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proof that he unduly suffered from any of such infirmities. Sinclair v. Henderson, D.C.1971, 331 F.Supp. 1123.

In order for petitioner charging that inadequate medical treatment on death row of state penitentiary amounted to cruel and unusual punishment to state a claim for relief under statute governing deprivation of civil rights (42 U.S.C.A. § 1983), complaint had to allege an abuse of discretion by prison authorities in providing medical treatment for prisoners, and in order to obtain relief, evidence had to support such claim. Id.

Evidence failed to support truth of claim that adequate psychiatric care on death row of state penitentiary was lacking in such proportions as to amount to cruel and unusual punishment. Id.

7. Food

Occasional incidents of foreign objects being found in food of inmates on death row of state penitentiary did not raise a question of cruel and unusual punishment but simply raised a problem of internal prison administration to be dealt with by prison authorities as best they could. Sinclair v. Henderson, D.C.1971, 331 F.Supp. 1123.

8. Bedding

There is no constitutional right for an inmate on death row to be furnished with an orthopedically approved mattress, and it is not cruel and unusual punishment to be denied exact kind and quality mattress that inmate might prefer. Sinclair v. Henderson, D.C.1971, 331 F.Supp. 1123.

9. Outdoor exercise

Term "solitary confinement," as used in this section (prior to the 1974 amendment) simply meant separate confinement with only occasional access to specifically authorized persons, and it would not be violative of this section if exercise yards were provided for prisoners housed in death row. Sinclair v. Henderson, D.C.1971, 331 F.Supp. 1123.

10. Letters and correspondence

This section to effect that, until time of execution, convict shall be kept in solitary confinement and no one shall be allowed access to him without order of court except certain persons was reasonably construed by state Attorney General to include act of corresponding in writing with the prisoner. Labat v. McKeithen, C.A.1966, 361 F.2d 757.

Act of prison authorities in censoring correspondence of petitioner while confined to death row of state penitentiary did not constitute a violation of his rights under First, Sixth or Fourteenth Amendments (U.S.C.A. Const. Amends. 1, 6, 14). Sinclair v. Henderson, D.C.1971, 331 F.Supp. 1123.

Communication by letter with persons not privileged to have access to inmate held under death sentence violated this section. Op.Atty.Gen., Sept. 22, 1964.

§ 569. Place for execution of death sentence; manner of execution

Every sentence of death imposed in this state shall be by electrocution; that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room.

Amended by Acts 1956, No. 143; Acts 1956, Ex.Sess., No. 18, § 1.

Operator of the electric chair provided by Act No. 14 of 1940 was to be employed by the Manager of the Louisiana State Penitentiary and placed on the penitentiary payroll, and general manager was to have charge of the chair. Op.Atty.Gen.1940–42, p. 2788.

§ 569.1. Hours for execution of death sentence

Every sentence of death imposed in this state shall be executed between the hours of 12:00 o'clock midnight and 3:00 A.M. upon the date set for the execution by the court of original jurisdiction.

Added by Acts 1952, No. 160, § 1. Amended by Acts 1980, No. 518, § 1.

History and Source of Law

The 1980 amendment deleted "o'clock" following "3:00", and substituted "court of original jurisdiction" for "Governor".

Library References

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

§ 570. Officials and witnesses present at execution; minors excluded

Every execution of the death sentence shall take place in the presence of the warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, the coroner of the parish of West Feliciana, or his deputy, and a physician summoned by the warden of the Louisiana State Penitentiary at Angola, the operator of the electric chair who shall be a competent electrician who shall have not been previously convicted of a felony, a priest or minister of the gospel, if the convict so requests it, and not less than five nor more than seven other witnesses, all citizens of the State of Louisiana; no person under the age of eighteen years shall be allowed within said execution room during the time of execution.

Amended by Acts 1956, Ex.Sess., No. 18, § 1; Acts 1972, No. 768, § 6.

History and Source of Law

Source:

Acts 1928, No. 2, § 1, art. 570.
Acts 1940, No. 14, § 1.
Acts 1946, No. 149, § 1.

The 1956 amendment substituted the warden of the penitentiary or a competent person selected by him for the sheriff of the parish, or one of his duly designated deputies.

The 1972 amendment lowered the age restriction from twenty-one years to eighteen years.

Prior Laws:

Acts 1918, No. 133, § 4.

Library References

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

Where accused was sentenced to death by hanging in accordance with existing law, while case was pending retrospective act, Act. No. 14 of 1940 (see, now, this section), substituting electrocution for method of execution became effective, and unqualified verdict of guilty and sentence imposing death penalty were held valid on appeal, sentence was directed to be amended to conform to new act. State ex rel. Pierre v. Jones, 1942, 200 La. 808, 9 So.2d 42, certiorari denied 63 S.Ct. 64, 317 U.S. 633, 87 L.Ed. 510.

5. Witnesses

If the executions of three persons were to take place at one and same time under section 4 of Act No. 113 of 1918 (see, now, this section), no more than seven witnesses could be present. Op. Atty.Gen.1924-26, p. 109.

6. Execution

Supreme Court had no authority, on petitions for certiorari, prohibition, mandamus, and habeas corpus, to set aside death sentence and release prisoner from sheriff's custody because attempt to electrocute prisoner was unsuccessful when electric chair failed to function, on ground that to subject prisoner to further electrocution would constitute cruel and unusual punishment and double jeopardy in violation of state constitution where proceedings had in district court up to and including pronouncement of sentence were entirely regular. State ex rel. Francis v. Resweber, 1947, 212 La. 143, 31 So.2d 697.

The fact that judgment of conviction stated only that defendant was sentenced to death and should be executed in manner provided by law, without setting forth specific mode of execution of defendant, did not entitle defendant to enjoin sheriff and his deputies from executing her by electrocution under death warrant issued by Governor, where defendant did not object to form of judgment on appeal and Governor's warrant was in exact conformity with Acts 1940, No. 14 (see, now, R.S. 15:569 and this section) directing that death sentence should be executed by electrocution. Henry v. Reid, 1943, 201 La. 857, 10 So.2d 681.

The execution of death sentence under Act No. 14 of 1940 (see, now, R.S. 15:569 and this section) was an executive function and accused was not entitled to complain unless mode of execution provided in Governor's warrant was contrary to the statute. Id.

Act No. 133 of 1918, § 4 (see, now, this section) did not inhibit execution of two prisoners at same time. Op.Atty.Gen. 1920-22, p. 1084.

§ 571. Proces verbal of execution; attesting and filing

When the sentence shall have been executed, the warden of the Louisiana State Penitentiary at Angola, or his deputy performing the execution, shall make a proces verbal of said execution immediately thereafter, which proces verbal shall recite the manner and date of said execution and shall be attested by said warden, or his deputy, and by all of the witnesses, and said proces verbal, when so signed, shall be filed with the clerk of court of the parish in which the sentence shall have been imposed.

Amended by Acts 1956, Ex.Sess., No. 18, § 1.

History and Source of Law

Source:

Acts 1928, No. 2, § 1, art. 571.

The 1956 amendment substituted warden of the penitentiary for sheriff.

Prior Laws:

Acts 1918, No. 133.

(2) The authority making the determination has notified the owner in writing giving the reasons for this determination.

(d) An owner may not:

(1) Leave a dangerous dog unattended on the owner's real property unless the dog is confined indoors, in a securely enclosed and locked pen, or in another structure designed to restrain the dog; or

(2) Permit a dangerous dog to go beyond the real property of the owner unless the dog is leashed and muzzled, or is otherwise securely restrained and muzzled.

(e) If an owner of a dangerous dog or potentially dangerous dog sells or gives the dog to another person, the owner shall provide written notice to:

(1) The authority that made the determination under subsection (c) of this section, stating the name and address of the new owner of the dog; and

(2) The person taking possession of the dog, specifying the dog's dangerous behavior.

(f) Any owner who violates the provisions of this section is guilty of a misdemeanor and, upon conviction shall be fined not more than $2,500. (1988, ch. 364.)

Editor's note. — Section 2, ch. 364, Acts 1988, provides that "this act may not be applied or construed to limit the authority of a county or municipal authority to enact legislation that regulates to a greater extent the ownership or possession of dangerous dogs."

Section 3 of ch. 364 provides that the act shall take effect July 1, 1988.

DEATH PENALTY

§ 73. Death chamber; conduct of executions.

The warden of the Maryland Penitentiary is hereby authorized and directed to provide and maintain a permanent death chamber within the confines of said penitentiary, and which said death chamber shall have all the necessary appliances for the proper execution of felons by the administration of a lethal gas. In said death chamber shall be executed all felons upon whom the death penalty has been imposed, for offenses committed on or after January 1st, 1923. Each execution shall be conducted by the said warden or some assistant or assistants designated by him, in the presence of the sheriff of the county or city where such felon was indicted, the physician of the said penitentiary, or his assistant, and a number of respectable citizens numbering not less than six or more than twelve. Counsel for the convict and two ministers of the gospel may be present. (An. Code, 1951, § 504; 1939, § 485; 1924, § 407; 1922, ch. 465, § 3; 1955, ch. 625, § 1; 1988, ch. 6, § 1.)

Effect of amendment. — The 1988 amendment, approved Feb. 18, 1988, and effective from date of passage, deleted a comma following "presence of" in the third sentence.

§ 75. Warrant for execution; revocation by Governor; stay of execution; time of execution.

(a) *Issuance and contents of warrant; effect of other proceedings on warrant; another warrant after stay of execution.* — When a person is sentenced to the punishment of death, the judge or judges presiding in the court shall, at the time of passing sentence, make out, sign and issue a warrant directed to the warden of the Maryland Penitentiary, stating the conviction and sentence and appointing a week within which the sentence must be executed, and commanding the said warden to execute the sentence upon some day within the week so appointed. If a proceeding is instituted in any federal or State court to test the validity of the conviction, other than by an appeal to the Court of Special Appeals or on certiorari in the Court of Appeals, or if a proceeding is instituted in any State court under § 75A of this article to determine the incompetency of the defendant, the warrant shall remain in full force and effect unless the court, in which such proceeding is instituted, shall pass an order revoking the warrant. In any case in which a stay of execution has resulted by reason of an appeal to the Court of Special Appeals or on certiorari in the Court of Appeals after compliance with the requirements of Title 12 of the Courts Article on appeals in criminal cases and the judgment has been affirmed, and in any case in which the warrant has been revoked by the order of a court in a proceeding to test the validity of the conviction and the conviction has not been set aside, or in a proceeding under § 75A of this article in which the defendant has been found to be competent, the judge that imposed the sentence or the judge then presiding in the trial court in which the sentence was imposed shall make out, sign and issue another warrant of execution in the manner and to the effect hereinbefore prescribed.
(1988, ch. 6, § 1.)

Effect of amendment.

The 1988 amendment, approved Feb. 18, 1988, and effective from date of passage, substituted "§ 75A of this article" for "§ 75A" two times in subsection (a).

As the remainder of the section was not affected by the amendment, it is not set forth above.

§ 75A. Incompetent inmates.

(d) *Order declaring inmate competent or incompetent; issuance of new warrant; revocation of warrant and modification of sentence; appeal.*

(2) If the court finds the inmate to be competent and has previously revoked the warrant to execute the death sentence pursuant to § 75 (a) of this article, it shall notify the court in which the sentence of death was imposed to issue a new warrant for execution.

(g) *Power of Governor to stay execution.* — This section does not affect the power of the Governor to stay execution of a death sentence under § 75 (c) of this article or to commute a sentence under Article 41, § 4-513 of the Code.
(1988, ch. 6, § 1.)

(2) Notwithstanding the provisions of paragraph (1) of this subsection, a person may offer these species for sale, trade, barter, import, or exchange to a public zoo, park, museum, educational institution, or to a person holding valid State or federal permits for educational, medical, scientific, or exhibition purposes.

(b) Any person violating this section shall be guilty of a misdemeanor and upon conviction, in the case of an individual, shall be fined not more than $1,000; or in the case of any person other than an individual, by a fine of not more than $10,000.

(c) Exempted from this section are those species of wildlife not being kept as household pets and which are individually exempted by a permit issued by the Department of Natural Resources. (1980, ch. 491; 1981, ch. 406; 1982, ch. 756; 1987, ch. 11, § 1.)

Effect of amendment. — The 1987 amendment, approved Apr 2, 1987, and effective from date of passage, substituted "section" for "subsection" in subsection (c).

DEATH PENALTY

§ 71. Convicted person sentenced to death by administration of lethal gas; remand to place where indictment was found.

If an offender, on conviction, may be sentenced to suffer death, the court before whom such offender shall be tried and convicted, shall sentence him to suffer death by the administration of a lethal gas; and when a case has been removed for trial and the party shall be sentenced to death, the court shall remand him to the place where the indictment was found, where such offender shall remain in the custody of the sheriff of that county or city for disposition as hereinafter provided. (An. Code, 1951, § 502; 1939, § 483; 1924, § 405; 1922, ch. 465, § 1; 1955, ch. 625, § 1.)

Cross reference. — See §§ 627 and 628 of this article.

Maryland Law Review. — For article, "A Punishment in Search .. a Crime: Standards for Capital Punishment in the Law of Criminal Homicide," see 46 Md. L. Rev. 115 (1986).

University of Baltimore Law Review. — For article "Capital Punishment . . . On the Way Out?" see 1 U. Balt. L. Rev. 28 (1971).

Cited in State v. Wooten, 27 Md. App. 434, 340 A.2d 308 (1975), aff'd, 277 Md. 114, 352 A.2d 829 (1976).

§ 72. Place of inflicting death penalty.

Punishment of death must be inflicted within the walls of the building hereinafter provided. (An. Code, 1951, § 503; 1939, § 484; 1924, § 406; 1922, ch. 465, § 2; 1951, ch. 285, § 484.)

§ 73. Death chamber; conduct of executions.

The warden of the Maryland Penitentiary is hereby authorized and directed to provide and maintain a permanent death chamber within the confines of said penitentiary, and which said death chamber shall have all the necessary

appliances for the proper execution of felons by the administration of a lethal gas. In said death chamber shall be executed all felons upon whom the death penalty has been imposed, for offenses committed on or after January 1st, 1923. Each execution shall be conducted by the said warden or some assistant or assistants designated by him, in the presence of, the sheriff of the county or city where such felon was indicted, the physician of the said penitentiary, or his assistant, and a number of respectable citizens numbering not less than six or more than twelve. Counsel for the convict and two ministers of the gospel may be present. (An. Code, 1951, § 504; 1939, § 485; 1924, § 407; 1922, ch. 465, § 3; 1955, ch. 625, § 1.)

§ 74. Custody of felon after sentence; notification to Governor; duty of clerk of court where case removed.

When a person is sentenced to the punishment of death, the judge presiding in the court at which the conviction takes place, shall cause the said felon to be taken into custody by the sheriff of the county or city where he was indicted, and to be held by him in solitary confinement as hereinafter provided when said felon is in the penitentiary, as long as said felon shall remain within the custody of the said sheriff, and immediately upon conviction the clerk of the court where the said felon was indicted shall make out, sign and deliver to the Governor of the State of Maryland, a copy of the docket entries in said case, showing fully the sentence of the court and the date thereof, and it shall be the duty of the clerk of the court where such sentence is pronounced in case the indictment therein was procured in another county or city, and the case removed thereto, to immediately upon conviction and sentence, certify the proceedings to the clerk of the circuit court from whence said case was removed and the duty of the clerk of the court upon the receipt of the mandate as to the notification to the Governor, shall be as hereinbefore provided. (An. Code, 1951, § 505; 1939, § 486; 1924, § 408; 1922, ch. 465, § 4.)

§ 75. Warrant for execution; revocation by Governor; stay of execution; time of execution.

(a) *Issuance and contents of warrant; effect of other proceedings on warrant; another warrant after stay of execution.* — When a person is sentenced to the punishment of death, the judge or judges presiding in the court shall, at the time of passing sentence, make out, sign and issue a warrant directed to the warden of the Maryland Penitentiary, stating the conviction and sentence and appointing a week within which the sentence must be executed, and commanding the said warden to execute the sentence upon some day within the week so appointed. If a proceeding is instituted in any federal or State court to test the validity of the conviction, other than by an appeal to the Court of Special Appeals or on certiorari in the Court of Appeals, or if a proceeding is instituted in any State court under § 75A to determine the incompetency of the defendant, the warrant shall remain in full force and effect unless the court, in which such proceeding is instituted, shall pass an

order revoking the warrant. In any case in which a stay of execution has resulted by reason of an appeal to the Court of Special Appeals or on certiorari in the Court of Appeals after compliance with the requirements of Title 12 of the Courts Article on appeals in criminal cases and the judgment has been affirmed, and in any case in which the warrant has been revoked by the order of a court in a proceeding to test the validity of the conviction and the conviction has not been set aside, or in a proceeding under § 75A in which the defendant has been found to be competent, the judge that imposed the sentence or the judge then presiding in the trial court in which the sentence was imposed shall make out, sign and issue another warrant of execution in the manner and to the effect hereinbefore prescribed.

(b) *Revocation of warrant where defendant pregnant.* — If, after medical examination, it shall appear to the satisfaction of the Governor that a female defendant, sentenced to the punishment of death, is pregnant, the Governor shall revoke the warrant previously issued for the execution of the defendant. As soon as the Governor is satisfied that such female defendant is no longer pregnant, he shall issue forthwith his warrant appointing a week within which the sentence must be executed.

(c) *Stay of execution by Governor.* — The Governor shall have the power, in his discretion, to grant a stay for any cause and, upon so doing, he shall issue an order revoking the warrant theretofore issued. Thereafter, the sentence shall not be executed until the Governor shall issue his warrant appointing a week within which the sentence must be executed.

(d) *Notice to warden upon revocation of warrant or stay of execution.* — When a warrant is revoked by an order of court or its execution is stayed, the clerk of the court by which the warrant is revoked, or the clerk of the court by which the sentence was imposed in the case of an appeal to the Court of Special Appeals or on certiorari in the Court of Appeals and the compliance with the requirements of Title 12 of the Courts Article on appeals in criminal cases, shall notify the warden forthwith, by telephone if necessary, that said warrant has been revoked or its execution has been stayed, as the case may be, and shall transmit forthwith to the warden a certificate that said warrant has been revoked or its execution stayed. The Governor shall notify the warden forthwith of the revocation of a warrant by him.

(e) *Time of execution; announcements concerning time.* — Each warrant for the execution of a person sentenced to suffer the death penalty shall appoint a week within which the sentence must be executed, and shall command the warden to execute the sentence upon some day within the week so appointed. The week so appointed must begin not less than four (4) weeks and not more than eight (8) weeks after the issuance of the warrant. The time of the execution within such week shall be left to the discretion of the warden of the Maryland Penitentiary. No previous announcement of the day or hour of the execution shall be made except to the persons who shall be invited or permitted to be present at the execution, as hereinbefore provided. (An. Code, 1951, § 507; 1951, ch. 285, § 487A; 1958, ch. 25; 1976, ch. 472, § 6; 1981, ch. 2, § 3; 1982, ch. 770, § 4; 1987, ch. 418.)

Effect of amendment. — The 1987 amendment, effective July 1, 1987, rewrote the second and third sentences of subsection (a), and deleted former subsection (c) and redesignated the remaining subsections accordingly.

Editor's note. — Section 2, ch. 418, Acts 1987, provides that "this act shall apply to all inmates under sentence of death on July 1, 1987 and those defendants sentenced to death after July 1, 1987."

§ 75A. Incompetent inmates.

(a) *Definitions.* — In this section, the following words have the meanings indicated:

(1) "Inmate" means an individual who has been convicted of murder and sentenced to death; and

(2) (i) "Incompetent" means the state of mind of an inmate who, as a result of a mental disorder or mental retardation, lacks awareness:

1. Of the fact of his or her impending execution; and

2. He or she is to be executed for the crime of murder.

(ii) An inmate is not incompetent merely because his or her competence is dependent upon continuing treatment, including the use of medication.

(b) *Execution of incompetent inmate prohibited.* — The State may not execute the death sentence against an inmate who has become incompetent.

(c) *Petition alleging incompetence and seeking revocation of warrant; representation of inmate; proceedings to determine competency.* — (1) The following individuals may file a petition alleging that an inmate is incompetent and seeking to revoke the warrant to execute the death sentence against the inmate:

(i) The inmate;

(ii) If the inmate is represented by counsel, counsel for the inmate; or

(iii) If the inmate is not represented by counsel, any other person on the inmate's behalf.

(2) The petition shall be filed in the circuit court of the county in which the inmate is confined.

(3) The petition must be accompanied by an affidavit of at least one psychiatrist, based, at least in part, on personal examination, attesting:

(i) That, in the pyschiatrist's medical opinion, the inmate is incompetent; and

(ii) The pertinent facts on which the opinion is based.

(4) A copy of the petition shall be served on the Attorney General and the Office of the State's Attorney who prosecuted the inmate, in accordance with the service requirements of the Maryland Rules.

(5) Unless the inmate is already represented by counsel, the court shall promptly appoint the public defender, or, if the public defender for good cause declines representation, other counsel to represent the inmate in the proceeding.

(6) Unless the State stipulates to the inmate's incompetence, it shall cause the inmate to be examined and evaluated by one or more psychiatrists of its choosing.

(7) The inmate is entitled to be independently examined by a psychiatrist of the inmate's choosing, provided the request is reasonable and timely made.

(8) Unless, with the court's approval, the parties waive a hearing, the administrative judge of the court shall designate a time for an evidentiary hearing to determine the inmate's competence. The hearing shall be held without a jury in court, at the place where the inmate is confined, or at any other convenient place.

(9) At the hearing, the inmate:

(i) Subject to the reasonable restrictions related to the inmate's condition, has the right to be present;

(ii) Has the right through counsel to offer evidence, cross-examine witnesses against the inmate, and make argument; and

(iii) Has the burden of establishing incompetence by a preponderance of the evidence.

(d) *Order declaring inmate competent or incompetent; issuance of new warrant; revocation of warrant and modification of sentence; appeal.* — (1) The court shall enter an order declaring the inmate to be competent or incompetent and stating the findings on which the conclusion is based.

(2) If the court finds the inmate to be competent and has previously revoked the warrant to execute the death sentence pursuant to § 75 (a), it shall notify the court in which the sentence of death was imposed to issue a new warrant for execution.

(3) If the court finds the inmate to be incompetent it shall revoke the warrant to execute the death sentence and remand the case to the court in which the sentence of death was imposed, which shall strike the sentence of death and enter in its place a sentence of life imprisonment without the possibility of parole. The sentence shall be mandatory and may not be suspended, in whole or in part.

(4) There is no right of appeal from the court's order. However, either party may seek review in the Court of Appeals by filing an application for leave to appeal in accordance with the Maryland Rules.

(e) *Subsequent petition by inmate.* — (1) Not earlier than 6 months after a finding of competence, the inmate may petition the court for a redetermination of competence.

(2) A petition under this subsection must be accompanied by an affidavit of at least one psychiatrist, based, at least in part, on personal examination, attesting:

(i) That, in the psychiatrist's medical opinion, the inmate is incompetent;

(ii) That the incompetence arose since the prior finding of competence; and

(iii) The pertinent facts on which each opinion is based, including the facts that show the change in the inmate's condition since the prior finding.

(3) Proceedings on a petition under this subsection shall be in accordance with subsections (c) and (d) of this section.

(f) *Forms of petitions and pleadings; procedure.* — The form of petitions and all other pleadings, and except as otherwise provided in this section, the procedures to be followed by the circuit court in determining competency or incompetency and by the Court of Appeals in reviewing applications for leave to appeal shall be as specified in the Maryland Rules.

(g) *Power of Governor to stay execution.* — This section does not affect the power of the Governor to stay execution of a death sentence under § 75 (c) of this article or to commute a sentence under Article 41, § 4-603 of the Code. (1987, ch. 418.)

Editor's note. — Section 2, ch. 418, Acts 1987, provides that "this act shall apply to all inmates under sentence of death on July 1, 1987 and those defendants sentenced to death after July 1, 1987."

Section 3 of ch. 418 provides that the act shall take effect July 1, 1987.

§ 76. Custody of convict after sentence; city or county not assessable for expense of detention in penitentiary or other State institutions.

