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629:2 Criminal Solicitation.

ANNOTATIONS

½. Construction with other laws

Under this section, if one solicits another to commit murder and the one solicited does not kill, then the one who solicited is guilty of criminal solicitation. State v. Kilgus (1986) 128 NH 577, 519 A2d 231.

If one solicits another to commit murder and the one solicited does kill the one solicited is guilty of capital murder under RSA 630:1. State v. Kilgus (1986) 128 NH 577, 519 A2d 231.

Solicitation of another to commit murder may constitute an attempt to commit murder within RSA 629:1 when the defendant has completed all the necessary preliminary steps for the hired murder to take place. State v. Kilgus (1986) 128 NH 577, 519 A2d 231.

1. Cited

Cited in In re Tinkham, 59 B.R. 209 (Bkrtcy. D.N.H. 1986); State v. Kaplan (1986) 128 NH 562, 517 A2d 1162.

629:3 Conspiracy.

ANNOTATIONS

2. Particular offenses

A conviction for conspiracy to commit murder was proper where the evidence, when read in the light most favorable to the state, was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant and another entered into a conspiracy to kill, and that three overt acts were carried out in furtherance of the conspiracy. State v. Kilgus (1986) 128 NH 577, 519 A2d 231.

3. Cited

Cited in State v. Labonville (1985) 126 NH 451, 492 A2d 1376; State v. Mayo (1985) 127 NH 67, 497 A2d 853; State v. Dennehy (1985) 127 NH 425, 503 A2d 769; In re Tinkham, 59 B.R. 209 (Bkrtcy. D.N.H. 1986); State v. Riccio (1988) 130 NH 376, 540 A2d 1239.

CHAPTER 630

HOMICIDE

LIBRARY REFERENCES

ALR

Corporation's criminal liability for homicide. 45 ALR4th 1021.

Homicide by causing victim's brain-dead condition. 42 ALR4th 742.

Homicide: physician's withdrawal of life supports from comatose patient. 47 ALR4th 18.

Homicide: sufficiency of evidence of mother's neglect of infant born alive, in minutes or hours immediately following unattended birth, to establish culpable homicide. 40 ALR4th 724.

630:1 Capital Murder.

I. A person is guilty of capital murder if he knowingl, causes the death of:

[No changes in subparagraphs (a) and (b).]

(c) Another by criminally soliciting a person to cause said death or after having been criminally solicited by another for his personal pecuniary gain; [Amended 1988, 69:1, eff. April 11, 1988.]

(d) Another after being sentenced to life imprisonment without parole. [Added 1988, 69:1, eff. April 11, 1988.]

II. As used in this section, a "law enforcement officer" is a sheriff or deputy sheriff of any county, a state police officer, a constable or police officer of any city or town, an official or employee of any prison, jail or

corrections institution, a probation-parole officer, or a conservation officer. [Amended 1988, 69:2, eff. April 11, 1988.]

[No changes in paragraphs III–V.]

Amendments—1988. Paragraph I: Made a minor stylistic change at the end of subpar. (c) and added subpar. (d).

Paragraph II: Inserted "a probation-parole officer" preceding "or a conservation officer" at the end of the paragraph.

ANNOTATIONS

1a. Elements

In order to support a conviction under paragraph I of this section, it must be shown that the accused acted purposely to cause the death of another; there must be not only an intention to kill, but also a deliberate and premeditated design to kill. Elbert v. Cunningham, 616 F. Supp. 433 (D.N.H. 1985).

Where the evidence in a prosecution for attempted first degree murder indicated that the victim, after perceiving her attacker and being threatened, ran several steps before she was shot in the head from behind, there was sufficient evidence that the defendant had time for reflection and consideration and deliberately attempted to inflict a lethal wound on the victim to warrant submission of the charge to a jury for consideration. Elbert v. Cunningham, 616 F. Supp. 433 (D.N.H. 1985).

1b. Construction

If one solicits another to commit murder and the one solicited does kill, then the one who solicited is guilty of capital murder under this section. State v. Kilgus (1986) 128 NH 577, 519 A2d 231.

If one solicits another to commit murder and the one solicited does not kill, then the one who solicited is guilty of criminal solicitation under RSA 629:2. State v. Kilgus (1986) 128 NH 577, 519 A2d 231.

Solicitation of another to commit murder may constitute an attempt to commit murder under RSA 629:1 when the defendant has completed all the necessary preliminary steps for the hired murder to take place. State v. Kilgus (1986) 128 NH 577, 519 A2d 231.

630:1-a First Degree Murder.

I. A person is guilty of murder in the first degree if he:

[No change in subparagraph (a).]

(b) Knowingly causes the death of

(1) Another before, after, while engaged in the commission of, or while attempting to commit aggravated felonious sexual assault as defined in RSA 632-A:2 or felonious sexual assault as defined in RSA 632-A:3; [Amended 1986, 132:3, eff. Jan. 1, 1987.]

[No changes in subparagraphs (2)–(4).]

[No changes in paragraphs II and III.]

Amendments—1986. Paragraph I(b)(1): Amended generally.

ANNOTATIONS

2. Elements

The elements of premeditation and deliberation necessary to prove first degree murder require that there be not only intention to kill, but also a deliberate and premeditated design to kill; such design must precede the killing by some appreciable space of time, but the time need not be long. State v. Place (1985) 126 NH 613, 495 A2d 1293; State v. Shackford (1986) 127 NH 695, 506 A2d 315.

While the object of the requirement of premeditation and deliberation, in a first degree murder charge, is to rule out action on sudden impulse, no particular period of premeditation and deliberation is required. State v. Shackford (1986) 127 NH 695, 506 A2d 315.

Whether the deliberate and premeditated design to kill necessary for a charge of first degree murder was formed must be determined from all the circumstances of the case. State v. Place (1985) 126 NH 613, 495 A2d 1293; State v. Shackford (1986) 127 NH 695, 506 A2d 315.

4a. Evidence

Circumstantial evidence which may be weighed by the jury, in its determination whether there was sufficient premeditation and deliberation to support a charge of first degree murder, includes the character of the

7. Evidence

RSA 265:87, listing prerequisites necessary to admit blood alcohol content tests into evidence, applies to an individual arrested for negligent homicide. State v. Dery (1985) 126 NH 747, 496 A2d 357.

8. Cited

Cited in State v. Place (1986) 128 NH 75, 513 A2d 321; State v. Dominguez (1986) 128 NH 288, 512 A2d 1112; State v. Lescard (1986) 128 NH 495, 517 A2d 1158.

630:4 Causing or Aiding Suicide.

LIBRARY REFERENCES

ALR

Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide. 40 ALR4th 702.

630:5 Procedure in Capital Murder.

[No changes in paragraphs I–VIII.]

IX. Where penalty of death is imposed the sentence shall be that the defendant be imprisoned in the state prison at Concord until the day appointed for his execution, which shall not be within one year from the day sentence is passed. The punishment of death shall be inflicted by continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice. [Amended 1986, 82:1, eff. Jan. 1, 1987.]

X. The commissioner of the department of corrections or his designee shall determine the substance or substances to be used and the procedures to be used in any execution; provided, however, that, if for any reason the commissioner finds it to be impractical to carry out the punishment of death by administration of the required lethal substance or substances, the sentence of death may be carried out by hanging under the provisions of law for the death penalty by hanging in effect December 31, 1986. [Added 1986, 82:1, eff. Jan. 1, 1987.]

XI. An execution carried out by lethal injection shall be performed by a person selected by the commissioner of the department of corrections and trained to administer the injection. The person administering the injection need not be a physician, registered nurse, or licensed practical nurse licensed or registered under the laws of this or any other state. [Added 1986, 82:1, eff. Jan. 1, 1987.]

XII. The infliction of the punishment of death by administration of the required lethal substance or substances in the manner 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 of corrections or his designee, without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law. [Added 1986, 82:1, eff. Jan. 1, 1987.]

XIII. The governor and council or their designee shall determine the time of performing such execution and shall be responsible for providing

facilities for the implementation thereof. In no event shall a sentence of death be carried out upon a pregnant woman or a person for an offense committed while a minor. [Added 1986, 82:1, eff. Jan. 1, 1987.]

Amendments—1986. Paragraph IX: Deleted "and he shall then be hanged by the neck until he is dead" following "sentence is passed" at the end of the first sentence, rewrote the second sentence and deleted the third sentence.

Paragraph X: Added.

Paragraph XI: Added.

Paragraph XII: Added.

Paragraph XIII: Added.

Applicability of 1986 amendment. 1986, 82:2, eff. Jan. 1, 1987, provided: "This act shall apply to all executions carried out on or after January 1, 1987, irrespective of the date sentence was imposed."

Manner of imposition of death sentence in event of decision holding 1986 amendment unconstitutional. 1986, 82:3, eff. Jan. 1, 1987, provided: "If the execution of the death sentence as provided in RSA 630:5, IX as amended by this act is held unconstitutional, then the sentence of death shall be carried out by hanging, under the provisions of law for the death penalty by hanging in effect on December 31, 1986."

CHAPTER 631

ASSAULT AND RELATED OFFENSES

631:1 First Degree Assault.

ANNOTATIONS

½. Construction with other laws

Imposition of consecutive sentences for first degree assault and the felonious use of a firearm violated constitutional guarantee against double jeopardy, because the underlying crime of knowing assault was itself enhanced by the use of a deadly weapon, and the perpetrator could therefore not be properly sentenced a second time for the felonious use of the firearm. State v. Houtenbrink (1988) 130 NH ---, 539 A2d 714.

2. Cited

Cited in State v. Shackford (1986) 127 NH 695, 506 A2d 315; State v. Wood (1986) 128 NH 739, 519 A2d 277; State v. Meaney (1987) 129 NH 448, 529 A2d 384; State v. Beaupre (1987) 129 NH 486, 529 A2d 944; State v. Bellner (1987) 130 NH 89, 534 A2d 396; State v. Guglielmo (1987) 130 NH 240, --- A2d ---.

631:2 Second Degree Assault.

ANNOTATIONS

½. Constitutionality

In the context of this section, the phrase "under circumstances manifesting an extreme indifference to the value of human life" in paragraph III of the section is not unconstitutionally vague. State v. Saucier (1986) 128 NH 291, 512 A2d 1120.

2a. Circumstances manifesting extreme indifference

Second degree assault committed in violation of paragraph III of this section requires proof that the circumstances of the crime manifest extreme indifference; neither paragraph III nor common sense limits the relevant circumstances to the injuries themselves. State v. Bailey (1985) 127 NH 416, 503 A2d 762.

To prove second degree assault committed in violation of paragraph III of this section, the injury or series of injuries need not themselves threaten life. State v. Bailey (1985) 127 NH 416, 503 A2d 762.

Under paragraph III of this section, an attacker acts with extreme indifference to the value of human life when he inflicts any degree of bodily harm on a victim and when the circumstances of the attack demonstrate a blatant disregard for the risk to the victim's life. State v. Saucier (1986) 128 NH 291, 512 A2d 1120.

In order to support a finding that the defendant acted with extreme indifference to the value of human life, as provided in paragraph III of this section, it is not necessary that the particular assaults or injuries charged themselves be life threatening, but instead that the circumstances of the crime manifest extreme indifference. State v. Saucier (1986) 128 NH 291, 512 A2d 1120.

For purposes of paragraph III of this

New Hampshire Code

CHAPTER 630

HOMICIDE

Cross References

Limitation of prosecutions, see RSA 625:8.
Shooting human beings while hunting, see RSA 207:37.

Library References

ALR

Admissibility, as res gestae, of accusatory utterances made by homicide victim before the act. 74 ALR3d 963.

Admissibility of testimony of coroner or mortician as to cause of death in homicide prosecution. 71 ALR3d 1265.

Corporation's criminal liability for homicide. 83 ALR2d 1117.

Criminal liability for death resulting from unlawful furnishing intoxicating liquor or drugs to another. 32 ALR3d 589.

Degree of homicide as affected by accused's religious or occult belief in harmlessness of ceremonial ritualistic acts directly causing fatal injury. 78 ALR3d 1132.

Homicide as affected by lapse of time between injury and death. 60 ALR3d 1323.

Homicide by fright or shock. 47 ALR2d 1072.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death. 65 ALR3d 283.

Peace officer's liability for death or personal injuries caused by intentional force in arresting misdemeanant. 83 ALR3d 238.

Right of peace officer to use deadly force in attempting to arrest fleeing felon. 83 ALR3d 174.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour. 93 ALR3d 925.

Validity and construction of statute defining homicide by conduct manifesting "depraved indifference." 25 ALR4th 311.

630:1 Capital Murder.

I. A person is guilty of capital murder if he knowingly causes the death of:

(a) A law enforcement officer acting in the line of duty;

(b) Another before, after, while engaged in the commission of, or while attempting to commit kidnapping as that offense is defined in RSA 633:1;

(c) Another by criminally soliciting a person to cause said death or after having been criminally solicited by another for his personal pecuniary gain.

II. As used in this section, a "law enforcement officer" is a sheriff or deputy sheriff of any county, a state police officer, a constable or police officer of any city or town, an official or employee of any prison, jail or corrections institution, or a conservation officer.

III. A person convicted of a capital murder may be punished by death.

IV. As used in this section and RSA 630:1-a, 1-b, 2, 3 and 4, the meaning of "another" does not include a foetus.

V. In no event shall any person under the age of 17 years be culpable of a capital murder.

History

Source. 1971, 518:1. 1974, 34:1. 1977, 440:1, eff. Sept. 3, 1977; 588:41, eff. Sept. 16, 1977.

Amendments—1977. Paragraph III: Chapter 440 substituted "may" for "shall" following "murder".

Paragraph IV: Chapter 588 inserted "and" preceding "4" and deleted "and 5" thereafter. —1974. Amended section generally.

CROSS REFERENCES

Appointment of counsel for indigent charged with capital offense, see RSA 604-A:2.
Charging manner of death, see RSA 601:6.
Jury trial in capital cases, see New Hampshire Constitution, Part 1, Article 16.
Procedure in capital murder, see RSA 630:5.
Rights of persons indicted in capital cases, see RSA 604:1.
Sentence for attempted murder, see RSA 651:2, II-c.
Victims permitted to speak before sentencing, see RSA 651:4-a.

ANNOTATIONS

1. Constitutionality

This section is not unconstitutional as a bill of attainder, since it does not provide for a legislative, rather than a judicial, determination of guilt. State v. McPhail (1976) 116 NH 140, 362 A2d 199.

2. Cited

Cited in State v. Lordan (1976) 116 NH 479, 363 A2d 201; State v. Stewart (1976) 116 NH 585, 364 A2d 621; State v. Darcy (1981) 121 NH 220, 427 A2d 516; Pugliese v. Perrin, 567 F. Supp. 1337 (D.N.H. 1983), affirmed, 731 F.2d 85 (1st Cir. 1984).

LIBRARY REFERENCES

New Hampshire Practice

2 N.H.P. Criminal Practice & Procedure § 857.

West Key Number

Homicide ⇐21, 351.

CJS

Homicide §§ 29 et seq., 433 et seq.

ALR

What constitutes termination of felony for purpose of felony-murder rule, 58 ALR3d 851.

630:1-a First Degree Murder.

I. A person is guilty of murder in the first degree if he:

(a) Purposely causes the death of another; or

(b) Knowingly causes the death of:

(1) Another before, after, while engaged in the commission of, or while attempting to commit rape as defined in RSA 632:1 or deviate sexual relations as defined in RSA 632:2, I;

(2) Another before, after, while engaged in the commission of, or while attempting to commit robbery or burglary while armed with a deadly weapon, the death being caused by the use of such weapon;

(3) Another in perpetrating or attempting to perpetrate arson as defined in RSA 634:1, I, II, or III;

(4) The president or president-elect or vice-president or vice-president-elect of the United States, the governor or governor-elect of New Hampshire or any state or any member or member-elect of the congress of the United States, or any candidate for such office after such candidate has been nominated at his party's primary, when such killing is motivated by knowledge of the foregoing capacity of the victim.

II. For the purpose of RSA 630:1-a, I(a), "purposely" shall mean that the actor's conscious object is the death of another, and that his act or acts in furtherance of that object were deliberate and premeditated.

III. A person convicted of a murder in the first degree shall be sentenced to life imprisonment and shall not be eligible for parole at any time.

HISTORY

Source. 1974, 34:2. eff. April 15, 1974.

References in text. RSA 632:1 and 632:2, I, referred to in subpar. I(b)(1), were repealed by 1975, 302:2. See now RSA 632-A.

CROSS REFERENCES

Charging manner of death, see RSA 601:6.
Rights of persons indicted for first degree murder, see RSA 604:1.
Sentence for attempted murder, see RSA 651:2, II-c.
Victims permitted to speak before sentencing, see RSA 651:4-a.

ANNOTATIONS

Cited, 7
Constitutionality, 1
Elements, 2
Indictment, 4
Lesser included offenses, 3
Parole, 6
Sentence, 5

1. Constitutionality

Paragraph III of this section does not constitute cruel and unusual punishment, either on grounds that the sentence is disproportional or on grounds that the sentence does not comport with basic notions of human dignity. State v. Farrow (1978) 118 NH 296, 386 A2d 808.

2. Elements

As elements of first-degree murder under paragraph II of this section, premeditation and deliberation require proof beyond a reasonable doubt of some reflection and consideration upon the choice to kill or not to kill, and the formation of a definite purpose to kill, and while the object of the requirement is to rule out action on sudden impulse, no particular period of premeditation and deliberation is required. State v. Elbert (1984) 125 NH 1, 480 A2d 854.

3. Lesser included offenses

Manslaughter is a lesser included offense of murder and indictment for murder contains all allegations essential to charge manslaughter, so that one indicted for murder may be convicted of manslaughter. Nichols v. Vitek (1974) 114 NH 453, 321 A2d 570.

4. Indictment

The word "purposely" as defined in paragraph II of this section satisfies the common law malice aforethought requirement in a first-degree murder indictment. State v. Glidden (1983) 123 NH 126, 459 A2d 1136.

Supreme court would quash attempted murder indictment where, by reading the indictment, defendant could not know whether he was indicted for attempting to purposely cause the death of another or for attempting to knowingly cause the death of another after having been engaged in the commission of rape. State v. Bussiere (1978) 118 NH 659, 392 A2d 151.

5. Sentence

Permanent isolation from the community of persons convicted of first-degree murder, prescribed by paragraph III of this section, bears a rational relationship to the need to protect society against murderers. State v. Farrow (1978) 118 NH 296, 386 A2d 808.

6. Parole

Seeking to avert any miscarriage of justice that occurs when parole authorities release dangerous felons by restricting power to release persons convicted of first-degree murder to governor through his pardoning power furthers state's goal of protecting society against murderers. State v. Farrow (1978) 118 NH 296, 386 A2d 808.

7. Cited

Cited in State v. Williams (1975) 115 NH 437, 343 A2d 29; State v. Lordan (1976) 116 NH 479, 363 A2d 201; State v. Breest (1976) 116 NH 734, 367 A2d 1320; State v. LaRoche (1977) 117 NH 127, 370 A2d 631; State v. Smith (1979) 119 NH 674, 406 A2d 135; State v. Baker (1980) 120 NH 773, 424 A2d 171; State v. Darcy (1981) 121 NH 220, 427 A2d 516; In re Vernon E. (1981) 121 NH 836, 435 A2d 832; Roy v. Perrin (1982) 122 NH 88, 441 A2d 1151; State v. Lister (1982) 122 NH 603, 448 A2d 395; State v. Comtois (1982) 122 NH 1173, 453 A2d 1324; State v. Sadvari (1983) 123 NH 410, 462 A2d 102; State v. Hamel (1983) 123 NH 670, 466 A2d 555; State v. Lessard (1983) 123 NH 788, 465 A2d 516.

ing of statutes penalizing negligent homicide by operation of a motor vehicle. 20 ALR3d 473.

630:4 Causing or Aiding Suicide.

I. A person is guilty of causing or aiding suicide if he purposely aids or solicits another to commit suicide.

II. Causing or aiding suicide is a class B felony if the actor's conduct causes such suicide or an attempted suicide. Otherwise it is a misdemeanor.

HISTORY

Source. 1971, 518:1, eff. Nov. 1, 1973.

CROSS REFERENCES

Classification of crimes, see RSA 625:9.
Sentences, see RSA 651.
Terminal care document, see RSA 137-H.

ANNOTATIONS

1. Cited

Cited in In re Caulk (1984) 125 NH 226, 480 A2d 93.

LIBRARY REFERENCES

West Key Number

Suicide ⇐3, 4.

CJS

Suicide §§ 4-6.

ALR

Liability of one causing physical injuries as a result of which injured party attempts or commits suicide. 77 ALR3d 311.

Patient's right to refuse treatment allegedly necessary to sustain life. 93 ALR3d 67.

630:5 Procedure in Capital Murder.

I. At the conclusion of all cases of capital murder and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without consideration of punishment.

II. If the jury returns a verdict of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury at which time the only issue shall be the determination of punishment to be imposed, at which evidence may be presented as to any matter that the court deems relevant to sentence, including the following aggravating or mitigating circumstances:

(a) Aggravating circumstances:

(1) The murder was committed by a person under sentence of imprisonment.

(2) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(3) At the time the murder was committed the defendant also committed another murder.

(4) The defendant knowingly created a great risk of death to many persons.

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

(6) The murder was committed for pecuniary gain.

(7) The murder was exceptionally heinous, atrocious or cruel.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal activity.

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(3) The defendant acted under extreme duress or under the substantial domination of another person.

(4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired.

(5) The youth of the defendant at the time of the crime.

III. The jury shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury.

IV. Upon the conclusion of the evidence and arguments, the jury shall retire to determine the punishment to be imposed. If by a unanimous vote the jury finds at least one statutory aggravating circumstance the jury may fix the sentence of death. The judge shall then impose the sentence fixed by the jury.

V. If the jury cannot, within a reasonable time, agree on the punishment the judge shall impose the sentence of life imprisonment without eligibility for parole at any time. If the trial judge is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

VI. In all cases of capital murder, where the death penalty is imposed, the judgment of conviction and the sentence of death shall be subject to automatic review by the supreme court within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days 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 said court.

VII. With regard to the sentence the supreme court shall determine:

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

(b) Whether the evidence supports the jury's finding of an aggravating circumstance, as authorized by law, 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.

VIII. 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.

(b) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel.

IX. Where penalty of death is imposed the sentence shall be that the defendant be imprisoned in the state prison at Concord until the day appointed for his execution, which shall not be within one year from the day sentence is passed, and that he shall be then hanged by the neck until he is dead. The governor and council shall determine the time and manner of performing such execution, and shall be responsible for providing facilities for the implementation thereof. In no event shall a sentence of death be carried out upon a pregnant woman or a person for an offense committed while a minor.

HISTORY

Source. 1974, 34:10. 1977, 440:2, eff. Sept. 3, 1977.

Amendments—1977. Amended section generally.

CROSS REFERENCES

Commutation of death sentence, see RSA 4:23.
Respite from execution of death sentence, see RSA 4:24.
True design of punishment, see New Hampshire Constitution, Part 1, Article 18.

ANNOTATIONS UNDER FORMER RSA 607:6

Cited, 3
Reprieve, 1
Time of execution, 2

1. Reprieve

A postponement of the time of execution, by reprieve, does not affect the sentence; it remains to be enforced at the end of the period of respite, or by a new order, if no other disposition has been made of the case. Ex parte Howard (1845) 17 NH 545.

2. Time of execution

The time designated for executing a sentence of death is not a part of the sentence but simply an order prescribing the time when the sentence shall take effect. Ex parte Howard (1845) 17 NH 545.

3. Cited

Cited in State v. Long (1939) 90 NH 103, 4 A2d 865.

LIBRARY REFERENCES

West Key Number
Criminal Law ⇐999(2).

CJS
Criminal Law § 1613.

630:6 Place; Witnesses. The punishment of death shall be inflicted within the walls or yard of the state prison. The sheriff of the county in which the person was convicted, and 2 of his deputies, shall be present, unless prevented by unavoidable casualty. He shall request the presence of the attorney general or county attorney, clerk of the court and a surgeon, and may admit other reputable citizens not exceeding 12, the relations of the convict, his counsel and such priest or clergyman as he may desire, and no others.

HISTORY

Source. 1974, 34:10, eff. April 15, 1974.

New Jersey Supplement

Title of Act:
An Act concerning bail for persons accused of minor offenses. L.1983, c. 423.

Library References
Bail ⇐51.
C.J.S. Bail § 49.

SUBTITLE 2. DEFINITION OF SPECIFIC OFFENSES

PART 1. OFFENSES INVOLVING DANGER TO THE PERSON

CHAPTER 11. CRIMINAL HOMICIDE

WESTLAW Electronic Research
See WESTLAW Electronic Research Guide following the Preface.

2C:11-1. Definitions

Notes of Decisions

1. Deadly weapon

Evidence was insufficient to establish that defendant possessed deadly weapon when he robbed victim, so as to support conviction for armed robbery; although victim testified that both defendant and accomplice demanded money and both indicated that they had a gun, and that he turned around and saw one of two men holding a newspaper, there was no evidence whatsoever to suggest that newspaper was fashioned or held in such a manner as to create reasonable impression on victim that newspaper concealed a gun. State v. Hutson, 107 N.J. 222, 526 A.2d 687 (1987).

Oral threat to use gun unaccompanied by display of any object capable of being believed by the victim to be a deadly weapon is insufficient to support conviction of armed robbery; hence, taxi driver's belief, based on passengers' demanding money, statement that one passenger had a Magnum and driver's observing passenger holding a newspaper, that a gun was under the newspaper neither converted the paper into a weapon nor eliminated the need for existence of some object. State v. Hutson, 211 N.J.Super. 49, 510 A.2d 706 (1986) affirmed 107 N.J. 222, 526 A.2d 687.

In prosecution for armed robbery with deadly weapon, evidence, including proof that defendant used spring action BB pistol that was loaded and operable, that defendant put weapon close to victim's head, and that small BB in weapon could cause loss or impairment of eye if fired into victim's eye, supported jury's finding that weapon was "deadly." State v. Mieles, 199 N.J.Super. 29, 488 A.2d 235 (A.D.1985) certification denied 101 N.J. 265, 501 A.2d 933.

Provision in § 2C:43-6 relating to mandatory minimum sentences was inapplicable where robbery was committed using "fake gun" incapable of firing any bullets or other noxious things. State v. Ortiz, 187 N.J.Super. 44, 453 A.2d 567 (A.D. 1982).

2C:11-2. Criminal homicide

Notes of Decisions

Instructions 12.2
Jury questions 12.1

12.1. Jury questions

Whether defendant actually believed in necessity of acting with deadly force to prevent imminent, grave attack is question for jury in prosecution for homicide. State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984).

12.2. Instructions

Where there is evidence in homicide prosecution of prior physical abuse of defendant by victim, jury must be told that finding of provocation may be premised on course of ill treatment which can induce homicidal response in person of ordinary firmness and which accused reasonably believes is likely to continue, and jury must be instructed to consider not only victim's conduct and threats at time of offense, but also his prior mistreatment of defendant. State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984).

For defendant to prevail on theory of self-defense in homicide prosecution, jury need not find beyond reasonable doubt that defendant's belief was honest and reasonable, but rather, if any evidence raising issue of self-defense is adduced, either in state's or defendant's case, then jury must be instructed that state is required to prove beyond reasonable doubt that self-defense claim does not accord with facts, and acquittal is required if there remains reasonable doubt whether defendant acted in self-defense. State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984).

13. Admissibility of evidence—In general

State in homicide prosecution could not bar introduction of expert testimony on battered woman's syndrome by stipulating that defendant's fear of serious bodily harm was honestly held, as jury might well question stipulation of honesty without introduction of expert testimony to dispel common misconceptions about battered women. State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984).

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2C:11-3. Murder

a. Except as provided in section 2C:11-4 criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death; or

(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is 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 instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; 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.

b. Murder is a crime of the first degree but a person convicted of murder shall be sentenced, except as provided in subsection c. of this section, by the court to a term of 30 years, during which the person shall not be eligible for parole or to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

c. Any person convicted under subsection a. (1) or (2) who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value shall be sentenced as provided hereinafter:

(1) The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section.

Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt, except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury. Nothing in this subsection shall be construed to prevent the participation of an alternate juror in the sentencing proceeding if one of the jurors who rendered the guilty verdict becomes ill or is otherwise unable to proceed before or during the sentencing proceeding.

(2)(a) At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4) of this subsection. The defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph (5) of this subsection but shall not have a burden with regard to the establishment of a mitigating factor.

(b) The admissibility of evidence offered by the State to establish any of the aggravating factors shall be governed by the rules governing the admission of evidence at criminal trials. The defendant may offer, without regard to the rules governing the admission of evidence at criminal trials, reliable evidence relevant to any of the mitigating factors. If the defendant produces evidence in mitigation

which would not be admissible under the rules governing the admission of evidence at criminal trials, the State may rebut that evidence without regard to the rules governing the admission of evidence at criminal trials.

(c) Evidence admitted at the trial, which is relevant to the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection, shall be considered without the necessity of reintroducing that evidence at the sentencing proceeding; provided that the fact finder at the sentencing proceeding was present as either the fact finder or the judge at the trial.

(d) The State and the defendant shall be permitted to rebut any evidence presented by the other party at the sentencing proceeding and to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor.

(e) Prior to the commencement of the sentencing proceeding, or at such time as he has knowledge of the existence of an aggravating factor, the prosecuting attorney shall give notice to the defendant of the aggravating factors which he intends to prove in the proceeding.

(f) Evidence offered by the State with regard to the establishment of a prior homicide conviction pursuant to paragraph (4)(a) of this subsection may include the identity and age of the victim, the manner of death and the relationship, if any, of the victim to the defendant.

(3) The jury or, if there is no jury, the court shall return a special verdict setting forth in writing the existence or nonexistence of each of the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection. If any aggravating factor is found to exist, the verdict shall also state whether it outweighs beyond a reasonable doubt any one or more mitigating factors.

(a) If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death.

(b) If the jury or the court finds that no aggravating factors exist, or that all of the aggravating factors which exist do not outweigh all of the mitigating factors, the court shall sentence the defendant pursuant to subsection b.

(c) If the jury is unable to reach a unanimous verdict, the court shall sentence the defendant pursuant to subsection b.

(4) The aggravating factors which may be found by the jury or the court are:

(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;

(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping; or

(h) The defendant murdered a public servant, as defined in N.J.S. 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.

(5) The mitigating factors which may be found by the jury or the court are:

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;

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(b) The victim solicited, participated in or consented to the conduct which resulted in his death;

(c) The age of the defendant at the time of the murder;

(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;

(e) The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution;

(f) The defendant has no significant history of prior criminal activity;

(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or

(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

d. The sentencing proceeding set forth in subsection c. of this section shall not be waived by the prosecuting attorney.

e. Every judgment of conviction which results in a sentence of death under this section ~~may~~ shall be appealed, pursuant to the Rules of Court, to the Supreme Court. Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In any instance in which the defendant fails, or refuses to appeal, the appeal shall be taken by the Office of the Public Defender or other counsel appointed by the Supreme Court for that purpose.

f. Prior to the jury's sentencing deliberations, the trial court shall inform the jury of the sentences which may be imposed pursuant to subsection b. of this section on the defendant if the defendant is not sentenced to death. The jury shall also be informed that a failure to reach a unanimous verdict shall result in sentencing by the court pursuant to subsection b.

g. A juvenile who has been tried as an adult and convicted of murder shall not be sentenced pursuant to the provisions of subsection c. but shall be sentenced pursuant to the provisions of subsection b. of this section

Amended by L.1985, c. 178, § 2, eff. June 10, 1985; L.1985, c. 478, § 1, eff. Jan. 17, 1986.

Senate Judiciary Committee Statement

Senate, No. 2652—L.1985, c. 478

This bill would require the Supreme Court review of each case in which a death penalty is imposed. If a defendant fails or refuses to appeal, then the appeal will be taken on the defendant's behalf by the Public Defender or other counsel appointed by the Supreme Court.

The committee adopted an amendment which would clarify that a juvenile tried and convicted of murder as an adult may not be sentenced to death. With regard to this amendment, the committee wished to stress that it was not the intent of the Legislature to have juveniles eligible for capital punishment and that this clarification should be applied to pending cases.

1985 Legislation

L.1985, c. 178, § 2 substituted "shall" for "may" before "be sentenced" in subsec. b., added the last sentence to the second paragraph of par. (1) of subsec. c. relating to the participation of an alternate juror in the sentencing proceeding, in par. (2) of subsec. c., inserted the subpar. (a) designation, inserted "but shall not have a burden with regard to the establishment of a mitigating factor" in the second sentence of subpar. (a), inserted subpars. (b) and (c), designation of the former last two sentences as subpars. (d) and (e), and addition of subpar. (f), in par. (3) of subsec. c., substituted "outweighs beyond a reasonable doubt" for "is or is not outweighed by" in the second sentence, substituted "factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the" for "factor exists and is not outweighed by one or more" in subpar. (a), and substituted "all of the aggravating factors which exist do not outweigh all of the" for "any aggravating factors which exist are out-

weighed by any one or more" in subpar. (b); in par. (4) of subsec. c., substituted subpar. (a) for the former subpar. (a) which read: "The defendant has previously been convicted of murder"; substituted "assault" for "battery" in subpar. (c) and inserted "murder" in subpar. (g); in subsec. e., deleted "which shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" at the end of the first sentence and added the second sentence which allows the defendant to request the Supreme Court to determine if the sentence is disproportionate to the penalty imposed in similar cases; and added subsec. f. which requires the court to inform the jury of the sentences which may be imposed if the defendant is not sentenced to death.

L.1985, c. 478, § 1, did not incorporate the amendment by L. 1985, c. 178, § 2; in subsec. e., substituted "shall" for "may" before "be appealed" and added a second, now the third, sentence which requires an appeal be taken if the defendant fails or refuses to appeal; and added a subsec. f., now subsec. g., relating to the sentencing of a juvenile tried as an adult and convicted of murder.

L.1985, c. 478, § 1, was corrected by the Legislative Counsel with the concurrence of the Attorney General under the authority of § 1:3-1 to incorporate the amendment of this section by L.1985, c. 178, § 2 by substitution of "shall" for "may" before "be sentenced" in subsec. b.; addition of the last sentence to the second paragraph of par. (1) of subsec. c., in par. (2) of subsec. c., insertion of the subpar. (a) designation, addition of "but shall not have a burden with regard to the establishment of a mitigating factor" in the second sentence of subpar. (a), insertion of subpars. (b) and (c), designation of the former last two sentences as subpars. (d) and (e), and addition of subpar. (f); in par. (3) of subsec. c., substitution of "outweighs beyond a reasonable doubt" for "is or is not outweighed by" in the second sentence, and substitution of "factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the" for "factor exists and is not outweighed by one or more" in subpar. (a), and substitution of "all of the aggravating factors which exist do not outweigh all of the" for "any aggravating factors which exist are outweighed by any one or more" in subpar. (b); in par. (4) of subsec. c., deletion of the former subpar. (a) which formerly read: "The defendant has previously been convicted of murder", addition of a new subpar. (a), substitution of "assault" for "battery" in subpar. (c), and insertion of "murder" in subpar. (g); in subsec. e., deletion of "which shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" and addition of the second sentence, by addition of subsec. f., and by redesignation of former subsec. f. as subsec. g.

Statement: Committee statement to Senate, No. 950—L.1985, c. 178, see § 2A:78-7.

Cross References

Unlawful use of body vest in commission of, attempt to commit or flight after commission of crime under this section, see § 2C:39-13.

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Aggravating circumstances, see Zant v. Stephens, 1983, 103 S.Ct. 2733, 462 U.S. 862, 77 L.Ed.2d 235, on remand 716 F.2d 276.

Consideration of nonstatutory mitigating factors, see Hitchcock v. Dugger, 1987, 107 S.Ct. 1821, 95 L.Ed.2d 347, on remand 832 F.2d 140.

Equal protection, racial bias in application, see McCleskey v. Kemp, 1987, 107 S.Ct. 1756, 95 L.Ed.2d 262, rehearing denied 107 S.Ct. 3199, 96 L.Ed.2d 686.

Felony murder, reckless indifference to human life, see Tison v. Arizona, 1987, 107 S.Ct. 1676, 95 L.Ed.2d 127, rehearing denied 107 S.Ct. 3201, 96 L.Ed.2d 688.

Death penalty after jury recommendation of life imprisonment, see Spaziano v. Florida, 1984, 104 S.Ct. 3154, 468 U.S. 447, 82 L.Ed.2d 340.

Felony murder, intent finding, jury right, see Cabana v. Bullock, 1986, 106 S.Ct. 689, 474 U.S. 376, 88 L.Ed.2d 704, on remand 784 F.2d 187.

Instructions.

Power of governor to commute life sentence see California v. Ramos, 1983, 103 S.Ct. 3446, 463 U.S. 992, 77 L.Ed.2d 1171, on remand 207 Cal.Rptr. 800, 689 P.2d 430, 37 C.3d 136, certiorari denied 105 S.Ct. 2367, 471 U.S. 1119, 86 L.Ed.2d 266.

Sympathy as mitigating factor in death penalty cases, see California v. Brown, 1987, 107 S.Ct. 837, 93 L.Ed.2d 934.

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.

Stay of enforcement of judgment invalidating death penalty, certiorari pending, see California v. Brown, 1986, 106 S.Ct. 1367, 475 U.S. 1301, 89 L.Ed.2d 702.

Victim impact statement, use at sentencing phase of capital murder trial, see Booth v. Maryland, 1987, 107 S.Ct. 2529, 96 L.Ed.2d 440, rehearing denied 108 S.Ct. 31, 97 L.Ed.2d 820.

Notes of Decisions

I. MURDER, IN GENERAL

1. Validity—In general

Death penalty provision does not violate prohibitions against cruel and unusual punishment contained in Federal and New Jersey Constitutions. State v. Biegenwald, 106 N.J. 13, 524 A.2d 130 (1987).

N.J.S.A. 2C:11-3, subd. c(4)(c), providing that jury may find aggravating factor where murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to victim was constitutional. State v. Moore, 207 N.J.Super. 561, 504 A.2d 804 (L.1985).

This section could not be challenged on ground that scope of review of sentence is inadequate to determine arbitrariness, excessiveness and disproportionality of punishment, in that it had to be presumed that Supreme Court would respect this section and those cases relating to review of death penalty proceedings. State v. Bass, 189 N.J.Super. 445, 460 A.2d 214 (L.1983).

This section is not unconstitutional on ground that it does not provide that jury can recommend mercy or punishment other than death, despite the proofs, in that, even if this was construed as a constitutional requirement, the construction could be given without statutory language to that effect. Id.

1.5. Standing, validity

Number and scope of aggravating factors embodied in this section did not essentially require capital punishment to be imposed, in that penalty does not apply to all convictions for murder; moreover, defendants do not have standing to address allegedly "overbroad" construction of aggravating factors other than factor which was noticed in case. State v. Bass, 189 N.J.Super. 445, 460 A.2d 214 (L.1983).

1.8. —— Death penalty, validity

This section which narrowed class of death eligibles, provided for bifurcated trial, required jury to find at least one aggravating factor and then weigh aggravating factors against mitigating factors, contained "catch-all" mitigating factor to allow introduction of any mitigating factor relevant to defendant's character or record or to circumstances of offense, did not allow mandatory sentence of death for any offense, and contained provision for appellate review by Supreme Court, did not violate federal constitutional prohibition against cruel and unusual punishment. State v. Ramseur, 106 N.J. 123, 524 A.2d [illegible] (1987).

Failure of this section to specify Supreme Court's standard of review did not violate federal constitutional prohibition against cruel and unusual punishment where court would exercise its power of review in accordance with applicable constitutional standards. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Death penalty provisions did not violate state or federal Constitutions' prohibitions against cruel and unusual punishment, where the provisions guided juries' discretion so as to achieve capital punishment system that narrowed class, and defined and selected those who would be subject to sentencing proceeding and to death penalty with consistency and reliability. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Failure of this section to exempt any murderers, except those who did not cause death by their own conduct or pay someone to do so, from potential subjection to death penalty did not render this section constitutionally infirm, even though, under prior death penalty law, only those defendants convicted of deliberate premeditated murder or felony-murder were subject to death sentence. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Notwithstanding fact that aggravating factor, that murder was committed in conjunction with robbery, rape, burglary, arson, or kidnapping, included very substantial portion of all murders, classification of death eligibles was not invalid in view of fact that it was capable of fairly exact definition, and would ultimately be tested by almost limitless introduction of mitigating factors. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Death penalty provision which subjected defendant who pays another to commit knowing or purposeful murder to death penalty without further proof of any further aggravating factor if aggravating factor outweighed any mitigating factors did not render death penalty provision unconstitutional, as definition of circumstance was precise, and penalty was consistent. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

This section is not facially unconstitutional on ground that nature and scope of statutory and aggravating factors are so broad as to allow for every intentional murder to qualify as a death case. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

This section does not mandate death penalty and therefore does not violate the Federal Constitution, notwithstanding that death sentence is imposed if jury finds that an aggravating factor exists and is not outweighed by any mitigating factors, as imposition of death sentence occurs only after jury considers mitigating factors presented, thus taking into consideration character and record of individual defendant and circumstances of particular offense so as to determine appropriateness of death penalty to particular case. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

This section is not unconstitutional on ground that defendants allegedly must show that mitigating factors outweigh the aggravating factors once state proves the existence of an aggravating factor, in that burden of proof beyond a reasonable doubt remains upon the state in order to prove the factors permitting imposition of death. State v. Bass, 189 N.J.Super. 445, 460 A.2d 214 (L.1983).

Properly construed and applied, this section which provides as an aggravating factor permitting death sentence that murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery on the victim is constitutional under the Eighth Amendment. (U.S.C.A.Const. Amend. 8). Id.

3. Construction and application

Term "character" within context of this section which provides that any other factor which is relevant to defendant's character may be found as mitigating factor in penalty phase of capital case embraces those individual qualities that distinguish particular person, including individual's potential for rehabilitation. State v. Davis, 96 N.J. 611, 477 A.2d 308 (1984).

5.5. Counsel

Defendant who refused to sign any more waivers without having an attorney present, during a polygraph examination in his investigation for arson and murder, did not initiate the questioning that ultimately led to his confession, where, when defendant appeared for further questioning upon his refusal to submit to the polygraph test, the prosecutor outlined the discrepancies between defendant's accounts, a sheriff's officer then proceeded to question defendant, and the prosecutor, upon directing that defendant be returned to jail, again described the pending arson charge, upon which defendant capitulated and confessed. State v. Wright, 97 N.J. 113, 477 A.2d 1265 (1984).

Where defendant, prior to administration of a polygraph test in an arson and murder investigation, stated, "I won't sign any more deeds without a lawyer present," at the very least the interrogating agent was under an obligation to clarify the meaning of defendant's remark before proceeding with further questioning. State v. Wright, 97 N.J. 113, 477 A.2d 1265 (1984).

6. Cause of death

Defendant could be convicted of murder on theory that victim's death as a result of jumping from eleventh story window was "purposefully" and "knowingly" caused by defendant's conduct where victim had been weakened by defendant's prior beating with shovel to the point where she could not walk unaided, she had been beaten

mercilessly with defendant's fists, victim, a drug user, called out for drugs and made repeated pleas and entreaties during the last 15 minutes of her life, and if victim misjudged her circumstances it was because defendant had caused her powers of perception to become impaired, an eventuality which was clearly foreseeable to defendant. State v. Lassiter, 197 N.J.Super. 2, 484 A.2d 13 (A.D.1984).

Having caused "brain death" of victim, defendant was properly found criminally responsible for homicide, even though victim did not expire until he was taken off respirator. State v. Watson, 191 N.J.Super. 464, 467 A.2d 590 (A.D.1983) certification denied 95 N.J. 230, 470 A.2d 443.

9. Merger of offenses

State v. Stenson, 174 N.J.Super. 402, 416 A.2d 944 (L.1980) [main volume] affirmed 186 N.J. 361, 457 A.2d 841, certification denied 93 N.J. 268, 460 A.2d 671.

15. Intent

Factual basis was not established for defendant's pleading guilty to attempted murder charge, where defendant's recollection of assault was vague as result of his ingesting drugs and defendant admitted only that he exhibited "wanton disregard" of human life. State v. Dishon, 222 N.J.Super. 58, 535 A.2d 998 (A.D.1987).

For purposes of the crime of felony-murder, intent to commit one of the enumerated felonies is ordinarily not mitigated by provocation/passion. State v. Grunow, 199 N.J.Super. 241, 488 A.2d 1098 (A.D.1985) affirmed 102 N.J. 133, 506 A.2d 708.

15.5. —— Purposeful or knowing conduct, intent

Before voluntary intoxication can be found to affect mental state of purposeful or knowing conduct, influence of alcohol must be such as to eliminate element of purpose and/or knowledge. State v. Martin, 213 N.J.Super. 426, 517 A.2d 513 (A.D.1986).

Murder conviction based on "knowing" conduct can result from conduct which is practically certain to cause serious bodily injury when death is result of injury caused. State v. Martin, 213 N.J.Super. 426, 517 A.2d 513 (A.D.1986).

22. Crimes, homicide during commission—In general

Felony-murder is by definition not a result which is purposely planned. State v. Darby, 200 N.J.Super. 327, 491 A.2d 733 (A.D.1984) certification denied 101 N.J. 226, 501 A.2d 905.

Provocation/passion manslaughter is not available to reduce a robber's accountability for murder when someone is killed in course of or immediate flight from the robbery. State v. Arriagas, 198 N.J.Super. 575, 487 A.2d 1290 (A.D.1985) affirmed 102 N.J. 265, 508 A.2d 167.

31. Double jeopardy

Where trial court in capital case has erroneously given coercive supplemental instructions to jury that has expressed its inability to agree on appropriate penalty, law must afford defendant benefit of final nonunanimous verdict that might have been returned absent coercion, and defendant may not be subject to another capital sentencing proceeding, rejecting *Legare v. State*, 250 Ga. 875, 302 S.E.2d 351. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Double jeopardy precluded retrial of defendant and State's seeking death penalty following jury's verdict finding defendant guilty of purposeful or knowing murder, without resolution as to whether homicidal act was committed by defendant's own conduct. State v. Moore, 207 N.J.Super. 561, 504 A.2d 804 (L.1985).

Appeal of defendant's underlying convictions resulting in a merger of the convictions for felony-murder and robbery removed any legitimate expectation of finality with respect to his original sentence, so that defendant, who had begun to serve the sentence originally imposed, could be resentenced without offending constitutional principles of double jeopardy, providing that any new sentence was in accordance with substantive punishment standards under the New Jersey code of criminal justice and not in excess of the sentence originally imposed. State v. Rodriguez, 97 N.J. 263, 478 A.2d 408 (1984).

33. Defenses—In general

In prosecution for murder, fact that murder took place some 24 hours after defendant had discovered victim with another man precluded a "heat of passion" defense. State v. Lassiter, 197 N.J.Super. 2, 484 A.2d 13 (A.D.1984).

38. —— Self-defense, defenses

Defendant's receipt, subsequent to trial, of toxicological report showing that victim was under influence of large amount of drugs at time of death did not warrant new murder trial, even though defense theory was that victim had accidentally shot herself; jury was permitted to infer that presence of fresh needle marks on victim's body indicated recent injections of drugs and defense theory was rendered implausible by evidence of force required to pull trigger, points of entry of bullets and defendant's admission to ex-wife and police that he shot victim. State v. Coburn, 221 N.J.Super. 586, 535 A.2d 531 (A.D.1987).

If it applies, "imperfect self-defense" exonerates defendant from purposeful or knowing murder conviction but subjects him to reckless manslaughter conviction and, arguably, to aggravated manslaughter conviction. State v. Bowens, 205 N.J.Super. 548, 501 A.2d 577 (A.D.1985) affirmed 108 N.J. 622, 532 A.2d 215.

Under criminal code, even if it is certain that actor's life will soon be threatened, actor may not use deadly defense of force until that threat is imminent, and he if or she does, crime in most cases would presumably be murder or manslaughter. State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984).

II. TRIAL, IN GENERAL

91. In general

Where there is evidence to prove crime by more than one set of elements, trial judge, to avoid confusion, should assign each set of elements a descriptive label related to a distinguishing ele-

ment, such as by referring to "purposeful murder," "knowing murder," and "felony murder," even though code labels all three simply "murder." State v. Arriagas, 198 N.J.Super. 575, 487 A.2d 1290 (A.D.1985) affirmed 102 N.J. 265, 508 A.2d 167.

On State's case a reasonable jury could have found both defendants guilty of murder beyond a reasonable doubt, and thus motions for acquittal were properly denied. State v. Jordan, 197 N.J. Super. 489, 485 A.2d 323 (A.D.1984).

94. Indictment and information

Defendant may not be subject to possible imposition of death penalty unless indictment contains allegation that homicidal act was committed by defendant's own conduct or that defendant procured commission of offense by payment or promise of payment of anything of pecuniary value. State v. Moore, 207 N.J.Super. 561, 504 A.2d 804 (L.1985).

95. Jurisdiction

Supreme Court had jurisdiction, and would not hesitate to exercise same on basis of separation-of-powers challenge, to address question whether pretrial judicial review is permitted in criminal cases with respect to adequacy of factual basis to support aggravating factors which prosecutor proposes to prove at capital sentencing proceeding and, if so, what procedures should be followed. State v. McCrary, 97 N.J. 132, 478 A.2d 339 (1984).

Evidence, and inferences reasonably to be drawn therefrom, presented sufficient ground to confer jurisdiction over murder prosecutions to state of New Jersey. State v. Reldan, 185 N.J.Super. 494, 449 A.2d 1317 (A.D.1982) certification denied 91 N.J. 543, 453 A.2d 862.

96. Venue

In capital proceedings, standard to apply in determining propriety of change of venue is whether change is necessary to overcome realistic likelihood of prejudice from pretrial publicity. State v. Bey, 96 N.J. 625, 477 A.2d 315 (1984) clarified 97 N.J. 666, 483 A.2d 185.

On defendant's motion for change of venue in murder prosecution, failure to apply standard of whether change of venue was necessary to overcome realistic likelihood of prejudice from pretrial publicity required remand for reconsideration. State v. Bey, 96 N.J. 625, 477 A.2d 315 (1984).

98. Joint trial

Severance of defendants was required where first defendant was charged with offenses including capital murder and second defendant was charged only with hindering apprehension, a subject which arose after the alleged murder and which was incidental to it. State v. Savage, 198 N.J.Super. 507, 487 A.2d 790 (L.1984).

100. Pretrial hearings

Hearsay evidence is admissible at pretrial hearing authorized by instant opinion to review adequacy of evidence to support aggravating factors which prosecutor proposes to prove at capital sentencing proceeding. State v. McCrary, 97 N.J. 132, 478 A.2d 339 (1984).

If aggravating factor which prosecutor proposed to prove at capital sentencing proceeding has been dismissed upon review of the evidence in support thereof at pretrial hearing, the dismissal is without prejudice to later application for introduction of additional supporting evidence, subject to certain requirements. State v. McCrary, 97 N.J. 132, 478 A.2d 339 (1984).

In evaluating defendant's application to close pretrial proceedings, court must assess all the evidence and circumstances which are relevant to a determination of the likelihood of prejudice; careful consideration must be given to publicity which will be generated by the particular hearing and its cumulative impact; court must be especially mindful of the nature of the particular pretrial proceeding for which closure is sought and must ascertain the contested issues which are the subject of the particular proceeding, the nature and form of the anticipated evidence material to those issues, and the character of the adverse publicity which may be generated; in capital cases where jury must determine in a separate trial whether to impose a sentence of death or life imprisonment, court must exercise special caution in weighing the effects of adverse publicity on the impartiality of the jury created by bail hearing at which the prosecutor must show reasonable grounds to believe that the death penalty may be imposed. State v. Williams, 93 N.J. 39, 459 A.2d 641 (1983).

102. Jurors, trial

Trial court's initial failure to conduct voir dire concerning effect upon each juror of media denouncements of acquittal, based on insanity defense, of John Hinckley, Jr., who attempted to assassinate President of United States was reversible error in murder trial involving insanity defense, even though trial court directed jury to apply different standards applicable in state court action, where there was little likelihood that any jury would be free of sustained taint caused by intensity of publicity. State v. Jasiulewicz, 205 N.J.Super. 558, 501 A.2d 583 (A.D.1985) certification denied 103 N.J. 467, 511 A.2d 649.

Trial court's failure to hold additional voir dire during course of murder trial to determine whether individual jurors had formed any prejudice against insanity defense in general or fixed opinion as to defendant's guilt or innocence as result of pervasive publicity denouncing acquittal, based on insanity defense, of John Hinckley, Jr., who attempted to assassinate President of United States, was reversible error, where publicity continued unabated during entire trial. State v. Jasiulewicz, 205 N.J.Super. 558, 501 A.2d 583 (A.D.1985) certification denied 103 N.J. 467, 511 A.2d 649.

A defendant in a capital case may conditionally waive the right to a jury trial and jury adjudication of sentence, thereby conferring on the court jurisdiction for the sentencing process. State v. Wright, 196 N.J.Super. 516, 483 A.2d 436 (L.1984).

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105. Presumptions—In general

Though presumption of validity is accorded prosecutor's conduct in giving notice of intent to prove aggravating factors at capital sentencing proceeding, minimal intrusion into that area of discretion is warranted to permit defendant to attempt to demonstrate prior to trial that evidence is clearly lacking to support the charged factors in aggravation; in that context, prosecutor is not required to prove his case before trial, and summary review of the evidence, without testimony, will generally be favored. State v. McCrary, 97 N.J. 132, 478 A.2d 339 (1984).

107. Burden of proof

Felony-murder requires only showing that death was caused during commission of, or attempted commission of, or flight from, one of statutorily designated crimes; state need not prove that death was purposely or knowingly committed. State v. Darby, 200 N.J.Super. 327, 491 A.2d 733 (A.D.1984) certification denied 101 N.J. 226, 501 A.2d 905.

112. Remarks of prosecutor, trial—In general

In homicide prosecution, prosecutor's argument which tied in racial aspect of revenge motive constituted proper comment. State v. Carter, 91 N.J. 86, 449 A.2d 1280 (1982).

113. —— Summation, trial, remarks by prosecutor

Statement by prosecutor during summation in penalty phase of capital trial that jury's deliberations should be influenced by need to protect society from crime improperly diverted jurors' attention from facts of case before them; declining to follow *People v. Lewis*, 88 Ill.2d 129, 58 Ill.Dec. 895, 430 N.E.2d 1346; *Com. v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

116. Jury questions—In general

Because issue of passion/provocation can arise in infinite number of factual settings, mitigation of homicide because of passion/provocation is ordinarily a question for the jury, unless evidence is so weak as to preclude jury consideration. State v. Crisantos (sub nom. State v. Arriagas), 102 N.J. 265, 508 A.2d 167 (1986).

119. Verdict, trial—In general

State v. Stenson, 174 N.J.Super. 402, 416 A.2d 944 (L.1980) [main volume] affirmed 188 N.J. 361, 457 A.2d 841, certification denied 93 N.J. 268, 460 A.2d 671.

124. Jury waiver, death penalty phase, trial

Trial court's denial of defendant's motion to waive his right to a jury in sentencing proceeding, after prosecutor objected to waiver, did not violate any constitutional right. State v. Biegenwald, 106 N.J. 13, 524 A.2d 130 (1987).

III. PLEAS

181.5. Guilty, pleas

Under this section, the only defendants who will be permitted to plead guilty are those who are entitled to a nondeath result after applying the legislative guidelines which satisfy the concern of the United States Supreme Court's *Jackson* decision, and thus this section removes any chilling effect on defendant's assertion of right to trial by jury. State v. Wright, 196 N.J.Super. 516, 483 A.2d 436 (L.1984).

A de facto procedure whereby defendant may plead guilty to avert the possibility of a death penalty is constitutionally permissible where the act employs standards for the sentencing adjudication and where a particular defendant's guilty plea can only be accepted if the legislative standards have been satisfied. State v. Wright, 196 N.J.Super. 516, 483 A.2d 436 (L.1984).

182.5. Agreements, pleas

Where facts supporting aggravating factor were present in capital murder case, prosecuting attorney had no discretion to withdraw it, and trial court had to deny state's application to do same pursuant to plea agreement. State v. Wright, 196 N.J.Super. 516, 483 A.2d 436 (L.1984).

Where defendant entered pleas of guilty to murder charges and it was obvious that among the numerous reasons defendant had for pleading guilty was the avoidance of the possibility of the death penalty, a plea agreement which provided for the avoidance of the death penalty as a condition of a guilty plea, voluntarily and freely entered into, was constitutionally permissible and desirable especially in view of the fact that there was a legislative standard which defendant had to satisfy in order for the guilty plea to be accepted. State v. Wright, 196 N.J.Super. 516, 483 A.2d 436 (L.1984).

185. Right to counsel, pleas

Caruso v. Zelinsky, D.C., 515 F.Supp. 676 (1981) affirmed in part, vacated in part 689 F.2d 435, appeal after remand 749 F.2d 25.

IV. ADMISSIBILITY OF EVIDENCE

254. Weapons, admissibility of evidence

Knife found in home of defendant's friend was admissible in homicide prosecution since evidence was sufficient to connect it to her in light of the fact that defendant had been living in the residence for several years, had complete access to the house and items therein were subject to her control. State v. Downey, 206 N.J.Super. 382, 502 A.2d 1171 (A.D.1986).

261.5. —— Escape, conduct of accused, admissibility of evidence

In prosecution for murder, trial court did not err in admitting evidence that defendant escaped from jail while awaiting trial on indictment. State v. Tomaras, 184 N.J.Super. 551, 446 A.2d 1224 (A.D.1982).

270. Admissions or declarations against interest, admissibility of evidence

Appellate Division's earlier decision on interlocutory appeal allowing admission of defendant's written statement into evidence in prosecution for murder was law of case where State's application for leave to appeal allowed Court to consider merits of appeal on papers submitted on motion so that defendant was free to present any argument in support of suppression of that statement, and

thus, defendant's suggestion that he might not have advanced all arguments in support of suppression at time of interlocutory appeal, particularly as regarding violation of his *Miranda* rights, was of no avail. State v. Vujosevic, 198 N.J.Super. 435, 487 A.2d 751 (A.D.1985) certification denied 101 N.J. 247, 501 A.2d 920.

272. Statements, declarations and conversations, of deceased

Where defendant freely admitted that she and murder victim's wife often argued with victim, admission into evidence of victim's letter, stating, in effect, that defendant, victim's wife, and another person were the ones responsible if anything happened to victim, was reversible error, even though trial judge instructed jury that victim's letter could not be considered as proof of truth of its contents but pertained solely to victim's state of mind, prosecutor did not allude to victim's letter in his summation, and evidence against defendant was substantial. State v. Prudden, 212 N.J.Super. 608, 515 A.2d 1260 (A.D.1986).

Admission of letter of murder victim to the effect that if anything happened to him defendant and named others were responsible was not harmless, although evidence against defendant was substantial, in light of letter's compelling nature coupled with prosecutor's repeated and graphic references to it in summation. State v. Downey, 206 N.J.Super. 382, 502 A.2d 1171 (A.D.1986).

283. —— Physicians, expert testimony

Trial court did not abuse discretion in refusing to allow counsel for defendant charged with felony-murder to use words "beyond reasonable doubt" in examination of medical experts concerning degree of certainty with which cause of death of victim could be determined. State v. Smith, 210 N.J.Super. 43, 509 A.2d 206 (A.D.1986) certification denied 105 N.J. 582, 523 A.2d 210.

284. —— Chemists, expert testimony

Testimony regarding results of analysis of blood spots found in defendant's truck was properly admissible, although not conclusive of source of blood spots, probative value of testimony in placing victim within portion of population having blood similar to that found in truck outweighed potential prejudice, which was minimized by testimony regarding inconclusiveness of test results, disagreeing with *People v. Robinson*, 27 N.Y.2d 864, 317 N.Y.S.2d 19, 265 N.E.2d 543, and *People v. Macedonio*, 42 N.Y.2d 944, 397 N.Y.S.2d 1002, 366 N.E.2d 1355. State v. Kelly, 207 N.J.Super. 114, 504 A.2d 37 (A.D.1986).

294. Insanity, admissibility of evidence

It was reversible error for prosecutor to argue to the jury that defendant's defense of insanity and alleged amnesia should not be believed because defendant refused to take sodium amytal test, as the result of the test would have been inadmissible even if she had taken one and the comments went directly to the issue of whether defendant was guilty or not guilty by reason of insanity. State v. Blome, 209 N.J.Super. 227, 507 A.2d 283 (A.D.1986) certification denied 108 N.J. 458, 517 A.2d 444.

295. Motive, admissibility of evidence

Admission of probation department's report which was highly critical of defendant and recommended that her husband be given custody of their child was not prejudicial error in prosecution of defendant for conspiracy, murder, and two counts of attempted murder stemming from her alleged participation in plot to kill her husband, in which prosecution State claimed that defendant formulated idea of having her husband killed to insure that she would be awarded custody, particularly in light of trial judge's emphatic limiting instructions concerning probative effect of that evidence. State v. Weiler, 211 N.J.Super. 602, 512 A.2d 531 (A.D.1986) certification denied 107 N.J. 37, 526 A.2d 130.

301. —— Victim, photographs

Three photographs of victim's body were properly admitted into evidence in prosecution for murder; brutal nature of beating was an issue in case and photographs had probative value to demonstrate defendant's conduct. State v. Vujosevic, 198 N.J.Super. 435, 487 A.2d 751 (A.D.1985) certification denied 101 N.J. 247, 501 A.2d 920.

Photograph showing victim's wound was properly admitted in murder prosecution. State v. Jordan, 197 N.J.Super. 489, 485 A.2d 323 (A.D.1984).

Photographs showing victim on his back after an autopsy stitched from shoulder to groin proved nothing inasmuch as victim had been shot in back and was simply inflammatory, and thus its admission was improper. State v. Jordan, 197 N.J.Super. 489, 485 A.2d 323 (A.D.1984).

305. Self-incrimination, admissibility of evidence

State could have bullet surgically removed from suspect's body for use as evidence in murder prosecution particularly since surgical procedure proposed constituted minor intrusion into individual's body under stringently limited conditions in medical environment and surgical removal did not implicate right against self-incrimination. State v. Lawson, 187 N.J.Super. 25, 453 A.2d 556 (A.D.1982).

306. Statistical evidence, admissibility of evidence

Subject to appropriate standards concerning its competency, such as its scientific reliability and qualifications of expert witness, statistical evidence of rehabilitative potential of similarly situated defendants is relevant and admissible in evaluating individual defendant's potential for rehabilitation as aspect of his character presented as mitigating factor in penalty phase of capital case. State v. Davis, 96 N.J. 611, 477 A.2d 308 (1984).

307. Aggravating and mitigating factors, death penalty, admissibility of evidence

Defense counsel could present any relevant evidence on mitigation during sentencing phase of capital trial despite defendant's express order not to contest imposition of death sentence, as proportionality of sentence was subject to mandatory review. State v. Hightower, 214 N.J.Super. 43, 518 A.2d 482 (A.D.1986).

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V. SUFFICIENCY OF EVIDENCE

361. In general

In prosecution for murder, evidence, including testimony of witness that defendant had threatened to kill victim and testimony of witnesses in surrounding apartments as to defendants beating of victim prior to her jumping from eleventh story window was sufficient to support conviction for murder. State v. Lassiter, 197 N.J.Super. 2, 484 A.2d 13 (A.D.1984).

365. Identification, sufficiency of evidence

Evidence including identification of car used in commission of murders and fact that defendants were picked up in that car within 30 minutes after shooting and fact that bullet found in car matched calibre discovered at scene and there being also "consciousness of guilt" evidence in solicitation of false testimony and evidence of motive and other identification evidence was sufficient amply to sustain murder convictions. State v. Carter, 91 N.J. 86, 449 A.2d 1280 (1982).

373. Preexisting conditions, sufficiency of evidence

Evidence was sufficient for jury in felony-murder prosecution of defendant who, after committing robbery, drove away from scene and struck motorist, allegedly causing him to suffer fatal heart attack, notwithstanding victim's preexisting heart condition. State v. Smith, 210 N.J.Super. 43, 509 A.2d 206 (A.D.1986) certification denied 105 N.J. 582, 523 A.2d 210.

374. Purposeful or knowing conduct, sufficiency of evidence

Evidence supported finding that defendant set fire with an accelerant and did so with requisite purposeful or knowing conduct so as to cause serious bodily injury which resulted in victim's death, thereby supporting murder conviction for "purposely" or "knowingly" causing serious bodily injury which resulted in death, where there was proof that defendant was asked to leave party at third-floor apartment in question, at which point defendant set fire on stairwell leading to apartment, and that defendant was aware of wooden structure and number of people in apartment, some of whom had been drinking. State v. Martin, 213 N.J.Super. 426, 517 A.2d 513 (A.D.1986).

375. Diminished capacity, sufficiency of evidence

Even though trier of fact determines that defendant's mental disease or defect prevented him from forming necessary criminal intent to commit murder, defendant may still be convicted of manslaughter provided essential elements of crime are present. State v. Breakiron, 108 N.J. 591, 532 A.2d 199 (1987).

VI. INSTRUCTIONS

431. In general

Jury instruction on accomplice liability was supported by sufficient factual basis in prosecution for felony-murder and robbery; codefendant gave defendant a gun which defendant put in his pants, defendant searched through robbery victim's purse, and both defendants threatened robbery victim's father after murder victim was shot. State v. Boyer, 221 N.J.Super. 387, 534 A.2d 744 (A.D.1987).

In view of testimony which tended to establish defendant's involvement in homicide, trial court's specific direction that codefendant could only be an accomplice, even in context of court's general statements regarding jury's functions as the sole finder of facts, came close to charging that defendant was guilty and was an impermissible invasion of jury's function. State v. Jordan, 197 N.J.Super. 489, 485 A.2d 323 (A.D.1984).

446. Manslaughter, instructions—In general

Inasmuch as defendant's defense was that he was not involved in fight that resulted in victim's death, and inasmuch as defendant did not request aggravated manslaughter charge, defendant was not entitled to such charge. State v. Ruscingno, 217 N.J.Super. 467, 526 A.2d 251 (A.D.1987) certification denied 108 N.J. 210, 528 A.2d 30.

Where manslaughter charge, if given sua sponte by the court in murder prosecution, would surprise prosecution or the defense, that unrequested charge might be inappropriate; at very least, its use may require opportunity to be given to both sides to address the new issue injected by the court, including opportunity to present further evidence; limiting *State v. Powell*, 84 N.J. 305. State v. Choice, 98 N.J. 295, 486 A.2d 833 (1985).

In murder prosecution in which facts did not clearly indicate possibility that the crime was manslaughter based upon provocation/passion, and in which there was no request for such a charge, trial court did not have obligation on its own to meticulously sift through entire record to see if some combination of facts and inferences might rationally sustain manslaughter charge. State v. Choice, 98 N.J. 295, 486 A.2d 833 (1985).

447. —— Provocation, manslaughter, instructions

In view of fact that defendant in prosecution for murder did not contend that there was mutual combat between himself and victim, but rather that person who went with defendant to hotel room pulled knife on victim once they were inside room, record did not clearly indicate appropriateness of charge for passion/provocation manslaughter as would warrant imposition of duty on trial court to sua sponte provide manslaughter charge. State v. Ruscingno, 217 N.J.Super. 467, 526 A.2d 251 (A.D.1987) certification denied 108 N.J. 210, 528 A.2d 30.

Evidence that argument ensued between murder victim and third party, which eventually resulted in victim's death, was insufficient to entitle defendant to manslaughter instruction in view of generally accepted rule that words alone, no matter how offensive or insulting, do not constitute adequate provocation to reduce murder to manslaughter, and fact that argument was allegedly between third party and victim not victim and defendant. State v. Ruscingno, 217 N.J.Super. 467, 526 A.2d 251 (A.D.1987) certification denied 108 N.J. 210, 528 A.2d 30.

Passion/provocation manslaughter was not only inconsistent with defendant's testimony but was

also inconsistent with State's version of homicide and was substantiated by no testimony, therefore, defendant was not entitled to manslaughter charge. State v. Crisantos (sub nom. State v. Arriagas), 102 N.J. 265, 508 A.2d 167 (1986).

449. —— Excluding charge on manslaughter

Defendant charged with felony-murder was not entitled to manslaughter instruction, where State never contended that defendant fired gun that killed victim. State v. Boyer, 221 N.J.Super. 387, 534 A.2d 744 (A.D.1987).

Defendant who was charged with murder was not entitled to manslaughter instruction in light of evidence that victim was killed by forced asphyxiation, despite defendant's theories that victim was killed inadvertently or in the heat of passion and provocation resulting from sexual frustration. State v. Hollander, 201 N.J.Super. 453, 493 A.2d 563 (A.D.1985) certification denied 101 N.J. 335, 501 A.2d 983.

Where by its verdict jury found that homicide was murder because it was committed in course of robbery, the "intent" necessary to commit felony being purpose to deprive victim of his property, trial judge's error in not giving manslaughter charge, justified by evidence, was harmless. State v. Arriagas, 198 N.J.Super. 575, 487 A.2d 1290 (A.D.1985) affirmed 102 N.J. 265, 508 A.2d 167.

Although defendant's posture before jury in homicide and robbery prosecution was that another person, acting alone, killed victim, defendant was not thereby barred from requesting manslaughter charge based on evidence that he intended to kill victim out of passion reasonably provoked by victim's assaultive conduct, ethnic slurs and obscenities, and thus judge erred in not giving manslaughter charge. State v. Arriagas, 198 N.J. Super. 575, 487 A.2d 1290 (A.D.1985) affirmed 102 N.J. 265, 508 A.2d 167.

455. Degree of offense, instructions

In prosecution for murder, trial court was obliged to submit to the jury those theories of homicide involving lesser degree of culpability which found reasonable support in the evidence. State v. Lassiter, 197 N.J.Super. 2, 484 A.2d 13 (A.D.1984).

459. Evidence as justifying instructions, instructions

In prosecution for murder based on theory that defendant's brutal beating of victim had caused her to jump from eleventh story window rather than be beaten to death, defendant was not entitled to jury instruction on offense of aiding suicide where evidence demonstrated that victim's behavior was provoked entirely by abuse and coercion on the part of defendant and was unrelated to any suicidal purpose. State v. Lassiter, 197 N.J.Super. 2, 484 A.2d 13 (A.D.1984).

461. Intoxication, instructions

Defendant convicted of murder was denied fair trial by trial court's failure to charge that intoxication was not defense to manslaughter or aggravated manslaughter, as that failure unintentionally prevented conviction on those lesser included offenses and forced jury to choose between murder conviction and acquittal. State v. Warren, 104 N.J. 571, 518 A.2d 218 (1986).

466. Verdict, sentence and punishment, instructions

Trial court's supplemental instructions given after jury informed court that it was unable to reach unanimous verdict constituted prejudicial error where instruction implied that jury's task was simply fact-finding and weighing, and may have left jury with impression that was not responsible for decision sentencing defendant to death. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Notwithstanding fact that trial court informed jury in penalty phase of capital trial that nonunanimous verdict would result in sentence of imprisonment, trial court's supplemental instructions given after jury announced that it could not reach unanimity which did not reinform jury of consequences of nonunanimous verdict, and which improperly emphasized importance of reaching unanimous verdict were coercive, and thus prejudicial error. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

After trial court was informed by jury after four hours of deliberations that it was unable to reach unanimous verdict, remand of matters to jury for further deliberations was not abuse of discretion where jury asked court for suggestions, and penalty phase involved several complex issues. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

467. Diminished capacity, instructions

Murder defendant was entitled to have jury charged that relevant evidence of mental disease or defect could be considered either with respect to insanity defense or as negating state of mind required for murder, where competent reliable evidence was submitted as to defendant's schizophrenic tendencies and disorientation at time of murder. State v. Breakiron, 108 N.J. 591, 532 A.2d 199 (1987).

Trial court's failure to give instruction on defense of diminished capacity was error in murder trial even though defendant failed to give pretrial notice of intention to rely on such defense, where hearing regarding defendant's competency to stand trial terminated before trial court reached issue of defendant's lack of capacity to waive insanity defense and where it was apparent to State that defendant's mental condition was at core of case. State v. Jasuilewicz, 205 N.J.Super. 558, 501 A.2d 583 (A.D.1985) certification denied 103 N.J. 467, 511 A.2d 649.

468. Causation, instructions

Trial court's failure to define statutory elements of causation in instruction to jury on felony-murder charge required reversal, despite court's repeatedly stressing that State had burden of proving beyond reasonable doubt that defendant "caused" death of victim. State v. Smith, 210 N.J.Super. 43, 508 A.2d 206 (A.D.1986) certification denied 105 N.J. 582, 523 A.2d 210.

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468.5. Aggravating and mitigating factors, in general, instructions

Charge instructing jury to decide case "without any bias, prejudice or sympathy" in death penalty deliberations was proper, declining to follow *People v. Lanphear*, 36 Cal.3d 163, 203 Cal.Rptr. 122, 680 P.2d 1081; *Legare v. State*, 250 Ga. 875, 302 S.E.2d 351; *State v. Quinlivan*, 81 Wash.2d 124, 499 P.2d 1268. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

469. Outrageousness or vileness of murder, aggravating factors, instructions

Trial court's charge during sentencing phase of capital trial which focused on fact that murder had been committed in presence of victim's grandchildren was proper to explain to jury that it could consider fact only as evidence of defendant's depravity of mind, and that it could not consider effect of crime on children. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Instruction on issue of whether murder involved torture, depravity of mind, or aggravated battery to victim for purpose of finding aggravating factor in penalty phase of capital trial lacked clarity necessary to satisfy requirement that jury's discretion be rationally channeled. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Where murder was not product of greed, envy, revenge, or other emotion ordinarily associated with murder, and served no purpose for defendant beyond his pleasure of killing, court shall instruct jury on meaning of depravity for purpose of finding as aggravating circumstance fact that murder involved depravity of mind. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

With regard to aggravating factor that "murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery," trial court should not quote subd. c(4)(c) since initial part of it serves no function, and it will serve only to confuse jury to tell it that it must find that murder was "outrageously or wantonly vile, horrible or inhuman," and then later instruct jury to disregard that portion of the instruction. State v. Biegenwald, 106 N.J. 13, 524 A.2d 130 (1987).

470. R[illegible]; belief, self-defense, instructions

In t[illegible]ecution in which defendant allegedly [illegible] victim was about to attack and fatal[illegible] victim in stomach, instruction that [illegible]-defense would serve to reduce murde[illegible]ecified degree of manslaughter was [illegible]used; jury was given opportunity to [illegible]ice of defendant's honest, if not rea[illegible]f in necessity to use force when jury [illegible]ed on alternative verdicts of murder, [illegible]slaughter, and aggravated manslaughte[illegible] Bowens, 108 N.J. 622, 532 A.2d 215 (19[illegible].

In [illegible]osecution, defendant was not entitled to [illegible] self-defense instruction based on defendan[illegible] that victim whom he fatally stabbed wa[illegible]o stab him, but was entitled to have jury cons[illegible]ailable verdicts implicated by defendant's evide[illegible] that he did not have prerequisite for murder co[illegible]iction of conscious object or near certainty that his attempt to defend himself would cause victim's death, and failure to submit reckless and aggravated manslaughter charges was thus reversible error; evidence presented at least rational basis for convicting defendant of reckless or aggravated manslaughter. State v. Bowens, 108 N.J. 622, 532 A.2d 215 (1987).

VII. SENTENCE AND PUNISHMENT

521. Validity—In general

The 30-year minimum sentence without parole eligibility mandated by N.J.S.A. 2C:11-3, subd. b, upon murder conviction is not facially violative of federal and state constitutional safeguards against inflictions of "cruel and unusual punishment" [U.S.C.A. Const.Amends. 8, 14; N.J.S.A. Const. Art. 1, par. 12], nor is the extent of such punishment disproportional to the offense. State v. Johnson, 206 N.J.Super. 341, 502 A.2d 1149 (A.D.1985) certification denied 104 N.J. 383, 517 A.2d 390.

523. In general

Trial judge in stating, when sentencing for murder, that he was imposing aggregate sentence of 70 years with 25 years parole ineligibility because of cruel and callous manner in which defendant had robbed and killed complied with code provisions which were in effect at time of sentencing. State v. Arriagas, 198 N.J.Super. 575, 487 A.2d 1290 (A.D.1985) affirmed 102 N.J. 265, 508 A.2d 167.

Where instruction kept jury from finding defendant guilty of purposeful or knowing murder, and defendant was found guilty only of felony-murder, armed robbery necessarily merged with the felony-murder, and judge lost opportunity of imposing separate sentence for armed robbery, and imposition of separate sentences was plain error. State v. Arriagas, 198 N.J.Super. 575, 487 A.2d 1290 (A.D.1985) affirmed 102 N.J. 265, 508 A.2d 167.

Societal interest in just punishment is particularly acute when the crime is murder. State v. Rodriguez, 97 N.J. 263, 478 A.2d 408 (1984).

Factor which makes case a "capital case" is existence of one or more aggravating factors which are not outweighed by one or more mitigating factors. State v. Timmons, 192 N.J.Super. 141, 469 A.2d 46 (L.1983).

Great deference must be given to legislative intent governing sentencing for murder. State v. Serrone, 95 N.J. 23, 468 A.2d 1050 (1983).

Defendant convicted of premeditated murder, felony-murder, and underlying felonies of rape and robbery could be sentenced not only for premeditated murder, but also for the two underlying felonies. State v. Stenson, 188 N.J.Super. 361, 457 A.2d 841 (A.D.1982) certification denied 93 N.J. 268, 460 A.2d 671.

523.5. Felony-murder, sentence and punishment

Robbery was an aggravating circumstance, as well as an essential element of felony-murder, that should properly have been considered in defendant's punishment on his felony-murder conviction. State v. Rodriguez, 97 N.J. 263, 478 A.2d 408 (1984).

524. Trial, in general, sentence and punishment

Failure by state to provide itemization of aggravating factors at arraignment in death penalty case and, further, to seek extension of the time to do so under this rule pertaining to additional discovery in capital cases precluded state from setting forth aggravating factors at sentencing hearing. State v. Timmons, 192 N.J.Super. 141, 469 A.2d 46 (L.1983).

525. Jurors, sentence and punishment

Concepts of due process, fundamental fairness, and judicial economy permit the court in a capital murder case to declare before the guilt phase of the trial, where it is clear that certain evidence of guilt ...ll not be relevant to the aggravating factors, that a nondeath-qualified jury will be empaneled to hear the guilt phase and a separate death-qualified jury will be empaneled to hear the penalty phase if required. State v. Monturi, 195 N.J.Super. 317, 478 A.2d 1266 (L.1984).

In death penalty case, prospective juror must be individually questioned in voir dire, apart from other prospective jurors, as to his or her attitudes about death penalty. State v. Timmons, 192 N.J. Super. 141, 469 A.2d 46 (L.1983).

Motion seeking order prohibiting "death qualification" of jurors and precluding or limiting prosecutor's use of peremptory challenges against minority groups would be denied, insofar as it related to federal grounds, for reasons stated in Dobbert v. State, 409 So.2d 1053 and Dobbert v. Strickland, 532 F.Supp. 545. State v. Bass, 191 N.J.Super. 343, 466 A.2d 976 (L.1983).

526. Evidence, sentence and punishment

In penalty phase of capital proceeding, conventional standards of competency of evidence, relating to both expert's qualifications and scientific reliability of subject matter, are not to be strictly applied on proffer of statistical evidence of rehabilitative potential of similarly situated defendants. State v. Davis, 96 N.J. 611, 477 A.2d 308 (1984).

Sentencing judge may exercise far-ranging discretion as to sources and types of evidence used to assist him or her in determining kind and extent of punishment to be imposed in sentencing phase of capital proceeding. State v. Davis, 96 N.J. 611, 477 A.2d 308 (1984).

In sentencing phase of capital proceeding, defendant is entitled to use all reliable, helpful information. State v. Davis, 96 N.J. 611, 477 A.2d 308 (1984).

Defendant's latitude in presenting mitigating factors in death penalty case should be exceedingly broad, bounded only by requirement of relevance. State v. Timmons, 192 N.J.Super. 141, 469 A.2d 46 (L.1983).

527. Instructions—In general, sentence and punishment

Aggravated assault charge should have been given in prosecution for murder where a jury could have concluded that, notwithstanding defendant's assault on victim, victim died solely from action of another. State v. Vujosevic, 198 N.J.Super. 435, 487 A.2d 751 (A.D.1985) certification denied 101 N.J. 247, 501 A.2d 920.

530. —— Unanimity of verdict, instructions, sentence and punishment

Subsection concerning consequences of failure to reach a unanimous verdict and directing court to advise jury about same does not apply in guilt phase of criminal case. State v. D'Amato, 218 N.J.Super. 595, 528 A.2d 928 (A.D.1987).

533. Concurrent sentences

State v. Reevey, 159 N.J.Super. 130, 387 A.2d 381 (A.D.1978) [main volume] certification denied 79 N.J. 471, 401 A.2d 228.

534. Consecutive sentences

Consecutive sentences of a custodial term of ten years, with parole ineligibility for five years, and 30-year custodial term, with parole ineligibility for 15 years, and $500 penalties on each count, for aggravated assault and murder, respectively, were within statutory limits and within applicable guidelines. State v. Lassiter, 197 N.J.Super. 2, 484 A.2d 13 (A.D.1984).

Trial court did not err in giving defendant consecutive sentences for murder and assault of the same victim because the crimes constituted separate and distinct offenses where the assault was committed more than 24 hours prior to the murder. State v. Lassiter, 197 N.J.Super. 2, 484 A.2d 13 (A.D.1984).

Imposition of consecutive life sentences for multiple murders remains a viable "ordinary" sentencing option without reference to or implication of statutory extended-term mechanisms, conditions or procedures. State v. Serrone, 95 N.J. 23, 468 A.2d 1050 (1983).

538. —— Excessive or punitive duration of sentence

State v. Barry, 86 N.J. 80, 429 A.2d 581 (1981), certiorari denied 102 S.Ct. 553 [main volume] 454 U.S. 1017, 70 L.Ed.2d 415.

540.5. Life imprisonment, sentence and punishment

There was no justifiable reason to disturb sentence imposing life imprisonment for murder and requiring defendant to serve term of 25 years without being eligible for parole, since trial court did not impose extended term, sentence was within statutory limits, sentence was based upon findings of fact grounded in competent, reasonably credible evidence, trial court applied correct legal principles in exercising its discretion, and sentence did not shock judicial conscience. State v. Humanik, 199 N.J.Super. 283, 489 A.2d 691 (A.D. 1985) certification denied 101 N.J. 266, 501 A.2d 934.

Life sentence for first-degree murder is not a sentence for an "extended term" within limitation of § 2C:44-5 which states that "not more than one sentence for an extended term shall be imposed." State v. Serrone, 95 N.J. 23, 468 A.2d 1050 (1983).

Imposition of a life sentence for murder is not dependent upon the offender's status with respect to enhancement criteria necessary to impose an "extended term" of imprisonment, but is primarily dependent upon the nature of the offense. State v. Serrone, 95 N.J. 23, 468 A.2d 1050 (1983).

Imposition of life imprisonment for murder is not based upon § 2C:43-6 which defines criteria for an "extended term"; a life sentence for murder is really an ordinary sentence. State v. Serrone, 95 N.J. 23, 468 A.2d 1050 (1983).

541. Death penalty—In general

Retribution constitutes valid penological objective for death penalty; rejecting *People v. Anderson*, 6 Cal.3d 628, 100 Cal.Rptr. 152, 493 P.2d 880; calling into doubt *State v. Ivan*, 33 N.J. 197, 162 A.2d 851; *State v. Leggeadrini*, 75 N.J. 150, 380 A.2d 1112. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

As prerequisite to capital punishment under statute, defendant must purposely or knowingly cause death or serious bodily injury resulting in death by his own conduct or procure same, and not merely participate as accomplice in felony-murder. State v. Martin, 213 N.J.Super. 426, 517 A.2d 513 (A.D.1986).

The 1982 amendment to death penalty provisions did not reduce authorized maximum in murder cases where death penalty is not imposed, rather, there are three sentencing options: death, sentence of 30 years without parole; or sentence between 30 years and life with mandatory minimum 30-year term of parole ineligibility. State v. Martin, 213 N.J.Super. 426, 517 A.2d 513 (A.D. 1986).

Existence of adequate factual basis for serving defendant with notice of aggravating factor to be proved in capital sentencing proceeding does not preclude determination that prosecutor acted arbitrarily or capriciously in selecting defendant's case for capital treatment. State v. Smith, 202 N.J.Super. 578, 495 A.2d 507 (L.1985).

State's proofs at penalty phase in a capital murder case are limited to that which is relevant to specific aggravating factors noted. State v. Montun, 195 N.J.Super. 317, 478 A.2d 1266 (L.1984).

There is no justification for different interpretations of state and federal law concerning capital punishment insofar as it is alleged to be constitutionally cruel and unusual punishment. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

Because of its uniqueness, death penalty cannot be imposed under a statutory scheme that creates a substantial risk that the death penalty would be inflicted in an arbitrary and capricious manner. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

Imposition of death penalty requires more procedural safeguards than would attend imposition of custodial sentence. State v. Biegenwald, 96 N.J. 630, 477 A.2d 318 (1984) clarified 97 N.J. 666, 483 A.2d 184.

Defendant is to be sentenced to death only on clearest evidence that no mitigating factor or factors outweigh aggravating factors alleged by State. State v. Timmons, 192 N.J.Super. 141, 469 A.2d 46 (L.1983).

Fact finder was precluded from imposing death penalty where state conceded the absence of aggravating factors and was barred from introducing existence of such aggravating factors, if later found, at sentencing hearing. State v. Timmons, 192 N.J.Super. 141, 469 A.2d 46 (L.1983).

Defendants could not prohibit the "death qualification" of jurors in capital case. State v. Bass, 189 N.J.Super. 461, 460 A.2d 223 (L.1983).

541.1. —— Aggravating factors, death penalty sentence and punishment

Jury finding that aggravating factors outweighed mitigating factors beyond a reasonable doubt was required by subd. c(2, 3) at time of defendant's murder trial as a matter of fundamental fairness, and absence of such a finding mandated reversal and retrial of death penalty decision. State v. Biegenwald, 106 N.J. 13, 524 A.2d 130 (1987).

