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629:2 Criminal Solicitation.

ANNOTATIONS

½. Construction with other laws

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

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

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

1. Cited

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

629:3 Conspiracy.

ANNOTATIONS

2. Particular offenses

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

3. Cited

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

CHAPTER 630

HOMICIDE

LIBRARY REFERENCES

ALR

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

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

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

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

630:1 Capital Murder.

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

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

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

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

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

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

[No changes in paragraphs III–V.]

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

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

ANNOTATIONS

1a. Elements

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

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

1b. Construction

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

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

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

630:1-a First Degree Murder.

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

[No change in subparagraph (a).]

(b) Knowingly causes the death of

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

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

[No changes in paragraphs II and III.]

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

ANNOTATIONS

2. Elements

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

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

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

4a. Evidence

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

7. Evidence

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

8. Cited

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

630:4 Causing or Aiding Suicide.

LIBRARY REFERENCES

ALR

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

630:5 Procedure in Capital Murder.

[No changes in paragraphs I–VIII.]

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

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

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

XII. The infliction of the punishment of death by administration of the required lethal substance or substances in the manner required by this section shall not be construed to be the practice of medicine, and any pharmacist or pharmaceutical supplier is authorized to dispense drugs to the commissioner of corrections or his designee, without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law. [Added 1986, 82:1, eff. Jan. 1, 1987.]

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

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

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

Paragraph X: Added.

Paragraph XI: Added.

Paragraph XII: Added.

Paragraph XIII: Added.

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

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

CHAPTER 631

ASSAULT AND RELATED OFFENSES

631:1 First Degree Assault.

ANNOTATIONS

½. Construction with other laws

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

2. Cited

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

631:2 Second Degree Assault.

ANNOTATIONS

½. Constitutionality

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

2a. Circumstances manifesting extreme indifference

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

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

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

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

For purposes of paragraph III of this

New Hampshire Code

CHAPTER 630

HOMICIDE

Cross References

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

Library References

ALR

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

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

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

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

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

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

Homicide by fright or shock. 47 ALR2d 1072.

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

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

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

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

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

630:1 Capital Murder.

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

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

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

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

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

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

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

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

History

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

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

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

CROSS REFERENCES

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

ANNOTATIONS

1. Constitutionality

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

2. Cited

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

LIBRARY REFERENCES

New Hampshire Practice

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

West Key Number

Homicide ⇐21, 351.

CJS

Homicide §§ 29 et seq., 433 et seq.

ALR

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

630:1-a First Degree Murder.

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

(a) Purposely causes the death of another; or

(b) Knowingly causes the death of:

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

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

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

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

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

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

HISTORY

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

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

CROSS REFERENCES

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

ANNOTATIONS

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

1. Constitutionality

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

2. Elements

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

3. Lesser included offenses

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

4. Indictment

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

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

5. Sentence

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

6. Parole

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

7. Cited

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

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

630:4 Causing or Aiding Suicide.

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

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

HISTORY

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

CROSS REFERENCES

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

ANNOTATIONS

1. Cited

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

LIBRARY REFERENCES

West Key Number

Suicide ⇐3, 4.

CJS

Suicide §§ 4-6.

ALR

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

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

630:5 Procedure in Capital Murder.

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

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

(a) Aggravating circumstances:

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

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

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

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

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

(6) The murder was committed for pecuniary gain.

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

(b) Mitigating circumstances:

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

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

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

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

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

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

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

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

VI. In all cases of capital murder, where the death penalty is imposed, the judgment of conviction and the sentence of death shall be subject to automatic review by the supreme court within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases, and shall be heard in accordance with rules promulgated by said court.

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

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

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

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

VIII. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death.

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

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

HISTORY

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

Amendments—1977. Amended section generally.

CROSS REFERENCES

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

ANNOTATIONS UNDER FORMER RSA 607:6

Cited, 3
Reprieve, 1
Time of execution, 2

1. Reprieve

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

2. Time of execution

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

3. Cited

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

LIBRARY REFERENCES

West Key Number
Criminal Law ⇐999(2).

CJS
Criminal Law § 1613.

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

HISTORY

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

New Jersey Supplement

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

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

SUBTITLE 2. DEFINITION OF SPECIFIC OFFENSES

PART 1. OFFENSES INVOLVING DANGER TO THE PERSON

CHAPTER 11. CRIMINAL HOMICIDE

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

2C:11-1. Definitions

Notes of Decisions

1. Deadly weapon

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

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

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

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

2C:11-2. Criminal homicide

Notes of Decisions

Instructions 12.2
Jury questions 12.1

12.1. Jury questions

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

12.2. Instructions

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

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

13. Admissibility of evidence—In general

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

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2C:11-3. Murder

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

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

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

(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

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

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senate Judiciary Committee Statement

Senate, No. 2652—L.1985, c. 478

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

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

1985 Legislation

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

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

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

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

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

Cross References

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

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

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

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

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

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

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

Instructions.

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

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

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

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

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

Notes of Decisions

I. MURDER, IN GENERAL

1. Validity—In general

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

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

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

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

1.5. Standing, validity

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

1.8. —— Death penalty, validity

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

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

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

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

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

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

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

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

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

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

3. Construction and application

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

5.5. Counsel

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

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

6. Cause of death

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

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

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

9. Merger of offenses

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

15. Intent

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

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

15.5. —— Purposeful or knowing conduct, intent

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

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

22. Crimes, homicide during commission—In general

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

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

31. Double jeopardy

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

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

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

33. Defenses—In general

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

38. —— Self-defense, defenses

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

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

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

II. TRIAL, IN GENERAL

91. In general

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

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

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

94. Indictment and information

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

95. Jurisdiction

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

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

96. Venue

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

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

98. Joint trial

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

100. Pretrial hearings

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

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

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

102. Jurors, trial

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

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

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

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105. Presumptions—In general

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

107. Burden of proof

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

112. Remarks of prosecutor, trial—In general

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

113. —— Summation, trial, remarks by prosecutor

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

116. Jury questions—In general

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

119. Verdict, trial—In general

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

124. Jury waiver, death penalty phase, trial

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

III. PLEAS

181.5. Guilty, pleas

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

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

182.5. Agreements, pleas

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

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

185. Right to counsel, pleas

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

IV. ADMISSIBILITY OF EVIDENCE

254. Weapons, admissibility of evidence

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

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

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

270. Admissions or declarations against interest, admissibility of evidence

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

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

272. Statements, declarations and conversations, of deceased

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

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

283. —— Physicians, expert testimony

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

284. —— Chemists, expert testimony

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

294. Insanity, admissibility of evidence

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

295. Motive, admissibility of evidence

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

301. —— Victim, photographs

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

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

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

305. Self-incrimination, admissibility of evidence

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

306. Statistical evidence, admissibility of evidence

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

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

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

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V. SUFFICIENCY OF EVIDENCE

361. In general

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

365. Identification, sufficiency of evidence

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

373. Preexisting conditions, sufficiency of evidence

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

374. Purposeful or knowing conduct, sufficiency of evidence

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

375. Diminished capacity, sufficiency of evidence

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

VI. INSTRUCTIONS

431. In general

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

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

446. Manslaughter, instructions—In general

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

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

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

447. —— Provocation, manslaughter, instructions

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

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

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

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

449. —— Excluding charge on manslaughter

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

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

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

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

455. Degree of offense, instructions

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

459. Evidence as justifying instructions, instructions

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

461. Intoxication, instructions

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

466. Verdict, sentence and punishment, instructions

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

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

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

467. Diminished capacity, instructions

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

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

468. Causation, instructions

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

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468.5. Aggravating and mitigating factors, in general, instructions

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

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

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

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

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

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

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

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

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

VII. SENTENCE AND PUNISHMENT

521. Validity—In general

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

523. In general

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

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

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

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

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

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

523.5. Felony-murder, sentence and punishment

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

524. Trial, in general, sentence and punishment

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

525. Jurors, sentence and punishment

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

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

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

526. Evidence, sentence and punishment

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

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

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

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

527. Instructions—In general, sentence and punishment

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

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

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

533. Concurrent sentences

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

534. Consecutive sentences

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

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

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

538. —— Excessive or punitive duration of sentence

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

540.5. Life imprisonment, sentence and punishment

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

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

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

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

541. Death penalty—In general

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

541.11. —— Escape, aggravating factors, death penalty

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

541.5. Notice, death penalty, sentence and punishment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

541.9. —— Discovery, death penalty

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

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

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

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

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

543. Change, correction or reduction of sentence

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

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

544. Parole eligibility

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

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

547. Resentencing

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

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

548. Restitution, sentence and punishment

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

549. Prior convictions, sentence and punishment

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

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

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

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

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

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

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

VIII. REVIEW

561. In general

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

563. Instructions, review

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

566. Capital causes, review

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

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

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

568. —— Prior offenses, review

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

[illegible]alty, review

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

2C:11–4. Manslaughter

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

b. Criminal homicide constitutes manslaughter when:

(1) It is committed recklessly; or

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

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

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

last deletions by strikeouts

New Jersey Code

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

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

2C:11-3. Murder

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

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

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

(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

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

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New Mexico Code

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

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

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

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

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

ARTICLE 2

Homicide

30-2-1. Murder.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30-2-2. Repealed.

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

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

"30-2-2. Malice.

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

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

30-2-3. Manslaughter.

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

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

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

B. Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection.

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

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

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

I. GENERAL CONSIDERATION.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 C.J.S. Convicts §§ 2 to 8.

ARTICLE 14

Execution of Death Sentence

Sec.

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

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

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

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

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

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

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

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

24 C.J.S. Criminal Law § 1613.

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

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

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

31-14-3. Governor may suspend.

No judge, court or officer, other than the governor, can suspend the execution of a judgment of death, except the warden of the state prison to whom he is delivered for execution, in accordance with the provisions of the six succeeding sections [31-14-4 to 31-14-9 NMSA 1978], unless an appeal is taken.

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

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

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

24 C.J.S. Criminal Law § 1618.

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

If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the state penitentiary is situated, whose duty it is to immediately file in the district court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon it shall be the duty of said court to inquire into said question and render judgment thereon.

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

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

24 C.J.S. Criminal Law § 1619.

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

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

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

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

The court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane, the order must direct that he be taken to the state hospital for the insane, and there kept in safe confinement until his reason is restored.

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

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

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

If it is found that the defendant is sane, the warden must proceed to execute the judgment as specified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution, and transmit a certified copy of the order mentioned in the last section [31-14-6 NMSA 1978] to the governor, and deliver the defendant, together with a certified copy of such order, to the superintendent of the state hospital for the insane [Las Vegas medical center]. When the defendant recovers his reason, the superintendent of such hospital must certify that fact to the governor, who must thereupon issue to the warden his warrant, appointing a day for the execution of the judgment.

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

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

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

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

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

If there is good reason to believe that a female against whom a judgment of death is rendered is pregnant, such proceedings must be had as are provided in Section 4 [31-14-4 NMSA 1978] of this act except that the court may summon three disinterested physicians, of good standing in their profession, to inquire into the supposed pregnancy, who shall, in the presence of the court, but with closed doors, if requested by the defendant, examine the defendant and hear any evidence that may be produced, and make a written finding and certificate of their conclusion, to be approved by the court and spread upon the minutes. The provisions of Section 5 [31-14-5 NMSA 1978] of this act apply to the proceedings upon such inquiry.

