murders was relatively minor or that defendant could not have reasonably foreseen

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that his conduct would cause or would create a great risk of causing, death to another person, and thus trial court's refusal to find such mitigating circumstances was not error. *Id.*

Where record indicated that state relied upon evidence presented during trial for aggravating circumstances warranting imposition of death penalty and prosecutor, in closing argument at hearing, stated that he was relying solely upon statutory aggravating circumstances, defendant was not prejudiced by trial court's erroneous order permitting state to present aggravating circumstances in addition to those in this section. *State v. Clark* (1980) 126 Ariz. 428, 616 P.2d 888, certiorari denied 101 S.Ct. 796, 449 U.S. 1067, 66 L.Ed.2d 612.

That defendant had been convicted of another offense in the United States for which under Arizona law sentence of life imprisonment or death was impossible and that defendant had been previously convicted of felony in the United States involving use or threat of violence on another person were aggravating circumstances sustaining imposition of death penalty, absent any mitigating circumstances. *State v. Jordan* (1980) 126 Ariz. 283, 614 P.2d 825, certiorari denied 101 S.Ct. 408, 449 U.S. 986, 66 L.Ed.2d 251.

Imposition of death penalty was not precluded by fact that court noted existence of one aggravating factor, the crime was committed in an especially cruel and heinous fashion, and one mitigating factor, defendant had no prior criminal record, since court was not required to consider the aggravating and mitigating factors of equal significance. *State v. Knapp* (1979) 125 Ariz. 503, 611 P.2d 90, supplemented 127 Ariz. 65, 618 P.2d 235.

Under provision of this section requiring imposition of death penalty if court finds one or more of enumerated aggravated circumstances and that there are no mitigating circumstances sufficiently substantial to call for leniency, mere existence of simply any mitigating factor is required and one significant enough to necessitate clemency must be shown. *Id.*

If trial court found that all mitigating circumstances presented were sufficiently substantial to call for leniency, death penalty could not be imposed. *State v. Watson* (1978) 120 Ariz. 441, 586 P.2d 1253, certiorari denied 99 S.Ct. 1254, 440 U.S. 924, 59 L.Ed.2d 478, appeal after remand 129 Ariz. 60, 628 P.2d 943.

Defendant's shooting of victim in back as victim was shooting at codefendant did not constitute a heinous, cruel, and depraved crime as contemplated by death penalty statute, § 13-454 (repealed; see, now, this section) which provided that aggravating circumstance to be considered included whether defendant committed offense in a specially heinous, cruel, or depraved manner. *Id.*

For sentencing purposes, aggravating circumstance that defendant knowingly created grave

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risk of death to another in addition to victim of offense defendant's shooting of wife and daughter were no

4.1. — Custody, aggravating circumstances

Under this section, aggravating defendant committed offense Department of Corrections defendant, who was required each day at 6:00 p.m. with furlough, since defendant nor incarcerated when murder State v. Libberton (1984) 1 1284.

Where defendant, as respondent, was on unsecured at time that he committed offense in considering as a circumstance for imposing death sentence murder had been committed while defendant was in custody of Corrections. *State v. Gillies* (19 P.2d 1007, appeal after 691 P.2d 655, certiorari 470 U.S. 1059, 84 L.Ed.2d

4.2. — Grave risk of mitigating circumstances

Evidence that there was other people in the immediate vicinity when they were shot, that one of the victims for a victim pleaded with him defendant pointed the gun at the victims was sufficient aggravating circumstance in committing murder defendant created a grave risk of death to other persons in addition to victim. *McMurtrey* (1986) 151 Ariz. 1, certiorari denied 107 S.Ct.

Trial court in determining sentence of death or life imprisonment, § 13-703, improper circumstance of defendant's grave risk of death to another in addition to victim of § 13-703, subd. F, paragraph 1, defendant was a victim in that defendant fired into bedroom and killed defendant shot second victim into hallway. *State v. Ariz.* 395, 710 P.2d 1050

Defendant's murder of grave risk of harm for defendant pointed his gun at the lot and told them that aggravating circumstance defendant knowingly created to another person in addition to apply. *State v. Smith* (1 P.2d 289.

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risk of death to another person or persons in addition to victim of offense was not present in defendant's shooting of victim at time victim's wife and daughter were not present. *Id.*

4.1. — Custody, aggravating or mitigating circumstances

Under this section, aggravating factor that defendant committed offense while in custody of Department of Corrections did not apply to defendant, who was required to return to facility each day at 6:00 p.m. while on secured work furlough, since defendant was neither confined nor incarcerated when murder was committed. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

Where defendant, as result of prior theft conviction, was on unsecured work furlough status at time that he committed murder, trial court erred in considering as aggravating circumstance for imposing death penalty that first-degree murder had been committed while defendant was in custody of Department of Corrections. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007, appeal after remand 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

4.2. — Grave risk of death, aggravating or mitigating circumstances

Evidence that there were from five to nine other people in the immediate area of the victims when they were shot, that the defendant shot one of the victims for a second time after the victim pleaded with him to stop, and that the defendant pointed the gun at others after shooting the victims was sufficient to establish "aggravating circumstance" for death penalty that in committing murder defendant knowingly created a grave risk of death to another person or persons in addition to victim of offense. *State v. McMurtrey* (1986) 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

Trial court in determining whether to impose sentence of death or life imprisonment under A.R.S. § 13-703, improperly applied aggravating circumstance of defendant knowingly creating grave risk of death to another person or persons in addition to victim of offense under A.R.S. § 13-703, subd. F, par. 3, where other person endangered was a victim of the criminal conduct in that defendant fired shotgun at bed in darkened bedroom and killed first victim, and then defendant shot second victim after second victim ran into hallway. *State v. Johnson* (1985) 147 Ariz. 395, 710 P.2d 1050.

Defendant's murderous act did not create grave risk of harm for witnesses, even though defendant pointed his gun at witnesses in parking lot and told them to leave and, therefore, aggravating circumstance under this section that defendant knowingly created grave risk of death to another person in addition to victim did not apply. *State v. Smith* (1985) 146 Ariz. 491, 707 P.2d 289.

Finding of the aggravating circumstance that defendant knowingly created a grave risk of death to another person in the commission of the offense was not warranted on evidence indicating that individual was an intended victim of the crime, not a bystander in the zone of danger during defendant's murderous act. *State v. Rossi* (1985) 146 Ariz. 359, 706 P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

The murderous act itself may put other people in the zone of danger so as to establish the aggravating circumstance in a death penalty case that in the commission of the offense the defendant knowingly created a great risk of death to another person or persons in addition to the victim of the offense. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 1143, 86 L.Ed.2d 706.

Provision of this section providing that sentencing court must consider it an aggravating circumstance if, in commission of the offense, defendant knowingly created a grave risk of death to a person or persons in addition to the victim of the offense did not apply to multiple murder in which each of three victims' bodies were close enough to the other two so that shooting any one of the three created a grave risk of danger to the other two, since evidence indicated that killers intended to murder all three persons, notwithstanding fact that one victim miraculously survived. *State v. McCall* (1983) 139 Ariz. 147, 677 P.2d 920, certiorari denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d 375.

In first-degree murder case, although evidence that defendant pointed gun at a woman to force her to participate in murder was sufficient to support conviction for assault with deadly weapon, that act was not sufficient to satisfy requirements of aggravating circumstance that defendant knowingly created grave risk of death to another person in addition to the victim where defendant put gun down after initial confrontation and it appeared that he never actually intended to harm woman. *State v. Jeffers* (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

Record failed to sustain trial court's finding the existence of grave risk of death as an aggravating circumstance warranting death penalty. *State v. Clark* (1980) 126 Ariz. 428, 616 P.2d 888, certiorari denied 101 S.Ct. 796, 449 U.S. 1067, 66 L.Ed.2d 612.

4.25. — Felony murder, aggravating or mitigating circumstances

Giving of felony-murder instruction is mitigating circumstance in sentencing defendant only where there is some doubt as to defendant's specific intent to kill victim. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

If evidence shows that defendant took active and deliberate part in killing, death penalty may be imposed even though theory of felony-murder

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Note 4.25

was presented to jury. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

4.3. — Heinous, cruel or depraved manner, aggravating or mitigating circumstances

Murder of victim was committed in especially cruel, heinous and depraved manner as delineated in aggravating circumstances statute, where victim was bound and gagged, threatened with death, received 24 stab wounds, of which only five could immediately have killed him, and thus, probably suffered physical torment prior to death. *State v. LaGrand* (1987) 153 Ariz. 21, 734 P.2d 563, certiorari denied 108 S.Ct. 207, 98 L.Ed.2d 158.

For purposes of aggravating circumstance of murders committed in especially heinous, cruel, or depraved manner, it is not necessary that all three elements be present, and finding of any one of those factors is sufficient to constitute aggravating circumstance. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

Finding of aggravated circumstance that murders with baseball bat and pipe wrench were committed in cruel manner was inappropriate, where defendant had attacked each of victims quickly and by surprise, State offered no evidence to establish pain or suffering by those victims, and record was inconclusive as to whether any of victims were conscious following initial blow to head. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

Finding of aggravating circumstance that murders were committed in heinous and depraved manner was supported by evidence that defendant had continued to beat victims, who were mother and children with whom he had lived for more than two years, with pipe wrench and baseball bat after they had collapsed to floor, had used force that was sufficient to fracture victims' skulls, and had shoved jagged portion of broken baseball bat through throat of one victim after he beat her; defendant's actions amounted to gratuitous violence and evidenced heinous or depraved state of mind. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

Evidence that victim realized defendant intended to kill him and begged not to be killed, that defendant stabbed victim in chest four times, that it might have taken victim as long as five minutes to die, and that victim died in writhing pain while lying on red ant hill was sufficient to find that murder was committed in cruel manner, supporting imposition of death penalty. *State v. Castaneda* (1986) 150 Ariz. 382, 724 P.2d 1.

Murders were committed in cruel, heinous, and depraved manner, which could be considered as aggravating circumstance in determining whether to impose death penalty, where victims were kept uncertain as to their fate and were murdered only after another victim was shot in back of head, and where murders were senseless in that they were unnecessary to accomplish under-

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lying robbery, victims were helpless in that they were bound and gagged, and defendant evinced total disregard for human life. *State v. Correll* (1986) 148 Ariz. 468, 715 P.2d 721.

Because most first-degree murders are cruel, heinous and depraved, the statutorily required inquiry concerning aggravating circumstances to be considered in imposing death penalty under A.R.S. § 13-703, subd. F, par. 6, is whether conduct was especially cruel, heinous or depraved. *State v. Johnson* (1985) 147 Ariz. 395, 710 P.2d 1050.

Evidence was insufficient to support finding of aggravating circumstance of heinous or depraved conduct under A.R.S. § 13-703, subd. F, par. 6, even though defendant killed senselessly, without apparent purpose or motive, and possibly while inebriated or to some extent mentally deranged, where defendant fired shotgun at bed in darkened bedroom killing one victim, and defendant then shot second victim after second victim ran into hallway. *State v. Johnson* (1985) 147 Ariz. 395, 710 P.2d 1050.

Murder of convenience store clerk was not especially heinous, within meaning of aggravating circumstance of this section that offense was committed in especially heinous, cruel or depraved manner, where defendant shot convenience store clerk in head immediately after demanding that clerk hand over money in cash register, he inflicted no further violence on victim and did not mutilate him and there was no indication that defendant "relished" act of murder. *State v. Smith* (1985) 146 Ariz. 491, 707 P.2d 289.

Murder of convenience store clerk was not committed in especially cruel manner within meaning of this section's aggravating circumstance that defendant committed offense in especially heinous, cruel or depraved manner where defendant shot clerk in head once, but there was no evidence he intended or reasonably foresaw pain and mental anguish suffered by victim during two-week interval between shooting and his death. *State v. Smith* (1985) 146 Ariz. 491, 707 P.2d 289.

Imposition of death penalty on conviction of first-degree murder was justified on a finding of such aggravating circumstances as cruelty, that victim was in pain before his ultimate death, and heinous and depraved manner of crime, that defendant used special bullets which he knew were designed to inflict greater tissue damage on a human body. *State v. Rossi* (1985) 146 Ariz. 359, 706 P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

A defendant who relishes the murderous act by such behavior as saving the spent bullets and giving them away as souvenirs can be said to have acted in an especially heinous and depraved state of mind as is required to find an aggravating circumstance justifying imposition of death penalty. *State v. Rossi* (1985) 146 Ariz. 359, 706

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P.2d 371, appeal after remand P.2d 1223.

Evidence that defendant inflicted distress and physical pain on aggravating circumstance that committed in specially cruel manner (1984) 145 Ariz. 212, 700 P.2d 105, 106 S.Ct. 2169, 471 U.S. 525.

Abduction, violent sexual strangulation of helpless severely distressed elements of "heinous depraved" state of mind for purging circumstance in sentence first-degree murder prosecution (1984) 146 Ariz. 212, 700 P.2d 105, 106 S.Ct. 2169, 471 U.S. 525.

State failed to establish that "especially heinous, cruel or depraved" circumstance, in the absence of suffering by victim: died by drowning. *State v. Ariz.* 412, 698 P.2d 207, affirmed 476 U.S. 147, 90 L.Ed.2d 123.

Record was not sufficient that murder was so "cruel" penalty, in light of failure of victims were conscious at time v. Poland (1985) 144 Ariz. 3 affirmed 106 S.Ct. 1749, 476 U.S. 123.

Enumeration in § 13-703 of depraved behavior is in the dicta the expressions or one of the an aggravating circumstance when physical pain or mental suffering by victim, while heinous and mental state and attitude of reflected by his words and Carriger (1984) 143 Ariz. 1 certiorari denied 105 S.Ct. 2585 L.Ed.2d 864.

Defendant committed murder for purposes of finding aggravating imposition of death penalty: victim was kept for eight hours in ultimate fate, was raped on, pushed from 40-foot embankment begging for her life, was strangled with rock. *State v. Gillies* (1981) 691 P.2d 655, certiorari denied 470 U.S. 1059, 84 L.Ed.2d 83.

Aggravating factor of cruelty of death sentence focuses on physical suffering. *State v. Ariz.* 564, 691 P.2d 655, certiorari denied 470 U.S. 1059, 84 L.Ed.2d 83.

Evidence, including evidence forced to climb down steep, dark, was kicked off edge and despite pleading for mercy death with rock, and defendant incident as "fun," supported

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P.2d 371, appeal after remand 154 Ariz. 245, 741
P.2d 1223.

Evidence that defendant inflicted both mental
distress and physical pain on victim established
aggravating circumstance that murder was com-
mitted in specially cruel manner. State v. Ros-
coe (1984) 145 Ariz. 212, 700 P.2d 1312, certiorari
denied 105 S.Ct. 2169, 471 U.S. 1094, 85 L.Ed.2d
525.

Abduction, violent sexual penetration and
strangulation of helpless seven-year-old child es-
tablished elements of "heinous" crime and "de-
praved" state of mind for purpose of aggravat-
ing circumstance in sentencing defendant in
first-degree murder prosecution. State v. Ros-
coe (1984) 146 Ariz. 212, 700 P.2d 1312, certiorari
denied 105 S.Ct. 2169, 471 U.S. 1094, 85 L.Ed.2d
525.

State failed to establish that murders were
"especially heinous, cruel or depraved" as aggra-
vating circumstance, in the absence of any evi-
dence of suffering by victims, who apparently
died by drowning. State v. Poland (1985) 144
Ariz. 412, 698 P.2d 207, affirmed 106 S.Ct. 1749,
476 U.S. 147, 90 L.Ed.2d 123.

Record was not sufficient to support finding
that murder was so "cruel" as to allow death
penalty, in light of failure of State to show that
victims were conscious at time of death. State
v. Poland (1985) 144 Ariz. 388, 698 P.2d 183,
affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d
123.

Enumeration in § 13-703 of heinous, cruel, or
depraved behavior is in the disjunctive and all of
the expressions or one of them could constitute
an aggravating circumstance; cruelty is found
when physical pain or mental distress is suffered
by victim, while heinous and depraved go to the
mental state and attitude of the perpetrator as
reflected by his words and actions. State v.
Carriger (1984) 143 Ariz. 142, 692 P.2d 991,
certiorari denied 105 S.Ct. 2347, 471 U.S. 1111,
85 L.Ed.2d 864.

Defendant committed murder in cruel fashion,
for purposes of finding aggravating factor war-
ranting imposition of death penalty, where vic-
tim was kept for eight hours uncertain as to her
ultimate fate, was raped on two occasions, was
pushed from 40-foot embankment, and despite
begging for her life, was still beaten to death
with rock. State v. Gillies (1984) 142 Ariz. 564,
691 P.2d 655, certiorari denied 105 S.Ct. 1775,
470 U.S. 1059, 84 L.Ed.2d 834.

Aggravating factor of cruelty for imposition
of death sentence focuses on victim's mental and
physical suffering. State v. Gillies (1984) 142
Ariz. 564, 691 P.2d 655, certiorari denied 105
S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Evidence, including evidence that victim was
forced to climb down steep embankment in the
dark, was kicked off edge when she was over it,
and despite pleading for mercy, was beaten to
death with rock, and defendant's reference to
incident as "fun," supported finding of heinous-

ness and depravity in commission of murder for
purpose of imposing death penalty. State v.
Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certio-
rari denied 105 S.Ct. 1775, 470 U.S. 1059, 84
L.Ed.2d 834.

Elimination of witnesses, as motive for mur-
der, illustrates heinousness and depravity for
purposes of imposition of death penalty. State
v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655,
certiorari denied 105 S.Ct. 1775, 470 U.S. 1059,
84 L.Ed.2d 834.

Fact that defendant was separately punished
for crimes he committed prior to murder, includ-
ing kidnapping, aggravated robbery, and sexual
assault, did not preclude consideration of these
events on issue of cruelty for purpose of death
sentence. State v. Gillies (1984) 142 Ariz. 564,
691 P.2d 655, certiorari denied 105 S.Ct. 1775,
470 U.S. 1059, 84 L.Ed.2d 834.

Suffering of victim who lingers, knowing he or
she will be killed, or victim who is kept uncertain
as to his or her fate, is to be contrasted with
individual who is killed instantly without know-
ing what happened in determining whether ag-
gravating factors of cruelty and heinousness
were present in killing so as to warrant death
penalty. State v. Gillies (1984) 142 Ariz. 564, 691
P.2d 655, certiorari denied 105 S.Ct. 1775, 470
U.S. 1059, 84 L.Ed.2d 834.

Victim's certainty or uncertainty as to his or
her ultimate fate can be indicative of cruelty and
heinousness, for purpose of imposition of death
penalty. State v. Gillies (1984) 142 Ariz. 564, 691
P.2d 655, certiorari denied 105 S.Ct. 1775, 470
U.S. 1059, 84 L.Ed.2d 834.

While aggravating factors of cruelty, heinous-
ness, and depravity, for purposes of imposition
of death penalty, have been defined disjunctive-
ly, analytically they are interlinked; one fact
pattern is frequently illustrative of all three
factors since act of cruelty to victim can also
reflect perpetrator's state of mind. State v.
Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certio-
rari denied 105 S.Ct. 1775, 470 U.S. 1059, 84
L.Ed.2d 834.

Imposition of death sentence upon conviction
of first-degree murder on ground that offense
was committed in an especially heinous, cruel or
depraved manner was warranted in that victim,
who was beaten and forced to undress and was
raped over course of a six-hour period, suffered
both mentally and physically and, when near
death after strangulation following a tremen-
dous struggle, was repeatedly stabbed. State v.
Clabourne (1984) 142 Ariz. 335, 690 P.2d 54.

Under § 13-703 defining an aggravated cir-
cumstance in a capital case as an offense com-
mitted in an especially heinous, cruel or de-
praved manner, the term "cruel" involves pain
and distress visited upon the victim, including
mental anguish, whereas the terms "heinous and
depraved" are concerned with the mental state
and attitude of the perpetrator, and include ap-
parent relishing of the murder by the killer,

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Note 4.3

needless mutilation of victim, senselessness of the crime and helplessness of the victim, and infliction of gratuitous violence on the victim. *State v. Clabourne* (1984) 142 Ariz. 335, 690 P.2d 54.

Element of cruelty under death penalty statute, § 13-703, focuses upon the pain and the mental and physical distress visited upon the victims, while depravity focuses upon the mental state and attitude of the perpetrator as reflected in his words and actions. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

To find cruelty under death penalty statute, § 13-703, the State must show beyond a reasonable doubt that the victim was conscious when the acts of violence causing death were committed. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

Where State failed to prove beyond a reasonable doubt that victim was conscious after she sustained a blow to the head which caused a hairline fracture in her skull, trial court's finding that defendant committed murder in an especially cruel manner could not stand. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

Under death penalty statute, § 13-703, numerous factors can be considered in making a finding of depravity, namely, the infliction of gratuitous violence on the victim, the senselessness of the murder, and the helplessness of the victim. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

Under death penalty statute, § 13-703, perverse gagging of a victim reflects a depraved state of mind. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

In prosecution for first-degree murder, trial court's finding of depravity was proper, where a ball of cloth was placed in victim's nasal pharynx to assure suffocation, and defendant did not tell the police about the victim until 24 hours after he was apprehended and 48 hours after he left the victim bound and gagged. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

Cruelty for purposes of aggravating circumstance justifying imposition of death penalty that murder was committed in especially heinous, cruel, or depraved manner refers to mental and physical pain suffered by victim. *State v. Harding* (1984) 141 Ariz. 492, 687 P.2d 1247.

Under this section providing death penalty for murder, physical pain or mental distress suffered by victim can support finding of cruelty as an aggravating circumstance. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

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Under provision of this section making heinous, cruel, or depraved conduct an aggravating circumstance, the presence of one or more of these three types of behavior justifies a finding of aggravated circumstances. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

"Heinous" and "depraved" as used in this section providing the death penalty for murder with aggravating circumstances concern the mental state and attitude of the perpetrator. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

Murder was "cruel," for purpose of this section imposing death penalty for murder where cruelty is an aggravating circumstance, where victim suffered mental anguish as defendant inflicted numerous wounds, and defendant stood close enough to victim to see that victim was in great pain and then fired again, including one shot which left powder burns, when defendant left he knew that victim was not dead and that victim was suffering, victim's left arm was almost severed by a bullet and was left hanging by a muscle, and victim, who was a doctor, and part-time deputy, was conscious for approximately 30 minutes after the attack and knew that he was slowly bleeding to death as he radioed to medics. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

Murder was specially "heinous" and "depraved," for purpose of this section providing death penalty for murder with aggravating circumstances, where defendant exhibited complete disregard for victim's life: once victim was down and helpless, defendant stood close enough to see this, and could have made his escape but decided to shoot again, and shot victim from rear at close range rather than taking victim's guns and disabling two-way radio and patrol car as he had done with other deputy, making the crime senseless; intentional and repeated firing of high powered destructive weapon at victim tended to show crime was heinous and depraved. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

Aggravating factor that a murder victim was killed in an especially heinous and depraved manner goes to the mental state and attitude of the perpetrator as reflected by his or her words and actions. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

Murder of a 73-year-old victim was committed by defendant in expectation of the receipt of something of pecuniary value and was committed in an especially heinous and depraved manner, and no mitigating circumstances were sufficiently substantial to call for leniency; therefore, death penalty was properly imposed upon defendant. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

Provision of this section making "heinous, cruel or depraved" murder an aggravating circum-

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stance is in the disjunctive, sions or one of them could vating circumstance. *State Ariz.* 141, 685 P.2d 1293, S.Ct. 398, 83 L.Ed.2d 332.

Under this section, aggr of "cruelty" is found wh mental distress is suffered *State v. James* (1984) 141 1293, certiorari denied 105 990, 83 L.Ed.2d 332.

For purposes of determini gravating circumstances un nous" means hatefully or s ly bad, and "depraved" m basement, corruption, per tion. *State v. James* (198 P.2d 1293, certiorari denie U.S. 990, 83 L.Ed.2d 332.

Where several hours pas tent to kill victim was fe victim was killed, where beaten all over body duri victim was taunted and cussed in his presence, wh released, and where victir beaten with fists, boards expired, murder was comm cruel" manner, satisfiing aggravating circumstance *State v. James* (1984) 141 1293, certiorari denied 105 990, 83 L.Ed.2d 332.

Murder which was comr tim with fists, boards, and ed period of time until v after which victim's body mine shaft, was committed nous and depraved" man determining presence of stances under this section. 141 Ariz. 141, 685 P.2d 1 105 S.Ct. 398, 469 U.S.

For purpose of aggravat ed in this section, "heinou: to perpetrator's mental st involves mental and phys victim. *State v. Libbertor* 685 P.2d 1284.

Under provision of this mission of murder in an es or depraved manner an stance, a finding of only necessary to constitute suc stance because statutory disjunctive. *State v. Libb* 132, 685 P.2d 1284.

For purposes of aggrre listed in this section, murd "cruel" manner where vi discuss killing him and w where victim was forced to held at gun point during t where victim knew assaila:

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Ariz. 141, 685 P.2d 1293, certiorari denied 105
S.Ct. 398, 83 L.Ed.2d 332.

Under this section, aggravating circumstance
of "cruelty" is found when physical pain or
mental distress is suffered by murder victim.
State v. James (1984) 141 Ariz. 141, 685 P.2d
1293, certiorari denied 105 S.Ct. 398, 469 U.S.
990, 83 L.Ed.2d 332.

For purposes of determining existence of ag-
gravating circumstances under this section, "hei-
nous" means hatefully or shockingly evil, gross-
ly bad, and "depraved" means marked by de-
basement, corruption, perversion or deteriora-
tion. State v. James (1984) 141 Ariz. 141, 685
P.2d 1293, certiorari denied 105 S.Ct. 398, 469
U.S. 990, 83 L.Ed.2d 332.

Where several hours passed between time in-
tent to kill victim was formed and time that
victim was killed, where victim was viciously
beaten all over body during such time, where
victim was taunted and his murder was dis-
cussed in his presence, where victim pled to be
released, and where victim was then viciously
beaten with fists, boards and rocks until he
expired, murder was committed in an "especially
cruel" manner, satisfying requirement for such
aggravating circumstance under this section.
State v. James (1984) 141 Ariz. 141, 685 P.2d
1293, certiorari denied 105 S.Ct. 398, 469 U.S.
990, 83 L.Ed.2d 332.

Murder which was committed by beating vic-
tim with fists, boards, and rocks over an extend-
ed period of time until victim finally expired,
after which victim's body was thrown down in
mine shaft, was committed in an especially "hei-
nous and depraved" manner, for purposes of
determining presence of aggravating circum-
stances under this section. State v. James (1984)
141 Ariz. 141, 685 P.2d 1293, certiorari denied
105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

For purpose of aggravating circumstances list-
ed in this section, "heinous and depraved" refer
to perpetrator's mental state whereas "cruelty"
involves mental and physical pain suffered by
victim. State v. Libberton (1984) 141 Ariz. 132,
685 P.2d 1284.

Under provision of this section making com-
mission of murder in an especially heinous, cruel
or depraved manner an aggravating circum-
stance, a finding of only one of such factors is
necessary to constitute such aggravating circum-
stance because statutory expression is in the
disjunctive. State v. Libberton (1984) 141 Ariz.
132, 685 P.2d 1284.

For purposes of aggravating circumstances
listed in this section, murder was committed in a
"cruel" manner where victim heard assailants
discuss killing him and where to hide his body,
where victim was forced to drive his own car and
held at gun point during two-hour drive to place,
where victim knew assailants had chosen to com-

mit murder, and where assaults on victim began
within several hours after midnight, but he was
not killed until almost daybreak. State v. Lib-
berton (1984) 141 Ariz. 132, 685 P.2d 1284.

Where victim was subjected to mental cruelty
by hearing assailants discuss killing him and
what to do with his body and where victim was
physically abused by being beaten with rocks, a
board, and then with more rocks while conscious,
aggravating circumstance of "heinous, cruel or
depraved" was present in murder. State v. Lib-
berton (1984) 141 Ariz. 132, 685 P.2d 1284.

With regard to aggravating circumstance that
defendant committed the offense in an especially
heinous, cruel or depraved manner, defendant
must intend that the victim suffer or reasonably
foresee a substantial likelihood that victim will
suffer as consequence of defendant's acts.
State v. McCall (1983) 139 Ariz. 147, 677 P.2d
920, certiorari denied 104 S.Ct. 2670, 467 U.S.
1220, 81 L.Ed.2d 375.

With regard to infliction of pain on a victim as
predicate for finding of aggravating circum-
stance that offense was committed in an espe-
cially heinous, cruel or depraved manner, such
pain can be either physical pain or mental dis-
tress. State v. McCall (1983) 139 Ariz. 147, 677
P.2d 920, certiorari denied 104 S.Ct. 2670, 467
U.S. 1220, 81 L.Ed.2d 375.

In contrast to emphasis upon feelings and
sufferings of victims in case of aggravating
circumstance of cruelty, statutory concepts of
"heinous" and "depraved" involve killer's vile
state of mind at time of murder. State v. McCall
(1983) 139 Ariz. 147, 677 P.2d 920, certiorari
denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d
375.

Evidence in murder prosecution, including fact
that one victim was not only shot twice in the
head but also had his throat cut open, that
slashing came just at time of victim's death or
shortly thereafter, and that the mutilation was
designed to be a "message" to warn other peo-
ple, supported finding, as an aggravating cir-
cumstance, that defendant committed the of-
fense in an especially heinous, cruel or depraved
manner. State v. McCall (1983) 139 Ariz. 147,
677 P.2d 920, certiorari denied 104 S.Ct. 2670,
467 U.S. 1220, 81 L.Ed.2d 375.

Where three victims, after giving up their
valuables, were forced to lie down on a bed, had
their hands taped behind their backs, and were
gagged with socks, and where two of the three
had to endure unimaginable terror of having
their loved ones shot to death within their hear-
ing and then having to wait for their own turn to
come, such mental distress clearly constituted
cruelty, and justified finding that murders were
committed in an especially heinous, cruel or de-
praved manner. State v. McCall (1983) 139 Ariz.
147, 677 P.2d 920, certiorari denied 104 S.Ct.
2670, 467 U.S. 1220, 81 L.Ed.2d 375.

Concepts of heinous and depraved, for pur-
poses of establishing aggravating circumstance

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was not improper, in light of fact that the murder was accomplished in an especially cruel manner. State v. Adamson (1983) 136 Ariz. 250, 665 P.2d 972, certiorari denied 104 S.Ct. 204, 464 U.S. 865, 78 L.Ed.2d 178.

Where murder victim was repeatedly raped, was transported to iso' d location not knowing her fate, was cast fro. .0-foot cliff, and then brutalized and beaten into unconsciousness prior to her death, trial court properly found aggravating circumstances of cruelty in sentencing defendant to death after his conviction for first-degree murder. State v. Gillies (1983) 135 Ariz. 500, 662 P.2d 1007.

For purposes of establishing aggravating factor in sentencing defendant, "cruelty" involves mental and physical distress suffered by victim, and evidence of mental anguish of victim resulting from such factors as being held captive for extended period while uncertain as to ultimate fate, is relevant to establish "cruelty;" however, where evidence is inconclusive as to whether victim was conscious during infliction of violence, sentencing court cannot find that "cruelty" existed. State v. Gillies (1983) 135 Ariz. 500, 662 P.2d 1007.

Each element of aggravating circumstance that murder was committed in especially heinous, cruel or depraved manner has been narrowly defined and construed and fact that Supreme Court chose to read circumstance in the disjunctive did not render aggravating circumstance unconstitutional. State v. Jeffers (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

For purposes of aggravating factor that defendant committed murder in especially heinous, cruel or depraved manner, element of cruelty involves pain and mental and physical distress visited on victim. Id.

For purposes of aggravating circumstance that defendant committed murder in especially heinous, cruel or depraved manner, terms "heinous and depraved" involve mental state and attitude of perpetrator as reflected in his words and actions. Id.

In first-degree murder prosecution arising out of death of victim from heroin overdose, element of cruelty was not proven under aggravating circumstance that defendant committed offense in especially heinous, cruel or depraved manner where there was no evidence that victim suffered any pain, but instead, it appeared from record that after injection of heroin, victim lost consciousness and never regained it before she died. Id.

Murder was committed in especially heinous and depraved manner where defendant climbed on top of dead victim and hit her in the face several times which eventually resulted in additional wounds and bleeding and, at the same time, defendant called victim "a bitch and a dirty snitch" and with each striking blow said "This

one is for so and so. [naming several names]." Id.

In determining whether murder was committed in especially heinous or depraved manner, factor to consider is apparent relish with which defendant commits murder. Id.

"Cruelty," an aggravating circumstance for imposition of sentence of life imprisonment or death, involves pain and distress visited upon victim, while "heinous" and "depraved" go to mental state and attitude of perpetrator as reflected in his words and actions. State v. Graham (1983) 135 Ariz. 209, 660 P.2d 460.

Aggravating circumstance provision of this section consisting of killing in "especially heinous, cruel, or depraved manner" is not unconstitutionally broad and vague. State v. Gretzler (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

Not all first-degree murders are "especially heinous, cruel, or depraved," but, rather, such aggravating circumstance is present if additional circumstances of a heinous, cruel or depraved nature set a killing apart from the usual or the norm. Id.

Defendant, who was convicted of two counts of first-degree murder and was sentenced to death, had committed the offenses in "heinous, cruel or depraved manner" where victim husband was bound for sustained period in such a manner that he would choke if his legs were straightened and victim wife heard her husband being shot to death and then had to wait for her turn to come. Id.

Factors which can lead to a finding that the aggravating circumstance of heinousness or depravity is present in a murder include: relishing of the murder by killer; infliction of gratuitous violence on victim; needless mutilation of victim; senselessness of the crime; helplessness of victim; and indiscriminate violent attacks on persons other than the murder victim. Id.

While evidence was inconclusive as to whether victim suffered in such a way as to support finding that crime was committed in cruel manner, record established that murder reflected heinous and depraved attitude and was committed in expectation of receipt of something of pecuniary value; thus, imposition of death penalty was proper, even though defendant contended that he was intoxicated at time of crime. State v. Woratzek (1982) 134 Ariz. 452, 657 P.2d 865.

The word "cruel," within former § 13-454 (now, this section) authorizing the death penalty when the defendant has committed the offense in an especially heinous, cruel, or depraved manner was interpreted as being disposed to inflict pain in a wanton, insensate or vindictive manner and as being sadistic. State v. Poland (1982) 132 Ariz. 269, 645 P.2d 784, appeal after remand 144 Ariz. 388, 412, 698 P.2d 183, 207, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Where murder committed by defendant, who inflicted upon defenseless woman multiple stab wounds in the neck and chest areas, then poured a flammable liquid over her body and around her home and set fire to home while victim's three children were inside in order to try to dispose of body, was especially heinous and more depraved than the norm of first-degree murders, although murder was not especially cruel in that state did not prove beyond a reasonable doubt that victim suffered during commission of murder, defendant was properly sentenced to death. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

Senselessness of murders, given inability of victims to thwart escape, especially in such an isolated area, and fact that a young child, less than two years old, who posed no threat to captors, was indiscriminately shot while in arms of his mother, compelled conclusion that actual slayers possessed a shockingly evil state of mind and warranted sentence of death on ground that offenses were committed in an especially heinous, cruel or depraved manner and in expectation or the receipt of anything of pecuniary value. *State v. Tison* (1981) 129 Ariz. 526, 639 P.2d 335, certiorari denied 103 S.Ct. 180, 459 U.S. 882, 74 L.Ed.2d 147, rehearing denied 103 S.Ct. 391, 459 U.S. 1024, 74 L.Ed.2d 520.

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, evidence including evidence that defendant stabbed victim numerous times and that defendant carved his nickname on victim's back, sufficiently supported finding that the offense was committed in an especially heinous, cruel or depraved manner. *State v. Vickers* (1981) 129 Ariz. 506, 633 P.2d 315.

Although medical expert's testimony supported conclusion that murder was not "especially cruel," where, after defendant struck victim several times with claw hammer, he removed victim's watch, wallet, and shoes, where defendant tied victim's legs together and dragged him some 50 feet to edge of mine shaft even though he knew his victim was still alive, where defendant admitted throwing rocks on top of victim as he lay twitching at bottom of mine shaft, and where, as defendant was driving away, he waved goodbye and said he hoped he never saw victim again, defendant committed crime in especially heinous and depraved manner so as to justify imposition of death penalty. *State v. Bishop* (1980) 127 Ariz. 531, 622 P.2d 478.

For purposes of determining existence of aggravating circumstance so as to justify imposition of death penalty, aspect of "cruelty" involves pain and mental and physical distress visited upon the victim; "heinous" and "depraved" go to mental state and attitude of perpetrator as reflected in his words and actions. *Id.*

For purposes of death penalty statute, former § 13-454 (now, this section), evidence sustained finding that murders were committed in an espe-

cially cruel and depraved manner. *State v. Clark* (1980) 126 Ariz. 428, 616 P.2d 888, certiorari denied 101 S.Ct. 796, 449 U.S. 1067, 66 L.Ed.2d 612.

Evidence established that killing of two victims who were bound and held for substantial period of time was especially heinous, or shockingly evil. *State v. Steelman* (1980) 126 Ariz. 19, 612 P.2d 475, certiorari denied 101 S.Ct. 237, 449 U.S. 913, 66 L.Ed.2d 141.

In order to be especially heinous, cruel or depraved, manner in which murder was committed must be such as to set defendant's acts apart from the norm of first-degree murder. *State v. Lujan* (1979) 124 Ariz. 365, 604 P.2d 629.

For a killing to be especially cruel, perpetrator must senselessly or sadistically inflict great pain on his victim. *Id.*

Helplessness of victim, lack of necessity for killing to establish defendant's plan to steal, and magnitude of wound inflicted demonstrating a clear intent to kill did not indicate that such killing was accomplished in an especially heinous or depraved manner. *Id.*

Where defendant shot victim twice in the back, murder was not committed in especially heinous, and depraved manner so as to warrant imposition of death penalty. *State v. Brookover* (1979) 124 Ariz. 38, 601 P.2d 1322.

4.35. — Gratuitous violence, aggravating or mitigating circumstances

In determining whether murder was committed in heinous or depraved manner, one factor to consider is infliction of gratuitous violence on victim. *State v. Jeffers* (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

4.5. — Death sentence, aggravating or mitigating circumstances

Mitigating circumstances surrounding defendant's murder of victim, such as defendant's young age, prior home life, and remorse were insufficient to outweigh aggravating circumstances of cruel, heinous, and depraved nature of defendant's conduct; thus, leniency in sentencing was not warranted. *State v. LaGrand* (1987) 153 Ariz. 21, 734 P.2d 563, certiorari denied 108 S.Ct. 207, 98 L.Ed.2d 158.

It is essential to inquire in totality of circumstances surrounding murder to determine whether aggravating factors warranting imposition of death penalty exist. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 84 L.Ed.2d 834.

Although balancing human factors, including facts that defendant had changed his attitudes while in prison, had become religious, shown remorse, and proved himself to be placid prisoner, against defendant's former behavior militated in his favor, such balancing did not require leniency, precluding imposition of death penalty for murder, given seriousness of defendant's crimes, which also included kidnapping, aggrava-

ted robbery and sexual assault. *State v. Greenawalt* (1984) 142 Ariz. 564, 691 P.2d 1105, certiorari denied 105 S.Ct. 1775, 84 L.

Imposition of the death penalty for first-degree murder without absence of evidence that the death is, that there was sufficient evidence that the victims had been prior to being placed in the death row had been a struggle. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

In light of wanton and brutal nature of killings, former convictions of other offenses of death sentence was not proportionate to the offense. *State v. Greenawalt* (1981) 128 Ariz. 564, 639 P.2d 1105, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

Refusal to conduct separate sentencing of defendant for crimes was not error, § 13-454 (repealed); now, sentencing hearing does not constitute a separate hearing on sentencing of defendant; but, rather, legislative intent to provide for bifurcated proceedings was to be separated.

Absence of evidence that defendant intended to kill, as bearing on sentencing of death penalty. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

Evidence from which it was intended to shoot victim in vital part of body, as bearing on sentencing of death penalty. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

Defendant failed to seek to police and waiver of right to constitute mitigating circumstance in imposition of death sentence.

For purposes of determining existence of aggravating circumstance of death penalty, involves pain and mental and physical distress visited upon the victim; "heinous" and "depraved" go to mental state and attitude of perpetrator as reflected in his words and actions. *Id.*

Evidence that defendant's husband and wife, initiated chest and then dragged

manner. State v. 6 P.2d 888, certiorari denied 105 S.Ct. 1067, 66 L.Ed.2d

killings of two victims for substantial heinous, or shock (1980) 126 Ariz. 19, 101 S.Ct. 287, 449

heinous, cruel or murder was committed by defendant's acts apart from murder. State v. 4 P.2d 629.

cruel, perpetrator inflict great pain

of necessity for plan to steal, and demonstrating a dictate that such especially heinous

twice in the back, especially heinous, warrant impossible Brookover (1979)

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circumstances, including his attitudes heinous, shown placid prison behavior militated to require death penalty defendant's aggravating

robbery and sexual assault. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 84 L.Ed.2d 834.

Imposition of the death penalty in prosecution for first-degree murder was not warranted in absence of evidence that the murders were cruel, that is, that there was suffering by the victims or that the victims had been bound or injured prior to being placed in the water, or that there had been a struggle. State v. Poland (1982) 132 Ariz. 269, 645 P.2d 784, appeal after remand 144 Ariz. 388, 412, 698 P.2d 183, 207, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

In light of wanton disregard for human life, brutal nature of killings and defendant's two former convictions of other murders, imposition of death sentence was neither excessive nor disproportionate to the offenses committed. State v. Greenawalt (1981) 128 Ariz. 150, 624 P.2d 828, certiorari denied 102 S.Ct. 364, 454 U.S. 882, 70 L.Ed.2d 191.

Refusal to conduct separate hearings for sentencing of defendant for capital and noncapital crimes was not error, in that provision of § 13-454 (repealed; now § 13-703) for separate sentencing hearing does not require separate hearings on sentencing to be held when there are convictions for capital and noncapital crimes but, rather, legislative intent was merely to provide for bifurcated procedure by which sentencing was to be separated from trial of guilt. Id.

Absence of evidence that defendant knew victim or that defendant intended to kill victim at time he entered store merely showed lack of premeditation, rather than absence of specific intent to kill, as bearing on presence or absence of mitigating circumstances considered in imposition of death penalty. State v. Jordan (1980) 126 Ariz. 283, 614 P.2d 825, certiorari denied 101 S.Ct. 408, 449 U.S. 986, 66 L.Ed.2d 251.

Evidence from which it was clear that defendant intended to shoot victim and that defendant shot victim in vital part of body did not show lack of specific intent to cause death, as bearing upon presence or absence of mitigating circumstances, and where defendant offered no evidence to contradict such natural inference from his act, court could find absence of mitigating circumstances, in imposing death penalty. Id.

Defendant failed to show that his confession to police and waiver of hearing on his extradition constituted mitigating circumstance making imposition of death sentence inappropriate. Id.

For purposes of determining existence of aggravating circumstance so as to justify imposition of death penalty, aspect of "cruelty" involves pain and mental and physical distress visited upon the victims; "heinous" and "depraved" go to mental state and attitude of perpetrator as reflected in his words and actions. State v. Ceja (1980) 126 Ariz. 35, 612 P.2d 491.

Evidence that defendant, in attempting to rob husband and wife, initially shot wife twice in the chest and then dragged her into another room

and shot her four more times in the head for no apparent reason, and that after husband had been shot and had fallen to the floor, defendant shot him in the back and kicked him in the face repeatedly, again for no apparent reason, supported finding of "heinous" and "depraved" nature so as to justify imposition of the death penalty. Id.

Imposition of death penalty for first-degree murder was proper where trial court considered all matters presented in mitigation of sentence and did not find them sufficiently substantial to call for leniency. State v. Arnett (1980) 125 Ariz. 201, 608 P.2d 778.

Trial court which considered testimony of two psychiatrists who had examined defendant but found that there was only a possibility that defendant's capacity to conform his conduct to requirements of law was significantly impaired and which considered defendant's conduct at time crime was committed and his conduct and demeanor at time of trial, did not err in finding that mitigating circumstances were not established and in imposing death penalty upon conviction of defendant for first-degree murder. State v. Evans (1980) 124 Ariz. 525, 606 P.2d 16.

Where there was nothing in record to establish that murder victim suffered pain, defendant's commission of such murder could not be considered especially cruel so as to warrant imposition of death sentence. State v. Lujan (1979) 124 Ariz. 365, 604 P.2d 629.

Defendant, who was under sentence of death, was entitled to a new hearing at which he could attempt to present mitigating circumstances where defendant's failure to present mitigating factors at the sentencing hearing was apparently based on statutory limitations on mitigating factors that were then in effect and where, subsequent to the sentencing, the Supreme Court had held that a defendant must be allowed to present any mitigating circumstances that might tend to show why the death penalty should not be imposed. State v. Evans (1978) 120 Ariz. 158, 584 P.2d 1149, appeal after remand 124 Ariz. 526, 606 P.2d 16, certiorari denied 101 S.Ct. 252, 449 U.S. 891, 66 L.Ed.2d 119.

4.55. — Capacity of defendant, aggravating or mitigating circumstances

Defendant's unrefuted but uncorroborated testimony that on day of murder he was under the influence of a hallucinogen was insufficient to establish defendant's "lack of capacity" as a mitigating circumstance, since record revealed that defendant's capacity on night of crime was not impaired. State v. James (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

4.6. — Intoxication, aggravating or mitigating circumstances

Defendant had failed to prove mitigating circumstance of intoxication, where only evidence that defendant had been drinking on day of murders came from his own statements to police,

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Note 4.6

in which defendant also stated that he knew what he was doing on afternoon in question and that it was "not right." *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

In order for a sentencing judge to find that voluntary intoxication constitutes a mitigating circumstance, there must be evidence that defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired; and to find that defendant was under duress at the time of the crime, such duress must be unusual and substantial. *State v. Rossi* (1985) 146 Ariz. 359, 706 P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

Defendant's capacity during entire eight hours that victim was held captive could not have been so impaired by reason of his intoxication that he could not appreciate wrongfulness of his behavior, and thus intoxication did not provide mitigating factor against imposition of death penalty. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

In determining sentence for murder conviction, defendant's claim of intoxication was not shown to be a mitigating circumstance, since he had a precise memory of the events of that day. *State v. Smith* (1984) 141 Ariz. 510, 687 P.2d 1265.

Voluntary intoxication is mitigating circumstance in sentencing defendant after conviction if defendant's capacity to appreciate wrongfulness of his conduct was significantly impaired, but not so impaired as to constitute defense to prosecution. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

Where it was never argued at trial for first-degree murder that defendant was intoxicated, nor did defendant present any credible evidence of intoxication at sentencing hearing, and defendant controlled murder victim for period of eight hours, voluntary intoxication was not to be considered as mitigating circumstance in sentencing defendant after conviction. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

A defendant's intoxication or alcoholism at time of offense is a mitigating circumstance if the evidence shows that it significantly impaired defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. *State v. Zaragoza* (1983) 135 Ariz. 63, 659 P.2d 22, certiorari denied 103 S.Ct. 3097, 462 U.S. 1124, 77 L.Ed.2d 1356.

Fact that defendant was to some degree intoxicated at time he committed crime was not, by itself, a mitigating circumstance under death penalty statute. *State v. Woratzeck* (1982) 134 Ariz. 452, 657 P.2d 865.

Whether a defendant's intoxication is mitigating circumstance such as to make death penalty inappropriate for homicide depends upon whether defendant's capacity to appreciate wrongfulness of his conduct or to conform his conduct to

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requirements of law was significantly impaired. *Id.*

Where defendant's wife testified that defendant was showing no effects of alcohol when he arrived at trailer, and defendant's testimony failed to show degree of impairment from intoxication at time of murder that would constitute mitigating circumstance, and, defendant had another conviction for aggravated assault, there were no mitigating circumstances sufficient to call for leniency, and therefore, sentence of death upon defendant's conviction for first-degree murder was properly imposed. *State v. Britson* (1981) 130 Ariz. 380, 636 P.2d 628.

Intoxication is "impairment", but whether defendant's intoxication was mitigating circumstance such as would make imposition of death penalty for homicide inappropriate depended upon whether his capacity to appreciate wrongfulness of his conduct or to conform his conduct to requirements of law was significantly impaired but not so impaired as to constitute defense to prosecution, and evidence fell short of proving necessary degree of impairment. *State v. Jordan* (1980) 126 Ariz. 283, 614 P.2d 825, certiorari denied 101 S.Ct. 283, 449 U.S. 986, 66 L.Ed.2d 251.

In prosecution for murder in the first degree, trial court did not commit fundamental error in finding that defendant's capacity was not significantly impaired by his consumption of alcohol so as to constitute a mitigating circumstance. *Id.*

4.65. — Drug use, aggravating or mitigating circumstances

Trial court properly refused to consider defendant's heroin use as a mitigating factor in homicide where the heroin use did not impair defendant's ability to appreciate the wrongfulness of his conduct, defendant was capable of maintaining a full-time job while being a heroin addict, defendant had a rather detailed plan to kill the victim, and defendant demonstrated detailed recall of the events. *State v. Tittle* (1985) 147 Ariz. 339, 710 P.2d 449.

4.7. — Pecuniary consideration, aggravating or mitigating circumstances

Defendant's expectation of pecuniary gain was aggravating factor in murder, though defendant may have reacted irrationally in response to failure or inability of victim to open safe in bank, where reason defendant was present in bank was his expectation of pecuniary gain and reason he stabbed victim was because victim was unable to open safe, frustrating defendant's attempt for pecuniary gain. *State v. LaGrand* (1987) 153 Ariz. 21, 734 P.2d 563, certiorari denied 108 S.Ct. 207, 98 L.Ed.2d 158.

There was insufficient evidence to support aggravating circumstance that murder was committed for pecuniary gain, notwithstanding that defendant had taken money and keys to truck from victim; defendant's motive, if any, for murder stemmed from difficulties in relationship,

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and taking was only incident. *Wallace* (1986) 151 Ariz. 362.

Trial court properly found defendant committed for pecuniary gain circumstance in determining death penalty, where defendant very carefully executed arm robbery for murders was motivated by robbery. *State v. Coi* 468, 715 P.2d 721.

Murder was committed in receipt of anything of pecuniary meaning of this section's circumstance, where defendant convenience store clerk's convenience store clerk's control and defendant clerk give him all money then shot clerk when he called instead of handing over money. (1985) 146 Ariz. 491, 707 P.2d 491.

Evidence, including testimony of defendant's associate stack of money as prepayment for murder of some of such money to defendant told witness murders were that shortly before murders were armed with guns and coming into large amount of money important job, was sufficient defendant was hired murdering circumstance state subd. F, par. 5, that defendant's defense as consideration for payment of receipt of anything indisputably applied. *State v. Ariz.* 538, 703 P.2d 482, 103 S.Ct. 834, 474 U.S. 1073.

Evidence that defendant items for purpose of robbery disposing of guards' bags in which victims' money was placed indicated that murders were planning of robbery and no doubt, as aggravated defendant committed offense in receipt of something of value. *Poland* (1985) 144 Ariz. 144, affirmed 106 S.Ct. 1749, 123.

Evidence of a plan furtherance of that plan to elicit the aggravating penalty case that the offense as consideration of the receipt of the pecuniary value. *State v. Poland* 694 P.2d 222, certiorari denied 108 S.Ct. 471 U.S. 1143, 86 L.Ed.2d 1143.

Term "pecuniary gain" § 13-703 authorizing a mitigating factor in death penalty, means thing of pecuniary value.

and taking was only incidental thereto. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

Trial court properly found that murders were committed for pecuniary gain, as aggravating circumstance in determining whether to impose death penalty, where defendant and accomplice very carefully executed armed robbery, and only motivation for murders was to leave no witnesses to robbery. *State v. Correll* (1986) 148 Ariz. 468, 715 P.2d 721.

Murder was committed in expectation of receipt of anything of pecuniary value, within meaning of this section's aggravating circumstance, where defendant committed murder of convenience store clerk solely for purpose of gaining access to cash register, which was under clerk's control and defendant first demanded that clerk give him all money in register, and then shot clerk when he called for store manager instead of handing over cash. *State v. Smith* (1985) 146 Ariz. 491, 707 P.2d 289.

Evidence, including testimony man gave defendant's associate stack of \$100 bills apparently as prepayment for murders, that associate gave some of such money to defendant, that person told witness murders were contract killings, and that shortly before murders all three assailants were armed with guns and were talking about coming into large amounts of money and doing important job, was sufficient to establish that defendant was hired murderer to whom aggravating circumstance statute A.R.S. § 13-703, subd. F, par. 5, that defendant committed offense as consideration for receipt or in expectation of receipt of anything of pecuniary value, indisputably applied. *State v. Hooper* (1987) 145 Ariz. 538, 703 P.2d 482, certiorari denied 106 S.Ct. 834, 474 U.S. 1073, 88 L.Ed.2d 805.

Evidence that defendant obtained numerous items for purpose of robbing van and ultimately disposing of guards' bodies, including canvas bags in which victims' bodies were found, indicated that murders were contemplated during planning of robbery and proved beyond reasonable doubt, as aggravating circumstance, that defendant committed offense in expectation of receipt of something of pecuniary value. *State v. Poland* (1985) 144 Ariz. 412, 698 P.2d 207, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Evidence of a plan to rob and a murder in furtherance of that plan are sufficient to establish the aggravating circumstance in a death penalty case that the defendant committed the offense as consideration for the receipt, or an expectation of the receipt, of something of pecuniary value. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 1143, 86 L.Ed.2d 706.

Term "pecuniary gain," within provision of § 13-703 authorizing use of pecuniary gain as an aggravated factor in justifying imposition of death penalty, means that the receipt of something of pecuniary value must be the impetus for

the murder, not merely the result. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 1143, 86 L.Ed.2d 706.

Trial court could find the aggravating circumstance of pecuniary gain where basis for first-degree murder conviction was felony-murder and the felony was robbery. *State v. Carriger* (1984) 143 Ariz. 142, 692 P.2d 991, certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.2d 864.

Fact that pecuniary gain was not found at defendant's first sentencing on first-degree murder charge did not bar State from proving that circumstance on resentencing where the law had been clarified between the original sentencing and resentencing and where the facts would have supported the finding of pecuniary gain at the original sentencing. *State v. Carriger* (1994) 143 Ariz. 142, 692 P.2d 991, certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.2d 864.

In sentencing hearing after conviction of defendant on first-degree murder, evidence that murders were a part of overall scheme of robbery with specific purpose to facilitate escape, that defendant had three victims lie on the floor and before leaving shot each in turn with intent that no witnesses be left to identify robbers, and that murders were not unexpected or accidental was sufficient to support finding of aggravating factor that murders had been committed for pecuniary gain allowing death sentence, despite mitigating factor that during time between original sentencing and present sentencing defendant had obtained a G.E.D. degree. *State v. Hensley* (1984) 142 Ariz. 598, 691 P.2d 689.

In sentencing, the "pecuniary value" aggravating circumstance is applied when the murder was committed for a "financial motivation." *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

In prosecution for kidnapping, first-degree murder, and theft of property valued in excess of \$1,000, although evidence supported jury's guilty verdict on the theft charge, this did not mean that the murder was necessarily committed for a "financial motivation," and trial judge was entitled to find that defendant committed murder and then formed the intent to commit theft. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

Aggravating circumstance justifying imposition of death penalty that murder was committed in expectation of pecuniary gain requires that pecuniary gain be cause of the murder, not just a result. *State v. Harding* (1984) 141 Ariz. 492, 687 P.2d 1247.

In light of defendant's acquittal of aggravated robbery and theft, pecuniary gain was not established as an aggravating circumstance with respect to first-degree murder. *State v. James* (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari

For aggravating circumstance of murder being committed in expectation of receipt of something of pecuniary value to be present, pecuniary consideration must be cause of murder, not merely a result. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

Where defendant wanted victim's car so that he could leave state to evade capture following his escape from work furlough program, where defendant wanted money to facilitate his flight from state authorities, and where defendant then killed victim to hinder detection of his theft of victim's car and wallet, aggravating circumstance of murder for "pecuniary gain" was present. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

Testimony that defendant participated in killings with the expectation of receiving \$10,000 in payment therefor was sufficient to support finding that offense was committed as consideration for the receipt, or in expectation of receipt, of anything of pecuniary value. *State v. McCall* (1983) 139 Ariz. 147, 677 P.2d 920, certiorari denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d 375.

Evidence that defendant removed clothing, a briefcase and credit cards from possession of murder victim, and left scene of homicides in car that had been in custody of another victim, supported finding that defendant committed murders in course of obtaining valuable personal property from his victims, an aggravating circumstance for purposes of imposition of death penalty. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013.

Where defendant's confessions demonstrated that purpose of murder was to eliminate victim as witness to her own rape, and there was no evidence that pecuniary gain was cause of murder, trial court erred, after defendant's conviction of first-degree murder, in finding as aggravating circumstance that murder was committed in expectation of receipt of something of pecuniary value, even though defendant did steal victim's purse, money, and credit cards after murder had been committed. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

For commission of a crime in the expectation of receipt of something of pecuniary value to be present as an aggravating circumstance in determining whether to impose sentence of life imprisonment or death for murder, murder must have been committed for a "financial motivation." *State v. Graham* (1983) 135 Ariz. 209, 660 P.2d 460.

Where defendant, who was convicted of two counts of first-degree murder and was sentenced to death, had committed such offenses in order to obtain victim's car as substitute car in which defendant could continue flight from police and victim's credit cards, blank checks and expensive

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defendant. State v. Co
382. 724 P.2d 1.

Once the trial court's capacity was significant, defendant was under unnecessary, a mitigating factor weighed against any aggravating factors that the trial court may consider mitigating factors to call for leniency. *Ariz. 359, 706 P.2d 371* (1985); *Ariz. 245, 741 P.2d 122* (1987).

It was not required
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factors was employed,
sentence be vacated
for resentencing. Stat
359, 706 P.2d 371, app
245, 741 P.2d 1223.

Any mitigating factors in homicides were not sufficient to justify leniency, and defendant's claim that he played a minor role in the crime was rejected. Villareal (1985) 145 Cal.App.4th 106; certiorari denied 106 S.Ct. 1171, 117 L.Ed.2d 324.

Defendant's testimony was insufficient to establish a mitigating circumstance. Participation in killing, on such point lacked apparently a willing (1984) 141 Ariz. 141 denied 105 S.Ct. 398 332.

5.1. — Violent fe gating circur

Armed robbery is against another person. The penalty aggravating factor was previously considered in States involving use of a firearm against another person. Sta 491, 707 P.2d 289.

5.5. — Hearing.
circumstances

Criminal Rule 17.:
advise defendant of
quences of pleading
address any duty of
right to aggravation
v. Gannon (1981) 1:

Where "change in
was for defendant"
introduce any miti-
tion/mitigation hear-
of general due pro-

camera were also taken after the killings, defendant had committed the offenses with expectation of receiving something of pecuniary value. *State v. Gretzler* (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

The trial court could find in prosecution for first-degree murder that the defendants committed the offense as consideration for or in expectation of the receipt of anything of pecuniary value. *State v. Poland* (1982) 132 Ariz. 269, 645 P.2d 784.

For "murder for pecuniary gain" to be an aggravating circumstance warranting imposition of death penalty, the murder need not be a "contract-type" murder or a murder "for hire" but, rather, such circumstance applies where hope of financial gain, i.e., robbery of victim, is a cause of the murder, and not merely the result. *State v. Rumsey* (1981) 130 Ariz. 427, 636 P.2d 1209, appeal after remand 136 Ariz. 166, 665 P.2d 48, affirmed 104 S.Ct. 2305, 467 U.S. 203, 81 L.Ed.2d 164.

For purposes of death penalty statute, former § 13-454 (now, this section), evidence that defendant, after killing victims, took their credit cards, some money, diamond rings and automobile was sufficient to establish aggravating factor of pecuniary value. *State v. Clark* (1980) 126 Ariz. 428, 616 P.2d 888, certiorari denied 101 S.Ct. 796, 449 U.S. 1067, 66 L.Ed.2d 612.

This section making pecuniary value an aggravating factor was not limited to "hired gun" situation. *Id.*

4.8. — Provocation, aggravating or mitigating circumstances

Even if victim's actions of informing against defendant and of being a prostitute were sufficient to constitute adequate provocation so as to be mitigating circumstance precluding imposition of death penalty, there was sufficient lapse of time between provocation and killing for those passions to "cool," where defendant learned that victim may have been informant against him months before murder and learned that victim was prostitute approximately one week before murder. *State v. Jeffers* (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

5. — Duress, aggravating or mitigating circumstances

Defendant had not murdered mother and her two children with whom he had lived under mitigating circumstance of unusual and substantial duress merely because mother had requested that defendant move out of mobile home. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

Defendant's personality disorder and impulse control problem was not within meaning of "duress" as mitigating circumstance in determining whether to impose death penalty upon murder

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pecuniary value.
42, 659 P.2d 1,
461 U.S. 971, 77
04 S.Ct. 32, 463

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Ariz. 166, 665
67 U.S. 203, 81

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defendant. State v. Castaneda (1986) 150 Ariz.
382, 724 P.2d 1.

Once the trial court finds that the defendant's
capacity was significantly impaired or that de-
fendant was under unusual and substantial duress,
a mitigating factor arises which is then
weighed against any aggravating circumstances
that the trial court may find to determine whether
mitigating factors are sufficiently substantial
to call for leniency. State v. Rossi (1985) 146
Ariz. 359, 706 P.2d 371, appeal after remand 154
Ariz. 245, 741 P.2d 1223.

It was not required that defendant's impair-
ment and duress be to such a degree as to
constitute a defense to prosecution to be mitigat-
ing factors in imposition of death penalty, and
when they were so considered, wrong standard
for determining and applying those mitigating
factors was employed, thus requiring that death
sentence be vacated and that case be remanded
for resentencing. State v. Rossi (1985) 146 Ariz.
359, 706 P.2d 371, appeal after remand 154 Ariz.
245, 741 P.2d 1223.

Any mitigating factors in connection with
homicides were not sufficiently substantial to
justify leniency, and evidence did not support
defendant's claim that he had acted under duress
and in minor role in crimes. State v. Martinez-
Villareal (1985) 145 Ariz. 441, 702 P.2d 670,
certiorari denied 105 S.Ct. 339, 474 U.S. 975, 88
L.Ed.2d 324.

Defendant's testimony concerning fear of indi-
viduals who also participated in killing of victim
was insufficient to establish "duress" as a miti-
gating circumstance regarding defendant's par-
ticipation in killing, since defendant's testimony
on such point lacked credibility; defendant was
apparently a willing participant. State v. James
(1984) 141 Ariz. 141, 685 P.2d 1293, certiorari
denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d
332.

5.1. — Violent felony, aggravating or miti- gating circumstances

Armed robbery is violent felony committed
against another person for purposes of death
penalty aggravating circumstance that defend-
ant was previously convicted of felony in United
States involving use or threat of violence on
another person. State v. Smith (1985) 146 Ariz.
491, 707 P.2d 289.

5.5. — Hearing, aggravating or mitigating circumstances

Criminal Rule 17.2 imposes duty on court to
advise defendant of certain rights and conse-
quences of pleading no contest, but does not
address any duty of court to advise accused of
right to aggravation-mitigation hearing. State
v. Gannon (1981) 130 Ariz. 592, 638 P.2d 206.

Where "change in rules" by judicial decision
was for defendant's benefit, allowing him to
introduce any mitigating factors in aggrava-
tion/mitigation hearing, there was no violation
of general due process requirements of funda-

mental fairness by reason of ex post facto appli-
cation. State v. Jordan (1980) 126 Ariz. 283, 614
P.2d 825, certiorari denied 101 S.Ct. 408, 449 U.S.
986, 66 L.Ed.2d 251.

Fact that evidence was inconclusive as to
whether victims suffered in such a way as to
support finding that crime was committed in
cruel manner was not of itself determinative; if
the crime was committed in especially heinous,
cruel, or depraved manner, either all or one,
aggravating circumstance is present so as to
support imposition of death penalty. State v.
Ceja (1980) 126 Ariz. 35, 612 P.2d 491.

The purpose of an aggravation mitigation
hearing is to determine the character and prop-
ensities of the defendant. State v. Valencia
(1979) 124 Ariz. 139, 602 P.2d 307, appeal after
remand 132 Ariz. 248, 645 P.2d 239.

6. — Character of offender, aggravating or mitigating circumstances

Mitigating circumstances offered by defendant
concerning his upbringing, cooperation in prepa-
ration of presentence report, psychological prob-
lems, minor participation in murders, and age,
were not sufficiently substantial, either individu-
ally or in combination, to call for leniency in
determining whether to impose death sentence.
State v. Correll (1986) 148 Ariz. 468, 715 P.2d
721.

Numerous letters written by family members
and acquaintances attesting to defendant's good
reputation were insufficient to establish good
reputation as a mitigating factor, in light of
defendant's statements at trial for murder that
he had robbed drug dealers and sold illicit gems.
State v. Poland (1985) 144 Ariz. 412, 698 P.2d
207, affirmed 105 S.Ct. 1749, 476 U.S. 147, 90
L.Ed.2d 123.

Fact that defendant was a model prisoner was
not a mitigating factor sufficiently substantial to
call for leniency. State v. Poland (1985) 144
Ariz. 388, 698 P.2d 183, affirmed 106 S.Ct. 1749,
476 U.S. 147, 90 L.Ed.2d 123.

Defendant's action in saving life of another
inmate was evidence in mitigation of a sentence
on first-degree murder conviction. State v. Car-
rigan (1984) 143 Ariz. 142, 692 P.2d 991, certiorari
denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.
2d 864.

Fact that defendant was only 20 at time of
offense, was born out of wedlock, and had a
history of childhood mental disease which re-
quired him to be placed on Thorazine to control
an aggressive personality were not sufficient
mitigating factors to preclude imposition of
death penalty on ground that murder was espe-
cially heinous, cruel and depraved. State v.
Clabourne (1984) 142 Ariz. 335, 690 P.2d 54.

Defendant's age, his troubled childhood and
feelings of remorse were not sufficient mitigat-
ing factors to preclude imposition of death pen-
alty on ground that murder was especially he-
inous, cruel and depraved absent evidence that
defendant's capacity to appreciate wrongfulness

of his conduct or to conform his conduct to requirements of law was significantly impaired. *State v. Clabourne* (1984) 142 Ariz. 335, 690 P.2d 54.

When defendant is being sentenced for first-degree murder, sentencer must consider as mitigating circumstance any aspect of defendant's character or record and any circumstance of offense relevant in determining whether sentence less severe than death is appropriate. *State v. McDaniel* (1983) 136 Ariz. 188, 665 P.2d 70.

In sentencing defendant after conviction for first-degree murder, if, after considering offered evidence as to defendant's mental illness, sentencing court concludes that evidence with respect to defendant's mental condition merely establishes a character or personality disorder, then court may conclude that mitigating circumstance of mental illness does not exist; court must further consider offered evidence, however, to determine whether it in some other way suggests that defendant should be treated with leniency. *State v. McMurtrey* (1983) 136 Ariz. 93, 664 P.2d 637, certiorari denied 104 S.Ct. 180, 464 U.S. 858, 78 L.Ed.2d 161, appeal after remand 143 Ariz. 71, 691 P.2d 1099, appeal after remand 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

Where trial court, in sentencing defendant after conviction for first-degree murder, considered evidence offered by defendant as to his mental illness sufficiently to conclude that it merely established that defendant suffered from character defect, but did not consider offered evidence further to determine whether it in some other way suggested that defendant should be shown leniency, there was risk that defendant was sentenced to death without full consideration of evidence offered in mitigation, and case was properly remanded for resentencing. *State v. McMurtrey* (1983) 136 Ariz. 93, 664 P.2d 637, certiorari denied 104 S.Ct. 180, 464 U.S. 858, 78 L.Ed.2d 161, appeal after remand 143 Ariz. 71, 691 P.2d 1099, appeal after remand 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

In determining whether a murder has been committed in an especially heinous or depraved manner, supreme court must necessarily consider the killer's state of mind at the time of the offense. *State v. Lujan* (1979) 124 Ariz. 365, 604 P.2d 629.

6.1. — Appreciate wrongfulness, aggravating or mitigating conduct

Mitigating circumstance that defendant's capacity to appreciate wrongfulness of his conduct or to conform to requirements of law was significantly impaired due to cocaine addiction required only proof of significant impairment of either of two personal attributes, not both. *State v. Rossi* (1987) 154 Ariz. 245, 741 P.2d 1223.

For purposes of determining appropriateness of imposition of death penalty defendant convicted of attempted burglary, attempted first-degree murder and first-degree murder failed to prove by preponderance of evidence that his cocaine addiction significantly impaired his capacity to appreciate wrongfulness of his conduct, based on defendant's efforts to cover up acts he committed on the days of the crime and defendant's ability to recall vivid details of crime themselves, but defendant proved by preponderance of evidence that his cocaine addiction significantly impaired his capacity to conform his conduct to requirements of law, based on unrefuted medical testimony on chemical dependency in general, and how addiction fostered insatiable and life controlling craving for additional drugs that overwhelmed user's ability to control his physical behavior. *State v. Rossi* (1987) 154 Ariz. 245, 741 P.2d 1223.

6.2. — State of mind of defendant, aggravating or mitigating circumstances

In considering defendant's state of mind for purposes of determining existence of aggravating circumstances warranting death penalty, supreme court must consider such things as defendant's apparently relishing the murder, inflicting gratuitous violence on victim, needless mutilation of victim, senselessness of the crime, and helplessness of victim. *State v. Summerlin* (1983) 138 Ariz. 426, 675 P.2d 686.

6.3. — Remorse, aggravating or mitigating circumstances

Presence of remorse as mitigating factor did not warrant leniency toward defendant who had murdered two children in heinous and depraved manner. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

Feelings of remorse were so minimal as to preclude use of remorse as a mitigating factor when death penalty was imposed on ground that murder was especially heinous, cruel and depraved. *State v. Clabourne* (1984) 142 Ariz. 335, 690 P.2d 54.

6.4. — Impaired mental condition, aggravating or mitigating circumstances

In penalty phase of first-degree murder trial, testimony of psychiatrist that defendant was a remorseless, bullying sociopath and victimized others merely for thrill of proving his "superiority" to his victims and his contempt for society's laws, and that defendant killed for the status he received by being able to escape the consequences of his actions was not sufficient to require finding of a mitigating circumstance of impaired mental condition. *State v. Gerlaugh* (1985) 144 Ariz. 449, 698 P.2d 694.

6.5. — Age, aggravating or mitigating circumstances

Defendant convicted of first-degree burglary, attempted first-degree murder, and first-degree murder proved by preponderance of evidence that he could be rehabilitated based on testimony

of three expert witnesses mining propriety of imposing death penalty. *State v. Rossi* (1987) 154 Ariz. 245, 741 P.2d 1223.

Fact that defendant was 19 years old at time of armed robbery and murder was not a mitigating factor for purposes of imposing death penalty. *State v. Rossi* (1987) 154 Ariz. 245, 741 P.2d 289.

Defendant's youth, lea-
ty, was not a substanti-
sentencing for first-degr-
his prior criminal history,
an armed robbery at age
a similar armed robber
tempted murder four d
question, fact that murd-
pulsive act, but involved
in which defendant was
of psychiatrist that del-
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laugh (1985) 144 Ariz. 4-

Neither defendant's ag-
of murders, nor fact tha-
were mitigating factors
to call for leniency. *St-
Ariz. 412, 698 P.2d 207,
476 U.S. 147, 90 L.Ed.2d*

While youth is cert-
weighing against impos-
impact was minimized b-
20-year-old defendant's
State v. Gillies (1984) 14-
certiorari denied 105 S.
84 L.Ed.2d 834.

In determining senti-
tion, defendant's age at
years, was not a miti-
cause the defendant v-
State v. Smith (1984)
1265.

While age of defenc-
circumstance in senten-
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135 Ariz. 500, 662 P.2c

In sentencing defen-
for first-degree murde-
judge properly found t-
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20 years old at time of
(1983) 135 Ariz. 500, 6

In prosecution for
which death penalty
factor that defendant
crimes was "sufficient
life imprisonment inste-
vating circumstances c-
tions for kidnapping, r-
at gunpoint. *State v.*
248, 645 P.2d 239.

Mitigating circumst-
defendant was only :

ing appropriateness of defendant convicted of first-degree murder failed to prove that his cocaine use impaired his capacity to conduct, based on facts he committed and defendant's crime themselves, consideration of evidence significantly in his conduct to unrefuted medical testimony in general, insatiable and life-long use of illegal drugs that control his physical condition. 187) 154 Ariz. 245,

defendant, aggravating circumstances of state of mind for purpose of aggravating death penalty, such things as death of the murder, victim, needless excess of the crime, State v. Summerlin 186.

ing or mitigating factor did defendant who had used and depraved 6) 151 Ariz. 362.

minimal as to mitigating factor on ground that, cruel and de 4) 142 Ariz. 335,

condition, aggravating circumstances of murder trial, defendant was a and victimized by his "superior" apt for society's or the status he gave the consequence sufficient to circumstance of State v. Gerlaugh 4.

mitigating circumstance of first-degree burglary, and first-degree of evidence on testimony

of three expert witnesses, for purpose of determining propriety of imposition of death penalty. State v. Rossi (1987) 154 Ariz. 245, 741 P.2d 1223.

Fact that defendant was 30 years old at time of armed robbery and murder did not establish defendant's relatively young age as mitigating factor for purposes of imposition of death penalty for murder. State v. Smith (1985) 146 Ariz. 491, 707 P.2d 289.

Defendant's youth, leading to alleged passivity, was not a substantial mitigating factor in sentencing for first-degree murder in light of: his prior criminal history, including conviction of an armed robbery at age 17 and participation in a similar armed robbery, kidnapping and attempted murder four days prior to crime in question, fact that murder was not a hasty impulsive act, but involved deliberation and cruelty in which defendant was a leader, and testimony of psychiatrist that defendant had history of associating with wild companions. State v. Gerlaugh (1985) 144 Ariz. 449, 698 P.2d 694.

Neither defendant's age, which was 36 at time of murders, nor fact that he was model prisoner were mitigating factors sufficiently substantial to call for leniency. State v. Poland (1985) 144 Ariz. 412, 698 P.2d 207, affirmed 106 S.Ct. 1749, 476 U.S. 147, 30 L.Ed.2d 123.

While youth is certainly mitigating factor, weighing against imposition of death penalty its impact was minimized by extent and duration of 20-year-old defendant's participation in murder. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

In determining sentence for murder conviction, defendant's age at the time of the crime, 21 years, was not a mitigating circumstance because the defendant was mature for his age. State v. Smith (1984) 141 Ariz. 510, 687 P.2d 1265.

While age of defendant might be mitigating circumstance in sentencing, it will not alone always require leniency. State v. Gillies (1983) 135 Ariz. 500, 662 P.2d 1007.

In sentencing defendant after his conviction for first-degree murder and other crimes, trial judge properly found that deliberation, duration of crime, and maturity of defendant nullified mitigating circumstance that defendant was only 20 years old at time of offense. State v. Gillies (1983) 135 Ariz. 500, 662 P.2d 1007.

In prosecution for first-degree murder in which death penalty was sought, mitigating factor that defendant was 16 at time of the crimes was "sufficiently substantial" to call for life imprisonment instead of death despite aggravating circumstances of defendant's prior convictions for kidnapping, robbery and raping a victim at gunpoint. State v. Valencia (1982) 132 Ariz. 248, 645 P.2d 239.

Mitigating circumstances, including fact that defendant was only 20 years of age when he

committed first-degree murder, did not, when weighed against aggravating circumstances consisting of fact that defendant had been convicted of another offense for which life imprisonment or death was impossible, that he had been previously convicted of a felony involving use or threat of violence on others, that he committed the murder offense in especially heinous, cruel or depraved manner and that he committed the offense while in custody of department of corrections, require that his death sentence be reversed. State v. Vickers (1981) 129 Ariz. 506, 633 P.2d 315.

Defendant's Texas convictions, which occurred after murder in Arizona, could be considered as aggravating circumstances at sentencing hearing held subsequent to those convictions. State v. Jordan (1980) 126 Ariz. 283, 614 P.2d 825, certiorari denied 101 S.Ct. 408, 449 U.S. 986, 66 L.Ed.2d 251.

Where defendant had not attacked validity of prior convictions by presenting specific claims of constitutional error, trial court correctly considered such convictions as aggravating circumstances though they were being collaterally attacked by means of petitions for federal writs of habeas corpus. Id.

Where convictions used to establish aggravating circumstances for death penalty resulted from submission on grand jury transcript but with defendant asserting not guilty plea and court being required to ascertain guilt beyond reasonable doubt, failure of court to have advised defendant of his right not to incriminate himself did not invalidate such convictions so as to preclude their use to establish aggravating circumstances. State v. Steelman (1980) 126 Ariz. 19, 612 P.2d 475, certiorari denied 101 S.Ct. 287, 449 U.S. 913, 66 L.Ed.2d 141.

Fact that convictions used to establish aggravating circumstances for purposes of death penalty occurred subsequent to homicide involved did not preclude their consideration as aggravating circumstances. Id.

In imposing death sentence following conviction of murder in first degree, trial court properly considered defendant's prior conviction for murder with malice in Texas, since murder for malice was a minimum second-degree murder and punishable under Arizona law by imprisonment in state prison for not less than ten years. State v. Smith (1980) 125 Ariz. 412, 610 P.2d 46.

At hearing to resentence defendant for first-degree murder, it was not improper for the trial court to consider as an aggravating circumstance a rape conviction which had not been entered prior to the original sentencing hearing where the rape was committed before the original sentencing hearing. State v. Valencia (1979) 124 Ariz. 139, 602 P.2d 807, appeal after remand 132 Ariz. 248, 645 P.2d 239.

The age of the offender is an important consideration in sentencing under this section. Id.

Evidence established that defendant's mental condition was not only mitigating factor in murder he committed, but also major and contributing cause of his conduct which was sufficiently substantial to outweigh aggravating fact of defendant's prior conviction, and imposition of death penalty was inappropriate. *State v. Brookover* (1979) 124 Ariz. 38, 601 P.2d 1322.

Guilty plea entered with respect to a prior felony charge was not invalid because defendant was not told at the time that such conviction might be used to impose death penalty if he was later convicted of murder. *State v. Watson* (1978) 120 Ariz. 441, 586 P.2d 1253, certiorari denied 99 S.Ct. 1254, 440 U.S. 924, 59 L.Ed.2d 478, appeal after remand 129 Ariz. 60, 628 P.2d 943.

State may not use a prior conviction to enhance punishment for later conviction if prior conviction was obtained in constitutionally infirm manner. *Id.*

Fear of force is element of robbery and a conviction of robbery presumes that such fear was present for purposes of determining whether conviction of robbery is aggravating circumstance to be considered in determining sentence to be imposed upon conviction of murder. *Id.*

It is nature of prior conviction and sentence possible that is aggravating circumstance to be considered in determining whether death penalty should be imposed for conviction of murder; sentence actually imposed pursuant to prior conviction is not controlling although it may be presented as mitigating factor. *Id.*

Fact that defendant had a prior felony conviction in California for attempted second-degree robbery was an "aggravating circumstance" for purpose of sentencing. *State v. Evans* (1978) 120 Ariz. 158, 584 P.2d 1149, appeal after remand, 124 Ariz. 526, 606 P.2d 16, certiorari denied 101 S.Ct. 252, 449 U.S. 891, 66 L.Ed.2d 119.

6.6. — Ability to be rehabilitated, aggravating and mitigating circumstances

Fact that numerous persons wrote letters on defendant's behalf did not establish his ability to be rehabilitated as a mitigating factor to imposition of death penalty; defendant showed no remorse and, in fact, relished his murderous act and possessed a prior arrest record for theft, drug usage, possession of a firearm, and forgery. *State v. Rossi* (1985) 146 Ariz. 359, 706 P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

6.8. — Parental status, aggravating or mitigating circumstances

In determining sentence for murder conviction, defendant's being the father of a small child was not a mitigating circumstance, where birth was out of wedlock and there was no apparent "family tie." *State v. Smith* (1984) 141 Ariz. 510, 687 P.2d 1265.

6.9. — Passion, aggravating or mitigating circumstances

Murders had not been committed as result of mitigating circumstance of passion, where defendant and victim had had more serious arguments than argument preceding murder in past and defendant showed neither anger nor resentment for having been asked to leave victim's house. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

7. — Prior conviction, aggravating or mitigating circumstances

Aggravating factors, including defendant's previous conviction for offense punishable by life imprisonment or death, fact that offense was committed for pecuniary gain and in a heinous, cruel, or depraved manner, outweighed mitigating factor defendant's "significant impairment"—and justified defendant's death sentence for first-degree murder of his mother. *State v. Moorman* (1987) 154 Ariz. 578, 744 P.2d 679.

Defendant's prior convictions for armed robbery and kidnapping, involving use or threat of violence were proven beyond reasonable doubt at defendant's murder trial, and thus were properly considered as aggravating factors for purposes of sentencing. *State v. LaGrand* (1987) 153 Ariz. 21, 734 P.2d 563, certiorari denied 108 S.Ct. 207, 98 L.Ed.2d 158.

Trial court properly found that defendant had previously been convicted of felony involving use or threat of violence against another person, as aggravating circumstance to be considered in determining whether to impose death penalty, in that certified record indicated defendant had been convicted in California on three counts of robbery, one which involved use of firearm, though under California Penal Code person could theoretically commit robbery with threat of violence against property of victim but without use or threat of violence directed to victim. *State v. Correll* (1986) 148 Ariz. 468, 715 P.2d 721.

Defendant's 1965 California robbery conviction, which had occurred at a time when the penalty in Arizona for first time robbery conviction was five years to life, could be considered an aggravating circumstance as a conviction of an offense for which Arizona law could impose a life sentence, even though the maximum sentence for robbery at the time of the homicide was five years' imprisonment. *State v. Tittle* (1985) 147 Ariz. 339, 710 P.2d 449.

First-degree murder defendant, whose previous conviction of attempted armed robbery in California was used as aggravating factor under death penalty statute, had been convicted of crime involving use or threat of violence on another person, irrespective of what was noted in California judgment of conviction, as nature of crime for which defendant was convicted could not be committed in California without use of force or fear against person of another. *State v. Evans* (1986) 147 Ariz. 57, 708 P.2d 738.

Trial court properly prior armed robbery conviction as circumstance in imposing first-degree murder conviction occurred during armed store, even though convicted, where prior conviction. *State v. Smith* (1985) 146

Judgment of conviction in Illinois for three counts for which he received count and could have been satisfied aggravating circumstance. S. § 13-703, subd. F, has been convicted of another State for which under imprisonment or death. Hooper (1985) 145 Ariz. 146, certiorari denied 106 S.Ct. 1, 89 L.Ed.2d 805.

Judgment against three counts of armed of aggravated kidnapping. Supreme Court took judicial notice of violence aggravating circumstance. subd. F, par. 2, that convicted of felony involving use of threat of violence. *State v. Hooper* (1985) 145 Ariz. 482, certiorari denied 107 S.Ct. 2, 89 L.Ed.2d 805.

In light of defendant's crime, and nature of his criminal history, and of his penetration, and of his ten-year-old child, defendant's ties with family or friends, and of his mitigating circumstances, and of his previous record, and of his previous conviction for armed robbery. *Roscoe* (1984) 145 Ariz. 146, certiorari denied 105 S.Ct. 1, 89 L.Ed.2d 525.

Where murder defendant's hearing that involved kidnapping found the existence of aggravating circumstance provided for. *State v. Smith* (1984) 146 Ariz. 1265.

Trial judge did not consider prior felony conviction as mitigating circumstance in sentencing defendant. *State v. Johnson* (1985) 147 Ariz. 672, 722 P.2d 169.

Prior convictions of aggravated robbery a reasonable doubt to the guilt of an offense in the State of Arizona. *State v. Johnson* (1985) 147 Ariz. 672, 722 P.2d 169.

Trial court properly considered defendant's prior armed robbery convictions as aggravating circumstance in imposing death penalty upon first-degree murder conviction for killing which occurred during armed robbery of convenience store, even though convictions had been appealed, where prior convictions were affirmed. *State v. Smith* (1985) 146 Ariz. 491, 707 P.2d 289.

Judgment of conviction against defendant in Illinois for three counts of first-degree murder, for which he received death sentence for each count and could have received same in Arizona, satisfied aggravating circumstance statute A.R.S. § 13-703, subd. F, par. 1, that defendant had been convicted of another offense in the United States for which under state law sentence of life imprisonment or death was impossible. *State v. Hooper* (1985) 145 Ariz. 538, 703 P.2d 482, certiorari denied 106 S.Ct. 834, 474 U.S. 1073, 88 L.Ed.2d 805.

Judgment against defendant in Illinois on three counts of armed robbery and three counts of aggravated kidnapping, which crimes the Supreme Court took judicial notice involved use or threat of violence against others, satisfied aggravating circumstance statute A.R.S. § 13-703, subd. F, par. 2, that defendant was previously convicted of felony in the United States involving use of threat of violence on another person. *State v. Hooper* (1985) 145 Ariz. 538, 703 P.2d 482, certiorari denied 106 S.Ct. 834, 474 U.S. 1073, 88 L.Ed.2d 805.

In light of defendant's past history, his prior crime, and nature of his abduction, violent sexual penetration, and strangulation of helpless seven-year-old child, defendant's age of 20 or close ties with family or friends were not sufficient mitigating circumstances to outweigh cruel, heinous and depraved nature of offense. *State v. Roscoe* (1984) 145 Ariz. 212, 700 P.2d 1312, certiorari denied 105 S.Ct. 2169, 471 U.S. 1094, 85 L.Ed.2d 525.

Where murder defendant admitted at the sentencing hearing that he had previously been convicted of kidnapping, the trial court properly found the existence of an aggravating circumstance provided for by sentencing this section. *State v. Smith* (1984) 141 Ariz. 510, 687 P.2d 1265.

Trial judge did not err in using petitioner's prior felony convictions as aggravating circumstances in sentencing petitioner to death notwithstanding that petitioner was appealing prior convictions. *State v. Jordan* (1983) 137 Ariz. 504, 672 P.2d 169.

Prior convictions of robbery by assault and of aggravated robbery supported a finding beyond a reasonable doubt that petitioner was convicted of an offense in the United States for which under Arizona law a sentence of life imprisonment was impossible and thus supported a finding of aggravating circumstances in death penalty proceeding. *State v. Jordan* (1983) 137 Ariz. 504, 672 P.2d 169.

Defendant's earlier conviction of dangerous or deadly assault by prisoner supported finding of two aggravating circumstances, namely, conviction of an offense punishable by life imprisonment and conviction of felony involving use of violence on another person, where facts of prior conviction indicated that defendant and another jail inmate struck fellow inmate several times with darts discharged through homemade blow-gun, that one dart penetrated victim's jawbone, a second traversed his skin near the shoulder, and a third penetrated his leg, and nurse and forensic pathologist both testified that darts were capable of causing serious physical injury. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

1. sentencing defendant convicted of murder, trial court did not err in finding prior murder conviction to be aggravating circumstance, even though defendant was convicted of prior murder subsequent to conviction in instant case. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

To constitute aggravating circumstance under this section, prior conviction of defendant must be for felony which by its statutory definition involves violence or threat of violence on another person. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

After defendant's conviction of first-degree murder and other crimes, trial court erred in considering evidence of circumstances surrounding defendant's prior conviction of theft to determine that it involved use and threat of violence and in thus using such prior conviction as aggravating circumstance in sentencing defendant to death. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

Convictions entered prior to sentencing hearing in first-degree murder case may be considered regardless of the order in which the underlying crimes occurred or the order in which the convictions were entered; disapproving of *State v. Ortiz*, 639 P.2d 1020. *State v. Gretzler* (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

Where defendant's conviction of conspiracy to commit murder was not entered until conclusion of murder trial, it should not have been considered as an aggravating circumstance in death penalty sentencing hearing. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

7.5. — Mental impairment, aggravating or mitigating circumstances

Defendant's partial mental impairment, which involved significant impairment of his capacity to appreciate wrongfulness of his conduct or to conform it to requirements of the law but which

was not sufficient to constitute a defense in prosecution for first-degree murder, was not an absolute bar to imposition of death penalty. *State v. Gretzler* (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, defendant's character disorder consisting of a sociopathic-psychopathic personality could not be used to establish the statutory mitigating circumstance consisting of a significant impairment of capacity to appreciate wrongfulness of one's conduct or to conform one's conduct to requirements of law, but not a sufficient impairment as to constitute a defense to prosecution. *State v. Vickers* (1981) 129 Ariz. 501, 633 P.2d 315.

Defendant's character disorders may be considered by trial judge prior to imposition of sentence in proceeding involving capital offense even though such circumstances cannot be used to establish the statutory mitigating circumstance consisting of a significant impairment of capacity to appreciate wrongfulness of one's conduct or to conform one's conduct to requirements of law, but not a sufficient impairment as to constitute a defense to prosecution. *Id.*

Evidence, including testimony of expert that defendant had suffered no brain damage from use of marijuana and sniffing of paint, and testimony of psychologist that defendant was intelligent and alert and was in possession of all his faculties and not bothered by depression, anxiety, or subjective discomfort, did not support defense counsel's claim that defendant was slow, brain-damaged individual with significantly impaired mental capacity and did not support finding of any mitigating circumstances which would indicate inappropriateness of imposition of death penalty following conviction for two murders. *State v. Ceja* (1980) 126 Ariz. 35, 612 P.2d 491.

Record did establish that defendant who was sentenced to death suffered impairment of his capacity to appreciate wrongfulness of his conduct or to conform his conduct to requirements of law but such impairment did not establish mitigation sufficiently substantial to call for leniency. *State v. Steelman* (1980) 126 Ariz. 19, 612 P.2d 475, certiorari denied 101 S.Ct. 287, 449 U.S. 913, 66 L.Ed.2d 141.

7.8. — Minor participation in offense, aggravating or mitigating circumstances

Evidence that defendant agreed that the only thing to do was to kill victim, that he agreed to hide victim's body in mine shaft, that he pointed a gun at victim during trip to mine and threatened to shoot victim if he said anything, that defendant fired gun at victim's head from close range, that defendant slammed large rock onto victim's head, and that defendant helped throw victim into mine shaft established beyond a reasonable doubt that defendant intended to kill

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victim, and thus, defendant's participation in murder was not relatively minor for sentencing purposes. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

8. — Burden of proof, aggravating or mitigating circumstances

State v. Knapp (1977) 114 Ariz. 531, 562 P.2d 704, certiorari denied 98 S.Ct. 1458 [main volume] 435 U.S. 908, 55 L.Ed.2d 500.

Arizona death penalty statute, A.R.S. § 13-703, subd. E, imposing on defendant burden of proof of mitigation "sufficiently substantial to call for leniency," did not unconstitutionally shift burden of proof to petitioner, in that petitioner was given opportunity to present factors in support of mitigation only after state had met its burden of proof on existence of at least one aggravating circumstance and only after petitioner had been convicted on charge of first-degree murder. *Jeffers v. Ricketts*, D.Ariz. 1986, 627 F.Supp. 1334, affirmed in part, reversed in part 832 F.2d 476.

In capital cases, state has burden of proving existence of aggravating circumstances beyond a reasonable doubt and burden is upon defendant to show mitigating circumstances; however, defendant need not prove mitigating circumstances beyond a reasonable doubt, but by lesser burden of a preponderance of the evidence. *State v. McMurtrey* (1984) 143 Ariz. 71, 691 P.2d 1099, appeal after remand 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

Even though the trial court could consider the eyewitness testimony negating capital murder defendant's claim of significant impairment due to intoxication in determining whether defendant had shown by a preponderance of the evidence that his intoxication, if any, was a mitigating circumstance, trial court's error in requiring defendant to prove mitigating circumstances beyond a reasonable doubt was neither harmless nor nonprejudicial. *State v. McMurtrey* (1984) 143 Ariz. 71, 691 P.2d 1099, appeal after remand 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

Once defendant in capital murder case has proven mitigating circumstances by a preponderance of the evidence, question before court is still whether mitigating circumstances are sufficiently substantial to call for leniency. *State v. McMurtrey* (1984) 143 Ariz. 71, 691 P.2d 1099, appeal after remand 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

Placing burden of proof on defendant to prove mitigating circumstances in sentencing determination did not violate due process. *State v. Lambright* (1983) 138 Ariz. 63, 673 P.2d 1.

The state seeking the death penalty for an accused must prove the existence of aggravating circumstances beyond a reasonable doubt. *State v. Jordan* (1983) 137 Ariz. 504, 672 P.2d 169.

State must prove aggravating circumstances beyond reasonable doubt. *State v. Harding*

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(1983) 137 Ariz. 278, 670 P.2d denied 104 S.Ct. 1017, 465 U.S. 1246.

Once defendant has been found a reasonable doubt, due process by requiring defendant to establish circumstances, as facts which show mitigation are peculiarly of defendant. *State v. Richmond* Ariz. 312, 666 P.2d 57, certiorari 435, 464 U.S. 986, 78 L.Ed.2d 367

In capital cases, state bears burden of proving existence of aggravating circumstances beyond a reasonable doubt. *State v. Jeffers* Ariz. 404, 661 P.2d 1105, certiorari denied 107 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 367

Burden of proof to establish circumstances is not met by lack of production by defendant of some affirmative evidence. *State v. Green* Ariz. 150, 624 P.2d 828, certiorari denied 107 S.Ct. 364, 454 U.S. 882, 70 L.Ed.2d 367

Generally, when defendant edge that his behavior is substantial cause result, he is considered result, and same is true in respect of absence of mitigating consideration of death penalty. (1980) 125 Ariz. 283, 614 P.2d denied 101 S.Ct. 408, 449 U.S. 251.

Defendant had burden of proving circumstances to avoid imposition of death penalty. *Id.*

In death penalty case, state must prove existence of aggravating circumstances beyond a reasonable doubt, and Supreme Court death penalty to life imprisonment if evidence of aggravating factors is insufficient.

Placing burden of proof of mitigating circumstances on defendant him his right to due process (1980) 125 Ariz. 412, 610 P.2d 202

8.2. — Stipulations, aggravating circumstances

In the absence of a record defendant clearly intended to have state prove, by admission of aggravating circumstances, imposition of the death penalty would have to be given the existing procedures established by court erred in sentencing by allowing which had been submitted permitting their use for determination of guilt or innocence. *State v. Jordan* 137 Ariz. 80, 669 P.2d 58.

8.3. — Judicial notice, aggravating circumstances

The Supreme Court may take judicial notice of facts that certain crimes are, by themselves, felonies against others in which there were aggravating circumstances.

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(1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

Once defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring defendant to establish mitigating circumstances, as facts which would tend to show mitigation are peculiarly within knowledge of defendant. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

In capital cases, state bears burden of proving existence of aggravating circumstances beyond reasonable doubt. *State v. Jeffers* (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

Burden of proof to establish mitigating circumstances is not met by lack of proof, but by production by defendant of some form of affirmative evidence. *State v. Greenawalt* (1981) 128 Ariz. 150, 624 P.2d 828, certiorari denied 102 S.Ct. 364, 454 U.S. 882, 70 L.Ed.2d 191.

Generally, when defendant acts with knowledge that his behavior is substantially likely to cause result, he is considered to intend that result, and same is true in respect to consideration of absence of mitigating circumstances in consideration of death penalty. *State v. Jordan* (1980) 126 Ariz. 283, 614 P.2d 825, certiorari denied 101 S.Ct. 408, 449 U.S. 986, 66 L.Ed.2d 251.

Defendant had burden of proving mitigating circumstances to avoid imposition of death penalty. *Id.*

In death penalty case, state must prove existence of aggravating circumstances beyond reasonable doubt, and Supreme Court will reduce death penalty to life imprisonment where evidence of aggravating factors is inconclusive. *Id.*

Placing burden of proof of establishing mitigating circumstances on defendant did not deny him his right to due process. *State v. Smith* (1980) 125 Ariz. 412, 610 P.2d 46.

8.2. — Stipulations, aggravating or mitigating circumstances

In the absence of a record which showed that defendant clearly intended to waive his right to have state prove, by admissible evidence, the aggravating circumstances on which the question of the death penalty revolved, defendant would have to be given the benefit of the hearing procedures established by law, and, trial court erred in sentencing by considering materials which had been submitted under a stipulation permitting their use for determination of issues of guilt or innocence. *State v. Hensley* (1983) 137 Ariz. 80, 669 P.2d 58.

8.3. — Judicial notice, aggravating or mitigating circumstances

The Supreme Court may take judicial notice that certain crimes are, by definition, violent felonies against others in determining whether there were aggravating circumstances justifying

the imposition of a death penalty in a capital case. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 1143, 86 L.Ed.2d 706.

8.5. — Delay, aggravating or mitigating circumstances

Where all mitigating factors presented at previous sentencing hearing were considered at second sentencing hearing, as well as new factors presented by defendant, and defendant was unable to suggest any other mitigating factors which could not be shown by reason of five-year delay between original sentence and subsequent sentence, delay in resentencing did not result in prejudice to defendant. *State v. Blazak* (1982) 131 Ariz. 538, 643 P.2d 694, certiorari denied 103 S.Ct. 184, 459 U.S. 882, 74 L.Ed.2d 149.

9. — Sufficiency of evidence, aggravating or mitigating circumstances

Finding of a "mitigating circumstance" for death penalty on ground that defendant's capacity to appreciate wrongfulness of his conduct or to conform his conduct to requirements of law was significantly impaired by reason of mental condition and intoxication was not warranted when evidence from State and defense experts was conflicting and, though experts for State were clear and unequivocal in their findings, experts for defense were less exact in their conclusions, leaving no clear evidence as to a significant impairment. *State v. McMurtrey* (1986) 150 Ariz. 382, 726 P.2d 202.

Evidence of murder defendant's mental disorder was not sufficient to support finding that defendant's capacity to appreciate wrongfulness of his conduct or to conform to requirements of law was significantly impaired, but not so impaired as to constitute defense to prosecution, as mitigating circumstance in determining whether to impose death penalty. *State v. Castaneda* (1986) 150 Ariz. 382, 724 P.2d 1.

Mitigating circumstances were not sufficiently substantial to call for leniency in determining whether to impose death penalty for murder, which was shockingly brutal and cruel. *State v. Castaneda* (1986) 150 Ariz. 382, 724 P.2d 1.

Defendant's remorse for the killing and his status as a cooperative, model prisoner are circumstances which should be considered but which did not sufficiently establish a mitigating circumstance in defendant's case to substantiate a claim for leniency, where the change in defendant's life style was not sufficiently substantial to call for leniency. *State v. Tittle* (1985) 147 Ariz. 339, 710 P.2d 449.

Imposition of death penalty upon conviction of one count of conspiracy to commit first-degree murder, two counts of first-degree murder, one count of attempted first-degree murder, three counts of kidnapping, three counts of armed robbery, and one count of first-degree burglary was justifiably based on such aggravating circumstances as fact that defendant was previously convicted of a felony involving the use or

threat of violence on another person, that defendant committed offense as consideration for receipt of a thing of pecuniary value, and that defendant committed offense in an especially heinous, cruel or depraved manner. *State v. Bracy* (1985) 145 Ariz. 520, 703 P.2d 464, certiorari denied 106 S.Ct. 898, 474 U.S. 1110, 88 L.Ed.2d 932.

