

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672  
6302 SENATE JUDICIARY

700

Table IX. Likelihood Ratio Tests for Alternative Simple Functional Forms

| Functional Form | $(\lambda_1, \lambda_2)$ | $L(\lambda_1, \lambda_2)$ | $\chi^2$ |
|-----------------|--------------------------|---------------------------|----------|
| Log-linear      | (0, 0)                   | 220.96                    | 2.75     |
| Semi-log        | (0, 1)                   | 201.70                    | 41.26    |
| Semi-log        | (1, 0)                   | 205.06                    | 34.54    |
| Linear          | (1, 1)                   | 198.55                    | 47.56    |
| Optimal         | (-0.3, 0)                | 222.33                    |          |

In equation (29) the coefficients on the probabilities of punishment are all negative, statistically significant,<sup>19</sup> and consistent with the elasticity conditions. It is interesting to note that the transformation of the independent variables,  $\lambda_2 = 0$ , is consistent with Ehrlich's [9, 734-44] theoretical arguments for measuring the probabilities of punishment in logarithms.

The values of the log likelihood function for 4 alternative simple functional forms and the optimal functional form,  $(\hat{\lambda}_1, \hat{\lambda}_2) = (-0.3, 0)$ , are presented in Table IX. The likelihood ratio test statistic for the hypothesis  $H_0: (\lambda_1, \lambda_2) = (\lambda_1^0, \lambda_2^0)$  is  $2[L(\hat{\lambda}_1, \hat{\lambda}_2) - L(\lambda_1^0, \lambda_2^0)]$  which has a  $\chi^2$  distribution with 2 degrees of freedom. The last column in Table IX reports the values of this test statistic for 4 alternative simple functional forms. The 5% and 1% critical values of  $\chi^2$  are, respectively, 5.99 and 9.21. The hypothesis that the homicide function is log-linear cannot be rejected at the 5% significance level. However, both versions of the semi-log functional form and the linear functional form are easily rejected at the 1% significance level. The finding that the time-series estimates of the homicide function are consistent with the log-linear specification corroborates Ehrlich's [9] finding that the optimal functional form for the cross-sectional homicide function is close to the log-linear specification.

Table X reports the coefficient estimates and *t*-statistics of the probabilities of punishment for the 4 simple functional forms. For all 4 functional forms the probabilities of punishment are negative and statistically significant at the 1% level. The deterrence findings are clearly robust with respect to the choice of functional form. However, the *t*-statistics on the probability of execution measured in natural values are considerably lower than the *t*-statistics on probability of execution measured in logarithms.

## V. Conclusion

This paper has presented updated estimates of the U.S. homicide function that strongly confirm Ehrlich's [6; 9] deterrence findings. The basic deterrence results reported here are also consistent with the author's [20; 21] studies of Canadian homicide and Wolpin's [29] study of homicide in England and Wales. For the full sample regressions estimated in this paper, the probability of arrest, the conditional probability of conviction given arrest, and the conditional probability of execution given conviction have negative and statistically significant effects on the homicide rate. In addition the ranking of the estimated elasticities of homicide with respect to the probabilities of punishment is consistent with sharp predictions derived from the hypothesis of expected utility maximization.

19. In equation 29 all *t*-statistics are conditional on the assumption that  $\lambda_1 = -0.3$  and  $\lambda_2 = 0$ .

Table X. Coefficients on the Probabilities of Punishment for Alternative Functional Forms

| Functional Form | Variables        |                  |                  |
|-----------------|------------------|------------------|------------------|
|                 | $\ln PA_3$       | $\ln PC_3$       | $\ln PE_3$       |
| Log-linear      | -1.37<br>(4.00)  | -.548<br>(10.4)  | -.103<br>(13.5)  |
| Semi-log        | -.118<br>(3.18)  | -.035<br>(6.01)  | -.0058<br>(6.13) |
|                 | $PA_3$           | $PC_3$           | $PE_3$           |
| Semi-log        | -.028<br>(3.72)  | -.021<br>(7.70)  | -.073<br>(3.28)  |
| Linear          | -.0018<br>(3.71) | -.0014<br>(7.89) | -.0044<br>(3.08) |

Note: Absolute value of *t*-statistics in parentheses.

In this paper the homicide rate is measured using the Vital Statistics measure of homicides rather than the FBI series. Previous researchers have used exclusively the FBI data in their time-series analysis. Bowers and Pierce [3], however, argue forcefully that the Vital Statistics measure of homicides is superior to the FBI measure. It is found in this paper that the Vital Statistics data supports the deterrence theory more strongly than the FBI series.

Two other important differences between previous research in this area and the estimates presented in this paper are: (1) OLS methods are used in this paper rather than 2SLS and (2) the probabilities of punishment are measured by averaging the current relative frequencies of punishment with their lagged values of the two previous years. The use of OLS methods rather than 2SLS is justified by an application of Hausman's test and by the use of lagged relative frequencies of punishment to measure murders subjective probabilities of punishment. The particular lag structure used to measure the probabilities is very simple and somewhat arbitrary. However, the deterrence findings reported in this paper are found to be robust with respect to the lag structure used.

Three other important issues that have arisen in the debate over Ehrlich's homicide work are carefully discussed: (1) the sensitivity of the deterrence results to the choice of explanatory variables, (2) the stability of the homicide function over time and (3) the choice of functional form. The deterrence findings are found to be robust with respect to the choice of explanatory variables and functional form. The use of the log-linear functional form is justified by the Box-Cox analysis. The homicide function estimated in this paper is also shown to be reasonably stable over time.

From the specification search, it was found that the proportion of the population that belongs to a religion has a negative and significant effect on the homicide rate in most specifications. Two variables often used by researchers in estimating homicide functions — the unemployment rate and the proportion of the population that is nonwhite — were found to have inconsistent and generally insignificant effects on the homicide rate depending on the choice of explanatory variables. The labor force participation rate has a negative and significant effect on the homicide rate in most specifications. Permanent income per

capita and the proportion of the population between 21 and 29 years of age have positive effects on the homicide rate in most specifications.

The econometric evidence presented in this paper provides solid support for the deterrence hypothesis. The deterrence findings reported in this paper are not fragile. Different sets of explanatory variables have been used, alternative functional forms for the homicide function have been used and the homicide function has been estimated over different time periods. The regression results consistently support the deterrence hypothesis that increases in the probabilities of arrest, conviction, and execution reduce the homicide rate. Even murderers appear to obey the law of demand.

## References

1. Beach, Charles M., and James G. Mackinnon, "A Maximum Likelihood Procedure for Regression with Autocorrelated Errors." *Econometrica*, January 1978, 51-58.
2. Box, G. E. P., and D. R. Cox, "An Analysis of Transformations." *Journal of the Royal Statistical Society, Series B*, 1964, 211-43.
3. Bowers, William T., and Glenn L. Pierce, "The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment." *Yale Law Journal*, December 1975, 187-208.
4. DeGroot, Morris H. *Optimal Statistical Decisions*. New York: McGraw-Hill Book Company, 1970.
5. Ehrlich, Isaac. "Participation in Illegitimate Activities: An Economic Analysis," in *Essays in the Economics of Crime and Punishment*, edited by Gary S. Becker and William M. Landes. New York: Columbia University Press, 1974.
6. ———, "The Deterrent Effect of Capital Punishment: A Question of Life and Death." *American Economic Review*, June 1975, 397-417.
7. ———, "Deterrence: Evidence and Inference." *Yale Law Journal*, December 1975, 209-27.
8. ———, "The Deterrent Effect of Capital Punishment: Reply." *American Economic Review*, June 1977, 452-58.
9. ———, "Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence." *Journal of Political Economy*, August 1977, 741-88.
10. Ehrlich, Isaac and Joel C. Gibbons, "On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence." *Journal of Legal Studies*, January 1977, 35-60.
11. Ehrlich, Isaac and Randall Mark, "Fear of Deterrence: A Critical Evaluation of the 'Report of the Panel on Research on Deterrent and Incapacitative Effects'." *Journal of Legal Studies*, June 1977, 293-316.
12. Fair, Ray C., "The Estimation of Simultaneous Equation Models with Lagged Endogenous Variables and First Order Serially Correlated Errors." *Econometrica*, May 1970, 507-16.
13. Goodnight, James and T. D. Wallace, "Operational Techniques and Tables for Making Weak MSE Tests for Restrictions in Regression." *Econometrica*, July 1972, 699-709.
14. Hall, Bronwyn H., and Robert E. Hall. *Time Series Version 3.5 User's Manual*. Mimeograph. Stanford, California, 1980.
15. Hausman, J. A., "Specification Tests in Econometrics." *Econometrica*, November 1978, 1251-71.
16. Hoenack, Stephen A., Robert T. Kudrle, and David L. Sjoquist, "The Deterrent Effect of Capital Punishment: A Question of Identification." *Policy Analysis*, Fall 1978, 491-527.
17. Hoenack, Stephen A., and William C. Weiler, "A Structural Model of Murder Behavior and the Criminal Justice System." *American Economic Review*, June 1980, 327-44.
18. ———, "Data Sources for 'A Structural Model of Murder Behavior and the Criminal Justice System'." Mimeograph, 1980.
19. Klein, Lawrence R., Brian Forst, and Victor Filatov, "The Deterrent Effect of Capital Punishment: An Assessment of the Estimates," in *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, edited by Alfred Blumstein, Jacqueline Cohen and Daniel Nagin. Washington, D.C.: Printing and Publishing Office, National Academy of Sciences, 1978.
20. Layson, Stephen K., "Another View of the Canadian Time-Series Evidence." *Canadian Journal of Economics*, February 1983, 52-73.
21. ———, "A Reexamination of the United States and Canadian Time-Series Evidence on Homicide and Deterrence." Ph.D. dissertation, University of Chicago, June 1983.

22. Leamer, Edward E., "Sets of Posterior Means with Bounded Variance Priors," *Econometrica* May 1982, 725-36.
23. \_\_\_\_\_, "Let's Take the Con Out of Econometrics," *American Economic Review* March 1983, 31-43.
24. Leamer, Edward E. and H. Leonard, "Reporting the Fragility of Regression Estimates," *Review of Economics and Statistics* May 1983, 306-17.
25. McManus, Walter. "Bayesian Estimation of the Deterrent Effect of Capital Punishment." Mimeograph. U.C.L.A., 1981.
26. Passell, Peter and John B. Taylor, "The Deterrent Effect of Capital Punishment: Another View." *American Economic Review*, June 1977, 445-51.
27. Seaks, Terry G. and Stephen K. Layson, "The Box-Cox Test with Standard Econometric Problems." *The Review of Economics and Statistics*, February 1983, 160-64.
28. Wallace, T. D., "Weaker Criteria and Tests for Linear Restrictions in Regression." *Econometrica*, July 1972, 689-98.
29. Wolpin, Kenneth, "Capital Punishment and Homicide in England: A Summary of Results." *American Economic Review: Papers and Proceedings*, May 1978, 422-27.

# DEATH AND DETERRENCE

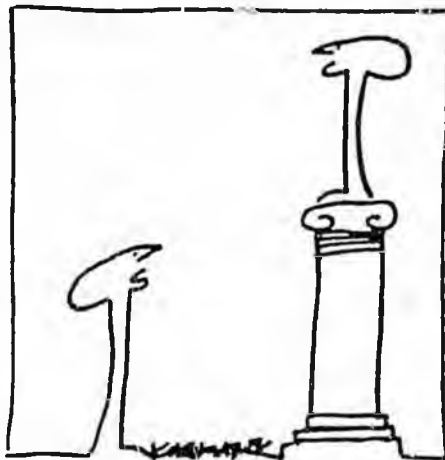
**P**ROFESSOR Stephen K. Layson, an economist at the University of North Carolina at Greensboro, has published in the *Southern Economic Journal* (July 1985) a statistical study of the effects of executions on the murder rate. He concluded that every execution of a murderer deters, on the average, 18 murders that would have occurred without it.

Layson also inquired into the effects of the arrest and conviction of murderers on the murder rate. His correlations indicate that a 1 per cent increase in the clearance (arrest) rate for murder would lead to 250 fewer murders per year. Currently the clearance rate is 75 per cent. Further, a 1 per cent increase in murder convictions would deter about 105 murders. Currently 38 per cent of all murders result in a conviction; 0.1 per cent of murders result in an execution.

Attempts to correlate murder to punishment rates have been made for a long time. Most had flagrant defects. Some correlated murder rates to the presence or absence of capital-punishment statutes—not to executions, which alone matter. Others failed properly to isolate murder rates from variables other than punishment, even when these variables were known to influence murder rates. For instance, changes in the proportion of young males in the population do influence murder rates regardless of executions, since most murders are committed by young males. The first major statistical analysis that properly handled all variables was published by Isaac Ehrlich in the *American Economic Review* (June 1975). Ehrlich found that from 1933 to 1969 "an additional execution per year . . . may have resulted on the average in seven or eight fewer murders."

Ehrlich's study went against the cher-

ished beliefs of most social scientists (after all, it confirmed what common sense tells us). A whole cottage industry arose to refute him. In turn he refuted the refuters. The verdict is inconclusive. As is often the case in statistical matters, if a different period is analyzed, or some technical assumptions are changed, a different result is produced. Thus the testimony of Professor Thorsten Sellin, given in 1953—long before Ehrlich wrote—to the Royal Commission on Capital Punishment in Great Britain, still stands. Asked whether he could "conclude . . . that capital punishment has no deterrent effect," Sellin, an ardent but honest opponent of capital punishment, replied, "No, there is no such conclusion." Despite considerable advances in methods of analysis I think that, as yet, it has not been proved conclusively that capital punishment deters more than life imprisonment, or that it does not. However, the preponderance of evidence now does tend to show that capital punishment deters more than alternative punishments. Professor Layson's paper will add to that preponderance. But many attempts will be made to refute it, and, in all likelihood, the verdict will still be that the statistics are not conclusive.



"You're way up there, but you're not way, way up there."

What are we to deduce? Obviously people fear death more than life imprisonment. Only death is final. Where there is life there is hope. Actual murderers feel that way: 99.9 per cent prefer life imprisonment to death. So will prospective murderers. What is feared most deters most. Possibly, statistics do not show this clearly, because there are so few executions compared to the number of murders. It is even possible that the uncertain prospect of execution deters so few not already deterred by the prospect of life imprisonment that there is no statistical trace. Yet, if by executing convicted murderers there is any chance, even a mere possibility, of deterring future murderers, I think we should execute them. The life even of a few victims who may be spared seems infinitely precious to me. The life of the convicted murderer has but negative value. His crime has forfeited it.

**O**PPONENTS of capital punishment usually admit that their opposition has little to do with statistical data. When asked whether they would favor the death penalty if it were shown conclusively that each execution deters, say, one hundred murders, such opponents as Ramsey Clark (former U.S. attorney general) or Henry Schwarzschild (ACLU) resoundingly say no. But neither likes the inference that must be drawn: that he is more interested in keeping murderers alive than in sparing their victims, that he values the life of a convicted murderer more than the life of innocent victims. Those who do not share this bizarre valuation will favor capital punishment.

For beyond deterrence, or possible deterrence, there is justice. The thought that the man who cruelly and deliberately slaughtered your child for fun or profit is entitled peacefully to live out his days at taxpayers' expense, playing

(Continues on page 61)

Mr. van den Haag is John M. Olin Professor of Jurisprudence and Public Policy at Fordham University in New York City.

Clemens, a/k/a Mark Twain, who was also known as Papa, though in a more familial and private sense of that endearing term. The endearment was especially pronounced, in this case, because it came from Twain's 12-year-old daughter Susy. She was an unusually bright and sensitive child and very much the natural offspring of the beloved "Livy" and our first truly indigenous storyteller of world rank. This is simply an astonishing book, in several ways at once, and one that must become a necessary reference for all Mark Twain enthusiasts and scholars. It gives Susy's biography of her father for the first time in its entirety, usefully set in large-print type in order to distinguish it from the rest of the text, and introduced by Mark Twain along with his predictably amusing and copious comments. Then there is editor Charles Neider's introduction, with its revelations of Susy as someone rather more complex than an adoring daughter in thrall to the father-genius. More than anything else, however, *Papa* is an intensely human document, which appeared in the great celebratory year of 1985: the 150th anniversary of Mark Twain's birth (1835); the 75th of his death (1910); and the centenary of both the American publication of *Huckleberry Finn* (1885) and Susy Clemens's charming biography of her father. She died at age 24 of spinal meningitis.

THOMAS P. MCDONNELL

*The Glenn Gould Reader*, edited by Tim Page (Knopf, 476 pp., \$20)

GLENN GOULD," B. H. Haggin once grumbled, "prefers talking nonsense on anything anywhere to playing the piano marvelously in the concert hall." For the benefit of those who appreciated Gould's particular brand of nonsense more than Mr. Haggin did, Tim Page has put together a lengthy collection of essays, speeches, and interviews called *The Glenn Gould Reader*. Gould's prose was as uneven as his piano playing; some of these pieces (particularly "The Prospects of Recording") are startlingly provocative, some embarrassingly sophomoric, one or two just plain dull. Virtually all are more or less perverse: Gould calls Richard Strauss "the greatest musical figure who has lived in this century" on one page and dismisses the Mozart G Minor Symphony as "a half-hour

of banality" on the next. But all are worthy of your closest attention—for despite his extreme (and self-conscious) eccentricities of taste and thought, Glenn Gould was the most gifted pianist of his generation, and his best writings on music were as thought-provoking, closely argued, and compelling as his best performances. Avoid the dragged-out spoofs and parodies; savor the liner notes, which are to recorded classical music as Paul Desmond's *triple sec*, set essays were to jazz. A wonderful, irritating book.

TERRY TEACHOUT

#### VAN DEN HAAG

(Continued from page 44)

tennis or baseball or enjoying the prison library, is hard to stomach. Wherefore about 67 percent of Americans favor the death penalty, for the sake of justice, and to save innocent lives. I think they are right.

On occasion I have been presented with a hypothetical. Suppose, I have been asked, that each execution were shown to raise rather than reduce the murder rate. Of course this is quite unlikely (wherefore there is no serious evidence): The more severe and certain the punishment, the less often the crime occurs, all other things being equal. The higher the price of anything, the less is bought. But, if one accepts, *arguendo*, the hypothetical, the answer depends on whether one prefers justice—which demands the execution of the murderer—or saving the lives that, by this hypothesis, could be saved by not executing him. I love justice, but I love innocent lives more. I would prefer to save them.

Fortunately we do not face this dilemma. On the contrary. Capital punishment not only satisfies justice but is also more likely to save innocent lives than life imprisonment. □

#### BROOKS

(Continued from page 36)

U.S. has been able to concentrate its foreign policy on faraway places like the Middle East and Asia precisely because of the lack of any threat close to home. Disorder in Latin America ties down our forces and makes us less able to fulfill commitments in Europe and elsewhere. Meanwhile, every effort to stabilize Latin America draws a flood of anti-American vitriol from

the American Left, our European allies, and the Latin Americans themselves. The Soviets want nothing constructive out of Latin America. They can view the disintegration of Latin America from a distance, hoping the U.S. will get sucked into the mess, while keeping their own hands clean.

In a limited sense, those who say our Latin America problem is not primarily part of the East-West conflict are correct. But neither is the unrest there an indigenous product of poverty and exploitation. Even in Nicaragua, there was no widespread anti-American sentiment before the rise of the Sandinistas. Rather, unrest in Latin America is brought on by a small vanguard of university-educated, upper-middle-class terrorists who have been elevated to guerrilla status by the strategy and support of Fidel Castro. Demographically, these groups are identical to Italy's Red Brigades or the German Baader-Meinhof Gang. The leader of *Sendero Luminoso* is an old philosophy professor who went off into the hills to form a pseudo-Maoist, pseudo-Inca personality cult. Arturo Cruz captured the character of the Sandinistas when he asked derisively, "Do you think a single one of them—the nine comandantes—could get a job and earn a living?"

In 1981, then Secretary of State Alexander Haig argued for going after what he called "the source" of Central America's trouble by applying direct pressure on Cuba. Since Haig's departure, nobody in the Administration or in Congress has echoed that view. Our hesitancy stems from the myth that the Cubans are Soviet puppets, and thus that pressure on the Cubans is the same as pressure on Moscow. The Cubans are not Soviet puppets but Soviet allies. They are dependent allies to be sure, but Moscow neither demands absolute Cuban obedience nor absolutely supports Cuban adventures. We must adopt a defensive posture vis-à-vis the Soviets because we don't have the power to defang them. But there is no reason to be similarly intimidated by Fidel Castro. We should not be satisfied with confronting Castro over his conquests in Grenada and Nicaragua; we should take aim at the factory of Latin revolution. Our Latin America policy would be more realistic if we were to pretend that except as a source of money and guns, the Soviet Union doesn't exist. □

**S B**

**17**

**FILE 3**

Codes attached for the following States:

Alabama

Arizona

Arkansas

Connecticut

Delaware

Florida

Georgia

Idaho

Illinois

Indiana

Kentucky

Louisiana

Maryland

Mississippi

Missouri

Nebraska

Nevada

New Jersey

New Mexico

Ohio

Oklahoma

Oregon

South Carolina

South Dakota

Tennessee

Texas

Utah

Vermont

California

Colorado

Virginia

Washington

Wyoming

1/24/89

Sandy -

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

New Hampshire

North Carolina

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

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

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

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

§ 13A-5-11. Fines for felonies.

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

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

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

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

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

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

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

ARTICLE 2.

DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE.

I. GENERAL CONSIDERATION.

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

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

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

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

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

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

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

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

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

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

**Collateral references.**

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

### § 13A-5-39. Definitions.

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

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

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

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

### § 13A-5-40. Capital offenses.

(a) The following are capital offenses:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### I. GENERAL CONSIDERATION.

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

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

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

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

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

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

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

ate, 500  
0 So. 2d  
former

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

DE.

be in  
deprive  
ause it  
in the  
circum-  
capital  
in the  
and a  
circum-  
tment  
e the  
ought  
rthur  
(1984),  
(Ala.

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

ison-  
avate-  
ed in  
oven  
ting  
the  
rder  
ugh  
tate  
ntry  
de-  
l of  
Ex

**When intent to rob arose is jury question.** — Although a robbery committed as a "mere afterthought" and unrelated to the murder will not sustain a conviction under subdivision (a)(2) for the capital offense of murder-robbery, the question of a defendant's intent at the time of the commission of the crime is usually an issue for the jury to resolve. The jury may infer from the facts and circumstances that the robbery began when the accused attacked the victim and the capital offense was consummated when the defendant took the victim's property and fled. *Connolly v. State*, 500 So. 2d 57 (Ala. Crim. App. 1985), *aff'd*, 500 So. 2d 66 (Ala. 1987).

**Failure to instruct on lesser offense of**

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

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

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

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

### § 13A-5-41. Lesser included offenses.

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

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

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

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

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

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

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

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

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

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

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

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

### § 13A-5-49. Aggravating circumstances.

Aggravating circumstances shall be the following:

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

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

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

Use of shotgun held to create great risk of death to many persons. — The trial court committed no error in finding that the aggravating circumstance provided by subdivision (3) existed, where in addition to the two persons who were actually killed by appellant, four people were certainly in a great risk of death, as they were either shot or shot at, or were in direct proximity of the shotgun blasts fired by appellant; and all of the shots were fired in a residential neighborhood and many of those residents were at risk from flying shotgun pellets. *Edwards v. State*, 515 So. 2d 80 (Ala. Crim. App. 1987).

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

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

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

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

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

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

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

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

§ 13  
Co  
is se  
error  
Us  
stan  
tion  
515  
Ki  
— W  
and  
less!  
turn  
fashi  
the l  
or cr  
1987  
Mi  
cirt  
men  
  
§ 13  
III. I  
  
De  
to ci  
— §  
quir  
have  
on ci  
offer  
allo  
give  
in a  
statu  
cons  
liste  
any  
Stat  
cert  
L. F  
Ti  
in c  
any  
v. S  
cert  
L. F  
Ti  
tria  
side  
and  
ular  
Stat  
cific  
ing  
Stat  
470  
(19)

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

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

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

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

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

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

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

### III. Illustrative Cases.

#### I. GENERAL CONSIDERATION.

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

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

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

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

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

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

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

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

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

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

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

### III. ILLUSTRATIVE CASES.

**Antisocial personality.** — Where evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### § 13A-5-39. Definitions.

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

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

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

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

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

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

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

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

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

#### § 13A-5-40. Capital offenses.

(a) The following are capital offenses:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### I. General Consideration.

#### II. Decisions Under Prior Law.

##### I. GENERAL CONSIDERATION.

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

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

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

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

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

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

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

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

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

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

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

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

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

### § 13A-5-41. Lesser included offenses.

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

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

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

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

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

Collateral references. — 22 C.J.S., Criminal Law, § 424(4); 22A C.J.S., Criminal Law, § 566. 21 Am. Jur. 2d, Criminal Law, §§ 484, 495; 29 Am. Jur. 2d, Evidence, §§ 125, 1170-1172.

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

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

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

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

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

Collateral references. — 89 C.J.S., Trial, § 487. 76 Am. Jur. 2d, Trial, §§ 1111, 1115, 1173.

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

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

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

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

**Collateral references.** — 50 C.J.S. *Juries*,  
§ 86.  
47 Am. Jur. 2d *Jury*, §§ 7, 12 72. 159.

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

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

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

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

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

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

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

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

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

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

### I. GENERAL CONSIDERATION.

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

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

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

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

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

21 Am. Jur. 2d, Criminal Law, § 527.

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

### II. DECISIONS UNDER PRIOR LAW.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### § 13A-5-49. Aggravating circumstances.