Immediately upon sentence of death being pronounced upon any convict by any court of this State, the convict shall be taken into custody by the sheriff of the county or city wherein he was indicted, and held by him under such guard or guards as the sheriff shall determine to be necessary, and as soon thereafter as possible, said convict shall be, by the said sheriff delivered to the warden of the Maryland Penitentiary, to await the execution of his sentence by the said warden as aforesaid. No expense incident to the detention of the said convict in the Maryland Penitentiary, including the expense of guarding, lodging, feeding, clothing and caring for such convict, shall be assessed against, billed to or paid by the county commissioners of the county where said convict was indicted, or the Mayor and City Council of Baltimore, if indicted in Baltimore City.

No expense incident to the guarding, lodging, feeding, clothing and caring for any person sentenced to any State institution shall be assessed against, billed to or paid by the county commissioners of the county where such person was indicted, or the Mayor and City Council of Baltimore, if indicted in Baltimore City, irrespectively of whether or not the judgment, upon which such sentence is imposed, is thereafter reversed. (An. Code, 1951, § 508; 1939, § 488; 1924, § 410; 1922, ch. 465, § 6; 1933, Sp. Sess., ch. 100; 1966, ch. 386.)

§ 77. Service of notice of reprieve or stay of execution; service of mandate of court in subsequent proceedings; proceedings upon resentencing; new trial.

Should the condemned felon, while in the custody of the warden of the Maryland Penitentiary or the sheriff of the county or city where he was indicted, be granted a reprieve by the Governor, or should the execution of the sentence be stayed by any competent judicial proceeding, notice of such reprieve or stay of execution shall be served upon the said warden or sheriff, as well as upon the condemned felon, and the said warden or sheriff shall yield obedience to the same, and said felon shall remain in the custody of said warden or sheriff where he happens to be at the time of that notice. In any subsequent proceeding the mandate of the court having regard to the con-

demned felon shall be served upon the warden or sheriff, then having said felon in custody, as well as the said felon. Should the said felon be resentenced by the court, then the proceedings shall be as hereinbefore provided under the original sentence. Should a new trial be granted such condemned felon after he has been conveyed to the penitentiary, then he shall be conveyed back to the place of trial by such guard or guards as the warden may direct, their expenses to be paid as is now provided by law for the conveyance of convicts to the house of correction. (An. Code, 1951, § 509; 1939, § 489; 1924, § 411; 1922, ch. 465, § 7.)

§ 78. Disposition of body after execution.

Upon application of the relatives of the person convicted, the body after execution shall be returned to their address and at their cost, otherwise burial shall be provided for as said warden shall arrange and determine. (An. Code, 1951, § 510; 1939, § 490; 1924, § 412; 1922, ch. 465, § 8; 1966, ch. 386.)

§ 79. Certificate of execution.

The warden aforesaid must prepare and sign a certificate, setting forth the time and place of execution, and that the execution was conducted in conformity to the sentence of the court, and the provisions of this subtitle, and must request all the persons present and witnessing the execution to sign said certificate. He must cause such certificate to be filed, within ten days after the execution, in the office of the clerk of the court in which the felon was indicted. (An. Code, 1951, § 511; 1939, § 491; 1924, § 413; 1922, ch. 465, § 9.)

DEBT ADJUSTING

§ 79A. Prohibited; exceptions.

(a) For the purpose of this section, "debt adjusting" means the making of a contract, expressed or implied, with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business, who shall for a consideration distribute the same among certain specified creditors in accordance with a plan agreed upon.

(b) Whoever shall engage in the business of debt adjusting shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred ($500.00) dollars, or be imprisoned not more than six months, or both.

(c) Nothing in this section applies to the following when engaged in the regular course of their respective business and professions:

(1) Attorneys at law.

(2) Banks and fiduciaries, as duly authorized and admitted to transact business in this State and performing credit and financial adjusting service in the regular course of their principal business.

(3) Title insurers and abstract companies, while doing an escrow business.

(4) Judicial officers or others acting under court orders.

Mississippi Code

§ 99-19-49. Execution of death sentence—time fixed—copy of sentence delivered to sheriff.

When any defendant shall be sentenced to the punishment of death, the court shall appoint a day for the execution of the sentence, not less than four nor more than eight weeks from the date of the sentence; and, unless the sentence be suspended, the clerk of the court shall deliver to the sheriff of the county a copy of such sentence, under the seal of the court, which shall be his warrant for executing the convict.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (10); 1857, ch. 64, art. 309; 1871, § 2810; 1880, § 3085; 1892, § 1442; 1906, § 1515; Hemingway's 1917, § 1273; 1930, § 1296; 1942, § 2539.

Cross references—

As to naming of day of execution by supreme court following affirmance of judgment of conviction punishable by death, see § 99-35-135.

Research and Practice References—

21 Am Jur 2d, Criminal Law § 596.
24B CJS, Criminal Law § 2001.

ALR Annotations—

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

JUDICIAL DECISIONS

As to the date of execution, it has been the policy of the supreme court to fix such dates not less than four or more than eight weeks from the announcement of the date in conformity with this section [Code 1942, § 2539] prescribing the time within which such dates are to be designated by the trial courts. McGee v State, 50 So 2d 383, cert den 340 US 950, 95 L Ed 685, 71 S Ct 569.

§ 99-19-51. Execution of death sentence—lethal gas to be used.

The manner of inflicting the punishment of death shall be by lethal gas, that is, by causing the person sentenced to suffer the death penalty to be placed in a properly constructed gas chamber, and then causing said gas chamber to be filled with a lethal gas commonly used in the execution of persons sentenced to suffer the death penalty, and the person placed therein allowed to remain a sufficient length of time to cause death.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (24); 1857, ch. 64, art. 323; 1871, § 2816; 1880, § 3091; 1892, § 1447; 1906, § 1520; Hemingway's 1917, § 1282; 1930, § 1307; 1942, § 2550; Laws, 1940, ch. 242; 1954, ch. 220, § 1, eff December 31, 1954.

Research and Practice References—

21 Am Jur 2d, Criminal Law § 598.
24B CJS, Criminal Law § 2002.

ALR Annotations—

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

JUDICIAL DECISIONS

Where prior to the date of execution set for the defendant, the method thereof was changed from hanging to electrocution by means of an electric chair but no chair had as yet been obtained when such date arrived, resentencing and fixing another date for the execution was not a taking of defendant's life without due process of law. Childress v State, 1 So 2d 494.

Where a new law gave condemned a choice as to the method of infliction of death penalty, the law was not an ex post facto law as to persons who were sentenced to death before the enactment of statute. Wetzel v Wiggins (M) 85 So 2d 469.

§ 99-19-53. Execution of death sentence—state executioner.

The state executioner, or his duly authorized representative, is hereby designated to supervise the operation of the lethal gas chamber, as the same is hereby provided. The state executioner shall receive for his services in connection therewith compensation in the sum of two hundred fifty dollars ($250.00) for each such execution, to be paid by the county where the crime was committed. The county of conviction shall likewise pay the fees of the attending physician or physicians in attendance. From the fee paid the executioner, he shall pay his deputy and other assistants required to assist in the operation of the gas chamber.

The state executioner shall be custodian of the lethal gas chamber. All expenses for the maintenance and protection of the property, together with operating expenses, which as a practical matter cannot be allocated to the county of conviction, shall be paid out of funds designated by law for that purpose or out of the general support fund of the Mississippi State Penitentiary.

The governor shall appoint the official state executioner who shall serve at the pleasure of the governor and until his successor shall have been duly appointed to replace him.

SOURCES: Codes, 1942, § 2555; Laws, 1940, ch. 242; 1954, ch. 220, § 3; 1954, Ex. ch. 33, § 2; 1955, Ex. ch. 41, § 2; 1968, ch. 361, § 62, eff from and after January 1, 1972.

§ 99-19-55. Execution of death sentence—procedure—witnesses—certificate of execution—disposition of body.

(1) Whenever any person shall be condemned to suffer death by lethal gas for any crime for which such person shall have been convicted in any court of any county of this state, such punishment shall be inflicted within the confines of the maxium security cell

block housing the lethal gas chamber at the state penitentiary at Parchman, Mississippi. Any person convicted of a capital offense wherein the death sentence has been imposed shall be immediately transported to the maximum security cell block at the state penitentiary; and, upon final affirmance of his conviction, the punishment shall be there imposed in the lethal gas chamber. The state executioner or his duly authorized deputy shall supervise and perform such execution.

(2) When a person is sentenced to suffer death by lethal gas, it shall be the duty of the clerk of the court to deliver forthwith to the sheriff of the county of conviction a warrant for the execution of the condemned person. It shall be the duty of the sheriff of the county forthwith to notify the state executioner of the date of the execution and it shall be the duty of the said state executioner, or any person deputized by him in writing, in the event of his physical disability, as hereinafter provided, to be present at such execution, to perform the same, and have general supervision over said execution. In addition to the above designated persons, the state executioner, by at least three (3) days' previous notice, shall secure the presence at such execution of the sheriff, or his deputy, of the county of conviction, two physicians and bona fide members of the press, not to exceed eight (8) in number, and at the request of the condemned, such ministers of the gospel, not exceeding two (2), as said condemned person shall name. The executioner shall also name to be present at the execution such officers or guards as may be deemed by him to be necessary to insure proper security. No other persons shall be permitted to witness the execution, except the sheriff may permit two (2) members of the condemned person's immediate family as witnesses, if they so request. Provided, further, that the governor may, for good cause shown, permit two (2) additional persons of good and reputable character to witness an execution. No person shall be allowed to take photographs of any type during the execution. The absence of the sheriff, or deputy, after due notice to attend, shall not delay the execution; and the execution may proceed with one attending physician, if it is not practical for two physicians to be secured.

(3) The state executioner, or his duly authorized representative, the sheriff, or his deputy, of the county of conviction, and the physician or physicians who witnessed such execution shall prepare and sign officially a certificate setting forth the time and place thereof and that such criminal was then and there executed in conformity to the sentence of the court and the provisions of sections 99-19-51 to 99-19-55, and shall procure the signatures of the other public officers and persons who witnessed such

execution, which certificate shall be filed with the clerk of the court where the conviction of the criminal was had, and the clerk shall subjoin the certificate to the record of the conviction and sentence.

(4) The body of the person so executed shall be released immediately by the state executioner, or his duly authorized representative, to the relatives of the dead person, or to such friends as may claim the body. The sheriff of the county of conviction shall have sole charge of burial in the event the body is not claimed as aforesaid, and his discretion in the premises shall be final. The county of conviction shall bear the reasonable expense of burial in the event the body is not claimed by relatives or friends.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (25); 1857, ch. 64, art. 324; 1871, § 2817; 1880, § 3092; 1892, § 1448; 1906, § 1521; Hemingway's 1917, § 1283; 1930, § 1308; 1942, § 2551; Laws, 1924, ch. 229; 1940, ch. 242; 1954, ch. 220, § 2; 1954, Ex. ch. 33, § 1; 1955, Ex. ch. 41, § 1.

Research and Practice References –
21 Am Jur 2d, Criminal Law §§ 595, 596, 598.
24B CJS, Criminal Law §§ 2002, 2003.

§ 99–19–57. Execution of death sentence—suspension of sentence when convict is insane or pregnant.

If the sheriff shall, at any time, be satisfied that any convict in his custody under sentence of death is insane, or that any female convict under like sentence is pregnant, he shall with concurrence of the judge of the circuit court, or of the chancellor, or the president of the board of supervisors in the absence of the circuit judge, summons six physicians if such can be found, and if not, other discreet and experienced freeholders and electors of said county, to make up an inquest to inquire into such insanity or pregnancy, as the case may be. The sheriff shall summons and swear all necessary witnesses and the jury and sheriff after full examination shall certify under their hand what the truth may be in relation to the alleged insanity or pregnancy, and in case such convict shall be found insane or pregnant, the sheriff shall immediately transmit the verdict of the jury to the governor and suspend execution of the sentence until the governor shall be satisfied of the sanity of said convict, or that the convict is not or is no longer pregnant. In case such convict shall be found insane the sheriff shall immediately transmit and deliver said convict to the state insane asylum, and a copy of the verdict of the jury and sheriff which made up an inquest to inquire into the sanity of said convict shall be sufficient authority for the director of the state

insane asylum to receive said convict as an inmate of said institution, and when the director of the insane asylum so certifies to the governor that he is satisfied of the sanity of the convict, and the governor is so satisfied of the sanity of the convict, the governor shall order the sheriff to return said convict to the county where the crime was committed, and shall order, by his warrant to the sheriff, the execution of the convict on a day to be therein appointed by the governor according to the sentence and judgment of the court.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (15–21); 1857, ch. 64, art. 326; 1871, § 2819; 1880, § 3094; 1892, § 1450; 1906, § 1523; Hemingway's 1917, § 1285; 1930, § 1310; 1942, § 2558; Laws, 1926, ch. 186.

Research and Practice References—

21 Am Jur 2d, Criminal Law §§ 75 et seq.
24 CJS, Criminal Law § 1619.

ALR Annotations—

Test of present insanity which will prevent trial for crime or punishment after conviction. 3 ALR 94.

JUDICIAL DECISIONS

This section [Code 1942, § 2558] is not the exclusive remedy to have execution of convicted murderer stayed on the ground that he was insane. Musselwhite v State, 215 M 363, 60 So 2d 807.

On petition to stay execution of a murderer on the ground that he was insane, technical perfection of pleading was not required. Musselwhite v State, 215 M 363, 60 So 2d 807.

On a petition for stay of execution of a convicted murderer on the ground that he was insane, the trial judge before whom the accused was convicted and sentenced, should not have limited the stay of execution to periods pending appeal but should have stayed execution until the convicted murderer should be adjudged sane. Musselwhite v State, 215 M 363, 60 So 2d 807.

In proceeding for order fixing date for execution of death sentence, convict could present answer or suggestion of insanity. Lewis v State, 155 M 810, 125 So 419.

§ 99-19-59. Execution of death sentence—procedure when execution does not take place as ordered.

Whenever, from any cause, a convict under sentence of death shall not have been executed according to the order and judgment of the court, and the same shall stand in force and unreversed, the circuit court where such sentence was pronounced, on the application of the state, shall issue a writ of habeas corpus to bring the convict before the court, or if the convict be at large, shall issue a warrant for his apprehension, and upon the convict being brought before the court, and there be not a legal reason against the execution of the sentence, the court shall issue a warrant to the sheriff of the proper county, reciting the facts, and commanding

the sheriff, on a day to be named in said warrant, to execute the sentence according to law, which the sheriff shall accordingly do.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (22); 1857, ch. 64, art. 327; 1871, § 2820; 1880, § 3095; 1892, § 1451; 1906, § 1524; Hemingway's 1917, § 1286; 1930, § 1311; 1942, § 2559.

Research and Practice References—

21 Am Jur 2d, Criminal Law § 597.

24 CJS, Criminal Law § 1614.

ALR Annotations—

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

JUDICIAL DECISIONS

1. In general.
2. Reasons for delay of execution.

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1. In general

This section [Code 1942, § 2559] must be construed so as to fit harmoniously into the system of which it is a part. Simmons v State, 197 M 326, 20 So 2d 64 (writ of certiorari denied in 324 US 821, 89 L Ed 1391, 65 S Ct 590).

The statute is but declaratory of the common law. Like proceedings can be had in cases not capital. Ex parte Bell, 56 M 282.

State supreme court, which had not issued mandate to trial court upon its affirmance of murder conviction imposing death sentence, the date for which had passed before dismissal of appeal by federal supreme court, still had jurisdiction of the case and the power to fix a new date therefor. Wood v State, 198 M 503, 23 So 2d 264.

Where, after mandate of supreme court had been issued and filed in the court below directing it to proceed with the execution of judgment affirming rape conviction, stay of execution for 60 days was granted to permit defendant to apply to the Supreme Court of the United States for a review, but application therefor was not made within such time, trial court was authorized by this section [Code 1942, § 2559] to fix another date for the execution of death sentence. Simmons v State, 196 M 102, 16 So 2d 617.

Where Mississippi Supreme Court affirmed murder conviction but failed to issue mandate to the court below, and the federal supreme court dismissed an appeal and its mandate was issued and filed with the clerk of the Mississippi Supreme Court, the latter still had jurisdiction, the date fixed for execution of the death sentence having passed, to fix a new date for the execution thereof. Thornton v State, 196 M 643, 20 So 2d 70.

Where a conviction for a murder imposing the death sentence had been affirmed by the supreme court, fact that respondent was endeavoring to appeal from the judgment of the federal district court denying his application of a writ of habeas corpus and remanding him to the possession of the superintendent of the state penitentiary, did not prohibit the state supreme court from setting another execution date where respondent had failed to secure a writ of probable cause required by 28 USC § 2253. Goldsby v State, 233 M 338, 102 So 2d 215.

A circuit judge in vacation has no authority, under this section [Code 1942, § 2559] to fix a day for the execution of a sentence. Simmons v State, 196 M 305, 17 So 2d 798.

The governor can grant a respite and fix a later day for the execution. In such case no order of court under the

What constitutes "newly discovered evidence" within meaning of Rule 33 of Federal Rules of Criminal Procedure relating to motions for new trial. 44 ALR Fed 13.

Time limitations in connection with motions for new trial under Rule 33 of Federal Rules of Criminal Procedure. 51 ALR Fed 482.

What standard, regarding necessity for change of trial result, applies in granting new trial pursuant to Rule 33 of Federal Rules of Criminal Procedure for newly discovered evidence of false testimony by prosecution witness. 59 ALR Fed 657.

JUDICIAL DECISIONS

2. Grounds for new trial

Conflict of interest on part of assistant district attorney who prosecutes cause after having previously counseled defendant in same matter while attorney was in private practice is ground for new trial notwithstanding defendant's failure to object at outset of trial. Gray v State (1985, Miss) 469 So 2d 1252.

District attorney's statement on voir dire, to the effect that trial would not be like one on television and that the jurors could not expect the defendant to confess, was not such improper comment on defendant's right not to testify as to require a new trial. Bridgeforth v State (1986, Miss) 498 So 2d 796.

§ 99-17-49. New trials—grant or refusal assignable for error.

Cross references—

As to new trials, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 5.16.

ALR Annotations—

Appeal by state of order granting new trial in criminal case. 95 ALR3d 596.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial. 29 ALR4th 659.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal. 46 ALR4th 11.

CHAPTER 19

Judgment, Sentence, and Execution

New sections Added

§ 99-19-1. Change of law not to affect prosecution or punishment of crime committed prior to change.

JUDICIAL DECISIONS

Under § 99-19-1, which provides that no statutory amendment may affect punishment for a crime committed prior to its enactment, a defendant convicted of armed robbery was properly sentenced to serve a term of 60 years in prison, pursuant to § 97-3-79, which was amended after defendant's conviction to provide for penalty of imprisonment for a term reasonably expected to be less than life, rather than imprisonment for any term not less than three years. Allen v State (1983, Miss) 440 So 2d 544.

Defendant who committed capital murder and was originally tried prior to enactment of current death penalty statute (§§ 99-19-101 et seq.) may nonetheless be sentenced to death under that statute, which does not affect substance of capital murder law but merely changes procedure by which capital cases are to be tried. Jordan v State (1985, Miss) 464 So 2d 475, vacated on other grounds (US) 54 USLW 3728.

Judge must consider alternative sentences available and in effect at time crime was committed, and not at time of sentencing, where subsequent amendment of statute limited alternatives available. Gardner v State (1987, Miss) 514 So 2d 292.

§ 99-19-3. Convictions obtained only by verdict or guilty plea—no punishment without legal conviction.

Cross references—

As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

ALR and L Ed Annotations—

Validity of guilty pleas. 25 L Ed 2d 1025.

Enforceability of plea agreement, or plea entered pursuant thereto, with prosecuting attorney involving immunity from prosecution for other crimes. 43 ALR3d 281.

Consideration of accused's juvenile court record in sentencing for offense committed as adult. 64 ALR3d 1291.

Right to withdraw guilty plea in state criminal proceedings where court refuses to grant concession contemplated by plea bargain. 66 ALR3d 902.

Validity and efficacy of accused's waiver of unanimous verdict. 97 ALR3d 1253.

Right of prosecutor to withdraw from plea bargain prior to entry of plea. 16 ALR4th 1089.

Sufficiency of court's statement, before accepting plea of guilty, as to waiver of right to jury trial being a consequence of such plea. 23 ALR4th 251.

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

Power or duty of state court, which has accepted guilty plea, to set aside such plea on its own initiative prior to sentencing or entry of judgment. 31 ALR4th 504.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession. 51 ALR4th 495.

Prohibition of federal trial judge's participation in plea bargaining negotiations under Rule 11(e)(1) of the Federal Rules of Criminal Procedure. 56 ALR Fed 529.

JUDICIAL DECISIONS

State court's affirmance of a criminal conviction, entered on a guilty plea, was vacated and the case remanded, where the prosecution, contrary to a "plea bargaining" agreement, had recommended the maximum sentence and such maximum sentence was imposed. Santobello v New York, 404 US 257, 30 L Ed 2d 427, 92 S Ct 495, on remand (1st Dept) 39 App Div 2d 654, 331 NYS2d 776.

The provisions of § 99-19-3 for the conviction of a person upon "a confession of his guilt in open court or by admitting the truth of the charge against him" apply only when the confession or admission is made to the charge for which the defendant is then being tried. Thus, in a prosecution of two defendants under § 99-35-1 for spotlighting deer following their conviction in a justice of the peace court, the circuit court erred in convicting them of unlawfully hunting from a public road based upon admissions or confessions

made during trial where the only offense for which they were on trial was that of spotlighting deer. Sanchez v State (1980, Miss) 385 So 2d 624.

§ 99-19-5. Findings of jury.

Cross references—
As to verdicts, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 5.14.

ALR Annotations—
Comment Note.—Impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime. 37 ALR3d 375.
Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.

JUDICIAL DECISIONS

1. In general

On indictment for any offense the jury may find the defendant guilty of the offense as charged or of attempt to commit the same offense or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose. Crocker v State, 272 So 2d 664.

On indictment for any offense the jury may find the defendant guilty of the offense as charged or any attempt to commit the same offense or may find him guilty of an inferior offense. Callahan v State (1982, Miss) 419 So 2d 165.

3. Lesser included offenses

Under the provisions of Code 1942, § 2523, a defendant indicted for armed robbery may properly be tried and convicted for robbery. Auman v State, 271 So 2d 427.

The charge of possession and delivery of marijuana is a constituent part of the charge of the sale of marijuana. Jones v State, 279 So 2d 650.

In a prosecution for robbery, it was not error for the trial court to refuse the defendant's requested instruction on the lessor included offense of assault and battery where the requested instruction ignored the charge of robbery and the evidence supporting that charge, and the evidence in the case was such that no fair-minded jury could have reached any other conclusion than that the defendant was guilty of robbery beyond a reasonable doubt. Presley v State (Miss) 321 So 2d 309.

A simple assault is a constituent or lesser included offense of aggravated assault. Callahan v State (1982, Miss) 419 So 2d 165.

The fact that a defendant has been indicted for capital murder does not preclude the trial court's giving instructions on lesser-included offenses of murder and manslaughter where, under the evidence, a reasonable jury could find the defendant not guilty of capital murder but guilty of one of the lesser-included offenses. Harveston v State (1986, Miss) 493 So 2d 365.

§ 99-19-7. Verdict as to some, disagreement as to other defendants.

Cross references—
As to verdicts and disagreements, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 5.14.

Research and Practice References—
Young, Trial Handbook for Mississippi Lawyers § 36:1.

§ 99-19-9. No special form of verdict required.

Research and Practice References—
76 Am Jur 2d, Trial §§ 1142 et seq.
Young, Trial Handbook for Mississippi Lawyers §§ 36:1, 36:2.

§ 99-19-11. Verdict may be reformed at the bar if informal or defective.

Cross references—
As to defective verdicts, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 5.14.

Research and Practice References—
76 Am Jur 2d, Trial §§ 1208 et seq.

§ 99-19-13. Repealed by Laws, 1974, ch. 576, § 9, eff from and after passage (approved April 23, 1974).

Cross references—
As to provisions that a jury is to determined punishment in capital cases in separate sentencing proceeding, see § 99-19-101.

ALR and L Ed Annotations—
Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 ALR4th 1069.

§ 99-19-15. Sentence—felon under age sixteen.

Cross references—
As to inapplicability of Mississippi Rules of Evidence in sentencing proceedings, see M.R.E. 1101.
As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 et seq.