Evidence established aggravating circumstance that murder was committed for pecuniary gain where defendant was at murder scene to rob victims and to take pickup truck. *State v. Martinez-Villareal* (1985) 145 Ariz. 441, 702 P.2d 670, certiorari denied 106 S.Ct. 339, 474 U.S. 975, 88 L.Ed.2d 324.

In consideration of mitigating factors, evidence of a troubled childhood is entitled to greater weight when defendant is a minor than when he is an adult. *State v. Gerlaugh* (1985) 144 Ariz. 449, 698 P.2d 694.

Existence of a mere character or personality disorder such as sociopathy is not alone sufficient to constitute a mitigating circumstance as regards death penalty for murder; however, such psychiatric evidence should be considered by a trial judge because it may suggest some reason other than the nature of the disorder why defendant should receive leniency, including a difficult family history; trial judge may refuse to find a mitigating circumstance so long as he considers this evidence. *State v. Gerlaugh* (1985) 144 Ariz. 449, 698 P.2d 694.

Testimony that murders were part of an overall scheme involving robbery of armored truck was sufficient to support finding of aggravating factor that they were committed to obtain items of pecuniary value. *State v. Poland* (1985) 144 Ariz. 388, 698 P.2d 183, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Sentence of death was proportionate to other sentences imposed by state upon other defendants who had committed murders having similar degree of aggravation where two or more aggravating factors had been found and there were no mitigating factors sufficiently substantial to call for leniency, as defendant had prior conviction involving use or threat of violence and offense was for pecuniary gain. *State v. Poland* (1985) 144 Ariz. 388, 698 P.2d 183, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

In light of facts that defendant was previously convicted of a felony including the use or threat of violence on another person, that murder of victim, who was bound and helpless and who received blows from behind and gratuitous pain, was heinous and depraved, that aggravating circumstance of pecuniary gain was properly filed and that the mitigating evidence was not sufficiently substantial to call for a leniency, imposition of death penalty was proper. *State v. Carriger* (1984) 143 Ariz. 142, 692 P.2d 991, certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.2d 864.

Record did not establish that trial judge had reasonable doubt as to existence of aggravating factor sufficient to order death sentence, even though trial judge appeared to have vacillated during an in-chambers discussion on the existence of the aggravating factor, where trial judge found existence of the aggravating factor subsequent to the discussion in chambers in which he had indicated his awareness of the reasonable-doubt standard. *State v. Hensley* (1984) 142 Ariz. 598, 691 P.2d 689.

Record established that trial judge did not rely upon improper materials in making finding of aggravating circumstance justifying imposition of death penalty upon defendant who was convicted of first-degree murder in light of his recital that he had based his decision solely upon information presented at sentencing hearing and had not reviewed notes taken during trial of codefendants or relied on other material not properly considered. *State v. Hensley* (1984) 142 Ariz. 598, 691 P.2d 689.

Trial judge should not have considered factor that victim was buried alive as indicative of cruelty, for purposes of imposition of death penalty for murder, where, although evidence indicated that victim was buried alive, it was inconclusive as to whether victim was ever conscious while in grave. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Not only manner of death, but also circumstances surrounding it, and their effect on victim, amply warranted finding of cruelty warranting imposition of death penalty for murder victim who was twice raped and was kept in uncertainty as to her fate for eight hours. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Where evidence is inconclusive as to whether victim was conscious during infliction of violence to his person, sentencing court cannot find that cruelty existed, for purposes of death penalty. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

In conviction for murder of sheriff's deputy, evidence in mitigation was minor at best where officer was shot several times by defendant, at close range, nearly severing officer's left arm, defendant shot even after officer was disabled, and then left officer, who was conscious for 30 minutes after the attack, to bleed to death. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

Defendant's uncorroborated testimony that he was a model prisoner following arrest for murder and that he realized wrongfulness of his conduct and felt genuine remorse was insufficient to establish such allegations as mitigating circumstances. *State v. James* (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

For purposes of determining death penalty, mitigating factor urged by defendant that defendant was "lower," that he was only 20 that he had no previous record not sufficiently substantial to light of defendant's actual past, defendant's apparent abhorrence of his acts, delirium at the murder and the fact that for substantial period of time defendant was in custody. *State v. Libberton* (1984) 141 Ariz. 1284.

In assessing death penalty court correctly found no mitigating factors sufficient to call for leniency. Court found the two aggravating circumstances of violent felony conviction and instant offense in especially depraved manner, where murder was indicated that she had off blows, evidence of bruising of rape indicated physical assault constituting cruelty, where corroboration of victim's head were more than were needed to kill her was incapable of defending Summerlin (1983) 138 Ariz.

Aggravating circumstance was an offense punishable by imprisonment, that such conviction involving use of violence that instant murders were committed for pecuniary gain, and that murder plus lack of mitigating circumstances was substantially to call for imposition of death penalty. (1983) 137 Ariz. 278, 670 P.2d 1017, certiorari denied 104 S.Ct. 1017.

Evidence supported trial court's finding of defendant's character of defendant, who had not changed behavior and resentencing, and mitigating factor sufficient to warrant death penalty. *State v. Richmond* (1983) 136 Ariz. 57, certiorari denied 104 S.Ct. 78 L.Ed.2d 367.

In resentencing defendant for first-degree murder, trial court found aggravating circumstances of defendant having been convicted of offense, of imprisonment or death was warranted where defendant had been convicted of use or threat of violence, and committed in especially heinous manner. *State v. Richmond* (1983) 136 Ariz. 57, certiorari denied 104 S.Ct. 78 L.Ed.2d 367.

Where defendant emptied crowded bar, with five to six shots fired into immediate area of victims, found fact that defendant's conduct posed grave risk of death to persons present to be aggravating circumstance.

For purposes of determining whether to impose death penalty, mitigating circumstances urged by defendant that defendant was a "follower," that he was only 20 years of age and that he had no previous record of violence were not sufficiently substantial to call for leniency in light of defendant's actual participation in murder, defendant's apparent ability to appreciate wrongfulness of his acts, deliberation involved in the murder and the fact that victim was beaten for substantial period of time before his death. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

In assessing death penalty for murder, trial court correctly found no mitigating circumstances sufficient to call for leniency, and correctly found the two aggravating circumstances of prior violent felony conviction and commission of instant offense in especially heinous, cruel, or depraved manner, where murder victim's bruised hand indicated that she had attempted to ward off blows, evidence of bruised hand and evidence of rape indicated physical and mental pain, constituting cruelty, where coroner testified that blows to victim's head were far more in number than were needed to kill her, and where victim was incapable of defending herself. *State v. Sunimerlin* (1983) 138 Ariz. 426, 675 P.2d 686.

Aggravating circumstances that prior conviction was an offense punishable in state by life imprisonment, that such conviction was of a felony involving use of violence on another person, that instant murders were committed for pecuniary gain, and that murders were "depraved," plus lack of mitigating circumstances sufficiently substantial to call for leniency, supported imposition of death penalty. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017.

Evidence supported trial court's finding that character of defendant, convicted of first-degree murder, had not changed between time of conviction and resentencing, and thus, such was not mitigating factor sufficient to outweigh aggravating circumstances warranting death sentence. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

In resentencing defendant, convicted of first-degree murder, trial court correctly found aggravating circumstances that defendant had been convicted of offense, murder, for which life imprisonment or death was impossible, that defendant had been convicted of felony involving use or threat of violence, and that offense was committed in especially heinous manner. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

Where defendant emptied his gun at victims in crowded bar, with five to nine other people in immediate area of victims, trial court properly found fact that defendant knowingly created grave risk of death to persons other than victims to be aggravating circumstance in sentencing

defendant after conviction of first-degree murder. *State v. McMurtrey* (1983) 136 Ariz. 93, 664 P.2d 637, certiorari denied 104 S.Ct. 180, 464 U.S. 858, 78 L.Ed.2d 161.

In reviewing imposition of death penalty, it is duty of supreme court to review record and make separate independent determination as to whether death penalty is appropriate. *State v. McMurtrey* (1983) 136 Ariz. 93, 664 P.2d 637, certiorari denied 104 S.Ct. 180, 464 U.S. 858, 78 L.Ed.2d 161.

If a defendant introduces uncontroverted credible evidence tending to prove a mitigating circumstance then the mitigating circumstance exists; once the existence of one or more mitigating circumstances is established, the court must determine whether they are sufficiently substantial to call for leniency. *State v. Zaragoza* (1983) 135 Ariz. 63, 659 P.2d 22, certiorari denied 103 S.Ct. 3097, 462 U.S. 1124, 77 L.Ed.2d 1556.

In prosecution for first-degree murder, evidence, including psychiatric testimony did not convincingly establish that defendant's capacity to conform his conduct to requirements of law was significantly impaired and, thus, mental impairment was not mitigating factor in sentencing. *State v. Smith* (1981) 131 Ariz. 29, 638 P.2d 696.

Evidence supporting a finding that one or more of certain aggravating conditions were present would be sufficient to find an aggravating circumstance under this section prior to 1979 amendment. *State v. Vickers* (1981) 129 Ariz. 506, 633 P.2d 315.

Determinations by trial court that defendant failed to establish existence of first mitigating circumstance and that defendant's capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired but not so impaired as to constitute a defense to prosecution were not error. *State v. Greenawalt* (1981) 128 Ariz. 150, 624 P.2d 828, certiorari denied 102 S.Ct. 364, 454 U.S. 882, 70 L.Ed.2d 191.

Trial court did not err in determining that defendant was not under substantial duress at time of events so as to constitute a mitigating circumstance in setting his sentence. *Id.*

Evidence that defendant had no prior criminal record, that defendant cooperated with law enforcement officers by confessing only after his accomplice was arrested, that defendant was below average in intelligence, and that he only completed sixth grade in school did not support finding of any mitigating circumstances which would indicate inappropriateness of imposition of death penalty following conviction for murder. *State v. Bishop* (1980) 127 Ariz. 531, 622 P.2d 478.

In prosecution for murder in the first degree, evidence was overwhelming that defendant was not acting in fear or self-defense so as to constitute a mitigating factor. *State v. Smith* (1980) 125 Ariz. 412, 610 P.2d 46.

In determining whether a murder has been committed in an especially heinous or depraved manner, killer's state of mind may be shown by his behavior at or near time of offense. *State v. Lujan* (1979) 124 Ariz. 365, 604 P.2d 629.

In view of contradictory evidence concerning defendant's condition trial court could refuse to find existence of suggested mitigating factor of psychotic condition with compulsory behavior. *State v. Smith* (1979) 123 Ariz. 231, 599 P.2d 187, appeal after remand 131 Ariz. 29, 638 P.2d 696.

Reporter's transcript of plea of guilty to prior felony charge established that there was a sufficient factual basis for such plea for purpose of determining whether prior felony conviction could be considered aggravating circumstance warranting imposition of death penalty upon conviction of murder. *State v. Watson* (1978) 120 Ariz. 441, 586 P.2d 1253, certiorari denied 99 S.Ct. 1254, 440 U.S. 924, 59 L.Ed.2d 478, appeal after remand 129 Ariz. 60, 628 P.2d 943.

10. — Jury questions, aggravating or mitigating circumstances

Defendant was not entitled to jury determinations of aggravating and mitigating factors, in penalty phase of capital murder prosecution. *Jeffers v. Ricketts*, C.A.9 (Ariz.) 1987, 832 F.2d 476.

Petitioner's constitutional rights were not violated by failure of Arizona death sentencing statute, A.R.S. § 13-703, to provide for jury determination of existence of aggravating circumstances. *Jeffers v. Ricketts*, D.Ariz.1986, 627 F.Supp. 1334, affirmed in part reversed in part 832 F.2d 476.

Petitioner's constitutional rights were not violated by failure of Arizona death sentencing statute, A.R.S. § 13-703, to require jury determinations of mitigating factors or to require a separate determination that death penalty was appropriate under the circumstances of the case. *Jeffers v. Ricketts*, D.Ariz.1986, 627 F.Supp. 1334.

Defendant convicted of first-degree murder did not have right under U.S.C.A. Const. Amend. 6 to have jury participate in determining existence of aggravating circumstances under this section. *State v. James* (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

10.1. — Record, aggravating or mitigating circumstances

Better practice is for trial court to place, on the record, a list of all factors offered by a defendant in mitigation of his sentence and then explain court's reasons for accepting or rejecting such factors. *State v. Leslie* (1985) 147 Ariz. 38, 708 P.2d 719.

If the Supreme Court cannot determine from the record whether the trial court considered all relevant mitigating factors in sentencing defendant, Federal Constitution compels the Supreme Court to remand the case for further explanation.

State v. Leslie (1985) 147 Ariz. 38, 708 P.2d 719.

10.2. — Findings, aggravating or mitigating circumstances

Trial court could properly impose death penalty for separate counts upon determining that defendant killed victims, that he reasonably knew that they would be killed and that he intended to kill them, though finding was not stated separately for each count. *State v. Correll* (1986) 148 Ariz. 468, 715 P.2d 721.

Trial court was not required to state its findings with respect to three mitigating circumstances proffered by defendant, convicted of murder in the first degree, where the proffered circumstances were not explicitly enumerated by this section as mitigating circumstances. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

10.5. — Independent review, aggravating or mitigating circumstances

Under Arizona death penalty statute, this section, supreme court is required to conduct independent review of trial court's decision concerning balancing of aggravating and mitigating circumstances. *State v. Summerlin* (1983) 138 Ariz. 426, 675 P.2d 686.

10.8. Burden of proof, in general

Before one is subject to death penalty, state must charge him and prove him guilty beyond reasonable doubt, and must prove aggravating circumstances beyond reasonable doubt. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

11. Admissibility of evidence

In sentencing phase of first-degree murder prosecution, manual of police procedures discussing use of handcuffs and chemical agents, which defendant was allegedly seen reading, although possibly relevant, if proven, to the "heinous, cruel or depraved" aggravating circumstance, was irrelevant as purely speculative; however, defendant was not prejudiced by admission of manual, since such aggravating circumstance was improper on other grounds. *State v. Poland* (1985) 144 Ariz. 412, 698 P.2d 207, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Trial court erred by considering materials at sentencing hearing which had been submitted under a stipulation permitting their use for determination of issues of guilt or innocence only. *State v. Hensley* (1983) 137 Ariz. 80, 669 P.2d 58.

Any relevant evidence may be used to rebut defendant's mitigating circumstances at death penalty sentencing hearing regardless of its admissibility at trial. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

Testimony of three law enforcement officers concerning details of prior crimes of violence

which were committed by defendant received in sentencing hearing was highly relevant to court of whether crime of view of section governing ex and aggravating circumstance statute, § 13-454 (repealed) a prior felony conviction in threat of violence on another occurred. *State v. Greenawald* 150, 624 P.2d 828, certiorari denied 454 U.S. 882, 70 L.Ed.2d 191.

Medical doctor may give based in part on hearsay. *State v. Smith* 123 Ariz. 231, 599 P.2d 187, 131 Ariz. 29, 638 P.2d 696.

13.2. Judge

Defendant was not entitled grounds that trial judge sentenced him to death was due and thus precluded from occurring hearing after remand, re new statute allowing a such deduct sentencing applied, due bility of prejudice where on ant received the minimum tion of first-degree murder (1985) 144 Ariz. 240, 697 P.

Capital sentencing by tri jury does not violate Const. U.S.C.A. Const. Amend. 8 a usual punishment. *State v. Ariz.* 564, 691 P.2d 655, 1 S.Ct. 1775, 470 U.S. 1059, 1

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13.5. Jury, in general

Defendant was not denied Amend. 6 right to jury t excluded from consid presented to court in de dure. *State v. Gillies* (19 P.2d 655, certiorari denied U.S. 1059, 84 L.Ed.2d 834

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which were committed by defendant was properly received in sentencing hearing, in that testimony was highly relevant to determination by court of whether crime of violence within purview of section governing existence of the second aggravating circumstance under death penalty statute, § 13-454 (repealed; now § 13-703) a prior felony conviction involving the use of threat of violence on another person, had occurred. State v. Greenawalt (1981) 128 Ariz. 150, 624 P.2d 828, certiorari denied 102 S.Ct. 364, 454 U.S. 882, 70 L.Ed.2d 191.

Medical doctor may give expert testimony based in part on hearsay. State v. Smith (1979) 123 Ariz. 231, 599 P.2d 187, appeal after remand 131 Ariz. 29, 638 P.2d 696.

13.2. Judge

Defendant was not entitled to a new trial on grounds that trial judge who originally sentenced him to death was disqualified for cause, and thus precluded from conducting resentencing hearing after remand, regardless of whether new statute allowing a successor judge to conduct sentencing applied, due to absence of possibility of prejudice where on resentencing defendant received the minimum sentence for conviction of first-degree murder. State v. Jordan (1985) 144 Ariz. 240, 697 P.2d 323.

Capital sentencing by trial judge rather than jury does not violate Const. Art. 2, § 15 and U.S.C.A. Const. Amend. 8 against cruel and unusual punishment. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

In death penalty case, which is treated differently from nondeath penalty cases, there was appearance of impropriety when judge who had sentenced defendant to death in prior case also tried same defendant for another potential death penalty offense, and judge should have recused himself from trying defendant for second murder even though defendant made no motion for peremptory change of judge prior to trial or request for change of judge for cause. State v. Vickers (1983) 138 Ariz. 450, 675 P.2d 710.

13.5. Jury, in general

Defendant was not denied his U.S.C.A. Const. Amend. 6 right to jury trial because jury was excluded from considering factual issues presented to court in death sentencing procedure. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Jury participation is not required in capital sentencing determinations. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Defendant did not have right to have jury participate in sentencing, notwithstanding that death penalty was a possible outcome. State v. Lambright (1983) 138 Ariz. 63, 673 P.2d 1.

Petitioner did not have a right under either U.S.C.A. Const. Amend. 6 or 8 to have a jury find those facts that made a death sentence impossible. State v. Jordan (1983) 137 Ariz. 504, 672 P.2d 169.

Defendant, who was convicted of first-degree murder and was sentenced to death, did not have right to have jury participate in sentencing decision. State v. Gretzler (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

Question, of jury, whether they entertained conscientious or religious opinion concerning death penalty which would prevent them from finding defendant guilty even if they were satisfied beyond a reasonable doubt that he was guilty of first-degree murder did not impermissibly interject issue of punishment into minds of prospective jurors. State v. Smith (1979) 123 Ariz. 231, 599 P.2d 187, appeal after remand 131 Ariz. 29, 638 P.2d 696.

Question, of prospective jurors, whether they entertained conscientious or religious opinion concerning death penalty which would prevent them from finding defendant guilty even if they were satisfied beyond reasonable doubt that he was guilty of first-degree murder did not cause biased jury by eliminating from jury those persons who abhor death penalty while leaving on jury any person whose judgment would be clouded by desire to see defendant suffer supreme penalty. Id.

14. Instructions

In potential death penalty cases, Supreme Court requires trial judge to instruct jury on all lesser included offenses of homicide that are supported by evidence. State v. Neal (1984) 143 Ariz. 93, 692 P.2d 272.

15. Presentence reports

State v. Watson (1976) 114 Ariz. 1, 559 P.2d 121, certiorari denied 97 S.Ct. 1687, 430 U.S. 986, 52 L.Ed.2d 382 [main volume] appeal on other grounds after remand 120 Ariz. 441, 586 P.2d 1253, certiorari denied 99 S.Ct. 1254, 440 U.S. 924, 59 L.Ed.2d 478, appeal after remand 129 Ariz. 60, 628 P.2d 943.

15.5. Sentencing hearing

"Evidence" to be admitted for sentencing purposes is, like other evidence, governed by rules of evidence, while "information" may be considered by sentencing court even though it may not meet requirements of evidence rules. State v. Jones (1985) 147 Ariz. 353, 710 P.2d 463.

Where sentencing judge's contact with the victim's relatives prior to presentence hearing mandated his disqualification from the case, former provisions of this section requiring that trial judge conduct sentencing proceedings further confined successor judge who ruled on motion for new trial, and accordingly new trial was required. State v. Leslie (1983) 136 Ariz. 463, 666 P.2d 1072.

Trial judge's contact with the victim's relatives before conducting presentence hearing mandated his disqualification from the case. *State v. Leslie* (1983) 136 Ariz. 463, 666 P.2d 1072.

By notifying both defendant and trial court of what aggravating circumstances prosecution would seek to prove in death penalty sentencing hearing, by disclosing what evidence it would use at hearing, and by giving notice of aggravating circumstances and disclosing additional evidence some three weeks before hearing, prosecution performed duties required of it in hearing. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

Although sentencing judge at original sentencing hearing stated that if he had had discretion, he would enter same judgment he was about to enter and that he felt that defendant was guilty, permitting that judge to preside over a second sentencing proceeding did not violate prohibition against permitting even appearance of partiality, since the opinion of judge was based upon observation of witnesses and other evidence. *State v. Knapp* (1979) 125 Ariz. 503, 611 P.2d 90, supplemented 127 Ariz. 65, 618 P.2d 235.

When defendant is to be resentenced, and particularly when death sentence is possible, evidence and testimony should be as fresh as possible; relying on previous hearing in mitigation and aggravation conducted months before the imposition of the death penalty is not recommended. *State v. Arnett* (1980) 125 Ariz. 201, 608 P.2d 778.

Where, after remand for resentencing of defendant who was originally sentenced to death, the trial judge engaged in a conversation in chambers with the murder victim's brother, a police officer, in which the brother expressed the family's opinion that the court should again impose the death penalty and where the judge thereafter failed to disqualify himself from presiding at the resentencing hearing, the trial judge's action so impinged on defendant's fundamental right to a fair hearing as to require that the sentence be set aside and a new sentence imposed by a different judge. *State v. Valencia* (1979) 124 Ariz. 139, 602 P.2d 807, appeal after remand 132 Ariz. 248, 645 P.2d 239.

16. Review--In general

Reversal of trial court's conclusions that defendant convicted of murder did not prove by preponderance of evidence that he could be rehabilitated during life sentence or that his cocaine addiction significantly impaired his capacity to conform his conduct to requirements of law required remand for resentencing, at which time trial court was required to consider two additional mitigating circumstances when determining whether to impose life sentence or death sentence. *State v. Rossi* (1987) 154 Ariz. 245, 741 P.2d 1223.

The Supreme Court must independently review the record in a capital felony case to deter-

mine the presence or absence of aggravating and mitigating circumstances, and the weight to be given to each, and must also determine the propriety of the sentence. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 1143, 86 L.Ed.2d 706.

Reviewing court has an independent duty to review the evidence dealing with sentencing and make its own decision regarding whether death sentence is warranted. *State v. Carriger* (1984) 143 Ariz. 142, 692 P.2d 991, certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.2d 864.

Though determination of whether defendant convicted of first-degree murder killed, attempted to kill, or intended to kill ought to be made by trial court in determining whether to impose death penalty, Supreme Court will not remand case for resentencing when record compels finding on such issue either affirmatively or negatively. *State v. Emery* (1984) 141 Ariz. 549, 688 P.2d 175.

Supreme Court has an independent duty to review evidence to determine whether sentence of death is properly imposed. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

On appeal, Supreme Court independently reviews record to determine existence or absence of aggravating and mitigating circumstances, and determines whether death penalty should be imposed. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

Supreme court independently reviews record of each capital case to determine correctness of findings of trial court as to aggravating and mitigating circumstances, in order to independently determine propriety of sentence imposed. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

Supreme court reviews each death penalty imposed by state's sentencing courts to insure that sentence has not been applied in arbitrary or capricious manner. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

In death penalty cases, supreme court will conduct independent examination of record to determine for itself the presence or absence of aggravating and mitigating circumstances and weight to give to each, and will independently determine propriety of the sentence. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

In each case where death penalty is imposed, supreme court will conduct independent review of record to assure just result. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

When death penalty is imposed, trial court may find mitigating factors substantial enough to call for leniency, and supreme court will then conduct independent review of all matters of

aggravation and sentence was proportional to crime. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 1143, 86 L.Ed.2d 706.

Supreme court sentence case to court correctly a mitigating circumstance. *Ariz.* 250, 665 P.2d 204, 464 U.S. 986, 78 L.Ed.2d 863.

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In capital case record and in whether the death penalty is warranted. *State v. Jeffers* (1983) 1105, certiorari denied 104 S.Ct. 863, 78 L.Ed.2d 863.

In capital case reviews facts to determine whether death penalty is warranted. *State v. Jeffers* (1983) 1105, certiorari denied 104 S.Ct. 863, 78 L.Ed.2d 863.

Supreme Court review record a that death penalty is warranted. *Graham* (1983)

Although not on appeal concerning an obligation to mitigate circumstances supported by evidence. *Gerlaugh* (1983)

Where death penalty is imposed, Supreme Court of a life sentence. *Ariz.* 42, 659 P.2d 244, 461 U.S. 1013, 79 L.Ed.2d 1452.

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In reviewing prime court is examination of death penalty is upheld imposition of death penalty. *State v. Jeffers* (1983) 1105, certiorari denied 104 S.Ct. 863, 78 L.Ed.2d 863.

Unlike appellate court's duty of supervisory review

aggravation and mitigation to determine if death sentence was properly imposed, and will conduct proportionality review in every case to assure penalty is not excessive nor disproportionate to sentences imposed in similar cases; such safeguards are blind to color, wealth or sex of defendant. *State v. Richmond* (1983) 136 Ariz. 312, 665 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

Supreme court reviews record of each death sentence case to independently determine if trial court correctly applied aggravating and mitigating circumstances. *State v. Adamson* (1983) 136 Ariz. 250, 665 P.2d 972, certiorari denied 104 S.Ct. 204, 464 U.S. 865, 78 L.Ed.2d 178.

In reviewing imposition of death penalty, it is supreme court's duty to review record and make separate and independent determination as to whether death penalty is appropriate. *State v. McDaniel* (1983) 136 Ariz. 188, 665 P.2d 70.

In capital cases, Supreme Court will search record and make independent determination whether the death penalty should be imposed. *State v. Jeffers* (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

In capital cases, Supreme Court independently reviews facts that trial court found established presence or absence of aggravating and mitigating circumstances, and it determines for itself whether latter outweigh former when it finds both to be present. *Id.*

Supreme Court is required to independently review record and determine whether it believes that death penalty should be imposed. *State v. Graham* (1983) 135 Ariz. 209, 660 P.2d 460.

Although none of the issues raised by counsel on appeal concerned penalty imposed, court had an obligation to examine aggravating and mitigating circumstances to determine if evidence supported imposition of death penalty. *State v. Gerlaugh* (1983) 135 Ariz. 89, 659 P.2d 642.

Where death penalty has been erroneously imposed, Supreme Court will set it aside in favor of a life sentence. *State v. Gretzler* (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

In reviewing imposition of death penalty court will conduct independent examination of record to determine whether death penalty was properly imposed. *State v. Smith* (1981) 131 Ariz. 29, 638 P.2d 696.

In reviewing imposition of death penalty, supreme court is obliged to conduct independent examination of record to determine whether death penalty was properly imposed, and will not uphold imposition of death penalty unless either murder or defendant differs from norm of first-degree murders or defendants. *State v. Britson* (1981) 130 Ariz. 380, 636 P.2d 628.

Unlike appellate review of noncapital crimes, duty of supreme court on review of death pen-

ty is to conduct independent examination of record to determine whether death penalty was properly imposed. *State v. Schad* (1981) 129 Ariz. 557, 633 P.2d 366, certiorari denied 102 S.Ct. 1492, 455 U.S. 983, 71 L.Ed.2d 693.

Reviewing court in considering imposition of death penalty is not concerned with findings of trier of fact during guilt determination process of trial. *State v. Jordan* (1980) 126 Ariz. 283, 614 P.2d 825, certiorari denied 101 S.Ct. 408, 449 U.S. 986, 66 L.Ed.2d 251.

Supreme court, in reviewing a death sentence, must make an independent review of the facts to determine presence or absence of aggravating and mitigating circumstances. *State v. Madsen* (1980) 125 Ariz. 346, 609 P.2d 1046.

Where death penalty was imposed based on aggravating circumstance that defendant committed murder in an especially heinous, cruel or depraved manner, supreme court was required to independently examine trial court record to determine if such aggravating circumstance existed. *State v. Lujan* (1979) 124 Ariz. 365, 604 P.2d 629.

16.1. — Proportionality, review

A proportionality review must be conducted in every death penalty case to determine whether sentences of death are excessive or disproportionate to penalty imposed in similar cases considering both the crime and the defendant. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222.

In death penalty case, Supreme Court independently reviews the record to determine presence or absence of aggravating circumstances and the weight to be given to each; Supreme Court must also determine the propriety of the sentence. *State v. Hensley* (1984) 142 Ariz. 598, 691 P.2d 689.

The Supreme Court is required in all death cases to make an independent review of the facts to determine for itself aggravating and mitigating factors. *State v. Clabourne* (1984) 142 Ariz. 335, 690 P.2d 54.

As part of Supreme Court's independent review of the propriety of the death sentence imposed in a case, it conducts proportionality review to determine whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

Supreme Court conducts proportionality review to determine whether death sentence is excessive or disproportionate to penalty imposed in similar cases, considering both the crime and the defendant; Supreme Court considers not only cases where death penalty was affirmed but also cases where death penalty was reduced to sentence of life imprisonment. *State v. Harding* (1984) 141 Ariz. 492, 687 P.2d 1247.

§ 13-703

Note 16.1

In determining whether the death penalty is disproportionately applied, cases involving imposition of the death penalty upon a finding of same aggravating circumstances are considered along with cases where the death penalty was reduced to life imprisonment. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

In death penalty cases, Supreme Court conducts proportionality review to determine whether sentences of death are excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant, as well as cases in which death penalty was reduced to life imprisonment. *State v. James* (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

In death penalty cases, Supreme Court conducts a proportionality review to determine whether sentences of death are excessive or disproportionate to penalty imposed in similar cases, considering both the crime and the defendant; Supreme Court considers not only cases where death penalty was affirmed but also cases where death penalty was reduced to sentence of life imprisonment. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

Supreme court, in reviewing death penalty, must consider whether imposition of death sentence in instant case is proportionate to imposition of death sentence in similar cases. *State v. Summerlin* (1983) 138 Ariz. 426, 675 P.2d 686.

For purposes of proportionality review of death sentence, facts of case were significantly different from facts of cases where death penalty was reduced to life imprisonment, and there-

§ 13-704. Method of infliction of sentence of death

The penalty of death shall be inflicted by lethal gas, under the supervision of the department of corrections.

Amended by Laws 1980, Ch. 229, § 8, eff. April 23, 1980.

United States Supreme Court

Death penalty, see *Gregg v. Georgia*, 1976, 96 S.Ct. 2909, 428 U.S. 153, 49 L.Ed.2d 859; *Wood-*

son v. North Carolina, 1976, 96 S.Ct. 2978, 428 U.S. 280, 49 L.Ed.2d 944; *Roberts v. Louisiana*, 1976, 96 S.Ct. 3001, 428 U.S. 325, 49 L.Ed.2d 974.

Imposition of death penalty was not disproportionate to penalty imposed in similar cases. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

Supreme Court conducts proportionality review to determine whether sentences of death are excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

16.5. — Modification of sentence, review

Defendant's sentence for first-degree murder was modified by the supreme court from life imprisonment, which was not sentence provided by sentencing statute for first-degree murder, to term of imprisonment in custody of department of corrections for life, without possibility of parole until completion of 25 calendar years. *State v. Watkins* (1980) 126 Ariz. 293, 614 P.2d 835.

17. Consecutive sentences

Defendant's sentences of seven and one-half years' imprisonment for aggravated assault and life imprisonment for first-degree murder were not excessive on basis that they were to be served consecutively rather than concurrently in light of fact that there were no unusual circumstances to mitigate a severe sentence, and defendant was prison escapee at time of instant offenses, violently assaulting young woman with whom he was living and stabbing to death one of his friends for no apparent reason. *State v. Watkins* (1980) 126 Ariz. 293, 614 P.2d 835.

§ 13-705. Persons present at execution of sentence of death; limitation

Library References

Criminal Law ¶985 to 989.

C.J.S. Criminal Law § 1573 et seq.

§ 13-707. Sentence of imprisonment for misdemeanor

A. A sentence of imprisonment for a misdemeanor shall be for a definite term to be served other than a place within custody of the state department of corrections. The court shall fix the term of imprisonment within the following maximum limitations:

1. For a class 1 misdemeanor, six months.
2. For a class 2 misdemeanor, four months.

CRIMINAL CODE

CRIMINAL CODE

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Library References

Criminal Law ¶1208.1(1)
C.J.S. Criminal Law § 19

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§ 13-708. Consecutive

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Reasons for sentence 2

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658 P.2d 803.

§ 13-702

CRIMINAL CODE

Title 13

Note 22

jury at his first trial did not decree his execution, reviewing court would carefully examine propriety of death penalty decree by jury at retrial. *Id.*

Where sentence is within permissible statutory limits, it will not be modified or reduced on appeal unless it clearly appears excessive under circumstances. *State v. Pickard* (1969) 105 Ariz. 219, 402 P.2d 87.

Trial court's wide discretion to sentence a defendant is not subject to interference by an appellate court unless it is clearly demonstrated that the power has been abused. *State v. Scott* (1969) 11 Ariz. App. 68, 401 P.2d 712.

Sentence will not be upset so long as it is within statutory limits and does not constitute an abuse of discretion. *State v. Roche* (1969) 104 Ariz. 276, 451 P.2d 605.

Where statute fixing punishment for an offense is constitutional, sentence within statutory limit is proper and, absent some showing to contrary, sentence will not be disturbed on appeal. *State v. Anders* (1965) 2 Ariz. App. 42, 406 P.2d 244.

Where penalty upon conviction is within limitations of statute and is entirely within sound discretion of trial judge, Supreme Court will not disturb ruling of trial court unless it clearly appears that sentence imposed is so excessive that it results in abuse of discretion. *State v. Wallace* (1965) 98 Ariz. 243, 403 P.2d 550.

Penalty to be imposed on conviction of crime is, within limitations of statute, entirely within discretion of trial judge and sentence will not be modified unless it clearly appears that sentence imposed is excessive. *State v. Quintana* (1963) 92 Ariz. 308, 376 P.2d 773.

§ 13-703. Sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years

A. A person guilty of first degree murder as defined in § 13-1105, shall suffer death or imprisonment in the custody of the department of corrections for life, without possibility of parole until the completion of the service of twenty-five calendar years, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection F or G of this section. Any information relevant to any of the mitigating circumstances set

forth in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence or nonexistence of each of the circumstances in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections F of this section and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

7. The defendant committed the offense while in the custody of the department of corrections, a law enforcement agency or county or city jail.

G. Mitigating circumstances shall be the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

Added as § 13-454 by Laws 1973, Ch. 138, § 5. Renumbered as § 13-902 and amended by Laws 1977, Ch. 142, § 58, eff. Oct. 1, 1978. Renumbered as § 13-703 by Laws 1978, Ch. 201, § 104, eff. Oct. 1, 1978. As amended by Laws 1978, Ch. 215, § 2, eff. Oct. 1, 1978.

Validity

Former § 13-454 (prior to renumbering as this section and amendment) was declared to be unconstitutional in the case of Richmond v. Cardwell (D.C.1978) 450 F.Supp. 519. See Notes of Decisions, post.

Historical Note

Source:

Pen.Code 1901, § 933.

Pen.Code 1913, § 1046.

Rev.Code 1928, §§ 4585, 5050.

Code 1939, §§ 43-2103, 44-1814.

A.R.S. former §§ 13-452, 13-454.

The 1973 amendment added subsection A; substituted "F of this section" for

references to subsection E (now subsection F) and "G of this section" for references to subsection F (now subsection G) throughout this section; relettered former subsection A as subsection B; inserted "as defined in § 13-1105" preceding ", the judge" in subsection B; relettered former subsection B as subsection C; substituted "defendant's" for "his" preceding "counsel" in the first sentence of subsection C; relettered former subsection C as subsection D; relettered former subsection D as subsection E; relettered former subsection E as subsection F; relettered former subsection F as subsection G; substituted "The defendant's" and "the defendant" for "his" and "he" in pars. 1 through 4 of subsection G; and added par. 5 to subsection G.

The 1978 amendment added subsec. F, par. 7.

For effective date provision of Laws 1978, Ch. 215, see Historical Note following § 13-1200.

Original § 13-703, derived from Pen. Code 1901, § 32; Pen.Code 1913, § 32;

Rev.Code 1928, § 4493; Code 1939, § 43-5702, relating to definition of levying was repealed by Laws 1977, ch. 142, § 23, eff. Oct. 1, 1978.

For disposition of the subject matter of sections of the former Criminal Code, see Disposition Table at the front of this volume.

Section § 13-703 as added by Laws 1977, Ch. 142, § 48, eff. Oct. 1, 1978, was transferred and renumbered as § 13-603; see italicized note preceding § 13-701.

1978 Revisor's Note:

Laws 1978, Ch. 215, section 2, effective October 1, 1978, amended this section as transferred and renumbered as section 13-902 by Laws 1977, Ch. 142, section 58. Laws 1978, Ch. 201, section 104 transferred and renumbered this section, effective October 1, 1978, as section 13-703. Pursuant to authority of section 41-1301.02, this section as amended by Laws 1978, Ch. 215, section 2 has been numbered as section 13-703.

Law Review Commentaries

Death penalty, validity of Arizona's response to Furman v. Georgia. Ariz. State L.J., 1974, p. 257.

Death penalty and Supreme Court. 15 Ariz.Law Rev. 355 (1973).

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1. Validity

Arizona death penalty statute, § 13-454 (renumbered as this section) was too restrictive regarding what mitigating factors the sentencing authority had to consider and, therefore, violated U.S.C. A.Const. Amendments 8 and 14. *Richmond v. Cardwell* (D.C.1978) 450 F.Supp. 519.

Death penalty may constitutionally be applied to felony-murder. *Id.*

Note 1

Arizona death penalty statute, § 13-454 (renumbered as this section), did not unconstitutionally permit the state to suppress mitigating evidence in providing that "any information relevant to any of the mitigating circumstances set forth in subsection F *may* [emphasis added] be presented by either the prosecution or the defendant * * *." *Id.*

While jury sentencing in a capital case can perform an important societal function, it is not constitutionally required. *Id.*

Statutory classification, under which fact that a defendant convicted of first-degree murder has previously been convicted of offense punishable by life imprisonment or death is an aggravating circumstance to be considered in determining whether to assess death penalty but a prior conviction of other arguable more serious offenses is not an aggravating circumstance, does not deny equal protection, in that the classification has rational relation to the statutory purpose of giving sentencing judges information deemed relevant to punishment for first-degree murder. *State v. Arnett* (1978) 119 Ariz. 38, 579 P.2d 542.

Where there are no mitigating factors and aggravating factor does exist, sentence of death is neither excessive nor unconstitutional. *State v. Bishop* (1978) 118 Ariz. 203, 576 P.2d 122.

Death penalty statute § 13-454 (renumbered as this section) was constitutional. *Id.*

Narrow limits of aggravating and mitigating factors which the trial judge is directed to consider insures that death penalty will not be arbitrarily, capriciously or freakishly imposed. *Id.*

Where there are no mitigating factors and aggravating factor does exist, sentence of death is neither excessive nor unconstitutional. *Id.*

Arizona death penalty statute § 13-454 (renumbered as this section) provided adequate guidance to trial judge in imposing death penalty. *State v. Ceja* (1977) 115 Ariz. 413, 565 P.2d 1274.

Arizona death penalty statute § 13-454 (renumbered as this section) was not constitutionally infirm because it was

the judge not a jury of peers, who imposed ultimate sentence of death. *Id.*

Death penalty statute, § 13-454 (renumbered as this section) under which trial court was given specific guidance in what it must find in the way of aggravating and mitigating circumstances and less in the way of judicial discretion complied with requirement of the United States Supreme Court. *State v. Holsinger* (1977) 115 Ariz. 80, 563 P.2d 888.

Punishment of death is not cruel and unusual punishment under all circumstances and does not violate either U.S. C.A.Const. Amends. 8 or 14 or Const. Art. 2, § 15, this section. *State v. Knapp* (1977) 114 Ariz. 531, 562 P.2d 704, certiorari denied 98 S.Ct. 1458.

Procedure for imposing death penalty meets constitutional mandates. *Id.*

Section 13-454 (renumbered as this section) did not allow death sentence to be imposed in an arbitrary and capricious manner and, hence, was not constitutionally infirm. *State v. Jordan* (1976) 114 Ariz. 452, 561 P.2d 1224.

Prosecutorial discretion, plea bargaining, jury discretion to convict on lesser included offense and possibility of sentence commutation or executive clemency did not render death penalty statute, § 13-454 (renumbered as this section) unconstitutional. *Id.*

Death penalty statute, § 13-454 (renumbered as this section) satisfied requirements of due process and equal protection. *State v. Richmond* (1977) 114 Ariz. 186, 560 P.2d 41, certiorari denied 97 S.Ct. 2988, 433 U.S. 915, 53 L. Ed.2d 1101, application denied 98 S.Ct. 8, 434 U.S. 1323, 54 L. Ed.2d 34, rehearing denied 98 S.Ct. 537, 434 U.S. 976, 54 L. Ed.2d 460.

Arizona death penalty statute, § 13-454 (renumbered as this section) was constitutional. *State v. Lee* (1970) 114 Ariz. 101, 550 P.2d 657.

2. Construction and application

Provision of § 13-454 (renumbered as this section) setting forth guidelines for determination of punishment after one was convicted of first-degree murder had nothing to do with criteria for

charging one with crime of murder and did not contemplate separate offense of aggravated first-degree murder, to be separated and specifically charged. *State v. Blazak* (1977) 114 Ariz. 199, 560 P.2d 54.

Former § 13-454 (renumbered as this section) which placed on defendant in homicide case burden of proving mitigation, after commission had been proved, acknowledged factual presumptions or inferences of malice and intent which arose when homicide was proved and shifted to defendant the burden of going forward with evidence but could not shift burden of proof from state to defendant. *State v. Maloney* (1960) 101 Ariz. 111, 416 P.2d 544, appeal after remand 102 Ariz. 495, 433 P.2d 625, appeal after remand 105 Ariz. 348, 464 P.2d 793, certiorari denied 91 S.Ct. 82, 400 U.S. 841, 27 L.Ed.2d 75.

Rule that in prosecution for homicide defendant may set up defense of insanity, alibi and self-defense under general plea of not guilty was not changed by adoption of rules of criminal procedure. *State v. Alford* (1965) 98 Ariz. 249, 403 P.2d 806.

3. Death sentence

Sentencing authority must be well-informed, and the circumstances of the offense, along with the character, record and propensities of the offender must be given careful consideration before the death sentence is imposed. *Richmond v. Cardwell* (D.C.1978) 450 F.Supp. 519.

Death sentence imposed upon defendant who perpetrated heinous killing was not excessive when viewed in the light of sentences of imprisonment received by defendant's companions whose participation in the killing was minor. *State v. Bishop* (1978) 118 Ariz. 263, 576 P.2d 122.

Provisions of § 13-454 (renumbered as this section) outlining procedures to be followed in imposing the death penalty was applicable to a conviction for which, under law of Arizona, a maximum sentence of life imprisonment could be imposed. *State v. Jordan* (1970) 114 Ariz. 452, 561 P.2d 1224.

Imposition of death penalty on conviction of first-degree murder was not im-

proper under § 13-454 (renumbered as this section) and § 13-643 (repealed: see, *n.w.*, §§ 13-1902, 13-1903, 13-1904) and 13-1644 (renumbered as § 13-4002), in view of defendant's four prior convictions in other states for felonies which were punishable by a sentence of life imprisonment or death under law of Arizona and which involved use or threat of violence on another person. *Id.*

Supreme Court's power to lessen sentences is ordinarily to be exercised with great caution, but not where a penalty has been imposed; in such case court will make independent review of facts to determine whether death penalty was appropriate under requirements of § 13-454 (renumbered as this section) and factors established by evidence, and court must be convinced that statutory aggravating circumstances outweighed mitigating circumstances. *State v. Blazak* (1977) 114 Ariz. 199, 560 P.2d 54.

Death penalty was properly imposed for homicide in view of aggravating circumstances. *Id.*

Under certain circumstances, trial court has no discretion but to impose death sentence. *Id.*

Gravity of death penalty requires that supreme court painstakingly examine record to determine whether it has been erroneously imposed, and court will undertake independent review of facts which establish presence or absence of aggravating and mitigating circumstances and will determine for itself if the latter outweighs the former when both are found to be present. *State v. Richmond* (1977) 114 Ariz. 186, 560 P.2d 41, certiorari denied 97 S.Ct. 2988, 433 U.S. 915, 53 L.Ed.2d 1101, application denied 98 S.Ct. 8, 434 U.S. 1323, 54 L.Ed.2d 34, rehearing denied 98 S.Ct. 537, 434 U.S. 970, 54 L.Ed.2d 409.

In reviewing imposition of death penalty, Supreme Court will determine whether sentence was imposed under influence of passion, prejudice or any other arbitrary factors, whether evidence will support finding of statutory aggravating circumstance and of absence of statutory mitigating circumstances, whether mitigating circumstances are sufficiently substantial to call for leniency and whether sentences of death are

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excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant. *Id.*

Imposition of death penalty for crime of murder does not per se constitute cruel and unusual punishment in violation of Const. Art. 2, § 15, or U.S.C.A. Const. Amends. 8, 14. *Id.*

On record, death penalty for murder was properly imposed. *Id.*

Where, to avoid imposition of death penalty, there is demonstrated either impairment of capacity to appreciate wrongfulness or impairment of capacity to conform, the impairment in either case is not required to be so great as to constitute defense to prosecution. *Id.*

Purpose of death penalty statute, § 13-454 (renumbered as this section) was to confine discretion of sentencing authority within defined limits, and trial court could not take into account any mitigating circumstances not enumerated, nor could trial judge impose death sentence if no aggravating circumstances were found. *Id.*

Death sentence imposed upon defendant convicted of first-degree murder would be set aside where prosecution was allowed to introduce into evidence at sentencing hearing certain admissions made by defendant which were not admissible at trial, and where, subsequent to sentencing hearing, armed robbery conviction which was basis for one of aggravating circumstances, was reversed. *State v. Lee* (1970) 114 Ariz. 101, 559 P.2d 657.

4. Aggravating or mitigating circumstances—In general

Statutory classification, under which fact that a defendant convicted of first-degree murder has previously been convicted of offense punishable by life imprisonment or death is an aggravating circumstance to be considered in determining whether to assess death penalty but a prior conviction of other arguable more serious offenses is not an aggravating circumstance, does not deny equal protection, in that the classification has rational relation to the statutory purpose of giving sentencing judges information deemed relevant to punish-

ment for first-degree murder. *State v. Arnett* (1978) 119 Ariz. 38, 579 P.2d 542.

Trial court as well as appellate court were to consider only aggravating and mitigating factors listed in § 13-454 (renumbered as this section). *State v. Bishop* (1978) 118 Ariz. 203, 576 P.2d 122.

An individual's relative participation in the crime is a mitigating factor to be taken into account. *Id.*

Defendant's conduct in continuing his barrage of violence, inflicting wounds and abusing his victims, beyond point necessary to fulfill his plan to steal, beyond even point necessary to kill, was such an additional circumstance of cruel and depraved nature so as to set it apart from the "usual or the norm" and sentencing court, which sentenced defendant to death upon his conviction on two counts of first-degree murder, accordingly did not err in finding as aggravating circumstance that murders were committed in especially cruel, heinous or depraved manner. *State v. Ceja* (1977) 115 Ariz. 413, 565 P.2d 1274.

Where no mitigating circumstances were established and one aggravating circumstance was established, i. e., that murders of two victims were committed by defendant in especially cruel, heinous or depraved manner, imposition of death penalty upon defendant's conviction on two counts of first-degree murder was not only proper, but required. *Id.*

Imposition of death penalty on conviction of first-degree murder was not improper, where trial court found aggravating circumstances pursuant to § 13-454 (renumbered as this section) and found no mitigating circumstances. *State v. Holsinger* (1977) 115 Ariz. 89, 563 P.2d 888.

Defendant who received death sentence on conviction of first-degree murder was not denied equal protection of the law because defendant's wife, who was also convicted of first-degree murder, received only a life sentence, where trial court found in wife's case a mitigating circumstance not found in defendant's case. *Id.*

Trial court's failure to specify which aggravating circumstance necessitated

Imposition of death penalty would not require a remand for resentencing. *State v. Knapp* (1977) 114 Ariz. 531, 562 P.2d 704, certiorari denied 98 S.Ct. 1458.

Evidence or lack thereof presented to sentencing judge and trial court in prosecution of defendant for murder, including circumstance of duress which came up only in context of one of state's theories for motive of crime, i. e., that defendant feared his wife was going to desert him and therefore killed his children in an effort to bring them closer together, supported sentencing court's finding of absence of circumstances which would mitigate against imposition of death penalty. *Id.*

What legislature intended to include as an aggravating circumstance that would warrant death penalty for murder was a killing where an additional circumstance of "heinous, cruel, or depraved" nature set crime apart from usual or the norm. *Id.*

Where defendant went into room where his own two infant daughters were sleeping, poured lantern fuel, in great quantities, around the room, stood in the doorway and threw a lighted match into the room, then returned to his bedroom to lie down while the children burned and died, crime was "heinous, cruel and depraved" and death sentence was clearly justified. *Id.*

Statement obtained from defendant by police officer who continued to talk with him after defendant indicated that he did not want to answer any more questions was not admissible at sentencing hearing following defendant's conviction for first-degree murder since statement was not admissible at trial and admissibility of evidence relevant to any aggravating circumstances at sentencing hearing is governed by rules governing admission of evidence in criminal trials. *State v. Lee* (1970) 114 Ariz. 101, 559 P.2d 657.

Record in homicide prosecution showed that trial court followed provisions of § 13-454 (renumbered as this section) requiring that materials in presentence report be revealed except for material necessary for protection of human life, and that any material withheld could not be considered in deter-

mining existence of aggravating or mitigating circumstances. *State v. Reid* (1976) 114 Ariz. 16, 559 P.2d 136, certiorari denied 97 S.Ct. 2191, 431 U.S. 921, 53 L.Ed.2d 234.

In proceeding under provision of § 13-454 (renumbered as this section) pertaining to determination of sentence upon finding or admitting of guilt in first-degree murder case, decision to offer evidence of aggravation or not offer such evidence was the responsibility of the prosecutor, and the court had no authority to interfere with discretion of prosecutor in this area; if trial court did not believe that plea agreement accepted by prosecutor served ends of justice, judge could decline to accept plea and transfer case to another judge. *State v. Murphy* (1970) 112 Ariz. 416, 555 P.2d 1110.

Where defendant, pursuant to plea agreement with prosecutor, pleaded guilty to charge of first-degree murder, and prosecutor, as agreed, recommended that defendant receive life sentence instead of death penalty, trial court erred in directing prosecutor, contrary to his wishes, to put on evidence of aggravating circumstances and thus sentence of death imposed by court was not proper and would be set aside and corrected to life imprisonment without possibility of parole for 25 years. *Id.*

Grand jury testimony, on which first-degree murder indictment was founded and which reflected that, inter alia, petitioner and codefendants planned burglary of residence they knew belonged to person involved in narcotics transactions and that petitioner, after shooting of victim, held gun on owner of residence and threatened him, was sufficient to support finding of "aggravating circumstance" that petitioner in commission of offense knowingly created grave risk of death to another person or persons in addition to victim of offense, and thus denying petitioner's bail application was not abuse of discretion. *Martinez v. Superior Court In and For Pima County* (1976) 20 Ariz.App. 358, 548 P.2d 1198.

5. — Duress, aggravating or mitigating circumstances

Defendant's actions in planning the killing of victim for over a day because

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he wanted victim's automobile and disliked victim's drinking habits and striking victim several times with hammer, placing him in mine shaft and dropping rocks and dirt on struggling victim did not indicate duress as mitigating factor calling for leniency in sentencing defendant convicted of first-degree murder. *State v. Bishop* (1978) 118 Ariz. 203, 576 P.2d 122.

Fact that defendant, who was sentenced to death upon his conviction on two counts of first-degree murder, might have been depressed or even traumatized by his wife's miscarriage did not, in itself, lead to conclusion that he was under unusual or substantial duress three months later on day he committed murders. *State v. Ceja* (1977) 115 Ariz. 413, 505 P.2d 1274.

6. — Character of offender, aggravating or mitigating circumstances

Character of individual offender is a circumstance which should be considered in determining whether death penalty should be imposed; sentencing authority should be given guidance about defendant, as well as the crime, which the state deems particularly relevant to the sentencing decision. *State v. Arnett* (1978) 119 Ariz. 38, 579 P.2d 542.

Offense of lewd and lascivious act on child under age of 14 years in which defendant's insertion of his finger into five-year-old girl's vagina ruptured her hymen and caused vaginal bleeding was a crime of "violence" within meaning of § 13-455 (renumbered as this section) providing that an aggravated circumstance to be considered in determining whether to impose death penalty against person convicted of first-degree murder was that "the defendant was previously convicted of a felony * * * involving the threat of violence on another person." *Id.*

Accused's mental condition, which was a substantial factor in causing murder victim's death, was a mitigating factor precluding imposition of death sentence against accused. *State v. Doss* (1977) 116 Ariz. 150, 508 P.2d 1054.

Psychopathic or sociopathic condition is not, as such, "mental disease or defect" which would constitute defense to

criminal act. *State v. Richmond* (1977) 114 Ariz. 180, 500 P.2d 41, certiorari denied 97 S.Ct. 2088, 433 U.S. 915, 53 L. Ed.2d 1101, application denied 98 S.Ct. 8, 434 U.S. 1323, 54 L. Ed.2d 34, rehearing denied 98 S.Ct. 537, 434 U.S. 970, 54 L. Ed.2d 469.

Personality or character disorders are not "mitigating circumstances" to be considered in determining penalty for first-degree murder. *Id.*

Character or personality disorder does not qualify as "impairment" within meaning of death penalty statute, this section, defining "mitigating circumstances" to include impairment of capacity. *Id.*

7. — Prior conviction, aggravating or mitigating circumstances

Under circumstances, trial court was correct in refusing to consider, as mitigating factor, lack of a prior conviction by defendant who was convicted of first-degree murder. *State v. Bishop* (1978) 118 Ariz. 203, 576 P.2d 122.

Evidence, at hearing on sentencing of defendant convicted of first-degree murder, failed to support finding that defendant had previously been convicted for assault with deadly weapon. *State v. Lee* (1979) 114 Ariz. 101, 559 P.2d 657.

Supreme Court does not approve procedure of asking court at sentencing hearing to take judicial notice of conviction for purpose of establishing such conviction as aggravating circumstance; proper procedure to establish prior conviction is for State to offer in evidence certified copy of conviction pursuant to Rules of Criminal Procedure and establish defendant as person to whom document refers. *Id.*

8. — Burden of proof, aggravating or mitigating circumstances

Burden of establishing mitigating factors in first degree murder sentencing proceeding is on defendant. *State v. Bishop* (1978) 118 Ariz. 203, 576 P.2d 122.

Burden of establishing existence of any mitigating circumstance, for purposes of imposition of death penalty, is on defendant. *State v. Ceja* (1977) 115 Ariz. 413, 505 P.2d 1274.

Burden of establishing mitigating circumstances for purposes of sentencing is on the defendant. *State v. Knapp* (1977) 114 Ariz. 531, 502 P.2d 704, certiorari denied 98 S.Ct. 1458.

State's burden to show that right to bail was limited rather than absolute included prima facie showing of existence of one of aggravating circumstances justifying imposition of death sentence. *Martinez v. Superior Court In and For Pima County* (1976) 26 Ariz.App. 386, 548 P.2d 1198.

Where defendant admitted that she had shot and killed deceased, burden of proving circumstances reducing offense to manslaughter was upon defendant, unless they were shown by state's proof. *Harris v. State* (1935) 46 Ariz. 121, 40 P.2d 1082.

9. — Sufficiency of evidence, aggravating or mitigating circumstances

Defendant, who was convicted on two counts of first-degree murder, failed to sustain his burden of establishing existence of any mitigating circumstances, for purposes of imposition of death penalty. *State v. Ceja* (1977) 115 Ariz. 413, 565 P.2d 1274.

There was insufficient evidence to support sentencing court's determination of existence of aggravating circumstance that defendant, who was sentenced to death upon his conviction on two counts of first-degree murder, had knowingly created grave risk of death to second victim in commission of offense against first victim. *Id.*

10. — Jury questions, aggravating or mitigating circumstances

Existence of aggravating and mitigating factors need not be determined by a jury in a capital case. *Richmond v. Cardwell* (D.C.1978) 450 F.Supp. 519.

11. Admissibility of evidence

At trial, since commission of homicide had been established, circumstances of mitigation must be confined to those surrounding commission of offense and relevant within res gestae thereof including those circumstances which might reduce grade of offense from first-degree to second-degree murder or

manslaughter. *State v. Knechten* (1966) 101 Ariz. 186, 417 P.2d 510, certiorari denied 87 S.Ct. 784, 385 U.S. 1043, 17 L.Ed.2d 687.

Circumstances in either mitigation or aggravation of punishment are not admissible on trial unless relevant to determine guilt or innocence. *Id.*

Where accused admitted that he fired the fatal shot, but claimed that he killed in self-defense, the exclusion of evidence of deceased's threats and the fact that he was armed was erroneous under § 13-454 (renumbered as this section). *Nelson v. State* (1914) 16 Ariz. 105, 141 P. 704.

12. Presumptions

When the state has proved a homicide by a defendant, the presumption is that he is guilty of murder unless the state's evidence tends to show the contrary, and it is incumbent upon defendant to contradict that presumption. *State v. Johnson* (1949) 69 Ariz. 203, 211 P.2d 469; *State v. Ponce* (1942) 50 Ariz. 158, 124 P.2d 543.

Instruction should have been given, in first-degree murder prosecution, on offense of voluntary manslaughter, where, while jury could have disregarded defendant's theory that decedent had attacked him with a knife, evidence presented could have overcome the presumption of malice established by the State and might have convinced the jury that the killing was committed in the heat of passion. *State v. Moore* (1973) 109 Ariz. 111, 506 P.2d 242.

Malice will be presumed from proof of homicide alone if evidence adduced to establish homicide shows neither mitigation nor justification or excuse. *State v. Maloney* (1966) 101 Ariz. 111, 416 P.2d 544, appeal after remand 102 Ariz. 495, 433 P.2d 625, appeal after remand 105 Ariz. 348, 464 P.2d 793, certiorari denied 91 S.Ct. 82, 400 U.S. 841, 27 L.Ed.2d 75.

Where state has proved commission of homicide by defendant, presumption obtains he is guilty of murder in first or second degree unless state's proof tends to reduce offense to manslaughter or show that defendant was justified in committing killing. *Miranda v. State* (1933) 42 Ariz. 358, 26 P.2d 241.

Note 13

13. Justification or excuse, in general

Although it might have been preferable not to instruct jury that "You are further instructed that upon a trial for homicide the commission of the homicide by the defendant being proved, the burden of proving the circumstances or mitigation to justify or excuse it revolves upon the defendant unless the proof on the part of the prosecution tends to show that the alleged crime committed only amounts to manslaughter or that the homicide was justifiable or excusable.", no prejudicial error resulted. *State v. Young* (1973) 109 Ariz. 221, 508 P.2d 51.

Provocation or other circumstances may reduce crime from murder to manslaughter. *State v. Sellers* (1970) 106 Ariz. 315, 475 P.2d 722.

In determining whether defendant accused of homicide acted in necessary self-defense or what appeared to be necessary self-defense, it is jury's duty to look at transaction from what it believes from the evidence was standpoint of defendant as a reasonable person at the time, and considered same in light of facts and circumstances as it believes they appeared to defendant as a reasonable person at the time. *State v. Anderson* (1967) 102 Ariz. 295, 428 P.2d 672.

When state had proved beyond reasonable doubt that defendant committed homicide, it had by operation of former § 13-454 (renumbered as this section) automatically proved that defendant acted intentionally and maliciously unless there was some evidence of mitigation, justification or excuse; without any other proof defendant would be guilty of second-degree murder. *State v. Maloney* (1966) 101 Ariz. 111, 416 P.2d 544, appeal after remand 102 Ariz. 495, 433 P.2d 625, appeal after remand 105 Ariz. 348, 464 P.2d 793, certiorari denied 91 S.Ct. 82, 400 U.S. 841, 27 L.Ed.2d 75.

Where state has proved a homicide by a defendant, and state's evidence tends only to reduce the offense to manslaughter, a verdict of that offense is required unless defendant can show excusable or justifiable homicide. *State v. Ponce* (1942) 59 Ariz. 158, 125 P.2d 543.

Defendant's admission that he fired shot which killed deceased was sufficient to make a prima facie case of sec-

ond-degree murder, and placed burden upon defendant of proving circumstances that mitigated, justified, or excused killing. *Viliborghi v. State* (1935) 45 Ariz. 275, 43 P.2d 210.

Section 13-454 (renumbered as this section) only required defendant, on trial for murder, to produce such proof as would raise a reasonable doubt in the minds of the jury whether the killing was justifiable or excusable to be entitled to an acquittal. *Anderson v. Territory* (1944) 9 Ariz. 50, 76 P. 636. In discussing the history and proper interpretation of this section the Supreme Court in this case said:

"Said section first appeared in the statutes of the territory in the revision of 1887, and is an exact rescript of section 1105 of the Penal Code of California. This being so, if the Supreme Court of that state had given a settled construction to this statute prior to its adoption by the Legislature of this territory, this settled construction would be binding upon us. We find, however, that the reported cases show a decided conflict of view upon the question as to whether the statute is to be construed as requiring a defendant, under charge of murder, to prove circumstances of mitigation or excuse by a preponderance of the evidence. * * * From these conflicting decisions, we cannot say that section 933 had been given a settled construction by the Supreme Court of California prior to its adoption. The case of *People v. Knapp*, 71 Cal. 1, 11 Pac. 793, cited in the brief of the respondent, was not published until after the Penal Code of 1887 had been enacted, and hence is not to be regarded in this connection. In *People v. Bushton*, 89 Cal. 160, 22 Pac. 127, 549, in a well-considered opinion, the Supreme Court of California, following *People v. Flanagan* [60 Cal. 3, 44 Am.Rep. 52] and *People v. Smith* [59 Cal. 601], held that that court, in *People v. Hong Ah Duck* [61 Cal. 383], had given an erroneous construction to said section 1105 of the Penal Code, and that a defendant, under the statute, is only required to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt, and that it makes no difference whether this reasonable doubt be the result of evidence on the part of the prosecution, tending to show circum-

stances of mitigation or excuse, or arises from evidence coming from the defendant. The doctrine announced in *People v. Baditon* [80 Cal. 160, 22 Pac. 127, 549] has been since followed, and appears to be the settled law of the state. We are in full accord with this view of the statute.

"An examination shows that the statute does not mention the quantum of proof required of the defendant where the burden is cast upon him of showing circumstances of mitigation or excuse. It is based upon the common-law doctrine that one is presumed to intend the reasonable and probable consequences of his act, and that, where the act is unlawful, the criminal intent is inferred. It must, however, be read in the light of that other presumption which lies at the very foundation of criminal law—that of innocence, which attaches to a defendant as a sufficient shield until his guilt is established to the satisfaction of the jury, and beyond any reasonable doubt. As expressed by Mr. Justice White in *Coffin v. U. S.*, 156 U.S. 450, 15 Sup.Ct. 405, 39 L.Ed. 481: 'This presumption is an instrument of proof created by the law in favor of the accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption, on the one hand, supplemented by any other evidence he may adduce, and the evidence against him, on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.'

"Again, is it a reasonable construction to give to the statute that a defendant is entitled to an acquittal where the evidence on the part of the prosecution raises a reasonable doubt whether he was justifiable or excusable in the commission of the homicide, but that he is not entitled to an acquittal where he seeks to justify or excuse the homicide, and no proof of justification or excuse is put in by the prosecution, unless he establishes circumstances of mitigation or excuse by a preponderance of the proof? Why should it be sufficient that a reasonable doubt exists in the one case, and insufficient in the other? What can it matter to the law whence or by whom or by what evidence the

reasonable doubt is raised? Why should the law be regardful of the source of the reasonable doubt—whether it originate in the evidence of the prosecution or in the evidence of the defense—provided it exists in the minds of the jury? It seems to us more reasonable to hold that the statute means that, where a *prima facie* case is made out, the defense must prove circumstances of mitigation or excuse sufficient to raise a reasonable doubt in the minds of the jury. As we have seen, this is now the rule applied by the Supreme Court of the state of California. The same rule was earlier applied by the Supreme Court of Nevada under a similar statute, *State v. McCluer*, 5 Nev. 132. In a recent case the Supreme Court of Montana, departing from its former rulings, has given a like construction to a similar statute. In fact, it would be easy to show that the trend of modern decisions is in favor of this construction."

If, in a prosecution for murder claimed to have been committed in self-defense, it appears that accused fired the shot, the burden of proving mitigating circumstances excusing the homicide is on the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the homicide was excusable. *Foster v. Territory* (1899) 6 Ariz. 240, 56 P. 738.

14. Instructions

Instructing jury in language of former § 13-454 (renumbered as this section) which shifted burden of proof of mitigation to defendant upon proof of commission of homicide by defendant was not prejudicial although better practice was not to instruct jury in language of statute. *State v. Maloney* (1966) 101 Ariz. 111, 416 P.2d 544, appeal after remand 102 Ariz. 405, 433 P.2d 625, appeal after remand 105 Ariz. 348, 464 P.2d 793, certiorari denied 91 S.Ct. 82, 400 U.S. 841, 27 L.Ed.2d 75.

Instruction that proof of homicide cast burden on defendant to prove circumstances that mitigated, justified, or excused it to extent of raising reasonable doubt in minds of jury was not error. *Rosser v. State* (1935) 45 Ariz. 264, 42 P.2d 613.

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Title 13

Note 14

Instruction that, commission of homicide by defendant being proven, burden is on him to prove justification or mitigation, etc., following § 13-454 (renumbered as this section) was not error, as assuming that defendant committed the homicide. *Ramirez v. State* (1916) 18 Ariz. 272, 158 P. 640.

Where, in a prosecution for homicide, the court charged that accused could not be convicted unless the evidence excluded every reasonable hypothesis but that of guilt; that, no matter how strong the circumstances were, they did not constitute proof required by law if they could be reasonably reconciled with the theory that defendant acted in self-defense; that defendant was presumed innocent; and that such presumption remained until overcome by evidence satisfying the jury beyond reasonable doubt of his guilt—an instruction in the language of § 13-454 (renumbered as this section) was proper. *Bryant v. Territory* (1909) 12 Ariz. 105, 100 P. 455.

It is not error for the court in a prosecution for murder to charge the exact language of § 13-454 (renumbered as this section). *Halderman v. Territory* (1900) 7 Ariz. 120, 60 P. 876.

15. Presentence reports

Where trial court in prosecution for murder and other crimes did not state why certain portions of presentence report were excised and did not indicate that it was not considering such excised material in imposing death sentence, proceeding would be remanded for new hearing and resentencing. *State v. Watson* (1970) 114 Ariz. 1, 559 P.2d 121, certiorari denied 97 S.Ct. 1687, 430 U.S. 986, 52 L.Ed.2d 382.

16. Review

The Supreme Court had jurisdiction of appeal from death sentence imposed upon defendant upon his conviction of two counts of first-degree murder. *State v. Coja* (1977) 115 Ariz. 413, 505 P.2d 1274.

While defendant, who was sentenced to death upon his conviction on two counts of first-degree murder, did not bring to attention of the supreme court on appeal any deficiency in conduct of trial itself, the supreme court nevertheless made independent review of record of proceedings below and was satisfied that defendant was accorded fair trial. *Id.*

Due to gravity of death penalty imposed upon defendant upon his conviction on two counts of first-degree murder, supreme court had duty on appeal to make independent examination of record to determine whether death penalty was properly imposed, and, in discharging that function, the court was required, among other things, to ascertain whether evidence supported sentencing court's finding of existence of statutory aggravating circumstances and absence of statutory mitigating circumstances. *Id.*

Because of unique severity of death penalty, Supreme Court will accord prompt consideration to appeals from imposition of the death sentence. *State v. Richmond* (1977) 114 Ariz. 186, 500 P.2d 41, certiorari denied 97 S.Ct. 2988, 433 U.S. 915, 53 L.Ed.2d 1161, application denied 98 S.Ct. 8, 434 U.S. 1323, 54 L.Ed.2d 34, rehearing denied 98 S.Ct. 537, 434 U.S. 976, 54 L.Ed.2d 469.

§ 13-704. Method of infliction of sentence of death

The penalty of death shall be inflicted by lethal gas.

Formerly § 13-1654. Renumbered as § 13-4004 by Laws 1977, Ch. 142, § 157, eff. Oct. 1, 1978. Renumbered as § 13-704 by Laws 1978, Ch. 201, § 109, eff. Oct. 1, 1978.

Historical Note

Source:

Rules Cr.Proc., § 400. [Reference is to a Code of Criminal Procedure based on the Model Code of Criminal Procedure and adopted by the Supreme Court. See Code 1939, § 44-102 et seq.]

Code 1939, § 44-2315.

A.R.S. former §§ 13-1654, 13-4004.

Adopted from Model Code Crim.Proc. § 418.

Original § 13-704, derived from Pen. Code 1901, § 34; Pen.Code 1913, § 34; Rev.Code 1928, § 4404; Code 1939, § 43-5703, defined misprision of treason, and was repealed by Laws 1977, ch. 142, § 23, effective October 1, 1978.

Section 13-704 as added by Laws 1977, Ch. 142, § 48, eff. Oct. 1, 1978, was transferred and renumbered as § 13-604; see italicized note preceding § 13-701.

Cross References

Method of inflicting death penalty, see Const., art. 22, § 22.

Warrant of execution, see Rules Cr.Proc. Rule 26.10.

Library References

Criminal Law §1219.

C.J.S. Criminal Law § 2001 et seq.

United States Supreme Court

Florida, Georgia, Louisiana, North Carolina and Texas. Death penalty, see *Gregg v. Georgia*, 1976, 90 S.Ct. 2509, 428 U.S. 153, 49 L.Ed.2d 859; *Jurek v. Texas*, 1976, 96 S.Ct. 2050, 428 U.S. 262, 49 L.Ed.2d 929; *Proffitt v. Florida*,

1976, 96 S.Ct. 2960, 428 U.S. 242, 49 L.Ed.2d 913; *Woodson v. North Carolina*, 1976, 96 S.Ct. 2978, 428 U.S. 280, 49 L.Ed.2d 944; *Roberts v. Louisiana*, 1976, 96 S.Ct. 3031, 428 U.S. 325, 49 L.Ed.2d 974.

Notes of Decisions

In general 1

Constitutional provisions 2

Related law 3

Const. Art. 22, § 22, prescribing lethal gas for execution of death penalty was not violative of Federal Constitution as imposing "cruel and unusual punishment". *Id.*

1. In general

Const. Art. 22, § 22, prescribing lethal gas for execution of death penalty required that such method be used in all cases following date of approval of amendment whether crime for which such sentence is imposed was committed prior thereto or not. *Hernandez v. State* (1934) 43 Ariz. 424, 32 P.2d 18.

Const. Art. 22, § 22, prescribing lethal gas for execution of death sentence, construed to apply to crime for which sentence was imposed prior to adoption of amendment, was not in violation of Federal Constitution prohibiting passage of "ex post facto laws". *Id.*

2. Constitutional provisions

Const. Art. 22, § 22, prescribing lethal gas for execution of death penalty was not in violation of state Constitution prohibiting passage of ex post facto laws since amendment having become part of Constitution would supersede any provision therein that was in conflict therewith. *Hernandez v. State* (1934) 43 Ariz. 424, 32 P.2d 18.

3. Related law

Initiative Act 1916, amending Pen. Code 1913, § 173 (repealed; see, now, §§ 13-1104 and 13-1105) abolishing death penalty for first degree murder only and repealing all laws in conflict therewith which left death penalty in full force as to treason and train robbery under §§ 33 and 438, did not repeal general laws for carrying out the death penalty, and hence was not a legislative pardon of one convicted of murder under § 173 before amendment, especially in view of

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re-establishment of death penalty for murder under Initiative Act 1918. Ex parte Fulton (1927) 31 Ariz. 465, 254 P. 477, certiorari denied 48 S.Ct. 22, 275 U.S. 522, 72 L.Ed. 405.

§ 13-705. Persons present at execution of sentence of death; limitation

The superintendent of the state prison shall be present at the execution of all death sentences and shall invite a physician, the attorney general and at least twelve reputable citizens of his selection to be present at the execution. The superintendent shall at the request of the defendant, permit clergymen, not exceeding two, whom the defendant names and any persons, relatives or friends, not to exceed five, to be present at the execution. The superintendent may invite such peace officers as he deems expedient to witness the execution. No persons other than those set forth in this section shall be present at the execution nor shall any minor be allowed to witness the execution.

Formerly § 13-1655. Renumbered as § 13-4005 by Laws 1977, Ch. 142, § 157, eff. Oct. 1, 1978. Renumbered as § 13-705 by Laws 1978, Ch. 201, § 109, eff. Oct. 1, 1978.

Historical Note

Source:

Pen.Code 1901, § 1030, am., Laws 1909, ch. 28, § 1.
Pen.Code 1913, § 1149.
Rev.Code 1928, § 5130.
Code 1939, § 44-2317.
A.R.S. former §§ 13-1655, 13-4005.
Adopted from California, see West's Pen.Code §§ 3603, 3605.
Former § 13-705 was transferred and renumbered as § 13-605; see italicized note preceding § 13-701.

Reviser's Note:

The first sentence of R.C.1928, § 5130 (44-2317, C. '39) is omitted as covered by Rule 345 of the Rules of Criminal Procedure.

This section is an Initiative measure amending P.C.1913, § 1149. The effective date of the measure was December 5, 1918. See Laws 1919, Initiative and Referendum Measures, p. 20.

Cross References

Constitutional provision relating to capital punishment, see Const. art. 22, § 22.
Definition of minor, see § 1-215.

§ 13-706. Return upon death warrant

Upon the execution of a sentence of death, the superintendent of the state prison shall make a return upon the death warrant to the court which pronounced sentence, showing the time, mode and manner in which it was executed.

Formerly § 13-1656. Renumbered as § 13-4006 by Laws 1977, Ch. 142, § 157, eff. Oct. 1, 1978. Renumbered as § 13-706 by Laws 1978, Ch. 201, § 109, eff. Oct. 1, 1978.

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SUBTITLE 2. OFFENSES AGAINST THE PERSON

CHAPTER 10

HOMICIDE

SECTION.

5-10-101. Capital murder.

5-10-102. Murder in the first degree.

SECTION.

5-10-105. Negligent homicide.

Effective Dates. Acts 1987 (1st Ex. Sess.), No. 52, § 2: June 29, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that in the case of *Ronnie Midgett, Sr. vs. State of Arkansas*, C/R 86-215, the Supreme Court of the State of Arkansas failed to find evidence of premeditation and deliberation in order to affirm a jury finding of first degree murder where a child's death was caused from a beating at the hands of his drunken father, and therefore reduced the father's conviction

to second degree murder causing considerable confusion with reference to the application of Arkansas' first degree murder statute to child abuse cases resulting in death, the immediate passage of this Act is necessary in order to clearly establish Arkansas' first degree murder statute to be applicable in such cases. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

5-10-101. Capital murder.

(a) A person commits capital murder if:

(1) Acting alone or with one (1) or more other persons, he commits or attempts to commit rape, kidnapping, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or

(2) Acting alone or with one (1) or more other persons, he commits or attempts to commit arson, and in the course of and in furtherance of the felony or in immediate flight therefrom, he or an accomplice causes the death of any person; or

(3) With the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, prison official, firefighter, judge or other court official, probation officer, parole officer, or any military personnel, when such person is acting in line of duty, he causes the death of any person; or

(4) With the premeditated and deliberated purpose of causing the death of any person, he causes the death of two (2) or more persons in the course of the same criminal episode; or

(5) With the premeditated and deliberated purpose of causing the death of the holder of any public office filled by election or appointment or a candidate for public office, he causes the death of any person; or

(6) While under sentence of life imprisonment, life imprisonment without parole, or death, he purposely causes the death of another person after premeditation and deliberation; or

(7) Pursuant to an agreement that he cause the death of another person in return for anything of value, he causes the death of any person; or

(8) He enters into an agreement whereby one person is to cause the death of another person in return for anything of value, and the person hired, pursuant to the agreement, causes the death of any person.

(b) It is an affirmative defense to any prosecution under subsection (a)(1) of this section for an offense in which the defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid its commission.

(c) Capital murder is punishable by death or life imprisonment without parole pursuant to §§ 5-4-601 — 5-4-605 and 5-4-607 — 5-4-609. For all purposes other than disposition under §§ 5-4-101 — 5-4-104, 5-4-201 — 5-4-204, 5-4-301 — 5-4-308, 5-4-310 — 5-4-312, 5-4-401 — 5-4-404, 5-4-501 — 5-4-505, 5-4-601 — 5-4-605, and 5-4-607 — 5-4-609, capital murder is a Class Y felony.

History. Acts 1975, No. 280, § 1501; A.S.A. 1947, § 41-1501; Acts 1987, No. 1983, No. 341, § 1; 1985, No. 840, § 1; 242, § 2.

5-10-102. Murder in the first degree.

(a) A person commits murder in the first degree if:

(1) Acting alone or with one (1) or more other persons, he commits or attempts to commit a felony, and in the course of and in the furtherance of the felony or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or

(2) With the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person; or

(3) Under circumstances manifesting cruel and malicious indifference to the value of human life, he knowingly causes the death of a person fourteen (14) years of age or younger.

(b) It is an affirmative defense to any prosecution under subsection (a)(1) for an offense in which the defendant was not the only participant that the defendant:

(1) Did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid its commission; and

(2) Was not armed with a deadly weapon; and

(3) Reasonably believed that no other participant was armed with a deadly weapon; and

(4) Reasonably believed that no other participant intended to engage in conduct which could result in death or serious physical injury.

(c) Murder in the first degree is a Class Y felony.

History. Acts 1975, No. 280, § 1502; § 41-1502; Acts 1987 (1st Ex. Sess.), No. 1981, No. 620, § 10; A.S.A. 1947, 52, § 1.

5-10-105. Negligent homicide.

(a)(1) A person commits negligent homicide if he negligently causes the death of another person, not constituting murder or manslaughter, as a result of operating a vehicle, an aircraft, or a watercraft:

(A) While intoxicated; or

(B) If at that time there is one-tenth of one percent (0.10%) or more by weight of alcohol in the person's blood as determined by a chemical test of the person's blood, urine, breath, or other bodily substance.

(2) A person who violates subdivision (a)(1) of this subsection is guilty of a Class D felony.

(b)(1) A person commits negligent homicide if he negligently causes the death of another person.

(2) A person who violates subdivision (b)(1) of this subsection is guilty of a Class A misdemeanor.

(c) For the purpose of this section, "intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians.

History. Acts 1975, No. 280, § 1505;
A.S.A. 1947, § 41-1505; Acts 1987, No.
538, § 1.

CHAPTER 12

ROBBERY

SECTION.

5-12-102. Robbery.

5-12-102. Robbery.

(a) A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another.

(b) Robbery is a Class B felony.

History. Acts 1975, No. 280, § 2103;
A.S.A. 1947, § 41-2103; Acts 1987, No.
934, § 1.

v. State, 286 Ark. 205, 691 S.W.2d 133 (1985).

Notice.

The defendant's contention that the pleadings gave him no notice of enhancement was meritless because the information alleged the defendant killed the murder victim with a revolver; thus, the defendant had notice of the firearm issue and that the State could ask for an enhancement. *David v. State*, 286 Ark. 205, 691 S.W.2d 133 (1985).

Resentencing.

Although the evidence was insufficient to support the finding that the defendant

in a burglary prosecution had violated this section by using a firearm in the commission of a felony, resentencing the defendant was unnecessary where the sentence that the defendant had received was the minimum sentence he could have received under § 5-4-501 as an extended term of punishment for conviction of four or more previous felonies, irrespective of the issue of the firearm. *Jordon v. State*, 274 Ark. 572, 626 S.W.2d 947 (1982).

Cited: *Thomas v. State*, 262 Ark. 79, 553 S.W.2d 32 (1977); *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982); *Gilbert v. State*, 277 Ark. 61, 639 S.W.2d 346 (1982); *Spillers v. Lockhart*, 802 F.2d 1007 (8th Cir. 1986).

SUBCHAPTER 6 — TRIAL AND SENTENCE — CAPITAL MURDER

SECTION.

- 5-4-601. Legislative intent.
- 5-4-602. Capital murder charge — Trial procedure.
- 5-4-603. Findings required for death sentence — Unanimity.
- 5-4-604. Aggravating circumstances.
- 5-4-605. Mitigating circumstances.
- 5-4-606. Life imprisonment without parole.
- 5-4-607. Application for executive clemency — Regulations.

SECTION.

- 5-4-608. Waiver of death penalty.
- 5-4-609 — 5-4-614. [Reserved.]
- 5-4-615. Conviction — Punishments.
- 5-4-616. Procedure following remand of capital case after vacation of death sentence — Retroactive application.
- 5-4-617. Method of execution.

Publisher's Notes. Acts 1975, No. 280, § 1309 provided that if any provision of §§ 5-4-601 — 5-4-608 or the application thereof to any person or circumstance was held invalid that the invalidity was not to affect other provisions or applications of §§ 5-4-601 — 5-4-608 that could be given effect without the invalid provision or application, and to that end the provisions of §§ 5-4-601 — 5-4-608 were declared to be severable.

Effective Dates. Acts 1983, No. 546, § 3: Mar. 19, 1983. Emergency clause provided: "It is hereby found and determined that those defendants whose death sentences have been vacated by the appellate courts, with their convictions upheld, have been sentenced to life without parole; because of the provision requiring sentencing by the same jury that determines guilt, the State must either accept the reduced sentence, or, if it wishes to reimpose the death penalty, to retry both

the guilt and sentencing phases; it is a waste of judicial resources to require the retrying of an error-free trial if the State wishes to seek to reimpose the death penalty; and this Act is immediately necessary to rectify that problem. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 833, § 2: Apr. 4, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present statute governing aggravating circumstances which justify the imposition of the death penalty does not adequately provide for appropriate punishment when the crime of capital murder is committed in an especially heinous, atrocious or cruel manner of committing a capital felony murder is an ap-

appropriate consideration in determining the penalty for such a crime; and that the addition of this aggravating circumstance to the statutorily authorized list of aggravating circumstances is immediately necessary to provide for its consideration in trials for capital murders which may oc-

cur after the passage and approval of this Act. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence, 8 ALR 4th 1028.

Am. Jur. 21 Am. Jur. 2d, Crim. L., 606-612 and 625-631.

Ark. L. Rev. The Constitutionality of

Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

Note, Grigsby v. Mabry: Convictions Rendered by Death-Qualified Juries Are Unconstitutional, 39 Ark. L. Rev. 335.

C.J.S. 24B C.J.S. Crim L., § 1995(1) et seq.

5-4-601. Legislative intent.

(a) It is the intention of the General Assembly of the State of Arkansas, in enacting this subchapter, to specify the procedures and standards pursuant to which a sentencing body must conform in making a determination as to whether a sentence of death is to be imposed upon a conviction of capital murder.

(b) In the event that the provisions of this subchapter respecting sentencing procedures are held invalid with regard to the imposition of a sentence of death or a sentence of death is declared to be invalid per se, it is the intent of the General Assembly that:

(1) Capital murder shall be punishable by life imprisonment without parole; and

(2) The procedures and findings required by §§ 5-4-602 — 5-4-605, 5-4-607, and 5-4-608 shall be deemed repealed and of no effect.

History. Acts 1975, No. 280, § 1308.
A.S.A. 1947, § 41-1308.

5-4-602. Capital murder charge — Trial procedure.

The following procedures shall govern trials of persons charged with capital murder:

(1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.

(2) If the defendant is found not guilty of the capital offense charged but guilty of a lesser included offense, sentence shall be determined and imposed as provided by law.

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subdivision (4) hereof, and to determine sentence in the manner provided by § 5-4-603; except that, if the state waives the death penalty,

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stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in § 5-4-604 or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, but the admissibility of evidence relevant to the aggravating circumstances set forth in § 5-4-604 shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing.

History. Acts 1975, No. 280, § 1301;
A.S.A. 1947, § 41-1301.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Constitutional Law, 1 UALR L.J. 140. Survey of Arkansas Law, Criminal Procedure, 5 UALR L.J. 123.

CASE NOTES

ANALYSIS

Constitutionality.
Appeal.
Cruel and unusual punishment.
Death penalty.
Evidence.
Instructions.
Juries.
Validity of procedure.
Voir dire.

Constitutionality.

Former similar statute was constitutional, since the basis for the verdict, supported by the jury's written finding with respect to the various aggravating and mitigating circumstances, would be known. *Collins v. State*, 259 Ark. 8, 531 S.W.2d 13 (1975), *aff'd*, 261 Ark. 195, 548 S.W.2d 106 (1977); *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgments left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 44, 45, 50 L. Ed. 2d 69 (1976), *aff'd*, 261 Ark. 336, 548 S.W.2d 135 (1977) (preceding decisions under prior law).

Where defendant was sentenced to life imprisonment without parole, he could

not attack as unconstitutionally vague provisions of former similar statute which would have permitted the jury to impose the death penalty after assessing aggravating circumstances, since defendant had not been penalized by that provision. *Williams v. State*, 260 Ark. 457, 541 S.W.2d 300 (1976) (decision under prior law).

Sections 5-4-602 — 5-4-605 do not place an impermissible burden on the exercise of the constitutional right to trial by jury. *Ruiz v. State*, 275 Ark. 410, 630 S.W.2d 44, cert. denied, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982).

Allegation that the Arkansas death penalty statute impermissibly penalized petitioner's exercise of his constitutional right to plead not guilty and to have a jury trial was rejected. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

There is no right to plead guilty, and the fact that only a jury may impose the death penalty does not invalidate this section and §§ 5-4-603 — 5-4-605. *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Appeal.

In a capital felony case, it is the duty of the Supreme Court to examine the entire record, not only for those errors raised on appeal but also for those that may be found in the record. *Bly v. State*, 263 Ark. 136, 562 S.W.2d 605 (1978).

Cruel and Unusual Punishment.

Sentence of life imprisonment without parole was not cruel or unusual punishment, where the sentence was within the limits established by the legislature. *Dyus v. State*, 260 Ark. 303, 539 S.W.2d 251 (1976) (decision under prior law).

Where jury found defendant guilty of capital murder, the sentence it imposed of life imprisonment without parole was within the statutory limits of this section and thus not cruel and unusual punishment under the Eighth Amendment to the United States Constitution. *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981).

Death Penalty.

A procedure for prosecuting those charged with capital felony murder in which the jury must make a unanimous determination of guilt of one of the narrowly defined categories of the crime beyond a reasonable doubt, and in which the same jury in the sentencing phase of the trial must hear testimony tending to show one or more specifically enumerated groups of aggravating circumstances plus evidence relevant to mitigating circumstances, provided adequate safeguards against arbitrary or capricious imposition of the death penalty. *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158 (1977) (decision under prior law).

Argument that the death penalty was unconstitutional was rejected. *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Evidence.

During the penalty stage of a capital murder trial, the state was not required to repeat evidence of aggravating circumstances in addition to any such evidence previously presented during the guilt or innocence phase of the trial. *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975),

vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 135 (1977) (decision under prior law).

Even though this section tends to relax the requirement of admissibility with regard to authenticity or hearsay, the legislature did not intend to totally open the door to any and all matters simply because mitigation is the issue, so that testimony should be sworn and the state given an opportunity to cross-examine unless there are compelling and valid reasons for not doing so. *Hobbs v. State*, 273 Ark. 125, 617 S.W.2d 347 (1981).

The trial court did not err when, in the penalty phase of the capital murder trial, it refused to allow a defense witness to testify as to the defendant's charitable acts which the defendant had related to him, because the defendant was available to testify and there was no reason for the admission of such hearsay testimony. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

The trial court should exclude from the penalty phase of the trial the results of a polygraph examination given to the defendant; while the rules of evidence are not applicable to the penalty phase of the trial, the evidence offered must be probative of some issue to be properly considered in the penalty phase. *Hendrickson v. State*, 285 Ark. 462, 688 S.W.2d 295 (1985).

Instructions.

Trial court did not err in allowing the state to prove all the defendant's prior felonies where the court clearly instructed the jury that they were to consider only the prior convictions involving threats or violence as aggravating circumstances and that the other convictions were to be considered only for enhancement purposes. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

Juries.

Insofar as the same jury is required to sit in both phases of a bifurcated trial, the idea that a juror who could qualify for only one phase of the trial can sit in both or that, on voir dire, the dual role of the jury should be distinguished, is fore-

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closed. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

It is obvious that the state has a significant interest in seeing that those who could never levy the death penalty not be allowed to participate in the assessment of the sentence in a capital case, else a single juror could effectively nullify the state legislature's determination that capital punishment should be an available, and might be the appropriate punishment, but that interest is not involved when a scrupled juror is excluded for cause from guilt determination so long as the juror swears to decide the guilt issue on the basis of the law and evidence. *Grigsby v. Mabry*, 483 F. Supp. 1372 (E.D. Ark.), modified on other grounds, 637 F.2d 525 (8th Cir. 1980).

It is not impermissible for the same "death qualified" jury to both hear the evidence and determine the sentence in a bifurcated trial for capital murder. *Lasley v. State*, 274 Ark. 352, 625 S.W.2d 466 (1981).

The law of Arkansas permits prospective jurors to be challenged if they would automatically vote for the death penalty upon conviction regardless of the evidence. *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), aff'd as modified 758 F.2d 226 (8th Cir. 1985); rev'd on other grounds, *Lockhart v. McCree*, 476 U.S. —, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

The exclusion for cause of the veniremen with conscientious objections to the death penalty, without a determination that their objections would preclude their finding defendant guilty, did not deny him his right to an impartial jury and to a jury that was representative of the community. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

The death-qualification of the jury did not deprive defendant of an impartial jury. *Abernathy v. State*, 278 Ark. 250, 644 S.W.2d 590 (1983); *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

A death-qualified jury is constitutional. *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865,

104 S. Ct. 197, 78 L. Ed. 2d 173 (1983); *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied, 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983); *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983), cert. denied, 466 U.S. 988, 104 S. Ct. 2370, 80 L. Ed. 2d 842 (1984).

Exclusion for cause of two veniremen because of their uncertainty as to capital punishment, and failure to excuse for cause a venireman who showed a preference for it, did not constitute abuse of discretion. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Jurors who are unalterably opposed to capital punishment should not be permitted to participate in the determination of guilt or innocence in capital cases and their exclusion is proper. *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983), cert. denied, 466 U.S. 988, 104 S. Ct. 2370, 80 L. Ed. 2d 842 (1984).

The removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors who state that they cannot, under any circumstances, vote for the imposition of the death penalty does not violate a defendant's right under the Sixth and Fourteenth Amendments of the United States Constitution to have his guilt or innocence determined by an impartial jury selected from a representative cross section of the community or his constitutional right to an impartial jury. *Lockhart v. McCree*, 476 U.S. —, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

The removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors who state that they cannot, under any circumstances, vote for the imposition of the death penalty serves the state's entirely proper interest in obtaining a single jury that can impartially decide all of the issues in the defendant's case. *Lockhart v. McCree*, 476 U.S. —, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

Since Arkansas recognizes the death penalty, jurors in a capital murder case must be able to consider imposing a death sentence if they are to perform their function as jurors; the trial court correctly decided that those excused jurors could not perform their duties, because they would not consider imposing a death sentence.

Williams v. State, 288 Ark. 444, 705 S.W.2d 888 (1986).

The proper standard to be used in releasing a juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. *Williams v. State*, 288 Ark. 444, 705 S.W.2d 888 (1986).

Validity of Procedure.

A procedure for prosecuting those charged with capital felony murder in which the jury must make a unanimous determination of guilt of one of the narrowly defined categories of the crime beyond a reasonable doubt, and in which the same jury in the sentencing phase of the trial must hear testimony tending to show one or more specifically enumerated groups of aggravating circumstances plus evidence relevant to mitigating circumstances, provided adequate safeguards

against arbitrary or capricious imposition of the death penalty. *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, rehearing denied, 434 U.S. 977, 98 S. Ct. 540, 54 L. Ed. 2d 471 (1977) (decision under prior law).

Voir Dire.

Defendants in a capital murder case are not permitted to voir dire the jury between the guilt phase and the penalty phase of the trial since subdivision (3) requires the same jury sit at both phases. *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

Cited: *Titus v. State*, 268 Ark. 9, 593 S.W.2d 164 (1980); *Heard v. State*, 272 Ark. 140, 612 S.W.2d 312 (1981); *Gruzen v. State*, 276 Ark. 149, 634 S.W.2d 92 (1982).

5-4-603. Findings required for death sentence — Unanimity.

(a) The jury shall impose a sentence of death if it unanimously returns written findings that:

- (1) Aggravating circumstances exist beyond a reasonable doubt; and
- (2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and
- (3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(b) The jury shall impose a sentence of life imprisonment without parole if it finds that:

- (1) Aggravating circumstances do not exist beyond a reasonable doubt; or
- (2) Aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or
- (3) Aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(c) If the jury does not make all findings required by subsection (a), the court shall impose a sentence of life imprisonment without parole.

History. Acts 1975, No. 280, § 1302; 1977, No. 474, § 11; A.S.A. 1947, § 41-1302.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Criminal Procedure, 5 UALR L.J. 123. Survey of Arkansas Law: Criminal Procedure, 6 UALR L.J. 119.

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CASE NOTES

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Burden of proof.

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Constitutionality.

Former death penalty statute held constitutional. *Swindler v. State*, 264 Ark. 107, 569 S.W.2d 120 (1978), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980) (decision under prior law).

Sections 5-4-602 — 5-4-605 do not place an impermissible burden on the exercise of the constitutional right to trial by jury: since, under this section the trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. *Ruiz v. State*, 275 Ark. 410, 630 S.W.2d 44, cert. denied, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982).

This section, which sets out the findings required for a death sentence, is not unconstitutional. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

The claim that the Arkansas statutory scheme regarding capital murder is unconstitutional in that it does not require the jury to separately weigh each defendant's role in a crime involving capital murder, so as to determine individual culpability, was rejected where the evidence showed that the blame for victim's murder rested with near equality on all of the defendants. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1973), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Since this sentencing statute does not require a mandatory death sentence, but rather establishes criteria which must be strictly met before a death sentence shall be imposed, it is not unconstitutional. *Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986).

Aggravating or Mitigating Circumstances.

During the penalty stage of a capital

murder trial, the state was not required to repeat evidence of aggravating circumstances in addition to any such evidence previously presented during the guilt or innocence phase of the trial. *Neal v. State*, 259 Ark. 8, 531 S.W.2d 17 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 135 (1977) (decision under prior law).

Weighing the aggravating circumstances against the mitigating ones for sentencing purposes is not simply a matter of counting the number of aggravating and mitigating circumstances and striking a balance but is a reasoned judgment to be exercised in light of the totality of the circumstances. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Where the jury found that aggravating circumstances existed and that no mitigating circumstances existed, the facts supported the sentence of death. *Woodard v. State*, 261 Ark. 895, 553 S.W.2d 259 (1977), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 83 (1979) (decision under prior law).

Jury must find not only that the aggravating circumstances outweigh the mitigating circumstances, but also that the aggravating circumstances justify a sentence of death beyond a reasonable doubt as required by subdivision (a)(3) of this section. *Williams v. State*, 274 Ark. 9, 621 S.W.2d 686 (1981), cert. denied, 459 U.S. 1042, 103 S. Ct. 460, 74 L. Ed. 2d 611 (1982).

This section requires only that the jury unanimously find at least one of the aggravating circumstances set out in § 5-4-604 to exist before it can impose the death penalty; accordingly, where the jury found one aggravating circumstance, it could properly impose the death penalty. *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Jury's finding that the aggravating circumstances outweighed beyond a reasonable doubt any mitigating circumstances was supported by the evidence. *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Burden of Proof.

State had the burden of proof on the issue of punishment for capital murder. *Collins v. State*, 259 Ark. 8, 531 S.W.2d 13 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 44, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 135 (1977) (decision under prior law).

Discretion of Court and Jury.

This section provides that the jury shall impose a sentence of death if it returns certain written findings, but the trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

Juries are not bound to return a verdict of death if they find aggravating circumstances outweigh mitigating circumstances; whatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death. Additionally, because the capital murder statute and the first degree murder statute overlap in appropriate cases, the jury may refuse consideration of both the death penalty and life without parole, by returning a guilty verdict as to the charge of murder in the first

degree. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Evidence.

Evidence sufficient to find that death penalty was not wantonly, arbitrarily or freakishly imposed, and was not excessive in relation to the crime and the jury's verdict was relatively free of passion or prejudice. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Evidence supported the jury's finding that defendant had previously committed another felony, an element of which was the use of threat of violence to another person. *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Jurors.

This section contemplates that persons on the jury will be capable of imposing the death penalty; accordingly, it was not error for the trial court to strike for cause persons who stated that they could not under any circumstances impose the death penalty. *Henderson v. State*, 279 Ark. 414, 652 S.W.2d 26, cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983), petition denied, 281 Ark. 406, 664 S.W.2d 451 (1984).

Cited: *Hulsey v. State*, 268 Ark. 312, 595 S.W.2d 934 (1980); *Simmons v. Lockhart*, 626 F. Supp. 872 (E.D. Ark. 1985).

5-4-604. Aggravating circumstances.

Aggravating circumstances shall be limited to the following:

- (1) The capital murder was committed by a person imprisoned as a result of a felony conviction;
- (2) The capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;
- (3) The person previously committed another felony, an element of which was the use or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person;

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- (4) The person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim;
- (5) The capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;
- (6) The capital murder was committed for pecuniary gain; or
- (7) The capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function.
- (8) The capital murder was committed in an especially heinous, atrocious, or cruel manner.

History. Acts 1975, No. 280, § 1303; 1977, No. 474, § 12; 1985, No. 833, § 1; A.S.A. 1947, § 41-1303.

Cross References. Obstructing governmental operations. § 5-54-101 et seq.

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Constitutionality.

The defendant's argument that the capital murder sentencing statutes are unconstitutionally vague in that the aggravating circumstances of this section are too closely related to the elements of capital felony murder was explicitly rejected because the aggravating circumstances are not an element of capital murder. *Henderson v. State*, 279 Ark. 414, 652 S.W.2d 26 (1983), cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983), petition denied, 281 Ark. 406, 664 S.W.2d 451 (1984).

Purpose.

The purpose of this section is to keep firearms out of the hands of persons who have been formally adjudicated as irre-

sponsible or dangerous. *Reynolds v. State*, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

Applicability.

Subdivision (3) of this section applies to crimes not connected in time or place to the killing for which the defendant has just been convicted. *Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986).

Avoiding Arrest.

A complaint and warrant for defendant's unlawful flight to avoid prosecution, was admissible to show that the shooting was for the purpose of avoiding or preventing a lawful arrest. *Swindle v. State*, 264 Ark. 107, 569 S.W.2d 120 (1978), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1982).

Death penalty statute was not unconstitutionally applied to defendant where the style of the murder suggested that the defendant committed the capital felony "for the purpose of ... preventing a lawful arrest." *Woodard v. Sargent*, 567 F. Supp. 1548 (E.D. Ark. 1983), rev'd on other grounds, 753 F.2d 694 (8th Cir. 1985).

