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charging one with crime of murder and did not contemplate separate offense of aggravated first-degree murder, to be separated and specifically charged. State v. Blazak (1977) 114 Ariz. 199, 560 P.2d 54.

Former § 13–454 (renumbered as this section) which placed on defendant in homicide case burden of proving mitigation, after commission had been proved, acknowledged factual presumptions or inferences of malice and intent which arose when homicide was proved and shifted to defendant the burden of going forward with evidence but could not shift burden of proof from state to defendant. State v. Maloney (1966) 101 Ariz. 111, 416 P.2d 544, appeal after remand 102 Ariz. 495, 433 P.2d 625, appeal after remand 105 Ariz. 348, 464 P.2d 793, certiorari denied 91 S.Ct. 82, 400 U.S. 841, 27 L.Ed.2d 75.

Rule that in prosecution for homicide defendant may set up defense of insanity, alibi and self-defense under general plea of not guilty was not changed by adoption of rules of criminal procedure. State v. Alford (1965) 98 Ariz. 249, 403 P.2d 806.

3. Death sentence

Sentencing authority must be well-informed, and the circumstances of the offense, along with the character, record and propensities of the offender must be given careful consideration before the death sentence is imposed. Richmond v. Cardwell (D.C.1978) 450 F.Supp. 519.

Death sentence imposed upon defendant who perpetrated heinous killing was not excessive when viewed in the light of sentences of imprisonment received by defendant's companions whose participation in the killing was minor. State v. Bishop (1978) 118 Ariz. 263, 576 P.2d 122.

Provisions of § 13–454 (renumbered as this section) outlining procedures to be followed in imposing the death penalty was applicable to a conviction for which, under law of Arizona, a maximum sentence of life imprisonment could be imposed. State v. Jordan (1976) 114 Ariz. 452, 561 P.2d 1224.

Imposition of death penalty on conviction of first-degree murder was not improper under § 13–454 (renumbered as this section) and § 13-643 (repealed; see, now, §§ 13-1902, 13-1903, 13-1904) and 13-1644 (renumbered as § 13–4002), in view of defendant's four prior convictions in other states for felonies which were punishable by a sentence of life imprisonment or death under law of Arizona and which involved use or threat of violence on another person. Id.

Supreme Court's power to lessen sentences is ordinarily to be exercised with great caution, but not where death penalty has been imposed; in such case court will make independent review of facts to determine whether death penalty was appropriate under requirements of § 13–454 (renumbered as this section) and factors established by evidence, and court must be convinced that statutory aggravating circumstances outweighed mitigating circumstances. State v. Blazak (1977) 114 Ariz. 199, 560 P.2d 54.

Death penalty was properly imposed for homicide in view of aggravating circumstances. Id.

Under certain circumstances, trial court has no discretion but to impose death sentence. Id.

Gravity of death penalty requires that supreme court painstakingly examine record to determine whether it has been erroneously imposed, and court will undertake independent review of facts which establish presence or absence of aggravating and mitigating circumstances and will determine for itself if the latter outweighs the former when both are found to be present. State v. Richmond (1977) 114 Ariz. 186, 560 P.2d 41, certiorari denied 97 S.Ct. 2988, 433 U.S. 915, 53 L.Ed.2d 1101, application denied 98 S.Ct. 8, 434 U.S. 1323, 54 L.Ed.2d 34, rehearing denied 98 S.Ct. 537, 434 U.S. 976, 54 L.Ed.2d 469.

In reviewing imposition of death penalty, Supreme Court will determine whether sentence was imposed under influence of passion, prejudice or any other arbitrary factors, whether evidence will support finding of statutory aggravating circumstance and of absence of statutory mitigating circumstances, whether mitigating circumstances are sufficiently substantial to call for leniency and whether sentences of death are

excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant. Id.

Imposition of death penalty for crime of murder does not per se constitute cruel and unusual punishment in violation of Const. Art. 2, § 15, or U.S.C.A. Const. Amends. 8, 14. Id.

On record, death penalty for murder was properly imposed. Id.

Where, to avoid imposition of death penalty, there is demonstrated either impairment of capacity to appreciate wrongfulness or impairment of capacity to conform, the impairment in either case is not required to be so great as to constitute defense to prosecution. Id.

Purpose of death penalty statute, § 13-454 (renumbered as this section) was to confine discretion of sentencing authority within defined limits, and trial court could not take into account any mitigating circumstances not enumerated, nor could trial judge impose death sentence if no aggravating circumstances were found. Id.

Death sentence imposed upon defendant convicted of first-degree murder would be set aside where prosecution was allowed to introduce into evidence at sentencing hearing certain admissions made by defendant which were not admissible at trial, and where, subsequent to sentencing hearing, armed robbery conviction which was basis for for one of aggravating circumstances, was reversed. State v. Lee (1976) 114 Ariz. 101, 559 P.2d 657.

4. Aggravating or mitigating circumstances—In general

Statutory classification, under which fact that a defendant convicted of first-degree murder has previously been convicted of offense punishable by life imprisonment or death is an aggravating circumstance to be considered in determining whether to assess death penalty but a prior conviction of other arguable more serious offenses is not an aggravating circumstance, does not deny equal protection, in that the classification has rational relation to the statutory purpose of giving sentencing judges information deemed relevant to punishment for first-degree murder. State v. Arnett (1978) 119 Ariz. 38, 579 P.2d 542.

Trial court as well as appellate court were to consider only aggravating and mitigating factors listed in § 13-454 (renumbered as this section). State v. Bishop (1978) 118 Ariz. 263, 576 P.2d 122.

An individual's relative participation in the crime is a mitigating factor to be taken into account. Id.

Defendant's conduct in continuing his barrage of violence, inflicting wounds and abusing his victims, beyond point necessary to fulfill his plan to steal, beyond even point necessary to kill, was such an additional circumstance of cruel and depraved nature so as to set it apart from the "usual or the norm" and sentencing court, which sentenced defendant to death upon his conviction on two counts of first-degree murder, accordingly did not err in finding as aggravating circumstance that murders were committed in especially cruel, heinous or depraved manner. State v. Coja (1977) 115 Ariz. 413, 565 P.2d 1274.

Where no mitigating circumstances were established and one aggravating circumstance was established, i. e., that murders of two victims were committed by defendant in especially cruel, heinous or depraved manner, imposition of death penalty upon defendant's conviction on two counts of first-degree murder was not only proper, but required. Id.

Imposition of death penalty on conviction of first-degree murder was not improper, where trial court found aggravating circumstances pursuant to § 13-454 (renumbered as this section) and found no mitigating circumstances. State v. Holsinger (1977) 115 Ariz. 89, 563 P.2d 888.

Defendant who received death sentence on conviction of first-degree murder was not denied equal protection of the law because defendant's wife, who was also convicted of first-degree murder, received only a life sentence, where trial court found in wife's case a mitigating circumstance not found in defendant's case. Id.

Trial court's failure to specify which aggravating circumstance necessitated

imposition of death penalty would not require a remand for resentencing. State v. Knapp (1977) 114 Ariz. 531, 562 P.2d 704, certiorari denied 98 S.Ct. 1458.

Evidence or lack thereof presented to sentencing judge and trial court in prosecution of defendant for murder, including circumstance of duress which came up only in context of one of state's theories for motive of crime, i. e., that defendant feared his wife was going to desert him and therefore killed his children in an effort to bring them closer together, supported sentencing court's finding of absence of circumstances which would mitigate against imposition of death penalty. Id.

What legislature intended to include as an aggravating circumstance that would warrant death penalty for murder was a killing where an additional circumstance of "heinous, cruel, or depraved" nature set crime apart from usual or the norm. Id.

Where defendant went into room where his own two infant daughters were sleeping, poured lantern fuel, in great quantities, around the room, stood in the doorway and threw a lighted match into the room, then returned to his bedroom to lie down while the children burned and died, crime was "heinous, cruel and depraved" and death sentence was clearly justified. Id.

Statement obtained from defendant by police officer who continued to talk with him after defendant indicated that he did not want to answer any more questions was not admissible at sentencing hearing following defendant's conviction for first-degree murder since statement was not admissible at trial and admissibility of evidence relevant to any aggravating circumstances at sentence hearing is governed by rules governing admission of evidence in criminal trials. State v. Lee (1976) 114 Ariz. 101, 559 P.2d 657.

Record in homicide prosecution showed that trial court followed provisions of § 13-454 (renumbered as this section) requiring that materials in presentence report be revealed except for material necessary for protection of human life, and that any material withheld could not be considered in determining existence of aggravating or mitigating circumstances. State v. Reid (1976) 114 Ariz. 16, 559 P.2d 136, certiorari denied 97 S.Ct. 2191, 431 U.S. 921, 53 L.Ed.2d 234.

In proceeding under provision of § 13-454 (renumbered as this section) pertaining to determination of sentence upon finding or admitting of guilt in first-degree murder case, decision to offer evidence of aggravation or not offer such evidence was the responsibility of the prosecutor, and the court had no authority to interfere with discretion of prosecutor in this area; if trial court did not believe that plea agreement accepted by prosecutor served ends of justice, judge could decline to accept plea and transfer case to another judge. State v. Murphy (1976) 113 Ariz. 416, 555 P.2d 1110.

Where defendant, pursuant to plea agreement with prosecutor, pleaded guilty to charge of first-degree murder, and prosecutor, as agreed, recommended that defendant receive life sentence instead of death penalty, trial court erred in directing prosecutor, contrary to his wishes, to put on evidence of aggravating circumstances and thus sentence of death imposed by court was not proper and would be set aside and corrected to life imprisonment without possibility of parole for 25 years. Id.

Grand jury testimony, on which first-degree murder indictment was founded and which reflected that, inter alia, petitioner and codefendants planned burglary of residence they knew belonged to person involved in narcotics transactions and that petitioner, after shooting of victim, held gun on owner of residence and threatened him, was sufficient to support finding of "aggravating circumstance" that petitioner in commission of offense knowingly created grave risk of death to another person or persons in addition to victim of offense, and thus denying petitioner's bail application was not abuse of discretion. Martinez v. Superior Court In and For Pima County (1976) 26 Ariz.App. 386, 548 P.2d 1198.

5. —— Duress, aggravating or mitigating circumstances

Defendant's actions in planning the killing of victim for over a day because

he wanted victim's automobile and disliked victim's drinking habits and striking victim several times with hammer, placing him in mine shaft and dropping rocks and dirt on struggling victim did not indicate duress as mitigating factor calling for leniency in sentencing defendant convicted of first-degree murder. State v. Bishop (1978) 118 Ariz. 263, 576 P.2d 122.

Fact that defendant, who was sentenced to death upon his conviction on two counts of first-degree murder, might have been depressed or even traumatized by his wife's miscarriage did not, in itself, lead to conclusion that he was under unusual or substantial duress three months later on day he committed murders. State v. Ceja (1977) 115 Ariz. 413, 565 P.2d 1274.

6. —— Character of offender, aggravating or mitigating circumstances

Character of individual offender is a circumstance which should be considered in determining whether death penalty should be imposed; sentencing authority should be given guidance about defendant, as well as the crime, which the state deems particularly relevant to the sentencing decision. State v. Arnett (1978) 119 Ariz. 38, 579 P.2d 542.

Offense of lewd and lascivious act on child under age of 14 years in which defendant's insertion of his finger into five-year-old girl's vagina ruptured her hymen and caused vaginal bleeding was a crime of "violence" within meaning of § 13-455 (renumbered as this section) providing that an aggravated circumstance to be considered in determining whether to impose death penalty against person convicted of first-degree murder was that "the defendant was previously convicted of a felony * * * involving the threat of violence on another person." Id.

Accused's mental condition, which was a substantial factor in causing murder victim's death, was a mitigating factor precluding imposition of death sentence against accused. State v. Doss (1977) 116 Ariz. 156, 568 P.2d 1054.

Psychopathic or sociopathic condition is not, as such, "mental disease or defect" which would constitute defense to criminal act. State v. Richmond (1977) 114 Ariz. 186, 560 P.2d 41, certiorari denied 97 S.Ct. 2988, 433 U.S. 915, 53 L.Ed.2d 1101, application denied 98 S.Ct. 8, 434 U.S. 1323, 54 L.Ed.2d 34, rehearing denied 98 S.Ct. 537, 434 U.S. 970, 54 L.Ed.2d 469.

Personality or character disorders are not "mitigating circumstances" to be considered in determining penalty for first-degree murder. Id.

Character or personality disorder does not qualify as "impairment" within meaning of death penalty statute, this section, defining "mitigating circumstances" to include impairment of capacity. Id.

7. —— Prior conviction, aggravating or mitigating circumstances

Under circumstances, trial court was correct in refusing to consider, as mitigating factor, lack of a prior conviction by defendant who was convicted of first-degree murder. State v. Bishop (1978) 118 Ariz. 263, 576 P.2d 122.

Evidence, at hearing on sentencing of defendant convicted of first-degree murder, failed to support finding that defendant had previously been convicted for assault with deadly weapon. State v. Lee (1976) 114 Ariz. 101, 559 P.2d 657.

Supreme Court does not approve procedure of asking court at sentencing hearing to take judicial notice of conviction for purpose of establishing such conviction as aggravating circumstance; proper procedure to establish prior conviction is for State to offer in evidence certified copy of conviction pursuant to Rules of Criminal Procedure and establish defendant as person to whom document refers. Id.

8. —— Burden of proof, aggravating or mitigating circumstances

Burden of establishing mitigating factors in first degree murder sentencing proceeding is on defendant. State v. Bishop (1978) 118 Ariz. 263, 576 P.2d 122.

Burden of establishing existence of any mitigating circumstance, for purposes of imposition of death penalty, is on defendant. State v. Ceja (1977) 115 Ariz. 413, 565 P.2d 1274.

Burden of establishing mitigating circumstances for purposes of sentencing is on the defendant. State v. Knapp (1977) 114 Ariz. 531, 562 P.2d 704, certiorari denied 98 S.Ct. 1458.

State's burden to show that right to bail was limited rather than absolute included prima facie showing of existence of one of aggravating circumstances justifying imposition of death sentence. Martinez v. Superior Court In and For Pima County (1976) 26 Ariz.App. 386, 548 P.2d 1198.

Where defendant admitted that she had shot and killed deceased, burden of proving circumstances reducing offense to manslaughter was upon defendant, unless they were shown by state's proof. Harris v. State (1935) 46 Ariz. 121, 46 P.2d 1082.

9. —— Sufficiency of evidence, aggravating or mitigating circumstances

Defendant, who was convicted on two counts of first-degree murder, failed to sustain his burden of establishing existence of any mitigating circumstances, for purposes of imposition of death penalty. State v. Ceja (1977) 115 Ariz. 413, 565 P.2d 1274.

There was insufficient evidence to support sentencing court's determination of existence of aggravating circumstance that defendant, who was sentenced to death upon his conviction on two counts of first-degree murder, had knowingly created grave risk of death to second victim in commission of offense against first victim. Id.

10. —— Jury questions, aggravating or mitigating circumstances

Existence of aggravating and mitigating factors need not be determined by a jury in a capital case. Richmond v. Cardwell (D.C.1978) 450 F.Supp. 519.

11. Admissibility of evidence

At trial, since commission of homicide had been established, circumstances of mitigation must be confined to those surrounding commission of offense and relevant within res gestae thereof including those circumstances which might reduce grade of offense from first-degree to second-degree murder or manslaughter. State v. Kruchten (1966) 101 Ariz. 186, 417 P.2d 510, certiorari denied 87 S.Ct. 784, 385 U.S. 1043, 17 L.Ed.2d 687.

Circumstances in either mitigation or aggravation of punishment are not admissible on trial unless relevant to determine guilt or innocence. Id.

Where accused admitted that he fired the fatal shot, but claimed that he killed in self-defense, the exclusion of evidence of deceased's threats and the fact that he was armed was erroneous under § 13–454 (renumbered as this section). Nelson v. State (1914) 16 Ariz. 165, 141 P. 704.

12. Presumptions

When the state has proved a homicide by a defendant, the presumption is that he is guilty of murder unless the state's evidence tends to show the contrary, and it is incumbent upon defendant to contradict that presumption. State v. Johnson (1949) 69 Ariz. 203, 211 P.2d 469; State v. Ponce (1942) 59 Ariz. 158, 124 P.2d 543.

Instruction should have been given, in first-degree murder prosecution, on offense of voluntary manslaughter, where, while jury could have disregarded defendant's theory that decedent had attacked him with a knife, evidence presented could have overcome the presumption of malice established by the State and might have convinced the jury that the killing was committed in the heat of passion. State v. Moore (1973) 109 Ariz. 111, 506 P.2d 242.

Malice will be presumed from proof of homicide alone if evidence adduced to establish homicide shows neither mitigation nor justification or excuse. State v. Maloney (1966) 101 Ariz. 111, 416 P.2d 544, appeal after remand 102 Ariz. 495, 433 P.2d 025, appeal after remand 105 Ariz. 348, 464 P.2d 793, certiorari denied 91 S.Ct. 82, 400 U.S. 841, 27 L.Ed.2d 75.

Where state has proved commission of homicide by defendant, presumption obtains he is guilty of murder in first or second degree unless state's proof tends to reduce offense to manslaughter or show that defendant was justified in committing killing. Miranda v. State (1933) 42 Ariz. 358, 26 P.2d 241.

Note 13

13. Justification or excuse, in general

Although it might have been preferable not to instruct jury that "You are further instructed that upon a trial for homicide the commission of the homicide by the defendant being proved, the burden of proving the circumstances or mitigation to justify or excuse it revolves upon the defendant unless the proof on the part of the prosecution tends to show that the alleged crime committed only amounts to manslaughter or that the homicide was justifiable or excusable.", no prejudicial error resulted. State v. Young (1973) 109 Ariz. 221, 508 P.2d 51.

Provocation or other circumstances may reduce crime from murder to manslaughter. State v. Sellers (1970) 106 Ariz. 315, 475 P.2d 722.

In determining whether defendant accused of homicide acted in necessary self-defense or what appeared to be necessary self-defense, it is jury's duty to look at transaction from what it believes from the evidence was standpoint of defendant as a reasonable person at the time, and considered same in light of facts and circumstances as it believes they appeared to defendant as a reasonable person at the time. State v. Anderson (1967) 102 Ariz. 295, 428 P.2d 672.

When state had proved beyond reasonable doubt that defendant committed homicide, it had by operation of former § 13-454 (renumbered as this section) automatically proved that defendant acted intentionally and maliciously unless there was some evidence of mitigation, justification or excuse; without any other proof defendant would be guilty of second-degree murder. State v. Maloney (1966) 101 Ariz. 111, 416 P.2d 544, appeal after remand 102 Ariz. 495, 433 P.2d 625, appeal after remand 105 Ariz. 348, 464 P.2d 793, certiorari denied 91 S.Ct. 82, 400 U.S. 841, 27 L.Ed.2d 75.

Where state has proved a homicide by a defendant, and state's evidence tends only to reduce the offense to manslaughter, a verdict of that offense is required unless defendant can show excusable or justifiable homicide. State v. Ponce (1942) 59 Ariz. 158, 124 P.2d 543.

Defendant's admission that he fired shot which killed deceased was sufficient to make a prima facie case of second-degree murder, and placed burden upon defendant of proving circumstances that mitigated, justified, or excused killing. Viliborghi v. State (1935) 45 Ariz. 275, 43 P.2d 210.

Section 13-454 (renumbered as this section) only required defendant, on trial for murder, to produce such proof as would raise a reasonable doubt in the minds of the jury whether the killing was justifiable or excusable to be entitled to an acquittal. Anderson v. Territory (1904) 9 Ariz. 50, 76 P. 636. In discussing the history and proper interpretation of this section the Supreme Court in this case said:

"Said section first appeared in the statutes of the territory in the revision of 1887, and is an exact rescript of section 1105 of the Penal Code of California. This being so, if the Supreme Court of that state had given a settled construction to this statute prior to its adoption by the Legislature of this territory, this settled construction would be binding upon us. We find, however, that the reported cases show a decided conflict of view upon the question as to whether the statute is to be construed as requiring a defendant, under charge of murder, to prove circumstances of mitigation or excuse by a preponderance of the evidence. * * * From these conflicting decisions, we cannot say that section 933 had been given a settled construction by the Supreme Court of California prior to its adoption. The case of People v. Knapp, 71 Cal. 1, 11 Pac. 793, cited in the brief of the respondent, was not published until after the Penal Code of 1887 had been enacted, and hence is not to be regarded in this connection. In People v. Rushton, 89 Cal. 160, 22 Pac. 127, 549, in a well-considered opinion, the Supreme Court of California, following People v. Flanagan [60 Cal. 3, 44 Am.Rep. 52] and People v. Smith [59 Cal. 601], held that that court, in People v. Hong Ah Duck [61 Cal. 387], had given an erroneous construction to said section 1105 of the Penal Code, and that a defendant, under the statute, is only required to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt, and that it makes no difference whether this reasonable doubt be the result of evidence on the part of the prosecution, tending to show circum-

stances of mitigation or excuse, or arises from evidence coming from the defendant. The doctrine announced in People v. Bushton [80 Cal. 160, 22 Pac. 127, 549] has been since followed, and appears to be the settled law of the state. We are in full accord with this view of the statute.

"An examination shows that the statute does not mention the quantum of proof required of the defendant where the burden is cast upon him of showing circumstances of mitigation or excuse. It is based upon the common-law doctrine that one is presumed to intend the reasonable and probable consequences of his act, and that, where the act is unlawful, the criminal intent is inferred. It must, however, be read in the light of that other presumption which lies at the very foundation of criminal law—that of innocence, which attaches to a defendant as a sufficient shield until his guilt is established to the satisfaction of the jury, and beyond any reasonable doubt. As expressed by Mr. Justice White in Coffin v. U. S., 156 U.S. 459, 15 Sup.Ct. 405, 39 L.Ed. 481: 'This presumption is an instrument of proof created by the law in favor of the accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption, on the one hand, supplemented by any other evidence he may adduce, and the evidence against him, on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.'

"Again, is it a reasonable construction to give to the statute that a defendant is entitled to an acquittal where the evidence on the part of the prosecution raises a reasonable doubt whether he was justifiable or excusable in the commission of the homicide, but that he is not entitled to an acquittal where he seeks to justify or excuse the homicide, and no proof of justification or excuse is put in by the prosecution, unless he establishes circumstances of mitigation or excuse by a preponderance of the proof? Why should it be sufficient that a reasonable doubt exists in the one case, and insufficient in the other? What can it matter to the law whence or by whom or by what evidence the reasonable doubt is raised? Why should the law be regardful of the source of the reasonable doubt—whether it originate in the evidence of the prosecution or in the evidence of the defense—provided it exists in the minds of the jury? It seems to us more reasonable to hold that the statute means that, where a prima facie case is made out, the defense must prove circumstances of mitigation or excuse sufficient to raise a reasonable doubt in the minds of the jury. As we have seen, this is now the rule applied by the Supreme Court of the state of California. The same rule was earlier applied by the Supreme Court of Nevada under a similar statute. State v. McCluer, 5 Nev. 132. In a recent case the Supreme Court of Montana, departing from its former rulings, has given a like construction to a similar statute. In fact, it would be easy to show that the trend of modern decisions is in favor of this construction."

If, in a prosecution for murder claimed to have been committed in self-defense, it appears that accused fired the shot, the burden of proving mitigating circumstances excusing the homicide is on the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the homicide was excusable. Foster v. Territory (1899) 6 Ariz. 240, 56 P. 738.

14. Instructions

Instructing jury in language of former § 13-454 (renumbered as this section) which shifted burden of proof of mitigation to defendant upon proof of commission of homicide by defendant was not prejudicial although better practice was not to instruct jury in language of statute. State v. Maloney (1966) 101 Ariz. 111, 416 P.2d 544, appeal after remand 102 Ariz. 405, 433 P.2d 625, appeal after remand 105 Ariz. 348, 464 P.2d 793, certiorari denied 91 S.Ct. 82, 400 U.S. 841, 27 L.Ed.2d 75.

Instruction that proof of homicide cast burden on defendant to prove circumstances that mitigated, justified, or excused it to extent of raising reasonable doubt in minds of jury was not error. Rosser v. State (1935) 45 Ariz. 264, 42 P.2d 613.

Note 14

Instruction that, commission of homicide by defendant being proven, burden is on him to prove justification or mitigation, etc., following § 13-454 (renumbered as this section) was not error, as assuming that defendant committed the homicide. Ramirez v. State (1916) 18 Ariz. 272, 158 P. 640.

Where, in a prosecution for homicide, the court charged that accused could not be convicted unless the evidence excluded every reasonable hypothesis but that of guilt; that, no matter how strong the circumstances were, they did not constitute proof required by law if they could be reasonably reconciled with the theory that defendant acted in self-defense; that defendant was presumed innocent; and that such presumption remained until overcome by evidence satisfying the jury beyond reasonable doubt of his guilt—an instruction in the language of § 13-454 (renumbered as this section) was proper. Bryant v. Territory (1909) 12 Ariz. 105, 100 P. 455.

It is not error for the court in a prosecution for murder to charge the exact language of § 13-454 (renumbered as this section). Halderman v. Territory (1900) 7 Ariz. 120, 60 P. 876.

15. Presentence reports

Where trial court in prosecution for murder and other crimes did not state why certain portions of presentence report were excised and did not indicate that it was not considering such excised material in imposing death sentence, proceeding would be remanded for new hearing and resentencing. State v. Watson (1976) 114 Ariz. 1, 559 P.2d 121, certiorari denied 97 S.Ct. 1687, 430 U.S. 986, 52 L.Ed.2d 382.

16. Review

The Supreme Court had jurisdiction of appeal from death sentence imposed upon defendant upon his conviction of two counts of first-degree murder. State v. Ceja (1977) 115 Ariz. 413, 565 P.2d 1274.

While defendant, who was sentenced to death upon his conviction on two counts of first-degree murder, did not bring to attention of the supreme court on appeal any deficiency in conduct of trial itself, the supreme court nevertheless made independent review of record of proceedings below and was satisfied that defendant was accorded fair trial. Id.

Due to gravity of death penalty imposed upon defendant upon his conviction on two counts of first-degree murder, supreme court had duty on appeal to make independent examination of record to determine whether death penalty was properly imposed, and, in discharging that function, the court was required, among other things, to ascertain whether evidence supported sentencing court's finding of existence of statutory aggravating circumstances and absence of statutory mitigating circumstances. Id.

Because of unique severity of death penalty, Supreme Court will accord prompt consideration to appeals from imposition of the death sentence. State v. Richmond (1977) 114 Ariz. 186, 560 P. 2d 41, certiorari denied 97 S.Ct. 2988, 433 U.S. 915, 53 L.Ed.2d 1104, application denied 98 S.Ct. 8, 434 U.S. 1323, 54 L.Ed.2d 34, rehearing denied 98 S.Ct. 537, 434 U.S. 976, 54 L.Ed.2d 469.

§ 13-704. Method of infliction of sentence of death

The penalty of death shall be inflicted by lethal gas.

Formerly § 13-1654. Renumbered as § 13-4004 by Laws 1977, Ch. 142, § 157, eff. Oct. 1, 1978. Renumbered as § 13-704 by Laws 1978, Ch. 201, § 109, eff. Oct. 1, 1978.

Historical Note

Source:

Rules Cr.Proc., § 409. [Reference is to a Code of Criminal Procedure based on the Model Code of Criminal Procedure and adopted by the Supreme Court. See Code 1939, § 44-102 et seq.]

Code 1939, § 44-2315.

A.R.S. former §§ 13-1654, 13-4004.

Adopted from Model Code Crim.Proc. § 418.

Original § 13-704, derived from Pen. Code 1901, § 34; Pen.Code 1913, § 34; Rev.Code 1928, § 4494; Code 1939, § 43-5703, defined misprision of treason, and was repealed by Laws 1977, ch. 142, § 23, effective October 1, 1978.

Section 13-704 as added by Laws 1977, Ch. 142, § 48, eff. Oct. 1, 1978, was transferred and renumbered as § 13-604; see Historical note preceding § 13-701.

Cross References

Method of inflicting death penalty, see Const., art. 22, § 22.
Warrant of execution, see Rules Cr.Proc. Rule 26.16.

Library References

Criminal Law ⇐1219. C.J.S. Criminal Law § 2001 et seq.