§ 99-19-17. Sentence—when receiving stolen goods, false pretenses and embezzlement may be punished as petit larceny.

Cross references—
As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 et seq.

ALR and L Ed Annotations—
What constitutes "constructive" possession of stolen property to establish requisite element of possession supporting offense of receiving stolen property. 30 ALR4th 488.

JUDICIAL DECISIONS

Evidence was insufficient to support finding beyond reasonable doubt that value of stolen property was in excess of $100; therefore, defendant should have been sentenced for offense of petit larceny, where in affidavit sworn out in justice court, value of property was set at $90, while at trial testimony regarding value of stolen property was inconsistent. Dulin v State (1987, Miss) 507 So 2d 897.

§ 99-19-19. Repealed by Laws, 1979, ch. 501, § 4, eff from and after April 18, 1979.

§ 99-19-20. Sentence—imposition of fine—payment—imprisonment for nonpayment—indigent defendants.

(1) When any court sentences a defendant to pay a fine, the court may order (a) that the fine be paid immediately, or (b) that the fine be paid in installments to the clerk of said court or to the judge, if there be no clerk, or (c) that payment of the fine be a condition of probation, or (d) that the defendant be required to work on public property for public benefit under the direction of the sheriff for a specific number of hours, or (e) any combination of the above.

(2) The defendant may be imprisoned until the fine is paid if the defendant is financially able to pay a fine and the court so finds, subject to the limitations hereinafter set out. The defendant shall not be imprisoned if the defendant is financially unable to pay a fine and so states to the court in writing, under oath, afer sentence is pronounced, and the court so finds, except if the defendant is financially unable to pay a fine and such defendant failed or refused to comply with a prior sentence as specified in subsection (1) of this section, the defendant may be imprisoned.

This subsection shall be limited as follows:

(a) In no event shall such period of imprisonment exceed one (1) day for each ten dollars ($10.00) of the fine.

(b) If a sentence of imprisonment, as well as a fine, were imposed, the aggregate of such term for nonpayment of a fine and the original sentence of imprisonment shall not exceed the maximum authorized term of imprisonment.

(c) Credit shall be earned for work performed under subsection (1)(d) above at the rate of the highest current federal minimum wage.

(3) Periods of confinement imposed for nonpayment of two (2) or more fines shall run consecutively unless specified by the court to run concurrently.

SOURCES: Laws, 1979, ch. 501, § 1, eff from and after passage (approved April 18, 1979.

Cross references—

As to imposition of fine on persons convicted of offenses punishable by more than 1 year of imprisonment, see § 99-19-32.

As to the utilization of a program of public service in the implementation of the provisions of this section, see § 21-23-7.

As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 et seq.

Research and Practice References—

1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss L J 795, December 1979.

ALR and L Ed Annotations—

Right to apply cash bail to payment of fine. 92 ALR 1084.

Indigency of offender as affecting validity or imprisonment as alternative to payment of fine. 31 ALR3d 926.

Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 ALR4th 1069.

JUDICIAL DECISIONS

Under § 99-19-20, a defendant could not be imprisoned for failure to pay a lawfully imposed fine, where he was financially unable to do so and the trial court so found; moreover, the trial court had no authority to alter defendant's $45,000 fine; however, the court could require defendant to perform public service, or it could establish a realistic installment plan for the payment of the fine. Cassibry v State (1984, Miss) 453 So 2d 1298.

If, after a defendant has completed his sentence, the Department of Corrections attempts to keep him incarcerated for failure to pay a fine, then the trial court must determine at that time whether he is financially able to pay the fine and, if not, must consider and apply one of the alternatives to imprisonment set out in § 99-19-20. Lee v State (1984, Miss) 457 So 2d 920.

JUDICIAL DECISIONS UNDER FORMER § 99-19-19

A violation of the equal protection clause of the Fourteenth Amendment inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term, and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine, for the constitution prohibits the state from imposing a fine as a sentence and then converting it into a jail term because the defendant is unable to pay the fine in full forthwith. Tate v Short, 401 US 395, 28 L Ed 2d 130, 91 S Ct 668, on remand (Tex Crim) 471 SW2d 404.

The imprisonment of an indigent, convicted of nine traffic offenses which were punishable by fines only, for inability to pay the fines totalling $425, constituted an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment.

Tate v Short, 401 US 395, 28 L Ed 2d 130, 91 S Ct 668, on remand (Tex Crim) 471 SW2d 404.

The trial court did not err in committing the defendant to jail for nonpayment of a fine, where, by the imposition of the fine of $100, the defendant could never have been required to remain in jail longer than 30 days which was the statutory maximum period of confinement for the crime of which convicted. McKinney v State, 260 So 2d 444.

§ 99-19-21. Sentence-prison terms to run consecutively unless imposed concurrently.

When a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction.

SOURCES: Laws, 1983, ch. 333, eff from and after passage (approved March 14, 1983).

Cross references—

As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 et seq.

ALR and L Ed Annotations—

Single act affecting multiple victims as constituting multiple assaults or homicides. 8 ALR4th 960.

Propriety of imposing consecutive sentences upon convictions, under federal statutes, of unlawful receipt, transportation, or making and possession of same firearm. 55 ALR Fed 633.

JUDICIAL DECISIONS

Defendant's sentences for four separate convictions were to run consecutively and not concurrently since none of the four judgments specified how they were to run. Maycock v Reed (Miss) 328 So 2d 349.

In a prosecution for burglary, armed robbery, and kidnapping in which the defendant had been sentenced to serve 15 years under the burglary verdict and a life sentence under each of the armed robbery and kidnapping verdicts after the jury had been unable to agree upon a penalty under the armed robbery and kidnapping charges, the case would be remanded to the trial court for resentencing where the trial court had failed to indicate whether the sentences were to run consecutively or concurrently and where, since the jury had been unable to arrive at a sentence for either of these convictions, the maximum sentence permissible for the kidnapping conviction under § 97-3-53 was 30 years and the maximum sentence for the armed robbery conviction was only the number of years that reasonably would be calculated to be less than life for that particular accused. Woods v State (1981, Miss) 393 So 2d 1319.

Three life sentences imposed on a defendant convicted of murder, rape, and kidnapping, were to run concurrently where each of the three sentencing orders, all dated March 25th, 1968, imposed a life sentence "commencing from this date." Watts v Lucas (1981, Miss) 394 So 2d 903.

In a prosecution for possession of marijuana with intent to deliver, the lower court improperly imposed the sentence in the present case to run concurrently with a revoked sentence in a prior case, where the sentences were not at the same term of court inasmuch as the five-year suspended sentence that was revoked by the lower court was rendered on June 22, 1979, and the sentence in the present case was rendered at the September 1981 term of court. Glover v State (1982, Miss) 419 So 2d 588.

A defendant who assaulted three police officers, on the same day and as a part of the same occurrence, was properly subjected to three separate charges of assault, in violation of § 97-3-7(1), and properly sentenced to three consecutive terms, pursuant to § 99-19-21, for the three resulting convictions. Ball v State (1983, Miss) 437 So 2d 423.

§ 99-19-21 required that defendant's two separate sentences imposed for two separate convictions of burglary during two separate terms of the court be served consecutively. Tate v State (1984, Miss) 455 So 2d 1312.

Defendant, who was convicted separately of two burglaries during two separate terms of the Circuit Court, was required to serve his two sentences consecutively, under § 99-19-21, where the second sentencing order did not expressly provide that the sentences run concurrently, and where, at the time of sentencing, § 99-19-21 provided that, in the absence of language affirmatively indicating that sentences run concurrently, a second term did not begin until the first had been completed. Tate v State (1984, Miss) 455 So 2d 1312.

In sentencing defendant convicted of rape to term of imprisonment to run concurrently

with separate judgment of imprisonment for another rape in another county, second sentencing court is not required to consider sentence previously imposed. Harper v State (1985, Miss) 463 So 2d 1036.

Consecutive sentences of 10 and 15 years imposed respectively for attempted rape and burglary of dwelling were permissible, even though both crimes arose out of same sequence of events and shared common element. Armstead v State (1987, Miss) 502 So 2d 281.

§ 99-19-23. Sentence—credit for time of prisoner's confinement.

Cross references—

As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 et seq.

Research and Practice References—

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Presentence Credit, 53 Miss LJ 159, March 1983.

ALR and L Ed Annotations—

Right of state or federal prisoner to credit for time served in another jurisdiction before delivery to state or federal authorities. 18 ALR2d 511.

Right to credit for time served under erroneous or void sentence or invalid judgment for conviction necessitating new trial. 35 ALR2d 1283.

Right to credit for time spent in custody prior to trial or sentence. 77 ALR3d 182.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where court fails to specify in that regard. 90 ALR3d 408.

Defendant's right to credit for time spent in halfway house, rehabilitation center, or similar restrictive environment as a condition of pretrial release. 29 ALR4th 240.

Sentencing: permissibility of sentence to a fine only, under statutory provision for imprisonment or imprisonment and fine. 35 ALR4th 192.

When is federal prisoner entitled, under 18 USCS § 3568, to credit for time spent in state custody "in connection with" offense or acts for which federal sentence was imposed. 47 ALR Fed 755.

JUDICIAL DECISIONS

Section 99-19-23 has no application to time served in another state while an accused is awaiting return to Mississippi to face criminal charges, where to hold otherwise would encourage an accused to flee the State and seek refuge in another state or locality of his own choosing and fight extradition knowing that any time spent in jail in such state would be credited to any sentence received by him upon co[illegible] Holland v State (1982, Miss) 418 So 2d [illegible].

Under § 99-19-23, a circuit judge of one county may grant credit for time served in a second county, where a prisoner is arrested and charged with a crime in the first county and, prior to arraignment, is subsequently transferred to the second county to face another charge, and where the transfer is attended by a detainer from the first county. Lee v State (1988, Miss) 537 So 2d 1208.

§ 99-19[illegible] Sentence; circuit and county judges and justices of the pe[illegible]y suspend in misdemeanor cases.

The [illegible] courts and the county courts, in misdemeanor cases, are hereby [illegible]ed to suspend a sentence and to suspend the execution of a sentence [illegible]y part thereof, on such terms as may be imposed by the judge of the co[illegible]rovided, the suspension of imposition or execution of a sentence he[illegible]er may not be revoked after a period of five (5) years.

The justice [illegible]s, in misdemeanor cases, are hereby authorized to suspend sentence a[illegible] to suspend the execution of a sentence, or any part thereof, on such [illegible]ms as may be imposed by the judge of the court. Provided, the suspension of imposition or execution of a sentence hereunder may not be revoked after a period of two (2) years. Provided, however, the justice courts in cases arising under the Implied Consent Law shall not suspend any fine.

SOURCES: Laws, 1973, ch. 470, § 1; 1981, ch. 491, § 14, eff from and after July 1, 1981.

Editor's Note—

Ch. 471, Laws, 1981, as part of a continuing overall legislative design to replace justice of the peace courts with justice courts and justices of the peace with justice court judges, amended numerous sections of the Mississippi Code of 1972 affecting justices of the peace and justice of the peace courts. Although ch. 471 did not specifically amend this section, attention is directed to Miss. Constn., § 171, amended 1975, which provides, inter alia, that "All reference in the Mississippi Code to justice of the peace shall mean justice court judge."

Section 15 of Chapter 491, Laws 1981, provides as follows:

SECTION 15. Prosecutions, convictions and penalties for violations which occurred prior to the effective date of this act under laws amended or repealed by this act, or suspensions or denials of driver's licenses or permits made pursuant to laws amended or repealed by this act, shall not be affected or abated by the provisons of this act.

Cross references—

As to placing offender on earned probation program, see § 47-7-47.

As to fines and other penalties under the Implied Consent Law, see § 63-11-30.

As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 et seq.

ALR Annotations—

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 ALR3d 1156

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 ALR3d 474.

Appealability of order suspending imposition or execution of sentence. 51 ALR4th 939.

§ 99-19-27. Convicts who violate terms of suspended sentence or parole are subject to arrest.

Cross references—

As to sentencing, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rules 6.00 et seq.

ALR Annotations—

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 ALR3d 1156.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 ALR3d 474.

§ 99-19-29. Vacation of suspended sentence and annulment of conditional pardon for violation of terms.

ALR and L Ed Annotations—

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 ALR3d 1156.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 ALR3d 474.

Admissibility of hearsay evidence in probation revocation hearings. 11 ALR4th 999.

Appealability of order suspending imposition or execution of sentence. 51 ALR4th 939.

§ 99-19-31. Penalty where none fixed elsewhere by statute.

Offenses for which a penalty is not provided elsewhere by statute, and offenses indictable at common law, and for which a statutory penalty is not elsewhere prescribed, shall be punished by fine of not more than one thousand dollars ($1,000.00) and imprisonment in the county jail not more than six (6) months, or either.

SOURCES: Laws, 1984, ch. 353, § 3, eff from and after July 1, 1984.

ALR and L Ed Annotations—

Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 ALR4th 1069.

§ 99-19-32. Fines and assessments upon persons convicted of offenses punishable by imprisonment for more than one year; deposit in Criminal Justice Fund.

(1) Offenses punishable by imprisonment in the State Penitentiary for

more than one (1) year and for which no fine is provided elsewhere by statute may be punishable by a fine not in excess of Ten Thousand Dollars ($10,000.00). Such fine, if imposed, may be in addition to imprisonment or any other punishment or penalty authorized by law.

(2) In addition to any fine imposed by the court under this section, there shall be imposed and collected an assessment, in an amount equal to the fine imposed, from each person upon whom the court imposes a fine. Each such assessment shall be paid to the court in which such fine is imposed, and all such assessments shall be forwarded to the State Treasurer on the day when the funds are credited to the treasury of the county, in accordance with Section 7-9-21. The State Treasurer shall then deposit such funds in a special fund hereby created in the State Treasury to be designated the "Criminal Justice Fund." The Legislature may make appropriations from the Criminal Justice Fund for the purpose of defraying such costs as the state incurs in the administration of the criminal justice system of this state.

SOURCES: Laws, 1985, ch. 495, § 1, eff from and after July 1, 1985.

Cross references—

As to imposition of fine, imprisonment for nonpayment, and application to indigent defendants, see 99–19–20.

As to collection of fines and duties of collecting officers, see §§ 99–19–65 et seq.

As to deposit of funds from escrow account established pursuant to Crime Victim's Escrow Account Act into Criminal Justice Fund, see § 99-38-9.

As to duty of state officials to pay in collections, see § 7–9–21.

As to the deposit into the criminal justice fund of an additional find imposed on a person convicted of issuing a bad check when the prosecution was commenced by the filing of a complaint by the district attorney after the accused failed to make restitution, see § 97-19-67.

As to the deposit of funds received as restitution for a bad check into the criminal justice fund when the complaintant cannot be located, see § 97-19-77.

Research and Practice References—

21 Am Jur 2d, Criminal Law §§ 613 et seq.

24B CJS Criminal Law § 1975.

ALR and L Ed Annotations—

Indigency of offender as affecting validity of imprisonment as alternative to payment of fine. 31 ALR3d 926.

Disqualification of judge, justice of the peace, or similar judicial officer for pecuniary interest in fines, forfeitures, or fees paid by litigants. 72 ALR3d 375.

§ 99–19–33. Where penalty modified milder penalty may be imposed.

JUDICIAL DECISIONS

This section gives the trial judge the right to sentence one convicted of crime after the law has been changed so as to permit a milder sentence before the conviction has become final, but does not apply where the statute providing for a milder sentence is passed after the conviction has become final. Lampley v State (Miss) 308 So 2d 87.

Following defendant's conviction for armed robbery, the trial court did not abuse its discretion in sentencing him under the terms of the statute prior to its amendment, which followed defendant's conviction, notwithstanding the provisions of § 99–19–33, which permitted the sentencing judge to exercise discretion to proceed under a new, ameliorating sentencing statute. Allen v State (1983, Miss) 440 So 2d 544.

§ 99–19–35. Convict of certain crimes not to vote, practice medicine or dentistry, or hold office.

A person convicted of bribery, burglary, theft, arson, obtaining money or

goods under false pretenses, perjury, forgery, embezzlement, or bigamy, shall not be allowed to practice medicine or dentistry, or be appointed to hold or perform the duties of any office of profit, trust, or honor, unless after full pardon for the same.

SOURCES: Laws, 1987, ch. 499, § 18, eff from and after July 24, 1987 (the date on which the United States Attorney General interposed no objection to the amendment).

Editor's Note—

Sections 20, 21 and 22, Chapter 499, Laws, 1987, provide as follows:

"SECTION 20. If any section, paragraph, sentence, clause or phrase of this act is declared to be unconstitutional or void, or for any reason is declared to be invalid or of no effect, the remaining sections, paragraphs, sentences, clauses or phrases shall be in no manner affected thereby but shall remain in full force and effect.

"SECTION 21. The Attorney General of the State of Mississippi is hereby directed to submit this act immediately upon its approval by the Legislature to the Attorney General of the United States or the United States District Court for the District of Columbia in accordance with the provisions of the Voting Rights Act of 1965, as amended and extended.

"SECTION 22. This act shall take effect and be in force from and after the date it is effectuated under the provisions of Section 5 of the Voting Rights Act of 1965, as amended and extended."

The United States Attorney General interposed no objection on July 24, 1987, to the amendment proposed by § 18, ch. 499, Laws, 1987.

ALR and L Ed Annotations—

Elections: effect of conviction under federal law, or law of another state or country, on right to vote or hold public office. 59 ALR3d 303.

§ 99–19–37. Restoration of right of suffrage to World War veterans.

Cross references—

As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99–39–1 et seq.

§ 99–19–39. Detention of convict pending appeal.

Cross references—

As to confinement of male prisoners sentenced to death, see § 99–19–55.

As to confinement of female prisoners sentenced to death, see § 99–19–55.

§ 99–19–41. Delivery of appellant to county where supreme court is held.

JUDICIAL DECISIONS

Action by convicted murderer sentenced to life imprisonment to be returned from state penitentiary to county detention center during pendency of his appeal, as mandated by § 99-19-41, is subject to one year statute of limitations, where inmate brought this action under 42 USCS § 1983. Fairley v Allain (1987, CA5 Miss) 817 F2d 306, reh gr (CA5 Miss) 820 F2d 728.

§ 99–19–43. Duty of judge when convict sentenced to penitentiary.

Cross references—

As to placing of offender on earned probation program, see § 47–7–47.

§ 99–19–45. Commitment to penitentiary; circuit clerks to furnish commitment papers to secretary of board of trustees; clerk's fee.

JUDICIAL DECISIONS

In felony cases where a prisoner is transferred to the penitentiary, the original commitment papers showing conviction of a felony duly issued by a circuit clerk pursuant to § 99–19–45 may be introduced in evidence as proof of such conviction; the absence of a

limit on consideration of remote convictions in the sentencing of habitual criminals does not rise to the level of cruel and unusual punishment. Pace v State (1981, Miss) 407 So 2d 530.

§ 99-19-47. Commitment to penitentiary; form.

Cross references—
As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

§ 99-19-49. Execution of death sentence; time fixed; copy of sentence delivered to sheriff.

When any defendant shall be sentenced to the punishment of death, the circuit court shall appoint a day for the execution of the sentence, not less than four (4) nor more than eight (8) weeks from the date of the sentence; and unless the sentence be suspended, the clerk of the court shall deliver to the commissioner of corrections a copy of such sentence, under the seal of the court, which shall be his warrant for executing the convict.

SOURCES: Laws, 1984, ch. 448, § 1, eff from and after July 1, 1984.

Cross references—
As to procedures regarding pregnant women awaiting execution of death sentence, see § 99-19-57.
As to Mississippi Supreme Court resetting date of death sentence execution following affirmance, see § 99-19-105.
As to stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.
As to the exception that execution of a defendant is not subject to a provision that death of a prisoner be investigated, etc., see § 47-5-151.

§ 99-19-51. Manner of execution of death sentence.

(1) Except as provided in subsection (2) of this section, the manner of inflicting the punishment of death shall be by continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate or other similar drug in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice.

(2) If the execution of the sentence of death as provided in subsection (1) of this section is held unconstitutional by an appellate court of competent jurisdiction, or if the person sentenced to suffer the death penalty was sentenced prior to July 1, 1984, then the manner of inflicting the punishment of death shall be by lethal gas; that is, by causing the person sentenced to suffer the death penalty to be placed in a properly constructed gas chamber, and then causing said gas chamber to be filled with a lethal gas commonly used in the execution of persons sentenced to suffer the death penalty, and the person placed therein allowed to remain a sufficient length of time to cause death.

SOURCES: Laws, 1984, ch. 448, § 2, eff from and after July 1, 1984.

Cross references—
As to procedures regarding pregnant women awaiting execution of death sentence, see § 99-19-57.
As to stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.
As to the exception that execution of a defendant is not subject to a provision that death of a prisoner be investigated, etc., see § 47-5-151.
As to infliction of death sentence as exception to "practice of nursing," see §§ 73-15-7 and 99-19-53.

JUDICIAL DECISIONS

The trial court in a prosecution for capital murder did not err in instructing the jury concerning aggravating and mitigating circumstances, notwithstanding the fact that its instruction limited the jury's consideration to three mitigating circumstances, where defendant proffered no evidence of nonstatutory mitigating factors at trial, and where his sole defense had been that he was addicted to drugs when the crime was committed, which was a statutory mitigating factor that was included in the instruction to the jury. Booker v State (1984, Miss) 449 So 2d 209, cert den (US) 83 L Ed 2d 159, 105 S Ct 230.

§ 99–19–53. Execution of death sentence; state executioner.

The state executioner, or his duly authorized representative, shall supervise and inflict the punishment of death as the same is hereby provided. All duties and necessary acts pertaining to the execution of a convict shall be performed by the commissioner of corrections except where such duties and actions are vested in the state executioner. The state executioner shall receive for his services in connection therewith compensation in the sum of five hundred dollars ($500.00) plus all actual and necessary expenses for each such execution, to be paid by the county where the crime was committed. The county of conviction shall likewise pay the fees of the attending physician or physicians in attendance. The executioner may appoint not more than two (2) deputies who shall be paid one hundred fifty dollars ($150.00) per execution and mileage as authorized by law, to be paid by the county where the crime was committed, to assist in the infliction of the punishment of death. The executioner may appoint such other assistants as may be required; however, such assistants shall not be entitled to compensation or travel expenses.

Any infliction of the punishment of death by administration of the required lethal substance or substances in the manner required by law shall not be construed to be the practice of medicine or nursing. Any pharmacist is authorized to dispense drugs to the state executioner without a prescription for the purpose of this chapter.

The state executioner shall be custodian of all equipment and supplies involved in the infliction of the death penalty. All expenses for the maintenance and protection of the property, together with operating expenses, which as a practical matter cannot be allocated to the county of conviction, shall be paid out of funds designated by law for that purpose or out of the general support fund of the Mississippi Department of Corrections.

The state executioner shall receive the per diem compensation authorized in section 25–3–69 in addition to actual and necessary expenses, including mileage as authorized by law, for each day, not to exceed three (3) days each month, spent in maintaining the equipment and supplies involved in the infliction of the death penalty or preparing for an execution which does not occur. Such payments shall be paid out of funds designated by law for that purpose or out of the general support fund of the Mississippi Department of Corrections.

The governor shall appoint the official state executioner who shall serve at the pleasure of the governor and until his successor shall have been duly appointed to replace him.

SOURCES: Laws, 1984, ch. 448, § 3, eff from and after July 1, 1984.

Cross references:

As to infliction of death sentence by intravenous injection of drugs or by lethal gas, see § 99–19–51.

As to procedures regarding pregnant women awaiting execution of death sentence, see § 99–19–57.

As to stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99–39–29.

As to the exception that execution of a defendant is not subject to a provision that death of a prisoner be investigated, etc., see § 47–5–151.

For a similar provision excepting infliction of death sentence from definition as and regulation as "practice of nursing," see § 73–15–7.

§ 99–19–55. Execution of death sentence; procedure; witnesses—certificate of execution; disposition of body.