The aggravating circumstance that the murder was committed to avoid arrest or to effect escape from custody was properly submitted to the jury and was not vague and overbroad where, under the facts of the case, the jury was justified in finding that defendant shot victim to increase his chances of avoiding arrest. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

Although a consequence of every murder is the elimination of the victim as a

potential witness, avoiding arrest is not necessarily an invariable motivation for killing, so this aggravating circumstance does not as a matter of logic necessarily duplicate an element of the underlying capital crime. *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986) (decisions under prior law).

Death Penalty.

The defendant's death sentence, which was based in part on the pecuniary-gain aggravating circumstance, was set aside, even though his case was decided before *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), cert. denied, — U.S. —, 106 S. Ct. 546, 88 L. Ed. 2d 475 (1985), which held that the pecuniary-gain aggravating circumstance could not be used to impose the death penalty for a murder in the course of a robbery, where the defendant's counsel urged this argument when the action was first appealed. *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986) (decision under prior law).

Because the aggravating circumstance of pecuniary gain is invalid as applied in cases of capital felony murder committed during the course of robberies, the death penalties imposed against the defendants were invalid and set aside, where this argument was made when the actions were first appealed. *Ruiz v. Lockhart*, 806 F.2d 158 (8th Cir. 1986).

In passing subdivision (3) of this section, the General Assembly intended to narrow the class of persons exposed to the death penalty to those with a predisposition for violent acts. The state, during the guilt and innocence phase, can always prove other acts done at the same time as the principal crime to show the aggravated nature of the crime charged; furthermore, subdivision (8) of this section allows the state, during the penalty phase, to show the murder was done in a particularly heinous manner. The reason, then, for subdivision (3) is to allow the state to show that the defendant has a character for violent crimes or a history of such crimes. *Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986).

Due Process.

Insofar as former provisions governing sentencing for capital felonies limited the jury's consideration of aggravating circumstances for sentencing purposes to

those enumerated, but did not limit consideration of mitigating circumstances, it worked to the advantage rather than prejudice of a defendant and posed no problem of due process. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Fear of Detection.

Fear of detection would be an aggravating circumstance, not a mitigating one. *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

Great Risk of Death to One Other Than Victim.

Where other persons were in the direct line of fire of the defendant's gun, the trial court did not err in submitting to the jury the question whether he had created a great risk of death to one other than the victim. *Swindler v. State*, 264 Ark. 107, 569 S.W.2d 120 (1978), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1982).

Impermissible Considerations.

Neither the savagery of the attack nor the sadistic mind of the attacker is an aggravating circumstance the jury is allowed to consider. *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied, 449 U.S. 852, 101 S. Ct. 144, 66 L. Ed. 2d 64 (1980), 459 U.S. 1020, 103 S. Ct. 386, 74 L. Ed. 2d 517 (1982).

Instructions.

Circuit judges are directed to omit from submission any aggravating or mitigating circumstances that are completely unsupported by any evidence. *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied, 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed. 2d 232 (1981).

Court did not err in allowing the state to prove all the defendant's prior felonies where the court clearly instructed the jury that they were to consider only those convictions which involved threats or violence as aggravating circumstances and that the other convictions were to be considered only for enhancement purposes. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982); *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

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the jury any aggravating or mitigating circumstances that are completely unsupported by any evidence; however, if there is any evidence of the aggravating or mitigating circumstances, however slight, the matter should be submitted to the jury. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied, 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

Jury's Discretion.

The fact that the jury must find the existence of the robbery in order to convict of capital felony murder committed in the course of a robbery and then may also consider the motive of robbery as an aggravating circumstance under subdivision (6) concerning "pecuniary gain" does not render the jury's discretion unfettered or unconstitutionally arbitrary; rather, the jury's attention is directed to the specific circumstances of the crime. *Woodard v. Sargent*, 567 F. Supp. 1548 (E.D. Ark. 1983), rev'd on other grounds, 753 F.2d 694 (8th Cir. 1985).

Parole.

Contention that felony conviction from which defendant was paroled did not amount to an aggravating circumstance was without merit. *Swindler v. State*, 264 Ark. 107, 569 S.W.2d 120 (1978), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1982).

Pecuniary Gain.

The phrase "pecuniary gain" was a matter of such common understanding and practice that it could not be said that an ordinary man or juror would have to speculate as to its meaning in its context as an aggravating circumstance in capital murder. *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 136 (1977) (decision under prior law).

Imposition of the death penalty was justified where there was sufficient evidence that the murder was committed for pecuniary gain. *Neal v. State*, 261 Ark. 336, 548 S.W.2d 135, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, rehearing denied, 434 U.S. 961, 98 S. Ct. 495, 54 L. Ed. 2d 322 (1977), modified on

other grounds, 270 Ark. 442, 605 S.W.2d 421 (1980) (decision under prior law).

Whether the homicide was committed for pecuniary gain is a pertinent and proper fact for the jury's consideration in determining whether the death sentence should be imposed. *Woodard v. State*, 261 Ark. 895, 553 S.W.2d 259 (1977), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 83 (1979) (decision under prior law).

Everyone who commits murder in the course of a robbery commits the crime for purposes of pecuniary gain; therefore, the pecuniary-gain aggravating circumstance unconstitutionally duplicates an element of the underlying offense of capital felony murder. *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986) (decision under prior law).

Prior Offenses.

Where accused admitted that he had previously pleaded guilty to several named charges, the fact that there was no crime technically labeled as such when he pleaded guilty to them did not prohibit the state from introducing those judgments of conviction as aggravating circumstances. *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied, 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed. 2d 232 (1981).

Where the trial court allowed the jury to consider defendant's single previous conviction without supplying any details about the offense, the offense could not be considered as a felony creating the substantial risk of death or serious physical injury to another person, absent supporting proof, since the offense as defined could be committed with no possibility of violence or injury to anyone. *Williams v. State*, 274 Ark. 9, 621 S.W.2d 686 (1981), cert. denied, 459 U.S. 1042, 103 S. Ct. 460, 74 L. Ed. 2d 611 (1982).

In order for an offense to be admissible as an aggravating circumstance, pursuant to this section, the felony committed must include the use or threat of violence to another person, or the creation of substantial risk of death or serious physical injury to another person; sometimes a burglary could include this risk. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied, 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

It was error for the trial court to allow

evidence of prior crimes which did not involve the use or threat of violence or create substantial risk of death or serious physical injury to another person as an aggravating circumstance; neither were these prior felonies proper for the purpose of anticipating a showing of lack of prior convictions as a mitigating circumstance. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied, 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

Evidence of a prior manslaughter conviction is admissible as an aggravating circumstance. *Harmon v. State*, 277 Ark. 265, 641 S.W.2d 21 (1982).

The penalty phase of capital murder cases ought not to be turned into a separate trial for other crimes, but the legislature has made it plain in amending subdivision (3) that the state can offer evidence that a defendant "committed" another crime which involves an element of violence. *Miller v. State*, 280 Ark. 551, 660 S.W.2d 163 (1983).

When the state in the penalty phase of capital murder cases attempts to prove another unrelated crime, without having evidence of a conviction, it does so at some risk and the trial court must prevent prejudicial evidence from reaching the jury; also, a defendant has a right to present rebutting evidence in such a case, just as in a trial. *Miller v. State*, 280 Ark. 551, 660 S.W.2d 163 (1983).

Uncorroborated testimony was admissible where it was offered to prove aggravating circumstance that defendants previously committed a crime of violence. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 667 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1323, 79 L. Ed. 2d 723 (1984).

This section prohibits a person convicted of a felony from possessing a firearm, regardless of the fact that the prior felony conviction is subject to collateral attack, and this prohibition continues until the conviction is either successfully

attacked and set aside, or a specific pardon is granted; therefore, there was no error in the trial court admitting evidence of the defendant's prior felony conviction which the defendant claimed was subject to collateral attack on constitutional grounds. *Reynolds v. State*, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

Where the crimes used to prove an aggravated circumstance involved other victims, in another place and previously in time to the principal crime for which defendant was convicted, they were properly used as an aggravating circumstance. *Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986).

Proof.

The same degree of proof is not required to sustain a finding that an aggravating or mitigating circumstance exists, as would be required to sustain a conviction if that circumstance was a separate crime. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Where jury was presented with proof of an aggravating circumstance that defendant had been convicted of felonies in other states but no details of the crimes were provided, there was no requirement that the state try a prior felony conviction a second time or that it present evidence that a prior conviction had as an element the use or threat of violence. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

Cited: *Clark v. State*, 264 Ark. 630, 573 S.W.2d 622 (1978); *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979); *Collins v. Lockhart*, 545 F. Supp. 83 (E.D. Ark. 1982); *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984); *Simmons v. Lockhart*, 626 F. Supp. 872 (E.D. Ark. 1985).

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5-4-605. Mitigating circumstances.

Mitigating circumstances shall include, but are not limited to, the following:

- (1) The capital murder was committed while the defendant was under extreme mental or emotional disturbance;
- (2) The capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;
- (3) The capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;
- (4) The youth of the defendant at the time of the commission of the capital murder;
- (5) The capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;
- (6) The defendant has no significant history of prior criminal activity.

History. Acts 1975, No. 280, § 1304;
A.S.A. 1947, § 41-1304.

CASE NOTES**ANALYSIS**

Constitutionality.
Applicability.
Due process.
Emotional disturbance, mental disease,
etc.
Evidence.
—Failure to present.
Fear of detection.
Instructions.
Religious and ethical considerations.
Totality of circumstances.
Youth of defendant.

Constitutionality.

The language used by the legislature in naming the various elements of mitigation could not be said to be vague and beyond the common understanding and practices of the ordinary man or juror so as to be constitutionally defective. *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976), *aff'd*, 261 Ark. 336, 548 S.W.2d 135 (1977) (decision under prior law).

The capital murder sentencing statutes

are not unconstitutionally vague simply because this section does not contain a specific definition of "mitigating circumstance"; the fact that the jury is not limited to specifically enumerated mitigating factors accrues to the benefit of the defendant, because it gives the jury a greater opportunity to extend leniency to him. *Henderson v. State*, 279 Ark. 414, 652 S.W.2d 26, cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983), petition denied, 281 Ark. 406, 664 S.W.2d 451 (1984).

Applicability.

Mitigating circumstances, as typified by those listed in this section, are applicable only to the particular defendant, not to capital punishment in general. *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

Due Process.

Insofar as former section governing sentencing for capital felonies limited the jury's consideration of aggravating circumstances for sentencing purposes to those enumerated, but did not limit con-

sideration of mitigating circumstances, it worked to the advantage rather than prejudice of a defendant and thus the sentencing procedures posed no problem of due process. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Emotional Disturbance, Mental Disease, Etc.

Where the state adduced testimony from psychiatrist that defendant was examined by him and found to be without psychosis and to know right from wrong, the evidence justified the jury's finding that no mitigating circumstances existed. *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975), vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 135 (1977) (decision under prior law).

Imposition of the death penalty was justified where there was sufficient evidentiary support for the jury's failure to find, as a mitigating circumstance, that the defendant had no capacity for understanding the wrongfulness of his conduct or that he was mentally impaired or emotionally disturbed at the time of the crime. *Neal v. State*, 261 Ark. 336, 548 S.W.2d 135, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, rehearing denied, 434 U.S. 961, 98 S. Ct. 495, 54 L. Ed. 2d 322 (1977), modified on other grounds, 270 Ark. 442, 605 S.W.2d 421 (1980) (decision under prior law).

Where the only evidence of extreme emotional disturbance was the opinion testimony of clinical psychologists that emotional pressures in certain situations typically accompany the disorders said to belong to defendants, the testimony was general and the jury was not required to accept opinion as fact or even conclude that what was generally true was specifically true of these defendants. *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

Evidence.

Court correctly refused to allow the defense to introduce pictures of a gas chamber, a gallows, and an electric chair, none of which could be regarded as a mitigating circumstance. *Simmons v. State*, 278

Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

— Failure to Present.

Where no evidence was introduced in the defendant's trial to show that he had any history of prior criminal activity, yet his lawyer failed to request a jury instruction on this mitigating circumstance and failed to ensure that the checklist of aggravating and mitigating circumstances submitted to the jury included lack of a prior history of significant criminal activity as one possible mitigating circumstance, and there was a reasonable probability that the outcome of the action would have been different had the jury know of this clearly applicable mitigating circumstance, the death sentence imposed on the defendant was constitutionally invalid. *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986).

Fear of Detection.

Fear of detection would be an aggravating circumstance, not a mitigating one. *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

Instructions.

Circuit judges are hereafter directed to omit from submission any aggravating or mitigating circumstances that are completely unsupported by any evidence. *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied, 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed. 2d 232 (1981).

Religious and Ethical Considerations.

Religious and philosophical approaches to the death penalty are not relevant as mitigating evidence. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

Totality of Circumstances.

Weighing the aggravating circumstances against the mitigating ones for sentencing purposes is not simply a matter of counting the number of aggravating and mitigating circumstances and striking a balance but is a reasoned judgment to be exercised in light of the totality of the circumstances. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied,

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434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Youth of Defendant.

While chronological age does not necessarily control in the jury's determination of whether a defendant's youth is a mitigating circumstance, it is an important

factor which must still be weighed in light of varying conditions and circumstances. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Cited: *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983).

5-4-606. Life imprisonment without parole.

A person sentenced to life imprisonment without parole shall be remanded to the custody of the Department of Correction for imprisonment for the remainder of his life and shall not be released except pursuant to commutation, pardon, or reprieve of the Governor.

History. Acts 1975, No. 280, § 1305;
A.S.A. 1947, § 41-1305.

5-4-607. Application for executive clemency — Recommendations.

(a) The pardon of a person convicted of a capital murder, or the commutation of a sentence of a person so convicted may be granted only in the manner provided herein:

(1) Copies of the application for pardon or commutation shall be filed with:

- (A) The Secretary of State;
- (B) The Attorney General;
- (C) The sheriff of the county in which the offense was committed;
- (D) The prosecuting attorney of the judicial district in which the applicant was found guilty and sentenced, if still in office, and, if not, the successor of such prosecuting attorney; and
- (E) The circuit judge presiding over the proceedings at which the applicant was found guilty and sentenced, if still in office, and, if not, the successor of such circuit judge;

(2) The application shall set forth the grounds upon which the pardon or commutation is asked and shall be published by two (2) insertions, separated by a minimum of seven (7) days, in a newspaper of general circulation in the county or counties in which the offense or offenses of the applicant were committed;

(3) On granting the application, the Governor shall include in his written order the reasons therefor, and shall file with each house of the General Assembly a copy of his order which shall state the applicant's name, the offense of which he was convicted and sentence imposed, the date of the judgment imposing the sentence, and the effective date of the pardon or commutation.

(b) A person sentenced to death or to life imprisonment without parole shall not be eligible for parole and shall not be paroled.

(c) If the sentence of a person sentenced to death or life imprisonment without parole is commuted by the Governor to a term of years,

such person shall not be paroled, nor shall the length of his incarceration be reduced in any way to less than the full term of years specified in the order of commutation or in any subsequent orders of commutation.

(d) Reprieves may be granted as presently provided by law.

History. Acts 1975, No. 280, § 1306;
1977, No. 474, § 13; A.S.A. 1947,
§ 41-1306.

5-4-608. Waiver of death penalty.

(a) If a defendant is charged with capital murder, the prosecuting attorney, with the permission of the court, may waive the death penalty.

(b) In such cases, if the defendant pleads guilty to capital murder or is found guilty of capital murder after trial to the court or to a jury, the trial court shall sentence the defendant to life imprisonment without parole.

History. Acts 1975, No. 280, § 1307;
1977, No. 474, § 14; A.S.A. 1947,
§ 41-1307.

5-4-609 — 5-4-614. [Reserved.]

5-4-615. Conviction — Punishments.

A person convicted of a capital offense shall be punished by death by lethal injection or by life imprisonment without parole pursuant to this subchapter.

History. Acts 1973, No. 438, § 6; 1975,
No. 928, § 17; A.S.A. 1947, § 41-1351.

CASE NOTES

Constitutionality.

The death penalty per se is not violative of the federal eighth and fourteenth amendments. *Clark v. State*, 264 Ark. 630, 573 S.W.2d 622 (1978).

Cited: *Collins v. State*, 259 Ark. 8, 531

S.W.2d 13 (1975); *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgments left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 44, 45, 50 L. Ed. 2d 69 (1976).

5-4-616. Procedures following remand of capital case after vacation of death sentence — Retroactive application.

Notwithstanding § 5-4-602(3), which requires that the same jury sit in the sentencing phase of a capital murder trial, the following shall apply.

(1) Upon any appeal by the defendant where the sentence is of death, the appellate court, if it finds prejudicial error in the sentencing

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proceeding only, may set aside the sentence of death and remand the case to the trial court in the jurisdiction in which the defendant was originally sentenced. No error in the sentencing proceeding shall result in the reversal of the conviction for a capital felony. When a capital case is remanded after vacation of a death sentence, the prosecutor may:

(A) Move the trial court to impose a sentence of life without parole, and the trial court may impose such sentence without a hearing;

(B) Move the trial court to impanel a new sentencing jury.

(2) If the prosecutor elects subdivision (1)(B) of this section, above, the trial court shall impanel a new jury for the purpose of conducting new sentencing proceedings;

(3) Resentencing proceedings shall be governed by the provisions of §§ 5-4-602(4) and 5-4-603 — 5-4-605;

(4) All exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in the new sentencing proceeding; additional relevant evidence may be admitted including testimony of witnesses who testified at the previous trial;

(5) The provisions of this section are procedural; they shall apply retroactively to any defendant sentenced to death after January 1, 1974.

(6) This section shall not be construed to amend the provisions of § 5-4-602 requiring the same jury to sit in both the guilt and sentencing phases of the original trial.

History. Acts 1983, No. 546, § 1;
A.S.A. 1947, § 41-1358.

CASE NOTES

Place of Resentencing.

This section requires that following remand after vacation of his death sentence, the resentencing was to be conducted in the county where the defendant

was originally tried, found guilty and sentenced, even though the murder took place in another county. *Pickens v. Circuit Court*, 283 Ark. 97, 671 S.W.2d 163 (1984).

5-4-617. Method of execution.

(a)(1) The punishment of death is to be administered by a continuous intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant's death is pronounced according to accepted standards of medical practice.

(2) The Director of the Department of Correction shall determine the substances to be uniformly administered and the procedures to be used in any execution.

(b) If the execution of the sentence of death as provided in subsection (a) is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by electrocution in a manner determined by the Director of the Department of Correction.

(c) Nothing in this section is to be construed as a declaration by the Arkansas General Assembly that death by electrocution constitutes cruel and unusual punishment in violation of the Constitutions of the United States or the State of Arkansas.

History. Acts 1983, No. 774, §§ 1, 5, 6; A.S.A. 1947, §§ 41-1352, 41-1356, 41-1357.

Publisher's Notes. Acts 1983, No. 774, § 2, provided that the act applied only to capital offenses committed after July 4, 1983, and that nothing in the act was to be construed to alter the execution of a sentence of death imposed for crimes committed prior to July 4, 1983, except as provided in § 3 of the act.

Acts 1983, No. 774, § 3, provided that

any defendant sentenced to death by electrocution prior to July 4, 1983, could elect to be executed by lethal injection and that the election must be exercised in writing one (1) week prior to the date of execution or it would be deemed waived.

Acts 1983, No. 774, § 4, provided that all references in the laws to execution by electrocution should mean execution by lethal injection except as to capital offenses already committed.

CASE NOTES

Cited: *Fairchild v. State*, 286 Ark. 191, 690 S.W.2d 355 (1985).

CHAPTER 5 DISPOSITION OF CONTRABAND AND SEIZED PROPERTY

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. FORFEITURE OF CONVEYANCES USED IN COMMISSION OF CERTAIN CRIMES.

RESEARCH REFERENCES

ALR. Forfeiture of money to state or local authorities based on its association with or proximity to other contraband. 38 ALR 4th 36.

Necessity of conviction of offense associ-

ated with property seized to support forfeiture. 38 ALR 4th 515.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

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P.O. Box 1 - State Capitol
Little Rock, Arkansas 72201

1. In General

In a murder prosecution in which defendant waived his right to a jury trial on the guilt issue, the trial court erred in failing to obtain a separate waiver of a jury on the trial of the special circumstance allegation of multiple murders. When a jury has been waived as to the guilt phase of the case, it is impossible to comply with the requirement of Pen. Code, § 190.4, that the special circumstances be tried by a jury, and also comply with the requirement of Pen. Code, § 190.1, that the guilt and special circumstances be determined at the same time. Thus, the provision of § 190.4, should prevail, and a personal waiver of a jury on a special circumstance allegation was required. An accused whose special circumstance allegations are to be tried by a court must make a separate, personal waiver of the right to a jury trial. *People v Memro* (1985) 38 Cal 3d 658, 214 Cal Rptr 832, 700 P2d 446.

3. Construction

The 1978 version of Pen. Code, § 190.4, subd. (e), providing that after a verdict imposing the death penalty defendant shall be deemed to have applied for modification of the verdict under Pen. Code, § 1181, subd. 7, by the trial judge, like the 1977 version, requires that the trial judge make an independent determination whether imposition of the death penalty upon defendant is proper in light of the relevant evidence and the applicable law. *People v Rodriguez* (1986) 42 Cal 3d 730, 230 Cal Rptr 667, time for gr or den reh extended.

An interpretation of Pen. Code, § 190.4 (pertaining to special findings on the truth of each alleged special circumstance) that would require the underlying felonies to be separately charged does not violate the separation of powers doctrine. The district attorney retains discretion to choose whether or not to allege special circumstances; the "charged and proved" requirement merely dictates

what must be done if he does decide to allege special circumstances. *People v Superior Court (Jennings)* (1986, 2d Dist) 183 Cal App 3d 636, 228 Cal Rptr 357.

Pen. Code, § 799, which allows a criminal prosecution for murder to be commenced "at any time," is not a special statute taking priority over the general statute of limitations for commencing prosecution of other crimes (former Pen. Code § 800, now § 801) upon which a felony-murder special circumstance may be based. Pen. Code, § 190 (describing the available punishments for first and second degree murder), provides that the penalty must be determined as specified in the special circumstance statutes, and thus those statutes take precedence over the general murder statutes. Hence, the requirement of Pen. Code, § 190.4, subd. (a), that the underlying crime be charged and proved pursuant to the general law applying to the trial and conviction of the crime specifically incorporates into each felony-based special circumstance allegation the general law of the underlying felony, including its statute of limitations. *People v Superior Court (Jennings)* (1986, 2d Dist) 183 Cal App 3d 636, 228 Cal Rptr 357.

5. Procedure

Pen. Code, § 190.4, requiring the jury in a capital case to make a special finding on the truth of each alleged special circumstance, contemplates a jury finding on each charge special circumstance by the application of legal principles on which the jury is instructed to the evidence presented to them. The statute does not contemplate that a jury return a special verdict, which presents conclusions of fact and leaves to the court the task of drawing conclusions of law and rendering judgment upon them (Pen. Code, §§ 1150, 1152). *People v Davenport* (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

§ 190.9. [(First of two; Operative until July 1, 1990) Presence of court reporter in all death penalty proceedings]

(a) In any case in which a death sentence may be imposed, all proceedings conducted after the effective date of this section in the justice, municipal, and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present.

The court shall assign a court reporter who uses computer-aided transcription equipment to report all proceedings under this section. Failure to comply with the requirements of this section relating to the assignment of court reporters who use computer-aided transcription equipment shall not be a ground for reversal.

(b) The court may waive the requirement that a court reporter use computer-aided transcription equipment if the court finds on the record that no reporter using computer-aided transcription equipment is available.

(c) This section shall remain in effect only until July 1, 1990, and as of that date is repealed.

Amended Stats 1986 ch 387 § 3; Stats 1987 ch 468 § 1, effective September 9, 1987.

Amendments:

1986 Amendment: Added the second paragraph

upon it. *People v Cordova* (1939) 14 C2d 308, 94 P2d 40.

The discretion of the jury in fixing the penalty for murder of the first degree, once exercised, may not be disturbed on appeal. *People v Williams* (1948) 32 C2d 78, 195 P2d 393.

In the absence of error, the supreme court has no power to substitute a sentence to life imprisonment for a death penalty imposed by the trial court in its discretion under this section, upon a conviction of first degree murder in a trial in which a jury was waived. *People v Odle* (1951) 37 C2d 52, 230 P2d 345.

Appellate court is without authority to reduce penalty from death to life imprisonment where there is no error in proceedings for determination of degree of murder and punishment therefore after plea of guilty to charge. *People v Thomas* (1951) 37 C2d 74, 230 P2d 351.

Where the evidence in a murder case tried by the court is ample to establish first degree murder and no prejudicial error was committed, the supreme court has no power to reduce the degree of the crime or the penalty imposed. *People v Dessauer* (1952) 38 C2d 547, 241 P2d 238.

Where trial court is vested with discretion to determine punishment of defendant convicted of first degree murder, and there has been no error, supreme court has no power to substitute its judgment for that of trial court as to penalty to be imposed. *People v Ortega* (1953) 41 C2d 621, 262 P2d 2.

Where defendant has been convicted of first degree murder and every element of offense has been proved, and the only error shown on appeal relates to selection of penalty, it is proper to order limited new trial on issue of penalty to be imposed by jury different from that which tried issue of guilt.

People v Green (1956) 47 C2d 209, 302 P2d 307 (disapproved on other grounds *People v Morse* (1964) 60 C2d 631, 36 Cal Rptr 201, 388 P2d 33).

Error relating solely to question of punishment for first degree murder cannot be corrected by appellate court's refusing punishment, trier of fact being vested with exclusive jurisdiction to determine punishment. *People v Green* (1956) 47 C2d 209, 302 P2d 307 (disapproved on other grounds *People v Morse* (1964) 60 C2d 631, 36 Cal Rptr 201, 388 P2d 33).

Jury's determination of penalty of death in first degree murder case, after defendant's entry of plea of guilty and proceedings pursuant to his request for jury trial on issue of penalty, will not be disturbed on appeal. *People v Feldkamp* (1958) 51 C2d 237, 331 P2d 632.

On retrial by jury on issue of penalty following adjudication that defendant was guilty of first degree murder and was sane at time of commission of offense, defendant cannot reopen question of his sanity at time of commission of offense, adjudication as to issue of insanity having been affirmed by supreme court. *People v Love* (1961) 56 C2d 720, 16 Cal Rptr 777, 366 P2d 33, 17 Cal Rptr 481, 366 P2d 809.

In a prosecution resulting in a conviction of first degree murder and first degree robbery, a verdict of life imprisonment, and a judgment which erred in imposing a sentence of life imprisonment without possibility of parole, the Supreme Court would exercise its power under Pen Code, § 1260, to modify the judgment to conform to the jury's verdict pursuant to Pen Code, § 190, which provides for the alternative punishments for first degree murder of life imprisonment or death but not of life imprisonment without possibility of parole. *People v Ketchel* (1969) 71 C2d 635, 79 Cal Rptr 92, 456 P2d 660.

§ 190.1. [Procedure in case involving death penalty]

A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the

first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Section 190.3 and 190.4.

Added by initiative measure § 4, approved November 7, 1978.

Prior Law:

(a) Former § 190.1, as added by Stats 1977 ch 316 § 7.

(b) Former § 190.1, as added by Stats 1973 ch 719 § 4.

(c) Former § 190.1, as added by Stats 1957 ch 1968 § 1, amended by Stats 1959 ch 738 § 1.

Former Sections: Former § 190.1, similar to the present section, was added by Stats 1977 ch 316 § 7, effective August 11, 1977, and repealed by initiative measure § 3, approved November 7, 1978.

Former § 190.1, similar to the present section, was added by Stats 1973 ch 719 § 4, and repealed by Stats 1977 ch 316, effective August 11, 1977.

Original § 190.1, similar to the present section, was added by Stats 1957 ch 1968 § 2, amended by Stats 1959 ch 738 § 1, and repealed by Stats 1973 ch 719 § 1.

Note—Severability, see note to § 190.

Cross References:

Penalty upon special finding: § 190.2.

Penalty for murder in the first degree of transportation worker: § 190.25

Determination as to imposition of death penalty or life imprisonment upon finding of special circumstance: § 190.3.

Special finding on truth of alleged special circumstance: § 190.4

Death penalty for person under age 18: § 190.5

Appeals in capital cases: §§ 190.6 et seq.

Collateral References:

Witkin Crimes pp 122, 271, 972, 973, 976, 977, 978, 979, 980, 982, 986.

Witkin Criminal Procedure pp 521, 550.

Witkin Evidence 2d p 19.

Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.

Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.

Am Jur 2d Criminal Law § 595, Homicide § 553.

Forms:

Calif Criminal Forms & Instructions (BW, 1983) §§ 43:19, 46:11

Law Review Articles:

History of insanity as a defense to accusations of crime. 12 CLR 105.

California penalty trial. 52 CLR 386.

California death penalty trials and appeals. 56 CLR 1364.

California Supreme Court in 1968-1969: death penalty. 58 CLR 229.

In mitigation of the penalty of death: Lockett v Ohio and the capital defendant's right to consideration of mitigating circumstances. (1981) 69 CLR 317.

California's death penalty: Did the legislature do its job? 2 Glendale LR 1.

Review of Selected 1977 California Legislation. 9 Pacific LJ 439.

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evidence in ways favorable to the prosecution, and in order to minimize such potentially prejudicial effects, in future capital cases that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration. Such rule will not in any way affect the open nature of a trial. Although trial counsel or the court may pose general questions to the panel, the venirepersons should not respond to any questions beyond those routinely asked in any criminal trial until they are outside the presence of their fellow venirepersons. Such sequestered voir dire will minimize each juror's exposure to the death-qualifying voir dire of others, and will thereby minimize the dilatorious effects of such exposure. *Hovey v Superior Court* (1980) 28 C3d 1, 168 Cal Rptr 128, 616 P2d 1301.

In a hearing on a pretrial motion to limit the exclusion for cause of prospective jurors to be called to try defendant's murder case, on the ground the guarantee in the state and federal Constitutions to due process of law and an impartial jury prohibited the trial court from excluding at the guilt phase of the trial prospective jurors who would be fair and impartial, but who were unequivocally opposed to imposing the death penalty at the penalty phase, the trial court properly rejected the motion, where defendant's expert evidence did not establish that the exclusion of jurors

with scruples against capital punishment resulted in an unrepresentative jury on the issue of guilt or substantially increase the risk of conviction. None of defendants' studies focused on a pool of jurors comprised of persons eligible to serve in a capital trial in California, which consists of persons eligible to serve in a noncapital case whose attitude toward capital punishment would place them in the "favor death penalty," "indifferent" or "oppose death penalty" group. Rather, the studies focused on a pool which, at least in theory, contained a fourth group comprised of those who would automatically vote for the death penalty, a group excluded from California death-qualified juries, and defendant failed to account for the effect of the inclusion of such jurors in a scientifically adequate fashion. *Hovey v Superior Court* (1980) 28 C3d 1, 168 Cal Rptr 128, 616 P2d 1301.

A penalty jury in a capital case can speak for the community only insofar as the pool of jurors from which it is drawn represents the full range of relevant community attitudes. Thus, a voir dire process which systematically reduces whatever doubts about the wisdom of capital punishment or reluctance to pronounce the extreme penalty is as constitutionally infirm as a jury from which individuals who hold such views are systematically culled. Neither jury can speak for the community, and both juries are less than neutral with respect to the choice of penalty. *Hovey v Superior Court* (1980) 28 C3d 1, 168 Cal Rptr 128, 616 P2d 1301.

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§ 190.2. [Penalty upon finding special circumstance]

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

- (1) The murder was intentional and carried out for financial gain.
- (2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.
- (3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.
- (4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.
- (5) The murder was committed for the purpose of avoiding or

preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Added by initiative measure § 6, approved November 7, 1978.

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that the killing occurred during a burglary, and where it could not be assumed that there was no evidence to support defenses which went to mitigation of the intent to kill. *People v Turner* (1984) 37 Cal 3d 302, 208 Cal Rptr 196, 690 P2d 669.

An intent to kill must be found in a felony-murder situation before a defendant can be sentenced to life in prison without the possibility of parole pursuant to Pen. Code, § 190.2, subd. (a)(17)(felony murder as special circumstance). A necessary corollary of this rule is that the jury must be instructed that a specific intent to kill is an essential element of such a special circumstance allegation and that the prosecution has the burden of proving the specific intent to kill beyond a reasonable doubt. *People v Quillin* (1984, 5th Dist) 155 Cal App 3d 691, 202 Cal Rptr 303.

In a murder prosecution in which it was alleged as a special circumstance that defendant was committing a robbery at the time of the murder (Pen. Code, § 190.2, subd. (a)(17)), the trial court's failure to instruct the jury that a specific intent to kill is an essential element of such special circumstance allegation required reversal of a finding that the special circumstance was true under the applicable "harmless beyond a reasonable doubt" standard of prejudice. Although such instructional error can be cured in some circumstances if it can be determined that the actual question posed by the omitted instruction was necessarily resolved

adversely to the defendant under other, properly given instructions, in the instant prosecution the only instructions on specific intent pertained to the specific intent to rob. Although the evidence strongly suggested an intent to kill, evidence of defendant's possible diminished capacity due to voluntary intoxication when he shot the victim foreclosed a finding that the omitted instructions were harmless beyond a reasonable doubt. *People v Quillin* (1984, 5th Dist) 155 Cal App 3d 691, 202 Cal Rptr 303.

In a prosecution in which the information charged defendant with two murders and alleged the special circumstance that defendant had "in this proceeding been convicted of more than one offense of murder in the first or second degree" (Pen. Code, § 190.2, subd. (a)(3)), the trial court erred in failing to dismiss the special circumstance allegation after defendant had successfully moved for severance of the murder charges. The prosecution, however, had the right to move to amend the information to allege the special circumstance of prior conviction of murder under Pen. Code, § 190.2, subd. (a)(2), an amendment that could not be attacked for technical defect at the preliminary examination since, as was shown by the court's own records, defendant had been convicted of first degree murder in the severed portion. *Shamburger v Superior Court* (1984, 1st Dist) 160 Cal App 3d 484, 207 Cal Rptr 586.

§ 190.25. [Penalty for murder of transportation worker]

(a) The penalty for a defendant found guilty of murder in the first degree shall be confinement in state prison for a term of life without the possibility of parole in any case in which any of the following special circumstances has been charged and specially found under Section 190.4, to be true: the victim was the operator or driver of a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle operated on land, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or the victim was a station agent or ticket agent for the entity providing such transportation, who, while engaged in the course of the performance of his or her duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was the operator or driver of a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle operated on land, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or was a station agent or ticket agent for the entity providing such transportation, engaged in the performance of his or her duties.

(b) Every person whether or not the actual killer found guilty of

intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

(c) Nothing in this section shall be construed to prohibit the charging or finding of any special circumstance pursuant to Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Added Stats 1982 ch 172 § 1, effective April 27, 1982.

Cross References:

Punishment for murder: § 190.
Procedure in case involving death penalty: § 190.1.
Penalties upon special findings: § 190.2.
Determination of death penalty or life imprisonment: § 190.3.
Special finding on truth of alleged special circumstance: § 190.4.
Appeals in capital cases: §§ 190.6 et seq.
Punishment for manslaughter: § 193.
Justifiable homicide: §§ 195 et seq.

Collateral References:

Witkin Crimes pp 972 et seq.
Witkin Criminal Procedure p 521.
Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.
Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.

§ 190.3. [Determination as to penalty of death or life imprisonment]

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted

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use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

- (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
- (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
- (c) The presence or absence of any prior felony conviction.
- (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- (f) Whether or not the offense was committed under circumstances which the defendant was reasonably believed to be a moral justification or extenuation for his conduct.
- (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
- (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.
- (i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state prison for a term of life without the possibility of parole.

Added by initiative measure § 8, approved November 7, 1978.

Prior Law: Former § 190.3, as added by Stats 1977 ch 316 § 11.

Former Sections: Former § 190.3, similar to the present section, was added by Stats 1977 ch 316 § 11, effective August 11, 1977, and repealed by initiative measure § 7, approved November 7, 1978.

Former § 190.3, similar to present § 190.5, was added by Stats 1973 ch 719 § 6 and repealed by Stats 1977 ch 316 § 10, effective August 11, 1977.

Note—Severability of provisions, see note to § 190.

Cross References:

Punishment for treason: § 37.

Punishment for procuring execution of innocent person by perjury or subornation of perjury: § 128.

Punishment for murder: § 190.

Procedure in case involving death penalty: § 190.1.

Penalties upon special findings: § 190.2.

Penalty for murder of transportation worker: § 190.25.

Special finding on truth of alleged special circumstance: § 190.4.

Death penalty for person under age 18: § 190.5.

Appeals in capital cases: §§ 190.6 et seq.

Punishment for manslaughter: § 193.

Justifiable homicide: §§ 195 et seq.

Punishment for aggravated assault by life prisoner: § 4500.

Punishment for hindering defense or war effort: Mil & Vet Code § 1672.

Collateral References:

Witkin Criminal Procedure p 521.

Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.

Cal Jur 3d Penal and Correctional Institutions § 134.

Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.

Forms:

Calif Criminal Forms & Instructions (BW, 1983) §§ 43:14, 43:24, 46:11, 46:12, 46:31.

Law Review Articles:

In mitigation of the penalty of death: *Lockett v Ohio* and the capital defendant's right to consideration of mitigating circumstances. (1981) 69 CLR 317.

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§ 190.4. [Special finding on truth of each alleged special circumstance]

(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues-the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is

waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered an any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

Added by initiative measure § 10, approved November 7, 1978.

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Under Pen. Code, § 190.4, a defendant charged with murder with allegations of special circumstances (killing committed during commission of robbery and burglary), calling for a life sentence without possibility of parole, had a statutory right to a trial by jury on the truth of the allegation of special circumstances. Thus, error resulted from defendant's failure to be informed of, and to waive his right to a jury trial on the special circumstances allegation. Moreover, the error was prejudicial where the jury could have found in defendant's favor on the issue of special circumstances. *People v Granger* (1980) 105 CA3d 422, 164 Cal Rptr 363.

In a prosecution in which a 16-year-old male was convicted of the rape and first degree murder of a 13-year-old girl, the trial court erred in submitting charges of special circumstances to the jury and in sentencing defendant to life imprisonment without possibility of parole when the special circumstances were found true. Since 1921, death penalty statutes have exempted minors from that sanction, and, though the statute does not also explicitly exempt minors from the sentence of life imprisonment without possibility of parole, neither the language nor the history of the statute supports an interpretation that would authorize imposing that harsh penalty on persons under 18. Since the statute is unclear in its effect on the penalty applicable to minors, silent regarding appropriate procedures by which the penalty of life imprisonment without possibility of parole would be imposed on them, and devoid of evidence of any legislative intent to depart from the status quo, the ambiguity was required to be resolved in defendant's favor by holding there is no authority for charging minors with special circumstances. (Disapproving *People v. Superior Court (Reed)* (1979) 98 Cal.App.3d 39, 48-49 [159 Cal.Rptr. 310], to the extent it is inconsistent with the opinion.)

People v Davis (1981) 29 Cal 3d 814, 176 Cal Rptr 521, 633 P2d 186.

In a prosecution on two counts of first degree murder with special circumstances alleged, the jury's special circumstances findings relating to murder in the course of robbery, rape and kidnapping would not be reversed on the ground the prosecution had failed to charge defendant with the robberies, rapes and kidnappings as separate crimes. Although the literal language of former Pen. Code, § 190.4, supported defendant's contention, the information notified defendant of all the special circumstances against which he had to defend, and thus no prejudice appeared. (Per Kaus, J., with Bird, C. J., and Newman, J., concurring.) *People v Robertson* (1982) 33 C3d 21, 188 Cal Rptr 77, 655 P2d 279.

5. Procedure

In a proceeding to determine the penalty for first degree murder, the court did not err in denying defendant's motion that he be permitted to waive a jury trial, where the prosecutor refused to join in the waiver. *People v King* (1970) 1 C3d 791, 83 Cal Rptr 401, 463 P2d 753.

In a first degree murder prosecution subject to Pen. Code, §§ 190.1 and 190.2, as revised in 1973 (under which it was the province of a jury to determine the accused's guilt, and of the same or (for good cause) a different jury to determine the truth of the "special circumstances" charge, and under which if such truth were found, the trial judge's imposition of the death penalty was mandatory), it was not improper for the trial judge to exclude from the jury, at either the guilt or the "special circumstances" phase of the trial, persons with unalterable beliefs in the wrongfulness of the death penalty. *People v Sand* (1978) 81 CA3d 448, 146 Cal Rptr 448.

§ 190.5. [Death penalty for person under 18 prohibited]

Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

Added by initiative measure § 12, approved November 7, 1978.

Prior Law:

(a) Former § 190.5, as added by Stats 1977 ch 316 § 13.

(b) Former § 190.3, as added by Stats 1973 ch 719 § 6.

Former Section: Former § 190.5, similar to the present section, was added by Stats 1977 ch 316 § 13, effective August 11, 1977, and repealed by initiative measure § 11, approved November 7, 1978.

Note — Severability of provisions, see note to § 190.

5. Procedure

In instructing the jury that the death penalty shall not be imposed upon any person for murder committed before such person shall have reached the age of eighteen years, and that the burden of proof as to the age of said person is upon the defendant, the court does not err in stating further that the law "presumes" that the defendant was over the age of eighteen years and that this "presumption . . . must prevail unless from a preponderance of the evidence produced you are convinced that any such defendant was under the age of eighteen years at the time of the commission of

the offense." *People v Ellis* (1929) 206 C 353, 274 P 353.

It is proper to instruct the jury that the burden is upon the defendant to prove "by a preponderance of the evidence" that he was under the age of eighteen years at the time of commission of the offense, without stating that if they should find that the defendant had not reached the age of eighteen years before the offense was committed, or if they should have a reasonable doubt on that point, the death penalty could not be imposed. *People v Ellis* (1929) 206 C 353, 274 P 353.

§ 190.6. [Appeals in capital cases to be handled expeditiously]

The legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of certification of the entire record by the sentencing court. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. A failure to comply with the time requirements of this section shall not be grounds for precluding the ultimate imposition of the death penalty.

Added Stats 1977 ch 316 § 14, effective August 11, 1977.

Note—Severability of provisions, see note to § 190.

Cross References:

"Entire record": § 190.7.

Certification of record where death sentence imposed: § 190.8. Presence of court reporter: § 190.9.

Collateral References:

Witkin Criminal Procedure pp 684 et seq.

Cal Jur 3d (Rev) Criminal Law §§ 342 et seq.

Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.

Law Review Articles:

Review of Selected 1977 California Legislation. 9 Pacific LJ 439.

Cruel punishment and respect: super due process for death. (1980) 53 SCLR 1143.

Identifying comparatively excessive sentences of death: a quantitative approach. (1980) 33 Stan LR 1.

NOTES OF DECISIONS

A state prisoner sentenced to death cannot allege that the state failed to compare his sentence with others decided under the state's death penalty statute where his case was one of the earliest to be decided under the statute and has been used by

the state supreme court as a reference point with which to compare all subsequent capital cases to insure proportionality. *Sullivan v Wainwright* (1983, US) 78 L Ed 2d 210, 104 S Ct 250.

§ 190.7. ["Entire record" of capital cases on review]

The "entire record" referred to in Section 190.6 shall include, but not be limited to, the following:

(a) The normal and additional record prescribed in the rules adopted by the Judicial Council pertaining to an appeal taken by the defendant from a judgment of conviction.

(b) A copy of any other paper or record on file or lodged with the superior court and a transcript of any other oral proceeding reported in the superior court pertaining to the trial of the cause.

Nothing contained in this section shall preclude a court from ordering that the entire record include municipal court or settlement proceedings pertaining to the case.

Notwithstanding this section, the Judicial Council may adopt rules, not inconsistent with the purpose of Section 190.6, specifically pertaining to the content, preparation and certification of the record on appeal when a judgment of death has been pronounced.

Added Stats 1982 ch 917 § 1.

Cross References:

- Procedure in case involving death penalty: § 190.1.
- Determination as to imposition of death penalty or life imprisonment: § 190.3.
- Special finding on truth of each alleged special circumstance: § 190.4.
- Certification of record: § 190.8.
- Presence of court reporter: § 190.9.

Collateral References:

- Witkin Criminal Procedure pp 684 et seq.
- Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.
- Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.

§ 190.8. [Certification and correction of record where death sentence imposed]

In any case in which a death sentence has been imposed, the record on appeal shall be expeditiously certified. If the record has not been certified within 60 days of the date it is delivered to the parties or their counsel, the trial court shall monitor the preparation of the record monthly to expedite certification and report the status of the record to the California Supreme Court.

Corrections to the record shall not be required to include simple typographical errors that cannot conceivably cause confusion.

Added Stats 1984 ch 1422 § 1.

Cross References:

- Necessity of expeditious handling of appeal: § 190.6.
- "Entire record": § 190.7.

Collateral References:

- Witkin Criminal Procedure pp 684 et seq.
- Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.
- Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.

§ 190.9. [Presence of court reporter in all death penalty proceedings]

In any case in which a death sentence may be imposed, all proceedings conducted after the effective date of this section in the justice, municipal, and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present.

Added Stats 1984 ch 1422 § 2.

Cross References:

- Procedure in case involving death penalty: § 190.1.
- Determination as to imposition of death penalty or life imprisonment: § 190.3.
- Special finding on truth of each alleged special circumstance: § 190.4.
- Record of capital cases on review: § 190.7.
- Certification of record on appeal: § 190.8.

Collateral References:

- Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.
- Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.

§ 191. Petit treason abolished

The rules of the common law distinguishing the killing of a master by his servant, and of a husband by his wife, as petit treason, are abolished, and these offenses are homicides, punishable in the manner prescribed by this chapter.

Enacted 1872.

Prior Law:

- (a) Crimes and Punishment Act § 39 (Stats 1850 ch 99 § 39 p 233).
- (b) Field's Draft NY Pen C § 239.
- (c) NY Pen C § 182.

Cross References:

- Treason against sovereignty of state: §§ 37, 38.

Collateral References:

- Witkin Crimes p 271.

§ 192. [Manslaughter]

Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:

- (a) Voluntary—upon a sudden quarrel or heat of passion.
- (b) Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle.
- (c) Vehicular—
 - (1) Except as provided in paragraph (3), driving a vehicle in the

maintain an action for damages against the person causing the death, or if dead, such person's personal representatives.

(d) If an action arising out of the same wrongful act or neglect may be maintained pursuant to subdivision (c) for wrongful death to any such prisoner, the action authorized by subdivision (a) shall be consolidated therewith for trial on motion of any interested party.

(e) For the purposes of this section, "heirs" mean only the following:

(1) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of Part 2 (commencing with Section 6400) of Division 6 of the Probate Code, and

(2) Whether or not qualified under paragraph (1), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, and parents. As used in this paragraph, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

Amended Stats 1983 ch 842 § 16, operative January 1, 1985

Amendments:

1983 Amendment: Substituted "Part 2 (commencing with Section 6400) of Division 6" for "Division 2 (commencing with Section 200)" in subd (e)(1).

Law Revision Commission Comment:

1983 Revision—Section 3524 is amended to revise the reference to the intestate succession provisions of the Probate Code in view of the recodification of those provisions as Part 2 of Division 6 of the Probate Code.

Review of 1983 legislation. 15 Pac LJ 423.

§ 3605. [Witnesses]

The warden of the State prison where the execution is to take place shall be present at the execution and must invite the presence of two physicians, the Attorney General of the State, and at least 12 reputable citizens, to be selected by him; and he or she shall at the request of the defendant, permit those ministers of the Gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under 18 years of age be allowed to witness the execution.

Amended Stats 1986 ch 248 § 167.

Amendments:

1986 Amendment: Routine code maintenance.

§ 3700 and following sections—general references:

Adequacy of defense counsel's representation of criminal client regarding incompetency, insanity, and related issues, 17 ALR4th 575.

§ 3701. [Petition requesting inquiry into sanity of prisoner]

Within Procedure (3d) Actions § 24.

§ 3704. [Execution of judgment when defendant found sane; Commitment of insane defendant to medical facility; Recovery of sanity]

Cal Jur 3d (Rev) Criminal Law § 2145.

TITLE 3
Execution of Death Penalty

Chapter

1. Executing Death Penalty. §§ 3599-3607
2. Suspension of Execution of Death Penalty: Insanity: Pregnancy. §§ 3700-3706

CHAPTER 1

Executing Death Penalty

- § 3599. [Repealed]
- § 3600. Detention of male prisoners pending execution: Designation of prison
- § 3601. Detention of female prisoners: During pendency of appeal
- § 3602. On affirmance of appeal: Designation of prison: Return on commutation of sentence
- § 3603. Place of execution
- § 3604. Method
- § 3605. Witnesses
- § 3606. [No section of this number]
- § 3607. Return on death warrant: Data required to be shown

Cross References:

- Treason as punishable by death: § 37.
- Procuring execution of innocent person by perjury or subornation thereof as punishable by death: § 128.
- Murder as punishable by death: § 190.
- Kidnaping for ransom, reward, etc., as punishable by death: § 209.
- Train wrecking as punishable by death: § 219.
- Reimposition of death sentence, on defendant in his absence, on judgment imposing death penalty has been affirmed by appellate court: § 1193 subd 1.
- Execution and delivery of warrants when judgment of death is rendered: § 1217.
- Transmittal of statement of conviction requiring judgment of death to Governor: § 1218.
- Authority for governor to require opinion of justices of Supreme Court and/or Attorney General on receipt of statement of conviction requiring judgment of death: § 1219.
- Order appointing day of execution when judgment of death remains in force unexecuted: § 1227.
- Carrying out execution of judgment of death after stay or reprieve: § 1227.5
- Automatic appeal after judgment of death: § 1239(b).

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Execution of judgment of death after sanity investigation when defendant found sane or when judge determines that defendant has recovered his sanity: § 3704.

Execution of judgment of death following investigation as to pregnancy of female defendant: § 3706.

Aggravated assault by person sentenced to life imprisonment as punishable with death: § 4500.

Requirement that Governor cause register to be kept with respect to statements in capital cases made to him, with his action thereon: Gov C § 12030(b).

Collateral References:

Law Review Articles:

Due process and capital punishment. 11 UCLA LR 527.

§ 3599. [Added by Stats 3d Ex Sess 1944 ch 2 § 42 p 29 and repealed by Stats 1957 ch 2256 § 96 p 3942.]

§ 3600. [Detention of male prisoners pending execution: Designation of prison]

Every male person, upon whom has been imposed the judgment of death, shall be delivered to the warden of the California state prison designated by the department for the execution of the death penalty, there to be kept until the execution of the judgment.

Added Stats 1941 ch 106 § 15; Amended Stats 1943 ch 107 § 2; Stats 1957 ch 2256 § 75.

Amendments:

1943 Amendment: Substituted "designated by the State Board of Prison Directors for the execution of the death penalty, there to be kept until the execution of the judgment" for "at San Quentin, there to be kept until the execution of the judgment, unless the State Board of Prison Directors shall designate another State prison" at the end of the section.

1957 Amendment: Substituted "department" for "State Board of Prison Directors" after "designated by the".

Cross References:

Execution and delivery of warrants when judgment of death is rendered: § 1217.

Collateral References:

Witkin Criminal Procedure p 612.

49 Cal Jur 3d Penal and Correctional Institutions § 203.

21 Am Jur 2d Criminal Law § 596.

Law Review Articles:

California's death penalty: Did the legislature do its job? 2 Glendale LR 1.

Post conviction remedies in California death penalty cases. 11 Stan LR 94.

§ 3601. [Detention of female prisoners: During pendency of appeal]

Every female person, upon whom has been imposed the judgment of death, shall be delivered to the superintendent of the California Institution for Women, there to be held pending decision upon appeal.

Added Stats 1941 ch 106 § 15.

Prior Law: Stats 1929 ch 248 § 17 p 490, as added by Stats 1935 ch 497 § 6 p 1567, amended by Stats 1937 ch 700 § 3 p 1973.

Cross References:

Execution and delivery of warrants when judgment of death is rendered: § 1217.
Automatic appeal after judgment of death: § 1239(b).

Collateral References:

Witkin Criminal Procedure p 612.
49 Cal Jur 3d Penal and Correctional Institutions § 203.
21 Am Jur 2d Criminal Law § 596.

§ 3602. [On affirmance of appeal: Designation of prison: Return on commutation of sentence]

Upon the affirmance of her appeal, the female person sentenced to death shall thereafter be delivered to the warden of the California state prison designated by the department for the execution of the death penalty, not earlier than three days before the day upon which judgment is to be executed; provided, however, that in the event of a commutation of sentence said female prisoner shall be returned to the California Institution for Women, there to be confined pursuant to such commutation.

Added Stats 1941 ch 106 § 15; Amended Stats 1943 ch 107 § 3; Stats 1957 ch 2256 § 76.

Amendments:

1943 Amendment: Substituted "designated by the State Board of Prison Directors for the execution of the death penalty" for "at San Quentin" after "Prison".
1957 Amendment: Substituted "department" for "State Board of Prison Directors" before "for the execution".

Cross References:

Reimposition of death sentence, on defendant's absence, where judgment imposing death penalty has been affirmed: § 1193.

Collateral References:

Witkin Criminal Procedure p 613.
49 Cal Jur 3d Penal and Correctional Institutions § 203.
21 Am Jur 2d Criminal Law §§ 596, 597.

§ 3603. [Place of execution]

The judgment of death shall be executed within the walls of one of the State prisons designated by the court by which judgment is rendered.

Added Stats 1941 ch 106 § 15.

Prior Law:

- (a) Former § 1229 1st sentence, as amended by Stats 1891 ch 191 § 9 p 274
- (b) Stats 1858 ch 231 § 1 p 192.
- (c) NY Code Crim Proc §§ 506, 507.

Cross References:

Warrant of death, execution and delivery of: § 1217.
Statement of conviction and testimony, transmission to Governor by judge: § 1218.

Collateral References:

Witkin Criminal Procedure p 613.
49 Cal Jur 3d Penal and Correctional Institutions § 206.
21 Am Jur 2d Criminal Law § 596.

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NOTES OF DECISIONS

The 1891 amendment to former § 1229, relating to the place for the execution of the death penalty of one convicted of murder in the first degree, did not apply to convictions for offenses committed prior to its enactment. *People v McNulty* (1892)

93 C 427, 26 P 597, 29 P 61, app dismd 149 US 645, 37 L Ed 882, 13 S Ct 959; *People v Vincent* (1892) 95 C 425, 30 P 581, app dismd 149 US 648, 37 L Ed 884, 13 S Ct 960.

§ 3604. [Method]

The punishment of death shall be inflicted by the administration of a lethal gas.

Added Stats 1941 ch 106 § 15.

Prior Law:

- (a) Former § 1228.
- (b) Criminal Practice Act § 480 (Stats 1851 ch 29 § 480 p 265).
- (c) Stats 1850 ch 119 § 512 p 313.
- (d) NY Code Crim Proc § 500.

Cross References:

Warrant of death, execution and delivery of: § 1217.

Collateral References:

Witkin Crimes p 972.

Witkin Criminal Procedure p 613.

17 Cal Jur 3d Criminal Law §§ 262, 265.

21 Am Jur 2d Criminal Law § 598.

Law Review Articles:

Joseph Story on Punishment. 43 CLR 76.

NOTES OF DECISIONS

The 1937 amendment to former § 1228, providing that the punishment of death should be inflicted by the administration of lethal gas instead of by hanging, did not repeal the statute then in force before the effective date of the new enactment; and the old punishment by hanging applied to a crime committed between the time of the passage of the new act and the time of its going into effect. *People v Righthouse* (1937) 10 C2d 86, 72 P2d 867.

This section is not invalid as permitting the imposition of cruel and unusual punishment contrary to the Federal Constitution. *People v Daugherty* (1953) 40 C2d 876, 256 P2d 911, cert den 346 US

827, 98 L Ed 352, 74 S Ct 47.

So long as the death penalty is still widely accepted, it does not violate the constitutional concept of cruelty (U. S. Const., 8th Amend.; Cal Const. art I, § 6); it is not rendered cruel or unusual as the result of the Legislature's vesting in the trier of fact discretion to extend mercy to a convicted first degree murderer, or by the mental suffering attending the detention in death row, or by the fact that under Pen Code, § 3604, it is inflicted by the administration of lethal gas. *Anderson*. In re (1968) 69 C2d 613, 73 Cal Rptr 21, 447 P2d 117.

§ 3605. [Witnesses]

The warden of the State prison where the execution is to take place must be present at the execution and must invite the presence of two physicians, the Attorney General of the State, and at least 12

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reputable citizens, to be selected by him; and he shall at the request of the defendant, permit such ministers of the Gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

Added Stats 1941 ch 106 § 15.

Prior Law:

(a) Former § 1229 2d, 3d sents, as amended by Stats 1891 ch 191 § 9 p 274.

(b) Stats 1858 ch 231 § 1 p 192.

(c) NY Code Crim Proc §§ 506, 507.

Cross References:

Warrant of death, execution and delivery of: § 1217.

Collateral References:

Witkin Criminal Procedure p 613.

49 Cal Jur 3d Penal and Correctional Institutions § 206.

21 Am Jur 2d Criminal Law § 595.

Attorney General's Opinions:

32 Ops Atty Gen 254 (authority of warden to appoint deputy to officiate at execution during warden's temporary absence or incapacity—authority for director of corrections to appoint deputy in event of warden's death).

§ 3606. [No section of this number]

§ 3607. [Return on death warrant: Data required to be shown]

After the execution, the warden must make a return upon the death warrant to the county clerk of the court by which the judgment was rendered, showing the time, mode, and manner in which it was executed.

Added Stats 1941 ch 106 § 15.

Prior Law:

(a) Former § 1230, as amended by Stats 1891 ch 191 § 10 p 274.

(b) Stats 1858 ch 231 § 2 p 193.

(c) NY Code Crim Proc § 508.

Collateral References:

Witkin Criminal Procedure p 613.

49 Cal Jur 3d Penal and Correctional Institutions § 206.

21 Am Jur 2d Criminal Law § 595.

Suspension of Execution of Death Penalty: Insanity: Pregnancy

- § 3700. Authority to suspend
- § 3700.5. Sanity examination following execution order: Report
- § 3701. Petition requesting inquiry into sanity of prisoner
- § 3702. Attendance of district attorney at sanity hearing
- § 3703. Entry of verdict: Hospitalization upon finding of insanity
- § 3704. Execution of judgment when defendant found sane: Commitment of insane defendant to medical facility: Recovery of sanity
- § 3704.5. Transfer of defendant from state hospital to medical facility
- § 3705. Pregnancy investigation
- § 3706. Execution of judgment suspended during pregnancy

Cross References:

Reprieve, pardons and commutations: §§ 4800 et seq.
 Inapplicability of statutory provisions governing notice of application for pardon when there is imminent danger of death of person convicted: § 4806 subd 1.
 Reprieve, pardons and commutations: Const Art V § 8.

§ 3700. [Authority to suspend]

No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken.

Added Stats 1941 ch 106 § 15.

Prior Law:

- (a) Former § 1220, as amended by Stats 1891 ch 191 § 2 p 273.
- (b) Criminal Practice Act § 469 (Stats 1851 ch 29 § 469 p 264).
- (c) Stats 1850 ch 119 § 501 p 312.
- (d) NY Code Crim Proc § 495.

Cross References:

Automatic appeal after judgment of death: § 1239(b).

Collateral References:

Witkin Crimes p 1034. Cal Jur 3d Criminal Law § 265. Penal and Correctional Institutions § 207.
 21 Am Jur 2d Criminal Law §§ 558, 596.

Law Review Articles:

Insanity after judgment operating to delay execution. 23 SCLR 246.
 Restatement of law of insanity as defense in criminal law of California. 27 SCLR 181.
 Inquiry into sanity of defendant after sentence. 27 SCLR 203.
 Capital punishment. 42 ABAJ 113.

NOTES OF DECISIONS

Under §§ 3700-3704, prior to the 1949 amendment of § 3704, a person who has been adjudged insane and committed to a state hospital after conviction, sentence, and delivery to a warden of a state prison for execution, and who, following certification by the superintendent of such hospital that he was sane, had been returned to the custody of the warden for execution, had no right to a judicial determination of his restoration to sanity. *Phyle, In re* (1947) 30 C2d 838, 186 P2d 134, cert dismd 334 US 431, 92 L Ed 1494, 68 S Ct 1131.

The supreme court has appellate jurisdiction in criminal cases where judgement of death has been rendered (including proceedings which attack such a judgment by motion to vacate or petition for the writ of coram nobis); and its power to issue writs necessary or proper to the complete exercise of such jurisdiction under Const Art VI § 4 includes the power to stay execution of the sentence of death until final determination of a pending appeal from an order made after the final judgment imposing such sentence. *People v Shorts* (1948) 32 C2d 502, 197 P2d 330.

The procedure which permits a convicted defendant, after affirmance of the judgment on appeal, to apply directly to a trial court for a vacation of the judgment, but which reserves to the supreme court, on appeal from an order denying the motion, the right in the exercise of judicial discretion to grant or deny a stay of execution and to dismiss the appeal as irregular and frivolous when there is a failure to accompany and support the application for a stay by a prima facie showing of merit and probable cause, fully meets the constitutional requirements of due process of law. *People v Shorts* (1948) 32 C2d 502, 197 P2d 330.

One who seeks a stay of execution of a judgment imposing the death penalty in order that he may perfect an appeal from an order denying the writ of coram nobis, where the only point involved appears on the face of the application and on the records already before the supreme court to be a question of the age of the defendant, which question on substantially conflicting evidence has been resolved adversely to the defendant by the trial court, must make some further prima facie showing of merit and diligence; otherwise he has failed to show that his appeal is taken in good faith. *People v Shorts* (1948) 32 C2d 502, 197 P2d 330.

One who applies for a writ of coram nobis on the ground that he was under the age of eighteen at the time the death penalty was imposed on him must show that the facts on which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his application for the writ; otherwise he has stated no ground for relief. *People v Shorts* (1948) 32 C2d 502, 197 P2d 330.

An appellant was not entitled to a stay of execu-

tion to enable him to perfect his appeal from an order denying a motion to vacate a judgment imposing the death penalty, after such judgment had previously been affirmed on appeal, where, at the time he applied for a stay, he did not furnish the supreme court with a copy of his motion for a writ of coram nobis, where he alleged merely that he was prepared to show in such writ that he "is under the age of eighteen at the present time," where the evidence available to support such ground is not set forth by affidavit or otherwise, and where he did not show that he was prompt and diligent in seeking relief by writ of coram nobis and that the controlling fact on which he relied is that proceeding was not known to him at the time he was tried and convicted. *People v Shorts* (1948) 32 C2d 502, 197 P2d 330.

On appeal from an order denying a motion to vacate a judgment imposing the death penalty, where such judgment has previously been reviewed on appeal and affirmed, the burden is on the defendant to apply for a stay of execution of such final judgment and to support such application by a prima facie showing of substantial merit in his appeal and probable cause for reversal of the order denying the motion; and in the absence of such prima facie showing, not only will the application for the stay be denied but the appeal itself will be deemed taken for an improper objective (namely, delay of execution of a final and valid judgment) and, hence, to be frivolous and irregular and subject to dismissal forthwith. *People v Shorts* (1948) 32 C2d 502, 197 P2d 330.

One who applies for a stay of execution pending appeal from an order denying a motion to vacate a judgment imposing the death penalty should make a prima facie showing that his appeal is taken in good faith, that some substantial and justiciable point is in actual controversy, and that there is probable cause for reversal of the trial court's order. *People v Shorts* (1948) 32 C2d 502, 197 P2d 330.

In a death penalty case, after judgment of conviction has been reviewed and affirmed on appeal and has been thereafter attacked in the trial court by motion to vacate, which motion has been denied, the right of the defendant to appeal from the order of denial does not carry with it as of course a right to stay of execution. *People v Shorts* (1948) 32 C2d 502, 197 P2d 330.

This and the following sections establish the measure of a convicted defendant's right to any determination of his present sanity, the manner of such determination being purely a matter of legislative regulation. *People v Riley* (1951) 37 C2d 510, 235 P2d 381.

There is no remedy whatsoever if warden fails to perform his statutory duties, with respect to sanity of condemned person, and neither habeas corpus

nor mandamus is available to review his determination that there is no reason to believe condemned man insane. *Caritativo v California* (1958) 357 US 549, 2 L Ed 2d 1531, 78 S Ct 1263.

Due process clause of Fourteenth Amendment

does not require that state afford to person condemned to death, and claiming insanity, opportunity to have his claim tested in judicial proceeding. *Caritativo v California* (1958) 357 US 549, 2 L Ed 2d 1531, 78 S Ct 1263.

§ 3700.5. [Sanity examination following execution order: Report]

Whenever a court makes and causes to be entered an order appointing a day upon which a judgment of death shall be executed upon a defendant, the warden of the state prison to whom such defendant has been delivered for execution or, if the defendant is a female, the superintendent of the California Institution for Women, shall notify the Director of Corrections who shall thereupon select and appoint three alienists, all of whom must be from the medical staffs of the Department of Corrections, to examine the defendant, under such judgment of death, and investigate his sanity. It is the duty of the alienists so selected and appointed to examine such defendant and investigate his sanity, and to report their opinions and conclusions thereon, in writing, to the Governor, to the warden of the prison at which the execution is to take place at least 20 days prior to the day appointed for the execution of the judgment of death upon the defendant. The warden shall furnish a copy of the report to counsel for the defendant upon his request.

Added Stats 1961 ch 1739 § 1.

Collateral References:

Witkin Criminal Procedure p 614.

49 Cal Jur 3d Penal and Correctional Institutions § 205.

21 Am Jur 2d Criminal Law §§ 559, 595.

§ 3701. [Petition requesting inquiry into sanity of prisoner]

If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry.

Added Stats 1941 ch 106 § 15.

Prior Law:

(a) Former § 1221, as amended by Stats 1891 ch 191 § 3 p 273, Stats 1905 ch 537 § 2 p 698.

(b) Criminal Practice Act § 470 (Stats 1851 ch 29 § 470 p 264).

(c) Stats 1850 ch 119 § 502 p 312.

penalty after warden has determined that there is no "good reason to believe" such prisoner is presently insane. *Caritativo v Teets* (1956) 47 C2d 304, 303 P2d 339, affd 357 US 549, 2 L Ed 2d 1531, 78 S Ct 1263.

8. Representation for Defendant

A convicted defendant may not complain that he did not have effective legal representation at a sanity hearing under this section, where in spite of not being entitled to the appointment of counsel in such proceedings he was competently represented by a counsel who introduced expert testimony, diligently examined and cross-examined witnesses and argued evidentiary considerations bearing on the defendant's mental condition to the jury. *People v Riley* (1951) 37 C2d 510, 235 P2d 381.

9. Verdict

A nine to three verdict is sufficient in a sanity hearing under this section. *People v Riley* (1951) 37 C2d 510, 235 P2d 381.

10. Restoration to Sanity

Under §§ 3700-3704, prior to the 1949 amendment of § 3704, a person who had been adjudged insane and committed to a state hospital after conviction, sentence, and delivery to a warden of a state prison for execution, and who, following certification by the superintendent of such hospital that he was sane, had been returned to the custody of the warden for execution, had no right to a judicial determination of his restoration to sanity.

Phyle, In re (1947) 30 C2d 838, 186 P2d 134, cert dismd 334 US 431, 92 L Ed 1494, 68 S Ct 1131.

11. Particular Applications

There was no such showing of the insanity of a 13-year-old defendant convicted of first degree murder of a 6-year-old girl as to constitute grounds for relief by way of coram nobis, where the claim of insanity was based only on the report of the director of an institution, to which the defendant was assigned by the Youth Authority for observation, that the institution's staff found the defendant to have a psychopathic personality, mixed type (defective or psychopathic delinquency), and a normal mentality, and recommended that he be committed for psychiatric treatment, as ordinary methods of rehabilitation would not be sufficient. *People v Thompson* (1949) 94 CA2d 578, 211 P2d 1.

12. Appeal and Review

No appeal lies from an order made pursuant to § 3703 reciting the finding of a jury in a proceeding initiated under this section. *People v Riley* (1951) 37 C2d 510, 235 P2d 381.

Habeas corpus is not available to review warden's determination that there is no reason to believe condemned man insane. *Caritativo v California* (1958) 357 US 549, 2 L Ed 2d 1531, 78 S Ct 1263.

Mandamus is not available to review warden's determination that there is no reason to believe condemned man insane. *Caritativo v California* (1958) 357 US 549, 2 L Ed 2d 1531, 78 S Ct 1263.

§ 3702. [Attendance of district attorney at sanity hearing]

The district attorney must attend the hearing, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court.

Added Stats 1941 ch 106 § 15.

Prior Law:

- 1) Former § 1222, as amended by Stats 1905 ch 537 § 3 p 699.
- 2) Criminal Practice Act § 471 (Stats 1851 ch 29 § 471 p 264).
- 3) Stats 1850 ch 119 § 503 p 312.
- 4) NY Code Crim Proc § 497.

Cross References:

- Compelling attendance of witnesses: §§ 1326 et seq.
- Application of this section to proceedings on inquiry as to pregnancy of female against whom judgment of death is rendered: § 3705.
- Admission of mentally disordered convicts to state hospitals: W & I C § 7227.

Collateral References:

- Witkin Criminal Procedure p 614.
- 49 Cal Jur 3d Penal and Correctional Institutions § 208.
- 21 Am Jur 2d Criminal Law §§ 558, 595.

NOTES OF DECISIONS

Under §§ 3700-3704, prior to the 1949 amendment of § 3704, a person who had been adjudged insane and committed to a state hospital after conviction, sentence, and delivery to a warden of a state prison for execution, and who, following certification by the superintendent of such hospital that he was sane, had been returned to the custody of the warden for execution, had no right to a judicial determination of his restoration to sanity. *Phyle, In re* (1947) 30 C2d 838, 186 P2d 134, cert dismd 334 US 431, 92 L Ed 1494, 68 S Ct 1131.

No provision is made for assignment of counsel or notice of hearing to defendant, but only district attorney is required to attend hearing, and it is he who may produce witnesses and subpoenas for such purpose as in grand jury inquiry rather than by county clerk as is usual process followed in court proceeding. *People v Riley* (1951) 37 C2d 510, 235 P2d 381.

§ 3703. [Entry of verdict: Hospitalization upon finding of insanity]

The verdict of the jury must be entered upon the minutes, and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane, the order must direct that he be taken to a medical facility of the Department of Corrections, and there kept in safe confinement until his reason is restored.

Added Stats 1941 ch 106 § 15; Amended Stats 1971 ch 1136 § 1.

Prior Law:

- (a) Former § 1223, as amended by Stats 1891 ch 191 § 4 p 273, Stats 1905 ch 537 § 4 p 699.
- (b) Criminal Practice Act § 472 (Stats 1851 ch 29 § 472 p 264).
- (c) Stats 1850 ch 119 § 504 p 312.

Amendments:

1971 Amendment: Substituted "medical facility of the Department of Corrections" for "State hospital for the insane".

Cross References:

Verdict generally: §§ 1147 et seq.

Commitment of insane person charged with commission of public offense: W & I C § 6825.

Collateral References:

Witkin Criminal Procedure p 614.

49 Cal Jur 3d Penal and Correctional Institutions § 208.

21 Am Jur 2d Criminal Law §§ 559, 597.

Law Review Articles:

Post-conviction remedies in California death penalty cases. 11 Stan LR 94.

NOTES OF DECISIONS

No appeal lies from an order made pursuant to this section reciting the finding of a jury in a proceeding initiated under § 3701 as to the sanity

of a defendant under judgment of death. *People v Riley* (1951) 37 C2d 510, 235 P2d 381.

§ 3704. [Execution of judgment when defendant found sane: Commitment of insane defendant to medical facility: Recovery of sanity]

If it is found that the defendant is sane, the warden must proceed to

execute the judgment as specified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor, and deliver the defendant, together with a certified copy of such order, to the superintendent of the medical facility named in such order. When the defendant recovers his sanity, the superintendent of such medical facility must certify that fact to the judge of the superior court from which the defendant was committed as insane, who must thereupon fix a date upon which, after 10 days' written notice to the defendant and the district attorney of the county from which the defendant was originally sentenced and the district attorney of the county from which he was committed to the medical facility, a hearing shall be had before said judge sitting without a jury to determine whether or not the defendant has in fact recovered his sanity. If the defendant appears without counsel, the court shall appoint counsel to represent him at said hearing. If the judge should determine that the defendant has recovered his sanity he must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the state prison pending the execution of the judgment. If, however, the judge should determine that the defendant has not recovered his sanity he shall direct the return of the defendant to a medical facility of the Department of Corrections, to be there kept in safe confinement until his sanity is restored.

Added Stats 1941 ch 106 § 15; Amended Stats 1949 ch 1020 § 1; Stats 1971 ch 1136 § 2.

Prior Law:

- (a) Former § 1224, as amended by Stats 1905 ch 537 § 5 p 699.
- (b) Criminal Practice Act §§ 473, 474 (Stats 1851 ch 29 §§ 473, 474 p 264).
- (c) Stats 1850 ch 119 §§ 505, 506 p 312.

Amendments:

1949 Amendment: (1) Substituted the second sentence for the former second sentence which read: "When the defendant recovers his reason, the superintendent of such hospital must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the State prison pending the execution of the judgment."; and (2) added the third, fourth, and fifth sentences.

1971 Amendment: (1) Deleted "medical" before "superintendent" in the first sentence; (2) substituted "medical facility" for "hospital" before "named" in the first sentence and before "must" in the second sentence; (3) substituted "medical facility" for "state hospital" before ", a hearing" in the second sentence; and (4) substituted "medical facility of the Department of Corrections" for "state hospital for the insane" in the last sentence.

Cross References:

Executing death penalty: §§ 3600 et seq.

Disposition of mentally disordered criminals on recovery of sanity: W & I C § 7375.

executive determination that he is not insane, where a state remedy is available to compel judicial determination of the existence of a duty on the part of the prison warden to initiate a statutory judicial proceeding to determine the fact of sanity. *Phyle v Duffy* (1948) 334 US 431, 97 L Ed 1494, 68 S Ct 1131.

A petition for writ of mandate to compel the warden of a state prison to institute a proceeding under § 3701 for a jury determination of the sanity of a prisoner who had previously been adjudged insane by a jury and committed to a state hospital following a death sentence, and who, on a certification by the superintendent of such hospital that

he was sane, was returned to prison for execution, will be denied, where, regardless of whether mandamus was an appropriate remedy, the prisoner was accorded a full hearing on the issue of his sanity at that time, and the evidence supported a determination that the warden then had no "good reason" to believe that the prisoner had become or was insane. *Phyle v Duffy* (1949) 34 C2d 144, 208 P2d 668 (overruled on other grounds *Caritativo v Teets* (1956) 47 C2d 304, 303 P2d 339).

Sections 3700-3704 establish the measure of a convicted defendant's right to any determination of his present sanity, the manner of such determination being purely a matter of legislative regulation. *People v Riley* (1951) 37 C2d 510, 235 P2d 381.

§ 3704.5. [Transfer of defendant from state hospital to medical facility]

Any defendant who, on the effective date of this section is in a state hospital under court order pursuant to Penal Code Section 3703, as that section read immediately preceding such effective date, shall be transferred to a medical facility of the Department of Corrections, designated by the director of such department, and there kept in safe confinement until his reason is restored. The provisions of Penal Code Section 3704 shall apply when such a defendant recovers his sanity.

Added by Stats 1971 ch 1136 § 3.

Collateral References:

49 Cal Jur 3d Penal and Correctional Institutions § 208.

§ 3705. [Pregnancy investigation]

If there is good reason to believe that a female against whom a judgment of death is rendered is pregnant, such proceedings must be had as are provided in Section 3701, except that instead of a jury, as therein provided, the court may summon three disinterested physicians, of good standing in their profession, to inquire into the supposed pregnancy, who shall, in the presence of the court, but with closed doors, if requested by the defendant, examine the defendant and hear any evidence that may be produced, and make a written finding and certificate of their conclusion, to be approved by the court and spread upon the minutes. The provisions of Section 3702 apply to the proceedings upon such inquiry.

Added Stats 1941 ch 106 § 15; Amended Stats 1941 ch 1192 § 13.

Prior Law:

1. Former § 1225, as amended by Stats 1891 ch 191 § 6 p 273, Stats 1905 ch 537 § 6 p 699.

2. Criminal Practice Act § 475 (Stats 1851 ch 29 § 475 p 264).

3. Stats 1850 ch 119 § 507 p 312.

4. NY Code Crim Proc § 500.

§ 3705

DEATH PENALTY

Amendments:

1941 Amendment: Substituted (1) "Section 3701" for "Section 2011" in the first sentence; and (2) "Section 3702" for "Section 2012" in the second sentence.

Collateral References:

Witkin Criminal Procedure p 612.
Cal Jur 3d Criminal Law § 265, Penal and Correctional Institutions § 211.
21 Am Jur 2d Criminal Law §§ 559, 597.

§ 3706. [Execution of judgment suspended during pregnancy]

If it is found that the female is not pregnant, the warden must execute the judgment; if it is found that she is pregnant the warden must suspend the execution of the judgment, and transmit a certified copy of the finding and certificate to the Governor. When the Governor receives from the warden a certificate that the defendant is no longer pregnant, he must issue to the warden his warrant appointing a day for the execution of the judgment.

Added Stats 1941 ch 106 § 15.

Prior Law:

- (a) Former § 1226, as amended by Stats 1891 ch 191 § 7 p 274, Stats 1905 ch 537 § 7 p 699.
- (b) Criminal Practice Act §§ 476, 477 (Stats 1851 ch 29 §§ 476, 477 pp 264, 265).
- (c) Stats 1850 ch 119 §§ 508, 509 pp 312, 313.
- (d) NY Code Crim Proc §§ 501, 502.

Cross References:

Execution of death penalty: §§ 3600 et seq.

Collateral References:

Witkin Criminal Procedure p 612.
Cal Jur 3d Criminal Law § 265, Penal and Correctional Institutions § 211.
21 Am Jur 2d Criminal Law §§ 559, 597.

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§ 4492. [Interest derived from investments]

Notwithstanding Section 16305.7 of the Government Code, all interest or other increment resulting from the investment of moneys deposited in the fund shall be credited to the fund.

Added Stats 1986 ch 12 § 1, approved at the June 3, 1986, primary election.

§ 4493. [Project expenditures; Allocations in legislative appropriations]

Money in the fund may only be expended for projects specified in this title as allocated in appropriations made by the Legislature.

Added Stats 1986 ch 12 § 1, approved at the June 3, 1986, primary election.

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§ 4494. [Finality of Board of Corrections decisions; Jurisdiction of courts]

(a) It is the intent of the people in enacting this bond act that jail authorization and construction proceed as quickly as possible. Due to the severe shortage of jail facilities and the need to begin construction of jail facilities as soon as possible, all decisions of the board regarding construction, reconstruction, remodeling, or replacement of jail facilities financed by this title shall be final.

(b) No court shall have jurisdiction over these decisions of the board absent a showing, beyond a reasonable doubt, of a gross abuse of discretion by the board.

(c) Should an action be commenced alleging gross abuse of discretion by the board, no court shall have jurisdiction to delay, prohibit, or interfere with the construction, reconstruction, remodeling, or replacement of the subject jail facilities. The sole remedy available to the court is a mandate that steps be taken to mitigate the abuse of discretion.

(d) Nothing in this title is intended in any way to delay, prohibit, or interfere with the construction of jail facilities.

Added Stats 1986 ch 12 § 1, approved at the June 3, 1986, primary election.

§ 4495. [Severability clause]

If any provision of this title, or the application thereof, is held to be invalid, that invalidity shall not affect the other provisions or applications of the title which can be given effect without the invalid provision or application, and to this end the provisions of this title are severable.

Added Stats 1986 ch 12 § 1, approved at the June 3, 1986, primary election.

§ 4500 and following sections—general references:

Cal Jur 3d (Rev) Criminal Law § 2013.

Constitutionality of assault and battery laws limited to protection of females only or which provide greater penalties for males than for females. 5 ALR4th 708.

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§ 4500. [Aggravated assault by life prisoner; Punishment]

Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty

shall be detained pursuant to the provisions of Sections 190.3 and 190.4, however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison in which the person committing the assault was undergoing a life sentence and was serving a sentence to a state prison at the time of the commission of the assault and was not on parole, on probation, or released on bail pending an appeal.

Amended Stats 1986 ch 1445 § 1.

Amendments:

1986 Amendment: (1) Substituted "while undergoing a life sentence, who is sentenced to state prison within this state, and" for "undergoing a life sentence in a state prison of this state." in the first sentence of the first paragraph; and (2) amended the last paragraph by (a) substituting "and was serving a sentence to" for "in" after "life sentence"; and (b) adding ", on probation, or released on bail pending an appeal" at the end.

Witkin Evidence (3d) § 416

Cal Jur 3d (Rev) Criminal Law §§ 204, 343, 2014, 2016, 2144

Calif Criminal Forms & Instructions (BW, 1983) § 39:11.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 ALR3d 287.

1. In General

Since the Legislature, in enacting death penalty legislation, in 1977 (including the revising of Pen C § 4500 to provide for an alternative punishment of life without possibility of parole for a life prisoner who maliciously assaults a noninmate if the victim dies) declared its belief that the increased sanctions permitted by the new death penalty legislation were necessary for the immediate protection of the public, the principle that statutes which increase the punishment for crime will be construed to apply only to crimes committed after their enactment governs the interpretation of the 1977 legislation and precludes its retroactive application. Thus, the penalty presently provided by § 4500 was inapplicable to defendants found guilty of violating former Pen C § 4500, which was unconstitutional, since at the time of the assault upon a prison guard by defendants the current provisions of § 4500 had not been enacted. *Graham v Superior Court* (1979) 98 CA3d 380, 160 Cal Rptr 10.

A prisoner serving less than a life term, who, along with a life prisoner, was charged with conspiracy to murder a correctional officer, but who was concededly not subject to charges under Pen. Code, § 4500 (imposing death penalty for aggravated assault by life prisoner), was likewise not subject to prosecution for conspiracy to violate § 4500. The general rule that a conspiracy charge may properly result in a greater punishment than under the substantive offense itself was inapplicable, since Pen. Code, § 4501, dealt with persons such as defendant who were serving less than life

terms and who engaged in the same type of conduct prohibited by § 4500. Since there was an affirmative legislative interest to impose a lesser punishment on persons such as defendant, it was impermissible to make use of a conspiracy charge to defeat this legislative intent. *People v Roberts* (1983, 1st Dist) 139 Cal App 3d 290, 188 Cal Rptr 586.

2. Constitutionality

A prisoner serving an indeterminate term of five years to life pursuant to a 1971 robbery conviction who was convicted in 1972 of assault while serving a life term (Pen. Code, § 4500) was not entitled to the benefit of the lesser punishment applicable to in-prison assaults by nonlifers (Pen. Code, § 4501), even though the punishment for robbery was modified subsequent to the assault conviction and no longer included the possibility of life imprisonment. The legislative purpose in enacting § 4500 was to deter violent crimes by life prisoners who might otherwise think themselves immune from punishment, and for this reason it was the prisoner's status on the day of the assault offense that was crucial. Thus, for purposes of an equal protection analysis, the correct comparison was between an inmate serving an indeterminate life term who commits an assault in prison and an inmate serving a determinate life term who commits an assault in prison. Since the punishment for both was identical, defendant was not denied equal protection. *In re Carmichael* (1982, 1st Dist) 132 Cal App 3d 542, 183 Cal Rptr 206.

§ 4500. [Aggravated assault by life prisoner: Punishment]

Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault and was not on parole.

Added Stats 1973 ch 719 § 13; Amended Stats 1977 ch 316 § 21, effective August 11, 1977.

Prior Law:

(a) Former § 4500, as added by Stats 1941 ch 106 § 15, amended by Stats 1959 ch 529 § 1, Stats 1965 ch 1904 § 1.

(b) Former § 246, as added by Stats 1901 ch 12 § 1.

Amendments:

1977 Amendment: (1) Amended the first paragraph by (a) deleting ", other than another inmate," before "with a deadly weapon"; (b) adding "or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Section 190.3 and 190.4" before "; however,,"; and (c) deleting "or the person so assaulted is another inmate," before "the punishment"; and (2) added "and was not on parole" at the end of the third paragraph.

Former Section: Former § 4500, similar to the present section, was added by Stats 1941 ch 106 § 15, amended by Stats 1959 ch 529 § 1, Stats 1965 ch 1904 § 1, and repealed by Stats 1973 ch 719 § 12.

Note—Severability, see note to § 190.

Cross References:

Mandatory death penalty upon special findings: § 190.2.

Assault with deadly weapon: § 245.

Form: Allegation charging assault with deadly weapon and by means of force likely to produce great bodily harm: § 245.

Execution of death penalty: §§ 3600 et seq.

Pertinent administrative rules and regulations: 15 Cal Adm Code §§ 3000 et seq.

Collateral References:

Witkin Crimes pp 20, 258, 860, 972.

Witkin Criminal Procedure p 510.

Cal Jur 3d Criminal Law §§ 63, 1604, 1605, Penal and Correctional Institutions § 134.

TITLE 3

Offenses Against the Sovereignty of the State

§ 37. Treason

§ 38. Misprision of treason

Cross References:

Crimes by and against executive power of the state: §§ 67 et seq.

Crimes against legislative power: §§ 85 et seq.

Crimes against public justice: §§ 92 et seq.

Criminal syndicalism: §§ 11400 et seq.

Paramilitary organizations: § 11460.

Collateral References:

Witkin Crimes p 821.

Witkin Summary (8th ed) Constitutional Law § 209.

Cal Jur 3d (Rev) Criminal Law §§ 1868 et seq.

Cal Digest of Official Reports 3d Series, Syndicalism, Sedition and Sabotage §§ 1 et seq.

Am Jur 2d Sedition, Subversive Activities, and Treason § 66.

Wharton's Criminal Law (14th ed) Treason and Related Offenses §§ 701 et seq.

§ 37. [Treason]

Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason shall be death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

Enacted 1872; Amended Stats 1977 ch 316 § 2, effective August 11, 1977.

Prior Law:

(a) Crimes and Punishment Act §§ 16, 17 (Stats 1850 ch 99 §§ 16, 17 p 231).

(b) Field's Draft NY Pen C §§ 57, 60.

(c) NY Pen C §§ 37, 38.

Amendments:

1977 Amendment: Added (1) "or life imprisonment without possibility of parole" at the end of the second sentence; and (2) the third sentence.

Cross References:

Misprision of treason: § 38.

Determination as to imposition of death penalty or life imprisonment upon finding of special circumstance: § 190.3.

Special finding on truth of alleged special circumstances: § 190.4.
 Petit treason abolished: § 191.
 Jurisdiction over treason where overt act committed out of state: § 788.
 Proof of treason: § 1103.
 Treason defined: Const Art I § 18.
 Duty of allegiance to State: Gov C § 271.
 Renunciation of allegiance: Gov C § 272.

Collateral References:

Witkin Crimes p 821.
 Cal Jur 3d (Rev) Criminal Law § 1869.
 Cal Digest of Official Reports 3d Series, Syndicalism, Sedition and Sabotage §§ 1 et seq.
 Federal treason provision: USCS Constitution Art III § 3.

Forms:

Suggested form is set out below, following notes of decisions.

Law Review Articles:

Review of Selected 1977 California Legislation. 9 Pacific LJ 439.

Annotations:

Validity of governmental requirement of oath of allegiance or loyalty. 18 ALR2d 268.
 Dismissal or rejection of public schoolteacher because of disloyalty. 27 ALR2d 487.
 Prejudicial effect of admission of evidence as to Communist or other subversive affiliation or association of accused. 30 ALR2d 589.
 Coercion, compulsion, or duress as defense to criminal prosecution. 40 ALR2d 908.

NOTES OF DECISIONS

To constitute levying of war within meaning of Constitution there must be assemblage of persons with force of arms to overthrow government and resist laws. United States v Greathouse (1863) F Cas No. 15254.

SUGGESTED FORM

Allegation Charging Treason

[Insert general form of indictment or information (see Penal C § 951)]

The _____ [Grand Jury or District Attorney] of the County of _____ hereby accuses _____ of a felony, to wit: Treason, in that on or about _____, 19____, in the County of _____, State of California, he, although owing allegiance* to the State of California, _____ [levied war against the State of California or adhered to the enemies of the State of California or gave aid and comfort to the enemies of the State of California] by committing the following overt act(s):

1. _____ [e.g., He and others assembled with arms, intending to overthrow the Government of the State of California].

* Citizens of the United States residing in California are citizens of California (see Gov C § 241), and owe allegiance to California (see Gov C § 271).

§ 38. [Misprision of treason]

Misprision of treason is the knowledge and concealment of treason,

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guilty of first degree murder for any homicide committed in the course thereof. *People v Rose* (1986, 4th Dist) 182 Cal App 3d 813, 227 Cal Rptr 570.

15. Mental State

The only intent required for conviction under the felony-murder rule (Pen. Code, § 189) is the intent to commit the underlying felony. Thus, in a prosecution for attempted robbery and murder, defendant, who killed a man in the course of the attempted robbery, was properly convicted under the felony-murder rule, where the facts indisputably showed that defendant intended to commit the underlying crime of robbery. *People v Schafer* (1987, 2d Dist) 189 Cal App 3d 786, 234 Cal Rptr 565.

No showing of an intent to kill is required to support a conviction based on the felony-murder rule (Pen. Code, § 189) absent a special circumstance allegation. The intent to kill requirement imposed by Pen. Code, § 190.2, subd. (b), with respect to felony-murder special circumstance convictions, is interpreted to avoid violation of the prohibition against cruel and unusual punishment under U.S. Const., 8th Amend.; it is not applicable to cases without special circumstances. The purpose of the felony-murder rule is to deter those engaged in felonies from killing negligently or accidentally. It would be inconsistent with this purpose to superimpose an intent to kill requirement on the felony-murder rule. *People v Schafer* (1987, 2d Dist) 189 Cal App 3d 786, 234 Cal Rptr 565.

17. Arson

In a prosecution of defendant for felony-murder, in which the evidence was such as to support a conclusion defendant intended either to kill through the device of a deadly weapon, or that his purpose was restricted to causing destruction by means of arson (defendant threw a Molotov cocktail into a house and a guest therein perished), the trial court properly refused a defense instruction stating that if the purpose of defendant was to kill someone inside the house, even if the intended victim was a different person from the actual

victim, and arson was the means intended to accomplish the killing, then the felony-murder rule did not apply. *People v Oliver* (1985, 2d Dist) 168 Cal App 3d 920, 214 Cal Rptr 587.

18. —Burglary

A burglar who kills after entering to steal does so in the perpetration of burglary within the meaning of the felony-murder rule embodied in Pen. Code, § 189. *People v Brady* (1987, 3d Dist) 190 Cal App 3d 124, 235 Cal Rptr 248.

20. Robbery

Defendant was properly convicted of first degree felony murder, where, during the course of an armed robbery, one of the victims died from a heart attack, even though defendant did not shoot or initiate any life-threatening violence against the victim. The felony-murder doctrine is applicable when there is substantial evidence to prove that a robbery caused a victim's fatal heart attack. As long as the homicide is the direct causal result of the robbery, the felony-murder rule applies, whether or not the death was a natural or probable consequence of the robbery. *People v Hernandez* (1985, 1st Dist) 169 Cal App 3d 282, 215 Cal Rptr 166.

Defendant's first degree murder conviction, obtained on a felony-murder theory when the jury found that the murder occurred as a result of his robbery of the victim, was barred by the doctrine of collateral estoppel, where the jury in an earlier proceeding had convicted him of first degree murder for the same incident, but had rejected the special circumstances that the murder had occurred in the course of the robbery. The felony-murder instruction (which only requires that the murder occur "as a result of" the robbery) was only slightly different from the special circumstances instruction (which specifies that the murder occur "in the commission of" the robbery), and the definition of felony murder under Pen. Code, § 189, is virtually indistinguishable from the language used in Pen. Code, § 190.2(a)(17), to define special circumstances. *People v Asbury* (1985, 2d Dist) 173 Cal App 3d 362, 218 Cal Rptr 902.

§ 190. (Operative term contingent) [Punishment for murder]

(a) Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Except as provided in subdivision (b), every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time.

(b) Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 25 years to life if the victim was a

peace officer, as defined in subdivision (a) of Section 830.1, subdivision (a) (b) of Section 830.2, or Section 830.5, who was killed while engaged in performance of his or her duties, and the defendant knew or reasonably should have known that the victim was such a peace officer engaged in performance of his or her duties.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter of Title 1 of Part 3 of the Penal Code shall not apply to reduce minimum term of 25 years in state prison when the person is guilty of murder in the second degree and the victim was a peace officer, as defined in this subdivision, and such person shall not be released prior to serving 25 years confinement.

Amended Stats 1987 ch 1006 § 1.

Amendments:

1987 Amendment: (1) Designated the former section to be subd (a); (2) added "Except as provided in subdivision (b)," in the second paragraph of subd (a); and (3) added subd (b).

Note—Stats 1987 ch 1006 provides:

SEC. 2. Section 1 of this act amends an initiative statute and shall become effective only when submitted to and approved by the electors pursuant to subdivision (c) of Section 10 of Article II of the California Constitution.

Witkin Evidence (3d) §§ 24, 153, 162, 511

2. Validity

The Briggs Death Penalty Initiative, adopted by the voters in November 1978 to supplant the Legislature's 1977 death penalty statute (Pen. Code, §§ 190.1-190.3), provides adequate procedural safeguards essential to a constitutional capital sentencing scheme. The 1978 statute suitably

narrows the class of death-eligible persons, and provides for an individualized penalty determination at the sentencing and appeal stages, thereby avoiding the proscription of U.S. Const., Amend., as to arbitrary sentencing procedures. *People v Rodriguez* (1986) 42 Cal 3d 730, 230 Rptr 667, time for *gr* or *den reh* extended.

§ 190.05. [Penalty for second degree murder when defendant served prior prison term for murder; Procedure]

(a) The penalty for a defendant found guilty of murder in the second degree, who has served a prior prison term for murder in the first or second degree, shall be confinement in the state prison for a term of life without the possibility of parole or confinement in the state prison for a term of 15 years to life. For purposes of this section, a prior prison term for murder of the first or second degree is that time period in which a defendant has spent actually incarcerated for his or her offense prior to release on parole.

(b) A prior prison term for murder for purposes of this section includes either of the following:

(1) A prison term served in any state prison or federal penal institution including confinement in a hospital or other institution or facility credited for service of prison time in the jurisdiction of confinement, as punishment for the commission of an offense which includes all of the elements of murder of the first or second degree as defined under California law.

(2) Incarceration at a facility operated by the Youth Authority for murder of the first or second degree when the person was subject to the custody, control, and discipline of the Director of Corrections.

(c) The fact of a prior prison term for murder in the first or second degree shall be alleged in the accusatory pleading, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or not contendere or by trial by the court sitting without a jury.

(d) In case of a reasonable doubt as to whether the defendant served a prior prison term for murder in the first or second degree, the defendant is entitled to a finding that the allegation is not true.

(e) If the trier of fact finds that the defendant has served a prior prison term for murder in the first or second degree, there shall be a separate penalty hearing before the same trier of fact, except as provided in subdivision (f).

(f) If the defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty or nolo contendere, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If the new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in the state prison for a term of 15 years to life.

(g) Evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(h) In the proceeding on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition, and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or the prior prison term for murder of the first or second degree which subjects a defendant to the punishment of life without the possibility of parole, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced

without such notice in rebuttal to evidence introduced by the defendant mitigation.

In determining the penalty, the trier of fact shall take into account all the following factors if relevant:

- (1) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of the prior prison term murder.
- (2) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
- (3) The presence or absence of any prior felony conviction.
- (4) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (5) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- (6) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his or her conduct.
- (7) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
- (8) Whether or not at the time of the offense the ability of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.
- (9) The age of the defendant at the time of the crime.
- (10) Whether or not the defendant was an accomplice to the offense and the nature of his or her participation in the commission of the offense was relatively minor.
- (11) Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider all the factors set forth in this section, and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of life with the possibility of parole if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, the trier of fact shall impose a sentence of confinement in state prison for 15 years to life.

(i) Nothing in this section shall be construed to prohibit the charging, finding of any special circumstance pursuant to Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Added Stats 1985 ch 1510 § 1.

§ 190.1. [Procedure in case involving death penalty]

1. In General

In a murder prosecution in which defendant waived his right to a jury trial on the guilt issue, the trial court erred in failing to obtain a separate waiver of a jury on the trial of the special circumstance allegation of multiple murders. When a jury

has been waived as to the guilt phase of the case, it is impossible to comply with the requirement of Pen. Code, § 190.4, that the special circumstance be tried by a jury, and also comply with the requirement of Pen. Code, § 190.1, that the aggravating and special circumstances be determined by a jury.

same time. Thus, the provision of § 190.4, should prevail, and a personal waiver of a jury on a special circumstance allegation was required. An accused whose special circumstance allegations are to be tried by a court must make a separate, personal waiver of the right to a jury trial. *People v Memro* (1985) 38 Cal 3d 658, 214 Cal Rptr 832, 700 P2d 446.

2. Validity

A state has considerable freedom to structure its capital sentencing system as it sees fit, and the United States Supreme Court is unwilling to say that there is any one right way for a state to set

up its capital sentencing scheme. *Cabana v Bullock* (1986, US) 88 L. Ed 2d 704, 106 S Ct 689, on remand *Bullock v Cabana* (1986, CA5 Miss) 784 F2d 187.

4. Application

The principles of proportionality embodied in the Eighth Amendment bar imposition of the death penalty upon a class of persons who may nonetheless be guilty of the crime of capital murder as defined by state law, that is, the class of murderers who did not themselves kill, attempt to kill, or intend to kill. *Cabana v Bullock* (1986, US) 88 L. Ed 2d 704, 106 S Ct 689, on remand *Bullock v Cabana* (1986, CA5 Miss) 784 F2d 187.

§ 190.2. [Penalty upon finding special circumstance]

Editor's note—The reference to § 447 in subd (17)(viii) is incorrect. On the effect of this error see *Hughes v Superior Court* (1985) 163 CA3d 883 (Hearing granted March 14, 1985).

Calif Trial Handbook 2d (BW,1987) 28:37.