United States Supreme Court

Florida, Georgia, Louisiana, North Carolina and Texas. Death penalty, see Gregg v. Georgia, 1976, 96 S.Ct. 2909, 428 U.S. 153, 49 L.Ed.2d 859; Jurek v. Texas, 1976, 96 S.Ct. 2950, 428 U.S. 262, 49 L.Ed.2d 929; Proffitt v. Florida, 1976, 96 S.Ct. 2960, 428 U.S. 242, 49 L.Ed.2d 913; Woodson v. North Carolina, 1976, 96 S.Ct. 2978, 428 U.S. 280, 49 L.Ed.2d 944; Roberts v. Louisiana, 1976, 96 S.Ct. 3001, 428 U.S. 325, 49 L.Ed.2d 974.

Notes of Decisions

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1. In general

Const. Art. 22, § 22, prescribing lethal gas for execution of death penalty required that such method be used in all cases following date of approval of amendment whether crime for which such sentence is imposed was committed prior thereto or not. Hernandez v. State (1934) 43 Ariz. 424, 32 P.2d 18.

2. Constitutional provisions

Const. Art. 22, § 22, prescribing lethal gas for execution of death penalty was not in violation of state Constitution prohibiting passage of ex post facto laws since amendment having become part of Constitution would supersede any provision therein that was in conflict therewith. Hernandez v. State (1934) 43 Ariz. 424, 32 P.2d 18.

Const. Art. 22, § 22, prescribing lethal gas for execution of death penalty was not violative of Federal Constitution as imposing "cruel and unusual punishment". Id.

Const. Art. 22, § 22, prescribing lethal gas for execution of death sentence, construed to apply to crime for which sentence was imposed prior to adoption of amendment, was not in violation of Federal Constitution prohibiting passage of "ex post facto laws". Id.

3. Related law

Initiative Act 1916, amending Pen. Code 1913, § 173 (repealed; see, now, §§ 13-1104 and 13-1105) abolishing death penalty for first degree murder only and repealing all laws in conflict therewith which left death penalty in full force as to treason and train robbery under §§ 33 and 438, did not repeal general laws for carrying out the death penalty, and hence was not a legislative pardon of one convicted of murder under § 173 before amendment, especially in view of

re-establishment of death penalty for murder under Initiative Act 1918. Ex parte Faltin (1927) 31 Ariz. 465, 254 P. 477, certiorari denied 48 S.Ct. 22, 275 U. S. 522, 72 L.Ed. 405.

§ 13-705. Persons present at execution of sentence of death; limitation

The superintendent of the state prison shall be present at the execution of all death sentences and shall invite a physician, the attorney general and at least twelve reputable citizens of his selection to be present at the execution. The superintendent shall at the request of the defendant, permit clergymen, not exceeding two, whom the defendant names and any persons, relatives or friends, not to exceed five, to be present at the execution. The superintendent may invite such peace officers as he deems expedient to witness the execution. No persons other than those set forth in this section shall be present at the execution nor shall any minor be allowed to witness the execution.

Formerly § 13-1655. Renumbered as § 13-4005 by Laws 1977, Ch. 142, § 157, eff. Oct. 1, 1978. Renumbered as § 13-705 by Laws 1978, Ch. 201, § 109, eff. Oct. 1, 1978.

Historical Note

Source:

Pen.Code 1901, § 1030, am., Laws 1909, ch. 28, § 1.
Pen.Code 1913, § 1149.
Rev.Code 1928, § 5130.
Code 1939, § 44-2317.
A.R.S. former §§ 13-1655, 13-4005.

Adopted from California, see West's Pen.Code §§ 3603, 3605.

Former § 13-705 was transferred and renumbered as § 13-605; see italicized note preceding § 13-701.

Reviser's Note:

The first sentence of R.C.1928, § 5130 (44-2317, C. '39) is omitted as covered by Rule 345 of the Rules of Criminal Procedure.

This section is an initiative measure amending P.C.1913, § 1149. The effective date of the measure was December 5, 1918. See Laws 1919, Initiative and Referendum Measures, p. 20.

Cross References

Constitutional provision relating to capital punishment, see Const. art. 22, § 22.
Definition of minor, see § 1-215.

§ 13-706. Return upon death warrant

Upon the execution of a sentence of death, the superintendent of the state prison shall make a return upon the death warrant to the court which pronounced sentence, showing the time, mode and manner in which it was executed.

Formerly § 13-1656. Renumbered as § 13-4006 by Laws 1977, Ch. 142, § 157, eff. Oct. 1, 1978. Renumbered as § 13-706 by Laws 1978, Ch. 201, § 109, eff. Oct. 1, 1978.

SUBTITLE 2. OFFENSES AGAINST THE PERSON

CHAPTER 10
HOMICIDE

SECTION.
5-10-101. Capital murder.
5-10-102. Murder in the first degree.
SECTION.
5-10-105. Negligent homicide.

Effective Dates. Acts 1987 (1st Ex. Sess.), No. 52, § 2: June 29, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that in the case of *Ronnie Midgett, Sr. vs. State of Arkansas*, CR 86-215, the Supreme Court of the State of Arkansas failed to find evidence of premeditation and deliberation in order to affirm a jury finding of first degree murder where a child's death was caused from a beating at the hands of his drunken father, and therefore reduced the father's conviction to second degree murder causing considerable confusion with reference to the application of Arkansas' first degree murder statute to child abuse cases resulting in death, the immediate passage of this Act is necessary in order to clearly establish Arkansas' first degree murder statute to be applicable in such cases. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

5-10-101. Capital murder.

(a) A person commits capital murder if:

(1) Acting alone or with one (1) or more other persons, he commits or attempts to commit rape, kidnapping, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or

(2) Acting alone or with one (1) or more other persons, he commits or attempts to commit arson, and in the course of and in furtherance of the felony or in immediate flight therefrom, he or an accomplice causes the death of any person; or

(3) With the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, prison official, firefighter, judge or other court official, probation officer, parole officer, or any military personnel, when such person is acting in line of duty, he causes the death of any person; or

(4) With the premeditated and deliberated purpose of causing the death of any person, he causes the death of two (2) or more persons in the course of the same criminal episode; or

(5) With the premeditated and deliberated purpose of causing the death of the holder of any public office filled by election or appointment or a candidate for public office, he causes the death of any person; or

(6) While under sentence of life imprisonment, life imprisonment without parole, or death, he purposely causes the death of another person after premeditation and deliberation; or

(7) Pursuant to an agreement that he cause the death of another person in return for anything of value, he causes the death of any person; or

(8) He enters into an agreement whereby one person is to cause the death of another person in return for anything of value, and the person hired, pursuant to the agreement, causes the death of any person.

(b) It is an affirmative defense to any prosecution under subsection (a)(1) of this section for an offense in which the defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid its commission.

(c) Capital murder is punishable by death or life imprisonment without parole pursuant to §§ 5-4-601 — 5-4-605 and 5-4-607 — 5-4-609. For all purposes other than disposition under §§ 5-4-101 — 5-4-104, 5-4-201 — 5-4-204, 5-4-301 — 5-4-308, 5-4-310 — 5-4-312, 5-4-401 — 5-4-404, 5-4-501 — 5-4-505, 5-4-601 — 5-4-605, and 5-4-607 — 5-4-609, capital murder is a Class Y felony.

History. Acts 1975, No. 280, § 1501; A.S.A. 1947, § 41-1501; Acts 1987, No. 1983, No. 341, § 1; 1985, No. 840, § 1; 242, § 2.

5-10-102. Murder in the first degree.

(a) A person commits murder in the first degree if:

(1) Acting alone or with one (1) or more other persons, he commits or attempts to commit a felony, and in the course of and in the furtherance of the felony or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or

(2) With the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person; or

(3) Under circumstances manifesting cruel and malicious indifference to the value of human life, he knowingly causes the death of a person fourteen (14) years of age or younger.

(b) It is an affirmative defense to any prosecution under subsection (a)(1) for an offense in which the defendant was not the only participant that the defendant:

(1) Did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid its commission; and

(2) Was not armed with a deadly weapon; and

(3) Reasonably believed that no other participant was armed with a deadly weapon; and

(4) Reasonably believed that no other participant intended to engage in conduct which could result in death or serious physical injury.

(c) Murder in the first degree is a Class Y felony.

History. Acts 1975, No. 280, § 1502; § 41-1502; Acts 1987 (1st Ex. Sess.), No. 1981, No. 620, § 10; A.S.A. 1947, 52, § 1.

5-10-105. Negligent homicide.

(a)(1) A person commits negligent homicide if he negligently causes the death of another person, not constituting murder or manslaughter, as a result of operating a vehicle, an aircraft, or a watercraft:

(A) While intoxicated; or

(B) If at that time there is one-tenth of one percent (0.10%) or more by weight of alcohol in the person's blood as determined by a chemical test of the person's blood, urine, breath, or other bodily substance.

(2) A person who violates subdivision (a)(1) of this subsection is guilty of a Class D felony.

(b)(1) A person commits negligent homicide if he negligently causes the death of another person.

(2) A person who violates subdivision (b)(1) of this subsection is guilty of a Class A misdemeanor.

(c) For the purpose of this section, "intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians.

History. Acts 1975, No. 280, § 1505; A.S.A. 1947, § 41-1505; Acts 1987, No. 538, § 1.

CHAPTER 12
ROBBERY

SECTION.
5-12-102. Robbery.

5-12-102. Robbery.

(a) A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another.

(b) Robbery is a Class B felony.

History. Acts 1975, No. 280, § 2103; A.S.A. 1947, § 41-2103; Acts 1987, No. 934, § 1.

Arkansas Code

v. State, 286 Ark. 205, 691 S.W.2d 133 (1985).

Notice.

The defendant's contention that the pleadings gave him no notice of enhancement was meritless because the information alleged the defendant killed the murder victim with a revolver; thus, the defendant had notice of the firearm issue and that the State could ask for an enhancement. David v. State, 286 Ark. 205, 691 S.W.2d 133 (1985).

Resentencing.

Although the evidence was insufficient to support the finding that the defendant in a burglary prosecution had violated this section by using a firearm in the commission of a felony, resentencing the defendant was unnecessary where the sentence that the defendant had received was the minimum sentence he could have received under § 5-4-501 as an extended term of punishment for conviction of four or more previous felonies, irrespective of the issue of the firearm. Jordon v. State, 274 Ark. 572, 626 S.W.2d 947 (1982).

Cited: Thomas v. State, 262 Ark. 79, 553 S.W.2d 32 (1977); Foster v. State, 275 Ark. 427, 631 S.W.2d 7 (1982); Gilbert v. State, 277 Ark. 61, 639 S.W.2d 346 (1982); Spillers v. Lockhart, 802 F.2d 1007 (8th Cir. 1986).

SUBCHAPTER 6 — TRIAL AND SENTENCE — CAPITAL MURDER

SECTION.
5-4-601. Legislative intent.
5-4-602. Capital murder charge — Trial procedure.
5-4-603. Findings required for death sentence — Unanimity.
5-4-604. Aggravating circumstances.
5-4-605. Mitigating circumstances.
5-4-606. Life imprisonment without parole.
5-4-607. Application for executive clemency — Regulations.
5-4-608. Waiver of death penalty.
5-4-609 — 5-4-614. [Reserved.]
5-4-615. Conviction — Punishments.
5-4-616. Procedure following remand of capital case after vacation of death sentence — Retroactive application.
5-4-617. Method of execution.

Publisher's Notes. Acts 1975, No. 280, § 1309 provided that if any provision of §§ 5-4-601 — 5-4-608 or the application thereof to any person or circumstance was held invalid that the invalidity was not to affect other provisions or applications of §§ 5-4-601 — 5-4-608 that could be given effect without the invalid provision or application, and to that end the provisions of §§ 5-4-601 — 5-4-608 were declared to be severable.

Effective Dates. Acts 1983, No. 546, § 3: Mar. 19, 1983. Emergency clause provided: "It is hereby found and determined that those defendants whose death sentences have been vacated by the appellate courts, with their convictions upheld, have been sentenced to life without parole; because of the provision requiring sentencing by the same jury that determines guilt, the State must either accept the reduced sentence, or, if it wishes to reimpose the death penalty, to retry both the guilt and sentencing phases; it is a waste of judicial resources to require the retrying of an error-free trial if the State wishes to seek to reimpose the death penalty; and this Act is immediately necessary to rectify that problem. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 833, § 2: Apr. 4, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present statute governing aggravating circumstances which justify the imposition of the death penalty does not adequately provide for appropriate punishment when the crime of capital murder is committed in an especially heinous, atrocious or cruel manner of committing a capital felony murder is an ap-

propriate consideration in determining the penalty for such a crime; and that the addition of this aggravating circumstance to the statutorily authorized list of aggravating circumstances is immediately necessary to provide for its consideration in trials for capital murders which may occur after the passage and approval of this Act. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence. 8 ALR 4th 1028.

Am. Jur. 21 Am. Jur. 2d, Crim. L., 606-612 and 625-631.

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

Note, Grigsby v. Mabry: Convictions Rendered by Death-Qualified Juries Are Unconstitutional, 39 Ark. L. Rev. 335.

C.J.S. 24B C.J.S., Crim L., § 1995(1) et seq.

5-4-601. Legislative intent.

(a) It is the intention of the General Assembly of the State of Arkansas, in enacting this subchapter, to specify the procedures and standards pursuant to which a sentencing body must conform in making a determination as to whether a sentence of death is to be imposed upon a conviction of capital murder.

(b) In the event that the provisions of this subchapter respecting sentencing procedures are held invalid with regard to the imposition of a sentence of death or a sentence of death is declared to be invalid per se, it is the intent of the General Assembly that:

(1) Capital murder shall be punishable by life imprisonment without parole; and

(2) The procedures and findings required by §§ 5-4-602 — 5-4-605, 5-4-607, and 5-4-608 shall be deemed repealed and of no effect.

History. Acts 1975, No. 280, § 1308; A.S.A. 1947, § 41-1308.

5-4-602. Capital murder charge — Trial procedure.

The following procedures shall govern trials of persons charged with capital murder:

(1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.

(2) If the defendant is found not guilty of the capital offense charged but guilty of a lesser included offense, sentence shall be determined and imposed as provided by law.

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subdivision (4) hereof, and to determine sentence in the manner provided by § 5-4-603; except that, if the state waives the death penalty,

stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in § 5-4-604 or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, but the admissibility of evidence relevant to the aggravating circumstances set forth in § 5-4-604 shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing.

History. Acts 1975, No. 280, § 1301; A.S.A. 1947, § 41-1301.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Constitutional Law, 1 UALR L.J. 140.

Survey of Arkansas Law, Criminal Procedure, 5 UALR L.J. 123.

CASE NOTES

ANALYSIS

Constitutionality.
Appeal.
Cruel and unusual punishment.
Death penalty.
Evidence.
Instructions.
Juries.
Validity of procedure.
Voir dire.

Constitutionality.

Former similar statute was constitutional, since the basis for the verdict, supported by the jury's written finding with respect to the various aggravating and mitigating circumstances, would be known. Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975), aff'd, 261 Ark. 195, 548 S.W.2d 106 (1977); Neal v. State, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgments left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 44, 45, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 135 (1977) (preceding decisions under prior law).

Where defendant was sentenced to life imprisonment without parole, he could not attack as unconstitutionally vague provisions of former similar statute which would have permitted the jury to impose the death penalty after assessing aggravating circumstances, since defendant had not been penalized by that provision. Williams v. State, 260 Ark. 457, 541 S.W.2d 300 (1976) (decision under prior law).

Sections 5-4-602 — 5-4-605 do not place an impermissible burden on the exercise of the constitutional right to trial by jury. Ruiz v. State, 275 Ark. 410, 630 S.W.2d 44, cert. denied, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982).

Allegation that the Arkansas death penalty statute impermissibly penalized petitioner's exercise of his constitutional right to plead not guilty and to have a jury trial was rejected. Hill v. State, 278 Ark. 194, 644 S.W.2d 282 (1983).

There is no right to plead guilty, and the fact that only a jury may impose the death penalty does not invalidate this section and §§ 5-4-603 — 5-4-605. Hayes v. State, 280 Ark. 509, 660 S.W.2d 648, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Appeal.

In a capital felony case, it is the duty of the Supreme Court to examine the entire record, not only for those errors raised on appeal but also for those that may be found in the record. Bly v. State, 263 Ark. 138, 562 S.W.2d 605 (1978).

Cruel and Unusual Punishment.

Sentence of life imprisonment without parole was not cruel or unusual punishment, where the sentence was within the limits established by the legislature. Dyas v. State, 260 Ark. 303, 539 S.W.2d 251 (1976) (decision under prior law).

Where jury found defendant guilty of capital murder, the sentence it imposed of life imprisonment without parole was within the statutory limits of this section and thus not cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Wilson v. State, 271 Ark. 682, 611 S.W.2d 739 (1981).

Death Penalty.

A procedure for prosecuting those charged with capital felony murder in which the jury must make a unanimous determination of guilt of one of the narrowly defined categories of the crime beyond a reasonable doubt, and in which the same jury in the sentencing phase of the trial must hear testimony tending to show one or more specifically enumerated groups of aggravating circumstances plus evidence relevant to mitigating circumstances, provided adequate safeguards against arbitrary or capricious imposition of the death penalty. Collins v. State, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158 (1977) (decision under prior law).

Argument that the death penalty was unconstitutional was rejected. Hayes v. State, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Evidence.

During the penalty stage of a capital murder trial, the state was not required to repeat evidence of aggravating circumstances in addition to any such evidence previously presented during the guilt or innocence phase of the trial. Neal v. State, 259 Ark. 27, 531 S.W.2d 17 (1975), vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 135 (1977) (decision under prior law).

Even though this section tends to relax the requirement of admissibility with regard to authenticity or hearsay, the legislature did not intend to totally open the door to any and all matters simply because mitigation is the issue, so that testimony should be sworn and the state given an opportunity to cross-examine unless there are compelling and valid reasons for not doing so. Hobbs v. State, 273 Ark. 125, 617 S.W.2d 347 (1981).

The trial court did not err when, in the penalty phase of the capital murder trial, it refused to allow a defense witness to testify as to the defendant's charitable acts which the defendant had related to him, because the defendant was available to testify and there was no reason for the admission of such hearsay testimony. Hill v. State, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

The trial court should exclude from the penalty phase of the trial the results of a polygraph examination given to the defendant; while the rules of evidence are not applicable to the penalty phase of the trial, the evidence offered must be probative of some issue to be properly considered in the penalty phase. Hendrickson v. State, 285 Ark. 462, 688 S.W.2d 295 (1985).

Instructions.

Trial court did not err in allowing the state to prove all the defendant's prior felonies where the court clearly instructed the jury that they were to consider only the prior convictions involving threats or violence as aggravating circumstances and that the other convictions were to be considered only for enhancement purposes. Hill v. State, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

Juries.

Insofar as the same jury is required to sit in both phases of a bifurcated trial, the idea that a juror who could qualify for only one phase of the trial can sit in both or that, on voir dire, the dual role of the jury should be distinguished, is fore-

closed. Giles v. State, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

It is obvious that the state has a significant interest in seeing that those who could never levy the death penalty not be allowed to participate in the assessment of the sentence in a capital case, else a single juror could effectively nullify the state legislature's determination that capital punishment should be an available, and might be the appropriate punishment, but that interest is not involved when a scrupled juror is excluded for cause from guilt determination so long as the juror swears to decide the guilt issue on the basis of the law and evidence. Grigsby v. Mabry, 483 F. Supp. 1372 (E.D. Ark.), modified on other grounds, 637 F.2d 525 (8th Cir. 1980).

It is not impermissible for the same "death qualified" jury to both hear the evidence and determine the sentence in a bifurcated trial for capital murder. Lasley v. State, 274 Ark. 352, 625 S.W.2d 466 (1981).

The law of Arkansas permits prospective jurors to be challenged if they would automatically vote for the death penalty upon conviction regardless of the evidence. Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), aff'd as modified 758 F.2d 226 (8th Cir. 1985); rev'd on other grounds, Lockhart v. McCree, 476 U.S. —, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

The exclusion for cause of the veniremen with conscientious objections to the death penalty, without a determination that their objections would preclude their finding defendant guilty, did not deny him his right to an impartial jury and to a jury that was representative of the community. Hill v. State, 278 Ark. 194, 644 S.W.2d 282 (1983).

The death-qualification of the jury did not deprive defendant of an impartial jury. Abernathy v. State, 278 Ark. 250, 644 S.W.2d 590 (1983); Hayes v. State, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

A death-qualified jury is constitutional. Simmons v. State, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983); Henry v. State, 278 Ark. 478, 647 S.W.2d 419, cert. denied, 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983); Rector v. State, 280 Ark. 385, 659 S.W.2d 168 (1983), cert. denied, 466 U.S. 988, 104 S. Ct. 2370, 80 L. Ed. 2d 842 (1984).

Exclusion for cause of two veniremen because of their uncertainty as to capital punishment, and failure to excuse for cause a venireman who showed a preference for it, did not constitute abuse of discretion. Clines v. State, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Jurors who are unalterably opposed to capital punishment should not be permitted to participate in the determination of guilt or innocence in capital cases and their exclusion is proper. Rector v. State, 280 Ark. 385, 659 S.W.2d 168 (1983), cert. denied, 466 U.S. 988, 104 S. Ct. 2370, 80 L. Ed. 2d 842 (1984).

The removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors who state that they cannot, under any circumstances, vote for the imposition of the death penalty does not violate a defendant's right under the Sixth and Fourteenth Amendments of the United States Constitution to have his guilt or innocence determined by an impartial jury selected from a representative cross section of the community or his constitutional right to an impartial jury. Lockhart v. McCree, 476 U.S. —, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

The removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors who state that they cannot, under any circumstances, vote for the imposition of the death penalty serves the state's entirely proper interest in obtaining a single jury that can impartially decide all of the issues in the defendant's case. Lockhart v. McCree, 476 U.S. —, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

Since Arkansas recognizes the death penalty, jurors in a capital murder case must be able to consider imposing a death sentence if they are to perform their function as jurors; the trial court correctly decided that those excused jurors could not perform their duties, because they would not consider imposing a death sentence.

Williams v. State, 288 Ark. 444, 705 S.W.2d 888 (1986).

The proper standard to be used in releasing a juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. Williams v. State, 288 Ark. 444, 705 S.W.2d 888 (1986).

Validity of Procedure.

A procedure for prosecuting those charged with capital felony murder in which the jury must make a unanimous determination of guilt of one of the narrowly defined categories of the crime beyond a reasonable doubt, and in which the same jury in the sentencing phase of the trial must hear testimony tending to show one or more specifically enumerated groups of aggravating circumstances plus evidence relevant to mitigating circumstances, provided adequate safeguards against arbitrary or capricious imposition of the death penalty. Collins v. State, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, rehearing denied, 434 U.S. 977, 98 S. Ct. 540, 54 L. Ed. 2d 471 (1977) (decision under prior law).

Voir Dire.

Defendants in a capital murder case are not permitted to voir dire the jury between the guilt phase and the penalty phase of the trial since subdivision (3) requires the same jury sit at both phases. Ruiz v. State, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

Cited: Titus v. State, 268 Ark. 9, 593 S.W.2d 164 (1980); Heard v. State, 272 Ark. 140, 612 S.W.2d 312 (1981); Gruzen v. State, 276 Ark. 149, 634 S.W.2d 92 (1982).

5-4-603. Findings required for death sentence — Unanimity.

(a) The jury shall impose a sentence of death if it unanimously returns written findings that:

(1) Aggravating circumstances exist beyond a reasonable doubt; and

(2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and

(3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(b) The jury shall impose a sentence of life imprisonment without parole if it finds that:

(1) Aggravating circumstances do not exist beyond a reasonable doubt; or

(2) Aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or

(3) Aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(c) If the jury does not make all findings required by subsection (a), the court shall impose a sentence of life imprisonment without parole.

History. Acts 1975, No. 280, § 1302; 1977, No. 474, § 11; A.S.A. 1947, § 41-1302.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Criminal Procedure, 5 UALR L.J. 123.

Survey of Arkansas Law: Criminal Procedure, 6 UALR L.J. 119.

CASE NOTES

Analysis

Constitutionality.
Aggravating or mitigating circumstances.
Burden of proof.
Discretion of court and jury.
Evidence.
Jurors.

Constitutionality.

Former death penalty statute held constitutional. Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980) (decision under prior law).

Sections 5-4-602 — 5-4-605 do not place an impermissible burden on the exercise of the constitutional right to trial by jury since, under this section the trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. Ruiz v. State, 275 Ark. 410, 630 S.W.2d 44, cert. denied, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982).

This section, which sets out the findings required for a death sentence, is not unconstitutional. Hill v. State, 278 Ark. 194, 644 S.W.2d 282 (1983).

The claim that the Arkansas statutory scheme regarding capital murder is unconstitutional in that it does not require the jury to separately weigh each defendant's role in a crime involving capital murder, so as to determine individual culpability, was rejected where the evidence showed that the blame for victim's murder rested with near equality on all of the defendants. Clines v. State, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Since this sentencing statute does not require a mandatory death sentence, but rather establishes criteria which must be strictly met before a death sentence shall be imposed, it is not unconstitutional. Hill v. State, 289 Ark. 387, 713 S.W.2d 233 (1986).

Aggravating or Mitigating Circumstances.

During the penalty stage of a capital murder trial, the state was not required to repeat evidence of aggravating circumstances in addition to any such evidence previously presented during the guilt or innocence phase of the trial. Neal v. State, 259 Ark. 8, 531 S.W.2d 17 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 135 (1977) (decision under prior law).

Weighing the aggravating circumstances against the mitigating ones for sentencing purposes is not simply a matter of counting the number of aggravating and mitigating circumstances and striking a balance but is a reasoned judgment to be exercised in light of the totality of the circumstances. Giles v. State, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Where the jury found that aggravating circumstances existed and that no mitigating circumstances existed, the facts supported the sentence of death. Woodard v. State, 261 Ark. 895, 553 S.W.2d 259 (1977), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 83 (1979) (decision under prior law).

Jury must find not only that the aggravating circumstances outweigh the mitigating circumstances, but also that the aggravating circumstances justify a sentence of death beyond a reasonable doubt as required by subdivision (a)(3) of this section. Williams v. State, 274 Ark. 9, 621 S.W.2d 686 (1981), cert. denied, 459 U.S. 1042, 103 S. Ct. 460, 74 L. Ed. 2d 611 (1982).

This section requires only that the jury unanimously find at least one of the aggravating circumstances set out in § 5-4-604 to exist before it can impose the death penalty; accordingly, where the jury found one aggravating circumstance, it could properly impose the death penalty. Hayes v. State, 280 Ark. 509, 660 S.W.2d 648, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Jury's finding that the aggravating circumstances outweighed beyond a reasonable doubt any mitgating circumstances was supported by the evidence. Hayes v. State, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Burden of Proof.

State had the burden of proof on the issue of punishment for capital murder. Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 44, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 135 (1977) (decision under prior law).

Discretion of Court and Jury.

This section provides that the jury shall impose a sentence of death if it returns certain written findings, but the trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. Hill v. State, 278 Ark. 194, 644 S.W.2d 282 (1983).

Juries are not bound to return a verdict of death if they find aggravating circumstances outweigh mitigating circumstances; whatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death. Additionally, because the capital murder statute and the first degree murder statute overlap in appropriate cases, the jury may refuse consideration of both the death penalty and life without parole, by returning a guilty verdict as to the charge of murder in the first degree. Clines v. State, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Evidence.

Evidence sufficient to find that death penalty was not wantonly, arbitrarily or freakishly imposed, and was not excessive in relation to the crime and the jury's verdict was relatively free of passion or prejudice. Clines v. State, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Evidence supported the jury's finding that defendant had previously committed another felony, an element of which was the use of threat of violence to another person. Hayes v. State, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Jurors.

This section contemplates that persons on the jury will be capable of imposing the death penalty; accordingly, it was not error for the trial court to strike for cause persons who stated that they could not under any circumstances impose the death penalty. Henderson v. State, 279 Ark. 414, 652 S.W.2d 26, cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983), petition denied, 281 Ark. 406, 664 S.W.2d 451 (1984).

Cited: Hulsey v. State, 268 Ark. 312, 595 S.W.2d 934 (1980); Simmons v. Lockhart, 626 F. Supp. 872 (E.D. Ark. 1985).

5-4-604. Aggravating circumstances.

Aggravating circumstances shall be limited to the following:

(1) The capital murder was committed by a person imprisoned as a result of a felony conviction;

(2) The capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;

(3) The person previously committed another felony, an element of which was the use or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person;

(4) The person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim;

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

(6) The capital murder was committed for pecuniary gain; or

(7) The capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function.

(8) The capital murder was committed in an especially heinous, atrocious, or cruel manner.