Aggravating circumstances shall be the following:

- (1) The capital offense was committed by a person under sentence of imprisonment;
- (2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;
- (3) The defendant knowingly created a great risk of death to many persons;
- (4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight

after committing, or attempting to commit, rape, robbery, burglary or kidnapping;

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

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

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

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

I. General Consideration.

II. Decisions Under Prior Law.

I. GENERAL CONSIDERATION.

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

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

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

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

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

21 Am. Jur. 2d, Criminal Law, § 584.

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

II. DECISIONS UNDER PRIOR LAW.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Collateral references.** — 24B C.J.S., Criminal Law, § 1983(1).  
21 Am. Jur. 2d, Criminal Law, § 584.

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

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

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

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

**I. GENERAL CONSIDERATION.**

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

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

21 Am. Jur. 2d, Criminal Law, § 584

**II. DECISIONS UNDER PRIOR LAW.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Am. Jur. 2d, Criminal Law, § 584.

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

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

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

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

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

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

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

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

(1) Affirm the sentence of death;

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

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

**Collateral references.** — 24 C.J.S., Criminal Law, §§ 1643-1647, 1831-1840.  
5 Am. Jur. 2d, Appeal and Error, § 723.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Am. Jur. 2d, Criminal Law, § 14.

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

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

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

Collateral references. — 22 C.J.S., Criminal Law, § 25.  
21 Am. Jur. 2d, Criminal Law, § 14.

CRIMINAL CODE

CRIMINAL CODE

1985) 146 Ariz. 511,

sentenced, and par-  
ce is possible, evi-  
e as fresh as possi-  
ring in mitigation  
months before the  
alty is not recom-  
1980) 125 Ariz. 201,

nce  
years imposed for  
prohibited weapon  
were modified to  
of dangerousness  
of prior convictions  
App.1984) 142 Ariz.

ained in sentencing  
wo prior felony con-  
o require an order  
though recommen-  
mentioned two pri-  
ke only to one prior  
ed. State v. Mount  
9 P.2d 280.

Ariz. 79, 570 P.2d  
Ct. 1498 [main vol-  
524.

l not be overturned  
at sentence is too  
bused his discretion  
ate v. Frisroe (App.  
825.

ion to study defend-  
ntencing will not be  
usual circumstances  
y limits. Id.

ot disturb sentence  
s it is clearly exces-  
discretion. State v.  
Ariz. 411, 656 P.2d

n statutory limits, it  
ed on appeal unless  
clearly appears that  
ion in imposing sen-  
is characterized by  
ess or by a failure to  
gation into the facts  
nt exercise thereof.  
133 Ariz. 282, 650

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

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

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

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

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

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

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

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

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

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

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

23. Reasons for sentence

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

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

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

24. Pending proceedings

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

25. Probation revocation

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

26. Continuances

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

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

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

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

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

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

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

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

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

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

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

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

9. The defendant was under the age of 18 at the time of the offense and the victim was an adult and the victim was killed.

10. The murdered individual was a peace officer or a law enforcement officer while performing his official duties and the victim was a peace officer or a law enforcement officer.

G. Mitigating circumstances are those circumstances which state which are relevant to the offense and including any aspect of the offense or the circumstances of the offense.

1. The defendant's conduct shall not be considered to conform his conduct to the standards of the community if it is impaired as to constitute a defense to the offense.

2. The defendant was under the age of 18 at the time of the offense and the victim was an adult and the victim was killed.

3. The defendant was under the age of 18 at the time of the offense and the victim was an adult and the victim was killed as to constitute a defense to the offense.

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

5. The defendant's conduct shall not be considered to conform his conduct to the standards of the community if it is impaired as to constitute a defense to the offense. Amended by Laws 1979, Ch. 10, § 5; Laws 1984, Ch. 66, § 5.

Historical

Laws 1982, Ch. 325, which amended this section, was repealed by Laws 1988, Ch. 3, § 1.

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

1985 Reviser's Note:

Pursuant to authority vested in the Reviser by the Constitution of the State of Arizona, the sentence of death or life imprisonment without possibility of release until the expiration of a prescribed period of time was changed in the previous section heading.

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

Capital punishment. Arizona State Bar Journal 797.

Capital sentencing in Arizona. Arizona State Law Journal 1.

Constitutionality of the death penalty statute. 19 Arizona Law Review.

Death penalty. Arizona State Bar Journal 285.

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

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

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

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

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

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

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

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

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

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

5. The defendant's age.

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

**Historical Note**

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

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

**1985 Reviser's Note:**

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

**Law Review Commentaries**

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

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

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

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

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

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

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

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

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

**Library References**

Criminal Law ¶1208 et seq.

C.J.S. Criminal Law § 1980 et seq.

**WESTLAW Electronic Research**

See WESTLAW Electronic Research Guide following the Preface.

**United States Supreme Court**

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

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

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

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

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

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

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

Death sentence,

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

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

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

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

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

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

Notes of Decisions

Ability to be rehabilitated, aggravating and mitigating circumstances 6.6

Accomplices, death sentence 3.4

Age, aggravating or mitigating circumstances 6.5

Aggravating or mitigating circumstances

Age 6.5

Custody 4.1

Delay 8.5

Drug use 4.65

Felony murder 4.25  
 Gratuitous violence 4.35  
 Grave risk of death 4.2  
 Hearing 5.5  
 Heinous, cruel or depraved manner 4.3  
 Intoxication 4.6  
 Pecuniary consideration 4.7  
 Provocation 4.8  
 State of mind of defendant 6.2  
 Stipulations 8.2

Appreciate wrongfulness, aggravating or mitigating conduct 6.1

Burden of proof, in general 10.8

Capacity of defendant, aggravating or mitigating circumstances 4.55

Consecutive sentences 17

Cruel manner, aggravating or mitigating circumstances 4.3

Custody, aggravating or mitigating circumstances 4.1

Death sentence

In general 3

Accomplices 3.4

Aggravating or mitigating circumstances 4.5

Felony murder 3.35

Intent 3.15

Notice 3.5

Proportionality 3.7

Prosecutorial discretion 3.1

Reduction of sentence 3.6

Resentencing 3.2

Stipulations 3.3

Delay, aggravating or mitigating circumstances 8.5

Depraved manner, aggravating or mitigating circumstances 4.3

Double jeopardy 2.3

Drug use, aggravating or mitigating circumstances 4.65

Effective assistance of counsel 2.2

Felony murder

Aggravating or mitigating circumstances 4.25

Death sentence 3.35

Findings, aggravating or mitigating circumstances 10.2

Gratuitous violence, aggravating or mitigating circumstances 4.35

Grave risk of death, aggravating or mitigating circumstances 4.2

Hearing, aggravating or mitigating circumstances 5.5

Heinous, cruel or depraved manner, aggravating or mitigating circumstances 4.3

Impaired mental condition, aggravating or mitigating circumstances 6.4

Independent review, aggravating or mitigating circumstances 10.5

Intent, death sentence 3.15

Intoxication, aggravating or mitigating circumstances 4.6

Judge 13.2

Judicial notice, aggravating or mitigating circumstances 8.3

Jury, in general 13.5  
 Life sentence 2.5  
 Mental impairment, aggravating circumstances 7.5

Minor participation in offenses mitigating circumstances

Modification of sentence, rev

Notice of death sentence 3.5

Parental status, aggravating circumstances 6.8

Pecuniary consideration, aggravating circumstances 4.7

Proportionality  
 Death sentence 3.7  
 Review 16.1

Prosecutorial discretion, death sentence 4.8

Provocation, aggravating or mitigating circumstances 10.1

Record, aggravating or mitigating circumstances 10.1

Reduction of sentence, death sentence 6.3

Remorse, aggravating or mitigating circumstances 6.3

Resentencing, death sentence  
 Review  
 In general 16  
 Modification of sentence  
 Proportionality 16.1

Sentencing hearing 15.5

State of mind of defendant, mitigating circumstances

Stipulations  
 Aggravating or mitigating circumstances 8.2

Death sentence 3.3

Sufficiency of evidence, death sentence 3.8

Violent felony, aggravating circumstances 5.1

1. Validity

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

State v. Knapp (1977) 1704, certiorari denied 98 U.S. 435 U.S. 908, 55 L.Ed.2d 1157

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

Defendant's comments no principled way to deal with case, in which death penalty imposed, and thus, this section not applied to defendant's comments, C.A.9 (Ariz.) 1987, 8

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

- Jury, in general 13.5
- Life sentence 2.5
- Mental impairment, aggravating or mitigating circumstances 7.5
- Minor participation in offense, aggravating or mitigating circumstances 7.8
- Modification of sentence, review 16.5
- Notice of death sentence 3.5
- Parental status, aggravating or mitigating circumstances 6.8
- Pecuniary consideration, aggravating or mitigating circumstances 4.7
- Proportionality
  - Death sentence 3.7
  - Review 16.1
- Prosecutorial discretion, death sentence 3.1
- Provocation, aggravating or mitigating circumstances 4.8
- Record, aggravating or mitigating circumstances 10.1
- Reduction of sentence, death sentence 3.6
- Remorse, aggravating or mitigating circumstances 6.3
- Resentencing, death sentence 3.2
- Review
  - In general 16
  - Modification of sentence 16.5
  - Proportionality 16.1
- Sentencing hearing 15.5
- State of mind of defendant, aggravating or mitigating circumstances 6.2
- Stipulations
  - Aggravating or mitigating circumstances 8.2
  - Death sentence 3.3
- Sufficiency of evidence, proportionality, death sentence 3.8
- Violent felony, aggravating or mitigating circumstances 5.1

1. Validity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Arizona supreme court in (1978) 120 Ariz. 441, 586 P.2d 186, while legislating but was merely re-enacting Arizona death penalty statute (now this section), to eliminate the ineliminable mitigating circumstance of pecuniary gain onto the statute by the Arizona supreme court in *Richmond* (1976) 114 Ariz. 186.

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

Section 13-703 provides acceptable standards for deciding aggravating circumstances and does not violate U.S.C.A. Const. Amend. 14 in requiring the state to find that aggravating circumstances exist without mitigating circumstances beyond a reasonable doubt. *State v. Nash* (1985) 143 Ariz. 491, 707 P.2d 222, certiorari denied 105 S.Ct. 1143, 86 L.Ed.2d 706.

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

Section 13-703 did not violate U.S.C.A. Const. Art. 2, § 13 on ground that trial court did not find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. *State v. Nash* (1985) 143 Ariz. 491, 707 P.2d 289, certiorari denied 105 S.Ct. 1143, 86 L.Ed.2d 706.

Janus-like quality of aggravating circumstances, cruelty, heinousness and depravity to victim can also reflect state of mind, does not render death sentence violative of U.S.C.A. Const. Art. 2, § 13 under test which requires the state to prove beyond a reasonable doubt that obviates standardless sentencing. *State v. Gillies* (1984) 142 Ariz. 564, 707 P.2d 177, certiorari denied 105 S.Ct. 84, 84 L.Ed.2d 834.

Death penalty statute which places burden of establishing mitigating circumstances on defendant does not violate due process rights under U.S.C.A. Const. Art. 2, § 13 by shifting burden of proof to defendant. *Gillies* (1984) 142 Ariz. 564, 707 P.2d 177, certiorari denied 105 S.Ct. 177, 84 L.Ed.2d 834.

Death penalty statute which requires the state to prove beyond a reasonable doubt that obviates standardless sentencing procedure and unbridled judicial discretion thus does not violate U.S.C.A. Const. Art. 2, § 13.

itted in cruel, institutionally determining State v. Cas- 2d 1.

ality statute committed for cruel or de- institutionally Ariz. 491, 707

les adequate and mitigat- not violate t. State v. 1 289.

nder A.R.S. inous, cruel ially are not Rossi (1985) after remand

l-703) is not andards for ing circum- Ariz. 359, 706 Ariz. 245, 741

-703) is not no part in prosecutor ases death i (1985) 146 remand 154

§§ 13-703, nal as ad- hment, as respect to discretion ty will be ine terms ing impo- gravating mitigating ke part in g to give mitigating ors are to stances. P.2d 464, . 1110, 88

s not vio- of cruel jury trial rden on ances, of g aggra- r of fail- nguage. 700 P.2d 471 U.S.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Arizona scheme for imposition of death penalty is not unconstitutionally vague. State v. Richmond (1983) 135 Ariz. 404, 670 P.2d 1007, certiorari denied 104 S.Ct. 199, 465 U.S. 1013, 79 L.Ed.2d 246.

This section allowing trial judge to consider whether a murder was especially heinous, cruel or depraved, and aggravating circumstance, is not unconstitutionally vague. State v. Zarbo (1983) 135 Ariz. 63, 659 P.2d 22, certiorari denied 104 S.Ct. 462, 465 U.S. 1124, 77 L.Ed.2d 834.

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

This section, which only allows mitigation in sentencing, sets out sentencing court to consider any mitigating circumstances, which preclude both aggravating and mitigation. Sentencing court must determine if mitigating circumstances are sufficient for leniency and which require sentencing court to craft sentencing decision. State v. Gillies (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 104 S.Ct. 32, 465 U.S. 2444, 461 U.S. 971, 77 L.Ed.2d 1457.

Death penalty statute which allows arbitrary selection of mitigating factors is unconstitutional because there is no guidance in statute which constitutes mitigating factors to balance aggravating factors. State v. Worat (1983) 135 Ariz. 657 P.2d 865.

Death penalty sentencing court is not unconstitutional on ground that it does not allow sentencer to consider defendant's mens rea in mitigation. State v. Richmond (1983) 135 Ariz. 195, 639 P.2d 1007, certiorari denied 104 S.Ct. 2259, 456 U.S. 98

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## § 13-703

### Note 1

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

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

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

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

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

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

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

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

### 2. Construction and application

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

## CRIMINAL CODE

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

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

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

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

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

### 2.2. Effective assistance of counsel

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

### 2.3. Double jeopardy

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

## CRIMINAL CODE

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

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

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

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

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

### 2.5. Life sentence

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

Invalidation of the prev ing procedure by Watson, supreme court eliminated nizable mitigating circur previously engrafted ont

nce of death  
ity of parole  
gree murder  
4) 143 Ariz.

ing made it  
te defendant  
t faced same  
her statute,  
n sentencing  
effect when  
Ortiz (1981)  
iorari denied  
L.Ed.2d 863.  
a grave risk  
victim when  
by burning  
de was prop-

was convict-  
sentenced to  
gation hear-  
ality statute,  
tween Octo-  
d two court  
ntention that  
s to statute  
acted penal-  
iz. 506, 633

m, required  
lict and sen-  
who presid-  
0) 127 Ariz.  
nd 136 Ariz.

l  
rmed by his  
tements he  
fter his con-  
be admissi-  
t relied on  
mitigating  
prove, and  
endant was  
l amounting  
led to new  
g to deter-  
properly im-  
iz. 273, 665

bar second  
lants based  
ing circum-  
viction and  
s the state  
e erred in  
nce limited  
trial judge  
at circum-  
of "pecuni-  
was not an  
because re-

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

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

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

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

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

### 2.5. Life sentence

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

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

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

### 3. Death sentence—In general

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

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

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

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

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

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

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

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

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

## § 13-703

### Note 3

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

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

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

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

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

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

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

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

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

## CRIMINAL CODE

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

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

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

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

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

Rule that death sentence cannot be executed if jury finding defendant guilty was culled of veniremen stating general objections to death penalty or expressing conscientious or religious scruples against its imposition was inapplicable when defendant was sentenced to life imprisonment without possibility of parole for 25 years, not to death. *State v. Thomas* (1982) 133 Ariz. 538, 652 P.2d 1380.

## CRIMINAL CODE

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

Where shooting during course of intentional and was done by defendant, imposition of death penalty did not constitute unusual punishment nor was it grossly disproportionate to offense charged; imposition of death penalty in defendant's case constitutes cruel and unusual punishment. *Id.*

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

Though a great risk of death to others, where bodies of victim around automobile which had defendant and his companions after abandonment of vehicle, companions left scene of homicide, imposition of death penalty on ground that homicides by defendant and his companions with which to continue the offense was not disproportionate to penalty imposed. *State v. Tison* (1981) 129 Ariz. 546, 633 P.2d 180, 459 U.S. 1024, 74 L.Ed.2d 520.

Death penalty did not per se constitute unusual punishment. *State v. Tison* (1981) 129 Ariz. 506, 633 P.2d 180.

Death penalty should be imposed in most aggravating circumstances that are so shocking and heinous as to raise murder standards above the usual standards, or the background of the case apart from the usual background. *State v. Watson* (1981) 129 Ariz. 60.

Death penalty was not manifestly unjust where defendant, not convicted of first-degree murder, had mitigating circumstances of behavior in prison, his attitude, education, his age (21) at time of offense, that victim shot first, and that defendant received a life sentence; death outweighed the two mitigating circumstances arising out of defendant's offense of robbery. *Id.*

For purposes of death penalty, § 13-454 (renumbered as § 13-454) in homicide prosecution established circumstances warranting death penalty and did not establish circumstances calling for leniency. *State v. Thomas* (1980) 126 Ariz. 428, 616 P.2d 1380.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 3.1. — Prosecutorial discretion, death sentence

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

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

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

**3.15. — Intent, death sentence**

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

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

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

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

**3.2. — Resentencing, death sentence**

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

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

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

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

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

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

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

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

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

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

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

In proceeding in which death of first-degree murder, resentencing defendant to certain state Supreme Court decision, violate ex post facto law.

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

**3.3. — Stipulations**

Where issue involves stipulation, a stipulation has broader effect than that established by intended parties; intended effect be broadened by technique when defendant failed to foresee such a stipulation. (1983) 137 Ariz. 80, 669

**3.35. — Felony murder**

Court properly had defendant participated and intended to kill her death penalty. *State v. ...* 21, 734 P.2d 563, certiorari denied 104 S.Ct. 98 L.Ed.2d 158.

Where trial court had defendant and codefendant, that killing comman strangling victim, victim while she was clear finding that defendant intended to kill, and the codefendant was not precluded on imposition of death penalty theory. *State v. ...* 79, 673 P.2d 17, certiorari denied 104 S.Ct. 465 U.S. 1074, 79 L.Ed.2d 158.

Where trial court had defendant and codefendant, that killing comman strangling victim, victim while she was clear finding that defendant intended to kill, and the codefendant was not precluded on imposition of death penalty theory. *State v. ...* 73, 673 P.2d 17, certiorari denied 104 S.Ct. 465 U.S. 1074, 79 L.Ed.2d 158.

**3.4. — Accomplice**

Imposition of death sentence on defendant killed, attempted to kill, even though defendant was not convicted of death. *State v. Hooper* (1983) 135 Ariz. 432, certiorari denied 103 S.Ct. 1073, 88 L.Ed.2d 805.

Where trial court had defendant and codefendant, that killing comman

denied 104 S.Ct.

not violation of jeopardy prohi- separation of Richmond (1983) certiorari denied 104 S.Ct. 1429, 465 U.S. 1074, 79 L.Ed.2d 753.

by six-year delay resulted in present addi- tence, and sen- was no harsher Richmond (1983) certiorari denied 104 S.Ct. 1429, 465 U.S. 1074, 79 L.Ed.2d 753.

of defendant titudinal right eedy trial does v. Richmond, certiorari de- 8 L.Ed.2d 367.

defendant did not tional right to gggravating or v. Richmond, certiorari de- 8 L.Ed.2d 367.

down three of found by trial ter his convic- er crimes, and e were mitigat- ot sufficiently se was proper- resentencing. 500, 662 P.2d Ariz. 564, 691 S.Ct. 1775, 470

after defend- ded for reesen- ess clause, ex dy guarantee, ed penalties or overnment and Jeffers (1983) certiorari denied L.Ed.2d 174. death penalty remanded for d not receive ed in original

ant had been and was sen- defendant to e Court deci- ly prohibition. 2, 659 P.2d 1, 1 U.S. 971, 77 S.Ct. 32, 463

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

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

3.3. — Stipulations, death sentence

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

3.35. — Felony murder, death sentence

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

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

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

3.4. — Accomplices, death sentence

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

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

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

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

3.5. — Notice of death sentence

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

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

3.6. — Reduction of sentence, death sentence

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

3.7. — Proportionality, death sentence

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

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

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

Death sentence for murders was not excessive or disproportionate to penalty imposed in similar cases, though defendant did not actually kill victims, where there were no sufficient mitigating circumstances calling for leniency and murders were committed in cruel, heinous and depraved manner, and for pecuniary gain, and defendant had prior convictions for crimes involving violence. *State v. Correll* (1986) 148 Ariz. 468, 715 P.2d 721.

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

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

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

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

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

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

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

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

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

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

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

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

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

Imposition of the death penalty upon defendant, who was convicted of first-degree murder in regard to the killing of defendant's 70-year-old landlady in order that defendant could retain approximately \$500 in rent money he had collected for landlady, was not disproportionate to imposition of the death penalty in prior cases in the State. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

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

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

Imposition of death penalty upon defendant who, along with another assailant, held gun on victim while victim was in mine shaft, beat victim with rocks, then threw more rocks, then threw down mine shaft, was not disproportionate to penalty imposed in similar cases. *State v. 141 Ariz. 141, 685 P.2d 1293, 105 S.Ct. 398, 469 U.S. 990, 1*

That State's witness received favorable treatment for her testimony against defendant to create a disproportionate result in imposition of death sentence for first-degree murder, as codefendant received favorable treatment received by defendant. *State v. 141 Ariz. 138 Ariz. 63, 673 P.2d 1*

Death sentence received by defendant was proportional to disposition of other crimes involving same age and mental state, that murder was especially heinous, cruel or depraved, and that defendant was not disproportionate to other crimes of the more compelling mitigating circumstances than were present in instant case. *State v. 141 Ariz. 138 Ariz. 63, 673 P.2d 1*

While disposition of other crimes is an important factor in determining proportionality of capital sentence, courts should consider propriety of sentence in light of disposition of persons involved in similar crimes. *State v. 141 Ariz. 138 Ariz. 63, 673 P.2d 1*

Favorable treatment accorded defendant in police can, under certain circumstances, is a weight in considering proportionality of sentence. *State v. 141 Ariz. 138 Ariz. 63, 673 P.2d 1*

3.8. — Sufficiency of evidence in capital case, death sentence

Fact that neither of the co-defendants received the death penalty was insufficient to require that defendant's sentence be reduced by reason of racial animus. *State v. 141 Ariz. 138 Ariz. 63, 673 P.2d 1*

4. Aggravating or mitigating factors

In general  
*State v. Knapp* (1977) 117 Ariz. 704, certiorari denied 98 S.Ct. 1351, 435 U.S. 908, 55 L.Ed.2d 1066

For purposes of imposing death sentence under Arizona law based on aggravating circumstances, murder was committed in especially heinous and depraved manner, defendant could reasonably be expected to have committed the crime. *State v. 141 Ariz. 138 Ariz. 63, 673 P.2d 1*

ence and defendant's  
ence induced by plea  
v. Gillies (1984) 142  
ertiorari denied 105

ence was neither dis-  
as compared to sen-  
defendants, where,  
I not know whether  
wielded rock that  
idnapped and raped,  
nt intended victim's  
al. State v. Gillies  
P.2d 655, certiorari  
d.2d 834.

e was proportionate  
her defendants for  
ilar manner. State  
z. 233, 690 P.2d 42,  
234, 469 U.S. 1230,

egree murder was  
ere the murder was  
of the receipt of  
and defendant had  
of kidnapping, and  
circumstances out-  
circumstances out-  
in mitigation.  
riz. 510, 687 P.2d

on defendant con-  
was not dispropor-  
aggravating circum-  
tion for prior crime  
was impossible, de-  
felony involving use  
of person, commis-  
of pecuniary gain,  
especially heinous,  
State v. Harding  
1247.

f sheriff's deputy,  
nal to penalties in  
shot several times  
, nearly severing  
shot even after  
left officer, who  
fter the attack, to  
y (1984) 141 Ariz.

ality upon defend-  
-degree murder in  
dant's 73-year-old  
tant could retain  
ey he had collect-  
proportionate to im-  
prior cases in the  
41 Ariz. 227, 686  
S.Ct. 548, 469 U.S.

n defendant who  
with fists, board  
od of time until  
m's body down a

mine shaft, was not disproportionate to penalty  
imposed in similar cases. State v. James (1984)  
141 Ariz. 141, 685 P.2d 1293, certiorari denied  
105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

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

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

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

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

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

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

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

### 4. Aggravating or mitigating circumstances— In general

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

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

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

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

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

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

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

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

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

After defendant's conviction for first-degree  
murder, trial court considered all possible miti-  
gating circumstances in sentencing defendant to  
death where it considered each mitigating cir-  
cumstance enumerated in this section and con-  
sidered all testimony and evidence received with  
regard to all aspects of defendant's character,  
propensities, record, and circumstances of of-  
fense and concluded that there were no mitiga-  
ting circumstances sufficient to call for leniency,  
although defendant claimed lack of harm to oth-  
er victims, his family background, and fac-  
t that accomplice received a lesser sentence as mitiga-  
ting factors. State v. Chaney (1984) 141 Ariz.  
295, 686 P.2d 1265.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

first-degree murder, approached concerning chose instead to exercise accomplice's life sentence considered mitigating circumstance defendant or in consequence resulting inequity was consequence induced. *State v. Gillies* (1983) 137 Ariz. 504, 672 P.2d 1007, appeal after remand 144 Ariz. 240, 691 P.2d 655, certiorari denied 104 S.Ct. 470 U.S. 1059, 84 L.Ed.2d 436.