1. In General

The legislative body has the power to define torture for purposes of the special circumstance of murder involving torture (Pen. Code, § 190.2, subd. (a)(18)) in a manner which differs from its definition as a degree of murder (Pen. Code, § 189), so long as the resulting statute is within constitutional limits. However, it should not be presumed that the legislative body intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication. *People v Davenport* (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

2. Validity

Pen. Code, § 190.2, subd. (a)(18), providing for a mandatory penalty of life imprisonment or death for a defendant found guilty of a murder which was intentional and involved the infliction of torture, and which further provides that torture requires proof of the infliction of extreme physical pain no matter how long its duration, is not unconstitutional for failing to distinguish the required pain from that characteristic of most murders. The very use of the term torture imports into the statute a requirement that the perpetrator have sadistic intent to cause the victim to suffer pain in addition to the pain of death, which intent is distinct from the intent to cause the victim's death. It is the state of mind of the torturer which sets the torture murder apart from others who kill with malice aforethought. *People v Davenport* (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

Pen. Code, § 190.2, subd. (a)(18), providing for a mandatory penalty of life imprisonment or death for a defendant found guilty of a murder which was intentional and involved the infliction of torture, and which further provides that torture requires proof of the infliction of extreme physical pain no matter how long its duration, is not unconstitutional as requiring unavailable subjective proof of the victim's experience. The purpose of the statute is to encompass killings in which the

perpetrator intentionally performed acts which were calculated to cause extreme physical pain to the victim and which were inflicted prior to death. The statutory requirement of the infliction of extreme physical pain emphasizes the concern with the physical rather than mental experience of the victim. *People v Davenport* (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

Pen. Code, § 190.2, subd. (a)(18), providing for a mandatory penalty of life imprisonment or death for a defendant found guilty of a murder which was intentional and involved the infliction of torture, is not unconstitutional for failure to require that the defendant have a specific intent to kill the victim. Since the statute is applicable only to cases where the defendant is found guilty of first degree murder (Pen. Code, § 190.2, subd. (a)), the defendant must be found to have had either a wilful, deliberate, and premeditated intent to kill, or some other mental state which has historically been deemed to be equally culpable. *People v Davenport* (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

Pen. Code, § 190.2, subd. (a)(18), providing for a mandatory penalty of life imprisonment or death for a defendant found guilty of a murder which was intentional and involved the infliction of torture, is not unconstitutional for failure to require a specific intent to torture. The electorate which enacted the statute intended to incorporate so much of the established judicial meaning of torture as is not inconsistent with the statute's specific language. Furthermore an alternative constitutional construction to include the specific intent to torture is consistent with the language of the statute, its relationship to the larger statutory scheme, and its relation to the recognized meaning of the terms used. *People v Davenport* (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

Although the special circumstance of murder committed while engaged in the commission of arson (Pen. Code, § 190.2, subd. (a)(17)(viii)), refers to arson in violation of "Pen. Code, § 447," a superseded and nonexistent section, the statute was not unconstitutionally vague as applied to a

defendant charged thereunder, and he was not prejudiced thereby, where he was charged with wilfully and maliciously setting fire to and burning an inhabited structure in violation of Pen. Code, § 451, subd. (b), where the original arson statute, which was Pen. Code, § 447, defined the crime as "the wilful and malicious burning of a building with attempt to destroy it." Section 451, subd. (b), thus constituted a restatement of the prior statute, subject to the rule in Gov. Code, § 9604, that when the provisions of one statute are carried into another under circumstances in which they are required to be construed as restatements and continuations and not as new enactments, any reference made by any statute shall be deemed as a reference to the restatements and continuations. *People v Oliver* (1985, 2d Dist) 168 Cal App 3d 920, 214 Cal Rptr 587.

The provisions of Pen. Code, § 190.2, subd. (a)(7), providing as a special circumstance (making a defendant eligible for the death penalty) that defendant intentionally killed one he knew or reasonably should have known was an on-duty peace officer, violates neither the federal nor the state Constitution. This portion of the 1978 death penalty statute, and particularly the "reasonable knowledge" feature of the peace-officer special circumstance, provides a principled way to distinguish the case from other first degree murders. Sentencing a defendant to death because he should have known his victim was a peace officer measurably contributes to the retributive end of ensuring that the criminal gets his "just desserts." Also, the statute is neither vague nor overbroad. *People v Rodriguez* (1986) 42 Cal 3d 730, 230 Cal Rptr 667, time for or den reh extended.

Pen. Code, § 190.2, subd. (a)(16), providing a special circumstance of punishment for a murder that is motivated by race, color or religion, does not violate U.S. Const., 1st Amend., Establishment of Religion Clause. Such a provision does not advance religion, but merely provides a penalty for conduct resulting in damage, and the argument that the statute's primary effect advances religion and discriminates against nonreligion is without factual or legal basis. *People v Talamantez* (1985, 4th Dist) 169 Cal App 3d 443, 215 Cal Rptr 542.

"Nationality," as used in Pen. Code, § 190.2, subd. (a)(16) (providing a penalty of death or confinement for a term of life without possibility of parole where the victim was intentionally killed because of his race, color, religion, nationality or country of origin), was not unconstitutionally vague as applied to defendant, who was convicted of murder in the first degree (Pen. Code, § 187) with a true finding of the special circumstance that the killing was because of the victim's nationality. The dictionary definition of nationality as "national quality or character," or "the fact or state of belonging to a nation; the status of being a national; a legal relationship between an individual and a nation" provides an easily ascertainable standard of conduct or workable standard of guilt. Further, the evidence offered by the prosecution directly established the fact that defendant killed his victim because of the victim's nationality, and such evidence was sufficient to support the jury's

conclusion that defendant's motive was the thing expressly and clearly proscribed by § subd. (a)(16). *People v Sassounian* (1986, 2d Dist) 182 Cal App 3d 361, 226 Cal Rptr 880.

In a murder prosecution, defendant's sentence in prison without possibility of parole, on the trial court's finding of the special circumstances that the murder was committed during robbery and burglary (Pen. Code, § 190.12, (a)(17)), was not rendered unconstitutional by the trial court's failure to determine that, in addition to being intentional, the killing was wilful, deliberate, and premeditated. None of the guidelines set forth in § 190.2, the death penalty statute, is vague or ambiguous, and imposition of the death penalty on a defendant who has intentionally and unlawfully killed another is constitutionally proper, so long as the discretion of the sentencing authority is governed by clear and objective standards. The statute is not unconstitutional as applied to defendant, since defendant was not sentenced to die, and no authority supports the proposition that the penalty imposed on him was disproportionate to the crime of first degree murder in which the killing was intentional. *People v Epps* (1986, 5th Dist) 182 Cal App 3d 1227 Cal Rptr 625.

The torture murder special circumstance provided by Pen. Code, § 190.2, subd. (a)(18), is unconstitutionally vague and overbroad. Under governing decisional law, which has preserved constitutional validity of the statute by incorporating the established judicial meaning of torture, the extent it is not inconsistent with the purpose of the enactment, proof of a murder committed under the torture-murder special circumstance requires proof of first degree murder where the defendant intended to kill and to torture the victim, and the infliction of an extremely painful act upon a living victim. *People v Williams* (1987) 43 Cal 3d 366, 233 Cal Rptr 48, time for or den reh extended.

3. Construction

To constitute the special circumstance of murder "to perfect an escape from lawful custody within the meaning of Pen. Code, § 190.2, subd. (a)(5), the killing must not only be motivated by the goal of escaping custody, but must take place before the defendant has departed the confines of the prison facility and reached a place of temporary safety outside the confines of the prison. Although the special circumstance of murder "to perfect an escape" was intended to apply to an inmate who kills while breaking out of prison even though he has already escaped from his cell, and should likewise apply to an inmate who is caught during hot pursuit after departing the prison confines, upon reaching a place of temporary safety the escape is "perfected" within the meaning of the statutory language, and the special circumstance is inapplicable to any subsequent killing. *People v Bigelow* (1984) 37 Cal 3d 731, 209 Cal Rptr 328, 691 P2d 994.

In a prosecution for first degree murder with special circumstances, the trial court did not err in failing to instruct the jury that the prosecution must prove that the murder occurred during

commission of both kidnaping as defined in Pen. Code, § 207 (simple kidnaping) and Pen. Code, § 209 (aggravated kidnaping). Although the 1978 death penalty initiative changed the language of former Pen. Code, § 190.2, subd. (c)(3), which provided a special circumstance for murder committed during the commission or attempted commission of "[k]idnaping in violation of Section 207 or 209," to the conjunctive, specifying "[k]idnaping in violation of Sections 207 and 209" (Pen. Code, § 190.2, subd. (a)(17)), the drafters carelessly used the word "and" when "or" was intended, and the intent of the provision is to permit a special circumstance finding if the defendant is convicted of kidnaping under either § 207 or 209, and found to have committed murder while engaged in such kidnaping. *People v Bigelow* (1984) 37 Cal 3d 731, 209 Cal Rptr 328, 691 P2d 994.

In construing Pen. Code, § 190.2, subd. (a)(10), which subjects an individual to a sentence of death or life imprisonment without the possibility of parole if the victim was a witness to a crime and was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, even if the precise meaning of the "criminal proceeding" language was somehow ambiguous, the policy to construe a penal statute as favorably to the defendant as its language and the circumstance of its application may reasonably permit, would preclude application of the witness special circumstance to witnesses in juvenile proceedings. The policy carries particular force because § 190.2, subd. (a)(10), establishes eligibility for the death penalty, an area in which the courts have recognized a heightened constitutional demand for certainty. *People v Weidert* (1985) 39 Cal 3d 836, 218 Cal Rptr 57, 705 P2d 380.

Pen. Code, § 190.2, subd. (a)(10), which subjects an individual to a sentence of death or of life imprisonment without the possibility of parole if the victim "was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceedings . . ." is clear and unambiguous that only witnesses in criminal proceedings are covered, and not witnesses in juvenile proceedings. Welf. & Inst. Code, § 203, provides that a proceeding in a juvenile court shall not be deemed a criminal proceeding, and the failure to except § 190.2, subd. (a)(10), from the umbrella of Welf. & Inst. Code, § 203 is controlling. If § 190.2, subd. (a)(10), were judicially construed to include juvenile delinquency proceedings, the construction would change the legal consequences of an accused's acts completed before the effective date of the judicial construction and would result in a violation of the prohibition against ex post facto laws and a denial of due process for lack of notice. *People v Weidert* (1985) 39 Cal 3d 836, 218 Cal Rptr 57, 705 P2d 380.

The electorate that enacted Pen. Code, § 190.2, subd. (a)(18), intended to incorporate as much of the established judicial meaning of torture as is not inconsistent with the specific language of the initiative; thus the torture-murder special circumstance requires proof of first degree murder, proof that defendant intended to kill and to torture the victim, and the infliction of an extremely painful

act upon a living victim. *People v Leach* (1985) 41 Cal 3d 92, 221 Cal Rptr 826, 710 P2d 893.

In a prosecution for murder (Pen. Code, § 187) the jury was clearly and correctly instructed that first degree murder by torture (Pen. Code, § 189) did not require finding an intent to kill but did require finding an intent to cause cruel pain and suffering from some sadistic purpose, and that the special circumstance of murder involving torture (Pen. Code, § 190.2, subd. (a)(18)) required findings of an intent to kill and suffering by the victim, where the difference between a verdict of first degree murder and a verdict on the alleged special circumstance was explained during voir dire, in the court's formal instructions, and in the arguments of both counsel. In addition, the jury had also been instructed that they must find a first degree murder before they could consider the truth of the special circumstance. *People v Davenport* (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

Pen. Code, § 190.2, subd. (a)(18) providing for a mandatory penalty of life imprisonment or death for a defendant found guilty of a murder which was intentional and which involved infliction of torture, is distinguished from murder by torture (Pen. Code, § 189) in that Pen. Code, § 190.2, subd. (a)(18), requires that the defendant must have acted with the intent to kill. *People v Davenport* (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

Although Pen. Code, § 189, requires that a murder be perpetrated, and the death caused, by torture to elevate a killing to the substantive offense of first degree murder, Pen. Code, § 190.2, subd. (a)(18), requires only that the murder "involve" torture to establish that the murder was committed under special circumstances. Torture as a special circumstance thus refers to a longer period of time and encompasses torture that precedes the actual act of killing. *People v Hoban* (1985, 2d Dist) 176 Cal App 3d 255, 221 Cal Rptr 626.

In a prosecution of defendant for three murders (Pen. Code, § 187) and conspiracy to murder several witnesses (Pen. Code, § 182), it was error for the prosecution to submit, and for the jury to find true, two witness-killing special circumstances (Pen. Code, § 190.2, subd. (a)(10)), instead of one. Nothing in the statute, defining as a special circumstance the intentional killing of a victim to prevent his testimony or the intentional killing of a victim who was a witness in retaliation for testimony, suggests that evidence supporting findings on both theories permits the People to charge and the jury to find two separate special circumstances. A defendant who is shown to have violated a particular special circumstance in more than one way is guilty of no more than one of such a special circumstance violation, although evidence supporting the alternative theories of violation would be properly before the jury and could properly be emphasized by the prosecutor. *People v Allen* (1986) 42 Cal 3d 1222, 232 Cal Rptr 849.

Pen. Code, § 190.2, subd. (a)(17)(vii), requires by its terms only that a murder be committed while defendant was engaged in the commission

of, attempted commission of, or immediate flight after committing or attempting, burglary. Although the statute requires the intent to kill, such intent need not exist at the time of the entry. *People v Lousaunau* (1986, 2d Dist) 181 Cal App 3d 163, 226 Cal Rptr 216.

To fall within the terms of Pen. Code, § 190.2 (murder under special circumstances, justifying penalties of death or life imprisonment without possibility of parole), a killing must be intentional, but there is no requirement that it be willful, deliberate, premeditated, or in "cold blood." *People v Lousaunau* (1986, 2d Dist) 181 Cal App 3d 163, 226 Cal Rptr 216.

The trial court in a murder prosecution properly sentenced defendant to life in prison without possibility of parole based on its finding that the murder was committed while defendant was engaged in a robbery and burglary within the meaning of Pen. Code, § 190.2, subd. (a)(17), without additionally finding that the murder was willful, deliberate, and premeditated. Although the statute has been interpreted to require proof of an intent to kill before a finding of felony-murder special circumstances, the current version of § 190.2, adopted by initiative in 1978, was intended to expand the circumstances under which the penalties of death or life without possibility of parole could be meted out, and specifically omitted the "willful, deliberate, and premeditated" language of the former version. While a review of the initiative and the arguments in support or opposition thereto reasonably leads to the conclusion that the electorate expected that a defendant would have to be found to have intended to kill, a similar conclusion that the electorate assumed that the premeditation and deliberation requirement would remain is unreasonable. *People v Epps* (1986, 5th Dist) 182 Cal App 3d 1102, 227 Cal Rptr 625.

A prior-murder-conviction special circumstance allegation (Pen. Code, § 190.2, subd. (a)(2)) was proper even though the predicate murders on which the allegation was based were committed after the murders which were being tried. The unambiguous language and purpose of Pen. Code, § 190.2, subd. (a)(2) require that a person already convicted of murder in a prior proceeding must be considered eligible for the death penalty if convicted of first degree murder in a subsequent trial. The order of the commission of the homicides is immaterial. Further, § 190.2, subd. (a)(2) does not require a finding of intent to kill. *People v Hendricks* (1987) 43 Cal 3d 584, 238 Cal Rptr 66, 737 P2d 1350.

In a prosecution for the murder of a mother and her unborn fetus, defendant had statutory notice under the multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)), that a fetus may be counted in determining whether multiple murders have taken place. Although the statute does not expressly use the word fetus, it does expressly require conviction of more than one offense of murder in the first or second degree. The meaning of "murder" in the statute is derived from Pen. Code, § 187, subd. (a), which defines murder to include the unlawful killing of a fetus

with malice aforethought. *People v Smith* (1985, 5th Dist) 188 Cal App 3d 1495, 234 Cal Rptr 216.

4. Application

In a prosecution for first degree murder with special circumstances alleged, the trial court in instructing the jury as to the special circumstance that "[t]he murder was intentional carried out for financial gain" (Pen. Code, § 190.2, subd. (a)(1)), where the killing occurred during commission of a robbery. The special circumstances provisions should be construed to minimize cases in which multiple circumstances will be found to the same conduct, thereby reducing the risk that multiple findings on special circumstances prejudice the defendant. Such a limiting construction will not prejudice the prosecution, since there will remain at least one special circumstance, either financial gain or felony murder—applicable in virtually all cases in which the defendant kills to obtain money or other property. The financial gain special circumstance applies only when the victim's death is an essential prerequisite to financial gain sought by the defendant. *People v Bigelow* (1984) 37 Cal 3d 731, 209 Cal Rptr 691 P2d 994.

In a prosecution for first degree murder with special circumstances alleged, the trial court in instructing the jury with respect to the special circumstance of murder committed "for the purpose of avoiding or preventing a lawful arrest" (Pen. Code, § 190.2, subd. (a)(5)), and the verdict finding the murder was committed for the purpose of avoiding arrest was not supported by substantial evidence. There was no evidence that the victim, who had been kidnaped and robbed, was murdered to avoid or prevent a lawful arrest. At the time of the killing defendant and his accomplice were under arrest and were not threatened with imminent arrest. Although the prosecutor surmised that the victim was killed so that he would not report the robbery and kidnaping—a report which might eventually lead to defendant's arrest—this surmise was totally speculative. It was also an unreasonably expansive reading of the special circumstance of avoiding arrest, a reading which would cause that circumstance to overlap extensively with felony murder. The special circumstance of avoiding arrest should be limited to cases in which the arrest is imminent. *People v Bigelow* (1984) 37 Cal 3d 731, 209 Cal Rptr 691 P2d 994.

Proof of intent to kill or to aid a killing is essential to sustain a felony-murder special circumstances allegation under the 1978 death penalty law (Pen. Code, § 190.2, subd. (a)(17)). Reversal is required if the jury's instructions completely eliminate the issue of intent to kill from the jury's consideration unless the erroneous instruction was given regarding an offense for which defendant was acquitted and the instruction had no bearing on the offense for which he was convicted; or defendant conceded the issue of intent; or the issue was necessarily resolved adversely to defendant under proper instructions; or the parties recognized that intent to kill was an issue, presented evidence at their command on the issue, and the record established the necessary intent as a matter of law and showed the contrary evidence to be

worthy of consideration. *People v Cantu* (1984, 5th Dist) 161 Cal App 3d 259, 207 Cal Rptr 460.

Pen. Code, § 190.2, subd. (a)(10), which subjects an individual to a sentence of death or life imprisonment without the possibility of parole if the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, contemplates that it is an accused's subjective intent that is relevant in establishing the special circumstance finding. Thus, if an accused believes himself to be exposed to criminal prosecution and intentionally kills another to prevent that person from testifying in an anticipated or pending criminal proceeding, the special circumstance may be found true whether or not an actual criminal proceeding was pending or about to be initiated. The only relevance of an actual prior and ongoing criminal proceeding is that it may strengthen the inference of the existence of the prescribed purpose; conversely, the prosecution does not have the benefit of this inference when a criminal proceeding has not yet commenced. *People v Weidert* (1985) 39 Cal 3d 836, 218 Cal Rptr 57, 705 P2d 380.

Where an accused's primary goal was not to kidnap the victim but to kill him in order to prevent him from testifying, and where the kidnapping was merely incidental to the murder and not committed to advance an independent felonious purpose, a kidnapping-felony murder special circumstance finding (Pen. Code, § 190.2, subd. (a)(17)(ii)), could not be sustained, and further proceedings on the allegation were barred by the double jeopardy clause. *People v Weidert* (1985) 39 Cal 3d 836, 218 Cal Rptr 57, 705 P2d 380.

In a prosecution for murder (Pen. Code, § 187), with special circumstances alleged, the felony-murder special circumstance (Pen. Code, § 190.2, subd. (a)(17)) necessarily requires proof that the defendant intended to kill. *People v Montiel* (1985) 39 Cal 3d 910, 218 Cal Rptr 572, 705 P2d 1248.

Although defendant was properly convicted of first degree murder based solely on the fact that he was engaged in the felony of robbing, or attempting to rob, the victim at the time of the killing, the jury's finding of the "special circumstance" based on the robbery (Pen. Code, § 190.2, subd. (a)(17)(ii)), on the basis of which defendant became eligible for only the penalties of death or life imprisonment without parole, resulting in defendant's death sentence, was improper. The trial court failed to give the jury the required instruction that it could not find a "special circumstance" based solely on the commission of an underlying felony unless it also found an intent to kill. Additionally, defendant did not concede the issue of intent, the issue was not necessarily resolved against him in that the jury was instructed on both premeditation and felony murder and did not specify by its verdict which theory it chose, and the evidence, including extensive testimony indicating the defendant had not meant to shoot his victim, did not reveal an intent to kill as a matter of law. *People v Balderas* (1985) 41 Cal 3d 144, 222 Cal Rptr 184, 711 P2d 480.

In a prosecution for first degree murder and

other offenses, the trial court committed reversible error in failing to instruct the jury that in order to find true the special circumstances that the murder was committed while defendant was engaged in or was an accomplice in the commission of robbery, burglary, and kidnapping, it must find an intent to kill. The only theory on which the jury was instructed vis-à-vis the murder was felony murder, which does not require a finding of intent to kill, and the evidence did not establish intent to kill as a matter of law, where the coroner was unable to determine the cause of death or whether the victim's head and hands were cut off before or after death, where the one stab wound that was inflicted before death was nonfatal, and where it was possible that the victim might have been killed accidentally, with defendant deciding afterwards to mutilate the body in an attempt to prevent its identification. *People v Hamilton* (1985) 41 Cal 3d 408, 221 Cal Rptr 902, 710 P2d 981.

In a prosecution for first-degree felony murder (Pen. Code, §§ 187, 189) with an attending "special circumstance" that defendant had suffered a previous conviction for second degree murder (Pen. Code, § 190.2, subd. (a)(2)), the trial court's finding that defendant was not the actual killer and did not intentionally aid and abet another in the commission of murder in the first degree prohibited application of the special circumstance of murder with a prior murder conviction, and precluded imposition of a sentence of life imprisonment without possibility of parole. An intent to kill or an intent to aid in a killing is constitutionally mandated when the special circumstance provision alleged is that the defendant previously was convicted of murder. *People v Malone* (1985, 5th Dist) 165 Cal App 3d 31, 211 Cal Rptr 210.

Under the special circumstance for murder committed while lying in wait (Pen. Code, § 190.2, subd. (a)(15)), if a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist. But if there is no such interruption, circumstances calling for the death penalty do exist. Thus, in a prosecution for murder of a pizza deliveryman, committed while he was delivering a pizza to defendants' motel room, and within 20 minutes after he left the pizza parlor, the trial court erred in striking the lying in wait circumstance allegation on the asserted ground that no precise moment as to when the victim died was given. As there was no cognizable interruption to separate the period of lying in wait from the period during which the killing occurred, the precise moment of the victim's death was not the determinative factor. The appropriate inquiry was whether the acts which ultimately caused the victim's death took place during, or at least immediately following some period of watchful waiting from concealment, and the only reasonable inference which could be drawn from the evidence is that they did. *People v Superior Court (Sims)* (1986, 2d Dist) 185 Cal App 3d 471, 230 Cal Rptr 4.

*The single act of murdering the victim known to be pregnant constitutes a multiple homicide for

purposes of the multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)). One illegal act harming multiple persons constitutes a multiple offense justifying separate charges. Thus, in a prosecution for murder of a mother and her unborn fetus, charging special circumstances on both counts for multiple murder, the act of murdering the pregnant mother constituted double homicide for purposes of the multiple murder special circumstance where defendant was intimately familiar with the fact and duration of the mother's pregnancy, and the very motivation for the murder was to rid the father-to-be of the responsibility of caring for the future child. *People v Smith* (1987, 5th Dist) 188 Cal App 3d 1495, 234 Cal Rptr 142.

A person who hires another to kill a human being is subject to the special circumstance finding under Pen. Code, § 190.2, subd. (a)(1), that the murder was intentional and carried out for financial gain, even if the hirer is not himself shown to be financially motivated. Thus, in a prosecution for first degree murder (Pen. Code, §§ 187, 189) in which defendant pleaded *nolo contendere*, the trial court did not err in finding the special circumstance that the murder was intentional and committed for financial gain to be true based solely on

the financial gain to be received by the person to whom defendant offered financial inducement and aided and abetted in the killing of defendant's wife, and not on any financial benefit acquired by defendant. *People v Freeman* (1987, 2d Dist) Cal App 3d 337, 238 Cal Rptr 257.

5. Procedure

Defendant's first degree murder conviction, sustained on a felony-murder theory when the court found that the murder occurred as a result of robbery of the victim, was barred by the doctrine of collateral estoppel, where the jury in an earlier proceeding had convicted him of first degree murder for the same incident, but had rejected special circumstances that the murder had occurred in the course of the robbery. The felony murder instruction (which only requires that the murder occur "as a result of" the robbery) is only slightly different from the special circumstances instruction (which specifies that the murder occur "in the commission of" the robbery) and the definition of felony murder under Pen. Code, § 189, is virtually indistinguishable from language used in Pen. Code, § 190.2(a)(17), to define special circumstances. *People v Asch* (1985, 2d Dist) 173 Cal App 3d 312, 218 Cal Rptr 902.

§ 190.3. [Determination as to penalty of death or life imprisonment]

2. Validity

The 1978 death penalty law, by providing that, if the penalty trial jury finds that "the aggravating circumstances outweigh the mitigating circumstances" it "shall impose" sentence of death" does not unconstitutionally restrict the jury's sentencing discretion. In this context, "weighing" connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each factor he is permitted to consider. The word "shall" does not require any juror to vote for the death penalty unless, after the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. *People v Brown* (1985) 40 Cal 3d 512, 220 Cal Rptr 637, 709 P2d 440.

Pen. Code, § 190.3, subd. (k), which directs the jury in a capital penalty trial to consider, as a mitigating factor, "[a]ny . . . circumstances which extenuate the gravity of the crime even though it is not a legal excuse for the crime," does not unconstitutionally restrict the jury's sentencing discretion by failing to expressly state the jury's further duty to consider in mitigation all other sympathetic evidence the defendant may offer about his character and background, even though unconnected to the charged crime. Trial courts are required, in instructing on the factors embodied in § 190.3, subd. (k), to inform the jury that it may consider as a mitigating factor any other aspect of the defendant's character or record that the defen-

dant proffers as a basis for a sentence less than death. The phrase "any other circumstance which extenuates the gravity of the crime" is an open ended catchall provision, which allows the jury consideration of any mitigating evidence. *People v Brown* (1985) 40 Cal 3d 512, 220 Cal Rptr 637, 709 P2d 440.

The provisions of Pen. Code, § 190.3, permitting a jury, in determining the penalty for first degree murder, to consider both other violent criminal activity by the defendant and any "prior felony conviction" are not void for vagueness in that they suggest to the jury that any "prior felony conviction" introduced by the prosecution was for violent crime. The plain meaning of the provision is that the jury must consider any violent criminal activity by the defendant, whether or not it led to prosecution and conviction, and any "prior felony conviction," whether the underlying offense was violent or nonviolent. The jury instructed in the statutory language could scarcely understand otherwise. *People v Balderas* (1985) 41 Cal 3d 146, 222 Cal Rptr 184, 711 P2d 480.

Pen. Code, § 190.3, relating to the determination of a death penalty or life imprisonment, is not unconstitutional for failing to specifically enumerate separately aggravating and mitigating factors. To exclude nonstatutory aggravating factors as a basis for the death penalty, require written findings on the aggravating factors, require that aggravating factors be proved beyond a reasonable doubt, require that aggravating factors supporting a death verdict be found unanimously, require the jury find beyond a reasonable doubt that aggravating factors outweigh those in mitigation and that

death is the appropriate punishment, and require "intercase" proportionality review. (Per Grodin and Mosk, JJ.) *People v Allen* (1986) 42 Cal 3d 1222, 232 Cal Rptr 849.

The instruction called for by Pen. Code, § 190.3, which advises the jury that the Governor may commute a sentence of life imprisonment without possibility of parole, but which fails to advise that the commutation power extends to death penalties as well, violates the due process guarantee of the California Constitution, because its reference to the commutation power invites the jury to consider matters that are totally speculative and that should not, in any event, influence the jury's determination. The instruction inevitably leads the jury to attempt to predict not only what a particular defendant is likely to be like 20 or more years in the future, when commutation may be considered, but also what unknown actors—future Governors—will do in response to a defendant's future condition. *People v Myers* (1987) 43 Cal 3d 250, 233 Cal Rptr 264, 729 P2d 698, time for *gr* or *den reh* extended.

8. Function of Jury; Matters Considered

The trial court in a first degree felony-murder prosecution erred in permitting the jury to consider, as a "prior felony conviction" to be considered in aggravation (Pen. Code, § 190.3, subd. (c)), defendant's conviction for auto theft one year after the subject murder. Such "prior felony conviction[s]" are limited to those entered before commission of the capital crime, since the rationale of laws calling for harsher penal treatment on the basis of "prior convictions" is that an offender undeterred by his prior brushes with the law deserves more severe criminal treatment. If § 190.3, subd. (c), was intended only as a limitation on the method of proof of nonviolent felonies, the word "prior" is redundant in context, since no other felony "conviction" will be available for introduction at a capital penalty trial unless it has already been entered. Given the limited importance of nonviolent criminality to a death penalty determination, § 190.3, subd. (b), which allows in all evidence of violent criminality to show defendant's propensity for violence, and § 190.3, subd. (c), clearly have separate purposes. *People v Balderas* (1985) 41 Cal 3d 144, 222 Cal Rptr 184, 711 P2d 480.

Pen. Code, § 190.3, subd. (b), which permits the jury which has already decided a first degree murder defendant's guilt to consider, on the issue of penalty, other violent crimes on which defendant was neither charged nor convicted does not deny due process to defendant by prejudicing the penalty jury through its prior view of defendant's serious criminality, or by allowing imposition of the death penalty for unconvicted offenses which were deemed unworthy of prosecution. Even if a separate jury were empaneled to decide the penalty, it would be entitled to hear, in aggravation or mitigation, the circumstances of the crime, including "the existence of any special circumstance found true" at the guilt trial (§ 190.3, subd. (a)). Under these circumstances, the strong legislative preference for a unitary jury outweighs any supposed disadvantage to defendant in the single-jury

process. *People v Balderas* (1985) 41 Cal 3d 144, 222 Cal Rptr 184, 711 P2d 480.

Pen. Code, § 190.3, directing that the jury shall impose the death penalty if it finds that the aggravating factors outweigh the mitigating factors, should not be understood to require any juror to vote for the death penalty. The statute requires the completion of a weighing process wherein a juror decides that death is the appropriate penalty under all of the circumstances. The weighing of aggravating and mitigating circumstances must occur within the context of the two permissible punishments: life without possibility of parole and death. Furthermore, the trial court must instruct the jury as to the scope of its discretion and responsibility. *People v Davenport* (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

9. Evidence

Under Pen. Code, § 190.3, which lists specific aggravating and mitigating factors to be weighed by a jury in determining whether to impose the death penalty, the prosecution may not present evidence at the penalty phase which is not relevant to any of the specific factors listed. Thus, evidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation. *People v Boyd* (1985) 38 Cal 3d 762, 215 Cal Rptr 1, 700 P2d 782.

In capital cases, the cruel and unusual punishment clause of the Eighth Amendment requires that the sentence not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death; and it is a corollary rule that the sentence may not refuse to consider or be precluded from considering any relevant mitigating evidence where it appears likely that the exclusion from evidence at the sentencing hearing of testimony bearing upon the accused's behavior in jail prior to trial, and hence upon his likely behavior in prison, may have affected the jury's decision to impose the death penalty, the exclusion of the evidence is sufficiently prejudicial to constitute reversible error. *Skipper v South Carolina* (1986, US) 90 L Ed 2d 1, 106 S Ct 1669, 20 Fed Rules Evid Serv 241.

10. —Other Criminal Activity

In Pen. Code, § 190.3, the purpose of the exclusion of nonfelonious criminal conduct which does not involve the use or attempted use of force or violence or the threat to use force or violence from the penalty phase of a trial for first degree murder is to prevent the jury from hearing evidence of conduct which is not of a type which should influence a life or death decision. *People v Boyd* (1985) 38 Cal 3d 762, 215 Cal Rptr 1, 700 P2d 782.

At the penalty phase of a trial for first degree murder, the trial court erred in admitting evidence that defendant committed the crime of attempted escape by removing a metal grate from an air vent

in a lockup tank. Pen. Code, § 190.3, expressly excludes evidence of criminal activity, except for felony convictions, which activity did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. Violent injury or the threat of violent injury to property is not sufficient to justify admissibility, and there was no evidence that defendant used or threatened to use force or violence to any person. The evidence was also irrelevant to any of the specific aggravating or mitigating factors listed in Pen. Code, § 190.3. *People v Boyd* (1985) 38 Cal 3d 762, 215 Cal Rptr 1, 700 P2d 782.

Evidence of other "criminal activity" introduced in the penalty phase of a capital case pursuant to former Pen. Code, § 190.3, subd. (d), as an aggravating factor in determining the penalty to impose, must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute. The history of the statute demonstrates only that the Legislature's choice of terms was intended to be sufficiently broad to include crimes for which the defendant had not been convicted, but not to include offenses of which defendant was acquitted, or nonoffenses for which defendant could not even be tried. (Per *Reynoso and Broussard, JJ.*, and *Kaus, J.**)

In the penalty phase of a capital case in which the trial court instructed the jury that in determining the penalty it should take into account the presence or absence of other criminal activity by defendant involving the use or attempted use of force or violence (former Pen. Code, § 190.3, subd. (d)), the trial court erred in failing to tell the jury that they could consider evidence of other criminal activity only if they found beyond a reasonable doubt that defendant had engaged in such activity. (Per *Reynoso and Broussard, JJ.*, and *Kaus, J.**) *People v Phillips* (1985) 41 Cal 3d 29, 222 Cal Rptr 127, 711 P2d 423.

11. Instructions

Because the language of the death penalty statute (Pen. Code, § 190.3, subd. (k)), and in particular the words "shall impose a sentence of death," leave room for some confusion as to the jury's role as the exclusive decisionmaker on the issue of the penalty to be imposed on the defendant, trial courts in future death penalty trials should instruct the jury as to the scope of its discretion and responsibility. *People v Brown* (1985) 40 Cal 3d 512, 220 Cal Rptr 637, 709 P2d 440.

The instruction called for by Pen. Code, § 190.3, which advises the jury that the Governor may

commute a sentence of life imprisonment with possibility of parole, but which fails to advise the commutation power extends to death penalty as well, is manifestly prejudicial to a defendant tried for a capital crime. The instruction presents a classic half-truth that invites a jury to be misled by speculative and improper considerations. It would reasonably be understood by the jury to mean, by negative implication, that a sentence of life without parole may be commuted, but that a death penalty may not. The instruction's pernicious effect is that it may lead the jury to believe that the death penalty is unnecessary, but fears a future commutation will return a death penalty in the mistaken belief that such a sentence alone will preclude any release of the defendant. *People v Myers* (1987) 43 Cal 3d 250, 233 Cal Rptr 264, 729 P2d 698, time for grant or denial extended.

The instruction called for by Pen. Code, § 190.3, which advises the jury that the Governor may commute a sentence of life imprisonment with possibility of parole, but which fails to advise the commutation power extends to death penalty as well, presents a very serious potential for confusion and makes it strongly doubtful that a reviewing court could ever conclude that there is no reasonable possibility that such an instruction improperly tainted a jury's decisionmaking process. *People v Myers* (1987) 43 Cal 3d 250, 233 Cal Rptr 264, 729 P2d 698, time for grant or denial extended.

A jury instruction drawn from Pen. Code, § 190.3, that advises the jury that it shall impose a death sentence if it finds the aggravating circumstances of a defendant's crime outweigh the mitigating, and that it shall impose a sentence without possibility of parole if it finds the aggravations outweigh the aggravations, is potentially misleading unless supplemented by further clarifying descriptions of the jury's task. It may be helpful to inform the jury about the nature of the "weighing process," which is a metaphor for an imponderable process in which jurors are free to give whatever moral or sympathetic value they deem appropriate to each and all the factors considered. Further, the imperative "shall" could mislead the jury as to the ultimate question it is to decide, which is whether, under all the circumstances, death is the appropriate penalty. (Per *Groves and Mosk, JJ.*) *People v Myers* (1987) 43 Cal 3d 250, 233 Cal Rptr 264, 729 P2d 698, time for grant or denial extended.

*Retired Associate Justice of the Supreme Court, sitting under assignment¹ by the Chairperson of the Judicial Council.

§ 190.4. [Special finding on truth of each alleged special circumstance]

Editor's Note—The reference, in subdivision (e), to an application for modification of the verdict pursuant to "Subdivision 7 of Section 11" is apparently an inadvertent error. Instruction reference should be to Penal Code § 1181, subd. 7. See *People v Rodriguez* (1986) 42 Cal 3d 741, 747 fn. 25.

1. In General

In a murder prosecution in which defendant waived his right to a jury trial on the guilt issue, the trial court erred in failing to obtain a separate waiver of a jury on the trial of the special circumstance allegation of multiple murders. When a jury has been waived as to the guilt phase of the case, it is impossible to comply with the requirement of Pen. Code, § 190.4, that the special circumstances be tried by a jury, and also comply with the requirement of Pen. Code, § 190.1, that the guilt and special circumstances be determined at the same time. Thus, the provision of § 190.4, should prevail, and a personal waiver of a jury on a special circumstance allegation was required. An accused whose special circumstance allegations are to be tried by a court must make a separate, personal waiver of the right to a jury trial. *People v Memro* (1985) 38 Cal 3d 658, 214 Cal Rptr 832, 700 P2d 446.

3. Construction

The 1978 version of Pen. Code, § 190.4, subd. (c), providing that after a verdict imposing the death penalty defendant shall be deemed to have applied for modification of the verdict under Pen. Code, § 1181, subd. 7, by the trial judge, like the 1977 version, requires that the trial judge make an independent determination whether imposition of the death penalty upon defendant is proper in light of the relevant evidence and the applicable law. *People v Rodriguez* (1986) 42 Cal 3d 730, 230 Cal Rptr 667, time for grant or deny extended.

An interpretation of Pen. Code, § 190.4 (pertaining to special findings on the truth of each alleged special circumstance) that would require the underlying felonies to be separately charged does not violate the separation of powers doctrine. The district attorney retains discretion to choose whether or not to allege special circumstances; the "charged and proved" requirement merely dictates

what must be done if he does decide to allege special circumstances. *People v Superior Court (Jennings)* (1986, 2d Dist) 183 Cal App 3d 636, 228 Cal Rptr 357.

Pen. Code, § 799, which allows a criminal prosecution for murder to be commenced "at any time," is not a special statute taking priority over the general statute of limitations for commencing prosecution of other crimes (former Pen. Code, § 800, now § 801) upon which a felony-murder special circumstance may be based. Pen. Code, § 190 (describing the available punishments for first and second degree murder), provides that the penalty must be determined as specified in the special circumstance statutes, and thus those statutes take precedence over the general murder statutes. Hence, the requirement of Pen. Code, § 190.4, subd. (a), that the underlying crime be charged and proved pursuant to the general law applying to the trial and conviction of the crime specifically incorporates into each felony-based special circumstance allegation the general law of the underlying felony, including its statute of limitations. *People v Superior Court (Jennings)* (1986, 2d Dist) 183 Cal App 3d 636, 228 Cal Rptr 357.

5. Procedure

Pen. Code, § 190.4, requiring the jury in a capital case to make a special finding on the truth of each alleged special circumstance, contemplates a jury finding on each charge special circumstance by the application of legal principles on which the jury is instructed to the evidence presented to them. The statute does not contemplate that a jury return a special verdict, which presents conclusions of fact and leaves to the court the task of drawing conclusions of law and rendering judgment upon them (Pen. Code, §§ 1150, 1152). *People v Davenport* (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

§ 190.9. [(First of two; Operative until July 1, 1990) Presence of court reporter in all death penalty proceedings]

(a) In any case in which a death sentence may be imposed, all proceedings conducted after the effective date of this section in the justice, municipal, and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present.

The court shall assign a court reporter who uses computer-aided transcription equipment to report all proceedings under this section. Failure to comply with the requirements of this section relating to the assignment of court reporters who use computer-aided transcription equipment shall not be a ground for reversal.

(b) The court may waive the requirement that a court reporter use computer-aided transcription equipment if the court finds on the record that no reporter using computer-aided transcription equipment is available.

(c) This section shall remain in effect only until July 1, 1990, and as of that date is repealed.

Amended Stats 1986 ch 387 § 3; Stats 1987 ch 468 § 1, effective September 9, 1987.

Amendments:

1986 Amendment: Added the second paragraph.

1987 Amendment: (1) Added subdivision designation (a); (2) added the last sentence of subd (a); and (3) added subds (b) and (c).

§ 190.9. [(Second of two; Operative July 1, 1990) Presence of court reporter in all proceedings in which death sentence may be imposed]

(a) In any case in which a death sentence may be imposed, all proceedings conducted after the effective date of this section in the justice, municipal, and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present.

The court shall assign a court reporter who uses computer-aided transcription equipment to report all proceedings under this section. Failure to comply with the requirements of this section relating to the assignment of court reporters who use computer-aided transcription equipment shall not be a ground for reversal.

(b) This section shall become operative on July 1, 1990.

Added Stats 1987 ch 468 § 3, effective September 9, 1987, operative July 1, 1990.

§ 191.5. [Gross vehicular manslaughter while intoxicated]

(a) Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23152 or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

(b) Gross vehicular manslaughter while intoxicated also includes operating a vessel in violation of subdivisions (b) to (e), inclusive, of Section 655 of the Harbors and Navigation Code, and in the commission of an unlawful act, not amounting to felony, and with gross negligence; or operating a vessel in violation of subdivisions (b) to (e), inclusive, of Section 655 of the Harbors and Navigation Code, and in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

(c) Gross vehicular manslaughter while intoxicated is punishable by imprisonment in the state prison for 4, 6, or 10 years.

(d) This section shall not be construed as prohibiting or precluding a charge of murder under Section 188 upon facts exhibiting wantonness and a conscious disregard for life to support a finding of implied malice, or upon facts showing malice consistent with the holding of the California Supreme Court in *People v. Watson*, 30 Cal. 3d 290.

(e) This section shall not be construed as making any homicide in the driving of a vehicle or the operation of a vessel punishable which is not a proximate result of the commission of an unlawful act, not amounting to felony, or of the commission of a lawful act which might produce death, in an unlawful manner.

Added Stats 1986 ch 1106 § 2; Amended Stats 1987 ch 518 § 1.

Amendments:

1987 Amendment: (1) Added subd (b); (2) redesignated former subds (b)-(d) to be subds (c)-(e); and (3) added "or the operation of a vessel" after "vehicle" in subd (e).

Note—Stats 1986 ch 1106 provides:

SECTION 1. The Legislature finds and declares that traffic accidents are the greatest cause of violent death in the United States and that over one-half of the ensuing fatalities are alcohol related.

The Legislature further finds that despite millions of dollars being spent by government at all levels, by private organizations, and by concerned citizen groups on efforts to stop drinking and driving, statistics

continue to indicate the billions of dollars in ann by the intoxicated driver those who voluntarily operate a motor vehicle, capable of exerting great

§ 192. [Manslaughter]
Manslaughter is t of three kinds:

(a) Voluntary—u

(b) Involuntary—felony; or in the c an unlawful mar subdivision shall r

(c) Vehicular—

(1) Except as pro of an unlawful ac driving a vehicle death, in an unlav

(2) Except as pro of an unlawful ac or driving a vehic death, in an unlav

(3) Driving a veh Code and in the but without gros 23152 or 23153 c which might pro negligence.

This section shall a vehicle punisha unlawful act, not which might proc

"Gross negligenc prohibiting or pr exhibiting wanto of implied malice of the California

Amended Stats 1986 ch Amendments:

1986 Amendment: (1) : "paragraph (3)" for "I Driving a vehicle in vic an unlawful act, not an Section 23152 or 23153 death, in an unlawful m (c)(3); and (5) deleted "

Suspension or revocatio ter: Veh C § 13954. Cal Jur 3d (Rev) Delinc Provoked reason in mei UCLA LR 1679.

culpability requirement beyond a reasonable doubt and where evidence on the issue of deliberation was overwhelming. *Key v. People*, 715 P.2d 319 (Colo. 1986); *People v. Tyler*, 728 P.2d 314 (Colo. 1986).

Evidence supports the element of deliberation. Evidence that defendant shot at the

victim three times, twice from behind, is sufficient to support the element of deliberation. *People v. Cisneros*, 720 P.2d 982 (Colo. App.), cert. denied, _____ U.S. _____, 107 S. Ct. 282, _____ L. Ed.2d _____ (1986).

18-3-102. Murder in the first degree. (1) (b) Acting either alone or with one or more persons, he commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault in the first or second degree as prohibited by section 18-3-402 or 18-3-403, or a class 3 felony for sexual assault on a child as provided in section 18-3-405 (2), or the crime of escape as provided in section 18-8-208, and, in the course of or in furtherance of the crime that he is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone; or

Source: Amended, L. 88, p. 712, § 16.

Editor's note: Section 28 of chapter 124, Session Laws of Colorado 1988, provides that the act amending subsection (1)(b) is effective July 1, 1988, and applies to offenses committed on or after said date.

- I. General Consideration.
- II. Elements of Offense.
 - A. In General.
 - D. Extreme Indifference to Life.
- III. Trial and Prosecution.
 - D. Jury.
 - E. Instructions.
- IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Murder after deliberation and felony murder are not separate, etc.

In accord with original. See *People v. Brown*, 731 P.2d 763 (Colo. App. 1986).

Applied in *People v. Bowman*, 738 P.2d 387 (Colo. App. 1987).

II. ELEMENTS OF OFFENSE.

A. In General.

First-degree murder statutes contain rationally different elements than first-degree assault statute, § 18-3-202, and thus a defendant sentenced under the former and not the latter was not denied equal protection of the law. *People v. Brewer*, 720 P.2d 596 (Colo. App. 1985).

D. Extreme Indifference to Life.

Statutory definition of extreme indifference murder, etc.

In accord with 1st paragraph in original. See *Crespin v. People*, 721 P.2d 688 (Colo. 1986).

III. TRIAL AND PROSECUTION.

D. Jury.

Trial by jury may be waived. Since under the statutes there are no mandatory requirements for the jury to determine the degree of murder or to determine the class of felony and because the criminal defendant has a substantive right to waive a jury trial, defendant could properly waive his right to a jury trial even though he was convicted of a class 1 felony. *People v. Cisneros*, 720 P.2d 982 (Colo. App.), cert. denied, _____ U.S. _____, 107 S. Ct. 282, _____ L. Ed.2d _____ (1986).

E. Instructions.

When court must instruct jury on second degree murder.

Trial court does not have to instruct jury on the lesser included offense when there is no evidence to support the instruction. *Jones v. People*, 711 P.2d 1270 (Colo. 1986), reversing *People v. Jones* annotated in the 1986 replacement volume.

IV. VERDICT AND SENTENCE.

Although defendant could not be convicted for felony-murder and murder after deliberation based on killing of single victim, sufficient evidence existed to sustain defendant's conviction for first-degree murder, and thus judgment of conviction for first-degree murder after deliberation and sentence imposed

Lakewood v. District Court, 181 Colo. 69, 506 P.2d 1228 (1973).

Where defense requested instruction defining "intentionally" in terms of new statute which became effective July 1, 1972, but offense had occurred prior to that time, trial

court did not err in refusing such request. People v. Crawford, 191 Colo. 504, 553 P.2d 827 (1976).

Applied in People v. Marlott, 191 Colo. 304, 552 P.2d 491 (1976); Barreras v. People, 636 P.2d 686 (Colo. App. 1981).

18-1-104. "Offense" defined - offenses classified - common-law crimes abolished. (1) The terms "offense" and "crime" are synonymous and mean a violation of, or conduct defined by, any state statute for which a fine or imprisonment may be imposed.

(2) Each offense falls into one of ten classes. There are five classes of felonies as defined in section 18-1-105, three classes of misdemeanors as defined in section 18-1-106, and two classes of petty offenses as defined in section 18-1-107.

(3) Common-law crimes are abolished and no conduct shall constitute an offense unless it is described as an offense in this code or in another statute of this state, but this provision does not affect the power of a court to punish for contempt, or to employ any sanction authorized by law for the enforcement of an order lawfully entered, or a civil judgment or decree; nor does it affect the use of case law as an interpretive aid in the construction of the provisions of this code.

Source: R & RE, L. 71, p. 389, § 1; C.R.S. 1963, § 40-1-104.

Am. Jur.2d. See 21 AM. Jur.2d, Criminal Law, § 1, 6, 7.

C.J.S. See 22 C.J.S., Criminal Law, § 1, 5, 20.

Annotator's note. Since § 18-1-104 is similar to former § 40-1-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Common-law rule. Colorado has statutorily adopted the common-law rule that a crime consisted of the union of an act and intent. Gallegos v. People, 159 Colo. 379, 411 P.2d 956 (1966).

Courts are not precluded from reliance upon the common law in amplification of sections of the criminal code. People v. Berry, 703 P.2d 613 (Colo. App. 1985).

The common law may be used in aid of the meaning to be given statutory language, when such language is not defined in the statute. Allen v. People, 175 Colo. 113, 485 P.2d 886 (1971).

Where a statute does not define a crime, but merely gives to it its common-law name or designation, resort must be had to the common law to ascertain what acts constitute the crime in question. Thompson v. People, 181 Colo. 194, 510 P.2d 311 (1973).

When the general assembly defines a crime and sets forth the intent necessary to commit the crime, the courts cannot alter the elements or substitute a different animus or intent. People v. Kanan, 186 Colo. 255, 526 P.2d 1339 (1974).

The definition of a crime is the same as that of a misdemeanor, each consisting of a violation of a public law. Hoffman v. People, 72 Colo. 552, 212 P. 848 (1923).

And "crime" includes all grades of public offenses, which at the common law are often classified as treason, felony, and misdemeanor. Hoffman v. People, 72 Colo. 552, 212 P. 848 (1923).

The violation of a municipal ordinance does not come within the definition of this section and is neither a crime nor a misdemeanor. City of Greeley v. Hamman, 12 Colo. 94, 20 P. 1 (1888).

Contempt of court. Although the General Assembly in 1971 abolished all common law crimes in Colorado, it reserved to the courts the power to punish contempt by enacting this section. People v. Barron, 677 P.2d 1370 (Colo. 1984).

Applied in People v. Swanson, 638 P.2d 45 (Colo. 1981); City of Greenwood Village v. Fleming, 643 P.2d 511 (Colo. 1982).

18-1-105. Felonies classified - presumptive penalties. (1) (a) (1) As to any person sentenced for a felony committed after July 1, 1979, and before

July 1, 1984, felonies are divided into five classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Presumptive Range
1	Life imprisonment or death
2	Eight to twelve years plus one year of parole
3	Four to eight years plus one year of parole
4	Two to four years plus one year of parole
5	One to two years plus one year of parole

(II) As to any person sentenced for a felony committed on or after July 1, 1984, and before July 1, 1985, felonies are divided into five classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Presumptive Range
1	Life imprisonment or death
2	Eight to twelve years
3	Four to eight years
4	Two to four years
5	One to two years

(III) As to any person sentenced for a felony committed on or after July 1, 1985, in addition to, or in lieu of, any sentence to imprisonment provided for in this paragraph (a), a fine within the following presumptive ranges may be imposed for the specified classes of felonies:

Class	Minimum Sentence	Maximum Sentence
1	No fine	No fine
2	Five thousand dollars	One million dollars
3	Three thousand dollars	Seven hundred fifty thousand dollars
4	Two thousand dollars	Five hundred thousand dollars
5	One thousand dollars	One hundred thousand dollars

(IV) As to any person sentenced for a felony committed on or after July 1, 1985, felonies are divided into five classes which are distinguished from

one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Minimum Sentence	Maximum Sentence
1	Life imprisonment	Death
2	Eight years imprisonment	Twenty-four years imprisonment
3	Four years imprisonment	Sixteen years imprisonment
4	Two years imprisonment	Eight years imprisonment
5	One year imprisonment	Four years imprisonment

(b) (I) Except as provided in subsection (6) and subsection (9) of this section and in section 18-4-202.1, a person who has been convicted of a class 2, class 3, class 4, or class 5 felony shall be punished by the imposition of a definite sentence which is within the presumptive ranges set forth in paragraph (a) of this subsection (I). In imposing the sentence within the presumptive range, the court shall consider the nature and elements of the offense, the character and record of the offender, and all aggravating or mitigating circumstances surrounding the offense and the offender. The prediction of the potential for future criminality by a particular defendant, unless based on prior criminal conduct, shall not be considered in determining the length of sentence to be imposed.

(II) As to any person sentenced for a felony committed on or after July 1, 1985, a person may be sentenced to imprisonment as described in subparagraph (I) of this paragraph (b) or to pay a fine which is within the presumptive ranges set forth in subparagraph (III) of paragraph (a) of this subsection (I), or to both such fine and imprisonment.

(III) Notwithstanding anything in this section to the contrary, as to any person sentenced for a crime of violence, as defined in section 16-11-309, C.R.S., committed on or after July 1, 1985, a person may be sentenced to pay a fine in addition to, but not instead of, a sentence for imprisonment.

(c) Except as otherwise provided by statute, felonies are punishable by imprisonment in the correctional facilities at Canon City. Nothing in this section shall limit the authority granted in part 1 of article 13 of title 16, C.R.S., to increase sentences for habitual criminals. Nothing in this section shall limit the authority granted in part 2 of article 13 of title 16, C.R.S., to commit sex offenders to the department of corrections for an indeterminate term. Nothing in this section shall limit the authority granted in section 18-4-202.1 for increased sentences for habitual burglary offenders.

(2) (a) A corporation which has been found guilty of a class 2 or class 3 felony shall be subject to imposition of a fine of not less than five thousand dollars nor more than fifty thousand dollars. A corporation which has been found guilty of a class 4 or class 5 felony shall be subject to imposition of a fine of not less than one thousand dollars nor more than thirty thousand dollars.

(b) A corporation which has been found guilty of a class 2, class 3, class 4, or class 5 felony, for an act committed on or after July 1, 1985, shall

be subject to imposition of a fine which is within the presumptive ranges set forth in subparagraph (III) of paragraph (a) of subsection (1) of this section.

(3) Every person convicted of a felony, whether defined as such within or outside this code, shall be disqualified from holding any office of honor, trust, or profit under the laws of this state or from practicing as an attorney in any of the courts of this state during the actual time of confinement or commitment to imprisonment or release from actual confinement on conditions of probation. Upon his discharge after completion of service of his sentence or after service under probation, the right to hold any office of honor, trust, or profit shall be restored, except as provided in section 4 of article XII of the state constitution.

(4) A person who has been convicted of a class 1 felony shall be punished by life imprisonment unless the proceeding held to determine sentence according to the procedure set forth in section 16-11-103, C.R.S., results in a verdict which requires imposition of the death penalty, in which event such person shall be sentenced to death. As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1985, life imprisonment shall mean imprisonment without the possibility of parole for forty calendar years.

(5) In the event the death penalty as provided for in this section is held to be unconstitutional by the Colorado supreme court or the United States supreme court, a person convicted of a crime punishable by death under the laws of this state shall be punished by life imprisonment. In such circumstance, the court which previously sentenced a person to death shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment.

(6) In imposing a sentence to incarceration, the court shall impose a definite sentence which is within the presumptive ranges set forth in subsection (1) of this section unless it concludes that extraordinary mitigating or aggravating circumstances are present, are based on evidence in the record of the sentencing hearing and the presentence report, and support a different sentence which better serves the purposes of this code with respect to sentencing, as set forth in section 18-1-102.5. If the court finds such extraordinary mitigating or aggravating circumstances, it may impose a sentence which is lesser or greater than the presumptive range; except that in no case shall the term of sentence be greater than twice the maximum nor less than one-half the minimum term authorized in the presumptive range for the punishment of the offense.

(7) In all cases, except as provided in subsection (9) of this section, in which a sentence which is not within the presumptive range is imposed, the court shall make specific findings on the record of the case, detailing the specific extraordinary circumstances which constitute the reasons for varying from the presumptive sentence.

(8) Repealed, L. 82, p. 312, § 3, effective July 1, 1982.

(9) (a) The presence of any one or more of the following extraordinary aggravating circumstances shall require the court, if it sentences the defendant to incarceration, to sentence the defendant to a term greater than the maximum in the presumptive range, but not more than twice the maximum term authorized in the presumptive range for the punishment of a felony:

(I) The defendant is convicted of a crime of violence under section 16-11-309, C.R.S.;

(II) The defendant was on parole for another felony at the time of commission of the felony;

(III) The defendant was on probation for another felony at the time of the commission of the felony;

(IV) The defendant was charged with or was on bond for a previous felony at the time of the commission of the felony, for which previous felony the defendant was subsequently convicted;

(V) The defendant was under confinement, in prison, or in any correctional institution within the state as a convicted felon, or an escapee from any correctional institution within the state for another felony at the time of the commission of a felony;

(VI) The defendant was under a deferred judgment and sentence for another felony at the time of the commission of the felony;

(VII) At the time of the commission of the felony, the defendant was on parole for having been adjudicated a delinquent child for an offense which would constitute a felony if committed by an adult;

(VIII) At the time of the commission of the felony, the defendant was on appeal bond following his conviction for a previous felony.

(b) In any case in which one or more of the extraordinary aggravating circumstances provided for in paragraph (a) of this subsection (9) exist, the provisions of subsection (7) of this section shall not apply.

(c) Nothing in this subsection (9) shall preclude the court from considering aggravating circumstances other than those stated in paragraph (a) of this subsection (9) as the basis for sentencing the defendant to a term greater than the presumptive range for the felony.

(d) (I) If the defendant is convicted of the class 2 or the class 3 felony of child abuse under section 18-6-401 (7) (a) (I) or (7) (a) (III), the court shall be required to sentence the defendant to a term greater than the maximum in the presumptive range, but not more than twice the maximum term authorized in the presumptive range for the punishment of that class felony.

(II) In no case shall any defendant sentenced pursuant to subparagraph (I) of this paragraph (d) be eligible for suspension of sentence or for probation or deferred prosecution.

(e) (I) If the defendant is convicted of the class 2 felony of sexual assault in the first degree under section 18-3-402 (3), the court shall be required to sentence the defendant to a term greater than the maximum in the presumptive range, but not more than twice the maximum term authorized in the presumptive range for the punishment of that class of felony.

(II) In no case shall any defendant sentenced pursuant to subparagraph (I) of this paragraph (e) be eligible for suspension of sentence or probation.

(III) As a condition of parole under section 17-2-201 (5) (e), C.R.S., a defendant sentenced pursuant to this paragraph (e) shall be required to participate in a program of mental health counseling or receive appropriate treatment to the extent that the state board of parole deems appropriate to effectuate the successful reintegration of the defendant into the community while recognizing the need for public safety.

(f) The court may consider aggravating circumstances such as serious bodily injury caused to the victim or the use of a weapon in the commission

of a crime, notwithstanding the fact that such factors constitute elements of the offense.

Source: R & RE, L. 71, p. 390, § 1; C.R.S. 1963, § 40-1-105; L. 72, p. 267, § 4; L. 73, p. 531, § 83; L. 74, pp. 251, 409, § § 3, 26, 27; L. 76, p. 548, § 7; L. 77, p. 867, § 15; L. 79, pp. 669, 700, § § 16, 69; L. 81, pp. 969, 970, 972, 986, § § 1, 1, 1, 2; L. 82, p. 312, § 3; L. 84, p. 513, § 5; L. 85, pp. 622, 652, 655, 667, 675, § § 5, 7, 1, 3, 4; L. 86, p. 769, § § 1, 2.

Editor's notes: (1) The effective date for amendments made to this section by chapter 216, L. 77, was changed to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

(2) Subsections (9)(a)(VII), (9)(a)(VIII), and (9)(f) are enacted by chapter 136, Session Laws of Colorado 1986, and section 16 of chapter 136 provides that the act set out in that chapter is effective July 1, 1986, and applies to acts committed on or after said date.

Cross references: For one-year supervision for persons released from residential community correctional facilities, see § 17-27-105 (5); for the restoration of citizenship to prisoners following completion of their sentences, see § 17-20-113.

Am. Jur.2d. See 21 Am. Jur.2d, Criminal Law, § § 19, 28, 29; 21A Am. Jur.2d, Criminal Law, § § 1022-1024.

C.J.S. See 22 C.J.S., Criminal Law, § § 5, 6.

Annotator's note. Since § 18-1-105 is similar to former § 39-10-17, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Law reviews. For note, "Disbarment for Crime in Colorado", see 10 Rocky Mt. L. Rev. 203 (1938). For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976). For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Colorado Felony Sentencing an Update", see 14 Colo. Law. 2163 (1985).

Constitutionality of death penalty. The imposition and carrying out of the death penalty was held to constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments of the U.S. constitution. *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed.2d 346 (1972).

Subsection (6) is not unconstitutionally vague and does not deprive a defendant of due process and equal protection on the grounds that no standards are set out in the statute to guide the trial court on what are extraordinary, aggravating or mitigating circumstances. *People v. Phillips*, 652 P.2d 575 (Colo. 1982).

Although the phrase "aggravating or mitigating circumstances" is not defined in the legislative act, that failure does not render the statute unconstitutionally vague. *People v. Phillips*, 652 P.2d 575 (Colo. 1982).

Subsection (6) is not unconstitutionally vague because it allegedly fails to indicate precise standards for imposition of an enhanced sentence. *People v. Wright*, 672 P.2d 518 (Colo. 1983).

Classification does not create substantive offense. A classification of felony does not in and of itself create a substantive offense; it merely establishes the boundaries within which a court may impose a sentence. *People v. Beigel*, 646 P.2d 948 (Colo. App. 1982).

Retroactive application. This section is to be given retroactive application because a defendant is entitled to the benefits of amendatory legislation which mitigates penalties for crimes when the relief is sought before finality has attached to the judgment of conviction. *Salas v. District Court*, 190 Colo. 447, 548 P.2d 605 (1976); *People v. Johnson*, 638 P.2d 61 (Colo. 1981).

1979 amendment inapplicable where crime committed before July 1, 1979. Where acts for which defendants were convicted occurred well in advance of July 1, 1979, the effective date of H.B. 1589, it was not error to refuse to sentence under the provisions of that legislation. *People v. Lopez*, 624 P.2d 1301 (Colo. 1981).

Since the crime for which a defendant was sentenced was committed well before the effective date of either the 1977 or 1979 version of House Bill 1589, he is not entitled to be resentenced under the provisions of those acts. *People v. Stewart*, 626 P.2d 685 (Colo. 1981).

In resentencing a defendant originally convicted before the 1979 reduction in the sentencing range for class 3 felonies, the trial

(2) "Person", when referring to the victim of a homicide, means a human being who had been born and was alive at the time of the homicidal act.

(3) The term "after deliberation" means not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.

Source: R & RE, L. 71, p. 417, § 1; C.R.S. 1963, § 40-3-101; L. 74, p. 251, § 1.

Cross references: For the statutory provision which declares that the withholding or withdrawal of life-sustaining procedures does not constitute suicide or homicide, see § 15-18-111; for the effect of homicide on probate matters, see § 15-11-803.

Am. Jur.2d. See 40 Am. Jur.2d, Homicide, § 1.

C.J.S. See 40 C.J.S., Homicide, § 1.

Meaningful distinction between first and second degree murder intended. The general assembly intended that there be a meaningful distinction between first and second degree murder. *People v. Mullins*, 188 Colo. 23, 532 P.2d 733 (1975).

Killing may be perpetrated by any means by which death may be occasioned. The unlawful killing may be perpetrated by poisoning, sticking, starving, drowning, stabbing, shooting, or by any other of the various forms or

means by which human nature may be overcome, and death thereby occasioned. *May v. People*, 8 Colo. 210, 6 P. 816 (1885).

Use of a deadly weapon is not in itself sufficient to show deliberation. *People v. Hamrick*, 624 P.2d 1333 (Colo. App. 1979), aff'd. 624 P.2d 1320 (Colo. 1981).

Applied in *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Madson*, 638 P.2d 18 (Colo. 1981); *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Fields*, 697 P.2d 749 (Colo. App. 1984).

18-3-102. Murder in the first degree. (1) A person commits the crime of murder in the first degree if:

(a) After deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person; or

(b) Acting either alone or with one or more persons, he commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault in the first or second degree as prohibited by section 18-3-402 or 18-3-403, or a class 3 felony for sexual assault on a child as provided in section 18-3-405 (2), and, in the course of or in furtherance of the crime that he is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone; or

(c) By perjury or subornation of perjury he procures the conviction and execution of any innocent person; or

(d) Under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another.

(2) It is an affirmative defense to a charge of violating subsection (1) (b) of this section that the defendant:

(a) Was not the only participant in the underlying crime; and

(b) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

- (c) Was not armed with a deadly weapon; and
- (d) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
- (e) Did not engage himself in or intend to engage in and had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious bodily injury; and
- (f) Endeavored to disengage himself from the commission of the underlying crime or flight therefrom immediately upon having reasonable grounds to believe that another participant is armed with a deadly weapon, instrument, article, or substance, or intended to engage in conduct likely to result in death or serious bodily injury.

(3) Murder in the first degree is a class 1 felony.

Source: R & RE, L. 71, p. 418, § 1; C.R.S. 1963, § 40-3-102; L. 74, p. 251, § 2; L. 75, pp. 617, 632, § § 5, 5; L. 77, p. 960, § 5; L. 81, p. 973, § 4.

Cross references: For affirmative defenses generally, see § § 18-1-407, 18-1-710, and 18-1-815.

- I. General Consideration.
- II. Elements of Offense.
 - A. In General.
 - B. Premeditation.
 - C. Felony Murder.
 - D. Extreme Indifference to Life.
- III. Trial and Prosecution.
 - A. In General.
 - B. Indictment or Information.
 - C. Evidence.
 - D. Jury.
 - E. Instructions.
- IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Am. Jur.2d. See 40 Am. Jur.2d, Homicide, § § 45-52, 72.

C.J.S. See 40 C.J.S., Homicide, § § 30-34.

Annotator's note. Since § 18-3-102 is similar to former § § 40-2-1 and 40-2-3, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Law reviews. For article, "Should Ralph Fleagle Hang?", see 7 Dicta 10 (Nov. 1929); 7 Dicta 17 (Jan. 1930). For comment on Reppin v. People (95 Colo. 192, 34 P.2d 71 (1934)), see 7 Rocky Mt. L. Rev. 209 (1935). For article, "One Year Review of Criminal Law", see 34 Dicta 98 (1957). For article, "One Year Review of Criminal Law and Procedure", see 36 Dicta 34 (1959). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For comment on Bizup v. People (150 Colo. 214, 371 P.2d 786 (1962)), see 35 U. Colo. L. Rev. 435 (1963). For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L. J. 137 (1972). For article, "The Jurisprudence of Death by Another:

Accessories and Capital Punishment", see 51 U. Colo. L. Rev. 17 (1979). For note, "Extreme-Indifference Murder: The Impact of People v. Marcy", see 54 U. Colo. L. Rev. 83 (1982).

Section constitutional. Since there is a rational difference expressed by the general assembly between first degree murder and second degree murder, the first degree murder statute is constitutional. People v. Speed, 183 Colo. 96, 514 P.2d 776 (1973).

This section defines murder. See People v. People, 173 Colo. 351, 478 P.2d 972 (1970).

Murder after deliberation and felony murder are not separate and independent offenses, but only ways in which criminal liability for first degree murder may be charged and prosecuted. People v. Lowe, 660 P.2d 1261 (Colo. 1983).

Election of theories not required. The prosecution should be allowed to charge multiple theories of first degree murder in separate counts, and it may, but should not be required to, elect among theories after the evidence is closed. People v. Freeman, 668 P.2d 1371 (Colo. 1983).

Defendant can be convicted only of one first degree murder for one killing, as two convictions for one killing would result in enhanced collateral punishment. People v. Lowe, 660 P.2d 1261 (Colo. 1983).

The rule of lenity prohibits the entry of dual convictions and sentences for felony murder and murder after deliberation when the convictions and sentences are predicated upon the killing of a single victim. People v. Bartowsheski, 661 P.2d 235 (Colo. 1983).

Dual convictions and sentences may not be entered on the murder after deliberation and

Applied in *Rocha v. People*, 713 P.2d 350 (Colo. 1986); *People v. Wieghard*, 743 P.2d 977 (Colo. App. 1987).
(Colo. 1986); *People v. Sanders*, 717 P.2d 948

16-11-310. Release from incarceration.

Repealed. L. 88, p. 715, § 25, effective July 1, 1988.

Editor's note: Section 28 of chapter 124, Session Laws of Colorado 1988, provides that the act repealing this section applies to offenses committed on or after July 1, 1988.

PART 4

DEATH PENALTY - EXECUTION

16-11-401. Death penalty inflicted by lethal injection. The manner of inflicting the punishment of death shall be by the administration of a lethal injection within the time prescribed in this part 4, unless for good cause the court or governor may prolong the time. For the purposes of this part 4, "lethal injection" means a continuous intravenous injection of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death.

Source: Amended, L. 88, p. 671, § 1.

Editor's note: Section 3 of chapter 113, Session Laws of Colorado 1988, provides that the act amending this section is effective July 1, 1988, and applies to offenses subject to the death penalty committed on or after said date.

16-11-402. Implements - sentence executed by executive director. The executive director of the department of corrections, at the expense of the state of Colorado, shall provide a suitable and efficient room or place, enclosed from public view, within the walls of the correctional facilities at Canon City and therein at all times have in preparation all necessary implements requisite for carrying into execution the death penalty by means of the administration of a lethal injection. The execution shall be performed in the room or place by a person selected by the executive director and trained to administer intravenous injections. Death shall be pronounced by a licensed physician or a coroner according to accepted medical standards.

Source: Amended, L. 88, p. 671, § 2.

Editor's note: Section 3 of chapter 113, Session Laws of Colorado 1988, provides that the act amending this section is effective July 1, 1988, and applies to offenses subject to the death penalty committed on or after said date.

PART 5

SENTENCES TO PAYMENT OF FINES - COSTS

16-11-501. Judgment for costs and fines. (1) Where any person, association, or corporation is convicted of an offense, the court shall give judgment

Fifteen to twenty-year sentence was not excessive for aggravated robbery and a crime of violence. *People v. Colasanti*, 626 P.2d 1136 (Colo. 1981).

Applied in *People v. Smith*, 195 Colo. 404, 579 P.2d 1129 (1978); *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978); *People v. Girard*, 196 Colo. 68, 582 P.2d 666 (1978); *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979); *Watson v. District Court*, 199 Colo. 76, 604 P.2d 1165 (1980); *People v. Swain*, 43 Colo. App. 343, 607 P.2d 396 (1979); *People in Interest of R.R.*, 43 Colo. App. 208, 607 P.2d 1013 (1979); *People v. Hardin*, 199 Colo. 229, 607 P.2d 1291 (1980); *People v. Martinez*, 43 Colo. App. 419, 608 P.2d 359 (1979); *People v. Cabral*, 629 P.2d 575 (Colo. 1981); *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981); *People v. Francis*, 630

P.2d 82 (Colo. 1981); *People v. Valencia*, 630 P.2d 85 (Colo. 1981); *People v. Jones*, 631 P.2d 1132 (Colo. 1981); *People v. Flowers*, 644 P.2d 916 (Colo. 1982); *People v. Gallegos*, 644 P.2d 920 (Colo. 1982); *People v. Constant*, 645 P.2d 843 (Colo. 1982); *People v. Garries*, 645 P.2d 1306 (Colo. 1982); *People v. Bookman*, 646 P.2d 924 (Colo. 1982); *People v. Bueno*, 646 P.2d 931 (Colo. 1982); *People v. Hogan*, 649 P.2d 326 (Colo. 1982); *People v. Aragon*, 653 P.2d 715 (Colo. 1982); *People v. Ferguson*, 653 P.2d 725 (Colo. 1982); *Watkins v. People*, 655 P.2d 834 (Colo. 1982); *People v. Dillion*, 655 P.2d 841 (Colo. 1982); *People v. Cooper*, 662 P.2d 478 (Colo. 1983); *People v. District Court*, 603 P.2d 616 (Colo. 1983); *People v. SMith*, 709 P.2d 4 (Colo. App. 1985).

16-11-310. Release from incarceration. Except as provided in section 7 of article IV of the state constitution relating to the power of the governor to grant reprieves and pardons, an incarcerated person shall be unconditionally released and discharged upon the expiration of his sentence, less the deductions authorized in article 22.5 of title 17, C.R.S.

Source: L. 77, p. 865, § 12; L. 79, p. 666, § 10.

PART 4

DEATH PENALTY - EXECUTION

16-11-401. Death penalty inflicted by lethal gas. The manner of inflicting the punishment of death shall be by the administration of lethal gas within the time prescribed in this part 4, unless for good cause the court or governor may prolong the time.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-401.

Am. Jur.2d. See 21 Am. Jur.2d, Criminal Law, § 612.

C.J.S. See 24B C.J.S., Criminal Law, § 2002.

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950).

16-11-402. Appliances - sentence executed by executive director. The executive director of the department of corrections, at the expense of the state of Colorado, shall provide a suitable and efficient room or place, enclosed from public view, within the walls of the correctional facilities at Canon City and therein construct and at all times have in preparation all necessary appliances requisite for carrying into execution the death penalty by means of the administration of lethal gas. The punishment of death in each case of death sentence pronounced in this state shall be inflicted by the executive director or his designee in the room or place and with the

appliances provided for inflicting the punishment of death by the administration of lethal gas.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-402; L. 76, p. 530, § 3; L. 79, p. 682, § 11.

Am. Jur.2d. See 21 Am. Jur.2d, Criminal Law, § 610.

C.J.S. See 24B C.J.S., Criminal Law, § § 2002, 2003.

16-11-403. Week of execution - warrant. When a person is convicted of a class 1 felony, the punishment for which is death, and the convicted person is sentenced to suffer the penalty of death, the judge passing such sentence shall appoint and designate in the warrant of conviction a week of time within which the sentence must be executed; the end of such week so appointed shall be not less than ninety days nor more than one hundred twenty days from the day of passing the sentence. Said warrant shall be directed to the executive director of the department of corrections or his designee commanding said executive director or his designee to execute the sentence imposed upon some day within the week of time designated in the warrant and shall be delivered to the sheriff of the county in which such conviction is had, who, within three days thereafter, shall proceed to the correctional facilities at Canon City and deliver the convicted person, together with the warrant, to said executive director or his designee, who shall keep the convict in confinement until infliction of the death penalty. No person shall be allowed access to said convict, except his attendants, counsel, and physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-403; L. 76, p. 531, § 4; L. 79, p. 682, § 12.

Am. Jur.2d. See 21 Am. Jur.2d, Criminal Law, § 610.

C.J.S. See 24B C.J.S., Criminal Law, § § 1613, 2002.

Annotator's note. Since § 16-11-403 is similar to repealed § 39-11-3, CRS 1963, CSA, C. 48 § 538, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Meaning of "week of time". The week of time which is required by this section to be appointed and designated in capital cases within which the sentence must be executed, is a period of time extending from 12 midnight Saturday until 12 midnight the following Saturday, but an error in the designation of the week is rendered immaterial when the execution is stayed by the supreme court pending review. *Mora v. People*, 19 Colo. 255, 35 P. 179 (1893).

Court fixes date of execution following stay. The court has authority to fix the date of execution in cases of affirmance, where the execution has been stayed upon appeal or supersedeas. *Mora v. People*, 19 Colo. 255, 35 P. 179 (1893).

But definite date set in order granting stay did not deny due process. The fact that the state supreme court set a definite execution date pending determination of post-conviction relief was not "suggestion of predetermination" in violation of due process and did not constitute an implied direction to deny petitioner relief. *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo.), aff'd, 402 F.2d 394 (10th Cir. 1968), cert. denied, 403 US 955, 91 S. Ct. 2279, 29 L. Ed.2d 865 (1971).

Procedure of delivery of prisoner by sheriff held not improper. *Agnes v. People*, 104 Colo. 527, 93 P.2d 891 (1939).

Applied in *Medley*, Petitioner, 134 U.S. 160, 10 S.Ct. 384, 33 L. Ed. 835 (1890).

16-11-404. Execution - witnesses. The particular day and hour of the execution of said sentence within the week specified in said warrant shall

be fixed by the executive director of the department of corrections or his designee but shall not be made public by him, and he shall be present thereat or shall appoint some other representative among the officials or officers of the correctional facilities at Canon City to be present in his place and stead. There shall also be present a physician and such guards, attendants and other persons as the executive director or his designee in his discretion deems desirable, not to exceed fifteen persons. The executive director or his designee shall notify the governor of the day and hour for the execution, as soon as it has been fixed.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-404; L. 76, p. 531, § 5; L. 79, p. 682, § 13.

Am. Jur.2d. See 21 Am. Jur.2d, Criminal Law, § 610.

C.J.S. See 24B C.J.S., Criminal Law, § 2002.

16-11-405. Record and certificate of execution. The executive director of the department of corrections or his designee shall keep a book of record to be known as record of executions, in which shall be entered the reports specified in this section. Immediately after the execution, a postmortem examination of the body of the convict shall be made by the attending physician, who shall enter in said book of record the nature and extent of the examination and sign and certify to the same. The executive director or his designee shall also immediately make and enter in said book a report, setting forth the time of such execution and that the convict (naming him) was then and there executed in conformity to the sentence specified in the warrant of the court (naming such court) to him directed and in accordance with the provisions of this part 4, and shall insert in said report the names of all the persons who were present and witnessed the execution, and shall procure each of such persons to sign said report with his full name and place of residence before leaving the place of execution. The executive director or his designee shall thereupon attach his certificate to said report, certifying to the truth and correctness thereof, and shall immediately deliver a certified transcript of the record entry to the court which sentenced the convict.

Source: R & RE, L. 72, p. 251, § 1; C.R.S. 1963, § 39-11-405; L. 76, p. 531, § 6; L. 79, p. 683, § 14.

PART 5

SENTENCES TO PAYMENT OF FINES - COSTS

16-11-501. Judgment for costs and fines. (1) Where any person, association, or corporation is convicted of an offense, the court shall give judgment in favor of the state of Colorado and against the offender for the amount of the costs of prosecution and any fine imposed. No fine shall be imposed for conviction of a felony except as provided in section 18-1-105, C.R.S. Such judgments shall be enforceable in the same manner as are civil judgments, and, in addition, the provisions of section 16-11-502 shall be applicable.

of three years by specifying minimum terms and to add Subdiv. (3) re unclassified felonies and ~~amended~~ Subsec. (d) to add exception re Subsec. (c)(2) and to include applicability re unclassified felonies; P.A. 73-137 ~~removed~~ reference to death sentence imposed for class A felony in accordance with Sec. 53a-46 in Subsec. (b)(1) and added Subdiv. (6) re capital felonies; P.A. 74-186 removed reference to guilt under Subdiv. (2) or (4) of Sec. 53a-60(a) in Subsec. (c) (2)(B); P.A. 75-380 added exception in Subsec. (d) re required one-year term; P.A. 75-411 deleted reference to guilt under Sec. 53a-135(a)(2) in Subsec. (c)(2)(B); P.A. 76-435 added exception in Subsec. (d) as amended by P.A. 75-380; P.A. 77-422 expanded exception in Subsec. (c) (2)(B) re required three-year and two-year minimum terms and added reference to guilt under Sec. 53-59a; P.A. 80-442 amended Subsec. (a) to limit applicability to felonies committed prior to July 1, 1981, effective on that date; P.A. 83-587 substituted "53a-59a" for "53-59a" in Subsec. (c).

Cited. 169 C. 263, 264. Cited. 176 C. 270, 271. Cited. 180 C. 557, 560. Cited. 182 C. 595, 597-599, 602. Cited. 190 C. 327, 335; Id., 639, 642.

Cited. 1 CA 724, 734.

Courts may impose a definite sentence for a felony of one year or less. 31 CS 350. ~~Cited.~~ 33 CS 705.

Subsec. (a):

Cited. 171 C. 278. Cited. 189 C. 114, 116. Cited. 196 C. 655, 658.

Subsec. (b):

Subdiv. (2) cited. 189 C. 114, 116, 117. Cited. 193 C. 144, 151. Subdiv. (1) cited. 195 C. 326, 328. Subdiv. (2) ~~cited.~~ 195 C. 326, 328. Subdiv. (4) cited. 199 C. 121, 124.

Subsec. (c):

Subdiv. (2)(B). Rational relationship exists between the protection of public health and safety and the imposition of nonsuspendable sentence for violent crime of second degree robbery, an essential element of which is threatened use of a deadly weapon or dangerous instrument. 171 C. 677, 681. Subdiv. (2) cited. 182 C. 595, 599; 189 C. 114, 117. Subdiv. (2)(B) cited. 182 C. 595, 601, 603. Cited. 193 C. 144, 151. Subdiv. (1) cited. Id., 144, 153. Subdiv. (2) cited. Id. Subdiv. (1) cited. 195 C. 326, 328. Subdiv. (2) cited. Id. Subdiv. (2) cited. 197 C. 413, 427. Subdiv. (2) cited. Id., 485, 482, 500, 503. Subdiv. (2) cited. 199 C. 121, 124.

Sec. 53a-35a. Imprisonment for any felony committed on or after July 1, 1981: Definite sentences; terms authorized. For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and the term shall be fixed by the court as follows: (1) For a capital felony, a term of life imprisonment without the possibility of release unless a sentence of death is imposed in accordance with section 53a-46a; (2) for the class A felony of murder, a term not less than twenty-five years nor more than life; (3) for a class A felony other than murder, a term not less than ten years nor more than twenty-five years; (4) for a class B felony, a term not less than one year nor more than twenty years, except that for a conviction under section 53a-55a, 53a-59(a) (1), 53a-59a, 53a-70a, 53a-94a, 53a-101(a)(1) or 53a-134(a)(2), the term shall be not less than five years nor more than twenty years; (5) for a class C felony, a term not less than one year nor more than ten years, except that for a conviction under section 53a-56a, the term shall be not less than three years nor more than ten years; (6) for a class D felony, a term not less than one year nor more than five years, except that for a conviction under section 53a-60b, the term shall be not less than two years nor more than five years, and for a conviction under section 53a-60c, the term shall be not less than three years nor more than five years; (7) for an unclassified felony, a term in accordance with the sentence specified in the section of the general statutes that defines the crime.

(P.A. 80-442, S. 10, 28; P.A. 86-220.)

History: P.A. 80-442 effective July 1, 1981; P.A. 86-220 amended Subdiv. (1) to add "imprisonment without the possibility of release" to reflect revision made by P.A. 85-366.

Cited. 196 C. 655, 659. Cited. 197 C. 337, 353, 355, 357. Cited. 198 C. 92, 94. ~~Cited.~~ 200 C. 268, 279.

Cited. 6 CA 680, 681.

Subdiv. (3):

Cited. 198 C. 671, 674.

Subdiv. (5):

Cited. 6 CA 680, 681.

Sec. 53a-35b. "Life imprisonment" defined. A sentence of imprisonment for life shall mean a definite sentence of sixty years, unless the sentence is life imprisonment without the possibility of release, imposed pursuant to subsection (f) of section 53a-46a,

fixed by the court, not to exceed double the amount of the defendant's gain from the commission of the offense. In such case the court shall make a finding as to the amount of the defendant's gain from the offense, and if the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue. For purposes of this section the term "gain" means the amount of money or the value of property derived.

(1969, P.A. 828, S. 44.)

Sec. 53a-45. Murder: Penalty; waiver of jury trial; finding of lesser degree. (a) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony.

(b) If a person indicted for murder or held to answer for murder after a hearing conducted in accordance with the provisions of section 54-46a waives his right to a jury trial and elects to be tried by a court, the court shall be composed of three judges designated by the chief court administrator or his designee, who shall name one such judge to preside over the trial. Such judges, or a majority of them, shall determine the question of guilt or innocence and shall, as provided in said section 53a-46a, render judgment and impose sentence.

(c) The court or jury before which any person indicted for murder or held to answer for murder after a hearing conducted in accordance with the provisions of section 54-46a is tried may find him guilty of homicide in a lesser degree than that charged.

(1969, P.A. 828, S. 45; P.A. 73-137, S. 1; P.A. 80-442, S. 13, 28; P.A. 82-298, S. 4; P.A. 83-210, S. 2, 3.)

History: P.A. 73-137 added reference to capital felonies in Subsec. (a) and substituted reference to Sec. 53a-46a for reference to Sec. 53a-46, deleted former Subsec. (b) which had allowed person indicted for murder to plead guilty with consent of court and state's attorney in which case court would sentence him as for a Class A felony, relettering former Subsecs. (c) and (d) accordingly; P.A. 80-442 specified punishment in accordance with Sec. 53a-35a and deleted reference to death sentenced under Sec. 53a-46a in Subsec. (a), effective July 1, 1981; P.A. 82-298 amended Subsec. (b) to provide that court shall be composed of three judges designated by chief court administrator, who shall also name one such judge to preside, where previously one judge was the judge presiding at the session and the other two were designated by the chief justice of the supreme court; P.A. 83-210 amended Subsecs. (b) and (c) by inserting "or held to answer for murder after a hearing conducted in accordance with the provisions of section 54-46a".

See annotations to part IV.

Cited. 187 C. 6, 28.

Subsec. (b):

Cited. 180 C. 382, 404. Cited. 190 C. 639, 640. Cited. 198 C. 77, 90. Cited. 199 C. 163, 165.

Subsec. (c):

Constitutionally permissible for a jury to find a defendant indicted for murder guilty of homicide in a lesser degree where the evidence supports such a finding although the state of mind required is different. 180 C. 382, 399, 400, 402, 403, 407. Cited. 181 C. 187, 200; id., 406, 412. Cited. 182 C. 66, 71, 72. Cited. 187 C. 6, 28. Cited. 188 C. 542, 546. Cited. 190 C. 639, 652. Cited. 193 C. 695, 732. Cited. 195 C. 232, 243. Manslaughter is not lesser included offense of felony murder. 196 C. 421, 422, 427.

Cited. 7 CA 180, 187.

Sec. 53a-46. Sentencing proceedings; appeal. Section 53a-46 is repealed.

(1969, P.A. 828, S. 46; 1972, P.A. 56, S. 1; P.A. 73-137, S. 15.)

Sec. 53a-46a. Hearing on imposition of death penalty. Aggravating and mitigating factors. (a) A person shall be subjected to the penalty of death for a capital felony only if a hearing is held in accordance with the provisions of this section.

(b) For the purpose of determining the sentence to be imposed when a defendant is convicted of or pleads guilty to a capital felony, the judge or judges who presided at the

trial or before whom the guilty plea was entered shall conduct a separate hearing to determine the existence of any mitigating factor concerning the defendant's character, background and history, or the nature and circumstances of the crime, including any mitigating factor set forth in subsection (g), and any aggravating factor set forth in subsection (h). Such hearing shall not be held if the state stipulates that none of the aggravating factors set forth in subsection (h) of this section exists or that one or more mitigating factors exist. Such hearing shall be conducted (1) before the jury which determined the defendant's guilt, or (2) before a jury impaneled for the purpose of such hearing if (A) the defendant was convicted upon a plea of guilty; (B) the defendant was convicted after a trial before three judges as provided in subsection (b) of section 53a-45; or (C) if the jury which determined the defendant's guilt has been discharged by the court for good cause or, (3) before the court, on motion of the defendant and with the approval of the court and the consent of the state.

(c) In such hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report which may have been prepared. No presentence information withheld from the defendant shall be considered in determining the existence of any mitigating or aggravating factor. Any information relevant to any mitigating factor may be presented by either the state or the defendant, regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, but the admissibility of information relevant to any of the aggravating factors set forth in subsection (h) shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any mitigating or aggravating factor. The burden of establishing any of the factors set forth in subsection (h) shall be on the state. The burden of establishing any mitigating factor shall be on the defendant.

(d) In determining whether a mitigating factor exists concerning the defendant's character, background or history, or the nature and circumstances of the crime, pursuant to subsection (b) of this section, the jury or, if there is no jury, the court shall first determine whether a particular factor concerning the defendant's character, background or history, or the nature and circumstances of the crime, has been established by the evidence, and shall determine further whether that factor is mitigating in nature, considering all the facts and circumstances of the case. Mitigating factors are such as do not constitute a defense or excuse for the capital felony of which the defendant has been convicted, but which, in fairness and mercy, may be considered as tending either to extenuate or reduce the degree of his culpability or blame for the offense or to otherwise constitute a basis for a sentence less than death.

(e) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence of any aggravating or mitigating factor.

(f) If the jury or, if there is no jury, the court finds that one or more of the factors set forth in subsection (h) exist and that no mitigating factor exists, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that none of the factors set forth in subsection (h) exists or that one or more mitigating factors exist, the court shall impose a sentence of life imprisonment without the possibility of release.

(g) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided in subsection (e), that

any mitigating factor exists. The mitigating factors to be considered concerning the defendant shall include, but are not limited to, the following: That at the time of the offense (1) he was under the age of eighteen or (2) his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution or (3) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution or (4) he was criminally liable under sections 53a-8, 53a-9 and 53a-10 for the offense, which was committed by another, but his participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution or (5) he could not reasonably have foreseen that his conduct in the course of commission of the offense of which he was convicted would cause, or would create a grave risk of causing, death to another person.

(h) If no mitigating factor is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in subsection (e) that (1) the defendant committed the offense during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of, a felony and he had previously been convicted of the same felony; or (2) the defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person; or (3) the defendant committed the offense and in such commission knowingly created a grave risk of death to another person in addition to the victim of the offense; or (4) the defendant committed the offense in an especially heinous, cruel or depraved manner; or (5) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value; or (6) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

(P.A. 73-137, S. 4; P.A. 80-332, S. 1; 80-442, S. 14, 28; P.A. 85-366, S. 1.)

History: P.A. 80-332 restated provision and referred to mitigating or aggravating factors throughout, replacing references to factors set forth in Subsecs. (f) and (g); P.A. 80-442 referred to imposition of sentence in accordance with Sec. 53a-35a(1) rather than to sentence for a Class A felony in Subsec. (e), effective July 1, 1981; P.A. 85-366 added a new Subsec. (d) to specify the procedure for the determination by a jury or court of the existence of a mitigating factor and to add a definition of mitigating factors, relettered the remaining Subsecs. and amended Subsec. (f) to replace "a sentence in accordance with Sec. 53a-35a(1)" with "a sentence of life imprisonment without the possibility of release".

See Sec. 53a-35b re definition of "life imprisonment".

See Sec. 53a-35c re availability of sentence of life imprisonment without possibility of release.

Former Sec. 53-10 unconstitutional. 164 C. 162. Cited. 197 C. 436, 440.

Subsec. (e):

Cited. 199 C. 163, 166.

Subsec. (f):

Cited. 199 C. 163, 165.

Subsec. (g):

Cited. 199 C. 163, 166.

Sec. 53a-46b. Review of death sentence. (a) Any sentence of death imposed in accordance with the provisions of section 53a-46a shall be reviewed by the supreme court pursuant to its rules. In addition to its authority to correct errors at trial, the supreme court shall either affirm the sentence of death or vacate said sentence and remand for imposition of a sentence in accordance with subdivision (1) of section 53a-35a.

(b) The supreme court shall affirm the sentence of death unless it determines that: (1) The sentence was the product of passion, prejudice or any other arbitrary factor; (2) the evidence fails to support the finding of an aggravating circumstance specified in subsection (h) of section 53a-46a; or (3) the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

(c) The sentence review shall be in addition to direct appeal and if taken, the review and appeal shall be consolidated for consideration. The court shall then render its decision on the legal errors claimed and the validity of the sentence.

(P.A. 80-332, S. 2; P.A. 81-472, S. 151, 159; P.A. 85-366, S. 2.)

History: P.A. 81-472 made technical changes; P.A. 85-366 made a technical change to reflect changes made to Sec. 53a-46a by same public act.

Sec. 53a-46c. Applicability of death penalty provisions in effect on October 1, 1980. The provisions of sections 53a-46a and 53a-46b in effect on October 1, 1980, shall be applicable to any person who is convicted of or pleads guilty to a capital felony under subdivisions (1) to (6), inclusive, of section 53a-54b on or after June 13, 1983.

(P.A. 83-327, S. 1, 2.)

Sec. 53a-47. Disposition of person found not guilty by reason of mental disease or defect. Confinement and examination. Release. Section 53a-47 is repealed.

(1969, P.A. 828, S. 47; P.A. 75-476, S. 5, 6; P.A. 78-280, S. 1, 2, 115, 127; P.A. 81-301, S. 2; P.A. 83-486, S. 2; P.A. 85-506, § 31, 32.)

PART III*

INCHOATE OFFENSES

*Annotations to former section 54-197:

To constitute conspiracy there need be no formal agreement between the parties; conspiracy may be established by proof of separate acts of individual conspirators with common purpose. 129 C. 540. Principles stated which prevent a charge of conspiracy against certain participants in unlawful acts. 132 C. 335. Conspiracy is a distinct offense, entirely independent of the unlawful act which is its purpose. 134 C. 183. Conspiracy may be inferred from activities of accused persons. 138 C. 292. Where a prima facie case is made out, court is entitled to take into consideration the fact that defendant failed to testify. 139 C. 229. Declaratory judgment that a violation would exist. 142 C. 53. Cited. 145 C. 124; 150 C. 230; 152 C. 167. No formal agreement need be proven; it is enough if there is a mutual purpose to do the forbidden act. 147 C. 296. Information charging a conspiracy may properly allege acts done in furtherance of the conspiracy. Information charged that defendants conspired to commit larceny and in pursuance of the conspiracy stole copper wire worth \$2000. Since larceny statute made theft of property worth more than \$50 a felony, effect of the information was to charge a conspiracy to commit a felony. Not necessary for state to prove that the unlawful object of the conspiracy was ever successfully accomplished or that any larceny was ever committed in any amount. Confessions made by two conspirators were not admissible to prove guilt of third conspirator. Since court made that clear in instructions to jury, third conspirator could not complain of admission of confessions in evidence. 149 C. 640. Fact that one or more persons jointly charged with the commission of a crime pleaded guilty is not admissible, on trial of another person so charged, to establish that the crime was committed. A plea of guilty is, in effect, a confession of guilt which, having been made by one of those charged with the crime, can be no more than hearsay as to another who is so charged. The state must prove the whole case against any accused. 150 C. 195. Where one of alleged coconspirators is acquitted, this does not necessarily make fatal convictions of other coconspirators. 151 C. 592. Crime of conspiracy at common law is unlawful combination and accomplishment of objectives of conspiracy is not material. 157 C. 330. Once defendant had been proved to be member of conspiracy, declarations of coconspirators in furtherance of conspiracy could be used against him. 158 C. 412. Warrant authorizing search for "...paraphernalia which could be used to violate Sec. 54-197" was general warrant and therefore was illegal and did not meet constitutional requirement that search warrant particularly describe things to be seized. 160 C. 28, 33 - 37. Admission of evidence that defendant denied he knew coconspirators was reversible error when interrogation was made in absence of defendant's counsel. 159 C. 608. Essence of crime of conspiracy is unlawful combination coupled with

or is an object of the conspiracy, except that an attempt or conspiracy to commit a class A felony is a class B felony.

(1969, P.A. 828, S. 52.)

Cited. 182 C. 395, 598, 600-602. Cited. 184 C. 369. Cited. 195 C. 183, 185.

Sec. 53a-52. Conviction; sentencing. Section 53a-52 is repealed.

(1969, P.A. 828, S. 53; 1971, P.A. 871, S. 129.)

PART IV*

HOMICIDE

*Annotations to former section 53-9:

Necessity of stating degree of crime in indictment; 38 C. 399; 47 C. 117; of alleging deliberation and premeditation when it alleges first degree. 50 C. 198. Unlawful homicide perpetrated in commission of rape is in the first degree; 72 C. 729, in commission of robbery or in attempt to rob. 110 C. 307; id., 559; 123 C. 670; 126 C. 59; 132 C. 44. Homicide committed by driving automobile recklessly. 82 C. 671; 83 C. 437; 109 C. 491. What mental capacity necessary for first degree murder. 77 C. 509; charge as to defense of insanity; 87 C. 7; 96 C. 242; burden of proof; id., 639; when court need not charge as to insanity. 87 C. 285. Actual malice must be proved beyond a reasonable doubt. 43 C. 518; 64 C. 305; 78 C. 25. Malice is implied if homicide is wilful, deliberate and premeditated; 46 C. 326, 109 C. 138; but not in the case of sufficient provocation or uncontrollable passion. 74 C. 181. Malice is implied where an unlawful homicide is unattended by extenuating circumstances. 110 C. 307; id., 559. What constitutes malice; 64 C. 305; 74 C. 181; 128 C. 44; charge as to it. 79 C. 590; 84 C. 472; 87 C. 5; 98 C. 463; 103 C. 484; 106 C. 351; rebutted by reasonable belief that victim committed adultery with accused's wife. 74 C. 177; 87 C. 5; 92 C. 71; evidence of statements by accused and feeling towards victim; 74 C. 177; 83 C. 261; 84 C. 472; 87 C. 5; 88 C. 177; malice presumed from circumstances of atrocity. 84 C. 152. Theft as motive. 79 C. 590; 96 C. 126. Intoxication admissible on question of deliberation; 40 C. 143; 41 C. 587; 49 C. 382; where indulged in to nerve person to carry out preconceived plan; 48 C. 97; as bearing on malice; 64 C. 305; as a defense. 83 C. 165; 87 C. 291; 88 C. 256; 89 C. 472; 57 C. 313; 79 C. 590; 83 C. 261; 106 C. 455; 105 C. 349; or defense of home. 57 C. 313; 88 C. 360. Suicide of victim as a defense; her statements as to intent. 77 C. 267. Alibi. 84 C. 152; 98 C. 466. Charge as to corpus delicti. 83 C. 22. See note re 152 C. 15, infra. Burden and amount of proof: reasonable doubt; 77 C. 267; 79 C. 590; 81 C. 22; 87 C. 573; 89 C. 139; as to malice. 78 C. 25. Homicide in general; nature and definition of degrees. 72 C. 729; 74 C. 180. When court should charge as to excuse, justification or extenuation. 84 C. 470; 87 C. 285; 98 C. 463; 103 C. 484. Murder in second degree; 87 C. 5; 128 C. 44; 131 C. 60; in case of poisoning; 19 C. 393. What facts will reduce crime to manslaughter. 74 C. 180; 78 C. 18; 79 C. 590; 87 C. 585. Under indictment for murder accused cannot be found guilty of any crime except murder in first or second degree or manslaughter. 132 C. 41. Bad prison food no justification. 38 C. 127. Effect of plea of not guilty. 87 C. 285; of plea of guilty; 78 C. 18; 88 C. 208. Confession or admissions by accused; 18 C. 180; 78 C. 18; 92 C. 65 et seq.; 103 C. 478; declarations before grand jury. 56 C. 413. Momentary absence of accused from trial. 82 C. 59. Evidence equivalent to that of two witnesses; for jury to determine. 78 C. 18; 90 C. 126; 93 C. 246; 103 C. 467; 106 C. 714. Appeal as supersedeas; 82 C. 59; if decided before time set for execution by reprieve, supreme court need not set another day. 81 C. 22. Clothes of victim as evidence; 82 C. 59; so empty cartridge shells found in accused's room. 74 C. 649. Where two indicted together, charge that state had not made out a case as to three upheld. 87 C. 285. Abandonment of enterprise by one before murder. 47 C. 139; 97 C. 329; 110 C. 309. Evidence of other unconnected crimes generally inadmissible; when such evidence is admissible. 92 C. 530; 97 C. 266; 103 C. 480; 120 C. 631. When separate trials should be given persons jointly accused. 92 C. 62; 97 C. 323; 98 C. 461; 147 C. 194. Time required for deliberation. 93 C. 246; 110 C. 561; 120 C. 629. Degree of murder is for jury; power of court to set aside. Id., 244; 106 C. 705. Admissibility of dying declarations. 90 C. 387; 93 C. 337. Mental tests of accused; expert testimony as to insanity; reading medical textbooks. 96 C. 250. Conspiracy to commit homicide in perpetration; abandonment of enterprise by some of conspirators. 97 C. 329. Change of venue; alibi; testimony of accomplice. 98 C. 466; 105 C. 333. When witnesses should be segregated. 103 C. 473. Premeditation is necessary for first degree murder. 106 C. 352. As to use and effect of verdict of not guilty on ground of insanity. see 39 C. 595; 96 C. 243. Possession of a deadly weapon with bearing on existence of malice. 109 C. 138; 110 C. 308. An inference of guilt may be drawn from failure of accused to take stand and deny facts within his knowledge which tend to prove his guilt. 109 C. 144; 109 C. 463; but failure of accused to take stand must not be commented on. Id. In prosecution for homicide by reckless operation of an automobile, conduct of accused in leaving victims lying in road without stopping, unexplained, supports an inference of guilt. 109 C. 494. Rule concerning responsibility of conspirators to commit an unlawful act for a homicide by one of them in carrying it out. 126 C. 59; 132 C. 44, 45. Has not changed common-law definition of murder but provides more severe penalty when certain features are present. 128 C. 44. Actual intent to kill not necessary in second degree murder. 131 C. 60. Jury may determine case under original charge by finding accused guilty of a lesser offense where such a conviction is warranted and is the only one warranted upon the evidence. 137 C. 114. Unskillful or improper treatment of wound by surgeons does not relieve defendant of responsibility for his crime. Id. Distinction between murder and manslaughter is the presence of malice in the one and its absence in the other. Court's charge held sufficient. 139 C. 89. Charge on intoxication and alcoholic beverages sustained. Id., 317. A killing in an attempted robbery is murder in the first degree even though killing itself is accidental. Id., 475. Cited. 141 C. 656; 143 C. 167; 145 C. 60; 154 C. 272, 286. A wilful, deliberate and premeditated killing is murder in the first degree. 142 C. 117. Court refuses to adopt "Durham" rule. 146 C. 137. Assault with intent to rob within premeditation

or attempted perpetration of a robbery. 146 C. 227. Even if there is a confession, there must be extrinsic corroborative evidence which will, when taken in connection with the confession, establish the corpus delicti in the mind of the trier beyond a reasonable doubt. 147 C. 95. Standard to determine sanity or mental capacity of the defendant to commit murder. *Id.* Adoption of Wigmore definition of "corpus delicti." Previous definitions overruled. 152 C. 15. Charge re what constitutes malice upheld. 152 C. 81. History discussed; claim that guilty plea to second degree murder should have been taken before three judges, that jury should have determined degree of homicide and that sentence should have been imposed by three judges, disallowed. 153 C. 320. et seq. Absence of element of wilful, deliberate and premeditated murder in indictment for murder in first degree justifies jury verdict of guilty of murder in second degree. 154 C. 624. Malice aforethought defined. *Id.*, 627. Court should have permitted defendant to change his plea where it appeared trial court's concern that defendant be exposed to possible electrocution if found guilty on trial for first degree murder was prime basis for denial; defendant must decide risk. 157 C. 492. Length of time necessary to form specific intent may be long or short. 158 C. 341. Voluntary drunkenness, while no excuse for crime, may make person mentally incapable of intent of premeditation which is element of murder in first degree. *Id.* Preconviction bail in capital cases is governed by section 8 of article first of constitution as well as Sec. 54-53. Cited. 159 C. 264. Evidence produced by state was adequate to show defendants were in danger of being convicted of capital offense under this section, hence bail could be denied under exception provided in section 8 of article I of state constitution. 159 C. 285. Cited. 159 C. 347. Cited. 161 C. 219. Cited. 166 C. 630. Trial judges direction to jury not coercive in context of circumstances in which given. 167 C. 408.