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

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

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

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

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

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

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

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

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

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

24 C.J.S. Criminal Law § 1613.

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

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

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

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

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

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

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

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

24B C.J.S. Criminal Law § 2002.

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

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

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

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

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

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

24B C.J.S. Criminal Law § 2002.

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

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

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

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

31-14-14. Statutory references to execution.

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

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

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

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

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

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

A judgment of death must be executed within the walls of the state penitentiary at Santa Fe, and such execution shall be under the supervision and direction of the warden of said institution. The warden of the state penitentiary must be present at the execution and must invite the presence of a physician, the attorney general of the state and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any person, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

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

31-14-16. Return of warden.

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

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

ARTICLE 15
Public Defenders

Sec.

31-15-1. Short title.

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

North Carolina Code

ARTICLE 18.

Appeal.

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

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

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

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

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

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

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

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

ARTICLE 19.

Execution.

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

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

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

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

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

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

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

CASE NOTES

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

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

§ 15-188. Manner and place of execution.

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

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

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

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

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

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

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

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

CASE NOTES

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

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

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

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

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

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

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

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

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

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

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

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

CASE NOTES

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

§ 15-191. Pending sentences unaffected.

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

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

§ 15-192. Certificate filed with clerk.

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

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

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

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

§ 15-194. Time for execution.

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

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

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

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

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

§ 15-196. Disposition of body.

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

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

Article 19A.

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

§ 15-196.1. Credits allowed.

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

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

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

CASE NOTES

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

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

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

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

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

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

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

Cross-References to Related Sections

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

§ 2927.11 Desecration.

Cross-References to Related Sections

Civil action for desecration, RC § 2307.70.

§ 2927.12 Ethnic intimidation.

Cross-References to Related Sections

Civil action for ethnic intimidation, RC § 2307.70.

IN GENERAL

§ 2929.01 Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CASE NOTES AND OAG

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

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

Law Review

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

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

§ 2929.03 Imposing sentence for a capital offense.

Law Review

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

CASE NOTES AND OAG

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

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

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

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

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

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

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

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

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

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

Law Review

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

CASE NOTES AND OAG

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

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

Ohio Code

CHAPTER 2929: PENALTIES AND SENTENCING

Committee Comment to H 511

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

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

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

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

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

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

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

IN GENERAL

§ 2929.01 Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee Comment to H 511

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

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

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

Transition—capital offenses.

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

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

Cross-References to Related Sections

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

Imprisoned defined, RC § 1.05

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

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

Sentencing for domestic violence offense, RC § 2929.51.

Substantial risk defined, RC § 2901.01(H).

Text Discussion

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

Research Aids

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

ALR

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

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

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

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

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

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

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

Law Review

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

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

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

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

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

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

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

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

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

CASE NOTES AND OAG

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

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

PENALTIES FOR MURDER

§ 2929.02 Penalties for murder.

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

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

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

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

Committee Comment to H 511

This section establishes the penalty for aggravated mur-

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

Cross-References to Related Sections

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

Ohio Constitution

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

Ohio Rules

Sentence, CrimR 32.

Ohio Administrative Code

Death row, OAC 5120-9-12.

Text Discussion

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

Research Aids

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

Law Review

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

CASE NOTES AND OAG

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

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

[CONSTRUING FORMER ANALOGOUS RC § 2901.01]

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

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

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

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

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

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

4. The date on which the indictment was filed.

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

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

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

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

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

Cross References to Related Sections

Aggravated murder, RC § 2903.01.

Law Review

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

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

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

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

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

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

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

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

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

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

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

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

Cross-References to Related Sections

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

Forms

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

Law Review

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

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

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

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

Cross-References to Related Sections

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

Law Review

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

CASE NOTES AND OAG

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

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

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

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

Cross-References to Related Sections

Aggravated murder, RC § 2903.01.

CASE NOTES AND OAG

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

§ 2929.03 Imposing sentence for a capital offense.

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

parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to divi-

sion (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-51.

Committee Comment to H 511

This section specifies the procedure to be followed in determining whether the sentence for aggravated murder is to be life imprisonment or death.

The death penalty is precluded unless the indictment contains a specification of one or more of the aggravating circumstances listed in section 2929.04. In the absence of such specifications, life imprisonment must be imposed. If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and specification. If the verdict is guilty of the charge but not guilty of the specification, the penalty is life imprisonment.

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the second phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a

reasonable doubt, and the panel's verdict must be unanimous

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and specification, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the issue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by the defendant, represent partial exceptions to the rules of evidence).

Cross-References to Related Sections

Penalties for murder, RC § 2929.02.

Aggravated murder, RC § 2903.01.

Execution of death sentence, RC §§ 2949.21-2949.31.

Parole eligibility, RC § 2967.13.

Reasonable doubt, RC § 2901.05.

Time of execution in capital cases, RC § 2947.08.

Ohio Constitution

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

Comparative Legislation

Capital offense, sentence:
- 18 USC § 3566
- CA—Penal Code §§ 190, 190.1
- FL—Stat Ann § 775.081
- IL—Ann Stat ch 38 § 9-1
- IN—Code § 35-50-2-9
- KY—Rev Stat Ann § 532.035
- MI—Comp Laws Ann § 750.316
- NY—Penal Law §§ 60.05, 60.06
- PA—CSA tit 18 § 1102

Text Discussion

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

Presentence investigation. 1 Ohio Crim. Prac. & Pro. § 43.1

Verdict, penalty. 1 Ohio Crim. Prac. & Pro. § 41.3

Forms

Sentencing hearing. 4 OJI § 503.01

Specifications of aggravating circumstance. 4 OJI § 413.45

Research Aids

Imposing sentence for a capital offense:
- O-Jur3d: Crim L §§ 1840-1842
- Am-Jur2d: Crim L §§ 535-556

ALR

Absence of counsel for accused at time of sentence as requiring vacation thereof or other relief. 20 ALR2d 1240

Beliefs regarding capital punishment as disqualifying juror in capital case—post Witherspoon cases. 39 ALR3d 550.

Court's right in imposing sentence to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR 768.

Defendant's rights to disclosure of presentence report. 40 ALR3d 681.

Necessity and sufficiency of question to defendant as to whether he has anything to say why sentence should not be pronounced against him. 96 ALR2d [illegible]

Propriety of imposition of death sentence by [illegible] following jury's recommendation of life imprisonment or lesser sentence. 8 ALR4th 1028.

Law Review

Capital punishment: impairment of a death sentence by the invalidity of an aggravating circumstance. Comment. 52 CinLRev 541 (1983).

Capital punishment in Ohio: the constitutionality of the death penalty statute. Comment. 3 UD[illegible] 169 (1978).

Capital punishment of children in Ohio: "They'd never send a boy of seventeen to the chair in [illegible] would they?" Victor L. Streib. 18 AkronLRev 5[illegible]

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

Capital punishment statutes after *Furman* [illegible] 238 (1972)]. Note. 35 OSLJ 651 (1974).

Constitutional consequences of Ohio's new sentencing laws. Louis A. Jacobs. 15 ToledoLRev 71 (198[illegible]

Constitutional law—cruel and unusual punishment—the imposition and carrying out of the death penalty under current discretionary sentencing statutes constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments. *Furman v. Georgia*, 408 US 238 (1972). Case note. 42 C[illegible] 172 (1973).

The constitutionality of Ohio's death penalty. Comment. 38 OSLJ 617 (1977).

Constitutionality of Ohio's New Death Penalty Statute. David J. Benson. 14 ToledoLRev 77 (198[illegible]

Criminal law—death penalty—cruel and unusual punishment—individualized sentencing determination. *Lockett v. Ohio*, 438 US 586 (1978). Case note. 12 AkronLRev 360 (1978).

Death penalties and Hugo Bedau: a crusading philosopher goes overboard. Raoul Berger. 45 OSLJ [illegible]

The death penalty and guilty pleas: Ohio rule [illegible]—a constitutional answer to a capital defendant's dilemma. Comment. 5 ONorthLRev 68[illegible]

Diminished capacity and diminished responsibility—irreconcilable doctrines confused in *State v.* [illegible] Gary O. Sommer. 14 ToledoLRev 1399 (1983

Estelle v. Smith [451 US 454 (1981)]: expansion of constitutional safeguards in sentencing proceedings. Case note. 9 ONorthLRev 529 (1982).

Fact or fiction: mitigating the death penalty [illegible]. Note. 32 ClevStLRev 263 (1983).

Gardner v. Florida [430 US 349 (1977)]: [illegible] sentence reports in capital sentencing procedures. [illegible] 5 ONorthLRev 175 (1978).

Legislative response to *Furman v. Georgia* [illegible] 238 (1972)]—Ohio restores the death penalty. [illegible] 8 AkronLRev 149 (1974).

Recent changes in Ohio sentencing law: the [illegible] left unanswered. Jack A. Guttenberg. 15 T[illegible] 35 (1983).

psychiatrist and a psychologist pursuant to RC § 2947.06, is not constitutionally required to appoint an additional psychiatrist of the defendant's choosing at state expense: State v. Downs, 51 OS2d 47, 5 OO3d 30, 364 NE2d 1140.

13. (1977) Revised Code § 2929.03 is not unconstitutional in providing that the three-judge panel not only try the charges and specifications but also determine the sentence: State v. Miller, 49 OS2d 198, 3 OO3d 321, 361 NE2d 419.

14. (1976) A defendant is not coerced or impelled to waive his constitutional right to jury trial by RC § 2929.03(C)(1), (2) and (E), under the provisions of which an offender who waives a jury trial need persuade only one member of the three-judge panel at the mitigation hearing to avoid imposition of the death penalty: State v. Bell, 48 OS2d 270, 2 OO3d 427, 358 NE2d 556.

15. (1975) In the deliberation of a verdict concerning a charge of aggravated murder with specifications, the possible imposition of the death penalty is not within the province of the jury: State v. Strub, 48 OApp2d 57, 2 OO3d 40, 355 NE2d 819.

16. (1975) Since the potential imposition of the death penalty in the trial of an aggravated murder charge with specifications is not within the province of the jury, it is improper, upon voir dire, to question prospective jurors relative to such penalty: State v. Strub, 48 OApp2d 57, 2 OO3d 40, 355 NE2d 819.

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

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer as defined in section 2935.01 of the Revised Code whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding, and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

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

Committee Comment to H 511

This section provides that the death penalty for aggravated murder is precluded unless one of seven listed aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The seven aggravating circumstances deal with: (1) assassination of the President, the President, Governor, Lieutenant Governor or a person who has been elected to or is a candidate for any such office; (2) murder for hire; (3) murder to escape accountability for another crime; (4) murder by a prisoner; (5) repeat murder or mass murder; (6) killing a law enforcement officer; (7) felony murder.