Motion for evidentiary hearing to dismiss one of two aggravating factors which State intended to establish in sentencing proceeding in murder prosecution to support death sentence could not be considered before guilt determination phase of trial where, because both aggravating factors were not being challenged, death-qualified jury and separate sentencing hearing were still necessary and issue might become moot upon rendition of verdict in guilty phase of trial. State v. Spotwood, 202 N.J.Super. 532, 495 A.2d 483 (L.1984).

Alleged facts that defendant, apparently because of her beliefs that the father of three of her children might attempt to gain custody of them, over a period of several hours and after much thought, placed each of her four children into a river until they were drowned, demonstrated a murder which was outrageously or wantonly vile, horrible or inhuman and which involved torture, depravity of mind and an aggravated battery to the victims, thereby constituting an aggravating factor under this section. State v. Wright, 196 N.J.Super. 516, 483 A.2d 436 (L.1984).

To permit the prosecutor to withdraw a previously indicated aggravating factor violates the clear legislative intent to remove from the prosecutor any discretion in connection with the death aspect of a murder case and gives an interpretation to this section which might render it unconstitutional. State v. Wright, 196 N.J.Super. 516, 483 A.2d 436 (L.1984).

Having an aggravating factor involved does not deny the trial court jurisdiction to determine the penalty aspect of a capital case. State v. Wright, 196 N.J.Super. 516, 483 A.2d 436 (L.1984).

Postmurder offenses defendant allegedly committed were irrelevant in penalty phase of his prosecution for two counts of conspiracy to commit murder and three counts of murder, to support, as an aggravating factor, a finding that the murder was committed for the purpose of escaping detection, apprehension, trial, or punishment. State v. Montun, 195 N.J.Super. 317, 478 A.2d 1266 (L.1984).

Fact that a murder was outrageously or wantonly vile, horrible, or inhuman, as an aggravating factor in a murder prosecution, requires a showing of torture, depravity of mind, or aggravated battery to the victim, the depravity of mind referring to a mental state which leads to torture or aggravated battery before the victim is killed, and

torture and aggravated battery considered together, imposing a requirement for evidence that the victim was seriously physically abused prior to death State v. Montuni, 195 N.J.Super. 317, 478 A.2d 1266 (L.1984).

Statutory aggravating factor that defendant purposely or knowingly created grave risk of death to another person in addition to murder victim may constitutionally be applied where another is actually injured by virtue of proximity to defendant during actual killing and type of weapon used, including handgun, revolver or shotgun. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

Statutory aggravating factor that defendant purposefully or knowingly created grave risk of death to another person in addition to murder victim was not facially unconstitutional as applied to defendant where undisputed facts reflected that defendant unloaded six rounds of his .38 caliber revolver at intended murder victim while the "other person" was sitting close to victim on couch, and several bullets struck victim on side next to which "other person" was sitting. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

Pretrial judicial review of adequacy of evidence to support aggravating factors which prosecutor proposes to prove at capital sentencing proceeding is warranted, though not mandated, by, inter alia, need to ensure that defendant is not subjected to such proceeding without justifiable cause, together with substantial commitments of time and resources triggered by prosecutorial charging of aggravating factors which could result in death penalty. State v. McCrary, 97 N.J. 132, 478 A.2d 339 (1984).

This section which provides as an aggravating factor permitting death sentence that murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery of the victim must be construed so that test requires evidence of torture, depravity of mind or an aggravated battery to the victim and, under this section depravity of mind is the mental state which leads to torture or aggravated battery before the victim is killed, and torture and aggravated battery must be construed together, imposing a requirement of evidence that the victim was seriously physically abused prior to death. State v. Bass, 189 N.J.Super. 445, 460 A.2d 214 (L.1983).

541.11. —— Escape, aggravating factors, death penalty

N.J.S.A. 2C:11-3, subd. c(4)(f), stating that aggravating factor shall be found when murder was committed for purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by defendant or another, did not apply only to killing of law enforcement officer or someone acting in capacity of law enforcement officer, particularly where N.J.S.A. 2C:11-3, subd. c(4)(h) specifically applied to killing of law enforcement officer. State v. Moore, 207 N.J.Super. 561, 504 A.2d 804 (L.1985).

Alleged robbery of victim and burglary of victim's apartment on same day as murder of victim could be used to support aggravating factor provided for in N.J.S.A. 2C:11-3, subd. c(4)(f), for murder committed for purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by defendant or another. State v. Moore, 207 N.J.Super. 561, 504 A.2d 804 (L.1985).

Evidence that victim was next door neighbor of one defendant and that victim knew who defendants were was sufficient, for purposes of overcoming defendants' pretrial motion to dismiss aggravating factor, to support State's allegation that defendants murdered victim to prevent victim identifying them to police and testifying against them at trial for robbery, burglary, possession of a weapon and conspiracy. State v. Moore, 207 N.J.Super. 561, 504 A.2d 804 (L.1985).

541.12. —— Commission during other offense, aggravating factors, death penalty

Defendants convicted under common-law doctrine of felony-murder will not be subjected to capital punishment. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Consideration of fact that murder was committed during felony as aggravating factor was not unconstitutional in view of fact that this section required that defendant commit murder "purposely" or "knowingly." State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Allegations that murder was committed during robbery and that murder was committed during burglary must be enumerated as single aggravating factor under N.J.S.A. 2C:11-3, subd. c(4)(g), for offense committed while defendant was engaged in commission of, or attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary or kidnapping, but jury must be instructed to consider both robbery and burglary in overall weighing process. State v. Moore, 207 N.J.Super. 561, 504 A.2d 804 (L.1985).

541.15. —— Juveniles, death penalty, sentence and punishment

Legislature's providing for adult treatment of certain juvenile defenders was not intended to preclude application of capital punishment statute to such offenders especially in light of inclusion of mitigating factors of age and character. State v. Smith, 202 N.J.Super. 578, 495 A.2d 507 (L.1985).

541.16. —— Outrageousness or vileness, aggravating factors, death penalty, sentence and punishment

Facts that murderer committed murder because he liked it or it made him feel better, that he killed bystanders without reason, that he killed children or others whose helplessness would indicate that there was no reason to murder, or that murderer intentionally mutilated body he believed was no longer a live human being, evidenced "depravity of mind" for purposes of provision in death penalty statute listing as aggravating circumstance fact that murder was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Mere fact that murder is preceded by warning to victim would not fulfill requirement that murderer intends to, or has explicit purpose to, inflict severe psychological or physical pain prior to death for purpose of provision in this section listing as aggravating circumstance fact that murder was outrageously or wantonly vile, horrible, or inhuman and that it involved depravity of mind State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Torture or aggravated battery to murder victim exists, for purpose of provision in this section ting as aggravating circumstance fact that murnvolved torture or aggravated battery, if de- t intended to cause, and did in fact cause, severe physical or psychological pain or suffering to victim prior to victim's death, with severity measured either by intensity of pain or duration of pain, or combination of both. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Subdivision c(4)(c) listing as aggravating circumstance fact that murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or aggravated battery to victim could be applied to execution-style murders in view of extreme psychological suffering by victim. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Evidence that defendant told murder victim, after he had stabbed her, but while she was still alive, that he was going to kill her grandchildren would be sufficient to support finding that defendant purposely inflicted severe mental pain prior to victim's death for purpose of subd. c(4)(c) listing as aggravating circumstance fact that murder involved torture. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

541.17. —— Age, mitigating factors, death penalty, sentence and punishment

Age should be considered as mitigating factor in penalty phase of capital trial only when defendant is relatively young or when defendant is relatively old. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Notwithstanding fact that defendant was '2 years old at time of killing, failure to provide definition for mitigating factor of age of defendant was proper in penalty phase of capital trial even if imposition of mandatory 30-year term without parole would have protected society because defendant would have been too old to constitute threat to anyone when he would become eligible for parole. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

541.2. —— Burden of proof, death penalty, sentence and punishment

In all cases charged under the Code's murder provisions, in order for the death penalty to be imposed, State must prove beyond a reasonable doubt that aggravating factors outweighed the mitigating factors. State v. Biegenwald, 106 N.J. 13, 524 A.2d 130 (1987).

This section does not unconstitutionally impose upon defendant burden of proof in connection with weighing of aggravating and mitigating factors, rather, only burden imposed on defendant is burden of producing existence of any mitigating factors, whereas burden imposed upon state is to prove beyond reasonable doubt existence of aggravating factors and the ultimate issue, that is whether aggravating factors outweigh mitigating. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

541.3. —— Intent, death penalty, sentence and punishment

To sustain a finding that murder was committed for purpose of escaping detection, apprehension, trial, punishment, or confinement for another offense committed by the defendant or another, as an aggravating factor in prosecution for murder, motive behind the murder must be the concealment of another prior offense, and the proof must be limited to that issue. State v. Montun, 195 N.J.Super. 317, 478 A.2d 1266 (L.1984).

Statutory aggravating factor that defendant purposely or knowingly created grave risk of death to another person in addition to murder victim may constitutionally be applied where, though no actual injury was sustained, other person was so close to defendant during his act of killing as to be within the "zone of danger" posing real likelihood of risk of death, considering type of weapon used and actual conduct of defendant. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

To constitutionally apply statutory aggravating factor that in commission of murder, defendant purposely or knowingly created grave risk of death to another person in addition to victim, facts must include a knowing or purposeful state of mind vis-a-vis the creation of a great risk of death, that there be a likelihood or high probability of great risk of death created, not just a mere possibility, and that there be at least another person within the "zone of danger" created by defendant's conduct. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

541.4. —— Procedure, death penalty, sentence and punishment

Pretrial motion to merge aggravating factor that murder was committed during robbery and that murder was committed during burglary was premature, and would only become viable if, after guilt phase of trial, jury convicted defendant of purposeful or knowing murder by his own conduct and of both robbery and burglary. State v. Moore, 207 N.J.Super. 561, 504 A.2d 804 (L.1985).

A prosecuting attorney who may determine which defendants will be subjected to the death penalty and which will not is violating the sentencing proceeding set forth in this section, which provides that such proceeding may not be waived by the prosecuting attorney. State v. Wright, 196 N.J.Super. 516, 483 A.2d 436 (L.1984).

Any sentencing procedure which lacks legislative standards in connection with death sentence adjudication or which allows arbitrary or capricious sentences may be rendered unconstitutional. State v. Wright, 196 N.J.Super. 516, 483 A.2d 436 (L.1984).

State death penalty sentencing procedure must allow any mitigating factors to be considered.

State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

This section must direct sentencer's discretion by clear and objective standards, providing specific and detailed guidance, and it must provide for an appellate process by which a sentence of death may be rationally reviewed. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

541.5. Notice, death penalty, sentence and punishment

Rule 3:13–4 providing that notice of aggravating factors should be served at time of arraignment means that notice must be given at arraignment, not whenever prosecutor determines, if there is sufficient reason for an extension of time for such notice, it should be prosecutor's responsibility to move for an enlargement and such motion should be made at time of arraignment. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

Prosecutor's failure, in violation of Rule 3:13–4, to provide defendant at arraignment with notice of intent to seek death penalty and aggravating factor, rather waiting until two months after arraignment, would be treated as if a motion to enlarge time had been filed and granted nunc pro tunc, notwithstanding that no motion to enlarge was made at arraignment, nor was a motion to enlarge nunc pro tunc filed at any time, where defendant had had notice since September 1983 for a trial expected to begin in March, 1984, defense counsel had had ample and sufficient opportunity to prepare, there was no indication that delay was result of negligence or bad faith on part of prosecutor, and it could be reasonably assumed that delay arose as result of prosecutor's attempts to carefully and fully evaluate each case. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

541.6. —— Jury, death penalty, sentence and punishment

Courts may not require postguilt death qualification of jury pursuant to court's common-law supervisory powers over administration of criminal justice where Legislature explicitly required that same jury must generally decide both guilt and sentencing. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

A court may decide pretrial in a capital murder case that a second jury will be empaneled if defendant is found guilty of purposeful or knowing murder by his own conduct. State v. Montun, 195 N.J.Super. 317, 478 A.2d 1266 (L.1984).

Empaneling a death-qualified jury in prosecution for two counts of conspiracy to commit murder and three counts of murder, as well as 15 additional postmurder offenses, and trying the case as to guilt on all counts, deferring any decision as to the necessity for empaneling a separate death-qualified jury for the penalty phase until the guilt phase was completed, was the appropriate procedure to follow in light of information originally before the court, despite fact that guilt phase of trial might consist largely of postmurder offenses which could prejudice defendant at penalty phase of trial, but further information warranted severing the postmurder offenses. State v. Montun, 195 N.J.Super. 317, 478 A.2d 1266 (L.1984).

That state death penalty scheme requires jury to determine and weigh aggravating and mitigating factors but does not authorize jury to determine actual sentence does not violate N.J.S.A. Const. Art. 1, pars. 9, 10 providing for right of trial by jury, as jury sentencing has never been permitted and the Constitution does not require to the contrary, and, as a practical matter, it is precisely the jury which does determine whether death penalty is to be imposed by performing its weighing function. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

541.7. —— Grand jury, death penalty, sentence and punishment

Section 2C:11-3 fails to provide for presentation of aggravating factor or factors to grand jury does not violate N.J.S.A. Const. Art. 1, par. 8 providing that no person may be held to answer for any criminal offense unless on presentment or indictment of grand jury, as that requirement relates to indictment by grand jury of offense charged, not the particular sentence or punishment. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

541.8. —— Evidence, death penalty, sentence and punishment

Upon finding of necessity to go to penalty stage in trials of defendants charged with purposeful or knowing murder by their own conduct, State would be limited, in proofs in support of N.J.S.A. 2C:11–3, subd. c(1)(c), providing that jury may find aggravating factor where murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to victim, to evidence that murder was outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to victim, where State clearly provided evidence that murder of victim involved aggravated battery involving three separate beatings but failed to provide any evidence to support allegation that murder involved depravity of mind or torture. State v. Moore, 207 N.J.Super. 561, 504 A.2d 804 (L.1985).

Evidence which might be admissible to prove defendant's guilt in prosecution for three counts of murder and two counts of conspiracy to commit murder would not be admissible at penalty phase of the prosecution on specific aggravating factors noticed, including outrageousness and vileness of the offense and purpose of escaping detection, if defendant was found guilty of purposeful or knowing murder by his own conduct, in view of fact that this section proscribes admissibility. State v. Montun, 195 N.J.Super. 317, 478 A.2d 1266 (L.1984).

Evidence of postmurder offenses committed by defendant would be inadmissible at penalty phase of his trial on two counts of conspiracy to commit murder and three counts of murder, where aggravating factor relied on was that the murder involved outrageously or wantonly vile, horrible or inhuman conduct in that it involved torture, depravity of mind or aggravated battery to the

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victim. State v. Montuni, 195 N.J.Super. 317, 478 A.2d 1266 (L.1984).

Evidence of postmurder offenses committed by a defendant against other victims are irrelevant to a determination of existence or nonexistence of aggravating factor that murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim, such aggravating factor is sustained only by proof of premurder conduct of the defendant. State v. Montuni, 195 N.J.Super. 317, 478 A.2d 1266 (L.1984).

541.9. —— Discovery, death penalty

Defendants were not entitled to bills of particular specifying facts State intended to rely on in support of allegation that murder involved aggravated battery, where defendants had been provided with ample discovery supporting such allegation. State v. Moore, 207 N.J.Super. 561, 504 A.2d 804 (L.1985).

If evidence is present in a murder case which would justify determination of an aggravating factor for purposes of death sentence, the prosecuting attorney's duty is to reveal those facts to defendant and the court, a prosecuting attorney who fails to indicate the existence of evidence of an aggravating factor is not exercising discretion, but rather is derelict in his duty as an officer of the court and as a public servant. State v. Wright, 196 N.J.Super. 516, 483 A.2d 436 (L.1984).

542.1. —— Defendant's own conduct, death penalty

Fact that jury was unable to reach conclusion on whether defendant committed murder by his own conduct was not fatal to murder conviction, but merely precluded State from seeking death penalty, where jury returned guilty verdict finding defendant had purposefully or knowingly committed murder. State v. Moore, 207 N.J.Super. 561, 504 A.2d 804 (L.1985).

Fact that medical examiner was unable to say which specific blow caused death of old man who died as result of group beating did not require elimination of death penalty as possible punishment for defendants, where evidence that defendants each directly participated in beatings of victim was sufficient to carry the case to the jury on issue of whether each defendant committed murder by his own conduct. State v. Moore, 207 N.J.Super. 561, 504 A.2d 804 (L.1985).

543. Change, correction or reduction of sentence

Habeas corpus petitioner's claim that by reason of refusal of resentencing panel to reduce his life sentence for murder, in light of sentence imposed on codefendant, he had been denied due process and equal protection, was a state law claim, not a federal claim and did not come within habeas corpus statute (28 U.S.C.A. § 2254). Jones v. Superintendent of Rahway State Prison, D.C., 576 F.Supp. 4 (1982) affirmed 725 F.2d 40.

Retribution constitutes valid penological objective for death penalty, rejecting *People v. Anderson*, 6 Cal.3d 628, 100 Cal.Rptr. 152, 493 P.2d 880, calling into doubt *State v. Ivan*, 53 N.J. 197, 162 A.2d 851, *State v. Leggenadrini*, 75 N.J. 150, 380 A.2d 1112. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

544. Parole eligibility

Sentencing defendant to extended term of 70 years for murder was not error, but imposing term of parole ineligibility in excess of 25 years was error. State v. Kelly, 207 N.J.Super. 14, 504 A.2d 37 (A.D.1986).

Courts can require offenders to serve mandatory minimum terms before they can be considered for parole. New Jersey Parole Bd. v. Byrne, 93 N.J. 192, 460 A.2d 103 (1983).

547. Resentencing

Resentencing cannot be considered double jeopardy where first sentence was death sentence and evidence was sufficient, however, State cannot charge any aggravating factors on resentencing that were not found by jury in first sentencing phase. State v. Biegenwald, 106 N.J. 13, 524 A.2d 130 (1987).

Improper introduction of prior conviction as aggravating factor requires resentencing. State v. Biegenwald, 96 N.J. 630, 477 A.2d 318 (1984) clarified 97 N.J. 666, 483 A.2d 184.

548. Restitution, sentence and punishment

Parole board, in appropriate situation in which it determines restitution is to be paid by homicide defendant as a condition of parole, may limit damages to medical expenses and related costs, funeral expenses, specific personal property losses, and other less common losses if clearly provable; it may decide in a given case to include within the restitutional amount lost wages for limited periods of time which do not involve assessments of life expectancy; but such damages should not include valuation of life, permanent injury, pain and suffering, loss of companionship, services, nurture, support and other derivative and indirect losses, or costs not readily demonstrable on an objective basis. Application of Trantino, 89 N.J. 347, 446 A.2d 104 (1982).

549. Prior convictions, sentence and punishment

Capital defendant may attack use of prior murder conviction as aggravating circumstance where prior conviction resulted from non vult plea entered at time when its acceptance eliminated possibility of death sentence, and if no factual basis existed for plea to murder. State shall be barred in sentencing proceedings from relying on prior conviction to prove aggravating factor. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Defendant's prior non vult plea to indictment for murder was sufficient to prove aggravating factor that defendant had previously been convicted of murder, even though defendant might have been convicted of either murder or manslaughter under indictment. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Ambiguity in this section which provides that jury at penalty phase of capital proceeding may consider as aggravating factor fact that defendant was previously convicted of murder was required to be resolved in favor of defendant. State v. Biegenwald, 96 N.J. 630, 477 A.2d 318 (1984) clarified 97 N.J. 666, 483 A.2d 184.

This section which provides that jury at penalty phase of capital proceeding may consider as aggravating factor fact that defendant was previously convicted of murder is unclear with respect to necessity for or degree of finality that must attach to prior conviction in order for it to be available for consideration, requiring resort to intrinsic and extrinsic aids of statutory interpretation to glean legislative intent. State v. Biegenwald, 96 N.J. 630, 477 A.2d 318 (1984) clarified 97 N.J. 666, 483 A.2d 184.

This section which provides that jury at penalty phase of capital proceeding may consider as aggravating factor fact that defendant "has previously been convicted" of murder requires that state appellate process affecting that conviction be first exhausted. State v. Biegenwald, 96 N.J. 630, 477 A.2d 318 (1984) clarified 97 N.J. 666, 483 A.2d 184.

Status of prior conviction at time of its intended use in penalty phase of subsequent murder prosecution is determinative, rather than status at time that subsequent offense was committed, and thus, final conviction obtained prior to commencement of penalty phase of subsequent trial may be relied on as aggravating factor at that trial. State v. Bey, 96 N.J. 625, 477 A.2d 315 (1984) clarified 97 N.J. 666, 483 A.2d 185.

State may not use defendant's prior conviction as aggravating factor in penalty phase of capital proceeding until all avenues of appellate review of that conviction have been exhausted. State v. Bey, 96 N.J. 625, 477 A.2d 315 (1984) clarified 97 N.J. 666, 483 A.2d 185.

VIII. REVIEW

561. In general

Murder defendant's appeal of interlocutory order which rejected admissibility of proffered expert testimony in mitigation of death penalty verdict was entertained, notwithstanding its interlocutory nature, in view of its importance to state and to defendant, as well as to other similarly situated defendants. State v. Davis, 96 N.J. 611, 477 A.2d 308 (1984).

563. Instructions, review

In prosecution for knowingly causing death "and/or" causing death in course of a robbery, trial judge's instruction to jury that it might have to consider whether defendant purposely or knowingly killed even though indictment did not charge "purposely" was, if error, harmless, in view of fact that jury convicted only of felony-murder. State v. Arriagas, 198 N.J.Super. 575, 487 A.2d 1290 (A.D.1985) affirmed 102 N.J. 265, 508 A.2d 167.

566. Capital causes, review

In reviewing death sentence, appellate courts must adhere to stricter standard of review than in reviewing jury's findings of fact in noncapital trial. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Proportionality review in context of capital sentencing scheme is not appellate review to ensure that aggravating factors outweigh beyond reasonable doubt all mitigating factors, or to determine if death sentence is disproportionate to crime, but it rather purports to inquire whether penalty is nonetheless acceptable in particular case because disproportionate to punishment imposed on others convicted of same crime. State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

Proportionality review in imposition of death penalty should include comparisons of similar cases throughout entire state, declining to follow *State v. Sonnier*, 379 So.2d 1336 (La.). State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

568. —— Prior offenses, review

Introduction, in murder prosecution, of evidence of defendant's accomplishing alleged prior rape and alleged prior assault by "the use of force to the throat" was improper admission of other crimes evidence to establish identity and constituted reversible error. State v. Reldan, 185 N.J.Super. 494, 449 [illegible] 1317 (A.D.1982) certification [illegible] 91 [illegible], 453 A.2d 862.

[illegible]alty, review

[illegible] appellate review of sentence imposed under this section is sufficient to satisfy Federal Constitution. State v. Price, 195 N.J.Super. 285, 478 A.2d 1249 (L.1984).

2C:11–4. Manslaughter

a. Criminal homicide constitutes aggravated manslaughter when the actor recklessly causes death under circumstances manifesting extreme indifference to human life.

b. Criminal homicide constitutes manslaughter when:

(1) It is committed recklessly; or

(2) A homicide which would otherwise be murder under section 2C:11–3 is committed in the heat of passion resulting from a reasonable provocation.

c. Aggravated manslaughter is a crime of the first degree and upon conviction thereof, a person may, notwithstanding the provisions of paragraph (1) of subsection a. of N.J.S. 2C:43–6, be sentenced to an ordinary term of imprisonment between 10 and 30 years. Manslaughter is a crime of the second degree.

Amended by L.1986, [illegible]72, § 1, eff. Dec. 8, 1986.

last deletions by strikeouts

New Jersey Code

Rule that in order to make a killing murder, victim must die within a year and a day after the stroke was received or cause of death was administered would be abolished. Id.

The common law "year and a day rule," which has been part of the basic law of New Jersey, does not conform to present-day medical realities, principles of equity or public policy, and the rule will therefore be rejected as an anachronism and declared to be no longer part of the state's common law. State v. Young, 148 N.J.Super. 405, 372 A.2d 1117 (A.D.1977), reversed on other grounds 77 N.J. 245, 390 A.2d 556.

2C:11-3. Murder

a. Except as provided in section 2C:11-4 criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death; or

(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is 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 instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; 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.

b. Murder is a crime of the first degree but a person convicted of murder may be sentenced, except as provided in subsection c. of this section, by the court to a term of 30 years, during which the person shall not be eligible for parole or to a specific

term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

c. Any person convicted under subsection a.(1) or (2) who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment, of anything of pecuniary value shall be sentenced as provided hereafter:

(1) The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section. Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury.

(2) At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4) of this subsection. The defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph (5) of this subsection. The State and the defendant shall be permitted to rebut any evidence presented by the other party at the sentencing proceeding and to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor. Prior to the commencement of the sentencing proceeding, or at such time as he has knowledge of the existence of an aggravating factor, the prosecuting attorney shall give notice to the defendant of the aggravating factors which he intends to prove in the proceeding.

(3) The jury, or if there is no jury, the court shall return a special verdict setting forth in writing the existence or non-existence of each of the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsec-

tion. If any aggravating factor is found to exist, the verdict shall also state whether it is or is not outweighed by any one or more mitigating factors.

(a) If the jury or the court finds that any aggravating factor exists and is not outweighed by one or more mitigating factors, the court shall sentence the defendant to death.

(b) If the jury or the court finds that no aggravating factors exist, or that any aggravating factors which exist are outweighed by one or more mitigating factors, the court shall sentence the defendant pursuant to subsection b.

(c) If the jury is unable to reach a unanimous verdict, the court shall sentence the defendant pursuant to subsection b.

(4) The aggravating factors which may be found by the jury or the court are:

(a) The defendant has previously been convicted of murder;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of any thing of pecuniary value;

(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary or kidnapping; or

(h) The defendant murdered a public servant, as defined in 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.

(5) The mitigating factors which may be found by the jury or the court are:

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;

(b) The victim solicited, participated in or consented to the conduct which resulted in his death;

(c) The age of the defendant at the time of the murder;

(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;

(e) The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution;

(f) The defendant has no significant history of prior criminal activity;

(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or

(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

d. The sentencing proceeding set forth in subsection c. of this section shall not be waived by the prosecuting attorney.

e. Every judgment of conviction which results in a sentence of death under this section may be appealed, pursuant to the rules of court, to the Supreme Court, which shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

L.1978, c. 95, § 2C:11-3, eff. Sept. 1, 1979. Amended by L.1979, c. 178, § 21, eff. Sept. 1, 1979; L.1981, c. 290, § 12, eff. Sept. 24, 1981; L. 1982, c. 111, § 1, eff. Aug. 6, 1982.

New Mexico Code

Although the deceased died in Texas, the blow was struck in Quay county, and hence venue was proper in that county. State v. Justus, 65 N.M. 195, 334 P.2d 1104 (1959), cert. denied, 365 U.S. 828, 81 S. Ct. 714, 5 L. Ed. 2d 706 (1961).

Venue improper where offenses completed before reaching county. — Where the first six criminal sexual penetration offenses were completed before reaching Bernalillo county, trial in Bernalillo county as to those offenses was improper. State v. Ramirez, 92 N.M. 206, 585 P.2d 651 (Ct. App. 1978).

Absent prejudice venue provisions inapplicable to Rule 93 hearing. — Neither constitutional nor statutory provisions on venue apply to a hearing under Rule 93, N.M.R. Civ. P. (considering defendant's motion to vacate judgment and sentence against him), because such a hearing is neither a criminal trial nor a criminal prosecution, but rather a civil proceeding. State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

Since defendant had no right to be present at a hearing under Rule 93, N.M.R. Civ. P., a fortiori he had no right to be heard in a particular place, absent a showing of prejudice. State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

Effect of special venue statute. — Former statute providing for prosecution of a person who obtained possession of personal property from its owner by a conditional sales contract and before securing title transferred and conveyed it without consent of its owner, in the counties where such sales contract may be recorded, did not repeal the general law authorizing prosecutions where the crime was committed. State v. Shedoudy, 45 N.M. 516, 118 P.2d 280 (1941).

ARTICLE 2

Homicide

30-2-1. Murder.

A. Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused:

(1) by any kind of willful, deliberate and premeditated killing;

(2) in the commission of or attempt to commit any felony; or

(3) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life.

Whoever commits murder in the first degree is guilty of a capital felony.

B. Unless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree if in performing the acts which cause the death he knows that such acts create a strong probability of death or great bodily harm to that individual or another.

Murder in the second degree is a lesser included offense of the crime of murder in the first degree.

Whoever commits murder in the second degree is guilty of a second degree felony.

History: 1953 Comp., § 40A-2-1, enacted by Laws 1963, ch. 303, § 2-1; 1980, ch. 21, § 1.

I. General Consideration.
II. Deliberation and Premeditation.
III. Felony Murder.
IV. Second-Degree Murder.
V. Manslaughter.
VI. Defenses.
VII. Indictment and Information.
VIII. Evidence and Proof.
IX. Jury Instructions.
X. Malice.

And by lack of provocation. — Malice could be implied from evidence of absence of provocation or from the undisputed fact that the killing was with a deadly weapon. State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

Or fact of unlawful killing. — Malice supporting conviction of second-degree murder would be implied if, by reason of intoxication, defendant was incapable of the cool and deliberate premeditation necessary to constitute first-degree murder, but the killing was unlawful. State v. Cooley, 19 N.M. 91, 140 P. 1111, 52 L.R.A. (n.s.) 230 (1914).

But may not be inferred from mere carrying of gun. State v. Ochoa, 61 N.M. 225, 297 P.2d 1053 (1956).

It is within province of jury to imply malice in a case where a killing with a deadly weapon has been established. State v. Ochoa, 61 N.M. 225, 297 P.2d 1053 (1956); State v. Gilbert, 37 N.M. 435, 24 P.2d 280 (1933).

Ordinary malice. — Refusal to find "intensified or first-degree malice" left a residuum of ordinary malice which constituted second-degree murder. State v. Reed, 39 N.M. 44, 39 P.2d 1005, 102 A.L.R. 995 (1934).

Torture. — Under former law murder perpetrated by means of torture was first-degree murder, whether or not done with deliberation and malice aforethought to effect death. State v. Reed, 39 N.M. 44, 39 P.2d 1005, 102 A.L.R. 995 (1934).

30-2-2. Repealed.

Repeals. — Laws 1980, ch. 21, § 2, repeals 30-2-2 NMSA 1978, relating to malice.

Provisions applicable to murders committed prior to May 14, 1980. — The provisions of this section, applicable to murders committed prior to May 14, 1980, read:

"30-2-2. Malice.

"A. Malice is express malice, when there is the deliberate intention, unlawfully to take away the life of a fellow creature and which is manifested by external circumstances capable of proof.

"B. Malice shall be implied when no considerable provocation appears, or when all circumstances of the killing show a wicked and malignant heart."

30-2-3. Manslaughter.

Manslaughter is the unlawful killing of a human being without malice.

A. Voluntary manslaughter consists of manslaughter committed upon a sudden quarrel or in the heat of passion.

Whoever commits voluntary manslaughter is guilty of a third degree felony.

B. Involuntary manslaughter consists of manslaughter committed 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.

Whoever commits involuntary manslaughter is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-2-3, enacted by Laws 1963, ch. 303, § 2-3.

I. General Consideration.
II. Voluntary Manslaughter.
III. Involuntary Manslaughter.
  A. In General.
  B. Proximate Cause.
IV. Evidence.
V. Jury Instructions.

I. GENERAL CONSIDERATION.

Cross-references. — As to homicide by vehicle, see 66-8-101 NMSA 1978. As to negligence of overseer of coal mine which caused death, being deemed manslaughter, see 69-14-18 NMSA 1978. For instruction on voluntary manslaughter, see UJI Crim. 2.20.

Crime and punishment properly separated. — The fact that the former manslaughter statute, 40-24-7, 1953 Comp., merely defined the offense, while 40-24-10, 1953 Comp., provided the penalty, does not mean that the statute was defective or the acts defined not crimes; crime and punishment can be separated and distinguished by the legislature. State v. McFall, 67 N.M. 260, 354 P.2d 547 (1960).

Applicability to motor vehicle accidents. — This section, the involuntary manslaughter statute, was in no sense repealed by adoption of the negligent homicide statute (64-22-1, 1953 Comp.), but has been in full force and effect at all times; although cases of death resulting from driving while under the influence of intoxicating liquor were taken out from under its operation by adoption of 66-8-102 NMSA 1978, which made driving under the influence a felony, because when a death resulted it would not be "in the commission of an unlawful act not amounting to a felony," upon repeal of the negligent homicide statute by Laws 1957, ch. 239, § 7, and reinstatement of the offense of driving under the influence as a misdemeanor by Laws 1955, ch. 184, § 8, the reapplicability of the involuntary manslaughter statute automatically ensued. State v. Deming, 66 N.M. 175, 344 P.2d 481 (1959).

Manslaughter is one of the four kinds of homicide, and is included within a charge of murder. State v. La Boon, 67 N.M. 466, 357 P.2d 54 (1960); State v. McFall, 67 N.M. 260, 354 P.2d 547 (1960).

trine that a full pardon absolves one from all legal consequences of his crime. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction it removes the penalties and disabilities which ordinarily follow from conviction, and, generally speaking, restores the offender to all his civil rights. 1959-60 Op. Att'y Gen. No. 59-176.

And restores citizenship rights. — A full pardon automatically restores such citizenship rights as were lost by the conviction. 1959-60 Op. Att'y Gen. No. 59-176.

But record not expunged. — There is no law in this state authorizing the expunging from records the fact of a felony conviction for which pardoned. 1959-60 Op. Att'y Gen. No. 59-176.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21A Am. Jur. 2d Criminal Law §§ 1022 to 1035.

Executive clemency to remove disqualification for office, resulting from conviction of crime, as applicable in case of conviction in federal court or court of another state, 135 A.L.R. 1493.

Pardon as restoring license or other special privilege or office forfeited by conviction, 143 A.L.R. 172.

Offense under federal law or law of another state or country, conviction as vacating accused's holding of state or local office or as ground for removal, 20 A.L.R.2d 732.

Pardon of applicant for admission to bar as affecting requisite of good moral character, 64 A.L.R.2d 325.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 71 A.L.R.2d 593.

Propriety of conditioning probation on suspended sentence or defendant's refraining from political activity, protest, or the like, 45 A.L.R.3d 1022.

Pardon as restoring public office on license or eligibility therefor, 58 A.L.R.3d 1191.

State pardon as affecting "convicted" status of one accused of violations of Gun Control Act of 1968 (18 USCS §§ 921 et seq.), 44 A.L.R. Fed. 692.

18 C.J.S. Convicts §§ 2 to 8.

ARTICLE 14

Execution of Death Sentence

Sec.

31-14-1. Warrant of execution upon judgment of death; time of execution.

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 is to be executed, which must be not less than sixty nor more than ninety 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 Santa Fe for execution.

History: Laws 1929, ch. 69, § 1; C.S. 1929, § 35-321; 1941 Comp., § 42-1401; 1953 Comp., § 41-14-1.

State solely responsibile for cost of maintenance of convict. — Where convict under sentence of death is, under the statute, confined in state penitentiary pending determination of his appeal, state has entire jurisdiction of his appeal, state has entire jurisdiction over such convict, and cannot recover cost of his maintenance from county. State v. Board of Comm'rs, 43 N.M. 521, 96 P.2d 290 (1939).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 544, 609 to 612.

Effect of permitting day fixed for execution to pass without carrying out sentence, 34 A.L.R. 314.

Delay in taking defendant into custody after conviction and sentence, 98 A.L.R.2d 687.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death-post-Furman decisions, 71 A.L.R.3d 453.

24 C.J.S. Criminal Law § 1613.

31-14-2. Judge to transmit statement of conviction.

The judge of the court at which a conviction is had, must, immediately after the conviction, transmit to the governor, by mail or otherwise, a statement of the conviction and judgment.

History: Laws 1929, ch. 69, § 2; C.S. 1929, § 35-322; 1941 Comp., § 42-1402; 1953 Comp., § 41-14-2.

31-14-3. Governor may 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, in accordance with the provisions of the six succeeding sections [31-14-4 to 31-14-9 NMSA 1978], unless an appeal is taken.

History: Laws 1929, ch. 69, § 3; C.S. 1929, § 35-323; 1941 Comp., § 42-1403; 1953 Comp., § 41-14-3.

Effect of execution order on defendant's right to appeal. — That defendant's execution was ordered at a date which required him to take an appeal within 90 days of his conviction did not invalidate the judgment and sentence, under 31-14-1 NMSA 1978, since an appeal was taken in less than 60 days, and the judgment suspended, and he was not prejudiced. State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 563.

24 C.J.S. Criminal Law § 1618.

31-14-4. Insanity of defendant; how determined.

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 state penitentiary is situated, whose duty it is to immediately file in the district 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 it shall be the duty of said court to inquire into said question and render judgment thereon.

History: Laws 1929, ch. 69, § 4; C.S. 1929, § 35-324; 1941 Comp., § 42-1404; 1953 Comp., § 41-14-4.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Insanity supervening after conviction and sentence of death, 49 A.L.R. 804.

24 C.J.S. Criminal Law § 1619.

31-14-5. Duty of district attorney upon hearing.

The district attorney must attend the hearing, and may produce witnesses before the court, 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.

History: Laws 1929, ch. 69, § 5; C.S. 1929, § 35-325; 1941 Comp., § 42-1405; 1953 Comp., § 41-14-5.

31-14-6. Order of court committing insane person to hospital.

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 the state hospital for the insane, and there kept in safe confinement until his reason is restored.

History: Laws 1929, ch. 69, § 6; C.S. 1929, § 35-326; 1941 Comp., § 42-1406; 1953 Comp., § 41-14-6.

Law reviews. — For note, "Statutory Proposals for Expanding Outpatient Treatment in New Mexico," see 2 Nat. Resources J. 153 (1962).

31-14-7. Defendant found to be sane, duty of warden [; procedure when sanity is restored.]

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 [31-14-6 NMSA 1978] to the governor, and deliver the defendant, together with a certified copy of such order, to the superintendent of the state hospital for the insane [Las Vegas medical center]. 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.

History: Laws 1929, ch. 69, § 7; C.S. 1929, § 35-327; 1941 Comp., § 42-1407; 1953 Comp., § 41-14-7.

State hospital for the insane. — Laws 1970, ch. 45, § 1, enacts 23-1-13 NMSA 1978 which changes the name of the state hospital for the insane to Las Vegas medical center.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Judicial declaration of sanity, made after alleged offense but before acquittal on ground of insanity at time of offense, as affecting duty of court to commit defendant to asylum for insane, 88 A.L.R. 1084.

24 C.J.S. Criminal Law § 1618; 24B C.J.S. Criminal Law § 2001.

31-14-8. Proceedings when female is supposed to be pregnant.

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 4 [31-14-4 NMSA 1978] of this act except that 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 5 [31-14-5 NMSA 1978] of this act apply to the proceedings upon such inquiry.

History: Laws 1929, ch. 69, § 8; C.S. 1929, § 35-328; 1941 Comp., § 42-1408; 1953 Comp., § 41-14-8.

31-14-9. If female is not pregnant.

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.

History: Laws 1929, ch. 69, § 9; C.S. 1929, § 35-329; 1941 Comp., § 42-1409; 1953 Comp., § 41-14-9.

31-14-10. Judgment of death remaining in force, not executed; no appeal from order of court.

If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction is had, on the application of the district attorney of the county in which the conviction is had, must order the defendant to be brought before it, or if he is

at large, a warrant for his apprehension may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and if no legal reason exists against the execution of the judgment, must make an order that the warden of the state penitentiary, to whom the sheriff is directed to deliver the defendant, execute the judgment at a specified time. The warden must execute the judgment accordingly. From an order directing and fixing the time for the execution of a judgment, as herein provided, there is no appeal.

History: Laws 1929, ch. 69, § 10; C.S. 1929, § 35-330; 1941 Comp., § 42-1410; 1953 Comp., § 41-14-10.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 611.

Effect of permitting day fixed for execution to pass without carrying out sentence, 34 A.L.R. 314.

24 C.J.S. Criminal Law § 1613.

31-14-11. Punishment of death; how inflicted.

The manner of inflicting punishment of death shall be by administration of a continuous intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent.

History: 1953 Comp., § 41-14-11.1, enacted by Laws 1955, ch. 127, § 1; 1979, ch. 150, § 8.

Substitution of means of inflicting death. — Laws 1929, ch. 69, § 11, substituted electrocution for hanging as a mode of executing death penalty, and was applicable to those under sentence of hanging on effective date of the statute. Woo Dak San v. State, 36 N.M. 53, 7 P.2d 940 (1931) (decided under former law).

Caused no constitutional violation. — Laws 1929, ch. 69, § 11, substituting electrocution for hanging, and applicable to persons informed against before passage of the statute, was not violative of constitutional provision prohibiting legislation changing rights, remedies or rules of evidence or procedure in pending cases. Woo Dak San v. State, 36 N.M. 53, 7 P.2d 940 (1931) (decided under former law).

Law reviews. — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 612.

Manner of inflicting death sentence as cruel or unusual punishment, 30 A.L.R. 1452.

24B C.J.S. Criminal Law § 2002.

31-14-12. Place of execution; direction of warden.

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

History: 1978 Comp., § 31-14-12, enacted by Laws 1979, ch. 150, § 9.

Repeals and reenactments. — Laws 1979, ch. 150, § 9, repeals former 31-14-12 NMSA 1978, relating to place of execution, appliances for carrying into execution the death penalty and supervision by the superintendent of the penitentiary, and enacts the above section.

Law reviews. — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 610.

24B C.J.S. Criminal Law § 2002.

31-14-13. [Applicability of act.]

The provision of this act [31-14-11 to 31-14-14 NMSA 1978] shall apply only to capital offenses committed after the effective date of this act, and nothing contained in the provisions of this act shall be construed to alter in any manner the execution of a sentence of death imposed on account of any crime or crimes committed prior to the effective date of this act.

History: 1953 Comp., § 41-14-11.3, enacted by Laws 1955, ch. 127, § 3.

Emergency clauses. — Laws 1955, ch. 127, § 6, makes the act effective immediately. Approved March 16, 1955.

31-14-14. Statutory references to execution.

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

History: 1953 Comp., § 41-14-11.4, enacted by Laws 1955, ch. 127, § 4; 1979, ch. 150, § 10.

Law reviews. — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

Emergency clauses. — Laws 1955, ch. 127, § 6, makes the act effective immediately. Approved March 16, 1955.

Repealing clauses. — Laws 1955, ch. 127, § 5, repeals 41-14-11, 1953 Comp.

31-14-15. Where judgment must be executed; who may be present.

A judgment of death must be executed within the walls of the state penitentiary at Santa Fe, and such execution shall be under the supervision and direction of the warden of said institution. The warden of the state penitentiary must be present at the execution and must 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 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.

History: Laws 1929, ch. 69, § 12; C.S. 1929, § 35-332; 1941 Comp., § 42-1412; 1953 Comp., § 41-14-12.

31-14-16. Return of warden.

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.

History: Laws 1929, ch. 69, § 13; C.S. 1929, § 35-333; 1941 Comp., § 42-1413; 1953 Comp., § 41-14-13.

ARTICLE 15
Public Defenders

Sec.

31-15-1. Short title.

This act [31-15-1 to 31-15-12 NMSA 1978] may be cited as the "Public Defender Act."

North Carolina Code

ARTICLE 18.

Appeal.

§§ 15-177 to 15-178: Repealed by Session Laws 1973, c. 1141, s. 17.

Cross References. — For provisions as to appeals in criminal cases, see § 15A-1441 et seq.

§§ 15-179 to 15-186: Repealed by Session Laws 1977, c. 711, s. 33.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-186.1: Repealed by Session Laws 1973, c. 44, s. 1.

Cross References. — As to credits against the service of sentences and for attainment of prison privileges, see §§ 15-196.1 through 15-196.4.

ARTICLE 19.

Execution.

§ 15-187. Death by administration of lethal gas or drugs.

Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor, except that if any person sentenced to death so chooses, he may at least five days prior to his execution date, elect in writing to be executed by the administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent. (1909, ch. 443, s. 1; C.S., s. 4657; 1935, c. 294, s. 1; 1983, c. 678, s. 1.)

Cross References. — As to punishment for capital crimes committed before July 1, 1935, see § 15-191.

Editor's Note. — Session Laws 1983, c. 678, s. 4, provides: "The warden of Central Prison may obtain and employ the drugs necessary to carry out the provisions of this act, regardless of contrary provisions in Chapter 90 of the General Statutes."

Effect of Amendments. — The 1983 amendment, effective July 5, 1983, added the language beginning "except that if any person sentenced to death so chooses" at the end of the section.

Legal Periodicals. — For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

For comment on capital punishment and evolving standards of decency, see 16 Wake Forest L. Rev. 737 (1980).

CASE NOTES

Section applies only to crimes committed after the effective date of the statute, July 1, 1935, and it will not support a sentence of death by lethal gas imposed for a capital crime committed prior to the effective date of the statute although defendant was tried and convicted after the effective date thereof. State v. Hester, 209 N.C. 99, 182 S.E. 738 (1935). See also State v. Dingle, 209 N.C. 293, 183 S.E. 376 (1936); State v. McNeill, 211 N.C. 286, 189 S.E. 872 (1937).

Cited in State v. Jackson, 199 N.C. 321, 154 S.E. 402 (1930); State v. Ferrell, 205 N.C. 640, 172 S.E. 186 (1934); State v. Wall, 205 N.C. 659, 172 S.E. 216 (1934); State v. Baxter, 208 N.C. 90, 179 S.E. 450 (1935); State v. Horne, 209 N.C. 725, 184 S.E. 470 (1936); State v. Brice, 214 N.C. 34, 197 S.E. 690 (1938); State v. Hawley, 229 N.C. 167, 48 S.E.2d 35 (1948); State v. Gibson, 229 N.C. 497, 50 S.E.2d 520 (1948); State v. Hall, 233 N.C. 310, 63 S.E.2d 636 (1951).

§ 15-188. Manner and place of execution.

Except as otherwise provided in G.S. 15-187, the mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this Article. (1909, c. 443, s. 2; C.S., s. 4658; 1935, c. 294, s. 2; 1983, c. 678, s. 2.)

Editor's Note. — Session Laws 1983, c. 678, s. 4, provides: "The warden of Central Prison may obtain and employ the drugs necessary to carry out the provisions of this act, regardless of contrary provisions in Chapter 90 of the General Statutes."

Effect of Amendments. — The 1983 amendment, effective July 5, 1983, inserted "Except as otherwise provided in G.S. 15-187" at the beginning of this section.

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Cited in State v. Brooks, 206 N.C. 113, 172 S.E. 879 (1934); State v. Exum, 213 N.C. 16, 195 S.E. 7 (1938); State v. Montgomery, 227 N.C. 100, 40 S.E.2d 614 (1946).

§ 15-189. Sentence of death; prisoner taken to penitentiary.

Upon the sentence of death being pronounced against any person in the State of North Carolina convicted of a crime punishable by death, it shall be the duty of the judge pronouncing such death sentence to make the same in writing, which shall be filed in the papers in the case against such convicted person. The clerk of the superior court in which such death sentence is pronounced shall prepare a certified copy of said judgment or sentence of death, including therewith a copy of any notice or entries of appeal made in such case; if no entries or notice of appeal have been made or given in such case, a statement to the effect shall be included in the certificate of the clerk; it shall also be the duty of the district attorney, assistant district attorney, or attorney prosecuting in behalf of the State in the absence of the district attorney, to prepare and sign a certificate stating in substance that he prosecuted said case in behalf of the State and that notice or entries of appeal have or have not been made or given in said case, and further that he has examined a copy of said judgment or sentence of death certified by the clerk, including the copy of the notice or entries of appeal or statement to the effect that no appeal has been given, and to the best of his knowledge the same is correct; the certificate of said district attorney, or other prosecuting officer above named, shall be attached to the certified copy of said sentence of death, as prepared and certified by the clerk, and both certificates shall be transmitted by the clerk of the superior court in which said sentence of death is pronounced to the warden of the State penitentiary at Raleigh, North Carolina; at the same time and in the same manner, a duplicate original of said certificates shall be prepared by the clerk of the superior court and the district attorney, or other prosecuting officer above named, and the said duplicate original or said certificates shall be transmitted to the Attorney General of North Carolina. If notice of appeal is given or entries of appeal are made after the expiration of the term of superior court in which said sentence of death is pronounced, said certificates shall be prepared by the clerk of the superior court in which said sentence is pronounced and by the district attorney, or other prosecuting officer above named, prosecuting in behalf of the State, in the same manner and shall be transmitted as soon as possible to the warden of the State penitentiary at Raleigh, North Carolina, and to the Attorney General of North Carolina. The above certificates so prepared by the clerk of the superior court in which such sentence of death is pronounced and by the district attorney, or other prosecuting officer above named, shall be transmitted by the clerk of the superior court in which such sentence is pronounced to the warden of the State penitentiary at Raleigh, North Carolina, and to the Attorney General of North Carolina, not more than 20 or less than 10 days before the time fixed in the judgment of the court for the execution of the sentence; and in all cases where there is no appeal, said sentence of death shall not be carried out by the warden of the State penitentiary or by any of his deputies or agents until said certificates so prepared and transmitted by the clerk of the superior court in which said sentence of death is pronounced, and by the district attorney, or the prosecuting officer above named, have been received in the office of the warden of the State penitentiary at Raleigh, North Carolina. In all cases where there is no appeal from

the sentence of death and in all cases where the sentence is pronounced against a prisoner convicted of the crime of rape it shall be the duty of the sheriff, together with at least one deputy, to convey to the penitentiary, at Raleigh, North Carolina, such condemned felon or convict forthwith upon the adjournment of the court in which the felon was tried, and deliver the convict or felon to the warden of the penitentiary. (1909, c. 443, s. 3; C.S., s. 4659; 1951, c. 899, s. 1; 1973, c. 47, s. 2.)

Legal Periodicals. — For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

CASE NOTES

No Distinction between Conviction by Plea or by Verdict. — Since an accused may be convicted by his plea as well as by a verdict, there is no reason to read into this section a legislative attempt to distinguish between conviction by plea and by verdict. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

Judgment Must Be Written and Signed by Trial Judge. — The entry of judgment of the court on the verdict of guilty of a capital felony by the clerk of the court on its minutes and signed by the judge is not a sufficient compliance with the provisions of this section, its mandatory provisions requiring the judgment to be written and signed by the judge, and where it appears of record that he has failed so to do the case will be remanded. State v. Jackson, 199 N.C. 321, 154 S.E. 402 (1930).

Failure to Refer to Trial or Crime in Judgment. — A judgment, while somewhat informal, because it made no reference to the trial or the crime of which the prisoner was convicted, is, nevertheless, sufficient to meet the requirements of this section. State v. Edney, 202 N.C. 706, 164 S.E. 23 (1932).

Death Sentence without Reference to Crime. — A judgment sentencing defendant to death for the commission of a capital felony, though making no reference to the trial or the crime of which the defendant was convicted, while not commenced is held sufficient. State v. Taylor, 194 N.C. 738, 140 S.E. 728 (1927).

Judgment Must Show Degree of Murder. — Where the judgment upon a verdict of guilty of murder in the first degree states that the defendant had been convicted of murder, the cause must be remanded in order that it appear on the face of the judgment that the conviction was for murder in the first degree, since the judgment alone is certified to the warden of the State penitentiary. State v. Montgomery, 227 N.C. 100, 40 S.E.2d 614 (1946).

Where in a prosecution for murder the jury returns a verdict of guilty of murder in the first degree, the judgment of the court, which alone is certified to the warden of the State prison, under this section and §§ 15-188, 15-190 must recite that the defendant had been convicted of murder in the first degree, and where it recites that the prisoner had been convicted of murder, and sentences the prisoner to death, the case will be remanded. State v. Langley, 204 N.C. 687, 169 S.E. 705 (1933).

Applied in State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

§ 15-190. Person or persons to be designated by warden to execute sentence; supervision of execution; who shall be present.

Some guard or guards or other reliable person or persons to be named and designated by the warden from time to time shall cause the person, convict or felon against whom the death sentence has been so pronounced to be executed as provided by this Article and all amendments thereto. The execution shall be under the general

supervision and control of the warden of the penitentiary, who shall from time to time, in writing, name and designate the guard or guards or other reliable person or persons who shall cause the person, convict or felon against whom the death sentence has been pronounced to be executed as provided by this Article and all amendments thereto. At such execution there shall be present the warden or deputy warden or some person designated by the warden in his stead; the surgeon or physician of the penitentiary and six respectable citizens, the counsel and any relatives of such person, convict or felon and a minister or ministers of the gospel may be present if they so desire, and the board of directors of the penitentiary may provide for and pay the fee for each execution not to exceed thirty-five dollars ($35.00). (1909, c. 443, s. 4; C.S., s. 4660; 1925, c. 123; 1935, c. 294, s. 3; 1983, c. 678, s. 3.)

Editor's Note. — Session Laws 1983, c. 678, s. 4, provides: "The warden of Central Prison may obtain and employ the drugs necessary to carry out the provisions of this act, regardless of contrary provisions in Chapter 90 of the General Statutes."

Effect of Amendments. — The 1983 amendment, effective July 5, 1983, substituted "executed" for "asphyxiated" in the first and second sentences and "execution" for "asphyxiation" in the second sentence.

CASE NOTES

Cited in State v. Montgomery, 227 N.C. 100, 40 S.E.2d 614 (1946).

§ 15-191. Pending sentences unaffected.

Nothing in G.S. 15-187, 15-188, and 15-190 shall be construed to alter in any manner the execution of the sentence of death imposed on account of any crime or crimes committed before July 1, 1935. (1935, c. 294, s. 4.)

Editor's Note. — The act from which this section was codified changed the mode of executing a death sentence from electrocution to the administration of lethal gas.

§ 15-192. Certificate filed with clerk.

The warden, together with the surgeon or physician of the penitentiary, shall certify the fact of the execution of the condemned person, convict or felon to the clerk of the superior court in which such sentence was pronounced, and the clerk shall file such certificate with the papers of the case and enter the same upon the records thereof. (1909, c. 443, s. 5; C.S., s. 4661.)

§ 15-193. Notice of reprieve or new trial.

Should the condemned person, convict or felon be granted a reprieve by the Governor or obtain a writ of error, or a new trial be granted by the Supreme Court of the State of North Carolina, or should the execution of the sentence be stayed by any competent judicial tribunal or proceeding, notice of such reprieve, new trial,

appeal, writ of error or stay of execution shall be served upon the warden or deputy warden of the penitentiary by the sheriff of Wake County, in case such condemned person is confined in the penitentiary, or upon any sheriff having the custody of any such condemned person, also upon the condemned person himself. (1909, c. 443, s. 6; C.S., s. 4662.)

§ 15-194. Time for execution.

Whenever the Supreme Court has filed an opinion upholding the sentence of death, or a stay of execution granted by any competent judicial tribunal or proceeding has expired or been terminated, or a reprieve by the Governor has expired or been terminated, a hearing shall be held in a superior court anywhere within the district where the case was tried to fix a new date for the execution of the original sentence. The district attorney shall promptly calendar such hearing. The condemned person shall be present at the hearing unless the condemned person has an attorney appearing at the hearing. The judge shall set the date of execution for not less than 60 days nor more than 90 days from the date of the hearing. The hearing may be conducted, whether or not in session, by any regular or special superior court judge resident in the district or assigned to hold court in this district wherever the case is docketed. The order fixing the date shall be recorded in the minutes of the court, and the clerk of the superior court shall immediately send a certified copy to the warden of the State penitentiary, at Raleigh. The clerk shall also send certified copies to the condemned person, the condemned person's attorney, and the district attorney who prosecuted the case. (1909, c. 443, s. 6; C.S., s. 4663; 1925, c. 55; 1951, c. 244, ss. 1, 2; 1973, c. 47, s. 2; 1981, c. 900.)

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Applied in State v. Hawley, 229 N.C. 167, 48 S.E.2d 35 (1948); Miller v. State, 237 N.C. 29, 74 S.E.2d 513 (1953).

Cited in State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

§ 15-195. Prisoner taken to place of trial when new trial granted.

Should a new trial be granted the condemned person, convict or felon against whom sentence of death has been pronounced, after he has been conveyed to the penitentiary, he shall be conveyed back to the place of trial by such guard or guards as the warden of the penitentiary shall direct, their expenses to be paid as is now provided by law for the conveyance of convicts to the penitentiary. (1909, c. 443, s. 7; C.S., s. 4664.)

§ 15-196. Disposition of body.

Upon application, written or verbal, of any relative as near as the degree of fourth cousin of the person executed, made at any time prior to the execution or on the morning thereof, the body, after execution, shall be prepared for burial under the supervision of the warden or deputy warden and shall be returned to the nearest rail-

road station of the relative or relatives asking for such body. In the event that no relative asks for the body of such executed person, convict or felon, the same shall be disposed of as other bodies of convicts dying in the penitentiary. (1909, c. 443, s. 9; C.S., s. 4665; 1925, c. 275, s. 6.)

Article 19A.

Credits against the Service of Sentences and for Attainment of Prison Privileges.

§ 15-196.1. Credits allowed.

The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole and probation revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject. (1973, c. 44, s. 1; 1977, c. 711, s. 16A; 1977, 2nd Sess., c. 1147, s. 30.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1147, s. 30, amended Session Laws 1977, c. 711, by substituting "The minimum and maximum term of a" for "The term of a determinate sentence or the minimum and maximum term of an indeterminate" at the beginning of the section.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

CASE NOTES

Section repealed former §§ 15-176.2 and 15-186.1 and was made applicable to all prisoners, including those convicted prior to its enactment, who are entitled to, but who have not heretofore received all such allowable credit. State v. Lewis, 18 N.C. App. 681, 198 S.E.2d 57, cert. denied and appeal dismissed, 283 N.C. 756, 198 S.E.2d 726 (1973).

Constitutional guarantee against double jeopardy absolutely requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971), decided under former § 15-184.

To deny petitioner 64-day credit against his original sentence, after subjecting petitioner to the loss of his liberty by incarceration in a foreign state, would amount to punishment twice for the same offense and a deprivation of his liberty without due process of law, both in violation of the Fifth Amendment, as made applicable to the states via the Fourteenth Amendment. Childers v. Laws, 558 F. Supp. 1284 (W.D.N.C. 1983).

By its express terms, this statute includes only time spent in custody in "State" institutions and requires a credit against only custody under a charge already "commenced." "State" is defined at subdivision (8c) of § 15A-501

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been, or in order to discourage that person or any other person from, lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex, national origin, handicap, or ancestry, in any of the activities, services, organizations, or facilities described in division (A)(1) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate.

(B) Whoever violates division (A) of this section is guilty of a misdemeanor of the first degree, except that whoever violates division (A) of this section and causes bodily injury is guilty of a felony of the third degree, and whoever violates division (A) of this section and causes death is guilty of a felony of the first degree and subject to life imprisonment.

HISTORY: 142 v H 5. Eff 9-23-87.

Cross-References to Related Sections

Parole eligibility for prisoner convicted of willful injury or death in violation of state's civil rights law, RC § 2967.13.

§ 2927.11 Desecration.

Cross-References to Related Sections

Civil action for desecration, RC § 2307.70.

§ 2927.12 Ethnic intimidation.

Cross-References to Related Sections

Civil action for ethnic intimidation, RC § 2307.70.

IN GENERAL

§ 2929.01 Definitions.

As used in sections 2929.01 to 2929.51 of the Revised Code:

(A) "Repeat offender" means a person who has a history of persistent criminal activity, and whose character and condition reveal a substantial risk that he will commit another offense. It is prima-facie evidence that a person is a repeat offender if any of the following apply:

(1) Having been convicted of one or more offenses of violence, and having been imprisoned pursuant to sentence for any such offense, he commits a subsequent offense of violence;

(2) Having been convicted of one or more sex offenses as defined in section 2950.01 of the Revised Code, and having been imprisoned pursuant to sentence for any such offense, he commits a subsequent sex offense;

(3) Having been convicted of one or more theft offenses as defined in section 2913.01 of the Revised Code, and having been imprisoned pursuant to sentence for any such offense, he commits a subsequent theft offense;

(4) Having been convicted of one or more felony drug abuse offenses as defined in Chapter 2925. of the Revised Code, and having been imprisoned pursuant to sentence for any such offense, he commits a subsequent felony drug abuse offense;

(5) Having been convicted of two or more felonies, and having been imprisoned pursuant to sentence for any such offense, he commits a subsequent offense;

(6) Having been convicted of three or more offenses of any type or degree other than traffic offenses, alcoholic intoxication offenses, or minor misdemeanors, and having been imprisoned pursuant to sentence for any such offense, he commits a subsequent offense.

(B) "Dangerous offender" means a person who has committed an offense, whose history, character, and condition reveal a substantial risk that he will be a danger to others, and whose conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences.

(C) "Actual incarceration" means that an offender is required to be imprisoned for the stated period of time to which he is sentenced that is specified as a term of actual incarceration. If a person is sentenced to a term of actual incarceration, the court shall not suspend his term of actual incarceration, and shall not grant him probation or shock probation, pursuant to section 2929.51, 2947.061 [2947.06.1], 2951.02, or 2951.04 of the Revised Code, and the department of rehabilitation and correction or the adult parole authority shall not, pursuant to Chapter 2967. of the Revised Code or its rules adopted pursuant to Chapter 2967., 5120., 5143., or 5149. of the Revised Code, grant him a furlough for employment or education, a furlough for being a trustworthy prisoner other than a furlough pursuant to division (A)(1) or (2) of section 2967.27 of the Revised Code, parole, emergency parole, or shock parole until after the expiration of his term of actual incarceration, diminished as provided in sections 2967.19, 2967.193 [2967.19.3], 5145.11, and 5145.12 of the Revised Code.

An offender who is sentenced to a term of actual incarceration may be transferred from an institution operated by the department of rehabilitation and correction to the custody of the department of mental health or the department of mental retardation and developmental disabilities, as provided in section 5120.17 of the Revised Code, and shall be credited with all time served in the custody of the department of mental health or the department of

mental retardation and developmental disabilities against the term of actual incarceration.

(D) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.

*HISTORY: 142 v H 261. Eff 11-1-87.

CASE NOTES AND OAG

1. (1986) A conviction and sentence for a prior offense is only prima facie evidence that a person is a "repeat offender" as defined in RC § 2929.01(A). A prior conviction and sentence do not automatically disqualify such offender from probation under RC § 2951.02(F)(2). Before determining that the defendant is a repeat offender, the trial court must determine his character, condition and behavior pattern: State v. Smith, 31 OApp3d 26, 31 OBR 40, 507 NE2d 1161.

[§ 2929.02.3] § 2929.023 Defendant may raise matter of age.

Law Review

The Eighth Amendment and capital punishment of juveniles. Victor L. Streib. 34 ClevStLRev 363 (1985-86).

Youth on Death Row: Waiver of Juvenile Court Jurisdiction and Imposition of the Death Penalty on Juvenile Offenders. 13 NoKyLRev 495 (1987).

§ 2929.03 Imposing sentence for a capital offense.

Law Review

United States Supreme Court 1984-1985 Term: criminal law and procedure highlights. B.J. George, Jr. 16 CapitalULRev 159, 190 (1986).

CASE NOTES AND OAG

1. (1986) Defendant in a capital case must be afforded a complete, full and unabridged transcript of all proceedings against him so that he may prosecute an effective appeal: State ex rel. Spirko v. Court of Appeals, 27 OS3d 13, 27 OBR 432, 501 NE2d 625.

2. (1986) It is error for one who prepares a presentence report to include witness statements given to the police or other versions of the crime taken from police reports when the presentence report is to be utilized in the mitigation phase of an aggravated murder trial. The report should include only such information as is directly relevant to the aggravating and mitigating circumstances. However, the error is not prejudicial when basically the material in the report has been presented as evidence at the trial where the defendant has had the opportunity of full cross-examination of the witnesses, and retains the right to recall such witnesses: State v. Glenn, 28 OS3d 451, 28 OBR 501, 504 NE2d 701.

3. (1987) The court fully complied with its duty under RC § 2929.03(F) to specify its findings: State v. Steffen, 31 OS3d 111, 31 OBR 273, 509 NE2d 383.

4. (1987) There can be no finding that the death penalty is imposed in a discriminatory fashion absent a demonstration of specific discriminatory intent. (McCleskey v. Kemp [1987], 481 US ____, 95 LEd2d 262, followed.): State v. Zuern, 32 OS3d 56, 512 NE2d 585.

5. (1987) Under RC § 2929.03(F), a trial court or three-judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors: State v. Stumpf, 32 OS3d 95, 512 NE2d 598.

6. (1987) When an accused is tried by jury and convicted of aggravated murder with specification, a death sentence may be imposed by the trial judge only upon recommendation of the same jury that tried the guilt phase of the proceedings, pursuant to the criteria set forth in RC § 2929.03. Thus, when a case is remanded to the trial court following vacation of the death sentence due to error occurring at the penalty phase of the proceeding, the trial court, in resentencing the offender, is limited to the sentences of life imprisonment with parole eligibility after serving twenty full years of imprisonment or life imprisonment with parole eligibility after serving thirty full years of imprisonment. (RC § 2929.06, applied and construed.): State v. Penix, 32 OS3d 369, 513 NE2d 744; State v. Zuranski, 32 OS3d 379, 513 NE2d 753.

7. (1987) In determining sentence under RC § 2929.03(D), the trial court, jury or three-judge panel is not required to compare the mitigating factors established in prior cases with the mitigating factors presented in the case before it: State v. Post, 32 OS3d 380, 513 NE2d 754.

8. (1987) Any egregious error in the penalty phase of a death penalty proceeding, including prosecutorial misconduct, will be cause to vacate the sentence of death with a subsequent remand to the trial court for a new sentencing procedure pursuant to RC § 2929.06: State v. Thompson, 33 OS3d 1, 514 NE2d 407.

9. (1986) Revised Code § 2929.03 does not require that the trial court issue a separate written opinion with specific findings in a situation in which the jury has recommended that the defendant be sentenced to life imprisonment: State v. Holmes, 30 OApp3d 26, 30 OBR 64, 506 NE2d 276.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

Law Review

United States Supreme Court 1984-1985 Term: criminal law and procedure highlights. B.J. George, Jr. 16 CapitalULRev 159, 189 (1986).

CASE NOTES AND OAG

1. (1986) One who is a reserve or special deputy sheriff qualifies as a peace officer as that term is utilized in RC § 2929.04(A)(6), which section sets forth one of the criteria for imposing death or imprisonment for a capital offense: State v. Glenn, 28 OS3d 451, 28 OBR 501, 504 NE2d 701.

2. (1987) While RC § 2929.04(B)(7) evinces the legislature's intent that a defendant in a capital case be given wide latitude to introduce any evidence the defendant considers to be mitigating, this does not mean that the court is necessarily required to accept as mitigating everything offered by the defendant and admitted. The fact that an item of evidence is admissible under RC §

Ohio Code

CHAPTER 2929: PENALTIES AND SENTENCING

Committee Comment to H 511

Chapter 2929 brings together in one unit the basic rules for dealing with convicted offenders—the range of penalties which may be assessed, guidelines for choosing the penalty to be imposed, and general rules for modifying sentences after imposition. Emphasis is emphasized, particularly at the trial court level and also at the corrections level, and the overall effect of the new penalty structure is to encourage tailoring sentences to fit individual offenders rather than to fit the type of crime alone.

The death penalty is reinstated for aggravated murder, which includes premeditated murder and felony murder. Death may be imposed only if one of seven listed aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt, and none of three listed mitigating circumstances is established by a preponderance of the evidence. The jury decides whether aggravation is present or not, but the trial court decides the question of mitigation in a separate hearing following the trial. [See Editor's Note following this comment.]

With respect to sentences for felonies other than murder, the concept of indeterminant sentencing is retained, but while the maximum terms are fixed, the trial court determines the minimum term to be imposed from among four choices given in the statute for each degree. Also, only a few felonies under former law carried fines, but under the new code all felonies may have a fine imposed in addition to imprisonment. Detailed criteria are given to aid the trial court in determining the penalty to be imposed in a given case.

Conceptually, the misdemeanor penalties are much the same as in former law. That is, either a fine, or a definite term of imprisonment, or both, may be imposed. As with felony penalties, detailed guidelines are provided for choosing the penalty to be imposed in a given case.

In addition to the usual penalties for the various degrees of offenses, the chapter contains a schedule of fines applicable to organizations for all degrees of offenses (under section 2901.23, an organization may be convicted of any offense under certain circumstances).

Also, the chapter lists the different ways in which a trial court may modify sentences, including consecutive and concurrent sentences, probation, shock probation, "split" sentencing, weekend sentencing, installment payment of fines, and other measures.

[Editor's Note: In relation to the death penalty, a 1981 amendment added an eighth aggravating circumstance and increased the mitigating circumstances to seven. The amendment allows jury participation at the mitigation phase of the trial. In order to propose the death penalty the trier of fact must now find, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors.]

IN GENERAL

§ 2929.01 Definitions.

As used in sections 2929.01 to 2929.51 of the Revised Code:

(A) "Repeat offender" means a person who has a history of persistent criminal activity, and whose character and condition reveal a substantial risk that he will commit another offense. It is prima-facie evidence that a person is a repeat offender if any of the following apply:

(1) Having been convicted of one or more offenses of violence, and having been imprisoned pursuant to

sentence for any such offense, he commits a subsequent offense of violence;

(2) Having been convicted of one or more sex offenses as defined in section 2950.01 of the Revised Code, and having been imprisoned pursuant to sentence for any such offense, he commits a subsequent sex offense;

(3) Having been convicted of one or more theft offenses as defined in section 2913.01 of the Revised Code, and having been imprisoned pursuant to sentence for any such offense, he commits a subsequent theft offense;

(4) Having been convicted of one or more felony drug abuse offenses as defined in Chapter 2925. of the Revised Code, and having been imprisoned pursuant to sentence for any such offense, he commits a subsequent felony drug abuse offense;

(5) Having been convicted of two or more felonies, and having been imprisoned pursuant to sentence for any such offense, he commits a subsequent offense;

(6) Having been convicted of three or more offenses of any type or degree other than traffic offenses, alcoholic intoxication offenses, or minor misdemeanors, and having been imprisoned pursuant to sentence for any such offense, he commits a subsequent offense.

(B) "Dangerous offender" means a person who has committed an offense, whose history, character, and condition reveal a substantial risk that he will be a danger to others, and whose conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences.

(C) "Actual incarceration" means that an offender is required to be imprisoned for the stated period of time to which he is sentenced that is specified as a term of actual incarceration. If a person is sentenced to a term of actual incarceration, the court shall not suspend his term of actual incarceration, and shall not grant him probation or shock probation, pursuant to section 2929.51, 2947.061 [2947.06.1], 2951.02, or 2951.04 of the Revised Code, and the department of rehabilitation and correction or the adult parole authority shall not, pursuant to Chapter 2967. of the Revised Code or its rules adopted pursuant to Chapter 2967., 5120., 5143., or 5149. of the Revised Code, grant him a furlough for employment or education, a furlough for being a trustworthy prisoner other than a furlough pursuant to division (A)(1) or (2) of section 2967.27 of the Revised Code, parole, emergency parole, or shock parole until after the expiration of his term of actual incarceration, diminished as provided in section 2967.19 of the Revised Code.

An offender who is sentenced to a term of actual incarceration may be transferred from an institution operated by the department of rehabilitation and correction to the custody of the department of mental health or the department of mental retardation and developmental disabilities, as provided in section 5120.17 of the Revised Code, and shall be credited with all time served in the custody of the department of mental health or the department of mental retardation and developmental disabilities against the term of actual incarceration.

(D) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.

HISTORY: 134 v H 511 (Eff 1-1-74); 136 v H 300 (Eff 7-1-76; 137 v H 565 (Eff 11-1-78); 139 v S 109 (Eff 1-5-83); 140 v S 210. Eff 7-1-83

The effective date of SB 210 is set by section 3 of the act.

Committee Comment to H 511

This section defines the terms "repeat offender" and "dangerous offender," used in connection with determining sentences, eligibility for probation, and eligibility for early release on parole.

In general, repeat offenders are those with a history of persistent criminal activity and who appear to be bad risks for the future. A person is prima facie a repeat offender if he has served time on a prior conviction and is convicted of a second offense of violence, second sex offense, or second theft offense, or is convicted of a third felony, or of a fourth offense of any kind or degree (other than a minor misdemeanor, intoxication offense, or traffic offense).

"Dangerous offenders" are those who have committed an offense whose history, character and condition reveal them as dangerous, and whose conduct shows a callous, repetitive, compulsive, or aggressive behavior without thought for the consequences. The term "dangerous offender" equates with "psychopathic offender."

Transition—capital offenses.

Persons charged with a capital offense committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense and, if convicted, sentenced to life imprisonment. If the section defining the offense provides for a lesser penalty under the circumstances of a particular case, then the lesser penalty must be imposed in that case.

Persons committing aggravated murder (the only capital offense in the new code) on and after January 1, 1974, must be charged and tried under the new law and, if convicted, may be subject to the death penalty. See sections 2903.01, 2929.02 to 2929.04, and 2941.14.

Cross-References to Related Sections

Additional sentence for felonies involving a firearm, RC § 2929.71.

Imprisoned defined, RC § 1.05

Offense of violence defined, RC § 2901.01(H).

Referral to community based correctional facility prohibited, RC § 2301.32.

Sentencing for domestic violence offense, RC § 2929.51.

Substantial risk defined, RC § 2901.01(H).

Text Discussion

Classification of offenders, 1 Ohio Crim. Prac. & Pro. § 52.19

Research Aids

Repeat and dangerous offenders:
O-Jur3d: Crim L § 414
Am-Jur2d: Crim L § 525 et seq

ALR

Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes. 24 ALR2d 1247.

Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender. 19 ALR2d 227.

Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction. 11 ALR2d 870.

Form and sufficiency of allegations as to time, place, or court of prior convictions or offenses, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 ALR2d 1196.

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 restricting new trial to issue of status as habitual criminal. 79 ALR2d 826.

What constitutes former "conviction" within statute enhancing penalty for second or subsequent offense. 5 ALR2d 1080.

Law Review

Capital punishment of children in Ohio: "They'd never send a boy of seventeen to the chair in Ohio, would they?" Victor L. Streib. 18 AkronLRev 51 (1984).

Capital punishment, psychiatric experts and predictions of dangerousness. William Green. 13 CapitalULRev 533 (1984).

Constitutional consequences of Ohio's new sentencing laws. Louis A. Jacobs. 15 ToledoLRev 71 (1983).

Constitutional law—criminal law—cruel and unusual punishment—sentencing—recidivism—penology—the eighth amendment does not preclude society from isolating a three-time offender by sentencing him to life in prison even when the felonies are minor and nonviolent and represent a total theft of less than $300—*Rummel v. Estelle*. 100 SCt 1133 (1980). Case note. 49 CinLRev 725 (1980).

Recent changes in Ohio sentencing law: the questions left unanswered. Jack A. Guttenberg. 15 ToledoLRev 35 (1983).

Recidivist laws under the eighth amendment—*Rummel v. Estelle* [587 F2d 651 (5thCir 1978)]. Note. 10 ToledoLRev 606 (1979).

Reconsideration of proportionality in sentencing procedures: *Solem v. Helm* [103 SCt 3001 (1983)]. Case note. 11 ONorthLRev 429 (1984).

Recidivist offenders: the constitutionality of the dangerous special offender act—*United States v. Stewart*, 531 F2d 326 (6thCir), *cert. den.*, 96 SCt 2629 (1976). Note. 2 UDayLRev 137 (1977).

Some reflections on criminal sentencing. Hon. Don. J. Young. 12 ToledoLRev 475 (1981).

CASE NOTES AND OAG

1. 1976 OAG 76-076. In some cases, as here, it is not possible for a judge, prior to the acceptance of a guilty plea, to determine that a defendant is a repeat or dangerous offender as defined in RC § 2929.01 and thereby be able to inform him that he is not eligible for probation under RC § 2951.02. Where such determination cannot be made from the presentence investigation and probation report, a hearing pursuant to Criminal Rule 11(C)(2)(a) is not required to inform the defendant that he is not eligible for probation prior to the acceptance of a guilty plea. In such a case, the judge, after studying the probation report, may decide that the defendant's present character and condition are such that he is not a repeat or dangerous offender as defined in RC § 2929.01, despite the defendant's past criminal record: State v. Wood, 48 OApp2d 339, 2 OO3d 345, 357 NE2d 1106.

2. (1984) Revised Code § 2951.04(B)(3) provides that a defendant must be eligible for probation pursuant to RC § 2951.02, which states that repeat offenders are ineligible for probation, in order to also be eligible for conditional (drug treatment) probation. However, proof of prior convictions for theft offenses only presents a prima facie case that a defendant is a "repeat offender," as defined by RC § 2929.01(A)(3); thus, in order for a trial judge to deny a defendant conditional probation because, based on past convictions for theft offenses, he is, technically, a "repeat offender," the trial judge must also conclude that the defendant's character and condition are such that there is a substantial risk that he will commit another offense: State v. Bush, 16 OApp3d 407, 16 OBR 477, 476 NE2d 692.

PENALTIES FOR MURDER

§ 2929.02 Penalties for murder.

(A) Whoever is convicted of, pleads guilty to, or pleads no contest and is found guilty of, aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 [2929.02.3] or division (C) of section 2929.05 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of, pleads guilty to, or pleads no contest and is found guilty of, murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

Committee Comment to H 511

This section establishes the penalty for aggravated mur-

der as life imprisonment or death, plus an optional fine of up to $25,000. The penalty to be imposed in a given case of aggravated murder is determined by the procedure given in sections 2929.03 and 2929.04. The penalty for murder is given as imprisonment for 15 years to life, plus an optional fine of $15,000. A fine for aggravated murder or murder may not be imposed unless the crime was committed for hire or profit, or in support of organized crime. Also, a fine or fines may not be imposed, which to the extent not suspended exceeds the amount the offender can pay without undue hardship to himself or his dependents, or which will prevent him from making reparation for the victim's death.

Cross-References to Related Sections

Additional sentence for felonies involving a firearm, RC § 2929.71.
Aggravated murder, RC § 2903.01.
Execution of death sentence, RC §§ 2949.21–2949.31.
Mandatory incarceration, RC § 2929.71.
Murder, RC § 2903.02.
Organizational penalties, RC § 2929.31.
Time of execution in capital cases, RC § 2947.08.

Ohio Constitution

Cruel and unusual punishment, OConst art I, § 9.

Ohio Rules

Sentence, CrimR 32.

Ohio Administrative Code

Death row, OAC 5120-9-12.

Text Discussion

Penalties and sentencing in capital offenses, 1 Ohio Crim. Prac. & Pro. § 51.6c, d, e
Verdict; penalty, 1 Ohio Crim. Prac. & Pro. § 41.3

Research Aids

Penalties for murder:
O-Jur3d: Crim L §§ 1838, 1839
Am-Jur2d: Crim L §§ 525–556

Law Review

Capital punishment—deterrent or stimulus to murder? Our unexamined deaths and penalties. Daniel Glaser. 10 ToledoLRev 317 (1979).
Capital punishment in Ohio: the constitutionality of the death penalty statute. Comment. 3 UDayLRev 169 (1978).
Capital punishment of children in Ohio: "They'd never send a boy of seventeen to the chair in Ohio, would they?" Victor L. Streib. 18 AkronLRev 51 (1984).
Capital punishment statutes after *Furman* [408 US 238 (1972)]. Note. 35 OSLJ 651 (1974).
Constitutional consequences of Ohio's new sentencing laws. Louis A. Jacobs. 15 ToledoLRev 71 (1983).
Constitutional law—cruel and unusual punishments—the imposition and carrying out of the death penalty under current discretionary sentencing statutes constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments. *Furman v. Georgia*, 408 US 238 (1972). Case note. 42 CinLRev 172 (1973).
The constitutionality of Ohio's death penalty. Comment. 38 OSLJ 617 (1977).
Constitutionality of Ohio's New Death Penalty Statute. David J. Benson. 14 ToledoLRev 77 (1982).
Death penalties and Hugo Bedau: a crusading philosopher goes overboard. Raoul Berger. 45 OSLJ 563 (1984).
The deterrent effect of the death penalty for murder in Ohio: a time-series analysis. William C. Bailey. 25 ClevStLRev 51 (1979).
Hans Mattick and the death penalty: Sentimental notes on two topics. Norval Morris. 10 ToledoLRev 299 (1979).
Legislative response to *Furman v. Georgia* [408 US 238 (1972)]—Ohio restores the death penalty. Comment. 5 AkronLRev 149 (1974).
Mr. Chief Justice . . . reason proves a sorry substitute for revelation. John R. Spon, Jr. 1 ONorthLRev 139 (1973).
The response to *Furman*: Can legislators breathe life back into death? Comment. 23 ClevStLRev 172 (1974).
Witherspoon [391 US 510 (1968)] revisited: exploring the tension between *Witherspoon* and *Furman*. Welsh S. White. 45 CinLRev 19 (1976).

CASE NOTES AND OAG

1. (1980) Although the U.S. Supreme Court, by its decision in Lockett v. Ohio, precluded imposition of the death penalty under Ohio statutes, there was, nevertheless, a valid remaining penalty for aggravated murder, i.e., life imprisonment: State v. Morningstar, 19 OO3d 283 (App).

2. (1977) Where a fine is imposed upon the conviction of a defendant and that defendant dies prior to the collection of the fine, and before there has been a levy against the property of the defendant, the fine cannot be collected from the estate of the defendant: State v. Blake, 53 OApp2d 101, 7 OO3d 71, 371 NE2d 843.

[CONSTRUING FORMER ANALOGOUS RC § 2901.01]

1. (1973) The decision of the U.S. Supreme Court in Furman v. Georgia compels the Ohio supreme court to modify death sentences imposed under RC § 2901.01, reducing them to life imprisonment, but not to set aside first degree murder convictions, or to invalidate the indictments: Vargas v. Metzger, 35 OS2d 116, 64 OO2d 70, 298 NE2d 600.

[§ 2929.02.1] § 2929.021 [Notice to supreme court of indictment charging aggravated murder; plea.]

(A) If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the clerk of the court in which the indictment is filed, within fifteen days after the day on which it is filed, shall file a notice with the supreme court indicating that the indictment was filed. The notice shall be in the form prescribed by the clerk of the supreme court and shall contain, for each charge of aggravated murder with a specification, at least the following information pertaining to the charge:

(1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;

2. The docket number or numbers of the case or cases arising out of the charge, if available;

3. The court in which the case or cases will be heard;

4. The date on which the indictment was filed.

B. If the indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the defendant pleads guilty or no contest to any offense in the case and the indictment or any count in the indictment is dismissed, the clerk of the court in which the plea is entered or the indictment or count is dismissed shall file a notice with the supreme court indicating what action was taken in the case. The notice shall be filed within fifteen days after the plea is entered or the indictment or count is dismissed, shall be in the form prescribed by the clerk of the supreme court, and shall contain at least the following information:

1. The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;

2. The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;

3. The sentence imposed on the offender in each case.

HISTORY: 139 v S 1. Eff 10-19-81.

Cross References to Related Sections

Aggravated murder, RC § 2903.01.

Law Review

Capital punishment: impairment of a death sentence by the invalidity of an aggravating circumstance. Comment. 42 U Cin L Rev 541 (1963).

[§ 2929.02.2] § 2929.022 [Determination of aggravating circumstances.]

A. If an indictment or count in an indictment charges a defendant with aggravated murder contains a specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, the defendant may elect to have the panel of three judges, if he waives trial by jury, or the trial judge, if he is tried by jury, determine the existence of that aggravating circumstance at the sentencing hearing held pursuant to divisions (C) and (D) of section 2929.03 of the Revised Code.

1. If the defendant does not elect to have the existence of the aggravating circumstance determined at the sentencing hearing, the defendant shall be tried on the charge of aggravated murder, on the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, and on any other specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code in a single trial as in any other criminal case in which a person is charged with aggravated murder and specifications.

(2) If the defendant does elect to have the existence of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code determined at the sentencing hearing, then, following a verdict of guilty of the charge of aggravated murder, the panel of three judges or the trial judge shall:

(a) Hold a sentencing hearing pursuant to division (B) of this section, unless required to do otherwise under division (A)(2)(b) of this section;

(b) If the offender raises the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense, conduct a hearing to determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

(i) If that aggravating circumstance is proven beyond a reasonable doubt or if the defendant at trial was convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence according to division (E) of section 2929.03 of the Revised Code:

(ii) If that aggravating circumstance is not proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) At the sentencing hearing, the panel of judges, if the defendant was tried by a panel of three judges, or the trial judge, if the defendant was tried by jury, shall, when required pursuant to division (A)(2) of this section, first determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. If the panel of judges or the trial judge determines that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt or if they do not determine that the specification is proven beyond a reasonable doubt but the defendant at trial was convicted of a specification of any other aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge and trial jury shall impose sentence on the offender pursuant to division (D) of section 2929.03 and section

2929.04 of the Revised Code. If the panel of judges or the trial judge does not determine that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge shall terminate the sentencing hearing and impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

HISTORY: 139 v S 1. Eff 10-19-81.

Cross-References to Related Sections

Aggravated murder, RC § 2903.01.
Reasonable doubt defined, RC § 2901.05.

Forms

Sentencing hearing, 4 OJI § 503.01
Specifications of aggravating circumstances, 4 OJI § 413.45

Law Review

Capital punishment in Ohio: aggravating circumstances. Note. 31 ClevStLRev 495 (1983).
Capital punishment, psychiatric experts and predictions of dangerousness. William Green. 13 CapitalULRev 533 (1984).
Fact or fiction: mitigating the death penalty in Ohio. Note. 32 ClevStLRev 263 (1983).
S.B. 1: Ohio enacts death penalty statute. Note. 7 UDayLRev 531 (1982).

[§ 2929.02.3] § 2929.023 [Defendant may raise matter of age.]

A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.

HISTORY: 139 v S 1. Eff 10-19-81.

Cross-References to Related Sections

Aggravated murder, RC § 2903.01.
Reasonable doubt, RC § 2901.05.

Law Review

Eddings v. *Oklahoma* [50 USLW 4161 (1982)]: no blanket exemption under the eighth amendment for juveniles on death row. Note. 11 CapitalLRev 785 (1982).
"Unusual" punishment: the domestic effects of international norms restricting the application of the death penalty. Joan F. Hartman. 52 CinLRev 655 (1983).

CASE NOTES AND OAG

1. (1985) The word "age" as used in RC §§ 2929.02, 2929.02.3, 2929.03 and 2929.04 refers to a defendant's chronological age: State v. Rogers, 17 OS3d 174, 17 OBR 414, 478 NE2d 984.