Where defendant events leading to death all times during murder handed his accomplice strike victim, and help with rocks, defendant was substantial and in fact could properly be held to have been instructed in felony-murder and had knowledge of first-degree murder which theory defendant. *State v. Gillies* (1983) 137 Ariz. 504, 672 P.2d 1007, appeal after remand 144 Ariz. 240, 691 P.2d 655, certiorari denied 104 S.Ct. 470 U.S. 1059, 84 L.Ed.2d 436.

In first-degree murder case, medical testimony contrary to defense psychiatric testimony, influence of social factors including defendant's defendant's prior conduct for impeachment considered all evidence post-trial hearings to determine factors sufficient for leniency. *State v. Jordan* (1983) 137 Ariz. 504, 672 P.2d 1105, certiorari denied 104 S.Ct. 464 U.S. 865, 78 L.Ed.2d 436.

Mitigating circumstance defendant was only 19 years old, weigh aggravating factors committed in expectation of value and was especially heinous, cruel and depraved imposition of death penalty. *Gerlaugh* (1983) 135 Ariz. 135.

Defendant convicted properly received death sentence aggravating circumstances defendant had previous felonies involving another and he committed heinous and depraved factors were present. *State v. Smith* (1983) 138 Ariz. 63, 659 P.2d 107, certiorari denied 104 S.Ct. 3097, 462 U.S. 1074.

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

that the  
or de-  
d in its  
avating  
entially  
sentenc-  
m find-  
pecuni-  
riz. 504,  
riz. 240,

ng peti-  
existed  
ity was  
ation of  
Const.  
1983) 127  
and 144

ce case  
as suffi-  
imposi-  
1983) 137  
ied 104  
6.

cruelty,  
consti-  
rovision  
circum-  
heinous,  
diamond  
rari de-  
2d 367.  
or first-  
as miti-  
ndant's  
ance of  
er sen-  
ate, and  
matter  
igation;  
ire that  
factors  
State v.  
2d 637,  
858, 78  
13 Ariz.  
51 Ariz.  
17 S.Ct.

ation of  
quired to  
required  
found;  
present-  
ate v.  
2d 637,  
858, 78  
13 Ariz.  
51 Ariz.  
17 S.Ct.

life im-  
pulty to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For sentencing purposes, aggravating circumstance that defendant knowingly created grave

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

4.1. — Custody, aggravating circumstances

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

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

4.2. — Grave risk of death, mitigating circumstances

Evidence that there was no other people in the immediate vicinity when they were shot, that one of the victims for a victim pleaded with him, defendant pointed the gun at the victims was sufficient aggravating circumstance for imposing death sentence in committing murder defendant created a grave risk of death to other persons in addition to victim. *McMurtrey* (1986) 151 Ariz. 1, certiorari denied 107 S.Ct.

Trial court in determining whether sentence of death or life imprisonment under A.R.S. § 13-703, improper aggravating circumstance of defendant's grave risk of death to another person in addition to victim of § 13-703, subd. F, paragraph 1, defendant endangered was a victim in that defendant fired a shot into bedroom and killed defendant shot second victim who ran into hallway. *State v. Libberton* (1984) 129 Ariz. 395, 710 P.2d 1050

Defendant's murder of victim created grave risk of harm for defendant pointed his gun at the victim and told them that defendant's aggravating circumstance was defendant knowingly created grave risk of death to another person in addition to victim. *State v. Smith* (1981) 129 Ariz. 506, 633 P.2d 315

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

#### 4.1. — Custody, aggravating or mitigating circumstances

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

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

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

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

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

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

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

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

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

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

Record failed to sustain trial court's finding the existence of grave risk of death as an aggravating circumstance warranting death penalty. *State v. Clark* (1980) 126 Ariz. 428, 616 P.2d 888, certiorari denied 101 S.Ct. 796, 445 U.S. 1067, 66 L.Ed.2d 612.

#### 4.25. — Felony murder, aggravating or mitigating circumstances

Giving of felony-murder instruction is mitigating circumstance in sentencing defendant only where there is some doubt as to defendant's specific intent to kill victim. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

If evidence shows that defendant took active and deliberate part in killing, death penalty may be imposed even though theory of felony-murder

## § 13-703

### Note 4.25

was presented to jury. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

#### 4.3. — Heinous, cruel or depraved manner, aggravating or mitigating circumstances

Murder of victim was committed in especially cruel, heinous and depraved manner as delineated in aggravating circumstances statute, where victim was bound and gagged, threatened with death, received 24 stab wounds, of which only five could immediately have killed him, and thus, probably suffered physical torment prior to death. *State v. LaGrand* (1987) 153 Ariz. 21, 734 P.2d 563, certiorari denied 108 S.Ct. 207, 98 L.Ed.2d 158.

For purposes of aggravating circumstance of murders committed in especially heinous, cruel, or depraved manner, it is not necessary that all three elements be present, and finding of any one of those factors is sufficient to constitute aggravating circumstance. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

Finding of aggravated circumstance that murders with baseball bat and pipe wrench were committed in cruel manner was inappropriate, where defendant had attacked each of victims quickly and by surprise, State offered no evidence to establish pain or suffering by those victims, and record was inconclusive as to whether any of victims were conscious following initial blow to head. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

Finding of aggravating circumstance that murders were committed in heinous and depraved manner was supported by evidence that defendant had continued to beat victims, who were mother and children with whom he had lived for more than two years, with pipe wrench and baseball bat after they had collapsed to floor, had used force that was sufficient to fracture victims' skulls, and had shoved jagged portion of broken baseball bat through throat of one victim after he beat her; defendant's actions amounted to gratuitous violence and evidenced heinous or depraved state of mind. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

Evidence that victim realized defendant intended to kill him and begged not to be killed, that defendant stabbed victim in chest four times, that it might have taken victim as long as five minutes to die, and that victim died in writhing pain while lying on red ant hill was sufficient to find that murder was committed in cruel manner, supporting imposition of death penalty. *State v. Castaneda* (1986) 150 Ariz. 382, 724 P.2d 1.

Murders were committed in cruel, heinous, and depraved manner, which could be considered as aggravating circumstance in determining whether to impose death penalty, where victims were kept uncertain as to their fate and were murdered only after another victim was shot in back of head, and where murders were senseless in that they were unnecessary to accomplish under-

## CRIMINAL CODE

lying robbery, victims were helpless in that they were bound and gagged, and defendant evinced total disregard for human life. *State v. Correll* (1986) 148 Ariz. 468, 715 P.2d 721.

Because most first-degree murders are cruel, heinous and depraved, the statutorily required inquiry concerning aggravating circumstances to be considered in imposing death penalty under A.R.S. § 13-703, subd. F, par. 6, is whether conduct was especially cruel, heinous or depraved. *State v. Johnson* (1985) 147 Ariz. 395, 710 P.2d 1050.

Evidence was insufficient to support finding of aggravating circumstance of heinous or depraved conduct under A.R.S. § 13-703, subd. F, par. 6, even though defendant killed senselessly, without apparent purpose or motive, and possibly while inebriated or to some extent mentally deranged, where defendant fired shotgun at bed in darkened bedroom killing one victim, and defendant then shot second victim after second victim ran into hallway. *State v. Johnson* (1985) 147 Ariz. 395, 710 P.2d 1050.

Murder of convenience store clerk was not especially heinous, within meaning of aggravating circumstance of this section that offense was committed in especially heinous, cruel or depraved manner, where defendant shot convenience store clerk in head immediately after demanding that clerk hand over money in cash register, he inflicted no further violence on victim and did not mutilate him and there was no indication that defendant "relished" act of murder. *State v. Smith* (1985) 146 Ariz. 491, 707 P.2d 289.

Murder of convenience store clerk was not committed in especially cruel manner within meaning of this section's aggravating circumstance that defendant committed offense in especially heinous, cruel or depraved manner where defendant shot clerk in head once, but there was no evidence he intended or reasonably foresaw pain and mental anguish suffered by victim during two-week interval between shooting and his death. *State v. Smith* (1985) 146 Ariz. 491, 707 P.2d 289.

Imposition of death penalty on conviction of first-degree murder was justified on a finding of such aggravating circumstances as cruelty, that victim was in pain before his ultimate death, and heinous and depraved manner of crime, that defendant used special bullets which he knew were designed to inflict greater tissue damage on a human body. *State v. Rossi* (1985) 146 Ariz. 359, 706 P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

A defendant who relishes the murderous act by such behavior as saving the spent bullets and giving them away as souvenirs can be said to have acted in an especially heinous and depraved state of mind as is required to find an aggravating circumstance justifying imposition of death penalty. *State v. Rossi* (1985) 146 Ariz. 359, 706

## CRIMINAL CODE

P.2d 371, appeal after remand P.2d 1223.

Evidence that defendant inflicted distress and physical pain on aggravating circumstance that committed in especially cruel manner (1984) 145 Ariz. 212, 700 P.2d 105, 106 S.Ct. 2169, 471 U.S. 525.

Abduction, violent sexual strangulation of helpless severely distressed elements of "heinous and depraved" state of mind for purging circumstance in sentencing first-degree murder prosecution (1984) 146 Ariz. 212, 700 P.2d 105, 106 S.Ct. 2169, 471 U.S. 525.

State failed to establish that "especially heinous, cruel or depraved" circumstance, in the absence of suffering by victim: died by drowning. *State v. Ariz.* 412, 698 P.2d 207, affirmed 476 U.S. 147, 90 L.Ed.2d 123.

Record was not sufficient that murder was so "cruel" penalty, in light of failure of victims were conscious at time v. Poland (1985) 144 Ariz. 3 affirmed 106 S.Ct. 1749, 476 U.S. 123.

Enumeration in § 13-703 of depraved behavior is in the dictionary the expressions or one of the an aggravating circumstance when physical pain or mental suffering by victim, while heinous and depraved mental state and attitude of reflected by his words and actions. *Carriger* (1984) 143 Ariz. 1 certiorari denied 105 S.Ct. 2585 L.Ed.2d 864.

Defendant committed murder for purposes of finding aggravating imposition of death penalty, victim was kept for eight hours in ultimate fate, was raped on a stretcher pushed from 40-foot embankment begging for her life, was struck with rock. *State v. Gillies* (1981) 691 P.2d 655, certiorari denied 470 U.S. 1059, 84 L.Ed.2d 83.

Aggravating factor of cruelty of death sentence focuses on physical suffering. *State v. Ariz.* 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84

Evidence, including evidence forced to climb down steep embankment in dark, was kicked off edge of embankment and despite pleading for mercy death with rock, and defendant's conduct in incident as "fun," supported

ess in that they  
fendant evinced  
State v. Correll  
1.

rders are cruel,  
torily required  
ircumstances to  
penalty under  
6, is whether  
heinous or de-  
147 Ariz. 395,

pport finding of  
einous or de-  
3-703, subd. F,  
led senselessly,  
tive, and possi-  
extent mentally  
shotgun at bed  
victim, and de-  
n after second  
Johnson (1985)

clerk was not  
ig of aggravat-  
at offense was  
cruel or de-  
nt shot conve-  
ately after de-  
money in cash  
violence on vic-  
l there was no  
"act of mur-  
Ariz. 491, 707

clerk was not  
manner within  
vating circum-  
ffense in espe-  
manner where  
but there was  
nably foresaw  
by victim dur-  
ooting and his  
Ariz. 491, 707

conviction of  
on a finding of  
s cruelty, that  
ate death, and  
of crime, that  
hich he knew  
tissue damage  
ssi (1985) 146  
er remand 154

murderous act  
nt bullets and  
an be said to  
and depraved  
l an aggravat-  
ition of death  
Ariz. 359, 706

P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

Evidence that defendant inflicted both mental distress and physical pain on victim established aggravating circumstance that murder was committed in specially cruel manner. State v. Roscoe (1984) 145 Ariz. 212, 700 P.2d 1312, certiorari denied 105 S.Ct. 2169, 471 U.S. 1094, 85 L.Ed.2d 525.

Abduction, violent sexual penetration and strangulation of helpless seven-year-old child established elements of "heinous" crime and "depraved" state of mind for purpose of aggravating circumstance in sentencing defendant in first-degree murder prosecution. State v. Roscoe (1984) 146 Ariz. 212, 700 P.2d 1312, certiorari denied 105 S.Ct. 2169, 471 U.S. 1094, 85 L.Ed.2d 525.

State failed to establish that murders were "especially heinous, cruel or depraved" as aggravating circumstance, in the absence of any evidence of suffering by victims, who apparently died by drowning. State v. Poland (1985) 144 Ariz. 412, 698 P.2d 207, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Record was not sufficient to support finding that murder was so "cruel" as to allow death penalty, in light of failure of State to show that victims were conscious at time of death. State v. Poland (1985) 144 Ariz. 388, 698 P.2d 183, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Enumeration in § 13-703 of heinous, cruel, or depraved behavior is in the disjunctive and all of the expressions or one of them could constitute an aggravating circumstance; cruelty is found when physical pain or mental distress is suffered by victim, while heinous and depraved go to the mental state and attitude of the perpetrator as reflected by his words and actions. State v. Carriger (1984) 143 Ariz. 142, 692 P.2d 991, certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.2d 864.

Defendant committed murder in cruel fashion, for purposes of finding aggravating factor warranting imposition of death penalty, where victim was kept for eight hours uncertain as to her ultimate fate, was raped on two occasions, was pushed from 40-foot embankment, and despite begging for her life, was still beaten to death with rock. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Aggravating factor of cruelty for imposition of death sentence focuses on victim's mental and physical suffering. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Evidence, including evidence that victim was forced to climb down steep embankment in the dark, was kicked off edge when she was over it, and despite pleading for mercy, was beaten to death with rock, and defendant's reference to incident as "fun," supported finding of heinous-

ness and depravity in commission of murder for purpose of imposing death penalty. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Elimination of witnesses, as motive for murder, illustrates heinousness and depravity for purposes of imposition of death penalty. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Fact that defendant was separately punished for crimes he committed prior to murder, including kidnapping, aggravated robbery, and sexual assault, did not preclude consideration of these events on issue of cruelty for purpose of death sentence. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Suffering of victim who lingers, knowing he or she will be killed, or victim who is kept uncertain as to his or her fate, is to be contrasted with individual who is killed instantly without knowing what happened in determining whether aggravating factors of cruelty and heinousness were present in killing so as to warrant death penalty. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Victim's certainty or uncertainty as to his or her ultimate fate can be indicative of cruelty and heinousness, for purpose of imposition of death penalty. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

While aggravating factors of cruelty, heinousness, and depravity, for purposes of imposition of death penalty, have been defined disjunctively, analytically they are interlinked; one fact pattern is frequently illustrative of all three factors since act of cruelty to victim can also reflect perpetrator's state of mind. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Imposition of death sentence upon conviction of first-degree murder on ground that offense was committed in an especially heinous, cruel or depraved manner was warranted in that victim, who was beaten and forced to undress and was raped over course of a six-hour period, suffered both mentally and physically and, when near death after strangulation following a tremendous struggle, was repeatedly stabbed. State v. Clabourne (1984) 142 Ariz. 335, 690 P.2d 54.

Under § 13-703 defining an aggravated circumstance in a capital case as an offense committed in an especially heinous, cruel or depraved manner, the term "cruel" involves pain and distress visited upon the victim, including mental anguish, whereas the terms "heinous and depraved" are concerned with the mental state and attitude of the perpetrator, and include apparent relishing of the murder by the killer,

## § 13-703

### Note 4.3

needless mutilation of victim, senselessness of the crime and helplessness of the victim, and infliction of gratuitous violence on the victim. *State v. Clabourne* (1984) 142 Ariz. 335, 690 P.2d 54.

Element of cruelty under death penalty statute, § 13-703, focuses upon the pain and the mental and physical distress visited upon the victims, while depravity focuses upon the mental state and attitude of the perpetrator as reflected in his words and actions. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

To find cruelty under death penalty statute, § 13-703, the State must show beyond a reasonable doubt that the victim was conscious when the acts of violence causing death were committed. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

Where State failed to prove beyond a reasonable doubt that victim was conscious after she sustained a blow to the head which caused a hairline fracture in her skull, trial court's finding that defendant committed murder in an especially cruel manner could not stand. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

Under death penalty statute, § 13-703, numerous factors can be considered in making a finding of depravity, namely, the infliction of gratuitous violence on the victim, the senselessness of the murder, and the helplessness of the victim. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

Under death penalty statute, § 13-703, perverse gagging of a victim reflects a depraved state of mind. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

In prosecution for first-degree murder, trial court's finding of depravity was proper, where a ball of cloth was placed in victim's nasal pharynx to assure suffocation, and defendant did not tell the police about the victim until 24 hours after he was apprehended and 48 hours after he left the victim bound and gagged. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

Cruelty for purposes of aggravating circumstance justifying imposition of death penalty that murder was committed in especially heinous, cruel, or depraved manner refers to mental and physical pain suffered by victim. *State v. Harding* (1984) 141 Ariz. 492, 687 P.2d 1247.

Under this section providing death penalty for murder, physical pain or mental distress suffered by victim can support finding of cruelty as an aggravating circumstance. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

## CRIMINAL CODE

Under provision of this section making heinous, cruel, or depraved conduct an aggravating circumstance, the presence of one or more of these three types of behavior justifies a finding of aggravated circumstances. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

"Heinous" and "depraved" as used in this section providing the death penalty for murder with aggravating circumstances concern the mental state and attitude of the perpetrator. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

Murder was "cruel," for purpose of this section imposing death penalty for murder where cruelty is an aggravating circumstance, where victim suffered mental anguish as defendant inflicted numerous wounds, and defendant stood close enough to victim to see that victim was in great pain and then fired again, including one shot which left powder burns, when defendant left he knew that victim was not dead and that victim was suffering, victim's left arm was almost severed by a bullet and was left hanging by a muscle, and victim, who was a doctor, and part-time deputy, was conscious for approximately 30 minutes after the attack and knew that he was slowly bleeding to death as he radioed to medics. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

Murder was specially "heinous" and "depraved," for purpose of this section providing death penalty for murder with aggravating circumstances, where defendant exhibited complete disregard for victim's life: once victim was down and helpless, defendant stood close enough to see this, and could have made his escape but decided to shoot again, and shot victim from rear at close range rather than taking victim's guns and disabling two-way radio and patrol car as he had done with other deputy, making the crime senseless; intentional and repeated firing of high powered destructive weapon at victim tended to show crime was heinous and depraved. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

Aggravating factor that a murder victim was killed in an especially heinous and depraved manner goes to the mental state and attitude of the perpetrator as reflected by his or her words and actions. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

Murder of a 73-year-old victim was committed by defendant in expectation of the receipt of something of pecuniary value and was committed in an especially heinous and depraved manner, and no mitigating circumstances were sufficiently substantial to call for leniency; therefore, death penalty was properly imposed upon defendant. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

Provision of this section making "heinous, cruel or depraved" murder an aggravating circum-

## CRIMINAL CODE

stance is in the disjunctive, one or more of them could be an aggravating circumstance. *State v. James* (1984) 141 Ariz. 685 P.2d 1293, 105 S.Ct. 398, 83 L.Ed.2d 332.

Under this section, aggravating circumstance of "cruelty" is found where mental distress is suffered by victim. *State v. James* (1984) 141 Ariz. 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 83 L.Ed.2d 332.

For purposes of determining aggravating circumstances under this section, "heinous" means hatefully or especially bad, and "depraved" means involving baseness, corruption, perjury, or the like. *State v. James* (1984) 141 Ariz. 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 83 L.Ed.2d 332.

Where several hours passed before victim was killed, where victim was beaten all over body during attack, where victim was taunted and released in his presence, where victim was released, and where victim was beaten with fists, boards, and chairs, murder was committed in a "cruel" manner, satisfying aggravating circumstance under this section. *State v. James* (1984) 141 Ariz. 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 83 L.Ed.2d 332.

Murder which was committed with fists, boards, and chairs, and extended period of time until victim was released, after which victim's body was thrown into mine shaft, was committed in a "heinous and depraved" manner, satisfying aggravating circumstance under this section. *State v. James* (1984) 141 Ariz. 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 83 L.Ed.2d 332.

For purpose of aggravating circumstance under this section, "heinous" refers to perpetrator's mental state and attitude, and involves mental and physical pain suffered by victim. *State v. Libberton* (1984) 141 Ariz. 685 P.2d 1284.

Under provision of this section providing death penalty for murder in an especially heinous, cruel, or depraved manner, a finding of only one aggravating circumstance is necessary to constitute such a finding because statutory language is disjunctive. *State v. Libberton* (1984) 141 Ariz. 685 P.2d 1284.

For purposes of aggravating circumstance under this section, murder in a "cruel" manner where victim was forced to watch his wife being killed, where victim was forced to watch his wife being held at gun point during attack, and where victim knew assailant

CRIMINAL CODE

ance is in the disjunctive, and all of its expressions or one of them could constitute an aggravating circumstance. State v. James (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 83 L.Ed.2d 332.

Under this section, aggravating circumstance of "cruelty" is found when physical pain or mental distress is suffered by murder victim. State v. James (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

For purposes of determining existence of aggravating circumstances under this section, "heinous" means hatefully or shockingly evil, grossly bad, and "depraved" means marked by debasement, corruption, perversion or deterioration. State v. James (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

Where several hours passed between time intent to kill victim was formed and time that victim was killed, where victim was viciously beaten all over body during such time, where victim was taunted and his murder was discussed in his presence, where victim pled to be released, and where victim was then viciously beaten with fists, boards and rocks until he expired, murder was committed in an "especially cruel" manner, satisfying requirement for such aggravating circumstance under this section. State v. James (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

Murder which was committed by beating victim with fists, boards, and rocks over an extended period of time until victim finally expired, after which victim's body was thrown down in mine shaft, was committed in an especially "heinous and depraved" manner, for purposes of determining presence of aggravating circumstances under this section. State v. James (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

For purpose of aggravating circumstances listed in this section, "heinous and depraved" refer to perpetrator's mental state whereas "cruelty" involves mental and physical pain suffered by victim. State v. Libberton (1984) 141 Ariz. 132, 685 P.2d 1284.

Under provision of this section making commission of murder in an especially heinous, cruel or depraved manner an aggravating circumstance, a finding of only one of such factors is necessary to constitute such aggravating circumstance because statutory expression is in the disjunctive. State v. Libberton (1984) 141 Ariz. 132, 685 P.2d 1284.

For purposes of aggravating circumstances listed in this section, murder was committed in a "cruel" manner where victim heard assailants discuss killing him and where to hide his body, where victim was forced to drive his own car and held at gun point during two-hour drive to place, where victim knew assailants had chosen to com-

mit murder, and where assaults on victim began within several hours after midnight, but he was not killed until almost daybreak. State v. Libberton (1984) 141 Ariz. 132, 685 P.2d 1284.

Where victim was subjected to mental cruelty by hearing assailants discuss killing him and what to do with his body and where victim was physically abused by being beaten with rocks, a board, and then with more rocks while conscious, aggravating circumstance of "heinous, cruel or depraved" was present in murder. State v. Libberton (1984) 141 Ariz. 132, 685 P.2d 1284.

With regard to aggravating circumstance that defendant committed the offense in an especially heinous, cruel or depraved manner, defendant must intend that the victim suffer or reasonably foresee a substantial likelihood that victim will suffer as consequence of defendant's acts. State v. McCall (1983) 139 Ariz. 147, 677 P.2d 920, certiorari denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d 375.

With regard to infliction of pain on a victim as predicate for finding of aggravating circumstance that offense was committed in an especially heinous, cruel or depraved manner, such pain can be either physical pain or mental distress. State v. McCall (1983) 139 Ariz. 147, 677 P.2d 920, certiorari denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d 375.

In contrast to emphasis upon feelings and sufferings of victims in case of aggravating circumstance of cruelty, statutory concepts of "heinous" and "depraved" involve killer's vile state of mind at time of murder. State v. McCall (1983) 139 Ariz. 147, 677 P.2d 920, certiorari denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d 375.

Evidence in murder prosecution, including fact that one victim was not only shot twice in the head but also had his throat cut open, that slashing came just at time of victim's death or shortly thereafter, and that the mutilation was designed to be a "message" to warn other people, supported finding, as an aggravating circumstance, that defendant committed the offense in an especially heinous, cruel or depraved manner. State v. McCall (1983) 139 Ariz. 147, 677 P.2d 920, certiorari denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d 375.

Where three victims, after giving up their valuables, were forced to lie down on a bed, had their hands taped behind their backs, and were gagged with socks, and where two of the three had to endure unimaginable terror of having their loved ones shot to death within their hearing and then having to wait for their own turn to come, such mental distress clearly constituted cruelty, and justified finding that murders were committed in an especially heinous, cruel or depraved manner. State v. McCall (1983) 139 Ariz. 147, 677 P.2d 920, certiorari denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d 375.

Concepts of heinous and depraved, for purposes of establishing aggravating circumstance

CRIMINAL CODE

section making heinous or one of more of justifies a finding State v. Chaney 1265.

as used in this penalty for murder concern the perpetrator. Ariz. 295, 686 P.2d

purpose of this section for murder where circumstance, where as defendant in defendant stood that victim was in aim, including one when defendant not dead and that left arm was left hanging was a doctor, and for approximate attack and knew to death as he Chaney (1984) 141

heinous" and "depraved" section providing aggravating circumstance prohibited complete victim was down close enough to his escape but victim from rear victim's guns patrol car as he making the crime repeated firing of at victim tend- and depraved. 295, 686 P.2d

der victim was depraved man- attitude of the her words and Ariz. 227, 686 t. 548, 469 U.S.

was committed the receipt of l was commit- depraved man- es were suffi- cy; therefore, sed upon de- 41 Ariz. 227, S.Ct. 548, 469

heinous, cru- ating circum-

§ 13-703

Note 4.3

that murder was committed in an especially heinous, cruel, or depraved manner, go to mental state and attitude of perpetrator as reflected in his words and actions. *State v. Lambright* (1983) 138 Ariz. 63, 673 P.2d 1, certiorari denied 105 S.Ct. 267, 469 U.S. 892, 83 L.Ed.2d 203.