The section also provides that even if one or more aggravating circumstances is proved beyond a reasonable doubt, the death penalty for aggravated murder is still precluded if the court finds that any of three mitigating circumstances established by a preponderance of the evidence. The mitigating circumstances are: (1) the victim of the offense induced or facilitated it; (2) the offender acted under duress, coercion or strong provocation; and (3) although the defense of insanity could not be or was not established, the offense was chiefly the product of the offender's mental deficiency or psychosis (psychosis is mental illness, as distinguished from a behavioral disorder. Primarily psychopaths have a behavioral disorder.)

Transition—capital offenses.

Persons charged with a capital offense committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense and, if convicted, sentenced to life imprisonment. If the section defining the offense provides for a greater penalty under the circumstances of a particular case than the lesser penalty must be imposed in that case.

Persons committing aggravated murder (the only capital offense in the new code) on and after January 1, 1974, must be charged and tried under the new law and, if convicted, may be subject to the death penalty. See sections 2929.01, 2929.02 to 2929.04, and 2941.14.

Transition—offenses other than capital offenses.

Persons charged with an offense other than a capital offense committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense. Any such person convicted and sentenced prior to January 1, 1974, must be sentenced under the penalty provided in the law under which he was tried. Any such person either convicted or sentenced on or after January 1, 1974, must be sentenced under the lesser of the penalties provided for the offense for which he was tried or for the substantially equivalent offense in the new code. If there is no substantially equivalent offense in the new code, sentence must be imposed under the old law.

[Editor's Note: A 1981 amendment added an eighth aggravating circumstance: murder of a witness to an offense. The amendment added four new mitigating circumstances: (1) youth of the offender, (2) lack of prior criminal involvement, (3) degree of participation, and (4) any other relevant matters.]

Cross-References to Related Sections

Aggravated murder, RC § 2903.01.
Allegations in homicide indictment, RC § 2941.14.
Prosecutor required to notify victim of date, time and place of trial, RC § 2937.08.1.
Reasonable doubt, RC § 2901.05.
Sentencing for capital offense, RC § 2929.03.
Statement by victim—
Proceeding of final disposition other than trial, RC § 2943.04.1.
Trial, RC § 2945.07.

Ohio Constitution

Cruel and unusual punishment, OConst art I, § 9.

Comparative Legislation

Death penalty:
18 USC § 3148
CA—Penal Code §§ 190, 190.1
FL—Stat Ann § 775.081
IL—Ann Stat ch 38 § 9-1
IN—Code § 35-50-2-9
KY—Rev Stat Ann § 532.075
NY—Penal Law §§ 60.05, 60.06
PA—CSA tit 18 § 1102

Text Discussion

Guilty or no contest plea to capital offense, 1 Ohio Crim. Prac. & Pro. § 25.6
Penalties and sentencing in capital offenses, 1 Ohio Crim. Prac. & Pro. § 51.6c, d, e
Verdict; penalty, 1 Ohio Crim. Prac. & Pro. § 41.3

Forms

Sentencing hearing, 4 OJI § 503.01
Specifications of aggravating circumstance, 4 OJI § 413.45

Outlines of Procedure

Sentencing—felony, Leyshon No. 315-1

Research Aids

Criteria for imposing death or imprisonment for a capital offense:
O-Jur3d: Crim L §§ 1843-1845
Am-Jur2d: Crim L §§ 609-612

Law Review

Capital punishment in Ohio: aggravating circumstances, Note, 31 ClevStLRev 495 (1983).

tion of these, has overcome the mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences: State v. Woods, 48 OS2d 127, 2 OO3d 289, 357 NE2d 1059.

21. (1976) The Ohio statutory scheme for imposing capital punishment differs somewhat from any of those considered by the U.S. Supreme Court in its July 2, 1976, decisions, but it is basically similar to the Georgia, Florida, and Texas statutes which the court found to be constitutional. Each of those states provide for a bifurcated trial with a separate sentencing hearing to consider information relevant to the imposition of sentence, under standards to guide the sentencing authority in the use of that information. Statutes in North Carolina and Louisiana which were struck down imposed mandatory death sentences, with no "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of the sentence of death." More clearly than any of the states whose statutes were reviewed Ohio has attempted to insulate the determination of guilt and of sentence from any likelihood of jury arbitrariness. The Ohio statutes are therefore constitutional: State v. Bayless, 48 OS2d 73, 2 OO3d 249, 357 NE2d 1035.

22. (1975) The term "psychosis" of the offender as used in RC § 2929.04 relating to mitigating a death penalty means any serious functional mental disorder, including the effects of drug abuse: State v. Farmer, 73 OO2d 341 (CP).

[CONSTRUING FORMER ANALOGOUS RC § 2901.04]

1. (1970) Where several persons combine to commit an unlawful act, e.g., escape from jail, each is criminally responsible for the acts of the others committed while perpetrating such act: State v. Halleck, 24 OApp2d 74, 53 OO2d 195, 263 NE2d 917.

2. A deputy marshal or policeman is one of the officers included within the terms of the offense defined by RC § 2901.04, taking the life of a police officer: State v. Byomin, 106 App 393, 7 OO2d 155, 154 NE2d 823.

3. A police officer who, pursuant to the arrest of an individual, accompanies such person to a room where he resides, for the purposes of examining identification material promised by him for the officer's inspection, is in the act of "preserving the peace" under GC § 4378 (RC § 737.11) and is "in discharge of his duties" within the purview of GC § 12402-1 (RC § 2901.04), which sets out the elements of the crime of murder in the first degree for purposely and willfully killing a policeman: State v. Ross, 92 App 29, 49 OO 196, 108 NE2d 77.

4. Where officers under the direction of their superiors had been sent to search for the participant in a robbery, and in doing so entered the cottage where a policeman met his death, the jury was justified in concluding that the officer was in the discharge of his duties when killed, within the scope of this section: State v. Dingledine, 14 OO 339 (App) [appeal dismissed, 135 OS 251].

5. Where one of several persons arming themselves with firearms and conspiring to resist sheriff kills sheriff while in discharge of duties, all conspirators are guilty of first degree murder: Rails v. State, 43 App 129, 182 NE 691, 35 OLR 80.

§ 2929.05 [Appellate review of death sentence.]

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

Any court of appeals that reviews a case in which the sentence of death is imposed shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed, and, except as otherwise provided in this section, shall conduct the review in accordance with the Appellate Rules.

(C) Whenever sentence of death is imposed pursuant to section 2929.022 [2929.02.2] or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall, upon motion of the offender and after conducting a hearing on the motion, vacate the sentence if all of the following apply:

(1) The offender alleges in the motion and presents evidence at the hearing that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(2) The offender did not present evidence at trial

pursuant to section 2929.023 [2929.02.3] of the Revised Code that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(3) The motion was filed at any time after the sentence was imposed in the case and prior to execution of the sentence;

(4) At the hearing conducted on the motion, the prosecution does not prove beyond a reasonable doubt that the offender was eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced.

HISTORY: 139 v S 1. Eff 10-19-81.

Cross-References to Related Sections

Reasonable doubt, RC § 2901.05.

CASE NOTES AND OAG

1. (1984) Revised Code § 2929.05 requires the review of the proportionality of death sentences regardless of whether counsel has provided evidence of disproportionality: State v. Jenkins, 15 OS3d 164, 15 OBR 311, 473 NE2d 264.

2. (1984) Revised Code § 2929.05 requires the court of appeals, and the Supreme Court as well, to independently weigh all the facts and other evidence in the record in determining whether the aggravating circumstances outweigh the mitigating factors in reviewing the sentencing court's determination. As a necessary corollary to that requirement, the court of appeals and the Supreme Court must articulate the reasons why the aggravating circumstances outweigh the mitigating factors: State v. Maurer, 15 OS3d 239, 15 OBR 379, 473 NE2d 768.

3. (1985) The proportionality review required of the Court of Appeals pursuant to RC § 2929.05(A) need not include criminal cases outside its geographical jurisdiction: State v. Rogers, 17 OS3d 174, 17 OBR 414, 478 NE2d 984.

4. (1986) Conviction and death sentence upheld: State v. [illegible], 26 OS3d 92, 26 OBR 79, 497 NE2d 55.

5. (1986) Death sentence was neither excessive nor disproportionate: State v. Brooks, 25 OS3d 144, 25 OBR 190, [illegible] NE2d 407.

6. (1986) Defendant's death sentence was neither excessive nor disproportionate to the penalty imposed in similar cases: State v. Barnes, 25 OS3d 203, 25 OBR 266, 495 NE2d [illegible].

§ 2929.06 [Resentencing hearing after vacation of death sentence.]

If the sentence of death that is imposed upon any offender is vacated upon appeal because the court of appeals or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, did not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is vacated upon appeal for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, or is vacated pursuant to division (C) of section 2929.05 of the Revised Code, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

HISTORY: 139 v S 1. Eff 10-19-81.

Cross-References to Related Sections

Parole eligibility, RC § 2967.13.

PENALTIES FOR FELONY

§ 2929.11 Penalties for felony.

(A) Whoever is convicted of or pleads guilty to a felony other than aggravated murder or murder, except as provided in division (D) or (E) of this section, shall be imprisoned for an indefinite term and, in addition, may be fined or required to make restitution, or both. The indefinite term of imprisonment shall consist of a maximum term as provided in this section and a minimum term fixed by the court as provided in this section. The fine and restitution shall be fixed by the court as provided in this section.

Whoever is convicted of or pleads guilty to committing, attempting to commit, or complicity in committing a felony violation of section 2909.02 or 2909.03 of the Revised Code and is sentenced to an indefinite term of imprisonment shall be required to reimburse agencies for their investigation or prosecution costs in accordance with section 2929.28 of the Revised Code.

(B) Except as provided in division (D) of this section, section 2929.71, and Chapter 2925, of the Revised Code, terms of imprisonment for felony shall be imposed as follows:

(1) For an aggravated felony of the first degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be five, six, seven, eight, nine, or ten years, and the maximum term shall be twenty-five years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of ten, eleven, twelve, thirteen, four-

teen, or fifteen years, and the maximum term shall be twenty-five years;

(2) For an aggravated felony of the second degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be three, four, five, six, seven, or eight years, and the maximum term shall be fifteen years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of eight, nine, ten, eleven, or twelve years, and the maximum term shall be fifteen years;

(3) For an aggravated felony of the third degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be two, three, four, or five years, and the maximum term shall be ten years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of five, six, seven, or eight years, and the maximum term shall be ten years;

(4) For a felony of the first degree, the minimum term shall be four, five, six, or seven years, and the maximum term shall be twenty-five years;

(5) For a felony of the second degree, the minimum term shall be two, three, four, or five years, and the maximum term shall be fifteen years;

(6) For a felony of the third degree, the minimum term shall be two years, thirty months, three years, or four years, and the maximum term shall be [illegible] years;

(7) For a felony of the fourth degree, the minimum term shall be eighteen months, two years, thirty months, or three years, and the maximum term shall be five years.

(C) Fines for felony shall be imposed as follows:

(1) For an aggravated felony of the first degree or a felony of the first degree, not more than ten thousand dollars;

(2) For an aggravated felony of the second degree or a felony of the second degree, not more than seven thousand five hundred dollars;

(3) For an aggravated felony of the third degree or a felony of the third degree, not more than five thousand dollars;

(4) For a felony of the fourth degree, not more than two thousand five hundred dollars.