[§ 2929.02.4] § 2929.024 [Investigation services and experts for indigent.]

If the court determines that the defendant is indigent and that investigation services, experts, or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant's counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made pursuant to Chapter 120. of the Revised Code. If the court determines that the necessary services had to be obtained prior to court authorization for payment of the fees and expenses for the necessary services, the court may, after the services have been obtained, authorize the defendant's counsel to obtain the necessary services and order that payment of the fees and expenses for the necessary services be made as provided in this section.

HISTORY: 139 v S 1. Eff 10-19-81.

Cross-References to Related Sections

Aggravated murder, RC § 2903.01.

CASE NOTES AND OAG

1. (1984) Revised Code § 2929.02.4 requires the court to provide an indigent defendant with expert assistance whenever, in the sound discretion of the court, the services are reasonably necessary for the proper representation of a defendant charged with aggravated murder. The factors to consider are (1) the value of the expert assistance to the defendant's proper representation at either the guilt or sentencing phase of an aggravated murder trial; and (2) the availability of alternative devices that would fulfill the same functions as the expert assistance sought: State v. Jenkins, 15 OS3d 164, 15 OBR 311, 473 NE2d 264.

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with

parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to divi-

sion (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-51.

Committee Comment to H 511

This section specifies the procedure to be followed in determining whether the sentence for aggravated murder is to be life imprisonment or death.

The death penalty is precluded unless the indictment contains a specification of one or more of the aggravating circumstances listed in section 2929.04. In the absence of such specifications, life imprisonment must be imposed. If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and specification. If the verdict is guilty of the charge but not guilty of the specification, the penalty is life imprisonment.

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the second phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a

reasonable doubt, and the panel's verdict must be unanimous.

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and specification, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the issue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by the defendant, represent partial exceptions to the rules of evidence).

Cross-References to Related Sections

Penalties for murder, RC § 2929.02.

Aggravated murder, RC § 2903.01.

Execution of death sentence, RC §§ 2949.21-2949.31.

Parole eligibility, RC § 2967.13.

Reasonable doubt, RC § 2901.05.

Time of execution in capital cases, RC § 2947.08.

Ohio Constitution

Cruel and unusual punishment, OConst art I, § 9.

Comparative Legislation

Capital offense, sentence:
- 18 USC § 3566
- CA—Penal Code §§ 190, 190.1
- FL—Stat Ann § 775.081
- IL—Ann Stat ch 38 § 9-1
- IN—Code § 35-50-2-9
- KY—Rev Stat Ann § 532.035
- MI—Comp Laws Ann § 750.316
- NY—Penal Law §§ 60.05, 60.06
- PA—CSA tit 18 § 1102

Text Discussion

Penalties and sentencing in capital offenses. 1 Ohio Crim. Prac. & Pro. § 51.6c, d, e

Presentence investigation. 1 Ohio Crim. Prac. & Pro. § 43.1

Verdict, penalty. 1 Ohio Crim. Prac. & Pro. § 41.3

Forms

Sentencing hearing. 4 OJI § 503.01

Specifications of aggravating circumstance. 4 OJI § 413.45

Research Aids

Imposing sentence for a capital offense:
- O-Jur3d: Crim L §§ 1840-1842
- Am-Jur2d: Crim L §§ 535-556

ALR

Absence of counsel for accused at time of sentence as requiring vacation thereof or other relief. 20 ALR2d 1240

Beliefs regarding capital punishment as disqualifying juror in capital case—post Witherspoon cases. 39 ALR3d 550.

Court's right in imposing sentence to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR 768.

Defendant's rights to disclosure of presentence report. 40 ALR3d 681.

Necessity and sufficiency of question to defendant as to whether he has anything to say why sentence should not be pronounced against him. 96 ALR2d [illegible]

Propriety of imposition of death sentence by [illegible] following jury's recommendation of life imprisonment or lesser sentence. 8 ALR4th 1028.

Law Review

Capital punishment: impairment of a death sentence by the invalidity of an aggravating circumstance. Comment. 52 CinLRev 541 (1983).

Capital punishment in Ohio: the constitutionality of the death penalty statute. Comment. 3 UD[illegible] 169 (1978).

Capital punishment of children in Ohio: "[illegible] never send a boy of seventeen to the chair in [illegible] would they?" Victor L. Streib. 18 AkronLRev 5[illegible]

Capital punishment, psychiatric experts and predictions of dangerousness. William Green. 13 Capital[illegible] 533 (1984).

Capital punishment statutes after *Furman* [illegible] 238 (1972)]. Note. 35 OSLJ 651 (1974).

Constitutional consequences of Ohio's new sentencing laws. Louis A. Jacobs. 15 ToledoLRev 71 (198[illegible]

Constitutional law—cruel and unusual punishment—the imposition and carrying out of the death penalty under current discretionary sentencing statutes constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments. *Furman* v. *Georgia*, 408 US 238 (1972). Case note. 42 C[illegible] 172 (1973).

The constitutionality of Ohio's death penalty. Comment. 38 OSLJ 617 (1977).

Constitutionality of Ohio's New Death Penalty Statute. David J. Benson. 14 ToledoLRev 77 (198[illegible]

Criminal law—death penalty—cruel and unusual punishment—individualized sentencing determination. *Lockett v. Ohio*, 438 US 586 (1978). Case note. 12 AkronLRev 360 (1978).

Death penalties and Hugo Bedau: a crusading philosopher goes overboard. Raoul Berger. 45 OSLJ [illegible]

The death penalty and guilty pleas: Ohio rule [illegible]—a constitutional answer to a capital defendant's dilemma. Comment. 5 ONorthLRev 68[illegible]

Diminished capacity and diminished responsibility: irreconcilable doctrines confused in *State v.* [illegible] Gary O. Sommer. 14 ToledoLRev 1399 (1983).

Estelle v. Smith [451 US 454 (1981)]: expansion of constitutional safeguards in sentencing procedure. Case note. 9 ONorthLRev 529 (1982).

Fact or fiction: mitigating the death penalty [illegible] Note. 32 ClevStLRev 263 (1983).

Gardner v. Florida [430 US 349 (1977)]: presentence reports in capital sentencing procedures. [illegible] 5 ONorthLRev 175 (1978).

Legislative response to *Furman v. Georgia* [illegible] 238 (1972)]—Ohio restores the death penalty. [illegible] 8 AkronLRev 149 (1974).

Recent changes in Ohio sentencing law: the [illegible] left unanswered. Jack A. Guttenberg. 15 T[illegible] 35 (1983).

psychiatrist and a psychologist pursuant to RC § 2947.06, is not constitutionally required to appoint an additional psychiatrist of the defendant's choosing at state expense: State v. Downs, 51 OS2d 47, 5 OO3d 30, 364 NE2d 1140.

13. (1977) Revised Code § 2929.03 is not unconstitutional in providing that the three-judge panel not only try the charges and specifications but also determine the sentence: State v. Miller, 49 OS2d 198, 3 OO3d 321, 361 NE2d 419.

14. (1976) A defendant is not coerced or impelled to waive his constitutional right to jury trial by RC § 2929.03(C)(1), (2) and (E), under the provisions of which an offender who waives a jury trial need persuade only one member of the three-judge panel at the mitigation hearing to avoid imposition of the death penalty: State v. Bell, 48 OS2d 270, 2 OO3d 427, 358 NE2d 556.

15. (1975) In the deliberation of a verdict concerning a charge of aggravated murder with specifications, the possible imposition of the death penalty is not within the province of the jury: State v. Strub, 48 OApp2d 57, 2 OO3d 40, 355 NE2d 819.

16. (1975) Since the potential imposition of the death penalty in the trial of an aggravated murder charge with specifications is not within the province of the jury, it is improper, upon voir dire, to question prospective jurors relative to such penalty: State v. Strub, 48 OApp2d 57, 2 OO3d 40, 355 NE2d 819.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer as defined in section 2935.01 of the Revised Code whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding, and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

Committee Comment to H 511

This section provides that the death penalty for aggravated murder is precluded unless one of seven listed aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The seven aggravating circumstances deal with: (1) assassination of the President, the President, Governor, Lieutenant Governor or a person who has been elected to or is a candidate for any such office; (2) murder for hire; (3) murder to escape accountability for another crime; (4) murder by a prisoner; (5) repeat murder or mass murder; (6) killing a law enforcement officer; (7) felony murder.

The section also provides that even if one or more aggravating circumstances is proved beyond a reasonable doubt, the death penalty for aggravated murder is still precluded if the court finds that any of three mitigating circumstances established by a preponderance of the evidence. The mitigating circumstances are: (1) the victim of the offense induced or facilitated it; (2) the offender acted under duress, coercion or strong provocation; and (3) although the defense of insanity could not be or was not established, the offense was chiefly the product of the offender's mental deficiency or psychosis (psychosis is mental illness, as distinguished from a behavioral disorder. Primarily psychopaths have a behavioral disorder.)

Transition—capital offenses.

Persons charged with a capital offense committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense and, if convicted, sentenced to life imprisonment. If the section defining the offense provides for a greater penalty under the circumstances of a particular case than the lesser penalty must be imposed in that case.

Persons committing aggravated murder (the only capital offense in the new code) on and after January 1, 1974, must be charged and tried under the new law and, if convicted, may be subject to the death penalty. See sections 2929.01, 2929.02 to 2929.04, and 2941.14.

Transition—offenses other than capital offenses.

Persons charged with an offense other than a capital offense committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense. Any such person convicted and sentenced prior to January 1, 1974, must be sentenced under the penalty provided in the law under which he was tried. Any such person either convicted or sentenced on or after January 1, 1974, must be sentenced under the lesser of the penalties provided for the offense for which he was tried or for the substantially equivalent offense in the new code. If there is no substantially equivalent offense in the new code, sentence must be imposed under the old law.

[Editor's Note: A 1981 amendment added an eighth aggravating circumstance: murder of a witness to an offense. The amendment added four new mitigating circumstances: (1) youth of the offender, (2) lack of prior criminal involvement, (3) degree of participation, and (4) any other relevant matters.]

Cross-References to Related Sections

Aggravated murder, RC § 2903.01.
Allegations in homicide indictment, RC § 2941.14.
Prosecutor required to notify victim of date, time and place of trial, RC § 2937.08.1.
Reasonable doubt, RC § 2901.05.
Sentencing for capital offense, RC § 2929.03.
Statement by victim—
Proceeding of final disposition other than trial, RC § 2943.04.1.
Trial, RC § 2945.07.

Ohio Constitution

Cruel and unusual punishment, OConst art I, § 9.

Comparative Legislation

Death penalty:
18 USC § 3148
CA—Penal Code §§ 190, 190.1
FL—Stat Ann § 775.081
IL—Ann Stat ch 38 § 9-1
IN—Code § 35-50-2-9
KY—Rev Stat Ann § 532.075
NY—Penal Law §§ 60.05, 60.06
PA—CSA tit 18 § 1102

Text Discussion

Guilty or no contest plea to capital offense, 1 Ohio Crim. Prac. & Pro. § 25.6
Penalties and sentencing in capital offenses, 1 Ohio Crim. Prac. & Pro. § 51.6c, d, e
Verdict; penalty, 1 Ohio Crim. Prac. & Pro. § 41.3

Forms

Sentencing hearing, 4 OJI § 503.01
Specifications of aggravating circumstance, 4 OJI § 413.45

Outlines of Procedure

Sentencing—felony, Leyshon No. 315-1

Research Aids

Criteria for imposing death or imprisonment for a capital offense:
O-Jur3d: Crim L §§ 1843-1845
Am-Jur2d: Crim L §§ 609-612

Law Review

Capital punishment in Ohio: aggravating circumstances, Note, 31 ClevStLRev 495 (1983).

tion of these, has overcome the mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences: State v. Woods, 48 OS2d 127, 2 OO3d 289, 357 NE2d 1059.

21. (1976) The Ohio statutory scheme for imposing capital punishment differs somewhat from any of those considered by the U.S. Supreme Court in its July 2, 1976, decisions, but it is basically similar to the Georgia, Florida, and Texas statutes which the court found to be constitutional. Each of those states provide for a bifurcated trial with a separate sentencing hearing to consider information relevant to the imposition of sentence, under standards to guide the sentencing authority in the use of that information. Statutes in North Carolina and Louisiana which were struck down imposed mandatory death sentences, with no "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of the sentence of death." More clearly than any of the states whose statutes were reviewed Ohio has attempted to insulate the determination of guilt and of sentence from any likelihood of jury arbitrariness. The Ohio statutes are therefore constitutional: State v. Bayless, 48 OS2d 73, 2 OO3d 249, 357 NE2d 1035.

22. (1975) The term "psychosis" of the offender as used in RC § 2929.04 relating to mitigating a death penalty means any serious functional mental disorder, including the effects of drug abuse: State v. Farmer, 73 OO2d 341 (CP).

[CONSTRUING FORMER ANALOGOUS RC § 2901.04]

1. (1970) Where several persons combine to commit an unlawful act, e.g., escape from jail, each is criminally responsible for the acts of the others committed while perpetrating such act: State v. Halleck, 24 OApp2d 74, 53 OO2d 195, 263 NE2d 917.

2. A deputy marshal or policeman is one of the officers included within the terms of the offense defined by RC § 2901.04, taking the life of a police officer: State v. Byomin, 106 App 393, 7 OO2d 155, 154 NE2d 823.

3. A police officer who, pursuant to the arrest of an individual, accompanies such person to a room where he resides, for the purposes of examining identification material promised by him for the officer's inspection, is in the act of "preserving the peace" under GC § 4378 (RC § 737.11) and is "in discharge of his duties" within the purview of GC § 12402-1 (RC § 2901.04), which sets out the elements of the crime of murder in the first degree for purposely and willfully killing a policeman: State v. Ross, 92 App 29, 49 OO 196, 108 NE2d 77.

4. Where officers under the direction of their superiors had been sent to search for the participant in a robbery, and in doing so entered the cottage where a policeman met his death, the jury was justified in concluding that the officer was in the discharge of his duties when killed, within the scope of this section: State v. Dingledine, 14 OO 339 (App) [appeal dismissed, 135 OS 251].

5. Where one of several persons arming themselves with firearms and conspiring to resist sheriff kills sheriff while in discharge of duties, all conspirators are guilty of first degree murder: Rails v. State, 43 App 129, 182 NE 691, 35 OLR 80.

§ 2929.05 [Appellate review of death sentence.]

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

Any court of appeals that reviews a case in which the sentence of death is imposed shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed, and, except as otherwise provided in this section, shall conduct the review in accordance with the Appellate Rules.

(C) Whenever sentence of death is imposed pursuant to section 2929.022 [2929.02.2] or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall, upon motion of the offender and after conducting a hearing on the motion, vacate the sentence if all of the following apply:

(1) The offender alleges in the motion and presents evidence at the hearing that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(2) The offender did not present evidence at trial

pursuant to section 2929.023 [2929.02.3] of the Revised Code that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(3) The motion was filed at any time after the sentence was imposed in the case and prior to execution of the sentence;

(4) At the hearing conducted on the motion, the prosecution does not prove beyond a reasonable doubt that the offender was eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced.

HISTORY: 139 v S 1. Eff 10-19-81.

Cross-References to Related Sections

Reasonable doubt, RC § 2901.05.

CASE NOTES AND OAG

1. (1984) Revised Code § 2929.05 requires the review of the proportionality of death sentences regardless of whether counsel has provided evidence of disproportionality: State v. Jenkins, 15 OS3d 164, 15 OBR 311, 473 NE2d 264.

2. (1984) Revised Code § 2929.05 requires the court of appeals, and the Supreme Court as well, to independently weigh all the facts and other evidence in the record in determining whether the aggravating circumstances outweigh the mitigating factors in reviewing the sentencing court's determination. As a necessary corollary to that requirement, the court of appeals and the Supreme Court must articulate the reasons why the aggravating circumstances outweigh the mitigating factors: State v. Maurer, 15 OS3d 239, 15 OBR 379, 473 NE2d 768.

3. (1985) The proportionality review required of the Court of Appeals pursuant to RC § 2929.05(A) need not include criminal cases outside its geographical jurisdiction: State v. Rogers, 17 OS3d 174, 17 OBR 414, 478 NE2d 984.

4. (1986) Conviction and death sentence upheld: State v. [illegible], 26 OS3d 92, 26 OBR 79, 497 NE2d 55.

5. (1986) Death sentence was neither excessive nor disproportionate: State v. Brooks, 25 OS3d 144, 25 OBR 190, [illegible] NE2d 407.

6. (1986) Defendant's death sentence was neither excessive nor disproportionate to the penalty imposed in similar cases: State v. Barnes, 25 OS3d 203, 25 OBR 266, 495 NE2d [illegible].

§ 2929.06 [Resentencing hearing after vacation of death sentence.]

If the sentence of death that is imposed upon any offender is vacated upon appeal because the court of appeals or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, did not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is vacated upon appeal for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, or is vacated pursuant to division (C) of section 2929.05 of the Revised Code, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

HISTORY: 139 v S 1. Eff 10-19-81.

Cross-References to Related Sections

Parole eligibility, RC § 2967.13.

PENALTIES FOR FELONY

§ 2929.11 Penalties for felony.

(A) Whoever is convicted of or pleads guilty to a felony other than aggravated murder or murder, except as provided in division (D) or (E) of this section, shall be imprisoned for an indefinite term and, in addition, may be fined or required to make restitution, or both. The indefinite term of imprisonment shall consist of a maximum term as provided in this section and a minimum term fixed by the court as provided in this section. The fine and restitution shall be fixed by the court as provided in this section.

Whoever is convicted of or pleads guilty to committing, attempting to commit, or complicity in committing a felony violation of section 2909.02 or 2909.03 of the Revised Code and is sentenced to an indefinite term of imprisonment shall be required to reimburse agencies for their investigation or prosecution costs in accordance with section 2929.28 of the Revised Code.

(B) Except as provided in division (D) of this section, section 2929.71, and Chapter 2925, of the Revised Code, terms of imprisonment for felony shall be imposed as follows:

(1) For an aggravated felony of the first degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be five, six, seven, eight, nine, or ten years, and the maximum term shall be twenty-five years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of ten, eleven, twelve, thirteen, four-

teen, or fifteen years, and the maximum term shall be twenty-five years;

(2) For an aggravated felony of the second degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be three, four, five, six, seven, or eight years, and the maximum term shall be fifteen years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of eight, nine, ten, eleven, or twelve years, and the maximum term shall be fifteen years;

(3) For an aggravated felony of the third degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be two, three, four, or five years, and the maximum term shall be ten years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of five, six, seven, or eight years, and the maximum term shall be ten years;

(4) For a felony of the first degree, the minimum term shall be four, five, six, or seven years, and the maximum term shall be twenty-five years;

(5) For a felony of the second degree, the minimum term shall be two, three, four, or five years, and the maximum term shall be fifteen years;

(6) For a felony of the third degree, the minimum term shall be two years, thirty months, three years, or four years, and the maximum term shall be [illegible] years;

(7) For a felony of the fourth degree, the minimum term shall be eighteen months, two years, thirty months, or three years, and the maximum term shall be five years.

(C) Fines for felony shall be imposed as follows:

(1) For an aggravated felony of the first degree or a felony of the first degree, not more than ten thousand dollars;

(2) For an aggravated felony of the second degree or a felony of the second degree, not more than seven thousand five hundred dollars;

(3) For an aggravated felony of the third degree or a felony of the third degree, not more than five thousand dollars;

(4) For a felony of the fourth degree, not more than two thousand five hundred dollars.

(D) Whoever is convicted of or pleads guilty to a felony of the third or fourth degree and did not, during the commission of that offense, cause physical harm to any person or make an actual threat of physical harm to any person with a deadly weapon, as defined in section 2923.11 of the Revised Code, and who has not previously been convicted of an offense of violence shall be imprisoned for a definite term and, in addition, may be fined or required to make restitution. The restitution shall be fixed by the court as provided in this section. If a person is convicted or pleads guilty to committing, attempting to commit, or complicity in committing a violation of section 2909.03 of the Revised Code that is a felony of the third or fourth degree and is sentenced pursuant to this division, he shall be required to reimburse agencies for their investigation or prosecution costs in accordance with section 2929.28 of the Revised Code.

The terms of imprisonment shall be imposed as follows:

(1) For a felony of the third degree, the term shall be one, one and one-half, or two years;

(2) For a felony of the fourth degree, the term shall be six months, one year, or eighteen months.

(E) The court shall require a person who is convicted of or pleads guilty to a violation of section 2921.41 of the Revised Code, in the circumstances described in division (C)(2)(a) of that section, to make restitution for all of the property that is the subject of the offense, in accordance with division (C)(2) of that section. The court shall require, if appropriate, a person who is convicted of or pleads guilty to arson under section 2909.03 or to aggravated arson under section 2909.02 of the Revised Code to make restitution for all or part of the property damage that is caused by his offense, which restitution shall be in addition to the penalty otherwise imposed by the court for a conviction of

plea of guilty for arson or aggravated arson. The court, in any other case, may require a person who is convicted of or pleads guilty to a felony to make restitution for all or part of the property damage that is caused by his offense and for all or part of the value of the property that is the subject of any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, that the person committed. If the court determines that the victim of the offense was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the offense, the court shall, regardless of whether the offender knew the age of the victim, consider this fact in favor of imposing restitution, but this fact shall not control the decision of the court.

(F) No person shall be sentenced for an offense pursuant to division (B)(1)(b), (2)(b), or (3)(b) of this section because the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.142 [2941.14.2] of the Revised Code.

(G) No person shall be sentenced pursuant to division (B)(6) or (7) of this section to an indefinite term of imprisonment for a felony of the third or fourth degree unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.143 [2941.14.3] of the Revised Code.

HISTORY: 134 v H 511 (Eff 1-1-74); 137 v S 119 (Eff 8-30-78); 139 v S 199 (Eff 7-1-83); 140 v S 210 (Eff 7-1-83); 140 v H 265 (Eff 8-30-84); 140 v S 4 (Eff 9-26-84); 141 v H 284, Eff 3-6-86.

The provisions of § 5 of HB 284 (141 v —) read as follows:

SECTION 5. Section 2929.11 of the Revised Code is presented in this act as a composite of the section as amended by Am. S.B. 210, Am. Sub. H.B. 265, and Am. S.B. 4 of the 115th General Assembly, with the new language of none of these acts shown in capital letters. This is in recognition of the principle stated in division (B) of section 1.52 of the Revised Code that such amendments are to be harmonized where not substantively irreconcilable and constitutes a legislative finding that such is the resulting version in effect prior to the effective date of this act.

Committee Comment to H 511

This section provides penalties for felonies other than murder. Each degree of felony carries an indeterminant definite, or reformatory sentence consisting of a minimum term fixed by the trial court from among four choices given in the statute and a maximum term fixed by the statute. In addition the trial court may impose a fine not exceeding the maximum given for each degree. Penalties for felony are as follows:

Penalties for Felony

Offense	Minimum Term	Maximum Term	Maximum Fine
Felony 1	4, 5, 6, or 7 yrs	25 yrs	$10,000
Felony 2	2, 3, 4, or 5 yrs	15 yrs	$ 7,500
Felony 3	1, 1 1/2, 2, or 3 yrs	10 yrs	$ 5,000
Felony 4	1/2, 1, 1 1/2, or 2 yrs	5 yrs	$ 2,500

Cross-References to Related Sections

Penalties for engaging in pattern of corrupt activities, RC § 2923.32.
Actual incarceration defined, RC § 2929.01.
Additional sentence for felonies involving a firearm, RC § 2929.71.
Aggravated murder, RC § 2903.01.
Imposing sentence, RC § 2929.12.
Imposition of term of incarceration, RC §§ 2941.14.2, 2941.14.3
Modification of sentence, RC § 2929.51.
Multiple sentences, RC § 2929.41.
Murder, RC § 2903.02.
Organizational penalties, RC § 2929.31.
Second conviction—
  Actual incarceration for certain felonies; specification of prior offense, RC § 2941.14.2.
  Indefinite term where either offense was violent, RC § 2941.14.3.
Sentencing criteria for third or fourth degree felony offenses, RC § 2929.13.
Trafficking in drugs, RC § 2925.03.
Victim's bill of rights pamphlet, RC § 109.42.

Ohio Constitution

Excessive fines, OConst art I, § 9.
Transportation for crime, OConst art I, § 12.

Ohio Administrative Code

Sentencing, 2 Ohio Crim. Prac. & Pro.: OAC § 5120:1-1-04.

Comparative Legislation

Penalties for felony:
  18 USC § 1
  CA—Penal Code § 17
  FL—Stat Ann § 775.081
  IL—Ann Stat ch 38 § 1005-1-9
  IN—Code § 35-50-2-1
  KY—Rev Stat Ann § 532.060
  MI—Comp Laws Ann § 750.503
  NY—Penal Law §§ 55.05, 55.10
  PA—CSA tit 18 § 1103

Text Discussion

Aggravating circumstances, 1 Ohio Crim. Prac. & Pro. § 52.14
Penalties and sentencing, 1 Ohio Crim. Prac. & Pro. § 51.6

Oklahoma Code

CHAPTER 17

DEATH SENTENCE

Section

§ 1001. Judgment of death—Warrant

When judgment of death is rendered, the judge must sign and deliver to the sheriff of the county a warrant duly attested by the clerk, under the seal of the court, stating the conviction and judgment and appointing a day on which the judgment is to be executed, which must be not less than sixty (60) nor more than ninety (90) days from the time of the judgment and must direct the sheriff to deliver the defendant within ten (10) days from the time of judgment to the warden of the state prison at McAlester, in this state, for execution.

R.L.1910, § 5967. Laws 1913, c. 113, p. 206, § 2.

Historical Note

This section, as contained in Revised Laws of 1910, read as follows:

"When judgment of death is rendered, the judge must sign and deliver to the sheriff of the county, a warrant duly attested by the clerk, under the seal of the court, stating the conviction and judgment, and appointing a day on which the judgment is to be executed, which must not be less than thirty nor more than sixty days from the time of the judgment."

The 1913 amendment deleted commas following "sheriff of the county" and following "conviction and judgment", substituted "sixty" for "thirty" and

"ninety" for "sixty" and added "and must direct the sheriff to deliver the defendant within ten days from the time of judgment to the warden of the state prison at McAlester, in this state, for execution".

Section 11 of the Act of 1913, read as follows:

"Immediately upon the passage of this act the warden of the State Penitentiary shall ask for bids for apparatus for electrocution purposes and the contract for the same shall be let as public contracts are now let within the state."

Source:

St.1890, § 5734.
St.1893, § 5299.
St.1903, § 5587.
Comp.Laws 1909, § 6926.
Comp.St.1921, § 2784.
St.1931, § 3170.

Origin: Comp.Laws Dak.1887, § 7480.

Law Review Commentaries

Death penalty, constitutionality. 2 Okl.City U.L.Rev. 201 (1977).

Death penalty for children. Victor L. Streib. 36 Okl.L.Rev. 613 (1983).

Sentencing procedure. Eugene Rice 13 Okl.L.Rev. 1 (Feb. 1960).

Uniform State Laws. Maurice H. Merrill. 49 Okl.B.J. 1986 (1978).

Library References

Criminal Law ⇐1213, 1219.
C.J.S. Criminal Law §§ 1978, 2001 et seq.

United States Supreme Court

Aggravating circumstances, death penalty, see Godfrey v. Georgia, 1980, 100 S.Ct. 1759, 446 U.S. 420, 64 L.Ed.2d 398.

Death penalty, see Dobbert v. Florida, 1977, 97 S.Ct. 2290, 432 U.S. 282, 53 L.Ed.2d 344.

Death sentence, lesser included noncapital offenses to be considered when supported by evidence, see Beck v. Alabama, 1980, 100 S.Ct. 2382, 447 U.S. 625, 65 L.Ed.2d 392.

Exclusion of venireman, death penalty, see Davis v. Georgia, 1976, 97 S.Ct. 399, 429 U.S. 122, 50 L.Ed.2d 339.

Rape, death penalty, see Coker v. Georgia, 1977, 97 S.Ct. 2861, 433 U.S. 584, 53 L.Ed.2d 982.

Waiver of federal rights, death penalty, see Gilmore v. Utah, 1976, 97 S.Ct. 436, 429 U.S. 1012, 50 L.Ed.2d 632.

Notes of Decisions

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1. Validity

Imposition and carrying out of death penalty in cases before court would constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments (U.S.C.A.Const.Amends. 8, 14). Furman v. Georgia, U.S.Ga., 92 S.Ct. 2726, 408 U.S. 238, 33 L.Ed.2d 346 (1972).

The death penalty is not a per se violation of the Eighth and Fourteenth Amendments (U.S.C.A.Const.Amends. 8, 14), when properly imposed pursuant to judgment and sentence of murder in the first degree. Hays v. State, Okl.Cr., 617 P.2d 223 (1980).

It is impermissible, under relevant United States Supreme Court decisions, to impose sentence of death on any convicted person until such time as laws

have been duly enacted conforming to standards set forth in such decisions. Pate v. State, Okl.Cr., 507 P.2d 915 (1973).

2. Construction and application

The penalty of death is to be inflicted as punishment for crime only in most extreme cases, wherein evidence and law justifies it. Parish v. State, 77 Okl.Cr. 436, 142 P.2d 642 (1943).

Where Laws 1913, c. 113, p. 206 (§ 1014 of this title) prescribed "the punishment of death must be inflicted by electrocution," and substituted the penitentiary for the county jail as the place where a judgment of death must be executed (§ 1015 of this title) and required the court to appoint a day for the execution not less than 60, nor more than 90, days from the time of the judgment (this section), and the former statute (R.L. 1910, § 5967, see Historical Note) required the court to appoint a day for the execution not less than 30, nor more than 60, days from the time of the judgment; the punishment of death to be by hanging, or by electrocution, as the trial court might order, (R.L.1910, § 5981, see Historical Note under § 1014 of this title), the changes effected by the later law related solely to penal administration, and it was within the power of the Legislature to make them applicable to offenses committed prior to its enactment, and the extension of the time within which the execution may take place after sentence was a mitigation, and not an increase, of punishment, and did not render the act ex post facto, and the substitution of the penitentiary for the county jail as the place where the judgment of death must be executed was not ex post facto, when applied to a person convicted of a murder committed before its enactment. Alberty v. State, 10 Okl.Cr. 616, 140 P. 1025, 52 L.R.A., N.S., 248 (1914).

3. Time of execution—In general

Under this section, it is mandatory on the trial judge when judgment of death is rendered to appoint a day upon which such judgment shall be executed, which day must not be less than 60 nor more than 90 days from the date of the rendition of the judgment, and to direct the sheriff to deliver defendant within 10 days from the date of the judgment to the warden of the state prison at McAlester, to be dealt with in accordance with the judgment and sentence. In re Opinion of the Judges, 24 Okl.Cr. 5, 215 P. 640 (1923); In re Opinion of the Judges, 18 Okl.Cr. 366, 195 P. 149 (1921).

Where a judgment imposing the death sentence is affirmed and the time for execution has expired, Criminal Court of Appeals is required by this section to fix a new date for execution which is never less than sixty nor more than ninety days thereafter. Hathcox v. Waters, 94 Okl.Cr. 286, 234 P.2d 950 (1951).

"Judgment," is adjudication of guilt, and fixing of punishment, and, when punishment is death, must be executed not less than 60 nor more than 90 days from time thereof under this section, and time of execution of sentence is part of execution of judgment rather than part of judgment itself. Washington v. State, 32 Okl.Cr. 392, 241 P. 350 (1926).

Under this section, it is mandatory upon the trial judge, when judgment of death is rendered, to appoint a day on which such judgment is to be executed, which must be not less than 60 nor more than 90 days from the date of the judgment. In re Opinion of the Judges, 26 Okl.Cr. 41, 221 P. 1041 (1924).

Judgment sentencing defendant convicted of murder to be electrocuted on specified date less than 60 days after judgment was void as to the portion thereof appointing the day for the electrocution, under Laws 1913, c. 113, p. 206 (§ 1014 of this title), providing that the day on which defendant is to be electrocuted shall be not less than 60 nor more than 90 days from the judgment (this section). In re Opinion of the Judges, 21 Okl.Cr. 237, 205 P. 1109 (1922).

4. —— Hour of execution

It is the duty of the court under this section, as amended by Laws 1913, c. 113, p. 206, § 2, to appoint a day of the execution of a death sentence only, and the court has no authority to fix the hour of execution; that being for the executive branch of the government. Thomas v. State, 18 Okl.Cr. 648, 197 P. 853 (1921).

Where in a prosecution for murder the court fixed not only the day, but the hour of execution in a death warrant,

Note 4

the error was harmless where the day and hour named had passed pending appeal. Id.

Sentence was erroneous because fixed electrocution at between certain hours of day instead of during day. In re Opinion of Judges, 18 Okl.Cr. 20, 192 P. 597 (1920).

This section, as amended in 1913, is mandatory, and the judge cannot appoint a day beyond the ninetieth day from the judgment, or designate the hours of the day fixed, as that is left to the discretion of the warden of the penitentiary. In re Opinion of the Judges, 18 Okl.Cr. 20, 192 P. 597 (1920).

5. —— Extension of time of execution

The time of execution of a sentence in a capital case is a part of the execution of the judgment rather than a part of the judgment itself, and, a refixing or resetting of the time for execution, where for any reason the judgment of death has not been executed, is a mere ministerial act, which may be performed either by the trial court or the Criminal Court of Appeals. Ex parte Grayson, 86 Okl.Cr. 86, 187 P.2d 232 (1948).

Where, by petitioner's own act of invoking jurisdiction of Criminal Court of Appeals by appeal, a stay of the proceedings under orders of lower court was procured until day of execution under death sentence had passed, though time for executing sentence exceeded 90 days, error became immaterial and could not be made the basis for relief by habeas corpus, and act of refixing or resetting the time for execution being a merely ministerial act and jurisdiction of the Criminal Court of Appeals having been invoked, a new date for execution of the judgment and sentence would be set. Id.

After delivery by the sheriff of a defendant to the warden of the penitentiary pursuant to a judgment of death, the trial court has no authority to extend the time of execution. In re Opinion of the Judges, 26 Okl.Cr. 41, 221 P. 1041 (1923).

6. Persons authorized to execute death warrant

Warden of state penitentiary, or any one legally designated or deputized by him, has authority to execute death warrant. Application of O'Neil, 40 Okl.Cr. 309, 268 P. 734 (1928).

7. Warrant

Where the day designated in the judgment and fixed in the death warrant was only 56 days subsequent to the judgment, contrary to this section, as amended by Laws 1913, c. 113, p. 206, § 2, requiring execution not less than 60 or more than 90 days from judgment, the warrant was void. Noel v. State, 17 Okl.Cr. 308, 188 P. 688 (1920).

8. Judgment

Judgment and sentence in capital conviction should recite that all requirements of this section have been complied with, and, where jury finds defendant guilty of murder and assess death penalty, judgment should contain such verdict, or recite fact that defendant was convicted of murder by verdict of jury and death penalty assessed. Hargus v. State, 58 Okl.Cr. 301, 54 P.2d 211 (1936).

Judgment, in murder prosecution, which was erroneously combined with and designated as death warrant, did not require reversal, where it contained all requisites of this section, was signed by judge, and attested by clerk, with court's seal. Id.

§ 1002. Governor to be informed of proceedings

The judge of a court at which a conviction requiring a judgment of death is had, must, immediately after the conviction, transmit to the Governor, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial

R.L.1910, § 5968.

the error was harmless where the day and hour named had passed pending appeal. Id.

Sentence was erroneous because fixed electrocution at between certain hours of day instead of during day. In re Opinion of Judges, 18 Okl.Cr. 20, 192 P. 597 (1920).

This section, as amended in 1913, is mandatory, and the judge cannot appoint a day beyond the ninetieth day from the judgment, or designate the hours of the day fixed, as that is left to the discretion of the warden of the penitentiary. In re Opinion of the Judges, 18 Okl.Cr. 20, 192 P. 597 (1920).

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After delivery by the sheriff of a defendant to the warden of the penitentiary pursuant to a judgment of death, the trial court has no authority to extend the time of execution. In re Opinion of the Judges, 26 Okl.Cr. 41, 221 P. 1041 (1923).

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8. Judgment

Judgment and sentence in capital conviction should recite that all requirements of this section have been complied with, and, where jury finds defendant guilty of murder and assess death penalty, judgment should contain such verdict, or recite fact that defendant was convicted of murder by verdict of jury and death penalty assessed. Hargus v. State, 58 Okl.Cr. 301, 54 P.2d 211 (1936).

Judgment, in murder prosecution, which was erroneously combined with and designated as death warrant, did not require reversal, where it contained all requisites of this section, was signed by judge, and attested by clerk, with court's seal. Id.

§ 1002. Governor to be informed of proceedings

The judge of a court at which a conviction requiring a judgment of death is had, must, immediately after the conviction, transmit to the Governor, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial.

R.L.1910, § 5968.

Historical Note

Source:
St.1890, § 5735.
St.1893, § 5300.
St.1903, § 5588.
Comp.Laws 1909, § 6927.
Comp.St.1921, § 2785.
St.1931, § 3171.
Origin: Comp.Laws Dak.1887, § 7481.

Notes of Decisions

In general 1
Review 2

1. In general

Where the information sufficiently charged murder and upon arraignment the defendant informed the court that he did not desire counsel and was not permitted to enter his plea of guilty until after he had been informed of all his constitutional and statutory rights and he was fully cognizant of the consequences of his plea of guilty before it was accepted and judgment and sentence pronounced, the conviction and death sentence were in accordance with law in view of this section. In re Watkins, 21 Okl.Cr. 95, 205 P. 191 (1922).

On a conviction of murder imposing the death penalty and submission of the evidence by the Governor to the Criminal Court of Appeals under this section and § 1003 of this title, the conviction was warranted, and punishment of death justified. In re Opinion of the Judges, 4 Okl.Cr. 594, 112 P. 948 (1911).

2. Review

Since the right of appeal is a constitutional right, the counsel appointed by the court to defend an indigent defendant fails in his duty when he neglects to take an appeal from a judgment and sentence of death in a homicide case, in view of this section and § 1003 of this title. Noel v. State, 17 Okl.Cr. 308, 188 P. 688 (1920).

On the creation of the Criminal Court of Appeals, all criminal jurisdiction previously vested in the Supreme Court vested in that court, together with the jurisdiction to express an opinion on matters referred as authorized by this section and § 1003 of this title. In re Opinion of the Judges, 25 Okl. 76, 105 P. 325 (1940).

§ 1003. Governor may require opinion of appellate judges

The Governor may thereupon require the opinion of the Judges of the Criminal Court of Appeals, or any of them, upon the statement so furnished.

R.L.1910, § 5969.

Historical Note

Source:
St.1890, § 5736.
St.1893, § 5301.
St.1903, § 5589.
Comp.Laws 1909, § 6928.
Comp.St.1921, § 2786.
St.1931, § 3172.
Origin: Comp.Laws Dak.1887, § 7482.
The revision of 1910 substituted Criminal Court of Appeals for Supreme Court.

Notes of Decisions

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1. Construction and application

This section contemplates that an advisory opinion of the judges may be giv-

en to the Governor when an appeal has not been taken in a capital case from a judgment and sentence of death. In re Opinion of the Judges, 70 Okl.Cr. 83, 104 P.2d 726 (1940); In re Opinion of the Judges, 56 Okl. 188, 36 P.2d 310 (1934); In re Opinion of the Judges, 55 Okl.Cr. 381, 31 P.2d 159 (1934); In re Opinion of the Judges, 54 Okl.Cr. 103, 14 P.2d 956 (1932); In re Opinion of the Judges, 54 Okl.Cr. 101, 14 P.2d 955 (1932); In re Opinion of Judges, 43 Okl.Cr. 40, 277 P. 283 (1929); In re Opinion of the Judges, 6 Okl.Cr. 18, 115 P. 1028 (1911).

Advisory opinion of Criminal Court of Appeals, under this section, will not be rendered, where appeal has been taken or time within which appeal might be perfected, under § 1054 of this title, has not expired. In re Opinion of the Judges, 35 Okl.Cr. 39, 248 P. 350 (1926).

2. Nature of opinion

An opinion of judges of Criminal Court of Appeals in response to Governor's requirement, as authorized by this section upon statement showing conviction, judgment, and sentence of death, is an "advisory opinion" of the judges when appeal has not been taken from the judgment. In re Opinion of the Judges, 87 Okl.Cr. 297, 197 P.2d 629 (1948).

An opinion of Criminal Court of Appeals in response to a request of the Governor regarding legality of criminal proceedings against an accused and to ascertain whether according to the record there had been an observance of all the formalities of law essential to the taking of human life is merely advisory and not an "adjudication." Tuggle v. State, 73 Okl.Cr. 208, 119 P.2d 857 (1942).

An opinion under this section is an "advisory opinion" of the judges, where an appeal has not been taken from the judgment. In re Opinion of the Judges, 70 Okl.Cr. 83, 104 P.2d 726 (1940).

An opinion rendered by the Criminal Court of Appeals in response to a request of the Governor as authorized by this section, is advisory only and the adjudication of the matters involved cannot be made until the case is lodged in such court on appeal. In re Opinion of the Judges, 18 Okl.Cr. 366, 195 P. 149 (1921).

3. Questions presented

In proceeding in matter of opinion of judges of Criminal Court of Appeals in response to request of Governor relative to conviction and death sentence under this section, scope of question is whether there has been observance of all formalities of law essential to taking of human life, and whether the trial, conviction, and sentence of death have been in accordance with law of the land. In re Opinion of the Judges, 87 Okl.Cr. 297, 197 P.2d 629 (1948); In re Opinion of the Judges, 70 Okl.Cr. 83, 104 P.2d 726 (1940); In re Opinion of the Judges, 56 Okl.Cr. 188, 36 P.2d 310 (1934).

This section contemplates an advisory opinion by the judges to be rendered to the Governor of the state where an appeal has not been taken in a capital case and where the death penalty has been assessed; the questions presented being whether there has been an observance of all the formalities of law essential to the taking of human life, and whether the trial, conviction and sentence of death have been in accordance with the law of the land. In re Opinion of the Judges, 18 Okl.Cr. 360, 195 P. 146 (1921); In re Opinion of Judges, 6 Okl.Cr. 210, 118 P. 156 (1911).

4. Operation and effect of opinion

Where statement is submitted to the court for an opinion under this section, the case is not in the Supreme Court as a suit upon which the judgment may be affirmed or reversed. State v. Johnson, 21 Okl. 40, 96 P. 26, 1 Okl.Cr. 154, 22 L.R.A., N.S., 463 (1908).

5. Time for advisory opinion

Before expiration of period allowed for appeal, Criminal Court of Appeals should not give Governor advisory opinion. In re Opinion of the Judges, 54 Okl.Cr. 56, 14 P.2d 238 (1932); In re Opinion of the Judges, 56 Okl.Cr. 372, 40 P.2d 692 (1935); In re Opinion of the Judges, 33 Okl.Cr. 250, 242 P. 539 (1925).

An opinion to the Governor in a case where a defendant has been sentenced to death ought not to be given when the time for taking an appeal has not expired, and when defendant has not waived the right to appeal. In re Opinion of the Judges, 33 Okl.Cr. 354, 244 P. 50 (1926); In re Opinion of the Judges, 17 Okl.Cr. 369, 189 P. 198 (1920); In re

Opinion of the Judges, 8 Okl.Cr. 467, 128 P. 734 (1913).

Criminal Court of Appeals should not render advisory opinion where time given for appeal from judgment and sentence of death had not expired, and where appeal may be perfected. In re Opinion of the Judges, 55 Okl.Cr. 381, 31 P.2d 159 (1934).

Advisory opinion cannot be rendered before expiration of time for appeal from conviction of murder with death sentence. In re Opinion of the Judges, 36 Okl.Cr. 38, 251 P. 757 (1927).

6. Jurisdiction of reviewing court

On the creation of the Criminal Court of Appeals, all criminal jurisdiction previously vested in the Supreme Court vested in that court, together with the jurisdiction to express an opinion on matters referred as authorized by St. 1903, §§ 5588, 5589 (incorporated in this section and § 1002 of this title). In re Opinion of the Judges, 25 Okl. 76, 105 P. 325.

7. Appeal

Where Governor, in compliance with this section requested of the Criminal Court of Appeals an advisory opinion, but thereafter accused filed appeal and case was argued and briefs were filed, it became duty of the court to pass upon the appeal. Johnson v. State, 82 Okl.Cr. 437, 172 P.2d 337 (1918); Steen v. State, 82 Okl.Cr. 141, 167 P.2d 375 (1946).

The right of appeal being a constitutional right, the counsel appointed by the court to defend an indigent defendant fails in his duty when he neglects to take an appeal from a judgment and sentence of death in a homicide case, in view of this section and § 1002 of this title. Noel v. State, 17 Okl.Cr. 308, 188 P. 688 (1920).

§ 1004. Reprieve and suspension of execution—Authority of officers

No judge, court or officer, other than the Governor, can reprieve or suspend the execution of the judgment of death, except the warden of the said state prison, to whom he is delivered for execution in the cases provided in the next seven sections,[1] unless an appeal is taken.

R.L.1910, § 5970. Laws 1913, c. 113, p. 207, § 3.

[1] Section 1005 et seq. of this title.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"No judge, court or officer other than the governor can reprieve or suspend the execution of a judgment of death, except the sheriff, in the cases provided in the next seven sections, unless a writ of error is allowed and taken."

Source:

St.1890, § 5737.
St.1893, § 5302.
St.1903, § 5590.
Comp.Laws 1909, § 6929.
Comp.St.1921, § 2787.
St.1931, § 3173.

Origin: Comp.Laws Dak.1887, § 7483.

Constitutional Provisions

Constitution Art. 6, § 10, provides in part:

"The Governor shall have the power to grant, after conviction and after favorable recommendation by a majority vote of the said Board, commutations, pardons and paroles for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to such regulations as may be prescribed by law. The Legislature shall

have the authority to prescribe for those persons convicted of three felonies arising out of separate and distinct transactions a minimum mandatory period of confinement which must be served prior to being eligible to be considered for parole. The Governor shall have power to grant after conviction, reprieves or leaves of absence not to exceed [illegible] days, without the action of said Board.

Library References

Criminal Law ⇐1001.
C.J.S. Criminal Law § 1615 et seq.

United States Supreme Court

Commutation of death sentence to long term sentences, see Rose v. Hodges, 1975, 96 S.Ct. 175, 423 U.S. 19, 46 L.Ed.2d 162.

Notes of Decisions

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Construction and application 1
Trial court's authority to extend time for execution 2

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1. Construction and application

Where a person has been convicted of a capital offense, and the death penalty has been assessed, but no appeal has been taken, the Governor has the sole power to suspend execution of the sentence, until such time as an appeal may be perfected, or until a day beyond the six months' period in which an appeal may be taken. In re Opinion of the Judges, 70 Okl.Cr. 83, 104 P.2d 726 (1940); In re Opinion of the Judges, 26 Okl.Cr. 41, 221 P. 1041 (1924); In re Opinion of the Judges, 24 Okl.Cr. 5, 215 P. 640 (1923); In re Opinion of the Judges, 18 Okl.Cr. 366, 195 P. 149 (1921); In re Opinion of the Judges, 18 Okl.Cr. 360, 195 P. 146 (1921); In re Opinion of the Judges, 17 Okl.Cr. 369, 189 P. 198 (1920).

Under this section, a reprieve can only be granted by the Governor pending the perfecting of an appeal, and an order of the court staying execution of the sentence of death indefinitely, entered after term in which judgment was rendered, is without authority. McConnell v. State, 18 Okl.Cr. 688, 197 P. 521 (1921).

No court or officer other than the Governor can suspend the execution of a judgment and sentence of death after delivery of the defendant to the warden of the penitentiary unless and until an appeal is taken from such judgment. In re Opinion of the Judges, 18 Okl.Cr. [illegible] 195 P. 149 (1921).

Where a defendant has been duly convicted of murder and sentenced to be electrocuted before the expiration of the six months allowed for an appeal by §§ 1051, 1054, 1055, 1060 and § 962 of title 12, the Governor, under this section, has the sole power to suspend the execution of the death sentence until such time as an appeal may be perfected or until a day beyond the six months allowed in which to take an appeal. In re Opinion of the Judges, 18 Okl.Cr. 20 [illegible] P. 597 (1920).

Under this section, a reprieve can only be granted by the Governor pending the perfecting of an appeal in the case, and an order of the trial judge staying the execution of judgment after granting an appeal is without authority; and, where an appeal has been granted, but not filed, in the Criminal Court of Appeals, the Governor may grant a reprieve to a day beyond the time allowed to make, serve, and file a case-made and petition in error. Opinion of the Judges, 3 Okl.Cr. 315, 105 P. 684 (1910).

2. Trial court's authority to extend time for execution

After delivery by the sheriff of a defendant to the warden of the penitentiary pursuant to a judgment of death, the trial court has no authority to extend the time of execution. In re Opinion of the Judges, 26 Okl.Cr. 41, 221 P. 1041 (1924).

After delivery by the sheriff of a convicted defendant to the warden of the state penitentiary for execution of sentence and judgment imposing death, the

trial court has no authority to extend the time of execution, and the Criminal Court of Appeals acquires no jurisdiction to suspend sentence until the appeal has been filed therein. In re Opinion of the Judges, 24 Okl.Cr. 5, 215 P. 640 (1923).

After delivery by the sheriff of a defendant sentenced to death, to the warden of the penitentiary, the trial court has no authority to extend the time of execution, and the Criminal Court of Appeals cannot suspend sentence until an appeal has been filed. In re Opinion of the Judges, 18 Okl.Cr. 366, 195 P. 149 (1921).

3. Appeal

Application filed by defendants sentenced to death for offense of first-degree murder for stay of execution, treated by court as original proceeding for writ of habeas corpus, which was presented to enable defendants to file timely petition for writ of certiorari to the Supreme Court of the United States could not be granted where court had already affirmed judgment of trial court fixing penalty at death; further stay of execution would have to be sought from state governor or in proper federal forum. Williams v. State, Okl.Cr., 544 P.2d 1283 (1976).

Where one convicted of murder served written notice of intention to appeal, which under Constitution and laws he might do within six months from conviction, and had taken steps to perfect appeal, if appeal was not lodged in Appellate Court before date fixed for execution, such execution should be postponed until after six months from date of conviction. In re Opinion of the Judges, 29 Okl.Cr. 27, 232 P. 121 (1925).

§ 1005. Prisoner becoming insane—Question for jury trial

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 is to immediately file in the district or 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 a jury of twelve persons to hear such inquiry.

R.L.1910, § 5971. Laws 1913, c. 113, p. 207, § 4.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"If, after judgment of death, there is good reason to suppose that the defendant has become insane, the sheriff of the county or subdivision, with the concurrence of the judge of the court by which the judgment was rendered, upon notice to the county attorney, may summon from a list of thirty jurors selected or to be selected, forthwith by the county commissioners, a jury of twelve persons to inquire into the supposed insanity."

Source:

St.1890, § 5738.
St.1893, § 5303.
St.1903, § 5591.
Comp.Laws 1909, § 6930.
Comp.St.1921, § 2788.
St.1931, § 3174.

Origin: Comp.Laws Dak.1887, § 7484.

The 1910 revision provided for a panel of thirty jurors and made minor changes in language.

Cross References

Inquisition into sanity of defendant in general, see §§ 1161 to 1170 of this title.
Verdict in case of defense of insanity, see § 925 of this title.

Library References

Criminal Law ⇐973.
C.J.S. Criminal Law § 1544.

Notes of Decisions

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1. Construction and application

In murder prosecution, trial court did not abuse its discretion in overruling a motion in arrest of judgment, where the showing made was not such as to create a reasonable doubt in its mind as to the defendant's sanity, but if on a proper showing it should subsequently develop that defendant is presently insane, resort to the law for relief was available both to the defendant and the state on proper showing. Pate v. State, Okl.Cr., 361 P.2d 1086 (1961).

Where prisoner incarcerated in state penitentiary awaiting execution, whose conviction had been affirmed upon appeal, had trial before jury of county in which penitentiary was located upon question of his present sanity and verdict was rendered finding that prisoner was sane, the sole recourse of prisoner under common law and the statutes was an appeal to the Governor who could exercise his powers of clemency at his discretion in the manner provided by law. Bingham v. State, 82 Okl.Cr. 305, 169 P.2d 311 (1946).

The common-law rule relating to inquisition to determine sanity of prisoner under death sentence has been modified by this section to provide that district or superior court of county in which prisoner is confined may make inquisition into prisoner's sanity, which shall be determined by a mandatory jury trial, where warden of institution has reason to believe that the prisoner has become insane since his incarceration. Bingham v. State, 82 Okl.Cr. 305, 169 P.2d 311 (1946).

2. Purpose of law

The investigation of sanity of prisoner incarcerated under death sentence is based on public will and sense of propriety rather than on any right of prisoner and any investigation of mental condition of prisoner is for sole purpose of determining whether it would be consistent with public decency and propriety to take away life of person not sane enough to realize what was being done. Bingham v. State, 82 Okl.Cr. 305, 169 P.2d 311 (1946).

3. Insanity—In general

At the common law, "insanity" which will preclude execution of prisoner under death sentence means a state of general insanity with the mental powers being wholly obliterated. Bingham v. State, 82 Okl.Cr. 305, 169 P.2d 311 (1946).

The test of sanity or insanity of person under death sentence is whether such person at time of examination, from defects of his faculties, has 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, and if he has such intelligence, he is "sane", and if he does not have such intelligence, he is "insane" and should not be executed. Id.

4. —— Investigation after trial, insanity

The Court of Criminal Appeals is not authorized by this section or by common law to conduct an inquisition into sanity of prisoner incarcerated in penitentiary awaiting execution. Bingham v. State, 82 Okl.Cr. 305, 169 P.2d 311 (1946).

The fact that there was no evidence of insanity presented to trial judge and nothing in the record to indicate that defendant was insane at the time of the commission of the crime or insane at

time judgment and sentence was pronounced against him did not preclude a further investigation into the sanity of defendant since his incarceration in state penitentiary. Tuggle v. State, 73 Okl.Cr. 208, 119 P.2d 837 (1942).

Defendant was not concluded by finding of his present sanity at time of judgment and sentence, but further inquisitions might be had as to his mental condition by warden of penitentiary on belief of defendant's insanity, or by Governor. Weiland v. State, 58 Okl.Cr. 108, 50 P.2d 741 (1935).

An application made after verdict of guilty to try the sanity of the accused is properly denied when no doubt of his sanity is raised by the pleadings and the proof offered in support thereof. Kearns v. State, 14 Okl.Cr. 142, 168 P. 242 (1917).

5. Review

A jury's verdict upon collateral issue of prisoner's sanity after incarceration in penitentiary is not a final judgment from which an appeal or writ of error will lie. Bingham v. State, 82 Okl.Cr. 305, 169 P.2d 311 (1946).

An appeal from finding of sanity or insanity of prisoner in collateral proceeding before district court does not lie to the Criminal Court of Appeals, and hence such court is without authority to issue writ of certiorari or in any manner review such finding. Id.

§ 1006. Attendance by district attorney—Witnesses for inquisition

The district attorney must attend the inquisition, 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.
R.L.1910, § 5972.

Historical Note

Source:
St.1890, § 5739.
St.1893, § 5304.
St.1903, § 5592.
Comp.Laws 1909, § 6931.
Comp.St.1921, § 2789.
St.1931, § 3175.
Origin: Comp.Laws Dak.1887, § 7485.

§ 1007. Verdict—Order of court

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 one of the state hospitals for the insane and there kept for safe confinement until his reason is restored.
R.L.1910, § 5973. Laws 1913, c. 113, p. 207, § 5.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"A certificate of the inquisition must be signed by the jurors and the sheriff, and filed with the clerk of the court in which the conviction was had."

Source:

St.1890, § 5740.
St.1893, § 5305.
St.1903, § 5593.
Comp.Laws 1909, § 6932.
Comp.St.1921, § 2790.
St.1931, § 3176.

Origin: Comp.Laws Dak.1887, § 7[illegible]

Notes of Decisions

1. Construction and application

Where, since confinement of accused in state penitentiary pending execution of death sentence upon conviction of murder, accused was found to be insane and was confined in hospital, cause would be remanded to district court with directions that judgment and sentence should be set aside and order entered postponing pronouncement of judgment and sentence until accused recovered his sanity, and proper authorities would be ordered to deliver accused to sheriff when he recovered his sanity to be [illegible] subject to order of district court. M[illegible] v. State, 82 Okl.Cr. 367, 170 P.2d [illegible] (1946).

§ 1008. Execution of judgment—Proceedings when defendant found insane—Recovery of reason

If it is found that the defendant is sane the warden must proceed to execute the judgment as certified 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 [1] to the Governor and deliver the defendant, together with a certified copy of such order to the medical superintendent of the hospital named in such order. 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.

R.L.1910, § 5974. Laws 1913, c. 113, p. 208, § 6.

[1] Section 1007 of this title.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"If it is found by the inquisition that the defendant is sane, the sheriff must execute the judgment; but if it is found that he is insane, the sheriff must suspend the execution of the judgment until he receives a warrant from the governor, or from a majority of the judges of the criminal court of appeals, directing the execution of the judgment."

Source:

St.1890, § 5741.
St.1893, § 5306.
St.1903, § 5594.
Comp.Laws 1909, § 6933.
Comp.St.1921, § 2791.
St.1931, § 3177.

Origin: Comp.Laws Dak.1887, § 7487.

The revision of 1910 substituted Criminal Court of Appeals for Supreme Court.

Library References

Criminal Law ⇐973, 1219.
C.J.S. Criminal Law §§ 1544, 2001 et seq.

Notes of Decisions

1. In general

Where judgment of conviction for murder and death sentence were ordered set aside on ground of present insanity after rendition of verdict and accused was committed to mental hospital, upon certification by superintendent of hospital that accused's sanity was restored, trial court acted within its lawful powers in pronouncing judgment and sentence in accordance with verdict and accused was not thereby denied due process of law. Mitts v. State, Okl.Cr., 345 P.2d 913 (1959), certiorari denied 80 S.Ct. 1620, 363 U.S. 846, 4 L.Ed.2d 1730.

§ 1009. Repealed by Laws 1941, p. 462, § 1, eff. June 7, 1941

Historical Note

This section relating to the duty of sheriff when defendant was found insane, and execution of judgment upon defendant's becoming sane, was derived from:

Comp.Laws Dak.1887, § 7488.
St.1890, § 5742.
St.1893, § 5307.
St.1903, § 5595.
Comp.Laws 1909, § 6934.
R.L.1910, § 5975.
Comp.St.1921, § 2792.

§ 1010. Pregnancy of prisoners—Judicial investigation

If it is alleged that a female prisoner under judgment of death is pregnant, the warden must notify the district attorney of the county in which the prison is situated whose duty is to immediately file with the district court a petition stating such allegation. A hearing must be conducted by a judge of that district court to determine the validity of the allegation. Enforcement of the judgment is suspended upon the filing of the petition, pending the outcome of the hearing.

Upon filing of the petition a judge of the district court shall appoint a physician licensed under the laws of the State of Oklahoma to conduct a medical examination for pregnancy of the female prisoner. Such examination shall be conducted within thirty (30) days prior to the hearing. The report of the examining physician shall be submitted to the court as evidence. The court may also hear any other evidence that may be presented. The court shall make a written finding to be filed with the court clerk as a part of the permanent record.

R.L.1910, § 5976. Laws 1913, c. 113, p. 208, § 7; Laws 1973, c. 101, § 1, eff. May 2, 1973.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"Where there is good reason to suppose that a female, against whom judgment of death is rendered, is pregnant, the sheriff of the county or subdivision, with the concurrence of the judge of the court by which the judgment was rendered, may summon a jury of three physicians of the State to inquire into the supposed pregnancy. Immediate notice thereof must be given to the county

attorney. The provisions of the two preceding sections apply to the proceedings upon the inquisition."

The 1973 amendment rewrote the section which prior thereto provided:

"If there is good reason to believe that a female against whom judgment is rendered is pregnant, such proceedings must be had as are provided in section 4 hereof (S. 5971 Revised Laws) except that instead of a jury as therein provided, the court must 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 6 hereof apply to the proceedings upon such inquiry."

Source:

St.1890, § 5743.
St.1893, § 5308.
St.1903, § 5596.
Comp.Laws 1909, § 6935.
Comp.St.1921, § 2793.
St.1931, § 3179.

Origin: Comp.Laws Dak.1887, § 74..

Library References

Criminal Law ⇐967, 1219.
C.J.S. Criminal Law §§ 1517 et seq., 2001 et seq.

§ 1011. Execution of judgment—Suspension when defendant pregnant—Execution when pregnancy ceases

If it is found that a 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 findings 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.
R.L.1910, § 5977. Laws 1913, c. 113, p. 209, § 8.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"If it is found by the inquisition that the female is not pregnant, the sheriff must execute the judgment. If, however, it is found that she is pregnant, the sheriff must suspend the execution of the judgment, and transmit the inquisition to the governor."

Source:

St.1890, § 5744.
St.1893, § 5309.
St.1903, § 5597.
Comp.Laws 1909, § 6936.
Comp.St.1921, § 2794.
St.1931, § 3180.

Origin: Comp.Laws Dak.1887, § 7490.

R.L.1910, § 5978, which provided that when the Governor was satisfied that the female was no longer pregnant, he could issue his warrant appointing the day for the execution of the judgment, was repealed by Laws 1941, p. 462, § 1.

§ 1012. Duty of court when judgment not executed

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,

on the application of the district attorney, must order the defendant to be brought before it, or, if he is at large, a warrant for his apprehension may be issued.
R.L.1910, § 5979.

Historical Note

Source:
St.1890, § 5746.
St.1893, § 5311.
St.1903, § 5599.
Comp.Laws 1909, § 6938.
Comp.St.1921, § 2796.
St.1931, § 3182.
Origin: Comp.Laws Dak.1887, § 7492.

Notes of Decisions

1. Construction and application

Accused, inadvertently not electrocuted pursuant to death sentence, may be returned under this section and § 1013 of this title, as modified by § 1015 of this title, for resentence to court originally sentencing him. In re Opinion of the Judges, 31 Okl.Cr. 442, 239 P. 676 (1925).

As the day fixed for the execution of the judgment and sentence had passed, the cause was remanded to the district court of Creek county for the purpose of appointing another day for the execution of the judgment, as provided by this section and § 1013 of this title; proceedings to be had in accordance with the rule prescribed by this court in the case of Alberty v. State, 10 Okl.Cr. 616, 140 P. 1025. Hawkins v. State, 11 Okl.Cr. 73, 142 P. 1093 (1914).

This section applies where a sentence has been indefinitely suspended, by order, because of an appeal. Armstrong v. State, 2 Okl.Cr. 567, 103 P. 658, 24 L.R.A.,N.S., 776 (1909).

§ 1013. Inquiry and determination by court

Upon the defendant being brought before the court, it must inquire into the facts, and if no legal reason exists against the execution of the judgment, must make an order that the sheriff of the proper county execute the judgment at a specified time. The sheriff must execute the judgment accordingly.
R.L.1910, § 5980.

Historical Note

Source:
St.1890, § 5747.
St.1893, § 5312.
St.1903, § 5600.
Comp.Laws 1909, § 6939.
Comp.St.1921, § 2797.
St.1931, § 3183.
Origin: Comp.Laws Dak.1887, § 7493.

Notes of Decisions

1. Construction and application

Accused, inadvertently not electrocuted pursuant to death sentence, may be returned under this section and § 1012 of this title, as modified by § 1015 of this title, for resentence to court originally sentencing him. In re Opinion of the Judges, 31 Okl.Cr. 442, 239 P. 676 (1925).

This section applies where a sentence has been indefinitely suspended, by order, because of an appeal. Armstrong v. State, 2 Okl.Cr. 567, 103 P. 658, 24 L.R.A.,N.S., 776 (1909).

§ 1014. Manner of inflicting punishment of death

A. The punishment of death must be inflicted by continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice.

B. If the execution of the sentence of death as provided in subsection A of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by electrocution.

C. If the execution of the sentence of death as provided in subsections A and B of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by firing squad.

R.L.1910, § 5981. Laws 1913, ch. 113, p. 206, § 1; Laws 1951, p. 63, § 1. Laws 1977, c. 41, § 1.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"The punishment of death must be inflicted by hanging the defendant by the neck until he is dead; or his life may, under the direction of the governor, and at the cost of the State, be taken by electricity if the court so orders."

For § 11 of the amendatory Act of 1913, see Historical Note under § 1001 of this title.

The 1951 amendment rewrote the section which prior thereto provided:

"The punishment of death must be inflicted by electrocution."

Sections 2 and 3 of the act of 1951 read as follows:

"Section 2. The State Board of Public Affairs is hereby authorized to expend from the Revolving Fund of the Oklahoma State Penitentiary an amount not to exceed Fourteen Thousand Dollars ($14,000.00); for the purpose of building a lethal gas execution chamber to carry out the provisions of Section 1 of this Act. Prison labor and materials shall be used, in so far as practicable, in the construction of said chamber.

"Section 3. The expenditures herein authorized for contractual and expenditure purposes may be contracted against and expended at any time within two and one-half (2½) years after the passage of this Act."

The 1977 amendment rewrote the section which prior thereto provided:

"The punishment of death must be inflicted by the administration of a lethal gas. Provided however, the punishment of death must be inflicted by electrocution until such time as a lethal gas execution chamber is available."

Section 2 of Laws 1977, c. 41, provides for severability of provisions of act.

Source:

St.1890, § 5748.
St.1893, § 5313.
St.1903, § 5601.
Comp.Laws 1909, § 6940.
Comp.St.1921, § 2798.
St.1931, § 3184.

Origin: Comp.Laws Dak.1887, § 7494.

Law Review Commentaries

Constitutionality of death penalty. 2 Okl.City U.L.Rev. 201 (1977).

Notes of Decisions

1. Validity

Execution of death sentence by electrocution before lethal gas execution chamber had been made available at state penitentiary would not deprive defendant of life without due process of law in violation of federal or state constitution, U.S.C.A. Const. Amend. 14, § 1 and Const. Art. 2, § 7. Hathcox v. Waters, 94 Okl.Cr. 286, 234 P.2d 950 (1951).

The amendment to this section by Laws 1913, ch. 113, p. 206, § 1, providing for electrocution, and substituting the penitentiary for the county jail as the place of execution and changing the time limit therefor, was not violative of U.S.C.A. Const. Art. 1, § 10, prohibiting the enactment of an ex post facto law, though applied to a person convicted of a murder committed before its enactment. Alberty v. State, 10 Okl.Cr. 616, 140 P. 1025, 52 L.R.A.,N.S., 248 (1914).

Although this section, as amended by the 1913 legislation, provided that the punishment of death must be inflicted in the state penitentiary by electrocution, and was passed subsequent to the commission of the offense in question, this was not an ex post facto law, so far as appellant was concerned, because under the provisions of R.L. 1910, § 5981 [this section, prior to the 1913 amendment], which was in force when the offense was committed, the death penalty could be inflicted either by hanging or by electrocution, at the discretion of the court before whom the case was tried. The amendment required it to be by electrocution, and the sentence of the court must be in conformity to the provisions of the act of 1913, hereinbefore referred to. Henry v. State, 10 Okl.Cr. 369, 136 P. 982, 52 L.R.A.,N.S., 113 (1914).

2. Purpose of law

Legislature, by enacting this section which specified that punishment of death be inflicted by administration of a lethal gas and providing that such punishment be inflicted by electrocution until such time as a lethal gas execution chamber is available and by appropriating $14,000 under same statute for purpose of building a lethal gas execution chamber and allowing two and one-half years for expenditure of such moneys, did not intend to abolish the death penalty; rather, punishment of death must be inflicted by electrocution until such time as a lethal gas execution chamber is available. (Per Bussey, P.J., with two Judges specially concurring.) Garcia v. State, Okl.Cr., 501 P.2d 1128 (1972).

3. Writ of prohibition

Court of Criminal Appeals took notice that there had been filed in Supreme Court application for that court to assume original jurisdiction in action having for its purpose obtaining of writ of prohibition against warden's inflicting death sentence by means of electrocution. Ex parte Williams, Okl.Cr., 341 P.2d 652 (1959) certiorari denied 80 S.Ct. 597, 361 U.S. 968, 4 L.Ed.2d 547.

§ 1015. Place of execution of judgment—Persons who may be present

A judgment of death must be executed within the walls of the state prison at McAlester, Oklahoma, said prison to be designated by the court by which judgment is to be rendered. The warden of the said state prison must be present along with other necessary prison officials at the execution and must invite the presence of a physician and the district attorney, and sheriff of the county wherein the conviction was had, to witness the execution; and he shall, at the request of the defendant, permit the presence of such ministers of the Gospel, not exceeding two, and any persons,

relatives or friends, not to exceed five, as the defendant may name; provided, newspapermen from recognized newspapers, press, and wire services, and radio reporters will be admitted upon proper identification, application and approval of the warden. No other person than those mentioned in this section can be present at the execution.

R.L.1910, § 5982. Laws 1913, c. 113, p. 209, § 9; Laws 1951, p. 64, § 1.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"A judgment of death must be executed within the walls or yards of a jail of the county in which the conviction was had, or some convenient private place in the county. If there is no such jail or prison in the county in which the conviction was had, or if it becomes unfit or unsafe for the confinement of prisoners, or is destroyed by fire or otherwise, and the jail of another county has been legally designated for the confinement of the prisoners of the county in which the conviction was had, the judgment must be executed in manner as above."

The 1951 amendment, in the second sentence, inserted "along with other necessary prison officials" following "must be present", substituted "and" for a comma following "physician", deleted "of Pittsburg County" following "county attorney", and substituted "and sheriff of the county wherein the conviction was had, to witness the execution; and he shall, at the request of the defendant, permit the presence of such ministers of the Gospel, not exceeding two (2), and any persons, relatives or friends, not to exceed five (5), as the defendant may name; provided, newspapermen from recognized newspapers, press, and wire services, and radio reporters will be admitted upon proper identification, application and approval of the warden. No other person than those mentioned in this Section can be present at the execution" for "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 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 person than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness same."

Source:

St.1890, § 5749.
St.1893, § 5314.
St.1903, § 5602.
Comp.Laws 1909, § 6941.
Comp.St.1921, § 2799.
St.1931, § 3185.

Origin: Comp.Laws Dak.1887, § 749[illegible].

R.L.1910, § 5983, which covered the same subject matter as this section was repealed by Laws 1941, p. 462, § 1, eff. June 7, 1941. Said section read as follows:

"The sheriff or deputy sheriff of the county must be present at the execution, and must invite the presence by at least three days' notice of the county attorney, together with one physician and twelve reputable citizens, to be selected by him. He must, also, at the request of the defendant, permit any minister or ministers of the gospel whom the defendant may name, and any of his relatives or friends, not to exceed five, to attend the execution, and also such peace officers as the sheriff or under sheriff may deem proper. But no person, other than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same."

Notes of Decisions

1. Construction and application

Accused, inadvertently not electrocuted pursuant to death sentence, may be returned under §§ 1012 and 1013 of this title, as modified by this section, for resentence to court originally sentencing him. In re Opinion of the Judges, 31 Okl.Cr. 442, 239 P. 676 (1925).

§ 1016. Warden's return upon death warrant

After the execution, the warden must make a report upon the death warrant to the court by which the judgment was rendered, showing the time, mode and manner in which it was executed. R.L.1910, § 5984. Laws 1913, c. 113, p. 210, § 10.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"The sheriff or deputy sheriff must prepare and sign with his name of office a certificate attached to the death warrant setting forth the time, manner and place of execution, and that the judgment was executed upon the defendant according to the provisions of the last three sections, and attested by at least twelve persons not relatives of the defendant who witnessed the execution."

Source:

St.1890, § 5751.
St.1893, § 5316.
St.1903, § 5604.
Comp.Laws 1909, § 6943.
Comp.St.1921, § 2801.
St.1931, § 3187.

Origin: Comp.Laws Dak.1887, § 7497.

R.L.1910, § 5985, which covered the same subject as this section and was repealed by Laws 1941, p. 462, § 1, eff. June 7, 1941 read as follows:

"The sheriff or deputy sheriff must cause the certificate to be filed in the office of the clerk of the court."

§§ 1017 to 1050. Reserved to accommodate future legislation

Oregon Code

Chapter 137

1987 REPLACEMENT PART

Judgment and Execution; Parole and Probation by the Court

EXECUTION OF JUDGMENT

(Imprisonment)

137.310 Authorizing execution of judgment; detention of defendant

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137.320 Delivery of defendant when committed to Department of Corrections; credit on sentence

137.330 Where judgment of imprisonment in county jail is executed

137.370 Commencement and computation of term of imprisonment in state penal or correctional institution; sentences concurrent unless court orders otherwise

137.375 Release of prisoners whose terms expire on legal holidays

137.380 Discipline, treatment and employment of prisoners

137.390 Commencement, term and termination of term of imprisonment in county jail; treatment of prisoners therein

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PROBATION AND PAROLE BY COMMITTING MAGISTRATE

137.520 Power of committing magistrate to parole and grant temporary release to persons confined in county jail; authority of sheriff to release county jail inmates; disposition of work release earnings

137.525 Probation for person convicted of crime described in ORS 163.305 to 163.495; examination; report; written consent of convicted person

137.530 Investigation and report of probation officers; statement of victim

137.540 Conditions of probation; evaluation and treatment; effect of failure to abide by conditions; modification

137.550 Period of probation; discharge from probation; proceedings in case of violation of conditions

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137.557 Citation; procedure; contents

137.560 Copies of certain orders to be sent to Department of Corrections

137.570 Authority to transfer probationer from one agency to another; procedure

137.580 Effect of transfer of probationer from one agency to another

137.590 Appointment of probation officers and assistants; chief probation officer

137.610 Performance by Department of Corrections staff of duties of probation officers appointed by judge

137.620 Powers of probation officers; oath of office; bond; audit of accounts

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regardless of whether the sentence is to be served in a state or federal institution.

(2) Except as provided in subsection (3) of this section, when a person is sentenced to imprisonment in the custody of the Department of Corrections, for the purpose of computing the amount of sentence served the term of confinement includes only:

(a) The time that the person is confined by any authority after the arrest for the crime for which sentence is imposed; and

(b) The time that the person is authorized by the Department of Corrections to spend outside a confinement facility, in a program conducted by or for the Department of Corrections.

(3) When a judgment of conviction is vacated and a new sentence is thereafter imposed upon the defendant for the same crime, the period of detention and imprisonment theretofore served shall be deducted from the maximum term, and from the minimum, if any, of the new sentence.

(4) Unless the court expressly orders otherwise, a term of imprisonment shall be concurrent with that portion of any sentence previously imposed that remains unexpired at the time the court imposes sentence. This subsection applies regardless of whether the earlier sentence was imposed by the same or any other court, and regardless of whether the earlier sentence is being or is to be served in the same penal institution or under the same correctional authority as will be the later sentence. [Amended by 1955 c.660 §15; 1965 c.463 §19; 1967 c.232 §2; 1973 c.562 §2; 1973 c.631 §4; 1981 c.424 §2; 1987 c.251 §4; 1987 c.320 §35]

137.375 Release of prisoners whose terms expire on legal holidays. When the date of release from imprisonment of any prisoner in an adult correctional facility under the jurisdiction of the Department of Corrections, or any prisoner in the county or city jail, falls on Saturday, Sunday or a legal holiday, the prisoner shall be released on the first day preceding the date of release which is not a Saturday, Sunday or legal holiday, except for prisoners of a county or city jail serving a mandatory minimum term specifically limited to weekends who shall only be released at the time fixed in the sentence. [1953 c.532 §1; 1955 c.660 §16; 1971 c.290 §1; 1979 c.487 §10; 1987 c.320 §36]

137.380 Discipline, treatment and employment of prisoners. A judgment of commitment to the custody of the Department of Corrections need only specify the duration of confinement as provided in ORS 137.120. Thereafter the manner of the confinement and the treatment and employment of a person shall be regulated and governed by whatever law is then in force prescribing the discipline, treatment and employment of persons committed. [Amended by 1955 c.32 §1; 1955 c.660 §17; 1959 c.687 §1; 1973 c.836 §265; 1987 c.320 §37]

137.390 Commencement, term and termination of term of imprisonment in county jail; treatment of prisoners therein. The commencement, term and termination of a sentence of imprisonment in the county jail is to be ascertained by the rule prescribed in ORS 137.370, and the manner of such confinement and the treatment of persons so sentenced shall be governed by whatever law may be in force prescribing the discipline of county jails. [Amended by 1973 c.631 §3]

137.400 [Amended by 1953 c.104 §2; 1955 c.662 §6; repealed by 1967 c.372 §13]

137.410 [Repealed by 1967 c.372 §13]

137.420 [Repealed by 1967 c.372 §13]

137.430 [Repealed by 1967 c.372 §13]

137.440 Return by officer executing judgment; annexation to trial court file. When a judgment in a criminal action has been executed, the sheriff or officer executing it shall return to the clerk the warrant or copy of the entry or judgment upon which the sheriff or officer acted, with a statement of the doings of the sheriff or officer indorsed thereon, and the clerk shall file the same and annex it to the trial court file, as defined in ORS 19.005. [Amended by 1967 c.471 §4]

137.450 Enforcement of money judgment in criminal action. A judgment against the defendant or complainant in a criminal action, so far as it requires the payment of a fine, fee, assessment, costs and disbursements of the action or restitution, may be enforced as a judgment in a civil action. [Amended by 1973 c.836 §269; 1987 c.709 §1]

137.460 [Renumbered 137.270]

(Death Sentence)

137.463 Death warrant; delivery to sheriff; automatic review by Supreme Court. (1) When a judgment of death is pronounced, a warrant signed by the trial judge and attested by the clerk of the court, with the seal of the court affixed, shall be drawn and delivered to the sheriff of the county. The warrant shall state the conviction and judgment and shall direct the sheriff to deliver the defendant within 20 days from the time of the judgment to the Superintendent of the Oregon State Penitentiary pending

the determination of the automatic and direct review by the Supreme Court.

(2) If the Supreme Court affirms the sentence of death, a warrant, signed by the trial judge of the court in which the judgment was rendered and attested by the clerk of that court, shall be drawn and delivered to the Superintendent of the Oregon State Penitentiary. The warrant shall appoint a day on which the judgment is to be executed and shall authorize and command the superintendent to execute the judgment of the court. [1984 c.3 §5]

137.465 [1979 c.2 §5; repealed by 1981 c.873 §9]

137.467 Delivery of warrant when place of trial changed. If the place of trial has been changed, the death warrant shall be delivered to the sheriff of the county in which the defendant was tried. [1984 c.3 §6]

137.470 [1979 c.2 §6; repealed by 1981 c.873 §9]

137.473 Means of inflicting death; place and procedures; acquisition of lethal substance. (1) The punishment of death shall be inflicted by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant is dead. The judgment shall be executed by the superintendent of the Department of Corrections institution in which the execution takes place, or by the designee of that superintendent. All executions shall take place within the enclosure of a Department of Corrections institution designated by the Director of the Department of Corrections. The superintendent of the institution shall be present at the execution and shall invite the presence of one or more physicians, the Attorney General and the sheriff of the county in which the judgment was rendered. At the request of the defendant, the superintendent shall allow no more than two clergymen designated by the defendant to be present at the execution. At the discretion of the superintendent, no more than five friends and relatives designated by the defendant may be present at the execution. The superintendent shall allow the presence of any peace officers as the superintendent thinks expedient.

(2) The person who administers the lethal injection under subsection (1) of this section shall not thereby be considered to be engaged in the practice of medicine.

(3)(a) Any wholesale drug outlet, as defined in ORS 689.005, registered with the State Board of Pharmacy under ORS 689.305 may provide the lethal substance described in subsection (1) of this section upon written order of the Director of the Department of Corrections, accompanied by a certified copy of the judgment of the court imposing the punishment.

(b) For purposes of ORS 689.765 (8) the director shall be considered authorized to purchase the lethal substance described in subsection (1) of this section.

(c) The lethal substance described in subsection (1) of this section is not a controlled substance when purchased, possessed or used for purposes of this section. [1984 c.3 §7; 1987 c.320 §38]

137.475 [1979 c.2 §7; repealed by 1981 c.873 §9]

PROBATION AND PAROLE BY COMMITTING MAGISTRATE

137.510 [Amended by 1955 c.660 §15; 1955 c.688 §1; repealed by 1971 c.743 §432]

137.520 Power of committing magistrate to parole and grant temporary release to persons confined in county jail; authority of sheriff to release county jail inmates; disposition of work release earnings. (1) The committing magistrate, having sentenced a defendant to confinement in a county jail for a period of up to one year, may parole the defendant outside the county jail subject to condition and subject to being taken back into confinement upon the breach of such condition. The committing magistrate may also authorize, limit or prohibit the release of a sentenced defendant upon pass, furlough, leave, work or educational release.

(2) The committing magistrate, having suspended imposition or execution of sentence and placed a defendant upon probation and having confined the defendant as a condition of that probation in a county jail for a period up to one

Chapter 163

1987 REPLACEMENT PART

Offenses Against Persons

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163.105

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HOMICIDE

163.005 Criminal homicide. (1) A person commits criminal homicide if, without justification or excuse, the person intentionally, knowingly, recklessly or with criminal negligence causes the death of another human being.

(2) "Criminal homicide" is murder, manslaughter or criminally negligent homicide.

(3) "Human being" means a person who has been born and was alive at the time of the criminal act. [1971 c.743 §87]

163.010 [Amended by 1963 c.625 §4; repealed by 1971 c.743 §432]

163.020 [Amended by 1963 c.625; §5; repealed by 1971 c.743 §432]

163.030 [Repealed by 1963 c.431 §1]

163.040 [Repealed by 1971 c.743 §432]

163.050 [Repealed by 1971 c.743 §432]

163.060 [Repealed by 1969 c.684 §17]

163.070 [Repealed by 1971 c.743 §432]

163.080 [Repealed by 1971 c.743 §432]

163.090 [Amended by 1953 c.676 §2; repealed by 1957 c.396 §1 (163.091 enacted in lieu of 163.090)]

163.091 [1957 c.396 §2 (enacted in lieu of 163.090); repealed by 1971 c.743 §432]

163.095 "Aggravated murder" defined. As used in ORS 163.105 and this section, "aggravated murder" means murder as defined in ORS 163.115 which is committed under, or accompanied by, any of the following circumstances:

(1)(a) The defendant committed the murder pursuant to an agreement that the defendant receive money or other thing of value for committing the murder.

(b) The defendant solicited another to commit the murder and paid or agreed to pay the person money or other thing of value for committing the murder

(c) The defendant committed murder after having been convicted previously in any jurisdiction of any homicide, the elements of which constitute the crime of murder as defined in ORS 163.115 or manslaughter in the first degree as defined in ORS 163.118.

(d) There was more than one murder victim in the same criminal episode as defined in ORS 131.505.

(e) The homicide occurred in the course of or as a result of intentional maiming or torture of the victim.

(2)(a) The victim was one of the following and the murder was related to the performance of the victim's official duties in the justice system:

(A) A police officer as defined in ORS 181.610 (6);

(B) A correctional, parole or probation officer or other person charged with the duty of custody, control or supervision of convicted persons;

(C) A member of the Oregon State Police;

(D) A judicial officer as defined in ORS 1.210;

(E) A juror or witness in a criminal proceeding;

(F) An employe or officer of a court of justice; or

(G) A member of the State Board of Parole.

(b) The defendant was confined in a state, county or municipal penal or correctional facility or was otherwise in custody when the murder occurred.

(c) The defendant committed murder by means of an explosive as defined in ORS 164.055 (2)(a).

(d) Notwithstanding ORS 163.115 (1)(b), the defendant personally and intentionally committed the homicide under the circumstances set forth in 163.115 (1)(b).

(e) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime.

(f) The murder was committed after the defendant had escaped from a state, county or municipal penal or correctional facility and before the defendant had been returned to the custody of the facility. [1977 c.370 §1; 1981 c.873 §1]

163.100 [Amended by 1967 c.372 §12; repealed by 1971 c.743 §432]

163.103 Pleading, proof and stipulation regarding previous conviction element in aggravated murder case. (1) In a prosecution for aggravated murder under ORS 163.095 (1)(c), the state shall plead the previous conviction, and shall prove the previous conviction unless the defendant stipulates to that fact prior to trial. If the defendant so stipulates and the trial is by jury:

(a) The court shall accept the stipulation regardless of whether or not the state agrees to it;

(b) The defendant's stipulation to the previous conviction constitutes a judicial admission to that element of the accusatory instrument. The stipulation shall be made a part of the record of the case, but shall not be offered or received in the presence of the jury;

(c) For the purpose of establishing the prior conviction solely as an element of the crime under ORS 163.095 (1)(c), neither the court nor the state shall reveal to the jury the previous conviction, but the previous conviction is established in the record by the defendant's stipulation; and

(d) The court shall not submit the accusatory instrument or evidence of the previous conviction to the jury.

(2) In a proceeding under ORS 163.095 (1)(c), the state may offer, and the court may receive and submit to the jury, evidence of the previous conviction for impeachment of the defendant or another purpose, other than establishing the conviction as an element of the offense, when the evidence of the previous conviction is otherwise admissible for that purpose. When evidence of the previous conviction has been admitted by the court, the state may comment upon, and the court may give instructions about, the evidence of the previous conviction only to the extent that the comments or instructions relate to the purpose for which the evidence was admitted.

(3) When the defendant stipulates to the prior conviction required as an element of aggravated murder under ORS 163.095 (1)(c), if the jury finds the defendant guilty upon instruction regarding the balance of the elements of the crime, the court shall enter a judgment of guilty of aggravated murder. [1981 c.873 §3]

163.105 Death or life imprisonment for aggravated murder; review by State Board of Parole. Notwithstanding the provisions of ORS chapter 144, ORS 421.165 and 421.450 to 421.490:

(1) When a defendant is convicted of aggravated murder as defined by ORS 163.095, the defendant shall be sentenced to death or life imprisonment pursuant to ORS 163.150. If sentenced to life imprisonment, the court shall order that the defendant shall be confined for a minimum of 30 years without possibility of parole, release on work release or any form of temporary leave or employment at a forest or work camp.