History. Acts 1975, No. 280, § 1303; 1977, No. 474, § 12; 1985, No. 833, § 1; A.S.A. 1947, § 41-1303.

Cross References. Obstructing governmental operations, § 5-54-101 et seq.

CASE NOTES

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Constitutionality.
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Constitutionality.

The defendant's argument that the capital murder sentencing statutes are unconstitutionally vague in that the aggravating circumstances of this section are too closely related to the elements of capital felony murder was explicitly rejected because the aggravating circumstances are not an element of capital murder. Henderson v. State, 279 Ark. 414, 652 S.W.2d 26 (1983), cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983), petition denied, 281 Ark. 406, 664 S.W.2d 451 (1984).

Purpose.

The purpose of this section is to keep firearms out of the hands of persons who have been formally adjudicated as irresponsible or dangerous. Reynolds v. State, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

Applicability.

Subdivision (3) of this section applies to crimes not connected in time or place to the killing for which the defendant has just been convicted. Hill v. State, 289 Ark. 387, 713 S.W.2d 233 (1986).

Avoiding Arrest.

A complaint and warrant for defendant's unlawful flight to avoid prosecution, was admissible to show that the shooting was for the purpose of avoiding or preventing a lawful arrest. Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1982).

Death penalty statute was not unconstitutionally applied to defendant where the style of the murder suggested that the defendant committed the capital felony "for the purpose of ... preventing a lawful arrest." Woodard v. Sargent, 567 F. Supp. 1548 (E.D. Ark. 1983), rev'd on other grounds, 753 F.2d 694 (8th Cir. 1985).

The aggravating circumstance that the murder was committed to avoid arrest or to effect escape from custody was properly submitted to the jury and was not vague and overbroad where, under the facts of the case, the jury was justified in finding that defendant shot victim to increase his chances of avoiding arrest. Hill v. State, 278 Ark. 194, 644 S.W.2d 282 (1983).

Although a consequence of every murder is the elimination of the victim as a

potential witness, avoiding arrest is not necessarily an invariable motivation for killing, so this aggravating circumstance does not as a matter of logic necessarily duplicate an element of the underlying capital crime. Woodard v. Sargent, 806 F.2d 153 (8th Cir. 1986) (decisions under prior law).

Death Penalty.

The defendant's death sentence, which was based in part on the pecuniary-gain aggravating circumstance, was set aside, even though his case was decided before Collins v. Lockhart, 754 F.2d 258 (8th Cir.), cert. denied, — U.S. —, 106 S. Ct. 546, 88 L. Ed. 2d 475 (1985), which held that the pecuniary-gain aggravating circumstance could not be used to impose the death penalty for a murder in the course of a robbery, where the defendant's counsel urged this argument when the action was first appealed. Woodard v. Sargent, 806 F.2d 153 (8th Cir. 1986) (decision under prior law).

Because the aggravating circumstance of pecuniary gain is invalid as applied in cases of capital felony murder committed during the course of robberies, the death penalties imposed against the defendants were invalid and set aside, where this argument was made when the actions were first appealed. Ruiz v. Lockhart, 806 F.2d 158 (8th Cir. 1986).

In passing subdivision (3) of this section, the General Assembly intended to narrow the class of persons exposed to the death penalty to those with a predisposition for violent acts. The state, during the guilt and innocence phase, can always prove other acts done at the same time as the principal crime to show the aggravated nature of the crime charged; furthermore, subdivision (8) of this section allows the state, during the penalty phase, to show the murder was done in a particularly heinous manner. The reason, then, for subdivision (3) is to allow the state to show that the defendant has a character for violent crimes or a history of such crimes. Hill v. State, 289 Ark. 387, 713 S.W.2d 233 (1986).

Due Process.

Insofar as former provisions governing sentencing for capital felonies limited the jury's consideration of aggravating circumstances for sentencing purposes to those enumerated, but did not limit consideration of mitigating circumstances, it worked to the advantage rather than prejudice of a defendant and posed no problem of due process. Giles v. State, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Fear of Detection.

Fear of detection would be an aggravating circumstance, not a mitigating one. Simmons v. State, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

Great Risk of Death to One Other Than Victim.

Where other persons were in the direct line of fire of the defendant's gun, the trial court did not err in submitting to the jury the question whether he had created a great risk of death to one other than the victim. Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1982).

Impermissible Considerations.

Neither the savagery of the attack nor the sadistic mind of the attacker is an aggravating circumstance the jury is allowed to consider. Gruzen v. State, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied, 449 U.S. 852, 101 S. Ct. 144, 66 L. Ed. 2d 64 (1980), 459 U.S. 1020, 103 S. Ct. 386, 74 L. Ed. 2d 517 (1982).

Instructions.

Circuit judges are directed to omit from submission any aggravating or mitigating circumstances that are completely unsupported by any evidence. Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied, 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed. 2d 232 (1981).

Court did not err in allowing the state to prove all the defendant's prior felonies where the court clearly instructed the jury that they were to consider only those convictions which involved threats or violence as aggravating circumstances and that the other convictions were to be considered only for enhancement purposes. Hill v. State, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982); Hill v. State, 278 Ark. 194, 644 S.W.2d 282 (1983).

The circuit judge should not submit to

the jury any aggravating or mitigating circumstances that are completely unsupported by any evidence; however, if there is any evidence of the aggravating or mitigating circumstances, however slight, the matter should be submitted to the jury. Ford v. State, 276 Ark. 98, 633 S.W.2d 3, cert. denied, 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

Jury's Discretion.

The fact that the jury must find the existence of the robbery in order to convict of capital felony murder committed in the course of a robbery and then may also consider the motive of robbery as an aggravating circumstance under subdivision (6) concerning "pecuniary gain" does not render the jury's discretion unfettered or unconstitutionally arbitrary; rather, the jury's attention is directed to the specific circumstances of the crime. Woodard v. Sargent, 567 F. Supp. 1548 (E.D. Ark. 1983), rev'd on other grounds, 753 F.2d 694 (8th Cir. 1985).

Parole.

Contention that felony conviction from which defendant was paroled did not amount to an aggravating circumstance was without merit. Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1982).

Pecuniary Gain.

The phrase "pecuniary gain" was a matter of such common understanding and practice that it could not be said that an ordinary man or juror would have to speculate as to its meaning in its context as an aggravating circumstance in capital murder. Neal v. State, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 136 (1977) (decision under prior law).

Imposition of the death penalty was justified where there was sufficient evidence that the murder was committed for pecuniary gain. Neal v. State, 261 Ark. 336, 548 S.W.2d 135, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, rehearing denied, 434 U.S. 961, 98 S. Ct. 495, 54 L. Ed. 2d 322 (1977), modified on other grounds, 270 Ark. 442, 605 S.W.2d 421 (1980) (decision under prior law).

Whether the homicide was committed for pecuniary gain is a pertinent and proper fact for the jury's consideration in determining whether the death sentence should be imposed. Woodard v. State, 261 Ark. 895, 553 S.W.2d 259 (1977), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 83 (1979) (decision under prior law).

Everyone who commits murder in the course of a robbery commits the crime for purposes of pecuniary gain; therefore, the pecuniary-gain aggravating circumstance unconstitutionally duplicates an element of the underlying offense of capital felony murder. Woodard v. Sargent, 806 F.2d 153 (8th Cir. 1986) (decision under prior law).

Prior Offenses.

Where accused admitted that he had previously pleaded guilty to several named charges, the fact that there was no crime technically labeled as such when he pleaded guilty to them did not prohibit the state from introducing those judgments of conviction as aggravating circumstances. Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied, 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed. 2d 232 (1981).

Where the trial court allowed the jury to consider defendant's single previous conviction without supplying any details about the offense, the offense could not be considered as a felony creating the substantial risk of death or serious physical injury to another person, absent supporting proof, since the offense as defined could be committed with no possibility of violence or injury to anyone. Williams v. State, 274 Ark. 9, 621 S.W.2d 686 (1981), cert. denied, 459 U.S. 1042, 103 S. Ct. 460, 74 L. Ed. 2d 611 (1982).

In order for an offense to be admissible as an aggravating circumstance, pursuant to this section, the felony committed must include the use or threat of violence to another person, or the creation of substantial risk of death or serious physical injury to another person; sometimes a burglary could include this risk. Ford v. State, 276 Ark. 98, 633 S.W.2d 3, cert. denied, 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

It was error for the trial court to allow

evidence of prior crimes which did not involve the use or threat of violence or create substantial risk of death or serious physical injury to another person as an aggravating circumstance; neither were these prior felonies proper for the purpose of anticipating a showing of lack of prior convictions as a mitigating circumstance. Ford v. State, 276 Ark. 98, 633 S.W.2d 3, cert. denied, 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

Evidence of a prior manslaughter conviction is admissible as an aggravating circumstance. Harmon v. State, 277 Ark. 265, 641 S.W.2d 21 (1982).

The penalty phase of capital murder cases ought not to be turned into a separate trial for other crimes, but the legislature has made it plain in amending subdivision (3) that the state can offer evidence that a defendant "committed" another crime which involves an element of violence. Miller v. State, 280 Ark. 551, 660 S.W.2d 163 (1983).

When the state in the penalty phase of capital murder cases attempts to prove another unrelated crime, without having evidence of a conviction, it does so at some risk and the trial court must prevent prejudicial evidence from reaching the jury; also, a defendant has a right to present rebutting evidence in such a case, just as in a trial. Miller v. State, 280 Ark. 551, 660 S.W.2d 163 (1983).

Uncorroborated testimony was admissible where it was offered to prove aggravating circumstance that defendants previously committed a crime of violence. Clines v. State, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1323, 79 L. Ed. 2d 723 (1984).

This section prohibits a person convicted of a felony from possessing a firearm, regardless of the fact that the prior felony conviction is subject to collateral attack, and this prohibition continues until the conviction is either successfully attacked and set aside, or a specific pardon is granted; therefore, there was no error in the trial court admitting evidence of the defendant's prior felony conviction which the defendant claimed was subject to collateral attack on constitutional grounds. Reynolds v. State, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

Where the crimes used to prove an aggravated circumstance involved other victims, in another place and previously in time to the principal crime for which defendant was convicted, they were properly used as an aggravating circumstance. Hill v. State, 289 Ark. 387, 713 S.W.2d 233 (1986).

Proof.

The same degree of proof is not required to sustain a finding that an aggravating or mitigating circumstance exists, as would be required to sustain a conviction if that circumstance was a separate crime. Clines v. State, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Where jury was presented with proof of an aggravating circumstance that defendant had been convicted of felonies in other states but no details of the crimes were provided, there was no requirement that the state try a prior felony conviction a second time or that it present evidence that a prior conviction had as an element the use or threat of violence. Hill v. State, 278 Ark. 194, 644 S.W.2d 282 (1983).

Cited: Clark v. State, 264 Ark. 630, 573 S.W.2d 622 (1978); Westbrook v. State, 265 Ark. 736, 580 S.W.2d 702 (1979); Collins v. Lockhart, 545 F. Supp. 83 (E.D. Ark. 1982); Hayes v. State, 280 Ark. 509, 660 S.W.2d 648, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984); Simmons v. Lockhart, 626 F. Supp. 872 (E.D. Ark. 1985).

5-4-605. Mitigating circumstances.

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

(1) The capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) The capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;

(3) The capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;

(4) The youth of the defendant at the time of the commission of the capital murder;

(5) The capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;

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

History. Acts 1975, No. 280, § 1304; A.S.A. 1947, § 41-1304.

CASE NOTES

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Constitutionality.
Applicability.
Due process.
Emotional disturbance, mental disease, etc.
Evidence.
—Failure to present.
Fear of detection.
Instructions.
Religious and ethical considerations.
Totality of circumstances.
Youth of defendant.

Constitutionality.

The language used by the legislature in naming the various elements of mitigation could not be said to be vague and beyond the common understanding and practices of the ordinary man or juror so as to be constitutionally defective. Neal v. State, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 135 (1977) (decision under prior law).

The capital murder sentencing statutes are not unconstitutionally vague simply because this section does not contain a specific definition of "mitigating circumstance"; the fact that the jury is not limited to specifically enumerated mitigating factors accrues to the benefit of the defendant, because it gives the jury a greater opportunity to extend leniency to him. Henderson v. State, 279 Ark. 414, 652 S.W.2d 26, cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983), petition denied, 281 Ark. 406, 664 S.W.2d 451 (1984).

Applicability.

Mitigating circumstances, as typified by those listed in this section, are applicable only to the particular defendant, not to capital punishment in general. Simmons v. State, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

Due Process.

Insofar as former section governing sentencing for capital felonies limited the jury's consideration of aggravating circumstances for sentencing purposes to those enumerated, but did not limit con-

sideration of mitigating circumstances, it worked to the advantage rather than prejudice of a defendant and thus the sentencing procedures posed no problem of due process. Giles v. State, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Emotional Disturbance, Mental Disease, Etc.

Where the state adduced testimony from psychiatrist that defendant was examined by him and found to be without psychosis and to know right from wrong, the evidence justified the jury's finding that no mitigating circumstances existed. Neal v. State, 259 Ark. 27, 531 S.W.2d 17 (1975), vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 135 (1977) (decision under prior law).

Imposition of the death penalty was justified where there was sufficient evidentiary support for the jury's failure to find, as a mitigating circumstance, that the defendant had no capacity for understanding the wrongfulness of his conduct or that he was mentally impaired or emotionally disturbed at the time of the crime. Neal v. State, 261 Ark. 336, 548 S.W.2d 135, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, rehearing denied, 434 U.S. 961, 98 S. Ct. 495, 54 L. Ed. 2d 322 (1977), modified on other grounds, 270 Ark. 442, 605 S.W.2d 421 (1980) (decision under prior law).

Where the only evidence of extreme emotional disturbance was the opinion testimony of clinical psychologists that emotional pressures in certain situations typically accompany the disorders said to belong to defendants, the testimony was general and the jury was not required to accept opinion as fact or even conclude that what was generally true was specifically true of these defendants. Ruiz v. State, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

Evidence.

Court correctly refused to allow the defense to introduce pictures of a gas chamber, a gallows, and an electric chair, none of which could be regarded as a mitigating circumstance. Simmons v. State, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

— Failure to Present.

Where no evidence was introduced in the defendant's trial to show that he had any history of prior criminal activity, yet his lawyer failed to request a jury instruction on this mitigating circumstance and failed to ensure that the checklist of aggravating and mitigating circumstances submitted to the jury included lack of a prior history of significant criminal activity as one possible mitigating circumstance, and there was a reasonable probability that the outcome of the action would have been different had the jury know of this clearly applicable mitigating circumstance, the death sentence imposed on the defendant was constitutionally invalid. Woodard v. Sargent, 806 F.2d 153 (8th Cir. 1986).

Fear of Detection.

Fear of detection would be an aggravating circumstance, not a mitigating one. Simmons v. State, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

Instructions.

Circuit judges are hereafter directed to omit from submission any aggravating or mitigating circumstances that are completely unsupported by any evidence. Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied, 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed. 2d 232 (1981).

Religious and Ethical Considerations.

Religious and philosophical approaches to the death penalty are not relevant as mitigating evidence. Hill v. State, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

Totality of Circumstances.

Weighing the aggravating circumstances against the mitigating ones for sentencing purposes is not simply a matter of counting the number of aggravating and mitigating circumstances and striking a balance but is a reasoned judgment to be exercised in light of the totality of the circumstances. Giles v. State, 261 Ark. 413, 549 S.W.2d 479, cert. denied,

434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Youth of Defendant.

While chronological age does not necessarily control in the jury's determination of whether a defendant's youth is a mitigating circumstance, it is an important factor which must still be weighed in light of varying conditions and circumstances. Giles v. State, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Cited: Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983).

5-4-606. Life imprisonment without parole.

A person sentenced to life imprisonment without parole shall be remanded to the custody of the Department of Correction for imprisonment for the remainder of his life and shall not be released except pursuant to commutation, pardon, or reprieve of the Governor.

History. Acts 1975, No. 280, § 1305; A.S.A. 1947, § 41-1305.

5-4-607. Application for executive clemency — Re[illegible]nations.

(a) The pardon of a person convicted of a capital murder, or the commutation of a sentence of a person so convicted may be granted only in the manner provided herein:

(1) Copies of the application for pardon or commutation shall be filed with:

(A) The Secretary of State;

(B) The Attorney General;

(C) The sheriff of the county in which the offense was committed;

(D) The prosecuting attorney of the judicial district in which the applicant was found guilty and sentenced, if still in office, and, if not, the successor of such prosecuting attorney; and

(E) The circuit judge presiding over the proceedings at which the applicant was found guilty and sentenced, if still in office, and, if not, the successor of such circuit judge;

(2) The application shall set forth the grounds upon which the pardon or commutation is asked and shall be published by two (2) insertions, separated by a minimum of seven (7) days, in a newspaper of general circulation in the county or counties in which the offense or offenses of the applicant were committed;

(3) On granting the application, the Governor shall include in his written order the reasons therefor, and shall file with each house of the General Assembly a copy of his order which shall state the applicant's name, the offense of which he was convicted and sentence imposed, the date of the judgment imposing the sentence, and the effective date of the pardon or commutation.

(b) A person sentenced to death or to life imprisonment without parole shall not be eligible for parole and shall not be paroled.

(c) If the sentence of a person sentenced to death or life imprisonment without parole is commuted by the Governor to a term of years,

such person shall not be paroled, nor shall the length of his incarceration be reduced in any way to less than the full term of years specified in the order of commutation or in any subsequent orders of commutation.

(d) Reprieves may be granted as presently provided by law.

History. Acts 1975, No. 280, § 1306; 1977, No. 474, § 13; A.S.A. 1947, § 41-1306.

5-4-608. Waiver of death penalty.

(a) If a defendant is charged with capital murder, the prosecuting attorney, with the permission of the court, may waive the death penalty.

(b) In such cases, if the defendant pleads guilty to capital murder or is found guilty of capital murder after trial to the court or to a jury, the trial court shall sentence the defendant to life imprisonment without parole.

History. Acts 1975, No. 280, § 1307; 1977, No. 474, § 14; A.S.A. 1947, § 41-1307.

5-4-609 — 5-4-614. [Reserved.]

5-4-615. Conviction — Punishments.

A person convicted of a capital offense shall be punished by death by lethal injection or by life imprisonment without parole pursuant to this subchapter.

History. Acts 1973, No. 438, § 6; 1975, No. 928, § 17; A.S.A. 1947, § 41-1351.

CASE NOTES

Constitutionality.

The death penalty per se is not violative of the federal eighth and fourteenth amendments. Clark v. State, 264 Ark. 630, 573 S.W.2d 622 (1978).

Cited: Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975); Neal v. State, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgments left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 44, 45, 50 L. Ed. 2d 69 (1976).

5-4-616. Procedures following remand of capital case after vacation of death sentence — Retroactive application.

Notwithstanding § 5-4-602(3), which requires that the same jury sit in the sentencing phase of a capital murder trial, the following shall apply:

(1) Upon any appeal by the defendant where the sentence is of death, the appellate court, if it finds prejudicial error in the sentencing

proceeding only, may set aside the sentence of death and remand the case to the trial court in the jurisdiction in which the defendant was originally sentenced. No error in the sentencing proceeding shall result in the reversal of the conviction for a capital felony. When a capital case is remanded after vacation of a death sentence, the prosecutor may:

(A) Move the trial court to impose a sentence of life without parole, and the trial court may impose such sentence without a hearing;

(B) Move the trial court to impanel a new sentencing jury.

(2) If the prosecutor elects subdivision (1)(B) of this section, above, the trial court shall impanel a new jury for the purpose of conducting new sentencing proceedings;

(3) Resentencing proceedings shall be governed by the provisions of §§ 5-4-602(4) and 5-4-603 — 5-4-605;

(4) All exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in the new sentencing proceeding; additional relevant evidence may be admitted including testimony of witnesses who testified at the previous trial;

(5) The provisions of this section are procedural; they shall apply retroactively to any defendant sentenced to death after January 1, 1974.

(6) This section shall not be construed to amend the provisions of § 5-4-602 requiring the same jury to sit in both the guilt and sentencing phases of the original trial.

History. Acts 1983, No. 546, § 1; A.S.A. 1947, § 41-1358.

CASE NOTES

Place of Resentencing.

This section requires that following remand after vacation of his death sentence, the resentencing was to be conducted in the county where the defendant was originally tried, found guilty and sentenced, even though the murder took place in another county. Pickens v. Circuit Court, 283 Ark. 97, 671 S.W.2d 163 (1984).

5-4-617. Method of execution.

(a)(1) The punishment of death is to be administered by a continuous intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant's death is pronounced according to accepted standards of medical practice.

(2) The Director of the Department of Correction shall determine the substances to be uniformly administered and the procedures to be used in any execution.

(b) If the execution of the sentence of death as provided in subsection (a) is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by electrocution in a manner determined by the Director of the Department of Correction.

(c) Nothing in this section is to be construed as a declaration by the Arkansas General Assembly that death by electrocution constitutes cruel and unusual punishment in violation of the Constitutions of the United States or the State of Arkansas.

History. Acts 1983, No. 774, §§ 1, 5, 6; A.S.A. 1947, §§ 41-1352, 41-1356, 41-1357.

Publisher's Notes. Acts 1983, No. 774, § 2, provided that the act applied only to capital offenses committed after July 4, 1983, and that nothing in the act was to be construed to alter the execution of a sentence of death imposed for crimes committed prior to July 4, 1983, except as provided in § 3 of the act.

Acts 1983, No. 774, § 3, provided that any defendant sentenced to death by electrocution prior to July 4, 1983, could elect to be executed by lethal injection and that the election must be exercised in writing one (1) week prior to the date of execution or it would be deemed waived.

Acts 1983, No. 774, § 4, provided that all references in the laws to execution by electrocution should mean execution by lethal injection except as to capital offenses already committed.

CASE NOTES

Cited: Fairchild v. State, 286 Ark. 191, 690 S.W.2d 355 (1985).

CHAPTER 5

DISPOSITION OF CONTRABAND AND SEIZED PROPERTY

SUBCHAPTER.

1. General Provisions.
2. Forfeiture of Conveyances Used in Commission of Certain Crimes.

RESEARCH REFERENCES

ALR. Forfeiture of money to state or local authorities based on its association with or proximity to other contraband. 38 ALR 4th 396.

Necessity of conviction of offense associated with property seized to support forfeiture. 38 ALR 4th 515.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

1. In General

In a murder prosecution in which defendant waived his right to a jury trial on the guilt issue, the trial court erred in failing to obtain a separate waiver of a jury on the trial of the special circumstance allegation of multiple murders. When a jury has been waived as to the guilt phase of the case, it is impossible to comply with the requirement of Pen. Code, § 190.4, that the special circumstances be tried by a jury, and also comply with the requirement of Pen. Code, § 190.1, that the guilt and special circumstances be determined at the same time. Thus, the provision of § 190.4, should prevail, and a personal waiver of a jury on a special circumstance allegation was required. An accused whose special circumstance allegations are to be tried by a court must make a separate, personal waiver of the right to a jury trial. People v Memro (1985) 38 Cal 3d 658, 214 Cal Rptr 832, 700 P2d 446.

3. Construction

The 1978 version of Pen. Code, § 190.4, subd. (e), providing that after a verdict imposing the death penalty defendant shall be deemed to have applied for modification of the verdict under Pen. Code, § 1181, subd. 7, by the trial judge, like the 1977 version, requires that the trial judge make an independent determination whether imposition of the death penalty upon defendant is proper in light of the relevant evidence and the applicable law. People v Rodriguez (1986) 42 Cal 3d 730, 230 Cal Rptr 667, time for gr or den reh extended.

An interpretation of Pen. Code, § 190.4 (pertaining to special findings on the truth of each alleged special circumstance) that would require the underlying felonies to be separately charged does not violate the separation of powers doctrine. The district attorney retains discretion to choose whether or not to allege special circumstances; the "charged and proved" requirement merely dictates what must be done if he does decide to allege special circumstances. People v Superior Court (Jennings) (1986, 2d Dist) 183 Cal App 3d 636, 228 Cal Rptr 357.

Pen. Code, § 799, which allows a criminal prosecution for murder to be commenced "at any time," is not a special statute taking priority over the general statute of limitations for commencing prosecution of other crimes (former Pen. Code § 800, now § 801) upon which a felony-murder special circumstance may be based. Pen. Code, § 190 (describing the available punishments for first and second degree murder), provides that the penalty must be determined as specified in the special circumstance statutes, and thus those statutes take precedence over the general murder statutes. Hence, the requirement of Pen. Code, § 190.4, subd. (a), that the underlying crime be charged and proved pursuant to the general law applying to the trial and conviction of the crime specifically incorporates into each felony-based special circumstance allegation the general law of the underlying felony, including its statute of limitations. People v Superior Court (Jennings) (1986, 2d Dist) 183 Cal App 3d 636, 228 Cal Rptr 357.

5. Procedure

Pen. Code, § 190.4, requiring the jury in a capital case to make a special finding on the truth of each alleged special circumstance, contemplates a jury finding on each charge special circumstance by the application of legal principles on which the jury is instructed to the evidence presented to them. The statute does not contemplate that a jury return a special verdict, which presents conclusions of fact and leaves to the court the task of drawing conclusions of law and rendering judgment upon them (Pen. Code, §§ 1150, 1152). People v Davenport (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

§ 190.9. [(First of two; Operative until July 1, 1990) Presence of court reporter in all death penalty proceedings]

(a) In any case in which a death sentence may be imposed, all proceedings conducted after the effective date of this section in the justice, municipal, and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present.

The court shall assign a court reporter who uses computer-aided transcription equipment to report all proceedings under this section. Failure to comply with the requirements of this section relating to the assignment of court reporters who use computer-aided transcription equipment shall not be a ground for reversal.

(b) The court may waive the requirement that a court reporter use computer-aided transcription equipment if the court finds on the record that no reporter using computer-aided transcription equipment is available.

(c) This section shall remain in effect only until July 1, 1990, and as of that date is repealed.

Amended Stats 1986 ch 387 § 3; Stats 1987 ch 468 § 1, effective September 9, 1987.

Amendments:

1986 Amendment: Added the second paragraph

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upon it. People v Cordova (1939) 14 C2d 308, 94 P2d 40.

The discretion of the jury in fixing the penalty for murder of the first degree, once exercised, may not be disturbed on appeal. People v Williams (1948) 32 C2d 78, 195 P2d 393.

In the absence of error, the supreme court has no power to substitute a sentence to life imprisonment for a death penalty imposed by the trial court in its discretion under this section, upon a conviction of first degree murder in a trial in which a jury was waived. People v Odle (1951) 37 C2d 52, 230 P2d 345.

Appellate court is without authority to reduce penalty from death to life imprisonment where there is no error in proceedings for determination of degree of murder and punishment therefore after plea of guilty to charge. People v Thomas (1951) 37 C2d 74, 230 P2d 351.

Where the evidence in a murder case tried by the court is ample to establish first degree murder and no prejudicial error was committed, the supreme court has no power to reduce the degree of the crime or the penalty imposed. People v Dessauer (1952) 38 C2d 547, 241 P2d 238.

Where trial court is vested with discretion to determine punishment of defendant convicted of first degree murder, and there has been no error, supreme court has no power to substitute its judgment for that of trial court as to penalty to be imposed. People v Ortega (1953) 41 C2d 621, 262 P2d 2.

Where defendant has been convicted of first degree murder and every element of offense has been proved, and the only error shown on appeal relates to selection of penalty, it is proper to order limited new trial on issue of penalty to be imposed by jury different from that which tried issue of guilt. People v Green (1956) 47 C2d 209, 302 P2d 307 (disapproved on other grounds People v Morse (1964) 60 C2d 631, 36 Cal Rptr 201, 388 P2d 33).

Error relating solely to question of punishment for first degree murder cannot be corrected by appellate court's refusing punishment, trier of fact being vested with exclusive jurisdiction to determine punishment. People v Green (1956) 47 C2d 209, 302 P2d 307 (disapproved on other grounds People v Morse (1964) 60 C2d 631, 36 Cal Rptr 201, 388 P2d 33).

Jury's determination of penalty of death in first degree murder case, after defendant's entry of plea of guilty and proceedings pursuant to his request for jury trial on issue of penalty, will not be disturbed on appeal. People v Feldkamp (1958) 51 C2d 237, 331 P2d 632.

On retrial by jury on issue of penalty following adjudication that defendant was guilty of first degree murder and was sane at time of commission of offense, defendant cannot reopen question of his sanity at time of commission of offense, adjudication as to issue of insanity having been affirmed by supreme court. People v Love (1961) 56 C2d 720, 16 Cal Rptr 777, 366 P2d 33, 17 Cal Rptr 481, 366 P2d 809.