(D) Whoever is convicted of or pleads guilty to a felony of the third or fourth degree and did not, during the commission of that offense, cause physical harm to any person or make an actual threat of physical harm to any person with a deadly weapon, as defined in section 2923.11 of the Revised Code, and who has not previously been convicted of an offense of violence shall be imprisoned for a definite term and, in addition, may be fined or required to make restitution. The restitution shall be fixed by the court as provided in this section. If a person is convicted or pleads guilty to committing, attempting to commit, or complicity in committing a violation of section 2909.03 of the Revised Code that is a felony of the third or fourth degree and is sentenced pursuant to this division, he shall be required to reimburse agencies for their investigation or prosecution costs in accordance with section 2929.28 of the Revised Code.

The terms of imprisonment shall be imposed as follows:

(1) For a felony of the third degree, the term shall be one, one and one-half, or two years;

(2) For a felony of the fourth degree, the term shall be six months, one year, or eighteen months.

(E) The court shall require a person who is convicted of or pleads guilty to a violation of section 2921.41 of the Revised Code, in the circumstances described in division (C)(2)(a) of that section, to make restitution for all of the property that is the subject of the offense, in accordance with division (C)(2) of that section. The court shall require, if appropriate, a person who is convicted of or pleads guilty to arson under section 2909.03 or to aggravated arson under section 2909.02 of the Revised Code to make restitution for all or part of the property damage that is caused by his offense, which restitution shall be in addition to the penalty otherwise imposed by the court for a conviction of

plea of guilty for arson or aggravated arson. The court, in any other case, may require a person who is convicted of or pleads guilty to a felony to make restitution for all or part of the property damage that is caused by his offense and for all or part of the value of the property that is the subject of any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, that the person committed. If the court determines that the victim of the offense was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the offense, the court shall, regardless of whether the offender knew the age of the victim, consider this fact in favor of imposing restitution, but this fact shall not control the decision of the court.

(F) No person shall be sentenced for an offense pursuant to division (B)(1)(b), (2)(b), or (3)(b) of this section because the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.142 [2941.14.2] of the Revised Code.

(G) No person shall be sentenced pursuant to division (B)(6) or (7) of this section to an indefinite term of imprisonment for a felony of the third or fourth degree unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.143 [2941.14.3] of the Revised Code.

HISTORY: 134 v H 511 (Eff 1-1-74); 137 v S 119 (Eff 8-30-78); 139 v S 199 (Eff 7-1-83); 140 v S 210 (Eff 7-1-83); 140 v H 265 (Eff 8-30-84); 140 v S 4 (Eff 9-26-84); 141 v H 284, Eff 3-6-86.

The provisions of § 5 of HB 284 (141 v —) read as follows:

SECTION 5. Section 2929.11 of the Revised Code is presented in this act as a composite of the section as amended by Am. S.B. 210, Am. Sub. H.B. 265, and Am. S.B. 4 of the 115th General Assembly, with the new language of none of these acts shown in capital letters. This is in recognition of the principle stated in division (B) of section 1.52 of the Revised Code that such amendments are to be harmonized where not substantively irreconcilable and constitutes a legislative finding that such is the resulting version in effect prior to the effective date of this act.

Committee Comment to H 511

This section provides penalties for felonies other than murder. Each degree of felony carries an indeterminant definite, or reformatory sentence consisting of a minimum term fixed by the trial court from among four choices given in the statute and a maximum term fixed by the statute. In addition the trial court may impose a fine not exceeding the maximum given for each degree. Penalties for felony are as follows:

Penalties for Felony

Offense	Minimum Term	Maximum Term	Maximum Fine
Felony 1	4, 5, 6, or 7 yrs	25 yrs	$10,000
Felony 2	2, 3, 4, or 5 yrs	15 yrs	$ 7,500
Felony 3	1, 1 1/2, 2, or 3 yrs	10 yrs	$ 5,000
Felony 4	1/2, 1, 1 1/2, or 2 yrs	5 yrs	$ 2,500

Cross-References to Related Sections

Penalties for engaging in pattern of corrupt activities, RC § 2923.32.
Actual incarceration defined, RC § 2929.01.
Additional sentence for felonies involving a firearm, RC § 2929.71.
Aggravated murder, RC § 2903.01.
Imposing sentence, RC § 2929.12.
Imposition of term of incarceration, RC §§ 2941.14.2, 2941.14.3
Modification of sentence, RC § 2929.51.
Multiple sentences, RC § 2929.41.
Murder, RC § 2903.02.
Organizational penalties, RC § 2929.31.
Second conviction—
  Actual incarceration for certain felonies; specification of prior offense, RC § 2941.14.2.
  Indefinite term where either offense was violent, RC § 2941.14.3.
Sentencing criteria for third or fourth degree felony offenses, RC § 2929.13.
Trafficking in drugs, RC § 2925.03.
Victim's bill of rights pamphlet, RC § 109.42.

Ohio Constitution

Excessive fines, OConst art I, § 9.
Transportation for crime, OConst art I, § 12.

Ohio Administrative Code

Sentencing, 2 Ohio Crim. Prac. & Pro.: OAC § 5120:1-1-04.

Comparative Legislation

Penalties for felony:
  18 USC § 1
  CA—Penal Code § 17
  FL—Stat Ann § 775.081
  IL—Ann Stat ch 38 § 1005-1-9
  IN—Code § 35-50-2-1
  KY—Rev Stat Ann § 532.060
  MI—Comp Laws Ann § 750.503
  NY—Penal Law §§ 55.05, 55.10
  PA—CSA tit 18 § 1103

Text Discussion

Aggravating circumstances, 1 Ohio Crim. Prac. & Pro. § 52.14
Penalties and sentencing, 1 Ohio Crim. Prac. & Pro. § 51.6

Oklahoma Code

CHAPTER 17

DEATH SENTENCE

Section

§ 1001. Judgment of death—Warrant

When judgment of death is rendered, the judge must sign and deliver to the sheriff of the county a warrant duly attested by the clerk, under the seal of the court, stating the conviction and judgment and appointing a day on which the judgment is to be executed, which must be not less than sixty (60) nor more than ninety (90) days from the time of the judgment and must direct the sheriff to deliver the defendant within ten (10) days from the time of judgment to the warden of the state prison at McAlester, in this state, for execution.

R.L.1910, § 5967. Laws 1913, c. 113, p. 206, § 2.

Historical Note

This section, as contained in Revised Laws of 1910, read as follows:

"When judgment of death is rendered, the judge must sign and deliver to the sheriff of the county, a warrant duly attested by the clerk, under the seal of the court, stating the conviction and judgment, and appointing a day on which the judgment is to be executed, which must not be less than thirty nor more than sixty days from the time of the judgment."

The 1913 amendment deleted commas following "sheriff of the county" and following "conviction and judgment", substituted "sixty" for "thirty" and

"ninety" for "sixty" and added "and must direct the sheriff to deliver the defendant within ten days from the time of judgment to the warden of the state prison at McAlester, in this state, for execution".

Section 11 of the Act of 1913, read as follows:

"Immediately upon the passage of this act the warden of the State Penitentiary shall ask for bids for apparatus for electrocution purposes and the contract for the same shall be let as public contracts are now let within the state."

Source:

St.1890, § 5734.
St.1893, § 5299.
St.1903, § 5587.
Comp.Laws 1909, § 6926.
Comp.St.1921, § 2784.
St.1931, § 3170.

Origin: Comp.Laws Dak.1887, § 7480.

Law Review Commentaries

Death penalty, constitutionality. 2 Okl.City U.L.Rev. 201 (1977).

Death penalty for children. Victor L. Streib. 36 Okl.L.Rev. 613 (1983).

Sentencing procedure. Eugene Rice 13 Okl.L.Rev. 1 (Feb. 1960).

Uniform State Laws. Maurice H. Merrill. 49 Okl.B.J. 1986 (1978).

Library References

Criminal Law ⇐1213, 1219.
C.J.S. Criminal Law §§ 1978, 2001 et seq.

United States Supreme Court

Aggravating circumstances, death penalty, see Godfrey v. Georgia, 1980, 100 S.Ct. 1759, 446 U.S. 420, 64 L.Ed.2d 398.

Death penalty, see Dobbert v. Florida, 1977, 97 S.Ct. 2290, 432 U.S. 282, 53 L.Ed.2d 344.

Death sentence, lesser included noncapital offenses to be considered when supported by evidence, see Beck v. Alabama, 1980, 100 S.Ct. 2382, 447 U.S. 625, 65 L.Ed.2d 392.

Exclusion of venireman, death penalty, see Davis v. Georgia, 1976, 97 S.Ct. 399, 429 U.S. 122, 50 L.Ed.2d 339.

Rape, death penalty, see Coker v. Georgia, 1977, 97 S.Ct. 2861, 433 U.S. 584, 53 L.Ed.2d 982.

Waiver of federal rights, death penalty, see Gilmore v. Utah, 1976, 97 S.Ct. 436, 429 U.S. 1012, 50 L.Ed.2d 632.

Notes of Decisions

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1. Validity

Imposition and carrying out of death penalty in cases before court would constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments (U.S.C.A.Const.Amends. 8, 14). Furman v. Georgia, U.S.Ga., 92 S.Ct. 2726, 408 U.S. 238, 33 L.Ed.2d 346 (1972).

The death penalty is not a per se violation of the Eighth and Fourteenth Amendments (U.S.C.A.Const.Amends. 8, 14), when properly imposed pursuant to judgment and sentence of murder in the first degree. Hays v. State, Okl.Cr., 617 P.2d 223 (1980).

It is impermissible, under relevant United States Supreme Court decisions, to impose sentence of death on any convicted person until such time as laws

have been duly enacted conforming to standards set forth in such decisions. Pate v. State, Okl.Cr., 507 P.2d 915 (1973).

2. Construction and application

The penalty of death is to be inflicted as punishment for crime only in most extreme cases, wherein evidence and law justifies it. Parish v. State, 77 Okl.Cr. 436, 142 P.2d 642 (1943).

Where Laws 1913, c. 113, p. 206 (§ 1014 of this title) prescribed "the punishment of death must be inflicted by electrocution," and substituted the penitentiary for the county jail as the place where a judgment of death must be executed (§ 1015 of this title) and required the court to appoint a day for the execution not less than 60, nor more than 90, days from the time of the judgment (this section), and the former statute (R.L. 1910, § 5967, see Historical Note) required the court to appoint a day for the execution not less than 30, nor more than 60, days from the time of the judgment; the punishment of death to be by hanging, or by electrocution, as the trial court might order, (R.L.1910, § 5981, see Historical Note under § 1014 of this title), the changes effected by the later law related solely to penal administration, and it was within the power of the Legislature to make them applicable to offenses committed prior to its enactment, and the extension of the time within which the execution may take place after sentence was a mitigation, and not an increase, of punishment, and did not render the act ex post facto, and the substitution of the penitentiary for the county jail as the place where the judgment of death must be executed was not ex post facto, when applied to a person convicted of a murder committed before its enactment. Alberty v. State, 10 Okl.Cr. 616, 140 P. 1025, 52 L.R.A., N.S., 248 (1914).