(2) At any time after 20 years from the date of imposition of a minimum period of confinement pursuant to subsection (1) of this section, the State Board of Parole, upon the petition of a prisoner so confined, shall hold a hearing to determine if the prisoner is likely to be rehabilitated within a reasonable period of time. The sole issue shall be whether or not the prisoner is likely to be rehabilitated within a reasonable period of time. The proceeding shall be conducted in the manner prescribed for a contested case hearing under ORS 183.310 to 183.550 except that:

(a) The prisoner shall have the burden of proving by a preponderance of the evidence the likelihood of rehabilitation within a reasonable period of time; and

(b) The prisoner shall have the right, if the prisoner is without sufficient funds to employ an attorney, to be represented by legal counsel, appointed by the board, at board expense.

(3) If, upon hearing all of the evidence, the board, upon a unanimous vote of all five members, finds that the prisoner is capable of rehabilitation and that the terms of the prisoner's confinement should be changed to life imprisonment with the possibility of parole, or work release, it shall enter an order to that effect and the order shall convert the terms of the prisoner's confinement to life imprisonment with the possibility of parole or work release. Otherwise the board shall deny the relief sought in the petition.

(4) Not less than two years after the denial of the relief sought in a petition under this section, the prisoner may petition again for a change in the terms of confinement. Further petitions for a change may be filed at intervals of not less than two years thereafter. [1977 c.370 §2; 1981 c.873 §4; 1985 c.3 §1; 1987 c.158 §23; 1987 c.803 §20]

163.110 [Repealed by 1971 c.743 §432]

163.115 Murder; affirmative defense to certain felony murders; sentence of life imprisonment required; minimum term. (1) Except as provided in ORS 163.118 and 163.125, criminal homicide constitutes murder when:

(a) It is committed intentionally, except that it is an affirmative defense that, at the time of the homicide, the defendant was under the influence of an extreme emotional disturbance; or

(b) It is committed by a person, acting either alone or with one or more persons, who commits or attempts to commit any of the following crimes and in the course of and in furtherance of the crime the person is committing or attempting to commit, or during the immediate flight therefrom, the person, or another participant if there be any, causes the death of a person other than one of the participants:

(A) Arson in the first degree as defined in ORS 164.325;

(B) Criminal mischief in the first degree by means of an explosive as defined in ORS 164.365;

(C) Burglary in the first degree as defined in ORS 164.225;

(D) Escape in the first degree as defined in ORS 162.165;

(E) Kidnapping in the second degree as defined in ORS 163.225;

S. Carolina Code Supplement

CHAPTER 3

Offenses Against the Person

New Articles Added

ARTICLE 6. Hazing

ARTICLE 1

HOMICIDE

§ 16-3-10. "Murder" defined.

Cross references—

As to the prohibition against the appointment of any person convicted under this section as guardian ad litem for a child in an abuse or neglect proceeding, see § 20-7-123.

As to provisions of South Carolina Probate Code relative to effect of homicide on intestate succession, wills, joint assets, life insurance, and beneficiary designations, see § 62-2-803.

Research and Practice References—

Photograph of nude homicide victim not unduly prejudicial. 39 SC L Rev 93, Autumn 1987.

ALR and L Ed Annotations—

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.

Homicide by causing victim's brain-dead condition. 42 ALR4th 742.

Corporation's criminal liability for homicide. 45 ALR4th 1021.

Homicide: physician's withdrawal of life supports from comatose patient. 47 ALR4th 18.

CASE NOTES

1. In general

An unborn child is a "person" within the definition of murder found in § 16-3-10. State v Horne (1984) 282 SC 444, 319 SE2d 703.

The offense of killing by stabbing or thrusting under § SC/16-3-40 requires proof of an element not required to prove the crime of murder, i.e., use of a knife or similar weapon to cause death, and the offense of killing by stabbing or thrusting is not supported by an indictment for murder. State v Kornahrens (1986) 290 SC 281, 350 SE2d 180, cert den (US) 94 L Ed 2d 781, 107 S Ct 1592.

Indictment for murder is sufficient if offense is stated with sufficient certainty and particularity to enable court to know what judgment to pronounce, defendant to know what he is called upon to answer, and if acquittal or conviction thereon may be pleaded as bar to any subsequent prosecution; allegations may state in alternative manner instrumentality of death, or may state that death was caused by means or instrumentality unknown. State v Owens (1987) 293 SC 161, 359 SE2d 275, cert den (US) 98 L Ed 2d 495, 108 S Ct 496.

Evidence was sufficient to establish venue in Horry County where facts indicated that victim was last seen at his residence in that county, there were signs of struggle, and ransom money was demanded and delivered in that county; venue in criminal case need not be affirmatively proven if there is sufficient evidence from which it can be inferred. State v Owens (1987) 293 SC 161, 359 SE2d 275, cert den (US) 98 L Ed 2d 495, 108 S Ct 496.

Murder case was properly submitted to jury where defendant's inculpatory statements were not the only proof of corpus delicti of murder, which may be proven by circumstantial evidence; circumstances surrounding sudden disappearance of victim, considered with unlikelihood of his voluntary departure, as shown by his personal habits and relationships, was sufficient to establish corpus delicti of murder or that victim was dead by criminal act of another. State v Owens (1987) 293 SC 161, 359 SE2d 275, cert den (US) 98 L Ed 2d 495, 108 S Ct 496.

There was no error in trial judge's refusal

dant, where, in the two instances complained of, the term "rebuttable" was used in conjunction with the term "inference" rather than "presumption", and was followed immediately by the instruction that the state bore the burden of proving malice beyond a reasonable doubt and that it was for the jury to determine from all the evidence whether or not malice had been proven. State v Patrick (1986) 289 SC 301, 345 SE2d 481.

It is not error for trial judge to instruct jury that it must not be governed by sympathy in reaching its sentencing decision. State v Owens (1987) 293 SC 161, 359 SE2d 275, cert den (US) 98 L Ed 2d 495, 108 S Ct 496.

It was not error to refuse to charge lesser included offense of involuntary manslaughter, where defendant was convicted of murder, where victim was hit with single shot from substantial distance, most of shot missed her, and pellets which did hit her struck upper portion of her head; defendant contended this evidence could have been basis for jury to reasonably have found that fatal shot was fired recklessly at wall of victim's bedroom, but argument was rejected where additional evidence established that victim had shotgun wounds to right hand, which demonstrated that she was most likely attempting to protect herself when shot was fired, and single shot to head was fired with shotgun at distance of only 5 to 15 feet; lesser included offense instruction is required by due process only when evidence warrants such instruction. State v Atkins (1987) 293 SC 294, 360 SE2d 302.

6. —Presumption and burden of proof

From the use of a deadly weapon, malice may be inferred. State v Merriman (1985, App) 287 SC 74, 337 SE2d 218.

There was no material variance between indictment and proof where state did not prove specific means of accomplishing murder, because state did produce evidence tending to show that victim could have been killed by any one of means alleged in indictment. State v Owens (1987) 293 SC 161, 359 SE2d 275, cert den (US) 98 L Ed 2d 495, 108 S Ct 496.

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years; provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. Provided, further, that under no circumstances may a female who is pregnant with child be executed so long as she is in that condition. When the Governor commutes a sentence of death under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole. No person sentenced under the provisions of this subsection may receive any work-release credits, good-time credits, or any other credit that would reduce the mandatory imprisonment required by this subsection.

(B) Upon conviction or adjudication of guilt of a defendant of murder, 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 after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel shall be permitted to present arguments for or against the sentence to

be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

(1) Murder was committed while in the commission of the following crimes or acts: (a) criminal sexual conduct in any degree, (b) kidnapping, (c) burglary in any degree,(d) robbery while armed with a deadly weapon, (e) larceny with use of a deadly weapon, (f) killing by poison, and (g) physical torture.

(2) Murder was committed by a person with a prior record of conviction for murder.

(3) The offender by his act of murder 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, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(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 was committed against any peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

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

(9) The murder of a child eleven years of age or under.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of 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 committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the 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 or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding an aggravating circumstance or circumstances beyond a reasonable doubt, shall, in writing, and signed by all members of the jury, designate the aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment as provided in subsection (A). In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found an aggravating circumstance or circumstances beyond a reasonable doubt. If the jury has found an aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided.

(D) Notwithstanding the provisions of § 14-7-1020, in cases involving capital punishment any person called as a juror shall be examined by the attorney for the defense.

(E) In every criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror therein by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

HISTORY: 1985 Act No. 104, § 1, eff May 21, 1985; 1986 Act No. 462, § 27, eff June 3, 1986.

Effect of Amendment—

The 1985 amendment rewrote subsection (A) to provide that when a sentence of death is commuted, the commutee is not eligible for parole.

The 1986 amendment made grammatical changes; revised subsection (A) by adding the provision relative to the sentence to be imposed when an aggravating circumstance is found beyond a reasonable doubt but a recommendation of death is not made, and by substituting "mandatory imprisonment" for "mandatory twenty years' imprisonment" in the last sentence; revised subsection (B) by substituting "trial by jury" for "the trial jury", and by substituting "the sentence to be imposed" for "the sentence of death" and for "the sentence imposed"; revised

does not extend so far as to authorize trial judge to refuse counsel right to conduct any examination at all in capital case. State v Atkins (1987) 293 SC 294, 360 SE2d 302.

It was not error for trial court to fail to give limiting instruction where solicitor had referred to parole violations, because solicitor mentioned parole only in context of defendant's prior convictions, at no time stating or implying that defendant could be put on parole if he were given life sentence. State v Drayton (1987) 293 SC 417, 361 SE2d 329, cert den (US) 98 L Ed 2d 1021, 108 S Ct 1060.

Final argument of solicitor in penalty phase of capital trial must be carefully tailored so as not to appeal to personal bias of jurors, nor be calculated to arouse passion or prejudice; argument must be confined to record and its reasonable inferences and focus on characteristics of defendant and nature of crime. State v Reed (1987) 293 SC 515, 362 SE2d 13.

Court's exclusion from death penalty sentencing hearing of testimony of jailors and visitor to jail as to defendant's good behavior in jail between his arrest and trial denied defendant his right to place before sentencing jury all relevant evidence in mitigation of punishment, thus violating cruel and unusual punishment clause of Eighth Amendment. Skipper v South Carolina (1986, US) 90 L Ed 2d 1, 106 S Ct 1669, 20 Fed Rules Evid Serv 241.

ATTORNEY GENERAL'S OPINIONS

Under the 1986 Omnibus Criminal Justice Improvements Act, individuals convicted of murder are *not* entitled to reductions in time prior to parole eligibility through the use of earned work credits. Prisoners convicted of any violent crimes, as defined in Section 16-1-60, for a criminal event that occurred after June 3, 1986, and who have a prior conviction at any time before or after June 3, 1986, for one of the specified crimes, would not be eligible for parole consideration on the recent conviction and must complete service of their entire sentences. Under the provisions of §§ 24-21-645 and 24-21-650, the review in two years upon rejection, of prisoners in confinement for a violent crime, is applicable to the entire violent offender population. Under the provisions of § 24-21-610, all burglary in the second degree convictions would not be eligible for parole until they have served at least one-third of their sentence. Any and all offenses of burglary in the first degree and burglary in the second degree under Section 16-11-312(B) carry all consequences of a "violent crime" regardless of the statutory aggravating circumstances shown. 1986 Op Atty Gen, No. 86-102, p 309.

§ 16-3-25. Punishment for murder: review by Supreme Court of imposition of death penalty.

Research and Practice References—

Alibi evidence admissible in sentencing hearing in capital case. 39 SC L Rev 48, Autumn 1987.

ALR and L Ed Annotations—

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case—modern state cases. 30 ALR4th 414.

CASE NOTES

In a murder prosecution, imposition of the death penalty was proper where defendant's conversations on the telephone and his carrying out of the murder plan, as well as his efforts after the victim's death to lure the state's witness into helping to exonerate him, involved a scheme which was about as wicked as it was conceivable. State v Gaskins (1985, SC) 326 SE2d 132, cert den (US) 86 L Ed 2d 266, 105 S Ct 2368.

Imposition of the death penalty was proper where the defendant shot the victim in cold blood for pecuniary gain and the victim's autopsy revealed a shotgun wound one inch by two inches in the back of his skull and 30 to 40 pellet wounds to the head. State v Patterson (1984) 285 SC 5, 327 SE2d 650.

The imposition of the death penalty was fully justified by a brutal homicide, accompanied by rape. State v Truesdale (1984) 285 SC 13, 328 SE2d 53.

The death penalty was fully justified where the defendant was convicted of murder and first degree criminal sexual conduct (rape). State v Skipper (1985) 285 SC 42, 328 SE2d 58, revd on other grounds (US) 90 L Ed 2d 1, 106 S Ct 1669.

The imposition of the death penalty was proper where the defendant was found guilty of two murders while committing burglary, armed robbery and grand larceny. State v Lucas (1985) 285 SC 37, 328 SE2d 63, cert den (US) 86 L Ed 2d 729, 105 S Ct 2714.

The imposition of the death penalty was justified on the conviction of a series of crimes "about as savage as any known to the law," where there was no semblence of an excuse, nor did the record reveal any facts relative to the accused persons themselves that would warrant leniency. State v Chaffee (1984) 285 SC 21, 328 SE2d 464.

A death penalty was neither excessive nor inappropriate in light of the circumstances of

§ 16-3-26. Punishment for murder: notice to defense attorney of solicitor's intention to seek death penalty; appointment of attorneys for indigent; investigative, expert or other services

(A) Whenever the solicitor seeks the death penalty he shall notify the defense attorney of his intention to seek such penalty at least thirty days prior to the trial of the case. At the request of the defense attorney, the defense attorney shall be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.

(B) Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff.

Notwithstanding any other provision of law, the court shall order payment of fees and costs, not to exceed five thousand dollars per trial from funds appropriated for the defense of indigents.

(C) Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment, from state funds appropriated for the defense of indigents, of fees and expenses not to exceed twenty-five hundred dollars as the court shall deem appropriate. Upon a finding that timely procurement of such services cannot await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

HISTORY: 1986 Act No. 462, § 26, eff June 3, 1986.

Effect of Amendment—

The 1986 amendment made grammatical changes, rewrote the provisions in subsection (B) relative to payment of fees and costs, and raised to twenty-five hundred dollars the limitation on fees and expenses payable pursuant to subsection (C).

CASE NOTES

Section 17-23-70 has been superseded by § 16-3-26(B), a more recent statute, which by its terms is more specific than § 17-23-70. State v Brown (1986) 289 SC 581, 347 SE2d 882.

Since, by clear implication, nonindigent defendants have no right to court appointed counsel under § 16-3-26(B), which provides exclusive procedure for appointment of counsel for indigent defendants charged with capital murder, there was no merit to capital defendant's contention that he was entitled to free court appointed counsel, whether an indigent or not, and further that, since he had not been informed of this right, his waiver of counsel had not been knowingly and intelligently made. State v Brown (1986) 289 SC 581, 347 SE2d 882.

Section 16-3-26(B) provides the exclusive procedure for appointment of counsel for indigent defendants charged with capital murder. State v Brown (1986) 289 SC 581, 347 SE2d 882.

Trial court's ruling that the defense team could spend up to the then $2,000 limit pursuant to § 16-3-26(C) for the procurement of expert witnesses, which ruling also reserved to the defense team the right to petition for an expansion of that amount, did not prejudice the defendant, especially where the record established that not only did the state provide defendant with the services of a published medical expert on "brain death," but also that defense counsel exhaustively cross-examined the state's expert witnesses on the defendant's behalf. State v Matthews (1986) 291 SC 339, 353 SE2d 444.

§ 16-3-28. Punishment for murder: right of defendant to make last argument

Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument.

HISTORY: 1986 Act No. 462, § 43, eff June 3, 1986.

Effect of Amendment—

The 1986 amendment substituted "the defendant and his counsel" for "the defendant or his counsel".

CASE NOTES

Trial judge erred in allowing state to have closing argument in guilt phase in capital case where record was devoid of evidence defendant made knowing and intelligent waiver of this right; speculation as to whether defendant was prejudiced by being denied right to final argument was inappropriate in this situation. State v Reed (1987) 293 SC 515, 362 SE2d 13.

§ 16-3-30. Killing by poison.

Cross references—

As to the prohibition against the appointment of any person convicted under this section as guardian ad litem for a child in an abuse or neglect proceeding, see § 20-7-123.

§ 16-3-40. Killing by stabbing or thrusting.

Cross references—

As to the prohibition against the appointment of any person convicted under this section as guardian ad litem for a child in an abuse or neglect proceeding, see § 20-7-123.

CASE NOTES

The offense of killing by stabbing or thrusting under § 16-3-40 requires proof of an element not required to prove the crime of murder, i.e., use of a knife or similar weapon to cause death, and the offense of killing by stabbing or thrusting is not supported by an indictment for murder. State v Kornahrens (1986) 290 SC 281, 350 SE2d 180, cert den (US) 94 L Ed 2d 781, 107 S Ct 1592.

Section 16-3-40, providing for an automatic penalty of death upon conviction, is unconstitutional. State v Kornahrens (1986) 290 SC 281, 350 SE2d 180, cert den (US) 94 L Ed 2d 781, 107 S Ct 1592.

§ 16-3-50. Manslaughter.

Cross references—

As to the prohibition against the appointment of any person convicted under this section as guardian ad litem for a child in an abuse or neglect proceeding, see § 20-7-123.

As to provisions of South Carolina Probate Code relative to effect of homicide on intestate succession, wills, joint assets, life insurance, and beneficiary designations, see § 62-2-803.

ALR and L Ed Annotations—

Homicide by causing victim's brain-dead condition, 42 ALR4th 742.

Corporation's criminal liability for homicide, 45 ALR4th 1021.

Homicide: physician's withdrawal of life supports from comatose patient, 47 ALR4th 18.

CASE NOTES

1. In general

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v Damon (1985) 285 SC 125, 328 SE2d 628, cert den (US) 88 L Ed 2d 156, 106 S Ct 187.

When death is caused by a deadly weapon, words alone are insufficient to constitute a legal provocation. State v Plemmons (1985) 286 SC 78, 332 SE2d 765, vacated on other grounds (US) 90 L Ed 2d 353, 106 S Ct 1943.

Manslaughter is the unlawful killing of a

The 1982 amendment, in the last sentence of the second paragraph, substituted "§ 24-1-250" for the former "§ 24-3-400."

ARTICLE 5

CAPITAL PUNISHMENT

§ 24-3-510. Death sentence and notice thereof.

ALR and L Ed Annotations—

Propriety of imposition of death sentence by state cou[illegible] jury's recommendation of life imprisonment or lesser sentence. 8 ALR4th[illegible]ne ap[illegible]

Propriety, under Federal Constitution, of evidence or argument concerning deterent effect of death penalty. 78 ALR Fed 553.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975-76 Op Atty Gen, No 4388, p 224.

§ 24-3-520. Transportation of convict sentenced to death.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975-76 Op Atty Gen, No 4388, p 224.

§ 24-3-530. Capital punishment shall be by electrocution.

CASE NOTES

Section 24-3-530, providing that sentence of death shall be by electrocution, does not constitute cruel and unusual punishment. State v Shaw (1979, SC) 255 SE2d 799.

In a prosecution for murder, the court properly quashed defendant's subpoena duces tecum issued for the Director of the South Carolina Department of Corrections, directing him to bring the electric chair to the courtroom based on defendant's allegation that the process of electrocution is evidence in mitigation of the punishment and should have been presented to the jury under § 16-3-20(B); the legislature has determined that capital punishment shall be imposed by electrocution, under § 24-3-530, and the manner or nature of capital punishment has been removed from consideration of juries. State v Thompson (1982, SC) 292 SE2d 581, cert den 456 US 938, 72 L Ed 2d 458, 102 S Ct 1996.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975-76 Op Atty Gen, No 4388, p 224.

§ 24-3-540. Death chamber; expenses incurred in transporting criminal to place of execution.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975-76 Op Atty Gen, No 4388, p 224.

§ 24-3-550. Witnesses at execution.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975-76 Op Atty Gen, No 4388, p 224.

§ 24-3-570. Disposition of body.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975-76 Op Atty Gen, No 4388, p 224.

ARTICLE 9

MISCELLANEOUS PROVISIONS

§ 24-3-920. Rewards for capture of escaped convicts.

The Commissioner of the Department of Corrections shall offer a reward of one hundred dollars for the capture of each escaped convict.

HISTORY: 1979 Act No. 132 § 3, eff June 26, 1979.

Effect of Amendments—

The 1979 amendment increased the reward from twenty five to one hundred dollars and deleted the provision for payment of expenses for returning escapees to the penitentiary.

§ 24-3-950. Contraband.

ATTORNEY GENERAL'S OPINIONS

Review of South Carolina Code reveals no specific "conspiracy to violate § 24-3-950" that would raise that act to felony. 1985 Op Atty Gen, No. 85-57, p 165.

S. Carolina Code

son (1899) 54 SC 240, 32 SE 357; State v Henderson (1906) 74 SC 477, 55 SE 117. See also, State v Smith (1847) 33 SCL 77.

Charge not error which stated, "The use of a deadly weapon presumes malice, but the presumption may be rebutted; so, after all, it is left for the jury to say, from all the facts and circumstances, whether the killing was done with malice or not." State v Byrd (1905) 72 SC 104, 51 SE 542.

If facts are proved sufficient to raise a presumption of malice, such a presumption would be rebuttable, and it is always for the jury to determine from all of the evidence in the case whether or not malice has been proved beyond a reasonable doubt. State v Fuller (1956) 229 SC 439, 93 SE2d 463.

Malice is to be presumed from the use of a deadly weapon in the commission of a homicide. State v Arnold (1976) 266 SC 153, 221 SE2d 867.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975–76 Op Atty Gen, No 4388, p 224.

§ 16–3–20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. *Provided*, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, 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 after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section 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 South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;

(3) The offender by his act of murder 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, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;

(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 was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of 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 committed by another person and his participation was relatively minor;

(5) The defendant acted under duress or under the 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 or mentality of the defendant at the time of the crime;

(8) The defendant was provoked by the victim into committing the murder;

(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

(D) Notwithstanding the provisions of § 14-7-1020, in cases involving capital punishment any person called as a juror shall be examined by the attorney for the defense.

(E) In every criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused or excluded from service as a juror therein by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict of guilty according to law.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975–76 Op Atty Gen, No 4388, p 224.

§ 16–3–25. Punishment for murder: review by Supreme Court of imposition of death penalty.

(A) 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 Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina 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 Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:

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

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 16–3–20, 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.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) 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:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in

its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of § 16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) 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 all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

HISTORY: 1962 Code § 16-52.1; 1977 Act No. 177 § 2.

Research and Practice References—

21 Am Jur 2d, Criminal Law §§ 552–557, 559–563, 595–598.

24B CJS, Criminal Law §§ 1978, 1984.

41 CJS, Homicide §§ 412 et seq.

Annual Survey of South Carolina Law: Criminal Law and Procedure: The Death Penalty, 29 SC L Rev 86.

Annual Survey of South Carolina Law: Criminal Law; South Carolina Death Penalty Law, 32 SC L Rev 81, August, 1980.

Annual Survey of South Carolina Law: Criminal Law: The Death Penalty, 33 SC L Rev 53, August 1981.

1981 Survey: Capital punishment; Fifth Amendment privilege in bifurcated capital trials, 34 SC L Rev 112, August 1982.

Hubbard, A "Meaningful" Basis for the Death Penalty: The Practice, Constitutionality, and Justice of Capital Punishment in South Carolina, 34 SC L Rev 391, December 1982.

ALR and L Ed Annotations—

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

CASE NOTES

Supreme Court would uphold imposition of death penalty where it was satisfied that sentences were not influenced by passion, prejudice or any other arbitrary factor but were products of sound and careful deliberation based on evidence, sentencing judge imposed sentences of death after finding beyond reasonable doubt that murder was committed while in commission of rape, while in commission of kidnapping and while in commission of

State v Copeland (1982) 278 SC 572, 300 SE2d 63, cert den (US) 76 L Ed 2d 367, 103 S Ct 1802, reh den (US) 77 L Ed 2d 1357, 103 S Ct 3099 and cert den (US) 77 L Ed 2d 1399, 103 S Ct 3553, reh den (US) 77 L Ed 2d 1457, 104 S Ct 39.

In interpreting § 16–3–25(C)(3) the search for "similar cases" can only begin with an actual conviction and a sentence of death rendered by a trier of fact, in accordance with § 16–3–20, and it is not necessary to compare a given death sentence with a "universe" of cases which includes sentences of life imprisonment, acquittals, reversals and even mere indictments and arrests; therefore, it is of no consequence that the South Carolina "universe" consists of only a handful of cases for purposes of proportionality review. State v Copeland (1982) 278 SC 572, 300 SE2d 63, cert den (US) 76 L Ed 2d 367, 103 S Ct 1802, reh den (US) 77 L Ed 2d 1357, 103 S Ct 3099 and cert den (US) 77 L Ed 2d 1399, 103 S Ct 3553, reh den (US) 77 L Ed 2d 1457, 104 S Ct 39.

In a prosecution for capital murder, the sentence of death was neither excessive nor disproportionate to the penalty imposed in similar cases, under § 16-3-25(C)(3), where defendant was a twenty-three year old man whose participation in his trial indicated intelligence beyond question, where the evidence indicated that he broke into the residence of his victim by force, lay in wait for his victim's arrival, took him from his home, strangled him to death, and hid his body under brush, all for the purpose of attempting to extort money from the victim's parents, and where the jury found no mitigating circumstances to offset the aggravating circumstances. State v Adams (1983) 279 SC 228, 306 SE2d 208, cert den (US) 78 L Ed 2d 730, 104 S Ct 558.

Where defendant broke into an elderly woman's home, stole money and jewelry, assaulted her sexually, and strangled her, the death penalty was fully justified, and was proportional to that imposed in similar cases, under § 16–3–25(C)(3). State v Spann (1983) 279 SC 399, 308 SE2d 518, cert den and app dismd (US) 80 L Ed 2d 533, 104 S Ct 2146.

In a murder prosecution, the totality of the record abundantly supported the trial judge's finding that the death penalty was warranted and that its imposition was not the result of passion, prejudice, or any other arbitrary factor, within the meaning of § 16–3–25(C). State v Yates (1982) 280 SC 29, 310 SE2d 805.

Information concerning prior criminal convictions is admissible as additional evidence during the sentencing or resentencing phase of a capital trial under § 16-3-25(E); accordingly, where a defendant charged with murder took the witness stand during the guilt phase of his trial and, on direct examination, revealed his own prior criminal record, he would not be heard to complain when that information, exactly as he had volunteered it, was placed before the jury during the sentencing trial. State v Plath (1984, SC) 313 SE2d 619, cert den (US) 82 L Ed 2d 862, 104 S Ct 3560.

§ 16–3–26. Punishment for murder: notice to defense attorney of solicitor's intention to seek death penalty; appointment of attorneys for indigent; investigative, expert or other services.

(A) Whenever the Solicitor seeks the death penalty, he shall notify defense attorney of his intention to seek such penalty at least 30 days prior to the trial of the case. At the request of the defense attorney, the defense attorney shall be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.

(B) Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff.

The State shall pay from funds appropriated for the defense of indigents such fee and costs, not to exceed fifteen hundred dollars, as the court shall deem appropriate.

(C) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment, from state funds appropriated for the defense of indigents, of fees and expenses not to exceed two thousand dollars as the court shall deem appropriate. Upon a finding that timely procurement of such services cannot await prior authorization, the court may authorize the provision of and payment for such services *nunc pro tunc*.

HISTORY: 1962 Code § 16-52.2; 1977 Act No. 177 § 3; 1978 Act No. 555 § 2

Research and Practice References—

21 Am Jur 2d, Criminal Law §§ 318, 324, 552–557, 595–598.

24B CJS, Criminal Law §§ 1978, 1984.

41 CJS, Homicide §§ 433–436.

7 Am Jur Trials, Homicide §§ 62–77.

Annual Survey of South Carolina Law: Criminal Law and Procedure: The Death Penalty, 29 SC L Rev 86.

Annual Survey of South Carolina Law: The Death Penalty, 31 SC L Rev 49.

Hubbard, A "Meaningful" Basis for the Death Penalty: The Practice, Constitutionality, and Justice of Capital Punishment in South Carolina, 34 SC L Rev 391, December 1982.

1982 Survey: Capital punishment: validity of statutory limits on recovery of fees by expert witnesses and court-appointed attorneys, 35 SC L Rev 58, Autumn 1983.

ALR and L Ed Annotations—

Unanimity as to punishment in criminal case where jury can recommend lesser penalty, 1 ALR 3d 1461.

CASE NOTES

A defendant indicted for murder was not entitled to a copy of the indictment at least three days prior to her trial as provided in § 17-19-80 for capital cases where the prosecution had not given the defense 30 days notice of its intention to seek the death penalty as required by § 16-3-26, thus foregoing the right to seek that penalty under § 16-3-20 and rendering § 17-19-80 inapplicable. State v Rackley (1980) 275 SC 402, 272 SE2d 33.

The refusal of the trial court, based upon the conclusion of the Court Administrator that the defendant was not indigent, to enforce its order directing the judicial department to advance funds to defense counsel to procure expert witnesses did not result in prejudice to the defendant where, after the request for defense expenses had been denied, the defendant's attorney nevertheless replied that he was "ready, willing, and able to go forward representing him at trial." State v Owens (1981) 277 SC 189, 284 SE2d 584.

The punishment for a crime is not and never has been considered a part of the pleading charging a crime. Thus, in a prosecution for murder in which the aggravating circumstance of rape resulted in the imposition of the death penalty, the indictment for murder was not defective for failure to specify the aggravating circumstance. State v Butler (1982) 277 SC 452, 290 SE2d 1, cert den 459 U.S 932, 74 L. Ed 2d 191, 103 S Ct 242.

Spending limit mandated by SC Code § 16-3-26(C) is construed to apply equally to noncapital cases, thus, § 16-3-26(C) is not unconstitutional as denial of equal protection. State v Goolsby (1982) 278 SC 52, 292 SE2d 180.

The trial court in a murder prosecution properly denied defendant's motion, pursuant to § 16-3-26(C), for funds to pay a jury selection expert, where the expert stated that he would provide his expertise regardless of whether or not the court ordered the payment of his fee. State v Yates (1982) 280 SC 29, 310 SE2d 805.

ATTORNEY GENERAL'S OPINIONS

As Act No. 177 of 1977 is in conflict with the earlier Code provision establishing a maximum compensation for appointed counsel, Act No. 177 controls the amount and method of compensation and costs to be paid. 1976-77 Op Atty Gen, No 77-217, p 168.

The cost of transcripts (1) are not payable under Section 16-3-26(C); (2) cannot be paid under subsection 16-3-26(b); (3) may be paid out of the Capital Defense Fund (Section 17-3-80) pursuant to Rule 7(3) of the Rules of the Supreme Court. 1981 Op Att'y Gen, No 81-11, p 16.

§ 16-3-27. Punishment for murder: pregnant females.

In no case and under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition or anytime following thereafter for a period of at least nine months.

HISTORY: 1977 Act No. 177 § 4.

Research and Practice References--

21 Am Jur 2d, Criminal Law §§ 552-557, 595-598.

24B CJS, Criminal Law §§ 1978, 1984.

41 CJS, Homicide §§ 433-436.

Annual Survey of South Carolina Law: Criminal Law and Procedure: The Death Penalty, 29 SC L Rev 86.

§ 16-3-28. Punishment for murder: right of defendant to make last argument.

Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant or his counsel shall have the right to make the last argument.

HISTORY: 1977 Act No. 177 § 5.

S. Carolina Code

HISTORY: 1962 Code § 55-349.1; 1960 (51) 1933; 1961 (52) 471; 1962 (52) 1961; 1963 (53) 506; 1967 (55) 280.

Research and Practice References—
60 Am Jur 2d, Penal and Correctional Institutions § 40.
18 CJS, Convicts § 26.

ATTORNEY GENERAL'S OPINIONS

Prison labor may engage in business of repairing furniture since such activity does not constitute production of goods for sale on open market. Att'y Gen. Ops., Jan. 16, 1963.

A sale of prison-produced goods cannot lawfully be made to one under contract to provide goods or services to a State agency. 1967-68 Ops. Att'y Gen., No 2565, p 263.

Convict-made goods may be sold in another state for export and sale abroad as nothing in this section [Code 1962 § 55-349.1] prohibits such sale. Att'y Gen. Ops., Mar. 18, 1963.

Products may be sold to brokers outside State.—The Department of Corrections may sell any article manufactured or produced by the Prison Industries System to brokers outside the State of South Carolina. 1962-63 Ops. Att'y Gen., No 1579, p 152.

Resale by public institution prohibited.—A public institution may not sell on the open market, or sell to others who will sell on the open market, goods which have been purchased from the prison industries. 1964-65 Ops. Att'y Gen., No 1830, p 85.

The governing Federal statutes relating to interstate shipment of convict-made goods (18 USCA 1761, et seq.) should be complied with, as well as the laws of each state to which shipment is contemplated. 1962-63 Ops. Att'y Gen., No 1579, p 152.

§ 24-3-420. Violations.

Any person who wilfully violates any of the provisions of this article other than § 24-3-410 shall be guilty of a misdemeanor and, upon conviction, shall be confined in jail not less than ten days nor more than one year, or fined not less than ten dollars nor more than five hundred dollars, or both, in the discretion of the court.

HISTORY: 1962 Code § 55-349.2; 1960 (51) 1933.

ARTICLE 5

CAPITAL PUNISHMENT

SEC.
24-3-510. Death sentence and notice thereof.
24-3-520. Transportation of convict sentenced to death.
24-3-530. Capital punishment shall be by electrocution.
24-3-540. Death chamber; expenses incurred in transporting criminal to place of execution.
24-3-550. Witnesses at execution.
24-3-560. Certification of execution.
24-3-570. Disposition of body.

§ 24-3-510. Death sentence and notice thereof.

Upon the conviction of any person in this State of a crime the punishment of which is death, the presiding judge shall sentence such convicted person to death according to the provisions of § 24-3-530 and make such sentence in writing. Such sentence shall be filed with the papers in the case against such convicted person and a certified copy thereof shall be transmitted by the clerk of the court of general sessions in which such sentence is pronounced to the Commissioner of the Department of Corrections not less than ten days prior to the time fixed in the sentence of the court for the execution of it.

HISTORY: 1962 Code § 55-371; 1952 Code § 55-371; 1942 Code § 1988; 1932 Code § 1988; Cr. C. '22 § 972; 1912 (27) 702; 1960 (51) 1917.

Cross references—

As to cruel or unusual or corporal punishment, see SC Const. Art 1, § 15.

CASE NOTES

Constitutionality of death penalty.— In Furman v Georgia, 408 US 238, 92 S Ct 2726, 33 L Ed 2d 346 (1972), the imposition and carrying out of the death penalty, under statutes making the penalty discretionary with judge or jury, was found to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Cited in State V Cannon, 248 SC 506, 151 SE2d 752 (1966).

§ 24-3-520. Transportation of convict sentenced to death.

The sheriff of the county in which such convicted person is so sentenced, to with one deputy or more, if in his judgment it is necessary, convey such convicted person to the State Penitentiar olumbia to deliver him to the Commissioner of the Depar of Corrections not more than twenty days nor less than two rior to the time fixed in the judgment for the execution condemned person, unless otherwise directed by the Gove unless a stay of execution has been caused by appeal or nting of a new trial or other order of a court of competent ju tion.

HISTORY: 1962 § 55-372; 1952 Code § 55-372; 1942 Code § 1988; 1932 Code § 1988; C '22 § 972; 1912 (27) 702; 1960 (51) 1917.

Cross references—

As to cruel or unusual corporal punishment, see SC Const. Art 1, § 15.

§ 24-3-530. Capital punishment shall be by electrocution.

All persons convicted of capital crime and having imposed upon them the sentence of death shall suffer such penalty by electrocution within the walls of the State Penitentiary at Columbia under

the direction of the Commissioner of the Department of Corrections instead of by hanging.

HISTORY: 1962 Code § 55-373; 1952 Code § 55-373; 1942 Code § 1986; 1932 Code § 1986; Cr. C. '22 § 970; 1912 (27) 702; 1960 (51) 1917.

Cross references—

As to the punishment for murder, see § 16-3-20.

As to cruel or unusual or corporal punishment, see SC Const, Art 1, § 15.

Research and Practice References—

21 Am Jur 2d, Criminal Law §§ 581, 598, 613.

24B CJS, Criminal Law §§ 2001, 2002.

CASE NOTES

Article is not ex post facto.—The change of the method of punishment, place of execution and number of witnesses in this article is not disadvantageous to one convicted of murder for an act performed prior to the enactment of the law. Therefore, insofar as it applies to him, it is not objectionable as an ex post facto law. State v Malloy, 97 SC 441, 78 SE 995 (1913), affirmed in 237 US 180, 35 S Ct 507, 59 L Ed 905 (1915); State v Vaughn, 95 SC 455, 79 SE 312 (1913), affirmed in 238 US 612, 35 S Ct 940, 59 L Ed 1489 (1915).

Sentence that defendant be executed "at the usual place" fixed by statute, is not a sentence "to be publicly executed." State v Anderson, 85 SC 229, 67 SE 237 (1910).

§ 24-3-540. Death chamber; expenses incurred in transporting criminal to place of execution.

The Board of Corrections shall provide a death chamber and all necessary appliances for inflicting such penalty by electrocution and pay the costs thereof out of any funds in its hands. The expense of transporting any such criminal to the State Penitentiary shall be borne by the county in which the offense was committed.

HISTORY: 1962 Code § 55-374; 1952 Code § 55-374; 1942 Code § 1987; 1932 Code § 1987; Cr. C. '22 § 971; 1912 (27) 702; 1960 (51) 1917.

§ 24-3-550. Witnesses at execution.

At such execution there shall be present the executioner and two assistants, the institutional physician, the electrician and a group of not more than four respectable citizens of the State designated by the executioner. The counsel of the convict and a minister of the gospel may be present.

HISTORY: 1962 Code § 55-375; 1952 Code § 55-375; 1942 Code § 1989; 1932 Code § 1989; Cr. C. '22 § 973; 1912 (27) 702; 1967 (55) 281.

§ 24-3-560. Certification of execution.

The executioner and the attending physician shall certify the fact of such execution to the clerk of the court of general sessions

in which such sentence was pronounced. Such certificate shall be filed by the clerk with the papers in the case.

HISTORY: 1962 Code § 55-376; 1952 Code § 55-376; 1942 Code § 1990; 1932 Code § 1990; Cr. C. '22 § 974; 1912 (27) 702.

§ 24-3-570. Disposition of body.

The body of the person executed shall be delivered to his relatives. If no claim is made by relatives for such body it shall be disposed of as bodies of convicts dying in the State Penitentiary. If the nearest relatives of a person so executed desire that the body be carried to such person's former home, if in the State, the expenses for such transportation shall be paid by the Penitentiary authorities, who shall draw their warrant upon the county treasurer of the county from which such convict came and such county treasurer shall pay such expenses and charge to the item of court expenses.

HISTORY: 1962 Code § 55-377; 1952 Code § 55-377; 1942 Code § 1991; 1932 Code § 1991; Cr. C. '22 § 975; 1912 (27) 702.

ARTICLE 7

SUPPRESSION OF DISORDERS, RIOTS AND THE LIKE

SEC.

§ 24-3-710. Conduct in Penitentiary.

The Board may investigate any misconduct occurring in the State Penitentiary, provide suitable punishment therefor and execute it and take all such precautionary measures as in its judgment will make for the safe conduct and welfare of the institution. The Board may suppress any disorders, riots or insurrections that may take place in the Penitentiary and prescribe any and all such rules and regulations as in its judgment are reasonably necessary to avoid any such occurrence.

HISTORY: 1962 Code § 55-351; 1952 Code § 55-351; 1942 Code § 1962; 1939 (41) 107.

Research and Practice References—

60 Am Jur 2d, Penal and Correctional Institutions §§ 41–45.
18 CJS, Convicts § 9.
72 CJS, Prisons § 18.

South Dakota Code

23A-27-44. Conduct of hearing. The hearing shall be conducted pursuant to the provisions of § 23A-46-3.

Source: SL 1985, ch 192, § 21.

23A-27-45. Commitment — Finding — Provisional sentence. If, after hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the human services center. The human services center sl hospitalize the defendant for care or treatment. Such a commitment constitutes a provisional sentence of imprisonmer to the maximum term authorized by law for the offense for which the endant was found guilty.

Source: SL 1985, ch 192, § 22.

23A-27-46. Recovery of defendant — Notice — Final sentencing. When the administrator of the human services center determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to defendant's counsel and to the prosecuting attorney. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to § 23A-27-45 has not expired, the court shall proceed finally to sentencing and may modify the provisional sentence.

Source: SL 1985, ch 192, § 23.

CHAPTER 23A-27A

CAPITAL PUNISHMENT

Section

23A-27A-1. Mitigating and aggravating circumstances considered by judge or jury. Pursuant to §§ 23A-27A-2 to 23A-27A-6, inclusive, in all cases 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 and any of the following aggravating circumstances which may be supported by the evidence:

(1) The offense was committed by a person with a prior record of conviction for a Class A or Class B felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The defendant by his act 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;

(3) The defendant committed the offense for himself or another, for the purpose of receiving money or any other thing of monetary value;

(4) The defendant committed the offense on a judicial officer, former judicial officer, prosecutor or former prosecutor while such prosecutor

former prosecutor, judicial officer or former judicial officer was engaged in the performance of his official duties or where a major part of the motivation for the offense came from the official actions of such judicial officer, former judicial officer, prosecutor or former prosecutor;

(5) The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person;

(6) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(7) The offense was committed against a law enforcement officer, employee of a corrections institution or fireman while engaged in the performance of his official duties;

(8) The offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement; and

(9) The offense 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.

Source: SL 1979, ch 160, § 7; 1981, ch 186, § 3.

Cross-References.

Penalties for classified felonies, § 22-6-1.

Law Reviews.

Death Among the Shifting Standards: Capital Punishment After Furman, 26 SD LRev 243 (1981).

Inequities and Abuses of Death Qualification: Causes and Cures, 32 SD LRev 281 (1987).

23A-27A-2. Presentence hearing required. In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted to hear additional evidence in mitigation and aggravation of punishment.

Source: SL 1979, ch 160, § 5.

Elimination of Death Penalty Issue.

Where prior to murder trial, the State indicated that it was not asking for the death penalty, the trial court did not err (1) by instructing the prospective jurors that the death penalty was not involved, and (2) by refusing thereafter to further inform them that defendant could receive a life sentence without parole if convicted of first-degree murder. Since the issue of punishment by death was eliminated prior to trial by the prosecutor and the court, which left as the only punishment life imprisonment if convicted of first-degree murder, there was no penalty issue for the jury to decide, and no prejudice to defendant when the court told the jury that it was not a death case. State v. Clothier (1986) 381 NW 2d 253.

Law Reviews.

Inequities and Abuses of Death Qualification: Causes and Cures, 32 SD LRev 281 (1987).

23A-27A-3. Jury to determine existence of mitigating or aggravating circumstances — Instructions to jury. Upon the conclusion of the evidence and arguments of counsel, the judge shall give the jury appropriate instructions and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in § 23A-27A-1 exist. The instructions as determined by the trial judge to be warranted by the evidence shall be given in his charge and in writing to the jury for its deliberation.

Source: SL 1979, ch 160, § 5.

23A-27A-4. Aggravating circumstance and recommendation of death penalty required for Class A felony death sentencing — Life imprisonment — Bench trial or guilty plea. If, upon a trial by jury, a person is convicted of a Class A felony, a sentence of death shall not be imposed unless the jury verdict at the presentence hearing includes a finding of at least one aggravating circumstance and a recommendation that such sentence be imposed. If an aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. If a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. The provisions of this section shall not affect a sentence when the case is tried without a jury or when a court accepts a plea of guilty.

Source: SL 1979, ch 160, § 4.

Cross-References.
Penalties for classified felonies, § 22-6-1.

Law Reviews.
Inequities and Abuses of Death Qualification: Causes and Cures, 32 SD LRev 281 (1987).

23A-27A-5. Written designation of aggravating circumstances required. 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. Upon the findings of the jury, the judge shall fix a sentence of death.

Source: SL 1979, ch 160, § 5.

Law Reviews.
Inequities and Abuses of Death Qualification: Causes and Cures, 32 SD LRev 281 (1987).

23A-27A-6. Designation by judge in nonjury cases — At least one aggravating circumstance required for death penalty imposition. In nonjury cases the judge shall, after conducting the presentence hearing as provided in § 23A-27A-2, designate, in writing, the aggravating circumstance or circumstances, if any, which he found beyond a reasonable doubt. Unless at least one of the statutory aggravating circumstances enumerated in § 23A-27A-1 is so found, the death penalty shall not be imposed.

Source: SL 1979, ch 160, § 6.

23A-27A-7. Sentencing — Copy to warden of state penitentiary. Upon a verdict or judgment of death made by a jury or a judge, it shall be the duty of the judge presiding at the trial to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person. A certified copy thereof shall be sent by the clerk of the court in which the sentence is pronounced to the warden of the state penitentiary, not less than ten days prior to the time fixed in the sentence of the court for the execution of the sentence.

Source: SL 1979, ch 160, § 8.

23A-27A-8. Accumulation of prior capital felony records by Supreme Court — Staff and methods. The Supreme Court shall accumulate the records of all capital felony cases that the court deems appropriate.

The court may employ an appropriate staff and such methods to compile the data as are deemed by the chief justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

Source: SL 1979, ch 160, § 13; 1982, ch 185.

23A-27A-9. Review by Supreme Court required when death penalty imposed — Procedure. If the death penalty is imposed, and if the judgment becomes final in the trial court, the sentence shall be reviewed on the record by the South Dakota Supreme Court. The clerk of the trial court, 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 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 imposed. The Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

Source: SL 1939, ch 137, §§ 1 to 3; SDC Supp 1960, § 34.37A16; SDCL, §§ 23-49-31, 23-49-32; SL 1979, ch 160, § 9.

23A-27A-10. Sentence review consolidated with direct appeal — Decision. 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.

Source: SL 1979, ch 160, § 14.

23A-27A-11. Procedure on appeal from capital punishment case — Briefs — Oral argument. Except as provided in this chapter, the procedure on appeal from a decision in which capital punishment has been imposed shall be the same as is prescribed by law or Supreme Court rule in other criminal cases. 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.

Source: SL 1939, ch 137, § 4; SDC Supp 1960, § 34.37A16; SDCL, § 23-49-33; SL 1979, ch 160, §§ 11, 15.

23A-27A-12. Factors reviewed by Supreme Court regarding sentence. 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; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 23A-27A-1; 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.

Source: SL 1979, ch 160, § 10.

23A-27A-13. Reference to similar cases to be included in decision — Death sentence affirmed or set aside — Similar-case records provided to resentencing judge. 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:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

Source: SL 1979, ch 160, § 12.

23A-27A-14. Life imprisonment when death penalty held unconstitutional. In the event the death penalty for a Class A felony is held to be unconstitutional by the South Dakota Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a Class A felony shall have such person brought before the court, and the court shall sentence such person to life imprisonment.

Source: SL 1979, ch 160, § 16.

Cross-References.
Penalties for classified felonies, § 22-6-1.

23A-27A-15. Warrant of execution on judgment of death — Time of execution. When judgment of death is rendered, the judge must forthwith sign and deliver to the sheriff of the county a warrant duly attested by the clerk under the seal of the court stating the conviction and sentence and appointing the week within which sentence must be executed. The warrant must be directed to the warden of the state penitentiary at Sioux Falls, commanding the warden to execute the sentence on some day within the week appointed.

Source: SL 1939, ch 135, § 1; SDC Supp 1960, § 34.37A01; SDCL, § 23-49-1; SL 1979, ch 160, § 17.

23A-27A-16. Delivery of defendant with warrant to state penitentiary — Solitary confinement — Persons allowed access. Within ten days after the issuing of a warrant under § 23A-27A-15 the sheriff must deliver the defendant together with the warrant to the warden or his deputies at the state penitentiary. From the time of delivery to the warden until the infliction of the punishment of death upon him, unless he is lawfully discharged from such imprisonment, the defendant shall be kept in solitary confinement at the penitentiary and no person shall be allowed access to him without an order of the trial court except the officers of the prison, his counsel, his physician, a priest or minister if he shall desire one, and the members of his family.

Source: SL 1939, ch 135, § 1; SDC Supp 1960, § 34.37A01; SDCL, § 23-49-2; SL 1979, ch 160, § 18.

23A-27A-17. Time of execution — Prior announcement prohibited. The week so appointed must begin not less than six months nor more than eight months after the date of judgment. The time of execution within such week shall be left to the discretion of the warden to whom the warrant is directed, who shall cause the execution to be performed between the hours of 12:01 a.m. and 6:00 a.m. on some day of such week, but no previous announcement of the day or hour of the execution shall be made except to the persons as may be invited or permitted to be present as provided in §§ 23A-27A-34 and 23A-27A-35.

Source: SL 1939, ch 135, § 2; SDC Supp 1960, § 34.37A02; SDCL, § 23-49-3. SL 1979, ch 160, § 19.

23A-27A-18. Judge's statement of conviction transmitted to Governor. The judge of any court imposing sentence of death shall immediately thereafter transmit by registered or certified mail to the Governor a certified copy of such judgment together with a brief statement of the facts and circumstances of the case over his signature.

Source: SL 1939, ch 135, § 3; SDC Supp 1960, § 34.37A03; SDCL, § 23-49-4; SL 1979, ch 160, § 20.

23A-27A-19. Investigation by Governor. The Governor may thereupon make such investigation of the case as he may deem proper and may require the assistance of the attorney general.

Source: SL 1939, ch 135, § 4; SDC Supp 1960, § 34.27A04; SDCL, § 23-49-5; SL 1979, ch 160, § 21.

23A-27A-20. Reprieve or suspension of sentence by Governor during investigation. The Governor shall have power to reprieve or suspend the execution of the sentence for such reasonable time as he may see fit for the purpose of completing his investigation or other like proper purpose but the period of reprieve or suspension shall not in any event, exceed ninety days except as provided in § 23A-27A-24 or § 23A-27A-28.

Source: SL 1939, ch 135, § 4; SDC Supp 1960, § 34.37A04; SDCL, § 23-49-7; SL 1979, ch 160, § 22.

23A-27A-21. Power to reprieve or suspend sentence limited to Governor — Exception. No judge, officer, commission or board, other than the Governor, can reprieve or suspend the execution of a judgment of death except where the warden or deputy warden of the penitentiary is authorized so to do in a case and in the manner prescribed in this chapter. This section does not apply to a stay of proceedings upon appeal or to the issuance of a writ of habeas corpus, certiorari or other original remedial writ of the Supreme Court.

Source: SL 1939, ch 135, § 5; SDC Supp 1960, § 34.37A05; SDCL, § 23-49-8; SL 1979, ch 160, § 23.

23A-27A-22. Mental illness of defendant — Notice to Governor — Appointment of commission to make examination. If a defendant confined under sentence of death appears to be mentally incompetent to proceed the warden having him in custody shall forthwith notify the Governor, who shall appoint a commission of not less than three nor more than five disinterested duly licensed physicians, one of whom shall be the superintendent of the

human services center or his assistant, to examine the defendant and report to the Governor as to his mental condition at the time of the examination.

Source: SL 1939, ch 135, § 6; SDC Supp 1960, § 34.37A06; SDCL, § 23-49-9; SL 1979, ch 160, § 24.

23A-27A-23. Examination by commission — Oath — Notice of time — Counsel — Witnesses — Report to Governor. The commission appointed pursuant to § 23A-27A-22 must summarily proceed to make the examination. Before commencing they must take the oath required of referees as prescribed by the Supreme Court rule for trial courts of record. They shall give at least seven days' notice of the time of such examination to the attorney general and to the state's attorney who tried or participated in the trial of the defendant and to counsel for the defendant. Either the attorney general or one of his assistants or the state's attorney or a deputy shall, and counsel for defendant may, attend the examination and any of the attorneys may take part in the proceedings before the commission. The commission shall have power to call and examine witnesses, administer oaths and compel the attendance of witnesses. When the commission has concluded its examination it must forthwith report in writing to the Governor, setting forth the facts found together with the opinion of the commission as to the mental condition of the defendant.

Source: SL 1939, ch 135, § 6; SDC Supp 1960, § 34.37A06; SDCL, § 23-49-10; SL 1979, ch 160, § 25.

23A-27A-24. Defendant incompetent to proceed — Suspension of sentence, confinement in human services center — Periodic review. If the commission finds the defendant mentally incompetent to proceed the Governor shall suspend the execution of sentence and may in his discretion order the defendant removed to the human services center, there to remain confined until he is no longer mentally ill.

The commission shall review the defendant's mental condition at least once every six months during his confinement.

Source: SL 1939, ch 135, § 6; SDC Supp 1960, § 34.37A06; SDCL, § 23-49-11; SL 1979, ch 160, § 26.

23A-27A-25. Defendant no longer incompetent — Report — Inquiry and certification by chief justice — Return to penitentiary. When the commission determines that the defendant is no longer mentally incompetent to proceed, it shall report the fact to the Governor and to the chief justice of the Supreme Court. The chief justice shall thereupon inquire into the truth of the report in such manner as he may deem proper and if the justice upholds the commission's report, he shall so certify to the Governor and to the clerk of

the court in which the defendant was convicted. Thereupon the defendant shall be forthwith returned and delivered to the custody of the warden of the state penitentiary, there to be dealt with according to law.

Source: SL 1939, ch 135, § 6; SDC Supp 1960, § 34.37A06; SDCL, § 23-49-12; SL 1979, ch 160, § 27.

23A-27A-26. Governor's warrant for execution when defendant competent to proceed. The Governor, upon receiving the certificate provided for in § 23A-27A-25, that states the defendant is no longer mentally incompetent to proceed, must issue his warrant appointing a week beginning within a period of not less than thirty nor more than ninety days from the date of the warrant, for the execution of the defendant pursuant to his sentence unless the sentence has been commuted or the defendant pardoned. The defendant shall continue in or be returned to the custody of the warden of the state penitentiary accordingly.

Source: SL 1939, ch 135, § 8; SDC Supp 1960, § 34.37A08; SDCL, § 23-49-14; SL 1979, ch 160, § 28.

23A-27A-27. Pregnancy of defendant — Examination by physicians — Report to warden. If there is reasonable ground to believe that a female defendant sentenced to death is pregnant the warden having her in custody shall summon three disinterested licensed physicians of this state to examine the defendant and inquire into her condition. The physicians upon completing the examination shall make a report in writing over their signatures, stating the facts, and submit the same to the warden.

Source: SL 1939, ch 135, § 9; SDC Supp 1960, § 34.37A09; SDCL, § 23-49-15; SL 1979, ch 160, § 29.

23A-27A-28. Suspension of sentence if defendant pregnant — Report transmitted to Governor. If the physicians summoned under § 23A-27A-27 find that the defendant is pregnant the execution of the sentence must be suspended. The warden shall forthwith transmit the report of the physicians to the Governor and the defendant shall not be executed until a new warrant is received from the Governor so directing.

Source: SL 1939, ch 135, § 9; SDC Supp 1960, § 34.37A09; SDCL, § 23-49-16; SL 1979, ch 160, § 30.

23A-27A-29. Defendant no longer pregnant — Governor's execution warrant issued. In case the execution of a sentence is suspended pursuant to § 23A-27A-28, the Governor, as soon as he is satisfied that the defendant is no longer pregnant, shall forthwith issue his warrant appointing a week for her execution, pursuant to her sentence, beginning within a period of not less than thirty nor more than ninety days from the date of the warrant.

Source: SL 1939, ch 135, § 9; SDC Supp 1960, § 34.37A09; SDCL, § 23-49-17; SL 1979, ch 160, § 31.

23A-27A-30. Sentence not suspended if defendant not pregnant — Report to Governor. If the physicians summoned pursuant to § 23A-27A-27 report that the female defendant is not pregnant a copy of the report shall be transmitted by the warden to the Governor but the same shall not work a stay or suspension of the execution of the sentence.

Source: SL 1939, ch 135, § 9; SDC Supp 1960, § 34.37A09; SDCL, § 23-49-18; SL 1979, ch 160, § 32.

23A-27A-31. Failure to execute death sentence — Order and warrant issued by Supreme Court. Whenever, for any reason, or under any circumstances not otherwise specifically provided for in this chapter, a defendant sentenced to death has not been executed pursuant to the sentence at the time specified and the sentence or judgment inflicting the death penalty stands in full force, the Supreme Court, upon application of the attorney general or the state's attorney of the county where the crime was committed, shall make an order to the warden in whose custody the defendant may be, commanding him to bring the defendant before the court or commanding him to apprehend the defendant if at large and bring him before the court. Upon the defendant being brought before the court, the court shall inquire into the facts and if no legal reason exists against the execution of the judgment the court shall issue its warrant to the warden of the state penitentiary directing the execution of the judgment during a week specified in the warrant and the warden shall execute the warrant accordingly.

Source: SL 1939, ch 135, § 10; SDC Supp 1960, § 34.37A10, SDCL, § 23-49-19; SL 1979, ch 160, § 33.

23A-27A-32. Place and manner of execution — Qualifications to perform — Exemptions. The punishment of death shall be inflicted within the walls of some building at the state penitentiary or within the yard or enclosure adjoining thereto. The punishment of death shall be inflicted by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent and continuing the application thereof until the convict is pronounced dead by a licensed physi-

cian according to accepted standards of medical practice. An execution carried out by lethal injection shall be performed by a person selected by the warden and trained to administer the injection. The person administering the injection need not be a physician, registered nurse or licensed practical nurse licensed or registered under the laws of this or any other state. Any infliction of the punishment of death by administration of the required lethal substance or substances in the manner required by this section may not be construed to be the practice of medicine and any pharmacist or pharmaceutical supplier is authorized to dispense the drugs to the warden without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law.

Source: SL 1939, ch 135, § 11; SDC Supp 1960, § 34.37A11; SDCL, § 23-49-20; SL 1979, ch 160, § 34; 1984, ch 181.

Law Reviews.

Inequities and Abuses of Death Qualification: Causes and Cures, 32 SD LRev 281 (1987).

23A-27A-33. Place for persons and equipment provided at penitentiary. The board of charities and corrections shall arrange for and provide a proper and suitable place at the state penitentiary for the custody of persons awaiting sentence of death and for the execution of the death sentence together with any and all proper equipment and appliances for the infliction of such punishment.

Source: SL 1939, ch 135, § 12; SDC Supp 1960, § 34.37A12; SDCL, § 23-49-21; SL 1979, ch 160, § 35.

23A-27A-34. Persons attending execution — Arrangement by warden. The warden of the penitentiary shall request, by at least two days' previous notice, the presence of the attorney general, the trial judge before whom the conviction was had or his successor in office, the state's attorney and sheriff of the county where the crime was committed, and not more than ten reputable adult citizens, including at least one member of the news media, to be selected by the warden at the execution. The warden shall also arrange for the attendance of the prison physician and two other licensed physicians of this state. The warden shall arrange for the attendance of such prison guards and peace officers as he may deem proper.

Source: SL 1939, ch 135, § 13; 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL, § 23-49-22; SL 1979, ch 160, § 36.

23A-27A-35. Clergy and relatives or friends to attend at defendant's request. The warden of the state penitentiary must also, at the request of the defendant, permit such ministers of the gospel, priests or clergymen of any denomination as the defendant may desire, not exceeding two, to be present at the execution and any relatives or friends requested by the defendant not exceeding five.

Source: SL 1939, ch 135, § 13; 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL, § 23-49-23; SL 1979, ch 160, § 37.

23A-27A-36. Persons not permitted to attend. The warden of the state penitentiary shall permit no persons to be present at such execution other than those designated in §§ 23A-27A-34 and 23A-27A-35 and shall not permit the presence of any person under the age of eighteen years, unless a relative, and no relatives of tender years shall be admitted.

Source: SL 1939, ch 135, § 13; 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL, § 23-49-24; SL 1979, ch 160, § 38.

23A-27A-37. Secrecy of execution time — Disclosure as misdemeanor. The time fixed by the warden for the execution shall be kept secret and in no manner divulged except privately to the persons by him invited or requested to be present as provided by §§ 23A-27A-34 and 23A-27A-35. It is a Class 2 misdemeanor for such persons so invited or requested to be present to divulge such invitation to any person or persons nor in any manner disclose the time of the execution.

Source: SL 1939, ch 135, § 13; 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL, § 23-49-25; SL 1979, ch 160, § 39.

Cross-References.
Penalties for classified misdemeanors, § 22-6-2.

23A-27A-38. Post-mortem required after execution — Report. Immediately after the execution a post-mortem examination of the body of the defendant shall be made by the physicians present and they shall report in writing the result of their examination stating the nature thereof and the finding made, which report shall be annexed to the return mentioned in § 23A-27A-40 and filed therewith.

Source: SL 1939, ch 135, § 13; 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL, § 23-49-26; SL 1979, ch 160, § 40.

23A-27A-39. Interment of body unless claimed by relative. After the post-mortem examination the body of the defendant, unless claimed by some relative, shall be interred in a cemetery within the county where the penitentiary is situated.

Source: SL 1939, ch 135, § 13; 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL, § 23-49-27; SL 1979, ch 160, § 41.

23A-27A-40. Certificate and return of warden after execution — Filing of return with post-mortem report. The warden or prison officer attending the execution and in charge thereof must immediately prepare and sign a certificate and return setting forth the time, place and manner thereof, and that the defendant was then and there executed in conformity to the judgment of the court and the provisions of this chapter. He shall sign the certificate and return and shall also procure the same to be signed by all the persons present and witnessing the execution and shall thereupon cause the certificate together with the certificate of the post-mortem examination mentioned in § 23A-27A-38 to be filed within ten days after the execution in the office of the clerk of the court where the trial and conviction of the defendant was had.

Source: SL 1939, ch 135, § 14; SDC Supp 1960, § 34.37A14; SDCL, § 23-49-29; SL 1979, ch 160, § 42.

23A-27A-41. Disability of warden — Execution by deputy or other designated prison officer. In case of the disability from illness or other sufficient cause of the warden to whom the death warrant is directed to be present and execute the same, it shall be the duty of the principal deputy warden or such other officer of the prison as may be designated by the warden to execute the warrant and to perform all other duties imposed upon the warden by this chapter.

Source: SL 1939, ch 135, § 15; SDC Supp 1960, § 34.37A15; SDCL, § 23-49-30; SL 1979, ch 160, § 43.

CHAPTER 23A-28

RESTITUTION TO VICTIMS OF CRIME

Section

Tennessee Code Supplement

§ 1; impl. am. Acts 1979, ch. 68, § 3; T.C.A. (orig. ed.), §§ 40-117, 40-118; Acts 1983, ch. 334, § 1.]

Textbooks. Tennessee Criminal Practice and Procedure (Raybin), §§ 7.7, 22.2.

Tennessee Jurisprudence, 8 Tenn. Juris., Criminal Procedure, § 20; 17 Tenn. Juris., Justices of Peace and General Sessions Courts, §§ 11, 21, 22, 39; 25 Tenn. Juris., Weapons, § 7.

Law Reviews. Selected Tennessee Legislation of 1983 (N. L. Resener, J. A. Whitson, K. J. Miller), 50 Tenn. L. Rev. 785 (1983).

The Tennessee Pretrial Diversion Act: A Practitioner's Guide (Steven W. Feldman), 13 Mem. St. U.L. Rev. 285 (1983).

Attorney General Opinions. Jurisdiction over offenses in Lenoir City, OAG 85-047 (2/21/85).

General session judge's sentencing state prisoners serving misdemeanor sentences to a municipal jail, OAG 84-185 (6/22/85).

NOTES TO DECISIONS

3. Facially Valid Judgments.

The fact that the general sessions court is not generally considered a court of record does not mean that its facially valid judgments will not be afforded finality for all legitimate purposes until those judgments are reversed or vacated by the proper authority. State v. McClintock, 732 S.W.2d 268 (Tenn. 1987).

40-1-110. Judicial acts of general sessions judges.

Attorney General Opinions. General session judge's sentencing state prisoners serving misdemeanor sentences to a municipal jail, OAG 84-185 (6/22/85).

NOTES TO DECISIONS

1. Facially Valid Judgments.

The fact that the general sessions court is not generally considered a court of record does not mean that its facially valid judgments will not be afforded finality for all legitimate purposes until those judgments are reversed or vacated by the proper authority. State v. McClintock, 732 S.W.2d 268 (Tenn. 1987).

40-1-111. Appointment of judicial commissioners — Duties — Terms — Compensation.

Cross-References. Judicial commissioners, metropolitan government, title 40, ch. 5, part 2.

Textbooks. Tennessee Criminal Practice and Procedure (Raybin), §§ 3.2, 18.81.

Attorney General Opinions. Return of salaried officers to fee system, OAG 84-010 (1/19/84).

Conflict of interest affecting functions of constable serving as judicial commissioner, OAG 84-328 (12/10/84).

CHAPTER 2

LIMITATION OF PROSECUTIONS

SECTION.

40-2-101. Felonies. — (a) Any person may be prosecuted, tried and punished for any offense punishable with death or by imprisonment in the penitentiary during life, at any time after the offense shall have been committed.

(b) Prosecutions for any offense punishable by imprisonment in the penitentiary when the punishment is expressly limited to five (5) years or less,

shall be commenced within two (2) years next after the commission of the offense, except for offenses arising under the revenue laws of the state. Prosecution for any offense arising under the revenue laws shall be commenced within three (3) years next after the commission of the offense, except that the period of limitation of prosecution shall be six (6) years in the following instances:

(1) For offenses involving the defrauding or attempting to defraud the state of Tennessee or any agency thereof, whether by conspiracy or not, and in any manner;

(2) For the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) For the offense of willfully aiding or abetting, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under the revenue laws of the state, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) For the offense of willfully failing to pay any tax, or make any return at the time or times required by law or regulation; and

(5) For the offenses described in § 67-1-1440, except those relating to assaults upon revenue officers and interference with administration of revenue laws, as described in subsections (a) and (c) thereof.

(c) Prosecutions for any offense committed against a child that constitutes a criminal offense under the provisions of §§ 39-2-601, 39-2-603, 39-2-604, 39-2-606, 39-2-607, 39-2-608, 39-2-612, 39-4-306, 39-4-307, 39-6-1137, and 39-6-1138, shall be commenced no later than the date the child attains the age of majority or within four (4) years next after the commission of the offense, whichever occurs later; provided, however, pursuant to subsection (a) of this section an offense punishable by life imprisonment may be prosecuted at any time after the offense shall have been committed.

(d) Prosecution for any offense punishable by imprisonment in the penitentiary, other than as specified in subsections (a), (b), or (c), shall be commenced within four (4) years next after the commission of the offense. [Code 1932, §§ 11481 — 11483; Acts 1977, ch. 62, § 1; T.C.A. (orig. ed.), §§ 40-201 — 40-203; Acts 1985, ch. 478, § 21.]

Textbooks. Tennessee Criminal Practice and Procedure (Raybin), § 16.82.

Tennessee Jurisprudence, 18 Tenn. Juris., Limitations of Actions, § 18.

Law Reviews. Defending Life in Tennessee Death Penalty Cases (Roy B. Herron), 51 Tenn. L. Rev. 681 (1984).

Cited: State v. Fears, 659 S.W.2d 370 (Tenn. Crim. App. 1983); State v. Franklin, 714 S.W.2d 252 (Tenn. 1986); State v. Phillips, 726 S.W.2d 21 (Tenn. Crim. App. 1986); State v. West, 737 S.W.2d 790 (Tenn. Crim. App. 1987).

40-2-102. Misdemeanors. — Except as provided in § 62-18-120(g), all prosecutions for misdemeanors, shall be commenced within twelve (12) months next after the offense has been committed, except gaming, which shall be commenced within six (6) months. [Code 1858, § 4983 (deriv. Acts 1831, ch.

Notwithstanding any other provision of the law to the contrary, no such person sentenced to the custody of the department of correction shall be committed or conveyed to the department unaccompanied by the completed report required by this section. [Code 1858, § 5263 (deriv. Acts 1829, ch. 38, § 1); Shan., § 7238; Code 1932, § 11844; T.C.A. (orig. ed.), § 40-3116; Acts 1985 (1st E.S.), ch. 5, § 28.]

40-23-114. Death by electrocution.

Law Reviews. Defending Life in Tennessee Death Penalty Cases (Roy B. Herron), 51 Tenn. L. Rev. 681 (1984).

40-23-115. Maintenance of death chamber. — The commissioner of the department of correction shall ensure that a permanent and suitable death chamber is kept and maintained within a penitentiary of this state as defined in § 41-1-101 (b), and that an electrical apparatus, together with all necessary appliances sufficient for the infliction of punishment of death as provided in § 40-23-114, is kept and maintained in the death chamber. [Acts 1913 (1st E.S.), ch. 36, § 2; Shan., § 7204a2; mod. Code 1932, § 11791; T.C.A. (orig. ed.), § 40-3118; Acts 1985 (1st E.S.), ch. 5, § 15.]

Section to Section References. This section is referred to in § 40-23-114.

40-23-116. Manner of executing sentence of death — Witnesses. — (a) In all cases in which the sentence of death has been passed upon any person by the courts of this state, it shall be the duty of the sheriff of the county in which such sentence of death has been passed to remove the person so sentenced to death from such county to the state penitentiary in which the death chamber is located, within a reasonable time before the date fixed for the execution of the death sentence in the judgment and mandate of the court pronouncing the same; and on the date fixed for such execution in the judgment and mandate of the court the warden of the state penitentiary in which the death chamber is located shall cause such death sentence to be carried out within an inclosure to be prepared for that purpose in strict seclusion and privacy, and the only witnesses who shall be entitled to be present at the carrying out of such death sentence shall be:

(1) The warden of the state penitentiary or his duly authorized deputy;

(2) The sheriff of the county in which the crime was committed;

(3) A priest or minister of the gospel who has been preparing the condemned person for death;

(4) The prison physician; and

(5) Such attendants chosen and selected by the warden of the state penitentiary as may be necessary to properly carry out the execution of the death sentence;

Provided, that members of the family of the condemned prisoner may be present and witness the execution.

(b) No other person or persons than those hereinabove mentioned shall be allowed or permitted to be present at the carrying out of the death sentence,

and it is hereby declared to be a misdemeanor, punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for the warden of the state penitentiary to permit any other person or persons than those above provided for to be present at such legal execution. [Acts 1909, ch. 500, § 1; Shan., § 7253a1; Code 1932, § 11859; T.C.A. (orig. ed.), § 40-3119; Acts 1985 (1st E.S.), ch. 5, § 16.]

40-23-119. Order of execution after arrest of condemned prisoner. — Upon such convict being brought before the court, it shall inquire into the circumstances, and, if no legal reason exists against the execution of such sentence, shall order the warden of the state penitentiary in which the death chamber is located to execute the defendant on a day to be fixed by the court. [Code 1858, § 5281; impl. am. Acts 1909, ch. 500, § 1; Shan., § 7261; Code 1932, § 11863; T.C.A. (orig. ed.), § 40-3123; Acts 1985 (1st E.S.), ch. 5, § 17.]

CHAPTER 24

FINES

SECTION.

40-24-101. Payment of fines — Manner. — (a) When any court of this state including municipal courts for violation of municipal ordinances, imposes a fine upon an individual, the court may direct as follows:

(1) That the defendant pay the entire amount at the time sentence is pronounced;

(2) That the defendant pay the entire amount at some later date;

(3) That the defendant pay the fine in specified portions or installments at designated periodic intervals and that such portion be remitted to a designated official, who shall report to the court in the event of any failure to comply with the order; or

(4) Where the defendant is sentenced to a period of probation as well as a fine, that payment of the fine be a condition of the sentence.

(b) For their services in administering any court approved plan authorizing payment of a fine by installments, the clerk of court shall be entitled to a fee of five percent (5%) of the total amount to be collected, not to exceed fifteen dollars ($15.00). The clerk's fees shall be added to the defendant's bill of costs. [Acts 1972 (Adj. S.), ch. 729, § 1; T.C.A., §§ 40-3201, 40-3207; Acts 1987, ch. 135, § 1.]

Amendments. The 1987 amendment added (b).

Effective Dates. Acts 1987, ch. 135, § 3. April 14, 1987.

Cross-References. Fees for installment or deferred payment plans for fines, § 8-21-401.

Section to Section References. This section is referred to in § 8-21-401.

Textbooks. Tennessee Criminal Practice and Procedure (Raybin), §§ 32.21, 32.22.

Law Reviews. Criminal Injuries Compensation: A Primer (Richard W. Rucker) 23 No. 4 Tenn. B.J. 32 (1987).

Attorney General Opinions. Pre and post-conviction imprisonment for violation of municipal ordinances, OAG 84-283 (10/18/84).

Tennessee Code

(b)(1) Notwithstanding any provision of this section to the contrary, a judge of a court of general sessions in a county having a population of not less than fourteen thousand seven hundred (14,700) people, nor more than fourteen thousand eight hundred (14,800) people, according to the 1970 federal census or any subsequent federal census, may appoint one or more judicial commissioners whose duties shall be the same as those prescribed for judicial commissioners in subsection (a) of this section. Such a judge may appoint such a commissioner if the county legislative body of the counties noted above does not appoint a judicial commissioner before May 1, 1980. The term of such a judicial officer shall be for one (1) year, or until the county legislative body appoints a judicial commissioner as provided by subsection (a) of this section.

(2) A judicial commissioner who is appointed by a general sessions judge as outlined in the first paragraph of this subsection shall serve without compensation unless an amount of compensation is specifically established by the county legislative body.

(c) Notwithstanding any provision of this section to the contrary, in any county having a population of not less than two hundred seventy-six thousand (276,000) nor more than two hundred seventy-seven thousand (277,000) according to the 1970 federal census of population or any subsequent federal census, any appointment of a judicial commissioner pursuant to subsection (a) of this section shall be subject to the approval of a majority of the general sessions judges in such county. [Acts 1978 (Adj. S.), ch. 933, § 4; 1979, ch. 15, § 1; 1980 (Adj. S.), ch. 781, § 1; 1981, ch. 209, §§ 1, 2; T.C.A., § 40-120.]

NOTES TO DECISIONS

ANALYSIS

1. In general.
2. Constitutionality.
3. Duties.
4. —Jurisdiction.

1. In General.

This section creates neither an inferior court nor a corporation court, but a magistrate, to which office the requirements of Tenn. Const., art. 6, § 4 are not applicable. State v. Bush, 626 S.W.2d 470 (Tenn. Crim. App. 1981).

2. Constitutionality.

This section is constitutional. State v. Bush, 626 S.W.2d 470 (Tenn. Crim. App. 1981).

3. Duties.

A judicial commissioner's duties under this section are characteristic of a magistrate's and not a court's. State v. Bush, 626 S.W.2d 470 (Tenn. Crim. App. 1981).

4. —Jurisdiction.

Appointing someone to be a judicial commissioner, in order to issue warrants in a particular town, did not restrict the commissioner's activity to that town, absent evidence of contrary intent. State v. Bush, 626 S.W.2d 470 (Tenn. Crim. App. 1981).

Compiler's Notes. For table of U.S. decennial population of Tennessee counties, see the supplement to volume 16 (tables).

CHAPTER 2

LIMITATION OF PROSECUTIONS

[SEE TABLE IN FRONT OF THIS VOLUME FOR CHANGES IN SECTION NUMBERING]

40-2-101. Felonies. — (a) Any person may be prosecuted, tried and punished for any offense punishable with death or by imprisonment in the penitentiary during life, at any time after the offense shall have been committed.

(b) Prosecutions for any offense punishable by imprisonment in the penitentiary when the punishment is expressly limited to five (5) years or less, shall be commenced within two (2) years next after the commission of the offense, except for offenses arising under the revenue laws of the state. Prosecution for any offense arising under the revenue laws shall be commenced within three (3) years next after the commission of the offense, except that the period of limitation of prosecution shall be six (6) years in the following instances:

(1) For offenses involving the defrauding or attempting to defraud the state of Tennessee or any agency thereof, whether by conspiracy or not, and in any manner;

(2) For the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) For the offense of willfully aiding or abetting, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under the revenue laws of the state, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knoweldge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) For the offense of willfully failing to pay any tax, or make any return at the time or times required by law or regulation; and

(5) For the offenses described in § 67-6045, except those relating to assaults upon revenue officers and interference with administration of revenue laws, as described in subsections (a) and (c) thereof.

(c) Prosecution for any offense punishable by imprisonment in the penitentiary, other than as specified in subsections (a) or (b), shall be commenced within four (4) years next after the commission of the offense. [Code 1932, §§ 11481 — 11483; Acts 1977, ch. 62, § 1; T.C.A. (orig. ed.), §§ 40-201 — 40-203.]

Compiler's Notes. Acts 1977, ch. 62, § 2 provided that the provisions of subsection (b) shall apply only to offenses committed after April 5, 1977.

Law Reviews. The New Tennessee Code (Charles C. Trabue), 10 Tenn. L. Rev. 155.

The Tennessee Court System — Criminal Court (Frederic S. Le Clercq), 8 Mem. St. U.L. Rev. 319.

Comparative Legislation. Limitation of prosecutions:

Ala. Code § 15-3-1 et seq.
Ark. Stat. Ann. § 43-1601 et seq.
Ga. OCGA § 17-3-1 et seq.
Miss. Code Ann. §§ 99-1-5 — 99-1-7.
Mo. Rev. Stat. §§ 541.190 — 541.230.
Va. Code § 19.2-8.

Cited: State v. Baker, 614 S.W.2d 352 (Tenn. 1981).

40-23-112. Juror disqualified to act as guard. — The sheriff shall not summon any person as a guard to assist in taking the prisoner to the penitentiary, whom such person, as a juror, convicted. [Code 1858, § 5268; Shan., § 7246; Code 1932, § 11853; T.C.A. (orig. ed.), § 40-3115.]

40-23-113. Report of convict's background made by court to warden. — Whenever any person is sentenced to be imprisoned in the penitentiary, the court shall, during the same term, make and cause to be transmitted to the warden of the penitentiary a short report of the circumstances attending the offense committed by such convict, particularly such as tend to aggravate or extenuate the same, and also report what character the convict sustained upon the trial, and whether the court has reason to believe that he has before, at any time, been convicted of any felony or other infamous offense, which reports the warden shall carefully file and preserve. [Code 1858, § 5263 (deriv. Acts 1829, ch. 38, § 1); Shan., § 7238; Code 1932, § 11844; T.C.A. (orig. ed.), § 40-3116.]

Law Reviews. Justice on the Tennessee Frontier: The Williamson County Circuit Court 1810-1820, 32 Vand. L. Rev. 413.

40-23-114. Death by electrocution. — Whenever any person is sentenced to the punishment of death, the court shall direct that he be put to death by electrocution, and that the body be subjected to shock by a sufficient current of electricity until he is dead. [Acts 1913 (1st E. S.), ch. 36, § 1; Shan., §§ 7204, 7204a1; mod. Code 1932, § 11790; T.C.A. (orig. ed.), § 40-3117.]

Law Reviews. Constitutional Law — 1962 Tennessee Survey (James C. Kirby, Jr.), 16 Vand. L. Rev. 649.

NOTES TO DECISIONS

ANALYSIS

1. In general.
2. Power to fix sentence.
3. Crimes committed prior to act.
4. Death sentence for rape.

1. In General.

This section merely changed the method or procedure for execution. State ex rel. Dawson v. Bomar, 209 Tenn. 567, 354 S.W.2d 763 (1962).

2. Power to Fix Sentence.

Under other sections, the power to fix punishment for murder in the first degree is with the trial jury, and it is prejudicial error to withhold it from such jury. Gohlston v. State, 143 Tenn. 126, 223 S.W. 839 (1919).

3. Crimes Committed Prior to Act.

Sentence of hanging for murder committed prior to date of act changing punishment to electrocution was improper where sentence was made after date of act. Shipp v. State, 130 Tenn. 491, 172 S.W. 317 (1914).

4. Death Sentence for Rape.

Failure of legislature to reapportion itself since 1901 had no bearing on validity of conviction of defendant tried for rape and sentenced to death by electrocution where rape had been punishable by death since 1871 and fact that this section was enacted at a time when the legislature had not reapportioned itself as required by Const., Art. 2, § 4, was immaterial. State ex rel. Dawson v. Bomar, 209 Tenn. 567, 354 S.W.2d 763 (1962).

Both the de facto doctrine and the doctrine of the avoidance of chaos and confusion apply to prevent the federal court from holding state

statute authorizing death by electrocution for rape unconstitutional because of the alleged malapportionment of the legislature which passed it. Dawson v. Bomar, 322 F.2d 445 (6th Cir. 1963), cert. denied, 376 U.S. 933, 84 S. Ct. 705, 11 L. Ed. 2d 653 (1964).

40-23-115. Maintenance of death chamber. — The warden of the state penitentiary, at Nashville, shall keep and maintain a permanent and suitable death chamber in the state penitentiary, at Nashville, and shall keep and maintain in said death chamber an electrical apparatus, together with all necessary appliances sufficient for the infliction of punishment of death as provided in § 40-23-114. [Acts 1913 (1st E. S.), ch. 36, § 2; Shan., § 7204a2; mod. Code 1932, § 11791; T.C.A. (orig. ed.), § 40-3118.]

40-23-116. Manner of executing sentence of death — Witnesses. — (a) In all cases in which the sentence of death has been passed upon any person by the courts of this state, it shall be the duty of the sheriff of the county in which such sentence of death has been passed to remove the person so sentenced to death from such county to the state penitentiary at Nashville, within a reasonable time before the date fixed for the execution of the death sentence in the judgment and mandate of the court pronouncing the same; and on the date fixed for such execution in said judgment and mandate of the court the warden of the state penitentiary at Nashville shall cause such death sentence to be carried out within an inclosure to be prepared for that purpose in strict seclusion and privacy, and the only witnesses who shall be entitled to be present at the carrying out of such death sentence shall be:

(1) The warden of the state penitentiary or his duly authorized deputy;

(2) The sheriff of the county in which the crime was committed;

(3) A priest or minister of the gospel who has been preparing the condemned person for death;

(4) The prison physician; and

(5) Such attendants chosen and selected by the warden of the state penitentiary as may be necessary to properly carry out the execution of the death sentence;

Provided, that members of the family of the condemned prisoner may be present and witness the execution.

(b) No other person or persons than those hereinabove mentioned shall be allowed or permitted to be present at the carrying out of the death sentence, and it is hereby declared to be a misdemeanor, punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for the warden of the state penitentiary to permit any other person or persons than those above provided for to be present at such legal execution. [Acts 1909, ch. 500, § 1; Shan., § 7253a1; Code 1932, § 11859; T.C.A. (orig. ed.), § 40-3119.]

Cross-References. Failure of sheriff to remove condemned convict to penitentiary, penalty, § 39-5-427.

Section to Section References. This section is referred to in § 39-5-427.

40-23-117. Death sentence stands if not carried out at scheduled time. — When, from any cause, a convict sentenced to death has not been executed pursuant to such sentence, the sentence stands in full force, and shall be carried into execution by the court in which such convict was tried. [Code 1858, § 5279; Shan., § 7259; Code 1932, § 11861; T.C.A. (orig. ed.), § 40-3121.]

Collateral References. Effect of abolition of capital punishment on procedural rules governing crimes punishable by death — Post-Furman decisions. 71 A.L.R.3d 453.

40-23-118. Warrant for apprehension of condemned convict. — If such convict is at large, the court or any magistrate may issue a warrant for his apprehension, and, if no good reason is shown for his discharge, shall commit him to abide the order and sentence of the said court. [Code 1858, § 5280; Shan., § 7260; Code 1932, § 11862; T.C.A. (orig. ed.), § 40-3122.]

Cross-References. Persons whose compensation is contingent upon issuance or nonissuance are prohibited from issuing a search warrant, an arrest warrant or mittimus, § 40-5-106.

Cited: McCaslin v. McCord, 116 Tenn. 690, 94 S.W. 79 (1906).

40-23-119. Order of execution after arrest of condemned prisoner. — Upon such convict being brought before the court, it shall inquire into the circumstances, and, if no legal reason exists against the execution of such sentence, shall order the warden of the state penitentiary at Nashville to execute the defendant on a day to be fixed by the court. [Code 1858, § 5281; impl. am. Acts 1909, ch. 500, § 1; Shan., § 7261; Code 1932, § 11863; T.C.A. (orig. ed.), § 40-3123.]

CHAPTER 24

FINES

40-24-101. Payment of fines — Manner. — When any court of this state including municipal courts for violation of municipal ordinances, imposes a fine upon an individual, the court may direct as follows:

(1) That the defendant pay the entire amount at the time sentence is pronounced;

(2) That the defendant pay the entire amount at some later date;

(3) That the defendant pay the fine in specified portions or instalments at designated periodic intervals and that such portion be remitted to a designated official, who shall report to the court in the event of any failure to comply with the order; or

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legal custodian of the originals of such documents and that such responsibility was imposed solely on state's district clerks, in light of certification by record clerk of correctness of copies and by county judge that record clerk had legal custody of the original records of the Department of Corrections. Id.

7. Order of confinement

Confinement for contempt was unlawful where order of confinement was verbal. (Per Clinton, J., with three Judges concurring and five Judges concurring in the result.) White v. Reiter (Cr.App.1982) 640 S.W.2d 586.

Art. 43.13. [797] [881] [859] Discharge of defendant

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6. Mandamus

For purpose of mandamus, district court had clear and unmistakable duty to order defendant discharged from confinement where he had served more time than the sentence and to set such nominal bond as necessary to perfect appeal from conviction. Hicks v. Duncan (App. 1 Dist.1983) 651 S.W.2d 871, review refused 662 S.W.2d 3.

Art. 43.14. [798] Execution of convict

Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time before the hour of sunrise on the day set for the execution not less than thirty days from the day the court sets the execution date, as the court may adjudge, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the Department of Corrections.

Amended by Acts 1981, 67th Leg., p. 812, ch. 291, § 120, eff. Sept. 1, 1981.

Section 149 of the 1981 amendatory act provides:

"This Act takes effect on September 1, 1981. Appeals to the courts of appeals filed on or after that date shall be filed in the court of appeals having jurisdiction. At least 1,800 appeals including death penalty appeals pending in the Court of Criminal Appeals prior to September 1, 1981, shall be retained by that court for disposition in accordance with laws in effect prior to the effective date of this Act, and for that purpose, all laws repealed or amended by this Act shall remain in force and effect for those appeals pending in the Court of Criminal Appeals. The remaining appeals pending in the Court of Criminal Appeals shall be transferred to the various courts of appeals on which the number of judges is increased by the 67th Session of the legislature; provided, no more than 75 nondeath penalty appeals shall be transferred for each newly created judgeship and such a transfer shall not be made until such justice assumes office."