(1) Whenever any person shall be condemned to suffer death for any crime for which such person shall have been convicted in any court of any county of this state, such punishment shall be inflicted at an appropriate place designated by the commissioner of corrections on the premises of the Mississippi State Penitentiary at Parchman, Mississippi. All male persons convicted of a capital offense wherein the death sentence has been imposed shall be immediately committed to the department of corrections and transported to the maximum security cell block at the Mississippi State Penitentiary at Parchman, Mississippi. When the maximum inmate capacity at such maximum security cell block has been reached, the commissioner of corrections shall place such male convicts in an appropriate facility on the grounds of the Mississippi State Penitentiary at Parchman, Mississippi. All female persons convicted of a capital offense wherein the death sentence has been imposed shall be immediately committed to the department of corrections and housed in an appropriate facility designated by the commissioner of corrections. Upon final affirmance of the conviction, the punishment shall be imposed in the manner provided by law. The state executioner or his duly authorized deputy shall supervise and perform such execution.

(2) When a person is sentenced to suffer death in the manner provided by law, it shall be the duty of the clerk of the court to deliver forthwith to the commissioner of corrections a warrant for the execution of the condemned person. It shall be the duty of the commissioner forthwith to notify the state executioner of the date of the execution and it shall be the duty of the said state executioner, or any person deputized by him in writing, in the event of his physical disability, as hereinafter provided, to be present at such execution, to perform the same, and have general supervision over said execution. In addition to the above designated persons, the commissioner of corrections shall secure the presence at such execution of the sheriff or his deputy, of the county of conviction, at least one (1) but not more than two (2) physicians, and bona fide members of the press, not to exceed eight (8) in number, and at the request of the condemned, such ministers of the gospel not exceeding two (2), as said condemned person shall name. The commissioner of corrections shall also name to be present at the execution such officers or guards as may be deemed by him to be necessary to insure proper security. No other persons shall be permitted to witness the execution, except the commissioner may permit two (2) members of the condemned person's immediate family as witnesses, if they so request. Provided further, that the governor may, for good cause shown, permit two (2) additional persons of good and reputable character to witness an execution. No person shall be allowed to take photographs or other recordings of any type during

the execution. The absence of the sheriff, or deputy, after due notice to attend, shall not delay the execution.

(3) The state executioner, or his duly authorized representative, the commissioner of corrections, or his duly authorized representative, and the physician or physicians who witnessed such execution shall prepare and sign officially a certificate setting forth the time and place thereof and that such criminal was then and there executed in conformity to the sentence of the court and the provisions of sections 99-19-51 through 99-19-55, and shall procure the signatures of the other public officers and persons who witnessed such execution, which certificate shall be filed with the clerk of the court where the conviction of the criminal was had, and the clerk shall subjoin the certificate to the record of the conviction and sentence.

(4) The body of the person so executed shall be released immediately by the state executioner, or his duly authorized representative, to the relatives of the dead person, or to such friends as may claim the body. The commissioner of corrections shall have sole charge of burial in the event the body is not claimed as aforesaid, and his discretion in the premises shall be final. The commissioner may donate the unclaimed body of an executed person to the University of Mississippi Medical Center for scientific purposes. The county of conviction shall bear the reasonable expense of burial in the event the body is not claimed by relatives or friends or donated to the University of Mississippi Medical Center.

SOURCES: Laws, 1984, ch. 448, § 4, eff from and after July 1, 1984.

Cross references—

As to procedures regarding pregnant women awaiting execution of death sentence, see § 99-19-57.

As to stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

As to the disposition of unclaimed bodies generally, see § 41-39-5.

As to anatomical gift law, see §§ 41-39-31 et seq.

As to autopsies on bodies of prisoners generally, see § 47-5-151.

As to the exception that execution of a defendant is not subject to a provision that death of a prisoner be investigated, see § 47-5-151.

§ 99-19-57. Execution of death sentence; suspension of sentence when convict is insane or pregnant.

(1) If the commissioner of corrections shall, at any time, be satisfied that any female convict in his custody under sentence of death is pregnant, he shall summon a physician to inquire into such pregnancy. The commissioner shall summons and swear all necessary witnesses and the commissioner after full examination shall certify under his hand what the truth may be in relation to the alleged pregnancy, and in case such convict shall be found pregnant, the commissioner shall immediately transmit his findings to the governor, and the governor shall suspend the execution of the sentence until he is satisfied that the convict is not or is no longer pregnant. The governor shall then order, by his warrant to the commissioner, the execution of the convict on a day to be therein appointed by the governor according to the sentence and judgment of the court.

(2)(a) If it is believed that a convict under sentence of death has become insane since the judgment of the court, the following shall be the exclusive procedural and substantive procedure. The convict, or a person acting as his next friend, or the commissioner of corrections may file an appropriate application seeking post conviction relief with the Mississippi Supreme

Court. [illegible] that the convict is insane, as defined in this subsect the court shall suspend the execution of the sentence. The convict shall b be committed to the forensic unit of the Mississippi State Hospital Whitfield. The order of commitment shall require that the convict examined and a written report be furnished to the court at that time every month thereafter stating whether there is a substantial probabil that the convict will become sane under this subsection within the fores able future and whether progress is being made toward that goal. If at a time during such commitment the appropriate official at the state hospi shall consider the convict is sane under this subsection, such official sh promptly notify the court to that effect in writing, and place the convict the custody of the commissioner of corrections. The court shall thereupo conduct a hearing on the sanity of the convict. The finding of the circu court is a final order appealable under the terms and conditions of th Mississippi Uniform Post-Conviction Collateral Relief Act.

(b) For the purposes of this subsection, a person shall be deemed insane the court finds the convict does not have sufficient intelligence to unde stand the nature of the proceedings against him, what he was tried for th purpose of his punishment, the impending fate which awaits him, and sufficient understanding to know any fact which might exist which woul make his punishment unjust or unlawful and the intelligence requisite t convey such information to his attorneys or the court.

SOURCES: Laws, 1984, ch. 448, § 5, eff from and after July 1, 1984.

Cross references—

As to pretrial insanity proceedings, see §§ 99-13-1 et seq.

As to confinement of female prisoners sentenced to death, see § 99-19-55.

As to Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

As to procedural effect of final order in post-conviction collateral relief proceeding, see § 99-39-23.

As to procedural effect of dismissal or denial of application for leave to proceed in trial court for post-conviction collateral relief, see § 99-39-27.

As to stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

ALR and L Ed Annotations—

Appealability of order suspending imposition or execution of sentence. 51 ALR4th 939.

JUDICIAL DECISIONS

Finding at trial that criminal defendant is presently sane is res judicata as to issue of present sanity of convicted defendant under sentence of death where defendant claims that present mental condition stems from that existing prior to time of offense and trial. Billiot v State (1985, Miss) 478 So 2d 1043, cert den (US) 89 L Ed 2d 901, 106 S Ct 1501.

Affidavits of clinical psychologists and psychiatrists failed to establish reasonable probability that defendant was insane, where he alleged insanity as bar to his execution on grounds of cruel and unusual punishment. Johnson v State (1987, Miss) 508 So 2d 1126.

Defendant was entitled to in-court opportunity to prove his claims of present insanity where he had presented allegations under oath which, if true, brought into serious question legality of execution under both state and federal law; defendant had presented court with application for relief backed by affidavits of 3 mental health professionals. Billiot v State (1987, Miss) 515 So 2d 1234.

State is not required to resolve death row inmate's claim that he has become insane since his conviction, warranting stay of his execution under Miss Code Anno § 99-19-57(2) by means of formal trial, as state may properly presume that inmate, who in order to have been convicted and sentenced must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise serious question for trial court, that inmate's mental state remains same at time sentence is to be carried out, and that allegation of change of mental state requires substantial threshold showing of insanity merely to trigger hearing process, and constitutionally acceptable procedure requires only

that state provide impartial hearing officer or board that can receive evidence from prisoner's counsel, including expert psychiatric evidence that may differ from state's own psychiatric evidence. Johnson v Cabana (1987, CA5 Miss) 818 F2d 333, later proceeding, en banc (Miss) 508 So 2d 1126.

§ 99–19–59. Repealed by Laws, 1984, ch. 448, § 10, eff from and after July 1, 1984.

§ 99–19–61. Cost of trial and/or execution of one committing crime within confines of penitentiary, or of inmate committing crime outside bounds of penitentiary.

The commissioner of corrections is hereby authorized and empowered to pay out of any available funds of the department of corrections all lawful costs, fees, and expenses and/or the costs of the execution of any person, not a legal resident of Sunflower County, Mississippi, who is charged, tried and/or executed for the commission of a crime within the confines of the penitentiary, or any crime committed outside the bounds of the land of the penitentiary by any inmate lawfully charged thereto. Such costs shall include the reasonable expense of burial in the event the person is executed and the body is not claimed by relatives or friends, and any and all other expenses required to be borne by the state of Mississippi under the provisions of sections 99–19–53 and 99–19–55. It is intended hereby to provide a means and method and source of payment of such expenses which said sections require to be borne by the state.

SOURCES: Laws, 1984, ch. 448, § 6, eff from and after July 1, 1984.

§ 99–19–63. Repealed by Laws, 1980, ch. 555, § 9, eff from and after July 1, 1980.

Editor's Note—

As to the Mississippi Justice Information Center and current provisions regarding maintenance and submission of records, fingerprints, photographs and other data, see §§ 45–27–1 et seq.

§ 99–19–65. Collection of fines, penalties, and list reported.

Cross references—

As to imposition of fine on persons convicted of offense punishable by more than 1 year of imprisonment, see § 99–19–32.

§ 99–19–67. Remedy against officer, in reference to fines.

Cross references—

As to imposition of fine on persons convicted of offense punishable by more than 1 year of imprisonment, see § 99–19–32.

§ 99–19–69. Liability of officers for default as to fines.

Cross references—

As to imposition of fine on persons convicted of offense punishable by more than 1 year of imprisonment, see § 99–19–32.

§ 99–19–71. Expunction of misdemeanor conviction occurring prior to twenty-third birthday.

Any person who has been convicted of a misdemeanor before reaching his twenty-third birthday, excluding a conviction for a traffic violation, and who is a first offender, may petition the justice, county, circuit or municipal court, as may be applicable, for an order to expunge any such conviction

from all public records. Upon entering such order, a nonpublic record thereof shall be retained by the court solely for the purpose of use by the court in determining whether or not in subsequent proceedings such person is a first offender. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest. No person as to whom such order has been entered shall be held thereafter under any provision of law to be guilty of perjury or to have otherwise given a false statement by reason of his failure to recite or acknowledge such arrest or conviction in response to any inquiry made of him for any purpose, except for the purpose of determining in any subsequent proceedings under this section, whether such person is a first offender.

SOURCES: Laws, 1986, ch. 412; 1987, ch. 380, § 2, eff from and after July 1, 1987.

Cross references—

As to the application of this section to the powers of the municipal court to expunge a misdemeanor conviction occurring prior to a person's 23rd birthday, see § 21-23-7.

As to other provisions relative to expunction of records, see §§ 21-23-7, 41-29-150, and 43-21-159.

As to provisions relative to the transfer to family court of misdemeanor cases involving children under thirteen years of age, see § 43-23-31.

SENTENCING OF HABITUAL CRIMINALS

§ 99-19-81. Sentencing of habitual criminals to maximum term of imprisonment.

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

SOURCES: Laws, 1976, ch. 470, § 1, eff from and after January 1, 1977.

Cross references—

As to ineligibility of confirmed and hardened criminals for supervised earned release, see § 47-5-17.

As to promulgation of rules and regulations concerning earned time allowances for habitual offenders, see § 47-5-138.

As to ineligibility of confirmed and hardened criminals for parole, see § 47-7-3.

As to ineligibility for earned probation program of persons previously convicted of felonies, see § 47-7-47.

As to the procedure for proof of prior convictions under the Habitual Criminal Statute, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 6.04.

Research and Practice References—

39 Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 1 et seq.

24B CJS, Criminal Law §§ 1958 et seq.

1981 Mississippi Supreme Court Review: Criminal Law and Procedure. 52 Miss L J 427, June 1982.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Rape. 53 Miss LJ 149, March 1983.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Amendments to the Uniform Criminal Rules of Circuit Court Practice. 53 Miss LJ 162, March 1983.

ALR and L Ed Annotations—

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

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

which a defendant is being charged, the better practice is to include it, this is especially so in habitual offender cases where the state may proceed under one of 2 statutes. Martin v State (1987, Miss) 501 So 2d 1124.

Habitual offender phase of trial was so infirm that it could not survive review where no two-phase trial actually occurred, because state did not reintroduce documents to prove prior convictions in sentencing phase of trial, the trial judge simply relying on it without its introduction. Young v State (1987, Miss) 507 So 2d 48.

Trial court did not err in sentencing defendant as habitual offender based, in part, on 2 previous felony convictions in Iowa, where those prior guilty pleas sufficiently showed on their face that defendant entered pleas knowingly and voluntarily, despite contention of defendant that there was nothing on face of either Iowa conviction indicating that he understood nature and consequences of his guilty pleas. Moore v State (1987, Miss) 508 So 2d 666.

Sentence of 30 years in prison without probation or parole, maximum term of imprisonment prescribed for offense of sexual battery, did not violate either United States Constitution or Mississippi Constitution; under standards set forth in Solem v Helm (1983) 463 US 277, 77 L Ed 2d 637, 103 S Ct 3001 (superseded by statute as stated in Re Petition of Lauer (CA8) 788 F2d 135) sentence was not grossly disproportionate to crime of sexual battery where harshness of penalty was justified by gravity of offense, non-habitual offenders convicted under § 97-3-95 could be sentenced to up to 30 years in prison, and sentence was not so dissimilar to sentences for same crime in other states as to make it a disproportionate penalty. Davis v State (1987, Miss) 510 So 2d 794.

Circuit court did not err in sentencing defendant as habitual offender, although defendant contended that 2 prior convictions in Memphis, Tennessee, had arisen out of the same incident, where court expressly found that prior convictions had in fact arisen out of separate incidents, one consisting of assault and forceful taking of wallet from victim on September 9, 1967, the other of unlawful possession of stolen credit cards which had arisen from incident which occurred on August 26, 1967. Buckley v State (1987, Miss) 511 So 2d 1354.

Sentence of life imprisonment was required by § 99-19-81 because defendant had previously been convicted of 2 separate felonies arising out of separate incidents at different times and had been sentenced to separate terms of one year or more, and maximum term of imprisonment for the crime of rape was life imprisonment. Johnson v State (1987, Miss) 511 So 2d 1360.

Certified copies of sentencing orders were proper proof of prior convictions, sufficient under habitual offender statute, where certification at issue contained attestation that copy was true and correct, and attestation bore seal of court; lack of book and page number were not fatal. Monroe v State (1987, Miss) 515 So 2d 860.

Full hearing is not required on habitual offender charge if trial court had no discretion in sentencing. Monroe v State (1987, Miss) 515 So 2d 860.

Concurrent sentences are "separate terms" under statute for sentencing as recidivist, language of statute requiring simply sentencing to separate terms, specifically omitting requirement that they be served separately or at all. Three prior convictions set out in habitual offender portion of indictment, although two occurred on same date and third a few days later, all arose out of separate incidents. All three guilty pleas were entered on same date and resulted in concurrent 7-year sentences. Jackson v State (1988, Miss) 518 So 2d 1219.

§ 99-19-81 is not unconstitutional as ex post facto law, nor does it constitute equal protection violation. Perkins v Cabana (1986, CA5 Miss) 794 F2d 168, cert den (US) 93 L Ed 2d 366, 107 S Ct 414.

Neither § 99-19-81 nor § 99-19-83 violates constitutional prohibition against double jeopardy. Perkins v Cabana (1986, CA5 Miss) 794 F2d 168, cert den (US) 93 L Ed 2d 366, 107 S Ct 414.

Reasonable and harmonious construction of §§ 47-5-138, 47-5-139, and 47-7-3 is that legislature intended them to maintain enhanced penalty that § 99-19-81 imposes on habitual offenders, which penalty includes denial of certain privileges available to other prisoners. Perkins v Cabana (1986, CA5 Miss) 794 F2d 168, cert den (US) 93 L Ed 2d 366, 107 S Ct 414.

§ 99-19-83. Sentencing of habitual criminals to life imprisonment.

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence

shall not be reduced or suspended nor shall such person be eligible for parole or probation.

SOURCES: Laws, 1976, ch. 470, § 2, eff from and after January 1, 1977.

Cross references—

As to ineligibility of confirmed and hardened criminals for parole, see § 47-7-3.

As to the procedure for proof of prior convictions under the Habitual Criminal Statute, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 6.04.

Research and Practice References—

39 Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 1 et seq.

24B CJS, Criminal Law §§ 1958 et seq.

1981 Mississippi Supreme Court Review: Criminal Law and Procedure. 52 Miss LJ 427, June 1982.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Rape. 53 Miss LJ 149, March 1983.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Amendments to the Uniform Criminal Rules of Circuit Court Practice. 53 Miss LJ 162, March 1983.

ALR Annotations—

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

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

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

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

Pardon as affecting consideration of earlier conviction in applying habitual criminal statute. 31 ALR2d 1186.

Propriety, under statute enhancing punishment for second or subsequent offense, of restricting new trial to issue of status as habitual criminal. 79 ALR2d 826.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions under habitual criminal act or statute enhancing punishment for repeated offenses. 80 ALR2d 1190.

Conviction under Dyer Act (18 USCS §§ 2312, 2313) as ground for enhancement of penalty under state habitual criminal statutes. 65 ALR3d 586.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 ALR3d 474.

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment. 27 ALR Fed 110.

JUDICIAL DECISIONS

In a prosecution for armed robbery, the trial court did not err in admitting during the state's case in chief evidence of prior convictions pursuant to this section, even though Criminal Rule of Circuit Court Practice Rule 6.04 prohibits mentioning prior convictions except for impeachment, where the trial antedated the court rule, where the indictment was laid under the habitual criminal statute, and where a cautionary instruction was given to the jury regarding the prohibition against using prior convictions as substantive evidence of the cardinal charge. Davis v State (1979, Miss) 377 So 2d 1076.

In a prosecution for aggravated assault on an indictment charging defendant with being a habitual criminal, the trial court's failure to give a limiting instruction on its own motion informing the jury not to consider defendant's prior convictions as evidence of the assault charges did not deny him due process of law, where defendant had testified freely as to the offenses made part of the indictment and where no limiting instruction was requested by defendant's counsel; under the totality of the circumstances, such an instruction was not constitutionally required. Nettles v State (1980, Miss) 380 So 2d 246.

A sentence of life imprisonment without probation or parole for a defendant convicted of carrying a concealed weapon after conviction of a prior felony did not constitute cruel and unusual punishment in violation of the United States and Mississippi Constitutions. Baker v State (1981, Miss) 394 So 2d 1378.

The statute contemplates that the trial court without a jury should hear evidence and make a determination of whether the defendant has been previously convicted under the statute, with the burden resting upon the state to prove the previous convictions beyond a reasonable doubt; however, it is not necessary that the issue of prior convictions be submitted to a jury. Wilson v State (1980, Miss) 395 So 2d 957.

In a prosecution for cattle theft in which

ter practice is to include it, and this especially so in habitual offender cases where the state may proceed under one of 2 statutes. Martin v State (1987, Miss) 501 So 2d 1124.

Indictment of defendant as habitual offender should contain allegation that 2 separate penal terms of one year or more have actually been served. Hentz v State (1987, Miss) 510 So 2d 515.

Neither § 99-19-81 nor § 99-19-83 violates constitutional prohibition against double jeopardy. Perkins v Cabana (1986, CA5 Miss) 794 F2d 168, cert den (US) 93 L Ed 2d 366, 107 S Ct 414.

§ 99-19-85. Governor's pardoning power unaffected.

Nothing in sections 99-19-81 to 99-19-87 shall be construed or considered as seeking or tending to impair the pardoning power or other powers reserved to the Governor under Section 124 of the Mississippi Constitution of 1890.

SOURCES: Laws, 1976, ch. 470, § 3, eff from and after January 1, 1977.

§ 99-19-87. Punishment by death unaffected.

Nothing in sections 99-19-81 to 99-19-87 shall abrogate or affect punishment by death in any and all crimes now or hereafter punishable by death.

SOURCES: Laws, 1976, ch. 470, § 4, eff from and after January 1, 1977.

SEPARATE SENTENCING PROCEEDING TO DETERMINE PUNISHMENT IN CAPITAL CASES

§ 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the state of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section;

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

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

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

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or the unlawful use or detonation of a bomb or explosive device.

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

(f) The capital offense was committed for pecuniary gain.

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

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

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

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

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

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

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

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

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

(7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:

(a) The defendant actually killed;

(b) The defendant attempted to kill;

(c) The defendant intended that a killing take place;

(d) The defendant contemplated that lethal force would be employed.

SOURCES: Laws, 1977, ch. 458, § 2; 1983, ch. 429, § 2, eff from and after passage (approved March 29, 1983).

Cross references—

As to review by Supreme Court of imposition of death penalty, see § 99-19-105.

As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

As to inapplicability of Mississippi Rules of Evidence in sentencing proceedings, see M.R.E. 1101.

As to bifurcated trials, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 5.13.

Research and Practice References—

21 Am Jur 2d, Criminal Law §§ 583-586, 595.

24B CJS, Criminal Law §§ 1983, 2001.

Constitutional problems concerning certain aggravating circumstances used for capital murder sentencing in Mississippi, 53 Miss L J 319, June, 1983.

ALR and L Ed Annotations—

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

Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence. 8 ALR4th 1028.

Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 ALR4th 1069.

Propriety, under Federal Constitution, of evidence or argument concerning deterent effect of death penalty. 78 ALR Fed 553.

JUDICIAL DECISIONS

The trial court in a murder prosecution erred in requiring defendant at the punishment stage of trial to proceed before the state, since the state has the burden of proof not only as to guilt but also as to aggravating circumstances during the punishment stage of a trial. Gray v State (Miss) 351 So 2d 1342, later app (Miss) 375 So 2d 994.

A prior conviction of another capital offense or of a felony involving the use or threat of violence to the person is admissible at the punishment stage of a trial for a capital crime as an aggravating circumstance to be considered by the jury in determining punishment. Gray v State (Miss) 351 So 2d 1342, later app (Miss) 375 So 2d 994, cert den 446 US 988, 64 L Ed 2d 847, 100 S Ct 2975, reh den (US) 65 L Ed 2d 1174, 101 S Ct 30.

The statutory provision allowing a jury in a capital murder prosecution to consider, on the issue of aggravating circumstances, whether "the capital offense was especially heinous, atrocious, or cruel," was not unconstitutionally vague; pursuant to the statute requiring appellate review of all death sentences, such a sentence would not be reversed where it was not imposed under the influence of passion, prejudice or any other arbitrary factor; where the evidence fully supported the jury's unanimous findings that two aggravating circumstances existed; where the death sentence was

defendant's conduct that caused the death was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, (b) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and (c) if raised by the evidence, whether or not the defendant's conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; (4) if the jury finds that the state has proved beyond a reasonable doubt that the answer to each of the pertinent questions is yes, then the death sentence is imposed, but if the jury finds that the answer to any question is no, then a sentence of life imprisonment results; and (5) death sentences are given expedited review on appeal. Jurek v Texas, 428 US 262, 49 L Ed 2d 929, 96 S Ct 2950, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 198.

State statute which imposed mandatory death penalty for first-degree murder, which included any willful, deliberate, and premeditated killing, and any murder committed in perpetrating or attempting to perpetrate a felony, constituted a violation of the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution. Woodson v North Carolina, 428 US 280, 49 L Ed 2d 944, 96 S Ct 2978.

§ 99-19-103. Instructions; aggravating circumstances shall be designated by jury in writing; effect of jury's failure to agree on punishment.

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

SOURCES: Laws, 1977, ch. 458, § 3, eff from and after passage (approved April 13, 1977).

Cross references—

As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

As to bifurcated trials, see Miss. Uniform Criminal Rules of Circuit Court Practice, Rule 5.13.

JUDICIAL DECISIONS

In a prosecution for capital murder the trial court properly refused defendant's requested amendment to his jury instruction that "if you are unable to unanimously agree on which circumstances outweigh the other, and arrive at a verdict fixing the punishment, then the form of your verdict should be as follows: we, the jury are unable to unanimously agree on the punishment to be inflicted," where the was no indication in the record that the jury had any difficulty reaching an agreement, and where Code § 99-19-103 imposed a duty on the court to dismiss the jury after a reasonable period of deliberation and impose a life sentence on the defendant. King v State (1982, Miss) 421 So 2d 1069.