Evidence, including proof that victim was abducted and driven away from city in which she was picked up by her captors, was scared and trembling as she sat in backseat of car, was sexually assaulted during drive, was taken to an isolated location and placed in obvious fear for her life, as evidenced by her asking her captors if they intended to let her go, and was then sexually assaulted a second time before being killed, supported finding of aggravating circumstance of cruelty, that is, murder was committed in a cruel manner, based on great degree of mental pain inflicted on victim during course of crime. *State v. Lambright* (1983) 138 Ariz. 63, 673 P.2d 1, certiorari denied 105 S.Ct. 267, 469 U.S. 892, 83 L.Ed.2d 203.

Where victim was choked and then stabbed in chest and abdomen, knife was twisted and turned while it was inside her, her throat was then cut deeply, she remained alive and was still conscious as she raised herself up on one elbow when her assailants turned to leave, and then defendant returned and threw large boulder down on her head, aggravating element of cruelty, provided for in this section, was established. *State v. Lambright* (1983) 138 Ariz. 63, 673 P.2d 1, certiorari denied 105 S.Ct. 267, 469 U.S. 892, 83 L.Ed.2d 203.

Evidence, including proof that when defendant was arrested one year after murder he was wearing a necklace with a charm that had belonged to victim, that when authorities inquired about the charm, defendant told them he kept it as a memento of the trip, plus proof that defendant participated in celebration of killing during which group played song "We Are the Champions," supported finding that defendant had a heinous and depraved attitude during the crime, thereby establishing that aggravating circumstance. *State v. Lambright* (1983) 138 Ariz. 63, 673 P.2d 1, certiorari denied 105 S.Ct. 267, 469 U.S. 892, 83 L.Ed.2d 203.

Where evidence supported aggravating circumstance that murder was committed in an especially heinous, cruel, or depraved manner, based on findings of cruelty relative to both great mental pain inflicted on victim during course of murder and victim's suffering of great physical pain during murder itself, and that defendant had a heinous and depraved state of mind, imposition of death penalty was proper, notwithstanding that in mitigation defendant presented a lack of record of prior violent crime, honorable discharge from military, an asserted unsettled family life as a child, and fact that state's witness who purportedly participated in murder was granted immunity for her testimony. *State v. Lambright* (1983) 138 Ariz. 63, 673

CRIMINAL CODE

CRIMINAL CODE

P.2d 1, certiorari denied 105 S.Ct. 267, 469 U.S. 892, 83 L.Ed.2d 203.

Helplessness of murder victims plus gratuitous nature of bludgeoning, beyond point necessary to rob or to dispatch victims by shooting, rendered beating apart from the usual or norm, and it therefore was "depraved" within meaning of aggravating circumstance that murders were committed in "an especially cruel, heinous and depraved manner." *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383 certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

Where there was no evidence beyond reasonable doubt that victims were conscious, evidence failed to establish that sadistic treatment of victims on part of defendant was especially cruel to the victims, for purposes of aggravating circumstance that murders were committed in "an especially cruel, heinous and depraved manner." *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

Where murder victim was run over twice and his skull crushed, such was ghastly mutilation of victim sufficient to support finding that offense was committed in especially heinous and depraved manner, for purposes of this section making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

As used in provision of this section making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner, "heinous" and "depraved" involve mental state and attitude of offender as reflected in his words and actions; factors to be considered include infliction of gratuitous violence on victim and needless mutilation of victim. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

Evidence which, in first-degree murder prosecution, failed to indicate that victim suffered more pain than that of initial blow which rendered him unconscious failed to establish that offense was committed in cruel manner, for purposes of this section making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

For purposes of applying this section making commission of offense in especially heinous, cruel or depraved manner an aggravating circumstance in first-degree murder prosecution, "cruelty" involves victim's pain or suffering before death. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

Imposition of death sentence for the bombing death of a newspaper reporter by hired killer

was not improper, in light of order was accomplished in an order. *State v. Adamson* (1983) P.2d 972, certiorari denied 104 S.Ct. 865, 78 L.Ed.2d 178.

Where murder victim was transported to isolated location, her fate, was cast from 40 feet, brutalized and beaten into unconsciousness to her death, trial court purporting to find aggravating circumstances of cruelty to defendant to death after his degree murder. *State v. C* 500, 662 P.2d 1007.

For purposes of establishing factor in sentencing defendant involves mental and physical suffering of victim, and evidence of mental pain resulting from such factor for extended period while victim in custody, is relevant to sentencing, however, where evidence whether victim was conscious at time of offense "existed." *State v. C* 500, 662 P.2d 1007.

Each element of aggravating circumstance that murder was committed in especially heinous, cruel or depraved manner, as defined and construed by the Supreme Court, chose to be disjunctive did not render this section unconstitutional. 135 Ariz. 404, 661 P.2d 104 S.Ct. 199, 464 U.S.

For purposes of aggravating circumstance that defendant committed murder in especially heinous, cruel or depraved manner, involves pain and mental suffering inflicted on victim. *Id.*

For purposes of aggravating circumstance that defendant committed murder in especially heinous, cruel or depraved manner, involves mental state and attitude of perpetrator and actions. *Id.*

In first-degree murder prosecution, evidence of death of victim from infliction of cruelty was not sufficient to establish aggravating circumstance that defendant committed murder in especially heinous, cruel or depraved manner, where there was no evidence that defendant inflicted any pain, but it was sufficient to establish that after injection of defendant was conscious and nervous. *Id.*

Murder was committed in especially heinous and depraved manner on top of dead victim's wounds and several times which inflicted additional wounds and at the time, defendant called a "snitch" and with each

S.Ct. 267, 469 U.S.

victims plus gratuitous beyond point necessary victims by shooting, the usual or norm, and within meaning that murders were cruel, heinous and marding (1983) 137 certiorari denied 104 L.Ed.2d 246.

ce beyond reason-conscious, evidence treatment of vic- especially cruel to aggravating circum- mitted in "an espe- praved manner." Ariz. 278, 670 P.2d 1017, 465 U.S.

an over twice and astly mutilation of ding that offense heinous and de- of this section mak- ce to commit of- ruel or depraved (1983) 136 Ariz. 312, 104 S.Ct. 435, 464

section making it ommit offense in depraved manner, olve mental state ected in his words onsidered include ce on victim and State v. Rich- P.2d 57, certiorari 986, 78 L.Ed.2d

ce murder prose- victim suffered blow which ren- to establish that manner, for pur- aggravating cir- in especially hei- r. State v. Rich- P.2d 57, certiorari 986, 78 L.Ed.2d

s section making ally heinous, cru- ravating circum- prosecution, "cru- suffering before (1983) 136 Ariz. 312, 104 S.Ct. 435, 464

for the bombing r by hired killer

was not improper, in light of fact that the murder was accomplished in an especially cruel manner. State v. Adamson (1983) 136 Ariz. 250, 665 P.2d 972, certiorari denied 104 S.Ct. 204, 464 U.S. 865, 78 L.Ed.2d 178.

Where murder victim was repeatedly raped, was transported to iso' d location not knowing her fate, was cast fro. .0-foot cliff, and then brutalized and beaten into unconsciousness prior to her death, trial court properly found aggravating circumstances of cruelty in sentencing defendant to death after his conviction for first-degree murder. State v. Gillies (1983) 135 Ariz. 500, 662 P.2d 1007.

For purposes of establishing aggravating factor in sentencing defendant, "cruelty" involves mental and physical distress suffered by victim, and evidence of mental anguish of victim resulting from such factors as being held captive for extended period while uncertain as to ultimate fate, is relevant to establish "cruelty;" however, where evidence is inconclusive as to whether victim was conscious during infliction of violence, sentencing court cannot find that "cruelty" existed. State v. Gillies (1983) 135 Ariz. 500, 662 P.2d 1007.

Each element of aggravating circumstance that murder was committed in especially heinous, cruel or depraved manner has been narrowly defined and construed and fact that Supreme Court chose to read circumstance in the disjunctive did not render aggravating circumstance unconstitutional. State v. Jeffers (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

For purposes of aggravating factor that defendant committed murder in especially heinous, cruel or depraved manner, element of cruelty involves pain and mental and physical distress visited on victim. Id.

For purposes of aggravating circumstance that defendant committed murder in especially heinous, cruel or depraved manner, terms "heinous and depraved" involve mental state and attitude of perpetrator as reflected in his words and actions. Id.

In first-degree murder prosecution arising out of death of victim from heroin overdose, element of cruelty was not proven under aggravating circumstance that defendant committed offense in especially heinous, cruel or depraved manner where there was no evidence that victim suffered any pain, but instead, it appeared from record that after injection of heroin, victim lost consciousness and never regained it before she died. Id.

Murder was committed in especially heinous and depraved manner where defendant climbed on top of dead victim and hit her in the face several times which eventually resulted in additional wounds and bleeding and, at the same time, defendant called victim "a bitch and a dirty snitch" and with each striking blow said "This

one is for so and so. [naming several names]." Id.

In determining whether murder was committed in especially heinous or depraved manner, factor to consider is apparent relish with which defendant commits murder. Id.

"Cruelty," an aggravating circumstance for imposition of sentence of life imprisonment or death, involves pain and distress visited upon victim, while "heinous" and "depraved" go to mental state and attitude of perpetrator as reflected in his words and actions. State v. Graham (1983) 135 Ariz. 209, 660 P.2d 460.

Aggravating circumstance provision of this section consisting of killing in "especially heinous, cruel, or depraved manner" is not unconstitutionally broad and vague. State v. Gretzler (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

Not all first-degree murders are "especially heinous, cruel, or depraved," but, rather, such aggravating circumstance is present if additional circumstances of a heinous, cruel or depraved nature set a killing apart from the usual or the norm. Id.

Defendant, who was convicted of two counts of first-degree murder and was sentenced to death, had committed the offenses in "heinous, cruel or depraved manner" where victim husband was bound for sustained period in such a manner that he would choke if his legs were straightened and victim wife heard her husband being shot to death and then had to wait for her turn to come. Id.

Factors which can lead to a finding that the aggravating circumstance of heinousness or depravity is present in a murder include: relishing of the murder by killer; infliction of gratuitous violence on victim; needless mutilation of victim; senselessness of the crime; helplessness of victim; and indiscriminate violent attacks on persons other than the murder victim. Id.

While evidence was inconclusive as to whether victim suffered in such a way as to support finding that crime was committed in cruel manner, record established that murder reflected heinous and depraved attitude and was committed in expectation of receipt of something of pecuniary value; thus, imposition of death penalty was proper, even though defendant contended that he was intoxicated at time of crime. State v. Woratzeck (1982) 134 Ariz. 452, 657 P.2d 865.

The word "cruel," within former § 13-454 (now, this section) authorizing the death penalty when the defendant has committed the offense in an especially heinous, cruel, or depraved manner was interpreted as being disposed to inflict pain in a wanton, insensate or vindictive manner and as being sadistic. State v. Poland (1982) 132 Ariz. 269, 645 P.2d 784, appeal after remand 144 Ariz. 388, 412, 698 P.2d 183, 207, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Where murder committed by defendant, who inflicted upon defenseless woman multiple stab wounds in the neck and chest areas, then poured a flammable liquid over her body and around her home and set fire to home while victim's three children were inside in order to try to dispose of body, was especially heinous and more depraved than the norm of first-degree murders, although murder was not especially cruel in that state did not prove beyond a reasonable doubt that victim suffered during commission of murder, defendant was properly sentenced to death. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

Senselessness of murders, given inability of victims to thwart escape, especially in such an isolated area, and fact that a young child, less than two years old, who posed no threat to captors, was indiscriminately shot while in arms of his mother, compelled conclusion that actual slayers possessed a shockingly evil state of mind and warranted sentence of death on ground that offenses were committed in an especially heinous, cruel or depraved manner and in expectation or the receipt of anything of pecuniary value. *State v. Tison* (1981) 129 Ariz. 526, 639 P.2d 335, certiorari denied 103 S.Ct. 180, 459 U.S. 882, 74 L.Ed.2d 147, rehearing denied 103 S.Ct. 391, 459 U.S. 1024, 74 L.Ed.2d 520.

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, evidence including evidence that defendant stabbed victim numerous times and that defendant carved his nickname on victim's back, sufficiently supported finding that the offense was committed in an especially heinous, cruel or depraved manner. *State v. Vickers* (1981) 129 Ariz. 506, 633 P.2d 315.

Although medical expert's testimony supported conclusion that murder was not "especially cruel," where, after defendant struck victim several times with claw hammer, he removed victim's watch, wallet, and shoes, where defendant tied victim's legs together and dragged him some 50 feet to edge of mine shaft even though he knew his victim was still alive, where defendant admitted throwing rocks on top of victim as he lay twitching at bottom of mine shaft, and where, as defendant was driving away, he waved goodbye and said he hoped he never saw victim again, defendant committed crime in especially heinous and depraved manner so as to justify imposition of death penalty. *State v. Bishop* (1980) 127 Ariz. 531, 622 P.2d 478.

For purposes of determining existence of aggravating circumstance so as to justify imposition of death penalty, aspect of "cruelty" involves pain and mental and physical distress visited upon the victim; "heinous" and "depraved" go to mental state and attitude of perpetrator as reflected in his words and actions. *Id.*

For purposes of death penalty statute, former § 13-454 (now, this section), evidence sustained finding that murders were committed in an espe-

cially cruel and depraved manner. *State v. Clark* (1980) 126 Ariz. 428, 616 P.2d 888, certiorari denied 101 S.Ct. 796, 449 U.S. 1067, 66 L.Ed.2d 612.

Evidence established that killing of two victims who were bound and held for substantial period of time was especially heinous, or shockingly evil. *State v. Steelman* (1980) 126 Ariz. 19, 612 P.2d 475, certiorari denied 101 S.Ct. 287, 449 U.S. 913, 66 L.Ed.2d 141.

In order to be especially heinous, cruel or depraved, manner in which murder was committed must be such as to set defendant's acts apart from the norm of first-degree murder. *State v. Lujan* (1979) 124 Ariz. 365, 604 P.2d 629.

For a killing to be especially cruel, perpetrator must senselessly or sadistically inflict great pain on his victim. *Id.*

Helplessness of victim, lack of necessity for killing to establish defendant's plan to steal, and magnitude of wound inflicted demonstrating a clear intent to kill did not indicate that such killing was accomplished in an especially heinous or depraved manner. *Id.*

Where defendant shot victim twice in the back, murder was not committed in especially heinous, and depraved manner so as to warrant imposition of death penalty. *State v. Brookover* (1979) 124 Ariz. 38, 661 P.2d 1322.

4.25. — *Gratuitous violence, aggravating or mitigating circumstances*

In determining whether murder was committed in heinous or depraved manner, one factor to consider is infliction of gratuitous violence on victim. *State v. Jeffers* (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

4.5. — *Death sentence, aggravating or mitigating circumstances*

Mitigating circumstances surrounding defendant's murder of victim, such as defendant's young age, prior home life, and remorse were insufficient to outweigh aggravating circumstances of cruel, heinous, and depraved nature of defendant's conduct; thus, leniency in sentencing was not warranted. *State v. LaGrand* (1987) 153 Ariz. 21, 734 P.2d 563, certiorari denied 108 S.Ct. 207, 98 L.Ed.2d 158.

It is essential to inquire in totality of circumstances surrounding murder to determine whether aggravating factors warranting imposition of death penalty exist. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 84 L.Ed.2d 834.

Although balancing human factors, including facts that defendant had changed his attitudes while in prison, had become religious, shown remorse, and proved himself to be placid prisoner, against defendant's former behavior militated in his favor, such balancing did not require leniency, precluding imposition of death penalty for murder, given seriousness of defendant's crimes, which also included kidnapping, aggrava-

ted robbery and sexual assault (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 84 L.

Imposition of the death penalty for first-degree murder without absence of evidence that that is, that there was sufficient evidence that the victims had been prior to being placed in the had been a struggle. *State v. Ariz.* 259, 645 P.2d 784, appeal denied 101 S.Ct. 388, 412, 698 P.2d 1; 101 S.Ct. 1749, 476 U.S. 147, 9.

In light of wanton and brutal nature of killings and former convictions of other of death sentence was not proportionate to the offense. *State v. Greenawalt* (1981) 128 Ariz. 391, 633 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

Refusal to conduct separate sentencing of defendant for crimes was not error, § 13-454 (repealed); now, separate sentencing hearing does not constitute error. *State v. Ariz.* 283, 614 P.2d 825, 101 S.Ct. 408, 449 U.S. 986, 72 L.Ed.2d 863.

Absence of evidence that defendant intended to kill, as bearing on mitigation of death penalty, is not a mitigating circumstance. *State v. Ariz.* 283, 614 P.2d 825, 101 S.Ct. 408, 449 U.S. 986, 72 L.Ed.2d 863.

Evidence from which it is apparent that defendant intended to shoot victim in vital part of body, and lack of specific intent to kill, upon presence or absence of mitigating circumstances, and where defendant's evidence to contradict such his act, court could find mitigating circumstances, in imposition of death penalty.

Defendant failed to request police and waiver of right to constitute mitigating circumstance in imposition of death sentence.

For purposes of determining existence of aggravating circumstance in imposition of death penalty, mental and physical distress visited upon the victim, "heinous" and "depraved" go to mental state and attitude of perpetrator as reflected in his words and actions. *State v. Ceja* (1980) 127 Ariz. 531, 622 P.2d 478.

Evidence that defendant's husband and wife, initiated a search and then dragged

manner. State v. [unclear] P.2d 888, certiorari denied 105 S.Ct. 1067, 66 L.Ed.2d [unclear]

robbery and sexual assault. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 84 L.Ed.2d 834.

and shot her four more times in the head for no apparent reason, and that after husband had been shot and had fallen to the floor, defendant shot him in the back and kicked him in the face repeatedly, again for no apparent reason, supported finding of "heinous" and "depraved" nature so as to justify imposition of the death penalty. Id.

killin of two vic- eld fo substantial heinous, or shock (1980) 126 Ariz. 19, 101 S.Ct. 287, 449

Imposition of the death penalty in prosecution for first-degree murder was not warranted in absence of evidence that the murders were cruel, that is, that there was suffering by the victims or that the victims had been bound or injured prior to being placed in the water, or that there had been a struggle. State v. Poland (1982) 132 Ariz. 269, 645 P.2d 784, appeal after remand 144 Ariz. 388, 412, 698 P.2d 183, 207, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Imposition of death penalty for first-degree murder was proper where trial court considered all matters presented in mitigation of sentence and did not find them sufficiently substantial to call for leniency. State v. Arnett (1980) 125 Ariz. 201, 608 P.2d 778.

heinous, cruel or rder was commit- andant's acts apart; murder. State v. P.2d 629.

In light of wanton disregard for human life, brutal nature of killings and defendant's two former convictions of other murders, imposition of death sentence was neither excessive nor disproportionate to the offenses committed. State v. Greenawalt (1981) 128 Ariz. 150, 624 P.2d 828, certiorari denied 102 S.Ct. 364, 454 U.S. 882, 70 L.Ed.2d 191.

Trial court which considered testimony of two psychiatrists who had examined defendant but found that there was only a possibility that defendant's capacity to conform his conduct to requirements of law was significantly impaired and which considered defendant's conduct at time crime was committed and his conduct and demeanor at time of trial, did not err in finding that mitigating circumstances were not established and in imposing death penalty upon conviction of defendant for first-degree murder. State v. Evans (1980) 124 Ariz. 525, 606 P.2d 16.

of necessity for plan to steal, and demonstrating a dicate that such specially heinous

Refusal to conduct separate hearings for sentencing of defendant for capital and noncapital crimes was not error, in that provision of § 13-454 (repealed; now § 13-703) for separate sentencing hearing does not require separate hearings on sentencing to be held when there are convictions for capital and noncapital crimes but, rather, legislative intent was merely to provide for bifurcated procedure by which sentencing was to be separated from trial of guilt. Id.

Where there was nothing in record to establish that murder victim suffered pain, defendant's commission of such murder could not be considered especially cruel so as to warrant imposition of death sentence. State v. Lujan (1979) 124 Ariz. 365, 604 P.2d 629.

twice in the back, specially heinous, warrant imposi- Brookover (1979)

Absence of evidence that defendant knew victim or that defendant intended to kill victim at time he entered store merely showed lack of premeditation, rather than absence of specific intent to kill, as bearing on presence or absence of mitigating circumstances considered in imposition of death penalty. State v. Jordan (1980) 126 Ariz. 283, 614 P.2d 825, certiorari denied 101 S.Ct. 408, 449 U.S. 956, 66 L.Ed.2d 251.

Defendant, who was under sentence of death, was entitled to a new hearing at which he could attempt to present mitigating circumstances where defendant's failure to present mitigating factors at the sentencing hearing was apparently based on statutory limitations on mitigating factors that were then in effect and where, subsequent to the sentencing, the Supreme Court had held that a defendant must be allowed to present any mitigating circumstances that might tend to show why the death penalty should not be imposed. State v. Evans (1978) 120 Ariz. 158, 584 P.2d 1149, appeal after remand 124 Ariz. 526, 606 P.2d 16, certiorari denied 101 S.Ct. 252, 449 U.S. 891, 66 L.Ed.2d 119.

, aggravating or er was commit- er, one factor to us violence on 5 Ariz. 404, 661 S.Ct. 199, 464

Evidence from which it was clear that defendant intended to shoot victim and that defendant shot victim in vital part of body did not show lack of specific intent to cause death, as bearing upon presence or absence of mitigating circumstances, and where defendant offered no evidence to contradict such natural inference from his act, court could find absence of mitigating circumstances, in imposing death penalty. Id.

4.55. — Capacity of defendant, aggravating or mitigating circumstances

ating or mitli-

Defendant failed to show that his confession to police and waiver of hearing on his extradition constituted mitigating circumstance making imposition of death sentence inappropriate. Id.

Defendant's unrefuted but uncorroborated testimony that on day of murder he was under the influence of a hallucinogen was insufficient to establish defendant's "lack of capacity" as a mitigating circumstance, since record revealed that defendant's capacity on night of crime was not impaired. State v. James (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

unding defend- as defendant's remorse were ating circum- aved nature of cy in sentenc- Grand (1987) ari denied 108

For purposes of determining existence of aggravating circumstance so as to justify imposition of death penalty, aspect of "cruelty" involves pain and mental and physical distress visited upon the victims; "heinous" and "depraved" go to mental state and attitude of perpetrator as reflected in his words and actions. State v. Ceja (1980) 126 Ariz. 35, 612 P.2d 491.

4.6. — Intoxication, aggravating or mitigating circumstances

ity of circum- ermine wheth- imposition of ies (1984) 142 ri denied 105

Evidence that defendant, in attempting to rob husband and wife, initially shot wife twice in the chest and then dragged her into another room

Defendant had failed to prove mitigating circumstance of intoxication, where only evidence that defendant had been drinking on day of murders came from his own statements to police,

rs, including his attitudes gious, shown placid prison- vior militated t require le- eath penalty defendant's ng, aggrava-

## § 13-703

### Note 4.6

in which defendant also stated that he knew what he was doing on afternoon in question and that it was "not right." *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

In order for a sentencing judge to find that voluntary intoxication constitutes a mitigating circumstance, there must be evidence that defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired; and to find that defendant was under duress at the time of the crime, such duress must be unusual and substantial. *State v. Rossi* (1985) 146 Ariz. 359, 706 P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

Defendant's capacity during entire eight hours that victim was held captive could not have been so impaired by reason of his intoxication that he could not appreciate wrongfulness of his behavior, and thus intoxication did not provide mitigating factor against imposition of death penalty. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

In determining sentence for murder conviction, defendant's claim of intoxication was not shown to be a mitigating circumstance, since he had a precise memory of the events of that day. *State v. Smith* (1984) 141 Ariz. 510, 687 P.2d 1265.

Voluntary intoxication is mitigating circumstance in sentencing defendant after conviction if defendant's capacity to appreciate wrongfulness of his conduct was significantly impaired, but not so impaired as to constitute defense to prosecution. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

Where it was never argued at trial for first-degree murder that defendant was intoxicated, nor did defendant present any credible evidence of intoxication at sentencing hearing, and defendant controlled murder victim for period of eight hours, voluntary intoxication was not to be considered as mitigating circumstance in sentencing defendant after conviction. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

A defendant's intoxication or alcoholism at time of offense is a mitigating circumstance if the evidence shows that it significantly impaired defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. *State v. Zaragoza* (1983) 135 Ariz. 63, 659 P.2d 22, certiorari denied 103 S.Ct. 3097, 462 U.S. 1124, 77 L.Ed.2d 1356.

Fact that defendant was to some degree intoxicated at time he committed crime was not, by itself, a mitigating circumstance under death penalty statute. *State v. Woratzeck* (1982) 134 Ariz. 452, 657 P.2d 865.

Whether a defendant's intoxication is mitigating circumstance such as to make death penalty inappropriate for homicide depends upon whether defendant's capacity to appreciate wrongfulness of his conduct or to conform his conduct to

## CRIMINAL CODE

requirements of law was significantly impaired. *Id.*

Where defendant's wife testified that defendant was showing no effects of alcohol when he arrived at trailer, and defendant's testimony failed to show degree of impairment from intoxication at time of murder that would constitute mitigating circumstance, and, defendant had another conviction for aggravated assault, there were no mitigating circumstances sufficient to call for leniency, and therefore, sentence of death upon defendant's conviction for first-degree murder was properly imposed. *State v. Britson* (1981) 130 Ariz. 380, 636 P.2d 628.