Notes of Decisions

1. Validity

Felder v. State (Cr.App.1978) 564 S.W.2d 776 [main volume] certiorari denied 99 S.Ct. 1433, 440 U.S. 950, 59 L.Ed.2d 640 habeas corpus granted 765 F.2d 1245, certiorari denied 106 S.Ct. 1523, 475 U.S. 1111, 89 L.Ed.2d 921.

Death by intravenous injection is not cruel and unusual punishment forbidden by the Eighth Amendment nor would it deprive defendant convicted of capital murder of due process of law and equal protection of law in violation of Fourteenth Amendment. Earvin v. State (Cr.App. 1979) 582 S.W.2d 794, certiorari denied 100 S.Ct. 238, 444 U.S. 919, 62 L.Ed.2d 175, rehearing denied 100 S.Ct. 492, 444 U.S. 985, 62 L.Ed.2d 414.

Art. 43.15. [799] Warrant of execution

Whenever any person is sentenced to death, the clerk of the court in which the sentence is pronounced, shall within ten days after the court enters its order setting the date for execution, issue a warrant under the seal of the court for the execution of the sentence of death, which shall recite the fact of conviction, setting forth specifically the offense, the judgment of the court, the time fixed for his execution, and directed to the Director of the Department of Corrections at Huntsville, Texas, commanding him to proceed, at the time and place named in the order of execution, to carry the same into execution, as provided in the preceding Article, and shall deliver such warrant to the sheriff of the county in which such judgment of conviction was had, to be by him delivered to the said Director of the Department of Corrections, together with the condemned person if he has not previously been so delivered.

Amended by Acts 1981, 67th Leg., p. 812, ch. 291, § 121, eff. Sept. 1, 1981.

Section 149 of the 1981 amendatory act provides:

"This Act takes effect on September 1, 1981. Appeals to the courts of appeals filed on or after that date shall be filed in the court of appeals having jurisdiction. At least 1,800 appeals including death penalty appeals pending in the Court of Criminal Appeals prior to September 1, 1981, shall be retained by that court for disposition in accordance with laws in effect prior to the effective date of this Act, and for that purpose, all laws repealed or amended by this Act shall remain in force and effect for those appeals pending in the Court of Criminal Appeals. The remaining appeals pending in the Court of Criminal Appeals shall be transferred to the various courts of appeals on which the number of judges is increased by the 67th Session of the legislature; provided, no more than 75 nondeath penalty appeals shall be transferred for each newly created judgeship and such a transfer shall not be made until such justice assumes office."

Notes of Decisions

1. In general

District court was without power to hold hearing on application for writ of habeas corpus, where applicant had appealed his conviction for offense of capital murder and attendant death sentence to Court of Criminal Appeals, and such court's mandate, though entered, had not yet been issued, having been stayed by an order of a United States Supreme Court Justice, thereby precluding imposition of the death sentence, which was a prerequisite to final conviction of capital murder. Houston Chronicle Pub. Co. v. McMaster (Cr.App.1980) 598 S.W.2d 864.

Art. 43.16. [800] Taken to Department of Corrections

Immediately upon the receipt of such warrant, the sheriff shall transport such condemned person to the Director of the Department of Corrections, if he has not already been so delivered, and shall deliver him and the warrant aforesaid into the hands of the Director of the Department of Corrections and shall take from the Director of the Department of Corrections his receipt for such person and such warrant, which receipt the sheriff shall return to the office of the clerk of the court where the judgment of death was rendered. For his services, the sheriff shall be entitled to the same compensation as is now allowed by law to sheriffs for removing or conveying prisoners under the provisions of Section 4 of Article 1029 or 1030 of the Code of Criminal Procedure of 1925, as amended.

Amended by Acts 1981, 67th Leg., p. 812, ch. 291, § 122, eff. Sept. 1, 1981.

Art. 43.17. [801] Visitors

Upon the receipt of such condemned person by the Director of the Department of Corrections, the condemned person shall be confined therein until the time for his or her execution arrives, and while so confined, all persons outside of said prison shall be denied access to him or her, except his or her physician, lawyer, and clergyperson, who shall be admitted to see him or her when necessary for his or her health or for the transaction of business, and the relatives and friends of the condemned person, who shall be admitted to see and converse with him or her at all proper times, under such reasonable rules and regulations as may be made by the Board of Directors of the Department of Corrections.

Amended by Acts 1979, 66th Leg., p. 1181, ch. 572, § 1, eff. Aug. 27, 1979.

Notes of Decisions

1. Validity

Garrett v. Estelle (C.A.1977) 556 F.2d 1274 [main volume] rehearing denied 560 F.2d 1023, certiorari denied 98 S.Ct. 3142, 438 U.S. 914, 57 L.Ed.2d 1159.

2. In general

Garrett v. Estelle (C.A.1977) 556 F.2d 1274 [main volume] rehearing denied 560 F.2d 1023, certiorari denied 98 S.Ct. 3142, 438 U.S. 914, 57 L.Ed.2d 1159.

Art. 43.18. [802] Executioner

Notes of Decisions

1. Validity

Death by intravenous injection is not cruel and unusual punishment forbidden by the Eighth Amendment nor would it deprive defendant convicted of capital murder of due process of law and equal protection of law in violation of Fourteenth Amendment. Earvin v. State (Cr.App. 1979) 582 S.W.2d 794, certiorari denied 100 S.Ct. 238, 444 U.S. 919, 62 L.Ed.2d 175, rehearing denied 100 S.Ct. 492, 444 U.S. 985, 62 L.Ed.2d 414.

Art. 43.19. [803] Place of execution

The execution shall take place at a location designated by the Texas Department of Corrections in a room arranged for that purpose.

Amended by Acts 1985, 69th Leg., ch. 250, § 1, eff. Aug. 26, 1985.

Art. 43.20. [804] Present at execution

Notes of Decisions

1. Validity

Garrett v. Estelle (C.A.1977) 556 F.2d 1274, rehearing denied 560 F.2d 1023, certiorari denied 98 S.Ct. 3142 [main volume] 438 U.S. 914, 57 L.Ed.2d 1159.

2. In general

Garrett v. Estelle (C.A.1977) 566 F.2d 1274 [main volume] rehearing denied 560 F.2d 1023, certiorari denied 98 S.Ct. 3142, 438 U.S. 914, 57 L.Ed.2d 1159.

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the officer executing the commitment or release is entitled to fee provided by law for executing such commitment or release. Op.Atty.Gen.1940, No. O-2003.

A county judge may, within his discretion, give defendant convicted of a misdemeanor credit on his sentence for time defendant has spent in jail, and where time is as much or more than sentence, he may be discharged, but in such case officers would not be entitled to half fees from county where jail time was served prior to and not subsequent to trial and conviction. Op. Atty.Gen.1941, No. O-4159.

3. Defendant at large on bail

Where, after an affirmance of a conviction by an appellate court and issuance of the mandate by that court, the convict still remained at large on bail failing to surrender himself as provided for in his appeal bond, he could not after arrest and imprisonment claim that his term for imprisonment began on the issuance of mandate from the appellate court and that his arrest and detention were unauthorized because the period of confinement had already elapsed. Ex parte Underwood (1923) 91 Cr.R. 157, 248 S.W. 551.

4. Release

A constable is not entitled to a release fee unless he has the defendant in his actual and legal custody at time defendant pays his fine and costs, or satisfies same by serving time in jail, and constable then and there releases defendant from force and effect of a judgment restraining him. Op.Atty.Gen.1940, No. O-2755.

Where a prisoner pays fine and costs in full, or lays same out in jail, or serves same out on county farm or other authorized county project for time required to fully discharge same, it becomes duty of sheriff to release prisoner, and is not duty of sheriff to notify anyone prior to such release, but if fine and costs are unsatisfied, either in whole or in part, sheriff has no authority to release prisoner. Op.Atty. Gen.1942, No. O-5005.

5. Costs

Where the provision for costs against a defendant who plead guilty to a charge of theft was inadvertently omitted from the judgment against such defendant, a nunc pro tunc entry could be made by proper proceedings to include such omitted provision although, until such correction was made, the sheriff had no authority to hold the defendant for costs. Op.Atty.Gen.1941, No. O-3279.

Art. 43.14. [798] Execution of convict

Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time before the hour of sunrise on the day set for the execution not less than thirty days from the day of sentence, as the court may adjudge, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the Department of Corrections.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1977, 65th Leg., p. 287, ch. 138, § 1, eff. Aug. 29, 1977.

Historical Note

The 1977 amendment substituted "by intravenous injection of a substance or substances in a quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the Department of Corrections" for "by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of such convict until he is dead".

Prior Law:

Vernon's Ann.C.C.P.1925, art. 798.
Acts 1923, 2nd C.S., p. 111.

Library References

Criminal Law ⇨1219.
C.J.S. Criminal Law § 2001 et seq.

Forms
Death warrant. Willson's Texas Criminal Forms, 8th Ed., § 62.01.
Sentence of death. Willson's Texas Criminal Forms, 8th Ed., §§ 58.05, 58.06.

Notes of Decisions

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1. Validity

This article permitting the director of the Department of Corrections to determine the lethal substance to be used in the execution of a condemned prisoner by the intravenous injection of a lethal substance does not violate the constitutional prohibition by an unauthorized delegation of legislative power. Ex parte Granviel (Cr.App.1978) 561 S.W.2d 503.

Death penalty administered under this article is not disproportionate to the offense of capital murder, which, under V.T.C.A. Penal Code, § 12.31, is the only offense for which the supreme penalty may be imposed. Id.

Execution by the intravenous injection of a lethal substance may be imposed upon a defendant without violating constitutional prohibition against ex post facto legislation, even though death by electrocution was the mode of execution authorized by law at the time of the commission of capital murder, at the time of his trial, and even if he had been previously sentenced to die by electrocution. Id.

Execution under this article by the intravenous injection of a lethal substance does not constitute cruel and unusual punishment in violation of either the Federal or State Constitutions. Id.

Fact that execution by intravenous injection of a lethal substance is new and innovative does not make it cruel and unusual. Id.

Possibility that complications in execution by the intravenous injection of a lethal substance might cause additional pain to condemned prisoner does not make means of inflicting death inherently cruel. Id.

Failure to specify the exact substances and procedures to be used in executions through the use of an intravenous injection of a lethal substance does not render this article providing for such executions unconstitutionally vague. Id.

This article providing that sentence of death shall be carried out by lethal injection was not unconstitutional delegation of legislative authority. Felder v. State (Cr.App.1978) 564 S.W.2d 776.

Legislature's judgment in substituting death by lethal injection as a means of execution in lieu of electrocution is consistent with principle that Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Id.

Vernon's Ann.Civ.St. art. 6166j, which allows the director of the Department of Corrections to make rules and regulations governing prisoners only with the consent of Board of Corrections, does not conflict with this article permitting director to choose the lethal substance to be used in the execution of a condemned prisoner by intravenous injection without the approval of Board of Corrections. Id.

In carrying out a death sentence by the intravenous injection of a lethal substance, U.S.C.A.Const. Amend. 8 and Const. Art. 1, § 13, require the director of Department of Corrections and the executioner to act in a manner to avoid cruel and unusual punishment. Id.

2. Validity of prior laws

The change by Laws 1923, 38th Leg., 2d C.S., ch. 51 in mode of execution from hanging to electrocution, though after verdict of guilty and before sentence did not offend against the inhibition of the Constitution against ex post facto legislation. Ex parte Johnson (1924) 96 Cr.R. 471, 254 S.W. 473.

Vernon's Ann.C.C.P.1925, art. 775, authorizing execution of those who had been assessed the death penalty was not unconstitutional because it was not uniformly enforced. Williams v. State (1960) 168 Cr.R. 196, 323 S.W.2d 224, certiorari denied 81 S.Ct. 98, 364 U.S. 851, 5 L.Ed.2d 76.

3. Construction and application

It was common knowledge that prior to 1923, all legal executions were had by means of hanging, but that since passage of Vernon's Ann.C.C.P.1925, art. 775, execu-

tions are by electrocution. Singleton v. State (1940) 139 Cr.R. 28, 138 S.W.2d 100.

Court will not presume that director of the Department of Corrections will act in an arbitrary manner in selecting the substance for the execution of a condemned prisoner by the intravenous injection of a lethal substance. Ex parte Granviel (Cr. App.1978) 561 S.W.2d 503.

A defendant who was convicted for murder and sentenced to death by hanging but who escaped before execution could be electrocuted if apprehended and returned to Texas. Op.Atty.Gen.1944, No. O-5765.

Acts 1977, 65th Leg., H.B. 945 (ch. 138), which changed the method of execution, could apply to persons sentenced before its effective date. Op.Atty.Gen.1977, No. LA-125.

4. Due process

Condemned prisoner was not denied due process by the lack of notice, hearing, and procedure for review of director of the Department of Corrections' choice of lethal substance to be used in the execution of the prisoner where the director complied with basic principles of administrative law by first ascertaining facts to support his final choice of substance. Ex parte Granviel (Cr.App.1978) 561 S.W.2d 503.

5. Recital of mode of execution in judgment

Judgment in capital conviction need not recite the mode of execution. Steagald v. State (1887) 22 Cr.R. 464, 3 S.W. 771.

6. Stay

Stay of execution granted by a court on the application of one under death sentence did not deprive governor of authority to fix new day for execution of death warrant even though stay was granted less than an hour before day of execution began. Ex parte Stickney (1961) 171 Cr.R. 388, 350 S.W.2d 564, certiorari denied 82 S.Ct. 1033, 369 U.S. 868, 8 L.Ed.2d 87.

7. Reprieve

Reprieve granted on date set for execution of death sentence was not void even though Board of Pardons and Parole did not recommend and governor did not grant such reprieve before sunrise. Ex parte Stickney (1961) 171 Cr.R. 388, 350 S.W.2d 564, certiorari denied 82 S.Ct. 1033, 369 U.S. 868, 8 L.Ed.2d 87.

Art. 43.15. [799] Warrant of execution

Whenever any person is sentenced to death, the clerk of the court in which the sentence is pronounced, shall within ten days after sentence has been pronounced, issue a warrant under the seal of the court for the execution of the sentence of death, which shall recite the fact of conviction, setting forth specifically the offense, the judgment of the court, the time fixed for his execution, and directed to the Director of the Department of Corrections at Huntsville, Texas, commanding him to proceed, at the time and place named in the sentence, to carry the same into execution, as provided in the preceding Article, and shall deliver such warrant to the sheriff of the county in which such judgment of conviction was had, to be by him delivered to the said Director of the Department of Corrections, together with the condemned person.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:

Substituted the Director of the Department of Corrections in lieu of the warden of the State Penitentiary.

Prior Law:

Vernon's Ann.C.C.P.1925, art. 799.
Acts 1923, 2nd C.S., p. 111.

Library References

Criminal Law ⇨999(2).
C.J.S. Criminal Law § 1613.

Forms
Death warrant. Willson's Texas Criminal Forms, 8th Ed., § 62.01.

Sentence of death. Willson's Texas Criminal Forms, 8th Ed., §§ 58.05, 58.06.

Art. 43.16. [800] Taken to Department of Corrections

Immediately upon the receipt of such warrant, the sheriff shall transport such condemned person to the Director of the Department of Corrections and shall deliver him and the warrant aforesaid into the hands of the Director of the Department of Corrections and shall take from the Director of the Department of Corrections his receipt for such person and such warrant, which receipt the sheriff shall return to the office of the clerk of the court where the judgment of death was rendered. For his services, the sheriff shall be entitled to the same compensation as is now allowed by law to sheriffs for removing or conveying prisoners under the provisions of Section 4 of Article 1029 or 1030 of the Code of Criminal Procedure of 1925, as amended.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:

Provided for the transportation of the prisoner to the director of the department of corrections rather than to the state penitentiary at Huntsville.

Prior Law:

Vernon's Ann.C.C.P.1925, art. 940.
Acts 1923, 2nd C.S., p. 121.

Library References

Criminal Law ⇨999(2).
C.J.S. Criminal Law § 1613.

Forms
Sentence of death. Willson's Texas Criminal Forms, 8th Ed., §§ 58.05, 58.06.

Art. 43.17. [801] Visitors

Upon the receipt of such condemned person by the Director of the Department of Corrections, he shall be confined therein until the time for his execution arrives, and while so confined, all persons outside of said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary to his health or for the transaction of business, and the relatives, friends and spiritual advisors of the condemned person, who shall be admitted to see and converse with him at all proper times, under such reasonable rules and regulations as may be made by the Board of Directors of the Department of Corrections.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:

Substituted the words "Director of the Department of Corrections" and "Directors of the Department of Corrections" in lieu of "warden of the State Penitentiary" and "Prison Commissioners", respectively.

Prior Law:

Vernon's Ann.C.C.P.1925, art. 801
Acts 1923, 2nd C.S. p. 111.

Library References

Prisons ⇨13.

C.J.S. Prisons §§ 18, 19.

Notes of Decisions

In general 2
Validity 1

1. Validity

Texas' rule barring use of motion picture cameras to gather news at executions did not deny news cameraman equal protection of the law. Garrett v. Estelle (C.A.1977) 556 F.2d 1274.

2. In general

The First Amendment did not require Texas to allow a news cameraman to film executions in state prison for showing on television. Garrett v. Estelle (C.A.1577) 556 F.2d 1274.

Art. 43.18. [802] Executioner

The Director of the Texas Department of Corrections shall designate an executioner to carry out the death penalty provided by law.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1975, 64th Leg., p. 911, ch. 341, § 6, eff. June 19, 1975; Acts 1977, 65th Leg., p. 288, ch. 138, § 2, eff. Aug. 29, 1977.

Historical Note

The 1975 amendment, in the first sentence, substituted "Texas Department of Corrections" for "Department of Corrections at Huntsville" and substituted "the Warden of the Huntsville Unit of the Texas Department of Corrections" for "his deputy", and in the second sentence inserted "Texas" and substituted "the Warden of the Huntsville Unit of the Texas Department of Corrections" for "his deputy".

The 1977 amendment rewrote this article, which prior thereto read:

"The Director of the Texas Department of Corrections or in case of his death, disability or absence, the Warden of the Huntsville Unit of the Texas Department of Corrections, shall be the executioner. In the event of the death or disability or absence of both the Director of the Texas Department of Corrections and the Warden of the Huntsville Unit of the Texas Department of Corrections, the executioner shall be the person appointed by the Board of Directors of the Texas Department of Corrections for that purpose."

For saving provisions of the 1975 amendatory act, see the Historical Note set out under art. 3.01.

1965 Revision:

Rewrote the article, which prior thereto read:

"The Warden of the State Penitentiary at Huntsville shall be the executioner; in case of his death, disability or absence, the executioner shall be that person appointed by the General Manager of the Texas Prison System."

Prior Law:

Vernon's Ann.C.C.P.1925, art. 802.
Acts 1951, 52nd Leg. p. 772, ch. 423, § 1
Acts 1923, 2nd C.S., p. 111.

The 1951 act rewrote the article, which prior thereto read:

"The warden of the State Penitentiary at Huntsville, or in case of his death, disability or absence, his deputy, shall be the executioner. In the event of the death or disability or absence of both the warden and his deputy, the executioner shall be that person appointed by the Board of Prison Commissioners for that purpose."

Library References

Criminal Law ⇐1219. C.J.S. Criminal Law § 2001 et seq.

Art. 43.19. [803] Place of execution

The execution shall take place at the Department of Corrections at Huntsville, Texas, in a room arranged for that purpose.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:
Substituted the Department of Corrections in lieu of the State Penitentiary.

Prior Law:
Vernon's Ann.C.C.P.1925, art. 803.
Acts 1923, 2nd C.S., p. 111.

Library References

Criminal Law ⇐1219.
C.J.S. Criminal Law § 2001 et seq.

Forms
Death warrant. Willson's Texas Criminal Forms 8th Ed., § 62.01.

Art. 43.20. [804] Present at execution

The following persons may be present at the execution: the executioner, and such persons as may be necessary to assist him in conducting the execution; the Board of Directors of the Department of Corrections, two physicians, including the prison physician, the spiritual advisor of the condemned, the chaplains of the Department of Corrections, the county judge and sheriff of the county in which the Department of Corrections is situated, and any of the relatives or friends of the condemned person that he may request, not exceeding five in number, shall be admitted. No convict shall be permitted by the prison authorities to witness the execution.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

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by Hon. John F. Onion, Jr.

After the phrase "The following persons may be present at the execution" the words "and none other;" were deleted. Also the word "chaplain" was changed to "chaplains."

Historical Note

Prior Law:
Vernon's Ann.C.C.P.1925, art. 804.
Acts 1923, 2nd C.S., p. 111.

Library References

Criminal Law ⇐1219. C.J.S. Criminal Law § 2001 et seq.

Notes of Decisions

In general 2
Validity 1

1. Validity

Texas' rule barring use of motion picture cameras to gather news at executions did not deny news cameraman equal protection of the law. Garrett v. Estelle (C.A.1977) 556 F.2d 1271, rehearing denied 560 F.2d 1023, certiorari denied 98 S.Ct. 3142.

2. In general

The First Amendment did not require Texas to allow a news cameraman to film executions in state prison for showing on television. Garrett v. Estelle (C.A.1977) 556 F.2d 1274.

Art. 43.21. [805] Escape after sentence

If the condemned escape after sentence and before his delivery to the Director of the Department of Corrections, and be not rearrested until after the time fixed for execution, any person may arrest and commit him to the jail of the county in which he was sentenced; and thereupon the court by whom the condemned was sentenced; either in term-time or vacation, on notice of such arrest being given by the sheriff, shall again appoint a time for the execution, not less than thirty days from such appointment, which appointment shall be by the clerk of said court immediately certified to the Director of the Department of Corrections and such clerk shall place such certificate in the hands of the sheriff, who shall deliver the same, together with the warrant aforesaid and the condemned person to the Director of the Department of Corrections, who shall receipt to the sheriff for the same and proceed at the appointed time to carry the sentence of death into execution as hereinabove provided.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:

Substituted the director of the department of corrections in lieu of the warden of the state penitentiary.

Prior Law:

Vernon's Ann.C.C.P.1925, art. 805.
Acts 1923, 2nd C.S., p. 111.

Library References

Prisons ⇐16. C.J.S. Prisons § 23.

Art. 43.22. [806] Escape from Department of Corrections

If the condemned person escapes after his delivery to the Director of the Department of Corrections, and is not retaken before the time appointed for his execution, any person may arrest and commit him to the Director of the Department of Corrections whereupon the Director of the Department of Corrections shall certify the fact of his escape and recapture to the court in which sentence was passed; and the court, either in term-time or vacation, shall again appoint a time for the execution which shall not be less than thirty days from the date of such appointment; and thereupon the clerk of such court

shall certify such appointment to the Director of the Department of Corrections, who shall proceed at the time so appointed to execute the condemned, as hereinabove provided. The sheriff or other officer or other person performing any service under this and the preceding Article shall receive the same compensation as is provided for similar services under the provisions of Articles 1029 or 1030 of the Code of Criminal Procedure of 1925, as amended. If for any reason execution is delayed beyond the date set, then the court which originally sentenced the defendant may set a later date for execution.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:

Substituted the "Director of the Department of Corrections" in lieu "warden" and "State Penitentiary"; and added the last sentence.

Prior Law:

Vernon's Ann.C.C.P.1925, art. 806.
Acts 1923, 2nd C.S., p. 111.

Library References

Prisons ⇐16.

C.J.S. Prisons § 23.

Art. 43.23. [807] Return of Director

When the execution of sentence is suspended or respited to another date, same shall be noted on the warrant and on the arrival of such date, the Director of the Department of Corrections shall proceed with such execution; and in case of death of any condemned person before the time for his execution arrives, or if he should be pardoned or his sentence commuted by the Governor, no execution shall be had; but in such cases, as well as when the sentence is executed, the Director of the Department of Corrections shall return the warrant and certificate with a statement of any such act and his proceedings endorsed thereon, together with a statement showing what disposition was made of the dead body of the convict, to the clerk of the court in which the sentence was passed, who shall record the warrant and return in the minutes of the court.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:

Substituted the director of the department of corrections in lieu of the warden.

Prior Law:

Vernon's Ann.C.C.P.1925, art. 807.
Acts 1949, 51st Leg., p. 536, ch. 298, § 1.
Acts 1923, 2nd C.S., p. 111.

The requirement that the return shall show what disposition was made of the dead body of the convict was substituted by the amendatory act of 1949 for a requirement that it should state that the body of the convict was decently buried or delivered to his relatives or friends, naming them, or to some other person, by consent of the convict, naming such person, and naming two or more witnesses to the fact that the convict consented that his body might be delivered to such person.

A provision that the body of the person electrocuted might be returned to the county in which the conviction was had at the expense of the county when requested by the convict's relatives was omitted by the amendment.

Library References

Criminal Law ⇐1219
C.J.S. Criminal Law § 2001 et seq.

Forms
Death warrant. Willson's Texas Criminal Forms, 8th Ed., § 62.01.

Art. 43.24. [808] [888] Treatment of condemned

No torture, or ill treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

Prior Law:
Vernon's Ann.C.C.P.1925, art. 808.
O.C. 713

Library References

Criminal Law ⇐1217.
Prisons ⇐17.

C.J.S. Criminal Law §§ 1981, 1992.
C.J.S. Prisons § 18.

Art. 43.25. [809] [891] [869] Body of convict

The body of a convict who has been legally executed shall be embalmed immediately and so directed by the Director of the Department of Corrections. If the body is not demanded or requested by a relative or bona fide friend within forty-eight hours after execution then it shall be delivered to the Anatomical Board of the State of Texas, if requested by the Board. If the body is requested by a relative, bona fide friend, or the Anatomical Board of the State of Texas, such recipient shall pay a fee of not to exceed twenty-five dollars to the mortician for his services in embalming the body for which the mortician shall issue to the recipient a written receipt. When such receipt is delivered to the Director of the Department of Corrections, the body of the deceased shall be delivered to the party named in the receipt or his authorized agent. If the body is not delivered to a relative, bona fide friend, or the Anatomical Board of the State of Texas, the Director of the Department of Corrections shall cause the body to be decently buried, and the fee for embalming shall be paid by the county in which the indictment which resulted in conviction was found.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

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by Hon. John F. Onion, Jr.

The Legislature changed the time within which the body of a convict legally executed may be claimed from "ten days" to "forty-eight hours."

Utah Code

except further as otherwise specifically provided by law."

"(2) Fines imposed by the district court in cases appealed from a circuit court shall be paid in their entirety to the state treasury."

77-18-5.5. Judgment of death — Defendant to select method — Time of selection.

When a person is convicted of a capital offense and the judgment of death has been imposed, the defendant is entitled to select, at the time of sentencing, either a firing squad or a lethal intravenous injection as the method of execution. If the defendant does not indicate a preference at that time to the court, the judgment of death shall be executed by lethal intravenous injection.

History: C. 1953, 77-18-5.5, enacted by L. 1983, ch. 112, § 1; 1988, ch. 90, § 1.

Compiler's Notes. — The 1988 amendment, effective April 25, 1988, substituted "When" for "Whenever" at the beginning; inserted ", at the time of sentencing," in the first sentence; and inserted "at the time" in the second sentence.

77-18-6. Judgment to pay fine or restitution constitutes a lien.

A judgment which orders the payment of a fine or payment of restitution to a victim pursuant to Section 76-3-201, constitutes a lien when recorded in the judgment docket and shall have the same effect and is subject to the same rules as a judgment for money in a civil action.

History: C. 1953, 77-18-6, enacted by L. 1980, ch. 15, § 2; 1983, ch. 262, § 4.

Compiler's Notes. — The 1983 amendment inserted "or payment of restitution to a victim pursuant to Section 76-3-201."

CHAPTER 19
THE EXECUTION

77-19-6. Judgment of death — Warrant — Delivery of warrant — Determination of execution time.

(1) When judgment of death is rendered, a warrant, signed by the judge and attested by the clerk under the seal of the court, shall be drawn and delivered to the sheriff of the county where the conviction is had. The sheriff shall deliver the warrant and a certified copy of the judgment to the executive

director of the Department of Corrections or his designee at the time of delivering the defendant to the custody of the Department of Corrections.

(2) The warrant shall state the conviction, the judgment, the method of execution, and the appointed day the judgment is to be executed, which may not be fewer than 30 days nor more than 60 days from the date of issuance of the warrant. The Department of Corrections shall determine the hour, within the appointed day, at which the judgment is to be executed.

History: C. 1953, 77-19-6, enacted by L. 1980, ch. 15, § 2; 1983, ch. 112, § 2; 1988, ch. 190, § 2.

Compiler's Notes. — The 1983 amendment inserted "the method of execution" in the last sentence.

The 1988 amendment, effective April 25, 1988, inserted the subsection designations (1) and (2); substituted "executive director of the Department of Corrections or his designee" for "warden of the state prison" and "custody of the Department of Corrections" for "prison" in the second sentence of Subsection (1) and rewrote the provisions now contained in Subsection (2), which read "The warrant shall state the conviction, the judgment, the method of execution, and the appointed day on which the judgment is to be executed, which day shall not be less than 30 days nor more than 60 days from the date of judgment."

77-19-8. Judgment of death, when suspended, and by whom.

No judge, tribunal, or officer, other than the governor or the Board of Pardons, may suspend the execution of a judgment of death, except:

(1) a temporary stay of judgment of death may issue by a court of competent jurisdiction when the judgment is appealed, automatically reviewed, or subjected to collateral attack in a post conviction proceeding; or

(2) in cases of suspected incompetency or pregnancy of the defendant, execution may be temporarily suspended by the executive director of the Department of Corrections or his designee under Section 77-19-13.

History: C. 1953, 77-19-8, enacted by L. 1980, ch. 15, § 2; 1988, ch. 190, § 3.

Compiler's Notes. — The 1988 amendment, effective April 25, 1988, inserted the designations (1) and (2); substituted "executive director of the Department of Corrections or his designee" for "warden" in Subsection (2), and made minor stylistic changes.

77-19-9. Judgment of death not executed — Order for execution.

(1) If for any reason a judgment of death has not been executed and remains in force, the court where the conviction was had, on application of the prosecuting attorney, shall order the defendant to be brought before it or, if he is at large, issue a warrant for his apprehension.

(2) When the defendant is brought before the court, it shall inquire into the facts and, if no legal reason exists against the execution of judgment, the court shall make an order requiring the executive director of the Department of Corrections or his designee to ensure that the judgment is executed on a specified day, not fewer than 30 nor more than 60 days thereafter, at an hour determined by the Department of Corrections.

(3) The court shall also draw and have delivered another warrant under Section 77-19-6.

History: C. 1953, 77-19-9, enacted by L. 1980, ch. 15, § 2; 1988, ch. 190, § 4.

Compiler's Notes. — The 1988 amendment, effective April 25, 1988, inserted the subsection designations; rewrote the provisions now contained in Subsection (2) following "requiring the." which read "warden to see that the judgment is executed on a specified day, not less than 30 nor more than 60 days thereafter"; and made a minor stylistic change in Subsection (3).

77-19-10. Judgment of death — Location and procedures for execution.

(1) The executive director of the Department of Corrections or his designee shall ensure that the method of judgment of death specified in the warrant is carried out at a secure correctional facility operated by the Department of Corrections at an hour determined by the Department of Corrections on the date specified in the warrant.

(2) If the judgment of death is to be carried out by shooting, the executive director of the Department of Corrections or his designee shall select a five-person firing squad of peace officers.

(3) If the judgment of death is to be carried out by lethal intravenous injection, the executive director of the Department of Corrections or his designee shall select two or more persons trained in accordance with accepted medical practices to administer intravenous injections, who shall each administer a continuous intravenous injection, one of which shall be of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death. Death shall be pronounced by a licensed physician according to accepted medical standards.

(4) Compensation for members of a firing squad or persons administering intravenous injections shall be in an amount determined by the director of the Division of Finance.

(5) The Department of Corrections shall adopt and enforce rules governing procedures for the execution of judgments of death.

History: C. 1953, 77-19-10, enacted by L. 1983, ch. 112, § 3; 1985, ch. 212, § 19; 1988, ch. 190, § 5.

Compiler's Notes. — Laws 1983, ch. 112, § 3 repealed old § 77-19-10 (L. 1980, ch. 15, § 2), relating to execution of the death penalty by shooting, and enacted new § 77-19-10.

The 1985 amendment substituted "Department of Corrections" for "division of corrections" in Subsection (4).

The 1988 amendment, effective April 25, 1988, inserted the subsection designation (1) at the beginning of the section and redesignated former Subsections (1) to (4) as present Subsections (2) to (5); substituted "executive director of the Department of Corrections or his designee" for "warden" in Subsections (1) and (2) and in the first sentence of Subsection (3); substituted "a secure correctional facility *** in the warrant" for "the state prison" at the end of Subsection (1); and substituted "rules" for "regulations" in Subsection (5).

Constitutionality.

Execution by shooting does not violate establishment clause of First Amendment nor does it constitute cruel and unusual punishment in violation of Eighth Amendment of United States Constitution. Andrews v. Shulsen, 600 F. Supp. 408 (D. Utah 1984), aff'd, 802 F.2d 1256 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).

77-19-11. Who may be present — Photographic and recording equipment.

(1) The executive director of the Department of Corrections or his designee shall cause a physician to attend the execution.

(2) At the discretion of the executive director of the Department of Corrections or his designee, the following persons may attend the execution:

(a) The prosecuting attorney, or his designated deputy, of the county in which the defendant committed the offense for which he is being executed;

(b) No more than two law enforcement officials from the county in which the defendant committed the offense for which he is being executed;

(c) The attorney general or his designated deputy; and

(d) Religious representatives, friends, or relatives designated by the defendant, not exceeding a total of five persons.

(3) The persons enumerated in Subsection (2) may not be required to attend, nor may any of them attend as a matter of right.

(4) The executive director of the Department of Corrections or his designee shall permit the attendance at the execution of a total of nine members of the press and broadcast news media named by the executive director of the Department of Corrections in accordance with rules of the Department of Corrections, provided that the selected news media members serve as a pool for other members of the news media as a condition of attendance.

(5) (a) Photographic or recording equipment is not permitted at the execution site until the execution is completed, the body is removed, and the site has been restored to an orderly condition. However, the physical arrangements for the execution may not be disturbed.

(b) A violation of this subsection is a class B misdemeanor.

(6) All persons in attendance are subject to reasonable search as a condition of attendance.

(7) (a) The following persons may also attend the execution:

(i) Staff as determined necessary for the execution by the executive director of the Department of Corrections or his designee; and

(ii) No more than three correctional officials from other states that are preparing for executions, but no more than two correctional officials may be from any one state, as designated by the executive director of the Department of Corrections or his designee.

(b) Any person younger than 18 years of age may not attend.

(8) The Department of Corrections shall adopt rules governing the attendance of persons at the execution.

History: C. 1953, 77-19-11, enacted by L. 1980, ch. 15, § 2; 1985, ch. 212, § 20; 1988, ch. 190, § 6.

Compiler's Notes. — The 1985 amendment substituted "Department of Corrections" for "Division of Corrections" in three places; inserted "executive" in Subsection (4); deleted "and regulations" after "rules" in Subsection (4); deleted "hereby" before "empowered" in Subsection (8); and substituted "to adopt rules" for "to promulgate, adopt and employ rules and regulations" in Subsection (8).

The 1988 amendment, effective April 25, 1988, substituted "executive director of the Department of Corrections or his designee" for "warden" in Subsections (1), (2), and (4); and wrote Subsection (2)(a), which read "the prosecuting attorney of the county in which the defendant was convicted or a deputy prosecuting attorney designated by the prosecuting attor-

ney"; added Subsection (2)(b); redesignated former Subsections (2)(b) and (2)(c) as present Subsections (2)(c) and (2)(d); rewrote Subsection (2)(c), which read "the attorney general or a deputy attorney general designated by the attorney general"; rewrote subsection (5), which read "No photographic or recording equipment shall be permitted at the execution site until the execution is completed, the body is removed, and the site has been restored to an orderly condition; provided, however, that the physical arrangements for the execution shall not be disturbed. Any person who violates this subsection is guilty of a class B misdemeanor"; rewrote Subsection (7), which read "No other persons, except the necessary staff designated by the warden, shall be permitted to attend the execution, nor shall any person under the age of 18 attend"; and made minor stylistic changes.

77-19-12. Return upon death warrant.

After the execution, the executive director of the Department of Corrections or his designee shall make a return upon the death warrant, showing the time, place, and manner in which it was executed.

History: C. 1953, 77-19-12, enacted by L. 1980, ch. 15, § 2; 1988, ch. 190, § 7.

Compiler's Notes. — The 1988 amendment, effective April 25, 1988, substituted "executive director of the Department of Corrections or his designee" for "warden" and made a minor stylistic change.

77-19-13. Incompetency or pregnancy of person sentenced to death — Procedures.

(1) If, after judgment of death, there is good reason to believe the defendant is incompetent to proceed under this chapter, or is pregnant, the executive director of the Department of Corrections or his designee shall immediately give written notice to the court in which the judgment of death was rendered, to the prosecuting attorney, and counsel for defendant. The judgment shall be stayed pending further order of the court.

(2) (a) On receipt of the notice, the mental condition of the defendant shall be examined under the provisions of Chapter 15, Title 77.

(b) If the defendant is found incompetent, the court shall immediately transmit a certificate of the findings to the Board of Pardons and enter an order for commitment under Chapter 15, Title 77. If the defendant is found competent, the judge shall immediately transmit a certificate of the findings to the Board of Pardons, and shall draw and have delivered another warrant under Section 77-19-6, together with a copy of the certificate of the findings. The warrant shall state an appointed day on which the judgment is to be executed, which may not be fewer than 30 nor more than 60 days from the date of the drawing of the warrant, at an hour determined by the Department of Corrections.

(3) (a) If the court finds the defendant is pregnant, it shall immediately transmit a certificate of the finding to the Board of Pardons and to the executive director of the Department of Corrections or his designee, and the court shall issue an order staying the execution of the judgment of death during the pregnancy.

(b) When the court determines the defendant is no longer pregnant, it shall immediately transmit a certificate of the finding to the Board of Pardons and draw and have delivered another warrant under Section 77-19-6, with a copy of the certificate of the finding. The warrant shall state an appointed day on which the judgment is to be executed, which

may not be fewer than 30 nor more than 60 days from the date of the drawing of the warrant.

History: C. 1953, 77-19-13, enacted by L. 1980, ch. 15, § 2; 1988, ch. 190, § 8.

Compiler's Notes. — The 1988 amendment, effective April 25, 1988, substituted "under this chapter" for "as defined in this title" in the first sentence of Subsection (1); substituted "executive director of the Department of Corrections or his designee" for "warden" in the first sentence of Subsection (1) and in Subsection (3)(a); inserted the subsection designations (a) and (b) in Subsection (2); substituted "Title 77" for "of this title" at the end of Subsection (2)(a) and the end of the first sentence of Subsection (2)(b); added ", at an hour determined by the Department of Corrections" at the end of Subsection (2)(b); inserted the subsection designations (a) and (b) in Subsection (3); and made minor stylistic changes.

CHAPTER 20
BAIL

77-20-1. Right to bail — Cases requiring hearing.

(1) A person charged with or arrested for a public offense shall be admitted to bail as a matter of right, except where the proof is evident or the presumption of guilt is strong that the accused committed a:

(a) capital offense;

(b) felony while he was free on bail awaiting trial on a previous felony; or

(c) felony while he was on probation or parole for a felony.

(2) Under Subsection (1), the accused may be admitted to bail only by a circuit or district court judge, or upon the circuit or district court's refusal and upon good cause shown, by a judge of the Court of Appeals, or a justice of the Supreme Court, after hearing and finding that the interests of justice do not require detention without bail.

History: C. 1953, 77-20-1, enacted by L. 1980, ch. 15, § 2; 1988, ch. 160, § 1.

Compiler's Notes. — The 1988 amendment, effective April 25, 1988, inserted the subsection designation (1) at the beginning of the section; redesignated former Subsections (1) to (3) as present Subsections (1)(a) to (1)(c); inserted subsection designation (2); substituted "Under Subsection (1)" for "In these cases" and "circuit or district court judge" for "magistrate" in Subsection (2); inserted "a judge of the Court of Appeals, or" in Subsection (2); and made minor stylistic changes.

Cross-References. — Rules of Evidence inapplicable to bail proceedings, Rules of Evidence, Rule 1101.

Cited in State v. Alvillar, 748 P.2d 207 (Utah Ct. App. 1988).

Vermont

Subchapter 3. Execution of Death Sentence

§ 7101. Sentence and warrant

In pronouncing sentence of death upon a person who is convicted of a capital crime, the court shall appoint a week within which the sentence shall be executed. At the time of such sentence, the court shall order a warrant to be issued by the clerk, under the seal of the court for the county in which such sentence is passed, to be directed to the commissioner of corrections, stating the conviction and sentence and commanding him to cause execution to be done in accordance with the provisions of such sentence, upon a day within the week so appointed. At the same time, the clerk shall transmit to the sheriff of the county in which such sentence is passed a mittimus directing him to deliver the body of such person to the commissioner of corrections and deliver to him a true and attested copy of such mittimus, the original of which shall be returned by the sheriff to the court from which issued. Unless a reprieve is granted or the inmate is pardoned, the sentence of death shall be executed by the commissioner of corrections, or by a person acting under his direction, within the week appointed by the court. If a reprieve is granted, the sentence of death shall be executed within the week beginning on the day next after the day on which the term of respite expires, and such sentence shall be executed on such day within such week as the commissioner elects. Previous announcement thereof shall not be made, except to such persons as are to be present.—Amended 1971, No. 199 (Adj. Sess.), § 9, eff. July 1, 1972.

HISTORY

Source. V.S. 1947, § 2513. 1941, No. 36, § 1. P.L. § 2470. 1933, No. 157, § 2292. 1927, No. 131, § 2. G.L. § 2641. 1915, No. 1, § 99. 1912, No. 97, § 1. P.S. § 2366. V.S. § 2004. R.L. § 1731. 1878, No. 22, § 1. 1872, No. 26. 1864, No. 2, §§ 2, 3. 1864, No. 23, § 2. 1864, No. 24, § 1. G.S. 120, §§ 8, 9. 1844, No. 27, §§ 2, 3. 1842, No. 5, § 3.

Amendments—1971 (Adj. Sess.). Substituted "commissioner of corrections" and "commissioner" for "warden of the state prison" and "warden" and "inmate" for "convict".

ANNOTATIONS

1. Reprieve. A "reprieve" as referred to in this section is intended to be, and contemplates, an executive act—not a staying of execution by judicial action. 1942 Op. Atty. Gen. 161.

§ 7102

§ 7102. Pardon

If such inmate is pardoned by the governor, the governor shall forthwith issue his warrant to the commissioner of corrections

superseding the original warrant provided for in section 7101 of this title.—Amended 1971, No. 199 (Adj. Sess.), § 10, eff. July 1, 1972.

HISTORY

Source. V.S. 1947, § 2514. P.L. § 2471. 1933, No. 157, § 2293. 1927, No. 131, § 2. G.L. § 2642. 1915, No. 1, § 100. 1912, No. 97, § 2. P.S. § 2367. V.S. § 2005. R.L. § 1732. 1878, No. 22, § 2.

Amendments—1971 (Adj. Sess.). Substituted "commissioner of corrections" for "warden of the state prison" and "inmate" for "convict".

§ 7103. Place of execution

The sentence of death shall be carried into effect at a place designated by the commissioner of corrections.—Amended 1971, No. 199 (Adj. Sess.), § 11, eff. July 1, 1972.

HISTORY

Source. V.S. 1947, § 2515. P.L. § 2472. G.L. § 2643. 1912, No. 97, § 3. P.S. § 2368. V.S. § 2006. R.L. § 1733. 1878, No. 22, § 3. 1872, No. 26. 1864, No. 23, § 2. 1864, No. 24, § 1. G.S. 120, § 9. 1844, No. 27, § 3.

Amendments—1971 (Adj. Sess.). Provided for designation of place of execution by commissioner of corrections.

§ 7104. Manner of confinement

When the sentence of death is imposed, the court shall sentence, at the same time, the respondent to the custody of the commissioner of corrections until the time of execution.—Amended 1971, No. 199 (Adj. Sess.), § 12, eff. July 1, 1972.

HISTORY

Source. V.S. 1947, § 2516. P.L. § 2473. G.L. § 2544. 1912, No. 97, § 4. P.S. § 2369. V.S. § 2007. R.L. § 1734. 1880, No. 9. 1878, No. 22, § 4. 1874, No. 62. 1864, No. 23, § 1. G.S. 120, § 7. 1844, No. 27, § 1. 1842, No. 5, § 1.

Amendments—1971 (Adj. Sess.). Provided for sentencing to the custody of the commissioner of corrections.

ANNOTATIONS

1. Constitutionality. Solitary confinement after the original day fixed for execution has passed is not a denial of due process under the 14th amendment to federal constitution. Rogers v. Peck (1905) 199 U.S. 425, 26 S. Ct. 87, 50 L. Ed. 256.

§ 7105. Persons present at execution

There shall be present at the execution of the sentence of death the commissioner of corrections or in case of his disability, the keeper, the person who is to perform the execution and his assistant, such persons as the commissioner shall designate, and two physicians approved by the commissioner. The physicians

present shall be the legal witnesses of the execution. There may also be present the sheriff of the county in which the condemned was convicted or one of his deputies approved by him, such clergyman as the condemned may desire, and not more than three other persons to be selected by the commissioner. There shall be paid to the person actually performing the execution and to his assistant such sums for services and expenses as the commissioner shall approve.—Amended 1971, No. 199 (Adj. Sess.), § 13, eff. July 1, 1972.

HISTORY

Source. V.S. 1947, § 2517. P.L. § 2474. 1933, No. 157, § 2296. 1927, No. 131, § 2. G.L. § 2645. 1917, No. 115, § 2. 1912, No. 97, § 5. P.S. § 2371. V.S. § 2009. R.L. § 1736. G.S. 120, § 10. 1844, No. 27, § 4.

Amendments—1971 (Adj. Sess.). Amended generally to provide for designation of persons by commissioner.

§ 7106. Manner of execution

The punishment of death shall be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current shall be continued until such convict is dead.

HISTORY

Source. V.S. 1947, § 2518. P.L. § 2475. G.L. § 2646. 1912, No. 97, § 6. P.S. § 2372. V.S. § 2010. R.L. § 1737. G.S. 120, § 6. R.S. 102, § 6. 1818, p. 20. R. 1797, p. 174, § 39.

§ 7107. Returns of commissioner

When the commissioner of corrections inflicts the punishment of death upon an inmate, in obedience to a warrant as aforesaid, he shall forthwith return a copy thereof with his doings thereon to the office of the secretary of state, and shall forthwith return the original warrant with his doings thereon to the court from which it was issued. The clerk thereof shall subjoin to the record of the sentence a brief abstract of the commissioner's return upon such warrant.—Amended 1971, No. 199 (Adj. Sess.), § 14, eff. July 1, 1972.

HISTORY

Source. V.S. 1947, § 2519. P.L. § 2476. 1933, No. 157, § 2298. 1927, No. 131, § 2. G.L. § 2647. 1912, No. 97, § 7. P.S. § 2373. V.S. § 2011. R.L. § 1738. G.S. 120, § 11. 1844, No. 27, § 5.

Amendments—1971 (Adj. Sess.). Substituted reference to "commissioner" for "warden" and "an inmate" for "a convict".

Virginia

§ 53.1-229. Powers vested in Governor. — In accordance with the provisions of Section 12 of Article V of the Constitution of Virginia, the power to commute capital punishment and to grant pardons or reprieves is vested in the Governor. (Code 1950, § 53-228; 1970, c. 648; 1982, c. 636.)

Cross reference. — For constitutional provision as to pardons and reprieves, see Va. Const., art. V, § 12.

The effect of a commutation was to substitute a sentence of life imprisonment for the death penalty, a substitution the Governor was empowered to make without the defendant's consent. Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977).

Substituted penalty is only sentence considered on appeal. — After commutation of a sentence of death, the penalty substituted therefor is the only sentence to be considered on appeal. In such circumstances, the defendant's status is to be reviewed as though the substituted sentence, and not the allegedly invalid death penalty, had been imposed originally. Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977).

Question of constitutionality of death penalty rendered moot by commutation. — Where a life term is substituted validly by commutation for a viable sentence of death, the conclusion is inescapable that the question of the constitutionality of the death penalty has been rendered moot. Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977).

§ 53.1-230. Commutation of capital punishment. — In any case in which the Governor shall exercise the power conferred on him to commute capital punishment, he may issue his order to the Director, who shall receive and confine the person whose punishment is commuted according to such order. To carry into effect any commutation of punishment, the Governor may issue his warrant directed to any proper officer, and the same shall be obeyed and executed. (Code 1950, § 53-228.1; 1956, c. 344; 1981, c. 497; 1982, c. 636.)

§ 53.1-231. Investigation of cases for executive clemency by Parole Board. — The Virginia Parole Board shall, at the request of the Governor, investigate and report to the Governor on cases in which executive clemency is sought. In any other case in which it believes action on the part of the Governor is proper or in the best interest of the Commonwealth, the Board may investigate and report to the Governor with its recommendations. (Code 1950, § 53-229; 1970, c. 648; 1982, c. 636.)

Supplement

CHAPTER 13.

DEATH SENTENCES.

Sec.
53.1-232. Procedures for execution of death sentence; subsequent process.
53.1-233. Death chamber; who to execute death sentence.
53.1-234. Transfer of prisoner; how death sentence executed; who to be present.
53.1-235. Certificate of execution of death sentence.
53.1-236. Disposition of remains.

§ 53.1-232. Procedures for execution of death sentence; subsequent process. — A. Sentence of death shall not be executed sooner than thirty days after the sentence is pronounced. The court shall, in imposing such sentence, fix a day when the execution shall occur.

B. Whenever the day fixed for the execution of a sentence of death shall have passed without the execution of the sentence and it becomes necessary to fix a new date therefor, the circuit court which pronounced the sentence shall fix another day for the execution. The person to be executed need not be present but shall be represented by an attorney when such other day is fixed.

A copy of the order fixing the new date of execution shall be promptly furnished by the clerk of the court making the order to the Director. The Director shall cause a copy of the order to be delivered to the person to be executed, and, if he is unable to read it, cause it to be explained to him at least ten days before the date fixed for such execution, and make return thereof to the clerk of the court which issued such order.

C. When the day fixed for the execution of a sentence of death has passed without the execution of the sentence by reason of a reprieve granted by the Governor, it shall not be necessary for the court to resentence the prisoner. The sentence of death shall be executed on the day to which the prisoner has been reprieved.

D. Should the condemned prisoner be granted a reprieve by the Governor, or obtain a writ of error from the Supreme Court of Virginia, or should the execution of the sentence be stayed by any other competent judicial proceeding, notice of such reprieve, writ of error or stay of execution shall be served upon (i) the Director, (ii) the warden or superintendent having actual custody of the prisoner, and (iii) the prisoner himself; the Director shall yield obedience to the same. In any subsequent proceeding, the mandate of the court having regard to the condemned prisoner shall be served upon the Director, the warden or superintendent having actual custody of the prisoner and upon the prisoner. Should the condemned prisoner be resentenced to death by the court, the proceedings shall be as hereinabove provided under the original sentence. Should a new trial be granted, such condemned prisoner shall be conveyed back to the place of trial by such officer or officers as the Director may direct. (Code 1950, §§ 19-274, 19.1-301, 53-316; 1960, c. 366; 1972, c. 145; 1978, c. 667; 1982, c. 636.)

Law Review. — For article, "Psychiatry and the Death Penalty: Emerging Problems in Virginia," see 66 Va. L. Rev. 167 (1980).

Applied in Giarratano v. Murray, 668 F. Supp. 511 (E.D. Va. 1986).

§ 53.1-233. Death chamber; who to execute death sentence. — The Director is hereby authorized and directed to provide and maintain a permanent death chamber within the confines of the state correctional facility in Richmond known as the Penitentiary. The death chamber shall have all the necessary appliances for the proper execution of prisoners by electrocution. In the death chamber shall be executed all prisoners upon whom the death penalty has been imposed. Each execution shall be conducted by the Director or one or more assistants designated by him. (Code 1950, §§ 19-275, 19-302, 53-317; 1960, c. 366; 1972, c. 145; 1978, c. 667; 1982, c. 636.)

Death by electrocution is not a constitutionally impermissible mode of punishment. Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

§ 53.1-234. Transfer of prisoner; how death sentence executed; who to be present. — The clerk of the circuit court in which is pronounced the sentence of death against any person shall, after such judgment becomes final in the circuit court, deliver a certified copy thereof to the Director. Such person so sentenced to death shall be confined prior to the execution of the sentence in a state correctional facility designated by the Director. Not less than fifteen days before the time fixed in the judgment of the court for the execution of the sentence, the Director shall cause to be conveyed to the Penitentiary in Richmond the condemned prisoner.

The Director, or the assistants appointed by him, shall at the time named in the sentence cause the prisoner under sentence of death to be electrocuted until he is dead unless a suspension of execution be ordered. At the execution

there shall be present the Director or an assistant, a physician employed by the Department or his assistant, such other employees of the Department as may be required by the Director and, in addition thereto, at least six citizens who shall not be employees of the Department. In addition, the counsel for the prisoner and a clergyman may be present. (Code 1950, §§ 19-276, 19.1-303, 53-318; 1960, c. 366; 1972, c. 145; 1978, c. 667; 1982, c. 636.)

Law Review. — For note on right of access to executions, see 69 Va. L. Rev. 373 (1983).

Death by electrocution is not a constitutionally impermissible mode of punishment. Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

Death by electrocution does not constitute cruel and unusual punishment. Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371, cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984).

§ 53.1-235. Certificate of execution of death sentence. — After execution of the death sentence as provided in this chapter, the physician in attendance shall perform an examination to determine that death has occurred. The Director shall certify the fact of the execution, appending the physician's death certificate thereto, to the clerk of the court by which such sentence was pronounced. The clerk shall file the certificate with the papers of the case and shall enter the same upon the records of the case. (Code 1950, § 53-319.1; 1978, c. 451; 1982, c. 636.)

§ 53.1-236. Disposition of remains. — Upon application of the relatives of the person executed, the remains after execution shall be returned to their address and at their cost. If no such application is made within three days of the date of execution, the provisions of § 32.1-298 shall apply. (Code 1950, §§ 19-281, 19.1-307, 53-323; 1960, c. 366; 1972, c. 145; 1978, c. 614; 1982, c. 636.)

CHAPTER 14.

CORRECTIONAL PROGRAMS AND FACILITIES FOR JUVENILES.

Article 1.

Care of Children Committed to Department.

§ 53.1-231. Investigation of cases for executive clemency by Parole Board. — The Virginia Parole Board shall, at the request of the Governor, investigate and report to the Governor on cases in which executive clemency is sought. In any other case in which it believes action on the part of the Governor is proper or in the best interest of the Commonwealth, the Board may investigate and report to the Governor with its recommendations. (Code 1950, § 53-229; 1970, c. 648; 1982, c. 636.)

CHAPTER 13.

DEATH SENTENCES.

§ 53.1-232. Procedures for execution of death sentence; subsequent process. — A. Sentence of death shall not be executed sooner than thirty days after the sentence is pronounced. The court shall, in imposing such sentence, fix a day when the execution shall occur.

B. Whenever the day fixed for the execution of a sentence of death shall have passed without the execution of the sentence and it becomes necessary to fix a new date therefor, the circuit court which pronounced the sentence shall fix another day for the execution. The person to be executed need not be present but shall be represented by an attorney when such other day is fixed. A copy of the order fixing the new date of execution shall be promptly furnished by the clerk of the court making the order to the Director. The Director shall cause a copy of the order to be delivered to the person to be executed, and, if he is unable to read it, cause it to be explained to him at least ten days before the date fixed for such execution, and make return thereof to the clerk of the court which issued such order.

C. When the day fixed for the execution of a sentence of death has passed without the execution of the sentence by reason of a reprieve granted by the Governor, it shall not be necessary for the court to resentence the prisoner. The sentence of death shall be executed on the day to which the prisoner has been reprieved.

D. Should the condemned prisoner be granted a reprieve by the Governor, or obtain a writ of error from the Supreme Court of Virginia, or should the execution of the sentence be stayed by any other competent judicial proceeding, notice of such reprieve, writ of error or stay of execution shall be served upon (i) the Director, (ii) the warden or superintendent having actual custody of the prisoner, and (iii) the prisoner himself; the Director shall yield obedience to the same. In any subsequent proceeding, the mandate of the court having regard to the condemned prisoner shall be served upon the Director, the warden or superintendent having actual custody of the prisoner and upon the prisoner. Should the condemned prisoner be resentenced to death by the court, the proceedings shall be as hereinabove provided under the original sentence. Should a new trial be granted, such condemned prisoner shall be conveyed back to the place of trial by such officer or officers as the Director may direct. (Code 1950, §§ 19-274, 19.1-301, 53-316; 1960, c. 366; 1972, c. 145; 1978, c. 667; 1982, c. 636.)

which such prisoner is interested with others, infants or adults, may be sold, exchanged for other real estate, or encumbered for the purpose of borrowing money to be used to erect buildings or other improvements on the same, in the same manner as the real estate of an incompetent person in the hands of a committee. (Code 1950, § 53-312; 1982, c. 636.)

The strong similitude between remedies for and against the property of lunatics and convicts is emphasized by this section. Merchant's Adm'r v. Shry, 116 Va. 437, 82 S.E. 106 (1914).

§ 53.1-228. Disposal of unclaimed personal property of prisoner. — If any prisoner in a state, local or community correctional facility, upon being released or having escaped, leaves personal property valued at less than $100 in the custody of such facility for 6 months after his release or escape without making a claim therefor, the Director or the sheriff, as the case may be, may sell such property at public sale or may otherwise dispose of the property. The proceeds of such sale shall escheat to the Commonwealth and shall be paid into the state treasury and credited to the Literary Fund. (Code 1950, § 53-312.1; 1956, c. 344; 1981, c. 497; 1982, c. 636.)

CHAPTER 12.

EXECUTIVE CLEMENCY.

§ 53.1-229. Powers vested in Governor. — In accordance with the provisions of Section 12 of Article V of the Constitution of Virginia, the power to commute capital punishment and to grant pardons or reprieves is vested in the Governor. (Code 1950, § 53-228; 1970, c. 648; 1982, c. 636.)

Cross reference. — For constitutional provision as to pardons and reprieves, see Va. Const., art. V, § 12.

The effect of a commutation was to substitute a sentence of life imprisonment for the death penalty, a substitution the Governor was empowered to make without the defendant's consent. Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977).

Substituted penalty is only sentence considered on appeal. — After commutation of a sentence of death, the penalty substituted therefor is the only sentence to be considered on appeal. In such circumstances, the defendant's status is to be reviewed as though the substituted sentence, and not the allegedly invalid death penalty, had been imposed originally. Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977).

Question of constitutionality of death penalty rendered moot by commutation. — Where a life term is substituted validly on commutation for a viable sentence of death, the conclusion is inescapable that the question of the constitutionality of the death penalty has been rendered moot. Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977).

§ 53.1-230. Commutation of capital punishment. — In any case in which the Governor shall exercise the power conferred on him to commute capital punishment, he may issue his order to the Director, who shall receive and confine the person whose punishment is commuted according to such order. To carry into effect any commutation of punishment, the Governor may issue his warrant directed to any proper officer, and the same shall be obeyed and executed. (Code 1950, § 53-228.1; 1956, c. 344; 1981, c. 497; 1982, c. 636.)

Washington Code

CHAPTER 10.70

COMMITMENTS AND EXECUTIONS

Section

10.70.010 Commitment until fine and costs are paid

When the defendant is adjudged to pay a fine and costs, the court shall order him to be committed to the custody of the sheriff until the fine and costs are paid or secured as provided by law.

Enacted by Code 1881, § 1119.

Historical Note

Source:

Laws 1854, p. 123, § 141.
Laws 1873, p. 242, § 277.
RRS § 2200.

Cross References

Collection and disposition of fines and costs, see § 10.82.010 et seq.
Commitment for failure to pay fine and costs, execution against defendant's property, see § 10.82.030.
Judgments a lien on realty, see § 10.64.080.
Procedure to secure discharge from confinement as criminally insane, see § 10.77.110.
Stay of execution for sixty days on recognizance, see §§ 10.82.020, 10.82.025.

Library References

Fines ⇐10 to 13. C.J.S. Fines §§ 11, 12.

Notes of Decisions

1. In general

Where trial court did not direct additional imprisonment for failure to pay fine, part of commitment inserted by clerk calling for additional imprisonment on default was void. Boyd v. Archer (C.A.1930) 42 F.2d 43.

Provisions as to manner of enforcing fine are no part of punishment, and may be written into formal judgment when accused is not present without infringing his rights. In re St. Clair (1926) 140 Wash. 675, 250 P. 55.

Under RRS § 2200 (now, this section) court has power on sentencing defendant to term of imprisonment and to pay fine, to further provide that he could be committed to jail until fine is satisfied according to law. State v. Tullock (1922) 118 Wash. 496, 203 P. 932.

10.70.020 Mittimus upon sentence to imprisonment

When any person shall be sentenced to be imprisoned in the penitentiary or county jail, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, or his deputy, a transcript from the minutes of the court of such conviction and sentence, duly certified by such clerk, which shall be sufficient authority for such sheriff to execute the sentence, who shall execute it accordingly.

Enacted by Code 1881, § 1126.

Historical Note

Source:

Laws 1854, p. 124, § 148.
Laws 1873, p. 243, § 284.
RRS § 2207.

Cross References

Form of sentence to penitentiary, see § 10.64.060.

Library References

Criminal Law ⇐999(1 to 3). C.J.S. Criminal Law §§ 1605 to 1613.

Notes of Decisions

1. In general

Where certified copy of order directing accused's imprisonment in penitentiary, and record of conviction, was delivered to warden, accused was properly retained in custody, though no warrant or mittimus was issued. In re Thurston (C.A. 1916) 233 F. 847.

This is only statute that touches what might be termed "warrant of commitment"; it is clear on its face, and there is no reason why warden should have in his possession such warrant, which is merely sheriff's authority to transfer prisoner from county of sentence to peniten-

tiary. Whipple v. Smith (1949) 33 Wash.2d 615, 206 P.2d 510.

Where prisoner by virtue of mittimus from clerk, is under supervision of sheriff, court no longer has authority over him. In re Cavitt (1932) 170 Wash. 84, 15 P.2d 276.

One imprisoned in county jail after final judgment of conviction and sentence authorizing his detention is lawfully in custody and may be guilty of attempt to escape jail, although sheriff did not have in his possession any commitment or written evidence of authority to detain him, this section merely providing that such commitment shall be sufficient authority to sheriff to execute sentence, not that it is essential. State v. Hatfield (1911) 66 Wash. 9, 118 P. 893.

10.70.030 Repealed by Laws 1955, ch. 42, p. 332

Historical Note

The repealed section, enacted by Laws 1903, ch. 35, p. 39 and derived from RRS § 1746, related to dates of commencement of prison sentences.

See, now, §§ 9.95.060, 9.95.062.

10.70.040 Death sentence—Sheriff to hold prisoner

Pending the issuance of the death warrant the sheriff shall hold the condemned person in safe custody.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 8.

Historical Note

Source:

RRS § 2219.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐999(2).

C.J.S. Criminal Law § 1613.

10.70.050 Death warrant—Form

When judgment of death is rendered following conviction and no appeal is taken, or the judgment has been affirmed on appeal, a death warrant shall be issued by the clerk of the trial court, which said warrant shall be signed by a judge of said court and attested by the clerk thereof under the seal of the court. Said warrant shall be directed to the superintendent of the state penitentiary of the state of Washington, and shall state the conviction of the person named therein and the judgment of the court, and appoint a day in which the judgment shall be executed by

the superintendent of the state penitentiary, which shall not be less than thirty nor more than ninety days from the date of final judgment.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 1.

Historical Note

Source:

Laws 1854, p. 125, § 152.
Laws 1860, p. 152, § 291.
Laws 1873, p. 244, § 288.
Code 1881, § 1130.
RRS § 2210.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐999(2).

C.J.S. Criminal Law § 1613.

Notes of Decisions

1. In general

Where appeal from death sentence is taken, no death warrant can issue unless and until judgment is affirmed. State ex rel. Bird v. Superior Court (1948) 30 Wash.2d 110, 190 P.2d 762.

Better practice is to withhold signing of death warrant until appeal period has expired. Id.

Order of lower court fixing day of execution of one convicted of murder is not reviewable on appeal, and hence appeal from such order affords no ground for application for stay of execution of death sentence. State v. Seaton (1902) 27 Wash. 120, 67 P. 572.

Since divisions of a day are not allowed to make priorities in statutes, a repealing act, to be of immediate force, takes effect from the beginning of the day on which it was enacted, and hence a death warrant issued on the very day an act amending the statute under which it was issued was to take effect, but which amended act was repealed also on the same day, was valid. In re Boyce (1901) 25 Wash. 612, 66 P. 54.

Superior court was compelled to issue death warrant in accordance with existing law, although before such death warrant could have been carried out, existing law would have been superseded by later enactment which would go into effect in period intervening between application for death warrant and date fixed for execution. State ex rel. Campbell v. Superior Court (1901) 25 Wash. 271, 65 P. 183.

Though time of execution of death sentence should be fixed in warrant, and not in judgment, irregularity of death sentence fixing specific day for its execution does not affect validity of judgment. Timmerman v. Washington Territory (1888) 3 Wash.Terr. 445, 17 P. 624.

10.70.060 Death sentence—Mittimus to sheriff

At the time of the issuance of said death warrant an order shall be issued by the clerk of the court, which shall be signed by the judge and attested by the clerk under the seal of the

court. Said order shall direct the sheriff to hold the person condemned to death, who shall be named therein, in safe custody and forthwith deliver said person, together with the death warrant, into the hands of the superintendent of the state penitentiary.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 2.

Historical Note

Source:
Laws 1873, p. 244, § 288.
RRS § 2213.

Cross References

Issuance of death warrant, see § 10.70.050.
Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐999(2). C.J.S. Criminal Law § 1613.

10.70.070 Mittimus on death sentence—Return by sheriff

The sheriff to whom the above named order is issued and delivered shall immediately execute such order and return the same into court within twenty days after he has delivered the death warrant and the person named therein into the hands of the superintendent of the state penitentiary, with his return thereon showing all proceedings had by him thereunder.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 6.

Historical Note

Source:
RRS § 2217.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐999(2). C.J.S. Criminal Law § 1613.

10.70.080 Death penalty—Custody of prisoner and execution

Upon delivery to him of said death warrant and of the person therein named, the superintendent of the state penitentiary shall take the person condemned to be executed and keep said person

in safe custody within said state penitentiary until the day appointed in the warrant for the execution, upon which appointed day he shall carry out the mandate contained in said warrant by executing said condemned person within the walls of the state penitentiary in the manner provided by law. And between the date of receiving such condemned person and the date fixed in such warrant for his execution, such superintendent shall not suffer or permit any person to visit, converse or communicate with such condemned person excepting the attendants in the state penitentiary, legal, spiritual and medical advisers, and the members of the immediate family of the condemned person, which visits and communications shall be under and subject to the rules and regulations of the state penitentiary.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 3.

Historical Note

Source:

RRS § 2214.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Law Review Commentaries

Capital punishment, 35 Wash.L. Rev. 335 (1960).

Library References

Criminal Law ⇨1219. C.J.S. Criminal Law §§ 2001 et seq.

10.70.090 Death penalty—How executed

The punishment of death prescribed by law must be inflicted by hanging by the neck.

Enacted by Code 1881, § 1131.

Historical Note

Source:

Laws 1854, p. 125, § 153.
Laws 1873, p. 244, § 289.
RRS § 2212.

Law Review Commentaries

Capital punishment. 35 Wash.L. Rev. 335 (1960).

Library References

Criminal Law ⇐1219. C.J.S. Criminal Law §§ 2001 et seq.

10.70.100 Death warrant—Record by superintendent of prison

The superintendent of the state penitentiary shall keep in his office as part of the public records a book in which shall be entered a copy of the death warrant and his return made thereon, together with a complete statement of his acts in pursuance of said warrant.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 4.

Historical Note

Source:
RRS § 2215.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐999(2). C.J.S. Criminal Law § 1613.

10.70.110 Death warrant—Return to clerk

Within twenty days after said execution the superintendent of the state penitentiary shall return said death warrant to the clerk of the court from which same was issued with his return thereon showing all proceedings had by him thereunder.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 5.

Historical Note

Source:
RRS § 2216.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

10.70.120 Proceedings on failure to execute on day named

Whenever the time appointed for the execution of a prisoner shall have passed, from any cause, the court by whom the time

was fixed, or the judge or judges thereof, shall cause the prisoner to be brought immediately before the said court, judge or judges, and proceed to appoint a day for the carrying into effect of the sentence of death.

Enacted by Code 1881, § 1133.

Historical Note

Source:

Laws 1854, p. 125, § 155.
Laws 1873, p. 245, § 291.
RRS § 2222.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐1219.

C.J.S. Criminal Law §§ 2001 et seq.

Notes of Decisions

1. In general

Appointment of another day for execution of death penalty, in accordance with this statute, when day first appointed has passed during pendency of appeal, is not in denial of due process of law or in violation of Federal Constitution. Craemer v. Washington (1897) 18 S.Ct. 1, 168 U.S. 124, 42 L.Ed. 407.

Recall of death warrant was unnecessary because it was rendered inoperative when date fixed by death warrant for execution had passed. State ex rel. Bird v. Superior Court (1948) 30 Wash.2d 110, 190 P.2d 762.

Where time fixed for carrying into effect execution of death sentence has passed, another order to that effect must be obtained from court pronouncing sentence, before it can be carried into execution. Grossi v. Long (1925) 136 Wash. 133, 238 P. 983.

Ballinger's Ann.Codes & St. §§ 6993 to 6996, prescribed the proceedings to be taken when the judgment of death was rendered, and included the provision that "the judge shall appoint a day for the execution which shall not be less than 30 nor more than 90 days from the time of judgment, and the sheriff or officer to whom a death warrant is delivered shall return the same within 20 days after the time fixed for execution." Act March 8, 1901, relating to the death warrant, the contents thereof, the return, and fixing the place of execution, amended §§ 6995, supra. Mandamus would lie to compel the judge of the superior court to issue a death warrant against a defendant convicted before the amendment though the day fixed therein would necessarily be after the amendment took effect. State ex rel. Campbell v. Superior Court of Pierce County (1901) 25 Wash. 271, 65 P. 183.

Reprieve for time certain, new execution date, and issuance of new death warrant. Op.Atty.Gen. 1945-1946, p. 428.

Necessity for fixing date of execution of death sentence after expiration of reprieve granted by governor. Op.Atty.Gen. 1933-34, p. 296.

10.70.130 Returns on death warrant and mittimus—Filing by clerk

The clerk of the court from which the death warrant and the order to the sheriff were issued shall, upon receipt of the returns from the superintendent of the state penitentiary and from the sheriff hereinbefore directed, file same with the records in the case and subjoin to the record of conviction and sentence a brief abstract of such returns.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 7.

Historical Note

Source:

Laws 1854, p. 125, § 154.
Code 1881, § 1132.
RRS § 2218.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐999(2), 1219.

C.J.S. Criminal Law §§ 1613, 2001 et seq.

10.70.140 Aliens committed—Notice to immigration authority

Whenever any person shall be committed to the state penitentiary, the state reformatory, the county jail or any other state or county institution which is supported wholly or in part by public funds, it shall be the duty of the warden, superintendent, sheriff or other officer in charge of such state or county institution to at once inquire into the nationality of such person, and if it shall appear that such person is an alien, to immediately notify the United States immigration officer in charge of the district in which such penitentiary, reformatory, jail or other institution is located, of the date of and the reasons for such alien commitment, the length of time for which committed, the country of which he is a citizen, and the date on which and the port at which he last entered the United States.

Enacted by Laws 1925, Ex.Sess., ch. 169, § 1.

Historical Note

Source:

RRS § 2206–1.

Library References

Aliens ⇦17.
Criminal Law ⇦999(1).

C.J.S. Aliens §§ 14, 15.
C.J.S. Criminal Law § 1605 et seq.

Notes of Decisions

1. In general

Deportation of persons discharged from reformatory and penitentiary. Op.Atty.Gen. 1913–14, p. 443.

10.70.150 Aliens committed—Copies of clerk's records

Upon the official request of the United States immigration officer in charge of the territory or district in which is located any court committing any alien to any state or county institution which is supported wholly or in part by public funds, it shall be the duty of the clerk of such court to furnish without charge a certified copy of the complaint, information or indictment and the judgment and sentence and any other record pertaining to the case of the convicted alien.

Enacted by Laws 1925, Ex.Sess., ch. 169, § 2.

Historical Note

Source:
RRS § 2206–2.

Library References

Aliens ⇦17.
Criminal Law ⇦1000.

C.J.S. Aliens §§ 14, 15.
C.J.S. Criminal Law § 1608 et seq.

CHAPTER 10.94

DEATH PENALTY

Section

10.94.010 Notice of intention—Filing required, when—Service—Contents—Failure of as bar to request

When a defendant is charged with the crime of murder in the first degree as defined in RCW 9A.32.030(1)(a), the prosecuting attorney or the prosecuting attorney's designee shall file a written notice of intention to request a proceeding to determine whether or not the death penalty should be imposed when the prosecution has reason to believe that one or more aggravating circumstances, as set forth in RCW 9A.32.045 as now or hereafter amended, was present and the prosecution intends to prove the presence of such circumstance or circumstances in a special sentencing proceeding under RCW 10.94.020.

The notice of intention to request the death penalty must be served on the defendant or the defendant's attorney and filed with the court within thirty days of the defendant's arraignment in superior court on the charge of murder in the first degree under RCW 9A.32.030(1)(a). The notice shall specify the aggravating circumstance or circumstances upon which the prosecuting attorney bases the request for the death penalty. The court may, within the thirty day period upon good cause being shown, extend the period for the service and filing of notice.

If the prosecution does not serve and file written notice of intent to request the death penalty within the specified time the prosecuting attorney may not request the death penalty.

Added by Laws 1977, Ex.Sess., ch. 206, § 1, eff. June 10, 1977.

Library References

Criminal Law ⇐984. C.J.S. Criminal Law § 1567.

10.94.020 Special sentencing proceeding—Procedure

(1) If notice of intention to request the death penalty has been served and filed by the prosecution in accordance with RCW 10.94.010, then a special sentencing proceeding shall be held in the event the defendant is found guilty of murder in the first degree under RCW 9A.32.030(1)(a).

(2) If the prosecution has filed a request for the death penalty in accordance with RCW 10.94.010, and the trial jury returns a verdict of murder in the first degree under RCW 9A.32.030(1)(a), then, at such time as the verdict is returned, the trial judge shall reconvene the same trial jury to determine in a separate special sentencing proceeding whether there are one or more aggravating circumstances and whether there are mitigating circumstances sufficient to merit leniency, as provided in RCW 9A.32.045 as now or hereafter amended, and to answer special questions pursuant to subsection (10) of this section. The special sentencing proceeding shall be held as soon as possible following the return of the jury verdict.

(3) At the commencement of the special sentencing proceeding the judge shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its findings as provided in RCW 9A.32.040 as now or hereafter amended.

(4) In the special sentencing proceeding, evidence may be presented relating to the presence of any aggravating or mitigating circumstances as enumerated in RCW 9A.32.045 as now or hereafter amended. Evidence of aggravating circumstances shall be limited to evidence relevant to those aggravating circumstances specified in the notice required by RCW 10.94.010.

(5) Any relevant evidence which the court deems to have probative value may be received regardless of its admissibility under usual rules of evidence: *Provided,* That the defendant is accorded a fair opportunity to rebut any hearsay statements: *Provided further,* That evidence secured in violation of the Constitutions of the United States or the state of Washington shall not be admissible.

(6) Upon the conclusion of the evidence, the judge shall give the jury appropriate instructions and the prosecution and the defendant or defendant's counsel shall be permitted to present argument. The prosecution shall open and conclude the argument to the jury.

(7) The jury shall then retire to deliberate. Upon reaching a decision, the jury shall specify each aggravating circumstance that it unanimously determines to have been established beyond a reasonable doubt. In the event the jury finds no aggravating circumstances the defendant shall be sentenced pursuant to RCW 9A.32.040(3) as now or hereafter amended.

(8) If the jury finds there are one or more aggravating circumstances it must then decide whether it is also unanimously convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency. If the jury makes such a finding, it shall proceed to answer the special questions submitted pursuant to subsection (10) of this section.

(9) If the jury finds there are one or more aggravating circumstances but fails to be convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended.

(10) If the jury finds that there are one or more aggravating circumstances and is unanimously convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency, the jury shall answer the following questions:

(a) Did the evidence presented at trial establish the guilt of the defendant with clear certainty?

(b) Are you convinced beyond a reasonable doubt that there is a probability that the defendant would commit additional criminal acts of violence that would constitute a continuing threat to society?

The state shall have the burden of proving each question and the court shall instruct the jury that it may not answer either question in the affirmative unless it agrees unanimously.

If the jury answers both questions in the affirmative, the defendant shall be sentenced pursuant to RCW 9A.32.040(1) as now or hereafter amended.

If the jury answers either question in the negative the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended.

[Amended by Laws 1977, Ex.Sess., ch. 206, § 2, eff. June 10, 1977.]

Library References

Criminal Law ⇐984. C.J.S. Criminal Law § 1567.

10.94.030 Mandatory review of sentence by state supreme court—Procedures—Consolidation with appeal

(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 supreme court of Washington. The clerk of the trial court within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court of Washington 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 the defendant's 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 supreme court of Washington.

(2) The supreme court of Washington 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 evidence supports the jury's findings; and

(b) 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 resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the supreme court of Washington in its decision and the extracts prepared therefor shall be provided to the resentencing judge for the judge's consideration.

(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.

Added by Laws 1977, Ex.Sess., ch. 206, § 7, eff. June 10, 1977.

Library References

Criminal Law ⇨1026, 1068½ et seq. C.J.S. Criminal Law §§ 1668, 1701.

10.94.900 Severability—1977 ex.s. c 206

If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

Enacted by Laws 1977, Ex.Sess., ch. 206, § 10, eff. June 10, 1977.

Historical Note

Reviser's Note: This applies to the amendments to RCW 9A.32.040, 9A.32.045, 9A.32.046, and 9A.32.047 and to RCW 9.01.200, 10.94.010, 10.94.020, 10.94.030, and 10.94.900 as enacted by 1977 ex.s. c 206.

Wyoming Code

CHAPTER 2

Offenses Against the Person

Article 1. Homicide

Article 2. Kidnapping and Related Offenses

Article 3. Sexual Assault

Article 4. Robbery and Blackmail

Article 5. Assault and Battery

ARTICLE 1. HOMICIDE

Cross references. — As to aggravated assault and battery on pregnant woman, see § 6-2-502. As to civil action for wrongful death when the death shall have been caused under such circumstances as amounts in law to murder in the first or second degree or manslaughter, see § 1-38-101. For provision that felonious taking of life precludes inheritance or insurance benefits, see § 2-14-101. As to penalty if death results from willful destruction, etc., of railroad tracks or fixtures, see § 37-12-103.

Am. Jur. 2d, ALR and C.J.S. references. — Corporation's criminal liability for homicide, 45 ALR4th 1021.

§ 6-2-101. Murder in the first degree; penalty.

(a) Whoever purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate, any sexual assault, arson, robbery, burglary, escape, resisting arrest or kidnapping, or by administering poison or causing the same to be done, kills any human being is guilty of murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or life imprisonment according to law. (Laws 1982, ch. 75, § 3; 1983, ch. 171, § 1.)

I. General Consideration.
II. Purpose, Premeditation and Malice.
III. Felony Murder.

I. GENERAL CONSIDERATION.

Death penalty constitutional. — The death penalty, if administered in a humane fashion, is constitutional. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

Constitutionality of former statute imposing mandatory death penalty for murder when its commission involved certain aggravating circumstances. — See Kennedy v. State, 559 P.2d 1014 (Wyo. 1977).

Second-degree murder may be lesser included offense. — The elements of the lesser offense of murder in the second degree are identical to part of the elements of murder in the first degree; both contain the elements of the killing of a human being with malice and purpose. State v. Selig, 635 P.2d 786 (Wyo. 1981).

On information charging all elements of murder in the first degree as well as elements of second degree and on a plea of guilty defendant could be sentenced for second degree murder. Hollibaugh v. Hehn, 13 Wyo. 269, 79 P. 1044 (1905).

Where indictment charges assault with intent to commit murder in the first degree, defendant may be convicted of assault with intent to commit murder in the second degree, as the latter is an included offense. Brantly v. State, 9 Wyo. 102, 61 P. 139 (1900).

But felony murder is not divisible into lesser degrees of homicide since the necessary elements of first degree murder — premeditation, deliberation and malice aforethought — are imputed in felony murder by a conclusive presumption. Richmond v. State, 554 P.2d 1217 (Wyo. 1976).

Manslaughter is not an offense necessarily included in robbery and therefore is not a lesser included offense of the crime of felony murder. Richmond v. State, 554 P.2d 1217 (Wyo. 1976).

Aggravated robbery and felony murder are two distinct statutory offenses, and imposition of consecutive sentences for the violation of these statutes, whether as a principal or as an accessory, does not violate the double jeopardy provisions of either the constitution of the state of Wyoming or the constitution of the United States. Burt v. State, 744 P.2d 1117 (Wyo. 1987).

Aiding and abetting voluntary manslaughter is lesser-included offense of aiding and abetting first degree murder. Jahnke v. State, 692 P.2d 911 (Wyo. 1984).

Motive as probative factor. — While motive, defined as that which leads or tempts the mind to indulge in a criminal act, is not an element of a crime and proof of it is not essential to sustain a conviction, it does have great probative force in determining guilt, especially in cases which depend on circumstantial evidence. Jones v. State, 568 P.2d 837 (Wyo. 1977).

The absence of motive is an important fact in determining the degree of guilt, particularly when the claim is of an accidental shooting. Buckles v. State, 500 P.2d 514 (Wyo.), cert. denied, 409 U.S. 1026, 93 S. Ct. 475, 34 L. Ed. 2d 320 (1972).

Information held sufficient. — An information charging murder purposely and with premeditated malice, under this section, will sustain conviction for murder upon proof showing murder was committed during attempted robbery, notwithstanding art. 1, § 10, Wyo. Const., giving accused right to demand nature and cause of accusation. Harris v. State, 34 Wyo. 175, 242 P. 411 (1926).

Instructions as to burden of proving lack of self-defense. — When self-defense is properly raised, the jury should be specifically instructed that the state has the burden to prove absence of self-defense beyond a reasonable doubt. Small v. State, 689 P.2d 420 (Wyo. 1984), cert. denied, 469 U.S. 1224, 105 S. Ct. 1215, 84 L. Ed. 2d 356 (1985).

Effect of guilty plea. — The effect of a plea of guilty was tantamount to a confession and it waived the state's need to convict. Pixley v. State, 406 P.2d 662 (Wyo. 1965).

On prosecution for murder in perpetration of rape, plea of guilty dispenses with proof of corpus delicti and venue. State v. Brown, 60 Wyo. 379, 151 P.2d 950 (1944).

Plea of self-defense. — The obvious nature or quality of the plea of self-defense is that of justification or excuse for an otherwise unlawful homicide or aggravated assault and bat-

sity of the proof thereof. Osborn v. State, 672 P.2d 777 (Wyo. 1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Time sequence is not important in felony murder as long as the evidence, including the inferences, point to one continuous transaction. Whether the homicide preceded, followed or was contemporaneous with the robbery is immaterial. Cloman v. State, 574 P.2d 410 (Wyo. 1978).

Fact that pistol was discharged in struggle for its possession during robbery made no difference in the degree of murder. State v. Best, 44 Wyo. 383, 12 P.2d 1110 (1932).

Codefendants equally guilty. — If two or more persons are jointly engaged in the perpetration of or an attempt to perpetrate a robbery, and a human being is killed during its commission by any one of the persons so jointly engaged, then each of the offenders is equally guilty of the homicide.; Clay v. State, 15 Wyo. 42, 568 P.2d 837, 86 P. 17 (Wyo. 1977) See also, rehearing denied, 86 P. 544 (1906).

Evidence of intent to kill during robbery sustains capital punishment eligibility. — The evidence was sufficient of the defendant's intent to kill during an armed robbery and to thus sustain his eligibility for capital punishment. Engberg v. State, 686 P.2d 541 (Wyo.), cert. denied, 469 U.S. 1077, 105 S. Ct. 577, 83 L. Ed. 2d 516 (1984).

Evidence held sufficient. — Evidence that defendant shot deceased after having unsuccessfully attempted an entrance through locked door of truck owned by deceased with intent to pilfer same is sufficient to sustain conviction of murder in the first degree. State v. Lindsay, 77 Wyo. 410, 317 P.2d 506 (1957).

Evidence sufficient to sustain conviction of attempted sexual assault felony murder. — See Murray v. State, 671 P.2d 320 (Wyo. 1983).

§ 6-2-102. Presentence hearing for murder in the first degree; mitigating and aggravating circumstances; effect of error in hearing.

(a) Upon conviction of a person for murder in the first degree the judge shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment. The hearing shall be conducted before the judge alone if:

(i) The defendant was convicted by a judge sitting without a jury;

(ii) The defendant has pled guilty; or

(iii) The defendant waives a jury with respect to the sentence.

(b) In all other cases the sentencing hearing shall be conducted before the jury which determined the defendant's guilt or, if the judge for good cause shown discharges that jury, with a new jury impaneled for that purpose.

(c) The judge or jury shall hear evidence as to any matter that the court deems relevant to a determination of the sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (h) and (j) of this section. Any evidence which the court deems to have probative value may be received regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements, and provided further that only such evidence in aggravation as the state has made known to the defendant or his counsel prior to his trial shall be admissible.

(d) Upon conclusion of the evidence and arguments the judge shall give the jury appropriate instructions, including instructions as to any aggravating or mitigating circumstances, as defined in subsections (h) and (j) of this section, or proceed as provided by paragraph (ii) of this subsection:

(i) After hearing all the evidence, the jury shall deliberate and render a recommendation of sentence to the judge, based upon the following:

(A) Whether one (1) or more sufficient aggravating circumstances exist as set forth in subsection (h) of this section;

(B) Whether sufficient mitigating circumstances exist as set forth in subsection (j) of this section which outweigh the aggravating circumstances found to exist; and

(C) Based upon these considerations, whether the defendant should be sentenced to death or life imprisonment.