In a prosecution resulting in a conviction of first degree murder and first degree robbery, a verdict of life imprisonment, and a judgment which erred in imposing a sentence of life imprisonment without possibility of parole, the Supreme Court would exercise its power under Pen Code, § 1260, to modify the judgment to conform to the jury's verdict pursuant to Pen Code, § 190, which provides for the alternative punishments for first degree murder of life imprisonment or death but not of life imprisonment without possibility of parole. People v Ketchel (1969) 71 C2d 635, 79 Cal Rptr 92, 456 P2d 660.

§ 190.1. [Procedure in case involving death penalty]

A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the

first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Section 190.3 and 190.4.

Added by initiative measure § 4, approved November 7, 1978.

Prior Law:

(a) Former § 190.1, as added by Stats 1977 ch 316 § 7.

(b) Former § 190.1, as added by Stats 1973 ch 719 § 4.

(c) Former § 190.1, as added by Stats 1957 ch 1968 § 1, amended by Stats 1959 ch 738 § 1.

Former Sections: Former § 190.1, similar to the present section, was added by Stats 1977 ch 316 § 7, effective August 11, 1977, and repealed by initiative measure § 3, approved November 7, 1978.

Former § 190.1, similar to the present section, was added by Stats 1973 ch 719 § 4, and repealed by Stats 1977 ch 316, effective August 11, 1977.

Original § 190.1, similar to the present section, was added by Stats 1957 ch 1968 § 2, amended by Stats 1959 ch 738 § 1, and repealed by Stats 1973 ch 719 § 1.

Note —Severability, see note to § 190.

Cross References:

Penalty upon special finding: § 190.2.
Penalty for murder in the first degree of transportation worker: § 190.25
Determination as to imposition of death penalty or life imprisonment upon finding of special circumstance: § 190.3.
Special finding on truth of alleged special circumstance: § 190.4
Death penalty for person under age 18: § 190.5
Appeals in capital cases: §§ 190.6 et seq.

Collateral References:

Witkin Crimes pp 122, 271, 972, 973, 976, 977, 978, 979, 980, 982, 986.
Witkin Criminal Procedure pp 521, 550.
Witkin Evidence 2d p 19.
Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.
Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.
Am Jur 2d Criminal Law § 595, Homicide § 553.

Forms:

Calif Criminal Forms & Instructions (BW, 1983) §§ 43:19, 46:11

Law Review Articles:

History of insanity as a defense to accusations of crime. 12 CLR 105.
California penalty trial. 52 CLR 386.
California death penalty trials and appeals. 56 CLR 1364.
California Supreme Court in 1968–1969: death penalty. 58 CLR 229.
In mitigation of the penalty of death: Lockett v Ohio and the capital defendant's right to consideration of mitigating circumstances. (1981) 69 CLR 317.
California's death penalty: Did the legislature do its job? 2 Glendale LR 1.
Review of Selected 1977 California Legislation. 9 Pacific LJ 439.

evidence in ways favorable to the prosecution, and in order to minimize such potentially prejudicial effects, in future capital cases that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration. Such rule will not in any way affect the open nature of a trial. Although trial counsel or the court may pose general questions to the panel, the venirepersons should not respond to any questions beyond those routinely asked in any criminal trial until they are outside the presence of their fellow venirepersons. Such sequestered voir dire will minimize each juror's exposure to the death-qualifying voir dire of others, and will thereby minimize the dilatorious effects of such exposure. Hovey v Superior Court (1980) 28 C3d 1, 168 Cal Rptr 128, 616 P2d 1301.

In a hearing on a pretial motion to limit the exclusion for cause of prospective jurors to be called to try defendant's murder case, on the ground the guarantee in the state and federal Constitutions to due process of law and an impartial jury prohibited the trial court from excluding at the guilt phase of the trial prospective jurors who would be fair and impartial, but who were unequivocally opposed to imposing the death penalty at the penalty phase, the trial court properly rejected the motion, where defendant's expert evidence did not establish that the exclusion of jurors with scruples against capital punishment resulted in an unrepresentative jury on the issue of guilt or substantially increase the risk of conviction. None of defendants' studies focused on a pool of jurors comprised of persons eligible to serve in a capital trial in California, which consists of persons eligible to serve in a noncapital case whose attitude toward capital punishment would place them in the "favor death penalty," "indifferent" or "oppose death penalty" group. Rather, the studies focused on a pool which, at least in theory, contained a fourth group comprised of those who would automatically vote for the death penalty, a group excluded from California death-qualified juries, and defendant failed to account for the effect of the inclusion of such jurors in a scientifically adequate fashion. Hovey v Superior Court (1980) 28 C3d 1, 168 Cal Rptr 128, 616 P2d 1301.

A penalty jury in a capital case can speak for the community only insofar as the pool of jurors from which it is drawn represents the full range of relevant community attitudes. Thus, a voir dire process which systematically reduces whatever doubts about the wisdom of capital punishment or reluctance to pronounce the extreme penalty is as constitutionally infirm as a jury from which individuals who hold such views are systematically culled. Neither jury can speak for the community, and both juries are less than neutral with respect to the choice of penalty. Hovey v Superior Court (1980) 28 C3d 1, 168 Cal Rptr 128, 616 P2d 1301.

§ 190.2. [Penalty upon finding special circumstance]

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or

preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enun. rated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Added by initiative measure § 6, approved November 7, 1978.

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that the killing occurred during a burglary, and where it could not be assumed that there was no evidence to support defenses which went to mitigation of the intent to kill. People v Turner (1984) 37 Cal 3d 302, 208 Cal Rptr 196, 690 P2d 669.

An intent to kill must be found in a felony-murder situation before a defendant can be sentenced to life in prison without the possibility of parole pursuant to Pen. Code, § 190.2, subd. (a)(17)(felony murder as special circumstance). A necessary corollary of this rule is that the jury must be instructed that a specific intent to kill is an essential element of such a special circumstance allegation and that the prosecution has the burden of proving the specific intent to kill beyond a reasonable doubt. People v Quillin (1984, 5th Dist) 155 Cal App 3d 691, 202 Cal Rptr 303.

In a murder prosecution in which it was alleged as a special circumstance that defendant was committing a robbery at the time of the murder (Pen. Code, § 190.2, subd. (a)(17)), the trial court's failure to instruct the jury that a specific intent to kill is an essential element of such special circumstance allegation required reversal of a finding that the special circumstance was true under the applicable "harmless beyond a reasonable doubt" standard of prejudice. Although such instructional error can be cured in some circumstances if it can be determined that the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions, in the instant prosecution the only instructions on specific intent pertained to the specific intent to rob. Although the evidence strongly suggested an intent to kill, evidence of defendant's possible diminished capacity due to voluntary intoxication when he shot the victim foreclosed a finding that the omitted instructions were harmless beyond a reasonable doubt. People v Quillin (1984, 5th Dist) 155 Cal App 3d 691, 202 Cal Rptr 303.

In a prosecution in which the information charged defendant with two murders and alleged the special circumstance that defendant had "in this proceeding been convicted of more than one offense of murder in the first or second degree" (Pen. Code, § 190.2, subd. (a)(3)), the trial court erred in failing to dismiss the special circumstance allegation after defendant had successfully moved for severance of the murder charges. The prosecution, however, had the right to move to amend the information to allege the special circumstance of prior conviction of murder under Pen. Code, § 190.2, subd. (a)(2), an amendment that could not be attacked for technical defect at the preliminary examination since, as was shown by the court's own records, defendant had been convicted of first degree murder in the severed portion. Shamburger v Superior Court (1984, 1st Dist) 160 Cal App 3d 484, 207 Cal Rptr 586.

§ 190.25. [Penalty for murder of transportation worker]

(a) The penalty for a defendant found guilty of murder in the first degree shall be confinement in state prison for a term of life without the possibility of parole in any case in which any of the following special circumstances has been charged and specially found under Section 190.4, to be true: the victim was the operator or driver of a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle operated on land, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or the victim was a station agent or ticket agent for the entity providing such transportation, who, while engaged in the course of the performance of his or her duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was the operator or driver of a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle operated on land, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or was a station agent or ticket agent for the entity providing such transportation, engaged in the performance of his or her duties.

(b) Every person whether or not the actual killer found guilty of

intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

(c) Nothing in this section shall be construed to prohibit the charging or finding of any special circumstance pursuant to Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Added Stats 1982 ch 172 § 1, effective April 27, 1982.

Cross References:
Punishment for murder: § 190.
Procedure in case involving death penalty: § 190.1.
Penalties upon special findings: § 190.2.
Determination of death penalty or life imprisonment: § 190.3.
Special finding on truth of alleged special circumstance: § 190.4.
Appeals in capital cases: §§ 190.6 et seq.
Punishment for manslaughter: § 193.
Justifiable homicide: §§ 195 et seq.

Collateral References:
Witkin Crimes pp 972 et seq.
Witkin Criminal Procedure p 521.
Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.
Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.

§ 190.3. [Determination as to penalty of death or life imprisonment]

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted

use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant was reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state rison for a term of life without the possibility of parole.

Added by initiative measure § 8, approved November 7, 1978.

Prior Law: Former § 190.3, as added by Stats 1977 ch 316 § 11.

Former Sections: Former § 190.3, similar to the present section, was added by Stats 1977 ch 316 § 11, effective August, 11, 1977, and repealed by initiative measure § 7, approved November 7, 1978.

Former § 190.3, similar to present § 190.5, was added by Stats 1973 ch 719 § 6 and repealed by Stats 1977 ch 316 § 10, effective August 11, 1977.

Note —Severability of provisions, see note to § 190.

Cross References:

Punishment for treason: § 37.
Punishment for procuring execution of innocent person by perjury or subornation of perjury: § 128.
Punishment for murder: § 190.
Procedure in case involving death penalty: § 190.1.
Penalties upon special findings: § 190.2.
Penalty for murder of transportation worker: § 190.25.
Special finding on truth of alleged special circumstance: § 190.4.
Death penalty for person under age 18: § 190.5.
Appeals in capital cases: §§ 190.6 et seq.
Punishment for manslaughter: § 193.
Justifiable homicide: §§ 195 et seq.
Punishment for aggravated assault by life prisoner: § 4500.
Punishment for hindering defense or war effort: Mil & Vet Code § 1672.

Collateral References:

Witkin Criminal Procedure p 521.
Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.
Cal Jur 3d Penal and Correctional Institutions § 134.
Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.

Forms:

Calif Criminal Forms & Instructions (BW, 1983) §§ 43:14, 43:24, 46:11, 46:12, 46:31.

Law Review Articles:

In mitigation of the penalty of death: Lockett v Ohio and the capital defendant's right to consideration of mitigating circumstances. (1981) 69 CLR 317.

§ 190.4. [Special finding on truth of each alleged special circumstance]

(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) I defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is

waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered an any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

Added by initiative measure § 10, approved November 7, 1978.

Under Pen. Code, § 190.4, a defendant charged with murder with allegations of special circumstances (killing committed during commission of robbery and burglary), calling for a life sentence without possibility of parole, had a statutory right to a trial by jury on the truth of the allegation of special circumstances. Thus, error resulted from defendant's failure to be informed of, and to waive his right to a jury trial on the special circumstances allegation. Moreover, the error was prejudicial where the jury could have found in defendant's favor on the issue of special circumstances. People v Granger (1980) 105 CA3d 422, 164 Cal Rptr 363.

In a prosecution in which a 16-year-old male was convicted of the rape and first degree murder of a 13-year-old girl, the trial court erred in submitting charges of special circumstances to the jury and in sentencing defendant to life imprisonment without possibility of parole when the special circumstances were found true. Since 1921, death penalty statutes have exempted minors from that sanction, and, though the statute does not also explicitly exempt minors from the sentence of life imprisonment without possibility of parole, neither the language nor the history of the statute supports an interpretation that would authorize imposing that harsh penalty on persons under 18. Since the statute is unclear in its effect on the penalty applicable to minors, silent regarding appropriate procedures by which the penalty of life imprisonment without possibility of parole would be imposed on them, and devoid of evidence of any legislative intent to depart from the status quo, the ambiguity was required to be resolved in defendant's favor by holding there is no authority for charging minors with special circumstances. (Disapproving *People* v. *Superior Court (Reed)* (1979) 98 Cal.App.3d 39, 48–49 [159 Cal.Rptr. 310], to the extent it is inconsistent with the opinion.) People v Davis (1981) 29 Cal 3d 814, 176 Cal Rptr 521, 633 P2d 186.

In a prosecution on two counts of first degree murder with special circumstances alleged, the jury's special circumstances findings relating to murder in the course of robbery, rape and kidnaping would not be reversed on the ground the prosecution had failed to charge defendant with the robberies, rapes and kidnapings as separate crimes. Although the literal language of former Pen. Code, § 190.4, supported defendant's contention, the information notified defendant of all the special circumstances against which he had to defend, and thus no prejudice appeared. (Per Kaus, J., with Bird, C. J., and Newman, J., concurring.) People v Robertson (1982) 33 C3d 21, 188 Cal Rptr 77, 655 P2d 279

5. Procedure

In a proceeding to determine the penalty for first degree murder, the court did not err in denying defendant's motion that he be permitted to waive a jury trial, where the prosecutor refused to join in the waiver. People v King (1970) 1 C3d 791, 83 Cal Rptr 401, 463 P2d 753.

In a first degree murder prosecution subject to Pen. Code, §§ 190.1 and 190.2, as revised in 1973 (under which it was the province of a jury to determine the accused's guilt, and of the same or (for good cause) a different jury to determine the truth of the "special circumstances" charge, and under which if such truth were found, the trial judge's imposition of the death penalty was mandatory), it was not improper for the trial judge to exclude from the jury, at either the guilt or the "special circumstances" phase of the trial, persons with unalterable beliefs in the wrongfulness of the death penalty. People v Sand (1978) 81 CA3d 448, 146 Cal Rptr 448.

§ 190.5. [Death penalty for person under 18 prohibited]

Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

Added by initiative measure § 12, approved November 7, 1978.

Prior Law:

(a) Former § 190.5, as added by Stats 1977 ch 316 § 13.

(b) Former § 190.3, as added by Stats 1973 ch 719 § 6.

Former Section: Former § 190.5, similar to the present section, was added by Stats 1977 ch 316 § 13, effective August 11, 1977, and repealed by initiative measure § 11, approved November 7, 1978.

Note — Severability of provisions, see note to § 190.

5. Procedure

In instructing the jury that the death penalty shall not be imposed upon any person for murder committed before such person shall have reached the age of eighteen years, and that the burden of proof as to the age of said person is upon the defendant, the court does not err in stating further that the law "presumes" that the defendant was over the age of eighteen years and that this "presumption . . . must prevail unless from a preponderance of the evidence produced you are convinced that any such defendant was under the age of eighteen years at the time of the commission of the offense." People v Ellis (1929) 206 C 353, 274 P 353.

It is proper to instruct the jury that the burden is upon the defendant to prove "by a preponderance of the evidence" that he was under the age of eighteen years at the time of commission of the offense, without stating that if they should find that the defendant had not reached the age of eighteen years before the offense was committed, or if they should have a reasonable doubt on that point, the death penalty could not be imposed. People v Ellis (1929) 206 C 353, 274 P 353.

§ 190.6. [Appeals in capital cases to be handled expeditiously]

The legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of certification of the entire record by the sentencing court. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. A failure to comply with the time requirements of this section shall not be grounds for precluding the ultimate imposition of the death penalty.

Added Stats 1977 ch 316 § 14, effective August 11, 1977.

Note—Severability of provisions, see note to § 190.

Cross References:

"Entire record": § 190.7.

Certification of record where death sentence imposed: § 190.8. Presence of court reporter: § 190.9.

Collateral References:

Witkin Criminal Procedure pp 684 et seq.

Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.

Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.

Law Review Articles:

Review of Selected 1977 California Legislation. 9 Pacific LJ 439.

Cruel punishment and respect: super due process for death. (1980) 53 SCLR 1143.

Identifying comparatively excessive sentences of death: a quantitative approach. (1980) 33 Stan LR 1.

NOTES OF DECISIONS

A state prisoner sentenced to death cannot allege that the state failed to compare his sentence with others decided under the state's death penalty statute where his case was one of the earliest to be decided under the statute and has been used by the state supreme court as a reference point with which to compare all subsequent capital cases to insure proportionality. Sullivan v Wainwright (1983, US) 78 L Ed 2d 210, 104 S Ct 250.

§ 190 et seq (123)

§ 190.7. ["Entire record" of capital cases on review]

The "entire record" referred to in Section 190.6 shall include, but not be limited to, the following:

(a) The normal and additional record prescribed in the rules adopted by the Judicial Council pertaining to an appeal taken by the defendant from a judgment of conviction.

(b) A copy of any other paper or record on file or lodged with the superior court and a transcript of any other oral proceeding reported in the superior court pertaining to the trial of the cause.

Nothing contained in this section shall preclude a court from ordering that the entire record include municipal court or settlement proceedings pertaining to the case.

Notwithstanding this section, the Judicial Council may adopt rules, not inconsistent with the purpose of Section 190.6, specifically pertaining to the content, preparation and certification of the record on appeal when a judgment of death has been pronounced.

Added Stats 1982 ch 917 § 1.

Cross References:

Procedure in case involving death penalty: § 190.1.
Determination as to imposition of death penalty or life imprisonment: § 190.3.
Special finding on truth of each alleged special circumstance: § 190.4.
Certification of record: § 190.8.
Presence of court reporter: § 190.9.

Collateral References:

Witkin Criminal Procedure pp 684 et seq.
Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.
Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.

§ 190.8. [Certification and correction of record where death sentence imposed]

In any case in which a death sentence has been imposed, the record on appeal shall be expeditiously certified. If the record has not been certified within 60 days of the date it is delivered to the parties or their counsel, the trial court shall monitor the preparation of the record monthly to expedite certification and report the status of the record to the California Supreme Court.

Corrections to the record shall not be required to include simple typographical errors that cannot conceivably cause confusion.

Added Stats 1984 ch 1422 § 1.

Cross References:

Necessity of expeditious handling of appeal: § 190.6.
"Entire record": § 190.7.

Collateral References:

Witkin Criminal Procedure pp 684 et seq.
Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.
Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.

§ 190.9. [Presence of court reporter in all death penalty proceedings]

In any case in which a death sentence may be imposed, all proceedings conducted after the effective date of this section in the justice, municipal, and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present.

Added Stats 1984 ch 1422 § 2.

Cross References:

Procedure in case involving death penalty: § 190.1.
Determination as to imposition of death penalty or life imprisonment: § 190.3.
Special finding on truth of each alleged special circumstance: § 190.4.
Record of capital cases on review: § 190.7.
Certification of record on appeal: § 190.8.

Collateral References:

Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.
Cal Digest of Official Reports 3d Series, Homicide §§ 100, 101.

§ 191. Petit treason abolished

The rules of the common law distinguishing the killing of a master by his servant, and of a husband by his wife, as petit treason, are abolished, and these offenses are homicides, punishable in the manner prescribed by this chapter.

Enacted 1872.

Prior Law:

(a) Crimes and Punishment Act § 39 (Stats 1850 ch 99 § 39 p 233).

(b) Field's Draft NY Pen C § 239.

(c) NY Pen C § 182.

Cross References:

Treason against sovereignty of state: §§ 37, 38.

Collateral References:

Witkin Crimes p 271.

§ 192. [Manslaughter]

Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:

(a) Voluntary—upon a sudden quarrel or heat of passion.

(b) Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle.

(c) Vehicular—

(1) Except as provided in paragraph (3), driving a vehicle in the

maintain an action for damages against the person causing the death, or if dead, such person's personal representatives.

(d) If an action arising out of the same wrongful act or neglect may be maintained pursuant to subdivision (c) for wrongful death to any such prisoner, the action authorized by subdivision (a) shall be consolidated therewith for trial on motion of any interested party.

(e) For the purposes of this section, "heirs" mean only the following:

(1) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of Part 2 (commencing with Section 6400) of Division 6 of the Probate Code, and

(2) Whether or not qualified under paragraph (1), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, and parents. As used in this paragraph, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

Amended Stats 1983 ch 842 § 16, operative January 1, 1985

Amendments:

1983 Amendment: Substituted "Part 2 (commencing with Section 6400) of Division 6" for "Division 2 (commencing with Section 200)" in subd (e)(1).

Law Revision Commission Comment:

1983 Revision—Section 3524 is amended to revise the reference to the intestate succession provisions of the Probate Code in view of the recodification of those provisions as Part 2 of Division 6 of the Probate Code.

Review of 1983 legislation, 15 Pac LJ 423.

§ 3605. [Witnesses]

The warden of the State prison where the execution is to take place shall be present at the execution and must invite the presence of two physicians, the Attorney General of the State, and at least 12 reputable citizens, to be selected by him; and he or she shall at the request of the defendant, permit those ministers of the Gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under 18 years of age be allowed to witness the execution.

Amended Stats 1986 ch 248 § 167.

Amendments:

1986 Amendment: Routine code maintenance.

§ 3700 *and following sections—general references:*

Adequacy of defense counsel's representation of criminal client regarding incompetency, insanity, and related issues, 17 ALR4th 575.

§ 3701. [Petition requesting inquiry into sanity of prisoner]

Witkin Procedure (3d) Actions § 24.

§ 3704. [Execution of judgment when defendant found sane; Commitment of insane defendant to medical facility; Recovery of sanity]

Cal Jur 3d (Rev) Criminal Law § 2145.

California Code

TITLE 3
Execution of Death Penalty

Chapter

1. Executing Death Penalty. §§ 3599–3607
2. Suspension of Execution of Death Penalty: Insanity: Pregnancy. §§ 3700–3706

CHAPTER 1

Executing Death Penalty

§ 3599. [Repealed]
§ 3600. Detention of male prisoners pending execution: Designation of prison
§ 3601. Detention of female prisoners: During pendency of appeal
§ 3602. On affirmance of appeal: Designation of prison: Return on commutation of sentence
§ 3603. Place of execution
§ 3604. Method
§ 3605. Witnesses
§ 3606. [No section of this number]
§ 3607. Return on death warrant: Data required to be shown

Cross References:

Treason as punishable by death: § 37.
Procuring execution of innocent person by perjury or subornation thereof as punishable by death: § 128.
Murder as punishable by death: § 190.
Kidnaping for ransom, reward, etc., as punishable by death: § 209.
Train wrecking as punishable by death: § 219.
Reimposition of death sentence, on defendant in his absence, on judgment imposing death penalty has been affirmed by appellate court: § 1193 subd 1.
Execution and delivery of warrants when judgment of death is rendered: § 1217.
Transmittal of statement of conviction requiring judgment of death to Governor: § 1218.
Authority for governor to require opinion of justices of Supreme Court and/or Attorney General on receipt of statement of conviction requiring judgment of death: § 1219.
Order appointing day of execution when judgment of death remains in force unexecuted: § 1227.
Carrying out execution of judgment of death after stay or reprieve: § 1227.5
Automatic appeal after judgment of death: § 1239(b).

Execution of judgment of death after sanity investigation when defendant found sane or when judge determines that defendant has recovered his sanity: § 3704.

Execution of judgment of death following investigation as to pregnancy of female defendant: § 3706.

Aggravated assault by person sentenced to life imprisonment as punishable with death: § 4500.

Requirement that Governor cause register to be kept with respect to statements in capital cases made to him, with his action thereon: Gov C § 12030(b).

Collateral References:

Law Review Articles:

Due process and capital punishment. 11 UCLA LR 527.

§ 3599. [Added by Stats 3d Ex Sess 1944 ch 2 § 42 p 29 and repealed by Stats 1957 ch 2256 § 96 p 3942.]

§ 3600. [Detention of male prisoners pending execution: Designation of prison]

Every male person, upon whom has been imposed the judgment of death, shall be delivered to the warden of the California state prison designated by the department for the execution of the death penalty, there to be kept until the execution of the judgment.

Added Stats 1941 ch 106 § 15; Amended Stats 1943 ch 107 § 2; Stats 1957 ch 2256 § 75.

Amendments:

1943 Amendment: Substituted "designated by the State Board of Prison Directors for the execution of the death penalty, there to be kept until the execution of the judgment" for "at San Quentin, there to be kept until the execution of the judgment, unless the State Board of Prison Directors shall designate another State prison" at the end of the section.

1957 Amendment: Substituted "department" for "State Board of Prison Directors" after "designated by the".

Cross References:

Execution and delivery of warrants when judgment of death is rendered: § 1217.

Collateral References:

Witkin Criminal Procedure p 612.

49 Cal Jur 3d Penal and Correctional Institutions § 203.

21 Am Jur 2d Criminal Law § 596.

Law Review Articles:

California's death penalty: Did the legislature do its job? 2 Glendale LR 1.

Post conviction remedies in California death penalty cases. 11 Stan LR 94.

§ 3601. [Detention of female prisoners: During pendency of appeal]

Every female person, upon whom has been imposed the judgment of death, shall be delivered to the superintendent of the California Institution for Women, there to be held pending decision upon appeal.

Added Stats 1941 ch 106 § 15.

Prior Law: Stats 1929 ch 248 § 17 p 490, as added by Stats 1935 ch 497 § 6 p 1567, amended by Stats 1937 ch 700 § 3 p 1973.

Cross References:
Execution and delivery of warrants when judgment of death is rendered: § 1217.
Automatic appeal after judgment of death: § 1239(b).

Collateral References:
Witkin Criminal Procedure p 612.
49 Cal Jur 3d Penal and Correctional Institutions § 203.
21 Am Jur 2d Criminal Law § 596.

§ 3602. [On affirmance of appeal: Designation of prison: Return on commutation of sentence]

Upon the affirmance of her appeal, the female person sentenced to death shall thereafter be delivered to the warden of the California state prison designated by the department for the execution of the death penalty, not earlier than three days before the day upon which judgment is to be executed; provided, however, that in the event of a commutation of sentence said female prisoner shall be returned to the California Institution for Women, there to be confined pursuant to such commutation.

Added Stats 1941 ch 106 § 15; Amended Stats 1943 ch 107 § 3; Stats 1957 ch 2256 § 76.

Amendments:
1943 Amendment: Substituted "designated by the State Board of Prison Directors for the execution of the death penalty" for "at San Quentin" after "Prison".
1957 Amendment: Substituted "department" for "State Board of Prison Directors" before "for the execution".

Cross References:
Reimposition of death sentence, on defendant's absence, where judgment imposing death penalty has been affirmed: § 1193.

Collateral References:
Witkin Criminal Procedure p 613.
49 Cal Jur 3d Penal and Correctional Institutions § 203.
21 Am Jur 2d Criminal Law §§ 596, 597.

§ 3603. [Place of execution]

The judgment of death shall be executed within the walls of one of the State prisons designated by the court by which judgment is rendered.

Added Stats 1941 ch 106 § 15.

Prior Law:

(a) Former § 1229 1st sentence, as amended by Stats 1891 ch 191 § 9 p 274

(b) Stats 1858 ch 231 § 1 p 192.

(c) NY Code Crim Proc §§ 506, 507.

Cross References:
Warrant of death, execution and delivery of: § 1217.
Statement of conviction and testimony, transmission to Governor by judge: § 1218.

Collateral References:
Witkin Criminal Procedure p 613.
49 Cal Jur 3d Penal and Correctional Institutions § 206.
21 Am Jur 2d Criminal Law § 596.

NOTES OF DECISIONS

The 1891 amendment to former § 1229, relating to the place for the execution of the death penalty of one convicted of murder in the first degree, did not apply to convictions for offenses committed prior to its enactment. People v McNulty (1892) 93 C 427, 26 P 597, 29 P 61, app dismd 149 US 645, 37 L Ed 882, 13 S Ct 959; People v Vincent (1892) 95 C 425, 30 P 581, app dismd 149 US 648, 37 L Ed 884, 13 S Ct 960.

§ 3604. [Method]

The punishment of death shall be inflicted by the administration of a lethal gas.

Added Stats 1941 ch 106 § 15.

Prior Law:

(a) Former § 1228.

(b) Criminal Practice Act § 480 (Stats 1851 ch 29 § 480 p 265).

(c) Stats 1850 ch 119 § 512 p 313.

(d) NY Code Crim Proc § 500.

Cross References:

Warrant of death, execution and delivery of: § 1217.

Collateral References:

Witkin Crimes p 972.
Witkin Criminal Procedure p 613.
17 Cal Jur 3d Criminal Law §§ 262, 265.
21 Am Jur 2d Criminal Law § 598.

