

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6304 SENATE • JUDICIARY • 708

Fifteen to twenty-year sentence was not excessive for aggravated robbery and a crime of violence. *People v. Colasanti*, 626 P.2d 1136 (Colo. 1981).

Applied in *People v. Smith*, 195 Colo. 404, 579 P.2d 1129 (1978); *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978); *People v. Girard*, 196 Colo. 68, 582 P.2d 666 (1978); *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979); *Watson v. District Court*, 199 Colo. 76, 604 P.2d 1165 (1980); *People v. Swain*, 43 Colo. App. 343, 607 P.2d 396 (1979); *People in Interest of R.R.*, 43 Colo. App. 208, 607 P.2d 1013 (1979); *People v. Hardin*, 199 Colo. 229, 607 P.2d 1291 (1980); *People v. Martinez*, 43 Colo. App. 419, 608 P.2d 359 (1979); *People v. Cabral*, 629 P.2d 575 (Colo. 1981); *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981); *People v. Francis*, 630

P.2d 82 (Colo. 1981); *People v. Valencia*, 630 P.2d 85 (Colo. 1981); *People v. Jones*, 631 P.2d 1132 (Colo. 1981); *People v. Flowers*, 644 P.2d 916 (Colo. 1982); *People v. Gallegos*, 644 P.2d 920 (Colo. 1982); *People v. Constant*, 645 P.2d 843 (Colo. 1982); *People v. Garries*, 645 P.2d 1306 (Colo. 1982); *People v. Bookman*, 646 P.2d 924 (Colo. 1982); *People v. Bueno*, 646 P.2d 931 (Colo. 1982); *People v. Hogan*, 649 P.2d 326 (Colo. 1982); *People v. Aragon*, 653 P.2d 715 (Colo. 1982); *People v. Ferguson*, 653 P.2d 725 (Colo. 1982); *Watkins v. People*, 655 P.2d 834 (Colo. 1982); *People v. Dillion*, 655 P.2d 841 (Colo. 1982); *People v. Cooper*, 662 P.2d 478 (Colo. 1983); *People v. District Court*, 603 P.2d 616 (Colo. 1983); *People v. SMith*, 709 P.2d 4 (Colo. App. 1985).

16-11-310. Release from incarceration. Except as provided in section 7 of article IV of the state constitution relating to the power of the governor to grant reprieves and pardons, an incarcerated person shall be unconditionally released and discharged upon the expiration of his sentence, less the deductions authorized in article 22.5 of title 17, C.R.S.

Source: L. 77, p. 865, § 12; L. 79, p. 666, § 10.

PART 4

DEATH PENALTY - EXECUTION

16-11-401. Death penalty inflicted by lethal gas. The manner of inflicting the punishment of death shall be by the administration of lethal gas within the time prescribed in this part 4, unless for good cause the court or governor may prolong the time.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-401.

Am. Jur.2d. See 21 Am. Jur.2d, Criminal Law, § 612.

C.J.S. See 24B C.J.S., Criminal Law, § 2002.

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950).

16-11-402. Appliances - sentence executed by executive director. The executive director of the department of corrections, at the expense of the state of Colorado, shall provide a suitable and efficient room or place, enclosed from public view, within the walls of the correctional facilities at Canon City and therein construct and at all times have in preparation all necessary appliances requisite for carrying into execution the death penalty by means of the administration of lethal gas. The punishment of death in each case of death sentence pronounced in this state shall be inflicted by the executive director or his designee in the room or place and with the

appliances provided for inflicting the punishment of death by the administration of lethal gas.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-402; L. 76, p. 530, § 3; L. 79, p. 682, § 11.

Am. Jur.2d. See 21 Am. Jur.2d, Criminal Law, § 610.

C.J.S. See 24B C.J.S., Criminal Law, § § 2002, 2003.

16-11-403. Week of execution - warrant. When a person is convicted of a class 1 felony, the punishment for which is death, and the convicted person is sentenced to suffer the penalty of death, the judge passing such sentence shall appoint and designate in the warrant of conviction a week of time within which the sentence must be executed; the end of such week so appointed shall be not less than ninety days nor more than one hundred twenty days from the day of passing the sentence. Said warrant shall be directed to the executive director of the department of corrections or his designee commanding said executive director or his designee to execute the sentence imposed upon some day within the week of time designated in the warrant and shall be delivered to the sheriff of the county in which such conviction is had, who, within three days thereafter, shall proceed to the correctional facilities at Canon City and deliver the convicted person, together with the warrant, to said executive director or his designee, who shall keep the convict in confinement until infliction of the death penalty. No person shall be allowed access to said convict, except his attendants, counsel, and physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-403; L. 76, p. 531, § 4; L. 79, p. 682, § 12.

Am. Jur.2d. See 21 Am. Jur.2d, Criminal Law, § 610.

C.J.S. See 24B C.J.S., Criminal Law, § § 1613, 2002.

Annotator's note. Since § 16-11-403 is similar to repealed § 39-11-3, CRS 1963, CSA, C. § 538, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Meaning of "week of time". The week of time which is required by this section to be appointed and designated in capital cases within which the sentence must be executed, is a period of time extending from 12 midnight Saturday until 12 midnight the following Saturday, but an error in the designation of the week is rendered immaterial when the execution is stayed by the supreme court pending review. *Mora v. People*, 19 Colo. 255, 35 P. 179 (1893).

Court fixes date of execution following stay. The court has authority to fix the date of execution in cases of affirmance, where the execution has been stayed upon appeal or supersedeas. *Mora v. People*, 19 Colo. 255, 35 P. 179 (1893).

But definite date set in order granting stay did not deny due process. The fact that the state supreme court set a definite execution date pending determination of post-conviction relief was not "suggestion of predetermination" in violation of due process and did not constitute an implied direction to deny petitioner relief. *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo.), aff'd, 402 F.2d 394 (10th Cir. 1968), cert. denied, 403 US 955, 91 S. Ct. 2279, 29 L. Ed.2d 865 (1971).

Procedure of delivery of prisoner by sheriff held not improper. *Agnes v. People*, 104 Colo. 527, 93 P.2d 891 (1939).

Applied in *Medley*, Petitioner, 134 U.S. 160, 10 S.Ct. 384, 33 L. Ed. 835 (1890).

16-11-404. Execution - witnesses. The particular day and hour of the execution of said sentence within the week specified in said warrant shall

be fixed by the executive director of the department of corrections or his designee but shall not be made public by him, and he shall be present thereat or shall appoint some other representative among the officials or officers of the correctional facilities at Canon City to be present in his place and stead. There shall also be present a physician and such guards, attendants and other persons as the executive director or his designee in his discretion deems desirable, not to exceed fifteen persons. The executive director or his designee shall notify the governor of the day and hour for the execution, as soon as it has been fixed.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-404; L. 76, p. 531, § 5; L. 79, p. 682, § 13.

Am. Jur.2d. See 21 Am. Jur.2d, Criminal Law, § 610.

C.J.S. See 24B C.J.S., Criminal Law § 2002.

16-11-405. Record and certificate of execution. The executive director of the department of corrections or his designee shall keep a book of record to be known as record of executions, in which shall be entered the reports specified in this section. Immediately after the execution, a postmortem examination of the body of the convict shall be made by the attending physician, who shall enter in said book of record the nature and extent of the examination and sign and certify to the same. The executive director or his designee shall also immediately make and enter in said book a report, setting forth the time of such execution and that the convict (naming him) was then and there executed in conformity to the sentence specified in the warrant of the court (naming such court) to him directed and in accordance with the provisions of this part 4, and shall insert in said report the names of all the persons who were present and witnessed the execution, and shall procure each of such persons to sign said report with his full name and place of residence before leaving the place of execution. The executive director or his designee shall thereupon attach his certificate to said report, certifying to the truth and correctness thereof, and shall immediately deliver a certified transcript of the record entry to the court which sentenced the convict.

Source: R & RE, L. 72, p. 251, § 1; C.R.S. 1963, § 39-11-405; L. 76, p. 531, § 6; L. 79, p. 683, § 14.

PART 5

SENTENCES TO PAYMENT OF FINES - COSTS

16-11-501. Judgment for costs and fines. (1) Where any person, association, or corporation is convicted of an offense, the court shall give judgment in favor of the state of Colorado and against the offender for the amount of the costs of prosecution and any fine imposed. No fine shall be imposed for conviction of a felony except as provided in section 18-1-105, C.R.S. Such judgments shall be enforceable in the same manner as are civil judgments, and, in addition, the provisions of section 16-11-502 shall be applicable.

of three years by specifying minimum terms and to add Subdiv. (3) re unclassified felonies and ~~expanded~~ Subsec. (d) to add exception re Subsec. (c)(2) and to include applicability re unclassified felonies; P.A. 73-137 removed reference to death sentence imposed for class A felony in accordance with Sec. 53a-46 in Subsec. (b)(1) and added Subdiv. (6) re capital felonies; P.A. 74-186 removed reference to guilt under Subdiv. (2) or (4) of Sec. 53a-60(a) in Subsec. (c) (2)(B); P.A. 75-380 added exception in Subsec. (d) re required one-year term; P.A. 75-411 deleted reference to guilt under Sec. 53a-135(a)(2) in Subsec. (c)(2)(B); P.A. 76-435 added exception in Subsec. (d) as amended by P.A. 75-380; P.A. 77-422 expanded exception in Subsec. (c) (2)(B) re required three-year and two-year minimum terms and added reference to guilt under Sec. 53-59a; P.A. 80-442 amended Subsec. (a) to limit applicability to felonies committed prior to July 1, 1981, effective on that date; P.A. 83-587 substituted "53a-59a" for "53-59a" in Subsec. (c).

Cited. 169 C. 263, 264. Cited. 176 C. 270, 271. Cited. 180 C. 557, 560. Cited. 182 C. 595, 597-599, 602. Cited. 190 C. 327, 335; Id., 639, 642.

Cited. 1 CA 724, 734.

Courts may impose a definite sentence for a felony of one year or less. 31 CS 350. ~~Cited.~~ 33 CS 705.

Subsec. (a):

Cited. 171 C. 278. Cited. 189 C. 114, 116. Cited. 196 C. 655, 658.

Subsec. (b):

Subdiv. (2) cited. 189 C. 114, 116, 117. Cited. 193 C. 144, 151. Subdiv. (1) cited. 195 C. 326, 328. Subdiv. (2) ~~cited.~~ 195 C. 326, 328. Subdiv. (4) cited. 199 C. 121, 124.

Subsec. (c):

Subdiv. (2)(B). Rational relationship exists between the protection of public health and safety and the imposition of nonsuspendable sentence for violent crime of second degree robbery, an essential element of which is threatened use of a deadly weapon or dangerous instrument. 171 C. 677, 681. Subdiv. (2) cited. 182 C. 595, 599; 189 C. 114, 117. Subdiv. (2)(B) cited. 182 C. 595, 601, 603. Cited. 193 C. 144, 151. Subdiv. (1) cited. Id., 144, 153. Subdiv. (2) cited. Id. Subdiv. (1) cited. 195 C. 326, 328. Subdiv. (2) cited. Id. Subdiv. (2) cited. 197 C. 413, 427. Subdiv. (2) ~~cited.~~ Id., 485, 488. ~~Sec.~~ 503. Subdiv. (2) cited. 199 C. 121, 124.

Sec. 53a-35a. Imprisonment for any felony committed on or after July 1, 1981: Definite sentences; terms authorized. For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and the term shall be fixed by the court as follows: (1) For a capital felony, a term of life imprisonment without the possibility of release unless a sentence of death is imposed in accordance with section 53a-46a; (2) for the class A felony of murder, a term not less than twenty-five years nor more than life; (3) for a class A felony other than murder, a term not less than ten years nor more than twenty-five years; (4) for a class B felony, a term not less than one year nor more than twenty years, except that for a conviction under section 53a-55a, 53a-59(a) (1), 53a-59a, 53a-70a, 53a-94a, 53a-101(a)(1) or 53a-134(a)(2), the term shall be not less than five years nor more than twenty years; (5) for a class C felony, a term not less than one year nor more than ten years, except that for a conviction under section 53a-56a, the term shall be not less than three years nor more than ten years; (6) for a class D felony, a term not less than one year nor more than five years, except that for a conviction under section 53a-60b, the term shall be not less than two years nor more than five years, and for a conviction under section 53a-60c, the term shall be not less than three years nor more than five years; (7) for an unclassified felony, a term in accordance with the sentence specified in the section of the general statutes that defines the crime.

(P.A. 80-442, S. 10, 28; P.A. 86-220.)

History: P.A. 80-442 effective July 1, 1981; P.A. 86-220 amended Subdiv. (1) to add "imprisonment without the possibility of release" to reflect revision made by P.A. 85-366.

Cited. 196 C. 655, 659. Cited. 197 C. 337, 353, 355, 357. Cited. 198 C. 92, 94. ~~Cited.~~ 200 C. 268, 279.

Cited. 6 CA 680, 681.

Subdiv. (3):

Cited. 198 C. 671, 674.

Subdiv. (5):

Cited. 6 CA 680, 681.

Sec. 53a-35b. "Life imprisonment" defined. A sentence of imprisonment for life shall mean a definite sentence of sixty years, unless the sentence is life imprisonment without the possibility of release, imposed pursuant to subsection (f) of section 53a-46a,

fixed by the court, not to exceed double the amount of the defendant's gain from the commission of the offense. In such case the court shall make a finding as to the amount of the defendant's gain from the offense, and if the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue. For purposes of this section the term "gain" means the amount of money or the value of property derived.

(1969, P.A. 828, S. 44.)

Sec. 53a-45. Murder; Penalty; waiver of jury trial; finding of lesser degree. Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony.

(b) If a person indicted for murder or held to answer for murder after a hearing conducted in accordance with the provisions of section 54-46a waives his right to a jury trial and elects to be tried by a court, the court shall be composed of three judges designated by the chief court administrator or his designee, who shall name one such judge to preside over the trial. Such judges, or a majority of them, shall determine the question of guilt or innocence and shall, as provided in said section 53a-46a, render judgment and impose sentence.

(c) The court or jury before which any person indicted for murder or held to answer for murder after a hearing conducted in accordance with the provisions of section 54-46a is tried may find him guilty of homicide in a lesser degree than that charged.

(1969, P.A. 828, S. 45; P.A. 73-137, S. 1; P.A. 80-442, S. 13, 28; P.A. 82-298, S. 4; P.A. 83-210, S. 2, 5)

History: P.A. 73-137 added reference to capital felonies in Subsec. (a) and substituted reference to Sec. 53a-46a for reference to Sec. 53a-46, deleted former Subsec. (b) which had allowed person indicted for murder to plead guilty with consent of court and state's attorney in which case court would sentence him as for a Class A felony, relettering former Subsecs. (c) and (d) accordingly; P.A. 80-442 specified punishment in accordance with Sec. 53a-35a and deleted reference to death sentenced under Sec. 53a-46a in Subsec. (a), effective July 1, 1981; P.A. 82-298 amended Subsec. (b) to provide that court shall be composed of three judges designated by chief court administrator, who shall also name one such judge to preside, where previously one judge was the judge presiding at the session and the other two were designated by the chief justice of the supreme court; P.A. 83-210 amended Subsecs. (b) and (c) by inserting "or held to answer for murder after a hearing conducted in accordance with the provisions of section 54-46a".

See annotations to part IV.

Cited. 187 C. 6, 28.

Subsec. (b):

Cited. 180 C. 382, 404. Cited. 190 C. 639, 640. Cited. 198 C. 77, 90. Cited. 199 C. 163, 165.

Subsec. (c):

Constitutionally permissible for a jury to find a defendant indicted for murder guilty of homicide in a lesser degree where the evidence supports such a finding although the state of mind required is different. 180 C. 382, 399, 400, 402, 403, 407. Cited. 181 C. 187, 200; id., 406, 412. Cited. 182 C. 66, 71, 72. Cited. 187 C. 6, 28. Cited. 188 C. 542, 546. Cited. 190 C. 639, 652. Cited. 193 C. 695, 732. Cited. 195 C. 232, 243. Manslaughter is not lesser included offense of felony murder. 196 C. 421, 422, 427.

Cited. 7 CA 180, 187.

Sec. 53a-46. Sentencing proceedings; appeal. Section 53a-46 is repealed.

(1969, P.A. 828, S. 46; 1972, P.A. 56, S. 1; P.A. 73-137, S. 15.)

Sec. 53a-46a. Hearing on imposition of death penalty. Aggravating and mitigating factors. (a) A person shall be subjected to the penalty of death for a capital felony only if a hearing is held in accordance with the provisions of this section.

(b) For the purpose of determining the sentence to be imposed when a defendant is convicted of or pleads guilty to a capital felony, the judge or judges who presided at the

trial or before whom the guilty plea was entered shall conduct a separate hearing to determine the existence of any mitigating factor concerning the defendant's character, background and history, or the nature and circumstances of the crime, including any mitigating factor set forth in subsection (g), and any aggravating factor set forth in subsection (h). Such hearing shall not be held if the state stipulates that none of the aggravating factors set forth in subsection (h) of this section exists or that one or more mitigating factors exist. Such hearing shall be conducted (1) before the jury which determined the defendant's guilt, or (2) before a jury impaneled for the purpose of such hearing if (A) the defendant was convicted upon a plea of guilty; (B) the defendant was convicted after a trial before three judges as provided in subsection (b) of section 53a-45; or (C) if the jury which determined the defendant's guilt has been discharged by the court for good cause or, (3) before the court, on motion of the defendant and with the approval of the court and the consent of the state.

(c) In such hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report which may have been prepared. No presentence information withheld from the defendant shall be considered in determining the existence of any mitigating or aggravating factor. Any information relevant to any mitigating factor may be presented by either the state or the defendant, regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, but the admissibility of information relevant to any of the aggravating factors set forth in subsection (h) shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any mitigating or aggravating factor. The burden of establishing any of the factors set forth in subsection (h) shall be on the state. The burden of establishing any mitigating factor shall be on the defendant.

(d) In determining whether a mitigating factor exists concerning the defendant's character, background or history, or the nature and circumstances of the crime, pursuant to subsection (b) of this section, the jury or, if there is no jury, the court shall first determine whether a particular factor concerning the defendant's character, background or history, or the nature and circumstances of the crime, has been established by the evidence, and shall determine further whether that factor is mitigating in nature, considering all the facts and circumstances of the case. Mitigating factors are such as do not constitute a defense or excuse for the capital felony of which the defendant has been convicted, but which, in fairness and mercy, may be considered as tending either to extenuate or reduce the degree of his culpability or blame for the offense or to otherwise constitute a basis for a sentence less than death.

(e) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence of any aggravating or mitigating factor.

(f) If the jury or, if there is no jury, the court finds that one or more of the factors set forth in subsection (h) exist and that no mitigating factor exists, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that none of the factors set forth in subsection (h) exists or that one or more mitigating factors exist, the court shall impose a sentence of life imprisonment without the possibility of release.

(g) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided in subsection (e), that

any mitigating factor exists. The mitigating factors to be considered concerning the defendant shall include, but are not limited to, the following: That at the time of the offense (1) he was under the age of eighteen or (2) his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution or (3) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution or (4) he was criminally liable under sections 53a-8, 53a-9 and 53a-10 for the offense, which was committed by another, but his participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution or (5) he could not reasonably have foreseen that his conduct in the course of commission of the offense of which he was convicted would cause, or would create a grave risk of causing, death to another person.

(h) If no mitigating factor is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in subsection (e) that (1) the defendant committed the offense during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of, a felony and he had previously been convicted of the same felony; or (2) the defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person; or (3) the defendant committed the offense and in such commission knowingly created a grave risk of death to another person in addition to the victim of the offense; or (4) the defendant committed the offense in an especially heinous, cruel or depraved manner; or (5) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value; or (6) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

(P.A. 73-137, S. 4; P.A. 80-332, S. 1; 80-442, S. 14, 28; P.A. 85-366, S. 1.)

History: P.A. 80-332 restated provision and referred to mitigating or aggravating factors throughout, replacing references to factors set forth in Subsecs. (f) and (g); P.A. 80-442 referred to imposition of sentence in accordance with Sec. 53a-35a(1) rather than to sentence for a Class A felony in Subsec. (e), effective July 1, 1981; P.A. 85-366 added a new Subsec. (d) to specify the procedure for the determination by a jury or court of the existence of a mitigating factor and to add a definition of mitigating factors, relettered the remaining Subsecs. and amended Subsec. (f) to replace "a sentence in accordance with Sec. 53a-35a(1)" with "a sentence of life imprisonment without the possibility of release".

See Sec. 53a-35b re definition of "life imprisonment".

See Sec. 53a-35c re availability of sentence of life imprisonment without possibility of release.

Former Sec. 53-10 unconstitutional. 164 C. 162. Cited. 197 C. 436, 440.

Subsec. (e):

Cited. 199 C. 163, 166.

Subsec. (f):

Cited. 199 C. 163, 165.

Subsec. (g):

Cited. 199 C. 163, 166.

Sec. 53a-46b. Review of death sentence. (a) Any sentence of death imposed in accordance with the provisions of section 53a-46a shall be reviewed by the supreme court pursuant to its rules. In addition to its authority to correct errors at trial, the supreme court shall either affirm the sentence of death or vacate said sentence and remand for imposition of a sentence in accordance with subdivision (1) of section 53a-35a.

(b) The supreme court shall affirm the sentence of death unless it determines that: (1) The sentence was the product of passion, prejudice or any other arbitrary factor; (2) the evidence fails to support the finding of an aggravating circumstance specified in subsection (h) of section 53a-46a; or (3) the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

(c) The sentence review shall be in addition to direct appeal and if taken, the review and appeal shall be consolidated for consideration. The court shall then render its decision on the legal errors claimed and the validity of the sentence.

(P.A. 80-332, S. 2; P.A. 81-472, S. 151, 159; P.A. 85-366, S. 2.)

History: P.A. 81-472 made technical changes; P.A. 85-366 made a technical change to reflect changes made to Sec. 53a-46a by same public act.

Sec. 53a-46c. Applicability of death penalty provisions in effect on October 1, 1980. The provisions of sections 53a-46a and 53a-46b in effect on October 1, 1980, shall be applicable to any person who is convicted of or pleads guilty to a capital felony under subdivisions (1) to (6), inclusive, of section 53a-54b on or after June 13, 1983.

(P.A. 83-327, S. 1, 2.)

Sec. 53a-47. Disposition of person found not guilty by reason of mental disease or defect. Confinement and examination. Release. Section 53a-47 is repealed.

(1969, P.A. 828, S. 47; P.A. 75-476, S. 5, 6; P.A. 78-280, S. 1, 2, 115, 127; P.A. 81-301, S. 2; P.A. 83-486, S. 2; P.A. 85-506, §. 31, 32.)

PART III*

INCHOATE OFFENSES

*Annotations to former section 54-197:

To constitute conspiracy there need be no formal agreement between the parties; conspiracy may be established by proof of separate acts of individual conspirators with common purpose. 129 C. 540. Principles stated which prevent a charge of conspiracy against certain participants in unlawful acts. 132 C. 335. Conspiracy is a distinct offense, entirely independent of the unlawful act which is its purpose. 134 C. 183. Conspiracy may be inferred from activities of accused persons. 138 C. 292. Where a prima facie case is made out, court is entitled to take into consideration the fact that defendant failed to testify. 139 C. 229. Declaratory judgment that a violation would exist. 142 C. 53. Cited. 145 C. 124; 150 C. 230; 152 C. 167. No formal agreement need be proven; it is enough if there is a mutual purpose to do the forbidden act. 147 C. 296. Information charging a conspiracy may properly allege acts done in furtherance of the conspiracy. Information charged that defendants conspired to commit larceny and in pursuance of the conspiracy stole copper wire worth \$2000. Since larceny statute made theft of property worth more than \$50 a felony, effect of the information was to charge a conspiracy to commit a felony. Not necessary for state to prove that the unlawful object of the conspiracy was ever successfully accomplished or that any larceny was ever committed in any amount. Confessions made by two conspirators were not admissible to prove guilt of third conspirator. Since court made that clear in instructions to jury, third conspirator could not complain of admission of confessions in evidence. 149 C. 640. Fact that one or more persons jointly charged with the commission of a crime pleaded guilty is not admissible, on trial of another person so charged, to establish that the crime was committed. A plea of guilty is, in effect, a confession of guilt which, having been made by one of those charged with the crime, can be no more than hearsay as to another who is so charged. The state must prove the whole case against any accused. 150 C. 195. Where one of alleged coconspirators is acquitted, this does not necessarily make fatal convictions of other coconspirators. 151 C. 592. Crime of conspiracy at common law is unlawful combination and accomplishment of objectives of conspiracy is not material. 157 C. 330. Once defendant had been proved to be member of conspiracy, declarations of coconspirators in furtherance of conspiracy could be used against him. 158 C. 412. Warrant authorizing search for "...paraphernalia which could be used to violate Sec. 54-197" was general warrant and therefore was illegal and did not meet constitutional requirement that search warrant particularly describe things to be seized. 160 C. 28, 33 - 37. Admission of evidence that defendant denied he knew coconspirators was reversible error when interrogation was made in absence of defendant's counsel. 159 C. 608. Essence of crime of conspiracy is unlawful combination coupled with

or is an object of the conspiracy, except that an attempt or conspiracy to commit a class A felony is a class B felony.

(1969, P.A. 828, S. 52.)

Cited. 182 C. 395, 598, 600-602. Cited. 184 C. 369, 377. Cited. 195 C. 183, 185.

Sec. 53a-52. Conviction; sentencing. Section 53a-52 is repealed.

(1969, P.A. 828, S. 53; 1971, P.A. 871, S. 129.)