3. Time of execution—In general

Under this section, it is mandatory on the trial judge when judgment of death is rendered to appoint a day upon which such judgment shall be executed, which day must not be less than 60 nor more than 90 days from the date of the rendition of the judgment, and to direct the sheriff to deliver defendant within 10 days from the date of the judgment to the warden of the state prison at McAlester, to be dealt with in accordance with the judgment and sentence. In re Opinion of the Judges, 24 Okl.Cr. 5, 215 P. 640 (1923); In re Opinion of the Judges, 18 Okl.Cr. 366, 195 P. 149 (1921).

Where a judgment imposing the death sentence is affirmed and the time for execution has expired, Criminal Court of Appeals is required by this section to fix a new date for execution which is never less than sixty nor more than ninety days thereafter. Hathcox v. Waters, 94 Okl.Cr. 286, 234 P.2d 950 (1951).

"Judgment," is adjudication of guilt, and fixing of punishment, and, when punishment is death, must be executed not less than 60 nor more than 90 days from time thereof under this section, and time of execution of sentence is part of execution of judgment rather than part of judgment itself. Washington v. State, 32 Okl.Cr. 392, 241 P. 350 (1926).

Under this section, it is mandatory upon the trial judge, when judgment of death is rendered, to appoint a day on which such judgment is to be executed, which must be not less than 60 nor more than 90 days from the date of the judgment. In re Opinion of the Judges, 26 Okl.Cr. 41, 221 P. 1041 (1924).

Judgment sentencing defendant convicted of murder to be electrocuted on specified date less than 60 days after judgment was void as to the portion thereof appointing the day for the electrocution, under Laws 1913, c. 113, p. 206 (§ 1014 of this title), providing that the day on which defendant is to be electrocuted shall be not less than 60 nor more than 90 days from the judgment (this section). In re Opinion of the Judges, 21 Okl.Cr. 237, 205 P. 1109 (1922).

4. —— Hour of execution

It is the duty of the court under this section, as amended by Laws 1913, c. 113, p. 206, § 2, to appoint a day of the execution of a death sentence only, and the court has no authority to fix the hour of execution; that being for the executive branch of the government. Thomas v. State, 18 Okl.Cr. 648, 197 P. 853 (1921).

Where in a prosecution for murder the court fixed not only the day, but the hour of execution in a death warrant,

Note 4

the error was harmless where the day and hour named had passed pending appeal. Id.

Sentence was erroneous because fixed electrocution at between certain hours of day instead of during day. In re Opinion of Judges, 18 Okl.Cr. 20, 192 P. 597 (1920).

This section, as amended in 1913, is mandatory, and the judge cannot appoint a day beyond the ninetieth day from the judgment, or designate the hours of the day fixed, as that is left to the discretion of the warden of the penitentiary. In re Opinion of the Judges, 18 Okl.Cr. 20, 192 P. 597 (1920).

5. —— Extension of time of execution

The time of execution of a sentence in a capital case is a part of the execution of the judgment rather than a part of the judgment itself, and, a refixing or resetting of the time for execution, where for any reason the judgment of death has not been executed, is a mere ministerial act, which may be performed either by the trial court or the Criminal Court of Appeals. Ex parte Grayson, 86 Okl.Cr. 86, 187 P.2d 232 (1948).

Where, by petitioner's own act of invoking jurisdiction of Criminal Court of Appeals by appeal, a stay of the proceedings under orders of lower court was procured until day of execution under death sentence had passed, though time for executing sentence exceeded 90 days, error became immaterial and could not be made the basis for relief by habeas corpus, and act of refixing or resetting the time for execution being a merely ministerial act and jurisdiction of the Criminal Court of Appeals having been invoked, a new date for execution of the judgment and sentence would be set. Id.

After delivery by the sheriff of a defendant to the warden of the penitentiary pursuant to a judgment of death, the trial court has no authority to extend the time of execution. In re Opinion of the Judges, 26 Okl.Cr. 41, 221 P. 1041 (1923).

6. Persons authorized to execute death warrant

Warden of state penitentiary, or any one legally designated or deputized by him, has authority to execute death warrant. Application of O'Neil, 40 Okl.Cr. 309, 268 P. 734 (1928).

7. Warrant

Where the day designated in the judgment and fixed in the death warrant was only 56 days subsequent to the judgment, contrary to this section, as amended by Laws 1913, c. 113, p. 206, § 2, requiring execution not less than 60 or more than 90 days from judgment, the warrant was void. Noel v. State, 17 Okl.Cr. 308, 188 P. 688 (1920).

8. Judgment

Judgment and sentence in capital conviction should recite that all requirements of this section have been complied with, and, where jury finds defendant guilty of murder and assess death penalty, judgment should contain such verdict, or recite fact that defendant was convicted of murder by verdict of jury and death penalty assessed. Hargus v. State, 58 Okl.Cr. 301, 54 P.2d 211 (1936).

Judgment, in murder prosecution, which was erroneously combined with and designated as death warrant, did not require reversal, where it contained all requisites of this section, was signed by judge, and attested by clerk, with court's seal. Id.

§ 1002. Governor to be informed of proceedings

The judge of a court at which a conviction requiring a judgment of death is had, must, immediately after the conviction, transmit to the Governor, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial

R.L.1910, § 5968.

the error was harmless where the day and hour named had passed pending appeal. Id.

Sentence was erroneous because fixed electrocution at between certain hours of day instead of during day. In re Opinion of Judges, 18 Okl.Cr. 20, 192 P. 597 (1920).

This section, as amended in 1913, is mandatory, and the judge cannot appoint a day beyond the ninetieth day from the judgment, or designate the hours of the day fixed, as that is left to the discretion of the warden of the penitentiary. In re Opinion of the Judges, 18 Okl.Cr. 20, 192 P. 597 (1920).

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After delivery by the sheriff of a defendant to the warden of the penitentiary pursuant to a judgment of death, the trial court has no authority to extend the time of execution. In re Opinion of the Judges, 26 Okl.Cr. 41, 221 P. 1041 (1923).

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8. Judgment

Judgment and sentence in capital conviction should recite that all requirements of this section have been complied with, and, where jury finds defendant guilty of murder and assess death penalty, judgment should contain such verdict, or recite fact that defendant was convicted of murder by verdict of jury and death penalty assessed. Hargus v. State, 58 Okl.Cr. 301, 54 P.2d 211 (1936).

Judgment, in murder prosecution, which was erroneously combined with and designated as death warrant, did not require reversal, where it contained all requisites of this section, was signed by judge, and attested by clerk, with court's seal. Id.

§ 1002. Governor to be informed of proceedings

The judge of a court at which a conviction requiring a judgment of death is had, must, immediately after the conviction, transmit to the Governor, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial.

R.L.1910, § 5968.

Historical Note

Source:
St.1890, § 5735.
St.1893, § 5300.
St.1903, § 5588.
Comp.Laws 1909, § 6927.
Comp.St.1921, § 2785.
St.1931, § 3171.
Origin: Comp.Laws Dak.1887, § 7481.

Notes of Decisions

In general 1
Review 2

1. In general

Where the information sufficiently charged murder and upon arraignment the defendant informed the court that he did not desire counsel and was not permitted to enter his plea of guilty until after he had been informed of all his constitutional and statutory rights and he was fully cognizant of the consequences of his plea of guilty before it was accepted and judgment and sentence pronounced, the conviction and death sentence were in accordance with law in view of this section. In re Watkins, 21 Okl.Cr. 95, 205 P. 191 (1922).

On a conviction of murder imposing the death penalty and submission of the evidence by the Governor to the Criminal Court of Appeals under this section and § 1003 of this title, the conviction was warranted, and punishment of death justified. In re Opinion of the Judges, 4 Okl.Cr. 594, 112 P. 948 (1911).

2. Review

Since the right of appeal is a constitutional right, the counsel appointed by the court to defend an indigent defendant fails in his duty when he neglects to take an appeal from a judgment and sentence of death in a homicide case, in view of this section and § 1003 of this title. Noel v. State, 17 Okl.Cr. 308, 188 P. 688 (1920).

On the creation of the Criminal Court of Appeals, all criminal jurisdiction previously vested in the Supreme Court vested in that court, together with the jurisdiction to express an opinion on matters referred as authorized by this section and § 1003 of this title. In re Opinion of the Judges, 25 Okl. 76, 105 P. 325 (1940).

§ 1003. Governor may require opinion of appellate judges

The Governor may thereupon require the opinion of the Judges of the Criminal Court of Appeals, or any of them, upon the statement so furnished.

R.L.1910, § 5969.

Historical Note

Source:
St.1890, § 5736.
St.1893, § 5301.
St.1903, § 5589.
Comp.Laws 1909, § 6928.
Comp.St.1921, § 2786.
St.1931, § 3172.
Origin: Comp.Laws Dak.1887, § 7482.
The revision of 1910 substituted Criminal Court of Appeals for Supreme Court.

Notes of Decisions

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1. Construction and application

This section contemplates that an advisory opinion of the judges may be giv-

en to the Governor when an appeal has not been taken in a capital case from a judgment and sentence of death. In re Opinion of the Judges, 70 Okl.Cr. 83, 104 P.2d 726 (1940); In re Opinion of the Judges, 56 Okl. 188, 36 P.2d 310 (1934); In re Opinion of the Judges, 55 Okl.Cr. 381, 31 P.2d 159 (1934); In re Opinion of the Judges, 54 Okl.Cr. 103, 14 P.2d 956 (1932); In re Opinion of the Judges, 54 Okl.Cr. 101, 14 P.2d 955 (1932); In re Opinion of Judges, 43 Okl.Cr. 40, 277 P. 283 (1929); In re Opinion of the Judges, 6 Okl.Cr. 18, 115 P. 1028 (1911).

Advisory opinion of Criminal Court of Appeals, under this section, will not be rendered, where appeal has been taken or time within which appeal might be perfected, under § 1054 of this title, has not expired. In re Opinion of the Judges, 35 Okl.Cr. 39, 248 P. 350 (1926).

2. Nature of opinion

An opinion of judges of Criminal Court of Appeals in response to Governor's requirement, as authorized by this section upon statement showing conviction, judgment, and sentence of death, is an "advisory opinion" of the judges when appeal has not been taken from the judgment. In re Opinion of the Judges, 87 Okl.Cr. 297, 197 P.2d 629 (1948).

An opinion of Criminal Court of Appeals in response to a request of the Governor regarding legality of criminal proceedings against an accused and to ascertain whether according to the record there had been an observance of all the formalities of law essential to the taking of human life is merely advisory and not an "adjudication." Tuggle v. State, 73 Okl.Cr. 208, 119 P.2d 857 (1942).

An opinion under this section is an "advisory opinion" of the judges, where an appeal has not been taken from the judgment. In re Opinion of the Judges, 70 Okl.Cr. 83, 104 P.2d 726 (1940).

An opinion rendered by the Criminal Court of Appeals in response to a request of the Governor as authorized by this section, is advisory only and the adjudication of the matters involved cannot be made until the case is lodged in such court on appeal. In re Opinion of the Judges, 18 Okl.Cr. 366, 195 P. 149 (1921).