Law Review Articles:

Joseph Story on Punishment. 43 CLR 76.

NOTES OF DECISIONS

The 1937 amendment to former § 1228, providing that the punishment of death should be inflicted by the administration of lethal gas instead of by hanging, did not repeal the statute then in force before the effective date of the new enactment; and the old punishment by hanging applied to a crime committed between the time of the passage of the new act and the time of its going into effect. People v Righthouse (1937) 10 C2d 86, 72 P2d 867.

This section is not invalid as permitting the imposition of cruel and unusual punishment contrary to the Federal Constitution. People v Daugherty (1953) 40 C2d 876, 256 P2d 911, cert den 346 US 827, 98 L Ed 352, 74 S Ct 47.

So long as the death penalty is still widely accepted, it does not violate the constitutional concept of cruelty (U. S. Const., 8th Amend.; Cal. Const. art I, § 6); it is not rendered cruel or unusual as the result of the Legislature's vesting in the trier of fact discretion to extend mercy to a convicted first degree murderer, or by the mental suffering attending the detention in death row, or by the fact that under Pen. Code, § 3604, it is inflicted by the administration of lethal gas. Anderson, In re (1968) 69 C2d 613, 73 Cal Rptr 21, 447 P2d 117.

§ 3605. [Witnesses]

The warden of the State prison where the execution is to take place must be present at the execution and must invite the presence of two physicians, the Attorney General of the State, and at least 12

reputable citizens, to be selected by him; and he shall at the request of the defendant, permit such ministers of the Gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

Added Stats 1941 ch 106 § 15.

Prior Law:

(a) Former § 1229 2d, 3d sents, as amended by Stats 1891 ch 191 § 9 p 274.

(b) Stats 1858 ch 231 § 1 p 192.

(c) NY Code Crim Proc §§ 506, 507.

Cross References:

Warrant of death, execution and delivery of: § 1217.

Collateral References:

Witkin Criminal Procedure p 613.
49 Cal Jur 3d Penal and Correctional Institutions § 206.
21 Am Jur 2d Criminal Law § 595.

Attorney General's Opinions:

32 Ops Atty Gen 254 (authority of warden to appoint deputy to officiate at execution during warden's temporary absence or incapacity—authority for director of corrections to appoint deputy in event of warden's death).

§ 3606. [No section of this number]

§ 3607. [Return on death warrant: Data required to be shown]

After the execution, the warden must make a return upon the death warrant to the county clerk of the court by which the judgment was rendered, showing the time, mode, and manner in which it was executed.

Added Stats 1941 ch 106 § 15.

Prior Law:

(a) Former § 1230, as amended by Stats 1891 ch 191 § 10 p 274.

(b) Stats 1858 ch 231 § 2 p 193.

(c) NY Code Crim Proc § 508.

Collateral References:

Witkin Criminal Procedure p 613.
49 Cal Jur 3d Penal and Correctional Institutions § 206.
21 Am Jur 2d Criminal Law § 595.

CHAPTER 2

Suspension of Execution of Death Penalty: Insanity: Pregnancy

§ 3700. Authority to suspend
§ 3700.5. Sanity examination following execution order: Report
§ 3701. Petition requesting inquiry into sanity of prisoner
§ 3702. Attendance of district attorney at sanity hearing
§ 3703. Entry of verdict: Hospitalization upon finding of insanity
§ 3704. Execution of judgment when defendant found sane: Commitment of insane defendant to medical facility: Recovery of sanity
§ 3704.5. Transfer of defendant from state hospital to medical facility
§ 3705. Pregnancy investigation
§ 3706. Execution of judgment suspended during pregnancy

Cross References:

Reprieve, pardons and commutations: §§ 4800 et seq.
Inapplicability of statutory provisions governing notice of application for pardon when there is imminent danger of death of person convicted: § 4806 subd 1.
Reprieve, pardons and commutations: Const Art V § 8.

§ 3700. [Authority to suspend]

No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken.

Added Stats 1941 ch 106 § 15.

Prior Law:

(a) Former § 1220, as amended by Stats 1891 ch 191 § 2 p 273.

(b) Criminal Practice Act § 469 (Stats 1851 ch 29 § 469 p 264).

(c) Stats 1850 ch 119 § 501 p 312.

(d) NY Code Crim Proc § 495.

Cross References:

Automatic appeal after judgment of death: § 1239(b).

Collateral References:

Witkin Crimes p 1034. Cal Jur 3d Criminal Law § 265. Penal and Correctional Institutions § 207.
21 Am Jur 2d Criminal Law §§ 558, 596.

Law Review Articles:

Insanity after judgment operating to delay execution. 23 SCLR 246.
Restatement of law of insanity as defense in criminal law of California. 27 SCLR 181.
Inquiry into sanity of defendant after sentence. 27 SCLR 203.
Capital punishment. 42 ABAJ 113.

NOTES OF DECISIONS

Under §§ 3700–3704, prior to the 1949 amendment of § 3704, a person who has been adjudged insane and committed to a state hospital after conviction, sentence, and delivery to a warden of a state prison for execution, and who, following certification by the superintendent of such hospital that he was sane, had been returned to the custody of the warden for execution, had no right to a judicial determination of his restoration to sanity. Phyle, In re (1947) 30 C2d 838, 186 P2d 134, cert dismd 334 US 431, 92 L Ed 1494, 68 S Ct 1131.

The supreme court has appellate jurisdiction in criminal cases where judgement of death has been rendered (including proceedings which attack such a judgment by motion to vacate or petition for the writ of coram nobis); and its power to issue writs necessary or proper to the complete exercise of such jurisdiction under Const Art VI § 4 includes the power to stay execution of the sentence of death until final determination of a pending appeal from an order made after the final judgment imposing such sentence. People v Shorts (1948) 32 C2d 502, 197 P2d 330.

The procedure which permits a convicted defendant, after affirmance of the judgment on appeal, to apply directly to a trial court for a vacation of the judgment, but which reserves to the supreme court, on appeal from an order denying the motion, the right in the exercise of judicial discretion to grant or deny a stay of execution and to dismiss the appeal as irregular and frivolous when there is a failure to accompany and support the application for a stay by a prima facie showing of merit and probable cause, fully meets the constitutional requirements of due process of law. People v Shorts (1948) 32 C2d 502, 197 P2d 330.

One who seeks a stay of execution of a judgment imposing the death penalty in order that he may perfect an appeal from an order denying the writ of coram nobis, where the only point involved appears on the face of the application and on the records already before the supreme court to be a question of the age of the defendant, which question on substantially conflicting evidence has been resolved adversely to the defendant by the trial court, must make some further prima facie showing of merit and diligence; otherwise he has failed to show that his appeal is taken in good faith. People v Shorts (1948) 32 C2d 502, 197 P2d 330.

One who applies for a writ of coram nobis on the ground that he was under the age of eighteen at the time the death penalty was imposed on him must show that the facts on which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief. People v Shorts (1948) 32 C2d 502, 197 P2d 330.

An appellant was not entitled to a stay of execution to enable him to perfect his appeal from an order denying a motion to vacate a judgment imposing the death penalty, after such judgment had previously been affirmed on appeal, where, at the time he applied for a stay, he did not furnish the supreme court with a copy of his motion for a writ of coram nobis, where he alleged merely that he was prepared to show in such writ that he "is under the age of eighteen at the present time," where the evidence available to support such ground is not set forth by affidavit or otherwise, and where he did not show that he was prompt and diligent in seeking relief by writ of coram nobis and that the controlling fact on which he relied is that proceeding was not known to him at the time he was tried and convicted. People v Shorts (1948) 32 C2d 502, 197 P2d 330.

On appeal from an order denying a motion to vacate a judgment imposing the death penalty, where such judgment has previously been reviewed on appeal and affirmed, the burden is on the defendant to apply for a stay of execution of such final judgment and to support such application by a prima facie showing of substantial merit in his appeal and probable cause for reversal of the order denying the motion; and in the absence of such prima facie showing, not only will the application for the stay be denied but the appeal itself will be deemed taken for an improper objective (namely, delay of execution of a final and valid judgment) and, hence, to be frivolous and irregular and subject to dismissal forthwith. People v Shorts (1948) 32 C2d 502, 197 P2d 330.

One who applies for a stay of execution pending appeal from an order denying a motion to vacate a judgment imposing the death penalty should make a prima facie showing that his appeal is taken in good faith, that some substantial and justiciable point is in actual controversy, and that there is probable cause for reversal of the trial court's order. People v Shorts (1948) 32 C2d 502, 197 P2d 330.

In a death penalty case, after judgment of conviction has been reviewed and affirmed on appeal and has been thereafter attacked in the trial court by motion to vacate, which motion has been denied, the right of the defendant to appeal from the order of denial does not carry with it as of course a right to stay of execution. People v Shorts (1948) 32 C2d 502, 197 P2d 330.

This and the following sections establish the measure of a convicted defendant's right to any determination of his present sanity, the manner of such determination being purely a matter of legislative regulation. People v Riley (1951) 37 C2d 510, 235 P2d 381.

There is no remedy whatsoever if warden fails to perform his statutory duties, with respect to sanity of condemned person, and neither habeas corpus

nor mandamus is available to review his determination that there is no reason to believe condemned man insane. Caritativo v California (1958) 357 US 549, 2 L Ed 2d 1531, 78 S Ct 1263.

Due process clause of Fourteenth Amendment does not require that state afford to person condemned to death, and claiming insanity, opportunity to have his claim tested in judicial proceeding. Caritativo v California (1958) 357 US 549, 2 L Ed 2d 1531, 78 S Ct 1263.

§ 3700.5. [Sanity examination following execution order: Report]

Whenever a court makes and causes to be entered an order appointing a day upon which a judgment of death shall be executed upon a defendant, the warden of the state prison to whom such defendant has been delivered for execution or, if the defendant is a female, the superintendent of the California Institution for Women, shall notify the Director of Corrections who shall thereupon select and appoint three alienists, all of whom must be from the medical staffs of the Department of Corrections, to examine the defendant, under such judgment of death, and investigate his sanity. It is the duty of the alienists so selected and appointed to examine such defendant and investigate his sanity, and to report their opinions and conclusions thereon, in writing, to the Governor, to the warden of the prison at which the execution is to take place at least 20 days prior to the day appointed for the execution of the judgment of death upon the defendant. The warden shall furnish a copy of the report to counsel for the defendant upon his request.

Added Stats 1961 ch 1739 § 1.

Collateral References:

Witkin Criminal Procedure p 614.
49 Cal Jur 3d Penal and Correctional Institutions § 205.
21 Am Jur 2d Criminal Law §§ 559, 595.

§ 3701. [Petition requesting inquiry into sanity of prisoner]

If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry.

Added Stats 1941 ch 106 § 15.

Prior Law:

(a) Former § 1221, as amended by Stats 1891 ch 191 § 3 p 273, Stats 1905 ch 537 § 2 p 698.

(b) Criminal Practice Act § 470 (Stats 1851 ch 29 § 470 p 264).

(c) Stats 1850 ch 119 § 502 p 312.

penalty after warden has determined that there is no "good reason to believe" such prisoner is presently insane. Caritativo v Teets (1956) 47 C2d 304, 303 P2d 339, affd 357 US 549, 2 L Ed 2d 1531, 78 S Ct 1263.

8. Representation for Defendant

A convicted defendant may not complain that he did not have effective legal representation at a sanity hearing under this section, where in spite of not being entitled to the appointment of counsel in such proceedings he was competently represented by a counsel who introduced expert testimony, diligently examined and cross-examined witnesses and argued evidentiary considerations bearing on the defendant's mental condition to the jury. People v Riley (1951) 37 C2d 510, 235 P2d 381.

9. Verdict

A nine to three verdict is sufficient in a sanity hearing under this section. People v Riley (1951) 37 C2d 510, 235 P2d 381.

10. Restoration to Sanity

Under §§ 3700–3704, prior to the 1949 amendment of § 3704, a person who had been adjudged insane and committed to a state hospital after conviction, sentence, and delivery to a warden of a state prison for execution, and who, following certification by the superintendent of such hospital that he was sane, had been returned to the custody of the warden for execution, had no right to a judicial determination of his restoration to sanity. Phyle, In re (1947) 30 C2d 838, 186 P2d 134, cert dismd 334 US 431, 92 L Ed 1494, 68 S Ct 1131.

11. Particular Applications

There was no such showing of the insanity of a 13-year-old defendant convicted of first degree murder of a 6-year-old girl as to constitute grounds for relief by way of coram nobis, where the claim of insanity was based only on the report of the director of an institution, to which the defendant was assigned by the Youth Authority for observation, that the institution's staff found the defendant to have a psychopathic personality, mixed type (defective or psychopathic delinquency), and a normal mentality, and recommended that he be committed for psychiatric treatment, as ordinary methods of rehabilitation would not be sufficient. People v Thompson (1949) 94 CA2d 578, 211 P2d 1.

12. Appeal and Review

No appeal lies from an order made pursuant to § 3703 reciting the finding of a jury in a proceeding initiated under this section. People v Riley (1951) 37 C2d 510, 235 P2d 381.

Habeas corpus is not available to review warden's determination that there is no reason to believe condemned man insane. Caritativo v California (1958) 357 US 549, 2 L Ed 2d 1531, 78 S Ct 1263.

Mandamus is not available to review warden's determination that there is no reason to believe condemned man insane. Caritativo v California (1958) 357 US 549, 2 L Ed 2d 1531, 78 S Ct 1263.

§ 3702. [Attendance of district attorney at sanity hearing]

The district attorney must attend the hearing, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court.

Added Stats 1941 ch 106 § 15.

Prior Law:

a) Former § 1222, as amended by Stats 1905 ch 537 § 3 p 699.

b) Criminal Practice Act § 471 (Stats 1851 ch 29 § 471 p 264).

c) Stats 1850 ch 119 § 503 p 312.

d) NY Code Crim Proc § 497.

Cross References:

Compelling attendance of witnesses: §§ 1326 et seq.

Application of this section to proceedings on inquiry as to pregnancy of female against whom judgment of death is rendered: § 3705.

Admission of mentally disordered convicts to state hospitals: W & I C § 7227.

Collateral References:

Witkin Criminal Procedure p 614.

49 Cal Jur 3d Penal and Correctional Institutions § 208.

21 Am Jur 2d Criminal Law §§ 558, 595.

NOTES OF DECISIONS

Under §§ 3700–3704, prior to the 1949 amendment of § 3704, a person who had been adjudged insane and committed to a state hospital after conviction, sentence, and delivery to a warden of a state prison for execution, and who, following certification by the superintendent of such hospital that he was sane, had been returned to the custody of the warden for execution, had no right to a judicial determination of his restoration to sanity. Phyle, In re (1947) 30 C2d 838, 186 P2d 134, cert dismd 334 US 431, 92 L Ed 1494, 68 S Ct 1131.

No provision is made for assignment of counsel or notice of hearing to defendant, but only district attorney is required to attend hearing, and it is he who may produce witnesses and subpoenas for such purpose as in grand jury inquiry rather than by county clerk as is usual process followed in court proceeding. People v Riley (1951) 37 C2d 510, 235 P2d 381.

§ 3703. [Entry of verdict: Hospitalization upon finding of insanity]

The verdict of the jury must be entered upon the minutes, and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane, the order must direct that he be taken to a medical facility of the Department of Corrections, and there kept in safe confinement until his reason is restored.

Added Stats 1941 ch 106 § 15; Amended Stats 1971 ch 1136 § 1.

Prior Law:

(a) Former § 1223, as amended by Stats 1891 ch 191 § 4 p 273, Stats 1905 ch 537 § 4 p 699.

(b) Criminal Practice Act § 472 (Stats 1851 ch 29 § 472 p 264).

(c) Stats 1850 ch 119 § 504 p 312.

Amendments:

1971 Amendment: Substituted "medical facility of the Department of Corrections" for "State hospital for the insane".

Cross References:

Verdict generally: §§ 1147 et seq.

Commitment of insane person charged with commission of public offense: W & I C § 6825.

Collateral References:

Witkin Criminal Procedure p 614.

49 Cal Jur 3d Penal and Correctional Institutions § 208.

21 Am Jur 2d Criminal Law §§ 559, 597.

Law Review Articles:

Post-conviction remedies in California death penalty cases. 11 Stan LR 94.

NOTES OF DECISIONS

No appeal lies from an order made pursuant to this section reciting the finding of a jury in a proceeding initiated under § 3701 as to the sanity of a defendant under judgment of death. People v Riley (1951) 37 C2d 510, 235 P2d 381.

§ 3704. [Execution of judgment when defendant found sane: Commitment of insane defendant to medical facility: Recovery of sanity]

If it is found that the defendant is sane, the warden must proceed to

execute the judgment as specified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor, and deliver the defendant, together with a certified copy of such order, to the superintendent of the medical facility named in such order. When the defendant recovers his sanity, the superintendent of such medical facility must certify that fact to the judge of the superior court from which the defendant was committed as insane, who must thereupon fix a date upon which, after 10 days' written notice to the defendant and the district attorney of the county from which the defendant was originally sentenced and the district attorney of the county from which he was committed to the medical facility, a hearing shall be had before said judge sitting without a jury to determine whether or not the defendant has in fact recovered his sanity. If the defendant appears without counsel, the court shall appoint counsel to represent him at said hearing. If the judge should determine that the defendant has recovered his sanity he must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the state prison pending the execution of the judgment. If, however, the judge should determine that the defendant has not recovered his sanity he shall direct the return of the defendant to a medical facility of the Department of Corrections, to be there kept in safe confinement until his sanity is restored.

Added Stats 1941 ch 106 § 15; Amended Stats 1949 ch 1020 § 1; Stats 1971 ch 1136 § 2.

Prior Law:

(a) Former § 1224, as amended by Stats 1905 ch 537 § 5 p 699.

(b) Criminal Practice Act §§ 473, 474 (Stats 1851 ch 29 §§ 473, 474 p 264).

(c) Stats 1850 ch 119 §§ 505, 506 p 312.

Amendments:

1949 Amendment: (1) Substituted the second sentence for the former second sentence which read: "When the defendant recovers his reason, the superintendent of such hospital must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the State prison pending the execution of the judgment."; and (2) added the third, fourth, and fifth sentences.

1971 Amendment: (1) Deleted "medical" before "superintendent" in the first sentence; (2) substituted "medical facility" for "hospital" before "named" in the first sentence and before "must" in the second sentence; (3) substituted "medical facility" for "state hospital" before ", a hearing" in the second sentence; and (4) substituted "medical facility of the Department of Corrections" for "state hospital for the insane" in the last sentence.

Cross References:

Executing death penalty: §§ 3600 et seq.

Disposition of mentally disordered criminals on recovery of sanity: W & I C § 7375.

executive determination that he is not insane, where a state remedy is available to compel judicial determination of the existence of a duty on the part of the prison warden to initiate a statutory judicial proceeding to determine the fact of sanity. Phyle v Duffy (1948) 334 US 431, 92 L Ed 1494, 68 S Ct 1131.

A petition for writ of mandate to compel the warden of a state prison to institute a proceeding under § 3701 for a jury determination of the sanity of a prisoner who had previously been adjudged insane by a jury and committed to a state hospital following a death sentence, and who, on a certification by the superintendent of such hospital that he was sane, was returned to prison for execution, will be denied, where, regardless of whether mandamus was an appropriate remedy, the prisoner was accorded a full hearing on the issue of his sanity at that time, and the evidence supported a determination that the warden then had no "good reason" to believe that the prisoner had become or was insane. Phyle v Duffy (1949) 34 C2d 144, 208 P2d 668 (overruled on other grounds Caritativo v Teets (1956) 47 C2d 304, 303 P2d 339).

Sections 3700–3704 establish the measure of a convicted defendant's right to any determination of his present sanity, the manner of such determination being purely a matter of legislative regulation. People v Riley (1951) 37 C2d 510, 235 P2d 381.

§ 3704.5. [Transfer of defendant from state hospital to medical facility]

Any defendant who, on the effective date of this section is in a state hospital under court order pursuant to Penal Code Section 3703, as that section read immediately preceding such effective date, shall be transferred to a medical facility of the Department of Corrections, designated by the director of such department, and there kept in safe confinement until his reason is restored. The provisions of Penal Code Section 3704 shall apply when such a defendant recovers his sanity.

Added by Stats 1971 ch 1136 § 3.

Collateral References:

49 Cal Jur 3d Penal and Correctional Institutions § 208.

§ 3705. [Pregnancy investigation]

If there is good reason to believe that a female against whom a judgment of death is rendered is pregnant, such proceedings must be had as are provided in Section 3701, except that instead of a jury, as therein provided, the court may summon three disinterested physicians, of good standing in their profession, to inquire into the supposed pregnancy, who shall, in the presence of the court, but with closed doors, if requested by the defendant, examine the defendant and hear any evidence that may be produced, and make a written finding and certificate of their conclusion, to be approved by the court and spread upon the minutes. The provisions of Section 3702 apply to the proceedings upon such inquiry.

Added Stats 1941 ch 106 § 15; Amended Stats 1941 ch 1192 § 13.

Prior Law:

a) Former § 1225, as amended by Stats 1891 ch 191 § 6 p 273, Stats 1905 ch 537 § 6 p 699.

b) Criminal Practice Act § 475 (Stats 1851 ch 29 § 475 p 264).

c) Stats 1850 ch 119 § 507 p 312.

d) NY Code Crim Proc § 500.

Amendments:

1941 Amendment: Substituted (1) "Section 3701" for "Section 2011" in the first sentence; and (2) "Section 3702" for "Section 2012" in the second sentence.

Collateral References:

Witkin Criminal Procedure p 612.
Cal Jur 3d Criminal Law § 265, Penal and Correctional Institutions § 211.
21 Am Jur 2d Criminal Law §§ 559, 597.

§ 3706. [Execution of judgment suspended during pregnancy]

If it is found that the female is not pregnant, the warden must execute the judgment; if it is found that she is pregnant the warden must suspend the execution of the judgment, and transmit a certified copy of the finding and certificate to the Governor. When the Governor receives from the warden a certificate that the defendant is no longer pregnant, he must issue to the warden his warrant appointing a day for the execution of the judgment.

Added Stats 1941 ch 106 § 15.

Prior Law:

(a) Former § 1226, as amended by Stats 1891 ch 191 § 7 p 274, Stats 1905 ch 537 § 7 p 699.

(b) Criminal Practice Act §§ 476, 477 (Stats 1851 ch 29 §§ 476, 477 pp 264, 265).

(c) Stats 1850 ch 119 §§ 508, 509 pp 312, 313.

(d) NY Code Crim Proc §§ 501, 502.

Cross References:

Execution of death penalty: §§ 3600 et seq.

Collateral References:

Witkin Criminal Procedure p 612.
Cal Jur 3d Criminal Law § 265, Penal and Correctional Institutions § 211.
21 Am Jur 2d Criminal Law §§ 559, 597.

§ 4492. [Interest derived from investments]

Notwithstanding Section 16305.7 of the Government Code, all interest or other increment resulting from the investment of moneys deposited in the fund shall be credited to the fund.

Added Stats 1986 ch 12 § 1, approved at the June 3, 1986, primary election.

§ 4493. [Project expenditures; Allocations in legislative appropriations]

Money in the fund may only be expended for projects specified in this title as allocated in appropriations made by the Legislature.

Added Stats 1986 ch 12 § 1, approved at the June 3, 1986, primary election.

§ 4494. [Finality of Board of Corrections decisions; Jurisdiction of courts]

(a) It is the intent of the people in enacting this bond act that jail authorization and construction proceed as quickly as possible. Due to the severe shortage of jail facilities and the need to begin construction of jail facilities as soon as possible, all decisions of the board regarding construction, reconstruction, remodeling, or replacement of jail facilities financed by this title shall be final.

(b) No court shall have jurisdiction over these decisions of the board absent a showing, beyond a reasonable doubt, of a gross abuse of discretion by the board.

(c) Should an action be commenced alleging gross abuse of discretion by the board, no court shall have jurisdiction to delay, prohibit, or interfere with the construction, reconstruction, remodeling, or replacement of the subject jail facilities. The sole remedy available to the court is a mandate that steps be taken to mitigate the abuse of discretion.

(d) Nothing in this title is intended in any way to delay, prohibit, or interfere with the construction of jail facilities.

Added Stats 1986 ch 12 § 1, approved at the June 3, 1986, primary election.

§ 4495. [Severability clause]

If any provision of this title, or the application thereof, is held to be invalid, that invalidity shall not affect the other provisions or applications of the title which can be given effect without the invalid provision or application, and to this end the provisions of this title are severable.

Added Stats 1986 ch 12 § 1, approved at the June 3, 1986, primary election.

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§ 4500 *and following sections—general references:*

Cal Jur 3d (Rev) Criminal Law § 2013.

Constitutionality of assault and battery laws limited to protection of females only or which provide greater penalties for males than for females, 5 ALR4th 708.

§ 4500. [Aggravated assault by life prisoner; Punishment]

Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty

shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence and was serving a sentence to a state prison at the time of the commission of the assault and was not on parole, on probation, or released on bail pending an appeal.

Amended Stats 1986 ch 1445 § 1.

Amendments:

1986 Amendment: (1) Substituted "while undergoing a life sentence, who is sentenced to state prison within this state, and" for "undergoing a life sentence in a state prison of this state," in the first sentence of the first paragraph; and (2) amended the last paragraph by (a) substituting "and was serving a sentence to" for "in" after "life sentence"; and (b) adding ", on probation, or released on bail pending an appeal" at the end.

Witkin Evidence (3d) § 416

Cal Jur 3d (Rev) Criminal Law §§ 204, 343, 2014, 2016, 2144.

Calif Criminal Forms & Instructions (BW, 1983) § 39:11.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 ALR3d 287.

1. In General

Since the Legislature, in enacting death penalty legislation, in 1977 (including the revising of Pen C § 4500 to provide for an alternative punishment of life without possibility of parole for a life prisoner who maliciously assaults a noninmate if the victim dies) declared its belief that the increased sanctions permitted by the new death penalty legislation were necessary for the immediate protection of the public, the principle that statutes which increase the punishment for crime will be construed to apply only to crimes committed after their enactment governs the interpretation of the 1977 legislation and precludes its retroactive application. Thus, the penalty presently provided by § 4500 was inapplicable to defendants found guilty of violating former Pen C § 4500, which was unconstitutional, since at the time of the assault upon a prison guard by defendants the current provisions of § 4500 had not been enacted. Graham v Superior Court (1979) 98 CA3d 880, 160 Cal Rptr 10.

A prisoner serving less than a life term, who, along with a life prisoner, was charged with conspiracy to murder a correctional officer, but who was concededly not subject to charges under Pen. Code, § 4500 (imposing death penalty for aggravated assault by life prisoner), was likewise not subject to prosecution for conspiracy to violate § 4500. The general rule that a conspiracy charge may properly result in a greater punishment than under the substantive offense itself was inapplicable, since Pen. Code, § 4501, dealt with persons such as defendant who were serving less than life terms and who engaged in the same type of conduct prohibited by § 4500. Since there was an affirmative legislative interest to impose a lesser punishment on persons such as defendant, it was impermissible to make use of a conspiracy charge to defeat this legislative intent. People v Roberts (1983, 1st Dist) 139 Cal App 3d 290, 188 Cal Rptr 586.

2. Constitutionality

A prisoner serving an indeterminate term of five years to life pursuant to a 1971 robbery conviction who was convicted in 1972 of assault while serving a life term (Pen. Code, § 4500) was not entitled to the benefit of the lesser punishment applicable to in-prison assaults by nonlifers (Pen. Code, § 4501), even though the punishment for robbery was modified subsequent to the assault conviction and no longer included the possiblility of life imprisonment. The legislative purpose in enacting § 4500 was to deter violent crimes by life prisoners who might otherwise think themselves immune from punishment, and for this reason it was the prisoner's status on the day of the assault offense that was crucial. Thus, for purposes of an equal protection analysis, the correct comparison was between an inmate serving an indeterminate life term who commits an assault in prison and an inmate serving a determinate life term who commits an assault in prison. Since the punishment for both was identical, defendant was not denied equal protection. In re Carmichael (1982, 1st Dist) 132 Cal App 3d 542, 183 Cal Rptr 206.

California Code

§ 4500. [Aggravated assault by life prisoner: Punishment]

Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault and was not on parole.

Added Stats 1973 ch 719 § 13; Amended Stats 1977 ch 316 § 21, effective August 11, 1977.

Prior Law:

(a) Former § 4500, as added by Stats 1941 ch 106 § 15, amended by Stats 1959 ch 529 § 1, Stats 1965 ch 1904 § 1.