PART IV*

HOMICIDE

*Annotations to former section 53-9:

Necessity of stating degree of crime in indictment; 38 C. 399; 47 C. 117; of alleging deliberation and premeditation when it alleges first degree. 50 C. 198. Unlawful homicide perpetrated in commission of rape is in the first degree; 72 C. 709. In commission of robbery or in attempt to rob. 110 C. 307; id., 559; 123 C. 670; 126 C. 59; 132 C. 44. Homicide committed by driving automobile recklessly. 82 C. 671; 83 C. 437; 109 C. 491. What mental capacity necessary for first degree murder. 77 C. 509; charge as to defense of insanity; 87 C. 7; 96 C. 242; burden of proof; id., 639; when court need not charge as to it. 87 C. 285. Actual malice must be proved beyond a reasonable doubt. 43 C. 518; 64 C. 305; 73 C. 25. Malice is proved if homicide is wilful, deliberate and premeditated; 46 C. 326; 109 C. 138; but not in the case of sufficient provocation or uncontrollable passion. 74 C. 181. Malice is implied where an unlawful homicide is unattended by extenuating circumstances. 110 C. 307; id., 559. What constitutes malice; 64 C. 305; 74 C. 181; 128 C. 44; charge as to it. 79 C. 590; 84 C. 472; 87 C. 5; 98 C. 463; 103 C. 484; 106 C. 351; rebutted by reasonable belief that victim committed adultery with accused's wife. 74 C. 177; 87 C. 5; 92 C. 71; evidence of statements by accused and feeling towards victim; 74 C. 177; 83 C. 261; 84 C. 472; 87 C. 5; 88 C. 177; malice presumed from circumstances of atrocity. 84 C. 152. Theft as motive. 79 C. 590; 96 C. 126. Intoxication inadmissible on question of deliberation; 40 C. 143; 41 C. 587; 49 C. 382; where indulged in to nerve person to carry out preconceived plan; 48 C. 97; as bearing on malice; 64 C. 305; as a defense. 83 C. 165; 87 C. 291; 88 C. 206. Self-defense; 57 C. 313; 79 C. 590; 83 C. 261; 106 C. 455; 105 C. 349; or defense of home. 57 C. 313; 88 C. 360. Suicide of victim as a defense; her statements as to intent. 77 C. 267. Alibi. 84 C. 152; 98 C. 466. Charge as to corpus delicti. 83 C. 22. See note re 152 C. 15, infra. Burden and amount of proof; reasonable doubt; 77 C. 267; 79 C. 590; 81 C. 22; 87 C. 573; 106 C. 139; as to malice. 78 C. 25. Homicide in general; nature and definition of degrees. 72 C. 728; 74 C. 180. When court should charge as to excuse, justification or extenuation. 84 C. 470; 87 C. 285; 98 C. 463; 103 C. 484. Murder in second degree; 87 C. 5; 128 C. 44; 131 C. 60; in case of poisoning; 19 C. 393. What facts will reduce crime to manslaughter. 74 C. 180; 78 C. 18; 79 C. 590; 87 C. 585. Under indictment for murder accused cannot be found guilty of any crime except murder in first or second degree or manslaughter. 132 C. 41. Bad prison food no justification. 38 C. 127. Effect of plea of not guilty. 87 C. 285; of plea of guilty; 78 C. 18; 88 C. 208. Confession or admissions by accused. 18 C. 180; 78 C. 18; 92 C. 65 et seq.; 103 C. 478; declarations before grand jury. 56 C. 413. Momentary absence of accused from trial. 82 C. 59. Evidence equivalent to that of two witnesses; for jury to determine. 78 C. 18; 90 C. 126; 93 C. 246; 103 C. 467; 106 C. 714. Appeal as supersedeas; 82 C. 59; if decided before time set for execution by reprieve, supreme court need not set another day. 81 C. 22. Clothes of victim as evidence; 82 C. 59; so empty cartridge shells found in accused's room. 74 C. 649. Where two indicted together, charge that state had not made out a case as to three upheld. 87 C. 285. Abandonment of enterprise by one before murder. 47 C. 139; 97 C. 329; 110 C. 309. Evidence of other unconnected crimes generally inadmissible; when such evidence is admissible. 92 C. 530; 97 C. 266; 103 C. 480; 120 C. 631. When separate trials should be given persons jointly accused. 92 C. 62; 97 C. 323; 98 C. 461; 147 C. 194. Time required for deliberation. 93 C. 246; 110 C. 561; 120 C. 629. Degree of murder is for jury; power of court to set aside. Id., 244; 106 C. 705. Admissibility of dying declarations. 90 C. 387; 93 C. 337. Mental tests of accused; expert testimony as to insanity; reading medical textbooks. 96 C. 250. Conspiracy to commit homicide in perpetration; abandonment of enterprise by some of conspirators. 97 C. 329. Change of venue; alibi; testimony of accomplice. 98 C. 466; 105 C. 333. When witnesses should be segregated. 103 C. 473. Premeditation is necessary for first degree murder. 106 C. 352. As to use and effect of verdict of not guilty on ground of insanity. see 39 C. 595; 96 C. 263. Possession of a deadly weapon as bearing on existence of malice. 109 C. 138; 110 C. 308. An inference of guilt may be drawn from failure of accused to take stand and deny facts within his knowledge which tend to prove his guilt. 109 C. 144; 106 C. 463; but failure of accused to take stand must not be commented on. Id. In prosecution for homicide by reckless operation of an automobile, conduct of accused in leaving victims lying in road without stopping, unexplained, supports an inference of guilt. 109 C. 494. Rule concerning responsibility of conspirators to commit an unlawful act for a homicide by one of them in carrying it out. 126 C. 59; 132 C. 44, 45. Has not changed common-law definition of murder but provides more severe penalty when certain features are present. 128 C. 44. Actual intent to kill not necessary in second degree murder. 131 C. 66. Jury may determine case under original charge by finding accused guilty of a lesser offense where such a conviction is warranted and is the only one warranted upon the evidence. 137 C. 114. Unskillful or improper treatment of wound by surgeons does not relieve defendant of responsibility for his crime. Id. Distinction between murder and manslaughter is the presence of malice in the one and its absence in the other. Court's charge held sufficient. 139 C. 89. Charge on intoxication and alcoholic beverages sustained. Id., 317. A killing in an attempted robbery is murder in the first degree even though killing itself is accidental. Id., 475. Cited. 141 C. 656; 143 C. 167; 145 C. 60; 154 C. 272, 286. A wilful, deliberate and premeditated killing is murder in the first degree. 142 C. 117. Court refuses to adopt "Durham" rule. 146 C. 137. Assault with intent to rob within perpetration

or attempted perpetration of a robbery. 146 C. 227. Even if there is a confession, there must be extrinsic corroborative evidence which will, when taken in connection with the confession, establish the corpus delicti in the mind of the trier beyond a reasonable doubt. 147 C. 95. Standard to determine sanity or mental capacity of the defendant to commit murder. *Id.* Adoption of Wigmore definition of "corpus delicti." Previous definitions overruled. 152 C. 15. Charge re what constitutes malice upheld. 152 C. 81. History discussed; claim that guilty plea to second degree murder should have been taken before three judges, that jury should have determined degree of homicide and that sentence should have been imposed by three judges, disallowed. 153 C. 320. et seq. Absence of element of wilful, deliberate and premeditated murder in indictment for murder in first degree justifies jury verdict of guilty of murder in second degree. 154 C. 624. Malice aforethought defined. *Id.*, 627. Court should have permitted defendant to change his plea where it appeared trial court's concern that defendant be exposed to possible electrocution if found guilty on trial for first degree murder was prime basis for denial; defendant must decide risk. 157 C. 492. Length of time necessary to form specific intent may be long or short. 158 C. 341. Voluntary drunkenness, while no excuse for crime, may make person mentally incapable of intent of premeditation which is element of murder in first degree. *Id.* Preconviction bail in capital cases is governed by section 8 of article first of constitution as well as Sec. 54-53. Cited. 159 C. 264. Evidence produced by state was adequate to show defendants were in danger of being convicted of capital offense under this section, hence bail could be denied under exception provided in section 8 of article I of state constitution. 159 C. 285. Cited. 159 C. 347. Cited. 161 C. 219. Cited. 166 C. 630. Trial judges direction to jury not coercive in context of circumstances in which given. 167 C. 408.

Where accused pleaded guilty to second degree murder, fact that court in imposing sentence did not consist of a presiding judge and two other judges and that no witnesses were heard and that the degree of crime was not determined by a majority of the judges did not invalidate the conviction. 20 CS 127. Cited. 26 CS 175.

Annotations to former section 53-10:

Failure of deceased to exercise due care not a defense. 110 C. 61. Act of accused need not be immediate cause of the death. *Id.*, 62. Cited. 139 C. 401; 141 C. 656; 150 C. 459; 152 C. 344; 154 C. 272, 275. Not retroactive. 142 C. 29. Constitutionality of statute re recommendation for life imprisonment. 145 C. 60. Death penalty does not constitute cruel and unusual punishment in violation of eighth amendment to U. S. constitution and court will not vitiate legislative determination of punishment for crimes. 158 C. 341. Preconviction bail in capital cases is to be governed by Sec. 54-53 in light of section 8 of article first of state constitution. 159 C. 264. Cited. 161 C. 219. Cited. 169 C. 13.

Annotations to former section 53-11:

Court had authority to impose consecutive life sentences for two second degree murders. 152 C. 600-602. Cited. 154 C. 622, 624.

Cited. 25 CS 473.

Annotation to former section 53-13:

The intentional inflicting of a wound from which death ensues within a year and a day may be either murder or manslaughter. 44 C. 540. If blow produces condition which results in death, this sufficient; reasonable doubt. 87 C. 573. By reckless driving of automobile. 82 C. 671; 83 C. 457; 109 C. 491. One who engages with others in a common purpose to carry on an activity in a reckless manner or with wanton disregard for the safety of others is guilty of involuntary manslaughter, even though he is not present when the homicide occurs. 138 C. 281. Distinction between murder and manslaughter is the presence of malice in the one and its absence in the other. 139 C. 89. Cited. 153 C. 325. Cited. 163 C. 305.

Cited. 22 CS 175; *id.*, 497, 499; 23 CS 248; 25 CS 473; 26 CS 215; 27 CS 73. Sentence of not less than five nor more than ten years in state prison confirmed by review division where defendant had in jealousy killed woman with whom he lived after observing her with another man. 27 CS 353. Sentence of not less than five nor more than ten years should stand where defendant entered a fight between his two companions, knocked victim to the ground and stabbed him with his knife. *Id.*, 370.

Annotations to former section 53-17:

What constitutes "gross negligence." 120 C. 234. Cited. 130 C. 147. Contributory negligence no defense to gross or wilful misconduct or gross negligence. 154 C. 23. Age of accused not a criterion in determination of his gross or wilful misconduct or his gross negligence. *Id.* Statute does not require actual contact between accused's vehicle and deceased or vehicle in which deceased was riding. *Id.*

Cited. 25 CS 84; 26 CS 36, 27 CS 232.

Annotations to chapter 952, part IV:

Unconstitutionally broad discretion. 164 C. 162. Cited. 184 C. 597, 598.

Secs. 53a-53 and 53a-54. Homicide defined. Murder defined; affirmative defenses; evidence of mental condition; classification. Sections 53a-53 and 53a-54 are repealed.

(1969, P.A. 828, S. 54, 55; 1971, P.A. 871, S. 129; P.A. 73-137, S. 15.)

Sec. 53a-54a. Murder defined. Affirmative defenses. Evidence of mental condition. Classification. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed

act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, ~~manslaughter in the~~ first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, ~~mental defect or~~ other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony.

(P.A. 73-137, S. 2; P.A. 80-442, S. 15, 28; P.A. 83-486, S. 4.)

History: P.A. 80-442 amended Subsec. (c) to specify punishment in accordance with Sec. ~~53a-35a(2)~~ relating reference to death penalty imposed as provided by Sec. 53a-46a for capital felony, effective July 1, 1980. P.A. 83-486 ~~amended~~ Subsec. (a) by replacing "acted" with "committed the proscribed act or acts".

See Sec. 53a-54b re capital felony.

See Sec. 53a-54c re felony murder.

Cited. 171 C. 241. Cited. 173 C. 414, 415. Cited. 176 C. 508, 509; 177 C. 1, 2, 8-10. Cited. 178 C. 450, 452, 453, 454, 626, 627. Cited. 179 C. 1, 2; Id., 431, 432. Cited. 180 C. 141, 142. Constitutionally permissible for a jury to find a defendant indicted for murder guilty of homicide in a lesser degree where the evidence supports such a finding although the state of mind required is different. Id., 382, 383. Cited. Id., 589, 590. Cited. 181 C. 406, 412. Cited. 182 C. 66; Id., 388-394; Id., 497, 498; Id., 603, 604, 606. Cited. 185 C. 163, 164. Cited. 186 C. 261, 262; Id., 476, 477. Cited. 188 C. 626, 627, 642. Cited. 189 C. 303, 304, 308; Id., 346, 347. 190 C. 639, 642. Cited. 191 C. 233, 234, 235, 236, 546. Cited. 194 C. 408-411. Cited. Id., 416, 419. Cited. Id., 483. Cited. Id., 530, 560. Cited. 195 C. 475, 476. Cited. 196 C. 667, 668. Cited. 197 C. 60, 61. Cited. Id., 180, 181. Cited. Id., 337, 340. Cited. Id., 436, 438, 439. Cited. Id., 507, 508, 509. Cited. 198 C. 124, 126. Cited. Id., 209, 210. Cited. Id., 397, 398. Cited. Id., 542, 543. Cited. Id., 560. Cited. Id., 573, 574. Cited. Id., 644, 646. Cited. 199 C. 102. Cited. Id., 155, 159. Cited. Id., 163, 164. Cited. 178 C. 179. Cited. Id., 633. Cited. Id., 718, 720.

Cited. 7 CA 180, 181, 184. Cited. Id., 223, 224. Cited. Id., 470, 472.

Cited. 40 CS 38.

Subsec. (a):

Cited. 172 C. 65, 69. "Extreme emotional disturbance" guidelines. 177 C. 1, 3, 4, 7. Cited. 178 C. 487, 489, 491, 502. Cited. 180 C. 171, 173, 177. Cited. 181 C. 268; id., 284, 285; id., 406, 408. Cited. 182 C. 142, 143, 144, 145, 168, 169, 222, 395; id., 585, 587, 592; id., 603, 607. Cited. 184 C. 121, 122, 125. Cited. 186 C. 414, 415, 416, 417, 423; id., 574-576, 585, 586. Cited. 187 C. 6, 8. Cited. 189 C. 303, 304, 306. Cited. 190 C. 219, 733. Cited. 191 C. 23, 28. Cited. 192 C. 700. Cited. 193 C. 474, 475. Cited. Id., 646, 667. Cited. 194 C. 376, 380, 383, 387. Cited. Id., 392, 393. Cited. Id., 416, 418. Cited. Id., 530, 559. Cited. 195 C. 166, 167, 170. Cited. Id., 232, 233. Cited. Id., 251, 252, 655. Cited. 196 C. 557, 558. Cited. 197 C. 106-108. Cited. Id., 595, 596. Cited. 198 C. 53, 62. Cited. Id., 77, 78. Cited. 199 C. 102.

Cited. 7 CA 180, 182. Cited. Id., 367, 370. Cited. Id., 457-459.

Subsection must be read without the word "affirmative." The state must prove beyond a reasonable doubt all of the elements of the offense charged without imposing any burden on the defendant. 33 CS 28, 81.

Subsec. (b):

Cited. 182 C. 603, 606. Evidence of mental capacity admissible when defendant is charged with commission of crime under which state must prove defendant acted recklessly. 195 C. 232, 240, 241.

Subsec. (c):

Cited. 180 C. 171, 173. Cited. 181 C. 151, 153. Cited. 193 C. 144, 151, 153. Cited. Id., 251, 252. Cited. 194 C. 376, 380, 383. Cited. Id., 392, 393. Cited. Id., 416, 418. Cited. Id., 530, 559, 560. Cited. 196 C. 555, 661, 662.

Sec. 53a-54b. Capital felony. A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the division of state police within the department of public safety or of any local police department, a chief inspector or inspector in the division of criminal justice, a sheriff or deputy sheriff, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18, an official of the department of correction authorized by the commissioner of correction to make arrests in a correctional institution or facility, or of any fireman as defined in subsection (10) of section 53a-3, while such victim was acting within the scope of his duties; (2) murder committed by a defendant who is tried to commit the

same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain; (3) murder committed by one who has previously been convicted of intentional murder or murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; (6) the illegal sale, for economic gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone; (7) murder committed in the course of the commission of sexual assault in the first degree; (8) murder of two or more persons at the same time or in the course of a single transaction.

(P.A. 73-137, S. 3; P.A. 77-604, S. 39, 84; 77-614, S. 486, 610; P.A. 80-335; P.A. 85-144.)

History: P.A. 77-604 substituted "chief inspector or inspector in the division of criminal justice" for "county detective" in Subdiv. (1); P.A. 77-614 made state police department a division within the department of public safety, effective January 1, 1979; P.A. 80-335 added Subdivs. (7) and (8) making murder in course of committing sexual assault in first degree and murder of two or more persons at same time a capital felony; P.A. 85-144 amended Subdiv. (6) by adding "economic" and deleting the proviso that the seller was not, at the time of such sale, a drug-dependent person.

See Sec. 53a-54a re murder.

See Sec. 53a-54c re felony murder.

Cited. 194 C. 416, 418. Cited. 198 C. 92, 110. Cited. 199 C. 163, 174, 177, 178.

Subdiv. (2):

Capital felony murder discussed. 199 C. 163, 164, 173, 174, 176, 178.

Subdiv. (5):

Cited. 197 C. 436, 439, 461.

Subdiv. (8):

Cited. 198 C. 92, 110.

Sec. 53a-54c. Felony murder. A person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit robbery, burglary, kidnapping, sexual assault in the first degree, sexual assault in the first degree with a firearm, sexual assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, he, or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant: (A) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (B) was not armed with a deadly weapon, or any dangerous instrument; and (C) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (D) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(P.A. 74-186, S. 11, 12; P.A. 76-336, S. 21; P.A. 79-570, S. 2.)

History: P.A. 76-336 replaced rape in first degree, deviate sexual intercourse in first degree and sexual contact in first degree with sexual assault in first degree, sexual assault in first degree with firearm, sexual assault in third degree and sexual assault in third degree with firearm; P.A. 79-570 removed murder resulting from commission of or attempt to commit arson from purview of section.

See Sec. 53a-54a re murder.

See Sec. 53a-54b re capital felony.

Cited 171 C. 683, 687. Cited. 176 C. 257, 258. Cited. 177 C. 677, 679. Cited. 178 C. 116, 118. Cited. 179 C. 78-80. Court did not err in refusing to instruct jury on lesser offenses of first degree burglary and first degree robbery since element of causation, which differentiates felony murder from the lesser offenses, was not sufficiently in dispute. 180 C. 599, 601, 602, 604. Cited. 181 C. 151, 153; id., 187, 188. Cited. 182 C. 419, 420; id., 580. Cited (1975 revision). 183 C. 299, 300, 311. Cited. 186 C. 1, 2, 7. Cited. 188 C. 542, 543, 545, 550. Cited. 189 C. 346, 347. Cited. 191 C. 636, 638-641, 644; id., 659-663. Cited. 193 C. 70, 72, 75. Cited. Id., 144, 145, 151. Cited. Id., 350, 352. Cited. 194 C. 223, 224. Cited. Id., 279, 285. Cited. Id., 416, 419. Cited. Id., 530, 559, 565. Cited. 195 C. 505, 506. Manslaughter is not a lesser included

Effect of amendments. — 66 Del. Laws, c. 269, effective June 15, 1988, inserted "unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact." following "rape" throughout subsection (a) and following

"the rape" in subsection (b), and inserted "attempted unlawful sexual intercourse, attempted unlawful sexual penetration or attempted unlawful sexual contact." in subsection (b).

§ 3509. Same — Admissibility of certain evidence.

(a) Notwithstanding any other provision of this Code to the contrary, and except as provided in this section, in any prosecution for rape, unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact, any opinion evidence, reputation evidence and evidence of specific instances of the complaining witness' sexual conduct, or any of such evidence, is not admissible by the defendant in order to prove consent by the complaining witness. (66 Del. Laws, c. 269, § 6.)

Effect of amendments. — 66 Del. Laws, c. 269, effective June 15, 1988, inserted "unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact." following "rape" in subsection (a).

As the rest of this section was not amended, it is not reprinted in this Supplement.

CHAPTER 39. SENTENCE, JUDGMENT AND EXECUTION

§ 3905. Instructions on separate issues of guilt and insanity; instructions on verdicts.

Guilty but mentally ill instruction required where warranted by evidence. — Where warranted by the evidence, guilty but

mentally ill instruction is required regardless of a defendant's desire to avoid it. Daniels v. State, Del. Supr., 538 A.2d 1104 (1988).

CHAPTER 42. CLASSIFICATION OF OFFENSES; SENTENCES

Sec. 4206. Sentence for misdemeanors.
4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.

Sec. 4209A. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.
4214. Habitual criminal; life sentence.

§ 4206. Sentence for misdemeanors.

(a) The sentence for a class A misdemeanor shall be fixed by the court and shall not exceed 2 years' imprisonment and such fine or other conditions as the court may order; provided, however, that the court shall require a person convicted of issuing a worthless check under § 900 of this title to make restitution to the person to whom the worthless check was issued. For purposes of this section, "restitution" shall mean the amount in which the check was

written plus a service fee in the amount of \$30 for processing a worthless check, or a fee of \$50 for processing more than 1 worthless check issued by the same person.

(66 Del. Laws, c. 253, § 1.)

Effect of amendments. — 66 Del. Laws, c. 253, effective May 19, 1986, added the last sentence in subsection (a). As the rest of this section was not amended, it is not reprinted in this Supplement.

§ 4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.

(e) *Aggravating circumstances.*— (1) In order for a sentence of death to be imposed, the jury, unanimously, or judge when applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder:

j. The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary.

(66 Del. Laws, c. 269, § 29.)

Effect of amendments.

66 Del. Laws, c. 269, effective June 15, 1988, inserted "rape," in subsection (e)(1)j.

As the rest of this section was not amended, it is not reprinted in this Supplement.

Constitutionality of capital punishment.

Death by hanging is not "cruel and unusual" punishment in violation of the Eighth Amendment to the United States Constitution, nor is it "cruel" in violation of Article I, § 11 of the Delaware Constitution. *DeShields v. State*, Del. Supr., 534 A.2d 630 (1987).

Standing to challenge constitutionality of death by hanging. — Given the General Assembly-enacted alternative of death by lethal injection, defendant sentenced prior to the 1986 amendment to the section lacked standing to challenge the constitutionality of death by hanging. *DeShields v. State*, Del. Supr., 534 A.2d 630 (1987).

Unconstitutional sentencing infirmity

does not invalidate underlying conviction.

— Invalidity of this section did not retrospectively abrogate the State's right to death-qualify the jury and unconstitutional sentencing infirmity does not invalidate the underlying conviction. *Hobbs v. State*, Del. Supr., 538 A.2d 723 (1988).

Right to impartial jury not violated by death qualification of jury under invalid statute. — Defendant was not deprived of his federal and state constitutional rights to an impartial jury as a result of the death-qualification of the jury in trial under a constitutionally invalid capital punishment statute. *Hobbs v. State*, Del. Supr., 538 A.2d 723 (1988).

A death-qualified jury is not necessarily conviction prone simply because the conviction was rendered in a trial occurring under a mandatory death penalty statute later declared to be unconstitutional. *Hobbs v. State*, Del. Supr., 538 A.2d 723 (1988).

§ 4209A. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.

Any person who is convicted of rape or unlawful sexual intercourse in the first degree shall be punished by imprisonment for not less than 20 years

without benefit of probation or parole or any other reduction. (63 Del. Laws, c. 393, § 1; 65 Del. Laws, c. 494, § 3; 66 Del. Laws, c. 269, § 30.)

Effect of amendments.

66 Del. Laws, c. 269, effective June 15, 1988,
inserted "rape or."

§ 4214. Habitual criminal; life sentence.

(b) Any person who has been 2 times convicted of a felony or an attempt to commit a felony hereinafter specifically named, under the laws of this State, and/or any other state, United States or any territory of the United States, and who shall thereafter be convicted of a subsequent felony hereinafter specifically named, or an attempt to commit such specific felony, is declared to be an habitual criminal, and the court in which such third or subsequent conviction is had, in imposing sentence, shall impose a life sentence upon the person so convicted unless the subsequent felony conviction requires or allows and results in the imposition of capital punishment. Such sentence shall not be subject to the probation or parole provisions of Chapter 43 of this title.

Such felonies shall be:

<i>Section</i>	<i>Crime</i>
803	Arson in the first degree
826	Burglary in the first degree
825	Burglary in the second degree
636	Murder in the first degree
635	Murder in the second degree
632	Manslaughter
783	Kidnapping in the second degree
783A	Kidnapping in the first degree
613	Assault in the first degree
763	Rape in the second degree
764	Rape in the first degree
766	Sodomy in the first degree
832	Robbery in the first degree
771	Unlawful sexual penetration in the second degree
772	Unlawful sexual penetration in the first degree
773	Sexual intercourse in the third degree
774	Unlawful sexual intercourse in the second degree
775	Unlawful sexual intercourse in the first degree
<i>Title 16, Section</i>	<i>Crime</i>
4751	Manufacture, delivery or possession with intent to manufacture or deliver a narcotic drug
4752	Manufacture, delivery or possession with intent to manufacture or deliver nonnarcotic, controlled substance
4752A	Unlawful delivery or attempt to deliver noncontrolled substance

Delaware Code

11 § 4205 CLASSIFICATION OF OFFENSES; SENTENCES 11 § 4205

(k) The court may direct as a condition to any sentence of imprisonment that the Department of Correction shall not permit an offender to be furloughed or be allowed to participate in work release or supervised custody outside the prison institution or facilities. (11 Del. C. 1953, § 4204; 58 Del. Laws, c. 497, § 2; 62 Del. Laws, c. 259, § 2; 66 Del. Laws, c. 134, §§ 1, 2.)

Revisor's note. — Section 3 of 66 Del. Laws, c. 134, provides: "This act shall become effective 90 days after its enactment into law." The act was signed by the Governor on July 10, 1987.

Effect of amendment. — 66 Del. Laws, c. 134, rewrote subsection (c), and substituted "Department of Correction" for "Department of Health and Social Services" in subsections (e), (f) and (g).

Mandatory life term for kidnapping not cruel and unusual punishment. — Under the circumstances of the case, there was no

merit in defendant's contention that a mandatory life term for kidnapping constituted cruel and unusual punishment. *Tyre v. State*, Del. Supr., 412 A.2d 326 (1980).

Restitution as condition of probation authorized. — Sentences imposed on defendants which included as a condition of probation the payment of restitution based on the victim's medical expenses and the victim's pain and suffering or inconvenience caused by serious injury, were fully within the authority of this section. *Wyatt v. State*, Del. Supr., 498 A.2d 1088 (1985).

§ 4205. Sentence for felonies.

(a) A sentence of imprisonment for a felony shall be a definite sentence. The term of imprisonment shall be as provided in subsection (b) of this section.

(b) The term of imprisonment which the court may impose for a felony is fixed as follows:

(1) For a class A felony, life imprisonment, except for conviction of first-degree murder in which event § 4209 of this title shall apply; provided, however, that in the case of an attempt to commit any class A felony, the court shall impose a term of imprisonment and may impose life imprisonment, but may impose less than life imprisonment, except for conviction of an attempt to commit first-degree murder, in which event the court shall impose life imprisonment;

(2) For a class B felony, from 3 to 30 years and such fine or other conditions as the court may order;

(3) For a class C felony, from 2 to 20 years and such fine or other conditions as the court may order;

(4) For a class D felony, 10 years and such fine or other conditions as the court may order;

(5) For a class E felony, 7 years and such fine or other conditions as the court may order.

(c) In the case of the conviction of any felony other than a class A felony, the court may impose the maximum term of imprisonment as stated in subsection (b) of this section or any part thereof, or it may impose any sentence authorized by § 4204 of this title. (11 Del. C. 1953, § 4205; 58 Del. Laws, c. 497, § 2; 59 Del. Laws, c. 203, § 32.)

Cross reference. — As to punishment for persons convicted a second or subsequent time for robbery in the first degree, see § 832 of this title.

Mandatory life term for kidnapping not cruel and unusual punishment. — Under the circumstances of the case, there was no merit in defendant's contention that a manda-

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§ 4208. Fines for corporations.

A sentence to pay a fine, when imposed on a corporation, shall be a sentence to pay an amount fixed by the court not exceeding:

- (1) Ten thousand dollars, when the conviction is of a felony;
- (2) Five thousand dollars, when the conviction is of a class A misdemeanor or of an unclassified misdemeanor for which a term of imprisonment in excess of 3 months is authorized, unless the law defining the offense permits a greater fine;
- (3) Two thousand dollars, when the conviction is of a class B or class C misdemeanor or of an unclassified misdemeanor for which the authorized term of imprisonment is not in excess of 3 months, unless the law defining the offense permits a greater fine;
- (4) Five hundred dollars, when the conviction is of a violation if there is no prior conviction of the same violation;
- (5) One thousand dollars, when the conviction is of a violation and the defendant has a prior conviction of the same violation; or
- (6) Any higher amount equal to double the amount of money or double the value of the property gained by the defendant through the commission of the offense. (11 Del. C. 1953, § 4208; 58 Del. Laws, c. 497, § 2.)

Cross reference. — As to criminal liability of corporations, see §§ 281 to 284 of this title.

§ 4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.

(a) *Punishment for first-degree murder.* — Any person who is convicted of first-degree murder shall be punished by death or by imprisonment for the remainder of his or her natural life without benefit of probation or parole or any other reduction, said penalty to be determined in accordance with this section.

(b) *Separate hearing on issue of punishment for first-degree murder.* — (1) Upon a conviction of guilt of a defendant of first-degree murder, the Superior Court shall conduct a separate hearing to determine whether the defendant should be sentenced to death or to life imprisonment without benefit of probation or parole as authorized by subsection (a) of this section. If the defendant was convicted of first-degree murder by a jury, this hearing shall be conducted by the trial judge before that jury as soon as practicable after the return of the verdict of guilty. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and shall remain separately sequestered until a verdict on guilt is entered. If the verdict of the trial jury is guilty of first-degree murder said alternates shall sit as alternate jurors on the issue of punishment. If, for any reason satisfactory to the Court, any member of the trial jury is excused from participation in the hearing on punishment, the trial judge shall replace such juror or jurors with alternate juror or jurors. If a jury of

12 jurors cannot participate in the hearing a separate and new jury, plus alternates, shall be selected for the hearing in accordance with the applicable rules of the Superior Court and laws of Delaware, unless the defendant(s) and the State stipulate to the use of a lesser number of jurors.

(2) If the defendant was convicted of first-degree murder by the Court, after a trial and waiver of a jury trial or after a plea of guilty or nolo contendere, the hearing shall be conducted by the trial judge before a jury, plus alternates, empaneled for that purpose and selected in accordance with the applicable rules of the Superior Court and laws of Delaware, unless said jury is waived by the State and the defendant in which case the hearing shall be conducted, if possible, by and before the trial judge who entered the finding of guilty or accepted the plea of guilty or nolo contendere.

(c) *Procedure at punishment hearing.* -- (1) The sole determination for the jury or judge at the hearing provided for by this section shall be the penalty to be imposed upon the defendant for the conviction of first-degree murder. At the hearing, evidence may be presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed. The evidence shall include matters relating to any mitigating circumstance and to any aggravating circumstance, including, but not limited to, those aggravating circumstances enumerated in subsection (e) of this section. Notice in writing of any aggravating circumstances and any mitigating circumstances shall be given to the other side by the party seeking to introduce evidence of such circumstances prior to the punishment hearing, and after the verdict on guilt, unless in the discretion of the Court such advance notice is dispensed with as impracticable. The record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant or the absence of any such prior criminal convictions and pleas shall also be admissible in evidence.

(2) At the hearing the Court shall permit argument by the State, the defendant and/or his counsel, on the punishment to be imposed. Such argument shall consist of opening statements by each, unless waived, opening summation by the State, rebuttal summation by the defendant and/or his counsel and closing summation by the State.

(3) Upon the conclusion of the evidence and arguments the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed.

(4) In the instructions to the jury the Court shall include instructions for it to weigh and consider any mitigating circumstances or aggravating circumstances and any of the statutory aggravating circumstances set forth in subsection (e) of this section which may be raised by the evidence. The jury shall be instructed to weigh any mitigating factors against the aggravating factors.

(d) *Determination of sentence.* -- (1) A sentence of death shall not be imposed unless the jury or judge, where appropriate, finds:

a. Beyond a reasonable doubt at least 1 statutory aggravating circumstance; and

b. Unanimously recommends, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circum-

stances or details of the commission of the offense and the character and propensities of the offender, that a sentence of death be imposed. Where the jury, or judge when applicable, submits such a finding and recommendation, the Court shall sentence the defendant to death as provided by subsection (f) of this section. A finding by the jury of a statutory aggravating circumstance, and a consequent recommendation of death, supported by the evidence, shall be binding on the Court.

(2) Refusal or failure of the Court to follow the jury's recommendation for any reason shall be appealable by the State as of right to the Supreme Court within 30 days after imposition of sentence.