In a capital murder prosecution in which defendant was sentenced to death under §§ 99-19-101 and 99-19-103, the trial court did not err in refusing to instruct the jury that they must return a verdict of life imprisonment unless they believed beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. Hill v State (1983, Miss) 432 So 2d 427, cert den (US) 78 L Ed 2d 352, 104 S Ct 414.

Jury instruction in penalty phase of capital murder prosecution which follows language of §§ 99-19-101, 99-19-103 need not define aggravating circumstances which may be found by jury; sentencing instruction does not impermissibly favor sentence of death by instructing jury foreman concerning completion of verdict forms only if death sentence is imposed; jury need not be instructed of authority to return life sentence even where aggravating circumstances outweigh mitigating circumstances. Cabello v State (1985, Miss) 471 So 2d 332.

The jury is required to find the existence of each aggravating circumstance beyond a reasonable doubt, but it is not required to find that the aggravating circumstances beyond a doubt outweigh the mitigating circumstances. Wiley v State (1986, Miss) 484 So 2d 339, cert den (US) 93 L Ed 2d 278, 107 S Ct 304.

In a capital murder prosecution, the jury's note sent to the court after the jury had deliberated for over two hours which stated, "We the jury cannot come to a unanimously [sic] decision—what shall we do?" was simply a request for further instruction, and did not require the dismissal of the jury and imposition of a life sentence. Jones v Thigpen (1983, SD Miss) 555 F Supp 870.

§ 99–19–105. Review by supreme court of imposition of death penalty.

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

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

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101; and

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

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

(7) Upon affirmance, and again upon rehearing if such is necessary, of any sentence of death by the Mississippi Supreme Court or the affirmance or

denial of review by the United States Supreme Court, the Mississippi Supreme Court shall reset the date of execution not more than sixty (60) days from the date of the Mississippi Supreme Court's affirmance of the sentence or from the denial of relief by the United States Supreme Court. Unless the sentence is suspended, the Clerk of the Mississippi Supreme Court shall forthwith deliver to the Commissioner of Corrections a warrant of execution under seal of the court, which warrant shall be his authority to execute the convict.

SOURCES: Laws, 1977, ch. 458, § 4; 1984, ch. 448, § 7; 1985, ch. 305, § 1, eff from and after passage (approved February 28, 1985).

Cross references—

As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

As to criminal docket in supreme court, see § 9-3-21.

JUDICIAL DECISIONS

The statutory provision allowing a jury in a capital murder prosecution to consider, on the issue of aggravating circumstances, whether "the capital offense was especially heinous, atrocious, or cruel," was not unconstitutionally vague; pursuant to the statute requiring appellate review of all death sentences, such a sentence would not be reversed where it was not imposed under the influence of passion, prejudice or any other arbitrary factor; where the evidence fully supported the jury's unanimous findings that two aggravating circumstances existed; where the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and where the jury carefully weighed the mitigating circumstances and found that they were insufficient to outweigh the two aggravating circumstances. Washington v State (1978, Miss) 361 So 2d 61, cert den 441 US 916, 60 L Ed 2d 388, 99 S Ct 2016.

The death penalty was properly imposed on defendant where, out of a desire to obtain money, he abducted his victim at gunpoint and fatally shot her when she tried to escape and where he then demanded and received a ransom from his victim's husband. Jordan v State (1978, Miss) 365 So 2d 1198, cert den 444 US 885, 62 L Ed 2d 114, 100 S Ct 175 and petition den (Miss) 390 So 2d 584.

In prosecution for the murder of a three-year-old girl, the circumstances in evidence amply supported a finding that the crime was especially heinous, atrocious and cruel and the jury was warranted, from the evidence before it, in finding that the aggravating circumstances outweighed any circumstance that might conceivably have been considered a mitigating circumstance; the death penalty was not imposed wantonly or freakishly or under the influence of passion, prejudice or any other arbitrary factor and was not excessive or disproportionate to similar cases in which such sentence had been imposed. Gray v State (1979, Miss) 375 So 2d 994, cert den 446 US 988, 64 L Ed 2d 847, 100 S Ct 2975, reh den (US) 65 L Ed 2d 1174, 101 S Ct 30.

In a prosecution for capital murder committed during a burglary, the death sentence would be reversed and the case remanded for sentencing to life imprisonment, where the victim, upon seeing defendant, began firing his pistol and was then shot by defendant, and where defendant had the opportunity to shoot the victim's wife but did not; the penalty of death in this case was disproportionate to the penalty imposed in similar cases. Coleman v State (1979, Miss) 378 So 2d 640.

In a prosecution for capital murder committed during an attempted robbery, the evidence supported the jury's finding of statutory aggravating circumstances, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; furthermore, prosecutorial discretion was not abused even though defendant's accomplice, who turned state's evidence, was permitted to plead guilty to manslaughter, while defendant, who fired the fatal shot, was given the death penalty. Culberson v State (1979, Miss) 379 So 2d 499.

In a prosecution for capital murder committed during a robbery, the sentence of death was not imposed by the jury under the influence of passion or prejudice, and the evidence supported the jury's finding that the mitigating circumstances did not outweigh the aggravating circumstances (§ 99-19-101), where the evidence in mitigation of the sentence was that defendant was only 17 or 18 at the time of the offense, and that there was no testimony indicating that this codefendant had struck the blows causing death, where the jury found that the offense, committed during a robbery, was especially heinous and cruel, and that defendant had been previously convicted of a felony involving the use or threat

affirmed but death sentence was reversed and remanded where defendant did not receive a fair sentencing hearing due to admission of photographs of wife's body during trial and during closing argument, state's attempt to prevent defendant from calling a co-indictee as a witness, prosecutor's attempt during voir dire to get commitment from jury to exclude certain mitigating factors from its consideration of the death penalty, and prosecutor's comment on defendant's failure to testify. Stringer v State (1986, Miss) 500 So 2d 928.

While there may be legitimate differences of opinion as to just when and how heightened scrutiny on appeal works in death penalty cases, it would seem clear that heightened scrutiny approach is most needed and most applicable in cases resting upon circumstantial evidence and where matter of whether defendant is guilty at all is by no means free of all doubt. Fisher v State (1985, Miss) 481 So 2d 203.

When prosecutor seeks to rebut defense counsel's effort to impress upon sentencing jury enormity of decision to impose death penalty by informing jury that decision will be subject to automatic appellate review, sentence of death imposed by jury must be vacated. Caldwell v Mississippi (1985) 86 L Ed 2d 231, 105 S Ct 2633, later proceeding Caldwell v State (1985, Miss) 481 So 2d 850.

Finding that capital murder defendant either killed, attempted to kill, intended that killing take place, or used lethal force, as required for imposition of death penalty, need not be made by jury, but may be made by state appellate court, trial judge or jury. Cabana v Bullock (1986) 88 L Ed 2d 704, 106 S Ct 689, on remand Bullock v Cabana (1986, CA5 Miss) 784 F2d 187.

§ 99-19-107. Life sentence to be imposed if death penalty held to be unconstitutional.

In the event the death penalty is held to be unconstitutional by the Mississippi Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death shall cause such person to be brought before the court and the court shall sentence such person to imprisonment for life, and such person shall not be eligible for parole.

SOURCES: Laws, 1977, ch. 458, § 5; 1982, ch. 431, § 6, eff from and after July 1, 1982.

Cross references—

As to relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

VICTIM IMPACT STATEMENT ACT

§ 99-19-151. Title.

Sections 99-19-151 through 99-19-161 shall be known and may be cited as "The Victim Impact Statement Act."

SOURCES: Laws, 1987, ch. 433, § 1, eff from and after July 1, 1987.

§ 99-19-153. Declaration of purpose.

(1) The Legislature finds and declares that:

(a) Protection of the public, restitution to the crime victim and the crime victim's family and just punishment for the harm inflicted are primary objectives of the sentencing process;

(b) The financial, emotional and physical effects of a criminal act on the victim and the victim's family are among the essential factors to be considered in the sentencing of the person responsible for the crime;

(c) In order to impose a just sentence, the court must obtain and consider information about the adverse impact of the crime upon the victim and the victim's family as well as information from and about the defendant; and

(d) The victim of the crime or a relative of the victim is usually in the

best position to provide information to the court about the direct impact of the crime on the victim and the victim's family.

(2) Therefore, the Legislature declares that the purpose of Sections 99-19-151 through 99-19-161 is to provide the sentencing court with a victim impact statement prior to sentencing a convicted offender who has caused physical, emotional or financial harm to a victim as defined herein.

SOURCES: Laws, 1987, ch. 433, § 2, eff from and after July 1, 1987.

§ 99-19-155. Definitions.

For the purposes of Sections 99-19-151 through 99-19-161, the following words shall have the meanings ascribed herein, unless the context otherwise requires:

(a) "Victim" means an individual who suffers direct or threatened physical, emotional or financial harm as the result of the commission of a felony or an immediate family member of a minor victim or a homicide victim.

(b) "Victim impact statement" means a statement providing information about the financial, emotional and physical effects of the crime on the victim and the victim's family, and specific information about the victim, the circumstances surrounding the crime and the manner in which it was perpetrated.

(c) "Victim representative" means a spouse, parent, child, sibling or other relative of a deceased or incapacitated victim or of a victim who is under fourteen (14) years of age, or a person who has had a close personal relationship with the victim and is designated by the court to be a victim representative.

SOURCES: Laws, 1987, ch. 433, § 3, eff from and after July 1, 1987.

§ 99-19-157. Victim impact statement.

(1) If a court orders the preparation of a presentence evaluation report on a defendant in a felony case, the presentence investigator shall prepare a written victim impact statement for the court which shall be appended to such report. The statement shall include applicable information obtained during consultation with the victim or the victim representative. If the victim or victim representative cannot be located or declines to cooperate in the preparation of the statement, the presentence investigator shall include a notation to that effect in the statement. If there are multiple victims and preparation of individual victim impact statements is not feasible, the presentence investigator may submit one or more representative statements.

(2) If a court does not order the preparation of a presentence evaluation report on a defendant in a felony case, the victim or victim representative may also submit a victim impact statement in one or both of the following ways:

(a) With the permission of the trial court, the victim may present an oral victim impact statement at any sentencing hearing. However, where there are multiple victims, the court may limit the number of oral victim impact statements.

(b) The victim may submit a written statement to the prosecuting attorney, who shall present such statement to the trial judge prior to sentencing.

SOURCES: Laws, 1987, ch. 433, § 4, eff from and after July 1, 1987.

Cross references—
As to requirement that personnel of division of community services prepare written victim impact statements at the request of a sentencing judge, see § 47-7-9.

ALR and L Ed Annotations—
Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 ALR 3d 976.

§ 99-19-159. Victim impact statement to be made available to defense and to prosecution; statement as factor in sentencing; cooperation of victim not mandatory.

(1) At least forty-eight (48) hours prior to the date of sentencing, the court shall make available copies of the statement to the defendant, defendant's counsel and the prosecuting attorney. These parties shall return all copies of the statement to the court immediately following the imposition of sentence upon the defendant.

(2) Any victim impact statement submitted to the court under Section 99-19-157 shall be among the factors considered by the court in determining the sentence to be imposed upon the defendant.

(3) Sections 99-19-151 through 99-19-161 shall not be construed to require a victim or victim representative to submit a victim impact statement or to cooperate in the preparation of a victim impact statement.

SOURCES: Laws, 1987, ch. 433, § 5, eff from and after July 1, 1987.

ALR and L Ed Annotations—
Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 ALR 3d 976.

§ 99-19-161. Notice to victim prior to sentencing.

The prosecuting attorney shall notify the victim or the victim representative in writing of the date, time and place of any sentencing hearing. If a sentencing hearing is not ordered by the trial judge, the prosecuting attorney shall notify the victim or the victim representative of his right to prepare a written victim impact statement to be considered by the trial judge prior to sentencing. A copy of any relevant rules and regulations pertaining to the victim impact statement and the hearing shall accompany the notice. The notice and the copy of any relevant rules and regulations shall be sent to the last known address of the victim or the victim representative at least five (5) days prior to the sentencing hearing.

SOURCES: Laws, 1987, ch. 433, § 6, eff from and after July 1, 1987.

ALR and L Ed Annotations—
Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 ALR 3d 976.

CHAPTER 20 [New]

Community Service Restitution

SEC.

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vided with a copy of such report at least ten days prior to the preliminary hearing and shall have the opportunity before the hearing upon notice to the state of the time and place to conduct the interview, which may be recorded, of any person who conducted the testing, analysis, identification, or compa of evidence which is the subject matter o report. Nothing in this section shall affect right of the accused to subpoena such per

(L. 1987 H.B. 341 § 2)

Chapter 545

PROCEEDINGS BEFORE TRIAL

Sec.

CROSS REFERENCE

Television, closed circuit coverage of prisoners for court appearances, when, requirements, RSMo 561.031.

545.485. Judge of circuit court may order change of venue, when—procedure—transportation furnished jury instead of mileage, when.—1. Whenever it shall appear, in the manner provided in section 545.490, that the inhabitants of the entire county in which the cause is pending are so prejudiced against the defendant that a fair trial cannot be had, the circuit court judge may order as many jurors as he deems necessary to be summoned from any county or counties in the same judicial circuit as the county of trial or in any adjoining judicial circuit. If the circuit court judge is of the opinion that it is necessary in order to provide a fair trial of any cause, he may summon jurors from a county which is neither in the circuit nor adjoining the judicial circu which the trial is to be held by requesting chief justice of the supreme court of the s of Missouri to name a county in the state fr which jurors may be summoned for such tr

2. If jurors are summoned from a cou other than the county of trial, the selection the jury panel may, at the discretion of t circuit court judge, be held in the county which the jurors reside.

3. Jurors summoned pursuant to t provisions of subsection 1 of this section sh be subject to the same challenges as oth jurors, except challenges for nonresidence the county of trial. Transportation may furnished to the jurors in lieu of mileage.

4. The supreme court of the state of Mi souri shall promulgate rules to implement t provisions of this section.

(L. 1988 S.B. 479)

Effective 3-31-88

Chapter 546

TRIALS, JUDGMENTS AND EXECUTIONS IN CRIMINAL CASES

TRIALS

Sec.

VERDICTS, JUDGMENTS AND EXECUTIONS

CROSS REFERENCE

Television, closed circuit coverage of prisoners for co appearances, when, requirements, RSMo 561.031

TRIALS

546.032. Deaf person's interpreters definitions for sections 546.034

546.036.—As used in sections 546.034 and 546.036, the following words and terms mean:

(1) "Deaf person", a person who, because of a hearing impairment, cannot readily understand an oral or written language or who cannot readily communicate in an oral or written language;

(2) "Judicial or administrative proceeding", any court, or judicial proceeding existing under the constitution or laws of the state of Missouri or any of its political subdivisions;

(3) "Qualified interpreter", a person who is capable of interpreting and translating criminal, civil and administrative proceedings for deaf persons and accurately communicating the responses of deaf persons.

(L. 1984 S.B. 464, A.L. 1987 S.B. 40)

546.070.

(1987) It was error to give instruction on reputation of defendant where defendant did not present any evidence at trial as to his general reputation for good character. State v. Stone 731 S.W.2d 466 (Mo.App. 1987).

546.260.

(1987) Person on trial for selling marijuana who testified in his own behalf was subject to cross examination on subject of identity of supplier pursuant to this section in view of defendant's numerous references to supplier and defendant's implication that defendant was motivated to sell marijuana to pay a cocaine debt owed to supplier. State v. McClintic, 731 S.W.2d 853 (Mo.App. 1987).

546.270.

(1987) Argument focusing on the lack of evidence offered to explain the presence of stolen property in possession of defendant who did not testify on his own behalf in trial for burglary and theft is not comment on the defendant's failure to testify in violation of this section. State v. Masterson, 733 S.W.2d 40 (Mo.App. 1987).

VERDICTS, JUDGMENTS AND EXECUTIONS

546.680. Capital cases, duty of court.—When judgment of death is rendered by any court of competent jurisdiction, a warrant signed by the judge and attested by the clerk under the seal of the court must be drawn and delivered to the sheriff. It must state the conviction and judgment and appoint a day on which the judgment must be executed, which must not be less than thirty nor more than sixty days from the date of judgment, and must direct the sheriff to deliver the defendant, at a time specified in said order, not more than ten days from the date of judgment, to the chief administrative officer of a correctional institution controlled by the division of adult institutions, for execution.

(RSMo 1939 § 4108, A.L. 1988 H.B. 1340 & 1348)

Prior revisions: 1929 § 3719; 1919 § 4063; 1909 § 5269)

546.710. Execution warrant issued to the chief administrative officer of a correctional institution for execution of prisoner.—Upon such convict being brought before the court, they shall proceed to inquire into the facts, and if no legal reasons exist against the execution of sentence, such court shall issue a warrant to the chief administrative officer of a correctional institution controlled by the division of adult institutions, for the execution of the prisoner at the time therein specified, which execution shall be obeyed by said chief administrative officer of the correctional institution accordingly.

(RSMo 1939 § 4111, A.L. 1988 H.B. 1340 & 1348)

Prior revisions: 1929 § 3721; 1919 § 4065; 1909 § 5271

546.720. Death penalty—manner of execution.—The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection. And for such purpose the director of the division of adult institutions is hereby authorized and directed to provide a suitable and efficient room or place, enclosed from public view, within the walls of a correctional institution controlled by the division of adult institutions, and the necessary appliances for carrying into execution the death penalty by means of the administration of lethal gas or by means of the administration of lethal injection.

(RSMo 1939 § 4112, A.L. 1988 H.B. 1340 & 1348)

546.730. Place of executing judgment of death.—A judgment of death must be executed within the walls of a correctional institution controlled by the division of adult institutions; and such execution shall be under the supervision and direction of the chief administrative officer of the correctional institution.

(RSMo 1939 § 4113, A.L. 1988 H.B. 1340 & 1348)

546.740. Execution, witnesses.—The chief administrative officer of the correctional institution, or his duly appointed representative shall be present at the execution and the chief administrative officer of the correctional institution shall invite the presence of a physician, the attorney general of the state, and at least twelve reputable citizens, to be selected by him; and he shall at the request of the defendant, permit such clergy or religious leaders, not exceeding two, as the defendant may name, and any person, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execu-

tion; but no person under twenty-one years of age shall be allowed to witness the execution.

(RSMo 1939 § 4114, A.L. 1988 H.B. 1340 & 1348)

Prior revisions: 1929 § 3724; 1919 § 4068; 1909 § 5274

546.750. Warrant of execution, how returned.—After the execution the chief administrative office of the correctional institution shall make a return upon the death warrant to the court by which the judgment was rendered, showing the time, mode and manner in which it was executed.

(RSMo 1939 § 4115, A.L. 1988 H.B. 1340 & 1348)

Prior revisions: 1929 § 3725; 1919 § 4069; 1909 § 5275

Chapter 549

PROBATION, PARDONS AND PAROLES

CROSS REFERENCE

Educational grants for surviving children of officers and employees killed in the line of duty, RSMo 173.260

Chapter 550

COSTS IN CRIMINAL CASES

CROSS REFERENCE

Interpreters, fee taxed as costs against state in criminal cases, RSMo 491.300

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sons who shall neglect or refuse to assist such sheriff or deputy, when required, shall be liable to the same penalties as if such officer were in his own county.

(RSMo 1939 § 4107)
Prior revisions: 1929 § 3718; 1919 § 4062; 1909 § 5268

546.630. Restitution or reparation in damages, when made.—In all cases of conviction of felony, the party convicted shall restore the property stolen or destroyed, or make reparation in damages therefor. The court in which such conviction may be had, if applied to at the same term in which the sentence was pronounced, by petition, verified by affidavit, may order restitution or give judgment against the convict for reparation in damages, and enforce the collection of the same by execution or other process.

(RSMo 1939 § 4171)
Prior revisions: 1929 § 3781; 1919 § 4127; 1909 § 5332

546.640. Proceedings on motion for restitution.—In motion for restitution or reparation, the court shall cause the prisoner to be set within the bar, and demand of him if he has any defense to make to the motion; and if the convict consent to such restitution or reparation in damages, the court shall give judgment accordingly, if the damages are agreed; otherwise a jury shall be impaneled to try the facts, and ascertain the amount and value of the property, or assess the damages, as the case may be. A failure to pursue the remedy hereby given shall not deprive the party aggrieved of his civil action for the injury sustained. The party injured shall have a lien on the estate of the criminal from the time of his arrest, subject to any lien granted by law to the state.

(RSMo 1939 § 4172)
Prior revisions: 1929 § 3782; 1919 § 4128; 1909 § 5333

546.650. Court may require security to keep the peace.—The court before which any person shall be convicted of any criminal offense shall have power, in addition to the sentence prescribed or authorized by law, to require such person to give security to keep the peace or be of good behavior, or both, for a term not exceeding two years, or to stand committed until such security be given.

(RSMo 1939 § 4097)
Prior revisions: 1929 § 3708; 1919 § 4052; 1909 § 5258

546.660. Section 546.650 construed.—Section 546.650 shall not extend to convictions for writing or publishing any libel; nor shall any such security be hereafter required by any court upon any complaint, prosecution or conviction for any such writing or publishing

(RSMo 1939 § 4098)
Prior revisions: 1929 § 3709; 1919 § 4053; 1909 § 5259

546.670. Recognizance, when broken.—No recognizance given under the provisions of section 546.650 shall be deemed to be broken, unless the principal therein be convicted of some offense amounting, in judgment of law, to a breach of such recognizance.

(RSMo 1939 § 4099)
Prior revisions: 1929 § 3710; 1919 § 4054; 1909 § 5260

546.680. Duty of court in capital cases.—When judgment of death is rendered by any court of competent jurisdiction a warrant signed by the judge and attested by the clerk under the seal of the court must be drawn and delivered to the sheriff. It must state the conviction and judgment and appoint a day on which the judgment must be executed, which must not be less than thirty nor more than sixty days from the date of judgment, and must direct the sheriff to deliver the defendant, at a time specified in said order, not more than ten days from the date of judgment, to the warden of the state penitentiary at Jefferson City, Missouri, for execution.

(RSMo 1939 § 4108)
Prior revisions: 1929 § 3719; 1919 § 4063; 1909 § 5269

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

(RSMo 1939 § 4109)

Pardons, governor's powers, conditions and restrictions, RSMo 217.800

546.700. Sentence not executed, procedure.—Whenever, for any reason, any convict sentenced to the punishment of death shall not have been executed pursuant to such sentence, and the cause shall stand in full force, the supreme court, or the court of the county in which the conviction was had, on the application of the prosecuting attorney, shall issue a writ of habeas corpus to bring such convict before the court; or if he be at large, a warrant for his apprehension may be issued by such court, or any judge thereof.