Intoxication is "impairment", but whether defendant's intoxication was mitigating circumstance such as would make imposition of death penalty for homicide inappropriate depended upon whether his capacity to appreciate wrongfulness of his conduct or to conform his conduct to requirements of law was significantly impaired but not so impaired as to constitute defense to prosecution, and evidence fell short of proving necessary degree of impairment. *State v. Jordan* (1980) 126 Ariz. 283, 614 P.2d 825, certiorari denied 101 S.Ct. 283, 449 U.S. 986, 66 L.Ed.2d 251.

In prosecution for murder in the first degree, trial court did not commit fundamental error in finding that defendant's capacity was not significantly impaired by his consumption of alcohol so as to constitute a mitigating circumstance. *Id.*

### 4.65. — Drug use, aggravating or mitigating circumstances

Trial court properly refused to consider defendant's heroin use as a mitigating factor in homicide where the heroin use did not impair defendant's ability to appreciate the wrongfulness of his conduct, defendant was capable of maintaining a full-time job while being a heroin addict, defendant had a rather detailed plan to kill the victim, and defendant demonstrated detailed recall of the events. *State v. Tittle* (1985) 147 Ariz. 339, 710 P.2d 449.

### 4.7. — Pecuniary consideration, aggravating or mitigating circumstances

Defendant's expectation of pecuniary gain was aggravating factor in murder, though defendant may have reacted irrationally in response to failure or inability of victim to open safe in bank, where reason defendant was present in bank was his expectation of pecuniary gain and reason he stabbed victim was because victim was unable to open safe, frustrating defendant's attempt for pecuniary gain. *State v. LaGrand* (1987) 153 Ariz. 21, 734 P.2d 563, certiorari denied 108 S.Ct. 207, 98 L.Ed.2d 158.

There was insufficient evidence to support aggravating circumstance that murder was committed for pecuniary gain, notwithstanding that defendant had taken money and keys to truck from victim; defendant's motive, if any, for murder stemmed from difficulties in relationship,

## CRIMINAL CODE

and taking was only incident. *Wallace* (1986) 151 Ariz. 362

Trial court properly found committed for pecuniary gain circumstance in determining death penalty, where defendant very carefully executed arm es to robbery. *State v. Co* 468, 715 P.2d 721.

Murder was committed i receipt of anything of pecu meaning of this section's stance, where defendant c convenience store clerk s gaining access to cash regis clerk's control and defen that clerk give him all m then shot clerk when he cal instead of handing over c (1985) 146 Ariz. 491, 707 F

Evidence, including test defendant's associate stack o as prepayment for murder some of such money to d told witness murders wer that shortly before murd were armed with guns a coming into large amou important job, was suffi defendant was hired mu vating circumstance sta subd. F, par. 5, that de fense as consideration fo tion of receipt of anyth indisputably applied. *St* Ariz. 538, 703 P.2d 482 S.Ct. 834, 474 U.S. 1073,

Evidence that defend items for purpose of rot disposing of guards' b bags in which victims' cated that murders we planning of robbery an able doubt, as aggrav defendant committed o receipt of something of v. Poland (1985) 144 affirmed 106 S.Ct. 1749 123.

Evidence of a plan furtherance of that pla lish the aggravating penalty case that the offense as considerati expectation of the rece niary value. *State v. 1* 694 P.2d 222, certiora 471 U.S. 1143, 86 L.Ed

Term "pecuniary g § 13-703 authorizing i aggravated factor in death penalty, means thing of pecuniary val

7 impaired.  
at defend-  
l when he  
testimony  
rom intoxi-  
constitute  
nt had an-  
ult, there  
fficient to  
ntence of  
r first-de-  
State v.  
628.  
hether de-  
g circum-  
s of death  
depended  
te wrong-  
is conduct  
ntly im-  
titute de-  
l short of  
nt. State  
P.2d 825,  
S. 986, 66  
st degree,  
l error in  
ot signifi-  
alcohol so  
nce. Id.  
mitigat-  
sider de-  
factor in  
t impair  
wrongful-  
ipable of  
a heroin  
l plan to  
rated de-  
tle (1985)  
ggravat-  
s  
gain was  
efendant  
e to fail-  
in bank,  
in bank  
d reason  
s unable  
empt for  
(87) 153  
(08 S.Ct.  
port ag-  
as com-  
ing that  
to truck  
for mur-  
sonship,

and taking was only incidental thereto. State v. Wallace (1986) 151 Ariz. 362, 728 P.2d 232.

Trial court properly found that murders were committed for pecuniary gain, as aggravating circumstance in determining whether to impose death penalty, where defendant and accomplice very carefully executed armed robbery, and only motivation for murders was to leave no witnesses to robbery. State v. Correll (1986) 148 Ariz. 468, 715 P.2d 721.

Murder was committed in expectation of receipt of anything of pecuniary value, within meaning of this section's aggravating circumstance, where defendant committed murder of convenience store clerk solely for purpose of gaining access to cash register, which was under clerk's control and defendant first demanded that clerk give him all money in register, and then shot clerk when he called for store manager instead of handing over cash. State v. Smith (1985) 146 Ariz. 491, 707 P.2d 289.

Evidence, including testimony man gave defendant's associate stack of \$100 bills apparently as prepayment for murders, that associate gave some of such money to defendant, that person told witness murders were contract killings, and that shortly before murders all three assailants were armed with guns and were talking about coming into large amounts of money and doing important job, was sufficient to establish that defendant was hired murderer to whom aggravating circumstance statute A.R.S. § 13-703, subd. F, par. 5, that defendant committed offense as consideration for receipt or in expectation of receipt of anything of pecuniary value, indisputably applied. State v. Hooper (1985) 145 Ariz. 538, 703 P.2d 482, certiorari denied 106 S.Ct. 834, 474 U.S. 1073, 88 L.Ed.2d 805.

Evidence that defendant obtained numerous items for purpose of robbing van and ultimately disposing of guards' bodies, including canvas bags in which victims' bodies were found, indicated that murders were contemplated during planning of robbery and proved beyond reasonable doubt, as aggravating circumstance, that defendant committed offense in expectation of receipt of something of pecuniary value. State v. Poland (1985) 144 Ariz. 412, 698 P.2d 207, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Evidence of a plan to rob and a murder in furtherance of that plan are sufficient to establish the aggravating circumstance in a death penalty case that the defendant committed the offense as consideration for the receipt, or an expectation of the receipt, of something of pecuniary value. State v. Nash (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 1143, 86 L.Ed.2d 706.

Term "pecuniary gain," within provision of § 13-703 authorizing use of pecuniary gain as an aggravated factor in justifying imposition of death penalty, means that the receipt of something of pecuniary value must be the impetus for

the murder, not merely the result. State v. Nash (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 1143, 86 L.Ed. 2d 706.

Trial court could find the aggravating circumstance of pecuniary gain where basis for first-degree murder conviction was felony-murder and the felony was robbery. State v. Carriger (1984) 143 Ariz. 142, 692 P.2d 991, certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.2d 864.

Fact that pecuniary gain was not found at defendant's first sentencing on first-degree murder charge did not bar State from proving that circumstance on resentencing where the law had been clarified between the original sentencing and resentencing and where the facts would have supported the finding of pecuniary gain at the original sentencing. State v. Carriger (1984) 143 Ariz. 142, 692 P.2d 991, certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.2d 864.

In sentencing hearing after conviction of defendant on first-degree murder, evidence that murders were a part of overall scheme of robbery with specific purpose to facilitate escape, that defendant had three victims lie on the floor and before leaving shot each in turn with intent that no witnesses be left to identify robbers, and that murders were not unexpected or accidental was sufficient to support finding of aggravating factor that murders had been committed for pecuniary gain allowing death sentence, despite mitigating factor that during time between original sentencing and present sentencing defendant had obtained a G.E.D. degree. State v. Hensley (1984) 142 Ariz. 598, 691 P.2d 689.

In sentencing, the "pecuniary value" aggravating circumstance is applied when the murder was committed for a "financial motivation." State v. Villafuerte (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

In prosecution for kidnapping, first-degree murder, and theft of property valued in excess of \$1,000, although evidence supported jury's guilty verdict on the theft charge, this did not mean that the murder was necessarily committed for a "financial motivation," and trial judge was entitled to find that defendant committed murder and then formed the intent to commit theft. State v. Villafuerte (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

Aggravating circumstance justifying imposition of death penalty that murder was committed in expectation of pecuniary gain requires that pecuniary gain be cause of the murder, not just a result. State v. Harding (1984) 141 Ariz. 492, 687 P.2d 1247.

In light of defendant's acquittal of aggravated robbery and theft, pecuniary gain was not established as an aggravating circumstance with respect to first-degree murder. State v. James (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari

denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

For aggravating circumstance of murder being committed in expectation of receipt of something of pecuniary value to be present, pecuniary consideration must be cause of murder, not merely a result. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

Where defendant wanted victim's car so that he could leave state to evade capture following his escape from work furlough program, where defendant wanted money to facilitate his flight from state authorities, and where defendant then killed victim to hinder detection of his theft of victim's car and wallet, aggravating circumstance of murder for "pecuniary gain" was present. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

Testimony that defendant participated in killings with the expectation of receiving \$10,000 in payment therefor was sufficient to support finding that offense was committed as consideration for the receipt, or in expectation of receipt, of anything of pecuniary value. *State v. McCall* (1983) 139 Ariz. 147, 677 P.2d 920, certiorari denied 104 S.Ct. 2670, 467 U.S. 1220, 81 L.Ed.2d 375.

Evidence that defendant removed clothing, a briefcase and credit cards from possession of murder victim, and left scene of homicides in car that had been in custody of another victim, supported finding that defendant committed murders in course of obtaining valuable personal property from his victims, an aggravating circumstance for purposes of imposition of death penalty. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013.

Where defendant's confessions demonstrated that purpose of murder was to eliminate victim as witness to her own rape, and there was no evidence that pecuniary gain was cause of murder, trial court erred, after defendant's conviction of first-degree murder, in finding as aggravating circumstance that murder was committed in expectation of receipt of something of pecuniary value, even though defendant did steal victim's purse, money, and credit cards after murder had been committed. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

For commission of a crime in the expectation of receipt of something of pecuniary value to be present as an aggravating circumstance in determining whether to impose sentence of life imprisonment or death for murder, murder must have been committed for a "financial motivation." *State v. Graham* (1983) 135 Ariz. 209, 660 P.2d 460.

Where defendant, who was convicted of two counts of first-degree murder and was sentenced to death, had committed such offenses in order to obtain victim's car as substitute car in which defendant could continue flight from police and victim's credit cards, blank checks and expensive

camera were also taken after the killings, defendant had committed the offenses with expectation of receiving something of pecuniary value. *State v. Gretzler* (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

The trial court could find in prosecution for first-degree murder that the defendants committed the offense as consideration for or in expectation of the receipt of anything of pecuniary value. *State v. Poland* (1982) 132 Ariz. 269, 645 P.2d 784.

For "murder for pecuniary gain" to be an aggravating circumstance warranting imposition of death penalty, the murder need not be a "contract-type" murder or a murder "for hire" but, rather, such circumstance applies where hope of financial gain, i.e., robbery of victim, is a cause of the murder, and not merely the result. *State v. Rumsey* (1981) 130 Ariz. 427, 636 P.2d 1209, appeal after remand 136 Ariz. 166, 665 P.2d 48, affirmed 104 S.Ct. 2305, 467 U.S. 203, 81 L.Ed.2d 164.

For purposes of death penalty statute, former § 13-454 (now, this section), evidence that defendant, after killing victims, took their credit cards, some money, diamond rings and automobile was sufficient to establish aggravating factor of pecuniary value. *State v. Clark* (1980) 126 Ariz. 428, 616 P.2d 888, certiorari denied 101 S.Ct. 796, 449 U.S. 1067, 66 L.Ed.2d 612.

This section making pecuniary value an aggravating factor was not limited to "hired gun" situation. *Id.*

4.8. — Provocation, aggravating or mitigating circumstances

Even if victim's actions of informing against defendant and of being a prostitute were sufficient to constitute adequate provocation so as to be mitigating circumstance precluding imposition of death penalty, there was sufficient lapse of time between provocation and killing for those passions to "cool," where defendant learned that victim may have been informant against him months before murder and learned that victim was prostitute approximately one week before murder. *State v. Jeffers* (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

5. — Duress, aggravating or mitigating circumstances

Defendant had not murdered mother and her two children with whom he had lived under mitigating circumstance of unusual and substantial duress merely because mother had requested that defendant move out of mobile home. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

Defendant's personality disorder and impulse control problem was not within meaning of "duress" as mitigating circumstance in determining whether to impose death penalty upon murder

defendant. *State v. Co* 382, 724 P.2d 1.

Once the trial court found capacity was significant factor, defendant was under unusual duress, a mitigating factor weighed against any aggravating factors that the trial court may find. *State v. Co* 382, 724 P.2d 1.

It was not required that duress be a mitigating factor to call for leniency. *State v. Co* 382, 724 P.2d 1.

Any mitigating factors in homicide cases were not sufficient to justify leniency, and defendant's claim that and in minor role in *Villareal* (1985) 145 Ariz. 145, certiorari denied 106 L.Ed.2d 324.

Defendant's testimony that defendant was insufficient to establish mitigating circumstance in killing, *State v. Co* 382, 724 P.2d 1.

5.1. — Violent force

Armed robbery was against another person, defendant was previously convicted of murder in another person. *State v. Co* 382, 724 P.2d 1.

5.5. — Hearing

Criminal Rule 17: advise defendant of consequences of pleading guilty, address any duty of right to aggravation. *State v. Gannon* (1981) 141 Ariz. 141, 670 P.2d 383.

Where "change in plea" was for defendant's introduction of any mitigation/mitigation hearing of general due process

the killings, de-  
fenses with expec-  
pecuniary value.  
42, 659 P.2d 1,  
461 U.S. 971, 77  
04 S.Ct. 32, 463

prosecution for  
defendants commit-  
for or in expec-  
g of pecuniary  
2 Ariz. 269, 645

tain" to be an  
ating imposition  
need not be a  
rder "for hire"  
applies where  
y of victim, is a  
rely the result.  
427, 636 P.2d  
Ariz. 166, 665  
67 U.S. 203, 81

statute, former  
dence that de-  
k their credit  
and automo-  
aggravating  
v. Clark (1980)  
ari denied 101  
2d 612.

value an aggra-  
"hired gun"

ing or mitigat-

ming against  
e were suffi-  
ation so as to  
ng imposition  
ient lapse of  
ng for those  
learned that  
against him  
l that victim  
week before  
5 Ariz. 404,  
14 S.Ct. 199,

mitigating cir-

her and her  
lived under  
nd substan-  
d requested  
ome. State  
8 P.2d 232.

nd impulse  
ing of "du-  
etermining  
on murder

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

Once the trial court finds that the defendant's capacity was significantly impaired or that defendant was under unusual and substantial duress, a mitigating factor arises which is then weighed against any aggravating circumstances that the trial court may find to determine whether mitigating factors are sufficiently substantial to call for leniency. State v. Rossi (1985) 146 Ariz. 359, 706 P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

It was not required that defendant's impairment and duress be to such a degree as to constitute a defense to prosecution to be mitigating factors in imposition of death penalty, and when they were so considered, wrong standard for determining and applying those mitigating factors was employed, thus requiring that death sentence be vacated and that case be remanded for resentencing. State v. Rossi (1985) 146 Ariz. 359, 706 P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

Any mitigating factors in connection with homicides were not sufficiently substantial to justify leniency, and evidence did not support defendant's claim that he had acted under duress and in minor role in crimes. State v. Martinez-Villareal (1985) 145 Ariz. 441, 702 P.2d 670, certiorari denied 105 S.Ct. 339, 474 U.S. 975, 88 L.Ed.2d 324.

Defendant's testimony concerning fear of individual who also participated in killing of victim was insufficient to establish "duress" as a mitigating circumstance regarding defendant's participation in killing, since defendant's testimony on such point lacked credibility; defendant was apparently a willing participant. State v. James (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

5.1. — Violent felony, aggravating or mitigating circumstances

Armed robbery is violent felony committed against another person for purposes of death penalty aggravating circumstance that defendant was previously convicted of felony in United States involving use or threat of violence on another person. State v. Smith (1985) 146 Ariz. 491, 707 P.2d 289.

5.5. — Hearing, aggravating or mitigating circumstances

Criminal Rule 17.2 imposes duty on court to advise defendant of certain rights and consequences of pleading no contest, but does not address any duty of court to advise accused of right to aggravation-mitigation hearing. State v. Gannon (1981) 130 Ariz. 592, 638 P.2d 206.

Where "change in rules" by judicial decision was for defendant's benefit, allowing him to introduce any mitigating factors in aggravation/mitigation hearing, there was no violation of general due process requirements of funda-

mental fairness by reason of ex post facto application. State v. Jordan (1980) 126 Ariz. 283, 614 P.2d 825, certiorari denied 101 S.Ct. 408, 449 U.S. 986, 66 L.Ed.2d 251.

Fact that evidence was inconclusive as to whether victims suffered in such a way as to support finding that crime was committed in cruel manner was not of itself determinative; if the crime was committed in especially heinous, cruel, or depraved manner, either all or one, aggravating circumstance is present so as to support imposition of death penalty. State v. Ceja (1980) 126 Ariz. 35, 612 P.2d 491.

The purpose of an aggravation mitigation hearing is to determine the character and propensities of the defendant. State v. Valencia (1979) 124 Ariz. 139, 602 P.2d 307, appeal after remand 132 Ariz. 248, 645 P.2d 239.

6. — Character of offender, aggravating or mitigating circumstances

Mitigating circumstances offered by defendant concerning his upbringing, cooperation in preparation of presentence report, psychological problems, minor participation in murders, and age, were not sufficiently substantial, either individually or in combination, to call for leniency in determining whether to impose death sentence. State v. Correll (1986) 148 Ariz. 468, 715 P.2d 721.

Numerous letters written by family members and acquaintances attesting to defendant's good reputation were insufficient to establish good reputation as a mitigating factor, in light of defendant's statements at trial for murder that he had robbed drug dealers and sold illicit gems. State v. Poland (1985) 144 Ariz. 412, 698 P.2d 207, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Fact that defendant was a model prisoner was not a mitigating factor sufficiently substantial to call for leniency. State v. Poland (1985) 144 Ariz. 388, 698 P.2d 183, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Defendant's action in saving life of another inmate was evidence in mitigation of a sentence on first-degree murder conviction. State v. Carriker (1984) 143 Ariz. 142, 692 P.2d 991, certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed. 2d 864.

Fact that defendant was only 20 at time of offense, was born out of wedlock, and had a history of childhood mental disease which required him to be placed on Thorazine to control an aggressive personality were not sufficient mitigating factors to preclude imposition of death penalty on ground that murder was especially heinous, cruel and depraved. State v. Clabourne (1984) 142 Ariz. 335, 690 P.2d 54.

Defendant's age, his troubled childhood and feelings of remorse were not sufficient mitigating factors to preclude imposition of death penalty on ground that murder was especially heinous, cruel and depraved absent evidence that defendant's capacity to appreciate wrongfulness

of his conduct or to conform his conduct to requirements of law was significantly impaired. *State v. Clabourne* (1984) 142 Ariz. 335, 690 P.2d 54.

When defendant is being sentenced for first-degree murder, sentencer must consider as mitigating circumstance any aspect of defendant's character or record and any circumstance of offense relevant in determining whether sentence less severe than death is appropriate. *State v. McDaniel* (1983) 136 Ariz. 188, 665 P.2d 70.

In sentencing defendant after conviction for first-degree murder, if, after considering offered evidence as to defendant's mental illness, sentencing court concludes that evidence with respect to defendant's mental condition merely establishes a character or personality disorder, then court may conclude that mitigating circumstance of mental illness does not exist; court must further consider offered evidence, however, to determine whether it in some other way suggests that defendant should be treated with leniency. *State v. McMurtrey* (1983) 136 Ariz. 93, 664 P.2d 637, certiorari denied 104 S.Ct. 180, 464 U.S. 858, 78 L.Ed.2d 161, appeal after remand 143 Ariz. 71, 691 P.2d 1099, appeal after remand 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

Where trial court, in sentencing defendant after conviction for first-degree murder, considered evidence offered by defendant as to his mental illness sufficiently to conclude that it merely established that defendant suffered from character defect, but did not consider offered evidence further to determine whether it in some other way suggested that defendant should be shown leniency, there was risk that defendant was sentenced to death without full consideration of evidence offered in mitigation, and case was properly remanded for resentencing. *State v. McMurtrey* (1983) 136 Ariz. 93, 664 P.2d 637, certiorari denied 104 S.Ct. 180, 464 U.S. 858, 78 L.Ed.2d 161, appeal after remand 143 Ariz. 71, 691 P.2d 1099, appeal after remand 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

In determining whether a murder has been committed in an especially heinous or depraved manner, supreme court must necessarily consider the killer's state of mind at the time of the offense. *State v. Lujan* (1979) 124 Ariz. 365, 604 P.2d 629.

**6.1. — Appreciate wrongfulness, aggravating or mitigating conduct**

Mitigating circumstance that defendant's capacity to appreciate wrongfulness of his conduct or to conform to requirements of law was significantly impaired due to cocaine addiction required only proof of significant impairment of either of two personal attributes, not both. *State v. Rossi* (1987) 154 Ariz. 245, 741 P.2d 1223.

For purposes of determining appropriateness of imposition of death penalty defendant convicted of attempted burglary, attempted first-degree murder and first-degree murder failed to prove by preponderance of evidence that his cocaine addiction significantly impaired his capacity to appreciate wrongfulness of his conduct, based on defendant's efforts to cover up acts he committed on the days of the crime and defendant's ability to recall vivid details of crime themselves, but defendant proved by preponderance of evidence that his cocaine addiction significantly impaired his capacity to conform his conduct to requirements of law, based on unrefuted medical testimony on chemical dependency in general, and how addiction fostered insatiable and life controlling craving for additional drugs that overwhelmed user's ability to control his physical behavior. *State v. Rossi* (1987) 154 Ariz. 245, 741 P.2d 1223.

**6.2. — State of mind of defendant, aggravating or mitigating circumstances**

In considering defendant's state of mind for purposes of determining existence of aggravating circumstances warranting death penalty, supreme court must consider such things as defendant's apparently relishing the murder, inflicting gratuitous violence on victim, needless mutilation of victim, senselessness of the crime, and helplessness of victim. *State v. Summerlin* (1983) 138 Ariz. 426, 675 P.2d 686.

**6.5. — Remorse, aggravating or mitigating circumstances**

Presence of remorse as mitigating factor did not warrant leniency toward defendant who had murdered two children in heinous and depraved manner. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

Feelings of remorse were so minimal as to preclude use of remorse as a mitigating factor when death penalty was imposed on ground that murder was especially heinous, cruel and depraved. *State v. Clabourne* (1984) 142 Ariz. 335, 690 P.2d 54.

**6.4. — Impaired mental condition, aggravating or mitigating circumstances**

In penalty phase of first-degree murder trial, testimony of psychiatrist that defendant was a remorseless, bullying sociopath and victimized others merely for thrill of proving his "superiority" to his victims and his contempt for society's laws, and that defendant killed for the status he received by being able to escape the consequences of his actions was not sufficient to require finding of a mitigating circumstance of impaired mental condition. *State v. Gerlaugh* (1985) 144 Ariz. 449, 698 P.2d 694.

**6.5. — Age, aggravating or mitigating circumstances**

Defendant convicted of first-degree burglary, attempted first-degree murder, and first-degree murder proved by preponderance of evidence that he could be rehabilitated based on testimony

of three expert witnesses mining propriety of imposition. *State v. Rossi* (1987) 154 Ariz. 245, 741 P.2d 1223.

Fact that defendant was convicted of armed robbery and murder was not a mitigating factor for purposes of leniency for murder. *State v. Rossi* (1987) 154 Ariz. 245, 741 P.2d 289.

Defendant's youth, leniency, was not a substantial mitigating factor in sentencing for first-degree murder, an armed robbery at age 17, a similar armed robbery, an armed robbery attempted murder four days later, a question, fact that murder was impulsive act, but involved in which defendant was convicted of psychiatric delinquency, fact that defendant was delinquent, fact that defendant was associating with wild crowd, fact that defendant was laughing (1985) 144 Ariz. 499.

Neither defendant's age nor fact that he was a minor were mitigating factors to call for leniency. *State v. Gillies* (1984) 144 Ariz. 412, 698 P.2d 207, 476 U.S. 147, 90 L.Ed.2d 207.

While youth is certainly a mitigating factor, it is not a mitigating factor when impact was minimized by defendant's 20-year-old defendant's state of mind. *State v. Gillies* (1984) 144 Ariz. 412, 698 P.2d 207, 476 U.S. 147, 90 L.Ed.2d 207.

In determining sentence, defendant's age at time of crime, was not a mitigating factor. *State v. Smith* (1984) 144 Ariz. 412, 698 P.2d 207, 476 U.S. 147, 90 L.Ed.2d 207.

While age of defendant is a mitigating factor, it is not a mitigating factor when impact was minimized by defendant's 20-year-old defendant's state of mind. *State v. Gillies* (1984) 144 Ariz. 412, 698 P.2d 207, 476 U.S. 147, 90 L.Ed.2d 207.