(3) If the jury, or judge when applicable, cannot unanimously find that at least 1 statutory aggravating circumstance exists and cannot unanimously recommend death, the Court shall sentence the defendant to life imprisonment without benefit of probation or parole.

(e) *Aggravating circumstances.* — (1) In order for a sentence of death to be imposed, the jury, unanimously, or judge when applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder:

a. The murder was committed by a person in, or who has escaped from, the custody of a law-enforcement officer or place of confinement.

b. The murder was committed for the purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody.

c. The murder was committed against any law-enforcement officer, corrections employee or fireman, while such victim was engaged in the performance of his official duties.

d. The murder was committed against a judicial officer, a former judicial officer, Attorney General, former Attorney General, Assistant or Deputy Attorney General or former Assistant or Deputy Attorney General, State Detective or former State Detective, Special Investigator or former Special Investigator, during, or because of, the exercise of his official duty.

e. The murder was committed against a person who was held or otherwise detained as a shield or hostage.

f. The murder was committed against a person who was held or detained by the defendant for ransom or reward.

g. The murder was committed against a person who was a witness to a crime and who was killed for the purpose of preventing his appearance or testimony in any grand jury, criminal or civil proceeding involving such crime.

h. The defendant paid or was paid by another person or had agreed to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

i. The defendant was previously convicted of another murder or manslaughter or of a felony involving the use of, or threat of, force or violence upon another person.

j. The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary.

k. The defendant's course of conduct resulted in the deaths of 2 or more persons where the deaths are a probable consequence of the defendant's conduct.

l. The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering him.

m. The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person.

n. The defendant was under a sentence of life imprisonment, whether for natural life or otherwise, at the time of the commission of the murder.

o. The murder was committed for pecuniary gain.

p. The victim was pregnant.

q. The victim was severely handicapped or severely disabled.

r. The victim was 62 years of age or older.

s. The victim was defenseless.

(2) In any case where the defendant has been convicted of murder in the first degree in violation of any provision of § 636(a)(2)-(7) of this title, that conviction shall establish the existence of a statutory aggravating circumstance and the jury, or judge where appropriate, shall be so instructed. This provision shall not preclude the jury, or judge where applicable, from considering and finding the statutory aggravating circumstances listed in this subsection and any other aggravating circumstances established by the evidence.

(f) *Method and imposition of sentence of death.* — The imposition of a sentence of death shall be upon such terms and conditions as the trial court may impose in its sentence, including the place, the number of witnesses and conditions of privacy. Punishment of death shall, in all cases, be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person sentenced to death is dead, and such execution procedure shall be determined and supervised by the Commissioner of the Department of Correction. The administration of the required lethal substance or substances required by this section shall not be construed to be the practice of medicine and any pharmacist or pharmaceutical supplier is authorized to dispense drugs to the Commissioner or his designee, without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law. Such sentence may not be carried out until final review thereof is had by the Delaware Supreme Court as provided for in subsection (g) of this section. The Court or the Governor may suspend the execution of the sentence until a later date to be specified, solely to permit completion of the process of judicial review of the conviction.

If the execution of the sentence of death as provided above is held unconstitutional by a court of competent jurisdiction, then punishment of death shall,

in all cases, be inflicted by hanging by the neck. The imposition of a sentence of death shall be upon such terms and conditions as the trial court may impose in its sentence, including the place, the number of witnesses and conditions of privacy. Such sentence may not be carried out until final review thereof is had by the Delaware Supreme Court as provided in subsection (g) of this section. The Court or the Governor may suspend the execution of the sentence until a later date to be specified, solely to permit completion of the process of judicial review of the conviction.

(g) *Automatic review of death penalty by Delaware Supreme Court.* — (1)

Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the recommendation on and imposition of that penalty shall be reviewed on the record by the Delaware Supreme Court. Absent an appeal having been taken by the defendant upon the expiration of 30 days after the sentence of death has been imposed, the Clerk of the Superior Court shall require a complete transcript of the punishment hearing to be prepared promptly and within 10 days after receipt of that transcript he shall transmit the transcript, together with a notice prepared by him, to the Delaware Supreme Court. The notice shall set forth the title and docket number of the case, the name of the defendant, the name and address of any attorney and a narrative statement of the judgment, the offense and the punishment prescribed. The Court shall, if necessary, appoint counsel to respond to the State's positions in the review proceedings.

(2) The Supreme Court shall limit its review under this section to the recommendation on and imposition of the penalty of death and shall determine:

a. Whether, considering the totality of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases arising under this section.

b. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection (e) of this section and, where applicable, § 636(a)(2)-(7) of this title.

(3) The Supreme Court shall permit the defendant and the State to submit briefs within the time provided by the Court, and permit them to present oral argument to the Court.

(4) With regard to review of the sentence in accordance with this subsection, the Court shall:

a. Affirm the sentence of death.

b. In cases where the trial court erroneously rejected the jury's recommendation of the death sentence, remand with directions to reinstate the jury's recommendation and to impose the penalty of death.

c. Set aside the sentence of death and remand for correction of any errors occurring during the hearing and for imposition of the appropriate penalty. Such errors shall not affect the determination of guilt

and shall not preclude the reimposition of death where appropriately determined after a new hearing on punishment.

d. Set forth its findings as to the reasons for its actions.

(h) *Ordinary review not affected by section.* — Any error in the guilt phase of the trial may be raised as provided by law and rules of court and shall be in addition to the review of punishment provided by this section. (11 Del. C. 1953, § 4209; 58 Del. Laws, c. 497, § 2, 59 Del. Laws, c. 284, § 2; 61 Del. Laws, c. 41, § 1; 63 Del. Laws, c. 357, § 1; 65 Del. Laws, c. 281, § 1; 65 Del. Laws, c. 494, § 4.)

Cross reference. — As to murder in the first degree, see § 636 of this title.

Revisor's note. — Section 2 of 65 Del. Laws, c. 281, provides: "If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable."

Section 3 of 65 Del. Laws, c. 281, provides: "This act shall become effective only for acts committed after its enactment except that any person sentenced to death for acts committed prior to the enactment of this act shall be permitted to elect lethal injection, as provided herein, as the method of death. The Commissioner of the Department of Correction by regulation shall determine the procedures for such election." The act was signed by the Governor on June 13, 1986.

Section 6 of 65 Del. Laws, c. 494, provides: "If any provisions of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act, which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable."

Effect of amendments. — 65 Del. Laws, c. 281, effective June 18, 1986, in subsection (f), divided the former second sentence into the present second and fourth sentences, substituting "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person sentenced to death is dead, and such execution procedure shall be determined and supervised by the Commissioner of the Department of Correction" for "hanging by the neck and" at the end of the second sentence, inserted the present third sentence, and added the second paragraph.

65 Del. Laws, c. 494, effective July 9, 1986, substituted "unlawful sexual intercourse" for "rape" in subparagraph j of paragraph (1) of subsection (e).

Constitutionality of capital punishment. — Capital punishment per se is not violative of

the constitutional guaranties against "cruel" or "cruel and unusual" punishment. *State v. Dickerson*, Del. Supr., 298 A.2d 761 (1972).

Assuming uniform application, the provisions governing punishment for first-degree murder in this section and § 636 of this title, as amended Mar. 29, 1974, are constitutional under *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); *State v. Sheppard*, Del. Supr., 331 A.2d 142 (1974).

A mandatory death penalty, uniformly applied, does not constitute "cruel and unusual" punishment under the Eighth Amendment of the federal Constitution, or "cruel" punishment under the Delaware Bill of Rights. *State v. Sheppard*, Del. Supr., 331 A.2d 142 (1974).

The mandatory death provision of former subsection (a) of this section must fall as permitting "cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments. *State v. Spence*, Del. Supr., 367 A.2d 983 (1976).

Retention or abolition of the death penalty is a question for the lawmaking authorities rather than the courts. *Steigler v. State*, Del. Supr., 277 A.2d 662, modified, 408 U.S. 939, 92 S. Ct. 2872, 33 L. Ed. 2d 760 (1971).

The retention or abolition of capital punishment in this State is for the decision of the people of this State, speaking through their chosen representatives in the General Assembly. *State v. Dickerson*, Del. Supr., 298 A.2d 761 (1972).

Delaware retains the death penalty only for murder in the first degree. *State v. White*, Del. Supr., 395 A.2d 1082 (1978).

Mandatory death statute is not retroactive. *State v. Smith*, Del. Supr., 324 A.2d 202 (1974).

Subsection (c) of this section is not unconstitutionally broad and vague. *State v. White*, Del. Supr., 395 A.2d 1082 (1978).

Subsection (c)(1) of this section, permitting the sentencing authority to receive evidence of "any aggravating circumstance, including, but not limited to, those aggravating circumstances enumerated in subsection (e) of this section" is constitutional. *State v. White*, Del. Supr., 395 A.2d 1082 (1978).

CHAPTER 782

HOMICIDE

- 782.02 Justifiable use of deadly force
- 782.03 Excusable homicide.
- 782.04 Murder.
- 782.07 Manslaughter.
- 782.071 Vehicular homicide.
- 782.072 Vessel homicide.
- 782.08 Assisting self-murder.
- 782.09 Killing of unborn child by injury to mother.
- 782.11 Unnecessary killing to prevent unlawful act.

782.02 Justifiable use of deadly force.—The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or upon or in any dwelling house in which such person shall be.

History.—ss 4, 5, ch 1637, 1868, RS 2378, ch 4967, 1901, s 1, ch 4964, 1901, GS 3203, RGS 5033, CGL 7135, s 66, ch 74-383, s 1, ch 75-24, s 45, ch 75-293

782.03 Excusable homicide.—Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

History.—s 6, ch 1637, 1868, RS 2379, GS 3204, RGS 5034, CGL 7136, s 1, ch 75-13

782.04 Murder.—

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; or

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

- a. Trafficking offense prohibited by s. 893.135(1),
- b. Arson,
- c. Sexual battery,
- d. Robbery,
- e. Burglary,
- f. Kidnapping,
- g. Escape,
- h. Aggravated child abuse,
- i. Aircraft piracy, or
- j. Unlawful throwing, placing, or discharging of a destructive device or bomb; or

3. Which resulted from the unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being perpetrated by any act imminently dangerous and evincing a depraved mind regardless of whether although without any premeditated design to death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any:

- (a) Trafficking offense prohibited by s. 893.135(1),
- (b) Arson,
- (c) Sexual battery,
- (d) Robbery,
- (e) Burglary,
- (f) Kidnapping,
- (g) Escape,
- (h) Aggravated child abuse,
- (i) Aircraft piracy, or
- (j) Unlawful throwing, placing, or discharging of a destructive device or bomb

by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony is guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being perpetrated without any design to effect death of the person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any:

- (a) Trafficking offense prohibited by s. 893.135(1),
- (b) Arson,
- (c) Sexual battery,
- (d) Robbery,
- (e) Burglary,
- (f) Kidnapping,
- (g) Escape,
- (h) Aggravated child abuse,
- (i) Aircraft piracy,
- (j) Unlawful throwing, placing, or discharging of a destructive device or bomb, or
- (k) Unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the person killed,

is murder in the third degree and constitutes the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s 2, ch 1637, 1868, RS 2380, GS 3205, RGS 5035, s 1, ch 28023, 1953, s 712, ch 71-136, s 2, ch 74-383, s 6, ch 75-298, s 1, ch 76-141, s 290, ch 75-600, s 82-69, s 1, ch 84-16, s 6, ch 97-243
 cf—s 316.656 Mandatory adjudication, prohibition against plea of insanity
 s 732.802 Killer not entitled to receive property of other person

CHAPTER 922

EXECUTION

- 922.02 Execution of sentence imposing fine.
 922.04 Discharge of prisoner unable to pay fine.
 922.051 Imprisonment in county jail, term of 1 year or less.
 922.06 Stay of execution of death sentence.
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 922.09 Capital cases.
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 922.14 Sentence of death unexecuted for unjustifiable reasons.
 922.15 Return of warrant of execution issued by Supreme Court.

922.02 Execution of sentence imposing fine.—Execution on a sentence imposing a fine may be issued in the same manner as execution on a judgment in a civil action, whether or not the sentence also imposes imprisonment.

History.—s. 263, ch. 19554, 1939; CGL 1940 Supp. 8663(273), s. 7, ch. 22000, 1945; s. 130, ch. 70-339.

922.04 Discharge of prisoner unable to pay fine.—When the court determines on the written application of a prisoner that he has been imprisoned for 60 days solely for failure to pay a fine or costs which total not more than \$300 and that the prisoner is indigent and unable to pay the fine or costs, the court shall order the prisoner discharged from custody.

History.—s. 265, ch. 19554, 1939; CGL 1940 Supp. 8663(275), s. 1, ch. 29661, 1961; s. 131, ch. 70-339.

922.051 Imprisonment in county jail, term of 1 year or less.—When a statute expressly directs that imprisonment be in a state prison, the court may impose a sentence of imprisonment in the county jail if the total of the prisoner's cumulative sentences is not more than 1 year.

History.—s. 1, ch. 59-72, s. 1, ch. 61-168, s. 1, ch. 67-241, s. 132, ch. 70-339.

922.06 Stay of execution of death sentence.—The execution of a death sentence may be stayed only by the Governor or incident to an appeal.

History.—s. 267, ch. 19554, 1939; CGL 1940 Supp. 8663(277), s. 133, ch. 70-339.

922.07 Proceedings when person under sentence of death appears to be insane.—

(1) When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The

examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the sentence shall appoint counsel to represent him.

(2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to a Department of Corrections mental health treatment facility.

(4) When a person under sentence of death has been committed to a Department of Corrections mental health treatment facility, he shall be kept there until the facility administrator determines that he has been restored to sanity. The facility administrator shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

(5) The Governor shall allow reasonable fees to psychiatrists appointed under the provisions of this section which shall be paid by the state.

History.—s. 268, ch. 19554, 1939; CGL 1940 Supp. 8663(278), s. 134, ch. 70-339, s. 1, ch. 85-193.

922.08 Proceedings when person under sentence of death appears to be pregnant.—

(1) When the Governor is informed that a person under sentence of death may be pregnant, he shall stay execution of the sentence and appoint a qualified physician to examine the convicted person and determine if she is pregnant.

(2) After receiving the report of the physician, if the Governor determines that the convicted person is not pregnant, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

(3) If the Governor determines that a convicted person whose execution has been stayed because of pregnancy is no longer pregnant, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

(4) The Governor shall allow a reasonable fee to the physician appointed under the provisions of this section which shall be paid by the state.

History.—s. 269, ch. 19554, 1939; CGL 1940 Supp. 8663(279), s. 135, ch. 70-339.

922.09 Capital cases.—When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record of the conviction and sentence, and the sheriff shall send the record to the Governor. The sentence shall not be executed until the Governor issues a warrant, attaches it to the copy of the rec-

ord. and transmits it to the warden, directing him to execute the sentence at a time designated in the warrant.
History.—s 270 ch 19554 1939 CGL 1940 Supp 8663(280) s 136 ch 70-339

922.10 Execution of death sentence.—A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution.

History.—s 271 ch 19554 1939 CGL 1940 Supp 8663(281) ss 19 22 35 ch 69-106 s 137 ch 70-339

922.11 Regulation of execution.—

(1) The superintendent of the state prison or a deputy designated by him shall be present at the execution. The superintendent shall set the day for execution within the week designated by the Governor in the warrant.

(2) Twelve citizens selected by the superintendent shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of religion requested by the convicted person may be present. Representatives of news media may be present under rules approved by the Secretary of Corrections. All other persons, except prison officers and guards, shall be excluded during the execution.

(3) The body of the executed person shall be prepared for burial and, if requested, delivered at the prison gates to relatives of the deceased. If a coffin has not been provided by relatives, the body shall be delivered in a plain coffin. If the body is not claimed by relatives, it shall be given to physicians who have requested it for dissection or to be disposed of in the same manner as are bodies of prisoners dying in the state prison.

History.—s 272 ch 19554 1939 CGL 1940 Supp 8663(282) s 1 ch 20520 1941 s 1 ch 59-90 ss 19 35 ch 69-106 s 138 ch 70-339 s 1 ch 77-189 s 31 ch 79-3

922.111 Transfer to state prison for safekeeping before death warrant issued.—The sheriff shall deliver

a person sentenced to death to the state prison to await the death warrant. A circuit judge of the circuit in which a death sentence was imposed may order the convicted person transferred to the state prison before the issuance of a warrant of execution if he determines that the transfer is necessary for the safekeeping of the prisoner.

History.—s 1 ch 59-215 s 139 ch 70-339

922.12 Return of warrant of execution issued by Governor.—After the death sentence has been executed, the warden of the state prison shall return to the Governor the warrant and a signed statement of the execution. The warden shall file an attested copy of the warrant and statement with the clerk of the court that imposed the sentence.

History.—s 273 ch 19554 1939 CGL 1940 Supp 8663(283) s 140 ch 70-339

922.14 Sentence of death unexecuted for unjustifiable reasons.—If a death sentence is not executed because of unjustified failure of the Governor to issue a warrant, or for any other unjustifiable reason, on application of the Department of Legal Affairs, the Supreme Court shall issue a warrant directing the sentence to be executed during a week designated in the warrant.

History.—s 275 ch 19554 1939 CGL 1940 Supp 8663(285) ss 11 35 ch 69-106 s 141 ch 70-339 s 1 ch 70-439

922.15 Return of warrant of execution issued by Supreme Court.—After the sentence has been executed pursuant to a warrant issued by the Supreme Court, the warden of the state prison shall return to the Supreme Court the warrant and a signed statement of the execution. The warden shall file an attested copy of the warrant and statement with the clerk of the court that imposed the sentence. The warden shall send to the Governor an attested copy of the warrant and statement.

History.—s 276 ch 19554 1939 CGL 1940 Supp 8663(286) s 142 ch 70-339

17-10-35.2. Hearing to determine appropriateness of interim appellate review of pretrial rulings.

Prior to the filing of a report by the trial judge under Code Section 17-10-35.1 certifying that pretrial proceedings are complete, the court shall conduct a hearing to determine if an interim appellate review of pretrial rulings is appropriate. The court shall hear from the state and the defense as to whether the delay to be caused by interim appellate review outweighs the need for such review. The court shall order such review and initiate the procedure contained in Code Section 17-10-35.1 unless the court concludes and enters an order to the effect that interim appellate review would not serve the ends of justice in the case. An order obviating interim appellate review shall not be appealable. (Code 1981, § 17-10-35.2, enacted by Ga. L. 1988, p. 1437, § 4.)

Effective date. — This Code section became effective July 1, 1988.

17-10-36. Establishment of unified review procedure by Supreme Court; effect on habeas corpus.

(a) The Supreme Court of Georgia shall establish, by rules, a new unified review procedure to provide for the presentation to the sentencing court and to the Supreme Court of all possible challenges to the trial, conviction, sentence, and detention of defendants upon whom the sentence of death has been or may be imposed, which challenges before July 1, 1988, have been presented for review by the former unified review procedure under this subsection. Such new unified review procedure shall govern both pretrial and posttrial appellate review of death penalty cases.

(b) The Supreme Court shall establish, by rules, a series of check lists to be utilized by the trial court, the prosecuting attorney, and defense counsel prior to, during, and after the trial of cases in which the death penalty is sought to make certain that all possible matters which could be raised in defense have been considered by the defendant and defense counsel and either asserted in a timely and correct manner or waived in accordance with applicable legal requirements, so that, for purposes of any pretrial review and the trial and posttrial review, the record and transcript of proceedings will be complete for a review by the sentencing court and the Supreme Court of all possible challenges to the trial, conviction, sentence, and detention of the defendant.

(c) Nothing in this Code section or in the rules of the Supreme Court shall limit or restrict the grounds of review or suspend the rights or remedies available through the procedures governing the writ of habeas corpus.

(d) The procedures governing the writ of habeas corpus may be employed to assert rights or seek remedies if the procedures established in the rules of the Supreme Court as applied to the petitioner are inadequate or ineffective in any constitutional sense. (Code 1933, § 27-2538, enacted by Ga. L. 1980, p. 390, § 1; Ga. L. 1988, p. 1437, § 5.)

The 1988 amendment, effective July 1, 1988, rewrote subsections (a) and (b) to the extent that a detailed comparison would be impracticable. For the previous versions of these subsections, see § 17-10-36 in the bound volume.

Code Commission notes. — Pursuant to § 28-9-5, in 1988 a comma was inserted following "July 1, 1988" in subsection (a) and a comma was deleted following "death penalty is sought" near the beginning of subsection (b).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION TO WHAT PROCEEDINGS SECTION APPLICABLE

General Consideration

Constitutionality. — The unified appeal procedure under this section does not violate the due process clause of U.S. Const., Amend. 14 in that it fails to provide a defendant with reciprocal rights of discovery, nor does it violate the equal protection clause of the same amendment. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Purpose of procedure is to prevent and correct error. — The purpose of the unified appeal procedure under this section is not to force a waiver of any rights. Rather, the procedure is designed to prevent the occurrence of error to the maximum extent feasible and to correct as promptly as possible any error that nonetheless may occur. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Unified appeal procedure benefits criminal defendant against whom death penalty is sought by ensuring that all state and federal rights available to him are made known to him. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Defendant offered numerous opportunities to state dissatisfaction with attor-

ney. — A defendant has not suffered the denial of a constitutional right under this section when he is offered the opportunity, prior to and during trial, to state that he is dissatisfied with his attorney's assistance. By affording a defendant numerous opportunities to raise questions or objections concerning his counsel's assistance, the unified appeal procedure recognizes that prior to or during trial the problem of ineffective assistance of counsel may be more suitably remedied than after conviction and the imposition of the death sentence. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

To What Proceedings Section Applicable

Procedure designed to protect defendant during each phase of judicial process. — The unified appeal procedure is designed to protect the criminal defendant in this potentially precarious situation during each phase of the judicial process which may ultimately result in a conviction and sentence of death. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Proceedings under unified appeal procedure are applicable only in cases in

which death penalty is sought, and commence at earliest possible opportunity after indictment. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Unified appeal procedure establishes

unified motion for review procedure; this "motion" encompasses pretrial, trial, and certain review proceedings. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

17-10-37. Appointment of assistant to Supreme Court to provide information from prior capital cases; employment of staff to compile data; attachment for administrative purposes of office of assistant to office of clerk of Supreme Court.

JUDICIAL DECISIONS

Cited in *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984).

17-10-38. Death sentences generally.

(a) All persons who have been convicted of a capital offense and have had imposed upon them a sentence of death shall suffer such punishment by electrocution.

(b) In all cases in which the defendant is sentenced to be electrocuted, it shall be the duty of the trial judge in passing sentence to direct that the defendant be delivered to the Department of Corrections for electrocution at a state correctional institution designated by the department. (Ga. L. 1924, p. 195, § 1; Code 1933, § 27-2512; Ga. L. 1937-38, Ex. Sess., p. 330, § 1; Ga. L. 1985, p. 283, § 1.)

The 1985 amendment, effective July 1, 1985, substituted "Corrections" for "Offender Rehabilitation" in subsection (b).

OPINIONS OF THE ATTORNEY GENERAL

Commissioner of offender rehabilitation (now corrections) is authorized to designate any state correctional institution as the place for carrying out an execution. 1980 Op. Att'y Gen. No. 80-121.

A state correctional institution is any facility used to punish criminal offenders. 1980 Op. Att'y Gen. No. 80-121.

17-10-40. Change of time period for execution where time period set for execution has passed generally; recordation on court minutes; length of and time limitation for new time period for execution; setting of day and time for execution by Department of Corrections.

(a) Where the time period for the execution of any convicted person in a capital case has passed by reason of a supersedeas incident to appellate review, a stay of execution by the State Board of Pardons and Paroles, or for any other reason, a judge of the superior court of the county where the case was tried shall have the power and authority to pass an order fixing a new time period for the execution of the original sentence without requiring the convicted person to be brought before him by a writ of habeas corpus. The order shall be recorded on the minutes of the court and a certified copy of the order shall be sent immediately to the convicted person's attorney of record, to the Attorney General, and to the superintendent of the state correctional institution at the place of execution.

(b) The new time period for the execution shall be seven days in duration and shall commence at noon on a specified date and shall end at noon on a specified date. The new time period for the execution fixed by the judge shall commence not less than ten nor more than 20 days from the date of the order.

(c) The Department of Corrections shall set the day and time for execution within the time period designated by the judge of the superior court. If the execution is not carried out on the day and at the time originally set by the Department of Corrections, the Department of Corrections is authorized to set new dates and times for execution within the period designated by the judge of the superior court. (Ga. L. 1924, p. 195, § 7; Code 1933, § 27-2518; Ga. L. 1983, p. 665, § 2; Ga. L. 1985, p. 1463, § 2.)

The 1983 amendment, effective March 16, 1983, inserted "the convicted person's attorney of record, to the Attorney General, and to" preceding "the superintendent of the state correctional institution" in the next-to-last sentence.

The 1985 amendment, effective July 1, 1985, designated the first and second sentences of this Code section as subsection (a); designated the remaining sentence of this Code section as the second sentence of subsection (b); in the first sentence of sub-

section (a), twice substituted "time period" for "date," and substituted "a" for "the" preceding "judge of the superior court of the county"; in subsection (b), added the first sentence and, in the second sentence, substituted "time period" for "date" and substituted "commence" for "be"; and added subsection (c).

Code Commission notes. — Pursuant to § 28-9-5, in 1985 "Offender Rehabilitation" has been changed to "Corrections" in subsection (c).

OPINIONS OF THE ATTORNEY GENERAL

Requirements for order establishing new execution date. — To constitute a facially valid order establishing a new execution date for a condemned person where the original execution date has passed, the order must establish a new execution date within limits set forth in this section. 1981 Op. Att'y Gen. No. 81-105.

17-10-41. Persons required to be present at executions.

There shall be present at the execution of a convicted person the superintendent of the state correctional institution or a deputy superintendent thereof, at least three executioners, two physicians to determine when death supervenes, electricians, and other correctional officers, assistants, and witnesses as determined by the commissioner of corrections. In addition, the convicted person may request the presence of his counsel, clergyman, and a reasonable number of relatives and friends, provided that the total number of witnesses appearing at the request of the convicted person shall be determined by the commissioner of corrections. (Ga. L. 1924, p. 195, § 4; Code 1933, § 27-2515; Ga. L. 1956, p. 161, § 32; Ga. L. 1988, p. 252, § 1.)

The 1988 amendment, effective March 15, 1988, substituted "at least three executioners," for "who shall serve as executioner, at least two assistants," and "electricians and other correctional officers, assistants, and witnesses as determined by the commissioner of corrections" for "an electrician, a suitable guard, and, if the convicted person so desires, his counsel, relatives, and such clergymen and friends as he may desire" in the first sentence and added the second sentence.

17-10-44. Death chamber apparatus, etc.

The Department of Corrections shall provide a death chamber and all necessary apparatus, machinery, and appliances for inflicting the penalty of death by electrocution. (Ga. L. 1924, p. 195, § 2; Code 1933, § 27-2513; Ga. L. 1956, p. 161, § 28; Ga. L. 1985, p. 283, § 1.)

The 1985 amendment, effective July 1, 1985, substituted "Corrections" for "Offender Rehabilitation."

ARTICLE 3

MENTAL INCOMPETENCY TO BE EXECUTED

Editor's notes. — Ga. L. 1988, p. 1003, § 2, effective July 1, 1988, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of §§ 17-10-60 through 17-10-63 and was based on Ga. L. 1981, Ex. Sess., p. 8 (Code enactment act). (See history lines in bound volume for pre-Code history of the former article.)

17-10-60. "Mentally incompetent to be executed" defined.

As used in this article, the term "mentally incompetent to be executed" means that because of a mental condition the person is presently unable to know why he or she is being punished and understand the nature of the punishment. (Code 1981, § 17-10-60, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-61. No execution upon determination of mental incompetency to be executed.

A person under sentence of death shall not be executed when it is determined under the provisions of this article that the person is mentally incompetent to be executed as defined in Code Section 17-10-60. (Code 1981, § 17-10-61, enacted by Ga. L. 1988, p. 1003, § 2.)

Law reviews. — For note, "Ford v. Execution of the Insane," see 38 Mercer L. Wainwright: Eighth Amendment Prohibits Rev. 949 (1987).

17-10-62. Exclusive procedure for challenging mental competency to be executed.

Notwithstanding any other provision of this Code, this article provides the exclusive procedure for challenging mental competency to be executed when such challenge is made subsequent to the time of conviction and sentence. (Code 1981, § 17-10-62, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-63. Filing of application; contents.

(a) An application brought under this article must be filed in the superior court of the county in which the applicant is being detained. The named respondent shall be the person having actual custody of the applicant.

(b) An application brought under this article shall identify the proceeding in which the applicant was convicted, give the date of the rendition and the final judgment complained of, set forth the fact that a time

period for execution has been set, give the date of the signing of the order and the dates of the designated time period for execution, and shall clearly set forth alleged facts in support of the assertion that the applicant is presently mentally incompetent to be executed. The application shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The application shall identify any previous proceedings that the applicant may have taken challenging his mental competency to be executed or challenging his mental condition in relation to a conviction and sentence in question. Arguments and citations of authority shall be omitted from the application. The application must be verified with the oath of the applicant or of some other person in his behalf. (Code 1981, § 17-10-63, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-64. Service of application.