(b) Former § 246, as added by Stats 1901 ch 12 § 1.

Amendments:

1977 Amendment: (1) Amended the first paragraph by (a) deleting ", other than another inmate," before "with a deadly weapon"; (b) adding "or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Section 190.3 and 190.4" before "; however,"; and (c) deleting "or the person so assaulted is another inmate," before "the punishment"; and (2) added "and was not on parole" at the end of the third paragraph.

Former Section: Former § 4500, similar to the present section, was added by Stats 1941 ch 106 § 15, amended by Stats 1959 ch 529 § 1, Stats 1965 ch 1904 § 1, and repealed by Stats 1973 ch 719 § 12.

Note—Severability, see note to § 190.

Cross References:

Mandatory death penalty upon special findings: § 190.2.
Assault with deadly weapon: § 245.
Form: Allegation charging assault with deadly weapon and by means of force likely to produce great bodily harm: § 245.
Execution of death penalty: §§ 3600 et seq.
Pertinent administrative rules and regulations: 15 Cal Adm Code §§ 3000 et seq.

Collateral References:

Witkin Crimes pp 20, 258, 860, 972.
Witkin Criminal Procedure p 510.
Cal Jur 3d Criminal Law §§ 63, 1604, 1605, Penal and Correctional Institutions § 134.

California

TITLE 3

Offenses Against the Sovereignty of the State

§ 37. Treason
§ 38. Misprision of treason

Cross References:
Crimes by and against executive power of the state: §§ 67 et seq.
Crimes against legislative power: §§ 85 et seq.
Crimes against public justice: §§ 92 et seq.
Criminal syndicalism: §§ 11400 et seq.
Paramilitary organizations: § 11460.

Collateral References:
Witkin Crimes p 821.
Witkin Summary (8th ed) Constitutional Law § 209.
Cal Jur 3d (Rev) Criminal Law §§ 1868 et seq.
Cal Digest of Official Reports 3d Series, Syndicalism, Sedition and Sabotage §§ 1 et seq.
Am Jur 2d Sedition, Subversive Activities, and Treason § 66.
Wharton's Criminal Law (14th ed) Treason and Related Offenses §§ 701 et seq.

§ 37. [Treason]

Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason shall be death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

Enacted 1872; Amended Stats 1977 ch 316 § 2, effective August 11, 1977.

Prior Law:

(a) Crimes and Punishment Act §§ 16, 17 (Stats 1850 ch 99 §§ 16, 17 p 231).

(b) Field's Draft NY Pen C §§ 57, 60.

(c) NY Pen C §§ 37, 38.

Amendments:
1977 Amendment: Added (1) "or life imprisonment without possibility of parole" at the end of the second sentence; and (2) the third sentence.

Cross References:
Misprision of treason: § 38.
Determination as to imposition of death penalty or life imprisonment upon finding of special circumstance: § 190.3.

Special finding on truth of alleged special circumstances: § 190.4.
Petit treason abolished: § 191.
Jurisdiction over treason where overt act committed out of state: § 788.
Proof of treason: § 1103.
Treason defined: Const Art I § 18.
Duty of allegiance to State: Gov C § 271.
Renunciation of allegiance: Gov C § 272.

Collateral References:

Witkin Crimes p 821.
Cal Jur 3d (Rev) Criminal Law § 1869.
Cal Digest of Official Reports 3d Series, Syndicalism, Sedition and Sabotage §§ 1 et seq.
Federal treason provision: USCS Constitution Art III § 3.

Forms:

Suggested form is set out below, following notes of decisions.

Law Review Articles:

Review of Selected 1977 California Legislation. 9 Pacific LJ 439.

Annotations:

Validity of governmental requirement of oath of allegiance or loyalty. 18 ALR2d 268.
Dismissal or rejection of public schoolteacher because of disloyalty. 27 ALR2d 487.
Prejudicial effect of admission of evidence as to Communist or other subversive affiliation or association of accused. 30 ALR2d 589.
Coercion, compulsion, or duress as defense to criminal prosecution. 40 ALR2d 908.

NOTES OF DECISIONS

To constitute levying of war within meaning of Constitution there must be assemblage of persons with force of arms to overthrow government and resist laws. United States v Greathouse (1863) F Cas No. 15254.

SUGGESTED FORM

Allegation Charging Treason

[Insert general form of indictment or information (see Penal C § 951)]

The __1__ [Grand Jury *or* District Attorney] of the County of __2__ hereby accuses __3__ of a felony, to wit: Treason, in that on or about __4__, 19__5__, in the County of __6__, State of California, he, although owing allegiance* to the State of California, __7__ [levied war against the State of California *or* adhered to the enemies of the State of California *or* gave aid and comfort to the enemies of the State of California] by committing the following overt act(s):

1. __8__ *[e.g.,* He and others assembled with arms, intending to overthrow the Government of the State of California].

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* Citizens of the United States residing in California are citizens of California (see Gov C § 241), and owe allegiance to California (see Gov C § 271).

§ 38. [Misprision of treason]

Misprision of treason is the knowledge and concealment of treason,

guilty of first degree murder for any homicide committed in the course thereof. People v Rose (1986, 4th Dist) 182 Cal App 3d 813, 227 Cal Rptr 570.

15. Mental State

The only intent required for conviction under the felony-murder rule (Pen. Code, § 189) is the intent to commit the underlying felony. Thus, in a prosecution for attempted robbery and murder, defendant, who killed a man in the course of the attempted robbery, was properly convicted under the felony-murder rule, where the facts indisputably showed that defendant intended to commit the underlying crime of robbery. People v Schafer (1987, 2d Dist) 189 Cal App 3d 786, 234 Cal Rptr 565.

No showing of an intent to kill is required to support a conviction based on the felony-murder rule (Pen. Code, § 189) absent a special circumstance allegation. The intent to kill requirement imposed by Pen. Code, § 190.2, subd. (b), with respect to felony-murder special circumstance convictions, is interpreted to avoid violation of the prohibition against cruel and unusual punishment under U.S. Const., 8th Amend.; it is not applicable to cases without special circumstances. The purpose of the felony-murder rule is to deter those engaged in felonies from killing negligently or accidentally. It would be inconsistent with this purpose to superimpose an intent to kill requirement on the felony-murder rule. People v Schafer (1987, 2d Dist) 189 Cal App 3d 786, 234 Cal Rptr 565.

17. Arson

In a prosecution of defendant for felony-murder, in which the evidence was such as to support a conclusion defendant intended either to kill through the device of a deadly weapon, or that his purpose was restricted to causing destruction by means of arson (defendant threw a Molotov cocktail into a house and a guest therein perished), the trial court properly refused a defense instruction stating that if the purpose of defendant was to kill someone inside the house, even if the intended victim was a different person from the actual victim, and arson was the means intended to accomplish the killing, then the felony-murder rule did not apply. People v Oliver (1985, 2d Dist) 168 Cal App 3d 920, 214 Cal Rptr 587.

18. —Burglary

A burglar who kills after entering to steal does so in the perpetration of burglary within the meaning of the felony-murder rule embodied in Pen. Code, § 189. People v Brady (1987, 3d Dist) 190 Cal App 3d 124, 235 Cal Rptr 248.

20. Robbery

Defendant was properly convicted of first degree felony murder, where, during the course of an armed robbery, one of the victims died from a heart attack, even though defendant did not shoot or initiate any life-threatening violence against the victim. The felony- murder doctrine is applicable when there is substantial evidence to prove that a robbery caused a victim's fatal heart attack. As long as the homicide is the direct causal result of the robbery, the felony- murder rule applies, whether or not the death was a natural or probable consequence of the robbery. People v Hernandez (1985, 1st Dist) 169 Cal App 3d 282, 215 Cal Rptr 166.

Defendant's first degree murder conviction, obtained on a felony-murder theory when the jury found that the murder occurred as a result of his robbery of the victim, was barred by the doctrine of collateral estoppel, where the jury in an earlier proceeding had convicted him of first degree murder for the same incident, but had rejected the special circumstances that the murder had occurred in the course of the robbery. The felony-murder instruction (which only requires that the murder occur "as a result of" the robbery) was only slightly different from the special circumstances instruction (which specifies that the murder occur "in the commission of" the robbery), and the definition of felony murder under Pen. Code, § 189, is virtually indistinguishable from the language used in Pen. Code, § 190.2(a)(17), to define special circumstances. People v Asbury (1985, 2d Dist) 173 Cal App 3d 362, 218 Cal Rptr 902.

§ 190. (Operative term contingent) [Punishment for murder]

(a) Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Except as provided in subdivision (b), every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time.

(b) Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 25 years to life if the victim was a

peace officer, as defined in subdivision (a) of Section 830.1, subdivision (a (b) of Section 830.2, or Section 830.5, who was killed while engaged in performance of his or her duties, and the defendant knew or reasona should have known that the victim was such a peace officer engaged in performance of his or her duties.

The provisions of Article 2.5 (commencing with Section 2930) of Chapt of Title 1 of Part 3 of the Penal Code shall not apply to reduce minimum term of 25 years in state prison when the person is guilty murder in the second degree and the victim was a peace officer, as define this subdivision, and such person shall not be released prior to serving years confinement.

Amended Stats 1987 ch 1006 § 1.

Amendments:

1987 Amendment: (1) Designated the former section to be subd (a); (2) added "Except as provid subdivision (b)," in the second paragraph of subd (a); and (3) added subd (b).

Note—Stats 1987 ch 1006 provides:

SEC. 2. Section 1 of this act amends an initiative statute and shall become effective only when subm to and approved by the electors pursuant to subdivision (c) of Section 10 of Article II of the Calif Constitution.

Witkin Evidence (3d) §§ 24, 153, 162, 511

2. Validity

The Briggs Death Penalty Initiative, adopted by the voters in November 1978 to supplant the Legislature's 1977 death penalty statute (Pen. Code, §§ 190.1-190.3), provides adequate procedural safeguards essential to a constitutional capital sentencing scheme. The 1978 statute suitably narrows the class of death-eligible persons, provides for an individualized penalty determi tion at the sentencing and appeal stages, ther avoiding the proscription of U.S. Const., Amend., as to arbitrary sentencing procedu People v Rodriguez (1986) 42 Cal 3d 730, 230 Rptr 667, time for gr or den reh extended.

§ 190.05. [Penalty for second degree murder when defendant served pri prison term for murder; Procedure]

(a) The penalty for a defendant found guilty of murder in the seco degree, who has served a prior prison term for murder in the first or seco degree, shall be confinement in the state prison for a term of life without t possibility of parole or confinement in the state prison for a term of 15 yea to life. For purposes of this section, a prior prison term for murder of t first or second degree is that time period in which a defendant has spe actually incarcerated for his or her offense prior to release on parole.

(b) A prior prison term for murder for purposes of this section includ either of the following:

(1) A prison term served in any state prison or federal penal institutio including confinement in a hospital or other institution or facility credited service of prison time in the jurisdiction of confinement, as punishment f the commission of an offense which includes all of the elements of murder the first or second degree as defined under California law.

(2) Incarceration at a facility operated by the Youth Authority for murd of the first or second degree when the person was subject to the custod control, and discipline of the Director of Corrections.

(c) The fact of a prior prison term for murder in the first or second degr shall be alleged in the accusatory pleading, and either admitted by t defendant in open court, or found to be true by the jury trying the issue guilt or by the court where guilt is established by a plea of guilty or no contendere or by trial by the court sitting without a jury.

(d) In case of a reasonable doubt as to whether the defendant served a prior prison term for murder in the first or second degree, the defendant is entitled to a finding that the allegation is not true.

(e) If the trier of fact finds that the defendant has served a prior prison term for murder in the first or second degree, there shall be a separate penalty hearing before the same trier of fact, except as provided in subdivision (f).

(f) If the defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty or nolo contendere, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If the new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in the state prison for a term of 15 years to life.

(g) Evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(h) In the proceeding on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition, and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or the prior prison term for murder of the first or second degree which subjects a defendant to the punishment of life without the possibility of parole, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced

without such notice in rebuttal to evidence introduced by the defend mitigation.

In determining the penalty, the trier of fact shall take into account a the following factors if relevant:

(1) The circumstances of the crime of which the defendant was convict the present proceeding and the existence of the prior prison term murder.

(2) The presence or absence of criminal activity by the defendant v involved the use or attempted use of force or violence or the expre implied threat to use force or violence.

(3) The presence or absence of any prior felony conviction.

(4) Whether or not the offense was committed while the defendant under the influence of extreme mental or emotional disturbance.

(5) Whether or not the victim was a participant in the defendant's ho dal conduct or consented to the homicidal act.

(6) Whether or not the offense was committed under circumstances w the defendant reasonably believed to be a moral justification or extenu for his or her conduct.

(7) Whether or not the defendant acted under extreme duress or unde substantial domination of another person.

(8) Whether or not at the time of the offense the ability of the defenda appreciate the criminality of his or her conduct or to conform his or conduct to the requirements of law was impaired as a result of m disease or defect, or the effects of intoxication.

(9) The age of the defendant at the time of the crime.

(10) Whether or not the defendant was an accomplice to the offense an or her participation in the commission of the offense was relatively mino

(11) Any other circumstance which extenuates the gravity of the crime though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having h and considered the arguments of counsel, the trier of fact shall cons take into account, and be guided by the aggravating and mitigating circ stances referred to in this section, and shall impose a sentence of life wit the possibility of parole if the trier of fact concludes that the aggrav circumstances outweigh the mitigating circumstances. If the trier of determines that the mitigating circumstances outweigh the aggrav circumstances, the trier of fact shall impose a sentence of confinement in state prison for 15 years to life.

(i) Nothing in this section shall be construed to prohibit the chargin finding of any special circumstance pursuant to Sections 190.1, 190.2, 1 190.4, and 190.5.

Added Stats 1985 ch 1510 § 1.

§ 190.1. [Procedure in case involving death penalty]

1. In General

In a murder prosecution in which defendant waived his right to a jury trial on the guilt issue, the trial court erred in failing to obtain a separate waiver of a jury on the trial of the special circumstance allegation of multiple murders. When a jury has been waived as to the guilt phase of the it is impossible to comply with the requirem Pen. Code, § 190.4, that the special circumst be tried by a jury, and also comply wit requirement of Pen. Code, § 190.1, that the and special circumstances be determined a

same time. Thus, the provision of § 190.4, should prevail, and a personal waiver of a jury on a special circumstance allegation was required. An accused whose special circumstance allegations are to be tried by a court must make a separate, personal waiver of the right to a jury trial. People v Memro (1985) 38 Cal 3d 658, 214 Cal Rptr 832, 700 P2d 446.

2. Validity

A state has considerable freedom to structure its capital sentencing system as it sees fit, and the United States Supreme Court is unwilling to say that there is any one right way for a state to set up its capital sentencing scheme. Cabana v Bullock (1986, US) 88 L Ed 2d 704, 106 S Ct 689, on remand Bullock v Cabana (1986, CA5 Miss) 784 F2d 187.

4. Application

The principles of proportionality embodied in the Eighth Amendment bar imposition of the death penalty upon a class of persons who may nonetheless be guilty of the crime of capital murder as defined by state law, that is, the class of murderers who did not themselves kill, attempt to kill, or intend to kill. Cabana v Bullock (1986, US) 88 L Ed 2d 704, 106 S Ct 689, on remand Bullock v Cabana (1986, CA5 Miss) 784 F2d 187.

§ 190.2. [Penalty upon finding special circumstance]

Editor's note—The reference to § 447 in subd (17)(viii) is incorrect. On the effect of this error see Hughes v Superior Court (1985) 163 CA3d 883 (Hearing granted March 14, 1985).

Calif Trial Handbook 2d (BW,1987) 28:37.

1. In General

The legislative body has the power to define torture for purposes of the special circumstance of murder involving torture (Pen. Code, § 190.2, subd. (a)(18)) in a manner which differs from its definition as a degree of murder (Pen. Code, § 189), so long as the resulting statute is within constitutional limits. However, it should not be presumed that the legislative body intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication. People v Davenport (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

2. Validity

Pen. Code, § 190.2, subd. (a)(18), providing for a mandatory penalty of life imprisonment or death for a defendant found guilty of a murder which was intentional and involved the infliction of torture, and which further provides that torture requires proof of the infliction of extreme physical pain no matter how long its duration, is not unconstitutional for failing to distinguish the required pain from that characteristic of most murders. The very use of the term torture imports into the statute a requirement that the perpetrator have sadistic intent to cause the victim to suffer pain in addition to the pain of death, which intent is distinct from the intent to cause the victim's death. It is the state of mind of the torturer which sets the torture murder apart from others who kill with malice aforethought. People v Davenport (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

Pen. Code, § 190.2, subd. (a)(18), providing for a mandatory penalty of life imprisonment or death for a defendant found guilty of a murder which was intentional and involved the infliction of torture, and which further provides that torture requires proof of the infliction of extreme physical pain no matter how long its duration, is not unconstitutional as requiring unavailable subjective proof of the victim's experience. The purpose of the statute is to encompass killings in which the perpetrator intentionally performed acts which were calculated to cause extreme physical pain to the victim and which were inflicted prior to death. The statutory requirement of the infliction of extreme physical pain emphasizes the concern with the physical rather than mental experience of the victim. People v Davenport (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

Pen. Code, § 190.2, subd. (a)(18), providing for a mandatory penalty of life imprisonment or death for a defendant found guilty of a murder which was intentional and involved the infliction of torture, is not unconstitutional for failure to require that the defendant have a specific intent to kill the victim. Since the statute is applicable only to cases where the defendant is found guilty of first degree murder (Pen. Code, § 190.2, subd. (a)), the defendant must be found to have had either a wilful, deliberate, and premeditated intent to kill, or some other mental state which has historically been deemed to be equally culpable. People v Davenport (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

Pen. Code, § 190.2, subd. (a)(18), providing for a mandatory penalty of life imprisonment or death for a defendant found guilty of a murder which was intentional and involved the infliction of torture, is not unconstitutional for failure to require a specific intent to torture. The electorate which enacted the statute intended to incorporate so much of the established judicial meaning of torture as is not inconsistent with the statute's specific language. Furthermore an alternative constitutional construction to include the specific intent to torture is consistent with the language of the statute, its relationship to the larger statutory scheme, and its relation to the recognized meaning of the terms used. People v Davenport (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

Although the special circumstance of murder committed while engaged in the commission of arson (Pen. Code, § 190.2, subd. (a)(17)(viii)), refers to arson in violation of "Pen. Code, § 447," a superseded and nonexistent section, the statute was not unconstitutionally vague as applied to a

defendant charged thereunder, and he was not prejudiced thereby, where he was charged with wilfully and maliciously setting fire to and burning an inhabited structure in violation of Pen. Code, § 451, subd. (b), where the original arson statute, which was Pen. Code, § 447, defined the crime as "the wilful and malicious burning of a building with attempt to destroy it." Section 451, subd. (b), thus constituted a restatement of the prior statute, subject to the rule in Gov. Code, § 9604, that when the provisions of one statute are carried into another under circumstances in which they are required to be construed as restatements and continuations and not as new enactments, any reference made by any statute shall be deemed as a reference to the restatements and continuations. People v Oliver (1985, 2d Dist) 168 Cal App 3d 920, 214 Cal Rptr 587.

The provisions of Pen. Code, § 190.2, subd. (a)(7), providing as a special circumstance (making a defendant eligible for the death penalty) that defendant intentionally killed one he knew or reasonably should have known was an on- duty peace officer, violates neither the federal nor the state Constitution. This portion of the 1978 death penalty statute, and particularly the "reasonable knowledge" feature of the peace-officer special circumstance, provides a principled way to distinguish the case from other first degree murders. Sentencing a defendant to death because he should have known his victim was a peace officer measurably contributes to the retributive end of ensuring that the criminal gets his "just desserts." Also, the statute is neither vague nor overbroad. People v Rodriguez (1986) 42 Cal 3d 730, 230 Cal Rptr 667, time for gr or den reh extended.

Pen. Code, § 190.2, subd. (a)(16), providing a special circumstance of punishment for a murder that is motivated by race, color or religion, does not violate U.S. Const., 1st Amend., Establishment of Religion Clause. Such a provision does not advance religion, but merely provides a penalty for conduct resulting in damage, and the argument that the statute's primary effect advances religion and discriminates against nonreligion is without factual or legal basis. People v Talamantez (1985, 4th Dist) 169 Cal App 3d 443, 215 Cal Rptr 542.

"Nationality," as used in Pen. Code, § 190.2, subd. (a)(16) (providing a penalty of death or confinement for a term of life without possibility of parole where the victim was intentionally killed because of his race, color, religion, nationality or country of origin), was not unconstitutionally vague as applied to defendant, who was convicted of murder in the first degree (Pen. Code, § 187) with a true finding of the special circumstance that the killing was because of the victim's nationality. The dictionary definition of nationality as "national quality or character," or "the fact or state of belonging to a nation; the status of being a national; a legal relationship between an individual and a nation" provides an easily ascertainable standard of conduct or workable standard of guilt. Further, the evidence offered by the prosecution directly established the fact that defendant killed his victim because of the victim's nationality, and such evidence was sufficient to support the jury's conclusion that defendant's motive was the thing expressly and clearly proscribed by § subd. (a)(16). People v Sassounian (1986, 2d 182 Cal App 3d 361, 226 Cal Rptr 880.

In a murder prosecution, defendant's sente life in prison without possibility of parole, on the trial court's finding of the special ci stances that the murder was committed dur robbery and burglary (Pen. Code, § 19012, (a)(17)), was not rendered unconstitutional b trial court's failure to determine that, in ad to being intentional, the killing was wilful, de ate, and premeditated. None of the guidelin forth in § 190.2, the death penalty statute vague or ambiguous, and imposition of the penalty on a defendant who has intentionall unlawfully killed another is constitutio proper, so long as the discretion of the sente authority is governed by clear and objective dards. The statute is not unconstitutional a plied to defendant, since defendant was not tenced to die, and no authority supports proposition that the penalty imposed on him disproportionate to the crime of first degree f murder in which the killing was intentional. ple v Epps (1986, 5th Dist) 182 Cal App 3d 1 227 Cal Rptr 625.

The torture murder special circumstance vided by Pen. Code, § 190.2, subd. (a)(18), is unconstitutionally vague and overbroad. Under governing decisional law, which has preserved constitutional validity of the statute by incorpo ing the established judicial meaning of tortu the extent it is not inconsistent with the sp age of the enactment, proof of a mu committed under the torture-murder special cumstance requires proof of first degree mur proof the defendant intended to kill and to tor the victim, and the infliction of an extrem painful act upon a living victim. People v W (1987) 43 Cal 3d 366, 233 Cal Rptr 48, time fo or den reh extended.

3. Construction

To constitute the special circumstance of m der "to perfect an escape from lawful custo within the meaning of Pen. Code, § 190.2, su (a)(5), the killing must not only be motivated the goal of escaping custody, but must take p before the defendant has departed the confine the prison facility and reached a place of ten rary safety outside the confines of the pris Although the special circumstance of murder perfect an escape" was intended to apply to inmate who kills while breaking out of pri even though he has already escaped from his and should likewise apply to an inmate who k during hot pursuit after departing the prison fines, upon reaching a place of temporary sa the escape is "perfected" within the meaning the statutory language, and the special circu stance is inapplicable to any subsequent kill People v Bigelow (1984) 37 Cal 3d 731, 209 Rptr 328, 691 P2d 994.

In a prosecution for first degree murder w special circumstances, the trial court did not er failing to instruct the jury that the prosecut must prove that the murder occurred during

commission of both kidnaping as defined in Pen. Code, § 207 (simple kidnaping) and Pen. Code, § 209 (aggravated kidnaping). Although the 1978 death penalty initiative changed the language of former Pen. Code, § 190.2, subd. (c)(3), which provided a special circumstance for murder committed during the commission or attempted commission of "[k]idnaping in violation of Section 207 or 209," to the conjunctive, specifying "[k]idnaping in violation of Sections 207 and 209" (Pen. Code, § 190.2, subd. (a)(17)), the drafters carelessly used the word "and" when "or" was intended, and the intent of the provision is to permit a special circumstance finding if the defendant is convicted of kidnaping under either § 207 or 209, and found to have committed murder while engaged in such kidnaping. People v Bigelow (1984) 37 Cal 3d 731, 209 Cal Rptr 328, 691 P2d 994.

In construing Pen. Code, § 190.2, subd. (a)(10), which subjects an individual to a sentence of death or life imprisonment without the possibility of parole if the victim was a witness to a crime and was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, even if the precise meaning of the "criminal proceeding" language was somehow ambiguous, the policy to construe a penal statute as favorably to the defendant as its language and the circumstance of its application may reasonably permit, would preclude application of the witness special circumstance to witnesses in juvenile proceedings. The policy carries particular force because § 190.2, subd. (a)(10), establishes eligibility for the death penalty, an area in which the courts have recognized a heightened constitutional demand for certainty. People v Weidert (1985) 39 Cal 3d 836, 218 Cal Rptr 57, 705 P2d 380.

Pen. Code, § 190.2, subd. (a)(10), which subjects an individual to a sentence of death or of life imprisonment without the possibility of parole if the victim "was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceedings . . ." is clear and unambiguous that only witnesses in criminal proceedings are covered, and not witnesses in juvenile proceedings. Welf. & Inst. Code, § 203, provides that a proceeding in a juvenile court shall not be deemed a criminal proceeding, and the failure to except § 190.2, subd. (a)(10), from the umbrella of Welf. & Inst. Code, § 203 is controlling. If § 190.2, subd. (a)(10), were judicially construed to include juvenile delinquency proceedings, the construction would change the legal consequences of an accused's acts completed before the effective date of the judicial construction and would result in a violation of the prohibition against ex post facto laws and a denial of due process for lack of notice. People v Weidert (1985) 39 Cal 3d 836, 218 Cal Rptr 57, 705 P2d 380.

The electorate that enacted Pen. Code, § 190.2, subd. (a)(18), intended to incorporate as much of the established judicial meaning of torture as is not inconsistent with the specific language of the initiative; thus the torture-murder special circumstance requires proof of first degree murder, proof that defendant intended to kill and to torture the victim, and the infliction of an extremely painful act upon a living victim. People v Leach (1985) 41 Cal 3d 92, 221 Cal Rptr 826, 710 P2d 893.

In a prosecution for murder (Pen. Code, § 187) the jury was clearly and correctly instructed that first degree murder by torture (Pen. Code, § 189) did not require finding an intent to kill but did require finding an intent to cause cruel pain and suffering from some sadistic purpose, and that the special circumstance of murder involving torture (Pen. Code, § 190.2, subd. (a)(18)) required findings of an intent to kill and suffering by the victim, where the difference between a verdict of first degree murder and a verdict on the alleged special circumstance was explained during voir dire, in the court's formal instructions, and in the arguments of both counsel. In addition, the jury had also been instructed that they must find a first degree murder before they could consider the truth of the special circumstance. People v Davenport (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

Pen. Code, § 190.2, subd. (a)(18) providing for a mandatory penalty of life imprisonment or death for a defendant found guilty of a murder which was intentional and which involved infliction of torture, is distinguished from murder by torture (Pen. Code, § 189) in that Pen. Code, § 190.2, subd. (a)(18), requires that the defendant must have acted with the intent to kill. People v Davenport (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

Although Pen. Code, § 189, requires that a murder be perpetrated, and the death caused, by torture to elevate a killing to the substantive offense of first degree murder, Pen. Code, § 190.2, subd. (a)(18), requires only that the murder "involve" torture to establish that the murder was committed under special circumstances. Torture as a special circumstance thus refers to a longer period of time and encompasses torture that precedes the actual act of killing. People v Hoban (1985, 2d Dist) 176 Cal App 3d 255, 221 Cal Rptr 626.

In a prosecution of defendant for three murders (Pen. Code, § 187) and conspiracy to murder several witnesses (Pen. Code, § 182), it was error for the prosecution to submit, and for the jury to find true, two witness-killing special circumstances (Pen. Code, § 190.2, subd. (a)(10)), instead of one. Nothing in the statute, defining as a special circumstance the intentional killing of a victim to prevent his testimony or the intentional killing of a victim who was a witness in retaliation for testimony, suggests that evidence supporting findings on both theories permits the People to charge and the jury to find two separate special circumstances. A defendant who is shown to have violated a particular special circumstance in more than one way is guilty of no more than one of such a special circumstance violation, although evidence supporting the alternative theories of violation would be properly before the jury and could properly be emphasized by the prosecutor. People v Allen (1986) 42 Cal 3d 1222, 232 Cal Rptr 849.