In sentencing defendant for first-degree murder, judge properly found that defendant was 20 years old at time of crime, and maturity was a mitigating circumstance. *State v. Smith* (1984) 144 Ariz. 412, 698 P.2d 207, 476 U.S. 147, 90 L.Ed.2d 207.

In prosecution for which death penalty was sought, fact that defendant was 20 years old at time of crime was not a mitigating factor. *State v. Smith* (1984) 144 Ariz. 412, 698 P.2d 207, 476 U.S. 147, 90 L.Ed.2d 207.

Mitigating circumstance that defendant was only 20 years old at time of crime was not a mitigating factor. *State v. Smith* (1984) 144 Ariz. 412, 698 P.2d 207, 476 U.S. 147, 90 L.Ed.2d 207.

ing appropriateness  
defendant convicted  
npted first-degree  
ler failed to prove  
e that his cocaine  
ed his capacity to  
conduct, based on  
p acts he commit-  
e and defendant's  
crime themselves,  
ponderance of evi-  
n significantly im-  
n his conduct to  
unrefuted medical  
tency in general,  
asatiable and life  
ional drugs that  
control his physi-  
187) 154 Ariz. 245,

defendant, aggra-  
cumstances  
state of mind for  
nce of aggravat-  
leath penalty, su-  
ch things as de-  
the murder, in-  
victim, needless  
ess of the crime,  
ate v. Summerlin  
186.

ing or mitigating  
ating factor did  
defendant who had  
us and depraved  
6) 151 Ariz. 362.

o minimal as to  
mitigating factor  
d on ground that  
e, cruel and de-  
4) 142 Ariz. 335,

dition, aggra-  
cumstances  
ee murder trial,  
defendant was a  
and victimized  
g his "superiori-  
t for society's  
or the status he  
ape the conse-  
t sufficient to  
circumstance of  
te v. Gerlaugh  
4.

mitigating cir-  
egree burglary,  
nd first-degree  
ce of evidence  
ad on testimony

of three expert witnesses, for purpose of deter-  
mining propriety of imposition of death penalty.  
State v. Rossi (1987) 154 Ariz. 245, 741 P.2d  
1223.

Fact that defendant was 30 years old at time  
of armed robbery and murder did not establish  
defendant's relatively young age as mitigating  
factor for purposes of imposition of death pen-  
alty for murder. State v. Smith (1985) 146 Ariz.  
491, 707 P.2d 289.

Defendant's youth, leading to alleged passivi-  
ty, was not a substantial mitigating factor in  
sentencing for first-degree murder in light of:  
his prior criminal history, including conviction of  
an armed robbery at age 17 and participation in  
a similar armed robbery, kidnapping and at-  
tempted murder four days prior to crime in  
question, fact that murder was not a hasty im-  
pulsive act, but involved deliberation and cruelty  
in which defendant was a leader, and testimony  
of psychiatrist that defendant had history of  
associating with wild companions. State v. Ger-  
laugh (1985) 144 Ariz. 449, 698 P.2d 694.

Neither defendant's age, which was 36 at time  
of murders, nor fact that he was model prisoner  
were mitigating factors sufficiently substantial  
to call for leniency. State v. Poland (1985) 144  
Ariz. 412, 698 P.2d 207, affirmed 106 S.Ct. 1749,  
476 U.S. 147, 90 L.Ed.2d 123.

While youth is certainly mitigating factor,  
weighing against imposition of death penalty its  
impact was minimized by extent and duration of  
20-year-old defendant's participation in murder.  
State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655,  
certiorari denied 105 S.Ct. 1776, 470 U.S. 1059,  
84 L.Ed.2d 834.

In determining sentence for murder convic-  
tion, defendant's age at the time of the crime, 21  
years, was not a mitigating circumstance be-  
cause the defendant was mature for his age.  
State v. Smith (1984) 141 Ariz. 510, 687 P.2d  
1265.

While age of defendant might be mitigating  
circumstance in sentencing, it will not alone al-  
ways require leniency. State v. Gillies (1983)  
135 Ariz. 500, 662 P.2d 1007.

In sentencing defendant after his conviction  
for first-degree murder and other crimes, trial  
judge properly found that deliberation, duration  
of crime, and maturity of defendant nullified  
mitigating circumstance that defendant was only  
20 years old at time of offense. State v. Cimes  
(1983) 135 Ariz. 500, 662 P.2d 1007.

In prosecution for first-degree murder in  
which death penalty was sought, mitigating  
factor that defendant was 16 at time of the  
crimes was "sufficiently substantial" to call for  
life imprisonment instead of death despite aggra-  
vating circumstances of defendant's prior convic-  
tions for kidnapping, robbery and raping a victim  
at gunpoint. State v. Valencia (1982) 132 Ariz.  
248, 645 P.2d 239.

Mitigating circumstances, including fact that  
defendant was only 20 years of age when he

committed first-degree murder, did not, when  
weighed against aggravating circumstances con-  
sisting of fact that defendant had been convicted  
of another offense for which life imprisonment  
or death was impossible, that he had been previ-  
ously convicted of a felony involving use or  
threat of violence on others, that he committed  
the murder offense in especially heinous, cruel  
or depraved manner and that he committed the  
offense while in custody of department of cor-  
rections, require that his death sentence be re-  
versed. State v. Vickers (1981) 129 Ariz. 506,  
633 P.2d 315.

Defendant's Texas convictions, which occurred  
after murder in Arizona, could be considered as  
aggravating circumstances at sentencing hear-  
ing held subsequent to those convictions. State  
v. Jordan (1980) 126 Ariz. 283, 614 P.2d 825,  
certiorari denied 101 S.Ct. 408, 449 U.S. 986, 66  
L.Ed.2d 251.

Where defendant had not attacked validity of  
prior convictions by presenting specific claims of  
constitutional error, trial court correctly con-  
sidered such convictions as aggravating circum-  
stances though they were being collaterally at-  
tacked by means of petitions for federal writs of  
habeas corpus. *Id.*

Where convictions used to establish aggra-  
vating circumstances for death penalty resulted  
from submission on grand jury transcript but  
with defendant asserting not guilty plea and  
court being required to ascertain guilt beyond  
reasonable doubt, failure of court to have ad-  
vised defendant of his right not to incriminate  
himself did not invalidate such convictions so as  
to preclude their use to establish aggravating  
circumstances. State v. Steelman (1980) 126  
Ariz. 19, 612 P.2d 475, certiorari denied 101 S.Ct.  
287, 449 U.S. 913, 66 L.Ed.2d 141.

Fact that convictions used to establish aggra-  
vating circumstances for purposes of death pen-  
alty occurred subsequent to homicide involved  
did not preclude their consideration as aggra-  
vating circumstances. *Id.*

In imposing death sentence following convic-  
tion of murder in first degree, trial court prop-  
erly considered defendant's prior conviction for  
murder with malice in Texas, since murder for  
malice was a minimum second-degree murder  
and punishable under Arizona law by imprison-  
ment in state prison for not less than ten years.  
State v. Smith (1980) 125 Ariz. 412, 610 P.2d 46.

At hearing to resentence defendant for first-  
degree murder, it was not improper for the trial  
court to consider as an aggravating circum-  
stance a rape conviction which had not been  
entered prior to the original sentencing hearing  
where the rape was committed before the origi-  
nal sentencing hearing. State v. Valencia (1979)  
124 Ariz. 139, 602 P.2d 807, appeal after remand  
132 Ariz. 248, 645 P.2d 239.

The age of the offender is an important consid-  
eration in sentencing under this section. *Id.*

Evidence established that defendant's mental condition was not only mitigating factor in murder he committed, but also major and contributing cause of his conduct which was sufficiently substantial to outweigh aggravating fact of defendant's prior conviction, and imposition of death penalty was inappropriate. *State v. Brookover* (1979) 124 Ariz. 38, 601 P.2d 1322.

Guilty plea entered with respect to a prior felony charge was not invalid because defendant was not told at the time that such conviction might be used to impose death penalty if he was later convicted of murder. *State v. Watson* (1978) 120 Ariz. 441, 586 P.2d 1253, certiorari denied 99 S.Ct. 1254, 440 U.S. 924, 59 L.Ed.2d 478, appeal after remand 129 Ariz. 60, 628 P.2d 943.

State may not use a prior conviction to enhance punishment for later conviction if prior conviction was obtained in constitutionally infirm manner. *Id.*

Fear of force is element of robbery and a conviction of robbery presumes that such fear was present for purposes of determining whether conviction of robbery is aggravating circumstance to be considered in determining sentence to be imposed upon conviction of murder. *Id.*

It is nature of prior conviction and sentence possible that is aggravating circumstance to be considered in determining whether death penalty should be imposed for conviction of murder; sentence actually imposed pursuant to prior conviction is not controlling although it may be presented as mitigating factor. *Id.*

Fact that defendant had a prior felony conviction in California for attempted second-degree robbery was an "aggravating circumstance" for purpose of sentencing. *State v. Evans* (1978) 120 Ariz. 158, 584 P.2d 1149, appeal after remand, 124 Ariz. 526, 606 P.2d 16, certiorari denied 101 S.Ct. 252, 449 U.S. 891, 66 L.Ed.2d 119.

**6.6. — Ability to be rehabilitated, aggravating and mitigating circumstances**

Fact that numerous persons wrote letters on defendant's behalf did not establish his ability to be rehabilitated as a mitigating factor to imposition of death penalty; defendant showed no remorse and, in fact, relished his murderous act and possessed a prior arrest record for theft, drug usage, possession of a firearm, and forgery. *State v. Rossi* (1985) 146 Ariz. 359, 706 P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

**6.8. — Parental status, aggravating or mitigating circumstances**

In determining sentence for murder conviction, defendant's being the father of a small child was not a mitigating circumstance, where birth was out of wedlock and there was no apparent "family tie." *State v. Smith* (1984) 141 Ariz. 510, 687 P.2d 1265.

**6.9. — Passion, aggravating or mitigating circumstances**

Murders had not been committed as result of mitigating circumstance of passion, where defendant and victim had had more serious arguments than argument preceding murder in past and defendant showed neither anger nor resentment for having been asked to leave victim's house. *State v. Wallace* (1986) 151 Ariz. 362, 728 P.2d 232.

**7. — Prior conviction, aggravating or mitigating circumstances**

Aggravating factors, including defendant's previous conviction for offense punishable by life imprisonment or death, fact that offense was committed for pecuniary gain and in a heinous, cruel, or depraved manner, outweighed mitigating factor defendant's "significant impairment"— and justified defendant's death sentence for first-degree murder of his mother. *State v. Moorman* (1987) 154 Ariz. 578, 744 P.2d 679.

Defendant's prior convictions for armed robbery and kidnapping, involving use or threat of violence were proven beyond reasonable doubt at defendant's murder trial, and thus were properly considered as aggravating factors for purposes of sentencing. *State v. LaGrand* (1987) 153 Ariz. 21, 734 P.2d 563, certiorari denied 108 S.Ct. 207, 98 L.Ed.2d 158.

Trial court properly found that defendant had previously been convicted of felony involving use or threat of violence against another person, as aggravating circumstance to be considered in determining whether to impose death penalty, in that certified record indicated defendant had been convicted in California on three counts of robbery, one which involved use of firearm, though under California Penal Code person could theoretically commit robbery with threat of violence against property of victim but without use or threat of violence directed to victim. *State v. Correll* (1986) 148 Ariz. 468, 715 P.2d 721.

Defendant's 1965 California robbery conviction, which had occurred at a time when the penalty in Arizona for first time robbery conviction was five years to life, could be considered an aggravating circumstance as a conviction of an offense for which Arizona law could impose a life sentence, even though the maximum sentence for robbery at the time of the homicide was five years' imprisonment. *State v. Tittle* (1985) 147 Ariz. 339, 710 P.2d 449.

First-degree murder defendant, whose previous conviction of attempted armed robbery in California was used as aggravating factor under death penalty statute, had been convicted of crime involving use or threat of violence on another person, irrespective of what was noted in California judgment of conviction, as nature of crime for which defendant was convicted could not be committed in California without use of force or fear against person of another. *State v. Evans* (1986) 147 Ariz. 57, 708 P.2d 738.

Trial court properly prior armed robbery conviction as aggravating circumstance in imposing first-degree murder conviction occurred during armed store, even though convicted, where prior conviction. *State v. Smith* (1985) 146

Judgment of conviction in Illinois for three counts for which he received count and could have been satisfied aggravating circumstance. *State v. Smith* (1985) 146 Ariz. 510, 687 P.2d 1265.

Judgment against three counts of armed robbery and kidnapping of aggravated kidnapping. Supreme Court took jurisdiction of threat of violence aggravating circumstance. *State v. Hooper* (1985) 145 Ariz. 482, certiorari denied 107 S.Ct. 805.

In light of defendant's crime, and nature of his penetration, and stranglehold on child, defendant's ties with family or friends, mitigating circumstances. *State v. Roscoe* (1984) 145 Ariz. 526, 606 P.2d 16, certiorari denied 105 S.Ct. 525.

Where murder defendant's conviction of kidnapping found the existence of mitigating circumstance provided for. *State v. Smith* (1984) 146 Ariz. 359, 706 P.2d 371, appeal after remand 154 Ariz. 245, 741 P.2d 1223.

Trial judge did not consider prior felony conviction as mitigating circumstance in sentencing defendant. *State v. J.* 672 P.2d 169.

Prior convictions of aggravated robbery a reasonable doubt to an offense in the past under Arizona law. *State v. J.* 672 P.2d 169.

Trial court properly considered defendant's prior armed robbery convictions as aggravating circumstance in imposing death penalty upon first-degree murder conviction for killing which occurred during armed robbery of convenience store, even though convictions had been appealed, where prior convictions were affirmed. *State v. Smith* (1985) 146 Ariz. 491, 707 P.2d 289.

Judgment of conviction against defendant in Illinois for three counts of first-degree murder, for which he received death sentence for each count and could have received same in Arizona, satisfied aggravating circumstance statute A.R.S. § 13-703, subd. F, par. 1, that defendant had been convicted of another offense in the United States for which under state law sentence of life imprisonment or death was impossible. *State v. Hooper* (1985) 145 Ariz. 538, 703 P.2d 482, certiorari denied 106 S.Ct. 834, 474 U.S. 1073, 88 L.Ed.2d 805.

Judgment against defendant in Illinois on three counts of armed robbery and three counts of aggravated kidnapping, which crimes the Supreme Court took judicial notice involved use or threat of violence against others, satisfied aggravating circumstance statute A.R.S. § 13-703, subd. F, par. 2, that defendant was previously convicted of felony in the United States involving use of threat of violence on another person. *State v. Hooper* (1985) 145 Ariz. 538, 703 P.2d 482, certiorari denied 106 S.Ct. 834, 474 U.S. 1073, 88 L.Ed.2d 805.

In light of defendant's past history, his prior crime, and nature of his abduction, violent sexual penetration, and strangulation of helpless seven-year-old child, defendant's age of 20 or close ties with family or friends were not sufficient mitigating circumstances to outweigh cruel, heinous and depraved nature of offense. *State v. Roscoe* (1984) 145 Ariz. 212, 700 P.2d 1312, certiorari denied 105 S.Ct. 2169, 471 U.S. 1094, 85 L.Ed.2d 525.

Where murder defendant admitted at the sentencing hearing that he had previously been convicted of kidnapping, the trial court properly found the existence of an aggravating circumstance provided for by sentencing this section. *State v. Smith* (1984) 141 Ariz. 510, 687 P.2d 1265.

Trial judge did not err in using petitioner's prior felony convictions as aggravating circumstances in sentencing petitioner to death notwithstanding that petitioner was appealing prior convictions. *State v. Jordan* (1983) 137 Ariz. 504, 672 P.2d 169.

Prior convictions of robbery by assault and of aggravated robbery supported a finding beyond a reasonable doubt that petitioner was convicted of an offense in the United States for which under Arizona law a sentence of life imprisonment was impossible and thus supported a finding of aggravating circumstances in death penalty proceeding. *State v. Jordan* (1983) 137 Ariz. 504, 672 P.2d 169.

Defendant's earlier conviction of dangerous or deadly assault by prisoner supported finding of two aggravating circumstances, namely, conviction of an offense punishable by life imprisonment and conviction of felony involving use of violence on another person, where facts of prior conviction indicated that defendant and another jail inmate struck fellow inmate several times with darts discharged through homemade blowgun, that one dart penetrated victim's jawbone, a second traversed his skin near the shoulder, and a third penetrated his leg, and nurse and forensic pathologist both testified that darts were capable of causing serious physical injury. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

In sentencing defendant convicted of murder, trial court did not err in finding prior murder conviction to be aggravating circumstance, even though defendant was convicted of prior murder subsequent to conviction in instant case. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

To constitute aggravating circumstance under this section, prior conviction of defendant must be for felony which by its statutory definition involves violence or threat of violence on another person. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

After defendant's conviction of first-degree murder and other crimes, trial court erred in considering evidence of circumstances surrounding defendant's prior conviction of theft to determine that it involved use and threat of violence and in thus using such prior conviction as aggravating circumstance in sentencing defendant to death. *State v. Gillies* (1983) 135 Ariz. 500, 662 P.2d 1007.

Convictions entered prior to sentencing hearing in first-degree murder case may be considered regardless of the order in which the underlying crimes occurred or the order in which the convictions were entered; disapproving of *State v. Ortiz*, 639 P.2d 1020. *State v. Gretzler* (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

Where defendant's conviction of conspiracy to commit murder was not entered until conclusion of murder trial, it should not have been considered as an aggravating circumstance in death penalty sentencing hearing. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

7.5. — Mental impairment, aggravating or mitigating circumstances

Defendant's partial mental impairment, which involved significant impairment of his capacity to appreciate wrongfulness of his conduct or to conform it to requirements of the law but which

was not sufficient to constitute a defense in prosecution for first-degree murder, was not an absolute bar to imposition of death penalty. *State v. Gretzler* (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, defendant's character disorder consisting of a sociopathic-psychopathic personality could not be used to establish the statutory mitigating circumstance consisting of a significant impairment of capacity to appreciate wrongfulness of one's conduct or to conform one's conduct to requirements of law, but not a sufficient impairment as to constitute a defense to prosecution. *State v. Vickers* (1981) 129 Ariz. 503, 633 P.2d 315.

Defendant's character disorders may be considered by trial judge prior to imposition of sentence in proceeding involving capital offense even though such circumstances cannot be used to establish the statutory mitigating circumstance consisting of a significant impairment of capacity to appreciate wrongfulness of one's conduct or to conform one's conduct to requirements of law, but not a sufficient impairment as to constitute a defense to prosecution. *Id.*

Evidence, including testimony of expert that defendant had suffered no brain damage from use of marijuana and sniffing of paint, and testimony of psychologist that defendant was intelligent and alert and was in possession of all his faculties and not bothered by depression, anxiety, or subjective discomfort, did not support defense counsel's claim that defendant was slow, brain-damaged individual with significantly impaired mental capacity and did not support finding of any mitigating circumstances which would indicate inappropriateness of imposition of death penalty following conviction for two murders. *State v. Ceja* (1980) 126 Ariz. 35, 612 P.2d 491.

Record did establish that defendant who was sentenced to death suffered impairment of his capacity to appreciate wrongfulness of his conduct or to conform his conduct to requirements of law but such impairment did not establish mitigation sufficiently substantial to call for leniency. *State v. Steelman* (1980) 126 Ariz. 19, 612 P.2d 475, certiorari denied 101 S.Ct. 287, 449 U.S. 913, 66 L.Ed.2d 141.

7.8. — Minor participation in offense, aggravating or mitigating circumstances

Evidence that defendant agreed that the only thing to do was to kill victim, that he agreed to hide victim's body in mine shaft, that he pointed a gun at victim during trip to mine and threatened to shoot victim if he said anything, that defendant fired gun at victim's head from close range, that defendant slammed large rock onto victim's head, and that defendant helped throw victim into mine shaft established beyond a reasonable doubt that defendant intended to kill

victim, and thus, defendant's participation in murder was not relatively minor for sentencing purposes. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

8. — Burden of proof, aggravating or mitigating circumstances

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

Arizona death penalty statute, A.R.S. § 13-703, subd. E, imposing on defendant burden of proof of mitigation "sufficiently substantial to call for leniency," did not unconstitutionally shift burden of proof to petitioner, in that petitioner was given opportunity to present factors in support of mitigation only after state had met its burden of proof on existence of at least one aggravating circumstance and only after petitioner had been convicted on charge of first-degree murder. *Jeffers v. Ricketts*, D.Ariz. 1986, 627 F.Supp. 1334, affirmed in part, reversed in part 832 F.2d 476.

In capital cases, state has burden of proving existence of aggravating circumstances beyond a reasonable doubt and burden is upon defendant to show mitigating circumstances; however, defendant need not prove mitigating circumstances beyond a reasonable doubt, but by lesser burden of a preponderance of the evidence. *State v. McMurtrey* (1984) 143 Ariz. 71, 691 P.2d 1099, appeal after remand 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

Even though the trial court could consider the eyewitness testimony negating capital murder defendant's claim of significant impairment due to intoxication in determining whether defendant had shown by a preponderance of the evidence that his intoxication, if any, was a mitigating circumstance, trial court's error in requiring defendant to prove mitigating circumstances beyond a reasonable doubt was neither harmless nor nonprejudicial. *State v. McMurtrey* (1984) 143 Ariz. 71, 691 P.2d 1099, appeal after remand 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

Once defendant in capital murder case has proven mitigating circumstances by a preponderance of the evidence, question before court is still whether mitigating circumstances are sufficiently substantial to call for leniency. *State v. McMurtrey* (1984) 143 Ariz. 71, 691 P.2d 1099, appeal after remand 151 Ariz. 105, 726 P.2d 202, certiorari denied 107 S.Ct. 1359, 94 L.Ed.2d 530.

Placing burden of proof on defendant to prove mitigating circumstances in sentencing determination did not violate due process. *State v. Lambright* (1983) 138 Ariz. 63, 673 P.2d 1.

The state seeking the death penalty for an accused must prove the existence of aggravating circumstances beyond a reasonable doubt. *State v. Jordan* (1983) 137 Ariz. 504, 672 P.2d 169.

State must prove aggravating circumstances beyond reasonable doubt. *State v. Harding*

(1983) 137 Ariz. 278, 670 P.2d denied 104 S.Ct. 1017, 465 U.S. 1246.

Once defendant has been found a reasonable doubt, due process by requiring defendant to establish circumstances, as facts which show mitigation are peculiarly work of defendant. *State v. Richmond* Ariz. 312, 666 P.2d 57, certiorari 435, 464 U.S. 986, 78 L.Ed.2d 367

In capital cases, state bears burden of existence of aggravating circumstances beyond a reasonable doubt. *State v. Jefferson* Ariz. 404, 661 P.2d 1105, certiorari 199, 464 U.S. 865, 78 L.Ed.2d 367

Burden of proof to establish circumstances is not met by lack of production by defendant of some affirmative evidence. *State v. Green* Ariz. 150, 624 P.2d 828, certiorari 364, 454 U.S. 882, 70 L.Ed.2d 367

Generally, when defendant alleges that his behavior is substance cause result, he is considered result, and same is true in respect of absence of mitigating consideration of death penalty. (1980) 125 Ariz. 283, 614 P.2d denied 101 S.Ct. 408, 449 U.S. 251.

Defendant had burden of proving circumstances to avoid imposition. *Id.*

In death penalty case, state bears burden of proving circumstances beyond a reasonable doubt, and Supreme Court death penalty to life imprisonment of aggravating factors is

Placing burden of proof of mitigating circumstances on defendant him his right to due process (1980) 125 Ariz. 412, 610 P.2d 412

8.2. — Stipulations, aggravating circumstances

In the absence of a record defendant clearly intended to have state prove, by admission of aggravating circumstances imposition of the death penalty would have to be given the sentencing procedures established by court erred in sentencing by allowing which had been submitted permitting their use for determination of guilt or innocence. *State v. Jordan* 137 Ariz. 80, 669 P.2d 58.

8.3. — Judicial notice, aggravating circumstances

The Supreme Court may take judicial notice that certain crimes are, but felonies against others in which there were aggravating circum-

icipation in  
sentencing  
4) 141 Ariz.

ing or miti-

31, 562 P.2d  
8 [main vol-

ve, A.R.S.  
endant bur-  
tly substan-  
stitutional-  
ner, in that  
to present  
after state  
stence of at  
and only af-  
n charge of  
etts, D.Ariz.  
in part, re-

of proving  
ces beyond  
pon defend-  
s; however,  
ing circum-  
ut by lesser  
e evidence.  
1, 691 P.2d  
z. 105, 726  
t. 1359, 94

onsider the  
tal murder  
riment due  
e defendant  
e evidence  
mitigating  
quiring de-  
stances be-  
r harmless  
rey (1984)  
ter remand  
denied 107

case has  
preponder-  
e court is  
are suffi-  
State v.  
P.2d 1099,  
P.2d 202,  
Ed.2d 530.  
t to prove  
g determi-  
State v.  
d 1.

ty for an  
gravating  
bt. State  
P.2d 169.  
stances  
Harding

(1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

Once defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring defendant to establish mitigating circumstances, as facts which would tend to show mitigation are peculiarly within knowledge of defendant. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.E.2d 367.

In capital cases, state bears burden of proving existence of aggravating circumstances beyond reasonable doubt. *State v. Jeffers* (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

Burden of proof to establish mitigating circumstances is not met by lack of proof, but by production by defendant of some form of affirmative evidence. *State v. Greenawalt* (1981) 128 Ariz. 150, 624 P.2d 828, certiorari denied 102 S.Ct. 364, 454 U.S. 882, 70 L.Ed.2d 191.