Where accused pleaded guilty to second degree murder, fact that court in imposing sentence did not consist of a presiding judge and two other judges and that no witnesses were heard and that the degree of crime was not determined by a majority of the judges did not invalidate the conviction. 20 CS 127. Cited. 26 CS 175.

Annotations to former section 53-10:

Failure of deceased to exercise due care not a defense. 110 C. 61. Act of accused need not be immediate cause of the death. *Id.*, 62. Cited. 139 C. 401; 141 C. 656; 150 C. 459; 152 C. 344; 154 C. 272, 275. Not retroactive. 142 C. 29. Constitutionality of statute re recommendation for life imprisonment. 145 C. 60. Death penalty does not constitute cruel and unusual punishment in violation of eighth amendment to U. S. constitution and court will not vitiate legislative determination of punishment for crimes. 158 C. 341. Preconviction bail in capital cases is to be governed by Sec. 54-53 in light of section 8 of article first of state constitution. 159 C. 264. Cited. 161 C. 219. Cited. 169 C. 13.

Annotations to former section 53-11:

Court had authority to impose consecutive life sentences for two second degree murders. 152 C. 600-602. Cited. 154 C. 622, 624.

Cited. 25 CS 473.

Annotation to former section 53-13:

The intentional inflicting of a wound from which death ensues within a year and a day may be either murder or manslaughter. 44 C. 540. If blow produces condition which results in death, this sufficient; reasonable doubt. 87 C. 573. By reckless driving of automobile. 82 C. 671; 83 C. 457; 109 C. 491. One who engages with others in a common purpose to carry on an activity in a reckless manner or with wanton disregard for the safety of others is guilty of involuntary manslaughter, even though he is not present when the homicide occurs. 138 C. 281. Distinction between murder and manslaughter is the presence of malice in the one and its absence in the other. 139 C. 89. Cited. 153 C. 325. Cited. 163 C. 305.

Cited. 22 CS 175; *id.*, 497, 499; 23 CS 248; 25 CS 473; 26 CS 215; 27 CS 73. Sentence of not less than five nor more than ten years in state prison confirmed by review division where defendant had in jealousy killed woman with whom he lived after observing her with another man. 27 CS 353. Sentence of not less than five nor more than ten years should stand where defendant entered a fight between his two companions, knocked victim to the ground and stabbed him with his knife. *Id.*, 370.

Annotations to former section 53-17:

What constitutes "gross negligence." 120 C. 234. Cited. 130 C. 147. Contributory negligence no defense to gross or wilful misconduct or gross negligence. 154 C. 23. Age of accused not a criterion in determination of his gross or wilful misconduct or his gross negligence. *Id.* Statute does not require actual contact between accused's vehicle and deceased or vehicle in which deceased was riding. *Id.*

Cited. 25 CS 84; 26 CS 36, 27 CS 232.

Annotations to chapter 952, part IV:

Unconstitutionally broad discretion. 164 C. 162. Cited. 184 C. 597, 598.

Secs. 53a-53 and 53a-54. Homicide defined. Murder defined; affirmative defenses; evidence of mental condition; classification. Sections 53a-53 and 53a-54 are repealed.

(1969, P.A. 828, S. 54, 55; 1971, P.A. 871, S. 129; P.A. 73-137, S. 15.)

Sec. 53a-54a. Murder defined. Affirmative defenses. Evidence of mental condition. Classification. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed

act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, ~~manslaughter in the~~ first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, ~~mental defect or~~ other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony.

(P.A. 73-137, S. 2; P.A. 80-442, S. 15, 28; P.A. 83-486, S. 4.)

History: P.A. 80-442 amended Subsec. (c) to specify punishment in accordance with Sec. ~~53a-35a~~ deleting reference to death penalty imposed as provided by Sec. 53a-46a for capital felony, effective July 1, 1980. P.A. 83-486 amended Subsec. (a) by replacing "acted" with "committed the proscribed act or acts".

See Sec. 53a-54b re capital felony.

See Sec. 53a-54c re felony murder.

Cited. 171 C. 241. Cited. 173 C. 414, 415. Cited. 176 C. 508, 509; 177 C. 1, 2, 8-10. Cited. 178 C. 450, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Cited. 7 CA 180, 181, 184. Cited. Id., 223, 224. Cited. Id., 470, 472.

Cited. 40 CS 38.

Subsec. (a):

Cited. 172 C. 65, 69. "Extreme emotional disturbance" guidelines. 177 C. 1, 3, 4, 7. Cited. 178 C. 487, 489, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Cited. 7 CA 180, 182. Cited. Id., 367, 370. Cited. Id., 457-459.

Subsection must be read without the word "affirmative." The state must prove beyond a reasonable doubt all of the elements of the offense charged without imposing any burden on the defendant. 33 CS 28, 81.

Subsec. (b):

Cited. 182 C. 603, 606. Evidence of mental capacity admissible when defendant is charged with commission of crime under which state must prove defendant acted recklessly. 195 C. 232, 240, 241.

Subsec. (c):

Cited. 180 C. 171, 173. Cited. 181 C. 151, 153. Cited. 193 C. 144, 151, 153. Cited. Id., 351, 352. Cited. 194 C. 376, 380, 383. Cited. Id., 392, 393. Cited. Id., 416, 418. Cited. Id., 530, 559, 560. Cited. Id., 555, 661, 662.

Sec. 53a-54b. Capital felony. A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the division of state police within the department of public safety or of any local police department, a chief inspector or inspector in the division of criminal justice, a sheriff or deputy sheriff, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18, an official of the department of correction authorized by the commissioner of correction to make arrests in a correctional institution or facility, or of any fireman as defined in subsection (10) of section 53a-3, while such victim was acting within the scope of his duties; (2) murder committed by a defendant who is found to commit the

same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain; (3) murder committed by one who has previously been convicted of intentional murder or murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; (6) the illegal sale, for economic gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone; (7) murder committed in the course of the commission of sexual assault in the first degree; (8) murder of two or more persons at the same time or in the course of a single transaction.

(P.A. 73-137, S. 3; P.A. 77-604, S. 39, 84; 77-614, S. 486, 610; P.A. 80-335; P.A. 85-144.)

History: P.A. 77-604 substituted "chief inspector or inspector in the division of criminal justice" for "county detective" in Subdiv. (1); P.A. 77-614 made state police department a division within the department of public safety, effective January 1, 1979; P.A. 80-335 added Subdivs. (7) and (8) making murder in course of committing sexual assault in first degree and murder of two or more persons at same time a capital felony; P.A. 85-144 amended Subdiv. (6) by adding "economic" and deleting the proviso that the seller was not, at the time of such sale, a drug-dependent person.

See Sec. 53a-54a re murder.

See Sec. 53a-54c re felony murder.

Cited. 194 C. 416, 418. Cited. 198 C. 92, 110. Cited. 199 C. 163, 174, 177, 178.

Subdiv. (2):

Capital felony murder discussed. 199 C. 163, 164, 173, 174, 176, 178.

Subdiv. (5):

Cited. 197 C. 436, 439, 461.

Subdiv. (8):

Cited. 198 C. 92, 110.

Sec. 53a-54c. Felony murder. A person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit robbery, burglary, kidnapping, sexual assault in the first degree, sexual assault in the first degree with a firearm, sexual assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, he, or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant: (A) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (B) was not armed with a deadly weapon, or any dangerous instrument; and (C) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (D) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(P.A. 74-186, S. 11, 12; P.A. 76-336, S. 21; P.A. 79-570, S. 2.)

History: P.A. 76-336 replaced rape in first degree, deviate sexual intercourse in first degree and sexual contact in first degree with sexual assault in first degree, sexual assault in first degree with firearm, sexual assault in third degree and sexual assault in third degree with firearm; P.A. 79-570 removed murder resulting from commission of or attempt to commit arson from purview of section.

See Sec. 53a-54a re murder.

See Sec. 53a-54b re capital felony.

Cited. 171 C. 683, 687. Cited. 176 C. 257, 258. Cited. 177 C. 677, 679. Cited. 178 C. 116, 118. Cited. 179 C. 78-80. Court did not err in refusing to instruct jury on lesser offenses of first degree burglary and first degree robbery since element of causation, which differentiates felony murder from the lesser offenses, was not sufficiently in dispute. 180 C. 599, 601, 602, 604. Cited. 181 C. 151, 153; id., 187, 188. Cited. 182 C. 419, 420; id., 580. Cited (1975 revision). 183 C. 299, 300, 311. Cited. 186 C. 1, 2, 7. Cited. 188 C. 542, 543, 545, 550. Cited. 189 C. 346, 347. Cited. 191 C. 636, 638-641, 644; id., 659-663. Cited. 193 C. 70, 72, 75. Cited. Id., 144, 145, 151. Cited. Id., 350, 352. Cited. 194 C. 223, 224. Cited. Id., 279, 285. Cited. Id., 416, 419. Cited. Id., 530, 559, 565. Cited. 195 C. 505, 506. Manslaughter is not a lesser included

Effect of amendments. — 66 Del. Laws, c. 269, effective June 15, 1988, inserted "unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact," following "rape" throughout subsection (a) and following

"the rape" in subsection (b), and inserted "attempted unlawful sexual intercourse, attempted unlawful sexual penetration or attempted unlawful sexual contact," in subsection (b).

§ 3509. Same — Admissibility of certain evidence.

(a) Notwithstanding any other provision of this Code to the contrary, and except as provided in this section, in any prosecution for rape, unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact, any opinion evidence, reputation evidence and evidence of specific instances of the complaining witness' sexual conduct, or any of such evidence, is not admissible by the defendant in order to prove consent by the complaining witness. (66 Del. Laws, c. 269, § 6.)

Effect of amendments. — 66 Del. Laws, c. 269, effective June 15, 1988, inserted "unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact," following "rape" in subsection (a).

As the rest of this section was not amended, it is not reprinted in this Supplement.

CHAPTER 39. SENTENCE, JUDGMENT AND EXECUTION

§ 3905. Instructions on separate issues of guilt and insanity; instructions on verdicts.

Guilty but mentally ill instruction required where warranted by evidence. — Where warranted by the evidence, guilty but

mentally ill instruction is required regardless of a defendant's desire to avoid it. *Daniels v. State*, Del. Supr., 538 A.2d 1104 (1988).

CHAPTER 42. CLASSIFICATION OF OFFENSES; SENTENCES

Sec.

4206. Sentence for misdemeanors.

4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.

Sec.

4209A. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.

4214. Habitual criminal; life sentence.

§ 4206. Sentence for misdemeanors.

(a) The sentence for a class A misdemeanor shall be fixed by the court and shall not exceed 2 years' imprisonment and such fine or other conditions as the court may order; provided, however, that the court shall require a person convicted of issuing a worthless check under § 900 of this title to make restitution to the person to whom the worthless check was issued. For purposes of this section, "restitution" shall mean the amount in which the check was

written plus a service fee in the amount of \$30 for processing a worthless check, or a fee of \$50 for processing more than 1 worthless check issued by the same person.

(66 Del. Laws, c. 253, § 1.)

Effect of amendments. — 66 Del. Laws, c. 253, effective May 19, 1986, added the last sentence in subsection (a).

As the rest of this section was not amended, it is not reprinted in this Supplement.

§ 4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.

(e) *Aggravating circumstances.*— (1) In order for a sentence of death to be imposed, the jury, unanimously, or judge when applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder:

j. The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary.

(66 Del. Laws, c. 269, § 29.)

Effect of amendments.

66 Del. Laws, c. 269, effective June 15, 1988, inserted "rape," in subsection (e)(1)j.

As the rest of this section was not amended, it is not reprinted in this Supplement.

Constitutionality of capital punishment.

Death by hanging is not "cruel and unusual" punishment in violation of the Eighth Amendment to the United States Constitution, nor is it "cruel" in violation of Article I, § 11 of the Delaware Constitution. *DeShields v. State*, Del. Supr., 534 A.2d 630 (1987).

Standing to challenge constitutionality of death by hanging. — Given the General Assembly-enacted alternative of death by lethal injection, defendant sentenced prior to the 1986 amendment to the section lacked standing to challenge the constitutionality of death by hanging. *DeShields v. State*, Del. Supr., 534 A.2d 630 (1987).

Unconstitutional sentencing infirmity

does not invalidate underlying conviction.

— Invalidity of this section did not retrospectively abrogate the State's right to death-qualify the jury and unconstitutional sentencing infirmity does not invalidate the underlying conviction. *Hobbs v. State*, Del. Supr., 538 A.2d 723 (1988).

Right to impartial jury not violated by death qualification of jury under invalid statute. — Defendant was not deprived of his federal and state constitutional rights to an impartial jury as a result of the death-qualification of the jury in trial under a constitutionally invalid capital punishment statute. *Hobbs v. State*, Del. Supr., 538 A.2d 723 (1988).

A death-qualified jury is not necessarily conviction prone simply because the conviction was rendered in a trial occurring under a mandatory death penalty statute later declared to be unconstitutional. *Hobbs v. State*, Del. Supr., 538 A.2d 723 (1988).

§ 4209A. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.

Any person who is convicted of rape or unlawful sexual intercourse in the first degree shall be punished by imprisonment for not less than 20 years

without benefit of probation or parole or any other reduction. (63 Del. Laws, c. 393, § 1; 65 Del. Laws, c. 494, § 3; 66 Del. Laws, c. 269, § 30.)

Effect of amendments.

66 Del. Laws, c. 269, effective June 15, 1988,
inserted "rape or."

§ 4214. Habitual criminal; life sentence.

(b) Any person who has been 2 times convicted of a felony or an attempt to commit a felony hereinafter specifically named, under the laws of this State, and/or any other state, United States or any territory of the United States, and who shall thereafter be convicted of a subsequent felony hereinafter specifically named, or an attempt to commit such specific felony, is declared to be an habitual criminal, and the court in which such third or subsequent conviction is had, in imposing sentence, shall impose a life sentence upon the person so convicted unless the subsequent felony conviction requires or allows and results in the imposition of capital punishment. Such sentence shall not be subject to the probation or parole provisions of Chapter 43 of this title.

Such felonies shall be:

<i>Section</i>	<i>Crime</i>
803	Arson in the first degree
826	Burglary in the first degree
825	Burglary in the second degree
636	Murder in the first degree
635	Murder in the second degree
632	Manslaughter
783	Kidnapping in the second degree
783A	Kidnapping in the first degree
613	Assault in the first degree
763	Rape in the second degree
764	Rape in the first degree
766	Sodomy in the first degree
832	Robbery in the first degree
771	Unlawful sexual penetration in the second degree
772	Unlawful sexual penetration in the first degree
773	Sexual intercourse in the third degree
774	Unlawful sexual intercourse in the second degree
775	Unlawful sexual intercourse in the first degree
<i>Title 16, Section</i>	<i>Crime</i>
4751	Manufacture, delivery or possession with intent to manufacture or deliver a narcotic drug
4752	Manufacture, delivery or possession with intent to manufacture or deliver nonnarcotic, controlled substance
4752A	Unlawful delivery or attempt to deliver noncontrolled substance

11 § 4205 CLASSIFICATION OF OFFENSES; SENTENCES 11 § 4205

(k) The court may direct as a condition to any sentence of imprisonment that the Department of Correction shall not permit an offender to be furloughed or be allowed to participate in work release or supervised custody outside the prison institution or facilities. (11 Del. C. 1953, § 4204; 58 Del. Laws, c. 497, § 2; 62 Del. Laws, c. 259, § 2; 66 Del. Laws, c. 134, §§ 1, 2.)

Revisor's note. — Section 3 of 66 Del. Laws, c. 134, provides: "This act shall become effective 90 days after its enactment into law." The act was signed by the Governor on July 10, 1987.

Effect of amendment. — 66 Del. Laws, c. 134, rewrote subsection (c), and substituted "Department of Correction" for "Department of Health and Social Services" in subsections (e), (f) and (g).

Mandatory life term for kidnapping not cruel and unusual punishment. — Under the circumstances of the case, there was no

merit in defendant's contention that a mandatory life term for kidnapping constituted cruel and unusual punishment. *Tyre v. State*, Del. Supr., 412 A.2d 326 (1980).

Restitution as condition of probation authorized. — Sentences imposed on defendants which included as a condition of probation the payment of restitution based on the victim's medical expenses and the victim's pain and suffering or inconvenience caused by serious injury, were fully within the authority of this section. *Wyatt v. State*, Del. Supr., 498 A.2d 1088 (1985).

§ 4205. Sentence for felonies.

(a) A sentence of imprisonment for a felony shall be a definite sentence. The term of imprisonment shall be as provided in subsection (b) of this section.

(b) The term of imprisonment which the court may impose for a felony is fixed as follows:

(1) For a class A felony, life imprisonment, except for conviction of first-degree murder in which event § 4209 of this title shall apply; provided, however, that in the case of an attempt to commit any class A felony, the court shall impose a term of imprisonment and may impose life imprisonment, but may impose less than life imprisonment, except for conviction of an attempt to commit first-degree murder, in which event the court shall impose life imprisonment;

(2) For a class B felony, from 3 to 30 years and such fine or other conditions as the court may order;

(3) For a class C felony, from 2 to 20 years and such fine or other conditions as the court may order;

(4) For a class D felony, 10 years and such fine or other conditions as the court may order;

(5) For a class E felony, 7 years and such fine or other conditions as the court may order.

(c) In the case of the conviction of any felony other than a class A felony, the court may impose the maximum term of imprisonment as stated in subsection (b) of this section or any part thereof, or it may impose any sentence authorized by § 4204 of this title. (11 Del. C. 1953, § 4205; 58 Del. Laws, c. 497, § 2; 59 Del. Laws, c. 203, § 32.)

Cross reference. — As to punishment for persons convicted a second or subsequent time for robbery in the first degree, see § 832 of this title.

Mandatory life term for kidnapping not cruel and unusual punishment. — Under the circumstances of the case, there was no merit in defendant's contention that a manda-

§ 4208. Fines for corporations.

A sentence to pay a fine, when imposed on a corporation, shall be a sentence to pay an amount fixed by the court not exceeding:

- (1) Ten thousand dollars, when the conviction is of a felony;
- (2) Five thousand dollars, when the conviction is of a class A misdemeanor or of an unclassified misdemeanor for which a term of imprisonment in excess of 3 months is authorized, unless the law defining the offense permits a greater fine;
- (3) Two thousand dollars, when the conviction is of a class B or class C misdemeanor or of an unclassified misdemeanor for which the authorized term of imprisonment is not in excess of 3 months, unless the law defining the offense permits a greater fine;
- (4) Five hundred dollars, when the conviction is of a violation if there is no prior conviction of the same violation;
- (5) One thousand dollars, when the conviction is of a violation and the defendant has a prior conviction of the same violation; or
- (6) Any higher amount equal to double the amount of money or double the value of the property gained by the defendant through the commission of the offense. (11 Del. C. 1953, § 4208; 58 Del. Laws, c. 497, § 2.)

Cross reference. — As to criminal liability of corporations, see §§ 281 to 284 of this title.

§ 4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.

(a) *Punishment for first-degree murder.* — Any person who is convicted of first-degree murder shall be punished by death or by imprisonment for the remainder of his or her natural life without benefit of probation or parole or any other reduction, said penalty to be determined in accordance with this section.

(b) *Separate hearing on issue of punishment for first-degree murder.* — (1)

Upon a conviction of guilt of a defendant of first-degree murder, the Superior Court shall conduct a separate hearing to determine whether the defendant should be sentenced to death or to life imprisonment without benefit of probation or parole as authorized by subsection (a) of this section. If the defendant was convicted of first-degree murder by a jury, this hearing shall be conducted by the trial judge before that jury as soon as practicable after the return of the verdict of guilty. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and shall remain separately sequestered until a verdict on guilt is entered. If the verdict of the trial jury is guilty of first-degree murder said alternates shall sit as alternate jurors on the issue of punishment. If, for any reason satisfactory to the Court, any member of the trial jury is excused from participation in the hearing on punishment, the trial judge shall replace such juror or jurors with alternate juror or jurors. If a jury of

12 jurors cannot participate in the hearing a separate and new jury, plus alternates, shall be selected for the hearing in accordance with the applicable rules of the Superior Court and laws of Delaware, unless the defendant(s) and the State stipulate to the use of a lesser number of jurors.

(2) If the defendant was convicted of first-degree murder by the Court, after a trial and waiver of a jury trial or after a plea of guilty or nolo contendere, the hearing shall be conducted by the trial judge before a jury, plus alternates, empaneled for that purpose and selected in accordance with the applicable rules of the Superior Court and laws of Delaware, unless said jury is waived by the State and the defendant in which case the hearing shall be conducted, if possible, by and before the trial judge who entered the finding of guilty or accepted the plea of guilty or nolo contendere.

(c) *Procedure at punishment hearing.* — (1) The sole determination for the jury or judge at the hearing provided for by this section shall be the penalty to be imposed upon the defendant for the conviction of first-degree murder. At the hearing, evidence may be presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed. The evidence shall include matters relating to any mitigating circumstance and to any aggravating circumstance, including, but not limited to, those aggravating circumstances enumerated in subsection (e) of this section. Notice in writing of any aggravating circumstances and any mitigating circumstances shall be given to the other side by the party seeking to introduce evidence of such circumstances prior to the punishment hearing, and after the verdict on guilt, unless in the discretion of the Court such advance notice is dispensed with as impracticable. The record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant or the absence of any such prior criminal convictions and pleas shall also be admissible in evidence.

(2) At the hearing the Court shall permit argument by the State, the defendant and/or his counsel, on the punishment to be imposed. Such argument shall consist of opening statements by each, unless waived, opening summation by the State, rebuttal summation by the defendant and/or his counsel and closing summation by the State.

(3) Upon the conclusion of the evidence and arguments the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed.

(4) In the instructions to the jury the Court shall include instructions for it to weigh and consider any mitigating circumstances or aggravating circumstances and any of the statutory aggravating circumstances set forth in subsection (e) of this section which may be raised by the evidence. The jury shall be instructed to weigh any mitigating factors against the aggravating factors.

(d) *Determination of sentence.* — (1) A sentence of death shall not be imposed unless the jury or judge, where appropriate, finds:

a. Beyond a reasonable doubt at least 1 statutory aggravating circumstance; and

b. Unanimously recommends, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circum-

stances or details of the commission of the offense and the character and propensities of the offender, that a sentence of death be imposed. Where the jury, or judge when applicable, submits such a finding and recommendation, the Court shall sentence the defendant to death as provided by subsection (f) of this section. A finding by the jury of a statutory aggravating circumstance, and a consequent recommendation of death, supported by the evidence, shall be binding on the Court.

(2) Refusal or failure of the Court to follow the jury's recommendation for any reason shall be appealable by the State as of right to the Supreme Court within 30 days after imposition of sentence.

(3) If the jury, or judge when applicable, cannot unanimously find that at least 1 statutory aggravating circumstance exists and cannot unanimously recommend death, the Court shall sentence the defendant to life imprisonment without benefit of probation or parole.

(e) *Aggravating circumstances.* — (1) In order for a sentence of death to be imposed, the jury, unanimously, or judge when applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder:

a. The murder was committed by a person in, or who has escaped from, the custody of a law-enforcement officer or place of confinement.

b. The murder was committed for the purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody.

c. The murder was committed against any law-enforcement officer, corrections employee or fireman, while such victim was engaged in the performance of his official duties.

d. The murder was committed against a judicial officer, a former judicial officer, Attorney General, former Attorney General, Assistant or Deputy Attorney General or former Assistant or Deputy Attorney General, State Detective or former State Detective, Special Investigator or former Special Investigator, during, or because of, the exercise of his official duty.

e. The murder was committed against a person who was held or otherwise detained as a shield or hostage.

f. The murder was committed against a person who was held or detained by the defendant for ransom or reward.

g. The murder was committed against a person who was a witness to a crime and who was killed for the purpose of preventing his appearance or testimony in any grand jury, criminal or civil proceeding involving such crime.

h. The defendant paid or was paid by another person or had agreed to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

i. The defendant was previously convicted of another murder or manslaughter or of a felony involving the use of, or threat of, force or violence upon another person.

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j. The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary.

k. The defendant's course of conduct resulted in the deaths of 2 or more persons where the deaths are a probable consequence of the defendant's conduct.

l. The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering him.

m. The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person.

n. The defendant was under a sentence of life imprisonment, whether for natural life or otherwise, at the time of the commission of the murder.

o. The murder was committed for pecuniary gain.

p. The victim was pregnant.

q. The victim was severely handicapped or severely disabled.

r. The victim was 62 years of age or older.

s. The victim was defenseless.

(2) In any case where the defendant has been convicted of murder in the first degree in violation of any provision of § 636(a)(2)-(7) of this title, that conviction shall establish the existence of a statutory aggravating circumstance and the jury, or judge where appropriate, shall be so instructed. This provision shall not preclude the jury, or judge where applicable, from considering and finding the statutory aggravating circumstances listed in this subsection and any other aggravating circumstances established by the evidence.

(f) *Method and imposition of sentence of death.* — The imposition of a sentence of death shall be upon such terms and conditions as the trial court may impose in its sentence, including the place, the number of witnesses and conditions of privacy. Punishment of death shall, in all cases, be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person sentenced to death is dead, and such execution procedure shall be determined and supervised by the Commissioner of the Department of Correction. The administration of the required lethal substance or substances required by this section shall not be construed to be the practice of medicine and any pharmacist or pharmaceutical supplier is authorized to dispense drugs to the Commissioner or his designee, without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law. Such sentence may not be carried out until final review thereof is had by the Delaware Supreme Court as provided for in subsection (g) of this section. The Court or the Governor may suspend the execution of the sentence until a later date to be specified, solely to permit completion of the process of judicial review of the conviction.

If the execution of the sentence of death as provided above is held unconstitutional by a court of competent jurisdiction, then punishment of death shall,

in all cases, be inflicted by hanging by the neck. The imposition of a sentence of death shall be upon such terms and conditions as the trial court may impose in its sentence, including the place, the number of witnesses and conditions of privacy. Such sentence may not be carried out until final review thereof is had by the Delaware Supreme Court as provided in subsection (g) of this section. The Court or the Governor may suspend the execution of the sentence until a later date to be specified, solely to permit completion of the process of judicial review of the conviction.

(g) *Automatic review of death penalty by Delaware Supreme Court.* — (1)

Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the recommendation on and imposition of that penalty shall be reviewed on the record by the Delaware Supreme Court. Absent an appeal having been taken by the defendant upon the expiration of 30 days after the sentence of death has been imposed, the Clerk of the Superior Court shall require a complete transcript of the punishment hearing to be prepared promptly and within 10 days after receipt of that transcript he shall transmit the transcript, together with a notice prepared by him, to the Delaware Supreme Court. The notice shall set forth the title and docket number of the case, the name of the defendant, the name and address of any attorney and a narrative statement of the judgment, the offense and the punishment prescribed. The Court shall, if necessary, appoint counsel to respond to the State's positions in the review proceedings.

(2) The Supreme Court shall limit its review under this section to the recommendation on and imposition of the penalty of death and shall determine:

a. Whether, considering the totality of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases arising under this section.

b. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection (e) of this section and, where applicable, § 636(a)(2)-(7) of this title.

(3) The Supreme Court shall permit the defendant and the State to submit briefs within the time provided by the Court, and permit them to present oral argument to the Court.

(4) With regard to review of the sentence in accordance with this subsection, the Court shall:

a. Affirm the sentence of death.

b. In cases where the trial court erroneously rejected the jury's recommendation of the death sentence, remand with directions to reinstate the jury's recommendation and to impose the penalty of death.

c. Set aside the sentence of death and remand for correction of any errors occurring during the hearing and for imposition of the appropriate penalty. Such errors shall not affect the determination of guilt

and shall not preclude the reimposition of death where appropriately determined after a new hearing on punishment.

d. Set forth its findings as to the reasons for its actions.

(h) *Ordinary review not affected by section.* — Any error in the guilt phase of the trial may be raised as provided by law and rules of court and shall be in addition to the review of punishment provided by this section. (11 Del. C. 1953, § 4209; 58 Del. Laws, c. 497, § 2; 59 Del. Laws, c. 284, § 2; 61 Del. Laws, c. 41, § 1; 63 Del. Laws, c. 357, § 1; 65 Del. Laws, c. 281, § 1; 65 Del. Laws, c. 494, § 4.)

Cross reference. — As to murder in the first degree, see § 636 of this title.

Revisor's note. — Section 2 of 65 Del. Laws, c. 281, provides: "If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable."

Section 3 of 65 Del. Laws, c. 281, provides: "This act shall become effective only for acts committed after its enactment except that any person sentenced to death for acts committed prior to the enactment of this act shall be permitted to elect lethal injection, as provided herein, as the method of death. The Commissioner of the Department of Correction by regulation shall determine the procedures for such election." The act was signed by the Governor on June 13, 1986.

Section 6 of 65 Del. Laws, c. 494, provides: "If any provisions of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act, which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable."

Effect of amendments. — 65 Del. Laws, c. 281, effective June 18, 1986, in subsection (f), divided the former second sentence into the present second and fourth sentences, substituting "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person sentenced to death is dead, and such execution procedure shall be determined and supervised by the Commissioner of the Department of Correction" for "hanging by the neck and" at the end of the second sentence, inserted the present third sentence, and added the second paragraph.

65 Del. Laws, c. 494, effective July 9, 1986, substituted "unlawful sexual intercourse" for "rape" in subparagraph j of paragraph (1) of subsection (e).

Constitutionality of capital punishment. — Capital punishment per se is not violative of

the constitutional guaranties against "cruel" or "cruel and unusual" punishment. *State v. Dickerson*, Del. Supr., 298 A.2d 761 (1972).

Assuming uniform application, the provisions governing punishment for first-degree murder in this section and § 636 of this title, as amended Mar. 29, 1974, are constitutional under *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); *State v. Sheppard*, Del. Supr., 331 A.2d 142 (1974).

A mandatory death penalty, uniformly applied, does not constitute "cruel and unusual" punishment under the Eighth Amendment of the federal Constitution, or "cruel" punishment under the Delaware Bill of Rights. *State v. Sheppard*, Del. Supr., 331 A.2d 142 (1974).

The mandatory death provision of former subsection (a) of this section must fall as permitting "cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments. *State v. Spence*, Del. Supr., 367 A.2d 983 (1976).

Retention or abolition of the death penalty is a question for the lawmaking authorities rather than the courts. *Steigler v. State*, Del. Supr., 277 A.2d 662, modified, 408 U.S. 939, 92 S. Ct. 2872, 33 L. Ed. 2d 760 (1971).

The retention or abolition of capital punishment in this State is for the decision of the people of this State, speaking through their chosen representatives in the General Assembly. *State v. Dickerson*, Del. Supr., 298 A.2d 761 (1972).

Delaware retains the death penalty only for murder in the first degree. *State v. White*, Del. Supr., 395 A.2d 1082 (1978).

Mandatory death statute is not retroactive. *State v. Smith*, Del. Supr., 324 A.2d 202 (1974).

Subsection (c) of this section is not unconstitutionally broad and vague. *State v. White*, Del. Supr., 395 A.2d 1082 (1978).

Subsection (c)(1) of this section, permitting the sentencing authority to receive evidence of "any aggravating circumstance, including, but not limited to, those aggravating circumstances enumerated in subsection (e) of this section" is constitutional. *State v. White*, Del. Supr., 395 A.2d 1082 (1978).

CHAPTER 782

HOMICIDE

- 782.02 Justifiable use of deadly force.
- 782.03 Excusable homicide.
- 782.04 Murder.
- 782.07 Manslaughter.
- 782.071 Vehicular homicide.
- 782.072 Vessel homicide.
- 782.08 Assisting self-murder.
- 782.09 Killing of unborn child by injury to mother.
- 782.11 Unnecessary killing to prevent unlawful act.

782.02 Justifiable use of deadly force.—The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or upon or in any dwelling house in which such person shall be.

History.—ss 4, 5, ch 1637, 1868, RS 2378, ch 4967, 1901, s 1, ch 4964, 1901, GS 3203, RGS 5033, CGL 7135, s 66, ch 74-383, s 1, ch 75-24, s 45, ch 75-293

782.03 Excusable homicide.—Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

History.—s 6, ch 1637, 1868, RS 2379, GS 3204, RJS 5034, CGL 7136, s 1, ch 75-13

782.04 Murder.—

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; or

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

- a. Trafficking offense prohibited by s. 893.135(1),
- b. Arson,
- c. Sexual battery,
- d. Robbery,
- e. Burglary,
- f. Kidnapping,
- g. Escape,
- h. Aggravated child abuse,
- i. Aircraft piracy, or
- j. Unlawful throwing, placing, or discharging of a destructive device or bomb; or

3. Which resulted from the unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being perpetrated by any act imminently dangerous and evincing a depraved mind regardless of whether although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any:

- (a) Trafficking offense prohibited by s. 893.135(1),
- (b) Arson,
- (c) Sexual battery,
- (d) Robbery,
- (e) Burglary,
- (f) Kidnapping,
- (g) Escape,
- (h) Aggravated child abuse,
- (i) Aircraft piracy, or
- (j) Unlawful throwing, placing, or discharging of a destructive device or bomb

by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony is guilty of murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being perpetrated without any design to effect death of the person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any:

- (a) Trafficking offense prohibited by s. 893.135(1),
- (b) Arson,
- (c) Sexual battery,
- (d) Robbery,
- (e) Burglary,
- (f) Kidnapping,
- (g) Escape,
- (h) Aggravated child abuse,
- (i) Aircraft piracy,
- (j) Unlawful throwing, placing, or discharging of a destructive device or bomb, or

(k) Unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the third degree and constitutes a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s 2, ch 1637, 1868, RS 2380, GS 3205, RGS 5035, CGL 7137, s 1, ch 28023, 1953, s 712, ch 71-136, s 3, ch 74-383, s 6, ch 75-298, s 1, ch 76-141, s 290, ch 76-400, s 82-69, s 1, ch 84-16, s 6, ch 97-243
cl —s 316 656 Mandatory adjudication, prohibition against plea of insanity
s 732 802 Killer not entitled to receive property of other person

CHAPTER 922

EXECUTION

- 922.02 Execution of sentence imposing fine.
 922.04 Discharge of prisoner unable to pay fine.
 922.051 Imprisonment in county jail, term of 1 year or less.
 922.06 Stay of execution of death sentence.
 922.07 Proceedings when person under sentence of death appears to be insane.
 922.08 Proceedings when person under sentence of death appears to be pregnant.
 922.09 Capital cases.
 922.10 Execution of death sentence.
 922.11 Regulation of execution.
 922.111 Transfer to state prison for safekeeping before death warrant issued.
 922.12 Return of warrant of execution issued by Governor.
 922.14 Sentence of death unexecuted for unjustifiable reasons.
 922.15 Return of warrant of execution issued by Supreme Court.

922.02 Execution of sentence imposing fine.—Execution on a sentence imposing a fine may be issued in the same manner as execution on a judgment in a civil action, whether or not the sentence also imposes imprisonment.

History.—s. 263, ch. 19554, 1939; CGL 1940 Supp. 8663(273); s. 7, ch. 22000, 1943; s. 130, ch. 70-339.

922.04 Discharge of prisoner unable to pay fine.—When the court determines on the written application of a prisoner that he has been imprisoned for 60 days solely for failure to pay a fine or costs which total not more than \$300 and that the prisoner is indigent and unable to pay the fine or costs, the court shall order the prisoner discharged from custody.

History.—s. 265, ch. 19554, 1939; CGL 1940 Supp. 8663(275); s. 1, ch. 29661, 1941; s. 131, ch. 70-339.

922.051 Imprisonment in county jail, term of 1 year or less.—When a statute expressly directs that imprisonment be in a state prison, the court may impose a sentence of imprisonment in the county jail if the total of the prisoner's cumulative sentences is not more than 1 year.

History.—s. 1, ch. 59-72; s. 1, ch. 61-168; s. 1, ch. 67-241; s. 132, ch. 70-339.

922.06 Stay of execution of death sentence.—The execution of a death sentence may be stayed only by the Governor or incident to an appeal.

History.—s. 267, ch. 19554, 1939; CGL 1940 Supp. 8663(277); s. 133, ch. 70-339.

922.07 Proceedings when person under sentence of death appears to be insane.—

(1) When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The

examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the sentence shall appoint counsel to represent him.

(2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to a Department of Corrections mental health treatment facility.

(4) When a person under sentence of death has been committed to a Department of Corrections mental health treatment facility, he shall be kept there until the facility administrator determines that he has been restored to sanity. The facility administrator shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

(5) The Governor shall allow reasonable fees to psychiatrists appointed under the provisions of this section which shall be paid by the state.

History.—s. 268, ch. 19554, 1939; CGL 1940 Supp. 8663(278); s. 134, ch. 70-339; s. 1, ch. 85-193.

922.08 Proceedings when person under sentence of death appears to be pregnant.—

(1) When the Governor is informed that a person under sentence of death may be pregnant, he shall stay execution of the sentence and appoint a qualified physician to examine the convicted person and determine if she is pregnant.

(2) After receiving the report of the physician, if the Governor determines that the convicted person is not pregnant, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

(3) If the Governor determines that a convicted person whose execution has been stayed because of pregnancy is no longer pregnant, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

(4) The Governor shall allow a reasonable fee to the physician appointed under the provisions of this section which shall be paid by the state.

History.—s. 269, ch. 19554, 1939; CGL 1940 Supp. 8663(279); s. 135, ch. 70-339.

922.09 Capital cases.—When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record of the conviction and sentence, and the sheriff shall send the record to the Governor. The sentence shall not be executed until the Governor issues a warrant, attaches it to the copy of the rec-

ord. and transmits it to the warden, directing him to execute the sentence at a time designated in the warrant.
History.—s 270 ch 19554 1939 CGL 1940 Supp 8663(280) s 136 ch 70-339

922.10 Execution of death sentence.—A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution.

History.—s 271 ch 19554 1939 CGL 1940 Supp 8663(281) ss 19 22 35 ch 69-106 s 137 ch 70-339

922.11 Regulation of execution.—

(1) The superintendent of the state prison or a deputy designated by him shall be present at the execution. The superintendent shall set the day for execution within the week designated by the Governor in the warrant.

(2) Twelve citizens selected by the superintendent shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of religion requested by the convicted person may be present. Representatives of news media may be present under rules approved by the Secretary of Corrections. All other persons, except prison officers and guards, shall be excluded during the execution.

(3) The body of the executed person shall be prepared for burial and, if requested, delivered at the prison gates to relatives of the deceased. If a coffin has not been provided by relatives, the body shall be delivered in a plain coffin. If the body is not claimed by relatives, it shall be given to physicians who have requested it for dissection or to be disposed of in the same manner as are bodies of prisoners dying in the state prison.

History.—s 272 ch 19554 1939 CGL 1940 Supp 8663(282) s 1 ch 20520 1941 s 1 ch 59-90 ss 19 35 ch 69-106 s 138 ch 70-339 s 1 ch 77-189 s 31 ch 79-3

922.111 Transfer to state prison for safekeeping before death warrant issued.—The sheriff shall deliver

a person sentenced to death to the state prison to await the death warrant. A circuit judge of the circuit in which a death sentence was imposed may order the convicted person transferred to the state prison before the issuance of a warrant of execution if he determines that the transfer is necessary for the safekeeping of the prisoner.

History.—s 1 ch 59-215 s 139 ch 70-339

922.12 Return of warrant of execution issued by Governor.—After the death sentence has been executed, the warden of the state prison shall return to the Governor the warrant and a signed statement of the execution. The warden shall file an attested copy of the warrant and statement with the clerk of the court that imposed the sentence.

History.—s 273 ch 19554 1939 CGL 1940 Supp 8663(283) s 140 ch 70-339

922.14 Sentence of death unexecuted for unjustifiable reasons.—If a death sentence is not executed because of unjustified failure of the Governor to issue a warrant, or for any other unjustifiable reason, on application of the Department of Legal Affairs, the Supreme Court shall issue a warrant directing the sentence to be executed during a week designated in the warrant.

History.—s 275 ch 19554 1939 CGL 1940 Supp 8663(285) ss 11 35 ch 69-106 s 141 ch 70-339 s 1 ch 70-439

922.15 Return of warrant of execution issued by Supreme Court.—After the sentence has been executed pursuant to a warrant issued by the Supreme Court, the warden of the state prison shall return to the Supreme Court the warrant and a signed statement of the execution. The warden shall file an attested copy of the warrant and statement with the clerk of the court that imposed the sentence. The warden shall send to the Governor an attested copy of the warrant and statement.

History.—s 276 ch 19554 1939 CGL 1940 Supp 8663(286) s 142 ch 70-339

17-10-35.2. Hearing to determine appropriateness of interim appellate review of pretrial rulings.

Prior to the filing of a report by the trial judge under Code Section 17-10-35.1 certifying that pretrial proceedings are complete, the court shall conduct a hearing to determine if an interim appellate review of pretrial rulings is appropriate. The court shall hear from the state and the defense as to whether the delay to be caused by interim appellate review outweighs the need for such review. The court shall order such review and initiate the procedure contained in Code Section 17-10-35.1 unless the court concludes and enters an order to the effect that interim appellate review would not serve the ends of justice in the case. An order obviating interim appellate review shall not be appealable. (Code 1981, § 17-10-35.2, enacted by Ga. L. 1988, p. 1437, § 4.)

Effective date. — This Code section became effective July 1, 1988.

17-10-36. Establishment of unified review procedure by Supreme Court; effect on habeas corpus.

(a) The Supreme Court of Georgia shall establish, by rules, a new unified review procedure to provide for the presentation to the sentencing court and to the Supreme Court of all possible challenges to the trial, conviction, sentence, and detention of defendants upon whom the sentence of death has been or may be imposed, which challenges before July 1, 1988, have been presented for review by the former unified review procedure under this subsection. Such new unified review procedure shall govern both pretrial and posttrial appellate review of death penalty cases.

(b) The Supreme Court shall establish, by rules, a series of check lists to be utilized by the trial court, the prosecuting attorney, and defense counsel prior to, during, and after the trial of cases in which the death penalty is sought to make certain that all possible matters which could be raised in defense have been considered by the defendant and defense counsel and either asserted in a timely and correct manner or waived in accordance with applicable legal requirements, so that, for purposes of any pretrial review and the trial and posttrial review, the record and transcript of proceedings will be complete for a review by the sentencing court and the Supreme Court of all possible challenges to the trial, conviction, sentence, and detention of the defendant.

(c) Nothing in this Code section or in the rules of the Supreme Court shall limit or restrict the grounds of review or suspend the rights or remedies available through the procedures governing the writ of habeas corpus.

(d) The procedures governing the writ of habeas corpus may be employed to assert rights or seek remedies if the procedures established in the rules of the Supreme Court as applied to the petitioner are inadequate or ineffective in any constitutional sense. (Code 1933, § 27-2538, enacted by Ga. L. 1980, p. 390, § 1; Ga. L. 1988, p. 1437, § 5.)

The 1988 amendment, effective July 1, 1988, rewrote subsections (a) and (b) to the extent that a detailed comparison would be impracticable. For the previous versions of these subsections, see § 17-10-36 in the bound volume.

Code Commission notes. — Pursuant to § 28-9-5, in 1988 a comma was inserted following "July 1, 1988" in subsection (a) and a comma was deleted following "death penalty is sought" near the beginning of subsection (b).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION TO WHAT PROCEEDINGS SECTION APPLICABLE

General Consideration

Constitutionality. — The unified appeal procedure under this section does not violate the due process clause of U.S. Const., Amend. 14 in that it fails to provide a defendant with reciprocal rights of discovery, nor does it violate the equal protection clause of the same amendment. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Purpose of procedure is to prevent and correct error. — The purpose of the unified appeal procedure under this section is not to force a waiver of any rights. Rather, the procedure is designed to prevent the occurrence of error to the maximum extent feasible and to correct as promptly as possible any error that nonetheless may occur. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Unified appeal procedure benefits criminal defendant against whom death penalty is sought by ensuring that all state and federal rights available to him are made known to him. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Defendant offered numerous opportunities to state dissatisfaction with attor-

ney. — A defendant has not suffered the denial of a constitutional right under this section when he is offered the opportunity, prior to and during trial, to state that he is dissatisfied with his attorney's assistance. By affording a defendant numerous opportunities to raise questions or objections concerning his counsel's assistance, the unified appeal procedure recognizes that prior to or during trial the problem of ineffective assistance of counsel may be more suitably remedied than after conviction and the imposition of the death sentence. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

To What Proceedings Section Applicable

Procedure designed to protect defendant during each phase of judicial process. — The unified appeal procedure is designed to protect the criminal defendant in this potentially precarious situation during each phase of the judicial process which may ultimately result in a conviction and sentence of death. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Proceedings under unified appeal procedure are applicable only in cases in

which death penalty is sought, and commence at earliest possible opportunity after indictment. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Unified appeal procedure establishes

unified motion for review procedure; this "motion" encompasses pretrial, trial, and certain review proceedings. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

17-10-37. Appointment of assistant to Supreme Court to provide information from prior capital cases; employment of staff to compile data; attachment for administrative purposes of office of assistant to office of clerk of Supreme Court.

JUDICIAL DECISIONS

Cited in *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984).

17-10-38. Death sentences generally.

(a) All persons who have been convicted of a capital offense and have had imposed upon them a sentence of death shall suffer such punishment by electrocution.

(b) In all cases in which the defendant is sentenced to be electrocuted, it shall be the duty of the trial judge in passing sentence to direct that the defendant be delivered to the Department of Corrections for electrocution at a state correctional institution designated by the department. (Ga. L. 1924, p. 195, § 1; Code 1933, § 27-2512; Ga. L. 1937-38, Ex. Sess., p. 330, § 1; Ga. L. 1985, p. 283, § 1.)

The 1985 amendment, effective July 1, 1985, substituted "Corrections" for "Offender Rehabilitation" in subsection (b).

OPINIONS OF THE ATTORNEY GENERAL

Commissioner of offender rehabilitation (now corrections) is authorized to designate any state correctional institution as the place for carrying out an execution. 1980 Op. Att'y Gen. No. 80-121.

A state correctional institution is any facility used to punish criminal offenders. 1980 Op. Att'y Gen. No. 80-121.

17-10-40. Change of time period for execution where time period set for execution has passed generally; recordation on court minutes; length of and time limitation for new time period for execution; setting of day and time for execution by Department of Corrections.

(a) Where the time period for the execution of any convicted person in a capital case has passed by reason of a supersedeas incident to appellate review, a stay of execution by the State Board of Pardons and Paroles, or for any other reason, a judge of the superior court of the county where the case was tried shall have the power and authority to pass an order fixing a new time period for the execution of the original sentence without requiring the convicted person to be brought before him by a writ of habeas corpus. The order shall be recorded on the minutes of the court and a certified copy of the order shall be sent immediately to the convicted person's attorney of record, to the Attorney General, and to the superintendent of the state correctional institution at the place of execution.

(b) The new time period for the execution shall be seven days in duration and shall commence at noon on a specified date and shall end at noon on a specified date. The new time period for the execution fixed by the judge shall commence not less than ten nor more than 20 days from the date of the order.

(c) The Department of Corrections shall set the day and time for execution within the time period designated by the judge of the superior court. If the execution is not carried out on the day and at the time originally set by the Department of Corrections, the Department of Corrections is authorized to set new dates and times for execution within the period designated by the judge of the superior court. (Ga. L. 1924, p. 195, § 7; Code 1933, § 27-2518; Ga. L. 1983, p. 665, § 2; Ga. L. 1985, p. 1463, § 2.)

The 1983 amendment, effective March 16, 1983, inserted "the convicted person's attorney of record, to the Attorney General, and to" preceding "the superintendent of the state correctional institution" in the next-to-last sentence.

The 1985 amendment, effective July 1, 1985, designated the first and second sentences of this Code section as subsection (a); designated the remaining sentence of this Code section as the second sentence of subsection (b); in the first sentence of sub-

section (a), twice substituted "time period" for "date," and substituted "a" for "the" preceding "judge of the superior court of the county"; in subsection (b), added the first sentence and, in the second sentence, substituted "time period" for "date" and substituted "commence" for "be"; and added subsection (c).

Code Commission notes. — Pursuant to § 28-9-5, in 1985 "Offender Rehabilitation" has been changed to "Corrections" in subsection (c).

OPINIONS OF THE ATTORNEY GENERAL

Requirements for order establishing new execution date. — To constitute a facially valid order establishing a new execution date for a condemned person where

the original execution date has passed, the order must establish a new execution date within limits set forth in this section. 1981 Op. Att'y Gen. No. 81-105.

17-10-41. Persons required to be present at executions.

There shall be present at the execution of a convicted person the superintendent of the state correctional institution or a deputy superintendent thereof, at least three executioners, two physicians to determine when death supervenes, electricians, and other correctional officers, assistants, and witnesses as determined by the commissioner of corrections. In addition, the convicted person may request the presence of his counsel, clergyman, and a reasonable number of relatives and friends, provided that the total number of witnesses appearing at the request of the convicted person shall be determined by the commissioner of corrections. (Ga. L. 1924, p. 195, § 4; Code 1933, § 27-2515; Ga. L. 1956, p. 161, § 32; Ga. L. 1988, p. 252, § 1.)

The 1988 amendment, effective March 15, 1988, substituted "at least three executioners," for "who shall serve as executioner, at least two assistants," and "electricians and other correctional officers, assistants, and witnesses as deter-

mined by the commissioner of corrections" for "an electrician, a suitable guard, and, if the convicted person so desires, his counsel, relatives, and such clergymen and friends as he may desire" in the first sentence and added the second sentence.

17-10-44. Death chamber apparatus, etc.

The Department of Corrections shall provide a death chamber and all necessary apparatus, machinery, and appliances for inflicting the penalty of death by electrocution. (Ga. L. 1924, p. 195, § 2; Code 1933, § 27-2513; Ga. L. 1956, p. 161, § 28; Ga. L. 1985, p. 283, § 1.)

The 1985 amendment, effective July 1, 1985, substituted "Corrections" for "Offender Rehabilitation."

ARTICLE 3

MENTAL INCOMPETENCY TO BE EXECUTED

Editor's notes. — Ga. L. 1988, p. 1003, § 2, effective July 1, 1988, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of §§ 17-10-60 through 17-10-63 and was based on Ga. L. 1981, Ex. Sess., p. 8 (Code enactment act). (See history lines in bound volume for pre-Code history of the former article.)

17-10-60. "Mentally incompetent to be executed" defined.

As used in this article, the term "mentally incompetent to be executed" means that because of a mental condition the person is presently unable to know why he or she is being punished and understand the nature of the punishment. (Code 1981, § 17-10-60, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-61. No execution upon determination of mental incompetency to be executed.

A person under sentence of death shall not be executed when it is determined under the provisions of this article that the person is mentally incompetent to be executed as defined in Code Section 17-10-60. (Code 1981, § 17-10-61, enacted by Ga. L. 1988, p. 1003, § 2.)

Law reviews. — For note, "Ford v. Execution of the Insane," see 38 Mercer L. Wainwright: Eighth Amendment Prohibits Rev. 949 (1987).

17-10-62. Exclusive procedure for challenging mental competency to be executed.

Notwithstanding any other provision of this Code, this article provides the exclusive procedure for challenging mental competency to be executed when such challenge is made subsequent to the time of conviction and sentence. (Code 1981, § 17-10-62, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-63. Filing of application; contents.

(a) An application brought under this article must be filed in the superior court of the county in which the applicant is being detained. The named respondent shall be the person having actual custody of the applicant.

(b) An application brought under this article shall identify the proceeding in which the applicant was convicted, give the date of the rendition and the final judgment complained of, set forth the fact that a time

period for execution has been set, give the date of the signing of the order and the dates of the designated time period for execution, and shall clearly set forth alleged facts in support of the assertion that the applicant is presently mentally incompetent to be executed. The application shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The application shall identify any previous proceedings that the applicant may have taken challenging his mental competency to be executed or challenging his mental condition in relation to a conviction and sentence in question. Arguments and citations of authority shall be omitted from the application. The application must be verified with the oath of the applicant or of some other person in his behalf. (Code 1981, § 17-10-63, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-64. Service of application.

Service of an application brought under this article shall be made upon the person having custody of the applicant. If the applicant is being detained under the custody of the Department of Corrections, an additional copy of the application shall be served upon the Attorney General. If the applicant is being detained under the custody of some authority other than the Department of Corrections, an additional copy of the petition shall be served upon the district attorney of the county in which the application is filed. (Code 1981, § 17-10-64, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-65. Answer by respondent.

As soon as possible after the filing and docketing of the application under this article, the respondent shall answer the application. The court may schedule a case for a hearing prior to the filing of responsive pleadings but, in any event, shall schedule the case for a hearing as soon as possible so that the proceedings may move expeditiously. (Code 1981, § 17-10-65, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-66. Examination of applicant.

(a) By filing an application under this article, the applicant specifically consents to submit to a state examination for the purposes of assessing mental competency to be executed.

(b) Simultaneously with the filing of the application, the applicant, if he or she wishes the court to consider any request for appointment of an expert, shall file such a request and shall state specific facts in support of that request so that the court may determine if the applicant's mental competency to be executed is in fact a significant issue. The applicant shall further submit with the motion a specific statement as to the partic-

ular expert requested, the nature of the examination to be conducted, the time period within which an examination can be conducted, and an estimate of the expenses to be incurred.

(c) If the applicant has filed a request for an examination as provided in subsection (b) of this Code section and the applicant makes a sufficient showing that his or her mental competency to be executed is a significant issue, the court shall appoint an expert to make an examination of the applicant, with such examination to be conducted as soon as possible. Payment for such expert shall be made by the Department of Corrections unless otherwise designated by the General Assembly. (Code 1981, § 17-10-66, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-67. When application to be filed.

An application under this article shall not be filed until completion of direct appeal and until an order has been signed by a judge of the trial court setting a time period for the execution. (Code 1981, § 17-10-67, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-68. Proof; disposition.

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

(b) The taking of depositions shall be governed by Code Sections 9-11-26 through 9-11-32 and 9-11-37.

(c) If a sworn affidavit is to be introduced into evidence by either party, the party intending to introduce such an affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case or, in the event a hearing is set less than five days from the date of the filing of the application, as soon as possible so that opposing counsel has the opportunity to review the affidavit prior to the hearing. The affidavit so served shall be accompanied by notice of the party's intention to introduce it into evidence. The superior court judge considering the application may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) After reviewing the pleadings and evidence offered at the hearing, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgment is based. The findings of fact and conclusions of law shall be recorded as part of the record in the case.

(e) If the court finds in favor of the applicant by finding that the applicant has proven his or her mental incompetence to be executed by a preponderance of the evidence, the court shall enter an appropriate

order with respect to any scheduled execution time period and shall enter such supplementary orders as necessary and proper. If the court denies the application, the court shall direct that immediate telephonic notification be given to the parties and any stay presently entered under this article shall be dissolved instantaneously. (Code 1981, § 17-10-68, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-69. Prior adjudication as presumption of mental competency.

If an applicant is determined to have previously filed an application under this article and has previously been determined to be mentally competent to be executed, such prior adjudication shall act as a presumption of mental competency and the applicant shall not be entitled to a new hearing on the question of mental competency to be executed absent the applicant's making a prima-facie showing of a substantial change in circumstances sufficient to raise a significant question as to the applicant's mental competency to be executed at the time of filing of any subsequent applications. (Code 1981, § 17-10-69, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-70. Appeals.

(a) Appeals in cases brought under this article shall be governed by Chapter 6 of Title 5 except that as to final orders of the court which are adverse to the applicant, no appeal shall be ordered unless the Supreme Court of this state issues a certificate of probable cause for the appeal.

(b) If an unsuccessful applicant desires to appeal, he or she must file a written application for a certificate of probable cause to appeal with the clerk of the Supreme Court within three days of the entry of the order denying relief. The applicant shall also file within the same period a notice of appeal with the clerk of the concerned superior court. The Supreme Court shall either grant or deny the application within a reasonable time after filing. In order for the Supreme Court to consider fully the request for a certificate, the clerk of the concerned superior court shall forward, as in any other case, the record and transcript, if designated, to the clerk of the Supreme Court when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file a copy of the original record and a copy of the original transcript of proceedings. The clerk of the Supreme Court shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Supreme Court denies the application for a certificate of probable cause, the clerk of the Supreme Court shall return the original record and transcript and shall notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the applicant, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and shall stay the judgment of the superior court until there is a final adjudication by the Supreme Court. (Code 1981, § 17-10-70, enacted by Ga. L. 1988, p. 1003, § 2.)

Code Commission notes. — Pursuant to following "to the applicant" in subsection § 28-9-5, in 1988 a comma was inserted (a).

17-10-71. Procedure upon convicted person's regaining mental competency.

If a convicted person under sentence of death who is found to be mentally incompetent to be executed under this article regains his or her mental competency, the fact shall be certified at once by the appropriate mental health official to the court initially making the finding of mental incompetency. Upon such certification, that court shall enter an appropriate order noting receipt of certification and vacating any previously entered stay of execution. A copy of such order shall be sent to the sentencing court, at which time the sentencing court shall fix a new time period for execution as provided in Code Section 17-10-40. The judge of the court which made the determination on the issue of mental competency shall cause the new order and other proceedings in the case to be presented on the minutes of the court. (Code 1981, § 17-10-71, enacted by Ga. L. 1988, p. 1003, § 2.)

CHAPTER 11

ASSESSMENT AND PAYMENT OF COSTS OF CRIMINAL PROCEEDINGS

Article 1

General Provisions

Sec.

17-11-4. Imposition of costs and jail fees upon prosecutor or complainant.

Article 2

Reimbursement of Counties for Expenses of Capital Felony Prosecutions

Sec.

17-11-22. Basis for reimbursement of counties for capital felony expenses.

17-11-23. When reimbursement payments to be made; manner of reimbursement where requests exceed funds appropriated.

17-11-24. Administration of article generally; adoption of rules and regulations; maintenance of records of capital felony expenses by clerks of superior courts.

17-11-21. Definitions.

ARTICLE 2

DEATH PENALTY GENERALLY

Cross references. — As to constitutional guarantee against deprivation of life without due process, see Ga. Const. 1976, Art. I, Sec. 1, Para. 1.

U.S. Code. — For provisions of Federal Rules of Criminal Procedure, Rule 38, relating to the death penalty, and annotations pertaining thereto, see 18 U.S.C.A.

17-10-30. Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed. (Code 1933, § 27-2534.1, enacted by Ga. L. 1973, p. 159, § 3.)

Cross references. — As to time limitation on prosecutions for crimes punishable by death, see § 17-3-1. As to presentence hearings in death penalty cases, see § 17-10-2.

Law reviews. — For article opposing capital punishment in Georgia, see 15 Ga. St. B.J. 159 (1979). For article supporting capital punishment in Georgia, see 16 Ga. St. B.J. 48 (1979). For article surveying Georgia cases in the area of evidence from

June 1979 through May 1980, see 32 Mercer L. Rev. 63 (1980).

For comment analyzing and criticizing the 1973 capital punishment statute in light of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), see 24 Mercer L. Rev. 891 (1973). For comment on *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978), see 31 Mercer L. Rev. 349 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

MITIGATING CIRCUMSTANCES

AGGRAVATING CIRCUMSTANCES

1. IN GENERAL

2. PRIOR CONVICTIONS

3. CRIME COMMITTED WHILE ENGAGED IN COMMISSION OF OTHER CRIMES

4. OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE, OR INHUMAN CIRCUMSTANCES

5. MURDER OF PEACE OFFICER, CORRECTIONS EMPLOYEE, OR FIREMAN, OR FOR PURPOSE OF AVOIDING, ETC., ARREST OR CUSTODY

Death sentence where codefendant receives lesser sentence. — There is no simplistic rule that a codefendant may not be sentenced to death when another defendant receives a lesser sentence. *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980).

As to propriety of death sentence where not imposed upon all participants in same transaction, see *Hall v. State*, 241 Ga. 252, 244 S.E.2d 833 (1978).

Where same defendant was tried previously on same charges and jury imposed life sentence, the death sentence in the case under review was obviously disproportionate to the life sentence previously imposed against the same defendant in the same case. *Ward v. State*, 239 Ga. 205, 236 S.E.2d 365 (1977).

In a capital case, if a defendant is sentenced to life on the first trial and later retried, a death sentence cannot be imposed at the conclusion of the second trial. *Reddy v. State*, 242 Ga. 876, 252 S.E.2d 383 (1979).

Death penalty for armed robbery is excessive or disproportionate. — Under the test provided by paragraph (3) of subsection (c) of this section, a death sentence imposed for armed robbery must be considered to be excessive or disproportionate to the penalties imposed in similar cases. *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974), aff'd, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 159-161, 267, 268, 397-400, 5 Am. Jur. 2d, Appeal and Error, §§ 684-701, 21 Am. Jur. 2d, Criminal Law,

§§ 583-585, 595-598.

C.J.S. — 24A C.J.S., Criminal Law, §§ 1772, 1789, 1831, 1878, 24B C.J.S., Criminal Law, §§ 1948, 1995, 2001-2003.

17-10-36. Establishment of unified review procedure by Supreme Court; effect on habeas corpus.

(a) The Supreme Court of Georgia shall establish, by rules, a unified motion for review procedure to provide for the presentation to the sentencing court and to the Supreme Court of all possible challenges to the conviction, sentence, and detention of defendants upon whom the sentence of death has been imposed, which challenges before March 29, 1980, have been presented for review by motion for new trial, motion to withdraw a guilty plea, appeal, writ of habeas corpus, or any other writ, motion, or proceeding cognizable in the courts of this state, except a claim or proceeding challenging the competency of counsel.

(b) The Supreme Court shall establish, by rules, a series of check lists to be utilized by the trial court, the prosecuting attorney, and defense counsel prior to, during, and after the trial of cases in which the death penalty is sought, to make certain that all possible matters which could be raised in defense have been considered by the defendant and defense counsel and either asserted in a timely and correct manner or waived in accordance with applicable legal requirements, so that, if the defendant is convicted and the sentence of death is imposed, the record and transcript of proceedings will be complete for a unified review by the sentencing court and the Supreme Court of all possible challenges to the

judgment of conviction, sentence of death, and the detention of the defendant.

(c) Nothing in this Code section or in the rules of the Supreme Court shall limit or restrict the grounds of review or suspend the rights or remedies available through the procedures governing the writ of habeas corpus.

(d) The procedures governing the writ of habeas corpus may be employed to assert rights or seek remedies if the procedures established in the rules of the Supreme Court as applied to the petitioner are inadequate or ineffective in any constitutional sense. (Code 1933, § 27-2538, enacted by Ga. L. 1980, p. 390, § 1.)

Cross references. — As to authority of Governor to suspend execution of sentences of death or sentences in cases of treason, see Ga. Const. 1976, Art. V, Sec. II, Para. II and § 42-9-55. As to habeas corpus generally, see Ch. 14, T. 9. As to employment of law clerks to assist superior courts in handling appeals by individuals awaiting execution, see § 15-6-28.1.

Code commission note. — Under Ga. L. 1980, p. 390, § 1, the rules established by the Supreme Court were required to be

submitted to the General Assembly for approval. By resolution found at Ga. L. 1981, p. 1532, the rules were approved and ratified.

Editor's note. — Ga. L. 1981, p. 1532 approved rules adopted by the Supreme Court regarding uniform motion for review procedures for presenting challenges to conviction, sentence, and detention of defendants upon whom the death sentence has been imposed.

17-10-37. Appointment of assistant to Supreme Court to provide information from prior capital cases; employment of staff to compile data; attachment for administrative purposes of office of assistant to office of clerk of Supreme Court.

(a) There shall be an assistant to the Supreme Court who shall be an attorney appointed by the Chief Justice and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The assistant shall provide the court with whatever extracted information it desires with respect thereto, including, but not limited to, a synopsis or brief of the facts in the record concerning the crime and the defendant.

(b) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence reviewed in accordance with Code Section 17-10-35.

(c) The office of the assistant shall be attached for administrative purposes to the office of the clerk of the Supreme Court of Georgia. (Code 1933, § 27-2537, enacted by Ga. L. 1973, p. 159, § 4.)

Law reviews. — For article, "Toward a Perspective on the Death Penalty Cases," see 27 Emory L.J. 469 (1978). For article surveying judicial developments in Georgia Criminal Law, see 31 Mercer L. Rev. 59 (1979).

For comment analyzing and criticizing the 1973 capital punishment statute in light

of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), see 24 Mercer L. Rev. 891 (1973). For comment criticizing inadequate standards and nebulous measurements for review under Georgia death penalty statute, in light of *Colby v. State*, 231 Ga. 829, 204 S.E.2d 612 (1974), see 26 Mercer L. Rev. 331 (1974).

JUDICIAL DECISIONS

Constitutionality. — Section is not unconstitutional. *Young v. State*, 237 Ga. 852, 230 S.E.2d 287 (1976).

Section is not subject to constitutional attack under U.S. Const., Amendments 8 and 14. *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612 (1974).

As to constitutionality of this section, see *House v. State*, 232 Ga. 140, 205 S.E.2d 217 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3221, 49 L. Ed. 2d 1217 (1976); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974), cert. denied, 431 U.S. 949, 97 S. Ct. 2667, 53 L. Ed. 2d 266 (1977); *Stephens v. State*, 237 Ga. 259, 227 S.E.2d 261, cert. denied, 429 U.S. 986, 97 S. Ct. 508, 50 L. Ed. 2d 599 (1976).

Examination of defendant's other convictions. — Nothing in this section forecloses the Supreme Court during the course of its independent review from examining nonappealed cases and cases in which the defendant pleaded guilty to a lesser offense. *Ross v. State*, 233 Ga. 361, 211 S.E.2d 356 (1974).

Duty of state to provide indigents access to appellate process. — The duty of the state is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the state's appellate process. *Ross v. State*, 233 Ga. 361, 211 S.E.2d 356 (1974).

Cited in *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612 (1974); *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975); *Owens v. State*, 233 Ga. 869, 214 S.E.2d 173 (1975); *Mitchell v. State*, 234

Ga. 160, 214 S.E.2d 900 (1975); *Chenault v. State*, 234 Ga. 216, 215 S.E.2d 223 (1975); *Brown v. State*, 235 Ga. 644, 220 S.E.2d 922 (1975); *Tamplin v. State*, 235 Ga. 774, 221 S.E.2d 455 (1975); *Goodwin v. State*, 236 Ga. 339, 223 S.E.2d 703 (1976); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976); *Banks v. State*, 237 Ga. 325, 227 S.E.2d 389 (1976); *Hill v. State*, 237 Ga. 794, 229 S.E.2d 737 (1976); *Douthitt v. State*, 239 Ga. 81, 235 S.E.2d 493 (1977); *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977); *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977); *Lamb v. State*, 241 Ga. 10, 243 S.E.2d 59 (1978); *Dunfee v. Hopper*, 241 Ga. 236, 241 S.E.2d 849 (1978); *Bowen v. State*, 241 Ga. 492, 246 S.E.2d 322 (1978); *Sprouse v. State*, 242 Ga. 831, 252 S.E.2d 173 (1979); *Willis v. State*, 243 Ga. 185, 253 S.E.2d 70 (1979); *Hamilton v. State*, 244 Ga. 145, 259 S.E.2d 81 (1979); *Bowden v. Zant*, 244 Ga. 260, 260 S.E.2d 465 (1979); *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666 (1980); *Hardy v. State*, 245 Ga. 272, 264 S.E.2d 209 (1980); *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980); *Dampier v. State*, 245 Ga. 427, 265 S.E.2d 565 (1980); *Stevens v. State*, 245 Ga. 583, 266 S.E.2d 194 (1980); *Thomas v. State*, 245 Ga. 688, 266 S.E.2d 199 (1980); *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316 (1980); *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980); *Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (1980); *Lewis v. State*, 246 Ga. 101, 268 S.E.2d 915 (1980); *State v. Graham*, 246 Ga. 341, 271 S.E.2d 627 (1980); *Alderman v. Austin*, 498 F. Supp. 1134 (S.D. Ga. 1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 159-161, 267, 268, 397-400. **C.J.S.** — 24A C.J.S., Criminal Law, § 1772, 1789, 1831, 1878, 24B C.J.S., §§ 684-701, 21 Am. Jur. 2d, Criminal Law, §§ 1948, 1995, 2001-2003.

17-10-38. Sentence of death to be carried out by electrocution; delivery of defendant to Department of Offender Rehabilitation.

(a) All persons who have been convicted of a capital offense and have had imposed upon them a sentence of death shall suffer such punishment by electrocution.

(b) In all cases in which the defendant is sentenced to be electrocuted, it shall be the duty of the trial judge in passing sentence to direct that the defendant be delivered to the Department of Offender Rehabilitation for electrocution at a state correctional institution designated by the department. (Ga. L. 1921, p. 195, § 1; Code 1933, § 27-2512; Ga. L. 1937-38, Ex. Sess., p. 330, § 1.)

JUDICIAL DECISIONS

For challenge of Ga. L. 1937-38, Ex. Sess., p. 330, § 1 on ex post facto grounds, see *Benton v. State*, 187 Ga. 449, 199 S.E. 749 (1939).

Allegation that section violates separation of powers provision. — An allegation that this section is unconstitutional, null, and void, because it supposedly violates Ga. Const. 1877, Art. I, Sec. I, Para. XXIII (see Ga. Const. 1976, Art. I, Sec. II, Para. IV), presents no question for judicial determination, where it fails to point out wherein the Act is repugnant to and in conflict with that constitutional provision. *Williams v. State*, 187 Ga. 415, 1 S.E.2d 27 (1939).

Ga. L. 1937-38, Ex. Sess., p. 330, § 1 did not violate constitutional requirements as to amendatory Acts. — This section is not unconstitutional as violative of Ga. Const. 1877, Art. III, Sec. I, Para. I (see Ga. Const. 1976, Art. III, Sec. VII, Para. XII) to the

effect that no law shall be amended or repealed by mere reference to its title or section number. *Williams v. State*, 187 Ga. 415, 1 S.E.2d 27 (1939).

Variance between title and subject matter of legislation. — Ga. L. 1924, p. 195 did not contain matter not expressed in its caption, in violation of Ga. Const. 1877, Art. III, Sec. VII, Para. VIII (see Ga. Const. 1976, Art. III, Sec. VII, Para. IV). *Howell v. State*, 164 Ga. 204, 138 S.E. 206, appeal dismissed, 275 U.S. 576, 48 S. Ct. 114, 72 L. Ed. 435 (1927).

Manner in which capital sentences executed is for legislative enactment. — There being no provision in the Constitution conferring upon sheriffs of counties the power to execute sentences of the courts in capital cases, the manner of execution of such sentences is for legislative enactment. *Dunaway v. Gore*, 154 Ga. 219, 138 S.E. 213 (1927).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 1581, 24B C.J.S., Criminal Law, §§ 1973, 1985, 2002.

C.J.S. — 24 C.J.S., Criminal Law.

17-10-39. Procedure for determination if female sentenced to death is pregnant; suspension of execution of sentence; issuance of new order for execution of sentence; entry of order, etc., upon minutes of court.

After a sentence of death has been imposed, if a female defendant so sentenced is believed to be pregnant, the sheriff of the county in which the defendant is imprisoned, with the concurrence and assistance of the judge of the probate court, shall select one or more physicians who shall conduct an examination. If the female is found to be pregnant, the sheriff shall suspend the execution of the sentence and make a report of the examination and suspension of execution to the presiding judge of the circuit, who shall cause the report and suspension to be entered on the minutes of the superior court of the county where the sentence was imposed. When the defendant is no longer pregnant, the judge shall issue a new order as provided in Code Section 17-10-40 directing the sheriff to execute the sentence at such date and place as the judge may appoint and direct in the order, which the sheriff shall be bound to do accordingly. The judge shall cause the new order and other proceedings in the case to be entered on the minutes of the court in which the sentence was imposed. (Laws 1833, Cobb's 1851 Digest, p. 839; Code 1863, § 4553; Code 1868, § 4573; Code 1873, § 4667; Ga. L. 1874, p. 30; Code 1882, § 4667; Penal Code 1895, § 1045; Penal Code 1910, § 1071; Code 1933, § 27-2520.)

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 558, 559, 595-598.

C.J.S. — 24 C.J.S., Criminal Law, § 1568.

17-10-40. Change of date of execution where date set for execution has passed generally; recordation on court minutes; time limitation for new execution date.

Where the date for the execution of any convicted person in a capital case has passed by reason of a supersedeas incident to appellate review, a stay of execution by the Governor, or for any other reason, the judge of the superior court of the county where the case was tried shall have the power and authority to pass an order fixing a new date for the execution

of the original sentence without requiring the convicted person to be brought before him by a writ of habeas corpus. The order shall be recorded on the minutes of the court and a certified copy of the order shall be sent immediately to the superintendent of the state correctional institution at the place of execution. The new date for the execution fixed by the judge shall be not less than ten nor more than 20 days from the date of the order. (Ga. L. 1924, p. 195, § 7; Code 1933, § 27-2518.)

Cross references. — As to authority of Governor to suspend execution of death sentences, see Ga. Const. 1976, Art. V, Sec. 11, Para. 11 and § 42-9-56.

JUDICIAL DECISIONS

Trial judge can exercise the jurisdiction vested in him under this section in vacation. *Mallory v. Chapman*, 158 Ga. 228, 122 S.E. 884, 34 A.L.R. 310 (1924).

Effect of involuntary absence of defendant. — The order of a trial judge fixing a new date for execution of sentence, after the original date has passed, is not void because the defendant is involuntarily absent and has not waived or authorized anyone else to waive his right to be present at the time and place of resentencing, and the passage of such order is not violative of the defendant's rights under the several provisions of the state and federal Constitutions. *McBurnett v. Balkcom*, 207 Ga. 452, 62 S.E.2d 180 (1950).

Absence of defendant when new date set does not violate due process. — Although it was necessary for the defendant to have been present in court when the original sentence of execution was pronounced, as well as during other proceedings throughout the trial, in the absence of waiver, no violation of the due process clause of U.S. Const., Amend. 14 appears, where the attack is not on the original sen-

tence, but merely on an order fixing a new date of execution, entered in his absence, which order became necessary after the date fixed in the original sentence had passed because supersedeas pending the determination of a writ of error, since setting a new date of execution is not a new sentence of defendant, as to which the judge has no discretion, but merely setting the time. *Fowler v. Grimes*, 198 Ga. 84, 31 S.E.2d 174, cert. denied, 323 U.S. 784, 65 S. Ct. 266, 89 L. Ed. 626 (1944).

Setting of new date where sheriff has allowed date for execution to elapse. — A prisoner who has been convicted and sentenced to be executed will not be discharged on habeas corpus because the sheriff had permitted the date assigned for the execution to elapse. A new date will be assigned. *Mallory v. Chapman*, 158 Ga. 228, 122 S.E. 884, 34 A.L.R. 310 (1924).

Cited in *Williams v. State*, 187 Ga. 415, 1 S.E.2d 27 (1939); *Smith v. Henderson*, 190 Ga. 886, 10 S.E.2d 921 (1940); *Parks v. State*, 206 Ga. 675, 58 S.E.2d 142 (1950); *McLendon v. Balkcom*, 207 Ga. 100, 60 S.E.2d 753 (1950).

OPINIONS OF THE ATTORNEY GENERAL

Authority to transport defendant for physical examination. — A person in the custody of the sheriff, who has not actually been transported to the penitentiary and delivered to the director, remains with the superior court, and the Board of Pardons and Paroles or the State Board of Corrections (now Board of Offender Rehabilitation) would have no jurisdiction, authority,

or power to pass any order directing such a person to be transported to another place for physical examination. 1945-47 Op. Att'y Gen. p. 434.

Custody of Department of Offender Rehabilitation. — Once the Department of Offender Rehabilitation has obtained custody of a prisoner whose execution date has been stayed and no new execution date

has been set, it remains until execution and so long as the sentence is valid. 1971 Op. Att'y Gen. No. 71-188.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 595-598.

C.J.S. — 24 C.J.S., Criminal Law, §§ 1613, 1614.

ALR. — Effect of permitting day fixed for execution to pass without carrying out sentence, 34 ALR 314.

17-10-41. Persons required to be present at executions.

There shall be present at the execution of a convicted person the superintendent of the state correctional institution or a deputy superintendent thereof, who shall serve as executioner, at least two assistants, two physicians to determine when death supervenes, an electrician, a suitable guard, and, if the convicted person so desires, his counsel, relatives, and such clergymen and friends as he may desire. (Ga. L. 1924, p. 195, § 4; Code 1933, § 27-2515; Ga. L. 1956, p. 161, § 32.)

JUDICIAL DECISIONS

Cited in *Irwin v. Lawrence*, 196 Ga. App. 202, 26 S.E.2d 251 (1943).

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Other persons admitted only with defendant's consent. — Since this section explicitly enumerates who may be witnesses at an execution, it is conclusive that the General Assembly intended to exclude any other witnesses except the condemned person's counsel, relatives, and such clergymen and friends as he may desire. This exception for designated persons requires a determination by the condemned person, which must be conveyed to the Department of Corrections (now Department of Offender Rehabilitation) within a reasonable time before the execution. If the condemned person should express a desire to have some member of the press present the department would be legally authorized to admit him. Otherwise, the department is required by this section to restrict those present to the

ones named in this section, and others requested by the condemned. 1963-65 Op. Att'y Gen. p. 346.

Discretion as to who may be present. — The only person with any discretion in deciding who shall be present at an execution is the condemned person himself. Further, the condemned person has no discretion as to individual members of the general public who are not his counsel, relatives, and such clergymen and friends as he may desire. 1960-61 Op. Att'y Gen. p. 354.

Residence of electrician immaterial. — No reference is made by this section to the residence of the electrician. The indefinite article "an" is used and therefore the place of residence of the electrician used in electrocutions is immaterial under the law. 1948-49 Op. Att'y Gen. p. 281.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 595-598.

C.J.S. — 24B C.J.S., Criminal Law, §§ 2001-2003.

17-10-42. Preparation and filing of certification of execution.

The executioner and attending physicians shall certify the fact of the execution to the clerk of the superior court of the county in which the sentence was imposed, which certificate shall be filed by the clerk with the papers in the case. (Ga. L. 1924, p. 195, § 5; Code 1933, § 27-2516.)

Cross references. — As to maintenance of death records generally, see § 31-10-70 et seq.

JUDICIAL DECISIONS

Cited in *Meyers v. Whittle*, 171 Ga. 509, 156 S.E. 120 (1930); *Irwin v. Lawrence*, 196 Ga. App. 202, 26 S.E.2d 251 (1943).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 595-598; 60 Am. Jur. 2d, Penal and Correctional Institutions, § 13.

C.J.S. — 24B C.J.S., Criminal Law, §§ 2001-2003.

17-10-43. Disposition of body of executed person; payment of expenses of transporting body.

The body of an executed person shall be delivered to the relatives of the person if they so desire; and, in case no claim is made by relatives for the body, it shall be disposed of in the same manner as bodies of inmates dying in a state correctional institution. If the nearest relatives of the person executed desire that the body be transported to the former home of the executed person, if in this state, the expenses of transportation shall be paid by the county governing authority of the county where the person was convicted, from any funds on hand in the treasury. (Ga. L. 1924, p. 195, § 6; Code 1933, § 27-2517.)

Cross references. — As to disposition of unclaimed dead bodies generally, see § 31-21-20 et seq.

JUDICIAL DECISIONS

Cited in *Mevers v. Whittle*, 171 Ga. 509, 156 S.E. 120 (1930).

17-10-44. Provision of death chamber, apparatus, etc., by Department of Offender Rehabilitation.

The Department of Offender Rehabilitation shall provide a death chamber and all necessary apparatus, machinery, and appliances for inflicting the penalty of death by electrocution. (Ga. L. 1924, p. 195, § 2; Code 1933, § 27-2513; Ga. L. 1956, p. 161, § 28.)

RESEARCH REFERENCES

ALR. — Manner of inflicting death sentence as cruel or unusual punishment. 30 ALR 1452.

ARTICLE 3

**DISPOSITION OF MENTALLY INCOMPETENT PERSONS
CONVICTED OF CAPITAL OFFENSES**

17-10-60. Right of person convicted of capital offense to inquisition or trial to determine sanity generally.

No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity. (Ga. L. 1903, p. 77, § 1; Penal Code 1910, § 1073; Code 1933, § 27-2601.)

JUDICIAL DECISIONS

Section not violative of due process standards under the state and federal Constitutions. *Solesbee v. Balkcom*, 339 U.S. 9, 70 S. Ct. 457, 94 L. Ed. 604 (1950); *Solesbee v. Balkcom*, 208 Ga. 121, 65 S.E.2d 263 (1951); *McCorquodale v. Stynchcombe*, 239 Ga. 138, 236 S.E.2d 486, cert. denied, 434 U.S. 975, 98 S. Ct. 534, 54 L. Ed. 2d 467 (1977).

Notwithstanding lack of means for judicial determination of sanity. — The failure to provide a means by which a prisoner's sanity or insanity may be judicially deter-

mined is not a denial of due process of law. *McLendon v. Balkcom*, 207 Ga. 100, 60 S.E.2d 753 (1950).

Section expressly divests the courts of all jurisdiction to determine mental status of one alleged to have become insane since the date of his trial and conviction of a capital offense. *Solesbee v. Balkcom*, 208 Ga. 121, 65 S.E.2d 263 (1951).

Except as to cases pending when enacted. *Solesbee v. Balkcom*, 208 Ga. 121, 65 S.E.2d 263 (1951).

Superior court judge has no jurisdiction to entertain original application for inquisition of insanity or to grant an order suspending the sentence in the case. Cribb

v. Parker, 119 Ga. 298, 46 S.E. 110 (1903).
Cited in *Alford v. State*, 137 Ga. 458, 73 S.E. 375 (1912); *Solesbee v. Balkcom*, 205 Ga. 122, 52 S.E.2d 433 (1949).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 75-80.

C.J.S. — 24 C.J.S., Criminal Law, §§ 1569, 1619.

ALR. — Insanity supervening after conviction and sentence of death, 49 ALR 804.

Right of appeal in proceeding for restoration to competency, 122 ALR 541.

Insanity of accused at time of commission of offense, not raised at trial, as ground for habeas corpus or coram nobis after conviction, 29 ALR2d 703.

Effect of death of appellant upon appeal from judgment of mental incompetence against him, 54 ALR2d 1161.

17-10-61. Conduct of examination into sanity of person convicted of capital offense upon order of Governor; procedure; commitment of person to custody of Department of Human Resources.

Upon satisfactory evidence being offered to the Governor, showing reasonable grounds to believe that a person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, in his discretion, have the convicted person examined by such expert physicians as the Governor may choose, the cost of the examination to be paid by the Governor out of the contingent fund. It shall be the responsibility of the Governor to cause the physicians to receive written instructions which plainly set forth the legal definitions of insanity as recognized by the laws of this state. The physicians shall, after making the necessary examination of the convicted person, report in writing to the Governor whether or not reasonable grounds exist to raise an issue that the person is insane under the standards previously specified to them by the Governor. The Governor may, if he determines that the convicted person has become insane, have the power of committing him to the custody of the Department of Human Resources until his sanity has been restored or determined to be restored as provided by law. (Ga. L. 1903, p. 77, § 2; Penal Code 1910, § 1074; Code 1933, § 27-2602; Ga. L. 1960, p. 988, § 1.)

Set

18-3913. Wild flowers protected — Amended list — Duty of parks department. — (a) In order to further protect native wild flowers and shrubs from needless destruction and waste, the parks department may, after investigation and public hearings and in accordance with the provisions of this act, establish and amend a list of wild flowers and shrubs in addition to those listed in section 1 (3) [§ 18-3911(3)] of this act. The provisions of this act will then apply to such "established" or "amended" list.

(b) In determining additions to the list of wild flowers set forth herein, the parks department may take into consideration:

- (1) The laws and regulations of the United States and other states.
- (2) The effect on the scenic beauty of public roads and public land.
- (3) The necessity to preserve and protect native plants whenever it appears that they might possibly become extinct. [I.C., § 18-3913, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1967, ch. 430, § 3, p. 1415, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section

added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

The words "this act" refer to §§ 18-3911 — 18-3914.

18-3914. Violation a misdemeanor. — A violation of this chapter and regulations authorized by this act is a misdemeanor. [I.C., § 18-3914, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1967, ch. 430, § 4, p. 1415, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section

added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

The words "this act" refer to §§ 18-3911 — 18-3914.

CHAPTER 40

HOMICIDE

SECTION.

- 18-4001. Murder defined.
- 18-4002. Express and implied malice.
- 18-4003. Degrees of murder.
- 18-4004. Punishment for murder.
- 18-4005. Petit treason abolished.
- 18-4006. Manslaughter defined.
- 18-4007. Punishment for manslaughter.
- 18-4008. Death must occur when.
- 18-4009. Justifiable homicide by any person.

SECTION.

- 18-4010. Fear not sufficient justification.
- 18-4011. Justifiable homicide by officer.
- 18-4012. Excusable homicide.
- 18-4013. Discharge of defendant when homicide justifiable or excusable.
- 18-4014. Administering poison with intent to kill.
- 18-4015. Assault with intent to murder.

18-4001. Murder defined. — Murder is the unlawful killing of a human being with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being. Torture is the intentional infliction of extreme and prolonged pain with the intent to cause suffering. It shall also be torture to inflict on a human being extreme and prolonged acts of brutality irrespective of proof of intent to cause suffering. The death of a human being caused by such torture is murder irrespective of proof of specific intent to kill; torture causing death

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shall be deemed the equivalent of intent to kill. [I.C., § 18-4001, as added by 1972, ch. 336, § 1, p. 844; am. 1977, ch. 154, § 1, p. 390.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 15; R.S., R.C., & C.L., § 6560; C.S., § 8209; I.C.A., § 17-1101, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Section 2 of S.L. 1977, ch. 154 is compiled as § 18-4003.

Cross ref. Homicide caused by placing obstruction on railroad track is murder, § 18-6011.

Homicide caused by stealing of car parts is murder, § 18-6007.

Juvenile charged with murder, when proceeded against as adult, § 16-1806A.

Sec. to sec. ref. This section is referred to in § 18-7503.

Cited in: State v. Foley, 95 Idaho 222, 506 P.2d 119 (1973); State v. Aragon, 107 Idaho 358, 690 P.2d 293 (1984); State v. Pennell, 108 Idaho 669, 701 P.2d 289 (Ct. App. 1985); State v. Merrifield, 109 Idaho 11, 704 P.2d 343 (Ct. App. 1985); Sivak v. State, — Idaho —, 731 P.2d 192 (1986); State v. Simons, — Idaho —, 731 P.2d 797 (Ct. App. 1987).

ANALYSIS

Cross-examination.

Double jeopardy.

Dual juries.

Elements of offense.

Evidence.

— Confession.

— Malice aforethought.

— Photographs.

— Sufficiency of.

Included offense.

Instructions to jury.

Intent.

Intoxication as defense.

Opening statement.

Premeditation.

Prosecutor's comments.

Punishment.

Sanity of defendant.

Solicitation of attempted murder.

Sufficiency of charge.

Sufficiency of indictment.

Cross-Examination.

Where the defense, on cross-examination, attempted to elicit from police officer testimony that his true motive in telling witness not to discuss case with others was to prevent disclosure of witness having failed polygraph tests, the trial court properly limited the

cross-examination in order to prevent the introduction of potentially prejudicial polygraph information; the court gave the defense considerable latitude in its attempt to establish that the witness had changed his statements because of police accusations that he was lying, and no prejudice was shown. State v. Wheeler, 109 Idaho 795, 711 P.2d 741 (Ct. App. 1985).

Double Jeopardy.

Giving the double jeopardy statute, § 18-301, its broadest possible application, it is not a bar to the present prosecution for robbery because both the robbery and the murder did not arise out of the same act or omission; the act of taking property from the deceased by means or force or fear was separate from the act of firing the shots which killed him, defendant's companions having flagged the deceased to a stop, defendant was handed deceased's wallet after parking their car and, hearing a shot and screaming, was told to go home. State v. Hall, 66 Idaho 63, 383 P.2d 602 (1963).

It is clear from the former statutory definitions that murder and robbery are separate, distinct and independent crimes; neither is the "same offense" as the other, within the constitutional provision against double jeopardy, and prosecution for one does not bar a subsequent prosecution on the other on that ground. State v. Hall, 66 Idaho 63, 383 P.2d 602 (1963).

It is obvious, from the definition of robbery in § 18-6501, that the murder information did not purport to charge defendant with the crime of robbery, and it was insufficient for that purpose; therefore, defendant after acquittal on the charge of murder was not entitled to an instruction that the robbery was the same offense as that for which he had been previously charged. State v. Hall, 66 Idaho 63, 383 P.2d 602 (1963).

Dual Juries.

Where the trial judge was meticulous and meticulous in his conduct of trial before dual juries and there was no indication whatsoever that the dual jury procedure resulted in any unfairness, prejudice or violation of defendant's constitutional rights, there was no error in using a dual jury procedure in trying two co-defendants for murder. State v. Beam, 109 Idaho 616, 710 P.2d 525 (1985), cert. denied, — U.S. —, 106 S. Ct. 2250, 90 L. Ed. 2d 704 (1986).

The trial court did not deprive the defendant of due process by placing him with his codefendant and using separate juries sit-

Judgment of acquittal. *State v. Rodriguez*, 106 Idaho 30, 674 P.2d 1029 (Ct. App. 1983).

Premeditation.

Premeditation is not an essential element of crime of assault with intent to commit murder. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Use of Deadly Weapon.

In a murder prosecution, because of the use to which knife of defendant was put and results of this use, it will be classified as a deadly weapon and therefore it is to be concluded that there was both express and implied malice on behalf of defendant immediately prior to the time he took the life of the deceased. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Trial court had no other alternative than to find the defendant guilty of wilful, deliberate, and premeditated killing with malice aforethought in view of the defendant's act of deliberately opening up a pocket knife, next cutting the victim's throat and then hacking and cutting until he had killed the deceased and expended himself and the imposition of the death sentence under the circumstances was not an abuse of discretion by the trial court under such facts and circumstances. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Where a defendant uses a deadly weapon against the person of another in a deadly and dangerous manner, the element of malice may be presumed, such a presumption may be rebutted. *State v. Rodriguez*, 106 Idaho 30, 674 P.2d 1029 (Ct. App. 1983).

18-4003. Degrees of murder. — (a) All murder which is perpetrated by means of poison, or lying in wait, or torture, when torture is inflicted with the intent to cause suffering, to execute vengeance, to extort something from the victim, or to satisfy some sadistic inclination, or which is perpetrated by any kind of wilful, deliberate and premeditated killing is murder of the first degree.

(b) Any murder of any peace officer, executive officer, officer of the court, fireman, judicial officer or prosecuting attorney who was acting in the lawful discharge of an official duty, and was known or should have been known by the perpetrator of the murder to be an officer so acting, shall be murder of the first degree.

(c) Any murder committed by a person under a sentence for murder of the first or second degree, including such persons on parole or probation from such sentence, shall be murder of the first degree.

(d) Any murder committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem is murder of the first degree.

(e) Any murder committed by a person incarcerated in a penal institution upon a person employed by the penal institution, another inmate of the penal institution or a visitor to the penal institution shall be murder of the first degree.

(f) Any murder committed by a person while escaping or attempting to escape from a penal institution is murder of the first degree.

(g) All other kinds of murder are of the second degree. I.C., § 18-4003, as added by 1972, ch. 336, § 1, p. 844; am. 1973, ch. 276, § 1, p. 588; am. 1977, ch. 154, § 2, p. 390.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 17, R.S., R.C., & C.L., § 6562; C.S., § 8211; I.C.A., § 17-1103; am. S.L. 1935, ch. 24, § 1, p. 41; am. S.L. 1969, ch. 248, § 1, p. 773, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L.

1972, ch. 336, § 1 restored the subject matter contained in the section as it existed prior to its repeal.

Section 1 of S.L. 1977, ch. 154 is compiled as § 18-4001.

Cross ref. Jury to find degree of crime, § 19-2311.

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omitting to find degree or nature of crime. reassembling jury after discharge for purpose of. 66 A.L.R. 557.

Entrapment to attempt to commit murder. 66 A.L.R. 504; 86 A.L.R. 263.

Intoxication as affecting deliberation and premeditation. 79 A.L.R. 904.

Arson, necessity of intent to kill to bring death resulting from, within statute making homicide in perpetration of felony murder in first degree. 87 A.L.R. 414.

Instruction as to lesser degree of crime, duty of court as to, where statute fixes degree of homicide in perpetration of felony. 21 A.L.R. 628; 27 A.L.R. 1097; 102 A.L.R. 1019.

Escape from scene of crime, homicide by companion of defendant while attempting to make, as murder in first degree. 108 A.L.R. 847.

Instructions, applying rule of reasonable doubt as to intent or malice as curing error in instruction placing burden of proof upon defendant in that regard. 120 A.L.R. 610.

Inference of intent to kill where killing is by blow without weapon. 22 A.L.R.2d 854.

Pregnancy as element of offense of attempt to procure a miscarriage or of homicide predicated in such attempt. 46 A.L.R.2d 1393.

Use of set gun, trap, or similar device on defendant's own property. 47 A.L.R.3d 646.

Homicide as affected by time elapsing between wound and death. 60 A.L.R.3d 1316.

Intoxicating liquor, criminal responsibility of one unlawfully furnishing, for death resulting from its use. 82 A.L.R.3d 589.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour. 93 A.L.R.3d 925.

18-4004. Punishment for murder. — Subject to the provisions of 19-2515, Idaho Code, every person guilty of murder of the first degree shall be punished by death or by imprisonment for life, provided that whenever the court shall impose a sentence of life imprisonment, the court shall set forth in its judgment and sentence a minimum period of confinement of not less than ten (10) years during which period of confinement the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct, except for meritorious service. Every person guilty of murder of the second degree is punishable by imprisonment not less than ten (10) years and the imprisonment may extend to life. [I.C., § 18-4004, as added by 1972, ch. 336, § 1, p. 844; am. 1973, ch. 276, § 2, p. 588; am. 1977, ch. 154, § 3, p. 390; am. 1986, ch. 232, § 2, p. 638.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 17; R.S., & R.C., § 6563; am. S.L. 1911, ch. 68, § 1, p. 190; reen. C.L., § 6563; C.S., § 8212; I.C.A., § 17-1104, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section as it existed prior to its repeal.

Section 3 of S.L. 1986, ch. 232 is compiled as § 19-2513.

Section 6 of S.L. 1986, ch. 232 read: "This act shall be in full force and effect on and after February 1, 1987, and the amendments in this act shall apply only to those persons who shall commit an offense on or after February 1, 1987, and are not intended to repeal or amend those provisions of the Code which apply to persons committing an offense prior to February 1, 1987, which provisions shall continue to apply, and further that amendments in this act are not intended to repeal or amend sections 19-2520, 19-2520A, 19-2520B, 29-2520 or 29-2520D, Idaho Code."

Section 8 of S.L. 1977, ch. 154 declared an emergency. Approved March 28, 1977.

Title of 1986 Act. Section 1 of S.L. 1986, ch. 232 read: "This act shall be known as the 'Unified Sentencing Act of 1986.'"

Cited in: *State v. De La Paz*, 106 Idaho 924, 684 P.2d 326 (Ct. App. 1984); *Lindquist v. Gardner*, 770 F.2d 876 (9th Cir. 1985); *State v. Nellsch*, 110 Idaho 594, 716 P.2d 1366 (Ct. App. 1986); *State v. Martinez*, — Idaho —, 723 P.2d 825 (1986).

ANALYSIS

Certainty of verdict.
Constitutionality.
Death penalty.
Discretion of trial court.
Due process.
Effect on capacity of jurors.
Indeterminate life sentence.
Instructions to jury.
Parole eligibility.
Right to jury.
Sentence.
— Excessive.