Service of an application brought under this article shall be made upon the person having custody of the applicant. If the applicant is being detained under the custody of the Department of Corrections, an additional copy of the application shall be served upon the Attorney General. If the applicant is being detained under the custody of some authority other than the Department of Corrections, an additional copy of the petition shall be served upon the district attorney of the county in which the application is filed. (Code 1981, § 17-10-64, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-65. Answer by respondent.

As soon as possible after the filing and docketing of the application under this article, the respondent shall answer the application. The court may schedule a case for a hearing prior to the filing of responsive pleadings but, in any event, shall schedule the case for a hearing as soon as possible so that the proceedings may move expeditiously. (Code 1981, § 17-10-65, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-66. Examination of applicant.

(a) By filing an application under this article, the applicant specifically consents to submit to a state examination for the purposes of assessing mental competency to be executed.

(b) Simultaneously with the filing of the application, the applicant, if he or she wishes the court to consider any request for appointment of an expert, shall file such a request and shall state specific facts in support of that request so that the court may determine if the applicant's mental competency to be executed is in fact a significant issue. The applicant shall further submit with the motion a specific statement as to the partic-

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ular expert requested, the nature of the examination to be conducted, the time period within which an examination can be conducted, and an estimate of the expenses to be incurred.

(c) If the applicant has filed a request for an examination as provided in subsection (b) of this Code section and the applicant makes a sufficient showing that his or her mental competency to be executed is a significant issue, the court shall appoint an expert to make an examination of the applicant, with such examination to be conducted as soon as possible. Payment for such expert shall be made by the Department of Corrections unless otherwise designated by the General Assembly. (Code 1981, § 17-10-66, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-67. When application to be filed.

An application under this article shall not be filed until completion of direct appeal and until an order has been signed by a judge of the trial court setting a time period for the execution. (Code 1981, § 17-10-67, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-68. Proof; disposition.

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

(b) The taking of depositions shall be governed by Code Sections 9-11-26 through 9-11-32 and 9-11-37.

(c) If a sworn affidavit is to be introduced into evidence by either party, the party intending to introduce such an affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case or, in the event a hearing is set less than five days from the date of the filing of the application, as soon as possible so that opposing counsel has the opportunity to review the affidavit prior to the hearing. The affidavit so served shall be accompanied by notice of the party's intention to introduce it into evidence. The superior court judge considering the application may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) After reviewing the pleadings and evidence offered at the hearing, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgment is based. The findings of fact and conclusions of law shall be recorded as part of the record in the case.

(e) If the court finds in favor of the applicant by finding that the applicant has proven his or her mental incompetence to be executed by a preponderance of the evidence, the court shall enter an appropriate

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order with respect to any scheduled execution time period and shall enter such supplementary orders as necessary and proper. If the court denies the application, the court shall direct that immediate telephonic notification be given to the parties and any stay presently entered under this article shall be dissolved instantler. (Code 1981, § 17-10-68, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-69. Prior adjudication as presumption of mental competency.

If an applicant is determined to have previously filed an application under this article and has previously been determined to be mentally competent to be executed, such prior adjudication shall act as a presumption of mental competency and the applicant shall not be entitled to a new hearing on the question of mental competency to be executed absent the applicant's making a prima-facie showing of a substantial change in circumstances sufficient to raise a significant question as to the applicant's mental competency to be executed at the time of filing of any subsequent applications. (Code 1981, § 17-10-69, enacted by Ga. L. 1988, p. 1003, § 2.)

17-10-70. Appeals.

(a) Appeals in cases brought under this article shall be governed by Chapter 6 of Title 5 except that as to final orders of the court which are adverse to the applicant, no appeal shall be ordered unless the Supreme Court of this state issues a certificate of probable cause for the appeal.

(b) If an unsuccessful applicant desires to appeal, he or she must file a written application for a certificate of probable cause to appeal with the clerk of the Supreme Court within three days of the entry of the order denying relief. The applicant shall also file within the same period a notice of appeal with the clerk of the concerned superior court. The Supreme Court shall either grant or deny the application within a reasonable time after filing. In order for the Supreme Court to consider fully the request for a certificate, the clerk of the concerned superior court shall forward, as in any other case, the record and transcript, if designated, to the clerk of the Supreme Court when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file a copy of the original record and a copy of the original transcript of proceedings. The clerk of the Supreme Court shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Supreme Court denies the application for a certificate of probable cause, the clerk of the Supreme Court shall return the original record and transcript and shall notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the applicant, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and shall stay the judgment of the superior court until there is a final adjudication by the Supreme Court. (Code 1981, § 17-10-70, enacted by Ga. L. 1988, p. 1003, § 2.)

Code Commission notes. — Pursuant to following "to the applicant" in subsection § 28-9-5, in 1988 a comma was inserted (a).

17-10-71. Procedure upon convicted person's regaining mental competency.

If a convicted person under sentence of death who is found to be mentally incompetent to be executed under this article regains his or her mental competency, the fact shall be certified at once by the appropriate mental health official to the court initially making the finding of mental incompetency. Upon such certification, that court shall enter an appropriate order noting receipt of certification and vacating any previously entered stay of execution. A copy of such order shall be sent to the sentencing court, at which time the sentencing court shall fix a new time period for execution as provided in Code Section 17-10-40. The judge of the court which made the determination on the issue of mental competency shall cause the new order and other proceedings in the case to be presented on the minutes of the court. (Code 1981, § 17-10-71, enacted by Ga. L. 1988, p. 1003, § 2.)

CHAPTER 11

**ASSESSMENT AND PAYMENT OF COSTS
OF CRIMINAL PROCEEDINGS**

Article 1

General Provisions

Sec. 17-11-4. Imposition of costs and jail fees upon prosecutor or complainant.

Article 2

Reimbursement of Counties for Expenses of Capital Felony Prosecutions

17-11-21. Definitions.

Sec.

17-11-22. Basis for reimbursement of counties for capital felony expenses.

17-11-23. When reimbursement payments to be made; manner of reimbursement where requests exceed funds appropriated.

17-11-24. Administration of article generally; adoption of rules and regulations; maintenance of records of capital felony expenses by clerks of superior courts.

ARTICLE 2

DEATH PENALTY GENERALLY

Cross references. — As to constitutional guarantee against deprivation of life without due process, see Ga. Const. 1976, Art. I, Sec. 1, Para. 1.

U.S. Code. — For provisions of Federal Rules of Criminal Procedure, Rule 38, relating to the death penalty, and annotations pertaining thereto, see 18 U.S.C.A.

17-10-30. Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed. (Code 1933, § 27-2534.1, enacted by Ga. L. 1973, p. 159, § 3.)

Cross references. — As to time limitation on prosecutions for crimes punishable by death, see § 17-3-1. As to presentence hearings in death penalty cases, see § 17-10-2.

Law reviews. — For article opposing capital punishment in Georgia, see 15 Ga. St. B.J. 159 (1979). For article supporting capital punishment in Georgia, see 16 Ga. St. B.J. 48 (1979). For article surveying Georgia cases in the area of evidence from

June 1979 through May 1980, see 32 Mercer L. Rev. 63 (1980).

For comment analyzing and criticizing the 1973 capital punishment statute in light of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), see 24 Mercer L. Rev. 891 (1973). For comment on *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978), see 31 Mercer L. Rev. 349 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

MITIGATING CIRCUMSTANCES

AGGRAVATING CIRCUMSTANCES

1. IN GENERAL

2. PRIOR CONVICTIONS

3. CRIME COMMITTED WHILE ENGAGED IN COMMISSION OF OTHER CRIMES

4. OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE, OR INHUMAN CIRCUMSTANCES

5. MURDER OF PEACE OFFICER, CORRECTIONS EMPLOYEE, OR FIREMAN, OR FOR PURPOSE OF AVOIDING, ETC., ARREST OR CUSTODY

Death sentence where codefendant receives lesser sentence. — There is no simplistic rule that a codefendant may not be sentenced to death when another defendant receives a lesser sentence. *McClesky v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980).

As to propriety of death sentence where not imposed upon all participants in same transaction, see *Hall v. State*, 241 Ga. 252, 244 S.E.2d 833 (1978).

Where same defendant was tried previously on same charges and jury imposed life sentence, the death sentence in the case under review was obviously disproportionate to the life sentence previously imposed against the same defendant in the same case. *Ward v. State*, 239 Ga. 205, 236 S.E.2d 365 (1977).

In a capital case, if a defendant is sentenced to life on the first trial and later retried, a death sentence cannot be imposed at the conclusion of the second trial. *Reddy v. State*, 242 Ga. 876, 252 S.E.2d 383 (1979).

Death penalty for armed robbery is excessive or disproportionate. — Under the test provided by paragraph (3) of subsection (c) of this section, a death sentence imposed for armed robbery must be considered to be excessive or disproportionate to the penalties imposed in similar cases. *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974), *aff'd*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 159-161, 267, 268, 397-400, 5 Am. Jur. 2d, Appeal and Error, §§ 684-701, 21 Am. Jur. 2d, Criminal Law,

§§ 583-585, 595-598.

C.J.S. — 24A C.J.S., Criminal Law, §§ 1772, 1789, 1831, 1878, 24B C.J.S., Criminal Law, §§ 1948, 1995, 2001-2003.

17-10-36. Establishment of unified review procedure by Supreme Court; effect on habeas corpus.

(a) The Supreme Court of Georgia shall establish, by rules, a unified motion for review procedure to provide for the presentation to the sentencing court and to the Supreme Court of all possible challenges to the conviction, sentence, and detention of defendants upon whom the sentence of death has been imposed, which challenges before March 29, 1980, have been presented for review by motion for new trial, motion to withdraw a guilty plea, appeal, writ of habeas corpus, or any other writ, motion, or proceeding cognizable in the courts of this state, except a claim or proceeding challenging the competency of counsel.

(b) The Supreme Court shall establish, by rules, a series of check lists to be utilized by the trial court, the prosecuting attorney, and defense counsel prior to, during, and after the trial of cases in which the death penalty is sought, to make certain that all possible matters which could be raised in defense have been considered by the defendant and defense counsel and either asserted in a timely and correct manner or waived in accordance with applicable legal requirements, so that, if the defendant is convicted and the sentence of death is imposed, the record and transcript of proceedings will be complete for a unified review by the sentencing court and the Supreme Court of all possible challenges to the

judgment of conviction, sentence of death, and the detention of the defendant.

(c) Nothing in this Code section or in the rules of the Supreme Court shall limit or restrict the grounds of review or suspend the rights or remedies available through the procedures governing the writ of habeas corpus.

(d) The procedures governing the writ of habeas corpus may be employed to assert rights or seek remedies if the procedures established in the rules of the Supreme Court as applied to the petitioner are inadequate or ineffective in any constitutional sense. (Code 1933, § 27-2538, enacted by Ga. L. 1980, p. 390, § 1.)

Cross references. — As to authority of Governor to suspend execution of sentences of death or sentences in cases of treason, see Ga. Const. 1976, Art. V, Sec. II, Para. II and § 42-9-55. As to habeas corpus generally, see Ch. 14, T. 9. As to employment of law clerks to assist superior courts in handling appeals by individuals awaiting execution, see § 15-6-28.1.

Code commission note. — Under Ga. L. 1980, p. 390, § 1, the rules established by the Supreme Court were required to be

submitted to the General Assembly for approval. By resolution found at Ga. L. 1981, p. 1532, the rules were approved and ratified.

Editor's note. — Ga. L. 1981, p. 1532 approved rules adopted by the Supreme Court regarding uniform motion for review procedures for presenting challenges to conviction, sentence, and detention of defendants upon whom the death sentence has been imposed.

17-10-37. Appointment of assistant to Supreme Court to provide information from prior capital cases; employment of staff to compile data; attachment for administrative purposes of office of assistant to office of clerk of Supreme Court.

(a) There shall be an assistant to the Supreme Court who shall be an attorney appointed by the Chief Justice and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The assistant shall provide the court with whatever extracted information it desires with respect thereto, including, but not limited to, a synopsis or brief of the facts in the record concerning the crime and the defendant.

(b) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence reviewed in accordance with Code Section 17-10-35.

(c) The office of the assistant shall be attached for administrative purposes to the office of the clerk of the Supreme Court of Georgia. (Code 1933, § 27-2537, enacted by Ga. L. 1973, p. 159, § 4.)

Law reviews. — For article, "Toward a Perspective on the Death Penalty Cases," see 27 Emory L.J. 469 (1978). For article surveying judicial developments in Georgia Criminal Law, see 31 Mercer L. Rev. 59 (1979).

For comment analyzing and criticizing the 1973 capital punishment statute in light

of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 316 (1972), see 21 Mercer L. Rev. 891 (1973). For comment criticizing inadequate standards and nebulous measurements for review under Georgia death penalty statute, in light of *Colby v. State*, 231 Ga. 829, 204 S.E.2d 612 (1974), see 26 Mercer L. Rev. 331 (1974).

JUDICIAL DECISIONS

Constitutionality. — Section is not unconstitutional. *Young v. State*, 237 Ga. 852, 230 S.E.2d 287 (1976).

Section is not subject to constitutional attack under U.S. Const., Amendments 3 and 14. *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612 (1974).

As to constitutionality of this section, see *House v. State*, 232 Ga. 140, 205 S.E.2d 217 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3221, 49 L. Ed. 2d 1217 (1976); *Floyd v. State*, 233 Ga. 280, 210 S.E. 2d 810 (1974), cert. denied, 431 U.S. 949, 97 S. Ct. 2667, 53 L. Ed. 2d 266 (1977); *Stephens v. State*, 237 Ga. 259, 227 S.E.2d 261, cert. denied, 429 U.S. 986, 97 S. Ct. 508, 50 L. Ed. 2d 599 (1976).

Examination of defendant's other convictions. — Nothing in this section forecloses the Supreme Court during the course of its independent review from examining nonappealed cases and cases in which the defendant pleaded guilty to a lesser offense. *Ross v. State*, 233 Ga. 361, 211 S.E.2d 356 (1974).

Duty of state to provide indigents access to appellate process. — The duty of the state is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the state's appellate process. *Ross v. State*, 233 Ga. 361, 211 S.E.2d 356 (1974).

Cited in *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612 (1974); *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975); *Owens v. State*, 233 Ga. 869, 214 S.E.2d 173 (1975); *Mitchell v. State*, 234

Ga. 460, 214 S.E.2d 900 (1975); *Chenault v. State*, 234 Ga. 216, 215 S.E.2d 223 (1975); *Brown v. State*, 235 Ga. 644, 220 S.E.2d 922 (1975); *Tamplin v. State*, 235 Ga. 774, 221 S.E.2d 455 (1975); *Goodwin v. State*, 236 Ga. 339, 223 S.E.2d 703 (1976); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976); *Banks v. State*, 237 Ga. 325, 227 S.E.2d 389 (1976); *Hill v. State*, 237 Ga. 794, 229 S.E.2d 737 (1976); *Douthit v. State*, 239 Ga. 81, 235 S.E.2d 493 (1977); *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 691 (1977); *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977); *Lamb v. State*, 241 Ga. 10, 243 S.E.2d 59 (1978); *Dungee v. Hopper*, 241 Ga. 236, 241 S.E.2d 849 (1978); *Bowen v. State*, 241 Ga. 492, 246 S.E.2d 322 (1978); *Sprouse v. State*, 242 Ga. 831, 252 S.E.2d 173 (1979); *Willis v. State*, 243 Ga. 185, 253 S.E.2d 70 (1979); *Hamilton v. State*, 244 Ga. 145, 259 S.E.2d 81 (1979); *Bowden v. Zant*, 244 Ga. 260, 260 S.E.2d 465 (1979); *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666 (1980); *Hardy v. State*, 245 Ga. 272, 264 S.E.2d 209 (1980); *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980); *Dampier v. State*, 245 Ga. 427, 265 S.E.2d 565 (1980); *Stevens v. State*, 245 Ga. 583, 266 S.E.2d 194 (1980); *Thomas v. State*, 245 Ga. 688, 266 S.E.2d 199 (1980); *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316 (1980); *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980); *Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (1980); *Lewis v. State*, 246 Ga. 101, 268 S.E.2d 915 (1980); *State v. Graham*, 246 Ga. 341, 271 S.E.2d 627 (1980); *Alderman v. Austin*, 498 F. Supp. 1134 (S.D. Ga. 1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 *Am. Jur. 2d. Appeal and Error*, §§ 159-161, 267, 268, 397-400. **C.J.S.** — 24A *C.J.S., Criminal Law*, 5 *Am. Jur. 2d. Appeal and Error*, §§ 1772, 1789, 1831, 1878, 24B *C.J.S., Criminal Law*, §§ 1948, 1995, 2001-2003.

17-10-38. Sentence of death to be carried out by electrocution; delivery of defendant to Department of Offender Rehabilitation.

(a) All persons who have been convicted of a capital offense and have had imposed upon them a sentence of death shall suffer such punishment by electrocution.

(b) In all cases in which the defendant is sentenced to be electrocuted, it shall be the duty of the trial judge in passing sentence to direct that the defendant be delivered to the Department of Offender Rehabilitation for electrocution at a state correctional institution designated by the department. (Ga. L. 1921, p. 195, § 1; Code 1933, § 27-2512; Ga. L. 1937-38, Ex. Sess., p. 330, § 1.)

JUDICIAL DECISIONS

For challenge of Ga. L. 1937-38, Ex. Sess., p. 330, § 1 on ex post facto grounds, see *Benton v. State*, 187 Ga. 449, 199 S.E. 749 (1939).

Allegation that section violates separation of powers provision. — An allegation that this section is unconstitutional, null, and void, because it supposedly violates Ga. Const. 1877, Art. I, Sec. I, Para. XXIII (see Ga. Const. 1976, Art. I, Sec. II, Para. IV), presents no question for judicial determination, where it fails to point out wherein the Act is repugnant to and in conflict with that constitutional provision. *Williams v. State*, 187 Ga. 415, 1 S.E.2d 27 (1939).

Ga. L. 1937-38, Ex. Sess., p. 330, § 1 did not violate constitutional requirements as to amendatory Acts. — This section is not unconstitutional as violative of Ga. Const. 1877, Art. III, Sec. I, Para. I (see Ga. Const. 1976, Art. III, Sec. VII, Para. XII) to the

effect that no law shall be amended or repealed by mere reference to its title or section number. *Williams v. State*, 187 Ga. 415, 1 S.E.2d 27 (1939).

Variance between title and subject matter of legislation. — Ga. L. 1924, p. 195 did not contain matter not expressed in its caption, in violation of Ga. Const. 1877, Art. III, Sec. VII, Para. VIII (see Ga. Const. 1976, Art. III, Sec. VII, Para. IV). *Howell v. State*, 164 Ga. 204, 138 S.E. 206, appeal dismissed, 275 U.S. 576, 48 S. Ct. 114, 72 L. Ed. 435 (1927).

Manner in which capital sentences executed is for legislative enactment. — There being no provision in the Constitution conferring upon sheriffs of counties the power to execute sentences of the courts in capital cases, the manner of execution of such sentences is for legislative enactment. *Dunaway v. Gore*, 154 Ga. 219, 138 S.E. 213 (1927).

RESEARCH REFERENCES

- Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 1581, 24B C.J.S., Criminal Law, §§ 595-598. §§ 1973, 1985, 2002.
C.J.S. — 24 C.J.S., Criminal Law.

17-10-39. Procedure for determination if female sentenced to death is pregnant; suspension of execution of sentence; issuance of new order for execution of sentence; entry of order, etc., upon minutes of court.

After a sentence of death has been imposed, if a female defendant so sentenced is believed to be pregnant, the sheriff of the county in which the defendant is imprisoned, with the concurrence and assistance of the judge of the probate court, shall select one or more physicians who shall conduct an examination. If the female is found to be pregnant, the sheriff shall suspend the execution of the sentence and make a report of the examination and suspension of execution to the presiding judge of the circuit, who shall cause the report and suspension to be entered on the minutes of the superior court of the county where the sentence was imposed. When the defendant is no longer pregnant, the judge shall issue a new order as provided in Code Section 17-10-40 directing the sheriff to execute the sentence at such date and place as the judge may appoint and direct in the order, which the sheriff shall be bound to do accordingly. The judge shall cause the new order and other proceedings in the case to be entered on the minutes of the court in which the sentence was imposed. (Laws 1833, Cobb's 1851 Digest, p. 839; Code 1863, § 4553; Code 1868, § 4573; Code 1873, § 4667; Ga. L. 1874, p. 30; Code 1882, § 4667; Penal Code 1895, § 1045; Penal Code 1910, § 1071; Code 1933, § 27-2520.)

RESEARCH REFERENCES

- Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 558, 559, 595-598. **C.J.S.** — 24 C.J.S., Criminal Law, § 1568.

17-10-40. Change of date of execution where date set for execution has passed generally; recordation on court minutes; time limitation for new execution date.

Where the date for the execution of any convicted person in a capital case has passed by reason of a supersedeas incident to appellate review, a stay of execution by the Governor, or for any other reason, the judge of the superior court of the county where the case was tried shall have the power and authority to pass an order fixing a new date for the execution

of the original sentence without requiring the convicted person to be brought before him by a writ of habeas corpus. The order shall be recorded on the minutes of the court and a certified copy of the order shall be sent immediately to the superintendent of the state correctional institution at the place of execution. The new date for the execution fixed by the judge shall be not less than ten nor more than 20 days from the date of the order. (Ga. L. 1924, p. 195, § 7; Code 1933, § 27-2518.)

Cross references. — As to authority of Governor to suspend execution of death sentences, see Ga. Const. 1976, Art. V, Sec. II, Para. 11 and § 42-9-56.

JUDICIAL DECISIONS

Trial judge can exercise the jurisdiction vested in him under this section in vacation. *Mallory v. Chapman*, 158 Ga. 228, 122 S.E. 884, 34 A.L.R. 310 (1924).

Effect of involuntary absence of defendant. — The order of a trial judge fixing a new date for execution of sentence, after the original date has passed, is not void because the defendant is involuntarily absent and has not waived or authorized anyone else to waive his right to be present at the time and place of resentencing, and the passage of such order is not violative of the defendant's rights under the several provisions of the state and federal Constitutions. *McBurnett v. Balkcom*, 207 Ga. 452, 62 S.E.2d 180 (1950).

Absence of defendant when new date set does not violate due process. — Although it was necessary for the defendant to have been present in court when the original sentence of execution was pronounced, as well as during other proceedings throughout the trial, in the absence of waiver, no violation of the due process clause of U.S. Const., Amend. 14 appears, where the attack is not on the original sen-

tence, but merely on an order fixing a new date of execution, entered in his absence, which order became necessary after the date fixed in the original sentence had passed because supersedeas pending the determination of a writ of error, since setting a new date of execution is not a new sentence of defendant, as to which the judge has no discretion, but merely setting the time. *Fowler v. Grimes*, 198 Ga. 84, 31 S.E.2d 174, cert. denied, 323 U.S. 784, 65 S. Ct. 266, 89 L. Ed. 626 (1944).

Setting of new date where sheriff has allowed date for execution to elapse. — A prisoner who has been convicted and sentenced to be executed will not be discharged on habeas corpus because the sheriff had permitted the date assigned for the execution to elapse. A new date will be assigned. *Mallory v. Chapman*, 158 Ga. 228, 122 S.E. 884, 34 A.L.R. 310 (1924).

Cited in *Williams v. State*, 187 Ga. 415, 1 S.E.2d 27 (1939); *Smith v. Henderson*, 190 Ga. 886, 10 S.E.2d 921 (1940); *Parks v. State*, 206 Ga. 675, 58 S.E.2d 142 (1950); *McLendon v. Balkcom*, 207 Ga. 100, 60 S.E.2d 753 (1950).

OPINIONS OF THE ATTORNEY GENERAL

Authority to transport defendant for physical examination. — A person in the custody of the sheriff, who has not actually been transported to the penitentiary and delivered to the director, remains with the superior court, and the Board of Pardons and Paroles or the State Board of Corrections (now Board of Offender Rehabilitation) would have no jurisdiction, authority,

or power to pass any order directing such a person to be transported to another place for physical examination. 1945-47 Op. Atty Gen. p. 434.

Custody of Department of Offender Rehabilitation. — Once the Department of Offender Rehabilitation has obtained custody of a prisoner whose execution date has been stayed and no new execution date

has been set, it remains until execution and so long as the sentence is valid. 1971 Op. Att'y Gen. No. 71-188.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 595-598.
C.J.S. — 24 C.J.S., Criminal Law, §§ 1613, 1614.

ALR. — Effect of permitting day fixed for execution to pass without carrying out sentence, 34 ALR 314.

17-10-41. Persons required to be present at executions.

There shall be present at the execution of a convicted person the superintendent of the state correctional institution or a deputy superintendent thereof, who shall serve as executioner, at least two assistants, two physicians to determine when death supervenes, an electrician, a suitable guard, and, if the convicted person so desires, his counsel, relatives, and such clergymen and friends as he may desire. (Ga. L. 1924, p. 195, § 4; Code 1933, § 27-2515; Ga. L. 1956, p. 161, § 32.)

JUDICIAL DECISIONS

Cited in *Irwin v. Lawrence*, 196 Ga. App. 202, 26 S.E.2d 251 (1943).

OPINIONS OF THE ATTORNEY GENERAL

Other persons admitted only with defendant's consent. — Since this section explicitly enumerates who may be witnesses at an execution, it is conclusive that the General Assembly intended to exclude any other witnesses except the condemned person's counsel, relatives, and such clergymen and friends as he may desire. This exception for designated persons requires a determination by the condemned person, which must be conveyed to the Department of Corrections (now Department of Offender Rehabilitation) within a reasonable time before the execution. If the condemned person should express a desire to have some member of the press present the department would be legally authorized to admit him. Otherwise, the department is required by this section to restrict those present to the

ones named in this section, and others requested by the condemned, 1963-65 Op. Att'y Gen. p. 346.

Discretion as to who may be present. — The only person with any discretion in deciding who shall be present at an execution is the condemned person himself. Further, the condemned person has no discretion as to individual members of the general public who are not his counsel, relatives, and such clergymen and friends as he may desire, 1960-61 Op. Att'y Gen. p. 354.

Residence of electrician immaterial. — No reference is made by this section to the residence of the electrician. The indefinite article "an" is used and therefore the place of residence of the electrician used in electrocutions is immaterial under the law, 1948-49 Op. Att'y Gen. p. 281.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 595-598.

C.J.S. — 24B C.J.S., Criminal Law, §§ 2001-2003.

17-10-42. Preparation and filing of certification of execution.

The executioner and attending physicians shall certify the fact of the execution to the clerk of the superior court of the county in which the sentence was imposed, which certificate shall be filed by the clerk with the papers in the case. (Ga. L. 1924, p. 195, § 5; Code 1933, § 27-2516.)

Cross references. — As to maintenance of death records generally, see § 31-10-70 et seq.

JUDICIAL DECISIONS

Cited in *Meyers v. Whittle*, 171 Ga. 509, 156 S.E. 120 (1930); *Irwin v. Lawrence*, 196 Ga. App. 202, 26 S.E.2d 251 (1943).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 595-598; 60 Am. Jur. 2d, Penal and Correctional Institutions, § 13.

C.J.S. — 24B C.J.S., Criminal Law, §§ 2001-2003.

17-10-43. Disposition of body of executed person; payment of expenses of transporting body.

The body of an executed person shall be delivered to the relatives of the person if they so desire; and, in case no claim is made by relatives for the body, it shall be disposed of in the same manner as bodies of inmates dying in a state correctional institution. If the nearest relatives of the person executed desire that the body be transported to the former home of the executed person, if in this state, the expenses of transportation shall be paid by the county governing authority of the county where the person was convicted, from any funds on hand in the treasury. (Ga. L. 1924, p. 195, § 6; Code 1933, § 27-2517.)

Cross references. — As to disposition of unclaimed dead bodies generally, see § 31-21-20 et seq.

JUDICIAL DECISIONS

Cited in *Meyers v. Whittle*, 171 Ga. 509, 156 S.E. 120 (1930).

17-10-44. Provision of death chamber, apparatus, etc., by Department of Offender Rehabilitation.

The Department of Offender Rehabilitation shall provide a death chamber and all necessary apparatus, machinery, and appliances for inflicting the penalty of death by electrocution. (Ga. L. 1924, p. 195, § 2; Code 1933, § 27-2513; Ga. L. 1956, p. 161, § 28.)

RESEARCH REFERENCES

ALR. — Manner of inflicting death sentence as cruel or unusual punishment, 30 ALR 1452.

ARTICLE 3

DISPOSITION OF MENTALLY INCOMPETENT PERSONS
CONVICTED OF CAPITAL OFFENSES

17-10-60. Right of person convicted of capital offense to inquisition or trial to determine sanity generally.

No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity. (Ga. L. 1903, p. 77, § 1; Penal Code 1910, § 1073; Code 1933, § 27-2601.)

JUDICIAL DECISIONS

Section not violative of due process standards under the state and federal Constitutions. *Solesbee v. Balkcom*, 339 U.S. 9, 70 S. Ct. 457, 94 L. Ed. 604 (1950); *Solesbee v. Balkcom*, 208 Ga. 121, 65 S.E.2d 263 (1951); *McCorquodale v. Stynchcombe*, 239 Ga. 138, 236 S.E.2d 486, cert. denied, 434 U.S. 975, 98 S. Ct. 534, 54 L. Ed. 2d 467 (1977).

Notwithstanding lack of means for judicial determination of sanity. — The failure to provide a means by which a prisoner's sanity or insanity may be judicially deter-

mined is not a denial of due process of law. *McLendon v. Balkcom*, 207 Ga. 100, 60 S.E.2d 753 (1950).