Generally, when defendant acts with knowledge that his behavior is substantially likely to cause result, he is considered to intend that result, and same is true in respect to consideration of absence of mitigating circumstances in consideration of death penalty. *State v. Jordan* (1980) 126 Ariz. 283, 614 P.2d 825, certiorari denied 101 S.Ct. 408, 449 U.S. 986, 66 L.Ed.2d 251.

Defendant had burden of proving mitigating circumstances to avoid imposition of death penalty. *Id.*

In death penalty case, state must prove existence of aggravating circumstances beyond reasonable doubt, and Supreme Court will reduce death penalty to life imprisonment where evidence of aggravating factors is inconclusive. *Id.*

Placing burden of proof of establishing mitigating circumstances on defendant did not deny him his right to due process. *State v. Smith* (1980) 125 Ariz. 412, 610 P.2d 46.

#### 8.2. — Stipulations, aggravating or mitigating circumstances

In the absence of a record which showed that defendant clearly intended to waive his right to have state prove, by admissible evidence, the aggravating circumstances on which the question of the death penalty revolved, defendant would have to be given the benefit of the hearing procedures established by law, and, trial court erred in sentencing by considering materials which had been submitted under a stipulation permitting their use for determination of issues of guilt or innocence. *State v. Hensley* (1983) 137 Ariz. 80, 669 P.2d 58.

#### 8.3. — Judicial notice, aggravating or mitigating circumstances

The Supreme Court may take judicial notice that certain crimes are, by definition, violent felonies against others in determining whether there were aggravating circumstances justifying

the imposition of a death penalty in a capital case. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 1143, 86 L.Ed.2d 706.

#### 8.5. — Delay, aggravating or mitigating circumstances

Where all mitigating factors presented at previous sentencing hearing were considered at second sentencing hearing, as well as new factors presented by defendant, and defendant was unable to suggest any other mitigating factors which could not be shown by reason of five-year delay between original sentence and subsequent sentence, delay in resentencing did not result in prejudice to defendant. *State v. Blazak* (1982) 131 Ariz. 538, 643 P.2d 694, certiorari denied 103 S.Ct. 184, 459 U.S. 882, 74 L.Ed.2d 149.

#### 9. — Sufficiency of evidence, aggravating or mitigating circumstances

Finding of a "mitigating circumstance" for death penalty on ground that defendant's capacity to appreciate wrongfulness of his conduct or to conform his conduct to requirements of law was significantly impaired by reason of mental condition and intoxication was not warranted when evidence from State and defense experts was conflicting and, though experts for State were clear and unequivocal in their findings, experts for defense were less exact in their conclusions, leaving no clear evidence as to a significant impairment. *State v. McMurtrey* (1986) 150 Ariz. 382, 726 P.2d 202.

Evidence of murder defendant's mental disorder was not sufficient to support finding that defendant's capacity to appreciate wrongfulness of his conduct or to conform to requirements of law was significantly impaired, but not so impaired as to constitute defense to prosecution, as mitigating circumstance in determining whether to impose death penalty. *State v. Castaneda* (1986) 150 Ariz. 382, 724 P.2d 1.

Mitigating circumstances were not sufficiently substantial to call for leniency in determining whether to impose death penalty for murder, which was shockingly brutal and cruel. *State v. Castaneda* (1986) 150 Ariz. 392, 724 P.2d 1.

Defendant's remorse for the killing and his status as a cooperative, model prisoner are circumstances which should be considered but which did not sufficiently establish a mitigating circumstance in defendant's case to substantiate a claim for leniency, where the change in defendant's life style was not sufficiently substantial to call for leniency. *State v. Tittle* (1985) 147 Ariz. 339, 710 P.2d 449.

Imposition of death penalty upon conviction of one count of conspiracy to commit first-degree murder, two counts of first-degree murder, one count of attempted first-degree murder, three counts of kidnapping, three counts of armed robbery, and one count of first-degree burglary was justifiably based on such aggravating circumstances as fact that defendant was previously convicted of a felony involving the use or

threat of violence on another person, that defendant committed offense as consideration for receipt of a thing of pecuniary value, and that defendant committed offense in an especially heinous, cruel or depraved manner. *State v. Bracy* (1985) 145 Ariz. 520, 703 P.2d 464, certiorari denied 106 S.Ct. 898, 474 U.S. 1110, 88 L.Ed.2d 932.

Evidence established aggravating circumstance that murder was committed for pecuniary gain where defendant was at murder scene to rob victims and to take pickup truck. *State v. Martinez-Villareal* (1985) 145 Ariz. 441, 702 P.2d 670, certiorari denied 106 S.Ct. 339, 474 U.S. 975, 88 L.Ed.2d 324.

In consideration of mitigating factors, evidence of a troubled childhood is entitled to greater weight when defendant is a minor than when he is an adult. *State v. Gerlaugh* (1985) 144 Ariz. 449, 698 P.2d 694.

Existence of a mere character or personality disorder such as sociopathy is not alone sufficient to constitute a mitigating circumstance as regards death penalty for murder; however, such psychiatric evidence should be considered by a trial judge because it may suggest some reason other than the nature of the disorder why defendant should receive leniency, including a difficult family history; trial judge may refuse to find a mitigating circumstance so long as he considers this evidence. *State v. Gerlaugh* (1985) 144 Ariz. 449, 698 P.2d 694.

Testimony that murders were part of an overall scheme involving robbery of armored truck was sufficient to support finding of aggravating factor that they were committed to obtain items of pecuniary value. *State v. Poland* (1985) 144 Ariz. 388, 698 P.2d 183, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Sentence of death was proportionate to other sentences imposed by state upon other defendants who had committed murders having similar degree of aggravation where two or more aggravating factors had been found and there were no mitigating factors sufficiently substantial to call for leniency, as defendant had prior conviction involving use or threat of violence and offense was for pecuniary gain. *State v. Poland* (1985) 144 Ariz. 388, 698 P.2d 183, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

In light of facts that defendant was previously convicted of a felony including the use or threat of violence on another person, that murder of victim, who was bound and helpless and who received blows from behind and gratuitous pain, was heinous and depraved, that aggravating circumstance of pecuniary gain was properly filed and that the mitigating evidence was not sufficiently substantial to call for a leniency, imposition of death penalty was proper. *State v. Carriger* (1984) 143 Ariz. 142, 692 P.2d 991, certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.2d 864.

Record did not establish that trial judge had reasonable doubt as to existence of aggravating factor sufficient to order death sentence, even though trial judge appeared to have vacillated during an in-chambers discussion on the existence of the aggravating factor, where trial judge found existence of the aggravating factor subsequent to the discussion in chambers in which he had indicated his awareness of the reasonable-doubt standard. *State v. Hensley* (1984) 142 Ariz. 598, 691 P.2d 689.

Record established that trial judge did not rely upon improper materials in making finding of aggravating circumstance justifying imposition of death penalty upon defendant who was convicted of first-degree murder in light of his recital that he had based his decision solely upon information presented at sentencing hearing and had not reviewed notes taken during trial of codefendants or relied on other material not properly considered. *State v. Hensley* (1984) 142 Ariz. 598, 691 P.2d 689.

Trial judge should not have considered factor that victim was buried alive as indicative of cruelty, for purposes of imposition of death penalty for murder, where, although evidence indicated that victim was buried alive, it was inconclusive as to whether victim was ever conscious while in grave. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Not only manner of death, but also circumstances surrounding it, and their effect on victim, amply warranted finding of cruelty warranting imposition of death penalty for murder victim who was twice raped and was kept in uncertainty as to her fate for eight hours. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Where evidence is inconclusive as to whether victim was conscious during infliction of violence to his person, sentencing court cannot find that cruelty existed, for purposes of death penalty. *State v. Gillies* (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

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

Defendant's uncorroborated testimony that he was a model prisoner following arrest for murder and that he realized wrongfulness of his conduct and felt genuine remorse was insufficient to establish such allegations as mitigating circumstances. *State v. James* (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

For purposes of determining death penalty, mitigating factor urged by defendant that defendant was "lower," that he was only 20 that he had no previous record not sufficiently substantial to light of defendant's actual past, defendant's apparent abhorrence of his acts, defendant's wrongfulness of his acts, defendant's murder and the fact that for substantial period of time. *State v. Libberton* (1984) 141 Ariz. 1284.

In assessing death penalty court correctly found no mitigating factors sufficient to call for leniency. Defendant found the two aggravating circumstances of violent felony conviction and instant offense in especially depraved manner, where murder hand indicated that she had suffered off blows, evidence of bruising of rape indicated physical assault constituting cruelty, where coroner's report indicated that blows to victim's head were more than were needed to kill her and she was incapable of defending herself. *Summerlin* (1983) 138 Ariz.

Aggravating circumstance of murder was an offense punishable by imprisonment, that such conviction involving use of violence that instant murders were committed for pecuniary gain, and that murder plus lack of mitigating circumstances was substantially to call for leniency in imposition of death penalty. *Summerlin* (1983) 137 Ariz. 278, 670 P.2d 1017, certiorari denied 104 S.Ct. 1017.

Evidence supported trial court's finding of defendant's character of defendant, conviction for murder, had not changed between sentencing and resentencing, and mitigating factor sufficient to call for leniency in sentencing was not present. *State v. Richmond* (1983) 136 Ariz. 57, certiorari denied 104 S.Ct. 78 L.Ed.2d 367.

In resentencing defendant for first-degree murder, trial court's finding of aggravating circumstances was not sufficient to call for leniency. Defendant had been convicted of offense, and defendant had been convicted of offense or threat of violence, and defendant had committed in especially heinous manner. *State v. Richmond* (1983) 136 Ariz. 57, certiorari denied 104 S.Ct. 78 L.Ed.2d 367.

Where defendant emptied crowded bar, with five to six shots fired in immediate area of victims, defendant's conduct was found fact that defendant's conduct posed grave risk of death to persons present to be aggravating circum-

For purposes of determining whether to impose death penalty, mitigating circumstances urged by defendant that defendant was a "follower," that he was only 20 years of age and that he had no previous record of violence were not sufficiently substantial to call for leniency in light of defendant's actual participation in murder, defendant's apparent ability to appreciate wrongfulness of his acts, deliberation involved in the murder and the fact that victim was beaten for substantial period of time before his death. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

In assessing death penalty for murder, trial court correctly found no mitigating circumstances sufficient to call for leniency, and correctly found the two aggravating circumstances of prior violent felony conviction and commission of instant offense in especially heinous, cruel, or depraved manner, where murder victim's bruised hand indicated that she had attempted to ward off blows, evidence of bruised hand and evidence of rape indicated physical and mental pain, constituting cruelty, where coroner testified that blows to victim's head were far more in number than were needed to kill her, and where victim was incapable of defending herself. *State v. Summerlin* (1983) 138 Ariz. 426, 675 P.2d 686.

Aggravating circumstances that prior conviction was an offense punishable in state by life imprisonment, that such conviction was of a felony involving use of violence on another person, that instant murders were committed for pecuniary gain, and that murders were "depraved," plus lack of mitigating circumstances sufficiently substantial to call for leniency, supported imposition of death penalty. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017.

Evidence supported trial court's finding that character of defendant, convicted of first-degree murder, had not changed between time of conviction and resentencing, and thus, such was not mitigating factor sufficient to outweigh aggravating circumstances warranting death sentence. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

In resentencing defendant, convicted of first-degree murder, trial court correctly found aggravating circumstances that defendant had been convicted of offense, murder, for which life imprisonment or death was impossible, that defendant had been convicted of felony involving use or threat of violence, and that offense was committed in especially heinous manner. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

Where defendant emptied his gun at victims in crowded bar, with five to nine other people in immediate area of victims, trial court properly found fact that defendant knowingly created grave risk of death to persons other than victims to be aggravating circumstance in sentencing

defendant after conviction of first-degree murder. *State v. McMurtrey* (1983) 136 Ariz. 93, 664 P.2d 637, certiorari denied 104 S.Ct. 180, 464 U.S. 858, 78 L.Ed.2d 161.

In reviewing imposition of death penalty, it is duty of supreme court to review record and make separate independent determination as to whether death penalty is appropriate. *State v. McMurtrey* (1983) 136 Ariz. 93, 664 P.2d 637, certiorari denied 104 S.Ct. 180, 464 U.S. 858, 78 L.Ed.2d 161.

If a defendant introduces uncontroverted credible evidence tending to prove a mitigating circumstance then the mitigating circumstance exists; once the existence of one or more mitigating circumstances is established, the court must determine whether they are sufficiently substantial to call for leniency. *State v. Zaragoza* (1983) 135 Ariz. 63, 659 P.2d 22, certiorari denied 103 S.Ct. 3097, 462 U.S. 1124, 77 L.Ed.2d 1566.

In prosecution for first-degree murder, evidence, including psychiatric testimony did not convincingly establish that defendant's capacity to conform his conduct to requirements of law was significantly impaired and, thus, mental impairment was not mitigating factor in sentencing. *State v. Smith* (1981) 131 Ariz. 29, 638 P.2d 696.

Evidence supporting a finding that one or more of certain aggravating conditions were present would be sufficient to find an aggravating circumstance under this section prior to 1979 amendment. *State v. Vickers* (1981) 129 Ariz. 506, 633 P.2d 315.

Determinations by trial court that defendant failed to establish existence of first mitigating circumstance and that defendant's capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired but not so impaired as to constitute a defense to prosecution were not error. *State v. Greenawalt* (1981) 128 Ariz. 150, 624 P.2d 828, certiorari denied 102 S.Ct. 364, 454 U.S. 882, 70 L.Ed.2d 191.

Trial court did not err in determining that defendant was not under substantial duress at time of events so as to constitute a mitigating circumstance in setting his sentence. *Id.*

Evidence that defendant had no prior criminal record, that defendant cooperated with law enforcement officers by confessing only after his accomplice was arrested, that defendant was below average in intelligence, and that he only completed sixth grade in school did not support finding of any mitigating circumstances which would indicate inappropriateness of imposition of death penalty following conviction for murder. *State v. Bishop* (1980) 127 Ariz. 531, 622 P.2d 478.

In prosecution for murder in the first degree, evidence was overwhelming that defendant was not acting in fear or self-defense so as to constitute a mitigating factor. *State v. Smith* (1980) 125 Ariz. 412, 610 P.2d 46.

In determining whether a murder has been committed in an especially heinous or depraved manner, killer's state of mind may be shown by his behavior at or near time of offense. *State v. Lujan* (1979) 124 Ariz. 365, 604 P.2d 629.

In view of contradictory evidence concerning defendant's condition trial court could refuse to find existence of suggested mitigating factor of psychotic condition with compulsory behavior. *State v. Smith* (1979) 123 Ariz. 231, 599 P.2d 187, appeal after remand 131 Ariz. 29, 638 P.2d 696.

Reporter's transcript of plea of guilty to prior felony charge established that there was a sufficient factual basis for such plea for purpose of determining whether prior felony conviction could be considered aggravating circumstance warranting imposition of death penalty upon conviction of murder. *State v. Watson* (1978) 120 Ariz. 441, 586 P.2d 1253, certiorari denied 99 S.Ct. 1254, 440 U.S. 924, 59 L.Ed.2d 478, appeal after remand 129 Ariz. 60, 628 P.2d 943.

10. — Jury questions, aggravating or mitigating circumstances

Defendant was not entitled to jury determinations of aggravating and mitigating factors, in penalty phase of capital murder prosecution. *Jeffers v. Ricketts, C.A.9 (Ariz.)* 1987, 832 F.2d 476.

Petitioner's constitutional rights were not violated by failure of Arizona death sentencing statute, A.R.S. § 13-703, to provide for jury determination of existence of aggravating circumstances. *Jeffers v. Ricketts, D.Ariz.* 1986, 627 F.Supp. 1334, affirmed in part reversed in part 832 F.2d 476.

Petitioner's constitutional rights were not violated by failure of Arizona death sentencing statute, A.R.S. § 13-703, to require jury determinations of mitigating factors or to require a separate determination that death penalty was appropriate under the circumstances of the case. *Jeffers v. Ricketts, D.Ariz.* 1986, 627 F.Supp. 1334.

Defendant convicted of first-degree murder did not have right under U.S.C.A. Const. Amend. 6 to have jury participate in determining existence of aggravating circumstances under this section. *State v. James* (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

10.1. — Record, aggravating or mitigating circumstances

Better practice is for trial court to place, on the record, a list of all factors offered by a defendant in mitigation of his sentence and then explain court's reasons for accepting or rejecting such factors. *State v. Leslie* (1985) 147 Ariz. 38, 708 P.2d 719.

If the Supreme Court cannot determine from the record whether the trial court considered all relevant mitigating factors in sentencing defendant, Federal Constitution compels the Supreme Court to remand the case for further explanation.

tion. *State v. Leslie* (1985) 147 Ariz. 38, 708 P.2d 719.

10.2. — Findings, aggravating or mitigating circumstances

Trial court could properly impose death penalty for separate counts upon determining that defendant killed victims, that he reasonably knew that they would be killed and that he intended to kill them, though finding was not stated separately for each count. *State v. Correll* (1986) 148 Ariz. 468, 715 P.2d 721.

Trial court was not required to state its findings with respect to three mitigating circumstances proffered by defendant, convicted of murder in the first degree, where the proffered circumstances were not explicitly enumerated by this section as mitigating circumstances. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

10.5. — Independent review, aggravating or mitigating circumstances

Under Arizona death penalty statute, this section, supreme court is required to conduct independent review of trial court's decision concerning balancing of aggravating and mitigating circumstances. *State v. Summerlin* (1983) 138 Ariz. 426, 675 P.2d 686.

10.8. Burden of proof, in general

Before one is subject to death penalty, state must charge him and prove him guilty beyond reasonable doubt, and must prove aggravating circumstances beyond reasonable doubt. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

11. Admissibility of evidence

In sentencing phase of first-degree murder prosecution, manual of police procedures discussing use of handcuffs and chemical agents, which defendant was allegedly seen reading, although possibly relevant, if proven, to the "heinous, cruel or depraved" aggravating circumstance, was irrelevant as purely speculative; however, defendant was not prejudiced by admission of manual, since such aggravating circumstance was improper on other grounds. *State v. Poland* (1985) 144 Ariz. 412, 698 P.2d 207, affirmed 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed.2d 123.

Trial court erred by considering materials at sentencing hearing which had been submitted under a stipulation permitting their use for determination of issues of guilt or innocence only. *State v. Hensley* (1983) 137 Ariz. 80, 669 P.2d 58.

Any relevant evidence may be used to rebut defendant's mitigating circumstances at death penalty sentencing hearing regardless of its admissibility at trial. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

Testimony of three law enforcement officers concerning details of prior crimes of violence

which were committed by defendant received in sentencing hearing was highly relevant to court of whether crime of violence of section governing ex onid aggravating circumstance. Statute, § 13-454 (repealed) a prior felony conviction in threat of violence on another. *State v. Greenawald* 150, 624 P.2d 828, certiorari denied 454 U.S. 882, 70 L.Ed.2d 191.

Medical doctor may give based in part on hearsay. *State v. Smith* 123 Ariz. 231, 599 P.2d 187, 131 Ariz. 29, 638 P.2d 696.

13.2. Judge

Defendant was not entitled to grounds that trial judge sentenced him to death was denied and thus precluded from conducting hearing after remand, re new statute allowing a such duct sentencing applied, due bility of prejudice where on ant received the minimum tion of first-degree murder (1985) 144 Ariz. 240, 697 P.

Capital sentencing by tri jury does not violate Const. U.S.C.A. Const. Amend. 8 a usual punishment. *State v. Ariz.* 564, 691 P.2d 655, S.Ct. 1775, 470 U.S. 1059, 1

In death penalty case, w ently from nondeath pena appearance of impropriety sentenced defendant to de tried same defendant for a penalty offense, and judge himself from trying defen der even though defendan peremptory change of ju request for change of jud Vickers (1983) 138 Ariz. 4

13.5. Jury, in general

Defendant was not denied Amend. 6 right to jury t excluded from consid presented to court in de dure. *State v. Gillies* (19 P.2d 655, certiorari denied U.S. 1059, 84 L.Ed.2d 834

Jury participation is r sentencing determination: (1984) 142 Ariz. 564, 69 denied 105 S.Ct. 1775, 471 834.

Defendant did not ha participate in sentencing death penalty was a pos Lambright (1983) 138 Ar

iz. 38, 708 P.2d

or mitigating

the death penal-  
ermining that  
e reasonably  
and that he  
iding was not  
State v. Cor-  
721.

state its find-  
ating circum-  
convicted of  
the proffered  
numerated by  
tances. State  
86 P.2d 750,  
U.S. 1066, 83

aggravating or

tute, this sec-  
conduct inde-  
ision concern-  
mitigating cir-  
983) 138 Ariz.

penalty, state  
guilty beyond  
aggravating  
doubt. State  
666 P.2d 57,  
U.S. 986, 78

gree murder  
lures discuss-  
gents, which  
he "heinous,  
circumstance,  
re; however,  
admission of  
circumstance  
ate v. Poland  
affirmed 106  
123.

materials at  
n submitted  
use for de-  
ocence only.  
669 P.2d 58.  
ed to rebut  
es at death  
ss of its ad-  
(1981) 131  
denied 102  
863.

ent officers  
of violence

which were committed by defendant was properly received in sentencing hearing, in that testimony was highly relevant to determination by court of whether crime of violence within purview of section governing existence of the second aggravating circumstance under death penalty statute, § 13-454 (repealed; now § 13-703) a prior felony conviction involving the use of threat of violence on another person, had occurred. State v. Greenawalt (1981) 128 Ariz. 150, 624 P.2d 822, certiorari denied 102 S.Ct. 364, 454 U.S. 882, 70 L.Ed.2d 191.

Medical doctor may give expert testimony based in part on hearsay. State v. Smith (1979) 123 Ariz. 231, 599 P.2d 187, appeal after remand 131 Ariz. 29, 638 P.2d 696.

13.2. Judge

Defendant was not entitled to a new trial on grounds that trial judge who originally sentenced him to death was disqualified for cause, and thus precluded from conducting resentencing hearing after remand, regardless of whether new statute allowing a successor judge to conduct sentencing applied, due to absence of possibility of prejudice where on resentencing defendant received the minimum sentence for conviction of first-degree murder. State v. Jordan (1985) 144 Ariz. 240, 697 P.2d 323.

Capital sentencing by trial judge rather than jury does not violate Const. Art. 2, § 15 and U.S.C.A. Const. Amend. 8 against cruel and unusual punishment. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

In death penalty case, which is treated differently from nondeath penalty cases, there was appearance of impropriety when judge who had sentenced defendant to death in prior case also tried same defendant for another potential death penalty offense, and judge should have recused himself from trying defendant for second murder even though defendant made no motion for peremptory change of judge prior to trial or request for change of judge for cause. State v. Vickers (1983) 138 Ariz. 450, 675 P.2d 710.

13.5. Jury, in general

Defendant was not denied his U.S.C.A. Const. Amend. 6 right to jury trial because jury was excluded from considering factual issues presented to court in death sentencing procedure. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Jury participation is not required in capital sentencing determinations. State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, certiorari denied 105 S.Ct. 1775, 470 U.S. 1059, 84 L.Ed.2d 834.

Defendant did not have right to have jury participate in sentencing, notwithstanding that death penalty was a possible outcome. State v. Lambright (1983) 138 Ariz. 63, 673 P.2d 1.

Petitioner did not have a right under either U.S.C.A. Const. Amend. 6 or 8 to have a jury find those facts that made a death sentence impossible. State v. Jordan (1983) 137 Ariz. 504, 672 P.2d 169.

Defendant, who was convicted of first-degree murder and was sentenced to death, did not have right to have jury participate in sentencing decision. State v. Gretzler (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

Question, of jury, whether they entertained conscientious or religious opinion concerning death penalty which would prevent them from finding defendant guilty even if they were satisfied beyond a reasonable doubt that he was guilty of first-degree murder did not impermissibly interject issue of punishment into minds of prospective jurors. State v. Smith (1979) 123 Ariz. 231, 599 P.2d 187, appeal after remand 131 Ariz. 29, 638 P.2d 696.

Question, of prospective jurors, whether they entertained conscientious or religious opinion concerning death penalty which would prevent them from finding defendant guilty even if they were satisfied beyond reasonable doubt that he was guilty of first-degree murder did not cause biased jury by eliminating from jury those persons who abhor death penalty while leaving on jury any person whose judgment would be clouded by desire to see defendant suffer supreme penalty. Id.

14. Instructions

In potential death penalty cases, Supreme Court requires trial judge to instruct jury on all lesser included offenses of homicide that are supported by evidence. State v. Neal (1984) 143 Ariz. 93, 692 P.2d 272.

15. Presentence reports

State v. Watson (1976) 114 Ariz. 1, 559 P.2d 121, certiorari denied 97 S.Ct. 1687, 430 U.S. 986, 52 L.Ed.2d 382 [main volume] appeal on other grounds after remand 120 Ariz. 441, 586 P.2d 1253, certiorari denied 99 S.Ct. 1254, 440 U.S. 924, 59 L.Ed.2d 478, appeal after remand 129 Ariz. 60, 628 P.2d 943.

15.5. Sentencing hearing

"Evidence" to be admitted for sentencing purposes is, like other evidence, governed by rules of evidence, while "information" may be considered by sentencing court even though it may not meet requirements of evidence rules. State v. Jones (1985) 147 Ariz. 353, 710 P.2d 463.