(ii) In nonjury cases, the judge shall determine if any aggravating or mitigating circumstances exist and impose sentence within the limits prescribed by law, based upon the considerations enumerated in subparagraphs (A), (B) and (C) of [paragraph (i) of] this subsection.

(e) The death penalty shall not be imposed unless at least one (1) of the aggravating circumstances set forth in subsection (h) of this section is found. 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. If the jury cannot, within a reasonable time, agree on the punishment to be imposed, the judge shall impose a life sentence.

(f) Unless the jury trying the case recommends the death sentence in its verdict, the judge shall not sentence the defendant to death but shall sentence the defendant to life imprisonment as provided by law. Where a recommendation of death is made, the court shall sentence the defendant to death.

(g) If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(h) Aggravating circumstances are limited to the following:

(i) The murder was committed by a person under sentence of imprisonment;

(ii) The defendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person;

(iii) The defendant knowingly created a great risk of death to two (2) or more persons;

(iv) The murder was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual assault, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb;

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

(vi) The murder was committed for pecuniary gain;

(vii) The murder was especially heinous, atrocious or cruel;

(viii) The murder of a judicial officer, former judicial officer, district attorney, former district attorney or former county and prosecuting attorney, during or because of the exercise of his official duty.

(j) Mitigating circumstances shall be the following:

(i) The defendant has no significant history of prior criminal activity;

(ii) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(iii) The victim was a participant in the defendant's conduct or consented to the act.

(iv) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;

(v) The defendant acted under extreme duress or under the substantial domination of another person;

(vi) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(vii) The age of the defendant at the time of the crime. (Laws 1982, ch. 75, § 3; 1983, ch. 171, § 1.)

Cross references. — As to sentence and judgment generally, see Rule 33, W.R. Cr. P.

Editor's notes. — There is no subsection (i) in this section as it appears in the printed acts.

Constitutionality. — The death penalty provisions as set forth in this section and § 6-2-103 are not unconstitutional on their face. Hopkinson v. State, 632 P.2d 79 (Wyo. 1981), cert. denied, 455 U.S. 922, 102 S. Ct. 1280, 71 L. Ed. 2d 463 (1982).

The Wyoming death penalty provisions are constitutional. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983); Hopkinson v. Shillinger, 645 F. Supp. 374 (D. Wyo. 1986).

The Wyoming death penalty provisions are not unconstitutional; they do not usurp the supervisory and rule-making power of the supreme court nor expand its jurisdiction in violation of the Wyoming constitution. Osborn v. State, 672 P.2d 777 (Wyo. 1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Each defendant sentenced separately. — Each specific individual convicted of a capital offense must be separately dealt with in the decision to impose the death penalty; leniency in one case does not invalidate the death penalty in others. Hopkinson v. State, 664 P.2d 43 (Wyo. 1983), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

To justify death penalty for one who does not do actual killing, there must be present an intent that a killing will take place or that lethal force will be employed. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

Instruction on defendant's due process rights not necessary. — An instruction in a death penalty case, requiring the jury to determine that the defendant's constitutionally guaranteed right to due process of law has been adequately protected throughout the course of the proceedings, is not necessary. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

Defendant cannot challenge death penalty provisions where he is given life sentence. Alberts v. State, 642 P.2d 447 (Wyo. 1982).

Jury right upon retrial after remand. — After an appeal and remand for new sentencing trial, if the previous conviction had been by jury, then there must now be a sentencing trial with a new jury impaneled for that purpose, unless the defendant exercises his right to waive a jury in the resentencing phase. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

Appellate review of finding of aggravating circumstances. — All aggravating circumstances are, on review, measured as to the sufficiency of the evidence beyond a reasonable doubt according to the standard set by Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The question is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

§ 6-2-103. Review of death sentences; notice from clerk of trial court; factors to be considered by supreme court; disposition of appeal.

(a) The judgment of conviction and sentence of death is subject to automatic review by the supreme court of Wyoming within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases.

(b) Within ten (10) days after receiving the transcript, the clerk of the trial court shall transmit the entire record and transcript to the supreme court of Wyoming 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 statement of the judgment, the crime and punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Wyoming.

(c) The supreme court of Wyoming shall consider the punishment as well as any errors enumerated by way of appeal.

(d) With regard to the sentence, the court shall determine if:

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

(ii) The evidence supports the jury's or judge's finding of an aggravating circumstance as enumerated in W.S. 6-2-102 and a lack of sufficient mitigating circumstances which outweigh the aggravating circumstances;

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

(e) 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, may:

(i) Affirm the sentence of death;

(ii) Set the sentence aside and impose a sentence of life imprisonment; or

(iii) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. (Laws 1982, ch. 75, § 3; 1983, ch. 171, § 1.)

Cross references. — As to stay of execution and relief pending appeal, see Rule 2.11, W.R.A.P.

Constitutionality. — The death penalty provisions as set forth in § 6-2-102 and this section are not unconstitutional on their face. Hopkinson v. State, 632 P.2d 79 (Wyo. 1981), cert. denied, 455 U.S. 922, 102 S. Ct. 1280, 71 L. Ed. 2d 463 (1982).

The Wyoming death penalty provisions are not unconstitutional; they do not usurp the supervisory and rule-making power of the supreme court nor expand its jurisdiction in violation of the Wyoming constitution. Osborn

v. State, 672 P.2d 777 (Wyo. 1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Appellate review of finding of aggravating circumstances. — All aggravating circumstances are, on review, measured as to the sufficiency of the evidence beyond a reasonable doubt according to the standard set by Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 465 U.S. 1051, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

Death penalty imposed for felony murder during armed robbery not excessive or disproportionate. — See Engberg v. State, 686 P.2d 541 (Wyo.), cert. denied, 469 U.S. 1077, 105 S. Ct. 577, 83 L. Ed. 2d 516 (1984).

Accomplices in crime need not be sentenced alike, as a sentence should be patterned to the individual defendant. Leniency in one case does not invalidate the death penalty in others. Osborn v. State, 672 P.2d 777 (Wyo. 1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Quoted in Hopkinson v. State, 704 P.2d 1323 (Wyo. 1985).

Cited in Turner v. State, 624 P.2d 774 (Wyo. 1981).

Law reviews. — See article, "The Evolution of Capital Punishment in Wyoming: A Reconciliation of Social Retribution and Humane Concern?" XIII Land & Water L. Rev. 865 (1978).

For case note, "Is the Current Test of the Constitutionality of Capital Punishment Proper? Hopkinson v. State, 632 P.2d 79 (Wyo. 1981)," see XVII Land & Water L. Rev. 681 (1982).

For article, "Goodbye 3-Card Monte: The Wyoming Criminal Code of 1982" (part one), see XIX Land & Water L. Rev. 107 (1984).

For case note, "Constitutional Law — Double Jeopardy — The New Role of Double Jeopardy in Capital Sentencing. Hopkinson v. State, 664 P.2d 43 (Wyo. 1983)," see XIX Land & Water L. Rev. 743 (1984).

For comment, "Reforming Criminal Sentencing in Wyoming," see XX Land & Water L. Rev. 575 (1985).

§ 6-2-104. Murder in the second degree; penalty.

Whoever purposely and maliciously, but without premeditation, kills any human being is guilty of murder in the second degree, and shall be imprisoned in the penitentiary for any term not less than twenty (20) years, or during life. (Laws 1982, ch. 75, § 3.)

I. General Consideration.
II. Purpose.
III. Malice.

I. GENERAL CONSIDERATION.

Proof necessary to sustain conviction. — In order to sustain a conviction of second-degree murder, the state must prove beyond a reasonable doubt that the defendant killed the victim purposely, meaning intentionally or deliberately, and maliciously. Kennedy v. State, 422 P.2d 88 (Wyo. 1967). See also State v. Bruner, 78 Wyo. 111, 319 P.2d 863 (1958); Nunez v. State, 383 P.2d 726 (Wyo. 1963); Reeder v. State, 515 P.2d 969 (Wyo. 1973).

Elements of first- and second-degree murder identical in part. — The elements of the lesser offense of murder in the second degree are identical to part of the elements of murder in the first degree, as both contain the elements of the killing of a human being with malice and purpose. State v. Selig, 635 P.2d 786 (Wyo. 1981).

Defendant's attempt to commit second-degree murder was complete when he stabbed victim with the ice pick; that he stabbed her eight more times leaves little doubt but that he had attempted to kill her. If calling an ambulance saved her life, it also saved defendant from being convicted of the crime of murder and perhaps a more severe sentence, but, with respect to the attempt, that crime was complete, as he had passed beyond the point at which abandonment was legally possible. Accordingly, he was not entitled to an instruction on that defense. Ramirez v. State, 739 P.2d 1214 (Wyo. 1987).

Reversal denied when evidence of malice and intent present to counter defendant's testimony. — Reversal will be denied, despite the Eagan Rule which holds that, when the defendant is the sole witness of an alleged crime, his testimony, if not impeached, nor

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THE SACRAMENTO BEE

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CLOSING DEATH ROW WOULD SAVE STATE $90 MILLION A YEAR

If California's death penalty law were abolished tomorrow, taxpayers could save $90 million a year. It now costs the state much more to attempt to execute someone than to lock the person up for life without parole.

If California resumed executions today at its historical rate of six a year, the total costs of having capital punishment -- defense and prosecution fees, court costs and incarceration on death row -- would come to at least $15 million per execution, according to figures compiled by The Bee.

On the other hand, it costs about $930,240 to imprison an inmate for life, based on an average life expectancy of 40 years in prison, according to figures supplied by prison officials.

Eleven years ago, California re-enacted the death penalty. Since that time, prosecutors have filed death-penalty charges against more than 2,000 defendants, according to the California Appellate Project, which finds attorneys to handle appeals for death-row clients.

But while Californians clamor for fresh executions, the state's current death-penalty law has so many protections built into it that it's nearly impossible to execute someone who has a good lawyer.

Earlier this year, Texas inmate Robert Streetman was executed six days after he was finally assigned an attorney. "By then it was too late for the attorney to do anything," said University of Texas law professor Scott Howe.

But in California, the state Supreme Court spends $3.6 million a year on experienced death-penalty defense lawyers to make sure accused murderers get a fair shake.

The investment has paid off. There is no evidence that California has executed an innocent person this century, according to a recent Stanford Law Review study.

But a review of thousands of pages of court documents, coupled with dozens of interviews with prosecutors, defense attorneys, law-enforcement experts and court officials, reveals an expensive capital-punishment system clogged at every level.

Gov. Deukmejian said costs are secondary to the government's need to protect the public from murderers.

"The victim of a murder has lost everything, and his family also suffers a great loss," Deukmejian said. "The costs of crime and the costs of punishing criminals both carry a high price tag."

To help ease the financial burden created by death penalty trials, California spends $10 million a year reimbursing counties for expert witnesses, investigators and other death-penalty defense costs, plus $2 million more to help pay for the overall cost of murder trials in smaller counties.

But despite this infusion of state funds, many financially strapped smaller counties still can't afford to prosecute complicated death-penalty cases, district attorneys said.

--- counties have only one prosecutor with little or no experienc in death-penalty cases, no investigators, a single Superior Court judge, an not enough unbiased people to qualify as potential jurors.

Other criminal cases are delayed for years while death-penalty cases are decided. Ironically, Sierra County has had to cut police services to pick up the tab.

For prosecutors, taking on a death-penalty case is a high-stakes gamble with low odds of success. Only one in 10 capital cases filed in California results in a death verdict, according to the California Appellate Project.

Every death verdict is automatically appealed to the California Supreme Court, which now spends more than half its time reviewing death cases, exper noted. Nearly 200 death cases are currently under review by the high court, which gets about 30 new such cases each year.

The current California Supreme Court, headed by Chief Justice Malcolm Lucas, is deciding death cases at twice the rate of the previous court heade by Rose Bird.

But even at the current court's accelerated pace, it will be impossible t erase the backlog. The Supreme Court, which has more than 400 criminal and civil cases pending, is reviewing ways to speed up its work; one proposal is to hire a pool of lawyers to work exclusively on death-penalty cases for the court.

Only 14 inmates on San Quentin's death row have had their verdicts affirmed by the California Supreme Court. Those cases have kicked around the courts for an average of eight years. They have cost the taxpayers an averag of $1.7 million each, according to information compiled by San Quentin information officer Dave Langerman, and the meter is still running.

State officials said the case of Earl Lloyd Jackson, convicted of murdering two elderly Los Angeles women in 1977, has already cost more than $5 million.

"The cost of a death-penalty case could range from $750,000 to -- the sky's the limit," said Deputy Attorney General Michael Wellington. His boss, Chief Assistant Attorney General Steve White, estimated that each death-penalty case has cost at least $1 million to prosecute so far at both the trial and appellate levels.

The prosecution of Robert Alton Harris -- a seemingly open-and-shut case that included six confessions -- has dragged through the court system for 10 years. Harris, considered the most likely person to be executed next in California, was convicted in 1979 of murdering two youngsters to steal their car for a robbery.

The case "symbolizes the people's efforts over the last 15 years to establish a working, valid capital-punishment law," said Deputy Attorney General Michael Wellington. "We don't have an execution date yet. I can't even say we've got an execution date in sight."

Defenders must be paid

Prosecutors and defense attorneys alike agree that California's death-penalty law, as a practical matter, doesn't work.

"You're not getting your money's worth," said Michael Millman, director of the California Appellate Project. "It's true that the money could be spen on AIDS research or a lot of things, but the worst thing about capital punishment is that it's an irrelevant diversion from the problems of society. The ethos is, we will feel better if we kill the SOB rather than taking the money and using it to prevent the causes of violent crime."

Chief Assistant Attorney General White also expressed dissatisfaction with the capital-punishment system. "We have the worst of all possible worlds: a society that has the death penalty as a social and moral judgment and then doesn't have the character to carry it out," he said.

Wellington favors a law that would force a defendant to make all his lega challenges at trial instead of dragging out the issues through a seemingly endless series of appeals the way Harris did. "If you give them (Harris' attorneys) nine more years, they'll think up other issues. There's never goin to be a time that imaginative defense counsel runs out of issues," said Wellington.

Gov. Deukmejian and many prosecutors claim that the removal of Chief

1986 will speed a condamned man's trip to the gas chamber. But seven Southern states, which have managed to sufficiently speed up the legal process so that executions now take place regularly, require an average of seven years to execute someone from the date of his arrest, Millman said.

Because "death is a different kind of punishment from any other," in the words of the U.S. Supreme Court, death-penalty cases must be tried differentl from other murder cases. In California, defendants of capital cases are entitled to not one but two defense attorneys at public expense during the trial stage. Taxpayers also pay for psychiatrists, forensic specialists and other expert witnesses for the defense.

San Francisco Public Defender Jeff Brown said a typical death-penalty defense costs an additional $25,000-$50,000 for a special investigation of th case; and $15,000 for psychiatrists or other expert witnesses."

Months -- and sometimes years -- go by before the actual trial starts. Potential jurors must be questioned individually to probe their personal biases and feelings on capital punishment. Jury selection routinely takes six weeks or more.

Death-penalty trials are often stalled by dozens of pre-trial maneuvers: a change of venue because of blanket pre-trial publicity; a community attitude survey; suppression of evidence or a confession; requests for release of additional evidence or exclusion of witnesses; motions for a dismissal or a new trial.

Michael Burt, a San Francisco deputy public defender, said defense attorneys and prosecutors battled seven months over one pre-trial motion concerning the admissibility of bloodstained evidence during a recent trial i San Diego.

Once a defendant is found guilty of murder, a special penalty trial is hel to decide whether to impose death or life without possibility of parole.

The added time and expense of capital cases are enough to discourage some small counties from seeking the death penalty, said Assistant Attorney Genera White.

"In talking to district attorneys, some of them have taken the view that it is so expensive and so unlikely to get a death judgment that they will simply seek life imprisonment without possibility of parole," White said.

Marin County recently signed a novel agreement with six defense attorneys hired to represent three San Quentin inmates accused of conspiring to murder correctional officer -- a crime punishable by death. Each attorney will receive a flat fee of $225,000, said court administrator Howard Hanson.

Hanson acknowledged that the cap on attorney fees could jeopardize the defendants' right to a fair trial if the trial costs far exceed the cap. But Hanson said that the defendants agreed to the contract. If the trial lasts tw years as projected, he said, defense attorneys will receive the equivalent of $75 an hour.

But San Francisco Deputy Public Defender Burt said that if the trial lasts longer than expected, "they could end up making $2.25 an hour."

The real battle is joined before the state Supreme Court, which routinely takes five years to uphold or overturn a death verdict. By then, virtually no defendants can afford their own lawyer, so the court assigns them a new attorney, at taxpayers' expense. A typical death-penalty appeal consumes abou 1,000 attorney hours a year -- about $62,000 -- according to the California Judicial Council.

Other states have decided that the expense of the death penalty outweighs any benefits. Last year, the Kansas Legislature voted down the death penalty. -- even though Gov. Mike Hayden campaigned on a promise to bring it back and polls indicated that 80 percent of the population supports it.

A coalition of Kansas death-penalty opponents estimated that capital punishment would cost Kansas taxpayers in excess of $50 million by the time a 100-innate death row had been built and the first person was executed.

Imperial County's lesson

In California, county officials who balk at the high price of capital trials could learn a lesson from Imperial County, which in 1982 refused to pa $13,000 for the defense of a man it was trying to send to the gas chamber.

Instead of saving money, Imperial County ended up spending $500,000, only to see accused murderer Robert "King Kong" Corenevsky go free more than five years after he was arrested and charged with the murder and robbery of a Manhattan Beach jeweler in a Calexico motel room.

The county budget officer also spent three days in jail for refusing to pay the bill.

Imperial County supervisors argued at the time that the Corenevsky case could bankrupt the county and said they'd "be damned" if they'd pay for a murderer's defense. (Corenevsky's past included a murder conviction in Mexico).

This brazen policy ended up costing Imperial a bundle. Superior Court Judge William Lehnhardt reduced the charges and took away the county's right to seek the death penalty -- which meant the state no longer had to reimburse the county for defense costs.

The case went all the way to the California Supreme Court, which threatened to send troops to the county auditor's office to collect.

Corenevsky's lawyer, Stephen Feldman, said the case "is an allegory for what happens in a system that doesn't fairly deliver services to a man the state is trying to kill. This innocent man could have been killed because the state illegally refused to pay for his defense."

County Supervisor James Bucher, a former judge, agreed that the death-penalty system is a failure, but for different reasons: "I don't believe justice has much to do with the court system any more; it's all dollars and cents and gamesmanship. There should be limits on what people are expected to pay for these bastards who get themselves in trouble. We pay for his doctors, his housing, his attorney and he's a goddamned convicted killer."

Corenevsky commented, "If you believe they should have the death penalty in California, you believe in Santa Claus. It's never gonna happen because it's never gonna be fair. Jesus Christ himself couldn't have had a fair trial in Imperial County."

LEGAL TIME IS MONEY

Death-penalty trials take an average of two years from arraignment to verdict -- three times longer than other murder cases, The Bee found. And the longer the case, the more margin for error and grounds for appeal, said prosecutors and defense lawyers.

Death-penalty trials cost an average of six times more than other murder trials -- $592,500 compared to $93,000, based on an analysis of average daily court costs.

There are 328 capital trials in progress in California. If the cases follow the normal course, approximately 175 of them will be decided by juries, 70 will result in life in prison or death for the defendant and 35 defendants will wind up on death row.

Since death-penalty trials cost more and last longer than standard murder cases -- about $7,500 a day for 79 days instead of $6,200 a day for 15 days for a standard murder case -- California taxpayers spend an extra $78 million a year on death-penalty trials.

Additionally, each year the state spends an extra $2.8 million for special housing of death-row inmates, another $1.8 million to prosecute death row inmates on appeal, and yet another $7.6 million defending condemned prisoners on appeal.

Add it all up and you get $90 million a year spent on the death penalty.

This doesn't include the cost of federal appeals. "The first federal appeal and the first habeas corpus petition consume an average of 1,000 hours of attorney time, or $75,000 to the taxpayers," Millman said.

No one knows how many people will be executed in California in a given year, but when the state was executing inmates, it averaged about six per year.

In Texas, where more murderers are executed than in any other state, about five inmates have been given lethal injections each year since 1982.

Thus, if California continues as expected to pursue the death penalty at a cost of $90 million per year -- and if the state moves at its historical rate of six per year -- it will cost taxpayers about $15 million per execution.

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Execution Does Not Pay

Barbarism Aside, the Death Penalty Simply Isn't Cost Efficient

By Jonathan E. Gradess

FIFTEEN years ago the Supreme Court ruled that the death penalty as then applied in the United States was unconstitutional *(Furman v. Georgia)*. One brief sentence in Thurgood Marshall's opinion, overlooked by many, noted that "when all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life."

Today, there are more than 1,900 men, women and children as young as 16 on death row, and American policy makers, political officials and criminal justice experts are beginning to regret skipping so lightly over Justice Marshall's comment.

In 1982, my office conducted a national survey to determine the cost of capital litigation. We examined the nature of capital cases, identified 11 levels of review and defined a minimum of 144 "cost centers" that determine the total price-tag of capital litigation. Based on proposed but never enacted legislation to reinstate the death penalty in New York, and using conservative estimates, we projected the potential costs of litigating a model New York capital case across just the first three levels of review—the trial and penalty phase, the appeal to the New York State Court of Appeals, and subsequent review in the United States Supreme Court. The cost of that limited process: $1.8 million per case. The cost of life imprisonment for 40 years: $602,000.

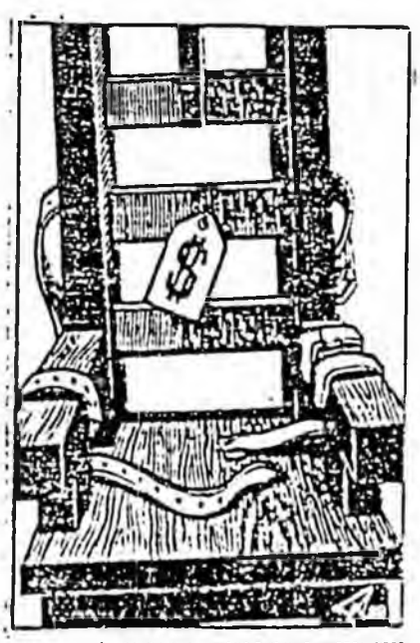
Since then, many more states have looked at the cost of capital punishment, including Maryland, Alaska, Hawaii, Vermont, Texas, Florida, Kansas, Ohio and New Jersey. Some authorities have estimated that capital cases cost 10 times as much as non-capital cases. A Pennsylvania journalist has estimated the cost of a single capital case at $5 to $7 million. There is no longer any doubt that criminal-justice systems with a death penalty cost inordinately more to maintain and expand than criminal-justice systems without a death penalty.

Before policy can change, however, the American people need to understand why capital cases cost more than non-capital cases, why there is no chance that costs can be reduced, and why we can expect that they will exponentially increase yearly until the death penalty is abolished.

Capital cases are more expensive than non-capital cases essentially for three reasons: they are *practically* different than non-capital cases; they are *legally* different; and they are *reviewed more thoroughly*.

■ *The practical difference.* For more than a century, capital cases have been treated differently from non-capital cases. They take longer. Frequently more than one attorney is appointed for a capital defendant. Because life is at stake, trial judges provide more latitude and appeal judges search more carefully for reversible error. (The reversal rate is about 50 percent for death cases and about 7 percent for non-capital cases.) Because the decision to kill is unpleasant, responsibility in capital cases is often diffused—which makes for longer trials, lengthy delays and frequent reversals.

■ *The legal difference.* Ten years ago, the Supreme Court made it clear that heightened standards of due process must be applied to death penalty cases. Consequently, a new jurisprudence—a "super due process"—has evolved governing the trial and appeal of such cases. The investigation is more extensive, the number of pretrial proceedings is substantially increased, and jury selection takes longer. After conviction, a separate "penalty phase" is conducted to determine the sentence. Because mandatory death sentences have been ruled unconstitutional, the sentencing jury must consider a defendant's individual characteristics. Preparation for this phase is extensive; in essence, it is a trial for life. The defense commonly tries to talk with as many of the defendant's friends, associates, teachers and co-workers as it can reach, to trace his life history, to visit all of the places he has lived and to vigorously pursue all leads in the search for mitigating evidence.



DAVE MEMEHAN FOR THE WASHINGTON POST

■ *Longer review.* Any defendant convicted in a state court has the right to initiate judicial review at 11 different levels. However, the Supreme Court's ruling that poor people are entitled to appointed counsel applies to only the first two stages; representation in the

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remaining nine stages essentially depends on volunteer counsel. Ordinarily, lawyers do not volunteer to represent an indigent robber, burglar or non-capital murderer at those stages, but they routinely do so for death-penalty defendants. While these lawyers are not paid, the final stages of a capital case can last a decade or more and generate enormous litigation costs. Police officers and witnesses are brought in. State attorneys general are called upon to respond. Judges must preside. Court time is used up. The United States Court of Appeals for the 11th Circuit in Atlanta, deep in the heart of the nation's death-penalty belt, complains that more than 30 percent of its docket is tied up with death-penalty cases. And all the while, the prisoner is held in a costly high-security death-row cell year after year.

What, then, is the answer? Short-circuit the process and step up the pace of executions? Most Americans recognize that our sophisticated appellate-review process, though seemingly laborious, is a fundamental part of our legal system and protects our citizens against government error and abuse. Even with 11 levels of review, we still convict and condemn the innocent. A study in the November 1987 Stanford Law Review cites more than 100 examples of innocent people sentenced to death since 1900, of whom 23 were executed.

Nor is it reasonable to expect a significantly quickened pace of execution. Since 1977, when we reintroduced the idea of slaying citizens to stop crime, there have been more than 200,000 homicides in the United States, about 2,000 death sentences but fewer than 100 executions. Not even death-penalty proponents believe the American people would tolerate the wave of executions needed to empty death row and keep it that way.

Since both the Constitution and a permanent death-row population are likely to be with us for some time, the cost of the death penalty is certain to grow at an ever-greater rate. The numbers of capitally-sentenced defendants will continue to increase. As cases are appealed, new issues decided in favor of death-penalty defendants will affect all cases not yet final. As issues increase in scope and complexity, costs will escalate. And these factors will combine with the high costs of death-row construction and security.

The cost of the death penalty is emerging as one of our most serious public policy questions. In Kansas last year, the newly-elected governor promised Kansans a death penalty while simultaneously calling for budget cuts for each state agency. The high cost of capital litigation, the establishment of a death row, maintenance of death-row prisoners, the high costs and inordinate delays of the appellate process were debated not only by politicians but by university professors, governmental research units and by Kansas citizens. Opponents cited racial discrimination in the conduct of capital punishment, its lack of deterrence, its inability to stop crime, its potential for erroneous convictions, its immorality and—not least—its high cost. In the end, massive numbers of citizens declared "no" to the reintroduction of the capital sanction and the death penalty was defeated.

Other Americans will eventually realize, as did the citizens of Kansas, that there is not an endless supply of money for the criminal-justice system. Policy choices need to be made. From a conservative cost-benefit analysis, we must declare the death penalty an inordinate waste of resources that deprives our citizens of adequate police protection and reconciliation systems to make both victims and offenders whole.

As the New Jersey public defender budgets more than $100,000 per capital case and anticipates total defense costs in the millions, as the federal judiciary bemoans the resource drain caused by capital litigation and as California prosecutors declare cases non-capital at the outset to save money, the dollars and cents of the death penalty may in fact be the clarion call that sounds the defeat of this archaic and brutal policy.

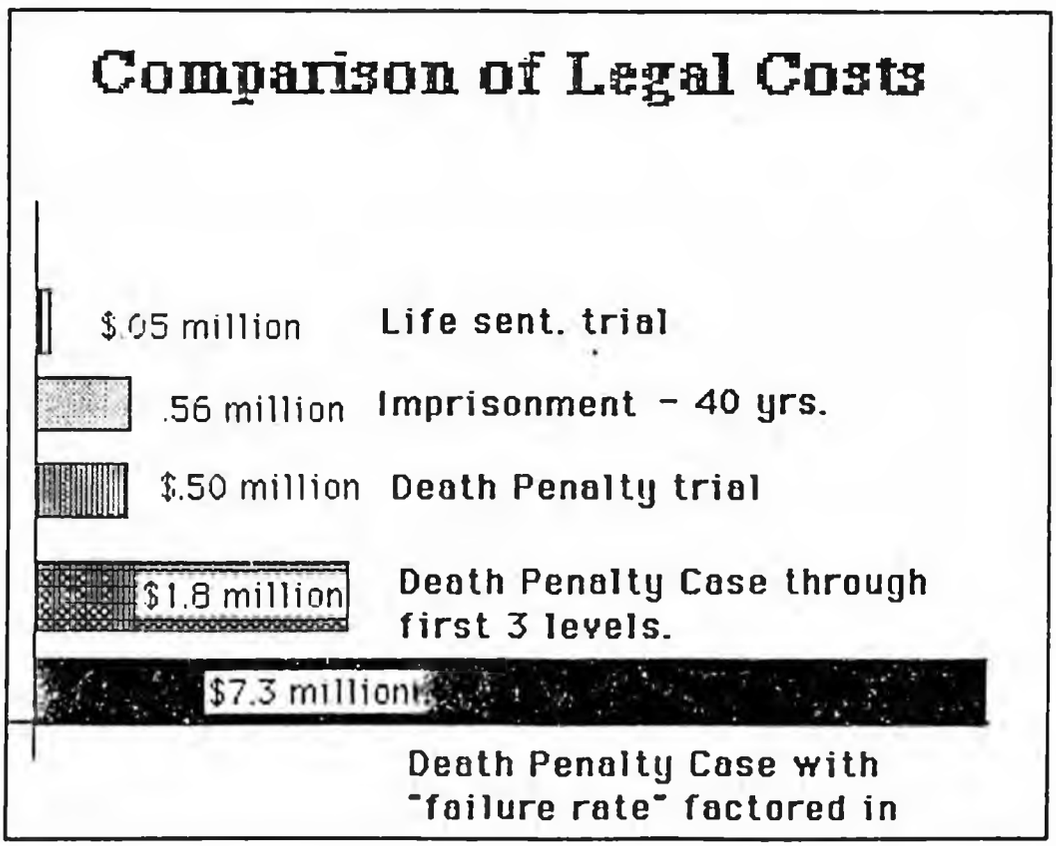
Costs and the Death Penalty

There has been debate surrounding the death penalty for as long as the punishment has existed and many arguments have been explored on both sides of the issue. But the excessive costs associated with capital punishment were not really a factor until fairly recently.

Executions were designed to be graphic warnings to others that certain crimes would be severely punished by death. Hangings were public and followed quickly upon sentencing. Later, to avoid abuse, executions were centralized in one part of the state and carried out with just a few witnesses. Still, it remained relatively swift. For the 52 people executed in Maryland for murder since 1923, the average length of time elapsing between imposition of sentence and execution was 220 days. Today the situation is totally different. Richard Tichnell has been on Maryland's death row longer than any person - over 8 years - and he is still far from the gas chamber. This length of time has become the norm around the country where 2,000 people are on death row.

As a matter of fact, the delay factor in Maryland is likely to become much longer. Just in the past year the Supreme Court has accepted two Maryland cases (*Booth* and *Mills*) which affect the viability of our capital punishment statute. It is a very real possibility that **all** of Maryland's death sentences will be overturned in the current session of the Supreme Court. Then, if we so choose, the long process of new sentencings and appeals would begin again.

All of this has a direct bearing on the cost associated with the death penalty. They not only far exceed the costs of imprisoning someone for life, they are becoming an intolerable burden on both the state's financial and judicial resources. Special Appeals Court Judge Alan Wilner raised this issue recently when he said that, "in Maryland the cost of pursuing this (the death penalty) largely fruitless course, not just in terms of money, but, more importantly, in the commitment of judicial resources, has become so high that public attention should be directed to the reality of the situation."



A LOOK AT THE NUMBERS

Since Maryland has not had an execution in over 26 years, we do not yet know what carrying the process through to an execution actually costs. However, there have been some studies done in Maryland and in other states from which it is possible to form a clearer picture.

In 1983 the Maryland House Appropriations Committee asked the Public Defender and the Chief Judge of Maryland's Court of Appeals to provide information on the fiscal impact of processing death penalty cases. A committee was formed and a report submitted in April 1985. One of their key findings was that filings that resulted in the death penalty averaged higher costs for **each** justice component than filings where the outcome was a non-death sentence. Unfortunately, the study does not include any estimates of appeals' costs which represent a major portion of costs in such cases. Nor does the data include information from Prince George's County or Baltimore City. The study concludes by suggesting that the issue of costs can only be resolved by a more comprehensive survey.

"The cost of pursuing this largely fruitless course has become so high that public attention should be directed to the reality of the situation."

- Judge Alan Wilner

Chief Judge Robert C. Murphy confirmed the inadequacy of this study in his 1987 State of the Judiciary Message. But he also noted that "studies in other states indicate that death penalty litigation is enormously expensive." A similar conclusion was reached by the Public Defender's Office concerning their Interim Report on Death Penalty Costs in October, 1986. Their figures represent just "the tip of the iceberg" and the Death Penalty Defense Unit believes that it is **many times** more expensive to try a case capitally than to try it non-capitally and costs more to execute than to incarcerate for a lifetime.

With respect to costs, there is considerable evidence from around the country that the financial burden is becoming intolerable. The most extensive and frequently quoted study was done by the *N.Y. State Defenders Association* in 1982. Even this study, which is cited by both Judge Wilner and Chief Judge Murphy, acknowledges that its estimates are conservative and include only the first three levels of capital litigation. Nevertheless, their conclusion illustrated in the table below, is that just these **three phases cost the state $1.8 million per case.**

Naturally, the goal of the state in expending such resources is an eventual execution. But it is well known that a high percentage of cases are overturned on subsequent appeal. Judge Wilner points out that if we rightly assume a "failure rate" of 75% in these cases, then the actual costs **per execution** are an astounding $7.3 million.

To put this into perspective, the cost of incarcerating an individual in the Maryland Penitentiary is about $14,000 per year. Thus, a real life sentence of say 40 years would cost the state $560,000, and during this time a prisoner could be productive and perhaps make some restitution to either the state or the victim's family.

Other states, using different methods of accounting, have arrived at different numbers but similar conclusions. In California, it has been estimated that it costs a minimum of $500,000 just to complete a death penalty **trial** in that state. And according to a report in the *Wall Street Journal*, only 10% of these cases are " successful" and thus it costs the citizens of California **$4.5 million just to sentence one person to death.**

Here are some cost figures from other states:

- Oregon estimates its costs per case to be $700,000.
- The Ohio Public Defender's Office cites costs of at least $1 million per execution.
- One county in Georgia spent seven times its entire annual budget for criminal prosecutions on one death penalty case.

COST OF STATE I
(Trial, Appeal, Supreme Court)

	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$517,700	—0—	$300,000	?	?	$817,700
County Charge	—0—	$1,010,400	—0—	?	?	$1,010,400

STATE $817,700
COUNTY $1,010,400
TOTAL $1,828,100

• In Kansas, the death penalty was recently rejected and costs played a deciding role as some senators switched their votes. The director of the Indigent Defense Service there estimated that costs in his office would spiral to $7-8 million in two years with the death penalty.

• Texas leads the country in executions. Some officials there estimate that the state's pursuit of capital punishment has cost taxpayers $183.2 million. There have been 26 executions in Texas since re-instatement.

• Florida's first post-1972 execution was of John Spenkelink in May, 1979. It has been estimated that the execution cost the state $5 million. And the murder rate in Florida rose in the months following this execution.

The topic of judicial time spent on these cases is another area of concern which should be explored further. Judge Wilner examined the judicial complexities which have become part of death penalty cases and concluded with this dilemma: "The question, then, in light of the history in this State of no executions in 26 years, an 86% failure rate at the trial level, and a further 50% failure rate at the appellate level, is whether it's really worth the effort."

In matters where lives are being weighed on both sides of the issue, costs and time necessarily take second place. But if the money and time spent is failing to procure anyone's goals then the expenditures should be reconsidered. If millions of dollars are spent to produce one execution perhaps ten years after the crime, then certainly little is done in the name of deterrence or for the victim's family.

"Because of the Supreme Court's rulings, there is no way to streamline this elaborate process. Any attempt to do so would deny a defendant the protections guaranteed under the Constitution and increase the possibility of sending innocent people to their death."

-Richard Moran & Joseph Ellis in the Wall Street Journal

There may be some who feel that these excessive costs can be alleviated by cutting back on the appeals process. But that tactic has been found unacceptable by our own courts and by the Supreme Court as well. Insufficient care at the early junctures just means re-trials and re-sentencings at later levels and hence even higher costs. The article mentioned above from the Wall Street Journal concludes that: "Nor can these costs be significantly lowered... Because of the Supreme Court's rulings, there is no way to streamline this elaborate process. Any attempt to do so would deny a defendant the protections guaranteed under the Constitution and increase the possibility of sending innocent people to their death...Like it or not, the Supreme Court has made it abundantly clear that shortcuts to justice are legally unacceptable."

The article goes on to say that New York and California could save $75 million and $125 million respectively by not having the death penalty. The same is true to some extent in Maryland as well. Ways could be explored to use the money which would be saved in this state to aid the families of victims and to institute programs which would be more productive in preventing serious crime.

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Death penalty foe criticizes expense

By Anne Belli
Staff Writer of The Dallas Morning News

The death penalty is racist, expensive and can result in the execution of innocent people, the leader of a national coalition that seeks to abolish capital punishment said Friday.

"I understand people being outraged over crime," said Robert Bryan, chairman of the Washington, D.C.-based National Coalition to Abolish the Death Penalty. "But people need to know the facts."

Bryan's group is holding its annual conference this week at Southern Methodist University. He said the three-day meeting, which began Friday, is being held in Dallas "because of the problem in Texas."

Texas, with 27 executions, has employed the death penalty more than any other state since the penalty was reinstated by the U.S. Supreme Court in 1976. Nationwide, 101 people have been executed in the past 12 years, he said.

The state also has the second largest death row population in the nation, with 269 prisoners awaiting execution, compared with 2,110 nationwide.

The latest Texas Poll, conducted by telephone on Oct. 19, found that 86 percent of Texans favor the death penalty, although 73 percent said they do not favor capital punishment for convicted capital murderers who are mentally retarded.

Bryan said legal costs for a capital murder case average $1.9 million. In Texas, he said, the costs have been even higher, about $2.6 million per case. Legal costs connected with non-capital murder cases average much less — about $700,000 — because the trials are shorter and there usually are fewer appeals, he said.

"When a capital case is prosecuted, everybody, including the government, is spending an enormous amount of money," said Bryan, a California lawyer who said he has tried more than 100 murder cases.

"Also, in spending all that money to kill someone, sometimes we kill innocent people," he added. "Not only is that shocking morally, but also it's a huge waste of money."

Recent cases have raised questions regarding evidence available at trials. In Texas, there is the case of Randall Dale Adams, who was convicted in 1977 of killing a Dallas police officer. Adams' case recently was reopened by a state district judge after the release of a documentary film, The Thin Blue Line, that raised questions about his guilt.

In Florida, the case of Willie Darden has been the subject of similar speculation. Darden was executed in March.

"One innocent person executed is too much," Bryan said. "And it's going on in our country."

DALLAS MORNING NEWS

SAT. 11-19-88

The New York Times Sunday, August 7, 1988

NEW JERSEY
OPINION

No Savings In Lives or Money With Death Penalty

By LEIGH BIENEN

THE recent Federal drug bill reintroducing capital punishment for certain drug-related murders in an election year is further evidence that politics never changes. You can fool some of the people, but, one hopes, not all of the time.

The death penalty is a fraud upon the public. The taxpayers are being sold a bill of goods. Both a simple and a complex analysis of the costs and benefits of the death penalty, and of the logic behind re-enactment, indicate that the policy accomplishes nothing its proponents claim, and its cost is exorbitant.

Since 1976, 34 jurisdictions have reintroduced the death penalty. There are now over 2,000 people on death row. And last spring the United States Supreme Court handed down an opinion stating that it would not invalidate state capital punishment schemes, even if those schemes were not applied in a manner that was neutral with regard to race. Capital punishment is back, and for all the wrong reasons.

The public was led to believe that the reintroduction of the death penalty would produce several desirable outcomes, soon, if not immediately. There would be less crime. The crime rate would go down because those people who commit violent and heinous crimes would know about the re-enactment of capital punishment and decide not to commit those murders.

But everything we know about murderers indicates that they don't act after rationally weighing their actions. And everything we know about the imposition of the death penalty tells us that it is just those who are too enfeebled, or mentally deficient, or hapless to plan their actions or participate in their defense who end up being sentenced to death.

In fact, the rational murderer could well conclude that his chances of being executed are minimal. In the whole United States, there have been 190 executions since 1976, and more than 240,000 murders have been committed in the same period.

People want to go back to the good old days when everyone respected law and order. Whether or not there ever were any such good old days, they weren't brought about by the infliction of capital punishment.

In New Jersey capital punishment was the law from Colonial days until 1972, and the Legislature re-enacted it in 1982. From 1907, when formal records were kept, the high point for capital punishment was 1930, when 18 people were sentenced to death and 11 executed. It wasn't until after 1930 that most death sentences were appealed.

In 1940 nobody was sentenced to death and nobody was executed, and there were 50 homicides recorded. In 1950 in New Jersey one person was sentenced to death; nobody was executed, and 99 homicides were reported. In 1964 in New Jersey, 450 homicides were reported, and fewer than 10 people were sentenced to death.

Equally illogical are the supposedly sophisticated arguments about the death penalty and deterrence, which are once again being put forward. That work has been conclusively discredited. But no one has discredited the statistical evidence, from study after study, in jurisdictions from Kentucky to Florida, showing that race of the victim is as important in determining who gets the death penalty as the presence of another crime, or even that the defendant has been previously convicted of murder.

> Society's price is an unjust system.

The public believes that it will save money by executing murderers. Nothing could be farther from the truth. The cost of the reimposition of capital punishment runs into the millions of dollars. Texas says the re-enactment of capital punishment has cost the state $183.3 million. In Ohio it's been estimated that it costs $1 million per execution, and a California study estimated over four times that. The cost of death-penalty trials, the costs of appeals, of separate places of confinement for prisoners, all far exceed the cost of keeping murderers in prison for the rest of their days. In New Jersey the state has spent millions of the taxpayers' money to house some 20 murderers under special guard at the maximum security prison.

Well, some reply, let's get rid of those expensive due-process guarantees, which are wasted on our worst citizens anyway.

But does this society really want to get rid of the premise that the accused is entitled to representation and innocent until proven guilty? Or is that promise now only going to operate for certain classes of likable or sympathetic criminals? People tend to think due-process guarantees are a luxury until one of their own is accused of a crime.

A more honest, but disturbingly cynical, point of view is the belief that the society needs capital punishment because the criminal-justice system is not to be trusted.

Cases where murderers have been let out, or considered for parole in what seems to be an alarmingly short period of time, have received a great deal of attention. They are, however, few and far between.

The majority of states, including New Jersey, now have in place sentencing statutes that insure that murderers and others convicted of serious crimes will actually spend many, many years, or the remainder of their lives, in prison. In New Jersey the mandatory minimum terms for murder is 30 years, that is 30 calendar years, and it can be longer if one has additional convictions or prior offenses.

The public's distrust and frustration with the criminal-justice system is the worst reason to dust off the electric chair. And it is just that fear and paranoia that is played upon when support is drummed up for capital punishment. Executing a few who are selected by a system that is capricious, arbitrary and not racially neutral will not do away with the public's distrust of the legal system. It will only buttress the arguments of those who say the criminal-justice system exists only for the many and the poor for the benefit of the few and the rich.

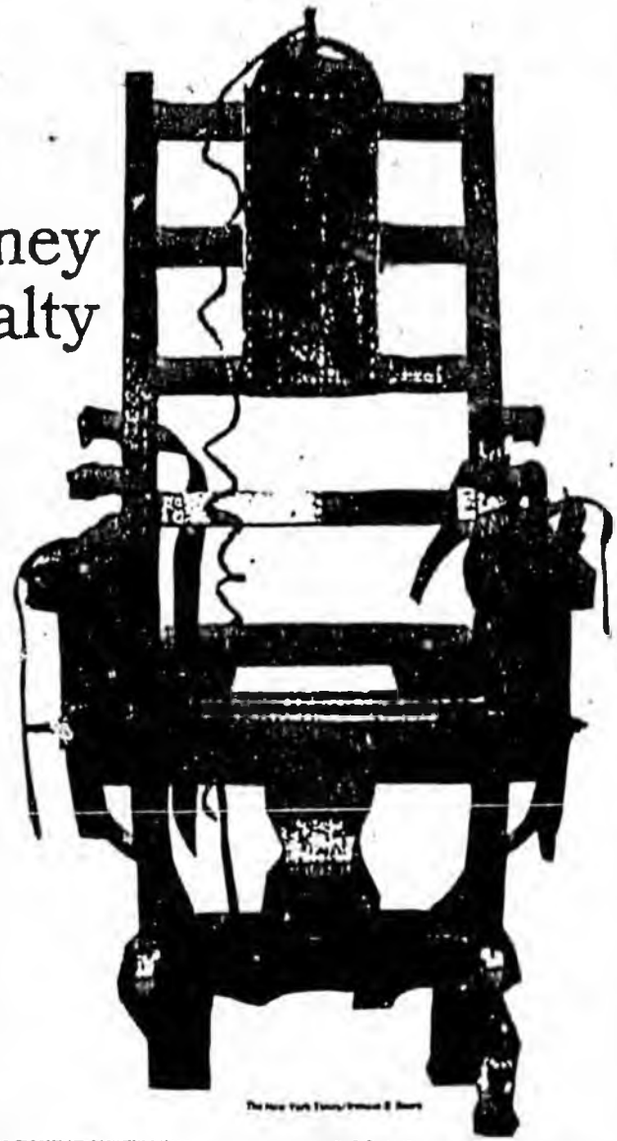
It is a statistical certainty that some of those executed will be entirely innocent of their crimes. It is just as certain that for every executed person there will be 3 or 4 or 20 whose crimes were just as horrible, but whose lives were spared for reasons of luck or prosecutorial discretion, or because they had competent counsel, and race and jurisdiction will not have been irrelevant.

The costs of capital punishment are staggering, much more than the dollars and cents of court time, transcripts and appeals. The true cost of capital punishment is the establishment and perpetuation of a system of sanction that has repeatedly been shown to be counterproductive and discriminatory. It isn't fashionable to talk about justice, and the concept of justice for victims has added a new and valued dimension to the debate.

But what kind of justice for victims is it when only a select few are prosecuted for capital murder? The families and loved ones of the other thousands of victims see their cases disposed of as ordinary, noncapital murders. The message to them is clear: Society's resources aren't going to be spent on you.

The price of capital punishment is the support of a system that is unjust, and perceived to be unjust, as well as wasteful and inefficient. The price of capital punishment is that the public is misled and then disappointed. Capital punishment was going to accomplish desirable objectives, like reducing or deterring crime, and that was never possible.

The price of capital punishment is the hypocrisy introduced into the compact between the legislators and the governed, between the suppliers and consumers of public policy. If you will. The millions of public money wasted on capital punishment are measurable, but rarely mentioned. The price of capital punishment is beyond counting. ■



Electric chair in museum at Correction Officers Training Academy.

Leigh Bienen is a public defender who has just completed a study on homicide in New Jersey.

WALL STREET JOURNAL October 15, 1986

Price of Executions Is Just Too High

By Richard Moran
And Joseph Ellis

When people argue that the death penalty costs too much, they are usually speaking about the human and social costs of the state's decision to take a life. While these costs are undoubtedly great, when we say that the death penalty costs too much we mean quite literally that it is much more expensive than life imprisonment. Here is the reason.

In 1972 the Supreme Court in *Furman v. Georgia* held that "arbitrary" and "capricious" application of the death penalty violated the Eighth Amendment's prohibition against "cruel and unusual punishment." This meant that a defendant had to be prosecuted and convicted in a way that was extraordinarily rigorous and free of any kind of prejudice. Since then the Supreme Court has fashioned what is generally called a "super due process" model for death penalty cases. In a series of subsequent decisions, involving effectiveness of counsel, the right to a fair and impartial jury, as well as "cruel and unusual punishment," the court has held consistently that special substantive and procedural protections are required before a state court can impose the death penalty.

The "super due process" requirement has made the prosecution of death penalty cases enormously expensive. In a recent University of California at Davis law review article, Margot Garey has calculated that it costs a minimum of $500,000 to complete a death penalty trial in California. And between August 1977 (when the current law took effect) and December 1985, only 10% (190 of 1,847 cases) have actually resulted in a death sentence.

Since statistical evidence is notoriously subject to manipulation, there are a number of ways to figure the costs. We think it is fair to say that it costs the citizens of California about $4.5 million ($500,000 x 0.90 failure-rate) to sentence one person to death. Data from New York state suggest that if it adopted the death penalty the cost would be $1,828,100 per capital trial. Assuming even a 0.75 failure-rate, it would cost about $7.3 million to sentence one person to death in New York.

And, of course, not all people sentenced to death will be executed. Many if not most will have their sentences commuted to life imprisonment. Even if we do not include the costs of keeping a man on death row for an average of four years prior to his execution (about $160,000), or the cost to maintain and operate the gas chamber or the electric chair, and if we naively assume that all people condemned to die will be executed (all 55 cases in California have been overturned), it will still cost $4.5 million to execute one felon in California, and $7.3 million in New York.

Nor can these costs be significantly lowered. Since each trial is unique, and most of the costs are incurred in the trial phase—not on appeal—there really is no economy of scale. The $4.5 million and $7.3 million figures do not include appeals that average only $100,000. When a defendant faces a possible death sentence, more time is spent investigating the facts of the case, more pre-trial motions are filed, the trial tends to last much longer, more expert witnesses are called to testify, and there are, of course, many legal objections and appeals. Most of all, there is no cost-saving plea bargaining when the prosecution seeks the death penalty.

Because of the Supreme Court's rulings, there is no way to streamline this elaborate process. Any attempt to do so would deny a defendant the protections guaranteed under the Constitution and increase the possibility of sending innocent people to their death. And the recent decision in the case of Alvin Ford—that a condemned man is entitled to a court hearing on the question of his mental competence before he can be executed—can only further the delays and increase the costs. Like it or not, the Supreme Court has made it abundantly clear that shortcuts to justice are legally unacceptable.

Nationally, the average offender who is sentenced to death is about 30 years old. Let's say he lives to 70—40 more years. At $20,000 a year to keep him in prison that adds up to $800,000. Indeed, if all people charged with capital offenses were actually sentenced to death, then the death penalty would be slightly cheaper in some states. But, in California, for example, only one out of 10 is sentenced to death—so 90% of the cases bear the costs of both a capital trial and life imprisonment.

It isn't necessary to be an accountant to realize that if you substitute life imprisonment for the death penalty, you will save almost $500,000 per trial for first-degree murder in California, and $1.8 million in New York. And since there are about 250 such trials in California per year, the abolition of the death penalty would save the taxpayers about $125 million a year. In New York it has been estimated to be $75 million. Put another way, the death penalty consumes a disproportionate share of our criminal justice dollars.

No one should mistake the above argument as a reduction of a great moral and philosophical issue to a question of accounting. Behind our simple economic argument lies a more haunting moral and legal complexity that has made these costly and cumbersome constitutional protections necessary. The dollars reflect doubts. Not even the most avid supporter of the death penalty wants to execute people capriciously. But the costs incurred in easing our doubts and assuring fairness in capital cases have now reached the point at which they constitute eloquent testimony in their own right. Until scholarly research can prove that the death penalty is more cost effective in deterring murder than life imprisonment, we think that our elected officials might do well to choose the cheaper option.

Mr. Moran is professor of sociology at Mount Holyoke College, where Mr. Ellis is professor of history and dean of faculty.

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THE HOUSTON POST
12/7/86/3B

Death, dollars and the scales of justice

Weighing the costs of capital punishment, life imprisonment

By DAN GROTHAUS
Post Reporter

What does capital punishment cost the state? The state doesn't know. Conventional criminal justice wisdom says it costs more to keep 'em than to kill 'em.

But in reality, it costs the state more to execute an inmate convicted of capital murder than it would cost to convict the same suspect of non-capital murder and lock him up — literally — for life.

Considering the current prison housing shortage, the state could build a new prison holding 2,250 inmates for what it has spent to place 212 inmates on death row since 1980 and keep them there.

Since executions began again in 1982, Texas has executed 19 inmates, more than any other state.

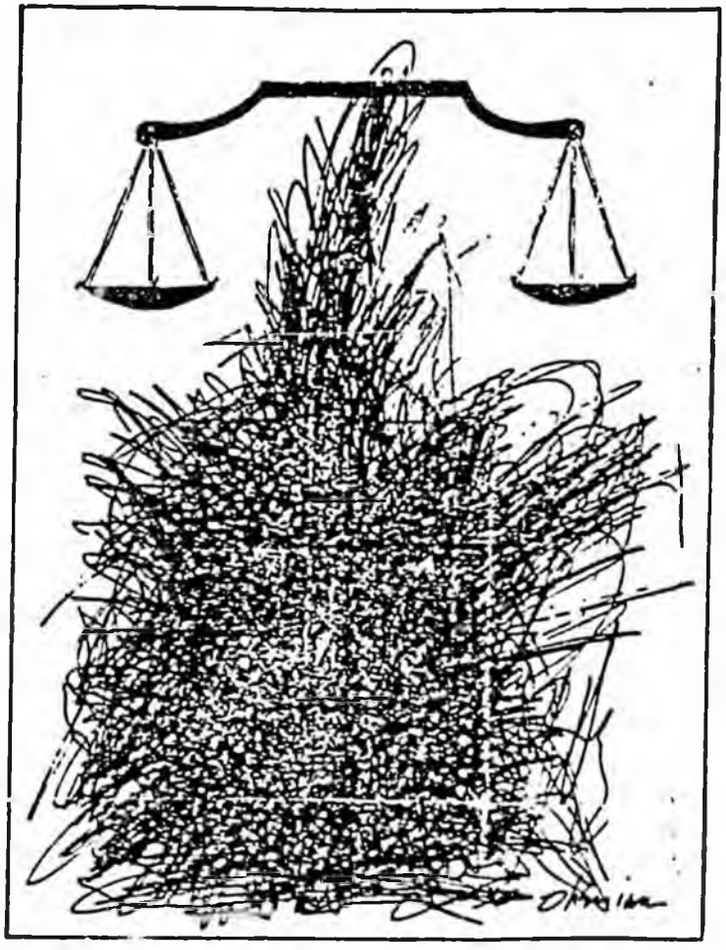
In Harris County alone, the pursuit of death sentences in the 245 capital murder trials held since 1980 represents approximately $86.3 million, or about $1 million per death row inmate sentenced in Harris County. Only 88 death sentences were granted in those 245 capital murder trials. If those cases had been prosecuted for non-capital murder and the 88 death row inmates were instead locked up until age 65, the cost would have been $40,672,370. The difference would be $45.6 million.

However, no one at the state or county level has ever attempted to determine the cost of capital punishment.

Management questions

"You're asking for basic management questions," answered Scott McCown, the Attorney General's law enforcement chief. "And the state gives us no money to provide answers like that. We're just inundated with (appelate) work."

However, the question of capital punishment's cost-effectiveness is gaining attention in other parts of the country. Last year the American Bar Association endorsed a research project that developed a formula to determine the actual cost of capital punishment.



Since 1978, the only three studies that assessed the cost of capital punishment concluded that the death penalty was not cost-effective. "The argument that the death penalty costs less to punish than does life imprisonment is erroneous," concluded a heavily documented article published in 1965 in the University of California-Davis Law Review.

Statewide, since 1980, only 40 percent (212) of the state's capital murder trials (519) have resulted in a death sentence.

Of those death sintences, the Court of Criminal Appeals, since 1972, has reversed 30 percent of all death penalty cases it has reviewed. That cort currently has 122 cases pending on apeal.

Using Harris Couty cost figures, the state's pursuit of th death penalty has cost taxpayers $183.2million.

If these same suspcts had been prosecuted for non-capitalmurder and placed in prison until their 6th birthday rather than sent to death row it would have cost the state $103.6 millio, or $79.6 million less. The projected costs of building the new prison in Palestine, for 2,250 inmates, is $67 million.

These figures were derived from computerized averages of capital murder trials in Harris County, actual cost figures from the Texas Department of Corrections and estimates of average appellate costs based on more than 30 interviews at the county, state and federal level.

In Harris County, the average capital murder trial costs $305,825. The average appellate process and death row incarceration costs an additional $176,305. The total: $482,130.

Figuring the cost

The cost of capital punishment includes court costs, court-appointed attorneys' fees, average appellate costs at the county, state and federal level, housing costs during the average six years spent on death row awaiting execution and the $36.95 cost of the lethal injection.

The cost of capital punishment was compared to the county court administrator's average cost of a non-capital murder trial (where life is the maximum penalty) and TDC's costs of locking up someone until age 65. The average capital murder suspect in Texas is 27 at the time of conviction.

The average cost of a non-capital murder trial is $22,640. The TDC says incarceration costs $11 388 per inmate per year, or $432,744 for 38 years. The total: $455,384.

Harris County District Attorney John B. Holmes said he was "not surprised" at these cost figures or the results of this comprehensive yet unscientific study.

"But the cost doesn't enter into it when I look at pursuing the death penalty," Holmes said. "That should be a factor for the Legislature to question: Should we have a death penalty, or is it too costly a luxury?"

State Sen. Ray Farabee of Wichita Falls, who serves on the state affairs and criminal justice committees, said he supports the feelings of his constituents, no matter how much it costs the state to execute a convicted killer. "I'm not surprised at those figures (almost $500,000 to gain and affirm a death sentence), but my constituency is overwhelmingly in favor of the death penalty," he said.

Referring to the statewide cost of capital punishment since 1980 compared to the cost of a new prison, he said, "That's an impressive comparison, but it still costs more to keep them in prison than execute them."

"It ought to be a capital offense to use that kind of logic," said Henry Schwarzschild, with the American Civil Liberties Union. "The notion that executing two people will save $30,000 from next year's prison budget is laughable."

Favor executions

The vice chairman of the House committee on law enforcement also feels Texans want capital punishment no matter what the cost. State Rep. Allen Hightower of Huntsville, when told the cost of the state's 212 death sentences since 1980 would more than pay for the new prison being built in Palestine, said, "I think you'll find the people in Texas would still rather pursue the death penalty regardless of the cost."

There are currently 241 inmates awaiting execution on the state's death row, including 81 from Harris County.

TDC's death row population in Huntsville ranks second only to Florida. If Harris County were a state, its death row population would rank sixth in the nation.

Texas ranks first in modern-day executions with 19. Five of those executed inmates were convicted in Harris County.

The 1986 Texas Crime Poll, released Nov. 19 by the Criminal Justice Center at Sam Houston State University, showed that 85 percent of those questioned favored the death penalty. Nearly 75 percent, the survey stated, believe too few criminals have been executed.

Although popular support of the death penalty where capital punishment exists hasn't diminished, there is a small movement around the country to re-evaluate the actual cost of capital punishment.

One study, completed in 1982 by the New York State Defenders Association, was based on hypothetical figures drawn from proposed capital punishment legislation. The executive director of that association said the total costs may vary from state to state but the cost difference between pursuing a death or a life sentence remains the same.

"The cost ratio of 10 to 1 ($500,000 to $50,000) for a capital murder trial versus a non-capital murder trial is what we found in New York and what we would expect to find anywhere else," said Johnathon Grades.

In the most recent study, Margot Garey concluded that the minimum cost of carrying out one execution was $600,000.

"Although the cost of lifelong incarceration surely would be high, the cost of execution with constitutional protections is staggering," said Garey in a lengthy, heavily documented article, published July 1985 in the University of California-Davis Law Review. As a result of these questions being raised, the American Bar Association has decided it is time to provide factual answers to questions on the cost of capital punishment.

Research formula developed

Last year, a committee of prosecutors, defense attorneys and judges developed a research formula to determine the actual expense of seeking the death penalty.

"We did it because no one had ever done it before," said North Carolina Supreme Court's Chief Justice-elect James Exum. The conventional wisdom that an execution was ultimately less expensive than a life sentence has never been tested against an actual study, he said.

Exum hopes to use the formula next year to assess the cost of capital punishment in North Carolina.

The project's director, Richard Van Duizend of the National Center for State Courts in Virginia, refused to speculate on what he expects will be "the actual cost of capital punishment."

District Attorney Holmes, who has sent more convicts to death row than any other prosecutor in the state, believes in the death penalty, although he is not a zealous proponent of executions.

Holmes said the death penalty serves as a deterrent, "even if it keeps just one guy from killing an innocent person."

But if there were such a thing as a life sentence without parole, Holmes belives most citizens and juries would prefer assessing life in prison rather than death sentences, "especially if it's not cheaper to kill them . . ."

However, Holmes belives there is another factor supporting the death penalty, regardless of the cost: "It comforts people to know that that retribution (the death penalty) is available. If we don't have that option, society may decide to scratch that itch itself, like Bernard Goetz did in the New York subway."

One last factor to be considered is the cost of irreversible error.

Following last Thursday's execution of a convicted killer out of Dallas, Attorney General Jim Mattox said he believes one of the 19 inmates executed since 1982 may have been wrongly sentenced to die. He refused to identify the dead man.

Mattox also told reporters there are "legitimate questions" involving the death sentences of two other unidentified inmates currently on death row.

"I think there are cases that it could be argued the punishment chosen was not the proper one, but I don't think I've seen any glaring abuse," Mattox said.

THE MIAMI HERALD
7/10/88/12A

Bottom line: Life in prison one-sixth as expensive

By DAVE VON DREHLE
Herald Staff Writer

At first glance, executions appear cheap.

Funeral suit from Jim Tatum's Fashion Showroom in Jacksonville — "We Fit Them All, Big and Tall" — costs $150. Florida's budget for the last meal: $20. Executioner's fee: $150. Undertaker: $525, box included.

But the true cost of an execution is closer to $3.2 million.

To execute a prisoner, the state of Florida spends six times as much money as it would to keep him in prison until he dies of natural causes.

How come? Why does the death penalty cost so much more than life-without-parole?

Government agencies and independent analysts in eight states have scrutinized the ledgers. Said Michael Gradess, who calculated the cost of a proposed death penalty in New York: "People in states that have the death penalty kept telling me, 'I hope you're ready to go bankrupt.' "

Although the numbers vary, all the studies agree that death penalty cases cost more than life-in-prison cases at every level — from pretrial investigation to last-gasp appeals.

To begin with, death penalty cases almost always require a trial. They usually generate a lot of publicity, making prosecutors reluctant to plea bargain. And only a suicidal defendant pleads guilty when facing death.

And death penalty trials take longer. Attorneys have unusual freedom to question potential jurors one by one — a very time-consuming process. Fighting for their clients' lives, defense attorneys file twice as many pretrial motions as in the average nondeath murder trial, a California study found.

Once the defendant is found guilty, the law requires a second trial to decide if the prisoner should live or die.

To show why they should live, defendants often call as witnesses psychiatrists, family members, former teachers, even accomplices in past crimes. The witnesses have to be located, which can take months of expensive investigation.

To show why the defendant should die, the state tries to persuade the jury that he is hopelessly evil, a permanent danger to society. For this, prosecutors rely heavily on high-priced psychiatrists.

The total additional cost for trial and sentencing over a no-execution murder trial: at least $36,000, a Maryland study showed. A similar study in Kansas figured the additional costs at $116,700.

After sentencing, every death verdict must be reviewed by the state Supreme Court. The U.S. Supreme Court requires it. And every defendant is entitled to a state-paid lawyer.

Bob Spangenberg, a consultant for the American Bar Association, surveyed more than 150 capital cases across the country. For defense alone, these mandatory reviews cost an average of $34,740 each, Spangenberg computed.

That's just the beginning. After the mandatory review there are at least six levels of appeals. Spangenberg calculated these costs. Average cost for government-salaried defense lawyers: $137,410.

This is a bargain compared to costs racked up by prestigious volunteer lawyers handling death penalty appeals. Wilmer, Cutler and Pickering, a big-name Washington firm, figures it has already laid out $1.2 million in attorney time and $173,000 in hard cash arguing federal appeals for serial killer Ted Bundy.

There are two sides, of course, to every appeal. The prosecution needs lawyers, too. Repeated studies show that prosecutors match defense attorneys dollar-for-dollar.

In Florida, state-paid prosecutors and defense attorneys received about $3 million last year — to fuel a system that executed only one man, Willie Darden.

James Rinaman, former president of the Florida Bar Association, has studied the process at length, hoping to speed it up. He believes more lawyers are needed. To keep up with the demands of Florida's enormous death-penalty system, Rinaman estimates, taxpayers should be shelling out $12 million a year for lawyers alone.

"It boggles the mind," he says.

Analyst Spangenberg estimates the cost of appellate lawyers will soon top $30 million a year nationwide.

In the past, states kept costs down by relying on volunteer defense lawyers. Now there are too many cases and too few lawyers.

Says Clearwater's Pat Doherty, one of Florida's busiest volunteer capital attorneys: "It isn't good publicity. If you're going to do volunteer work, you're better off representing the Poor Clares."

Then comes the expense of prison. Death Rows cost more to run than ordinary maximum security cell blocks, according to studies in Kansas and Alaska. Florida prison officials say specific calculations are impossible.

Florida officials calculate one cost, however. When the governor signs a death warrant and an inmate's execution is scheduled, the doomed man is moved to a cell near-

er the electric chair. For 30 days, guards keep a round-the-clock watch to make sure the inmate doesn't kill himself.

The cost in overtime for guards each time a warrant is signed is $13,800.

There have been 199 warrants signed in Florida since 1973. Sometimes the state saves money because the guards can watch several doomed men at once.

Merely feeding and housing a Death Row prisoner long enough to execute him costs, on average, $108,000.

Total it up.

Florida taxpayers have paid more than $57 million for the death penalty since 1973. This number is based on the most conservative figures available. The real cost could easily be twice that or more.

Divide the $57 million by 18 executions. The bottom line: at least $3.2 million per execution. And the cost is growing.

Bob Spangenberg, the bar association consultant: "The costs are going to add and add and add and add. It's going to add up until something gives."

Michael Gradess, who studied the issue for the state of New York: "You're going to see a death penalty that costs a billion dollars nationwide."

THE PRICE OF VENGEANCE

The death penalty costs more than life in prison. Here's how much more. The numbers show the range of estimates.

TRIAL & SENTENCING: $36,000-$116,700

The average death penalty case requires more investigation, more pretrial motions, more expert witnesses and a longer jury selection process. A separate sentencing trial is also required — not required in nondeath cases.

MANDATORY STATE REVIEW: $69,480-$160,000

Every death sentence must be reviewed by the state Supreme Court — not required in nondeath cases.

ADDITIONAL APPEALS: $274,820-$1 million-plus

After conviction is affirmed by the state Supreme Court, at least six levels of appeals remain open.

JAIL COSTS: $37,600-$312,600

Death Row requires extra guards for high security.

EXECUTION COSTS: $845

Florida pays $150 for the executioner, $150 for a death suit, $20 for the last meal and $525 for burial.

SOURCES: Miami Herald research; Florida Department of Corrections; Florida attorney general; Florida Office of Capital Collateral Representative; American Bar Association Post-Conviction Death Penalty Representation Project; Criminal Justice Act Division, Administrative Office of the U.S. Courts; Committee to Study the Death Penalty in Maryland; Kansas Legislative Research Department; Alaska Department of Corrections; *Capital Losses*, a report to the New York Assembly Ways and Means Committee; *The Cost of the Death Penalty*, in the University of California Davis Law Review

THE MIAMI HERALD
7/10/88/1A, 12A

Capital punishment in paralysis

Huge caseload bloats lethargic, costly system in Florida, U.S.

By DAVE VON DREHLE
Herald Staff Writer

On a whim during a burglary, Charles Proffitt murdered Joel Medgebow on July 10, 1973. He plunged a bread knife into his sleeping victim's chest, "just to see what it felt like."

Three years later, using *Proffitt vs. Florida* as its test case, the U.S. Supreme Court upheld Florida's death penalty. Proffitt could be dead in six months, Attorney General Robert Shevin predicted.

Today, 15 years after the murder, Charles Proffitt is alive and well, sewing uniforms for inmates at Florida State Prison. The Florida Supreme Court reduced his sentence to life last year.

The state of Florida spent at least half a million dollars over a decade and a half trying to execute Charles Proffitt. It failed.

THE DEATH PENALTY
A FAILURE OF EXECUTION
First of a series

For Florida, and the 36 other states that impose the death penalty, *Proffitt vs. Florida* is still a test case. And the death penalty fails the test. The death penalty is costly, slow and inefficient.

Apart from any arguments about the morality of capital punishment, there is something terribly wrong with the system.

● **Costly:** The death penalty costs much more than life imprisonment without parole. It has cost Florida at least $57 million since 1973, according to conservative calculations based on independent studies.

● **Slow:** 36 inmates on Florida's Death Row have been there more than 10 years. Florida's senior Death Row resident, Howard Douglas, is in his 15th year — and his execution is nowhere in sight.

● **Inefficient:** Half of all death sentences are overturned on appeal, usually after years of expensive litigation. For every execution in America, courts sentence 13 more people to die.

The statistics speak for themselves: Death Row is going to get bigger, the wait for execution is sure to get longer, and the cost is bound to get higher. Experts are coming to the grim conclusion that little or nothing can be done to make the system work. It is a failure of execution.

Nowhere is this fact more clear than in Florida, a fervently pro-execution state that has always been among the first to arrive at death penalty milestones.

Here — where 296 convicted killers make up the largest Death Row in the nation — judges, prosecutors and politicians are quietly lowering their sights, giving up on swift and sure justice, and learning to live with a bloated system that splutters and wheezes.

"I don't know if we're ever going to catch up," says Carolyn Snurkowski, Florida's chief appellate prosecutor. The best the system can hope for, she says, is to "keep plodding along."

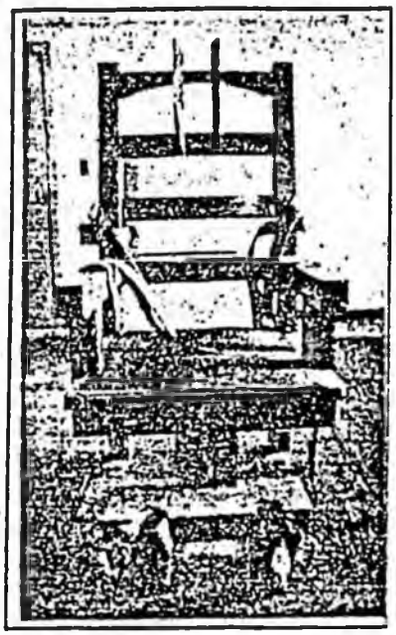
For capital punishment advocates, this is a bitter pill. Just two years ago, former Florida Attorney General Jim Smith pumped up his campaign for governor by promising two executions a month or more. "This delay couldn't go on forever," he said.

Today, the numbers refute such predictions. Even though the public solidly supports the death penalty, Florida has executed but two men in the past two years. Nationwide, the number is just 39.

In the same two years, Florida courts sent 89 people to Death Row. Nationwide: some 600.

"We're not going to clear out Death Row any more than we're going to pay off the national debt," says former Florida Bar Association President James Rinaman of Jacksonville. Rinaman, a death penalty advocate, has labored for more than three years to speed up the system.

A WHOPPING BILL



- Spent by Florida taxpayers on the death penalty since 1973: **at least $57,215,210.**
- Executions: **18.**
- Cost per execution: **at least $3,178,623.**
- Cost of life in prison (40 years): **$515,964.**
- The appeal process: **at least $36.1 million,** just for government-paid lawyers.

Failure clearly visible

The failure of the death penalty is visible from one end of the nation to the other.

● More than 2,100 people live on America's Death Rows. At the current execution rate, it would take 82 years to kill them all. And the Death Row population is likely to double by the turn of the century.

● In Dade County, the public defender is under court order not to take on any more death penalty cases — the caseload is too great. Private attorneys must be appointed — and paid for — by the courts. "The system doesn't have the resources to handle the workload," says Public Defender Bennett Brummer.

● The number of capital cases on appeal in the federal courts will more than triple in the next two years, according to a study prepared for the federal judiciary. Lawyers to handle these appeals will cost the nation's taxpayers $30 million a year, the study concluded.

California, for example, has 234 prisoners on Death Row — the third-largest population in the country. Its last execution was in 1967. Yet the taxpayer-funded budget for defense attorneys there is more than $2 million a year.

● Even Bob Graham, the former Florida governor who signed more death warrants than anyone in the state's history, pronounces the death penalty system a "quagmire."

"And if the definition of justice is a system that administers equal and predictable results, then capital punishment in the United States today falls short," Graham says.

It was not supposed to be this way. Not after millions of dollars and years of effort spent trying to make the death penalty work.

The heyday

The heyday of the death penalty in America came in the 1930s. Hanging judges and biased juries too often used the penalty as little more than a legal lynching.

Proffitt

Bundy

'If the definition of justice is a system that administers equal and predictable results, then capital punishment in the United States today falls short.'

Sen. Bob Graham

Gradually, the numbers subsided: there were fewer executions in the '40s and fewer still in the '50s. Legal assaults on the fairness of the death penalty system stopped executions altogether in Florida in 1964. In 1965, a commission to revise New York's penal code found that "whatever aspect of the death penalty one examines, one finds nothing but obstruction, confusion and waste."

Two years later, executions ceased across the country.

In 1972, a narrow and fractured majority of the U.S. Supreme Court concluded the death penalty, as it existed in America, was unconstitutional.

Justice William Brennan wrote that capital punishment depends on "a system in which the punishment of death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. A rational person contemplating a murder is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future."

Although Brennan and Justice Thurgood Marshall said the death penalty would always be unconstitutional, the seven other justices encouraged the states to draft new laws that would meet the constitutional test.

'A back-breaker'

Florida obliged within six months. Texas, Georgia, Louisiana and others were close behind. Courts and legislatures in 37 states have tinkered ceaselessly ever since, trying to make the death penalty fair, rational and swift.

But instead of fair, rational and swift, all this tinkering is making the law ever more complicated. And complicated means slow. It means expensive.

"There is no question that it's a back-breaker," says Sandy Weinberg, a former federal prosecutor. Recently, Weinberg helped win freedom for Death Row inmates William Riley Jent and Earnest Lee Miller. "It takes eight years or more of litigation to execute someone, and the process just can't go faster."

"The Supreme Court has said 'death is different,' " says Bob Spangenberg, a Boston-based consultant who has studied legal costs and the death penalty for 24 state and federal agencies. "The court has said everyone must follow extensive procedures to guarantee the process is fair. And that takes a lot of time. In *every* case."

As judges anguish over each case, more and more pile up behind. The backlog is infinite. With 300 new cases every year, the U.S. could execute one person every day, and it would take more than 30 years to empty all the Death Row cells.

No one familiar with the system believes that is possible. Daily executions are unprecedented in American history. The executioner's busiest year was 1935, when there were 199 executions.

That record rate, given the current pace of death sentencing, wouldn't make a dent in America's Death Row. At that rate, Death Row would keep on growing.

Last year there were 25 executions in America, the most in a quarter century. Yet the system is barely plodding along, falling further and further behind.

Even that great motivator of balky government — community outrage and pressure — cannot speed the system. No murderer is more loathed and notorious than Theodore Robert Bundy. In 1978, Bundy slipped into a Tallahassee sorority house and bludgeoned two sleeping women to death, then killed a 12-year-old girl in Lake City.

He was sentenced to die three times in 1979. Nine years later, Bundy is alive and well on Death Row.

For five of those years, his case sat before the Florida Supreme Court. Like all capital cases in Florida, Bundy's sentence went to the state high court for a mandatory review. Court justices insist they weren't dragging their heels. The backlog was just too big.

Florida high court justices plow through 70 mandatory reviews each year, consuming at least a third of their time. On top of that, the justices are hit with 30 to 40 last-minute appeals.

"Let me put it this way: Capital cases are a very small part of the caseload of the Court, but we must spend a very, very, very substantial amount of time on them," says Justice Gerald Kogan. "The workload is far out of proportion with the actual number of cases."

Chief Justice Parker Lee McDonald: "If I could figure out a way to make this better or easier or quicker, I would. But I can't."

Executing Ted Bundy

Bundy's federal appeals couldn't even *start* until the state Supreme Court made its ruling. Once the federal appeals were filed, they immediately bogged down in another backlog.

Last week, the 11th Circuit Court of Appeals in Atlanta turned down a Bundy petition. The court took almost two years to decide. Some think the end is in sight for Ted Bundy. They've been wrong before.

There's nothing unusual about Bundy's case. Indeed, there are 55 death cases in Florida alone that have been in the system longer than Bundy's.

And it's getting worse. A year ago, only 275 of the 2,100 death penalty cases in America — 13 percent — had reached the federal level of appeals. Almost all of them were from Southern states. They consumed about a third of the judges' time in the 11th Circuit Court of Appeals and the Fifth Circuit in New Orleans.

From those 275 cases, the federal caseload will increase to 1,000 by 1990, according to Spangenberg, the Boston analyst. He talks of "a tidal wave" of death penalty cases about to swamp courts that have little or no experience with such appeals.

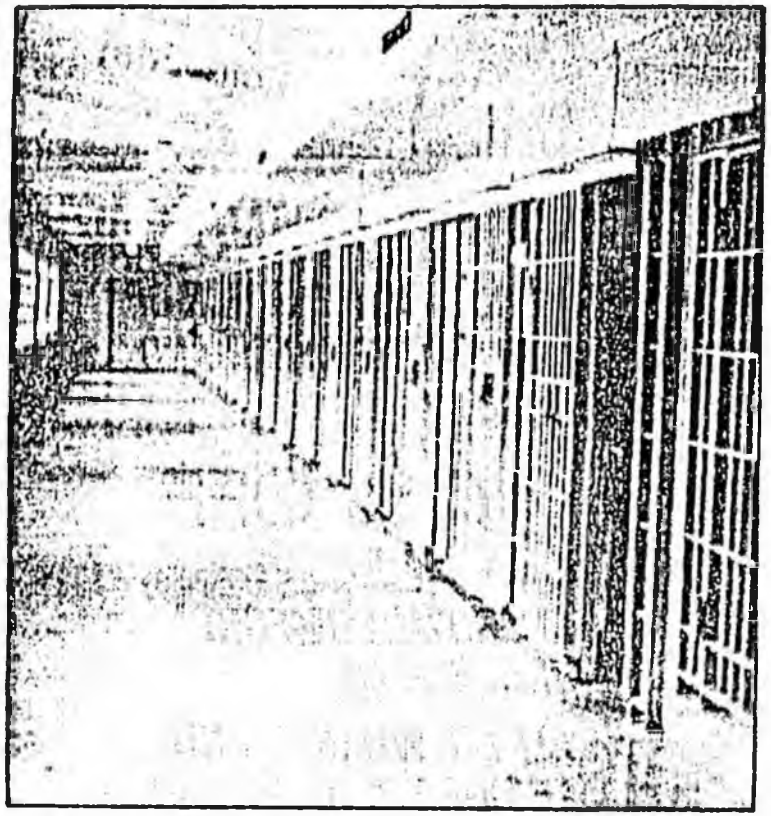
Specifically, the federal courts in California have but a single death penalty case on their dockets. Soon, the caseload will be 80. After the wave hits California, it will hit Ohio. Then Illinois, Pennsylvania, Arizona.

"What was once a Southern problem is soon going to become a national problem," Spangenberg says.

Across the nation, federal judges are looking toward Florida to size up the future. They see a 300-person Death Row. They see a five-year court backlog. They see Charles Proffitt sewing uniforms and Ted Bundy reading legal briefs.

"The judges are beginning to realize what is happening," says Spangenberg. "And they're asking: 'What the hell are we going to do?' "

FLORIDA'S DEATH ROW INMATES



At Starke, more inmates — 296 — await the executioner than in any state. Eighteen have been electrocuted.

14 YEARS ON DEATH ROW: Howard Douglas, Gary Alvord, Ja ies McCray, Vernon Cooper.

13 YEARS: Ronald Jackson, Jacob Dorgan, Alvin Ford, Lewis Aldrich, Charles Messer, Douglas Meeks, William Lliedge, Thomas Knight, Lenson Hargrave.

12 YEARS: Carl Jackson, Sampson Armstrong, Charles Foster, Raymond Stone, Elijaah Jacobs, Wardell Riley, Jessie Tafero, Mark Mikenas, William Zeigler, Joseph Spaziano.

11 YEARS: Henry Street Jr., Harold Lucas, James Hitchcock.

10 YEARS: James Rose, Amos King, Carl Songer, Ernest Downs, Bennie Demps, Robert Buford, Freddie Hall, Mack Ruffin, Morgan Floyd, James Morgan.

9 YEARS: John Ferguson, Walter Steinhorst, William Thompson, Jimmy Smith, Stephen Booker, Hollie Martin, William Christopher, Raleigh Porter, William White, Marvin Johnson, Aubrey Adams Jr., Leslie Jones, David Delap, McArthur Breedlove, Robert Heiney, Kenneth Griffin, Gary Trawick, Roy Stewart, Terry Sims, Theodore Bundy.

8 YEARS: Gregory Engle, Rufus Stevens, Johnny Copeland, Bryan Jennings.

7 YEARS: Frank Smith, Paul Scull, Larry Johnson, Theodore Bassett, Bobby Lusk, Gregory Mills, Bernard Bolander, Robert Combs, Robert Waterhouse, William Middleton, Terrell Johnson, Robert Telleteller, Kenneth Quince, James Agan, Dan Poully, Ernest Fitzpatrick, Sonny Dale Jr., Larry Mond, Oscar Mason, Jellery Daugherty, Linroy Bolfoson, Ian Lightbourn, John Michael, John O'Callaghan, Chester Maxwell, Jim Chandler.

6 YEARS: Manuel Valle, Ed Thomas, Theodore Harris, Robert Preston, Leo Jones, Freddie Williams, Edward Kennedy, Norman Parker Jr., James Card Sr., Phillip Atkins, Ted Herring, William Squires, Daniel Johnson, Robert Patton, Thomas Rope, Roy Harich, Jerry White, Robert Craig, Omar Blanco, Charlie Burr, Ronnie Jones, Davidson James, Milford Byrd, Daniel Doyle, Frank Griffin, Mario Lara, David Gorham, Larry Brown, Robert Henderson, John Rush, Douglas Jackson.

5 YEARS: Alphonso Cave, John Mills, J.B. Parker, Garry Hoffman, Tommy Groover, Kenneth Hardwick, Allen Davis, George Lemon, Kayle Sales, Ernest Roman, F.L. Medina, Lloyd Guest, Robert Parker, Clarence Hill, Marion Francis, Milo Rose, William Rutzy, Raymond Koon, Clarence Jackson.

4 YEARS: Harold Hooper, Joel Wright, Ronald Woods, Enrique Garcia, Raymond Dolinsky, Gerald Stano, Fred Way, Andrea Jackson, Harry Phillips, Robert Reese, Richard Cooper, Jason Mallon, Michael Lambrix, Ernesto Suarez, William Kelley, Anthony DeViolotti, Robert Glock, Carl Durafh, David Johnston, Jason Deaton, Donald Lloyd, James Huff, John Marek, Jeffrey Muehleman, Thomas Provenzano, Eduardo Lopez.

3 YEARS: Charles Knight, James Floyd, James Hamblen, Juan Melendez, Gregory Koral, Oscar Torres-Abreledo, Jerry Rogers, Abron Scott, Nathaniel Jackson, David Gore, Joseph Ramirez, Herbert Spivey, Burley Gilliam, Billy Nibert, Robert Long, Joe Nixon, James Floyd.

2 YEARS: Richard Rhodes, Layne Tompkins, Guy Cochran, Jessie Livingston, William Turner, Roy Swafford, David Cook, Judias Buendano, Martin Grossman, Rickey Roberts, Angel Diaz, Johnny Perry, Jerry Correll, Duane Owen, Gary Tillman, Morris Brown, John Hardwick Jr., Frank Smith, Anthony Bryan, Johnny Williamson, Daniel Remeta, Reinaldo Amores, Donald Kritzman, Johnny Robinson, Harold Harvey Jr., Hector Fuente, Juan Banda, Jesus Scull.

LESS THAN 2 YEARS: Etheria Jackson, John Merritt, Paul Baldwin, Kenneth Stewart, Robert Roundtree, Walter Brown, Cleo Leroy, Allen Moore, Walter Kyser, Charles Pridgen, Willie Mitchell Jr., John Edwards, Arthur Rutherford, Rudolph Holton, James Harmon, Leonard Spencer, Grover Reed, Kayse Dudley, Darryl Barwick, Mark Davis, Timothy Hudson, James Brown, Paul Brown, George Morris, Wilburn Lamb, Carla Caillier, Charlie Thompson, Alberto Farinas, George Hill, Carlos Bello, John Henry, Michael Rivera, Darrell Hallman, Arthur Schafer, Melvin Trotter, Jorge Zerquera, James Mack, Samuel Rivera, James Dailey, Manuel Colins, Andrew Williams, William Reaves, Jerry Stokes, Mac Wright, Roger Cherry, James Bryant, William Rhodes, Dee Casteel, Michael Irvine, Michael Bruno Sr., Alphonso Green, Eddie Alvin, Dominick Occhicone, Todd Mendyk, Dennis Stocker, Antonio Carter, Krishna Maharaj, Michael Keen, Guy Christian, John Freeman, Frederick Nowlike, Clinton Jackson, Peter Ventura, Bradley Scott, Edward Castro, David Pentecost, George South, David Young, Richard Anderson, Raymond Thompson, George Porter Jr., Johnnie Boone Jr., Walter Caruak, Bernell Heywood, Thewell Hamilton, Jerry Haliburton, Paul Johnson, Randall Jones, Robert Blakley, Edward Ragsdale, Donny Craig, Daniel Burns Jr., James Campbell, Manuel Pardo Jr., Leonard Smalley Jr., James Duckett.

EXECUTED IN 14 YEARS: John Spenkelink, Robert Sullivan, Anthony Antone, Arthur Goode, James Adams, Carl Shriner, David Washington, Earnest Dobbert, James Henry, Timothy Palmes, James Raulerson, Johnny Witt, Marvin Francois, Daniel Thomas, David Funchess, Ronald Straight, Beauford White, Willie Darden.

SOURCE: Florida Department of Corrections

THE MIAMI HERALD
7/11/88/1A,8A

Fairness was fatal blow to fast executions

By DAVE VON DREHLE
Herald Staff Writer

Howard Douglas is the Methuselah of Death Row. The jury thought he should live, and the judge thought he should die. Fifteen years later, courts are still trying to sort it out.