3. Questions presented

In proceeding in matter of opinion of judges of Criminal Court of Appeals in response to request of Governor relative to conviction and death sentence under this section, scope of question is whether there has been observance of all formalities of law essential to taking of human life, and whether the trial, conviction, and sentence of death have been in accordance with law of the land. In re Opinion of the Judges, 87 Okl.Cr. 297, 197 P.2d 629 (1948); In re Opinion of the Judges, 70 Okl.Cr. 83, 104 P.2d 726 (1940); In re Opinion of the Judges, 56 Okl.Cr. 188, 36 P.2d 310 (1934).

This section contemplates an advisory opinion by the judges to be rendered to the Governor of the state where an appeal has not been taken in a capital case and where the death penalty has been assessed; the questions presented being whether there has been an observance of all the formalities of law essential to the taking of human life, and whether the trial, conviction and sentence of death have been in accordance with the law of the land. In re Opinion of the Judges, 18 Okl.Cr. 360, 195 P. 146 (1921); In re Opinion of Judges, 6 Okl.Cr. 210, 118 P. 156 (1911).

4. Operation and effect of opinion

Where statement is submitted to the court for an opinion under this section, the case is not in the Supreme Court as a suit upon which the judgment may be affirmed or reversed. State v. Johnson, 21 Okl. 40, 96 P. 26, 1 Okl.Cr. 154, 22 L.R.A., N.S., 463 (1908).

5. Time for advisory opinion

Before expiration of period allowed for appeal, Criminal Court of Appeals should not give Governor advisory opinion. In re Opinion of the Judges, 54 Okl.Cr. 56, 14 P.2d 238 (1932); In re Opinion of the Judges, 56 Okl.Cr. 372, 40 P.2d 692 (1935); In re Opinion of the Judges, 33 Okl.Cr. 250, 242 P. 539 (1925).

An opinion to the Governor in a case where a defendant has been sentenced to death ought not to be given when the time for taking an appeal has not expired, and when defendant has not waived the right to appeal. In re Opinion of the Judges, 33 Okl.Cr. 354, 244 P. 50 (1926); In re Opinion of the Judges, 17 Okl.Cr. 369, 189 P. 198 (1920); In re

Opinion of the Judges, 8 Okl.Cr. 467, 128 P. 734 (1913).

Criminal Court of Appeals should not render advisory opinion where time given for appeal from judgment and sentence of death had not expired, and where appeal may be perfected. In re Opinion of the Judges, 55 Okl.Cr. 381, 31 P.2d 159 (1934).

Advisory opinion cannot be rendered before expiration of time for appeal from conviction of murder with death sentence. In re Opinion of the Judges, 36 Okl.Cr. 38, 251 P. 757 (1927).

6. Jurisdiction of reviewing court

On the creation of the Criminal Court of Appeals, all criminal jurisdiction previously vested in the Supreme Court vested in that court, together with the jurisdiction to express an opinion on matters referred as authorized by St. 1903, §§ 5588, 5589 (incorporated in this section and § 1002 of this title). In re Opinion of the Judges, 25 Okl. 76, 105 P. 325.

7. Appeal

Where Governor, in compliance with this section requested of the Criminal Court of Appeals an advisory opinion, but thereafter accused filed appeal and case was argued and briefs were filed, it became duty of the court to pass upon the appeal. Johnson v. State, 82 Okl.Cr. 437, 172 P.2d 337 (1918); Steen v. State, 82 Okl.Cr. 141, 167 P.2d 375 (1946).

The right of appeal being a constitutional right, the counsel appointed by the court to defend an indigent defendant fails in his duty when he neglects to take an appeal from a judgment and sentence of death in a homicide case, in view of this section and § 1002 of this title. Noel v. State, 17 Okl.Cr. 308, 188 P. 688 (1920).

§ 1004. Reprieve and suspension of execution—Authority of officers

No judge, court or officer, other than the Governor, can reprieve or suspend the execution of the judgment of death, except the warden of the said state prison, to whom he is delivered for execution in the cases provided in the next seven sections,[1] unless an appeal is taken.

R.L.1910, § 5970. Laws 1913, c. 113, p. 207, § 3.

[1] Section 1005 et seq. of this title.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"No judge, court or officer other than the governor can reprieve or suspend the execution of a judgment of death, except the sheriff, in the cases provided in the next seven sections, unless a writ of error is allowed and taken."

Source:

St.1890, § 5737.
St.1893, § 5302.
St.1903, § 5590.
Comp.Laws 1909, § 6929.
Comp.St.1921, § 2787.
St.1931, § 3173.

Origin: Comp.Laws Dak.1887, § 7483.

Constitutional Provisions

Constitution Art. 6, § 10, provides in part:

"The Governor shall have the power to grant, after conviction and after favorable recommendation by a majority vote of the said Board, commutations, pardons and paroles for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to such regulations as may be prescribed by law. The Legislature shall

have the authority to prescribe for those persons convicted of three felonies arising out of separate and distinct transactions a minimum mandatory period of confinement which must be served prior to being eligible to be considered for parole. The Governor shall have power to grant after conviction, reprieves or leaves of absence not to exceed [illegible] days, without the action of said Board.

Library References

Criminal Law ⇐1001.
C.J.S. Criminal Law § 1615 et seq.

United States Supreme Court

Commutation of death sentence to long term sentences, see Rose v. Hodges, 1975, 96 S.Ct. 175, 423 U.S. 19, 46 L.Ed.2d 162.

Notes of Decisions

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Construction and application 1
Trial court's authority to extend time for execution 2

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1. Construction and application

Where a person has been convicted of a capital offense, and the death penalty has been assessed, but no appeal has been taken, the Governor has the sole power to suspend execution of the sentence, until such time as an appeal may be perfected, or until a day beyond the six months' period in which an appeal may be taken. In re Opinion of the Judges, 70 Okl.Cr. 83, 104 P.2d 726 (1940); In re Opinion of the Judges, 26 Okl.Cr. 41, 221 P. 1041 (1924); In re Opinion of the Judges, 24 Okl.Cr. 5, 215 P. 640 (1923); In re Opinion of the Judges, 18 Okl.Cr. 366, 195 P. 149 (1921); In re Opinion of the Judges, 18 Okl.Cr. 360, 195 P. 146 (1921); In re Opinion of the Judges, 17 Okl.Cr. 369, 189 P. 198 (1920).

Under this section, a reprieve can only be granted by the Governor pending the perfecting of an appeal, and an order of the court staying execution of the sentence of death indefinitely, entered after term in which judgment was rendered, is without authority. McConnell v. State, 18 Okl.Cr. 688, 197 P. 521 (1921).

No court or officer other than the Governor can suspend the execution of a judgment and sentence of death after delivery of the defendant to the warden of the penitentiary unless and until an appeal is taken from such judgment. In re Opinion of the Judges, 18 Okl.Cr. [illegible] 195 P. 149 (1921).

Where a defendant has been duly convicted of murder and sentenced to be electrocuted before the expiration of the six months allowed for an appeal by §§ 1051, 1054, 1055, 1060 and § 962 of title 12, the Governor, under this section, has the sole power to suspend the execution of the death sentence until such time as an appeal may be perfected or until a day beyond the six months allowed in which to take an appeal. In re Opinion of the Judges, 18 Okl.Cr. 20 [illegible] P. 597 (1920).

Under this section, a reprieve can only be granted by the Governor pending the perfecting of an appeal in the case, and an order of the trial judge staying the execution of judgment after granting an appeal is without authority; and, where an appeal has been granted, but not filed, in the Criminal Court of Appeals, the Governor may grant a reprieve to a day beyond the time allowed to make, serve, and file a case-made and petition in error. Opinion of the Judges, 3 Okl.Cr. 315, 105 P. 684 (1910).

2. Trial court's authority to extend time for execution

After delivery by the sheriff of a defendant to the warden of the penitentiary pursuant to a judgment of death, the trial court has no authority to extend the time of execution. In re Opinion of the Judges, 26 Okl.Cr. 41, 221 P. 1041 (1924).

After delivery by the sheriff of a convicted defendant to the warden of the state penitentiary for execution of sentence and judgment imposing death, the

trial court has no authority to extend the time of execution, and the Criminal Court of Appeals acquires no jurisdiction to suspend sentence until the appeal has been filed therein. In re Opinion of the Judges, 24 Okl.Cr. 5, 215 P. 640 (1923).

After delivery by the sheriff of a defendant sentenced to death, to the warden of the penitentiary, the trial court has no authority to extend the time of execution, and the Criminal Court of Appeals cannot suspend sentence until an appeal has been filed. In re Opinion of the Judges, 18 Okl.Cr. 366, 195 P. 149 (1921).

3. Appeal

Application filed by defendants sentenced to death for offense of first-degree murder for stay of execution, treated by court as original proceeding for writ of habeas corpus, which was presented to enable defendants to file timely petition for writ of certiorari to the Supreme Court of the United States could not be granted where court had already affirmed judgment of trial court fixing penalty at death; further stay of execution would have to be sought from state governor or in proper federal forum. Williams v. State, Okl.Cr., 544 P.2d 1283 (1976).

Where one convicted of murder served written notice of intention to appeal, which under Constitution and laws he might do within six months from conviction, and had taken steps to perfect appeal, if appeal was not lodged in Appellate Court before date fixed for execution, such execution should be postponed until after six months from date of conviction. In re Opinion of the Judges, 29 Okl.Cr. 27, 232 P. 121 (1925).

§ 1005. Prisoner becoming insane—Question for jury trial

If, after his delivery to the warden for execution, there is good reason to believe that a defendant under judgment of death has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty is to immediately file in the district or superior court of such county a petition stating the conviction and judgment and the fact that the defendant is believed to be insane and asking that the question of his sanity be inquired into. Thereupon, the court must at once cause to be summoned and impaneled from the regular jury list a jury of twelve persons to hear such inquiry.

R.L.1910, § 5971. Laws 1913, c. 113, p. 207, § 4.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"If, after judgment of death, there is good reason to suppose that the defendant has become insane, the sheriff of the county or subdivision, with the concurrence of the judge of the court by which the judgment was rendered, upon notice to the county attorney, may summon from a list of thirty jurors selected or to be selected, forthwith by the county commissioners, a jury of twelve persons to inquire into the supposed insanity."

Source:

St.1890, § 5738.
St.1893, § 5303.
St.1903, § 5591.
Comp.Laws 1909, § 6930.
Comp.St.1921, § 2788.
St.1931, § 3174.

Origin: Comp.Laws Dak.1887, § 7484.

The 1910 revision provided for a panel of thirty jurors and made minor changes in language.

Cross References

Inquisition into sanity of defendant in general, see §§ 1161 to 1170 of this title.
Verdict in case of defense of insanity, see § 925 of this title.

Library References

Criminal Law ⇐973.
C.J.S. Criminal Law § 1544.

Notes of Decisions

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1. Construction and application

In murder prosecution, trial court did not abuse its discretion in overruling a motion in arrest of judgment, where the showing made was not such as to create a reasonable doubt in its mind as to the defendant's sanity, but if on a proper showing it should subsequently develop that defendant is presently insane, resort to the law for relief was available both to the defendant and the state on proper showing. Pate v. State, Okl.Cr., 361 P.2d 1086 (1961).