(RSMo 1939 § 4110)
Prior revisions: 1929 § 3720; 1919 § 4064; 1909 § 5270

Habeas corpus generally, Chap. 532, RSMo

546.710. Warrant to warden of state penitentiary for execution of prisoner.—Upon such convict being brought before the court, they shall proceed to inquire into the facts, and if no legal reasons exist against the execution of sentence, such court shall issue a warrant to the warden of the state penitentiary at Jefferson City, Missouri, for the execution of the prisoner

at the time therein specified, which execution shall be obeyed by said warden accordingly.
(RSMo 1939 § 4111)
Prior revisions: 1929 § 3721; 1919 § 4065; 1909 § 5271
Appeal from death sentence, clerk of supreme court to notify attorney general and warden, RSMo 547.260

546.720. Death penalty—manner of execution.—The manner of inflicting the punishment of death shall be by the administration of lethal gas. And for such purpose the warden of the state penitentiary is hereby authorized and directed to provide a suitable and efficient room or place, enclosed from public view, within the walls of the penitentiary, and the necessary appliances for carrying into execution the death penalty by means of the administration of lethal gas.
(RSMo 1939 § 4112)

546.730. Place of executing judgment of death.—A judgment of death must be executed within the walls of the state penitentiary at Jefferson City, Missouri; and such execution shall be under the supervision and direction of the warden of said institution.
(RSMo 1939 § 4113)

546.740. Execution—certain persons to be present.—The warden, deputy warden, or some other duly appointed representative of the warden of the state penitentiary must be present at the execution and the warden shall invite the presence of a physician, the attorney general of the state, and at least twelve reputable citizens, to be selected by him; and he shall at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any person, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution; but no person under twenty-one years of age shall be allowed to witness the execution.
(RSMo 1939 § 4114)
Prior revisions: 1929 § 3724; 1919 § 4068; 1909 § 5274

546.750. Warrant of execution, how returned.—After the execution the warden must make a return upon the death warrant to the court by which the judgment was rendered, showing the time, mode and manner in which it was executed.
(RSMo 1939 § 4115)
Prior revisions: 1929 § 3725; 1919 § 4069; 1909 § 5275

546.800. Pregnancy of female convict under death sentence—proceedings.—If, after any female convict shall be sentenced to the punishment of death, the officer having charge of her person shall have reason to suspect that she is pregnant, he shall in like manner summon a jury of six persons, not less than three of whom shall be physicians, and shall give notice thereof to the prosecuting attorney of the county where such criminal proceedings originated, or to the circuit attorney of the city of St. Louis, if such criminal proceedings originated in that city, who shall attend, and the proceedings shall be had as provided.
(RSMo 1939 § 4196, A.L. 1969 p. 77)
Prior revisions: 1929 § 3806; 1919 § 4152; 1909 § 5360

546.810. If found pregnant—sentence suspended.—The inquisition shall be signed by the jury and the officer in charge of such convict, and if it appear that such female convict is pregnant with child, her execution shall be suspended and the inquisition shall be transmitted to the governor.
(RSMo 1939 § 4197)
Prior revisions: 1929 § 3807; 1919 § 4153; 1909 § 5361

546.820. Execution ordered when causes for suspension cease.—Whenever the governor shall be satisfied that the cause of such suspension no longer exists, he shall issue his warrant, appointing a day for the execution of such convict, pursuant to her sentence; or he may, at his discretion, commute her punishment to imprisonment in the penitentiary for life.
(RSMo 1939 § 4198)
Prior revisions: 1929 § 3808; 1919 § 4154; 1909 § 5362

546.860. All property bound for fine and costs.—The property, real and personal, of any person charged with a criminal offense, shall be bound from the time of his final conviction of such offense, for the payment of all fines and costs which he may be adjudged to pay.
(RSMo 1939 § 4119)
Prior revisions: 1929 § 3729; 1919 § 4073; 1909 § 5279

546.870. Executions shall issue, when.—It shall be the duty of the clerk of the court having criminal jurisdiction for the county at the end of each term, to issue executions for all fines imposed, and the costs of conviction in criminal cases, during the term and remaining unpaid, which shall be executed in the same manner as executions in civil cases; and the property of the defendant may be seized and sold thereon, notwithstanding he may be in custody for the same demand.
(RSMo 1939 § 4120)
Prior revisions: 1929 § 3730; 1919 § 4074; 1909 § 5280

546.880. May be consigned to workhouse, when.—Whenever any person shall, because of a conviction for any misdemeanor or felony, be subject to imprisonment in a county jail, such person may, at the discretion of the court, be

confined in any workhouse or other place of imprisonment belonging to any town or city in such county, or in any incorporated city from which said county has been separated by law; provided, the county commission of such county shall have contracted or agreed with the town or city owning such workhouse or other place of confinement for the custody and keeping of such convicts; and cities or towns having no workhouse or houses shall have authority to work convicted persons on the streets, bridges or other public works in such city or town.

(RSMo 1939 § 4121)
Prior revisions: 1929 § 3731; 1919 § 4075; 1909 § 5281

(1957) Section 479.270 has been partially repealed by implication and superseded by § 546.880, insofar as it mandatorily requires that prisoners be sentenced by the St. Louis Court of Criminal Correction to the workhouse; sentences to the city jail are valid. In re Thomas (A.), 306 S.W.2d 336.

546.881. St. Louis city workhouse, commitment.—1. Every person committed to the workhouse of the city of St. Louis, or other place of punishment provided by that city, by the circuit court of the city of St. Louis, shall be put to hard labor at such work as his or her strength and health will permit, whether within or without such place of imprisonment, and shall be under the control and management of those having charge of such prison, subject to such rules and regulations as the municipal assembly of St. Louis city may establish for such prisons.

2. If the party committed is unwilling although able to pay the fine and costs, if such be the punishment for the offense, in whole or in part, in payment of such fines and costs, the party committed shall be allowed for his or her work at the rate of ten dollars per day. No imprisonment for nonpayment of fine and costs shall exceed six months.

3. When a fine is assessed by the circuit court of the city of St. Louis the court may provide for the payment of the fine and costs on an installment basis under such terms and conditions as the court deems appropriate.

4. Any person, after being committed to the workhouse or other place of imprisonment provided by the city of St. Louis, for nonpayment of his or her fine and costs, desiring to pay same, shall make application to the judge of said court, who shall in open court order the fine and all costs of such person to be paid to the clerk of said court, whose duty it shall be to receive same, enter satisfaction on the execution in his execution book, and give notice in writing, under the seal of said court, to the superintendent or person having charge and control of said workhouse, that the execution against such person has been fully satisfied, whereupon such person shall immediately be discharged from said workhouse or place of punishment.

(L. 1978 H.B. 1634)
Effective 1-2-79

546.890. Persons committed to workhouse imprisoned for full term.—All persons committed to any workhouse or other places of confinement under the provisions of section 546.880 shall be imprisoned for the full term of their sentence, unless sooner discharged by due course of law.

(RSMo 1939 § 4122)
Prior revisions: 1929 § 3732; 1919 § 4076; 1909 § 5282

546.900. Stay of execution granted, when.—In case of a conviction for any offense where the punishment has been fixed at a fine or imprisonment in the county jail, or workhouse, or by both such fine and imprisonment, the court in which any such conviction was had, or the judge thereof in vacation, or any associate circuit judge before whom such conviction was had, may, for good cause shown, by order entered of record, or in writing signed by such judge or associate circuit judge, grant a stay of execution on any such judgment of conviction and sentence thereon for a definite period of time to be fixed by the court, judge or associate circuit judge granting the same, not to exceed six months, upon the defendant or some person for him entering a recognizance conditioned for his surrendering himself in execution at the time and place fixed by the judgment of such conviction or sentence on a day to be named in such order.

(RSMo 1939 § 4129)
Prior revisions: 1929 § 3739; 1919 § 4085; 1909 § 5291

Chapter 565

OFFENSES AGAINST THE PERSON

CROSS REFERENCES

Criminal activity forfeiture act, (CAFA), definitions applicable to this chapter, RSMo 513.605
Minimum prison terms for repeat offenders for the commission of certain crimes in this chapter, RSMo 558.019

*** 565.001. Procedure for chapter 565.**—1. The provisions of this chapter shall govern the construction and procedures for charging, trial, punishment and appellate review of any offense defined in this chapter and committed after July 1, 1984.

2. The provisions of this chapter shall not govern the construction or procedures for charging, trial, punishment or appellate review of any offense committed before the effective date of this chapter. Such an offense must be construed, punished, charged, tried and reviewed on appeal according to applicable provisions of law existing prior to the effective date of this chapter in the same manner as if this chapter had not been enacted, the provisions of section 1.160, RSMo, notwithstanding.

3. All provisions of "The Criminal Code" or other law consistent with the provisions of this chapter shall apply to this chapter. In the event of a conflict, the provisions of this chapter shall govern the interpretation of the provisions of this chapter.

4. Persons accused of committing a homicide offense shall be prosecuted:

(1) In the county in which the offense is committed; or

(2) If the offense is committed partly in one county and partly in another, or if the elements of the offense occur in more than one county, then in any of the counties where any element of the offense occurred; or

(3) In the county in which the body of the deceased victim is found; or

(4) If subdivisions (1), (2), and (3) of this subsection do not apply, then in the county in which the victim lived.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

* This section has no continuity with section 565.001, shown repealed by S.B. 276, 82nd G.A. 1st Reg. Sess., 1983.

565.002. Definitions.—As used in this chapter, unless a different meaning is otherwise plainly required:

(1) **"Adequate cause"** means cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control;

(2) **"Conduct"** includes any act or omission;

(3) **"Deliberation"** means cool reflection for any length of time no matter how brief;

(4) **"Intoxicated condition"** means under the influence of alcohol, a controlled substance, or drug, or any combination thereof;

(5) **"Operates"** means physically driving or operating or being in actual physical control of a motor vehicle;

(6) **"Serious physical injury"** means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body;

(7) "Sudden passion" means passion directly caused by and arising out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation;

(8) "Trier" means the judge or jurors to whom issues of fact, guilt or innocence, or the assessment and declaration of punishment are submitted for decision.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

*** 565.003. Culpable mental state may exist though different person killed—time between act and death no defense.**—1. The culpable mental state necessary for a homicide offense may be found to exist if the only difference between what actually occurred and what was the object of the offender's state of mind is that a different person or persons were killed.

2. The length of time which transpires between conduct which results in a death and is the basis of a homicide offense and the event of such death is no defense to any charge of homicide.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

* This section has no continuity with section 565.003 shown repealed by S.B. 276, 82nd G.A. 1st Reg. Sess., 1983.

*** 565.004. Joinder of offenses, exception—prior offenders, procedure, exception, first degree murder—joinder, first degree murder, waiver of death penalty.**—1. Each homicide offense which is lawfully joined in the same indictment or information together with any homicide offense or offense other than a homicide shall be charged together with such offense in separate counts. A count charging any offense of homicide may only be charged and tried together with one or more counts of any other homicide or offense other than a homicide when all such offenses arise out of the same transaction or constitute part of a common scheme or plan. Except as provided in subsections 2, 3, and 4 of this section, no murder in the first degree offense may be tried together with any offense other than murder in the first degree. In the event of a joinder of homicide offenses, all offenses charged which are supported by the evidence in the case, together with all proper lesser offenses under section 565.025, shall, when requested by one of the parties or the court, be submitted to the jury or, in a jury-waived trial, considered by the judge.

2. A count charging any offense of homicide of a particular individual may be joined in an indictment or information and tried with one or more counts charging alternatively any other homicide or offense other than a homicide committed against that individual. The state shall not be required to make an election as to the alternative count on which it will proceed. This subsection in no way limits the right to try in the conjunctive, where they are properly joined under subsection 1 of this section, either separate offenses other than murder in the first degree or separate offenses of murder in the first degree committed against different individuals.

3. When a defendant has been charged and proven before trial to be a prior offender pursuant to chapter 558, RSMo, so that the judge shall assess punishment and not a jury for an offense other than murder in the first degree, that offense may be tried and submitted to the trier together with any murder in the first degree charged with which it is lawfully joined. In such case the judge will assess punishment on any offense joined with a murder in the first degree charge according to law and, when the trier is a jury, it shall be instructed upon punishment on the charge of murder in the first degree in accordance with section 565.030.

4. When the state waives the death penalty for a murder first degree offense, that offense may be tried and submitted to the trier together with any other charge with which it is lawfully joined.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

* This section has no continuity with section 565.004 shown repealed by S.B. 276, 82nd G.A. 1st Reg. Sess., 1983

*** 565.005. Prior to trial for first degree murder, opposing counsels to furnish requested information, rules applied.**—1. At a reasonable time before the commencement of the first stage of any trial of murder in the first degree at which the death penalty is not waived, the state and defendant, upon request and without order of the court, shall serve counsel of the opposing party with:

(1) A list of all aggravating or mitigating circumstances as provided in subsection 1 of section 565.032, which the party intends to prove at the second stage of the trial;

(2) The names of all persons whom the party intends to call as witnesses at the second stage of the trial;

(3) Copies or locations and custodian of any books, papers, documents, photographs or objects which the party intends to offer at the second stage of the trial. If copies of such materials are not supplied to opposing counsel, the party shall cause them to be made available for inspection and copying without order of the court.

2. The disclosures required in subsection 1 of this section are supplemental to those required by rules of the supreme court relating to

a continuing duty to disclose information, the use of matters disclosed, matters not subject to disclosure, protective orders, and sanctions for failure to comply with an applicable discovery rule or order, all of which shall also apply to any disclosure required by this section.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

* This section has no continuity with section 565.005 shown repealed by S.B. 276, 82nd G.A. 1st Reg. Sess., 1983.

*** 565.006. Waiver of jury trial permitted, when.**—1. At any time before the commencement of the trial of a homicide offense, the defendant may, with the assent of the court, waive a trial by jury and agree to submit all issues in the case to the court, whose finding shall have the force and effect of a verdict of a jury. Such a waiver must include a waiver of a trial by jury of all issues and offenses charged in the case, including the punishment to be assessed and imposed if the defendant is found guilty.

2. No defendant who pleads guilty to a homicide offense or who is found guilty of a homicide offense after trial to the court without a jury shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state.

3. If a defendant is found guilty of murder in the first degree after a jury trial in which the state has not waived the death penalty, the defendant may not waive a jury trial of the issue of the punishment to be imposed, except by agreement with the state and the court.

4. Any waiver of a jury trial and agreement permitted by this section shall be entered in the court record.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

* This section has no continuity with section 565.006 shown repealed by S.B. 276, 82nd G.A. 1st Reg. Sess., 1983.

565.020. First degree murder, penalty.—1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Murder in the first degree is a class A felony, except that the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

Execution, location, duties of the warden, RSMo 546.738

*** 565.021. Second degree murder, penalty.**—1. A person commits the crime of murder in the second degree if he:

(1) Knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person; or

(2) Commits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.

2. Murder in the second degree is a class A felony, and the punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, other than murder or manslaughter.

3. Notwithstanding section 556.046, RSMo, and section 565.025, in any charge of murder in the second degree, the jury shall be instructed on, or, in a jury-waived trial, the judge shall consider, any and all of the subdivisions in subsection 1 of this section which are supported by the evidence and requested by one of the parties or the court.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A)
Effective 10-1-84

* This section has no continuity with § 565.021 shown repealed by S.B. 276, 82nd G.A. 1st Reg. Sess. 1983.

565.023. Voluntary manslaughter, penalty—under influence of sudden passion, defendant's burden to inject.—1. A person commits the crime of voluntary manslaughter if he:

(1) Causes the death of another person under circumstances that would constitute murder in the second degree under subdivision (1) of subsection 1 of section 565.021, except that he caused the death under the influence of sudden passion arising from adequate cause; or

(2) Knowingly assists another in the commission of self-murder.

2. The defendant shall have the burden of injecting the issue of influence of sudden passion arising from adequate cause under subdivision (1) of subsection 1 of this section.

3. Voluntary manslaughter is a class B felony.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

565.024. Involuntary manslaughter, penalty.—1. A person commits the crime of involuntary manslaughter if he:

(1) Recklessly causes the death of another person; or

(2) While in an intoxicated condition operates a motor vehicle in this state and, when so oper-

ating, acts with criminal negligence to cause the death of any person.

2. Involuntary manslaughter is a class C felony.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A, A.L. 1986 H.B. 1596)

565.025. Lesser degree offenses of first and second degree murder—instruction on lesser offenses, when.—1. With the exceptions provided in subsection 3 of this section and subsection 3 of section 565.021, section 556.046, RSMo, shall be used for the purpose of consideration of lesser offenses by the trier in all homicide cases.

2. The following lists shall comprise, in the order listed, the lesser degree offenses:

(1) The lesser degree offenses of murder in the first degree are:

(a) Murder in the second degree under subdivisions (1) and (2) of subsection 1 of section 565.021;

(b) Voluntary manslaughter under subdivision (1) of subsection 1 of section 565.023; and

(c) Involuntary manslaughter under subdivision (1) of subsection 1 of section 565.024;

(2) The lesser degree offenses of murder in the second degree are:

(a) Voluntary manslaughter under subdivision (1) of subsection 1 of section 565.023; and

(b) Involuntary manslaughter under subdivision (1) of subsection 1 of section 565.024.

3. No instruction on a lesser included offense shall be submitted unless requested by one of the parties or the court.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A)
Effective 10-1-84

565.030. Trial procedure, first degree murder.—1. Where murder in the first degree is charged but not submitted or where the state waives the death penalty, the submission to the trier and all subsequent proceedings in the case shall proceed as in all other criminal cases with a single stage trial in which guilt and punishment are submitted together.

2. Where murder in the first degree is submitted to the trier without a waiver of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage. If an offense is charged other than murder in the first degree in a count together with a count of murder in the first degree, the trial judge shall assess punishment on any such offense according to law, after the defendant is found guilty of such offense and after he finds the defendant to be a prior offender pursuant to chapter 558, RSMo.

3. If murder in the first degree is submitted and the death penalty was not waived but the trier finds the defendant guilty of a lesser homicide, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. No further evidence shall be received. If the trier is a jury it shall be instructed on the law. The attorneys may then argue as in other criminal cases the issue of punishment, after which the trier shall assess and declare the punishment as in all other criminal cases.

4. If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence of any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032 may be presented subject to the rules of evidence at criminal trials. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(1) If the trier does not find beyond a reasonable doubt at least one of the aggravating circumstances set out in subsection 2 of section 565.032; or

(2) If the trier does not find beyond a reasonable doubt that any one or more of the aggravating circumstances listed in subsection 2 of section 565.032, if found, together with any other authorized aggravating circumstances found, warrant imposing the death sentence; or

(3) If the trier finds the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

If the trier is a jury it shall be so instructed. If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment

the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

(L. 1983 S.B. 276. A.L. 1984 S.B. 448 § A)
Effective 10-1-84

565.032. Evidence to be considered in assessing punishment in first degree murder cases for which death penalty authorized.—1. In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which are requested by the state and supported by the evidence;

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which are requested by the defendant and supported by the evidence;

(3) Any mitigating or aggravating circumstances otherwise authorized by law and supported by the evidence and requested by a party including any aspect of the defendant's character, the record of any prior criminal convictions, and pleas and findings of guilty and admissions of guilt of any crime or pleas of nolo contendere of the defendant;

(4) All evidence received during the first stage of the trial.

2. Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions;

(2) The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide;

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

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

(5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty;

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

(7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty;

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

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

(11) The murder in the first degree was committed while the defendant was engaged in the perpetration or in the attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195, RSMo;

(12) The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness;

(13) The murdered individual was an employee of an institution or facility of the department of corrections and human resources of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility;

(14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance.

3. Statutory mitigating circumstances shall include the following:

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

(2) The murder in the first degree was committed while the defendant was under the influ-

ence of extreme mental or emotional disturbance;

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

(4) The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

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

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A)
Effective 10-1-84

565.035. Supreme court to review all death sentences, procedure—powers of court—assistant to court authorized, duties.—1. Whenever the death penalty is imposed in any case, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court together with a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Missouri.

2. The supreme court of Missouri shall consider the punishment as well as any errors enumerated by way of appeal.

3. With regard to the sentence, the supreme court shall determine:

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

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

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

4. Both the defendant and the state shall have the right to submit briefs within the time provided by the supreme court, and to present oral argument to the supreme court.

5. The supreme court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and resentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor; or

(3) Set the sentence aside and remand the case for retrial of the punishment hearing. A new jury shall be selected or a jury may be waived by agreement of both parties and then the punishment trial shall proceed in accordance with this chapter, with the exception that the evidence of the guilty verdict shall be admissible in the new trial together with the official transcript of any testimony and evidence properly admitted in each stage of the original trial where relevant to determine punishment.

6. There shall be an assistant to the supreme court, who shall be an attorney appointed by the supreme court and who shall serve at the pleasure of the court. The court shall accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed after May 26, 1977, or such earlier date as the court may deem appropriate. The assistant shall provide the court with whatever extracted information the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant. The court shall be authorized to employ an appropriate staff, within the limits of appropriations made for that purpose, and such methods to compile such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence. The office of the assistant to the supreme court shall be attached to the office of the clerk of the supreme court for administrative purposes.

7. In addition to the mandatory sentence review, there shall be a right of direct appeal of the conviction to the supreme court of Missouri. This right of appeal may be waived by the defendant. If an appeal is taken, the appeal and the sentence review shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

565.040. Death penalty, if held unconstitutional, resentencing procedure.—1. In the event that the death penalty provided in this chapter is held to be unconstitutional, any person convicted of murder in the first degree shall be sentenced by the court to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for resentencing or retrial of the punishment pursuant to subsection 5 of section 565.036*.

2. In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of section 565.035.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

* Probably should be 565.035, since there is no § 565.036 and § 565.035 is germane.

565.050. Assault, first degree, penalty.—1. A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person.

2. Assault in the first degree is a class B felony unless in the course thereof the actor inflicts serious physical injury on the victim in which case it is a class A felony.

(L. 1977 S.B. 60, A.L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

565.060. Assault, second degree, penalty.—1. A person commits the crime of assault in the second degree if he:

(1) Attempts to kill or knowingly causes or attempts to cause serious physical injury to another person under the influence of sudden passion arising out of adequate cause; or

(2) Attempts to cause or knowingly causes physical injury to another person by means of a deadly weapon or dangerous instrument; or

(3) Recklessly causes serious physical injury to another person, or

(4) While in an intoxicated condition or under the influence of controlled substances or drugs, operates a motor vehicle in this state and, when so operating, acts with criminal negligence to cause physical injury to any other person than himself.

2. The defendant shall have the burden of injecting the issue of influence of sudden passion arising from adequate cause under subdivision (1) of subsection 1 of this section.

3. Assault in the second degree is a class C felony.

(L. 1977 S.B. 60, A.L. 1983 S.B. 276, A.L. 1984 S.B. 602)

"Physical injury", terms used in instructions were terms of common usage and no definition of such terms are required. (Mo.App.) State v. Mace, 665 S.W.2d 655.

565.065. Unlawful endangerment of another, penalty.—1. A person commits the crime of unlawful endangerment of another if, while engaged in or as a part of the enterprise for the production of a controlled substance, he protects or attempts to protect the production of the controlled substance by creating, setting up, building, erecting, or using any device or weapon which causes or is intended to cause physical injury to another person.

2. Unlawful endangerment of another is a class C felony.

(L. 1986 S.B. 450)
Effective 3-17-86

565.070. Assault in the third degree.—1. A person commits the crime of assault in the third degree if:

(1) He attempts to cause or recklessly causes physical injury to another person; or

(2) With criminal negligence he causes physical injury to another person by means of a deadly weapon; or

(3) He purposely places another person in apprehension of immediate physical injury; or

(4) He recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person; or

(5) He knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative.

2. Assault in the third degree is a class A misdemeanor unless committed under subdivision (3) or (5) of subsection 1 in which case it is a class C misdemeanor.

(L. 1977 S.B. 60)
Effective 1-1-79

565.080. Consent as a defense.—1. When conduct is charged to constitute an offense because it causes or threatens physical injury, con-

sent to that conduct or to the infliction of the injury is a defense only if:

(1) The physical injury consented to or threatened by the conduct is not serious physical injury; or

(2) The conduct and the harm are reasonably foreseeable hazards of

(a) The victim's occupation or profession; or

(b) Joint participation in a lawful athletic contest or competitive sport; or

(3) The consent establishes a justification for the conduct under chapter 563 of this code.

2. The defendant shall have the burden of injecting the issue of consent.

(L. 1977 S.B. 60)
Effective 1-1-79

565.090. Harassment.—1. A person commits the crime of harassment if for the purpose of frightening or disturbing another person, he

(1) Communicates in writing or by telephone a threat to commit any felony; or

(2) Makes a telephone call or communicates in writing and uses coarse language offensive to one of average sensibility; or

(3) Makes a telephone call anonymously; or

(4) Makes repeated telephone calls.

2. Harassment is a class A misdemeanor.

(L. 1977 S.B. 60)
Effective 1-1-79

(1981) Statute defining offense of harassment was not unconstitutionally vague, and was not overbroad and did not deny due process. State v. Koetting (Mo.), 616 S.W.2d 822.
(1985) Held not unconstitutionally overbroad. The caller's intent to disturb or frighten need not be the sole intent or purpose of the call. State v. Koetting (A.), 691 S.W.2d 328.

565.100. Lack of consent in kidnapping and crimes involving restraint.—1. It is an element of the offenses described in sections 565.110 through 565.130 of this chapter that the confinement, movement or restraint be committed without the consent of the victim.

2. Lack of consent results from:

(1) Forcible compulsion; or

(2) Incapacity to consent.

3. A person is deemed incapable of consent if he is

(1) Less than fourteen years old; or

(2) Incapacitated.

(L. 1977 S.B. 60)
Effective 1-1-79

(1981) Statute defining offense of harassment was not unconstitutionally vague, and was not overbroad and did not deny due process. State v. Koetting (Mo.), 616 S.W.2d 822.