Section expressly divests the courts of all jurisdiction to determine mental status of one alleged to have become insane since the date of his trial and conviction of a capital offense. *Solesbee v. Balkcom*, 208 Ga. 121, 65 S.E.2d 263 (1951).

Except as to cases pending when enacted. *Solesbee v. Balkcom*, 208 Ga. 121, 65 S.E.2d 263 (1951).

Superior court judge has no jurisdiction to entertain original application for inquisition of insanity or to grant an order suspending the sentence in the case. Cribb

v. Parker, 119 Ga. 298, 46 S.E. 110 (1903). Cited in *Alford v. State*, 137 Ga. 458, 73 S.E. 375 (1912); *Solesbee v. Balkcom*, 205 Ga. 122, 52 S.E.2d 433 (1949).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 75-80.

C.J.S. — 24 C.J.S., Criminal Law, §§ 1569, 1619.

ALR. — Insanity supervening after conviction and sentence of death, 49 ALR 804.

Right of appeal in proceeding for restoration to competency, 122 ALR 541.

Insanity of accused at time of commission of offense, not raised at trial, as ground for habeas corpus or coram nobis after conviction, 29 ALR2d 703.

Effect of death of appellant upon appeal from judgment of mental incompetence against him, 54 ALR2d 1161.

17-10-61. Conduct of examination into sanity of person convicted of capital offense upon order of Governor; procedure; commitment of person to custody of Department of Human Resources.

Upon satisfactory evidence being offered to the Governor, showing reasonable grounds to believe that a person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, in his discretion, have the convicted person examined by such expert physicians as the Governor may choose, the cost of the examination to be paid by the Governor out of the contingent fund. It shall be the responsibility of the Governor to cause the physicians to receive written instructions which plainly set forth the legal definitions of insanity as recognized by the laws of this state. The physicians shall, after making the necessary examination of the convicted person, report in writing to the Governor whether or not reasonable grounds exist to raise an issue that the person is insane under the standards previously specified to them by the Governor. The Governor may, if he determines that the convicted person has become insane, have the power of committing him to the custody of the Department of Human Resources until his sanity has been restored or determined to be restored as provided by law. (Ga. L. 1903, p. 77, § 2; Penal Code 1910, § 1074; Code 1933, § 27-2602; Ga. L. 1960, p. 988, § 1.)

Set

18-3913. Wild flowers protected — Amended list — Duty of parks department. — (a) In order to further protect native wild flowers and shrubs from needless destruction and waste, the parks department may, after investigation and public hearings and in accordance with the provisions of this act, establish and amend a list of wild flowers and shrubs in addition to those listed in section 1 (3) [§ 18-3911(3)] of this act. The provisions of this act will then apply to such "established" or "amended" list.

(b) In determining additions to the list of wild flowers set forth herein, the parks department may take into consideration:

- (1) The laws and regulations of the United States and other states.
- (2) The effect on the scenic beauty of public roads and public land.
- (3) The necessity to preserve and protect native plants whenever it appears that they might possibly become extinct. [I.C., § 18-3913, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1967, ch. 430, § 3, p. 1415, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. The words "this act" refer to §§ 18-3911 — 18-3914.

18-3914. Violation a misdemeanor. — A violation of this chapter and regulations authorized by this act is a misdemeanor. [I.C., § 18-3914, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1967, ch. 430, § 4, p. 1415, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. The words "this act" refer to §§ 18-3911 — 18-3914.

CHAPTER 40
HOMICIDE

SECTION.	SECTION.
18-4001. Murder defined.	18-4010. Fear not sufficient justification.
18-4002. Express and implied malice.	18-4011. Justifiable homicide by officer.
18-4003. Degrees of murder.	18-4012. Excusable homicide.
18-4004. Punishment for murder.	18-4013. Discharge of defendant when homicide justifiable or excusable.
18-4005. Petit treason abolished.	18-4014. Administering poison with intent to kill.
18-4006. Manslaughter defined.	18-4015. Assault with intent to murder.
18-4007. Punishment for manslaughter.	
18-4008. Death must occur when.	
18-4009. Justifiable homicide by any person.	

18-4001. Murder defined. — Murder is the unlawful killing of a human being with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being. Torture is the intentional infliction of extreme and prolonged pain with the intent to cause suffering. It shall also be torture to inflict on a human being extreme and prolonged acts of brutality irrespective of proof of intent to cause suffering. The death of a human being caused by such torture is murder irrespective of proof of specific intent to kill; torture causing death

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shall be deemed the equivalent of intent to kill. [I.C., § 18-4001, as added by 1972, ch. 336, § 1, p. 844; am. 1977, ch. 154, § 1, p. 390.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 15; R.S., R.C., & C.L., § 6560; C.S., § 8209; I.C.A., § 17-1101, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Section 2 of S.L. 1977, ch. 154 is compiled as § 18-4003.

Cross ref. Homicide caused by placing obstruction on railroad track is murder, § 18-6011.

Homicide caused by stealing of car parts is murder, § 18-6007.

Juvenile charged with murder, when proceeded against as adult, § 16-1806A.

Sec. to sec. ref. This section is referred to in § 18-7503.

Cited in: State v. Foley, 95 Idaho 222, 506 P.2d 119 (1973); State v. Aragon, 107 Idaho 358, 690 P.2d 293 (1984); State v. Pennell, 108 Idaho 669, 701 P.2d 289 (Ct. App. 1985); State v. Merrifield, 109 Idaho 11, 704 P.2d 343 (Ct. App. 1985); Sivak v. State, — Idaho —, 731 P.2d 192 (1986); State v. Simons, — Idaho —, 731 P.2d 797 (Ct. App. 1987).

ANALYSIS

Cross-examination.
 Double jeopardy.
 Dual juries.
 Elements of offense.
 Evidence.
 — Confession.
 — Malice aforethought.
 — Photographs.
 — Sufficiency of.
 Included offense.
 Instructions to jury.
 Intent.
 Intoxication as defense.
 Opening statement.
 Premeditation.
 Prosecutor's comments.
 Punishment.
 Sanity of defendant.
 Solicitation of attempted murder.
 Sufficiency of charge.
 Sufficiency of indictment.

Cross-Examination.

Where the defense, on cross-examination, attempted to elicit from police officer testimony that his true motive in telling witness not to discuss case with others was to prevent disclosure of witness having failed polygraph tests, the trial court properly limited the

cross-examination in order to prevent the introduction of potentially prejudicial polygraph information; the court gave the defense considerable latitude in its attempt to establish that the witness had changed his statements because of police accusations that he was lying, and no prejudice was shown. State v. Wheeler, 109 Idaho 795, 711 P.2d 741 (Ct. App. 1985).

Double Jeopardy.

Giving the double jeopardy statute, § 18-301, its broadest possible application, it is not a bar to the present prosecution for robbery because both the robbery and the murder did not arise out of the same act or omission; the act of taking property from the deceased by means of force or fear was separate from the act of firing the shots which killed him, defendant's companions having flagged the deceased to a stop, defendant was handed deceased's wallet after parking their car and, hearing a shot and screaming, was told to go home. State v. Hall, 66 Idaho 63, 383 P.2d 602 (1963).

It is clear from the former statutory definitions that murder and robbery are separate, distinct and independent crimes, neither is the "same offense" as the other, within the constitutional provision against double jeopardy, and prosecution for one does not bar a subsequent prosecution on the other on that ground. State v. Hall, 66 Idaho 63, 383 P.2d 602 (1963).

It is obvious, from the definition of robbery in § 18-6501, that the murder information did not purport to charge defendant with the crime of robbery, and it was insufficient for that purpose; therefore, defendant after acquittal on the charge of murder was not entitled to an instruction that the robbery was the same offense as that for which he had been previously charged. State v. Hall, 66 Idaho 63, 383 P.2d 602 (1963).

Dual Juries.

Where the trial judge was careful and meticulous in his conduct of trial before dual juries and there was no indication whatsoever that the dual jury procedure resulted in any unfairness, prejudice or violation of defendant's constitutional rights, there was no error in using a dual jury procedure in trying two co-defendants for murder. State v. Beam, 109 Idaho 616, 710 P.2d 525 (1985), cert. denied, — U.S. —, 106 S. Ct. 2250, 90 L. Ed. 2d 704 (1986).

The trial court did not deprive the defendant of due process by placing him with his codefendant and using separate juries sit-

Judgment of acquittal *State v. Rodriguez*, 106 Idaho 30, 674 P.2d 1029 (Ct. App. 1983).

Premeditation.

Premeditation is not an essential element of crime of assault with intent to commit murder. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Use of Deadly Weapon.

In a murder prosecution, because of the use to which knife of defendant was put and results of this use, it will be classified as a deadly weapon and therefore it is to be concluded that there was both express and implied malice on behalf of defendant immediately prior to the time he took the life of the deceased. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Trial court had no other alternative than to find the defendant guilty of wilful, deliberate, and premeditated killing with malice aforethought in view of the defendant's act of deliberately opening up a pocket knife, next cutting the victim's throat and then hacking and cutting until he had killed the deceased and expended himself and the imposition of the death sentence under the circumstances was not an abuse of discretion by the trial court under such facts and circumstances. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Where a defendant uses a deadly weapon against the person of another in a deadly and dangerous manner, the element of malice may be presumed, such a presumption may be rebutted. *State v. Rodriguez*, 106 Idaho 30, 674 P.2d 1029 (Ct. App. 1983).

18-4003. Degrees of murder. — (a) All murder which is perpetrated by means of poison, or lying in wait, or torture, when torture is inflicted with the intent to cause suffering, to execute vengeance, to extort something from the victim, or to satisfy some sadistic inclination, or which is perpetrated by any kind of wilful, deliberate and premeditated killing is murder of the first degree.

(b) Any murder of any peace officer, executive officer, officer of the court, fireman, judicial officer or prosecuting attorney who was acting in the lawful discharge of an official duty, and was known or should have been known by the perpetrator of the murder to be an officer so acting, shall be murder of the first degree.

(c) Any murder committed by a person under a sentence for murder of the first or second degree, including such persons on parole or probation from such sentence, shall be murder of the first degree.

(d) Any murder committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem is murder of the first degree.

(e) Any murder committed by a person incarcerated in a penal institution upon a person employed by the penal institution, another inmate of the penal institution or a visitor to the penal institution shall be murder of the first degree.

(f) Any murder committed by a person while escaping or attempting to escape from a penal institution is murder of the first degree.

(g) All other kinds of murder are of the second degree. I.C., § 18-4003, as added by 1972, ch. 336, § 1, p. 844; am. 1973, ch. 276, § 1, p. 588; am. 1977, ch. 154, § 2, p. 390.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 17, R.S., R.C., & C.L., § 6562; C.S., § 8211; I.C.A., § 17-1103; am. S.L. 1935, ch. 24, § 1, p. 41; am. S.L. 1969, ch. 248, § 1, p. 773, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L.

1972, ch. 336, § 1 restored the subject matter contained in the section as it existed prior to its repeal.

Section 1 of S.L. 1977, ch. 154 is compiled as § 18-4001.

Cross ref. Jury to find degree of crime, § 19-2311.

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omitting to find degree or nature of crime. reassembling jury after discharge for purpose of. 66 A.L.R. 557.

Entrapment to attempt to commit murder. 66 A.L.R. 504; 86 A.L.R. 263.

Intoxication as affecting deliberation and premeditation. 79 A.L.R. 904.

Arson, necessity of intent to kill to bring death resulting from, within statute making homicide in perpetration of felony murder in first degree. 87 A.L.R. 414.

Instruction as to lesser degree of crime, duty of court as to, where statute fixes degree of homicide in perpetration of felony. 21 A.L.R. 628; 27 A.L.R. 1097; 102 A.L.R. 1019.

Escape from scene of crime, homicide by companion of defendant while attempting to make, as murder in first degree. 108 A.L.R. 847.

Instructions, applying rule of reasonable doubt as to intent or malice as curing error in instruction placing burden of proof upon defendant in that regard. 120 A.L.R. 610.

Inference of intent to kill where killing is by blow without weapon. 22 A.L.R.2d 854.

Pregnancy as element of offense of attempt to procure a miscarriage or of homicide predicated in such attempt. 46 A.L.R.2d 1393.

Use of set gun, trap, or similar device on defendant's own property. 47 A.L.R.3d 646.

Homicide as affected by time elapsing between wound and death. 60 A.L.R.3d 1316.

Intoxicating liquor, criminal responsibility of one unlawfully furnishing, for death resulting from its use. 82 A.L.R.3d 589.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour. 93 A.L.R.3d 925.

18-4004. Punishment for murder. — Subject to the provisions of 19-2515, Idaho Code, every person guilty of murder of the first degree shall be punished by death or by imprisonment for life, provided that whenever the court shall impose a sentence of life imprisonment, the court shall set forth in its judgment and sentence a minimum period of confinement of not less than ten (10) years during which period of confinement the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct, except for meritorious service. Every person guilty of murder of the second degree is punishable by imprisonment not less than ten (10) years and the imprisonment may extend to life. [I.C., § 18-4004, as added by 1972, ch. 336, § 1, p. 844; am. 1973, ch. 276, § 2, p. 588; am. 1977, ch. 154, § 3, p. 390; am. 1986, ch. 232, § 2, p. 638.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 17; R.S., & R.C., § 6563; am. S.L. 1911, ch. 68, § 1, p. 190; reen. C.L., § 6563; C.S., § 8212; I.C.A., § 17-1104, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section as it existed prior to its repeal.

Section 3 of S.L. 1986, ch. 232 is compiled as § 19-2513.

Section 6 of S.L. 1986, ch. 232 read: "This act shall be in full force and effect on and after February 1, 1987, and the amendments in this act shall apply only to those persons who shall commit an offense on or after February 1, 1987, and are not intended to repeal or amend those provisions of the Code which apply to persons committing an offense prior to February 1, 1987, which provisions shall continue to apply, and further that amendments in this act are not intended to repeal or amend sections 19-2520, 19-2520A, 19-2520B, 29-2520C or 29-2520D, Idaho Code."

Section 8 of S.L. 1977, ch. 154 declared an emergency. Approved March 28, 1977.

Title of 1986 Act. Section 1 of S.L. 1986, ch. 232 read: "This act shall be known as the 'Unified Sentencing Act of 1986.'"

Cited in: State v. De La Paz, 106 Idaho 924, 684 P.2d 326 (Ct. App. 1984); Lindquist v. Gardner, 770 F.2d 876 (9th Cir. 1985); State v. Nellsch, 110 Idaho 594, 716 P.2d 1366 (Ct. App. 1986); State v. Martinez, — Idaho —, 723 P.2d 825 (1986).

ANALYSIS

Certainty of verdict.
Constitutionality.
Death penalty.
Discretion of trial court.
Due process.
Effect on capacity of jurors.
Indeterminate life sentence.
Instructions to jury.
Parole eligibility.
Right to jury.
Sentence
— Excessive.

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DIVISION III. CODE OF CRIMINAL PROCEDURE OF 1963

Title	Paragraph
I. General Provisions	100-1
Article	
106A. [Child Witnesses] [New]	106A-1
IV. Proceedings to Commence Prosecution	111-1
Article	
112A. Domestic Violence: Order of Protection.....	112A-1

DIVISION V. SUPPLEMENTARY PROVISIONS

	Paragraph
Public or Community Service	204a-1
Illinois Law Enforcement Commission [Repealed].....	209-1
Criminal Justice Information Act	210-1
Habitual Child Sex Offender Registration Act	221
Pretrial Services	301

MISCELLANEOUS LAWS

	Paragraph
Anti-Crime Advisory Council	1301
Bill of Rights for Victims and Witnesses of Violent Crime Act.....	1401
Privacy of Child Victims of Criminal Sexual Offenses Act	1451
Probation Challenge Program Act.....	1501
Polygraph Examinations of Sex Offense Victims [New]	1551
Illinois Uniform Conviction Information Act [New]	1601

DIVISION III. CODE OF CRIMINAL PROCEDURE OF 1963

TITLE VII. PROCEEDINGS AFTER TRIAL

ARTICLE 119. EXECUTION OF SENTENCE

119-5. Execution of death sentence

§ 119-5. Execution of Death Sentence. (a)(1) A defendant sentenced to ~~death~~ shall be executed by a continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent. ~~Death~~ death is pronounced by a licensed physician according to accepted standards of medical practice.

(2) If the execution of the sentence of death as provided in paragraph (1) is ~~found~~ illegal or unconstitutional by a reviewing court of competent jurisdiction, ~~the~~ sentence of death shall be carried out by electrocution.

(b) In pronouncing the sentence of death the court shall set the date of the execution which shall be not less than 60 nor more than 90 days from the ~~date~~ sentence is pronounced.

(c) A sentence of death shall be executed at the Illinois State Penitentiary.

(d) The warden of the penitentiary shall supervise such execution which shall be conducted in the presence of 2 physicians and 6 other witnesses who shall certify the execution of the sentence which certification shall be filed with the clerk of the ~~court~~ which imposed the sentence.

Amended by P.A. 83-233, § 1, eff. Sept. 8, 1983.

38 § 119-1 CODE OF CRIMINAL PROCEDURE
Code Crim. Proc. § 119-1

ARTICLE 119. EXECUTION OF SENTENCE

Sec.

119-1 to 119-4. Repealed.

119-5. Execution of death sentence.

§§ 119-1 to 119-4. Repealed by P.A. 77-2097, § 8-5-1,
eff. Jan. 1, 1973

Historical Note

These sections, relating to the execution of sentences, were repealed by section 8-5-1 of the Unified Code of Corrections (section 1005-5-1 of this chapter).

For savings provisions of the Unified Code of Corrections, see section 1008-2-1 et seq. of this chapter.

The disposition of the subject matter of the repealed sections is as follows:

Former ch. 38 sections	Present ch. 38 sections
119-1	1005-8-5
119-2	1005-8-6

Former ch. 38 sections	Present ch. 38 sections
119-3	1005-8-7
119-4	1003-3-51d), (e) 1003-3-10

For the derivation of the repealed sections, see Prior Laws under parallel sections of the Unified Code of Corrections.

An amendment of section 119-2 by P.A. 77-2829, § 16, was excised from that Act under the terms of section 67, thereof. See note under ch. 23, §§ 2501 to 2507.

§ 119-5. Execution of death sentence

(a) A sentence of death shall be executed by the electrocution of the defendant.

(b) In pronouncing the sentence of death the court shall set the date of the execution which shall be not less than 60 nor more than 90 days from the date sentence is pronounced.

(c) A sentence of death pronounced before, on or after the effective date of this amendatory Act shall be executed at the Illinois State Penitentiary.

(d) The warden of the penitentiary shall supervise such execution which shall be conducted in the presence of 2 physicians and 6 other witnesses who shall certify the execution of the sentence which certification shall be filed with the clerk of the court which imposed the sentence.

Laws 1963, p. 2836, § 119-5, eff. Jan. 1, 1964. Amended by P.A. 76-474, § 1, eff. July 18, 1969.

PROCEEDINGS AFTER TRIAL 38 § 119-5

Code Crim. Proc. § 119-5

Historical Note

As enacted in 1963 subsections (c) and (d) read:

"(c) A sentence of death pronounced by a court of a county of fewer than 1,000,000 inhabitants shall be executed at the Illinois State Penitentiary. A sentence of death pronounced by a court of a county having 1,000,000 or more inhabitants shall be executed in the county jail for such county.

"(d) The warden of the penitentiary, or the sheriff or a deputy sheriff of a county having 1,000,000 or more inhabitants, shall supervise such execution which shall be conducted in the presence of 2 physicians and 6 other witnesses who shall certify the execution of the sentence which certification shall be filed with the clerk of the court which imposed the sentence."

P.A. 76-471 eliminated executions at the Cook County Jail.

Prior Laws:

R.L. 1827, c. 158, § 155.

R.L. 1832, p. 208, § 157.

R.S. 1845, p. 182, § 167.

Laws 1859, p. 17, § 3.

R.S. 1874, p. 348, div. 14, §§ 1 to 5.

Laws 1927, p. 100, § 1.

Laws 1929, p. 346, § 1.

Laws 1941, vol. 1, p. 554, § 1.

Laws 1945, p. 687, § 1.

Ill.Rev.Stat.1963, ch. 38, §§ 719 to 753.

For the text of provisions repealed by the Code of Criminal Procedure of 1963, see Ill.Rev.Stat.1963.

Cross References

Sentence to death, see section 1007-5-3 of this chapter.

Law Review Commentaries

Concept of punishment. Ugo Conti. 13 Ill.L.Rev. 231.

Early corporal punishments. Joseph J. Thompson, 1923, 6 Ill.L.Q. 37.

Punishment v. treatment in cure of criminal. 1937, 2 John Marshall L.Q. 560.

Library References

Criminal Law ¶1219.

J.S. Criminal Law § 2001 et seq.

I.L.P. Criminal Law § 951.

Notes of Decisions

Extension of time during insanity proceedings 4

Insanity proceeding 3

Review 5

Time of execution

In general 1

After stay 2

day of first Supreme Court term following expiration of 50-day period was January 15. *People v. Williams*, 1943, 383 Ill. 318, 50 N.E.2d 450, certiorari denied 61 S.Ct. 453, 321 U.S. 762, 88 L.Ed. 1059.

It was error to fix the time at more than 25 days from the day of the sentence. *Wallace v. People*, 1896, 159 Ill. 116, 42 N.E. 771.

It was error to order death penalty to be executed before tenth day of term of Supreme Court next following. *White v. People*, 1876, 81 Ill. 233.

2. Time of execution after stay

Where the jury found that a defendant convicted of a capital crime was sane, the trial court, having stayed execution of sentence, should immediately fix the

Time of execution in general

Time of execution of sentence was correctly imposed on date of argument on appeal for new trial, five days after ending of next succeeding term of Supreme Court. *People v. Wilson*, 1918, 351 Ill. 211, 51 N.E.2d 211.

Under former section 719 of this chapter death sentence pronounced October 12, 1912, properly provided for execution on January 16, 1913, where fifth

ant was sentenced to impose consecutive sentences not exceeding twice minimum authorized for murder despite this paragraph having been amended during course of prosecution, as defendant was entitled to sentencing in accordance with version of this paragraph most favorable to him. *People v. Hillenbrand*, App. 3 Dist. 1986, 100 Ill. Dec. 620, 146 Ill. App. 3d 1075, 497 N.E.2d 798, appeal allowed 106 Ill. Dec. 51, 113 Ill.2d 580, 505 N.E. 2d 357.

43. — Review, consecutive sentences

People v. Thomas, 1981, 54 Ill. Dec. 235, 98 Ill. App. 3d 852, 424 N.E.2d 985, certiorari denied 102 S.Ct. 2276 [main volume] 456 U.S. 993, 73 L.Ed.2d 1289.

This paragraph governing imposition of consecutive sentences requires nothing more than that, on review of record, it is clear that sentencing judge was convinced in light of all facts and circumstances before him that consecutive term was necessary for the protection of the public. *People v. Peebles*, App. 1 Dist. 1984, 80 Ill. Dec. 427, 125 Ill. App. 3d 213, 465 N.E.2d 539.

Conclusion, if any, in sentencing defendant to consecutive terms of imprisonment that alleged accomplice's uncontradicted testimony that he and defendant had participated in prior burglary, which did not result in conviction of record, was true was not reversible error where court on three occasions referred to alleged accomplice's credibility as questionable during sentencing hearing prior to remand for resentencing and was thus shown to understand importance of determining alleged accomplice's credibility. *People v. Walker*, 1983, 69 Ill. Dec. 748, 113 Ill. App. 3d 1074, 448 N.E.2d 208, certiorari denied 104 S.Ct. 1297, 465 U.S. 1031, 79 L.Ed.2d 697.

1005-8-5. Commitment of the offender

§ 5-8-5. Commitment of the Offender. Upon rendition of judgment after pronouncement of a sentence of periodic imprisonment, imprisonment, or death, the court shall commit the offender to the custody of the sheriff or to the Department of Corrections. A sheriff in executing an order for commitment to the Department of Corrections shall convey such offender to the nearest receiving station designated by the Department of Corrections. The court may commit the offender to the custody of the Attorney General of the United States under Section 5-8-5¹ when a sentence for a State offense provides that such sentence is to run concurrently with a previous and unexpired federal sentence. The expense of conveying a person committed by the juvenile court or an offender convicted of a felony shall be paid by the State. The expenses in all other cases shall be paid by the county of the committing court.

Amended by P.A. 84-551, § 27, eff. Sept. 18, 1985.

¹ Paragraph 1005-8-6 of this chapter.

P.A. 84-551 revised terminology and extended a statute of limitations (ch. 110, ¶ 13-214).

Notes of Decisions

6. — Amendment of mittimus

Where, because of apparent clerical errors, defendants' mittimuses did not correctly reflect sen-

45. Credit for time previously served

Defendant, who was sentenced for offenses committed while on parole for armed robbery conviction, with the new sentence to be served consecutively with armed robbery sentence, was not entitled to "good time" credit toward release date on new sentence for all time served in custody from original custody date on armed robbery conviction, as this paragraph allows an award of "good time" only from date of imprisonment on the consecutive sentence, and not before. *Cornes v. Groves*, App. 5 Dist. 1984, 78 Ill. Dec. 608, 122 Ill. App. 3d 1085, 462 N.E.2d 722.

Where trial judge who conducted sentencing hearing stated that defendant would be given credit for all time served on the offense, whether awaiting trial, awaiting hearing on the violation, or time served initially as a condition of probation, defendant was entitled to credit toward his sentence of imprisonment for the time served in jail as a condition of probation and defendant would also be credited with time served on probation in the cause, because court did not expressly deny such credit. *People v. Redman*, App. 4 Dist. 1984, 78 Ill. Dec. 305, 122 Ill. App. 3d 747, 462 N.E.2d 21.

47. Review

In sentencing phase of prosecution for rape, deviate sexual assault and attempted armed robbery, record, which indicated that trial court was informed that in the past four years prior to convictions at issue defendant had been convicted of four armed robberies, rape, deviate sexual assault, and unlawful restraint, and that trial court had been forced to have defendant forcibly removed from courtroom at one point because of his belligerent behavior, supported finding that consecutive sentences were necessary to protect public from further criminal conduct by defendant. *People v. Carter*, App. 1 Dist. 1984, 85 Ill. Dec. 124, 124 Ill. App. 3d 1076, 473 N.E.2d 434.

tences given them, mittimuses would be corrected. *People v. Ammons*, App. 1 Dist. 1983, 76 Ill. Dec. 377, 120 Ill. App. 3d 855, 458 N.E.2d 1691.

Where jail credit indicated in mittimus did not mesh with information in record regarding defendant's time in custody prior to sentencing, and time spent in jail could not be accurately calculated from record, case was properly remanded to circuit court to recalculate credit due defendant.

38 ¶ 1005-8-4 CODE OF CORRECTIONS

Unified Corr. Code § 5-8-4

Note 46

imposed, and, after judge refused to accept guilty plea, when one defendant declared that, although he was not guilty, he would plead guilty simply to make it easier on himself, sentences of not less than ten years nor more than 20 years to be served consecutively to prior sentences were imposed, defendants failed to show that disparity between sentences bargained for and actual sentences had been due to trial judge's and prosecutor's pique at being put to trouble of jury trial. *People v. Morgan*, 1973, 14 Ill.App.3d 232, 302 N.E.2d 152, affirmed, remanded with directions 59 Ill.2d 276, 319 N.E.2d 764, on remand 29 Ill.App.3d 1043, 332 N.E.2d 191.

Facts that following jury trial, defendant received nine to ten-year sentence for aggravated battery, to run consecutively to previous sentence for unrelated burglary, while, after defendant pleaded guilty to rape upon the battery victim, he received only three to six-year sentence for the rape, to run concurrently with the battery sentence, did not demonstrate that the battery sentence was vindictively imposed to punish defendant for requesting jury trial. *People v. Rossi*, 1972, 52 Ill.2d 13, 284 N.E.2d 275.

In absence of evidence that defendant was promised his sentence would run concurrently with other previously imposed sentence if he would plead guilty, record did not show that defendant was given a consecutive sentence by reason of fact that he demanded a jury trial. *People v. Lairson*, App.1971, 266 N.E.2d 735.

47. Review

One of primary purposes of provisions in this paragraph requiring trial judge to set forth his reasons for imposing a particular sentence is to enable reviewing court to determine just what went into sentencing decision and whether it is consistent with statutory objectives. *People v. Green*, 1980, 39 Ill.Dec. 339, 83 Ill.App.3d 982, 404 N.E.2d 930.

Claim that this paragraph requiring imposition of a consecutive sentence for defendants convicted of escape from adult division was violative of equal protection because § 1003-6-4 of this chapter failed to require consecutive sentencing for convicted defendants found guilty of escaping from custody while awaiting sentencing was a non-jurisdictional question which was waived by defendant when it was not properly presented in trial court and preserved for review. *People v. Nelson*, 1975, 26 Ill.App.3d 227, 324 N.E.2d 719.

Where aggregate minimum period of defendant's sentences was 120 years but, under this paragraph, aggregate minimum sentence could not be more than twice the lowest minimum authorized sentence for the most serious felony involved, and the lowest minimum sentence for such felony, murder, was 14 years, sentences would be vacated and cause remanded for resentencing. *People v. McAfee*, 1974, 23 Ill.App.3d 788, 320 N.E.2d 84, appeal after remand 1 Ill.Dec. 727, 42 Ill.App.3d 966, 356 N.E.2d 1009.