Where sentencing judge's contact with the victim's relatives prior to presentence hearing mandated his disqualification from the case, former provisions of this section requiring that trial judge conduct sentencing proceedings further confined successor judge who ruled on motion for new trial, and accordingly new trial was required. State v. Leslie (1983) 136 Ariz. 463, 666 P.2d 1072.

Trial judge's contact with the victim's relatives before conducting presentence hearing mandated his disqualification from the case. *State v. Leslie* (1983) 136 Ariz. 463, 666 P.2d 1072.

By notifying both defendant and trial court of what aggravating circumstances prosecution would seek to prove in death penalty sentencing hearing, by disclosing what evidence it would use at hearing, and by giving notice of aggravating circumstances and disclosing additional evidence some three weeks before hearing, prosecution performed duties required of it in hearing. *State v. Ortiz* (1981) 131 Ariz. 195, 639 P.2d 1020, certiorari denied 102 S.Ct. 2259, 456 U.S. 984, 72 L.Ed.2d 863.

Although sentencing judge at original sentencing hearing stated that if he had had discretion, he would enter same judgment he was about to enter and that he felt that defendant was guilty, permitting that judge to preside over a second sentencing proceeding did not violate prohibition against permitting even appearance of partiality, since the opinion of judge was based upon observation of witnesses and other evidence. *State v. Knapp* (1979) 125 Ariz. 503, 611 P.2d 90, supplemented 127 Ariz. 65, 618 P.2d 235.

When defendant is to be resentenced, and particularly when death sentence is possible, evidence and testimony should be as fresh as possible; relying on previous hearing in mitigation and aggravation conducted months before the imposition of the death penalty is not recommended. *State v. Arnett* (1980) 125 Ariz. 201, 608 P.2d 778.

Where, after remand for resentencing of defendant who was originally sentenced to death, the trial judge engaged in a conversation in chambers with the murder victim's brother, a police officer, in which the brother expressed the family's opinion that the court should again impose the death penalty and where the judge thereafter failed to disqualify himself from presiding at the resentencing hearing, the trial judge's action so impinged on defendant's fundamental right to a fair hearing as to require that the sentence be set aside and a new sentence imposed by a different judge. *State v. Valencia* (1979) 124 Ariz. 159, 602 P.2d 807, appeal after remand 132 Ariz. 248, 645 P.2d 239.

#### 16. Review--In general

Reversal of trial court's conclusions that defendant convicted of murder did not prove by preponderance of evidence that he could be rehabilitated during life sentence or that his cocaine addiction significantly impaired his capacity to conform his conduct to requirements of law required remand for resentencing, at which time trial court was required to consider two additional mitigating circumstances when determining whether to impose life sentence or death sentence. *State v. Rossi* (1987) 154 Ariz. 245, 741 P.2d 1223.

The Supreme Court must independently review the record in a capital felony case to deter-

mine the presence or absence of aggravating and mitigating circumstances, and the weight to be given to each, and must also determine the propriety of the sentence. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222, certiorari denied 105 S.Ct. 2689, 471 U.S. 1143, 86 L.Ed.2d 706.

Reviewing court has an independent duty to review the evidence dealing with sentencing and make its own decision regarding whether death sentence is warranted. *State v. Carriger* (1984) 143 Ariz. 142, 692 P.2d 991, certiorari denied 105 S.Ct. 2347, 471 U.S. 1111, 85 L.Ed.2d 864.

Though determination of whether defendant convicted of first-degree murder killed, attempted to kill, or intended to kill ought to be made by trial court in determining whether to impose death penalty, Supreme Court will not remand case for resentencing when record compels finding on such issue either affirmatively or negatively. *State v. Emery* (1984) 141 Ariz. 549, 688 P.2d 175.

Supreme Court has an independent duty to review evidence to determine whether sentence of death is properly imposed. *State v. Chaney* (1984) 141 Ariz. 295, 686 P.2d 1265.

On appeal, Supreme Court independently reviews record to determine existence or absence of aggravating and mitigating circumstances, and determines whether death penalty should be imposed. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

Supreme court independently reviews record of each capital case to determine correctness of findings of trial court as to aggravating and mitigating circumstances, in order to independently determine propriety of sentence imposed. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

Supreme court reviews each death penalty imposed by state's sentencing courts to insure that sentence has not been applied in arbitrary or capricious manner. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

In death penalty cases, supreme court will conduct independent examination of record to determine for itself the presence or absence of aggravating and mitigating circumstances and weight to give to each, and will independently determine propriety of the sentence. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

In each case where death penalty is imposed, supreme court will conduct independent review of record to assure just result. *State v. Richmond* (1983) 136 Ariz. 312, 666 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

When death penalty is imposed, trial court may find mitigating factors substantial enough to call for leniency, and supreme court will then conduct independent review of all matters of

aggravation and sentence was proportional penalty is not ex sentences imposed guards are blind defendant. *State v. 666 P.2d 57, cert U.S. 986, 78 L.E*

Supreme court sentence case to court correctly a ing circumstance Ariz. 250, 665 U S.Ct. 204, 464 U

In reviewing i supreme court's separate and in whether death J McDaniel (1983)

In capital cas record and m whether the de. *State v. Jeffers* 1105, certiorari 865, 78 L.Ed.2d

In capital cas reviews facts th presence or abs ing circumstanc whether latter both to be pres

Supreme Cou review record a that death pen: Graham (1983)

Although nor on appeal conce an obligation t: gating circum: supported impe Gerlaugh (1983)

Where death imposed, Supre of a life sente Ariz. 42, 659 P 2444, 461 U.S. denied 104 S.C 1452.

In reviewing will conduct in to determine w ly imposed. S 638 P.2d 696.

In reviewing preme court i: examination o death penalty v uphold imposit murder or def: degree murder (1981) 130 Ari:

Unlike appe duty of suprer

aggravation and mitigation to determine if death sentence was properly imposed, and will conduct proportionality review in every case to assure penalty is not excessive nor disproportionate to sentences imposed in similar cases; such safeguards are blind to color, wealth or sex of defendant. *State v. Richmond* (1983) 136 Ariz. 312, 665 P.2d 57, certiorari denied 104 S.Ct. 435, 464 U.S. 986, 78 L.Ed.2d 367.

Supreme court reviews record of each death sentence case to independently determine if trial court correctly applied aggravating and mitigating circumstances. *State v. Adamson* (1983) 136 Ariz. 250, 665 P.2d 972, certiorari denied 104 S.Ct. 204, 464 U.S. 865, 78 L.Ed.2d 178.

In reviewing imposition of death penalty, it is supreme court's duty to review record and make separate and independent determination as to whether death penalty is appropriate. *State v. McDaniel* (1983) 136 Ariz. 188, 665 P.2d 70.

In capital cases, Supreme Court will search record and make independent determination whether the death penalty should be imposed. *State v. Jeffers* (1983) 135 Ariz. 404, 661 P.2d 1105, certiorari denied 104 S.Ct. 199, 464 U.S. 865, 78 L.Ed.2d 174.

In capital cases, Supreme Court independently reviews facts that trial court found established presence or absence of aggravating and mitigating circumstances, and it determines for itself whether latter outweigh former when it finds both to be present. *Id.*

Supreme Court is required to independently review record and determine whether it believes that death penalty should be imposed. *State v. Graham* (1983) 135 Ariz. 209, 660 P.2d 460.

Although none of the issues raised by counsel on appeal concerned penalty imposed, court had an obligation to examine aggravating and mitigating circumstances to determine if evidence supported imposition of death penalty. *State v. Gerlaugh* (1983) 135 Ariz. 89, 659 P.2d 642.

Where death penalty has been erroneously imposed, Supreme Court will set it aside in favor of a life sentence. *State v. Gretzler* (1983) 135 Ariz. 42, 659 P.2d 1, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

In reviewing imposition of death penalty court will conduct independent examination of record to determine whether death penalty was properly imposed. *State v. Smith* (1981) 131 Ariz. 29, 638 P.2d 696.

In reviewing imposition of death penalty, supreme court is obliged to conduct independent examination of record to determine whether death penalty was properly imposed, and will not uphold imposition of death penalty unless either murder or defendant differs from norm of first-degree murders or defendants. *State v. Britson* (1981) 130 Ariz. 380, 636 P.2d 628.

Unlike appellate review of noncapital crimes, duty of supreme court on review of death penal-

ty is to conduct independent examination of record to determine whether death penalty was properly imposed. *State v. Schad* (1981) 129 Ariz. 557, 633 P.2d 366, certiorari denied 102 S.Ct. 1492, 455 U.S. 983, 71 L.Ed.2d 693.

Reviewing court in considering imposition of death penalty is not concerned with findings of trier of fact during guilt determination process of trial. *State v. Jordan* (1980) 126 Ariz. 283, 614 P.2d 825, certiorari denied 101 S.Ct. 408, 449 U.S. 986, 66 L.Ed.2d 251.

Supreme court, in reviewing a death sentence, must make an independent review of the facts to determine presence or absence of aggravating and mitigating circumstances. *State v. Madsen* (1980) 125 Ariz. 346, 609 P.2d 1046.

Where death penalty was imposed based on aggravating circumstance that defendant committed murder in an especially heinous, cruel or depraved manner, supreme court was required to independently examine trial court record to determine if such aggravating circumstance existed. *State v. Lujan* (1979) 124 Ariz. 365, 604 P.2d 629.

#### 16.1. — Proportionality, review

A proportionality review must be conducted in every death penalty case to determine whether sentences of death are excessive or disproportionate to penalty imposed in similar cases considering both the crime and the defendant. *State v. Nash* (1985) 143 Ariz. 392, 694 P.2d 222.

In death penalty case, Supreme Court independently reviews the record to determine presence or absence of aggravating circumstances and the weight to be given to each; Supreme Court must also determine the propriety of the sentence. *State v. Hensley* (1984) 142 Ariz. 598, 691 P.2d 689.

The Supreme Court is required in all death cases to make an independent review of the facts to determine for itself aggravating and mitigating factors. *State v. Clabourne* (1984) 142 Ariz. 335, 690 P.2d 54.

As part of Supreme Court's independent review of the propriety of the death sentence imposed in a case, it conducts proportionality review to determine whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *State v. Villafuerte* (1984) 142 Ariz. 323, 690 P.2d 42, certiorari denied 105 S.Ct. 1234, 469 U.S. 1230, 84 L.Ed.2d 371.

Supreme Court conducts proportionality review to determine whether death sentence is excessive or disproportionate to penalty imposed in similar cases, considering both the crime and the defendant; Supreme Court considers not only cases where death penalty was affirmed but also cases where death penalty was reduced to sentence of life imprisonment. *State v. Harding* (1984) 141 Ariz. 492, 687 P.2d 1247.

## § 13-703

### Note 16.1

In determining whether the death penalty is disproportionately applied, cases involving imposition of the death penalty upon a finding of same aggravating circumstances are considered along with cases where the death penalty was reduced to life imprisonment. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436.

In death penalty cases, Supreme Court conducts proportionality review to determine whether sentences of death are excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant, as well as cases in which death penalty was reduced to life imprisonment. *State v. James* (1984) 141 Ariz. 141, 685 P.2d 1293, certiorari denied 105 S.Ct. 398, 469 U.S. 990, 83 L.Ed.2d 332.

In death penalty cases, Supreme Court conducts a proportionality review to determine whether sentences of death are excessive or disproportionate to penalty imposed in similar cases, considering both the crime and the defendant; Supreme Court considers not only cases where death penalty was affirmed but also cases where death penalty was reduced to sentence of life imprisonment. *State v. Libberton* (1984) 141 Ariz. 132, 685 P.2d 1284.

Supreme court, in reviewing death penalty, must consider whether imposition of death sentence in instant case is proportionate to imposition of death sentence in similar cases. *State v. Summerlin* (1983) 138 Ariz. 426, 675 P.2d 686.

For purposes of proportionality review of death sentence, facts of case were significantly different from facts of cases where death penalty was reduced to life imprisonment, and there-

## § 13-704. Method of infliction of sentence of death

The penalty of death shall be inflicted by lethal gas, under the supervision of the department of corrections.

Amended by Laws 1980, Ch. 229, § 8, eff. April 23, 1980.

### United States Supreme Court

Death penalty, see *Gregg v. Georgia*, 1976, 96 S.Ct. 2909, 428 U.S. 153, 49 L.Ed.2d 859; *Wood-*

son v. North Carolina, 1976, 96 S.Ct. 2978, 428 U.S. 280, 49 L.Ed.2d 944; *Roberts v. Louisiana*, 1976, 96 S.Ct. 3001, 428 U.S. 325, 49 L.Ed.2d 974.

fore death sentence would be affirmed. *State v. Summerlin* (1983) 138 Ariz. 426, 675 P.2d 686. Imposition of death penalty was not disproportionate to penalty imposed in similar cases. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

Supreme Court conducts proportionality review to determine whether sentences of death are excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant. *State v. Harding* (1983) 137 Ariz. 278, 670 P.2d 383, certiorari denied 104 S.Ct. 1017, 465 U.S. 1013, 79 L.Ed.2d 246.

### 16.5. — Modification of sentence, review

Defendant's sentence for first-degree murder was modified by the supreme court from life imprisonment, which was not sentence provided by sentencing statute for first-degree murder, to term of imprisonment in custody of department of corrections for life, without possibility of parole until completion of 25 calendar years. *State v. Watkins* (1980) 126 Ariz. 293, 614 P.2d 835.

### 17. Consecutive sentences

Defendant's sentences of seven and one-half years' imprisonment for aggravated assault and life imprisonment for first-degree murder were not excessive on basis that they were to be served consecutively rather than concurrently in light of fact that there were no unusual circumstances to mitigate a severe sentence, and defendant was prison escapee at time of instant offenses, violently assaulting young woman with whom he was living and stabbing to death one of his friends for no apparent reason. *State v. Watkins* (1980) 126 Ariz. 293, 614 P.2d 835.

## § 13-705. Persons present at execution of sentence of death; limitation

### Library References

Criminal Law ¶985 to 989.  
C.J.S. Criminal Law § 1573 et seq.

## § 13-707. Sentence of imprisonment for misdemeanor

A. A sentence of imprisonment for a misdemeanor shall be for a definite term to be served other than a place within custody of the state department of corrections. The court shall fix the term of imprisonment within the following maximum limitations:

1. For a class 1 misdemeanor, six months.
2. For a class 2 misdemeanor, four months.

## CRIMINAL CODE

## CRIMINAL CODE

3. For a class 3 misdemeanor  
B. The court may, pursuant to this section, order that the defendant be released on any basis provided by law.  
Amended by Laws 1987, Ch. 117.

### Library References

Criminal Law ¶1208.1(1)  
C.J.S. Criminal Law § 19

Notes of Decisions  
Construction and application of flat time sentences 2

1. Construction and application of concurrent sentence on lawful. *State v. Harris* (Ariz.) 655 P.2d 1339.

## § 13-708. Consecutive sentences

Except as otherwise provided by law, a person sentenced to a term of imprisonment shall not be discharged until the expiration of the full term of imprisonment unless the court orders otherwise. The court may, in its discretion, order that a person sentenced to a term of imprisonment be discharged on the expiration of the term of imprisonment set forth on the record.  
Amended by Laws 1985, Ch. 117.

### Historical

### 1985 Reviser's Note:

Pursuant to authority vested in the Reviser by the heading of this section "Consecutive Sentences," the word "Consecutive" is substituted for "Consecutive".

### Notes of Decisions

In general 1  
Consecutive sentences  
Reasons for sentence 2

See, also, Notes of Decisions on Rule 26.13.

### 1. In general

This section and Criminal Code provisions relating to multiple sentences create "statutory preference" for consecutive sentences. *State v. Van Dyke* (Ariz.) 655 P.2d 97.

Where defendant was sentenced to three years on assault and three months for unlawful imprisonment, the sentences were imposed on one trial based on same facts and could run concurrently. Imprisonment was in custody of Department of Corrections. *State v. Mendenhall* (Ariz.) 658 P.2d 803.

§ 13-702

CRIMINAL CODE

Title 13

Note 22

jury at his first trial did not decree his execution, reviewing court would carefully examine propriety of death penalty decree by jury at retrial. *Id.*

Where sentence is within permissible statutory limits, it will not be modified or reduced on appeal unless it clearly appears excessive under circumstances. *State v. Pickard* (1969) 105 Ariz. 219, 402 P.2d 87.

Trial court's wide discretion to sentence a defendant is not subject to interference by an appellate court unless it is clearly demonstrated that the power has been abused. *State v. Scott* (1969) 11 Ariz. App. 68, 401 P.2d 712.

Sentence will not be upset so long as it is within statutory limits and does not constitute an abuse of discretion. *State v. Roche* (1969) 104 Ariz. 276, 451 P.2d 605.

Where statute fixing punishment for an offense is constitutional, sentence within statutory limit is proper and, absent some showing to contrary, sentence will not be disturbed on appeal. *State v. Anders* (1965) 2 Ariz. App. 42, 406 P.2d 244.

Where penalty upon conviction is within limitations of statute and is entirely within sound discretion of trial judge, Supreme Court will not disturb ruling of trial court unless it clearly appears that sentence imposed is so excessive that it results in abuse of discretion. *State v. Wallace* (1965) 98 Ariz. 243, 403 P.2d 550.

Penalty to be imposed on conviction of crime is, within limitations of statute, entirely within discretion of trial judge and sentence will not be modified unless it clearly appears that sentence imposed is excessive. *State v. Quintana* (1963) 92 Ariz. 308, 370 P.2d 773.

§ 13-703. Sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years

A. A person guilty of first degree murder as defined in § 13-1105, shall suffer death or imprisonment in the custody of the department of corrections for life, without possibility of parole until the completion of the service of twenty-five calendar years, as determined and in accordance with the procedures provided in subsections B through G of this section.

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

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection F or G of this section. Any information relevant to any of the mitigating circumstances set

forth in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection G of this section is on the defendant.

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

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

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

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

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

G. Mitigating circumstances shall be the following:

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

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

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

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

5. The defendant's age.

Added as § 13-454 by Laws 1973, Ch. 138, § 5. Renumbered as § 13-902 and amended by Laws 1977, Ch. 142, § 58, eff. Oct. 1, 1978. Renumbered as § 13-703 by Laws 1978, Ch. 201, § 104, eff. Oct. 1, 1978. As amended by Laws 1978, Ch. 215, § 2, eff. Oct. 1, 1978.

Validity

*Former § 13-454 (prior to renumbering as this section and amendment) was declared to be unconstitutional in the case of Richmond v. Cardwell (D.C.1978) 450 F.Supp. 519. See Notes of Decisions, post.*

Historical Note

Source:

Pen.Code 1901, § 933.  
 Pen.Code 1913, § 1046.  
 Rev.Code 1928, §§ 4585, 5050.

Code 1939, §§ 43-2103, 44-1814.  
 A.R.S. former §§ 13-452, 13-454.

The 1973 amendment added subsection A; substituted "F of this section" for

references to subsection E (now subsection F) and "G of this section" for references to subsection F (now subsection G) throughout this section; relettered former subsection A as subsection B; inserted "as defined in § 13-1105" preceding ", the judge" in subsection B; relettered former subsection B as subsection C; substituted "defendant's" for "his" preceding "counsel" in the first sentence of subsection C; relettered former subsection C as subsection D; relettered former subsection D as subsection E; relettered former subsection E as subsection F; relettered former subsection F as subsection G; substituted "The defendant's" and "the defendant" for "his" and "he" in pars. 1 through 4 of subsection G; and added par. 5 to subsection G.

The 1978 amendment added subsec. F, par. 7.

For effective date provision of Laws 1978, Ch. 215, see Historical Note following § 13-1200.

Original § 13-703, derived from Pen. Code 1901, § 32; Pen.Code 1913, § 32;

Rev.Code 1928, § 4493; Code 1939, § 43-5702, relating to definition of levying was repealed by Laws 1977, ch. 142, § 23, eff. Oct. 1, 1978.

For disposition of the subject matter of sections of the former Criminal Code, see Disposition Table at the front of this volume.

Section § 13-703 as added by Laws 1977, Ch. 142, § 48, eff. Oct. 1, 1978, was transferred and renumbered as § 13-603; see italicized note preceding § 13-701.

#### 1978 Revisor's Note:

Laws 1978, Ch. 215, section 2, effective October 1, 1978, amended this section as transferred and renumbered as section 13-902 by Laws 1977, Ch. 142, section 58. Laws 1978, Ch. 201, section 104 transferred and renumbered this section, effective October 1, 1978, as section 13-703. Pursuant to authority of section 41-1301.02, this section as amended by Laws 1978, Ch. 215, section 2 has been numbered as section 13-703.

#### Law Review Commentaries

Death penalty, validity of Arizona's response to Furman v. Georgia. Ariz. State L.J., 1974, p. 257.

Death penalty and Supreme Court. 15 Ariz.Law Rev. 355 (1973).

#### Notes of Decisions

Admissibility of evidence 11  
 Aggravating or mitigating circumstances 4-10  
     In general 4  
     Burden of proof 8  
     Character of offender 6  
     Duress 5  
     Jury questions 10  
     Prior conviction 7  
     Sufficiency of evidence 9  
 Burden of proof, aggravating or mitigating circumstances 8  
 Character of offender, aggravating or mitigating circumstances 6  
 Construction and application 2  
 Death sentence 3  
 Duress, aggravating or mitigating circumstances 5  
 Instructions 14  
 Jury questions, aggravating or mitigating circumstances 10  
 Justification or excuse, in general 13

Presentence reports 15  
 Presumptions 12  
 Prior conviction, aggravating or mitigating circumstances 7  
 Review 16  
 Sufficiency of evidence, aggravating or mitigating circumstances 9  
 Validity 1

#### 1. Validity

Arizona death penalty statute, § 13-454 (renumbered as this section) was too restrictive regarding what mitigating factors the sentencing authority had to consider and, therefore, violated U.S.C. A.Const. Amends. 8 and 14. *Richmond v. Cardwell* (D.C.1978) 450 F.Supp. 519.

Death penalty may constitutionally be applied to felony-murder. *Id.*

Note 1

Arizona death penalty statute, § 13-454 (renumbered as this section), did not unconstitutionally permit the state to suppress mitigating evidence in providing that "any information relevant to any of the mitigating circumstances set forth in subsection F *may* [emphasis added] be presented by either the prosecution or the defendant \* \* \*." *Id.*

While jury sentencing in a capital case can perform an important societal function, it is not constitutionally required. *Id.*

Statutory classification, under which fact that a defendant convicted of first-degree murder has previously been convicted of offense punishable by life imprisonment or death is an aggravating circumstance to be considered in determining whether to assess death penalty but a prior conviction of other arguable more serious offenses is not an aggravating circumstance, does not deny equal protection, in that the classification has rational relation to the statutory purpose of giving sentencing judges information deemed relevant to punishment for first-degree murder. *State v. Arnett* (1978) 119 Ariz. 38, 579 P.2d 542.

Where there are no mitigating factors and aggravating factor does exist, sentence of death is neither excessive nor unconstitutional. *State v. Bishop* (1978) 118 Ariz. 203, 576 P.2d 122.

Death penalty statute § 13-454 (renumbered as this section) was constitutional. *Id.*

Narrow limits of aggravating and mitigating factors which the trial judge is directed to consider insures that death penalty will not be arbitrarily, capriciously or freakishly imposed. *Id.*

Where there are no mitigating factors and aggravating factor does exist, sentence of death is neither excessive nor unconstitutional. *Id.*

Arizona death penalty statute § 13-454 (renumbered as this section) provided adequate guidance to trial judge in imposing death penalty. *State v. Ceja* (1977) 115 Ariz. 413, 565 P.2d 1274.

Arizona death penalty statute § 13-454 (renumbered as this section) was not constitutionally infirm because it was

the judge not a jury of peers, who imposed ultimate sentence of death. *Id.*

Death penalty statute, § 13-454 (renumbered as this section) under which trial court was given specific guidance in what it must find in the way of aggravating and mitigating circumstances and less in the way of judicial discretion complied with requirement of the United States Supreme Court. *State v. Holsinger* (1977) 115 Ariz. 80, 563 P.2d 888.

Punishment of death is not cruel and unusual punishment under all circumstances and does not violate either U.S. C.A.Const. Amends. 8 or 14 or Const. Art. 2, § 15, this section. *State v. Knapp* (1977) 114 Ariz. 531, 562 P.2d 704, certiorari denied 98 S.Ct. 1458.

Procedure for imposing death penalty meets constitutional mandates. *Id.*

Section 13-454 (renumbered as this section) did not allow death sentence to be imposed in an arbitrary and capricious manner and, hence, was not constitutionally infirm. *State v. Jordan* (1976) 114 Ariz. 452, 561 P.2d 1224.

Prosecutorial discretion, plea bargaining, jury discretion to convict on lesser included offense and possibility of sentence commutation or executive clemency did not render death penalty statute, § 13-454 (renumbered as this section) unconstitutional. *Id.*

Death penalty statute, § 13-454 (renumbered as this section) satisfied requirements of due process and equal protection. *State v. Richmond* (1977) 114 Ariz. 186, 560 P.2d 41, certiorari denied 97 S.Ct. 2988, 433 U.S. 915, 53 L. Ed.2d 1101, application denied 98 S.Ct. 8, 434 U.S. 1323, 54 L. Ed.2d 34, rehearing denied 98 S.Ct. 537, 434 U.S. 976, 54 L. Ed.2d 469.

Arizona death penalty statute, § 13-454 (renumbered as this section) was constitutional. *State v. Lee* (1970) 114 Ariz. 101, 550 P.2d 657.

2. Construction and application

Provision of § 13-454 (renumbered as this section) setting forth guidelines for determination of punishment after one was convicted of first-degree murder had nothing to do with criteria for