565.110. Kidnapping.—1. A person commits the crime of kidnapping if he unlawfully removes another without his consent from the place where he is found or unlawfully confines another without his consent for a substantial period, for the purpose of

(1) Holding that person for ransom or reward, or for any other act to be performed or not performed for the return or release of that person; or

(2) Using the person as a shield or as a hostage; or

(3) Interfering with the performance of any governmental or political function; or

(4) Facilitating the commission of any felony or flight thereafter; or

(5) Inflicting physical injury on or terrorizing the victim or another.

2. Kidnapping is a class A felony unless committed under subdivision (4) or (5) of subsection 1 in which cases it is a class B felony.

(L. 1977 S.B. 60)
Effective 1-1-79

(1981) Kidnapping and rape were separate offenses and defendant thus was not punished twice for same offense because confinement and movement of victim were not incidental to commission of rape but increased risk of harm and danger to victim. State v. Stewart (A.), 615 S.W.2d 600.

565.120. Felonious restraint.—1. A person commits the crime of felonious restraint if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty and exposes him to a substantial risk of serious physical injury.

2. Felonious restraint is a class C felony.

(L. 1977 S.B. 60)
Effective 1-1-79

565.130. False imprisonment.—1. A person commits the crime of false imprisonment if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty.

2. False imprisonment is a class A misdemeanor unless the person unlawfully restrained is removed from this state, in which case it is a class D felony.

(L. 1977 S.B. 60)
Effective 1-1-79

565.140. Defenses to false imprisonment.—1. A person does not commit false imprisonment under section 565.130 if the person restrained is a child under the age of seventeen and

(1) A parent, guardian or other person responsible for the general supervision of the child's welfare has consented to the restraint; or

(2) The actor is a relative of the child; and

(a) The actor's sole purpose is to assume control of the child; and

(b) The child is not taken out of the state of Missouri.

2. For the purpose of this section, "relative" means a parent or stepparent, ancestor, sibling, uncle or aunt, including an adoptive relative of the same degree through marriage or adoption.

3. The defendant shall have the burden of injecting the issue of a defense under this section.

(L. 1977 S.B. 60)
Effective 1-1-79

565.150. Interference with custody.—1. A person commits the crime of interference with custody if, knowing that he has no legal right to do so, he takes or entices from lawful custody any person entrusted by order of a court to the custody of another person or institution.

2. Interference with custody is a class A misdemeanor unless the person taken or enticed away from legal custody is removed from this state, in which case it is a class D felony.

(L. 1977 S.B. 60)
Effective 1-1-79

(1984) "Takes . . . from lawful custody" is construed to include unlawful retention of any person following a period of temporary lawful custody. State v. Edmisten (Mo.App.), 674 S.W.2d 576.

Nebraska Code Supplement

ARTICLE 25

SPECIAL PROCEDURE IN CASES OF HOMICIDE

Section.

29-2537. Convict; appears to be mentally incompetent; notice to judge; suspend sentence; commission appointed; findings; suspension of execution; when. If any convict under sentence of death shall appear to be mentally incompetent, the warden or sheriff having him or her in custody shall forthwith give notice thereof to a judge of the district court of the judicial district in which the convict was tried and sentenced and such judge shall at once make such investigation as shall satisfy him or her as to whether a commission ought to be named to examine such convict.

If he or she shall determine that there is not sufficient reason for the appointment of a commission, he or she shall so find and refuse to suspend the execution of the convict. If the judge shall determine that a commission ought to be appointed to examine such convict, he or she shall make a finding to that effect and cause it to be entered upon the records of the district court in the county in which such convict was sentenced, and, if necessary, the judge shall suspend the execution and appoint the three superintendents of the state centers at Lincoln, Hastings, and Norfolk as a commission to examine such convict. The commission shall examine the convict to determine whether he or she is mentally competent or mentally incompetent and shall report its findings in writing to such judge within ten days after its appointment. If for any reason any of such superintendents cannot serve in such capacity, the judge shall appoint in his or her place one of the assistant superintendents of such center. If two of the commission shall find the convict mentally incompetent, the judge shall suspend his or her execution until further order. Any time thereafter, when it shall be made to appear to the judge that the convict has become mentally competent, he or she shall appoint a commission in the manner provided in this section, who shall make another investigation as to the mental competency of the convict, and in case such convict is again declared mentally incompetent his or her execution shall be suspended by the judge until further order. Such proceedings may be had at such times as the judge shall order until it is either determined that the convict is mentally competent or incurably mentally incompetent.

Source: Laws 1973, LB 268, § 22; Laws 1986, LB 1177, § 8.
Effective date July 17, 1986.

29-2540. Female convict; pregnant; warden notify judge; procedures. If a female convict under sentence of death shall appear to be pregnant, the warden or sheriff shall in like manner notify the judge of the

district court of the county in which she was sentenced, who shall in all things proceed as in the case of a mentally incompetent convict.

Source: Laws 1973, LB 268, § 25; Laws 1986, LB 1177, § 9.
Effective date July 17, 1986.

29-2541. Female convict; finding convict is pregnant; judge; duties; costs. If the commission shall find that the female convict is pregnant, the judge shall suspend the execution of her sentence. At such time as it shall be determined that such woman is no longer pregnant, the judge shall appoint a time for her execution, which shall be carried into effect in the same manner as provided in the original sentence. The costs and expenses thereof shall be the same as those provided for in the case of a mentally incompetent convict and shall be paid in the same manner.

Source: Laws 1973, LB 268, § 26; Laws 1986, LB 1177, § 10.
Effective date July 17, 1986.

ARTICLE 27

RECEIPTS AND DISBURSEMENTS OF MONEY IN CRIMINAL CAUSES

Section.
29-2701. Fines, costs, forfeited recognizances; to whom paid.
29-2702. Money received; disposition.
29-2703. Costs; county not liable; exception.
29-2708. Receipts; to what funds credited; disbursement of costs in criminal cases.
29-2709. Misdemeanor, traffic, and juvenile cases; uncollectible costs; certification; payment; conditions.

29-2701. Fines, costs, forfeited recognizances; to whom paid. All money due upon any judgment for fines, costs, or forfeited recognizances shall be paid to the judge or clerk of the court where the judgment is pending, if paid before execution is issued therefor, otherwise to the officer holding the execution, or such money may be paid to the sheriff of the county if the judgment debtor is in jail. Every sheriff, marshal, or other ministerial officer who shall receive any such money shall pay the same to the proper clerk of the court within ten days from the time of receiving the same.

Source: G.S. p. 840; R.S.1913, § 9237; C.S.1922, § 10266; C.S.1929, § 29-2701; R.S.1943, § 29-2701; Laws 1973, LB 226, § 18; Laws 1988, LB 1030, § 28.
Effective date April 14, 1988.

29-2702. Money received; disposition. Every judge or clerk of court, upon receiving any money on account of forfeited recognizances, fines, or costs accruing or due to the county or state, shall pay the same to the treasurer of the proper county, except as may be otherwise expressly provided, within ten days from the time of receiving the same. When any money is paid to a judge or clerk of court on account of costs due to individual persons, the same shall be paid to the persons to whom the same are due upon demand therefor.

Source: G.S. p. 840; R.S.1913, § 9238; C.S.1922, § 10267; Laws 1927, c. 62, § 1, p. 223; C.S.1929, § 29-2702; R.S.1943, § 29-2702; Laws 1973, LB 226, § 19; Laws 1988, LB 370, § 8.
Effective date July 9, 1988.

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convicts, and for their safe custody during such employment. The county jail is hereby declared to extend to any stone quarry, road or other place that shall be designated by the county board for the employment of such convicts.

Source: G.S. p. 839; R.S.1913, § 9202; C.S.1922, § 10209; C.S.1929, § 29-2414.

29-2415. **Jail convict labor; disposition of proceeds.** It shall be the duty of the county board to make the contracts for the employment of convicts as specified in section 29-2414, and the sheriff of the county, or such other person as may be charged with the administrative direction of the jail, shall collect the proceeds of all such labor, and after paying the board of such convicts and the expenses incident to such labor, to pay the balance to the county treasurer within ten days.

Source: G.S. p. 839; R.S.1913, § 9202; C.S.1922, § 10209; C.S.1929, § 29-2415; R.S.1943, § 29-2415; Laws 1984, LB 394, § 8.

ARTICLE 25

SPECIAL PROCEDURE IN CASES OF HOMICIDE

Section.

result in a death sentence in one portion of the state should not result in death in a different portion;

(4) Charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results; and

(5) In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

Source: Laws 1978, LB 711, § 1.

A literal interpretation of this section would unconstitutionally encroach upon the judicial function. This section will be restricted in application to a review of cases in which the defendant in the district court was convicted of murder in the first degree. State v. Moore, 210 Neb. 457, 316 N.W.2d 33.

In sentencing for a felony not involving the death penalty, there is no requirement that the judge conduct a case-by-case review of similar sentencings in that jurisdiction. State v. Glover, 207 Neb. 487, 299 N.W.2d 445.

Sections 29-2521.01, 29-2521.02, and 29-2521.03 only require the Supreme Court to review cases involving criminal homicides committed on or after April 20, 1973, in which the trial court has imposed a sentence of death. State v. Williams, 205 Neb. 56, 287 N.W.2d 18.

In adopting sections 29-2521.01 to 29-2522, the Legislature intended to establish a procedure whereby the death penalty would be applied uniformly throughout the state. The procedure does not come into play where the death penalty is not imposed. State v. Welsh, 202 Neb. 249, 275 N.W.2d 54.

29-2521.02. Criminal homicide cases; review and analysis by Supreme Court; manner. The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur.

Source: Laws 1978, LB 711, § 2.

A literal interpretation of this section would unconstitutionally encroach upon the judicial function. This section will be restricted in application to a review of cases in which the defendant in the district court was convicted of murder in the first degree. State v. Moore, 210 Neb. 457, 316 N.W.2d 33.

Sections 29-2521.01 to 29-2521.03 require the Supreme Court to review cases involving criminal homicides committed on or after April 20, 1973, in which the trial court has imposed a sentence of death. State v. Williams, 205 Neb. 56, 287 N.W.2d 18.

In adopting sections 29-2521.01 to 29-2522, the Legislature intended to establish a procedure whereby the death penalty would be applied uniformly throughout the state. The procedure does not come into play where the death penalty is not imposed. State v. Welsh, 202 Neb. 249, 275 N.W.2d 54.

29-2521.03. Criminal homicide cases; appeal; sentence; Supreme Court review. The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by com-

paring such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

Source: Laws 1978, LB 711, § 3.

The Supreme Court's review and analysis shall include all first degree murder convictions for offenses committed on or after April 20, 1973, including cases presently pending in this court on appeal. State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984).

Sections 29-2521.01 to 29-2521.03 require the Supreme Court to review cases involving criminal homicides committed on or after April 20, 1973, in which the trial court has imposed a sentence of death. State v. Williams, 205 Neb. 56, 287 N.W.2d 18.

In adopting sections 29-2521.01 to 29-2522, the Legislature intended to establish a procedure whereby the death penalty would be applied uniformly throughout the state. The procedure does not come into play where the death penalty is not imposed. State v. Welsh, 202 Neb. 249, 275 N.W.2d 54.

29-2521.04. Criminal homicide cases; Supreme Court review and analyze; district court; provide records. Each district court shall provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2522 and 29-2524.

Source: Laws 1978, LB 711, § 4.

In adopting sections 29-2521.01 to 29-2522, the Legislature intended to establish a procedure whereby the death penalty would be applied uniformly throughout the state. The procedure does not come into play where the death penalty is not imposed. State v. Welsh, 202 Neb. 249, 275 N.W.2d 54.

29-2522. Sentence; death; life imprisonment; considerations; determination of death in writing; time of execution. After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

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

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

If an order is entered sentencing the defendant to death, a date for execution shall not be fixed until after the conclusion of the appeal provided for by section 29-2525.

Source: Laws 1973, LB 268, § 7; Laws 1978, LB 711, § 5; Laws 1982, LB 722, § 10.

No jury determination of aggravating and mitigating circumstances or the application thereof is required by state or federal constitution. State v. Moore, 210 Neb. 457, 316 N.W.2d 33.

Death sentence was not excessive where the sentencing court found four statutory aggravating circumstances present and no mitigating circumstances. State v. Harper, 208 Neb. 568, 304 N.W.2d 663.

Amendments to this section by virtue of Laws 1978, L.B. 711, do not apply to a capital case in which a final sentence was imposed prior to the effective date of L.B. 711, and such case will not be reviewed in light of the act. State v. Rust, 208 Neb. 320, 303 N.W.2d 490.

In adopting sections 29-2521.01 to 29-2522, the Legislature intended to establish a procedure whereby the death penalty would be applied uniformly throughout the state. The procedure does not come into play where the death penalty is not imposed. State v. Welsh, 202 Neb. 249, 275 N.W.2d 54.

Death sentence upheld where defendant murdered six family members, including children, and sexually molested female victims. State v. Simants, 197 Neb. 549, 250 N.W.2d 881.

Death sentence not excessive for defendant with history of multiple convictions for bank robbery, first-degree assault, and armed robbery, where defendant point-blank murdered and wounded unresisting robbery victims. State v. Holtan, 197 Neb. 544, 250 N.W.2d 876.

Death sentence imposed where twenty-three-year-old defendant with prior criminal convictions for aggravated assault and grand larceny killed civilian aiding police in the apprehension of defendant fleeing the scene of an armed robbery. State v. Rust, 197 Neb. 525, 250 N.W.2d 867.

District court's imposition of death sentence reduced to life imprisonment where sixteen-year-old defendant with no prior criminal record killed victim instantaneously, without torture. State v. Stewart, 197 Neb. 497, 250 N.W.2d 849.

29-2523. Aggravating and mitigating circumstances, defined. The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

Source: Laws 1973, LB 268, § 8.

1. Aggravating circumstances
2. Mitigating circumstances
3. Miscellaneous

1. Aggravating circumstances

No jury determination of aggravating and mitigating circumstances or the application thereof is required by state or federal constitution. A state of mind which indicates a callous disposition to repeat the crime of murder manifests exceptional depravity by ordinary standards of morality and intelligence within the meaning of subsection (1)(d) of this section. An aggravating circumstance existed where the murder was committed to conceal the identity of the perpetrator of a robbery under subsection (1)(b) of this section. State v. Moore, 210 Neb. 457, 316 N.W.2d 33.

Circumstances of victim's death, found bound and gagged when killed, constituted effort to conceal identity of perpetrator. State v. Peery, 199 Neb. 656, 261 N.W.2d 95.

Prior record of multiple crimes of violence constituted an aggravating circumstance. State v. Peery, 199 Neb. 656, 261 N.W.2d 95.

2. Mitigating circumstances

This section does not in any way limit the mitigating circumstances a sentencing court may consider, and the sentencing court should be liberal in admitting evidence the defendant asserts is a mitigating factor. State v. Moore, 210 Neb. 457, 316 N.W.2d 33.

3. Miscellaneous

Aggravating circumstances must be proved beyond a reasonable doubt. State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984).

Subsection (1)(d) of this section is not unconstitutionally vague. State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984).

Where a defendant has testified in a previous criminal case under a lawful grant of immunity, the sentencing court in a subsequent criminal case cannot consider such testimony or any information directly or indirectly derived from it in determining whether a death sentence should be imposed under the provisions of this section and related statutes. State v. Jones, 213 Neb. 1, 328 N.W.2d 166 (1982).

This section, as interpreted in State v. Holtan, 205 Neb. 314, 287 N.W.2d 671 (1980), meets the requirements of the Neb. Const. article 1, section 9, and of the U.S. State v. Anderson and Hochstein, 207 Neb. 51, 296 N.W.2d 440.

In arriving at a sentence in a first degree murder case, the court is not limited in its consideration to the factors listed in this section but may consider any matter relevant to imposition of sentence and receive any evidence with probative value as to the character of the defendant. State v. Holtan, 205 Neb. 314, 287 N.W.2d 671.

Murder committed during act of robbery held not a murder for pecuniary gain herein. State v. Peery, 199 Neb. 656, 261 N.W.2d 95.

The facts establishing an aggravating circumstance must be proved beyond a reasonable doubt. Definitions of aggravating and mitigating circumstances discussed and interpreted. State v. Simants, 197 Neb. 549, 250 N.W.2d 881; State v. Holtan, 197 Neb. 544, 250 N.W.2d 876; State v. Rust, 197 Neb. 528, 250 N.W.2d 867; State v. Stewart, 197 Neb. 497, 250 N.W.2d 849.

29-2524. Existing procedures; act does not repeal. Nothing in sections 24-342, 28-303, 28-313, and 29-2519 to 29-2546 shall be in any way

deemed to repeal or limit existing procedures for automatic review of capital cases, nor shall it in any way limit the right of the Supreme Court to reduce a sentence of death to a sentence of life imprisonment in accordance with the provisions of section 29-2308, nor shall it limit the right of the Board of Pardons to commute any sentence of death to a sentence of life imprisonment.

Source: Laws 1973, LB 268, § 9; Laws 1978, LB 748, § 23; Laws 1978, LB 711, § 6.

29-2524.01. Criminal homicide; report filed by county attorney; contents; time of filing. Each county attorney shall file a report with the State Court Administrator for each criminal homicide case filed by him. The report shall include (1) the initial charge filed, (2) any reduction in the initial charge and whether such reduction was the result of a plea bargain or some other reason, (3) dismissals prior to trial, (4) outcome of the trial including not guilty, guilty as charged, guilty of a lesser included offense, or dismissal, (5) the sentence imposed, (6) whether an appeal was taken, and (7) such other information as may be required by the State Court Administrator. Such report shall be filed not later than thirty days after ultimate disposition of the case by the court.

Source: Laws 1978, LB 749, § 1.

29-2524.02. State Court Administrator; criminal homicide report; provide forms. The State Court Administrator shall provide all forms necessary to carry out sections 29-2524.01 and 29-2524.02.

Source: Laws 1978, LB 749, § 2.

29-2525. Capital punishment cases; appeal; procedure. In cases when the punishment is capital, no notice of appeal shall be required and within the time prescribed by section 25-1931 for the commencement of proceedings for the reversing, vacating, or modifying of judgments, the clerk of the district court in which the conviction was had shall notify the court reporter who shall prepare a bill of exceptions as in other cases and the clerk shall prepare and file with the Clerk of the Supreme Court a transcript of the record of the proceedings, for which no charge shall be made. The Clerk of the Supreme Court shall, upon receipt of the transcript, docket the appeal. No payment of a docket fee shall be required.

Source: Laws 1973, LB 268, § 10; Laws 1982, LB 722, § 11.

A determination of whether a defendant is a sexual sociopath is of no importance where a death sentence has been imposed. The purpose of the sexual sociopath law is to provide confinement with treatment for those persons subject to the laws who are amenable to treatment and confinement without treatment for those subject to the law but not amenable to treatment. Sentencing is not to be delayed indefinitely where sexual sociopath proceedings have been instituted. Once the death penalty has been imposed, none of the defendant's contentions concerning the sexual sociopath law requires further consideration. State v. Otey, 205 Neb. 90, 287 N.W.2d 56.

Supreme Court automatically reviews each

case where death penalty imposed, comparing all previous capital cases where death penalty has or has not been imposed under the new death penalty statute. State v. Simants, 197 Neb. 549, 250 N.W.2d 881; State v. Rust, 197 Neb. 528, 250 N.W.2d 867.

29-2526. Repealed. Laws 1982, LB 722, § 13.

29-2527. Briefs; payment for printing by county. The cost of printing briefs on behalf of any person convicted of an offense for which the punishment adjudged is capital shall be paid by the county.

Source: Laws 1973, LB 268, § 12.

29-2528. Death penalty cases; Supreme Court; orders. In all cases when the death penalty has been imposed by the district court, the Supreme Court shall, after consideration of the appeal, order the prisoner to be discharged, a new trial to be had, or appoint a day certain for the execution of the sentence.

Source: Laws 1973, LB 268, § 13; Laws 1982, LB 722, § 12.

29-2529 to 29-2531. Repealed. Laws 1985, LB 41, § 1.

29-2532. Mode of inflicting punishment for death. The mode of inflicting the punishment of death, in all cases, shall be by causing to pass through the body of the convicted person a current of electricity of sufficient intensity to cause death; and the application of such current shall be continued until such convicted person is dead. The warden of the Nebraska Penal and Correctional Complex, and in case of his death, sickness, absence or inability to act, then the deputy warden, shall be the executioner; *Provided*, the warden may in writing specially designate and appoint a suitable and competent person to act for him, and under his direction, as executioner in any particular case. A crime punishable by death must be punished according to the provisions herein made and not otherwise.

Source: Laws 1973, LB 268, § 17.

29-2533. Punishment inflicted; exclude view of persons; exception. When any person shall be sentenced to be electrocuted, such punishment shall be inflicted within the walls of the Department of Correctional Services adult correctional facility, or within the yard or enclosure adjacent thereto, under the supervision of the warden and in such a manner as to exclude the view of all persons save those permitted to be present as provided in sections 29-2534 and 29-2535.

Source: Laws 1973, LB 268, § 18.

The definitions of aggravating and mitigating circumstances are not unconstitutionally vague. State v. Moore, 210 Neb. 457, 316 N.W.2d 33.

29-2534. Execution; persons permitted. Besides the warden, the deputy warden, the executioner, in case one shall have been appointed by the warden, and his assistants, the following persons, and no others, except as provided in section 29-2535, may be present at the execution: The clergyman in attendance upon the prisoner, such other persons, not exceeding three in number as the prisoner may designate, and such other persons, not exceeding six in number, as the warden may designate.

Source: Laws 1973, LB 268, § 19.

29-2535. Warden; military force necessary to carry out punishment; inform Governor. Whenever the warden shall deem the presence of a military force necessary to carry into effect the provisions of sections 29-2532 and 29-2533, he shall make the fact known to the Governor of the state, who is hereby authorized to call out so much of the military force of the state as in his judgment may be necessary for the purpose.

Source: Laws 1973, LB 268, § 20.

29-2536. Warden; inflict punishment; return of proceedings; clerk subjoin return to the record of conviction and sentence. Whenever the warden shall inflict the punishment of death upon a convict, in obedience to the command of the court, he shall make return of his proceedings as soon as may be to the clerk of the court where the conviction was had, and the clerk shall subjoin the return to the record of conviction and sentence.

Source: Laws 1973, LB 268, § 21.

29-2537. Convict; appears to be insane; notice to court; judge; suspend sentence; commission appointed; findings; suspension of execution; when. If any convict under sentence of death shall appear to be insane, the warden or sheriff having him in custody shall forthwith give notice thereof to a judge of the district court of the judicial district in which the convict was tried and sentenced, and such judge shall at once make such investigation as shall satisfy him as to whether a commission ought to be named to examine such convict.

If he shall determine that there is not sufficient reason for the appointment of a commission he shall so find and refuse to suspend the execution of the convict. If the judge shall determine that a commission ought to be appointed to examine such convict, he shall make a finding to that effect and cause it to be entered upon the records of the district court in the county in which such convict was sentenced, and, if necessary, the judge shall suspend the execution and appoint the three superintendents of the state centers at Lincoln, Hastings, and Norfolk as a commission to examine such convict; and the commission shall examine the convict with a view of determining whether he is sane or insane and shall report its

findings in writing to such judge within ten days after its appointment. If for any reason any of such superintendents cannot serve in such capacity, the judge shall appoint in his place one of the assistant superintendents of such center. If two of the commission shall find the convict insane, the judge shall suspend his execution until further order. Any time thereafter, when it shall be made to appear to the judge that the convict has become sane, he shall appoint a commission in the manner aforesaid, who shall make another investigation as to the sanity of the convict, and in case said convict is again declared insane his execution shall be suspended by the judge until further order. Such proceedings may be had at such times as the judge shall order until it is either determined that the convict is sane or incurably insane.

Source: Laws 1973, LB 268, § 22.

29-2538. Suspension of execution pending investigation; convict found sane; judge; appoint a day of execution. In case such judge has suspended the execution of the convict pending an investigation as to his sanity, and the convict shall be found to be sane, the judge shall appoint a day for his execution, which shall be carried into effect in the same manner as provided in the original sentence, a certified copy of which shall be transmitted by mail to the executioner.

Source: Laws 1973, LB 268, § 23.