1005-8-5. Commitment of the offender

§ 5-8-5. Commitment of the Offender. Upon rendition of judgment after pronouncement of a sentence of periodic imprisonment, imprisonment, or death, the court shall commit the offender to the custody of the sheriff or to the Department of Corrections. A sheriff in executing a mittimus issuing upon a commitment to the Department of Corrections shall convey such offender to the nearest receiving station designated by the Department of Corrections. The court may commit the offender to the custody of the Attorney General of the United States under Section 5-8-6¹ when a sentence for a State offense provides that such sentence is to run concurrently with a previous and unexpired federal sentence. The expense of conveying a person committed by the juvenile court or an offender convicted of a felony shall be

35-38-4-2. Appeal by state.

Cited: State v. Comerford, 484 N.E.2d 993 (Ind. App. 1985); State v. Monticello Developers, Inc., 515 N.E.2d 1070 (Ind. 1987);

State v. Watkins, 515 N.E.2d 1152 (Ind. App. 1987).

NOTES TO DECISIONS

ANALYSIS

Appealable orders.
—Civil proceedings.
Reserved question.

rounding the motion for return of property are civil in nature, and an appeal is not limited by this section. State v. Poxon, 514 N.E.2d 652 (Ind. App. 1987).

Appealable Orders.

Reserved Question.

—Civil Proceedings.

The state may appeal an adverse ruling from an order granted under IC 35-33-5-5(c)(1), because proceedings sur-

rounding the motion for return of property are civil in nature, and an appeal is not limited by this section. State v. Poxon, 514 N.E.2d 652 (Ind. App. 1987).
When a defendant has been acquitted and the state appeals a reserved question of law, only questions of law are considered by the Supreme Court. State v. Goodrich, 504 N.E.2d 1023 (Ind. 1987).

ARTICLE 50

SENTENCES

CHAPTER.

- 1. GENERAL PROVISIONS, 35-50-1-2 — 35-5-1-4.
- 2. SENTENCES FOR FELONIES, 35-50-2-1 — 35-50-2-3, 35-50-2-7 — 35-50-2-10.
- 3. SENTENCES FOR MISDEMEANORS, 35-50-3-1.

- 5. MISCELLANEOUS PENALTIES, 35-50-5-3.
- 6. RELEASE FROM IMPRISONMENT — GOOD TIME, 35-50-6-5.5.

CHAPTER 1

GENERAL PROVISIONS

SECTION.

35-50-1-2. Consecutive and concurrent terms.

SECTION.

35-50-1-3. [Repealed.]
35-50-1-4. [Repealed.]

35-50-1-1. Authority to sentence.

Indiana Law Review, 1983 Survey of Criminal Law and Procedure, 17 Ind. L. Rev. 115 (1984).

Survey of Recent Developments in Criminal Law and Procedure, 18 Ind. L. Rev. 157 (1935).

Cited: Stout v. State, 479 N.E.2d 563 (Ind. 1985); Kamyatti v. State, 490 N.E.2d 279 (Ind. 1986).

NOTES TO DECISIONS

ANALYSIS

Increase in sentence.
Jury instructions.

Increase in Sentence.

There was no error in the court's increasing the defendant's sentence prior to any entry being made in the court's record book, after the defendant, after hearing the initial sentence, began to use rude and profane language toward the judge, since the amended sentence was not manifestly unreasonable in light of the defendant's character and numerous prior offenses. Coleman v. State, 490 N.E.2d 711 (Ind. 1986).

Jury Instructions.

The court does not err in refusing to instruct the jury that the crime charged is a class D felony. It is only necessary to instruct the jury on the matters necessary for them to adequately understand the case and arrive at a fair verdict, and the fact that the crime is a felony or, specifically, a class D felony is not necessary information for the jury. Pursuant to this section, fixing the penalty and sentencing the defendant is the function of the court. Wilder v. State, 498 N.E.2d 1295 (Ind. App. 1986).

Though instructions informing the jury of specific penalties are irrelevant, instructions which relieve the jury of any speculation

about the sentencing procedure and allow the jury to concentrate on the guilt or innocence of the defendant are permissible. *Hatchett v. State*, 502 N.E.2d 398 (Ind. 1987).

An instruction that, "A person who is convicted of a crime by a jury is sentenced by a judge. By law the judge must hold a sentencing hearing in which a written presentence report and all matters in mitigation and aggravation are considered. After the hearing the judge may have various sentenc-

ing alternatives, including imprisonment within a certain range. That is why these instructions do not contain any information concerning the penalties that could be imposed upon a conviction," is not misleading nor confusing because it implies defendant may not be imprisoned if found guilty and is a correct statement of the law. Only the trial court has authority to determine the proper penalty to be given upon a conviction. *Willis v. State*, 510 N.E.2d 1354 (Ind. 1987).

35-50-1-2. Consecutive and concurrent terms. — (a) Except as provided in subsection (b), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively.

(b) If, after being arrested for one (1) crime, a person commits another crime:

(1) Before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or

(2) While the person is released:

(A) Upon the person's own recognizance; or

(B) On bond;

the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed. [IC 35-50-1-2, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 111; P.L.330-1987, § 1.]

Amendments. The 1987 amendment rewrote former subsection (b) as set out in the bound volume, adding subdivision (b)(2); and made stylistic changes in subsection (a).

Effective Dates. P.L.330-1987 contained no effective date provision. Pursuant to IC 1-1-3-3, the amendment became effective September 1, 1987.

Cited: *Little v. State*, 475 N.E.2d 677 (Ind. 1985); *Chambers v. State*, 478 N.E.2d 1234

(Ind. 1985); *Sides v. State*, 480 N.E.2d 572 (Ind. 1985); *Dunfee v. State*, 482 N.E.2d 499 (Ind. App. 1985); *Sides v. State*, 482 N.E.2d 757 (Ind. App. 1985); *Komyatti v. State*, 490 N.E.2d 279 (Ind. 1986); *Smith v. State*, 491 N.E.2d 193 (Ind. 1986); *Henderson v. State*, 492 N.E.2d 20 (Ind. 1986); *Patterson v. State*, 500 N.E.2d 1191 (Ind. 1986); *Nagy v. State*, 505 N.E.2d 434 (Ind. 1987).

NOTES TO DECISIONS

ANALYSIS

Concurrent sentences.

Consecutive sentences.

—Improper.

—Proper.

Discretion of court.

—Considerations.

Concurrent Sentences.

Where the trial court wanted to impose concurrent sentences for the present crimes because defendant was 47 years old and in ill health, but, the court imposed consecutive sentences after concluding that his status as a parolee made doing so mandatory under § 35-50-1-2, the case was remanded to allow the trial court to do what it wanted in the first place: Impose concurrent sentences for the three present offenses, to be served consecutively to any time to be served for violating his out-of-state parole. *LeMaster v. State*, 498 N.E.2d 1185 (Ind. 1986).

Consecutive Sentences.

Consecutive sentences were mandatory under subdivision (b)(2) as it existed prior to the

1987 amendment, which rewrote subsection (b), where the subsequent crime was committed after conviction and sentence for the prior crime and while the defendant was free on bond pending appeal. *Groff v. State*, 488 N.E.2d 711 (Ind. 1986).

Where the defendant commits a crime while on probation from a prior conviction, the trial court is without discretion and errs in not ordering that the sentences for the later convictions be served consecutively to the sentences imposed for the earlier convictions. *Bay v. State*, 489 N.E.2d 1220 (Ind. App. 1986).

Where a new conviction may constitute a parole violation for which the defendant could be returned to prison, this section requires that the sentences for the present offenses be served consecutively to any time resulting from the parole violation, but this section does not require that each of the sentences for the present crimes be served consecutively to each other, although the trial court could find aggravating circumstances which outweigh any mitigating circumstances and order consecutive sentences

35-50-1-3. [Repealed.]

Compiler's Notes. This section, providing for liability for costs, was repealed by P.L.305-1987, § 38. For present provisions, see 33-19-2-2.

Effective Dates. P.L.305-1987, § 43, July 1, 1987.

35-50-1-4. [Repealed.]

Compiler's Notes. This section, concerning disenfranchising of incarcerated convicts,

was repealed by P.L.5-1986, § 61, effective March 4, 1986.

35-50-1-5. Effect of postconviction remedy on subsequent sentencing.

Cited: *Linthicum v. State*, 511 N.E.2d 1026 (Ind. 1987).

NOTES TO DECISIONS**Retroactivity.**

The amended rule, allowing more severe sentences after post-conviction remedial action, should not apply retroactively, but

should apply only to petitions filed after the amendment date because of the potential due process and equal protection issues. *Dean v. State*, 499 N.E.2d 185 (Ind. 1986).

CHAPTER 2**SENTENCES FOR FELONIES****SECTION.**

- 35-50-2-1. Definitions.
 35-50-2-2. Suspension — Probation.
 35-50-2-2.1. Suspension for adult with juvenile record.
 35-50-2-3. Murder.
 35-50-2-7. Class D felony.

SECTION.

- 35-50-2-7.1. Habitual class D felony offenders.
 35-50-2-8. Habitual offenders.
 35-50-2-9. Death sentences.
 35-50-2-10. Habitual controlled substance offenders.

35-50-2-1. Definitions. — (a) As used in this chapter, "Class D felony conviction" means a conviction of a Class D felony in Indiana and a conviction, in any other jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year. However, it does not include a conviction with respect to which the person has been pardoned, or a conviction of a Class A misdemeanor under section 7(b) [35-50-2-7(b)] of this chapter.

(b) As used in this chapter, "felony conviction" means a conviction, in any jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year. However, it does not include a conviction with respect to which the person has been pardoned, or a conviction of a Class A misdemeanor under section 7(b) of this chapter.

(c) As used in this chapter, "minimum sentence" means:

- (1) For murder, thirty (30) years;
- (2) For a Class A felony, twenty (20) years;
- (3) For a Class B felony, six (6) years;
- (4) For a Class C felony, two (2) years; and
- (5) For a Class D felony, one (1) year.

[IC 35-50-2-1, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 114; P.L.334-1983, § 1; P.L.98-1985, § 8.]

Amendments. The 1988 amendment designated the former first paragraph as subsection (b) and former second paragraph as subsection (c); added subsection (a); divided subsection (b) into two sentences by substituting "However" for "but" at the beginning of the present second sentence and making a punctuation change; and added "As used in

this chapter:" to the beginning of subsection (c).

Effective Dates. P.L.98-1988 contains no effective date provision. Pursuant to IC 1-1-3-3, the act takes effect July 1, 1988.

Cited: *Washington v. State*, 517 N.E.2d 77 (Ind. 1987); *Stroud v. State*, 517 N.E.2d 780 (Ind. 1988).

NOTES TO DECISIONS

ANALYSIS

Convictions in other jurisdictions.

—Federal offenses.

Felony conviction.

—Theft.

Convictions in Other Jurisdictions.

The classification of crimes as felonies or misdemeanors in other states is not relevant for purposes of establishing a prior felony conviction in determining habitual criminal status in Indiana; therefore, because the defendant's prior convictions were both for more than one year imprisonment, the state showed sufficient proof that defendant had two prior felony convictions as required by the habitual offender statute. *Galmore v. State*, 467 N.E.2d 1173 (Ind. 1984).

Evidence that the defendant had been convicted of burglary in another state and that he received a sixty-day jail sentence and two years probation was insufficient to establish the defendant's prior conviction for a felony, since the evidence did not indicate that the defendant could have been imprisoned for more than one year for the burglary conviction. *Jones v. State*, 485 N.E.2d 627 (Ind. 1985).

A foreign state's classification of an offense as a felony or a misdemeanor is not relevant for purposes of establishing a prior felony conviction when determining habitual criminal status in Indiana. *Beach v. State*, 496 N.E.2d 43 (Ind. 1986).

A decision that the defendant's prior Tennessee conviction was for a felony was erroneous where it was based upon the fact that the Tennessee indictment stated that defendant "feloniously" possessed burglar tools. This is not the test by which Indiana determines whether an earlier judgment was a felony conviction. *Cavendish v. State*, 496 N.E.2d 46 (Ind. 1986).

—Federal Offenses.

Convictions not within the jurisdiction of the Indiana courts are admissible in a habitual offender determination, and this includes convictions to a federal institution when former 35-1-1-1 defined "felony" as an offense punishable by imprisonment in the state prison. *Denton v. State*, 496 N.E.2d 576 (Ind. 1986).

Felony Conviction.

—Theft.

Although defendant had bargained for and received a minimal sentence for the crime of theft under former Burns' § 10-3039, notwithstanding the language of "misdemeanor" used in the plea bargain and by the trial court, he had been convicted of a felony. Thus, the trial court did not err in permitting the record of that conviction to be used in the habitual offender phase of a later trial. *Wolfe v. State*, 512 N.E.2d 185 (Ind. 1987).

35-50-2-2. Suspension — Probation. — (a) The court may suspend any part of a sentence for a felony, except as provided in this section or in section 2.1 [35-50-2-2.1] of this chapter.

(b) With respect to the crimes listed in this subsection, the court may suspend only that part of the sentence that is in excess of the minimum sentence:

(1) The crime committed was a Class A or Class B felony and the person has a prior unrelated felony conviction.

(2) The crime committed was a Class C felony and less than (7) years have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for a prior unrelated felony conviction and the date the person committed the Class C felony for which the person is being sentenced.

(3) The crime committed was a Class D felony and less than three (3) years have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for a prior unrelated felony conviction and the date the person committed the Class D felony for which the person is being sentenced. However, the

court may suspend the minimum sentence for the crime only if the court orders home detention under IC 35-38-1-21 instead of the minimum sentence specified for the crime under this chapter.

(4) The felony committed was murder (IC 35-42-1-1); battery (IC 35-42-2-1) with a deadly weapon; kidnapping (IC 35-42-3-2); confinement (IC 35-42-3-3) with a deadly weapon; rape (IC 35-42-4-1) as a Class A felony; criminal deviate conduct (IC 35-42-4-2) as a Class A felony; child molesting (IC 35-42-4-3) as a Class A or Class B felony; robbery (IC 35-42-5-1) resulting in serious bodily injury or with a deadly weapon; arson (IC 35-43-1-1) for hire or resulting in serious bodily injury; burglary (IC 35-43-2-1) resulting in serious bodily injury or with a deadly weapon; resisting law enforcement (IC 35-44-3-3) with a deadly weapon; escape (IC 35-44-3-5) with a deadly weapon; rioting (IC 35-45-1-2) with a deadly weapon; dealing in cocaine or a narcotic drug (IC 35-48-4-1) as a Class A felony; or dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2) if the amount of controlled substance involved has an aggregate weight of three (3) grams or more.

(c) Whenever the court suspends a sentence for a felony, it shall place the person on probation under IC 35-38-2 for a fixed period to end not later than the date the suspended sentence expires.

(d) The minimum sentence for a person convicted of voluntary manslaughter may not be suspended unless the court finds at the sentencing hearing that the crime was not committed by means of a deadly weapon. [IC 35-50-2-2, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 115; 1979, P.L. 305, § 1; 1982, P.L. 204, § 39; P.L.334-1983, § 2; P.L.284-1985, § 3; P.L.211-1986, § 1; P.L.98-1988, § 9.]

Amendments. The 1988 amendment, in subsection (b), substituted "the person" for "he" in two places in subdivision (2) and in two places in the first sentence of subdivision (3), and added the second sentence of subdivision (3).

Effective Dates. P.L.98-1988 contains no effective date provision. Pursuant to IC

1-1-3-3, the act takes effect July 1, 1988.

Cited: *Carter v. State*, 467 N.E.2d 694 (Ind. 1984); *Lessig v. State*, 489 N.E.2d 978 (Ind. App. 1986); *Johnson v. State*, 490 N.E.2d 333 (Ind. 1986); *Willis v. State*, 492 N.E.2d 45 (Ind. App. 1986); *Stroud v. State*, 517 N.E.2d 780 (Ind. 1988).

NOTES TO DECISIONS

ANALYSIS

Habitual offenders.
Suspendable sentence.

Habitual Offenders.

This section pertains only to the suspended sentences for felonies generally. The statute which permits the trial court to reduce the fixed enhancement of 30 years upon an habitual offender determination is 35-50-2-8(e). *Marsillett v. State*, 495 N.E.2d 699 (Ind. 1986).

Suspendable Sentence.

The trial court's conclusion that it was

without authority to suspend a defendant's sentence where the defendant was charged with a class A felony for which the sentence was suspendable was in error, and the court's comments to the effect that it lacked such authority required remand for resentencing. *Henning v. State*, 477 N.E.2d 547 (Ind. 1985).

Probation term in sentence for murder provided for a 30-year prison sentence, and a 30-year probation term was void since probation can be imposed only if a portion of the executed sentence is suspended, and no portion of the 30-year prison sentence could be suspended. *Willis v. State*, 498 N.E.2d 1029 (Ind. App. 1986).

Collateral References. Appearance of order suspending imposition or execution of sentence. 51 A.L.R.4th 939.

35-50-2-2.1. Suspension for adult with juvenile record. — (a) Except as provided in subsection (b) or section 2 [35-50-2-2] of this chapter, the court may not suspend a sentence for a felony for a person with a juvenile record when:

(1) The juvenile record includes findings that the juvenile acts, if committed by an adult, would constitute:

(A) One (1) Class A or Class B felony;

(B) Two (2) Class C or Class D felonies; or

(C) One (1) Class C and one (1) Class D felony; and

(2) Less than three (3) years have elapsed between commission of the juvenile acts that would be felonies if committed by an adult and the commission of the felony for which the person is being sentenced.

(b) Notwithstanding subsection (a), the court may suspend any part of the sentence for a felony, except as provided in section 2 of this chapter, if it finds that:

(1) The crime was the result of circumstances unlikely to recur;

(2) The victim of the crime induced or facilitated the offense;

(3) There are substantial grounds tending to excuse or justify the crime, though failing to establish a defense; or

(4) The acts in the juvenile record would not be Class A or Class B felonies if committed by an adult, and the convicted person is to undergo home detention under IC 35-38-1-21 instead of the minimum sentence specified for the crime under this chapter. [P.L.284-1985, § 4; P.L.331-1987, § 1; P.L.98-1988, § 10.]

Compiler's Notes. Section 5 of P.L.284-1985, effective June 1, 1985, provides: "For purposes of SECTION 4 of this act [this section], the juvenile record includes only those adjudications of delinquency after May 31, 1985."

Amendments. The 1987 amendment, in the opening clause of subsection (a), substituted "a person" for "an adult."

The 1988 amendment, in subsection (b), added subdivision (4) and made related word changes at the end of subdivisions (2) and (3).

Effective Dates. P.L.331-1987, § 2, declared an emergency. Approved April 21, 1987.

P.L.98-1988 contains no effective date provision. Pursuant to IC 1-1-3-3, the act takes effect July 1, 1988.

35-50-2-3. Murder. — (a) A person who commits murder shall be imprisoned for a fixed term of forty (40) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, the person may be fined not more than ten thousand dollars (\$10,000).

(b) Notwithstanding subsection (a), a person who was at least sixteen (16) years of age at the time the murder was committed may be sentenced to death under section 9 [35-50-2-9] of this chapter. [IC 35-50-2-3, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 116; P.L.332-1987, § 1.]

Compiler's Notes. P.L.332-1987, § 3, provides: "This act does not apply to a case in which a death sentence was imposed before September 1, 1987."

Amendments. The 1987 amendment substituted "The person" for "he" in subsection (a) and substituted "a person who was at least sixteen (16) years of age at the time the murder was committed" for "of this section a person who commits murder" in subsection (b).

Effective Dates. P.L.332-1987 contained no effective date provision. Pursuant to IC 1-1-3-3, the amendment became effective September 1, 1987.

Cited: *Smith v. State*, 468 N.E.2d 512 (Ind. 1984); *Butrum v. State*, 469 N.E.2d 1174 (Ind. 1984); *McHugh v. State*, 471 N.E.2d 293 (Ind. 1984); *Hicks v. State*, 474 N.E.2d 987 (Ind. 1985).

(d) A person is an habitual class D felony offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated class D felony convictions.

(e) The court shall sentence a person found to be an habitual class D felony offender to an additional fixed term of eight (8) years imprisonment to be added to the term of imprisonment imposed under section 7 [35-50-2-7] of this chapter. If the court finds that three (3) years or more have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for the last prior unrelated class D felony conviction and the date the person committed the class D felony for which the person is being sentenced as an habitual class D felony offender, then the court may subtract up to four (4) years from the additional fixed term of eight (8) years.

(f) If a reduction of the additional eight (8) year fixed term is authorized under subsection (e), the court may also consider the aggravating or mitigating circumstances in IC 35-38-1-7 to:

- (1) Decide the issue of granting a reduction; or
- (2) Determine the number of years, if any, to be subtracted under subsection (e). [P.L.328-1985, § 1.]

Compiler's Notes. Section 3 of P.L.328-1985 provides: "(a) The addition of IC 35-50-2-7.1 and the amendment of IC 35-50-2-8 by this act do not affect any:

- "(1) rights or liabilities accrued;
 - "(2) penalties incurred; or
 - "(3) proceedings begun;
- before September 1, 1985. The rights, liabilities, and proceedings are continued and punishments, penalties, or forfeitures shall be

imposed and enforced under IC 35-50-2-8 as if this act had not been enacted.

"(b) If all of the felonies that are relied upon for sentencing a person as an habitual offender under IC 35-50-2-8 are felonies that were committed before September 1, 1985, the felonies shall be prosecuted and remain punishable under IC 35-50-2-8 as if this act had not been enacted."

NOTES TO DECISIONS

Applicability.

This section did not apply to a defendant whose class D felonies had been committed

before the effective date of September 1, 1985. *Hensley v. State*, 497 N.E.2d 1053 (Ind. 1986).

35-50-2-8. Habitual offenders. — (a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions.

(b) After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two (2) prior unrelated felony convictions. However, a conviction does not count for purposes of this subsection if:

- (1) It has been set aside; or
- (2) It is one for which the person has been pardoned.

(c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing under IC 35-38-1-3.

(d) A person is an habitual offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated felony convictions.

(e) The court shall sentence a person found to be an habitual criminal to an additional fixed term of thirty (30) years imprisonment to be added to the term of imprisonment imposed under section 3, 4, 5, 6, or 7 [35-50-2-3,

35-50-2-4, 35-50-2-5, 35-50-2-6 or 35-50-2-7] of this chapter. If the court finds that ten (10) years or more have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for the last prior unrelated felony conviction and the date he committed the felony for which he is being sentenced as an habitual offender, then the court may subtract up to twenty-five (25) years from the additional fixed term of thirty (30) years. If at least one (1) of the offenses relied upon to establish that the person has accumulated two (2) prior unrelated felonies is a class D felony, then the court may subtract up to ten (10) years from the additional fixed term of thirty (30) years. If the felony for which the person is being sentenced is a class D felony, then the court may subtract up to twenty (20) years from the additional fixed term of thirty (30) years.

(f) Notwithstanding the court's authority to reduce the additional fixed term of thirty (30) years imprisonment under subsection (e), if a person is found to be an habitual offender under this section, the court shall sentence the person to an additional fixed term of at least five (5) years imprisonment to be added to the term of imprisonment imposed under section 3, 4, 5, 6, or 7 of this chapter.

(g) If a reduction of the additional thirty (30) year fixed term is authorized under subsection (e), the court may also consider the aggravating or mitigating circumstances in IC 35-38-1-7 to:

- (1) Decide the issue of granting a reduction; or
- (2) Determine the number of years, if any, to be subtracted under subsection (e).

(h) A person may not be sentenced as an habitual offender under this section if all of the felonies relied upon for sentencing the person as an habitual offender are class D felonies. [IC 35-50-2-8, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 121; 1980, P.L. 210, § 1; P.L.335-1983, § 1; P.L.328-1985, § 2.]

Compiler's Notes. Section 3 of P.L.328-1985 provides: "(a) The addition of IC 35-50-2-7.1 and the amendment of IC 35-50-2-8 by this act do not affect any:

"(1) rights or liabilities accrued;

"(2) penalties incurred; or

"(3) proceedings begun: before September 1, 1985. The rights, liabilities, and proceedings are continued and punishments, penalties, or forfeitures shall be imposed and enforced under IC 35-50-2-8 as if this act had not been enacted.

"(b) If all of the felonies that are relied upon for sentencing a person as an habitual offender under IC 35-50-2-8 are felonies that were committed before September 1, 1985, the felonies shall be prosecuted and remain punishable under IC 35-50-2-8 as if this act had not been enacted."

Cited: *Galmore v. State*, 467 N.E.2d 1173 (Ind. 1984); *Smith v. State*, 468 N.E.2d 512 (Ind. 1984); *Connell v. State*, 470 N.E.2d 701 (Ind. 1984); *Davis v. State*, 472 N.E.2d 922 (Ind. 1985); *Smith v. State*, 475 N.E.2d 1139

(Ind. 1985); *Coppock v. State*, 480 N.E.2d 941 (Ind. 1985); *Richardson v. State*, 481 N.E.2d 1310 (Ind. 1985); *Woodson v. State*, 483 N.E.2d 62 (Ind. 1985); *Jackson v. State*, 483 N.E.2d 1374 (Ind. 1985); *Foster v. State*, 484 N.E.2d 965 (Ind. 1985); *Martin v. State*, 488 N.E.2d 1160 (Ind. App. 1986); *Gibson v. State*, 490 N.E.2d 297 (Ind. 1986); *Turpin v. State*, 490 N.E.2d 1109 (Ind. 1986); *Ashley v. State*, 493 N.E.2d 768 (Ind. 1986); *Gilliam v. State*, 494 N.E.2d 319 (Ind. 1986); *Wendling v. State*, 495 N.E.2d 192 (Ind. 1986); *Gipson v. State*, 495 N.E.2d 722 (Ind. 1986); *Cavendish v. State*, 496 N.E.2d 46 (Ind. 1986); *Blue v. State*, 504 N.E.2d 583 (Ind. 1987); *Carter v. State*, 505 N.E.2d 798 (Ind. 1987); *Hutcherson v. State*, 507 N.E.2d 969 (Ind. 1987); *Duff v. State*, 508 N.E.2d 17 (Ind. 1987); *Vaxter v. State*, 508 N.E.2d 809 (Ind. 1987); *Taylor v. State*, 511 N.E.2d 1036 (Ind. 1987); *Criss v. State*, 512 N.E.2d 858 (Ind. 1987); *Washington v. State*, 517 N.E.2d 77 (Ind. 1987).

tions is mere surplusage. *Wilson v. State*, 511 N.E.2d 1014 (Ind. 1987).

35-50-2-9. Death sentences. — (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either:

(A) The victim was acting in the course of duty; or

(B) The murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(10) The defendant was serving a term of imprisonment and on the date of the murder the defendant had twenty (20) or more years remaining to be served before the earliest possible release date as defined by IC 35-38.

(11) The defendant dismembered the victim.

(12) The victim of the murder was less than twelve (12) years of age.

(c) The mitigating circumstances that may be considered under this section are as follows:

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

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

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the

judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c).

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review. [IC 35-50-2-9, as added by Acts 1977, P.L. 340, § 122; P.L.336-1983, § 1; P.L.212-1986, § 1; P.L.320-1987, § 2; P.L.332-1987, § 2.]

Compiler's Notes. P.L.332-1987, § 3, effective September 1, 1987, provides: "This act does not apply to a case in which a death sentence was imposed before September 1, 1987."

Amendments. The 1987 amendment by P.L.332-1987 inserted present subdivision (7) in subsection (c), renumbering former subdivision (7) as subdivision (8); and made phraseology changes in subsections (b) and (c).

The 1987 amendment by P.L.320-1987 added subsection (b)(12) and made stylistic changes in subsection (b)(6).

Effective Dates. P.L.320-1987 contained no effective date provision. Pursuant to IC 1-1-3-3, the amendment became effective September 1, 1987.

P.L.332-1987 contained no effective date

provision. Pursuant to IC 1-1-3-3, the amendment became effective September 1, 1987.

Indiana Law Journal. The Death Penalty Cases: Shaping Substantive Criminal Law, 58 Ind. L.J. 187 (1982).

Notre Dame Law Review. The Case for Comparative Proportionality Review, 59 Notre Dame L. Rev. 1412 (1984).

Cited: *Didio v. State*, 471 N.E.2d 1117 (Ind. 1984); *Dillon v. Duckworth*, 751 F.2d 895 (7th Cir. 1984); *Rowan v. Owens*, 752 F.2d 1186 (7th Cir. 1984); *Smith v. State*, 474 N.E.2d 973 (Ind. 1985); *Schiro v. State*, 479 N.E.2d 556 (Ind. 1985); *Mers v. State*, 496 N.E.2d 75 (Ind. 1986); *Braver v. State*, 496 N.E.2d 371 (Ind. 1986); *Spranger v. State*, 500 N.E.2d 1170 (Ind. 1986); *Resnover v. State*, 507 N.E.2d 1382 (Ind. 1987); *Fleenor v. State*, 514 N.E.2d 80 (Ind. 1987).

Cross References. Penalties for misdemeanors, 35-50-1-1 — 35-50-1-4, 35-50-3-1 — 35-50-3-4, 35-50-5-2.

CHAPTER 6

DEATH PENALTY PROCEDURE

SECTION	SECTION
35-38-6-1. Death penalty — Manner and time of execution — Executioner.	35-38-6-7. Escape of prisoner — Recapture — Effect on execution date
35-38-6-2. Warrant for execution.	35-38-6-8. Reason for delay of execution noted on warrant — When warrant returned to court clerk.
35-38-6-3. Sheriff's duty.	35-38-6-9. Applicability of chapter to execution of women.
35-38-6-4. Prisoner confined — Who may visit.	35-38-6-10. Pregnancy of condemned prisoner.
35-38-6-5. Execution inside prison.	
35-38-6-6. Who may be present at execution.	