Where prisoner incarcerated in state penitentiary awaiting execution, whose conviction had been affirmed upon appeal, had trial before jury of county in which penitentiary was located upon question of his present sanity and verdict was rendered finding that prisoner was sane, the sole recourse of prisoner under common law and the statutes was an appeal to the Governor who could exercise his powers of clemency at his discretion in the manner provided by law. Bingham v. State, 82 Okl.Cr. 305, 169 P.2d 311 (1946).

The common-law rule relating to inquisition to determine sanity of prisoner under death sentence has been modified by this section to provide that district or superior court of county in which prisoner is confined may make inquisition into prisoner's sanity, which shall be determined by a mandatory jury trial, where warden of institution has reason to believe that the prisoner has become insane since his incarceration. Bingham v. State, 82 Okl.Cr. 305, 169 P.2d 311 (1946).

2. Purpose of law

The investigation of sanity of prisoner incarcerated under death sentence is based on public will and sense of propriety rather than on any right of prisoner and any investigation of mental condition of prisoner is for sole purpose of determining whether it would be consistent with public decency and propriety to take away life of person not sane enough to realize what was being done. Bingham v. State, 82 Okl.Cr. 305, 169 P.2d 311 (1946).

3. Insanity—In general

At the common law, "insanity" which will preclude execution of prisoner under death sentence means a state of general insanity with the mental powers being wholly obliterated. Bingham v. State, 82 Okl.Cr. 305, 169 P.2d 311 (1946).

The test of sanity or insanity of person under death sentence is whether such person at time of examination, from defects of his faculties, has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court, and if he has such intelligence, he is "sane", and if he does not have such intelligence, he is "insane" and should not be executed. Id.

4. —— Investigation after trial, insanity

The Court of Criminal Appeals is not authorized by this section or by common law to conduct an inquisition into sanity of prisoner incarcerated in penitentiary awaiting execution. Bingham v. State, 82 Okl.Cr. 305, 169 P.2d 311 (1946).

The fact that there was no evidence of insanity presented to trial judge and nothing in the record to indicate that defendant was insane at the time of the commission of the crime or insane at

time judgment and sentence was pronounced against him did not preclude a further investigation into the sanity of defendant since his incarceration in state penitentiary. Tuggle v. State, 73 Okl.Cr. 208, 119 P.2d 837 (1942).

Defendant was not concluded by finding of his present sanity at time of judgment and sentence, but further inquisitions might be had as to his mental condition by warden of penitentiary on belief of defendant's insanity, or by Governor. Weiland v. State, 58 Okl.Cr. 108, 50 P.2d 741 (1935).

An application made after verdict of guilty to try the sanity of the accused is properly denied when no doubt of his sanity is raised by the pleadings and the proof offered in support thereof. Kearns v. State, 14 Okl.Cr. 142, 168 P. 242 (1917).

5. Review

A jury's verdict upon collateral issue of prisoner's sanity after incarceration in penitentiary is not a final judgment from which an appeal or writ of error will lie. Bingham v. State, 82 Okl.Cr. 305, 169 P.2d 311 (1946).

An appeal from finding of sanity or insanity of prisoner in collateral proceeding before district court does not lie to the Criminal Court of Appeals, and hence such court is without authority to issue writ of certiorari or in any manner review such finding. Id.

§ 1006. Attendance by district attorney—Witnesses for inquisition

The district attorney must attend the inquisition, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court.
R.L.1910, § 5972.

Historical Note

Source:
St.1890, § 5739.
St.1893, § 5304.
St.1903, § 5592.
Comp.Laws 1909, § 6931.
Comp.St.1921, § 2789.
St.1931, § 3175.
Origin: Comp.Laws Dak.1887, § 7485.

§ 1007. Verdict—Order of court

The verdict of the jury must be entered upon the minutes and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane the order must direct that he be taken to one of the state hospitals for the insane and there kept for safe confinement until his reason is restored.
R.L.1910, § 5973. Laws 1913, c. 113, p. 207, § 5.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"A certificate of the inquisition must be signed by the jurors and the sheriff, and filed with the clerk of the court in which the conviction was had."

Source:

St.1890, § 5740.
St.1893, § 5305.
St.1903, § 5593.
Comp.Laws 1909, § 6932.
Comp.St.1921, § 2790.
St.1931, § 3176.

Origin: Comp.Laws Dak.1887, § 7[illegible]

Notes of Decisions

1. Construction and application

Where, since confinement of accused in state penitentiary pending execution of death sentence upon conviction of murder, accused was found to be insane and was confined in hospital, cause would be remanded to district court with directions that judgment and sentence should be set aside and order entered postponing pronouncement of judgment and sentence until accused recovered his sanity, and proper authorities would be ordered to deliver accused to sheriff when he recovered his sanity to be [illegible] subject to order of district court. M[illegible] v. State, 82 Okl.Cr. 367, 170 P.2d [illegible] (1946).

§ 1008. Execution of judgment—Proceedings when defendant found insane—Recovery of reason

If it is found that the defendant is sane the warden must proceed to execute the judgment as certified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section [1] to the Governor and deliver the defendant, together with a certified copy of such order to the medical superintendent of the hospital named in such order. When the defendant recovers his reason the superintendent of such hospital must certify that fact to the Governor, who must thereupon issue to the warden his warrant, appointing a day for the execution of the judgment.

R.L.1910, § 5974. Laws 1913, c. 113, p. 208, § 6.

[1] Section 1007 of this title.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"If it is found by the inquisition that the defendant is sane, the sheriff must execute the judgment; but if it is found that he is insane, the sheriff must suspend the execution of the judgment until he receives a warrant from the governor, or from a majority of the judges of the criminal court of appeals, directing the execution of the judgment."

Source:

St.1890, § 5741.
St.1893, § 5306.
St.1903, § 5594.
Comp.Laws 1909, § 6933.
Comp.St.1921, § 2791.
St.1931, § 3177.

Origin: Comp.Laws Dak.1887, § 7487.

The revision of 1910 substituted Criminal Court of Appeals for Supreme Court.

Library References

Criminal Law ⇐973, 1219.
C.J.S. Criminal Law §§ 1544, 2001 et seq.

Notes of Decisions

1. In general

Where judgment of conviction for murder and death sentence were ordered set aside on ground of present insanity after rendition of verdict and accused was committed to mental hospital, upon certification by superintendent of hospital that accused's sanity was restored, trial court acted within its lawful powers in pronouncing judgment and sentence in accordance with verdict and accused was not thereby denied due process of law. Mitts v. State, Okl.Cr., 345 P.2d 913 (1959), certiorari denied 80 S.Ct. 1620, 363 U.S. 846, 4 L.Ed.2d 1730.

§ 1009. Repealed by Laws 1941, p. 462, § 1, eff. June 7, 1941

Historical Note

This section relating to the duty of sheriff when defendant was found insane, and execution of judgment upon defendant's becoming sane, was derived from:

Comp.Laws Dak.1887, § 7488.
St.1890, § 5742.
St.1893, § 5307.
St.1903, § 5595.
Comp.Laws 1909, § 6934.
R.L.1910, § 5975.
Comp.St.1921, § 2792.

§ 1010. Pregnancy of prisoners—Judicial investigation

If it is alleged that a female prisoner under judgment of death is pregnant, the warden must notify the district attorney of the county in which the prison is situated whose duty is to immediately file with the district court a petition stating such allegation. A hearing must be conducted by a judge of that district court to determine the validity of the allegation. Enforcement of the judgment is suspended upon the filing of the petition, pending the outcome of the hearing.

Upon filing of the petition a judge of the district court shall appoint a physician licensed under the laws of the State of Oklahoma to conduct a medical examination for pregnancy of the female prisoner. Such examination shall be conducted within thirty (30) days prior to the hearing. The report of the examining physician shall be submitted to the court as evidence. The court may also hear any other evidence that may be presented. The court shall make a written finding to be filed with the court clerk as a part of the permanent record.

R.L.1910, § 5976. Laws 1913, c. 113, p. 208, § 7; Laws 1973, c. 101, § 1, eff. May 2, 1973.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"Where there is good reason to suppose that a female, against whom judgment of death is rendered, is pregnant, the sheriff of the county or subdivision, with the concurrence of the judge of the court by which the judgment was rendered, may summon a jury of three physicians of the State to inquire into the supposed pregnancy. Immediate notice thereof must be given to the county

attorney. The provisions of the two preceding sections apply to the proceedings upon the inquisition."

The 1973 amendment rewrote the section which prior thereto provided:

"If there is good reason to believe that a female against whom judgment is rendered is pregnant, such proceedings must be had as are provided in section 4 hereof (S. 5971 Revised Laws) except that instead of a jury as therein provided, the court must summon three disinterested physicians of good standing in their profession, to inquire into the supposed pregnancy, who shall, in the presence of the court, but with closed doors, if requested by the defendant, examine the defendant and hear any evidence that may be produced and make a written finding and certificate of their conclusion, to be approved by the court and spread upon the minutes. The provisions of section 6 hereof apply to the proceedings upon such inquiry."

Source:

St.1890, § 5743.
St.1893, § 5308.
St.1903, § 5596.
Comp.Laws 1909, § 6935.
Comp.St.1921, § 2793.
St.1931, § 3179.

Origin: Comp.Laws Dak.1887, § 74..

Library References

Criminal Law ⇐967, 1219.
C.J.S. Criminal Law §§ 1517 et seq., 2001 et seq.

§ 1011. Execution of judgment—Suspension when defendant pregnant—Execution when pregnancy ceases

If it is found that a female is not pregnant the warden must execute the judgment. If it is found that she is pregnant, the warden must suspend the execution of the judgment and transmit a certified copy of the findings and certificate to the Governor. When the Governor receives from the warden a certificate that the defendant is no longer pregnant, he must issue to the warden his warrant appointing a day for the execution of the judgment.
R.L.1910, § 5977. Laws 1913, c. 113, p. 209, § 8.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"If it is found by the inquisition that the female is not pregnant, the sheriff must execute the judgment. If, however, it is found that she is pregnant, the sheriff must suspend the execution of the judgment, and transmit the inquisition to the governor."

Source:

St.1890, § 5744.
St.1893, § 5309.
St.1903, § 5597.
Comp.Laws 1909, § 6936.
Comp.St.1921, § 2794.
St.1931, § 3180.

Origin: Comp.Laws Dak.1887, § 7490.

R.L.1910, § 5978, which provided that when the Governor was satisfied that the female was no longer pregnant, he could issue his warrant appointing the day for the execution of the judgment, was repealed by Laws 1941, p. 462, § 1.

§ 1012. Duty of court when judgment not executed

If, for any reason, a judgment of death has not been executed, and it remains in force, the court in which the conviction was had,

on the application of the district attorney, must order the defendant to be brought before it, or, if he is at large, a warrant for his apprehension may be issued.
R.L.1910, § 5979.

Historical Note

Source:
St.1890, § 5746.
St.1893, § 5311.
St.1903, § 5599.
Comp.Laws 1909, § 6938.
Comp.St.1921, § 2796.
St.1931, § 3182.
Origin: Comp.Laws Dak.1887, § 7492.