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Illinois Code Supplement

38 ¶ 119-5

CRIMINAL LAW AND PROCEDURE

Code Crim.Proc. § 119-5

DIVISION III. CODE OF CRIMINAL PROCEDURE OF 1963

Title	Paragraph
I. General Provisions	100-1
Article	
106A. [Child Witnesses] [New]	106A-1
IV. Proceedings to Commence Prosecution	111-1
Article	
112A. Domestic Violence: Order of Protection	112A-1

DIVISION V. SUPPLEMENTARY PROVISIONS

	Paragraph
Public or Community Service	204a-1
Illinois Law Enforcement Commission [Repealed]	209-1
Criminal Justice Information Act	210-1
Habitual Child Sex Offender Registration Act	221
Pretrial Services	301

MISCELLANEOUS LAWS

	Paragraph
Anti-Crime Advisory Council	1301
Bill of Rights for Victims and Witnesses of Violent Crime Act	1401
Privacy of Child Victims of Criminal Sexual Offenses Act	1451
Probation Challenge Program Act	1501
Polygraph Examinations of Sex Offense Victims [New]	1551
Illinois Uniform Conviction Information Act [New]	1601

DIVISION III. CODE OF CRIMINAL PROCEDURE OF 1963

TITLE VII. PROCEEDINGS AFTER TRIAL

ARTICLE 119. EXECUTION OF SENTENCE

119-5. Execution of death sentence

§ 119-5. Execution of Death Sentence. (a)(1) A defendant sentenced to ~~death~~ shall be executed by a continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent. ~~and~~ death is pronounced by a licensed physician according to accepted standards of medical practice.

(2) If the execution of the sentence of death as provided in paragraph (1) is ~~found~~ illegal or unconstitutional by a reviewing court of competent jurisdiction, the sentence of death shall be carried out by electrocution.

(b) In pronouncing the sentence of death the court shall set the date of the execution which shall be not less than 60 nor more than 90 days from the ~~date~~ sentence is pronounced.

(c) A sentence of death shall be executed at the Illinois State Penitentiary.

(d) The warden of the penitentiary shall supervise such execution which shall be conducted in the presence of 2 physicians and 6 other witnesses who shall certify the execution of the sentence which certification shall be filed with the clerk of the ~~court~~ which imposed the sentence.

Amended by P.A. 83-233, § 1, eff. Sept. 8, 1983.

38 § 119-1 CODE OF CRIMINAL PROCEDURE
Code Crim. Proc. § 119-1

ARTICLE 119. EXECUTION OF SENTENCE

Sec.

119-1 to 119-4. Repealed.

119-5. Execution of death sentence.

§§ 119-1 to 119-4. Repealed by P.A. 77-2097, § 8-5-1, eff. Jan. 1, 1973

Historical Note

These sections, relating to the execution of sentences, were repealed by section 8-5-1 of the Unified Code of Corrections (section 1005-5-1 of this chapter).

For savings provisions of the Unified Code of Corrections, see section 1008-2-1 et seq. of this chapter.

The disposition of the subject matter of the repealed sections is as follows:

Former ch. 38 sections	Present ch. 38 sections
119-1	1005-8-5
119-2	1005-8-6

Former ch. 38 sections	Present ch. 38 sections
119-3	1005-8-7
119-4	1005-3-51d), (e) 1003-3-10

For the derivation of the repealed sections, see Prior Laws under parallel sections of the Unified Code of Corrections.

An amendment of section 119-2 by P.A. 77-2829, § 16, was excised from that Act under the terms of section 67, thereof. See note under ch. 23, §§ 2501 to 2507.

§ 119-5. Execution of death sentence

(a) A sentence of death shall be executed by the electrocution of the defendant.

(b) In pronouncing the sentence of death the court shall set the date of the execution which shall be not less than 60 nor more than 90 days from the date sentence is pronounced.

(c) A sentence of death pronounced before, on or after the effective date of this amendatory Act shall be executed at the Illinois State Penitentiary.

(d) The warden of the penitentiary shall supervise such execution which shall be conducted in the presence of 2 physicians and 6 other witnesses who shall certify the execution of the sentence which certification shall be filed with the clerk of the court which imposed the sentence.

Laws 1963, p. 2836, § 119-5, eff. Jan. 1, 1964. Amended by P.A. 76-474, § 1, eff. July 18, 1969.

PROCEEDINGS AFTER TRIAL 38 § 119-5

Code Crim. Proc. § 119-5

Historical Note

As enacted in 1963 subsections (c) and (d) read:

"(c) A sentence of death pronounced by a court of a county of fewer than 1,000,000 inhabitants shall be executed at the Illinois State Penitentiary. A sentence of death pronounced by a court of a county having 1,000,000 or more inhabitants shall be executed in the county jail for such county.

"(d) The warden of the penitentiary, or the sheriff or a deputy sheriff of a county having 1,000,000 or more inhabitants, shall supervise such execution which shall be conducted in the presence of 2 physicians and 6 other witnesses who shall certify the execution of the sentence which certification shall be filed with the clerk of the court which imposed the sentence."

P.A. 76-471 eliminated executions at the Cook County Jail.

Prior Laws:

R.L.1827, c. 158, § 155.

R.L.1832, p. 208, § 157.

R.S.1845, p. 182, § 167.

Laws 1859, p. 17, § 3.

R.S.1874, p. 348, div. 14, §§ 1 to 5.

Laws 1927, p. 100, § 1.

Laws 1929, p. 346, § 1.

Laws 1941, vol. 1, p. 554, § 1.

Laws 1945, p. 687, § 1.

Ill.Rev.Stat.1963, ch. 38, §§ 719 to 753.

For the text of provisions repealed by the Code of Criminal Procedure of 1963, see Ill.Rev.Stat.1963.

Cross References

Sentence to death, see section 1007-5-3 of this chapter.

Law Review Commentaries

Concept of punishment. Ugo Conti, 13 Ill.L.Rev. 231.

Early corporal punishments. Joseph J. Thompson, 1923, 6 Ill.L.Q. 37.

Punishment v. treatment in cure of criminal. 1937, 2 John Marshall L.Q. 560.

Library References

Criminal Law ¶1219.

U.S. Criminal Law § 2001 et seq.

I.L.P. Criminal Law § 951.

Notes of Decisions

Extension of time during insanity proceedings 4

Insanity proceeding 3

Review 5

Time of execution

In general 1

After stay 2

day of first Supreme Court term following expiration of 50-day period was January 15. People v. Williams, 1943, 383 Ill. 318, 50 N.E.2d 450, certiorari denied 64 S.Ct. 453, 321 U.S. 762, 88 L.Ed. 1059.

It was error to fix the time at more than 25 days from the day of the sentence. Wallace v. People, 1896, 159 Ill. 116, 42 N.E. 771.

It was error to order death penalty to be executed before tenth day of term of Supreme Court next following. White v. People, 1876, 81 Ill. 232.

2. Time of execution after stay

Where the jury found that a defendant convicted of a capital crime was sane, the trial court, having stayed execution of sentence, should immediately fix the

Time of execution in general

Time of execution of sentence was postponed on date of argument on appeal for new trial, five days after expiration of next succeeding term of Supreme Court. People v. Wilson, 1948, 361 Ill. 51 N.E.2d 211.

See former section 749 of this chapter. Death sentence pronounced October 12, properly provided for execution on January 16, 1943, where fifth

38 ¶ 1005-8-4

Unified Corr.Code § 5-8-4

CRIMINAL LAW AND PROCEDURE

ant was sentenced to impose consecutive sentences not exceeding twice minimum authorized for murder despite this paragraph having been amended during course of prosecution, as defendant was entitled to sentencing in accordance with version of this paragraph most favorable to him. *People v. Hillenbrand*, App. 3 Dist.1986, 100 Ill.Dec. 620, 146 Ill.App.3d 1075, 497 N.E.2d 798, appeal allowed 106 Ill.Dec. 51, 113 Ill.2d 580, 505 N.E. 2d 357.

43. — Review, consecutive sentences

People v. Thomas, 1981, 54 Ill.Dec. 235, 98 Ill.App.3d 852, 424 N.E.2d 985, certiorari denied 102 S.Ct. 2276 [main volume] 456 U.S. 993, 73 L.Ed.2d 1289.

This paragraph governing imposition of consecutive sentences requires nothing more than that, on review of record, it is clear that sentencing judge was convinced in light of all facts and circumstances before him that consecutive term was necessary for the protection of the public. *People v. Peebles*, App. 1 Dist.1984, 80 Ill.Dec. 427, 125 Ill.App.3d 213, 465 N.E.2d 539.

Conclusion, if any, in sentencing defendant to consecutive terms of imprisonment that alleged accomplice's uncontradicted testimony that he and defendant had participated in prior burglary, which did not result in conviction of record, was true was not reversible error where court on three occasions referred to alleged accomplice's credibility as questionable during sentencing hearing prior to remand for resentencing and was thus shown to understand importance of determining alleged accomplice's credibility. *People v. Walker*, 1983, 69 Ill.Dec. 748, 113 Ill.App.3d 1074, 448 N.E.2d 208, certiorari denied 104 S.Ct. 1297, 465 U.S. 1031, 79 L.Ed.2d 697.

1005-8-5. Commitment of the offender

§ 5-8-5. Commitment of the Offender. Upon rendition of judgment after pronouncement of a sentence of periodic imprisonment, imprisonment, or death, the court shall commit the offender to the custody of the sheriff or to the Department of Corrections. A sheriff in executing an order for commitment to the Department of Corrections shall convey such offender to the nearest receiving station designated by the Department of Corrections. The court may commit the offender to the custody of the Attorney General of the United States under Section 5-8-6¹ when a sentence for a State offense provides that such sentence is to run concurrently with a previous and unexpired federal sentence. The expense of conveying a person committed by the juvenile court or an offender convicted of a felony shall be paid by the State. The expenses in all other cases shall be paid by the county of the committing court.

Amended by P.A. 84-551, § 27, eff. Sept. 18, 1985.

¹ Paragraph 1005-8-6 of this chapter.

P.A. 84-551 revised terminology and extended a statute of limitations (ch. 110, ¶ 13-214).

Notes of Decisions

6. — Amendment of mittimus

Where, because of apparent clerical errors, defendants' mittimuses did not correctly reflect sen-

45. Credit for time previously served

Defendant, who was sentenced for offenses committed while on parole for armed robbery conviction, with the new sentence to be served consecutively with armed robbery sentence, was not entitled to "good time" credit toward release date on new sentence for all time served in custody from original custody date on armed robbery conviction, as this paragraph allows an award of "good time" only from date of imprisonment on the consecutive sentence, and not before. *Cornes v. Groves*, App. 5 Dist.1984, 78 Ill.Dec. 605, 122 Ill.App.3d 1085, 462 N.E.2d 722.

Where trial judge who conducted sentencing hearing stated that defendant would be given credit for all time served on the offense, whether awaiting trial, awaiting hearing on the violation, or time served initially as a condition of probation, defendant was entitled to credit toward his sentence of imprisonment for the time served in jail as a condition of probation and defendant would also be credited with time served on probation in the cause, because court did not expressly deny such credit. *People v. Redman*, App. 4 Dist.1984, 78 Ill.Dec. 305, 122 Ill.App.3d 747, 462 N.E.2d 21.

47. Review

In sentencing phase of prosecution for rape, deviate sexual assault and attempted armed robbery, record, which indicated that trial court was informed that in the past four years prior to convictions at issue defendant had been convicted of four armed robberies, rape, deviate sexual assault, and unlawful restraint, and that trial court had been forced to have defendant forcibly removed from courtroom at one point because of his belligerent behavior, supported finding that consecutive sentences were necessary to protect public from further criminal conduct by defendant. *People v. Carter*, App. 1 Dist.1984, 85 Ill.Dec. 124, 113 Ill.App.3d 1076, 473 N.E.2d 434.

ences given them, mittimuses would be corrected. *People v. Ammons*, App. 1 Dist.1983, 76 Ill.Dec. 377, 120 Ill.App.3d 855, 458 N.E.2d 1061.

Where jail credit indicated in mittimus did not mesh with information in record regarding defendant's time in custody prior to sentencing, and time spent in jail could not be accurately calculated from record, case was properly remanded to circuit court to recalculate credit due defendant.

38 ¶ 1005-8-4 CODE OF CORRECTIONS

Unified Corr. Code § 5-8-4

Note 46

imposed, and, after judge refused to accept guilty plea, when one defendant declared that, although he was not guilty, he would plead guilty simply to make it easier on himself, sentences of not less than ten years nor more than 20 years to be served consecutively to prior sentences were imposed, defendants failed to show that disparity between sentences bargained for and actual sentences had been due to trial judge's and prosecutor's pique at being put to trouble of jury trial. *People v. Morgan*, 1973, 14 Ill.App.3d 232, 302 N.E.2d 152, affirmed, remanded with directions 59 Ill.2d 276, 319 N.E.2d 764, on remand 29 Ill.App.3d 1043, 332 N.E.2d 191.

Facts that following jury trial, defendant received nine to ten-year sentence for aggravated battery, to run consecutively to previous sentence for unrelated burglary, while, after defendant pleaded guilty to rape upon the battery victim, he received only three to six-year sentence for the rape, to run concurrently with the battery sentence, did not demonstrate that the battery sentence was vindictively imposed to punish defendant for requesting jury trial. *People v. Rossi*, 1972, 52 Ill.2d 13, 284 N.E.2d 275.

In absence of evidence that defendant was promised his sentence would run concurrently with other previously imposed sentence if he would plead guilty, record did not show that defendant was given a consecutive sentence by reason of fact that he demanded a jury trial. *People v. Lairson*, App.1971, 266 N.E.2d 735.

47. Review

One of primary purposes of provisions in this paragraph requiring trial judge to set forth his reasons for imposing a particular sentence is to enable reviewing court to determine just what went into sentencing decision and whether it is consistent with statutory objectives. *People v. Green*, 1980, 39 Ill.Dec. 339, 83 Ill.App.3d 982, 404 N.E.2d 930.

Claim that this paragraph requiring imposition of a consecutive sentence for defendants convicted of escape from adult division was violative of equal protection because ¶ 1003-6-4 of this chapter failed to require consecutive sentencing for convicted defendants found guilty of escaping from custody while awaiting sentencing was a non-jurisdictional question which was waived by defendant when it was not properly presented in trial court and preserved for review. *People v. Nelson*, 1975, 26 Ill.App.3d 227, 324 N.E.2d 719.

Where aggregate minimum period of defendant's sentences was 120 years but, under this paragraph, aggregate minimum sentence could not be more than twice the lowest minimum authorized sentence for the most serious felony involved, and the lowest minimum sentence for such felony, murder, was 14 years, sentences would be vacated and cause remanded for resentencing. *People v. McAfee*, 1974, 23 Ill.App.3d 788, 320 N.E.2d 84, appeal after remand 1 Ill.Dec. 727, 42 Ill.App.3d 966, 356 N.E.2d 1009.

1005-8-5. Commitment of the offender

§ 5-8-5. Commitment of the Offender. Upon rendition of judgment after pronouncement of a sentence of periodic imprisonment, imprisonment, or death, the court shall commit the offender to the custody of the sheriff or to the Department of Corrections. A sheriff in executing a mittimus issuing upon a commitment to the Department of Corrections shall convey such offender to the nearest receiving station designated by the Department of Corrections. The court may commit the offender to the custody of the Attorney General of the United States under Section 5-8-6¹ when a sentence for a State offense provides that such sentence is to run concurrently with a previous and unexpired federal sentence. The expense of conveying a person committed by the juvenile court or an offender convicted of a felony shall be

35-38-4-2. Appeal by state.

Cited: *State v. Comerford*, 484 N.E.2d 993 (Ind. App. 1985); *State v. Monticello Developers, Inc.*, 515 N.E.2d 1070 (Ind. 1987);

State v. Watkins, 515 N.E.2d 1152 (Ind. App. 1987).

NOTES TO DECISIONS

ANALYSIS

Appealable orders.
—Civil proceedings.
Reserved question.

Appealable Orders.

—Civil Proceedings.

The state may appeal an adverse ruling from an order granted under IC 35-33-5-5(c)(1), because proceedings sur-

rounding the motion for return of property are civil in nature, and an appeal is not limited by this section. *State v. Poxon*, 514 N.E.2d 652 (Ind. App. 1987).

Reserved Question.

When a defendant has been acquitted and the state appeals a reserved question of law, only questions of law are considered by the Supreme Court. *State v. Goodrich*, 504 N.E.2d 1023 (Ind. 1987).

ARTICLE 50

SENTENCES

CHAPTER.

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CHAPTER 1

GENERAL PROVISIONS

SECTION.

35-50-1-2. Consecutive and concurrent terms.

SECTION.

35-50-1-3. [Repealed.]
35-50-1-4. [Repealed.]

35-50-1-1. Authority to sentence.

Indiana Law Review. 1983 Survey of Criminal Law and Procedure, 17 Ind. L. Rev. 115 (1984).

Survey of Recent Developments in Criminal Law and Procedure, 18 Ind. L. Rev. 157 (1935).

Cited: *Stout v. State*, 479 N.E.2d 563 (Ind. 1985); *Kamyatti v. State*, 490 N.E.2d 279 (Ind. 1986).

NOTES TO DECISIONS

ANALYSIS

Increase in sentence.
Jury instructions.

Increase in Sentence.

There was no error in the court's increasing the defendant's sentence prior to any entry being made in the court's record book, after the defendant, after hearing the initial sentence, began to use rude and profane language toward the judge, since the amended sentence was not manifestly unreasonable in light of the defendant's character and numerous prior offenses. *Coleman v. State*, 490 N.E.2d 711 (Ind. 1986).

Jury Instructions.

The court does not err in refusing to instruct the jury that the crime charged is a class D felony. It is only necessary to instruct the jury on the matters necessary for them to adequately understand the case and arrive at a fair verdict, and the fact that the crime is a felony or, specifically, a class D felony is not necessary information for the jury. Pursuant to this section, fixing the penalty and sentencing the defendant is the function of the court. *Wilder v. State*, 498 N.E.2d 1295 (Ind. App. 1986).

Though instructions informing the jury of specific penalties are irrelevant, instructions which relieve the jury of any speculation

about the sentencing procedure and allow the jury to concentrate on the guilt or innocence of the defendant are permissible. *Hatchett v. State*, 502 N.E.2d 398 (Ind. 1987).

An instruction that, "A person who is convicted of a crime by a jury is sentenced by a judge. By law the judge must hold a sentencing hearing in which a written presentence report and all matters in mitigation and aggravation are considered. After the hearing the judge may have various sentencing alternatives, including imprisonment within a certain range. That is why these instructions do not contain any information concerning the penalties that could be imposed upon a conviction," is not misleading nor confusing because it implies defendant may not be imprisoned if found guilty and is a correct statement of the law. Only the trial court has authority to determine the proper penalty to be given upon a conviction. *Willis v. State*, 510 N.E.2d 1354 (Ind. 1987).

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35-50-1-2. Consecutive and concurrent terms. — (a) Except as provided in subsection (b), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively.

(b) If, after being arrested for one (1) crime, a person commits another crime:

(1) Before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or

(2) While the person is released:

(A) Upon the person's own recognizance; or

(B) On bond;

the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed. [IC 35-50-1-2, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 111; P.L.330-1987, § 1.]

Amendments. The 1987 amendment rewrote former subsection (b) as set out in the bound volume, adding subdivision (b)(2); and made stylistic changes in subsection (a).

Effective Dates. P.L.330-1987 contained no effective date provision. Pursuant to IC 1-1-3-3, the amendment became effective September 1, 1987.

Cited: *Little v. State*, 475 N.E.2d 677 (Ind. 1985); *Chambers v. State*, 478 N.E.2d 1234

(Ind. 1985); *Sides v. State*, 480 N.E.2d 572 (Ind. 1985); *Dunfee v. State*, 482 N.E.2d 499 (Ind. App. 1985); *Sides v. State*, 482 N.E.2d 757 (Ind. App. 1985); *Komyatti v. State*, 490 N.E.2d 279 (Ind. 1986); *Smith v. State*, 491 N.E.2d 193 (Ind. 1986); *Henderson v. State*, 492 N.E.2d 20 (Ind. 1986); *Patterson v. State*, 500 N.E.2d 1191 (Ind. 1986); *Nagy v. State*, 505 N.E.2d 434 (Ind. 1987).

NOTES TO DECISIONS

ANALYSIS

Concurrent sentences.

Consecutive sentences.

—Improper.

—Proper.

Discretion of court.

—Considerations.

Concurrent Sentences.

Where the trial court wanted to impose concurrent sentences for the present crimes because defendant was 47 years old and in ill health, but, the court imposed consecutive sentences after concluding that his status as a parolee made doing so mandatory under § 35-50-1-2, the case was remanded to allow the trial court to do what it wanted in the first place: Impose concurrent sentences for the three present offenses, to be served consecutively to any time to be served for violating his out-of-state parole. *LeMaster v. State*, 498 N.E.2d 1185 (Ind. 1986).

Consecutive Sentences.

Consecutive sentences were mandatory under subdivision (b)(2) as it existed prior to the

1987 amendment, which rewrote subsection (b), where the subsequent crime was committed after conviction and sentence for the prior crime and while the defendant was free on bond pending appeal. *Groff v. State*, 488 N.E.2d 711 (Ind. 1986).

Where the defendant commits a crime while on probation from a prior conviction, the trial court is without discretion and errs in not ordering that the sentences for the later convictions be served consecutively to the sentences imposed for the earlier convictions. *Bay v. State*, 489 N.E.2d 1220 (Ind. App. 1986).

Where a new conviction may constitute a parole violation for which the defendant could be returned to prison, this section requires that the sentences for the present offenses be served consecutively to any time resulting from the parole violation, but this section does not require that each of the sentences for the present crimes be served consecutively to each other, although the trial court could find aggravating circumstances which outweigh any mitigating circumstances and order consecutive sentences.

35-50-1-3. [Repealed.]

Compiler's Notes. This section, providing for liability for costs, was repealed by P.L.305-1987, § 38. For present provisions, see 33-19-2-2.

Effective Dates. P.L.305-1987, § 43, July 1, 1987.

35-50-1-4. [Repealed.]

Compiler's Notes. This section, concerning disenfranchising of incarcerated convicts,

was repealed by P.L.5-1986, § 61, effective March 4, 1986.

35-50-1-5. Effect of postconviction remedy on subsequent sentencing.

Cited: *Linthicum v. State*, 511 N.E.2d 1026 (Ind. 1987).

NOTES TO DECISIONS**Retroactivity.**

The amended rule, allowing more severe sentences after post-conviction remedial action, should not apply retroactively, but

should apply only to petitions filed after the amendment date because of the potential due process and equal protection issues. *Dean v. State*, 499 N.E.2d 185 (Ind. 1986).

CHAPTER 2**SENTENCES FOR FELONIES****SECTION.**

35-50-2-1. Definitions.

35-50-2-2. Suspension — Probation.

35-50-2-2.1. Suspension for adult with juvenile record.

35-50-2-3. Murder.

35-50-2-7. Class D felony.

SECTION.

35-50-2-7.1. Habitual class D felony offenders.

35-50-2-8. Habitual offenders.

35-50-2-9. Death sentences.

35-50-2-10. Habitual controlled substance offenders.

35-50-2-1. Definitions. — (a) As used in this chapter, "Class D felony conviction" means a conviction of a Class D felony in Indiana and a conviction, in any other jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year. However, it does not include a conviction with respect to which the person has been pardoned, or a conviction of a Class A misdemeanor under section 7(b) [35-50-2-7(b)] of this chapter.

(b) As used in this chapter, "felony conviction" means a conviction, in any jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year. However, it does not include a conviction with respect to which the person has been pardoned, or a conviction of a Class A misdemeanor under section 7(b) of this chapter.

(c) As used in this chapter, "minimum sentence" means:

- (1) For murder, thirty (30) years;
- (2) For a Class A felony, twenty (20) years;
- (3) For a Class B felony, six (6) years;
- (4) For a Class C felony, two (2) years; and
- (5) For a Class D felony, one (1) year.

[IC 35-50-2-1, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 114; P.L.334-1983, § 1; P.L.98-1985, § 8.]

Amendments. The 1988 amendment designated the former first paragraph as subsection (b) and former second paragraph as subsection (c); added subsection (a); divided subsection (b) into two sentences by substituting "However" for "but" at the beginning of the present second sentence and making a punctuation change; and added "As used in

this chapter:" to the beginning of subsection (c).

Effective Dates. P.L.98-1988 contains no effective date provision. Pursuant to IC 1-1-3-3, the act takes effect July 1, 1988.

Cited: *Washington v. State*, 517 N.E.2d 77 (Ind. 1987); *Stroud v. State*, 517 N.E.2d 780 (Ind. 1988).

NOTES TO DECISIONS

ANALYSIS

Convictions in other jurisdictions.

—Federal offenses.

Felony conviction.

—Theft.

Convictions in Other Jurisdictions.

The classification of crimes as felonies or misdemeanors in other states is not relevant for purposes of establishing a prior felony conviction in determining habitual criminal status in Indiana; therefore, because the defendant's prior convictions were both for more than one year imprisonment, the state showed sufficient proof that defendant had two prior felony convictions as required by the habitual offender statute. *Galmore v. State*, 467 N.E.2d 1173 (Ind. 1984).

Evidence that the defendant had been convicted of burglary in another state and that he received a sixty-day jail sentence and two years probation was insufficient to establish the defendant's prior conviction for a felony, since the evidence did not indicate that the defendant could have been imprisoned for more than one year for the burglary conviction. *Jones v. State*, 485 N.E.2d 627 (Ind. 1985).

A foreign state's classification of an offense as a felony or a misdemeanor is not relevant for purposes of establishing a prior felony conviction when determining habitual criminal status in Indiana. *Beach v. State*, 496 N.E.2d 43 (Ind. 1986).

A decision that the defendant's prior Tennessee conviction was for a felony was erroneous where it was based upon the fact that the Tennessee indictment stated that defendant "feloniously" possessed burglar tools. This is not the test by which Indiana determines whether an earlier judgment was a felony conviction. *Cavendish v. State*, 496 N.E.2d 46 (Ind. 1986).

—Federal Offenses.

Convictions not within the jurisdiction of the Indiana courts are admissible in a habitual offender determination, and this includes convictions to a federal institution when former 35-1-1-1 defined "felony" as an offense punishable by imprisonment in the state prison. *Denton v. State*, 496 N.E.2d 576 (Ind. 1986).

Felony Conviction.

—Theft.

Although defendant had bargained for and received a minimal sentence for the crime of theft under former Burns' § 10-3039, notwithstanding the language of "misdemeanor" used in the plea bargain and by the trial court, he had been convicted of a felony. Thus, the trial court did not err in permitting the record of that conviction to be used in the habitual offender phase of a later trial. *Wolfe v. State*, 512 N.E.2d 185 (Ind. 1987).

35-50-2-2. Suspension — Probation. — (a) The court may suspend any part of a sentence for a felony, except as provided in this section or in section 2.1 [35-50-2-2.1] of this chapter.

(b) With respect to the crimes listed in this subsection, the court may suspend only that part of the sentence that is in excess of the minimum sentence:

(1) The crime committed was a Class A or Class B felony and the person has a prior unrelated felony conviction.

(2) The crime committed was a Class C felony and less than (7) years have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for a prior unrelated felony conviction and the date the person committed the Class C felony for which the person is being sentenced.

(3) The crime committed was a Class D felony and less than three (3) years have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for a prior unrelated felony conviction and the date the person committed the Class D felony for which the person is being sentenced. However, the

court may suspend the minimum sentence for the crime only if the court orders home detention under IC 35-38-1-21 instead of the minimum sentence specified for the crime under this chapter.

(4) The felony committed was murder (IC 35-42-1-1); battery (IC 35-42-2-1) with a deadly weapon; kidnapping (IC 35-42-3-2); confinement (IC 35-42-3-3) with a deadly weapon; rape (IC 35-42-4-1) as a Class A felony; criminal deviate conduct (IC 35-42-4-2) as a Class A felony; child molesting (IC 35-42-4-3) as a Class A or Class B felony; robbery (IC 35-42-5-1) resulting in serious bodily injury or with a deadly weapon; arson (IC 35-43-1-1) for hire or resulting in serious bodily injury; burglary (IC 35-43-2-1) resulting in serious bodily injury or with a deadly weapon; resisting law enforcement (IC 35-44-3-3) with a deadly weapon; escape (IC 35-44-3-5) with a deadly weapon; rioting (IC 35-45-1-2) with a deadly weapon; dealing in cocaine or a narcotic drug (IC 35-48-4-1) as a Class A felony; or dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2) if the amount of controlled substance involved has an aggregate weight of three (3) grams or more.

(c) Whenever the court suspends a sentence for a felony, it shall place the person on probation under IC 35-38-2 for a fixed period to end not later than the date the suspended sentence expires.

(d) The minimum sentence for a person convicted of voluntary manslaughter may not be suspended unless the court finds at the sentencing hearing that the crime was not committed by means of a deadly weapon. [IC 35-50-2-2, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 115; 1979, P.L. 305, § 1; 1982, P.L. 204, § 39; P.L.334-1983, § 2; P.L.284-1985, § 3; P.L.211-1986, § 1; P.L.98-1988, § 9.]

Amendments. The 1988 amendment, in subsection (b), substituted "the person" for "he" in two places in subdivision (2) and in two places in the first sentence of subdivision (3), and added the second sentence of subdivision (3).

Effective Dates. P.L.98-1988 contains no effective date provision. Pursuant to IC

1-1-3-3, the act takes effect July 1, 1988.

Cited: *Carter v. State*, 467 N.E.2d 694 (Ind. 1984); *Lessig v. State*, 489 N.E.2d 978 (Ind. App. 1986); *Johnson v. State*, 490 N.E.2d 333 (Ind. 1986); *Willis v. State*, 492 N.E.2d 45 (Ind. App. 1986); *Stroud v. State*, 517 N.E.2d 780 (Ind. 1988).

NOTES TO DECISIONS

ANALYSIS

Habitual offenders.
Suspendable sentence.

Habitual Offenders.

This section pertains only to the suspended sentences for felonies generally. The statute which permits the trial court to reduce the fixed enhancement of 30 years upon an habitual offender determination is 35-50-2-8(e). *Marsillett v. State*, 495 N.E.2d 699 (Ind. 1986).

Suspendable Sentence.

The trial court's conclusion that it was

without authority to suspend a defendant's sentence where the defendant was charged with a class A felony for which the sentence was suspendable was in error, and the court's comments to the effect that it lacked such authority required remand for resentencing. *Henning v. State*, 477 N.E.2d 547 (Ind. 1985).

Probation term in sentence for murder provided for a 30-year prison sentence, and a 30-year probation term was void since probation can be imposed only if a portion of the executed sentence is suspended, and no portion of the 30-year prison sentence could be suspended. *Willis v. State*, 498 N.E.2d 1029 (Ind. App. 1986).

Collateral References. Appealability of order suspending imposition or execution of sentence. 51 A.L.R.4th 939.

35-50-2-2.1. Suspension for adult with juvenile record. — (a) Except as provided in subsection (b) or section 2 [35-50-2-2] of this chapter, the court may not suspend a sentence for a felony for a person with a juvenile record when:

(1) The juvenile record includes findings that the juvenile acts, if committed by an adult, would constitute:

(A) One (1) Class A or Class B felony;

(B) Two (2) Class C or Class D felonies; or

(C) One (1) Class C and one (1) Class D felony; and

(2) Less than three (3) years have elapsed between commission of the juvenile acts that would be felonies if committed by an adult and the commission of the felony for which the person is being sentenced.

(b) Notwithstanding subsection (a), the court may suspend any part of the sentence for a felony, except as provided in section 2 of this chapter, if it finds that:

(1) The crime was the result of circumstances unlikely to recur;

(2) The victim of the crime induced or facilitated the offense;

(3) There are substantial grounds tending to excuse or justify the crime, though failing to establish a defense; or

(4) The acts in the juvenile record would not be Class A or Class B felonies if committed by an adult, and the convicted person is to undergo home detention under IC 35-38-1-21 instead of the minimum sentence specified for the crime under this chapter. [P.L.284-1985, § 4; P.L.331-1987, § 1; P.L.98-1988, § 10.]

Compiler's Notes. Section 5 of P.L.284-1985, effective June 1, 1985, provides: "For purposes of SECTION 4 of this act [this section], the juvenile record includes only those adjudications of delinquency after May 31, 1985."

Amendments. The 1987 amendment, in the opening clause of subsection (a), substituted "a person" for "an adult."

The 1988 amendment, in subsection (b), added subdivision (4) and made related word changes at the end of subdivisions (2) and (3).

Effective Dates. P.L.331-1987, § 2, declared an emergency. Approved April 21, 1987.

P.L.98-1988 contains no effective date provision. Pursuant to IC 1-1-3-3, the act takes effect July 1, 1988.

35-50-2-3. Murder. — (a) A person who commits murder shall be imprisoned for a fixed term of forty (40) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, the person may be fined not more than ten thousand dollars (\$10,000).

(b) Notwithstanding subsection (a), a person who was at least sixteen (16) years of age at the time the murder was committed may be sentenced to death under section 9 [35-50-2-9] of this chapter. [IC 35-50-2-3, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 116; P.L.332-1987, § 1.]

Compiler's Notes. P.L.332-1987, § 3, provides: "This act does not apply to a case in which a death sentence was imposed before September 1, 1987."

Amendments. The 1987 amendment substituted "The person" for "he" in subsection (a) and substituted "a person who was at least sixteen (16) years of age at the time the murder was committed" for "of this section a person who commits murder" in subsection (b).

Effective Dates. P.L.332-1987 contained no effective date provision. Pursuant to IC 1-1-3-3, the amendment became effective September 1, 1987.

Cited: *Smith v. State*, 468 N.E.2d 512 (Ind. 1984); *Butrum v. State*, 469 N.E.2d 1174 (Ind. 1984); *McHugh v. State*, 471 N.E.2d 293 (Ind. 1984); *Hicks v. State*, 474 N.E.2d 987 (Ind. 1985).

(d) A person is an habitual class D felony offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated class D felony convictions.

(e) The court shall sentence a person found to be an habitual class D felony offender to an additional fixed term of eight (8) years imprisonment to be added to the term of imprisonment imposed under section 7 [35-50-2-7] of this chapter. If the court finds that three (3) years or more have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for the last prior unrelated class D felony conviction and the date the person committed the class D felony for which the person is being sentenced as an habitual class D felony offender, then the court may subtract up to four (4) years from the additional fixed term of eight (8) years.

(f) If a reduction of the additional eight (8) year fixed term is authorized under subsection (e), the court may also consider the aggravating or mitigating circumstances in IC 35-38-1-7 to:

- (1) Decide the issue of granting a reduction; or
- (2) Determine the number of years, if any, to be subtracted under subsection (e). [P.L.328-1985, § 1.]

Compiler's Notes. Section 3 of P.L.328-1985 provides: "(a) The addition of IC 35-50-2-7.1 and the amendment of IC 35-50-2-8 by this act do not affect any:

"(1) rights or liabilities accrued;

"(2) penalties incurred; or

"(3) proceedings begun;

before September 1, 1985. The rights, liabilities, and proceedings are continued and punishments, penalties, or forfeitures shall be

imposed and enforced under IC 35-50-2-8 as if this act had not been enacted.

"(b) If all of the felonies that are relied upon for sentencing a person as an habitual offender under IC 35-50-2-8 are felonies that were committed before September 1, 1985, the felonies shall be prosecuted and remain punishable under IC 35-50-2-8 as if this act had not been enacted."

NOTES TO DECISIONS

Applicability.

This section did not apply to a defendant whose class D felonies had been committed

before the effective date of September 1, 1985. *Hensley v. State*, 497 N.E.2d 1053 (Ind. 1986).

35-50-2-8. Habitual offenders. — (a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions.

(b) After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two (2) prior unrelated felony convictions. However, a conviction does not count for purposes of this subsection if:

(1) It has been set aside; or

(2) It is one for which the person has been pardoned.

(c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing under IC 35-38-1-3.

(d) A person is an habitual offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated felony convictions.

(e) The court shall sentence a person found to be an habitual criminal to an additional fixed term of thirty (30) years imprisonment to be added to the term of imprisonment imposed under section 3, 4, 5, 6, or 7 [35-50-2-3,

35-50-2-4, 35-50-2-5, 35-50-2-6 or 35-50-2-7] of this chapter. If the court finds that ten (10) years or more have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for the last prior unrelated felony conviction and the date he committed the felony for which he is being sentenced as an habitual offender, then the court may subtract up to twenty-five (25) years from the additional fixed term of thirty (30) years. If at least one (1) of the offenses relied upon to establish that the person has accumulated two (2) prior unrelated felonies is a class D felony, then the court may subtract up to ten (10) years from the additional fixed term of thirty (30) years. If the felony for which the person is being sentenced is a class D felony, then the court may subtract up to twenty (20) years from the additional fixed term of thirty (30) years.

(f) Notwithstanding the court's authority to reduce the additional fixed term of thirty (30) years imprisonment under subsection (e), if a person is found to be an habitual offender under this section, the court shall sentence the person to an additional fixed term of at least five (5) years imprisonment to be added to the term of imprisonment imposed under section 3, 4, 5, 6, or 7 of this chapter.

(g) If a reduction of the additional thirty (30) year fixed term is authorized under subsection (e), the court may also consider the aggravating or mitigating circumstances in IC 35-38-1-7 to:

- (1) Decide the issue of granting a reduction; or
- (2) Determine the number of years, if any, to be subtracted under subsection (e).

(h) A person may not be sentenced as an habitual offender under this section if all of the felonies relied upon for sentencing the person as an habitual offender are class D felonies. [IC 35-50-2-8, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 121; 1980, P.L. 210, § 1; P.L.335-1983, § 1; P.L.328-1985, § 2.]

Compiler's Notes. Section 3 of P.L.328-1985 provides: "(a) The addition of IC 35-50-2-7.1 and the amendment of IC 35-50-2-8 by this act do not affect any:

"(1) rights or liabilities accrued;

"(2) penalties incurred; or

"(3) proceedings begun;

before September 1, 1985. The rights, liabilities, and proceedings are continued and punishments, penalties, or forfeitures shall be imposed and enforced under IC 35-50-2-8 as if this act had not been enacted.

"(b) If all of the felonies that are relied upon for sentencing a person as an habitual offender under IC 35-50-2-8 are felonies that were committed before September 1, 1985, the felonies shall be prosecuted and remain punishable under IC 35-50-2-8 as if this act had not been enacted."

Cited: *Galmore v. State*, 467 N.E.2d 1173 (Ind. 1984); *Smith v. State*, 468 N.E.2d 512 (Ind. 1984); *Connell v. State*, 470 N.E.2d 701 (Ind. 1984); *Davis v. State*, 472 N.E.2d 922 (Ind. 1985); *Smith v. State*, 475 N.E.2d 1139

(Ind. 1985); *Coppock v. State*, 480 N.E.2d 941 (Ind. 1985); *Richardson v. State*, 481 N.E.2d 1310 (Ind. 1985); *Woodson v. State*, 483 N.E.2d 62 (Ind. 1985); *Jackson v. State*, 483 N.E.2d 1374 (Ind. 1985); *Foster v. State*, 484 N.E.2d 965 (Ind. 1985); *Martin v. State*, 488 N.E.2d 1160 (Ind. App. 1986); *Gibson v. State*, 490 N.E.2d 297 (Ind. 1986); *Turpin v. State*, 490 N.E.2d 1109 (Ind. 1986); *Ashley v. State*, 493 N.E.2d 768 (Ind. 1986); *Gilliam v. State*, 494 N.E.2d 319 (Ind. 1986); *Wendling v. State*, 495 N.E.2d 192 (Ind. 1986); *Gipson v. State*, 495 N.E.2d 722 (Ind. 1986); *Cavendish v. State*, 496 N.E.2d 46 (Ind. 1986); *Blue v. State*, 504 N.E.2d 583 (Ind. 1987); *Carter v. State*, 505 N.E.2d 798 (Ind. 1987); *Hutcherson v. State*, 507 N.E.2d 969 (Ind. 1987); *Duff v. State*, 508 N.E.2d 17 (Ind. 1987); *Vaxter v. State*, 508 N.E.2d 809 (Ind. 1987); *Taylor v. State*, 511 N.E.2d 1036 (Ind. 1987); *Criss v. State*, 512 N.E.2d 858 (Ind. 1987); *Washington v. State*, 517 N.E.2d 77 (Ind. 1987).

tions is mere surplusage. *Wilson v. State*, 511 N.E.2d 1014 (Ind. 1987).

35-50-2-9. Death sentences. — (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either:

(A) The victim was acting in the course of duty; or

(B) The murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(10) The defendant was serving a term of imprisonment and on the date of the murder the defendant had twenty (20) or more years remaining to be served before the earliest possible release date as defined by IC 35-38.

(11) The defendant dismembered the victim.

(12) The victim of the murder was less than twelve (12) years of age.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the

judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c).

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review. [IC 35-50-2-9, as added by Acts 1977, P.L. 340, § 122; P.L.336-1983, § 1; P.L.212-1986, § 1; P.L.320-1987, § 2; P.L.332-1987, § 2.]

Compiler's Notes. P.L.332-1987, § 3, effective September 1, 1987, provides: "This act does not apply to a case in which a death sentence was imposed before September 1, 1987."

Amendments. The 1987 amendment by P.L.332-1987 inserted present subdivision (7) in subsection (c), renumbering former subdivision (7) as subdivision (8); and made phraseology changes in subsections (b) and (c).

The 1987 amendment by P.L.320-1987 added subsection (b)(12) and made stylistic changes in subsection (b)(6).

Effective Dates. P.L.320-1987 contained no effective date provision. Pursuant to IC 1-1-3-3, the amendment became effective September 1, 1987.

P.L.332-1987 contained no effective date

provision. Pursuant to IC 1-1-3-3, the amendment became effective September 1, 1987.

Indiana Law Journal. The Death Penalty Cases: Shaping Substantive Criminal Law, 58 Ind. L.J. 187 (1982).

Notre Dame Law Review. The Case for Comparative Proportionality Review, 59 Notre Dame L. Rev. 1412 (1984).

Cited: *Didio v. State*, 471 N.E.2d 1117 (Ind. 1984); *Dillon v. Duckworth*, 751 F.2d 895 (7th Cir. 1984); *Rowan v. Owens*, 752 F.2d 1186 (7th Cir. 1984); *Smith v. State*, 474 N.E.2d 973 (Ind. 1985); *Schiro v. State*, 479 N.E.2d 556 (Ind. 1985); *Mers v. State*, 496 N.E.2d 75 (Ind. 1986); *Braver v. State*, 496 N.E.2d 371 (Ind. 1986); *Spranger v. State*, 500 N.E.2d 1170 (Ind. 1986); *Resnover v. State*, 507 N.E.2d 1382 (Ind. 1987); *Fleener v. State*, 514 N.E.2d 80 (Ind. 1987).

Cross References. Penalties for misdemeanors, 35-50-1-1 — 35-50-1-4, 35-50-3-1 — 35-50-3-4, 35-50-5-2.

CHAPTER 6

DEATH PENALTY PROCEDURE

SECTION	SECTION
35-38-6-1. Death penalty — Manner and time of execution — Executioner.	35-38-6-7. Escape of prisoner — Recapture — Effect on execution date
35-38-6-2. Warrant for execution.	35-38-6-8. Reason for delay of execution noted on warrant — When warrant returned to court clerk.
35-38-6-3. Sheriff's duty.	35-38-6-9. Applicability of chapter to execution of women.
35-38-6-4. Prisoner confined — Who may visit.	35-38-6-10. Pregnancy of condemned prisoner.
35-38-6-5. Execution inside prison.	
35-38-6-6. Who may be present at execution.	

35-38-6-1. Death penalty — Manner and time of execution — Executioner. — (a) The punishment of death shall be inflicted by causing to pass through the body of the convicted person a current of electricity of sufficient intensity to cause death. The application of the current must continue until the person is dead.

(b) The death penalty shall be inflicted before the hour of sunrise on a date fixed by the sentencing court. However, the execution must not occur until at least one hundred [100] days after the conviction.

(c) The warden of the state prison, or persons designated by the warden, shall serve as the executioner. [IC 35-38-6-1, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.).
Special provisions relating to the death penalty, § 483.

DECISIONS UNDER PRIOR LAW

ANALYSIS

Place of execution.
Time for execution.

Place of Execution.

It was within the power of the legislature to change the place where the death penalty should be inflicted after sentence was passed

imposing such penalty. *Keith v. State*, 157 Ind. 376, 61 N.E. 716 (1901).

Time for Execution.

The time fixed for carrying the sentence into execution could not be less than the time prescribed by statute, even with the consent of the defendant. *Koerner v. State*, 96 Ind. 243 (1884).

Collateral References. 21 Am. Jur. 2d.
Criminal Law. §§ 609-612

35-38-6-2. Warrant for execution. — The court in which a death sentence is ordered shall issue a warrant to the sheriff within fourteen [14] days of the sentence:

- (1) That is under the seal of the court;
- (2) That contains notice of the conviction and the sentence;
- (3) Directed to the warden of the state prison; and
- (4) That orders the warden to execute the convicted person at a specified time and date in the state prison. [IC 35-38-6-2, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.).
Special provisions relating to the death penalty, § 483.

35-38-6-3. Sheriff's duty. — A sheriff who receives a warrant under section 2 or section 7 [35-38-6-2 or 35-38-6-7] of this chapter shall immediately:

- (1) Transport the person to the state prison;
- (2) Deliver the person and the warrant to the warden of the prison;
- (3) Obtain a receipt for the delivery of the person; and
- (4) Deliver the receipt to the clerk of the sentencing court. [IC 35-38-6-3, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.) Special provisions relating to death penalty, § 483.
Duties of clerk and sheriff after judgment. § 481.

35-38-6-4. Prisoner confined — Who may visit. — (a) The convicted person shall be confined in the state prison until the date of his execution.

(b) The convicted person's:

- (1) Attorney;
- (2) Physician;
- (3) Relatives;
- (4) Friends; and
- (5) Spiritual advisor;

may visit him while he is confined. The department of correction shall adopt rules, under IC 4-22-2, governing such visits. [IC 35-38-6-4, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.).
Special provisions relating to death penalty.
§ 483.

35-38-6-5. Execution inside prison. — The execution must take place inside the walls of the state prison in a room arranged for that purpose. The department of correction shall provide the necessary room and appliances to carry out the electrocution as provided in this chapter. [IC 35-38-6-5, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.).
Special provisions relating to death penalty.
§ 483.

35-38-6-6. Who may be present at execution. — Only the following persons may be present at the execution:

- (1) The warden and any of his assistants who are necessary to assist him in the execution.
- (2) The prison physician.
- (3) One [1] other physician.
- (4) The spiritual advisor of the convicted person.
- (5) The prison chaplain.
- (6) Not more than ten [10] friends or relatives of the convicted person who are invited by the convicted person to attend. [IC 35-38-6-6, as added by P.L.311-1983, § 3.]

Cross References. Delivering body to medical college, 4-23-1-2. Special provisions relating to death penalty, § 483.
Ewbank's Criminal Law (Symmes ed.).

35-38-6-7. Escape of prisoner — Recapture — Effect on execution date. — (a) If the convicted person:

- (1) Escapes from custody before the date set for his execution; and
 - (2) Is recaptured before the date set for his execution;
- he shall be returned to the state prison and executed according to the terms of the warrant.

(b) If the convicted person:

- (1) Escapes from custody before his delivery to the warden; and
 - (2) Is recaptured after the date set for his execution;
- any person may arrest him and commit him to the jail of the county in which he was sentenced. The sheriff shall notify the sentencing court of the recapture, and the court shall fix a new date for the execution. The new execution date must not be less than thirty [30] nor more than sixty [60] days after the recapture of the person. The court shall issue a new warrant in the form prescribed by section 2 [35-38-6-2] of this chapter.

(c) If the convicted person:

- (1) Escapes from the state prison; and
 - (2) Is recaptured after [the] the date set for his execution;
- any person may arrest him and commit him to the state prison. When he is returned to the state prison, the warden shall notify the sentencing court, and the court shall fix a new date for the execution. The new execution date must not be less than thirty [30] nor more than sixty [60] days after the

recapture of the person. The court shall issue a warrant to the warden directing him to execute the convicted person at a specified time and date in the state prison. [IC 35-38-6-7, as added by P.L.311-1983, § 3.]

Compiler's Notes. The word "the" in subdivision (c)(2) was so enclosed in brackets to indicate surplusage.

Ewbank's Criminal Law (Symmes ed.). Special provisions relating to death penalty, § 483.

Collateral References. Effect of permitting day fixed for execution to pass without carrying out sentence. 34 A.L.R. 314.

35-38-6-8. Reason for delay of execution noted on warrant — When warrant returned to court clerk. — (a) If the execution of the death sentence is suspended, the warden shall note the reason for the delay on the warrant but shall proceed with the execution when the period of suspension ends.

(b) The warrant shall be returned to the clerk of the sentencing court after:

- (1) The convicted person is executed;
- (2) The convicted person has been pardoned;
- (3) The convicted person's judgment has been reversed;
- (4) The convicted person's sentence has been commuted; or
- (5) The convicted person dies before his execution;

with a statement concerning the completion of the execution or the reason why the person was not executed. [IC 35-38-6-8, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.). Special provisions relating to the death penalty, § 483.

DECISIONS UNDER PRIOR LAW

Suspension Pending Appeal.

When an appeal was taken from a judgment affixing the death penalty, the Supreme Court could stay the execution of the judg-

ment during the pendency of the appeal. *Parker v. State*, 135 Ind. 534, 35 N.E. 179, 23 L.R.A. 859 (1893).

35-38-6-9. Applicability of chapter to execution of women. — The provisions of this chapter in relation to the infliction of the death penalty extend equally, so far as applicable, to the case of any woman convicted and sentenced to death. [IC 35-38-6-9, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.). Special provisions relating to the death penalty, § 483.

35-38-6-10. Pregnancy of condemned prisoner. — If the physician of the prison and one [1] other physician certify in writing to the warden and the sentencing court that a condemned woman is pregnant, the warden shall suspend the execution of the sentence. When the prison physician and one [1] other physician certify in writing to the warden and the sentencing court that the woman is no longer pregnant, the sentencing court shall immediately fix a new execution date. [IC 35-38-6-10, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.).
Special provisions relating to the death penalty, § 483.

ARTICLES 39-49 [IN BOOK 2]

ARTICLE 50

SENTENCES

CHAPTER

1. GENERAL PROVISIONS, 35-50-1-1 — 35-50-1-5.
- 1A. [REPEALED.]
2. SENTENCES FOR FELONIES, 35-50-2-1 — 35-50-2-10.
3. SENTENCES FOR MISDEMEANORS, 35-50-3-1 — 35-50-3-4.

CHAPTER

4. [REPEALED.]
5. MISCELLANEOUS PENALTIES, 35-50-5-1 — 35-50-5-3.
- 5A. [REPEALED.]
6. RELEASE FROM IMPRISONMENT — GOOD TIME, 35-50-6-1 — 35-50-6-7.

CHAPTER 1

GENERAL PROVISIONS

SECTION

- 35-50-1-1. Authority to sentence.
- 35-50-1-2. Consecutive and concurrent terms.
- 35-50-1-3. Costs.

SECTION

- 35-50-1-4. Disfranchisement.
- 35-50-1-5. Effect of postconviction remedy on subsequent sentencing.

35-50-1-1. Authority to sentence. — The court shall fix the penalty of and sentence a person convicted of an offense. [IC 35-50-1-1, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 110.]

Cited: *Kocher v. State*, 270 Ind. 661, 69 Ind. Dec. 147, 389 N.E.2d 18 (1979); *Lyda v. State*, 272 Ind. 15, 72 Ind. Dec. 100, 395 N.E.2d 776 (1979); *Bumgardner v. State*, — Ind. —, 422 N.E.2d 1244 (1981); *Cornelius v. State*, — Ind. —, 425 N.E.2d 616 (1981); *State v. Williams*, — Ind. —, 430 N.E.2d 756

(1982); *Naked City, Inc. v. State*, — Ind. App. —, 434 N.E.2d 576 (1982); *Schiro v. State*, — Ind. —, 451 N.E.2d 1047 (1983); *Stafford v. State*, — Ind. App. —, 455 N.E.2d 402 (1983); *Haskett v. State*, — Ind. App. —, 467 N.E.2d 32 (1984).

CHAPTER 1A

ADDITIONAL GENERAL PROVISIONS

35-50-1A-1 — 35-50-1A-18 [9-1827a, 9-1828a, 9-2201, 9-2201b, 9-2201c, 9-2202a, 9-2205, 9-2206a, 9-2251 — 9-2252e].
[Repealed.]

Compiler's Notes. This chapter, which was enacted as 35-4.1-4 and transferred to this position by the compiler, and concerned the entry of judgment and sentencing, was

repealed by Acts 1976, P.L. 148, § 24; Acts 1977, P.L. 340, § 148; P.L. 311-1983, § 49. For present provisions, see 35-38-1.

CHAPTER 2

SENTENCES FOR FELONIES

SECTION.

35-50-2-1. Definitions.
35-50-2-2. Suspension — Probation.
35-50-2-3. Murder.
35-50-2-4. Class A felony.
35-50-2-5. Class B felony.

SECTION.

35-50-2-6. Class C felony.
35-50-2-7. Class D felony.
35-50-2-8. Habitual offenders.
35-50-2-9. Death sentences.
35-50-2-10. Habitual controlled substance offenders.

35-50-2-1. Definitions. — As used in this chapter:

"Felony conviction" means a conviction, in any jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one year; but it does not include a conviction with respect to which the person has been pardoned, or a conviction of a class A misdemeanor under section 7(b) [35-50-2-7(b)] of this chapter.

"Minimum sentence" means:

- (1) For murder, thirty [30] years;
- (2) For a class A felony, twenty [20] years;
- (3) For a class B felony, six [6] years;
- (4) For a class C felony, two [2] years; and
- (5) For a class D felony, one [1] year. [IC 35-50-2-1, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 114; P.L. 334-1983, § 1.]

Compiler's Notes. Section 26 of Acts 1976, P.L. 148 read: "A conviction for a felony committed before the effective date [October 1, 1977] of this act constitutes a felony conviction under IC 35-50-2-1."

Cross References. Penalties for felonies, 35-50-1-1 — 35-50-2-10, 35-50-5-2.

Penalties for misdemeanors, 35-50-1-1 — 35-50-1-4, 35-50-3-1 — 35-50-3-4, 35-50-5-2.

Compensation for victims of violent crimes, 16-7-3.6-1 — 16-7-3.6-19

Crimes to be defined by statute, 1-1-2-2.

Revocation of driving license following conviction of a felony in the commission of which a motor vehicle is used, 9-2-1-5.

Cited: Griffin v. State. — Ind. —, 415 N.E.2d 60 (1981); Clay v. State. — Ind. —, 440 N.E.2d 466 (1982); Minneman v. State. — Ind. —, 441 N.E.2d 673 (1982); Thomas v. State. — Ind. —, 443 N.E.2d 1197 (1983); McBrady v. State. — Ind. —, 459 N.E.2d 719 (1984).

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35-50-2-2. Suspension — Probation. — (a) The court may suspend any part of a sentence for a felony, except as provided by subsection (b).

(b) With respect to the crimes listed in this subsection, the court may suspend only that part of the sentence that is in excess of the minimum sentence:

(1) The crime committed was a class A or class B felony and the person has a prior unrelated felony conviction.

(2) The crime committed was a class C felony and less than seven [7] years have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for a prior unrelated felony conviction and the date he committed the class C felony for which he is being sentenced.

(3) The crime committed was a class D felony and less than five [5] years have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for a prior unrelated felony conviction and the date he committed the class D felony for which he is being sentenced.

(4) The felony committed was murder [35-42-1-1]; battery [35-42-2-1] with a deadly weapon; kidnapping [35-42-3-2]; confinement [35-42-3-3] with a deadly weapon; rape [35-42-4-1] as a class A felony; criminal deviate conduct [35-42-4-2] as a class A felony; child molesting [35-42-4-3] as a class A or class B felony; robbery [35-42-5-1] resulting in serious bodily injury or with a deadly weapon; arson [35-43-1-1] for hire or resulting in serious bodily injury; burglary [35-43-2-1] resulting in serious bodily injury or with a deadly weapon; resisting law enforcement [35-44-3-3] with a deadly weapon; escape [35-44-3-5] with a deadly weapon; rioting [35-45-1-2] with a deadly weapon; dealing in cocaine or a narcotic drug [35-48-4-1] as a class A felony; or dealing in a schedule I, II or III controlled substance [35-48-4-2] if the amount of controlled substance involved has an aggregate weight of three [3] grams or more.

(c) Whenever the court suspends a sentence for a felony, it shall place the person on probation under IC 35-7 [repealed] for a fixed period to end not later than the date the suspended sentence expires. [IC 35-50-2-2, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 115; 1979, P.L. 305, § 1; 1982, P.L. 204, § 39; P.L.334-1983, § 2.]

Compiler's Notes. IC 35-7, referred to in subsection (c), was repealed by Acts 1979, P.L. 120, § 22, and P.L.311-1983, § 49. For present provisions, see IC 35-38-2.

Cross References. Penalties for felonies, 35-50-1-1 — 35-50-2-10, 35-50-5-2.

Cited: Galloway v. State, — Ind. App. —, 422 N.E.2d 1290 (1981); Anderson v. State, — Ind. —, 426 N.E.2d 674 (1981); Grassmyer

v. State, — Ind. App. —, 426 N.E.2d 1377 (1981); Vacendak v. State, — Ind. —, 431 N.E.2d 100 (1982); Yager v. State, — Ind. —, 437 N.E.2d 454 (1982); Smith v. State, — Ind. —, 439 N.E.2d 634 (1982); Huff v. State, — Ind. —, 440 N.E.2d 465 (1982); Abercrombie v. State, — Ind. —, 441 N.E.2d 442 (1982); McVey v. State, — Ind. App. —, 438 N.E.2d 770 (1982).

5/8/84

NOTES TO DECISIONS

ANALYSIS

Attempted murder.
 Conspiracy.
 Constitutionality.
 Conviction of prior felonies.
 Erroneous suspension.
 —Correction.
 Habitual offenders.
 Role of court and jury.

Attempted Murder.

Sentence imposed upon a defendant for attempted murder is not suspendable, since reference to "murder" in paragraph (a)(4) of this section also includes attempted murder. *Haggenjos v. State*, — Ind. —, 441 N.E.2d 430 (1982).

Conspiracy.

Conspiracy is not one of the offenses that is nonsuspendable under this section. *Huff v. State*, — Ind. App. —, 443 N.E.2d 1234 (1983).

Constitutionality.

This section does not violate the constitution. *Davis v. State*, — Ind. App. —, 73 Ind. Dec. 450, 398 N.E.2d 704 (1980).

Conviction of Prior Felonies.

Court did not err in refusing probation

where defendant had been convicted of prior felonies although the sentences he received for such prior crimes were for misdemeanors. *Davis v. State*, — Ind. App. —, 73 Ind. Dec. 450, 398 N.E.2d 704 (1980).

Erroneous Suspension.**—Correction.**

Where a trial court erroneously suspends a sentence in violation of this section, the court has the power to vacate the sentence. *Niece v. State*, — Ind. App. —, 456 N.E.2d 1081 (1983).

Habitual Offenders.

When a criminal defendant receives an enhanced sentence under the habitual offender statute, such sentence may not be suspended. *State v. Williams*, — Ind. —, 430 N.E.2d 756 (1982).

Role of Court and Jury.

Discretion is vested in the trial court to suspend a sentence unless one of a series of exceptions applies. This decision is not shared with the jury. The same is true of aggravating or mitigating circumstances in the determination of a sentence by the trial judge. *Hunt v. State*, — Ind. —, 455 N.E.2d 307 (1983).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Constitutionality.
 No ground for sentence revision.

Constitutionality.

A statute which prohibits the suspension of sentence does not violate Ind. Const., art. 1, § 18, prohibiting vindictive justice. *State v. Lawson*, 272 Ind. 541, 74 Ind. Dec. 69, 400 N.E.2d 128 (1980).

No Ground for Sentence Revision.

Where law at time offense was committed prohibited court from suspending sentence or placing defendant on probation in case of a conviction for first-degree burglary fact that this section places no such restriction on the court for the corresponding crime in the present law was no ground for defendant to obtain a revision of his sentence. *Holliday v. State*, 181 Ind. App. 360, 70 Ind. Dec. 470, 391 N.E.2d 866 (1979).

35-50-2-3. Murder. — (a) A person who commits murder shall be imprisoned for a fixed term of forty [40] years, with not more than twenty [20] years added for aggravating circumstances or not more than ten [10] years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars [\$10,000].

(b) Notwithstanding subsection (a) of this section, a person who commits murder may be sentenced to death under section 9 [35-50-2-9] of this chapter. [IC 35-50-2-3, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 116.]

Prior Criminal Record.

It was proper for trial court to add two years for aggravating circumstances because of defendant's prior criminal history. *Evans v. State*, 181 Ind. App. 687, 71 Ind. Dec. 162, 393 N.E.2d 246 (1979).

It was not error for court to sentence defendant convicted of theft, a Class D felony, to a term of four years because of the rather extensive criminal record of the defendant. *Gary v. State*, — Ind. App. —, 74 Ind. Dec. 209, 400 N.E.2d 215 (1980).

—Defendant Not Prosecuted.

Court in finding aggravating circumstances could consider prior criminal activity although defendant was not prosecuted for such crimes. *Beil v. State*, — Ind. App. —, 77 Ind. Dec. 502, 407 N.E.2d 1206 (1980).

—Failure to Advise Defendant of Effect.

Aggravating circumstances may consist of defendant's prior criminal activity, and therefore failure to advise defendant of the effect that prior convictions may have on his

sentence prior to acceptance of his plea of guilty was reversible error. *Bullock v. State*, — Ind. App. —, 77 Ind. Dec. 115, 406 N.E.2d 1220 (1980).

Recommendation of Prosecutor.

The fact that prosecutor agreed with defendant that if he entered a plea of guilty he would not make a recommendation concerning sentencing and would make no objection if defendant asked for sentencing as a Class A misdemeanor rather than a Class D felony, did not bind the court with respect to sentencing. *Smith v. State*, 181 Ind. App. 480, 70 Ind. Dec. 637, 392 N.E.2d 503 (1979).

Review.

Appellate court will not adjust a sentence which is authorized by statute and which is not manifestly unreasonable in that no reasonable person could find it reasonable in light of nature of offense and character of offender. *Atkins v. State*, — Ind. App. —, 437 N.E.2d 114 (1982), cert. denied, — U.S. —, 103 S. Ct. 2460, 77 L. Ed. 2d 1337 (1983).

35-50-2-8. Habitual offenders. — (a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two [2] prior unrelated felony convictions.

(b) After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two [2] prior unrelated felony convictions. However, a conviction does not count, for purposes of this subsection, if:

- (1) It has been set aside; or
- (2) It is one for which the person has been pardoned.

(c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under IC 35-38-1-3.

(d) A person is an habitual offender if the jury (if the hearing is by jury), or the court (if the hearing is to the court alone), finds that the state has proved beyond a reasonable doubt that the person had accumulated two [2] prior unrelated felony convictions.

(e) The court shall sentence a person found to be an habitual criminal to an additional fixed term of thirty [30] years imprisonment to be added to the term [of] imprisonment imposed under section 3, 4, 5, 6, or 7 [35-50-2-3, 35-50-2-4, 35-50-2-5, 35-50-2-6, or 35-50-2-7] of this chapter. If the court finds that ten [10] years or more have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for the last prior unrelated felony conviction, and the date he committed the felony for which he is being sentenced as an habitual offender, then the court may subtract up to twenty-five [25] years from the additional fixed term of thirty [30] years.

tutional rights. *Shaw v. State*, 247 Ind. 139, 6 Ind. Dec. 667, 211 N.E.2d 172 (1965). See *Lawrence v. State*, 259 Ind. 306, 32 Ind. Dec. 480, 286 N.E.2d 830 (1972).

To preserve defendant's right to due process the indictment or affidavit should be in two parts, one part containing the offense charged and the other part containing the prior convictions for the habitual criminal charge; the trial should then proceed as if there were no allegations of former convictions and if the finding is guilty the second part of the indictment should be read to the jury. *Lawrence v. State*, 259 Ind. 306, 32 Ind. Dec. 480, 286 N.E.2d 830 (1972).

Since 1972 ruling in *Lawrence v. State* that there should be bifurcated proceedings for habitual criminal charges went to the

fairness of the trial itself and was designed to eliminate a previously existing danger of convicting the innocent. Such holding would be applicable where defendant was tried and convicted in 1954 for both automobile banditry and being an habitual criminal in which trial proof of his prior convictions was introduced to establish the elements of an habitual criminal at the same proceeding where the jury had to pass on the present felony charge. *Enlow v. State*, 261 Ind. 348, 39 Ind. Dec. 597, 303 N.E.2d 658 (1973).

The requirement of a separate trial upon the issue of habitual criminality is not to be applied retroactively. *McPhearson v. State*, 262 Ind. 468, 44 Ind. Dec. 369, 318 N.E.2d 355 (1974); *Paneitz v. State*, 262 Ind. 473, 44 Ind. Dec. 379, 318 N.E.2d 353 (1974).

Collateral References. Constitutionality and construction of statute enhancing penalty for second or subsequent offense. 58 A.L.R. 20, 82 A.L.R. 345, 116 A.L.R. 209, 132 A.L.R. 91, 139 A.L.R. 673.

Pardon as affecting previous offenses or punishment therefor 57 A.L.R. 443.

35-50-2-9. Death sentences. — (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(10) The defendant was serving a term of imprisonment and on the date of the murder the defendant had twenty [20] or more years remaining to be served before his earliest possible release date as defined by IC 35-38.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c).

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the Supreme Court. The review, which shall be heard under rules adopted by the Supreme Court, shall be given priority over all other cases. The death sentence may not be executed until the Supreme Court has completed its review. [IC 35-50-2-9, as added by Acts 1977, P.L. 340, § 122; P.L.336-1983, § 1.]

Cross References. Compensation for victims of violent crimes, 16-7-3.6-1 — 16-7-3.6-19.

Valparaiso University Law Review. The Indiana Death Penalty: An Exercise in Constitutional Futility, 15 Val. U.L. Rev. 409.

Cited: Lynk v. State, 271 Ind. 445, 71 Ind.

Dec. 223, 393 N.E.2d 751 (1979); *Ferguson v. State*, 273 Ind. 468, 76 Ind. Dec. 394, 405 N.E.2d 902 (1980); *Tapp v. State*, — Ind. App. —, 76 Ind. Dec. 597, 406 N.E.2d 296 (1980); *Suggs v. State*, — Ind. —, 428 N.E.2d 226 (1981); *Dunaway v. State*, — Ind. —, 440 N.E.2d 682 (1982).

NOTES TO DECISIONS

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Aggravating circumstances.

- Commission of other murders.
- Failure to allege on separate page.

—Instructions.

—Perpetration of rape.

—Prior criminal activity.

Constitutionality.

—Application to accessories.

—Cruel and unusual punishment.

—Due process.

—Mandatory death penalty.

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—Constitutionality.

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Aggravating Circumstances.

—Commission of Other Murders.

Where jury found defendant guilty of four murders it could properly consider such other three murders as aggravating circumstances in deciding to recommend the death penalty. *Judy v. State*, — Ind. —, 416 N.E.2d 95 (1981).

—Failure to Allege on Separate Page.

Where the aggravating circumstance was the intentional murder in the perpetration of a robbery with which defendant was charged, failure of state to allege an aggravating circumstance on a page separate from the rest of the charging instrument did not prejudice the substantial rights of the defendant. *Brewer v. State*, — Ind. —, 417 N.E.2d

889 (1981), cert. denied, 458 U.S. 1122, 102 S. Ct. 3510, 73 L. Ed. 2d 1384, rehearing denied, 458 U.S. 1132, 102 S. Ct. 18, 73 L. Ed. 2d 1403 (1982).

—Instructions.

The jury was adequately instructed about the aggravating factor that needed to be proved before a recommendation of death could be returned, where the jury was informed in a final instruction that before a recommendation of death could be returned it first must find beyond a reasonable doubt that the defendant intentionally killed the victim while the defendant was committing a robbery, and preliminary instructions stated that the intentional murder during the course of robbery was the aggravating circumstance and defined "intentionally." *Burris v. State*, — Ind. —, 465 N.E.2d 171 (1984).

—Perpetration of Rape.

Where jury found defendant guilty of murder while in the perpetration of a rape, the circumstances of such killing constituted a valid aggravating factor for the jury to consider in deciding to recommend the death penalty. *Judy v. State*, — Ind. —, 416 N.E.2d 95 (1981).

—Prior Criminal Activity.

Evidence of prior criminal activity was relevant at a sentencing hearing. *Brewer v. State*, — Ind. —, 417 N.E.2d 889 (1981), cert. denied, 458 U.S. 1122, 102 S. Ct. 3510, 73 L. Ed. 2d 1384, rehearing denied, 458 U.S. 1132, 102 S. Ct. 18, 73 L. Ed. 2d 1403 (1982).

Constitutionality.

The statutory and procedural scheme for imposing the death sentence limits the imposition of such sentence in such manner as to assure that it will not be inflicted in an arbitrary or capricious manner and therefore

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431.220. Execution of death sentence. — Every death sentence shall be executed by causing to pass through the body of the condemned a current of electricity of sufficient intensity to cause death as quickly as possible. The application of the current shall be continued until the condemned is dead. All executions of the death penalty by electrocution shall take place within the walls of the state penal institution designated by the corrections cabinet, and in such enclosure as will exclude public view thereof. (1137-1: amend. Acts 1974, ch. 74, Art. V, § 2; 1986, ch. 331, § 51, effective July 15, 1986.)

431.240. Time of execution — Governor to fix time in case of insanity, pregnancy or escape — Transfer to forensic psychiatric facility in case of insanity. — (1) Unless the execution is stayed by due process of law or under authority of subsection (2) of this section, the warden of the penitentiary or his deputy shall proceed, on the day and at the place named in the judgment of conviction, to cause the condemned person to be electrocuted. The execution shall take place before sunrise on the day designated in the judgment.

(2) If the condemned person is insane or pregnant with child on the day designated for the execution, the execution shall be suspended until the condemned is restored to sanity or is delivered of child. The execution shall then take place under the warrant of the governor and at the time designated by him, unless stayed by due process of law. If execution is suspended on the ground of insanity, the secretary of corrections may transfer the condemned person to the state forensic psychiatric facility operated by the corrections cabinet until such time as he is restored to sanity.

(3) If the condemned person escapes from custody and is recaptured after the expiration of the date fixed for the execution, the governor, upon receiving written notice of the recapture from the warden of the penitentiary, shall send his warrant of execution to the warden by special messenger and shall name therein the day of execution. The warden shall then proceed to the execution thereof according to the provisions of KRS 431.215 to 431.270.

(4) Whenever a judgment of death has not been executed on the day appointed therefor by the court, from any cause whatever, the governor, by a warrant under his hand and the seal of the Commonwealth, shall fix the day of the execution, which warrant shall be obeyed by the warden of the penitentiary. (1137-3, 1137-7, 1137-8: amend. Acts 1944, ch. 145; 1962, ch. 234, § 46; 1976, ch. 332, § 30; 1980, ch. 295, § 91, effective July 15, 1980; 1986, ch. 331, § 52, effective July 15, 1986.)

431.250. Persons who may attend executions. — The following persons, and no others, may attend an execution: The electrician and the warden of the penitentiary and his deputy or deputies and guards; the sheriff of the county in which the condemned was convicted; the secretary of the corrections cabinet and representatives of the corrections cabinet designated by him; the physician and chaplain of the penitentiary; a clergyman and three (3) other persons selected by the condemned; nine (9) representatives of the news media as follows: one (1) representative from United Press International Wire Service, one (1) representative from Associated Press Wire Service, one (1) representative from Kentucky Network, Inc., three (3) representatives for radio and television media within the state and three (3) representatives for newspapers within the state. Use of audiovisual equipment by the representatives is prohibited during the execution. The corrections cabinet shall issue administrative regulations which govern media representation during the execution. (1137-4: amend. Acts 1974, ch. 74, Art. V, § 2; 1986, ch. 156, § 1, effective July 15, 1986.)

UNIFORM TRAFFIC CITATION

431.450. Uniform citation. — (1) The department of state police in consultation with the transportation cabinet shall design, print, and distribute to all law enforcement agencies in the Commonwealth a uniform citation.

(2) The citation shall:

- (a) Be approved by the Supreme Court;
- (b) Consist of an original document and five (5) copies;
- (c) Be serially numbered in such a manner that the year of issue and the individual citation number may be readily ascertained; and
- (d) Contain such other information as may be required by the Supreme Court.

(3) The circuit court clerk shall maintain a system of accountability for all citations issued in accordance with rules and regulations issued by the Supreme Court to assure that citations are not wrongfully destroyed, tampered with, or otherwise compromised in any manner.

(4) All peace officers in the Commonwealth shall use the uniform citation for all violations of the traffic laws and for all felonies, misdemeanors and violations. (Enact. Acts 1976 (Ex. Sess.), ch. 36, § 3; 1978, ch. 26, § 2, effective March 3, 1978; 1986, ch. 389, § 28, effective July 15, 1986.)

Legislative Research Commission Note. Acts 1986, ch. 389, § 29(1) specifies that use of the uniform citation shall be implemented

no later than January 1, 1987; § 31, however, provides that it may be implemented at any time prior to that date.

431.451. Delineation of offenses for which fines may and may not be prepaid. [Effective April 10, 1988 to July 15, 1988.] — (1) Offenses for which citations may be issued and for which the minimum fine may be prepaid are: KRS 150.170, 150.175, 150.237, 150.280, 150.290, 150.305, 150.320, 150.340, 150.370, 150.400, 150.410, 150.412, 150.440, 150.445, 150.450, 150.470, 150.660, 150.993, 186.020, 186.050, 186.070, 186.190, 189.020, 189.025, 189.030, 189.040, 189.045, 189.050(1)(2), 189.055, 189.060, 189.070, 189.080, 189.090(1)(2)(3), 189.095, 189.100, 189.110, 189.120, 189.130, 189.140, 189.150, 189.160, 189.170, 189.190, 189.205, 189.231 for first offense only, 189.285, 189.290, 189.300, 189.310, 189.330, 189.338, 189.340, 189.350, 189.375, 189.380, 189.390, 189.430, 189.450, 189.470, 189.480, 189.550, 189.560, 189.570, 189.580(2), 189.820, 189.940(5), and 222.202.

(2) Offenses for which citations may be issued but for which no prepayment of the fine may be made are: KRS 138.570, 138.63C, 138.665, 177.230, 177.300, 186.052, 186.053, 186.170, 186.200, 186.210, 186.410, 186.450, 186.510, 186.540, 186.600, 186.610, 186.620, 186.630, 187.990(2), 189.050(3)(4), 189.090(4), 189.221, 189.222, 189.223, 189.224, 189.270, 189.370, 189.393, 189.500, 189.505, 189.520, 189.530, 189.565, 189.580, 189.751, 189.920, 189.930, 189.950, 281.615, 281.720, 281.726 and 281.804. (Enact. Acts 1978, ch. 26, § 3, effective March 3, 1978; 1980, ch. 188, § 299, effective July 15, 1980; 1986, ch. 336, § 7, effective July 1, 1986; 1988, ch. 347, § 3, effective April 10, 1988.)

431.451. Delineation of offenses for which fines may and may not be prepaid. [Effective July 15, 1988.] — (1) Offenses for which citations may be issued and for which the minimum fine may be prepaid are: KRS 150.170, 150.175, 150.237, 150.280, 150.290, 150.305, 150.320, 150.340, 150.370, 150.400, 150.410, 150.412, 150.440, 150.445, 150.450, 150.470, 150.660, 186.020, 186.050, 186.070, 186.190, 189.020, 189.025, 189.030, 189.040, 189.045, 189.050(1)(2), 189.055, 189.060, 189.070, 189.080,

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TITLE XL

CRIMES AND PUNISHMENTS

CHAPTER.

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433. OFFENSES AGAINST PROPERTY BY FORCE, 433.010 to 433.870.
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CHAPTER 431

GENERAL PROVISIONS CONCERNING CRIMES AND PUNISHMENTS

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- 431.005. Arrest by peace officers — By private persons.
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431.017. Appearance bond of prosecuting witness.
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431.021. Guaranteed arrest bond certificate of surety company to be accepted in lieu of cash bail in traffic cases.
431.025. Notice of intention to arrest — Act of arrest — Force.
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431.035. [Repealed.]
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431.045. Pursuit in effecting arrest.
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- 431.095. Process, execution on Sunday.
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431.220. Execution of death sentence.
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431.270.	Delivery or burial of body.	431.530.	Deposit of bail security — Payments into public advocate special account — Return of deposit when innocent or charges dropped or dismissed.
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Compiler's Notes. Under authority of Acts 1984, ch. 401, § 6 "warden" should be substituted for "superintendent" wherever it appears throughout the chapter.

431.005. Arrest by peace officers — By private persons. — (1) A peace officer may make an arrest:

- (a) In obedience to a warrant; or
- (b) Without a warrant when a felony is committed in his presence; or
- (c) Without a warrant when he has probable cause to believe that the person being arrested has committed a felony; or
- (d) Without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his presence; or
- (e) Without a warrant when a violation of KRS 189.290, 189.393, 189.520, 189.580, 511.080, or 525.070 has been committed in his presence, except that a violation of KRS 189A.010 need not be committed in his presence in order to make an arrest without a warrant if the officer has probable cause to believe that the person has violated KRS 189A.010.

(2) Any peace officer may arrest without warrant when he has probable cause to believe that if the person is not arrested he will present a danger or threat of danger to others if not immediately restrained and in addition he has probable cause for believing that said person has intentionally or wantonly caused physical injury to his spouse, parent, grandparent, child, or stepchild. Within twelve (12) hours following apprehension and booking

ch. 14, § 441, effective January 2, 1978; 1984, ch. 415, § 11, effective July 13, 1984.)

Compiler's Notes. This section was formerly compiled as KRS 431.230.

A provision similar to subsection (1) of this section appears under RCr 11.22.

Cross-References. Fee of sheriff for transporting felon, KRS 64.070.

Powers of sheriff in conveying prisoner to penitentiary, KRS 70.060.

Cited: Nolan v. Thomas (1964), 379 S.W.2d 248.

Collateral References. 24 C.J.S., Criminal Law, § 1607.

431.216. Commitment of person convicted of felony. [Repealed.]

Compiler's Note. This section (Acts 1970, ch. 91, § 1) was repealed by Acts 1974, ch.

406, § 336, effective January 1, 1975. For present law see KRS 532.100.

431.218. Date of execution of condemned — Copy of mandate to proper officer. — When a judgment sentencing the defendant to death has been affirmed, the mandate shall fix the day of the execution as the fifth Friday following the date of the mandate of the court. The clerk of the Supreme Court shall transmit either by special messenger, certified mail, return receipt requested, a certified copy of the mandate to the proper officer which shall be the authority of such officer to carry the mandate into effect. The officer receiving the copy shall report his action both to the governor and to the circuit court. If from any cause the execution does not take place on the day appointed in the mandate, the governor may from time to time appoint another day for execution until the sentence is carried into effect. (Enact. Acts 1962, ch. 234, § 45; 1974, ch. 315, § 86; 1976, ch. 62, § 126; 1980, ch. 114, § 105, effective July 15, 1980.)

Collateral References. 21 Am. Jur. 2d, Criminal Law, §§ 544, 610, 611.
24 C.J.S., Criminal Law, § 1581.

431.220. Execution of death sentence. — Every death sentence shall be executed by causing to pass through the body of the condemned a current of electricity of sufficient intensity to cause death as quickly as possible. The application of the current shall be continued until the condemned is dead. All executions of the death penalty by electrocution shall take place within the walls of the state penal institution designated by the corrections cabinet, and in such inclosure as will exclude public view thereof. (1137-1: amend. Acts 1974, ch. 74, Art. V, § 2.)

Cross-References. Affirmance of judgment to fix day of execution, KRS 431.218.
Execution of criminal sentences, RCr 11.22

Collateral References. 21 Am. Jur. 2d,

Criminal Law, § 612; 40 Am. Jur. 2d, Homicide, §§ 549, 557.

24 C.J.S., Criminal Law, § 1581.

431.230. Conveyance of condemned to penitentiary — Duties of sheriff and superintendent. [Reenacted as KRS 431.215.]

Compiler's Notes. This section (1137-2) was reenacted as KRS 431.215 by Acts 1962, ch. 234, § 44.

431.240. Time of execution—Governor to fix time in case of insanity, pregnancy or escape—Transfer to forensic psychiatric facility in case of insanity. — (1) Unless the execution is stayed by due process of law or under authority of subsection (2) of this section, the warden of the penitentiary or his deputy shall proceed, on the day and at the place named in the judgment of conviction, to cause the condemned person to be electrocuted. The execution shall take place before sunrise on the day designated in the judgment.

(2) If the condemned person is insane or pregnant with child on the day designated for the execution, the execution shall be suspended until the condemned is restored to sanity or is delivered of child. The execution shall then take place under the warrant of the governor and at the time designated by him, unless stayed by due process of law. If execution is suspended on the ground of insanity, the commissioner of corrections may transfer the condemned person to the state forensic psychiatric facility operated by the corrections cabinet until such time as he is restored to sanity.

(3) If the condemned person escapes from custody and is recaptured after the expiration of the date fixed for the execution, the governor, upon receiving written notice of the recapture from the warden of the penitentiary, shall send his warrant of execution to the warden by special messenger and shall name therein the day of execution. The warden shall then proceed to the execution thereof according to the provisions of KRS 431.215 to 431.270.

(4) Whenever a judgment of death has not been executed on the day appointed therefor by the court, from any cause whatever, the governor, by a warrant under his hand and the seal of the Commonwealth, shall fix the day of the execution, which warrant shall be obeyed by the warden of the penitentiary. (1137-3, 1137-7, 1137-8: amend. Acts 1944, ch. 145; 1962, ch. 234, § 46; 1976, ch. 332, § 30; 1980, ch. 295, § 91, effective July 15, 1980.)

Cross-References. Governor's right to pardon, Const., § 77.

NOTES TO DECISIONS

ANALYSIS

1. Application.
2. Authority over inquests.

1. Application.

This section is not applicable to a convict given a penitentiary sentence for crime.

Davidson v. Commonwealth, 174 Ky. 789, 192 S.W. 846 (1917).

2. Authority over Inquests.

The warden of a penitentiary may hold an inquest if he has reasonable grounds to believe that a prisoner in his custody may be

insane. *Barrett v. Commonwealth*, 202 Ky. 153, 259 S.W. 25 (1923).

Under this section, authority to conduct inquests is given to the sheriff and warden of the penitentiary and a private citizen is without authority to institute an inquest to determine the sanity of one under sentence of

death. *Stucker v. Commonwealth*, 251 Ky. 618, 88 S.W.2d 280 (1935).

Collateral References. 21 Am. Jur. 2d, Criminal Law, §§ 122-128.

24 C.J.S., Criminal Law, §§ 1568, 1581, 1614, 1619; 24B C.J.S., Criminal Law, §§ 2001-2003.

431.250. Persons who may attend execution. — The following persons, and no others, may attend an execution: The electrician and the warden of the penitentiary and his deputy or deputies and guards; the sheriff of the county in which the condemned was convicted; the secretary of the corrections cabinet and representatives of the corrections cabinet designated by him; the physician and chaplain of the penitentiary; a clergyman and three (3) other persons selected by the condemned; one (1) representative of every newspaper published in the county in which the condemned was convicted, and (1) representative of every daily newspaper published in the state. (1137-4: amend. Acts 1974, ch. 74, Art. V, § 2.)

431.260. Warden's return on judgment. — The warden of the penitentiary shall make due return, on the copy of the judgment of the court pronouncing the death sentence, of the manner, time and place of its execution by him. The return shall be filed by the clerk of the court in the papers of the case in his office. (1137-5.)

431.270. Delivery or burial of body. — The body of the condemned shall be delivered to any friend or relative making request for it. The expense for the return of the body to its home, not to exceed thirty dollars (\$30.00), shall be paid out of the appropriations to the corrections cabinet. If no such request is made, the body shall be buried, and the cost of such burial, not to exceed thirty dollars (\$30.00), shall be paid out of the appropriations to the corrections cabinet. (1137-6: amend. Acts 1974, ch. 74, Art. V, § 2.)

Opinions of Attorney General. The department of corrections [now corrections cabinet] may have the body of an inmate buried where no one claims it, with the cost of

burial not to exceed the sum set out in this section, to be deducted from the institutional account of the inmate. OAG 70-645.

431.350. Consumer reporting agency records restriction — Penalty.
[Repealed.]

Compiler's Notes. This section (Acts 1974, ch. 119, § 1) was repealed by Acts 1980, ch.

49, § 22, effective July 15, 1980. For present law, see KRS 367.310, 367.990.

431.400. Summons to issue in case of accidental homicide by motor vehicle.—In the case of accidental homicide by motor vehicle, when no arrest is made at the scene of the accident and a complaint is later filed against the driver, the court shall not issue a warrant for the arrest of the driver unless there is reason to believe that the driver will flee to avoid a summons or unless circumstances within the discretion of the court require

1982 Amendment: Rewrote subsec. B (see main volume for prior text).

In subsec. B, pars. (a) to (e) were redesignated as pars. (1) to (5), "the" was capitalized at the beginning of pars. (1) to (4), and, in par. (4) a reference to "Paragraph (d)" was changed to "Paragraph (4)" on authority of R.S. 24:253.

Notes of Decisions

Construction and application 1 Orders of commitment 2

1. Construction and application

General statutory scheme of this section and R.S. 15:702 to 15:705, 15:757, 33:1432, and

33:4715, is that city parish is responsible for expense of establishing, maintaining and operating jail and for all expenses of feeding, clothing, and providing medical treatment to prisoners while sheriff has duty of operating jail and seeing to it that prisoners are properly cared for, fed, and clothed. *Amiss v. Dumas*, App.1982, 411 So.2d 1137, writ denied 415 So.2d 940.

2. Orders of commitment

An order of commitment in case of a sentence at hard labor does not necessarily have to articulate that prisoner is committed to Department of Corrections, as sentence at hard labor necessarily requires commitment to Department of Corrections. *State v. Caillier*, App.3 Cir.1984, 450 So.2d 43, writ denied 456 So.2d 168.

§ 566.2. Commencing of sentence to state penitentiary

Notes of Decisions

1. Construction and application

Where trial court vacated original sentence on same day it was imposed, so that its execution could not have commenced on following day when defendant was resentenced, and where

amendment of sentence was completed before sheriff undertook any act toward execution of original sentence, execution of original sentence had not already begun before resentencing so as to preclude latter. *State v. Guajardo*, Sup.1983, 428 So.2d 468.

PART II. CAPITAL CASES

§ 567. Conditions precedent to execution

A. Whenever the Supreme Court of Louisiana affirms a sentence of death, after review on appeal provided by Louisiana Code of Criminal Procedure Article 905.9, the court of original jurisdiction shall cause to be forwarded to the secretary of the Department of Public Safety and Corrections a certified copy of the indictment, verdict, sentence, and the judgment of the Supreme Court of Louisiana affirming the sentence of death.

B. The court of original jurisdiction shall also issue a warrant commanding the secretary to cause the execution of the person condemned as provided by law. The warrant shall specify the date upon which the person condemned shall be put to death, which date shall be not less than sixty days nor more than ninety days from the date the warrant is issued. Upon receipt of the warrant the secretary shall cause a copy of the warrant to be delivered to the person condemned. A certified copy of the warrant shall be mailed, return receipt requested, to the governor and the return receipt filed in the record.

C. If any federal or Louisiana court grants a stay of execution, or if the governor of Louisiana grants a reprieve, the trial court shall reset the execution date at not less than thirty days nor more than forty-five days from the dissolution of the stay order, or termination or expiration of the reprieve.

D. The failure of the trial court to fix an execution date within the time limits of this Section shall not affect the validity of a sentence of death. In such a case, the attorney general shall bring a mandamus proceeding in any court of competent jurisdiction to have the trial court set the execution date at not less than thirty days nor more than forty-five days from the date of issuance of the mandamus order.

Amended by Acts 1981, No. 585, § 1, eff. July 20, 1981; Acts 1985, No. 178, § 1, eff. July 6, 1985.

1981 Amendment: In the second paragraph, deleted "In addition," from the beginning of the first sentence, added "also" and "nor more than forty-five days", and substituted "not less than

sixty days nor more than ninety days" for "the day following the expiration of ninety days", and "less" for "more" in the fifth sentence.

In the fourth sentence of the second paragraph of this section as amended in 1981, "return" was substituted for "returned" on authority of R.S. 24:253.

Acts 1981, No. 585, § 1 amends this section with respect to fixing of execution dates. Section 2 of Act 585 provides: "The provisions of this Act shall not affect the validity of any warrants issued prior to the effective date hereof." Act 585 became effective July 20, 1981 upon signature by the governor.

1985 Amendment: Designated the existing paragraphs of this section as subsecs. A and B; in sec. c. A inserted "Public Safety and" preceding "Corrections"; at the end of subsec. B deleted "Furthermore, if any federal court or the Supreme Court of Louisiana grants a stay of execution, the trial court shall fix the execution date at not less than thirty days nor more than forty-five days from the dissolution of the stay order."; and added subsecs. C and D.

In the second sentence of subsec. D as added in 1985, "such a case," was substituted for "such cases," on authority of R.S. 24:253.

Cross References

Additional notification requirements, see Supreme Court Rule 27 (Vol. 8, LSA-R.S.).

Law Review Commentaries

Are Louisiana judicial death warrants constitutional? William H. Forman, Jr., 31 La.Bar J. 17 (1983).

WESTLAW Electronic Research

See WESTLAW guide following the Explanation pages of this supplement.

PART IV. DIMINUTION AND COMMUTATION OF SENTENCE FOR GOOD BEHAVIOR

§ 571.3. Diminution of sentence for good behavior

[See main volume for text of A to C]

D. Diminution of sentence shall not be allowed an inmate in the custody of the Department of Public Safety and Corrections if the instant offense was committed during a period of time that the inmate was under the jurisdiction of the department or placed on probation as a juvenile.

Added by Acts 1984, No. 137, § 1.

1984 Amendment: Added a new subsec.D. A prior subsec. D had been repealed by Acts 1977, No. 633, § 2. See notes in main volume.

Law Review Commentaries

Study of the Louisiana sentencing system and its relationship to prison overcrowding: Some realistic solutions. Louis Westerfield, 30 Loyola L.Rev. (La.) 5 (1984).

United States Supreme Court

Ex post facto laws, see *Weaver v. Graham*, 1981, 101 S.Ct. 960, 450 U.S. 24, 67 L.Ed.2d 17.

Notes of Decisions

Argument and conduct of counsel 5

1. In general

Conviction of first-degree murder was not to serve as a condition precedent to execution of sentence of death until defendant failed to file a timely petition for certiorari in the Supreme Court of the United States, the Court denied defendant's timely petition for certiorari, if one was filed, and the Court denied defendant's petition for rehearing on the petition for certiorari, if one was timely filed, or further orders of the Louisiana Supreme Court. *State v. Jones*, Sup. 1985, 474 So.2d 919, certiorari denied 106 S.Ct. 2906, 90 L.Ed.2d 993, rehearing denied 107 S.Ct. 13, 92 L.Ed.2d 768.

5. Argument and conduct of counsel

In first-degree murder prosecution in which defendant was sentenced to death, prosecutor's closing argument, which was to effect that trial judge had power to set aside inappropriate death sentence, that entire federal court system could review such a sentence, that governor had to review it, that it was improbable that death sentence would be sustained when "we . . . get through all of that review," that jurors' decision was unlikely to "make a significant contribution," that decision would be "reviewed and rehashed . . . for years to come" and that the importance of the function was not "going to be much but it's something," was improper; death sentence had to be set aside and remand for new sentencing hearing was required. *State v. Robinson*, Sup.1982, 421 So.2d 229.

Notes of Decisions

Discretion of court 12

Discretion of director of corrections 13

2. Construction and application—In general

This section and R.S. 15:574.4 on "good-time" and parole, parish prison rules and regulations, and standard disciplinary procedures followed in conjunction therewith, created liberty interest which inmates were entitled to rely upon and which federal District Court, pursuant to due process clause of Fourteenth Amendment (U.S. C.A. Const.Amend. 14) was bound to protect. *Martin v. Foti*, D.C.1983, 561 F.Supp. 252.

PART II. CAPITAL CASES

Sec.

- 567. Conditions precedent to execution.
- 568. Execution of death sentence; prior confinement of offender.
- 569. Place for execution of death sentence; manner of execution.
- 569.1. Hours for execution of death sentence.
- 570. Officials and witnesses present at execution; minors excluded.
- 571. Proces verbal of execution; attesting and filing.

§ 567. Conditions precedent to execution

Whenever the Supreme Court of Louisiana affirms a sentence of death, after review on appeal provided by Louisiana Code of Criminal Procedure Article 905.9, the court of original jurisdiction shall cause to be forwarded to the secretary of the Department of Corrections a certified copy of the indictment, verdict, sentence, and the judgment of the Supreme Court of Louisiana affirming the sentence of death.

In addition, the court of original jurisdiction shall issue a warrant commanding the secretary to cause the execution of the person condemned as provided by law. The warrant shall specify the date upon which the person condemned shall be put to death, which date shall be the day following the expiration of ninety days from the date the warrant is issued. Upon receipt of the warrant the secretary shall cause a copy of the warrant to be delivered to the person condemned. A certified copy of the warrant shall be mailed, return receipt requested, to the governor and the return receipt filed in the record. Furthermore, if any federal court or the Supreme Court of Louisiana grants a stay of execution, the trial court shall fix the execution date at not more than thirty days from the dissolution of the stay order.

Amended by Acts 1956, Ex.Sess., No. 18, § 1; Acts 1978, No. 758, § 1; Acts 1980, No. 518, § 1.

History and Source of Law

Source:

Acts 1928, No. 2, § 1, art. 567.

Prior to the 1956 amendment, the warrant was directed to and the command given to the sheriff of the court wherein the sentence or judgment was passed rather than to the warden.

As amended in 1966, this section provided:

No person sentenced to death shall be executed until a certified copy of the indictment, verdict and sentence shall

have been sent to the governor, and a warrant shall have been issued by him, under the seal of the state, directed to the warden of the Louisiana State Penitentiary at Angola, commanding the warden to cause the execution to be done on the person so condemned in all things according to the judgment against him, and upon the date named in said warrant."

The 1978 amendment deleted "warrant of governor" from the section heading and substantially altered the language

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of the section itself. The title of Act 758 indicated that the amendment was "to provide that the date for execution in capital cases shall be set by the court of original jurisdiction and repealing the requirement that such warrants be signed by the governor."

The 1950 amendment added "or the Supreme Court of Louisiana" in the second paragraph.

Prior Laws:

Acts 1855, No. 121, §§ 32, 33.

R.S. 1856, p. 164, §§ 30, 31.

R.S. 1870, §§ 1004, 1613.

R.S. 1870, §§ 1005, 1614.

Reporter's Notes

R.S. 1870, §§ 1004, 1613, duplicate sections, which required the governor to issue a warrant for execution in crimes punishable by death, have been omitted from the 1950 Revised Statutes because superseded by this section.

R.S. 1870, §§ 1005, 1614, duplicate sections, which required the clerk to send a

transcript of the proceedings to the governor in cases where the death sentence had been imposed, have been omitted from the 1950 Revised Statutes because dependent upon R.S. 1870, §§ 1004, 1613, which have been superseded by this and the following sections.

Cross References

Sentencing in capital cases, see LSA-Cr.P. art. 905 et seq.

Library References

Criminal Law Ⓒ1219.

C.J.S. Criminal Law § 2001 et seq.

Notes of Decisions

In general 1
Date of execution 4
Mental illness 2
Mode of execution 3

1. In general

Since the sheriff must keep condemned prisoner in parish jail until time of execution of prisoner, sheriff in every instance should make suitable arrangements to have the prisoner conveyed from the parish prison to the state penitentiary in sufficient time to make certain that the prisoner is on hand so that execution can be performed on the date and within the hours specified in the Governor's warrant. *Op. Atty. Gen.*, 1956-58, p. 127.

2. Mental illness

One sentenced to death upon conviction of capital crime, who thereafter became insane, could not be executed while in that condition. *State v. Allen*, 1944, 204 La. 513, 15 So.2d 870.

3. Mode of execution

The fact that judgment of conviction stated only that defendant was sentenced to death and should be executed in manner provided by law, without setting forth specific mode of execution of defendant, did not entitle defendant to enjoin sheriff and his deputies from executing her by electrocution under death warrant issued by Governor, where defendant did not object to form of judgment on appeal and Governor's warrant was in exact conformity with Acts 1940, No. 14 (see, now, R.S. 15:569) directing that death sentence should be executed by electrocution. *Henry v. Reid*, 1943, 201 La. 857, 10 So.2d 681.

The execution of death sentence was an executive function and accused was not entitled to complain unless mode of execution provided in Governor's warrant was contrary to Acts 1940, No. 14 (see, now, R.S. 15:569). *Id.*

4. Date of execution

Execution date was within discretion of Governor but at least ten days should

intervene between date of sentence and date of execution. Op. Atty. Gen. 1934-36, p. 198.

There was nothing in law that specified that legal execution should take

place on Friday, for day of execution was left entirely to discretion of Governor. Op. Atty. Gen. 1924-26, p. 106.

§ 568. Execution of death sentence; prior confinement of offender

The director of the Department of Corrections, or a competent person selected by him, shall execute the offender in conformity with the death warrant issued in the case. Until the time of his execution, the Department of Corrections shall incarcerate the offender in a manner affording maximum protection to the general public, the employees of the department, and the security of the institution.

Amended by Acts 1956, Ex. Sess., No. 18, § 1; Acts 1974, No. 199, § 1.

History and Source of Law

Source:

Acts 1928, No. 2, § 1, art. 508.

The 1956 amendment substituted the warden for the sheriff or a duly authorized deputy. This amendment also provided for confinement at the penitentiary rather than at the parish prison. As so amended, this section provided:

"The warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, shall execute the criminal in conformity with the death warrant issued in the case. Until the time of his execution, the convict shall be kept in solitary confinement at the Louisiana State Penitentiary at Angola and no one shall be allowed access to him without an order of the court except the officers of the prison, his counsel, his physician, his spiritual adviser, his wife, children, father, mother, brothers and sisters."

House Concurrent Resolution No. 6, 1st Ex. Sess., 1961, provided: "Therefore, Be It Resolved by the House of Representatives of the Legislature of Louisiana, the Senate thereof concurring, that the Legislature does hereby go on record as expressing its intent, under the provisions of existing laws, that every person convicted of a crime for which he has

been sentenced to death shall, within five days after the delays allowed by law for the taking of an appeal to or the application for review or rehearing by the Louisiana Supreme Court or, if such an appeal actually is perfected, within five days after a decision of said court confirming the sentence of death or denying an application for review or rehearing, be transported in the manner provided by law to the State Penitentiary at Angola, there to be maintained and confined until such time as his execution is carried out or pending any other disposition of his case resulting from any appeal thereafter taken to the Supreme Court of the United States or any petition to the Governor and/or the Pardon Board for reprieve, pardon or commutation of sentence."

The 1974 amendment substituted "offender" for "convict" in the section heading and rewrote the section, primarily by substituting references to the Department of Corrections for prior references to the Louisiana State Penitentiary and by altering the language relating to confinement.

Prior Laws:

Acts 1918, No. 133.

Library References

Criminal Law § 1219.

C.J.S. Criminal Law § 2001 et seq.

proof that he unduly suffered from any of such infirmities. *Sinclair v. Henderson*, D.C.1971, 331 F.Supp. 1123.