35-38-6-1. Death penalty — Manner and time of execution — Executioner. — (a) The punishment of death shall be inflicted by causing to pass through the body of the convicted person a current of electricity of sufficient intensity to cause death. The application of the current must continue until the person is dead.

(b) The death penalty shall be inflicted before the hour of sunrise on a date fixed by the sentencing court. However, the execution must not occur until at least one hundred [100] days after the conviction.

(c) The warden of the state prison, or persons designated by the warden, shall serve as the executioner. [IC 35-38-6-1, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.).
Special provisions relating to the death penalty, § 483.

DECISIONS UNDER PRIOR LAW

ANALYSIS

Place of execution.
Time for execution.

Place of Execution.

It was within the power of the legislature to change the place where the death penalty should be inflicted after sentence was passed

imposing such penalty. *Keith v. State*, 157 Ind. 376, 61 N.E. 716 (1901).

Time for Execution.

The time fixed for carrying the sentence into execution could not be less than the time prescribed by statute, even with the consent of the defendant. *Koerner v. State*, 96 Ind. 243 (1884).

Collateral References. 21 Am. Jur. 2d.
Criminal Law. §§ 609-612.

35-38-6-2. Warrant for execution. — The court in which a death sentence is ordered shall issue a warrant to the sheriff within fourteen [14] days of the sentence:

- (1) That is under the seal of the court;
- (2) That contains notice of the conviction and the sentence;
- (3) Directed to the warden of the state prison; and
- (4) That orders the warden to execute the convicted person at a specified time and date in the state prison. [IC 35-38-6-2, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.).
Special provisions relating to the death penalty, § 483.

35-38-6-3. Sheriff's duty. — A sheriff who receives a warrant under section 2 or section 7 [35-38-6-2 or 35-38-6-7] of this chapter shall immediately:

- (1) Transport the person to the state prison;
- (2) Deliver the person and the warrant to the warden of the prison;
- (3) Obtain a receipt for the delivery of the person; and
- (4) Deliver the receipt to the clerk of the sentencing court. [IC 35-38-6-3, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.)
Duties of clerk and sheriff after judgment. § 481.

Special provisions relating to death penalty, § 483.

35-38-6-4. Prisoner confined — Who may visit. — (a) The convicted person shall be confined in the state prison until the date of his execution.

(b) The convicted person's:

- (1) Attorney;
- (2) Physician;
- (3) Relatives;
- (4) Friends; and
- (5) Spiritual advisor;

may visit him while he is confined. The department of correction shall adopt rules, under IC 4-22-2, governing such visits. [IC 35-38-6-4, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.).
Special provisions relating to death penalty.
§ 483.

35-38-6-5. Execution inside prison. — The execution must take place inside the walls of the state prison in a room arranged for that purpose. The department of correction shall provide the necessary room and appliances to carry out the electrocution as provided in this chapter. [IC 35-38-6-5, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.).
Special provisions relating to death penalty,
§ 483.

35-38-6-6. Who may be present at execution. — Only the following persons may be present at the execution:

- (1) The warden and any of his assistants who are necessary to assist him in the execution.
- (2) The prison physician.
- (3) One [1] other physician.
- (4) The spiritual advisor of the convicted person.
- (5) The prison chaplain.
- (6) Not more than ten [10] friends or relatives of the convicted person who are invited by the convicted person to attend. [IC 35-38-6-6, as added by P.L.311-1983, § 3.]

Cross References. Delivering body to Special provisions relating to death penalty,
medical college, 4-23-1-2. § 483.
Ewbank's Criminal Law (Symmes ed.).

35-38-6-7. Escape of prisoner — Recapture — Effect on execution date. — (a) If the convicted person:

- (1) Escapes from custody before the date set for his execution; and
 - (2) Is recaptured before the date set for his execution;
- he shall be returned to the state prison and executed according to the terms of the warrant.

(b) If the convicted person:

- (1) Escapes from custody before his delivery to the warden; and
 - (2) Is recaptured after the date set for his execution;
- any person may arrest him and commit him to the jail of the county in which he was sentenced. The sheriff shall notify the sentencing court of the recapture, and the court shall fix a new date for the execution. The new execution date must not be less than thirty [30] nor more than sixty [60] days after the recapture of the person. The court shall issue a new warrant in the form prescribed by section 2 [35-38-6-2] of this chapter.

(c) If the convicted person:

- (1) Escapes from the state prison; and
 - (2) Is recaptured after [the] the date set for his execution;
- any person may arrest him and commit him to the state prison. When he is returned to the state prison, the warden shall notify the sentencing court, and the court shall fix a new date for the execution. The new execution date must not be less than thirty [30] nor more than sixty [60] days after the

recapture of the person. The court shall issue a warrant to the warden directing him to execute the convicted person at a specified time and date in the state prison. [IC 35-38-6-7, as added by P.L.311-1983, § 3.]

Compiler's Notes. The word "the" in subdivision (c)(2) was so enclosed in brackets to indicate surplusage.

Ewbank's Criminal Law (Symmes ed.). Special provisions relating to death penalty, § 483.

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

35-38-6-8. Reason for delay of execution noted on warrant — When warrant returned to court clerk. — (a) If the execution of the death sentence is suspended, the warden shall note the reason for the delay on the warrant but shall proceed with the execution when the period of suspension ends.

(b) The warrant shall be returned to the clerk of the sentencing court after:

- (1) The convicted person is executed;
- (2) The convicted person has been pardoned;
- (3) The convicted person's judgment has been reversed;
- (4) The convicted person's sentence has been commuted; or
- (5) The convicted person dies before his execution;

with a statement concerning the completion of the execution or the reason why the person was not executed. [IC 35-38-6-8, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.). Special provisions relating to the death penalty, § 483.

DECISIONS UNDER PRIOR LAW

Suspension Pending Appeal.

When an appeal was taken from a judgment affixing the death penalty, the Supreme Court could stay the execution of the judg-

ment during the pendency of the appeal. *Parker v. State*, 135 Ind. 534, 35 N.E. 179, 23 L.R.A. 859 (1893).

35-38-6-9. Applicability of chapter to execution of women. — The provisions of this chapter in relation to the infliction of the death penalty extend equally, so far as applicable, to the case of any woman convicted and sentenced to death. [IC 35-38-6-9, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.). Special provisions relating to the death penalty, § 483.

35-38-6-10. Pregnancy of condemned prisoner. — If the physician of the prison and one [1] other physician certify in writing to the warden and the sentencing court that a condemned woman is pregnant, the warden shall suspend the execution of the sentence. When the prison physician and one [1] other physician certify in writing to the warden and the sentencing court that the woman is no longer pregnant, the sentencing court shall immediately fix a new execution date. [IC 35-38-6-10, as added by P.L.311-1983, § 3.]

Ewbank's Criminal Law (Symmes ed.).
Special provisions relating to the death penalty, § 483.

ARTICLES 39-49 [IN BOOK 2]

ARTICLE 50

SENTENCES

CHAPTER

1. GENERAL PROVISIONS, 35-50-1-1 — 35-50-1-5.
- 1A. [REPEALED.]
2. SENTENCES FOR FELONIES, 35-50-2-1 — 35-50-2-10.
3. SENTENCES FOR MISDEMEANORS, 35-50-3-1 — 35-50-3-4.

CHAPTER

4. [REPEALED.]
5. MISCELLANEOUS PENALTIES, 35-50-5-1 — 35-50-5-3.
- 5A. [REPEALED.]
6. RELEASE FROM IMPRISONMENT — GOOD TIME, 35-50-6-1 — 35-50-6-7.

CHAPTER 1

GENERAL PROVISIONS

SECTION

- 35-50-1-1. Authority to sentence.
35-50-1-2. Consecutive and concurrent terms.
35-50-1-3. Costs.

SECTION

- 35-50-1-4. Disfranchisement.
35-50-1-5. Effect of postconviction remedy on subsequent sentencing.

35-50-1-1. Authority to sentence. — The court shall fix the penalty of and sentence a person convicted of an offense. [IC 35-50-1-1, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 110.]

Cited: Kocher v. State, 270 Ind. 661, 69 Ind. Dec. 147, 389 N.E.2d 18 (1979); Lyda v. State, 272 Ind. 15, 72 Ind. Dec. 100, 395 N.E.2d 776 (1979); Bumgardner v. State, — Ind. —, 422 N.E.2d 1244 (1981); Corneluis v. State, — Ind. —, 425 N.E.2d 616 (1981); State v. Williams, — Ind. —, 430 N.E.2d 756

(1982); Naked City, Inc. v. State, — Ind. App. —, 434 N.E.2d 576 (1982); Schiro v. State, — Ind. —, 451 N.E.2d 1047 (1983); Stafford v. State, — Ind. App. —, 455 N.E.2d 402 (1983); Haskett v. State, — Ind. App. —, 467 N.E.2d 32 (1984).

CHAPTER 1A

ADDITIONAL GENERAL PROVISIONS

35-50-1A-1 — 35-50-1A-18 [9-1827a, 9-1828a, 9-2201, 9-2201b, 9-2201c, 9-2202a, 9-2205, 9-2206a, 9-2251 — 9-2252e].
[Repealed.]

Compiler's Notes. This chapter, which was enacted as 35-4.1-4 and transferred to this position by the compiler, and concerned the entry of judgment and sentencing, was

repealed by Acts 1976, P.L. 148, § 24; Acts 1977, P.L. 340, § 148; P.L. 311-1983, § 49. For present provisions, see 35-38-1.

CHAPTER 2

SENTENCES FOR FELONIES

SECTION.

35-50-2-1. Definitions.
35-50-2-2. Suspension — Probation.
35-50-2-3. Murder.
35-50-2-4. Class A felony.
35-50-2-5. Class B felony.

SECTION

35-50-2-6. Class C felony.
35-50-2-7. Class D felony.
35-50-2-8. Habitual offenders.
35-50-2-9. Death sentences.
35-50-2-10. Habitual controlled substance offenders.

35-50-2-1. Definitions. — As used in this chapter:

"Felony conviction" means a conviction, in any jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one year; but it does not include a conviction with respect to which the person has been pardoned, or a conviction of a class A misdemeanor under section 7(b) [35-50-2-7(b)] of this chapter.

"Minimum sentence" means:

- (1) For murder, thirty [30] years;
- (2) For a class A felony, twenty [20] years;
- (3) For a class B felony, six [6] years;
- (4) For a class C felony, two [2] years; and
- (5) For a class D felony, one [1] year. [IC 35-50-2-1, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 114; P.L. 334-1983, § 1.]

Compiler's Notes. Section 26 of Acts 1976, P.L. 148 read: "A conviction for a felony committed before the effective date [October 1, 1977] of this act constitutes a felony conviction under IC 35-50-2-1."

Cross References. Penalties for felonies, 35-50-1-1 — 35-50-2-10, 35-50-5-2.

Penalties for misdemeanors, 35-50-1-1 — 35-50-1-4, 35-50-3-1 — 35-50-3-4, 35-50-5-2.

Compensation for victims of violent crimes, 16-7-3.6-1 — 16-7-3.6-19

Crimes to be defined by statute, 1-1-2-2.

Revocation of driving license following conviction of a felony in the commission of which a motor vehicle is used, 9-2-1-5.

Cited: Griffin v. State. — Ind. —, 415 N.E.2d 60 (1981); Clay v. State. — Ind. —, 440 N.E.2d 466 (1982); Minneman v. State. — Ind. —, 441 N.E.2d 673 (1982); Thomas v. State. — Ind. —, 443 N.E.2d 1197 (1983); McBrady v. State. — Ind. —, 459 N.E.2d 719 (1984).

Stop

35-50-2-2. Suspension — Probation. — (a) The court may suspend any part of a sentence for a felony, except as provided by subsection (b).

(b) With respect to the crimes listed in this subsection, the court may suspend only that part of the sentence that is in excess of the minimum sentence:

(1) The crime committed was a class A or class B felony and the person has a prior unrelated felony conviction.

(2) The crime committed was a class C felony and less than seven [7] years have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for a prior unrelated felony conviction and the date he committed the class C felony for which he is being sentenced.

(3) The crime committed was a class D felony and less than five [5] years have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for a prior unrelated felony conviction and the date he committed the class D felony for which he is being sentenced.

(4) The felony committed was murder [35-42-1-1]; battery [35-42-2-1] with a deadly weapon; kidnapping [35-42-3-2]; confinement [35-42-3-3] with a deadly weapon; rape [35-42-4-1] as a class A felony; criminal deviate conduct [35-42-4-2] as a class A felony; child molesting [35-42-4-3] as a class A or class B felony; robbery [35-42-5-1] resulting in serious bodily injury or with a deadly weapon; arson [35-43-1-1] for hire or resulting in serious bodily injury; burglary [35-43-2-1] resulting in serious bodily injury or with a deadly weapon; resisting law enforcement [35-44-3-3] with a deadly weapon; escape [35-44-3-5] with a deadly weapon; rioting [35-45-1-2] with a deadly weapon; dealing in cocaine or a narcotic drug [35-48-4-1] as a class A felony; or dealing in a schedule I, II or III controlled substance [35-48-4-2] if the amount of controlled substance involved has an aggregate weight of three [3] grams or more.

(c) Whenever the court suspends a sentence for a felony, it shall place the person on probation under IC 35-7 [repealed] for a fixed period to end not later than the date the suspended sentence expires. [IC 35-50-2-2, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 115; 1979, P.L. 305, § 1; 1982, P.L. 204, § 39; P.L.334-1983, § 2.]

Compiler's Notes. IC 35-7, referred to in subsection (c), was repealed by Acts 1979, P.L. 120, § 22, and P.L.311-1983, § 49. For present provisions, see IC 35-38-2.

Cross References. Penalties for felonies, 35-50-1-1 — 35-50-2-10, 35-50-5-2.

Cited: Galloway v. State, — Ind. App. —, 422 N.E.2d 1290 (1981); Anderson v. State, — Ind. —, 426 N.E.2d 674 (1981); Grassmyer

v. State, — Ind. App. —, 426 N.E.2d 1377 (1981); Vacendak v. State, — Ind. —, 431 N.E.2d 100 (1982); Yager v. State, — Ind. —, 437 N.E.2d 454 (1982); Smith v. State, — Ind. —, 439 N.E.2d 634 (1982); Huff v. State, — Ind. —, 440 N.E.2d 465 (1982); Abercrombie v. State, — Ind. —, 441 N.E.2d 442 (1982); McVey v. State, — Ind. App. —, 438 N.E.2d 770 (1982).

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NOTES TO DECISIONS

ANALYSIS

Attempted murder.
 Conspiracy.
 Constitutionality.
 Conviction of prior felonies.
 Erroneous suspension.
 —Correction.
 Habitual offenders.
 Role of court and jury.

Attempted Murder.

Sentence imposed upon a defendant for attempted murder is not suspendable, since reference to "murder" in paragraph (a)(4) of this section also includes attempted murder. *Haggenjos v. State*, — Ind. —, 441 N.E.2d 430 (1982).

Conspiracy.

Conspiracy is not one of the offenses that is nonsuspendable under this section. *Huff v. State*, — Ind. App. —, 443 N.E.2d 1234 (1983).

Constitutionality.

This section does not violate the constitution. *Davis v. State*, — Ind. App. —, 73 Ind. Dec. 450, 398 N.E.2d 704 (1980).

Conviction of Prior Felonies.

Court did not err in refusing probation

where defendant had been convicted of prior felonies although the sentences he received for such prior crimes were for misdemeanors. *Davis v. State*, — Ind. App. —, 73 Ind. Dec. 450, 398 N.E.2d 704 (1980).

Erroneous Suspension.**—Correction.**

Where a trial court erroneously suspends a sentence in violation of this section, the court has the power to vacate the sentence. *Niece v. State*, — Ind. App. —, 456 N.E.2d 1081 (1983).

Habitual Offenders.

When a criminal defendant receives an enhanced sentence under the habitual offender statute, such sentence may not be suspended. *State v. Williams*, — Ind. —, 430 N.E.2d 756 (1982).

Role of Court and Jury.

Discretion is vested in the trial court to suspend a sentence unless one of a series of exceptions applies. This decision is not shared with the jury. The same is true of aggravating or mitigating circumstances in the determination of a sentence by the trial judge. *Hunt v. State*, — Ind. —, 455 N.E.2d 307 (1983).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Constitutionality.
 No ground for sentence revision.

Constitutionality.

A statute which prohibits the suspension of sentence does not violate Ind. Const., art. 1, § 18, prohibiting vindictive justice. *State v. Lawson*, 272 Ind. 541, 74 Ind. Dec. 69, 400 N.E.2d 128 (1980).

No Ground for Sentence Revision.

Where law at time offense was committed prohibited court from suspending sentence or placing defendant on probation in case of a conviction for first-degree burglary fact that this section places no such restriction on the court for the corresponding crime in the present law was no ground for defendant to obtain a revision of his sentence. *Holliday v. State*, 181 Ind. App. 360, 70 Ind. Dec. 470, 391 N.E.2d 866 (1979).

35-50-2-3. Murder. — (a) A person who commits murder shall be imprisoned for a fixed term of forty [40] years, with not more than twenty [20] years added for aggravating circumstances or not more than ten [10] years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars [\$10,000].

(b) Notwithstanding subsection (a) of this section, a person who commits murder may be sentenced to death under section 9 [35-50-2-9] of this chapter. [IC 35-50-2-3, as added by Acts 1976, P.L. 148, § 8; 1977, P.L. 340, § 116.]

Prior Criminal Record.

It was proper for trial court to add two years for aggravating circumstances because of defendant's prior criminal history. *Evans v. State*, 181 Ind. App. 687, 71 Ind. Dec. 162, 393 N.E.2d 246 (1979).

It was not error for court to sentence defendant convicted of theft, a Class D felony, to a term of four years because of the rather extensive criminal record of the defendant. *Gary v. State*, — Ind. App. —, 74 Ind. Dec. 209, 400 N.E.2d 215 (1980).

—Defendant Not Prosecuted.

Court in finding aggravating circumstances could consider prior criminal activity although defendant was not prosecuted for such crimes. *Bell v. State*, — Ind. App. —, 77 Ind. Dec. 502, 407 N.E.2d 1206 (1980).

—Failure to Advise Defendant of Effect.

Aggravating circumstances may consist of defendant's prior criminal activity, and therefore failure to advise defendant of the effect that prior convictions may have on his

sentence prior to acceptance of his plea of guilty was reversible error. *Bullock v. State*, — Ind. App. —, 77 Ind. Dec. 115, 406 N.E.2d 1220 (1980).

Recommendation of Prosecutor.

The fact that prosecutor agreed with defendant that if he entered a plea of guilty he would not make a recommendation concerning sentencing and would make no objection if defendant asked for sentencing as a Class A misdemeanor rather than a Class D felony, did not bind the court with respect to sentencing. *Smith v. State*, 181 Ind. App. 480, 70 Ind. Dec. 637, 392 N.E.2d 503 (1979).

Review.

Appellate court will not adjust a sentence which is authorized by statute and which is not manifestly unreasonable in that no reasonable person could find it reasonable in light of nature of offense and character of offender. *Atkins v. State*, — Ind. App. —, 437 N.E.2d 114 (1982), cert. denied, — U.S. —, 103 S. Ct. 2460, 77 L. Ed. 2d 1337 (1983).

35-50-2-8. Habitual offenders. — (a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two [2] prior unrelated felony convictions.

(b) After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two [2] prior unrelated felony convictions. However, a conviction does not count, for purposes of this subsection, if:

- (1) It has been set aside; or
- (2) It is one for which the person has been pardoned.

(c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under IC 35-38-1-3.

(d) A person is an habitual offender if the jury (if the hearing is by jury), or the court (if the hearing is to the court alone), finds that the state has proved beyond a reasonable doubt that the person had accumulated two [2] prior unrelated felony convictions.

(e) The court shall sentence a person found to be an habitual criminal to an additional fixed term of thirty [30] years imprisonment to be added to the term [of] imprisonment imposed under section 3, 4, 5, 6, or 7 [35-50-2-3, 35-50-2-4, 35-50-2-5, 35-50-2-6, or 35-50-2-7] of this chapter. If the court finds that ten [10] years or more have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for the last prior unrelated felony conviction, and the date he committed the felony for which he is being sentenced as an habitual offender, then the court may subtract up to twenty-five [25] years from the additional fixed term of thirty [30] years.

tutional rights. *Shaw v. State*, 247 Ind. 139, 6 Ind. Dec. 667, 211 N.E.2d 172 (1965). See *Lawrence v. State*, 259 Ind. 306, 32 Ind. Dec. 480, 286 N.E.2d 830 (1972).

To preserve defendant's right to due process the indictment or affidavit should be in two parts, one part containing the offense charged and the other part containing the prior convictions for the habitual criminal charge; the trial should then proceed as if there were no allegations of former convictions and if the finding is guilty the second part of the indictment should be read to the jury. *Lawrence v. State*, 259 Ind. 306, 32 Ind. Dec. 480, 286 N.E.2d 830 (1972).

Since 1972 ruling in *Lawrence v. State* that there should be bifurcated proceedings for habitual criminal charges went to the

fairness of the trial itself and was designed to eliminate a previously existing danger of convicting the innocent, such holding would be applicable where defendant was tried and convicted in 1954 for both automobile banditry and being an habitual criminal in which trial proof of his prior convictions was introduced to establish the elements of an habitual criminal at the same proceeding where the jury had to pass on the present felony charge. *Enlow v. State*, 261 Ind. 348, 39 Ind. Dec. 597, 303 N.E.2d 658 (1973).

The requirement of a separate trial upon the issue of habitual criminality is not to be applied retroactively. *McPhearson v. State*, 262 Ind. 468, 44 Ind. Dec. 369, 318 N.E.2d 355 (1974); *Paneitz v. State*, 262 Ind. 473, 44 Ind. Dec. 379, 318 N.E.2d 353 (1974).

Collateral References. Constitutionality and construction of statute enhancing penalty for second or subsequent offense. 58 A.L.R. 20, 82 A.L.R. 345, 116 A.L.R. 209, 132 A.L.R. 91, 139 A.L.R. 673.

Pardon as affecting previous offenses or punishment therefor 57 A.L.R. 443.

35-50-2-9. Death sentences. — (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(10) The defendant was serving a term of imprisonment and on the date of the murder the defendant had twenty [20] or more years remaining to be served before his earliest possible release date as defined by IC 35-38.

(c) The mitigating circumstances that may be considered under this section are as follows:

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

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

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c).

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the Supreme Court. The review, which shall be heard under rules adopted by the Supreme Court, shall be given priority over all other cases. The death sentence may not be executed until the Supreme Court has completed its review. [IC 35-50-2-9, as added by Acts 1977, P.L. 340, § 122; P.L.336-1983, § 1.]

Cross References. Compensation for victims of violent crimes, 16-7-3.6-1 — 16-7-3.6-19.

Valparaiso University Law Review. The Indiana Death Penalty: An Exercise in Constitutional Futility, 15 Val. U.L. Rev. 409.

Cited: Lynk v. State, 271 Ind. 445, 71 Ind.

Dec. 223, 393 N.E.2d 751 (1979); Ferguson v. State, 273 Ind. 468, 76 Ind. Dec. 394, 405 N.E.2d 902 (1980); Tapp v. State, — Ind. App. —, 76 Ind. Dec. 597, 406 N.E.2d 296 (1980); Suggs v. State, — Ind. —, 428 N.E.2d 226 (1981); Dunaway v. State, — Ind. —, 440 N.E.2d 682 (1982).

NOTES TO DECISIONS

ANALYSIS

Aggravating circumstances.

- Commission of other murders.
- Failure to allege on separate page.
- Instructions.

- Perpetration of rape.
- Prior criminal activity.

Constitutionality.

- Application to accessories.
- Cruel and unusual punishment.
- Due process.
- Mandatory death penalty.

Evidence.

- Sufficient.

Information to jury.

Jury recommendation.

- Court's sentencing power.
- Mandatory change of venue

Procedure.

- Jury.

Provision of IC 35-38-1-3 applicable.

Review.

- Constitutionality.

Waiver of review.

Aggravating Circumstances.

—Commission of Other Murders.

Where jury found defendant guilty of four murders it could properly consider such other three murders as aggravating circumstances in deciding to recommend the death penalty. Judy v. State, — Ind. —, 416 N.E.2d 95 (1981).

—Failure to Allege on Separate Page.

Where the aggravating circumstance was the intentional murder in the perpetration of a robbery with which defendant was charged, failure of state to allege an aggravating circumstance on a page separate from the rest of the charging instrument did not prejudice the substantial rights of the defendant. Brewer v. State, — Ind. —, 417 N.E.2d

889 (1981), cert. denied, 458 U.S. 1122, 102 S. Ct. 3510, 73 L. Ed. 2d 1384, rehearing denied, 458 U.S. 1132, 102 S. Ct. 18, 73 L. Ed. 2d 1403 (1982).

—Instructions.

The jury was adequately instructed about the aggravating factor that needed to be proved before a recommendation of death could be returned, where the jury was informed in a final instruction that before a recommendation of death could be returned it first must find beyond a reasonable doubt that the defendant intentionally killed the victim while the defendant was committing a robbery, and preliminary instructions stated that the intentional murder during the course of robbery was the aggravating circumstance and defined "intentionally." Burris v. State, — Ind. —, 465 N.E.2d 171 (1984).

—Perpetration of Rape.

Where jury found defendant guilty of murder while in the perpetration of a rape, the circumstances of such killing constituted a valid aggravating factor for the jury to consider in deciding to recommend the death penalty. Judy v. State, — Ind. —, 416 N.E.2d 95 (1981).

—Prior Criminal Activity.

Evidence of prior criminal activity was relevant at a sentencing hearing. Brewer v. State, — Ind. —, 417 N.E.2d 889 (1981), cert. denied, 458 U.S. 1122, 102 S. Ct. 3510, 73 L. Ed. 2d 1384, rehearing denied, 458 U.S. 1132, 102 S. Ct. 18, 73 L. Ed. 2d 1403 (1982).

Constitutionality.

The statutory and procedural scheme for imposing the death sentence limits the imposition of such sentence in such manner as to assure that it will not be inflicted in an arbitrary or capricious manner and therefore

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431.220

CRIMES AND PUNISHMENTS

4

431.220. Execution of death sentence. — Every death sentence shall be executed by causing to pass through the body of the condemned a current of electricity of sufficient intensity to cause death as quickly as possible. The application of the current shall be continued until the condemned is dead. All executions of the death penalty by electrocution shall take place within the walls of the state penal institution designated by the corrections cabinet, and in such enclosure as will exclude public view thereof. (1137-1: amend. Acts 1974, ch. 74, Art. V, § 2; 1986, ch. 331, § 51, effective July 15, 1986.)

431.240. Time of execution — Governor to fix time in case of insanity, pregnancy or escape — Transfer to forensic psychiatric facility in case of insanity. — (1) Unless the execution is stayed by due process of law or under authority of subsection (2) of this section, the warden of the penitentiary or his deputy shall proceed, on the day and at the place named in the judgment of conviction, to cause the condemned person to be electrocuted. The execution shall take place before sunrise on the day designated in the judgment.

(2) If the condemned person is insane or pregnant with child on the day designated for the execution, the execution shall be suspended until the condemned is restored to sanity or is delivered of child. The execution shall then take place under the warrant of the governor and at the time designated by him, unless stayed by due process of law. If execution is suspended on the ground of insanity, the secretary of corrections may transfer the condemned person to the state forensic psychiatric facility operated by the corrections cabinet until such time as he is restored to sanity.

(3) If the condemned person escapes from custody and is recaptured after the expiration of the date fixed for the execution, the governor, upon receiving written notice of the recapture from the warden of the penitentiary, shall send his warrant of execution to the warden by special messenger and shall name therein the day of execution. The warden shall then proceed to the execution thereof according to the provisions of KRS 431.215 to 431.27C.

(4) Whenever a judgment of death has not been executed on the day appointed therefor by the court, from any cause whatever, the governor, by a warrant under his hand and the seal of the Commonwealth, shall fix the day of the execution, which warrant shall be obeyed by the warden of the penitentiary. (1137-3, 1137-7, 1137-8: amend. Acts 1944, ch. 145; 1962, ch. 234, § 46; 1976, ch. 332, § 30; 1980, ch. 295, § 91, effective July 15, 1980; 1986, ch. 331, § 52, effective July 15, 1986.)

431.250. Persons who may attend executions. — The following persons, and no others, may attend an execution: The electrician and the warden of the penitentiary and his deputy or deputies and guards; the sheriff of the county in which the condemned was convicted; the secretary of the corrections cabinet and representatives of the corrections cabinet designated by him; the physician and chaplain of the penitentiary; a clergyman and three (3) other persons selected by the condemned; nine (9) representatives of the news media as follows: one (1) representative from United Press International Wire Service, one (1) representative from Associated Press Wire Service, one (1) representative from Kentucky Network, Inc., three (3) representatives for radio and television media within the state and three (3) representatives for newspapers within the state. Use of audiovisual equipment by the representatives is prohibited during the execution. The corrections cabinet shall issue administrative regulations which govern media representation during the execution. (1137-4: amend. Acts 1974, ch. 74, Art. V, § 2; 1986, ch. 156, § 1, effective July 15, 1986.)

UNIFORM TRAFFIC CITATION

431.450. Uniform citation. — (1) The department of state police in consultation with the transportation cabinet shall design, print, and distribute to all law enforcement agencies in the Commonwealth a uniform citation.