Douglas may well become the first man in Florida history to live for 20 years in the shadow of the electric chair.

But almost certainly, he won't be the last.

Why does the death penalty take so long? Why is it that 97 percent of the death sentences imposed by America's courts have yet to be carried out — even though the public strongly supports capital punishment and spends millions trying to speed the process?

Lawyers blame the governors. Governors blame the courts. Courts blame the lawyers. But still nothing happens. There is a population explosion on America's Death Row, and no one has a realistic solution.

Legal experts — both for and against capital punishment — are coming to an identical conclusion: The death penalty itself is to blame. It is too complicated to work efficiently.

When the death penalty almost died 16 years ago, advocates rushed to resuscitate it. What they ended up with, many experts now believe, is a monster of litigation — unpredictable, irrational, causing chaos wherever it goes. And impossible to control.

Here's why it is failing:

● When the U.S. Supreme Court decided in 1972 that capital punishment was unconstitutionally arbitrary, state legislatures moved swiftly to restore the death penalty. To eliminate the problem of unfairness, lawmakers established complex standards for determining who should live and who should die.

● The Supreme Court wanted to make sure the new laws worked — that they really were fair. So it initiated an unprecedented level of state and federal court scrutiny.

● Courts eventually discovered that the complicated new laws worked only about half the time. Half of all death sentences, they determined, were mishandled — and ultimately illegal. So the intense level of case-by-case scrutiny persisted.

● As more and more judges looked at more and more cases, they came up with more and more interpretations of the law. With each new interpretation, inmates found more avenues of appeal.

● Judges and juries nevertheless have embraced the new death penalty as never before. The system is now hopelessly behind. For every 30 death sentences, America has executed one person.

A solution, if it comes, would require a virtual revolution in the criminal justice system — a bloodbath of proportions never seen in the nation's history. An execution a day, every day, for decades.

"That's just not going to happen. It's never going to happen," says Carolyn Snurkowski, chief appellate prosecutor for the Florida attorney general.

"We have to figure out a way to dig ourselves out of this mess, or we need to get rid of the death penalty," says Ed Austin, state attorney for Jacksonville, the pro-death penalty dean of Florida prosecutors.

The death penalty used to work *fast* — especially in the South. The jury delivered a verdict, the judge imposed sentence and the warden readied the gallows or the electric chair. Convicted rapist Robert Hinds was executed in Florida seven days after his trial in 1937.

But with speed came outrageous excesses. Small-town judges and juries had the awesome power to decide for themselves who would live and who would die. Not surprisingly, blacks fared poorly in this lottery. Though they comprised less than 20 percent of the population, blacks made up more than half the people executed in America before 1967.

THE LONG ROAD TO EXECUTION

These are the steps every capital case must pass through before execution:

THE DEATH PENALTY

A FAILURE OF EXECUTION
Second of a series

- ▶ **TRIAL** — Defendant guilty or not guilty?
- ▶ **SENTENCING** — Should defendant live or die?
- ▶ **DIRECT APPEAL** — State Supreme Court reviews decision.
- ▶ **U.S. SUPREME COURT** — Process fair thus far?
- ▶ **COLLATERAL APPEAL** — State courts examine trial procedures.
- ▶ **HABEAS CORPUS** — Federal courts look for constitutional violations.
- ▶ **U.S. SUPREME COURT** — Final review.

At any point, the case can be sent back to a lower level. And the process begins again.

Eventually, the abuses soured the public on the death penalty. Executions ground to a halt in 1967, and the Supreme Court agreed to take a long look at the issue. After an anguished debate, the justices ruled in 1972 that all existing capital punishment laws were fundamentally unfair and thus unconstitutional.

Dependent on whim

Justice William Douglas summed up: "No standards govern the selection of the penalty. People live or die, dependent on the whim of one man or 12."

This landmark decision in Furman vs. Georgia was a narrow one — the vote was 5-4. The chief justice at the time, Warren Burger, wrote the dissenting opinion, joined by current Chief Justice William Rehnquist.

Burger complained that the majority decision left the death penalty in "an uncertain limbo" and suggested that state legislatures "bring their laws into compliance . . . by providing standards for judges and juries to follow."

Burger was doubtful, though, that anyone could actually define adequate standards. Defining in advance which cases should get the death penalty, he warned, has "been uniformly unsuccessful." Each passing year shows how right he was.

State legislatures nevertheless took up the challenge to make the death penalty fair. Two approaches emerged: "mandatory" and "guided discretion."

Some states — notably North Carolina and Louisiana — tried to eliminate caprice by making the death penalty mandatory for first-degree murder. Other states — notably Florida, Georgia and Texas — adopted a process called "guided discretion."

"Guided discretion" meant that a judge and jury must weigh every capital defendant on a balance of aggravating and mitigating circumstances.

If the defendant had a prior record, if he murdered in the course of another felony, if his crime was "heinous, atrocious or cruel" — these would count as aggravating circumstances, making him or her more likely to receive the death penalty.

But if the defendant was very young, the product of a savage family or under the influence of a vicious accomplice — these would count as mitigating circumstances, tipping the balance away from death.

When the balancing was done, if the aggravating circumstances outweighed the mitigating, the death penalty would be imposed. Then the state supreme court would be required to review the decision to make sure it met the standards of the law.

The U.S. Supreme Court pondered both approaches and, on July 2, 1976, made its decision. Mandatory death sentences were ruled unconstitutional. But guided discretion passed muster, in a case called Gregg vs. Georgia.

The death penalty was saved.

Planted seeds of failure?

More and more experts are coming to believe that the court inadvertently planted the seeds of failure in its Gregg opinion. By declaring that "death is different" and demanding that *every* death sentence measure up to a complex and vague set of standards, the high court may have doomed the system to tedium and expense.

In a speech last year to the Maryland legislature, the state's chief judge, Robert Murphy, explained the problem. The very heart of the Gregg decision, he said, gives death penalty defendants "protections well beyond those required for noncapital felons." Those safeguards are "extremely difficult and complicated . . . protracted and expensive."

People may wonder, the judge said, "whether the time is close at hand when most of the legal problems will have been ironed out so that death penalty appeals will be treated as routinely as other criminal appeals. I doubt seriously that that day, if it ever comes, is close at hand."

Declares Richard Burr, director of the anti-death penalty Legal Defense Fund of the NAACP: "The Supreme Court has infused through all the lower courts an attitude that says, 'If you're going to have a death penalty, you're going to have to proceed in *each individual case* with as careful a review as is humanly possible.' "

This review takes place at three levels.

First, on "direct appeal," the state courts review each death sentence to be certain that the *facts* of the case justified the ultimate penalty.

Second, on "post-conviction" appeal, the same state courts again review each case, this time to be sure that the *procedures* used to convict the inmate were legal.

Third, on "habeas corpus" appeal, the federal courts determine if any aspect of the case violated the U.S. Constitution.

In theory, most of these reviews were available to doomed inmates even before the new death penalty laws were written. But in fact, in the old days, inmates were rarely executed without a glance from appel-

[illegible]rman and Gregg decisions changed all that. State supreme courts are now required to get involved. And scrutiny by the federal courts has become routine.

This puts a huge strain on the system.

An example: Every time a case hits the the federal level, a U.S. district judge is appointed to hear the appeal. At the same time, three judges of the Circuit Court of Appeals are appointed to review the decision of the first judge. And a U.S. Supreme Court justice is appointed to look over the decisions of the two lower courts.

With each step through the system, clerks must notify every judge. As the hour of doom nears, the process gets frantic.

U.S. District Judge Eugene Spellman remembers deciding one last-minute appeal at midnight. Spellman dialed the U.S. Supreme Court to notify the clerk. Could the clerk notify Justice Lewis Powell?

"He's right here," came the reply. "Why don't you tell him yourself?"

How often must a Supreme Court justice sit in his chambers, poised by the telephone, at midnight? Consider this: There are more than 2,100 cases in America's execution pipeline. The conclusion is inescapable: *Something has to give.*

Death penalty advocates have long hoped that courts will be forced to streamline the process. They have interpreted nearly every important death penalty decision as a sign that courts were abandoning tedious case-by-case review. Again and again, pro-death penalty politicians have predicted that the logjam was broken.

That was the prediction in 1979, when Florida electrocuted John Spenkelink. Officials confidently forecast six more executions in the coming year. But they were wrong — four years passed before the next execution.

Around the nation, death penalty advocates greeted favorable U.S. Supreme Court decisions in 1984 and 1986 as paving the way for quicker executions. Yet the execution rate nationwide hasn't accelerated. Quite the opposite: There were 2.08 executions per month in 1987; 1.17 per month so far in 1988.

In fact, there is little reason to believe that the judges will ever back off. Under the Gregg decision, they feel it is their duty to review every case. And, disturbingly, the judges keep finding major mistakes.

About half of all death sentences have been overturned on appeal since the "guided discretion" concept became law. Federal courts knock out about a quarter of the cases — even after the state's double-barreled review.

"There is a widespread sense that all this is just a matter of delays, that eventually everyone on Death Row is going to be executed. Well, that's just not the case," says Burr, of the NAACP. "How can you cut short someone's appeals when he stands a 50-50 chance of a major error?"

Yet case-by-case review has a disastrous effect on the legal system, prosecutors and defense attorneys agree. Laws are supposed to be predictable, solid as a rock. The failure of death penalty law, lawyers argue, is that it shifts and changes with each new lawyer arguing a new case to a new judge.

Instead of rock-solid, death penalty law is quicksand.

"The essence of the law is its predictability. The law is supposed to be coherent, consistent," says Pat Doherty, a Clearwater attorney who defends Death Row inmates. "Under the death penalty, all this is meaningless. The death penalty is a cancer on the law."

Exhibit A: Charles Proffitt, who murdered a sleeping man with a bread knife in Tampa in 1973.

In 1975, the Florida Supreme Court ruled that the facts of the case justified the death penalty. But over the years, as Proffitt's appeals crawled through the courts, the law subtly shifted.

In 1987, after a federal court ordered a new weighing of the aggravating circumstances, the state Supreme Court — the very court that had turned Proffitt down years before — spoke again.

This time, the court had a new sense of what made a murder especially "heinous, atrocious or cruel." Proffitt — who had not planned his crime, tortured his victim or compounded his crime by attacking his victim's wife — no longer met the test. The court reduced his sentence to life.

So a man who deserved the death penalty in 1975 didn't deserve it 12 years later.

'The law keeps changing'

"We're in a quandary of trying to hit a moving target," says Art Wiedinger, assistant general counsel to former Gov. Bob Graham. "The law keeps changing. The courts may make a ruling today that suddenly means something we did five years ago was wrong."

The changing law affected only one person in Proffitt's case. Often, though, shifts affect scores of condemned men. A U.S. Supreme Court decision last month will mean new appeals for 15 of the 19 inmates on Maryland's Death Row.

Arthur England, former chief justice of the Florida Supreme Court, lost hope of making death penalty law consistent.

"I thought the Supreme Court of Florida would be able to set standards that made sense that we could enforce," he says. "Because the legal system must be predictable. My experience on the court was that it's impossible to set standards and adhere to them. Predictability is not available in this area and it won't be."

One last hope of death penalty advocates: Ronald Reagan's conservative judges will swing the tide toward swifter executions. But even this hope is growing dim.

Seven of the nine U.S. Supreme Court justices support capital punishment. Four are Reagan nominees. Yet they continue to hear capital cases at a rate unimaginable before Furman and Gregg. Already this year, the high court has ruled on nine separate cases — without drastically changing anything.

Even Chief Justice Rehnquist, the most determined pro-death penalty voice on the court, concedes that capital punishment requires "especially careful review of the fairness of the trial, the accuracy of the fact-finding process and the fairness of the sentencing."

"No appeal is a 'mere technicality,'" says Florida Supreme Court Justice Gerald Kogan. "Technicalities are the law. So people can say, 'That's a technicality,' but we have to answer: 'Yeah, but that's what the law is.'"

More and more, it appears that the problem is the law itself.

Says Parker Lee McDonald, chief justice of Florida's high court: "The old cases never really go away, and the new ones just keep coming. The way the system is cranked in now, I think we're probably running pretty near maximum speed."

Maximum speed. In the 12 years since the "guided discretion" concept resuscitated the death penalty, America has executed 88 inmates against their will. Twelve more men quit their appeals and went to the death chamber willingly. Total: 100 executions.

Death Row, by comparison, grows at the rate of 300 death sentences a year.

Ed Austin, the pro-death penalty Jacksonville prosecutor, is just about ready to pull the plug.

"If you can't carry out the sentence within a reasonable amount of time, you should abolish the death penalty," Austin says. "The Supreme Court should fix it or get rid of it. If the court doesn't want to come to terms with this, then somebody should step in and say, 'It's a joke. It doesn't work. It's a shell game.'"

PROTECTING THE INNOCENT

The ultimate malfunction of justice is the execution of an innocent person. Fourteen times since 1973, justice in America has come close. Judges sentenced innocent men to die. Only the laborious appeals process saved them. One case took 13 years to correct.

▶ **JOSEPH GREEN BROWN, 23,** Florida: *Sentenced 1974. Freed 1987.*

A petty crook with a conscience, Brown confessed to a burglary he committed with an accomplice. The accomplice got even by accusing Brown of murder. Eventually, experts declared that Brown's gun wasn't the murder weapon. After more than a decade, the accomplice admitted he lied.

▶ **EARL CHARLES, 21,** Georgia: *Sentenced 1975. Freed 1978.*

After conviction, new evidence surfaced establishing his alibi. A federal judge ordered the state to compensate Charles in 1983 because a police officer violated his civil rights.

▶ **NEIL FERBER, 35,** Pennsylvania: *Sentenced 1982. Freed 1986.*

Prosecutors became convinced the star witness against Ferber lied. An eyewitness to the murder came forward to say Ferber was not the killer. When a new trial was ordered, charges were dropped.

▶ **GARY L. BEEMAN, 25,** Ohio: *Sentenced 1976. Freed 1979.*

An escaped prisoner, Clare Liuzzo, was the star witness against Beeman. When an appeals court ordered a new trial, five witnesses testified that Liuzzo bragged about committing the murder himself. Beeman was acquitted.

▶ **LARRY HICKS, 19,** Indiana: *Sentenced 1978. Freed 1980.*

Judge ordered a new trial because Hicks, who had a 'low-to-normal' IQ, had been too confused to assist his lawyer. At the new trial, Hicks' alibi was proved.

▶ **JOHNNY ROSS, 16,** Louisiana: *Sentenced 1975. Freed 1981.*

Convicted of rape. The youthful Ross confessed after police beat him. His trial lasted less than a day. Eventually, defense lawyers established that Ross' blood type did not match the sperm found in the victim.

GLADISH

GREER

KEINE

SMITH

▶ **THOMAS V. GLADISH, 23; RICHARD WAYNE GREER, 31; RONALD B. KEINE, 27; and CLARENCE SMITH JR. 30,** New Mexico: *Sentenced 1974. Freed 1976.*

Convicted of murder, kidnapping, sodomy and rape. Detroit News reporters traced the murder weapon and getaway car to a drifter in South Carolina. The drifter confessed.

JENT

MILLER

▶ **WILLIAM RILEY JENT, 28, and EARNEST LEE MILLER, 23,** Florida: *Sentenced 1980. Freed 1988.*

A federal judge found police withheld key evidence to back up the Jent-Miller alibi. Police overlooked the victim's boyfriend, whose next girlfriend was also beaten to death and burned. When a new trial was ordered, prosecutors offered to free Jent and Miller immediately if they would plead guilty to a lesser charge. While asserting their innocence, the half-brothers accepted the deal.

SOURCES: Herald research and Hugo Adam Bedau's and Michael Radelet's *Miscarriages of Justice* in the Stanford Law Review. These 14 cases are the most clear-cut. In scores of cases, significant doubts remain.

▶ **DELBERT TIBBS, 35,** Florida: *Sentenced 1974. Freed 1976.*

Victim's girlfriend, who was raped by the killer, gave a description of the attacker — which didn't match Tibbs. But she testified against him anyway. Tibbs, a hitchhiking divinity student, had a motel registration to support his alibi. Florida Supreme Court set him free. Prosecutor admitted the trial wasn't fair.

▶ **JONATHAN CHARLES TREADAWAY JR., 21,** Arizona: *Sentenced 1975. Freed 1978.*

Convicted of sodomy and murder of a 6-year-old boy. At retrial, five pathologists testified that the victim probably wasn't murdered or sodomized — that he probably died of pneumonia.

THE MIAMI HERALD
7/12/88/10A

'Judicial override' bogs system down

By DAVE VON DREHLE
Herald Staff Writer

A convicted killer stands before the judge. The jury recommends life in prison. But the judge imposes the death penalty.

This has occurred on 113 occasions in Florida since 1973. In more than 20 percent of the state's 544 death cases, judges sentenced to death defendants whom juries thought should live.

It is called "judicial override." For judges, it can be good publicity. For the legal system, it can be trouble.

In seven out of 10 "judicial overrides," higher courts reverse the trial judge — after long and costly appeals. Every time this happens, Florida taxpayers unwittingly shell out at least $69,480, according to conservative cost estimates — or $5 million thus far.

Says Bennett Brummer, Dade Public Defender: "Juries are supposed to be representative of the community. If a jury recommends that the defendant's life should be spared, then I feel the judge should be bound by that."

Jacksonville Circuit Judge Hudson Olliff is one of only two Florida judges whose override death sentences have actually ended in executions. Child-killer Earnest Dobbert was electrocuted on Olliff's orders on Sept. 7, 1984.

"Only a defense attorney would criticize the override," says Olliff.

Florida lawmakers created the judicial override late in 1972, as they rushed to write a new death penalty law after the U.S. Supreme Court declared the nation's existing capital punishment laws unconstitutional.

Existing death penalty laws gave juries too much power to decide who should live and who should die, the Supreme Court ruled. So in drafting the new law, Florida's legislators gave judges the power to disregard the jury's recommendations.

Now critics argue that the judges have too much power.

"If the people don't want an override, then let the Legislature change it."
Ellen Morphonios,
DADE CIRCUIT JUDGE

Other than Florida, only Alabama and Indiana permit judicial override. Only Florida judges use it extensively — so extensively that the Florida Supreme Court has been forced to set tough standards for policing the use of overrides.

Without these time-consuming standards, "the death penalty would be untenable in Florida," according to Supreme Court Justice Gerald Kogan.

It works the other way — but rarely. Angry citizens picketed Dade Circuit Judge Steven Robinson after he gave a life sentence to Jesse Ramirez in the "Duct Tape Murder" of Mario Portela.

No judge believes in the override more than Dade Circuit Judge Ellen Morphonios, known as "Maximum Morphonios" for her harsh sentences. *60 Minutes* and *NBC Nightly News* have filmed her in action.

"If I feel that's the thing that ought to be done, then I'll do it," she says.

Morphomos overrode the jury and sentenced Anibal Jaramillo to death in a 1981 drug-murder case. The justices of Florida's Supreme Court found her reasoning so unpersuasive they not only reversed the sentence, they turned Jaramillo loose.

In fact, all of Morphonios's nine death sentences have been reversed on appeal. The celebrity judge is unperturbed.

"You know there's a good chance the case is not going to fly, but you've got to live with yourself. If the people don't want an override, then let the Legislature change it."

A lot of people like that idea. Given the high cost and low success rate of judicial overrides, experts are increasingly calling for the elimination of this quirk in Florida's death penalty law.

"Face it," says Larry Spalding, Florida's chief Death Row defense lawyer. "If you can't convince the majority of a jury to impose the death penalty, then it's not a death penalty case."

THE MIAMI HERALD
7/12/88/1A,10A

Political pressure thwarts clemency

By DAVE VON DREHLE
Herald Staff Writer

Meet Vernon Cooper, the man on Death Row no one wants to execute.

Cooper may have murdered a policeman in 1974. Then again, maybe not. Cooper says his accomplice did it. The policeman and the accomplice are both dead. Since there were no other witnesses, no one knows for sure.

THE DEATH PENALTY
A FAILURE OF EXECUTION
Third of a series

In the heyday of the death penalty, Florida's governor probably would have granted executive clemency and reduced death to life in prison. For years, governors used this technique to dispose of marginal cases.

But today, in Florida, executive clemency is just one more aspect of the death penalty that doesn't work right.

Clemency exists only in theory, like UFOs and Bigfoot.

Since 1982, Govs. Bob Graham and Bob Martinez have reviewed 158 clemency requests — and granted zero.

The reason, some experts contend, is politics. No politician ever won an election by dispensing mercy to murderers.

"Theoretically, clemency could be used to clear away all the marginal cases and speed up executions," says Bob Spangenberg, a Boston attorney who has studied criminal law and the death penalty for 24 state and federal agencies.

"In reality, though, it's political."

Paradoxically, political pressure *in favor* of the death penalty is one reason the death penalty doesn't work.

In Florida, this happens three ways:

- By shunning the clemency process, governors have ignored an opportunity to cut court overload and streamline capital punishment.
- By signing a lot of death warrants, governors look tough on crime. But warrants signed willy-nilly merely increase the cost of capital punishment — by at least a third.
- By overriding jury recommendations for life in prison, judges look tough, too. Yet an astonishing number of these cases — seven out of 10 — are reversed after lengthy and expensive litigation.

Across the nation, the death penalty is taking on more and more political significance. Yet in the statistical world of murder, it counts for very little.

The 2,100 inmates on America's Death Rows account for less than two percent of the murders committed in the past 15 years.

Inmates actually executed — 100 — account for less than one-tenth of one percent of the nation's homicides.

The issue flourishes

Still, the death penalty issue flourishes in campaigns for state legislatures, governors' mansions, court benches, the halls of Congress — even the White House.

Strategists for Vice President George Bush already are attacking Democrat Michael Dukakis for opposing the death penalty.

"This is going to be part of the national debate," says Gov. Martinez, a prominent Bush man.

Candidates of every stripe affirm their belief in the death penalty almost as a code, symbolic of their hard line against crime.

People used to call Bob Graham a wimp. Not anymore. His strong support for the death penalty helped transform him into a U.S. senator and a finalist for the Democrats' vice president nomination.

Graham's pro-death penalty record, some say, makes him a perfect running mate for the vulnerable Dukakis.

The death penalty bandwagon is crowded. Witness the most recent race for governor of Florida

"I voted for the death penalty," boasted candidate Barry Kutun, Miami Beach senator.

"I've always, always supported it," declared candidate Harry Johnston, former Florida Senate president.

"I'll pull the switch personally," said candidate Joan Wolin, Lake County lawyer.

"If I am elected, Florida's electric bill will go up," promised candidate Tom Gallagher, Coconut Grove representative.

Candidate Bob Martinez, mayor of Tampa, won.

"Bob Graham politicized the death penalty and he set the standard for Bob Martinez," says Larry Spalding, a Graham appointee who directs an office of defense attorneys on behalf of Florida's doomed inmates.

Political motives?

Graham calmly denies that his death penalty agenda has been political. He consulted his "inner gyroscope," he says, and found his actions above reproach. Critics nevertheless see political motives behind the strange death of executive clemency in Florida.

Between 1925 and 1965, Florida's governors granted clemency in 57 of 265 capital cases — 21.3 percent.

In his first three years in office, Graham approached that pace. He granted clemency in six of 38 cases — 15.8 percent.

But Graham discovered that granting clemency risks political backlash. After he spared the life of Learie Leo Alford in 1979, Republicans denounced the governor. Alford's father, the Republicans noted, was a preacher active in Democratic politics.

After he spared the life of Darrell Hoy in 1980, parents of one of Hoy's victims deluged Graham with angry petitions.

In January 1982 — the year Graham ran for a second term — clemency vanished, never to be seen again. Although everyone on Death Row gets a clemency hearing, everyone on Death Row stays there.

Graham and Martinez explain: The system got better. The courts now weed out marginal cases before they get to the clemency board.

"After the first few years I was in office, the courts laid out sufficient standards, so cases that came through the process didn't leave much basis for clemency," says Graham.

Says Martinez: "Cases go through so many judges, they get sorted out pretty well."

In fact, though, marginal cases never stopped popping up. So, in place of clemency, Graham's staff quietly developed a way to sidetrack executions without making headlines.

Shift in tactics

The governor simply neglected to sign death warrants in cases that left him uncertain. No defendant can be executed without a warrant. Graham employed this tactic 20 times.

These cases, says Art Wiedinger, Graham's former assistant general counsel, "go into a sort of limbo."

Thus, Vernon Cooper, sentenced to death 14 years ago for the shooting of a Pensacola sheriff's deputy, remains on Death Row — though no one is trying to execute him. Jacob John Dougan, 13 years on Death Row, is in limbo. Eligaah Jacobs, 12 years on Death Row, is in limbo.

Limbo is politically safe. But at the same time, it does nothing to relieve the burdens of the system.

Martinez says he doesn't expect to grant clemency

> Bob Graham politicized the death penalty and he set the standard for Bob Martinez.
>
> **Larry Spalding,**
> CHIEF OF APPELLATE DEFENSE LAWYERS

any more than Graham did. He can't imagine circumstances that would convince him to reduce even one sentence.

"I guess I'll know it if I hear it," he says.

Today's clemency hearings are a Catch-22: The obvious way to win clemency is to be innocent. But every session begins with an admonition not to argue innocence.

"It is presumed," says Wiedinger, Graham's assistant counsel, "that the defendant is guilty."

In most cases, shortly after the clemency hearing, the governor signs the black-bordered death warrant. A date is set, usually 30 or 60 days later.

But most warrants don't really mean death. The courts issue a "stay of execution" while they weigh emergency appeals. While the judges are pondering, the warrants expire, and new ones must eventually be signed.

For every execution since 1973, Graham and Martinez have signed more than 10 warrants.

Warrants vs. executions

Critics say that the governors use death warrants as a vote-getter — the more warrants, the more votes. But more warrants don't mean more executions.

The Martinez record: 44 warrants, two executions.

Martinez argues that warrants are the only prod he has to keep cases moving. Defense attorneys can't stall if facing a date with the electric chair.

But using warrants to move capital cases is like using a sledgehammer to break an egg — it gets the job done, but makes a terrible mess.

When a warrant is signed, the system lurches into an expensive and inefficient overdrive. Everything costs more. Instead of mailing documents, lawyers use overnight express couriers. Airline tickets to distant courtrooms, booked on short notice, are always full-fare.

Judges must drop everything.

"When a death warrant is signed," says Florida Supreme Court Justice Gerald Kogan, "we get hit with appeals that are — and this is no exaggeration — a *foot* high. A thousand, 1,200 pages each.

"When we are served with this much documentation just a short time before an execution is scheduled, everything grinds to a halt while we deal with it."

Graham signed more death warrants than any Florida governor before him. But he always took care never to have more than four death warrants in effect at one time. "That was as much as the system could handle," Graham says.

Last month, by contrast, Martinez had *nine* warrants alive at the same time.

"That," says Justice Kogan, "creates a tremendous problem for us."

All nine warrants expired without an execution.

"We sign death warrants to move cases along — knowing full well that they're not going to get to the electric chair," Martinez explains. "Without the warrant, the case would just sit there."

Martinez considered Graham's four-warrant limit, but didn't like it. "Every office holder has to use his own judgment," he says.

The court's timetable

To simplify things, the Florida Supreme Court set a timetable for state appeals. This provides a way to keep cases moving without death warrants.

But Martinez has ignored the timetable. "There's nothing magic about the deadline," says Andrea Hillyer, Martinez's top death penalty lawyer.

Each time the timetable is ignored, Martinez sets off a costly warrant panic. An example: Fred Way, a Tampa man convicted of the arson-murder of his wife and daughter. His death warrant was signed last month.

Way had six months left under the timetable. When his warrant was signed, appellate lawyers on both sides had just days to study reams of court documents and write their legal arguments. They dumped everything on the appellate courts.

Costs soared. Judges called emergency hearings, halting the execution long enough to ponder the issues.

After weeks of frenzied labor, the warrant expired. Way's case stalled again. All this for a case that would have moved by itself in a couple of months anyway.

For years, people have talked about fixing the warrant problem.

Spalding, chief of the appellate defense lawyers, says he proposed a compromise with the governor: Both sides agree to deadlines for all appeals. As long as the deadlines are met, the governor would lay off the warrants.

"He'd sign fewer warrants and get more executions," Spalding says. But the governor wouldn't buy it.

Baloney, answers the governor.

"We tried to work with him," says Joe Spicola, the governor's general counsel. "We are perfectly willing to work things out. But we are not going to sit back and let them prostitute the process."

The feud is poisoning an already ailing system. Martinez ordered an investigation of Spalding. Spalding bashes Martinez to judges and the press.

And each week in Florida, another killer steps into the costly line to the seldom-used electric chair.

CLEMENCY CONFUSION

The clemency board said no, but a federal judge said Florida "lost sight of the ultimate goal" of justice in the case of William Riley Jent (center) and Earnest Miller.

IT'S NOT easy to tell the winners from the losers.

YES: Learie Leo Alford won clemency in 1979 because there was no physical evidence linking him to the rape-murder of a 13-year-old girl. And Alford's lawyer produced a witness who testified that Alford was innocent. Serving life in prison.

NO: Lawyers for William Riley Jent and Earnest Lee Miller stood before Graham and the cabinet to ask for clemency in 1983. No physical evidence linked the half-brothers to the torch-murder of an unidentified young woman. And three witnesses came forward to say that Jent and Miller were innocent. In 1986, Jent and Miller were freed, after a federal judge said Florida "lost sight of the ultimate goal" of justice.

YES: Darrell Edwin Hoy's case reached the clemency board in 1979. Two facts stood out: Hoy's jury had recommended a life sentence and Hoy's accomplice had won a new trial on appeal. Serving life in prison.

NO: Beauford James White's case reached the board in 1982. White didn't kill anyone — he was an accomplice to a Carol City mass murder. Two facts stood out: White's jury had recommended a life sentence and one accomplice was sentenced to just 20 years. In 1987, White was executed.

YES: Jesse Raymond Rutledge pleaded for mercy in early 1982. His lawyers argued Rutledge was innocent — that the key witness was pressured to finger the wrong killer. Serving life in prison.

NO: Joseph Green Brown asked for mercy late in 1982. His lawyers argued he was innocent — that the key witness blamed him because of a grudge. In 1986, a new trial was ordered. The next year, charges were dropped.

Former Gov. Bob Graham won't discuss these cases. But he argues that clemency cases are not necessarily supposed to make sense from one to the next. 'They are not meant to set precedents,' he says. Instead, he compares the governor's power to grant clemency to the power of kings in old England, not to be used 'on a wholesale basis.'

NO MERCY

In Florida, every doomed inmate has the right to a hearing before the governor and Cabinet prior to being executed. Circumstances overlooked, or undervalued, at the trial may convince the governor and Cabinet to reduce the death sentence to life in prison. Between 1925 and 1965, Florida's executives found more than one case in five worthy of clemency.

Under Bob Graham and Bob Martinez, however, the clemency process has withered and died.

		CLEMENCY		
Governor	Term	Requests	Granted	Pct.
Martin	1925-29	48	7	14.6
Carlton	1929-33	19	8	42.1
Sholtz	1933-37	24	3	12.5
Cone	1937-41	30	12	40.0
Holland	1941-45	39	4	10.3
Caldwell	1945-49	27	4	14.8
Warren	1949-53	19	2	10.5
Johns	1953-55	8	2	25.0
Collins	1955-61	38	9	23.7
Bryant	1961-65	16	6	37.5
TOTAL		268	57	21.3
Graham	1978-86	144	6	4.1
Martinez	1986-	58	0	0.0
TOTAL		202	6	3.0

THE MIAMI HERALD
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Cries for change

Both sides see flaws in capital punishment

By DAVE VON DREHLE
Herald Staff Writer

THE DEATH PENALTY
A FAILURE OF EXECUTION
Last of a series

In 1974, the year President Nixon left the White House and Americans lined up at the gasoline pumps, Charles Proffitt waited for the executioner on Florida's Death Row. Proffitt had stabbed a sleeping man with a bread knife.

Nearby waited Howard Douglas, the killer a jury thought should live and a judge thought should die. Vernon Cooper, who may or may not have killed a policeman, waited, too.

The executioner never came. In fact, if Florida's Death Row Class of '74 held a reunion, two-thirds of the inmates could attend.

In bluntest terms, the death penalty was supposed to kill these men. It failed, as it has failed in 97 percent of America's death cases in the past 15 years.

Scholars, lawyers, judges — even pro-death penalty politicians — conclude that such a dramatic failure demands change: Fix it or get rid of it. They propose a bunch of solutions, most of which would do neither.

Proffitt, Douglas and Cooper were among the first killers sentenced to die under new laws intended to make the death penalty rational and swift.

But just one in 30 people sentenced to death under those laws has been executed — leading some experts to argue that the laws aren't very rational. As for swift — consult the Class of '74.

America's death penalty enterprise has cost millions. Courts and legislatures have anguished uncounted hours. Capital punishment has driven an emotional wedge through the ranks of the law-abiding.

Now, attention is focused on a few highly publicized

cases — Ted Bundy's, for example. Undoubtedly, much of an angry public would hail the execution of Bundy as the triumph of capital punishment — cost, delay and frustration be damned.

And yet, the truth is that the death penalty is a failure in the overwhelming majority of cases. Almost everyone is dissatisfied, from advocates who demand vengeance to opponents who mourn each death.

Without dramatic change, America's capital punishment paralysis is going to get much worse. Here are the most discussed solutions:

Limit those eligible for execution

In most states, it is legal to execute juveniles and the mentally retarded.

But most Americans strongly oppose the idea of executing the mentally retarded. For example, a 1985 poll conducted in Florida showed eight of 10 people opposed. Americans also tend to oppose executions of juveniles — though many are undecided.

James Terry Roach was 17 and had an IQ of just 64 when he and two pals murdered a young couple in Columbia, South Carolina in 1976. A decade later, in 1986, Roach was electrocuted — despite pleas for mercy from Mother Teresa and the United Nations.

Increasingly, people argue that killers like Roach should not be executed. The Georgia Legislature recently outlawed executions of the retarded, and next year, the U.S. Supreme Court will take up the question of the death penalty for juveniles.

But eliminating juveniles wouldn't reduce the numbers noticeably: Only 32 of the more than 2,100 inmates on America's Death Rows were sentenced before their 18th birthday.

Joe Spicola, general counsel to Florida Gov. Bob Martinez, balks on principle. "A lot of our worst criminals are juveniles," he says. "You wouldn't believe some of the things they do."

No one knows how many condemned inmates are retarded. Some experts say hundreds. Even so, removing them from the process would not make a crucial difference to the nation's overloaded courts.

Executing the insane is a more difficult problem. Although laws forbid it, judges differ drastically on who's crazy and who isn't.

Anthony Antone, 66, his brain damaged by syphilis, did not meet the standard. He went to Florida's electric chair in 1984 convinced that when the surge went through him, his spirit would emerge via his pineal gland, ascend through the nine layers of the Universe, and come to rest on a throne from which he would rule the world.

David Funchess, executed by Florida in 1986, was diagnosed as suffering an uncontrollable violent reaction to the stress of Vietnam.

Criminologists have argued for decades over what constitutes insanity. Even if they agreed, the cost of thousands of lengthy psychiatric evaluations would be staggering.

Take politics out of the system

Florida's governors have not recommended clemency in a capital case since 1982. Their explanation is that the appeals process has become so refined that no marginal case gets as far as a clemency hearing.

In fact, though, Bob Graham and Bob Martinez acknowledge they have had substantial "problems" with 10 percent to 20 percent of the cases they have reviewed. Rather than reducing these sentences to life in prison, they have pitched them into limbo by refusing to sign death warrants.

Critics say Florida's governors don't grant clemency because it is politically unpopular. They believe the political dangers are exaggerated.

One of America's most popular governors, New York's Mario Cuomo, has twice vetoed capital punishment bills. When advocates complain, Cuomo answers: "If you like capital punishment so much, don't vote for me." Cuomo won re-election in a landslide.

Larry Spalding, director of the state agency that handles Death Row appeals, says Florida could "dramatically improve" the situation in another way: Eliminate "judicial override."

In more than 20 percent of Florida's capital cases judges have imposed the death penalty after juries recommended life. High courts have reversed seven out of 10 of these "judicial overrides."

Combined, elimination of judicial override and a meaningful clemency process could cut Florida's death penalty overload by 30 percent to 40 percent.

Florida could further reduce the overload by requiring jurors to agree unanimously on the death penalty, as most death penalty states do. This is less extreme than it appears at first, because prosecutors may exclude any potential juror who is categorically opposed to the death penalty.

Guarantee first-rank lawyers at trial

Death penalty laws are extremely complicated, and most criminal defense lawyers don't have much experience with capital cases. "Law schools don't teach about the death penalty because there's no money in it," says Clearwater defense attorney Pat Doherty, a veteran Death Row lawyer.

And because the vast majority of defendants are poor, they are represented by court-appointed attorneys.

"They tend to be lawyers who have small general practices — a real estate closing Monday, an uncontested divorce Tuesday and a capital murder case Wednesday," says Bob Mahler, director of a North Carolina agency that offers advice to death penalty defense attorneys. "It's the equivalent of going to a general practitioner for neurosurgery. No matter how good the general practitioner is, he can't do it."

Statistics show that first-rank lawyers lose fewer cases. Defense lawyer Doherty cites Steven Benson, the tobacco heir who pipebombed the family car.

"He blew up his family, *for money*, and didn't get the death penalty. The only difference between Benson and people on Death Row is that Benson had the greatest of all mitigating circumstances: He was rich, and rich people don't get the death penalty."

Hiring top lawyers for capital defendants would reduce the Death Row population. It would also reduce the enormous energy courts expend on appeals based on incompetency of defense lawyers.

New York proposed such a law several years ago. Predictably, it failed because taxpayers would have to pay millions for hot-shot lawyers.

Set time limits for federal appeals

Death Row defense attorneys have a favorite tactic for exploiting the federal courts to keep their clients alive, and their critics want to tighten up the rules.

Instead of filing one appeal that includes every imaginable argument for reducing the defendant's sentence, the lawyers file a separate appeal for each argument.

One at a time.

"If they have, say, three issues for the federal courts, they bring federal issue No. 1 first," explains former Florida Gov. Bob Graham. "When that appeal is completely finished, they bring federal issue No. 2. *Then* federal issue No. 3. And so on."

For six years, Southern legislators — including Florida's U.S. Sen. Lawton Chiles — have backed a bill to put a stop to that. Appeals would be lost forever if they weren't filed within a year after state appeals were exhausted.

Says Gov. Martinez, a strong proponent of Chiles' bill: "Let's agree on a time line. I think that would greatly enhance the whole system."

Defense attorneys fear the concept is flawed. In some cases, alibi witnesses refuse to talk until years after a trial. In others, facts that might exonerate a doomed inmate remain buried in old police files.

Earnest Lee Miller was convicted of the 1979 torch-murder of a Pasco County woman. Six years passed before fingerprints were located to show that the prosecutors had the wrong victim. Another year passed before a judge ordered police to turn over their files — which contained hidden testimony that supported Miller's alibi.

"I'm not going to argue about whether the death penalty is right or wrong," says Sandy Weinberg, a Tampa attorney who represented Miller. "But there is no question the system can't go faster as long as we've got cases like Earnie Miller's."

The Chiles bill — which has yet to get out of committee — contains provisions that address these fears. But defense attorneys argue that the provisions will not do much good if information surfaces after the defendant is dead.

Limit death penalty crimes

If the death penalty applied to fewer crimes, there would be fewer inmates on Death Row, fewer appeals burdening the courts, and more likelihood that condemned criminals would actually be executed.

Capital murders are supposed to be the most gruesome and vicious. People generally agree this makes sense in theory — but in practice, courts have had a very hard time distinguishing one murder from the next.

Some experts have proposed more specific laws. A death penalty only for killers of police officers, for example. Or a death penalty only for people who kill while serving a life sentence. Or a death penalty only for serial murderers — such as Ted Bundy.

These severe restrictions would permit society to keep the death penalty as an "ultimate penalty" — while greatly reducing the overload.

Abolish the death penalty, establish tougher life sentences

More and more people are asking whether something so costly, slow and inefficient as the death penalty is worth the trouble.

Florida Supreme Court Justice Parker Lee McDonald: "I think society needs to ask itself if the results justify the cost."

Former Florida Supreme Court Chief Justice Arthur England: "Is the value derived really worth all the trouble?"

Public confidence erodes as America pours millions each year into a system that doesn't work. And people wonder if the money couldn't be better spent.

"The same people who are saying, 'What about the victim?' are actually depriving the victims of services," says Jonathan Gradess, who studied the cost of the death penalty for the New York Assembly.

"We're spending millions on the death penalty. Why don't we put that money into counseling and compensation for the survivors who have lost a loved one and a breadwinner?"

The New York lawyer took note of Florida's most recent execution: "It's fine for Bob Martinez to stand up and pull the switch on Willie Darden, but I don't see him writing any checks to the widow."

In place of the death penalty, North Carolina's Mahler proposes a tough alternative: Lock 'em up and throw away the key.

"There are people on Death Rows who should never see the light of day," he says. "But this can be accomplished without a death penalty, and much, much cheaper — through life-without-parole that *really means* life-without-parole."

Such sentences are rare in America. Opponents argue it would be more cruel than execution. Some prison officials worry that these lifers would wreak havoc because they would have no incentive for good behavior.

But the idea of an ironclad life sentence instead of death is popular among Americans, according to several recent polls.

When asked simply whether or not they support capital punishment, 70 percent of Americans say yes. But when asked whether they prefer the death penalty over life-without-parole, the answers are evenly split.

And by a narrow majority, Americans *prefer* a life sentence — provided the defendant is made to work and his prison wages go to a fund for survivors of murder victims.

Some individuals, of course, stand by the death penalty as a matter of principle. No failures of execution will ever convince them to abandon it.

Gov. Martinez makes the case: "There must be an ultimate penalty. The death penalty is an expensive instrument — but it's an instrument of justice. And there should not be a cost factor on justice. You can't put a value on it.

"Even just one execution in a year shows that justice is being done, that it can work," says the governor.

For others, though, the time has arrived to put the death penalty on trial.

"It is a public policy question that must be decided," says Bob Spangenberg, a Boston lawyer who has advised 24 state and federal agencies on legal costs and the death penalty.

"The question is: When it gets down to decisions about health, education, law enforcement, highways — is the death penalty worth it?"

Price tag changed minds in Kansas

By DAVE VON DREHLE
Herald Staff Writer

Kansas state senators voted for the death penalty when they knew the governor would veto it. But when they got a new governor, pro-death penalty, the senators decided they had better take a hard look at the price tag.

What they saw made them change their minds.

Faced with a sagging farm economy, the conservative senators couldn't stomach the waste and expense of the modern-day American death penalty.

"I voted against it, and some people have tried to say I coddle criminals. Well, I don't coddle criminals," drawls Frank Gaines, a 16-year Senate veteran, one of the last of a dying breed of populist Kansas stump orators.

"It costs a lot more money to have capital punishment, and frankly, I think life in prison is just as tough a penalty," says Gaines. "You just get yourself a confining building and put all them animals in there together. If it was me, I'd rather be put out of my damn misery than have to live like that."

Senators who voted no had nightmares of political disaster. After all, the new governor, Mike Hayden, had made support of the death penalty a major part of his campaign. And voters gave him a solid victory.

But the backlash hasn't come.

"I never received as much mail as I did on that issue — but it was thank-you mail. That's real unusual," says Senate President Ross Doyen, who changed his mind after years of supporting the death penalty. "I think a lot of people say they favor it, but when you pin 'em down on the specifics, they're not so sure."

The most eye-opening specific was the bottom line: $11.5 million for the first year of the death penalty alone, according to the Legislature's researchers.

"And those costs are deceptive," says researcher Mary Galligan. "They stack up over the years."

The Senate killed the death penalty initiative. Doyen, the Senate president, doesn't expect the issue to decide any future elections.

"Some people will be upset with you because you support it, and some will be upset because you don't. But it's no pendulum swinger.

"I think this issue is greatly overplayed."

IS THE DEATH PENALTY DOOMED?

When judges, prosecutors and governors talk about the death penalty, more and more they talk about failure. Even staunch supporters are saying it may be time to give up.

'It is a quagmire. If the definition of justice is a system that administers equal and predictable results, then capital punishment in the United States today falls short. If a criminal feels that even if he's sentenced to death, the punishment won't be carried out, then that removes the rationale for capital punishment.'

Bob Graham, former governor of Florida, who signed more death warrants than any other Florida governor

'[We] have gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts and appellate courts must . . . rely has been all but completely sacrificed.'

William Rehnquist, chief justice of the U.S. Supreme Court, the court's strongest supporter of the death penalty

'If you can't carry out the sentence within a reasonable amount of time, you should abolish the death penalty. When the execution comes 12 years after the crime, nobody remembers why you're doing it. The Supreme Court has a duty to fix it or get rid of it.'

Ed Austin, pro-death penalty state attorney for Jacksonville

'I think society needs to ask itself if the results justify the cost.'

Parker Lee McDonald, chief justice of the Florida Supreme Court

'The way things are now, it's a surprise when anybody goes to the chair. If they're not going to go through with it, then why have a death penalty on the books? It's the Legislature's job to decide.'

Ellen Morphonios, Dade circuit judge, who has sentenced nine people to die

DEMANDING CHANGE

Nationwide, polls show that 70 percent of Americans favor the death penalty. In Florida, the number is higher. But Floridians also favor substantial changes in the law.

Do Floridians favor or oppose capital punishment?

Strongly favor	67%
Somewhat favor	19%
Somewhat oppose	3%
Strongly oppose	10%
Don't know	1%

How do Floridians feel about the death penalty for the mentally retarded?

Favor	14%
Oppose	79%
Don't know	8%

How do Floridians feel about the death penalty for juveniles?

Favor	38%
Oppose	46%
Don't know	17%

Do Floridians prefer life in prison over the death penalty, provided the inmate works in a prison industry and his wages go to a fund for the survivors of murder victims?

Yes:	53%
No:	38%
Don't know:	10%

SOURCES: The Gallup poll, Cambridge Survey Research.

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INTRODUCTION

The moral legitimacy of capital punishment polarizes society. Individuals advance countless ethical and practical arguments either supporting or opposing the punishment.[1] Both supporters and opponents espouse moral justifications for their positions, and both are equally adamant in their beliefs.[2] In an effort to garner public support for the

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[1] For representative examples, see THE DEATH PENALTY IN AMERICA 305-82 (H. Bedau 3d ed. 1982) [hereafter DEATH PENALTY]; THE DEATH PENALTY IN AMERICA 120-231 (H. Bedau rev. ed. 1968) [hereafter DEATH PENALTY 1968].

[2] For supporters' view of the death penalty, see, e.g., W. BERNS, FOR CAPITAL PUNISHMENT 164-76 (1979) (criminals are punished principally for retribution; the worst are executed out of moral necessity); van den Haag, *In Defense of the Death Penalty: A Legal—Practical—Moral Analysis*, 14 CRIM. L. BULL. 51, 66 (1978) ("If there is nothing for the sake of which one may be put to death, can there be nothing worth dying for? If there is nothing worth dying for, is there any moral value worth living for?"); *id.* ("No society can profess that the lives of its members are secure if those who did not allow innocent others to continue living are themselves allowed to continue living — at the expense of the community."). For opponents' view of the death penalty, see, e.g., C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981) (the process of choosing who dies continues to be standardless and mistake-prone); Amnesty International, *Proposal for a Presidential Commission on the Death Penalty in the United States of America*, in DEATH PENALTY, *supra* note 1, at 375-82 (the death penalty is a violation of human rights); Amsterdam, *Capital Punishment*, in DEATH PENALTY, *supra* note 1, at 346-58 (capital punishment does not undo the wrong done by the murderer, kills some people in error, and is discriminatorily imposed); Black, *Death Sentences and Our Criminal Justice System*, in DEATH PENALTY, *supra* note 1, at 359-64 (capital punishment is too final, brutal, and subject to human fallibility to be tolerated); Schwarzschild, *In Opposition to Death Penalty Legislation*, in DEATH PENALTY, *supra* note 1, at 364-70 (public that argues for the death penalty is generally uninformed about social facts surrounding the penalty and often merely responds to seemingly insoluble problem of crime; human judgment and human institutions are too fallible to have absolute certainty needed before considering executing a person); Yoder, *A Christian Perspective*, in DEATH

death penalty, some proponents also argue that the death penalty saves money because the cost of executing convicted murderers is less than the cost of imprisoning them.[3] This argument is disturbing since it reduces the moral complexity of state imposed killing to a debate over dollars and cents. However, since simplistic arguments often sway public opinion,[4] the factual merit of this "cost-effective" justification for the death penalty warrants examination.

Assessing the financial cost of capital punishment requires an examination of the special features of capital prosecutions and judicial review of capital convictions. Constitutional safeguards that guide the state and ensure a fair process for the defendant are of heightened importance in capital cases. As the United States Supreme Court repeatedly has stated, "death is different."[5] Consequently, the Supreme Court has required that states accord capital defendants procedural and substantive protections beyond those required for noncapital defendants.

Part I of this Comment examines the due process safeguards required for a constitutional system of state imposed execution. Part II outlines the financial costs of maintaining a constitutional execution process. Part III concludes that the execution process costs more than

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PENALTY, *supra* note 1, at 370-75 (one way government can keep society's violence at a minimum is to proclaim human life inviolate and prohibit killing even though secular justice may seem to sanction killing).

[3] *See, e.g.*, U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1983, at 278 (1984) (In fact, 9% of the persons who explained why they support the death penalty stated that jail sentences cost society too much money.); WASHINGTON RESEARCH PROJECT, THE CASE AGAINST CAPITAL PUNISHMENT 61 (1971) (copy on file with *U.C. Davis Law Review*).

[4] *See* Sarat & Vidmar, *Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171, 195 (finding that when death penalty supporters were more informed about capital punishment, especially its utilitarian aspects, a substantial portion changed their opinion); Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion*, 30 VAND. L. REV. 1005, 1029-30 (1977) (much of public support for death penalty stems from utilitarian belief in its deterrent effect — the strong support appears to result from uninformed opinion, and given the lack of evidence of the death penalty's deterrent effect, a far too generous assessment of deterrence; public support frequently lacks a detailed factual understanding of the criminal justice system and generally reflects attitudes and beliefs).

[5] *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (citations omitted) ("[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.").

imprisoning a person for life and notes the ramifications of the death penalty for the criminal justice system. Acknowledging that "death is different," the system attempts to adapt accordingly. However, it must be remembered that the death penalty is an alternative punishment; life imprisonment, with or without parole, is another punishment. If the goal is a more effective criminal justice system, retentionists should reassess the overall practicality and desirability of continuing capital punishment when its costs, both financially and morally, undermine the system.

I. Death Penalty Safeguards: A Scheme to Prevent Unconstitutional Executions

The spectrum of alternatives available to the Supreme Court when assessing the constitutionality of the death penalty, as with all spectra, has two extremes. At one extreme, the Court could rule that the the death penalty is per se an unconstitutional punishment. Although some members of the Court favor this view,[6] a majority of the Justices has never embraced this interpretation.[7] At the other end of the spectrum, the Court could declare that the death penalty is per se constitutional and a matter to be left to the states' political leaders.[8] The Court has

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[6] Justices Marshall and Brennan took such an approach in *Furman*. They concluded that the death penalty was per se unconstitutional as it is always cruel and unusual punishment. Furman v. Georgia, 408 U.S. 238, 305-06 (1972) (Brennan, J., concurring); *id.* at 360-61 (Marshall, J., concurring); *see also* Enmund v. Florida, 458 U.S. 782, 801 (1982) (Brennan, J., concurring); Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (Marshall, J., concurring, joined by Brennan, J.); Lockett v. Ohio, 438 U.S. 586, 619 (1978) (Marshall, J., concurring); Gardner v. Florida, 430 U.S. 349, 364-65 (1976) (Brennan, J., separate opinion); *id.* at 365 (Marshall, J., dissenting); Woodson v. North Carolina, 428 U.S. 280, 306 (1976) (Marshall, J., concurring); Gregg v. Georgia, 428 U.S. 153, 230-31 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

[7] In *Furman* three of the five Justice plurality concluded that the death penalty was unconstitutional as applied in the cases before the Court, but did not believe that the death penalty was unconstitutional per se. 408 U.S. at 253, 256-57 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 312-13 (White, J., concurring); *see also* Enmund v. Florida, 458 U.S. 782, 798 (1982); Godfrey v. Georgia, 446 U.S. 420, 428 (1980); Lockett v. Ohio, 438 U.S. 586, 601 (1978); Gregg v. Georgia, 428 U.S. 153, 169 (1976).

[8] In *Furman* the four dissenting Justices concluded that judicial restraint in reviewing the death penalty statutes should be exercised, and changes in death penalty law should be left to the legislatures. 408 U.S. at 405, 410, 466, 468; *see also* Enmund v. Florida, 458 U.S. 782, 801-02 (1982) (O'Connor, J., dissenting); Lockett v. Ohio, 438 U.S. 586, 633 (1978) (Rehnquist, J., dissenting).

never endorsed this approach[9] and implicitly has rejected it by holding mandatory imposition of the death penalty unconstitutional.[10] Between these extremes lies the Supreme Court's current approach to death penalty adjudication.

A. Adjudication in Death Penalty Cases: Conflicting Tensions in the Supreme Court

The Supreme Court's concern about the constitutionality of the death penalty derives from the nature of the penalty and the criminal justice system. Death differs from other state imposed punishments in its finality and irrevocability.[11] After the sentence is carried out, a factual mistake[12] or change in the law is irremediable. Because of the severity of the death penalty, a critical concern in the Court's determination of the punishment's constitutionality is its moral and ethical ramifications.[13] Consequently, the Court reviews the appropriateness of death as punishment, as well as the constitutionality of the process, within the pa-

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[9] The right to be free from cruel and unusual punishments requires judicial enforcement of the eighth amendment. " 'The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.' " *Furman*, 408 U.S. at 268-69 (Brennan, J., concurring) (quoting West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 638 (1943)); *see also* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1782 (1970) (statutory authorization is not sufficient to constitutionally authorize a punishment).

[10] *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (mandatory imposition of the death penalty for first degree murder unconstitutional).

[11] *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976) (death penalty unique in its severity and irrevocability); Furman v. Georgia, 408 U.S. 238, 289 (1972) (Brennan, J., concurring) (unusual severity of death manifested by its finality and enormity); *id.* at 306 (Stewart, J., concurring) (penalty of death unique in its total irrevocability).

[12] *See generally* Bedau, *Murder, Errors of Justice, and Capital Punishment*, in DEATH PENALTY 1968, *supra* note 1, at 434; *see also* L.A. Daily J., Sept. 4, 1984, at 4, col. 4 (in 1974, four of the seven men on New Mexico's death row were later found to be innocent — they had been convicted on perjured testimony).

[13] Coker v. Georgia, 433 U.S. 584, 597 (1977) ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."); Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989, 1030-33 (1978) (majority of Court has adopted the view that meaning of "cruelty" is variable and is dictated by society's present view of cruelty); Tao, *Beyond* Furman v. Georgia: *The Need For a Morally Based Decision on Capital Punishment*, 51 NOTRE DAME LAW. 722, 736 (1976) (moral value of capital punishment should determine the penalty's constitutionality).

rameters of our society's "evolving standards of decency."[8] The Court's goal is a fair process that scrupulously safeguards a capital defendant's constitutional rights. Without the safeguards and judicial review, imposition of the death penalty is unconstitutional.[9]

As a theoretical punishment, the death penalty has been held constitutional.[10] The practical application of the punishment, however, may violate constitutional protections. Our evolving standards of decency, and the Court's mandate against excessive punishments and arbitrarily and capriciously imposed death sentences, may sometimes render the death penalty invalid. For example, in *Coker v. Georgia*,[11] the Court held that the death penalty for rape was an excessive and therefore an unconstitutional punishment. *Coker* also illustrates the potentially discriminatory application of the death penalty. From 1930 until the 1977 *Coker* decision, 455 men had been executed for rape; 405 of those men were black.[12] Although not addressed in *Coker*, the fact that eighty-nine percent of those executed for rape were black clearly indicates the potential for discriminatory imposition of the punishment.[13] The likelihood for unjust death has led to the Supreme Court's rules governing the specific application of the sentence.

The Court's restrictions on the death penalty were developed only recently and require significant judicial involvement. From 1966 to

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[8] *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"); *see also* Lockett v. Ohio, 438 U.S. 586, 620 (1978) (Marshall, J., concurring); Woodson v. North Carolina, 428 U.S. 280, 301 (1976); Gregg v. Georgia, 428 U.S. 153, 173 (1976); Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); Comment, *The Impact of a Sliding Scale Approach to Due Process on Capital Punishment Litigation*, 30 SYRACUSE L. REV. 675, 681 (1979) (to satisfy due process, capital sentencing must meet "evolving standards").

[9] *See, e.g.*, Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 796-802 (1983) (judicial review implicit in concept of cruel and unusual punishment; circumscribes potential arbitrariness; is required to ensure equal protection).

[10] In *In re* Kemmler, 136 U.S. 436, 447 (1890), the Court reasoned that the death penalty did not violate the eighth amendment since the death penalty had a long history of acceptance in this country. The Court concluded that execution was not torture, basically on the theory that the death penalty was not considered cruel and unusual when the Bill of Rights was framed.

[11] 433 U.S. 584, 598 (1977).

[12] *See* Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1158 n.54 (1980).

[13] *See* Furman v. Georgia, 408 U.S. 238, 256-57 (1972) (Douglas, J., concurring) (death penalty statutes in *Furman* were unconstitutional in their operation since death sentences were imposed discriminatorily).

1976, largely due to the efforts of the NAACP Legal Defense and Educational Fund, there was a ten-year hiatus in executions.[28] Because death sentences were not carried out, the Court was not pressured to develop a constitutional framework for imposing the sentence. However, as the public outcry against crime and violence increased,[29] the Supreme Court again broached the emotional question: when may the state constitutionally impose death as a punishment? In answering this question, the Court has adopted an ad hoc system of constitutional interpretation.[30] The countless possible constitutional challenges[31] and the infinite variety of circumstances surrounding a murder warrants a case-by-case approach. Although careful drafting of death penalty statutes can eliminate some arbitrariness, implementation of these statutes is subject to much discretion by prosecutors, judges, and juries. Thus, while statutes may specify the special circumstances justifying a death sentence,[32] only a reviewing court can determine if the sentencer cor-

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[28] There was a de facto moratorium from 1966 to 1976. The decline in executions, however, began in the 1940's due to various social forces. For example, doubts about the morality of capital punishment, the fact that most of Western Europe had abandoned the death penalty, empirical evidence that undermined the belief that capital punishment was effective as a deterrent, and empirical evidence that indicated the racially discriminatory imposition of the death penalty resulted in the Court's willingness to delay executions and consider constitutional challenges. *See* Bedau, *Background and Developments*, in DEATH PENALTY, *supra* note 1, at 24-25.

[29] *See* Bedau, *American Attitudes Toward the Death Penalty*, in DEATH PENALTY, *supra* note 1, at 67 (national consciousness regarding increase in crime rate began with 1968 elections, when "law and order" and "crime in the streets" became important political issues).

[30] A defendant sentenced to death receives an automatic direct appeal to the state supreme court. *See* Gregg v. Georgia, 428 U.S. 153, 198 (1976). Although it is unclear whether the Court approved judicial review or constitutionally required it, the Court has subsequently concluded that one aspect of the death penalty statute in *Gregg* is not constitutionally required. In Pulley v. Harris, 104 S. Ct. 871 (1984), the Court held that proportionality review, a comparison of the defendant's sentence with sentences imposed in similar cases, is not constitutionally required. *See infra* notes 74-77 and accompanying text.

[31] Possible constitutional challenges include: The punishment of death is excessive to the crime, *see* Coker v. Georgia, 433 U.S. 584 (1977); mitigating evidence was excluded, *see* Lockett v. Ohio, 438 U.S. 586 (1978); the language of death penalty statutes is vague and ambiguous, *see* Godfrey v. Georgia, 446 U.S. 420 (1980); the punishment is not penologically justifiable, *see* Enmund v. Florida, 458 U.S. 782, 798-801 (1982).

[32] For example, California's special statutory circumstances, some of which are listed below, specify how the line should be drawn in Penal Code § 190.2:

> (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 fol-

rectly and constitutionally applied those circumstances in any particular

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lowing 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 . . . .

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree . . . .

(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 . . . .

(7) The victim was a peace officer . . . 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 . . . and was intentionally killed in retaliation for the performance of his official 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 . . . .

(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.

case." The Supreme Court's approach recognizes that only the courts can fully maintain the constitutionally required dividing line between capital and noncapital defendants."

To provide for a constitutional execution system while protecting the rights of capital defendants, the Court has placed a burden upon the judicial system to review individual claims with exacting scrutiny. Yet unless one adopts the extreme positions of the spectrum — per se unconstitutional or per se constitutional — the ad hoc approach is essential. The following section describes the Supreme Court's attempt to constitutionalize the penalty: to limit its scope and to prevent its arbitrary and capricious application.

B. Due Process for Death

Recognizing the inherent problems in imposing the death penalty, the Supreme Court has adopted what has been called a "super due process"[7] approach to capital punishment procedures. This approach

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(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 . . . .

CAL. PENAL CODE § 190.2 (West Supp. 1985).

[6] A recurring issue is whether a jury can sufficiently understand a statute, its accompanying instructions, and then subsequently conclude fairly that a defendant falls within the class of individuals that the legislature has deemed eligible for execution. As the Court concluded in Godfrey v. Georgia, 446 U.S. 420, 433 (1980), the aggravating factor that death qualified the defendant could not be applied in a principled way to distinguish the defendant's case from the many cases in which the death penalty was not imposed.

Additionally, studies generally conclude that the language of jury instructions is very difficult for jurors to understand and can frequently lead to improper verdicts. *See, e.g.* Severance, Greene & Loftus, *Toward Criminal Jury Instruction That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 202 (1984) (studies find that jurors understand only about one-half of legal instructions they are given; many criminal trial verdicts reflect misunderstandings of juror's role and of what the law requires).

[7] In Zant v. Stephens, 462 U.S. 862, 878-80 (1983) the Court reaffirmed the necessity of appellate review of the sentencer's initial decision that a defendant is among the class of persons that the legislature has deemed eligible for execution.

[8] The concept of super due process for death sentencing procedures is a theory derived from the Court's conclusion that capital trials require increased and unique procedural safeguards. *See* Radin, *supra* note 18, at 1143-48.

first surfaced in *Furman v. Georgia*[7] in which the Court held that arbitrary and capricious application of the death penalty was itself cruel and unusual punishment.[8] The Court has since fashioned substantive and procedural protections to ensure that the death penalty is not imposed unjustly.[9] In prescribing a constitutional procedure, the Court has focused on three major concerns.

1. Cruel and Unusual Punishment

The eighth amendment to the United States Constitution prohibits the state from inflicting cruel and unusual punishments.[10] Although the Supreme Court has struggled to define this concept,[11] changing mores have prevented any static interpretation.[12] The difficulty is that what constitutes cruel and unusual punishment largely reflects prevailing societal attitudes.[13] Nevertheless, the death penalty, because of society's

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[7] *See* Furman v. Georgia, 408 U.S. 238 (1972); *infra* notes 36-41 and accompanying text; *see also* Radin, *supra* note 18, at 1150.

[8] *Furman*, 408 U.S. at 239-40; *see also* Radin, *supra* note 18, at 1144 (a process can be as unconstitutionally cruel as the event it authorizes).

[9] The Court has continued to espouse the need for super due process in death penalty sentencing to prevent arbitrary imposition of the death penalty. *See* Radin, *supra* note 18, at 1144.

[10] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The eighth amendment was incorporated into the fourteenth amendment and made applicable to the states in Robinson v. California, 370 U.S. 660 (1962).

[11] In *Furman*, Justice Brennan noted that the Court has found only three punishments unconstitutional since adoption of the eighth amendment: Robinson v. California, 370 U.S. 660 (1962) (imprisonment for narcotics addiction); Trop v. Dulles, 356 U.S. 86 (1958) (expatriation for wartime desertion); Weems v. United States, 217 U.S. 349 (1910) (12 years in chains at hard and painful labor for falsifying a public document). *Furman*, 408 U.S. at 282. The nine separate opinions in *Furman* illustrate the difficulty of defining what constitutes cruel and unusual punishment. *See infra* note 38.

[12] In Weems v. United States, 217 U.S. 349, 373 (1910), the Court stated that "[t]ime . . . brings into existence new conditions and purposes," and that when applying the Constitution "our contemplation cannot be only of what has been but of what may be." The Court further noted that what constitutes cruel and unusual punishment changes as "public opinion becomes enlightened by a humane justice." *Id.* at 378. Following this position in Trop v. Dulles, 356 U.S. 86, 101 (1958), the Court concluded that the eighth amendment derived its meaning from "the evolving standards of decency that mark the progress of a maturing society."

[13] *See* Bedau, *Witness to a Persecution: The Death Penalty and the Dawson Five*, 8 BLACK L. J. 7, 19 (1983) (moral attitudes of society have banished such punishments as branding, flogging, and maiming people); *see also* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1246 (1974) (interpretation of the eighth amendment's prohibition of cruel and unusual punishment appears to

changing beliefs, the moral issues it raises, its questionable penological justification, and its finality and severity, inevitably requires the Court to determine whether it constitutes cruel and unusual punishment." The eighth amendment's cruel and unusual prohibition has therefore become the focal point for resolving the constitutionality of any given death sentence. Interpreting the eighth amendment, the Court has concluded that some state procedures for imposing the death penalty are unconstitutional and that death is a cruel and unusual punishment for some crimes. In both areas, the Court has found that certain state statutory schemes fall within the unconstitutional per se end of the spectrum. However, the Court also has concluded that with sufficient safeguards, a process for imposing death may be constitutional.

In *Furman v. Georgia*,[34] the Supreme Court declared, for the first time, that the death penalty as then imposed[35] constituted cruel and unusual punishment. In nine separate opinions, the Justices attempted to define cruel and unusual punishments.[36] A plurality of the Justices found that the death penalty was unconstitutional as applied in the

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include assessment of society's values). A recent Gallup Poll found that 70% of Americans favored capital punishment. However, if life imprisonment without parole were a certainty, the support fell to 50%; and a similar decline occurred (to 51%) if evidence were to show that the death penalty did not deter. Sacramento Bee, Feb. 3, 1985, Pt. A, at 25.

[33] In *Furman*, Justice Brennan concluded that inherent in the cruel and unusual clause are the principles that a severe punishment must not be unacceptable to contemporary society, a punishment is unconstitutionally excessive if a significantly less severe punishment adequately achieves the purpose for which the punishment is inflicted, a punishment must not by its severity degrade human dignity, and punishment cannot be inflicted arbitrarily. *Furman*, 408 U.S. at 281-82 (Brennan, J., concurring).

[34] 408 U.S. 238 (1972).

[35] In McGautha v. California, 402 U.S. 183, 196, 199 (1971), decided just one year before *Furman*, the Supreme Court rejected the petitioner's assertion that standardless imposition of the death penalty was a constitutional violation. The Court concluded that standardless discretionary judgment on the facts of each case was the only way to distinguish which crimes warranted executing the defendant and which defendants deserved death.

[36] A plurality of five Justices agreed in the per curiam judgment. Three Justices concluded that the death penalty was unconstitutional as applied in the cases before the court, but did not believe the death penalty was unconstitutional per se. *Id.* at 256-57, 310, 311. Justice Stewart found that in these cases, the death penalty was unconstitutional because it was wantonly and freakishly imposed. *Id.* at 310. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Id.* at 309-10. Justice Douglas also found the death penalty unconstitutional as applied in these cases.

cases before the Court. The Justices who formed the plurality found that a death penalty statute that leaves to judges and juries standardless and uncontrolled discretion to decide whether someone should live or die constitutes cruel and unusual punishment.[39] The *Furman* plurality focused on a number of unconstitutional results with the then existing death penalty scheme. Justice Douglas found that the imposition of the death penalty was "pregnant with discrimination."[40] Justice Stewart

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> People live or die, dependent on the whim of one man or of 12 . . . . [T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual punishments."

Id. at 253, 256-57. Justice White concluded that the death penalty statutes involved in these cases violated the eighth amendment because as administered, "the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." *Id.* at 313. He believed that if a punishment does not meet the social ends it was deemed to serve, in the case of death, it would mean the "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Id.* at 312. Justices Marshall and Brennan found the death penalty per se unconstitutional as it is always cruel and unusual punishment. Justice Brennan, stating that the death penalty is "fatally offensive to human dignity," concluded that the punishment of death is always

> "[c]ruel and unusual," and the States may no longer inflict it as a punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison. "The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal."

Id. at 305-06 (quoting Weems v. United States, 217 U.S. 349, 381 (1910)). Justice Marshall, after a thorough explanation of the evolving meaning of cruel and unusual and a discussion of the history of capital punishment in the United States, concluded that the death penalty per se violates the eighth amendment as it is an excessive and unnecessary punishment. *Id.* at 358. Additionally, he concluded that the death penalty "shocks the conscience and sense of justice" of an informed public and is therefore unconstitutional as it is "morally unacceptable to the people of the United States at this time in their history." *Id.* at 360-61. The four dissenting Justices asserted that changes in the law regarding the extent of imposing the death penalty were better and more appropriately made in the legislature. *Id.* at 405. The nine Justices, in as many opinions, attempted to define whether a punishment is cruel and unusual. *Furman* presents a good example of the difficulty in defining the terms.

[39] Although each stated a different reason for his conclusion, Justices Douglas, Stewart, and White found that the death penalty violated the eighth amendment's prohibition of cruel and unusual punishment, as it was imposed arbitrarily and capriciously. *See supra* note 38. In *Furman*, three petitioners sentenced to die were before the Court. Two were sentenced pursuant to Georgia law; one was convicted of murder, and one was convicted of rape. The third petitioner was convicted of rape pursuant to Texas law.

[40] 408 U.S. at 257.

believed that the death sentence violated the eighth amendment if it was wantonly and freakishly imposed, as arbitrarily as if the defendant were "struck by lightning."[41] Although not ruling the death penalty unconstitutional per se, the *Furman* majority did hold that, at a minimum, death penalty statutes must provide some rational basis for deciding who shall live and who shall die.

Furman invalidated death penalty statutes in over three-fourths of the states and in sections of the Federal Criminal Code.[42] States responded by reenacting death penalty statutes along two different lines to avoid the arbitrariness found unconstitutional in *Furman*. One scheme involved statutes that provided juries with guidelines for imposing the death penalty.[43] The second method provided mandatory death penalty statutes that theoretically would remove all sentencing discretion from the sentencer.[44] In formulating eighth amendment requirements for imposing the death penalty, the Supreme Court ultimately resolved the constitutionality of both approaches.

A constitutional process for determining how and upon whom the death penalty is imposed requires that a state's death penalty statute provide guidance to limit the jury's discretion. In *Gregg v. Georgia*,[45] the Court reviewed Georgia's guided discretion statute. Concluding that the death penalty is not per se unconstitutional, the Court found the constitutional infirmities of the *Furman* statutes could be corrected by providing juries with proper guidance, providing the defendant with a bifurcated proceeding, and entitling the defendant sentenced to death to an automatic direct appeal to the state supreme court.[46] Thus, *Gregg* established a constitutional scheme for imposing the death penalty. First, the statute authorizing the penalty must outline the aggravating factors that warrant the death penalty, thus guiding the sentencer's discretion.[47] To impose the sentence, the sentencer must find at least one

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[41] *Id.* at 309.

[42] In each of these jurisdictions, the sentencing choice of death was left to the sentencer's unguided discretion. *See* Note, *Capital Punishment: A Review of Recent Supreme Court Decisions*, 52 NOTRE DAME LAW. 261, 273 (1976).

[43] *See infra* notes 45-54 and accompanying text; *see also* MODEL PENAL CODE § 210.6 comment, at 156 n.144 (15 states enacted guided discretion statutes in response to *Furman*).

[44] *See infra* notes 59-61 and accompanying text; *see also* MODEL PENAL CODE § 210.6 comment, at 156 n.145 (18 states enacted mandatory death penalty statutes in response to *Furman*).

[45] 428 U.S. 153 (1976).

[46] *Id.* at 195, 206-07.

[47] The Georgia statute, as quoted in *Gregg*, 428 U.S. at 165 n.9, listed the following aggravating circumstances:

of the factors present.[41] Second, the defendant should receive a bifurcated trial:[42] one proceeding to determine the defendant's guilt, and if found guilty, a second proceeding to determine and impose the sentence. At the sentencing proceeding the defendant may provide the sentencer with additional information that would not be admissible at the

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(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, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(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 during or because of the exercise of his official duty.

(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.

(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.

Act of Mar. 28, 1973, No. 74 § 3, 1973 Ga. Laws 159, 163-65 (currently codified at GA. CODE ANN. § 27-2534.1(b) (1983)).

[41] According to the Georgia statute, even if the sentencer identifies an aggravating circumstance, it may nonetheless choose not to impose the death sentence. It may instead sentence the capital defendant to life in prison. GA. CODE ANN. § 27-2534.1(b) (1983) (death penalty "may be authorized"). Consequently, the Georgia statute provides more general guidelines for the sentencer, but also leaves a legal option should the jury believe the specific defendant does not deserve to die.

[42] *Gregg*, 428 U.S. at 163.

guilt trial, thereby increasing the probability of imposing an appropriate sentence.[28] The third safeguard, automatic state supreme court review,[29] ensures that the sentence resulted from application of the statutory guidelines, and not from arbitrary factors.[30] Satisfied with these provisions, the Court upheld Georgia's guided discretion statute,[31] believing that it would prevent juries from wantonly and freakishly imposing the death sentence.[32]

Although the Court approved the guided discretion approach, a guided discretion statute may still be constitutionally infirm. For example, the statutory language and jury instructions that guide sentencer discretion must not be ambiguous. In *Godfrey v. Georgia*,[33] the defendant argued that the aggravating factor used to justify his death sentence was unconstitutionally vague.[34] The Court agreed, chastising the Georgia Supreme Court for affirming a death sentence that could not, in a principled way, be distinguished from the many cases in which the death penalty is not imposed.[35] Although the Court may have remedied the error for Godfrey, the case illustrates the problems that surround

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[28] *Id.* at 195.

[29] The Georgia Supreme Court is to consider the punishment, as well as errors enumerated by the appeal. The court is to determine whether passion, prejudice, or any other arbitrary factor influenced the choice of death, whether the evidence supports the aggravating factor that permits the imposition of death, and whether death is disproportionate or excessive when compared with penalties in similar crimes, considering the offender and the offense. GA. CODE ANN. § 27-2537(b), (c) (1983).

[30] Note, *Constitutional Procedure for the Imposition of the Death Penalty — Godfrey v. Georgia*, 30 DE PAUL L. REV. 721, 726 (1981) (purpose of automatic review is to "correct any deviation from consistent jury sentencing") [hereafter, Note, *Constitutional Procedure*].

[31] *Gregg*, 428 U.S. at 206-07.

[32] The Court reviewed and upheld two other guided discretion statutes the same day as *Gregg*. Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

[33] 446 U.S. 420 (1980).

[34] The statutory aggravating circumstance permitted the imposition of death if the defendant was convicted of murder and if it was found beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Act of Mar. 28, 1973, No. 74, § 3, 1973 Ga. Laws 159, 163-65 (currently codified at GA. CODE § 27-2534.1(b)(7) (1983)). In *Godfrey*, the defendant shot his estranged wife and his mother-in-law. He immediately notified the authorities and asked them to pick him up. 446 U.S. at 425.

[35] 446 U.S. at 433; *see also* Note, *Constitutional Procedure*, *supra* note 52, at 730 (Court's attention was on role and responsibility of state supreme court in sentencing process).

the death penalty.[38] While guided discretion statutes may be theoretically constitutional, their language and application may still produce unconstitutional results.

In addition to Georgia's method for avoiding the *Furman* result, the Court tested the constitutionality of removing all discretion from the sentencer. The Court in *Woodson v. North Carolina*[39] invalidated a mandatory death penalty statute because the process was unconstitutional. The Court stated that the mandatory process would result in an arbitrary and wanton imposition of the death penalty, since the procedure would lead to "refusal of juries to convict murderers rather than subject them to automatic death sentences."[40] The procedure violated the eighth and fourteenth amendments because it treated "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[41] Thus, the Court recognized the need for some jury discretion when imposing the death penalty. Subsequently, the Court addressed the degree of discretion permitted for the sentencing portion of a constitutionally imposed death sentence.

In *Lockett v. Ohio*[42] the defendant contended that the Ohio death penalty statute was unconstitutional because it prevented the sentencer from considering the defendant's mitigating factors.[43] The defendant ar-

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[38] As Justice White noted in his dissent, the majority adopts the argument "'that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it.'" 446 U.S. at 456 (White, J., dissenting) (quoting *Gregg*, 428 U.S. at 226 (White, J., concurring)). White's words imply a frustration with a system that will not permit the imposition of a theoretically constitutional penalty. *Gregg*, 428 U.S. at 226 (1976) (White, J., concurring in judgment) (human incompetence cannot be accepted as a proposition of constitutional law).

[39] 428 U.S. 280 (1976).

[40] *Id.* at 290, 303.

[41] *Id.* at 304. In Roberts v. Louisiana, 428 U.S. 325 (1976), decided the same day as *Woodson*, the Court also found Louisiana's mandatory death penalty statute unconstitutional, for the same reason put forth in *Woodson*.

[42] 438 U.S. 586 (1978).

[43] Lockett waited in a getaway car while her three co-participants robbed a pawnshop. During the robbery, the pawnbroker was accidentally killed. Lockett's role in the crime as getaway driver was sufficient to convict her of murder. Lockett's case also presented the issue whether the death penalty was an unconstitutional punishment for a co-felon in a felony murder who did not kill. The Court did not have to decide this issue since it found Lockett's sentence unconstitutional on other grounds. However, a number of the Justices discussed whether death could be imposed when the defendant did not intend the death of the victim. *Id.* at 613-16, 624.

gued that her sentence was invalid since the mitigating factors she offered — her age, lack of specific intent to cause death, and relatively minor part in the crime — justified a sentence less than death.[42] The Court reversed Lockett's death sentence because a capital sentencing statute that prevents a sentencer "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[43]

In addition to regulating the process by which a death sentence may be imposed, the Court has concluded that a death sentence may only be imposed if proportionate to the crime. In *Coker v. Georgia*, the Court concluded that the eighth amendment prohibits "punishments . . . that are 'excessive' in relation to the crime committed."[44] An excessive, and therefore unconstitutional punishment, is one that "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[45] Applying this standard, the Court held that death was an excessively disproportionate penalty for the crime of rape.[46]

In 1982, the Court again considered the class of persons who may be

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[42] *Id.* at 597.

[43] *Id.* at 605. Unlimited mitigation and individualized sentencing is another attempt by the Court to ensure that the most appropriate sentence is imposed. However, according to some commentators, the *Lockett* decision returned to sentencers the discretion that *Furman* held result[ed] in the unconstitutional imposition of death. *See, e.g.*, Radin, *supra* note 18, at 1153-5. 'death is not a permissible punishment since fairness requires flexibility and nonar[bi]trariness, requirements that vary inversely to each other). Others assert that the two decisions are reconcilable. *See, e.g.*, Hertz & Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317, 373-76 (1981) (eighth amendment does not require that the discretion to afford mercy be guided). As one author noted, the emphasis in *Lockett* was on the importance of providing unlimited *mitigation*, and on individualizing the sentence, *Furman* only prohibits arbitrary and capricious imposition of death, not capricious imposition of mercy. *See* Comment, *Dark Year on Death Row: Guiding Sentencer Discretion After* Zant, Barclay, *and* Harris, 17 U.C. DAVIS L. REV. 689, 698-99 (1984) (as it is only in the aggravation of the sentence that a defendant receives death, the Court distinguished between permitting discretion in mitigation, and limiting discretion in aggravation). Nonetheless, as a result of *Lockett*, the reviewing court must ensure that the defendant's mitigating factors were considered, while preventing a sentence based on arbitrary factors.

[44] 433 U.S. 584, 592 (1977).

[45] *Id.*

[46] *Id.* at 598.

constitutionally sentenced to death. In *Enmund v. Florida*,[8] the Court concluded that an accomplice defendant convicted of first degree murder cannot be punished by death unless the state proves an intent to kill. The Court reiterated that to be constitutional a death sentence must be (1) proportionate to the severity of the crime,[9] and (2) penologically justifiable, that is, serve the purposes of retribution and deterrence.[10] The Court found neither constitutional requirement satisfied by executing a person who neither killed, intended to kill, nor attempted to kill. Although a state can still charge an aider or abettor with first degree murder under the felony-murder doctrine,[11] it may not impose the death penalty unless the defendant had the intent to kill. Imposing the death penalty by using felony murder's legal fiction of presumed intent to kill is unconstitutional.[12]

In its effort to maintain a constitutional execution system, the Court has designed procedures that limit the arbitrary and capricious imposition of the death penalty. Direct review by the state supreme court was considered one means of achieving a constitutional system. However, in *Pulley v. Harris*[13] the Court decided that the eighth amendment did not require proportionality review. Proportionality review is a sentencing comparison by the state supreme court between the defendant's sentence and the sentences imposed in similar cases.[14] Justice White writing for the Court observed that although *Gregg*'s guided discretion statute included a proportionality review of a death sentence by the state supreme court as a safeguard against jury inconsistency, it was not

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[8] 458 U.S. 782, 797 (1982); *see also* People v. Garcia, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984) (*Carlos* decision, requiring an instruction on intent to kill when the special circumstance is tried to a jury, shall apply retroactively to all cases not yet final), Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983) (proof of intent to kill or intent to aid a killing is essential to establish a felony-murder special circumstance under the California death penalty statute), Note, Enmund v. Florida: *The Constitutionality of Imposing the Death Penalty Upon a Co-Felon in Felony Murder*, 32 DE PAUL L. REV. 713, 734-35 (1983).

[9] 458 U.S. at 788, 798.

[10] *Id.* at 798-99.

[11] Felony murder is a killing or unintended death during the commission or attempted commission of a felony. *See, e.g.*, W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 71, at 545-58 (1972).

[12] 458 U.S. at 799-801.

[13] 104 S. Ct. 871, 881 (1984).

[14] *See id.* at 874. A controversy regarding proportionality is whether the comparison pool includes only other cases resulting in death judgments, all cases in which death was a possible punishment, or variations between these categories. Comments on earlier draft from Michael Millman, Executive Director, Cal. Appellate Project (Feb. 11, 1985) (copy on file with *U.C. Davis Law Review*).

required for a constitutional capital punishment scheme."[9] Observing that discretion is adequately guided by requiring the jury to find at least one special circumstance, that no procedure is perfect, and that occasional aberrations are inevitable, Justice White concluded that the potential for arbitrary and capricious imposition was not significant."[10]

The Supreme Court's treatment of the cruel and unusual punishments prohibition raises the difficult question of how to ensure a just and fair death sentence. The Court has developed some contours for answering that question — too much or too little discretion is unconstitutional — but unresolved areas persist."[11] With new studies presenting

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[9] *Harris*, 104 S. Ct. at 873.

[10] *Id.* at 881. As Justice White noted, Jurek v. Texas, 428 U.S. 262 (1976), a case upholding a guided discretion statute decided the same day as *Gregg*, did not include a proportionality review. *Harris*, 104 S. Ct. at 878. However, Texas' death penalty scheme included review by the Texas Supreme Court, and as the *Jurek* Court noted, Texas had provided for the evenhanded, rational, and consistent imposition of death. *Id.* at 878; *Jurek*, 428 U.S. at 276. Consequently, as the concurrence suggests, *Harris* may imply the necessity of some form of judicial review, *Harris*, 104 S. Ct. at 881-82, particularly because the decision was limited to proportionality review. *Id.* at 879. In fact, the Court itself has reviewed death penalty cases by comparing capital sentences in similar cases. *See, e.g.*, Comment, *Dark Year on Death Row: Guiding Sentencer Discretion After* Zant, Barclay, *and* Harris, 17 U.C. DAVIS L. REV. 689, 727 (1984).

The *Harris* decision is dismaying because it suggests that some arbitrary and capricious death sentences will be tolerated. As Justices Brennan and Marshall emphasized in their dissent, compelling evidence indicates that the death penalty violates the eighth amendment since racial discrimination influences the application of the penalty. *Harris*, 104 S. Ct. at 887-88; *see also* Spencer v. Zant, 715 F.2d 1562 (1983) (case remanded because district court did not adequately analyze petitioner's data that death penalty was disproportionately imposed based on factors of race, sex, and poverty). Consequently, they conclude that a system without proportionality review by a court of statewide jurisdiction will necessarily result in arbitrary, capricious, and therefore unconstitutional imposition of the death penalty. *Harris*, 104 S. Ct. at 888.

[11] There are countless examples of arbitrary and capricious imposition of the death penalty. Some of the factors that commentators have isolated include: (1) prosecutorial discretion, *see* Bedau, *supra* note 34, at 25; Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 784-85 (1983) [hereafter Paternoster, *South Carolina*]; Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984) [hereafter Paternoster, *Prosecutorial Discretion*]; Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1714, 1716 (1974); (2) race of the defendant, *see* Bedau, *The Laws, the Crimes, and the Executions*, in DEATH PENALTY, *supra* note 1, at 32; Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZ. L. REV. 651, 661 (1974); Note, *Constitutional Procedure*, *supra* note 52, at 733; (3) poverty of the defendant, *see* Greenberg, *Capital Punishment as a System*, 91 YALE L. REV. 908, 910 (1982); (4) race of the victim, Bowers & Pierce,

compelling evidence that death sentences continue to be imposed discriminatorily and arbitrarily,[79] the cruel and unusual prohibition will continue to be a focal point for resolving the constitutionality of capital punishment.

2. Ineffective Assistance of Counsel

The constitutional guarantee of effective counsel in death penalty cases derives from both the sixth and eighth amendments. The sixth amendment provides that in "all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel."[80] However, the eighth amendment is also implicated since a death sentence due to ineffective assistance would constitute a cruel and unusual punishment. Effective assistance is necessary to ensure that a capital defendant receives the super due process[81] that the Constitution requires.[82] When

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*Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980), (5) jury composition, *see Death Qualification*, 8 LAW & HUMAN BEHAV. 1-195 (1984); Schnapper, *Taking* Witherspoon *Seriously: The Search for Death-Qualified Jurors*, 62 TEX. L. REV. 977 (1984).