In order for petitioner charging that inadequate medical treatment on death row of state penitentiary amounted to cruel and unusual punishment to state a claim for relief under statute governing deprivation of civil rights (42 U.S.C.A. § 1983), complaint had to allege an abuse of discretion by prison authorities in providing medical treatment for prisoners, and in order to obtain relief, evidence had to support such claim. *Id.*

Evidence failed to support truth of claim that adequate psychiatric care on death row of state penitentiary was lacking in such proportions as to amount to cruel and unusual punishment. *Id.*

7. Food

Occasional incidents of foreign objects being found in food of inmates on death row of state penitentiary did not raise a question of cruel and unusual punishment but simply raised a problem of internal prison administration to be dealt with by prison authorities as best they could. *Sinclair v. Henderson*, D.C.1971, 331 F.Supp. 1123.

8. Bedding

There is no constitutional right for an inmate on death row to be furnished with an orthopedically approved mattress, and it is not cruel and unusual

punishment to be denied exact kind and quality mattress that inmate might prefer. *Sinclair v. Henderson*, D.C.1971, 331 F.Supp. 1123.

9. Outdoor exercise

Term "solitary confinement," as used in this section (prior to the 1974 amendment) simply meant separate confinement with only occasional access to specifically authorized persons, and it would not be violative of this section if exercise yards were provided for prisoners housed in death row. *Sinclair v. Henderson*, D.C.1971, 331 F.Supp. 1123.

10. Letters and correspondence

This section to effect that, until time of execution, convict shall be kept in solitary confinement and no one shall be allowed access to him without order of court except certain persons was reasonably construed by state Attorney General to include act of corresponding in writing with the prisoner. *Labat v. McKeithen*, C.A.1966, 361 F.2d 757.

Act of prison authorities in censoring correspondence of petitioner while confined to death row of state penitentiary did not constitute a violation of his rights under First, Sixth or Fourteenth Amendments (U.S.C.A. Const. Amends. 1, 6, 14). *Sinclair v. Henderson*, D.C.1971, 331 F.Supp. 1123.

Communication by letter with persons not privileged to have access to inmate held under death sentence violated this section. *Op Atty.Gen.*, Sept. 22, 1964.

§ 569. Place for execution of death sentence; manner of execution

Every sentence of death imposed in this state shall be by electrocution; that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room.

Amended by Acts 1956, No. 143; Acts 1956, Ex.Sess., No. 18, § 1.

Operator of the electric chair provided by Act No. 14 of 1940 was to be employed by the Manager of the Louisiana State Penitentiary and placed on the

penitentiary payroll, and general manager was to have charge of the chair. Op. Atty. Gen. 1940-42, p. 2788.

§ 569.1. Hours for execution of death sentence

Every sentence of death imposed in this state shall be executed between the hours of 12:00 o'clock midnight and 3:00 A.M. upon the date set for the execution by the court of original jurisdiction.

Added by Acts 1952, No. 160, § 1. Amended by Acts 1980, No. 518, § 1.

History and Source of Law

The 1980 amendment deleted "o'clock" following "3:00", and substituted "court of original jurisdiction" for "Governor".

Library References

Criminal Law § 1219.

C.J.S. Criminal Law § 2001 et seq.

§ 570. Officials and witnesses present at execution; minors excluded

Every execution of the death sentence shall take place in the presence of the warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, the coroner of the parish of West Feliciana, or his deputy, and a physician summoned by the warden of the Louisiana State Penitentiary at Angola, the operator of the electric chair who shall be a competent electrician who shall have not been previously convicted of a felony, a priest or minister of the gospel, if the convict so requests it, and not less than five nor more than seven other witnesses, all citizens of the State of Louisiana; no person under the age of eighteen years shall be allowed within said execution room during the time of execution.

Amended by Acts 1956, Ex.Sess., No. 18, § 1; Acts 1972, No. 768, § 6.

History and Source of Law

Source:

Acts 1928, No. 2, § 1, art. 570.

Acts 1940, No. 14, § 1.

Acts 1946, No. 149, § 1.

The 1956 amendment substituted the warden of the penitentiary or a competent person selected by him for the sheriff of the parish, or one of his duly designated deputies.

The 1972 amendment lowered the age restriction from twenty-one years to eighteen years.

Prior Laws:

Acts 1918, No. 133, § 4.

Library References

Criminal Law § 1219.

C.J.S. Criminal Law § 2001 et seq.

Where accused was sentenced to death by hanging in accordance with existing law, while case was pending retrospective act, Act. No. 14 of 1940 (see, now, this section), substituting electrocution for method of execution became effective, and unqualified verdict of guilty and sentence imposing death penalty were held valid on appeal, sentence was directed to be amended to conform to new act. *State ex rel. Pierre v. Jones*, 1942, 200 La. 808, 9 So.2d 42, certiorari denied 63 S.Ct. 64, 317 U.S. 633, 57 L. Ed. 510.

5. Witnesses

If the executions of three persons were to take place at one and same time under section 4 of Act No. 113 of 1918 (see, now, this section), no more than seven witnesses could be present. *Op. Atty.Gen.* 1924-26, p. 109.

6. Execution

Supreme Court had no authority, on petitions for certiorari, prohibition, mandamus, and habeas corpus, to set aside death sentence and release prisoner from sheriff's custody because attempt to electrocute prisoner was unsuccessful when electric chair failed to function, on ground that to subject prisoner to further electrocution would constitute cruel and unusual punishment and double jeopardy in violation of state

constitution where proceedings had in district court up to and including pronouncement of sentence were entirely regular. *State ex rel. Francis v. Resweber*, 1947, 212 La. 143, 31 So.2d 697.

The fact that judgment of conviction stated only that defendant was sentenced to death and should be executed in manner provided by law, without setting forth specific mode of execution of defendant, did not entitle defendant to enjoin sheriff and his deputies from executing her by electrocution under death warrant issued by Governor, where defendant did not object to form of judgment on appeal and Governor's warrant was in exact conformity with Acts 1940, No. 14 (see, now, R.S. 15:569 and this section) directing that death sentence should be executed by electrocution. *Henry v. Reid*, 1943, 201 La. 857, 10 So. 2d 681.

The execution of death sentence under Act No. 14 of 1940 (see, now, R.S. 15:569 and this section) was an executive function and accused was not entitled to complain unless mode of execution provided in Governor's warrant was contrary to the statute. *Id.*

Act No. 133 of 1918, § 4 (see, now, this section) did not inhibit execution of two prisoners at same time. *Op. Atty.Gen.* 1920-22, p. 1084.

§ 571. Proces verbal of execution; attesting and filing

When the sentence shall have been executed, the warden of the Louisiana State Penitentiary at Angola, or his deputy performing the execution, shall make a proces verbal of said execution immediately thereafter, which proces verbal shall recite the manner and date of said execution and shall be attested by said warden, or his deputy, and by all of the witnesses, and said proces verbal, when so signed, shall be filed with the clerk of court of the parish in which the sentence shall have been imposed.

Amended by Acts 1956, Ex.Sess., No. 18, § 1.

History and Source of Law

Source:

Acts 1928, No. 2, § 1, art. 571.
The 1956 amendment substituted warden of the penitentiary for sheriff.

Prior Laws:

Acts 1918, No. 133.

(2) The authority making the determination has notified the owner in writing giving the reasons for this determination.

(d) An owner may not:

(1) Leave a dangerous dog unattended on the owner's real property unless the dog is confined indoors, in a securely enclosed and locked pen, or in another structure designed to restrain the dog; or

(2) Permit a dangerous dog to go beyond the real property of the owner unless the dog is leashed and muzzled, or is otherwise securely restrained and muzzled.

(e) If an owner of a dangerous dog or potentially dangerous dog sells or gives the dog to another person, the owner shall provide written notice to:

(1) The authority that made the determination under subsection (c) of this section, stating the name and address of the new owner of the dog; and

(2) The person taking possession of the dog, specifying the dog's dangerous behavior.

(f) Any owner who violates the provisions of this section is guilty of a misdemeanor and, upon conviction shall be fined not more than \$2,500. (1988, ch. 364.)

Editor's note. — Section 2, ch. 364, Acts 1988, provides that "this act may not be applied or construed to limit the authority of a county or municipal authority to enact legisla-

tion that regulates to a greater extent the ownership or possession of dangerous dogs."

Section 3 of ch. 364 provides that the act shall take effect July 1, 1988.

DEATH PENALTY

§ 73. Death chamber; conduct of executions.

The warden of the Maryland Penitentiary is hereby authorized and directed to provide and maintain a permanent death chamber within the confines of said penitentiary, and which said death chamber shall have all the necessary appliances for the proper execution of felons by the administration of a lethal gas. In said death chamber shall be executed all felons upon whom the death penalty has been imposed, for offenses committed on or after January 1st, 1923. Each execution shall be conducted by the said warden or some assistant or assistants designated by him, in the presence of the sheriff of the county or city where such felon was indicted, the physician of the said penitentiary, or his assistant, and a number of respectable citizens numbering not less than six or more than twelve. Counsel for the convict and two ministers of the gospel may be present. (An. Code, 1951, § 504; 1939, § 485; 1924, § 407; 1922, ch. 465, § 3; 1955, ch. 625, § 1; 1988, ch. 6, § 1.)

Effect of amendment. — The 1988 amendment, approved Feb. 18, 1988, and effective from date of passage, deleted a comma following "presence of" in the third sentence.

§ 75. Warrant for execution; revocation by Governor; stay of execution; time of execution.

(a) *Issuance and contents of warrant; effect of other proceedings on warrant; another warrant after stay of execution.* — When a person is sentenced to the punishment of death, the judge or judges presiding in the court shall, at the time of passing sentence, make out, sign and issue a warrant directed to the warden of the Maryland Penitentiary, stating the conviction and sentence and appointing a week within which the sentence must be executed, and commanding the said warden to execute the sentence upon some day within the week so appointed. If a proceeding is instituted in any federal or State court to test the validity of the conviction, other than by an appeal to the Court of Special Appeals or on certiorari in the Court of Appeals, or if a proceeding is instituted in any State court under § 75A of this article to determine the incompetency of the defendant, the warrant shall remain in full force and effect unless the court, in which such proceeding is instituted, shall pass an order revoking the warrant. In any case in which a stay of execution has resulted by reason of an appeal to the Court of Special Appeals or on certiorari in the Court of Appeals after compliance with the requirements of Title 12 of the Courts Article on appeals in criminal cases and the judgment has been affirmed, and in any case in which the warrant has been revoked by the order of a court in a proceeding to test the validity of the conviction and the conviction has not been set aside, or in a proceeding under § 75A of this article in which the defendant has been found to be competent, the judge that imposed the sentence or the judge then presiding in the trial court in which the sentence was imposed shall make out, sign and issue another warrant of execution in the manner and to the effect hereinbefore prescribed. (1988, ch. 6, § 1.)

Effect of amendment.

The 1988 amendment, approved Feb. 18, 1988, and effective from date of passage, substituted "§ 75A of this article" for "§ 75A" two times in subsection (a).

As the remainder of the section was not affected by the amendment, it is not set forth above.

§ 75A. Incompetent inmates.

(d) *Order declaring inmate competent or incompetent; issuance of new warrant; revocation of warrant and modification of sentence; appeal.*

(2) If the court finds the inmate to be competent and has previously revoked the warrant to execute the death sentence pursuant to § 75 (a) of this article, it shall notify the court in which the sentence of death was imposed to issue a new warrant for execution.

(g) *Power of Governor to stay execution.* — This section does not affect the power of the Governor to stay execution of a death sentence under § 75 (c) of this article or to commute a sentence under Article 41, § 4-513 of the Code. (1988, ch. 6, § 1.)

(2) Notwithstanding the provisions of paragraph (1) of this subsection, a person may offer these species for sale, trade, barter, import, or exchange to a public zoo, park, museum, educational institution, or to a person holding valid State or federal permits for educational, medical, scientific, or exhibition purposes.

(b) Any person violating this section shall be guilty of a misdemeanor and upon conviction, in the case of an individual, shall be fined not more than \$1,000; or in the case of any person other than an individual, by a fine of not more than \$10,000.

(c) Exempted from this section are those species of wildlife not being kept as household pets and which are individually exempted by a permit issued by the Department of Natural Resources. (1980, ch. 491; 1981, ch. 406; 1982, ch. 756; 1987, ch. 11, § 1.)

Effect of amendment. — The 1987 amendment, approved Apr. 2, 1987, and effective from date of passage, substituted "section" for "subsection" in subsection (c).

DEATH PENALTY

§ 71. Convicted person sentenced to death by administration of lethal gas; remand to place where indictment was found.

If an offender, on conviction, may be sentenced to suffer death, the court before whom such offender shall be tried and convicted, shall sentence him to suffer death by the administration of a lethal gas; and when a case has been removed for trial and the party shall be sentenced to death, the court shall remand him to the place where the indictment was found, where such offender shall remain in the custody of the sheriff of that county or city for disposition as hereinafter provided. (An. Code, 1951, § 502; 1939, § 483; 1924, § 405; 1922, ch. 465, § 1; 1955, ch. 625, § 1.)

Cross reference. — See §§ 627 and 628 of this article.

Maryland Law Review. — For article, "A Punishment in Search of a Crime: Standards for Capital Punishment in the Law of Criminal Homicide," see 46 Md. L. Rev. 115 (1986).

University of Baltimore Law Review. — For article "Capital Punishment . . . On the Way Out?" see 1 U. Balt. L. Rev. 28 (1971).

Cited in *State v. Wooten*, 27 Md. App. 434, 340 A.2d 308 (1975), aff'd, 277 Md. 114, 352 A.2d 829 (1976).

§ 72. Place of inflicting death penalty.

Punishment of death must be inflicted within the walls of the building hereinafter provided. (An. Code, 1951, § 503; 1939, § 484; 1924, § 406; 1922, ch. 465, § 2; 1951, ch. 285, § 484.)

§ 73. Death chamber; conduct of executions.

The warden of the Maryland Penitentiary is hereby authorized and directed to provide and maintain a permanent death chamber within the confines of said penitentiary, and which said death chamber shall have all the necessary

appliances for the proper execution of felons by the administration of a lethal gas. In said death chamber shall be executed all felons upon whom the death penalty has been imposed, for offenses committed on or after January 1st, 1923. Each execution shall be conducted by the said warden or some assistant or assistants designated by him, in the presence of, the sheriff of the county or city where such felon was indicted, the physician of the said penitentiary, or his assistant, and a number of respectable citizens numbering not less than six or more than twelve. Counsel for the convict and two ministers of the gospel may be present. (An. Code, 1951, § 504; 1939, § 485; 1924, § 407; 1922, ch. 465, § 3; 1955, ch. 625, § 1.)

§ 74. Custody of felon after sentence; notification to Governor; duty of clerk of court where case removed.

When a person is sentenced to the punishment of death, the judge presiding in the court at which the conviction takes place, shall cause the said felon to be taken into custody by the sheriff of the county or city where he was indicted, and to be held by him in solitary confinement as hereinafter provided when said felon is in the penitentiary, as long as said felon shall remain within the custody of the said sheriff, and immediately upon conviction the clerk of the court where the said felon was indicted shall make out, sign and deliver to the Governor of the State of Maryland, a copy of the docket entries in said case, showing fully the sentence of the court and the date thereof, and it shall be the duty of the clerk of the court where such sentence is pronounced in case the indictment therein was procured in another county or city, and the case removed thereto, to immediately upon conviction and sentence, certify the proceedings to the clerk of the circuit court from whence said case was removed and the duty of the clerk of the court upon the receipt of the mandate as to the notification to the Governor, shall be as hereinbefore provided. (An. Code, 1951, § 505; 1939, § 486; 1924, § 408; 1922, ch. 465, § 4.)

§ 75. Warrant for execution; revocation by Governor; stay of execution; time of execution.

(a) *Issuance and contents of warrant; effect of other proceedings on warrant; another warrant after stay of execution.* — When a person is sentenced to the punishment of death, the judge or judges presiding in the court shall, at the time of passing sentence, make out, sign and issue a warrant directed to the warden of the Maryland Penitentiary, stating the conviction and sentence and appointing a week within which the sentence must be executed, and commanding the said warden to execute the sentence upon some day within the week so appointed. If a proceeding is instituted in any federal or State court to test the validity of the conviction, other than by an appeal to the Court of Special Appeals or on certiorari in the Court of Appeals, or if a proceeding is instituted in any State court under § 75A to determine the incompetency of the defendant, the warrant shall remain in full force and effect unless the court, in which such proceeding is instituted, shall pass an

order revoking the warrant. In any case in which a stay of execution has resulted by reason of an appeal to the Court of Special Appeals or on certiorari in the Court of Appeals after compliance with the requirements of Title 12 of the Courts Article on appeals in criminal cases and the judgment has been affirmed, and in any case in which the warrant has been revoked by the order of a court in a proceeding to test the validity of the conviction and the conviction has not been set aside, or in a proceeding under § 75A in which the defendant has been found to be competent, the judge that imposed the sentence or the judge then presiding in the trial court in which the sentence was imposed shall make out, sign and issue another warrant of execution in the manner and to the effect hereinbefore prescribed.

(b) *Revocation of warrant where defendant pregnant.* — If, after medical examination, it shall appear to the satisfaction of the Governor that a female defendant, sentenced to the punishment of death, is pregnant, the Governor shall revoke the warrant previously issued for the execution of the defendant. As soon as the Governor is satisfied that such female defendant is no longer pregnant, he shall issue forthwith his warrant appointing a week within which the sentence must be executed.

(c) *Stay of execution by Governor.* — The Governor shall have the power, in his discretion, to grant a stay for any cause and, upon so doing, he shall issue an order revoking the warrant theretofore issued. Thereafter, the sentence shall not be executed until the Governor shall issue his warrant appointing a week within which the sentence must be executed.

(d) *Notice to warden upon revocation of warrant or stay of execution.* — When a warrant is revoked by an order of court or its execution is stayed, the clerk of the court by which the warrant is revoked, or the clerk of the court by which the sentence was imposed in the case of an appeal to the Court of Special Appeals or on certiorari in the Court of Appeals and the compliance with the requirements of Title 12 of the Courts Article on appeals in criminal cases, shall notify the warden forthwith, by telephone if necessary, that said warrant has been revoked or its execution has been stayed, as the case may be, and shall transmit forthwith to the warden a certificate that said warrant has been revoked or its execution stayed. The Governor shall notify the warden forthwith of the revocation of a warrant by him.

(e) *Time of execution; announcements concerning time.* — Each warrant for the execution of a person sentenced to suffer the death penalty shall appoint a week within which the sentence must be executed, and shall command the warden to execute the sentence upon some day within the week so appointed. The week so appointed must begin not less than four (4) weeks and not more than eight (8) weeks after the issuance of the warrant. The time of the execution within such week shall be left to the discretion of the warden of the Maryland Penitentiary. No previous announcement of the day or hour of the execution shall be made except to the persons who shall be invited or permitted to be present at the execution, as hereinbefore provided. (An. Code, 1951, § 507; 1951, ch. 285, § 487A; 1958, ch. 25; 1976, ch. 472, § 6; 1981, ch. 2, § 3; 1982, ch. 770, § 4; 1987, ch. 418.)

Effect of amendment. — The 1987 amendment, effective July 1, 1987, rewrote the second and third sentences of subsection (a), and deleted former subsection (c) and redesignated the remaining subsections accordingly.

Editor's note. — Section 2, ch. 418, Acts 1987, provides that "this act shall apply to all inmates under sentence of death on July 1, 1987 and those defendants sentenced to death after July 1, 1987."

§ 75A. Incompetent inmates.

(a) *Definitions.* — In this section, the following words have the meanings indicated:

(1) "Inmate" means an individual who has been convicted of murder and sentenced to death; and

(2) (i) "Incompetent" means the state of mind of an inmate who, as a result of a mental disorder or mental retardation, lacks awareness:

1. Of the fact of his or her impending execution; and

2. He or she is to be executed for the crime of murder.

(ii) An inmate is not incompetent merely because his or her competence is dependent upon continuing treatment, including the use of medication.

(b) *Execution of incompetent inmate prohibited.* — The State may not execute the death sentence against an inmate who has become incompetent.

(c) *Petition alleging incompetence and seeking revocation of warrant; representation of inmate; proceedings to determine competency.* — (1) The following individuals may file a petition alleging that an inmate is incompetent and seeking to revoke the warrant to execute the death sentence against the inmate:

(i) The inmate;

(ii) If the inmate is represented by counsel, counsel for the inmate; or

(iii) If the inmate is not represented by counsel, any other person on the inmate's behalf.

(2) The petition shall be filed in the circuit court of the county in which the inmate is confined.

(3) The petition must be accompanied by an affidavit of at least one psychiatrist, based, at least in part, on personal examination, attesting:

(i) That, in the psychiatrist's medical opinion, the inmate is incompetent; and

(ii) The pertinent facts on which the opinion is based.

(4) A copy of the petition shall be served on the Attorney General and the Office of the State's Attorney who prosecuted the inmate, in accordance with the service requirements of the Maryland Rules.

(5) Unless the inmate is already represented by counsel, the court shall promptly appoint the public defender, or, if the public defender for good cause declines representation, other counsel to represent the inmate in the proceeding.

(6) Unless the State stipulates to the inmate's incompetence, it shall cause the inmate to be examined and evaluated by one or more psychiatrists of its choosing.

(7) The inmate is entitled to be independently examined by a psychiatrist of the inmate's choosing, provided the request is reasonable and timely made.

(8) Unless, with the court's approval, the parties waive a hearing, the administrative judge of the court shall designate a time for an evidentiary hearing to determine the inmate's competence. The hearing shall be held without a jury in court, at the place where the inmate is confined, or at any other convenient place.

(9) At the hearing, the inmate:

(i) Subject to the reasonable restrictions related to the inmate's condition, has the right to be present;

(ii) Has the right through counsel to offer evidence, cross-examine witnesses against the inmate, and make argument; and

(iii) Has the burden of establishing incompetence by a preponderance of the evidence.

(d) *Order declaring inmate competent or incompetent; issuance of new warrant; revocation of warrant and modification of sentence; appeal.* — (1) The court shall enter an order declaring the inmate to be competent or incompetent and stating the findings on which the conclusion is based.

(2) If the court finds the inmate to be competent and has previously revoked the warrant to execute the death sentence pursuant to § 75 (a), it shall notify the court in which the sentence of death was imposed to issue a new warrant for execution.

(3) If the court finds the inmate to be incompetent it shall revoke the warrant to execute the death sentence and remand the case to the court in which the sentence of death was imposed, which shall strike the sentence of death and enter in its place a sentence of life imprisonment without the possibility of parole. The sentence shall be mandatory and may not be suspended, in whole or in part.

(4) There is no right of appeal from the court's order. However, either party may seek review in the Court of Appeals by filing an application for leave to appeal in accordance with the Maryland Rules.

(e) *Subsequent petition by inmate.* — (1) Not earlier than 6 months after a finding of competence, the inmate may petition the court for a redetermination of competence.

(2) A petition under this subsection must be accompanied by an affidavit of at least one psychiatrist, based, at least in part, on personal examination, attesting:

(i) That, in the psychiatrist's medical opinion, the inmate is incompetent;

(ii) That the incompetence arose since the prior finding of competence; and

(iii) The pertinent facts on which each opinion is based, including the facts that show the change in the inmate's condition since the prior finding.

(3) Proceedings on a petition under this subsection shall be in accordance with subsections (c) and (d) of this section.

(f) *Forms of petitions and pleadings; procedure.* — The form of petitions and all other pleadings, and except as otherwise provided in this section, the procedures to be followed by the circuit court in determining competency or incompetency and by the Court of Appeals in reviewing applications for leave to appeal shall be as specified in the Maryland Rules.

(g) *Power of Governor to stay execution.* — This section does not affect the power of the Governor to stay execution of a death sentence under § 75 (c) of this article or to commute a sentence under Article 41, § 4-603 of the Code. (1987, ch. 418.)

Editor's note. — Section 2, ch. 418, Acts 1987, provides that "this act shall apply to all inmates under sentence of death on July 1, 1987 and those defendants sentenced to death after July 1, 1987."

Section 3 of ch. 418 provides that the act shall take effect July 1, 1987.

§ 76. Custody of convict after sentence; city or county not assessable for expense of detention in penitentiary or other State institutions.

Immediately upon sentence of death being pronounced upon any convict by any court of this State, the convict shall be taken into custody by the sheriff of the county or city wherein he was indicted, and held by him under such guard or guards as the sheriff shall determine to be necessary, and as soon thereafter as possible, said convict shall be, by the said sheriff delivered to the warden of the Maryland Penitentiary, to await the execution of his sentence by the said warden as aforesaid. No expense incident to the detention of the said convict in the Maryland Penitentiary, including the expense of guarding, lodging, feeding, clothing and caring for such convict, shall be assessed against, billed to or paid by the county commissioners of the county where said convict was indicted, or the Mayor and City Council of Baltimore, if indicted in Baltimore City.

No expense incident to the guarding, lodging, feeding, clothing and caring for any person sentenced to any State institution shall be assessed against, billed to or paid by the county commissioners of the county where such person was indicted, or the Mayor and City Council of Baltimore, if indicted in Baltimore City, irrespectively of whether or not the judgment, upon which such sentence is imposed, is thereafter reversed. (An. Code, 1951, § 508; 1939, § 488; 1924, § 410; 1922, ch. 465, § 6; 1933, Sp. Sess., ch. 100; 1966, ch. 386.)

§ 77. Service of notice of reprieve or stay of execution; service of mandate of court in subsequent proceedings; proceedings upon resentencing; new trial.

Should the condemned felon, while in the custody of the warden of the Maryland Penitentiary or the sheriff of the county or city where he was indicted, be granted a reprieve by the Governor, or should the execution of the sentence be stayed by any competent judicial proceeding, notice of such reprieve or stay of execution shall be served upon the said warden or sheriff, as well as upon the condemned felon, and the said warden or sheriff shall yield obedience to the same, and said felon shall remain in the custody of said warden or sheriff where he happens to be at the time of that notice. In any subsequent proceeding the mandate of the court having regard to the con-

demned felon shall be served upon the warden or sheriff, then having said felon in custody, as well as the said felon. Should the said felon be resentenced by the court, then the proceedings shall be as hereinbefore provided under the original sentence. Should a new trial be granted such condemned felon after he has been conveyed to the penitentiary, then he shall be conveyed back to the place of trial by such guard or guards as the warden may direct, their expenses to be paid as is now provided by law for the conveyance of convicts to the house of correction. (An. Code, 1951, § 509; 1939, § 489; 1924, § 411; 1922, ch. 465, § 7.)

§ 78. Disposition of body after execution.

Upon application of the relatives of the person convicted, the body after execution shall be returned to their address and at their cost, otherwise burial shall be provided for as said warden shall arrange and determine. (An. Code, 1951, § 510; 1939, § 490; 1924, § 412; 1922, ch. 465, § 8; 1966, ch. 386.)

§ 79. Certificate of execution.

The warden aforesaid must prepare and sign a certificate, setting forth the time and place of execution, and that the execution was conducted in conformity to the sentence of the court, and the provisions of this subtitle, and must request all the persons present and witnessing the execution to sign said certificate. He must cause such certificate to be filed, within ten days after the execution, in the office of the clerk of the court in which the felon was indicted. (An. Code, 1951, § 511; 1939, § 491; 1924, § 413; 1922, ch. 465, § 9.)

DEBT ADJUSTING

§ 79A. Prohibited; exceptions.

(a) For the purpose of this section, "debt adjusting" means the making of a contract, expressed or implied, with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business, who shall for a consideration distribute the same among certain specified creditors in accordance with a plan agreed upon.

(b) Whoever shall engage in the business of debt adjusting shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred (\$500.00) dollars, or be imprisoned not more than six months, or both.

(c) Nothing in this section applies to the following when engaged in the regular course of their respective business and professions:

(1) Attorneys at law.

(2) Banks and fiduciaries, as duly authorized and admitted to transact business in this State and performing credit and financial adjusting service in the regular course of their principal business.

(3) Title insurers and abstract companies, while doing an escrow business.

(4) Judicial officers or others acting under court orders.

Mississippi Code

JUDGMENT, SENTENCE, ETC.

§ 99-19-51

§ 99-19-49. Execution of death sentence—time fixed—copy of sentence delivered to sheriff.

When any defendant shall be sentenced to the punishment of death, the court shall appoint a day for the execution of the sentence, not less than four nor more than eight weeks from the date of the sentence; and, unless the sentence be suspended, the clerk of the court shall deliver to the sheriff of the county a copy of such sentence, under the seal of the court, which shall be his warrant for executing the convict.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (10); 1857, ch. 64, art. 309; 1871, § 2810; 1880, § 3085; 1892, § 1442; 1906, § 1515; Hemingway's 1917, § 1273; 1930, § 1296; 1942, § 2539.

Cross references—

As to naming of day of execution by supreme court following affirmance of judgment of conviction punishable by death, see § 99-35-135.

Research and Practice References—

21 Am Jur 2d, Criminal Law § 596.
24B CJS, Criminal Law § 2001.

ALR Annotations—

Effect of permitting day fixed for execution to pass without carrying out sentence. 34 ALR 314.

JUDICIAL DECISIONS

As to the date of execution, it has been the policy of the supreme court to fix such dates not less than four or more than eight weeks from the announcement of the date in conformity with this section [Code 1942, § 2539] prescribing the time within which such dates are to be designated by the trial courts. *McGee v State*, 50 So 2d 383, cert den 340 US 950, 95 L Ed 685, 71 S Ct 569.

§ 99-19-51. Execution of death sentence—lethal gas to be used.

The manner of inflicting the punishment of death shall be by lethal gas, that is, by causing the person sentenced to suffer the death penalty to be placed in a properly constructed gas chamber, and then causing said gas chamber to be filled with a lethal gas commonly used in the execution of persons sentenced to suffer the death penalty, and the person placed therein allowed to remain a sufficient length of time to cause death.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (24); 1857, ch. 64, art. 323; 1871, § 2816; 1880, § 3091; 1892, § 1447; 1906, § 1520; Hemingway's 1917, § 1282; 1930, § 1307; 1942, § 2550; Laws, 1940, ch. 242; 1954, ch. 220, § 1, eff December 31, 1954.

Research and Practice References—

21 Am Jur 2d, Criminal Law § 598.
24B CJS, Criminal Law § 2002.

ALR Annotations—

Manner of inflicting death sentence as cruel or unusual punishment, 30 ALR 1452.

JUDICIAL DECISIONS

Where prior to the date of execution set for the defendant, the method thereof was changed from hanging to electrocution by means of an electric chair but no chair had as yet been obtained when such date arrived, re-sentencing and fixing another date for the execution was not a taking of defendant's life without due process of

law. *Childress v State*, 1 So 2d 494.

Where a new law gave condemned a choice as to the method of infliction of death penalty, the law was not an ex post facto law as to persons who were sentenced to death before the enactment of statute. *Wetzel v Wiggins* (M) 85 So 2d 469.

§ 99-19-53. Execution of death sentence—state executioner.

The state executioner, or his duly authorized representative, is hereby designated to supervise the operation of the lethal gas chamber, as the same is hereby provided. The state executioner shall receive for his services in connection therewith compensation in the sum of two hundred fifty dollars (\$250.00) for each such execution, to be paid by the county where the crime was committed. The county of conviction shall likewise pay the fees of the attending physician or physicians in attendance. From the fee paid the executioner, he shall pay his deputy and other assistants required to assist in the operation of the gas chamber.

The state executioner shall be custodian of the lethal gas chamber. All expenses for the maintenance and protection of the property, together with operating expenses, which as a practical matter cannot be allocated to the county of conviction, shall be paid out of funds designated by law for that purpose or out of the general support fund of the Mississippi State Penitentiary.

The governor shall appoint the official state executioner who shall serve at the pleasure of the governor and until his successor shall have been duly appointed to replace him.

SOURCES: Codes, 1942, § 2555; Laws, 1940, ch. 242; 1954, ch. 220, § 3; 1954, Ex. ch. 33, § 2; 1955, Ex. ch. 41, § 2; 1968, ch. 361, § 62, eff from and after January 1, 1972.

§ 99-19-55. Execution of death sentence—procedure—witnesses—certificate of execution—disposition of body.

(1) Whenever any person shall be condemned to suffer death by lethal gas for any crime for which such person shall have been convicted in any court of any county of this state, such punishment shall be inflicted within the confines of the maximum security cell

block housing the lethal gas chamber at the state penitentiary at Parchman, Mississippi. Any person convicted of a capital offense wherein the death sentence has been imposed shall be immediately transported to the maximum security cell block at the state penitentiary; and, upon final affirmance of his conviction, the punishment shall be there imposed in the lethal gas chamber. The state executioner or his duly authorized deputy shall supervise and perform such execution.

(2) When a person is sentenced to suffer death by lethal gas, it shall be the duty of the clerk of the court to deliver forthwith to the sheriff of the county of conviction a warrant for the execution of the condemned person. It shall be the duty of the sheriff of the county forthwith to notify the state executioner of the date of the execution and it shall be the duty of the said state executioner, or any person deputized by him in writing, in the event of his physical disability, as hereinafter provided, to be present at such execution, to perform the same, and have general supervision over said execution. In addition to the above designated persons, the state executioner, by at least three (3) days' previous notice, shall secure the presence at such execution of the sheriff, or his deputy, of the county of conviction, two physicians and bona fide members of the press, not to exceed eight (8) in number, and at the request of the condemned, such ministers of the gospel, not exceeding two (2), as said condemned person shall name. The executioner shall also name to be present at the execution such officers or guards as may be deemed by him to be necessary to insure proper security. No other persons shall be permitted to witness the execution, except the sheriff may permit two (2) members of the condemned person's immediate family as witnesses, if they so request. Provided, further, that the governor may, for good cause shown, permit two (2) additional persons of good and reputable character to witness an execution. No person shall be allowed to take photographs of any type during the execution. The absence of the sheriff, or deputy, after due notice to attend, shall not delay the execution; and the execution may proceed with one attending physician, if it is not practical for two physicians to be secured.

(3) The state executioner, or his duly authorized representative, the sheriff, or his deputy, of the county of conviction, and the physician or physicians who witnessed such execution shall prepare and sign officially a certificate setting forth the time and place thereof and that such criminal was then and there executed in conformity to the sentence of the court and the provisions of sections 99-19-51 to 99-19-55, and shall procure the signatures of the other public officers and persons who witnessed such

execution, which certificate shall be filed with the clerk of the court where the conviction of the criminal was had, and the clerk shall subjoin the certificate to the record of the conviction and sentence.

(4) The body of the person so executed shall be released immediately by the state executioner, or his duly authorized representative, to the relatives of the dead person, or to such friends as may claim the body. The sheriff of the county of conviction shall have sole charge of burial in the event the body is not claimed as aforesaid, and his discretion in the premises shall be final. The county of conviction shall bear the reasonable expense of burial in the event the body is not claimed by relatives or friends.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (25); 1857, ch. 64, art. 324; 1871, § 2817; 1880, § 3092; 1892, § 1448; 1906, § 1521; Hemingway's 1917, § 1283; 1930, § 1308; 1942, § 2551; Laws, 1924, ch. 229; 1940, ch. 242; 1954, ch. 220, § 2; 1954, Ex. ch. 33, § 1; 1955, Ex. ch. 41, § 1.

Research and Practice References —

21 Am Jur 2d, Criminal Law §§ 595, 596, 598.

24B CJS, Criminal Law §§ 2002, 2003.

§ 99-19-57. Execution of death sentence—suspension of sentence when convict is insane or pregnant.

If the sheriff shall, at any time, be satisfied that any convict in his custody under sentence of death is insane, or that any female convict under like sentence is pregnant, he shall with concurrence of the judge of the circuit court, or of the chancellor, or the president of the board of supervisors in the absence of the circuit judge, summons six physicians if such can be found, and if not, other discreet and experienced freeholders and electors of said county, to make up an inquest to inquire into such insanity or pregnancy, as the case may be. The sheriff shall summons and swear all necessary witnesses and the jury and sheriff after full examination shall certify under their hand what the truth may be in relation to the alleged insanity or pregnancy, and in case such convict shall be found insane or pregnant, the sheriff shall immediately transmit the verdict of the jury to the governor and suspend execution of the sentence until the governor shall be satisfied of the sanity of said convict, or that the convict is not or is no longer pregnant. In case such convict shall be found insane the sheriff shall immediately transmit and deliver said convict to the state insane asylum, and a copy of the verdict of the jury and sheriff which made up an inquest to inquire into the sanity of said convict shall be sufficient authority for the director of the state

insane asylum to receive said convict as an inmate of said institution, and when the director of the insane asylum so certifies to the governor that he is satisfied of the sanity of the convict, and the governor is so satisfied of the sanity of the convict, the governor shall order the sheriff to return said convict to the county where the crime was committed, and shall order, by his warrant to the sheriff, the execution of the convict on a day to be therein appointed by the governor according to the sentence and judgment of the court.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (15-21); 1857, ch. 64, art. 326; 1871, § 2819; 1880, § 3094; 1892, § 1450; 1906, § 1523; Hemingway's 1917, § 1285; 1930, § 1310; 1942, § 2558; Laws, 1926, ch. 186.

Research and Practice References—

21 Am Jur 2d, Criminal Law §§ 75 et seq.

24 CJS, Criminal Law § 1619.

ALR Annotations—

Test of present insanity which will prevent trial for crime or punishment after conviction. 3 ALR 94.

JUDICIAL DECISIONS

This section [Code 1942, § 2558] is not the exclusive remedy to have execution of convicted murderer stayed on the ground that he was insane. *Musselwhite v State*, 215 M 363, 60 So 2d 807.

On petition to stay execution of a murderer on the ground that he was insane, technical perfection of pleading was not required. *Musselwhite v State*, 215 M 363, 60 So 2d 807.

On a petition for stay of execution of a convicted murderer on the ground

that he was insane, the trial judge before whom the accused was convicted and sentenced, should not have limited the stay of execution to periods pending appeal but should have stayed execution until the convicted murderer should be adjudged sane. *Musselwhite v State*, 215 M 363, 60 So 2d 807.

In proceeding for order fixing date for execution of death sentence, convict could present answer or suggestion of insanity. *Lewis v State*, 155 M 810, 125 So 419.

§ 99-19-59. Execution of death sentence—procedure when execution does not take place as ordered.

Whenever, from any cause, a convict under sentence of death shall not have been executed according to the order and judgment of the court, and the same shall stand in force and unreversed, the circuit court where such sentence was pronounced, on the application of the state, shall issue a writ of habeas corpus to bring the convict before the court, or if the convict be at large, shall issue a warrant for his apprehension, and upon the convict being brought before the court, and there be not a legal reason against the execution of the sentence, the court shall issue a warrant to the sheriff of the proper county, reciting the facts, and commanding

the sheriff, on a day to be named in said warrant, to execute the sentence according to law, which the sheriff shall accordingly do.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (22); 1857, ch. 64, art. 327; 1871, § 2820; 1880, § 3095; 1892, § 1451; 1906, § 1524; Hemingway's 1917, § 1286; 1930, § 1311; 1942, § 2559.

Research and Practice References—

21 Am Jur 2d, Criminal Law § 597.

24 CJS, Criminal Law § 1614.

ALR Annotations—

Effect of permitting day fixed for execution to pass without carrying out sentence. 34 ALR 314.

JUDICIAL DECISIONS

1. In general.
2. Reasons for delay of execution.

1. In general

This section [Code 1942, § 2559] must be construed so as to fit harmoniously into the system of which it is a part. *Simmons v State*, 197 M 326, 20 So 2d 64 (writ of certiorari denied in 324 US 821, 89 L Ed 1391, 65 S Ct 590).

The statute is but declaratory of the common law. Like proceedings can be had in cases not capital. *Ex parte Bell*, 56 M 282.

State supreme court, which had not issued mandate to trial court upon its affirmance of murder conviction imposing death sentence, the date for which had passed before dismissal of appeal by federal supreme court, still had jurisdiction of the case and the power to fix a new date therefor. *Wood v State*, 198 M 503, 23 So 2d 264.

Where, after mandate of supreme court had been issued and filed in the court below directing it to proceed with the execution of judgment affirming rape conviction, stay of execution for 60 days was granted to permit defendant to apply to the Supreme Court of the United States for a review, but application therefor was not made within such time, trial court was authorized by this section [Code 1942, § 2559] to fix another date for the

execution of death sentence. *Simmons v State*, 196 M 102, 16 So 2d 617.

Where Mississippi Supreme Court affirmed murder conviction but failed to issue mandate to the court below, and the federal supreme court dismissed an appeal and its mandate was issued and filed with the clerk of the Mississippi Supreme Court, the latter still had jurisdiction, the date fixed for execution of the death sentence having passed, to fix a new date for the execution thereof. *Thornton v State*, 196 M 643, 20 So 2d 70.

Where a conviction for a murder imposing the death sentence had been affirmed by the supreme court, fact that respondent was endeavoring to appeal from the judgment of the federal district court denying his application of a writ of habeas corpus and remanding him to the possession of the superintendent of the state penitentiary, did not prohibit the state supreme court from setting another execution date where respondent had failed to secure a writ of probable cause required by 28 USC § 2253. *Goldsby v State*, 233 M 338, 102 So 2d 215.

A circuit judge in vacation has no authority, under this section [Code 1942, § 2559] to fix a day for the execution of a sentence. *Simmons v State*, 196 M 305, 17 So 2d 798.

The governor can grant a respite and fix a later day for the execution. In such case no order of court under the

What constitutes "newly discovered evidence" within meaning of Rule 33 of Federal Rules of Criminal Procedure relating to motions for new trial. 44 ALR Fed 13.

Time limitations in connection with motions for new trial under Rule 33 of Federal Rules of Criminal Procedure. 51 ALR Fed 482.

What standard, regarding necessity for change of trial result, applies in granting new trial pursuant to Rule 33 of Federal Rules of Criminal Procedure for newly discovered evidence of false testimony by prosecution witness. 59 ALR Fed 657.

JUDICIAL DECISIONS

2. Grounds for new trial

Conflict of interest on part of assistant district attorney who prosecutes cause after having previously counseled defendant in same matter while attorney was in private practice is ground for new trial notwithstanding defendant's failure to object at outset of trial. *Gray v State* (1985, Miss) 469 So 2d 1252.

District attorney's statement on voir dire, to the effect that trial would not be like one on television and that the jurors could not expect the defendant to confess, was not such improper comment on defendant's right not to testify as to require a new trial. *Bridgeforth v State* (1986, Miss) 498 So 2d 796.

§ 99-17-49. New trials—grant or refusal assignable for error.

Cross references—

As to new trials, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 5.16.

ALR Annotations—

Appeal by state of order granting new trial in criminal case. 95 ALR3d 596.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial. 29 ALR4th 659.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal. 46 ALR4th 11.

CHAPTER 19

Judgment, Sentence, and Execution

New sections Added

SEC.

- 99-19-20. Sentence—imposition of fine—payment—imprisonment for nonpayment—indigent defendants.
- 99-19-32. Fines and assessments upon persons convicted of offenses punishable by imprisonment for more than one year; deposit in Criminal Justice Fund.
- 99-19-71. Expunction of misdemeanor conviction occurring prior to twenty-third birthday.

SENTENCING OF HABITUAL CRIMINALS

- 99-19-81. Sentencing of habitual criminals to maximum term of imprisonment.
- 99-19-83. Sentencing of habitual criminals to life imprisonment.
- 99-19-85. Governor's pardoning power unaffected.
- 99-19-87. Punishment by death unaffected.

SEPARATE SENTENCING PROCEEDING TO DETERMINE PUNISHMENT IN CAPITAL CASES

- 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.
- 99-19-103. Instructions; aggravating circumstances shall be designated by jury in writing; effect of jury's failure to agree on punishment.
- 99-19-105. Review by supreme court of imposition of death penalty.
- 99-19-107. Life sentence to be imposed if death penalty held to be unconstitutional.

VICTIM IMPACT STATEMENT ACT

- 99-19-151. Title.
- 99-19-153. Declaration of purpose.
- 99-19-155. Definitions.

99-19-157. Victim impact statement.

99-19-159. Victim impact statement to be made available to defense and to prosecution; statement as factor in sentencing; cooperation of victim not mandatory.

99-19-161. Notice to victim prior to sentencing.

§ 99-19-1. Change of law not to affect prosecution or punishment of crime committed prior to change.

JUDICIAL DECISIONS

Under § 99-19-1, which provides that no statutory amendment may affect punishment for a crime committed prior to its enactment, a defendant convicted of armed robbery was properly sentenced to serve a term of 60 years in prison, pursuant to § 97-3-79, which was amended after defendant's conviction to provide for penalty of imprisonment for a term reasonably expected to be less than life, rather than imprisonment for any term not less than three years. *Allen v State* (1983, Miss) 440 So 2d 544.

Defendant who committed capital murder and was originally tried prior to enactment of

current death penalty statute (§§ 99-19-101 et seq.) may nonetheless be sentenced to death under that statute, which does not affect substance of capital murder law but merely changes procedure by which capital cases are to be tried. *Jordan v State* (1985, Miss) 464 So 2d 475, vacated on other grounds (US) 54 USLW 3728.

Judge must consider alternative sentences available and in effect at time crime was committed, and not at time of sentencing, where subsequent amendment of statute limited alternatives available. *Gardner v State* (1987, Miss) 514 So 2d 292.

§ 99-19-3. Convictions obtained only by verdict or guilty plea—no punishment without legal conviction.

Cross references—

As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

ALR and L Ed Annotations—

Validity of guilty pleas. 25 L Ed 2d 1025.

Enforceability of plea agreement, or plea entered pursuant thereto, with prosecuting attorney involving immunity from prosecution for other crimes. 42 ALR3d 281.

Consideration of accused's juvenile court record in sentencing for offense committed as adult. 64 ALR3d 1291.

Right to withdraw guilty plea in state criminal proceedings where court refuses to grant concession contemplated by plea bargain. 66 ALR3d 902.

Validity and efficacy of accused's waiver of unanimous verdict. 97 ALR3d 1253.

Right of prosecutor to withdraw from plea bargain prior to entry of plea. 16 ALR4th 1089.

Sufficiency of court's statement, before accepting plea of guilty, as to waiver of right to jury trial being a consequence of such plea. 23 ALR4th 251.

Power of court to increase severity of unlawful sentence—modern status. 28 ALR4th 147.

Power or duty of state court, which has accepted guilty plea, to set aside such plea on its own initiative prior to sentencing or entry of judgment. 31 ALR4th 504.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession. 51 ALR4th 495.

Prohibition of federal trial judge's participation in plea bargaining negotiations under Rule 11(e)(1) of the Federal Rules of Criminal Procedure. 56 ALR Fed 529.

JUDICIAL DECISIONS

State court's affirmance of a criminal conviction, entered on a guilty plea, was vacated and the case remanded, where the prosecution, contrary to a "plea bargaining" agreement, had recommended the maximum sentence and such maximum sentence was imposed. *Santobello v New York*, 404 US 257, 30 L Ed 2d 427, 92 S Ct 495, on remand (1st Dept) 39 App Div 2d 654, 331 NYS2d 776.

The provisions of § 99-19-3 for the conviction of a person upon "a confession of his

guilt in open court or by admitting the truth of the charge against him" apply only when the confession or admission is made to the charge for which the defendant is then being tried. Thus, in a prosecution of two defendants under § 99-35-1 for spotlighting deer following their conviction in a justice of the peace court, the circuit court erred in convicting them of unlawfully hunting from a public road based upon admissions or confessions

made during trial where the only offense for which they were on trial was that of spot-

lighting deer. *Sanchez v State* (1980, Miss) 385 So 2d 624.

§ 99-19-5. Findings of jury.

Cross references—

As to verdicts, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 5.14.

ALR Annotations—

Comment Note.—Impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime. 37 ALR3d 375.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.

JUDICIAL DECISIONS

1. In general

On indictment for any offense the jury may find the defendant guilty of the offense as charged or of attempt to commit the same offense or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose. *Crocker v State*, 272 So 2d 664.

On indictment for any offense the jury may find the defendant guilty of the offense as charged or any attempt to commit the same offense or may find him guilty of an inferior offense. *Callahan v State* (1982, Miss) 419 So 2d 165.

3. Lesser included offenses

Under the provisions of Code 1942, § 2523, a defendant indicted for armed robbery may properly be tried and convicted for robbery. *Auman v State*, 271 So 2d 427.

The charge of possession and delivery of marijuana is a constituent part of the charge

of the sale of marijuana. *Jones v State*, 279 So 2d 650.

In a prosecution for robbery, it was not error for the trial court to refuse the defendant's requested instruction on the lesser included offense of assault and battery where the requested instruction ignored the charge of robbery and the evidence supporting that charge, and the evidence in the case was such that no fair-minded jury could have reached any other conclusion than that the defendant was guilty of robbery beyond a reasonable doubt. *Presley v State* (Miss) 321 So 2d 309.

A simple assault is a constituent or lesser included offense of aggravated assault. *Callahan v State* (1982, Miss) 419 So 2d 165.

The fact that a defendant has been indicted for capital murder does not preclude the trial court's giving instructions on lesser-included offenses of murder and manslaughter where, under the evidence, a reasonable jury could find the defendant not guilty of capital murder but guilty of one of the lesser-included offenses. *Harveston v State* (1986, Miss) 493 So 2d 365.

§ 99-19-7. Verdict as to some, disagreement as to other defendants.

Cross references—

As to verdicts and disagreements, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 5.14.

Research and Practice References—

Young, *Trial Handbook for Mississippi Lawyers* § 36:1.

§ 99-19-9. No special form of verdict required.

Research and Practice References—

76 Am Jur 2d, *Trial* §§ 1142 et seq.

Young, *Trial Handbook for Mississippi Lawyers* §§ 36:1, 36:2.

§ 99-19-11. Verdict may be reformed at the bar if informal or defective.

Cross references—

As to defective verdicts, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 5.14.

Research and Practice References—
76 Am Jur 2d, Trial §§ 1208 et seq.

§ 99-19-13. Repealed by Laws, 1974, ch. 576, § 9, eff from and after passage (approved April 23, 1974).

Cross references—

As to provisions that a jury is to determine punishment in capital cases in separate sentencing proceeding, see § 99-19-101.

ALR and L Ed Annotations—

Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 ALR4th 1069.

§ 99-19-15. Sentence—felon under age sixteen.

Cross references—

As to inapplicability of Mississippi Rules of Evidence in sentencing proceedings, see M.R.E. 1101.

As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 et seq.

§ 99-19-17. Sentence—when receiving stolen goods, false pretenses and embezzlement may be punished as petit larceny.

Cross references—

As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 et seq.

ALR and L Ed Annotations—

What constitutes "constructive" possession of stolen property to establish requisite element of possession supporting offense of receiving stolen property. 30 ALR4th 488.

JUDICIAL DECISIONS

Evidence was insufficient to support finding beyond reasonable doubt that value of stolen property was in excess of \$100; therefore, defendant should have been sentenced for offense of petit larceny, where in affidavit

sworn out in justice court, value of property was set at \$90, while at trial testimony regarding value of stolen property was inconsistent. *Dulin v State* (1987, Miss) 507 So 2d 897.

§ 99-19-19. Repealed by Laws, 1979, ch. 501, § 4, eff from and after April 18, 1979.

§ 99-19-20. Sentence—imposition of fine—payment—imprisonment for nonpayment—indigent defendants.

(1) When any court sentences a defendant to pay a fine, the court may order (a) that the fine be paid immediately, or (b) that the fine be paid in installments to the clerk of said court or to the judge, if there be no clerk, or (c) that payment of the fine be a condition of probation, or (d) that the defendant be required to work on public property for public benefit under the direction of the sheriff for a specific number of hours, or (e) any combination of the above.

(2) The defendant may be imprisoned until the fine is paid if the defendant is financially able to pay a fine and the court so finds, subject to the limitations hereinafter set out. The defendant shall not be imprisoned if the defendant is financially unable to pay a fine and so states to the court in writing, under oath, after sentence is pronounced, and the court so finds, except if the defendant is financially unable to pay a fine and such defendant failed or refused to comply with a prior sentence as specified in subsection (1) of this section, the defendant may be imprisoned.

This subsection shall be limited as follows:

(a) In no event shall such period of imprisonment exceed one (1) day for each ten dollars (\$10.00) of the fine.

(b) If a sentence of imprisonment, as well as a fine, were imposed, the aggregate of such term for nonpayment of a fine and the original sentence of imprisonment shall not exceed the maximum authorized term of imprisonment.

(c) Credit shall be earned for work performed under subsection (1)(d) above at the rate of the highest current federal minimum wage.

(3) Periods of confinement imposed for nonpayment of two (2) or more fines shall run consecutively unless specified by the court to run concurrently.

SOURCES: Laws, 1979, ch. 501, § 1, eff from and after passage (approved April 18, 1979).

Cross references—

As to imposition of fine on persons convicted of offenses punishable by more than 1 year of imprisonment, see § 99-19-32.

As to the utilization of a program of public service in the implementation of the provisions of this section, see § 21-23-7.

As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 et seq.

Research and Practice References—

1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss L J 792 December 1979.

ALR and L Ed Annotations—

Right to apply cash bail to payment of fine. 92 ALR 1084.

Indigency of offender as affecting validity or imprisonment as alternative to payment of fine. 31 ALR3d 926.

Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 ALR4th 1069.

JUDICIAL DECISIONS

Under § 99-19-20, a defendant could not be imprisoned for failure to pay a lawfully imposed fine, where he was financially unable to do so and the trial court so found; moreover, the trial court had no authority to alter defendant's \$45,000 fine; however, the court could require defendant to perform public service, or it could establish a realistic installment plan for the payment of the fine. *Cassibry v State* (1984, Miss) 453 So 2d 1298.

If, after a defendant has completed his sentence, the Department of Corrections attempts to keep him incarcerated for failure to pay a fine, then the trial court must determine at that time whether he is financially able to pay the fine and, if not, must consider and apply one of the alternatives to imprisonment set out in § 99-19-20. *Lee v State* (1994 Miss) 457 So 2d 920.

JUDICIAL DECISIONS UNDER FORMER § 99-19-19

A violation of the equal protection clause of the Fourteenth Amendment inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term, and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine, for the constitution prohibits the state from imposing a fine as a sentence and then converting it into a jail term because the

defendant is unable to pay the fine in full forthwith. *Tate v Short*, 401 US 395, 39 S Ct 2d 130, 91 S Ct 668, on remand (Tex Crim) 471 SW2d 404.

The imprisonment of an indigent, in violation of nine traffic offenses which were punishable by fines only, for inability to pay the fines totalling \$425, constituted an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment.

Tate v Short, 401 US 395, 28 L Ed 2d 130, 91 S Ct 668, on remand (Tex Crim) 471 SW2d 404.

The trial court did not err in committing the defendant to jail for nonpayment of a fine, where, by the imposition of the fine of \$100,

the defendant could never have been required to remain in jail longer than 30 days which was the statutory maximum period of confinement for the crime of which convicted. McKinney v State, 260 So 2d 444.

§ 99-19-21. Sentence-prison terms to run consecutively unless imposed concurrently.

When a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction.

SOURCES: Laws, 1983, ch. 333, eff from and after passage (approved March 14, 1983).

Cross references—

As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 et seq.

ALR and L Ed Annotations—

Single act affecting multiple victims as constituting multiple assaults or homicides. 8 ALR4th 960.

Propriety of imposing consecutive sentences upon convictions, under federal statutes, of unlawful receipt, transportation, or making and possession of same firearm. 55 ALR Fed 633.

JUDICIAL DECISIONS

Defendant's sentences for four separate convictions were to run consecutively and not concurrently since none of the four judgments specified how they were to run. Maycock v Reed (Miss) 328 So 2d 349.

In a prosecution for burglary, armed robbery, and kidnapping in which the defendant had been sentenced to serve 15 years under the burglary verdict and a life sentence under each of the armed robbery and kidnapping verdicts after the jury had been unable to agree upon a penalty under the armed robbery and kidnapping charges, the case would be remanded to the trial court for resentencing where the trial court had failed to indicate whether the sentences were to run consecutively or concurrently and where, since the jury had been unable to arrive at a sentence for either of these convictions, the maximum sentence permissible for the kidnapping conviction under § 97-3-53 was 30 years and the maximum sentence for the armed robbery conviction was only the number of years that reasonably would be calculated to be less than life for that particular accused. Woods v State (1981, Miss) 393 So 2d 1319.

Three life sentences imposed on a defendant convicted of murder, rape, and kidnapping, were to run concurrently where each of the three sentencing orders, all dated March 25th, 1968, imposed a life sentence "commencing from this date." Watts v Lucas (1981, Miss) 394 So 2d 903.

In a prosecution for possession of marijuana with intent to deliver, the lower court improperly imposed the sentence in the present case

to run concurrently with a revoked sentence in a prior case, where the sentences were not at the same term of court inasmuch as the five-year suspended sentence that was revoked by the lower court was rendered on June 22, 1979, and the sentence in the present case was rendered at the September 1981 term of court. Glover v State (1982, Miss) 419 So 2d 588.

A defendant who assaulted three police officers, on the same day and as a part of the same occurrence, was properly subjected to three separate charges of assault, in violation of § 97-3-7(1), and properly sentenced to three consecutive terms, pursuant to § 99-19-21, for the three resulting convictions. Ball v State (1983, Miss) 437 So 2d 423.

§ 99-19-21 required that defendant's two separate sentences imposed for two separate convictions of burglary during two separate terms of the court be served consecutively. Tate v State (1984, Miss) 455 So 2d 1312.

Defendant, who was convicted separately of two burglaries during two separate terms of the Circuit Court, was required to serve his two sentences consecutively, under § 99-19-21, where the second sentencing order did not expressly provide that the sentences run concurrently, and where, at the time of sentencing, § 99-19-21 provided that, in the absence of language affirmatively indicating that sentences run concurrently, a second term did not begin until the first had been completed. Tate v State (1984, Miss) 455 So 2d 1312.

In sentencing defendant convicted of rape to term of imprisonment to run concurrently

with separate judgment of imprisonment for another rape in another county, second sentencing court is not required to consider sentence previously imposed. *Harper v State* (1985, Miss) 463 So 2d 1036.

imposed respectively for attempted rape and burglary of dwelling were permissible, even though both crimes arose out of same sequence of events and shared common element. *Armstead v State* (1987, Miss) 500 So 2d 281.

Consecutive sentences of 10 and 15 years

§ 99-19-23. Sentence—credit for time of prisoner's confinement.

Cross references—

As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 seq.

Research and Practice References—

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Presentence Credit 53 Miss LJ 159, March 1983.

ALR and L Ed Annotations—

Right of state or federal prisoner to credit for time served in another jurisdiction before delivery to state or federal authorities. 18 ALR2d 511.

Right to credit for time served under erroneous or void sentence or invalid judgment for conviction necessitating new trial. 35 ALR2d 1283.

Right to credit for time spent in custody prior to trial or sentence. 77 ALR3d 182.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where court fails to specify in that regard. 90 ALR3d 408.

Defendant's right to credit for time spent in halfway house, rehabilitation center, or similar restrictive environment as a condition of pretrial release. 29 ALR4th 240.

Sentencing: permissibility of sentence to a fine only, under statutory provision for imprisonment or imprisonment and fine. 35 ALR4th 192.

When is federal prisoner entitled, under 18 USCS § 3568, to credit for time spent in state custody "in connection with" offense or acts for which federal sentence was imposed. 47 ALR Fed 755.

JUDICIAL DECISIONS

Section 99-19-23 has no application to time served in another state while an accused is awaiting return to Mississippi to face criminal charges, where to hold otherwise would encourage an accused to flee the State and seek refuge in another state or locality of his own choosing and fight extradition knowing that any time spent in jail in such state would be credited to any sentence received by him upon conviction. *Holland v State* (1982, Miss) 418 So 2d 1208.

Under § 99-19-23, a circuit judge of one county may grant credit for time served in a second county, where a prisoner is arrested and charged with a crime in the first county and, prior to arraignment, is subsequently transferred to the second county to face another charge, and where the transfer is attended by a detainer from the first county. *Lee v State* (1983, Miss) 437 So 2d 1208.

§ 99-19-24. Sentence; circuit and county judges and justices of the peace may suspend in misdemeanor cases.

The circuit courts and the county courts, in misdemeanor cases, are hereby authorized to suspend a sentence and to suspend the execution of a sentence or any part thereof, on such terms as may be imposed by the judge or justice. Provided, the suspension of imposition or execution of a sentence hereunder may not be revoked after a period of five (5) years.

The justice courts, in misdemeanor cases, are hereby authorized to suspend sentence and to suspend the execution of a sentence or any part thereof, on such terms as may be imposed by the judge of the court. Provided, the suspension of imposition or execution of a sentence hereunder may not be revoked after a period of two (2) years. Provided, however, the justice courts in cases arising under the Implied Consent Law shall not suspend any fine.

SOURCES: Laws, 1973, ch. 470, § 1; 1981, ch. 491, § 14, eff from and after July 1, 1981.

Editor's Note—

Ch. 471, Laws, 1981, as part of a continuing overall legislative design to replace justice of the peace courts with justice courts and justices of the peace with justice court judges, amended numerous sections of the Mississippi Code of 1972 affecting justices of the peace and justice of the peace courts. Although ch. 471 did not specifically amend this section, attention is directed to Miss. Constn., § 171, amended 1975, which provides, *inter alia*, that "All reference in the Mississippi Code to justice of the peace shall mean justice court judge."

Section 15 of Chapter 491, Laws 1981, provides as follows:

SECTION 15. Prosecutions, convictions and penalties for violations which occurred prior to the effective date of this act under laws amended or repealed by this act, or suspensions or denials of driver's licenses or permits made pursuant to laws amended or repealed by this act, shall not be affected or abated by the provisions of this act.

Cross references—

As to placing offender on earned probation program, see § 47-7-47.

As to fines and other penalties under the Implied Consent Law, see § 63-11-30.

As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 et seq.

ALR Annotations—

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 ALR3d 1156

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 ALR3d 474.

Appealability of order suspending imposition or execution of sentence. 51 ALR4th 939.

§ 99-19-27. Convicts who violate terms of suspended sentence or parole are subject to arrest.

Cross references—

As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 et seq.

ALR Annotations—

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 ALR3d 1156.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 ALR3d 474.

§ 99-19-29. Vacation of suspended sentence and annulment of conditional pardon for violation of terms.

ALR and L Ed Annotations—

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 ALR3d 1156.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 ALR3d 474.

Admissibility of hearsay evidence in probation revocation hearings. 11 ALR4th 999.

Appealability of order suspending imposition or execution of sentence. 51 ALR4th 939.

§ 99-19-31. Penalty where none fixed elsewhere by statute.

Offenses for which a penalty is not provided elsewhere by statute, and offenses indictable at common law, and for which a statutory penalty is not elsewhere prescribed, shall be punished by fine of not more than one thousand dollars (\$1,000.00) and imprisonment in the county jail not more than six (6) months, or either.

SOURCES: Laws, 1984, ch. 353, § 3, eff from and after July 1, 1984.

ALR and L Ed Annotations—

Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 ALR4th 1069.

§ 99-19-32. Fines and assessments upon persons convicted of offenses punishable by imprisonment for more than one year; deposit in Criminal Justice Fund.

(1) Offenses punishable by imprisonment in the State Penitentiary for

more than one (1) year and for which no fine is provided elsewhere by statute may be punishable by a fine not in excess of Ten Thousand Dollars (\$10,000.00). Such fine, if imposed, may be in addition to imprisonment or any other punishment or penalty authorized by law.

(2) In addition to any fine imposed by the court under this section, there shall be imposed and collected an assessment, in an amount equal to the fine imposed, from each person upon whom the court imposes a fine. Each such assessment shall be paid to the court in which such fine is imposed, and all such assessments shall be forwarded to the State Treasurer on the day when the funds are credited to the treasury of the county, in accordance with Section 7-9-21. The State Treasurer shall then deposit such funds in a special fund hereby created in the State Treasury to be designated the "Criminal Justice Fund." The Legislature may make appropriations from the Criminal Justice Fund for the purpose of defraying such costs as the state incurs in the administration of the criminal justice system of this state.

SOURCES: Laws, 1985, ch. 495, § 1, eff from and after July 1, 1985.

Cross references—

As to imposition of fine, imprisonment for nonpayment, and application to indigent defendants, see 99-19-20.

As to collection of fines and duties of collecting officers, see §§ 99-19-65 et seq.

As to deposit of funds from escrow account established pursuant to Crime Victim's Escrow Account Act into Criminal Justice Fund, see § 99-38-9.

As to duty of state officials to pay in collections, see § 7-9-21.

As to the deposit into the criminal justice fund of an additional fine imposed on a person convicted of issuing a bad check when the prosecution was commenced by the filing of a complaint by the district attorney after the accused failed to make restitution, see § 97-19-57.

As to the deposit of funds received as restitution for a bad check into the criminal justice fund when the complainant cannot be located, see § 97-19-77.

Research and Practice References—

21 Am Jur 2d, Criminal Law §§ 613 et seq.

24B CJS Criminal Law § 1975.

ALR and L Ed Annotations—

Indigency of offender as affecting validity of imprisonment as alternative to payment of fine. 31 ALR3d 926.

Disqualification of judge, justice of the peace, or similar judicial officer for pecuniary interest in fines, forfeitures, or fees paid by litigants. 72 ALR3d 375.

§ 99-19-33. Where penalty modified milder penalty may be imposed.

JUDICIAL DECISIONS

This section gives the trial judge the right to sentence one convicted of crime after the law has been changed so as to permit a milder sentence before the conviction has become final, but does not apply where the statute providing for a milder sentence is passed after the conviction has become final. *Lampley v State (Miss)* 308 So 2d 87.

Following defendant's conviction for armed

robbery, the trial court did not abuse its discretion in sentencing him under the terms of the statute prior to its amendment, which followed defendant's conviction, notwithstanding the provisions of § 99-19-33, which permitted the sentencing judge to exercise discretion to proceed under a new, ameliorating sentencing statute. *Allen v State (1983, Miss)* 440 So 2d 544.

§ 99-19-35. Convict of certain crimes not to vote, practice medicine or dentistry, or hold office.

A person convicted of bribery, burglary, theft, arson, obtaining money or

goods under false pretenses, perjury, forgery, embezzlement, or bigamy, shall not be allowed to practice medicine or dentistry, or be appointed to hold or perform the duties of any office of profit, trust, or honor, unless after full pardon for the same.

SOURCES: Laws, 1987, ch. 499, § 18, eff from and after July 24, 1987 (the date on which the United States Attorney General interposed no objection to the amendment).

Editor's Note—

Sections 20, 21 and 22, Chapter 499, Laws, 1987, provide as follows:

"SECTION 20. If any section, paragraph, sentence, clause or phrase of this act is declared to be unconstitutional or void, or for any reason is declared to be invalid or of no effect, the remaining sections, paragraphs, sentences, clauses or phrases shall be in no manner affected thereby but shall remain in full force and effect.

"SECTION 21. The Attorney General of the State of Mississippi is hereby directed to submit this act immediately upon its approval by the Legislature to the Attorney General of the United States or the United States District Court for the District of Columbia in accordance with the provisions of the Voting Rights Act of 1965, as amended and extended.

"SECTION 22. This act shall take effect and be in force from and after the date it is effectuated under the provisions of Section 5 of the Voting Rights Act of 1965, as amended and extended."

The United States Attorney General interposed no objection on July 24, 1987, to the amendment proposed by § 18, ch. 499, Laws, 1987.

ALR and L Ed Annotations—

Elections: effect of conviction under federal law, or law of another state or country, on right to vote or hold public office. 59 ALR3d 303.

§ 99-19-37. Restoration of right of suffrage to World War veterans.

Cross references—

As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

§ 99-19-39. Detention of convict pending appeal.

Cross references—

As to confinement of male prisoners sentenced to death, see § 99-19-55.

As to confinement of female prisoners sentenced to death, see § 99-19-55.

§ 99-19-41. Delivery of appellant to county where supreme court is held.

JUDICIAL DECISIONS

Action by convicted murderer sentenced to life imprisonment to be returned from state penitentiary to county detention center during pendency of his appeal, as mandated by § 99-19-41, is subject to one year statute of

limitations, where inmate brought this action under 42 USCS § 1983. *Fairley v Allain* (1987, CA5 Miss) 817 F2d 306, reh gr (CA5 Miss) 820 F2d 728.

§ 99-19-43. Duty of judge when convict sentenced to penitentiary.

Cross references—

As to placing of offender on earned probation program, see § 47-7-47.

§ 99-19-45. Commitment to penitentiary; circuit clerks to furnish commitment papers to secretary of board of trustees; clerk's fee.

JUDICIAL DECISIONS

In felony cases where a prisoner is transferred to the penitentiary, the original commitment papers showing conviction of a fel-

ony duly issued by a circuit clerk pursuant to § 99-19-45 may be introduced in evidence as proof of such conviction; the absence of a

limit on consideration of remote convictions in the sentencing of habitual criminals does not rise to the level of cruel and unusual punishment. *Pace v State* (1981, Miss) 407 S. 2d 530.

§ 99-19-47. Commitment to penitentiary; form.

Cross references—

As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

§ 99-19-49. Execution of death sentence; time fixed; copy of sentence delivered to sheriff.

When any defendant shall be sentenced to the punishment of death, the circuit court shall appoint a day for the execution of the sentence, not less than (4) nor more than eight (8) weeks from the date of the sentence; and, as the sentence be suspended, the clerk of the court shall deliver to the commissioner of corrections a copy of such sentence, under the seal of the court, which shall be his warrant for executing the convict.

SOURCES: Laws, 1984, ch. 448, § 1, eff from and after July 1, 1984.

Cross references—

As to procedures regarding pregnant women awaiting execution of death sentence, see § 99-19-57.

As to Mississippi Supreme Court resetting date of death sentence execution following affirmance, see § 99-19-105.

As to stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

As to the exception that execution of a defendant is not subject to a provision that death of a prisoner be investigated, etc., see § 47-5-151.

§ 99-19-51. Manner of execution of death sentence.

(1) Except as provided in subsection (2) of this section, the manner of inflicting the punishment of death shall be by continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate or other similar drug in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice.

(2) If the execution of the sentence of death as provided in subsection (1) of this section is held unconstitutional by an appellate court of competent jurisdiction, or if the person sentenced to suffer the death penalty was sentenced prior to July 1, 1984, then the manner of inflicting the punishment of death shall be by lethal gas; that is, by causing the person sentenced to suffer the death penalty to be placed in a properly constructed gas chamber, and then causing said gas chamber to be filled with a lethal gas commonly used in the execution of persons sentenced to suffer the death penalty, and the person placed therein allowed to remain a sufficient length of time to cause death.

SOURCES: Laws, 1984, ch. 448, § 2, eff from and after July 1, 1984.

Cross references—

As to procedures regarding pregnant women awaiting execution of death sentence, see § 99-19-57.

As to stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

As to the exception that execution of a defendant is not subject to a provision that death of a prisoner be investigated, etc., see § 47-5-151.

As to infliction of death sentence as exception to "practice of nursing," see §§ 73-13-1 and 99-19-53.

JUDICIAL DECISIONS

The trial court in a prosecution for capital murder did not err in instructing the jury concerning aggravating and mitigating circumstances, notwithstanding the fact that its instruction limited the jury's consideration to three mitigating circumstances, where defendant proffered no evidence of nonstatutory

mitigating factors at trial, and where his sole defense had been that he was addicted to drugs when the crime was committed, which was a statutory mitigating factor that was included in the instruction to the jury. *Booker v State* (1984, Miss) 449 So 2d 209, cert den (US) 83 L Ed 2d 159, 105 S Ct 230.

§ 99-19-53. Execution of death sentence; state executioner.

The state executioner, or his duly authorized representative, shall supervise and inflict the punishment of death as the same is hereby provided. All duties and necessary acts pertaining to the execution of a convict shall be performed by the commissioner of corrections except where such duties and actions are vested in the state executioner. The state executioner shall receive for his services in connection therewith compensation in the sum of five hundred dollars (\$500.00) plus all actual and necessary expenses for each such execution, to be paid by the county where the crime was committed. The county of conviction shall likewise pay the fees of the attending physician or physicians in attendance. The executioner may appoint not more than two (2) deputies who shall be paid one hundred fifty dollars (\$150.00) per execution and mileage as authorized by law, to be paid by the county where the crime was committed, to assist in the infliction of the punishment of death. The executioner may appoint such other assistants as may be required; however, such assistants shall not be entitled to compensation or travel expenses.

Any infliction of the punishment of death by administration of the required lethal substance or substances in the manner required by law shall not be construed to be the practice of medicine or nursing. Any pharmacist is authorized to dispense drugs to the state executioner without a prescription for the purpose of this chapter.

The state executioner shall be custodian of all equipment and supplies involved in the infliction of the death penalty. All expenses for the maintenance and protection of the property, together with operating expenses, which as a practical matter cannot be allocated to the county of conviction, shall be paid out of funds designated by law for that purpose or out of the general support fund of the Mississippi Department of Corrections.

The state executioner shall receive the per diem compensation authorized in section 25-3-69 in addition to actual and necessary expenses, including mileage as authorized by law, for each day, not to exceed three (3) days each month, spent in maintaining the equipment and supplies involved in the infliction of the death penalty or preparing for an execution which does not occur. Such payments shall be paid out of funds designated by law for that purpose or out of the general support fund of the Mississippi Department of Corrections.

The governor shall appoint the official state executioner who shall serve at the pleasure of the governor and until his successor shall have been duly appointed to replace him.

SOURCES: Laws, 1984, ch. 448, § 3, eff from and after July 1, 1984.

Cross references:

As to infliction of death sentence by intravenous injection of drugs or by lethal gas, see § 99-19-51.

As to procedures regarding pregnant women awaiting execution of death sentence, see § 99-19-57.

As to stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

As to the exception that execution of a defendant is not subject to a provision that death of a prisoner be investigated, etc., see § 47-5-151.

For a similar provision excepting infliction of death sentence from definition as and regulation as "practice of nursing," see § 73-15-7.

§ 99-19-55. Execution of death sentence; procedure; witnesses—certificate of execution; disposition of body.

(1) Whenever any person shall be condemned to suffer death for any crime for which such person shall have been convicted in any court of any county of this state, such punishment shall be inflicted at an appropriate place designated by the commissioner of corrections on the premises of the Mississippi State Penitentiary at Parchman, Mississippi. All male persons convicted of a capital offense wherein the death sentence has been imposed shall be immediately committed to the department of corrections and transported to the maximum security cell block at the Mississippi State Penitentiary at Parchman, Mississippi. When the maximum inmate capacity at such maximum security cell block has been reached, the commissioner of corrections shall place such male convicts in an appropriate facility on the grounds of the Mississippi State Penitentiary at Parchman, Mississippi. All female persons convicted of a capital offense wherein the death sentence has been imposed shall be immediately committed to the department of corrections and housed in an appropriate facility designated by the commissioner of corrections. Upon final affirmance of the conviction, the punishment shall be imposed in the manner provided by law. The state executioner or his duly authorized deputy shall supervise and perform such execution.

(2) When a person is sentenced to suffer death in the manner provided by law, it shall be the duty of the clerk of the court to deliver forthwith to the commissioner of corrections a warrant for the execution of the condemned person. It shall be the duty of the commissioner forthwith to notify the state executioner of the date of the execution and it shall be the duty of the state executioner, or any person deputized by him in writing, in the event of his physical disability, as hereinafter provided, to be present at such execution, to perform the same, and have general supervision over said execution. In addition to the above designated persons, the commissioner of corrections shall secure the presence at such execution of the sheriff, or his deputy, of the county of conviction, at least one (1) but not more than two (2) physicians, and bona fide members of the press, not to exceed eight (8) in number, and at the request of the condemned, such ministers of the gospel not exceeding two (2), as said condemned person shall name. The commissioner of corrections shall also name to be present at the execution such officers or guards as may be deemed by him to be necessary to insure proper security. No other persons shall be permitted to witness the execution, except the commissioner may permit two (2) members of the condemned person's immediate family as witnesses, if they so request. Provided further, that the governor may, for good cause shown, permit two (2) additional persons of good and reputable character to witness an execution. No person shall be allowed to take photographs or other recordings of any type during

the execution. The absence of the sheriff, or deputy, after due notice to attend, shall not delay the execution.

(3) The state executioner, or his duly authorized representative, the commissioner of corrections, or his duly authorized representative, and the physician or physicians who witnessed such execution shall prepare and sign officially a certificate setting forth the time and place thereof and that such criminal was then and there executed in conformity to the sentence of the court and the provisions of sections 99-19-51 through 99-19-55, and shall procure the signatures of the other public officers and persons who witnessed such execution, which certificate shall be filed with the clerk of the court where the conviction of the criminal was had, and the clerk shall subjoin the certificate to the record of the conviction and sentence.

(4) The body of the person so executed shall be released immediately by the state executioner, or his duly authorized representative, to the relatives of the dead person, or to such friends as may claim the body. The commissioner of corrections shall have sole charge of burial in the event the body is not claimed as aforesaid, and his discretion in the premises shall be final. The commissioner may donate the unclaimed body of an executed person to the University of Mississippi Medical Center for scientific purposes. The county of conviction shall bear the reasonable expense of burial in the event the body is not claimed by relatives or friends or donated to the University of Mississippi Medical Center.

SOURCES: Laws, 1984, ch. 448, § 4, eff from and after July 1, 1984.

Cross references—

As to procedures regarding pregnant women awaiting execution of death sentence, see § 99-19-57.

As to stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

As to the disposition of unclaimed bodies generally, see § 41-39-5.

As to anatomical gift law, see §§ 41-39-31 et seq.

As to autopsies on bodies of prisoners generally, see § 47-5-151.

As to the exception that execution defendant is not subject to a provision that death of a prisoner be investigated, see § 47-5-151.

§ 99-19-57. Execution of death sentence; suspension of sentence when convict is insane or pregnant.

(1) If the commissioner of corrections shall, at any time, be satisfied that any female convict in his custody under sentence of death is pregnant, he shall summon a physician to inquire into such pregnancy. The commissioner shall summons and swear all necessary witnesses and the commissioner after full examination shall certify under his hand what the truth may be in relation to the alleged pregnancy, and in case such convict shall be found pregnant, the commissioner shall immediately transmit his findings to the governor, and the governor shall suspend the execution of the sentence until he is satisfied that the convict is not or is no longer pregnant. The governor shall then order, by his warrant to the commissioner, the execution of the convict on a day to be therein appointed by the governor according to the sentence and judgment of the court.

(2)(a) If it is believed that a convict under sentence of death has become insane since the judgment of the court, the following shall be the exclusive procedural and substantive procedure. The convict, or a person acting as his next friend, or the commissioner of corrections may file an appropriate application seeking post conviction relief with the Mississippi Supreme

Court. 1. That the convict is insane, as defined in this subsection, the court shall suspend the execution of the sentence. The convict shall be committed to the forensic unit of the Mississippi State Hospital at Whitfield. The order of commitment shall require that the convict be examined and a written report be furnished to the court at that time and every month thereafter stating whether there is a substantial probability that the convict will become sane under this subsection within the foreseeable future and whether progress is being made toward that goal. If at any time during such commitment the appropriate official at the state hospital shall consider the convict is sane under this subsection, such official shall promptly notify the court to that effect in writing, and place the convict in the custody of the commissioner of corrections. The court shall thereupon conduct a hearing on the sanity of the convict. The finding of the circuit court is a final order appealable under the terms and conditions of the Mississippi Uniform Post-Conviction Collateral Relief Act.

(b) For the purposes of this subsection, a person shall be deemed insane if the court finds the convict does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court.

SOURCES: Laws, 1984, ch. 448, § 5, eff from and after July 1, 1984.

Cross references—

As to pretrial insanity proceedings, see §§ 99-13-1 et seq.

As to confinement of female prisoners sentenced to death, see § 99-19-55.

As to Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

As to procedural effect of final order in post-conviction collateral relief proceeding, see § 99-39-23.

As to procedural effect of dismissal or denial of application for leave to proceed in trial court for post-conviction collateral relief, see § 99-39-27.

As to stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

ALR and L Ed Annotations—

Appealability of order suspending imposition or execution of sentence. 51 ALR4th 939.

JUDICIAL DECISIONS

Finding at trial that criminal defendant is presently sane is res judicata as to issue of present sanity of convicted defendant under sentence of death where defendant claims that present mental condition stems from that existing prior to time of offense and trial. *Billiot v State* (1985, Miss) 478 So 2d 1043, cert den (US) 89 L Ed 2d 901, 106 S Ct 1501.

Affidavits of clinical psychologists and psychiatrists failed to establish reasonable probability that defendant was insane, where he alleged insanity as bar to his execution on grounds of cruel and unusual punishment. *Johnson v State* (1987, Miss) 508 So 2d 1126.

Defendant was entitled to in-court opportunity to prove his claims of present insanity where he had presented allegations under oath which, if true, brought into serious question legality of execution under both state

and federal law; defendant had presented court with application for relief backed by affidavits of 3 mental health professionals. *Billiot v State* (1987, Miss) 515 So 2d 1234.

State is not required to resolve death row inmate's claim that he has become insane since his conviction, warranting stay of his execution under Miss Code Anno § 99-19-57(2) by means of formal trial, as state may properly presume that inmate, who in order to have been convicted and sentenced must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise serious question for trial court, that inmate's mental state remains same at time sentence is to be carried out, and that allegation of change of mental state requires substantial threshold showing of insanity merely to trigger hearing process, and constitutionally acceptable procedure requires only

that state provide impartial hearing officer or board that can receive evidence from prisoner's counsel, including expert psychiatric evidence that may differ from state's own psychi-

atric evidence. *Johnson v Cabana* (1987, CA5 Miss) 818 F2d 333, later proceeding, en banc (Miss) 508 So 2d 1126.

§ 99-19-59. Repealed by Laws, 1984, ch. 448, § 10, eff from and after July 1, 1984.

§ 99-19-61. Cost of trial and/or execution of one committing crime within confines of penitentiary, or of inmate committing crime outside bounds of penitentiary.

The commissioner of corrections is hereby authorized and empowered to pay out of any available funds of the department of corrections all lawful costs, fees, and expenses and/or the costs of the execution of any person, not a legal resident of Sunflower County, Mississippi, who is charged, tried and/or executed for the commission of a crime within the confines of the penitentiary, or any crime committed outside the bounds of the land of the penitentiary by any inmate lawfully charged thereto. Such costs shall include the reasonable expense of burial in the event the person is executed and the body is not claimed by relatives or friends, and any and all other expenses required to be borne by the state of Mississippi under the provisions of sections 99-19-53 and 99-19-55. It is intended hereby to provide a means and method and source of payment of such expenses which said sections require to be borne by the state.

SOURCES: Laws, 1984, ch. 448, § 6, eff from and after July 1, 1984.

§ 99-19-63. Repealed by Laws, 1980, ch. 555, § 9, eff from and after July 1, 1980.

Editor's Note—

As to the Mississippi Justice Information Center and current provisions regarding maintenance and submission of records, fingerprints, photographs and other data, see §§ 45-27-1 et seq.

§ 99-19-65. Collection of fines, penalties, and list reported.

Cross references—

As to imposition of fine on persons convicted of offense punishable by more than 1 year of imprisonment, see § 99-19-32.

§ 99-19-67. Remedy against officer, in reference to fines.

Cross references—

As to imposition of fine on persons convicted of offense punishable by more than 1 year of imprisonment, see § 99-19-32.

§ 99-19-69. Liability of officers for default as to fines.

Cross references—

As to imposition of fine on persons convicted of offense punishable by more than 1 year of imprisonment, see § 99-19-32.

§ 99-19-71. Expunction of misdemeanor conviction occurring prior to twenty-third birthday.

Any person who has been convicted of a misdemeanor before reaching his twenty-third birthday, excluding a conviction for a traffic violation, and who is a first offender, may petition the justice, county, circuit or municipal court, as may be applicable, for an order to expunge any such conviction

from all public records. Upon entering such order, a nonpublic record thereof shall be retained by the court solely for the purpose of use by the court in determining whether or not in subsequent proceedings such person is a first offender. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest. No person as to whom such order has been entered shall be held thereafter under any provision of law to be guilty of perjury or to have otherwise given a false statement by reason of his failure to recite or acknowledge such arrest or conviction in response to any inquiry made of him for any purpose, except for the purpose of determining in any subsequent proceedings under this section, whether such person is a first offender.

SOURCES: Laws, 1986, ch. 412; 1987, ch. 380, § 2, eff from and after July 1, 1987.

Cross references—

As to the application of this section to the powers of the municipal court to expunge a misdemeanor conviction occurring prior to a person's 23rd birthday, see § 21-23-7.

As to other provisions relative to expunction of records, see §§ 21-23-7, 41-29-150, and 43-21-159.

As to provisions relative to the transfer to family court of misdemeanor cases involving children under thirteen years of age, see § 43-23-31.

SENTENCING OF HABITUAL CRIMINALS

§ 99-19-81. Sentencing of habitual criminals to maximum term of imprisonment.

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

SOURCES: Laws, 1976, ch. 470, § 1, eff from and after January 1, 1977.

Cross references—

As to ineligibility of confirmed and hardened criminals for supervised earned release, see § 47-5-17.

As to promulgation of rules and regulations concerning earned time allowances for habitual offenders, see § 47-5-138.

As to ineligibility of confirmed and hardened criminals for parole, see § 47-7-3.

As to ineligibility for earned probation program of persons previously convicted of felonies, see § 47-7-47.

As to the procedure for proof of prior convictions under the Habitual Criminal Statute, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 6.04.

Research and Practice References—

39 Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 1 et seq.

24B CJS, Criminal Law §§ 1958 et seq.

1981 Mississippi Supreme Court Review: Criminal Law and Procedure. 52 Miss L J 427, June 1982.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Rape. 53 Miss LJ 149, March 1983.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Amendments to the Uniform Criminal Rules of Circuit Court Practice. 53 Miss LJ 162, March 1983.

ALR and L Ed Annotations—

What constitutes former "conviction" within statute enhancing penalty for second or subsequent offense. 5 ALR2d 1080.

Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction. 11 ALR2d 870.

which a defendant is being charged, the better practice is to include it, this is especially so in habitual offender cases where the state may proceed under one of 2 statutes. *Martin v State* (1987, Miss) 501 So 2d 1124.

Habitual offender phase of trial was so infirm that it could not survive review where no two-phase trial actually occurred, because state did not reintroduce documents to prove prior convictions in sentencing phase of trial, the trial judge simply relying on it without its introduction. *Young v State* (1987, Miss) 507 So 2d 48.

Trial court did not err in sentencing defendant as habitual offender based, in part, on 2 previous felony convictions in Iowa, where those prior guilty pleas sufficiently showed on their face that defendant entered pleas knowingly and voluntarily, despite contention of defendant that there was nothing on face of either Iowa conviction indicating that he understood nature and consequences of his guilty pleas. *Moore v State* (1987, Miss) 508 So 2d 666.

Sentence of 30 years in prison without probation or parole, maximum term of imprisonment prescribed for offense of sexual battery, did not violate either United States Constitution or Mississippi Constitution; under standards set forth in *Solem v Helm* (1983) 463 US 277, 77 L Ed 2d 637, 103 S Ct 3001 (superseded by statute as stated in *Re Petition of Lauer* (CA8) 788 F2d 135) sentence was not grossly disproportionate to crime of sexual battery where harshness of penalty was justified by gravity of offense, non-habitual offenders convicted under § 97-3-95 could be sentenced to up to 30 years in prison, and sentence was not so dissimilar to sentences for same crime in other states as to make it a disproportionate penalty. *Davis v State* (1987, Miss) 510 So 2d 794.

Circuit court did not err in sentencing defendant as habitual offender, although defendant contended that 2 prior convictions in Memphis, Tennessee, had arisen out of the same incident, where court expressly found that prior convictions had in fact arisen out of separate incidents, one consisting of assault and forceful taking of wallet from victim on September 9, 1967, the other of unlawful possession of stolen credit cards which had arisen from incident which occurred on August 26, 1967. *Buckley v State* (1987, Miss) 511 So 2d 1354.

Sentence of life imprisonment was required by § 99-19-81 because defendant had previously been convicted of 2 separate felonies arising out of separate incidents at different times and had been sentenced to separate terms of one year or more, and maximum term of imprisonment for the crime of rape was life imprisonment. *Johnson v State* (1987, Miss) 511 So 2d 1360.

Certified copies of sentencing orders were proper proof of prior convictions, sufficient under habitual offender statute, where certification at issue contained attestation that copy was true and correct, and attestation bore seal of court; lack of book and page number were not fatal. *Monroe v State* (1987, Miss) 515 So 2d 860.

Full hearing is not required on habitual offender charge if trial court had no discretion in sentencing. *Monroe v State* (1987, Miss) 515 So 2d 860.

Concurrent sentences are "separate terms" under statute for sentencing as recidivist, language of statute requiring simply sentencing to separate terms, specifically omitting requirement that they be served separately or at all. Three prior convictions set out in habitual offender portion of indictment, although two occurred on same date and third a few days later, all arose out of separate incidents. All three guilty pleas were entered on same date and resulted in concurrent 7-year sentence. *Jackson v State* (1988, Miss) 518 So 2d 1219.

§ 99-19-81 is not unconstitutional as ex post facto law, nor does it constitute equal protection violation. *Perkins v Cabana* (1986, CA5 Miss) 794 F2d 168, cert den (US) 93 L Ed 2d 366, 107 S Ct 414.

Neither § 99-19-81 nor § 99-19-83 violates constitutional prohibition against double jeopardy. *Perkins v Cabana* (1986, CA5 Miss) 794 F2d 168, cert den (US) 93 L Ed 2d 366, 107 S Ct 414.

Reasonable and harmonious construction of §§ 47-5-138, 47-5-139, and 47-7-3 is that legislature intended them to maintain enhanced penalty that § 99-19-81 imposes on habitual offenders, which penalty includes denial of certain privileges available to other prisoners. *Perkins v Cabana* (1986, CA5 Miss) 794 F2d 168, cert den (US) 93 L Ed 2d 366, 107 S Ct 414.

§ 99-19-83. Sentencing of habitual criminals to life imprisonment.

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence

shall not be reduced or suspended nor shall such person be eligible for parole or probation.

SOURCES: Laws, 1976, ch. 470, § 2, eff from and after January 1, 1977.

Cross references—

As to ineligibility of confirmed and hardened criminals for parole, see § 47-7-3.

As to the procedure for proof of prior convictions under the Habitual Criminal Statute, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 6.04.

Research and Practice References—

39 Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 1 et seq.

24B CJS, Criminal Law §§ 1958 et seq.

1981 Mississippi Supreme Court Review: Criminal Law and Procedure. 52 Miss LJ 427, June 1982.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Rape. 53 Miss LJ 149, March 1983.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Amendments to the Uniform Criminal Rules of Circuit Court Practice. 53 Miss LJ 162, March 1983.

ALR Annotations—

What constitutes former "conviction" within statute enhancing penalty for second or subsequent offense. 5 ALR2d 1080.

Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction. 11 ALR2d 870.

Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender. 19 ALR2d 227.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes. 24 ALR2d 1247.

Pardon as affecting consideration of earlier conviction in applying habitual criminal statute. 31 ALR2d 1186.

Propriety, under statute enhancing punishment for second or subsequent offense, of entering new trial to issue of status as habitual criminal. 79 ALR2d 826.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions under habitual criminal act or statute enhancing punishment for repeated offenses. 80 ALR2d 1190.

Conviction under Dyer Act (18 USCS §§ 2312, 2313) as ground for enhancement of penalty under state habitual criminal statutes. 65 ALR3d 586.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 ALR3d 474.

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment. 27 ALR Fed 110.

JUDICIAL DECISIONS

In a prosecution for armed robbery, the trial court did not err in admitting during the state's case in chief evidence of prior convictions pursuant to this section, even though Criminal Rule of Circuit Court Practice Rule 6.04 prohibits mentioning prior convictions except for impeachment, where the trial antedated the court rule, where the indictment was laid under the habitual criminal statute, and where a cautionary instruction was given to the jury regarding the prohibition against using prior convictions as substantive evidence of the cardinal charge. *Davis v State* (1979, Miss) 377 So 2d 1076.

In a prosecution for aggravated assault on an indictment charging defendant with being a habitual criminal, the trial court's failure to give a limiting instruction on its own motion informing the jury not to consider defendant's prior convictions as evidence of the assault charges did not deny him due process of law, where defendant had testified freely as to the offenses made part of the indictment and

where no limiting instruction was requested by defendant's counsel; under the totality of the circumstances, such an instruction was not constitutionally required. *Nedles v State* (1980, Miss) 380 So 2d 246.

A sentence of life imprisonment without probation or parole for a defendant convicted of carrying a concealed weapon after conviction of a prior felony did not constitute cruel and unusual punishment in violation of the United States and Mississippi Constitutions. *Baker v State* (1981, Miss) 394 So 2d 1374.

The statute contemplates that the trial court without a jury should hear evidence and make a determination of whether the defendant has been previously convicted under the statute, with the burden resting upon the state to prove the previous convictions beyond a reasonable doubt; however, it is not necessary that the issue of prior convictions be submitted to a jury. *Wilson v State* (1982, Miss) 395 So 2d 957.

In a prosecution for cattle theft in which

ter practice is to include it, and this especially so in habitual offender cases where the state may proceed under one of 2 statutes. *Martin v State* (1987, Miss) 501 So 2d 1124.

Indictment of defendant as habitual offender should contain allegation that 2 separate penal terms of one year or more have

actually been served. *Hentz v State* (1987, Miss) 510 So 2d 515.

Neither § 99-19-81 nor § 99-19-83 violates constitutional prohibition against double jeopardy. *Perkins v Cabana* (1986, CA5 Miss) 794 F2d 168, cert den (US) 93 L Ed 2d 366, 107 S Ct 414.

§ 99-19-85. Governor's pardoning power unaffected.

Nothing in sections 99-19-81 to 99-19-87 shall be construed or considered as seeking or tending to impair the pardoning power or other powers reserved to the Governor under Section 124 of the Mississippi Constitution of 1890.

SOURCES: Laws, 1976, ch. 470, § 3, eff from and after January 1, 1977.

§ 99-19-87. Punishment by death unaffected.

Nothing in sections 99-19-81 to 99-19-87 shall abrogate or affect punishment by death in any and all crimes now or hereafter punishable by death.

SOURCES: Laws, 1976, ch. 470, § 4, eff from and after January 1, 1977.

SEPARATE SENTENCING PROCEEDING TO DETERMINE PUNISHMENT IN CAPITAL CASES

§ 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the state of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

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(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section;

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense 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, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:

(a) The defendant actually killed;

(b) The defendant attempted to kill;

(c) The defendant intended that a killing take place;

(d) The defendant contemplated that lethal force would be employed.

SOURCES: Laws, 1977, ch. 458, § 2; 1983, ch. 429, § 2, eff from and after passage (approved March 29, 1983).

Cross references—

As to review by Supreme Court of imposition of death penalty, see § 99-19-105.

As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

As to inapplicability of Mississippi Rules of Evidence in sentencing proceedings, see M.R.E. 1101.

As to bifurcated trials, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 5.13.

Research and Practice References—

21 Am Jur 2d, Criminal Law §§ 583-586, 595.

24B CJS, Criminal Law §§ 1983, 2001.

Constitutional problems concerning certain aggravating circumstances used for capital murder sentencing in Mississippi, 53 Miss L J 319, June, 1983.

ALR and L Ed Annotations—

Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.

Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence. 8 ALR4th 1028.

Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 ALR4th 1069.

Propriety, under Federal Constitution, of evidence or argument concerning deterrent effect of death penalty. 78 ALR Fed 553.

JUDICIAL DECISIONS

The trial court in a murder prosecution erred in requiring defendant at the punishment stage of trial to proceed before the state, since the state has the burden of proof not only as to guilt but also as to aggravating circumstances during the punishment stage of a trial. *Gray v State* (Miss) 351 So 2d 1342, later app (Miss) 375 So 2d 994.

A prior conviction of another capital offense or of a felony involving the use or threat of violence to the person is admissible at the punishment stage of a trial for a capital crime as an aggravating circumstance to be considered by the jury in determining punishment. *Gray v State* (Miss) 351 So 2d 1342, later app (Miss) 375 So 2d 994, cert den 446 US 988, 64

L Ed 2d 847, 100 S Ct 2975, reh den (US) 65 L Ed 2d 1174, 101 S Ct 30.

The statutory provision allowing a jury in a capital murder prosecution to consider, on the issue of aggravating circumstances, whether "the capital offense was especially heinous, atrocious, or cruel," was not unconstitutionally vague; pursuant to the statute requiring appellate review of all death sentences, such a sentence would not be reversed where it was not imposed under the influence of passion, prejudice or any other arbitrary factor; where the evidence fully supported the jury's unanimous findings that two aggravating circumstances existed; where the death sentence was

defendant's conduct that caused the death was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, (b) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and (c) if raised by the evidence, whether or not the defendant's conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; (4) if the jury finds that the state has proved beyond a reasonable doubt that the answer to each of the pertinent questions is yes, then the death sentence is imposed, but if the jury finds that the answer to any question is no, then a

sentence of life imprisonment results; and (5) death sentences are given expedited review on appeal. *Jurek v Texas*, 428 US 262, 49 L Ed 2d 929, 96 S Ct 2950, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 198.

State statute which imposed mandatory death penalty for first-degree murder, which included any willful, deliberate, and premeditated killing, and any murder committed in perpetrating or attempting to perpetrate a felony, constituted a violation of the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution. *Woodson v North Carolina*, 428 US 280, 49 L Ed 2d 944, 96 S Ct 2978.

§ 99-19-103. Instructions; aggravating circumstances shall be designated by jury in writing; effect of jury's failure to agree on punishment.

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

SOURCES: Laws, 1977, ch. 458, § 3, eff from and after passage (approved April 13, 1977).

Cross references—

As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

As to bifurcated trials, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 5.13.

JUDICIAL DECISIONS

In a prosecution for capital murder the trial court properly refused defendant's requested amendment to his jury instruction that "if you are unable to unanimously agree on which circumstances outweigh the other, and arrive at a verdict fixing the punishment, then the form of your verdict should be as follows: we, the jury are unable to unanimously agree on the punishment to be inflicted," where there was no indication in the record that the jury had any difficulty reaching an agreement, and where Code § 99-19-103 imposed a duty on the court to dismiss the jury after a reasonable period of deliberation and impose a life sentence on the defendant. *King v State* (1982, Miss) 421 So 2d 1069.

In a capital murder prosecution in which defendant was sentenced to death under §§ 99-19-101 and 99-19-103, the trial court did not err in refusing to instruct the jury

that they must return a verdict of life imprisonment unless they believed beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. *Hill v State* (1983, Miss) 432 So 2d 427, cert den (US) 78 L Ed 2d 352, 104 S Ct 414.

Jury instruction in penalty phase of capital murder prosecution which follows language of §§ 99-19-101, 99-19-103 need not define aggravating circumstances which may be found by jury; sentencing instruction does not impermissibly favor sentence of death by instructing jury foreman concerning completion of verdict forms only if death sentence is imposed; jury need not be instructed of authority to return life sentence even where aggravating circumstances outweigh mitigating circumstances. *Cabello v State* (1985, Miss) 471 So 2d 332.

The jury is required to find the existence of each aggravating circumstance beyond a reasonable doubt, but it is not required to find that the aggravating circumstances beyond a doubt outweigh the mitigating circumstances. *Wiley v State* (1986, Miss) 484 So 2d 339, cert den (US) 93 L Ed 2d 278, 107 S Ct 304.