29-2539. Commission; compensation; mileage; payment. The members of such commission shall each receive mileage at the rate authorized in section 84-306.03 for state employees for each mile actually and necessarily traveled in reaching and returning from the place where the convict is confined and examined, and it is hereby made the duty of the commission to act in this capacity without compensation other than that already provided for them by law. All of the findings and orders aforesaid shall be entered in the district court records of the county wherein the convict was originally tried and sentenced, and the costs therefor, including those providing for the mileage of the members of the commission, shall be allowed and paid in the usual manner by the county in which the convict was tried and sentenced to death.

Source: Laws 1973, LB 268, § 24; Laws 1981, LB 204, § 44.

29-2540. Female convict; pregnant; warden notify judge; proceed as insane convict. If a female convict under sentence of death shall appear to be pregnant, the warden or sheriff shall in like manner notify the judge of the district court of the county in which she was sentenced, who shall in all things proceed as in the case of an insane convict.

Source: Laws 1973, LB 268, § 25.

29-2541. Female convict; commission; finding convict is with child; suspension of sentence; judge appoint a time of execution; costs. If the commission shall find that the female convict is with child, the judge shall suspend the execution of her sentence. At such time as it shall be determined that such woman is no longer pregnant, the judge shall appoint a time for her execution, which shall be carried into effect in the same manner as provided in the original sentence. The costs and expenses thereof shall be the same as those provided for in the case of an insane convict and shall be paid in the same manner.

Source: Laws 1973, LB 268, § 26.

29-2542. Escape convict; retaken; notify Governor; fix time of execution. If any person who has been convicted of a crime punishable by death, and sentenced to be electrocuted, shall escape, and shall not be retaken before the time fixed for his execution, it shall be lawful for the warden, or any sheriff or other officer or person to rearrest such person and return him to the custody of the warden of the Nebraska Penal and Correctional Complex, who shall thereupon make return thereof to the Governor of the state, and the Governor shall thereupon issue a warrant, fixing and appointing a day for the execution, which shall be carried into effect by the warden in the same manner as herein provided for the execution of an original sentence of death.

Source: Laws 1973, LB 268, § 27.

29-2543. Convicted person of crime punishable by death; clerk of court; order; remove convicted person to Department of Correctional Services adult correctional facility. Whenever any person has been tried and convicted before any district court in this state, of a crime punishable by death, and under the conviction has been sentenced by the court to suffer death, it shall be the duty of the clerk of the court before which the conviction was had to issue his warrant, under the seal of the court, reciting therein the conviction and sentence directed to the warden of the Nebraska Penal and Correctional Complex, commanding him to proceed at the time named in the sentence to carry the same into execution by causing the person so convicted and sentenced to be electrocuted by the passage of an electric current through the body until dead, the clerk shall deliver the warrant to the sheriff of the county in which conviction was had, and such sheriff shall thereupon forthwith remove such convicted person to the Department of Correctional Services adult correctional facility of the state, and there deliver him, together with the warrant, into the custody of the warden who shall receive and safely keep such convict within the Department of Correctional Services adult correctional facility until the time of execution, or until otherwise ordered by competent authority.

Source: Laws 1973, LB 268, § 28.

29-2544. Warden; duty. It shall be the duty of the warden of the Nebraska Penal and Correctional Complex on receipt of such warrant, if the Supreme Court or a judge thereof shall not have ordered a suspension of the execution, and if the Board of Pardons shall not have commuted such sentence, or granted a reprieve or pardon to such convict, to proceed at the time named in the warrant to carry the sentence into execution in the manner herein provided; and of the manner of his executing the warrant, and of his doings thereon, he shall forthwith make return to the clerk, who shall cause the warrant and return to be recorded as a part of the records of the case.

Source: Laws 1973, LB 268, § 29.

29-2545. Court; day certain for execution; notice to warden; duties. In case the Supreme Court, or any judge thereof, shall allow a writ of error in any case and order a suspension of the execution of sentence, and, after having heard and determined the same, the court shall appoint a day certain for, and order the execution of the sentence, it shall be the duty of the clerk of the court to issue to the warden his warrant, under the seal of the court, commanding him to proceed to carry the sentence into execution at the time so appointed by the court, which time shall be stated in the warrant. Upon receipt of the warrant it shall be the duty of the warden to cause the sentence to be executed as herein provided, at the time so appointed by the court, and to make due return of the warrant, and of his proceedings thereunder, forthwith to the clerk of the district court before which the conviction was had, who shall cause the same to be recorded as a part of the records of the case.

Source: Laws 1973, LB 268, § 30.

29-2546. Reversal of judgment of conviction; warden deliver convict to custody of sheriff; await further judgment and order of court. Whenever the Supreme Court shall reverse the judgment of conviction in accordance with which any convict has been sentenced to death and is confined in the Department of Correctional Services adult correctional facility as herein provided, it shall be the duty of the warden, upon receipt of a copy of such judgment of reversal, duly certified by the clerk of the court, and under the seal thereof, to forthwith deliver such convict into the custody of the sheriff of the county in which the conviction was had, to be by him held in the jail of the county awaiting the further judgment and order of the court in the case.

Source: Laws 1973, LB 268, § 31.

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176.2235. Violation of residential confinement.

If it is determined that the person violated any term or condition of his residential confinement, the sentence may be rescinded, modified or continued. If it is rescinded, another punishment authorized by law must be imposed. (1987, ch. 804, § 4, p. 2229.)

176.2237. Procedures for supervision of residential confinees.

The department of parole and probation shall establish procedures to administer a program of supervision for persons who are ordered to a term of residential confinement. (1987, ch. 804, § 5, p. 2229.)

Suspension of Execution of Death Penalty

General Provisions

176.415. When execution of death penalty may be stayed.

The execution of a judgment of death must be stayed only:

1. By the state board of pardons commissioners as authorized in sections 13 and 14 of article 5 of the constitution of the State of Nevada;
2. When a direct appeal from the judgment of conviction and sentence is taken to the supreme court;
3. By a judge of the district court of the county in which the state prison is situated, for the purpose of an investigation of sanity or pregnancy as provided in NRS 176.425 to 176.485, inclusive; or
4. Pursuant to the provisions of NRS 176.486 to 176.492, inclusive. (1967, p. 1440; 1987, ch. 539, § 27, p. 1221.)

Effect of amendment. — The 1987 amendment, in the introductory paragraph, substituted "must" for "shall"; in subdivision 1, deleted "governor or the" preceding "state board"; in subdivision 2, substituted "a direct appeal from the judgment of conviction and sentence" for "an appeal from such judgment," deleted "of Nevada; or" following "court"; in subsection 3, substituted "an investigation of sanity or pregnancy" for "a sanity or pregnancy investigation," added "or" following "inclusive"; and added subsection 4.

Petition for Post-Conviction Relief

176.486. Stay of execution of death sentence upon petition for post-conviction relief.

A district court having proper jurisdiction or the supreme court, if it has proper jurisdiction, may stay the execution of a sentence of death when a petition for post-conviction relief has been filed only after appropriate notice has been given to the appropriate respondent in the case. (1987, ch. 539, § 21, p. 1220.)

176.487. Stay of death sentence upon filing of petition for post-conviction relief; considerations by court.

When a person under a sentence of death files a proper petition for post-conviction relief pursuant to chapter 34 or 177 of NRS, a district court or the supreme court on a subsequent appeal shall enter a stay of execution if the court finds a stay necessary for a proper consideration of the claims for relief. In making this determination, the court shall consider whether:

1. The petition is the first effort by the petitioner to raise constitutional claims for relief after a direct appeal from his conviction and the petition raises claims other than those which could have been raised at trial or on direct appeal.

2. The petition is timely filed and jurisdictionally appropriate and does not set forth conclusory claims only.

3. If the petition is not the first petition for post-conviction relief, it raises constitutional claims which are not procedurally barred by laches, the law of the case, the doctrines of abuse of the writ or successive petition or any other procedural default.

4. If the petition is a second or successive petition, it presents substantial grounds upon which relief might be granted and valid justification for the claims not having been presented in a prior proceeding.

5. The petition asserts claims based upon specified facts or law which, if true, would entitle the petitioner to relief.

6. The court cannot decide legal claims which are properly raised or expeditiously hold an evidentiary hearing on factual claims which are properly raised before the execution of sentence. (1987, ch. 539, § 22, p. 1220.)

176.488. Stay entered in writing; distribution of copies.

A stay of execution must be entered by the court in writing and copies sent as soon as practicable to the director of the department of prisons, the warden of the institution in which the offender is imprisoned and the office of the attorney general in Carson City. The court shall also enter an order and take all necessary actions to expedite further proceeding before that court. (1987, ch. 539, § 23, p. 1221.)

176.489. Vacation of stay if petition denied.

Any stay of execution previously entered by the court must be vacated if the court denies a petition filed pursuant to chapter 34 or 177 of NRS. (1987, ch. 539, § 24, p. 1221.)

176.491. Stay dissolved upon denial of appeal.

Upon the denial of any appeal to the supreme court pursuant to chapter 34 or 177 of NRS, the supreme court shall dissolve any stay of execution previously entered. No stay of such execution may be entered or continued by the supreme court after the denial of an appeal pending the filing of a petition with a federal court or a petition for a writ of certiorari with the Supreme Court of the United States. (1987, ch. 539, § 25, p. 1221.)

176.492. Petition to dissolve stay improperly entered; effect on jurisdiction of court.

The respondent may file a petition with the supreme court within 10 days after the entry of a stay of execution by a district court to dissolve a stay which was improperly entered. The filing of the petition does not divest the district court of jurisdiction to hear the claims raised by the petition and the district court shall not delay consideration of the claims because of the filing of such a petition with the supreme court. (1987, ch. 539, § 26, p. 1221.)

CHAPTER 177.

APPEALS AND REMEDIES AFTER CONVICTION.

APPEALS: WHEN ALLOWED, HOW TAKEN AND EFFECT THEREOF

POST-CONVICTION PROCEDURE

Appeals: When Allowed, How Taken and Effect Thereof

177.055. Automatic appeal in certain cases; mandatory review of death sentence by supreme court.

1. When upon a plea of not guilty or not guilty by reason of insanity a judgment of death is entered, an appeal is deemed automatically taken by the

Nevada Code

CHAPTER 176.

JUDGMENT AND EXECUTION.

COMMISSION FOR ESTABLISHING SUGGESTED SENTENCES FOR FELONIES

SENTENCE AND JUDGMENT

PRESENTENCE INVESTIGATION

WITHDRAWAL OF PLEA OF GUILTY

PROBATION

EXECUTION

SUSPENSION OF EXECUTION OF DEATH PENALTY: INSANITY OR PREGNANCY

NEW ORDER TO EXECUTE JUDGMENT OF DEATH

NEW TRIAL

ARREST OF JUDGMENT

MISCELLANEOUS PROVISIONS

CASE NOTES

Credit must be given for a void conviction. — The inflexible state sentencing system which under a former section required the time for service of all sentences to be computed from date of imposition denied the equal protection of the laws to one who successfully asserted a post-conviction remedy while serving the initial void sentence and was thereafter resentenced for the same offense or acts for which the sentence was originally imposed without being given credit for the time served. Gray v. Hocker, 268 F. Supp. 1004 (D. Nev. 1967).

A term of imprisonment begins on the date sentence is imposed and a grant of probation is a suspension of execution of a state prison sentence, not a suspension of the sentence itself; consequently, a person on probation while not imprisoned is actually under a sentence of imprisonment the execution of which has been suspended. Therefore, the district court cannot modify the sentence once the defendant was placed on probation. Grant v. State, 99 Nev. 149, 659 P.2d 878 (1983).

Cited in: Ibsen v. Warden, Nev. State Prison, 86 Nev. 540, 471 P.2d 229 (1970); Anglin v. State, 90 Nev. 287, 525 P.2d 34 (1974); Miller v. Hayes, 95 Nev. 927, 604 P.2d 117 (1979).

OPINIONS OF ATTORNEY GENERAL

Transfer from jail to prison without delay. — A person convicted, sentenced to imprisonment in the state prison should not be unreasonably detained in the county jail by the sheriff. AGO (10-10-1910). (Opinion under former similar statute).

Modification of death sentence. — Where a death sentence is modified on appeal to a sentence of imprisonment, the term of commitment should be counted from the date of the original sentence, not from the date of the modification. AGO (3-26-1937). (Opinion under former similar statute).

"Good time" credits. — The provisions of NRS 176.055, permitting credit to be allowed against a prison sentence for time spent in confinement prior to conviction, have no retroactive application; when allowed, credit should be deducted from the end of sentence, because this section provides that the term of imprisonment begins on the date of the sentence by a court. Credit for preconviction confinement cannot be utilized to increase "good time" credits authorized by former NRS 209.285 (see now NRS 209.443), because "good time" credits may be earned only while confinded at prison. AGO 25 (6-8-1971).

176.345. Proceedings when conviction carries death penalty.

1. When a judgment of death has been pronounced, a certified copy of the entry thereof in the minutes of the court shall be forthwith executed and attested in triplicate by the clerk under the seal of the court. There shall be attached to the triplicate copies a warrant signed by the judge, attested by the clerk, under the seal of the court, which shall recite the fact of the conviction and judgment, and appoint a week within which the judgment is to be executed, which must not be less than 60 days nor more than 90 days from the time of judgment, and must direct the sheriff to deliver the prisoner to such authorized person as the director of the department of prisons designates to receive the prisoner, for execution, such prison to be designated in the warrant.

2. The original of the triplicate copies of the judgment and warrant shall be filed in the office of the county clerk, and two of the triplicate copies shall be immediately delivered by the clerk to the sheriff of the county; one of the triplicate copies to be delivered by the sheriff, with the prisoner, to such authorized person as the director of the department of prisons designates, which shall be the warrant and authority of the director for the imprisonment

and execution of the prisoner, as therein provided and commanded, and the director shall return his certified copy of the judgment to the county clerk of the county whence it was issued; and the other triplicate copy of such judgment and warrant to be the warrant and authority of the sheriff to deliver the prisoner to such authorized person so designated by the director; the last-mentioned copy to be returned to the county clerk by the sheriff with his proceedings endorsed thereon. (1967, p. 1438; 1977, p. 860.)

176.355. Execution of death penalty: Method; place of execution; witnesses.

1. The judgment of death must be inflicted by an injection of a lethal drug.
2. The director of the department of prisons shall:
(a) Select the drug or combination of drugs to be used for the execution after consulting with the state health officer;
(b) Be present at the execution; and
(c) Invite a competent physician and not less than six nor more than nine reputable citizens over the age of 21 years, to be present at the execution.
3. The execution must take place at the state prison.
4. No person who has not been invited by the director may witness the execution. (1967, p. 1439; 1977, p. 860; 1983, p. 1937.)

176.365. Director of department of prisons to make return on death warrant.

After the execution, the director of the department of prisons must make a return upon the death warrant to the court by which the judgment was rendered, showing the time, place, mode and manner in which it was executed. (1967, p. 1439; 1977, p. 860.)

SUSPENSION OF EXECUTION OF DEATH PENALTY: INSANITY OR PREGNANCY

176.415. When execution of death penalty may be stayed.

The execution of a judgment of death shall be stayed only:
1. By the governor or the state board of pardons commissioners as authorized in sections 13 and 14 of article 5 of the constitution of the State of Nevada;
2. When an appeal from such judgment is taken to the supreme court of Nevada; or
3. By a judge of the district court of the county in which the state prison is situated, for the purpose of a sanity or pregnancy investigation as provided in NRS 176.425 to 176.485, inclusive. (1967, p. 1440.)

176.425. Sanity investigation: Filing of petition; stay of execution.

1. If, after judgment of death, there is a good reason to believe that the defendant has become insane, the director of the department of prisons to whom the convicted person has been delivered for execution may by a petition

in writing, verified by a physician, petition a district judge of the district court of the county in which the state prison is situated, alleging the present insanity of such person, whereupon such judge shall:

(a) Fix a day for a hearing to determine whether the convicted person is insane;

(b) Appoint two physicians, at least one of whom shall be a psychiatrist, to examine the convicted person; and

(c) Give immediate notice of the hearing to the attorney general and to the district attorney of the county in which the conviction was had.

2. If the judge determines that the hearing on and the determination of the sanity of the convicted person cannot be had before the date of the execution of such person, the judge may stay the execution of the judgment of death pending the determination of the sanity of the convicted person. (1967, p. 1440; 1977, p. 861.)

176.435. Sanity investigation: Conduct of hearing.

1. On the day fixed, the director of the department of prisons shall bring the convicted person before the court, and the attorney general or his deputy shall attend the hearing. The district attorney of the county in which the conviction was had, and an attorney for the convicted person, may attend the hearing.

2. The court shall receive the report of the examining physicians and may require the production of other evidence. The attorney general or his deputy, the district attorney, and the attorney for the convicted person or such person if he is without counsel may introduce evidence and cross-examine any witness, including the examining physicians.

3. The court shall then make and enter its finding of sanity or insanity. (1967, p. 1440; 1977, p. 861.)

176.445. Execution of judgment when defendant found sane.

If it is found by the court that the convicted person is sane, the director of the department of prisons must execute the judgment of death; but if the judgment has been stayed, as provided in NRS 176.425, the judge shall cause a certified copy of his order staying the execution of the judgment, together with a certified copy of his finding that the convicted person is sane, to be immediately forwarded by the clerk of the court to the clerk of the district court of the county in which the conviction was had, who shall give notice thereof to the district attorney of such county. Proceedings shall then be instituted in the last-mentioned district court for the issuance of a new warrant of execution of the judgment of death in the manner provided in NRS 176.495. (1967, p. 1441; 1977, p. 861.)

176.455. Suspension of execution when defendant found insane; proceedings on recovery of sanity.

1. If it is found by the court that the convicted person is insane, the judge shall make and enter an order staying the execution of the judgment of death

until the convicted person becomes sane, and shall therein order the director of the department of prisons to confine such person in a safe place of confinement until his reason is restored.

2. The clerk of the court shall serve or cause to be served three certified copies of the order, one on the director, one on the governor, for the use of the state board of pardons commissioners, and one on the clerk of the district court of the county in which the conviction was had.

3. If the convicted person thereafter becomes same, notice of this fact shall be given by the director to a judge of the court staying the execution of the judgment, and the judge, upon being satisfied that such person is then sane, shall enter an order vacating the order staying the execution of the judgment.

4. The clerk of the court shall immediately serve or cause to be served three certified copies of such vacating order as follows: One on the director, one on the governor, for the use of the state board of pardons commissioners, and one on the clerk of the district court of the county in which the conviction was had, who shall give notice thereof to the district attorney of such county, whereupon proceedings shall be instituted in the last-mentioned district court for the issuance of a new warrant of execution of the judgment of death in the manner provided in NRS 176.495. (1967, p. 1441; 1977, p. 861.)

176.465. Investigation of pregnancy: Procedure; hearing.

1. If there is good reason to believe that a female against whom a judgment of death has been rendered is pregnant, the director of the department of prisons to whom she has been delivered for execution shall petition a judge of the district court of the county in which the state prison is situated, in writing, alleging such pregnancy, whereupon such judge shall summon a jury of three physicians to inquire into the alleged pregnancy and fix a day for the hearing thereon, and give immediate notice thereon to the attorney general and to the district attorney of the county in which the conviction was had.

2. The provisions of NRS 176.425 and 176.435 apply to the proceedings upon the inquisition, except that three physicians shall be summoned. They shall certify in writing to the court their findings as to pregnancy. (1967, p. 1441; 1977, p. 862.)

176.475. Proceedings after investigation: Execution of judgment; suspension of execution; issuance of warrant on termination of pregnancy.

1. If it is found by the court that the female is not pregnant, the director of the department of prisons must execute the judgment of death; but if a stay of execution has been granted pursuant to NRS 176.425 the procedure provided in NRS 176.445 is applicable.

2. If the female is found to be pregnant, the judge shall enter an order staying the execution of the judgment of death, and shall therein order the director to confine such female in a safe place of confinement commensurate with her condition until further order of the court.

3. When such female is no longer pregnant, notice of this fact shall be given by the director to a judge of the court staying the execution of the judgment. Thereupon the judge, upon being satisfied that the pregnancy no longer exists, shall enter an order vacating the order staying the execution of the judgment and shall direct the clerk of such court to serve or cause to be served three certified copies of such order, one on the director, one on the governor, for the use of the state board of pardons commissioners, and one on the clerk of the district court of the county in which the conviction was had, who shall give notice thereof to the district attorney of such county, whereupon proceedings shall be instituted in the last-mentioned district court for the issuance of a new warrant of execution of the judgment in the manner provided in NRS 176.495. (1967, p. 1442; 1977, p. 862.)

176.485. Costs of investigations borne by state; manner of payment from reserve for statutory contingency fund.

The costs and expenses of the investigations provided in NRS 176.415 to 176.475, inclusive, shall be borne by the state and paid in the following manner: The costs and expenses of an investigation shall first be paid by county warrants drawn upon the order of the district judge. The county clerk shall then present a claim to the state board of examiners for the amount of such costs and expenses so ordered paid by the district judge. Upon approval of the claim by the state board of examiners, the state controller shall draw his warrant for the payment thereof, and the state treasurer shall pay the same from the reserve for statutory contingency fund. (1967, p. 1442.)

New Order to Execute Judgment of Death

176.495. New warrant generally.

1. If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had must, upon the application of the attorney general or the district attorney of the county in which the conviction was had, cause another warrant to be drawn, signed by the judge and attested by the clerk under the seal of the court, and delivered to the director of the department of prisons.

2. The warrant must state the conviction and judgment and appoint a day on which the judgment is to be executed, which must be not less than 15 days nor more than 30 days after the date of the warrant.

3. Where sentence was imposed by a district court composed of three judges, the district judge before whom the confession or plea was made, or his successor in office, shall set the date of execution and sign the warrant. (1967, p. 1442; 1977, p. 863.)

CASE NOTES

The question of whether a warrant was valid or not was moot where the time set for execution had passed and a new one was required. Rainsberger v. State, 85 Nev. 22, 449 P.2d 254 (1969).

176.505. Order following appeal.

When a remittitur showing the affirmation of a judgment of death has been filed with the clerk of the court from which the appeal therefrom has been taken, the court in which the conviction was had must inquire into the facts, and, if no legal reasons exist against the execution of the judgment, must make and enter an order that the director of the department of prisons shall execute the judgment at a specified time; but the presence of the defendant in the court at the time the order of execution is made and entered, or the warrant is issued, as in this section provided, is not required. (1967, p. 1442; 1977, p. 863.)

CASE NOTES

Cited in: Bishop v. State, 95 Nev. 511, 597 P.2d 273 (1979).

NEW TRIAL

176.515. New trial: Grounds; time for filing motion.

1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.

2. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment.

3. A motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt.

4. A motion for a new trial based on any other grounds must be made within 7 days after verdict or finding of guilt or within such further time as the court may fix during the 7-day period. (1967, p. 1443; 1983, p. 1671.)

CASE NOTES

I. General Consideration.
II. Newly Discovered Evidence.
III. Verdict Contrary to the Evidence.

I. GENERAL CONSIDERATION.

The exercise by the trial court of the right to grant a new trial will be presumed correct and proper by the appellate court until the contrary is shown. State v. Crockett, 84 Nev. 516, 444 P.2d 896 (1968).

The right to grant new trials being conferred upon the district courts, its exercise by them in any particular case will be presumed to be correct and proper until the contrary is shown. State v. Stanley, 4 Nev. 71 (1868). (Decision under former similar statute).

CHAPTER 200.

CRIMES AGAINST THE PERSON.

HOMICIDE

JUSTIFIABLE BODILY INJURY

MAYHEM

KIDNAPING

SEXUAL ASSAULT AND SEDUCTION

ROBBERY

ATTEMPTS TO KILL

ASSAULT OR BATTERY WITH INTENT TO COMMIT A CRIME

DUELS AND CHALLENGES

FALSE IMPRISONMENT

ASSAULT AND BATTERY

HOMICIDE

200.010. "Murder" defined.

Murder is the unlawful killing of a human being, with malice aforethought, either express or implied, or caused by a controlled substance which was sold to a person in violation of chapter 453 of NRS. The unlawful killing may be effected by any of the various means by which death may be occasioned. (C&P 1911, § 119; RL 1912, § 6384; CL 1929, § 10066; 1983, p. 512; 1985, p. 1598.)

Cross references. — As to definition of death for legal and medical purposes, see NRS 451.007.