Pen. Code, § 190.2, subd. (a)(17)(vii), requires by its terms only that a murder be committed while defendant was engaged in the commission

of, attempted commission of, or immediate flight after committing or attempting, burglary. Although the statute requires the intent to kill, such intent need not exist at the time of the entry. People v Loustaunau (1986, 2d Dist) 181 Cal App 3d 163, 226 Cal Rptr 216.

To fall within the terms of Pen. Code, § 190.2 (murder under special circumstances, justifying penalties of death or life imprisonment without possibility of parole), a killing must be intentional, but there is no requirement that it be willful, deliberate, premeditated, or in "cold blood." People v Loustaunau (1986, 2d Dist) 181 Cal App 3d 163, 226 Cal Rptr 216.

The trial court in a murder prosecution properly sentenced defendant to life in prison without possibility of parole based on its finding that the murder was committed while defendant was engaged in a robbery and burglary within the meaning of Pen. Code, § 190.2, subd. (a)(17), without additionally finding that the murder was wilful, deliberate, and premeditated. Although the statute has been interpreted to require proof of an intent to kill before a finding of felony-murder special circumstances, the current version of § 190.2, adopted by initiative in 1978, was intended to expand the circumstances under which the penalties of death or life without possibility of parole could be meted out, and specifically omitted the "wilful, deliberate, and premeditated" language of the former version. While a review of the initiative and the arguments in support or opposition thereto reasonably leads to the conclusion that the electorate expected that a defendant would have to be found to have intended to kill, a similar conclusion that the electorate assumed that the premeditation and deliberation requirement would remain is unreasonable. People v Epps (1986, 5th Dist) 182 Cal App 3d 1102, 227 Cal Rptr 625.

A prior-murder-conviction special circumstance allegation (Pen. Code, § 190.2, subd. (a)(2)) was proper even though the predicate murders on which the allegation was based were committed after the murders which were being tried. The unambiguous language and purpose of Pen. Code, § 190.2, subd. (a)(2) require that a person already convicted of murder in a prior proceeding must be considered eligible for the death penalty if convicted of first degree murder in a subsequent trial. The order of the commission of the homicides is immaterial. Further, § 190.2, subd. (a)(2) does not require a finding of intent to kill. People v Hendricks (1987) 43 Cal 3d 584, 238 Cal Rptr 66, 737 P2d 1350.

In a prosecution for the murder of a mother and her unborn fetus, defendant had statutory notice under the multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)), that a fetus may be counted in determining whether multiple murders have taken place. Although the statute does not expressly use the word fetus, it does expressly require conviction of more than one offense of murder in the first or second degree. The meaning of "murder" in the statute is derived from Pen. Code, § 187, subd. (a), which defines murder to include the unlawful killing of a fetus with malice aforethought. People v Smith (5th Dist) 188 Cal App 3d 1495, 234 Cal Rptr

4. Application

In a prosecution for first degree murder special circumstances alleged, the trial court in instructing the jury as to the special circumstance that "[t]he murder was intentional carried out for financial gain" (Pen. Code, § 1 subd. (a)(1)), where the killing occurred durin commission of a robbery. The special circums provisions should be construed to minimize cases in which multiple circumstances will to the same conduct, thereby reducing the that multiple findings on special circumstance prejudice the defendant. Such a limiting cons tion will not prejudice the prosecution, since will remain at least one special circumstan either financial gain or felony murder—appli in virtually all cases in which the defendant k to obtain money or other property. The fina gain special circumstance applies only when victim's death is an essential prerequisite to financial gain sought by the defendant. Peop Bigelow (1984) 37 Cal 3d 731, 209 Cal Rptr 691 P2d 994.

In a prosecution for first degree murder special circumstances alleged, the trial court e in instructing the jury with respect to the spe circumstance of murder committed "for the p pose of avoiding or preventing a lawful arr (Pen. Code, § 190.2, subd. (a)(5)), and the ver finding the murder was committed for the pur of avoiding arrest was not supported by substa evidence. There was no evidence that the vic who had been kidnaped and robbed, was murde to avoid or prevent a lawful arrest. At the tim the killing defendant and his accomplice were under arrest and were not threatened with im nent arrest. Although the prosecutor surmised the victim was killed so that he would not re the robbery and kidnaping—a report which mi eventually lead to defendant's arrest—this a ment was totally speculative. It was also an un sonably expansive reading of the special circu stance of avoiding arrest, a reading which wo cause that circumstance to overlap extensiv with felony murder. The special circumstance avoiding arrest should be limited to cases in wh the arrest is imminent. People v Bigelow (1984) Cal 3d 731, 209 Cal Rptr 328, 691 P2d 994.

Proof of intent to kill or to aid a killing essential to sustain a felony-murder special circu stances allegation under the 1978 death pen law (Pen. Code, § 190.2, subd. (a)(17)). Reversa required if the jury's instructions completely eli nate the issue of intent to kill from the jur consideration unless the erroneous instruction v given regarding an offense for which defend was acquitted and the instruction had no bear on the offense for which he was convicted; defendant conceded the issue of intent; the is was necessarily resolved adversely to defend under proper instructions; or the parties rec nized that intent to kill was an issue, presented evidence at their command on the issue, and t record established the necessary intent as a mat of law and showed the contrary evidence

worthy of consideration. People v Cantu (1984, 5th Dist) 161 Cal App 3d 259, 207 Cal Rptr 460.

Pen. Code, § 190.2, subd. (a)(10), which subjects an individual to a sentence of death or life imprisonment without the possibility of parole if the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, contemplates that it is an accused's subjective intent that is relevant in establishing the special circumstance finding. Thus, if an accused believes himself to be exposed to criminal prosecution and intentionally kills another to prevent that person from testifying in an anticipated or pending criminal proceeding, the special circumstance may be found true whether or not an actual criminal proceeding was pending or about to be initiated. The only relevance of an actual prior and ongoing criminal proceeding is that it may strengthen the inference of the existence of the prescribed purpose; conversely, the prosecution does not have the benefit of this inference when a criminal proceeding has not yet commenced. People v Weidert (1985) 39 Cal 3d 836, 218 Cal Rptr 57, 705 P2d 380.

Where an accused's primary goal was not to kidnap the victim but to kill him in order to prevent him from testifying, and where the kidnaping was merely incidental to the murder and not committed to advance an independent felonious purpose, a kidnaping-felony murder special circumstance finding (Pen. Code, § 190.2, subd. (a)(17)(ii)), could not be sustained, and further proceedings on the allegation were barred by the double jeopardy clause. People v Weidert (1985) 39 Cal 3d 836, 218 Cal Rptr 57, 705 P2d 380.

In a prosecution for murder (Pen. Code, § 187), with special circumstances alleged, the felony-murder special circumstance (Pen. Code, § 190.2, subd. (a)(17)) necessarily requires proof that the defendant intended to kill. People v Montiel (1985) 39 Cal 3d 910, 218 Cal Rptr 572, 705 P2d 1248.

Although defendant was properly convicted of first degree murder based solely on the fact that he was engaged in the felony of robbing, or attempting to rob, the victim at the time of the killing, the jury's finding of the "special circumstance" based on the robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), on the basis of which defendant became eligible for only the penalties of death or life imprisonment without parole, resulting in defendant's death sentence, was improper. The trial court failed to give the jury the required instruction that it could not find a "special circumstance" based solely on the commission of an underlying felony unless it also found an intent to kill. Additionally, defendant did not concede the issue of intent, the issue was not necessarily resolved against him in that the jury was instructed on both premeditation and felony murder and did not specify by its verdict which theory it chose, and the evidence, including extensive testimony indicating the defendant had not meant to shoot his victim, did not reveal an intent to kill as a matter of law. People v Balderas (1985) 41 Cal 3d 144, 222 Cal Rptr 184, 711 P2d 480.

In a prosecution for first degree murder and other offenses, the trial court committed reversible error in failing to instruct the jury that in order to find true the special circumstances that the murder was committed while defendant was engaged in or was an accomplice in the commission of robbery, burglary, and kidnapping, it must find an intent to kill. The only theory on which the jury was instructed vis-à-vis the murder was felony murder, which does not require a finding of intent to kill, and the evidence did not establish intent to kill as a matter of law, where the coroner was unable to determine the cause of death or whether the victim's head and hands were cut off before or after death, where the one stab wound that was inflicted before death was nonfatal, and where it was possible that the victim might have been killed accidentally, with defendant deciding afterwards to mutilate the body in an attempt to prevent its identification. People v Hamilton (1985) 41 Cal 3d 408, 221 Cal Rptr 902, 710 P2d 981.

In a prosecution for first-degree felony murder (Pen. Code, §§ 187, 189) with an attending "special circumstance" that defendant had suffered a previous conviction for second degree murder (Pen. Code, § 190.2, subd. (a)(2)), the trial court's finding that defendant was not the actual killer and did not intentionally aid and abet another in the commission of murder in the first degree prohibited application of the special circumstance of murder with a prior murder conviction, and precluded imposition of a sentence of life imprisonment without possibility of parole. An intent to kill or an intent to aid in a killing is constitutionally mandated when the special circumstance provision alleged is that the defendant previously was convicted of murder. People v Malone (1985, 5th Dist) 165 Cal App 3d 31, 211 Cal Rptr 210.

Under the special circumstance for murder committed while lying in wait (Pen. Code, § 190.2, subd. (a)(15)), if a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist. But if there is no such interruption, circumstances calling for the death penalty do exist. Thus, in a prosecution for murder of a pizza deliveryman, committed while he was delivering a pizza to defendants' motel room, and within 20 minutes after he left the pizza parlor, the trial court erred in striking the lying in wait circumstance allegation on the asserted ground that no precise moment as to when the victim died was given. As there was no cognizable interruption to separate the period of lying in wait from the period during which the killing occurred, the precise moment of the victim's death was not the determinative factor. The appropriate inquiry was whether the acts which ultimately caused the victim's death took place during, or at least immediately following some period of watchful waiting from concealment, and the only reasonable inference which could be drawn from the evidence is that they did. People v Superior Court (Sims) (1986, 2d Dist) 185 Cal App 3d 471, 230 Cal Rptr 4.

•The single act of murdering the victim known to be pregnant constitutes a multiple homicide for

purposes of the multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)). One illegal act harming multiple persons constitutes a multiple offense justifying separate charges. Thus, in a prosecution for murder of a mother and her unborn fetus, charging special circumstances on both counts for multiple murder, the act of murdering the pregnant mother constituted double homicide for purposes of the multiple murder special circumstance where defendant was intimately familiar with the fact and duration of the mother's pregnancy, and the very motivation for the murder was to rid the father-to-be of the responsibility of caring for the future child. People v Smith (1987, 5th Dist) 188 Cal App 3d 1495, 234 Cal Rptr 142.

A person who hires another to kill a human being is subject to the special circumstance finding under Pen. Code, § 190.2, subd. (a)(1), that the murder was intentional and carried out for financial gain, even if the hirer is not himself shown to be financially motivated. Thus, in a prosecution for first degree murder (Pen. Code, §§ 187, 189) in which defendant pleaded nolo contendere, the trial court did not err in finding the special circumstance that the murder was intentional and committed for financial gain to be true based solely on the financial gain to be received by the h whom defendant offered financial inducemen and aided and abetted in the killing of defend wife, and not on any financial benefit acquire defendant. People v Freeman (1987, 2d Dist) Cal App 3d 337, 238 Cal Rptr 257.

5. Procedure

Defendant's first degree murder conviction tained on a felony-murder theory when the found that the murder occurred as a result of robbery of the victim, was barred by the doc of collateral estoppel, where the jury in an ea proceeding had convicted him of first degree r der for the same incident, but had rejected special circumstances that the murder had curred in the course of the robbery. The fel murder instruction (which only requires that murder occur "as a result of" the robbery) only slightly different from the special circ stances instruction (which specifies that the m der occur "in the commission of" the robb and the definition of felony murder under P Code, § 189, is virtually indistinguishable from language used in Pen. Code, § 190.2(a)(17), define special circumstances. People v Ash (1985, 2d Dist) 173 Cal App 3d 302, 218 Cal R 902.

§ 190.3. [Determination as to penalty of death or life imprisonment]

2. Validity

The 1978 death penalty law, by providing that, if the penalty trial jury finds that "the aggravating circumstances outweigh the mitigating circumstances" it "shall impose sentence of death" does not unconstitutionally restrict the jury's sentencing discretion. In this context, "weighing" connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each factor he is permitted to consider. The word "shall" does not require any juror to vote for the death penalty unless, after the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. People v Brown (1985) 40 Cal 3d 512, 220 Cal Rptr 637, 709 P2d 440.

Pen. Code, § 190.3, subd. (k), which directs the jury in a capital penalty trial to consider, as a mitigating factor, "[a]ny . . . circumstances which extenuate the gravity of the crime even though it is not a legal excuse for the crime," does not unconstitutionally restrict the jury's sentencing discretion by failing to expressly state the jury's further duty to consider in mitigation all other sympathetic evidence the defendant may offer about his character and background, even though unconnected to the charged crime. Trial courts are required, in instructing on the factors embodied in § 190.3, subd. (k), to inform the jury that it may consider as a mitigating factor any other aspect of the defendant's character or record that the defendant proffers as a basis for a sentence less th death. The phrase "any other circumstance wh extenuates the gravity of the crime" is an op ended catchall provision, which allows the jur consideration of any mitigating evidence. Peopl Brown (1985) 40 Cal 3d 512, 220 Cal Rptr 6 709 P2d 440.

The provisions of Pen. Code, § 190.3, permitt a jury, in determining the penalty for first deg murder, to consider both other violent crimi activity by the defendant and any "prior felo conviction" are not void for vagueness in that th suggest to the jury that any "prior felony conv tion" introduced by the prosecution was for violent crime. The plain meaning of the provisi is that the jury must consider any violent crimi activity by the defendant, whether or not it led prosecution and conviction, and any "prior felo conviction," whether the underlying offense w violent or nonviolent. The jury instructed in t statutory language could scarcely understand o erwise. People v Balderas (1985) 41 Cal 3d 14 222 Cal Rptr 184, 711 P2d 480.

Pen. Code, § 190.3, relating to the determinati of a death penalty or life imprisonment, is n unconstitutional for failing to specifically enum ate separately aggravating and mitigating facto exclude nonstatutory aggravating factors as a ba for the death penalty, require written findings the aggravating factors, require that aggravati factors be proved beyond a reasonable doub require that aggravating factors supporting a dea verdict be found unanimously, require the ju find beyond a reasonable doubt that aggravati factors outweigh those in mitigation and th

death is the appropriate punishment, and require "intercase" proportionality review. (Per Grodin and Mosk, JJ.) People v Allen (1986) 42 Cal 3d 1222, 232 Cal Rptr 849.

The instruction called for by Pen. Code, § 190.3, which advises the jury that the Governor may commute a sentence of life imprisonment without possibility of parole, but which fails to advise that the commutation power extends to death penalties as well, violates the due process guarantee of the California Constitution, because its reference to the commutation power invites the jury to consider matters that are totally speculative and that should not, in any event, influence the jury's determination. The instruction inevitably leads the jury to attempt to predict not only what a particular defendant is likely to be like 20 or more years in the future, when commutation may be considered, but also what unknown actors—future Governors—will do in response to a defendant's future condition. People v Myers (1987) 43 Cal 3d 250, 233 Cal Rptr 264, 729 P2d 698, time for gr or den reh extended.

8. Function of Jury; Matters Considered

The trial court in a first degree felony-murder prosecution erred in permitting the jury to consider, as a "prior felony conviction" to be considered in aggravation (Pen. Code, § 190.3, subd. (c)), defendant's conviction for auto theft one year after the subject murder. Such "prior felony conviction[s]" are limited to those entered before commission of the capital crime, since the rationale of laws calling for harsher penal treatment on the basis of "prior convictions" is that an offender undeterred by his prior brushes with the law deserves more severe criminal treatment. If § 190.3, subd. (c), was intended only as a limitation on the method of proof of nonviolent felonies, the word "prior" is redundant in context, since no other felony "conviction" will be available for introduction at a capital penalty trial unless it has already been entered. Given the limited importance of nonviolent criminality to a death penalty determination, § 190.3, subd. (b), which allows in all evidence of violent criminality to show defendant's propensity for violence, and § 190.3, subd. (c), clearly have separate purposes. People v Balderas (1985) 41 Cal 3d 144, 222 Cal Rptr 184, 711 P2d 480

Pen. Code, § 190.3, subd. (b), which permits the jury which has already decided a first degree murder defendant's guilt to consider, on the issue of penalty, other violent crimes on which defendant was neither charged nor convicted does not deny due process to defendant by prejudicing the penalty jury through its prior view of defendant's serious criminality, or by allowing imposition of the death penalty for unconvicted offenses which were deemed unworthy of prosecution. Even if a separate jury were empaneled to decide the penalty, it would be entitled to hear, in aggravation or mitigation, the circumstances of the crime, including "the existence of any special circumstance found true" at the guilt trial (§ 190.3, subd. (a)). Under these circumstances, the strong legislative preference for a unitary jury outweighs any supposed disadvantage to defendant in the single-jury process. People v Balderas (1985) 41 Cal 3d 144, 222 Cal Rptr 184, 711 P2d 480.

Pen. Code, § 190.3, directing that the jury shall impose the death penalty if it finds that the aggravating factors outweigh the mitigating factors, should not be understood to require any juror to vote for the death penalty. The statute requires the completion of a weighing process wherein a juror decides that death is the appropriate penalty under all of the circumstances. The weighing of aggravating and mitigating circumstances must occur within the context of the two permissible punishments: life without possibility of parole and death. Furthermore, the trial court must instruct the jury as to the scope of its discretion and responsibility. People v Davenport (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

9. Evidence

Under Pen. Code, § 190.3, which lists specific aggravating and mitigating factors to be weighed by a jury in determining whether to impose the death penalty, the prosecution may not present evidence at the penalty phase which is not relevant to any of the specific factors listed. Thus, evidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation. People v Boyd (1985) 38 Cal 3d 762, 215 Cal Rptr 1, 700 P2d 782.

In capital cases, the cruel and unusual punishment clause of the Eighth Amendment requires that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death; and it is a corollary rule that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence where it appears likely that the exclusion from evidence at the sentencing hearing of testimony bearing upon the accused's behavior in jail prior to trial, and hence upon his likely behavior in prison, may have affected the jury's decision to impose the death penalty, the exclusion of the evidence is sufficiently prejudicial to constitute reversible error. Skipper v South Carolina (1986, US) 90 L Ed 2d 1, 106 S Ct 1669, 20 Fed Rules Evid Serv 241.

10. —Other Criminal Activity

In Pen. Code, § 190.3, the purpose of the exclusion of nonfelonious criminal conduct which does not involve the use or attempted use of force or violence or the threat to use force or violence from the penalty phase of a trial for first degree murder is to prevent the jury from hearing evidence of conduct which is not of a type which should influence a life or death decision. People v Boyd (1985) 38 Cal 3d 762, 215 Cal Rptr 1, 700 P2d 782.

At the penalty phase of a trial for first degree murder, the trial court erred in admitting evidence that defendant committed the crime of attempted escape by removing a metal grate from an air vent

in a lockup tank. Pen. Code, § 190.3, expressly excludes evidence of criminal activity, except for felony convictions, which activity did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. Violent injury or the threat of violent injury to property is not sufficient to justify admissibility, and there was no evidence that defendant used or threatened to use force or violence to any person. The evidence was also irrelevant to any of the specific aggravating or mitigating factors listed in Pen. Code, § 190.3. People v Boyd (1985) 38 Cal 3d 762, 215 Cal Rptr 1, 700 P2d 782.

Evidence of other "criminal activity" introduced in the penalty phase of a capital case pursuant to former Pen. Code, § 190.3, subd. (d), as an aggravating factor in determining the penalty to impose, must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute. The history of the statute demonstrates only that the Legislature's choice of terms was intended to be sufficiently broad to include crimes for which the defendant had not been convicted, but not to include offenses of which defendant was acquitted, or nonoffenses for which defendant could not even be tried. (Per Reynoso and Broussard, JJ., and Kaus, J.*)

In the penalty phase of a capital case in which the trial court instructed the jury that in determining the penalty it should take into account the presence or absence of other criminal activity by defendant involving the use or attempted use of force or violence (former Pen. Code, § 190.3, subd. (d)), the trial court erred in failing to tell the jury that they could consider evidence of other criminal activity only if they found beyond a reasonable doubt that defendant had engaged in such activity. (Per Reynoso and Broussard, JJ., and Kaus, J.*) People v Phillips (1985) 41 Cal 3d 29, 222 Cal Rptr 127, 711 P2d 423.

11. Instructions

Because the language of the death penalty statute (Pen. Code, § 190.3, subd. (k)), and in particular the words "shall impose a sentence of death," leave room for some confusion as to the jury's role as the exclusive decisionmaker on the issue of the penalty to be imposed on the defendant, trial courts in future death penalty trials should instruct the jury as to the scope of its discretion and responsibility. People v Brown (1985) 40 Cal 3d 512, 220 Cal Rptr 637, 709 P2d 440.

The instruction called for by Pen. Code, § 190.3, which advises the jury that the Governor may commute a sentence of life imprisonment v possibility of parole, but which fails to advi the commutation power extends to death p as well, is manifestly prejudicial to a def tried for a capital crime. The instruction pre classic half-truth that invites a jury to b enced by speculative and improper consider It would reasonably be understood by the juror to mean, by negative implication, sentence of life without parole may be com but that a death penalty may not. The tion's pernicious effect is that it may lead that does not believe that the death pen necessary, but fears a future commutati return a death penalty in the mistaken bel such a sentence alone will preclude any release of the defendant. People v Myers (1 Cal 3d 250, 233 Cal Rptr 264, 729 P2d 69 for gr or den reh extended.

The instruction called for by Pen. Code, which advises the jury that the Governo commute a sentence of life imprisonment possibility of parole, but which fails to adv the commutation power extends to death p as well, presents a very serious potential fo dice and makes it strongly doubtful that a ing court could ever conclude that there reasonable possibility that such an inst improperly tainted a jury's decisionmakin cess. People v Myers (1987) 43 Cal 3d 25 Cal Rptr 264, 729 P2d 698, time for gr or extended.

A jury instruction drawn from Pen. § 190.3, that advises the jury that it shall i death sentence if it finds the aggravating stances of a defendant's crime outweigh th gating, and that it shall impose a sentence without possibility of parole if it finds the tions outweigh the aggravations, is pot misleading unless supplemented by further rate descriptions of the jury's task. It may the jury about the nature of the "weighin cess, which is a metaphor for an imp described process in which jurors are free t whatever moral or sympathetic value they appropriate to each and all the factors cons Further, the imperative "shall" could misl jury as to the ultimate question it is to de which is whether, under all the circum death is the appropriate penalty. (Per Gro Mosk, JJ.) People v Myers (1987) 43 Cal 233 Cal Rptr 264, 729 P2d 698, time for gr reh extended.

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*Retired Associate Justice of the Supreme sitting under assignment by the Chairperso Judicial Council.

§ 190.4. [Special finding on truth of each alleged special circumstance]

Editor's Note—The reference, in subdivision (c), to an application for modification of the ve finding pursuant to "Subdivision 7 of Section 11" is apparently an inadvertent error. Inst reference should be to Penal Code § 1181, subd. 7. See *People* v. *Rodriguez* (1986) 42 Cal.3d 7 fn. 25.

1. In General

In a murder prosecution in which defendant waived his right to a jury trial on the guilt issue, the trial court erred in failing to obtain a separate waiver of a jury on the trial of the special circumstance allegation of multiple murders. When a jury has been waived as to the guilt phase of the case, it is impossible to comply with the requirement of Pen. Code, § 190.4, that the special circumstances be tried by a jury, and also comply with the requirement of Pen. Code, § 190.1, that the guilt and special circumstances be determined at the same time. Thus, the provision of § 190.4, should prevail, and a personal waiver of a jury on a special circumstance allegation was required. An accused whose special circumstance allegations are to be tried by a court must make a separate, personal waiver of the right to a jury trial. People v Memro (1985) 38 Cal 3d 658, 214 Cal Rptr 832, 700 P2d 446.

3. Construction

The 1978 version of Pen. Code, § 190.4, subd. (e), providing that after a verdict imposing the death penalty defendant shall be deemed to have applied for modification of the verdict under Pen. Code, § 1181, subd. 7, by the trial judge, like the 1977 version, requires that the trial judge make an independent determination whether imposition of the death penalty upon defendant is proper in light of the relevant evidence and the applicable law. People v Rodriguez (1986) 42 Cal 3d 730, 230 Cal Rptr 667, time for grant or denial extended.

An interpretation of Pen. Code, § 190.4 (pertaining to special findings on the truth of each alleged special circumstance) that would require the underlying felonies to be separately charged does not violate the separation of powers doctrine. The district attorney retains discretion to choose whether or not to allege special circumstances; the "charged and proved" requirement merely dictates what must be done if he does decide to allege special circumstances. People v Superior Court (Jennings) (1986, 2d Dist) 183 Cal App 3d 636, 228 Cal Rptr 357.

Pen. Code, § 799, which allows a criminal prosecution for murder to be commenced "at any time," is not a special statute taking priority over the general statute of limitations for commencing prosecution of other crimes (former Pen. Code, § 800, now § 801) upon which a felony-murder special circumstance may be based. Pen. Code, § 190 (describing the available punishments for first and second degree murder), provides that the penalty must be determined as specified in the special circumstance statutes, and thus those statutes take precedence over the general murder statutes. Hence the requirement of Pen. Code, § 190.4, subd. (a), that the underlying crime be charged and proved pursuant to the general law applying to the trial and conviction of the crime specifically incorporates into each felony-based special circumstance allegation the general law of the underlying felony, including its statute of limitations. People v Superior Court (Jennings) (1986, 2d Dist) 183 Cal App 3d 636, 228 Cal Rptr 357.

5. Procedure

Pen. Code, § 190.4, requiring the jury in a capital case to make a special finding on the truth of each alleged special circumstance, contemplates a jury finding on each charge special circumstance by the application of legal principles on which the jury is instructed to the evidence presented to them. The statute does not contemplate that a jury return a special verdict, which presents conclusions of fact and leaves to the court the task of drawing conclusions of law and rendering judgment upon them (Pen. Code, §§ 1150, 1152). People v Davenport (1985) 41 Cal 3d 247, 221 Cal Rptr 794, 710 P2d 861.

§ 190.9. [(First of two; Operative until July 1, 1990) Presence of court reporter in all death penalty proceedings]

(a) In any case in which a death sentence may be imposed, all proceedings conducted after the effective date of this section in the justice, municipal, and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present.

The court shall assign a court reporter who uses computer-aided transcription equipment to report all proceedings under this section. Failure to comply with the requirements of this section relating to the assignment of court reporters who use computer-aided transcription equipment shall not be a ground for reversal.

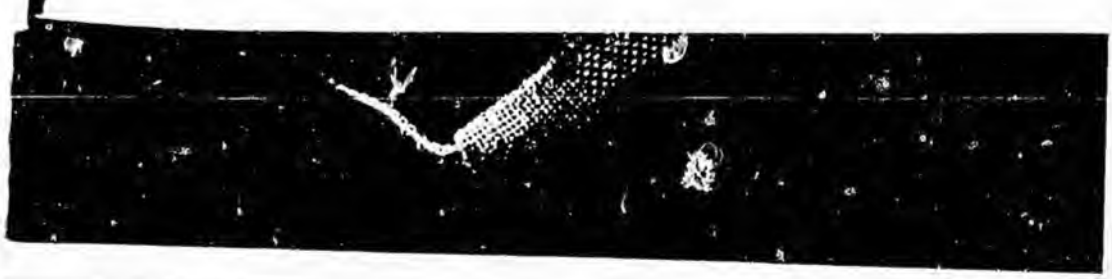
(b) The court may waive the requirement that a court reporter use computer-aided transcription equipment if the court finds on the record that no reporter using computer-aided transcription equipment is available.

(c) This section shall remain in effect only until July 1, 1990, and as of that date is repealed.

Amended Stats 1986 ch 387 § 3; Stats 1987 ch 468 § 1, effective September 9, 1987.

Amendments:

1986 Amendment: Added the second paragraph.



1987 Amendment: (1) Added subdivision designation (a); (2) added the last sentence of subd (a); and (3) added subds (b) and (c).

§ 190.9. [(Second of two; Operative July 1, 1990) Presence of court reporter in all proceedings in which death sentence may be imposed]

(a) In any case in which a death sentence may be imposed, all proceedings conducted after the effective date of this section in the justice, municipal, and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present.