In a capital murder prosecution, the jury's

note sent to the court after the jury had deliberated for over two hours which stated, "We the jury cannot come to a unanimously [sic] decision—what shall we do?" was simply a request for further instruction, and did not require the dismissal of the jury and imposition of a life sentence. *Jones v Thigpen* (1983 SD Miss) 555 F Supp 870.

§ 99-19-105. Review by supreme court of imposition of death penalty.

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

- (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
- (b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101; and
- (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

- (a) Affirm the sentence of death; or
- (b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

(7) Upon affirmance, and again upon rehearing if such is necessary, of any sentence of death by the Mississippi Supreme Court or the affirmance or

denial of review by the United States Supreme Court, the Mississippi Supreme Court shall reset the date of execution not more than sixty (60) days from the date of the Mississippi Supreme Court's affirmance of the sentence or from the denial of relief by the United States Supreme Court. Unless the sentence is suspended, the Clerk of the Mississippi Supreme Court shall forthwith deliver to the Commissioner of Corrections a warrant of execution under seal of the court, which warrant shall be his authority to execute the convict.

SOURCES: Laws, 1977, ch. 458, § 4; 1984, ch. 448, § 7; 1985, ch. 305, § 1, eff from and after passage (approved February 28, 1985).

Cross references—

As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

As to criminal docket in supreme court, see § 9-3-21.

JUDICIAL DECISIONS

The statutory provision allowing a jury in a capital murder prosecution to consider, on the issue of aggravating circumstances, whether "the capital offense was especially heinous, atrocious, or cruel," was not unconstitutionally vague; pursuant to the statute requiring appellate review of all death sentences, such a sentence would not be reversed where it was not imposed under the influence of passion, prejudice or any other arbitrary factor; where the evidence fully supported the jury's unanimous findings that two aggravating circumstances existed; where the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and where the jury carefully weighed the mitigating circumstances and found that they were insufficient to outweigh the two aggravating circumstances. *Washington v State* (1978, Miss) 361 So 2d 61, cert den 441 US 916, 60 L Ed 2d 388, 99 S Ct 2016.

The death penalty was properly imposed on defendant where, out of a desire to obtain money, he abducted his victim at gunpoint and fatally shot her when she tried to escape and where he then demanded and received a ransom from his victim's husband. *Jordan v State* (1978, Miss) 365 So 2d 1198, cert den 444 US 885, 62 L Ed 2d 114, 100 S Ct 175 and petition den (Miss) 390 So 2d 584.

In prosecution for the murder of a three-year-old girl, the circumstances in evidence amply supported a finding that the crime was especially heinous, atrocious and cruel and the jury was warranted, from the evidence before it, in finding that the aggravating circumstances outweighed any circumstance that might conceivably have been considered a mitigating circumstance; the death penalty was not imposed wantonly or freakishly or under the influence of passion, prejudice or any other arbitrary factor and was not excessive or disproportionate to similar cases in which such sentence had been imposed. *Gray v State* (1979, Miss) 375 So 2d 994, cert den

446 US 988, 64 L Ed 2d 847, 100 S Ct 2975, reh den (US) 65 L Ed 2d 1174, 101 S Ct 30.

In a prosecution for capital murder committed during a burglary, the death sentence would be reversed and the case remanded for sentencing to life imprisonment, where the victim, upon seeing defendant, began firing his pistol and was then shot by defendant, and where defendant had the opportunity to shoot the victim's wife but did not; the penalty of death in this case was disproportionate to the penalty imposed in similar cases. *Coleman v State* (1979, Miss) 378 So 2d 640.

In a prosecution for capital murder committed during an attempted robbery, the evidence supported the jury's finding of statutory aggravating circumstances, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; furthermore, prosecutorial discretion was not abused even though defendant's accomplice, who turned state's evidence, was permitted to plead guilty to manslaughter, while defendant, who fired the fatal shot, was given the death penalty. *Culberson v State* (1979, Miss) 379 So 2d 499.

In a prosecution for capital murder committed during a robbery, the sentence of death was not imposed by the jury under the influence of passion or prejudice, and the evidence supported the jury's finding that the mitigating circumstances did not outweigh the aggravating circumstances (§ 99-19-101), where the evidence in mitigation of the sentence was that defendant was only 17 or 18 at the time of the offense, and that there was no testimony indicating that this codefendant had struck the blows causing death, where the jury found that the offense, committed during a robbery, was especially heinous and cruel, and that defendant had been previously convicted of a felony involving the use or threat

affirmed but death sentence was reversed and remanded where defendant did not receive a fair sentencing hearing due to admission of photographs of wife's body during trial and during closing argument, state's attempt to prevent defendant from calling a co-indictee as a witness, prosecutor's attempt during voir dire to get commitment from jury to exclude certain mitigating factors from its consideration of the death penalty, and prosecutor's comment on defendant's failure to testify. *Stringer v State* (1986, Miss) 500 So 2d 928.

While there may be legitimate differences of opinion as to just when and how heightened scrutiny on appeal works in death penalty cases, it would seem clear that heightened scrutiny approach is most needed and most applicable in cases resting upon circumstantial evidence and where matter of whether defendant is guilty at all is by no

means free of all doubt. *Fisher v State* (1985, Miss) 481 So 2d 203.

When prosecutor seeks to rebut defense counsel's effort to impress upon sentencing jury enormity of decision to impose death penalty by informing jury that decision will be subject to automatic appellate review, sentence of death imposed by jury must be vacated. *Caldwell v Mississippi* (1985) 86 L Ed 2d 231, 105 S Ct 2633, later proceeding *Caldwell v State* (1985, Miss) 481 So 2d 850.

Finding that capital murder defendant either killed, attempted to kill, intended that killing take place, or used lethal force, as required for imposition of death penalty, need not be made by jury, but may be made by state appellate court, trial judge or jury. *Cabana v Bullock* (1986) 88 L Ed 2d 704, 106 S Ct 689, on remand *Bullock v Cabana* (1986, CA5 Miss) 784 F2d 187.

§ 99-19-107. Life sentence to be imposed if death penalty held to be unconstitutional.

In the event the death penalty is held to be unconstitutional by the Mississippi Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death shall cause such person to be brought before the court and the court shall sentence such person to imprisonment for life, and such person shall not be eligible for parole.

SOURCES: Laws, 1977, ch. 458, § 5; 1982, ch. 431, § 6, eff from and after July 1, 1982.

Cross references—

As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

VICTIM IMPACT STATEMENT ACT

§ 99-19-151. Title.

Sections 99-19-151 through 99-19-161 shall be known and may be cited as "The Victim Impact Statement Act."

SOURCES: Laws, 1987, ch. 433, § 1, eff from and after July 1, 1987.

§ 99-19-153. Declaration of purpose.

(1) The Legislature finds and declares that:

- (a) Protection of the public, restitution to the crime victim and the crime victim's family and just punishment for the harm inflicted are primary objectives of the sentencing process;
- (b) The financial, emotional and physical effects of a criminal act on the victim and the victim's family are among the essential factors to be considered in the sentencing of the person responsible for the crime;
- (c) In order to impose a just sentence, the court must obtain and consider information about the adverse impact of the crime upon the victim and the victim's family as well as information from and about the defendant; and
- (d) The victim of the crime or a relative of the victim is usually in the

best position to provide information to the court about the direct impact of the crime on the victim and the victim's family.

(2) Therefore, the Legislature declares that the purpose of Sections 99-19-151 through 99-19-161 is to provide the sentencing court with a victim impact statement prior to sentencing a convicted offender who has caused physical, emotional or financial harm to a victim as defined herein.

SOURCES: Laws, 1987, ch. 433, § 2, eff from and after July 1, 1987.

§ 99-19-155. Definitions.

For the purposes of Sections 99-19-151 through 99-19-161, the following words shall have the meanings ascribed herein, unless the context otherwise requires:

- (a) "Victim" means an individual who suffers direct or threatened physical, emotional or financial harm as the result of the commission of a felony or an immediate family member of a minor victim or a homicide victim.
- (b) "Victim impact statement" means a statement providing information about the financial, emotional and physical effects of the crime on the victim and the victim's family, and specific information about the victim, the circumstances surrounding the crime and the manner in which it was perpetrated.
- (c) "Victim representative" means a spouse, parent, child, sibling or other relative of a deceased or incapacitated victim or of a victim who is under fourteen (14) years of age, or a person who has had a close personal relationship with the victim and is designated by the court to be a victim representative.

SOURCES: Laws, 1987, ch. 433, § 3, eff from and after July 1, 1987.

§ 99-19-157. Victim impact statement.

(1) If a court orders the preparation of a presentence evaluation report on a defendant in a felony case, the presentence investigator shall prepare a written victim impact statement for the court which shall be appended to such report. The statement shall include applicable information obtained during consultation with the victim or the victim representative. If the victim or victim representative cannot be located or declines to cooperate in the preparation of the statement, the presentence investigator shall include a notation to that effect in the statement. If there are multiple victims and preparation of individual victim impact statements is not feasible, the presentence investigator may submit one or more representative statements.

(2) If a court does not order the preparation of a presentence evaluation report on a defendant in a felony case, the victim or victim representative may also submit a victim impact statement in one or both of the following ways:

- (a) With the permission of the trial court, the victim may present an oral victim impact statement at any sentencing hearing. However, where there are multiple victims, the court may limit the number of oral victim impact statements.
- (b) The victim may submit a written statement to the prosecuting attorney, who shall present such statement to the trial judge prior to sentencing.

SOURCES: Laws, 1987, ch. 433, § 4, eff from and after July 1, 1987.

Cross references—

As to requirement that personnel of division of community services prepare written victim impact statements at the request of a sentencing judge, see § 47-7-9.

ALR and L Ed Annotations—

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 ALR 3d 976.

§ 99-19-159. Victim impact statement to be made available to defense and to prosecution; statement as factor in sentencing; cooperation of victim not mandatory.

(1) At least forty-eight (48) hours prior to the date of sentencing, the court shall make available copies of the statement to the defendant, defendant's counsel and the prosecuting attorney. These parties shall return all copies of the statement to the court immediately following the imposition of sentence upon the defendant.

(2) Any victim impact statement submitted to the court under Section 99-19-157 shall be among the factors considered by the court in determining the sentence to be imposed upon the defendant.

(3) Sections 99-19-151 through 99-19-161 shall not be construed to require a victim or victim representative to submit a victim impact statement or to cooperate in the preparation of a victim impact statement.

SOURCES: Laws, 1987, ch. 433, § 5, eff from and after July 1, 1987.

ALR and L Ed Annotations—

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 ALR 3d 976.

§ 99-19-161. Notice to victim prior to sentencing.

The prosecuting attorney shall notify the victim or the victim representative in writing of the date, time and place of any sentencing hearing. If a sentencing hearing is not ordered by the trial judge, the prosecuting attorney shall notify the victim or the victim representative of his right to prepare a written victim impact statement to be considered by the trial judge prior to sentencing. A copy of any relevant rules and regulations pertaining to the victim impact statement and the hearing shall accompany the notice. The notice and the copy of any relevant rules and regulations shall be sent to the last known address of the victim or the victim representative at least five (5) days prior to the sentencing hearing.

SOURCES: Laws, 1987, ch. 433, § 6, eff from and after July 1, 1987.

ALR and L Ed Annotations—

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 ALR 3d 976.

CHAPTER 20 [New]

Community Service Restitution

Sec.

99-20-1. Short title; purpose.

99-20-3. Participation in community service restitution program.

99-20-5. Qualifications for participation in program.

99-20-7. Determining persons eligible for participation; review of district attorney's files.

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vided with a copy of such report at least ten days prior to the preliminary hearing and shall have the opportunity before the hearing upon notice to the state of the time and place to conduct the interview, which may be recorded, of any person who conducted the

testing, analysis, identification, or comparison of evidence which is the subject matter of report. Nothing in this section shall affect the right of the accused to subpoena such person.
(L. 1987 H.B. 341 § 2)

Chapter 545

PROCEEDINGS BEFORE TRIAL

Sec.

545.485. Judge of circuit court may order change of venue, when—procedure—transportation furnished jury instead of mileage, when

CROSS REFERENCE

Television, closed circuit coverage of prisoners for court appearances, when, requirements. RSMo 561.031.

545.485. Judge of circuit court may order change of venue, when—procedure—transportation furnished jury instead of mileage, when.—1. Whenever it shall appear, in the manner provided in section 545.490, that the inhabitants of the entire county in which the cause is pending are so prejudiced against the defendant that a fair trial cannot be had, the circuit court judge may order as many jurors as he deems necessary to be summoned from any county or counties in the same judicial circuit as the county of trial or in any adjoining judicial circuit. If the circuit court judge is of the opinion that it is necessary in order to provide a fair trial of any cause, he may summon jurors from a county which is neither in the

circuit nor adjoining the judicial circuit in which the trial is to be held by requesting the chief justice of the supreme court of the state of Missouri to name a county in the state in which jurors may be summoned for such trial.

2. If jurors are summoned from a county other than the county of trial, the selection of the jury panel may, at the discretion of the circuit court judge, be held in the county in which the jurors reside.

3. Jurors summoned pursuant to the provisions of subsection 1 of this section shall be subject to the same challenges as other jurors, except challenges for nonresidence in the county of trial. Transportation may be furnished to the jurors in lieu of mileage.

4. The supreme court of the state of Missouri shall promulgate rules to implement the provisions of this section.

(L. 1988 S.B. 479)

Effective 3-31-88

Chapter 546

TRIALS, JUDGMENTS AND EXECUTIONS IN CRIMINAL CASES

TRIALS

Sec.

546.032. Deaf person's interpreters, definitions for sections 546.034 and 546.036

VERDICTS, JUDGMENTS AND EXECUTIONS

546.680. Capital cases, duty of court.
546.710. Execution warrant issued to the chief administrative officer of a correctional institution for execution of prisoner.
546.720. Death penalty—manner of execution
546.730. Place of executing judgment of death

546.40. Execution, witnesses.

546.750. Warrant of execution, how returned.

CROSS REFERENCE

Television, closed circuit coverage of prisoners for court appearances, when, requirements. RSMo 561.031

TRIALS

546.032. Deaf person's interpreters, definitions for sections 546.034

546.036.—As used in sections 546.034 and 546.036, the following words and terms mean:

(1) "Deaf person", a person who, because of a hearing impairment, cannot readily understand an oral or written language or who cannot readily communicate in an oral or written language;

(2) "Judicial or administrative proceeding", any court, or judicial proceeding existing under the constitution or laws of the state of Missouri or any of its political subdivisions;

(3) "Qualified interpreter", a person who is capable of interpreting and translating criminal, civil and administrative proceedings for deaf persons and accurately communicating the responses of deaf persons.

(L. 1984 S.B. 464, A.L. 1987 S.B. 40)

546.070.

(1987) It was error to give instruction on reputation of defendant where defendant did not present any evidence at trial as to his general reputation for good character. *State v. Stone* 731 S.W.2d 466 (Mo.App. 1987).

546.260.

(1987) Person on trial for selling marijuana who testified in his own behalf was subject to cross examination on subject of identity of supplier pursuant to this section in view of defendant's numerous references to supplier and defendant's implication that defendant was motivated to sell marijuana to pay a cocaine debt owed to supplier. *State v. McClintic*, 731 S.W.2d 853 (Mo.App. 1987).

546.270.

(1987) Argument focusing on the lack of evidence offered to explain the presence of stolen property in possession of defendant who did not testify on his own behalf in trial for burglary and theft is not comment on the defendant's failure to testify in violation of this section. *State v. Masterson*, 733 S.W.2d 40 (Mo.App. 1987).

VERDICTS, JUDGMENTS AND EXECUTIONS

546.680. Capital cases, duty of court.—When judgment of death is rendered by any court of competent jurisdiction, a warrant signed by the judge and attested by the clerk under the seal of the court must be drawn and delivered to the sheriff. It must state the conviction and judgment and appoint a day on which the judgment must be executed, which must not be less than thirty nor more than sixty days from the date of judgment, and must direct the sheriff to deliver the defendant, at a time specified in said order, not more than ten days from the date of judgment, to the chief administrative officer of a correctional institution controlled by the division of adult institutions, for execution.

(RSMo 1939 § 4108, A.L. 1988 H.B. 1340 & 1348)

Prior revisions: 1929 § 3719; 1919 § 4063; 1909 § 5269)

546.710. Execution warrant issued to the chief administrative officer of a correctional institution for execution of prisoner.—Upon such convict being brought before the court, they shall proceed to inquire into the facts, and if no legal reasons exist against the execution of sentence, such court shall issue a warrant to the chief administrative officer of a correctional institution controlled by the division of adult institutions, for the execution of the prisoner at the time therein specified, which execution shall be obeyed by said chief administrative officer of the correctional institution accordingly.

(RSMo 1939 § 4111, A.L. 1988 H.B. 1340 & 1348)

Prior revisions: 1929 § 3721; 1919 § 4065; 1909 § 5271

546.720. Death penalty—manner of execution.—The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection. And for such purpose the director of the division of adult institutions is hereby authorized and directed to provide a suitable and efficient room or place, enclosed from public view, within the walls of a correctional institution controlled by the division of adult institutions, and the necessary appliances for carrying into execution the death penalty by means of the administration of lethal gas or by means of the administration of lethal injection.

(RSMo 1939 § 4112, A.L. 1988 H.B. 1340 & 1348)

546.730. Place of executing judgment of death.—A judgment of death must be executed within the walls of a correctional institution controlled by the division of adult institutions; and such execution shall be under the supervision and direction of the chief administrative officer of the correctional institution.

(RSMo 1939 § 4113, A.L. 1988 H.B. 1340 & 1348)

546.740. Execution, witnesses.—The chief administrative officer of the correctional institution, or his duly appointed representative shall be present at the execution and the chief administrative officer of the correctional institution shall invite the presence of a physician, the attorney general of the state, and at least twelve reputable citizens, to be selected by him; and he shall at the request of the defendant, permit such clergy or religious leaders, not exceeding two, as the defendant may name, and any person, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execu-

§ 546.740

CRIMINAL PROCEDURE

tion: but no person under twenty-one years of age shall be allowed to witness the execution.

(RSMo 1939 § 4114, A.L. 1988 H.B. 1340 & 1348)

Prior revisions: 1929 § 3724; 1919 § 4068; 1909 § 5274

546.750. Warrant of execution, how returned.—After the execution the chief administrative office of the correctional insti-

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tution shall make a return upon the death war-
rant to the court by which the judgment was
rendered, showing the time, mode and man-
ner in which it was executed.

(RSMo 1939 § 4115, A.L. 1988 H.B. 1340 & 1348)

Prior revisions: 1929 § 3725; 1919 § 4069; 1909 § 5275

Chapter 549

PROBATION, PARDONS AND PAROLES

CROSS REFERENCE

Educational grants for surviving children of officers and employees killed in the line of duty, RSMo 173.260

Chapter 550

COSTS IN CRIMINAL CASES

CROSS REFERENCE

Interpreters, fee taxed as costs against state in criminal cases, RSMo 491.300

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sons who shall neglect or refuse to assist such sheriff or deputy, when required, shall be liable to the same penalties as if such officer were in his own county.

(RSMo 1939 § 4107)

Prior revisions: 1929 § 3718; 1919 § 4062; 1909 § 5268

546.630. Restitution or reparation in damages, when made.—In all cases of conviction of felony, the party convicted shall restore the property stolen or destroyed, or make reparation in damages therefor. The court in which such conviction may be had, if applied to at the same term in which the sentence was pronounced, by petition, verified by affidavit, may order restitution or give judgment against the convict for reparation in damages, and enforce the collection of the same by execution or other process.

(RSMo 1939 § 4171)

Prior revisions: 1929 § 3781; 1919 § 4127; 1909 § 5332

546.640. Proceedings on motion for restitution.—In motion for restitution or reparation, the court shall cause the prisoner to be set within the bar, and demand of him if he has any defense to make to the motion; and if the convict consent to such restitution or reparation in damages, the court shall give judgment accordingly, if the damages are agreed; otherwise a jury shall be impaneled to try the facts, and ascertain the amount and value of the property, or assess the damages, as the case may be. A failure to pursue the remedy hereby given shall not deprive the party aggrieved of his civil action for the injury sustained. The party injured shall have a lien on the estate of the criminal from the time of his arrest, subject to any lien granted by law to the state.

(RSMo 1939 § 4172)

Prior revisions: 1929 § 3782; 1919 § 4128; 1909 § 5333

546.650. Court may require security to keep the peace.—The court before which any person shall be convicted of any criminal offense shall have power, in addition to the sentence prescribed or authorized by law, to require such person to give security to keep the peace or be of good behavior, or both, for a term not exceeding two years, or to stand committed until such security be given.

(RSMo 1939 § 4097)

Prior revisions: 1929 § 3708; 1919 § 4052; 1909 § 5258

546.660. Section 546.650 construed.—Section 546.650 shall not extend to convictions for writing or publishing any libel; nor shall any such security be hereafter required by any court upon any complaint, prosecution or conviction for any such writing or publishing

(RSMo 1939 § 4098)

Prior revisions: 1929 § 3709; 1919 § 4053; 1909 § 5259

546.670. Recognizance, when broken.—No recognizance given under the provisions of section 546.650 shall be deemed to be broken, unless the principal therein be convicted of some offense amounting, in judgment of law, to a breach of such recognizance.

(RSMo 1939 § 4099)

Prior revisions: 1929 § 3710; 1919 § 4054; 1909 § 5260

546.680. Duty of court in capital cases.—When judgment of death is rendered by any court of competent jurisdiction a warrant signed by the judge and attested by the clerk under the seal of the court must be drawn and delivered to the sheriff. It must state the conviction and judgment and appoint a day on which the judgment must be executed, which must not be less than thirty nor more than sixty days from the date of judgment, and must direct the sheriff to deliver the defendant, at a time specified in said order, not more than ten days from the date of judgment, to the warden of the state penitentiary at Jefferson City, Missouri, for execution.

(RSMo 1939 § 4108)

Prior revisions: 1929 § 3719; 1919 § 4063; 1909 § 5269

546.690. Statement of conviction and judgment to governor.—The judge of a court at which a conviction is had must, immediately after the conviction, transmit to the governor of the state, by mail or otherwise, a statement of the conviction and judgment.

(RSMo 1939 § 4109)

Pardons, governor's powers, conditions and restrictions, RSMo 217.800

546.700. Sentence not executed, procedure.—Whenever, for any reason, any convict sentenced to the punishment of death shall not have been executed pursuant to such sentence, and the cause shall stand in full force, the supreme court, or the court of the county in which the conviction was had, on the application of the prosecuting attorney, shall issue a writ of habeas corpus to bring such convict before the court; or if he be at large, a warrant for his apprehension may be issued by such court, or any judge thereof.

(RSMo 1939 § 4110)

Prior revisions: 1929 § 3720; 1919 § 4064; 1909 § 5270

Habeas corpus generally, Chap. 532, RSMo

546.710. Warrant to warden of state penitentiary for execution of prisoner.—Upon such convict being brought before the court, they shall proceed to inquire into the facts, and if no legal reasons exist against the execution of sentence, such court shall issue a warrant to the warden of the state penitentiary at Jefferson City, Missouri, for the execution of the prisoner

at the time therein specified, which execution shall be obeyed by said warden accordingly.

(RSMo 1939 § 4111)

Prior revisions: 1929 § 3721; 1919 § 4065; 1909 § 5271

Appeal from death sentence, clerk of supreme court to notify attorney general and warden, RSMo 547.260

546.720. Death penalty—manner of execution.—The manner of inflicting the punishment of death shall be by the administration of lethal gas. And for such purpose the warden of the state penitentiary is hereby authorized and directed to provide a suitable and efficient room or place, enclosed from public view, within the walls of the penitentiary, and the necessary appliances for carrying into execution the death penalty by means of the administration of lethal gas.

(RSMo 1939 § 4112)

546.730. Place of executing judgment of death.—A judgment of death must be executed within the walls of the state penitentiary at Jefferson City, Missouri; and such execution shall be under the supervision and direction of the warden of said institution.

(RSMo 1939 § 4113)

546.740. Execution—certain persons to be present.—The warden, deputy warden, or some other duly appointed representative of the warden of the state penitentiary must be present at the execution and the warden shall invite the presence of a physician, the attorney general of the state, and at least twelve reputable citizens, to be selected by him; and he shall at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any person, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution; but no person under twenty-one years of age shall be allowed to witness the execution.

(RSMo 1939 § 4114)

Prior revisions: 1929 § 3724; 1919 § 4068; 1909 § 5274

546.750. Warrant of execution, how returned.—After the execution the warden must make a return upon the death warrant to the court by which the judgment was rendered, showing the time, mode and manner in which it was executed.

(RSMo 1939 § 4115)

Prior revisions: 1929 § 3725; 1919 § 4069; 1909 § 5275

546.800. Pregnancy of female convict under death sentence—proceedings.—If, after any female convict shall be sentenced to the punishment of death, the officer having charge of her person shall have reason to suspect that she is

pregnant, he shall in like manner summon a jury of six persons, not less than three of whom shall be physicians, and shall give notice thereof to the prosecuting attorney of the county where such criminal proceedings originated, or to the circuit attorney of the city of St. Louis, if such criminal proceedings originated in that city, who shall attend, and the proceedings shall be had as provided.

(RSMo 1939 § 4196, A.L. 1969 p. 77)

Prior revisions: 1929 § 3806; 1919 § 4152; 1909 § 5360

546.810. If found pregnant—sentence suspended.—The inquisition shall be signed by the jury and the officer in charge of such convict, and if it appear that such female convict is pregnant with child, her execution shall be suspended and the inquisition shall be transmitted to the governor.

(RSMo 1939 § 4197)

Prior revisions: 1929 § 3807; 1919 § 4153; 1909 § 5361

546.820. Execution ordered when causes for suspension cease.—Whenever the governor shall be satisfied that the cause of such suspension no longer exists, he shall issue his warrant, appointing a day for the execution of such convict, pursuant to her sentence; or he may, at his discretion, commute her punishment to imprisonment in the penitentiary for life.

(RSMo 1939 § 4198)

Prior revisions: 1929 § 3808; 1919 § 4154; 1909 § 5362

546.860. All property bound for fine and costs.—The property, real and personal, of any person charged with a criminal offense, shall be bound from the time of his final conviction of such offense, for the payment of all fines and costs which he may be adjudged to pay.

(RSMo 1939 § 4119)

Prior revisions: 1929 § 3729; 1919 § 4073; 1909 § 5279

546.870. Executions shall issue, when.—It shall be the duty of the clerk of the court having criminal jurisdiction for the county at the end of each term, to issue executions for all fines imposed, and the costs of conviction in criminal cases, during the term and remaining unpaid, which shall be executed in the same manner as executions in civil cases; and the property of the defendant may be seized and sold thereon, notwithstanding he may be in custody for the same demand.

(RSMo 1939 § 4120)

Prior revisions: 1929 § 3730; 1919 § 4074; 1909 § 5280

546.880. May be consigned to workhouse, when.—Whenever any person shall, because of a conviction for any misdemeanor or felony, be subject to imprisonment in a county jail, such person may, at the discretion of the court, be

confined in any workhouse or other place of imprisonment belonging to any town or city in such county, or in any incorporated city from which said county has been separated by law; provided, the county commission of such county shall have contracted or agreed with the town or city owning such workhouse or other place of confinement for the custody and keeping of such convicts; and cities or towns having no workhouse or houses shall have authority to work convicted persons on the streets, bridges or other public works in such city or town.

(RSMo 1939 § 4121)

Prior revisions: 1929 § 3731; 1919 § 4075; 1909 § 5281

(1957) Section 479.270 has been partially repealed by implication and superseded by § 546.880, insofar as it mandatorily requires that prisoners be sentenced by the St. Louis Court of Criminal Correction to the workhouse; sentences to the city jail are valid. In re Thomas (A.), 306 S.W.2d 336.

546.881. St. Louis city workhouse, commitment.—1. Every person committed to the workhouse of the city of St. Louis, or other place of punishment provided by that city, by the circuit court of the city of St. Louis, shall be put to hard labor at such work as his or her strength and health will permit, whether within or without such place of imprisonment, and shall be under the control and management of those having charge of such prison, subject to such rules and regulations as the municipal assembly of St. Louis city may establish for such prisons.

2. If the party committed is unwilling although able to pay the fine and costs, if such be the punishment for the offense, in whole or in part, in payment of such fines and costs, the party committed shall be allowed for his or her work at the rate of ten dollars per day. No imprisonment for nonpayment of fine and costs shall exceed six months.

3. When a fine is assessed by the circuit court of the city of St. Louis the court may provide for the payment of the fine and costs on an installment basis under such terms and conditions as the court deems appropriate.

4. Any person, after being committed to the workhouse or other place of imprisonment provided by the city of St. Louis, for nonpayment

of his or her fine and costs, desiring to pay same, shall make application to the judge of said court, who shall in open court order the fine and all costs of such person to be paid to the clerk of said court, whose duty it shall be to receive same, enter satisfaction on the execution in his execution book, and give notice in writing, under the seal of said court, to the superintendent or person having charge and control of said workhouse, that the execution against such person has been fully satisfied, whereupon such person shall immediately be discharged from said workhouse or place of punishment.

(L. 1978 H.B. 1634)

Effective 1-2-79

546.890. Persons committed to workhouse imprisoned for full term.—All persons committed to any workhouse or other places of confinement under the provisions of section 546.880 shall be imprisoned for the full term of their sentence, unless sooner discharged by due course of law.

(RSMo 1939 § 4122)

Prior revisions: 1929 § 3732; 1919 § 4076; 1909 § 5282

546.900. Stay of execution granted, when.—In case of a conviction for any offense where the punishment has been fixed at a fine or imprisonment in the county jail, or workhouse, or by both such fine and imprisonment, the court in which any such conviction was had, or the judge thereof in vacation, or any associate circuit judge before whom such conviction was had, may, for good cause shown, by order entered of record, or in writing signed by such judge or associate circuit judge, grant a stay of execution on any such judgment of conviction and sentence thereon for a definite period of time to be fixed by the court, judge or associate circuit judge granting the same, not to exceed six months, upon the defendant or some person for him entering a recognizance conditioned for his surrendering himself in execution at the time and place fixed by the judgment of such conviction or sentence on a day to be named in such order.

(RSMo 1939 § 4129)

Prior revisions: 1929 § 3739; 1919 § 4085; 1909 § 5291

Chapter 565

OFFENSES AGAINST THE PERSON

Sec.	
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565.100.	Lack of consent in kidnapping and crimes involving restraint.
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565.140.	Defenses to false imprisonment.
565.150.	Interference with custody.

CROSS REFERENCES

Criminal activity forfeiture act, (CAFA), definitions applicable to this chapter, RSMo 513.605
Minimum prison terms for repeat offenders for the commission of certain crimes in this chapter, RSMo 558.019

* 565.001. Procedure for chapter 565.—

1. The provisions of this chapter shall govern the construction and procedures for charging, trial, punishment and appellate review of any offense defined in this chapter and committed after July 1, 1984.

2. The provisions of this chapter shall not govern the construction or procedures for charging, trial, punishment or appellate review of any offense committed before the effective date of this chapter. Such an offense must be construed, punished, charged, tried and reviewed on appeal according to applicable provisions of law existing prior to the effective date of this chapter in the same manner as if this chapter had not

been enacted, the provisions of section 1.160, RSMo, notwithstanding.

3. All provisions of "The Criminal Code" or other law consistent with the provisions of this chapter shall apply to this chapter. In the event of a conflict, the provisions of this chapter shall govern the interpretation of the provisions of this chapter.

4. Persons accused of committing a homicide offense shall be prosecuted:

(1) In the county in which the offense is committed; or

(2) If the offense is committed partly in one county and partly in another, or if the elements of the offense occur in more than one county, then in any of the counties where any element of the offense occurred; or

(3) In the county in which the body of the deceased victim is found; or

(4) If subdivisions (1), (2), and (3) of this subsection do not apply, then in the county in which the victim lived.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

* This section has no continuity with section 565.001, shown repealed by S.B. 276, 82nd G.A. 1st Reg. Sess., 1983.

565.002. Definitions.—As used in this chapter, unless a different meaning is otherwise plainly required:

(1) "Adequate cause" means cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control;

(2) "Conduct" includes any act or omission;

(3) "Deliberation" means cool reflection for any length of time no matter how brief;

(4) "Intoxicated condition" means under the influence of alcohol, a controlled substance, or drug, or any combination thereof;

(5) "Operates" means physically driving or operating or being in actual physical control of a motor vehicle;

(6) "Serious physical injury" means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body;

(7) "Sudden passion" means passion directly caused by and arising out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation;

(8) "Trier" means the judge or jurors to whom issues of fact, guilt or innocence, or the assessment and declaration of punishment are submitted for decision.

(L. 1983 S.B. 276)

Effective 10-1-84 (L. 1984 S.B. 448 § A)

* **565.003.** Culpable mental state may exist though different person killed—time between act and death no defense.—1. The culpable mental state necessary for a homicide offense may be found to exist if the only difference between what actually occurred and what was the object of the offender's state of mind is that a different person or persons were killed.

2. The length of time which transpires between conduct which results in a death and is the basis of a homicide offense and the event of such death is no defense to any charge of homicide.

(L. 1983 S.B. 276)

Effective 10-1-84 (L. 1984 S.B. 448 § A)

* This section has no continuity with section 565.003 shown repealed by S.B. 276, 82nd G.A. 1st Reg. Sess., 1983.

* **565.004.** Joinder of offenses, exception—prior offenders, procedure, exception, first degree murder—joinder, first degree murder, waiver of death penalty.—1. Each homicide offense which is lawfully joined in the same indictment or information together with any homicide offense or offense other than a homicide shall be charged together with such offense in separate counts. A count charging any offense of homicide may only be charged and tried together with one or more counts of any other homicide or offense other than a homicide when all such offenses arise out of the same transaction or constitute part of a common scheme or plan. Except as provided in subsections 2, 3, and 4 of this section, no murder in the first degree offense may be tried together with any offense other than murder in the first degree. In the event of a joinder of homicide offenses, all offenses charged which are supported by the evidence in the case, together with all proper lesser offenses under section 565.025, shall, when requested by one of the parties or the court, be submitted to the jury or, in a jury-waived trial, considered by the judge.

2. A count charging any offense of homicide of a particular individual may be joined in an indictment or information and tried with one or more counts charging alternatively any other homicide or offense other than a homicide com-

mitted against that individual. The state shall not be required to make an election as to the alternative count on which it will proceed. This subsection in no way limits the right to try in the conjunctive, where they are properly joined under subsection 1 of this section, either separate offenses other than murder in the first degree or separate offenses of murder in the first degree committed against different individuals.

3. When a defendant has been charged and proven before trial to be a prior offender pursuant to chapter 558, RSMo, so that the judge shall assess punishment and not a jury for an offense other than murder in the first degree, that offense may be tried and submitted to the trier together with any murder in the first degree charged with which it is lawfully joined. In such case the judge will assess punishment on any offense joined with a murder in the first degree charge according to law and, when the trier is a jury, it shall be instructed upon punishment on the charge of murder in the first degree in accordance with section 565.030.

4. When the state waives the death penalty for a murder first degree offense, that offense may be tried and submitted to the trier together with any other charge with which it is lawfully joined.

(L. 1983 S.B. 276)

Effective 10-1-84 (L. 1984 S.B. 448 § A)

* This section has no continuity with section 565.004 shown repealed by S.B. 276, 82nd G.A. 1st Reg. Sess., 1983

* **565.005.** Prior to trial for first degree murder, opposing counsels to furnish requested information, rules applied.—1. At a reasonable time before the commencement of the first stage of any trial of murder in the first degree at which the death penalty is not waived, the state and defendant, upon request and without order of the court, shall serve counsel of the opposing party with:

(1) A list of all aggravating or mitigating circumstances as provided in subsection 1 of section 565.032, which the party intends to prove at the second stage of the trial;

(2) The names of all persons whom the party intends to call as witnesses at the second stage of the trial;

(3) Copies or locations and custodian of any books, papers, documents, photographs or objects which the party intends to offer at the second stage of the trial. If copies of such materials are not supplied to opposing counsel, the party shall cause them to be made available for inspection and copying without order of the court.

2. The disclosures required in subsection 1 of this section are supplemental to those required by rules of the supreme court relating to

a continuing duty to disclose information, the use of matters disclosed, matters not subject to disclosure, protective orders, and sanctions for failure to comply with an applicable discovery rule or order, all of which shall also apply to any disclosure required by this section.

(L. 1983 S.B. 276)

Effective 10-1-84 (L. 1984 S.B. 448 § A)

* This section has no continuity with section 565.005 shown repealed by S.B. 276, 82nd G.A. 1st Reg. Sess., 1983.

* **565.006. Waiver of jury trial permitted, when.**—1. At any time before the commencement of the trial of a homicide offense, the defendant may, with the assent of the court, waive a trial by jury and agree to submit all issues in the case to the court, whose finding shall have the force and effect of a verdict of a jury. Such a waiver must include a waiver of a trial by jury of all issues and offenses charged in the case, including the punishment to be assessed and imposed if the defendant is found guilty.

2. No defendant who pleads guilty to a homicide offense or who is found guilty of a homicide offense after trial to the court without a jury shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state.

3. If a defendant is found guilty of murder in the first degree after a jury trial in which the state has not waived the death penalty, the defendant may not waive a jury trial of the issue of the punishment to be imposed, except by agreement with the state and the court.

4. Any waiver of a jury trial and agreement permitted by this section shall be entered in the court record.

(L. 1983 S.B. 276)

Effective 10-1-84 (L. 1984 S.B. 448 § A)

* This section has no continuity with section 565.006 shown repealed by S.B. 276, 82nd G.A. 1st Reg. Sess., 1983.

565.020. First degree murder, penalty.—

1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Murder in the first degree is a class A felony, except that the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

(L. 1983 S.B. 276)

Effective 10-1-84 (L. 1984 S.B. 448 § A)

Execution, location, duties of the warden. RSMo 546.738

* **565.021. Second degree murder, penalty.**—

1. A person commits the crime of murder in the second degree if he:

(1) Knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person; or

(2) Commits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.

2. Murder in the second degree is a class A felony, and the punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, other than murder or manslaughter.

3. Notwithstanding section 556.046, RSMo, and section 565.025, in any charge of murder in the second degree, the jury shall be instructed on, or, in a jury-waived trial, the judge shall consider, any and all of the subdivisions in subsection 1 of this section which are supported by the evidence and requested by one of the parties or the court.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A)

Effective 10-1-84

* This section has no continuity with § 565.021 shown repealed by S.B. 276, 82nd G.A. 1st Reg. Sess., 1983.

565.023. Voluntary manslaughter, penalty—under influence of sudden passion, defendant's burden to inject.—1. A person commits the crime of voluntary manslaughter if he:

(1) Causes the death of another person under circumstances that would constitute murder in the second degree under subdivision (1) of subsection 1 of section 565.021, except that he caused the death under the influence of sudden passion arising from adequate cause; or

(2) Knowingly assists another in the commission of self-murder.

2. The defendant shall have the burden of injecting the issue of influence of sudden passion arising from adequate cause under subdivision (1) of subsection 1 of this section.

3. Voluntary manslaughter is a class B felony.

(L. 1983 S.B. 276)

Effective 10-1-84 (L. 1984 S.B. 448 § A)

565.024. Involuntary manslaughter, penalty.

—1. A person commits the crime of involuntary manslaughter if he:

(1) Recklessly causes the death of another person; or

(2) While in an intoxicated condition operates a motor vehicle in this state and, when so oper-

ating, acts with criminal negligence to cause the death of any person.

2. Involuntary manslaughter is a class C felony.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A, A.L. 1986 H.B. 1596)

565.025. Lesser degree offenses of first and second degree murder—instruction on lesser offenses, when.—1. With the exceptions provided in subsection 3 of this section and subsection 3 of section 565.021 section 565.046, RSMo, shall be used for the purpose of consideration of lesser offenses by the trier in all homicide cases.

2. The following lists shall comprise, in the order listed, the lesser degree offenses:

(1) The lesser degree offenses of murder in the first degree are:

(a) Murder in the second degree under subdivisions (1) and (2) of subsection 1 of section 565.021;

(b) Voluntary manslaughter under subdivision (1) of subsection 1 of section 565.023; and

(c) Involuntary manslaughter under subdivision (1) of subsection 1 of section 565.024;

(2) The lesser degree offenses of murder in the second degree are:

(a) Voluntary manslaughter under subdivision (1) of subsection 1 of section 565.023; and

(b) Involuntary manslaughter under subdivision (1) of subsection 1 of section 565.024.

3. No instruction on a lesser included offense shall be submitted unless requested by one of the parties or the court.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A)
Effective 10-1-84

565.030. Trial procedure, first degree murder.—1. Where murder in the first degree is charged but not submitted or where the state waives the death penalty, the submission to the trier and all subsequent proceedings in the case shall proceed as in all other criminal cases with a single stage trial in which guilt and punishment are submitted together.

2. Where murder in the first degree is submitted to the trier without a waiver of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage. If an offense is charged other than murder in the first degree in a count together with a count of murder in the first degree, the trial judge shall assess punishment on any such offense according to law, after the de-

fendant is found guilty of such offense and after he finds the defendant to be a prior offender pursuant to chapter 558, RSMo.

3. If murder in the first degree is submitted and the death penalty was not waived but the trier finds the defendant guilty of a lesser homicide, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. No further evidence shall be received. If the trier is a jury it shall be instructed on the law. The attorneys may then argue as in other criminal cases the issue of punishment, after which the trier shall assess and declare the punishment as in all other criminal cases.

4. If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence of any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032 may be presented subject to the rules of evidence at criminal trials. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(1) If the trier does not find beyond a reasonable doubt at least one of the aggravating circumstances set out in subsection 2 of section 565.032; or

(2) If the trier does not find beyond a reasonable doubt that any one or more of the aggravating circumstances listed in subsection 2 of section 565.032, if found, together with any other authorized aggravating circumstances found, warrant imposing the death sentence; or

(3) If the trier finds the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

If the trier is a jury it shall be so instructed. If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment

the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A)
Effective 10-1-84

565.032. Evidence to be considered in assessing punishment in first degree murder cases for which death penalty authorized.—1. In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which are requested by the state and supported by the evidence;

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which are requested by the defendant and supported by the evidence;

(3) Any mitigating or aggravating circumstances otherwise authorized by law and supported by the evidence and requested by a party including any aspect of the defendant's character, the record of any prior criminal convictions, and pleas and findings of guilty and admissions of guilt of any crime or pleas of nolo contendere of the defendant;

(4) All evidence received during the first stage of the trial.

2. Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions;

(2) The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide;

(3) The offender by his act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another;

(5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person;

(7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty;

(9) The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another;

(11) The murder in the first degree was committed while the defendant was engaged in the perpetration or in the attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195, RSMo;

(12) The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness;

(13) The murdered individual was an employee of an institution or facility of the department of corrections and human resources of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility;

(14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder in the first degree was committed while the defendant was under the influ-

ence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) 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;

(7) The age of the defendant at the time of the crime.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A)
Effective 10-1-84

565.035. Supreme court to review all death sentences, procedure—powers of court—assistant to court authorized, duties.—1. Whenever the death penalty is imposed in any case, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court together with a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Missouri.

2. The supreme court of Missouri shall consider the punishment as well as any errors enumerated by way of appeal.

3. With regard to the sentence, the supreme court shall determine:

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

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

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

4. Both the defendant and the state shall have the right to submit briefs within the time

provided by the supreme court, and to present oral argument to the supreme court.

5. The supreme court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and resentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor; or

(3) Set the sentence aside and remand the case for retrial of the punishment hearing. A new jury shall be selected or a jury may be waived by agreement of both parties and then the punishment trial shall proceed in accordance with this chapter, with the exception that the evidence of the guilty verdict shall be admissible in the new trial together with the official transcript of any testimony and evidence properly admitted in each stage of the original trial where relevant to determine punishment.

6. There shall be an assistant to the supreme court, who shall be an attorney appointed by the supreme court and who shall serve at the pleasure of the court. The court shall accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed after May 26, 1977, or such earlier date as the court may deem appropriate. The assistant shall provide the court with whatever extracted information the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant. The court shall be authorized to employ an appropriate staff, within the limits of appropriations made for that purpose, and such methods to compile such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence. The office of the assistant to the supreme court shall be attached to the office of the clerk of the supreme court for administrative purposes.

7. In addition to the mandatory sentence review, there shall be a right of direct appeal of the conviction to the supreme court of Missouri. This right of appeal may be waived by the defendant. If an appeal is taken, the appeal and the sentence review shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

565.040. Death penalty, if held unconstitutional, resentencing procedure.—1. In the event that the death penalty provided in this chapter is held to be unconstitutional, any person convicted of murder in the first degree shall be sentenced by the court to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for resentencing or retrial of the punishment pursuant to subsection 5 of section 565.036*.

2. In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of section 565.035.

(L. 1983 S.B. 276)

Effective 10-1-84 (L. 1984 S.B. 448 § A)

* Probably should be 565.035, since there is no § 565.036 and § 565.035 is germane.

565.050. Assault, first degree, penalty.—

1. A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person.

2. Assault in the first degree is a class B felony unless in the course thereof the actor inflicts serious physical injury on the victim in which case it is a class A felony.

(L. 1977 S.B. 60, A.L. 1983 S.B. 276)

Effective 10-1-84 (L. 1984 S.B. 448 § A)

565.060. Assault, second degree, penalty.—

1. A person commits the crime of assault in the second degree if he:

(1) Attempts to kill or knowingly causes or attempts to cause serious physical injury to another person under the influence of sudden passion arising out of adequate cause; or

(2) Attempts to cause or knowingly causes physical injury to another person by means of a deadly weapon or dangerous instrument; or

(3) Recklessly causes serious physical injury to another person, or

(4) While in an intoxicated condition or under the influence of controlled substances or drugs, operates a motor vehicle in this state and, when so operating, acts with criminal negligence to cause physical injury to any other person than himself.

2. The defendant shall have the burden of injecting the issue of influence of sudden passion arising from adequate cause under subdivision (1) of subsection 1 of this section.

3. Assault in the second degree is a class C felony.

(L. 1977 S.B. 60, A.L. 1983 S.B. 276, A.L. 1984 S.B. 602)

"Physical injury", terms used in instructions were terms of common usage and no definition of such terms are required (Mo.App.) State v. Mace, 665 S.W.2d 655.

565.065. Unlawful endangerment of another, penalty.—1. A person commits the crime of unlawful endangerment of another if, while engaged in or as a part of the enterprise for the production of a controlled substance, he protects or attempts to protect the production of the controlled substance by creating, setting up, building, erecting, or using any device or weapon which causes or is intended to cause physical injury to another person.

2. Unlawful endangerment of another is a class C felony.

(L. 1986 S.B. 450)

Effective 3-17-86

565.070. Assault in the third degree.—1. A person commits the crime of assault in the third degree if:

(1) He attempts to cause or recklessly causes physical injury to another person; or

(2) With criminal negligence he causes physical injury to another person by means of a deadly weapon; or

(3) He purposely places another person in apprehension of immediate physical injury; or

(4) He recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person; or

(5) He knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative.

2. Assault in the third degree is a class A misdemeanor unless committed under subdivision (3) or (5) of subsection 1 in which case it is a class C misdemeanor.

(L. 1977 S.B. 60)

Effective 1-1-79

565.080. Consent as a defense.—1. When conduct is charged to constitute an offense because it causes or threatens physical injury, con-

sent to that conduct or to the infliction of the injury is a defense only if:

(1) The physical injury consented to or threatened by the conduct is not serious physical injury; or

(2) The conduct and the harm are reasonably foreseeable hazards of

(a) The victim's occupation or profession; or

(b) Joint participation in a lawful athletic contest or competitive sport; or

(3) The consent establishes a justification for the conduct under chapter 563 of this code.

2. The defendant shall have the burden of injecting the issue of consent.

(L. 1977 S.B. 60)

Effective 1-1-79

565.090. Harassment.—1. A person commits the crime of harassment if for the purpose of frightening or disturbing another person, he

(1) Communicates in writing or by telephone a threat to commit any felony; or

(2) Makes a telephone call or communicates in writing and uses coarse language offensive to one of average sensibility; or

(3) Makes a telephone call anonymously; or

(4) Makes repeated telephone calls.

2. Harassment is a class A misdemeanor.

(L. 1977 S.B. 60)

Effective 1-1-79

(1981) Statute defining offense of harassment was not unconstitutionally vague, and was not overbroad and did not deny due process. *State v. Koetting* (Mo.), 616 S.W.2d 822.

(1985) Held not unconstitutionally overbroad. The caller's intent to disturb or frighten need not be the sole intent or purpose of the call. *State v. Koetting* (A.), 691 S.W.2d 328.

565.100. Lack of consent in kidnapping and crimes involving restraint.—1. It is an element of the offenses described in sections 565.110 through 565.130 of this chapter that the confinement, movement or restraint be committed without the consent of the victim.

2. Lack of consent results from:

(1) Forcible compulsion; or

(2) Incapacity to consent.

3. A person is deemed incapable of consent if he is

(1) Less than fourteen years old; or

(2) Incapacitated.

(L. 1977 S.B. 60)

Effective 1-1-79

(1981) Statute defining offense of harassment was not unconstitutionally vague, and was not overbroad and did not deny due process. *State v. Koetting* (Mo.), 616 S.W.2d 822.

565.110. Kidnapping.—1. A person commits the crime of kidnapping if he unlawfully removes another without his consent from the

place where he is found or unlawfully confines another without his consent for a substantial period, for the purpose of

(1) Holding that person for ransom or reward, or for any other act to be performed or not performed for the return or release of that person; or

(2) Using the person as a shield or as a hostage; or

(3) Interfering with the performance of any governmental or political function; or

(4) Facilitating the commission of any felony or flight thereafter; or

(5) Inflicting physical injury on or terrorizing the victim or another.

2. Kidnapping is a class A felony unless committed under subdivision (4) or (5) of subsection 1 in which cases it is a class B felony.

(L. 1977 S.B. 60)

Effective 1-1-79

(1981) Kidnapping and rape were separate offenses and defendant thus was not punished twice for same offense because confinement and movement of victim were not incidental to commission of rape but increased risk of harm and danger to victim. *State v. Stewart* (A.), 615 S.W.2d 600.

565.120. Felonious restraint.—1. A person commits the crime of felonious restraint if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty and exposes him to a substantial risk of serious physical injury.

2. Felonious restraint is a class C felony.

(L. 1977 S.B. 60)

Effective 1-1-79

565.130. False imprisonment.—1. A person commits the crime of false imprisonment if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty.

2. False imprisonment is a class A misdemeanor unless the person unlawfully restrained is removed from this state, in which case it is a class D felony.

(L. 1977 S.B. 60)

Effective 1-1-79

565.140. Defenses to false imprisonment.—

1. A person does not commit false imprisonment under section 565.130 if the person restrained is a child under the age of seventeen and

(1) A parent, guardian or other person responsible for the general supervision of the child's welfare has consented to the restraint; or

(2) The actor is a relative of the child; and

(a) The actor's sole purpose is to assume control of the child; and

(b) The child is not taken out of the state of Missouri.

2. For the purpose of this section, "relative" means a parent or stepparent, ancestor, sibling, uncle or aunt, including an adoptive relative of the same degree through marriage or adoption.

3. The defendant shall have the burden of injecting the issue of a defense under this section.

(L. 1977 S.B. 60)
Effective 1-1-79

565.150. Interference with custody.—1. A person commits the crime of interference with

custody if, knowing that he has no legal right to do so, he takes or entices from lawful custody any person entrusted by order of a court to the custody of another person or institution.

2. Interference with custody is a class A misdemeanor unless the person taken or enticed away from legal custody is removed from this state, in which case it is a class D felony.

(L. 1977 S.B. 60)
Effective 1-1-79

(1984) "Takes . . . from lawful custody" is construed to include unlawful retention of any person following a period of temporary lawful custody. *State v. Edmisten* (Mo.App.), 674 S.W.2d 576.

ARTICLE 25

SPECIAL PROCEDURE IN CASES OF HOMICIDE

Section.

- 29-2537. Convict; appears to be mentally incompetent; notice to judge; suspend sentence; commission appointed; findings; suspension of execution; when.
29-2540. Female convict; pregnant; warden notify judge; procedures.
29-2541. Female convict; finding convict is pregnant; judge; duties; costs.

29-2537. Convict; appears to be mentally incompetent; notice to judge; suspend sentence; commission appointed; findings; suspension of execution; when. If any convict under sentence of death shall appear to be mentally incompetent, the warden or sheriff having him or her in custody shall forthwith give notice thereof to a judge of the district court of the judicial district in which the convict was tried and sentenced and such judge shall at once make such investigation as shall satisfy him or her as to whether a commission ought to be named to examine such convict.

If he or she shall determine that there is not sufficient reason for the appointment of a commission, he or she shall so find and refuse to suspend the execution of the convict. If the judge shall determine that a commission ought to be appointed to examine such convict, he or she shall make a finding to that effect and cause it to be entered upon the records of the district court in the county in which such convict was sentenced, and, if necessary, the judge shall suspend the execution and appoint the three superintendents of the state centers at Lincoln, Hastings, and Norfolk as a commission to examine such convict. The commission shall examine the convict to determine whether he or she is mentally competent or mentally incompetent and shall report its findings in writing to such judge within ten days after its appointment. If for any reason any of such superintendents cannot serve in such capacity, the judge shall appoint in his or her place one of the assistant superintendents of such center. If two of the commission shall find the convict mentally incompetent, the judge shall suspend his or her execution until further order. Any time thereafter, when it shall be made to appear to the judge that the convict has become mentally competent, he or she shall appoint a commission in the manner provided in this section, who shall make another investigation as to the mental competency of the convict, and in case such convict is again declared mentally incompetent his or her execution shall be suspended by the judge until further order. Such proceedings may be had at such times as the judge shall order until it is either determined that the convict is mentally competent or incurably mentally incompetent.

Source: Laws 1973, LB 268, § 22; Laws 1986, LB 1177, § 8.
Effective date July 17, 1986.

29-2540. Female convict; pregnant; warden notify judge; procedures. If a female convict under sentence of death shall appear to be pregnant, the warden or sheriff shall in like manner notify the judge of the

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district court of the county in which she was sentenced, who shall in all things proceed as in the case of a mentally incompetent convict.

Source: Laws 1973, LB 268, § 25; Laws 1986, LB 1177, § 9.
Effective date July 17, 1986.

29-2541. Female convict; finding convict is pregnant; judge; duties; costs. If the commission shall find that the female convict is pregnant, the judge shall suspend the execution of her sentence. At such time as it shall be determined that such woman is no longer pregnant, the judge shall appoint a time for her execution, which shall be carried into effect in the same manner as provided in the original sentence. The costs and expenses thereof shall be the same as those provided for in the case of a mentally incompetent convict and shall be paid in the same manner.

Source: Laws 1973, LB 268, § 26; Laws 1986, LB 1177, § 10.
Effective date July 17, 1986.

ARTICLE 27

RECEIPTS AND DISBURSEMENTS OF MONEY IN CRIMINAL CAUSES

Section.

29-2701. Fines, costs, forfeited recognizances; to whom paid.

29-2702. Money received; disposition.

29-2703. Costs; county not liable; exception.

29-2708. Receipts; to what funds credited; disbursement of costs in criminal cases.

29-2709. Misdemeanor, traffic, and juvenile cases; uncollectible costs; certification; payment; conditions.

29-2701. Fines, costs, forfeited recognizances; to whom paid. All money due upon any judgment for fines, costs, or forfeited recognizances shall be paid to the judge or clerk of the court where the judgment is pending, if paid before execution is issued therefor, otherwise to the officer holding the execution, or such money may be paid to the sheriff of the county if the judgment debtor is in jail. Every sheriff, marshal, or other ministerial officer who shall receive any such money shall pay the same to the proper clerk of the court within ten days from the time of receiving the same.

Source: G.S. p. 840; R.S. 1913, § 9237; C.S. 1922, § 10266; C.S. 1929, § 29-2701; R.S. 1943, § 29-2701; Laws 1973, LB 226, § 18; Laws 1988, LB 1030, § 28.
Effective date April 14, 1988.

29-2702. Money received; disposition. Every judge or clerk of court, upon receiving any money on account of forfeited recognizances, fines, or costs accruing or due to the county or state, shall pay the same to the treasurer of the proper county, except as may be otherwise expressly provided, within ten days from the time of receiving the same. When any money is paid to a judge or clerk of court on account of costs due to individual persons, the same shall be paid to the persons to whom the same are due upon demand therefor.

Source: G.S. p. 840; R.S. 1913, § 9236; C.S. 1922, § 10267; Laws 1927, c. 62, § 1, p. 223; C.S. 1929, § 29-2702; R.S. 1943, § 29-2702; Laws 1973, LB 226, § 19; Laws 1988, LB 370, § 8.
Effective date July 9, 1988.

convicts, and for their safe custody during such employment. The county jail is hereby declared to extend to any stone quarry, road or other place that shall be designated by the county board for the employment of such convicts.

Source: G.S. p. 839; R.S.1913, § 9202; C.S.1922, § 10209; C.S.1929, § 29-2414.

29-2415. Jail convict labor; disposition of proceeds. It shall be the duty of the county board to make the contracts for the employment of convicts as specified in section 29-2414, and the sheriff of the county, or such other person as may be charged with the administrative direction of the jail, shall collect the proceeds of all such labor, and after paying the board of such convicts and the expenses incident to such labor, to pay the balance to the county treasurer within ten days.

Source: G.S. p. 839; R.S.1913, § 9202; C.S.1922, § 10209; C.S.1929, § 29-2415; R.S.1943, § 29-2415; Laws 1984, LB 394, § 8.

ARTICLE 25

SPECIAL PROCEDURE IN CASES OF HOMICIDE

Section.

- 29-2501 to 29-2518. Repealed. Laws 1973, LB 146, § 6.
- 29-2519. Statement of intent.
- 29-2520. Murder; person found guilty; sentence; determination.
- 29-2521. Determination of sentence; procedure.
- 29-2521.01. Legislative findings.
- 29-2521.02. Criminal homicide cases; review and analysis by Supreme Court; manner.
- 29-2521.03. Criminal homicide cases; appeal; sentence; Supreme Court review.
- 29-2521.04. Criminal homicide cases; Supreme Court review and analyze; district court; provide records.
- 29-2522. Sentence; death; life imprisonment; considerations; determination of death in writing; time of execution.
- 29-2523. Aggravating and mitigating circumstances, defined.
- 29-2524. Existing procedures; act does not repeal.
- 29-2524.01. Criminal homicide; report filed by county attorney; contents; time of filing.
- 29-2524.02. State Court Administrator; criminal homicide report; provide forms.
- 29-2525. Capital punishment cases; appeal; procedure.
- 29-2526. Repealed. Laws 1982, LB 722, § 13.
- 29-2527. Briefs; payment for printing by county.
- 29-2528. Death penalty cases; Supreme Court; orders.
- 29-2529 to 29-2531. Repealed. Laws 1985, LB 41, § 1.
- 29-2532. Mode of inflicting punishment for death.
- 29-2533. Punishment inflicted; exclude view of persons; exception.
- 29-2534. Execution; persons permitted.
- 29-2535. Warden; military force necessary to carry out punishment; inform Governor.

result in a death sentence in one portion of the state should not result in death in a different portion:

(4) Charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results; and

(5) In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

Source: Laws 1978, LB 711, § 1.

A literal interpretation of this section would unconstitutionally encroach upon the judicial function. This section will be restricted in application to a review of cases in which the defendant in the district court was convicted of murder in the first degree. *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33.

In sentencing for a felony not involving the death penalty, there is no requirement that the judge conduct a case-by-case review of similar sentencings in that jurisdiction. *State v. Glover*, 207 Neb. 487, 299 N.W.2d 445.

Sections 29-2521.01, 29-2521.02, and 29-2521.03

only require the Supreme Court to review cases involving criminal homicides committed on or after April 20, 1973, in which the trial court has imposed a sentence of death. *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18.

In adopting sections 29-2521.01 to 29-2522, the Legislature intended to establish a procedure whereby the death penalty would be applied uniformly throughout the state. The procedure does not come into play where the death penalty is not imposed. *State v. Welsh*, 202 Neb. 249, 275 N.W.2d 54.

29-2521.02. Criminal homicide cases; review and analysis by Supreme Court; manner. The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur.

Source: Laws 1978, LB 711, § 2.

A literal interpretation of this section would unconstitutionally encroach upon the judicial function. This section will be restricted in application to a review of cases in which the defendant in the district court was convicted of murder in the first degree. *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33.

Sections 29-2521.01 to 29-2521.03 require the Supreme Court to review cases involving criminal homicides committed on or after April 20,

1973, in which the trial court has imposed a sentence of death. *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18.

In adopting sections 29-2521.01 to 29-2522, the Legislature intended to establish a procedure whereby the death penalty would be applied uniformly throughout the state. The procedure does not come into play where the death penalty is not imposed. *State v. Welsh*, 202 Neb. 249, 275 N.W.2d 54.

29-2521.03. Criminal homicide cases; appeal; sentence; Supreme Court review. The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by con-

paring such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

Source: Laws 1978, LB 711, § 3.

The Supreme Court's review and analysis shall include all first degree murder convictions for offenses committed on or after April 20, 1973, including cases presently pending in this court on appeal. State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984).

Sections 29-2521.01 to 29-2521.03 require the Supreme Court to review cases involving criminal homicides committed on or after April 20, 1973, in which the trial court has imposed a sen-

tence of death. State v. Williams, 205 Neb. 56, 287 N.W.2d 18.

In adopting sections 29-2521.01 to 29-2522, the Legislature intended to establish a procedure whereby the death penalty would be applied uniformly throughout the state. The procedure does not come into play where the death penalty is not imposed. State v. Welsh, 202 Neb. 249, 275 N.W.2d 54.

29-2521.04. Criminal homicide cases; Supreme Court review and analyze; district court; provide records. Each district court shall provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2522 and 29-2524.

Source: Laws 1978, LB 711, § 4.

In adopting sections 29-2521.01 to 29-2522, the Legislature intended to establish a procedure whereby the death penalty would be applied uniformly throughout the state. The procedure

does not come into play where the death penalty is not imposed. State v. Welsh, 202 Neb. 249, 275 N.W.2d 54.

29-2522. Sentence; death; life imprisonment; considerations; determination of death in writing; time of execution. After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

- (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;
- (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

If an order is entered sentencing the defendant to death, a date for execution shall not be fixed until after the conclusion of the appeal provided for by section 29-2525.

Source: Laws 1973, LB 268, § 7; Laws 1978, LB 711, § 5; Laws 1982, LB 722, § 10.

No jury determination of aggravating and mitigating circumstances or the application thereof is required by state or federal constitution. *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33.

Death sentence was not excessive where the sentencing court found four statutory aggravating circumstances present and no mitigating circumstances. *State v. Harper*, 208 Neb. 568, 394 N.W.2d 663.

Amendments to this section by virtue of Laws 1978, L.B. 711, do not apply to a capital case in which a final sentence was imposed prior to the effective date of L.B. 711, and such case will not be reviewed in light of the act. *State v. Rust*, 208 Neb. 320, 303 N.W.2d 490.

In adopting sections 29-2521.01 to 29-2522, the Legislature intended to establish a procedure whereby the death penalty would be applied uniformly throughout the state. The procedure does not come into play where the death penalty is not imposed. *State v. Welsh*, 202 Neb. 249, 275 N.W.2d 54.

Death sentence upheld where defendant murdered six family members, including children, and sexually molested female victims. *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881.

Death sentence not excessive for defendant with history of multiple convictions for bank robbery, first-degree assault, and armed robbery, where defendant point-blank murdered and wounded unresisting robbery victims. *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876.

Death sentence imposed where twenty-three-year-old defendant with prior criminal convictions for aggravated assault and grand larceny killed civilian aiding police in the apprehension of defendant fleeing the scene of an armed robbery. *State v. Rust*, 197 Neb. 525, 250 N.W.2d 867.

District court's imposition of death sentence reduced to life imprisonment where sixteen-year-old defendant with no prior criminal record killed victim instantaneously, without torture. *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849.

29-2523. Aggravating and mitigating circumstances, defined. The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

Source: Laws 1973, LB 268, § 8.

1. Aggravating circumstances
2. Mitigating circumstances
3. Miscellaneous

1. Aggravating circumstances

No jury determination of aggravating and mitigating circumstances or the application thereof is required by state or federal constitution. A state of mind which indicates a callous disposition to repeat the crime of murder manifests exceptional depravity by ordinary standards of morality and intelligence within the meaning of subsection (1)(d) of this section. An aggravating circumstance existed where the murder was committed to conceal the identity of the perpetrator of a robbery under subsection (1)(b) of this section. *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33.

Circumstances of victim's death, found bound and gagged when killed, constituted effort to conceal identity of perpetrator. *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95.

Prior record of multiple crimes of violence constituted an aggravating circumstance. *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95.

2. Mitigating circumstances

This section does not in any way limit the mitigating circumstances a sentencing court may consider, and the sentencing court should be liberal in admitting evidence the defendant asserts is a mitigating factor. *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33.

3. Miscellaneous

Aggravating circumstances must be proved beyond a reasonable doubt. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

Subsection (1)(d) of this section is not constitutionally vague. *State v. Reeves*, 216 Neb.

206, 344 N.W.2d 433 (1984).

Where a defendant has testified in a previous criminal case under a lawful grant of immunity, the sentencing court in a subsequent criminal case cannot consider such testimony or any information directly or indirectly derived from it in determining whether a death sentence should be imposed under the provisions of this section and related statutes. *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982).

This section, as interpreted in *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980), meets the requirements of the Neb. Const. article 1, section 9, and of the U.S. *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440.

In arriving at a sentence in a first degree murder case, the court is not limited in its consideration to the factors listed in this section but may consider any matter relevant to imposition of sentence and receive any evidence with probative value as to the character of the defendant. *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671.

Murder committed during act of robbery held not a murder for pecuniary gain herein. *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95.

The facts establishing an aggravating circumstance must be proved beyond a reasonable doubt. Definitions of aggravating and mitigating circumstances discussed and interpreted. *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881; *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876; *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867; *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849.

29-2524. Existing procedures; act does not repeal. Nothing in sections 24-342, 28-303, 28-313, and 29-2519 to 29-2546 shall be in any way

deemed to repeal or limit existing procedures for automatic review of capital cases, nor shall it in any way limit the right of the Supreme Court to reduce a sentence of death to a sentence of life imprisonment in accordance with the provisions of section 29-2308, nor shall it limit the right of the Board of Pardons to commute any sentence of death to a sentence of life imprisonment.

Source: Laws 1973, LB 268, § 9; Laws 1978, LB 748, § 23; Laws 1978, LB 711, § 6.

29-2524.01. Criminal homicide; report filed by county attorney; contents; time of filing. Each county attorney shall file a report with the State Court Administrator for each criminal homicide case filed by him. The report shall include (1) the initial charge filed, (2) any reduction in the initial charge and whether such reduction was the result of a plea bargain or some other reason, (3) dismissals prior to trial, (4) outcome of the trial including not guilty, guilty as charged, guilty of a lesser included offense, or dismissal, (5) the sentence imposed, (6) whether an appeal was taken, and (7) such other information as may be required by the State Court Administrator. Such report shall be filed not later than thirty days after ultimate disposition of the case by the court.

Source: Laws 1978, LB 749, § 1.

29-2524.02. State Court Administrator; criminal homicide report; provide forms. The State Court Administrator shall provide all forms necessary to carry out sections 29-2524.01 and 29-2524.02.

Source: Laws 1978, LB 749, § 2.

29-2525. Capital punishment cases; appeal; procedure. In cases when the punishment is capital, no notice of appeal shall be required and within the time prescribed by section 25-1931 for the commencement of proceedings for the reversing, vacating, or modifying of judgments, the clerk of the district court in which the conviction was had shall notify the court reporter who shall prepare a bill of exceptions as in other cases and the clerk shall prepare and file with the Clerk of the Supreme Court a transcript of the record of the proceedings, for which no charge shall be made. The Clerk of the Supreme Court shall, upon receipt of the transcript, docket the appeal. No payment of a docket fee shall be required.

Source: Laws 1973, LB 268, § 10; Laws 1982, LB 722, § 11.

A determination of whether a defendant is a sexual sociopath is of no importance where a death sentence has been imposed. The purpose of the sexual sociopath law is to provide confinement with treatment for those persons subject to the laws who are amenable to treatment and confinement without treatment for those subject to the law but not amenable to treat-

ment. Sentencing is not to be delayed indefinitely where sexual sociopath proceedings have been instituted. Once the death penalty has been imposed, none of the defendant's contentions concerning the sexual sociopath law requires further consideration. *State v. Orey*, 205 Neb. 90, 287 N.W.2d 58.

Supreme Court automatically reviews each

SPECIAL PROCEDURE IN CASES OF HOMICIDE § 29-2533

case where death penalty imposed, comparing death penalty statute. *State v. Simants*, 197
all previous capital cases where death penalty Neb. 549, 250 N.W.2d 881; *State v. Rust*, 197
has or has not been imposed under the new Neb. 528, 250 N.W.2d 867.

29-2526. Repealed. Laws 1982, LB 722, § 13.

29-2527. Briefs; payment for printing by county. The cost of printing briefs on behalf of any person convicted of an offense for which the punishment adjudged is capital shall be paid by the county.

Source: Laws 1973, LB 268, § 12.

29-2528. Death penalty cases; Supreme Court; orders. In all cases when the death penalty has been imposed by the district court, the Supreme Court shall, after consideration of the appeal, order the prisoner to be discharged, a new trial to be had, or appoint a day certain for the execution of the sentence.

Source: Laws 1973, LB 268, § 13; Laws 1982, LB 722, § 12.

29-2529 to 29-2531. Repealed. Laws 1985, LB 41, § 1.

29-2532. Mode of inflicting punishment for death. The mode of inflicting the punishment of death, in all cases, shall be by causing to pass through the body of the convicted person a current of electricity of sufficient intensity to cause death; and the application of such current shall be continued until such convicted person is dead. The warden of the Nebraska Penal and Correctional Complex, and in case of his death, sickness, absence or inability to act, then the deputy warden, shall be the executioner; *Provided*, the warden may in writing specially designate and appoint a suitable and competent person to act for him, and under his direction, as executioner in any particular case. A crime punishable by death must be punished according to the provisions herein made and not otherwise.

Source: Laws 1973, LB 268, § 17.

29-2533. Punishment inflicted; exclude view of persons; exception. When any person shall be sentenced to be electrocuted, such punishment shall be inflicted within the walls of the Department of Correctional Services adult correctional facility, or within the yard or enclosure adjacent thereto, under the supervision of the warden and in such a manner as to exclude the view of all persons save those permitted to be present as provided in sections 29-2534 and 29-2535.

Source: Laws 1973, LB 268, § 18.

The definitions of aggravating and mitigating circumstances are not unconstitutionally vague. *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33.

29-2534. Execution; persons permitted. Besides the warden, the deputy warden, the executioner, in case one shall have been appointed by the warden, and his assistants, the following persons, and no others, except as provided in section 29-2535, may be present at the execution: The clergyman in attendance upon the prisoner, such other persons, not exceeding three in number as the prisoner may designate, and such other persons, not exceeding six in number, as the warden may designate.

Source: Laws 1973, LB 268, § 19.

29-2535. Warden; military force necessary to carry out punishment; inform Governor. Whenever the warden shall deem the presence of a military force necessary to carry into effect the provisions of sections 29-2532 and 29-2533, he shall make the fact known to the Governor of the state, who is hereby authorized to call out so much of the military force of the state as in his judgment may be necessary for the purpose.

Source: Laws 1973, LB 268, § 20.

29-2536. Warden; inflict punishment; return of proceedings; clerk subjoin return to the record of conviction and sentence. Whenever the warden shall inflict the punishment of death upon a convict, in obedience to the command of the court, he shall make return of his proceedings as soon as may be to the clerk of the court where the conviction was had, and the clerk shall subjoin the return to the record of conviction and sentence.

Source: Laws 1973, LB 268, § 21.

29-2537. Convict; appears to be insane; notice to court; judge; suspend sentence; commission appointed; findings; suspension of execution; when. If any convict under sentence of death shall appear to be insane, the warden or sheriff having him in custody shall forthwith give notice thereof to a judge of the district court of the judicial district in which the convict was tried and sentenced, and such judge shall at once make such investigation as shall satisfy him as to whether a commission ought to be named to examine such convict.

If he shall determine that there is not sufficient reason for the appointment of a commission he shall so find and refuse to suspend the execution of the convict. If the judge shall determine that a commission ought to be appointed to examine such convict, he shall make a finding to that effect and cause it to be entered upon the records of the district court in the county in which such convict was sentenced, and, if necessary, the judge shall suspend the execution and appoint the three superintendents of the state centers at Lincoln, Hastings, and Norfolk as a commission to examine such convict; and the commission shall examine the convict with a view of determining whether he is sane or insane and shall report its

findings in writing to such judge within ten days after its appointment. If for any reason any of such superintendents cannot serve in such capacity, the judge shall appoint in his place one of the assistant superintendents of such center. If two of the commission shall find the convict insane, the judge shall suspend his execution until further order. Any time thereafter, when it shall be made to appear to the judge that the convict has become sane, he shall appoint a commission in the manner aforesaid, who shall make another investigation as to the sanity of the convict, and in case said convict is again declared insane his execution shall be suspended by the judge until further order. Such proceedings may be had at such times as the judge shall order until it is either determined that the convict is sane or incurably insane.

Source: Laws 1973, LB 268, § 22.

29-2538. Suspension of execution pending investigation; convict found sane; judge; appoint a day of execution. In case such judge has suspended the execution of the convict pending an investigation as to his sanity, and the convict shall be found to be sane, the judge shall appoint a day for his execution, which shall be carried into effect in the same manner as provided in the original sentence, a certified copy of which shall be transmitted by mail to the executioner.

Source: Laws 1973, LB 268, § 23.

29-2539. Commission; compensation; mileage; payment. The members of such commission shall each receive mileage at the rate authorized in section 84-306.03 for state employees for each mile actually and necessarily traveled in reaching and returning from the place where the convict is confined and examined, and it is hereby made the duty of the commission to act in this capacity without compensation other than that already provided for them by law. All of the findings and orders aforesaid shall be entered in the district court records of the county wherein the convict was originally tried and sentenced, and the costs therefor, including those providing for the mileage of the members of the commission, shall be allowed and paid in the usual manner by the county in which the convict was tried and sentenced to death.

Source: Laws 1973, LB 268, § 24; Laws 1981, LB 204, § 44.

29-2540. Female convict; pregnant; warden notify judge; proceed as insane convict. If a female convict under sentence of death shall appear to be pregnant, the warden or sheriff shall in like manner notify the judge of the district court of the county in which she was sentenced, who shall in all things proceed as in the case of an insane convict.

Source: Laws 1973, LB 268, § 25.

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29-2541. Female convict; commission; finding convict is with child; suspension of sentence; judge appoint a time of execution; costs. If the commission shall find that the female convict is with child, the judge shall suspend the execution of her sentence. At such time as it shall be determined that such woman is no longer pregnant, the judge shall appoint a time for her execution, which shall be carried into effect in the same manner as provided in the original sentence. The costs and expenses thereof shall be the same as those provided for in the case of an insane convict and shall be paid in the same manner.

Source: Laws 1973, LB 268, § 26.

29-2542. Escape convict; retaken; notify Governor; fix time of execution. If any person who has been convicted of a crime punishable by death, and sentenced to be electrocuted, shall escape, and shall not be retaken before the time fixed for his execution, it shall be lawful for the warden, or any sheriff or other officer or person to rearrest such person and return him to the custody of the warden of the Nebraska Penal and Correctional Complex, who shall thereupon make return thereof to the Governor of the state, and the Governor shall thereupon issue a warrant, fixing and appointing a day for the execution, which shall be carried into effect by the warden in the same manner as herein provided for the execution of an original sentence of death.

Source: Laws 1973, LB 268, § 27.

29-2543. Convicted person of crime punishable by death; clerk of court; order; remove convicted person to Department of Correctional Services adult correctional facility. Whenever any person has been tried and convicted before any district court in this state, of a crime punishable by death, and under the conviction has been sentenced by the court to suffer death, it shall be the duty of the clerk of the court before which the conviction was had to issue his warrant, under the seal of the court, reciting therein the conviction and sentence directed to the warden of the Nebraska Penal and Correctional Complex, commanding him to proceed at the time named in the sentence to carry the same into execution by causing the person so convicted and sentenced to be electrocuted by the passage of an electric current through the body until dead, the clerk shall deliver the warrant to the sheriff of the county in which conviction was had, and such sheriff shall thereupon forthwith remove such convicted person to the Department of Correctional Services adult correctional facility of the state, and there deliver him, together with the warrant, into the custody of the warden who shall receive and safely keep such convict within the Department of Correctional Services adult correctional facility until the time of execution, or until otherwise ordered by competent authority.

Source: Laws 1973, LB 268, § 28.

29-2544. Warden; duty. It shall be the duty of the warden of the Nebraska Penal and Correctional Complex on receipt of such warrant, if the Supreme Court or a judge thereof shall not have ordered a suspension of the execution, and if the Board of Pardons shall not have commuted such sentence, or granted a reprieve or pardon to such convict, to proceed at the time named in the warrant to carry the sentence into execution in the manner herein provided; and of the manner of his executing the warrant, and of his doings thereon, he shall forthwith make return to the clerk, who shall cause the warrant and return to be recorded as a part of the records of the case.

Source: Laws 1973, LB 268, § 29.

29-2545. Court; day certain for execution; notice to warden; duties. In case the Supreme Court, or any judge thereof, shall allow a writ of error in any case and order a suspension of the execution of sentence, and, after having heard and determined the same, the court shall appoint a day certain for, and order the execution of the sentence, it shall be the duty of the clerk of the court to issue to the warden his warrant, under the seal of the court, commanding him to proceed to carry the sentence into execution at the time so appointed by the court, which time shall be stated in the warrant. Upon receipt of the warrant it shall be the duty of the warden to cause the sentence to be executed as herein provided, at the time so appointed by the court, and to make due return of the warrant, and of his proceedings thereunder, forthwith to the clerk of the district court before which the conviction was had, who shall cause the same to be recorded as a part of the records of the case.

Source: Laws 1973, LB 268, § 30.

29-2546. Reversal of judgment of conviction; warden deliver convict to custody of sheriff; await further judgment and order of court. Whenever the Supreme Court shall reverse the judgment of conviction in accordance with which any convict has been sentenced to death and is confined in the Department of Correctional Services adult correctional facility as herein provided, it shall be the duty of the warden, upon receipt of a copy of such judgment of reversal, duly certified by the clerk of the court, and under the seal thereof, to forthwith deliver such convict into the custody of the sheriff of the county in which the conviction was had, to be by him held in the jail of the county awaiting the further judgment and order of the court in the case.

Source: Laws 1973, LB 268, § 31.

176.2235. Violation of residential confinement.

If it is determined that the person violated any term or condition of his residential confinement, the sentence may be rescinded, modified or continued. If it is rescinded, another punishment authorized by law must be imposed. (1987, ch. 804, § 4, p. 2229.)

176.2237. Procedures for supervision of residential confinees.

The department of parole and probation shall establish procedures to administer a program of supervision for persons who are ordered to a term of residential confinement. (1987, ch. 804, § 5, p. 2229.)

SUSPENSION OF EXECUTION OF DEATH PENALTY

General Provisions

176.415. When execution of death penalty may be stayed.

The execution of a judgment of death must be stayed only:

1. By the state board of pardons commissioners as authorized in sections 13 and 14 of article 5 of the constitution of the State of Nevada;

2. When a direct appeal from the judgment of conviction and sentence is taken to the supreme court;

3. By a judge of the district court of the county in which the state prison is situated, for the purpose of an investigation of sanity or pregnancy as provided in NRS 176.425 to 176.485, inclusive; or

4. Pursuant to the provisions of NRS 176.486 to 176.492, inclusive. (1967, p. 1440; 1987, ch. 539, § 27, p. 1221.)

Effect of amendment. — The 1987 amendment, in the introductory paragraph, substituted "must" for "shall"; in subdivision 1, deleted "governor or the" preceding "state board"; in subdivision 2, substituted "a direct appeal from the judgment of conviction and

sentence" for "an appeal from such judgment," deleted "of Nevada; or" following "court"; in subsection 3, substituted "an investigation of sanity or pregnancy" for "a sanity or pregnancy investigation," added "or" following "inclusive"; and added subsection 4.

Petition for Post-Conviction Relief

176.486. Stay of execution of death sentence upon petition for post-conviction relief.

A district court having proper jurisdiction or the supreme court, if it has proper jurisdiction, may stay the execution of a sentence of death when a petition for post-conviction relief has been filed only after appropriate notice has been given to the appropriate respondent in the case. (1987, ch. 539, § 21, p. 1220.)

176.487. Stay of death sentence upon filing of petition for post-conviction relief; considerations by court.

When a person under a sentence of death files a proper petition for post-conviction relief pursuant to chapter 34 or 177 of NRS, a district court or the supreme court on a subsequent appeal shall enter a stay of execution if the court finds a stay necessary for a proper consideration of the claims for relief. In making this determination, the court shall consider whether:

1. The petition is the first effort by the petitioner to raise constitutional claims for relief after a direct appeal from his conviction and the petition raises claims other than those which could have been raised at trial or on direct appeal.

2. The petition is timely filed and jurisdictionally appropriate and does not set forth conclusory claims only.

3. If the petition is not the first petition for post-conviction relief, it raises constitutional claims which are not procedurally barred by laches, the law of the case, the doctrines of abuse of the writ or successive petition or any other procedural default.

4. If the petition is a second or successive petition, it presents substantial grounds upon which relief might be granted and valid justification for the claims not having been presented in a prior proceeding.

5. The petition asserts claims based upon specified facts or law which, if true, would entitle the petitioner to relief.

6. The court cannot decide legal claims which are properly raised or expeditiously hold an evidentiary hearing on factual claims which are properly raised before the execution of sentence. (1987, ch. 539, § 22, p. 1220.)

176.488. Stay entered in writing; distribution of copies.

A stay of execution must be entered by the court in writing and copies sent as soon as practicable to the director of the department of prisons, the warden of the institution in which the offender is imprisoned and the office of the attorney general in Carson City. The court shall also enter an order and take all necessary actions to expedite further proceeding before that court. (1987, ch. 539, § 23, p. 1221.)

176.489. Vacation of stay if petition denied.

Any stay of execution previously entered by the court must be vacated if the court denies a petition filed pursuant to chapter 34 or 177 of NRS. (1987, ch. 539, § 24, p. 1221.)

176.491. Stay dissolved upon denial of appeal.

Upon the denial of any appeal to the supreme court pursuant to chapter 34 or 177 of NRS, the supreme court shall dissolve any stay of execution previously entered. No stay of such execution may be entered or continued by the supreme court after the denial of an appeal pending the filing of a petition with a federal court or a petition for a writ of certiorari with the Supreme Court of the United States. (1987, ch. 539, § 25, p. 1221.)

176.492. Petition to dissolve stay improperly entered; effect on jurisdiction of court.

The respondent may file a petition with the supreme court within 10 days after the entry of a stay of execution by a district court to dissolve a stay which was improperly entered. The filing of the petition does not divest the district court of jurisdiction to hear the claims raised by the petition and the district court shall not delay consideration of the claims because of the filing of such a petition with the supreme court. (1987, ch. 539, § 26, p. 1221.)

CHAPTER 177.**APPEALS AND REMEDIES AFTER CONVICTION.****APPEALS: WHEN ALLOWED. HOW TAKEN AND EFFECT THEREOF**

Sec.

177.055. Automatic appeal in certain cases; mandatory review of death sentence by supreme court.

POST-CONVICTION PROCEDURE

177.315. Remedy: To whom available; conditions.

177.325. Commencement of proceedings: Verification; filing; service.

177.335. Petition: Contents and limitation of grounds.

177.340. Form of petition for post-conviction relief.

177.345. Inability to pay costs.

Sec.

177.355. Pleadings.

177.357. Answer to petition for post-conviction relief; attachment of transcripts and appeal brief of petitioner.

177.360. Applicability of Nevada Rules of Civil Procedure; discovery.

177.365. Hearing; evidence; order.

177.370. Expansion of record upon evidentiary hearing.

177.375. Waiver of claims.

177.380. Procedure where post-conviction relief petition of petitioner under death sentence.

177.383. Specific findings of fact by court; service of copy of decision on respondent.

APPEALS: WHEN ALLOWED, HOW TAKEN AND EFFECT THEREOF**177.055. Automatic appeal in certain cases; mandatory review of death sentence by supreme court.**

1. When upon a plea of not guilty or not guilty by reason of insanity a judgment of death is entered, an appeal is deemed automatically taken by the

PROCEDURE IN CRIMINAL CASES

CHAPTER 176.

JUDGMENT AND EXECUTION.

COMMISSION FOR ESTABLISHING
SUGGESTED SENTENCES FOR
FELONIES

Sec.

- 176.003. Creation; members; compensation.
- 176.006. Development of statistical information describing sentencing.
- 176.009. Solicitation and use of grants in aid for support; use of computers and programs of department of parole and probation.
- 176.011. Review of suggested and actual sentences by department of prisons; projections; annual reports.

SENTENCE AND JUDGMENT

- 176.015. Imposition of sentence; right of defendant to make statement in his own behalf.
- 176.025. Death sentence not to be imposed on person under age of 16 years convicted of crime.
- 176.033. Sentence of imprisonment required or permitted by statute: Definite period; modification of sentence.
- 176.035. Conviction of two or more offenses; concurrent and consecutive sentences.
- 176.045. Imposition of concurrent or consecutive sentence on person under sentence in another jurisdiction.
- 176.055. Credit against sentence of imprisonment.
- 176.059. Administrative assessment: Collection; disbursement; limitations on use. [For effective date of this section — See Editor's note.]
- 176.059. Administrative assessment: Collection; disbursement; limitations on use. [Delayed effective date — See Editor's note.]
- 176.061. Administrative assessment: Distribution of money received by state controller.
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176.345. Proceedings when conviction carries death penalty.

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Credit must be given for a void conviction. — The inflexible state sentencing system which under a former section required the time for service of all sentences to be computed from date of imposition denied the equal protection of the laws to one who successfully asserted a post-conviction remedy while serving the initial void sentence and was thereafter resentenced for the same offense or acts for which the sentence was originally imposed without being given credit for the time served. *Gray v. Hocker*, 268 F. Supp. 1004 (D. Nev. 1967).

A term of imprisonment begins on the date sentence is imposed and a grant of

probation is a suspension of execution of a state prison sentence, not a suspension of the sentence itself; consequently, a person on probation while not imprisoned is actually under a sentence of imprisonment the execution of which has been suspended. Therefore, the district court cannot modify the sentence once the defendant was placed on probation. *Grant v. State*, 99 Nev. 149, 659 P.2d 878 (1983).

Cited in: *Ibsen v. Warden, Nev. State Prison*, 86 Nev. 540, 471 P.2d 229 (1970); *Anglin v. State*, 90 Nev. 287, 525 P.2d 34 (1974); *Miller v. Hayes*, 95 Nev. 927, 604 P.2d 117 (1979).

OPINIONS OF ATTORNEY GENERAL

Transfer from jail to prison without delay. — A person convicted, sentenced to imprisonment in the state prison should not be unreasonably detained in the county jail by the sheriff. AGO (10-10-1910). (Opinion under former similar statute).

Modification of death sentence. — Where a death sentence is modified on appeal to a sentence of imprisonment, the term of commitment should be counted from the date of the original sentence, not from the date of the modification. AGO (3-26-1937). (Opinion under former similar statute).

"Good time" credits. — The provisions of

NRS 176.055, permitting credit to be allowed against a prison sentence for time spent in confinement prior to conviction, have no retroactive application; when allowed, credit should be deducted from the end of sentence, because this section provides that the term of imprisonment begins on the date of the sentence by a court. Credit for preconviction confinement cannot be utilized to increase "good time" credits authorized by former NRS 209.285 (see now NRS 209.443), because "good time" credits may be earned only while confined at prison. AGO 25 (6-8-1971).

176.345. Proceedings when conviction carries death penalty.

1. When a judgment of death has been pronounced, a certified copy of the entry thereof in the minutes of the court shall be forthwith executed and attested in triplicate by the clerk under the seal of the court. There shall be attached to the triplicate copies a warrant signed by the judge, attested by the clerk, under the seal of the court, which shall recite the fact of the conviction and judgment, and appoint a week within which the judgment is to be executed, which must not be less than 60 days nor more than 90 days from the time of judgment, and must direct the sheriff to deliver the prisoner to such authorized person as the director of the department of prisons designates to receive the prisoner, for execution, such prison to be designated in the warrant.

2. The original of the triplicate copies of the judgment and warrant shall be filed in the office of the county clerk, and two of the triplicate copies shall be immediately delivered by the clerk to the sheriff of the county; one of the triplicate copies to be delivered by the sheriff, with the prisoner, to such authorized person as the director of the department of prisons designates, which shall be the warrant and authority of the director for the imprisonment

and execution of the prisoner, as therein provided and commanded, and the director shall return his certified copy of the judgment to the county clerk of the county whence it was issued; and the other triplicate copy of such judgment and warrant to be the warrant and authority of the sheriff to deliver the prisoner to such authorized person so designated by the director; the last-mentioned copy to be returned to the county clerk by the sheriff with his proceedings endorsed thereon. (1967, p. 1438; 1977, p. 860.)

176.355. Execution of death penalty: Method; place of execution; witnesses.

1. The judgment of death must be inflicted by an injection of a lethal drug.
2. The director of the department of prisons shall:
 - (a) Select the drug or combination of drugs to be used for the execution after consulting with the state health officer;
 - (b) Be present at the execution; and
 - (c) Invite a competent physician and not less than six nor more than nine reputable citizens over the age of 21 years, to be present at the execution.
3. The execution must take place at the state prison.
4. No person who has not been invited by the director may witness the execution. (1967, p. 1439; 1977, p. 860; 1983, p. 1937.)

176.365. Director of department of prisons to make return on death warrant.

After the execution, the director of the department of prisons must make a return upon the death warrant to the court by which the judgment was rendered, showing the time, place, mode and manner in which it was executed. (1967, p. 1439; 1977, p. 860.)

SUSPENSION OF EXECUTION OF DEATH PENALTY: INSANITY OR PREGNANCY

176.415. When execution of death penalty may be stayed.

The execution of a judgment of death shall be stayed only:

1. By the governor or the state board of pardons commissioners as authorized in sections 13 and 14 of article 5 of the constitution of the State of Nevada;
2. When an appeal from such judgment is taken to the supreme court of Nevada; or
3. By a judge of the district court of the county in which the state prison is situated, for the purpose of a sanity or pregnancy investigation as provided in NRS 176.425 to 176.485, inclusive. (1967, p. 1440.)

176.425. Sanity investigation: Filing of petition; stay of execution.

1. If, after judgment of death, there is a good reason to believe that the defendant has become insane, the director of the department of prisons to whom the convicted person has been delivered for execution may by a petition

in writing, verified by a physician, petition a district judge of the district court of the county in which the state prison is situated, alleging the present insanity of such person, whereupon such judge shall:

(a) Fix a day for a hearing to determine whether the convicted person is insane;

(b) Appoint two physicians, at least one of whom shall be a psychiatrist, to examine the convicted person; and

(c) Give immediate notice of the hearing to the attorney general and to the district attorney of the county in which the conviction was had.

2. If the judge determines that the hearing on and the determination of the sanity of the convicted person cannot be had before the date of the execution of such person, the judge may stay the execution of the judgment of death pending the determination of the sanity of the convicted person. (1967, p. 1440; 1977, p. 861.)

176.435. Sanity investigation: Conduct of hearing.

1. On the day fixed, the director of the department of prisons shall bring the convicted person before the court, and the attorney general or his deputy shall attend the hearing. The district attorney of the county in which the conviction was had, and an attorney for the convicted person, may attend the hearing.

2. The court shall receive the report of the examining physicians and may require the production of other evidence. The attorney general or his deputy, the district attorney, and the attorney for the convicted person or such person if he is without counsel may introduce evidence and cross-examine any witness, including the examining physicians.

3. The court shall then make and enter its finding of sanity or insanity. (1967, p. 1440; 1977, p. 861.)

176.445. Execution of judgment when defendant found sane.

If it is found by the court that the convicted person is sane, the director of the department of prisons must execute the judgment of death; but if the judgment has been stayed, as provided in NRS 176.425, the judge shall cause a certified copy of his order staying the execution of the judgment, together with a certified copy of his finding that the convicted person is sane, to be immediately forwarded by the clerk of the court to the clerk of the district court of the county in which the conviction was had, who shall give notice thereof to the district attorney of such county. Proceedings shall then be instituted in the last-mentioned district court for the issuance of a new warrant of execution of the judgment of death in the manner provided in NRS 176.495. (1967, p. 1441; 1977, p. 861.)

176.455. Suspension of execution when defendant found insane; proceedings on recovery of sanity.

1. If it is found by the court that the convicted person is insane, the judge shall make and enter an order staying the execution of the judgment of death

until the convicted person becomes sane, and shall therein order the director of the department of prisons to confine such person in a safe place of confinement until his reason is restored.

2. The clerk of the court shall serve or cause to be served three certified copies of the order, one on the director, one on the governor, for the use of the state board of pardons commissioners, and one on the clerk of the district court of the county in which the conviction was had.

3. If the convicted person thereafter becomes sane, notice of this fact shall be given by the director to a judge of the court staying the execution of the judgment, and the judge, upon being satisfied that such person is then sane, shall enter an order vacating the order staying the execution of the judgment.

4. The clerk of the court shall immediately serve or cause to be served three certified copies of such vacating order as follows: One on the director, one on the governor, for the use of the state board of pardons commissioners, and one on the clerk of the district court of the county in which the conviction was had, who shall give notice thereof to the district attorney of such county, whereupon proceedings shall be instituted in the last-mentioned district court for the issuance of a new warrant of execution of the judgment of death in the manner provided in NRS 176.495. (1967, p. 1441; 1977, p. 861.)

176.465. Investigation of pregnancy: Procedure; hearing.

1. If there is good reason to believe that a female against whom a judgment of death has been rendered is pregnant, the director of the department of prisons to whom she has been delivered for execution shall petition a judge of the district court of the county in which the state prison is situated, in writing, alleging such pregnancy, whereupon such judge shall summon a jury of three physicians to inquire into the alleged pregnancy and fix a day for the hearing thereon, and give immediate notice thereon to the attorney general and to the district attorney of the county in which the conviction was had.

2. The provisions of NRS 176.425 and 176.435 apply to the proceedings upon the inquisition, except that three physicians shall be summoned. They shall certify in writing to the court their findings as to pregnancy. (1967, p. 1441; 1977, p. 862.)

176.475. Proceedings after investigation: Execution of judgment; suspension of execution; issuance of warrant on termination of pregnancy.

1. If it is found by the court that the female is not pregnant, the director of the department of prisons must execute the judgment of death; but if a stay of execution has been granted pursuant to NRS 176.425 the procedure provided in NRS 176.445 is applicable.

2. If the female is found to be pregnant, the judge shall enter an order staying the execution of the judgment of death, and shall therein order the director to confine such female in a safe place of confinement commensurate with her condition until further order of the court.

3. When such female is no longer pregnant, notice of this fact shall be given by the director to a judge of the court staying the execution of the judgment. Thereupon the judge, upon being satisfied that the pregnancy no longer exists, shall enter an order vacating the order staying the execution of the judgment and shall direct the clerk of such court to serve or cause to be served three certified copies of such order, one on the director, one on the governor, for the use of the state board of pardons commissioners, and one on the clerk of the district court of the county in which the conviction was had, who shall give notice thereof to the district attorney of such county, whereupon proceedings shall be instituted in the last-mentioned district court for the issuance of a new warrant of execution of the judgment in the manner provided in NRS 176.495. (1967, p. 1442; 1977, p. 862.)

176.485. Costs of investigations borne by state; manner of payment from reserve for statutory contingency fund.

The costs and expenses of the investigations provided in NRS 176.415 to 176.475, inclusive, shall be borne by the state and paid in the following manner: The costs and expenses of an investigation shall first be paid by county warrants drawn upon the order of the district judge. The county clerk shall then present a claim to the state board of examiners for the amount of such costs and expenses so ordered paid by the district judge. Upon approval of the claim by the state board of examiners, the state controller shall draw his warrant for the payment thereof, and the state treasurer shall pay the same from the reserve for statutory contingency fund. (1967, p. 1442.)

NEW ORDER TO EXECUTE JUDGMENT OF DEATH

176.495. New warrant generally.

1. If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had must, upon the application of the attorney general or the district attorney of the county in which the conviction was had, cause another warrant to be drawn, signed by the judge and attested by the clerk under the seal of the court, and delivered to the director of the department of prisons.

2. The warrant must state the conviction and judgment and appoint a day on which the judgment is to be executed, which must be not less than 15 days nor more than 30 days after the date of the warrant.

3. Where sentence was imposed by a district court composed of three judges, the district judge before whom the confession or plea was made, or his successor in office, shall set the date of execution and sign the warrant. (1967, p. 1442; 1977, p. 863.)

CASE NOTES

The question of whether a warrant was valid or not was moot where the time set for execution had passed and a new one was required. *Rainsberger v. State*, 85 Nev. 22, 449 P.2d 254 (1969).

176.505. Order following appeal.

When a remittitur showing the affirmation of a judgment of death has been filed with the clerk of the court from which the appeal therefrom has been taken, the court in which the conviction was had must inquire into the facts, and, if no legal reasons exist against the execution of the judgment, must make and enter an order that the director of the department of prisons shall execute the judgment at a specified time; but the presence of the defendant in the court at the time the order of execution is made and entered, or the warrant is issued, as in this section provided, is not required. (1967, p. 1442; 1977, p. 863.)

CASE NOTES

Cited in: *Bishop v. State*, 95 Nev. 511, 597 P.2d 273 (1979).

NEW TRIAL

176.515. New trial: Grounds; time for filing motion.

1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.

2. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment.

3. A motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt.

4. A motion for a new trial based on any other grounds must be made within 7 days after verdict or finding of guilt or within such further time as the court may fix during the 7-day period. (1967, p. 1443; 1983, p. 1671.)

CASE NOTES

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- II. Newly Discovered Evidence.
- III. Verdict Contrary to the Evidence.

I. GENERAL CONSIDERATION.

The exercise by the trial court of the right to grant a new trial will be presumed correct and proper by the appellate court until the contrary is shown. *State v. Crockett*, 84 Nev. 516, 444 P.2d 896 (1968).

The right to grant new trials being conferred upon the district courts, its exercise by them in any particular case will be presumed to be correct and proper until the contrary is shown. *State v. Stanley*, 4 Nev. 71 (1868). (Decision under former similar statute).

CRIMES AND PUNISHMENTS

CHAPTER 200.

CRIMES AGAINST THE PERSON.

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HOMICIDE

200.010. "Murder" defined.

Murder is the unlawful killing of a human being, with malice aforethought, either express or implied, or caused by a controlled substance which was sold to a person in violation of chapter 453 of NRS. The unlawful killing may be effected by any of the various means by which death may be occasioned. (C&P 1911, § 119; RL 1912, § 6384; CL 1929, § 10066; 1983, p. 512; 1985, p. 1598.)

Cross references. — As to definition of death for legal and medical purposes, see NRS 451.007.