Notes of Decisions

1. Construction and application

Accused, inadvertently not electrocuted pursuant to death sentence, may be returned under this section and § 1013 of this title, as modified by § 1015 of this title, for resentence to court originally sentencing him. In re Opinion of the Judges, 31 Okl.Cr. 442, 239 P. 676 (1925).

As the day fixed for the execution of the judgment and sentence had passed, the cause was remanded to the district court of Creek county for the purpose of appointing another day for the execution of the judgment, as provided by this section and § 1013 of this title; proceedings to be had in accordance with the rule prescribed by this court in the case of Alberty v. State, 10 Okl.Cr. 616, 140 P. 1025. Hawkins v. State, 11 Okl.Cr. 73, 142 P. 1093 (1914).

This section applies where a sentence has been indefinitely suspended, by order, because of an appeal. Armstrong v. State, 2 Okl.Cr. 567, 103 P. 658, 24 L.R.A.,N.S., 776 (1909).

§ 1013. Inquiry and determination by court

Upon the defendant being brought before the court, it must inquire into the facts, and if no legal reason exists against the execution of the judgment, must make an order that the sheriff of the proper county execute the judgment at a specified time. The sheriff must execute the judgment accordingly.
R.L.1910, § 5980.

Historical Note

Source:
St.1890, § 5747.
St.1893, § 5312.
St.1903, § 5600.
Comp.Laws 1909, § 6939.
Comp.St.1921, § 2797.
St.1931, § 3183.
Origin: Comp.Laws Dak.1887, § 7493.

Notes of Decisions

1. Construction and application

Accused, inadvertently not electrocuted pursuant to death sentence, may be returned under this section and § 1012 of this title, as modified by § 1015 of this title, for resentence to court originally sentencing him. In re Opinion of the Judges, 31 Okl.Cr. 442, 239 P. 676 (1925).

This section applies where a sentence has been indefinitely suspended, by order, because of an appeal. Armstrong v. State, 2 Okl.Cr. 567, 103 P. 658, 24 L.R.A.,N.S., 776 (1909).

§ 1014. Manner of inflicting punishment of death

A. The punishment of death must be inflicted by continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice.

B. If the execution of the sentence of death as provided in subsection A of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by electrocution.

C. If the execution of the sentence of death as provided in subsections A and B of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by firing squad.

R.L.1910, § 5981. Laws 1913, ch. 113, p. 206, § 1; Laws 1951, p. 63, § 1. Laws 1977, c. 41, § 1.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"The punishment of death must be inflicted by hanging the defendant by the neck until he is dead; or his life may, under the direction of the governor, and at the cost of the State, be taken by electricity if the court so orders."

For § 11 of the amendatory Act of 1913, see Historical Note under § 1001 of this title.

The 1951 amendment rewrote the section which prior thereto provided:

"The punishment of death must be inflicted by electrocution."

Sections 2 and 3 of the act of 1951 read as follows:

"Section 2. The State Board of Public Affairs is hereby authorized to expend from the Revolving Fund of the Oklahoma State Penitentiary an amount not to exceed Fourteen Thousand Dollars ($14,000.00); for the purpose of building a lethal gas execution chamber to carry out the provisions of Section 1 of this Act. Prison labor and materials shall be used, in so far as practicable, in the construction of said chamber.

"Section 3. The expenditures herein authorized for contractual and expenditure purposes may be contracted against and expended at any time within two and one-half (2½) years after the passage of this Act."

The 1977 amendment rewrote the section which prior thereto provided:

"The punishment of death must be inflicted by the administration of a lethal gas. Provided however, the punishment of death must be inflicted by electrocution until such time as a lethal gas execution chamber is available."

Section 2 of Laws 1977, c. 41, provides for severability of provisions of act.

Source:

St.1890, § 5748.
St.1893, § 5313.
St.1903, § 5601.
Comp.Laws 1909, § 6940.
Comp.St.1921, § 2798.
St.1931, § 3184.

Origin: Comp.Laws Dak.1887, § 7494.

Law Review Commentaries

Constitutionality of death penalty. 2 Okl.City U.L.Rev. 201 (1977).

Notes of Decisions

1. Validity

Execution of death sentence by electrocution before lethal gas execution chamber had been made available at state penitentiary would not deprive defendant of life without due process of law in violation of federal or state constitution, U.S.C.A. Const. Amend. 14, § 1 and Const. Art. 2, § 7. Hathcox v. Waters, 94 Okl.Cr. 286, 234 P.2d 950 (1951).

The amendment to this section by Laws 1913, ch. 113, p. 206, § 1, providing for electrocution, and substituting the penitentiary for the county jail as the place of execution and changing the time limit therefor, was not violative of U.S.C.A. Const. Art. 1, § 10, prohibiting the enactment of an ex post facto law, though applied to a person convicted of a murder committed before its enactment. Alberty v. State, 10 Okl.Cr. 616, 140 P. 1025, 52 L.R.A.,N.S., 248 (1914).

Although this section, as amended by the 1913 legislation, provided that the punishment of death must be inflicted in the state penitentiary by electrocution, and was passed subsequent to the commission of the offense in question, this was not an ex post facto law, so far as appellant was concerned, because under the provisions of R.L. 1910, § 5981 [this section, prior to the 1913 amendment], which was in force when the offense was committed, the death penalty could be inflicted either by hanging or by electrocution, at the discretion of the court before whom the case was tried. The amendment required it to be by electrocution, and the sentence of the court must be in conformity to the provisions of the act of 1913, hereinbefore referred to. Henry v. State, 10 Okl.Cr. 369, 136 P. 982, 52 L.R.A.,N.S., 113 (1914).

2. Purpose of law

Legislature, by enacting this section which specified that punishment of death be inflicted by administration of a lethal gas and providing that such punishment be inflicted by electrocution until such time as a lethal gas execution chamber is available and by appropriating $14,000 under same statute for purpose of building a lethal gas execution chamber and allowing two and one-half years for expenditure of such moneys, did not intend to abolish the death penalty; rather, punishment of death must be inflicted by electrocution until such time as a lethal gas execution chamber is available. (Per Bussey, P.J., with two Judges specially concurring.) Garcia v. State, Okl.Cr., 501 P.2d 1128 (1972).

3. Writ of prohibition

Court of Criminal Appeals took notice that there had been filed in Supreme Court application for that court to assume original jurisdiction in action having for its purpose obtaining of writ of prohibition against warden's inflicting death sentence by means of electrocution. Ex parte Williams, Okl.Cr., 341 P.2d 652 (1959) certiorari denied 80 S.Ct. 597, 361 U.S. 968, 4 L.Ed.2d 547.

§ 1015. Place of execution of judgment—Persons who may be present

A judgment of death must be executed within the walls of the state prison at McAlester, Oklahoma, said prison to be designated by the court by which judgment is to be rendered. The warden of the said state prison must be present along with other necessary prison officials at the execution and must invite the presence of a physician and the district attorney, and sheriff of the county wherein the conviction was had, to witness the execution; and he shall, at the request of the defendant, permit the presence of such ministers of the Gospel, not exceeding two, and any persons,

relatives or friends, not to exceed five, as the defendant may name; provided, newspapermen from recognized newspapers, press, and wire services, and radio reporters will be admitted upon proper identification, application and approval of the warden. No other person than those mentioned in this section can be present at the execution.

R.L.1910, § 5982. Laws 1913, c. 113, p. 209, § 9; Laws 1951, p. 64, § 1.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"A judgment of death must be executed within the walls or yards of a jail of the county in which the conviction was had, or some convenient private place in the county. If there is no such jail or prison in the county in which the conviction was had, or if it becomes unfit or unsafe for the confinement of prisoners, or is destroyed by fire or otherwise, and the jail of another county has been legally designated for the confinement of the prisoners of the county in which the conviction was had, the judgment must be executed in manner as above."

The 1951 amendment, in the second sentence, inserted "along with other necessary prison officials" following "must be present", substituted "and" for a comma following "physician", deleted "of Pittsburg County" following "county attorney", and substituted "and sheriff of the county wherein the conviction was had, to witness the execution; and he shall, at the request of the defendant, permit the presence of such ministers of the Gospel, not exceeding two (2), and any persons, relatives or friends, not to exceed five (5), as the defendant may name; provided, newspapermen from recognized newspapers, press, and wire services, and radio reporters will be admitted upon proper identification, application and approval of the warden. No other person than those mentioned in this Section can be present at the execution" for "and at least twelve reputable citizens, to be selected by him, and he shall, at the request of the defendant permit such ministers of the Gospel not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient to witness the execution, but no other person than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness same."

Source:

St.1890, § 5749.
St.1893, § 5314.
St.1903, § 5602.
Comp.Laws 1909, § 6941.
Comp.St.1921, § 2799.
St.1931, § 3185.

Origin: Comp.Laws Dak.1887, § 749[illegible].

R.L.1910, § 5983, which covered the same subject matter as this section was repealed by Laws 1941, p. 462, § 1, eff. June 7, 1941. Said section read as follows:

"The sheriff or deputy sheriff of the county must be present at the execution, and must invite the presence by at least three days' notice of the county attorney, together with one physician and twelve reputable citizens, to be selected by him. He must, also, at the request of the defendant, permit any minister or ministers of the gospel whom the defendant may name, and any of his relatives or friends, not to exceed five, to attend the execution, and also such peace officers as the sheriff or under sheriff may deem proper. But no person, other than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same."

Notes of Decisions

1. Construction and application

Accused, inadvertently not electrocuted pursuant to death sentence, may be returned under §§ 1012 and 1013 of this title, as modified by this section, for resentence to court originally sentencing him. In re Opinion of the Judges, 31 Okl.Cr. 442, 239 P. 676 (1925).

§ 1016. Warden's return upon death warrant

After the execution, the warden must make a report upon the death warrant to the court by which the judgment was rendered, showing the time, mode and manner in which it was executed. R.L.1910, § 5984. Laws 1913, c. 113, p. 210, § 10.

Historical Note

The 1913 amendment rewrote the section which prior thereto provided:

"The sheriff or deputy sheriff must prepare and sign with his name of office a certificate attached to the death warrant setting forth the time, manner and place of execution, and that the judgment was executed upon the defendant according to the provisions of the last three sections, and attested by at least twelve persons not relatives of the defendant who witnessed the execution."

Source:

St.1890, § 5751.
St.1893, § 5316.
St.1903, § 5604.
Comp.Laws 1909, § 6943.
Comp.St.1921, § 2801.
St.1931, § 3187.

Origin: Comp.Laws Dak.1887, § 7497.

R.L.1910, § 5985, which covered the same subject as this section and was repealed by Laws 1941, p. 462, § 1, eff. June 7, 1941 read as follows:

"The sheriff or deputy sheriff must cause the certificate to be filed in the office of the clerk of the court."

§§ 1017 to 1050. Reserved to accommodate future legislation

Oregon Code

Chapter 137

1987 REPLACEMENT PART

Judgment and Execution; Parole and Probation by the Court

EXECUTION OF JUDGMENT

(Imprisonment)

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137.390 Commencement, term and termination of term of imprisonment in county jail; treatment of prisoners therein

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(Death Sentence)

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137.550 Period of probation; discharge from probation; proceedings in case of violation of conditions

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