[79] Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Jameson, *Ethnic Background May Influence Jurors' Decisions*, 16 TRIAL, Mar. 1980, at 11; Paternoster, *South Carolina*, *supra* note 78; Paternoster, *Prosecutorial Discretion*, *supra* note 78; Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981). As Justice Brennan noted in his dissenting opinion in *Harris*, studies continue to suggest that discrimination by race of the defendant, race of the victim, gender, socio-economic status, and geographical location within a state, are factors applied in deciding who dies. *Harris*, 104 S. Ct. 871, 888 (1984).

[80] U.S. CONST. amend. VI.

[81] As previously indicated, the constitutionality of the death penalty depends upon compliance with the safeguards designed to prevent unjust executions. *See supra* notes 27-30 and accompanying text.

[82] *See, e.g.*, Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)) ("[T]he right to counsel is the right to the effective assistance of counsel."); Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) ("[I]nadequate assistance does not satisfy the sixth amendment right to counsel . . . ."). In Faretta v. California, 422 U.S. 806 (1975), a noncapital case, the Court held that the sixth amendment guarantees the defendant the right to represent himself without counsel. The Court recognized, however, that its decision ran counter to the basic premise that "the help of a lawyer is essential to assure the defendant a fair trial." *Id.* at 832-33. Additionally, the Court stated that "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" *Id.* at 835 n.46. Arguably, the Court would not permit a capital defendant to proceed pro se. In *Faretta*, the Court concluded that the state may appoint "standby counsel," even over the defend-

defense counsel fails to protect adequately her client's interests, imposition of death is unjust.

Death penalty appeals and habeas corpus petitions frequently include claims of ineffective assistance of counsel.[83] A major reason for this may lie in the uniqueness of death penalty trials. In *Gregg*, the Court endorsed a bifurcated proceeding — one trial for the guilt phase and one for the penalty phase.[84] The penalty phase places the defense attorney in a novel and difficult position. Her role shifts from one of defending the accused's innocence to one of advocating an affirmative case for life.[85]

Many defense attorneys fail to make the transition and do not adequately prepare or effectively present the defendant's penalty phase trial. For example, a defense attorney may structure a guilt trial strategy that is inconsistent with the penalty phase theory. This situation may negate any effective defense at the penalty proceeding since a consistent trial strategy increases the defendant's believability and credibility. Should a guilty verdict be rendered in the guilt phase, it is imperative that the jury believe the defendant's mitigating circumstances proffered in the penalty phase.[86] Therefore, the defense attorney cannot

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ant's objection, in the event the court deems it necessary to end the defendant's self-representation. *Id.*

[83] *See, e.g., Death Row on Trial*, N.Y. Times, Nov. 13, 1983, § 6 (Magazine), at 80, 100. As noted by a former Deputy Attorney General, although ineffective assistance of counsel is one of the most common arguments in capital appeals, "the truth of the matter is that many, many, many times these people *were* represented by incompetent counsel . . . . Historically, we have taken the most serious of cases, where the defendant's life was at stake, and because the defendant was poor allowed him to be represented by inexperienced young lawyers." *Id.* (emphasis in original).

[84] *See supra* notes 49-50 and accompanying text; *see also* Goodpaster, *supra* note 15, at 790 (bifurcated trials reduce arbitrary sentencing by permitting the jury to consider guilt evidence apart from sentence evidence and therefore focus on sentencing guidelines, and by permitting the jury to hear mitigating evidence necessary for an individualized sentence, which might be inadmissible at a unitary trial).

[85] Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 337 (1983) (defense advocates must establish a prima facie case for life), *see also* Farmer & Mullin, *Capital Trial Emphasis on the Punishment Stage of a Case* (1977), *reprinted in* California Office of State Public Defender, 2 California Death Penalty Manual N-24-25 (1980) (attorney's role is to help the jury understand the defendant and view him as a human being).

[86] At the penalty phase, the defense attorney's goal is to convince the jury that the human life they are judging has value, in spite of the crime that was committed. The defense attorney should establish a rapport between the defendant and the jury, and, whenever possible, not present a guilt phase defense that jeopardizes that rapport for the sentencing phase. For example, if at the guilt phase a defendant claims an alibi that

plan the theory of the guilt phase trial independent of the penalty phase. She must develop and structure a defense theory that will include the penalty phase. Because the preparation required for structuring a bifurcated proceeding is categorically different from that required for a noncapital trial, defense counsel who may be very competent in complex noncapital criminal trials may, without training, be ineffective in capital trials.[87] For example, many defense attorneys fail to present any penalty phase evidence or any mitigating circumstances.[88] As a result, the jury may lack the meaningful individualized circumstances required by *Lockett*[89] in making its decision whether to impose death.

Recognizing the importance of effective counsel, the Supreme Court has developed standards to ensure effective representation. The Court in *Strickland v. Washington*[90] recently addressed minimum standards for effective assistance of counsel during the sentencing phase in a capital trial. Justice O'Connor, writing for the Court, concluded that the traditional standard applied to ineffective assistance claims is sufficient to "ensure that the adversarial testing process works to produce a just result."[91] Consequently, despite the Court's recognition that death is

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the jury disbelieves in light of the state's overwhelming contrary evidence, the jury may likewise disbelieve the defendant when he proffers mitigating circumstances at the penalty phase. *See* Farmer & Mullin, *supra* note 85, at N-27.

[87] Even though competent "defense counsel will reasonably exhaust every possible means to save his client from execution," Furman v. Georgia, 408 U.S. 238, 358 (1972) (Marshall, J., concurring), many attorneys do not understand how to use the bifurcated trial. *See generally* Farmer & Kinard, *The Trial of the Penalty Phase* (remarks at the National Legal Aid and Defender Association Convention, Philadelphia, 1976), *reprinted in* CALIFORNIA DEATH PENALTY MANUAL, *supra* note 85, at N-13. A competent defense counsel's inability to present effectively her client's case for life at the penalty phase was exemplified in Hopkinson v. State, 632 P.2d 79 (Wyo. 1981). In *Hopkinson*, the defense attorney, at the close of the guilt phase, informed the judge that he needed merely two minutes for the penalty phase since the jury would do what it wanted to, making it unnecessary to take more time. *Id.* at 197 n.13.

[88] *See e.g.*, Blake v. Zant, 513 F. Supp. 772, 779-81 (S.D. Ga. 1981) (experienced attorney failed to present any evidence at penalty phase), Collins v. State, 271 Ark. 825, 833-36, 611 S.W.2d 162, 166-90 (no penalty phase argument), *cert. denied*, 452 U.S. 973 (1981); People v. Jackson, 28 Cal. 3d 264, 285, 618 P.2d 149, 156, 168 Cal. Rptr. 603, 610 (1980) (no penalty phase evidence,.only argument), *cert. denied*, 450 U.S. 1035 (1981).

[89] Lockett v. Ohio, 438 U.S. 586 (1978). In *Lockett*, Chief Justice Burger's opinion for the Court concluded that "the nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence." *Id.* at 604-05, *see supra* notes 62-65 and accompanying text.

[90] 104 S. Ct. 2052 (1984).

[91] *Id.* at 2064.

different, the standard for attorney performance, as with a noncapital trial, is that of reasonably effective assistance. The defendant must show that counsel's representation fell below an objective standard[12] of reasonableness and prove that the unreasonable representation resulted in prejudice.[13] The Court's opinion in *Strickland* requires the same case-by-case review of ineffective assistance claims in the penalty phase as a defendant would receive in the guilt phase or in a noncapital trial.[14] Therefore, given the requirement that ineffective assistance be considered in light of the circumstances of the case, reviewing courts should apply the standards with concern for the capital defendant's unique constitutional protections.[15]

3. Fair and Impartial Jury

Ensuring that the final arbiters of guilt and punishment will be fair and impartial is another integral constitutional protection in a criminal case.[16] With society's inherent prejudices, the judicial system must

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[12] An objective standard is one that measures the attorney's performance against the performance customary of an attorney with ordinary training and skill in the criminal law — reasonableness under prevailing professional norms. *See id.* at 2065; *see also* Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970).

[13] *Strickland*, 104 S. Ct. at 2064-65.

[14] *Id.* at 2073.

[15] The *Strickland* Court affirmed the defendant's death sentence, although his attorney failed to investigate possible mitigating factors. Consequently, despite Chief Justice Burger's opinion for the Court in *Lockett*, which required the sentencer to consider a defendant's mitigating circumstances, *Strickland* concludes that the counsel's conduct was reasonable in not presenting such mitigation for the sentencer's consideration. *Id.* at 2070. Moreover, the Court noted that even assuming the counsel's conduct was unreasonable, the defendant suffered insufficient prejudice to warrant setting aside his death sentence. *Id.* Even Justice Brennan, who finds the death penalty per se unconstitutional, concurred in the Court's opinion, while dissenting in the judgment. *Id.* at 2071. He noted that the Court's "standards are sufficiently flexible to accommodate the wide variety of [ineffective assistance claims]," but also admonished the Court to apply the standards with the special consideration required for capital sentencing review. *Id.* at 2073. Since the penalty phase representation in *Strickland* was minimal, and the attorney failed even to investigate the defendant's mitigating factors, the Court's conclusion that the representation was effective is questionable. Apparently, the defendant's constitutional right to have the sentencer consider mitigating evidence is significant only if counsel effectively obtains and presents the evidence. *See, e.g.*, Note, Washington v. Strickland: *Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1569 (1983) (defense counsel should be required to undertake investigation that sufficiently enables her to discover defendant's mitigating circumstances).

[16] "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . ." U.S. CONST. amend. VI.

guard against unfairly imposed death sentences. The Supreme Court has been confronted with challenges to the composition of juries and has attempted to formulate constitutional standards for assessing the impartiality and fairness of death penalty juries.

In *Witherspoon v. Illinois*,[97] the Court held that excluding prospective jurors for cause[98] merely because they have general objections to or conscientious beliefs against imposing the death penalty denied a capital defendant an impartial jury on the sentencing issue.[99] The Court stated that excluding all prospective jurors who had "conscientious or religious scruples" against the death penalty produced a jury composed only of those "uncommonly willing to condemn a man to die."[100] The Court, however, rejected the defendant's argument that a jury composed only of persons favoring the death penalty resulted in an unrepresentative jury on the issue of guilt or unconstitutionally increased the risk of conviction.[101] The Court stated that the record before it did not permit

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[97] 391 U.S. 510 (1968).

[98] In selecting a jury, an attorney can excuse a prospective juror in two ways. She can challenge for cause for actual or implied bias; or she may challenge peremptorily, i.e., excuse without stating a reason. An attorney can challenge for cause an unlimited number of jurors; however, the number of peremptory challenges available to her is limited by statute. *See infra* note 167.

[99] *Witherspoon*, 391 U.S. at 518.

[100] *Id.* at 521; *accord* Adams v. Texas, 448 U.S. 38 (1980). Decided before *Furman*, *Witherspoon* was not based upon the super due process concept or the conclusion that arbitrary and capricious imposition of the death penalty is an eighth amendment violation. Nonetheless, the Court recognized the constitutional infirmity of permitting dismissal for cause for mere misgivings about imposing death.

[101] *Witherspoon*, 391 U.S. at 517-18 (petitioner's data too tentative to establish whether exclusion of jurors opposed to capital punishment results in an unrepresentative jury on issue of guilt or whether risk of conviction is substantially increased). In Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), the court held that the practice of excluding for cause from the guilt phase jurors holding absolute scruples against the death penalty violated the defendant's sixth amendment right to a jury composed of a representative cross-section of the community. The court concluded that a jury with *Witherspoon* excludables stricken for cause is "conviction prone and, therefore, does not constitute a cross-sectional representation in a given community." *Id.* at 229. At least one court disagrees with this approach. Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984). The *Keeten* court held that the exclusion of *Witherspoon*-excludable jurors did not create a conviction prone jury in violation of due process or in violation of defendant's right to a jury selected from a fair cross-section of the community. *Id.* at 133. The court stated that the right to a jury trial "does not include the right to be tried by jurors who are unable or unwilling to follow the law and the instructions of the trial judge in a capital case." *Id.*; *cf.* Smith v. Balkcom, 660 F.2d 573, 578 (5th Cir. 1981) (court held that excluding two persons from the guilt phase venire for cause when they unambiguously expressed their opposition to the death penalty, indicating that they

this conclusion. However, recent studies indicate that even though a jury may be constitutionally sound under *Witherspoon* for the penalty phase, it tends to be more willing to find a defendant guilty.[102] Moreover, this tendency may increase given the Court's recent modification of the *Witherspoon* standard. In *Wainwright v. Witt*,[103] the Court concluded that prospective jurors whose doubts about the propriety of the death penalty may prevent or substantially impair the performance of their duties as jurors may be excused for cause.

Studies also indicate that the death qualification process may deny the capital defendant a fair trial on the issue of guilt. A death-qualified jury has been circumscribed by its willingness to impose the death penalty and barraged with questions regarding its views on the death penalty.[104] Even before the trial begins, the potential punishment has been discussed before the jury at length, thus creating expectations and preconceptions about the case they will hear and the defendant they

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would automatically vote against imposing the death penalty, did not violate the defendant's right to an impartial jury), *cert. denied*, 459 U.S. 862 (1982).

[102] Studies conclude that a death-qualified jury is guilt prone. *See* Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data*, 8 LAW & HUM. BEHAV. 7 (1984); Thompson, Cowan, Ellsworth & Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984). However, the Supreme Court has not required a separate jury for the guilt and for the penalty phase. The Court apparently accepts the view that since a class of people who have absolutely no reservations about the death penalty do not constitute a cognizable group the sixth amendment does not provide the defendant with a challenge for the guilt phase. Nonetheless, the inability of this class of people to fit snugly into the language of the sixth amendment does not address the issue. Moreover, prosecutors can use their peremptory challenges to exclude persons who have only general objections to the death penalty, but who believe that they could impose it in the proper case, and effectively structure a jury that has absolutely no reservation about imposing the death penalty. *See* People v. Fields, 35 Cal. 3d 329, 342-53, 673 P.2d 680, 687-95, 197 Cal. Rptr. 803, 810-18 (1983); *see also* Hovey v. Superior Court, 28 Cal. 3d 1, 27-42, 616 P.2d 1301, 1314-26, 168 Cal. Rptr. 128, 142-53 (1980) (overview of conviction prone studies; expert witnesses testified to strong correlation between attitudes toward capital punishment and tendency to convict).

[103] 105 S. Ct. 844, 852 (1985) (stating that the Court was reaffirming the standard adopted in Adams v. Texas, 448 U.S. 38, 45 (1980)).

[104] *See* Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 122, 151 (1984) (biasing effects that flow from the death qualification process may deny defendant fair and impartial jury); *see also* Hovey v. Superior Court, 28 Cal. 3d 1, 74-81, 616 P.2d 1301, 1350-55, 168 Cal. Rptr. 128, 177-82 (1980).

will sentence.[101]

In construing the eighth amendment's cruel and unusual clause and the sixth amendment's right to counsel and an impartial jury, the Supreme Court has attempted to define the constitutionally permissible execution. This task has not been easy, nor is it finished. In each area of the Court's concern, unanswered questions remain. But for the moment, the Supreme Court has articulated some guidelines for imposing the death penalty. Although complex, these guidelines represent only the minimum required by the Constitution. The next part of this Comment will explore the financial costs of these minimum guidelines.

II. Financial Costs of a Constitutional Execution Process

The Supreme Court has decided that the death penalty is constitutional when its imposition complies with certain protections. Part II of this Comment focuses on the financial costs required by a constitutional capital punishment system. Little information exists on the costs of capital litigation, although commentators frequently allude to its astronomical dimensions.[104] While cost arguments, focusing solely on expense, should never replace a moral discussion concerning the sanctity of life, financial considerations are nonetheless important; findings regarding costs can be used to assess the common claim that the death penalty is cheaper than sentencing a person to life imprisonment.

Because of constitutional requirements and the diligence of attorneys in capital cases, death penalty litigation is a long, expensive process.[105]

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[101] *See* Haney, *supra* note 104, at 126-29 (death qualification process appears to increase juror belief in defendant's guilt, encourages belief that the law disapproves of persons who oppose the death penalty, and persuades jurors to believe that the death penalty is an appropriate sentence).

[104] Amsterdam, *Capital Punishment*, in Death Penalty, *supra* note 1, at 354 (cost of life imprisonment in most secure prison is less than cost of legal proceedings needed to execute a defendant); L.A. Times, July 27, 1983, Pt. II, at 5, col. 3 (cost of life imprisonment is one-third the cost of death penalty litigation); L.A. Daily J., Sept. 4, 1984, at 4, col. 4 (death penalty prosecution costs upwards of $2 million per successful conviction, with time delays of up to 12 years).

[105] As Justice Marshall stated in *Furman*, "defense counsel will reasonably exhaust every possible means to save his client from execution." 408 U.S. at 358 (Marshall, J., concurring); *cf. False Statistic*, Nation, Dec. 31, 1983-Jan. 7, 1984, at 685 (judges who cite the number of previous appeals a prisoner has made to either deny last minute pleas, or as Chief Justice Burger stated when referring to a defendant who made 14 appeals during his 10 years on death row, to demonstrate "the specious suggestion of a 'rush to judgment,'" often fail to disclose that the number of times a court *actually* considered the defendant's argument, may be closer to zero than to 14).

Although the cost of life-long incarceration surely would be high, the cost of execution with constitutional protections is staggering. This part examines the costs of the death penalty as the defendant moves toward execution.[108]

A. Pretrial Costs

The added costs of a death penalty system begin to accrue long before the trial. Limited plea bargaining, lengthy and complex pretrial motions, extensive investigation, and increased use of psychiatrists, psychologists, and other experts are impelled by the greater stakes in capital cases. These factors, as well as the constitutional requirements, result in a substantial financial toll on the criminal justice system.

In the usual criminal case, prosecution and defense attorneys commonly engage in plea bargaining. Under this arrangement, the defendant pleads guilty in return for certain concessions, such as the reduction of charges or the promise of a lenient sentence.[109] Statistics indicate that eighty-five to ninety percent of noncapital felony cases reaching the arraignment stage result in a plea of guilty,[110] which eliminates the need

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[108] Collecting cost data on each aspect of capital litigation is difficult. Much of the data upon which this Comment is based was collected through questionnaires sent to capital defense attorneys and district attorneys throughout the country. The questionnaire sent to 50 district attorneys and 50 defense attorneys in states with death penalty statutes is included in the Appendix. The responses to the questionnaires are on file with *U.C. Davis Law Review*. Additionally, the four counties in California that represent approximately 63% of the death penalty filings in the state were surveyed by in-person and telephone interviews. From 1977, when California enacted a new death penalty statute, to the end of 1983, 1948 special circumstances cases were filed in California. There were 950 filed in Los Angeles County; 95 in Orange County; 93 in Alameda County; and 90 in Sacramento County. Telephone interview with Linda Lenker, Legal Administrator, Cal. Appellate Project, a non-profit corporation established by the California State Bar (Feb. 26, 1985).

[109] Vorenberg, *Decent Restraint on Prosecutorial Power*, 94 HARV. L. REV. 21, 1533 (1981) (in return for defendant's decision to plead guilty, the prosecution offers a lighter punishment, either by reducing the charge or by recommending a reduced sentence).

[110] H. REYNOLDS, COPS AND DOLLARS — THE ECONOMICS OF CRIMINAL LAW AND JUSTICE 205 (1981) (for prosecutors, plea bargaining answers the problem of how to prosecute large case load with severely limited resources because it expedites the case; without plea bargaining the prosecutorial staff may not be able to handle the same quantity of cases and many defendants may have to be released and the charges against them dropped); Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFFOLK U.L. REV. 292, 293, 306 (1969) (plea bargaining is a necessary and expedient means of dealing with criminal cases; without plea bargaining courts would be overwhelmed and the criminal justice system severely impaired; courts

for a trial. Thus, plea bargaining has become an accepted resolution to an overburdened criminal justice system because it reduces the number of trials.[111]

In capital cases, however, plea bargaining is less effective in reducing the probability of proceeding to trial. In death penalty cases, the prosecutor is dissuaded from plea bargaining since reducing the charge or promising a lighter sentence would render the case noncapital.[112] Without the prosecutor's offer of a lesser charge or less severe punishment, the death-eligible defendant gains little, if anything, by pleading guilty to capital murder.[113] If he did, he would proceed directly to the penalty phase of his trial, waiving any defense. In economic terms, therefore, the immediate effect of the prosecutor's decision to seek the death penalty is that capital cases become jury trials.[114] Moreover, to meet constitutional safeguards these trials have evolved into separate proceedings on guilt and penalty.[115]

A second area disproportionately increasing the costs in capital cases is pretrial motions.[116] In a capital case, the number of pretrial motions

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depend upon guilty pleas even when a defendant is charged with first or second degree murder); Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69, 71 (1978) (85-90% of criminal cases, including murder cases, are resolved by guilty pleas and are therefore resolved without trials).

[111] JUDICIAL COUNCIL OF CALIFORNIA, 1984 ANNUAL REPORT 3 (1985) (increase of over 3000 cases per year disposed of by guilty plea rather than by trial); Vorenberg, *supra* note 109, at 1532 (United States Supreme Court, American Bar Association, President's Crime Commission, and American Law Institute endorse plea bargaining).

[112] Nakell, *supra* note 110, at 71 (if the prosecution offers capital murder defendant a lesser degree of homicide in exchange for a guilty plea, the defendant is no longer death-eligible). In a 1982-83 California death penalty case, the defendant was found guilty. However, in the penalty phase, the jury deadlocked at 11-1 for death. Although it was acknowledged that a retrial would hurt the already financially strapped county, the prosecutor declined a plea offer and pursued a retrial. The county auditor estimated that the retrial would be more expensive than the first trial. *Proctor: Death Penalty Worth the Cost!*, Redding (Cal.) Record Searchlight, Feb. 4, 1983, at 1, col. 1.

[113] Even in a case with overwhelming evidence of guilt, going to trial on guilt and presenting a reasonable doubt defense may benefit the defendant. For example, if the defendant is found guilty, the prosecution may forego presenting some of the vivid evidence and the aggravating factor evidence during the penalty phase. Thus, the guilt phase may help separate and distance the sentencer from the prosecution's strongest case against the defendant. Additionally, permitting the sentencer to observe the defendant for a longer time, that is, during two trials, may induce the sentencer to view the defendant more favorably. *See, e.g.*, Goodpaster, *supra* note 85, at 331-32.

[114] Nakell, *supra* note 110, at 71 (ten times as many trials for capital cases as there are for noncapital cases).

[115] *See supra* notes 49-50 and accompanying text.

[116] SOUTHERN POVERTY LAW CENTER, MOTIONS FOR CAPITAL CASES 2 (1981)

filed is at least double, but more often three or four times the number of motions filed in a noncapital case.[117] Defense attorneys assert that the increased number of pretrial motions in capital cases ranges from twice as many to as much as five to six times the number of motions as in noncapital cases.[118] District attorneys generally conclude the number of motions they file is approximately twice the number filed for noncapital murder cases but note that this may result from the increased number of defense motions.[119]

Although many of the motions are those typically filed in a criminal case and address the specific aspects of the defendant's criminal charges, even these motions increase costs because in a capital case they have greater ramifications, are often more complex,[120] and generally raise more evidentiary issues.[121] Another factor resulting in a lengthier process is that a capital defense attorney may have a dual goal when pursuing a motion in a capital case. Her primary concern may be with structuring a defense that will render the case noncapital.[122] Consequently, extensive planning and strategy are involved in preparing motions and collecting data to provide the proof and legal arguments to support the motions.[123] Additionally, the defense attorney also requests legal relief unique to capital cases.[124] In a capital case, a main goal is to prevent the penalty of death.[125] Because the potential punishment is so extraordinary, the defense attorney should, from the beginning, structure a defense that challenges the constitutionality of the death penalty generally, as well as its appropriateness for the individual defendant.

[hereafter MOTIONS FOR CAPITAL CASES]

[117] NEW YORK STATE DEFENDERS ASS'N, INC., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE 12 (1982) [hereafter CAPITAL LOSSES] (usual number of pretrial motions in noncapital cases between five and seven as compared to between ten and twenty-five for capital cases); *see also* MOTIONS FOR CAPITAL CASES, *supra* note 116, at 2.

[118] Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[119] *Id.*

[120] CAPITAL LOSSES, *supra* note 117, at 13 (ordinary motions take on different meaning in death penalty cases; routine motions are generally longer, more complicated, and more heavily litigated).

[121] Telephone interview with Stuart Rappaport, Bureau Chief, Los Angeles Public Defender (Apr. 4, 1985).

[122] *See, e.g.*, MOTIONS FOR CAPITAL CASES, *supra* note 116, at 5.

[123] *Id.* at 6.

[124] *See, e.g., id.* at 10-17.

[125] A critical factor to keep in mind is that a defense victory in a capital case often means a life sentence. *See id.* at 1.

General arguments, for example, challenge the penological justification of the death penalty, its arbitrary and capricious nature, and its cruelty.[126] Motions that are generally included in a death penalty case include: Change of venue;[127] challenging those aspects of the charge that render the defendant death-eligible;[128] motions for individual *voir dire*;[129] and sequestration of jurors during *voir dire*.[130] Motions are also made to request funds for investigators,[131] expert witnesses,[132] and pri-

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[126] *Id.* at 233-36. In answering the question regarding defense motions filed in capital cases, defense attorneys generally listed *voir dire* motions, jury composition, challenges to the death qualification process, change of venue, challenges to the constitutionality of the death penalty in general and the constitutionality of the state's statute specifically, as common capital case motions. Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[127] *See, e.g.*, CAL. PENAL CODE § 1033 (West Supp. 1985). *See generally* THE NATIONAL JURY PROJECT, JURYWORK—SYSTEMATIC TECHNIQUE § 7 (2d ed. 1983).

[128] For example, in California, the defendant would file a Penal Code § 995 motion to challenge the special circumstance of his charge. If defendant's motion were granted, the case no longer would be capital. Consequently, thorough preparation of this motion is critical. *See* CAL. PENAL CODE § 995 (West 1970 & Supp. 1985).

[129] In California, individual sequestered *voir dire* is judicially required in capital cases. *See* Hovey v. Superior Court, 28 Cal. 3d 1, 80, 616 P.2d 1301, 1354, 168 Cal. Rptr. 128, 181 (1980). Pennsylvania statutorily requires individual *voir dire* for capital cases unless defendant waives the right. *See* 42 PA. CONS. STAT. ANN. R. CRIM. P. 1106(e) (Purdon 1964). A Texas statute mandates individual sequestered *voir dire* at request of the state or defendant. TEX. CRIM. PROC. CODE ANN. § 35.17(2) (Vernon Supp. 1985). According to one experienced capital defense attorney, individual sequestered *voir dire* is the most important procedure in a death penalty case. There are numerous justifications for individual *voir dire*: Collective *voir dire* educates the jury panel on prejudicial and incompetent material; each juror hears the question as each attorney questions; and collective *voir dire* may be embarrassing and result in untruthful answers, especially when the questions explore bias and prejudice. Goodpaster, *supra* note 85, at 327.

[130] *See* Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555, 571 (some states require sequestration of remaining jurors while questioning of prospective jurors proceeds).

[131] For example, the defense attorney will make a motion requesting funds for an investigator. In California, the defense will file a Penal Code § 987.9 motion. The statute states, in relevant part:

> In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense . . . . The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

CAL. PENAL CODE § 987.9 (West Supp. 1985).

Pretrial investigation is essential. The capital defense attorney must prepare for both

vate psychologists and psychiatrists.[''] Although expensive, the exhaustive filing of motions is necessary to provide the defendant with the constitutional rights of super due process, effective assistance of counsel,

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proceedings and extensively investigate the defendant's life history to present mitigating evidence during the sentencing phase. *See* Goodpaster, *supra* note 85, at 344. Of course, the prosecution will conduct its own investigations to present aggravating circumstances to rebut the defense's mitigating circumstances.

[''] The types of expert witnesses needed will vary with differing facts of the case. In response to a questionnaire, defense attorneys listed the following experts as those most frequently requested in capital cases: Psychiatric; jury selection and composition; forensic; criminologists; and experts on the arbitrary and capricious imposition of the death penalty. Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

A recent article vividly described the impact of lack of investigative funds in an Arizona case. The defendant was sentenced to death for allegedly murdering his two children by setting fire to their bedroom. The defense retained an arson investigator as an expert witness. After initial preparations and testing, the expert billed the public defender's office $1300 ($40 an hour). Although the expert needed more time to investigate, the public defender could no longer afford the cost. The defense attorney's motion that the investigator be appointed by the court was denied. The prosecution presented two expert witnesses to support the state's theory of the fires. The defense expert had conducted sufficient tests to testify that the markings in the charred room could have been caused by means other than that in the state's theory, and in fact, that some of the consequences of the fire could not be explained by the state's theory. The first trial resulted in a hung jury. In the defendant's second trial, the judge excluded almost all of the expert testimony since it was not prepared in an exact replica of the bedroom. However, the earlier denial of the defense funds for the expert precluded the defense from further testing. Although the exclusion of the expert testimony was the only significant difference between the two trials, the jury found the defendant guilty. Brill, *An Innocent Man on Death Row*, AM. LAW., Dec. 1983, at 1, 87-88.

[''] Most state death penalty statutes allow mitigation based on the defendant's mental state. Generally, the jury may consider whether the defendant suffered a mental health problem during the commission of the act or generally suffers a serious mental health problem, even though the mental state does not satisfy the criteria for an insanity defense. Additionally, the defendant may present evidence of drug addiction or alcoholism. SOUTHERN POVERTY LAW CENTER, TRIAL OF THE PENALTY PHASE 16-17 (1981) [hereafter TRIAL OF THE PENALTY PHASE]. For example, California's death penalty statute lists, as mitigating factors to be considered by the sentencer, the following factors regarding the defendant's mental state:

> . . (d) whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance . . . . (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 (sic) of intoxication . . . .

CAL. PENAL CODE § 190.3 (West Supp. 1985).

and a fair trial.[114]

A third pretrial cost is investigators' fees.[115] The sixth amendment provides the defendant with the right to effective assistance of counsel.[116] To be effective, the defense attorney must thoroughly investigate both the facts of the case and the background and character of the capital defendant.[117] Much of this investigation is conducted during the filing of the pretrial motions to allow thorough preparation of the defendant's capital trial and to support the motions factually. The cost of capital case investigations is particularly high for two reasons: A capital trial is qualitatively different from noncapital trials; and an effective attorney must prepare to introduce mitigating circumstances during the penalty phase of the trial and therefore must extensively investigate the defendant's background.[118] This investigation may include an exploration of the past twenty, thirty, or forty years.[119] One capital case in-

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[114] Sevilla, *Between Scylla and Charybdis: The Ethical Perils of the Criminal Defense Lawyer*, 2 NAT'L J. CRIM. DEF. 237, 271 (1976) (defense counsel has ethical and professional responsibility to file nonfrivolous pretrial motions that advance client's interests). Establishing a record for the capital defendant is critical. Pretrial motions establish and protect the defendant's record for appeal. *See, e.g.*, Sevilla, *Motions*, in INEFFECTIVE ASSISTANCE OF COUNSEL SEMINAR SYLLABUS 1 (J. Thomson comp. 1985); *see also* People v. Pope, 23 Cal. 3d 412, 426, 590 P.2d 859, 867, 152 Cal. Rptr. 732, 740 (1979) (in an ineffective assistance challenge, the conviction will be affirmed when the record sheds no light on why counsel acted or failed to act in the manner challenged, unless no satisfactory explanation exists for the attorney's act or omission).

[115] *See supra* note 131.

[116] *See supra* notes 80-81 and accompanying text.

[117] *See, e.g.*, Keenan v. Superior Court, 31 Cal. 3d 424, 431, 640 P.2d 108, 112-13, 180 Cal. Rptr. 489, 493-94 (1982) (citing 1 ABA STANDARDS FOR CRIM. JUSTICE, THE DEFENSE FUNCTION 4-42 (2d ed. 1980), for proposition that capital defense counsel's responsibility includes thorough preparation of factual and legal circumstances of case prior to trial).

[118] *See* Goldpaster, *supra* note 85, at 323-24 (trial counsel's duty includes investigating client's life history and emotional and psychological makeup, i.e., inquiring into client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings); *see also* TRIAL OF THE PENALTY PHASE, *supra* note 133, at 15-16 (clergy, teachers, and social workers provide helpful testimony, the value of which is enhanced by their neutrality since they are not related to either the victim or the defendant); OFFICE OF THE PUBLIC DEFENDER, STATE OF MARYLAND, OPERATIONAL OVERVIEW—IMPACT DEATH PENALTY CASES—1982 FISCAL YEAR 3 (1982) (minimum capital defense requirements include extensive use of investigators and paralegals to locate and interview witnesses; a recent case listed 106 state's witnesses) [hereafter OPERATIONAL OVERVIEW].

[119] Telephone interviews with capital defense attorneys: Jim Merwin, Orange County (Mar. 6, 1985); Joe Najpaver, Alameda County (Mar. 6, 1985); Lawrence Biggam, Biggam, Christensen & Minsloff, Santa Cruz County (Mar. 10, 1985); James

volved interviewing 240 persons, one-half of whom became witnesses at the trial.[140] The investigation often includes extensive travel throughout the country and requires a skilled investigator who can locate persons from the defendant's past and persuade them to participate in a death penalty trial.[141] An investigation for capital trials is generally three to five times longer than that for noncapital trials,[142] and may take as long as two years.[143]

A fourth step in the pretrial process that increases the cost of the capital case is the use of psychiatrists. Psychiatric evaluations are used to prove diminished actuality, diminished capacity, an insanity defense, or more commonly, are presented at the penalty phase as mitigating evidence.[144] Additionally, the prosecution generally obtains the services of another psychiatrist to provide a contrary view of the defendant's psychiatric condition.[145] Moreover, the court may occasionally find it necessary to employ a third opinion, one not provided by either the defense or the prosecution.[146] The Supreme Court recently held that due

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Thomson, Sacramento County (Apr. 5, 1985); Stuart Rappaport, Bureau Chief, Los Angeles County Public Defender (Apr. 4, 1985).

[140] People v. Trillo, Cal. Super. Ct. 61425. Telephone interview with Roy Simmons, Sacramento County Public Defender's Office (Mar. 7, 1985).

[141] Telephone interviews with private investigators: Margaret Erickson, Santa Cruz, Cal. (Mar. 7, 1985); Rodney Harmon, Harmon Investigations, Sacramento, Cal. (Apr. 5, 1985); Casey Cohen, Criminal Justice Consultant, Beverly Hills, Cal. (Apr. 5, 1985).

[142] Questionnaire on file with *U.C. Davis Law Review*. Telephone interviews with private investigators: Margaret Erickson, Santa Cruz, Cal. (Mar. 7, 1985); Rodney Harmon, Harmon Investigations, Sacramento, Cal. (Apr. 5, 1985); Casey Cohen, Criminal Justice Consultant, Beverly Hills, Cal. (Apr. 5, 1985).

[143] Telephone interview with Lawrence Biggam, Attorney, Biggam, Christensen & Minsloff, Santa Cruz, Cal. (Mar. 10, 1985).

[144] During the penalty phase, the defense can present any aspect of a defendant's character or record as a mitigating factor in arguing for the defendant's life. Lockett v. Ohio, 438 U.S. 586, 604 (1978); *see also* Robinson v. State, 548 S.W.2d 63, 65 (Tex. 1977); TRIAL OF THE PENALTY PHASE, *supra* note 133, at 25 (courts readily approve use of traditional expert witnesses such as psychologists and psychiatrists). For example, in California, evidence of a defendant's mental disease, mental defect, or mental disorder is admissible to prove whether or not the defendant actually formed the required specific intent, premeditation, deliberation, or malice aforethought, when the crime was committed. *See* CAL. PENAL CODE § 28 (West Supp. 1985). A court may consider evidence of diminished capacity or a mental disorder at the time of sentencing. *See* CAL. PENAL CODE § 25 (West Supp. 1985).

[145] District attorneys assert that psychiatric evaluations are more commonly used in capital trials than in noncapital murder trials. Questionnaires on file with *U.C. Davis Law Review*.

[146] In critical criminal trials, there are occasions when the court will seek psychiatric

process requires that a state provide an indigent defendant access to a psychiatrist's assistance if the defendant's sanity at the time of the offense is likely to be a significant factor at trial.[127] The typical cost of the psychiatrist is approximately $700 a day, exclusive of expenses.[128] The per hour rate is in the range of $110 an hour for examinations and $125 an hour for in-court testimony.[129] When the defense, the prosecution, and the court all require evaluations, the cost to the state is clearly substantial.

Additional expert and auxiliary services necessary before trial include medical examiners, polygraph experts, and experts who provide data regarding race bias and death penalty bias for jury selection. In rendering effective assistance to the capital defendant, the defense attorney has an ethical obligation to present the best defense and the best possible case for life.[130] This obligation translates into case preparation that extensively uses experts.[131] A typical cost breakdown for use of experts includes the following: a medical examiner costs approximately $700 to $1000 per day;[132] a polygraph expert costs approximately $200-300 per day for courtroom testimony and $150-250 for the poly-

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evaluation and testimony not prepared by either defense or prosecution. Telephone interview with Martin Blinder, M.D., San Francisco, Cal. (Jan. 11, 1985).

[127] Ake v. Oklahoma, 105 S. Ct. 1087, 1092 (1985).

[128] CAPITAL LOSSES, *supra* note 117, at 15 (figure quoted by Psychological Evaluations, Inc., an Atlanta based firm that provides psychiatric evaluations in capital cases throughout the country). The fee in California can run as much as $1500 per day. Telephone interview with Martin Blinder, M.D., San Francisco, Cal. (Jan. 11, 1985).

[129] CAPITAL LOSSES, *supra* note 117, at 15 (figure quoted by Chicago psychiatrist who has testified in several capital cases; fee quoted is exclusive of expenses).

[130] *See supra* notes 80-82 and accompanying text; *see also* OPERATIONAL OVERVIEW, *supra* note 138, at 4 (although no constitutional or statutory right to expert witnesses exists for the indigent capital defendant, denial of expert witnesses establishes an "abhorrent double standard" when a defendant's life is at stake). Asked whether they attempted to obtain the "best" experts for capital trials, defense attorneys answered affirmatively. However, they also stated that they attempt to obtain the best experts for noncapital murder trials. Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[131] The use of experts, although varying with each case, is generally acknowledged to increase in death penalty case preparation. The costs of using experts also extend into the trial stage. *See, e.g.*, TRIAL OF THE PENALTY PHASE, *supra* note 133, at 25-26 (generally, use of expert witnesses readily approved, although use of expert testimony regarding unique aspects of capital trial not as commonly approved; nonetheless, experts' knowledge is used in defense preparation); questionnaires on file with *U.C. Davis Law Review*.

[132] CAPITAL LOSSES, *supra* note 117, at 15 (figure quoted by medical examiner in Atlanta, Georgia, as the going rate for medical examiner services).

graph examination;[111] an expert witness concerning eyewitness identification costs approximately $500 per day for courtroom testimony and $100 per hour for consultation;[112] and a witness who testifies concerning *Witherspoon*[113] issues could run $500 per day.[114]

Increased pretrial costs must be viewed in terms of its impact on the public defender or court appointed defense attorney, the prosecutor, the judge, and attendant court costs. Capital defendants are almost always poor,[115] and the state provides indigent defendants with an attorney. Additionally, although capital case prosecution costs are not generally apparent because expenditures may appear as part of the office's overall budget, documented prosecution costs are often greater than defense costs.[116] Also, the state puts more resources and time into prosecuting capital cases, increasing the complexity of the case that the defense at-

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[111] *Id.* (figure quoted by Georgia firm that has participated in approximately 25 capital trials). The research and procedure, which generally takes at least three hours, costs approximately $250 at a minimum. Telephone interview with LeClair and Associates, Sacramento, Cal. (Jan. 11, 1985). If the examination involves a single issue, the cost is approximately $200, however, if it is for a complicated homicide case with substantial discovery records, the cost often increases to $400 or more. In-court testimony costs $250 for one-half day. Telephone interview with John Smith, Polygraph Examiner, Sacramento, Cal. (Apr. 5, 1985).

[112] CAPITAL LOSSES, *supra* note 117, at 15 (fee quoted by eyewitness identification expert).

[113] *See supra* notes 97-100 and accompanying text.

[114] The approximate cost for testimony regarding death qualification of a jury is $500 per day plus expenses. A typical case might be a two-witness day for defense. Telephone interview with Samuel Gross, Acting Professor of Law, Stanford University, Palo Alto, Cal. (Jan. 14, 1985).

[115] The attorney costs involved in capital litigation invariably will be paid by the state. Almost all capital defendants are indigent and are assigned a defense attorney. *See* Greenberg & Himmelstein, *Varieties of Attack on the Death Penalty*, 15 CRIME & DELINQ. 112, 114 (1969) (almost 100% of the persons executed from 1930 until 1967 were poor); *see also* L.A. Daily J., Aug. 27, 1982, at 5, col. 3 (almost without exception people on death row are poor); San Francisco Chron., Oct. 13, 1982, at 39, col. 1 (quoting Clinton Duffy, former San Quentin Prison Warden who opposed the death penalty: "Only the poor and underprivileged are put to death. In the 60 years I have been around prisons, I have never known of one man who had wealth or position who has ever been executed.").

[116] *See, e.g.*, Kirsch, *Rural Justice at the Crossroads*, 4 CAL. LAW., Apr. 1984, at 22, 24 (during five-year period from 1975 to 1980, prosecution costs in California increased $138.4 million; public defender increases were $45.4 million); New York State Defenders Association, THE DEFENDER, Mar.-Apr. 1983, at 25, 25-26 (89% of the cost of a recent trial against an inmate defendant is attributable to the prosecution); L.A. Daily J., Feb. 3, 1983, at 2, col. 5 (58% of the money spent for the Juan Corona trial attributed to prosecution — 40% to defense). The prosecution also has access to law enforcement services. *See, e.g.*, Sacramento Union, Mar. 20, 1985, at A2, col. 1.

torney must address.[159] Moreover, the cost of the judge's time and courtroom costs are significant. The cost of running a courtroom for a day is approximately $2186.[160] The total courtroom time varies depending on the number of motions and the vigor with which they are pursued. The defense attorney carries the burden of presenting an impeccable defense. Consequently, she contests every viable issue and vigorously argues law and motions.[161]

B. Trial Costs

1. Voir Dire

The goal of *voir dire* is a fair and impartial jury, not one that will impose the death penalty arbitrarily or capriciously. The defense attempts to identify biases about the death penalty and prejudice against the defendant. If racism, a guilt prone bias, or a death penalty prone bias influences the jury's decision on the defendant's guilt or whether to impose the death penalty, the result is the unconstitutional imposition of death. To avoid this unconstitutional result, many states require sequestration of the jury panel while individual jurors are questioned, or permit sequestration upon motion by the defense.[162] In noncapital cases, jurors can be questioned collectively on certain issues, saving a considerable amount of time during *voir dire*.[163] In capital cases, however, the magnitude of the penalty warrants sequestered *voir dire*. Sequestered *voir dire* increases the likelihood that prospective jurors will provide their own answers, rather than give those answers that they have learned from other jurors are favored.[164] This individualized question-

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[159] Telephone interview with Stuart Rappaport, Bureau Chief, Los Angeles Public Defender (Apr. 4, 1985); interview with Gary Goodpaster, Professor of Law, U.C. Davis (Apr. 8, 1985).

[160] JUDICIAL COUNCIL OF CALIFORNIA, 1984 ANNUAL REPORT, at 53 (1984). This amount, however, does not include the cost of extra security or daily transcripts, both of which are often used in capital trials. Interview with Gary Goodpaster, Professor of Law, U.C. Davis (Mar. 22, 1985).

[161] *See generally* MOTIONS FOR CAPITAL CASES, *supra* note 116.

[162] *See supra* notes 129-30 and accompanying text.

[163] Kaplan, *supra* note 130, at 571. For example, the trial judge generally asks a series of questions of prospective jurors to determine their qualifications to serve as jurors in a criminal case. These include: Whether bias or prejudice would prevent a fair decision; whether they have heard of or have any prior knowledge of the case; and whether they or any member of their family or a close friend has been a witness or victim in a criminal case. *See, e.g.*, CAL. R. OF CT. APP. § 8.5.

[164] Although favored answers may occur and prejudice may go undetected during collective *voir dire* in noncapital trials, the cost and time of sequestering overrides these

ing generally takes longer for the attorney to gain sufficient knowledge about each juror."[163]

The use of peremptory challenges in a capital case also adds to the cost. During jury selection, attorneys dismiss prospective jurors by two methods. A peremptory challenge allows dismissal without cause.[164] The number of peremptory challenges available in a capital case is greater than that in a noncapital case.[165] Since it is permissible to peremptorily excuse a greater number of prospective jurors in a capital case, the result is a lengthier *voir dire* process. Moreover, the procedure is extended further because the lengthy questioning often permits an attorney to exercise her unlimited number of dismissals for cause. For example, jurors are questioned on their beliefs about the death penalty.[166] If a juror expresses opposition to the death penalty, the defense attorney will try to "rehabilitate" her to prevent the prosecution from having the prospective juror dismissed for cause. If the defense is able to get the juror to express only general misgivings about the death penalty, and to state that the misgivings will not interfere with her impartiality and the discharge of her duties, the prosecution cannot constitutionally dismiss the juror for cause.[167] The prosecution may,

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concerns when the punishment is less than death. *See, e.g.*, Kaplan, *supra* note 130, at 571.

[163] Attorneys recognize the need to be fully informed about jurors' attitudes in death penalty cases because jurors usually have strong feelings about both the specific case and the death penalty generally. In People v. Williams, 29 Cal. 3d 392, 406, 628 P.2d 869, 877, 174 Cal. Rptr. 317, 325 (1981), the California Supreme Court concluded that attorneys should be allowed to inquire into matters when strong feelings about a case are held by the local community or public at large for the purpose of conducting peremptory challenges.

[164] *See infra* notes 167, 169 and accompanying text.

[165] For example, in California, each attorney is permitted 10 peremptory challenges in a noncapital case and 26 peremptory challenges in a capital case. *See* CAL. PENAL CODE § 1070 (West Supp. 1985).

[166] Kaplan, *supra* note 130, at 571 (jurors closely questioned on their attitudes toward the death penalty). For example, the California Supreme Court has held that *voir dire* dealing with the death penalty should be performed individually and in sequestration. *See* Hovey v. Superior Court, 28 Cal. 3d 1, 80, 616 P.2d 1301, 1353, 168 Cal. Rptr. 128, 181 (1980).

[167] *See* Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968) (prospective jurors opposed to the death penalty may not be excused for cause on that basis unless they make it unmistakably clear that they would automatically vote against the death penalty regardless of the evidence at trial, and that their attitudes would prevent an impartial decision on the defendant's guilt); *cf.* Wainwright v. Witt, 105 S. Ct. 844, 852 (1985) (prosecutor may challenge for cause prospective juror who states that her doubts about the death penalty may impair the performance of her duties as a juror).

however, excuse this person by using a peremptory challenge.[170] The defense may also question a jury panel on prejudice, especially if the race of defendant and the victim differ.[171] Although some answers may permit the defense to have the jurors dismissed for cause, the peremptory challenges must be available to rid the jury box of racism. Thus, even with a greater number of peremptory challenges available to the defense attorney, she must use care in exercising those challenges.

This extensive process seeks to ensure the defendant's sixth amendment right to an impartial jury. Because the penalty is death, super due process requires or permits individual questioning, longer questioning, and more challenges.[172] Jury selection is estimated to take, on the average, 5.3 times longer than jury selection for a noncapital case[173] and courtroom time alone may increase the cost to the system by as much as $87,440.[174]

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[170] *See supra* note 167.

[171] *See*, NATIONAL JURY PROJECT, *supra* note 131, §§ 10-50 to -56; Note, *Restricting Inquiry Into Racial Attitudes During the Voir Dire — Rosales-Lopez v. United States, 451 U.S. 182 (1981)*, 19 AM. CRIM L. REV. 719 (1982); Note, *Probing Racial Prejudice on Voir Dire: The Supreme Court Provides Illusory Justice for Minority Defendants — Rosales-Lopez v. United States, 101 S. Ct. 1629 (1981)*, 72 J. CRIM. L. & CRIMINOLOGY 1444 (1981).

[172] *See, e.g.*, Goodpaster, *supra* note 85, at 328 n.132 (majority of jurisdictions give the attorneys leeway in asking questions since information gleaned may lead to intelligent use of peremptory challenges).

[173] L. Saunders, B. Moore & B. Gaal, An Empirical Study Attempting to Compare the Trial Costs of Capital Cases with the Trial Costs of NonCapital Cases (Spring 1983) (study of 20 California cases involving first degree murder convictions — 10 capital, and 10 noncapital — reveals that jury selection in capital cases lasted an average of 16 days as compared to 3 days for noncapital) (unpublished manuscript) (copy on file with *U.C. Davis Law Review*). Both district attorneys and defense attorneys assert that capital case *voir dire* lasts substantially longer than noncapital case *voir dire*. The estimated increase ranged from two days to two months — the average being approximately two weeks. Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985). Another reason that capital case jury selection takes longer than noncapital cases is that more prospective jurors try to disqualify themselves, claiming that a lengthy death penalty trial will cause hardship, that is, that prior personal obligations do not permit the time commitment a capital trial requires. Additionally, the process is lengthier because the attorney is essentially picking a jury for two trials — the guilt and penalty phase. Moreover, prospective jurors' strong attitudes about the death penalty generally increase the *voir dire* time as the attorney attempts to filter through the jurors' answers to determine whether they will fairly and impartially apply the law. Telephone interview with Stuart Rappaport, Bureau Chief, Los Angeles County Public Defender (Apr. 4, 1985).

[174] Telephone interviews with defense attorneys and questionnaire responses indicated that: death penalty *voir dire* can take as long as two months. Questionnaires on

2. The Trial

Due process for capital cases requires a lengthy and costly trial process. It has been estimated that it takes approximately 3.5 times longer to try capital cases than to try noncapital murder cases.[105] Attorneys contend that the average difference between a noncapital trial and capital trial is thirty days.[106] If this increase is multiplied by the cost per day of operating a courtroom, the additional cost for courtroom time alone is $65,580.[107] The additional attorney hours spent on capital trials must also be included.[108] A Maryland study estimated the cost of the defense attorney through trial disposition to range from $50,000 to $75,000 per capital case.[109] Moreover, because of the magnitude of capital trials, the state and the defendant may be assigned two attorneys.[110] Additionally, the expense is increased due to the large number of wit-

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file with *U.C. Davis Law Review*; telephone interviews conducted with Joe Najpaver, Alameda County (Mar. 6, 1985); Roy Simmons, Sacramento County (Mar. 7, 1985); James Thomson, Sacramento County (Apr. 5, 1985). Given the cost of a courtroom per day as $2186, *see supra* note 160, the total cost for *voir dire* would be approximately $87,440.

[105] L. Saunders, B. Moore & B. Gaal, An Empirical Study Attempting to Compare the Trial Costs of Capital Cases with the Trial Costs of NonCapital Cases (Spring 1983) (capital trials averaged 42 days and noncapital trials averaged 12 days in study of 20 California cases involving first degree murder convictions (10 capital and 10 noncapital)) (unpublished manuscript) (copy on file with *U.C. Davis Law Review*).

[106] *See id.*; questionnaires on file with *U.C. Davis Law Review*. However, the increased number of trial days can be substantially more. Interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[107] The cost of operating a court room is approximately $2186 per day. *See supra* note 160 and accompanying text. The cost for 30 days is $65,580.

[108] *See supra* notes 120-21, 173, & 175 and accompanying text. A major cost to some small public defender offices comes from having to assign to outside counsel the caseload that would be handled by staff, but which is displaced when the staff attorney is assigned a capital case. Questionnaires on file with *U.C. Davis Law Review*; telephone interview with Larry Biggam, Attorney, Biggam, Christensen & Minsloff, Santa Cruz, Cal. (Mar. 10, 1985).

[109] *See* OPERATIONAL OVERVIEW, *supra* note 138, at 2.

[110] *See, e.g.*, Keenan v. Superior Court, 31 Cal. 3d 424, 434, 640 P.2d 108, 114, 180 Cal. Rptr. 489, 495 (1982). The *Keenan* court held that given the constitutionally mandated distinction between death and other penalties, the trial court abused its discretion when it denied defendant's motion for appointment of a second attorney. *See* CAL. PENAL CODE § 987(d) (West Supp. 1985) (authorizes funds for appointment of a second attorney if the trial court finds that the second attorney is needed to provide a complete and full defense for the defendant); *see also* L.A. Times, July 27, 1983, Pt. II, at 5, col. 3 (complexity of capital case may entitle defendant to the appointment of two attorneys; prosecution also often assigns two attorneys to capital case).

nesses necessary in a capital trial.[101]

The capital trial process itself is more expensive because it includes two trials — the guilt phase and the penalty phase.[102] The capital trial lawyer must structure the bifurcated proceeding around the possible sentence. This requires that competent counsel thoroughly investigate and evaluate both the guilt and penalty phase evidence prior to trial to present a case in the guilt phase that will support the penalty phase strategy.[103] This requirement increases the capital trial cost because the penalty phase investigation demands thorough research of the defendant's life.

The penalty phase of a capital trial is categorically different, in character, procedure, and magnitude from any counterpart in a noncapital trial, and it accounts for the greatest increase in cost before the appellate stage.[104] In noncapital cases, the judge generally imposes the sentence, the procedure is brief, and the attorney's role is minimal.[105] By contrast, the capital defendant receives a second trial solely to determine whether he should be sentenced to death. Constitutionally, the court must permit the defense attorney to present any mitigating evidence.[106]

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[101] *See supra* notes 140-41 and accompanying text.

[102] Moreover, in addition to investigating and defending the charge or charges in the defendant's instant case, the defense attorney may also have to investigate and defend against uncharged offenses that the prosecution offers as evidence of aggravation during the penalty phase. *See, e.g.*, CAL. PENAL CODE § 190.3 (West Supp. 1985) (state may present evidence of "criminal activity" by the defendant that involved use or attempted use of force or violence or threat to use force or violence and the "criminal activity" does not require a conviction).

[103] *See, e.g.*, Goodpaster, *supra* note 85, at 334 (defense counsel should integrate "guilt phase defense and penalty phase case for life," to prevent inconsistency between penalty phase argument and guilt phase defense).

[104] A recent California case exemplifies the costs that can be incurred solely from the retrial of the penalty phase. The defendant was convicted in the guilt phase, but the jury could not decide whether the defendant should be sentenced to death or to life in prison without parole. The judge declared a mistrial for the penalty phase. The defense attorney suggested that the defendant might consider accepting the life without parole sentence and forego an appeal, but the district attorney stated he would not agree to a plea bargain. The county auditor commented that the retrial of the penalty phase would be more expensive than the first trial, which cost $10,000 just for defense investigation and defense expert witnesses. Moreover, the court costs alone would "skyrocket," since the judge granted a motion to move the penalty phase retrial to another county. *See Proctor: Death Penalty Worth the Cost?*, Redding (Cal.) Record Searchlight, Feb. 4, 1983, at 1, col. 1.

[105] *See, e.g.*, Goodpaster, *supra* note 85, at 328 (probation reports and mandatory sentencing schemes minimize role of defense attorney in noncapital case).

[106] Lockett v. Ohio, 438 U.S. 586 (1978); *see supra* notes 62-65 and accompanying text.

Due process must be satisfied in both the guilt phase and the penalty phase.[101] Consequently, as stated above,[102] competent counsel will investigate the defendant's entire background. A thorough investigation of a defendant's life will include locating, interviewing, and often presenting as witnesses, the defendant's family, friends, neighbors, teachers, coworkers, and social workers.[103] Additionally, depending on the law of the jurisdiction, the defense may be permitted to call witnesses to testify about the cruelty of the death penalty,[104] to testify that the death penalty does not deter,[105] and to testify that the death penalty is discriminatorily imposed.[106]

The preparation of a penalty phase trial and the presentation of guilt phase witnesses require substantial time and significant resources.[107] In California, the state appropriates funds each year to reimburse the county for money advanced for the defense preparation of capital trials.[108] The funds are used to pay investigators, experts, and others needed to prepare and present the defense.[109] Since 1978, the amount appropriated each year has been $1 million.[110] However, due to yearly overexpenditures, the amount appropriated for fiscal year 1984-85 was $4 million.[111] Since approximately 325 capital cases are pending in California trial courts, this total figure suggests the average per case payout to be approximately $12,000.[112] However, in major capital cases this payout may be substantially more.[113]

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[101] *See* Gardner v. Florida, 430 U.S. 349, 358 (1976).

[102] *See supra* notes 135-41 and accompanying text.

[103] *See supra* note 138 and accompanying text.

[104] *See, e.g.*, TRIAL OF THE PENALTY PHASE, *supra* note 133, at 17-18 (testimony of clergy on ethical and theological aspects of the death penalty); Bedau, *supra* note 34, at 19 (testimony of Hugo Bedau at pretrial hearing on cruelty of death penalty).

[105] *See, e.g.*, TRIAL OF THE PENALTY PHASE, *supra* note 133, at 20.

[106] *Id.* at 25; *see also* Wolfgang & Riedel, *Racial Discrimination, Rape and the Death Penalty*, in THE DEATH PENALTY IN AMERICA, *supra* note 1, at 94.

[107] Moreover, the state puts a great deal of time and resources into prosecuting capital cases and also calls many more witnesses than are generally called in a noncapital case. Telephone interview with Stuart Rappaport, Bureau Chief, Los Angeles Public Defender (Apr. 4, 1985).

[108] *See supra* note 131.

[109] *Id.*

[110] Telephone interview with Linda Lenker, Legal Administrator, Cal. Appellate Project (Feb. 28, 1985).

[111] *Id.*

[112] If the 325 cases divide the $4,000,000 provided under CAL. PENAL CODE § 987.9 (West Supp. 1985), each case would receive $12,307.69 from the state to prepare and present the defense.

[113] Comments on earlier draft from Michael Millman, Executive Director, Cal. Ap-

The $4 million appropriation does not include defense attorney time or prosecution expenses — all expected to be paid by the county.[200] The potential expenditure for a death penalty trial caused one California county to reject the death penalty as a possible punishment for the defendant.[201] The county's board of supervisors voted that the county could not afford to prosecute a death penalty case.[202] That county's concern about death penalty expenses has been echoed by others throughout the country. When New Jersey adopted a death penalty statute in 1982, it was estimated that prosecuting death penalty cases would cost the state $16 million a year.[203] According to the defense coordinator of the capital punishment cases, in August, 1983, New Jersey's public defender's office was budgeting $102,000 for each of its fifty-two pending capital cases.[204] The Maryland Public Defender asserts that ninety percent of its office's overexpenditures are due to death penalty cases.[205] As evidence of the magnitude of a death penalty case and its concomitant costs, a Maryland law firm that accepted a death case on a *pro bono* basis worked for eleven months (1817 hours of services rendered) on the case. Had the state been charged, the bill would have been $156,462.[206] The Ohio Public Defender estimated that Ohio's 1981 death penalty statute would cost the defender's office approximately $1.5 million annually.[207] An Oregon attorney estimated that defense cost for a death penalty case in Oregon would be approximately

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pellate Project (Mar. 28, 1985) (copy on file with *U.C. Davis Law Review*); interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[200] *See* Corenevsky v. Superior Court, 36 Cal. 3d 307, 314, 682 P.2d 360, 363, 204 Cal. Rptr. 165, 168 (1984) (appointment of second defense counsel not encompassed within Penal Code § 987.9 funds); Keenan v. Superior Court, 31 Cal. 3d 424, 430, 640 P.2d 108, 111, 180 Cal. Rptr. 489, 492 (1982).

[201] *See* Corenevsky v. Superior Court, 36 Cal. 3d 307, 314, 682 P.2d 360, 363, 204 Cal. Rptr. 165, 168 (1984) (because Imperial County Board of Supervisors refused to pay for a second defense counsel, superior court judge ordered that the prosecutor may not seek the death penalty).

[202] *See* San Diego Tribune, Dec. 3, 1982, at B-12, col. 3 (One member of the board of supervisors stated "[w]e're already borrowing $6 million to pay our people's salaries. Should we lay off employees to pay for a criminal's defense?").

[203] *See* Amicus Curiae Brief of Boston Bar Association at 67 n.21, Commonwealth v. Colon-Cruz, 393 Mass. 150, 470 N.E.2d 116 (1984) (copy on file with *U.C. Davis Law Review*).

[204] *Id.*

[205] *See* OPERATIONAL OVERVIEW, *supra* note 138, at 1.

[206] *See* Amicus Curiae Brief of Boston Bar Association at 68 n.21, Commonwealth v. Colon-Cruz, 393 Mass. 150, 470 N.E.2d 116 (1984) (copy on file with *U.C. Davis Law Review*).

[207] *Id.*

$700,000.[209]

A constitutional death penalty process requires an enormous expense because procedures must scrupulously be followed, and the punishment demands an exactness when the sentencer decides upon whom it will be imposed. The procedures, safeguards, and goal of exactness follow the defendant through the appeals process.

C. *Appeals Process*

At the end of the trial process, a defendant condemned to death receives an automatic appeal to the state supreme court.[209] In *Gregg v. Georgia*,[210] the Court concluded that the statutorily required state supreme court review of every death sentence "serves as a check against the random or arbitrary imposition of the death penalty."[211] The numerous errors in death penalty trials[212] warrant the constitutional safeguard of state supreme court review, because the review helps ensure that the penalty imposed stays within the parameters of super due process and within the eighth amendment's mandate of prohibiting punishments that by their arbitrary and capricious imposition are cruel and unusual. The result of the review in a significant percentage of cases is a reduction of the sentence to life, a remand for resentencing, or a reversal.[213]

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[209] *Id.*

[209] *See* Jurek v. Texas, 428 U.S. 262, 276 (1976); Proffitt v. Florida, 428 U.S. 242, 258 (1976); Gregg v. Georgia, 428 U.S. 153, 204 (1976).

[210] 428 U.S. 153 (1976).

[211] *Id.* at 206; *see, e.g.*, Note, *Constitutional Procedure*, *supra* note 52, at 733 (defendant's automatic appeal to state supreme court corrects error and prejudice in capital sentencing); *see also* Adelstein, *Informational Paradox and the Pricing of Crime: Capital Sentencing Standards in Economic Perspective*, 70 J. CRIM. L. & CRIMINOLOGY 281, 296 (1979) (appellate court's role is clear in evolutionary process of capital sentencing).

[212] *See, e.g.*, Kaplan, *supra* note 130, at 573-74 (reversal in capital cases far greater than in noncapital cases generally due to number of issues in capital cases, greater complexity, courts' increased willingness to disturb verdict rather than affirm on ground justice was done, scrupulous attention to procedure, and court's ambivalence towards death penalty).

[213] *See* Bedau, *American Attitudes Toward the Death Penalty*, in THE DEATH PENALTY, *supra* note 1, at 68 (over 2000 death sentences vacated since 1967 on constitutional grounds alone); Greenberg, *supra* note 78, at 918 (capital case reversal rate is approximately 60%; noncapital federal criminal judgment reversal rate of appealed cases is 6.5%; California reversal rate for all felony convictions is .8%); Sacramento Bee, Mar. 20, 1985, Pt. A, at 16 (in California, the state supreme court has reversed 27 of the 30 death penalty cases decided since the 1977 death penalty law); Sacramento Bee, June 6, 1985, Pt. A, at 1, col. 1 (California Supreme Court reversed death

A typical capital appeal takes approximately 800-1000 attorney hours.[210] In California, at the present compensation rate of $60 per hour for court appointed defense attorneys, the direct appeal will cost approximately $48,000-$60,000. This amount does not include the attorney's expenses for travel, photocopying, or investigation for habeas corpus petitions.[211] Nor does the cost include the attorney general's expenses or the court's time. The direct appeal must also be viewed in terms of its impact on the state supreme court.[212] The defense and the prosecution prepare extensive briefs, and the trial proceeding transcripts are voluminous.[213]

A final judgment by the state supreme court affirming a penalty of death far from ends the defendant's challenge of his conviction or sentence. As one recent study on the cost of capital litigation concluded, "a permanent and indispensable feature of capital litigation involves the review of constitutional, discretionary questions at a *minimum* of ten state and federal levels."[214] The trial process and state supreme court

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sentences in four cases — three of the decisions were unanimous), *Death Row on Trial*, N.Y. Times, Nov. 13, 1983, § 6 (Magazine), at 80, 112 (In Florida, trial judges have overridden jury's recommendation for life and sentenced defendant to death in 62 murder trials. The Florida Supreme Court has ruled on 60 of these cases. In 45 cases, either the sentence was reduced to a life sentence, or the case was reversed and remanded to the trial court for further proceedings).

[210] Telephone interview with Michael Millman, Executive Director, Cal. Appellate Project (Apr. 1, 1985); *see* Sacramento Bee, Apr. 21, 1985, at A11, col. 3.

[211] Telephone Interview with Michael Millman, Executive Director, Cal. Appellate Project (Apr. 1, 1985).

[212] *See, e.g.*, L.A. Times, Sept. 25, 1984, Pt. I, at 16, col. 1 (According to Justice Lucas of the California Supreme Court, "[t]he death penalty is consuming an ever greater share of the high court's attention — to the point where it threatens to take all the justices' time."); *Death Row on Trial*, N.Y. Times, Nov. 13, 1983 § 6 (Magazine), at 80, 112 (the Florida Supreme Court spends at least one-third of its time on death cases).

[213] *See, e.g.*, L.A. Times, Sept. 25, 1984, Pt. I, at 16, col. 1 (Justice Lucas of the California Supreme Court noted that a recent death penalty brief, not even among the most massive, weighed 3 pounds, 13 ounces, and involved 32 volumes of trial transcript); *see also* OPERATIONAL OVERVIEW, *supra* note 138, at 6 (fiscal year cost increase of trial transcripts due principally to death penalty cases); *see also* L.A. Daily J., Nov. 24, 1981, at 4, col. 3 (trial record is generally 4000 pages or more; opening brief averages 200 pages).

[214] CAPITAL LOSSES, *supra* note 117, at 7 (emphasis added). The levels of review may include, for example: A writ of certiorari to the Supreme Court; post-conviction proceedings such as evidentiary hearings to vacate the judgment or set aside the sentence; review by the state supreme court of adverse rulings in the post-conviction proceedings; petition for writ of habeas corpus to the United States District Court; appeal of an adverse determination of the writ to the federal court of appeals; petition for a

review merely constitute the first two steps in the process. If the state supreme court affirms the death sentence, the defendant has several post-conviction remedies available to further challenge his death sentence. Most capital defendants pursue all avenues available.[219] A death row inmate has every incentive to pursue post-conviction relief.[220] First, the appeals and writ process results in a number of reversals or remands for sentencing.[221] According to an American Bar Association report, federal circuit courts have ruled for the defendant in at least twenty-eight of thirty-six capital cases since 1976.[222] Second, the pending post-conviction proceedings extend the inmate's life. In the interim, new evidence may prove the inmate's innocence, or legal developments may render his death sentence unconstitutional.[223]

Generally, the defendant first seeks United States Supreme Court review by writ of certiorari.[224] Preparation of the petition takes many hours.[225] One recent study concluded that when the Supreme Court grants a hearing, the entire process, that is, the research, certiorari petition, briefs, and oral argument preparation can take approximately forty-six percent of an attorney's work year.[226] Another critical post-conviction remedy available to the capital defendant is the writ of habeas corpus. Habeas corpus relief is available at both the state and federal level.[227] Federal habeas corpus relief requires that the defendant

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rehearing en banc from a negative ruling in the court of appeals; petition for writ of certiorari to the Supreme Court to review a negative ruling in the court of appeals.

[219] *See, e.g.*, Kaplan, *supra* note 130, at 573.

[220] *Id.* (the time the review takes lengthens the time the death row defendant can live; the reversal rate is far greater than for noncapital (even murder) cases). The need for pursuing post conviction relief in these difficult, emotionally charged cases was well illustrated in the case of James C. McCray. McCray was on Florida's death row for eight years. The Florida Supreme Court took almost five years to review and affirm his sentence. His state-appointed clemency attorney was incompetent. Two weeks before his scheduled execution, a private defense attorney took the case, copied the ten volume record from the Attorney General's office (the defense record disappeared with the clemency attorney) and discovered that the trial judge made an error when instructing the jury. Six days before the appointed execution time, the Florida Supreme Court ordered that McCray be given a new trial. L.A. Daily J., Aug. 27, 1982, at 5, col. 3.

[221] *See supra* note 213 and accompanying text.

[222] *See* Sacramento Bee, Apr. 21, 1985, at A11, col. 3.

[223] *See supra* notes 66-73 and accompanying text.

[224] *See* Kaplan, *supra* note 130, at 573; CAPITAL LOSSES, *supra* note 117, at 21.

[225] A petition for writ of certiorari to the Supreme Court may take as many as 50 hours to prepare. Comments on earlier draft from Michael Millman, Executive Director, Cal. Appellate Project (Feb. 11, 1985) (copy on file with *U.C. Davis Law Review*).

[226] *See* CAPITAL LOSSES, *supra* note 117, at 22.

[227] *See id.* at 6 n.26 (theoretical model of capital case proceedings); *see also*

demonstrate that his imprisonment violates the United States Constitution.[208] When filing for a writ of habeas corpus, the defendant may introduce evidence to support his version of the facts because state court factual findings are only presumptively valid.[209] Additionally, federal courts may reconsider prior rulings of law by state courts.[210] If the defendant's petition for a writ is denied, he may appeal[211] or file a new petition for a writ of habeas corpus. However, a defendant's failure to raise a claim in the previous habeas corpus proceeding may bar him from litigating the claim in a subsequent proceeding, if the court determines that there has been an "abuse of the writ."[212] As the Court permits the state to take a life only after scrupulously following constitutional procedure, the financial cost of permitting numerous habeas claims pales when compared to the alternative social and moral cost of an erroneous and irrevocable execution.

Appellate and post-conviction costs include numerous *pro bono* hours expended by private law firms. Most of these firms enter the litigation close to the appointed time of execution, after all state proceedings have been exhausted. One firm that sought post-conviction relief in four capital cases estimated the costs of each case to the firm as: (1) $88,785 in out-of-pocket disbursements and $312,579 in attorney hours in a case that is still pending; (2) $48,909 in out-of-pocket disbursements and $138,858 in attorney hours; (3) $20,752 in out-of-pocket disbursements and $116,787 in attorney hours; and (4) $20,038 in out-of-pocket disbursements and $138,101 in attorney hours.[213]

The dollars and cents statistics of a constitutionally imposed death

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Goldberg, *The Supreme Court Reaches Out and Touches Someone—Fatally*, 10 HASTINGS CONST. L.Q. 7, 13 (1982) (federal habeas corpus as a safeguard of defendant's constitutional rights is still preserved). For example, in California, violation of certain fundamental procedural rights may be grounds for issuance of a writ of habeas corpus regardless of the state of the evidence or whether the claims were made on direct appeal. *See* J. SMITH & M. SNEDEKER, THE CALIFORNIA STATE PRISONERS HANDBOOK 326-29 (1982).

[208] 28 U.S.C. § 2254(a) (1982).

[209] *Id.* § 2254(d).

[210] Neil v. Biggers, 409 U.S. 188, 190-91 (1972).

[211] 28 U.S.C. § 2253 (1982).

[212] *Id.* § 2255, Rule 9(b). It has been suggested that an exception to the bar be made for capital defendants, as procedural errors should not preclude a death sentenced defendant from pursuing constitutional claims. *See* Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality With a Capital F"*, 36 U. FLA. L. REV. 252, 271-72 (1984).

[213] Telephone interview with Jay Topkis, Attorney, Paul, Weiss, Rifkind, Wharton & Garrison, New York City (Mar. 8, 1985).

sentence are overwhelming. However, to minimize the risk of arbitrary and capricious imposition of death, a costly execution process is unavoidable.

III. Implications of the Death Penalty on the Criminal Justice System

Financial considerations must play a role in criminal justice administration. The criminal justice system, like any system, has a finite source of funds. These funds will be used to achieve the system's goals and will inevitably define the types of goals that can be achieved.[231] One goal of the criminal justice system is crime prevention. Another is punishment.[232] A third goal is to prevent false convictions and disproportionate punishments.

Part II presented an overview of the costs of a constitutional state-imposed execution system. The costs are astronomical, although necessary. An expedited capital punishment process invites the risk of error and caprice.[233] Any attempt to modify the capital process must confront the constitutional recognition that death is different.[234] As one author so aptly stated, "[w]e must be careful not to imitate the village that took down the Dan[illegible]er—Curve Ahead sign on its road because nobody in

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[231] *See, e.g.*, Harrell, *The Underfunded Commitment to Justice*, 69 A.B.A. J. 528 (1983).

[232] Punishment is one of society's means of controlling crime and protecting itself. *See* McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 Fed. Probation, June 1964, at 11, 15 (society uses the criminal law to protect itself, and criminal law uses punishment to inhibit conduct detrimental to society), Tropman & Gohlke, *Cost/Benefit Analysis — Toward Comprehensive Planning in the Criminal Justice System*, 19 Crime & Delinq. 315 (1973).

[233] *See* Coleman v. Balkcom, 451 U.S. 949, 953 (1981) (Court must beware of novel procedural shortcuts resulting in constitutional error) (Stevens, J., concurring in memorandum decision).

[234] *See* Gardner v. Florida, 430 U.S. 349, 357-58 (1976) (Five members of the Court expressly recognized that death is a punishment different from any other that may be imposed. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.") (opinion of Stevens, J.); *see also* Note, *The Right of Confrontation and Reliability in Capital Sentencing — Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982)*, 20 Am. Crim. L. Rev. 599, 604 (1983) (some judges conclude that the Court's modification of constitutional requirements to impose death renders death penalty a procedural impossibility); Note, *The Impact of a Sliding Scale Approach to Due Process on Capital Punishment Litigation*, 30 Syracuse L. Rev. 675, 681 (1979) (Court has indicated due process test for capital sentencing procedures is a function of "evolving standards of procedural fairness in a civilized society," a requirement not applied in noncapital cases) (quoting *Gardner v. Florida*, 430 U.S. at 357).

years had gone off the curve."[238]

A system for achieving society's goals of preventing crime while providing a consistent and evenhanded punishment system requires wise use of the resources available to the administration of justice. However, maintaining a system with capital punishment deviates from and distorts these goals. Capital case litigation constitutionally requires that super due process be scrupulously followed.[239] Concomitantly, a capital trial demands a disproportionate amount of time by judges, prosecuting attorneys, defense attorneys, juries, and courtroom and correctional personnel. The demands made upon the legal system translate into an unparalleled financial and emotional[240] toll. Consequently, rather than providing a means of effectively adjudicating the law and combating crime, the death penalty's impact upon the administration of justice runs counter to its alleged goals.[241] The costly, time consuming, contro-

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[238] Kaplan, *supra* note 130, at 576.

[239] *See supra* notes 27-30 and accompanying text.

[240] In United States v. Harper, 729 F.2d 1216, 1223 (9th Cir. 1984), the court stated: "[E]nduring a trial that entails the possibility of a death penalty imposes a hardship "different in kind" from enduring the discomfiture of any other trial. The emotional stress and strain of a trial in a capital case are extreme in character and *sui generis*. We consider the ordeal of undergoing such a trial truly a substantial hardship."

[241] Capital punishment's proposed "benefit" of deterrence has been extensively researched and criticized. *See, e.g.*, Bailey, *Imprisonment v. the Death Penalty as Deterrent to Murder*, 1 LAW & HUM. BEHAV. 239 (1977); Bedau, *Deterrence: Problems, Doctrines, and Evidence*, in DEATH PENALTY, *supra* note 1, at 93-103; Bowers & Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?*, 26 CRIM & DELINQ 453 (1980); Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faith*, in THE DEATH PENALTY IN AMERICA, *supra* note 1, at 116. *But see* Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 AM. ECON. REV. 397 (1975). Ehrlich's study has been criticized, and studies utilizing his methodology have failed to duplicate his results. *See, e.g.*, Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); Bowers & Pierce, *supra* at 463; Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975). The other significant proffered "benefit" is retribution. "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct . . . . 'The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law . . . .'" Gregg v. Georgia, 428 U.S. 153, 183 (1976) (Stewart, J., quoting from his concurring opinion in *Furman*, 408 U.S. 238, 308 (1972)); *see, e.g.*, Gibbs, *The Death Penalty, Retribution and Penal Policy*, 69 J. CRIM. L. & CRIMINOLOGY 291 (1978); Pugsley, *A Retributivist Argument Against Capital Punishment*, 9 HOFSTRA L. REV. 1501 (1981); Watt & Stafford, *Public Goals of Punishment and Support for the Death Penalty*, 21 J. RE-

versial, and devastating process of capital punishment drains the criminal justice system of energy and resources that the system could otherwise direct toward achieving its goals.

What are the alternatives for the criminal justice system? An alternative punishment exists — life imprisonment. In 1982, the Director of the Michigan Department of Corrections stated that the argument that capital punishment is needed for society's safety will not withstand scrutiny; life imprisonment is as adequate for that purpose.[242] Currently, the cost of housing an inmate in prison is approximately $14,254 per year.[243] A Florida study found that the average age of persons sentenced to death was 30.8 years.[244] If an inmate lives to age sixty, multiplying the cost per year of life imprisonment by thirty years may give a rough estimate of the cost of this alternative punishment. Similarly, capital punishment costs, from the charging decision through the appeals, may be estimated. Conclusions are difficult given the variables and uncertainty of factors. For example: the cost increase due to decreased plea bargaining; whether the attorney chooses to conduct sequestered voir dire; or whether the attorney effectively investigates the capital defendant's background, are critical factors that affect the total amount, yet cannot be accurately estimated. Even with the uncertainties, assuming that the defense attorney will effectively prepare the case, pursue pretrial motions, thoroughly investigate and prepare for

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SEARCH CRIME & DELINQ. 95 (1984); Comment, *Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment*, 57 S. CAL. L. REV. 199 (1983). In fact, many death penalty proponents consider retribution alone a sufficient justification for the death penalty. *See* Vidmar & Ellsworth, *supra* note 34, at 1256-57 (54% of those who favored capital punishment stated they would favor it even if it did not deter); Warr & Stafford, *supra*, at 98-104 (persons who view retribution as the most important reason for punishment overwhelmingly favor capital punishment). However, retributionists may want to consider the means, given the greater resources that would be available if life imprisonment were the ultimate penalty. *See, e.g.*, Pugsley, *supra*, at 1514 (retribution theory seeks to achieve justice and reaffirm community rights and rule system), Comment, *Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment*, 57 S. CAL. L. REV. 199, 206-07 (1983) (retribution theory requires that the undeserving not be punished, and that punishment must be imposed upon those who deserve it to return society to a people equal in satisfactions). *See also* Tropman & Gohlke, *supra* note 235, at 321 n.10 (although cost-benefit analysis does not include the "political costs and benefits," its importance and significance come from providing alternatives for the worst projects in a system).

[242] *See* L.A. Daily J., Oct. 12, 1982, at 4, col. 3.

[243] Cost of housing inmate at San Quentin for one year is $14,254. Telephone interview with Department of Corrections staff services analyst, Sacramento, Cal. (Feb. 19, 1985).

[244] *See* CAPITAL LOSSES, *supra* note 117, at 23 n.61.

the penalty phase, and that the appeal and post-conviction remedies are sought, a minimal estimate for each execution is $600,000.[243] The cost of death row security additionally increases the cost.[244]

Life imprisonment saves the criminal justice system's resources. The number of pretrial motions filed in a noncapital case is one-half or less than the number filed in death penalty cases.[245] There is no bifurcated proceeding. The investigation process is more limited, as it is generally confined to issues of the defendant's guilt. In noncapital cases, mitigating circumstances and extensive investigation of the defendant's background do not play the role they do when determining whether a defendant lives or dies. The time and expense that the death penalty process takes from defense attorneys, district attorneys, and judges could be channeled elsewhere. Assuming the ratio of reversals and remands in noncapital to those in capital cases remains constant, the post-trial proceedings will substantially decrease.[246]

A less costly constitutional process for imposition of the death penalty does not exist. The minimum constitutional safeguards developed for death penalty sentencing were established by the Court to prevent the arbitrary and capricious application of death. Economizing capital punishment is unconstitutional. In a criminal justice system with inherent discretion, the constitutional mandate that death be imposed regularly and evenhandedly appears to be unachievable.[247]

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[243] This estimate reflects the minimum cost because of the significant incalculable increase due to limited plea bargaining. The $600,000 estimate was calculated as follows: (1) $12,000 for experts and investigation. *See supra* notes 193-98 and accompanying text. (2) $17,330 for pretrial motions: $10,930 for courtroom time (using an estimate of one week), *see supra* note 160 and accompanying text; and $6400 for attorney time — figured at $40 per hour for the district attorney and for the public defender, estimating a two-week preparation. (3) $67,400 *increase* for *voir dire*, *see supra* note 174 and accompanying text; and $6400 for attorney time estimating a two-week *voir dire*. (4) $65,580 *increase* for courtroom trial time, *see supra* note 177 and accompanying text; $12,800 for attorney time estimating a one-month trial. (5) $100,000 for estimated appeal costs, *see supra* notes 214-17 and accompanying text. (6) $221,202 for post-conviction remedies; *see supra* text accompanying note 233, figure estimated is the average of the cases listed. (7) $64,143 for estimated four and one-half year stay on death row, *see supra* text accompanying note 243; *see, e.g.*, Streib, *Executions Under the Post-Furman Capital Punishment Statutes: The Halting Progression from "Let's Do It" to "Hey, There Ain't No Point in Pulling so Tight"*, 15 RUTGERS L. REV. 443, 447-75 (1984) (average stay on death row is approximately 4.5 years).

[244] *See* CAPITAL LOSSES, *supra* note 117, at 23 (estimating that the expense of death row security can increase the cost by as much as $15,000 annually).

[245] *See supra* note 117 and accompanying text.

[246] *See supra* notes 212-13 and accompanying text.

[247] *See, e.g.* Greenberg, *supra* note 78, at 914 (*Furman* stands for the proposition

A moral and just society should not want to expedite a process that would lead to the execution of the innocent or the use of the death penalty in cases not warranting such a harsh penalty. The Constitution does not permit a process that is vulnerable to caprice or mistake when the result is death. Maintaining a constitutional death penalty process results in astronomical costs — both morally and financially — for the criminal justice system.

Conclusion

A criminal justice system that includes the death penalty costs more than a system that chooses life imprisonment as its ultimate penalty. Because the penalty is death, the Constitution requires additional procedural safeguards to protect the defendant and to ensure a fair system. These safeguards, formulated and designed specifically for capital trials, are costly. The argument that the death penalty costs less to punish than does life imprisonment is erroneous. Alternatives exist to punish the convicted defendant and protect society. When our "standards of decency" evolve to the point that the death penalty is considered per se cruel and unusual, or when we recognize the inability of the system to fairly or evenhandedly impose death,[210] the penalty of death will be replaced with life imprisonment. Justice will be served, society will be protected, the criminal justice system will be given a reprieve, and the state will not kill those few who are arbitrarily and capriciously chosen.

Margot Garey

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that capital punishment can be upheld only if it is applied regularly and evenhandedly); Krivosha, Copple & McDonough, *A Historical and Philosophical Look at the Death Penalty — Does It Serve Society's Needs?*, 16 Creighton L. Rev. 1, 37 (1982) (experience discloses that under present standards, goal of imposing death penalty in nondiscriminatory manner nearly impossible to meet).

[210] For a full discussion about the inherent nature of caprice and mistake in the imposition of the death penalty, see C. Black, *supra* note 2.

APPENDIX

District Attorney Questionnaire

1. Approximately how many more pre-trial motions are filed by the defense, and therefore need a respc se, in a capital case, as compared to a noncapital murder case?

2. Please list some of the motions that you respond to, which although not unique to capital cases, are more predominantly filed in capital cases.

3. Are the standard motions that you respond to in capital cases more complex and more time consuming?

4. If possible, please estimate the additional number of hours spent in preparing your response to the standard motions for capital trials.

5. Please approximate any differences in numbers of hours for investigations between a capital and a noncapital murder case.

6. Are psychiatric examinations more commonly used in at least some aspect of the capital trial, as compared with a noncapital murder case?

a. If psychiatric testimony is introduced by the defense, how often does the prosecution and/or the court introduce its own psychiatric evaluation?

7. If you use experts, is the quality of the experts the same or better than experts used in noncapital murder cases?

8. Do you attempt to obtain the "best" expert witnesses?

9. Please list the types of expert witnesses which you may use that are unique to capital cases.

10. In your state, is individual *voir dire* generally conducted in a capital case?

11. Is prospective juror questioning generally longer in capital cases?

a. If so, please estimate by number of days the approximate increase in time for empaneling the jury, as compared with a noncapital murder case.

12. Assuming the same case were tried both as a capital and as a noncapital case, approximately how many more days would the trial take if it is tried as a capital case.

13. a. Please estimate the average number of hours spent on a capital appeal.

b. Please estimate the average number of hours spent on a noncapital appeal.

14. Approximately how many days does it take one attorney to prepare a response to a death row defendant's writ of certiorari to the

United States Supreme Court?

15. General comments and impressions. (Please feel free to use back of questionnaire.)

Public Defender Questionnaire

1. Approximately how many more pre-trial motions are filed in a capital case, as compared to a noncapital murder case?

2. Please list some of the defense motions, which although not unique to capital cases, are more predominantly filed in capital cases.

3. Are the standard motions filed in capital cases more complex, and more time consuming?

4. If possible, please estimate the additional number of hours spent in preparing the standard motions for capital trials.

5. Please approximate any differences in number of hours for investigations between a capital and a noncapital murder case.

6. Are psychiatric examinations more commonly used in at least some aspect of the capital trial, as compared with a noncapital murder case?

7. If you use experts, is the quality of the experts the same or better than experts used in noncapital murder cases?

8. Do you attempt to obtain the "best" expert witnesses?

9. Please list the types of expert witnesses which you may use that are unique to capital cases

10. In your state, is individual voir dire generally conducted in a capital case?

11. Is prospective juror questioning generally longer in capital cases?

a. If so, please estimate by number of days the approximate increase in time for empaneling the jury, as compared with a noncapital murder case.

12. Assuming the same case were tried both as a capital and as a noncapital case, approximately how many more days would the trial take if it is tried as a capital case.

13. a. Please estimate the average number of hours spent on a capital appeal.

b. Please estimate the average number of hours spent on a noncapital appeal.

14. In what percentage of capital cases that you handle, are you likely to seek a habeas corpus hearing, in addition to appeal, as compared with noncapital cases.

15. Approximately how many days does it take one attorney to prepare a writ of certiorari to the United States Supreme Court for a capi-

tal case?

16. General comments and impressions. (Please feel free to use back of questionnaire.)