The court shall assign a court reporter who uses computer-aided transcription equipment to report all proceedings under this section. Failure to comply with the requirements of this section relating to the assignment of court reporters who use computer-aided transcription equipment shall not be a ground for reversal.

(b) This section shall become operative on July 1, 1990.

Added Stats 1987 ch 468 § 3, effective September 9, 1987, operative July 1, 1990.

§ 191.5. [Gross vehicular manslaughter while intoxicated]

(a) Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23152 or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

(b) Gross vehicular manslaughter while intoxicated also includes operating a vessel in violation of subdivisions (b) to (e), inclusive, of Section 655 of the Harbors and Navigation Code, and in the commission of an unlawful act, not amounting to felony, and with gross negligence; or operating a vessel in violation of subdivisions (b) to (e), inclusive, of Section 655 of the Harbors and Navigation Code, and in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

(c) Gross vehicular manslaughter while intoxicated is punishable by imprisonment in the state prison for 4, 6, or 10 years.

(d) This section shall not be construed as prohibiting or precluding a charge of murder under Section 188 upon facts exhibiting wantonness and a conscious disregard for life to support a finding of implied malice, or upon facts showing malice consistent with the holding of the California Supreme Court in People v. Watson, 30 Cal. 3d 290.

(e) This section shall not be construed as making any homicide in the driving of a vehicle or the operation of a vessel punishable which is not a proximate result of the commission of an unlawful act, not amounting to felony, or of the commission of a lawful act which might produce death, in an unlawful manner.

Added Stats 1986 ch 1106 § 2; Amended Stats 1987 ch 518 § 1.

Amendments:

1987 Amendment: (1) Added subd (b); (2) redesignated former subds (b)-(d) to be subds (c)-(e); and (3) added "or the operation of a vessel" after "vehicle" in subd (e).

Note.—Stats 1986 ch 1106 provides:

SECTION 1. The Legislature finds and declares that traffic accidents are the greatest cause of violent death in the United States and that over one-half of the ensuing fatalities are alcohol related.

The Legislature further finds that despite millions of dollars being spent by government at all levels, by private organizations, and by concerned citizen groups on efforts to stop drinking and driving, statistics

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§ 192. [Manslaugh

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culpability requirement beyond a reasonable doubt and where evidence on the issue of deliberation was overwhelming. Key v. People, 715 P.2d 319 (Colo. 1986); People v. Tyler, 728 P.2d 314 (Colo. 1986).

Evidence supports the element of deliberation. Evidence that defendant shot at the victim three times, twice from behind, is sufficient to support the element of deliberation. People v. Cisneros, 720 P.2d 982 (Colo. App.), cert. denied, _____ U.S. _____, 107 S. Ct. 282, _____ L. Ed.2d _____ (1986).

18-3-102. Murder in the first degree. (1) (b) Acting either alone or with one or more persons, he commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault in the first or second degree as prohibited by section 18-3-402 or 18-3-403, or a class 3 felony for sexual assault on a child as provided in section 18-3-405 (2), or the crime of escape as provided in section 18-8-208, and, in the course of or in furtherance of the crime that he is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone; or

Source: Amended, L. 88, p. 712, § 16.

Editor's note: Section 28 of chapter 124, Session Laws of Colorado 1988, provides that the act amending subsection (1)(b) is effective July 1, 1988, and applies to offenses committed on or after said date.

I. General Consideration.
II. Elements of Offense.
  A. In General.
  D. Extreme Indifference to Life.
III. Trial and Prosecution.
  D. Jury.
  E. Instructions.
IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Murder after deliberation and felony murder are not separate, etc.

In accord with original. See People v. Brown, 731 P.2d 763 (Colo. App. 1986).

Applied in People v. Bowman, 738 P.2d 387 (Colo. App. 1987).

II. ELEMENTS OF OFFENSE.

A. In General.

First-degree murder statutes contain rationally different elements than first-degree assault statute, § 18-3-202, and thus a defendant sentenced under the former and not the latter was not denied equal protection of the law. People v. Brewer, 720 P.2d 596 (Colo. App. 1985).

D. Extreme Indifference to Life.

Statutory definition of extreme indifference murder, etc.

In accord with 1st paragraph in original. See Crespin v. People, 721 P.2d 688 (Colo. 1986).

III. TRIAL AND PROSECUTION.

D. Jury.

Trial by jury may be waived. Since under the statutes there are no mandatory requirements for the jury to determine the degree of murder or to determine the class of felony and because the criminal defendant has a substantive right to waive a jury trial, defendant could properly waive his right to a jury trial even though he was convicted of a class 1 felony. People v. Cisneros, 720 P.2d 982 (Colo. App.), cert. denied, _____ U.S. _____, 107 S. Ct. 282, _____ L. Ed.2d _____ (1986).

E. Instructions.

When court must instruct jury on second degree murder.

Trial court does not have to instruct jury on the lesser included offense when there is no evidence to support the instruction. Jones v. People, 711 P.2d 1270 (Colo. 1986), reversing People v. Jones annotated in the 1986 replacement volume.

IV. VERDICT AND SENTENCE.

Although defendant could not be convicted for felony-murder and murder after deliberation based on killing of single victim, sufficient evidence existed to sustain defendant's conviction for first-degree murder, and thus judgment of conviction for first-degree murder after deliberation and sentence imposed

Lakewood v. District Court, 181 Colo. 69, 506 P.2d 1228 (1973).

Where defense requested instruction defining "intentionally" in terms of new statute which became effective July 1, 1972, but offense had occurred prior to that time, trial court did not err in refusing such request. People v. Crawford, 191 Colo. 504, 553 P.2d 827 (1976).

Applied in People v. Marlott, 191 Colo. 304, 552 P.2d 491 (1976); Barreras v. People, 636 P.2d 686 (Colo. App. 1981).

18-1-104. "Offense" defined - offenses classified - common-law crimes abolished. (1) The terms "offense" and "crime" are synonymous and mean a violation of, or conduct defined by, any state statute for which a fine or imprisonment may be imposed.

(2) Each offense falls into one of ten classes. There are five classes of felonies as defined in section 18-1-105, three classes of misdemeanors as defined in section 18-1-106, and two classes of petty offenses as defined in section 18-1-107.

(3) Common-law crimes are abolished and no conduct shall constitute an offense unless it is described as an offense in this code or in another statute of this state, but this provision does not affect the power of a court to punish for contempt, or to employ any sanction authorized by law for the enforcement of an order lawfully entered, or a civil judgment or decree; nor does it affect the use of case law as an interpretive aid in the construction of the provisions of this code.

Source: R & RE, L. 71, p. 389, § 1; C.R.S. 1963, § 40-1-104.

Am. Jur.2d. See 21 AM. Jur.2d, Criminal Law, § § 1, 6, 7.

C.J.S. See 22 C.J.S., Criminal Law, § § 1, 5, 20.

Annotator's note. Since § 18-1-104 is similar to former § 40-1-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Common-law rule. Colorado has statutorily adopted the common-law rule that a crime consisted of the union of an act and intent. Gallegos v. People, 159 Colo. 379, 411 P.2d 956 (1966).

Courts are not precluded from reliance upon the common law in amplification of sections of the criminal code. People v. Berry, 703 P.2d 613 (Colo. App. 1985).

The common law may be used in aid of the meaning to be given statutory language, when such language is not defined in the statute. Allen v. People, 175 Colo. 113, 485 P.2d 886 (1971).

Where a statute does not define a crime, but merely gives to it its common-law name or designation, resort must be had to the common law to ascertain what acts constitute the crime in question. Thompson v. People, 181 Colo. 194, 510 P.2d 311 (1973).

When the general assembly defines a crime and sets forth the intent necessary to commit the crime, the courts cannot alter the elements or substitute a different animus or intent. People v. Kanan, 186 Colo. 255, 526 P.2d 1339 (1974).

The definition of a crime is the same as that of a misdemeanor, each consisting of a violation of a public law. Hoffman v. People, 72 Colo. 552, 212 P. 848 (1923).

And "crime" includes all grades of public offenses, which at the common law are often classified as treason, felony, and misdemeanor. Hoffman v. People, 72 Colo. 552, 212 P. 848 (1923).

The violation of a municipal ordinance does not come within the definition of this section and is neither a crime nor a misdemeanor. City of Greeley v. Hamman, 12 Colo. 94, 20 P. 1 (1888).

Contempt of court. Although the General Assembly in 1971 abolished all common law crimes in Colorado, it reserved to the courts the power to punish contempt by enacting this section. People v. Barron, 677 P.2d 1370 (Colo. 1984).

Applied in People v. Swanson, 638 P.2d 45 (Colo. 1981); City of Greenwood Village v. Fleming, 643 P.2d 511 (Colo. 1982).

18-1-105. Felonies classified - presumptive penalties. (1) (a) (I) As to any person sentenced for a felony committed after July 1, 1979, and before

July 1, 1984, felonies are divided into five classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Presumptive Range
1	Life imprisonment or death
2	Eight to twelve years plus one year of parole
3	Four to eight years plus one year of parole
4	Two to four years plus one year of parole
5	One to two years plus one year of parole

(II) As to any person sentenced for a felony committed on or after July 1, 1984, and before July 1, 1985, felonies are divided into five classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Presumptive Range
1	Life imprisonment or death
2	Eight to twelve years
3	Four to eight years
4	Two to four years
5	One to two years

(III) As to any person sentenced for a felony committed on or after July 1, 1985, in addition to, or in lieu of, any sentence to imprisonment provided for in this paragraph (a), a fine within the following presumptive ranges may be imposed for the specified classes of felonies:

Class	Minimum Sentence	Maximum Sentence
1	No fine	No fine
2	Five thousand dollars	One million dollars
3	Three thousand dollars	Seven hundred fifty thousand dollars
4	Two thousand dollars	Five hundred thousand dollars
5	One thousand dollars	One hundred thousand dollars

(IV) As to any person sentenced for a felony committed on or after July 1, 1985, felonies are divided into five classes which are distinguished from

one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Minimum Sentence	Maximum Sentence
1	Life imprisonment	Death
2	Eight years imprisonment	Twenty-four years imprisonment
3	Four years imprisonment	Sixteen years imprisonment
4	Two years imprisonment	Eight years imprisonment
5	One year imprisonment	Four years imprisonment

(b) (I) Except as provided in subsection (6) and subsection (9) of this section and in section 18-4-202.1, a person who has been convicted of a class 2, class 3, class 4, or class 5 felony shall be punished by the imposition of a definite sentence which is within the presumptive ranges set forth in paragraph (a) of this subsection (1). In imposing the sentence within the presumptive range, the court shall consider the nature and elements of the offense, the character and record of the offender, and all aggravating or mitigating circumstances surrounding the offense and the offender. The prediction of the potential for future criminality by a particular defendant, unless based on prior criminal conduct, shall not be considered in determining the length of sentence to be imposed.

(II) As to any person sentenced for a felony committed on or after July 1, 1985, a person may be sentenced to imprisonment as described in subparagraph (I) of this paragraph (b) or to pay a fine which is within the presumptive ranges set forth in subparagraph (III) of paragraph (a) of this subsection (1), or to both such fine and imprisonment.

(III) Notwithstanding anything in this section to the contrary, as to any person sentenced for a crime of violence, as defined in section 16-11-309, C.R.S., committed on or after July 1, 1985, a person may be sentenced to pay a fine in addition to, but not instead of, a sentence for imprisonment.

(c) Except as otherwise provided by statute, felonies are punishable by imprisonment in the correctional facilities at Canon City. Nothing in this section shall limit the authority granted in part 1 of article 13 of title 16, C.R.S., to increase sentences for habitual criminals. Nothing in this section shall limit the authority granted in part 2 of article 13 of title 16, C.R.S., to commit sex offenders to the department of corrections for an indeterminate term. Nothing in this section shall limit the authority granted in section 18-4-202.1 for increased sentences for habitual burglary offenders.

(2) (a) A corporation which has been found guilty of a class 2 or class 3 felony shall be subject to imposition of a fine of not less than five thousand dollars nor more than fifty thousand dollars. A corporation which has been found guilty of a class 4 or class 5 felony shall be subject to imposition of a fine of not less than one thousand dollars nor more than thirty thousand dollars.

(b) A corporation which has been found guilty of a class 2, class 3, class 4, or class 5 felony, for an act committed on or after July 1, 1985, shall

be subject to imposition of a fine which is within the presumptive ranges set forth in subparagraph (III) of paragraph (a) of subsection (1) of this section.

(3) Every person convicted of a felony, whether defined as such within or outside this code, shall be disqualified from holding any office of honor, trust, or profit under the laws of this state or from practicing as an attorney in any of the courts of this state during the actual time of confinement or commitment to imprisonment or release from actual confinement on conditions of probation. Upon his discharge after completion of service of his sentence or after service under probation, the right to hold any office of honor, trust, or profit shall be restored, except as provided in section 4 of article XII of the state constitution.

(4) A person who has been convicted of a class 1 felony shall be punished by life imprisonment unless the proceeding held to determine sentence according to the procedure set forth in section 16-11-103, C.R.S., results in a verdict which requires imposition of the death penalty, in which event such person shall be sentenced to death. As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1985, life imprisonment shall mean imprisonment without the possibility of parole for forty calendar years.

(5) In the event the death penalty as provided for in this section is held to be unconstitutional by the Colorado supreme court or the United States supreme court, a person convicted of a crime punishable by death under the laws of this state shall be punished by life imprisonment. In such circumstance, the court which previously sentenced a person to death shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment.

(6) In imposing a sentence to incarceration, the court shall impose a definite sentence which is within the presumptive ranges set forth in subsection (1) of this section unless it concludes that extraordinary mitigating or aggravating circumstances are present, are based on evidence in the record of the sentencing hearing and the presentence report, and support a different sentence which better serves the purposes of this code with respect to sentencing, as set forth in section 18-1-102.5. If the court finds such extraordinary mitigating or aggravating circumstances, it may impose a sentence which is lesser or greater than the presumptive range; except that in no case shall the term of sentence be greater than twice the maximum nor less than one-half the minimum term authorized in the presumptive range for the punishment of the offense.

(7) In all cases, except as provided in subsection (9) of this section, in which a sentence which is not within the presumptive range is imposed, the court shall make specific findings on the record of the case, detailing the specific extraordinary circumstances which constitute the reasons for varying from the presumptive sentence.

(8) Repealed, L. 82, p. 312, § 3, effective July 1, 1982.

(9) (a) The presence of any one or more of the following extraordinary aggravating circumstances shall require the court, if it sentences the defendant to incarceration, to sentence the defendant to a term greater than the maximum in the presumptive range, but not more than twice the maximum term authorized in the presumptive range for the punishment of a felony:

(I) The defendant is convicted of a crime of violence under section 16-11-309, C.R.S.;

(II) The defendant was on parole for another felony at the time of commission of the felony;

(III) The defendant was on probation for another felony at the time of the commission of the felony;

(IV) The defendant was charged with or was on bond for a previous felony at the time of the commission of the felony, for which previous felony the defendant was subsequently convicted;

(V) The defendant was under confinement, in prison, or in any correctional institution within the state as a convicted felon, or an escapee from any correctional institution within the state for another felony at the time of the commission of a felony;

(VI) The defendant was under a deferred judgment and sentence for another felony at the time of the commission of the felony;

(VII) At the time of the commission of the felony, the defendant was on parole for having been adjudicated a delinquent child for an offense which would constitute a felony if committed by an adult;

(VIII) At the time of the commission of the felony, the defendant was on appeal bond following his conviction for a previous felony.

(b) In any case in which one or more of the extraordinary aggravating circumstances provided for in paragraph (a) of this subsection (9) exist, the provisions of subsection (7) of this section shall not apply.

(c) Nothing in this subsection (9) shall preclude the court from considering aggravating circumstances other than those stated in paragraph (a) of this subsection (9) as the basis for sentencing the defendant to a term greater than the presumptive range for the felony.

(d) (I) If the defendant is convicted of the class 2 or the class 3 felony of child abuse under section 18-6-401 (7) (a) (I) or (7) (a) (III), the court shall be required to sentence the defendant to a term greater than the maximum in the presumptive range, but not more than twice the maximum term authorized in the presumptive range for the punishment of that class felony.

(II) In no case shall any defendant sentenced pursuant to subparagraph (I) of this paragraph (d) be eligible for suspension of sentence or for probation or deferred prosecution.

(e) (I) If the defendant is convicted of the class 2 felony of sexual assault in the first degree under section 18-3-402 (3), the court shall be required to sentence the defendant to a term greater than the maximum in the presumptive range, but not more than twice the maximum term authorized in the presumptive range for the punishment of that class of felony.

(II) In no case shall any defendant sentenced pursuant to subparagraph (I) of this paragraph (e) be eligible for suspension of sentence or probation.

(III) As a condition of parole under section 17-2-201 (5) (e), C.R.S., a defendant sentenced pursuant to this paragraph (e) shall be required to participate in a program of mental health counseling or receive appropriate treatment to the extent that the state board of parole deems appropriate to effectuate the successful reintegration of the defendant into the community while recognizing the need for public safety.

(f) The court may consider aggravating circumstances such as serious bodily injury caused to the victim or the use of a weapon in the commission

of a crime, notwithstanding the fact that such factors constitute elements of the offense.

Source: R & RE, L. 71, p. 390, § 1; C.R.S. 1963, § 40-1-105; L. 72, p. 267, § 4; L. 73, p. 531, § 83; L. 74, pp. 251, 409, § § 3, 26, 27; L. 76, p. 548, § 7; L. 77, p. 867, § 15; L. 79, pp. 669, 700, § § 16, 69; L. 81, pp. 969, 970, 972, 986, § § 1, 1, 1, 2; L. 82, p. 312, § 3; L. 84, p. 513, § 5; L. 85, pp. 622, 652, 655, 667, 675, § § 5, 7, 1, 3, 4; L. 86, p. 769, § § 1, 2.

Editor's notes: (1) The effective date for amendments made to this section by chapter 216, L. 77, was changed to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See People v. McKenna, 199 Colo. 452, 611 P.2d 574 (1980).

(2) Subsections (9)(a)(VII), (9)(a)(VIII), and (9)(f) are enacted by chapter 136, Session Laws of Colorado 1986, and section 16 of chapter 136 provides that the act set out in that chapter is effective July 1, 1986, and applies to acts committed on or after said date.

Cross references: For one-year supervision for persons released from residential community correctional facilities, see § 17-27-105 (5); for the restoration of citizenship to prisoners following completion of their sentences, see § 17-20-113.

Am. Jur.2d. See 21 Am. Jur.2d, Criminal Law, § § 19, 28, 29; 21A Am. Jur.2d, Criminal Law, § § 1022-1024.

C.J.S. See 22 C.J.S., Criminal Law, § § 5, 6.

Annotator's note. Since § 18-1-105 is similar to former § 39-10-17, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Law reviews. For note, "Disbarment for Crime in Colorado", see 10 Rocky Mt. L. Rev. 203 (1938). For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976). For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Colorado Felony Sentencing an Update", see 14 Colo. Law. 2163 (1985).

Constitutionality of death penalty. The imposition and carrying out of the death penalty was held to constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments of the U.S. constitution. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed.2d 346 (1972).

Subsection (6) is not unconstitutionally vague and does not deprive a defendant of due process and equal protection on the grounds that no standards are set out in the statute to guide the trial court on what are extraordinary, aggravating or mitigating circumstances. People v. Phillips, 652 P.2d 575 (Colo. 1982).

Although the phrase "aggravating or mitigating circumstances" is not defined in the legislative act, that failure does not render the statute unconstitutionally vague. People v. Phillips, 652 P.2d 575 (Colo. 1982).

Subsection (6) is not unconstitutionally vague because it allegedly fails to indicate precise standards for imposition of an enhanced sentence. People v. Wright, 672 P.2d 518 (Colo. 1983).

Classification does not create substantive offense. A classification of felony does not in and of itself create a substantive offense; it merely establishes the boundaries within which a court may impose a sentence. People v. Beigel, 646 P.2d 948 (Colo. App. 1982).

Retroactive application. This section is to be given retroactive application because a defendant is entitled to the benefits of amendatory legislation which mitigates penalties for crimes when the relief is sought before finality has attached to the judgment of conviction. Salas v. District Court, 190 Colo. 447, 548 P.2d 605 (1976); People v. Johnson, 638 P.2d 61 (Colo. 1981).

1979 amendment inapplicable where crime committed before July 1, 1979. Where acts for which defendants were convicted occurred well in advance of July 1, 1979, the effective date of H.B. 1589, it was not error to refuse to sentence under the provisions of that legislation. People v. Lopez, 624 P.2d 1301 (Colo. 1981).

Since the crime for which a defendant was sentenced was committed well before the effective date of either the 1977 or 1979 version of House Bill 1589, he is not entitled to be resentenced under the provisions of those acts. People v. Stewart, 626 P.2d 685 (Colo. 1981).

In resentencing a defendant originally convicted before the 1979 reduction in the sentencing range for class 3 felonies, the trial

(2) "Person", when referring to the victim of a homicide, means a human being who had been born and was alive at the time of the homicidal act.

(3) The term "after deliberation" means not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.

Source: R & RE, L. 71, p. 417, § 1; C.R.S. 1963, § 40-3-101; L. 74, p. 251, § 1.

Cross references: For the statutory provision which declares that the withholding or withdrawal of life-sustaining procedures does not constitute suicide or homicide, see § 15-18-111; for the effect of homicide on probate matters, see § 15-11-803.

Am. Jur.2d. See 40 Am. Jur.2d, Homicide, § 1.

C.J.S. See 40 C.J.S., Homicide, § 1.

Meaningful distinction between first and second degree murder intended. The general assembly intended that there be a meaningful distinction between first and second degree murder. People v. Mullins, 188 Colo. 23, 532 P.2d 733 (1975).

Killing may be perpetrated by any means by which death may be occasioned. The unlawful killing may be perpetrated by poisoning, sticking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome, and death thereby occasioned. May v. People, 8 Colo. 210, 6 P. 816 (1885).

Use of a deadly weapon is not in itself sufficient to show deliberation. People v. Hamrick, 624 P.2d 1333 (Colo. App. 1979), aff'd. 624 P.2d 1320 (Colo. 1981).

Applied in Leonard v. People, 149 Colo. 360, 369 P.2d 54 (1962); People v. Morgan, 637 P.2d 338 (Colo. 1981); People v. Madson, 638 P.2d 18 (Colo. 1981); People v. Bartowsheski, 661 P.2d 235 (Colo. 1983); People v. Fields, 697 P.2d 749 (Colo. App. 1984).

18-3-102. Murder in the first degree. (1) A person commits the crime of murder in the first degree if:

(a) After deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person; or

(b) Acting either alone or with one or more persons, he commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault in the first or second degree as prohibited by section 18-3-402 or 18-3-403, or a class 3 felony for sexual assault on a child as provided in section 18-3-405 (2), and, in the course of or in furtherance of the crime that he is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone; or

(c) By perjury or subornation of perjury he procures the conviction and execution of any innocent person; or

(d) Under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another.

(2) It is an affirmative defense to a charge of violating subsection (1) (b) of this section that the defendant:

(a) Was not the only participant in the underlying crime; and

(b) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(c) Was not armed with a deadly weapon; and

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

(e) Did not engage himself in or intend to engage in and had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious bodily injury; and

(f) Endeavored to disengage himself from the commission of the underlying crime or flight therefrom immediately upon having reasonable grounds to believe that another participant is armed with a deadly weapon, instrument, article, or substance, or intended to engage in conduct likely to result in death or serious bodily injury.

(3) Murder in the first degree is a class 1 felony.

Source: R & RE, L. 71, p. 418, § 1; C.R.S. 1963, § 40-3-102. L. 74, p. 251, § 2; L. 75, pp. 617, 632, § § 5, 5; L. 77, p. 960, § 5; L. 81, p. 973, § 4.

Cross references: For affirmative defenses generally, see § § 18-1-407, 18-1-710, and 18-1-815.

I. General Consideration.
II. Elements of Offense.
A. In General.
B. Premeditation.
C. Felony Murder.
D. Extreme Indifference to Life.
III Trial and Prosecution.
A. In General.
B. Indictment or Information.
C. Evidence.
D. Jury.
E. Instructions.
IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Am. Jur.2d. See 40 Am. Jur.2d, Homicide, § § 45-52, 72.

C.J.S. See 40 C.J.S., Homicide, § § 30-34.

Annotator's note. Since § 18-3-102 is similar to former § § 40-2-1 and 40-2-3, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Law reviews. For article, "Should Ralph Fleagle Hang?", see 7 Dicta 10 (Nov. 1929); 7 Dicta 17 (Jan. 1930). For comment on Reppin v. People (95 Colo. 192, 34 P.2d 71 (1934)), see 7 Rocky Mt. L. Rev. 209 (1935). For article, "One Year Review of Criminal Law", see 34 Dicta 98 (1957). For article, "One Year Review of Criminal Law and Procedure", see 36 Dicta 34 (1959). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For comment on Bizup v. People (150 Colo. 214, 371 P.2d 786 (1962)), see 35 U. Colo. L. Rev. 435 (1963). For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L. J. 137 (1972). For article, "The Jurisprudence of Death by Another: Accessories and Capital Punishment", see 51 U. Colo. L. Rev. 17 (1979). For note, "Extreme-Indifference Murder: The Impact of People v. Marcy", see 54 U. Colo. L. Rev. 83 (1982).

Section constitutional. Since there is a rational difference expressed by the general assembly between first degree murder and second degree murder, the first degree murder statute is constitutional. People v. Steed, 183 Colo. 96, 514 P.2d 776 (1973).

This section defines murder. Sawyer v. People, 173 Colo. 351, 478 P.2d 672 (1970).

Murder after deliberation and felony murder are not separate and independent offenses, but only ways in which criminal liability for first degree murder may be charged and prosecuted. People v. Lowe, 660 P.2d 1261 (Colo. 1983).

Election of theories not required. The prosecution should be allowed to charge multiple theories of first degree murder in separate counts, and it may, but should not be required to, elect among theories after the evidence is closed. People v. Freeman, 668 P.2d 1371 (Colo. 1983).

Defendant can be convicted only of one first degree murder for one killing, as two convictions for one killing would result in unauthorized collateral punishment. People v. Lowe, 660 P.2d 1261 (Colo. 1983).

The rule of lenity prohibits the entry of dual convictions and sentences for felony murder and murder after deliberation when the convictions and sentences are predicated upon the killing of a single victim. People v. Bartowsheski, 661 P.2d 235 (Colo. 1983).

Dual convictions and sentences may not be entered on the murder after deliberation and

Applied in Rocha v. People, 713 P.2d 350 (Colo. 1986); People v. Sanders, 717 P.2d 948 (Colo. 1986); People v. Wieghard, 743 P.2d 977 (Colo. App. 1987).

16-11-310. Release from incarceration.

Repealed. L. 88, p. 715, § 25, effective July 1, 1988.

Editor's note: Section 28 of chapter 124, Session Laws of Colorado 1988, provides that the act repealing this section applies to offenses committed on or after July 1, 1988.

PART 4

DEATH PENALTY - EXECUTION

16-11-401. Death penalty inflicted by lethal injection. The manner of inflicting the punishment of death shall be by the administration of a lethal injection within the time prescribed in this part 4, unless for good cause the court or governor may prolong the time. For the purposes of this part 4, "lethal injection" means a continuous intravenous injection of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death.

Source: Amended, L. 88, p. 671, § 1.

Editor's note: Section 3 of chapter 113, Session Laws of Colorado 1988, provides that the act amending this section is effective July 1, 1988, and applies to offenses subject to the death penalty committed on or after said date.

16-11-402. Implements - sentence executed by executive director. The executive director of the department of corrections, at the expense of the state of Colorado, shall provide a suitable and efficient room or place, enclosed from public view, within the walls of the correctional facilities at Canon City and therein at all times have in preparation all necessary implements requisite for carrying into execution the death penalty by means of the administration of a lethal injection. The execution shall be performed in the room or place by a person selected by the executive director and trained to administer intravenous injections. Death shall be pronounced by a licensed physician or a coroner according to accepted medical standards.

Source: Amended, L. 88, p. 671, § 2.

Editor's note: Section 3 of chapter 113, Session Laws of Colorado 1988, provides that the act amending this section is effective July 1, 1988, and applies to offenses subject to the death penalty committed on or after said date.

PART 5

SENTENCES TO PAYMENT OF FINES - COSTS

16-11-501. Judgment for costs and fines. (1) Where any person, association, or corporation is convicted of an offense, the court shall give judgment