(2) The citation shall:

- (a) Be approved by the Supreme Court;
- (b) Consist of an original document and five (5) copies;
- (c) Be serially numbered in such a manner that the year of issue and the individual citation number may be readily ascertained; and
- (d) Contain such other information as may be required by the Supreme Court.

(3) The circuit court clerk shall maintain a system of accountability for all citations issued in accordance with rules and regulations issued by the Supreme Court to assure that citations are not wrongfully destroyed, tampered with, or otherwise compromised in any manner.

(4) All peace officers in the Commonwealth shall use the uniform citation for all violations of the traffic laws and for all felonies, misdemeanors and violations. (Enact. Acts 1976 (Ex. Sess.), ch. 36, § 3; 1978, ch. 26, § 2, effective March 3, 1978; 1986, ch. 389, § 28, effective July 15, 1986.)

Legislative Research Commission Note. Acts 1986, ch. 389, § 29(1) specifies that use of the uniform citation shall be implemented

no later than January 1, 1987; § 31, however, provides that it may be implemented at any time prior to that date.

431.451. Delineation of offenses for which fines may and may not be prepaid. [Effective April 10, 1988 to July 15, 1988.] — (1) Offenses for which citations may be issued and for which the minimum fine may be prepaid are: KRS 150.170, 150.175, 150.237, 150.280, 150.290, 150.305, 150.320, 150.340, 150.370, 150.400, 150.410, 150.412, 150.440, 150.445, 150.450, 150.470, 150.660, 150.993, 186.020, 186.050, 186.070, 186.190, 189.020, 189.025, 189.030, 189.040, 189.045, 189.050(1)(2), 189.055, 189.060, 189.070, 189.080, 189.090(1)(2)(3), 189.095, 189.100, 189.110, 189.120, 189.130, 189.140, 189.150, 189.160, 189.170, 189.190, 189.205, 189.231 for first offense only, 189.285, 189.290, 189.300, 189.310, 189.330, 189.338, 189.340, 189.350, 189.375, 189.380, 189.390, 189.430, 189.450, 189.470, 189.480, 189.550, 189.560, 189.570, 189.580(2), 189.820, 189.940(5), and 222.202.

(2) Offenses for which citations may be issued but for which no prepayment of the fine may be made are: KRS 138.570, 138.630, 138.665, 177.230, 177.300, 186.052, 186.053, 186.170, 186.200, 186.210, 186.410, 186.450, 186.510, 186.540, 186.600, 186.610, 186.620, 186.630, 187.990(2), 189.050(3)(4), 189.090(4), 189.221, 189.222, 189.223, 189.224, 189.270, 189.370, 189.393, 189.500, 189.505, 189.520, 189.530, 189.565, 189.580, 189.751, 189.920, 189.930, 189.950, 281.615, 281.720, 281.726 and 281.804. (Enact. Acts 1978, ch. 26, § 3, effective March 3, 1978; 1980, ch. 188, § 299, effective July 15, 1980; 1986, ch. 336, § 7, effective July 1, 1986; 1988, ch. 347, § 3, effective April 10, 1988.)

431.451. Delineation of offenses for which fines may and may not be prepaid. [Effective July 15, 1988.] — (1) Offenses for which citations may be issued and for which the minimum fine may be prepaid are: KRS 150.170, 150.175, 150.237, 150.280, 150.290, 150.305, 150.320, 150.340, 150.370, 150.400, 150.410, 150.412, 150.440, 150.445, 150.450, 150.470, 150.660, 186.020, 186.050, 186.070, 186.190, 189.020, 189.025, 189.030, 189.040, 189.045, 189.050(1)(2), 189.055, 189.060, 189.070, 189.080,

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TITLE XL

CRIMES AND PUNISHMENTS

CHAPTER.

- 431. GENERAL PROVISIONS CONCERNING CRIMES AND PUNISHMENTS, 431.005 to 431.550.
- 432. OFFENSES AGAINST THE STATE AND PUBLIC JUSTICE, 432.010 to 432.590.
- 433. OFFENSES AGAINST PROPERTY BY FORCE, 433.010 to 433.870.
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CHAPTER 431

GENERAL PROVISIONS CONCERNING CRIMES AND PUNISHMENTS

SECTION.

- 431.005. Arrest by peace officers — By private persons.
- 431.010. [Reenacted.]
- 431.015. Citation for misdemeanor — Failure to appear.
- 431.017. Appearance bond of prosecuting witness.
- 431.020. [Reenacted.]
- 431.021. Guaranteed arrest bond certificate of surety company to be accepted in lieu of cash bail in traffic cases.
- 431.025. Notice of intention to arrest — Act of arrest — Force.
- 431.030. [Reenacted.]
- 431.035. [Repealed.]
- 431.040. [Reenacted.]
- 431.045. Pursuit in effecting arrest.
- 431.050. [Reenacted.]
- 431.055. Pursuit to recapture escapee.
- 431.060. Felonies, misdemeanors and violations defined.
- 431.062. Detention in jail prior to trial prohibited for certain offenses — Exceptions.
- 431.065 to 431.075. [Repealed.]
- 431.080. Conviction of felony does not bar civil remedy.
- 431.090. [Repealed.]

SECTION.

- 431.095. Process, execution on Sunday.
- 431.100. Fines and forfeitures go to state.
- 431.105. State to receive fines and forfeitures for certain height, width, length and weight violations.
- 431.110. [Repealed.]
- 431.120. Person first suing entitled to certain fines and forfeitures.
- 431.130. Confinement in penitentiary, county jail or workhouse — Nature.
- 431.140. Option of working prisoner at community service related project or at hard labor.
- 431.150 to 431.190. [Repealed.]
- 431.200. Reparation for property stolen or damaged, from person convicted.
- 431.210. Return of property stolen if accused does not appear.
- 431.215. Conveyance of prisoner to institution of confinement.
- 431.220. [Repealed.]
- 431.230. Date of execution of condemned — Copy of mandate to proper officer.
- 431.220. Execution of death sentence
- 431.230. [Reenacted.]

SECTION.	SECTION.
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431.250. Persons who may attend execution.	431.523. Bail for nonresidents charged with driving under the influence.
431.260. Warden's return on judgment.	431.525. Conditions for establishing amount of bail.
431.270. Delivery or burial of body.	431.530. Deposit of bail security — Payments into public advocate special account — Return of deposit when innocent or charges dropped or dismissed.
431.350. [Repealed.]	431.531. Statement of collections to be filed — Funds to be sent to state treasury — Certification of amounts and publication of annual audit by administrative office of the courts.
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431.410. When issuance of summons is mandatory.	
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431.450. Uniform citation.	431.532. Bail deposits by person other than defendant.
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431.510. Prohibitions.	431.550. Penalty for KRS 431.510 to 431.545.
431.515. Pretrial release investigation and services.	

Compiler's Notes. Under authority of Acts 1984, ch. 401, § 6 "warden" should be substituted for "superintendent" wherever it appears throughout the chapter.

431.005. Arrest by peace officers — By private persons. — (1) A peace officer may make an arrest:

- (a) In obedience to a warrant; or
- (b) Without a warrant when a felony is committed in his presence; or
- (c) Without a warrant when he has probable cause to believe that the person being arrested has committed a felony; or
- (d) Without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his presence; or
- (e) Without a warrant when a violation of KRS 189.290, 189.393, 189.520, 189.580, 511.080, or 525.070 has been committed in his presence, except that a violation of KRS 189A.010 need not be committed in his presence in order to make an arrest without a warrant if the officer has probable cause to believe that the person has violated KRS 189A.010.

(2) Any peace officer may arrest without warrant when he has probable cause to believe that if the person is not arrested he will present a danger or threat of danger to others if not immediately restrained and in addition he has probable cause for believing that said person has intentionally or wantonly caused physical injury to his spouse, parent, grandparent, child, or stepchild. Within twelve (12) hours following apprehension and booking

ch. 14, § 441, effective January 2, 1978; 1984, ch. 415, § 11, effective July 13, 1984.)

Compiler's Notes. This section was formerly compiled as KRS 431.230.

A provision similar to subsection (1) of this section appears under RCr 11.22.

Cross-References. Fee of sheriff for transporting felon, KRS 64.070.

Powers of sheriff in conveying prisoner to penitentiary, KRS 70.060.

Cited: Nolan v. Thomas (1964), 379 S.W.2d 248.

Collateral References. 24 C.J.S., Criminal Law, § 1607.

431.216. Commitment of person convicted of felony. [Repealed.]

Compiler's Note. This section (Acts 1970, ch. 91, § 1) was repealed by Acts 1974, ch. 406, § 336, effective January 1, 1975. For present law see KRS 532.100.

431.218. Date of execution of condemned — Copy of mandate to proper officer. — When a judgment sentencing the defendant to death has been affirmed, the mandate shall fix the day of the execution as the fifth Friday following the date of the mandate of the court. The clerk of the Supreme Court shall transmit either by special messenger, certified mail, return receipt requested, a certified copy of the mandate to the proper officer which shall be the authority of such officer to carry the mandate into effect. The officer receiving the copy shall report his action both to the governor and to the circuit court. If from any cause the execution does not take place on the day appointed in the mandate, the governor may from time to time appoint another day for execution until the sentence is carried into effect. (Enact. Acts 1962, ch. 234, § 45; 1974, ch. 315, § 86; 1976, ch. 62, § 126; 1980, ch. 114, § 105, effective July 15, 1980.)

Collateral References. 21 Am. Jur. 2d, Criminal Law, §§ 544, 610, 611
24 C.J.S., Criminal Law, § 1581.

431.220. Execution of death sentence. — Every death sentence shall be executed by causing to pass through the body of the condemned a current of electricity of sufficient intensity to cause death as quickly as possible. The application of the current shall be continued until the condemned is dead. All executions of the death penalty by electrocution shall take place within the walls of the state penal institution designated by the corrections cabinet, and in such inclosure as will exclude public view thereof. (1137-1: amend. Acts 1974, ch. 74, Art. V, § 2.)

Cross-References. Affirmance of judgment to fix day of execution, KRS 431.218.

Execution of criminal sentences, RCr 11.22

Collateral References. 21 Am. Jur. 2d,

Criminal Law, § 612; 40 Am. Jur. 2d, Homicide, §§ 549, 557.

24 C.J.S., Criminal Law, § 1581.

431.230. Conveyance of condemned to penitentiary — Duties of sheriff and superintendent. [Reenacted as KRS 431.215.]

Compiler's Notes. This section (1137-2) was reenacted as KRS 431.215 by Acts 1962, ch. 234, § 44.

431.240. Time of execution—Governor to fix time in case of insanity, pregnancy or escape—Transfer to forensic psychiatric facility in case of insanity. — (1) Unless the execution is stayed by due process of law or under authority of subsection (2) of this section, the warden of the penitentiary or his deputy shall proceed, on the day and at the place named in the judgment of conviction, to cause the condemned person to be electrocuted. The execution shall take place before sunrise on the day designated in the judgment.

(2) If the condemned person is insane or pregnant with child on the day designated for the execution, the execution shall be suspended until the condemned is restored to sanity or is delivered of child. The execution shall then take place under the warrant of the governor and at the time designated by him, unless stayed by due process of law. If execution is suspended on the ground of insanity, the commissioner of corrections may transfer the condemned person to the state forensic psychiatric facility operated by the corrections cabinet until such time as he is restored to sanity.

(3) If the condemned person escapes from custody and is recaptured after the expiration of the date fixed for the execution, the governor, upon receiving written notice of the recapture from the warden of the penitentiary, shall send his warrant of execution to the warden by special messenger and shall name therein the day of execution. The warden shall then proceed to the execution thereof according to the provisions of KRS 431.215 to 431.270.

(4) Whenever a judgment of death has not been executed on the day appointed therefor by the court, from any cause whatever, the governor, by a warrant under his hand and the seal of the Commonwealth, shall fix the day of the execution, which warrant shall be obeyed by the warden of the penitentiary. (1137-3, 1137-7, 1137-8: amend. Acts 1944, ch. 145; 1962, ch. 234, § 46; 1976, ch. 332, § 30; 1980, ch. 295, § 91, effective July 15, 1980.)

Cross-References. Governor's right to pardon, Const., § 77.

NOTES TO DECISIONS

ANALYSIS

1. Application.
2. Authority over inquests.

1. Application.

This section is not applicable to a convict given a penitentiary sentence for crime.

Davidson v. Commonwealth, 174 Ky. 789, 192 S.W. 846 (1917).

2. Authority over Inquests.

The warden of a penitentiary may hold an inquest if he has reasonable grounds to believe that a prisoner in his custody may be

insane. *Barrett v. Commonwealth*, 202 Ky. 153, 259 S.W. 25 (1923).

Under this section, authority to conduct inquests is given to the sheriff and warden of the penitentiary and a private citizen is without authority to institute an inquest to determine the sanity of one under sentence of

death. *Stucker v. Commonwealth*, 251 Ky. 618, 88 S.W.2d 280 (1935).

Collateral References. 21 Am. Jur. 2d, Criminal Law, §§ 122-128.

24 C.J.S., Criminal Law, §§ 1568, 1581, 1614, 1619; 24B C.J.S., Criminal Law, §§ 2001-2003.

431.250. Persons who may attend execution. — The following persons, and no others, may attend an execution: The electrician and the warden of the penitentiary and his deputy or deputies and guards; the sheriff of the county in which the condemned was convicted; the secretary of the corrections cabinet and representatives of the corrections cabinet designated by him; the physician and chaplain of the penitentiary; a clergyman and three (3) other persons selected by the condemned; one (1) representative of every newspaper published in the county in which the condemned was convicted, and (1) representative of every daily newspaper published in the state. (1137-4: amend. Acts 1974, ch. 74, Art. V, § 2.)

431.260. Warden's return on judgment. — The warden of the penitentiary shall make due return, on the copy of the judgment of the court pronouncing the death sentence, of the manner, time and place of its execution by him. The return shall be filed by the clerk of the court in the papers of the case in his office. (1137-5.)

431.270. Delivery or burial of body. — The body of the condemned shall be delivered to any friend or relative making request for it. The expense for the return of the body to its home, not to exceed thirty dollars (\$30.00), shall be paid out of the appropriations to the corrections cabinet. If no such request is made, the body shall be buried, and the cost of such burial, not to exceed thirty dollars (\$30.00), shall be paid out of the appropriations to the corrections cabinet. (1137-6: amend. Acts 1974, ch. 74, Art. V, § 2.)

Opinions of Attorney General. The department of corrections [now corrections cabinet] may have the body of an inmate buried where no one claims it, with the cost of

burial not to exceed the sum set out in this section, to be deducted from the institutional account of the inmate. OAG 70-645.

431.350. Consumer reporting agency records restriction — Penalty.
[Repealed.]

Compiler's Notes. This section (Acts 1974, ch. 119, § 1) was repealed by Acts 1980, ch.

49, § 22, effective July 15, 1980. For present law, see KRS 367.310, 367.990.

431.400. Summons to issue in case of accidental homicide by motor vehicle.—In the case of accidental homicide by motor vehicle, when no arrest is made at the scene of the accident and a complaint is later filed against the driver, the court shall not issue a warrant for the arrest of the driver unless there is reason to believe that the driver will flee to avoid a summons or unless circumstances within the discretion of the court require

1982 Amendment: Rewrote subsec. B (see main volume for prior text).

In subsec. B, pars. (a) to (e) were redesignated as pars. (1) to (5), "the" was capitalized at the beginning of pars. (1) to (4), and, in par. (4) a reference to "Paragraph (d)" was changed to "Paragraph (4)" on authority of R.S. 24:253.

Notes of Decisions

- Construction and application 1
- Orders of commitment 2

1. Construction and application

General statutory scheme of this section and R.S. 15:702 to 15:705, 15:757, 33:1432, and

33:4715, is that city parish is responsible for expense of establishing, maintaining and operating jail and for all expenses of feeding, clothing, and providing medical treatment to prisoners while sheriff has duty of operating jail and seeing to it that prisoners are properly cared for, fed, and clothed. *Amiss v. Dumas*, App.1982, 411 So.2d 1137, writ denied 415 So.2d 940.

2. Orders of commitment

An order of commitment in case of a sentence at hard labor does not necessarily have to articulate that prisoner is committed to Department of Corrections, as sentence at hard labor necessarily requires commitment to Department of Corrections. *State v. Caillier*, App.3 Cir.1984, 450 So.2d 43, writ denied 456 So.2d 168.

§ 566.2. Commencing of sentence to state penitentiary

Notes of Decisions

1. Construction and application

Where trial court vacated original sentence on same day it was imposed, so that its execution could not have commenced on following day when defendant was resentenced, and where

amendment of sentence was completed before sheriff undertook any act toward execution of original sentence, execution of original sentence had not already begun before resentencing so as to preclude latter. *State v. Guajardo*, Sup.1983, 428 So.2d 468.

PART II. CAPITAL CASES

§ 567. Conditions precedent to execution

A. Whenever the Supreme Court of Louisiana affirms a sentence of death, after review on appeal provided by Louisiana Code of Criminal Procedure Article 905.9, the court of original jurisdiction shall cause to be forwarded to the secretary of the Department of Public Safety and Corrections a certified copy of the indictment, verdict, sentence, and the judgment of the Supreme Court of Louisiana affirming the sentence of death.

B. The court of original jurisdiction shall also issue a warrant commanding the secretary to cause the execution of the person condemned as provided by law. The warrant shall specify the date upon which the person condemned shall be put to death, which date shall be not less than sixty days nor more than ninety days from the date the warrant is issued. Upon receipt of the warrant the secretary shall cause a copy of the warrant to be delivered to the person condemned. A certified copy of the warrant shall be mailed, return receipt requested, to the governor and the return receipt filed in the record.

C. If any federal or Louisiana court grants a stay of execution, or if the governor of Louisiana grants a reprieve, the trial court shall reset the execution date at not less than thirty days nor more than forty-five days from the dissolution of the stay order, or termination or expiration of the reprieve.

D. The failure of the trial court to fix an execution date within the time limits of this Section shall not affect the validity of a sentence of death. In such a case, the attorney general shall bring a mandamus proceeding in any court of competent jurisdiction to have the trial court set the execution date at not less than thirty days nor more than forty-five days from the date of issuance of the mandamus order.

Amended by Acts 1981, No. 585, § 1, eff. July 20, 1981; Acts 1985, No. 178, § 1, eff. July 6, 1985.

1981 Amendment: In the second paragraph, deleted "In addition," from the beginning of the first sentence, added "also" and "nor more than forty-five days", and substituted "not less than

sixty days nor more than ninety days" for "the day following the expiration of ninety days", and "less" for "more" in the fifth sentence.

In the fourth sentence of the second paragraph of this section as amended in 1981, "return" was substituted for "returned" on authority of R.S. 24:253.

Acts 1981, No. 585, § 1 amends this section with respect to fixing of execution dates. Section 2 of Act 585 provides: "The provisions of this Act shall not affect the validity of any warrants issued prior to the effective date hereof." Act 585 became effective July 20, 1981 upon signature by the governor.

1985 Amendment: Designated the existing paragraphs of this section as subsecs. A and B; in subsec. A inserted "Public Safety and" preceding "Corrections"; at the end of subsec. B deleted "Furthermore, if any federal court or the Supreme Court of Louisiana grants a stay of execution, the trial court shall fix the execution date at not less than thirty days nor more than forty-five days from the dissolution of the stay order."; and added subsecs. C and D.

In the second sentence of subsec. D as added in 1985, "such a case," was substituted for "such cases," on authority of R.S. 24:253

Cross References

Additional notification requirements, see Supreme Court Rule 27 (Vol. 8, LSA-R.S.).

Law Review Commentaries

Are Louisiana judicial death warrants constitutional? William H. Forman, Jr., 31 La.Bar J. 17 (1983).

WESTLAW Electronic Research

See WESTLAW guide following the Explanation pages of this supplement.

PART IV. DIMINUTION AND COMMUTATION OF SENTENCE FOR GOOD BEHAVIOR

§ 571.3. Diminution of sentence for good behavior

[See main volume for text of A to C]

D. Diminution of sentence shall not be allowed an inmate in the custody of the Department of Public Safety and Corrections if the instant offense was committed during a period of time that the inmate was under the jurisdiction of the department or placed on probation as a juvenile.

Added by Acts 1984, No. 137, § 1.

1984 Amendment: Added a new subsec.D. A prior subsec. D had been repealed by Acts 1977, No. 633, § 2. See notes in main volume.

Law Review Commentaries

Study of the Louisiana sentencing system and its relationship to prison overcrowding: Some realistic solutions. Louis Westerfield, 30 Loyola L.Rev. (La.) 5 (1984).

United States Supreme Court

Ex post facto laws, see *Weaver v. Graham*, 1981, 101 S.Ct. 960, 450 U.S. 24, 67 L.Ed.2d 17.

Notes of Decisions

Argument and conduct of counsel 5

1. In general

Conviction of first-degree murder was not to serve as a condition precedent to execution of sentence of death until defendant failed to file a timely petition for certiorari in the Supreme Court of the United States, the Court denied defendant's timely petition for certiorari, if one was filed, and the Court denied defendant's petition for rehearing on the petition for certiorari, if one was timely filed, or further orders of the Louisiana Supreme Court. *State v. Jones*, Sup. 1985, 474 So.2d 919, certiorari denied 106 S.Ct. 2906, 90 L.Ed.2d 993, rehearing denied 107 S.Ct. 13, 92 L.Ed.2d 768.

5. Argument and conduct of counsel

In first-degree murder prosecution in which defendant was sentenced to death, prosecutor's closing argument, which was to effect that trial judge had power to set aside inappropriate death sentence, that entire federal court system could review such a sentence, that governor had to review it, that it was improbable that death sentence would be sustained when "we . . . get through all of that review," that jurors' decision was unlikely to "make a significant contribution," that decision would be "reviewed and rehashed . . . for years to come" and that the importance of the function was not "going to be much but it's something," was improper; death sentence had to be set aside and remand for new sentencing hearing was required. *State v. Robinson*, Sup.1982, 421 So.2d 229.

Notes of Decisions

Discretion of court 12
Discretion of director of corrections 13

2. Construction and application—In general

This section and R.S. 15:574.4 on "good-time" and parole, parish prison rules and regulations, and standard disciplinary procedures followed in conjunction therewith, created liberty interest which inmates were entitled to rely upon and which federal District Court, pursuant to due process clause of Fourteenth Amendment (U.S. C.A. Const.Amend. 14) was bound to protect. *Martin v. Foti*, D.C.1983, 561 F.Supp. 252.

PART II. CAPITAL CASES

Sec.

- 567. Conditions precedent to execution.
- 568. Execution of death sentence; prior confinement of offender.
- 569. Place for execution of death sentence; manner of execution.
- 569.1. Hours for execution of death sentence.
- 570. Officials and witnesses present at execution; minors excluded.
- 571. Proces verbal of execution; attesting and filing.

§ 567. Conditions precedent to execution

Whenever the Supreme Court of Louisiana affirms a sentence of death, after review on appeal provided by Louisiana Code of Criminal Procedure Article 905.9, the court of original jurisdiction shall cause to be forwarded to the secretary of the Department of Corrections a certified copy of the indictment, verdict, sentence, and the judgment of the Supreme Court of Louisiana affirming the sentence of death.

In addition, the court of original jurisdiction shall issue a warrant commanding the secretary to cause the execution of the person condemned as provided by law. The warrant shall specify the date upon which the person condemned shall be put to death, which date shall be the day following the expiration of ninety days from the date the warrant is issued. Upon receipt of the warrant the secretary shall cause a copy of the warrant to be delivered to the person condemned. A certified copy of the warrant shall be mailed, return receipt requested, to the governor and the return receipt filed in the record. Furthermore, if any federal court or the Supreme Court of Louisiana grants a stay of execution, the trial court shall fix the execution date at not more than thirty days from the dissolution of the stay order.

Amended by Acts 1956, Ex.Sess., No. 18, § 1; Acts 1978, No. 758, § 1; Acts 1980, No. 518, § 1.

History and Source of Law

Source:

Acts 1928, No. 2, § 1, art. 507.

Prior to the 1956 amendment, the warrant was directed to and the command given to the sheriff of the court wherein the sentence or judgment was passed rather than to the warden.

As amended in 1966, this section provided:

No person sentenced to death shall be executed until a certified copy of the indictment, verdict and sentence shall

have been sent to the governor, and a warrant shall have been issued by him, under the seal of the state, directed to the warden of the Louisiana State Penitentiary at Angola, commanding the warden to cause the execution to be done on the person so condemned in all things according to the judgment against him, and upon the date named in said warrant."

The 1978 amendment deleted "warrant of governor" from the section heading and substantially altered the language

of the section itself. The title of Act 758 indicated that the amendment was "to provide that the date for execution in capital cases shall be set by the court of original jurisdiction and repealing the requirement that such warrants be signed by the governor."

The 1950 amendment added "or the Supreme Court of Louisiana" in the second paragraph.

Prior Laws:

- Acts 1855, No. 121, §§ 32, 33.
- R.S.1856, p. 164, §§ 30, 31.
- R.S.1870, §§ 1004, 1613.
- R.S.1870, §§ 1005, 1614.

Reporter's Notes

R.S.1870, §§ 1004, 1613, duplicate sections, which required the governor to issue a warrant for execution in crimes punishable by death, have been omitted from the 1950 Revised Statutes because superseded by this section.

R.S.1870, §§ 1005, 1614, duplicate sections, which required the clerk to send a

transcript of the proceedings to the governor in cases where the death sentence had been imposed, have been omitted from the 1950 Revised Statutes because dependent upon R.S.1870, §§ 1004, 1613, which have been superseded by this and the following sections.

Cross References

Sentencing in capital cases, see LSA-Cr.P. art. 905 et seq.

Library References

Criminal Law ¶1219.

C.J.S. Criminal Law § 2001 et seq.

Notes of Decisions

- In general 1
- Date of execution 4
- Mental illness 2
- Mode of execution 3

3. Mode of execution

The fact that judgment of conviction stated only that defendant was sentenced to death and should be executed in manner provided by law, without setting forth specific mode of execution of defendant, did not entitle defendant to enjoin sheriff and his deputies from executing her by electrocution under death warrant issued by Governor, where defendant did not object to form of judgment on appeal and Governor's warrant was in exact conformity with Acts 1940, No. 14 (see, now, R.S. 15:569) directing that death sentence should be executed by electrocution. *Henry v. Reid*, 1943, 201 La. 857, 10 So.2d 681.

The execution of death sentence was an executive function and accused was not entitled to complain unless mode of execution provided in Governor's warrant was contrary to Acts 1940, No. 14 (see, now, R.S. 15:569). *Id.*

1. In general

Since the sheriff must keep condemned prisoner in parish jail until time of execution of prisoner, sheriff in every instance should make suitable arrangements to have the prisoner conveyed from the parish prison to the state penitentiary in sufficient time to make certain that the prisoner is on hand so that execution can be performed on the date and within the hours specified in the Governor's warrant. *Op. Atty. Gen.*, 1956-58, p. 127.

2. Mental illness

One sentenced to death upon conviction of capital crime, who thereafter became insane, could not be executed while in that condition. *State v. Allen*, 1944, 204 La. 513, 15 So.2d 870.

4. Date of execution

Execution date was within discretion of Governor but at least ten days should

intervene between date of sentence and date of execution. Op. Atty. Gen. 1934-36, p. 198.

place on Friday, for day of execution was left entirely to discretion of Governor. Op. Atty. Gen. 1924-26, p. 106.

There was nothing in law that specified that legal execution should take

§ 568. Execution of death sentence; prior confinement of offender

The director of the Department of Corrections, or a competent person selected by him, shall execute the offender in conformity with the death warrant issued in the case. Until the time of his execution, the Department of Corrections shall incarcerate the offender in a manner affording maximum protection to the general public, the employees of the department, and the security of the institution.

Amended by Acts 1956, Ex.Sess., No. 18, § 1; Acts 1974, No. 199, § 1.

History and Source of Law

Source:

Acts 1928, No. 2, § 1, art. 508.

The 1956 amendment substituted the warden for the sheriff or a duly authorized deputy. This amendment also provided for confinement at the penitentiary rather than at the parish prison. As so amended, this section provided:

"The warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, shall execute the criminal in conformity with the death warrant issued in the case. Until the time of his execution, the convict shall be kept in solitary confinement at the Louisiana State Penitentiary at Angola and no one shall be allowed access to him without an order of the court except the officers of the prison, his counsel, his physician, his spiritual adviser, his wife, children, father, mother, brothers and sisters."

House Concurrent Resolution No. 6, 1st Ex.Sess., 1961, provided: "Therefore, Be It Resolved by the House of Representatives of the Legislature of Louisiana, the Senate thereof concurring, that the Legislature does hereby go on record as expressing its intent, under the provisions of existing laws, that every person convicted of a crime for which he has

been sentenced to death shall, within five days after the delays allowed by law for the taking of an appeal to or the application for review or rehearing by the Louisiana Supreme Court or, if such an appeal actually is perfected, within five days after a decision of said court confirming the sentence of death or denying an application for review or rehearing, be transported in the manner provided by law to the State Penitentiary at Angola, there to be maintained and confined until such time as his execution is carried out or pending any other disposition of his case resulting from any appeal thereafter taken to the Supreme Court of the United State or any petition to the Governor and/or the Pardon Board for reprieve, pardon or commutation of sentence."

The 1974 amendment substituted "offender" for "convict" in the section heading and rewrote the section, primarily by substituting references to the Department of Corrections for prior references to the Louisiana State Penitentiary and by altering the language relating to confinement.

Prior Laws:

Acts 1918, No. 133.

Library References

Criminal Law § 1219.

C.J.S. Criminal Law § 2001 et seq.